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# THE IMPORTANCE AND HIDDEN RESOURCES OF LIFELONG LEARNING*

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## 1. Introduction

Lifelong learning is one of the key words of the 21st century. It seems to be essential not only in the western countries but also in the developing economies.

The rapid development of information and communication technologies is now promoting economic and social transformation, turning the world into an information, knowledge, globalized and lifelong learning society. The integration of education and technology pushes education at all levels and higher education in particular to be open, flexible, inclusive, and lifelong, which has increasingly become a trend of educational reform and innovation in many countries. The open universities, featured by such conceptions, will surely play an essential role in the future education development.

On the one hand, in the ever changing surrounding of the welfare societies, it is important to provide the population the chance to acquire competitive knowledge that can make them suitable for the challenging of the market economy.

On the other, it is also of crucial importance in the developing countries to provide not only general education for the youth but also further tuition for the adults. Thus, lifelong learning is a worldwide need of our age.

It can be found in the core of the aims of different international organizations, for example the World Education Forum that put it directly in the headline among four other targets (These are: equity, inclusion, learning, quality, and lifelong learning.)[1]

How did the education develop? What is the exact definition of lifelong learning? Why is it so important? What advantages can be expected in the societies at different economic levels? What is a learning society?

These questions are dealt with in the paper.

* The basic research for that paper was carried out in the framework of the International Visiting Scholar Program by the Shanghai Open University, China.

1 https://efareport.wordpress.com/2015/05/18/education-2030-equity-and-quality-with-a-lifelong-learning-perspective/ [06. 10. 2015]

## 2. What is lifelong learning?

Lifelong learning can be fundamentally defined as learning that is pursued throughout life: learning that is flexible, diverse and available at different times in different places and for different people. Lifelong learning crosses sectors, promoting learning beyond traditional schooling mostly throughout adult life (i.e. post-compulsory education). Delors defined the structure of lifelong learning as follows[2]:

**Learning to know** – mastering learning tools rather than acquisition of structured knowledge

**Learning to do** – equipping people for the types of work needed now and in the future including innovation and adaptation of learning to future work environments

**Learning to live together, and with others** – peacefully resolving conflict, discovering other people and their cultures, fostering community capability, individual competence and capacity, economic resilience, and social inclusion

**Learning to be** – education contributing to a person's complete development: mind and body, intelligence, sensitivity, aesthetic appreciation and spirituality

It took a long time while learning and education became a widespread priority.

In the former hundreds of years, knowledge was some sort of privilege of a narrow layer of the society. General working methods in an economy based mostly on agriculture, did not require comprehensive education and further tuition. The ruling class was not interested in the extension of education, consequently, as the owner of the monopoly of the knowledge, they could maintain their power easier for a long time.

After the intellectual movement called Enlightenment and mostly after the Industrial Revolution education was given to the masses. The monopoly of the church in the field of tuition was broken and a new and comprehensive system of public education was established with opening a large number of public schools. The most significant measure of the process was to make the basic education obligatory.

In present days, the more developed societies created a comprehensive system of public education, mostly free of charge.

The process of learning has been an important consideration for early philosophers and educators that continues today. Looking back at the roots of learning and how it occurs, we see the constant effort to make it better.[3]

The European Union also pays close intention to the topic of lifelong learning. Therefore, a Commission Communication has been issued with the title Making a European Area of Lifelong Learning a Reality.[4]

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2 DELORS, Jacques & UNESCO: *Learning, the treasure within: Report to UNESCO of the International Commission on Education for the Twenty-first Century*. UNESCO Publication, Paris, 1996.

3 SCHUNK, Dale H.: *Learning theories: An educational perspective.* Pearson, Upper Saddle River, NJ, 2004.

4 Brussels, 21. 11. 2001 COM (2001) 678final,

In the paper, a broad definition has been provided: beside its undisputed importance from pre-school education to post retirement period, lifelong learning should encompass the whole spectrum of formal, non-formal and informal learning. The consultation also highlighted the objectives of learning, including active citizenship, personal fulfillment and social inclusion, as well as employment-related aspects.

## 3. The importance of lifelong learning

It is quite undisputed and is rare of its kind that lifelong learning is of utmost importance for the future of the humanity.

An UNESCO report found that education holds the key to achieving most of the sustainable development goals.[5]

In addition, the Commission's Communication has been such an official declaration that highlighted the core issue of the topic.

Overall, consensus can be surmised around the following four broad and mutually supporting objectives. These are:

- personal fulfillment,
- active citizenship,
- social inclusion and
- employability/adaptability.

That lifelong learning promotes this wide range of objectives is reflected in the extended definition below, in the light of which all references to lifelong learning in this document should be understood.[6]

When talking about lifelong learning, the economic motives arise first. From Europe's point of view, it should serve the improving of living standards of the citizens on the one hand and to secure the proper functioning of the Single European Market on the other.

That is, consequently, stressed in the Communication.

In economic terms, the employability and adaptability of the citizens is vital for Europe to maintain its commitment to becoming the most competitive and dynamic knowledge-based society in the world. Labor shortages and competence gaps risk the limit of the capacity of the European Union for further growth, at any point in the economic cycle. Lifelong learning, therefore, has a key role to play in developing a coordinated strategy for employment and particularly for promoting a skilled, trained and adaptable workforce. This means removing the barriers that prevent

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0678:FIN:EN:PDF [06. 10. 2015]

5 http://unesdoc.unesco.org/images/0023/002330/233029E.pdf [06. 10. 2015]

6 Brussels, 21. 11. 2001 COM (2001) 678final, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0678:FIN:EN:PDF p. 9 [06. 10. 2015]

people from entering the labor market and limit progression within it. Tackling inequality and social exclusion is part of this. [7]

The Commission, however, emphasizes that not only economic relation is dealt with when coping with the realization of lifelong learning.

Lifelong learning is, however, much more than economics. It also promotes the goals and ambitions of European countries to become more inclusive, tolerant and democratic. Moreover, it promises a Europe in which citizens have the opportunity and ability to realize their ambitions and to participate in building a better society. Indeed, a recent OECD report refers to the growing evidence that learning and investment in human capital is associated not just with increased GDP, but also with greater civic participation, higher reported well-being and lower criminality.[8]

These goals are the elements of the ideal types of a society that is hard to achieve. However, governments are eager to take proper measures, which are promising to regard the structure of the society in the future.

## 4. Creation of an educated society

The Commission Communication set out the priorities for action of a lifelong learning strategy. Through the realization of that it would be much easier to achieve the desired well-educated society where every member is willing to learn more, and the society is capable to provide the means and methods for the continuative education.

As emphasized in the Communication, in order to achieve a European area of lifelong learning the actions listed below are declared to be essential:

- value learning. This means valuing formal diplomas and certificates, as well as non-formal and informal learning, so that all forms of learning can be recognized. This includes improving the transparency and coherence of the national learning systems, preparing transnational mechanisms for accumulating qualifications for 2003, defining a common system for presenting qualifications (inspired by the European curriculum vitae) by the end of 2002 and creating diplomas and certificates that pertain to European training on a voluntary basis;
- strengthen information, guidance and counseling services at European level. In 2002, the Commission was to launch an Internet portal on learning opportunities at European level and a European guidance forum to promote exchanges of information;

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[7] Brussels, 21. 11. 2001 COM (2001) 678final, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0678:FIN:EN:PDF p. 6 [06. 10. 2015]

[8] Brussels, 21. 11. 2001 COM (2001) 678final, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0678:FIN:EN:PDF p. 7 [06. 10. 2015]

- invest more time in learning. The Commission is inviting the European Investment Bank to support learning, preferably by creating local training centers, requesting the European investment fund to support risk capital in this area, suggesting that Member States make greater use of the European Social Fund, and committing itself to presenting a survey of tax incentives in the Member States;
- bring learning opportunities closer to learners. This will be possible by developing local knowledge acquisition centers and by encouraging learning on the job;
- provide everybody with basic skills;
- support research into innovative pedagogy for teachers, instructors and mediators, while taking account of the growing role of information and communication technologies.[9]

A further official instrument is a Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 21 November 2008 on better integrating lifelong guidance into lifelong learning strategies.[10]

This resolution emphasizes the need to strengthen the implementation of an active guidance policy within the framework of national lifelong learning strategies. It sets out four priority areas for lifelong guidance. These areas shall aim to enhance:

- the acquisition of empowering career management skills;
- access to guidance services, in particular for people from disadvantaged groups;
- the quality of guidance services;
- coordination and cooperation among all relevant stakeholders at all possible levels.

It is indisputable that the European Union and its organizations pay closer and closer attention in the topic of lifelong learning. The question, consequently, arises: what advantages actually can be expected from the effectuation of a conscious and learning society.

## 5. What are the advantages of lifelong learning for different countries?

In general, when economic aspects are kept in mind, countries are divided into two main groups. These are the developed and the developing countries.[11]
In the developed, industrialized countries, the economic structure is based on the rules of demand and supply, namely the market economy.

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[9] http://europa.eu/legislation_summaries/education_training_youth/lifelong_learning/c11054_en.htm [06. 10. 2015]

[10] *Official Journal C,* 319 of [13. 12. 2008]

[11] That can be divided further on the basis of income level and GDP. http://data.worldbank.org/country [06. 10. 2015]

The fundamental requirement of the market economy is the constant and balanced growth with a special aspect to the sustainable development. These two topics are difficult to harmonize, however, there is a common principle in both of them, the education.

Neither the constant economic growth nor the sustainability can be secured without the persistent education of the society worldwide.

As far as the previous term is concerned, only well-prepared and self-conscious persons can be active and broad-minded members of the society on one hand and useful power on the labor market on the other.

The latter term, sustainability, if it is possible, is of even greater importance because it includes the entire future of the Earth in close connection with the possible future of the humanity.

The realization of both terms, as mentioned above, can only be carried out with the help of lifelong learning, the constant sharing of information to make it possible that people recognize the relevant correlations.

In the developing countries, the points are completely different. While in the modern world people educate themselves to get better job or higher salary, in the poorest countries it goes for the completion of primary education.

The above mentioned UNESCO report emphasizes the urgent necessity that even those most in need can access proper education and set the requirements for that goal.

An equitable and quality lifelong learning approach would require at least:

Firstly, there should be 12 years of publicly funded quality primary and secondary schooling for all.

Secondly, equal opportunities should be secured for all to access education and to learn, paying particular attention to vulnerable groups who are disadvantaged by factors such as gender, poverty, conflict or disaster, geographical location, ethnicity, language, age or disability.

Finally, relevant and effective learning outcomes, including, at a minimum, foundational literacy and numeracy skills that provide the building blocks for further flexible lifelong learning opportunities.[12]

Earlier it was not expected that people educate themselves after leaving school or learn another profession. It was obvious that they could make both ends meet without learning as an adult.

However, the situation has completely changed. It is not because the people changed. It is the world around us that has changed. The economic environment, the technical conditions, the legal matters they all make it necessary for almost everyone to keep his knowledge up-to-date or to learn more.

As it could be seen, it is essential even in developed countries to lay emphasis on the requirements of lifelong learning, just as the European Commission did it in its Communication.

[12] http://unesdoc.unesco.org/images/0023/002330/233029E.pdf [06. 10. 2015]

In the developing countries, it seems to be even more important to train and educate the citizens for two reasons. First, it is of crucial importance to make them well prepared for the challenges of the labor market. Second, the government shall provide them the tools that can secure their subsistence.

Countries with lower-middle income[13] such as Bolivia, Ghana, Zambia, Sri Lanka, Pakistan, Moldova or Ukraine and with lower income[14] such as Bangladesh, Mali, Togo, People's Republic of Korea or Haiti are affected the most. These countries, however, do not have other chance to enhance their economic situation than to lay more emphasis on education. This is to apply for both the regular teaching and lifelong learning. Children must be involved in the comprehensive system of elementary schools while for adults a wide-range of special education should be offered.

However, for adults it is not easy to get back to school and do the same performance as in their childhood. They have too many things to hinder their efforts. Difficulties make people unwilling and discourage them. The key for that problem can be the distance teaching and the open universities that will be examined in the following section.

The economic strategy for developing or low income countries, whose comparative advantage over the foreseeable future will lie in agricultural commodities, light manufactures and assembly type activities, will need to enhance their access to export markets. This calls for a more active, coordinated and strategic participation in trade negotiations – in the making and the extracting of trade concessions.[15] All these activities, both in the industry or in the trade, require a high level of education that also can be reached in lifelong learning carried out in distance teaching.

## 6. Learning society and distance teaching

What is learning or knowledge based society? Learning society creates an advantageous environment for adults to be urged being more qualified. Many characteristics of the ordinary school system are appropriate for adults as well. The general goal of the countries of our age is to build a global learning society, thus, it would appear that education for all is a critical starting point. It is important to consider, at all ages, individual differences in perception, different kinds of intelligence and differences in world view. In these differences may lie the strengths that provide the tools that are needed to learn and to develop the abilities, as well as dealing with disabilities. Opportunities to learn in different modalities and understand the own unique characteristics play an important role in successful learning.[16] Students

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[13] http://data.worldbank.org/income-level/LMC [06. 12. 2015]

[14] http://data.worldbank.org/income-level/LIC [06. 12. 2015]

[15] YUSUF, Shahid: *Globalization and the Challenge for Developing Countries World Bank*. 2001, 10. http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-2618 [06. 12. 2015]

[16] DICKINSON, Dee: *Learning Society of the Future: Questions to Consider*. John Hopkins School of Education, 2000.

must also be offered opportunities to understand how to utilize these traits in a variety of contexts including those outside the classroom, in the practice.

In a learning society, most of people take part in the different levels of education, which is advantageous both for the individuals and for the society itself. It is considered normal when younger generations learn or study but there are several countries in the world where it is not the fact. These systems do not belong to welfare sates and the lack of the education system has been in close relation to and deep impact on the economic difficulties.

Knowledge-based society has a crucial impact on the economy, mostly on labor market.

The present transition from industrial to knowledge-based societies is characterized by major changes in working conditions and labor-market requirements. This process has resulted in a historically very fast restructuring in the scale of values. For example, the flexibility, non-hierarchic structure and high adaptation capacity are becoming key factors both at individual and organizational level. The traditional educational system is slow to react effectively to these challenges, which may raise walls against further technical developments and decelerate the growth. Three interdependent but parallel processes should be managed successfully in order to enjoy the advantages of the knowledge-based society: Firstly, the renewal of knowledge, secondly, the high-speed changes in labor-market demands and thirdly the changes of applied tools and methods in learning.[17]

The existing mismatch between supply and demand in the labor market may lead to a critical situation: a sharp division of the society into two groups by knowledge-based society skills, namely to small number of winners and a large majority of losers. Economically vulnerable countries (like Hungary) should pay close attention to these warnings and, based on their best traditions, they must react to the challenges in time and in a proper way. Otherwise, the favorable foundations created by social, economic and political transformation in the 1990s may not serve the real adjustment to the global trends and the prices of social modernization will become extremely high.[18]

One of the methods realizing lifelong learning in a knowledge-based society is distance education. Distance teaching makes it easier for he adults to get involved in the lifelong learning process since it reduces its costs and the time for travelling. The open universities, consequently, provide almost unlimited access to the knowledge for everyone interested and make the lifelong learning available for a

http://education.jhu.edu/PD/newhorizons/strategies/topics/Environments%20for%20Learning/learning-society/ [06. 12. 2015]

[17] NYÍRI, Lajos: Knowledge-based society its impact on labor market values. *Society and Economy*, 24 (2002), 212–218.

[18] NYÍRI, Lajos: Knowledge-based society its impact on labor market values. *Society and Economy*, 24 (2002), 2012–218.

wide range of those people who otherwise could not have had the chance to widen or sharpen their skills.[19]

The network of open universities that offer the key to the precious knowledge of the 21st century is the milestone of what we call learning society.

Open universities are the gates through which one can enter into the world of unlimited educational possibilities. Their advantage is hiding in the easy accessibility, in the lower costs, in the flexibility and in the online teaching methods.

In bigger countries like China or India, where the process of urbanization is still in the primal phase and hundreds of millions live in smaller towns and villages where there are hardly any universities or vocational schools, the role of open universities is of even more substantial.

The Shanghai Open University plays an important role in the area of Shanghai, where more than 30 millions people live, to create the fundamental conditions and possibilities of distance education. Hence, the SOU is providing the reinforcement of qualified workforce in the region, heating up the labor market and, indirectly, stimulating the massive economic growth in China.

It is, therefore, obvious that open universities, distance learning and lifelong learning have a close impact on the economic processes.

## 7. Closing remarks

There is not anything more important than education. Education means wider possibilities, more working places, balanced economic growth, welfare and happier society. A learning society is consisted of networks of universities both traditional and open ones that offer the chance of studying for everyone without barriers, implied transaction costs and other difficulties.

A well-operating lifelong learning system, however, makes the individual itself interested in participating because it offers them competitiveness, a fresher approach and an unrestricted access to the knowledge.

Catchword for the present situation is education for all. During my visit in Shanghai, China, I had the chance to examine the structure and working methods of one of the biggest open universities, the SOU. It has a key role in providing essential knowledge for those who would like to know more and who have not had the opportunity to study before. Thus, after learning hard and graduating, they have a chance to a get better job, promotion or higher salary.

It is easy to comprehend that lifelong learning has advantageous impact both on the economy and on the society by improving the living standards of the single citizens.

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[19] STROHMEIER, R. W.: Die Europäische Union auf dem Weg zur Wissens- und Informationsgesellschaft. In: ROTHE, G.: *Alternanz die EU-Konzeption für die Berufsausbildung.* Universitätsverlag, Karlsruhe, 2004, 179–184.

There could not be better way to conclude this paper than to recall an ancient Chinese proverb. It says: *When planning for a year, plant corn. When planning for a decade, plant trees. When planning for life, train and educate people.*[20]

[20] Guanzi (c. 645BC)

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# RELEASE FROM PRISON

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## 1. Introduction

It is well known, that in Hungary the prison population is high by European standards. In 2013 there were 18,042 people in prison custody (the possible: 12,584 people). The majority of these prisoners are serving determinate sentences, but a growing number face indeterminate (life) sentences.[1] This figure shows the owercrowding in Hungarian prison.

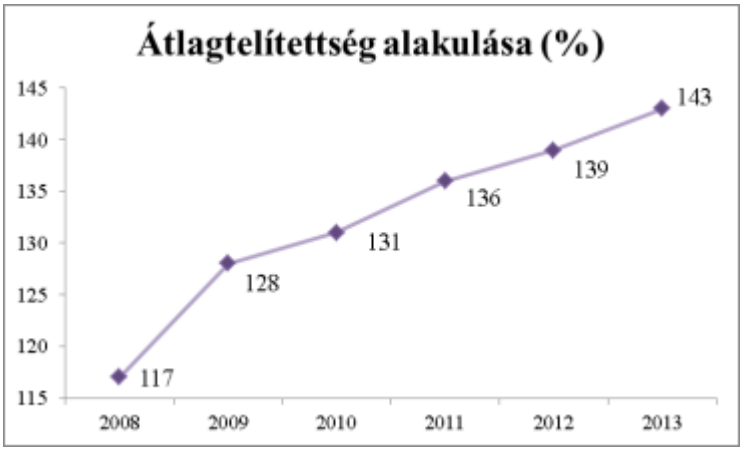


*Figure 1*
*The owercrowding in prison in Hungary from 2008–2013*

Imprisonment shall be executed on the security level assigned by the court, respectively on minimum, medium or on maximum security level.
The prisoner is assigned to the respective prison, preferably to the nearest to the domicile of the prisoner, registered by the National Prison Administrative. On different security levels of imprisonment, the prisoner's

a) segregation from the society
b) detention and supervision
c) movement within the parameters of the prison,
d) regime of life,

[1] http://www.bvop.hu/?mid=77&cikkid=2168

e) amount of money alloted for personal needs,
f) rewards and disciplinary sanctions
g) participation in prisoner organisations are different.

A new act was enacted in 2013 in Hungray, which came into force on 1 January 2015. This is theAct CCXL of 2013 for the execution of punishments and measures. This act takes focus on the reintegration, rehabilitation.

## 2. The system of early release in Hungary

Some data about Hungary:
Population: 9,839,000
Number of inmates: 18,244
Official capacity: 12,604
Inmates Imprisonment rate: 184 inmates/100,000 citizens
Female inmates: 1,227 inmates
Juveniles: 468 inmates
Overcrowding: 143%


*Figure 2*
*National and regional institutions, country institutions*[2]

The imprisonment may be life imprisonment or imprisonment lasting for a definite period of time. The shortest and the longest duration of a sentence for a specific term of imprisonment shall be three months and twenty years, respectively, or twenty-five years in respect of cumulative or consolidated sentences and for crimes committed in affiliation with organised crime.

[2] http://www.bvop.hu/?mid=4&lang=hu

While imprisonment lasting for a definite period of time may be applied against any perpetrator being over the age of 14 and possessing the general conditions of crimial liability, life imprisonment may be applied only against a person being over the age of 20 – at the time of committing the concerned crime.

The court may rule in the judgement sentencing life imprisonment that the convict might not be released from the penal institution even after serving certain part of his time.

In that case life imrisonment literally lasts for the lifetime of the convict, and thereby becomes the most severe sanctions of Hungarian criminal applicable law.

## 3. Life imprisonment

The toughest amendments concerning conditional release from life-imprisonment were made in 1998, and are still in force. This modification introduced the so-called "real life imprisonment" in cases where conditional release could be excluded by the sentencing judge. That is life sentence in this case, which would last literally until the end of the prisoner's life.

If the possibility of release on conditional release will not be excluded by the judge,[3] then in case of offence that can be be prosecuted without a time limit, the minimum period (before granting parole) must be ordered by the judge as being at least 25 years, maximum 40 years.

## 4. Imprisonment lasting for a definite period of time

One of the most effective tools of changing the attitudes of the convicts is the institution of conditional release. The essence of parole is that after serving a determined part of the punishment, it renders the opportunity to the convict to become reintegrated into the society.

Early release in Hungary is based on discretionary decisions and it is always conditioned. The basic provision governing the early release of prisoners is Article 38 (1) of the Penal Code.[4] According to this provision, prisoners can be conditionally released from determinate prison sentences after they have served two-thirds of their sentence. Since the amendments of 1998 a minimum period of three months must be served by the prisoner before being released conditionally.

The conditional release aims to ensure the opportunity of an effective re-socialization for the well-behaving prisoners. In this case, the aim of the penalty can be achieved without serving the complete term of imprisonment. The decision about the release of a certain prison inmate on parole belongs under the competence of the penal executive judge. There are objective criterion and subjective criterion on parole.

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3 NAGY, Anita: *Penal Judge.* Miskolci Doctorate Studies. Bíbor, 2015/2, 57–79.

4 Penal Code: The Act C of 2012.

a) The main objective criteria for release on parole is that a certain proportion of the sentence must have already been served. Definitely the two-thirds of their sentence. According to Article 38 (3), when the court imposes a term of imprisonment of no longer than five yeras, the court may – in circumstances deserving special consideration – grant conditional release after half of the sentence has been served. This option is not available in the case of multiple recidivists.

b) The subjective criteria is a particularly good prognosis for the future. The deciding judge must be convinced that there is no danger that the offender will relapse into further crime. The penal judge primarily may take into account the opinion of the penal institution concerning the prospects of the future. The judge shall examine the statement of the convict and other objective circumstances, such as the family circumstances of the convict, the opportunities of his employment, sources of his living.
The penal institution supports it, if the prisoner has a lot of rewards. The rewards in prison can be: praise, permisson of extra opportunity to reeceive extra parcel, permission of ecxtra opportunity to meet visitors, extension of the amount of money allotted for personal needs, article reward, money reward, delating the record of executed disciplinary sanctions, short term absence of leave, authorised absence.

The competent authority for conditional release is always a penal judge (Special chamber of the County Court). The penal judge acts as a single judge. The penal judge conducts the hearing of the offenders, in case of presenting evidence he holds trial where the prosecutor and the defender are permitted to be present. The penal judge conducts the hearing and holds the trial within the parameters of the penal institution. The decision, reached by the penal judge is appealable. If the penal judge has not released the prisoner on parole, he may review the chance of the release of the prisoner later.

The penal judge terminates the procedure if the motion has been withdrawn by the prosecution on the grounds of justifiable reason.

Appeals against the decision of the penal judge are decided by an appeal panel of the county court. The procedural costs are covered by the State.

In the following table data are focusing on the conditional release from 2010–2013:

Table 1
Conditional release in Hungary.
The first line shows the total number,
the second line the conditional released prisoners

| | | |
|---|---|---|
| 2010 | 7,533 | 6,079 |
| 2011 | 7,598 | 6,037 |
| 2012 | 7,334 | 5,900 |
| 2013 | 7,427 | 5,945 |

## 5. Probationary Supervision

The system of early release can include supervision by the probation services according to Article 69 of the Penal Code. The court shall place the convicted person under the supervision and guidance of a probation officer.

Probationary Supervision is a measure of educational function and a measure of an accessory character. This preventive measure cannot be applied independently, only in addition to imprisonment (penalty) and other measures.

According to Article 69 of Penal Code, probationary supervision can be applied:

1. for the postponement of accusation
2. for the duration of conditional release
3. for the duration of probation
4. for community labour
5. for suspended imprisonment

If the perpetrator is juvenile or recidivist, the application of probationary supervision is obligatory in the cases mentioned above. According to Article 70 of Penal Code the probation term is at least one year and no longer than five years. It shall be not less than the remainder of the sentence. The Probation Service have behavioural rules. Some of the behavioural rules are defined by the law, but the law also allows the prosecutor or the judge to order other requirements in accordance with the circumstances of the offender.

There are some examples for behavioural rules: the perpatrator is not allowed to contact concrete persons, she/he keeps away from the victim, carries on with studies or registers for job search. Article 71 (1) of Penal Code contains a long list of examples for behavioural rules. The main types of behavioural rules are the following.

1. The offender may be ordered to discontinue a form of conduct or activities related to the crime (such as visiting clubs or similar venues) or an obligation similar to a restraining order may be imposed on the offender (typically for offenders of domestic violence).
2. The offenders may be ordered to participate in treatment, trainings or counselling related to character or behavioural problems, addictions etc., for instance they may be required to undergo medical treatment, or to attend aggression management training, social skills improvement training, labour market training and job counselling.
3. Obligations to makeup for missing education; for instance the juvenile offenders can especially be ordered to continue or complete their studies or to attend learning assistance programmes.
4. Behaviour rules related to restitution; if such rules are prescribed, the offender may be required to pay compensation or provide symbolic reparation for the damage caused by the crime.

Table 2
Cases of ordering probation supervising from release

| | ***Mandator*** | ***Compulsory cases of ordering*** |
|---|---|---|
| ***Duration of conditional release*** | *penal judge* | *recidivist, juvenile* |
| ***Temporary release from reformatory*** | *penal judge* | *always* |

## 6. Tha after-care of the released prisoners[5]

The role of the probation officer is significant not only in the implementation of alternative sanctions, but also the task of after-care.[6] The aim of after-care is to provide the released prisoners or offenders released from prison or reformatory with the help for the social re-integration and for the creation of the necessary social conditions in order to protect the public and to prevent crime repetition.

Since 2003, after-care begins with six months before the expected time of release. The assistance may continue after release if the ex-convict requires it subsequent to the release.

The probation officer – among others – helps insolving housing problems, job search, obtaining documents and arranging other official matters.

The probation officer may direct the person under after-care to religious, charity or other organizations co-operating with the Probation Service, and in reasonable cases may provide the client with a small amount of cash subsidy.[7]

After-care serves both social and crime preventions roles, since one of the major reasons of recidivism is the disorder in the abovementioned circumstances as well as the sence of helplessness, which can be charged by the probation officer in cooperation with the client.

The after-care tasks in the reformatory and penal institutions are carried out by the competent probation officer according to the headquarters of the institutions, while the after-care following release and the preparation of the family are implemented by the probation officer of the competent county office. The number of persons under after-care all over the country is approxamately 2,200 annully.[8]

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5 http://kih.gov.hu/information-in-english1/-/asset_publisher/4frusdbuyVxX/content/information-in-english-probation-service

6 Issue of Central Office of Justice: Hungarian Office of Justice Probation Service, 2.

7 Issue of Central Office of Justice: Hungarian Office of Justice Probation Service, 4.

8 http://kih.gov.hu/information-in-english1/-/asset_publisher/4frusdbuyVxX/content/information-in-english-probation-service

## 7. Recalling conditionally released prisoners in Hungary

Conditions for recall are prescribed by law in Penal Code Article 40 (1) (2) According to the legal doctrin, the court shall terminate the parole, if the prisoner is sentenced to a term of executable imprisonment:

*a)* during the time when released on parole for a crime committed after the date on which the decision of the court becomes enforceable, or
*b)* for a crime committed during the time when released on parole.

### *7.1. So a reason for a recall a new offence.*

The suspension of the sentence can be revoked, if the conditionally released offender commits an offence during the probation period, which shows that the Courts expectation in his good prognosis has been disappointed.

It is agreed that not every punishment will automatically disqualify an offender from remaining on conditional release. Only the prisoner is sentenced to a term of executable imprisonment will automatically disqualify an offender from remaining on conditional release.

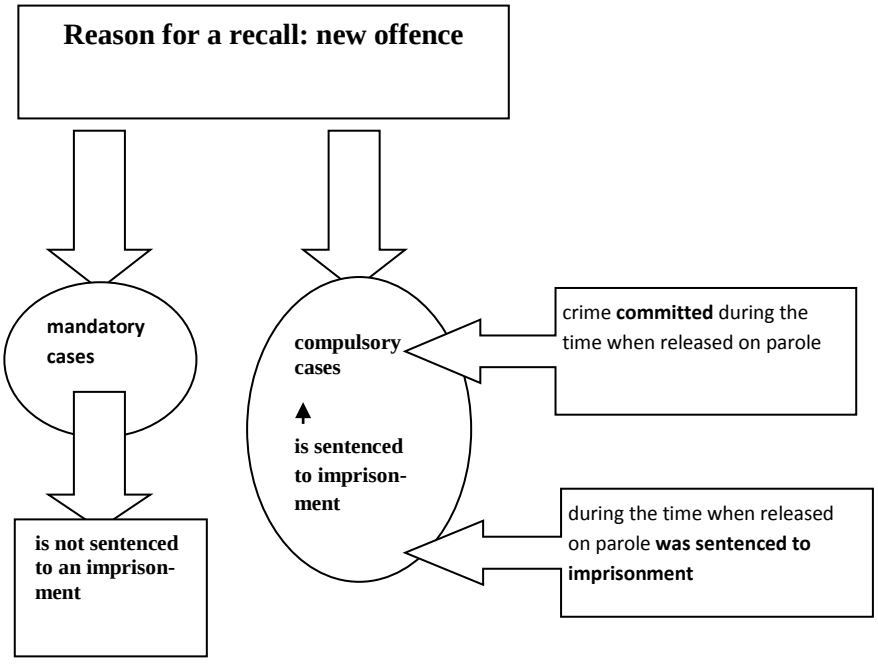


*Figure 3*
*Reason for a recall: new offence*

### *7.2. Serious Violation of direction*

It also possible according to Code Execution of Punishments and measures (Act CCXL of 2013) Article 61 (1) the serious violation of direction. The suspension of

the remainder of the sentence can furthermore be revoked if the released prisoner deliberately or persistently violatest the Court's instructions.
In this case the prosecutor files a motion of parole revocation to penal judge.
The penal judge has the right to decide if the behavioural rules serious or not.

### *7.3. Escape*

According to Code Execution of Punishments and measures Act 2013 CCXLArticle 61 (2) if the prisoner on parole has tried to escape from the authorities before his arrest, or attempt of escape can reasonably be suspected, the prosecutor, or after the filling of the motion, the penal judge may order the temporary execution of imprisonment.

**Exceed himself from conditional release**

There are two kind of exceed from conditional release:

1. if one does not appear for the starting of imprisonment
2. if one does not appear because of its own fault.

Life imprisonment violates the European Convention on Human Rights. Lifelong imprisonment without the opportunity of parole (actual life sentence) was introduced into Hungarian criminal law in 1998. At present, Hungary is the only EU Member State whose legal system makes it possible to impose a so-called "actual life sentence" on perpetrators of serious crimes.

In *Case of László Magyar v. Hungary*[9] (Application no. 73593/10*),* the applicant complained that his whole life sentence was incompatible with Article 3 of the Convention, which reads as the follows: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

As the third party – The Hungarian Helsinki Committee[10] expressed the opinion that the possibility of a presidential pardon did not mean that an actual life sentence in Hungary might be characterised as reducible in terms of the case-law of the Convention.

In the judgement *the European Court of Human Rights* did not say that Hungarian convict Mr László Magyar, who was sentenced to life-long imprisonment without the possibility of a parole (i.e. actual life-long imprisonment), shall be released. In fact, it did not even say that Mr Magyar shall be definitely released in the future.

The merit of the decision is that Article 3 of the Convention "must be interpreted as requiring reducibility of the sentence, in the sense of a review" which allows the domestic authorities to consider in case of all convicts whether further detention is justified, and all detainees are entitled to know "what they must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought."

As the result of this decision in Hungary in 18 November 2014 modified the new Code of Execution of Punishments and measures (Act 2013 CCXL).

According to this modification the procedure of Presidential Pardon have to consider *ex officio* and the condition of the procedure: the convict must be completed 40 years from his life long imprisoment.

**Recalling conditionally released prisoners in Germany**

Early release in Germany is based on discretionary decisions and is always conditional.[11] The law provides several possibilities for an early release from prison or preventive detention. Which law has to be applied depend on different criteria, such as the age of the offender, the length of the prison sentence, the type of offender.

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9 Case of László Magyar v. Hungary Application no. 73593/10 http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i/ 03. 02. 2015

10 http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-144109#{"itemid":["001-144109"]}

11 PRUINE, Ineke: Recalling conditionally released prisoners in Germany. *European Journal of Probation*, 2012/4, 63.

The basic provision governing the early release of prisoners is in 57 (1) of the Penal Code. According to this provision, prisoners can be conditionally released from determinate prison sentences after they have served two-thirds of their sentence. In exceptional cases (first time offenders; particularly good prognosis) they can be released after they have served half of their sentence [57 (2) of the Penal Code].

Life prisoners can be released after having served at least 15 years 57 a of the Penal Code). Conditional early release is granted to prisoners with good prognoses, but the exclusion of all risk is not required – a "justifiable" degree of risk is accepted. There are more detailed regulations for young inmates of youth prisons (aged 14–24).

The competent authority for conditional release is always a judge (special chamber of the District Courts). Statistical data about conditional release are not very accurate but, in practice, such release seems to have become less frequent over the last 10–15 years.

The system of early release can include supervision by the probation service sas in Hungary.

According to 56d of the Penal Code the court shall place the convicted person under the supervision and guidance of a probation officer for all or part of the probationary period, if this appears necessary to prevent him from committing offences.

Case loads are very high, with each probation officer being allocated about 70 clients on average at any one time. According to 57 (3) of the Penal Code [read together with s. 56a (1)], the probation term is at least two years and no longer than five years. It shall be not less than the remainder of the sentence.

Conditional release may be combined with so-called directives („Weisungen") or obligations („Auflagen"). Directives are imposed in order to influence the behaviour of the offender and the living routines of him/her (see 56 c of the Penal Code) and, in this way to prevent reoffending.

They can consist of an instruction to avoid contacts with persons who might negatively influence the released offender or to avoid certain places, to try to find work or – with the consent of the offender – to undergo alcohol or other treatment.[12]

Obligations are meant to fulfill the victim's or society's desire for satisfaction.

In the majority of all cases the recall is caused by a new offence. This means that the ratio of those whose suspension of the sentence is revoked for violations of directives or obligations is comparably small.[13]

[12] For details see 56c (2), (3) of The Penal Code.

[13] PRUINEE, Ineke: Recalling conditionally released prisoners in Germany. *European Journal of Probation*, 2012/4, 72.

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# THE NEW RULES OF THE EUROPEAN PUBLIC PROCUREMENT LAW

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## 1. Introductory thoughts. Antecedents of the reform and the reasons for reviewing the prior regulation

In December 2011, the European Commission (hereinafter Commission) made a proposal on the review of the than European public procurement directives, namely the 2004/17/EC[1] and 2004/18/EC[2]) directives. At the same time the Commission also initiated the adoption of a third directive, which contains separate rules on the concession contract.

Several considerations stood in the background of the overall public procurement reform. One of the defined goals of the reform was the making the European public procurement regulation more transparent and the ensuring a better access of European enterprises, in particular small and medium enterprises (hereinafter SMEs) to the public procurement procedures. Another important aspect was to make the regulation simpler and more effective and to enforce better and stronger the classical public procurement principles (e.g. best value for money, competition etc.)

Nevertheless, the European law-maker also should take into account those economic, social and political changes, which could be observed in the last decade and which had also influence on the development of the European public procurement law.

The regulation package, which was prepared and proposed by the Commission, was passed by the European Parliament on 15th January 2014. As the last step of the legislative process, the European Council adopted the new directives on 11th February 2014.

On the next few pages we intend to stress the most important elements, key features of the above mentioned reform of the European public procurement law and to introduce some new legal instruments. Above the concrete legal changes of the regulation, we also refer to the public procurement reforms taking place in the

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1 Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors. *OJ L,* 134, 30. 4. 2004, 1–113.

2 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. *OJ L,* 134, 30. 4. 2004, 114–240.

Member States as a necessary consequence of the European changes and the so-called national implementation measures (NIMs), which have been already adopted till now.

## 2. The legislative package for the modernisation of the European public procurement

The European public procurement legislative package, which was adopted by the European law-maker in several phases, contains three directives. Two of them, namely the 2014/24/EU[3] and the 2014/25/EU[4] served the concrete reform of the public procurement rules, since they replace the previously operating (above already mentioned) public procurement directives. The former regulates the purchases of the classical sector; the latter contains provisions on the public utilities sector. Next to the new public procurement directives, a third measure also keeps the part of the European legislation package. This directive (2014/23/EU[5]) contains single rules on the concession contract. With this legal act the European law-maker not only in the provisions, but formally also separates the concession rules from the public procurement regulation.[6]

The new rules shall be implemented by the national legislator until 18th April, 2016. However, there is also another deadline (September 2018) for the e-procurement rules. The main reason for this two different deadlines, that the preparation work of introducing the above mentioned electronic procurement rules requires more time in certain Member States, because of their low technical preparation level of certain Member States. Naturally, this factor does not significant in some other Member States. As we are going to see under point 6, these Member States have already adopted their national implementation measure either as single legal act (e.g. United Kingdom) or as an amendment of the operating public procurement regulation (e.g. France). An interesting point is, that both mentioned regulation maintained a later deadline (as to the European directives) for the introduction and coming into force of the rules on e-Procurement and electronic communication.

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3 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC. *OJ L*, 94, 28. 3. 2014, 65–242.

4 Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EU. *OJ L*, 94, 28. 3. 2014, 243–374.

5 Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts. *OJ L*, 94, 28. 3. 2014, 1–64.

6 The detailed review of the European public procurement legislation package see NEUN, Andreas– OTTIG, Olaf: Die Eu-Vergaberechtsreform 2014. In: *Europäische Zeitschrift für Wirtschaftsrecht,* 12/2014, 446–453, 448.

## 3. Simplification and effectiveness

As it was previously defined, the simplification of the public procurement procedures and the increasing of their effectiveness was one of the main aims of the EU's public procurement reform. Several sign of this intention can be caught in the directives. However, it is also important, that the simplification affects not only the contracting authorities, but all economic operators also, who are involved into the public procurement procedure.

### *3.1. Shorter deadlines, decreasing bureaucracy*

One of the touchable marks of the simplification of public procurement procedures is the foreshortening of the procedural deadlines. With this act – as to the intention of the European legislator – the public procurement procedures became more flexible and faster in the future. The deadlines shorten to 30 days in average.[7] (It is worth to mention, that the foreshortening of the deadlines serves not only the simplification of the public procurement procedures, but the more effective involving of SMEs into these procedures, which was also defined as an aim of the European public procurement reform.)

The roll-back of the bureaucratic elements of the public procurement is aimed in several forms in the new European directives. Some measures appear in the field of exclusion from public procurement procedure. (The exclusion from the public procurement procedure always stands at the core of public procurement examinations, since it is one of the most sensible questions, because it has a strong impact on the future of a certain tenderer.)

*a) Demonstrating of reliability*

The old directives (and the connecting judicial practice) have already known the legal institution of self-cleaning, i.e. the possibility for an economic operator, who is in such a situation, which grounds exclusion from the public procurement procedure, to prove its trustiness.[8] Nevertheless, such a possibility for exculpation still missed any legal ground at that time.

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[7] See FLETCHER, Glenn: Minimum time limits under the new Public Procurement Directive. In: *Public Procurement Law Review*, Issue 3 (2014), 94–102.

[8] ARROWSMITH, Sue–PRIEß, Hans-Joachim–FRITON, Pascal: Self-Cleaning as a Defence to Exclusions for Misconduct – An Emerging Concept in EC Public Procurement Law? In: *Public Procurement Law Review*, Issue 6 (2009), 257–282, 259; PRIEß, Hans-Joachim–STEIN, Roland M.: Nicht nur sauber, sondern rein: Die Wiederherstellung der Zuverlässigkeit durch Selbstreinigung. In: *Neue Zeitschrift für Baurecht und vergaberecht*, Nr. 13 (2008), 230; HJELMENG, Erling–SØREIDE, Tina: Debarment in Public Procurement: Rationales and Realisation. In: RACCA, Gabriella Margherita–YUKINS, Christopher (eds.): *Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally*. Bruylant, 2014, 226–227.

Directive 2014/24/EU – contrary to its antecedent – *expressis verbis* declares, that the economic operator that is in one of the situations referred to in paragraphs (1) and (4) may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion.[9] [10] This provision got place in the directive upon the practice of the Court of Justice of the European Union (hereinafter CJEU), since the possibility for self-cleaning has already been recognized in it.

As to the Article 57, paragraph (1) of the Directive 2014/24/EU, the exclusion of the economic operator is based on the committing of a certain crime (e.g. participation in a criminal organisation, corruption, fraud, terrorism, money laundering, child labour and other forms of trafficking in human). In these cases the contracting authority shall exclude the economic operator from the public procurement process. Article 57 paragraph (4) of the above mentioned directive contains those circumstances (e.g. grave violation of professional obligation, detaining information, giving untrue information, undertaking unduly influence the decision-making process of the contracting authority), under which the contracting authority has right to exclude the economic operator, but the exclusion is not prescribed by law.

The economic operator's duty of proving is very complex. On the one hand, the economic operator shall prove that it *has paid* or *undertaken to pay compensation* in respect of any damage (injury) caused by the criminal offence or misconduct. This means the reparation aspect of the duty. One the other hand, economic operator also shall prove that it – manner by actively collaborating with the investigating authorities – clarified the facts and circumstances in a comprehensive and taken such *concrete technical, organisational and personnel measures* which are appropriate to prevent further criminal offences or misconduct. (Such measure can be for instance the realignment of the organisation or the sending-off of the employee, who is personally responsible for the act, upon which the economic operator would have been excluded from the public procurement procedure.) This other aspect of the proving serves the prevention.

It is substantial that there is no general "recipe" for accept the economic operator's demonstration of reliability. Therefore, the measures taken by the economic operators shall always be evaluated with taking into account the *gravity* and *particular circumstances* of the criminal offence or misconduct. Where the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision.[11]

In the case, when the evidence given by the economic operator is satisfactory, the contracting authority shall not exclude the certain economic operator from the

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9 Directive 2014/24/EU, Article 57, paragraph 6.

10 PRIEß, Hans-Joachim: Rules on Exclusion and Self-Cleaning Under the 2014 Public Procurement Directive. In: *Public Procurement Law Review*, Issue 3 (2014), 112–121.

11 About the self-cleaning see in detail WIMMER, Jan Philipp: *Zuverlässigkeit im Vergaberecht: Verfahrensausschluss, Registereintrag und Selbstreinigung, Schriften zum Vergaberecht.* Schrift 38, Nomos Verlag, 2012.

public procurement procedure. Otherwise, particularly in those cases, when the measures taken by the economic operator are not appropriate as to the contracting authority and therefore the demonstrating of the non-existence of the ground for exclusion is not satisfactory, the contracting authority shall justify its exclusive decision to the economic operator.

*b) The European Single Procurement Document*

The Directive 2014/24/EU also makes possible for the economic operator to demonstrate previously the non-existence of the ground for exclusion by using the so called European Single Procurement Document (hereinafter ESPD). In this document the economic operator can proclaim that it is not in one of the situations referred to in Article 57 in which economic operators shall or may be excluded or it meets the relevant selection criteria that have been set out pursuant to Article 58. On the other hand, it can give relevant information required by the contracting authority. Moreover, the statement of the economic operator shall name the public authority (or third person), who is responsible for the issue of the supplementary documents, certificates. The economic operator also shall declare that it can show the above mentioned document for demand.[12]

As it can been seen, the ESPD has double content. In narrower sense it has proving function, but in wider sense it not only proves, but provides information related to the status of the economic operator.

The uniformity of the ESPD is assured by the fact that it shall be drawn up on the basis of a standard form, which is to be established by the Commission by means of implementing acts. The ESPD shall be provided exclusively in electronic form.

As to the intention of the European legislator, the using of the ESPD is going to lead to the decreasing of the administrative burdens and costs of public procurement procedures, since the certifying document shall effectively be submitted to the contracting authority exclusively by the winner.

*c) The e-Certis database*

Introducing the ESPD seems to be a good measure. However, a wholly electronic document as the ESPD can only reach its goal, if the technical background also exists. To ensure this technical background, the European legislator obliges the Member States to use the – at present already existing – e-Certis information system. At this time the e-Certis is ensured and maintained by the Commission, but the updating and controlling of the data is in the competency of the Member States. The national authorities do these activities voluntary, therefore the using of e-Certis presently does not give sufficient safety for the actors of the public procurement procedures. In the future, the "up-keeping" of the e-Certis will be compulsory for the Member States. One the one hand they shall ensure that the information con-

[12] Directive 2014/24/EU, Article 59, paragraph 1.

cerning certificates and other forms of documentary evidence introduced in e-Certis established by the Commission is constantly kept up-to-date.[13] On the other hand, Member States shall make available and up-to-date in e-Certis a complete list of databases containing relevant information on economic operators which can be consulted by contracting authorities from other Member States. Upon request, Member States shall communicate to other Member States any information related to these databases.[14]

In some Member States some electronic databases and registries already exist, which are very useful in the course of public procurement procedure. In Germany there is a special registry form, the so-called *Korruptionsregister*, which is still used only in some states, albeit there were initiations at the introduction of a federal registry.[15] At present, there are both single and joint registries in Germany. North Rhine-Westphalia was the first, who introduced such a registry in 2004 by its Act on the Fight against Corruption.[16] In the next few years (between 2004 and 2007) some other states (Bavaria,[17] Baden Württemberg[18] and Berlin[19]) also adopted legal acts, which contain provision on the state corruption registry. From 2010 the registry also exists in Hessen and from 2011 in Bremen.[20]

As it is defined in all of the above mentioned state acts, the registries primarily aim at the demonstration of reliability. (As it can be seen, the main aim of the act corresponds with the European public procurement regulation, which also puts emphasis on ensuring the possibility for economic operators to demonstrate their reliability.) It is a common feature that in all registries both natural and legal persons are registered, who are guilty of a certain crime. The certain registry always determines the scope of those crimes, which results the registration. It is interesting, that typically not only those crimes are named, which have corruption nature, but some other crimes, which relate for example to the unfair competition.

Next to the above mentioned single, on state level existing registries, there is another Korruptionsregister, which has been operating from 1st January 2014. The

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13 Directive 2014/24/EU, Article 61, paragraph 1.

14 Directive 2014/24/EU, Article 59, paragraph 6.

15 About the registry see FÜLLING, Daniel: *Korruptionsregister: Zwischen Anspruch und Wirklichkeit.* Brandenburgische Studien zum Öffentlichen Recht, Kovac, Dr. Verlag, 2013.

16 *Gesetz zur Verbesserung der Korruptionsbekämpfung und zur Errichtung und Führung eines Vergaberegisters in Nordrhein-Westfalen (Korruptionsbekämpfungsgesetz – KorruptionsbG)*

17 *Richtlinie zur Verhütung und Bekämpfung von Korruption in der öffentlichen Verwaltung (Korruptionsbekämpfungsrichtlinie – KorruR)*

18 *Verwaltungsvorschrift zur Verhütung unrechtmäßiger und unlauterer Einwirkungen auf das Verwaltungshandeln*

19 *Gesetz über die Einrichtung und Führung eines Registers über korruptionsauffällige Unternehmen in Berlin (Korruptionsregistergesetz – KRG)*

20 *Bremisches Gesetz zur Errichtung und Führung eines Korruptionsregisters (Bremisches Korruptionsregistergesetz – BremKorG)*

introduction of this registry is a result of an agreement between the City of Hamburg and Schleswig-Holstein, who intended to cooperate in the field of the fight against corruption. Contrary to the above mentioned registries, this latter operates jointly.)

As it can be seen, the European public procurement reform primarily intends to reduce the administrative burdens of the public procurement procedures by different electronic measures. An important provision of the directive 2014/24/EU, which prescribes for the Member States to ensure that all communication and information exchange (e.g. submission of an offer) are performed using electronic means of communication.[21] Regarding these electronic means, the Directive also prescribe that the tools and devices to be used for communicating by electronic means, as well as their technical characteristics, shall be non-discriminatory, generally available and shall not restrict economic operators' access to the procurement procedure.

### *3.2. Changing procedural rules, new procedures*

Thy selectable types of public procurement procedures have been increasing in the past decade. Next to the near classical open, restricted and negotiated procedure, the European legislator made possible the application of competitive dialogue after the European public procurement reform in 2004. The application of this new type was not compulsory for the Member States, but they could decide about the implementation of the relevant provisions into the national public procurement regulation.

Albeit the new – in 2014 adopted – European public procurement directives intend to simplify the public procurement procedures, the scale of procedure types has been broadened, since the European law-maker introduced the competitive procedure with negotiation and the innovation partnership. It is worth to mention that the application of the new procedure types will be compulsory for the Member States in the future, i.e. they shall implement the relevant provisions into their national public procurement law.[22]

#### *a) Competitive procedure with negotiation*

As it was mentioned before, a special procedure appears within the types of public procurement procedures, which washes away the borders existing between competitive dialogue and negotiated procedure, but at the same time mixes the most favourable features of them. Opposite to the "traditional" competitive dialogue, in the case of competitive procedure with negotiation the contracting authority has the

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[21] Directive 2014/24/EU, Article 22, paragraph 1.

[22] About the procedures see in detail: TELLES, Pedro–BUTLER, Luke R. A.: Public Procurement Award Procedures in Directive 2014/24/EU. In: LICHERE, Francois–CARANTA, Roberto–TREUMER, Steen (eds.): *Novelties in the 2014 Directive on Public Procurement.* DJØF Publishing, 2014, 131–184.

right to negotiate with all tenderer in order to facilitate the submission of the best tenders.

Compared to the negotiated procedure there is a significant difference, namely that the contracting authority negotiates not only with those tenderers, who are chosen, qualified and invited for submit tender by itself, but the possibility to negotiate is given for every tenderer. Otherwise, the negotiations are based on the offers, which have been submitted at the beginning of the procedure (so-called "initial tender") and serve the improving of the content of these tenders. The negotiating phase of the procedure formally terminates, when – after the negotiations – the contracting authority asks again the tenderers to submit their – by this time revised – offers.

With taking account this latter act, it can be stated that the examined new type of public procurement procedures – leastwise with regard to its character – is more similar to the competitive dialogue, than the negotiated procedure. Nevertheless, several differences also can be drafted. While the proposals ("outline solutions", "project proposals" etc.) submitted in the first phase of the "traditional" competitive dialogue expressly conform with the requirements and needs framed by the contracting authority, in the case of competitive procedure with negotiation the tenderers submit their offers at the beginning of the procedure and these offers keep the base of the further negotiations. After finishing negotiations, these offers can be revised and they get finality with their "re-submitting".

The competitive procedure with negotiation presumably will mean real possibility for the purchases of those contracting authorities, whose purchasing demands can fairly and precisely be drafted and therefore the preparation of the offer and the making-up of the documentation basically will not cause problems. In these cases maintaining the possibility to negotiate (as a "back-stair") can be advantageous for the contracting authority, if questions arise from the side of tenderers, which questions have to be negotiated.[23]

*b) Innovation partnership*

There is another public procurement procedure type, which is introduced by the directive 2014/24/EU. The innovation partnership is basically appropriate for those purchases, which aimed at innovation and typically planned for long-term.

The preamble of the directive remind that research and innovation (including eco-innovation and social innovation) are among the main drivers of future growth and therefore play key-role in the "Europe 2020" strategy for smart, sustainable and inclusive growth. In order to inspire the innovation, contracting authorities shall make the best strategic use of public procurement.

[23] About the competitive negotiated procedure see in details: DAVEY, Jonathan: Procedures Involving Negotiation in the New Public Procurement Directive: Key Reforms to the Grounds for Use and the Procedural Rules. In: *Public Procurement Law Review*, Issue 3 (2014), 103–111.

With the introduction of the innovation partnership, the European legislator intended to ensure the application of special procedures for the contracting authorities for those cases, in which a need for the development of a certain innovative product or service or innovative works and the subsequent purchase of the resulting supplies, services or works cannot be met by solutions already available on the market.

The innovation partnership means a long-term cooperation, which shall be structured in successive phases following the sequence of steps in the research and innovation process, which may include one the one hand the manufacturing of the products, but the provision of the services or the completion of the works, one the other hand. Innovation partnership – according to the decision of the contracting authority – can be set up only with one partner or with several partners, who conduct separate research and development activities.[24]

The provisions of the innovation partnership mainly based on the procedural rules that apply to the competitive procedure with negotiation. It is also important that contracts can solely be awarded on the basis of the best price-quality ratio, since – as the preamble of the directive also emphasizes –, this aspect is the most appropriate in the course of comparing innovative solutions. The directive also stresses, that innovation partnership should not use in such a way, which prevent, restrict or distort competition.[25]

## 4. Supporting the participation of SMEs in the public procurement

Promoting the participation of SMEs in the public procurement was defined as one of the key-elements of the European public procurement reform. As the Commission's Green Paper on the modernisation of EU public procurement policy[26] worded in 2011, these enterprises keeps the backbone of the European economy by acting significant role in the field of creating workplaces, growth and innovation.

Although the new directives aimed at taking the SMEs into public procurement, it is worth to pin down that the intention of the legislator does not and could not spread over this goal, since the favouring or ensuring different preferences for SME-s would be opposite to the principle of equal treatment and restraint of discrimination, which are worded as essential elements of the European public procurement regulation. With regard to the SMEs, several element of the regulation should be mention.

In the course of public procurement procedures it was common that the participation of an SME was legally possible, but because of other factor (typically because of the measure of the contract) the certain enterprise *de facto* could not submit appropriate offer. Contrary to the prior regulation, which expressly prohibited

[24] Directive 2014/24/EU, Article 31 paragraph 11.

[25] Directive 2014/24/EU, preamble paragraph (47)–(49).

[26] Green Paper on the modernisation of EU public procurement policy. Towards a more efficient European Procurement Market, COM/2011/15 final, Brussels, 27th January 2011.

the division of a contract into lots, under the new rules contracting authorities may decide to award a contract in the form of separate lots and may determine the size and subject-matter of such lots.[27] In the case of such a "divided contract" an SME has better chance to submit appropriate offer, since the individual contracts better correspond to the capacity of SMEs and the their content can be more closely to the specialised sectors of SMEs or in accordance with different subsequent project phases.[28]

The previous public procurement regulation had another weakness; it declared such unreasonable requirements with regard to the economic and financial capacity of tenderers', which often meant groundless burden for the participation of SMEs in public procurement. The new directives intend to "soften" the rigour of the above mentioned requirements. It is true, that contracting authorities also may require the economic operators to have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the certain public procurement contract. Nevertheless, the directive 2014/24/EU introduces a strong limitation, when it defines that the minimum yearly turnover that economic operators are required to have shall not exceed two times the estimated contract value.[29] Next to this strict burden the directive recognizes that the application of more rigorous requirements can be justified in certain exceptional cases, in particular, when the performing of contract goes with higher risks or the appropriate performing has special significance for the contracting authority (e.g. the correct performing is a pre-condition of other contracts).

## 5. Improving the rules of in-house exemption

The adjudication of in-house procurement (elsewhere in-house exemption) has always been a "hot topics" in the European public procurement law, not only in legislative level, but in the judicial practice of the CJEU too. Directive 2014/24/EU makes a clean breast of this question and contains detailed – and partly revised – rules on those public contracts, which are concluded between entities within the public sector. These rules were mostly improved upon the CJEU's several judgements, which were born in the last decade in the field of in-house procurement.[30]

1. Under paragraph 1 of Article 12 of the Directive 2014/24/EU, public contract awarded by a contracting authority to a legal person governed by private or

[27] Directive 2014/24/EU, Article 46 paragraph 1.

[28] Directive 2014/24/EU, preamble paragraph 78.

[29] Directive 2014/24/EU, Article 58, paragraph 3.

[30] About the judicial background and the built-in judgements see: WIGGEN, Janicke: Directive 2014/24/EU: The New Provision on Co-operation in the Public Sector. In: *Public Procurement Law Review,* Issue 3 (2014), 83–93; JANSSEN, Willem A.: The Institutionalised and Non-Institutionalised Exemptions from EU Public Procurement Law: Towards a More Coherent Approach? In: *Utrecht Law Journal,* Issue 5 (2014), 168–186.

public law *falls outside the scope of this Directive*, if certain conditions (so-called "Teckal criteria"[31]) are fulfilled. These –cumulative – conditions are the followings:

(a) *the contracting authority exercises* over the legal person concerned *a control*, which is *similar to* that, which *it exercises over its own departments* ("control criterion");

(b) *more than 80% of the activities* of the controlled legal person *are carried out in the performance of tasks entrusted to it by the controlling contracting authority* or by other legal persons controlled by that contracting authority ("activities criterion"); and

(c) there is *no direct private capital participation* in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

The notion of "similar control" is precisely worded by the Directive. As to the referred paragraph of the Directive, control exercised by the contracting authority is similar to that, which it exercises over its own departments, if the contracting authority exercises a *decisive influence* over both strategic objectives and significant decisions of the controlled legal person (*direct control*). Such control may also be exercised by another legal person, which is itself controlled in the same way by the contracting authority (*indirect control*).

The third criterion under point c) is introduced by the new directives as a further limitation of the in-house exemption. Summing up, in essence, the above conditions all more or less correspond to the content of the in-house exemption as outlined by the CJEU.

2. As to the judicial practice of the CJEU, new provisions also take into account other kinds of relationships existing between entities governed by public law. Accordingly, those cases fall outside the scope of the Directive (i.e. the paragraph 1 of Article 12 shall be applied), in which

a) a contracting authority ("daughter company") awards a contract to its controlling contracting authority ("mother company"), or

b) to another legal person controlled by the same contracting authority ("sister company"). In this latter case, there is a further prerequisite, namely, that there is no direct private capital participation in the legal person being awarded the public contract with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person. Point a) of the referred para-

[31] See the Judgement of the Court in the Case C-107/98 in Teckal Srl v Commune di Viano and AGAC di Reggio Emilia, ECR [1999] ECR, I-08121.

graph covers the so-called "reverse vertical" constellation, whereas point b) concerns on the "horizontal relationship".

As to the paragraph 3 of Article 12, not only those situations fall outside the Directive, whereby a contracting authority exercises control on its own ("individual control"), but those cases, where the required control ("similar to that, which it exercises over its own departments") is exercised jointly by several contracting authorities ("joint control").

According to paragraph 4 of Article 12, a contract concluded exclusively between two or more contracting authorities also shall fall outside the scope of the new directive, if the following – cumulative – conditions are fulfilled:

(a) the contract establishes or implements a *cooperation between the participating contracting authorities* with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common ("horizontal co-operation");
(b) the implementation of that cooperation is governed solely by considerations relating to the public interest; and
(c) the participating contracting authorities perform on the open market less than 20% of the activities concerned by the cooperation.

## 6. The impact of the new European rules on the national public procurement legislations

As it was mentioned before, the adoption of the new public procurement directives naturally have effect on the public procurement law of the Member States, since national legislators have a duty to implement these new legal acts into their law until the deadline determined by the directives. Although the deadline for the implementation is 18th April, 2016, some Member State (namely France and the United Kingdom) already fulfilled this duty and the preparation and adoption of the new public procurement acts is already in process in several other Member States (e.g. Hungary).

In September, 2014, the French legislator adopted a decree about the measures of the simplification applied in the public procurement.[32] With this legal act, which came into force on 1st October, 2014, the French Public Procurement Code (*Code des marchés publics*, *CMS*) was amended, i.e. the French legislator took a stand on the modification of the existing public procurement rules instead of adopting a wholly new legal act.

Contrary to the French solution, the Parliament of the United Kingdom implemented the European public procurement directives by adopting a new legal act (No.12 of 2015). Most of its provisions came into effect on 26th February 2015. It is worth to mention, that the new regulation concerns the public procurement only

[32] Décret n° 2014–1097 du 26 septembre 2014 portant mesures de simplification applicables aux marchés publics.

in England, Wales and Northern Ireland, since in Scotland the EU reforms are being implemented separately.

With regard to the implementation deadline determined by the European directives, other Member States outside the above mentioned also shall implement the new provisions into their national public procurement law. As to the timetable deigned by the German Federal Ministry for Economic Affairs and Energy, the adoption of the new rules is to be happened during the autumn 2015, the planned time of coming into force is 18th April 2016.

In order to fulfil the implementation duty, which is set up in the new European directives, in October 2014 the Hungarian Prime Minister's Office published a so-called Conceptional Proposal[33] on the implementation of the European public procurement directives and the adoption of a new public procurement act. In this document the Prime Minister's office made clear, that Hungarian legislator would comply with the EU rules not by the overall modification of the operating public procurement act,[34] but the adoption of a whole new national regulation. Though the Hungarian Parliament's legislation program for the spring 2015 did not contain the planned adoption of the new act, on 18th May 2015 the Minister heading the Prime Minister's Office submitted to the Parliament the Proposal No. T-4849 on the Public Procurement. As to the statement of the Minister, the closing vote on the new act presumably takes place during the autumn 2015 and the provisions comes into force on 1st November 2015.

## 7. New rules on scale: sonorous goals – pretence solutions?

After a short and only for the most important elements extending review of the European reform of public procurement law it seems to be unambiguous that the revision of the prior regulation was necessary. One and a half year after the adoption of the legislation package, the adjudication and evaluation is difficult and probably untimely. However, it is sure, that positive and negative features already can be draw up.

It is welcomed, that in the course of the working up of the new public procurement provisions the European legislator had due foresight and turned with due sensibility to the CJEU's judicial practice, in which several notion has been developed, which are crucial not only for the effective application of public procurement rules, but for the legal certainty. As a result of this positive attitude of the European legislator, several, in the judicial practice precisely outworked definition took place in the directives and we face with a much more precise definition-making from the part of the legislator too.

Within the factors motivating the supervision of the European public procurement law European Commission stressed the promoting of a better access of SMEs

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[33] http://www.kormany.hu/download/a/e8/20000/%C3%9Aj%20Kbt%20koncepci%C3%B3.pdf (Downloaded: 4th March 2015)

[34] Act No. CVIII of 2011 on Public Procurement

to the public procurement. At first sight this goal has been realised, since new directives annul those limitations, which balked the participation of SMEs in public procurement procedures, but also facilitate the application some other measures, which implicitly promote the situation of SMEs.

New European directives unambiguously have epoch-making character, since different electronic solutions get bigger role, than ever had. In this field the compulsory maintaining and using of the e-Certis system shall be heightened. Moreover we may not forget about the introduction of the ESPD, which certifies the non-existence of a certain ground for exclusion from the public procurement process and which can only be submitted electronically to the contracting authority.

Beyond the positive features of the adopted European legislative package, we may not pass the negatives, which mostly mean the non-realisation of certain factors, which were defined by the Commission as a goal of the revision.

Though the simplification of the public procurement regulation was one of the primary aims of the reform defined by the Commission, in deed the adopted provisions far fail from the expectations: concrete simplifications did not occur, but the regulation partially became broader and sadly more complicated. Flexibility realised also in part, since flexible procedures (or procedures, which leastwise are intended to be flexible) can only be applied optionally in certain special cases

Several serious fault are generated by the fact, that European legislation missed to having regard during the reform process to the structural and administrational differences existing between the Member States and to taking into account, that the future working-up and the introduction of the different electronic registries is going to cause thoughtful difficulties in certain Member States.

Summing up, we can state that the reform of the European public procurement law and consequently the national laws was timely and definitely necessary. The elaboration of such an overall reform was a hard and enormous work, which – because of its grandeur –naturally carries the possibility for making mistakes. Now, the decision is in the national legislators' hand; by adopting their national implementation measures only they have the chance to correct the new regulation's smaller (or sometimes bigger) faults and to eliminate the unreasonable solutions existing in it. We hope they do that.

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# THE NATURAL LAW PRINCIPLES OF INTEGRATION AND ITS HUNGARIAN RESONANCE IN THE 19TH CENTURY

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## 1. Ideas of Natural Law in the Modern Period

Although the origin of the Natural Law's essence is to be found in the philosophical doctrines of the ancient ages, and it is also to be noticed within the framework of Christian theology having been prosperous in the Middle Ages. Its new type different from the philosophy and theology and focusing really on legal issues is shaping in the early modern period. From the 1600-ies onwards such political-philosophical questions were in the focus of interest as the origin and legitimacy of public authority, practical and appropriate ways of the exercising state power, the inter-relationship between the ruler and his subjects, which directed the centre of legal thinking towards the examination of public law issues. This trend was most markedly elaborated by the Dutch secular approach of Natural Law adopting the thoughts of French legal humanism and at the same time determined the tasks of natural law disquisition that aimed at establishing a comprehensive legal system and revealing universal principles of law which tend to prevail in a general way. The Natural-Law ideologists began to explore those principles, which basically regulate the coexistence of people.[1]

According to *Hugo Grotius* human being who is created *a priori* for social life is endowed by God with the *appetitus societatis* namely an impelling desire for society.[2] Therefore people are capable of exploring the necessities that ensure the harmony of the social existence of people. *Thomas Hobbes* by his conception of "State of Nature" and his idea of the individual emerging from the above men-

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1 FRIVALDSZKY János: *Természetjog – eszmetörténet* [Natural Law – History of Ideas]. Szent István Társulat, Budapest, 2001, 219; HOCHSTRASSER, Tim J.: *Natural Law Theories in the Early Enlightenment*. Cambridge University Press, 2002, 176. POKOL Béla: *Középkori és újkori jogtudomány. Az európai jogi gondolkodás fejlődése* [Medieval and Modern Jurisprudence, The Development of European Legal Thought]. Dialóg Campus Kiadó, Budapest–Pécs 2008, 139.

2 *Inter haec autem quae homini sunt propria, est appetitus societatis, id est communitatis, non qualiscunque, sed tranquillae et pro sui intellectus modo ordinatae cum his qui sui sunt generis: quam oikeiosis Stoici appellabant.* GROTIUS, HUGO: *De iure belli ac pacis.* Prol 6.
http://www.academia.edu/437645/Appetitus_societatis_and_oikeiosis_Hugo_Grotius_Ciceronian_Argument_for_Natural_Law_and_Just_War (Downloaded: 14. 07. 2015)

tioned state by entering into a social contract relocated the focus of the examination of Natural Law on the interrelation between the Ruler and his subjects as well as the status of the individual determined by this relation.[3]

Samuel Pufendorf in his work written in Latin enumerated the fields of legal regulation of social life while emphasizing the explorability of the community rules that are to be revealed by reason. In Pufendorf's work the turn of geometric thinking elaborated by Descartes and the French thinkers can be perceived, which by an abstract arrangement based on the case law solutions intended to set a generally predominating legal system lacking paradoxes.[4]

A few years later, in 1665 an English metaphysician, *John Locke* refreshed the Social Contract Theory, insofar as he argued in favour of the so-called *Agency Theory*[5] in opposition to *Hobbesian Authorization Theory* considering the contract as irrevocable".[6] According to the Lockian theory "the rights of each person are only loaned to the Sovereign"[7] having a mandate from the subjects to exercise public power. It provides the Right of Resistance of subjects, which can be used in the case of violation of natural rules by the tyrannical ruler.[8] However, in the German protestant provinces the Pufendorf's conception rejecting radicalism proved to be more popular and soon gained adherents such as *Christian Thomaisus* then *Christian Wolf*. Work of Thomasius published in 1685 reflected such a human approach as to query the use of torture in criminal actions.

In the late 1700th Christian Wolff improved the system of Natural Law, which could serve as a base for German and Austrian codifications from the early 1800th. Christian Wolff specified the Natural Law conceived by Pufendorf in such a considerably abstract way[9] that it already seemed to be appropriate for the codification

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3 POKOL Béla: *Középkori és újkori jogtudomány. Az európai jogi gondolkodás fejlődése* [Medieval and Modern Jurisprudence, The Development of European Legal Thought]. Dialóg Campus Kiadó, Budapest–Pécs 2008, 142. HÖFFE, Otfried: *Immanuel Kant.* Beck, München, 2007, 215; COPLESTON, Frederick: *A History of Philosophy, the enlightenment, Voltire to Kant, Cornwall.* 2003, 97.

4 SZABÓ Imre: *A burzsoá állam- és jogbölcselet Magyarországon* [The Bourgeois Philosophy of the State and the Law in Hungary]. Akadémiai Kiadó, Budapest, 1980, 34.

5 STEELE, Dean A.: *A Comparison of Hobbes and Locke on Natural Law and Social Contract.* The University of Texas at Austin, 1993, 2; Jean HAMPTON: *Hobbes and the Social Contract Tradition.* Cambridge University Press, Cambridge, 1986, 3.

6 STEELE, Dean A.: *A Comparison of Hobbes and Locke on Natural Law and Social Contract.* The University of Texas at Austin, 1993, 2.

7 STEELE, Dean A.: *A Comparison of Hobbes and Locke on Natural Law and Social Contrac.* The University of Texas at Austin, 1993, 2.

8 TAKÁCS Péter: Állam, megállapodás, jogszerűség. A társadalmi szerződés elmélete [State, agreement, legality. The Social Contract Theory]. In: TAKÁCS Péter (szerk.): *Államélet I.* Szent István Társulat, Budapest, 180–181.

9 POKOL Béla: *Középkori és újkori jogtudomány. Az európai jogi gondolkodás fejlődése* [Medieval and Modern Jurisprudence, The Development of European Legal Thought]. Dialóg Campus Kiadó, Budapest–Pécs, 2008, 143–144.

activities of Natural Law codificators as Karl Anton Martini and Franz Zeiller, who could openly recline upon the Wolffian conception.[10]

By the time Immanual Kant's ideology proved to be progressive in the field of Natural Law thinking. He established a scientific system of Natural Law by advocating the capability of the individual for freedom apart from the separation of Ethics and Law. For Immanuel Kant the person is regarded as a legal entity.[11] Thus he found notion form according to which the individuals were capable of differentiating justice from injustice as well as created the ethical base of Positive Law.[12] The aim of the Natural Law for him also meant to determine those unchangeable basic principles which served as the base of all sorts of positive regulations. Since then the Natural Law thinkers have agreed that it can be conceded: any individual might be a legal entity by declaring this theory each legal institution should be derived from human freedom.

Despite the fact that Natural Law received a great deal of criticism from the middle of 19th century – first and foremost for instance by the *Historical School of Jurisprudence*, which denied and considered speculative the existence of eternal human rules revealed by pure reason. It focused the attention to a number of issues, the examination of which served the harmonious coexistence of human societies. All concepts of Natural Law gave a crucial role to the principle of *pacta sunt servanda*, which can only be prevailed in the case of the individuals bearing total freedom as legal entities. The concept of person as a subject of rights and an independent individual is not only a foresight of the catalog of human rights that are entitled to every individual and called as basic rights, but it also defines the human character, which sets the legal framework of community life.

On the basis of the principle of „*pacta sunt servanda"* social life can only be based on social contract. The state considered as a *civitas* should be a treaty-based community of *sui iuris* citizens, i.e. community of persons who are endowed with all the rights. The purpose of the State is no more than ensuring its citizens to practice their rights safely, whose rules according to the concept of Natural Law jurists are also set by the eternal principles of Natural Law beside Positive Law.

The work of Immanuel Kant entitled *Perpetual Peace* serves as a summary of the Natural Law Principles evolving by the turn of the 18th and 19th centuries that acquire the essential purpose of Natural Law namely to reveal and set the universal rules of the balanced co-existence of human community. Kant's point of view regarding peaceful co-existence was an alliance, integration among nations. Each

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[10] STEIN, Peter: *A római jog Európa történetében* [Roman law in European History]. Osiris Könyvtár, Osiris Kiadó, Budapest, 2005, 149.

[11] KANT, Immanuel: *A tiszta ész kritikája* [Critique of Pure Reason]. (Ford.: Alexander Bernát és Bánóczi József) Akadémiai Kiadó, Budapest, 1971, 198.

[12] KANT, Immanuel: Az erkölcsök metafizikája [The Metaphysics of Morals]. In: KANT, Immanuel: *Az erkölcsök metafizikájának alapvetése. A gyakorlati ész kritikája. Az erkölcsök metafizikája* [The Groundwork of Metaphysics, Critique of Practical Reason, The Metaphysics of Morals]. Gondolat Kiadó, Budapest, 1991, 416.

separate State should be considered as a single human being living in the "Natural State". The State of Nature is not the state of peace, but on the contrary, it is the state of war. In order to eliminate this state for each state it is advisable to form a League of Nations or enter there, which is capable of guaranteeing the rights of Member States ensuring peaceful exercising of rights. Kant outlined integration in which individual nations, states do not merge into one single state, "a State made up of these Nations"[13] Kant stressed that the single rights of Member States should be considered as the rights of individual Nations, not the right of Nations unified into only one State. The Community Law, which was called International Right by Kant in accordance with the principles of Natural Law „shall be founded on a Federation of Free Nations"[14] Since individual nations have their own constitutions they cannot be forced into broader constitutional frameworks. The realization of the latter statements could only be guaranteed by the contract among nations. Though this contract could not be viewed as a well-known peace treaty (*pactum pacis*), which is only intended to close a war. According to Kant the form of the suitable contract is the "League of Peace" (*foedus pacificum*), because only this type of contract is intended to terminate all war once and for all. Kant suggested that[15] the idea of federalism (*foederalitas*) should have be adopted by all states and it was how eternal peace could be guaranteed.

## 2. Natural Law thinking in Hungary in the First Half of the 19th Century

At the turn of 18th and 19th centuries this newer concept of Natural Law influenced by Immanuel Kant's views in Hungary was summed up by Mihály Szibenliszt following Franz Zeiller and Franz Egger who were Austrian Natural Law jurists in his work entitled *Institutiones juris naturalis*. This work was taught by him at the Academy of Law in Győr then in Faculty of Law at the University of Pest in the 1820-ies and 1930-ies. His natural-law work made his ideas possible, which were suitable for the elimination of the divisions of contemporary feudal society. Definition of law in the view of Kantian interpretation points out that while Natural Law defines universal principles, Positive Law is characterized by *particularism* and a kind of comformity. But Mihály Szibenliszt did not intend to discuss the importance of Positive Law, on the contrary, he designated the purpose of Natural-Law examination providing a better understanding of the practice of Positive Law since it is theoretical. Starting form interpreting law as a freedom of action, according to which anyone can be a subject of right Szibenliszt emphasized, exercising rights for the individual being isolated does not make sense, since exercising rights

[13] KANT, Immanuel: *Perpetual Peace. A Philosophical Sketch.* Section II., 1795. http://www.constitution.org/kant/perpeace.htm (Downloaded: 05. 06. 2015)

[14] KANT, Immanuel: *Perpetual Peace. A Philosophical Sketch.* Section II., 1795. http://www.constitution.org/kant/perpeace.htm (Downloaded: 05. 06. 2015)

[15] Kant. mek.oszk.hu/01300/01325/01325.pdf (Downloaded: 12. 09. 2014)

seems to be relevant only in the copartnership of the individual.[16] He emphasized that all rights are to be derived from personal rights, which should be understood as the dignity of man appearing as a legal entity. That is how the right of people to self-sufficiency, personal freedom and equality designates a framework which focuses on the right of independence. As a result of it we should not accept any foreign power against us. All the innate rights are characterized by equality.[17] Stressing individual freedom involves the illegitimacy of arbitrary acquisition of the state power. Mihály Szibenliszt agrees that the subjected status of citizens reflected in the public relations ought to mean only a subjection to laws. All his concepts of Natural Law including his state theory are based on individual freedom. These thoughts were adapted by his "disciple" József Eötvös whose main work entitled *The Influence of the Dominant Ideas and Their Impact on the State* examined the civilizational aspirations of humanity. These efforts are in constant movement or circulation induced by individual freedom, which also led to the development of humanity in all walks of life. The progress is only to extend as far as freedom.[18] The development of civilization or "embourgeoisement" in terms of Eötvös's wording can only be sustained if it takes place gradually, as the radical movements are in accordance with the negative consequences of revolutions. Since violence is a force that undermines the freedom making progress possible.[19] Eötvös considered the recognition of human dignity as a measurement for civil progress, which is a necessary consequence of the principle of equality. Each progress is the result of interaction of ideas. That is how civil development can only be possible if different entities, nations are in relation with one another.[20] Eötvös revealed that isolated nations without exception remained at a lower level of embourgeoisement.

The idea of freedom is innate for all people. The idea of equality is considered to be the instrument of realization of this innate desire, which aims at providing everyone with the enjoyment of freedom to the same extent – the notion of equality of Szibenliszt was enriched by Eötvös in such a way.

The Bourgeois Progress was promoted by the sense of necessity *for* some demands. The State as an elemental guarantee of individual freedom was emerged as a result of this kind of needs. However, higher quality of civilization always involves the emergence of wider communities. In parallel with the rise of the level of erudition and literacy the necessity for broader alliances is also inevitable. The

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16 „*Sola ratione* […] *agnovimus, quemlibet hominem esse subjectum jurium*" SZIBENLISZT Mihály: *Institutiones Iuris Naturalis* [Institutes of Natural Law]. Tomus I. Eger, 1821, Liber I, Pars I, Caput I, 42. §. 46.

17 "*haec [jus] aequitatis non est per se subsistens jus, sed potius proprietas omnium jurium connatorum*." SZIBENLISZT Mihály: *Institutiones juris naturalis* [Institutes of Natural Law]. Liber I, Pars I, Caput II, 54. §. 62–63.

18 EÖTVÖS József: *A XIX. század uralkodó eszméinek befolyása az államra I–II.* [The Influence of the Dominant Ideas and Their Impact on the State] Eötvös József művei, Magyar Helikon Kiadó, 1981, 197.

19 EÖTVÖS: i. m. 485.

20 EÖTVÖS: i. m. 485.

mutual protection and the common interests result in the approach of certain nations. This Kantian conception was followed by József Eötvös by expressing agreement with those who regards the federal system as the best way for safeguarding independence[21]. Eötvös emphasized in the light of social conditions of his era that the independent growth of the civilization of Europe's nations and the civilization of its people should depend on what extent the different nations succeed in uniting into a bigger community of States.[22] In this context he projected the possibility of establishing a European Community of States as well as when he stated that "considering the present situation of different nations in Western Europe shows up so many elements which can develop into a solid alliance in the future."[23] However Eötvös draws attention to the fact that the all federal systems depend on certain conditions, which are as follows: ideological affinities regarding the most important relations, common interests and aims. These are the ties that are to create the cohesion of a strong and close union and only these constant conditions are to guarantee its permanence. Eötvös stated the fact about the nations of Europe that concerning their civilization the most significant relations and notions revealed no differences. He argued that common interest was manifested in the principle of free trade for him. He does not consider the emerging of mutual aims too far either to become a utopia, however he claims that in this respect the nations of Europe should combat a number of obstacles.[24] Eötvös states the existence of bigger States and community of States are not to be endangered by the fact that the citizens are provided with more individual freedom,[25] which statement indicates the starting point of those principles through which this kind of community of States could be established. The whole legal conception of Ferenc Deák – who was also a "disciple" of Mihály Szibenliszt and played a key role in the development of the great "integration conflict" fought in the middle of the 19th century in Hungary, that is of the relation to Austria in Austro-Hungarian Monarchy or rather to a common Ruler representing Austria as well – was built on a system of abstract truths, namely on Natural Law.

The relation between law and justice was frequently stressed in his parliamentary speeches. In 1833 he proclaimed in a speech, that "There is a law […] which was not repressed by the power and violence and without which written law cannot be fair and exhilarating: this is an inviolable rule of Natural Law."[26]

Deák managed to fight against the Doctrine of *Forfeiture* (*Verwirkungstheo-*

21 EÖTVÖS: i. m. 132.
22 EÖTVÖS: i. m. 61.
23 EÖTVÖS: i. m. 132.
24 EÖTVÖS: i. m. 131.
25 EÖTVÖS: i. m. 61.
26 STIPTA István: Deák Ferenc nézetei a jogról, igazságról és hatalomról [ Views of Ferenc Deák about Law, Justice and Power]. *Review of Legal History*, 2003, 3, 1–4.

*rie*)[27] that supported the legality of the Austrian absolutism and caused a conflict with the Hungarian constitutionality by referring to the appropriate principles of contractual relations: "We have already heard this doctrine repeated frequently: if one of two contracting parties is not to respect the point of the treaty the other party is not required to respect it either. This doctrine called *Verwirkungstheorie* is not considered to be proper by us neither in theory nor in practice in terms of public law. But the doctrine, which is proclaimed by 'B', namely when one party constantly broke the negotiated contract and despite recent and stronger security measures and promises he acted repeatedly against the contract, the other party should not be expected to honour the treaty either, but one is to alter it unilaterally having the possibility even to eliminate it. This is a really new doctrine and astonishingly specific". Also, this kind of treaty theory-reasoning was published in his famous "Easter Article" of April 16, 1865 underlying the Austro-Hungarian compromise, and also in his parliamentary speech when he claimed that the "Pragmatic Sanction" "was the basic treaty of the State, which was put into practice between Hungary and the Dynasty in 1723". When one party (the ruler) even violated the treaty, the other party (the Hungarian nation) had the right to demand the compliance of the treaty. Based on the facts mentioned above it may be concluded that by the first half of the 19th century the natural law thinkers cited previously regarded principally the free will and personal freedom completed in practice by the doctrine of contractual freedom as well as the principle of *pacta sunt servanda* as incontrovertible elements of the integration among different nations. The theoretical elaboration of all the principles previously stated prove to be an inevitable merit of Natural Law thinkers.

[27] "The Hungarians rejected the constitution proposed by Vienna mainly because it insisted on the political Doctrine of Forfeiture (*Verwirkungstheorie*), which would have subjected Hungary to the administration of Vienna's hereditary provinces. The Hungarian elite insisted on the country's historic rights, and regarded the Pragmatic Sanction, a bilateral treaty from 1723, as the guiding principle of a new covenant. Furthermore, Hungarian experts of constitutional law were inclined to give the Pragmatic Sanction the radical interpretation that Hungary entered contractual relations only with the house of the Habsburgs and not with the Western parts of the Austrian realm. In this view, the Pragmatic Sanction acknowledged no more and no less than the right of the dynasty to succeed to the throne of the Lands of St. Steven's Crown. Although Hungary's fate was bound through the person of the ruler to those of the hereditary provinces, the Pragmatic Sanction preserved for the nation the right to its own legislative assembly and far-reaching an administive autonomy." NEUBAUER, John: The Austro–Hungarian compromise of 1867. In: CORNIS-POPE, Marcel–NEUBAUER, John (eds.): *History of the Literary Cultures of East-Central Europe: Junctures and Disjunctures in the 19th and 20th centuries – A Comparative History of Literatures in European Languages*. John Benjamins Publishing Company, Amsterdam/Philadelphia, 2004, 246.

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# CRIMINAL LAW COMPETENCES OF THE EUROPEAN UNION BEFORE AND AFTER THE TREATY OF LISBON

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## 1. Introduction

For a long time, criminal law was regarded as the symbol and last rampart of national sovereignty, therefore the European Communities originally did not have the legal competence in criminal matters. However, the development of the European integration demonstrated that it is difficult to disassociate Community action in the main areas of Community competence from criminal justice policy.

There are two main justifications for Union action in the field of criminal law: the need to combat against serious cross-border criminality and the need to safeguard interests, policies and objectives of the European Union by means of criminal law.[1] For these reasons, the Treaty of Maastricht extended the European integration to the justice and home affairs, and created the three pillar system of the European Union. Cooperation in criminal matters was placed in the third pillar of the EU. Since then the European Union's activity in criminal law gradually broadened. The Treaty of Lisbon, which was an important turning point in the history of EU criminal law, placed the cooperation in criminal matters on a new contractual basis, abolished the pillar structure and empowered the European Union with a wide legislative competence.

This paper aims to analyse the development of the European Union's competences in the area of criminal law. The paper is divided into two main sections: the first part deals with the criminal competences before the Treaty of Lisbon and the second part examines the reformed regulation introduced by the Treaty of Lisbon.

## 2. Criminal competences before the Treaty of Lisbon

### *2.1. Cooperation in criminal matters within the framework of the third pillar*

Initially the third pillar provisions did not explicitly grant the Union legal competence to adopt measures in the field of substantive criminal law.[2] The *Treaty of*

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1 MITSILEGAS, Valsamis: EU Criminal Law Competence after Lisbon: From Securitised to Functional Criminalisation. In: ARCARAZO, Diego Acosta–MURPHY, Cian C. (eds.): *EU Security and Justice Law. After Lisbon and Stockholm.* Hart Publishing, Oxford–Portland, 2014, 111.

2 PEERS, Steve: *EU Justice and Home Affairs Law*. Oxford University Press, Oxford–New York, 2011, 755.

*Maastricht* only listed some items, e.g. combatting fraud on an international scale, preventing and combatting terrorism, unlawful drug trafficking and other serious forms of international crime which shall be regarded as matters of *'common interest'*.[3] In these areas the Union was entitled to adopt joint positions, joint actions and draw up conventions.[4]

The *Treaty of Amsterdam* significantly modified the area of the third pillar. Article 29 of the Treaty on European Union (TEU) defined the main objective of the cooperation in criminal matters, which is the provision of 'a high level of safety within *an area of freedom, security and justice*'. This involves 'developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia' and 'crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud'. The objective has to be achieved through closer cooperation between police forces, customs and judicial authorities and other competent authorities in the Member States, and *if necessary through approximation of rules on criminal matters in the Member States*.[5] The Treaty of Amsterdam empowered the legislator of the Union with an express *legal harmonization competence*, when allowed the EU to adopt 'measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking'.[6] The main instrument of the legal harmonization were framework decisions, which were binding upon the Member States as to the result to be achieved but left to the national authorities the choice of form and methods.[7] Although the Treaty expressly specified that framework decisions do not entail direct effect, the Court of Justice ruled that they have 'indirect effect', because the national laws of the Member States have to be interpreted in conformity with the provisions of the framework decisions.[8]

The extent of the EU harmonization competence established by the Treaty of Amsterdam was highly debated. Although the Treaty only listed three criminal offences – organised crime, terrorism and illicit drug trafficking – relating to which minimum rules could be established, the Union interpreted its legislative competence

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3 Article K1 Maastricht Treaty.

4 Article K3 Maastricht Treaty. See further: PEERS: Op. cit. 12–15; MIETTINEN, Samuli: *Criminal Law and Policy in the European Union*. Routledge, London–New York, 2013, 25–29.

5 MIETTINEN: Op. cit. 30.

6 Article 31(e) TEU.

7 Article 34(2)(b) TEU.

8 Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285, para 38. See further: NASCIMBENE, Bruno: European judicial cooperation in criminal matters: what protection for individuals under the Lisbon Treaty? *ERA Forum*, Vol. 10/3, 2009, 400–401.

broadly and adopted framework decisions harmonizing other offences, mostly those which were enumerated in Article 29 TEU.[9]

### *2.2. Criminal law in the first pillar?*

According to Articles 29 and 47 TEU the provisions of the Treaty on European Union do not affect the Treaties establishing the European Communities and the powers of the European Community, which means that the first pillar had priority over the third pillar. Because cooperation in criminal matters was placed in the third pillar, there were no legal base in the EC-Treaty which contained an express reference to criminal law; therefore it was a general opinion, that the European Communities did not have criminal competences. However, the case-law of the European Court of Justice gradually breached this general approach. In its rulings the Court dealt with the Member States' duty to adopt criminal sanctions for breaches of Community law and with the European Union's legislative competence in criminal matters.[10]

*1. The Member States' obligation to adopt sanctions for breaches of Criminal law.* The case-law of the European Court of Justice recognized that the Member States are obliged to enforce Community rules by means of criminal law as well.[11] This obligation arise from the *principle of sincere cooperation,*[12] according to which Member States are ordered to take any appropriate measure to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union, to facilitate the achievement of the Union's tasks and to refrain from any measure which could jeopardise the attainment of the Union's objectives. Already in 1977 (15 years before the Treaty of Maastricht) the Court of Justice declared that the principle of sincere cooperation allows the Member States to 'choose the measures which they consider appropriate, including sanctions which may even be criminal in nature' in order to ensure the fulfilment of an obligation resulting from a Community rule. Therefore, 'in the absence of any provision in the Community rules providing for specific sanctions to be imposed on individuals for a failure to observe those rules, the Member States are competent to adopt such sanctions as appear to them to be appropriate'.[13]

In the famous *Greek Maize case*, the Court gave a more precise and detailed analysis of the Member States' duties arising from the principle of sincere cooperation. According to this principle Member States are required to 'penalize the infringement of Community law in the same way as they penalize the infringement

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9 See further: PEERS: Op. cit. 25–29, 756–758; MIETTINEN: Op. cit. 35–37.

10 HUGGER, H.: The European Communities' Competence to Prescribe National Criminal Sanctions. *European Journal of Crime, Criminal Law and Criminal Justice,* Vol. 3/3, 1995, 243–245.

11 PEERS: Op. cit. 770.

12 Article 4(3) TEU (originally Article 5, then Article 10 EC-Treaty).

13 Case 50/76 *Amsterdam Bulb BV v. Produktschap voor Siergewassen* [1977] ECR 137, paras 32–33.

of national law'. The choice of penalties remains within the discretion of the Member States, but they have to be 'effective, proportionate and dissuasive'. Furthermore, Member States must ensure that infringements of Community law are penalized under procedural and substantive conditions, which are 'analogous to those applicable to infringements of national law of a similar nature and importance'. Moreover, 'the national authorities must proceed, with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws'.[14]

The judgements of the European Court of Justice in these cases made it clear that, when the Community legislation provides no specific sanction for an infringement of Community rules, Member States are not only competent, but because of the principle of sincere cooperation, are obliged to take all measures necessary to ensure the application and effectiveness of Community law.[15] These measures could contain criminal law measures as well.

*2. The Union's criminal legislative competence.* Apart from the sanctioning duty of the Member States, the European Court of Justice scrutinized the criminal legislative competences of the European Union. However, for a long time the Court held that the Community does not have criminal competences, because 'criminal legislation and the rules of criminal procedure are matters for which the Member States are still responsible'.[16]

In 1992 the Court took the first step towards the breakthrough of this rule. In the judgement *Germany v. Commission*, the Court recognized the Community's power to 'impose penalties necessary for the effective application of the rules in the sphere of the common agricultural policy' based on Articles 40(3) and 43(2) EC-Treaty. When determining the most appropriate form of sanction the Community can also provide for penalties which 'go beyond the mere refund of a benefit improperly paid', for example the refund of a benefit unduly received with interest, the forfeiture of a security, the payment of surcharges and the exclusion from the benefit of the aid system. Although Germany asserted that exclusions are criminal penalties and therefore the Community does not have the competence to impose them, the Court held that they 'do not constitute penal sanctions'.[17] However, because these penalties go beyond the mere compensation for the damage caused or the payment of an amount equal to that wrongfully obtained, it can be argued that they have to be regarded as non-reparatory but punitive sanctions. Therefore, although the Court failed to express a view on the Community's power in the penal

[14] Case 68/88 *Commission v. Greece* [1989] ECR 2965, paras 22–25. These rules were repeated in Case 326/88 *Hansen* [1990] ECR I-2911, para 17.

[15] HUGGER: Op. cit. 247.

[16] Case 203/80 *Casati* [1981] ECR 2595, para 27, Case 226/97 *Lemmens* [1998] ECR I-3711, para 19.

[17] Case C-240/90 *Germany v. Commission* [1992] ECR I-5383, paras 8, 11–12, 20, 25, 29.

sphere, it enabled the Community to adopt administrative sanctions which disguise criminal penalties.[18]

The European Court of Justice went even further in the landmark *Environmental Crimes Case*. In the case the European Commission asked the Court to annul Framework Decision 2003/80/JHA of 27th January 2003 on the protection of the environment through criminal law[19] adopted by the Council based on Title VI, in particular Articles 29, 31(e) and 34(2)(b) TEU. According to the Commission the legislative act was adopted referring to a wrong legal basis, because the correct legal basis would have been Article 175(1) EC-Treaty, under which the Union legislator is competent to require the Member States to 'prescribe criminal penalties for infringements of Community environmental-protection legislation if it takes the view that that is a necessary means of ensuring that the legislation is effective'. The Council however argued that criminal law belongs to area of the third pillar. There is a specific title to judicial cooperation in criminal matters (Title VI), which expressly confers on the European Union competence in criminal matters; therefore the Community does not have power to require the Member States to impose criminal penalties.[20]

In its judgement the European Court of Justice upheld the Commission's arguments and annulled the framework decision. The argument of the Court was based on Articles 29 and 47 TEU which provide the priority of the EC-Treaty (first pillar) over the Treaty on European Union (third pillar). It is the 'task of the Court to ensure that acts which, according to the Council, fall within the scope of Title VI of the Treaty on European Union do not encroach upon the powers conferred by the EC-Treaty'. Therefore the Court had to ascertain whether the provisions of the framework decision affect the powers of the Community under Article 175 EC-Treaty. Examining its provision the Court found, that the objective of the framework decision is the protection of the environment, which is one of the Community's objective under Articles 3(1)(l) and 174-176 EC-Treaty and it entails partial harmonization of the criminal laws of the Member States. In connection with this the Court ruled, that '*generally neither criminal law nor the rules of criminal procedure fall within the Community's competence'*, but it 'does not prevent the Community legislature, when the *application of effective, proportionate and dissuasive criminal penalties* by the competent national authorities is an *essential measure* for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers *necessary* in order to ensure that the rules which it lays down on environmental protection are *fully effective*'. According to the case-law of the Court, the 'choice of the legal basis for a Community measure must rest on objective factors which are amenable to judicial review, including in particular the aim and the content of the measure'.

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[18] CORSTENS, Geert–PRADEL, Jean: *European Criminal Law*. Kluwer Law International, The Hague– London–New York, 2002, 552–553.

[19] *OJ L*, 29, 5. 2. 2003, 55–58.

[20] Case C-176/03 *Commission v. Council* [2005] ECR I-7879, paras 11, 18–19, 26–29.

The Court concluded that on account of both its aim and its content, the main purpose of the framework decision is the protection of the environment; therefore it could have been properly adopted on the basis of Article 175 EC-Treaty. That means that the framework decision violated Article 47 TEU because it encroaches on the powers which Article 175 EC-Treaty confers on the Community, hence it must be annulled.[21]

The *Environmental Crimes Case* was an important milestone, because it acknowledged that the European Communities (first pillar) also have criminal legislative competence. In this judgement the Community was considered functionally competent to harmonize the criminal law enforcement of a Community policy.[22] The threshold of the establishment of a competence to take measures relating to criminal law is the *effectiveness.*[23] That means criminal measure can only be used if it is essential to the effective implementation of the environmental policy.

However, the scope of the judgement was also highly questionable: it was controversial whether it only applies to issues within the scope of the environmental law, or to other areas of Community law as well?[24] The question was answered by the Commission, which issued a Communication analysing the consequences of the judgement.[25] Pursuant to the Commission, the judgment of the Court clarified the distribution of powers between the first and third pillars as regards the provisions of criminal law and laid down principles going far beyond the environmental policy, because the same arguments can be applied to the other common policies and to the four freedoms. The Commission emphasized, that criminal law still does not constitute a Community policy, since Community action in criminal matters may be based only on implicit powers associated with a specific legal basis. Hence, appropriate measures of criminal law can be adopted on a Community basis only at sectorial level and only on condition that there is a clear need to combat serious shortcomings in the implementation of the Community's objectives and to provide for criminal law measures to ensure the full effectiveness of a Community policy or the proper functioning of a freedom.

In the Annex of its Communication, the Commission listed several framework decisions and pending proposals, which are entirely or partly incorrect, since they

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21 Case C-176/03 paras 38–40, 45–48, 51, 53, 55.

22 VERVAELE, John A. E.: The European Community and Harmonization of the Criminal Law Enforcement of Community Policy. *Eucrim. The European Criminal Law Associations' Forum,* 3–4/2006, 87.

23 HERLIN-KARNELL, Esther: *The Constitutional Dimension of European Criminal Law.* Hart Publishing, Oxford–Portland, 2012, 30. See further: HERLIN-KARNELL, Ester: Commisson v. Council: some Reflections on Criminal Law in the First Pillar. *European Public Law,* Vol. 13/1, 2007, 74–81.

24 PEERS: Op. cit. 772.

25 Communication from the Commission to the European Parliament and the Council on the implications of the Court's judgment of 13 September 2005 (Case C 176/03 Commission v Council) [COM (2005) 583 final]

were adopted or submitted referring to a wrong legal basis.[26] For the correction of the legal basis of these acts, the Commission elaborated several methods; however, for reasons of procedural deadlines it could only introduce an appeal for annulment in connection with Council Framework Decision 2005/667/JHA of 12th July 2005 to strengthen the criminal law framework for the enforcement of the law against ship-source pollution.[27]

In the *Ship-Source Pollution Case*, the Court supported the point of view of the Commission elaborated in its Communication and confirmed the Community's criminal law competence outside the area of environmental protection.[28] In its judgement the Court literally repeated the main principles laid down in the previous judgement and concluded that the Community has the competence, on the basis of Article 80(2) EC-Treaty, to require Member States to apply criminal penalties to certain forms of conduct in order to ensure the efficacy of the rules adopted in the field of maritime safety. However, the Court held that the Community's legislative competence is not unlimited. Apart from the requirement of the 'necessity of criminal sanctions for ensuring the effectiveness of a Community policy' laid down in the previous judgement as well, the Court also held that the 'determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence', as it remained within the competence of the Member States.[29] This regulation precludes the adoption of precise criminal law measures in the Community's level, because the Community only possesses the competence to require Member States to criminalize certain behaviour and to enact criminal penalties, but not to specify the type and the level of the penalties. Therefore the Community's competence is limited to the mere indication that criminal sanction should be provided for the effective implementation of the Community policy concerned. The Member States have the right to decide what modality of sanction (e. g. imprisonment, fine, confiscation) they regard as appropriate measures and to what degree (e. g. duration of the imprisonment, level of the fine)

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[26] For example Framework Decisions on counterfeiting of euro and of non-cash means of payment, Framework Decision on combatting money laundering, Framework Decision on combating corruption in the private sector, Framework Decision on attacks against information systems, Proposal on the protection of the Community's financial interests, Proposal on combatting intellectual property offences. See further: WHITE, Simone: Case C-176/03 and Options for the Development of a Community Criminal Law. *Eucrim. The European Criminal Law Associations' Forum,* 3–4/2006, 95–96.

[27] *OJ L*, 255, 30. 9. 2005, 164–167.

[28] VERVAELE, John A. E.: Harmonised Union policies and the harmonisation of substantive criminal law. In: GALLI, Francesca–WEYEMBERGH, Anne (eds.): *Approximation of substantive criminal law in the EU. The way forward.* Editions de l'Université de Bruxelles, Brussels, 2013, 56.

[29] Case 440/05 *Commission v. Council* [2007] ECR I-9097, paras 66, 69–70.

they would impose it on the criminal offenders. These limitations enable the Member States to maintain the fundamental character of their criminal justice system.[30]

Because the Court annulled the two framework decisions, the Commission submitted two proposals for a *directive on the protection of the environment through criminal law* and *on ship-source pollution* based on Article 175(1) and Article 80(2) EC-Treaty. The proposals were adopted in 2008 and in 2009.[31] Another first pillar instrument containing criminal provisions was adopted in 2009 *on sanctions against employers of illegally staying third-country nationals* on the legal basis of Article 63(3)(b) EC-Treaty.[32] Furthermore the Commission also submitted a *proposal on criminal measures aimed at ensuring the enforcement of intellectual property rights*, but it was later withdrawn by the Commission.[33] It can be seen, that based on the general rules laid down by the aforementioned judgements an intensive legislative process began within the framework of the first pillar. However, the amendment of the other existing framework decisions listed in the Commission's Communication in the light of the Court's judgement did not occurred, partly because of the entry into force of the Treaty of Lisbon.

## 3. New criminal competences of the European Union after the Treaty of Lisbon

The Treaty of Lisbon entered into force on the 1st December 2009 introduced significant changes in EU criminal law. The new legal framework of the European Union consists of two Treaties: the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). The main change of the Treaty of Lisbon is the abolishment the pillar system, on account of which the former third pillar was transformed into the Community legal order. The areas of the previous third pillar can now be found in Title V TFEU (Area of Freedom, Security and Justice), which contains five chapters: general provisions; policies on border checks, asylum and immigration; judicial cooperation in civil matters; judicial cooperation in criminal matters; and police cooperation. The area of freedom, security and justice became one of the basic objectives of the European Union. Accord-

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30 KLIP, André: *European Criminal Law. An Integrative Approach*. Intersentia Publishing, Cambridge–Antwerpen–Portland, 2012, 175; MIETTINEN: Op. cit. 40–41.

31 Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law [*OJ L*, 328, 6. 12. 2008, 28–37.], Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements [*OJ L*, 280, 27. 10 .2009, 52–55.]

32 Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [*OJ L*, 168, 30. 6. 2009, 24–32.]

33 Amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights [COM (2006) 168 final]

ing to Article 3(2) TEU the 'Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime'. This objective is reiterated in Article 67 TFEU, which states that the 'Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States'.

In relation of criminal law, the Treaty of Lisbon put an end to the battle of competence between the first and the third pillars and defined clear legislative competences of the European Union. The criminal competences of the European Union can be divided into two categories: legal harmonization competences and supranational legislation competences.

### *3.1. Legal harmonization competence*

The *legal harmonization competence* of the European Union in the field of substantive criminal law is regulated by Article 83 TFEU. According to *Article 83(1) TFEU* the European Parliament and the Council are entitled to establish *minimum rules* concerning the *definition of criminal offences and sanctions* by way of directives. They can be adopted 'in the areas of *particularly serious crime* with a *cross-border dimension* resulting from the nature or impact of such offences or from a special need to combat them on a common basis'.

The Union's legal harmonization competence under Article 83(1) can be used if two cumulative criteria meet: *the particularly seriousness* and *the cross-border dimension* of the crime. The meaning of these criteria is not precisely defined by the Treaty. The first requirement is the *'area of particular serious crime'*, which means that a certain level of graveness needs to be reached in order to justify EU's legislative competence. Bagatelle criminality is excluded. The second requirement is the *'cross-border dimension'* of the crime, which is defined by three alternative criteria: nature (e.g. economic offences requiring new technology), impact (e.g. environmental offences which go through borders), or special need to combat the areas of crime on a common basis.[34] This latter requirement means that criminal law on the level of the European Union has to have an added value function in the fight against serious transnational criminal offences.[35] The Treaty lists ten so-called *'eurocrimes'*, which meet the aforementioned criteria, therefore can be subject to harmonization. These are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, com-

[34] SIMON, Perrine: The Criminalisation Power of the European Union after Lisbon and the Principle of Democratic Legitimacy. *New Journal of European Criminal Law,* Vol. 3/3–4, 2012, 247–248.

[35] MITSILEGAS: Op. cit. 116.

puter crime and organised crime.[36] However the Treaty does not provide an exhaustive list, because on the basis of developments in crime additional areas of crime can be adopted by the Council acting unanimously, with the consent of the European Parliament. The new criminal offences also have to meet the criteria specified by Article 83(1) (particular seriousness, cross-border dimension, special need to combat them on a common basis).

*Article 83(2) TFEU* regulates an *ancillary harmonization competence*, according to which, 'if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned'. With this provision the Treaty essentially incorporated the basic principles of the European Court of Justice formulated in the Environmental Crimes Case.

While Article 83(1) limits the criminal competence of the Union to certain areas of criminal offences where there is a special need to combat them on a common basis, Article 83(2) generally enables the use of criminal law if it is essential to the effective implementation of a Union policy.[37] The introduction of this competence in the Treaty of Lisbon confirms a *functionalist view of criminal law*. In this case, criminal law is considered as a mean to an end which is the effective implementation of other Union policies. Criminal law is thus used as a mere tool to achieve the effectiveness of the Union law.[38]

For the use of the criminal harmonization competence under Article 83(2) two requirements have to be fulfilled. Firstly, there is a *need for previous harmonization measures* in the policy area which the Union legislator intends to criminalize. The Treaty does not specify what degree of harmonization (partial, minimum or total harmonization) is needed; it only requires that Union rules have to exist in the area concerned. It means that the Union, prior to the adoption of criminal sanctions, already has adopted harmonized (non-criminal) rules. Secondly, the criminal sanctions have to be *essential for the effective implementation of the aforementioned harmonized Union policy*. The criteria of *'essentiality'* requires the Union legislator to prove that the current enforcement regime cannot achieve effective implementation of the policy concerned, that criminal law is more efficient than existing less restrictive measures to achieve the pursued objective and that the disadvantages caused by criminal law are not disproportionate in relation to the objective of en-

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[36] In most of these areas several third pillar instruments already exist. See: PEERS: Op. cit. 783–791. According to Article 9 of the Protocol No. 36 on transitional provisions, these acts adopted prior to the entry into force of the Treaty of Lisbon preserve until they are repealed, annulled or amended in implementation of the Treaties.

[37] KLIP: Op. cit. 166.

[38] MITSILEGAS: Op. cit. 117.

suring the effective implementation of a Union policy.[39] It can clearly be seen that the Treaty adopted a quite high threshold for EU intervention in the area of functional criminalization.[40]

In 2011 the European Commission issued a Communication in which it listed a number of potential policy areas, which meet the criteria laid down in Article 83(2). These are primarily the financial sector (e.g. market manipulation or insider trading), the fight against fraud affecting the financial interests of the European Union and the protection of the euro against counterfeiting through criminal law. Furthermore, the necessity of criminal law could also be explored in other harmonized policies as well, e.g. in the field of road transport, data protection, customs rules, environmental protection, fisheries policy or internal market policies.[41]

Both Article 83(1) and 83(2) TFEU stipulate that the Union can establish minimum rules concerning *the definition of criminal offences and sanctions*. Regarding the *definition of offences*, directives can define the element of the crimes, i.e. the description of the prohibited conduct. Directives can also cover ancillary conducts (instigating, aiding and abetting) as well as the attempt to commit the offence. Apart from offences committed by natural persons EU legislation can also regulates the liability of legal persons for the committed crimes. As regards to *sanctions*, the legislative competence of the European Union include the determination of the type (e.g. imprisonment, fines, community service) and/or the level of the penalty (minimum penalties) which could be imposed to natural or legal persons having committed the criminal offences defined in the directives.[42] However, the Treaty of Lisbon only prescribes *'minimum harmonization'*, which means that Member States are entitled to introduce or maintain stricter rules than the regulation of the directives adopted by the Union.[43]

According to Article 83 TFEU, directives can be adopted in accordance with the ordinary legislative procedure.[44] However, in order to protect the sovereignty and the different legal systems and traditions of the Member States, *Article 83(3) TFEU* provides for a special *'emergency brake'* procedure. This provision enables the

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[39] ÖBERG, Jacob: Union Regulatory Criminal Law Competence after Lisbon Treaty. *European Journal of Crime, Criminal Law and Criminal Justice,* Vol. 19/4, 2011, 290–293, 313–314.

[40] MITSILEGAS: Op. cit. 117.

[41] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law [COM (2011) 573 final].

[42] KLIP: Op. cit. 166.

[43] SATZGER, Helmut: *Internationales und Europäisches Strafrecht. Strafanwendungsrecht – Europäisches Straf- und Strafverfahrensrecht – Völkerstrafrecht*. Nomos Verlagsgesellschaft, Baden-Baden, 2013, 126; SAFFERLING, Christoph: *Internationales Strafrecht. Strafanwendungsrecht – Völkerstrafrecht – Europäisches Strafrecht.* Springer Verlag, Heidelberg–Dordrecht–London–New York, 2011, 417.

[44] Articles 289 and 294 TFEU.

suspension of the ordinary legislative procedure if a Member State considers that a draft directive 'would affect *fundamental aspects of its criminal justice system'*.[45] In this case the draft directive has to be referred to the European Council, which has four month to discuss it. In case of a consensus, the European Council refers the draft back to the Council, which terminate the suspension of the legislative procedure. In case of disagreement, the legislative process fails but at least nine Member States have the possibility to establish *enhanced cooperation* on the basis of the draft directive concerned if they notify the European Parliament, the Council and the Commission accordingly.

### *3.2. Supranational legislative competence*

Apart from the legal harmonization competence under Article 83 TFEU, the Treaty of Lisbon also empowered the European Union with a supranational legislative competence in the field of *the protection of the financial interests of the Union*. This legislative competence is regulated in *Article 325(4) TFEU*. According to this provision of the Treaty, 'the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union's institutions, bodies, offices and agencies'.

While Article 83 lists several criminal offences which could be subject to harmonization, Article 325 regulates one specific category of crime: fraud and other illegal activities affecting the financial interests of the Union.[46] Further difference that Article 325 does not refer to the form of the legal act it only states that the Union legislator could adopt *'the necessary measures'* in the field of the fight against fraud, including the criminal law measures.[47] Therefore the Union legislation is not restricted to directives as in Article 83, but the Treaty enables the Union to adopt *directly applicable, supranational criminal law norms* in the form of regulations as well.[48] Besides the form of the legislative act (directive or regulation) there are further distinctions between the legal harmonization and the supranational legislative competence of the EU. First of all, there are Member States which either

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45 The Treaty does not define what should be considered as fundamental aspects of the criminal justice system of a Member State. These include for example the principle of legality, the principle of guilt, the ultima ratio principle, the proportionality of the sanctions or the criminal liability of legal persons. See further: HECKER, Bernd: *Europäisches Strafrecht.* Springer Verlag, Berlin–Heidelberg, 2012, 285.

46 KLIP: Op. cit. 172.

47 SICURELLA, Rosaria: Some reflections on the need for a general theory of the competence of the European Union in criminal law. In: KLIP, André (ed.): *Substantive Criminal Law of the European Union.* Maklu Publishers, Antwerpen–Apeldoom–Portland, 2011, 236–237.

48 HECKER: Op. cit. 493; SAFFERLING: Op. cit. 409; SATZGER: Op. cit. 104.

do not participate in the adoption of measures pursuant to Title V (Denmark) or have an opting-in position (the United Kingdom and Ireland).[49] That means Denmark does not participate in the adopted measures on substantive criminal law under Article 83, the United Kingdom and Ireland only participate after a decision to 'opt in'.[50] In relation of Article 325(4) there are no such special rules. Furthermore, the emergency brake procedure can also be used only in connection with a directive adopted on the basis of Article 83. That means, if a legislative proposal is adopted on the basis of Article 83, it is likely that it would not apply to every Member States, while an act adopted under Article 325 is legally binding to all Member States.

## 4. Conclusion

The Treaty of Lisbon empowered the Union with a broad legislative competence on the field of criminal law. Firstly, the Treaty of Lisbon created a secure legal basis of the harmonization of national criminal law. While Article 83(1) TFEU enables the European Union to combat specified areas of cross-border criminality, Article 83(2) TFEU provides the Union a mean to ensure the effective implementation of other Union policies. Secondly, the Treaty of Lisbon not only allows the European legislator to harmonize the national criminal law of the Member States, but to adopt directly applicable, supranational criminal law norms in connection with the protection of the financial interests according to Article 325(4) TFEU.

After the entry into force of the Treaty of Lisbon, an intensive criminal legislation began at the EU's level. On the legal basis of Article 83(1) TFEU the European Union adopted *directives on the trafficking of human beings*,[51] *on the sexual abuse and sexual exploitation of children and child pornography*,[52] *on attacks against information systems*,[53] *on the protection of the euro against counterfeiting*[54]

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[49] VERVAELE, John A. E.: The material scope of competence of the European Public Prosecutor's Office: Lex uncerta and unpraevia. *ERA Forum,* Vol. 15/1, 2014, 91.

[50] See: Protocol No. 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice and Protocol No. 22 on the position of Denmark.

[51] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [*OJ L,* 101, 15. 4. 2011, 1–11.]

[52] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA [*OJ L,* 335, 17. 12. 2011, 1–14.]

[53] Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA [*OJ L,* 218, 14. 8. 2013, 8–14.]

[54] Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal

and *on the freezing and confiscation of instrumentalities and proceeds of crime*.[55] In 2014 the first directive was adopted based on the ancillary harmonization competence of the European Union laid down by Article 83(2) TFEU *on market abuse*.[56] Furthermore the Commission also submitted a proposal on the *fight against fraud affecting the Union's financial interests*,[57] whose legal basis and content is currently under negotiations between the institutions of the Union.

Therefore it can be said that the Union uses his legislative competences in the area of criminal law and we can expect the further increase of the Union's activity in this field, which results a more and more harmonized criminal law in the Member States.

law, and replacing Council Framework Decision 2000/383/JHA [*OJ L*, 151, 21. 5. 2014, 1–8.]

55 Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union [*OJ L*, 127, 29. 4. 2014, 39–50.]

56 Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse [*OJ L*, 173, 12. 6. 2014, 179–189.]

57 Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law [COM (2012) 363 final]

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# ECONOMIC DEVELOPMENT IN TURKEY

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## 1. Introduction

Turkey till recent has enjoyed high economic growth; thanks to its stable policies and reforms. Having a stable economy and a Muslim-dominated population, the country has been seen as a closer ally of the west in interactions with the Middle East.

To achieve growth, the country has eased the restrictions and removed requirement of clearances for environmental impact. Though the country's infrastructure boasting of skyscrapers, super-fast trains and other infrastructure projects paints a rosy picture, but in last few years the economic growth has slowed down and foreign capital has become scarce.

As part of this document I attempt to look into the economic development of Turkey and how environmental pollution is impacting its economy and that of the world. In connection with this topic I will also mention about the accession possibilities of Turkey to the EU.

The reason of choosing this topic is that I have been interested in the future of the European Union, the main aims of the future including the accession possibilities of Turkey, and I have read several books in this topic. Many people are not interested in this issue in Europe, because they feel this culture is very different from their one.

Cultivating international relationships is essential these days – this is another reason why I find it useful to get acquainted with the cultures of distant countries. Presently, Turkey has a strong and stable economic and military system.

## 2. The Turkish economy

So far Turkey has been witnessing high growth which was possible only because of its stable policies and reforms. Macroeconomic stability has attracted foreign capital.

However, the situation has changed in the recent years. The country is marred with rising inflation, slowing growth, increasing unemployment (in April 2015, it stood at 11.3 pc, its highest level in the last five years), decrease in demand for goods like cars among others.

Over the years, Turkey became more and more reliant on foreign funds and unfortunately has created an overdependence on the same. The country's economy is now exposed to foreign factors like US bond buying program, which is prompting

investors to pull money out of the country. In order to tackle the decline of the foreign capital, the government has picked up spending. Though government has spent a lot on infrastructure sector, alittle has been done in order to promote other sectors like manufacturing. There is still a large need of foreign financing, but with ongoing geopolitical tensions the capital inflows continue to be volatile.[1]

Despite the external factors, internal problems persist. The reforms are slowed down and were taken under expectations. Government needs to decrease dependence on foreign capital. The corruption charges over the government, restrictions were imposed on the freedom of press and the investors are do not come off well with the Turkish lira declining against the major currencies.[2]

Turkey needs to face its more and more social and economic problems. For example, the country needs to focus on the education system and work towards ensuring more and more of the students are completing school and college and not quitting at an earlier stage. The urgency to look into the matter can be understood from the data that just 34% of people aged b/w 25 and 64 have completed upper secondary school education which is much lower to the OECD (Organization for Economic Co-operation and Development) average of 74%.

In addition to above, there is an urgent need of job creation. Only 50% of the people b/w age 15 and 64 hold a paid job.[3] The currency has declined adding additional pressure. In first 4 months of 2015 only, Turkish lira has lost 10% of its value.

Tourism has declined in 2015 by over 8% compared to April 2014. This has an impact on the sector of services, which became one of the most important sectors for Turkey.[4]

Turkey is also facing the problems of increasing pollution. The pollution levels are considered higher than in other OECD countries. The pollutants small enough to damage our lungs, tune to 35.1 micrograms per cubic meter in the urban cities.[5]

The government is meddling in the affairs of central bank and policy making. Examples can be taken from government interference in central bank's action to cut interest rates. With excess of government involvement, businesses are looking for support of government and opting for bribery to win contracts. The government's interference has restricted research and risk taking.

The government is taking more control on policy-making and seeks moving the country to presidential system. This is a concern for the moderate voices. Recently,

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1 *Turkey – Economic forecast summary* (June 2015). http://www.oecd.org/economy/turkey-economic-forecast-summary.htm

2 *Turkey's economy: No more boom time.* http://www.dw.com/en/turkeys-economy-no-more-boom-time/a-18145860

3 *Turkey.* http://www.oecdbetterlifeindex.org/countries/turkey/

4 *How Turkey's economy went from flying to flagging – and could get worse.* http://www.telegraph.co.uk/finance/economics/11640135/How-Turkeys-economy-went-from-flying-to-flagging-and-could-get-worse.html

5 *Turkey.* http://www.oecdbetterlifeindex.org/countries/turkey/

the government has attempted to curtail the freedom of speech, judiciary, press. This has a bad impact on the relationship with the investors. The increase of corruption is concerning to the businesses.

The maintenance of loose monetary policy by the government is destructive in nature. One of the main concerns is over-dependence on foreign investment. It has exposed its economy to external shocks. The global economic crisis in 2009 caused the Turkish economy to shrink by 5%.

In 2013, Turkey shared a bold plan i.e. Vision 2023 as part of which country wants to be among the top 10 world economies, increasing GDP to around $2 trillion and to achieve annual exports of $500 billion. However, a lot of measures need to be done. Turkey needs to encourage research and development, create an environment cohesive to foreign investment and polices for intellectual rights protection. Exchange of technology and knowledge transfer and exposure to innovative goods and services would help in the growth of the country. Areas of the improvement are like regulatory policies. To get approvals for new drugs and medicines can take an average of more than 1100 days. The country has very weak intellectual rights' protection. This can be understood by the fact, that software piracy in the country exceeds 60% which is 20% more than the global average.[6]

Several reforms are required just as the declaration of the independence of the central bank, labor reforms, the improvement of the education system, the promotion of the participation of women in decision-making, the enhancing of exports. Currently labor costs are pretty high. This is accompanied by low productivity. Country has the low saving rate of just 14% of the GDP. This needs to be increased in order to decrease the reliance on foreign capital. Maintaining citizen rights is important.[7]

Turkey is a Contracting Party of The United Nations Convention on Contracts for the International Sale of Goods (CISG) since 2010, which entered into force for the quasi-European country on August 1, 2011. The accession to the Convention provides Turkey a various new opportunities and challenges as well, thus, it can be more efficient as far as the international trade is concerned.[8]

## 3. Turkey's environmental policies

Turkey recently exempted large development projects from seeking environmental impact assessment. This comprises shopping malls with more than 50,000 square meters of area, mass housing projects with more than 2000 units, laying of long railways lines golf courses, and big hospitals among others. The government at the

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6 *How Turkey can turn around its economy?* http://www.csmonitor.com/Technology/Breakthroughs-Voices/2015/0416/How-Turkey-can-turn-around-its-economy

7 *Who's Going to Save Turkey's Economy?* http://foreignpolicy.com/2015/04/03/whos-going-to-save-turkeys-economy-erdogan-akp/

8 See IMRE Mátyás: Good Faith and Legal Unification. *European Integration Studies*, Vol. 7, No. 2 (2009) 43–49.

same time narrowed down the CED report obligation for power plants like hydroelectric, geothermal, solar among others. The Chamber of Environmental Engineers had criticized the new regulation and raised concerns regarding increase of environmental problems, droughts and pollution.[9]

## 4. Impact of pollution on the world economies

The protection of environment is critical for economic and social development. Air pollution, water pollution, improper dumping of waste, and hazardous substances, climate change are matters of grave concern and pose major threats not only to the health of the society but to their existence itself.

Global warming is impacting climate change and increasing the earth's temperature at a rapid rate. Globally measures are being taken to control the temperature rise to 2 Celsius degrees. The goals must be the prevention of flooding, desertification, famines. Though responsibilities lie on the business owners as well but concerns are being raised against Shell, which despite the concerns is continuing with drilling and exploration of fossil fuels in the deep sea, which all are expected to cause global temperature rise of 4 Celsius degree. While businesses look to meet the energy demands of the developing economies, it is important that the urgent needs of our planet are kept in mind.[10]

Chile in recent years has become a victim of climate change. The country is facing water scarcity and this is impacting the drinking water needs, business needs esp. of the mining companies, power generation at the hydroelectric power plants among others. The deserts are expanding and cities like Santiago are suffering from the increasing level of pollution. With the widespread impact of climate change, the country is looking towards imposing carbon tax on industries in order to limit and decrease the level of pollution. Apart from tax on carbon emissions, the country is targeting other pollutants including sulphur dioxide, nitrogen dioxide. It has also taken initiatives to expand renewable energy usage and has setup wind and solar farms to meet its goal of generating 20% of electricity from renewable resources by 2025. The world should follow this example and make carbon a factor in world trade.[11]

Disposal of industrial and sewage waste is important and needs to be done properly. Developing economies in order to promote growth and investment tend to ease rules, which has an impact on the environment and create long term problems.

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9 *Turkey exempts urban projects from environmental impact reports.* http://www.todayszaman.com/business_turkey-exempts-urban-projects-from-environmental-impact-reports_365422.html

10 *Shell accused of strategy risking catastrophic climate change.* http://www.theguardian.com/environment/2015/may/17/shell-accused-of-strategy-risking-tastrophic-climate-change

11 *Climate Change Concerns Push Chile to Forefront of Carbon Tax Movement*. http://www.nytimes.com/2014/10/30/business/international/climate-change-concerns-push-chile-to-forefront-of-carbon-tax-movement.html?_r=0

Example: River Ganga in India, which is one of the major rivers and connects various towns, has been a victim of improper waste disposal. This has not only made the river unfit for drinking water, but has also impacted the usage of waterways for transport of goods and people. In recent initiatives by the Indian government to clean the river, the time to clean the river has been estimated to 18 years at a cost of more than $8 billion, which is a huge amount of money and a long term of time. This could have been prevented if sustainable development efforts were made in time.[12] The economic impact because of the pollution is not only about the massive cleanup cost but also has cost the cities in terms of tourism and businesses in term of higher transport costs and energy usage; sometimes even making the businesses uncompetitive.

Keeping the abovementioned concerns in mind, the world leaders had agreed in "World Summit on Sustainable Development" for an implementation plan, which focuses on reducing world hunger, providing access of clean drinking water and basic sanitation and bringing people above the poverty line. In addition to this, the plan comprises investment in cleaner, efficient and affordable energy and supports providing incentives for adoption of clean energy projects.[13]

## 5. Turkey and the European Union

Turkey is a founding member of the United Nations (1945), a member of NATO (1952), the Council of Europe (1949), the OECD (1960) and the OSCE (1973) and was an associate member of the Western European Union (1992).

On 31 July 1959, Turkey made its first application to join the newly-established organisation. The Ankara Agreement signed on 12 September 1963 started relation between Turkey and the EU. The aim of the Ankara Agreement, as stated in Article 2, was to promote the continuous and balanced strengthening of trade and economic relations between the parties. After that, the Customs Union decision, Turkey-EU relations entered in a totally new dimension as it was one of the most important steps for Turkey's EU integration objective.

Unfortunately, the EU highlighted many contra reasons of the connection, just as human rights' problems, immigration problems and also the Kurdish problem in Turkey. Recently, on the 100th anniversary of the Armenian Genocide, EU passed a non-binding agreement asking Turkey to recognize the Armenian Genocide. This was also followed by some EU member states, like Germany and Austria, recognizing the genocide. This has not gone well with Turkey and the diplomatic ties have soured.

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[12] *Cleaning Ganga will take 18 years, massive investment, Centre tells Supreme Court*. http://timesofindia.indiatimes.com/india/Cleaning-Ganga-will-take-18-years-massive-investment-Centre-tells-Supreme-Court/articleshow/43169859.cms

[13] *International Environmental Issues*. http://www.mfa.gov.tr/international-environmental-issues.en.mfa

The dispute over human rights is not a new one. Turkey has been monitored under the lens due to its historical past and recent crackdown on opposition parties, press and the judicial system. EU has locked the concerned chapters which form critical part of the 35 chapters, which a country must fulfill for the membership. Although there are issues in the process, we must look at the bigger picture, the economic future for EU and Turkey and the other alternatives.

Turkey is trying to show their modernization for EU and the world. Universities are opened in Turkey, and for instance, the rules for wearing chador are much looser and the principle according to which all women can freely decide to wear a veil or not prevail. Furthermore, there is no referring to Islam in the Turkish constitution at all. Wearing chador is pronouncedly forbidden at certain universities, but it is tolerated at Faith University of Istanbul, for example.

Having shared above, the road ahead for either Turkey or EU is full of obstacles and compromises. A win-win solution can only be reached with sheer will and cooperation.

I would like to quote David Cameron's words which were told during his stay in Turkey: a European Union without Turkey is "not stronger but weaker... not more secure but less... not richer but poorer".[14]

## 6. The present economic situation in Turkey and migrants' effects on it

Turkey is facing tough economic situation with slowing economy, rising inflation,[15] decline in exports and customer confidence, plummeting currency and increase in violence.[16] The economy is facing pressure from both internal and external factors. The factors vary from Syrian war and refugees' crisis to Chinese economic slowdown and devaluation of its currency yuan to country's own political uncertainty, which was triggered due to the collapse of two-year long truce with the Kurdistan Workers' Party, or PKK this July.[17]

The end of truce led to increase in internal tensions with attacks in few Turkish cities. Tourism has taken a toll and tourists from Britain and Russia have declined by nearly 30%.[18]

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[14] *Cameron anger at slow pace of Turkish negotiations*. http://www.bbc.com/news/uk-politics-10767768

[15] *What's the greatest risk to Turkey's economy?* http://www.al-monitor.com/pulse/originals/2015/08/turkey-economy-political-uncertainties-greatest-risk.html#

[16] *Turkey's economy ministers at odds over reform agenda, economic outlook*. http://www.hurriyetdailynews.com/turkeys-economy-ministers-at-odds-over-reform-agenda-economic-outlook.aspx

[17] *Turkey's lira sinks to record low against dollar*. http://www.marketwatch.com/story/turkeys-lira-sinks-to-record-low-against-dollar-2015-09-14

[18] *The Impact of Syria's Conflict on the Turkish Economy*. http://themarketmogul.com/impact-syrias-conflict-turkish-economy/

Turkey's currency, the lira continues to decline and record new lows compared to the US dollar. In one year, the currency had declined from nearly 0.4400 US dollar per lira to 0.33 US dollar per lira.[19] Decline in currency can boost exports of some countries but with war in Syria, exports have declined instead. There was loss of exports worth $6 billion between 2011 and 2014.

In addition to this, crisis in neighboring countries just as in Syria, have contributed to the economic situation. A huge number of refugees – almost 2 million, i.e. half of the dislocated 3.9 million – have entered in Turkey. The economic impact due to this migration could be understood from the report issued by Republican People's Party (CHP), which states that more than $5.5 billion from the budget of Turkey have been spent on the concerned refugees.

Syrian refugees have also contributed to rise in unemployment and overcrowding of the cities. For example, in Mardin, unemployment rose from 12.3% in 2011 to 20.6% in 2013.[20] While border town Kilis is overcrowded and increasing refugees have led to 100% jump in rent.[21] Some refugees are in very dire state and are homeless and have resorted to beggary. The rising number of Syrian refugees in public places is also a concern. It's dampening the tourism industry as tourists shy away from the places.

Despite the negative impact, there are some positives to take from the Syrian refugees in Turkey. Though Syrian refugees have taken unskilled/part time jobs, this has helped increase competition and focus on skill improvement. There is an increase in higher skilled job opportunities, which have thereby increased average wages of the Turkish workforce.[22]

Furthermore, Turkey should concentrate on being an active player on the scene of international trade and the legal unification.[23] Thus, the balance of trade could be improved and the economy could be more effective.

## 7. Special meeting of the European Council, 23 April 2015 – statement

While the over-crowding and influx of Syrian refugees continue, some have started considering EU to seek asylum. In recent months, the number of such refugees has

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19 *Lira to Dollars Today (TRY USD) and Live Lira Dollar Exchange Rate Converter*. http://www.exchangerates.org.uk/graphs/TRY-USD-365-day-exchange-rate-history-graph-medium.png

20 *Economic effect of Syrian refugees in Turkey*. http://www.hurriyetdailynews.com/economic-effect-of-syrian-refugees-in-turkey.aspx?pageID=449&nID=81950&NewsCatID=402

21 *Turkey Says Refugee Burden Unsustainable*. http://www.voanews.com/content/turkey-says-refugee-burder-unsustainable/2856348.html

22 *Much ado about nothing? The economic impact of refugee 'invasions'*. http://www.brookings.edu/blogs/future-development/posts/2015/09/16-economic-impact-refugees-cali

23 See IMRE Mátyás: Good Faith and Legal Unification. *European Integration Studies*, Vol. 7, No. 2 (2009) 43–49.

been rising and EU and Turkey have signed a re-admission agreement which means that Turkish nationals would be able to travel to EU freely but in exchange Turkey must accept the migrants deported from EU who transited through Turkey.[24]

EU itself is struggling with the inflow of migrants and is taking initiatives to prevent loss of life at the sea and help the people in need of protection. The European Union has decided to strengthen its maritime operations and seeks cooperation and support of various nations including African Union, Turkey etc. while it makes effort to fight the traffickers.[25]

For the migrants seeking asylum, the EU commission has proposed a plan to relocate a total of 160,000 people from Hungary, Italy and Greece the transit countries for migrants. This distribution of migrants is based on objective and quantifiable criteria (40% of the population size, 40% of the GDP, 10% of average number of asylum applications, 10% of the unemployment rate). This plan will benefit asylum seekers from Syria, Iraq and Eritrea. EU has also offered nearly 600 million Euros to Turkey and western Balkan countries for migration activities. In addition to that, EU regional Trust fund will provide 40 million Euros of aid to the 400,000 Syrian refugees and host communities in Lebanon, Turkey, Jordan and Iraq to help in their rehabilitation and development.[26]

Despite the efforts made by the EU, the region stresses that the countries of origin must address the root cause of violence and underdevelopment and work towards countering corruption, promoting democracy and safeguarding human rights. This would help in greatly reducing the number of people fleeing the country for security or economic concerns.[27]

## 8. Future of Turkey

Turkey needs to work towards exports led economy compared to its current domestic demand based economy. Turkey is home for automakers, however, lacks in high tech manufacturing. There is a need to foster research and development for which improvements in education institutions are required.

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[24] *Turkey's New Migration Policy: Control Through Bureaucratization*. http://www.syrianef.org/En/2014/10/turkeys-new-migration-policy-control-through-bureaucratiza tion/

[25] *Special meeting of the European Council, 23 April 2015 – statement.* http://www.consilium.europa.eu/en/press/press-releases/2015/04/23-special-euco-statement/

[26] *Refugee Crisis: European Commission takes decisive action – Questions and answers.* http://europa.eu/rapid/press-release_MEMO-15-5597_en.htm

[27] *European Parliament resolution of xx April 2015 on the latest tragedies in the Mediterranean and EU migration and asylum policies.* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0176+0+DOC+XML+V0//EN

The country needs to review its environmental policies, which are damaging to the environment and would cause long-term damage and economic loss.

There is a need to protect rights of not only individuals but also the business owners. Central banks, judiciary, press and industries need to be encouraged and their freedom should be protected. This will let them do their job independently and also boost investor confidences which are wary of the government's intentions. Removing regulatory hurdles and paper work would help the businesses. Protecting intellectual rights would encourage high tech companies to invest more in the country.

The outlook of country would surely improve if the government carries out the much needed reforms.

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# A LANDMARK DECISION: THE LAVAL-CASE AND ITS FURTHER JUDICIAL QUESTIONS

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## 1. Introductory thoughts

How is it possible to keep the balance between the application of the so-called free movement rules of the European Union and the fundamental social rights, with the preservation of the national social systems? Could the application of fundamental rights by the trade unions – such as collective actions – means the violation of the single market's principles? Reversing the question: could the literal compliance with the acts of the European Union mean – in certain cases – the restriction of those rights which are ensured to workers, employers, organisations by the European Charter of Fundamental Rights? Could the regulations on the single market be interpreted less strictly in order to ensure the collective rights in national social systems? Is there a balance between European economic-interests and social rights of employees? If yes, where is that balance? If the balance is not reached yet, how could we manage to reach?

In the next few pages I intend to present the European Court of Justice's (hereinafter referred to as: ECJ) answers to these questions on the one hand, and the arguments of the stakeholders at issue on the other hand, through the analyzis of the *Laval*-case.[1]

## 2. The core of judicial questions: the legally relevant facts of the *Laval*-case

Few days after the accession of Latvia to the European Union (hereinafter referred to as: EU) in 2004, a Latvian construction company (*Laval un Partneri Ltd.*) contracted to build a school in Vaxholm. However, every region of Sweden has fixed minimum wages regulated in collective bargainings and *Laval* accepted to undertake the work for lower wages than in the collective contracts. The majority of the workers posted to Sweden from Latvia were members of trade unions in Latvia, and *Laval* had signed collective agreements with the Latvian building sector's trade union.

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[1] C-341/05 – *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others, request for preliminary ruling from the Arbetsdomstolen* (Swedish Labour Court). ECLI:EU:C:2007, 809, 18. 12. 2007. http://curia.europa.eu/juris/document/document.jsf?text=&docid=71925&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=496104 [Consulted: 30. 09. 2015]

The Swedish trade union wanted *Laval* to accept their rules, which would have meant an "accession to the collective agreement for the building sector, which includes a process for negotiating salaries. If agreement cannot be reached, there is a fall-back minimum wage provided under the regional collective agreement of SEK[2] 109/hours."[3] (approximately 11 euros per hour) The Latvian workers earned less money, therefore this deal did not worth it for *Laval Ltd*.

This resulted in the Swedish trade unions protest against the situation and they applied blockades on the location of the constructions. After their action, other trade unions commenced solidarity, so they joined the worker's "campaign". In a few months' time, there were no contracting partners for *Laval Ltd.* in the whole country of Sweden. As a result, the construction-processes came to a halt, the subcontractor company (called: *L & P Baltic Bygg*) went bankrupt, and Latvian workers lost their jobs.

"In the light of the trade unions' collective action, *Laval* brought a case against the construction and electricians' unions seeking a declaration, that their actions were unlawful and compensation for the damage caused to its business. The Swedish court decided to refer the issue to the Court of Justice for an interpretation of EC law"[4] within the frames of the preliminary ruling procedure under the Article 267 of the Treaty on the Functioning of the European Union.

The core of the complex judicial questions is the collision of two principles of the EU. On the one hand, Article 56 (ex Article 49 TEC) of the Lisbon Treaty prohibits any restriction applied by the member states against the nationals of other member states who are not established in that member state where the person for whom the service is to be intented.[5] We can see, that *Laval Ltd.* lived with its right to provide services in a different member state by undertaking to build a school in Vaxholm. According to the abovementioned single market regulation, the action of the trade unions violated one of the main principles of the single market. On the other hand, Article 28 of the Charter of Fundamental Rights of the European Union (hereinafter referred to as: Charter of the Fundamental Rights/European Charter of Fundamental Rights) declares the right of collective bargaining and action.[6] Under

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2 Currency of Sweden: Swedish Krona.

3 BELL, Mark: *Understanding Viking and Laval: An IER Briefing Note*. The Institute of Employment Rights, Liverpool, point 21, page 6.

4 BELL, Mark: *Understanding Viking and Laval: An IER Briefing Note*. The Institute of Employment Rights, Liverpool, point 23, page 6.

5 Article 56 of the Lisbon Treaty: "*Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended."*

6 Article 28 of the Charter of Fundamental Rights of the EU: "*Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.*

the scope of this title, trade unions have the right to collective actions, when their interests are threatened or violated. This right is a fundamental right, thus it has to be respected by everyone – also by the acts of the single market. The collective action includes strike also, therefore the trade unions lived with their rights provided by another European document, namely the abovementioned Charter. This raises another collision, notably the collision of the economically motivated perspective of the European Union and the social issues of national labour law. In the next chapter I examine the collisions which make the case more complex and remarkable.

## 3. Collision of interests, collision of values, collision of laws

As I previously noted, the collision of different interests cause a complex legal case in issue. Free movement of services as a requirement of the European single market is a very strong economic interest of the EU. According to the objectives of the single market, the free movement rules intended the economical development, financial growth and the improvement of the welfare of Europe. By abolishing the borders among the countries of the Schengen-zone, European market of goods, services, employment, capital got the opportunity to improve sustainably and unstoppably.

While we concern with economic interests, welfare and good life in theory, we also have to take into account the fundamental rights of people and interest groups (such as trade unions) and the national interests of the member states. European freedoms cannot function self-servingly. Therefore, the founding treaties of the EU ensure the restriction of single market regulations when it is established by overriding national public interests such as public health, public moralty, public order, public safety etc. In the introductory thoughts of this paper I throwed up a question whether the regulations on the single market could be interpreted less strictly in order to ensure the collective rights in national social systems. Now I wonder whether collective rights in issue could be handled as public interest if the majority of the nation's employees are affected by it? If yes, could this mean an exception under the free movement of services?

The Charter of Fundamental Rights involves the human and fundamental rights, which have to be respected by everyone. However, the Charter did not have legally binding force at the time of the *Laval*-case[7] so it was mainly an elegant collection and declaration of rights but without any effect legally being enforced.

On the other hand, the EU served another act for the Swedish to refer to. The so-called *Posting Directive* (96/71/EC) of the EU concerning the posting of workers in the framework of the provision of services states that the guarantees ensured for the employees are regulated in legislative products or administrative-decrees and in the constructive industry guarantees are in collective agreements or in gen-

[7] The Charter got legally binding force by the entering into force of the Lisbon Treaty on 1 December 2009.

erally applicable judicial resolution.[8] The Swedish act regarded to the *Posting Directive* determines the working conditions of the employees however it does not determine the minimum wage. The Swedish tradition is that the wages are determined in collective agreements and the Swedish law contains that trade unions have the right to force the employers not belonging to the trade union to accept collective agreements elaborated by the trade unions. Swedish workers made their steps in harmony with their national rights and the *Posting Directive*. The minimal wage for a Swedish worker at the time of the *Laval*-case was around 11 euros per hour. When the Latvian workers came to work for less money (but possibly more than they have earned in Latvia before) and by this they turned up-side-down the Swedish labour-market situation, the Swedish workers of each field (mostly industrial fields) became disappointed and felt that their livelihood was in danger. According to the market-rules of our capitalized global world, the person who does the same job for smaller amount of money is usually the person who gets the job. Therefore, the worry and anger of Swedish workers are probably understandable. In order to keep the balance of the Swedish labour market, they had two options: trying to sign a contract with *Laval* in compliance with their traditionally accepted labour conditions, or starting to work for less money – such as Latvians do in their country – in order to stay on the market. Obviously, they did the first option and when it was not successful, they made a collective step. Soon another trade unions joined to the construction industry's action, because workers knew, that if they cannot stop the process, sooner or later the cheaper manpower will reach their industry, too. That could have turned totally up-side-down the whole country's living and working conditions, and as a *spillover-effect*[9] it would have reached whole Western and Northern Europe's labour-market. That is why the countries at issue[10] sent their opinion to the ECJ and supported the Swedish in this case in every channel they were able to use.

As we can see, the rest of the questions arise from the lack of the social-integration in the EU. We live in an economic integration which binds some cultural, traditional similarities and a generally common European value-system. However, this integration misses social and political integrity – as it already have been mentioned by some commentators such as *Martin Höpner*.[11] The question is that: how could the European Court of Justice bridge this huge gap between the social interests and single market requirements.

In the following chapter, I examine the opinion and arguments of *Paolo Mengozzi*, the Advocate General dealt with this case.

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8 Article 3, point 1 of directive 96/71/EC.

9 A secondary effect that follows from a primary effect.

10 The countries which have high minimal wages for workers, except for the United Kingdom.

11 alp. Prof. Dr. Martin Höpner, Max Planck Institute for the Study of Societies, Köln.

## 4. A step forward for trade unions − Opinion delivered by Paolo Mengozzi

The Swedish Labour Court requested the following question within the frames of preliminary rulings procedure to the European Court of Justice on 15 September 2005.

*"Is it compatible with rules of the EC Treaty on the freedom to provide services and the prohibition of discrimination on the grounds of nationality and with the provisions of Directive 96/71/EC […] if trade unions attempt, by means of industrial action in the form of a blockade, to force a foreign temporary provider of services in the host country to sign a collective agreement in respect of terms and conditions of employment such as that set out in the above-mentioned decision of the Arbetsdomstolen, if the situation in the host country is such that the legislation intended to implement Directive 96/71 has no express provisions concerning the application of terms and conditions of employment in collective agreements?"*[12]
The other question submitted to the ECJ was that: *"The Swedish Law on workers' participation in decisions prohibits industrial action taken with the intention of circumventing a collective agreement concluded by other parties. That prohibition applies, however, pursuant to a special provision contained in part of the law known as the 'lex Britannia', only where a trade union takes measures in respect of industrial relations to which the Medbestämmandelagen is directly applicable, which means in practice that the prohibition is not applicable to industrial action against a foreign undertaking which is temporarily active in Sweden and which brings its own workforce. Do the rules of the EC Treaty on the freedom to provide services and the prohibition on discrimination on grounds of nationality and the provisions of Directive 96/71 constitute an obstacle to an application of the latter rule - which, together with other parts of the lex Britannia also mean in practice that Swedish collective agreements become applicable and take precedence over foreign collective agreements already concluded - to industrial action in the form of a blockade taken by Swedish trade unions against a foreign temporary provider of services in Sweden?"*[13]

According to *Mengozzi*, the question of collective bargaining in this case belongs under the scope of the Union-law. He argues, that the fact that Sweden entitles the trade unions to determine the minimal wages in contracts does not mean the inadequate implementation of the *Posting Directive*. He examined the fulfilment of the protection of workers and the equal treatment of market players regarding the national companies interests' who intend to provide the same services as *Laval Ltd*

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[12] C-341/05, Reference for a preliminary ruling from the Arbetsdomstolen. http://curia.europa.eu/juris/liste.jsf?pro=&lgrec=it&nat=or&oqp=&dates=&lg=&language=hu&jur=C%2CT%2CF&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&num=C-341%252F05&td=%3BALL&pcs=Oor&avg=&page=1&mat=or&jge=&for=&cid=454231 [Consulted: 30. 09. 2015]

[13] Quoted above.

and who are binded by the collective agreements of the Swedish industry, highlighting that the case influences also the situation of employers on the market. He argued that the collective bargaining was not against the European law when the bargaining was based on public interest such as the protection of the rights of the employees and the fight against social dumping. However the bargaining should not be disproportionate related to the public interest.[14] This is also in compliance with the case-law of the Eropean Court of Human Rights. The examination of proportionality should be discussed by the court requesting the preliminary ruling, focusing on the conditions of the collective agreements accepted in the construction industry.

As we could see, the opinion presented by *Paolo Mengozzi*, the interests of the trade unions meet some advantages because the advocate general evaluated the social values, harmony between the employer and employee interests' and also the future of the national companies providing similar services to *Laval*.

The question of legally acceptable bargaining divided the European public opinion. According to "the advocates of business-freedom and liberalized market the Advocate General went too far"[15] because "the ECJ should not let the trade unions to dictate with power and blockades in the field of the single market of Europe."[16] Others argued that it was not possible, that some interest group only tended to accept the free market whenever it was advantageous for them. According to *Ashworth* the Swedish only fighted against the situation, because their employment-market was *not competitive enough* compared to the markets of the new member states (such as Latvia was at that time). Other representatives of the European People's Party also highlighted the importance of the ensurement of the free movement rules in practice. As we can see, the case divided the opinion of politicans, too. The liberal representatives argued for the market-interests, whereas the socialist representatives argued for the Swedish trade unions. Also the trade union representatives expressed their opinion related to the case and also their collective rights. They emphasized the importance of collective bargaining, collective actions and collective agreements, which cannot be ignored or disregarded.

Before analyzing the judgement of the ECJ, I would like to point out, that in my opinion although judicial issues can be affected by politics, decisions cannot be exclusively made on it. Maybe in some cases it is neccessary to take into account some opinions of the public sphere representatives' and politicans, when these

[14] Point 303 of the Opinion of Advocate General Paolo Mengozzi, delivered on 23 May 2007. http://curia.europa.eu/juris/document/document.jsf?text=&docid=62532&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=454231 [Consulted: 30. 09. 2015]

[15] Undated and unnamed article on Bruxinfo online news portal, 23 May, 2007. www.bruxinfo.eu [Condulted: 28. 09. 2015]

[16] Told Richard Ashworth member of European People's Party.

opinions are adequate and relevant, but issues covering social interests cannot be decided clearly on the base of economic interests and politics.

In my view, the ECJ paid more attention to the economic issues of the case than to the social rights, therefore the landmark decision of the ECJ in this case is based mostly on economic points of view of the single market.

## 5. The big surprise: the landmark decision of the ECJ

On 18 December 2007 the European Court of Justice gave the judgement[17] on the *Laval Un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others* case. As the opinion of *Paolo Mengozzi* meant a step forward for the trade unions, the judgement of the ECJ meant two steps back for them.

The Court evaluated the collective action of the trade unions as an unlawful restriction of the free movement of services. The Court did not question the rights of the trade unions to collective actions, but the action against the Latvian company was not supportable by the principle of the protection of social dumping.[18] The Court neither questioned the protection of employees as public interest, but it stated that the proportionality was not covered. According to the Court the action of the union was more overlaping than the one that the protection of workers' rights would have required, which led to the unlawful restriction of the free movement rule on services. However, the judgement is just the *right interpretation* of the acts of the EU released by the ECJ (as the only body who has the right of interpretation in the field of EU law), this does not make any sense in the case before the national court. Therefore, the Labour Court of Sweden would have had the right to decide against the trade unions, however the interpretation provided by the ECJ is binding, therefore indirectly the ECJ decided the case.

The judgement was shocking for the trade unions and their representatives. According to *John Monks*[19] the decision discredit the principle of *flexicurity*[20] and the flexible collective agreements on wages.

The ECJ's judgement on the Laval-case divided the public opinion of the EU and it was surprising for me in two aspects. The first is that is was contraversal with the Advocate General's opinion, which is not a problem, because the opinion is obviously not binding for the Court, however the Court usually follows these opinions. The second aspect of this surprising – but economically reasonable − decision is, that the Court gave a political answer to a judicial issue, in my opinion. This was unusual for me, because the EU usually tends to integrate the member states in every field possible. In this case, instead of suggesting some kind of social

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17 C-341/05; Reference for preliminary ruling. http://curia.europa.eu/juris/document/document.jsf?text=&docid=71925&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=454231 [Consulted: 29. 09. 2015]

18 See the points 103–113 of the judgement.

19 President of the European Trade Union Confederation (ETUC)

20 Flexicurity: Flexibility and security

integration, labour law integration or "*minimum wage integration*" for the EU, the ECJ took the focus on the single market interests', which ensures and strenghtens only an economic integration. Moreover, it enlarges the aversive feelings against the foreign employees in the member states. This process – in my view − is not an advantage for the EU in the long-run regarding the free-movement of workers, employers and other market-freedoms.

## 6. Consequences – in my view

The main message of the *Laval*-judgement is, that the freedoms of the single market cannot be restricted: neither because of national public interests, nor because of social questions. The Court concerned the employment-market interests of the whole European integration, but did not evaluate the future of the Swedish employment-market. The ECJ ignored the Advocate General's opinion in order to consider clearly economic and maybe political interests. Of course the judgement is legally based, but maybe the politically supported interests enjoyed the advantage and the social issues of the Swedish workers were left in the background.

Naturally the decision, which is exclusively legally-based, does not exist. However, in my opinion the ECJ should have taken into account the social interests to a greater extent than they did. Further consequence is that the trade unions will think twice whether they stand up for their interests, which leads to the ineffectiveness of the collective actions and collective advocaty. Employees and other interest groups will not trust in their representatives and as a result, the institution of trade unions will be deprived of their power in the long-run.

Other consequence is that – as I mentioned in the previous chapter – the aversive feelings towards the foreign workers will arise and strengthen in the member states. The European integration aims the free movement of persons, workers, services, goods and the capital, therefore the EU should strengthen the values of the foreign-ness in the member states. The question should be: what is the thing, that a foreign worker does better than the nationals of a state? What can we learn from the foreigners? In this case, the balance could be established between the economic interests of the integration and those of the national-social systems. By accepting the foreign workers and their knowledge, the effectiveness of a working-manufacturing process can develop. By the development, the financial effectiveness could be reached, which is an interest of a country and also that of the EU, and not just in the long-run, but from now on.

In the Introductory thoughts of this paper, I raised some questions. I asked: *How is it possible to keep the balance between the application of the so-called free movement rules of the European Union and the fundamental social rights, with the preservation of the national social systems?* I think it is not possible to find the balance, but we can try to find a satisfying solution between the application of the free movement rules and the requirements of the different social systems. We live in a Union which has 28 different social systems. Each system tries to protect its workers, employees, employers, and other national interest groups. In order to pro-

tect them, the states neccessarily make laws, agreements, regulations and institutions for the protection, not against the foreign citizens or their services intended to provide in the countries, but for declaring that the laws protect the citizens, their business and ensure their social rights. National laws are guarantees for the citizens in every legal system. Guarantees are available also against the home-state of a national. Therefore, by maintaining 28 different social systems the EU will not keep the adequate balance. However, an adequate solution could be made. Then both the goat has enough to eat and the cabbage remains – as the famous Hungarian proverb says. This solution – in my view – requires an integration in social issues, too. Of course, the EU takes steps in order to establish a *more social Europe*,[21] in which social cohesion is promoted, unemployment rates are lower, poverty is tackled and job creation is supported,[22] however the different social systems are still upheld. Different social systems should be abolished in my opinion, and a unique, special system for the whole Union should be established in the remote future. Now, this is not possible because of the diverse levels of the social-systems of the member states. Nevertheless, step by step, the harmonization could be reached. The first step would be a directive in which minimum wages for the workers of industry sector are declared for all member states of the EU. Secondly, the wages of the other employment-sectors should also be regulated, despite the fact that it is even more complicated than the previous one because of the different working-conditions of the states, and the different values of different university-degrees and so on… The *equalization of wages* would need the same social parameters of the member states which are diversing because of the different social systems. I wonder, whether the introductory step (before the previously mentioned first) would be the rule: every state has the rights to regulate minimum wages in decrees nationally, but all foreign workers have to earn that amount for the same work (not less, not more, the same). This would meet the requirement of *"equal pay for equal work"*, which would protect not just the foreign workers, but also the nationals, in the above-analyzed case: the Swedish. The wage-strategy[23] would support productivity also which would led to a further improvement of the integration.

I also asked *if the regulations on the single market could be interpreted less strictly in order to ensure the collective rights in national social systems*. Well, the answer is no, the regulations cannot be interpreted flexibly. Though, the collective rights are public interests of Sweden, the trade unions are not allowed to apply blockades in order to express their interests against the single market freedoms according to the ECJ. Therefore, there is no balance between economic interest of

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[21] For more information on the social policy of the EU, see: http://europa.eu/rapid/press-release_IP-15-5132_hu.htm [01. 10. 2015]

[22] See the page of the European Commission: On the path to a more social Europe. http://ec.europa.eu/news/2015/06/20150609_en.htm [01. 10. 2015]

[23] About wage-led growth, see: STOCKHAMMER, Engelbert: *Wage-led Growth*. Kingston University, London, Friedrich Ebert Stiftung, SE, No. 5, April, 2015.

the EU and the social rights of the employees, yet. In my view, not only can we consider the Swedish claims as social issues, but also as economic ones − as we consider the wages of the Swedish workers as economic interests. Their economic interest is to receive the same wage for their work as before. This is not in proportion with the interest of the EU namely, letting the workers move freely without any restrictions applied by the member states.

On the other hand, the judgement strenghtens the situation and place of the single market, ensures the free market rules without any restrictions on it. This – thinking federatively about Europe – is a "*continental"* interest for Europe. Federative aspect in the future can lead to a *federative Europe-concept*, however the conditions are not available either in time or in financial circumstances. Thus now, we have to treat Europe as *a Union* (as it is a union now), an integration covering more and more fields of cooperation and harmonization, prepairing for a future federative Europe, which is able to compete with the USA and the developed Asian countries. And in an integration, the national interests and the divergence of the different social-systems on a single employment-market mutually have to be concerned. Therefore, the integration has to be extended into more fields, eg. social integration, and *Social-Europe*[24] has to be established – as it was suggested also by other commentators. Thus – in my opinion – the judgement was neither the best, nor the worst, it was simply surprising.

[24] More information obout Social-Europe are available on the website of the social-Europe: www.socialeurope.eu

**NOTES FOR CONTRIBUTORS**
**to the European Integration studies**

## Aims and Scope

The aim of the journal is to publish articles on the legal, economic, political and cultural sides of the European integration process.

Two issues a year (approximately 150 pages per issue)

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