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EU GUIDELINES ON FREEDOM OF RELIGION OR BELIEF IN PRISON

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Religion's right occupies a particular place within prison. In Europe prisons are state institutions, places in which the state keeps people who were sentenced for having committed crimes in detention, limiting their freedom and thereby punishing them in the name of the society it represents.[1]

Why do we have to deal with this question? Kent R. Kerley answer for my question: "After the family the faith was the second major factor that ex-prisoners motivate to make positive changes in their lives following release."[2] However, religion is in principle part of a protected private sphere, that of religious freedom, which is a human right, even in prison.

European prison institutions are not permitted to deprive individuals of them of conscience or religion. Although a particular frame of security and deprivation is set.[3]

Freedom of thought, conscience and religion: general considerations. Guarantees of religious liberty and respect for conscience and belief are inevitably found in the constitutional orders of liberal democratic societies and in international and regional human rights instruments. Examples abound, each with perhaps subtly different emphases. In particular, Article 18 of the Universal Declaration on Human Rights of 1948 provides that:

> "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

1 APVV-16-0362 Privatizacia trestného práva-hmotnoprávne, prosecnoprávne, kriminologické a organizacno-technické aspekty

2 Kent R. KERLEY: *Religious Faith in Correctional Context*. Firstforumpress, Colorado, USA 2014, 149.

3 Irene BECCI: *Imprisoned Religion*. ASHGATE Publishing Company, Burlington, USA, 2012, 79.

Freedom of religion or belief is protected by Article 18 of the International Covenant on Civil and Political Rights (ICCPR) which says:

1. *Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*
2. *No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*
3. *Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamen tal rights and freedoms of others.*
4. *The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.*

According to the 1981 UN Declaration of the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, Article 6, the right to freedom of thought, conscience, religion, or belief includes, inter alia, the following freedoms:

a. *To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;*
b. *To establish and maintain appropriate charitable or humanitarian institutions;*
c. *To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;*
d. *To write, issue and disseminate relevant publications in these areas;*
e. *To teach a religion or belief in places suitable for these purposes;*
f. *To solicit and receive voluntary financial and other contributions from individuals and institutions;*
g. *To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;*
h. *To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;*
i. *To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.*

Such guarantees are found in other instruments at a regional level for example, Article 12 of the American Convention on Human Rights provides that freedom of conscience and religion includes the "freedom to maintain or to change one's reli-

gion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private", while Article 8 of the African Charter on Human and Peoples' Rights specifies that "freedom of conscience, the profession and free practice of religion shall be guaranteed" and further that "no one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms".

In 2013, the European Union adopted the EU Guidelines on Freedom of Religion or Belief[4] (FoRF) for which *Human Rights Without Frontiers International* was pleased to be involved in the drafting process along with religious communities and other civil society organisations.

The Guidelines are an important reference tool for EU institutions in third countries for identifying FoRB violations and assisting citizens who have been discriminated against on the basis of their religion or beliefs:

Under international law, FoRB has two components:

a) the freedom to have or not to have or adopt (which includes the right to change) a religion or belief of one's choice, and
b) the freedom to manifest one's religion or belief, individually or in community with others, in public or private, through worship, observance, practice and teaching.

In the European Convention on Human Rights, these key aspects of freedom of thought, conscience and religion or belief are found in three separate provisions. First, and most crucially, Article 9 provides that:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.
3. Article 14 of the Convention makes explicit reference to religious belief as an example of a prohibited ground for discriminatory treatment:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

[4] EU Guidelines on the promotion and protection of freedom of religion or belief FOREIGN AFFAIRS Council meeting, Luxembourg, 24 June 2013, https://eeas.europa.eu/sites/eeas/files/137585.pdf

Prison authorities will be expected to recognize the religious needs of those deprived of their liberty by allowing inmates to take part in religious observances. Thus where religion or belief dictates a particular diet, this should be respected by the authorities[5] Further, adequate provision should be made to allow detainees to take part in religious workship or to permit them access to spiritual guidance.

In the related cases of *Poltoratskiy v. Ukraine and Kuznetsov v. Ukraine* prisoners on death row complained that they had not been allowed visits from a priest nor to take part in religious services available to other prisoners.

The applicants succeeded in these cases on the ground, that these interferences had not been in accordance with the law as the relevant prison instruction could not so qualify within the meaning of the Convention[6] Article 9, cannot for example, be used to require recognition of a special status for prisoners who claim that wearing prison uniform and being forced to work violate their beliefs.[7]

The need to be able to identify prisoners may thus warrant the refusal to allow a prisoner to grow a beard, while security considerations may justify denial of the supply of a prayer-chain. These state obligations under the European Convention on Human Rights are also reflected in the European Prison Rules.

These Rules are non-binding standards which aim to ensure that prisoners are accommodated in material and moral terms respecting their dignity and accorded treatment which is non-discriminatory, which recognises religious beliefs, and which sustains health and self-respect.

Thus the Rules provide that "the prison regime shall be organised so far as is practicable to allow prisoners to practice their religion and follow their beliefs, to attend services or meetings led by approved representatives of such religion or beliefs, to receive visits in private from such representatives of their religion or beliefs and to have in their possession books or literature relating to their religion or beliefs".

However, prisoners may not be compelled to practice a religion or belief, to attend religious services or meetings, to take part in religious practices or to accept a visit from a representative of any religion or belief.[8] The Rules also make clear that prisoners should be given meals which comly with their religious requirement.[9] The prison authority has an obligation under Article 9 to take account of their religious beliefs and any restrictions have to be justified under Article 9(2). Prisoners are asked their religious affiliation at the time they enter prison. Of course, prisoners should also be protected from pressure to change their religious affiliation, so chaplains should not visit prisoners without their consent, or seek to persuade them to change their religious affiliation.

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5 Appl. no. 5947/72, X v. the United Kingdom, (1976), DR5, 8.

6 Poltoratskiy v. Ukraine, no. 38812/97, Reports 2003-V; and Kuznetsov v. Ukraine, no. 39042/97, 29 April 2003.

7 Appl. no. 8317/78, McFeely and others v. the United Kingdom, (1980) DR20, 44.

8 European Prison Rules, Recommendation Rec (2006) 2, Rules 29 (2)–(3)

9 European Prison Rules, Recommendation Rec (2006) 2, Rules 22 (1)

The number of Muslim prisoners has increased sharply in recent years and they have received more attention and their treatment has high-lighted the issue of treatment of religious minorities.

The treatment of Muslim women raises particular issues, for example, in relation to full body searching of Muslim women. Female visitors or prisoners wearing veil should not be asked to uncover themselves in public in the presence of a male officer, arrangement should be made to remove them in the private in the presence of female staff. Female prisoners should have access to women doctors.[10]

Conclusion, the convict's life typically has three stages: he starts in a life of a crime, then following arrest, he is imprisoned, and in the penitentiary, he may undergo some personal change that leads to and culminates in a greater religious awareness.[11]

[10] Susan EASTON: *Prisoners' Rights*. Routledge London and NewYork, 2011, 203.

[11] Robert Day MCCONELL: *The penitentiary: Prison control and the genesis of prison religion, self-control in a total institution*. Dissertation Services, University of Virginia, Department of Sociology, 2010, 41.

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CONSTITUTION CHANGES INFLUENCED BY THE EUROPEAN UNION MEMBERSHIP

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1. Introduction

The European Union is a political and economic community associating 28 member states located on the European continent. The idea of the foundation of the European Union based on the cooperation of individual states was highlighted after the end of the Second World War. The cooperation of the European states had to safeguard peace, security, reconstruction of economy and social stability. The continuation of integration activities of the concerned states and their chief representatives had been completed in 1992 by the approval of the Treaty on the European Union known as well as the Maastricht Treaty. The second founding treaty of the European Union was the Treaty on Functioning of the European Union regulating relation and defining the common and delegated powers among the European Union as the supranational institution and the member states creating its constituent substance.

The aaccession of the Slovak Republic into the European Union on 1st May had been the outcome of the several years' intensive integration process accompanied by the various economic and political changes carrying out the predestined completion of many provisions regarding the prospect of its accession to the European Union. In connection with the European policy and deliberations on its enlargement the European commission constantly states that after the countries' accession into the European Union, the candidate country is required to create conditions for integration by the adjustment of its administrative structures. In this connection it is obligatory, on the one hand to provide the transmission of the European Union legal regulations into the domestic legal ones, and at the same time to assure their effective implementation by means of the court and administrative structures. Having in mind of the then existed European Communities' law and to be in compliance with what have been said the harmonization of domestic law with the European law had been considered to be one of the most important and fundamental conditions for the Slovak Republic accession into the European Union. The prime integration norms had been represented by the Constitution Act No. 90/2001 Coll.,

the act which have changed and adjusted the Slovak Republic Constitution by No. 460/1992 Coll. as amended.

2. Constitution Changes under the conditions of the Slovak Republic influenced by the Accession to the European Union

Despite the reality that the most important changes of the constitution amendment under the Slovak Republic conditions have been brought by the citied Constitution Act, but according to the author's opinion, it is inevitable at the same time to point to the most important alterations of the previous constitution amendment which had been bound to the Slovak Republic within its historical context. That is to say that the Constitution of the Slovak Republic had been approved by the Slovak National Council during the existence of the Czech and Slovak Federative Republic and proclaimed on 1st September 1992 affirmed by the Collection of laws of the Czech and Slovak Federative Republic. At the time of the recognition of the Constitution of the Slovak Republic a lot of the constitution laws had been approved by the Federal Assembly of the Czechoslovak Federal Republic. Therefore, the Slovak Republic Constitution was not a direct document cancelling the previous constitution establishment having been in existed on the contemporary territory of the Slovak Republic until 1989, but rather it was an outcome of the implementation of the right of nation to sovereignty and the right to create its own state.

By the opinion of the author, the integration fundamental essentials bringing nearer the Slovak Republic to the European civilization had been not only the outcome of amendments of the Constitution Act No. 100/1960 Coll. as amended by the Constitution of the then Czechoslovak Socialist Republic, e.g. cancelling by one of them the Article 4 regarding the leading mission of the Communist party of Czechoslovakia, but it was an approval of the Constitution Act No. 23/1991 Coll. as amended, too. According to it the Charter of Fundamental Rights and Freedoms had been enclosed as the Constitution Act of the Federative Assembly of the Czech and Slovak Federative Republic into the legal order of the Czechoslovak Federative Republic.

The Czech and Slovak Federative Republic have reached the European standard by adjustment of basic rights and freedoms of the Charter of Fundamental Rights and Freedoms. In this way, the foundation of a new constitution and legal quality of this institute has been made.[1] Following the breakdown of the Czechoslovak federation the Charter of Fundamental Rights and Freedoms occurred in a kind of danger in connection with the appearance of disagreements connected with its enclosure into the text of the new Czech Republic Constitution. The legislator has finally decided to include it autonomously into the Czech legal order. By Article No. 3 regarding to Article No. 112 paragraph 1 of the Czech Republic Constitution it has become its integral part.[2] In the Slovak Republic conditions the legislator had

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1 PALÚŠ, I.: *The Slovak Republic State Law.* Košice, Univerzita Pavla Jozefa Šafárika, 2008. 135.

2 WAGNEROVÁ, E.–ŠIMÍČEK, V.–LANGÁŠEK, T.–POSPÍŠIL, I. a kol.: *Charter of fundamental rights and freedoms. Commentary.* Praha, Wolters Kluwer ČR, a. s. 2012, 9.

to challenge the question if to take the Charter of Fundamental Rights and Freedoms, having reached a deep respect in the whole Europe, into the constitution adjustment in its full range or to proclaim an original constitution adjustment. The legislator has decided to implement a direct adjustment of the institute of fundamental rights and freedoms in a separate Chapter of the Slovak Republic Constitution. However, the Slovak Republic Constitution transfers and further develops the amendment of fundamental rights and freedoms having been anchored by the Charter of fundamental rights and freedoms.[3] The author is of an opinion that before now the original wording of the Slovak Republic Constitution had contained the provisions which have begun to direct the Slovak Republic towards the European civilization, e.g. the original provision Article No. 1 of the Slovak Republic Constitution has been and is contrary to the previous statutory text of the Article No. 4 of the Czechoslovak Socialist Republic affirming the leading assignment of the Communist party in Czechoslovakia. Article No. 1 of the Slovak Republic Constitution has anchored an idea of the legal and democratic state which is an innate substance of the continental legal order.

Furthermore, the Slovak Republic has reflected towards the other European countries' standard by the adjustment of Article No. 55 paragraph 1 of the Slovak Republic Constitution as amended. By the cited provision the Slovak Republic has based the principles founded on the social and ecologically oriented market economy. It has been clearly declared by the Constitution that the economy of the Slovak Republic would be built on the market principles and not on the principles of the so-called socialist economy. By the authors opinion the provisions on the territorial self-governance and the establishment of the Slovak Republic Constitution Court might be included into the additional provisions of the Slovak Republic Constitution as regards their original statutory text, provisions which have prepared the Slovak Republic into the European Union integration process. The local administration in such an arrangement as we know it today had not been affirmed on the constitution level and had not any support in the legal norms which would have the force of law. In spite of that the reality that the previous adjustment of the constitution law No. 100/1960 Coll. as amended of the Czechoslovak Socialist Republic had counted with the establishment of the Slovak Republic Constitution Court, its judges had never been nominated during its existence which had been caused by the fact that when executing their powers the Constitution Court might have cancelled some acts of the legislative and executive powers and that would have been in contradiction with the Article 4 regarding the leading mission of the Communist party of Czechoslovakia.

In connection with the direct accession of the Slovak Republic into the European Union and other organizations of the European significance, such as the Council of Europe, the Constitution of the Slovak Republic must have overcome such changes by introducing of which the Slovak Republic could have become the rightful member of the European associations, and at the same time to be ready to take

[3] PALÚŠ, I.: *The Slovak Republic State Law.* Košice, Univerzita Pavla Jozefa Šafárika, 2008, 135.

charge of commitments as any other member-states. During the integration process into the European Union the Constitution of the Slovak Republic has been fundamentally changed by the Constitution Act No. 90/2001 Coll. regarding the transformation and adjustment of the Slovak Republic Constitution No. 460/1992 Coll. as amended. The biggest change has been the endorsement of a new statutory text of the Article 7 of the Slovak Republic Constitution. Before the approval of the Constitution Act No. 90/2001 Coll. which has changed and adjusted the Constitution of the Slovak Republic No. 460/1992 Coll. as amended, the cited Article of the SR Constitution contained only the provision being in one sentence with the wording that based on free decisions the Slovak Republic might enter into a state association with other states while the right to leave this association must not be restricted.

According to the actual and valid statutory text of the Article 7 paragraph 1 of the Slovak Republic Constitution, the Slovak Republic can decide to enter a state association with other states. Comparing with the previous amendment it does not contain the actual statutory text of the Article 7 regarding the provision on impossibility of the encroachment of the right to leave the state association with other states. Not-possible encroachment of the right to leave state association with other states indirectly follows from the second sentence of the Article 7 paragraph 1 declaring that entering the state association with other states or leaving it will be decided by the constitution act affirmed by referendum.

Article 7 paragraph 2 of the Slovak Republic Constitution enables the Slovak Republic to give up the execution of some of its own rights in favor of the European Communities and the European Union as it is settled done by the international treaty. The first sentence of the cited provision is the special constitution norm regulating the relationship of the Slovak Republic with the European Communities and the European Union. On this base, the legal fundament has been created for the acceptation of such international agreement by the legal order, and thus enabling the reassigning of the state bodies powers of the Slovak Republic to bodies established by the European Communities and the European Union. The second sentence of the given provision affirms a priority of the European Communities and the European Union law over the acts of the Slovak Republic.

It can be generally observe, that the right of the European Union is of an immense meaning in relation to the legal order of the Slovak Republic and to the legal orders of other states of the European Union as well. The interpretation of the constitution law has to be in compliance with the European law and not in contradiction with it which is one of the preconditions of the so-called Euro-conformity law interpretation. In the case of Simmenthal[4] the European Court came to the conclusion stating "following the preference of the European Community Law, it is evident that the outcome of the effectiveness of the directly exercisable provisions and institutes acting in relation to the domestic law of member-states is not only the loss of the use of the every existed inner-state assignation of a certain regulation which is in contradiction with it, but in respect thereof these provisions and acts

[4] Verdict by the European Court in case Simmenthal on 9th March 1978.

constitute an inseparable part of the legal order effective on the territory of every member-state as they have a preference above them. At the same time it concerns the exclusion of such an inner-state law which is incompatible with the law of the European Community".

In this connection the Constitution Court of the Slovak Republic stated "following the axiom of the European Union Law preference, all public power bodies, it means not only general courts are ex of obliged not to use domestic law which according to their opinion might be in contradiction with the law of the European Union, while what more the general courts have an opportunity to verify this legal estimation by putting down the prejudicial question to the European Union Court as it is affirmed by Article 267 of the Treaty on Functioning of the European Union" (PL. ÚS 3/09).

In the Slovak legal literature it is not a problem to find out studies and articles competing as regards the accentuating of the dominance of the European law over the legal order of the Slovak Republic but without taking into consideration the question what kind of role is played by the Constitution in this relation[5] as it is clearly stated in the second sentence of the Article 7 paragraph 2 of the Slovak Republic Constitution that the preference of the European law regards acts but not regarding the Constitution of the Slovak Republic. It means that in this case it is needful to emphasize the significance of the so-called substantive core of the Constitution.[6] When evaluating the Constitution substantive core it is necessary to answer the question if the au pied de la letter denotation of a certain norm, respectively principle or value have to be considered changeless if this changelessness becomes directly instituted or only it is approved. In spite of this that the Slovak Republic Constitution by provision Article 1 paragraph 1 directly affirms that the Slovak Republic is sovereign, democratic and lawful state, the changelessness of these state qualities are not specifically indicated by the Constitution. On the other hand the Czech Republic Constitution provides a guarantee for the democratic lawful state of the Czech Republic stating by Article 9 paragraph 2 that any change of its fundamental essentials are considered to be nonpermissible. The author thinks that it is necessary to mention the fact that when Article 7 paragraph 2 of the Slovak Republic Constitution has been affirmed, the legislator has not taken into consideration the principle concerning the right to predominance of the European Communities and the European Union laws over the domestic law in condition of the disagreement of the domestic law and the European law, in favor of regulating the equal legal relationship. What's more, the Article 7 paragraph 2 of the Slovak Republic Constitution is important by creating the constitution and legal foundation for stating obligations for government by means of an ordinance. By the original text of the Article 13 paragraph 1 of the Slovak Republic Constitution it was possi-

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5 DRGONEC, J.: *The Slovak Republic Constitution – Big Commentary. Theory and practice.* Bratislava, C. H. Beck, 2015, 313.

6 DRGONEC, J.: *The Slovak Republic Constitution – Big Commentary. Theory and practice.* Bratislava, C. H. Beck, 2015, 317.

ble to charge duties only on the base of law, within its limits and at the same time safeguarding the fundamental rights and freedoms. By Article 13 paragraph 1 letter c) of the Constitution of the Slovak Republic it is allowed to charge duties by the ordinance of government issued by the Slovak government newly affirmed by Article 120 paragraph 2. By this Article the government is eligible to issue ordinances even regarding the providing the European Treaty on Accession concluded between the European Communities and their member-states and the Slovak Republic, further on carrying out the international agreements as it is stated by Article 7 paragraph 2. The details are confirmed by Act No. 19/2002 Coll. as amended. According to this Act the conditions of issuing the approximation regulation of the Slovak Republic government are stated here.

The Article 13 paragraph 1 letter b) enables to charge duties to natural persons and corporate entities by the international agreements as it is expressed by Article 7 paragraph 4 if they directly affirm rights and duties regarding natural persons and corporate entities. By means of the constitution changes and adjustments provided by the Constitution law No. 90/20001 Coll. even the Article 7 paragraphs 3, 4 and 5 of the Slovak Republic Constitution have become a part of the constitution text.

The integration accession process into the European Union has inevitably brought the evolution of the Slovak legal system, mainly as regards the relation of international agreements within the legal order of the Slovak Republic. Since the preparation of entering the European structures has embodied the ratification of international agreements connected with the association and accession into the European Union, the collection of the original resources of the Slovak Republic have started to be extended by the international agreements acquiring the power of the constitution law and on the other hand the international agreements extended by the power of law. An inevitable part of the integration process of the Slovak Republic has become including the mentioned sources.[7] By Article No. 7 paragraph 4 before the ratification the following agreements must have an approval of the Slovak National Council; the international conventions on human rights and fundamental freedoms, international political agreements, international treaties of an army and military character, the international agreements creating the inception for the Slovak Republic membership in international organizations, international economic agreements of a general character, the international agreements requiring the approval of law and the international treaties which directly affirm the rights and duties of natural persons or corporate entities. All the mentioned international agreements can be ratified only if the National Council of the Slovak Republic has expressed their approval with them. The Constitution of the Slovak Republic does not allow ratifying an international agreement stated in Article No. 7 paragraph 4 if the National Council of the Slovak Republic has refused to give their approval.

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[7] KASINEC, R.: *Correlation among the sources of the European Union and domestic law of the Slovak Republic*. In: CHOVANCOVA, J. (ed): *EU Decision – making processes and their impact on domestic law*. Scientific Script from the international conference, Bratislava on 28th–29th June 2010. Bratislava, The Law Faculty Comenius University, 2010, 107.

Moreover, by Article 7 paragraph 4, the Constitution does not allow the ratification of an agreement having ad interim approval of the Slovak National Council stating that it would be discussed in future or by the further approbation of the international agreement according to the stated enumerative execution after its ratification as it is declared by the paragraph 4.[8]

Ad effectum Article 7 paragraph 5 the international conventions on human rights and fundamental freedoms, international agreements whose execution do not require to be approved by-law, and international agreements which directly state the rights and duties of natural persons and corporate entities and those being ratified and proclaimed by law have the priority over the laws.

The Constitution of the Slovak Republic recognizes the preference of the international treaties over the Slovak Republic laws. Hoverer the international treaties have not predominance over the Slovak Republic Constitution.[9] The attitude that the European Convention on the Protection of Human Rights and Fundamental Freedoms and similarly other international agreements on human rights are above the Charter of Fundamental Rights and Freedoms has not a support in the Constitution and there is no mechanism which would enable to any inner-state application body to prefer the international agreement instead of the Constitution and other constitution acts.[10] Since its beginning the Constitution Court of the Slovak Republic constantly states that "according to the Constitution the fundamental rights and freedoms have to be interpreted and implemented in the terms of the international agreements spirit regarding human rights and fundamental freedoms (PL. ÚS 5/93, PL. ÚS 15/98). From this follows that in cases when the Constitution Court has not been directly forced to declare the encroachment of a convention or any other treaty or agreement on human rights and fundamental freedoms, the Constitution Court takes always into consideration the legal wording of the mentioned agreements and their given judicature when specifying the content of fundamental rights and freedoms affirmed by the constitution unless the constitution does not exclude it by its content wording" (II. ÚS 55/98).

By the enforcement on 1st July 2001 the Article 11 of the Slovak Republic Constitution has been abolished by the Constitution Act No. 90/2001 Coll. The then valid law on the international conventions and treaties on human rights and fundamental freedoms ratified by the Slovak Republic and proclaimed by the affirmed law had a preference over our republic laws if they guarantee a higher range of the fundamental rights and freedoms. The preference of the mentioned international agreements under the conditions that they guarantee a higher range of the fundamental rights and freedoms than the laws of the Slovak Republic and fulfilling the condition being ratified and proclaimed in compliance with the stated law before acquiring the force of the constitution law declared by No. 90/2001 Coll., and be-

8 DRGONEC, J.: *The Slovak Republic Constitution – Big Commentary. Theory and practice.* Bratislava, C. H. Beck, 2015, 333.

9 DRGONEC, J.: *The Slovak Republic Constitution – Big Commentary. Theory and practice.* Bratislava, C. H. Beck, 2015, 333.

10 REPÍK, B.: *The Human Rights in court proceeding.* Bratislava, Published by MANZ, 1999, 26.

ing in an actual wording of the Slovak Republic Constitution are guaranteed by Article 154 paragraph 1 which have been enclosed into the constitution adjustment by the cited constitution law. When evaluating the preference of the mentioned international agreements over the laws, the Constitution Court of the Slovak Republic has declared their not preference regarding the Constitution of the Slovak Republic and in this connection the Constitution Court has added their impossibility to be concerned an integral part of the constitution law. Therefore, in connection with this, their protection of rights and freedoms is not of a character of the constitution protection. Consequently, the Constitution Court has not the power to act on the protection of rights and freedoms if a subject of law claims a violation of the international agreement without at the same asking for the protection of fundamental right or freedom guaranteed by the Slovak Republic Constitution (II. ÚS 91/99).

Connected with the more precise clarification of the relationship between the Slovak Republic law and the international law, the text No. 1 of the Slovak Republic Constitution has been amended. By the Constitution Act No. 90/2001 Coll. as amended, it has been put into the cited provision paragraph 2, according this paragraph the Slovak Republic acknowledges and upholds the general rules of international law, international agreements and other international commitments to which she is bound.

In this way Article 1 paragraph 2 of the Slovak Republic Constitution has created the foundation not only for being bounded to international agreements but being bound to all other sources of international law including its norms.[11] Connected with this the Constitution Court of the Slovak Republic has stated the cited article of the Slovak Republic Constitution concerns all international commitments of the Slovak Republic without taking into consideration their content and affirms the duty to fulfill them (PL. ÚS 44/03).

The Constitution Act No. 90/2001 Coll. has significantly changed the provisions concerning matters of election. The Constitution Act has anchored an active and passive election right for foreigners having a permanent stay on the territory of the Slovak Republic when by the Article 30 paragraph 1 foreigners are eligible to vote and to be voted into the administrative municipal bodies and to the bodies of the administrative self-governing units as well. According to the explanatory report regarding the proposal of the Constitution Act[12], the mentioned proposed amendment of the right to election corresponds to the similar constitution and legal amendments in the countries of the European Community and the European Union. Moreover, it enables to amend the election legislation in order to be in compliance with the general trends applicable abroad. By the author`s opinion the stated ex-

[11] DRGONEC, J.: *The Slovak Republic Constitution – Big Commentary. Theory and practice.* Bratislava, C. H. Beck, 2015, 281.

[12] Report on the proposal made by the Slovak National Council deputies regarding the issue of the Constitution Act by which the Slovak Republic Constitution is changed and amended No. 460/1992 Coll. as amended, Constitution Act No. 244/1988 Coll. and the Constitution Act No. 9/1999 Coll. (number of the parliamentary print – 643).

planatory report follows from the citizenry right of the European member state to settle down on the territory of any member- state of the European union. Only later on this political right has been specifically anchored by the Charter on Fundamental Rights of the European Union.

3. Conclusion

The Constitution Act No. 90/2001 Coll. as amended, the Act which changes and amends the Slovak Republic Constitution has without any doubt an immense influence on the legal and constitution evolution in the Slovak Republic. It is without saying that its purpose has been not only to provide integration of the Slovak Republic into the European Union, but at the same time to implement modern basics into the judiciary, e.g. the establishment of the Judiciary Council of the Slovak Republic. By the lasting-several-years of intensive integration process, the Slovak Republic has announced itself to esteem the European values. Besides the acceptance of the cited Constitution Act, which has considerably changed the texture of the Constitution of the Slovak Republic, the Slovak Republic has been obliged to approximate its legal order to be in compliance with the European legislature. Consequently, since the day of its association into the European Union, the Slovak Republic has been obliged to respect all provisions creating the content of the European Union law having been approved on the day of its accession.

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ASSUMPTION OF RISK AND EXPRESS CONSENT FROM THE VIEWPOINT OF LIABILITY FOR HIGHLY DANGEROUS ACTIVITIES*

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1. Introduction

The contributory negligence and the apportionment of the damages were dealt with in our last essay,[1] putting both the latest Hungarian judicial practice and the legal doctrinal traditions into the focus. We alleged that the risk-allocating aspect has more and more effect on the approach to the delictual liability law nowadays, especially in the field of strict liability. Furthermore, we could observe the increasing protection of interests of the injured persons in the judicial practice, which means an increasing encumbrance upon the individuals, who carry out dangerous activities (operators) and are obliged to have compulsory insurance or other covering for compensation. On the other scale of the balance, there is the appropriate risk-assessment that can be expected from injured or endangered persons, and the assumption of the well-known risk too, which factors have detrimental effect on the interests for compensation.

The research of the phenomena and the relating issues cannot be ended here. In this paper, we have to examine the conduct of the injured person – especially the intentional conducts, the consent to the injury and the assumption of risk – and further, their effect upon the compensation duty.

It is worth to examine the core concept of *volenti non fit iniuria* and its special meaning, which could be revealed in the context of liability for highly dangerous activities. It is also worth to examine what the consent of plaintiff means as a justification (a ground of exclusion of the wrongfulness) in Hungarian legal literature. The consent statement can be done explicitly or impliedly and it is also governed by validity rules as any other legal statement. We must also pay attention to the fact

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1 PUSZTAHELYI R.: A veszélyes üzemi felelősség mint objektív felelősségi tényállás és a károsulti közrehatás. *Publicationes Universitatis Miskolcinensis. Sectio Juridica et Politica*, Vol. 35, 2017, 409–424.

that the liability for highly dangerous activities, with the exception of the damage to property, cannot be eliminated or restricted by exculpatory clauses. The general policy of the intended higher protection of important values such as life, body and soul integrity, and health is carried out in this imperative rule, which is to be kept in mind examining not only these exculpatory clauses or unilateral notices, but also the consent announcements.

We must examine the notion of "acting at one's own risk" within the scope of voluntary assumption of the well-known risk and its relation to the contributory fault. We observed a relatively new opinion in the Hungarian judicial practice, which extends the concept of the operator. However, we dispute its suitability. According to the fact that the injured person could be reckoned as operator, as another person carrying out dangerous activity.[2]

The necessity of the examination of the concept of consent is supported by the following tendency emphasized by *Zimmermann*. "In the modern law, the opinion tends to prevail that the crucial issue is one of wrongfulness, not of fault: as long as the rule of the game are not infringed, participants in any form of contact sport do not act unlawfully if they injure each other."[3]

The conduct of the injured person and his resignation of his claim is regulated diversely in each national laws of liability and their elements become relevant in different ways resulting from the differences of the regulations of the liability for damages. However, we can draw a lesson from the legal answers to the problems occurring in Hungary quite the same way.

Finally, we should mention the fundamental issue that the new Hungarian Civil Code (hereinafter HCC) intends to draw a line between the two regimes of the contractual and delictual liability for damages. But the justifications, i.e. the causes eliminating the wrongfulness of the tortious act are enlisted only in a part of the code dealing with the delictual liability[4] and the contractual norm referring to certain delictual liability provisions to be applied does not cover this issue.[5] In our opinion, the consent of the injured or endangered person (volenti non fit iniuria) is more inclusive issue than it could be restricted to the field of delictual liability, but the changed method of regulation put the interrelation between the provisions in another light.

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2 Court Decision No. BDT 2010.2358.

3 ZIMMERMANN, R.: *The Law of Obligations: Roman Foundations of the Civilian Tradition*. Oxford. 1996, 1013, footnote 92.

4 Section 6:520. HCC "[Unlawfulness] All torts shall be considered unlawful, unless the tortfeasor has committed the tort: a) with the consent of the aggrieved party; b) against the assailant in order to prevent an unlawful assault or a threat suggesting an unlawful direct assault, if the tortfeasor did not use excessive measures to avert the assault; c) in an emergency, to the extent deemed proportionate; or d) by way of a lawful conduct, and such conduct does not violate the legally protected interests of others, or if the tortfeasor is required by law to provide compensation."

5 We thank *László Leszkoven* for calling our attention to this issue.

2. Some cases in Hungarian judicial practice to be examined

The necessity to deliberate the above-mentioned issues is to be demonstrated with the following Hungarian judicial cases. We have to mention that these cases were decided on the basis of the old Hungarian Civil Code (hereinafter old HCC) from 1959.

In the first case, the statement of facts established by the decision was that the plaintiff pursued the sport of wall-climbing in a wall-climbing hall with his friend, when the safety rope was loosened from the carabiner of the seat harness at the height of 12 meters. The wall face at this high was negative, therefore the plaintiff had to hang here unaided, without lifeline, so as his strength gave up, he fell onto the ground and suffered serious injuries. The plaintiff sued the defendant (the keeper of this climbing centre) for pecuniary and non-pecuniary damages. He stated that certain points of the general terms and conditions of the contract are null and void because of unfairness. The court stated that these conditions are invalid because of their unfairness. The decision established that the plaintiff's activity also shall be deemed also as pursuing highly dangerous activity, therefore the court applied the provision on the collision of two dangerous activities[6] and intended to ascertain the party, to whom the malfunction (of the carabiner) could be attributable. After all, the court shared the damages between the parties.[7]

In the second case one of the defendants (a sport club) concluded a contract with the plaintiff to teach him the basic technical and tactical skills and rules of paragliding and to prepare him for the exam, in order to getting the "A" category licence. The plaintiff noted in the contract that he assumed the risk occurring with this sport activity and he took over the damages suffered in the course of training. He waived the right to compensation from anybody. The other defendant was the agent of the sport club and the tutor of the plaintiff. The plaintiff suffered serious spinal injuries in the course of the training, when he failed to land correctly. He stated that the exculpatory clauses and his waiver were null and void. The court stated that the student had to bear the risk arising from the sport activity applying the sporting device, which is extra hazardous even by itself; he had not got any claim for compensation. The court stated that these contract terms are null and void but the assumption of risk had even effect on the part of the person threatened by

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6 Section 6:539. § [Interaction of hazardous operation and relationship of operators in liability for torts committed jointly] subsections (1–3): (1) Where damage is caused by one hazardous operation to another, the operators shall be liable to provide compensation as commensurate according to attributability. If the damage is caused by a person other than the operator, the operator shall be liable to provide compensation as commensurate according to the attributability of the de facto tortfeasor. (2) If the cause of damage is not attributable to either party, compensation shall be provided by the party whose highly dangerous activity is responsible for the malfunction that contributed to causing the damage. (3) If the cause of mutual damage is a malfunction that occurred in the scope of both parties' highly dangerous activity, or if such malfunction cannot be attributed to one of the parties, each party shall, where individual responsibility cannot be established, bear liability for his own loss.

7 Court Decision No. BDT 2010.2358.

the significant risk. He signified his acquiescence to the possibility of being injured by his concludent conduct, he assumed the risk and the injuries resulting generally from the paragliding.[8]

In the third case the plaintiff was involved in a planned and preconcerted road accident with his car built up from pieces of two other cars and without appropriate licenses. The driver of the other involved car admitted his fault, but during the litigation it was proven that there was no real "accident", the only aim of the involved parties was to deceive the insurance company in order to get compensation on the base of compulsory liability insurance. The court held that the justification of the consent from the injured person ruled out the wrongfulness, one of the elements of liability, since the conduct of the tortfeasor did not trigger the responsibility of the insurer.[9]

In the fourth case the father of the injured persons died with his fellow-worker together in the store-pit of wine-smash, when they were trying to scratch the jammed matter out of the bottom hole with a pitchfork. The pitchfork was too short so he jumped into the store-pit heedlessly. His fellow-worker came running and tried to help him but both of them suffocated because of breathing carbon dioxide gas.[10]

3. Consent of the injured person as a ground for justification

Under Section 6:520 of HCC, all torts shall be considered unlawful, unless the tortfeasor has committed the tort with the consent of the aggrieved party; (... etc.).

Tamás Lábady emphasized the sport games among the cases of consent, and reported its well-formed, fixed judicial practice. He referred to a case published in 1977, according to that a sportsman made a consent to the risk occurring ordinarily from the sport activity. The unlawful quality of the tortious conduct or injuring conduct is only excluded, if the injury, which realized during the activity, remains under the scope of the types of injuries accompanying the game. He mentioned one of the general requirements of consent, which materializes in the invalidity provisions against certain exculpatory clauses and which sets also limits to the unilateral consent of injured party, such as the protection of life, body integrity and health. [11]

Relating to the consent, *Attila Harmathy* drew attention to the fact that the new HCC does not require the former extra-conditions any more, according to that consent may not hurt or risk social interest or public policy. However, he pointed out that the express consent also should remain within the limits of the above mentioned cause of invalidity independently of the way this consent was made. Attila

8 Court Decision No. Pfv.III.20.069/2012/10.
9 Court Decision No. BH 2011.195.
10 Court Decision No. EBH 2001.413.
11 LÁBADY T.: Hatodik Könyv Negyedik Rész. 6:20. § In: VÉKÁS L.–GÁRDOS P. (szerk.): Kommentár a Polgári Törvénykönyvhöz Vol. II, Budapest, Wolters Kluwer, 2014, 2239.

Harmathy considered that it needs to draw a line between the concepts of assumption of risk and of consent, which opinion is reflected by the case of 1977.[12]

Ádám Fuglinszky examined[13] the consent from the viewpoint of its nature of renouncement (waiver); he pointed out the requirement of its explicitness[14]. He added that the rules of validity, invalidity and ineffectiveness relating to the legal statements are to be applied as well. In relation to this, *András Kisfaludy* held that the express nature of the renunciation is to be interpreted on the only correct way that the form of the waiver can be either written or oral, but implied as well.[15]

In relation with the consent Fuglinszky reminds us of the cautious application of the provisions concerning exculpatory clauses[16]: in most cases, these rules can be applied analogously, since the two concepts (exculpatory clause and consent) do not serve the same situation.[17]

It is to be remarked that the special issues on the informed consent in the field of medical law are not dealt with here, but it is prescribed by *Tímea Barzó* among other authors.[18]

As it was mentioned above, the old HCC contained the provisions on the express consent and on the exculpatory clauses almost the same way as the new one. Having regard to this, it is worth concerning on legal literature from the period of the old HCC.

According to *Tamás Fézer,* the consent and the exculpatory clauses are near to each other. He dealt with their unified application as *Ferenc Petrik*'s idea, which he could accept conditionally.[19] Another author, *György Wellmann* also wrote about this issue in the monograph edited by Petrik, in the following manner:

> "In our opinion, comparing with the subsections 1 and 2 of section 342. the interpretation leading us the only correct solution that the agreement is inva-

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12 HARMATHY A.: Hatodik Könyv Negyedik Rész XXVI. Cím 6.520. §, in: WELLMANN Gy. (szerk.): *Az új Ptk. magyarázata*. Vol. VI/VI, Budapest, HVG-ORAC, 2013, 440.; Court Decision No. BH 1977. 17.

13 FUGLINSZKY Á.: *Kártérítési jog.* Budapest, HVG-ORAC, 2015, 224.

14 Section 6:8. HCC: [Interpretation of legal statements] subsection (3): "Any waiver of a right in part or in full shall be considered valid if made by express legal statement. Should a person waive his rights in part or in full, such a legal statement shall not be broadly construed."

15 KISFALUDY A.: Hatodik Könyv Első Rész I. Cím. Ptk. 6:8. §, in: WELLMANN Gy. (szerk). *Az új Ptk. magyarázata*. Vol. V/VI, Budapest, HVG-ORAC, 2013, 46.

16 Section 6:526. of HCC: "[Limitation or exclusion of liability] Any contract term limiting or excluding liability for intentional tort or for causing damages resulting in loss of life, or harm to physical integrity or health shall be null and void." Comparing to the similar regulation of contractual exculpatory clauses, in our opinion, the English version of the latter – the contractual one – does not shows the fact there are two separated states of facts which make the agreements of that kind invalid.

17 FUGLINSZKY Á.: 6.520. §, in: OSZTOVITS A. (szerk): *A Polgári Törvénykönyvről szóló 2013. évi V. törvény és a kapcsolódó jogszabályok nagykommentárja*. Vol. IV, Budapest, OPTEN, 2014, 53.

18 BARZÓ T. A kiskorú egészségügyi önrendelkezési joga kapcsán felmerülő anomáliák. *Családi jog,* 2015/1., 10–16.

19 FÉZER T.: A kártérítési felelősség feltételei. In: FÉZER T. (szerk.): *A kártérítési jog magyarázata*. Budapest, 2010, 94–95.

> lid in which the injurer excluded his liability for damages from injury and in which the injured person had made the consent to be injured in his body integrity and to bear the consequences – provided that the agreement neither infringes nor endangers social interest or public policy."[20]

According to his thought, there is no any other way for interpretation to achieve the *contractual consent* to the risk attendant with sports or medical interventions.

Gyula Eörsi analysed this issue in his monograph and stated that causing damage with the consent of the injured party within limits is not unlawful. He referred to the invalidity of exculpatory clauses and added that this statement does not mean an express consent, but it is a near concept in the viewpoint of the law, since it facilitate the exoneration from liability by a legal statement.[21]

Reviewing the Hungarian theoretical opinions, we conclude that the former legal opinions looked for the solution of the collision of the provisions in the bilateral nature of the agreements including the voluntary acquiescence of the injured person. The recent legal opinion stressed upon the differences between the express consent and the assumption of risk to resolve the discrepancy responding the practical requisites.

Furthermore, the issue of the consent is very relevant in the viewpoint of the protection of personality rights[22], especially when it concerns with body integrity or health. In our opinion, this is such level of the regulation, where the moral and public norms are put into scales to measure and where the limits leading to invalidity can be set.

4. Approaches of the consent in national laws and model-rules

According to the comparative law reports supporting the *Draft of Common Frame of References* (hereinafter *DCFR*), it can be said that the consent of the injured person is common in the European national laws. However, to tell the truth, it is not formulated expressly in each country. Any person who inflicts damage on another with the previous consent of the latter, commits no civil wrong.

According to the DCFR, consent need not be given expressly; it may result from the circumstances thus it is implicitly conferred.[23] Here we should underline again, that in the case of contractual relationship the provisions relating to the exculpatory clauses determine the effect and the regulation of the consent of the injured person. In this case, the rule of non-cumul of HCC has effect, the clause which excludes the party to build his claim upon the ground of delictual liability, if

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[20] WELLMANN Gy.: A kártérítési felelősséget korlátozó és kizáró körülmények. In: PETRIK F. (szerk.): *A kártérítési jog*. Budapest, KJK, 1991, 51.

[21] EÖRSI Gy.: *A polgári jogi kártérítési felelősség kézikönyve*. Budapest, KJK, 1966, 117–118.

[22] HCC, Section 2:42. subsection (3) "Personality rights shall not be considered violated by any conduct if the person affected has given prior consent thereto."

[23] A person has a defence if the person suffering the damage validly consented to the legally relevant damage and was aware or could reasonably be expected to have been aware of the consequences of that consent. VI.–5:101. susb. 1.

there is a contract between the injured person and the tortfeasor and the damage was casual connection with the breach of contract or the fulfilment of the contract.[24]

Returning to the consent, it is generally required that the consent is made by the injured person, whom rights or interests (property or personal rights) are at risk of intended injury and can dispose the right.

The consent is to be given to intended conduct from the part of the injurer. The damages, the injury can be estimated and at least the types of the damages are to be predicted or ought to be predicted. The injured person must be aware of not only the damages he is to be suffered and its physical and psychological consequences, but also the legal consequences of his consent. If the harm is not certain, the risk of suffering loss can be assumed only through the assumption of risk. The person with endangered interest or right accepts the high risk of damage, despite of his hope for damages would not occur.

Manifold requirements are to be applied for the form and the content of the consent. One of the issues of this kind is the capacity of the injured person. Person having his full capacity can give the consent. Special issues emerge in the field of medical law, in which circumstances minors can give consent to medical interventions.[25] The consent is generally invalid, if it contravenes the law or incompatible the basic ethical value of the legal system. However, according to the Commentary of the DCFR Commentary it might be possible to give a valid consent if the infringed rule aims other than the protection of injured person.

The invalidity of the consent may be based on fraud, mistake, coercion or threats. These are the frequent grounds of invalidity. Under DCFR provision, the injured person should have been aware or could reasonably be expected to have been aware of the consequences of that consent.[26]

The consent is also a justifying ground in the Austrian lability law. In the opinion of *Koziol*, even if a statement as consent was invalid, it has some legal effect: it does not conclude the liability, but could reduce the amount of the loss to be reimbursed under the section 1304. ABGB. If the injured person contributed to the damages, he deserves less protection as normal.[27]

The nature of the consent is the bone of contention among Austrian authors. Some say that it is a legal statement *(Rechtsgeschäft)*; others think that the consent

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[24] HCC, Section 6:145. "[Exclusion of parallel compensation claims] The obligee shall enforce his claim for compensation against the obligor in accordance with the provisions on liability for damages for loss caused by non-performance of an obligation even if the obligor's non-contractual liability also exists."

[25] On consent of minors see BARZÓ ibid.

[26] See DCFR *VI.-5:101. Consent and acting at own risk.* Comments. See: VON BAR, Ch. et al. (eds.): *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR).* Outline Edition. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group) Based in part on a revised version of the Principles of European Contract Law. Munich, 2009, [DCFR outline ed.] 3459–3468.

[27] KOZIOL, H.: *Österreichisches Haftpflichtrecht.* Band I., Allgemeiner Teil Wien, 3, aufl., 1997, 182–185.

is a legal statement and a legally relevant act at the same time. Koziol emphasizes that the consent should be recognizable by other, given sophisticated, whole and of somebody's own free-will. While the consent to the infringement or to endangering a right is an exercise of the right of disposition, therefore the authors agree that it requires legal statement form. [28]

Ansgar Ohly collected and analysed the theories prevailing in the German literature.[29] The opinions are split to the approaches of legal statement, of statement-like act *(geschäftsähnliche Handlung)* and of real-act. The latter one underlines the real-act characteristics of the consent, which realizes in the waiving a mean of protection *(Rechtsschutzverzicht),* or in the comparison of the interests *(Interessenabgwägung)* or in the non-enforceability of rights to protections *(Nichtgeltendmachung von Abwechtansprüchen)*.[30]

The Code Civil in France was not extended with provisions referring to 'maxim volenti non fit iniuria' in spite of the law reform drafts called *Catala*[31] and *Terré*.[32] It is not deemed as a proper justification ground of the liability, but this concept emerged already in the fields of sport activities and of medical treatments.

The *Principles of European Tort Law* (hereinafter *PETL*) deals with this concept as a defence against the claim for damages and besides it with the assumption of risk as well. "The same applies if the person suffering the damage, knowing the risk of damage of the type caused, voluntarily takes that risk and is to be regarded as accepting it." The Commentary of the PETL amplifies that this provision subsumes not only the maxim volenti non fit iniuria but also the concept pertaining to it.[33]

Under the DCFR the tortfeasor has a defence, if the person suffering the damage validly consented to the legally relevant damage and was aware or could reasonably be expected to have been aware of the consequences of that consent. "The same applies", it continues, "if the person suffering the damage, knowing the risk of damage of the type caused, voluntarily takes that risk and is to be regarded as accepting it". We think that the *assumption of risk* and *the acting at own risk* are synonyms in the terminology of DCFR.[34]

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28 Ibid.

29 OHLY, A.: *„Volenti non fit iniuria": die Einwilligung im Privatrecht*. Mohr Siebeck, 2002.

30 OHLY, A.: ibid. 59.

31 Rapport Catala Art. 1350. See. CATALA, P.: *Proposal for Reform of the Law of Obligations and the Law of Prescription*. (English translation by John Cartwright and Simon Whittaker) Oxford, University Press, 2007.

32 MORÉTEAU, O.: French Tort Law in the Light of European Harmonization. *Journal of Civil Law Studies*, Vol. 6, 2013/2., 759–801, 775.

33 European Group on Tort Law (eds.): *Principles of European Tort Law*. Text and Commentary, Wien–New York, 2005, 126.

34 On the comprehensive examination of DCFR and PETL see JUHÁSZ Á.: Az európai kártérítési jog egyes kérdései. In: BARTA J.–BARZÓ T.–CSÁK Cs. (szerk.): *Magyarázat a kártérítési joghoz*. Budapest, Wolters Kluwer, 2017.

5. Acting at own risk, assumption of risk

The notion of 'acting at own risk' has different meaning and scope in the system of liability rules of DCFR. It results in exclusion of liability. This sentence resonates with the note appeared in the Hungarian judicial practice and literature that the notion assumption of risk has different or partially different, but distinguishable meaning from consent. According to the Commentary of the DFCR, the main fields where it is concerned are the contact sports and the extreme sports, but the notion cannot be limited such a way, it could appear among the issues on product liability, on transport liability law or on liability for animals. The Commentary ascertains that the only correct consequence of the assumption of risk is the exoneration from the liability, and it could not lead to the apportionment of damages.[35] We aim to prove that the latter can be a possible solution.

Nevertheless, we have to accept that the assumption of risk can be interpreted only in the case when the conduct of the tortfeasor is not intentional but negligent or careless. The Hungarian authors also mention that the assumption covers only the typical and well-known negative results of activity and it generally does not depend on the extent of damages. The decisive condition for the assessment of the assumption of risk is that the injured or endangered person should voluntary incur the danger and it will be obvious for the external bystander that the person has accepted the risks of damages (or the harm too). To be acquitted of the liability, the injurer should prove that he acted complying with the special rules of the activity (fair play). The DCFR emphasizes the difference which should be made between the leisure activity and the professional sport. Not only the damages, but the motives of the assumption are to be examined.[36]

Koziol shows the characteristic of the German judicial practice that the notion of consent was often applied in the cases of acting at own risk *(Handeln auf eigene Gefahr)*. That is the point, when a person exposes himself to a known or at least a discernible danger, while he does not consent the harm directly, he generally expects not being harmed at all. Therefore, we should limit the notion only to the assumption of *risk*, not the damages. The assumption of risk has the own effect distinguished by the consent. Consequently, it is necessary to ponder the opposite interests.[37]

In Koziol's opinion the true primary meaning of the notion acting at own risk belongs to the field of *Verschuldenshaftung*, the person endangering another individual is due to perform protective conduct for the person at risk. In the field of strict liability *(Gefährdungshaftun)*, there might be a situation, where the injured person is not entitled with full protection as a result of comparing of interests. On the one hand the assumption of risk with its primary meaning results in exoneration from liability. On the other hand, its secondary meaning (i.e. the self-risking)

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35 DCFR outline ed. 3463.

36 Ibid.

37 KOZIOL, H.: *Österreichisches Haftpflichtrecht*. Band I. Allgemeiner Teil, Wien, 3. aufl., 1997, 228.

drives to the apportionment of the damages under § 1304 ABGB *(Mitverantwortung)*, as already noticed.[38]

It is worth to note that certain subtypes are distinguished such as incurring oneself to the generally accepted risk, or exposing oneself to illegal impacts, to the risk from passing the control over the thing or participation in a sport or other activity. Some of the facts are regulated.[39] It is ought to be mentioned at least the first one: the operator of a motor vehicle *(Kraftfahrzeughalters)* can exonerate himself from liability, if he proves that the injured person was transported for free, only in his own interest.[40]

Finke shows that the English common law deals with the acting at own risk unlike the German one. Its scope and consequences are differentiated from the contributory negligence. In the practice, the „maxim volenti non fit iniuria" is accepted as an independent legal institution which results in the total exoneration from liability.[41] Furthermore, this principle is also called as express or implied consent of the injured person, who agreed in this way with the injurer: he takes the risk of damages over knowing about what type and extent of damages may occur. In the scope of the transport law, the special legal act concerning with these issues *(Fatal Accidents Act)* excludes the application of the principle in itself, while there is a special solution for indemnification of damages by compulsory liability insurance ordinarily. In his summary, Finke mentioned that the rule of contributory negligence enables the courts to share the loss between the involved parties instead of the "all or nothing" rule. However, its application is not free from discrepancies in the recent judicial practice resulting from its relatively new status.[42]

The absolute exonerative nature of the assumption of risk can be experienced also in the American tort law.[43] We have to call attention to the fact that nowadays the *Uniform Apportionment of Tort Responsibility Act (UATRA)* is already under in the implementing process or debate in several states.[44] The UATRA puts the comparative negligence at the place of the former contributory negligence (in the meaning of common law) allowing to compare the fault (subjective elements of conduct) of both side. Moreover, under the *American Second Restatement of the Law of Torts* (1977) a defendant is liable even where he has "exercised the utmost care to prevent the harm" nor is liability avoided when the harm has been caused by the

38 KOZIOL op. cit. 229.
39 EKHG
40 KOZIOL ibid. 227–228.
41 FINKE, T.: *Die Minderung der Schadensersatzpflicht in Europa: zu den Chancen für die Aufnahme einer allgemeiner Reductionsklausel in ein Europäishes Schadensrecht*. Göttingen, 2006, 268.
42 FINKE 2006, 308.
43 DEWOLF, D. K.–HANDER, D. G.: Assumption of risk and abnormally dangerous activities: a proposal. *Montana Law Review*, Vol. 51, 1990, 161–189.
44 STEENSON, M.: Minnesota Comparative Fault – Statutory Reform. *Journal of Law and Practice*, Vol. 9, 2016/1. http://open.mitchellhamline.edu/lawandpractice/vol9/iss1/4

intervention of a third party, or by force of nature. However, the victim is deemed to have assumed the risk if he knowingly exposed himself to the danger. [45]

In the law of *South Africa*, the consent of sportsmen is also to be subjected to the test of *boni mores*. Consent must be given freely or voluntarily; the person giving the consent must be capable of volition; the consenting person must have full knowledge of the nature and extent of the risk of possible prejudice; the consenting party must also comprehend and understand the nature and extent of the harm or risk; the person consenting must in fact subjectively consent to the prejudicial act – this consent has to be inferred from the proven facts; and the consent must be permitted by the legal order; in other words, the consent must not be contra bonos mores. The court continued that consent to bodily injury or consent to the risk of such injury is normally regarded as being contra bonos mores. Participation in sport or consent to medical treatment, may, in appropriate circumstances, constitute lawful consent to bodily injury or at least to the risk of such injury.[46]

Under the *Russian Federation Code*, defender is allowed to escape liability if he can prove that the harm arose as a result of insuperable force or due to the intentional conduct of the victim. It means that the principle „volenti non fit iniuria" is applied.

In *France*, the consequences of the assumption of risk depend on the fact, whether the liability is fault-based or non-fault-based. In the former case, the assumption of risk has no effect neither on the mitigation, nor on the exoneration the damages, unless it shall be deemed as contributory negligence. On the contrary, the assumption of risk *(acceptation des risques)* generally entails in the cases of non-fault liability that it becomes a justification ground for the injurer. [47] Some authors say that this is the direct consequence of the attributable contributory conduct of the injured person. Others think that the assumption of risk amounts to a mutually agreement between to absolve each other from liability. The concept of assumption of risk appears only in the relation of competitive sports and it is inapplicable in the case of a non-competitive or impromptu sporting meetings.[48]

6. Exculpatory clauses in the context of maxim volenti non fit iniuria

The next issue to be examined is the regulation of the exculpatory clauses in the Hungarian Civil Code. In accordance with the HCC, any contract term limiting or excluding liability shall be null and void in the case, when the damages caused by premeditated non-performance (in contractual liability) or by other intentional

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[45] Elspeth REID: Liability for Dangerous Activities. *International and Comparative Law Quarterly*, Vol. 48, 1999 October, 731–755.

[46] NEETHLING, J–POTGIETER, J.: Volenti Non Fit Iniuria and Rugby Injuries. *Journal of Contemporary Roman-Dutch Law*, Vol. 75, 675–680, 2012.
Electronic copy available at: http://ssrn.com/abstract=2259677

[47] ESMEIN, P.: L'idée d'acceptation des risques en matière de responsabilité civile. *Revue internationale de droit compare*, Vol. 4, 1952/4., 683–691.
www.persee.fr/doc/ridc_0035-3337_1952_num_4_4_6941

[48] DCFR outline ed. 3469–3470.

harmful conduct (in delictual liability) or in case when the results are loss of life, or harm to physical integrity or health (in both regime).

The validity limits of exculpatory clauses are grounded basically on several policies. One of them with economical nature is that "the enterprise is the best loss distributor either distributing the loss among its consumers through prices or, preferably, by distributing the loss among the group of those causing similar damages: through insurance".[49] The other approach is the victim-oriented one: the minimal and absolute protection is in the favour of the potential victims. Both of the abovementioned approaches require a very strong restriction on the validity of exculpatory clauses.

The HCC repeats this validity rule not only among the provisions on the contractual liability (HCC 6:152.), but also among the delictual ones (HCC 6:526.). At the same time, it establishes a stronger restriction for the validity of exculpatory clauses in the case of highly dangerous activities (HCC 6:535. subs. 3).[50]

About the relation between the two main validity rules – on the ground of the old HCC –, we agree with *Kornél Solt*: under the old HCC the concurrence of action (delictual and contractual liability for damages) was possible. The tortfeasor was liable for damages on the special ground of highly dangerous activities (hazardous operation), although he was in contractual relationship with the injured person. Thus, the special provision on the validity of exculpatory clauses in the scope of the strict liability was *lex special* compared with either the general contractual rule or the general delictual one.[51]

The regulation method of the new HCC requires for the rethinking of this issue. The exclusion of the concurrence of action, the so called rule "non-cumul" debars the injured person to claim damages on the parallel base of delictual liability from his contractual party.[52] In our opinion, the liability rule on contractual liability, such as delictual ones, are not permissive, so the validity provisions are also imperative. Therefore, the imperative rule 'non-cumul' has a special and disputable ef-

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[49] EÖRSI, Gy.: The Validity of Clauses Excluding or Limiting Liability. *The American Journal of Comparative Law*, 23/2., 215–235, 1975, 216.

[50] Section 6:152. "[Limitation or exclusion of the consequences of non-performance] Any contract term limiting or excluding liability for premeditated non-performance of an obligation resulting in loss of life, or harm to physical integrity or health shall be null and void." (In our opinion this official translation is not correct: "…for premeditated non-performance of an obligation *or for non-performance* resulting in loss of life…"
Section 6:526. "[Limitation or exclusion of liability] Any contract term limiting or excluding liability for intentional tort or for causing damages resulting in loss of life, or harm to physical integrity or health shall be null and void."
Section 6:535. subs. (3) "*Any* exclusion or limitation of liability shall be null and void; this prohibition shall not apply to damage caused to a tangible thing."

[51] SOLT K.: Kogencia és diszpozitivitás a veszélyes üzemi kártérítési felelősség körében. *Jogtudományi Közlöny*, 1968 (6), 302–307. Solt criticised the possibility for reducing the liability for damages on tangible things. He thought that this rule wakened the severity of the strict liability rules.

[52] This rule is criticised by several authors. Among them see: LESZKOVEN L.: *Szerződésszegés a polgári jogban*. Budapest, Wolters Kluwer, 2016, 164.

fect: if there were contractual relationship between the aggrieved parties, the tortfeasor can limit or exclude his liability for non-performance caused by (gross or slight) negligent conduct notwithstanding that his conduct would be deemed as highly dangerous on ground of delictual liability.

Further formal requirements and substantive grounds for avoidance are to be mentioned against the exculpatory clauses. In our opinion the main grounds are the nullity of the unfair standard contract terms (HCC 6:102.), unfair clause in consumer contracts (HCC 6:100.) or consumer disclaimers (HCC 6:101.).

7. Injured person as operator

The approach that qualifies an injured person as operator of hazardous operation could be based on the assumption of risk or contributory conduct of the aggrieved party. The provision of HCC determining the operator and focusing on the comparison of interests might establish the ground for that[53] but this misses the other elements of the notion "operator" elaborated by the judicial practice already.[54] The quality of operator *per se* can be established only in the cases where – on the field of the professional sport activities –, the injured person has taken control the sporting device (such as paraglide, soaring aircraft, racing car), and where the original (primary) operator's possibilities to avert the injury end up, and have no effect.

We should mention too, that the rule *non-cumul* will preclude the possibility of applying the *collision rule* between the operators[55], while that belongs to the delictual liability regime.

The end solution can be formally correct, which will apportion the damages among the operators aside from their role for operator. However, in our opinion, it is debatable that the injured person could be qualified as operator – as co-operator, common with the primary one – because of the conflicting interests. In our opinion, that is the reason, why the provision relating to collision of hazardous operations (highly dangerous activities) is not to be applied for the indemnification.

The qualification of the injured person to operator is particularly vulnerable in the cases of the amusing leisure activities. If the operator received licences for the pursuing the highly dangerous activity, it is obvious that its operation could not mean undue risk for others. There is no reason, why the injured person could entrust himself to the operator's protective measures, in spite of the fact that he had observed the high risk. Theoretically, it is true that he cannot become operator just

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53 HCC 6:536. subs. (1) "The person on whose behalf the hazardous operation is carried out shall be recognized as the pursuer of a highly dangerous activity."

54 "The components of the notion of 'operator' included the following: who was the owner of the equipment being used to carry out the activity; in whose interest the activity was carried out and who profited from that (profit and responsibility shall go hand in hand); who was able to control, coordinate, regulate and influence the activity; and who was entitled to make the fundamental decisions on how, where and when the dangerous activity was carried out." Translation see FUGLINSZKY, Á.: Risks and Side Effects: Five Questions on the 'New' Hungarian Tort Law. *ELTE Law Journal*, 2014/2., 199–221, 203.

55 Section 6:539. HCC.

because of the assumption of risk. But the legal consequences of the assumption of risk are to be set off.

In our opinion, the notion of operator was used to fill the legal vacuum resulting from the fact that the legal consequences of the assumption of risk are on the rim of contributory fault applied by courts in very restrained way, while the exculpatory clauses are *ex officio* stipulated invalid one by one.

8. Conclusion

The limited exculpatory clauses approach another way to the consent of injured person than the assumption of risk, but both of them are factors taken into account limiting liability for damages. These terms or notices reflect the unilateral interest inside and are imbued only the willing of tortfeasor to exonerate from liability. The victim's consent reflects the informed assumption of risk and of being harmed also, especially in cases when the possibility for prevention against source of risk is hindered by several factors and are exposed to the chance. The assumption of risk is more than mere waiving of a right; it serves justification ground only under the conditions and in the scope of the statement. Looking for the connection between exculpatory clauses and victim's consent, it might be asked whether the imperative limits of exculpation and the expressed will of the injured person can collide, and therefore whether a relative nature of the invalidity can be observed, exclusively in extreme situations.

It is probable to notice certain situations resulting in damages where the express consent from the injured person/party is missing, but his will to expose himself the direct and serious danger impending significant damages is obvious. Why the operator alone has a duty to prevent damages occurring from the highly dangerous activity? Even in the cases when the injured person is who has contributed willingly and significantly to the damages. It was noted that courts do not exonerate the operator from the liability hardly ever in the Hungarian legal practice since strict liability and the apportionment of liability. But, we think this approach is as a groundless amplification of the notion of strict liability (over-enhancement of concept of risk).[56]

In order to exoneration we should examine the charges laid on the operators. If the Hungarian judicial practice do not accept the entire exoneration of operator in cases of avoidable contributory conduct of injured party, we suggest that the court ensures lower legal protection for the injured person exposing himself to the risk wilfully and his contributory conduct was more then negligence act but the operator failed to avoid it because he breached the very strict obligations for preventive measures, should the comparison of interests suggest more protection for the victim's interests.

Returning the above-mentioned cases from judicial practice, the followings must be underlined. The second case dealing with the highly dangerous paragliding

[56] Mentioned by FÜRST L.: *A magánjog szerkezete*. Budapest, 1934, 66.

activity brought us a classic example for assumption of risk. In this case and in the climbing wall case the court held that the contributory conduct of the injured person is deemed as an activity of operator. Under the old HCC provision, the general liability rules are to be applied in the relation of the operators, so the conducts of both party were to be examined in the viewpoint of the blameworthiness (relatively objective standard of care). In the latter case, the court went forward and applied the special rule (malfunction) allocating the damages between two hazardous operations.[57] But in both cases the exculpatory clauses were null and void, this is out of question.

In the third case "preconcerted road accident" the court applied incorrectly the rule of express consent to eliminate the liability of the tortfeasor and the triggered obligation of the insurance company. We agree with Harmathy's opinion that the application of principle would have been adequate: "A person may not rely, in support of his claim, on an unlawful act he has committed."[58]

The fourth case (wine-smash) is a good example to mark out the application limits of notion assumption of risk. The deceased persons were quasi employee, they worked on behalf of the defendant. The comparison of the interests does not allow to apply the consequences of the assumption of risk, but their unreasonable act could be deemed as contributory negligence.

The extreme sports and leisure activities came into the everyday life. The proper legal effects of the consent or the assumption of risk are debatable even in the national laws regulating them expressively. Even if it is true that the enterprises are the best loss distributors, this fact could not result that the operator is alone who should suffer the consequences of completely reckless or intentional self-endangering or uncontrollable acts driven by the injured party.

It would be asked whether there are other significant cases of assumption of risk besides extreme recreational activities, medical treatment and road traffic accidents, and, whether all of these special fields require special regulation. The above – mention regulation methods of certain national laws and the model-rules suggest that these issues require a unified approach from the courts or from the legislation.

[57] Section 6:539. HCC.
[58] HCC sec. 1:4. subs 2

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FOREIGN EXCHANGE LOAN CONTRACTS AND UNFAIR TERMS – DISCUSSING THE CJEU'S JUDGEMENT IN THE ANDRICIUC CASE*

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1. Introduction

In these days, lending in foreign currencies is one of the most complex economic and social problems, which arises several legal questions not only in those Member States of the European Union, where such contractual constructions have been applied, but in relation to the judicial practice of the Court of Justice of the European Union (hereinafter CJEU). The study was inspired by the CJEU's new judgement[1], which was recently published, in September 2017. This judgement facilitates to examine some problematic questions in detail, with reference to the interpretation of Directive 93/13/EEC[2] and with regard to the specialities of the Hungarian regulatory environment.[3]

Notwithstanding the fact, that both the Hungarian legislator and the bodies applying law intended to close the debates on the lending in foreign currencies, statistics show the opposite. Between 1st November 2013 and 31st December 2016, more than 36,000 cases were submitted to the different courts from all over Hungary. About 19,000 of them came from the year 2016.[4] These numbers clearly indicate that debtors are not able to accept the solution proposals, which were worked up by the legislator as the remedy of the problems arisen. Instead, they steadily argue the fairness of the contracts and certain contract terms.

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1 Judgement of the Court in the case C-186/16 Ruxandra Paula Andriciuc and Others v Banca Românească SA. of 20 September 2017, ECLI:EU:C:2017:703

2 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21. 4. 1993, 29–34.

3 In the past few years, the interpretation of the different articles of the Directive 93/13/EEC became again a core question of the European law. See MICKLITZ, Hans-Wolfgang–REICH, Norbert: The court and sleeping beauty: The revival of the unfair contract terms directive (UCTD). *Common Market Law Review*, June 2014, 771–808.

4 http://birosag.hu/sites/default/files/allomanyok/stat-tart-file/devizahiteles_peres_eljarasok_2013._november_1.-2017._augusztus_31.pdf.
(Date of download: 30 October, 2017)

Although the lending in foreign currencies and the related difficulties got especially big attention and media publicity in Hungary, these problems also appear in other Member States of the EU.[5] Questions reappear in the field of foreign currency loans and the opens again the seemingly closed debates. The most recent example of this process is the CJEU's judgement in Andriciuc et al. (C-186/16), which gave hope for the Hungarian debtors at first sight. However, after the thorough examination of the judgement it is obvious that there is no meaningful changing in the CJEU's judicial practice on the lending in foreign currency. In the following pages we introduce the core statements of the case, in order to justify our previous ascertainment.

2. The dispute in the main proceedings and the questions referred by the national court for preliminary ruling

Between April 2007 and October 2008, the applicants of the main proceeding concluded loan contracts with the *Banca Românească SA* (hereinafter Bank) denominated in Swiss francs (CHF) with a view among others to acquiring immovable property and refinancing other credit arrangements. Each of these agreements contained the contract term, which prescribes that debtors[6] are required to make monthly payments on the loans in the same currency as that in which they had been concluded. It meant that debtors had to pay in Swiss francs, although they received their income in Romanian lei (RON) in these years. This contract term was completed with another one, which authorised the Bank to debit the debtor's account and, if necessary, to carry out any conversion of the balance available on the debtor's account into the currency of the contract at the Bank's exchange rate as it stood on the day of that operation, when the monthly payments had fallen due or the debtor failed to comply with the obligations arising from the agreement (infringement of contract).

According to the applicants' standing point, with the above mentioned contract terms the Bank fully put the exchange risk on the debtors. In accordance with their argumentation, the Bank could foresee the changings and fluctuations in the exchange rate of the Swiss franc, but express information were not given to the debtors.[7] Since the debtors found both contract terms unlawful, in 2004 they took a legal action against the Bank before the District Court, Bihor, Romania *(Tribunalul Bihor)*. In their action they ask the Romanian court to ascertain the nullity of the above mentioned contract terms and to oblige the Bank to work out a new loan

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5 See PANN, Johannes–SELIGER, Reinhardt–ÜBELEIS, Julia: Foreign currency lending in Central, Eastern and Southeastern Europe: the case of Austrian banks. *Finanzmarktstabilitätsbericht*, Vol. 20 (2010), 60–80.; BUSZKO, Michal–KRUPA, Dorota: Foreign Currency Loans in Poland and Hungary – A Comparative Analysis. *Procedia Economics and Finance*, 30 (2015), 124–136.

6 In this study we use the expression "debtor" instead of "borrower" used by the CJEU.

7 In the above mentioned period, the exchange rate of the Swiss franc compared to other foreign currencies fluctuated significantly. Despite, financial institutions emphasised the advantages of the applied product and currency and did not provide information about potential risks and the chance of their occurrence.

repayment schedule, which is applicable for each loan contract and which provides the conversion of the credit amount (in foreign currency) into Romanian lei at the exchange rate, which was in force at the time of the conclusion of the loan contract.

The Romanian court of first instance dismissed the action and stated that a contract term, which prescribes for the debtors to pay back the loan in the same currency as that in which they had been concluded, shall not be regarded as unfair even if it had not been individually negotiated with the consumers.

The debtors brought an appeal against that judgement. The Court of Appeal of Oradea *(Curtea de Apel Oradea)* disputed the interpretation of the relating provisions of Directive 93/13/EEC, therefore it made a request for a preliminary ruling. In its request it submitted the following three questions:

a) The first question referred to the Article 3(1) of Directive 93/13/EEC. It argued, if the significant imbalance in the parties' rights and obligations arising from the contract must be examined strictly at the time of the conclusion of the contract or it also can be examined during the performance of the contract, with regard to the circumstances of the case and to the significant variations in the exchange rate.

b) The court's second questions tended to the interpretation of the Article 4(2) of the Directive 93/13/EEC. It asked for the interpretation of the the plainness (clearness) and intelligibility of a contractual term and also examined the extension (scope and level) of the obligation to provide information. It was a question, whether the plain and intelligible contract term includes only those reasons and facts, which keep the base of the parties' contract or it should cover every potential consequence, upon which the debtor's contractual obligation can change. These latter include the exchange rate risk. In this context, it was a question, if the obligation to provide information should cover only the conditions of the loan (e.g. interests, charges and guarantees required of the debtor) or it should include the possible over-valuation or undervaluation of a foreign currency.

c) The third question also tended to the Article 4(2) and asked, whether the expressions "the main subject matter of the contract" and "adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other" include a term incorporated in a loan contract in a foreign currency, which has not been negotiated individually and pursuant to which "the credit must be repaid in the same currency".

In the subsequent points of our study we review the CJEU's standing point on the above mentioned three questions. Since the CJEU turned the order of the questions submitted by the Romanian court and moved logically backwards in the course of the preliminary ruling, we also present the answers given by the CJEU in compliance with the CJEU's judgement.

3. About the third question or what is the "main subject matter of the contract"?

In some other similar cases, CJEU already examined the question, how should the expression "the main subject matter of the contract" stated in the Article 4 of Directive 93/13/EEC be interpreted. This is quite important, since the unfairness of those contractual terms which fall into the scope of this expression can not be examined according to the Directive. These contract terms are exempt from being assessed for unfairness, provided that in they are in plain and intelligible language. [8] Accordingly, in order to assess the fairness of a certain contract term, we should make a two-step examination. First, it should be examined, if the given contractual term shall be deemed as "the main subject matter of the contract" or not, according to the Directive.

In its previous judgement Kásler (C-26/13)[9], which has Hungarian relevancy, CJEU stated that consumer protection mechanism created by Directive 93/13/EEC is based on the principle which declares that a consumer is in a much weaker position than the other contractual party (seller or service provider). The "information imbalance"[10], i.e. the consumer's defencelessness appears both in its negotiation position and in the level of information, since sellers and service providers often apply such conditions, which the consumer can influence a little or not at all.[11] With regard to this, the expression "the main subject matter of the contract" (as an exception to the mechanism for reviewing the substance of unfair terms) shall be strictly interpreted.[12]

According to the settled case-law of the CJEU it can be stated that a certain contractual term falls into the scope of the above mentioned notion, if it lays down the *essential* obligations of the contract and, as such, characterises it. [13] However, a contract term does not falls into the scope of the expression "the main subject matter of the contract", if it is merely *ancillary* compared to the terms laying down

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8 Directive 93/13/EEC, Article 4(2).

9 Judgement of the Court in the case C-26/13 Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt 30 April 2014, ECLI:EU:C:2014:282. The detail analysis of the judgement see: SOMSSICH, Réka: Az Európai Bíróság ítélete a fogyasztókkal kötött szerződésekben alkalmazott tisztességtelen feltételekről. *JeMa*, 2014/4, 83–91. and FAZEKAS, Judit: Gondolatok a devizaalapú hitelszerződések jogi hátteréről és a tisztességtelen általános szerződési feltételek érvénytelenségi kontrolljáról. *Jog, Állam, Politika*, 2016/4., 84–90.

10 GÁRDOS, István–NAGY, András: A devizahitel jogi alapkérdései. *Hitelintézeti Szemle,* 2013/5., 377.

11 Kásler, para 40.

12 See, in particular Kásler, para 42 and Judgement of the Court in the case C-143/13 Bogdan Matei and Ioana Ofelia Matei v SC Volksbank România SA. of 26 February 2015, ECLI:EU:C:2015:127, para 49 and Judgement of the Court in the case C-96/14 Jean-Claude Van Hove v CNP Assurances SA of 23 April 2015, ECLI:EU:C:2015:262, para 31.

13 Judgement of the Court in the case C-484/08 Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios (Ausbanc) of 3 June 2010, ECLI:EU:C:2010:309, para 34 and Van Hove, para 33 and Kásler, para 49.

essential obligations. [14] In the course of determining, whether a certain contractual term is essential or ancillary, both the nature and the general scheme of the given contract (e.g. loan contract) and its legal and factual context shall be taken into account. [15]

The opinion of Advocate General Wahl delivered on 27 April 2017 emphasised that in the case of a loan agreement, the essential obligation of the bank is to make the amount loaned available, while that of the debtor is to repay the principal and interest (which represents the price of the loan).[16] (The same was stated in the above mentioned Kásler case.[17]) Since these obligations are not separable from the currency of the loan, an approach according to which "the main subject matter of the contract" covers only the numerical sum, but excludes the reference foreign exchange, is not acceptable.

Moreover, it is a question, whether the determination of the currency, in which the debtor shall fulfil the monthly payments, is a necessary condition with regard to the loan contract or not. If it is, it shall be deemed as an essential feature of the contract and therefore it falls into the scope of the expression "the main subject matter of the contract".

It is also worthy to mention that in the course of the main procedure and the preliminary ruling, both the Romanian bank and the Romanian government referred to the fact that the above examined contractual term, which prescribes for the debtors to pay back the loan in the same currency as that in which they had been concluded, was conform with the principle of *monetary nominalism* stated in Article 1587 of Romanian Civil Code *(Codul civil)* existing in force at that time. According to the above mentioned article, an obligation arising from a money loan is always limited to the same numerical sum shown in the contract. The debtor is obliged to pay back the sum lent in the currency of the loan, accordingly the exchange rate at the time of payment, even if the value of a currency changes (increases or decreases) before the due date for payment.[18]

This provision was the basis of the defendant's argumentation, since those terms which reflect mandatory statutory or regulatory provisions of either of the EU's member states, do not fall into the scope of the provisions of Directive 93/13/EEC. Though the contract term examined in the case Andriciuc et al. (C-186/16) reflects to a certain regulatory provision of the Romanian civil code and therefore it exempts from the application of the Directive's provisions, CJEU stated that this exclusion is only applicable, if both prescribed conditions fulfil. Thus, the exemption applies insofar as the certain contractual term reflects a mandatory statutory or regulatory provision. In its judgement in Andriciuc et al. (C-186/16) the CJEU stated that the examination of these conditions falls within the competence of the national courts. In its judgement the CJEU prescribed for the

[14] Kásler, para 50, Van Hove, para 33, Matei, para 54.
[15] Kásler, para 50–51, Matei, para 53–54, Van Hove, para 37, Andriciuc et al., para 30.
[16] Opinion of Advocate General Nils Wahl (27 April 2017), para 43.
[17] Kásler, para 51.
[18] Andriciuc et al., para 7.

Romanian court the strict interpretation of the above mentioned terms in order to maintain and ensure the consumer protection mechanism created by the Directive.[19]

4. About the second question or what does the clarity and intelligibility of a contractual term means?

The second question submitted by the Romanian court to the CJEU closely relates to the problem examined in the previous point of the study. Then it was mentioned that the method of assessing the fairness of a certain contract term can be divided into two steps. According to the provision of Directive 93/13/EEC the assessment of the unfair nature of the terms is not possible, if they fall into the scope of the definition of "the main subject matter of the contract" provided that these terms are in plain and intelligible language.[20] As it was mentioned before, according to the CJEU's judgement, the above examined terms should expressly be deemed as "the main subject matter of the contract", therefore it is necessary to examine, if these terms were in plain and intelligible language, i.e. they were transparent for the debtors.

The criterion of clarity and intelligibility, similarly to the notion "the main subject matter of the contract", was examined for many times by the CJEU. In the course of this process it should be examined, what is the extent either of the consumers' awareness to be expected and of the seller's or service provider's obligation to disclose information.

With regard to the criterion of clarity and intelligibility, CJEU has already stated in the case Kásler (C-26/13) that the requirement of transparency can not be restrict to the linguistic and grammatical intelligibility nature[21] of the contract terms, i.e. it is not enough, if a consumer is able to interpret the contract terms grammatically, according to the general meaning of the words. [22] Transparency includes the real content of the contract, since as it was mentioned before, consumers are in weaker (detrimental) position in the having of information compared to the position of the sellers or service providers. Consequently, the requirement of transparency should be interpreted in a broad sense and the seller (or service provider) should set out transparently, in plain and intelligible language the specific functioning of the mechanism to which the given contractual term refers.[23]

In the case of loan contracts, it means that the contract should set out transparently the specific functioning of the mechanism of conversion for the foreign currency to which the relevant term refers and the relationship between that mechanism and that provided for by other contractual terms relating to the advance

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19 Andriciuc et al., para 27–31.

20 Directive 93/13/EEC, Article 4(2).

21 The linguistic and grammatical intelligibility means the narrower approach of the criterion of clarity and intelligibility.

22 Kásler, para 75.

23 Andriciuc et al., para 45–46 and Kásler, para 75.

of the loan, so that the consumer is in a position to evaluate, on the basis of clear and intelligible criteria, the economic consequences for him which derive from it.[24]

In its judgement in Kásler (C-26/13), the CJEU exposed that the bank should have explicitly given information about the using of different exchange rates and its reasons, i.e. why the buying rate of exchange was used in the case of the loan's disbursement and why the selling rate was used in the case of the conversion of the monthly debt payments. In the case Andriciuc et al. (C-186/16), grasping the meaning of the fluctuation in exchange rate was from the beginning expected from the debtors. Nevertheless, Bank should expressly inform the clients that they must take the risk of exchange rate and this duty could become more burdensome during the paying back of the debt, in particular when the currency in which the debtors get their monthly income depreciates.

In our view, AG Wahl's opinion delivered in the case Andriciuc et al. (C-186/16) is right. In this opinion he exposed that the bank having regard to its expertise and knowledge in the area, is obliged to draw the consumers' attention to the possible variations in the exchange rate and the risks inherent in taking out a loan in a foreign currency, particularly where the consumer debtor does not receive his income in that currency. However, the bank should not inform the consumer about those facts and circumstances, which the bank could not foreseen even if it acted having prudential diligence. [25]

In the judgement Andriciuc et al. (C-186/16) CJEU also stated that the examination of the clarity and intelligibility of a certain contract with regard to the case's all relevant circumstances, falls within the competence of the national courts. In the referred case the court should examine, if the debtors were informed by the bank about all facts and circumstances (e.g. the total cost of the loan), which could influence their decision. During this examination it will be important, if a reasonably well-informed, reasonably observant and circumspect consumer[26] can estimate the costs. Namely, it is essential to let the consumer to be aware still before the contract conclusion of all contractual conditions and relating circumstances, since the consumer only upon these information in his or her possession can make a deliberated decision on the contract conclusion.[27]

This requirement was already worded in the *Recommendation of the European Systemic Risk Board* (hereinafter ESRB) in 2011.[28] In the field of the risk awareness of borrowers (debtors) the ESRB recommends for the national

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24 Kásler, para 73 and 75.

25 Opinion of AG Wahl (C-186/16), para 67–68.

26 The standard of the average consumer, i.e. who is "reasonably well-informed, reasonably observant and circumspect", was explicitly employed by the CJEU. See Kásler, para 74 and Van Hove, para 47 and DJUROVIC, Mateja: *European Law on Unfair Commercial Practices and Contract Law*. Hart Publishing, Oxford and Portland, Oregon, 2016, p. 60. and LEONE, Candida: Of Private Law, Market Regularisation and Telling Them Apart in the EU. *Amsterdam Law School Legal Studies Research Paper*, No. 28 (2017), 8.

27 Andriciuc et al., para 46–48.

28 Recommendation of the European Systemic Risk Board of 21 September 2011 on lending in foreign currencies (ESRB/2011/1), OJ C 342, 22. 11. 2011, 1–47.

supervisory authorities and the Member States "to require the financial institutions to provide borrowers with adequate information regarding the risks involved in foreign currency lending. As it is worded, such information should be sufficient to enable borrowers to take well-informed and prudent decisions and should at least encompass the impact on instalments of a severe depreciation of the legal tender of the Member State in which a borrower is domiciled and of an increase of the foreign interest rate."[29]

5. Clear and intelligible contract terms – a Hungarian perspective

Finding solutions and arranging the problems arisen in relation to the lending in foreign currencies has already started in the judicial practice during the year 2013. Those decisions, which appeared within the frame of the highest judicial forum and which served the uniformisation of the relating judicial practice, covered both the requirement of transparency and the contractual parties' duty to provide information.

The *uniformity decision 6/2013 PJE* of the *Curia of Hungary* (hereinafter Curia) was published in December, 2013. In this decision the Curia stated that "[t]he statutory obligation of the financial institution to provide information had to extend to the possibility of exchange rate change and its impact on the payments". The decision also stated that this obligation should not extend to the extent of the exchange rate change. [30] This latter expectation is lawful, since the extent of the exchange rate change is an unforeseeable and objective circumstance. The Hungarian legal standing point expressly mentions that financial institutions shall make the debtors understand the changeability of the exchange rate in the course of the paying. This obligation is a necessary element of the duty to provide information, prescribed in general by the Act No. V of 2013 on the Civil Code.[31] However, this obligation should (and could) not extend to inform the debtor about the numeric change of the exchange rate.

The above many times mentioned judgement in Kásler (C-26/13), which has big importance in the settled judicial practice of the CJEU, gave new impulse to the working-out of the legal solutions on the lending in foreign currencies in Hungary. In 2014, the Curia passed another uniformity decision *(2/2014 PJE)*, which was strongly influenced by the CJEU's judgement is Kásler (C-26/13). The uniformity decision nearly took over the standing point of the CJEU, stated in the judgement. According to the point 1 of the uniformity decision's operative part, "the clause of a foreign exchange loan contract which stipulates that the risk of foreign exchange shall be taken without restrictions by the consumer […] forms part of the main subject matter of the contract", therefore its unfairness can only be examined, if it was clear and intelligible for the consumer at the time of contract conclusion.[32]

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29 ESRB/2011/1, Section 1, Recommendation A – Risk awareness of borrowers.
30 Uniformity Decision 6/2013 PJE, Operative Part, Point 3.
31 Hungarian Civil Code, Article 6:62, paragraph (1).
32 About the uniformity decision 2/2014 see FAZEKAS, 90–91.

The Curia's uniformity decisions have their significance not only on their own, but their ambitions on the legal unification have also strong impact on the formation of the regulatory environment. Article 205 paragraph (3) of the previous Hungarian Civil Code (Act No. IV. of 1959) prescribed for the contractual parties as a general duty to cooperate each other at the time of the contract conclusion and to provide information about all those circumstances, which is essential with regard to the contract to be concluded. The new Hungarian Civil Code took over the "old" civil code's provision on the duty to provide information and complement it. According to the Article 6:62 paragraph (1) of the operative Civil Code parties should not only at time of contract conclusion, but during the fulfilment and the cessation of the contract.[33]

It is worthy to mention that not only the prior and the Civil Code in force prescribe the duty to provide information, but single acts also dealt with the question. The provision of the "old" civil code was completed by the Act CXII of 1996 on Credit Institutions and Financial Enterprises (hereinafter CIFE), which is already not in force anymore.[34] The CIFE contained some provisions on the foreign exchange loan contract concluded with consumer. Article 203 paragraph (6) of the CIFE prescribed that in these kind of contracts the financial institution shall expressly specify in the contract the risks to which the consumer is exposed, and the consumer shall verify acknowledgement ("statement of risk acknowledgement") by his signature. In the case of foreign exchange loan contract, the statement of risk acknowledgement compulsory shall contain the risks in any fluctuation of exchange rates and its effect on the instalment payments.[35]

From the year 2009, consumer credit has been regulated by a single act.[36] The Act CLXII of 2009 on consumer credit (hereinafter CCA) was amended in 2014.[37] The relating rules of the CCA are more or less conform with the CIFE's rules on the obligation to provide information. According to the Article 21/A paragraph (1) of the CCA, in the case of a loan contract, which is concluded with consumer and either recorded or lended and repayable in foreign currency (i.e. "foreign currency based loan contract"), financial institution (creditor) shall inform the consumer about the risks to which the consumer is exposed in relation to the contract. The consumer's acknowledgement shall be certified by the statement signed by the

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[33] See JUHÁSZ, Ágnes: *The Borders of the Duty to Disclose Information in a Contractual Relationship* In: KÉKESI, Tamás (ed.): MultiScience – XXXI. microCAD International Multidisciplinary Scientific Conference, Miskolc, 2017; JUHÁSZ Ágnes: Az együttműködési és tájékoztatási kötelezettséghez kapcsolódó egyes kérdésekről. *Publicationes Universitatis Miskolciensis, Sectio Iuridica et Politica*, Tomus XXXV. (2017), 285–301.

[34] The CIFE was superseded by the Act CCXXXVII of 2013 on Credit Institutions and Financial Enterprises, which is at present in force.

[35] CIFE, Article 203, paragraph (7), point a).

[36] With this act the Hungarian legislator implemented the Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133, 22. 5. 2008, 66–92.

[37] See Act LXXVIII of 2014 on the amendment of the Act CLXII of 2009 on consumer credit and other related acts, Article 9.

consumer, in which the consumer acknowledged the risks. This statement also should contain the risks in any fluctuation of exchange rates and its effect on the instalment payments.[38]

6. About the first question or when shall the significant imbalance caused by the unfair contract term be examined?

Returning to the CJEU's judgement in Andriciuc (C-186/16), we go further with the first question, which was submitted by the Romanian court for preliminary ruling. This question asked for the interpretation of the Article 3(1) of Directive 93/13/EEC, which determined the time when the significant imbalance between the rights and obligations of the parties arising under the contract can be examined by the national courts. The question was quite important, since the above mentioned imbalance existing between the parties' rights and obligations can cause the unfairness of a certain contract term. It is also worthy to mention that this criterion can solely be examined, if it does not fall into the scope of the Article 4(2) of the Directive 93/13/EEC.[39]

In relation to this question, AG Wahl properly drew the attention in his opinion that between two types of the cases shall be made a distinction:

a) There are cases, in which the certain contractual term brings the significant imbalance between the parties from the beginning, but it manifests for the parties only during the performance of the contract.

Here can be mentioned the case C-92/11[40], in which the CJEU established relevant statements in relation to the unfair contractual practice of a German gas supplier company. The German company, the RWE Vertrieb was obliged to conclude gas supply contracts with consumers accordingly the legal provisions. At the same time, with regard to the dispositive nature of these provisions and the principle of contract freedom, it also had the right to apply single contract terms. In the referred case, those contracts were examined, which were concluded with consumers and the company applied its own general contract terms. These terms stipulated that the company has the right to amend unilaterally the price of the gas without providing information for the consumer about the reasons, conditions and the extent of the amendment. The company was only obliged to inform the consumers about the amendment and about their right to terminate the contract, if they would not accept the amendment passed by the company. In addition, the significant imbalance between the parties was increased by the fact that consumers had no possibility at that time to change the person of the gas supplier.

In relation to the above mentioned contract term the CJEU concluded that although the information to be provided is different with regard to the peculiarities of the certain product, the lack of information on the point before the contract is

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38 CCA, Article 21/A, paragraph (2).

39 C.f. the 2nd point of the study.

40 Judgement of the Court in the case C-92/11 RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV. of 21 March 2013, ECLI:EU:C:2013:180.

concluded cannot, in principle, be compensated for by the mere fact that consumers will, during the performance of the contract, be informed in good time of a variation of the charges (e.g. change in price) and of their right to terminate the contract if they do not wish to accept the variation, but of the reasons of the changes not.[41] That is, the contract term, which was applied by the parties during the conclusion of the contract, already brought at this time the significant imbalance between the parties and therefore it was deemed unfair.

b) In other cases, the unfairness of a given contractual term does not arise at the time of the conclusion of the contract, but it appears because of the changes in circumstances, which may occur during the fulfilment of the contract. By reason of these changes, the extent of the obligation borne by the consumer change, which the consumer perceives as excessive, i.e. such changes raise the significant imbalance between the contractual parties posteriorly.

The case Andiciuc et al. (C-186/16) examined in the study can be an example for this case, since the devaluation of the domestic currency caused extra costs for the debtors. Nevertheless, it also can be stated that at the time of contract conclusion, neither the debtors (consumers), nor the financial institute could reasonably be expected to foresee the exact measure of the changes in the exchange rate. The unforseeability of change in circumstances as an objective factor cause changing in the parties' obligations by all means. However, according to our view, these changes do not break the contractual balance, since the financial institute lent to the debtor a certain number of currency unit and financial institution is entitled to the return of that same number of units.[42] The risk of the fluctuation or the significant changing in exchange rates was known by the debtors at the time of contract conclusion, so CJEU stated that existence of significant imbalance between the parties' rights and obligations shall be examined at the time of contract conclusion. Moreover, the national court shall ascertain, whether the financial institution was, with regard to all circumstances, observant of the requirement of good faith and fairness and whether the significant imbalance between the parties' rights and obligations existed at the time of contract conclusion.

7. Consequences

The problem of the foreign exchange loans has continued to be a contentious issue, not only in Hungary, but in other countries across Europe. Debtors still trust that new and more favourable circumstances and possibilities emerge. Therefore, debtors have great expectations of both the national courts and the CJEU.

The CJEU returns to the question of the foreign exchange loans from time to time. It is well-demonstrated by the case introduced and analysed in the study. However, in view of the judgements taken by the CJEU, a question arises: can be

[41] RWE (C-92/11), para 51–53 and 55.
[42] Opinion of AG Wahl (C-186/16), para 87.

any new element in the adjudication of the foreign exchange loans at European level?

The CJEU's judicial practice on foreign exchange loans is uniform and mature, motions by Member States rarely reach the judicial body. It is one of the reasons, why we are of the opinion that the chance for the emerging of cases which would bring significant changes in the already evolved judicial practice is far too little. It is well-demonstrated by CJEU's recent judgement in Andriciuc et al. (C-186/16). Although the CJEU answered to the questions submitted by the Romanian court for preliminary ruling, the given answers are mostly based on the CJEU's previous case-law, e.g. on the judgement in Kásler (C-26/13). Moreover, the judgement does not contain any new and relevant statement.[43] However, a concrete turn presumably can not be expected. In those countries, where the economic problems caused by the foreign exchange loans and the demands on the solution arose the strongest (e.g. Romania, Bulgaria, Hungary and Poland)[44], national legislators have already taken steps. Nevertheless, tha solutions worked out by the different national legislators are not necessarily overlapping.

It is possible that some cases relating to foreign exchange loan emerge and reach Luxembourg in the future. If a Member State decide to create its own clear and mandatory regulation, the turning to the CJEU for preliminary ruling in foreign exchange loan cases is no longer necessary and justifiable.

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[43] In February 2017, the Budapest-Capital Regional Court of Appeal (Hungary) submitted a request for preliminary ruling. The request (C-51/17) contains five questions, which refer to the interpretation of Directive 93/13/EEC. About the request see: GADÓ Gábor: A fogyasztókkal kötött szerződésekben alkalmazott tisztességtelen feltételekről. *Gazdaság és Jog*, 2017/4, 18–23.

[44] As *Fazekas* commented, the increasing of foreign exchange loans could be experienced not only in Hungary, but in the Baltic countries, i.e. Estonia, Latvia and Lithuania. Similar constructions were also known and used in Poland, Bulgaria and Romania. See FAZEKAS, 73.

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REGULATIONS ON EXECUTING AUTHORITY DECISIONS IN HUNGARY FROM WORLD WAR II TO THE CHANGE IN THE POLITICAL REGIME IN 1990[*]

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1. From World War II to the first Code of Procedures

During the times of World War II, legislations adopted in the era of pre-world war Hungary were effective with respect to administrative authority proceedings, except for extraordinary rules of law. There was no law regulating administrative authority proceedings in a general and complex manner, and the provisions of Act XXX of 1929 were applied as effective. Legislative development appeared to be halted in this area. However, this issue had a practical reason, because 1929 was the year marked as the year of the Great Depression, a global economic crisis, causing particularly severe consequences in Hungary. In this situation, it is not surprising that legislators were not very attentive to the issue of progressively regulating administrative authority proceedings. As a result of the Depression, changes were introduced with respect to authority proceeding regulations,[1] but the primary aim of such changes was not to develop the proceeding in legal terms, but to make public administration affairs cheaper.[2] Subsequently, upon Hungary barely having made its way out of the crisis and managing the crisis consequences, Europe already was getting close to the brink of World War II. Accordingly, the development of authority proceedings was hindered by new social, political and economic obstacles. In the course of the development of law, development had always gained momentum when a certain extent of stability could be witnessed in terms of the conditions influencing legislative procedures. It is an obvious reasoning that the attentions of legislators always focus on issues that have the

[*] "The work was created in commission of the National University of Public Service under the priority project KÖFOP-2.1.2-VEKOP-15-2016-00001 titled *Public Service Development Establishing Good Governance* in (the) *István Egyed Postdoctoral Program*".

[1] Act XVI of 1933, on the Amendment and Supplementation of Act XXX of 1929 on the Management of Public Administration.

[2] Corpus Iuris Hungarici, from the Ministerial justification of Act XVI: "The current status of the country cannot bear the costs of the current system; all our procedures and procedural systems must be simplified and made as cheap as possible."

most definitive impacts on government operations and on the given society. After World War II, it became apparent – as a result of processes taking place in world politics – that the Hungarian government and social affairs would face a long, peaceful period, at least peaceful enough for the issue of regulating authority proceedings to be discussed. Even during the years following the war, it was still the provisions of the Act adopted in 1929 applicable on procedural affairs. Accordingly, there was no legislation that would provide regulations on each and every phase of administrative authority proceedings, providing regulations over such matters in a general way. However, significant changes took place in terms of academic legal theory experts, as – primarily due to the academic standpoint represented by Zoltán Magyary[3] − the long-lasting belief, according to which administrative authority proceedings could not be regulated in a comprehensive manner, seemed to come to an end.[4] As a result of this change of perspective, several attempts were made on the regulation of public administration proceedings; the first person to prepare a bill in the subject was József Valló, in 1937.[5] In the course of preparing the bill, Valló took into consideration the rules of proceedings in civil procedural law, the Austrian administrative procedural law, as well as those of certain special proceedings. Later, in 1939, it was Jenő Szitás[6] who prepared a bill, a simpler and shorter one than Valló's version, but more framework-like in its nature[7]. Subsequently, it was József Valló again who was asked to prepare the legislation in 1942. Nevertheless, none of these bills would ever become effective, because none of them were adopted by the national Parliament. The adverse fate of the above described bills was greatly influenced by the political situation of the country, as, apparently, they were actually made during the time of World War II. It is a rather unfortunate issue, as these bills, particularly Valló's 1937 draft could be considered as quite progressive works facilitating the development of law.

Furthermore, regulatory experiences also created favourable conditions for establishing general norms, as the system applied at that period stood the test of time, and, even if only partially, it could be considered as a basis. Regarding administrative proceedings, international legal developments were also significant further to Hungarian development. In Austria, the first act regulating public administration proceedings was adopted in 1925[8]. The best way to highlight its

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3 "Magyary believed that both the legality and the effectiveness of public administration is, in a small extent, dependent on the unified (as possible), complex regulation of proceedings." In: BERÉNYI–MARTONYI–SZAMEL, *Magyar államigazgatási jog* (Hungarian Administrative Law). General part, Tankönyvkiadó, Budapest, 1980, 363.

4 CONCHA Győző: *Politika* (Politics). Volume II, *Közigazgatástan* (Economics). Budapest, 1905, 105.

5 VALLÓ József: *Közigazgatási eljárás*. Budapest, 1937, 34.

6 SZITÁS Jenő: Közigazgatási eljárás (Administrative proceeding). *A korszerű közszolgálat útja*, 9. sz., Budapest, 1939.

7 BERÉNYI–MARTONYI–SZAMEL: *Magyar államigazgatási jog* (Hungarian Administrative Law). General part, Tankönyvkiadó, Budapest, 1980, 363.

8 Verwaltungsverfahrensgesetz

significance to state that Czechoslovakia[9], Poland[10], and Yugoslavia[11] all took over the Austrian law, naturally with some amendments here and there.[12] The development was rather slowly in Western European countries. There were some attempts for regulation in the provinces of Germany; Thuringia issued an act on the subject in 1926, Wurttemberg prepared a draft for the bill in 1931, but no unified German regulations could be adopted. In such a favourable situation, Hungarian law development was well supported, which resulted in practical results. After the War, several legislations were adopted in relation to administrative proceedings, which repealed different, still effective provisions of the Act XXX of 1929[13]. The first of such provisions was the Act I of 1950, the so-called Council Act, which mainly included regulations on legal remedies.[14] Subsequently, the so-called Appeal Act was adopted in 1954, which had a similar effect on the procedural law of 1929.[15] Further to legislations, certain procedural issues were regulated in a government level, in forms of decrees.[16] However, the real breakthrough was the Act IV of 1957 on the General Rules of Administrative Proceedings becoming effective. This Act provided overall regulations over administrative proceedings,

9 Government Decree of 13 January 1928.

10 Act of 22 March 1928.

11 Act of 9 November 1930.

12 VALLÓ József: *Közigazgatási eljárás* (Administrative proceeding). Budapest, 1937, Foreword.

13 Naturally, together with its 1933 amendments.

14 Act I of 1950, Section 53 *(1): Regarding a first degree order made by an executive authority regarding local administrative issues, a first degree legal remedy shall be applicable.*
(2) Regarding remedies, in line with their classifications, decisions shall be made by the local council or a superior executive authority, whereas remedies with respect to first degree orders of county executive authorities shall be judged by the given county council or the competent Minister.
(3) It is the decision of the Cabinet which listed body would judge a remedy of a particular case.
Section 27: *The tasks of the local council shall be, in particular, the elimination and modification of provisions or orders of lower class councils in cases specified under Section 14 (Section 55), Section 55 (1) The Presidential Council of the People's Republic of Hungary, or the Cabinet may eliminate or modify any resolution, order or measure made or taken by local councils, which would be deemed unconstitutional or would be against the interests of the people.*

15 Act I of 1954 – On Managing reports of the population, *Section 1 (1): The leaders of administrative bodies, local government bodies and economic bodies (hereinafter: bodies) shall be personally responsible for ensuring that the bodies led by them as well as the bodies under their control would deal with reports of the population in a permanent manner and they shall ensure the regular supervision of such actions*.
(2) The leaders of bodies shall ensure that each report would be immediately and thoroughly examined, the necessary measures would be taken as the result of evaluation processes and the execution of such measures would be carried out in a complete manner.

16 Cabinet Decree 43/1955 (VIII. 20.) MT has such an effect, regulating the simplification of delivering official documents, *Section 1. In all cases when official documents are required to be delivered to parties affected in administrative and judicial matters, such delivery – except for cases stipulated in Section 11 – shall be ensured by means of regular post.*, or Cabinet Decree 46/1951 (II. 16.) MT, regulating the summoning rights of council executive authorities: *Section 2. Subpoenas shall be issued in written form and shall include the legal consequences of non-attendance. Subpoenas shall be signed by the chairman or vice chairman of the given executive authority, the head or deputy head of the executive authority department*.

which was unprecedented in the former Hungarian legislations. Accordingly, the first administrative Code of Procedures became effective.

2. The social and economic situation in Hungary at the time of the Code becoming effective

Before presenting the respective regulations on the execution of legislations, we need to analyse the changes taking place in the society, and even more importantly, in economics. The establishment of a one-party system resulted in such social and economic changes that were unprecedented before in the history of Hungary, at least in such long-term manner. As a result of nationalization, state ownership became dominant in economic affairs. Achieving the elimination of unemployment was set as a political and economic goal, and, as a result, a seemingly existentially firm social layer was established. Such issues need to be pointed out because they had direct, significant effects on the effectiveness of administrative proceedings, especially regarding to the execution of orders. The effectiveness of execution was largely influenced by financial circumstances, due to the fact that the decisions enforceable by administrative bodies are usually of financial nature. Typically, orders to be executed originate from failures to fulfil payment liabilities, which may be public charges or imposed fines. In case liabilities to be collected are generated as a result of failing to carry out an action, they result in financial obligations by the end of the execution procedure, which then results in the execution of collecting the financial obligation in case such fulfilment is not voluntarily ensured. If an authority orders the demolition of a building, and the owner of the building fails to follow this order, and if the building needs demolishing without delay, and its performance is of particular significance, another party must carry out the demolition in place of the obligated party. Obviously, this process entails costs, which are to be borne by the obligated party. In summary, it can be stated that there are two risk factors characteristic to the financial side of executing decisions. One risk is when execution is initiated in relation to a significant extent of financial liability that should be settled by the obligated party. In such cases, the obligated party is usually a major economic operator, as an average customer from an economic perspective usually cannot generate liabilities of such magnitude. In almost all cases, larger financial obligations are generated in the economic sector. In the discussed period, practically all the major economic operators were in state ownership, and, moreover, they were operating under strict centralised control.[17] This economic environment practically resulted in the non-existence of the above described risk. The other risk factor is poverty. Without the need for detailed explanation, it is quite apparent that people with very little belongings would not be capable of fulfilling their financial obligations, and it is doubtful that collecting such

[17] Act II of 1952 on State Control: This legislation stipulated the establishment of the State Control Centre (Állami Ellenőrző Központ – ÁEK), which practically controlled the complete financial aspects of state economic operators. Section 2 of this Act specified the tasks of ÁEK.

obligations would be successful regarding such people, as there are actually no assets to be collected. This statement is true even if the fact is considered that customers in such financial statuses would typically be incapable of generating significant financial obligations. As the initiative to eliminate unemployment resulted in everyone having an income, this risk factor was only slightly present as well. It can be concluded that the established conditions could be considered ideal in terms of the codification of execution regulations.

3. Execution rules in the Code of Procedures

Prior to the preparation of the Code, a principal issue to be considered – which still comes up time after time – is to state the starting and ending point as well as the phases of an administrative authority proceeding. Regarding this issue, the legislators of the given era had various standpoints. According to one of the standpoints, an administrative proceeding ends upon the issuance of a legally binding decision closing the proceeding. Accordingly, administrative authority procedures include only the basic proceeding and the remedy proceeding. The executive procedure was considered as an independent administrative procedure. According to another standpoint, execution, being the practical guarantee of validating the decision made, must be the part of the whole proceeding.[18] In terms of choosing one of the above solutions, the determination of the definition of administrative authority proceedings may provide guidance. According to the concepts applied at that time, administrative procedures are required to be defined in their stricter and broader senses as well. In a stricter sense, "an administrative proceeding is the system of actions taken by administrative bodies, carried out for and during the issuance and execution of normative or specific acts".[19] However, in a broader sense, "an administrative proceeding covers all the means of actions carried out by administrative bodies".[20] Apparently, it is clear that the administrative authority proceeding is included in the stricter interpretation of administrative procedures. However, it cannot be fully identified with this interpretation, as it also includes, among other issues, the internal executive rules of such bodies. To clarify this issue, the jurisprudence of the given period determined two categories within the stricter definition. One category was the so-called external procedure, including the administrative authority proceeding, where the administrative bodies apply their law enforcement activities externally, i.e. towards the society. The other category was the so-called internal proceeding, including procedures on the activities within the given organisation system.[21] Understandably, certain phases of such procedures generated heated discussions, as a code of procedures (considered quite novel at that time) for civil proceedings

[18] BERÉNYI–MARTONYI–SZAMEL, op. cit., 359.
[19] BERÉNYI–MARTONYI–SZAMEL, op. cit., 356.
[20] BERÉNYI–MARTONYI–SZAMEL, op. cit., 356.
[21] BERÉNYI–MARTONYI–SZAMEL, op. cit., 356.

already existed, which did not include the execution of court decisions.[22] As the laws on civil procedures were more developed than administrative authority proceeding laws, they could point out certain guidelines with respect to the aspect of regulations. A separate legislation regulated the execution of court decisions, giving the power of execution enforcement to a separate body.[23] Civil procedural law and administrative authority proceedings – despite having similarities in certain acts, such as rules on proof or the rules of appealing, etc. – are procedures totally different in nature. Regarding civil proceedings, courts do not carry out the classical activity of enforcing legislations, as the aim of such proceedings is to make decisions on legal disputes. Accordingly, the decision resulting in a legally binding act fulfils its role by merely the fact of having been made. On the other hand, the aim of administrative authority proceedings is to realise a given legislation or a court order – i.e. the acute interpretation of the legislation – which does not fully fulfil its function upon the decision, as the execution of the decision is an integral part of the procedure. According to my viewpoint, which is the same as the point of the currently effective court practices, the execution of a court decision is an executive, regulating activity falling in the category of public administration. Nevertheless, the standpoint stated in the first Code of Procedures declared that the execution of decisions was part of administrative authority proceedings. Accordingly, the three specified phases of such proceedings were the basic procedure, the remedy procedure and the execution.

Regarding the regulation of execution, a set of conditions for enforceability was determined. According to the law, enforceability had two general and one specific conditions. A general condition was to ensure the final nature of the decision, related to the legal institution of appealing by the relevant act. Legislators were able to refer to academic and practical results regarding the issue of final decisions, which was a serious advantage regarding the regulatory process.[24] Accordingly, the legislator specified formal res judicata as one of the conditions for enforceability in administrative authority proceedings. This, due to the single-level nature of appeal proceedings, resulted in a clear regulatory framework. Another general condition on execution was set out by means of providing the definition of enforceability, which practically meant the failure of voluntary performance regarding the obligated party. The third special condition – more precisely, another set of cases – had to be applied in case execution had to be carried out without delay for any reason whatsoever. Such cases were named as "preliminary enforceability" cases in

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22 Act III of 1952 on Civil Procedures, regulating: first degree procedures (Part 2), legal remedies (Part 3), and special proceedings (Part 4).

23 Decree No 21 of 1955 on Court Decision Execution, Section 17 (1) *Execution is the competence of bailiffs working along local courts (municipal, district courts, hereunder altogether referred to as "local courts") and county courts (or Budapest Metropolitan Court) (hereunder: bailiffs).*
(2) *The executing party is employed by the state.*

24 TOMCSÁNYI Móric: *Jogerő a közigazgatási jogban* [Res judicata in administrative legislations]. Budapest, 1916; BAUMGARTEN Nándor: *Jogerő a közigazgatási eljárásban* [Res judicata in administrative procedures]. Budapest, 1917.

the legislation. However, because this was a touchy procedural law issue in terms of legal certainty, and a guarantee rule, it could only be applied in specific cases. Such cases included life threatening situations or protecting public security. On the other hand, the Code did not exclude the applicability such issues in other cases, but it required the regulation of such cases as subjects to special legislations[25]. In practice, public security protection was an undefined term requiring interpretation. Nevertheless the applied practices of the given period applied this term in a broad sense and did not narrow it down to the physical well-being of citizens, but also included the categories of threatening health or financial security.

The Code specified the different types of execution – although they were not regulated in a separate manner – as executions on pecuniary claims and executions in forms of specific acts. Such specific acts included the release of movable assets, transferring real properties, or the cessation or tolerance of a kind of conduct. Regarding the subject of executing a failed act, the legislation stipulated the imposing of fines, and it could order the execution of the act by another party in place of the obliged party, or determine a financial equivalent to the transferred movable asset, in case the obligated party requested so, in case the given movable asset was not in the ownership of the liable party. Such means of execution could be used by the given authority in its sole discretion, in consideration of ensuring efficiency. Upon the first reading, the system of potential execution enforcement means may seem to be rather limited according to the legislation stipulations. However, this issue has a rational reason. In the course of a more thorough review, it can be seen that in the execution processes of nearly any cases with failed performance, pecuniary claims will be presented, i.e. such processes refer to collecting money claims, which fall under separate rules. In consideration of the above described social conditions, this system of execution means can be considered as effective, as it provides sufficient guarantee on enforcing the decision. It was a progressive provision, the increased protection of the obligated party.

The legislation ensured that the enforcement of the execution could only be actually applied as "ultima ratio". For this purpose, the given authority was specified as the party responsible for inducing the given client to fulfil their obligations in a voluntary manner, further to the issues stipulated in the effective decision.[26] In practice, this obligation was mostly performed by means of warnings and notifications. Although it was not regulated among the content elements of the legislation, it was clarified in the ministerial justification that the given body is

[25] Act IV of 1957, Section 46 *An appeal has a suspensive effect on the execution of the given decision, unless the immediate execution of the decision is deemed necessary due to any danger to human life or to public security, and in case a law, a government decree or a cabinet decree authorises the competent administrative body (acting with respect to the given range of cases) to order the immediate execution of the given decision for significant reasons. The immediate execution of a decision must be clearly stated and properly justified.*

[26] Act IV of 1957, Section 73 (3) *Prior to ordering execution, the administrative body must attempt to make the obligated party perform or tolerate the provisions of the given decision.*

obligated to provide notification to the obligated party in the decision generating the obligation about the following: the means of performance, the consequences of non-compliance, as well as the measures applied in the course of execution.[27] In general, the law made it possible that the given authority could order the performance to be completed in instalments, although this issue mainly referred to pecuniary claims.[28] Furthermore, the given authority was also entitled to change the performance deadline, which also included ordering the extension of the given deadline.[29] The power to suspend the execution also served as the protection of the rights of the obligated party, as the aim of such power was to ensure that the execution of the potentially law-infringing decision could not result in such an impairment of the obligated party's rights that could later be remedied in a very difficult way, or not remedied at all. Accordingly, in such cases, the reason for the suspension was the presumption of the infringing nature of the decision. It could also occur that such considerable circumstances with respect to the obligated party – permanent absence, illness – in relation to which the enforcement of the execution would put the obligated party in an unreasonably adverse situation. The legislation also allowed suspension in such cases. It must be noted that the legislators managed to balance out the protection of both counterparties affected in the execution process. The decision was made for the sake of protecting the obligated party could only take place in consideration of the rights of the other party, or other affected parties.[30] The legislation introduced a special option of legal remedy in the course of the execution process, under the name of enforcement objection. Typically, enforcement objections were meant to remedy infringements generated in the course of execution and did not affect the decision on which the enforcement was based.[31]

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27 Ministerial justification on Act IV of 1957, Section 73: *The basic assumption of the proposal is that execution – as a forcing act – should only be applied in case the obligated party fails to perform the provisions of the order despite being given a notice on the subject. In order to facilitate voluntary performance by the obligated party, the acting body must notify such party of the means of performing the decision, the respective adverse consequences of non-compliance, as well as the available measures in the course of execution.*

28 Act IV of 1957, Section 40. §. *In case the decision contains any obligations, a performance deadline shall be stipulated in terms of days. The decision may also allow performance in instalments.*

29 Act IV of 1957, Section 44 *The performance deadline stipulated in the order may be changed based on a significant reason by the administrative body making the given decision, unless the relevant deadline is stipulated by any legislation*.

30 Act IV of 1957, Section 79 *The given administrative authority or its superior may order the suspension of the execution of the enforceable decision on one occasion, based on the official process or on request, in case the changing or cancellation of the decision can be assumed to take place based on the data available, or such act is justified by circumstances requiring special considerations. Execution cannot be suspended for a period longer than thirty days.*

31 Act IV of 1957, Section 78 (2) *People whose rights are infringed by the execution procedure may submit an appeal against such a procedure within three days upon learning about the infringement. The appeal cannot be submitted against the provisions of the decision the execution was based upon.*

4. Legislative background on tax execution

As I have mentioned it before, the regulations on pecuniary claims were practically the rules stipulating tax execution. That is why the provisions of the respective legislations need to be presented in a separate manner. At the time the Code of Procedures became effective, the Government Decree No. 4187/1949 (VIII. 9.) on Collecting Public Taxes was the effective legislation, including the rules of tax debt collection execution in details. Regarding the subject of the decree, the issue of the execution of public administration decisions was clarified, according to which all payment obligations set out by any authority decisions, were considered as public taxes from the perspective of collection.[32] The decree determined the means of execution in a detailed way. As a first step, a payment notice was to be applied, which practically demanded the obligated party to settle their debt within a specified term of performance (8 days). In the case if this process was not successful, levying could be applied as the subsequent step. Levying was to be applied with respect to movable assets, although it must be emphasized that the decree did not interpret movable assets in the same way as they are considered according to the currently effective legislations. The movable assets at that time included, without limitation, liquid assets, incomes and other revenues as well.[33] Nevertheless, levying still had the legal effect of a safety measure, as the obligated party was still entitled to lawfully fulfil its liability within 15 days upon the act of levying. The protection of the obligated party was also indicated in the legislation. In light of this aspect, movable assets that could not be collected were defined.[34] Accordingly, levying could not be carried out with respect to movable assets classified in such categories. In case levying failed to be successful, − i.e. the obligated party failed to perform their obligation within the subsequent 15 days – the tax debt was the next step and the forced sale of movable assets took place. Such sales consisted of two parts; one was offered for sale and purchase, and the

[32] Government Decree No. 4187/1949 (VIII. 9.), Section 1 (2) *The following shall be collected as public taxes and, accordingly, shall be considered as public taxes in terms of collection:*
1. services (claims, compensations, fines, civil fines, etc.) determined in the effective and final a public administration (or guardianship) authorities – or ones that can be executed without any appeal consideration –, in case there is no legislation ordering the execution of the given decision to be enforced by court.

[33] Government Decree No. 4187/1949 (VIII. 9.), Section 12 (1) *The movable assets (claim) regarding the person in arrears need to be taken under collection in the following order: 1. cash, securities, precious assets, 2. pecuniary or other claims; 3. service fee or care allowance, 4. assets not falling under point 1.*
(3) *The handling of items, rights or operations that may generate revenues can be taken under collection, in case such an item, right or operation cannot be taken under collection according to the collection regulations of real properties.*

[34] Government Decree No. 4187/1949 (VIII. 9.), Section 19: "The range of items in this category is quite broad. Practically, the range included working tools used for making a living, or movable assets used for everyday necessities, up to a certain value limit."

other was auctioned.[35] The forfeited items – i.e. forfeited movable assets – were primarily offered to be sold for or purchased by state operating organisations or public institutions; if this was not possible, auctions had to be held for selling the items. In case the auctioning of movable assets was not successful or was only partly successful, the next step was to enforce the collection by means of a mortgage.[36] Prior to the enforcement by means of applying mortgage on a real property, the obligated party had the option of offering their property for buying to the state. If they failed to use this option, the collection process began with respect to the real property, primarily the benefits of the given property. In case such collection was not successful within 3 years, the real property was sold by means of auction. In the course of the collection process of pecuniary claims, there was a chance for the suspension of enforcement, thus protecting the interests of the obligated party.[37] As means of remedy, the submission of a collection complaint or a debt claim was provided for an obligated party, and also for all parties with infringed rights in the course of the enforcement of the collection. Accordingly, it can be seen that a detailed regulation on collecting pecuniary claims was available at the time of the Code of Procedures becoming effective. However, such norms could only be used in practice with respect to the ongoing cases under the effect of the Code of Procedures, as a Government decree also entered into force as of 1 October 1957, along the Code of Procedures, including regulations on the rules of tax collection.[38] This decree specified that public debts were the subjects to the decree, which practically also involved authority decisions determining payment obligations. In this respect, a provision stated that tax collection could only be enforced with respect to debts expressed in a financial sum, or debts the financial equivalents of which were specified. It is an important issue, as the execution of a decision on an act was often converted to a pecuniary claim. The new legislation did not bring any actual novelty in terms of the system of execution means; from a

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35 Government Decree No. 4187/1949 (VIII. 9.), Section 23 (2) *Means of selling: 1. to the state, county, town (settlement), the public institutions or plants thereof, industrial directorates, national, state, public companies or bodies carrying out public services based on government contracts; to farming or tenant farming producer collectives, or to small industry production or processing cooperatives (hereunder: acceptors) for purchasing, or hand-over for selling by offer; 2. auction (sell from free ownership).*

36 Government Decree No. 4187/1949 (VIII. 9.), Section 35 *In case collection on movable assets turned out to be unsuccessful, or if the obligated party cannot provide coverage for the debt, but the obligated party has a real property, the given debt can be collected a) by ordering the blocking procedure on the tenancy of the real property; b) by applying mortgage on the real estate.*

37 Government Decree No. 4187/1949 (VIII. 9.), Section 43 *The tax authority shall suspend the collection procedure upon the request of the obligated party; 1. up to the extent of the sum to be cancelled, in case the obligated party request the cancellation or partial cancellation of their debt, based on a legal title that justifies the complete or partial cancellation of the given debt; 2. up to the extent of the variance sum, in case the obligated party credibly certifies, or the tax authority undoubtedly declares, based on the data available, that the obligated party's tax debt shall be significantly lower than that of the previous year.*

38 Government Decree 57/1957 (IX. 6.) on Imposing and Collecting Taxes.

structural point of view, it separately regulated the seizure of movable assets from the seizure of salaries or other revenues, or from the rules on collection of the obligated party's current claims. Accordingly, we can come to a conclusion that the Government Decree No. 4187/1949 (VIII. 9.) functioned as an effective legislation, as the new act did not introduce any material changes.

Regarding the area of tax enforcement, the subsequent change was brought by the Government Decree No. 39/1969 (XI. 25.) on the General rules of tax management and duty-related procedures of the public. This new norm did not cause any changes in the existing system, but it provided a transparent presentation of different means of collection. The applicable means of collection were listed individually, as well as their sequence of governance.[39] Legal remedies applicable in the course of the enforcement process were determined, as well as the regulations on limitation, tax relief, and on the cancellation of bad tax debts. In relation to such norms, it can be concluded that it provided sufficient balance in representing the interests of both the obligated party and the claimant – i.e. the state in this case. In public administration matters, the rules of enforcement did not result in any unreasonably radical means of intervention by the body representing the given authority that may have infringed the rights of the obligated party. On the other hand, the obligated party could not be exempted from fulfilling their obligations, except when a sufficient legal reasoning was provided. This balance was well reflected in the rules of cancellation due to irrecoverable (bad) debts. This legal institution could be applied when the collection of a debt was not successful, which was practically the case when the obligated party had no belongings. In such cases, it could be presumed that collection became necessary in the first place due to the adverse proprietary conditions of the obligated party, and not due to the fact that the obligated party willingly avoided the performance of their liabilities. Nevertheless, in case a change took place in the financial situation of the obligated party within the time of limitation that made the performance of the already cancelled debt possible, the tax debt was compulsory to be ordered. In such cases, collection could only be ordered upon the lack of voluntary performance. It is quite apparent that the interests of the claimant party were also vindicated, as the claimant was able to assert its right within the legal framework until the very last time possible. The obligated party was also properly protected against the state powers, as they had sufficient means for legal remedies[40], and they could also

[39] Section 12 (1) *In the framework of tax collection, the following enforcement actions can be implemented: a) enforcement sale, b) enforcement on salaries, other allowances and claims, c) collection of movable assets, d) collection of real property.*
(2) *Enforcement actions shall be carried out in the sequence stipulated under Section (1). If justified by the given circumstances, the implementation of other enforcement actions may be ordered by the leader of the tax authority, at the same time as notification is sent on such enforcement. Further to the actions stipulated under Section b), movable assets or real properties can only be collected in case the collectable salary, allowance or claim does not provide sufficient coverage for settling the public debt within one year*.

[40] Section 18 *In tax authority procedures, further to remedies provided by the provisions of Act IV of 1957 on the General Rules of Public Administration proceedings, the following remedies shall be*

request application of fairness, if such application was justified by the circumstances of the given party.[41] Also, legal security was expressly present in the norm via the regulation of limitation.[42]

5. The amendment of the Code of Procedures

In the regulations of administrative authority proceedings, the adoption of Act I of 1981 on Administrative Authority Procedures (AAP Act) amending the Code of Procedures in a general manner can be considered as a significant milestone. This amendment also affected the regulations on enforcement. Prior to the AAP Act, the legislation only included actual references on the rules of tax debt collection. However, the amendment brought changes in this field as well. It extended the rules on pecuniary claims, and in that framework, the regulation of collection by means of the obligated party's salary or any equivalent regular income. The reason for this issue was that the most characteristic source of income in the society of the given period was the work salary, or similar regular revenues, or old age pensions. It also has to be taken into consideration that nearly all the members in the society of that time had some forms of incomes. Accordingly, this form of regulation proved to be sufficient. Accordingly, there were very few collection procedures where collection from a person's income would not be enforceable. In this regard, the procedure was accelerated by the regulation as a result of which the authority ordering the collection no longer had to request the tax authority to enforce the collection, it could implement it itself.[43] In case such act turned out to be unsuccessful, the procedure of collecting movable assets or real property could take place, but such procedures were subject to the provisions of tax laws.[44] Typically, legislation on collecting tax debts regulated the enforcement of the so-called lien. It could take place when the obligated party had some sort of a lawful claim against a

available: tax adjustment, recovery, tax collection objection and disputed claim. The rules on such remedies and the application thereof shall be determined by the Minister of Finance. Rules of such nature were included in Ministry Decree 38/1969 (XII. 29.) PM, providing detailed regulations on tax adjustment, recovery, tax collection objection and disputed claims.

41 Section 17 (1) *In justified cases, the tax authority may decrease or cancel tax debts based on a fairness application of the taxpayer. In justified cases, the Minister of Finance may authorise or order no to impose the given tax. (2) In extraordinary cases (natural disasters, etc.), the Minister of Finance or the tax authority authorised by the Minister may allow the reduction or cancellation of tax debts registered with respect to a larger layer of taxpayers.*

42 Section 15 (1) *The right of collecting tax debts shall expire in five years upon the date of the tax liability becoming effective.*

43 Act IV of 1957, as amended by Act I of 1981, Section 79 (1) *In case a given decision orders the payment of money, and the obligated private person fails to settle such payment, the administrative body acting on the first degree will request the employer of the obligated party (or the organisation granting the given allowance) to deduct the sum indicated in the decision from obligated party's salary, periodic allowance received from cooperatives or other sources, or from revenues, allowances or claims arising from work activities (hereunder: salaries), and to transfer or pay it to the claimant*.

44 These regulations were included in Ministry Degree No. 58/1981 (XI. 19.) MT, as well as its executing Ministry Decree No. 54/1981 (XI. 19.) PM.

third party, typically a legal entity. Practically, the subject of collection in this case was such a claim to be borne by the third party as the obligated party.[45] Legislations adopted in the subject of tax debt collection only regulated partial issues regarding the collection of movable assets or real property, the basic norms were eventually stipulated in the Decree No. 18 of 1979 on Judicial Enforcement Proceedings. Accordingly, this legislation referred to the collection of a pecuniary claim by means of movable assets or real property.[46] In this case, the respective provisions of the legal norm were applied by public administration bodies, i.e. the tax authorities in this case.

Regulations on the enforcement of specific acts were also amended. Regarding the means of enforcement, the general introduction of collecting debts with the assistance of the police took place.[47] Prior to this amendment, the authority was only entitled to request the intervention of the police with respect to the protection of the official enforcing the collection. However, as a result of this amendment, the performance of the failed act could be enforced with police assistance as well. Such cases included the obligation of a person to leave the given real property, who did not voluntarily fulfil this obligation. Beforehand, the use of physical force by, for example, a council official had legal concerns. Through the new regulations, such concerns were eliminated, as the police had the legal entitlement to carry out such acts. The enforceability of an act not performed by a legal entity was also regulated, which was principally also considered as performing an unfulfilled obligation. In such cases, the authority typically attempted to enforce the fulfilment of such acts by means of imposing a fine, and the fine was imposed on the representative of the given legal entity, or the natural person member or employee of the obligated party. This way, sufficient forcing power could be presumed, i.e. the eventual realisation of prevention.

In summary, it can be concluded that the regulation of authority decisions in the specified period developed in a progressive and significant manner. A system was established with respect to the means of enforcement, and the legal remedies applicable in the course of the collection process were also established as a system. The key norms in relation to collection were stipulated. These regulations made it possible for enforcement to become an individual phase in administrative authority proceedings. Apparently, the state requirement in relation to enforcement, which

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[45] Ministry Degree No. 58/1981 (XI. 19.) MT, Section 10 (1) *Regarding their effective pecuniary claims – claimed from them by private persons - exceeding the value of HUF 2,000, legal entities and other unincorporated organisations shall exercise the legal institute of lien. Such pecuniary claims can only be settled in case the claimant is able to certify by tax certification that they are without any overdue payments and they are exempted from the retention of the pecuniary claims by the tax authority.*

[46] Ministry Degree No. 58/1981 (XI. 19.) MT, Section 8 (4) *In the course of collection, legislations on judicial enforcement must be applied in accordance with the differences specified by the Minister of Finance*.

[47] Act I of 1981 *d)* may enforce the conduct of the given act with the involvement of the police; the police shall be entitled to apply forcing measures (tools) set out in the respective legislations.

primarily demanded efficiency, was realised. In parallel with this issue, the protection of defendant rights was also given sufficient guarantees. Furthermore, it must be noted that legislators were in a relatively easy situation, which is also reflected in the simplicity of regulations. In my view, the real challenges in this legal field arose in the subsequent period, i.e. the period after the change in the Hungarian political regime in 1990.

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CODIFICATION RESULTS IN THE HUNGARIAN PRISON LEGISLATION

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As the Prison Code[1] came into effect on 1st January 2015, it is now possible to evaluate its accomplishments. Some might say that this brief period is simply insufficient for obtaining the practical experiences required to make universal claims or point out trends. As a two-year-period is quite short in the life of an act indeed, this statement is by no means beyond reason. Nevertheless, the novelty and the importance of the changes introduced by the Prison Code still allows for a brief summary.

1. Preceding Events

The Prison Code is often stigmatized with the claim that its creation was rushed and abrupt, since after the first ideas only a year had passed until the new law was accepted. It can be stated with confidence that the professionals' contributions during the preparation process both on theoretical and practical grounds virtually eliminated all factors that might have reduced the overall quality and effectiveness of the act and allowed for the successful codification of an otherwise very complex material. Nevertheless, it is crucial to note that contrary to the previous practice, the foundations of the new act were laid down by prison service professionals, thus underpinning the goal of synthesizing practice and theory. The process of building from bottom to the top has proven effective as the difference between the previous codification attempts (2005, 2009) and the new one is discernible. Those initiatives did not take the opinions of prison service professionals into account or if they did, later their draft had been disseminated. The draft of 2009 contained a number of elaborate and beneficial elements which have been put to use during the codification process.[2]

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1 Act No. CCXL of 2013 on the Execution of Punishments, Actions, Court-ordered Supervision and Post-charge Non-criminal Detention – Act CCXL of 2013 on the execution of punishments, criminal measures, certain coercive measures and confinement for administrative offences (Prison Code).

2 Some controversial ideas have emerged though (for example the one that called for the minister's approval) for the acceptance of internal regulations.

As the Program of National Cooperation emphasized the need for respectable, strong laws[3], various reasons exist due to which the activity and function of the Prison Service is now regulated by an act.

- The first and most apparent weakness was that the normative background represented by a law decree[4] was not conform to the notions declared by the change of regime, as it was issued by the Council of Ministers of the Hungarian People's Republic. However, it should be noted that the principal problem with the law-decree was not the content, but the form. As a matter of fact, its contents, especially in comparison to the standards of the era, could easily be considered state of the art. As time went by, the law decree became eroded and obsolete. Moreover, it was also problematic that the provisions of the Criminal Code and the rules on criminal proceedings were regulated by law, while the Prison Code was regulated only by a law decree.
- The second reason concerned directly with the application of law. The regulation was modified and amended frequently, which led to the fragmentation of the formerly uniform contents and the loss of previously unquestionable jurisprudential correspondences, which made the law application more difficult.
- The third issue with the previous regulation was that a number of its elements were unfinished, crude or entirely missing. The issue was addressed by the Act of 1993[5], which pushed the regulation towards the European values. It is important to emphasize that a demand for a new and independent law has already arisen that time. It was not realized though; only a novel (amendment) was adopted, which introduced provisions on the specification of a prisoner's legal status, the expansion of the penal judges' jurisdiction and the optional mitigation of execution rules.
- The dynamically changing legislative background posed another argument for the new legislation, since both the Act of 2012 on Administrative Offences and the following Prison Code (2013) brought forth inductive elements, e.g. the administrative custody of juveniles and the option of detention as a punishment have become available.
- Technical reasons demanded new codification as well. According to the provisions of the law on legislative activity[6], in the case of those institutions, whose operation is regulated by acts, the legal warranties on their execution shall also be determined by acts. Previously, this obligation was unobserved, since the relevant norms were issued as decrees by the Ministry of Justice.
- Finally, there is a factor which – despite not among the domestic obligations – has a significant influence on national legislative activity. This is the aggregation of relevant international regulations and the obligation of

[3] Program of National Cooperation, III/2.3.
[4] Law Decree no. 11. of 1979 on the Execution of Punishments and Actions.
[5] Act No. XXXII of 1993.
[6] Act No. CXXX of 2010 on Legislation.

adhering to them. The European Parliament's guidelines of 1998 unambiguously express that the relevant legal background should be provided by law. The recommendations of the CPT[7] and the plaintively topical judgements (and their consequences) of the ECHR[8] all have to be taken into account.

As these are the factors that served as a background for laying the foundations of the new act, of these are taken note in the act's preamble, which contains all the crucial principles denoting the importance, necessity and timeliness of its creation. The goals stated in the act have dual meaning derived from the principal legislative authority, the Hungarian Parliament. The first is about the unquestionable importance of declaring the protection of fundamental human rights in general and during the execution of punishments as well. The second important principle recognizes the priority of European and international law and states that the right to execute punishments is exclusively possessed by the state and is combined with the legitimate use of violence, if it is necessary, all the while adhering to the aim of complete employment of prisoners and the self-supporting of prisons[9].

2. Major Changes

At this time, it is apparent that the drafting process of the new act's conception was absolutely not abrupt and spontaneous, since it includes all the crucial notions and aspects that facilitated the creation of an internationally also up-to-date regulation. These are the following:

- The first notion is aimed at achieving a shift of paradigms in the philosophy of handling convicted people. Previously, the Prison Service had been using some sort of paternalistic approach which culminated in the field of pedagogy. This word had become widely used from 1957 when the pedagogical services were established using a Soviet scheme and the word "vospitatel". This paternalistic approach meant that the only expectation from the convicts was to observe the rules of the prison and adhere to them without causing any unnecessary problems. This allowed for obedience based on pure conformity. Contrary to this approach, the Act's provisions demand a prisoner's cooperation in programs that may have a positive effect

7 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, CPT.

8 European Court of Human Rights, ECHR.

9 Therefore, the Prison Code determines an internal, professional aim, providing the necessary legal framework for it to function. It draws up the social expectation of full-scale employment as a pre-requisite element for successful reintegration and a self-sustaining prison service. The first step for achieving this goal is to extend the scope of options for self-sustenance. This means that the professional profile has to be altered and broadened in a way that during the execution of its tasks, it would produce and manufacture all the tools and items required for its operation, based on the provisions of the act. Further employment expansion and the reduction of procurement costs are necessary in order for this initiative to work.

on their personality in order to initiate their "career in prison" (in a good sense). Accordingly, using the new terminology it can be stated that reintegration activities are aimed at achieving a positive outcome for which the prisoner's cooperation and will to develop are crucial. The reintegration activities organized by the Hungarian Prison Service are customized to fit the individual personal needs and are offered for each prisoner without prejudice. Furthermore, released prisoners receive support by the Probation Supervision Services (hereinafter: Services). Summing up the previous lines it can be stated that the assessment and evaluation of the prisoners' behaviour have been improved by receiving an unprecedented framework of conceptions in which simply adhering to the rules without active and voluntary effort is not sufficient anymore.

- Creating the synthesis of theory and practice was a principal factor during the drafting of the conception. We analysed and assessed decades of experience with the primary goal of disposing of obsolete methods and tools in order to substitute them with new, modern ones all the while keeping those which have proved effective. The endeavour of increasing the number of employed prisoners, implementing the tools of "treatment ideology", risk assessment and restorative justice was widely known. These pursuits have led to significant results, a number of them can even be regarded as professional breakthroughs on various fields.
- The third factor was determined by the perpetually investigated question of *Which one is more important: theory or practice?* Until now, tendency had shown that solution for professional issues was expected from theoretical experts. This has caused confusion on many occasions, so allow me to briefly return to the issues with the conceptions of 2005 and 2009. Back then, our endeavour was to meet our obligations in a way that we maintain professional pragmatism and retain control of our operations. In practice, this means that we constantly search for solutions that have already proved useful and valuable to implement them into legislation. This approach is by no means pointless. When Ferenc Finkey, one of the most influential Hungarian criminal lawyers returned from the Washington Prison Congress in 1911, he said the following: *While here in Europe, the process drafting and introducing new regulations is always preceded by scientific battles of theories, in the United States experts first make things happen, then science interprets principles*[10].

Obviously, Mr. Finkey's words cannot and should not be interpreted literally and by the letter. However, "walking with our eyes open" and the intent of optimization are crucial to our profession. Consequently, the fundamental elements of the

[10] FINKEY: *The Principles and Reform Institutions of North-American Criminal Law.*

legislation's concepts were the shift in paradigms, synthesis of theory and practice and professional pragmatism[11].

3. Dominant Experiences

The current Prison Code consists of 438 sections, 6 parts and 33 chapters. Since the legislation introduced a large number of innovations with varying depths, I would like to point out only the major ones and the practical experience resulting from them.

3.1. Law enforcement legal relationship (hereinafter: legal relationship)[12]

The constitutional legal standing of persons undergoing execution of a prison sentence is altered significantly because of the new environment they are subjected to on the basis of the entitled authority's verdict. This peculiar status is a "legal relationship with the prison service", a terminology coined by the Prison Code in a relevant definition. Naturally, the legal relationship itself is a hierarchical one: the law enforcement authority responsible for the execution of prison sentence makes up one part, while the convicted person or persons detained on other grounds make up for the second.

Due to the nature of the legal relationship, the parties have specific rights and duties. Another characteristic is the fact that every right bestowed upon the prisoner or person detained on other grounds appears as a duty on the side of the authority responsible for the execution. In order to enforce adherence to the rules and make the prisoners fulfil their obligations, the authority may use and initiate any legally available measures and ramifications that may facilitate this endeavour.

The subjects of this legal relationship are the convict and person detained on other grounds, the authority responsible for the execution of sentences and the cooperating bodies and persons. Even though the legal standing of the convicts and persons detained on other grounds is characterized by their obligation to tolerate, their fundamental human rights cannot be harmed. However, it is important to note that the circumstances resulting from the peculiar situation and strict schedule under which the prisoners are submitted are not to be determined as legal violations. In order to protect this principle, a complex and highly organized control system of checks and balances is used coupled with the protection offered by the relevant provisions of the Prison Code.

The function of the law enforcement authority responsible for the execution of prison sentences is to execute them according to the provisions of the relevant legal regulations thus ensuring that the legal sanction imposed by the sentence and the aim of the punishment are realized. In order to facilitate the enforcement of this function a number of various special powers and entitlements are bestowed upon

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11 *Korszakváltás a büntetés-végrehajtásban*. Büntetés-végrehajtás Tudományos Tanácsa.

12 Prison Code 7 §.

this authority which it can use whenever the relevant legal provisions allow it and in a way that is permitted.
The object of the legal relationship is the aggregation of the legal norms ensuring the execution of sanctions determined by the Prison Code. It is validated by those who apply the law.

The relationship is therefore established between the state (as the bearer of exclusive competence and jurisdiction regarding punishments and legal sanctions) and the private individual detained as per the provisions of the relevant law. It is a compulsory relationship bestowing rights and duties on both parties while ensuring adherence to them with the warranty brought about by the rule of law.
To sum up: the new regulation has disposed of an old weakness by precisely and adequately determining the concept of legal relationship. This is an important step as it makes a large number the vast legal material more exact and ensures that the structure of the convicted persons' legal states is now represented by a more accurate content and form.

3.2. The purpose of the imprisonment sentence[13]

A distinctive attribute of the Prison Code is the fact that explanatory regulations are not limited to three sections, but are expanded to include basic conceptions in order to achieve terminological unity in a more detailed professional environment. The safe and secure application of the provisions requires that the subjects of the legal relationship (mainly the law appliers) attribute the same content and meaning to each of the terms and legal institutions.

The law determines a broad and complex concept regarding the aim of prison sentences, which underpins the sentiment of identifying the goals as a system of relations vastly exceeding the standard projections of criminal law.

As a consequence, the goal of the imprisonment sentence requires dual interpretation, as the lawmaker determines the goals for the execution of determined imprisonment and actual life sentences alike.

Determined imprisonments require a dual mode of action: while realizing the punishment the convict is subjected to after the verdict of the court, the prisoner also has to successfully reintegrate into society as a law-abiding citizen. Achieving the set goals in the case of determined imprisonments is only possible when the proper measures (called reintegration activities) are employed. The emergence of this activity signifies the renewal of professional terminology and is expected to supplant the outdated term of pedagogy to which it is superior. The activity itself involves all the programmes and functions that facilitate the prisoners' successful reintegration into society and the minimisation or complete prevention of recidivism. For increased efficiency, external authorities and actors are allowed to participate in these programmes. The regulation lists programs which are crucially important from a civic aspect, and on which the Hungarian Prison Service is

[13] Prison Code 83 §.

focused on, such as education (primary, secondary and in some cases tertiary), vocational training and employment (therapeutic). I have to emphasize that this three-part system includes a far broader array of elements which are not individually specified in the legislation. All this proves that reintegration activity is a flexible effort operating according to the regulations and the pragmatical foundations it is based on. Obviously, reintegration activities and professional methods are – according to the principle of personalization – adapted to the needs and personality of the convict in question[14].

The Fundamental Law also sets forth the alternative of life sentences without parole, a sanction detailed in the Criminal Code. The law determines the goals of life sentences in a highly complex and abstract manner. Accordingly, in such cases the main purpose of the sanction is to execute the sentence in order to protect society. The number of prisoners who belong into this category amounts to around 50. It is important to note though that prisoners serving a life sentence without parole may not suffer discrimination in any way (accommodation, treatment, fundamental rights not affected by the punishment). Despite the fact that prisoners in category are the most threatening to society, it by no means should lead to any "extra" severities.

Previously there had been no provisions on the goals of life sentences without parole. This flaw was addressed by the Prison Code, as they now appear in the regulation as new elements. The purpose of the execution of a life sentence without parole verdict is a frequently debated fundamental question. The Prison Code, (acting upon the provisions of the Criminal Code) differentiates between determined sentences and real life imprisonment sentences without parole. We all know that the topic of life sentences is a controversial one, subjected to everyday debates not only from the Hungarian Constitutional Court, but the European Court of Human Rights (hereinafter: ECHR) as well. Without taking sides I would only like to point out that as long as the Fundamental Law and the Prison Code recognize this legal institution, the courts will continue utilizing it. In any case, the judgements of the ECHR (e.g.: Kafkaris v. Cyprus[15]) require Hungary to narrow the scope of the use of life sentence imprisonments and make mitigation possible[16]. For the Prison Service, this means that it has to continue executing these sanctions in the future. Whereas in the case of prisoners the principal goal subjected to determined sentences is the developing of their personalities in a way that enables them to become law-abiding citizens and reintegrate them into the society after their release, life sentences require the prisoner's safe and secure housing in order to protect society, structuring their activity in a way that harmonizes with the fundamental principle of human dignity.

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[14] The number of incarcerated persons in Hungarian prisons is above 18,000. This means an overcrowding ratio of 130%, which currently is the largest issue within the Hungarian prison system. The Government is making efforts in order to alleviate the problem by expanding the capacity.

[15] Kafkaris v Cyprus (GC), No. 219906/04, (2008) ECHR.

[16] NAGY Anita: *Szabadulás a büntetés-végrehajtási intézetből.* Bíbor Kiadó, 2015.

3.3. The system of structured principles[17]

Principles have a determining role from all legal aspects, as they unambiguously determine the moral, ethical and professional standards according to which a regulation can fulfil its function legally. Taxonomically we talk about the principles of legal systems (e.g. legitimacy) and legal fields (e.g. normalization) which are of course connected. As the principles of legal fields are derived from the principles of legal systems, no discrepancy may exist between them. They mostly appear already designated and appraised, but they may also be supplemented with principles derived from the concept of the regulation which not originally referred to in law. The largest and perhaps most important field of prison service law is the system of regulations on executing imprisonment sentences. The priority of this field is emphasized by the presence of specific professional principles related to this legal institution. These are fundamental jurisprudential and professional values that contain all the provisions relevant to execution and support the work of law appliers (as a standard) and lawmakers (as the determiners of a regulation's development). Recognizing the importance of these principles, the law lists them in a separate section as seen below.

3.4. Summoning Activities[18]

If we ask people on the street about what comes to their mind when we talk about prisons, they will likely refer to the increasing rate of overcrowding and the restitutions the Prison Service has to pay because of it. Reducing the severity of overcrowding is of utmost importance. If we draw up an inventory of the tools we can employ in order to achieve this goal, we can see that while some of these involve methods that are available to external bodies as they require legislative and law-making decisions (e.g. alternative sanctions) some others can facilitate the optimization of professional regulations in order to achieve this goal. The Hungarian Prison Service Headquarters' task of sending summoning notifications to begin custody (hereinafter: notification) has been created with the previously quoted pragmatical principles in mind. This enables the prison service to directly influence the schedule of tasks related to executing prison sentences, thus increasing efficiency. Last year the Hungarian Prison Service Headquarters issued 4,017 notification drafts[19] with the addressees' willingness to appear amounted to around 60%. This may not seem like an obvious success to an outsider, but let me also mention that the summoned convicts report for admission at the institution specified by the notification. The direct benefit of this approach is the that the convicts' contacts may be established within as little as two days of the admission and employing them becomes possible within a week. Should the convict be admitted based on the notification draft issued by a court, the following

[17] Prison Code 83. §.
[18] Prison Code 85. §.
[19] Source: self-evaluation report of the Hungarian Prison Service HQ, 2015 (draft).

administration would lead to a delay of up to a month. It is without a doubt that prisoner employment and contact are two vital elements of successful reintegration.

3.5. Reintegration Custody[20]

Another method suggested by the Prison Service to reduce overcrowding is the institution of reintegration custody which theoretically means that – based on his or her behaviour – a prisoner's sentence may be reduced and at the same time better treatment may be offered. This has added another tool into the array of options of the progressive structure of executions, which is – basically – a special form of house arrest. Combining the two factors has – although with difficulties – led to the inclusion of the norm system in the Prison Code. The new legal institution was introduced on 1 April 2015, the first application took place on 8 May. The experiences of the first 8 months have exceeded our expectations. Neither the courts, nor the prosecution had objections against the employment of the new tool, while the prisoners see it as a motivating factor as it is appealing to them. In 2015, 800 cases were filed, out of which 405 have received a positive verdict. The effectiveness of this legal institution is proved by the fact that it was revoked only in 4 cases.

Performing reintegration custody requires high-tech solutions, because the convict is equipped with a remote surveillance device which is part of a highly complex system. What is important is that in the future, the device can be used during external employment, hospitalization, or when prisoners visit sick relatives or attend funerals. Beyond the practical benefits I find it important to mention that by using this device, a new, modern approach and practice will appear in the everyday activities of the Prison System which will conform to the expectations of the 21th century. This atypical house arrest includes all the benefits of probation, plus it facilitates the development of the prisoners' social and domestic relations, improves their employment outlook and has a positive effect on their quality of life.

As probation also makes earlier release possible, it is necessary to elaborate their differences and resemblances. Part of the answer is the fact that while probation is an institution of criminal justice during which the court may decide to reduce the sentence based on the behaviour of the prisoner[21], reintegration custody is a tool which is purely and exclusively employed by the Prison Service. Effectively, the prisoner is serving his or her sentence outside of prisons in a way that the legal relationship stays intact. Beyond legal classifications, the two institutions differ in their aims, their time of enactment and the measures that follow after leaving the prison.

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[20] Prison Code 187/A §.

[21] Anita NAGY: i. m. 83.

3.6. Probation Supervision (hereinafter: Supervision)[22]

No special knowledge is required to see that the reintegration activities performed within the prisons will not be successful if – after his or her release – the prisoner receives no acceptance or support which would help him or her to overcome the difficulties of the first and most difficult period of freedom. This is why the function of the affiliated probation supervisors is really important. The efficiency of this activity is proved by the indicators according to which the number of released prisoners employed by the community and starting vocational training has increased to 1,159 in 2015[23]. Furthermore, another 1,297 persons have managed to gain employment, creating the idea of what I call labour market reintegration. This obviously has a positive effect on reducing the frequency of recidivisms, allowing the Prison Service to contribute to crime prevention activities. This pattern fits completely into the macrosocial scope of efforts we make. In 2015, probation officers had 5,849 cases, out of which only in 227 ended with repeated offences, which amounts to a ratio of 3.8%. Last year, 812 means-tests were conducted for the purpose of admission into reintegration custody, and the resulting professional documents were met with universal acclaim from the joint authorities (courts, prosecution). To sum up, it can be stated that the professional scope of reintegration activities has been expanded by including probation officers in the direct operations of the Prison Service, thereby increasing the efficiency of our work.

3.7. Risk Analysis and Management System[24] (hereinafter: System)

The lack of an effective device that would provide data regarding the frequency of recidivismus, the number of repeated offences and the related risks had become apparent before the new law came into effect. What posed another problem was that no data was available on the prisoners' willingness to change (and to reintegrate).

The Risk Analysis and Management System was created with these issues in mind, in the hopes of addressing them. The System follows the prisoners' "career" from admission until release, providing adequate information on his or her prospective behaviour during and after incarceration. Basically, the System itself is a professional work process that consists of getting to know the prisoners, analysing and assessing related information, adequate differentiation, classification and personalized decisions, all of which are based on a continuously operating monitoring system[25].

The System is built up of three major parts, based on three interdependent pillars: risk assessment and predictive measurement tools, reintegration programs

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22 Prison Code chapter XXII.

23 Source: Self-evaluation report of the Hungarian Prison Service HQ, 2015 (draft).

24 Prison Code, 92–93. §.

25 The formation of the Central Institution for Analytical Examination and Methodology is ongoing. As of current expectations, it will start its limited operation in 2016, putting emphasis on creating the methodology.

aimed at reducing the risk factors during and after imprisonment and progressive regime rules[26].

a) The goal of the risk assessment procedure is to indicate, filter out and reduce dangerous behaviour facilitating the proper, personalized classification of each prisoner. What is worth noting is the extensive work of the probation supervisors whose focus is directed towards measuring the risk of recidivism. During the process the prisoners will be classified as low, medium or high-risk inmates. In practice, we exercise due flexibility regarding these questions which means that it is not only the results of the predictive measurement tools that we take into account, but also the feedback from each of the fields and any previously recorded data regarding the prisoner. The will to synthesize theory and practice becomes apparent here as well. We put special emphasis on risks posed by suicidal tendencies, escapes, all types of aggressive behaviour, the use of psychoactive substances and vulnerability (age, sexual orientation, high status occupied in the prison hierarchy).
b) Reintegration activities consist of programs addressed to reduce the risk factors provided by the predictive measurement tools. Currently it includes trainings addressed to reduce drug abuse, develop assertively and self-control. The pool of participants principally consists of medium or high-risk prisoners. Experience shows that participating prisoners are willing to start working in these groups but maintaining their interest is more difficult.
c) Our efforts to introduce progressive regime rules were enhanced by our dedication and the need to provide an answer to a controversial question of criminal law. Looking back on the previous codification attempts it is apparent that during each occasion, suggestions regarding altering the traditional regimes of prisons (strict, medium and light regimes) into something more flexible were frequent claiming that the system makes the legal background static. The resulting difficulties were directly experienced by the prison service. In every case, the question was settled quickly: the regimes remain unchanged as there is no intention from the lawmakers to change it. However, they tried to moderate the rigidity resulting from the regime categories by introducing various legal institutions (change of regime category, release on parole) or using the progressive elements of the Prison Code (mitigation of sentence rules, transitional groups). In spite of all this, the Prison Code further manages to increase the flexibility and permeability of the regime categories which is realized by the differences provided by them (visitation lengths, phone calls, deposit money[27]). It is often claimed

[26] Document assembled by the Department of Strategic Evaluation and Planning.

[27] Béla Bartók (1881–1945), the famous Hungarian composer said the following about the "rubato", expressive and rhythmic freedom: *Like a thick trunk of tree standing in the storm, its canopy leaning left and right, but the trunk stands solidly with its roots reaching deep into the ground.* In our case, this means that legal requirements related to progressive regime system optimalize the available options, and by doing so they do not violate the provisions on regimes.

that by using progressive regime rules, the earlier tool of mitigating the sentence rules is rendered obsolete. I think that the answer is not to be sought after from what influence and effect they have during execution, but from the fact that mitigation falls into the jurisdiction of the judge. Considering that the judge is independent from the execution of the sentence, it is mainly due to guarantees that mitigation is still utilized. Further alteration may increase the harmony between the rules of the progressive system and this legal institution. The elements of this alteration have to be created by practice, for which a pragmatical point of view is of utmost importance.

It would obviously be beyond the scope of this study to further elaborate on the detailed rules of the System, so I will only provide a brief summary of the results so far:

- We have adapted a method with the purpose of facilitating the achievement of reintegration aims while at the same time remaining a complex and close-knit, yet adequately flexible system.
- It offers definite, professional and differentiated standards regarding the threat level of a prisoner and provides fundamental standards adhering to the principles of personalized execution.
- The re-classification of risk factors is directly related to the reintegration willingness of the convicted person, thus measuring it accordingly (with the tools provided by the System) will provide detailed information about the personality of the prisoner which will contribute to the decision-making processes in the future. By decision-making I relate to the verdicts of the judge responsible for the prison system, which often make leaving the institution or a determined short-term absence possible. A well-established decision can minimalize the risk of recidivisms during absence, so I can state that during this process, the prison system (and its specific tools) is contributing to the general crime-prevention efforts.

3.8. Mediation Activity[28]

As a result of criminal philosophy's recent efforts, tools that facilitate mediation are now present on the field of criminal policy as well. Following their appearance a few years ago, realizing the ideology and concept of restorative justice during the execution of a prison sentence is now possible. The mediation procedure has been created with these fundamentals in mind, which is principally a tool that facilitates the solving of disciplinary procedures in alternative ways.

The mediation procedure allows for the termination of disciplinary procedures or the disciplinary punishment itself if the prisoner is willing to participate in it. Based on our experiences so far, we consider that by taking responsibility for their actions, the prisoners can contribute to the formation of a safe, secure and orderly

[28] Prison Code 171. §.

prison environment that allows for personal comfort. Taking into account the fact that in the process parties directly try to solve the issues deriving from the conflict between them, there is an increased chance that the problem will indeed become resolved, especially when compared to disciplinary procedures as they only provide formal a sanction while not being an actual solution. Another argument conforming the importance of mediation is its potential to break the "code of honour" among the prisoners. All the mediation activities that had been conducted were effective in making the prisoners realize their personal responsibilities while adhering to the contents of the compromise. A pre-requisite for the efficiency of mediation is the voluntary and willing participation of the prisoners. Dogmatically, now we have modern tool in prison regulation which will be useful in the future of reintegration. The main pillars of this endeavour are responsibility, self-respect and – fitting into the notion of the prison law – the obligation of cooperation.

4. Closing Thoughts

The main purpose of this essay was the elaborating on the details and changes in order to prove that the change of an era in the Hungarian prison system has really been occured. I hope that my endeavours met with success, even if sometimes I could be slightly subjective.

Furthermore, I am sure that as a result of the general reform of the judicature coupled with the Criminal Code and the Criminal Proceedings Code soon to be introduced, a unified and close-knit criminal structure will be established which facilitates the adherence to the goals of the legal policy and suits the international expectations as well. Looking back upon the codification's direct professional benefits it can be seen that as an indirect effect, a for a long time not experienced brainstorming initiated in the Hungarian prison policy and legislation. I could say that the Hungarian prison system is currently undergoing an inverted *Sturm und Drang* period. Following the wish, now we experience a storm enriched with creative power.

The Prison Code is not perfect, so it should not be considered as something coming from an entity with divine power. No law is perfect. We know of course that there are people with doubts misgivings, even among our colleagues. I hope that their opinion will change (or at least soften) as soon as the results become apparent. Far more reassuring is the fact that the majorities of lawmakers have favourable experiences and understand the principal message of the regulation – an enormously important outcome.

Even after a year of use it is apparent that the regulation boasts great potential and energy, and transforming this into kinetic power seems like an achievable goal. For us who apply the regulation on a daily basis, it seems like that beyond mere words and legal formulae there is something more elevated – philosophical – among its lines. The goals of the future will be to continue optimizing the regulation and making the Hungarian Prison System's publicity proportionate to the importance of its function. The Prison System provides a service to a whole

community in order to reintegrate and reform prisoners and make them capable of living a law-abiding life. This is a merit on its own right.

Finally, if I would want to summarize the essentials and principal results of last year, I would say that now we have a lot higher quality answers than open questions and a greater harmony than disharmony. As a direct consequence, the interpretation of the Prison Code remained unchallenged and unquestioned last year.

The fact that I can end my essay with these lines proves that the current regulations launched the Hungarian Prison System on a modern, up-to-date trajectory boasting an array of promising results and outcomes.

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COPYRIGHT PROTECTION OF DRAMATIC WORKS IN THE LAW OF THE EUROPEAN UNION*

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1. Introductory remarks – The (lack of the) legal regulations

First of all, it shall be stated that the legal harmonization of copyright law is fragmented, because the legislator of the European Union does not touch all of the artworks and all of the uses of copyright subject matter. Dramatic works are subject matter of most of the countries' copyright laws. To put it in a nutshell, dramatic works are such works, which are intended to perform in a theatre, such as plays, dramas, operettas, operas and musicals.[1] During the former research regarding to the writing of the article, we have observed a kind of lack, because the rules concerning to dramatic works are almost completely missing. The lack is not the dramatic works' "fault", it means neither that they are less important than other artworks and nor that they do not deserve the legislatior's attention or the protecting umbrella of the law.

In fact, there are two main reasons, which results the lack of the European Union's rules pertaining to dramatic works. On the one hand, one reason covers the comprehensive factors of the partial and fragmented harmonization. In this circle one of the main reason of the lack of regulation is that the fundamental, essential issues of copyright law have not been harmonized until nowadays in the EU.

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1 See the conceptual approaches in the Hungarian legal literature for example: KNORR Alajos: *A szerzői jog magyarázata (1884. XVI. törvényczikk)*. Ifj. Nagel Otto Kiadása, Budapest, 1890, 146; KENEDI Géza: *A magyar szerzői jog. Az 1884:XVI. törvénycikk rendszeres magyarázata, valamint a vele egybefüggő törvények és rendeletek.* Athenaeum Irodalmi és Nyomdai Részvénytársulat, Budapest, 1908, 156; PALÁGYI Róbert: *A magyar szerzői jog zsebkönyve.* KJK, Budapest, 1959, 148–149; ALFÖLDY Dezső: *A magyar szerzői jog különös tekintettel a M. Kir. Kuria gyakorlatára. Az 1921:LIV., az 1922:XIII., az 1931:XXIV. t.-cikkek és a velük összefüggő törvények és rendeletek szövegével.* Grill Károly könyvkiadó vállalata, Budapest, 1936, 130; LONTAI Endre: Polgári Jog. Szellemi alkotások joga (szerzői jog és iparjogvédelem). Tankönyvkiadó, Budapest, 1986, 81; FÜR Sándor–MALONYAI Dezső: Színpadi művek. In: BENÁRD Aurél–TÍMÁR István (szerk.): *A szerzői jog kézikönyve.* KJK Kiadó, Budapest, 1973, 231–248.

Levente Tattay mentions as one of the reasons of the partial harmonization that the nature of copyright law is distant from the initial ambitions of the European integration, which concentrated to economical and commercial issues. On the other hand, he mentions that the collaboration of the European countries in the field of culture and education started later, which resulted that the copyright artworks' impact on competition was recognized later than the competitive impact of the creations of industrial property.[2]

The other, more specified factor of the partial harmonization is concerning directly to the lack of the EU regulations of dramatic works. *Gábor Faludi* and *Anikó Grad-Gyenge* in their joint article emphasize the strange situation, that while the public performance right of authors is not harmonized, it's pair in the field of neighbouring rights is mentioned in the InfoSoc Directive.[3] The above cited authors attribute to the lack of harmonization that the impact of the *(live) public performance* to the internal market of the EU is slight.[4]

The unification of the economic rights, which have the greatest importance in relation to dramatic works, such as the right of adaptation and live public performance, is still missing.[5] It is also important to mention that beside the right of adaptation and right of (live) public performance, the harmonization of moral rights is also missing.[6] Both the adaptation and the public performance rights are the author's exclusive rights. According to the rules of the Hungarian Copyright Act,[7] the author shall have the exclusive right to adapt his work or to authorise another person therefor. Adaptation covers the translation of the work, its stage or musical arrangement, its adaptation for a cinematographic production and any other alteration of the work as a result of which another work is derived from the original one.[8] According to the HCA, author shall have the exclusive right to perform his work to the public and to authorise another person therefor. The making of the work perceptible to those present shall be regarded as mean performance. The terminology "performance" covers the performance of the work to the public by a performer in person in the presence of an audience, such as stage performance, concert, recital, reading out ("live performance") and it also encompasses the making of the work communicated or distributed (as a copy) to the public become audible by loudspeaker or visible on screen.[9]

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2 TATTAY Levente: A szellemi tulajdonjogok védelme az Európai Unióban. *Magyar Jog*, 2012/7., 415.

3 Directive 2006/116/EC Article 8.

4 FALUDI Gábor–GRAD-GYENGE Anikó: A nyilvánossághoz közvetítési (előadási) jog értelmezése az Európai Bíróság gyakorlatában. *Iparjogvédelmi és Szerzői Jogi Szemle*, 2012/1., 77.

5 GOLDSTEIN, Paul–HUGENHOLTZ, Bernt: *International Copyright. Principles, Law and Practice.* Oxford University Press, 2013, 327.

6 In our view the moral rights of indication of the author's name and especially, the protection of the integrity of the works have great importance in relation to dramatic works.

7 Act LXXVI of 1999 on Copyright (henceforward abbreviated: HCA).

8 HCA Article 29.

9 HCA Article 24.

Similarly, the contracting relations of copyright legal relationships are not harmonized, because the legal settlement of contracting relations is traditionally remain the competence of the Member States.[10] So, it can be found that the harmonization of all of the substantial copyright elements of dramatic works has not occurred yet. Accordingly, to say the least, in the caselaw of the Court of Justice of the European Union (CJEU) there are not much cases, which deal with copyright issues of theatrical performances or live public performances.

2. Search for legal basis

The European Commission denoted already in the first lines of its Green Paper on Copyright and Related Rights in the Information Society of 1995[11] that the protection of copyright and related rights is vital to the Internal Market, and has cultural, economic and social implications for the Community. At the same time, it was emphasized that the information society will facilitate creation, access, distribution, use and similar activities, and consequently increases the number of situations in which differences between the laws of the Member States may obstruct trade in goods and services.[12]

In the European Union, eleven directives were adopted in the field of copyright law:

- Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission,[13]
- Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases,[14]
- Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society,[15]
- Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art,[16]
- Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights,[17]

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10 *Study on the conditions applicable to contracts relating to Intellectual Property in the European Union* (Final Report). Institute for Information Law, Amsterdam, The Netherlands, 2002, 8.

11 Green Paper – Copyright and Related Rights in the Information Society (COM (1995) 382 final, Brussels) Henceforward abbreviated: Green Paper 1995.

12 Green Paper, 1995, 10.

13 OJ L 248, 6. 10. 1993, 15–21.

14 OJ L 77, 27. 3. 1996, 20–28.

15 OJ L 167, 22. 6. 2001, 10–19.

16 OJ L 272, 13. 10. 2001, 32–36.

17 OJ L 157, 30. 4. 2004, 45–86.

- Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property,[18]
- Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights,[19] and later, the Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights,[20]
- Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs,[21]
- Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works,[22]
- Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market,[23]
- Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.[24]

The listed directives can be separated into two main categories: a part of them are about the harmonization of the rules on the protection of a given type of copyright works or a special circle of users, such as the newest directive. Their other part deals with certain issues and legal instruments of copyright law, which can be concerning to several artworks. Directives 93/83/EEC, 96/9/EC, 2001/84/EC, 2009/24/EC and 2017/1564/EU can be classified into the first group, while Directives 2001/29/EC, 2004/48/EC, 2006/115/EC, 2006/116/EC, 2011/77/EU, 2012/28/EU, and 2014/26/EU into the second group. While the directives of the first group are not relevant in relation to the topic of this article, the general regulations of the second group directives could be applicable to dramatic works too, at least in principle.

In the article we will outline the directives mentioned in the second group, because theoretically they can contain regulations concerning to dramatic works. At

[18] OJ L 376, 27. 12. 2006, 28–35.
[19] OJ L 372, 27. 12. 2006, 12–18.
[20] OJ L 265, 11. 10. 2011, 1–5.
[21] OJ L 111, 5. 5. 2009, 16–22.
[22] OJ L 299, 27. 10. 2012, 5–12.
[23] OJ L 84, 20. 3. 2014, 72–98.
[24] OJ L 242, 20. 9 .2017, 6–13.

the same time, we will not analyse them in details, because the detailed analysis is not the aim of the paper.

2.1. The InfoSoc Directive

The InfoSoc Directive, which is maybe the most comprehensive directive in the field of copyright law, lists the economic rights covered by the Directive in Chapter II. In line with this, the Directive specifies the reproduction right, the right of communication to the public of works and right of making available to the public other subject-matter, and the distribution right. Actually, the important issues of the Green paper 1995 were settled in the Directive.[25]

Among these three economic rights, the right of communication to the public of works is the closest to the theatrical productions and to right of public performance. The HCA regulates both economic rights individually. In our view, we could talk about reproduction and distribution rights too, if the theatre performance is recorded and produced on a DVD, which would be distributed and reproduced. Nevertheless, in this case it is completely irrelevant that the DVD contains a recorded theatre performance. In this case there is a tangible form, the DVD, and it is irrelevant from this view, if the DVD contains a music concert, or a drama or a musical.

According to Article 3(1) of the InfoSoc Directive, Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

The Directive extends the scope of the right of communication to the public to four types of neighbouring rights owners too. They are the performers in relation to the fixations of their performances, the phonogram producers relating to their phonograms, the producers of the first fixations of films in relation to the original and copies of their film and the broadcasting organisations, about the fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.[26] As the explanation of this rule, Recital 23 of the Directive declares that *this right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates.* Furthermore, it states that this right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting too but it should not cover any other acts. Indeed, the right of communication to the public declared by the Directive is a kind of *umbrella right*,[27] because it covers all non-tangible forms of transmission of the work to the people

[25] TÓTH Andrea Katalin: Az európai szerzői jogi harmonizáció és a territorialitás kérdése. *Iparjogvédelmi és Szerzői Jogi Szemle*, 2016/4., 11.

[26] Directive 2001/29/EC, Article 3(2).

[27] STAMATOUDI, Irini–TORREMANS, Paul: The Information Society Directive. In.: Irini STAMATOUDI–Paul TORREMANS (eds.): *EU Copyright Law. A Commentary.* Edward Elgar, Cheltenham, Northampton, 2014, 408.

who are not at the place where the communication originates, but this umbrella is not big enough to encompass the live public performance. In line with the regulations of the Directive it can be stated that a public performance, i.e. when the performance of the work and public is in the same place at the same time, is not covered by the InfoSoc Directive,[28] because in a theatrical performance:

- on the one hand, the members of the public do not individually chose the place and the time of the performance, but they can see the performance at the time and place on line with the theatrical program, and
- on the other hand, the members of the public are present at the time of the performance and in this case we cannot talk about *making available to the public, by wire or wireless means.*

It is another question that the technics can make it possible, that the currently running live performance would be recorded and broadcasted. If the theatrical performance, such as sports events, are recorded and broadcasted immediately and the member of a public can see the performance at home on the television, then in relation to this member of the public, it is not a public performance, but a broadcasting. In such a case, the theatrical performance becomes available for several layers of the public, by more exploitation. In relation to the public, who are at the present in the theatre, we can talk about *"public performance"* and in relation to the television viewers it is a making available to the public.

The decision 'Circul Globus Bucuresti'[29] of the CJEU in 2011 was not born in relation to theatrical issues, but in this case, the Court had to decide about making available music for the audience which is present at the place of communication, which can have relationship with the topic. The essence of the case[30] was that the Circul Globus in its capacity as organiser of circus and cabaret performances, publicly disseminated musical works for commercial purposes between May 2004 and September 2007 without obtaining a "non-exclusive" license from UCMR-ADA[31] and without paying the appropriate copyright fees to UCMR-ADA. The UCMR-ADA went to the court *(Tribunalul Bucureşti)* and argued that, under the Copyright Law, the exercise of the right to communicate musical works to the public is subject to compulsory collective management. The Circul Globus reacted that it entered into contracts with the authors of the musical works used in the performances organized by it and under which copyright had been waived, and that it had paid

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[28] FALUDI Gábor–GRAD-GYENGE Anikó: A nyilvánossághoz közvetítési (előadási) jog értelmezése az Európai Bíróság gyakorlatában. *Iparjogvédelmi és Szerzői Jogi Szemle*, 2012/1., 77–93. See: STAMATOUDI–TORREMANS: op.cit. 409.

[29] Case C-283/10 (Circul Globus Bucureşti [Circ & Variete Globus Bucureşti] contra Uniunea Compozitorilor şi Muzicologilor din România – Asociaţia pentru Drepturi de Autor [UCMR – ADA])

[30] Faludi Gábor and Grad-Gyenge Anikó summarizes the case too in their cited above article. See: FALUDI–GRAD-GYENGE: op. cit. 90–2.

[31] UCMR-ADA, i.e. the Romanian Musical Performing and Mechanical Rights Society is a Romanian collective rights management organization.

those authors an appropriate fee in return for using their works, furthermore, according to the Article 123(1) of the Copyright Law, there was no legal basis for the claim for payment made by the collective management organisation.[32] The court stated that Article 123a (1) (e) of the Copyright Law[33] expressly provides that the exercise of the right to communicate musical works to the public must be managed collectively, consequently the circus was obliged to pay the amount to the collective management organisation regardless the contracts with the authors. After this, the Circul Globus brought an appeal against the decision to the Romanian Supreme Court *(Înalta Curte de Casaţie şi Justiţie)* and it argued that the Directive 2001/29/EC had been incorrectly transposed into Romanian copyright law. From the viewpoint of our topic, the Romanian court's first question is important, which was, whether the "communication to the public" in the Article 3(1) of Directive 2001/29/EC has to be interpreted that it means exclusively communication to the public where the public is not present at the place where the communication originates, or also any other communication of a work which is carried out directly in a place open to the public using any means of public performance or direct presentation of the work? According to the answer, the cited rule of the Directive only covers the form of use, when the public is not present at the place of the communication of the work.[34]

2.2. The Enforcement Directive

The adoption of the Directive 2004/48/EC reacted to the fundamental demand to make the law possible to act against infringement with harmonized legal instruments in the whole area of intellectual property.[35] This is the only directive, which regulates the whole area of intellectual property completely, and not just the area of industrial property or the copyright law. The Directive does not constrain the scope for only those artworks, which are already harmonized by EU legal instruments. It

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[32] According to the English translation of the Romanian Copyright Act (No. 8 of 14 March 1996): *Art. 123 (1) Owners of copyright and neighboring rights may exercise their rights recognized by the present law individually or through collective management organizations, according to the present law.*

[33] *Art. 123a (1) Collective management is compulsory for the exercising of the following rights:*
a) right to compensatory remuneration for private copy;
b) right to equitable remuneration for public lending provided for in Art. 144 paragraph (2);
c) resale right;
d) right to broadcast musical works;
e) right to communication to the public of musical works, except the public projection of cinematographic works;
f) right to equitable remuneration recognized to performers and producers of phonograms for communication to the public and broadcasting of phonograms of commerce or of the reproductions thereof;
g) right to retransmission by cable.

[34] TATTAY Levente: *Versenyképesség és szellemi alkotások az Európai Unióban*. Wolter Kluwer, Budapest, 2016, 283.

[35] Ibid. 180.

is also a comprehensive, complex Directive, because it contains both substantive and procedural rules.[36] According to the Recital 13 of the Directive, *[i]t is necessary to define the scope of this Directive as widely as possible in order to encompass all the intellectual property rights covered by Community provisions in this field and/or by the national law of the Member State concerned.* The wider scope of the Directive covers the artworks of copyright and industrial property as well. The Directive does not contain any restrictions about which kind of artworks fall within its scope, so it does not exclude neither dramatic works, nor dramatico-musical works. It is also comprehensive in the relation to the sanctionable infringements, because it defines legal consequences for all infringements *("any infringement")*. At the same time, there are legal consequences[37], which can be applied against commercial scale infringements.[38] The legal consequences, which can also be found in the HCA because of the legal harmonization obligation,[39] shall be applied in the case of infringements of dramatic works as well. By the way, it can be stated that, according to the Hungarian judicial practice, most of the cases rightholders claim the restitution of the economic gains achieved through infringement of rights or compensation for damages in relation to dramatic works too.[40]

2.3. The Rental Right Directive

In the adoption of the Directive, it was a significant fact, that rental and lending of copyright works and the subject matter of related rights protection is playing an increasingly important role in particular for authors, performers and producers of phonograms and films.[41] Notwithstanding, it is also relevant to emphasise in relation to our topic, that neither the rental and nor the lending right are the most important uses and economic rights of dramatic works. According to the definition of the Directive, *"rental" means making available for use, for a limited period of time and for direct or indirect economic or commercial advantage*.[42] On the other hand, "lending" means making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public.[43] Within the meaning of the Directive, we shall exclude from rental and lending certain forms of making available, as for instance making available phonograms or films for the purpose of public performance or broadcasting, making available for the purpose of exhibition, or

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36 STAMATOUDI, Irini: The Enforcement Directive. In: Irini STAMATOUDI–Paul TORREMANS (eds.): *EU Copyright Law. A Commentary. Edward Elgar.* Cheltenham, Northampton, 2014, 530.

37 Article 6(2), Article 8(1), Article 9(2).

38 STAMATOUDI: op. cit. 541.

39 See more: BACHER Vilmos–FALUDI Gábor: Jogérvényesítés a szellemi tulajdonjogok területén. *Jogtudományi Közlöny*, 2005/9., 372–387.

40 See for example: Fővárosi Ítélőtábla Pf. 20.323/2016/3., Szegedi Ítélőtábla Gf.II.30.523/2014/4., Győri Ítélőtábla Pf.V.20.167/2011/4., Legfelsőbb Bíróság Pfv.IV.21.865/2009/5.

41 Directive 2006/115/EC recital 2.

42 Directive 2006/115/EC Article 2(1) a).

43 Directive 2006/115/EC Article 2(1) b).

making available for on-the-spot reference use. Moreover, lending within the meaning of this Directive should not include making available between establishments which are accessible to the public.[44]

The Commentary of the Hungarian Copyright Act highlights that rental right is relating to all of the copyright works, with the exception of buildings, products of applied arts, and industrial arts, because it only applies to their plans and designs.[45] Consequently, the right touches dramatic works (as an underlying literary work, which can be performed on stage), librettos and musics too, but it shall be emphasized that the act of rental in itself does not constitute copyright authorization. The author's rent the scenario in vain, it will not result an authorization of public performance of the drama. Accordingly, the Rental Right Directive does not give any concrete indication in relation to the ordinary, common use of dramatic works.

2.4. The Term Directive

The Directive 2006/116/EC on the terms of copyright and related rights was modified and completed by the Directive 2011/77/EU. On the one hand, the Term Directive refers to the Article 2 of the Berne Convention and on the other hand, it contains special regulations on certain works. Cinematographic or audiovisual works (Article 2) and photographs (Article 6) can be found in the Directive as nominated artworks. It also contains special provisions concerning to the term of protection of related rights (Article 3).[46] So dramatic works cannot be found as special, nominated artworks in the Directive, but it cannot be a huge problem, because in accordance with the Article 1 of the Berne Convention, Article 1(1) of the Directive states that the 70-year term protection shall be applied to those works, which are defined in the BC.[47] Dramatic works shall be part of the group of 'literary and artistic works', as declared by the Berne Convention,[48] so the regulation of the Article 1 of the Directive also covers them. Since lots of dramatic works, espe-

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44 Directive 2006/115/EC recital 10.

45 GYERTYÁNFY Péter (szerk.): *Nagykommentár a szerzői jogi törvényhez*. Wolters Kluwer, Budapest, 2014, 188.

46 See more about the topic: GRAD-GYENGE Anikó: A védelmiidő-irányelv módosításáról szóló szabályok átültetése a magyar jogba. *Iparjogvédelmi és Szerzői Jogi Szemle*, 2012/4.

47 MINERO, Gemma: The Term Directive. In: Irini STAMATOUDI–Paul TORREMANS (ed.): EU Copyright Law. A Commentary. Edward Elgar, Cheltenham, Northampton, 2014, 254. p., similarly: WALTER (2010a) 520.

48 Berne Convention, Article 2.: *The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.*

cially musicals, operas and operettas were born in the way that several authors make them together[49], for example they compose the music and the lyric of the rock opera together, so the term of protection is calculated from the first day of the year following the death of the joint author dying last.

Otherwise the Directive discusses the provisions on the term protection of related rights at length, of which the protection of performers is relevant in relation to the paper. In accordance with the Directive, the rights of performers (which covers theatre actors too) shall expire 50 years after the date of the performance.[50] As a result of the modification in 2011 two exceptions were declared from this 50-year general rule:

However

- *if a fixation of the performance otherwise than in a phonogram is lawfully published or lawfully communicated to the public within this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier,*
- *if a fixation of the performance in a phonogram is lawfully published or lawfully communicated to the public within this period, the rights shall expire 70 years from the date of the first such publication or the first such communication to the public, whichever is the earlier.*[51]

With this rule, the Directive separated the situation of those performers, who performs musical works or sound fixed in a phonogram, and the other performers whose performances are fixed otherwise than in a phonogram and performers of non-musical works.[52] *Gemma Minero* mentions performers and performances of movies as an example of the latter group.[53]

In 2002, the CJEU discussed the so-called *Ricordi-case*[54], which had theatrical relations. Although the decision does not construe the essential elements and copyright nature of dramatic works, it is still the only case, which is in relation to theatre performance, so we will give it a few attention.[55] The preliminary ruling focused two basic issues: the questions of interpretation were mainly generated by

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49 The Recasting of Copyright & Related Rights for the Knowledge Economy, Institute for Information Law, University of Amsterdam, The Netherlands, 2006, 144.

50 Directive 2006/116/EC Article 3(1), first sentence.

51 Directive 2011/77/EU.

52 MINERO, Gemma: The Term Directive. In: Irini STAMATOUDI–Paul TORREMANS (eds.): *EU Copyright Law*. A Commentary. Edward Elgar, Cheltenham, Northampton, 2014, 269.

53 Ibid. 269.

54 Case C-360/00 Land Hessen v G. Ricordi & Co. Bühnen- und Musikverlag GmbH.

55 The lack of lawsuits about dramatic works in the CJEU also does not calling the birth of regulations, because in the field of copyright law the CJEU has powerful developing and interpretating role. This fact was explained in details by Christophe Geiger. See: GEIGER, Christophe: The Role of the Court of Justice of the European Union: Harmonizing, Creating and sometimes Disrupting Copyright Law in the European Union. In.: Irini STAMATOUDI (ed.): *New Developments in EU and International Copyright Law*. Wolters Kluwer, The Netherlands, 2016, 435–446.

the prohibition of discrimination[56] and the legal institution of the term of protection gave the copyright background. The starting point of the case was the unauthorized use of Puccini's opera, La Bohème. *La Bohème* was staged first on 1st of February, 1896, under the conduction of *Arturo Toscanini* and based on the libretto of *Luigi Illica* and *Giuseppe Giacosa*. The underlying story was the *Scènes de la vie de bohème* short story series, written by *Henry Murger* in 1847. Not the opera, but the play, entitled *La vie de bohème* as a joint work of *Murger* and *Théodore Barrière* was the first stage adaptation of Murger's work. This play was performed first in 1849, in the *Théátre des Variètés*.[57]

According to the state of affairs, the right holder of performance of Puccini's La Bohème was the *G. Ricordi & Co. Bühnen- und Musicverlag GmbH*, which is a well-known publishing firm, specialized in music and libretto publishing.[58] The *Staatstheater of Wiesbaden* staged the opera numerous times in the season 1993–1994 and in the next season as well without any authorization. Because of the unauthorized performances, the dispute became a court case. The *Budesgerichtshof* went to the CJEU for a preliminary ruling.[59]

The complication was caused by the provision of the German Copyright Act[60] (UrhG) applicable at that time (in 1965). According to the German rule, copyright protection lasts 70 years after the death of the authors. On the contrary, the Italian Copyright Act[61] stated that the copyright protection of the works is 56 years after the death of the author. The defendant, Land Hessen, the maintainer of the theatre referred to the regulation of the UrhG, which prescribed, that the law shall draw a distinction between the works of German and foreign authors. The differences originates from the rule, that while German authors enjoyed protection for all their works, whether published or not and regardless where they were first published,[62] the works of foreign authors are protected only in the case if they were published in

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56 See also the so-called *Phil Collins-case* (C-326/92) about the prohibition of discrimination in the area of copyright law.

57 BUDDEN, Julian: *Életek és művek: Puccini*. Európa Könyvkiadó, Budapest, 2011, 153–157.
By the way, Puccini, Illica and Giacosa were more careful about copyright at the staging La Bohème, then the Staatstheater in the abovementioned case. Illica and Giacosa was afraid of that the opera will infringe copyright, but Puccini sought, that Murger's work was published in 1851 as a book and because Murger died in 1861 without heirs, this works wasn't protected (because of the rules of that time). However, the joint play by Murger and Théodore Barrière was protected, because Barriére was still alive. They eliminated the situation in the way, that the opera was strictly went along the book, and not along the action of the play. See in details: WINKLER Gábor: *Barangolás az operák világában*. III. Tudomány Kiadó, Budapest, 2004–2006, 1945.

58 Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 28th February 2002, 13.

59 Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 28th February 2002, 21–23. See also: MUNKÁCSI Péter: „Bohémélet" Luxemburgban – Két felvonás a közösségi jogi hátrányos megkülönböztetés tilalma és a szerzői jog viszonyához a „Ricordi"-eset kapcsán. *Iparjogvédelmi és Szerzői Jogi Szemle,* 2003/6.

60 Gesetz über Urheberrecht und verwandte Schutzrechte, UrHg.

61 Law No 633 of 22 April 1941 on the protection of copyright and related rights .

62 UrhG 120 (1), see the same: COOK, Trevor: *EU Intellectual Property Law*, Oxford University Press, New York, 2010, 16.

Germany first time, or within 30 days of their being first published.[63] According to the further provisions of the UrhG, foreign authors enjoyed the protection afforded to their rights by international treaties.[64] This rule provided an opportunity to the Land Hessen, to defend with the argument; the La Bohème is protected in accordance with the Italian rules, because the first performance did not happened in Germany, so the term protection expired in 1980.[65] Actually, the theatre selected from the regulations of the Berne Convention, and while it took into consideration the Article 7(1), which was more favorable for him,[66] and did not take into consideration another section of this Article. Under the Article 7(6), contracting parties may grant a longer term of protection.

The question which the Court had to ascertain first was whether the prohibition of discrimination in Article 6(1) of the EC Treaty is also applicable to the protection of copyright in cases where the author had died 30 years before when the EEC Treaty entered into force in the Member State of which he was a national.[67]

In the summary of his Opinion, Advocate General *Ruiz-Jarabo Colomer* suggested that the Court shall declare the provision in question of the German Copyright Act discriminatory, because it distinguishes the authors on the grounds of nationality and it leads to lesser protection for foreign authors.[68] The Court accepted the argumentation of the Advocat General and decided in accordance with it.

2.5. The Orphan Works Directive

The European Union adopted the Directive on certain permitted uses of orphan works in 2012. According to the Article 2 of the Directive *[a] work or a phonogram shall be considered an orphan work if none of the rightholders in that work or phonogram is identified or, even if one or more of them is identified, none is located despite a diligent search for the rightholders having been carried out and recorded […]*. The orphan work status could happen for many reasons, for example the author have never been publically known, or the work was published anonymously, or never published before, or the identity of the author was once known but after that the information was lost.[69] The Directive covers only works, which are first published in a Member State,[70] so works are excluded from the scope of

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63 UrhG 121 (1)

64 UrhG 121 (4)

65 SAPPA, Cristiana: The Principle of Non-Doscrimination. In: Irini STAMATOUDI–Paul TORREMANS (eds.): *EU Copyright Law. A Commentary*. Edward Elgar, Cheltenham, Northampton, 2016, 33.

66 *The term of protection granted by this Convention shall be the life of the author and fifty years after his death.*

67 Puccini died on 29 November 1924, 33 years before the adoption of the Rome Convention.

68 Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 28 February 2002. 61.

69 LIFSHITZ-GOLDBERG, Yeal: *Orphan Works*, WIPO Seminar, May 2010. www.wipo.int/edocs/mdocs/sme/en/wipo_smes_ge_10/wipo_smes_ge_10_ref_theme11_02.pdf (Date of downloading: 14. 11. 2017.)

70 Directive 2012/28/EU Article 1(2).

the Directive, if they are first published or broadcasted elsewhere in the world.[71] Furthermore, the Directive makes it clear, that which works are the subject matter of the Directive, and states, that:

- works published in the form of books, journals, newspapers, magazines or other writings contained in the collections of publicly accessible libraries, educational establishments or museums as well as in the collections of archives or of film or audio heritage institutions,
- cinematographic or audiovisual works and phonograms contained in the collections of publicly accessible libraries, educational establishments or museums as well as in the collections of archives or of film or audio heritage institutions; and
- cinematographic or audiovisual works and phonograms produced by public-service broadcasting organisations up to and including 31th December 2002 and contained in their archives.

This enumeration is less generic and accordingly less broad in scope, such as the scope of the Term Directive, which refers to the rules of the Berne Convention. It is also true, that the *(or other writings)* element of the first group is quite generalizing approach, especially, because other elements of the list are concrete. *Uma Suthershanen* and *Maria Mercedes Frabboni* wonders in this context, whether this element can be interpreted in a broad sense that it incorporates softwares, photos, and costume designs.[72] In our view, the delimitation of the scope can concern to the works, they mentioned and consequently in principle to scenarios (as a kind of literary works) and librettos too, but we think, there can be only a few scenarios, and dramas are orphan in the practice. The EUIPO[73] runs an orphan works database[74], in which the *search by category* is only contains audiovisual works, cinematographic works, fine art, illustration, literary works, map/plan, phonogram, poster and photography. So, in the database, in accordance with the scope of the Directive, we cannot see dramatic works, as a category, but in the category of literary works, we can find a few works, which title refers to dramatic works, for example a Dutch work.[75] Despite this, according to our opinion it can be quite rare, that a dramatic work is orphan.

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71 JANSSENS, Marie-Christine–TRYGGVADÓTTIR, Rán: Orphan Works, Out-of-commerce Works, and Making the European Cultural Heritage Available: Are We Nearly There Yet? In: Irini STAMATOUDI (ed.): *New Developments in EU and International Copyright Law*. Wolters Kluwer, The Netherlands, 2016, 193.

72 SUTHERSHANEN, Uma–FRABBONI, Maria Mercedes: The Orphan Works Directive. In: Irini STAMATOUDI–Paul TORREMANS (eds.): *EU Copyright Law. A Commentary*. Edward Elgar, Cheltenham, Northampton, 2014, 659.

73 European Union Intellectual Property Office.

74 https://euipo.europa.eu/orphanworks/#search/basic

75 https://euipo.europa.eu/orphanworks/#viewOW/2186/work (Date of downloading: 16. 11. 2017.)

2.6. The Collective Rights Management Directive

One of the newest Directive in the field of copyright law is about the collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market. The Directive has importance in relation to our topic that in some countries, the authorization of uses of dramatic works and dramatico-musical works is happening by a collective rights management organization (CMO). In line with this situation, the Recital 19 of the Directive says, that *Having regard to the freedoms established in the TFEU, collective management of copyright and related rights should entail a rightholder being able freely to choose a collective management organisation for the management of his rights, whether those rights be rights of communication to the public or reproduction rights, or categories of rights related to forms of exploitation such as broadcasting, theatrical exhibition or reproduction for online distribution, provided that the collective management organisation that the rightholder wishes to choose already manages such rights or categories of rights. (...) This Directive should not prejudice the possibility for rightholders to manage their rights individually, including for non-commercial uses.*

Although the Collective Management Directive entailed changes in Hungary too, inter alia a new act, the Act XCIII of 2016 on the collective managements of copyrights and related rights, its relevance is less in connection to dramatic works, because in line with the Article 24(3) of the HCA the authorization of literary works and dramatico-musicals intended for stage can be granted by the author, or the right holder directly, not from the collective rights management organization.

The cited recital of the Directive reserves the right to the rightholders to manage their rights individually, if the given county's law makes it possible. Indeed, because of the above-mentioned situation, the importance of the Collective Management Directive is less, but in some countries the authorization of public performance of dramatic works and dramatico-musical works is happening by a collective rights management organization. In some countries collective management organizations are a kind of representatives. Accordingly, in some countries the CMO concludes a framework agreement with the theatre for the authorization of the performance of a play. Collective management in the field of dramatic works dates back to France in the 18th century, when the *Société des auteurs et compositeurs dramatiques* (SACD) was founded in 3rd of July in 1777 by the French playwright, Pierre Augustin Caron de *Beaumarchais* to ensure recognition and respect for authors' economic and moral interests in theaters.[76] The number and nature of representatives varies from country to country and in many countries CMOs take part in the authorization process, such as in France (SACD) and in Germany (GEMA).[77]

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[76] KOSKINEN-OLSSON, Tarja–LOWE, Nicholas: *Educational Material on Collective Management of Copyright and Related Rights Module 6: Management of rights in dramatic works*. WIPO, 2012, 10.

[77] KOSKINEN-OLSSON–LOWE: op. cit. 17.

3. Final considerations

In our view, the reason of the less attention for dramatic works from the European Union legislator is that, the theatrical activities belong to the classical area of copyright law and the direct challenges of technology influence in this area has a smaller extent. The Green Paper 1988 of the European Commission[78] stated in the way that: *In the more traditional domains of copyright applying to literary, musical and dramatic works, this has not posed a significant problem since independent works of the same genre can in law and practice still compete with each other quite fairly.* (Just think about dramatico-musical works, where music and literary works draw up jointly the given damatico-musical work – mentioned by the author.) *In areas which have developed more recently, however, the restrictive effects of copyright protection on legitimate competition have on occasion risked becoming excessive, for example, in respect of purely functional industrial designs and computer programs.*[79]

Most of the existing directives concentrate to the possible answers of the challenges of the information society, the digitalization and the technology, which are really the most pressing problems.[80] In its Green Paper on Copyright in the Knowledge Economy, the European Commission mentions the freedom of knowledge and innovation as the "fifth freedom of the internal market."[81] Since dramatic works are less affected by the digital world, it is understandable, that the EU does not pay any particular attention to these works. It is also true, that in relation to dramatic works, the most significant factors are contractual relationships (especially with the content of adaptation right and public performance) and moral rights, which traditionally are not the subject matter of the European harmonization, but we dare not to state that this "dereliction" will not have negative effect in the future. Or, and perhaps it is a better expression: it may have a positive effect, if the Euopean legislator pays attention to this category of works too. However, from our point of view, the harmonization of the above-mentioned factors of copyright law would not be unproblematic, especially because of the issues of moral rights, because on the one hand it is a sensitive area and on the other hand, lots of interests and respects shall be taken into consideration during the haphazard harmonization and it may be incompatible.

We think, that it would not be harmful, if a material – even if it has no formal legal value – could be born in the future, which would clear the basic and comprehensive issues of copyright law. In the field of European copyright law, it is not a wild idea, because in 2010, the so-called *European copyright code* was born by the

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78 Green Paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action (COM(88) 172 final, Brussels, 7. 6. 1988).

79 Green Paper 1988, 5.

80 See in this topic for example the monographies of Péter Mezei: MEZEI Péter: *Digitális sampling és fájlcsere.* Szegedi Tudományegyetem, Állam- és Jogtudományi Kar, 2010; MEZEI Péter: *A fájlcsere dilemma – a perek lassúak, az internet gyors*. HVG-Orac, Budapest, 2012.

81 Green Paper on Copyright in the Knowledge Economy (COM [2008] 466 final, Brussels, 17. 6. 2008).

Wittem-project. This paper had the main objective to promote the transparency and consistency of the European copyright law, without making a recodification of the EU copyright law. [82] Although the European copyright code does not deal with dramatic works in details, beyond that in the Article 1.1.(2) it lists dramatic works as copyrighted works,[83] but it contains some basic regulations about moral rights.[84] In this material lists of economic rights also can be found and public performance and adaptation rights are also mentioned and ruled basically.[85] According to the Article 4.5. of the European copyright code, the right of communication to the public covers the *public performance* too.[86] In line with the explanation of *public performance,* it includes *public recitation* as well, which refers to the live public performance. So the Wittem-project's European copyright code went further than the law of the European Union.

In our view it is not necessarily a good practice, that the law-maker concentrates to digitalization and online sphere so greatly that during all of this he forgets the classical areas of copyright law. Even so, that the classical, traditional artworks of copyright law has really significant impact[87] to the cultural identity and cultural heritage of Europe.

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82 European Copyright Code (2010) 5–6.

83 Art. 1.1.(2) c) Plays and choreographies.

84 Article 3 – Moral rights.

85 Art. 4.6 *The right of adaptation is the right to adapt, translate, arrange or otherwise alter the work.*

86 Art. 4.5. (1) *The right of communication to the public is the right to communicate the work to the public, including but not limited to45public performance, broadcasting, and making available to the public of the work in such a way that members of the public may access it from a place and at a time individually chosen by them.*

87 See in the objectives of the Green Paper 1995.

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QUALIFYING EXAM AS A CONDITION TO OBTAINING THE STATUS OF A LAWYER: COMPARATIVE LEGAL ASPECTS

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1. Introduction

A lawyer is assigned a constitutional duty to provide professional legal assistance to persons. Guaranteeing a person to receive such assistance, the state sets higher qualification requirements for applicants for the status of the lawyer. When considering the nature of the legal status of the lawyer the emphasis is put on the question of the order of acquisition of such status. At the same time, we must note that one of the prerequisites for the person access to the legal profession is passing the qualification examination. The relevance of the study is shown in the fact that the qualification exam is regarded as contender's dropout condition, who are not able to carry out professional activities on the provision of adequate legal assistance to persons appropriate in the future.

The problem of determining the legal nature of the qualification exam as one of the conditions for obtaining the status of lawyer has been the subject of a number of scientists' research. Among the scholars who have examined some aspects of this problem, one should distinguish the works of V. I. Golovanov, M. A. Kosarev, M. S. Kosenko, N. A. Kudryavtseva, R. G. Melnichenko, S. F. Safulko, M. B. Smolensky and others. At the same time, nowadays a sufficient number of controversial issues remain in this area.

The purpose of this article is to analyze the legal nature of the qualifying examination as a condition for obtaining the status of lawyer. The main tasks of the author are as follows: to reveal the essence of the conditions of access to the legal profession as the person's passing of qualification examination; to analyze theoretical approaches and norms in the Ukrainian legislation and foreign legislation regulating this issue; and to formulate one's own attitude to the procedure of passing the qualification test as a condition for obtaining the status of the lawyer on the basis of the analysis.

2. Qualification exam as a condition of obtaining the status of lawyer in Ukraine

A mandatory condition for obtaining the status of Ukrainian lawyer is passing the appropriate qualification examination. It should be noted that in the legal literature scholars have different opinions concerning to the fact of obtaining the status of a lawyer. So, the compilers of the textbook *The legal profession in the Russian Federation* agree with the need for the existence of such exam, they indicate that *the qualifying examination is to determine the applicant's opportunity to qualify to provide legal assistance*[1], while nothing that such an examination also means of establishing whether or not an applicant has knowledge that correspond to his education. They also point out that such a condition complies with the Regulation on the Role of Lawyers, adopted by the VIII Congress of the United Nations in August 1990, in Havana[2], namely P. 9, where it is noted that the government, professional associations of lawyers and educational institutions shall ensure that lawyers shall receive appropriate education, training and knowledge of the ideals and ethical duties of lawyers as well as and human rights and fundamental freedoms recognized by national and international law.

A different view is held by the scholars who oppose the existence of the necessary conditions for qualification examination by a person who has expressed a desire to get the status of the lawyer. So, I. Golovan, pointing to the state certification of persons graduating from higher education which exists in Ukraine, draws attention to the fact that it is not clear on what grounds the Bar shows distrust of the state certification system, conducting re-examination of lawyers who want to become lawyer?[3]. He suggests to enter the average score of the diploma instead of passing the qualification exam, setting it at 4.5, while questioning the passing of such a test by numerous members of the qualifying commissions. Exploring the view of Golovan, the position of R. G. Melnichenko should be taken into account, who noted that the qualification committee took over the function of rechecking the results of final state certification (which is the basis for the issuance of a diploma of higher legal education), appropriately indicates that the evaluation commission majority (and as a rule it's everybody) are persons with academic degrees, who are experts in the field of pedagogy, also created various commissions (the experts in the field of the theory of state and law, as well as in special subjects), while the

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1 *Адвокатура в Российской Федерации : учебное пособие* / А. В. Гриненко–Ю. А. Костанов–С. А. Невский; Под ред. А. В. Гриненко. – М.: ТК Велби, 2003. – С. 36.

2 Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders 27 August to 7 September 1990 [Електронний ресурс]. – Режим доступу: http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx

3 *Головань І. Чи треба змінювати Закон «Про адвокатуру»?* [Електронний ресурс] / І. Головань // Дзеркало тижня. – 2004. – № 7 (482). – Режим доступу: http://gazeta.dt.ua/LAW/chi_treba_zminyuvati_zakon_pro_advokaturu.html

members of the qualification commissions *think it possible to evaluate the candidate on all issues of law*[4].

In our opinion, each of these positions is attention-worthy, and that's why we consider it necessary to review the order of the qualification examination of persons who have expressed a desire to become a lawyer in Ukraine, and the experience of foreign countries, to determine of the form of assessment of knowledge of these persons, which is appropriate for the reaching of the goal.

First of all, we should note that, in accordance with Part 1 and Part 2 Art. 9 of the Law of Ukraine *On Advocacy and Legal Practice*[5] qualifying exam is a certification of a person which identifies the theoretical knowledge in the fields of law, history of legal profession, legal ethics as well as to identify the level of his skills and abilities in application of the law.

So, the purpose of the qualification examination, along with the definition of the level of theoretical knowledge of the applicant, is the identification of the level of his skills and abilities. This state of affairs is reflected in the Programme of qualification exam[6], in which the written exam consists of the preparation of civil, economic, administrative, criminal, procedural documents and procedural documents of Administrative Offences (3 of more than 60 options), as well as in drawing conclusions about legal position and protection tactics or providing other legal assistance in the given case.

In this case, one should take into account the fact that, firstly, in accordance with the Ukrainian legislation qualification exam is not preceded by the internship institution (the purpose of which is the acquisition by a person of practical skills), and secondly, the Ukrainian system of legal education is characterized by providing job seekers a fundamental theoretical knowledge. We must not forget that, in accordance with the Order of admission to the qualification exam, the Order of the qualification examination and evaluation techniques qualification exam to be eligible to practice law in Ukraine (new edition)[7] written examination is passed first (PG 13.1 section 2), and persons who successfully pass the written exam are allowed to pass the oral examination (Sec. 14.1 of section 2). All this combined with the fact that the qualification exam program mentioned above is duplicated with the

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4 МЕЛЬНИЧЕНКО Р. Г. Квалификационный экзамен на получение статуса российского адвоката / Р. Г**.** Мельниченко // Право и образование. – 2010. – № 11. – С. 28–29.

5 Про адвокатуру та адвокатську діяльність : Закон України від 5 липня 2012 р. № 5076-VI // *Офіційний вісник України*. – 2012. – № 62. – Ст. 17.

6 Програма складання кваліфікаційного іспиту [Електронний ресурс], затверджена рішенням Ради адвокатів України від 01 червня 2013 року №153. – Режим доступу: http://unba.org.ua/assets/uploads/legislations/ programmy/2013.06.01-programma-153.pdf

7 Порядок допуску до складення кваліфікаційного іспиту, Порядок складення кваліфікаційного іспиту та методики оцінювання результатів складення кваліфікаційного іспиту для набуття права на заняття адвокатською діяльністю в Україні (нова редакція) [Електронний ресурс], які затверджені рішенням Ради адвокатів України від 17 грудня 2013 року № 270. – Режим доступу: http://unba.org.ua/assets/ uploads/legislations/poryadki/2015.09.25-poryadok-104.pdf

program of the internship[8] gives us the opportunity to come to a conclusion of essential drawbacks in the procedure of the organization and passing the qualification examination by persons willing to obtain the status of Ukrainian lawyer.

This drawback mentioned above is grounded on the fact that great attention (and in some cases decisive) is given to practical knowledge and skills of the applicant to obtain the status of lawyer while passing the qualification exam. Considering the fact that the system of legal education in Ukraine is characterized by providing mainly fundamental theoretical knowledge, the position of M. S. Kosenko deserves attention. He writes that *a law degree can serve as a basis (the original knowledge base) and the requirement necessary for the professional specialized training of such a person, as a result of which it is necessary to take a qualifying examination*[9]. In addition, in our opinion, the Ukrainian legislator's binding requirement of a two-year qualifying period of a person who has expressed a desire to become a lawyer, does not always justify the stated objective for the acquisition by the person of practical knowledge and skills necessary for further independent exercise of advocacy. The mentioned above facts gives us the opportunity to question the usefulness of the qualification examination in accordance with the procedure that exists nowadays, including the passing of such exam before passing the internship.

3. The experience of foreign countries in obtaining the status of a lawyer

Foreign lawmakers also use the qualifying examination as a condition for acquiring the status of lawyer. So, for example the French legislator provides the necessity to first passing the entrance exam by the applicant for the status of the lawyer at the regional training centre (where a person passes the theoretical and practical training for at least eighteen months). After graduating and obtaining a certificate of compliance with the legal profession (which still does not give the right to self-employment), such person should go through the internship (at least two years), and only after the appropriate validation (verification of skills in the specialty) National Council advocates a certificate, and the person is included in the register of lawyers (Art. 12 and 12-1 of the Law *Concerning the reform of certain judicial and legal professions* from 21 December 1971 № 71–1130)[10] All of this indicates that the candidate for the status of a French lawyer has to actually pass two exami-

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[8] *Програма проходження стажування для отримання особою свідоцтва про право на заняття адвокатською діяльністю* [Електронний ресурс], затверджена рішенням Ради адвокатів України 01 червня 2013 року №125. – Режим доступу: http://unba.org.ua/assets/uploads/legislations/programmy/2013. 06. 01-programma-125.pdf

[9] Косенко М. С. Місце кваліфікаційно-дисциплінарної комісії адвокатури у системі формування професійної адвокатури України / М. С. Косенко // *Вісник Академії адвокатури України*. – 2013. – Число 2. – С. 100.

[10] Portant réforme de certaines professions judiciaires et juridiques [Електронний ресурс] : Loi du 31 décembre 1971 № 71–1130. – Режим доступу: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte= EGITEXT000006068396

nations: the first, which is called "entrance" (as the access to the regional centre of professional training); and the second – "graduation" (after probation).

German legislature has a slightly different approach, which also points to the need for passing by the applicant two exams, but unlike the French, the first of such examinations is passed *in the school where the future judge or a lawyer has studied*[11] and that's why it is called «graduating» in the legal literature. In the future, a person who wants to become a lawyer or a judge (in accordance with Art. 4 of the Federal Law *On Advocacy*[12] the person who obtained the right to hold the office of judge also can be a lawyer)[13], in accordance with Art. 5 "b" of the Federal Law *On the Status of Judges* passes a two-year probation, and only then he passes the second exam, but *under the auspices of the Ministry of (management) Justice respective administrative territory (land)*[14].

Despite the fact that the French and German legislators actually use different ways for the legal profession, but they are united by a common objective of the abovementioned first examination, namely a test of knowledge (of the main professional disciplines) of applicants for the status of the lawyer to determine their ability to be engaged in advocacy.

It should be noted that there are interesting conditions that must be met to practice law in Hungary, and it is provided in paragraph 13 of the Hungarian Republic *On Lawyers'*. Lawyer can be a person who is a member of the Bar Association, he took the oath and received a photo ID. The lawyer must comply with the following conditions:

a) is a citizen of any country in accordance with the Agreement on the European Economic Area citizens of the State party;
b) have a higher legal education;
c) passed the state exam in Hungarian law;
d) worked as a lawyer, assistant lawyer to practice law at least for 1 year;
e) is a member of the Hungarian Lawyers Insurance Association;
f) has available office within the territory of the Chamber of Advocates;
g) does not fall within the grounds for refusal[15].

It should be noted that internship in Hungary before the exam should be at least 3 years with 8 hour working day, if it's less than 8 hour than internship increases[16].

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[11] Соловьева Ю. И. Актуальные проблемы приобретения статуса адвоката и подготовки к адвокатуре / Ю. И. Соловьева, О. В. Поспелов // Наука и Мир. – 2014. – № 10. – Т. 2. – С. 47.

[12] Bundesrechtsanwaltsordnung (BRAO) [Електронний ресурс], ausfertigungsdatum 01.08.1959. – Режим доступу: http://www.gesetze-im-internet.de/bundesrecht/brao/gesamt.pdf

[13] Deutsches Richtergesetz (DRiG) [Електронний ресурс], ausfertigungsdatum 08.09.1961. – Режим доступу: http://www.gesetze-im-internet.de/bundesrecht/drig/gesamt.pdf

[14] Смоленский М. Б. Адвокатская деятельность и адвокатура Российской Федерации / М. Б. Смоленский. – Ростов-на-Дону: «Феникс», 2004. – С. 199.

[15] 1998. évi XI. Törvény az ügyvédekről // [online source].: http://njt.hu/cgi_bin/njt_doc.cgi?docid=34117.242980

[16] 5/1991. (IV. 4.) IM rendelet a jogi szakvizsgáról // [online resource]. – www.njt.hu/cgi_bin/njt_doc.cgi? docid=14954.228085

We consider it necessary to change the procedure of passing the "entrance" exam qualification by the applicants for the status of Ukrainian lawyer, which has to be passed before the internship. In this case, the view of Melnichenko is attention-worthy: *candidates should be given the most basic questions, and secondly, with the limited scope of legal knowledge – issues of advocacy and law*[17]. According to his opinion, in this case the most unsuitable candidates for the status of the lawyer will be discarded. In addition, in our opinion, making a decision on the admission of persons to advocacy one should take into account not only the formal knowledge, but also moral and ethical level of individuals. Such a level should be determined by testing to establish the professional level of the applicant and psychological testing. At the same time, we must proceed from the fact that *it is impossible to require the presence of psychological competence of the lawyer, a predisposition to acquire this competence can be checked*[18]. A. F. Coney proceeded from the fact that the lawyer should be an educated person whose general education is ahead of special and care about the man is above all[19].

4. Conclusion

So, we shared the position of the Ukrainian legislator, who uses the qualification examination as the person's access to the legal profession, but we believe that the approach to its use should be changed. In our opinion, the applicant for the status of lawyer should pass two qualifying exams, namely one ("entry") prior to the internship and the second ("graduating") – after its passing. The purpose of "entrance" exam is only to check a person's ability to proceed his further theoretical and practical training in order to properly implement advocacy in the future, "graduating" – readiness of a person to carry out such activities on his own. In addition, in our opinion, "graduation" qualifying examination should be passed by all persons who wish to acquire the status of a lawyer, even those who use alternative methods of obtaining such status (without internship).

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[17] Мельниченко Р.Г. Квалификационный экзамен на получение статуса российского адвоката / Р. Г. Мельниченко // Право и образование. – 2010. – № 11. – С. 36.

[18] Мельниченко Р. Г. Почистить фильтры (Положение о порядке сдачи квалификационного экзамена на присвоение статуса адвоката нуждается в доработке) / Р.Г. Мельниченко // Новая адвокатская газета. – 2010. – № 23. – С. 7.

[19] Кони А.Ф. Собрание сочинений в восьми томах / А. Ф. Кони; под общ. ред. В.Г.Базанова, Л. Н. Смирнова, К. И. Чуковского. – М.: Юридическое издательство, 1967. – Том 3: Судебные речи. – С. 7.

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