

Cross-border and EU legal issues: Hungary – Croatia

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(eds.)**

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Foreword

On the threshold of the European Union, Croatia can now say that her legal system has been to the maximum extent harmonized with the *acquis* of the EU. However, harmonization on the normative level is not sufficient. Practical implementation of the *acquis* is the next step, which is certainly more difficult than the mere harmonization of norms. Universal legal analysis, both scientific and professional, comparison of standards and of the practice with those countries that have already gained experience in the implementation of the *acquis*, are certainly necessary for the adoption of the *acquis* in a way that will allow the realization of the latter's *ratio legis*.

This book, a collection of papers, may almost be regarded as a symbol. Its origin, its contributors, its themes and the circumstances in which it originated symbolize everything Croatia has been confronted with on her way into the EU which will soon reach its successful end.

On the one hand, with its content, this book covers a wide spectrum of legal topics related to the implementation of the Community *acquis*, and a comparative analysis of several legal institutes in the two neighbouring countries, Hungary and Croatia. On the other hand, it is of great political importance that Hungary is a member of the EU and is fulfilling the role of Presidency at the time of this book's publication. Croatia is a future member. Both countries have abandoned the socialist system and experienced all the hardships of the adjustment of the whole society to new legal, political, economic and national values. Hungary, which, thanks to historical circumstances, has joined the EU before Croatia, has been more than heartily supporting Croatia in her efforts to satisfy all the conditions for EU membership. From the very first day of her membership in the Union, Hungary has been advocating for and encouraging Croatia. As one of the priorities of her presidency over the EU in the first half of 2011, Hungary has set out the completion of Croatian accession negotiations with the EU. Furthermore, Osijek and Pécs are regionally connected and they are constantly emphasizing the importance of universal and quality cross-border relations, not only through the cooperation of their universities, but through every other form of cooperation. Tomorrow, when Croatia and Hungary, Osijek and Pécs, will be divided by the European border, which in fact is not a border at all, this cross-border cooperation will become even more important. Finally, this book has been co-financed by the European

Union through the IPA cross-border program Hungary-Croatia, which shows that EU itself has recognized Osijek and Pécs as centres of jurisprudence that are able to universally analyze particular aspects of cross-border cooperation and of the implementation of the Community *acquis*.

The publishers and authors certainly deserve praise for the choice of topic, the quality of papers, and the message they are sending to the Croatian and Hungarian professional and general public. This message is very simple: Croatia and Hungary are part of the common European legal space, countries that are directed at each other, countries whose resemblances are much greater and much more important than possible differences resulting from different historical circumstances in which they have followed their European way.

Zagreb, 25 January 2011.

Prof.dr.sc. Ivo Josipović
President of the Republic of Croatia

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Preface

The development of cross border issues is strictly interrelated with the expansion, transformation and strengthening of international relations among states. Consequently, in these days, cross border issues and related regulations are attracting more and more attention, becoming one of the core issues of international and supranational relations, especially when studying the European Union. The European Union, in accordance with the subsidiarity principle, emphasizes the significance and the necessity of deepening regional cooperation among the territories even beyond state borders. It is yet another characteristic of the beginning of the 21st century that we have to face different and diverse dangers (for instance epidemics, terrorism, climate change, economic crises, globalization) threatening our lives, health and security. These phenomena obviously raise various and at the same time similar problems clearly and manifestly apparent in each state in the field of civil, business, criminal, and family as well as public law. The answer states can give to these challenges cannot be other than strengthening the cooperation and making it more and more intense. It entails the approximation of legal regulations and establishing joint operations in order to solve, among others, cross border issues. Each EU candidate, including Croatia, has to prove to have created an adequate legal environment for the prerequisites of cross border cooperation. It is obviously true that the cross border phenomenon in itself means much more that is realized in the framework of the supranational organization called European Union. The Pécs Law School and the Strossmayer University have found it inevitable to establish common research and student exchange program even before Hungary joined the EU. This cooperation has not ended after 2004, or after the first decade of this century. It has become even more strengthened as we realized that especially in the legal education and research we can widen our horizons, share our theoretical knowledge and empirical experiences about accession and its effect to our legal system, legal theory and practice in all branches of law. These can be considered backgrounds to the co-operation between the law schools of Pécs and Osijek in the framework of **Establishing UNiversity Cooperation Osijek – Pécs** project (EUNICOP; HUHR/0901/2.2.1/0013). EUNICOP is a one-year long common research and curriculum development project that is co-financed and supported by the European Union through the Hungary-

Croatia IPA Cross-border Co-operation Programme and by the two participating law faculties. The EUNICOP project is operated in various interrelated areas and through various activities. One of these activities was the conference “Cross-border and EU legal issues: Hungary – Croatia”, organized by the Faculty of Law, University of Pécs on 16-18 September 2010. The conference, where knowledge gained during the joint research activities was shared, successfully brought together researchers and various fields of law were dealt with.

This volume contains all contributions written and presented in English during the conference. Two additional volumes containing the Hungarian and Croatian versions of all conference materials are published in the framework of EUNICOP cooperation, as well.

6 January 2011, Pécs-Osijek-Utrecht

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Consumer Acquis, de lege lata, de lege ferenda

I. Introductory notes

The paper analyzes the development of consumer rights in EU law. Consumer protection has an important place in the field of legal harmonization. In order for the consumers, as buyers, to feel secure in any EU Member state, it was necessary to harmonize the existing legal regimes on consumer protection and/or create a new legislative frame which will guarantee the same rights and obligations in any corner of the European economic space. The process of harmonization of consumer rights in the EU has been going on for almost 50 years (with more or less intensity). So far a whole series of directives and other legal acts have been adopted, which are primarily designed to ensure that the consumers throughout the EU have the same or similar level of legal protection in realizing their rights, but also to remove any obstacles to free and undisturbed trade in the European market.

However, in spite of that, only a minor part of the legal matter on consumer protection has been harmonized. This is caused by the fact that the field of consumer protection is an extremely broad field.¹ In addition to that, the development of consumer rights in the EU has been burdened by numerous dilemmas and turmoil from the very beginnings till this day. Some of the most important ones, which will also be addressed in this paper, are dilemmas regarding basic harmonization fields, the issue of degree or level of harmonization, and others as well.

Namely, while in the early periods of creating consumer rights in the EU there was a general consensus on the need for the so-called minimum level of harmonization, lately there has been a trend and tendency toward maximum harmonization of the law by means of so-called horizontal measures of legal harmonization. Recently there has been more and more debate on the possibility to adopt a document entitled 'Euro-

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¹ It should be stressed that consumer protection entails protection of health and safety, protection of economic interests of consumers, right on education and right to establishment of consumer organizations.

pean Consumer Contract Law Regulation’ (ECCLR) which would set a harmonized level of consumer protection (so-called ‘full harmonization’) in all EU Member states, albeit only in that part of the legal matter which is to be part of the future ECCLR.

This is however only one of the proposals for possible directions of consumer protection law development at EU level. There are different visions and ideas on what the future ‘European law on consumer protection’ should look like.

This paper presents the basic determinants of different ideas and approaches. It gives an overview of all relevant EU regulations adopted in the domain of consumer rights protection. The main issues and dilemmas in relation to the development of consumer rights protection so far and in the future are also pointed out.

II. Consumer protection in EU law

1. Historical overview of consumer protection development in the EU

Consumer protection in EU law was formed in several stages. In the beginnings of European integration consumer protection did not represent an independent policy of the EU. Its forming started as the by-product of the forming of the internal market. The EEC Treaty (Treaty of Rome from 1957) mentions consumer rights only indirectly, in four articles (Articles 39, 40, 85(3) and 86). This means that the Treaty of Rome did not contain any explicit legal grounds for legislative competence of the Community in the field of consumer protection.² However, the lack of any explicit constitutional/legal grounds for consumer rights harmonization³ did not appear as an obstacle to the development of consumer rights protection in the EU.

Consumer protection right was originally formed in soft law regulations. The first document of that type was the Preliminary Programme of the EEC for a consumer protection and information policy from 1975.⁴ Although it is not a legally binding act, it is exceptionally important. In it the consumer is not viewed only as a buyer or person using goods or

² N. Gavella, et al, *Europsko privatno pravo* [European Private Law] (Zagreb, Faculty of Law, Zagreb University 2002) p. 148.

³ Gavella, op. cit. n 2, at p. 149.

⁴ Council Resolution of 14 April 1975 on a Preliminary programme of the EEC for a consumer protection and information policy, *OJ C 092, 25/4/1975*

services for his/her personal needs, but also as a person interested in the various aspects of society which can directly or indirectly influence him/her as a consumer.⁵ The Preliminary programme lists five basic consumer rights for the first time:

- the right to protection of health and safety,
- the right to protection of economic interests,
- the right to redress,
- the right to be informed,
- the right to representation.

The Preliminary programme represents the first attempt to define a legal frame for future consumer rights protection in the EU. The special importance of this document can be seen in the following: 1) its adoption cancelled the previous practice of incidental regulation of detected problems in the field of consumer protection, 2) it is a confirmation of the existence of a political will to give much more attention to consumer protection in the EU than it was previously the case.⁶

In 1981 the second 'European programme' dedicated to consumer protection issues was adopted. It is the Council Resolution on a second programme of the EEC for a consumer protection and information policy.⁷ This document does not bring any special novelties in connection with the legal regulation of consumer protection in the EU. It confirms the basic consumer rights defined in the Preliminary programme. The emphasis is on the need to strengthen consumer protection in the segment of quality control of goods and services.

And finally, in 1985 the third 'European programme on consumer protection'⁸ was adopted. The third programme set three goals. The first goal pertains to product safety, the second goal is promotion and protection of the consumers' economic interests and the third goal is im-

⁵ D. Vaughan, *Law of the EC, Vol I*. (London, Butterworths 1986) p. 784.

⁶ Gavela, op. cit. n. 2.

⁷ Council Resolution of 19 May on a second programme of the EEC for a consumer protection and information policy, *OJ* 1981C, 133/1

⁸ A New Impetus for Consumer Policy, Council Resolution of 23 June 1986 concerning the future orientation of the policy of the European Economic Community for protection and promotion of consumer interests, *OJ C* 1986, C 167/1

provement of consumers' participation in the institutions of the Community.⁹

When the Maastricht Treaty entered into force in 1993 it was the start of a new and important period in the development of consumer protection in the EU.¹⁰ The Maastricht Treaty is the first of the European Treaties in which a special chapter was dedicated to consumer protection. In Article 129 (a) of the Treaty it says that the Community shall contribute to setting up a high level of consumer protection, pursuant to Article 100(a) of the Treaty within the common market programme, and pursuant to special programmes and measures of Member states focusing on protection of health, safety and economic interests of the consumers. Article 100(a) becomes the legal basis for the actions of the Community in the domain of consumer protection. Consequently, with the entering into force of the Maastricht Treaty the measures focusing on consumer protection were based on Article 100a of the Treaty. According to Article 100(a) of the Treaty the decision making was put under the competence of the Parliament and the Council, in accordance with Article 215 of the EC Treaty, given that the decisions are made in the Council by qualified majority voting.

The Treaty of Amsterdam is the next document which marked the development of consumer rights protection. It implemented the renumeration of the Maastricht Treaty. Article 129a of the EC Treaty became Article 153. However, the Treaty of Amsterdam, apart from the new numeration, also introduces some relevant qualitative changes in the consumer protection segment. Article 153 of the Amsterdam Treaty has a significantly different content than Article 129(a) of the Maastricht Treaty.¹¹

⁹ A. Pošćić, *Europsko pravo ugovora i zaštita potrošača* [European Contract Law and Consumer Protection] Magistarski rad (Rijeka, University of Rijeka, Faculty of Law 2004) p. 14.

¹⁰ J. Stuyck, 'European Consumer Law after the Treaty of Amsterdam: Consumer policy in or Beyond the Internal Market', *37 Common Market Law Review* (2000) p. 367-400.

¹¹ Art. 153 of Treaty of Amsterdam says: '[i]n order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organize themselves in order to safeguard their interests'.

For the first time, the Treaty explicitly formulates basic consumer rights. It states that for the purposes of promoting consumer interests and enabling a high level of consumer protection, the Community shall contribute to the protection of health, safety and economic interests of consumers, as well as to informing on consumer education and their organization. When defining and implementing other policies and activities of the Community, the Member states are required to bear in mind the need for consumer protection.¹²

Article 153 of the Treaty of Amsterdam significantly, if not to the greatest extent when compared to other European Treaties, marked the development of consumer protection law in the EU.

After it was made, a total of eleven directives were adopted only in the segment of protection of the consumers' economic interests. In that sense it does not seem wrong to ascertain that consumer protection law within the EU frame received full recognition and affirmation only after the new Article 153 was adopted by means of the Treaty of Amsterdam. However, in the context of this analysis one should point out that the activities of the EU bodies in the field of consumer protection did not take place only and exclusively at the legislative level..

Compared to the legislative activity aiming at harmonization of consumer rights protection, which was primarily the subject so far, there was also a process of creation and affirmation of law and policy on consumer protection.

In that sense the legal protection (of economic interests) of consumers, which is the subject of this paper, is only one of the segments of the overall EU policy on consumer protection. The policy of consumer protection is a comprehensive policy which is realized in different areas of social life, in the field of education and informing of the consumer, in the field of setting up consumer protection organizations and so on.

All these measures combined were necessary for a systematic creation and full affirmation of consumer protection law at EU level.

2. Consumer protection and the Treaty of Lisbon

The Treaty of Lisbon holds a historic place among the European Treaties. Its adoption finally created the prerequisites for implementation of necessary reforms in the functioning of the expanded EU. The European Union finally gets new institutions and new rules which should enable it

¹² Art. 153 (2) of Treaty of Amsterdam

to function more easily and have more political weight in the international scene. In that sense it could be anticipated that after the adoption of the Treaty of Lisbon a new and different stage of EU development will start.

The Treaty of Lisbon is divided in two parts: the Treaty on the EU which contains general provisions on the method of EU management and external policy, and the Treaty on the Functioning of the EU. The provisions on consumer protection are found in the Treaty on the Functioning of the EU (TFEU) and consumer protection is addressed in Article 169 TFEU as follows:

In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as promoting their right to information, education and to organize themselves.

The Union shall contribute to attainment of objectives referred to in paragraph 1 through:

- a) measures adopted pursuant to Article 114 in the context of realizing the objectives of internal market;
- b) measures which support the measures of Member states and serve as a supplement or control of measures undertaken by the Member states.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall adopt the measures referred to paragraph 2(b).

The mentioned measures shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the provisions of the Treaties. The Commission shall be notified of them.

It is evident that Article 169 does not bring anything new in comparison to the previous Article 153 of the Treaty of Amsterdam. This Article also confirms the basic consumer rights (protection of health, safety and economic interest of consumers, as well as information on education of consumers and their right to organize themselves) formulated in the Preliminary programme back in 1975.

Furthermore, it confirms the legitimacy of EU bodies to undertake measures to harmonize the consumer protection law for the purposes of completing the 'project' of internal market.

And finally, the Treaty of Lisbon also keeps the formulation according to which Member states can adopt more stringent measures of consumer

protection than those prescribed as minimum level of consumer protection.¹³

The latter provision created a series of problems in practice. Namely, one of the basic objections to the process of harmonization of consumer right protection is that the activities of the EU so far in the field of harmonization of contract law and consumer protection have not yielded the desired effects. The consumer protection laws of EU Member states still significantly differ, even after years of implementing harmonization measures. This is because some of the Member states have adopted only minimum standards of consumer protection, while others have opted for higher and more stringent consumer protection standards. This was possible only because Member states were allowed to implement different standards and levels of consumer protection. Such legal solution resulted in the situation where in some Member states consumers enjoy better legal protection and have greater rights than in others. Such a situation surely does not contribute to the creation of a unique European market or to stimulation of trade.

This being said, it is surprising that this was not taken into account when adopting the text of the Treaty of Lisbon, particularly in the light of the recent position of the EU Commission, which has clearly been advocating the need for a harmonized level of consumer protection in all Member states.

However, the problem of un-harmonized level of consumer protection is only one of the current issues and problems in harmonizing consumer protection law. There is a whole series of open issues and dilemmas which have characterized the development of consumer protection since the beginning, which will be explained in more detail further in the text.

3. Legislative dilemmas and basic characteristics of the process of creating EU law on consumer rights protection

Harmonization of consumer protection law within the EU did not go 'smoothly' and without difficulty. It is a process which was without clear contours or visions in the beginning, without the appropriate insti-

¹³ This under the condition that mentioned measures are not contrary to the Treaty and that Commission is notified on them (see Art. 169(4) Lisbon Treaty).

tutional frame,¹⁴ which had an effect on the dynamics and the level of legal regulation of the consumer protection matter within the EU frame. The modern law on consumer rights protection in the EU is characterized by a fragmentary approach.¹⁵ It is today, after almost 50 years of intensive legislative activity, still un-harmonized to a great extent. There are problems also in the implementation of a ‘harmonized’ legal field.¹⁶ All this can be associated with insufficiently formulated consumer protection policy at EU level, but to a certain extent also to the unwillingness of certain Member states to undergo the harmonization process unconditionally.

Namely, since the (contract) law on consumer protection is part of private law, in a great number of European countries there was (and still is) a resistance to harmonization (especially of general contract law). The opponents to the process of harmonization of private law (which includes the subject matter of consumer protection) believed that the differences in the legal regulation of private law among European countries were too significant and that this is why harmonization is not possible.¹⁷ Furthermore, they point out that harmonization is not a necessary prerequisite for the creation of an internal market and a more intensive trade activity therein. They claim that trade between European countries

¹⁴ EC Treaty is signed in 1957 in Rome. Consumer protection is only mentioned in context of establishment of internal market. That wasn’t enough for taking some serious actions by relevant EU institution.

¹⁵ See Green paper on the Review of the Consumer Acquis, Commission of the European Communities, Brussels, 2007, COM(2006)744 final, p. 6.

¹⁶ See more on that C. Twigg-Flesner, *The Europeanisation of Contract Law* (London and New York, Routledge – Cavendish 2008.) p. 10., O. Lando, ‘Some Features of the Law of Contract in the Third Millennium’, 40 *Scandinavian Studies in Law* (2000) p. 346., available at: <http://frontpage.cbs.dk/law/commission_on_european_cotract_law/literature/lando_01.htm>, (last accessed on 19.01.2009).

¹⁷ One of the leading opponents of full harmonization of contract law was Pierre Legrand, professor at Tilburg University in Netherland. He strongly opposed the process of so-called ‘inforced harmonization’. See on that more in P. Legrand, *Against a European Civil Code*, The Modern Law Review Limited (Oxford, Blackwell Publishers 1997), P. Legrand, ‘European Legal Systems are not Converging’, 45 *International and Comparative Law Quarterly* (1996) pp. 52-81., D. Caruso, ‘The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration’, 1 *European Law Journal* (1997) pp. 3-32., A. Lopez-Rodriguez, ‘Towards A European Civil Code Without a Common European legal Culture? The link Between Law, Language and Culture’, *Brook.J.Int’l. L.* (2004) pp. 1195-1220.

has been going on even without the (presently so intensely advocated) processes of harmonization of law and that there are already existing supranational legal instruments which are sufficient mechanisms for trade regulation in international and European area.

However, one should point out that resistance to harmonization was more intensive in the sphere of general contract law matter, than in the segment of consumer rights protection. The reason was the fact that all European countries saw their economic chance in the harmonization of consumer protection rights. Harmonization of consumer rights throughout the EU was to be an incentive to intensive trade at EU level and to the removal of barriers attributable to un-harmonized or different level of legal consumer protection in different Member states. Therefore the harmonization of contract law was significantly more intensive when it comes to consumer protection matter than when it comes to harmonization of general contract law.

However, in spite of that the development of consumer protection law has ever since the very beginnings been burdened by many open questions, which have not been definitely, answered to this day.

For example, one of the more important questions which are still to be answered is the question of *minimum versus maximum harmonization*.¹⁸

Furthermore, in connection with that there is the question of appropriate harmonization instruments. Then there is the question of *vertical or horizontal harmonization measures*.¹⁹ And finally, there is still no unique answer to the question of the future direction (directions) of the development of consumer protection law.

When it comes to the first dilemma, that is maximum versus minimum harmonization level, it should be pointed out that the minimum harmonization level has been unconditionally accepted and advocated for years, by EU bodies as well as the business community.

The central objective of the procedure of minimum harmonization level is to implement a minimum level of harmonization of legal matter or the legal issue being regulated. The final effect of minimum harmonization level is not a complete removal of legal differences which exist in a

¹⁸ See Green paper on the Review of the Consumer Acquis, op. cit. 15, at p. 15., Ch. Twigg-Flesner, *The Europeanization of Contract Law, Current Controversies in Law* (London, Routledge-Cavendish 2008) pp. 40- 42.; V. Mak, *Review of the Consumer Acquis- Towards Maximum Harmonization?* (Tilburg, Faculty of Law, Tilburg University working paper No. 2008/6).

¹⁹ Op. cit. 15, at p. 7-9.

legal regime of Member states. In that sense, minimum harmonization level does not represent a radical intervention in the legislation of the Member state, but it rather amounts to the obligation of the Member state to ‘include’ in its legislation at least the minimum standards of consumer rights protection, prescribed by individual directives.

Since the minimum harmonization level did not result in the expected level of harmonization of national laws on consumer protection, there is ever more talk of the need for maximum harmonization of the consumer law.²⁰ Maximum harmonization level means full harmonization of legal matter or the legal issue being regulated at EU level.²¹ In order to achieve that, legal issues at EU level should be regulated not by means of directives, which has been the case so far, but rather by means of regulations or even by another document which would be a kind of European civil code, which has recently been frequently debated in the EU. When it comes to the second dilemma, horizontal or vertical harmonization measures, it should be pointed out that this is about measures which are undertaken as part of the process of modernization and systematization of the existing law on consumer protection. It has already been mentioned in the introduction that the law on consumer protection has been fragmented, and that the directives were made as answers to current situations and acute questions which needed to be resolved. So, for example, the same terms were defined differently in different directives on consumer protection or a certain legal issue was re-regulated in every new directive, so the question is which solution to be implement in the national legislation, and similar.

The answer to such confusion can be found in form of vertical and horizontal measures.²² The objective of the mentioned measures is for the complete *acquis communautaire* in the domain of consumer protection to undergo the process of re-examination, to remove any vagueness, harmonize terminology and similar. This can be achieved by approaching the revision of every of the directives individually, when it comes to the so-called *vertical harmonization measures* or one could undertake

²⁰ See EU Consumer Policy Strategy 2007-2013, available at: <http://ec.europa.eu/consumers/overview/cons_policy/doc/EN_99.pdf>, (last accessed on 30.04.2010).

²¹ Twigg-Flesner, op. cit. n. 16.

²² Op. cit. 15, at p. 7-9.

the so-called *horizontal measures*, which are more comprehensive and more demanding in scope.

Horizontal measures represent the adoption of the new so-called frame document which would incorporate all common and general questions comprised in a greater number of different directives on consumer protection, without having this document specially deal with any specific question which is the subject of the scope of any of the directives. Such a document could be considered a kind of codification of the existing consumer protection law, because it is the result of the process of systematization of legal solutions and their unification in a single, unique document.

A possible example of such a document is the Proposal for a Directive on consumer rights from 2008,²³ in which the text of four previous directives was revised and unified (Directive on contracts negotiated away from business premises, Directive on unfair terms in consumer contracts, Directive on distance contracts and Directive which it is proposing). The final text of the latter Directive has not been adopted yet. The process of its evaluation and consulting the public is currently being performed, after which the final text of the directive should follow. However, notwithstanding the fact whether this Directive will finally be adopted or not, more important is the message behind the adoption of this document. It confirms that the previous announcements of the Commission on the need for full harmonization of law on consumer protection are more than just 'a dead letter'. It shows that concrete efforts are being made in that direction and that the issue of obligation of full harmonization of consumer protection law is only a matter of time and appropriate instrument to achieve the latter objective.

Connected with this is also the last, rhetorical, but essential question of the paper, regarding possible directions of consumer protection development. Since this question has been given a separate title in the paper, it shall be left out here because it is yet to be analyzed therein.

4. Overview of present directives on consumer protection

The development of the law on consumer protection in the EU has been marked by adoption of a great number of directives, aimed at regulating various consumer rights, from the question of protection of health and

²³ Proposal for a Directive of the European Parliament and of the Council on Consumer Rights, 2008/0196, COM(2008)614, Brussels. 8.10.2008

safety of consumers, the consumers' organizing, to the question of protection of economic interests of consumers. Since this involves a large number of different documents, the systematic and complex analysis of which is impossible in one paper, the following shall present only that part of the *acquis communautaire* which deals with regulation of the question of protection of economic interests of consumers.

Existing directives which deal with regulation of economic interests of consumers can be, in terms of the subject of scope and regulation, classified according to several criteria.

So for example, a special group of directives are directives dealing with unfair trade practice, the second group of directives includes those regulating the questions of concluding consumer contracts via electronic media, the third group of directives are those regulating consumer rights in the so-called tourist contracts, and so on.

The presented classification was performed by the EC Commission and primarily for the purpose of easier overview and easier monitoring of the activities of the Commission in the sphere of consumer protection.²⁴

However, apart from this great practical importance, such categorization leads to some other conclusions as well: 1) which are the most important and/or most disputable questions of consumer protection at EU level, 2) which are the new legal trends in the field of consumer rights protection, and so on.

Namely, the development of the law on consumer protection is closely related with the development of the market, technology, new technological and other achievements. In that sense the development of the law on consumer protection cannot be analyzed outside the context of time and economic conditions in which the law is created.

So for example, thirty or more years ago no one could have foreseen the importance of electronic trade and electronic business in trade activities in the internal market. On the other hand, in the beginnings of legal regulation of consumer rights, what was new were contracts concluded away from business premises of the trader, which are the subject matter of the first directive on consumer protection, and which are today, when compared to directives dealing with electronic business activities, of less importance.

²⁴ In legal theory there are also some other classifications. See for example Twigg-Flesner, op. cit. n. 16, at p. 52.; Gavela, op. cit. n. 2, at p. 158.

The latest directives of the EC Commission are focused on new legal questions, new contract forms, new legal affairs and more increasingly, on the codification of existing and ever more extensive legal material on consumer protection. The reason is the fact that the existing law on consumer protection is evidently non-systematic and mixed-up).

Reasons should be found in the following:

- in the fact that the approach to harmonization of the law on consumer protection was an *ad hoc* one, when need arises and without clear vision (the consequence being a series of unconnected (in terms of content) and mutually un-harmonized directives),
- apart from that, the objective of legislative processes in the segment of consumer protection has never been focused on regulating legal matter in order to create and form a supranational (European) law on consumer protection. The primary objective of the analyzed legislative processes was primarily focused on harmonizing the existing (and different) laws of Member states in order to simplify or advance trade in the internal market.

The result of the previously mentioned is the present situation. The *acquis communautaire* on consumer protection does not represent a logical legal unit, but it is rather the case of numerous, mutually un-connected and un-harmonized legal documents.

They are the following documents (directives):

- Directive on consumer protection regarding contracts negotiated away from business premises (85/577/EEC),
- Directive on distance contracts or so-called Distance Selling (97/7/EC),²⁵
- Directive on unfair terms in consumer contracts or so-called Unfair Contract Terms Directive (93/13/EEC),²⁶
- Directive on consumer protection in contracts on the right to use immovable properties on a time-share basis, so-called Timeshare Directive (94/47/EC),²⁷
- Directive on consumer protection in contracts on travel organization, so-called Package Travel Directive (90/314/EEC),²⁸

²⁵ Directive 97/7/EC of the European Parliament and of the Council on the protection of consumers in respect of distance contracts (1997) *OJ L* 144/19

²⁶ Directive 93/13/EEC on unfair terms in consumer contracts (1993) *OJ L* 95/29

²⁷ Directive 94/47/EC of the European Parliament and of the Council on the protection of purchaser in respect of certain aspects for contracts relating to the purchase of the right to use immovable properties on a timeshare basis (1994) *OJ L* 280/94

- Directive on consumer credit, the so-called Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Directive 87/102/EEC,²⁹ (replaced the previous Consumer Credit Directive (87/102/EEC),³⁰
- Directive on consumer protection in buying goods and services on the market, the so-called Sale of Consumer Goods and Associated Guarantees Directive (99/44/EC),³¹
- Directive on consumer protection in indication of prices of products offered to consumers, so-called Unit Price Directive (98/67/EC),³²
- Directives on infringement of protected consumer rights, so-called Injunction Directive (98/27/EC),³³
- Directive on advertising financial services in distance contracts or so-called Distance Marketing of Financial Services Directive (2002/65/EC),³⁴
- Directive 2005/29/EC on unfair commercial practice in consumer contracts, so-called Unfair Commercial Practice Directive (2005/29/EC),³⁵
- Directive 2000/31/EC on electronic commerce, so-called Electronic Commerce Directive (2000/31/EC),
- Directive 2008/122/EC on consumer protection in contracts on time-share rights (so-called Directive on protection of consumers in respects of certain aspects of timeshare, long-term holiday product, resale and exchange contracts (2008/122/EC),
- *Proposal* for a Directive on consumer rights 2008/0196 (COD), so-called Directive on consumer rights 2008/0196.³⁶

²⁸ Directive 90/314/EEC on package travel, package holidays and package tours (1990) *OJ L* 158/90

²⁹ Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC

³⁰ Directive 87/102/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (1987) *OJ L* 42/48

³¹ Directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees (1999) *OJ L* 171/12

³² Directive 98/67/EC on consumer protection in the indication of prices of product offered to consumers

³³ Directive 98/27/EC on Injunctions for the protection of consumers interests

³⁴ Directive 2002/65 of the European Parliament and of the Council concerning the distance marketing of consumer financial services(2002) *OJ L* 271/16

³⁵ Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, L 149/22

³⁶ Proposal for a Directive of the European Parliament and of the Council on consumers rights, COM(2008)614 final, 2008/0196

5. De lege ferenda – European Consumer Contract Law Regulation or something else

It is hard to foresee with certainty in which direction the law on consumer protection at EU level is going to evolve in the near future.

It is clear that the development of the law on consumer protection has reached a critical point, when many, even the Commission itself, are asking the question, what next? There are different ideas on what future consumer protection law might or should be like. Neither of the possible options, which shall be presented later in the text, currently have absolute prevalence over the others, based on which one could conclude that it could be the future model of development of consumer protection law. But, on the other hand, regardless of which of the possible options will prevail in the future, a series of questions need to be answered first, which have been without a concrete answer for years, and which could, on the other hand, contribute to the clarification of the analyzed problem.³⁷

The first question which needs to be answered is, how and in what way to improve and advance the existing EU law on consumer protection? Generally one could accept the criticism that the existing law on consumer protection lacks easy review, and that it is often mutually contradictory. It is regulated by means of numerous directives which are mutually un-harmonized, some solutions are out-dated. However, on the other hand, it provides an important basis on which to build the future consumer protection law. Therefore it cannot be ignored and not taken into consideration in the context of future legislative activities. However, first it is necessary to define the issue of the mode and methodology of implementation of the required improvements.

The second question is the question of defining legal instruments of harmonization of consumer protection law at EU level. So far the harmonization of consumer protection law has been done by means of directives. There is a dilemma between directives as harmonization instruments, or regulations or a third document. Different documents are mentioned, Common Frame Reference, European Consumer Contract Law Regulation etc.

And the last, third question, is the question of level of harmonization. Most of existing directives prescribe minimal level of harmonization.

³⁷ See N. Reich, 'A European Contract Law, or an EU Contract Law Regulation for Consumers', 28 *Journal of Consumer Policy* (2005) p. 397.

Last two directives prescribe maximal level of harmonization.³⁸ This raises a question of future trends and the choice between minimal or maximal level of harmonization.

Concerning the firstly raised question on future developments of consumer law, the Commission itself had a few proposals on how to improve current Consumer *acquis*.

The first proposal suggests individual revision of current consumer directives (so-called vertical approach). This approach is based on quality analysis of all existing consumer directives. The expected outcome is modernization and improvement of current Consumer *acquis*. Although such revision is a step forward, compared to current situation, still this approach is probably not the best one. Main critique concerns the fact that revision will have to be repeated frequently (from time to time) in order to follow developments and changes in the market. Besides that, revision of consumer directives would not solve one of the main problems of EU Consumer law: the uneven implementation of EU consumer *acquis* on EU level.³⁹

As an alternative to this approach Commission suggests creation of so-called 'horizontal instrument'.⁴⁰ It entails the following: a) a revision of existing Consumer *acquis*, b) its systematization and codification within a single document. Such document might be divided in two parts: the first part would contain general and common consumer law principles; part two would contain particular consumer contracts and other material which were so far parts of existing directives.

This approach seems quite logical, but it also has some shortcomings.

It might take some time before such document is finished. It is always indefinite what will be the final outcome. But on the other side, if this work is taken seriously, results might be good. Current terminological problems would be removed; problem of multiple regulation of some legal issue would be resolved. Everything would be regulated within one directive. So far, dispersed regulation of Consumer *acquis* caused serious problems to legal practitioners. They were faced with number of directives, often regulating same issue in a different way. And finally, this way, some of current consumer directives, which are now of insignificant importance or are outdated, might be exempted. The final out-

³⁸ Ibid., at p. 396-400.

³⁹ Op. cit. n. 15, at p. 8.

⁴⁰ Ibid., at p. 8-9.

come of such revision would be new and modern document which incorporates all important rules on consumer protection.

At glance, this approach again seems quite good, but it must be admitted that it resembles more to unification than harmonization. Thus, this approach might face resistance of those in EU who are opposing unification of private law and who claim that it is out of jurisdiction of EU.

The last approach, suggested by the Commission, is to continue harmonization the way it has been so far. This means harmonization via directives when needed and as a response to actual legal consumer law problems. This approach seems the least possible. Such an approach can be considered as a negation of all critiques of current process of harmonization which are not insignificant or of minor importance. The second question raised concerns the problem of future instruments of harmonization. Here too, there are couples of possible options. Legal theory knows the different instruments of harmonization and unification. Some of them are of mandatory nature (*ius cogens*) while the others are soft law rules (*ius dispositivus*).⁴¹ In the EU, both types of legal instruments are used in order to harmonize legal regimes of Member states.⁴² Most frequently harmonization is done by means of directives which are legally binding legal instruments, but Member states still have large discretionary rights to implement directives in national legal order in the 'most convenient way' in order to comply with legal tradition, other national rules, etc. That caused a new and evident problem of unevenness of legal rules, but it also opened discussion about need for new and more coherent approach.

The most interesting and complex discussion is about so-called European Consumer Contract Law Regulation. European Consumer Contract Law Regulation would be a kind of Consumer Contract Law Code with validity in all Member states. This way in all EU Member states same level of consumer protection will be established. But this idea about unification of consumer law is not quite new.⁴³ For number of years

⁴¹ R. Goode, et al., *Transnational Commercial Law* (Oxford, Oxford University Press 2007) pp. 191-200.; A. Goldštajn, *Trgovačko ugovorno pravo, međunarodno i komparativno* (Zagreb, Narodne novine 1991) pp. 60-64. See P. Craig, G., de Búrca, *EU Law, Text, Cases and Materials* (Oxford, Oxford University Press 2003) pp. 111-116.

⁴² See Craig, de Búrca: op. cit n. 41, at pp. 111-116.

⁴³ See for example D. Staudenmayer, 'The Place of Consumer Contract Law Within Process on European Contract Law', *27 Journal of Consumer Policy* (2004) pp. 269-

there is debate about enacting a European Civil Code. But since a number of EU countries are opposing to this idea, the idea is still far from its realization. Therefore, some legal scholars came with the idea of unification of just a consumer law. Enacting such a document would be a first step, leading to a full unification of contract law.⁴⁴ Right now it is hard to predict if this idea realistic at all or not. But anyway, it is not quite impossible. Globalization and economic prosperity of EU might be some of the arguments in favour of this idea. Some level of consumer protection in all EU countries would encourage cross-border trade, which was so far modest. On the other hand, consumers would benefit too.

The last, third question is partly connected to the above discussion about instruments of harmonization. It deals with the issue of choice between minimal versus maximal level of harmonization. It is already mentioned that minimal level of harmonization means defining lowest level of consumer protection in all EU Member states. In this case Member states must implement in national legislations only norms which are granting consumers minimal level of their rights. Maximal level of harmonization, on the other hand, would result with the same or equal level of protection of consumers in all Member states. Minimal level of harmonization is quite problematic. This approach would bring lot of uncertainty about consumer rights in different Member states, because some Member states might adopt only minimal level of consumer protection standards while the other might adopt higher level of consumer protection standards. Therefore this approach might create an obstacle to cross-border trade on internal market. Maximal level of harmonization, on the other side, would guarantee a (more or less) equal level of protection of consumers in the internal market. That might have some positive impacts on cross-border trade. Consumers would know that in any Member state they have the same rights as in their own country.

287; J. Karsten, A. Sinai, 'The Action Plan on European Contract Law, Perspectives for the Future of European Contract Law and EC Consumer law', 26 *Journal of Consumer Policy* (2003) pp. 159-195.; D. Kallweit, 'Towards a European Contract Code: For a Prosperous Future of International Trade', 9 *Victoria University of Wellington Law Review* (2004) p. 293.

⁴⁴ See Reich, loc. cit. n. 37, at pp. 383-407.

III. Main features of consumer law in Croatia

1. General remarks

Consumer law in Croatia follows EU legal concepts, solutions. When signing the Stabilization and Association Agreement⁴⁵ in 2001, Croatia accepted European legal values and European standards of consumer protection. Since 2001, when consumer law first became part of Croatian legislation we can see significant progress in field of Consumer law. Today, Croatia has modern legal framework for consumer protection: a Consumer Protection Department is established and we have a National Consumer Protection Programme, etc.⁴⁶ But still, this does not mean that the work in field of consumer is completed. There is a need for continuous improvement of level of consumer rights. Experiences of neighboring countries, such as Hungary, who become Member of EU before Croatia can be valuable. Looking at the consumer law developments in neighboring countries it is possible *ceteris paribus* to predict dynamics as well as future trends in area of consumer law.

2. Legal framework on consumer law

Consumers' rights in Croatia are incorporated in a number of codes. They are also Constitutional rights: Article 69 of the Croatian Constitution says that every Croatian citizen has the right for a healthy life and that anyone in Croatia is obliged within its powers to protect health, nature and environment. The main code regulating consumer rights is Consumer Protection Act, first enacted in 2003. It is significant because it is the first Croatian Code regulating consumer rights only. The new Consumer Protection Act was enacted in 2007 (Official Gazette 97/07), and is still in force. It incorporates all relevant consumer *acquis*. It also brought significant improvements in field of consumer protection. But the Consumer Protection Act is not the only code regulating consumers rights in Croatia. Consumer rights are incorporated in number of other codes, sectoral regulations as well.

Some of them are listed below:

⁴⁵ Stabilization and Association Agreement between Republic of Croatia and European Communities was signed on October 29th 2001.

⁴⁶ In year 2009 the Ministry of Economy, Labour and Entrepreneurship published National Consumer Protection Program for period from 2009 till 2012. The Croatian Parliament approved it in January 2010. It is a complex document dealing with all relevant consumer protection issues.

- Obligation Act OG 35/05, OG 41/08,
- Consumer Credit Act , OG 75/09,
- Trade Act, OG 87/08, 96/08, 116/08,
- State Inspector's Office Act OG 116/08, OG 123/08,
- Postal Service Act OG 88/09,
- Public Utilities Management Act OG NN 36/95, 70/97, 128/99, 57/00, 129/00, 59/01,
- Standardization Act OG 163/03,
- Act on Technical Requirements for Products and Conformity Assessment OG 158/03 OG 79/07,
- Food Act OG 46/07, 155/08,
- Act on Regulation Energy Related activities OG 177/04, OG 76/07,
- Electricity Market Act OG 177/04, 76/07, 152/08,
- Gas Market Act OG 40/07, OG 152/08, 83/09,
- Competition Act OG 79/09,
- Right on Information Act OG 172/03, etc.⁴⁷

The number of rules, where every code is regulating some segment of consumer protection is quite problematic. It is almost impossible to be familiar with legal solutions and court practice of each of those codes. Besides that, it is realistic to assume that comparison of those codes would prove inconsistencies in legal terminology, in application of similar legal rules, etc. Therefore we can expect that in the near future revision of existing consumer rules will be necessary, similar to revision that is currently taking place in EU.

3. Institutional framework for consumer protection in Croatia

Besides establishing a legal framework for consumer protection in Croatia it was also important to undertake other measures, necessary for effective exercising of consumers' rights in practice. Until 2001 in Croatia there was no public institution in charge of consumer protection. Now these activities are carried out by the Consumer Protection Department, a separate body within the Ministry of Business Affairs. The Consumer Protection Department carries out following activities:

- it carries out activities related to designing and implementation of laws and other regulations referring to consumer protection,
- it gives professional opinions on consumer protection issues,

⁴⁷ References on all relevant codes on consumers rights are available at: <<http://potrosac.mingorp.hr/hr/potrosac/print.php?id=12349>>, (last accessed on 30.04.2010).

- carries out activities with respect to harmonization of national legislation with the EU legislation in the area of consumer protection,
- prepares reports in view of systematic informing of competent bodies on the level of harmonization of legislation in view of EU accession of the Republic of Croatia,
- cooperates with competent consumer protection bodies from the EU area,
- cooperates with the courts of honour of the Croatian Chamber of Economy and the Croatian Chamber of Crafts in settlement of consumer disputes,
- proposes and follows up, within its competence, the contents of the EU projects and programmes,
- proposes and implements the consumer policy and consumer protection measures, including the designing of the National Consumer Protection Programme in cooperation with the National Consumer Council,
- follows up the realization of goals and assignments provided by the National Consumer Protection Programme,
- proceeds administrative and professional activities relating to the activities of Consumer Protection Council,
- carries out analyses and prepares analytical documents for follow up of the status in consumer protection area,
- carries out administrative and professional activities with respect to establishing and follow up of the Consumer Protection Counseling Centre, etc.

And finally, it is important to mention the role of civil society institutions in promoting and advancing consumers rights in Croatia. Citizens associations and non-governmental organizations are important factors in promoting consumer law and policy. Their role is two-fold: 1) to safeguard consumers interests and to monitor government measures in the field of consumer rights, 2) to provide direct legal aid to consumers in achieving their rights.

IV. Main characteristics of Hungarian consumer protection

The history of Hungarian consumer protection, like in most of the neighboring European countries, began at the end of the 20th century. Like in the other countries, the reason for this late development was the shortage-economy. After the transition into the market economy and all

of its increments led to a phenomenon that some subjects of the market did not gain equal positions. The weaker person was typically the consumer who is situated in the end of the commercial chain facing squarely the potentially stronger business entities.

In 1991 the Central Consumer Protection Agency was created (today known as National Consumer Protection Authority), which opined the drafts of laws and also initiated modification of laws concerning the consumer protection. Thanks to this organization the codification began and the most complex result of this process has been the Act CLV of 1997 on Consumer Protection. It contains all rights of the consumers such as:

- right to safety (protection of the consumer against products and services which risk his life or health),
- right to proper information (proper information on product usage, quality, the risks of the usage),
- right to education (consumer has to know his rights and duties and the ways to enforce consumer rights),
- right to fast, simple and effective enforcement of rights (arbitration boards)
- right to protection.

Declaring the methods of enforcement consumer rights and the consumer protection schemes by the state and local governments is further merits of the act.

After the act became into effect, there was a wide codification process till the accession to the EU. The reason for this was that Hungary vouched in the association agreement in 1991, to approach its laws to the EC *acquis*. The commitment referring to the harmonization also appeared in the field of consumer protection, so the implementation of directives and codification also began in special areas. As the result of this work the act of commercial advertising activities and the law of doorstep transactions and distance contracts and also the law of consumer contract for credit came into effect in Hungary.⁴⁸ The Civil Code was modified also: the regulation on unfair terms in contracts, guarantee and warranty became more stringent. Some of the acts and government decrees which were made or modified to protect the consumers are the following:

⁴⁸ J. Fazekas, *Fogyasztóvédelmi jog* [Law on Consumer protection] (Complex Kiadó, Budapest 2007) p. 42.

- Act XLII of 1999 on the Protection of Non-Smokers and Certain Regulations on the Consumption and Distribution of Tobacco Products,
- Act CVIII of 2001 on Electronic Commerce and on Information Society Services,
- Act CLXIV of 2005 on Trade,
- Act XVIII of 2005 on District Heating,
- Act LXXXVI of 2007 on Electric Energy,
- Act XL of 2008 on Natural Gas,
- Act XLVI of 2008 on the Food Supply Chain and on the Control and Supervision of the Food Supply Chain,
- Act XLVII of 2008 on the Prohibition of Unfair Business-to-Consumer Commercial Practices,
- Act XLVIII of 2008 on the Basic Requirements and Certain Restrictions of Commercial Advertising Activities,
- Act LXXXVI. of 2009 on the Beginning and Exercising of Service Activities,
- Government Decree No. 213/1996 (XII.23.) on Travel Organization and Agency Activities,
- Government Decree No. 17/1999 (II.5.) on Distance Contracts,
- Government Decree No. 18/1999 (II.5.) on Unfair Terms in Consumer Contracts,
- Government Decree No. 20/1999 (II.5.) on Time-share Contracts,
- Government Decree No. 151/2003. (IX. 22.) on Guarantees for Certain Durable Goods,
- Government Decree No. 213/2008. (VIII. 29.) on Contracts Negotiated Away From Business Premises,
- Government Decree No. 210/2009. (IX. 29.) on the Conditions for Conducting Trading Activities.

Of course the codification in the field of consumer protection is not finished yet; the legislature still has the task to react to the requirements of the market. After the accession to the EU, many acts, government decrees, ministerial orders needed to be supervised and this phenomenon continues nowadays. Regarding the expectations of the EU, the Government devised the main lines of consumer protection named ‘Consumer Policy 2007-2013’. Because of this extended period, a so-called 3rd medium-term consumer action program was also made, which specifies the aims of Consumer Policy for the relevant four years. The aim of the Government is to provide the fairness of the market permanently, and the safety of the consumers. Hence, the socialization of consumer protection thus enhancing the society’s ability for self-defense (which leads to conscious consumer behavior) is indispensable. Besides creation of the strongest consumer protection authorities is inevitable, be-

cause by these organizations the state can interfere widely if it is necessary.

Conscious consumer behavior, enforcement of non-governmental organizations for the protection of consumers, social dialogue and publicity are components of the society's ability for self-defense accordance with the action program. So raising the consumers' awareness so that they are able to make their own decisions in spite of any possible vicious influence and who also know every consequences of their activity is also indispensable. The instrument to meet this purpose is the consumer education in school and also outside of it. To increase the consumers' sense of security, knowledge of their rights and duties also their opportunities to enforce their rights is essential. More efficient support for non-governmental organizations is also important, because through these organizations we can reach the proper level of the development of consumer protection. The reason for this phenomenon is that these organizations are able to enforce consumer rights more sufficient because they do not have their strict competence as the authorities so it cannot detain them doing their tasks. This is the reason of founding the Consumer Advising Agencies which can take the tasks from the authorities like giving information or consultation on consumers' claims.⁴⁹ The Government sees important role for arbitration boards, which can be a fast instrument of enforcing consumer rights. It is also crucial to make a dialogue between legislation and judicature. For this reason the Consumer Protection Board was founded to help communication between legislation, non-governmental organizations and judicature so codification can be more effective in the field of consumer protection. Operating a national European Consumer Center is also necessary. This organization gives information or helps consumers who has problem with a product or service bought abroad. The center can only deal with cross-border problems and does not have competence to deal with domestic cases.

In addition, some more areas are concerned by the action program, for example:

- improving effectiveness of state structures
- providing solid constitution to consumer protection authority,
- reviewing consumer protection sanctions,

⁴⁹ <<http://www.szmm.gov.hu/main.php?folderID=21129&articleID=40486&ctag=articlelist&iid=1>>, (last accessed on 12.06.2010)

- publicity of consumer protection authority's orders,
- providing for the interest of sick people,
- translation of European standards,
- solidier claim administration,
- enforcement of public charges,
- providing aims of consumer protection policy in other policies
- improving the operation of arbitration boards,
- improving the role of local governments of communities,
- improving the role of non-governmental organizations,
- Consumer Protection Foundation Program, etc.

The medium-term consumer action program made some changes on fields mentioned above. The tasks according to the second four years period are specified nowadays.

1. Consumer protection schemes sponsored by the state, local governments and non-governmental organizations in Hungary

a) Government scheme for the protection of consumers' interests

Legislation and supervision of authorities relevant to consumer protection are divided between departments. Ministry for National Economy is the main leader of this work. The Minister:

- draws up and presents to the Government for approval the strategy for a consumer protection policy and shall make recommendations for the organizational and institutional conditions for the implementation of such,
- and takes or initiates measures concerning the enforcement and protection of consumer rights.

The provisions of the strategy shall be enforced during the preparation of economic policy decisions and during the execution activities being implemented in any sector of the national economy. The National Consumer Protection Authority executes and monitors regulations referring to consumer protection which is professionally controlled by Ministry for National Economy. With this system, the tasks relating to consumer protection became effective and transparent and with this regime wide intervention of the state can be guaranteed as it was appropriated by the action of the field of consumer policy. The National Consumer Protection Authority has its own regional and subservient organizations: these are the consumer protection authorities. Their task is to help enforce consumer rights, to check the observation of the rules and if those

was harmed and to deal with this problem. Nevertheless, the consumer protection authority monitors compliance with the provisions relating to:

- goods supplied to consumers;
- to the quality, composition, packaging, conformity assessment and conformity marking of products supplied to consumers;
- the measurement of goods offered and supplied to consumers, and to the official price and the mandatory price of such goods;
- the handling of consumer complaints;
- warranty claims and associated guarantees relating to certain aspects of the sale of consumer goods;
- enforcing the principle of equal treatment in connection with the supply of products and services; and
- consumer information;

and takes action in the event of any infringement.

There are several other authorities in Hungary which have its own competence related to consumer protection, for example: Hungarian Competition Authority, Hungarian Financial Supervisory Authority, Hungarian National Public Health and Medical Officer Service, Central Agricultural Office, National Transport Authority, etc.

b) Role of local governments of communities

The representative bodies of local governments promote the formation of independent consumer organizations and support the activities of non-governmental organizations for the protection of consumers' interests at the local level, and operate consumer protection consulting offices, depending on consumer demand. Besides they have the opportunity to create more stringent and concrete regulation protecting the consumers.

c) Non-Governmental organizations for the protection of consumers

With regard to the national intention to improve consumer behavior and attitudes the state provides widely the rearrangement of some state charges to non-governmental organizations. These organizations has the task of

- assisting in the enforcement of the economic interests and the rights of consumers by conducting investigative work, including work to reveal consumer problems and evaluate the enforcement of consumer rights;

- monitoring the general contractual conditions applied with regard to consumers;
- representing consumers in reconciliation forums and bodies;
- initiating proceedings, investigations, actions in the interest of protecting the rights and interests of consumers,
- assessing legislative bills concerning consumers, initiating the amendments of statutory provisions in the interest of protecting or enforcing the rights and interests of consumers;
- participating in drafting consumer protection policies and monitoring the implementation of such policies;
- operating consulting offices for providing information to consumers and aiding in the enforcement of consumer rights, and an information network to advise consumers;
- organizing and carrying out consumer protection education and tutorials with a view to improving consumer behavior and attitudes and their ability to make an informed decision;
- informing the general public by the publication of the findings of their activities;
- participating in the activities of international organizations, in the interest of protecting the rights of consumers.

2. Enforcement of consumer rights

The enforcement of consumer rights has its own order. If the consumer wants to make a complaint first it needs to be done at the store where the product was bought. The consumer has the opportunity to lodge his complain in oral or written format. Oral complaints shall be investigated without delay and, if possible, shall be remedied immediately. The business entity shall reply to written complaints within thirty days, unless otherwise prescribed by legal regulation. If the business entity rejects the complaint, it must provide the reasons thereof. The business entity shall inform the consumer affected in writing concerning the authority or arbitration body, as applicable, where he may seek remedy. There are organizations attached to the competent county chamber of industry and commerce, called arbitration boards, with a view to reach an extra-judicial settlement, or failing this to adopt a decision in the case to enforce consumer rights simply and practically and under the principle of cost-efficiency.

The competence of the arbitration board covers the disputes between consumers and business entities regarding the quality and safety of

products and services, the application of product liability regulations, the quality of services, and relating to the conclusion and performance of contracts. One member for the acting panel is delegated by the consumer requesting the procedure, and one other member by the business entity affected by the proceedings from the list of board members. The presiding umpire of the panel of arbitrators is appointed by the chairman of the board. A precondition for opening arbitration board proceedings is that the consumer has attempted to settle the case directly with the business entity affected. In the proceedings the presiding umpire of the panel shall attempt to negotiate an agreement between the parties. In the absence of a negotiated settlement the panel of arbitrators:

- adopts a binding resolution if the request is found substantiated, and the business entity affected has undertaken to be bound by the decision of the arbitration board in a standard statement of submission - filed at the arbitration board or the chamber, or contained in its commercial communication -, or in a statement filed at the time of the opening of the proceedings or, at the latest, before the decision is adopted, or
- makes a recommendation if the request is found substantiated, however, the business entity affected has refused to be bound by the decision of the arbitration board in a statement filed at the time of the opening of the proceedings, or did not declare its position concerning the decision of the arbitration panel in terms of submission.

The resolution or recommendation of the panel of arbitrators is adopted without prejudice to the consumer's right to have his claim enforced in the court of law. There is another way of enforcement of consumer rights. The consumer protection authority, non-governmental organization for the protection of consumers' interests or the public prosecutor may file charges against any party causing substantial harm to a wide range of consumers by illegal activities aimed at enforcing the interests of consumers even if the identity of the injured consumers cannot be established. The legal action can be filed within one year of the occurrence of the infringement. The infringing party shall satisfy the claims of the injured consumer in accordance with the resolution. This also not effects the right of the consumer to have his claims enforced against the said infringing party in accordance with the provisions of civil law.

V. Conclusion

Consumer law is one of the most significant area of harmonization in EU because of its impacts on creation and functioning of single European market. Different level of consumer rights creates lack of confidence in cross-border trade in EU economic area. In order to remove those obstacles a number of regulatory and other measures has been undertaken by the relevant EU institutions. A number of consumer right directives have been enacted in order to establish unique or similar level of consumers rights through the EU.

But still, despite all the efforts, consumer law of Member states still differs significantly. Reason for that is mainly the rule incorporated in all EU Treaties, as well as in Lisbon Treaty, which enables the Member states to establish different level of consumer protection rights. This approach raises a question of the final or wanted outcome of harmonization of consumer law. If the Member states are allowed to establish different level of consumer protection, then, there is a question of purpose or aim of harmonization. This problem is recognized by relevant EU bodies. There is intensive debate about finding a solution.

In this paper, we are addressing all relevant problems and possible solutions, as well as some other important consumer law issues. Reflections on future trends in consumer law are also discussed.

Addressing consumer law developments in EU is of particular interests for Croatia. The obligation to harmonize Croatian consumer law with EU consumer law is undertaken by Stabilization and Association Agreement. We can see that serious efforts in order to built modern framework for consumer protection are undertaken. But despite that, there is still a room for significant improvements. More should be done in area of education of consumers and promoting consumers' rights throughout civil society institutions, as well as in improving legal framework to establish higher and better level of consumers' rights. Hungarian experiences, as neighboring country, with similar level of economic development might be very useful.

As we have seen, the system of the Hungarian consumer protection is widely organized, the consumers are properly protected by state and local governments and they have modern, quick and efficient ways to exercise their rights. We are looking forward to hearing about the new aims of 'Consumer Policy 2007-2013'.

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Electronic administrative procedure in Hungary and Croatia

I. Electronic administrative procedure in Hungary

1. Introduction

Electronic administration, electronic government belongs to the main elements of the so called New Public Management (NPM). NPM is a scientific systemisation of tools, goals and experiences of real processes, as well as completion of experiences with new ideas and theories. NPM deals with modernisation of public institutions and with new forms of management. Its real aim is to modernise the state and to economically modernise the public sector. NPM is not a branch of administration science or a scientific trend; it is rather a movement aiming at creating efficient administration. The rhetoric of this 'new administration' trend – using market, client, competition and especially corporate management as key words – symbolises demarcation from 'old' administrative management. Six dimensions of NPM can be highlighted in parallel with this:

- governmental tasks should be restricted to the most important ones ('lesser government' principle),
- service and result centred organisational structure,
- management processes should be 'value producing' (each procedural step adds new value to the previous one, and this is experienced by the client),
- increase of automatic (electronic) data process,
- effective political and administrative management,
- competitive elements should be applied in public sector.¹

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¹ T. Diefenbach, 'New Public Management in Public Sector Organizations: the Dark Sides of Managerialistic 'Enlightenment'', 44 *Public Administration* (2009) pp. 892-909.

Naturally, the citizens' satisfaction with public administration is very important. In Germany, in an internet-based public opinion poll in 2002 (sample size: 8000), 75 percent of the inquiries answered that more client-friendly opening hours and shorter waiting time would be preferable in offices. 90 percent said that internet would improve the quality of public administration. According to the citizens, registration of residence, car-registration and tax return should be dealt with on the internet. To the same question, entrepreneurs mentioned taxation, company affairs and procurements. However, only 20 percent of the respondents were willing to pay more for the procedures in administration. The idea of the so-called electronic government had already emerged in the United States in 1993. This was perceived as the most important tool for bringing administration close to the citizens. Electronic government was related to NPM, but in some respects it was superior to it: through the internet the citizen was successfully involved in the opinion-formulation of society.²

Internet based task management can be the accelerator of a process in which the state tries to answer the challenges of 'new times'. Internet is accessible for everyone and it creates the possibility to gain information and to have a voice in the course of proceedings.³ On the other hand, it must be considered that citizens are usually not fully aware whether the given state organ operates efficiently, well, economically and legally. Citizens can only evaluate whether their affairs are dealt with professionalism, whether managing the affair was fast and convenient for them or rather on the contrary.

2. General rules on communications

The basic rules for electronic administrative procedures are laid down in Act CXL of 2004 on the General Rules of Administrative Proceedings and Services. One of the main goals of this act is to 'open new ways for faster and simpler handling of the majority of cases by putting to use modern means of electronics and information technology'. The electronic way of administrative procedure is usually optional to the client in Hungary: unless otherwise prescribed by law, clients and other

² V. Boehme-Nessler, 'Elektronic Government: Internet und Verwaltung – Visionen, Rechtsprobleme, Perspektiven', 3 *Neue Zeitschrift für Verwaltungsrecht* (2001)

³ H. Reiner mann, 'Das Internet und die Verwaltung – von der bürokratischen zur interaktiven Verwaltung?', 1 *Deutsche Öffentliche Verwaltung* (1999) pp. 20-41.

parties to the proceeding shall not be required to establish contact with the authority by way of electronic means. Additionally, unless otherwise prescribed by law, in proceedings opened upon their request, clients and other parties to the proceeding shall have the right to change the means of communication they have originally selected on one occasion without any explanation, and with reasonable justification thereafter. Where administrative authorities are required to conduct inter-departmental communications by way of electronic means or electronic mail, no other means of communication may be engaged. The authority shall liaise with clients in writing, that is via the postal service, by fax, through documents delivered in person, via an agent for service of process, through the authority's process server, through the administrator for service of process, by way of a posted notice, or by way of electronic means in accordance with the Act, or orally subject to the conditions set out in the Act.

These rules shall apply to communications between clients and the authorities, and among the authorities themselves. Where several different type of communication is available, the authority shall make a selection under the principles of cost-effectiveness and efficiency. At the time of establishing contact, the authority shall inform the client concerning the available modalities of communication along with its contact information, and also regarding the possibility of access to electronic information services provided by the authority. Short text message, electronic mail and the telephone are other permissible means for requesting and providing information, or for communicating in other cases defined in the relevant legislation. The authority may make arrangements with the client in advance by telephone and electronic mail regarding the time for the execution of certain procedural steps. Where intercommunication between the authorities does not involve any movement of documents, the authorities concerned shall communicate by electronic mail or by telephone. In a life-threatening or potentially devastating situation, or if so prescribed by law any means of communication between the authority and the client shall suffice, where the time and the means of communication shall be recorded on the document. The provisions of communications pertaining to clients shall also apply to other parties to the proceeding.

3. Electronic communication

Written correspondence shall mean in the Hungarian administrative procedure when a client sends a document to the authority through the customer port of entry; when the authority sends a document to the client or another authority through the central electronic services network ('central system'). Unless otherwise provided for in an act, a government decree adopted by the Government acting within its original legislative competence, or by a local government decree in administrative actions of local authorities, the client lodging a request for the opening of proceedings shall be entitled to communicate with the authority by way of electronic means, except if this latter cannot be applied with respect to the means of communication in force. The client shall maintain communication with the authority electronically where it is so prescribed by an act for the case in question or for specific procedural steps. The authority shall maintain communications with the client by way of electronic means where so requested by the client, and also if the client has lodged the request by way of electronic means and did not present otherwise in respect of the applicable mode of communication. Unless otherwise prescribed by act or government decree, if the client fails to acknowledge receipt of a document that was sent by way of electronic means within five working days, the authority shall henceforward use another form of communication with the client.

4. Information

Except where otherwise provided for in the relevant legislation, clients shall be able to use all modalities of communication for requesting information under Chapter II/A of the Act on the General Rules of Administrative Proceedings and Services. The authority shall be required to supply the information requested using the same means by which the client has requested the information. If the information pertains to any data contained in the documents of the case, and if the client has supplied the identification data prescribed for the given case and that can be processed by the competent authority on the strength of law in the request for information, the information may not be refused. The authority shall not be compelled to provide the information requested if the client is found to have exercised his right for requesting information improperly. Improper exercise of right shall mean, in particular, where the authority had delivered a decision to the client

within five working days before the time of requesting the information, or if any procedural step has been implemented with the client participating.

5. Electronic information

The authority shall publish the public sector information specified in the Freedom of Electronic Information Act by way of electronic means. In addition to the data specified in the Freedom of Electronic Information Act, the electronic information provided by the authority shall contain:

- the names of officers handling the various types of official proceedings and the officers' contact information, or contact information for the customer service from whom this information can be obtained;
- the time limit prescribed in the relevant legislation for administrative services;
- information relating to the rights of clients relating to procedural steps, and the obligations of clients;
- the duties and charges – including the duties and charges payable for the proceedings of special authorities –, and information relating to payment procedures;
- information relating to communication by way of electronic means, such as in particular the conditions for using the central system, the availability of the request and petition form, other standard forms and similar means of information technology required for the opening of the proceedings, instructions for filling out and sending these forms;
- information relating to setting up a customer port of entry for the purpose of electronic communication; and
- information relating to the technical requirements for electronic communication and on system malfunctions.

The authority shall compile statistical information relating to the volume of cases processed so as to measure its performance and efficiency, containing the number of cases handled broken down according to type and also on the aggregate, indicating the number of cases that became operative in the first instance, the number of cases overruled in remedy proceedings, the number of cases that were not concluded in due time, showing the extra time required beyond the administrative time limit on a case-to-case basis, the number of claims lodged against the authority for compensation, and the number of supervisory sanctions and

disciplinary proceedings opened against the head of the authority for exceeding the administrative time limit. The case statistics may also contain other statistical information as specified by the head of the authority. The authority shall display the case statistics in the customer service area as well.

The authority shall ascertain that the published information is authentic, accurate, updated and continuously available on-line over the internet. The authority may provide appointments by way of electronic means or by telephone for clients required to appear in person in connection with some official proceedings. The client may indicate in the electronic appointment book available by way of electronic means the time he wishes to appear at the authority in connection with some official proceedings. The authority must provide to the client a date of appointment within not more than ten working days from the time requested. The time of appointment may be modified by the authority at least one working day in advance.

6. Regulatory Services

The authorities duly authorized by legal regulation may:

- provide to the clients access to the electronic information provided by other authorities, and to their electronic communication systems;
- present requests in the name of clients for data or for copies from authentic records, if the conditions specified in legal regulation are satisfied;
- request the issue of official instruments in the name of clients in accordance with the regulations relating to the protection of personal data and special data;
- provide technical help, internet support and internet connection to clients for individual administrative services, after the client has identified himself.

7. The Hungarian administrative procedural law and EU requirements

European Union law continuously expands, intrudes the national law of the Member State, and in certain fields basically overwrites the preceding national provisions. The reason for this process is to ensure legal conditions for the implementation of common European goals. Today the conclusion can be drawn, that the expansion of EU law has

not stopped at the boundaries of individual branches of law. While previously administrative law was traditionally viewed as a national area of jurisdiction where EU law could not take a greater role, today EU law affects the national administrative law in several aspects. One of these aspects is linked to administrative procedure. Those who deal with administration and those who work in administration, have to get accustomed to the fact that EU law gradually ‘invades’ the Member States’ administrative law.

While in earlier periods, shaping Member State administration and particularly defining relevant positive law was generally viewed as a competence of the Member State’s legislature, today this view definitely has to be revised. It is perfectly obvious, that EU law ‘invades’ any branch of law, if that is required for reaching the goals of the EU. From the point of application of law, this means, that an additional obligation is imposed on public authorities: to be familiar with the relevant EU law and apply it appropriately in Hungarian law, despite the fact that it is not derived from a Hungarian legislative authority.

Act CXL of 2004 on the general rules of public administrative procedure and service has several references related to the European Union and to the EU acts. First of all, according to the preamble, the aim of the act was to ‘create harmony with the requirements of operating as an EU Member State, make the extension of international cooperation possible during the administration of official cases and make direct cooperation with foreign authorities possible’.

In the following we are going to refer to those important guidelines which have to be applied if the applicable EU acts differ from Act CXL of 2004.

- The ‘European Union binding legal act’ may contain rules different from Act CXL of 2004 concerning legal authority. In this case EU law may overwrite the rules concerning legal authority of Act CXL of 2004.
- The provisions of law concerning administrative actions, that are not mentioned in section 13 paragraph (1) and (2) in Act CXL of 2004, can only differ from the provisions of the said act if this act explicitly allows it or if it is necessary to implement legal acts of the EU or international agreements.
- The legal acts of the European Union may authorise the proceeding Hungarian and foreign authority to sign a

cooperation agreement in order to mutually promote their joint implementation of official tasks.

- Transmitting personal data may take place in accordance with the legal acts of the European Union within the framework of international legal assistance.
- The authority, if otherwise provided by the legal acts of the European Union, may refuse the fulfilment of the foreign petition even if the petition complies with the rules of Act CXL of 2004.
- Foreign decision can be implemented based on the acts of the European Union, international agreement or reciprocity.
- A decision, made by a Hungarian authority, can be implemented in a foreign country based on the acts of the European Union, international agreement or reciprocity.

If one considers again that the primacy of European law is obvious with regard to the Member State's administrative law as well, the rules of Act CXL of 2004 are nothing more than tautology. EU law has primacy, irrespective from Act CXL of 2004 during the implementation of EU law. Therefore, it is completely irrelevant whether or in what relations Act CXL of 2004 mentions the possibilities of different rules of EU law. The regulation is tautological, since Act CXL of 2004 generally says that 'if the directly applicable legal act of the EU or an international contract defines a procedural rule in a case that is subject to the effect of this act, the regulations of this act are not applicable'.

Act CXL of 2004 unnecessarily complicates the situation with sub-rules. For that matter, theoretically, the primacy of EU law principle could have been included in Act CXL of 2004. However, omitting this principle does not mean that the EU norm does not override the application of act Act CXL of 2004 or other procedural law.

8. The most critical points of administrative procedure – from the point of view of the EU

We shall begin with those regulations of Act CXL of 2004 that are clearly beyond EU law or the practice of the Court of Justice of the European Union, like for example the definition of client. According to Act CXL of 2004, 'client is a legal or natural person or unincorporated body, whose right, legitimate interest or legal status is affected by the given case, who is involved in administrative supervision or about whom the official register contains data, including his/her property,

rights or assets'. The practice of the Court of Justice of the European Union – especially if it concerns the direct applicability of the EU directives – shows the tendency that a right or legitimate interest based on Community law substantiates client status.

The use of language can also be a sensitive area from the judiciary's point of view, if a citizen of the EU is involved as client. Basically, according to Act CXL of 2004, the official language of the procedure is Hungarian. If the administrative authority is not of Hungarian nationality, and it starts a procedure with immediate steps in a case of a non-Hungarian speaking client during his/her residency in Hungary, or a non-Hungarian speaking natural person client turns to the Hungarian administrative authority for immediate legal aid, the authority must ensure that the client is not in a disadvantageous position due to the lack of knowledge of Hungarian language. A client without knowledge of the Hungarian language – besides bearing the costs of translation and interpretation – can request the administrative authority to consider his/her plea in his/her mother tongue or in another mediator language – in cases that belong to neither of the above mentioned cases. Act CXL of 2004 adds that rules, other than the previously described section, can be applied in administrative cases regulated by the compulsory acts of the EU or international agreements.

The above mentioned rules of Act CXL of 2004 do not make the specifications obvious for the legislator in case there is a citizen of the European Union among the clients. For my part in this context we would highlight the following:

- The procedure can proceed in Hungarian even if a citizen of the EU, other than Hungarian, is involved.
- The authority must pay extra attention in the case of an EU citizen, to ensure that he/she does not face any disadvantage as a result of not knowing the Hungarian language. Extra attention is also necessary, if the case does not involve immediate actions or there is no request for immediate legal aid.
- This does not mean that the EU citizen is not expected to have language knowledge, or to provide an interpreter in lack of knowing Hungarian language.
- The above mentioned statements still remain relative: they can be applied if the EU norm disposes otherwise.

In general, from the Hungarian point of view, it can be stated that when implementing EU law, probably the most critical point of law

application is that the official in charge not only has to know the corresponding EU law and the practice of the European Courts, but he/she has to apply it as well. The links between EU law and the Member State's administrative procedural law are not related to the problems of competence sharing between the Member States, but they are related to the practice of competences created by Community law. During the exercise of these competences that are based on EU law, the administrative authority of the Member State can find itself in a situation, when it has to ignore the applicable national law and proceed primarily according to EU law and practice. The authority must proceed in a way, that its primary aim is not to focus on national common interest and legitimacy but to implement European Union goals formulated as a general rule and explicitly in the given EU act. As the discussion above shows, dissolving this conflict is not an easy task.

II. Electronic administrative procedure in Croatia

1. Introduction

Electronic administration is the term used to refer to the public administration that has gone through specific infrastructural changes and now applies certain aspects of information-communication technology. This technology enables constant user-orientation and ensures appropriate adjustment of legal and technological influence and actions taken by state administrative bodies having only one goal in mind: more satisfying work efficiency, rational dispersion of government funds and more quality in public services. The development of electronic management brings public management closer to the citizens and entrepreneurs. This process results in giving prompt responses when placing a demand involving public services.

Ever since Croatia has gained its independence numerous attempts have been taken in order to make public administration use new, state-of-the-art technology. These attempts have been designed and coordinated by The Department of Informatization of Bureaucracy, Legislation and Public Affairs, incorporated in the Ministry of Justice and Administration [Article 12.- Law on republic administration order (unabridged version) (Official Gazette No. 34; June 17th 1992.)] which at that time existed.

The first foundations of e-management have been however placed as a result of the *Strategy – Information and communication technology –*

21st century Croatia which not only describes the role of information-communication technology in the societal development, but establishes orientation of the Republic of Croatia towards information society as well. The next step to be taken was the acceptance of large *e-Croatia 2007 programme*, designed to establish and connect the systems which would enable citizens and business associates to communicate with bureaucracy and to use a series of different applications via internet.

To make sure that the programme would be properly adopted, the Central State Office for e-Croatia has been founded. This Office has been given the role of the central administrative body answering directly to the Prime Minister with the purpose of monitoring and evaluating the development and acceptance of information society policies.

Having realized some of the main goals of the e-Croatia programme by the year 2008, constant and valid development of the information society in Croatia has been guaranteed. Following that development, the legal framework of information society has been defined, stable and secure information-communication infrastructural body of bureaucracy – HITRONet has been designed, a variety of electronic services have been offered, Central state portal of bureaucracy – *My Administration* – (the unique place from which all the information referring to public administration can be accessed to) has been initiated, and financial support and education of civil servants has been ensured.

In the period between 2008 and 2011⁴ the importance of building a user-orientated, available, responsible and efficient e-administration has been recognized by the Croatian Government.

By aiming to reform the administration in the same period 2008-2011 new, simplified and modernized laws have been passed – these laws have been adjusted to standards and customs practiced in the European Union. The entire process of bringing about reform has mostly improved the quality of services offered to citizens and other clients.

Moreover, the *Strategy of electronic administration development in the period between 2009-2012*⁵ has been approved and it is now valid as the second document of the Government Programme. The main purpose of the Strategy is to determine the frame and goals of the already existing

⁴ Republic of Croatia Government Programme for the ruling period 2008-2011, January 14th 2008, available at <www.vlada.hr>

⁵ Law on general administrative procedure, Official Gazette of Republic of Croatia, No. 47/2009

electronic government activities, as well as new ones. The emphasis is however put on the user-orientated service, rationalization of administrative procedures and offering modern electronic services to people in order to achieve better quality of life. The Strategy also elaborates developmental guidelines and corresponding activities leading to further growth and expansion of the communication network. The system of data and document processing is incorporated in the Strategy as well; its main task is to achieve the necessary level of quality not only for the provider but also for the user.

2. Provisions of the new Law on general administrative procedure

The new Law on general administrative procedure has tremendous success in the area of opening new possibilities for using modern information-communication technologies within administrative proceedings. There are four fields of expertise to which this new law can be applied.

- a) Taking particular actions within the proceedings:
 - Article 42(1) – request for initiating an administrative proceeding can be delivered electronically if the party involved so chooses;
 - Article 46(1) – there is a possibility of using an electronic media so as to terminate a filed request.
- b) Process of verification: Article 60(1) – identification used for verification can be applied even if it is electronic.
- c) Communication between a client and a legal representative:
 - Article 11(1) – the duty of all legal representatives is to enable access to their internet page to their clients;
 - Article 34(3) – there is a possibility of naming and publishing a temporary legal representative on a legal representative's homepage (the same has to be published in the official newsletter);
 - Article 71(3) – memorials can be electronically delivered to a legal representative but in the line with the accepted law;
 - Article 75 – legal representatives and their clients can communicate electronically; memorials delivered electronically will be considered handwritten and signed as such; the time of receiving a memorial is the moment when the same memorial is marked on the electronic receiver – the legal representative is then obligated to send a message to a client stating the

memorial as accepted and received; specific rules are applied when the memorial cannot be read from the electronic sender;

- Article 83 – clients and other participants in the proceedings can receive electronic messages referring to the course of legal action; the message is considered sent and received as soon as the action is verified on the server;
- Article 84(3) – when the legal case is handled electronically, the legal representative is obligated to ensure the conditions for this type of representation; the files can be made available in electronic form, but then the client privacy and security must be taken into consideration;
- Article 94 – electronic file delivery will be ensured if requested by the client and if there are no legal obstacles to do so; the delivery can be realised at any given time; the message is considered delivered when its delivery is marked on the server;
- Article 95(2) – delivery by public announcement can be accomplished by publishing the same announcement on the legal representative’s homepage.

d) Acquittance referring to the legal proceedings: Article 159(4) – acquittance referring to the legal matter in question can be delivered electronically if wanted.

The use of electronic communication service when communicating with legal representatives is offered as optional to clients; legal representatives are however in a different situation. There are only two cases where the legislator *obligates* the legal representatives to use electronic communication (Article 11(1) – the duty of all legal representatives is to enable access to their internet page to their clients; and Article 94 – electronic file delivery will be ensured if requested by the client and if there are no legal obstacles to do so). There are two more cases where it is possible for legal representatives to use electronic communication (Article 34(3) – there is a possibility of naming and publishing a temporary legal representative on legal representative’s homepage (the same has to be published in the official newsletter); and Article 95(2) – delivery by public announcement can be accomplished by publishing the same announcement on the legal representative’s homepage). In all other cases the legislator leaves it to the legal representative and the client to decide whether to use the means of electronic communication or not (e.g. Article 94 – electronic file delivery will be ensured if requested by the client and if there are no

legal obstacles to do so; Article 159(4) – acquittance referring to the legal matter in question can be delivered electronically if wanted;).

III. Conclusion

Social changes and demands referring to efficiency, speed and organization of bureaucracy have introduced the necessity to use the means of new information-communication technology to enable easier and faster communication between legal representatives and their clients. For these purposes modifications have been made within the General Administrative Proceedings Law – several ways of electronic communication have been introduced to the legal representatives and their clients (the obligation of publishing particular information and forms on the internet pages; electronic communication, memorial, notification and acquittance delivery). The most important thing now is to make sure the quality and dynamics of the new systems are efficient and satisfying. To fulfil all the requirements the Law states, it is crucial to ensure the needed computer and communication equipment and infrastructure; the corresponding data base has to be also well-prepared and properly functioning; the quality and availability of electronic services has to be ensured and the clerks have to be further trained and educated to make sure that they are capable to cope with all the demands the new information-communication technology brings. In conclusion, it is necessary to constantly pay attention to users' reaction (both citizens and entrepreneurs) to be able to appraise the efficiency and quality of the changes that have been introduced within the new Law. That is the only way to investigate the degree to which the new technologies have been used by citizens, entrepreneurs and other members of society.

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The legal characteristics of the European Arrest Warrant, its implementation in Hungary, and its future implementation in Croatia

I. Introduction

One of the most ambitious projects of cooperation in criminal matters in the European Union is the European Arrest Warrant (EAW). The EAW aims to replace traditional extradition procedures between the Member States of European Union. Traditionally, extradition procedures involve a 'dialogue' between sovereign states, and thus extradition requests are not always free of political reasons. As we will see, the EAW transfers the power to issue a warrant to the judiciary, and also dissolves (even if not totally) the rule of non-extradition of nationals. In this paper we set out to analyze the adoption of the EAW Framework Decision and the legal nature of this act; the implementation of the EAW in Hungarian law; and the future implementation of the EAW in Croatia, with a special emphasis on its compatibility with the constitutional principles of Croatian law.

II. The adoption and the legal nature of the European Arrest Warrant

1. Justice and Home Affairs cooperation in the European Union

Cooperation in Justice and Home Affairs in the European Union (EU) formally started with the Treaty of Maastricht (1992), which established the European Union itself. The EU had a so-called pillar structure, the Third Pillar of which was dubbed Cooperation in Justice and Home Affairs. The Third (and Second) pillars of the EU were mostly intergovernmental in nature, as opposed to the supranational character of the First Pillar (i.e., the European Communities). The Treaty of

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Amsterdam (1997) transferred a number of areas from the Third Pillar into the First, ‘communitarising’ among others asylum policy, visa policy and judicial cooperation in civil matters.¹ The Third Pillar was thus renamed into Police and Judicial Cooperation in Criminal Matters.² The Amsterdam Treaty also meant the introduction of the concept of the EU as an area of freedom, security and justice. Recently, when the Lisbon Treaty entered into force (on 1st of December 2009), the pillar structure was abolished, and the EU has *de jure* and *de facto* taken the place of the European Community. The former Third Pillar and Title IV of the EC-Treaty were modified and merged into the new Title V of the Treaty on the Functioning of the European Union (TFEU). The abolition of the pillars brought about remarkable changes for cooperation in criminal matters, as integration in these areas has become truly supranational.³

2. The circumstances of the adoption of the EAW Framework Decision

The EAW Framework Decision was adopted in 2002, under the then Third Pillar of the EU. The political impetus for its creation is to be found in the Tampere Programme adopted by the European Council in 1999. This political document introduced the idea of mutual recognition of judicial decisions in the EU. As an element of this, it was stated that enhanced mutual recognition of judicial decisions and judgements would facilitate better co-operation between authorities and the judicial protection of individual rights. The European Council identified the principle of mutual recognition as the future cornerstone of judicial co-operation in both civil and criminal matters within the Union. More specifically, concerning criminal cases, the Council proposed that the formal extradition procedure should be abolished among the Member States regarding persons who are fleeing from justice after having been finally sentenced, ‘and replaced by a simple transfer of such persons.’⁴

¹ These areas were inserted into Title IV of the EC Treaty, thus establishing new competences for the European Community.

² The Treaty of Amsterdam also incorporated the Schengen *acquis* into the framework of the EU.

³ Some intergovernmental features still remain, however. For an analysis see V. Mitsilegas, *EU Criminal Law* (Oxford, Hart Publishing 2009) pp. 41-56.

⁴ Tampere European Council 15 and 16 October 1999 – Presidency Conclusions, Section B/VI

The Commission was asked to produce a corresponding proposal. The proposal for the Framework Decision was ready by 2001.⁵ After some discussion (the proposal was a type B element on the Council's agenda), and after consulting the European Parliament, which produced a positive report,⁶ the legal instrument was finally adopted on the 13th of June 2002, with the formal title Council Framework Decision on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA).⁷ Member States were obliged to take the necessary measures to comply with the provisions of the Framework Decision by 31 December 2003.

3. The Legal Nature of Framework Decisions

Before the changes facilitated by the Treaty of Lisbon, Framework Decisions were regulated in an Article of the Treaty on European Union. Article 34 (b) declared that the Council, acting unanimously (on the initiative of any Member State or of the Commission) may adopt Framework Decisions 'for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect.' Framework Decisions are similar to Directives regarding structure and regulating method – they are binding as to their result, while leaving national legislators some regulatory freedom. As directive-like legal norms, they need to be implemented in national laws. Framework Decisions do not necessarily result in unified law, but in approximated legal regulations, allowing (some) national legal characteristics and traditions to be maintained. The EU Treaty itself proclaimed that Framework Decisions do not have direct effect – as opposed to Directives, which may entail vertical direct effect.⁸ This Treaty provision has been if not overridden, but certainly presented in new light by the Court of Justice of the European Union (CJEU) in the

⁵ COM(2001)0522 final, *OJ* 332 E, 27/11/2001 p. 0305-0319.

⁶ The Parliament was consulted under Art. 39 of the Treaty on European Union (pre-Lisbon version).

⁷ *OJ* 2002 L 190/1

⁸ For an analysis see P. Craig, 'Directives: Direct Effect, Indirect Effect and the Construction of National Legislation', 22 *European Law Review* (1997) pp. 519-538.

Pupino case.⁹ In this judgment the ECJ confirmed the application of the so-called principle of conforming interpretation, which was originally developed by the Court's case law regarding Community law Directives.¹⁰ In *Pupino*, the Court noted that it would be difficult for the EU

'to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not also binding in the area of police and judicial cooperation in criminal matters'.

Thus, in its judgment the CJEU held that the principle of conforming interpretation is also binding in relation to Framework Decisions: accordingly, when applying national law, the national court must interpret the national regulations as far as possible in the light of the wording and purpose of the framework decision in order to achieve the result which it pursues. An important constraint upon the principle, however, also needs to be kept in mind: the extent of the interpretation of national law in the light of Framework Directives is limited by general principles of law, particularly those of legal certainty and non-retroactivity.¹¹

4. The situation of Framework Decisions following the Lisbon Treaty

As the Pillar Structure of the EU has been abolished, and the sources of law in the EU have been (more or less) unified, new acts relating to the Area of Freedom, Security and Justice will take the form of Directives, Regulations and Decisions – supranational sources of law, the use of which was previously restricted to the area of Community law. These

⁹ ECJ, Case C-105/03 *Criminal Proceedings against Maria Pupino* [2005] ECR I-5285.

¹⁰ See *inter alia* Case 14/83 *Sabine Von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen* [1984] ECR 01981, para 26.; Case 80/86 *Criminal Proceedings against Kolpinghuis Nijmegen BV* [1987] ECR 03969., para 12.; C-106/89 *Marleasing SA v. La Comercial Internacional de Alimentacion SA* [1990] ECR I-04135., para 8.

¹¹ The Court referred in particular to 'those principles prevent that obligation from leading to the criminal liability of persons who contravene the provisions of a framework decision from being determined or aggravated on the basis of such a decision alone, independently of an implementing law.' Case C-105/03, para 45.

sources of law may entail direct effect, and have primacy (supremacy) over national law.¹²

However, the acts which have been previously under the Third Pillar, have neither been abolished nor transformed automatically. Their legal fate is regulated by a protocol attached to the Treaty on the Functioning of the European Union that lays down some transitional arrangements regarding (among others) the former Third Pillar of the EU.¹³ These 'legacy acts' (Common Positions, Framework Decisions, Conventions and implementing decisions) remain in force, and their legal nature is not altered, leaving them without direct effect and supremacy.¹⁴ Once such an act is amended, the new rules established by the Lisbon Treaty will apply, even if the matter at hand is a word-by-word conversion. Naturally, if such legacy acts are annulled, they can only be replaced by the 'new' legal instruments provided by the modified Treaties. In the Stockholm Programme, the Commission was asked to submit 'a proposal for a timetable for the transformation of instruments with a new legal basis', meaning that transformations are indeed foreseen and preferred by the European Council.¹⁵ The timetable has not yet been produced, so it is questionable whether the EAW Framework Decision

¹² Regarding direct effect, see *inter alia* Cases 26/62 *Van Gend en Loos* [1963] ECR 001.; 57/65 *Lüttcke v. Hauptzollamt* [1966] ECR 205.; 9/70 *Grad v Finanzamt Traunstein* [1970] ECR 825.; 41/74 *Van Duyn v. Home Office* [1974] ECR 1337.; 43/74 *Defrenne v Sabena* [1976] ECR 547.; 152/84 *Marshall v. Health Authority* [1986] ECR 723. Regarding supremacy or primacy see *inter alia* Cases 6/64 *Costa v. ENEL* [1964] ECR 585.; 11/70 *Internationale Handelsgesellschaft* [1970] and 106/77 *Simmmenthal* [1978] ECR 629. For some recent analysis of these doctrines see M. Prinssen and A. Schrauwen, *Direct Effect – Rethinking a Classic of EC Legal Doctrine* (Europa Law Publishing 2002) and K. J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford, Oxford University Press 2001).

¹³ Protocol (No. 36) on Transitional Provisions, Title VII – Transitional provisions concerning acts adopted on the basis of Titles V and VI of the Treaty on European Union prior to the entry into force of the Treaty of Lisbon.

¹⁴ The phrase 'legacy acts' has been borrowed from Professor Peers. See S. Peers, The 'Third Pillar acquis' after the Treaty of Lisbon enters into force, *Statewatch Analysis*, 3 November 2009, available at: <<http://www.statewatch.org/analyses/86-third-pillar-acquis-post-lisbon.pdf>>, (last accessed on 2010.07.20).

¹⁵ The Stockholm Programme – An open and secure Europe serving and protecting the citizen, Conclusions of the European Council (10/11 December 2009), Section 1.2.10. This political programme outlines the future priorities of the EU concerning Justice- and Home Affairs policy for the time period between 2010-2014.

will be transformed in the near future. (To make things even more complicated, there are still some Maastricht-era Third Pillar instruments currently in force.¹⁶)

The changes brought about by the Lisbon Treaty in the policy areas previously belonging to the Third Pillar not only concern the legal instruments, but also the method of decision making and the jurisdiction of the Court of Justice of the European Union (CJEU): in most cases, the ordinary decision making procedure (co-decision) will apply, and the CJEU will have full jurisdiction as opposed to the previously restricted possibilities under Article 35 EU of the pre-Lisbon Treaty on European Union. Regarding the latter, the aforementioned protocol establishes a five-year transitional period, during which the Commission will not be able to initiate infringement proceedings against members states on the basis of non-compliance with the acts adopted under the former Titles V and VI of the pre-Lisbon version of the Treaty on European Union. Furthermore, any other changes regarding the jurisdiction of the CJEU in relation to these policy areas will also not be applicable during the five-year moratorium.¹⁷

III. The basic characteristics of the European Arrest Warrant

The European Arrest Warrant is an instrument meant to replace traditional extradition between the Member States of the EU, in order to expedite and simplify the surrender of perpetrators of serious crimes, to facilitate the conducting a criminal prosecution or executing a custodial sentence or detention order. Instead of extradition, it uses the term surrender. The basic features distinguishing the EAW from extradition are the following.

The EAW is a judicial decision. The Framework Decision tries to eliminate the possible political influence on surrenders by providing that the warrant can only be issued by a judicial authority. Such judicial decisions shall be executed on the principle of mutual recognition. The role of member states' central authorities is limited to practical and administrative assistance in the execution of the EAW.

¹⁶ The catalogue of legal instruments available under the Third Pillar was originally determined by the Maastricht Treaty, but the Treaty of Amsterdam has amended the relevant provisions. For an detailed and very useful overview of all Third Pillar acts still in force see Peers, loc. cit. n. 14, at pp. 3-12.

¹⁷ Protocol (No. 36) on Transitional Provisions, Title VII, Art. 10.

The partial elimination of the double criminality requirement. The EAW contains a list of thirty-two serious criminal offences, which, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years, give rise to surrender pursuant to a European arrest warrant, without the verification of the double criminality of the act.¹⁸ In any other case, the surrender may be subject to the requirement that the offence at hand constitutes an offence under the law of the executing member states as well.

The partial abolition of the prohibition of surrender of own nationals. Under the EAW, own nationals of member states may principally be surrendered in the same way as non-nationals – an act which is traditionally refused under traditional extradition procedures.¹⁹

Faster procedure. According to the Commission, the average time of nine months that traditional extraditions required, the EAW takes an average of 43 days to execute (the maximum time limit being 60 days). In the case that the arrested person consents to his surrender, the procedure is even faster, the average time being mere 13 days.²⁰

IV. Human rights guarantees and grounds for refusal

The EU legislators saw to it that fundamental rights-based guarantees be inserted into the EAW Framework Decision. In addition, there are a number of mandatory and optional grounds for the refusal of the execution of a European Arrest Warrant determined in the norm itself.

¹⁸ Art. 2 para 2 EAW

¹⁹ For example in Hungary, the Act XXXVIII of 1996 on International Legal Assistance in Criminal Matters proclaimed that extradition of Hungarian citizens is only allowed if the person sought for extradition is also a citizen of an other state and has his permanent residence in a foreign state. This regulation is still in force in Hungary, but that does not cause conflict with the act implementing the EAW (Act CXXX of 2003 on Co-operation with the Member States of the European Union in Criminal Matters), as they are acts at the same level of the hierarchy of norms, and thus the later law prevails over the earlier one (*lex posterior derogat lege priori*). The 2003 Act could also be seen as *lex specialis* in relation to the 1996 Act. For a similar reasoning see K. Bárd, The EAW and the Hungarian Constitution, in: A. Górski and P. Hofmanski, eds., *The European Arrest Warrant and its Implementation in the Member States of the European Union* (München, C. H. Beck 2008) pp. 25-28.

²⁰ <http://ec.europa.eu/justice_home/fsj/criminal/extradition/fsj_criminal_extradition_en.htm>

Article 1 paragraph 3 of the Framework Decision states that it ‘shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union’. Also, section 12 of the preamble references the Charter of Fundamental Rights of the EU, declaring that nothing in the Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a EAW has been issued when (on the basis of objective elements) there is reason to believe, that the warrant has been issued for the purpose of ‘prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons’. Later on, the preamble reiterates the principle of non-refoulement.²¹

The Framework Decision contains a two-pronged system of refusal regarding execution of a EAW, differentiating between mandatory and optional reasons for refusal. Refusal of the execution of the EAW is mandatory if the offence in question is covered by amnesty in the executing Member State; if the requested person has been finally judged by a Member State in respect of the same acts; or if the person concerned by the EAW may not, due to his or her age, be held criminally responsible in the executing state. If any of these grounds manifest, the judicial authority is obliged to reject the execution of the warrant. Referring to the optional grounds, a judicial authority *may* decide to refuse execution of the EAW – this list is considerably longer, ranging from the non-fulfilment of the double criminality in the case of an offence other than the ones listed in the EAW to having been finally judged by a third state in respect of the same acts.²²

V. ‘Constitutional’ challenges against the EAW at the EU level

As Framework Decisions need to be implemented into national law, the legality of such acts could be challenged both at the national and the European level. In this section we will focus on a brief summary of a

²¹ No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. (Section 13 of the Preamble of the EAW Framework Decision)

²² The full list of optional grounds for refusal is listed in Art. 4 of the EAW Framework Decision.

case in which the legality of the EAW Framework Decision itself was also questioned before the Court of Justice of the EU.

Advocaten voor de wereld, a Belgian non profit making organization brought an action against the act which implemented the EAW into Belgian law, seeking the annulment of the national act. The Belgian court (*Arbitragehof*) in turn initiated a preliminary ruling procedure, and asking various questions regarding the validity of the Framework Decision.²³ The organization essentially made three pleas, claiming that the Framework Decision was invalid because (1) the subject-matter of the European arrest warrant ought to have been implemented by way of a convention and not by way of a framework decision; (2) the EAW infringes the principle of equality and non-discrimination and, finally, that (3) it fails to satisfy the conditions of the principle of legality in criminal matters. The questions by the Belgian court corresponded with these. Regarding our subject, the third question is of most relevance, thus we will limit ourselves to the examination of that query.²⁴

The principle of the legality of criminal offences and penalties (*nullum crimen sine lege and nulla poena sine lege*) are perhaps the most important principles of criminal law. The question of the *Arbitragehof* questioned whether Advocaten voor de wereld was right in pointing out that to the extent to the EAW Framework Decision dispenses with verification of the requirement of the double criminality of the 32 offences mentioned in it, Article 2(2) of the Framework Decision is contrary to the principle of legality in criminal matters.

²³ Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633.

²⁴ To give a very brief summary of the other answers to the other two questions: Regarding the first the Court stated that while it is true that the European arrest warrant could equally have been the subject of a convention, it is within the Council's discretion to give preference to the legal instrument of the framework decision in the case where, as here, the conditions governing the adoption of such a measure are satisfied. As to non-discrimination, which was used to criticise the choice of the 32 categories of offences listed in the Framework Decision, the Court held that 'the Council was able to form the view, on the basis of the principle of mutual recognition and in the light of the high degree of trust and solidarity between the Member States, that, whether by reason of their inherent nature or by reason of the punishment incurred of a maximum of at least three years, the categories of offences in question feature among those the seriousness of which in terms of adversely affecting public order and public safety justifies dispensing with the verification of double criminality'. See paras 23-43 and 55-59 of the judgment.

The Court began by stressing that the legality principle of criminal offences and penalties was a general principle of Community law which the institutions of the EU are obliged to respect, and that the legality of legal acts of the EU could be reviewed regarding their conformity with this fundamental principle. The challenge was thus in principle accepted.

Advocaten voor de wereld claimed that the list of 32 offences regarding which the traditional double criminality requirement of extradition is abolished, breaches the principle of legality, as the offences set out in the list 'are not accompanied by their legal definition but constitute very vaguely defined categories of undesirable conduct'. Thus the guarantee that criminal legislation must be precise, clear and predictable allowing each person to know, at the time when an act is committed, whether that act constituted an offence or not, is not met.

The Court held that the principle means among others that legislation must clearly define offences and the penalties which they attract. It is true that in the case of the list of 32 offences, double criminality does not need to be verified, but only if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State. Subsequently, as the Court pointed out, even if the Member States reproduce word-for-word the list of the categories of offences for the purposes of implementation, the actual definition of those offences and the penalties applicable are those which follow from the law of the issuing Member State. The definition of offences and of the penalties corresponding to the categories contained in the list continue to be matters determined by the law of the issuing Member State, which must respect fundamental rights and fundamental legal principles as enshrined in Article 6 EU, and, consequently, the principle of the legality of criminal offences and penalties. The Court concluded that the principle of legality regarding criminal matters is thus guaranteed, and upheld the legality of the EAW Framework Decision.

VI. The Implementation of the European Arrest Warrant in Hungary

International criminal cooperation in the Hungarian legal system is regulated partly by the Criminal Code (Act No. IV of 1978) and the Criminal Procedure Code (Act No. XIX of 1998), partly by the International Criminal Legal Assistance Act (Act No. XXXVIII of

1996) and the Criminal cooperation with the European Union countries Act (No. CXXX of 2003).²⁵ The following shall be emphasized from among the institutions of international criminal cooperation:

- a) the fundamental principles of international criminal legal assistance,
- b) acknowledgement of extraneous judgment,
- c) surrender and recognition of the criminal procedure,
- d) report a crime to a foreign country,
- e) procedural legal assistance,
- f) extradition,
- g) the European Arrest Warrant and surrender process,
- h) surrender and recognition of the execution of imprisonment, as well as
- i) the provisions regarding the general rules of international cooperation of the criminal investigation authorities.

ad a) The aim of the provisions concerning international criminal legal assistance is to regulate the terms of criminal cooperation with other countries. In the course of international criminal cooperation the following essential provisions shall be taken into account (Sections 1-10 of Act No.38 of 1996):

- the legal assistance shall not impair the sovereignty of the Hungarian Republic, shall not threaten its security, shall not contravene with its public order,²⁶
- the provisions regarding legal assistance shall be applied only subsidiary,
- legal assistance is subjected to the condition that the act constitutes an offence and punishable both by the Hungarian law and the law of the foreign country furthermore the legal

²⁵ E. Kirs, 'Az európai igazságügyi együttműködés büntetőjogi vetülete a nemzetközi bűntettek kapcsán' [The criminal law aspects of European judicial cooperation regarding international crimes] in Zs. Wopera and Zs. Asztalos, eds., *Egységesülő polgári eljárásjog Európában* [Unifying civil procedural law in Europe] (Budapest, 2009) pp. 193-199.

²⁶ P. Kovács, 'Az EUIN-megállapodás és az alkotmányosság' [The EUIN-Agreement and constitutionality] 6 *Magyar Jog* (2008) pp. 409-413.; A. Raisz, 'Keresztútban az európai elfogatóparancs – avagy emberi jogi aggályok az Alkotmánybíróság határozata kapcsán' [The European Arrest Warrant in the crossfire – human rights considerations relating to the decision of the Constitutional Court] 7-8 *Jogtudományi Közlöny* (2008) pp. 387-393.

assistance shall not concern political crimes or crimes closely connected thereto and military crimes²⁷,

- bilateral or multilateral reciprocity agreements may be concluded regarding legal assistance²⁸,
- in the course of legal assistance the provisions of law regarding passport, visa, foreign currency and customs shall not hinder the outward journey and entry of persons, as well as the surrender and receipt of objects.

ad b) The basic provisions concerning the validity of extraneous judgment is regulated by Sections 47-48 of Act No. 38 of 1996. According to this Act the judgement of a foreign court shall be regarded equal to the judgement of a Hungarian court, if a procedure was in progress against the perpetrator abroad, and the punishment imposed and measure taken does not contravene the Hungarian law and order. The Budapest Metropolitan Court has the competence and jurisdiction to acknowledge the judgement of a foreign court (Section 46 of Act No. 38 of 1996).

ad c) The surrender of the criminal procedure consists of practical (possible) and obligatory cases (Section 37-37/A of Act No. 38 of 1996). It is practical to let an authority of another country to proceed against a foreign citizen if the accused residing in Hungary is the citizen of the country for which the procedure is going to be surrendered or the permanent residence (ordinary residence) of the accused is in the county in question. In case the accused is abroad and can not be subjected to extradition it is practical as well to surrender the criminal prosecution if the accused resides abroad during the proceedings, and the extradition request of the accused can not be granted, has been declined or has not been filed yet.²⁹ The procedure must be conducted by authorities of

²⁷ N. Chronowski, 'Nullum crimen sine lege Lisszabon után' [Nullum crimen sine lege after Lisbon] in: *Pécsi Határőr Tudományos Közlemények* 9. (Pécs, 2008) pp. 167-175.

²⁸ P. Bárd, 'A kölcsönös bizalom elvével szembeni alkotmányos aggályok az európai elfogatóparancs példáján keresztül' [Constitutional concerns regarding the principle of mutual trust in relation to the European Arrest Warrant] 45 *Kriminológiai Tanulmányok* (2008) pp. 175-192.

²⁹ N. Balogh-Békesi, '„Közös európai alkotmányjog” vagy szuverenitás-transzfer esetről-esetre. A magyar Alkotmánybíróság döntéséről az EU valamint Izland és Norvégia közötti átadatási eljárásról szóló megállapodás tárgyában' [Common European Constitutional Law or case-by-case transfer of sovereignty. The decision

another country in cases subjected to Hungarian jurisdiction if the foreign citizen committed the crime in Hungary and the prosecution thereto is renounced on the ground of an international treaty promulgated by a statute of the Hungarian Republic.

ad d) In case the procedure is conducted against an accused residing abroad, and

- extradition request shall not be granted,
- extradition request has been declined,
- surrender of the criminal prosecution has not taken place,
- the prosecutor has not made a motion in order to conduct the proceeding in the absence of the accused,

the lodging of complaint can be initiated by the prosecutor at the Chief Prosecutor until filing the indictment, following this time it can be initiated by the court at the Minister for Public Administration and Justice³⁰ in order to file an indictment in the country of jurisdiction (Act No. 38 of 1996). If the Chief Prosecutor (Minister for Public Administration and Justice) files the indictment, the initiator must be notified about this, by right thereof the investigation (proceedings) shall be dismissed. This kind of dismissal shall hinder the later resumption of the criminal procedure.

ad e) The main rules of the procedural legal assistance is basically the same both in cases of providing legal assistance and requesting for legal assistance (Act No.38 of 1996). The procedural legal assistance shall usually consist of the following:³¹

- Activities concerning procedural actions (carrying out investigation activities, searching for evidence, conducting evidentiary procedures, implementing forced measures).
- Transportation of objects and persons (transportation across Hungary, dispatching documents and objects concerning criminal procedure).

of the Hungarian Constitutional Court regarding the agreement on surrender procedures between the EU and Norway and Iceland] 6 *Jogtudományi Közlöny* (2008) pp. 310-315.

³⁰ The law uses the designation 'Minister of Justice and Police', which was in use at the time of the passing of the law. In the paper the current designation (Minister for Public Administration and Justice) will be used.

³¹ K. Karsai, 'Magyar alkotmányosság a bűnügyi jogsegélyjog útvesztőiben' [Hungarian constitutionality and international legal assistance in criminal matters] 6 *Magyar Jog* (2008) pp. 399-408.

- Request for data included in registers (giving information about personal and other data stored in the criminal records of a Hungarian citizen being prosecuted abroad).

ad f) The surrender – similarly to legal assistance - can be executed in two ways: request for surrender filed by Hungary or filed by a foreign country to Hungary. The surrender can have three purposes:

- conducting a criminal procedure,
- executing custodial sentence,
- executing detention order (taking measures involving deprivation of liberty).

The positive conditions and disqualifications³² of surrender are illustrated in the following table:

Table 1 Positive conditions and disqualifications of surrender

The conditions of surrender	The disqualifications of surrender
<ul style="list-style-type: none"> - criminal offence carrying a maximum penalty of 1 year or more / imprisonment, measures: more than 6 months left - the person requested to be surrendered is not (not only) a Hungarian citizen - if the requesting country provides security: <ul style="list-style-type: none"> - the person in question will not be executed by death-penalty - it will not conduct procedure on account of another criminal offence (it will not execute penalty depriving liberty) - the person in question may leave the requesting country after the criminal procedure has been conducted / the punishment has been executed 	<ul style="list-style-type: none"> - lapse (in either of the countries) - amnesty (in either of the countries) - lack of private prosecution (in the requesting country) - <i>res iudicata</i> (in the requested country) - refugee (except if it is requested by a secure country)

ad g) Two main questions arise concerning the surrender procedure conducted on the basis of cooperation with European Union countries

³² P. M. Nyitrai, 'A kiadatás intézményének újragondolása Európában – az európai elfogatóparancs eszméje és alkalmazásának főbb dilemmái' [Rethinking extradition in Europe – the idea and the application of the European Arrest Warrant] *7 Magyar Jog* (2003) pp. 401-410.

and the European Arrest Warrant³³(cf. Act No. 130 of 2003 on criminal cooperation with European Union Member States):

g/1) surrender from Hungary;

g/2) request for surrender from another country.

ad g/1) By right of the European Arrest Warrant issued by judicial authority of another Member State of the European Union in order to

- conduct criminal procedure
- execution of imprisonment, as well as
- execution of detention order (taking measures involving deprivation of liberty)

a person residing in the Hungarian Republic may be arrested and transferred in case the maximum period of the penalty for the committed criminal offence is at least twelve months of imprisonment or detention order, or where a final sentence has already been passed for a prison term (detention) of at least four months.³⁴

The law specifies the criminal offences in which cases the person sought shall be surrendered on account of the European Arrest Warrant without verification of the double criminality of the act if the offences are punishable in the issuing Member State by imprisonment of at least three years. More than hundreds of these criminal offences are connected mainly to organized crime, but crimes serving the protection of minors, corruption, crimes against environmental protection etc. can be found as well among the most vicious traditional felonies (murder, robbery, fraud, extortion etc.). In other cases surrender shall be permissible only if the alleged crime for which extradition is being sought through the European Arrest Warrant constitutes an offence under Hungarian law.

The implementation of the European Arrest Warrant must be refused on the following grounds:

- if the person sought has not reached the legal age of criminal responsibility,
- if one of the acts underlying the European Arrest Warrant is not qualified as a felony according to the Hungarian law,

³³ E. Róth, 'Az európai elfogatóparancs' [The European Arrest Warrant] in E. Róth, ed., *Magyarország az Európai Unió csatlakozás küszöbén* [Hungary at the brink of EU accession] (Miskolc, 2003) pp. 57-67.

³⁴ A. Kenéz, 'A megerősített harmadik pillér. Az európai elfogatóparancsról' [The reinforced Third Pillar – Thoughts on the European Arrest Warrant], 3 *Ügyvédek Lapja* (2007) pp. 27-30.

- if punishability or penalty has already lapsed according to the Hungarian law,
- if in one of the Member States a decision has been passed on account of the act underlying the European Arrest Warrant against a person sought, which constitutes an obstacle to take criminal proceedings against him, or on the basis of which either the penalty has already been executed, or which execution is in progress, or which can not be implemented under the law of the Member State which passed the final judgement³⁵,
- if the person sought has already been acquitted or convicted validly of the same offence in a third Member State, on condition that the penalty has been executed, or which execution is in progress, or which can not be implemented under the law of the Member State which passed the final judgement,
- if a criminal proceeding is in progress in the Hungarian Republic on the basis of the act underlying the issuance of the European Arrest Warrant against the person sought,
- if the reporting was declined, or either the investigation or the proceeding was dismissed by the Hungarian criminal authority on the basis of the offence underlying the European Arrest Warrant,
- if amnesty is granted for the criminal offence underlying the European Arrest Warrant according to the Hungarian law furthermore the Hungarian Criminal Code shall be applied to the committed criminal offence.

In case the European Arrest Warrant was issued against the same person by two or more Member States, all of the circumstances surrounding the offence (if necessary after obtaining the opinion of Eurojust – The European Union’s Judicial Cooperation Unit) shall be taken into consideration before passing a resolution on the question that which

³⁵ B. Mohácsi, ‘Az Unió bünygyi együttműködés nehézségeinek egyik példája. A Német Alkotmánybíróság – 2 BvR 2236/04. sz. (2005. júl. 18.) – döntése az Európai Elfogató Parancsról szóló törvényről’ [Complications regarding legal assistance in criminal matters – Decision 2 BvR 2236/04 (18.07.2005.) of the German Constitutional Court regarding the Act implementing the European Arrest Warrant] 1 *Collega* (2006) pp. 16-19.

European Arrest Warrant should be executed and should the person sought surrendered on the score thereof.³⁶

In the proceeding initiated on the basis of the European Arrest Warrant only the Budapest Metropolitan Court shall take measures as executive judicial authority in a form of judge ordinary. An appeal may lie against its decision, which is going to be judged by the Court of Appeal of the capital in a form of council. The Budapest Metropolitan Court hears the case, on which the prosecutor and the counsel for defence must be presented. The Budapest Metropolitan Court

- hears the person sought (regarding especially his identity, nationality and the circumstances influencing the terms of surrender),
- informs the person sought about the possibility of simplified surrender procedure and its legal consequences,
- in case the person sought does not wish to take the opportunity to have a simplified surrender procedure and the Court rules that cause of refusal does not exist, it prescribes the temporary surrender arrest of the person sought (which can not be more than 40 days) and forwards the decision thereof immediately to the Minister for Public Administration and Justice who notifies the judicial authority of the Member State in order the European Arrest Warrant to be sent at once; after receiving the European Arrest Warrant the Budapest Metropolitan Court hears the case and if the terms of the execution and surrender of the European Arrest Warrant stand, it passes a decision thereon³⁷.

If the facts and data produced by the judicial authority of the issuer Member State are not estimated to be sufficient by Budapest Metropolitan Court in order to pass decision relating to the execution of the European Arrest Warrant and surrender, it can request through the

³⁶ F. Giesecke, 'Az európai elfogatóparancs, mint nemzetközi elfogatóparancs' [The European Arrest Warrant as an international arrest warrant] 1 *Bírák Lapja* (2005) pp. 74-78.; 'Az európai elfogatóparancsról. Egy ír elkövető magyar ügye kapcsán. Interjú Bárd Petrával' [Thoughts on the European Arrest Warrant regarding the case of an Irish perpetrator in Hungary – Interview with Petra Bárd] 2 *Ügyészek Lapja* (2008) pp. 37-45.

³⁷ K. Karsai, *Az európai elfogatóparancs és az átadási eljárás* [The European Arrest Warrant and the procedure of surrender] (Szeged, 2004) p. 36.

Minister for Public Administration and Justice to put urgently at its disposal the further necessary supplementary information.³⁸

The surrender of the person sought is managed by the NEBEK (Centre of International Criminal Cooperation) with the assistance of the police. The person sought shall be surrendered to the authorities responsible of the Member State which issued the European Arrest Warrant no later than ten days counted from the day when the decision passed on the execution of the European Arrest Warrant and surrender entered into effect.³⁹

The Budapest Metropolitan Court may order the seizure and surrender of certain property at the request of the judicial authority of the Member State which issued the European Arrest Warrant or *ex officio*

- which can be used as evidential means, or
- which were obtained by the person sought in the course of committing the crime or in connection thereto.⁴⁰

Further proof shall not be obtained during the proceeding regarding the execution of the European Arrest Warrant than the identification of the person arrested and taken to the police station.⁴¹

ad g/2) In case that criminal procedure must be conducted against the accused, the court shall issue immediately the European Arrest Warrant in order to arrest and surrender the person sought in one of the Member

³⁸ P. Bárd, 'Egy jogintézmény hányatott sorsa: az európai elfogatóparancs' [The hardships of a legal instrument – the European Arrest Warrant] 12 *Rendészeti Szemle* (2008) pp. 3-26.; T. Katona, 'Elemzés az elfogatóparancsról' [Analysis of the European Arrest Warrant], 4 *Bűnügyi Szemle* (2009) pp. 55-59.

³⁹ P. M. Nyitrai, 'Az európai elfogatóparancs intézményének jövőképe a vonatkozó kerethatározat tagállami végrehajtási megoldásainak tükrében' [The future of the European Arrest Warrant in the light of Member States' implementation solutions] in M. Lévay, ed., *Az Európai Unióhoz való csatlakozás kihívásai a bűnözés és más devianciák elleni fellépés területén* [Challenges of EU accession in the field of combatting crime and other acts of deviance] (Miskolc, 2004) pp. 183-197.

⁴⁰ A. Peisch, Belföldi elfogatóparancs, európai elfogatóparancs, nemzetközi elfogatóparancs. [Arrest warrant, European Arrest Warrant, International Arrest Warrant] in Országos Tudományos Diákköri Konferencia. Állam- és jogtudományi szekció. 2007. pp. 117-126., available at: <[http://www.ajk.elte.hu/TudomanyosProfil/kiadvanyok/elektronikus/seminarium/X XVIII-OTDK/Peisch%20Andr%C3%A1s%20-%20Belf%C3%B6ldi%20elfogat%C3%B3parancs,%20eur%C3%B3pai%20elfogat%C3%B3parancs,%20nemzetk%C3%B6zi%20elfogat%C3%B3parancs.pdf](http://www.ajk.elte.hu/TudomanyosProfil/kiadvanyok/elektronikus/seminarium/X%20XVIII-OTDK/Peisch%20Andr%C3%A1s%20-%20Belf%C3%B6ldi%20elfogat%C3%B3parancs,%20eur%C3%B3pai%20elfogat%C3%B3parancs,%20nemzetk%C3%B6zi%20elfogat%C3%B3parancs.pdf)>, (last accessed on 20.07.2010).

⁴¹ BH [Court Decision] 2009. 268.

State of the European Union. If a final judgement on imprisonment shall be executed against the accused, the European Arrest Warrant shall be issued by the judge of execution of punishment. The European Arrest Warrant shall be forwarded to NEBEK.

The European Arrest Warrant shall be issued in case the offence is punishable by imprisonment or a detention order for a maximum period of at least one year. If the decision on imposing imprisonment or detention order has already been passed, the European Arrest Warrant can be issued just in case the imprisonment or detention order has been imposed for a period of at least four months.

The European Arrest Warrant shall be translated into the official language or one of the official languages of the executing Member State. The court can require a seizure and surrender of certain properties in the European Arrest Warrant,

- which can be used as means of evidence, or
- which were obtained by the person sought in the course of committing the crime or in connection thereto.

If the court has already issued an international arrest warrant against the person sought, the European Arrest Warrant is going to replace it, but observing the original time of the issue and the judicial reference number. In such case the court shall notify NEBEK about the issue of the European Arrest Warrant.

The European Arrest Warrant shall be sent to the Minister for Public Administration and Justice within three days counted from the notification about the arrest of the defendant in order to forward it.

The whole length of time when the person sought was kept in prison resulting from the execution of the European Arrest Warrant shall be deducted from the total period of deprivation imposed by the court.

If the judicial authority of the Member State temporarily surrender the person sought instead of suspending the surrender, the provisions set forth in the agreement are obligatory for all of the Hungarian authorities. The taking over is managed by the NEBEK with the assistance of the police.

ad h) The following six institutions regarding the surrender and recognition of the penalties are regulated by Section 46-60 of Act No.38 of 1996:

- recognition of the execution of imprisonment imposed by foreign court,

- surrender of the execution of imprisonment imposed by foreign court,
- recognition of the execution of measures involved deprivation of liberty imposed by foreign court,
- surrender of the execution of measures involved deprivation of liberty imposed by foreign court,
- recognition of the execution of confiscation of property and seizure,
- surrender of the execution of confiscation of property and seizure.

ad i) The provisions of international cooperation of the criminal investigation authorities are set forth in Act No. 54 of 2002. The Act is applicable in case there are international conventions which regulate the forms of cooperation. Request for cooperation is usually filed (executed) in order to prevent or elucidate criminal offences punishable by imprisonment, it can not be filed (executed) regarding political and military criminal offences.

The request of the criminal investigation authority is forwarded by NEBEK to the foreign authorities and receives the request thereof. The request of the foreign authority

- is forwarded immediately to the Hungarian criminal investigation authority of jurisdiction for execution or
- can be carried out according to provisions defined in Act No. 54 of 1999 on cooperation and exchange of information fulfilled in the framework of European Union's criminal investigation information system and International Criminal Police Organization by NEBEK.

According to Section 8 of the Act the following forms of international criminal cooperation shall be carried out:

- direct exchange of information,
- exchange of information with criminal investigation authority of a Member State of the European Union,
- setting up a united group on criminal reconnaissance,
- requisition of a person cooperating with investigation authority,
- employment of undercover agent,
- observation across the border,
- hot pursuit,
- employment of a liaison officer,

- secret intelligence gathering on the basis of international cooperation,
- application of Witness Protection Program on the basis of international cooperation.

The forms of cooperation listed above may only be applied if they are rendered possible both by the law of the Hungarian Republic and by the foreign country in question.

VII. The future implementation of the EAW in the Republic of Croatia

1. Constitutional challenges against the EAW at the national level

As said before, as Framework Decision need to be implemented into national law, the legality of such acts could be challenged both at the national and the European level. In this section we will focus on cases which question the constitutionality of national implementation laws.

In fact, before the adoption of the Framework Decision, as many as fourteen of the then existing twenty-five Member States⁴² included in their constitutions a stipulation which prohibited⁴³ or in some manner limited⁴⁴ the extradition of their citizens. Therefore it is hardly surprising that a innovative system established with the EAW, which included some rather drastic changes, such as the one dealing with the prohibition or limitation of citizen extradition and, consequently, radical interventions within national legal systems, resulted in few constitutional conflicts in several Member States.

Certain Member States, such as Portugal, Slovakia and Slovenia, had chosen solutions which included constitutional amendments in order to comply with the EAW Framework Decision provisions. In such instances there had not been opportunity to question the implementation laws' constitutionality. Other Member States had enforced their own implementation laws. Subsequently, after the EAW Framework

⁴² See Z. Deen-Racsmány, 'Lessons of the European Arrest Warrant for Domestic Implementation of the Obligation to Surrender Nationals to the International Criminal Court', 1 *Leiden Journal of International Law* (2007) pp. 167-191.

⁴³ Such citizen extradition prohibition stipulation had been built in the constitutions of: Austria, Cyprus, Czech Republic, Estonia, Finland, Italy, Latvia, Lithuania, the Netherlands, Germany, Poland, Portugal, Slovakia and Slovenia.

⁴⁴ Such solutions assuming certain exceptions to the citizen extradition prohibition could have been found in the constitutions of Estonia (Art. 36.2), Italy (Art.26.1) and Lithuania (Art. 13).

Decision implementation three requests for national implementation regulations constitutional review had been submitted.

Chronologically, the first decision made by the Polish Constitutional Court,⁴⁵ of 27 April 2005, stated that the legal provision implementing the EAW (Article 607(1) of the Criminal Procedural Law) and pertaining to Polish citizens extradition is opposed to the Constitution prohibiting the extradition of Polish citizens to other countries. Nevertheless, the Constitutional Court recognized the importance of EAW in the same decision, emphasizing that the EAW 'has crucial significance for the functioning of the administration of justice and, primarily – as a form of cooperation between Member States assisting in the fight against crime – for improving security'. It should be mentioned that the Polish Constitutional Court postponed its decision for the period of eighteen months in order to synchronize the Constitution with the EAW Framework Decision, which has been done.

The German experience with the implementation of Framework Decision was quite interesting and of significant importance to the German legal system, as well as the EAW efficiency in the European Union.⁴⁶ The German Federal Constitutional Court (*Bundesverfassungsgericht*) in their decision of 18 July 2005 declared the entire German implementation law unconstitutional and abolished it, on the basis of it being in contradiction to the constitutional right against the unduly extradition (due to the fact that the legislator failed to take advantage of the flexibility provided by the EAW Framework Decision, that is, they failed to take advantage of the margins within the Framework Decision), as well as the fact that the implementation law breaches the access to court guarantee (due to the lack of court controlled decision on extradition in some cases).⁴⁷ The new implementation law was enacted on the 2nd of August 2006.

⁴⁵ Judgment of the Polish Constitutional Tribunal, P 01/05, 27 April 2005, English Summary available at: <http://www.trybunal.gov.pl/eng/summaries/documents/P_1_05_GB.pdf>, (last accessed on 20.07.2010).

⁴⁶ See Z. Đurđević, 'Europski sud pravde i legitimitet europskog uhidbenog naloga' [The European Court of Justice and the Legitimacy of the European Arrest Warrant] 2 *Hrvatski ljetopis za kazneno pravo i praksu* (2007) p. 1024.

⁴⁷ The German Federal Constitutional Court decision resulted in stay of execution for all orders in Germany and based on the principal of reciprocity certain countries refused to execute German orders (for instance, Spain on several occasions).

Likewise, The Supreme Court of Cyprus had in their decision of 11 November 2005⁴⁸ declared the extradition of the Cyprian citizens unconstitutional, but as soon as 18 June 2006 the constitutional provision on the extradition of Cyprian citizens has been changed on the condition that the surrender of nationals is only possible for acts committed after the accession to the EU (that is, since 1 May 2004).

Contrary to the previous three examples, other constitutional challenges to the Framework Decision, namely those before the Constitutional Courts of Ireland, Greece and Czech Republic, resulted in their own implementation legislature in accordance with the Constitution.⁴⁹

Particularly worth mentioning is the decision by the Czech Republic Constitutional Court of 3 May 2006,⁵⁰ denying a group of representatives' proposal for declaring the Czech implementation law unconstitutional.⁵¹ This decision is interesting for two primary reasons: because '*it developed in detail the concept of mutual trust*'⁵² and because the decision of the Court in this case is based on teleological interpretation of the constitutional provisions. Namely, the Czech Constitutional Court considered the *ratio* of the traditional extradition and the European Arrest Warrant and has stated that the significant variation between the two lies in the mutual trust or distrust relation. According to the Court statement, while traditional extradition had its *ratio* in mutual distrust between the Member States, the EAW has its own *ratio* in the high level of trust among the Member States, which is

⁴⁸ Judgment of the Supreme Court of Cyprus no 295/2005, Council Document no 14281/05, 11 November 2005

⁴⁹ See Górski and Hofmanski, eds., op. cit. n. 19.

⁵⁰ Judgment of the Czech Constitutional Court No. Pl. US 66/04 from 3rd May 2006, available in English at:

<http://www.eurowarrant.net/documents/cms_eaw_id862_1_Decision%20Czech%20Constitutional%20Court-001_EZR-66-06-ENG.doc>, (last accessed on 20.07.2010).

⁵¹ The ground arguments of the representatives were related to incompatibility of the implementation law and Art. 14(4) with the Czech Constitution (according to which '[n]o citizen may be forced to leave his or her country') and the insufficient explanation of the partial elimination of the double criminality requirement.

⁵² M. Fichera, 'The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?', 1 *European Law Journal* (2009) p. 83., available at: <<http://www3.interscience.wiley.com/cgi-bin/fulltext/121590091/PDFSTART>>, last accessed on 20.07.2010).

the reflection of the contemporary period ‘of high mobility of European people across the EU and increasing inter-state cooperation’.⁵³

2. The relevant situation in the Republic of Croatia

The preparation of the Republic of Croatia for the membership in the EU implies modifications of the entire economy, administration and legal system. With that purpose in mind, Croatia has, like any other candidate state presently, had to go through an ongoing complicated process of approximation of legislation with the *acquis communautaire*. Negotiations for the Accession of the Republic of Croatia to the EU in the Area of Justice, including Chapter 24 (*Justice, Freedom and Security*), are under the jurisdiction of the Ministry of Justice. Summarized, the dynamics of the negotiation in Chapter 24⁵⁴ are formulated as follows: during January and February 2006 the explanatory and bilateral screening were held. In July 2006 the benchmark for the opening the chapter was officially received and on November 2006 Action Plan for integrated border management was adopted and revised in December 2007. The benchmark was validated by the EU in April 2008 and in the same month Croatia presented its negotiating position to the EU. The relevant chapter was formally opened on 2 October 2009 and the common position of the EU for this chapter contains six closing benchmarks. The first Draft Report on fulfilling the obligations under Chapter 24 is completed. Furthermore, judicial cooperation in criminal matters between the Republic of Croatia and other countries currently is based on the conventional approach to judicial cooperation – which means that principally the concept of mutual recognition is not legally recognized and accepted. Croatia is a party to the 1959 Council of Europe Convention on Mutual Legal Assistance in Criminal Matters⁵⁵ and to its 1978 Protocol on Mutual

⁵³ *Ibid.*, at p. 84.

⁵⁴ See Negotiations for the Accession of the Republic of Croatia to the EU in the Area of Justice – State of Play for Chapters 23 and 24, available at: <http://www.oefz.at/cms/index.php?option=com_docman&task=doc_view&gid=268>.

⁵⁵ The European Convention on Mutual Assistance in Criminal Matters Confirmation Act from the 20th of April 1959, and Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters from the 17th of March 1978, National Gazette – International Agreements, No. 4/1999

Assistance in Criminal Matters. In addition, Croatia has signed but not ratified the 2001 Second Additional Protocol to the Convention.

a) Extradition in the Republic of Croatia

The issue of extradition in the Republic of Croatia is regulated by the Act of 2004 on Mutual Legal Assistance in Criminal Matters.⁵⁶ Apart from this Act, extradition in Croatia is based on concluded international conventions and bilateral treaties. Croatia has ratified the 1957 European Convention of Extradition,⁵⁷ as well as the 1975 Additional Protocol to the European Convention on Extradition⁵⁸ and 1978 Second Additional Protocol to the European Convention on Extradition.⁵⁹ Since certain issues related to extradition are regulated not only by the European Convention of Extradition and its Protocols but by the European Convention of 1977 on the Suppression of Terrorism as well, it is worth mentioning that Croatia is also a party to the said Convention.⁶⁰ It is worth noting that, in accordance with Article 140 of the Constitution of the Republic of Croatia,⁶¹ the international conventions made and validated under the Constitution, and which are valid presently, constitute a part of the internal legal system of the Republic of Croatia and are legally above the law. Furthermore, the provisions of the said conventions may be amended or terminated only according to conditions and manners determined by the same or in accordance with the general

⁵⁶ The International Legal Assistance in Criminal Matters Act, National Gazette No. 178/2004

⁵⁷ The European Extradition Convention Confirmation Act, National Gazette – International Agreements, No. 14/1994. The Convention is valid in the Republic of Croatia from the 25th of April 1995.

⁵⁸ The Additional Protocol to the European Convention on Extradition Confirmation Act from the 15th of October 1975, National Gazette – International Agreements, No. 14/1994. The Additional Protocol is valid in the Republic of Croatia from the 25th of April 1995.

⁵⁹ The Second Additional Protocol to the European Convention on Extradition Confirmation Act from the 17th of March 1978, National Gazette – International Agreements, No. 14/1994. The Second Additional Protocol is valid in the Republic of Croatia from the 25th of April 1995.

⁶⁰ The European Convention on the Suppression of Terrorism Confirmation Act, National Gazette – International Agreements, No. 12/2002 In the Republic of Croatia the Convention is valid from the 16th of April 2003.

⁶¹ The Constitution of the Republic of Croatia, National Gazette, No. 41/2001 – revised text and 55/2002 – amendment

regulations of the international law. Since the Act of 2004 on Mutual Legal Assistance in Criminal Matters is based on traditional extradition system and the Framework Decision is a constituent of the mutual *acquis communautaire*, the Republic of Croatia is faced with the task of Framework Decision implementation into national legislature; a task firmly implicit of certain significant interventions and modifications in the national legislature, including Constitutional Amendments.

b) Article 9(2) of the Constitution of the Republic of Croatia

All Member States of the EU from the 2004-7 enlargement rounds, apart from Cyprus, have amended their Constitutions before and/or after becoming a member of the Union, the only difference being the varied extent of constitutional changes depending on constitutional legal system of individual states.⁶² One of the reasons for Croatia's Constitutional Amendment of 16 June 2010 relates to the efficient implementation of the European Arrest Warrant. Then valid Constitutional provision of Article 9(2) prohibited Croatian citizens extradition to other states and as such it represented a legal barrier for the efficient EAW implementation from the date Croatia becomes a member of the Union, i.e., for the approximation of the entire Croatian legislature with the EAW Framework Decision, which is also one of the conditions for closing the Chapter 24 of the negotiations.

On the basis of the Constitutional Amendment voted in the Croatian Parliament on 16 June 2010, an amendment to Article 9 paragraph 2 of the Constitution has been made, according to which the tentative prohibition of extradition is enforced as a nationality determinant. However, a constitutional legal basis for EAW procedure, i. e., for adequate law regulating the issue in detail, has been assured.⁶³ Apart

⁶² According to some studies, major constitutional amendments occurred in Bulgaria, Czech Republic, Slovakia, Slovenia and Romania, while somewhat lesser occurred in Hungary and Poland, whereas the constitutions of Baltic States and Malta saw the least change. Cf.: The Proposal of the Amendments to the Constitution of the Republic of Croatia, available at: <<http://www.cpi.hr>>.

⁶³ Art. 9 para 2 of the Constitution presently states: '[a] citizen of the Republic of Croatia cannot be exiled from the Republic of Croatia, nor can they be deprived of their citizenship or extradited to any other state, with the exception of the execution of an order in accordance with international agreement or the European Union *acquis communautaire*'. The Amendment to the Constitution of the Republic of Croatia, National Gazette No. 76/2010

from enabling the implementation of the EAW from Croatia's entering the EU, the Constitutional Amendment also enables Croatian citizens' extradition to the legislative bodies of other states as based on the international convention with any other state. This way, a foundation for two parallel extradition systems has been created:⁶⁴ one dealing with the relations between the Member States of the EU (including Croatia once it becomes one of the Member States of the Union) and regulated by the implementation law, and the other dealing with relations of Croatia and non-Member States and regulated by international conventions on issue of extradition as well as national legislature in relation to extradition.

e) EAW Framework Decision implementation

Framework Decision is not implemented directly in the territory of Member States, meaning that the Member States had to enforce certain provisions in their national legislatures in order to validate their obligations under the Framework Decision. From this ensues that, after the Constitutional Amendment that created the legal basis for the EAW implementation as one of the two conditions for closing of Chapter 24, the Republic of Croatia, its legislator (*Hrvatski sabor*) is faced with fulfillment of another task, the task of EAW Framework Decision implementation into national legislature. The other condition implies voting a Judicial Cooperation in Criminal Matters with the EU Member States Act, which could not have been put into procedure until the Constitution had been amended. The aforementioned Act is already in the parliamentary procedure⁶⁵ and it will contain the provisions of the following EU legal instruments: the European Arrest Warrant and the surrender procedures between Member States; European orders freezing property or evidence; the principle of mutual recognition to financial penalties, confiscation orders and principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union; the principle of mutual recognition to judgments and probation decisions with a view to a supervision of probation measures and alternative sanctions; the European evidence warrant for

⁶⁴ See Z. Burić, 'Europski uhidbeni nalog' [The European Arrest Warrant], 1 *Hrvatski ljetopis za kazneno pravo i praksu* (2007) p. 264.

⁶⁵ Full European Union Membership Negotiations Closure Legislative Activity Plan of the Republic of Croatia, National Gazette No. 30/2010

the purpose of obtaining objects, documents and data for use in proceedings in criminal matters; the enhancement of the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the persons concerned at the trial. In conclusion, one may point out the manner in which the Croatian legislature will entirely be approximated with the EAW Framework Decision by the amendment to Article 9 par. 2 of the Constitution of the Republic of Croatia and the forcing of the Judicial Cooperation in Criminal Matters with the EU Member States Act.

VIII. Concluding remarks

The European Arrest Warrant is one of the most debated instruments in the field of European judicial cooperation. Even eight years after its adoption not all problems regarding the warrant seem solved. The London-based NGO, Fair Trials International has launched a campaign called 'Justice in Europe', aiming to spotlight some alleged predicaments connected to the EAW. In a recent submission⁶⁶ to the European Union Justice and Home Affairs Council Working Group, they claim that in a lot of cases, people are being sent to serve sentences in other Member States after unfair trials, proportionality is not taken into account properly (i.e., extraditions are taking place in connection with very minor offences) and legal representation of the extradited person is sometimes problematic. According to Fair Trials International, checks should be implemented to ensure that EAWs are only issued when proportionate to the offence and the interest of justice. Also, the EU should introduce common rules regarding legal aid in relation to criminal proceedings, especially proceedings relating to EAWs, and the system for removing EAW alerts from the Schengen Information System should be just as efficient and reliable as the system for issuing such alerts. The system for the removal of EAW alerts should too be made more accessible to individuals.

In its annual report for 2009, Eurojust has also identified a number of problems regarding the EAW, most of which overlap with the findings

⁶⁶ Fair Trials International: The European Arrest Warrant: Problems and Recommendations for Reform, Submission to the European Union Justice and Home Affairs Council Working Group, 31 July 2009, available at: <<http://www.fairtrials.net/images/uploads/Submission%20to%20EU%20on%20EAW.pdf>>, (last accessed on 20.07.2010).

of Fair Trials International, but some further concerns were also noted, for example the differences in the legal systems of Member States (in particular between common law and civil law systems), along with some more technical problems (missing information in issued EAWs and requests to supply additional information causing delays in many proceedings, problems of translation, in particular with respect to crime descriptions and factual circumstances, etc.).⁶⁷

Taking into account such concerns could prove useful to future Member States of the European Union, such as Croatia, while preparing for the implementation of the EAW into their national legal system.

However, most of the problems mentioned need to be addressed at the European Union level, and the process of adopting the necessary legal instruments regarding defence rights is already underway. The Council has adopted a 'Roadmap' for strengthening procedural rights of suspected or accused persons in criminal proceedings.⁶⁸ Taking a step-by-step approach, the Council document calls for the adoption of measures regarding the right to translation and interpretation; the right to information on rights and information about the charges; the right to legal advice and legal aid; the right to communication with relatives, employers and consular authorities; measures concerning pre-trial detention and regarding special safeguards for suspected or accused persons who are vulnerable.

The first measure envisioned in the Roadmap is near completion: the Directive of the European Parliament and of the Council on the rights to interpretation and to translation in criminal proceedings, laying down common minimum standards to be applied in the fields of interpretation and translation regarding criminal proceedings, with a view to enhancing mutual trust among Member States, was adopted in first reading by the European Parliament.⁶⁹ Other initiatives for measures

⁶⁷ Eurojust Annual Report 2009, p. 32-34., available at: <http://www.eurojust.europa.eu/press_releases/annual_reports/2009/Annual_Report_2009_EN.pdf>, (last accessed on 20.07.2010).

⁶⁸ Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings. *OJ* 2009 C 295. p. 1.

⁶⁹ The European Parliament has adopted the by 637 votes to 21, with 19 abstentions, a legislative resolution on the draft directive. As the amendments adopted by the Parliament are a result of a compromise reached between itself and the Council, the Council will most likely approve the Parliament's position, successfully concluding

foreseen by the Roadmap are already in the pipeline, while some legislative proposals are yet to be formulated by the Commission. Future research will have to examine whether these new legal instruments can indeed solve the problems encountered in relation to the EAW. Whether the adoption of instruments regarding such sensitive matters will be unproblematic, is, however, another compelling question.

the ordinary legislative procedure. (For details on the legislative process regarding the Directive in question see <<http://www.europarl.europa.eu/oeil/file.jsp?id=5840482>>, (last accessed on 20.07.2010).

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Modes of perpetration and complicity in Hungarian and Croatian criminal law

I. Introduction

Provisions of the special part of criminal code usually regulate punishable behavior of individuals and in such a case the legislator starts out from the assumption that a perpetrator is solely the one who personally fulfills the statutory facts of criminal offense. However, as in many allowed activities a person does not act alone, it is also true that often more persons appear in committing criminal offenses, particularly when it comes to organized crime. Thus, within the framework of criminal law, an emerging issue is how one should approach at the level of legislation the phenomenon of participation of more persons in committing a criminal offense or participation in wider terms. Participation in wider terms implies that criminal activities are in a causal relation to the committed criminal offense. If such a relation is missing, then it is about independent criminal offenses which are in certain relation to other committed or imagined offense, but they are not encompassed by the notion of participation in wider terms (e.g., concealing, assistance to the perpetrator following the perpetration of criminal offense, failure to report the preparation or committal of a criminal offense). The first possibility to solve the problem of regulating a participation in wider terms starts from the extensive understanding of perpetration, according to which all causal contributions in committing an offense are considered equally important, independent in their true meaning in the entire action happening. All those who have in any way causally contributed to committing an offense are considered perpetrators and all of them are generally subject to the same penal frame, while differences in individual contributions become apparent only when it comes to sentencing. That is a monistic model which leads to the notion of unique perpetrator. The other possible approach to the legal determination of participation in wider terms is based on the

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restrictive understanding of perpetration according to which a perpetrator is the only one who personally participates in committing a criminal offense. Such a restrictive understanding of perpetration represents a basis for a dualistic or perpetrator-accomplice model in which all persons who are participating in committing a criminal offense are divided as perpetrators (direct perpetrators, indirect perpetrators and co-perpetrators) and accomplices (instigators and aiders or abettors). The accessoriness of complicity or participation in narrower terms is characteristic for this model, i.e. the punishment of instigator and aider or abettor depends on something that must be done by the perpetrator. Clear differentiation between the perpetrators and accomplices or between perpetration and complicity reflects upon the sentencing since a milder sentence (mitigation of punishment, obligatory or optional) is usually prescribed to accomplices (especially aiders or abettors). The problem of differentiation between perpetration and complicity is a fundamental and at the same time the most controversial issue within a dualistic system. The primary issue here is the notion of perpetrator. Only when the boundaries of perpetration are clearly determined, can one approach the issue of complicity. The notion of perpetrator is a prime issue also when the complicity accessoriness is considered.

From the provisions of the general part (Articles 19-21) of the Hungarian criminal code (hereafter: HCC), one can conclude that Hungarian criminal law tends towards the monistic model of regulating participation in wider terms. Namely, according to the mentioned provisions, under the notion of perpetrator we can encompass direct perpetrators, indirect perpetrators, co-perpetrators, instigators and aiders or abettors. For all of them the same punishment frame is applied. However, there are also some features of the dualistic model, since for aiders and abettors a mitigation of punishment is possible and the criminal law theory emphasized a principle of accessoriness of complicity. The HCC follows the objective attitude: the perpetrator fulfills statutory facts of a criminal offense, while an accomplice does not. The problems of participation in wider terms are very important for Hungarian criminal law. Nevertheless, the Hungarian specialized literature is fairly poor in this domain. Thanks to István Losonczy there is a great monograph dating from the 1960s. However, since then only longer-shorter scholarly articles have been written. Before starting to analyze the provisions of HCC closely, it is worth to give a short historic review. For the first time in Hungarian law the bill of 1795

draws a distinction between perpetrators and accomplices. The well-known Act of 1843, hallmarked by Ferenc Deák, has already contained detailed regulations with reference to instigator and aider or abettor. The Code V of 1878 about felony and delict, what is considered as the most important work in Hungarian criminal legislation and is called Codex Csemegi after its editor, includes specified portions relevant to the perpetrator.

As for participation in wider terms, from the provisions of the general part (Articles 35-37) of the Croatian criminal code (hereafter: CCC) it is clear that Croatian criminal law accepts the dualistic model. However, distinction between perpetrators and accomplices is made in a special way. Article 35 of the CCC under the title The Single Perpetrator and Accomplices reads:

‘(1) The single perpetrator is a person who commits a criminal offense by his own act or omission or through another person. (2) Accomplices are: the co-perpetrators, the instigator and the aider or abettor. (3) Co-perpetrators of a criminal offense are two or more persons who, on the basis of a joint decision, commit a criminal offense in such a way that each of them participates in the perpetration or, in some other way, substantially contributes to the perpetration of a criminal offense. (4) The instigator and aider or abettor are accomplices who, without control over the perpetration of a criminal offense, contribute to its perpetration by instigation or by aiding and abetting.’

The cited article makes it obvious first of all that the use of the term single perpetrator is completely inadequate for indirect perpetration (perpetration by means) since this legal figure by the nature of things includes participation of at least two persons (a indirect perpetrator and a means by which a person from the background realizes his criminal goals). Furthermore, the scope of accomplices unnecessarily includes co-perpetrators who by the traditional comprehension of the dualistic model are always considered perpetrators. Qualitative difference between co-perpetrators and accomplices (instigator and aider or abettor) is obvious from paragraph 4 in which neither instigator or aider or abettor has power (control) over the criminal offense, from which *argumentum a contrario* is derived that co-perpetrators do have that power. A significant contribution to perpetration of criminal offense in a different way in legal definition of co-perpetrators refers to acts of co-perpetrators out of constitutive elements of criminal offense and they must be differentiated from mere aiding and abetting acts. The

mentioned disadvantages can easily be eliminated *de lege ferenda*: as for the perpetration the term ‘single’ should be deleted and co-perpetrators excluded from the term of accomplices.¹ The doctrine of control over the criminal offense which has been taken over from German criminal law theory enables clear signification between central (key) roles in the perpetration of offences. The dualistic concept of participation is characterized by accessorial liability of aiders and abettors and instigators. To become liable as accomplice the perpetrator needs to enter the punishable stage of criminal offense and commit an unlawful act (so called limited accessoryship).

II. Perpetration

As mentioned before, the notion of perpetrator in Hungarian criminal law is a summarizing denomination for the offender who participates in a criminal offense in some form. However, the perpetrator is punishable if and only if the condition to become a subject, which condition is the legal responsibility is attained. The legal responsibility is a kind of physical –psychical status of the human, on the grounds of that we are able to make social-moral assessment about our acts, and in conformity with this assessment to behave properly.² A party in crime is a natural person, since the culpability can be defined only in terms of a natural person, like a psychical relation between the perpetrator and its act, as well as a criminal conduct whose meaning is an activity or omission displayed by human. Further in the text on perpetration, when it comes to perpetration in Hungarian and Croatian criminal law, the term perpetrator will be used in narrower sense which encompasses direct perpetrator, indirect perpetrator and co-perpetrator.

According to a traditional understanding of dualistic model of participation of more persons in the committing of a criminal offense, a perpetrator is a person who personally, through other person or jointly with other persons, commits a criminal offense. Within this model, many theories about perpetration have been created, which are generally divided into objective, subjective and mixed. Croatian criminal law, as mentioned before, is accepting a theory of control over the commission

¹ P. Novoselec, *Opći dio kaznenog prava* [General part of criminal law] (Zagreb, Pravni fakultet Sveučilišta u Zagrebu 2009) pp. 330-331.

² J. Földvári, *Magyar büntetőjog. Általános rész* [Hungarian criminal law general part] (Budapest, Osiris Kiadó 2003) p. 116.

of criminal offense as a mixed theory about the perpetration. That theory, on the subjective side, seeks a controlling will of perpetrator, while on the objective side it seeks a perpetrator's contribution to the offense of a certain weight. The perpetrator is a central figure or a key person in an event which is regarded as a commission of criminal offense. According to the prevailing opinion, which accepts standpoints from German criminal law theory, the control over the commission of criminal offense as a criterion for differentiating between perpetration and complicity is not a universal one and it is applied only for those criminal offenses where the control over the commission of criminal offense is possible and those are intentional criminal offenses committed. Control over the commission of criminal offense is evident through various ways, depending upon particular appearance of forms of perpetration: when it comes to direct perpetration it is a control over an act, the indirect perpetration as a control over the other's will, and by co-perpetration as a functional control over a criminal offense. Control over the commission of criminal offense cannot be or it is not a dominant criterion of perpetration in cases of *delicta propria*, criminal offenses committed by omission, self-committed criminal offenses and negligent criminal offenses. In case of these offenses, a basic criterion of perpetration is a special feature of perpetrator, a breach of duty whose purpose is to prevent consequences of a criminal offense, personal fulfillment of statutory facts of a criminal offense and a breach of required attention.³

1. Direct perpetration

Within perpetration, the most typically appearing form is the direct perpetrator who realizes the statutory facts of a criminal offense. The HCC prescribes that a perpetrator is a person who actually commits a criminal act (Article 20 paragraph 1 of the HCC). According to the Hungarian criminal law theory, the direct perpetrator executes a crime with his own activity and his own mental and psychic power independently and alone, leaving out any other person. Naturally, devices can be employed. The direct perpetrator of most criminal offenses is the person who is defined by the statutory definition of a

³ I. Bojanić, *Počiniteljstvo kao vlast nad djelom* [Perpetration as control over an act] (Zagreb, Hrvatsko udruženje za kaznene znanosti i praksu, Ministarstvo unutarnjih poslova Republike Hrvatske 2003) p. 26.

particular offense, but special subjects like official person, young person, a woman in case of abortion can also be direct perpetrators.⁴ All criminal offenses have a direct perpetrator, so from the standpoint of culpability they can be intended and negligent. This is really important, because we can not talk about complicity in terms of a negligent act. In accordance with the law the perpetrator is the person who carries out a statutory facts of a criminal offense or its attempt independently or indirectly. A negligent criminal offense can only be accomplished by an independent perpetrator.

According to the CCC, a direct perpetrator is a person who by his own commission or omission commits a criminal offense (Article 35 paragraph 1 of the CCC). As far as the application of theory of control over the commission of a criminal offense is concerned, direct perpetration is the least controversial. In such form of perpetration, the control over the commission of a criminal offense originates from the personal fulfillment of the statutory facts of criminal offense and in that case a perpetrator has the control over an act. Personal fulfillment of the statutory facts of criminal offense is always the perpetration and it can neither be influenced by a direction of will or interest for committing a criminal offense nor by a circumstance that a direct perpetrator was acting under coercion. In the former case, control over the commission by the indirect perpetrator does not exclude the control over an act of direct perpetrator.

2. Indirect perpetration

Concerning indirect perpetration in Hungarian criminal law, one should emphasize that the definition of indirect perpetrator was created by Stübel in the 19th century. The issue has already been a matter in the 19th century, but the jurisprudence has not dealt with it intensively. The jurists have hardly gone into this topic previously. They have rather examined it as an act of instigation. The statutory regulation regarding this perpetration form, verging on the independent offender and instigator, occurred only in 2009, the practice have created and applied this kind of formation. Indirect perpetrator means the person who instigates the commission of a premeditated criminal act by using a

⁴ I. Losonczy, *Tetteség és részesség a büntetőjog rendszerében* [Perpetration and complicity in the system of criminal law] (Budapest, Jogi és Közgazdasági Kiadó 1966) p. 115.

person who cannot be prosecuted. In this case the indirect perpetrator is independently responsible, while the direct perpetrator becomes exploited. If the direct perpetrator could be called to account for the criminal offense, then the indirect perpetrator would be the instigator. However, the indirect perpetrator cannot serve as an accomplice, since the act of the direct perpetrator is not a crime. The HCC (Article 20 paragraph 2) determines that the exploited person can only be a non-punishable person in consequence of child-age, insanity, coercion, threat or mistake. These are grounds for the preclusion of punishability. The case of child-age is completely unambiguous, if the indirect perpetrator for the commission of a criminal offense employs a person under age of 14. Concerning the meaning of insanity, the offender is not punishable when the perpetrator commits the act in a kind of disabled condition that prevents him to realize the consequences and act properly. This is also an excluding cause. Under coercion and threat the direct perpetrator does not act in conformity with his own will, but executes somebody else's will. The last case is the mistake caused by the indirect perpetrator, but in this situation the direct perpetrator is still punishable if negligence exists and the legislator punishes the reckless act. But what happens if the coercion and threat is not captivating, or the legal responsibility of the exploited person is just limitedly expelled? The elements of a criminal offense are distributed between the direct and indirect perpetrator, the subjective side is present by the indirect part and the material side by the direct one. In some crimes this perpetration form is not possible. We cannot talk about an indirect involvement in crime either, since the commission does not happen individually with own power. On account of these problems a new criminal category had to be created. A soldier cannot be punished because of a crime committed by order of one's superior, except when the soldier was aware of the fact that he/she commits crime by obeying that order. The commander is responsible as an indirect perpetrator for the crime committed by order. According to Croatian criminal law, an indirect perpetrator is a person who uses other person as a means to fulfill the statutory facts of criminal offense. The indirect perpetrator or a person from behind has to fulfill all prerequisites for punishment which are requested for a perpetrator of a particular criminal offense. An essence of indirect perpetration is evident through a relation of submission of a direct perpetrator or a means to the person from behind. Due to this reason, the control over the commission of the criminal offense as a criterion of differentiation

between perpetration and complicity becomes fully evident in a case of indirect perpetrator. For contemporary criminal law (Croatian included) a continuous expansion of the application field of this legal figure at the expense of instigation is characteristic, as well as gradual abandonment of the customary principle that indirect perpetration is not possible in the case when the direct perpetrator is fully responsible person. A construction of indirect perpetrator is extremely important in cases in which the application of instigation is not possible. These are foremost cases in which a means does not fulfill statutory definition of a criminal offense (e.g. when a means commits a suicide under coercion) or does not commit an unlawful act (e.g. when a means acts in necessity which excludes unlawfulness). Indirect perpetration is the only possible solution in the case when a person from behind, who possesses a required special feature (e.g. officials) of a perpetrator instigate another person (who does not possess this special feature) to perpetrate a criminal offense which belongs to the so called *delicta propria*. If one accepts the standpoint that the essence of indirect perpetration is the submissiveness of a means, instigation should be also excluded in situations in which instigations is constructively possible according to the limited accessoriness of complicity, but in which culpability of a means is excluded or significantly reduced. These are the cases when a means acts in necessity which is a reason for obligatory remittance of punishment or excludes the culpability, as well as situations in which a means acts by mistake, or when children and mentally-ill people are used as means. Finally, indirect perpetration is possible in the case of so called organizational power, where the person from behind as a commander uses strict hierarchically established apparatus of power (state bodies or criminal organization) at his disposal which through its flawless functioning guarantees a realization of all his criminal goals. The indirect perpetrator in this case does not generally know the direct perpetrators, but he is aware that they will obey and carry out his orders or, in the case of opposing, they will be replaced by others. Being so replaceable makes direct perpetrator means in hands of a person from behind, despite his personal perpetrating responsibility. Accepting instigation in this case would not to the full extent reflect the real position and responsibility of a person from behind and it is also

difficult to talk about co-perpetrating because the joint decision on a criminal offense is missing.⁵

3. Co-perpetration

According to an Article 20 paragraph 3 of HCC, co-perpetrators are persons engaged in a criminal act jointly, having knowledge of each other's activities. So co-perpetration cannot materialize if one perpetrator does not perform the statutory facts of a criminal offense. In this case at least two offenders participate in the act which is punishable, as opposed to indirect involvement where a punishable and a not-punishable offender take part. The commission assumes united intent and a partial or entire realization of the case stated. As it appears from the definition, this perpetration form is intentional, since it is not possible to have knowledge recklessly of each other's activities and realize the act jointly. Based on the judicial practice co-perpetration can be present in mixed guilt.⁶ All perpetrators have to be aware of the existence of a united intent, and they perform statutory facts of the criminal offense. In the event of co-perpetration one crime takes place, and all co-perpetrators are responsible for the whole crime. Usually it is an aggravating circumstance. In the view of co-perpetration we also distinguish an objective and a subjective concept. According to the adherents of the objective trend the co-perpetrators cause the crime commonly and the accomplice also belongs to the commission. Within the objective concept, according to another opinion, the co-perpetrator performs the statutory facts of a criminal offense, while the accomplice cannot do it. The followers of the subjective trend emphasize that the co-perpetrators act for each other, while the accomplice acts for somebody else's interest, and the will of the accomplice is subordinated to the offender.⁷ In the view of their behavior all co-perpetrators perform all factors in crime, these conducts commonly yield the fulfillment of matters of fact, or they attain the conduct jointly. Finally, in case of an open statement of facts they act like they are aware of the possibility of the realization of the result. Later in the accomplice part we have to talk about qualitative and quantitative transgressing. In terms of a

⁵ Novoselec, op. cit. n. 1, at p. 349.

⁶ G. Varga: *Tettesi alakzatok a büntetőjogban* [Modes of perpetration in criminal law] Multa rogare, vol. 1. 2002. p. 179.

⁷ Ibid., at p. 180.

quantitative overstepping the act of co-perpetrators will have a different degree. However, in case of qualitative transgressing the associate of the perpetrator commits other crimes over and above the united intent, thereupon the co-perpetration does not comprise.

According to an Article 35 paragraph 3 of the CCC, co-perpetration exists only when two or more persons, based upon common decision, commit a criminal offense in a way that each of them fully or partially fulfills statutory facts of criminal offense or in another way significantly contributes to the commission of criminal offense. Co-perpetrators, jointly and usually with the division of labor, commit a criminal offense based upon joint decision while at the same time they have to fulfill certain function which is important to realize a planned offense. Thus, one speaks of functional control over the criminal offense. In the case of co-perpetration, the mutual attribution of all contributions principle holds true within the framework of joint decision over the offense. A subjective prerequisite of co-perpetration is a joint decision about an offense or an agreement about committing a criminal offense. Co-perpetration will not exist in the case of parallel perpetration whereby more persons, independent one of another, jointly cause a consequence but without a joint decision. The transgression of one co-perpetrator, which goes beyond the framework of joint decision, cannot be attributed to others. Others can be punished only if they at least considered a possibility to commit such an offense or if previously existed a taciturn agreement. Joint agreement encompasses a division of roles and can be explicit or taciturn. An agreement in general precedes the beginning of fulfillment of statutory facts of an offense, but particular co-perpetrators can join also during the course of committing an offense, until it is done. In that case, one talks about successive co-perpetration. The CCC allows a possibility of negligent co-perpetration (Article 36 paragraph 1 of the CCC). The prevailing understanding in the theory is that the negligent co-perpetration is not possible because in that case the joint decision about an offense is lacking.⁸ Still, the negligent co-perpetration could be, for example, accepted in the case of committing criminal offense qualified by severe consequence, as well as in the case of joint act of more persons in negligent mistake, especially in the mistake about factual elements of particular criminal offense. The objective

⁸ F. Bačić, *Kazneno pravo – opći dio* [Criminal law – general part] (Zagreb, Informator 1998) p. 311.

prerequisite of co-perpetration implies the joint committal of a criminal offense. It is fulfilled when a co-perpetrator with his behavior fully or partially fulfills the statutory facts of a criminal offense. The control over an offense becomes fully evident when co-perpetrators' actions remain outside the statutory facts of an offense. In that case, it is necessary to determine that co-perpetrator's behavior represents a significant contribution in committing a criminal offense which goes beyond solely aiding and abetting action. The opinions in theory are not united when it comes to the question whether a participation in preparatory phase can be considered a significant contribution. On the one hand, there are views arguing that a joint participation in the final phase of committal necessarily exists in order to determine a co-perpetration; on the other hand, one points out that co-perpetration should also be allowed in cases of intensive and extensive preparatory acts.⁹ Co-perpetration is possible by omission. Since the co-perpetrator is an appearing form of perpetration, a co-perpetrator can be a person which may also be a perpetrator himself. That is important in case of *delicta propria*, because a co-perpetrator can never be a person who does not have a required feature. He can be only an accomplice. The same penal framework is applicable for all co-perpetrators, while in sentencing one should take into consideration a weight of actually realized contribution as well as other mitigating and aggravating circumstances.

III. Complicity

Further in the text follows the general overview and more detailed explanation of instigation and aiding or abetting as the basic types of complicity (i.e., participation in narrower terms) in Hungarian and Croatian criminal law.

The first common feature of instigator's or aider's or abettor's act in Hungarian criminal law is its accessoriness to the perpetrator's act. If at least an attempt does not occur, then it is not participation. A causal relation must exist between the two acts, and grounds for the preclusion of punishability cannot exist at the perpetrator's side. The act of the accomplices precedes the perpetrator's act, or occurs in paralel. They

⁹ I. Bojanić, *Supočiniteljstvo i sudjelovanje u stadiju pripremanja* [Co-perpetration and participation in the preparatory phase] in *Aktualna pitanja kaznenog zakonodavstva* (Zagreb, Inženjerski biro 2004) pp. 61-80.

cannot perform the statutory facts of a criminal offense. If they do so, that is not complicity. The culpability can only be intentional in case of an accomplice act. It is worth to emphasize the so-called *excessus mandati* what means the transgressing of the perpetration act. In case of qualitative overstepping a more serious and different crime realizes, while in terms of a quantitative transgressing the same crime's more serious version attains, the will of the accomplice does not expand on it. The accomplice is not responsible for the qualitative overstepping. The situation is different when a quantitative transgressing appears. The accomplice is responsible in conformity with his intent. Participation cannot be connected to involuntary act, attempt, mixed guilt act, or crime by omission.

As mentioned before, accessorial liability of the instigators and aiders and abettors is a main feature of Croatian criminal law on complicity. To become liable as accomplice the perpetrator needs to enter the punishable stage of criminal offense and commit an unlawful act (so called limited accessoriness of complicity).¹⁰ According to the provision on punishability of accomplices, the instigator and the aider and abettor shall be liable in accordance with their intent (Article 36 paragraph 1 of the CCC). The material or personal characteristics of the perpetrator, which represent the elements of a criminal offense or influence the severity of the prescribed punishment, shall also apply to accomplices (Article 36 paragraph 2 of the CCC). Strictly personal circumstances for which the law excludes culpability and allows for remission or mitigation of punishment may apply only to the perpetrator or accomplice to whom they pertain (Article 36 paragraph 3 of the CCC). The punishment of a co-perpetrator or an accomplice who voluntarily prevents the perpetration of a criminal offense may be remitted (Article 36 paragraph 4 of the CCC). This is a situation of voluntary abandonment.

1. Instigation

Instigator is a person who intentionally persuades another person to commit a crime (Article 21 paragraph 1 of HCC). In any case it is important to remark, that the law prescribes about the intent only before the commission of a criminal offense, but the subornation has to be willful as well. The essence of the subornation is that the instigator

¹⁰ Novoselec, op. cit. n. 1, at p. 338.

produces the crucial incentive during the process of resolution to commit a criminal offense. Each participant is responsible for his own act and is culpable in accordance with his own guilt. In the first internal stage of the conduct in case of fight between the incentives the result of the instigator's behavior is when the perpetrator realizes the act. The conduct of instigator must be intentional. The instigator is aware of his own act of instigation and the consequences of his behavior, while the instigated person performs the statutory facts of a criminal offense. The sentence applicable to perpetrators shall also be applied for accomplices (instigators included). If the instigator convinces the perpetrator to withdraw before the start of the commission, or averts the result voluntarily, the instigator is not punishable.

According to Croatian criminal law, instigation is an intentional psychological influence on a perpetrator for the purpose of making a decision on committing an unlawful act. The behavior of instigator remains outside of the statutory facts of a criminal offense, and he does not have the control over the commission as opposed to a perpetrator. Any way of instigation, which can lead a perpetrator to make a decision about an offense, is adequate. That can be persuasion, giving presents or promises for reward, threats, expressing desires, pleads, orders, pointing out an opportunity to commit a criminal offense or just fictional giving of advice. The action of instigator must be causal and it is a case only if a perpetrator has not made yet a decision to commit a criminal offense. An instigator must act with the intent. The intent has to be concrete, i.e. it has to be related to the particular offense and particular perpetrator. The offense has to be concrete in its important and main elements. It is also sufficient that the instigation is directed towards certain circle of persons out of which someone will decide to commit an offense. The instigator is criminally liable only within the limits of his intent (Article 36 paragraph 1 of the CCC), and is punished as if he committed the offense himself, i.e., the same penal framework is applied to him as for a perpetrator (Article 37 paragraph 1 of the CCC). Even though an instigator does not personally fulfill statutory facts of a criminal offense, such a solution is mostly considered justified because he is the spiritual driver of the criminal offense. It is not excluded that in a concrete case, an instigator is punished in more severe way than a perpetrator. The unsuccessful instigation is also subject to punishment (Article 37 paragraph 2 of the CCC). It exists when one person instigates another to commit a particular criminal offense, and one does not even try to

commit that offense. The act of instigation is complete; however, a potential perpetrator – out of many various possible reasons – has done nothing punishable. Unsuccessful instigation is actually an attempt of instigation and it is punishable when it is related to the offense for which an attempt is punishable, and an instigator is being punished as if he had attempted to commit such a criminal offense. Attempt is punishable only in case of intentional criminal offense for which a punishment of five years of imprisonment or a more serious penalty can be imposed, while the attempt of minor offense is punishable only if the law in a special part of the criminal code expressly provides for the punishment for a particular offense (Article 33 paragraph 1 of the CCC). Since in case of attempt punishment can be mitigated, such possibility applies to unsuccessful instigation. The punishment for unsuccessful instigation represents an exception to the principle of limited accessoriness of complicity, since there is no unlawful act of the perpetrator in the punishable phase. A special case of unsuccessful instigation is the inappropriate attempt of instigation, i.e., instigation of a person who has already decided to commit a criminal offense (so called *omnimodo facturus*). For such a case, the CCC prescribes a possibility to remit a punishment (Article 37 paragraph 3 of CCC).

2. Aiding or abetting

Aider or abettor is a person who knowingly and voluntarily helps another person to commit a crime (Article 21 paragraph 2 of the HCC). The aider or abettor has two types, physical and intellectual (psychical). The physical aider or abettor provides external conditions e.g. equipment. Parties in crime rarely commit accomplice acts with passive behavior, but it is possible with omission. An intellectual aider or abettor encourages the perpetrator. In that case the act of the aider or abettor has a decisive influence on the perpetrator, until it paralyses the aggrieved party who presumes the stay at the scene. United will has to be present between the perpetrator and aider or abettor. For an aider or abettor there is an opportunity for more lenient punishment. The accomplice is not punishable if the crime is cancelled due to his voluntary rescission, or the result is prevented voluntarily. The aider or abettor shall be distinguished from the accessory after the act who provides help for the perpetrator after the commission, which help can be personal or material. It is material when the accessory after the act provides support for the security of the benefit coming from the crime.

The help is personal if the aiding person assists the perpetrator in escaping from the authority, or trying to defeat the success of the criminal procedure.

According to Croatian criminal law, aiding or abetting is intentional support of a perpetrator to commit unlawful act (Article 38 paragraph 1 of the CCC). Aider or abettor personally neither fulfills statutory facts of a criminal offense nor does he have the control over the offense; he only contributes to the committal of criminal offense done by somebody else or he improves it. A perpetrator does not have to know that an aider or abettor supports him (so called secret aiding or abetting) and in that sense aiding and abetting is differentiated from co-perpetration which always requires a joint decision on committing an offense. Aider or abettor provides a causal contribution to the commission of criminal offense, but it is not required that aiding or abetting has to be causal in the sense of formula *condicio sine qua non*, i.e. without act of aiding or abetting, the criminal offense would be missing. It is sufficient that aiding or abetting makes easier, fastens or intensifies the perpetrator's offense. Traditional division considers physical and intellectual (psychical) aiding and abetting. Typical appearing forms of physical aiding and abetting are placing the means for committing a criminal offense at a disposal to a perpetrator, as well as removing obstacles to commit a criminal offense; psychical or intellectual aiding and abetting are giving advices or instructions how to commit a criminal offense, promising in advance of concealing a criminal offense, perpetrator, means by which the criminal offense is committed, traces of the criminal offense or objects procured by the criminal offense as well as strengthening of already existing decision on committing a criminal offense, which should be differentiated from instigation where by such a decision is in making. Aider or abettor must act before or during the time of committing a criminal offense. Aiding or abetting is not possible after an offense is committed. Various forms of aiding or abetting after an offense is committed cannot be considered complicity since it does not represent causal contribution to the offense, but those behaviors are regulated as independent criminal offenses (e.g. concealing or aiding of perpetrator after the criminal offense is committed). Aider or abettor must act with the intent. Taking into consideration the accessoriness of complicity, aiding or abetting is punishable only if a perpetrator has completed the offense or the offense remained in the phase of attempt. Aider or abettor is criminally liable only within the limits of his intent

and thus the behavior of a perpetrator cannot be attributed to him since it represents completely different act or it differs from aider's or abettor's intent in important dimensions of wrongdoing (the transgression of perpetrator). Unsuccessful aiding or abetting is not punishable. Aiding or abetting is considered the least severe form of participation. Thus, optional mitigation of punishment is prescribed for aiding or abetting (Article 38 paragraph 2 of the CCC). If one person participates in the criminal offense at the same time as an instigator, co-perpetrator and aider or abettor, the rule applied is that the more severe form of participating excludes the less severe one.

IV. Other selected issues and provisions on participation in wider sense

Considering the provisions of the Hungarian criminal code, we have to talk about the criminal formations separately, because they are more dangerous for the community, and for this reason the legislator puts more serious sentence into perspective. There is no full agreement in which formations fit into this definition. In our opinion mob violence, commission in mass, criminal conspiracy and criminal organization all belong to the definition, but someone ranks the terroristic group with the others. The crime is committed jointly when at least two persons are engaged in the commission. This is the simplest type of a joint formation. The HPC itself contains the description of the definition of group, which practice has further refined. In this way we talk about a group when at least three persons participate in the commission. Both the perpetrator and the accomplice belong to the group, but not everybody shall be punishable e.g. a punishable perpetrator, an insane, and a juvenile can belong to the group in the same time. In addition, it is not necessary to all perpetrators stand on one side, so if three persons compete a group can be determined. The main point is that the three persons have to stay at the crime scene. A mass means 15-20 people, if the number of the participants cannot be established at first sight. The law also describes the definition of a criminal conspiracy at the end of the general part among the special provisions. At this place we find definitions created by the legislator which accompany the whole special part. So a criminal conspiracy is when two or more persons are engaged in criminal activities under arrangement, or they conspire to do so and attempt to commit a criminal act at least once, however, it is not considered a criminal organization. To establish this formation of joint

commission, an advance arrangement is necessary to exist. By the previous expressions this was not a stipulation, they came about *ad hoc*. According to the Supreme Court, the agreement between the perpetrators cannot only be explicit, but implicit, too. This statement is fulfilled when the perpetrator's conduct is consistent and planned, and a united will exists between them, but of course we have to examine the degree of the organization and the preliminary agreement in the commission. It is not essential that everybody appears in preparative classification. To establish a criminal conspiracy it is not necessary that all perpetrators possess the condition to become a subject. The difference between a criminal conspiracy and criminal organization is that in an organization more persons collaborate, it presumes a constant structure, control and a share in duties. In case of criminal conspiracy it is enough that the commission of a serious crime remains just an aim, not needed to venture that, until in case of criminal organization that is an essential element. When we would like to distinguish criminal conspiracy from co-perpetrators we find some governing viewpoints: organization, interim agreement, and how many crimes were committed.¹¹ Criminal conspiracy is established when the perpetrators preliminarily agree to commit more crimes and they know they will act in an organized way. Criminal organization occurs when a group of three or more persons collaborate to deliberately engage in an organized fashion in criminal acts, which are punishable with 5 years of imprisonment or more. This is the most dangerous formation of a collective commission, since a coordinated group wants to commit serious crimes. We can find the criminal organization in the general part, but the case stated in the special part means a participation in a criminal organization. It became part of the law with an amendment from 1997. The legislator attaches some detriments in case of a criminal organization: all assets gained during the participation in a criminal organization must be confiscated, suspension of sentence on probation is not possible, imprisonment of three years or longer with participating in criminal organization must be carried out in penitentiary, imprisonment of two years or longer with committing an act in criminal organization also must be carried out in penitentiary, release on probation cannot be applied, the upper value of the sentence doubles when the perpetrator

¹¹ M. Tóth, *Bűnszövetség, bűnszervezet* [Criminal conspiracy, criminal organization] (Budapest, Complex Kiadó 2009) p. 124.

commits a willful act in criminal organization that is sentenced with imprisonment of five years or more, ban must enforced. The legislator determines the definition of the terroristic group in the special part, case stated of act of terrorism, so accordingly a terroristic group shall mean a group of three or more persons operating in an organized and harmonized way for a longer term aiming to commit crimes determined in the law.

In the Hungarian criminal law special attention is given to differentiation of perpetrators which is based on the number of committed criminal offenses. Consequently we can talk about recidivism, recidivist, repeat offender, habitual recidivist and a repeat offender with history of violence. The creation of these categories was really essential, in order to punish those perpetrators who can not mend one's way, either from a special or a general preventive reason. In case of a recidivism we cannot talk about a recidivist, because one of the crime was negligent, or the perpetrator has been sentenced with a non-enforceable imprisonment for a previous crime, or sentenced with enforceable imprisonment, but more than three years have passed since the last term of punishment. A lot depends on judicial discretion that can assess an aggravating circumstance. Recidivist shall mean the perpetrator of a premeditated criminal act, if such person was previously sentenced to imprisonment without probation for a premeditated criminal act, and three years have not yet passed since the last day of serving the term of imprisonment or the last day of the term of limitation until the perpetration of another criminal act. Its consequence is a more serious penal law degree, in many times an aggravating circumstance. The conditions by both occasions are two intentional crimes that have to be committed, a previous sentence with enforceable imprisonment and three years have not yet passed since the last term of punishment, or the cessation of enforceability. Habitual recidivist shall mean any recidivist who commits on both occasions the same crime or a crime similar in nature. The same crime can be established even when that same crime is not realized, but its base, qualified or privileged case occurs what can be once a crime than a misdemeanor, or the stages and criminal formations differ, or as a summarized unit it contains the statutory approach of the last crime. Repeat offender shall mean a person who has been sentenced to imprisonment without probation as a recidivist prior to the perpetration of a premeditated criminal act, and three years have not yet passed since the last day of serving the term of imprisonment or the last

day of term of limitation until the perpetration of another criminal act punishable by imprisonment. So three willful crimes materialize and between the individual crimes three years have not yet passed. That is why the law lays down the prospect of serious sentences e.g. in case of imprisonment the new crime's upper degree of sentence expands with half of the original sentence. Repeat offender with a history of violence shall mean a repeat offender convicted for violent crimes against persons on all three occasions. By this point the law determines what crimes qualify as violent acts against persons.

In addition to the mentioned provisions on perpetration and complicity in Croatian criminal law, related to the participation in wider terms, it is worth to emphasize interpretative provisions from the general part of CCC on the group of people and criminal organization, as well as provisions of special part on criminal offense of the agreement to commit a criminal offense and a criminal offense of association for the purpose to commit criminal offenses. A group of people, according to Article 89 paragraph 22 of the CCC, is a group of at least three persons who are connected for the purpose of the regular or occasional perpetration of criminal offenses, whereby each of them exercises his share in perpetration of a criminal offense. When it comes to organized crime it is necessary to point out the legal definition of a criminal organization from Article 89 paragraph 23 of the CCC:

'[a] criminal organization is a structured association of at least three persons existing in the course of a certain period and acting with the common aim of committing one or more criminal offences for the purpose of direct or indirect financial and other material gain or with an aim to realize and keep supervision over certain economic and other activities, and these criminal offences for which imprisonment for not less than four years or harsher punishment may be imposed. The criminal organization is the basis of the notion of organized crime'.

This provision is significant for the interpretation of a number of provisions from the special part of the criminal code in which criminal offences committed within a criminal organization appear as an aggravating circumstance, or for criminal offenses of association for the purpose of committing criminal offences. Criminal offences where the perpetration of the criminal offence within a group or criminal organization is an aggravating circumstance are numerous: unlawful deprivation of freedom, kidnapping, coercion, threat, trafficking in persons and slavery, illegal transfer of persons across the state border,

robbery, larceny by coercion, extortion, money laundering, self-help and illegal debt collection. Some authors emphasize that perpetration of an offence within a group or criminal organization should be taken into consideration as aggravating circumstance for some other criminal offences that are typical of organized crime: corruption, taking of hostages, international prostitution, fraud, concealing, counterfeiting of money, securities and value tokens and forgery of documents. With one of the manifestations of the criminal offence of abuse of narcotic drugs instead of perpetration of a criminal offence within a group or criminal organization the legislator has marked as aggravating circumstance the perpetration of an offence by 'more persons who conspire to commit such offences or the perpetrator of this criminal offence has organized a network of resellers or dealers' (Article 173 paragraph 3 of the CCC). Such a formulation of aggravating circumstance has been criticized since the definition of 'more people' given by the law (Article 89 paragraph 20 of the CCC) assumes at least two and more persons. It is, namely, not clear why the perpetration of that offence is not connected to the action of the criminal organization. As for special provisions in reference to participation of more persons in perpetration of criminal offences in the special part of the criminal code it must be emphasized that they neither modify or derogate the provisions of the general part but supplement them, taking into consideration extreme danger of the offences connected with organized crime, terrorism and other serious criminal offences. Agreement to commit a criminal offense, as a criminal offense against public order, commits

'whoever agrees with another to commit a serious criminal offense for which, according to the law, imprisonment for three years or more severe punishment may be imposed'.

The prescribed punishment is a fine or imprisonment not exceeding three years. This is an autonomous criminal offense of preparation for which a question arises whether the perpetrator is liable for that offense or concurrence with other criminal offenses exists. This agreement to commit a criminal offense in Article 332 of the CCC keeps its autonomy only under the condition that perpetrators do not transfer into the realization of the agreed offense, since in that case the agreement gains non-autonomous or subsidiary nature in comparison to the offense that is in preparation (apparent concurrence). Associating for the purpose to commit criminal offenses is of particular significance when it comes to

preparatory acts as autonomous criminal offences. Such criminal offence is of dual nature: on the one hand it is a preparatory act *sui generis*, and on the other hand it is a form of extension of general provisions of the CCC on participation. Associating for the purpose of committing a criminal offence is regulated by Article 333 of the CCC:

‘(1) Whoever organizes a group of people or in some other way connects three or more persons in joint action with an aim to commit a serious criminal offence for which, according to the law, imprisonment for three years or more severe punishment may be imposed shall be punished by imprisonment for six months to five years. (2) Whoever organizes a criminal organization or manages it shall be punished by imprisonment for one to eight years. (3) A member of the group referred to in paragraph 1 of this Article shall be punished by a fine or by imprisonment not exceeding three years. (4) A member of the group referred to in paragraph 2 of this Article shall be punished by imprisonment for six months to five years. (5) If a member of a group or a criminal organization uncovers such a group or criminal organization prior to committing a criminal offense as a member of it or for it, the court may remit his punishment.’

The act of perpetration under Article 333 paragraphs 1 and 2 is the organization of a group or criminal organization (lesser and more serious form of associating for the purpose of committing a criminal offence). By Article 89 paragraph 22 of the CCC, as mentioned before, a group of people is made out of at least three persons connected for the purpose of permanent or temporary perpetration of criminal offenses where each of these persons has his share in the perpetration of an offense. In regard of the formulation of Article 333 the notion of a group under Article 89 paragraph 22 is considered inadequate in its part where it requires that members of the group should take their share in the perpetration of a criminal offence because this leads to the conclusion that the legislator did not have in mind this criminal offence but only situations in which the perpetration of offences within a group appears as an aggravating circumstance. The realization of conditions under Article 89 paragraph 22 is unthinkable prior to the perpetration of an offence. The law, further on, makes the group and persons connected in some other way equal but remained inconsistent in this case because these persons are not mentioned in paragraphs 3 and 4. The notion of a group matches the earlier traditional notion of a ‘gang’ which understood as continuous and higher level of organized association of more persons (at least three) for the purpose of common perpetration of criminal offenses that are not defined in details in advance. Between the

notion of the group and legal figure of co-perpetrators there exists a difference in content because co-perpetrators do not require the element of continuity (permanent or temporary perpetration of criminal offenses). The highest level or form of criminal association according to the CCC is criminal organization as defined in the above mentioned Article 89 paragraph 23. The members of the group or criminal organization were required to accept the goals and organizational elements of associating so that for their liability *animus sociandi* is required, i.e. the consciousness of and acceptance of group aims. The structure of a criminal organization is usually marked by the fact that members have lower or the lowest status. A key (dominant) figure is the organizer who directs the entire activity of the association and who in the hierarchy is the supreme cohesive power in internal relationships. The important issue in practice is if concurrence of associating for the purpose of committing criminal offenses and criminal offenses deriving from such associating is possible. This criminal offense is not of subsidiary significance. That means that perpetration of criminal offenses within a group or criminal organization does not exclude punishability of the organizer and members for the mere association and membership. *Inter alia*, this is a standpoint of the Supreme Court of the Republic of Croatia. More complex is the problem in cases when circumstances that adequate criminal offenses committed within a group or criminal organization represent the aggravated form of criminal offense or the description of aggravating circumstances applies adequate synonymous formulation. In principle such aggravated forms exclude concurrence of criminal offenses of associating with criminal offense committed within a group or criminal organization because this could mean that perpetrator is punished twice for associating. But some of the aggravated forms of criminal offenses in certain circumstances could, however, be in concurrence with criminal offenses of associating, depending on the prescribed penal scope. First of all this refers to more serious form of associating under Article 333 paragraph 2 of the CCC for which relatively severe punishment is prescribed so that concurrence of that form of associating with criminal offenses where perpetration as criminal organization is an aggravating circumstance is possible if lesser punishment is prescribed for these offenses. It is necessary in every single case to compare the penal frame prescribed for the aggravating form of criminal offense with the one that the court disposes with in the case of concurrence of criminal offense of associating for the purpose of

committing a criminal offense and basic form of criminal offense committed in a group or criminal organization. If for such concurrence a higher penal frame is reached than for the aggravated form it would be unjustifiable to punish only the aggravated form which in that case could mean that the aggravated form is advantageous for the perpetrator, which certainly is not *ratio legis*. In this case it would be right to take concurrence of the aggravating form of criminal offense committed in a group or criminal organization and the criminal offense of associating for the purpose to commit criminal offenses. The opposite is advisable if for the described concurrence a lower framework is reached than for the aggravated form because in that case the aggravated circumstance in itself ensures the desired aggravation of penalty. The application of concurrence would be excessive.¹² Among possible perpetrators of a criminal offense in Article 333 of the CCC the legislator has not included individuals who are not members of a group or criminal organization though they support (occasionally or continuously) its activity by multipurpose logistic support. Their activities can be legally marked as aiding and abetting within the very association organization. The possibility for the punishment to be remitted is connected with a legal figure of so called active repentance. The valid solution in Article 333 paragraph 5 of the CCC is considered insufficient since the stimulative measure in form of obligatory remission is connected only with the conduct of the group members or members of the criminal organization who still has not committed any criminal offense. It is emphasized that remission is possible in case that a group or organization dissolves prior to the perpetration of some criminal offense or in case when a member voluntarily leaves, uncovers the preparation of the perpetration of criminal offense on time etc. Besides, it is criticized that no special privileges are foreseen for the organizer, since he can most strongly affect that the group or criminal organization seize their activities.

V. Conclusion

The article took a closer look at the provisions on perpetration and complicity in Hungarian and Croatian criminal law with the aim of a comparative analysis. This issue is very broad so we tried to focus on

¹² L. Cvitanović, in P. Novoselec, ur., *Posebni dio kaznenog prava* [Special part of criminal law] (Zagreb, Pravni fakultet Sveučilišta u Zagrebu 2007) p. 394.

the similarities and differences between the two legal systems in chosen field. The most important difference exists in different approaches to the phenomenon of participation in wider terms. Hungarian criminal law tends to the monistic model, while Croatian criminal law accepts dualistic model, based on the theory of control over a criminal offense. Within the modes of perpetration, there are some differences in co-perpetration and indirect perpetration. For example, Croatian criminal law accepts negligent co-perpetration, while Hungarian criminal law does not. According to the CCC, co-perpetration is possible also in situations in which acts of co-perpetrators stand outside of the statutory facts of criminal offense if these acts were substantial for commission of a criminal offense. Croatian criminal law has a wider approach to indirect perpetration because it accepts this legal figure also in cases in which the direct perpetrator is fully responsible person. Both systems emphasize a principle of accessoriness of complicity. Provisions of the CCC on instigation are little bit wider because the unsuccessful instigation is also punishable. Both criminal codes pay attention to provisions related to organized crime regulating for example the criminal conspiracy, criminal organizations and associating for committing criminal offenses. These forms of participation in wider terms are very dangerous to society and their occurrence increases.

Solidarity in and beyond the Constitution? **

I. The topicality of solidarity and its relevance to constitutional law

In the era of the financial-economic crisis, terror threats, racism and segregation, impoverishment and famines, world-wide pandemics, climate change, environmental dangers and natural disasters, the *question* arises as to whether the motivation behind the *measures* planned, formulated and implemented with reference to combating the above-mentioned phenomena constitutes an effort merely to reduce, fight and eliminate the undesirable phenomenon or mitigate its consequences, or, underlying this *primary* motivation – as a *secondary* one – there is some common driving force.¹

My starting point is that such secondary motivation could be *solidarity*. In the case of such hypothesis, the question presents itself *to what extent law* as a means and the *constitution* as a system of values *can be used to serve the purpose of solidarity*. For such an inquiry one may need to answer the following questions. What constitutes solidarity based on the general and normative approach? Is it defined by the constitution, in other words, can it be considered a legal or constitutional value in a democratic state governed by the rule of law? If it has relevance from the aspect of (constitutional) law, is it expressed in the norm content? When and how does it appear as reality, to what extent does it have an effect on law-making as a motivating factor or impulse? In the present essay, out of the enumerated ramifying questions, I will concentrate only on the quality of solidarity as a legal and constitutional value; at the same time, I consider that the exploration and evaluation of solidarity norms to be found in the legal system would be worth further research.

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** See the earlier Hungarian version of the essay in N. Chronowski and J. Petrétei, eds., *Tanulmányok Ádám Antal professor emeritus születésének 80. évfordulójára* [Essays Dedicated to the 80th Birthday of Professor Emeritus Antal Ádám] (Pécs, PTE ÁJK 2010)

¹ The characteristic features of the era are comprehensively analysed in A. Ádám, *Alkotmányi értékek és alkotmánybíráskodás* [Constitutional values and the practice of the Constitutional Court] (Budapest, Osiris Kiadó 1998) pp. 10-11.; A. Ádám, 'Biztonság, felelősség, kötelesség' [Security, responsibility, duty] 7-8 *Jogtudományi Közlöny* (2005) pp. 307-315.

Before the interpretation of solidarity as a constitutional value, it is worth giving a brief overview of the conclusions of Hungarian dogmatics concerning constitutional values and how they permeate the practice of the Constitutional Court. Antal Ádám distinguishes between three layers of constitutional values.

‘Among the components of the first layer of constitutional values, one may find values having existed already before constitutional regulation or existing independently of it, values that are generally considered necessary, useful or advantageous. [...] A large, wide-ranging group and, at the same time, also the second layer of constitutional values is made up of objectives, tasks, basic principles, basic requirements, basic rights, basic duties, essential prohibitions, qualities, responsibilities, executive and other organizations, organs, institutions defined or established by the constitution-making power. [...] As the third layer of constitutional values one may consider the provisions of the basic law pertaining to the values of the former two layers. Professor István Losonczy from Pécs qualified basic provisions and other legal regulations grounded on them as legal instrumental values in his excellent work on values written in 1948.’²

By comparison, the *Constitutional Court* made an attempt at outlining the content elements of the ‘*scale of constitutional values*’ in its decision on the conferment of honours.³

‘The scale of constitutional values of the Republic of Hungary comprises primary (fundamental) values defined in a normative way by the Constitution, constitutional principles and values deduced through construction from the normative provisions of the Constitution (derived values), as well as further values contained in the codes (statutes and other regulations) of the individual branches of law [...] – which give expression to (i.e., mediate) the primary and derived scale of values of the Constitution. These values are

² See earlier A. Ádám, op. cit. n. 1, at p. 39., and for the quoted text A. Ádám, ‘A rendőrség az alkotmányi értékek között’ [The Police and Constitutional Values] in Gy. Gaál and Z. Hautzinger, eds., *Pécsi Határőr Tudományos Közlemények IX. Tanulmányok a „Rendészet és rendvédelem – kihívások a XXI. században” című tudományos konferenciáról.* (Pécs, Magyar Hadtudományi Társaság Határőr Szakosztály Pécsi Szakcsoportja 2008) p. 10

³ Decision 47/2007. (VII. 3.) of the Constitutional Court, *ABH* [Decisions of the Constitutional Court] 2007-I. 620.

present in the interpretations (decisions) of the Constitutional Court and, in the final analysis, in the whole constitutional culture.⁴

The Court considers ‘the scale of constitutional values’ as a scale of values defined by the existing social, economic and political system, fixed in space and time, the basic elements of which are laid down in the basic law during constitution-making by Parliament.⁵ The values *expressed in the Constitution* are called *terminal values* by the Constitutional Court; while *legal regulations* detailing constitutional provisions and *implementing* those ends are considered *instrumental values*.⁶

Solidarity – from the aspect of constitutional law – may be either a value having existed prior to constitutional regulation or one formulated by the constitution-making power depending on whether it appears in an implied or express form in the basic law. However, this will be examined more closely only in Point IV, since in order to establish the quality of solidarity as a constitutional value, it is necessary to explore the notion and legal relevance of solidarity first.

II. The notion of solidarity

1. General interpretation of solidarity

Solidarity⁷ taken in its *most general* sense⁸ means, on the one hand, the consciousness of individuals and groups of belonging together and, on the other hand (but stemming from this first meaning), joint and mutual commitment and assistance.⁹ The appearance of solidarity as a *frame of*

⁴ ABH 2007-I. 620, 636.

⁵ ABH 2007-I. 620, 638.

⁶ ABH 2007-I. 620, 637.

⁷ *Solidarietas* from the (Neo-Latin) word *solidus* (firm, well-founded): sharing of fate, community of fate. Available at <<http://lexikon.katolikus.hu/S/szolidarit%C3%A1s.html>>, (last accessed on 25.09.2009).

⁸ *Magyar Nagylexikon* [Hungarian Encyclopedia], vol. 16. (Budapest, Magyar Nagylexikon Kiadó 2003) p. 876.

⁹ A similar approach: ‘[i]n a wider sense, the well-founded belonging together of a group or society motivated from several sides; in a narrow sense, the undertaking of mutual obligations and mutual provision of assistance, by which each member of a group takes a stand for the group and the group takes a stand for them.’ Available at: <<http://lexikon.katolikus.hu/S/szolidarit%C3%A1s.html>>, (last accessed on 25.09.2009). Concerning the definition of solidarity, see also: G. Kardos, ‘Szolidaritás, szubszidiaritás és a szociális jogok védelme’ [The protection of solidarity,

mind and as an *act* is based on the recognition of mutual dependence and on the established fact that mutual dependence between the members of a community gives rise to obligations.

The *scope of effect* or, rather, field of effect of solidarity extended primarily (and historically) to the micro- and small community (it existed in relations within the family, the religious and corporate community) – at a higher (universal) level it appeared only as a moral principle (command) (in religious tenets,¹⁰ in theology and philosophy). Urbanization, industrialization and the appearance of a service-providing state led to a definition of solidarity to be implemented at a higher level: to the presumption that society was a solidary unit. Within this scope, spontaneous mechanisms of solidarity gave way to the state's policy of solidarity and to a 'system of compulsory solidarity'.¹¹ The

subsidiarity and social rights], in J. Frivaldszky, ed., *Szubszidiaritás és szolidaritás az Európai Unióban* [Subsidiarity and solidarity in the European Union] (Budapest, OCIPE Magyarország – Faludy Ferenc Akadémia 2006) p. 168. and K. Arató, 'Szolidaritás és civil részvétel az Európai Unióban' [Solidarity and civil participation in the European Union], in J. Frivaldszky, ed., *Szubszidiaritás és szolidaritás az Európai Unióban* [Subsidiarity and solidarity in the European Union] (Budapest, OCIPE Magyarország – Faludy Ferenc Akadémia 2006) pp. 143-144.

¹⁰ See A. Ádám, *Bölcsélet, vallás, állami egyházjog* [Philosophy, religion, state church law] (Budapest-Pécs, Dialóg Campus Kiadó 2007). Based on this work of Antal Ádám, if highlighting only the teachings of individual world religions, the following conclusions may be drawn. One requirement of Jewish religion is solidary charity (p. 169). Judaism embodies the global solidarity of the Jewish people (p. 171). An outstanding command of the Roman Catholic religion is love of one's fellow-beings, to which physical and spiritual works of mercy are attached (p. 178.). An important tenet of Protestantism is responsibility for the community (pp. 188-190.). The third duty in the Islamic religion is 'obligatory alms-giving' (p. 195.). The divine attitudes expected of Buddhist people are: universal love and compassion for all living beings, delighting in other people's well-being and equanimity concerning one's own affairs (p. 217.). One command of the Sikh religion is to help the poor (p. 226.). Confucian ethics lays down as a requirement to care for others and exercise the virtue of humanity (p. 228.). The review of religious rules provides an exciting opportunity for the association of ideas, which Zoltán Nemessányi points out quoting Lord Atkin's reasoning given in the case of Donoghue (or McAlister) v Stevenson: the biblical rule that you are to 'love thy neighbour' becomes in law: you must not injure your neighbour. In this case judicial practice transposes the religious requirement of solidarity into law. See: Z. Nemessányi, 'Rejtett képviselő az angol jogban' [Undisclosed agency under English law], 2 *Jura* (2008) p. 77.

¹¹ See Sz. Hámor, 'A szolidaritás világtól a szép új világig?' [From the world of solidarity to the brave new world?], 3 *Esély* (2000) p. 4.

globalization of risks and dangers described in the introduction necessitated the recognition and influence of solidarity in a new dimension, as the motivating force behind international union and cooperation – institutionalized to varying degrees – which is based on the restriction of the sovereignty of states and reciprocity. In summary, one may consider as fields of effect of solidarity the sub-national level, the national level and also the supranational and international level. Solidarity implemented and operating at one level may enhance solidarity at the other levels, but it may also occur that the appearance of higher levels erodes solidarity that has existed in the small community, at the sub-state level.¹²

At the level of individual behaviour, solidarity may be perceived as a frame of mind and as an act. The *feeling* of solidarity – which is more than sympathy and compassion, because it means a feeling of responsibility based on fate shared from some aspect – is a precondition for solidary *activity*. Solidarity may be *directed* at persons (mainly in a community built on personal relations, e.g. in families, groups of friends or colleagues), or at issues (mainly in larger communities, e.g. fight against starvation, aid provision to victims of natural disasters).¹³

From the side of the individual, solidarity means that one voluntarily restricts the fulfilment and assertion of self-interest taking into consideration others' interests as well.¹⁴ 'The basic principle of conduct not based on self-interest can be altruism or equity; and it may be motivated by the improvement of others' welfare, the desire to give and goodwill directed toward the unknown members of society (*charitas*), to the enhancement of social welfare. All these lead to the support of

¹² For example, the model of spending public goods elaborated by an international aid organization, the state or a private company may eliminate the generally more effective small community model based on solidarity, which had been developed by the users of the goods. See also *inter alia*, E. Ostrom, 'Collective Action and the Evolution of Social Norms', 14 *The Journal of Economic Perspectives* № 3 (Summer 2000) p. 153.

¹³ G. Bognár, 'L. Bokros, Verseny és szolidaritás' [L. Bokros, Competition and solidarity] 4 *BUKSZ* (2004) pp. 382-383.

¹⁴ B. Farkas, 'A szolidaritás a társadalmi-gazdasági szerveződésben' [Solidarity in social-economic organization], available at: <<http://www.vigilia.hu/1999/9/9909far.html>>, (last accessed on 10.09.2009).

institutions serving others' interests – which are expected to be “unprofitable” for the individual.’¹⁵

The system of solidary cohesion within the community presupposes the coordination of actions, which is based on joint consumption – resulting from the risk of material scarcity or uncertainty. This may cause the members of the community, whose aim is to satisfy needs based on equality within the community, to restrain their momentary self-interests and provide mutual assistance.¹⁶ Solidarity within the group does not stem from the emotional or natural (biological) conditions of the members, but from common interests such as common needs, fight against poverty or oppression, or the achievement of some common goals.¹⁷

2. Disciplinary approaches to solidarity

Solidarity has relevance to numerous fields of social sciences. Before exploring the legal significance of the principle, it is worth reviewing briefly what aspects of solidarity are emphasized by other fields of science.

In *sociology* – mainly as a central notion of Durkheim’s social theory – solidarity is the synopsis of social cohesion and two types of it may be distinguished. Mechanical solidarity corresponds basically to the traditional form of society defined by collective consciousness, in other words, it is based on common pre-defined criteria relating to some group (e.g., belonging to the given sex); while organic solidarity – which is based on interdependence – serves the integration of modern, functionally differentiated societies grounded on the division of labour.¹⁸

¹⁵ B. Janky, *Szolidaritás és jóléti preferenciák* [Solidarity and welfare preferences], PhD-dissertation – manuscript (Budapest, 2002) p. 47., available at: <http://phd.lib.uni-corvinus.hu/83/01/janky_bela.pdf>, (last accessed on 10.09.2009).

¹⁶ *Ibid.*, p. 18.

¹⁷ Solidarity with the members of the community or group may be based on shared political conviction, economic or political situation etc.

¹⁸ É. Durkheim, *A társadalmi munkamegosztásról* [On social division of work], (Budapest, Osiris Kiadó 2001) pp. 69-80, 138-140. See also <<http://www.tankonyvtar.hu/filozofia/durkheim-szolidaritاس-080904>>, (last accessed on 22.01.2010).

In accordance with this – as viewed by *political sociology* – solidarity represents a principle directed against isolation and massification, and emphasizes belonging together – that is, mutual responsibility for one another and joint obligation. Distinction may be made between group solidarity as the belonging together and joint action of persons of comparable social status who want to assert their common claims and interests jointly against others; and solidarity taken in a general sense oriented toward the common interests of all, toward the just order of society as a whole.

From the aspect of *political history*, in the workers' movement – in the beginning as a political slogan –, solidarity gave expression to the working class's self-consciousness and consciousness of belonging together, to their moral value serving as the foundation for their mutual aid institutions. In the workers' movement, solidarity provided opportunity for the members of the group to achieve freedom and social progress despite the fact that the members alone lacked the required power. It is also true of modern society that the individual can pursue political aims only if he joins forces with others (through interest organizations, trade unions, parties, civil initiatives). Beyond individual and group interests, there has grown a need for (global) solidarity extending to the whole world as the condition for a humane way of life and the survival of mankind in freedom and peace.

In the approach of *economics*, the importance of solidarity is characterized by differing intensity in the dominant trends from the aspect of the apprehension and modelization of market economy.¹⁹ The least space to solidarity is afforded in Adam Smith's theory, which oversimplifyingly proposed that, if everybody pursued their own interests in the economy, it would lead to the maximization of public good (through the 'assistance' of an invisible hand). Consequently, if through the pursuit of individual interests the maximum of public good can be achieved, the role of solidarity in organizing society will become questionable. In contrast to this logic (following the world economic crisis), John Maynard Keynes considered that it was the state's task to interfere in market relations in order to increase employment. Parallel to this, state participation is also required to resolve social tensions and reduce inequalities, in other words, voluntary charity is not sufficient in this model. The value of solidarity was moved to the forefront as a result

¹⁹ On this, see B. Farkas, loc. cit. n. 14.

of the fact that the state provided welfare services for citizens through the redistribution of wealth. However, based on Milton Friedman's theory, (after the era known as the crisis of the welfare state) the idea reasserted itself that the socially detrimental effects of the operation of the market could basically be eliminated through civil solidarity and self-organization; it is not the state primarily that should provide remedy for them.²⁰

The outlined disciplinary conceptions of solidarity are to be utilized by all means during legal interpretation, since they have been developed based on the examination of social reality from different aspects, and by its instrumental nature, law cannot disregard these results; at the same time, it flows from the function of law that during regulation solidarity may acquire a peculiar relevance different from the above.

III. Solidarity as a legal value

Based on Ádám Antal's definition 'the weight and hierarchical position of any value is determined or, at least, strongly influenced by the level of harmfulness of the danger, disadvantage, harm or lack of value constituting its opposite'.²¹ In our case it must be examined *what can be considered the opposite of solidarity*, in other words, what disadvantages and dangers may be caused by the lack of solidarity. In a socio-political sphere lacking the value of solidarity, one may reckon with the phenomena of isolation, separation, selfishness, hostility, massification, nivellization and inadequate assertion of interest. As a consequence of these phenomena – due to the lack of means or abilities, either through their own fault or through no fault of their own – certain members and groups of society get into a momentary or lasting disadvantageous situation; their living conditions may become desperately hard. From a legal aspect, one is to examine what subsidiary help the state or executive power (even one being established at the international level) may provide by its self-definition and participation,

²⁰ According to Beáta Farkas: '[a]s neo-conservative and neo-liberal economists place the emphasis on providing proof for the optimal functioning of the self-regulating market, it goes without saying that the value of solidarity plays a subordinated role in their system'. Farkas, loc. cit. n. 14.

²¹ Ádám, op. cit. n. 10, at p. 71.

and by what legal means it may encourage the natural functioning of social solidarity.²²

The recognition and formulation of *solidarity rights*,²³ which may be regarded as a result of international legal development, contribute to the assertion of solidarity as a legal value. This circle comprises some modern rights (viewed by some as third generation rights) including the right to a healthy environment, sustainable development, proper feeding, consumer protection, the right to communication, protection of the future generations and the rights of the elderly as a manifestation of solidarity between the generations, as well as the right to peace, humanitarian aid or to the common heritage of humanity. The assertion of these rights requires active solidarity on the part of states and the international community; in the case of the major part of them one may regard as obligor all of the states taken together, while the part of obligee is taken by mankind as a whole. However, with a view to the present state of legal development, these rights can be enforced only to a low degree or hardly at all, since neither their content, nor their subjects and obligors are adequately defined.²⁴

In law-making *states* may utilize and assert the principle of solidarity in various ways, although this mostly results in solidarity implemented

²² According to Pál Sonnevend: '[s]tate intervention [...] becomes justified and necessary in many areas only where solidarity between the individual people proves insufficient: state activity concerning the improvement of the situation of those at a disadvantage is of secondary importance anyway'. P. Sonnevend, 'Szolidaritás és jog' [Solidarity and Law], available at: <<http://www.vigilia.hu/1999/9/9909son.html>>, (last accessed on 10.09.2009). Concerning this, Lajos Bokros states the following: '[i]f solidarity is raised to the level of social behavioral norm, its most beautiful form of implementation is constituted by voluntary social initiatives'. L. Bokros, 'Verseny és szolidaritás' [Competition and solidarity] *Élet és Irodalom* (Budapest, 2004) p. 29. However, this categorical imperative requires self-consciousness, independence and self-care (independent responsibility), the framework of which is set by democracy and market economy based on fair competition. This is adversely affected if the state forces people to undertake solidarity obligatorily and pushes self-care into the background. See: Bokros, *ibid.*, p. 41.

²³ V. Lamm and V. Peschka, eds., *Jogi lexikon* [Lexicon of law] (Budapest, KJK-KERSZÖV Kiadó 1999) pp. 563-564.

²⁴ J. Petrétei, *Az alkotmányos demokrácia alapintézményei* [Basic institutions of constitutional democracy] (Budapest-Pécs, Dialóg Campus Kiadó 2009) p. 450. See also G. Halmai and G. A. Tóth, eds., *Emberi jogok* [Human Rights] (Budapest, Osiris Kiadó 2003) p. 88.

with the help of the state, in other words, *rules prescribing citizens' solidarity toward each other* are rather rare. As exceptions to this one may regard the obligation to provide help (that is, the criminalization of the failure to provide help) and the obligation of support in family law.²⁵ The legal imprints of the moral minimum stemming from a family tie are parents' duty of childcare and education as well as the rights and duties of children. The state *may encourage* voluntary, *civil solidarity mechanisms*, e.g. by tax discounts on the aid provided for the needy and by announcing grants for charitable persons and organizations that carry out their activities in the interests of others.

Some sub-constitutional norms may contain *an element of solidarity as well* exceeding their primary objective, or at least, the idea of solidarity may also be detected among the problem impulses of the regulation.²⁶ One may consider as such obligations relating to the protection of the environment and nature, the protection of public health and emergency management. In the world of work one may mention social partnership, conciliation of interests, coalitional freedom and trade union activity as well as the exercise of the right to strike. Solidarity may function as significant motivation behind some pieces of crisis-legislation.²⁷ Finally, the public interest action relating to consumer protection – besides cost-effective litigation – and compulsory liability insurance – besides substituting for and distributing individual liability – may also be regarded, at least indirectly, as manifestations of solidarity flowing from a shared risk.

Non-legal means contributing to the implementation of norms carrying solidarity also include employment and social policies, anti-

²⁵ P. Sonnevend, *op. cit.* n. 22.

²⁶ It is worth mentioning that in the Hungarian legal system relatively few normative provisions concern solidarity expressly. Some examples: the preamble of Act XCVI of 1993 on Voluntary Mutual Insurance Funds, the preamble of Act LXXVII of 1993 on the Rights of National and Ethnic Minorities, the basic principles and priorities of Parliamentary Resolution 29/2008. (III. 20.) OGY on the National Climate Change Strategy, Parliamentary Resolution 47/2007. (V. 31.) OGY on the National Strategy 'Let it be better for Children!'

²⁷ See Act XLVIII of 2009 on specific amendments required for the protection of citizens in a difficult situation caused by a house loan, Government Decree 136/2009. (VI. 24.) on supporting persons in a situation of crisis.

discrimination and labour market integration programmes and strategies.²⁸

IV. Solidarity in the constitution

1. Solidarity as a constitutional value

Solidarity conceived as a constitutional value has three projections: political solidarity, social solidarity taken in a narrow sense and supranational solidarity.

a) *Political solidarity* may be grasped, on the one hand, in the national consciousness of belonging together and its expression in the constitution and, on the other hand, in constitutional norms referring to cases and situations where the community-forming and cohesive force of some political issues is moved to the forefront. The former is supported, for example, by provisions laying down national sovereignty, the institution of citizenship, the emblems and symbols expressing belonging to the nation, and – if it is relevant to the given state – rules relating to the diaspora. The extent and form of appearance of this aspect of political sovereignty in the Constitution are influenced by the given political community's concept of 'nation'. More precisely, whether the constitutional order is dominated by the concept of 'nation as state' or 'nation as culture' (nation as language).²⁹ The other constitutional aspect of solidarity may be grasped in means intended for situations and events outside the law,³⁰ namely, in the rights relating to political participation and communication (especially, in the guarantee of the right to assembly and association, freedom of opinion and the right to petition).

b) The constitutional expression of *social solidarity* taken in a narrow sense³¹ may be found in the principles of the social state, social market economy, the guarantee of social rights, the protection of social outcasts and the needy, which are implemented in the world of work and within

²⁸ See e.g., Community programme for employment and solidarity – PROGRESS (2007-2013). Available at: <<http://europa.eu/scadplus/leg/en/cha/c11332.htm>>.

²⁹ J. Petrétei, op. cit. n. 24, at pp. 186-187.

³⁰ For example, a matter of political nature (internal or foreign political event) that evokes reaction from the community or a defined group who also intend to give expression to this in a demonstration or joint action.

³¹ In a wider sense, social solidarity as an actuality outside law also serves as the foundation for political, social – taken in a narrow sense – and supranational solidarity.

the framework of the social care system. Social solidarity is a characteristic feature of the welfare state and it is related to the state's social welfare services functions; the purpose of laying it down in the Constitution may be to outline the legal guarantees of secure livelihood. If social solidarity is outlined in a paternalistic model or by paternalistic methods, its practical effect is usually to push individual self-care and responsibility-taking to the background.³² Compulsory social solidarity also means the reorganization of relations of wealth to a certain degree, because people who have not borne the burden of averting risks also necessarily receive social benefits.³³ Therefore, the obligation of solidarity may be prescribed only based on the principle of equality and in compliance with the constitutional standard of the restriction of ownership.

The degree of solidarity manifested in the social security system depends on the size of the circle of members of the community involved in the system, the scope of the problems covered by it, the degree of intervention it leaves to the executive power and the degree of fairness of the model of redistribution applied by the system. Consequently, the distribution of risk is not determined individually but along a standard of equality adopted jointly by the whole society. Thus, problems constituting the subject of individual consideration earlier become politicized: what should happen in the case of illness, disability, old age, unemployment or parenthood is determined based on the principles of regularity, predictability and equality instead of eventuality and defenselessness.³⁴ All this leads to the recognition in the Constitution of the fact that individuals are not equal only in their civil and political rights but also in their risks. While the formal belonging together of the

³² Cf. Hámor, op. cit. n. 11. p. 3. According to Gábor Kardos: '[s]olidarity is based on the fact that a person sympathizing with the situation of another person is also ready to act in his support. When the government carries out a financial transfer or redistribution through the taxation system and social policy with reference to solidarity, it quasi nationalizes this readiness. However, it is forced to do so because otherwise support for those in need could be implemented merely as voluntary care organized on a charitable basis. This way many people would be left without support'. G. Kardos, 'A szolidaritás határai' [Limits of Solidarity] 21 *Liget – literary and ecological journal* (2008) № 3. p. 95.

³³ A. Takács, 'A szociális jogok' [Social rights] in G. Halmai and G. A. Tóth, eds., *Emberi jogok* [Human Rights] (Budapest, Osiris Kiadó 2003) p. 803.

³⁴ P. Baldwin, *The Politics of Social Solidarity* (Cambridge, Cambridge University Press 1990) p. 2.

political community finds expression in citizenship, interdependence caused by personal and individual neediness and risk are manifested in social rights and institutions.

c) The requirement of *supranational* solidarity presents itself, on the one hand, in relation to global challenges. Among them mention could be made of managing climate change, combating poverty and famines, crisis management, ensuring sustainable development – all these require *global* solidarity on the part of mankind.³⁵ The assertion of the solidarity rights mentioned above already also presupposes global solidarity of the international community. On the other hand, organizations of defence and economic integration also emphasize the requirement of solidarity of participating states. This is manifested in the basic documents of the said organizations, e.g. it is implied in the North-Atlantic Treaty,³⁶ or expressly laid down in the Treaty on the European Union³⁷; but Constitutions also usually give expression to commitment toward the international community and readiness to international cooperation.

2. Presence and interpretation of solidarity in constitutional law in Europe

At this point it is worth examining how solidarity appears in the individual European constitutions and the founding treaties of the European Union.

a) The first group is made up of the – otherwise small number of – constitutions that *expressly lay down* the principle of solidarity. As example one may cite the preamble of the *Czech constitution*, which speaks about ‘equal and free citizens who are conscious of their duties towards others and their responsibility towards the whole’. The *Polish constitution* provides an even simpler formulation of solidarity in its Article 20, which lays down, concerning the economic order, the principle of ‘a social market economy, based on solidarity, dialogue and cooperation between social partners’, which is to be interpreted jointly

³⁵ Ban Ki Mun, ‘A szolidaritás víziója’ [The Vision of Solidarity], 1-7 *Figyelő* (January 2009) p. 37.

³⁶ See the Preamble and Arts 3-5 of the North-Atlantic Treaty, available at <http://www.nato.int/cps/en/natolive/what_is_nato.htm>.

³⁷ Preamble, Arts. 2-3, Art. 21, Art. 24, Art. 31 of the Treaty on the European Union (version incorporating the Lisbon Treaty); Preamble, Art. 67, Art. 80, Art. 122, Art. 194, Art. 222 of the Treaty on the Functioning of the European Union (consolidated version)

with the basic principle of ‘a democratic state ruled by law and implementing the principles of social justice’ laid down in Article 2. According to the preamble, the basic value of the Republic of Poland, among others, is the obligation of solidarity with others. Finally, mention could be made of the *Romanian constitution*, Article 1 of which – besides other values – also refers to solidarity taken in a political sense: ‘[r]omania is a sovereign, independent, unitary, and indivisible Nation State. The State foundation is laid on the unity of the Romanian people and the solidarity of its citizens’.

b) The second group comprises constitutions that are *interpreted using* the principle of solidarity. Article 2 of the *Italian constitution* asserts that ‘[t]he republic recognizes and guarantees the inviolable human rights, be it as an individual or in social groups expressing their personality, and it ensures the performance of the unalterable duty to political, economic, and social solidarity’. The Italian theory of basic rights interprets individuals within the framework of a way of thinking founded on social dependence. In Article 2 the Constitution lays down two basic principles: the principle of personality (*il principio personalistico*), according to which natural persons have a sphere that cannot be violated by others and the principle of plurality (*il principio pluralistico*), which protects individuals in their social relations. In addition to the general expression of the principle of plurality given in Article 2 (and Article 18 in the guarantee of the right to union), it is also specially formulated in the articles relating to social organizations having direct constitutional relevance (family, linguistic minority, religious communities, trade unions, political parties). *Solidarity* is not simply a programme principle, but *also influences civil law relations between citizens*, which is true of provisions relating to the family (Article 29), the right to health (Article 32), the right to work (Articles 35-36), the limits of the right to property (Articles 42 and 44), private economic enterprise (Article 41(1)), workers’ participation in the management of companies (Article 46), the system of cooperatives (Article 45) and the ability to acquire property (Article 47(1)).³⁸ As the Italian constitution lists among basic constitutional principles the

³⁸ In this sense, in Italy one may speak of the constitutionalization of civil law, which is manifested first of all in the decisions of the Constitutional Court relating to family law, labour law and the law of delict. The process of constitutionalization gained importance because the Constitutional Court moved away from the interpretation of general principles of constitutional law as mere programme norms.

principle of equality (Article 3), the principle of solidarity and the right to work (Article 4), these principles provide guidance for legislature with establishing a social order in conformity with the constitution.³⁹

Out of the state-organizing principles of the *German* basic law (GG), one may also mention the *creation of a social state* (GG, Articles 20 and 28), which, taken in a general sense, means protecting and helping weaker people. In a wider sense, however, it may be constructed as the possibility for everybody to share common goods, moreover, ensuring dignified conditions of existence. The GG supports this by the declaration of basic social rights, the special regulation of contributions to public revenues and the creation of equal opportunities.⁴⁰ However, the state – as a social state governed by the rule of law – does not only protect the individual from social risks but also encourages self-help and solidarity communities. Consequently, the GG's social state governed by the rule of law is not a 'totally caring state' but, apart from the welfare of the individual, its aim is also to realize 'responsible freedom'.⁴¹ The task of the German social state is to implement and maintain social justice. The protection of work and incomes earned by work as well as the guarantee of social security irrespectively of the individual's working capacity presuppose redistribution defined primarily by the principle of equality. This is grounded on the ethical principle of solidarity.⁴² The guarantee of social justice by the state *transforms solidarity* to be borne by society *into a legal issue*. The socially just social system ensures everybody the possibility to contribute to the economy and culture in a self-determining way based on his own decision and performance.⁴³

³⁹ T. Drinóczi, 'Államszervezési elvek és államszervezet az Olasz Köztársaságban' [Principles of State Organization and the Structure of State in the Republic of Italy] 11 *Magyar Jog* (2007) pp. 672-674.

⁴⁰ J. Zeller, 'Német Szövetségi Köztársaság' [Federal Republic of Germany] in N. Chronowski and T. Drinóczi, eds., *Európai kormányformák rendszertana* [Systematics of European forms of government] (Budapest, HVG-Orac Kiadó 2007) pp. 118-119.

⁴¹ T. Drinóczi, *Gazdasági alkotmány és gazdasági alapjogok* [Economic constitution and economic fundamental rights] (Budapest-Pécs, Dialóg Campus Kiadó 2007) p. 145.

⁴² P. Badura, *Staatsrecht* (München, C. H. Beck'sche Verlagsbuchhandlung 1996) (2) p. 256.

⁴³ *Ibid.*, at p. 257.

c) The principle of solidarity emphasized in the amended founding treaties of the *European Union* enhances – externally – the *identity* of the integrational *organization* (in other words, the fact that the integration of the Member States forming an increasingly close union between themselves differs from other international organizations),⁴⁴ on the other hand – internally – it gives expression to the economic-social *cohesion between Member States*, and to the commitment of mutual assistance.⁴⁵ Internal solidarity is a natural consequence of the development of the community established amongst states, which, on the other hand, serves as a foundation e.g., for the free movement of labour, temporary derogations for acceding states concerning the fulfilment of some requirements or the expansion of transfers of resources.⁴⁶ The principle of social solidarity as the foundation for the social welfare system can also be found in the practice of the Court of Justice.⁴⁷ This practice is justified by the title of the *Charter of Fundamental Rights* summing up solidarity rights, which acquired legal

⁴⁴ P. Szilágyi, 'Csak akkor(?) és abban a mértékben(?)...: Szubszidiaritás és szolidaritás az Európai Unióban' Recenzió [Only if? and to the Extent(?)...: Subsidiarity and Solidarity in the European Union] Review, 1 *Európai Jog* (2009) p. 63.

⁴⁵ Some examples: The material manifestation of enhancing cohesion between the Member States is the Solidarity Fund, which provides emergency relief in case of natural disasters. (See O. Sebők, 'A szolidaritás alapja' [The Basis of Solidarity], *Piac&Profit* (October 2007) pp. 22-23.) Joint action against terror attacks and mutual assistance in case of a terrorist attack are ensured by the solidarity clause. See Art. 222 of the Treaty on the Functioning of the European Union (consolidated version).

⁴⁶ P. Balázs, 'A szolidaritás határai Európában' [The Limits of Solidarity in Europe], 2 *Esély* (2002) p. 5. In connection with the economic driving forces and political significance of solidarity, Árpád Gordos states that 'the principle of solidarity is the suspension point of our European policy'. Á. Gordos, 'A szolidaritás és a szubszidiaritás mint a közjó horizontális és vertikális szolgálatának alapelvei' [Solidarity and Subsidiarity as the Basic Principles of the Horizontal and Vertical Service of Public Good] in J. Frivaldszky, ed., *Szubszidiaritás és szolidaritás az Európai Unióban* [Subsidiarity and Solidarity in the European Union] (Budapest, OCPE Magyarország – Faludy Ferenc Akadémia 2006) p. 182.

⁴⁷ A. Somek, 'Solidarity Decomposed. Being and time in European citizenship' *University of Iowa Legal Studies, Research Paper* 07-13, 2007, p. 4., available at <<http://ssrn.com/abstract=987346>>, (last accessed on 22.11.2009).

force through the Treaty of Lisbon.⁴⁸ In this respect, attention must be drawn to the following idea of Gábor Kardos:

‘[i]t is not unjustified to designate economic and social rights as solidarity rights. The reason for this is that the financial base of services provided on the basis of social rights is given by nationalized solidarity, which receives its resources from taxes. At the same time, the inclusion of the concept of solidarity in the summary of basic rights to be protected by the EU further emphasizes the importance of this value in the functioning of this institution’.⁴⁹

Having regard to international legal development, the modern catalogue of fundamental rights does not merely declare classical solidarity rights (oriented to the world of labour), but also attributes importance to solidarity between generations⁵⁰; and also regulates environmental and consumption risks based on the universal principle of solidarity.⁵¹

3. Solidarity-oriented provisions of the Hungarian Constitution (Act XX of 1949)

The Hungarian Constitution⁵² does not expressly lay down the principle of solidarity; however, it contains several rules inspired by some aspects of solidarity. The solidarity-oriented rules, institutions and solutions of the legal system may be traced back to them. At the same time, it is a problem that solidarity – similarly to other constitutional values – has become interiorized to a low degree in the members of the political community, to whom the Constitution is addressed and whom it is about. As opposed to other constitutional values, such as the rule of law, democracy, parliamentarism, freedom, security, human rights etc., the

⁴⁸ Charter of Fundamental Rights of the European Union, Title IV. Arts 27-38. *OJ C* 303/8-10, 14.12.2007

⁴⁹ G. Kardos, loc. cit. n. 9, at p. 170.

⁵⁰ Art. 25 of the Charter of Fundamental Rights of the European Union (rights of the elderly)

⁵¹ Arts. 37-38 of the Charter of Fundamental Rights of the European Union (protection of the environment, consumer protection)

⁵² At the time of finishing this essay, this is Act XX of 1949, which has been modified several times. However, the majority of the National Assembly elected as a result of the parliamentary elections of 2010 set it as an objective to create a new Constitution and set up an ad hoc preparatory committee for constitutional reform on 5 July 2010, which, according to the press, is to elaborate the regulatory conception by the end of 2010. On the website of the Parliament the minutes of the sitting held on 20 July were not available on 22 July.

value-character and preciousness of which could be (could have been) learnt by society in the two decades following the democratic political transformation, the value of solidarity could have taken root in the era of socialism too as a community-organizing factor. This is what happened, for example, in Poland and Czechoslovakia, where solidarity against the dictatorial state and regime had developed and influenced social practice before the years of political change. In contrast, in Hungary the Kádár era was favourable for achieving modest individual prosperity and influenced public atmosphere in the direction of self-interest pursuing behaviour. As a result of these circumstances, Hungary has a lower level of social solidarity, and consequently, also lower levels of law-abidance than other post-socialist countries with a similar line of development. On the other hand, there is a high demand for government intervention and high expectation of solutions of redistribution, in many cases without the recognition of the justified need for readiness to individual sacrifice. The outlined attitude of the political community may serve as explanation to the question why solidarity as a constitutional value has such a low impact on the actual state of reality in Hungary.

In spite of the above, from the aspect of Hungarian constitutional law, solidarity may be considered a value that is independent of constitutional regulation, which, at the same time, may be served by several instrumental values laid down in the basic law or a lower level legal norm. The solidarity-oriented provisions of the Hungarian Constitution may also be analysed in political, international and social dimensions based on the system described above.

a) In the Constitution one may find only provisions giving expression to *political solidarity* indirectly, e.g., in the provision concerning the sense of responsibility for the fate of Hungarians living outside the borders (Article 6(3) – responsibility clause), the institution of the Head of State designed to express national unity (Article 29), or the recognition of the rights of the national and ethnic minorities defined as participants in the sovereign power of the people (Article 68).⁵³ During the identification of solidarity norms it may cause a problem that the basic law uses the terms ‘people’, ‘people representing a constituent part of the State’ and ‘nation’ as well (both in the form of subject and attribute). The

⁵³ Concerning political solidarity, see A. Zs. Varga, ‘Alkotmányunk értékei. A fogalmi keretek’ [The values of our Constitution. A notional framework], 1 *Iustum Aequum Salutare* (2009) pp. 97-100.

expression ‘(Hungarian) people’ denotes nation in a political sense having the meaning of nation as state, which also includes persons belonging to (national and ethnic) minorities. If the category of nation is used within the meaning of nation as culture, nation is both a narrower and wider category than political nation. It is narrower, because it embraces only the part of the citizens of the state who share the same culture, speak the same language, have the same origins, identity etc. On the other hand it is wider, because it regards as part of the nation also those who live in other countries and are citizens of other states, but who otherwise belong to the nation based on their language, culture, origins etc. Because of the complicated nature of the notion of nation, the terms ‘people’ and ‘citizenship’ are rather applicable in constitutional law. Therefore – in this sense – ‘people’ may be regarded as the indispensable element of the state, the source of state sovereignty and the community functioning as the vehicle of political solidarity.⁵⁴

b) The *international dimension* of solidarity is manifested primarily in the foreign policy objectives of the state formulated in the Constitution (Article 6), the provision about the acceptance of international law (Article 7(1)), the authorization relating to European integration (Article 2/A) as well as in compliance with certain policies (Article 57(4)). Although solidarity with the international community and the other Member States of the European Union is not expressly laid down by these provisions, nevertheless, it may be taken into account as an immanent value during the interpretation of the Constitution. Help with the latter is provided by the expressions: rejection of war and violence,⁵⁵ endeavour to cooperate, taking part in establishing European unity, joint exercise of authority, which presuppose solidarity with those concerned. Moreover, because readiness to international and supranational cooperation is expressed in the Constitution, the Constitutional Court

⁵⁴ See J. Petrétei, op. cit. n. 24, at pp. 185-188. A different view is held by e.g. János Zlinszky, who considers ‘people’ an ethnic concept and ‘nation’ a political category. See J. Zlinszky, ‘Tudjátok-e, mi a haza?’ [Do you know what motherland is?] in *Formatori Iuris Publici – Ünnepi kötet Kilényi Géza professzor 70. születésnapjára*. [Special Volume Dedicated to the 70th Birthday of Professor Géza Kilényi] (Budapest, PPKE-JÁK, Szent István Társulat 2006) p. 599.

⁵⁵ This may also be regarded as the declaration of the right to peace, which may be grouped with the solidarity rights described above. See Zs. Balogh *et al.*, *Az Alkotmány magyarázata* [The interpretation of the Constitution] (Budapest, KJK-KERSZÖV 2003) p. 157.

may, during its interpretational activity, use⁵⁶ the provisions of conventions containing accepted international obligations which give expression to and serve solidarity.⁵⁷

c) The *rules* of the Constitution inspired by *social solidarity* and giving expression to the social responsibility of the state⁵⁸ are: providing support for those in need (Article 17), the protection of the young (Article 16), the right to social security (Article 70/E) and health (Article 70/D). In a wider sense and having regard to the tendencies of international legal development, solidarity may be associated with the right to a healthy environment (Article 18) and the right to access to culture (Article 70/F), freedom of coalition and the right to strike (70/C), parents' duty to educate their children (Article 66), and the obligation to contribute to public revenues, which constitutes the financial base of institutions of solidarity encouraged or organized by the state (Article 70/I).

With respect to the interpretation of the mentioned solidarity norms – expressed mostly in social rights – , determinative significance may be attributed to *the right to human dignity, the prohibition of discrimination, equal rights and opportunities*⁵⁹; while the background for their implementation is provided by the principle of market economy. According to the position of the Constitutional Court, apart from the declaration of *market economy*, the Constitution is neutral from the point of view of economic policy,⁶⁰ which means that it is not

⁵⁶ For more detail concerning the role played by international law in the interpretation of the Constitution, see L. Blutman, 'A nemzetközi jog használata az Alkotmány értelmezésénél' [The use of international law in the interpretation of the Constitution], 7-8 *Jogtudományi Közlöny* (2009) pp. 301-315.

⁵⁷ See, for example, Decision 357/B/2002 of the Constitutional Court (30 May 2006) dealing with the the protection of victims, in which the Constitutional Court also referred to the solidarity principle of the European Convention of 1983 on the Compensation of the Victims of Violent Crimes in its reasoning.

⁵⁸ According to Sonnevend: '[w]ith regard to society-scale solidarity, the social responsibility of the state is what is laid down by the Constitution. In this context, two constitutional principles of central importance may serve as a starting point: respect for and protection of human dignity and the principle of citizens' equality before the law'. Sonnevend, op. cit. n. 22, at pp. 1-2.

⁵⁹ The above also serve as guarantees of social justice and tolerance (and social immunity). Solidarity is also connected with these values.

⁶⁰ Decision 33/1993. (V. 28.) of the Constitutional Court, ABH (1993) 247., 249.

committed to any model of market economy.⁶¹ Social market economy, laid down in the preamble, is merely a state objective in the Republic of Hungary; therefore, it cannot be invoked concerning the principle of solidarity.⁶²

In the present essay, I will not provide a detailed analysis of the basic rights, fundamental duties and constitutional principles listed above, but merely mention the fact that, *in its practice*, the *Constitutional Court* has invoked the principle of solidarity during its interpretational activity primarily in connection with the right to social security and the social security system guaranteeing this right.

The Court considers the *right to social security* a constitutional value:

'[t]he Constitution defines the right to social security as a terminal value (Constitution, Article 70/E), which – by way of the state's objective obligation to protect the institutions (maintenance of social insurance and social institutions) – ensures to those entitled to it the support required to live in old age, and in the case of sickness, disability, being widowed or orphaned and in the case of unemployment through no fault of their own. The instrumental values attached to the terminal value (the conditions for the establishment and operation of the institutions and for receiving the specific provisions) are set forth in statutes and other legal instruments relating to the institutions.'⁶³

Out of the connected 'instrumental values', it was in the case of the characterization of the mixed nature and operation of the *social security system* and the services provided within its framework as well as the created legal relations that the Constitutional Court invoked the principle of solidarity. State regulation of legal relations created within the framework of social security is governed by the principles of individual responsibility, self-care and social solidarity.⁶⁴ Social

⁶¹ Decision 21/1994. (IV. 6.) of the Constitutional Court, ABH (1994) 117., 119.

⁶² If the Constitution contained, as a basic principle of the economic order, the requirement of social market economy or, in connection with market economy – similarly to the Polish Constitution – the principle of solidarity, then during the protection of the constitution, besides the requirements of fair distribution, social balance and the subsidiary responsibility of the state, the requirements of individual responsibility and foresight could also clearly unfold. Concerning this, see Drinóczi, *op. cit.* n 41, at p. 165.

⁶³ Decision 47/2007. (VII. 3.) of the Constitutional Court, ABH (2007)-I. 620., 637.

⁶⁴ 'In order to ensure the operability and financing of the social security system, there was a need for a comprehensive reform of the system. Since 1 January 1998

security, on the one hand, gives the insured persons some in-kind provisions based on the principle of solidarity, and on the other hand, it gives financial provisions to them adjusted to the amount of their payments.⁶⁵ The Court itself finds the system mixed in a double sense:

‘[f]irstly, in the respect that the state meets its obligation of care laid down in the Constitution by operating both a compulsory social security system and a system of social provisions. In this dual system both insurance and solidarity are present. Secondly, the legal relation created by compulsory social security itself has a mixed nature too, because it contains both the elements of insurance and solidarity’.⁶⁶

The principle of solidarity also plays a role during the constitutional examination of the establishment of the obligation to pay a contribution,⁶⁷ and the amount of the contribution⁶⁸.

the pension system has been characterised by mixed financing: it consists of a distributive-impositional element (social security pension) and a capital backing element (private pension). The change is aimed at regulating legal relations created within the framework of social security in accordance with the requirements of individual responsibility and self-care and the principles of social solidarity.’ Decision 5/1998. (III. 1.) of the Constitutional Court, ABH (1998) 82., 87.

⁶⁵ ‘As applied in Art. 70/E of the Constitution, the notion of “social security” means a system based on legally compulsory membership and the compulsory payments of the members, providing both financial and in-kind services, the functioning of which is laid down by legal provision. In other words, state-operated social security is a supply system which gives insured persons in-kind provisions – based on the principle of solidarity – independently of the amount of the contributions, in case of the occurrence of events that are certain or highly probable to take place in a person’s life, as well as financial provisions of differing amounts adjusted to the amount of the contributions paid by the insured persons, who are required to contribute a percentage of their income laid down by law to the maintenance of the social security system.’ Decision 51/2007. (IX. 15.) of the Constitutional Court, ABH (2007)-I. 652., 657.

⁶⁶ Decision 35/1997. (VI. 11.) of the Constitutional Court, ABH 1997. 200., 214.

⁶⁷ ‘Therefore, it may be deduced logically from the constitutionally acceptable principle of solidarity that based on the Constitution, the legislator is free to extend the obligation to pay a contribution to all incomes earned by work but derived from different sources, consequently, even to incomes gained by the insured persons within the framework of their legal relations in their second or third jobs, as employees, sole traders or partners. Otherwise, the principle that – within the framework of medical care – those of lower income are entitled to the same social security services as the insured persons paying higher contributions would not be constitutionally acceptable either. Therefore, if the extension of the obligation of contribution to include incomes gained within the framework of further employment

Finally, it could also be interesting to examine when the principle of solidarity plays no role in the practice of the Constitutional Court. For example, in its Decision on the wealth tax adopted in 2010,⁶⁹ the Constitutional Court does not mention it either as a reason or as an aspect of interpretation – despite the fact that, concerning the proportionality (fairness) of contributions to public revenues, social solidarity serves as a (not so hidden) underlying motivation.⁷⁰

* * *

Summarizing the observations contained in the essay, one arrives at the conclusion that solidarity may have an impact on the existence, establishment or interpretation of several legal institutions. However, compulsory solidarity prescribed by the state is only a restricted means and may easily lead to paternalism.⁷¹ Therefore, legal provisions

and entrepreneurial legal relations is – at least partly – accompanied by an element of insurance, the taking into consideration of the principle of solidarity to a higher proportion in this circle is not in itself unconstitutional.’ Decision 34/1997. (VI. 11.) of the Constitutional Court, ABH (1997) 174., 187.

⁶⁸ In accordance with the principle of solidarity, contributions defined as percentages impose a heavier burden on people of higher incomes than those having lower incomes or no income at all; on the other hand, the quality of in-kind health insurance provisions is independent of the amount of the contribution paid. Decision 197/B/2002. of the Constitutional Court, ABH (2007) 1389., 1394-1395.

⁶⁹ Decision 8/2010. (I. 28.) of the Constitutional Court, *Magyar Közlöny* (2010) № 10

⁷⁰ Reference to the principle of solidarity has appeared only in the communication (campaign) of the government but it has little relevance to constitutional law. Let us quote without comment: ‘[t]he introduction of the wealth tax which concerns the richest 5 percent of the population is right and just, because it enhances proportional contribution to public revenues and the principle of solidarity’. Available at: <http://www.kormanysovivo.hu/news/show/news_2954?lang=hu>, (last accessed on 05.02.2010).

⁷¹ A Hungarian example of the declaration of political solidarity by the state is Political Statement 1/2010. (VI.16.) OGY of Parliament about National Cooperation, the posting of which in public institutions was ordered by Government Decision 1140/2010. (VII. 2.). Within the framework of this essay it is impossible to give a thorough scholar analysis of the statement. However, it is worth mentioning that the statement recognizes the system of national cooperation founded by the parliamentary elections of April 2010, it sets as its objective to build up the system of national cooperation, which has both a political and an economic projection. The statement enumerates certain values (work, home, family, health, order) which ‘bind the members of the diverse Hungarian nation together’. The content of the statement

expressing and implementing solidarity must be based on wide public social consensus. If the principle of solidarity is expressly laid down in the Constitution, this fact may encourage its assertion in legislation and the application of law because it enjoys the protection of the Constitutional Court. Moreover, the assertion of the principle of solidarity in (constitutional law) may contribute to the more effective implementation of social justice and tolerance as well as social immunity. Naturally, this presupposition is realistic only if the principle of solidarity laid down by the Constitution has real social legitimacy.

is a political declaration so far, and in the summer of 2010 it still cannot be seen to what extent it is intended to be used during the constitution-making activity that had begun already. It is possible that by the constitutionalization of some of its elements, the state/governmental scale of values, styled as the new social contract, will acquire a certain degree of normativity. It is only following this that its interpretation and the analysis of its impact will become possible.

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Hungarian and Croatian electoral remedies

Right to legal remedy in its general, most common sense means the right to initiate proceedings against some state decision before an organ that is different or separate from, or is at a higher level than the organ that has taken the challenged decision, during which the injury to the initiator's rights or lawful interests will be eliminated and remedied. In this sense the right to legal remedy includes both the right to the review of decisions and the right of access to the courts.¹

Based on the wording of the *Hungarian Constitution*² the *Constitutional Court* has concluded that the Constitution attaches authority to statutory regulations laying down different procedures in order to specify the forms of legal remedy, to establish the forums for adjudication and to determine the levels of the remedy system.³ This, on the one hand, points to

‘possible differences in regulation, in other words, to the fact that legal remedy may take different forms in different procedures’.⁴

On the other hand, the regulation authorizes the legislature to set conditions for the exercise of the right to remedy and even to exclude it beyond certain limits and on certain conditions. Accordingly, the Constitutional Court has established, *inter alia*, that the requirement of

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¹ See e.g., Art. 2 point 3 of ICCPR, Art. 13 of ECHR and Art. 57 (5) of the Hungarian Constitution.

² Art. 57 (5) of the Hungarian Constitution: In the Republic of Hungary everyone may seek legal remedy, in accordance with the provisions of the law, to judicial, administrative or other official decisions, which infringe on his rights or justified interests. A law passed by a majority of two-thirds of the votes of the Members of Parliament present may impose restrictions on the right to legal remedy in the interest of, and in proportion with, adjudication of legal disputes within a reasonable period of time.

³ Decision 1437/B/1990 of the Constitutional Court, ABH 1992. 453., 454.

⁴ J. Petrétei, *Magyar Alkotmányjog II.* [Hungarian constitutional law II] (Budapest-Pécs, Dialóg Campus Kiadó 2005) p. 221.

ensuring the basic right to legal remedy by all means shall be applicable to decisions on the merits. Therefore, the legislator enjoys a rather high level of freedom in establishing the remedy system and its individual elements. Pursuant to the *Constitution of the Republic of Croatia* the right to appeal against an individual legal decision passed in first-instance proceedings before courts or other authorized bodies shall be guaranteed. The right to appeal may, by way of exception, be denied in cases specified by law if other legal protection is ensured.⁵ This provision implies that appeal is a legal remedy that must be granted to any legal subject in the Republic of Croatia unless there is an option of lodging some other remedy. The *Constitutional Court of Croatia* deems the right to appeal possible only if the first-instance body of a judicial or an administrative authority that passed the contested decision gives and explains the grounds of that decision which then can be contested by appeal.⁶ This means that the Constitution guarantees the right of appeal against all actions passed by authorities in power.

Proceeding from the nature of the right to remedy, the present essay aims to answer the question whether there is any similarity between electoral remedy rules in Hungary and Croatia and to describe any similarities found and their legal relevance. We assume that there are some subject areas where similarities as well as differences can be captured. We analyze the reason and justification of these characteristics from the perspective of a constitutional democracy. Nevertheless, in order to understand and compare remedy procedures, it is necessary to give a brief – comparative – introduction to the electoral systems and electoral organs in these two countries.

I. Electoral systems

1. The Hungarian electoral system⁷ was adopted in 1989 when the main compromise reached during the Roundtable Discussions was to establish a *mixed electoral system*, thus electing representatives from

⁵ Art. 18 of the Constitution of the Republic of Croatia, Official Gazette Nr. 85/10

⁶ Decisions of the Constitutional Court of the Republic of Croatia U-III-4532/2007 and U-III-1187/2006

⁷ The basic rules for the electoral system, suffrage, election bodies functioning and the electoral procedure applicable for the elections (as well as votes on plebiscites and popular initiatives) are provided for by Act XX of 1949 on the Constitution, Act XXXIV of 1989 on the election of MPs and Act C of 1997 on Electoral Procedure

*majoritarian single-member districts (SMDs) and from multi-member, list proportional representation (PR) districts (territorial list election).*⁸ Additionally, a *national list* was established to equalize the shortcomings of both the majoritarian and the proportionate systems. Consequently, Hungary's mixed electoral system combines⁹ *three essentially distinct systems* to elect its unicameral 386-member¹⁰ Parliament: voting for single candidates from SMD contests, list-voting for parties in larger territorial districts (counties) using proportional rules to award seats from party lists, and proportionally allocated compensation seats from the national compensation list. The *first two levels each require a ballot* while the *national compensation list uses surplus votes* that have reached no mandate at other levels. The surplus vote *in SMDs* is the vote that is cast for a candidate during the first valid round but cannot result in mandate in any electoral turn. The surplus votes *in the PR districts* are the votes cast for a list in the valid electoral round that are not enough for establishing mandate or exceed the required number of votes for winning a seat.

The election of the European Parliament is held in a proportionate electoral system based on list voting, in which the territory of Hungary constructs a single constituency. The right to set up lists belongs to parties registered in Hungary and they can do so upon the collection of 200,000 recommendations. Verifying the results, which means transformation of list votes into mandates, is done by the *d'Hondt* formula. Candidates get their mandates from the list according to an

and Act CXIII of 2003 on the election of the members of the European Parliament (Act L of 2010 on the election of representatives of local governments and mayors, Act on III of 1989 on the national plebiscite and popular initiatives, and Act LXV of 1990 on the local governments that includes regulation on the local plebiscite and popular initiatives).

⁸ See Act XXXIV of 1989 on the election of the members of Parliament.

⁹ See more in T Drinóczy, 'Evaluation of the newest amendments to the Hungarian electoral procedural law', in B. Banaszak and M. Bernaczyk, eds., *Praktyczne i teoretyczne aspekty prawa konstytucyjnego (Practical and theoretical aspects of constitutional law)* Międzynarodowa konferencja, Wrocław, 16-18 marca 2006. (Wrocław, Wydawnictwo Uniwersytetu Wrocławskiego, 2006) pp. 81-82.

¹⁰ This number was reduced (to 200) by the amendment of the Constitution adopted on 20 May 2010 and published in 2010/85 of the Official Gazette of the Republic of Hungary at p. 19722.

order previously announced by the party. In order to gain mandate in the Parliament, a threshold of 5% of the votes cast is laid down for parties.¹¹

2. The current electoral system for representatives in the Croatian Parliament (*Sabor*) was introduced in 1999. Between the Republic of Croatia's declaration of independence until 1999, a mixed electoral system was applied in which a part of representatives was elected in one-term constituencies and the other part by proportional electoral system with one constituency. The *d'Hondt* method was applied for seat-allocation. The share of representatives elected by plurality system in one-term constituencies decreased by reforms of electoral laws, whereas the share of representatives elected by proportional system increased and changed in 1999 completely to proportional system. There are three groups of representatives in the Republic of Croatia that are elected by different electoral system types. The first group comprises of 140 representatives out of whom 14 are elected in 10 constituencies by proportional system and the *d'Hondt* method of allocating seats. The number of voters among different constituencies can vary by +/- 5 % in order to achieve equal electoral rights guaranteed by the Constitution. The other group comprises of 8 representatives of national minorities, elected by plurality system and the constituency in which they are elected is the territory of the Republic of Croatia. The third group comprises of 3 representatives of Croatian nationals domiciled abroad. Consequently, there are a total of 12 constituencies in the Republic of Croatia since in addition to the 10 provided for the representatives elected in 'general' elections there are two constituencies in which representatives of national minorities and Croatian nationals domiciled abroad are elected. Elective franchise is uniform; the threshold is 5% of the valid votes in each of the 10 constituencies.

II. Election organs in general

1. In Hungary the Electoral Procedure Act (hereinafter EPA) differentiates between electoral committees and electoral offices based on their task to be fulfilled before and during elections and votes. The EPA stipulates that *electoral committees* are citizens' independent bodies subject to nothing but the law. Their primary responsibility is to determine the results of elections, to ensure the fairness of elections, to

¹¹ See in more detail N. Chronowski, *Constitution and Constitutional Principles in the EU* (Budapest-Pécs, Dialóg Campus Kiadó 2005) pp. 159-163.

enforce impartiality and, when necessary, to restore the legal order of elections. During the term of its operation, an electoral committee is deemed to be an authority and its members are public officials. Electoral committees thus have to be considered as special organs of state administration. *Electoral offices* are bodies fulfilling the state's responsibilities in connection with preparing, organizing, conducting the elections, providing voters, candidates and nominating organizations with information free from any party-bias, handling electoral data, creating technical conditions, checking compliance with statutory conditions and professional rules. Except for ballot counting committees (BCC), an electoral office operates beside each electoral committee, and at foreign representation units (FREO). Along the BCC, one member of the local electoral office acts as the keeper of the minutes.

Table 1 Hungarian election organs

Electoral committees	Electoral offices	Head of the electoral offices	Members of the electoral offices - delegated for indefinite period by
ballot counting committees (BCC)	member of competent electoral office	-	-
parliamentary single member district electoral committees (PSMDEC)	parliamentary single member district electoral office (PSMDEO)	competent notary	head of the electoral office
territorial electoral committees (TEC)	territorial electoral office (TEO)	county/capital notary	head of the electoral office
National Electoral committee (NEC)	National Electoral office (NEO)	appointed by the corresponding minister	appointed by the corresponding minister
-	electoral office at foreign representation units (FREO)	delegated by the head of the NEO	head of the NEC

The electoral committee shall act as a *body* deciding by majority, therefore in order to adopt decisions the presence of the majority of the members and the identical voting of the members present are required. There are minutes made out, that has to include minority opinions, together with their supporting reasons. The electoral committee decides the case by *adopting a resolution* in a written form on the day it enters into force.

2. In Croatia, the Law on Election of Representatives for the Croatian Parliament distinguishes between State electoral commission, electoral commission of electoral district, county electoral commission and city electoral commission and voting committees. The Law on *State electoral commission* governs its organization, scope and performance. This authority plays central role in organizing and conducting elections and functions as a permanent body consisting of judges of the Supreme Court of the Republic of Croatia and equal number of persons chosen by the representatives of Croatian Parliament at the proposal of both ruling party and party in opposition. This legal solution contributes to the balance of influence by the ruling and party in opposition. The State electoral commission is competent for

- delivering opinions on structuring and improving electoral legislation and legislation governing the issue of referendum;
- appointment of members of County and the City of Zagreb Electoral Committees;
- educating members of electoral committees and committees for conducting referendum in local and regional self-government units;
- informing citizens on the course of elections and the possibility of bringing into effect and protecting their electoral rights in electoral procedure;
- determining the way of filing and publishing materials on conducted elections and referendum,;
- publishing periodical, expert publications concerning electoral system;
- conduct of election and practice of filing reports to authorities on election conduct and referendum;
- setting down the organization of the expert committee, Committee secretary, appointment and their substitutes;

- cooperation with domestic organizations and international organizations and institutions within the scope of electoral legislation and election;
- filing reports on conducted election and referendum to Croatian Parliament within 60 days from the announcement of the official election results, and
- other activities stipulated by special rules and regulations.

The competence for decisions on objections raised for the protection of electoral right has not been explicitly laid down by the Law on State Electoral Commission but has been dispersed in several different laws (related to the election of President, representatives for Croatian Parliament, members of the representative bodies of local and regional self-government units and municipal prefects, mayors and county prefects). The State electoral commission is a standing and professionalized body and its very professionalization is a prerequisite to continuous preparation and education of all participants within the electoral procedure ranging from members of electoral commissions and their professional boards to the members of electoral committees and citizens, which contributes to democratic political process in general.¹²

The *Electoral commissions of constituencies* are *ad hoc* bodies whose members are appointed by the State electoral commission, with competence for the constituency area. The County electoral commission members are appointed by the State electoral commission whereas members of City and Municipal electoral commissions are appointed by the electoral commission of the constituency. The members of electoral committees are appointed by the electoral commission of the constituency.¹³

¹² M. Jelušić, 'State electoral commission as a standing institution', Informator (2005) p. 1.

¹³ Art. 53 of the Law on Election of Representatives for Croatian Parliament, Official Gazette Nr. 69/03

Table 2 Croatian election organs

Bodies	Status and role	Members
State electoral commission	-permanent -organizing, conduction elections -giving opinion on legislation -educating members of electoral bodies -informing citizens	judges of the Supreme Court and MPs
County electoral commission	- ad hoc -activities on voting process in their jurisdiction	are appointed by the State electoral commission
City electoral commission		
Municipal electoral commission		
Voting committees	- ad hoc	

III. Legal remedies in Hungary

1. Legal remedies in the Electoral Procedure Act

a) The EPA identifies *three different kinds of legal remedies: objection, appeal, and judicial reconsideration*. An objection can be lodged within 2 days from the notice of the unlawful act to the competent electoral committee if anybody observes *infringement of laws* (on electoral procedure¹⁴ or on electoral principles¹⁵). The electoral committee shall decide within 2 days.

The decision in the first instance is delivered by the electoral committee within 2 days upon request (for example, in the case of the registration of candidates) or *ex officio* (for example, with regard to establishing the 5% threshold during parliamentary elections). Objection against the activity of an electoral office at foreign representation units (FREO) shall be submitted to the head of the FREO, who shall, without delay, forward it to the National Electoral office (NEO) by fax or electronically. The decision shall be taken by the National electoral committee (NEC), to which the objection may also be submitted directly. The competent electoral committee shall decide on the case

¹⁴ See case in point IV. a).

¹⁵ See case in point IV. 2.

within 2 days after its arrival. The electoral committee shall take a decision at first instance.

The decision at first instance can be challenged if it was taken by violating the law or the assessment of circumstances, including the weighing of evidence, was not just. In this case an *appeal* shall be lodged. The appeal shall be submitted to the electoral committee that has taken the challenged decision,¹⁶ and it shall be referred on the day of its arrival to the competent electoral committee authorized to decide on it. The electoral committee in question shall decide on the appeal within three days of its arrival. Appeal against a resolution of the NEC shall be handed to the Supreme Court under a special review procedure. In this case the procedure has only two levels: the procedure of the NEC is followed by the review procedure of the Supreme Court.

Table 3 Appeal

Organ (1st instance)	Organ deciding on the appeal
BCC (relating to SMD)	PSMDEC
BCC (relating to the TE notary)	TEC
PSMDEC	TEC
TEC	NEC
FREO (consulates)	NEC
NEC	judicial review

If the electoral committee agrees with the objection, it may employ the following general sanctions: it may establish the fact of violation of law, it may take an injunction prohibiting the infringer from further violations, it may annul the electoral procedure or its part affected by the remedy and it may order its repeat. If the electoral committee does not agree with the objection, it shall dismiss it.¹⁷

A *judicial review petition* may be lodged against the decision of the electoral committee in second instance to the county court, or against the decision of the NEC to the Supreme Court.¹⁸ The grounds for requesting judicial reconsideration and the applicable time limit are those mentioned above with regard to appeal. In the non-litigious court

¹⁶ Except in the case of an appeal against the decision of the BCC, because such an application must be filed with the electoral committee which latter has competence to adjudicate on it.

¹⁷ See case in point IV. 1.

¹⁸ See case in point IV. 2.

proceeding, involving three judges, legal representation is compulsory. The court decides within 2 days and its judgment is non-appealable.

b) Chapter V on electoral committees in the EPA regulates *exhaustively the formal and material criteria of decisions* of electoral committees and their adoption. The EPA regulating electoral procedures determines in great detail the method of reaching a decision: the electoral committee shall clarify the facts of the case, present evidence concerning the case and hear the complainant and the other party. As traditionally the decision will be delivered on the day of its adoption, the decision may be communicated shortly, by handing or faxing or e-mailing the resolution. Preference for actual method of delivery is chosen by the person involved. This ruling is in line with the technical development and the decision 59/2003. (XI.26) of the Constitutional Court.

2. Special remedies

a) *Legal remedies (complaint) are available in connection with the content of national and foreign registry of voters*, whether the voter is added to the list of voters or not or, or if he/she is missing or cancelled from the registry. The forum of complaint is the head of the local electoral office in the first instance, and the local court in the second instance. The time limit for submitting the complaint is the period of publication of the registry, and 3 days counting from the communication about recording in the foreign registry; the head of the electoral office decides the following day at the latest. The court has another 3 days for delivering the resolution.

b) Chapter VI on Election Campaign in the EPA provides that an objection can be submitted in connection with the *participation of the media in the election campaign*, in particular, concerning the violation of the basic principles of the electoral procedure and the publication of political advertisements. It is sufficient to indicate in the objection the programme serving as evidence for the violation, without attaching it, as the indicated evidence shall be obtained by the electoral committee *ex officio*. Objections concerning non-nationally circulated periodicals and local broadcasts shall be decided by the competent local electoral committee; objections concerning district broadcasts by the competent territorial electoral committee and those concerning nationally circulated periodicals, national news agencies and broadcasts by the National Electoral Committee. If the electoral committee allows the objection, apart from the above-mentioned general sanctions, it may order the mass

media violating the law to publish its decision or the operative part thereof in the form corresponding to the character of the media.¹⁹

The three-day time limit laid down concerning objections shall be applicable to this procedure as well. This rule was incorporated into the EPA as a result of a decision taken by the Constitutional Court in 2003. In its *Decision 60/2003 (26/11) CC*²⁰ the CC dealt with the time limit available for *legal remedy related to broadcasting of political advertisements by the media*. In relation to the legal remedies existing in this specific field of electoral procedure, the ex-EPA rule referred to Act I of 1996 on radio and television which did not apply the same *short period of time* rule for legal remedies rendering the procedure to breach the democracy principle declared in Article 2 of the Constitution. The CC emphasizes that the media has a particularly great influence on the public, and that it is outstandingly important, especially in the course of election campaigns, that the *freedom of expression* and the freedom of information can *prevail in the media*.

c) Article 73 (Part I – general provisions, Chapter IX on counting the votes) regulates the *scrutiny of votes, i.e., the declaration of results*. The counting of votes is done by ballot counting committees and electoral committees. The EPA provides the possibility for seeking redress (in the form of appeal or judicial reconsideration) against the declaration of results in wards and constituencies. A separate complaint cannot be lodged against the declaration of results delivered by a CCB; this kind of complaint shall be attached to the complaint against the declaration of results delivered by an electoral committee.

3. Legal remedies in practice – Hungary

To illustrate the above remedy procedures, three legal cases will be presented. The first two concern the violation of campaign ban, where decisions of the NEC will be cited, one allowing the application and the other one dismissing it. No judicial review petition was submitted against either of these decisions. The other case concerns the universal freedom of expression of opinion during campaign. In the case the

¹⁹ This should be carried out in identical form within three days in case of daily papers and news agencies and in the following issue in case of periodicals. In case of a broadcaster, it shall take place within three days at the same time of the day and as many times as the unlawful communication occurred.

²⁰ Decision 60/2003 (XI. 26.) of the Constitutional Court, ABH 2003. 620.

decision of the NEC was challenged before the Supreme Court, which, however, upheld the decision and did not find any violation of law.

a) Campaign ban

aa) In its *Decision 363/2010*, the National Electoral Committee *allowed* the objections and found that the Internet site kuruc.info had violated the campaign ban by its published articles referred to in the objection. The National Electoral Committee ordered the infringer to refrain from further violations.

Petitioner submitted objections on 24 and 25 April 2010, in which he presented that ‘in his opinion the Internet site kuruc.info violated the campaign ban on 24 April 2010 by publishing articles entitled “*Fidesz: Even Spit on, We Love You, America!*”, “*The Székely Position concerning Csanád Szegedi’s Statement*”, “*Edelény, before the Second Round*” and on 25 April 2010 by the articles “*The MSZP (Hungarian Socialist Party) Would Not for All the World Like to Influence Members of the Electorate during the Campaign Ban*” and “*FIDESZ Candidate for Edelény Says There Was No Development in the Area When His Party Was in Power*”. In his petition, the petitioner indicated the weblinks providing access to these articles. The petitioner requested the National Electoral Committee to establish the violation of law and order the infringer to refrain from further violations.

In accordance with Section 40(2) of the EPA, “Election campaign is prohibited after 0:00 o’clock of the day prior to Election Day until the end of voting (i.e., campaign ban)”. Section 41 of the EPA states that “[i]nfluencing voting intentions of voters is regarded as violation of campaign ban.” The National Electoral Committee has found that the articles referred to by the petitioner were published on the Internet site kuruc.info during the campaign ban and displayed such content relating to candidates running for the parliamentary elections of 2010 and nominating organizations that were definitely capable of influencing voting intentions of voters and therefore, constituted a violation of law as laid down by Section 41 of the EPA.’

ab) In its *Decision 362/2010*, the National Electoral Committee *rejected* the objection submitted to it. The Petitioner submitted his objection on 24 April 2010 and presented that ‘on the Internet news portal of Népszabadság he read the writing in question via the link http://nol.hu/specialis/rss_valogatás/lendvai_a_sajton_beluli_jobbra_ig_azodj_ at 10.54 on 24 April 2010. In the petitioner’s opinion, by publishing the article, the newspaper violated the campaign ban.

Petitioner requested the NEC to investigate the matter.’ The NEC rejected the complaint.

The NEC based the decision on the following grounds. ‘In accordance with Section 40(2) of the EPA, “[e]lection campaign is prohibited after 0:00 o’clock of the day prior to Election Day (campaign ban)”. Section 41 of the EPA provides that “influencing voting intentions of voters is regarded as violation of campaign ban”. The National Electoral Committee set forth in its Resolution 2/2007 (III. 19.) on some questions of the campaign ban, namely that “[i]t is not considered to be a violation of campaign ban if the information published *before* the commencement of the campaign ban concerning the candidates or the nominating organizations is accessible on the website of the electronic content provider even during the period of the campaign ban as well. However, it is considered to be violation of campaign ban if after its commencement the electronic content provider publishes information of such kind created either earlier or during the period of the campaign ban or updates such information”.’ Based on the evidence the National Electoral Committee found that the disputed article had been published on 23 April 2010. Therefore, the fact that the article was accessible on the Internet website of the newspaper ‘Népszabadság’ also during the period of the campaign ban did not constitute the violation of campaign ban.

b) Freedom of expression during campaign

In its Decision *Kvk.IV.37.429/2010/6*²¹ the Supreme Court upheld Decision 323/2010 of the National Electoral Committee rejecting the petitioners motion alleging the infringement of human dignity.

On 14 April 2010, applicants filed a remedy petition concerning the statement by Attila Csaba Mesterházy (in the Decision: M.A.Cs. or M.A.), candidate number one on the national list of the Hungarian Socialist Party (MSZP) made on the night from 11 to 12 April 2010: ‘Therefore I am asking everybody who believes that there is a need for such a democratic control, such a strong democratic control, regardless of his or her party preferences, if he or she does not want to vote for the fascists and O. V. (Viktor Orbán), to support the Hungarian Socialist Party in the second round.’ According to the petitioners, it may be unambiguously identified ‘which would-be parliamentary power’ M. A. meant ‘by this expression’ and that by this he meant ‘Hungarians electing fascist Members of Parliament’.

²¹ Budapest, 21 April 2010. Presiding judge: Dr. Zoltán Buzinkay, reporting judge: Dr. András Patyi, judge: Dr. Ildikó Fekete.

'In the petitioner's opinion "by his statement, M.A.Cs. overstrained the constitutional limits of the freedom of expression and opinion and restricted (violated) the right to human dignity", and also violated the basic principle laid down by Section 3 Point d) of Act C of 1997 on the Electoral Procedure (i.e., EPA). The petitioners requested the National Electoral Committee to establish the violation and prohibit the infringer from further violations.'

The *National Electoral Committee* adjudged the objections in its Decision 323/2010 taken at the session of 15 April 2010 (hereinafter referred to as: Decision) and found that Attila Mesterházy's statement referred to in the objections contained an expression of political opinion and did not have such content that would exceed the limits of the free expression of opinion.

The Decision stated that an expression of opinion did not constitute an allegation of fact and it could not serve as ground for establishing the violation of the basic principles of the Electoral Act. Moreover, during the electoral campaign, apart from presenting their own programme, nominating organizations often evaluate and rate the programme of their election rivals as well (i.e., negative campaign). Since based on the opinion of the Committee the disputed sentence did not constitute a violation of the basic principle of *bona fide* and proper exercise of rights laid down by Section 3 Point d) of the EPA, the objections were rejected by the Committee.

A review for judicial reconsideration petition was filed against the decision by the Movement for a Better Hungary through their representing lawyer, in which they applied for the reversal of the decision and, at the same time, for a decision allowing the objections, establishing the violation of law and granting an injunction against the infringer prohibiting him from future violations.

Their lawyer argued that 'the decision conflicted with Section 3 Points a), c), e), and d), Sections 29/A and 29/B of the EPA. Apart from these provisions, the decision was also in conflict with the right to human dignity laid down by Article 54(1) of the Constitution because by the disputed conduct M.A. exercised the right to expression of opinion violating the human dignity of others. They recalled that the Constitution does not distinguish between allegations of fact and evaluations concerning the freedom of expression and opinion, and the said statement contained an allegation of fact (i.e., there are fascists, they exist). The allegation of fact according to which O. V. [Viktor Orbán – authors], the Fidesz or the Movement for a Better Hungary had something to do with fascists and fascism lacks any ground.

Consequently, based on the consistent practice followed by the Supreme Court, the statement was suitable for establishing a violation of law, as it could not be considered either as presentation of a political programme nor the evaluation of the someone else's programme or proper exercise of rights.'

The Supreme Court held that the petition was unfounded.

In accordance with the provisions of the EPA referred to in the petition:²²

'§ 3. During application of the rules of the electoral procedure participants concerned in the election shall implement the following basic principles:

a) preservation of electoral fairness, prevention of electoral fraud,
(...)

c) equal opportunities of candidates and nominating organisations,

d) *bona fide* and proper exercise of rights,

e) possibility and impartial adjudication of legal remedy.'

The Supreme Court pointed out already in its Order Kvk.IV.37.248/2006/2 that the freedom of expression and opinion guaranteed by Article 61(1) of the Constitution shall not be restricted even during the electoral campaign. It does not constitute the violation of the provisions relating to basic principles contained in the EPA if the campaign tricks of one of the parties elicit extreme manifestations from the opposing party.

With regard to the present case, the Supreme Court, upholding the decision of the NEC, also found that the disputed statement did not constitute an allegation of fact but an expression of opinion. Moreover, the content of the statement was inaccurate because it was not possible to vote for 'O.V.' in the second round of the elections, votes could only be cast for single candidates. The disputed classification ('fascists') appeared without further specification, therefore, based merely on the disputed statement, it was not possible to determine to which specific person/persons it referred to. The question whether this statement may be evaluated as an allegation of fact or an opinion had significance with regard to the violation of electoral principles. An opinion in itself – be it either extreme or offensive to some – could hardly result in a violation of electoral rules. The fact that the person making the statement considered some people fascists did not violate the basic principles of the EPA listed above despite the fact that public opinion could find such characterization of political adversaries offensive and morally objectionable. The violation of the electoral principle laid

²² Art. 29/A contains provisions concerning the establishment of facts, while Art. 29/B contains provisions relating to the decision.

down by Section 3 Point d) of the EPA may be established if the participants involved in the elections exercise their electoral rights – including the right to carry out campaign activity – in a such a way that, by hiding or distorting certain facts, they attempt to mislead the electorate and thereby to reduce the electoral chances of their political adversaries. (Kvk.III.37.211/2006/3.)

The NEC's decision did not violate the basic principles of the EPA enumerated in the petition. When taking its decision, the NEC established the facts correctly based on the data at its disposal, it deliberated upon the matter and adopted its decision by vote. The fact that the NEC evaluated the statement in question as an expression of opinion and not as an allegation of fact did not result in electoral fraud nor did it prejudice the equal opportunities of the candidates.

With regard to the allegation that the decision violated the right to human dignity guaranteed by the Constitution, the Supreme Court held that the expression of opinion (classification) referring to an undefined circle of people that cannot be precisely determined on the basis of the statement itself was not suitable, in the present case, for establishing the violation of the constitutional rights of others. During the review of the decisions of the NEC on the basis of Sections 82-85 of the EPA, the Supreme Court examined the implementation of the provisions of the Constitution mainly from the aspect of compliance with substantive and procedural electoral rules. The arguments presented above do not mean that the Supreme Court approves of such evaluation of political adversaries. However, maintaining the standard of political culture is not a matter falling within the scope of electoral judicature. In consideration of all of the above, the decision of the NEC did not violate legal regulation on the grounds indicated in the petition; consequently, the decision was upheld by the Supreme Court under Section 84 (7) Point a) of the EPA.'

IV. Legal remedies in Croatia

1. Supervision of election legality in the Republic of Croatia falls outside judicial authority. The Law on Election of Representatives for the Croatian Parliament provides objection as remedy for protection of electoral rights. Objection is filed with the State electoral commission within 2 days (48 hours) counted from the day when the objected action was completed. Active legitimacy in filing objection lies within any political party, independent candidates, candidates for representatives in the Croatian Parliament, at least 100 voters or at least 5% of the voters of the constituency in which the elections are conducted. There are two

cases of infringement of electoral rights: irregularity in nomination procedure and irregularity in election procedure. Irregularity in nomination procedure refers to failure to meet a particular nomination condition stipulated by law whereas irregularity in election procedure can refer to inaccurate counting of votes. The State electoral commission renders decision on a raised objection within 48 hours from the day of filing the objection. If the State electoral commission, while deciding on the objection, establishes irregularities that substantially influenced or could have influenced election results, it shall annul electoral actions and set the course in which they are repeated. In case that annulled actions cannot be repeated or if irregularities refer to voting procedure and they substantially influenced or could have influenced election results, the State electoral commission shall annul elections and set a deadline to repeat it. Thus, the State electoral commission has two options if it establishes any irregularities in the process of nomination or election. It can either repeat electoral actions or annul election. The criterion for a decision on the objection filed is its real or potential influence on election results. Failure to meet particular condition stipulated by law in reference to passive electoral right always results in repeating electoral actions. Irregularities in the election procedure referring to inaccurate counting of votes of the particular politically active participant sometimes can and in other cases cannot have influence on election results. If there is no influence on election results there is no real reason to repeat specific electoral actions. The State electoral commission is a body of first instance that adopts decision in reference to objection for protection of electoral right.

Pursuant to the Constitution the Constitutional Court supervises constitutionality and legality of elections and state referendum.²³ The Constitutional Act on the Constitutional Court stipulates that the Constitutional Court solves all electoral disputes that do not fall under the jurisdiction of the courts and decides in case of appeal against a decision of the State electoral commission. Every political party, every candidate, at least 100 voters or at least 5% of the voters of the constituency in which elections are conducted have right to file an appeal to the Constitutional Court against a first instance decision of the State electoral commission. The appeal is filed within 48 hours from the day of the receipt of the decision by the State electoral commission

²³ Art. 129 of the Constitution of the Republic of Croatia, Official Gazette Nr. 85/10

which rejects objection as ungrounded. The Constitutional Court decides on the appeal within 48 hours from the day of its receipt.. Decision upon the appeal is rendered by *ad hoc* panel of three judges by unanimity. In case unanimous decision upon the appeal in electoral dispute has not been reached, the session of the Constitutional Court decides, which involves all thirteen judges.

2. Besides the State electoral commission and Constitutional court that operate outside the judiciary there are no other authorities in Croatia to seek protection of electoral right from. Considering the fact that the Constitutional court decision in relation to the protection of electoral right completes this procedure in the Republic of Croatia, and since the Republic of Croatia as a member of the Council of Europe signed and ratified the European Convention of Human Rights and Fundamental Freedoms, it is possible to seek protection before the European Court of Human Rights if any right guaranteed by the Convention has been infringed in the course of election.

The following legal remedies are available for the protection of electoral rights in the Republic of Croatia: *objections*, that is reviewed by electoral commission and *appeals* that is decided by the Constitutional Court.

3. In Croatia, the practice of the Constitutional Court in rendering decisions on appeals against decisions of State electoral commission by which the filed objection has been rejected as ungrounded is rather diverse. In May 2005 the Constitutional Court by its decision admitted the appeal against the decision of the County electoral commission of the Osijek-Baranja county and ordered the formation of new electoral committee and the repeat of election for the members of the municipal council in the *municipality of Bilje*.²⁴ By the count of ballots it was established that there were more ballots cast in the box than the number of registered voters so that pursuant to Article 47 paragraph 3 the Electoral Committee was dissolved, a new one had to be appointed and the election was repeated.²⁵ Such a decision of the Constitutional court

²⁴ See the decision of the Constitutional Court of the Republic of Croatia U-VIIA/2257/2005, available at: <<http://sljeme.usud.hr/usud/praksaw.nsf/Pojmovi/C1256A25004A262AC125700B0046E606?OpenDocument>>.

²⁵ The Law on Nominating Members of Representative Bodies of Local and Regional Self-government Units, revised text, Official Gazette Nr. 44/05

is the only logical solution regarding the fact that there were more ballots cast than the number of participating registered voters.

4. Besides the previous case that refers to irregularity in the election procedure the Constitutional Court rendered a decision in *May 2001* by which it admitted the appeal against the decision by the County electoral commission of the *Primorje-Gorski Kotar County*.²⁶ Recalling the corresponding provisions applicable to the nomination of candidates, in this case the commission established that a particular candidate was not resident of the area of the local self-government unit that he was nominated for, therefore the City electoral commission was ordered to subsequently set rearrange the election list. The law explicitly stipulates that a candidate for the members of representative body of the local or regional self-government unit who does not meet the conditions stipulated by law cannot subsequently achieve legally valid candidacy. In this case County electoral commission of the Primorje-Gorski Kotar County, without authorization,, set the time limit for meeting particular conditions and by doing so it directly infringed the explicit provisions.

V. Conclusion

Recalling that the starting point of our research was the common approach of the Hungarian and Croatian Constitution and the respective Constitutional Courts,²⁷ we captured four areas that were compared in the field of remedies available under Hungarian and Croatian legal regulations on electoral procedures.

1. According to the constitutional regulations²⁸ and practices of the Constitutional Courts, a) legal remedies are fundamental rights that are regulated by the legislatures in more detail; b) it is not necessarily unconstitutional if a remedy is available only for the merits of the case; iii) legal remedies are to challenge a decision and can be considered as component to the right to access to court.

2. The fields of comparison revealed the following.

a) We learnt that remedies are considered and judged by electoral commissions, and, at final instance, by courts in Hungary and by

²⁶ See the decision of the Constitutional Court of the Republic of Croatia U-VIIA/914/2001, available at: <<http://sljeme.usud.hr/usud/praksaw.nsf/Pojmovi/C1256A25004A262AC1256A47003D078E?OpenDocument>>.

²⁷ See introductory notes to this paper.

²⁸ These rules respect the existing international obligations in this field.

Constitutional Court in Croatia, outside of the regime of electoral bodies. Regardless of structure, the first procedural step in each country is the submission of a complaint challenging a decision or bringing an unlawful act to the attention of the organ. Then, should additional injury occur, the judicial power or the independent Constitutional Court can make the very final decision.

b) As for the applicable remedies, we located 3 types of remedies in Hungary, and some other additional ones, and two types in Croatia.

c) There are more differences than similarities in the cases in which an application can be submitted. In Hungary everybody is invited to submit a complaint when she/he notices any unlawfulness during the process, whereas in Croatia remedies can be applied for only in restricted cases (namely, upon alleged irregularities in nomination procedure and election procedure and during voting) and only by those who are entitled, i.e., have legal interest in connection with the challenged case.

d) Pursuant to the different concept of challenging, the procedural rules differ with regard to submission and deciding on the case. One essential similarity can, however, be recognized, namely the deadline for (interim) decision being quite short, only 2 days in each case. The importance of this kind of regulation is found in the necessity of having the final results as early as possible after the election.

3. When focusing on remedies in electoral procedure we have to justify the reason of having such possibility to challenge. The reason lies in the feature and function of an election in a constitutional democracy.²⁹ In a democracy an election has to be periodic, competitive and democratic, reflecting the will of the people (voters) as much as possible (popular sovereignty). Elections have to be conducted according to the law (legal sovereignty). Based on these observations, the possibility of challenging a decision in the course of an election has to be provided; otherwise the implementation of popular sovereignty can be questioned. However, the efficiency of elections has to also be ensured in order to make the constitutional change of governmental actors as rapid and smooth as possible. This would help to exercise certain functions of competitive elections, such as: constituting representation; legitimizing the political/governmental system; representation of political and social

²⁹ See more in J. Petrétai, *Az alkotmányos demokrácia alapintézményei* [Basic institutions of constitutional democracy] (Budapest-Pécs, Dialóg Campus Kiadó 2009) pp. 219-221.

groups; canalizing political conflicts; creating parliamentary majority and controlling minority.

We noticed one major difference in the Croatian and Hungarian electoral remedy system, and this is mentioned under point V. 2. c) regarding the cases in which petition can be submitted and the persons entitled to do so. In our view, the legislature can weight different considerations and, as far as it is constitutional and does not conflict international obligations, can make its own choices, giving priority to one or the other alternatives. Our analysis revealed that the Hungarian legislative power seems to give priority to the human right character of remedies, whereas the *Sabor* seems to prioritize the public interest of rapid, effective parliamentary elections by restricting the cases in which a remedy procedure can be initiated, and by limiting the number of entitled persons for submission of a remedy.

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System of financing and budget of local and regional self-government units

I. Introduction

As current tax systems of the European countries show many similarities and much less differences, the principles of taxation and the trends are quite similar. In recent decades, one of the most important European taxation tendencies has been tax cuts, so reducing the tax burden, one element of which is the introduction of flat tax systems. Another important trend is the shift towards cooperative tax administration, and the increase of the role of local and regional taxation. Especially these last two items are discussed in this study.

The idea of local self-government dates back to a tradition of centuries in Europe. Local self-determination and exercise of power, although to different extends, appeared both in the concept of the Scandinavian '*tingsted*' (i.e., locality, the materialized expression of local autonomy in the early Middle Ages) and the British 'devolution' (i.e., decentralization of central authority). Marked differences and delimiting characteristics can be observed in both the horizontal and vertical structures of existing local self-governments of individual European countries, which developed with different characteristics. The systems having unique traits, despite the small and large differences, however, can be categorized according to the local government development path: they can be classified as per their formation, history, and related traits. Accordingly, European development path of local authorities

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draws up three main self-government models: the northern, the Napoleonic (Latin), as well as the intermediate model.¹

The models can be separated according to the level of autonomy. In the north, the Nordic model is the type of public administration based on stronger local self-governments, which fulfills traditionally a higher number and more significant public tasks, exercises wider powers providing considerable autonomy and allows greater flexibility (including, *inter alia*, Sweden, Denmark, Finland, Norway, Belgium, the Netherlands, Great Britain and Ireland)². The Napoleonic (or Latin) model compared to this grants a limited degree of autonomy to local governments (e.g., France, Spain, Italy, Greece and Portugal). The intermediate model is between these two types, by achieving local governments of medium level of power (such as Germany, Austria, Switzerland and Belgium).

The Hungarian and Croatian self-government systems belong to the intermediate model of the three basic types of self-governments according to economic autonomy and funding aspects. Both the Hungarian and Croatian model follow the European trends, since the types move toward each other, and, as a result of European unification, the elements, which could be separated earlier, converge due to the unifying principles.

The local government models show a number of differences, however, certain similarities, some traditional values occur in all countries. Certain values are specified by the legal regulation of every EU Member State, and are also declared by the European Charter of Local Self-government (hereinafter referred to as the Charter) accepted by the Council of Europe. Article 9 – which includes eight sections – (Financial resources of local authorities), the longest part of the Charter, regulates the finances of local governments. It provides detailed guidelines on local self-governments, and contains the following financial and economic management principles:

¹ E.K. Nyitrai, ed., *Helyi önkormányzatok és pénzügyeik* [Local Governments and Their Finances] (Budapest, Municipium Magyarország Alapítvány 2003) pp. 3-6.

² A. Torma, *Edited version of habilitation lecture held in the University of Miskolc on 2 May, 2002*, available at: <http://www.uni-miskolc.hu/~www.wallin/kozig/hirek/eukozig/onk_reform.pdf>, (last accessed on 24.06.2010).

- principle of income: the local authorities are entitled to their own financial resources, of which they may dispose freely within the framework of their powers;
- local authorities' financial resources shall be commensurate with the responsibilities provided for by the constitution and the corresponding law (the principle of entitlement to the financial resources adequate to the responsibilities);
- the principle of local taxation powers (local taxation rights, and the right to introduce other local payment obligations; part at least of the financial resources of local authorities shall derive from local taxes and charges of which, within the limits of statute, they have the power to determine the rate);
- reduction of financial disparities between the local self-government units (so-called equalization principle);
- the use of funds as per the statutory limits (the principle of expenditure);
- as far as possible, grants to local authorities shall not be earmarked for the financing of specific projects (the limitation of earmarked funds);
- the autonomy of management decisions within their own jurisdiction (principle of discretionary powers);
- participation in the central decision-making concerning local self-government finances (principle of participation).

The most important principle, in our opinion, is the entitlement to appropriate financial resources, which means, on one hand that the volume of municipal funds shall be commensurate with the extent of local government responsibilities set forth in the corresponding law in the legislation (Paragraph 2 of Article 9 of the Charter), and, on the other hand, the amount of funds allocated at the local self-governments can be considered as appropriate, if they keep pace with the cost of carrying out their tasks (Paragraph 4 of Article 9 of the Charter).

It is in accordance with the single European principles and unifying trends, that the Republic of Hungary developed its tax system in compliance with the requirements of the European Union, by fulfilling the related harmonization tasks, and that the Republic of Croatia has adopted solutions that are used by the majority of European countries. The current Hungarian tax system can be examined through two, and the Croatian through three fiscal levels. This paper deals especially with tax revenue of local and regional self-government units, by presenting the

way of realizing tax revenue, levying and collecting taxes, furthermore satisfying public needs on state, county and city levels.

The establishment of the tax system of the Republic of Hungary and the tax reform starting in 1988 faced, similarly to the changes in Croatia, problems and difficulties during the peaceful political transition into a constitutional state ready to introduce parliamentary democracy, and promote conversion to a socially alert market economy, and took similar examples as a basis. Furthermore, the harmonization need and tax legislation modified accordingly show several solutions that were used in the Republic of Croatia as well. Since the declaration of its independence, the Republic of Croatia has commenced thorough reconstruction of its tax system as well, since it had to meet the requirements of the new political system terminating the war period, as well as the challenges of market economy closing the socialist character. Essential tax reforms have brought the system closer to systems of the EU Member States, through its harmonization with taxation systems of developed European countries.

II. The tax system of the Republic of Hungary and the Republic of Croatia in revenue classification terms

The tax system is the totality of all types of taxes that are in force in the society in a certain period. Accordingly, the tax system of every country includes all tax forms existing in that country. Taking this into account, in this section we will therefore only mention the main elements of the tax systems of the two countries.

1. Tax system of the Republic of Hungary

a) Central taxes:

- corporate income tax,³
- simplified business tax,⁴
- value added tax,⁵
- excise tax,⁶

³ Act LXXXI of 1996 on Corporate Tax and Dividend Tax

⁴ Act XLIII of 2002 on Simplified Entrepreneurial Taxation

⁵ Act CXXVII of 2007 on Value Added Tax. See also Z. Ercsey, 'Általános forgalmi adó' [Value Added Tax] in Lilliné Fecz Ildikó, ed., *Költségvetési szervek gazdálkodása* [Financial Management of Budgetary Agencies] (Budapest, Verlag Dashöfer Kft. 2010)

⁶ Act CXXVII of 2003 on Excise Taxes and Special Regulations on the Distribution of Excise Goods

- registration tax on vehicles,⁷
- personal income tax,⁸
- duties.

b) Local taxes:⁹

- wealth taxes:
 - o building tax,
 - o property tax,
- community taxes:
 - o personal community tax,
 - o corporate community tax,
 - o tourism tax,
- local business tax.

c) Shared taxes in the Republic of Hungary:¹⁰

- personal income tax,
- tax on motor vehicles,
- duties,
- other shared types of revenue (e.g. fines).

2. Tax system of the Republic of Croatia

a) Central taxes:

- value added tax,¹¹
- profit Tax,¹²
- excise duty/tax on:¹³
 - o personal motor vehicles, other motor vehicles, vessels and airplanes,
 - o petroleum products,

⁷ Act CX of 2003 on Motor Vehicle Registration Duty

⁸ Act CXVII of 1995 on Personal Income Tax

⁹ The international figures show the dominance of central taxes. The wealth taxes are used among local taxes in the Anglo-Saxon countries. The surtax on income tax is the dominant in the Nordic countries, and local business tax is used as the highest proportion of local taxes by the third group of countries.

¹⁰ The taxation rights are delegated to the central state regarding the shared and assigned taxes. Accordingly, the revenue deriving from shared and assigned taxes is allocated to the self-government units by sharing of certain central taxes (tax-sharing). It is the decision of the state, which type of tax in what proportion and based on what principles shall be allocated to the self-government units. The general trend is that the specific proportion of personal income tax increases the budgetary revenue of the self-governments (besides the two scrutinized country, see for instance Austria and Germany).

¹¹ Law on VAT, Official Gazette 47/95, 106/96, 164/98, 105/99, 54/00, 73/00, 48/04, 82/04, 90/05, 76/07, 94/09

¹² Profit Tax Act, Official Gazette, 177/04, 90/05, 57/06

¹³ Every excise duty is regulated by specific law.

- alcohol,
- beer,
- non-alcoholic beverages,
- tobacco and tobacco products,
- coffee,
- luxury products,
- insurance premiums from automobile liability and motor vehicle insurance premiums.

b) County taxes:¹⁴

- inheritance tax,
- tax on motor vehicles,
- tax on boats,
- tax on gaming machines.

c) Municipal and town taxes:¹⁵

- surtax to income tax,
- tax on consumption,
- tax on holiday homes,
- tax on corporate title,
- tax on public land use.

d) Shared taxes:¹⁶

- income tax,¹⁷
- tax on sales of real estate.¹⁸

3. Concluding remarks

It can be clearly seen from the above review that besides a number of similarities – such as the regulation of value added tax and excise duty – there is a significant difference deriving basically from the different structure of public finances. The legal system of the Republic of Croatia separates clearly the local and county (regional) self-government units also from the point of view of tax law, whereas the effective Hungarian provisions specify these uniformly as the local fiscal level, and the two levels of state revenue, despite smaller failures, function in harmony. For instance, Act C of 1990 on Local Taxes, as a central legal framework, entitles the local self-government units to legislate and to

¹⁴ Law on Financing of Local and Regional Self-Government Units, Official Gazette 117/93, 33/00, 73/00, 59/01, 107/01, 117/01-correction 150/02, 147/03, 132/06, 73/08

¹⁵ Ibid.

¹⁶ Shared taxes are those whose revenue is divided between two or more fiscal levels.

¹⁷ Income Tax Law, Official Gazette, 177/04, 73/08, 80/10

¹⁸ Tax on Sales of Real Estate, Official Gazette 69/97, 153/02

form the local tax system, but the the calculation of applicable taxes operating since 1998 could also be mentioned, according to which the volume of local taxes levied by local self-government units shall be taken into account as well regarding the state subsidies. In respect of the duties, as shared (assigned) taxes, it shall be pointed out that according to the Hungarian tax system, duties¹⁹ form a group separate from taxes, and are part of revenues of the central budget – which is partly assigned to the local self-government –, whereas these duties are specified and levied by the counties as per the Croatian regulation. The VAT, excise duty, and profit taxes are central taxes in both countries as indicated above. It is intriguing that the excise duty in the Republic of Croatia is related to the types of taxes similar to VAT (for instance, tax on luxury products, tax on non-alcoholic beverages), whereas in Hungary it shall be paid only regarding excise products²⁰ (so fuel products, alcoholic beverages, and tobacco products). It is a further similarity that the tax on certain buildings (although expressively it is in force only in relation to holiday homes in Croatia), and the tax on public land use (although that is not considered as a type of local taxes in Hungary, but the local government regulates it in a decree) belong to self-governmental (local) taxation and revenue. It is only a formal difference from the point of view of revenue allocation, but from the point of self-determination and the point of self-government financial management, it is a significant difference that the tax on motor vehicles is a central type of tax in the Republic of Hungary, which is assigned by the fiscal level of the central governmental budget to the local self-governments, whereas the determination thereof belongs exclusively to the jurisdiction of the county in Croatia.

III. Powers and responsibilities of local and regional self-government units

The local self-government is the local level of public finances, which performs specified public duties based on its revenue. The public duties, on which the revenue of the local self-government rests and have to be spent, are the following.

¹⁹ Act XCIII of 1990 on Duties

²⁰ Para (2) of Section 3 of the Act CXXVII of 2003 on Excise Taxes and Special Regulations on the Distribution of Excise Goods lists the excise goods. Accordingly, excise goods are the mineral oils, alcohol and alcoholic beverages, beers, wines, sparkling wines, intermediate alcoholic products, and tobacco products.

1. The powers and responsibilities of local self-governments in the Republic of Hungary

Local self-governments may – within the framework of an act – independently regulate and in certain cases freely manage the public affairs that fall within their jurisdiction, furthermore obligatory powers and responsibilities of local self-governments may be prescribed by an act, in which the financial resources necessary for carrying out such powers and responsibilities are simultaneously designated as well. It may independently and voluntarily undertake to resolve any public affair that is not allocated upon any other authority by statutory provision. In public affairs undertaken voluntarily, self-governments may do anything that does not violate the law; however, the resolution of voluntarily undertaken public affairs may not endanger the performance of the municipal powers and responsibilities statutorily prescribed by an act. The basic rights of the different local self-government units are the same, their tasks are different for several reasons. There is no hierarchical relationship between the municipal and county self-government units; they cooperate in performing their functions on the basis of mutual interest.

a) Responsibilities and powers of municipalities

According to the Hungarian regulation, the powers and responsibilities of local, therefore municipal self-government units may be voluntary or mandatory, therefore are divided into two categories: obligatory functions, and freely undertaken (optional) tasks.²¹ Local authorities shall be responsible for providing the following services to the local public: regional development, spatial planning, protection of the built and the natural environments, housing management, water resources planning and drainage, sewer system, maintenance of public cemeteries, maintenance of local public roads and public areas, providing parking facilities for road vehicles on local public roads, on private roads owned by the local municipal government which are open to the general public, as well as in squares, parks and other similar public land, local mass transit, public sanitation and ensuring the cleanliness of the locality; providing for local fire protection and public safety; participation in the local supply of energy, in employment related matters; provision of

²¹ N. Chronowski and E. Rózsás, *Alkotmányjog és közigazgatási jog* [Constitutional Law and Administrative Law] (Budapest-Pécs, Dialóg Campus Kiadó 2005) p. 335.

kindergartens, primary education, health and social services as well as other responsibilities concerning children and youth; provision of community space; support of public education, scientific and artistic activities, of sports; ensuring the enforcement of the rights of national and ethnic minorities; promotion of the community conditions of a healthy way of life. It belongs to the responsibility of local authorities of municipalities to provide for the supply of safe drinking water, kindergarten education, primary school education, basic health and social benefits, public lighting, maintenance of local public roads and the public cemetery, to provide parking facilities for road vehicles on local public roads, on private roads owned by the local municipal government which are open to the general public, as well as in squares, parks and other similar public land; and to ensure the enforcement of the rights of national and ethnic minorities.

b) Powers and responsibilities of county governments

The county government is a regional self-government, and it must carry out the responsibilities prescribed by law for which local authorities cannot be compelled. A county government may be compelled by law to provide public services of a regional nature that cover the entire county or a large section of the county, furthermore to provide public services of a regional nature whose users for the most part do not reside on the territory of the local authorities where the institution providing the service is located. The fundamental purpose of the county is to provide public services on an additional, assistant (subsidiary) basis, which cannot or be performed or are not undertaken by the municipalities and/or their associations due to their economic position. County governments shall be compelled to provide for the following: secondary school, vocational schooling and student dormitory facilities; the collection, safekeeping, scientific processing of the county's natural and cultural relics and historical documents; the services of a county library, consulting and services in the range of pedagogy and general education; tasks of physical training, sports organization, as well as the enforcement of the rights of children and youth; furthermore education of children who are undergoing extended medical treatment in health care institutions; education, schooling and care of handicapped children who cannot be educated together with the other pupils; special health care exceeding basic care; as well as the provision of child and youth protection; regional coordination of specialized social services; as well

as certain tasks falling within the scope of specialized provisions; coordination of the responsibilities connected with the protection of the architectural and natural environment, regional planning, the exploration of the county's tourism values, setting objectives related to tourism in the county, coordinating the activities of those participating in the performance thereof; as well as the coordination of regional employment tasks and vocational training and participation in the development of a regional information system; furthermore it shall be liable to enforce the rights of national and ethnic minorities. In addition to the performance of its legal responsibilities, the county government may freely undertake a public duty that is not delegated to the exclusive competence of another body by law and whose performance does not violate the interests of the villages and towns located in the county.

2. The powers and responsibilities of local self-governments in the Republic of Croatia

The Croatian Law on Local and Regional Self-Government²² regulates the scope of functions of municipality and city separated from the powers and responsibilities of the county.

a) The scope of municipality and city

The Croatian regulation states that municipalities and cities in their self-governing domain (scope) perform the services of local importance which directly actualize the needs of citizens, not assigned by the Constitution and laws to the national authorities and in particular services related to:

- planning of settlements and housing
- spatial and urban planning
- utility services
- childcare
- social care
- primary health care
- education and primary education
- culture, physical culture and sport
- consumer protection
- protection and enhancement of natural environment

²²Law on Local and Regional Self-Government, NN br. 33/01, 60/01, 106/03, 129/05, 109/07, 125/08

- fire and civil protection
- traffic in their area

other activities in accordance with special laws.

b) The scope of functions of a county

According to the Croatian provisions, the county conducts services of regional importance, not assigned to the national authorities by the Constitution and laws. Thus, the scope of functions of a county can be original (self-governing) and delegated (services of state administration). County in its self-management scope performs services relating to:

- education
- health care system
- spatial and urban planning
- economic development
- transport and transport infrastructure
- public roads maintenance
- educational, health, social and cultural institutions network planning and development
- issuing construction and location permits and other documents related to construction and implementation of spatial planning documents for the county outside the big city
- other activities in accordance with special laws.

By the decision of the representative body of a local self-government unit in accordance with its statute and the statute of the county, some functions and tasks of self-government scope of the municipality or city can be transferred to the county. Delegated services relate to services of state administration which are carried out by a county and are defined by law. The costs of these services shall be paid from the state budget.

3. Concluding remarks

The powers and responsibilities of the local self-government units are regulated at statutory level in both countries. The scope of activities and functions are determined the same way by the two referred statutes, although a different approach is used. On the one hand, the corresponding Hungarian statute, by using a reverse idea that is based on the standpoint of the limited opportunities of the municipality and the larger area of the county administrative units, states that the county and regional self-government units must carry out the responsibilities prescribed by law for which municipalities cannot be compelled;

furthermore it may be compelled by law to provide public services of a regional nature that cover the entire county or a large section of the county.²³ The powers and responsibilities of the municipalities (village, town, the capital and its districts) and county governments are determined by the Hungarian provisions the same ways as they are specified in the Croatian system.²⁴

Article 19 of the Croatian act and Section 1 of the Hungarian act contain very similar rules. Pursuant to the referred provision of Article 19, local and regional self-government units in their self-governing scope perform the tasks of local importance, and especially see to jobs that are not constitutionally or legally assigned to government bodies, relating to the planning of settlements and housing, spatial and urban planning, social welfare, primary health care, education, etc. According to Subsection 1(1) of the Hungarian act, the local self-government (villages, towns, counties, the capital and the capital's districts) shall act independently in local public affairs within their scope of responsibilities and jurisdiction (hereinafter referred to as 'public affair'), so in relation to providing local residents with public utilities, locally exercising public power through self-government and creating the organizational, personnel and financial conditions for these.

The powers and responsibilities of the Hungarian municipalities, also due to the two separate groups of functions, partly differ from the ones of the Croatian units, since they – besides the mutual obligatory tasks such as kindergarten education, primary school education, basic health and social benefits – have to provide the supply of safe drinking water, public lighting, maintenance of local public roads and the public cemetery, to provide parking facilities for road vehicles on local public land; and, as a significant guarantee, to ensure the enforcement of the rights of national and ethnic minorities. Additionally, most of the other functions in the Croatian system may be performed as voluntary tasks depending on the financial resources and the needs of the population.

It is identical in the two pieces of legislation that the county in its self-management scope performs services relating to education, health care system and spatial and urban planning.

²³ Subsection 69(1) of Act LXV of 1990 on Local Self-Governments

²⁴ The Hungarian Constitution, the Act LXV of 1990 on Local Self-governments, and Act XX of 1991 on the Powers and Responsibilities of the Local Self-governments and the Bodies thereof, furthermore Certain Central Subordinated Bodies

The Croatian regulation lists additionally the following tasks: economic development; transport and transport infrastructure; public roads maintenance (which is a task of the local authorities in the Hungarian system); educational, health, social and cultural institutions network planning and development; issuing construction and location permits and other documents related to construction and implementation of spatial planning documents for the county outside the big city; other activities in accordance with special laws; which is in correlation with the Hungarian regulation as described above (except the powers related to the issue of different permits regarding construction). The Hungarian regulation contains also a few more responsibilities, for instance the exploration of the county's tourism values, setting objectives related to tourism in the county.

IV. The revenue of local and regional self-government units

Financing of local and regional self-government units in decentralized countries is of great importance, both for the development of the overall economy, as well as for the development of local and regional self-government units which carry out the logic of polycentric development. To satisfy this postulate it is necessary to find the optimal method of financing. Local and regional self-government units, in order to have the tasks performed, have to ensure revenues in their budgets which are proportional to expenditures, from their own sources, of shared (assigned) taxes and grants from state and, in the Republic of Croatia, county budgets.

1. The revenues of local and regional self-government units in the Republic of Hungary

The local self-government units accumulate funding for their responsibilities from their own revenues, assigned (shared) central taxes²⁵, revenues received from other economic organizations, the normative contributions of the central budget as well as subsidies. The self-government's own revenues are local taxes as per point II.1.b) assessed and levied by the local authorities in compliance with the law; business income, income derived from charges,²⁶ capital gains,²⁷ privatization receipts,²⁸ loans,²⁹ other income.³⁰

²⁵ See point II.1.c).

²⁶ E.g. public land-use fees and the institutional tuition fees.

As explained in detail in the previous chapters, in economic terms the local self-government units are treated uniformly in the Republic of Hungary – except that the self-governments of the counties have no taxation rights – and therefore despite the municipal and county governments have varying tasks and powers, they do not differ in terms of assets and revenues, and the same set of uniform rules shall be applied for their financial management.

Local taxes provide taxation power and therefore autonomy to the local self-government,³¹ and essentially they could not be calculated to the wider range of state subsidies either. In contrast, the example of tax-ability test of the local governments could be mentioned that used to be previously in force in the Hungarian legislation, according to which the state determined the amount of subsidies provided for the local authorities by taking into account the taxing opportunities of the local authorities, irrespectively whether the total actual tax rate applied or not. Accordingly, the local authority which refused to levy the maximum rate of tax set forth by the legal provisions, received less subsidy with this not-levied and not-collected amount.

In accordance with the authorization of Act C of 1990 on Local Taxes under limits defined in the act, the representative body of the local government could introduce local tax regimes by a decree within its area of jurisdiction. The taxable subject is the real property and the related property rights, employment, and the temporary stay within the territory of the municipality as a not permanent resident, furthermore business activity. Actual tax liability may be established only by a municipal decree.

Within the right of taxation, the local government is entitled to introduce the statutory tax categories, to define the tax rates and the related

²⁷ Dividends, interest, and foreign exchange gains.

²⁸ E.g. real estate sales.

²⁹ Financial institutions, bond floatation.

³⁰ E.g. fines, donations, gifts.

³¹ Joining the European Union generated judicial harmonization obligations for Hungary even regarding local taxes, in order to avoid harmful competition as regulated by the Chapter of Competition. The Hungarian act on local taxes – being unique in Europe – provided wide powers for the local self-government units: they became entitled to decide upon the introduction and operation of the types of taxes that generate significant revenue. The tax rate of the levied tax as well as the specification of allowances are determined exclusively by the local government as well.

benefits and exemptions, as well as to establish the detailed rules of local taxation. The municipality is entitled to reduce or dismiss the local tax imposed thereby due to reasons of equity, however, the regulation may be modified only for the benefit of the taxpayer: any amendment instituted during the year may not increase the tax obligations of taxpayers in the same calendar year. The tax rate may be defined with due consideration of local characteristics, the financial requirements of the local government and the capacity of taxpayers, in observation of the upper limits prescribed by the act.³² The local self-governments may provide exclusively such allowances and exemptions for the undertakings, for which the act specifically authorizes them. In respect of any particular tax category, taxpayers may only be obliged to pay one type of tax.³³

2. Revenue of local and regional self-government units in the Republic of Croatia

Revenue of local and regional self-government units:

- income from movable and immovable objects in their possession;
- income from companies and other legal entities in their ownership and revenue from concessions granted by local self-government units;
- revenue from the sale of movable and immovable objects in their possession;
- gifts, inheritances and legacies;
- municipal, town and county taxes and fees and duties, whose rates, within the limits specified by law, are determined independently;
- government assistance and grants provided by the state budget or a special law;

³² According to a research done between 2002 and 2007 based on approximately 2,500 pieces of eight-page-questionnaires, raising the rates of local taxes (unlike for example the increase of the excise tax burden) is rejected by the groups of society in Hungary. See C. Szilovics, *Adózási ismeretek és adózói vélemények Magyarországon (2002-2007)* [Taxation Knowledge and the Opinion of the Taxpayers in Hungary (2002-2007)] (Pécs, G&G Kiadó 2009)

³³ V. Srb and R. Perić, *Javne financije-knjiga I* [Public Finance – Volume 1] (Osijek, University J. J. Strossmayera Faculty of Law in Osijek 2004) p. 91.

- compensation from the state budget for performing services of the state administration, which were conveyed to them;
- other revenue determined by law.

The Law on Financing of Local and Regional Self-Government Units determines the resources of funds and financing services from the scope of the counties, municipalities and cities.

a) County revenue

- Revenue from the own property of the local self-government:
 - o income from movable and immovable objects in the possession of the county,
 - o income from companies and other entities owned by the county,
 - o revenue from the sale of movable and immovable objects in the possession of the county,
 - o gifts, inheritances and legacies.
- County taxes (see point II.2.b).
- Fines and confiscated assets for the offenses that are prescribed by the county itself.
- Other revenue determined by special law.

b) Municipal and town revenue

- Revenue from own property:
 - o income from movable and immovable objects in the possession of the municipality or town,
 - o income from companies and other entities owned by the municipality or town,
 - o revenue from concessions granted by local self-government units,
 - o revenue from the sale of movable and immovable objects in the possession of the municipality or town,
 - o gifts, inheritances and legacies.
- Municipal and town taxes (see point II.2.c)
- Fines and confiscated assets for the offenses that are prescribed by the municipality or town themselves.
- Administrative fees in accordance with a special law.
- Residence fees in accordance with a special law.
- Utility charges for the use of municipal or city facilities and institutions.
- Utility charges for the use of public or municipal urban areas.
- Other revenue determined by special law.

3. Concluding remarks

The local self-governments of two countries have similar income structure; they manage their finances from the same sources and cover the obligatory and optional functions specified in Chapter III above with

similar types of funds. The types of income are the same, the self-governments provide the funds covering their budgetary expenses from their own revenues, assigned (shared) central taxes, furthermore different grants and subsidies received from the central budget.

V. A detailed analysis of local taxes

There is no specific regulation in the European Union concerning local taxes. Each Member State is free to decide what types of taxes shall be managed by the local self-government units, and what limits are prescribed for them. The only requirement is that the tax system shall contain such types of taxes, the rate of which is determined by the self-government within the limits set forth by the corresponding law.³⁴ Therefore, in our opinion, both the Hungarian and the Croatian regulations are EU-conform.

1. Inheritance tax and gift tax

a) Duty on inheritance and gifts in the Republic of Hungary

Duties on inheritance and gifts are central duties in the Republic of Hungary, which are levied and collected by the Hungarian Tax and Financial Control Administration (hereinafter: APEH). The local reference thereof is just that according to section 48 of Act CXXX of 2009 on the Central Budget of the Republic of Hungary (hereinafter referred to as the Finances Act) the central budget is entitled to 50% of the revenue derived from inheritance tax and gift tax, and the remaining 50% thereof – deducted with the collection costs – shall belong to the budget of the self-governments of the capital, county, and the county of a city. The costs to be deducted are specified clearly as per the intention of the legislator, they form a certain quota of the revenue: 4% of the revenue collected from the duties on the territory of the Metropolitan Self-government shall be retained therefrom, and 8.5% of the amount of duties collected on the territory of the county self-government and the self-government of a county of a city shall be retained therefrom (according to Subsection 48(4) of the Finances Act).

The subject of inheritance duty is the property acquired on the basis of inheritance – including redemption of usufruct, and takeover of an independent medical practice – devise or bequest, a compulsory share of

³⁴ Cf., C. Szilovics, *Csalás és jogkövetés az adójogban* [Tax Fraud and Tax Compliance] (Budapest, Gondolat Könyvkiadó 2003) p. 129.

inheritance, or a gift *causa mortis*. The subject to duty payment on gifts is gifts of real property and movable property, furthermore gratuitous creation of a right of pecuniary value, surrender of such right or the exercise thereof without consideration, and the waiver of such right without consideration.

The amounts of duty on inheritance and gifts shall be calculated on the net value of the inheritance or gifts received by any one heir, legatee or donee, according to the rates set forth in the tables indicated in the related act. The calculation shall be made according to the degree of kinship of the beneficiary (the act separates 3 groups: spouse, adopted, and step-children, parents; brothers and sisters; furthermore all others) and the type of property acquired (favourable rates are applicable for the acquisition of residential property).

Since the duties belong to the central types of tax burden, here are just some examples of the complex system of exemptions and allowances (the itemized list of exemptions for certain taxpayers and transactions) set forth in the Hungarian provisions:

The following shall be exempt from inheritance duty and/or duty on gifts:

- the acquisition of assets scientific, artistic, educational, cultural, and public welfare purposes;
- inheritance and gratuitous acquisition of savings deposits;
- the fraction of movable inheritance with a market value of less than 300 000 HUF per heir;
- inheritance of usufruct or use of residential property by the surviving spouse;
- gifts provided to public-benefit organizations for the purposes of public service activities;
- gratuitous acquisition of the management right of residential property.

b) Inheritance tax and gift tax in the Republic of Croatia

Inheritance tax and gift tax are county taxes in the Republic of Croatia, and form entirely the revenue of county self-government units. According to the applicable Croatian regulation, taxpayer is a legal entity or natural person who in the Republic of Croatia inherits or receives a gift or gains on some other basis without compensation a property on which inheritance or gift tax is paid. Inheritance and gifts tax is not to be paid if VAT on inherited/gift movables has already been

paid. Tax base makes the cash total and market value of financial and other assets on the day of tax determination after all debts and costs related to assets have been paid. The tax is paid on cash, securities and monetary claims, furthermore on movables if their individual market value is more than 50,000.00 HRK on the day tax obligation is determined. Inheritance, gift or acquisition of real estate is taxed by tax on sales of real estate. The tax rate is prescribed by the county and amounts to 5%.

Inheritance and gifts tax are not to be paid by:

- spouse, consanguinity lineal and adopted children and adoptive parents of the deceased or the donor;
- brothers and sisters or their descendants, son in law, daughter in law of testator or donor, if they lived in the same household with the testator at the time of his death or with the donor at the time of receiving the gift;
- natural and legal persons to whom the Republic of Croatia or local and regional (regional) self-government units donate or give movable without compensation for damages or for other reasons related to Homeland War;
- Republic of Croatia or local and regional (regional) self-government units and national authorities, bodies of local and regional self-government units, public institutions, religious communities, foundations and trusts, the Red Cross and other humanitarian organizations established by special regulations;
- natural and legal persons when receiving gifts (donations) for the purposes regulated by specific law.

Counties may by their decisions prescribe other exemptions and reliefs.

c) Concluding remarks

The inheritance and gift tax differ in the two states basically due to the local or central nature of the type of these taxes (duties) and because of the related characteristics thereof. Accordingly, these form entirely the revenue of county self-government units in the Republic of Croatia, while in Republic of Hungary they are shared between the central government budget and the local authorities. The Croatian county may decide, in relation to these types of taxes, on the introduction, the rate within the statutory ceiling, and the scope of exemptions, whereas no such opportunity is provided for the local governments in Hungary.

The Croatian inheritance and gift tax, however, differ not only because of the local characteristics unlike the central type of the Hungarian one, but also because these local taxes do not extend to the free acquisition of real estates, whereas inheritance and gift duties are levied on those transactions in Hungary.

Further difference is that a wider range of exemption is provided by Croatian system, and the exemptions are primarily of personal nature, much less exemptions are related to certain types of transaction. The collateral kin as beneficiary for the second group is not exempt from tax at all in Hungary. It is a common element of the two systems though, that gifts provided for certain purposes are exempt from tax.

2. Tax on motor vehicles

a) Tax on motor vehicles in the Republic of Hungary

In Hungary, this type of tax as a central tax is regulated in detail by Act LXXXII of 1991 on Motor Vehicle Tax. Accordingly, the taxable person is registered as the operator or the owner on the first day of the year. Car is 'is a vehicle that has two or three wheels and a maximum design speed is more than 45 km/h, and a four-wheeled vehicle with an unladen weight not exceeding 550 kg and an engine not exceeding 15 kilowatts'.³⁵

The following are exempted from tax in Hungary:

- the budgetary agency,
- in the case of specific conditions, the social organization, the foundation after the car owned thereby,
- the bus in particular case,
- motor vehicle owned by the church,
- firefighter cars of economic organizations, maintaining fire department,
- the disabled person with a severe disability, and the a piece of vehicle (less than 100 kW power cars) used to transport, owned by him/her and parents living together with her,
- the electric-only cars,
- the vehicle, of which tax exemption provided by international treaties or reciprocity,

³⁵ Point 7 of Section 18 of Act LXXXII of 1991 on Motor Vehicle Tax

- vehicle owned by determined international organizations, armed forces.

According to Subsection 49(1) of the Finances Act, 100% of the tax on domestic motor vehicles collected by the municipality remains at the local authority.

b) Tax on motor vehicles in the Republic of Croatia

The taxpayer is a legal and natural person as the owner of a licensed passenger car and motorcycles. A passenger car is a motor vehicle for transport of persons that besides a driver's seat includes up to eight seats and its loading capacity is limited to 250 kg. A motorcycle is a two-wheeled motor vehicle with or without a side car and a three-wheeled motor vehicle with a weight up to 400 kg. Object to taxation is a personal vehicle (up to 10 years of age) and a motorcycle. The amount of tax is calculated according to engine power expressed in kW and age of vehicles.

Tax on motor vehicle is not payable for:

- vehicles owned by the Republic of Croatia and local and regional self-government units;
- vehicles owned by state administration bodies and bodies of local and regional self-government units;
- vehicles owned by health clinics and fire brigades;
- vehicles of diplomatic and consular missions and foreign diplomatic personnel;
- special vehicles by which owners perform registered activity of transport of the deceased and taxi services.

Tax on motor vehicles does not have to be paid by persons who were fully exempt from customs duties and VAT when purchasing vehicles. Counties may by its decisions prescribe other exemptions and reliefs.

When changing the ownership of motor vehicles during a calendar year, the new owner does not pay tax on motor vehicle if such tax was already paid by a previous owner. If during the calendar year a new vehicle is purchased, the new owner has to pay an annual tax deducted for the part of the year prior to purchasing vehicle.

c) Concluding remarks

In the European Union, the tax on motor vehicles was considered as a potential obstacle for the creation of the Common Market already in the sixties. The Commission, in order to eliminate the discrimination and

the factors that distort competition, already made a proposal to harmonize the taxation of commercial vehicles in 1968, but till the early nineties, the harmonization of this direct tax did not happen. Although the EU has achieved considerable success in harmonization on the field of the commercial vehicle taxation, the harmonization of taxation of private cars is still to be done. The current tax rules largely leave the issue of taxation of passenger cars to Member States, and as a result, except for some Member States (e.g. France), annual tax is due in all Member States after the passengers car. According to the Commission's current proposal for harmonization taxes on the car registration should be paid in the form of sales tax in all Member States by gradually reducing the annual registration fees.

The harmonization of taxation of personal motor vehicles is still a significant issue. Basically the matter of type and level of taxation on motor vehicles has come under the Member States yet. The registration tax is prevalent in many countries, which because of the nature of one-time (setup charge) has not implemented the requirement of fairness and proportionality, as there is significant difference in the rate defined by Member States.³⁶

In our views, both the Croatian and Hungarian legislation is in line with the EU efforts and regulatory trends. The determining concepts (taxbase, tax subject, car), and the method of calculating the tax rates accordingly are defined by the Hungarian and Croatian legislature. Similarity, in both states the tax (in Hungary the municipal, in Croatia the county governments) are collected and used by local authorities.

3. Tax on real estates

a) Tax on real estates in Hungary

In the Republic of Hungary, the local taxes on real estates are mainly property tax and building tax, furthermore one type of tourism tax.

Building tax (in this form only in Hungary)

The structures located in the area of jurisdiction of a local government, dwelling places, buildings and building sections not used for housing purposes, as well as the related parcel of land shall be subject to tax liability. The person subject to tax liability is the person who is the owner of the building as of the first day of the calendar year (if there is

³⁶ T. Öry (ed.), *Az Európai Unió adójoga* [The Tax Law of the European Union] (Budapest, Osiris Kiadó 2003) pp. 403-405.

more than one owner, the owners shall be subject to taxation in the percentage of their respective ownership share in the property); if there is any incorporeal right registered on the building in the real estate register, the person registered as the holder of such right shall be subject to tax liability. The following shall be exempt from tax: temporary housing units; 100 square meters of a dwelling place without any amenities that is located in a small settlement not qualifying as a health or holiday resort; premises used for the purposes of social, health care, child welfare and educational institutions; buildings owned by budgetary agencies, religious organizations; and buildings registered in the real estate register as being used for animal husbandry or plant cultivation (e.g., stables, greenhouses, facilities for storing crops or fertilizer, barns) if they are used solely for such activities. The tax liability shall commence on the first day of the year following the year when the occupancy or continuation permit was issued. For buildings built or occupied without a permit, tax liability shall commence on the first day of the year following the year when the building was occupied. The tax base, depending upon the decision of the local government, shall be the net floor space of the building expressed in square meters, or the adjusted market value of the building. The maximum rate of tax per annum is 900 HUF/square meter if the tax base is established in square meters, or 3% of the adjusted market value, if the tax base is established in accordance with the adjusted market value.

Property tax, tax on land parcels (in that form only in Hungary)

Undeveloped parcels of land situated in incorporated areas within the area of jurisdiction of a local government shall be subject to taxation. The person subject to tax liability is the person who is the owner of the land parcel on the first day of the year. If there is more than one owner, the owners shall be subject to taxation in the percentage of their respective ownership share in the property. If there is any incorporeal right registered on the land parcel in the real estate register, the person registered as the holder of such right shall be subject to tax liability. The following shall be exempt from tax: land parcels subject to building ban until the ban is lifted; taxpayers providing scheduled local and long-distance public transportation services, in respect of land parcels used for such purpose; portions of parcels subject to building tax; the safety (protection) zone of buildings, structures not qualifying as building, or public utility lines; land parcels registered in the forestry sector. Tax liability commences on the first day of the year following the year when

the resolution of the local government for the incorporation of a land parcel is promulgated, or when the land is removed from agricultural production and/or its designated cultivation profile is changed, or in connection with any building that is demolished or destroyed, on the first day following the half-year period when the building was in fact demolished or destroyed. The basis for tax, depending upon the decision of the local government, shall be the actual area of the land parcel expressed in square meters, or the adjusted market value of the parcel. The maximum rate of tax per annum is 200 HUF/square meter if the tax base is established according to the square meter calculation, or 3% of the adjusted market value if the tax base is established in accordance with the adjusted market value of the parcel.

Tourism tax (in that form only in Hungary)

Only one form of this type of Hungarian local taxes – as discussed below – belong to the real estate taxes. A private individual shall be subject to tax liability,

- who is not a permanent resident, spending at least one guest-night within the area of jurisdiction of a local government, or
- who is the owner of a building designed for recreational purposes, which does not qualify as a dwelling place and is located within the area of jurisdiction of a local government.

Therefore tourism tax has two separated subjects: the stay at the territory of the self-government and the holiday building located at the territory of the self-government. Tourism tax to be paid upon the stay shall be collected by the hosts of private lodgings or the agency for private lodgings; therefore it is an indirect type of tax. The tourism tax to be paid upon the holiday building is basically a real estate tax, which is applicable only for a building designed for recreational purposes owned by a private individual. The building separate from the holiday building and used temporarily for recreational purposes (for instance boat-house) shall be considered also as taxable object. Private individuals under the age of 18; or receiving inpatient care in health institutions or regular care in social institutions; and who reside within the jurisdictional area of a local government because they are students in an institution of secondary or higher education, under official or court order to do so, undergoing vocational training, fulfilling a service obligation, furthermore entrepreneurs pursuing business activities who have a registered office or place of business in the community or an employee in such a company, last but not least private individuals who own or

lease a holiday resort which is located in the area of jurisdiction of a local government shall be exempt from tax regarding the tax to be paid upon spending a guest-night. The tax base is the number of guest-nights and any fraction thereof or the accommodation fee for a guest-night; or the net floor space of the building in respect of the tax liability of the nature of real estate tax. The maximum rate of tax is HUF 300 per person and per guest-night or 4% of the tax base; or, regarding the tax to be paid upon the holiday building, 900 HUF/ square meter payable annually for the building in question.

b) Tax on holiday homes in the Republic of Croatia

The taxpayer is a legal entity or natural person, who is the owner of a holiday home. Holiday home is any building, its part or apartment used occasionally or seasonally. A holiday home is not considered to be a building which serves as accommodation for agricultural machinery, tools and other accessories. The tax basis is a square meter of usable area of the holiday home. The tax amount is from 5,0 to 15,00 HRK per square meter of usable area. The municipality or city prescribes the amount of tax on holiday homes, depending on location, age and state of infrastructure and other relevant circumstances.

The tax on holiday homes is not to be paid on:

- holiday home that cannot be used because of war destruction and natural disasters (flood, earthquake, fire), age and fragility;
- holiday home while it accommodates displaced persons and refugees;
- resort owned by local and regional self-government units that accommodate children under 15 years of age;
- municipality and the city may prescribe other exemptions from tax on holiday homes regarding economic and social reasons.

c) Concluding remarks

The Hungarian regulation entitles the local self-governments to introduce property tax and building tax as wealth tax. The self-government may choose how to determine the tax base of these types of taxes: either according to the net floor space of the real estate expressed in square meters, or the adjusted market value thereof. The decision, however, shall be made uniformly together for both types of tax. Both of them are annual taxes, therefore the taxpayer shall remain the same, even in case of change of ownership during the tax year, that is

connected to the title and ownership as per the first day of the tax year. Tourism tax is a community tax in the Hungarian system, one form of which – tax levied on holiday building located at the territory of the self-government – shows conformity with the tax on Croatian holiday homes. Thus the regulation of tax on holiday homes is part of the tax system of both countries, although with different names, but with the same content. The object and subject of tax, as well as the tax base are completely the same in both statutes. The only difference is that the Hungarian provisions determine the upper limit on the one hand, and the Croatian act determines a frame including a lower limit as well on the other hand, also includes broad exemptions, which are entirely lacking from the Hungarian system.

4. Tax on vessels

a) Tax on vessels in Hungary

This type of tax was introduced and regulated by Act LXXVIII of 2009 on High-value Property Tax in the Republic of Hungary. According to this act, the vessels registered in the official records, as well as the vessels owned by the Hungarian residents as per the act on personal income tax or legal enterprises registered in Hungary which are not registered in the official register, but are suitable for the registration according to their technical conditions, or their registration took place abroad, used to be subject to tax. The taxpayer was the person or enterprise registered as the owner of the vessel on the first calendar year (in case of several owners, the property owners proportionally classified as taxpayers), the tax liability was established on the first day of the year following the acquisition of ownership of the vessel. The tax should be paid according to the nominal square meter surface of the sail of the vessel, and the engine power expressed in kW, upon the number of square meters, and the fix amount as per each kW. This type of tax, as well as the applicable Act LXXVIII of 2009 was declared void by Section 33 of Act XC of 2010, by 16 August 2010.

b) Tax on vessels in Croatia

The taxpayer is a legal and natural person, the owner of a vessel. Subject to taxation is a vessel according to its length in meters, with or without a cabin and according to engine power expressed in kW. Tax on vessels is not to be paid on vessels by which registered service is provided and on vessels owned by domicile inhabitants living on islands that have a

purpose of necessary organization of life on the island. Counties may by their decisions prescribe other exemptions and reliefs.

c) Concluding remarks

Such type of tax was in force in Hungary just as a central type of tax, currently exists only in Croatia, where it may be levied as a local tax belonging to the powers of the county self-government units. However, the idea and principles of the regulation rested on the same grounds.

5. Tax on gaming machines

a) Tax on gaming machines in the Republic of Hungary

This type of tax forms part of the central revenue: according to Section 33/A of Act XXXIV of 1991 on Organization of Gambling, the annual tax of gaming machines is HUF 60,000. The gaming machine operator is obliged to file a registration request at the Hungarian Tax and Financial Control Administration (APEH) in every six months, furthermore to indicate and simultaneously pay the amount of tax for the period of 6 months by the 20th day of the month prior to the submission of the registration request.

b) Tax on gaming machines in the Republic of Croatia

The taxpayer is a legal entity or natural person who puts gaming machine into use in entertainment centers, restaurants, public buildings and other public premises. Gaming machines are considered to be machines used for organizing entertaining games on computers, simulators, videogames, pinball, darts, snooker, table football and alike that are put into operation with coins, tokens, or surcharge, where a player does not win money, things or rights. Subject to taxation are gaming machines put into use in entertainment centers, restaurants, public buildings and other public premises. The tax amounts to 100 HRK per month per machine. Tax on gaming machines is not paid on snooker if labelled by the Croatian Snooker Association.

c) Concluding remarks

This type of tax is a central one in Hungary, and a local one in Croatia. This different characteristic can be seen regarding the regulations as well: this particular tax is of fix amount that belongs to the central government tax revenue in Hungary, whereas it can be levied by the county self-governments within a frame specified in the act in Croatia.

6. Surtax to income tax (in that form only in Croatia)

The taxpayer is obliged to income tax if domiciled or habitual resident in the municipality or city that prescribed the obligation for surtax. Tax basis is the amount of income tax. Municipality or city can prescribe that tax payers in their territory have to pay surtax to income tax as follows:

- municipality at a rate of up to 10%;
- city under 30,000 inhabitants at a rate of up to 12%;
- city above 30,000 inhabitants at a rate of up to 15%;
- City of Zagreb at a rate of up to 30%.

7. Tax on consumption (in that form only in Croatia)

The taxpayer is a legal entity or natural person who provides catering services. The tax basis is the sales price of beverages that are sold in restaurants. Tax on consumption is paid on the consumption of alcoholic beverages (cognac, brandy and spirits), natural wine, special wine, beer and non-alcoholic beverages in restaurants. Tax rate is prescribed by the municipality or city, and cannot be higher than 3% of the basis on which this tax is paid.

8. Tax on corporate title (in that form only in Croatia)

The taxpayer is a legal entity or natural person who is subject to profit tax or income tax and is registered to conduct business. The object of taxation is a company (corporate title). The tax amounts to HRK 2,000,00 for each corporate title. Legal and natural persons not registered to conduct business are not obliged to pay tax on corporate title.

9. Tax on public land use (in that form only in Croatia)

The taxpayer is a legal entity or natural person who uses a public land (area). What is considered as a public land (area) is prescribed by the municipality or town. The subject to taxation is public land (area) used by legal and natural persons. The amount of tax is prescribed by the municipality or city.

10. Personal community tax (in that form only in Hungary)

The personal community tax is partly a flat-rate, surtax type of property tax. The taxable object is the real estate (such as buildings and building sections and undeveloped parcels of land) situated in the area of

jurisdiction of a local government, and owned by a natural person or on which an incorporeal right is registered for the benefit of a natural person, furthermore lease rights of private individuals to a dwelling place owned by a person other than a private individual. The private individuals who own a real property within the territory of the local government, and the private individuals holding lease rights to a dwelling place owned by a person other than a private individual in the area of jurisdiction of a local government shall be subject to pay community tax. The provisions discussed under point V.3.a) above shall apply to the commencement and termination of tax liability, and in respect of the lease right, tax liability shall commence on the first day of the year following the conclusion of the lease contract, and shall terminate on the last day of the year when the lease contract is terminated (when a lease contract is terminated during the first half of a year, tax liability for the second half shall be terminated as well). The maximum rate of tax per annum is HUF 12,000 for each real estate, as well as for each lease right.

11. Corporate community tax (in that form only in Hungary)

The tax liability is related to the business activity, so the taxpayer is the entrepreneur, who is regularly engaged in for-profit economic activities in his own name and on his own account. The tax base is the adjusted average statistical number of staff employed by the taxpayer in the area of jurisdiction of the local self-government. The maximum rate of tax per annum is 2000 HUF per person.

12. Local business tax (in that form only in Hungary)

All business activities (commercial activities) pursued permanently or temporarily in the area of jurisdiction of a local government shall be subject to taxation. The taxable person shall be the entrepreneur. Tax liability shall commence on the day of commencing commercial activities, and shall terminate on the day of termination of such activities. If commercial activity is pursued on a temporary (occasional) basis, tax liability shall be based on the duration of the activity. The tax base for permanent commercial activities shall be the net sales revenue, deducted with the original costs of goods sold, the value of mediated services and material costs, furthermore the direct costs of applied research and experimental development paid in the tax year. Any entrepreneur who is engaged in permanent commercial activities in the

areas of jurisdiction of more than one local government, the tax base shall be divided. For temporary commercial activities the tax shall be established on the basis of the number of calendar days during which the activity was performed. For permanent commercial activities the maximum rate of tax per annum is 2% of the tax base, while for temporary commercial activities, the tax rate is limited per calendar days.

VI. Conclusion

The autonomy of self-governments, from the conceptual point of view and particularly from the practical approach is the assessment of the economic opportunities, the amount and structure of resources, and the freedom of use of the resource. The actual operating conditions of each system depend not on the legal regulation, but instead on the the local economic circumstances of the self-government and their involvement of local economic development, furthermore on the economic and fiscal policy of the state. The self-government systems are categorized accordingly to the clientist (e.g. France, Italy, Spain and the Greek and Turkish self-government systems), economic development (USA), and the welfare system (e.g. Germany, Great Britain, the Nordic countries).³⁷ The noticeable differences between the Hungarian and Croatian local and regional levels of taxation derive from the significant difference between the two states regarding the regional involvement and the position in the system of redistribution. The Hungarian structure of local self-government units are closer to the clientist model – so there is a remarkable centralizing tendency of the state, most of the local resources come from the state, often by determinating the way and aim of use –, thus the level of economic development activity of the self-governments is lower. Contrary, the Croatian model, due to the important county and municipality taxes, is closer to the welfare and economic development models³⁸ of self-governments, in which, besides the central dependence,

³⁷ M. Goldsmith, 'Local autonomy. Theory and practice' in D. King, J. Pierre, eds., *Challenges to Local Government* (London, Sage 1990) pp. 18-32.

³⁸ In the welfare model, the self-government units fulfill their obligations within strong central dependence, they focus on providing the services, and they deal less with the development of the local economy, which is undertaken mostly by the central state. The self-governments act as undertakings in local economy, their local need of resources is higher than the central one, therefore they establish a more intense relationship with the local actors of the economy.

a structure was established with more active self-governments providing notable services.

In our opinion, in order to guarantee the four freedoms of the Single Market³⁹ and to ensure the optimal level of completion⁴⁰ of the internal market, the system of local taxation should be standardized in the territory of the European Union: an itemized list of local taxes should be established, and clearly unified rates, or at least minimum and maximum rates shall be declared, furthermore the tax allowances should be harmonized. The various methods of levying taxes, the different determination of the tax base, and the significant diversity regarding the tax rates distorts competition between the Member States, and hinders the free movement of persons and the free flow of capital, since unpredictable tax environment is set up accordingly. Therefore the European Union may take measures regarding the harmonization of this field of law, and could at least provide a unified frame for the taxation rights of the self-government units.

Nevertheless, the normative distribution is a mutual requirement of the financing systems, in which the state declares the aims and priorities to be supported thereby, as well as those parameters and conditions, which determine the decision of redistribution with normative power, taking into account that state distribution is always based on political decisions and preferences of value.⁴¹

It is a fundamental problem of both the Hungarian and the Croatian central, regional, and local taxation, which is also a tendency all around the world, that despite the continually expanding scope of central and local activities, new types of public revenue cannot be found neither in the central, nor within local taxation, which could improve the increasing revenue that covers the government services, therefore there is no other option, but to tune these systems carefully, and to harmonize their operational reserves, furthermore to improve tax compliance. For this work, it is essential to understand the theoretical and practical problems of the the functioning of the tax system.

³⁹ The Internal Market of the European Union (the Single Market, formerly the Common Market) aims to guarantee the free movement of goods, capital, services, and people within the the 27 member states thereof.

⁴⁰ Meaning the free flow of working people, goods, services and capital in a borderless Europe.

⁴¹ C.G. Hockley, *Fiscal Policy* (London, Routledge 1992) p. 19.

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Main characteristics of Hungarian and Croatian anti-money laundering systems

I. Introduction

Money laundering is a legal, economic and social phenomenon which has assumed global proportions nowadays. Thus, we can say that today money laundering is present almost all over the world. It is a phenomenon with a long past, during which it developed and perfected highly sophisticated methods of action. There are opinions in literature that the first forms of money laundering occurred somewhere around 2000 years B.C. in China, where merchants used to hide their earning from rulers to avoid confiscation. To achieve this goal they used to take the money to distance provinces or to foreign countries and invested it there in different activities.¹ That is how they created the basic principles of money laundering that have been retained to this day. During subsequent centuries, until the present time, people have gradually improved techniques of money laundering, using them to hide the money that came from illegal activities, but also to hide from their despotic and unjust ruling regime.² Trade in alcohol and illegal gambling during Prohibition in the U.S.A. led to a significant increase of illegally realized profits for those who were thus engaged. That caused further expansion of money laundering, which was done through a variety of activities with a lot of cash involved, such as laundry and drying machine services (Laundries). Therefore, oral tradition says that the term ‘money laundering’ comes precisely from that era.³ In literature there is an opinion that the term ‘money laundering’ was used for the first time by British magazine *The Guardian* in 1973 when it was reporting about the scandal that emerged when 200,000 U.S. dollars

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¹ <<http://www.countermonylaundering.com/public/?q=node/6>>, (last accessed on 10.07.2010)

² Ibid.

³ Ibid.

intended for the Republican election campaign in the U.S. – was carried the suitcases to Mexico in order to ‘wash’.⁴

Money laundering, in its modern sense, means the conversion of money or other property, the proceeds of unlawful activity (so-called ‘dirty’ money) into so-called ‘clean’ money, i.e., one that can be legally used without fear of being brought into contact with the illegal activities from which it originates. That means that this money (or some other property), which should have been seized as a result of the crime, is instead used as any other, lawfully earned income. Such treatment entails multiple harmful consequences. Besides being difficult to detect the crime from which the money comes, it creates competition for those who do business with capital from noncriminal activities, and also violates the economic and financial system of the country. For this reason, money laundering is set out in many systems as a separate criminal offense, punishable with high prison sentences.⁵

The Hungarian and Croatian systems of money laundering are interesting for two reasons. First, these are former communist countries, in which the process of multi-year transition from a socialist to a capitalist system took place. This process involved the implementation of a long transformation and privatization of former social capital. During this process there was a significant increase in economic crimes, whose consequences are most felt precisely in these times of global financial / economic crises, which latter did not avoid these neighboring countries. Second, Hungary has only recently gone through the process of joining EU, through which process Croatia is currently undergoing. That is why Hungarian experiences are very helpful for Croatia to overcome obstacles and meet the criteria set by the EU. For that reasons, in this text we will show main characteristics of Hungarian and Croatian anti-money laundering regime.

II. Hungarian law on money laundering

Perpetrators of certain crimes can spend the assets originating from criminal activities without money laundering. There are, however, crimes in which:

- the perpetrators gain extremely huge amount of income or,

⁴ See D. Derenčinović, *Mit(o) korupciji* [The Myth of corruption] (Zagreb, 2001) p. 78. Same in Ž. Howatić, *Osnove kriminologie* [Basis of criminology] (Zagreb, 1998) p. 103.

⁵ Ibid.

- the perpetrators regularly (weekly, monthly) realize illegal benefits originating from criminal activities without having legal sources of income.

In these two cases the risk of being detected is too high, thus the criminal can watch the money accumulate from the crime but he cannot spend it. Or, he can try to spend it, but with it he may draw the attention of tax- and investigating authorities. They need money laundering, which, in criminological sense, is an illegal economic service whose aim is to make justifiable the origin of the wealth from the criminal activity, getting rid of its obviously illegal character.

Hungary was the first amongst the Council for Mutual Economic Assistance (or Comecon) countries to enact regulations against money laundering in 1994. Since then the regulation has been numerously modified, but the crime has not become significant in practice. Annually, in average less than ten investigations begin with the suspect of money laundering. This activity was developed with capitalism in our country in the 1990ies. The reason for the lack of money laundering in the *1970ies and 1980ies* in Hungary was not that there were no organized criminals or that no extra profit was produced, but the underdeveloped nature of the banking system and the lack of the convertibility of the Forint, which prevented it. A couple of years later, however, everything changed drastically. The standard of living was dropping continuously in the second part of the 1980ies, while inflation accelerated. It became obvious that something had to be done to the economy, and the political change of regime was also around the corner. By the summer of 1989,

‘the movements ongoing in the political sphere shifted their direction, content and dynamism too; in addition to the change of advertised models., the emphasis – at least in the manifestation of some organizations and certain layers of society – shifted in the direction of the change of regime’.⁶

Following the *political and economic change of regime*, the establishment of a market economy started in 1990. This paved the way for the spending of assets that were previously accumulated. The banking system was not yet able to satisfy the hunger for capital; usurious interest rates and the collection of money related to it

⁶ J. Horváth, *A tábornok vallomása* [The confession of a general] (Budapest, 1990) p. 315.

flourished in the underworld. The long-term decrease of the standard of living and the increase of tensions of income distribution gave an impulse to crime, and, additionally, subsistence crime also spread. Criminals of outstanding abilities and good organizational skills started building their domestic criminal organizations, for which they also had sufficient amounts of cash. The disarrangement of the police also contributed to the leap forward of the criminal underworld. The *economic and social transformation* related to the change of regime, as well as the *privatization of state property* necessarily implied the appearance of certain business crimes. The significant increase of the number of criminal activities and the increase of the average amount of damage calculated for one criminal activity – even with the rate of inflation deducted – continuously produces the wealth that can also be the basis of money laundering. In addition to this, on 1 January 1987, the *one-tiered banking system was replaced by the two-tiered system*, and, in the early years, the too broad interpretation of the scope of banking secrets provided a favorable area for money launderers. However, the creation of anti-money laundering regulations and criminal law protection took years to develop. In Article 86 of the *Articles of Partnership* of Hungary, created with the *European Community* in 1994, we undertook the obligation to make all efforts to prevent money laundering, and to introduce sufficient regulation that is of equivalent value with those regulations that the Community and other international forums working in this area – including the Financial Action Task Force (FATF) – accepted.

In 1994, the Parliament passed a law covering the prevention and obstruction of money laundering, and the Government issued an executive order. Furthermore, the definition of the crime of money laundering, and its sanctions were laid down in the Criminal Code: Law IX of 1994 integrated money laundering as Article 303 in the Criminal Code. The law ordered that the laundering of money be sanctioned with regard to material goods emerging in connection with areas most affected by organized crime that is crimes committed in connection with drug abuse, arms smuggling, and terrorism. In harmony with the planned modifications of Law LXIX of 1991, on financial institutions and activities of financial institutions, the modification of the Criminal Code sanctioned the failure to perform the obligation of reporting defined in the law in the case of both willful and negligent commission.

For aggravated cases, the legal regulations contained habitualness, and, similarly to drug abuse, the commission within the framework of an organization. Furthermore, the law ordered that those perpetrators who – through their position (rank, occupation, profession) – found it easier to help with the covering up of the origins of the money one gained in an unlawful way, be punished more severely. Furthermore, Hungary joined the Convention on money laundering, the search for, seizure and confiscation of items originating from criminal activity, ratified in Strasbourg, on 8 November 1990, the announcement of which was ordered by *Law CI of 2000*.

The facts of the case of money laundering as it is described in the Criminal Code went through continuous change: it was modified practically every other year to prevent practice by criminals.

However, these steps did not satisfy the international financial organizations. Hungary was put on the money laundering 'black list' of FATF at the end of June 2001 among non-cooperating countries, as first and so far only amongst the OECD member countries. Even though along the law-making process there were legal regulations created at the end of 2000, according to which it should not have been possible to open a bearer and code-named savings deposit,⁷ and withdraw money from those already existing without identification, from the day of the accession of Hungary to the EU, the FATF did not consider this solution sufficient, with special respect to the fact that the neighboring countries – being in similar shoes as Hungary – tied the termination of identification to a fixed date.⁸

Three months after the FATF's decision to place Hungary on the black-list, under the influence of the 11 September 2001 terrorist attacks in the U.S., the international cooperation against terrorism definitely started to strengthen, and the strengthening of anti-money laundering regulations on the agenda anyway was accelerated. It was in the wake of this that Law LXXXIII of 2001, on the struggle against terrorism, the strengthening of the decrees on the prevention of money laundering, and the order of particular restricting measures, was created. This legal regulation tried to remedy the problems and shortcomings brought up by the FATF, in the following manner:

⁷ Such were banking papers under the given names of 'Jubileum' (Jubilee), 'Garas' (Penny), 'Dénár' (Denarius), 'Zafir' (Sapphire), etc.

⁸ K. Koós-Hutás, 'A pénzmosás elleni szabályok szigorítása: megszűnő anonimitás' [The strengthening of the AML rules: loosing anonymity], 3 *Cég és Jog* (2002) p. 44.

- The prevention of circumventing the legal regulation on money laundering is served by the fact that through the modification of Law-decree 2 of 1989, on savings deposits, the possibility of opening anonymous deposits is terminated. The law contains sufficient measures with respect to the already existing bearer and code-named savings deposits as well. In case of safety deposits transformed into bearer deposits following 30 June 2002, and reaching or exceeding the amount of 2 million HUF, every credit institution is obligated to send the data of identification of the client to the National Police Department with the aim of prevention and obstruction of money laundering. After 1 January 2005, upon the client's written request and with the approval of the National Police Department, the non-bearer safety deposits can be transformed into bearer ones.
- For reasons similar to those of savings deposits, the law orders – with the modification of Law CXI of the year 1996, on the marketing of securities, the investment services and the securities stock exchange - that securities can only be issued and publicly marketed in series only in a bearer manner.
- A significant part of the turnover of money is performed in cash. The monitoring of this in international turnover is served by the above-mentioned law by forcing those crossing the country border – if they have Forints or foreign currency reaching or exceeding one million Forints in their possession – to report this fact to the customs authorities and provide the particulars, the information on the amount and currency of the money in their possession to the customs authority.
- After 1 January 2002, only the credit institution or the agent of the credit institution can get permission from the State Supervision of Financial Institutions to carry out money-changing activities. Through this, the performance of money-changing activities, and the strengthening of their conditions of operation, as well as their increased monitoring, take place on the basis of regulations identical with those with respect to enterprises performing the other financial services.⁹

⁹ Reasoning of the Act LXXXIII of 2001

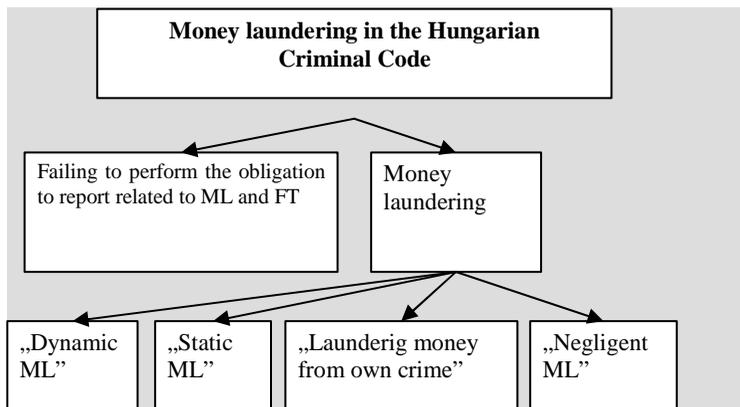
As a result of the measures introduced, in June 2002, FATF removed Hungary from the list of Non-complying Countries and Territories.¹⁰ In 2003, the former money laundering law was replaced by a new law: at its sitting on 24 February 2003, the Parliament passed Law XV of 2003, on the prevention and obstruction of money laundering. This law, as well as the previous measures, forced the decision-makers of FATF to terminate the former special monitoring mechanism against Hungary at its Berlin meeting ending on 20 June 2003. According to the reasoning of FATF, Hungary ‘sufficiently handled all the shortcomings named earlier’; therefore, the special monitoring mechanism was not needed any more. Furthermore, the report emphasizes the significant development in the Hungarian policy against money laundering, positively mentions the extension of the law to non-financial professions, among others to real-estate traders, tax advisers, and most recently to lawyers and public notaries. It also speaks highly about the assignment of names to some 90% of the anonymous deposits of Hungary, and the good-quality cooperation of the country with the Financial Action Task Force.¹¹ Thus, the most recent developments are promising, the Hungarian regulations in force meet the resolutions of the third money laundering guidelines of the European Union (not in force yet), as it was established by speakers at the conference on ‘The current issues of the struggle against money laundering’, held in the fall of 2004.

The Hungarian anti-money laundering regulation, operating from 2007, can be found in two acts, in the Criminal Code (act IV of 1978) and in the Act of Prevention of Financing Money Laundering and Terrorism (Act CXXXVI of 2007). The previously mentioned Criminal Code contains presently two crimes in connection with money laundering. The first one is called ‘Money Laundering’ and the second is ‘Failing to perform the obligation to report related to ML and FT’.

¹⁰ See FATF-GAFI Annual Review of Non-Cooperative Countries and Territories, 20 June 2003.

¹¹ <www.figyelo.hu/cikk.php?action=nyomtat&cid=61860&layout=no&id=3>, (last accessed on 20.07.2003)

Chart 1 Money laundering in the Hungarian Criminal Code



The first version of the crime can be called dynamic money laundering since the majority of the perpetrating behaviors in economic sense result in some kind of wealth transformation. Dynamic ML cannot be committed by the perpetrator of the basic crime therefore in this case the money launderer is an outsider.

The perpetrator behaviors are the followings:

- The transformation of the thing means such a wealth transfer when the thing transforms from one form of money-keeping to the other without changing the owner. An example is melting the stolen jewellery and preparing a new one or other golden utensils from the gained raw material.
- The transferring the thing can happen by free (*negotium gratulitum*) or onerous (*negotium onerosum*) legal transaction. In this situation the money launderer transfers the amount to a third person with the aim of blurring the connection between the basic crime and the perpetrator. Or he sells the thing to a third party with a pretended contract.
- The usage of the thing during an economic activity is a typical ML technique. In this case the perpetrator uses the amount or the thing gained from ML in his own enterprise (established for particularly this reason or an already operating enterprise) and then he transfers back to the perpetrators of the predicate offense under a nominal pretence.

- The law standing on the thing, changes in this thing or concealment and cover-up of the place of the thing belong basically to complicity similar behaviors, which is committed by the money launderer because he wants to arrest or render more difficult the impeachment of the basis of the crime's perpetrator.

We may call the other variant, which can be found in the second paragraph, 'static money laundering' because the majority of the commission behaviors do not yield a property transformation in an economic sense. The perpetrator of the basic crime may not commit the static money laundering.

The perpetrator behaviors are the followings:

- The acquisition of the thing for himself or for a third party. Practically with declaring punishable the acquisition without the origin's concealment purpose, being equal to EU's right though, but we filed a regulation in the Criminal Code that classifies activities which cannot be considered money laundering in a criminological sense already as money laundering. That a parent commits money laundering when, for example, he receives a smaller sum of his child's plunder originating from a bank robbery, from which the parent pays his flat overhead.
- The safekeeping, attendance, usage or use of the thing, or the procurement of other material goods on its offset: these can be a friendly favor for the perpetrator of the basis crime, or activities happening because of a profit acquisition even.

For example, the plain keeping of a property obtained illegally in an iron safe (frequently in the form of a lawyer's deposit), or investing the money likewise, or make financial operation with the sum (if there are not for an origin-concealment purpose).

Only the perpetrator of basis crime may commit the laundering of the own money exclusively with the following behaviors:

- the use of the thing originating from his own earlier activity, which is subject to imprisonment, if it happens in the course of the practice of commerce,
- in connection with the thing, any kind of financial activity, or strain of a financial service.

The state of affairs of the negligent money laundering is equal to the laundering of the own money, but it has got an essential difference: a

person who did not take part in the basis crime may commit this only. We treat it as an independent formation because it does not constitute any negligent variant among the three previous mentioned versions and as such this is a new base case.

The attestations of the commission behaviors, of use, of performing the financial activities here are also intentional; the negligence is attached to the recognition of the unlawful origin of the thing. If the money launderer was not aware of the unlawful origin of the thing (or it is not possible to prove it upon him), though he should have recognized it from the circumstances, he may be responsible for the negligent formation.

The crime is completed with attesting the commission behaviors, so it is not necessary that the operation of money laundering should be successful. Anybody may commit the dynamic, static or negligent money laundering apart from the perpetrator of the basic crime, so the subject of the crime can be all natural persons elder than 14 years of age, is *compos mentis*, and did not take part in the basis crime. Logically, the perpetrator of the basis crime may commit the laundering of own money as an offender.

According to the opinion of some authors, punishment of the money launderer of the basis crime is controversial from more viewpoints. The dogmatic theology of the Hungarian penal law knows the category of the ‘unpunished subsequent’ plots. According to some authors expecting from a perpetrator to reveal his crime would be a requirement contrary to human nature. So, we may never assess the lack of this as a separate independent crime.

The laundering of the dynamic and own money can be committed only intentionally. Both versions can be committed only with straight intention (*dolus directus*) because of the purpose which can be found in the state of affairs. At this time the consciousness of perpetrator grasps that the thing has an unlawful origin, and the aim of his behavior is to make the punishment of the basis crime’s perpetrator impossible or more difficult. The static money laundering can be committed also with *dolus eventualis*. According to the Criminal Code, in this case the perpetrator's consciousness has to grasp, that he has to know the origin of the thing at the time of commission. Money laundering has a negligent formation, which is equal to the state of affairs of the laundering of own money, but only a third party may commit it; the perpetrator of the basis crime cannot.

The legislator lists circumstances in the Article 303 (4) of the law, when static, dynamic and own money laundering can become so dangerous to society, that a more grave punishment (i.e., imprisonment from two to eight years) can be justified.

The subject of crime is the thing. Therefore, we have to define the idea of object in as wide sense as possible. The legislator's interpretation of Criminal Code Article 303/C(1) supports this. Accordingly, with regard to money laundering, the object we can be an estate, entitlement, deed, dematerialized stock also, which ensures the command of the included estate value or entitlement in itself, or rather in case of in dematerialized form emitted stock the entitled of the stock account.

The thing may derive only from a plot liable to imprisonment, so according to the Hungarian regulation not all crimes can be the predicate offense of money laundering.

The personal scope of the Act of Prevention of Financing Money Laundering and Terrorism (Act CXXXVI of 2007) are the followings:

- financial services or in activities auxiliary to financial services;
- investment services, in activities auxiliary to investment services or in providing investment fund management services;
- insurance services, insurance agency or occupational retirement provision;
- commodity exchange services;
- the service of accepting and delivering international postal money orders;
- real estate agency or brokering and any related services;
- auditing services;
- accountancy (bookkeeping), tax consulting services whether or not certified, or tax advisory activities under agency or service contract;
- the operation of a casino or electronic casino;
- the trading in precious metals or articles made of precious metals;
- the trading in goods, involving a cash payment in the amount of three million six hundred thousand forints or more;
- the provision of voluntary mutual insurance fund services;
- the provision of legal counsel or notary services.

An announcement has to be made in the form of an electronic message in case of suspicion of money laundering to the Financial Information Dimension of Hungarian Customs and Finance Guard, which works as

the Hungarian Financial Intelligence Unit (FIU) with executive (administrative) roles. They digest approximately 10,000 announcements annually.

III. Croatian law on money laundering

The Croatian law on money laundering consists of Criminal Code (NN 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 84/05, 71/06, 110 / 07, 152/08, hereinafter: CC) and the Law on Prevention of Money Laundering and Terrorism Financing (NN 87/08). The criminal procedure is regulated by the relevant provisions of the Law on the Office for Combating Corruption and Organized Crime (NN 76/09, hereinafter: LOCCOC), Criminal Procedure Act (NN 110/97, 27/98, 58/99, 112/99, 58/02, 115/06) and «new» Criminal Procedure Act (NN 152/08, 76/09, hereinafter: CPC).¹² The Croatian regulations are harmonized with the relevant international instruments, such as the Vienna Convention of the United Nations against illicit traffic in narcotic drugs and psychotropic substances from the year 1988 and the Council of Europe Convention of 1990. Given that Croatia is in talks on a Stabilization and Association with the European Union, one should also mention the European Union's guidelines on the prevention of use of the financial system for money laundering from 1991, which provide concrete measures to combat money laundering. Money laundering is regulated also by the *Corpus iuris* from 1995-1996.¹³

In this paper we will limit our exposure to the presentation of the provision of the CC concerning the criminal offence of money laundering (Article 279). This provision has recently undergone some serious amendments that will be displayed. In addition, we will also describe the main features of the Law on Prevention of Money Laundering and Terrorism Financing. It is a relatively new law (created in 2008), which is *lex specialis* in the matter of money laundering and is, therefore, important to present in this paper. Other relevant legislation will be mentioned only so far as may be necessary.

¹² Specifically, in the Republic of Croatia is currently a duality of regulations governing criminal procedure. The new law applies from 1st of July 2009, but only to acts within the jurisdiction of the Office for Combating Corruption and Organized Crime. It is, in this case, only a qualified form of money laundering.

¹³ See more about that in F. Bačić and Š. Pavlović, *Komentar Kaznenog zakona* [The commentary of Criminal Code] (Zagreb, 2004) p. 973

1. The criminal offence of money laundering

Criminal law regulates money laundering in Article 279 of CC. This criminal offence, after amending the Criminal Code in 2008 (NN 152/08), is now entitled 'money laundering'. The previous name was 'concealment of illegally acquired money'. The new name is much more appropriate because it better highlights the difference with the concealment of a criminal offence (Article 236 CC) and it better expresses the nature of this crime (in Germany for example, basically the same term, *Geldwäsche* is used). According to the Croatian conception, this crime has two basic forms, which is in accordance with the Vienna Convention of the United Nations against illicit traffic in narcotic drugs and psychotropic substances. These are the following forms.

- Money laundering by concealing the sources of money, which can be committed only in the banking or other financial operations. The activity is described alternatively as an investment, downloading, replacement or otherwise;
- Money laundering by acquisition, which need not to be in banking or other financial operations. The activity is described as the acquisition, possession or marketing.

The object of this crime is not just money, but it can also be subjects purchased with money obtained through criminal offense and the rights acquired by such funds. Criminal activity from which they must originate is not specified in Croatian law, so the money can come from any criminal act. Such a solution is not good because it greatly expands the criminal zone¹⁴ and loses sight of the *ratio* of the offense. It is also difficult to distinguish it from the criminal offence of concealment of Article 236 CC.¹⁵

This offense can be committed intentionally and negligently. Intent may be direct or indirect. From the text of CC one might conclude that the offence can be committed only with the direct intent.¹⁶ However, that is not sustainable if we take into account that negligence is also punishable. Otherwise the interpretation would lead to contradictory

¹⁴ Same in P. Novoselec, ur., *Posebni dio kaznenog prava* [Special part of criminal law] (Zagreb, 2007) p. 339

¹⁵ For the differences between those two criminal offences see *ibid.*, p. 338.

¹⁶ It seems that Bačić and Pavlović think so when they say that the perpetrator 'knows the origin of money'. See Bačić and Pavlović, *op. cit.* n. 13, at p. 976.

result, according to which punishable direct intention and negligence would be, but not indirect intent. The indirect purpose would be, for example, if the offender allowed the possibility that money, or other objects are originating from criminal offences and, despite that, would continue his activity.¹⁷ Negligence refers to the fact that the money, or other specified facilities obtained through a criminal offense, which means that concerning the other features of this criminal offence, there must exist intent.¹⁸

Qualified form of this criminal offence exists if the perpetrator commits a criminal offense as a member of a group or criminal organization. In this case, the penalty is imprisonment for one to ten years, which is also the strictest possible punishment for this crime under Croatian law. Thus it is approaching the German regulations, which, for the most serious cases also provides up to ten years in prison. Prosecution of the qualifying forms is subject to the Office for Combating Corruption and Organized Crime (hereinafter: OCCOC).¹⁹ The OCCOC is a part of the State Prosecutions Office established for the territory of the Republic of Croatia with headquarters in Zagreb.²⁰ The jurisdiction and powers of OCCOC are regulated by LOCCOC.

In terms of penalty, it should be pointed out that the basic form of this criminal offense was originally punishable by imprisonment of six months to five years. When the CC was amended in the year 2000, that penalty was erased by mistake. This situation lasted until 2005, when the Secretary of the Croatian Parliament made a correction (NN 84/05) which returned an earlier penalty in the legal text. After that, the Croatian Supreme Court (hereinafter CSC) adopted, following requests for protection of legality, the decision (Kzz 1/05) in which it held the view that this correction is only valid from the date of its enactment and the basic forms of money laundering committed from 2000 until the law's correction in 2005 remain unpunishable.²¹

¹⁷ Example taken from P. Novoselec, *Uvod u gospodarsko kazneno pravo* [Introduction to economical criminal law] (Zagreb, 2009) p. 195 and further.

¹⁸ See *ibid.*, at p. 340

¹⁹ See Art. 21. para 1/3. LOCCOC.

²⁰ See Art. 2. para 1. LOCCOC.

²¹ See P. Novoselec, *Brisanje kazne i ispravak kod kaznenog djela pranja novca, sudska praksa, Hrvatski ljetopis za kazneno pravo i praksu* [Deleting of the sentence and correction by criminal act of money laundering] (Zagreb, 2006) p. 340.

The Croatian model of money laundering regulation, as well as German and Swiss laws, allows the predicate offense to be committed abroad.²² But in this case, the Croatian model goes beyond these laws because it allows prosecution and conviction, even if the dual criminality condition is not fulfilled, but with the further condition of approval by the Attorney General.

The law provides that the money obtained through a criminal offense and items that were purchased with money obtained through criminal offense shall be forfeited and the rights acquired by such funds shall be undone. This is actually a special form of security measure of forfeiture (Article 80 CC),²³ which should be distinguished from forfeiture of property used (Article 82 CC). To stimulate the perpetrators for self – denunciation, CC provides that the perpetrators of all forms of money laundering who voluntary contribute to the detection of criminal offenses may be remitted by the Court. The institute of effective remorse is at issue here.²⁴

Regarding whether one can be held responsible to launder money from his own criminal activities, this question has not been sufficiently discussed in Croatian scholar literature. One possible solution is that, in this case, money laundering is an unpunishable subsequent activity, which is in apparent concurrence with the predicate offense. This opinion is based on an analogy to the crime of hiding. It argues that money laundering does not bring new criminal amount, so it should not be penalized. This solution was adopted in some foreign jurisdictions, such as in Austria. In Croatia, this solution is, however, represented in part of the State Attorney's practice.²⁵ Another possible position is to be condemned for the concurrence because it produces various legal goods (legal properties). In addition, given the fact that money is usually washed out of organized criminal activity, it would be unjustified to set

²² More about German and Swiss law in S. Preller, 'Comparing AML legislation of the UK, Switzerland and Germany', 11 *Journal of Money Laundering Control* (2008), available at: <<http://www.emeraldinsight.com/Insight/ViewContentServlet?Filename=Published/EmeraldFullTextArticle/Articles/3100110303.html>>, (last accessed on 20.04.2010).

²³ See more in P. Novoselec, op. cit. n. 21, at p. 341.

²⁴ Ibid. More information about the institute of effective remorse see in P. Novoselec, *Opći dio kaznenog prava* [General part of criminal law] (Zagreb, 2009) p. 325.

²⁵ More in Novoselec, op. cit. n. 17, at p. 198.

free someone for money laundering simply because in some way he participated in the commission of predicate offenses, especially if, for some reason, he can no longer be punished for the predicate criminal offense.²⁶ There is also a third, compromise position, which is based on the German model. The German Penal Code includes a provision that is designed to allow punishment for laundering money from criminal activity only in cases in which there is no possibility of punishment of predicate offenses. Given that the Croatian provision is silent on this issue, this compromise interpretation could be applied to Croatian law. It seems that *Novoselec* also represents this opinion, when he says that this solution is acceptable, but only if we already have a prior conviction for a predicate criminal offense.²⁷ But one could add that to fulfill this requirement, assessment should always be done *in concreto*, bearing in mind which predicate offense is in question and if there is a place for concurrent consideration for violation of legal goods. Sometime it will be better to condemn for concurrence of crimes because it will be better to include the amount of crime recorded and it will avoid unjustified privilege for the offenders.

2. The main features of the Law on Prevention of Money Laundering and Terrorism Financing

The Republic of Croatia adopted in 2008 the new Law on Prevention of Money Laundering and Financing of Terrorism, which replaced the previous Law on Prevention of Money Laundering from 1997. The new law contains a hundred and six articles, which regulate various aspects of this issue. Among other things, the new law regulates in detail issues such as the inclusion of requirements for the prevention and detection of terrorist financing in the financial system of Government, provides preventive system based on the degree of risk, creating a unique list of taxpayers, analytical and intelligence work of the Office for Money Laundering Prevention, retroactive reporting obligation, protection of shipping information in good faith, international cooperation and other important issues. In this way, the new law fully complies with all international standards.²⁸

²⁶ See *ibid.*, at pp. 198-199.

²⁷ See *ibid.*, at p. 200.

²⁸ See more in S. Cindori, *Unaprijeđenje sustava sprječavanja pranja novca Republike Hrvatske i usklađivanje s međunarodnim standardima* [Improvement of

In terms of creating a single list of taxpayers it should be noted that the new law joins the following categories to the already existing list of taxpayers. These new subjects are: lawyers and law firms, public notaries, audit companies, statutory auditors and persons performing accountancy jobs or tax advice.²⁹

The Law specifies the role of the Office for the Prevention of Money Laundering (hereinafter: Office). This is an administrative organization under the Ministry of Finance, which performs various tasks in order to prevent money laundering and terrorist financing. The Office, acting as financial – intelligence body and central national authority, collects, stores, analyzes and delivers data, information and documentation of suspicious transactions to competent state bodies for their further treatment in order to prevent and detect activities aimed at money laundering and terrorist financing. The functions, powers, scope of work and other important issues related to the office are also prescribed by this Law.

IV. Conclusion

There are countries that conduct a very profitable business through the tacit suffering of money laundering, by allowing phantom firms to be formed and, by the very strict interpretation of banking secrets, make anonymous bank deposits possible. As ‘unclean’ money very quickly finds such areas, these countries come into outstandingly high incomes through money laundering. We have to admit, however, that Hungary and Croatia must not choose this route not only for sheer moral reasons (although these alone would be enough), but also for reasons dictated by economic rationality. Average-sized European countries with a democratic political culture would lose more as a result of the sanctions introduced by the international community and the organizations dealing with money laundering than the profits it would gain from the capital coming in to be laundered in the country. We could also say that our countries are neither small, nor large enough to put up with money laundering. Every opinion in between, any tiny allowance could be equally dangerous as tacitly letting money launderers gain ground. Therefore, the interest of Hungary and Croatia is to prosecute money

anti money laundering system in the Republic of Croatia and its harmonization with international standards] (Zagreb, Pravni fakultet u Zagrebu 2009) p. 282-317.

²⁹ See more in *ibid.*

laundering with all the means at its disposal, or at least try to drive it out of the country. In the interest of the struggle against money laundering as an objective, it is necessary to cooperate with other countries and international organizations. With respect to this, these two countries have already undertaken several international obligations but they are ready to conclude further agreements or the reinforcement of the earlier ones; at the same time, they also initiate such. Hungary and Croatia cannot give up on the development and continuous improvement of the legal regulations in view of the fact that the problem of money laundering cannot be solved exclusively by criminal law means. Criminal law – as we can unfortunately experience nowadays – is not able to remedy harmful social phenomena, it cannot even solve the problems emerging in connection with crime. Crime is a social phenomenon in connection with which criminal law – to use a medical expression – can only provide symptomatic treatment. In spite of this, this branch of law cannot be neglected or replaced by anything else either. In the fight against money laundering, however, we should give priority to non-criminal law means; that is, we should develop the financial system in such a way that money laundering in Hungary and Croatia would be possible only through extreme difficulties. This way, a great percentage of ‘unclean money’ would avoid the country and would move towards areas where it would not meet such strong opposition. If we achieve this, while simultaneously taking part in the cooperation conducted for the fight against money laundering, we can say that we have performed the undertaken international obligations. However, we can still not lean back as the methods of money laundering are continuously being perfected; perpetrators are developing newer and newer techniques. As far as we can see, the fight will never end, consequently, the main aim can only be that we are a step ahead of the perpetrators, and we preserve this step for the longest possible time.

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International and EU law aspects of sustainable development and environmental protection in the Danube catchment area

I. Concept of sustainable development in international and EU policies

1. Sustainable development as a principle of international and European environmental law

Sustainable development is a fundamental principle of international, European and national environmental policies.¹ The concept was developed at international level; the first and most often quoted definition was given by the 1987 Bruntland Report:

‘[s]ustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.’²

The concept was reinforced and further evolved by the 1992 Rio Declaration on Environment and Development,³ and the Johannesburg Declaration on Sustainable Development. Now it is widely accepted that the concept comprises three interlinked pillars: economic development, social development and environmental protection.⁴

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¹ For the meaning and development of the concept see, e.g., H. C. Bugge and C. Voight, eds., *Sustainable Development in International and National Law* (Groningen, Europa Law Publishing 2008)

² The report titled ‘*Our Common Future*’ was prepared in 1987 by the UN World Commission on Environment and Development (WCED) chaired by Gro Harlem Bruntland, the past Prime Minister of Norway. It dealt with the deterioration of the human environment and natural resources and its consequences for economic and social development (Oxford University Press, 1987). See UN Documents, A/42/427, Chapter 2: Towards Sustainable Development, point 1, available at: <<http://www.un-documents.net/wced-ocf.htm>>, (last accessed on 30.06.2010).

³ S. P. Johnson, *The Earth Summit, The United Nations Conference on Environment and Development* (UNCED) (London, Graham & Trotman 1993) p. 118.

⁴ The Johannesburg Declaration on Sustainable Development, point 5. In point 8 it reaffirms the Rio commitment. Available at: <<http://www.un.org/esa/>>

Sustainable development is a fundamental objective of not only its environmental policy, but of the European Union itself. The 5th Environmental Action Programme of the EC adopted after the Rio Conference has the title ‘Towards Sustainability’, and is based on this concept, including it into the range of other principles of EC environmental policy. In this document,

‘the world “sustainable” is intended to reflect a policy and strategy for continued economic and social development without detriment to the environment and natural resources on the quality of which continued human activity and further development depend’.⁵

The 6th Environmental Action Programme entitled ‘Our Future, Our Choice’ also aims to contribute to the EU Sustainable Development Strategy. Forming a basis for its environmental dimension it defines priorities, first of all in the area of climate change, preservation of nature and biological diversity, protection of environment and human health, improvement of quality of life, improvement of resource efficiency, resource and waste management.⁶ According to the Commission sustainable development is more than the environmental protection, and the social and economic implications of environmental action must also be taken into account when pursuing it.⁷

The importance of sustainable development for the European integration is reflected by the insertion of this concept into the founding treaties. The first occasion was the 1992 Maastricht Treaty establishing the European Union and amending the Treaty on the European Community. Article 2 of the EU Treaty set the objective ‘to promote economic and social progress which is balanced and sustainable [...]’. The Article 2 of the EC Treaty set the task for the Community ‘to promote [...] a

sustdev/documents/WSSD_POI_PD/English/POI_PD.htm>, (last accessed on: 30.06.2010).

⁵ Resolution of the Council and the Representatives of the Governments of the Member States on the Community programme of policy and action in relation to the environment and sustainable development (the 5th Environmental Action Programme), *OJ C* 138, 17 May 1993, pp. 2., 12., 17-24.

⁶ 1600/2002 Decision of the European Parliament and of the Council laying down the Sixth Community Environment Action Programme, *OJ L* 242, 10.09.2002, pp. 1-3.

⁷ Commission Communication on the sixth environment action programme of the European Community, Environment 2010: Our future, Our choice, COM(2001)32, Brussels, 24.1.2001, p. 11.

harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment [...]'. Only the Amsterdam Treaty modifications in 1997 used the expression of sustainable development both in the EU and EC Treaties. Following the Lisbon Treaty amendments inserted in 2007, the present wording of the Treaty on European Union sets sustainable development as an aim of the Union:

'[t]he Union [...] shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment... In its relations with the wider world, the Union shall [...] contribute to the sustainable development of the Earth [...]'.⁸

Promoting sustainable development is an aim for the integration of environmental requirements into the Union policies provided by Article 11 of the Treaty on the Functioning of the European Union.

2. The EU Sustainable Development Strategy

a) The Lisbon Strategy

The sustainability process of the European Union is the so-called Lisbon Strategy, which is the commitment of the Union to the economic, social and environmental renewal. In 2000 the European Council in Lisbon

'set itself a new strategic goal for the next decade: to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion.'

For the achievement of this goal it presented an overall 10 year programme and action plan, which was based on, first of all, the development of economic and social pillar.⁹ In 2001 the European Council in its Gothenburg meeting adopted the Sustainable Development Strategy of the European Union, which completed the

⁸ Art. 3 paras 3 and 5 of the Treaty on European Union as amended by the Lisbon Treaty. The new Treaty entered into force on 1 December 2009.

⁹ Presidency Conclusions, Lisbon European Council, 23-24. March 2000, point 5, 'The way forward'

Lisbon Strategy by including an environmental dimension. Thus, the strategy

‘recognizes that in the long term, economic growth, social cohesion and environmental protection must go hand in hand’.¹⁰

The Heads of States and Governments invited the Council to continue the process of integration of environmental requirements in order to further develop its policies in various sectors providing an environmental input to EU Sustainable Development Strategy.¹¹

In 2005 the Council adopted a Declaration on key objectives and guiding principles for sustainable development,¹² and in 2006 the European Council reviewed the EU Sustainable Development Strategy and adopted the Renewed Strategy for the enlarged EU.¹³ The renewed strategy aims, *inter alia*, at a continuous improvement of quality of life for present and future generations, promotion of effective management of natural resources, economic prosperity, environmental protection and social cohesion. Within the key objectives of the renewed strategy the first is the environmental protection: prevention and reduction of environmental pollution and the promotion of sustainable consumption and production in order to break the link between economic growth and harmful environmental consequences, environmental degradation (de-coupling). The guiding principles of this policy are, among others, integration of economic, social and environmental considerations; integration of environmental requirements into the other policies (sectoral policy integration), precautionary principle and the polluter pays principle.¹⁴ Key priorities of the renewed sustainable development strategy until 2010 are: climate change and clean energy; sustainable transport; sustainable consumption and production; conservation and management of natural resources; public health; social inclusion,

¹⁰ Commission Communication, A Sustainable Europe for a Better World: A European Strategy for Sustainable Development, COM(2001)264, Brussels, 15.5.2001, p. 2.

¹¹ *Ibid.*, at p. 14.

¹² Commission Communication on Guiding Principles for Sustainable Development, COM(2005)218, Brussels, 25.5.2005, adopted by the Council, see Presidency Conclusions, Annex I, Brussels, 16-17. June, 2005, pp. 28-30.

¹³ European Council, Review of the EU Sustainable Development Strategy – Renewed Strategy, Brussels, 15/16 June 2006, DOC 10917/06

¹⁴ *Ibid.*, at pp. 3-5.

demography and migration; global poverty and sustainable development challenges.¹⁵

In 2009 the Commission reviewed the Strategy again, with a view to mainstream it into the EU policies. The Commission, in reflection to the current economic and financial crisis affecting all sectors, considered it crucial to

‘turn the crisis into an opportunity to address financial and ecological sustainability and develop a dynamic low-carbon and resource efficient, knowledge-based, socially inclusive society [...]’.

The focus is on ‘green growth’, since green measures help to revive the economy and create jobs, and stimulate new technologies and reduce the impact on climate change, the depletion of natural resources and the degradation of ecosystems.¹⁶ Taking sustainable development into the future, the strategy should focus, *inter alia*, on a low-input economy, energy and resource efficient technologies, sustainable transport and shifts towards sustainable consumption behaviour, intensified environmental efforts for the protection of biodiversity, water and natural resources. It emphasizes that

‘degradation of ecosystems not only reduces the quality of our lives and the lives of future generations, it also stands in the way of sustainable, long-term economic development.’¹⁷

Adopting these findings and suggestions for the future, the Council repeatedly stated that the current developments in many respects are not sustainable and that the limits on the carrying capacity of the Earth are being exceeded. The Council’s Conclusions now urge the necessary reform for the EU Sustainable Development Strategy, which remains a long term vision and an overarching policy framework providing guidance for all EU policies and strategies, with a time frame up to 2050. It calls for the enhancement of the links and synergies between the EU Sustainable Development Strategy and the EU 2020 strategy. Based on the figures from the Eurostat monitoring report,¹⁸ the Council

¹⁵ Ibid., at pp. 7-21.

¹⁶ Commission Communication on Mainstreaming sustainable development into EU policies: Review of the European Union Strategy for Sustainable Development, COM(2009)400, Brussels, 24.7.2009, p. 1-2.

¹⁷ Ibid., at pp. 13-15.

¹⁸ Eurostat, Sustainable Development in the European Union, 2009 monitoring report, Office for Official Publications of the European Communities, 2009

summarizes the progress and shortcomings in key areas, and lists new challenges for the future sustainable development strategy of the EU being energy security, adaptation to climate change, food security and land use.¹⁹

b) The European Union 2020 Strategy

Nearing the end of the 10 years implementation period for the Lisbon Strategy, the Commission put forward its proposals for the new strategy of the European Union for jobs and growth called 'Europe 2020'. This new strategy is intended to move European economies out from the crisis and to lift the EU onto a new, more sustainable growth path. Three priorities of Europe 2020 are defined: smart growth – development of an economy based on knowledge and innovation; sustainable growth – promoting a more resource efficient, greener and more competitive economy; inclusive growth – fostering a high-employment economy delivering social and territorial cohesion. For the achievement of these aims, the Commission proposed headline targets for the employment rate, investments for research and development, education and fighting poverty, and developed 'flagship initiatives'.²⁰

Under the priority of sustainable growth a more resource efficient, greener and more competitive economy is promoted: the development of new processes, green technologies, a low-carbon, resource-constrained economy while preventing environmental degradation, bio-diversity loss and unsustainable use of resources. For this priority two flagship initiatives 'Resource efficient Europe' and 'An industrial policy for the globalisation era' are proposed. The first aims at structural and technological changes to decouple the economic growth from resource and energy use, to reduce CO₂ emissions, to enhance competitiveness and to promote greater energy security. The aim of the second flagship initiative is to establish a modern, competitive industrial base, to transform the industrial sectors to greater energy and resource efficiency, which is able to seize the opportunities of globalization and of the green economy.²¹ Within the external policy aspects, the

¹⁹ Council, Presidency Report on the 2009 Review of the EU Sustainable Development Strategy, 16818/09, Brussels, 1 December, 2009, p. 21.

²⁰ Commission Communication, Europe 2020, A strategy for smart, sustainable and inclusive growth, COM(2010)2020, Brussels, 3.3.2010, pp. 3-4, 8-9.

²¹ Ibid., at pp. 12-15.

Commission emphasizes that the Europe 2020 strategy is not only relevant inside the EU, it can also offer considerable potential to candidate and neighborhood countries and help them better accommodate their reform efforts. Expanding the area where EU rules apply will create new opportunities for both the EU and its neighbors. The Commission considers as an important objective for the coming years to build strategic relationships with emerging economies, to discuss issues of common concern, and to promote cooperation.²² The European Council adopting the strategy considers it to be a framework for the Union to mobilize all of its instruments and policies, and also for the Member States to take coordinated action. The Council emphasizes the necessity of the implementation in which new supervisory bodies will start to work. While all the EU policies will have their role to play in the new strategy, a need for a common energy policy and a new ambitious industrial policy has to be addressed.²³

II. Global international (UN and UNECE) conventions regulating environmental protection of transboundary watercourses and their catchment areas

1. International conventions on water protection

Environmental protection is an issue covered by a number of international and European conventions, with the objective to unify and equalize national law and to ensure undertaking of appropriate policies and measures related to protection of the environment.

a) The Helsinki Rules

In 1996, the International Law Association (ILA), adopted as a result of its fruitful work the Helsinki Rules on the Uses of the Waters of International Rivers ('Helsinki Rules'). It was drafted by the Committee on the Uses of the Waters of International Rivers of the ILA. This document represented the earliest attempt to codify customary international law related to trans-boundary water resources.²⁴

²² Ibid., at p. 21.

²³ European Council, Conclusions on a New European Strategy for Jobs and Growth (Europe 2020), EUCO 13/10, Brussels, 17 June 2010, pp. 1., 3.

²⁴ L. Jansky et al., *The Danube, Environmental Monitoring of an International River* (Tokyo, New York, Paris, UN University Press 2004) pp. 9-10. Also D. A. Caponera, 'Legal Aspects of the Development of Mekong Basin Area', in *Regional*

b) Draft rules on the use of international watercourses for non-navigational purposes

In 1991, the Commission for International Law of the United Nations adopted the draft rules on the use of international watercourses for non-navigable purposes. Article II of the Draft rules defines a ‘watercourse’ as

‘a system of surface and groundwater, which is the basis of their physical relationships within the unified whole.’

Recognizing that these two sources of water are part of a single entity on the basis of physical correlation, the Commission accepts as a fact and that the rules of international law apply to groundwater. In addition, existing international agreements, and other potential sources of international law are considered to be binding and operative insofar as codified by contemporary international customary law.²⁵

c) The UN Convention on the Law of the Non-navigational Uses of International Watercourses

The United Nations Convention on the Law of the Non-navigational Uses of International Watercourses from 1997 is probably the most concrete articulation of global international law relating to transboundary watercourses.²⁶ It represents a sublimation of decades of analysis, dialogue and negotiations, but still does not contain clear provisions on the role of public sector in the matter.²⁷ The Convention promotes the principle of equitable and reasonable use of international rivers, as well as liabilities to prevent causing significant damage. Complaints are raised against this Convention about the lack of commitment manifested in the case of different interests of coastal states. Articles 5 and 7 of the Convention only urge States Parties to take into account the interests of other coastal States and to include them in

Development for the Mekong Basin, Report on the International Symposium (Tokyo, UNU Press 1996)

²⁵ G. Eckstein, ‘Application of International Water Law to Transboundary Groundwater Resources, and the Slovak-Hungarian Dispute Over Gabčíkovo-Nagymaros’, 19 *Suffolk Transnational Law Review* (1995) p. 75.

²⁶ See General Assembly resolution 51/229, Annex, Official Records of the General Assembly, Fifty-first Session, Supplement No. 49 (A/51/49).

²⁷ C. E. Bruch, ‘New Tools for Governing International Watercourses’, *Global Environmental Change* (2004) p. 16.

preparing their own development plans.²⁸ This section of the Convention is a practical solution to rely on rules established in the Stockholm Declaration of 1972, according to which states have the sovereign right to exploit natural resources in their own territory, but also have a responsibility to ensure that activities that occur on their territory do not cause harm to the environment of other countries. The Convention attempts to codify the common law using more general terms, but does not pretend to be applicable in case of dispute by the mutually concluded agreements. This Convention, however, has not yet entered into force because it has not obtained the required 35 instruments of ratification, although 12 years have already passed since its enactment.²⁹ Croatia was not among the signatories.

d) The Convention on the Protection and Use of Transboundary Watercourses and International Lakes

Within the United Nations Economic Commission for Europe (UNECE) in 1992, the Convention on the Protection and Use of Transboundary Watercourses and International Lakes was adopted.³⁰ The purpose of the Convention is to prevent, control and reduce transboundary impact on cross-border European waters. It is especially intended for securing public data and information exchange about the situation in connection with the waters, and planned and undertaken measures to be implemented for preventing, controlling and reducing transboundary impacts and effects of measures which are taken on watercourses.³¹ Article 2 of the Convention lays down the obligations of its parties to take all necessary measures to prevent, control and reduce transboundary impact on water bodies, whereby they are obliged to take appropriate measures:

- to prevent, control and reduce pollution that causes or may cause, cross-border effects;

²⁸ S. Dinar, *International Water Treaties, Negotiation and Cooperation along Transboundary Rivers* (London, Routledge 2008) p. 41.

²⁹ *Ibid.*, at p. 42.

³⁰ Adopted on 03/17/1992 and came into force in 1996, the Official Gazette, International Treaties No. 4/96, available at: <<http://www.unece.org/env/water/text/text.htm>>, (last accessed on 15.06.2010).

³¹ A. S. Rieu-Clarke, 'An Overview of Stakeholder Participation – What Current Practice and Future Challenges? Case Study of the Danube Basin', 18 *Colorado Journal of International Environmental Law and Policy* (2007) p. 621.

- to ensure that the transboundary waters are used for the purpose of environmentally safe and rational water management, protection of water resources and environment;
- to ensure that transboundary waters are used rationally and fairly, taking into account its international character, in connection with activities which cause or may cause transboundary effects.³²

In addition to this Convention there are a number of other documents (protocols and conventions) that concern the issue of water and environment, such as the Protocol on Water and Health,³³ Protocol on Civil Liability and Compensation for Damage Caused by Transboundary Effects of Industrial Accidents on Transboundary Waters,³⁴ the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention).³⁵ This Convention was adopted by the Croatian Republic in 1996 and thus, became a part of the Croatian legal system.

2. The Danube Convention

a) The establishment of the Danube Convention

When discussing environmental protection of the Danube River, the importance of the International Convention on Cooperation for the Protection and Sustainable Use of Danube River cannot be bypassed.³⁶

³² Narodne Novine, International Agreements, no. 4/96

³³ Adopted on 17.06.1999, entered into force on 4 08 2005, available at: <http://www.unece.org/env/water/text/text_protocol.htm>, (last accessed on 15.06.2010).

³⁴ Adopted on 21.05.2003, available at: <<http://www.unece.org/env/civil-liability/protocol.html>>, (last accessed on 15.06.2010).

³⁵ Adopted on 25. 06. 1998, entered into force on 30.10.2001, available at: <http://www.eisil.org/index.php?sid=535441163&id=2078&t=link_details&cat=418>, (last accessed on. 15.06.2010).

³⁶ It was signed in Sofia June 29, 1994. The Convention entered into force in October 1998, after it was ratified by most of its signatories. Available at: <<http://www.icpdr.org/icpdr-pages/drpc.htm>>, (last accessed on 15.06.2010). The following 13 countries are all 'Contracting Parties' to the Danube River Protection Convention: Austria, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Germany, Hungary, Moldova, Romania, Slovenia, Slovakia, Serbia and Montenegro and Ukraine. In 2006, Serbia and Montenegro divided into two countries; efforts are now underway to secure the accession of Montenegro to the

For the implementation of the Convention a special International Commission for the Protection of the Danube River (ICPDR) has been established, which coordinates the activities within its expert groups for the management of the Danube catchment area. It is particularly related to the following topics: emissions, ecology, monitoring, and laboratory information management.³⁷ It is an international convention entered in mainly by the countries through which the Danube flows; however it is open for accession by all States and international organizations which are invited by the Member States.³⁸ The ICPDR, as the International Commission for the implementation of this Convention was established in October 1999 and proved to be extremely useful in strengthening cooperation along the Danube River basin, whereby it has identified and facilitated to finance over 50 projects. These projects involved investments for waste water treatment facilities. It also has established more than 75 points to monitor the water quality, compiled a list of pollution emissions that originate from the public sector, industry and agriculture. Along the Danube basin the ICPDR has established systems for warning of accidents that occur, for the assessment and reduction of the number of potential black spots, and it prepared an action programme for flood protection along the basin of the river Danube.³⁹

b) The scope of the Danube Convention

In order to analyze the scope of this Convention we can assert that this Convention affects the 'hydrological catchment areas of the contracting parties'. Thus, there is no doubt that it encompasses all tributaries of the Danube River, even the smallest ones in terms of amount of water which flows from them into the Danube.⁴⁰ The Convention on Cooperation for the Protection and Sustainable Use of Danube River covers not only the surface waters of the river Danube and of its tributaries, but also the groundwater and parts of the land along the river Danube. This conclusion comes from Article 3, paragraph 2, of the Convention, where the scope of the Convention is determined. It is evident that the

Convention. 15 Years of managing Danube river Basin, p. 12, available at: <http://www.icpdr.org/icpdpages/15_years_managing_danube_basin.htm>, (last accessed on 15.07.2010)

³⁷ See Art. 18 of the Convention, and Jánký et al., op. cit. n. 24, at p. 22.

³⁸ Art. 28 para 2 of the Convention

³⁹ Rieu-Clarke, op.cit. n. 31, at p. 624.

⁴⁰ See Art. 2 para 1 in relation to Art. 1 para b) of the Convention.

Convention extends to all activities and measures that are planned or under way, to the extent that they cause or may cause transboundary effects. Therefore, matters dealt within the frame of this Convention are set very broadly, because its provisions say that it refers to all activities and measures that cause, or only may cause transboundary impacts. Moreover, such activities and measures relate to: a) discharge, bringing nutrients into the water or hazardous substances from point and diffuse sources, and release of heat, b) planned activities and measures in water works, especially the regulatory works, facilities to control runoff and water levels in rivers, flood control, ice, and the effect of buildings, located in the watercourse or adjacent, that are under its water regime, c) other planned activities and measures to use water for various purposes, e.g., use of water energy, transfer of water and water abstraction; d) the operation of existing hydraulic structures such as reservoirs, hydroelectric power, measures to prevent environmental impacts, including: deterioration of hydrology, erosion, abrasion, flooding and sediment discharge; e) measures to protect ecosystems; f) handling of substances hazardous to water and prevention of accidents. Thereby, in the same article of the Convention under Section 3 it is added that the Convention is applicable in the field of fisheries and inland water navigation to the extent that it is concerned with the problem of water protection from pollution caused by these activities.

The question might arise: how can the Convention so bravely expand to an area far beyond the riverbed of the Danube? The answer could rely on the fact that from the point of view of environmental protection one particular area cannot be treated independently from its surrounding. In particular, when watercourses are concerned, it is impossible to protect only one part of the watercourse without protection of its other integral parts. This means that ground waters around the Danube are integral parts of its watercourse and it is not possible to prevent pollution of the river Danube when its tributaries or the groundwater surrounding it are polluted. On the other hand, even the protection against water pollution of the land, through which these watercourses flow, is important. Furthermore, cities, other settlements and the behavior of their population, as well as industrial, agricultural activities and logistic infrastructure are part of that polluting potential.

c) The role of contracting parties to the Danube Convention

Therefore, the role of contracting parties to the Convention is important, in particular as far as their regulatory measures and instruments are concerned. These measures are framed by the objectives and assignments defined by the Convention. It is left to the contracting parties to decide whether they take measures alone or together with other states in order to ensure the conditions and basis for the effective protection of the quality and sustainable use of water, and thereby prevent, limit and reduce transboundary impacts. These measures focus on the followings: a) registration of the status of natural water resources in the Danube catchment area, using the agreed parameters for the quantity and quality of water, including the corresponding methodology; b) adoption of legal provisions concerning the requirements to be met by sewers, including timelines; c) adoption of legal provisions on the handling of substances hazardous to water; d) adoption of legal provisions to reduce the introduction of nutrients or hazardous substances from diffuse sources into the water, particularly regarding the application of nutrients, protective agents and pesticides in agriculture; f) the contracting parties shall cooperate in a way that they will take appropriate measures to avoid cross-border effects and the impact of waste and hazardous substances, which originate from transportation activities.⁴¹ In each of these obligations the role of states is almost sovereign.

One point of this article of the Convention stresses the role of the International Commission / ICPDR stating that:

‘e) in order to harmonize these regulations at a high level of protection, and coordinated implementation of appropriate measures, contracting parties shall take into consideration and discuss the results and proposals submitted by the International Commission.’

So, the activities of contracting parties are strongly supported by ICPDR, which facilitates and speeds up the process of regulation of environmental protection around the Danube River, in line with international and EU conventions, regulations and directives.

⁴¹ See Art. 5 of the Convention.

3. The Practice of the International Commission for the Protection of the Danube River (ICPDR)

a) The ICPDR as a regional coordinating institution

Nowadays, the ICPDR has an important role in the implementation not only of the International Convention on Cooperation for the Protection and Sustainable Use of Danube River, but also of all international and European conventions, regulations and directives related to environmental protection of the river Danube. Although it provides only proposals, the ICPDR conducts voluminous and comprehensive research and analysis of the ecological situation in the territory of the Danube, through all the riparian countries. The ICPDR's proposals are usually respected by contracting parties. Based on the results that the ICPDR has so far achieved – including compliance with EU requirements related to the Danube river – it can be stated, that it has become a mature regional coordinating institution, creating systems for water quality monitoring and for early warning of accidents, reducing pollution emissions and nutrient pollution, conserving wetlands and enhancing public participation and communications.⁴²

b) Priority fields of the ICPDR activities

In its research and analysis the ICPDR concentrates on human impact, impact of municipalities, impact of industry and agriculture. Human impacts are results from the activities of over 83 million people in 19 countries within the Danube catchment area and are related to the inadequate waste water treatment, excessive volumes of nutrients entering the river (mainly from agricultural fertilizers and from inadequately treated municipal sewage, including those produced by households), organic pollution causing significant changes in oxygen balance (resulted from untreated or only partially treated wastewater from settlements, industry and agriculture), hazardous and toxic substances (in particular through occasional industrial accidents or floods) and hydromorphological alterations (interruption of river and habitat continuity, disconnection of adjacent wetland or floodplains,

⁴² 15 Years of managing Danube river Basin, p. 24, available at: <http://www.icpdr.org/icpdpages/15_years_managing_danube_basin.htm>, (last accessed on: 15.07.2010).

hydrological alterations and future infrastructure matters).⁴³ The ICPDR devotes special attention to municipalities, which generate around 60% of the wastewater discharged into the Danube river catchment area. It is therefore indispensable to employ new sewer systems and wastewater treatment plants reconstructed or upgraded, to improve the operation of sewer systems, to remove more nutrients in wastewater treatment plants, and to prevent water pollution from landfills.⁴⁴ The industrial impact refers to all industrial sectors in the area, among which the chemical, food, pulp, and paper industries are the main polluters. The research and analysis of the ICPDR refer particularly to immediate environmental impacts and long term impacts of industrial pollution in the region. Most of the problems are caused by outdated technologies or harmful substances used, but could be substituted or problems are due to inadequate treatment facilities used by the industry.⁴⁵ Agriculture has long been a major source of income for many people living in the Danube River Basin. But today agriculture is also a major source of pollution including fertilizers and pesticides, as well as effluents from huge pig farms and agro-industrial units. Animal breeding and manure disposal are important point sources of pollution from agriculture.

Inappropriate agricultural practices in some areas have polluted rivers and the groundwater, and have led to soil erosion. Many wetlands have been converted into farmland, drained, contaminated or otherwise degraded. Fertile topsoils have also been eroded in many agricultural regions. These changes have affected the structure and biodiversity of ecosystems. Unsustainable agricultural practices also reduce the standard of living for farmers and rural communities in the long term. The modernization and intensification of agriculture in the new EU countries is expected to bring about an increase in the amount of agricultural pollutants affecting the Danube. The ICPDR recommendations on best agro-industrial techniques address the following issues: a) development and implementation of good agricultural practice, b) adequate use of pesticides and fertilizers, c) proper storage and handling of manure, d) proper treatment of

⁴³ <http://www.icpdr.org/icpdr-pages/human_impacts.htm>, (last accessed on 15.07.2010).

⁴⁴ <<http://www.icpdr.org/icpdr-pages/municipalities.htm>>, (last accessed on 15.07.2010).

⁴⁵ <<http://www.icpdr.org/icpdr-pages/industry.htm>>, (last accessed on 15.07.2010).

wastewater discharges from farms, e) reductions in run-off and erosion, f) Promotion of organic farming, g) proper operation of irrigation and drainage systems, and h) suitable restoration, management and conservation of wetlands.⁴⁶

The ICPDR defined a ‘Danube River Basin Strategy for Public Participation in River Basin Management Planning 2003 – 2009’ to be implemented by Danube countries with the ICPDR’s guidance. Considerable resources were provided to the ICPDR for its communication activities including assistance for workshops, Danube Watch publications, Danube Day activities and media support. Particular attention was also given to strengthen the capacities of the Danube Environmental Forum (DEF), created earlier through the UN Development Programme – Global Environment Facility (UNDP/GEF) interventions. Today, the DEF is the umbrella organization for the largest network of NGOs in the basin with a strong Secretariat, 174 member organizations and national focal points from 13 Danube countries.⁴⁷ Danube countries and international institutions were successful in establishing programmes and carrying out activities to support the Integrated River Basin Management (IRBM). Environmental progress will presumably be one of the key results coming from the effective application of the IRBM. In the Danube catchment area, there are already signs of environmental improvement. However, there is still much to be done. Prior to 1990, the over 150 years of human activities caused significant damage to the river, its tributaries and ecosystems. The old adage therefore applies well here: it takes much longer to rebuild something than to damage it. Nonetheless, the necessary framework and foundations have been put in place so more improvements are expected soon.⁴⁸

III. The EU Water Framework Directive

Protection of water resources is one of the most important areas of environmental protection in Europe and worldwide. Since water is a precondition for human, animal and plant life, it is an indispensable

⁴⁶ <<http://www.icpdr.org/icpdr-pages/agriculture.htm>>, (last accessed on 15.07.2010).

⁴⁷ See ‘15 Years of managing the Danube Basin’, pp. 30-31, available at: <http://www.icpdr.org/icpdr-pages/15_yers_managing_danube_basin.htm>, (last accessed on 15.07.2010).

⁴⁸ *Ibid.*, at p. 33.

resource for the economy. Furthermore, water plays a fundamental role in the climate regulation circle. At a global level, water is often a limited resource.⁴⁹ Although compared to the situation in some parts of the world the status of European water resources is relatively favourable: the continent faces no overall water shortages and extreme water problems such as droughts and floods are rare, it is clear that Europe's water quality is far from satisfactory.⁵⁰ Given the increasing pressures on Europe's water resources, effective legislation at EU level is needed for their sustainable use and to secure these resources for future generations.

The European Community started to adopt legislation on water protection at the beginning of the establishment of its environmental policy, in the mid 1970s. The early directives focused first of all on human needs, i.e., protection of surface waters for the abstraction of drinking water, quality of bathing water and fresh water supporting fish life.⁵¹ They were aimed at two objectives: quality requirements for specific water uses and limitation of discharges of pollutants into the water. Despite the numerous legislative acts on water protection,⁵² the EU water policy and law was fragmented in terms both of objectives and of means. From the mid 1990s a pressure for a fundamental reconsideration of the EU water policy began. In 1996 in its Communication the Commission defined four objectives for the EU sustainable water policy:

- a secure supply of safe drinking water provided in sufficient quantity and with sufficient reliability;

⁴⁹ Less than 1% of the planet's water is available for human consumption. More than 1.2 billion people have no access to safe drinking water. See European Commission, DG Environment, Tap into it! The Water Framework Directive, Office for Official Publications of the European Communities, Luxembourg, 2002, p. 2.

⁵⁰ E.g. 20% of all surface water in the EU is seriously threatened with pollution; groundwater supplies around 65% of all Europe's drinking water, while 60% of European cities overexploit their groundwater resources; 50% of wetlands have 'endangered status' due to groundwater overexploitation, etc. Ibid., at p. 2.

⁵¹ Directives 75/440 (drinking water), 76/160 (bathing water), 78/659 (fresh water for fish), 79/923 (shellfish water).

⁵² For the development of water policy and legislation of the EU see L. Krämer, *EC Environmental Law* (London, Sweet & Maxwell 2007) pp. 273-304, and the Environment Policy website of the Commission at: <http://ec.europa.eu/environment/water/water-framework/info/intro_en.htm>, (last accessed on 15.07.2010).

- water resources should be of sufficient quality and quantity to meet other economic requirements (abstraction needs of industry, agriculture, fisheries, transport and power generation activities, recreational needs);
- the quality and quantity of water resources, together with the physical structure of the aquatic environment, should be sufficient to protect and sustain the good ecological state and functioning of the aquatic environment as well as meet the water needs of wetland and terrestrial ecosystems and habitats
- water should be managed so as to prevent or reduce the adverse impact of floods and minimize the impact of droughts.⁵³

A need for a more global approach towards the EU water policy and law resulted in the single framework legislation, the 2000/60 Water Framework Directive (WFD),⁵⁴ which entered into effect at the end of 2003.

1. The key aims of the WFD

The key aims for the water protection, use and management are the following (Article 1):

- to expand the scope of water protection to all waters: inland surface waters, transitional waters, coastal waters and groundwater;
- to promote sustainable water use based on a long-term protection of available water resources;
- to enhance and to improve the protection of the aquatic environment, to reduce discharges, emissions and losses of priority progressively, and to stop or phase out discharges, emissions and losses of priority hazardous substances;
- to reduce groundwater pollution progressively and to prevent further pollution;
- to mitigate the effects of floods and droughts, and thereby to contribute to the provision of the sufficient supply of good quality surface water and groundwater.

⁵³ Commission Communication on the European Community Water Policy, COM(96)59, Brussels, 21.02.1996, p. 2.

⁵⁴ Directive 2000/60 on establishing a framework for the Community action in the field of water policy, *OJ L 327*, 22.12.2000, p. 1.

2. River basin management and related administrative arrangements

The WFD introduces a single system of water management by river basin – which is the natural geographical and hydrological unit – instead of one according to administrative or political boundaries. The WFD requires Member States to identify the individual river basins lying within their national territory and to assign them to individual river basin districts. The appropriate administrative arrangements have to be ensured by the Member States according to these units. Where a river basin covers the territory of more than one Member State, it has to be assigned to an international river basin district; the concerned Member States have to ensure the appropriate coordination. This is also the case where a river basin extends beyond the territory of the EU: Member States ‘shall endeavor’ to establish appropriate coordination with the relevant non-Member States to achieve the objectives of the WFD (Article 3).

3. Environmental objectives

The WFD defines environmental objectives according to surface waters, groundwater and protected areas (Article 4). The key objectives are: general protection of the aquatic ecology, specific protection of unique and valuable habitats, protection of drinking water resources, and protection of bathing water. All these objectives must be integrated for each river basin. For surface waters – including all bodies of surface waters, natural and artificial ones as well – the general aim is to reach a good ecological potential and a good chemical status. The relevant parameters are defined in the Annex V of the Directive⁵⁵ and by quality standards at EU level. Member States have to protect, enhance and restore all bodies of surface waters, and reduce, stop or phase out pollution from priority hazardous substances. For groundwater the aim is to reach a good groundwater status: Member States have to prevent or limit the input of pollutants into groundwater, protect, enhance and restore all bodies of groundwater, ensure a balance between abstraction and recharge of groundwater, and reverse significant trends in the

⁵⁵ Qualifications such as ‘high’, ‘good’ and ‘moderate’ (below these ‘poor’ or ‘bad’) ecological status is given for rivers, lakes, transitional waters and coastal waters according to various characteristics (hydromorphological, physico-chemical, biological quality elements, e.g., presence of certain polluting substances, etc.).

concentration of any pollutant resulting from human activity. For protected areas all the objectives (the most stringent ones) set out for the first two categories of water have to be met: Member States have to comply with any standards and objectives; they have to designate specific protection zones within the river basin district, and establish registers of these areas, e.g., for the conservation of habitats and species directly depending on water.

The WFD establishes as deadline 2015 'at the latest' by which date the above objectives must be met. This deadline, however, may be extended for the purpose of phased achievement, provided that no further deterioration occurs (Article 4(4)). Member States may derogate from the requirements set by the WFD under certain circumstances and in cases where certain uses of water adversely affect their status. However, the objectives must be essential on their own terms, e.g., flood protection, essential drinking water supply, navigation or power generation. The WFD allows Member States to achieve less stringent environmental objectives for specific bodies of water when they are so affected by human activity that the achievement of the objectives defined above would be infeasible or disproportionately expensive, provided that the conditions set out in the Directive are met (Article 4(5)).

4. Application of a combined approach

The WFD combines the two traditional approaches to environment protection: setting emission limit values (source control) and quality objectives. Both have their advantages and disadvantages: the application of limit values alone may result in a cumulative pollution, which is severely detrimental to the environment; while quality standards can underestimate the effect of a particular substance on the ecosystem. For this reason, a consensus has been developed, that both are needed in practice. The Commission in its 1996 Communication already stated that

'[i]n practical terms, the existence of environmental quality objectives allows authorities to judge the effectiveness or otherwise of the emission limit values adopted and whether they need to be tightened. Conversely, controls on emissions (usually based on Best Available Technology) are the key element of any strategy to ensure compliance with environmental quality objectives. The two approaches are therefore complementary and not contradictory. Pollution control in Community water policy therefore has elements of the environmental

quality objectives approach and of emission limit values derived from an assessment of what is technologically possible.⁵⁶

Member States have to ensure that all discharges into surface waters are controlled according to the combined approach: they have to establish and implement emission controls and limit values as set out in the relevant EU legislation defined in the WFD. Where a quality objective or quality standard requires stricter conditions, more stringent emission controls have to be set accordingly (Article 10).

5. Programme of measures and the river basin management plan

The WFD requires the coordination of measures at EU level to tackle various water pollution problems, e. g., in the Directives on urban waste water, on nitrates or on the integrated pollution prevention and control.⁵⁷ Each body of water has to meet requirements of all existing legislation in this respect (listed in Article 10, and in Annex VI). For each river basin district Member States have to establish a programme of measures for which the WFD sets out various requirements (Article 11). Each programme shall include ‘basic measures’ – minimum requirements, e.g., controls, monitoring programmes of abstraction of fresh surface water, of point source discharges; prohibitions, authorizations, etc. Member States have to identify why the objectives for a certain river basin have not been achieved, and, where necessary, design additional ‘supplementary measures’ to satisfy them, e.g. by means of stricter controls on industrial or agricultural emissions or on urban waste water sources, legislative, administrative, fiscal instruments, codes of good practice, certain agricultural methods, or water-efficient technologies, etc. (a non-exclusive list is provided by the Annex VI. Part B). These programmes must be updated every six years.

In addition to these programmes, Member States have to produce a management plan for each river basin district (Article 13), which, in case of an international river basin district should serve as international river basin management plan, where coordination between Member

⁵⁶ Op. cit. n. 53, at pp. 10-11.

⁵⁷ Dir. 91/271 concerning urban waste-water treatment, *OJ L* 135, 30.5.1991, p. 40, amended by Commission Dir. 98/15, *OJ L* 67, 7.3.1998, p. 29., Dir. 91/676 concerning the protection of waters against pollution caused by nitrates from agricultural sources, *OJ L* 375, 31.12.1991, p. 1. Dir. 1996/61 concerning integrated pollution prevention and control, *OJ L* 257, 10.10.1996, p. 26.

States has to be ensured. Similarly, Member States ‘shall endeavor’ to produce a single plan in case of an international river basin district extending beyond the boundaries of the EU. Annex VII to the WFD details the elements that management plans should include, e.g. general description of characteristics of the river basin district; a summary of significant pressures and impact of human activity on the status of surface water; monitoring networks established; a list of the environmental objectives and measures taken to achieve them, etc. These plans had to be published by 2009, and shall be reviewed and updated by 2015 at the latest. Member States are obliged to send copies of these plans to the Commission and to other Member States, and regularly report on analyses and monitoring programmes (Article 15).

6. Integration of policies in water protection

The protection of the aquatic environment can only be achieved through the integration of various policy areas which come into contact with water use. Therefore, the WFD encourages, in some cases requires further integration of protection and sustainable management of water into other EU policies, such as energy, transport, agriculture, fisheries, regional policy and tourism, which also be traced back to the Treaty requirement on the integration of environmental requirements into the definition and implementation of other EU policies and activities with a view to promoting sustainable development.⁵⁸ The WFD provides a basis for dialogue and for development of strategies towards further integration of policy areas that can contribute to improving water quality.⁵⁹ Thus, the objectives of the WFD have to be integrated into other EU policies. Where existing legislation fails to solve the problems of good water quality, the Member States must identify them and design additional measures to satisfy all relevant objectives, e.g., via stricter controls on pollution emissions from industry or from agriculture, etc. (Article 11 – programme of measures).

7. Public participation

The WDF requires public participation in water protection in order to ensure greater transparency and better implementation and enforceability. Member States have to involve all interested parties

⁵⁸ Art. 11. Treaty on the Functioning of the European Union

⁵⁹ 2006/60 Water Framework Directive, Preamble, 16 indent

(citizens, interested parties, NGOs) in the implementation of the Directive, in particular, in the production, review and updating of the river basin management plans. Member States have to publish timetables, work programmes, overviews and draft copies of these plans well before the beginning of the period of reference (1-3 years prior). They have to ensure access to background documents and information used for the development of plans. Member States have to allow at least six months to submit comment in writing on these documents in order to ensure active involvement and consultation (Article 14).

8. Getting the prices right

One of the important innovations of the WFD is the introduction of pricing for water use. Adequate water pricing acts as an incentive for efficient and sustainable use of water resources and thus helps to achieve the environmental objectives of the Directive. This part of the WFD is based on the principle of recovery of the costs of water services, including environmental and resource costs, and on the polluter pays principle (Article 9), which is one of the basic principles of the EU environmental policy, enshrined also in the Environmental title of the Treaty. Member States have to ensure by 2010 an adequate contribution of the different water uses disaggregated into at least industry, households and agriculture, to the recovery of the costs of water services. Prices charged to water consumers – such as for the abstraction and distribution of fresh water and the collection and treatment of waste water – have to reflect the true costs, based on economic analysis conducted according to Annex III of the Directive. Member States are allowed to derogate from this requirement (Article 9(4), e.g., in less favored areas or provide basic services at an affordable price.

9. Cross-border cooperation and international obligations

Since water does not stop at borders the best way to manage water is through international cooperation. The WFD can rely on experience of various European regions like the Danube and Rhine basins where a long-standing tradition of international cooperation exists. The WFD requires that all partners in a given river basin manage their waters together in close cooperation: as it is mentioned above, Member States have to ensure the coordination of all programmes of measures in international river basin districts where they are covering the territory of more than one Member State. Similarly, they are expected to establish

such coordination with relevant non-Member States where the river basin district expands over the territory of the EU. They may, for this purpose, use existing structures stemming from international agreements (Article 3(4)-(5)). The same applies for the establishment of river basin management plans. Thus, the cooperation requirement of the WFD aims at the establishment of a new solidarity in water management within river basins.⁶⁰

The EU and its Member States are parties to various international agreements on the protection of marine waters from pollution, for example on the Baltic Sea Area,⁶¹ on the North-East Atlantic,⁶² and on the Mediterranean Sea.⁶³ The WFD intends to contribute to the fulfillment of their obligations stemming from these conventions (Article 1, purposes of the Directive). The WFD intends also to contribute to the implementation of EU obligations under international conventions on water protection and management, notably the UN Convention on the protection and use of transboundary water courses and international lakes,⁶⁴ and any subsequent agreements on its application.⁶⁵ The EU and Member States are parties to other important international agreements concerning water protection, not expressly mentioned in the WFD, e.g., the Convention for the Protection of the Rhine,⁶⁶ or the Convention on Co-operation for the Protection and Sustainable Use of the Danube River.⁶⁷ The Rhine Convention is designed to preserve and improve the ecosystem of the Rhine and the Council Decision approving the Convention seeks to strengthen the cooperation between the EU and the Rhine riparian States. The Danube

⁶⁰ Op. cit. n. 49, at p. 4.

⁶¹ Convention on the Protection of Marine Environment of the Baltic Sea (Helsinki, 1992), approved by Council Decision 94/157, *OJ L* 73, 16.3.1994, p. 19.

⁶² Convention for the Protection of the Marine Environment of the North-East Atlantic (Paris, 1992), approved by Council Decision 98/249, *OJ L* 104, 3.4.1998, p. 1.

⁶³ Convention for the Protection of the Mediterranean Sea Against Pollution (Barcelona, 1976), approved by Council Decision 77/585, *OJ L* 240, 19.9.1997, p. 1.

⁶⁴ Signed in Helsinki (1992), approved by Council Decision 95/308, *OJ L* 186, 5.8.1995, p. 42.

⁶⁵ 2006/60 Water Framework Directive, Preamble, 21, indent 35

⁶⁶ Signed in Berne (1999), approved by Council Decision 2000/706, *OJ L* 289, 16.11.2000, p. 30.

⁶⁷ Signed in Sofia (1994), approved by Council Decision 97/825, *OJ L* 342, 24.7.1997, p. 18.

Convention is aimed at achieving the sustainable and equitable water management in the Danube basin, the conservation, improvement and the rational use of surface waters and ground water in the Danube catchment area.

The International Commission for the Protection of the Danube River (ICPDR) in its recent Danube Declaration emphasized the importance of cooperation on water management between the EU Member States and non-Member States existing in the framework of the ICPDR, and expressed its support for the further enlargement process of the EU.⁶⁸ The ICPDR approved the Danube River Basin Management Plan for the period of 2009-2015,⁶⁹ which is in line with the EU WFD, and will contribute to the achievement of its ultimate goal, the good status of water bodies.

10. Future strategies

The WFD requires that the European Parliament and the Council adopt further specific measures against pollution of water by individual pollutants or group of pollutants which present a significant risk to the aquatic environment, including risks to waters used for the abstraction of drinking water. It requires the Commission to submit proposals for such measures, e.g., regarding the list of priority substances, priority hazardous substances, controls for the progressive reduction of discharges and emissions, and for quality standards.⁷⁰ Similar requirements apply to prevent and control pollution of groundwater (Articles 16-17). The Commission is required to present its plans of measures having an impact on water legislation, and review the Directive by 2019 at the latest (Article 19). The WFD repealed a number of earlier water directives according to a given timetable, and it provided for transitional rules (Article 22).

⁶⁸ ICPDR Danube Declaration, Danube Basin: Shared Waters – Joint Responsibilities, adopted at the Ministerial Meeting, 16 February 2010, p. 1.

⁶⁹ <http://www.icpdr.org/icpdr-pages/danube_rbm_plan_ready.htm>, (last accessed on 15.07.2010)

⁷⁰ Examples of EU water legislation adopted so far: Directive 2006/118 on the protection of groundwater against pollution and deterioration, *OJ L 372*, 27.12.2006, p. 19; Decision 2455/2001 on establishing the list of priority substances in the field of water policy and amending Directive 2000/60, *OJ L 331*, 15.12.2001, p. 1.

11. Joint implementation

The WFD required Member States to adopt necessary legislation for the transposition of the Directive by the end of 2003. The implementation of the WFD is unique, since it relies on the participation of all players concerned, i.e., the EU Institutions, Member States, the Candidate and EEA Countries as well as all other stakeholders and NGOs. Since the WFD raises a number of shared technical challenges for the Member States, and since many of the European river basins are international, crossing administrative and territorial borders, the implementation requires a common understanding and approach from all interested parties. For this cooperation, coordination and partnership the Member States, the Commission and Norway agreed on a Common Implementation Strategy (CIS) for the WFD.⁷¹

Following a quite high number of floods in Europe,⁷² the EU adopted a separate Directive on floods in 2007.⁷³ Although the WFD contributes to mitigating the effects of floods, reducing the risks of floods is not one of its principal objectives. The aim of the Floods Directive is to reduce and manage flood-related risks to human health, the environment, infrastructure and property. The Directive requires Member States to make a preliminary flood risk assessment, prepare flood risk maps and flood risk management plans for each river basin district. Similarly to the WFD, the Floods Directive requires cooperation among Member States and with non-Member States in case of international river basin districts. The Floods Directive provides for the coordination with the Water Framework Directive, thus, the Common Implementation Strategy for the WFD also supports the implementation of the Floods

⁷¹ For the guiding principles, key activities, methods, projects, timetables and organisational structure see the Strategic Document on the Common Implementation Strategy for the Water Framework Directive as Agreed by the Water Directors Under the Swedish Presidency in Paris 23-24 October 2000, available at: <<http://ec.europa.eu/environment/water/water-framework/objectives/pdf/strategy.pdf>>, (last accessed on 15.07.2010).

⁷² For some figures on floods between 1998 and 2000, and for risks of floods see Commission proposal for the Floods Directive, COM(2006)15, Brussels, 18.01.2006, p. 1.

⁷³ Directive 2007/60 on the assessment and management of flood risks, *OJ L* 288, 6.11.2007, p. 27.

Directive, through a separate Working Group F on Floods.⁷⁴ Since the Directive has not become fully operational it is difficult to judge whether it will successfully reach all of its objectives. It can be admitted that

'[m]uch depends on the political will and the determination of the relevant administrations to work for the improvement of water quality rather than for the administration of status quo.'⁷⁵

IV. The EU Strategy for the Danube Region (EUSDR)

1. Preliminaries to the EU Danube Strategy

As it has already been discussed above, many aspects of environmental protection and sustainable use of water for various purposes along the Danube River are aimed at by several international conventions, organizations and programmes, requiring cooperation among parties.⁷⁶ During the preparation for accession to the EU by the Central and Eastern European Countries, the increasing strategic importance of the Danube Region was emphasized. With enlargement, a number of Danube countries were expected to be new members of the EU; four of them have already joined, one is a candidate and another one is a potential candidate country. Now, among the 10 countries in which the Danube flows through, and the additional 4 countries that the Danube Region also encompasses, 8 are EU Member States, 6 are non-Member States.⁷⁷ Thus, the Danube became a central axis of Europe,

⁷⁴ See the Work-programme and mandate for 2008-2009 for Working Group F on Floods, available at: <http://ec.europa.eu/environment/water/water-framework/objectives/implementation_en.htm>, (last accessed on 15.07.2010).

⁷⁵ Krämer, op. cit. n. 52, at p. 278. On the assessment of results achieved so far see the documents on the implementation of the WDF, common strategy and work programme for 2010-2012, available at: <http://ec.europa.eu/environment/water/water-framework/objectives/implementation_en.htm>, (last accessed on 5.07.2010).

⁷⁶ For example the above-mentioned 1994 Danube Protection Convention, EU support programmes, like PHARE and TACIS, bilateral environmental cooperation among Member States, the UN programmes, like the above-mentioned GEF, etc.

⁷⁷ Danube riparian States: Germany, Austria, Slovakia, Hungary, Romania, Bulgaria (Member States), Croatia (non-Member but Candidate State), Serbia (non Member but potential Candidate State), Moldova, Ukraine (non-Member States); other countries belonging to the Danube catchment area: Czech Republic, Slovenia (Member States), Bosnia and Herzegovina, Montenegro (non-Member States). Major tributaries of the Danube are the Inn (Switzerland, Austria, and Germany), the

furthermore, since the Danube Delta lies at the territory of Romania, the Black Sea became a coastal area of the European Union.

The Danube and Black Sea Region contains the single most important non-oceanic water body of Europe. The area of the whole River Basin is about 800.000 km², covering about one third of the area of continental Europe, with a population over 100 million. The Danube is the most important river running into the Black Sea. It is the second largest European River (after the Volga), which flows over 2,857 kilometres from its source in the Black Forest of Germany to the Black Sea. Apart from the Danube, Europe's third and fourth largest rivers, the Dnieper and Don, flow to the Black Sea. The 'Blue Danube', as it is frequently referred to, binds together eighty million people, a multitude of different traditions, cultural images, and past experiences. The Danube and especially its wetland areas are habitats for a diversity of plants and animals, and a home for rare and threatened species. The Danube supports the supply of drinking water, agriculture, industry, fishing, tourism and recreation, it is used for power generation, navigation, and too often it is the final destination of disposal of waste waters. These intensive uses have created problems of water quality and quantity, affected the health of the people and reduced biodiversity in the basin.⁷⁸

Since the international and national actions and initiatives trying to remedy the environmental degradation of the Danube area so far have not proved to be sufficient enough to reverse the environmental situation, the need for strengthened action moved the Commission to initiate a closer and more effective cooperation in the Danube Region. The first step was the 2001 Communication on Environmental cooperation in the Danube – Black Sea Region,⁷⁹ which gave an overview of the environmental situation of the region and the ongoing environmental cooperation activities.⁸⁰ It highlighted priority actions

Drava (Austria, Slovenia, Croatia, and Hungary), the Tisza (Slovakia, Romania, Ukraine, Hungary, and Serbia), the Sava (Slovenia, Croatia, Bosnia and Herzegovina, and Serbia), the Morava (Serbia, Montenegro) and the Prut (Ukraine, Moldova, and Romania).

⁷⁸ Commission Communication on Environmental cooperation in the Danube – Black Sea Region, COM(2001)615, Brussels, 30.10.2011, p. 5.

⁷⁹ Ibid.

⁸⁰ For the list and summary of the main conventions, programmes and projects see *ibid.*, at pp. 26-35. For many other projects in particular fields in the Danube Region

required for improving the environmental quality and outlined a strategy to achieve environmental protection objectives to be pursued in the region. The Commission called for an increased involvement of the EU and its Member States in environmental cooperation, including a coordinated action by all financial instruments operating in the region. As main environmental challenges affecting the Danube ecosystems, the high nutrient loads from agriculture and industry, the large water consumption by the same sectors, the absence of integrated water management, the overexploitation of the surface and groundwater, the changes in river flow patterns, the contamination with hazardous substances, the accidental pollution and the degradation and loss of wetlands were listed. The Communication called for the effective implementation of the EU Water Framework Directive in close cooperation between the EU Member States and non-Member States also under the Danube Protection Convention, with the coordination by an expert group under the ICPDR; the group is chaired by the European Commission. The Commission highlighted the importance of the improved integration of Danube priorities into the EU cooperation policy framework, and the need for more efficient financial assistance to the region.

2. Launching of the EU Danube Strategy

The above initiative resulted in the preparation of the EU Strategy for the Danube Region (EUSDR) starting in 2009. The European Council stated that sustainable development should also be pursued through an integrated approach to the specific challenges facing particular regions, and invited the Commission to present an EU strategy for the Danube Region before the end of 2010.⁸¹ On behalf of the Commission the Directorate General of Regional Policy coordinates the preparation of the Strategy. In February, 2010 it issued a scoping paper intended to outline the main topics suggested for the public consultation with the participation of all interested parties including member States, neighboring countries, regions, municipalities, international organizations, financial institutions, the socio-economic partners and

see <http://www.interact-eu.net/danube_region_projects/327>, (last accessed on 15.07.2010).

⁸¹ Brussels European Council, 18/19 June 2009, Presidency Conclusions, 11225/2/09 REV 2, pp. 12-13.

civil society.⁸² The wide consultation organized by the Commission, includes a series of public events and also internet consultations.⁸³

The DG REGIO emphasizes that the strategy will be a so-called macro regional strategy, a new working method, which will operate on the basis of territorial cohesion and cooperation, being in line with the adopted Lisbon Treaty which states that the EU shall promote economic, social and territorial cohesion and solidarity among Member States (Article 3(3) of the Treaty on the European Union). The EUSDR is also within the framework of the EU 2020 strategy for smart, sustainable and inclusive growth, adopted by the European Council in June 2010.⁸⁴

The approach of the EUSDR draws on the experience of the EU Strategy for the Baltic Sea Region, in particular the involvement of all relevant partners whose aim is to find commonly agreed solutions to common problems and to provide a common strategic approach and governance mechanisms, as well as common implementation of concrete actions and projects.⁸⁵

In the Baltic Sea Strategy the following characteristics seem to be similar to those planned for the Danube Strategy: an integrated approach (of various policies) for sustainable development of the Region; better coordination and a more strategic use of Community programmes, to ensure that funds and policies in the region contribute fully to the strategy; closer cooperation and coordination within the existing financial and legal framework; specific actions undertaken by stakeholders in the region, including governments and agencies,

⁸² Commission, DG REGIO, EU Strategy for the Danube Region, Scoping Paper for the public consultation, REGIO/E1/EN/NV/OB D (2010), Brussels, 2 February 2010.

⁸³ The first stakeholder conference was held in Ulm (Germany) on 1/2 February 2010, followed by conferences in Budapest (Hungary) on 25/26 February, in Vienna (Austria) and Bratislava (Slovakia) on 19/21 April, in Ruse (Bulgaria) on 10/11 May, and the last in the series in Constanta (Romania) on 9/11 June 2010. For the topics discussed see:

<http://ec.europa.eu/regional_policy/cooperation/danube/events_en.htm>, (last accessed on 15.07.2010).

⁸⁴ Brussels European Council 17 June 2010, Presidency Conclusions EUCO 13/10, pp.1-6. In point 5 the European Council stresses the importance of promoting economic, social and territorial cohesion as well as developing infrastructure in order to contribute to the success of the new strategy. See at p. 3.

⁸⁵ For the Baltic Sea Strategy see <http://ec.europa.eu/regional_policy/cooperation/baltic/index_en.htm>, (last accessed on 15.07.2010).

municipalities, international and non-governmental organizations to respond to the identified challenges; the strategy is an internal one addressed to the European Union and its Member States, however a continuing constructive cooperation with interested third countries in the region is needed for the effectiveness of the strategy; existing well functioning structures provide the framework for the EU to pursue further cooperation with these countries. So the strategy should provide an integrated framework that allows the European Union and Member States to identify needs and match them to available resources through coordination of appropriate policies. This will enable the Region to enjoy a sustainable environment and optimal economic and social development.⁸⁶

3. Main issues to be covered by the EU Danube Strategy

The Commission indicates a set of overall questions for the consultation on the topics (what are the main challenges and opportunities in the Danube Region, which topics should be covered by the Strategy, what are the main concrete actions and projects to be recommended in the coming years); on the implementation (how to cooperate, coordinate and to exchange good practices better, how to improve the cross-border links and transnational policies, what would be the added value of the Strategy to the existing mechanisms in the Region, what would be expected of different EU policies and financial instruments, what are the needs in terms of funding and how to improve the use of existing financial instruments⁸⁷ to achieve the objective of the Strategy); and on the approach (contribution of the Strategy to improve the situation, advantages and disadvantages of an approach going beyond national

⁸⁶ Commission Communication concerning the European Union Strategy for the Baltic Sea Region, COM(2009)248, Brussels, 10.6.2009, p. 3.

⁸⁷ Although the strategy will not come with extra EU finance, a considerable amount of funding is already available to the region through a host of EU programmes. The aim is to use this available support – € 100 billion alone has been allocated from the cohesion policy (European Regional Development Fund, Cohesion Fund, European Social Fund) between 2007 and 2013 – to greater effect and show how macro-regional cooperation can help tackle local problems. See the speech of Johannes Hahn, European Commissioner for Regional Policy addressed for the Budapest Conference on 25 February 2010, IP/10/191, p. 2, available at: <http://ec.europa.eu/regional_policy/cooperation/danube/press_en.htm>, (last accessed on 15.07.2010).

boundaries, the value of an approach that covers several topics together and looks at their relationship, e.g., interaction of economic and environmental issues).

The indication of specific questions shows that the EUSDR will have three pillars:

a) Improving connectivity and communication systems:

- inland waterways road and rail systems,
- intermodal nodes (including ports and airports),
- energy systems and security of supply,
- increased use of renewable and clean energies, energy efficiency and savings,
- information society.

b) Protection of the environment, preserve water resources and prevent against natural risks:

- environment of the water (especially rivers),
- quality of air and soils (including waste),
- biodiversity and landscapes,
- natural risks (floods and droughts),
- mitigation and adaptation to climate change.

c) Reinforcing socio-economic, human and institutional development:

- internal market / trade,
- competitiveness of economic sectors (agriculture, industry and services),
- innovation / research,
- human capital (including job markets, education and health)
- institutional capacity,
- Danube identity / culture (including tourism),
- Roma community and other disadvantaged groups.⁸⁸

The addressees were free to add other relevant topics or aspects for the consultation. The target group was composed of the Member States, regional and local authorities, inter-governmental and non-governmental bodies, public organizations, enterprises, the civil society and the general public. During the consultation period many stakeholders expressed their interests in the EUSDR; they sent their contributions⁸⁹ to the Commission, which will publish the analysis of results.

⁸⁸ Op. cit. n. 82, at pp. 3-4.

⁸⁹ More than 100 contributions – ranging from international organizations, national public bodies to environmental organizations, enterprises, and private persons –

Until now the Commission has received contributions from 11 countries,⁹⁰ some of which are discussion papers elaborated in a detailed manner, others are position papers or so-called ‘non-papers’. Irrespective of whether they are final papers or only first drafts, they all have in common a welcoming reflection, expressing their readiness and determination to enhance the cooperation among countries – including their citizens and all other stakeholders – of the Danube Region and the joint and shared responsibility felt for the sustainable development of the Danube Region driven by the European integration. It is not possible to analyze the position of all the participating countries here,⁹¹ however, considering especially the environmental protection of the Danube area, the declaration of the Budapest Danube Summit reflecting the commitment of participating countries worth quoting:

‘[We, the representatives] Reaffirm our readiness to:

- create an attractive, secure and prosperous Danube region along our common values, principles and fundamental objectives;
- play an active role, engage public and private sectors and encourage all stakeholders, especially regional and local authorities, business and academic circles, and civil society in the successful preparation of the Strategy;
- take cooperative action aiming at finding common solutions to the challenges the region is facing *inter alia* in the field of environment, nature, transport infrastructure including inland navigation and railways routes, energy security, rural development, tourism, sport, good governance, food safety, migration, demography, climate changes, global crises, effects of market economic transition;
- use the Danube river basin for prudent and rational utilization of natural resources, while protecting human health, the nature and the environment; [...],⁹²

have been received by the Commission, see the list available at: <http://ec.europa.eu/regional_policy/consultation/danube/doc/stakeholders_draft.doc>, (last accessed on 15.07.2010).

⁹⁰ Austria, Bulgaria, Croatia, Czech Republic, Germany, Hungary, Romania, Serbia, Slovak Republic, Slovenia, Ukraine.

⁹¹ The countries’ contribution papers are available at:

<http://ec.europa.eu/regional_policy/cooperation/danube/documents_en.htm>, (last accessed on 15.07.2010).

⁹² Declaration of the Danube summit on 25th February 2010 in Budapest of the representatives of the Governments of Austria, Bulgaria, the Czech Republic, Germany, Hungary, Romania, Slovakia and Slovenia, available at:

All contribution papers consider the protection of the Danube ecosystem and the sustainable use of the Danube River as a matter of high priority. Many contributors emphasize the importance of the International Convention for the protection and sustainable use of the Danube River, and the activities of the International Commission for the Protection of the Danube River (ICPDR), since all 14 ‘Danubian countries’ are parties to the Convention. The expertise of ICDPR should be involved and relied upon in the development and implementation of the EUSDR. The cooperation among Member and non-Member States required under the EU Water Framework Directive and the EU Floods Directive, as well as their remarkable product, the joint ‘Danube River Basin Management Plan’ have to be seen as key sources for the development and implementation of the EUSDR.⁹³

As for the common priorities for Croatia and Hungary requiring closer cooperation and joint measures in respect of environmental protection in the Danube Region, in their contributions both countries list environmental risk management, prevention of damage caused by floods, prevention of transboundary pollution, integrated water management, ensuring sufficient quality and quantity of water used for drinking water and for other purposes, improvement of shipping and navigation conditions, protection of the ecosystem and preservation of natural resources and biological diversity, and the necessity to fight against climate change. In addition, Croatia, as Candidate country emphasizes the importance of the EUSDR in its accession process, therefore, it considers an equal partnership in the development of the strategy as the basic prerequisite for the successful implementation. Furthermore, Hungary attaches great importance to responsible water management, which means that the countries sharing the Danube catchment area should solve together (or at least in a co-ordinated way) problems affecting this area, therefore it considers the support for bilateral cooperation crucial in the strategy.⁹⁴

<http://ec.europa.eu/regional_policy/cooperation/danube/documents_en.htm>, (last accessed on 15.07.2010).

⁹³ See e.g. EU-Strategy for the Danube Region (EUSDR), Austrian thematic contributions (‘2nd non-paper’), available at: <http://ec.europa.eu/regional_policy/cooperation/danube/documents_en.htm>, (last accessed on 15.07.2010), pp. 2, 30-31.

⁹⁴ See Croatia’s priorities and Cooperation in the Danube Region, ‘Non Paper’, pp. 2, 7-9., and Hungary’s contribution to the development of the Danube Strategy, pp.

The major input by Member States, regional and local authorities and other stakeholders took place in the first half of 2010 with a number of conferences, bilateral meetings and a public consultation. Analysis, concretization and prioritization of these inputs is envisaged for the second half of 2010; the Commission will present the final communication and Action Plan with a governance system to the European Institutions by the end of 2010. The Strategy is expected to be endorsed by Member States under the Hungarian Presidency in the first half of 2011. In the adoption of the EUSDR and its Action Plan, Hungary has a key co-ordinating role. The Hungarian Presidency is unequivocally committed to adopting the Strategy and the successful launch of implementation procedures.⁹⁵

4. European Territorial Cooperation Programmes (ETC) in the Danube area

Sharing cooperation expertise in managing INTERREG⁹⁶ – ETC programmes (between Member States, co-financed by the European Regional Development Fund (ERDF), and in IPA – CBC programmes (cooperation with Accession Countries co-financed by the Instrument for Pre-accession Assistance (IPA)), furthermore in managing various cooperation programmes across national borders addressing thematic issues such as environment, socio-economic development and transport, will contribute to the development and implementation of the EU Danube Strategy. Thus, in the context of the EUSDR, the territorial cooperation approach has an important role to play. The ETC programmes should be fully exploited in order to initiate and to accelerate the process of development and to strengthen the cooperation between the countries concerned in the region.⁹⁷

2-4. available at: <http://ec.europa.eu/regional_policy/cooperation/danube/documents_en.htm>, (last accessed on 15.07.2010).

⁹⁵ See Hungary's contribution to the development of the Danube Strategy. Ibid., at p. 8.

⁹⁶ INTERREG is a Community initiative that aims to stimulate interregional cooperation in the EU. It started in 1989, and is financed under the ERDF. The current programme is Interreg IV, covering the period 2007-2013.

⁹⁷ For the period 2007-2013, nearly half of the Territorial Cooperation Programmes are focused on the Danube area. More exactly, on a total of 94 ETC programmes, 41 ETC programmes (18 Cross-border programmes, 7 Transnational programmes, 13 IPA CBC programmes and 3 ENPI programmes) are being runned in the Danube

'A cross-border region where rivers connect, not divide' is the suggestive official slogan of the Hungary-Croatia IPA Cross-border Cooperation Programme, which started in 2002. Its aim was to support non-profit cross border cooperation and to prepare potential candidates for future INTERREG funding opportunities. The present Hungary-Croatia IPA Cross-border Cooperation Programme was approved by the Commission for the 2007-2013 funding period.⁹⁸ This IPA programme has a shared management system; it offers a wide range of opportunities to the potential beneficiaries in the two priority areas: i) sustainable environment and tourism, ii) co-operative economy and intercommunity human resource development. Various activities are eligible for financing such as infrastructure developments serving the protection of nature and natural values; elaboration of joint programmes, studies, strategies for the improvement of environmental protection; construction and designation of new recreational and sport facilities, development of tourism, improvement in the fields of employment, research, development of joint education and training or activities in various cultural areas, and so on. Potential participants are ranging from county and local governments, associations, through development agencies, NGOs, water management authorities to universities and other educational organizations.

Under the heading 'Sustainable and Attractive Environment' of the first priority area, the following activities are to be supported: i) development of landscapes in the Mura-Drava-Danube area and its natural and rural surroundings; ii) environmental planning activities and minor public actions to improve the quality of the environment in natural areas. During the first period of the 2007-2013 programme, 47 projects were eligible for funding. The following approved environmental projects are good examples for cooperation: waste water treatment plants on Mura River; revitalization and landscape development of the riverine ecosystem in the Drava-Danube area; preparation for project documentation for ecological revitalization of a two Drava's branches; development of a bilingual environmental protection and water management lexicon and phrase book, aid communication, enhancement of working relationship for cooperating partners; development of flood

region. Available at: <http://ec.europa.eu/regional_policy/cooperation/danube/documents_en.htm>, (last accessed on 15.07.2010).

⁹⁸ <<http://www.hu-hr-ipa.com/>>, (last accessed on 15.07.2010)

forecast system at Drava River referring to the Croatian-Hungarian hydrographic stations; pest control forecasting service, etc. Partners include municipalities, national park management boards, agriculture associations, etc. Activities under the priority area for tourism also concern environmental protection, e.g., development of infrastructure for ecotourism or promotion of the river area as a single touristic product, etc. The second period of the term for the Hungary-Croatia IPA Cross-border Cooperation Programme is already open for project proposals. It remains to be seen how these ETC cooperation programmes can successfully be accommodated within the elaboration and implementation of the EUSDR in the future, in order to promote sustainable development, environmental protection and territorial cohesion.

European Union-related referendums in Europe

I. The referendum experience in Europe

The idea that every citizen (irrespective of developments in requirements for ‘citizen’ status) has a right to be a part of decision making in his or her state’s affairs is one that has been accepted in democratic tradition. The forms and possibilities of such participation naturally vary from place to place and between different ages. In ancient Greece, where relatively small polis-states coexisted, it was possible to use the popular vote (and debate) in state affairs with regularity. In modern countries, referendums and forms of direct democracy are the exception rather than the rule, as representative forms of democracy prevail for practical reasons: the complexity of issues to be decided upon and population size and geographical distance make a real debate very close to impossible in most cases.¹

Nevertheless, most European countries have, in their written constitution or political tradition, procedures for decision making about certain matters by all voters, instead of only by their elected representatives. Forms and purposes of direct democracy vary: from local rallies to state-wide referendums, from popular initiatives to binding votes and vetoes, European states have a wide spectrum of possibilities for citizens’ involvement in decision making. Although constitutional rules can differ greatly, a certain typology of forms of direct democracy can be made.

- In the widest sense of this category, a differentiation between referendums, plebiscites, popular initiatives and popular vetoes is necessary.
- The difference between referendums and plebiscites (and whether there is any) varies across constitutional systems and rules.
- The subject of the referendum may be a decision about constitutional issues, or decisions falling normally under the jurisdiction of the state or local legislature (Parliament or local governments).

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¹ J. Petrétei, *Az alkotmányos demokrácia alapintézményei* [Fundamental institutions of constitutional democracy] (Budapest-Pécs, Dialóg Campus Kiadó 2009) p. 206.

- The date of referendums may be preventive (before the legislative decision) or successive (after the adoption of a state act).
- Referendums may be obligatory, i.e., the constitution makes it necessary to have a referendum when certain issues need to be decided. Referendums are or non-required if a referendum is held only when a certain number of voters or elected officials request it.
- Finally, referendum results may be binding or non-binding (consultative) to the legislature. Naturally, political results may follow from consultative referendums as well.²

II. History and typology of EU-related referendums

Why is the referendum question relevant in connection to European integration? If this was asked in the fifties or sixties, in the early stages of the integration process, the answer would be: it is not a relevant one at all. After all, the Member States' citizens had very little to do with what started out as an elite-driven process. The first round of referendums came in the seventies, connected to the first round of enlargement, and most of the referendums took place in candidate countries. On the other hand, anyone familiar with the history of the European Union after the turn of the millennium would not hesitate to state that many plans of state leaders and Brussels officials – the political elite still driving the integration process – were laid to rest because of the results of various referendums in several Member States. Referendums lead to political and scholar controversy due to 'no' results (and eventual repeats) and/or low levels of turnout. A significant amount of literature has discussed issues, such as the necessity and appropriateness for making decisions on EU issues by referendums (especially in the context of Treaty ratifications), and raised the possibility of EU-wide referendums. Turning to the typology of EU-related referendums, the above-mentioned types can be detected amongst those employed in EU matters as well, with the binding / consultative and obligatory / optional differentiation being most important. From a political point of view the latter (i.e. obligatory / optional) is especially significant, as non-obligatory referenda held to

² M. Dezső: 'Népszavazás és népi kezdeményezés', in I. Kukorelli, ed., *Alkotmánytan* [Constitutional studies] (Osiris Kiadó, Budapest 2007) p. 175.

confirm a political point have proven problematic in their negative results. For a more specialized typology, the first apparent distinction to be made concerns the topic of the referendums: membership in the EC/EU and ratification of Treaty amendments or new treaties form two easily distinguishable groups, while issues (such as enlargement, leaving the EU, joining the eurozone) fall into the third category. Another, somewhat overlapping categorization might be the status of the states holding a referendum: that is, if at the time of the referendum, these are being full members of the EU, candidates for membership or non-member third states (e.g., Switzerland). There have also been examples of dependent territories not having the status of independent states holding referendums on EU matters (Greenland and the Åland Islands).

III. Referendums in individual Member States

In this part I examine the relevant referendums held in countries that are EU Member States today. Since the constitutional requirements vary from country to country, I have chosen to make a list by countries, rather than to follow a strict chronological order.

1. No referendums held on EU matters

Although the number of EU-related referendums exceeds by far the number of Member States, referendums were not evenly distributed among the countries. While a number of Member States have put to popular choice more than one question concerning the integration process, there are some that have not yet held such a referendum at all. In these countries, even though referendums in other questions were held, some of them have no such institution in their constitutional system employable for EU matters. As of 2010, Belgium, Bulgaria, Cyprus, Germany, Greece and Portugal have not held referendums directly concerning EU matters, although the Portuguese were planning to do so for the ratification of the European Constitution. This idea was given up after the French and Dutch ‘no’ in 2005 on the same subject.

2. Austria

Austria’s single EU-related referendum, held in June 1994, was about its accession to the European Union. As a traditionally neutral country situated between the two blocks in the Cold War, Austria’s membership in the EEC became a realistic option only after 1989, when it applied for membership. After the conclusion of accession negotiations, and in line

with the provisions of the constitution for a major amendment (Article 44. para 3. of the Bundes-Verfassungsgesetz), the Austrian government decided for a referendum to be held on 12 June, 1994. The relatively early date, compared to other countries in the same enlargement round, was to avoid that the discussion about accession would get mixed up with political campaigns for the upcoming general election. The question asked was '[s]hall the National Council's decision on the Constitutional Act concerning the Accession of Austria to the European Union be enacted as law?'. The Austrian political elite was unified in supporting accession, with the exception of the right-wing Freedom Party. The electorate approved of membership by 66.6% voting in favor, with a very high turnout (82.4%).³

3. Czech Republic

Although the Czech Republic had announced that it would hold a referendum on the European Constitution, this, similarly to the Portuguese and several other planned ones, came to nothing after the French and Dutch rejected the European Constitution by popular vote. Thus, the Czech voted on Europe only once, concerning the country's accession to the EU. Historically, Czech political elites have been against the idea of referendums and other forms of direct democracy. After the Cold War, Czechoslovakian legislation allowed referendums in only two cases: local referendums on local matters and a 1991 constitutional act allowing referendums on the principles of any new Czech-Slovak constitutional settlement; however, this latter option was not used in the eventual division. The 1992 Czech Constitution made referendums possible, but subject to the adoption of a constitutional act which required a qualified majority. After a long political debate, such a law was passed in October 2002 for the specific case of the accession.⁴ The referendum was held on 13-14 June 2003, with 77.33% of those voting supporting accession. At 55.21% the turnout was not high, but not much lower than at the previous year's general elections.⁵ When the European Constitution ratification was at hand, there was a wide

³ W. Kaiser, 'Austria in the European Union', 33 *Journal of Common Market Studies* (1995) p. 411

⁴ S. Hanley, 'A Nation of Sceptics? The Czech EU Accession Referendum of 13-14 June 2003', 27 *West European Politics* (2004) p. 691.

⁵ Hanley, loc. cit. n. 4.

political debate in the Czech Republic about adopting a general provision for referendums or a specific one for the European Constitution in particular.⁶

4. Denmark

Denmark is a Member State with one of the highest number of referendums relating to the European Union. This is because Article 20 of the Danish Constitution stipulates that unless the Folketing (Denmark's Parliament) can pass a law concerning the delegation of national powers to international authorities by a majority of five-sixths, a referendum shall be held on the matter. The Constitution also mandates that its amendments have to be approved by referendums and constitutional tradition provides for the possibility of ad hoc and advisory referendums as well.⁷ Denmark's first Europe-related referendum was about its accession to the European Communities, held in 1972. Although the above-mentioned Article 20 was applicable, political forces suggested holding a referendum irrespective of the prospects of a five-sixth majority support in the Folketing – indeed, the suggestion for referendum came almost a year before the parliamentary vote. An exceptionally high (90%) turnout and the 63.3% of votes in favour made the October 1972 vote a win for the 'yes' side, although this percentage was smaller than the 80% 'yes' in the Folketing. On 26 February 1986, Denmark held an advisory referendum on the Single European Act. With a turnout of 74.8%, the 56.2% of those voting in favour, the popular vote overrode the rejecting 'no' by the Parliament on the same issue and resolved problems for the government. Denmark had to hold two referendums before the Treaty of Maastricht could be ratified. The first was held on 2 June 1992, and was necessary due to the lack of five-sixth majority support in the Folketing and as a result of a previous political decision to hold a referendum in any event. This referendum had a turnout of 82.9% but ended in a 'no' result rejecting approval of the Treaty of Maastricht by a slim margin, with only 47.9% in favour of the Treaty. After this decision, indicating a difference between the opinions of the political elite and the people, Denmark

⁶ <<http://www.radio.cz/en/article/64232>>, (last accessed on 30.07.2010)

⁷ P. Svensson, 'Denmark: the referendum as minority protection', in M. Gallagher and P.V. Uleri, eds., *The referendum experience in Europe* (London, Macmillan 1996) pp. 35-37. at p. 33.

became the first country that had to repeat a referendum on the same issue. After that defeat of the Treaty, the government of Denmark, working based on a national compromise, renegotiated and received four opt-outs from portions of the Treaty: concerning Economic and Monetary Union, Union citizenship, Justice and Home Affairs and Common Defense Policy. Despite the existence of sufficient parliamentary majority support, a binding referendum was held anew in May 1993. The turnout was 85.5% of which 56.8% voted in favor of the renegotiated treaty. The next Danish referendum, on the Amsterdam Treaty, took place in May 1998. The Treaty was accepted by the Danish people, with 55.1% voting in favor and a voter turnout of 76.2%. The latest Danish referendum was held in September 2000, on joining the euro area. Despite a former enthusiasm for the subject, several factors, including the declining strength of the euro and the EU's sanctions against Austria, led to a defeat of the proposal by 53.2% voting against at a turnout of 87.6%. Denmark planned to hold a referendum for the European Constitution and has plans for another referendum on abolishing all of the opt-outs, to be held at some point before 2011.⁸

5. Estonia

Estonia held its only EU-related referendum in September 2003, on the topic of accession. The referendum was binding, and, since it required an amendment of the Constitution, mandatory. Despite previous opinion polls showing only a slight majority of popular support for membership, 66.83% voted in favor, with a turnout of 64%.⁹

6. Finland

In Finland, the only nation-wide referendum on the European Union took place in October 1994, on the issue of membership. The Finnish constitution in force at that time provided for an optional and consultative referendum since an amendment in 1987, and the Finns voted 56.9% in favor with a 70% turnout, despite the little tradition that

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<<http://business.timesonline.co.uk/tol/business/markets/europe/article5050240.ece>>, (last accessed on 30.07.2010)

⁹ E. Mikkel and G. Pridham, 'Clinching the 'Return to Europe': The Referendums on EU Accession in Estonia and Latvia', 27 *West European Politics* (2004) p. 716.

Finland has with referendums.¹⁰ The Åland Islands, a dependent territory that belongs to Finland, and enjoys a certain amount of independence from the country,¹¹ also voted on 20 November 1994 on their accession to the European Union, thus becoming the second dependency after Greenland to individually vote on EU matters. With a turnout of 49.1% the result was 73.64% in favor, which meant that EU law also applies to the Åland Islands.

7. France

France has a long tradition of constitutional referendums, looking back to the era of the French revolution; the idea of direct democracy is therefore well accepted in the state. Article 11 of the Constitution provides for a referendum to be organized in specific matters, including Community issues and ratification of international treaties. A salient feature is that the President is the only one able to initiate a referendum, acting in agreement with the government or both houses of the parliament.¹² All EU-related referendums were therefore the result of a political decision – mainly as the President wished to reinforce his power by a successful popular vote –, rather than constitutional necessity.

One of the founding states of the European Communities and an important driving force behind the integration process, France was also the first state to hold a referendum on a matter related to a European issue. This referendum was unique viewed from other aspects as well, since no other referendum has been held specifically on the matter of allowing new states to join the European Union – although some view that the Nice Treaty ratification referendums effectively had the same consequences. The first ‘European’ referendum, held in April 1972, was a consultative one with 60.72% turnout and 68.28% voting in favor.¹³

¹⁰ M. Suksi, ‘Finland: the referendum as a dormant feature’, in M. Gallagher and P.V. Uleri, eds., *The referendum experience in Europe* (London, Macmillan 1996) pp. 55-57. at p. 52.

¹¹ F. Murray, *The EU and member state territories: The special relationship under community law* (London, Thomson, Sweet & Maxwell 2004) p. 74.

¹² L. Morel, ‘France: towards a less controversial use of the referendum?’, in M. Gallagher and P.V. Uleri, eds., *The referendum experience in Europe* (London, Macmillan 1996) pp. 70-73. at p. 66.

¹³ C. Leleu, ‘The French referendum of April 23, 1972’, 4 *European Journal of Political Research* (1976) p. 25.

The next French referendum was held on the ratification of the Treaty of Maastricht: France voted in an optional but binding manner in September 1992. The treaty was verified with a very small margin of victory of 51% in favor, in relatively high turnout of 69.7%. The disaster of near rejection and a very tight support (that ran parallel with the Danish ‘no’ at that time) shocked the European political elite, and were considered a warning sign of troubles that followed suit in the integration process.¹⁴ Troubles manifested themselves at France’s third EU-related referendum which was to approve the European Constitution. In a high turnout of 69%, 54.7% of the voters rejected the Treaty in May 2005, resulting in the eventual discarding of the text and the adoption of the seemingly less ambitious Lisbon Treaty. Ironically, this referendum was also non-required and non-binding. The French rejection (together with the subsequent Dutch ‘no’) prompted several discussions about the future of the EU, reforms in the operation of its bureaucracy, and a long period of crisis perceived by many.¹⁵ France also has constitutional provisions for referendums to be held on future enlargements, which can potentially create new ‘problems’. Article 88-5 of the Constitution stipulates that: ‘Any Government Bill authorizing the ratification of a treaty pertaining to the accession of a state to the European Union shall be submitted to referendum by the President of the Republic. Notwithstanding the foregoing, by passing a motion adopted in identical terms in each House by a three-fifths majority, Parliament may authorize the passing of the Bill according to the procedure provided for in paragraph three of article 89.’

8. Hungary

Hungary’s single vote on the EU was its required and binding accession referendum in April 2003. With a (controversially) low turnout of 46%, the result was, nevertheless, clear, as 83.8% voted in favour of joining the EU.¹⁶

¹⁴ M. S. Lewis-Beck and D. S. Morey, ‘The French “Petit Oui”’: The Maastricht Treaty and the French Voting Agenda’, 38 *Journal of Interdisciplinary History* (2007) p. 65.

¹⁵ M. Carbone, ‘From Paris to Dublin: Domestic Politics and the Treaty of Lisbon’, 5 *Journal of Contemporary European Research* (2009) p. 43.

¹⁶ B. Fowler, ‘Hungary: Unpicking the Permissive Consensus’, in A. Szczerbiak and P. Taggart, eds., *EU enlargement and referendums* (London, Routledge 2005) p. 68.

9. Ireland

Ireland is the Member State which held the most referendums about a European integration issue. This is partly due to the fact that any amendment to the Constitution of Ireland has to be approved by the electorate in a referendum as stipulated in Article 46 of the Constitution. The country's accession and all subsequent Treaty amendments required an amendment to the Constitution as settled by the Supreme Court in the case of *Crotty v. An Taoiseach* in 1987 regarding the ratification of the Single European Act. In the two cases when the Irish voters said 'no' to the Treaty amendment at hand (namely, to the Nice and Lisbon Treaties), political circumstances made it necessary to hold 'repeat' referendums on the same issues, thus bringing the number of referendums up to eight.

Ireland's first European referendum – on its accession to the Communities – took place in May 1972, when 83.1% voted in favor in a turnout of 70.3%. After the above-mentioned *Crotty* decision of the Supreme Court of Ireland, ratification of the Single European Act was approved by referendum in May 1987. The result of the referendum was 69.9% in favor, in a low turnout of 43.9%. The Maastricht Treaty referendum was held in June 1992, with 68.7% in favor of a turnout of 57.3%; the Amsterdam Treaty received a 61.74% approval of votes at a 56.2% turnout. In these referendums there was a nearly constant division amongst the political parties on the issue of approval, with left-wing parties opposing ratification. Ireland's permanent neutrality and the problems surrounding abortion were brought up in the discussions during referendum campaigns, but despite this, until 2001, Irish voters approved European Treaties with comfortable, albeit declining margins.¹⁷ Two Irish referendums were held about the Treaty of Nice, as in 2001 Irish voters first rejected the Treaty that would have made the envisaged enlargement possible. The proposal for an amendment of the Constitution was put to a referendum in June 2001 but was rejected by 53.9% of the votes. Both the European and Irish political elite was surprised by the rejection of the Treaty. The turnout itself was low (34.8%), partly because Irish political parties did not consider that a strong campaign was needed as all previous Treaties had been passed

¹⁷ M. Gallagher, 'Ireland: the referendum as a conservative device?', in M. Gallagher and P.V. Uleri, eds., *The referendum experience in Europe* (London, Macmillan 1996) p. 86.

without difficulty. In 2001, however, most pro-treaty citizens did not attend the vote, while the 'Vote No' campaigns were effective in raising serious questions as to the value of the Treaty. The Treaty of Nice was eventually ratified by Ireland in October 2002. To settle issues about neutrality raised in the previous campaign, the new amendment added to the constitution a provision, guaranteeing that the state would not enter an EU mutual defence pact. This, together with the forceful 'yes' campaign resulted in a 62.9% approving votes and a turnout of 49.5%. While this paved the way for the entry into force of the Nice Treaty, substantial scholarly debate arose on just how democratic it was to hold a second referendum on essentially the same question after a first rejection. The planned Irish referendum on the European Constitution, as many others, failed to materialize in the wake of the French and Dutch rejecting votes. However, its necessity for an eventual ratification was never questioned.

Only one member state, Ireland, intended to ratify the Treaty of Lisbon through a referendum, which decision proved to be a problematic one as in June 2008, in a turnout of 53.1% the proposed constitutional amendment was defeated by 53.4% of the votes. One of the interesting aspects of this result is that the relatively high turnout did not cause a 'yes' vote; the outcome was also a product of a division in the Irish society as people with higher level of education and white-collar jobs were more likely to vote in favor than blue-collar workers.¹⁸ Unfortunately, many issues rose in the campaign by the 'no' side were more connected to controversial Irish political topics than the actual content of the Treaty. After the rejecting vote, the European institutions together with Irish political leaders tried to come up with a compromise that would allow Ireland to re-vote and thus ratify the Lisbon Treaty. In the end, the European Council adopted a document assuring the Irish people that the Lisbon Treaty would not affect Irish neutrality, the tax system, and would not force Ireland to change its view on issues such as abortion. Another, more significant compromise was made in the matter of the number of Commissioners in the European Commission. The Irish thus voted again on the Lisbon Treaty in October 2009. The result was 67.1% supporting the Treaty, in a turnout of 59%. Naturally, the repeat of the re-vote in Ireland again raised the questions of the

¹⁸ J. O'Brennan, 'EU-Déjà vu – Ireland's No to Lisbon', 21 *The Federalist Debate: Papers for Federalists in Europe and the World* (2008) p. 5.

democratic character of such an act.¹⁹ Another issue frequently discussed in legal circles was whether the *Crotty* decision really mandates a referendum in all cases of EU Treaty amendments, as the text of the judgment is not unambiguous on the issue. At the moment it is impossible to tell whether the Irish practice of one referendum per amendment will continue in the future.

10. Italy

Article 71 of the Italian Constitution states that the legislative initiative belongs not only to the Government and to each Member of Parliament, but also to 50.000 voters. In June 1988, the Italian section of the European federalist movement sent a proposition with 114,000 signatures to the Italian Parliament. The proposition called for a referendum about conferring a mandate on the European Parliament to create a draft European Constitution to establish an European Union. In November 1989 the two chambers of Parliament backed this proposition by means of an ad-hoc constitutional amendment. The referendum took place in parallel with the European elections on 18 June, 1989, and attained a high turnout (81%) and 88% support.²⁰

11. Latvia

Latvia's only EU-referendum was about its accession: the last amongst those joining in 2004, Latvians voted in September 2003. Since the constitution had no provisions for referendums on international matters, the Parliament had to create such a possibility by passing an amendment. With a 75.3% turnout, 67.5% voted in favor of joining the EU.²¹

¹⁹ G. Barrett, 'Is a Second Referendum Appropriate in Order to Allow Ireland to Ratify the Treaty of Lisbon?', available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1263300>, (last accessed on 30.07.2010).

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<http://www.thefederalist.eu/index.php?option=com_content&view=article&id=411%3Ail-primero-referendum-per-la-costituente-europea&Itemid=1&lang=en>, (last accessed on 30.07.2010)

²¹ E. Mikkel and G. Pridham, 'Clinching the 'Return to Europe': The Referendums on EU Accession in Estonia and Latvia', 27 *West European Politics* (2004) p. 716.

12. Lithuania

Lithuania's accession referendum took place in May 2003, in a turnout of 63% and with an overwhelming 91.1% supporting vote. The Lithuanian law on referendums was amended several times and heavily discussed in 2002 and 2003, before settling on the version that was binding and obligatory, requiring 50% of the electorate to turn up for voting for the result to be considered positive. The main challenge in Lithuania was, therefore, to ensure that enough citizens participated in the vote.²²

13. Luxembourg

The Luxembourg referendum on the European Constitution is a referendum that was held on 10 July 2005 to decide whether Luxembourg should ratify the proposed document. With a turnout of 89% and a 'yes' vote of 56.5%, the document was approved, although in view of the previous French and Dutch 'no' votes, turned out to be irrelevant. The referendum was Luxembourg's first since 1937, was consultative in nature but the parliament agreed to abide by the people's majority vote.²³

14. Malta

Malta, the smallest country to join the European Union in 2004 was also the one whose accession referendum showed the most internal division on the issue. In the first vote amongst the ten countries to join the EU at the same time, in March 2003, the Maltese electorate voted to join the European Union. The small (53.65%) majority in favour reflected the polarized character of the Maltese electorate, while the turnout of 91% showed an impressive degree of political mobilization. Of the ten accession states due to join the European Union in May 2004, Malta was the only country with a major political party actively campaigning against EU membership. It has been argued that Malta's 'second EU accession referendum' was the general election of 12 April 2003 that

²² <<http://www.sussex.ac.uk/sei/documents/epernbreflith.pdf>>, (last accessed on 2010.07.30.)

²³ <<http://www.uni.lu/content/download/8356/135703/file/referendum.pdf>>, (last accessed on 30.07.2010)

followed the ‘real’, non-required and non-binding referendum a month earlier.²⁴

15. The Netherlands

The Dutch referendum in June 2005 on the European Constitution was a consultative referendum to decide if the Netherlands would ratify the proposed document. The vote was the first national referendum in modern Dutch political history, and was not binding on the government, meaning that despite the electorate’s rejection of the European Constitution, this latter could theoretically have still been ratified. The government, however, promised that it would abide by a decisive result, provided that turnout exceeded 30%. As there was no precedent for a national referendum, its procedural rules were decided on a one-off basis, specifically for this occasion. Despite an overwhelming support of the general populace for European integration in general and an agreement of the main political parties on the usefulness of the European Constitution in particular, in the referendum 61.6% of voters rejected the Constitution, with a high turnout of 63.3%. This, together with the French ‘no’ vote just a few days earlier, meant that ignoring the vote against the Treaty became impossible. The ‘no’ vote was generally attributed to the inefficient ‘yes’ campaign, as well as fears of loss of national sovereignty.²⁵

16. Poland

Poland, the largest country to join the EU in 2004, voted on its accession in a constitutionally required and binding referendum in June 2003. With a turnout of 59% and 77.45% voting in favor, Poles belied expectations of a Eurosceptic nation joining the EU.²⁶ This, however, does not mean that the planned, but never executed Polish referendum on the European Constitution would have been without its own problems. Political division of the Polish political elite over the issue

²⁴ M. Cini, ‘Malta Votes Twice for Europe: The Accession Referendum and General Election, March/April 2003’, 8 *South European Society and Politics* (2003) p. 132.

²⁵ <http://www.sussex.ac.uk/sei/documents/epern-rb_netherlands_2005.pdf>, (last accessed on 30.07.2010)

²⁶ A. Szczerbiak, ‘History trumps government unpopularity: The June 2003 Polish EU Accession Referendum’ in A. Szczerbiak and P. Taggart, eds., *EU enlargement and referendums* (London, Routledge 2005) p. 115.

would have meant a difficult, if not impossible popular vote, were it not for the French and Dutch rejections rendering the issue irrelevant.

17. Romania

Romania's single EU-related referendum was the one approving the amendments of its Constitution making accession possible: in this, it was a somewhat unusual version of an accession referendum. This also meant that it happened relatively early in the accession process: the binding and obligatory referendum was held in 2003, and with a turnout of 56% and a 'yes' vote of 89.7%, paving the way for eventual accession.²⁷

18. Slovakia

The Slovak referendum on EU accession (the only EU-related referendum so far in the country) held on 16–17 May 2003 produced the strongest 'yes' vote in the history of EU enlargement, with 93.71% of votes in favor of membership. However, the turnout, at 52.15%, was the second lowest ever recorded in a referendum of this kind, and the 50 % turnout threshold necessary for the referendum to be valid was only achieved during the last hour of polling. Further complicating the issue was the fact that Slovakia's constitutional provisions for joining the EU (or other international unions) mandated a referendum, but whether or not this was to be a binding one remained subject to much legal discussion, similarly to the question of what would happen if the 50% threshold would not be reached.²⁸

19. Slovenia

Slovenia, the second country to vote on accession from the ten countries joining in 2004, held its only 'European' referendum in March 2003. Although the possibility of referendums was included in the Yugoslavian constitution, the real history of Slovenian direct democracy coincides with independence: the 1990 plebiscite on succession from Yugoslavia was a precursor to several national referendums that

²⁷ S.B. Hobolt, *Europe in question: referendums on European integration* (Oxford, Oxford University Press 2009) p. 9.

²⁸ K. Henderson, 'EU Accession and the New Slovak Consensus' in A. Szczerbiak and P. Taggart, eds., *EU enlargement and referendums* (London, Routledge 2005) p. 96.

followed. The decision to hold a referendum on EU accession was made as early as 1997 by the Parliament. One of the individual features of the Slovenian vote was that the decision to join NATO was approved at the same time (but as a different referendum question) as the EU accession. With a turnout of 60%, a majority of 89.61% voted in favor of joining the EU (and 66.1% for NATO, a more controversial issue).²⁹

20. Spain

In an optional and consultative referendum that later proved to be somewhat irrelevant, the Spanish electorate gave its overwhelming approval to the proposed European Constitution in 2005. 76.5% voted in favour of the document with a 42% turnout. The result was seen as a victory for Spanish President Rodriguez Zapatero, not necessarily because of the turnout, but because of the size of the majority of votes supporting the European constitution.³⁰

21. Sweden

Sweden's constitution allows for both decisive and consultative referendums and the country had some, if not too much, experience with popular votes before the EU accession referendum held in November 1994. Both EU-related referendums were non-required and consultative, held under Chapter 8, paragraph 4 of the constitution. The accession referendum had a high, 83% turnout and the initiative received a 52.8% approval. A decision to hold such a referendum was initially sought after by two opposition parties opposing accession, but was taken up by pro-EU political forces as well.³¹ Sweden's second Euro-referendum was held about the issue of the euro, on joining the EMU. Although Sweden has not received an opt-out such as the UK and Denmark, it still refuses to join for now, as well. The referendum held on this issue echoed the Danish one three years earlier, in that it failed to produce the results the

²⁹ A. Krasovec and D. Lajh, 'The Slovenian EU Accession Referendum: A Cat-and-Mouse Game', in A. Szczerbiak and P. Taggart, eds., *EU enlargement and referendums* (London, Routledge 2005) p. 47.

³⁰ Hobolt, op. cit. n. 27, at p. 9.

³¹ O. Ruln, 'Sweden: the referendum as an instrument for defusing political issues', in M. Gallagher, P.V. Uleri, eds., *The referendum experience in Europe* (London, Macmillan, 1996) p. 171.

government hoped for: Swedish voters voted 56.1% against the initiative with another high turnout of 81.2% in September 2003.³²

22. United Kingdom

In 1975 the United Kingdom held a referendum in which the electorate was asked whether the UK should remain member in the EEC. This was unique from several aspects: a first and only national referendum in the country as well as the first 'reverse accession' referendum. The doctrine of parliamentary sovereignty held in the UK also meant that a binding referendum was structurally impossible. The political circumstances included a change of government: the UK had joined the EEC on 1 January 1973 under the Conservative government of Edward Heath, while the general election held in February 1974 was won by the Labour party, who had made a manifesto commitment to renegotiate Britain's terms of membership in the EEC and then hold a referendum on whether to remain in the EEC on the new terms. In June 1975, the electorate was asked to vote on the question: '[d]o you think the UK should stay in the European Community (Common Market)?' The result was a 67.2% support with a turnout of 64.5%. The question of withdrawal from the EC/EU and further referendums has been raised several times since, mostly in cases where ratification of new or amending treaties was called for. The UK government has indicated the will to hold a referendum on the European Constitution, but after the French and Dutch rejection this became unnecessary. There were also suggestions for a popular vote on joining the euro zone, which referendum also failed to materialize.

IV. Non-Member State referendums

1. Switzerland

Switzerland, although not an EU Member State, has held more EU-related referendums so far than any EU country. This, naturally, is due to the specific nature of Switzerland's constitutional traditions that rely

³² N. Aylott, 'Lessons Learned, Lessons Forgotten: The Swedish Referendum on EMU of September 2003', 40 *Government and Opposition* (2005) p. 540.

on direct democracy more than most European states³³ as well as the geographic, economic and other ties of the Swiss state to the EU.

Swiss euro-referendums can be divided into two groups: one including referendums on membership (in the EU or in the European Economic Area) and the other dealing with approval of thematic, bilateral agreements with the EU, which latter constitute the now preferred mode of cooperation between the Union and Switzerland on bilateral level. The referendums and results in the first group of referendums were:

- in 1992 on EEA accession (with 50.3% rejecting it);
- in 1997 on starting EU accession negotiations (with 74.1% rejecting it);
- in 2001 on starting EU accession negotiations (with 76.8% rejecting it).

The Swiss have, therefore, rejected every attempt to start EU negotiations and even the European Economic Area membership was rejected. Other types of cooperation with the EC/EU were, however, backed by the Swiss electorate, in referendums that included a 1972 EC-EFTA treaty, several ones connected to transport policy and free establishment (and the extension of the latter to the countries joining the EU in 2004 and 2007), the extension of the Cohesion Fund to the CEECs, and two referendums related to entering the Schengen area. Altogether, Switzerland voted in favor of these agreements, and is more likely to continue this trend.³⁴

2. Norway

Norway's history with an eventual EC/EU membership is full of rejections of the idea: the first two times the country applied in the 1960s, membership discussions were terminated by a strong French opposition to the accession of the United Kingdom, applying at the same time. The other times, in 1972 and 1994, the Norwegian people rejected membership, after two separate successful enlargement negotiations were concluded by governments of the time. Despite having no constitutional rules for holding referendums, Norway has some history

³³ J. Zeller, 'Svájci Államszövetség', in N. Chronowski and T. Drinóczi, eds., *Európai kormányformák rendszertana* [Systematics of European forms of government] (Budapest, HVG-ORAC Kiadó 2007) pp. 155-172. at p. 157.

³⁴ R. Schwok, *Switzerland – European Union: an impossible membership?* (Brussels, P.I.E. Peter Lang 2009)

with them, starting with the 1905 plebiscite deciding on the dissolution of the union with Sweden. The two European referendums, however, were the only ones held after the Second World War. In 1972, the vote was held in September, even though the pro-EC political parties wanted to have it after the Danish vote in October, thinking it might influence the Norwegian vote. In the end, 53.5% of the votes rejected it, at a turnout of 79%. The 1994 vote was strategically held in November, as the last of that enlargement round, hoping for the domino effect to work. Accession was rejected at this time as well, though, with 52.2% voting against in a high, 89% turnout. In both cases, political parties were divided on the membership question, as well as Norwegian society along urban / rural and geographical lines, issues of sovereignty, fisheries, energy policy being the most controversial. At the moment, Norway is not planning another bid for accession, meaning that another referendum on the question may be in the uncertain future.³⁵

3. Greenland

Greenland is the only territory to have chosen to leave the EU or its predecessors without also seceding from a member state. It initially voted against joining the EEC when Denmark joined in 1973, but because Denmark as a whole voted to join, Greenland, as a part of Denmark, joined too. When home rule for Greenland began in 1979, it held a new referendum and voted to leave the EEC. After debates over fishing rights the dependent territory left the EEC in 1985, but remains subject to the EU treaties through the EU Association of Overseas Countries and Territories. This was permitted by the Greenland Treaty, a special treaty signed in 1984 to allow its withdrawal.³⁶

V. Future enlargements, future referendums?

Possible sources for future EU-related referendums are future enlargement rounds: present-day candidate countries such as Croatia, the Former Yugoslav Republic of Macedonia, Iceland and Turkey (and, naturally, all prospective candidates of the Western Balkans) all have a possibility to put the question of accession forward for their electorate to

³⁵ I. Sogner and C. Archer, 'Norway and Europe: 1972 and now', 33 *Journal of Common Market Studies* (1995) p. 389.

³⁶ <<http://www.nytimes.com/1985/02/04/business/greenland-out-of-eeec.html>>, (last accessed on 30.07.2010)

decide. Of all these, Croatia and Iceland were the only ones so far to seriously discuss holding such a referendum; Icelandic political parties have called for a referendum on handing in the application for membership, a separate one for the approval of accession, and yet another one for joining the euro zone.³⁷ Nevertheless, there are no concrete details of any of these just yet.

There are possibilities for enlargement to be put to popular vote in presently Member States as well: I have mentioned the constitutional provisions of France for such a referendum, but, especially in connection with Turkey's extremely controversial accession, other Member States might decide to vote as well. Future Treaty revisions will also undoubtedly create possibilities for new ratification referendums. Nevertheless, having drawn conclusions from the fiascos relating in particular to the European Constitution and the Lisbon Treaty ratifications, I think it is likely that fewer referendums will be held to prove a (sometimes unrelated) political point, if there is no real necessity to do so. Unfortunately the elite / population division over European affairs might mean even less direct democracy in the process of the integration. The Lisbon Treaty's provisions for a European Citizens' Initiative, on the other hand, may start a new trend to involve citizens directly on the European level.

³⁷ <<http://www.eubusiness.com/news-eu/1238178722.13>>, (last accessed on 30.07.2010)

European rules on hostile takeovers

I. Development of European Takeover Regulation

Until the 1980s, regulation of takeovers existed primarily in the United States¹ and the United Kingdom. These transactions of the capital markets were so rare in most of the European states² that the legislators considered it unnecessary to develop special regulation in this respect. Acquisitions were implemented outside the stock exchanges, as a result of negotiations between the management of the offeror company and the target company. Within the framework of the concentrated ownership structure characteristic of continental Europe, a hostile takeover meant negotiations with the owner of the block of shares ensuring control. Thus, these transactions were rather similar to the acquisition of private companies limited by shares.³ The above practice changed during the second half of the 1980s, when takeover activity noticeably increased

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¹ In the US, takeovers were regulated at federal level by the Williams Act of 1968, which was an amendment to the Securities Exchange Act of 1934. See R. S. Karmel, 'Transnational Takeover Talk: Regulations Relating to Tender Offers and Insider Trading in the United States, the United Kingdom, Germany and Australia', 4 *University of Cincinnati Law Review* (1998) p. 1135.

² The number of takeovers in the European Union has shown to increase only in the past two decades. During the significant surge in takeovers in the 1990s the European M&A market quickly developed and by 1999 it almost caught up with the US market. In 1999, 369 hostile takeover bids were made in the European market (as opposed to the 20 US bids). This is a significant increase, since only 14 bids were made in 1996, 7 in 1997, 5 in 1998 and 35 in 2000. However, the stock exchange crashes of 2000 significantly decreased European M&A activity (41% decrease). The decrease continued between 2001 and 2003, however, due to the changes of monetary policy and the security markets, an increase was experienced between 2003 and 2007. Thus, the number of M&A transactions increased 200 transactions annually during the period between 2001 and 2007. The increase in M&A from 2001 is attributable to the higher market integrity of the EU and the availability of new financing mechanisms. See J. McCahery and E. P. M. Vermuelen, 'Does the Takeover Bids Directive Need Revision?', TILEC Discussion Paper No. 2010-006, available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1547861>, pp. 14-15. (last accessed on 26.05.2010).

³ See C. Bergstrom et al., 'Regulation of Corporate Acquisitions: A Law and Economics Analysis of European Proposals for Reform', 2 *Columbia Business Law Review* (1995) p. 505.

also in the European stock exchanges. At this time, the practice of offers made directly to the shareholders emerged, in several cases without conducting any preliminary negotiations with the management of the target company, or even if such negotiations proved unsuccessful. In response to this new challenge, EU Member States first adopted certain self-regulatory elements, and then framed mandatory legal regulations.⁴ By the end of the first decade of the 21st century takeovers can be considered as general practice in respect of almost all of the European capital markets. The majority of acquisitions are implemented smoothly: these are either friendly offers or mandatory bids made upon the acquisition of the controlling block of shares. However, two situations that might occur in respect of takeovers may still involve challenges in respect of the framing of legal regulations. These transactions are hostile takeovers and cross-border takeovers. In the case of the former the designation itself may be somewhat misleading, due to the fact that in the case that the offeror is not supported by the management of the target company upon the announcement of the offer, the bid is typically considered as hostile. If the offeror is supported by the management of the target company, the bid is considered as friendly.⁵ Thus, takeover bids are evaluated primarily from the point of view of the management. This practice runs contrary to the interest of the shareholders of the target company, for whom the hostile takeovers may frequently result in considerably high premium.⁶ Therefore, in the case of hostile takeovers the management and/or the controlling shareholder opposes the bid and possibly uses defensive measures. In this respect, takeovers resemble 'war games', involving tactical maneuvers by both the offeror and the target company. When developing the appropriate legal regulation, certain issues, such as the primary role of the management and the board of directors, and the permissibility of defensive measures need to be tackled. Theoretical issues that arose in respect of the limitation of the role of the board of directors to increase shareholder welfare⁷, the

⁴ See E. Berglöf and M. Burkart, 'European Takeover Regulation', 18 *Economic Policy* (2003) p. 186.

⁵ See D. Tuchinsky, 'The Takeover Directive and Inspire Art: Reevaluating the European Union's Market for Corporate Control in the New Millennium', 3 *New York Law School Law Review* (2006-2007) p. 694.

⁶ *Ibid.*, at p. 695.

⁷ In the US this position is held by e.g. Professors Frank H. Easterbrook and Daniel R. Fischel. See F. H. Easterbrook and D. R. Fischel, 'The Proper Role of a Target's

maintaining of the independence of the company, or the extension of such role to the protection of the interests of other interested parties, are of primary significance.⁸ The above referenced extension of the management's role may result in a situation that by way of the defensive measures adopted in the interest of the stakeholders, the management deprives the shareholders of the possibility to earn control premium.⁹ From time to time, the issue is raised whether it would be advisable to place the long term, continuous economic integrity of the company above the current investor interests. However, in this case, we are to face the problem that by way of its self-interested conduct the management might endanger shareholder welfare.

The second scope of issues originates from the efforts of governments and regulatory organs operating under their supervision, aimed at the influencing, or in some cases, the prevention of certain transactions. As typical measures, governments may employ the establishment of so called 'national champion' companies by way of organized mergers, although it seems to be a more straightforward solution to prevent certain transactions by reference to national interests, or by including regulatory prohibitions, limitations within the regulatory framework, thereby ensuring economic patriotism.

II. Brief history of the framing of the Takeover Directive

The European Union aims to regulate takeovers for the purpose of establishing a unified, integrated capital market.¹⁰ The first significant step in this respect was the European Commission's 'White Paper' which emphasized the need for the development of the regulations concerning public bids for shares, due to the considerable regulatory

Management in Responding to a Tender Offer', 6 *Harvard Law Review* (1981) p. 1161.

⁸ According to the supporters of the so called long-term shareholder and social welfare theory, companies serve not only the gaining of economic advantage by shareholders, but have broader social purposes as well. See E.N. Veasey, 'Musings on the Dynamics of Corporate Governance Issues, Director Liability Concerns, Corporate Control Transactions, Ethics, and Federalism', 2 *University of Pennsylvania Law Review* (2004) p. 1015.

⁹ See M. Lipton, 'Takeover Bids in the Target's Boardroom', 1 *Business Lawyer* (1979) p. 101.

¹⁰ See Tuchinsky, loc. cit. n. 5, at p. 691.

differences among the Member States.¹¹ On the basis of the White Paper, in 1989 the Commission introduced a proposal for the 13th Company Law Directive, which was to regulate takeovers. The proposal, which was based on the ‘City Code on Takeovers and Mergers’ of the United Kingdom,¹² already included the principle of equal treatment for shareholders, and specified obligations in respect of the board of directors of both the offeror and the target company.¹³ However, the draft of the 13th Company Law Directive failed to be adopted in the crossfire of criticism from Germany and the United Kingdom. Although the proposed regulation was based on the City Code, the United Kingdom feared that the codification of the City Code, which was not a statutory regulation, would undermine the greatest asset of takeover regulation, namely the possibility of prompt and flexible adaptation. On the other hand, European economic players feared that the directive might lead to frequent and irresponsible litigation.¹⁴ Thereafter, as a result of extensive consultation with the Member States, in 1996 the Commission submitted a new proposal for the directive regulating European takeovers. Although this proposal was based on the previous one, it did not require a mandatory bid in respect of all shares from the person who reached a controlling interest in the company.¹⁵ The European Parliament approved the Council’s common position in 2000 with some amendments. The influence of politics in this respect is well represented by the fact that in his submission the Rapporteur of the Legal Affairs Committee proposed that the supervisory authorities be entitled to grant permission to the board of directors of target companies to adopt defensive measures without consulting the shareholders. The

¹¹ Completing the Internal Market: White Paper from the Commission to the European Council (June 1985), available at: <http://europa.eu/documents/comm/white_papers/pdf/com1985_0310_f_en.pdf>, p. 35., Section 139, or see page 29 of the Appendix available at: <http://europa.eu/documents/comm/white_papers/pdf/com1985_0310_f_en_annexe.pdf>, (last accessed on: 19.04.2010)

¹² See L.-J. Chen, ‘The Defensive Measures in Case of Takeover Under German Takeover Act and Delaware Corporate Law’, 2 *National Taiwan University Law Review* (2007) p. 101. See also V. Edwards, ‘The Directive on Takeover Bids’, 4 *European Company and Financial Law Review* (2004) p. 418.

¹³ See Berglöf and Burkart, op.cit. n. 4, at pp. 185-86. See also W. Magnuson, ‘Takeover Regulation in the United States and Europe: an Institutional Approach’, 1 *Pace International Law Review* (2009) p. 229.

¹⁴ See Magnuson, *Ibid* at p. 230. See also Edwards, loc. cit. n. 12, at p. 420.

¹⁵ *Ibid* at p. 421.

referenced Rapporteur was Klaus-Heiner Lehne, a German Christian-Democrat politician representing Düsseldorf. Lehne was obviously influenced by the fact that the Düsseldorf based German company, Mannesmann had been recently taken over¹⁶ by UK based Vodafone in the course of the first successful hostile takeover in Germany since World War II.¹⁷ Following twelve years of consultations, on July 4, 2001 the draft directive was put to the vote in the European Parliament, however, due to a tie vote of 273-273¹⁸ the proposal was turned down.¹⁹ The Commission intended to move the matter of the takeover directive from the deadlock by requesting a group of corporate law experts, headed by Professor Jaap Winter²⁰ to prepare their proposals on this issue. The main aim was the establishment of the frequently urged 'level playing field'. In its report the Winter Group introduced the concept of the so called break-through rule and some further innovations destined to ensure equal treatment for shareholders.²¹ Based on the report of the group published in 2002,²² the Commission issued its new proposal for the directive in October 2002. The Report specified three cornerstones

¹⁶ The EUR 141 billion takeover bid made by Vodafone for the German Mannesmann in 1999 was the first successful hostile takeover in Germany since World War II. Previous unsuccessful bids included e.g., Krupp's 1997 takeover bid for Thyssen AG, which was initially opposed by Thyssen, then through a friendly transaction Krupp obtained control over the steel business of Thyssen AG. See: C. Kirchner and R. W. Painter, 'Towards a European Modified Business Judgment Rule for Takeover Law', p. 1, available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=247214>, (last accessed on 20.05.2010).

¹⁷ See Magnuson, loc. cit. n. 13, at p. 231.

¹⁸ See M. Menjucq, 'The European Regimes on Takeovers', 3 *European Company and Financial Law Review* (2006) p. 222.

¹⁹ See Tuchinsky, loc. cit. n. 5, at p. 700.

²⁰ Jaap Winter is a partner at the Amsterdam based De Brauw Blackstone Westbroek Law Office, his practice focuses on M&A, corporate governance and corporate litigation. He is also a professor of international company law at the University of Amsterdam. In 2003 he was a visiting professor at Columbia Law School, New York. He was the chairman of the expert group set up in 2001, which prepared its report first in respect of the European takeover directive, then the reform of European company law.

²¹ See J. Winter, 'We All Want to Go to Heaven but Nobody Wants to Die', 1 *European Company Law* (2004).

²² See Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids, January 10, 2002, available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=315322>, (last accessed on 14.04.2010).

in respect of the minimum regulation: the achievement of a ‘level playing field’ within the EU by ensuring equal treatment for shareholders among the Member States, the determination of ‘equitable price’, which is to be paid to the shareholders and the squeeze-out right of the majority shareholder.²³

Nevertheless, this draft also met with harsh criticism. Sweden strongly criticized the break-through rule, setting forth that more than half of its companies listed on the stock exchange carry share classes with varying voting rights. Other countries with a similar legal system also agreed with the Swedish concerns. Germany also raised concerns, since Europe’s largest car manufacturer, Volkswagen was protected against potential hostile takeovers by the significant share block owned by Lower Saxony and the provision of law restricting the exercising of voting rights in excess of 20%. The European Parliament responded to the above concerns in a report, the authors of which criticized the break-through rule to the extent that in this respect it was inconclusive and highly inconsistent.²⁴

Following several months of negotiations, and at the expense of numerous compromises, the Italian presidency repeatedly examined the possibility of rendering neutrality and break-through rules optional. This new compromise eliminated the concerns of several countries, and the proposal gained extensive support. Thus it could be adopted despite the objections raised by both the scientific and governmental sides.²⁵ However, the compromises significantly softened the adopted regulation. European Commissioner for Internal Market, Frits Bolkestein described the Directive as ‘not worth the paper it is written on’.²⁶

Thus, the adoption of the 13th Company Law Directive is the result of a more than 10 year procedure.²⁷ The regulation is based on the

²³ See A. Guaccero, ‘Recent Developments in European and Corporate Law’, 1 *Cardozo Journal of International and Comparative Law Review* (2004) p. 96.

²⁴ See B. Dauner-Lieb and M. L. Reiner, ‘The New Proposal of a Directive on Company Law Concerning Takeover Bids and the Achievement of a Level Playing Field’ (European Parliament Working Paper, 2002) 55, available at: <<http://www.jura.uni-duesseldorf.de/dozenten/noack/texte/sonstige/study.pdf>>, (last accessed on 03.05.2010).

²⁵ See Magnuson, loc. cit. n. 13, at pp. 232-233.

²⁶ See Edwards, loc. cit. n. 12, at p. 417.

²⁷ See L-J. Chen, loc. cit. n. 12, at p. 101.

assumption that takeover bids have several advantages for companies, investors and ultimately the European economy. If appropriately regulated, takeovers may create value since they facilitate the restructuring and consolidation of companies, thereby providing an opportunity for achieving the optimal operation required for successful performance in the European market and global market competition. Takeovers also contribute to the development of appropriate corporate governance practices, as well as to the raising of the standards of corporate governance and the increase of corporate performance. Furthermore, takeovers discipline the management and enhance competitiveness. These transactions are also favorable for investors, since they provide an opportunity for achieving higher returns on their investments.²⁸ The proposals themselves originate from the reasonable observations of the scientific sphere and the Community bureaucracy. However, these concepts, no matter whether they were conceived by the European Commission or the Winter Group, were exposed to an unexpected extent to the political pressure of various spheres of interest. The commitment of the Member States aimed at the maintaining their effective legal regulations and corporate governance regime also meant that the Directive was to exhibit substantial flexibility in exchange for the extensive support. Nevertheless, it is indisputable that the Takeover

²⁸ However, several theoretical approaches emphasize the self-interested ambitions of the management of offeror companies in respect of the takeover of the target company, pointing out that these acquisitions cannot be considered advantageous from all aspects. These theoretical approaches include, for example the so called empire building theory. According to this theory, the offeror simply overpays in order to establish a group as large as possible. According to Professor Roll, offerors tend to overpay in the course of takeovers, and he described this tendency in the so called hubris theory. Professor Roll demonstrated how personal egotism and corporate pride may lead to overpayment (however, this is obviously not the adequate explanation in all cases). See R. Roll, 'Empirical Evidence in Takeover Activity and Shareholder Wealth', in J. C. Coffee, Jr., et al., eds., *Knights, Raiders and Targets* (Oxford, Oxford University Press 1988) pp. 249-250. See also R. A. Prentice and J. H. Langmore, 'Hostile Tender Offers and the Nancy Reagan Defense: May Target Boards Just Say No - Should They be Allowed To', 2 *Delaware Journal of Corporate Law* (1990) p. 457. The observation of behaviorist researchers that companies erroneously strive to maximize their size instead of their profits, may raise also concerns in respect of the shareholders of the offeror company. Moreover, behaviorist theories also indicate it as a motivation for acquisition that it may provide an opportunity for promotion for executive and middle level management in the offeror company.

Directive includes numerous, possibly sensitive provisions in respect of the Member States. Such provisions include for instance the cooperation obligation between the Member States in respect of governing law and supervisory authorities in the case of cross-border takeovers. A similar example is the harmonization of several aspects, and the transparency of, as well as the publication of information on takeovers.²⁹

III. Conflict of laws issues

The determination of applicable law is essential in the case of cross-border takeover bids. The mutual acknowledgement of national regulations is specified as a general principle under Article 4 of the 13th Company Law Directive. Upon examination of the relevant clause it can be established that in the EU the harmonization of takeover bids in respect of the regulation of securities proved highly successful and significantly facilitates cross-border takeover bids. Previously, cross-border takeover bids were to be approved by the relevant supervisions in each affected Member State, and compliance with the publication requirements had to be separately examined in each Member State. Upon entry into force of the Directive this rule was replaced by the 'home state' rule. Pursuant to the home state rule, the takeover bid is to be evaluated in accordance with the law of the Member State where the offeree company has its registered seat, or is registered, provided that the securities of the relevant company are admitted to trading on the stock exchange of this same Member State, this being the basic case.³⁰ The above system, in full harmony with other securities law principles, significantly simplifies the supervision of several takeover bids, since all applicable rules are primarily the rules of the home state. The decision delivered by the authority of the home state shall be applied by other jurisdictions as well. Thus the prospectus and other documents to be published are to be examined for compliance only on a single occasion in order to be accepted within the whole Community.

²⁹ See B. Sjaffell, 'Political Path Dependency in Practice: the Takeover Directive', 27 *Yearbook of European Law* (2008) p. 389.

³⁰ See M. M. Siems, 'The Rules on Conflict of Laws in the European Takeover Directive', 1 *European Company and Financial Law Review* (2004) p. 469.

IV. The mandatory bid rule

As a significant innovation, based on the regulation of the British City Code, and contrary to the US regulation,³¹ the Directive includes a mandatory bid rule. This rule stipulates that in the case that an offeror acquires a specified percentage of voting rights in a publicly traded company (the target company), giving her control of that company, it shall be required to make a bid at the earliest opportunity, for all voting shares at an equitable price.³² It shall within the scope of authority of the Member State in which the company has its registered office determine the percentage of voting rights which confers control over the company, and the methods for its calculation (Article 5(3)).³³ Thus, the Directive does not determine the percentage of voting rights that is to be considered as controlling interest. Therefore, it is objectionable that the Directive does not specify an exact limit,³⁴ or at least a threshold value, which is to be considered as controlling holding in all EU Member States. While seeking a community minimum requirement, the Directive abandoned the ambition to specify the criteria for the determination of the threshold value for the acquisition of a controlling interest in the target company.³⁵ Due to the above described limited harmonization, although the mandatory bid is included in the national regulations, the percentage of votes requiring such mandatory bid significantly varies among the Member States. Upon examination of the effective regulations of the Member States, we may establish that stipulating the mandatory bid in respect of the acquisition of approximately 1/3 of the voting shares could be considered as 'best practice'.³⁶ Furthermore, the

³¹ The Williams Act of 1968 regulating takeover in the US at federal level, does not include the requirement of the mandatory bid, it predominantly specifies publication and procedural rules.

³² See Magnuson, loc. cit. n. 13, at p. 219-20. See also S. Maul and D. Muffat-Jeandet, 'Die EU-Übernehmerichtlinie', 5 *Die Aktiengesellschaft* (2004) p. 226., L. Enriques, 'The Mandatory Bid Rule in the Takeover Directive: Harmonization Without Foundation?', 1 *European Company and Financial Law Review* (2004) p. 443. See also M. Menjuq, loc. cit. n. 18, at p. 226.

³³ See Edwards, loc. cit. n. 12, at p. 433.

³⁴ Ibid., at p. 434.

³⁵ G. Gadó, 'Társasági jogi reform Európában' [Corporate Law Reform in Europe], 6 *Magyar Jog* (2006) p. 335.

³⁶ COMMISSION STAFF WORKING DOCUMENT – Report on the Implementation of the Directive on Takeover Bids, available at: <http://ec.europa.eu/internal_market/company/docs/takeoverbids/2007-02-

Member States should guarantee that an ‘equitable price’ is applied in respect of the bid. According to the Directive, the minimum price to be indicated in the bid shall be the highest price paid for the same securities by the offeror, or by persons acting in concert with him/her, over a period to be determined by Member States.³⁷ The above mentioned period shall not be less than six months and more than 12 months.³⁸

The mandatory bid rule is limited to the extent that it does not apply to non-voting shares.³⁹ This is an interesting differentiation between share types, especially in light of the fact that in the spirit of the achievement of shareholder democracy, the strengthening of the ‘one share – one vote’ principle became topical in Community corporate law, which principle was also among the mid-term objectives of the company law Action Plan adopted at 2003.⁴⁰ On the basis of that the mandatory bid rule does not apply to non-voting shares, we may establish that the Directive did not expressly adopt this principle.⁴¹

Article 7(1) of the Directive stipulates that the time allowed for the acceptance of a bid may not be less than two weeks, nor more than ten weeks from the date of publication of the offer document.⁴² This rule also provides the members states with a relatively wide scope for action.⁴³

report_en.pdf>, (last accessed on 14.05.2010). The majority of Members States adopted an approximately 30% percentage in respect of the mandatory bid. See p. 9., 13-14. See also Menjucq, loc. cit. n. 18, at p. 226-227.

³⁷ But Member States may authorize their supervisory authorities to adjust the price referred to, in circumstances and in accordance with criteria that are clearly determined. To that end, they may draw up a list of circumstances in which the highest price may be adjusted either upwards or downwards.

³⁸ Maul and Muffat-Jeandet, loc. cit. n. 32, at p. 229. See also Art. 5(4) of the Directive.

³⁹ Enriques, loc. cit. n. 32, at p. 447.

⁴⁰ T. Sárközy, *Társasági törvény, cégtörvény* [Corporate Law, Company Law] (Budapest, HVG-ORAC, 2006) p. 37.

⁴¹ G. Ferrarini, ‘One share – One Vote: A European Rule?’, 2 *European Company and Financial Law Review* (2006) p. 165.

⁴² See Edwards, loc. cit. n. 12, at p. 433.

⁴³ Even wider acceptance period is possible, because Art. 7(2) stipulates that Member States may provide for rules changing the period referred to, in specific cases. A Member State may authorise a supervisory authority to grant a derogation from the period referred to in paragraph 1 in order to allow the offeree company to call a general meeting of shareholders to consider the bid.

V. The ‘neutrality’ rule

Corporate governance disputes regarding defensive measures against takeovers are centered around two conceptions. On the one hand, the opinions supporting the possibility that the board of directors take defensive measures emphasize the fact that the small shareholders of public limited companies, due to their limited experience, and the problems arising in respect of collective actions,⁴⁴ are unable to deliver a well-founded decision on a takeover bid. Therefore, the board of directors is to be authorized to adopt defensive measures, since this organ of the company is in a better position to protect the interests of shareholders and other interested parties. However, the theories preferring shareholder discretion claim that the boards tend to be self-interested in respect of their response to takeover bids, therefore they should not be permitted to decide on the adoption of defensive measures.⁴⁵

The provision of the Directive stipulating the neutrality of the board of directors was formulated for the purpose of rendering takeovers more straightforward, since the defensive measures taken by the board of

⁴⁴ The problems related to collective action could serve as an explanation for shareholder passivity observable in dispersed ownership structures. According to this theory, the vote of a single shareholder may influence the decision making of the company only to a small extent. The organization of collective action may impose significant costs on small shareholders, while the benefits of such action are universal for the whole company. This is the reason why in a diffused shareholder structure several shareholders show ‘apathy’ in respect of the company and the decision making of the general meeting. Since the shareholder is not interested in spending substantial amounts and time in order to become familiar with the resolutions of the general meeting, he/she does not consider circumspectly these proposals, but simply votes in accordance with the management. In the event that any issues arise, the shareholders typically apply the so called Wall Street rule. See J. N. Gordon, ‘Ties that Bind: Dual Class Common Stock and the Problem of Shareholder Choice’, 1 *California Law Review* (1988) pp. 43-47. See also H. G. Manne, ‘Some Theoretical Aspects of Share Voting: An Essay in Honor of Adolf A. Berle’, 8 *Columbia Law Review* (1964) p. 1427. See also R. K. Jr. Winter, ‘State Law, Shareholder Protection and the Theory of the Corporation’, 2 *The Journal of Legal Studies* (1977) p. 251-292.

⁴⁵ See L. Arye Bebchuk, ‘The Case for Empowering Shareholders, Law and Economics Workshop’, *Berkeley Program in Law and Economics – UC Berkeley* (March/2003), available at: <<http://escholarship.org/uc/item/1zw819wt>>, (last accessed on 27.05.2010). See also from same author, ‘The Case Against Board Veto in Corporate Takeovers’, 3 *The University of Chicago Law Review* (2002) p. 1027.

directors render such takeovers either impossible, or even more costly and time consuming.⁴⁶ The neutrality rule of the Directive provides for this issue by stipulating that from the date on which it obtains information about the bid and until the result of the bid is made public (or the bid lapses), the board of directors of the offeree company shall obtain the prior authorization of the general meeting of shareholders before taking any action, other than seeking alternative bids, which may result in the frustration of the bid (Article 9(2)), and until such authorization the board shall remain neutral.⁴⁷ At first view, this rule may put the European companies in an unfavorable position in respect of the prevention of takeovers, as compared to US companies, which are not bound by a similar restriction. However, we should not forget that in the majority of EU Member States there are several possibilities available for companies to defend themselves against hostile takeovers (e.g. maximization of voting rights, shares with multiple voting right, non-voting shares, preferred shares). Thus, empowering the board to apply defensive measures would create an almost insurmountable obstacle for offeror companies. Upon comparison of this EU provision with the US takeover theories, we may establish that the European model best corresponds to the position of the so called distributional approach, which is considered in the US as an intermediary theory.⁴⁸

VI. The break-through rule

The so called break-through rules are included under Article 11 of the Directive, which in all probability is the most disputed section thereof. These rules provide the offeror companies with substantial advantages in respect of evading the mechanisms for the prevention of takeovers, which mechanisms are particularly significant in continental Europe. According to the break-through rule, the restrictions on the transfer of

⁴⁶ See Sjaafjell, loc. cit. n. 29, at pp. 389-90.

⁴⁷ See A. Zinser, 'Einer neuer Anlauf: der jüngste Vorschlag einer Übernahmerrichtlinie vom 2.10.2002', 1 *Europäisches Zeitschrift für Wirtschaftsrecht* (2003) pp. 10-13.

⁴⁸ The most renowned academics sharing this theory are Junewicz and Greene, and also Bebchuk and Gilson. See J. J. Junewicz and E.F. Greene, 'A Reappraisal of Current Regulation of Mergers and Acquisitions', 4 *University of Pennsylvania Law Review* (1984) pp. 647-741. See also Bebchuk, loc. cit. n. 45. See also L. A. Bebchuk, 'The Case for Facilitating Competing Tender Offers: A Reply and Extension', 1 *Stanford Law Review* (1983) pp. 23-50.

securities provided for in the articles of association of the offeree company shall not apply *vis-à-vis* the offeror during the time allowed for acceptance of the bid. Any restrictions on the transfer of securities provided for in contractual agreements between the offeree company and holders of its securities, or in contractual agreements between holders of the offeree company's securities shall not apply *vis-à-vis* the offeror during the time allowed for acceptance of the bid. Similarly, restrictions on voting rights provided for in the articles of association of the offeree company, or in the above contractual agreements shall not have effect at the general meeting of shareholders which decides on any defensive measures against the takeover. Furthermore, no extraordinary voting rights or restrictions shall apply at the first general meeting of shareholders following closure of the bid, called by the offeror in order to amend the articles of association or to remove or appoint board members, if the offeror acquires at least 75% or more of the capital carrying voting rights (Article 11(4)).⁴⁹ In such cases multiple-vote securities shall carry only one vote each. However, the Directive does not specify whether the votes carried by the multiple-vote securities held by the offeror should be included in the 75% to be achieved by the offeror. Pursuant to the provisions of the Directive, compensation is to be provided to shareholders whose voting rights are affected by the break-through rule. But in respect of the break-through rule, the issue of equitable compensation, as described in Article 11(5) of the Directive is not sufficiently clarified. According to common logic and Article 6(3)⁵⁰ of the Directive, this compensation is to be paid, in all probability by the acquirer; however, in lack of explicit wording, this cannot be clearly established. It also remains unclear what method is to be used for the purpose of determining the compensation. The Directive reserves the right to determine such compensation solely for the Member States. Consequently, the regulation of the compensation will vary among Member States, unless the particular Member State leaves this area unregulated and submits the decision to the jurisdiction of courts.⁵¹

⁴⁹ See Edwards, loc. cit. n. 12, at p. 437.

⁵⁰ See Art. 6(3)e of the Directive. The offer document contains the compensation offered for the rights which might be removed as a result of the breakthrough rule laid down in Art. 11(4), with particulars of the way in which that compensation is to be paid and the method employed in determining it.

⁵¹ See Sjaafjell, loc. cit. n. 29, at p. 391.

The purpose of the break-through rule is to eliminate the numerous obstacles placed prior to making the offer. This is an essential effort for the achievement of an efficiently operating market of cross-border takeovers. Thus, by acquiring the rights attached to the appropriate 75% cash flow, the shareholder will become entitled to modify the company's articles of association (and possibly other fundamental documents), eliminate any restriction, including even those adopted by the shareholders of the target company prior to making the takeover bid, which prevent the obtaining of control over the company.⁵² The majority of the Member States do not apply the break-through rule due to the related controversy of opinions, however they make it optional for their national companies.⁵³

VII. Optionality and reciprocity

The neutrality and breakthrough rules significantly contribute to the successful implementation of takeovers within the European Union. However, Article 12 of the Directive renders optional the enforcement of the provisions ensuring the offeror's interests, as it authorizes the Members States not to require the companies which have their registered offices within their territories to apply Article 9(2) and (3) and/or Article 11.⁵⁴ Thus the neutrality and break-through rules can be evaded by the member states, and only the provisions of the Directive regarding applicable law, mandatory bid, publication and sell out/squeeze out rights remain as binding. Consequently, the achievement of a level playing field and the appropriate regulatory environment required for the development of takeovers is not fully ensured.

For the purpose of ensuring equal opportunities, the majority of Member States apply the so called reciprocity rule of the Directive. This rule makes it possible for companies falling within the scope of the break-through rule and the neutrality rule (either pursuant to the national regulations or upon their own choice) not to apply the above rules in respect of offerors that do not apply the provisions under the referenced

⁵² See Menjucq, loc. cit. n. 18, at p. 231.

⁵³ COMMISSION STAFF WORKING DOCUMENT – *Report on the Implementation of the Directive on Takeover Bids* p. 7., available at: <http://ec.europa.eu/internal_market/company/docs/takeoverbids/2007-02-report_en.pdf>, (last accessed on 14.05.2010)-

⁵⁴ See Siems, loc. cit. n. 30, at p. 460.

articles of the Directive.⁵⁵ It is only natural that in order to ensure equal opportunities (achieve a level playing field), the Member States rendering their own legal systems more open for takeovers reserve the right to apply the reciprocity rule against the companies that do not apply the optional provisions under Articles 9 and 11 facilitating takeovers. This provides the management with more opportunity for maneuvers against foreign takeover bids, and suitable for eliminating unequal competition among undertakings.⁵⁶ The other reason for the application of the reciprocity rule is the fear from regulatory competition (Delaware effect⁵⁷). Companies would prefer the states allowing a greater scope for action and by moving their registered seat would render the position of the states not applying the reciprocity rule less favorable. The objective to provide companies with the flexibility offered by the Directive can also be a significant argument for the Member States in support of the application of the reciprocity rule.⁵⁸

VIII. Squeeze-out and sell-out

This rights shall become effective only upon the acquisition of the securities of the target company following a public tender offer, namely upon a bid made to all of the securities (Articles 15(1) and 16(1)), provided that the offeror holds securities representing not less than 90% of the capital carrying voting rights and 90% of the voting rights in the offeree company, or where, following acceptance of the bid, the offeror has acquired or has firmly contracted to acquire securities representing not less than 90% of the offeree company's capital carrying voting rights and 90% of the voting rights comprised in the bid (Article 15(2)).⁵⁹ The Member States are to determine the threshold values for the exercising of the above rights by selecting from these two options. The member

⁵⁵ See Menjucq, loc. cit. n. 18, at p. 232.

⁵⁶ Ibid at p. 235.

⁵⁷ V. Halász, 'A részvénytörvény összehasonlító kereskedelmi jogi elemzése' [Comparative Analysis of Stock Purchase from the Viewpoint of Trade Law] in T. Drinóczi, ed., *Studia Iuvenum Iurisperitorum* (Pécs, 2008) p. 41.

⁵⁸ See COMMISSION STAFF WORKING DOCUMENT – *Report on the Implementation of the Directive on Takeover Bids*, p. 8., available at: <http://ec.europa.eu/internal_market/company/docs/takeoverbids/2007-02-report_en.pdf> (last accessed on 14.05.2010).

⁵⁹ Menjucq, loc. cit. n. 18, at p. 227.

states may set a higher threshold that may not, however, be higher than 95% of the capital carrying voting rights and 95% of the voting rights.⁶⁰ By exercising the so called squeeze-out right, the possibility of the squeeze out of minority shareholders relieves the offeror of the risks and costs caused by the continuous presence of minority shareholders. Thus, the offeror is provided with an opportunity to purchase, by way of a unilateral statement and at a fair price, the securities of the remaining minority shareholders within three months of the end of the time allowed for acceptance of the bid. This is an efficient means of ensuring that the offeror completes the acquisition of the company, which makes takeover bids even more attractive. The right of squeeze-out first appeared in the national laws of several Member States as a result of the Directive,⁶¹ and it will hopefully facilitate the development of transactions within the EU.

The so called sell out right is to be listed among the rights protecting the minority shareholders in the case of takeovers. The sell out right ensures that minority shareholders may sell their securities at an equitable price to the offeror within three months from the closing of a successful takeover bid. This rule is suitable for lessening the pressure on the shareholders of the target company to offer their shares to an offeror submitting a bid which is not sufficiently attractive.

IX. Evaluation of the 13th Company Law Directive

The harmonization achieved by the Directive is to be considered limited in several aspects. The fact that in certain cases the Member States may adopt further rules does not present any problem; however, the Directive includes numerous concepts that require further clarification. Such concepts include, for example, the equitable price and the persons acting in concern, but even the definition of the nature of the compensation applicable in the case of break-through needs to be clarified.⁶² The most

⁶⁰ Edwards, loc. cit. n. 12, at p. 427-428.

⁶¹ See e.g.: in the case of Greece, Spain, Luxembourg, Malta, Slovenia, Slovakia.

⁶² In respect of the break-through rule the compensation specified in Art. 11(5) of the Directive is not sufficiently clarified. According to the above Article, the shareholders whose voting rights are affected by the break-through rule should receive equitable compensation. According to common logic and Art. 6(3) of the Directive, this compensation is to be paid, in all probability by the acquirer, however, in lack of explicit wording, this cannot be clearly established. See Sjafjell, loc. cit. n. 29, at p. 391.

‘awkward’ provisions of the Directive are related to corporate law, in particular to the defensive measures against takeovers. Furthermore, although the Directive regulates several areas, it also permits conduct contrary to such regulations. As an example, the Directive includes an overall prohibition in respect of defensive measures against takeovers; however it also permits that Member States forbear from the application of these rules. Since this is rendered possible by the Directive, the Member States will obviously take advantage of this opportunity to a great extent. The rule was severely criticized due also to the fact that while it was seeking to stipulate a community minimum requirement, it abandoned the ambition to specify the criteria for the determination of the threshold value for the acquisition of a qualifying interest in the target company in the case of public tender offers.⁶³

The compromise made by the Member States not to harmonize some fundamental issues relating to takeover bids, was necessary for the successful approval of the Directive. If the objective of the Directive had been a thorough and comprehensive harmonization extending to all issues, a significantly wider range of rules should have been adopted and agreed. The innumerable issues raised by a takeover situation results in greatly varying positions. The harmonization of such positions would require the development of numerous detailed rules.

⁶³ See Gadó, *loc. cit.* n. 35, at p. 335.

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Test of certain common law procedural law instruments in the practice of European Court of Justice

I. Anti-suit injunction

First, this study is concerned with the anti-suit injunction, which is a common law procedural instrument. The ECJ dealt with the compatibility of the above mentioned legal instrument and the Brussels Convention and Brussels I Regulation in two appreciable judgments. Nevertheless, before we examine the judgments in more details, it seems necessary to characterize the essential rules and procedural effects of the anti-suit injunction.

1. The legal nature of the anti-suit injunction

The English courts' jurisdiction to grant anti-suit injunction has a long history. The remedy first appeared in the form of a writ of prohibition by the common law courts to the ecclesiastical courts to prevent their expansive jurisdictional assertions. Later in the nineteenth century the Court of Chancery (the body with equity jurisdiction) would grant an injunction to restrain commencing or continuing to prosecute proceedings under common law.¹ The power is now given statutory recognition but it remains an equitable jurisdiction exercised as a matter of discretion when 'the ends of justice require it'.²

Under English law, a person may be put on trial before a special (domestic or foreign) forum, unless special reasons exist that would allow that person to object to jurisdiction. The anti-suit injunction is such a special reason under English law. One may use this remedy when a party brings a suit in a foreign court and the other party believes that the court of another country provides a more appropriate forum. In this

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¹ C. Ambrose, 'Can the anti-suit injunctions survive European Community law', 52 *International and Comparative Law Quarterly* (2003) p. 404.; M. E. Wilson, 'Let go of that case! British anti-suit injunctions against Brussels Convention Members', 36 *Cornell International Law Journal* (2003-2004) p. 213.

² Supreme Court Act 1981, s 37(1)

case a party may make a motion before the British court, arguing that the opposing party should be enjoined from further pursuit of the lawsuit in the other (more appropriate) jurisdiction. A court will grant the injunction when it must intervene to prevent injustice. Due to the discretionary nature of this legal instrument, it is difficult to define exactly those cases when suits before a foreign court result in injustice.³

Probably the most common situation where the foreign proceedings are pursued by this remedy is those cases where commencing a foreign action constitutes a breach of a forum selection clause or arbitration agreement. The court intervenes in order to protect a contractual right of the applicant unless the party suing abroad establishes good reason or strong cause why it should not be held to its contract. Another justification for intervention is that the abroad suing party is acting unconscionably. In fact, it covers those situations where an English court is the natural forum and the foreign proceeding would be 'vexatious or oppressive'. Overall, it can be said that unconscionability is a broader term encompassing all situations where it could be said that the applicant has an equitable right not to be sued in the foreign court.⁴

It is necessary to emphasize that English precedent – based on *Airbus v Patel* case,⁵ so called 'Airbus test' – curbs the discretionary standard for issuing anti-suit injunctions outlined by the English statute. In the above mentioned cases the power has been exercised cautiously by English courts. An anti-suit injunction should not be granted unless the English court is satisfied that the continuance of the foreign proceedings would be oppressive. In a closer view it means that the English court should consider itself the natural forum for the determination of the dispute, but also take into account whether the continuance of the foreign proceedings would cause injustice to the defendant there and that prevention of the foreign proceedings would not unjustly deprive the plaintiff of a legitimate advantage abroad. An English court will usually refuse to grant an anti-suit injunction, where the appropriate forum is another foreign court.⁶

³ See Wilson, loc. cit. n. 1, at p. 214.

⁴ S. Dutson, Stuart 'Breach of an Arbitration or Exclusive Jurisdiction Clause: The Legal Remedies if it Continues', 16 *International Arbitration* (2000) pp. 89- 94.

⁵ *Airbus Industrie GIE v. Patel* [1999] 1 AC 119

⁶ See Wilson, loc. cit. n. 1, at pp. 214-213.; e.g., Ambrose, loc. cit. n. 1, at pp. 404-405., p. 409.

Overall, the court's power to grant an injunction is generally confined to situations where the injunction is necessary for the protection of some legal or equitable right. The jurisdiction is always exercised as a matter of discretion and any relevant factors will be taken into consideration. The English courts justify the necessity of this remedy by noting that without the anti-suit injunction, the claimant will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy. The mechanism of the anti-suit injunction, for continental eyes, is conspicuously reminiscent of a peculiar form of enforcement of the constitutionally protected principle of having the right to one's lawful judge, which is codified in most international human rights treaties.⁷

The conflict of the anti-suit injunction and European law is typical in two cases. The English forum issuing the anti-suit injunction is called upon on the first or second place to carry out legal proceedings.⁸ Article 27(1) of Brussels I Regulation unequivocally issues orders to those cases when the English forum is called upon secondly and the court called upon firstly states its jurisdiction. In this case, the forum called upon firstly is obliged to proceed and the other forum – which was called upon later – is obliged to state the lack of its own jurisdiction in favor of the other court.⁹ On the basis of this, it can be concluded that if there is no jurisdiction demanding defence there is no place for issuing anti-suit injunction either. However, if the English forum is called upon on the first place, it is obliged to practice own jurisdiction. By reason of this, we can pose a question whether European law allows the issuing of the anti-suit injunction in order to defend jurisdiction or this practice of the English courts is against the European law. This question has been

⁷ A. J. Bělohávek, 'West Tankers as a Trojan Horse with Respect to the Autonomy of Arbitration Proceedings and the New York Convention 1958', 27 *ASA Bulletin* (2009) pp. 652-653.; see also e.g., Ambrose, loc. cit. n. 1, at pp. 404-405.

⁸ *Marc Rich & Co AG v. Società Italiana Supianti XX (The Atlantic Empear)*; *Continental Bank NA v. Aekos Cia Naviera SA* and others; *Aggheliki Charis Compania Maritina SA v. Pagnan S.p.A. (The Angelic Grace)*

⁹ No. 44/2001 EC regulation Article 27(1) Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established. (2) Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favor of that court.

answered by the ECJ in its two judgments of great importance presented below.¹⁰

2. Turner case

a) Facts

Mr Turner, a British citizen domiciled in the United Kingdom, was recruited in 1990 as solicitor to a group of undertakings by one of the companies belonging to that group. The group, known as Chequepoint Group, is directed by Mr Grovit and its main business is running bureaux de change. It comprises several companies established in different countries, one being China Security Ltd, which initially recruited Mr Turner, Chequepoint UK Ltd, which took over Mr Turner's contract at the end of 1990, Harada, established in the United Kingdom, and Changepoint, established in Spain. Mr Turner carried out his work in London. However, in May 1997, at his request, his employer allowed him to transfer his office to Madrid. Mr Turner started working in Madrid in November 1997. On February 1998, he submitted his resignation to Harada, the company to which he had been transferred on 31 December 1997. In March 1998 Mr Turner brought an action in London against Harada before the Employment Tribunal. He claimed that he had been the victim of efforts to implicate him in illegal conduct, which, in his opinion, were tantamount to unfair dismissal. The Employment Tribunal dismissed the objection of lack of jurisdiction raised by Harada. Its decision was confirmed on appeal. Giving judgment on the substance, it awarded damages to Mr Turner.¹¹ In July 1998, Changepoint brought an action against Mr Turner before a court of first instance in Madrid. The summons was served to Mr Turner

¹⁰ R. Fuglinszky, 'Az anti-suit injunction (a határon átnyúló perlési tilalom) Angliában, különös tekintettel a jogintézmény európai joggal való összeegyeztethetőségére' [The anti-suit injunction in England, special regard with the compatibility of the legal instrument with the EU law], in V. Szikora, ed., *Kihívások és lehetőségek napjaink magánjogában* [Challenges and Opportunities in today's private law] (Debrecen, Debreceni Egyetem Állam- és Jogtudományi Kar Polgári Jogi Tanszékének kiadványa 2009) pp. 151-182.

¹¹ ECJ, Case C-159/02 *Gregory Paul Turner v. Felix Fareed Ismail Grovit and Others* [2004] ECR I-3565, paras 1-9. See A. Kecskés, 'Felelős vállalatirányítás az Egyesült Királyságban, Németországban és Franciaországban' [Corporate governance in the United Kingdom, Germany and France] *PhD Tanulmányok* (Pécs, 2009) pp. 213-233.

around 15 December 1998. Mr Turner did not accept service and contested the jurisdiction of the Spanish court. In the course of the proceedings in Spain, Changepoint claimed damages of ESP 85 million from Mr Turner as compensation for losses allegedly resulting from Mr Turner's professional conduct. On 18 December 1998 Mr Turner asked the High Court of Justice of England and Wales to issue an injunction restraining Mr Grovit, Harada and Changepoint from pursuing the proceedings commenced in Spain. An interlocutory injunction was issued on those terms on 22 December 1998. On February 1999, the High Court refused to extend the injunction.¹²

Mr Turner appealed the High Court's decision to the Court of Appeal (England and Wales). That Court issued an anti-suit injunction restraining the defendants (Mr Grovit and others) from continuing the proceedings commenced in Spain and from commencing other proceedings in Spain or elsewhere against Mr Turner regarding his contract of employment. The reasons for the anti-suit injunction stated that the proceedings in Spain had been brought in bad faith and to hinder Mr Turner's application before the Employment Tribunal in London. The Court of Appeal considered the relevance of the Brussels Convention and stated:

'were the English court to find that the proceedings had been launched in another Brussels Convention jurisdiction for no purpose other than to harass and oppress a party who is already a litigant here, the English court possesses the power to prohibit by injunction the plaintiff in the other jurisdiction from continuing the foreign process.'¹³

Overall the Court was of the view that, by granting the injunction, it was not being an intervention into the Spanish court's jurisdiction, but rather safeguarding the proper application of the Brussels Convention.¹⁴ Mr Grovit, Harada and Changepoint then appealed to the House of Lords, claiming in essence that the English courts did not have the power to

¹² See n. 11. paras 10-11.

¹³ *Turner v. Grovit* [2000] 1 QB 345 at 356; cited by T. Kruger, 'The anti-suit injunction in the European judicial space: *Turner v Grovit*', 53 *International Law and Comparative Law Quarterly* (2004) pp. 1031-1032.

¹⁴ Advocate General Coloner's Opinion on Gregory Paul Turner v. Felix Fareed Ismail Grovit and Others (Case C-159/02). 20 November, 2003 (ECJ) paras 8-9

make restraining orders preventing the continuation of proceedings in foreign jurisdictions covered by the Convention.¹⁵

b) The House of Lords' judgment

The House of Lords considered the interpretation of European Union law important in the case before them. For that reason they referred the following preliminary question to the European Court of Justice:

'is it inconsistent with the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters signed at Brussels on 27 September 1968 to grant restraining orders against defendants who are threatening to commence or continue legal proceedings in another Convention country when those defendants are acting in bad faith with the intent and purpose of frustrating or obstructing proceedings properly before the English courts?'¹⁶

In the referral the House of Lords carefully explained the legal phenomenon of an anti-suit injunction. It has been pointed out that although it had emerged from case law, the injunction is now based on statutory law which states that

'the High Court may by order (whether interlocutory or final) grant an injunction... in all cases in which it appears to the court to be just and convenient to do so.'¹⁷

It was emphasized that the anti-suit injunction involved no decision upon the foreign court's jurisdiction and therefore was not prohibited under Brussels Convention. Namely an anti-suit injunction was based on the presumption that the English courts had *in personam* jurisdiction over parties to proceedings pending before them. Therefore, the English courts had the right to prescribe an obligatory code of conduct to the parties and these rules could prohibit them from bringing or continuing proceedings before other courts. This prohibition did not interfere with the sovereignty of other courts, but only told the parties how to act while under the jurisdiction of the English courts. The House of Lords reminded that there was nothing in the wording of the Convention that precluded the power to grant restraining orders such as anti-suit injunction. Furthermore, the anti-suit injunction was an effective mechanism to prevent irreconcilable judgments, which was one of the

¹⁵ See n. 11. paras 12-14.

¹⁶ *Ibid.*, at para 18

¹⁷ Supreme Court Act 1981, s 37(1)

purposes of the Brussels Convention. In the case under discussion, irreconcilable judgments would be prevented by the anti-suit injunction. Finally the House of Lords strongly argued in defence of anti-suit injunctions that the fact that the mechanism did not exist in the legal systems of other European Union Member states was not problematic since the purpose of the Brussels Convention was not uniformity, but rather the creation of clear rules on jurisdiction.¹⁸

The House of Lords stated in the referral that the essential elements which justified the power to issue an injunction in this case were the following:

- the applicant was a party to existing legal proceedings in England;
- the defendants had in bad faith commenced and proposed to prosecute proceedings against the applicant in another jurisdiction for the purpose of frustrating or obstructing the proceedings in England;
- the Court of Appeal considered that in order to protect the legitimate interest of the applicant in the English proceedings it was necessary to grant the applicant an injunction against the defendants.¹⁹

c) The ECJ's judgment

ECJ held in the Turner case that an injuncton constitutes interference with the jurisdiction of the foreign court if it is inconsistent with the legal regime of the Brussels Convention. Moreover, the Court pointed out that interference cannot be justified by the fact that it is only indirect and is intended to prevent an abuse of process by the party concerned, because the judgment made as to the abusive nature of that conduct implies an assessment of the appropriateness of bringing proceedings before a court of another Member state, which runs counter to the principle of mutual trust which underpins the Convention and prohibits a court, except in special cases occurring only at the stage of the recognition and enforcement of foreign judgments, from reviewing the jurisdiction of the court of another Member state.²⁰

¹⁸ See Bělohávek, loc. cit. n. 7, at p. 654.; Kruger, loc. cit. n. 13, at pp. 1032-1033.; see also Ambrose, loc. cit. n. 1, at p. 410.

¹⁹ See n. 11, para 17.

²⁰ Ibid., at paras 26-28 and para 31

The European Court of Justice emphasized the mutual trust that should exist between the courts of the EU Member states, because this was what enabled the system of jurisdiction and a simplified procedure for the recognition and enforcement of judgments. Prohibiting a party from going to a foreign court consequently interfered with that court's jurisdiction. That interference was incompatible with the system of the Brussels Convention. The argument that there was no direct interference, since the injunction is directed at the parties and not at the foreign court, did not convince the European Court of Justice. Even a true indirect interference would be against the Convention.²¹ Additionally, the Court did not accept the argument that an anti-suit injunction could help to reach one of the goals of the Convention, namely to reduce irreconcilable judgments.²² The anti-suit injunction did not fit in with the rest of the Convention: there were no rules for the situation where a foreign court gave a judgment despite an injunction and there were no rules to regulate the existence of contradictory injunctions.²³

The ECJ apparently clearly committed itself to the irreconcilability of the anti-suit injunction and European law. However, as it can be seen from the next case the English courts continued issuing this injunction and the House of Lords continued arguing for its necessity and utility of the anti-suit injunction with regard to European law.

3. The West Tankers case

a) Facts

In August 2000 the *Front Comor*, a vessel owned by West Tankers and chartered by Erg Petroli SpA ('Erg'), collided in Syracuse with a jetty owned by Erg and caused damage. The charter party was governed by English law and contained a clause providing for arbitration in London. Erg claimed compensation from its insurers Allianz and Generali up to the limit of its insurance coverage and commenced arbitration proceedings in London against West Tankers for the excess. West Tankers denied liability for the damage caused by the collision. Having

²¹ Coloner's Opinion on *Gregory Paul Turner v. Felix Fareed Ismail Grovit and Others* (Case C-159/02), 27 April, 2004 (ECJ) paras 30-33

²² The Convention had its own rules to deal with that situation, also called *lis alibi pendens* (Article 2i).

²³ See n. 11, paras 24-31.

paid Erg compensation under the insurance policies for the loss it had suffered, Allianz and Generali brought proceedings on July 2003 against West Tankers before the court of Syracuse in order to recover the sums they had paid to Erg. The action was based on their statutory right of subrogation to Erg's claims, in accordance with the Italian Civil Code (Codice Civile). West Tankers raised an objection of lack of jurisdiction on the basis of the existence of arbitration agreement. In parallel, West Tankers brought proceedings, on September 2004, before the High Court of Justice (England and Wales), Queens Bench Division (Commercial Court), seeking a declaration that the dispute between itself, on the one hand, and Allianz and Generali, on the other, was to be settled by arbitration pursuant to the arbitration agreement. West Tankers also sought an injunction restraining Allianz and Generali from pursuing any proceedings other than arbitration and requiring them to discontinue the proceedings commenced before the court of Syracuse. By judgment of 21 March 2005, the High Court of Justice upheld West Tankers' claims and granted the anti-suit injunction sought against Allianz and Generali. The insurance companies appealed against that judgment to the House of Lords. They argued that the grant of such an injunction is contrary to the Brussels I Regulation.²⁴

b) The House of Lords' Judgment

The House of Lords held that the answer to that question whether the anti-suit injunction is reconcilable with Brussels I regulation was not so obvious, therefore referred the following question to the ECJ.

'Is it consistent with EC Regulation 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member state on the ground that such proceedings are in breach of an arbitration agreement?'²⁵

The House of Lords also set out what it believed was the correct answer to this question. Lord Hoffmann (judge of the House of Lords) argued,

²⁴ See Bělohávek, loc. cit. n. 7, at pp. 647-649.; ECJ, Case C-185/07 *Allianz SpA and Generali Assicurazioni Generali SpA v. West Tankers Inc* (2009) OJ C 82. paras. 9-13.

²⁵ *Ibid.*, at para 18; J. Grierson, 'Comment on West Tankers Inc. v. RAS Riunione Adriatica di Sicurtà S.p.A. (The Front Comor)', 26 *Journal of International Arbitration* (2009) p. 893.

first, that the ECJ's reasoning in *Turner v. Grovit* did not apply in this case. In this case the ECJ had held that:

'if a party is restrained from commencing or continuing proceedings before a court of another Contracting Party by an anti-suit injunction, that constitutes interference with that court's jurisdiction which is incompatible with the system of the Convention and impairs its effectiveness. The Brussels Convention (Regulation) provides a complete set of uniform rules for the allocation of jurisdiction between Member States and [...] the courts of each Member State have to trust the courts of other Member States to apply those rules correctly'.²⁶

By contrast, Lord Hoffman stated, no such set of uniform rules exists with respect to arbitration, which is altogether excluded from the scope of the Regulation by Article 1(2) (d),²⁷ and arbitration includes not only arbitration proceedings themselves and the recognition and enforcement of arbitral awards but also all national court proceedings in which the subject-matter is arbitration. As anti-suit injunctions support the conduct of arbitration proceedings, it argues that proceedings seeking the issue of such injunctions are covered by the exception in Article 1(2)(d) of Regulation.²⁸

Lord Hoffmann next turned to ECJ case law on the interpretation of the arbitration exception to the Judgments Regulation, and in particular two ECJ judgments. In *Marc Rich & Co. A. G v Society Italiana Impianti PA.*, the ECJ held that the exception applies not only to arbitration proceedings themselves but also to court proceedings where the subject matter is arbitration.²⁹ In *Van Uden Maritime B.V. v. Deco-Line*, the ECJ held that the subject matter of court proceedings is arbitration if those proceedings serve to protect the right to have the dispute determined by arbitration.³⁰ Applying this test, Lord Hoffmann opined that an application for an antisuit-injunction falls within the arbitration exception, as its purpose is

²⁶ See n. 11, paras 27-29; Case C-116/02 *Erich Gasser GmbH v. MISAT Srl* [2003] ECR I-4693.

²⁷ See Grierson, loc. cit. n. 25, at p. 893.

²⁸ AG Juliane Kokott's opinion on *Allianz SpA (formerly Riunione Adriatica Di Sicurtà SpA) and Others v. West Tankers Inc.* (C-185/07) 4 September 2008, para 30

²⁹ ECJ, Case C-190/89 *Marc Rich & Co. A.G. v. Society Italiana Impianti PA.*, [1991] ECR I-3855

³⁰ *Van Uden Maritime B.V. v. Deco-Line*, 1998 E.C.R. I-7091

‘entirely to protect the contractual right to have the dispute determined by arbitration.’³¹

In addition, Lord Hoffmann offered policy reasons for allowing Member state courts to issue anti-suit injunctions in the arbitral context. He described the anti-suit injunction as

‘an important and valuable weapon in the hands of a court exercising supervisory jurisdiction over the arbitration. It promotes legal certainty and reduces the possibility of conflict between the arbitration award and the judgment of a national court.’³²

In the conclusion of the referral, House of Lords stated:

‘the arbitration agreement lies outside the system of allocation of court jurisdiction which the Regulation creates. There is no dispute that, under the Regulation, the Tribunale di Syracusea (court of Syracusea) has jurisdiction to try the delictual claim. But the arbitration clause is an agreement not to invoke that jurisdiction and it is that agreement which the order of (the Commercial Court) requires to be performed.’³³

c) The ECJ’s judgment

The ECJ did not follow the House of Lords’ argumentation, preferring instead the Opinion of Advocate General Kokott, and answered the question as follows.

‘It is incompatible with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement.’³⁴

The ECJ in the reasoning accepted that the proceedings which led to the making of the anti-suit injunction did not fall within the scope of the Regulation, because their subject matter was arbitration. However, it held that even though proceedings do not come within the scope of Regulation, they may nevertheless have consequences which undermine its effectiveness, namely preventing the attainment of the objectives of

³¹ See Grierson, loc. cit. n. 25, at p. 893.

³² See Bělohlávek, loc. cit. n. 7, at pp. 666-667.; See also Grierson, *ibid.*, at p. 894.

³³ See Grierson, *ibid.*, at pp. 893-894.

³⁴ Case C-185/07 *Allianz SpA and Generali Assicurazioni Generali SpA v. West Tankers Inc.* (2009) OJ C 82

unification of the rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters. This is so, *inter alia*, where such proceedings prevent a court of another Member state from exercising the jurisdiction conferred on it by Regulation.³⁵

In further explanation, the ECJ held that the proceedings before the court of Syracuse, including also the preliminary issue concerning the validity of the arbitration agreement, fell within the scope of the Regulation:

‘[t]he use of an anti-suit injunction to prevent a court of a Member State, which normally has jurisdiction to resolve a dispute under Article 5(3) of the Regulation, from ruling, in accordance with Article 1(2)(d) of that Regulation, on the very applicability of the Regulation to the dispute brought before it necessarily amounts to stripping the court of the power to rule on its own jurisdiction under the Regulation.’³⁶

In addition, referring to the Advocate General’s opinion, the ECJ relied upon that an anti-suit injunction, such as that in the main proceedings, is contrary to the general principle which emerges from the case-law of the Court on the Brussels Convention, that every court seized itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it. The anti-suit injunction in obstructing the court of another Member state in the exercise of the powers conferred on it by Regulation, namely to decide, whether that regulation is applicable, such an anti-suit injunction also runs counter to the trust which the Member states accord to one another’s legal systems and judicial institutions and on which the system of jurisdiction under the Regulation is based.³⁷

The ECJ also pointed to the risk that by means of an anti-suit injunction, the Tribunale di Siracusa was prevented from examining itself the preliminary issue of the validity or the applicability of the arbitration agreement, a party could avoid the proceedings merely by relying on that agreement and the applicant, which considers that the agreement is void, inoperative or incapable of being performed, would thus be barred from access to the court before which it brought proceedings under the

³⁵ *Ibid.*, at para 24. See also Bělohávek, *loc. cit.* n. 7, at pp. 664-665.

³⁶ *Ibid.*, at para 28

³⁷ *Ibid.*, at paras 29-30

Regulation and would therefore be deprived of a form of judicial protection to which it is entitled.³⁸

It is necessary to note that Advocate General Kokott's opinion acknowledged the risk of conflicting judgments under a rule barring anti-suit injunctions, another concern which the ECJ judgment did not address. Kokott argued that a unilateral anti-suit injunction is not a suitable measure to remedy that situation. In particular, if other Member states were to follow the English example and also introduce anti-suit injunctions, reciprocal injunctions would ensue. Ultimately, the jurisdiction which could impose higher penalties for failure to comply with the injunction would prevail. Instead of a solution by way of such coercive measures, a solution by law provisions is called for. In that respect only the inclusion of arbitration in the scheme of Regulation could remedy the situation. AG Kokott also pointed out that these cases are exceptions.³⁹ Therefore if an arbitration clause is clearly formulated and does not give rise to any doubt as to its validity, the national courts have no reason not to refer the parties to the arbitral body appointed in accordance with the New York Convention⁴⁰.

II. Default judgment – the Gambazzi case

English common law similarly to the continental legal systems is acquainted with the condemnation in litigation of defendants on the basis of their demonstrated failure in the trial. However, as it can be seen from the next case, the concept of default judgment of the common law seems unfamiliar for the lawyer working within the continental law system. It is because the court may exclude the defendant from the procedure if the court's order is not or not appropriately fulfilled and by this reason the defendant is no longer being viewed as a party of the procedure. After this, the forum decides the case on the basis of the available evidences regarding the default of the respondent. However, the recognition and implementation of the default judgment made by the English court may cause problems in the Member states which are non-common law countries and it also raises further questions in connection with the effective enforcement of Brussels I Regulation. In the next

³⁸ *Ibid.*, at para 31

³⁹ See n. 28, paras 72-73.

⁴⁰ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958)

chapter, we review the statements of the ECJ relevant to the default judgment and the test developed for the reconciliation of the legal instrument and the Brussels I Regulation.⁴¹

1. Facts

At the request of Daimler Chrysler Canada Inc. ('Daimler Chrysler') and CIBC Mellon Trust Company ('CIBC') in July 1996 the High Court of Justice (England and Wales) Chancery Division issued a freezing order against Mr Gambazzi (Swiss citizen). By that freezing order he was prohibited from dealing with his assets in order to safeguard the enforcement of a future judgment. In February 1997, at the request of Daimler Chrysler and CIBC, the English court issued an amended version of the freezing order, now with additional instructions under which Mr Gambazzi was required to disclose information regarding his assets and to submit certain documents also relating to the main proceedings (disclosure orders). Mr Gambazzi did not comply with the obligations under the disclosure orders, or at least not in full. Thereupon, at the request of Daimler Chrysler and CIBC, the English court issued a further order (unless order). In that order Mr Gambazzi was notified that unless he complied with the terms of the orders and disclosed the requested information by a certain date his defence submissions in the main proceedings would not be taken into consideration and he would be prohibited from taking further part in the proceedings. Mr Gambazzi brought various appeals against the freezing order, the disclosure order and the unless order without any success. Even after a repeated unless order he failed to comply with his obligations in full within the prescribed period. The English court considered this to be contempt of court and excluded him from the proceedings (debarment), as notified in the unless orders. In the main action Mr Gambazzi was then treated as a defendant in default. By a default judgment of 10 December 1998, the High Court of Justice ordered him to pay Daimler Chrysler and CIBC damages of CAD 170 million and CAD 71,6 million and a further USD 130 million.

Daimler Chrysler and CIBC wished to have that judgment enforced in Italy. By order of December 2004, the Corte d'Appello di Milano (Court

⁴¹ T. Ingmann, *The English Legal Process* (Oxford, Oxford University Press 2006) pp. 329-400.; P. Wautelet 'Article 32 section 8', in U. Magnus and P Mankowski, eds., *Brussels I Regulation* (München, 2007)

of Appeal, Milan) declared enforceable the English judgment and the order by which Mr Gambazzi was ordered to pay damages. Mr Gambazzi appealed against that order. He claimed that the High Court judgments cannot be recognised in Italy, on the ground that they are contrary to public policy within the meaning of Article 27(1) of the Brussels Convention, because they were made in breach of the rights of the defence and of the adversarial principle. By order of 27 June 2007, the Corte d'Appello di Milano, which is hearing the appeal, stayed the proceedings and referred a question to the Court of Justice for a preliminary ruling, in which the court asked essentially, whether the court of the State in which recognition is sought may, on grounds of public order, refuse to recognize a civil judgment which was delivered after the defendant was excluded for failure to comply with a court order proceedings by an order and therefore a party has been prevented from exercising the rights of the defence.⁴²

2. The ECJ's judgment

By the interpretation of Article 27(1) of the Brussels Convention, the ECJ answered the referred question:

‘that the court of the State of origin ruled on the applicant’s claims without hearing the defendant, who entered appearance before it but who was excluded from the proceedings by order on the ground that he had not complied with the obligations imposed by an order made earlier in the same proceedings, if, following a comprehensive assessment of the proceedings and in the light of all the circumstances, it appears to it that that exclusion measure constituted a manifest and disproportionate infringement of the defendant’s right to be heard.’⁴³

The Court in its reasons sought the answer for this question: in which case would, on the basis of the Brussels Convention – implicitly the Brussels I regulation –, a default judgment which was brought after the litigant had been excluded qualify as being against the public order?

Mr Gambazzi maintained that the High Court’s default judgment is not judgment within the meaning of Article 25 of the Brussels Convention because they were adopted in infringement of the adversarial principle and the right to a fair trial. Against this statement, the ECJ considered

⁴² Case C-394/07 *Marco Gambazzi v. DaimlerChrysler Canada Inc., CIBC Mellon Trust Company* (2009) OJ C 269 paras 18-20

⁴³ *Ibid.*

that, for such decisions to fall within the scope of the Convention, it is sufficient if they are judicial decisions which, before their recognition and enforcement are sought in a State other than the State of origin, have been, or have been capable of being, the subject in that State of origin and under various procedures, of an inquiry in adversarial proceedings. The fact that the court entered judgment as if the defendant, who had entered appearance, was in default, cannot suffice to call into question the categorization of those decisions as judgments. That fact can be taken into consideration only with regard to the compatibility of those decisions with the public policy of the State in which enforcement is sought.

The concept of public order, based on Article 27(1) of the Brussels Convention, was interpreted in *Krombach v Bamberski*⁴⁴ by the ECJ. In this context the ECJ held that the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from a court in another Contracting State when recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. The infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognized as being fundamental within that legal order.⁴⁵ The Milan court asked in the referral in connection with the limitation of right of defence, whether such a decision is contrary to the public order. The Court has pointed out that the rights of defence occupies a prominent position in the organization and conduct of a fair trial and is one of the fundamental rights deriving from the constitutional traditions common to the Member states and from the international treaties for the protection of human rights, therefore it must be interpreted as a fundamental right.⁴⁶ Continuing this train of thought, the ECJ stated that the rights of the defence do not constitute unfettered prerogatives and may be subject to restrictions. However, such restrictions must in fact correspond to the objectives of public interest pursued by the measure in question and must not constitute, with regard to the aim pursued, a

⁴⁴ ECJ, Case C-7/98 *Dieter Krombach v André Bamberski* [2000] ECR. I-1935.

⁴⁵ *Ibid.*, at para 37

⁴⁶ See n. 42, para 28

manifest or disproportionate breach of the rights thus guaranteed.⁴⁷ The Government of the United Kingdom, an intervener in the procedure, explained that the aim of the freezing, disclosure and unless orders is to ensure the fair and efficient administration of justice and such an objective is capable of justifying a restriction on the rights of the defence. The ECJ accepted this argumentation, however, it added that such sanctions may not be manifestly disproportionate to the aim pursued, which is to ensure the efficient conduct of proceedings in the interests of the sound administration of justice. The ECJ pointed out, that it is for the national court to assess, in the light of the specific circumstances of these proceedings, if that is the case.⁴⁸

It seems necessary to expound the justified distinction appearing in AG Kokott's opinion, namely the different assessment of what was contrary to public order in the Krombach case and the present case, which is needed to be taken into consideration by the Member state court when judging the dispute:

- in the Krombach case the Court itself could establish that the proceedings before the court of the State of origin constituted a manifest breach of the fundamental right to a fair trial. That case concerned a civil claim in criminal proceedings. The court prevented the defendant from being defended by a lawyer because the defendant did not comply with the court's order to appear in person. If, however, the defendant had complied with the order to appear in person, he would have been threatened with arrest for a criminal offence. The situation in Krombach was clear and unambiguous in fact and in law. The defendant was not heard at any time, did not have any opportunity to defend himself and no means of appeal were available to him either;⁴⁹
- in contrast, the proceedings before the court of the State of origin in the present case are highly complex. The defendant was repeatedly heard at various stages of the proceedings and apparently various legal remedies were open to him. In addition, the different strands of the interim legal protection (freezing order, disclosure orders, unless orders) appear to be

⁴⁷ Ibid., at para 29

⁴⁸ Ibid., at para 34

⁴⁹ See n. 44, paras 12-17.

closely interwoven with the proceedings in the main action and thus with the default judgment which was delivered. They essentially serve therefore to enable the judgment to be enforced in the event that the applicant is successful. It is not therefore sufficient to consider the default judgment in isolation without also including the prior procedural steps in the examination of public policy. Rather, the proceedings must be considered as a whole and the matter must be assessed having regard to all circumstances.⁵⁰

The Court accepting the arguments of the Advocate General set up a test. By applying this test the Member state court may decide if the judgment being the basis of the continued procedure due to limiting the right of defence of the litigant is against the public order or not. In the point of the Court's view the courts of Contracting States should take into consideration not only the circumstances in which, at the conclusion of the High Court proceedings, the decisions of that court – the enforcement of which is sought – were taken, but also the circumstances in which, at an earlier stage, the disclosure order and the unless order were adopted.⁵¹ The referring court shall examine the followings:

- whether, and if so to what extent, Mr Gambazzi had the opportunity to be heard as to its subject-matter and scope, before it was made;
- what legal remedies were available to Mr Gambazzi, after the disclosure order was made, in order to request its amendment or revocation. In that regard, it must be established whether he had the opportunity to raise all the factual and legal issues which, in his view, could support his application and whether those issues were examined as to the merits, in full accordance with the adversarial principle, or whether on the contrary, he was able to ask only limited questions;
- with regard to Mr Gambazzi's failure to comply with the disclosure order, it is for the national court to ascertain whether the reasons advanced by Mr Gambazzi, in particular the fact that disclosure of the information requested would have led him to infringe the principle of protection of legal confidentiality by

⁵⁰ AG Juliane Kokott's opinion on *Marco Gambazzi v DaimlerChrysler Canada Inc., CIBC Mellon Trust Company (C-394/07)* 18 December 2008 (ECJ) paras 46-48

⁵¹ See n. 42, para 41.

which he is bound as a lawyer and therefore to commit a criminal offence, could have been raised in adversarial court proceedings;

- concerning the issuing of the unless order, the national court must examine whether Mr Gambazzi could avail himself of procedural guarantees which gave him a genuine possibility of challenging the adopted measure;
- with regard to the High Court judgments in which the High Court ruled on the applicants' claims as if the defendant was in default, it is for the national court to investigate the question whether the well-foundedness of those claims was examined, at that stage or at an earlier stage, and whether Mr Gambazzi had, at that stage or at an earlier stage, the possibility of expressing his opinion on that subject and a right of appeal.⁵²

The ECJ pointed out that the Milan Court had to carry out a balancing exercise with regard to those various factors in order to assess whether, in the light of the objective of the efficient administration of justice pursued by the High Court, the exclusion of Mr Gambazzi from the proceedings appeared to be a manifest and disproportionate infringement of his right to be heard.⁵³

This argumentation can give a new aspect for the member states courts to judge whether an other member state court's decision is against to the public order of the forum or not. In other aspect the Gambazzi judgment is also a cornerstone – such as the Turner and West Tankers judgment – in the process of legal harmonization, which is in progress in the EU between the common law based English law and the so called civil law countries. Expected this process will point at further neuralgic points and problems and will give further opportunity for deeper researching.

⁵² Ibid., at paras 41-46

⁵³ Ibid., at para 47

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Multi-party actions and the legal aid

I. Introduction

The terms *class action*, *group action*, *mass claim*, *representative action*, *association claim*, *joint action* are different forms of multi-party actions used in legal systems around the world.¹ This paper attempts to explain the term and to show the features of the most common forms of collective legal protection mechanisms within several legal systems. Considering the fact that some of the models of collective legal protection which are subjects of our interest belong to the civil law and the remainder to the common law legal family, we should start from the basic features of the civil procedure in the legal systems of both legal families. While defining the very term of collective legal protection we shall use the definition of the traditional two-party civil procedure. Namely, the sole term 'collective legal protection' was developed through the recognition of the need for the widening of the two-party civil procedure concept and this can be particularly seen in the development process of the collective legal protection models of EU Member States. Therefore it is necessary to give at least a brief overview of the historical and legal context of the formation of collective legal protection mechanisms in the EU. In the central part of the paper we will show the legal sources and the main features of the

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¹ Class action – skupna tužba – csoportos keresetindítás, group action – grupna tužba – csoportos fellépés, mass claim – masovna tužba – tömeges követelés, representative action – reprezentativna tužba – reprezentatív per, association or interest group action / joint action (Verbandsklage) – udružna tužba – társasági követelés, multi-party action – višestranačka tužba – több résztvevős per. Here the authors give possible terminological solutions (translation to Croatian and Hungarian language) for different mechanisms of collective legal protection (most of which are for now unknown in the legal system of the two countries) which will be used further in the paper.

collective legal protection models in four legal systems² (German, Hungarian, American and Croatian). Finally, questioning the relationship between collective legal protection and legal aid will serve for examining the possible efficiency of legal aid in the advancement of the collective legal protection mechanisms and also for the anticipation of future directions of its development. The civil procedure is a general, regular and basic method for the protection of subjective civil rights which have been threatened or violated, provided by the state judiciary.³ However, there are two legal families, the civil law and the common law legal family which have different civil procedure rules. Legal systems of civil law countries are marked by principles which have their source in the Constitution as the fundamental legal act of each country.⁴ The most significant principles of civil procedures in the civil law legal family are principles of party control, the principle of party control of the facts and the means of proof of and the right to be heard which combines the right to access to justice, equality of arms and adversarial proceedings.⁵ Legal systems of common law countries draw their principles and procedural rules from the jurisprudence as the main legal source and that is why the common law system is usually referred to as case law system.⁶ The basic principles and features immanent to the civil procedure in the common law legal family are due process, pre-trial discovery, trial by jury, the American rule on cost, contingency fees (which differ greatly from the rules of the civil procedure in civil law legal family) and also class action.⁷

As mentioned earlier, the very term collective legal protection was developed from a kind of recognition of the need for the widening of the civil procedure concept. Logically, the easiest way to recognize the

² The German, Hungarian and the Croatian (German subgroup) legal systems belong to the civil law legal family and American legal systems belong to the common law legal family. N. Gavella, *Građansko pravo i pripadnost hrvatskog pravnog poretka u kontinentalnoeuropskom pravnom krugu* [Civil law and the affiliation of the Croatian legal system to the civil law legal family] (Zagreb, Pravni fakultet 2005) p. 18.

³ S. Triva and M. Dika, *Građansko parnično procesno pravo* [Civil procedural law] (Zagreb, Narodne novine 2004) p. 3.

⁴ Gavella, op. cit. n. 2, at p. 11-19.

⁵ Triva and Dika, op. cit. n. 3, at p. 127-158.

⁶ Gavella, op. cit. n. 2, at p. 18-20.

⁷ B. Hess, 'Aktuelle Brennpunkte des transatlantischen Justizkonflikts', 50 *DIE AKTIENGESESELLSCHAFT* [DIE AG] (2005) p. 897.

basic features and come to a definition of collective legal protection is to put the term collective procedure and traditional civil procedure in a relation. But it is not possible to perceive or to define the term collective legal protection and its forms today without foreknowledge of the mode of its formation. Therefore we will first provide a description of the development of collective legal protection, with the emphasis on the context of EU legal space. Namely, twenty years ago theorists Cappelletti and Garth in the *Access to Justice* volume argued that it is 'necessary to go beyond the scope of individuals'.⁸ This need was recognized because of the frequent injury or harm to the rights of large groups of individuals which emerged as a consequence of the growing mass production, distribution and consumption. That is why it was necessary to find mechanisms for the realization of adequate legal protection of groups of individuals whose quality would not differ from the level of the protection provided by the existing mechanisms of individual legal protection. These problems were first observed in the field of consumer protection but soon similar trends were also detected in the fields of environmental protection, competition and industrial law.⁹ Taking into account that it is not possible to show the complexity and diversity of the collective protection regulation in each of the aforementioned fields, we shall be satisfied with the review of the field of consumer protection.

In the context of the EU, collective legal protection in the field of consumer protection was first mentioned in the Commission paper from

⁸ The Florence Access to Justice Project (a series under the general editorship of Mauro Cappelletti); Mauro Cappelletti and Bryant Garth, eds., *Access to Justice, The World Survey*, Vol. I. Book I., (Milan, Dott. A. Giuffr  Editore 1978); Mauro Cappelletti and Bryant Garth, eds., *Access to Justice Vol. I. Book II.* (Milan, Dott. A. Giuffr  Editore 1978); Mauro Cappelletti and John Weisner, eds., *Access to Justice, Promising Institutions, Vol II., Book II.* (Milan, Dott. A. Giuffr  Editore 1979); Mauro Cappelletti and Bryant Garth, eds., *Access to Justice, Emerging Issues and Perspectives, Vol III. Book II.*, Mauro Cappelletti and Bryant Garth, eds., *Access to Justice, Emerging issues and perspectives, Vol III. Book II.* (Milan, Dott. A. Giuffr  Editore 1979); Klaus-Friedrich Koch, ed., *The Anthropological Perspective, Vol IV. Book II.* (Milan, Dott. A. Giuffr  Editore 1979)

⁹ P. H. Lindbloom, 'Individual Litigation and Mass Justice: A Swedish Perspective and Proposal on Group Actions in Civil Procedure', *XLV The American Journal of Comparative Law* (1997) p. 805 at p. 817.

1984.¹⁰ Until then, many EU Member States had some form of representative action in their national legislations which enabled consumer protection organizations to request legal protection for consumers whose interests they represented. However, these mechanisms had not proven to be particularly efficient given that organizations for consumer protection usually were not able to finance the conduct of proceedings nor bear the costs of eventual losing the proceedings. In some EU Member States representation and realization of interest of groups of consumers is entrusted to state attorneys or another authorized state entity. Taking into account the inconsistency and complexity of the regulations of collective legal protection mechanisms within the EU Member States, the EU Commission concluded in the Commission paper that it is not possible to propose a harmonization of national collective legal protection mechanisms.¹¹ The diversity of European mechanisms of collective legal protection perhaps can be best described by a picturesque remark on the European legal space which resembles ‘a mixed bag filled with different collective legal protection mechanisms’.¹²

Precisely this conclusion seems to be one of the reasons why the definition of collective legal protection is still complex and incorporates the diversity of all the above forms:

‘test cases to resolve / potentially resolve similar claims of multiple potential litigants, or defenses of multiple accused; Litigation undertaken by groups or individuals in the wider public interest, e.g. environmental, consumer, administrative law proceedings; Proceedings involving multiple plaintiffs with similar cases of action against a single/common class of defendants; Representation of multiple defendants in criminal proceedings

¹⁰ Memorandum from the Commission: Consumer Redress COM(84)692, 12.12.1984

¹¹ C. Hodges, *Global Class Actions Project: Summary of European Union Developments* (2007) p. 1. at p. 2., available at: <http://www.law.stanford.edu/library/globalclassaction/PDF/EU_Report_2007.pdf>, (last accessed on 08.15.2010).

¹² Sorabji et al, *Improving Access to Justice through Collective Actions-Developing a More Efficient and Effective Procedure for Collective Actions*, (2008) p. 3., available at: <[http://www.civiljusticecouncil.gov.uk/files/Improving Access to Justice through Collective Actions.pdf](http://www.civiljusticecouncil.gov.uk/files/Improving%20Access%20to%20Justice%20through%20Collective%20Actions.pdf)>

arising out of a common/related incident; and proceedings under any relevant group proceedings, class, representative actions legislation.¹³

If we return to the beginning of this paper where the definition of the civil procedure was first mentioned and if we compare it with the definition of collective legal protection, the following can be said on the latter term: Collective procedures, that is, procedures initiated by a class or representative actions are also considered a part of the civil procedure independent of the difference between two-party and collective procedure made by, for example, the issue of legal interest for the initiation of the proceedings.¹⁴ Namely, legal interest is one of the prerequisites which have to be satisfied in order to commence the proceedings. Therefore in a two-party procedure the right to initiate the proceedings belongs to the person who has a legal and concrete interest to seek legal protection, that is, the expected benefit from the involvement of the courts should be reflected on the rights of that person.¹⁵ The collective procedure often serves for the realization of a wider social, public interest.¹⁶ But, private disputes, the harm or injury of subjective rights are also considered to be the source of the legal interest of members of the group for the initiation of collective procedures. This justifies the procurement of the term collective

¹³ D. Fleming, 'Responding to New Demands: Legal Aid and Multi-party Actions', in: F. Regan et al., eds., *The Transformation of Legal Aid: Comparative and Historical Studies* (Oxford, Oxford University Press 2002) pp.259-275., p. 261.

¹⁴ See W. H. Van Boom, *Collective Settlement of Mass Claims in The Netherlands* (2009) p. 4., available at: < <http://ssrn.com/abstract=1456819>>; Greiner, op. cit. n. 1, at p. 125-131.

¹⁵ Triva and Dika, op. cit. n. 3, at p. 139.

¹⁶ However, it should be mentioned that although American class action is used for the realization of a wider public interest (especially in declaratory and injunctive relief class actions in the field of consumer or environmental protection or anti-discrimination) they are primarily considered as private actions. This is notable from the definition of the institute in which the entitlement for the commencement of a class action in their own and in the name of others is given to one of more persons (representative plaintiff). Also, the Rule 23 FRCP prescribes monetary claim class actions, while there is no such possibility in the representative actions and this fact emphasizes the private character of the American class action. See R. Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Oxford-Portland Oregon, Hart 2004) p. 5.

procedure under the term civil procedure.¹⁷ Indisputably, legal interest for initiation of the proceedings is not the only feature which characterizes the mutual differences between the two-party and collective procedure. There are also differences between the parties to the procedure, rules on representation, the subject matter, rules on discovery, costs of the proceedings, types of judgment and the binding effect of the judgment. But the differences are not only apparent when we compare the terms two-party and collective procedure because there are also great differences among the mechanisms of collective legal protection. The most significant differences can be observed in the comparison between the US class action and the associations claim which latter is typical of the civil law legal family. However, given the extent of the problems it is not possible to give a detailed view of all the differences in this paper. Therefore, within the presentation of the collective legal protection models of different legal systems we will also try to refer to some of the most characteristic similarities and differences among them.

Finally, unlike the traditional civil procedure whose European foundations were laid down over a century ago,¹⁸ it is obvious that the collective legal protection concept is in its formation, at least when it comes to the European legal space because regardless of the fact that some forms have been existing for a longer period of time in the national legal systems and regardless of their principle flexibility to the single legal system, they have not proven to be especially efficient in the realization of the threatened or injured rights of groups of individuals. Defining one prevailing, common form for all EU Member States would certainly eliminate current difficulties and enable a better use of the collective legal protection mechanisms in the framework of the European legal space.¹⁹ Surely, the comparison of several currently

¹⁷ C.H. (Remco) van Rhee & R. Verkerk, 'Civil Procedure' in J. M. Smits, ed., *Elger Encyclopedia of Comparative Law* (Maastricht, Maastricht University 2006) at p. 120-121.

¹⁸ M. Cappelletti, *The Judicial Process in Comparative Perspective* (Oxford, Clarendon Press 1989) at p. 18-20.

¹⁹ 'There has been very considerable debate on possible reforms and extensions to current procedures both at European and national level in Europe. Important issues that are being discussed relate to the technical aspects of representative mechanisms for collective damages claims, to the problems of funding mass claims especially those of low value, but the essence of the debate relates to whether private damages

existing models in Europe and beyond is useful for observing the advantages and disadvantages of every single model. This analysis will certainly not offer final solutions but may provide for recognition of significant issues of which at least several will be the subject of future discussions on the direction of the development of collective legal protection.

II. German model

The German legal system is the most significant representative of the German subgroup in the civil law legal family. A constitutional guarantee of the right to access to justice and fair proceedings, the principles of party control and the party control of the facts and the means of proof are the foundation of the civil procedure in the German legal system.²⁰ Although not the only, the Code of Civil Procedure from 1877²¹ is the basic source of rules of German procedural law. While the association claim (*Verbandsklage*) dates back to 1896 when it was introduced in the Act against Unfair Competition²² it is still considered as the most common mechanism of collective legal protection in German law. In the beginning, the purpose of the association claim was to bring a claim for injunction in case of deceptive advertising but in 1965 the possibility to bring a representative action was extended to the

claims should be enlisted as supplementary mechanisms for regulatory enforcement, and whether it is possible to so balance civil procedures and funding systems for multiple claims such that excessive litigation and cost are avoided. Although the question of whether the EU possesses jurisdictional competence to propose harmonizing legislation in relation to class or collective actions, either generally or in specific sectors is an unresolved issue, there is now a considerable level of debate over whether collective remedies should or should not be introduced and, if so, what checks and balances should be included.' Hodges, loc. cit. n. 11, at p. 6.

²⁰ Arts. 2 and 103(1) of the German Constitution (Grundgesetz, GG from 23 May, 1949). There is also a guarantee from Art. 6 of the European Convention on Human Rights and Fundamental freedoms. D. Baetge, 'Class Actions, Group Litigation & Other Forms of Collective Litigation', p. 3. available at: <http://law.stanford.edu/library/PPDF/.../Germany_National_Report.pdf>, (last accessed on 20.05.2010)

²¹ Zivilprozessordnung [ZPO] from January 1877, Bundesgesetzblatt I (BGBI. I) [Federal Gazette, Part I]. The final important reform was in 2001, and it came into force on 1 January, 2002. Baetge, loc. cit. n. 20, at p. 2.

²² Gesetz gegen den unlauteren Wettbewerb or UWG. The last reforms of the Act have come into force on July, 3rd 2004, BGBI. I.

field of consumer protection. Later, an association claim in a form adjusted to the needs of Acts regulating very different legal fields was introduced in the Law Regulating the Use of Standard Contract Terms from 1977,²³ The Act on Injunctive Relief from 2002²⁴, The German Competition Act from 1998,²⁵ The Telecommunications Law from 2004²⁶ and Federal Environmental Protection Law from 2002.²⁷

It is obvious that the application of association claims in German law is very wide today and the most common application is in the fields of consumer protection and unfair competition.²⁸ Therefore we will try to determine the most significant features of the association claim by observing the forms defined by the provisions of the Acts which regulate these legal fields. Basic principles and procedural rules of the Code of Civil Procedure apply to the association claim unless it is otherwise proscribed by special regulations.²⁹ An association for consumer or merchant protection is a legal person, has a certain number of members and sufficient financial and organizational means for the promotion of interests of a group which the association represents and is entitled to bring an association claim. Before an action has been brought an association is required to notify the opponent of the wrongful act he allegedly has committed and to send a declaration which he should sign stating that he will refrain from such action in the future. If the opponent

²³ Gesetz zur Regelung der Allgemeinen Geschäftsbedingungen or AGB-Gesetz from 9 December 1976 BGB1. I.

²⁴ Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen from 26 November 2001 which came into force on 27 August 2002, BGB1. I

²⁵ Gesetz gegen Wettbewerbsbeschränkungen or GWB from 26 August 1998, BGB1. I

²⁶ Telekommunikationsgesetz or TKG from 22 June 2004, BGB1. I

²⁷ Gesetz über Naturschutz und Landschaftspflege, BNatSchG from 25 March 2002, BGB1. I

²⁸ Wettbewerbszentrale (*Zentrale zur Bekämpfung unlauteren Wettbewerbs*) situated in Bad Homburg near Frankfurt and as the most significant organization for the protection of merchants it has filed 600 association claims actions in 2006, and the Verbraucherzentrale Bundesverband (*vzbv*) from Berlin as the most significant organization for consumer protection together with regional centres has filed 450 association claims in the period between the year 2000 and 2005. Wettbewerbszentrale, Annual Report 2006; Verbraucherschutzbilanz 2006: Gerichtserfolge serienweise-aber Verbraucher gehen leer aus, available at: <www.vzbv.de>.

²⁹ There is an exception in the provisions of the Act on Injunction. Baetge, loc. cit. n. 20, at p. 14.

refuses to sign a statement, an association is entitled to bring an association claim.³⁰ Members of a group are not considered parties to the procedure. Therefore there is no obligation of the notification of members of the group of filing of the association claim. Considering that the binding effect of the final judgment is restricted exclusively to the rights and obligations of the parties to the proceedings there is no impediment for the members of the group to bring an individual action during the collective procedure. German laws which have provisions on association claims do not have provisions on opt in and opt out since they are not considered as especially purposeful solutions.³¹

Recently, a need for the introduction of new mechanisms of collective legal protection in the German legal system appeared. More precisely, the initiative came from the courts after the Deutsche Telekom case which has been considered to be the largest case of that type in the German history because of the thousands of claims that had been filed by the shareholders. Model proceedings introduced in the experimental³² Capital Markets Model Case Act from 2005³³ were seen as a solution for similar future situations. The Act was designed to facilitate filing of a damage claim for shareholders by securing an efficient procedure and at the same time reducing the costs of the proceedings. Namely, the court is obligated to discuss and decide on all factual and legal issues equally and the effect of a judgment is binding for all shareholders who have participated in the proceedings. This solution not only provides acceleration and increase of efficiency of the proceedings but also contributes to legal certainty.

Model proceeding begins by filing an application for a model proceeding to the State District Court. The applicant has to prove that the decision brought in the model proceedings has a significance for all future proceedings beyond the proceeding for which the application has been brought. The application may be filed by any plaintiff or defendant who is member to the proceedings that preceded the model proceedings

³⁰ The notification may be regarded as one of the procedural requirements which have to be satisfied in order for an association claim to be brought.

³¹ Baetge, loc. cit. n. 20, at p. 13-21.

³² The Act is introduced in 2005 and it will be in force until 1 November 2010. If the provisions prove to be satisfactory during the trial period its provisions will be implemented in the Code of Civil Procedure.

³³ Gesetz über Musterverfahren in kapitalmarktrechtlichen Streitigkeiten from 16 August 2005, BGBI. I

and often more applications³⁴ are filed simultaneously among which a court is entitled to select one for conducting model proceedings. Usually the court requests that the application, that is, the model claim contains both the claim of the applicant and also fully reflects all aspects of the claims of all other applicants which are relevant for the subject matter of the proceedings. When the court certifies the model proceeding it submits it to the court of appeals (*Oberlandesgericht*) which conducts the model proceeding and delivers a judgment. From the moment the court certifies the model claim there is a model plaintiff and other plaintiffs whose claims will not be decided on until a judgment in a model proceeding is delivered.³⁵ The plaintiffs are not parties to the proceedings so they are not entitled to opt in or opt out. Nevertheless, there is a possibility for a plaintiff who has not filed an application to join the proceedings afterwards as an interested party. Also, the model plaintiff has the right to withdraw his claim but if the claim is withdrawn after the model proceedings has begun, he is still bound by the effect of the final judgment in the model proceeding. Therefore, the model proceeding judgment is obligatory for the parties as well as for the plaintiffs as interested parties, but only if they had an opportunity to influence the conduct of the proceeding and the delivering of the final judgment.³⁶ After delivering of judgment in model proceedings the State District Court will deliver a judgment in all pending cases.

In Germany there is currently debate on defining the direction of future development of the collective legal protection mechanisms. Encouragement as well as the first concrete proposals for reform of the

³⁴ If 10 or more of the same claims have been brought State District Court will refer them to the Court of Appeals.

³⁵ The notification on the decision of the commencement of model proceedings is announced in the complaint registry on the Internet. The court suspends all other pending cases and the suspension order at the same time serves as notification to the plaintiffs that they are regarded as interested parties (*Beigeladene*). The position of the interested parties is very similar to that of an auxiliary intervener (*Nebenintervenient*) who is entitled to take action in the proceedings in accordance with the provisions of the Code of Civil Procedure. Baetge, loc. cit. n. 20, at p.19.

³⁶ According to the position of the German doctrine American class action in which members of the group do not take active part in the proceedings is in violation of the fundamental guarantee of their right to be heard (*Recht auf rechliches Gehör*). In the German model proceedings the right of the interested parties as the plaintiffs to take a more active role is strongly emphasized since the effect of the final judgment is binding on their rights and obligations. Baetge, loc. cit. n. 20, at p. 20.

German collective legal protection system has been put forward by legal theorists in 1998.³⁷ It seems that at least some of these proposals have found approval since the application of association claim has been expanded outside the field of consumer protection and unfair competition. Also, a significant shift has been made with the introduction of model proceedings which are still in the phase of experimental legal solution. It is expected that should some of the disadvantages be removed,³⁸ model proceedings will be successfully introduced into the Code of Civil Procedure.³⁹

III. Multi-party action in Hungary

The right of addressing the court has been recognized as both a basic human right and a civil right in Hungary and in other democratic countries worldwide.⁴⁰ According to the traditional Hungarian case model, the rightful collective right can be enforced only by the state. No private individual is given the right to, on behalf of a group, bring a lawsuit for a collective grievance. Accordingly, the Hungarian Civil Procedure is dominated by individual actions, thus it can be said that the

³⁷ Max Planck Institute for Comparative and International Private Law has made a proposal of the reform for an expansion of association claim to all the fields in which interests of individuals could be threatened or injured in a similar way by the action of the same person (the defendant) and whose rights could be realized in a representative proceedings. The proposal also included the introduction of model proceedings. However the most interesting is the idea of the introduction of a model similar to the American class action (especially if we consider the position of the German doctrine of the unconstitutionality of the American class action) which would be based on an opt-out principle. Also, a very significant proposal was made by Professor Astrid Stadler which suggested the introduction of 'voluntary' group actions based on the opt-in principle. Together with Professor Hans-W. Micklitz Professor Stadler suggested the introduction of a new Association Complaints Act (*Verbandsklagegesetz*) which would include regulation on group action and model proceedings. Baetge, loc. cit. n. 20, at pp. 28-30.

³⁸ The criticism of the Capital Markets Model Case Act relates to the duration of the proceedings, especially in the first stage when the State District Court decides on the approval of the model proceedings and then refers the case to the Court of Appeals for the conduct of the proceedings and of delivering the judgment. Further, there is no effective mechanism for pressuring the parties to settle the case and the provisions on sharing the costs of the proceedings give no incentive to the plaintiff. Baetge, loc. cit. n. 20, at p. 31.

³⁹ Ibid.

⁴⁰ Art. 57(1) the Constitution of the Republic of Hungary

‘individually approached civil case model’⁴¹ is completely compelled by the claim to represent collective interests in legal forms. Not even after the change of social system was the regulation of the Hungarian statutory law susceptible to integrating instruments of collective legal defense into the legal system; however, an attempt was made at initiating the ‘specialized attorney general’ and ‘intercessor’.⁴² Nevertheless, today there is an increasing need for the procedural legitimization of groups aiming at collective prosecution of a right. The opportunity of collective validation of subjective rights has long been available in several countries around the world.

In the last decade, establishing the opportunity of prosecution of a right was put on the agenda in several, mainly European countries where, by reasons of legal culture and negative experiences, the application of this legal solution had been strongly resisted before. The essential grounds of this change is the realization that in the modern and globalized societies, numerous individuals or legal entities experience several kinds of injury that fail to be remedied on account of difficulties arising out of prosecution of a right, the high expenses compared to the amount of individual claims or the social status of the subjects suffering the injuries. Grievance caused by violations of the prohibition of prejudicial discrimination, regulations regarding the consumers’ information, or the rules of environmental protection might especially be such kinds of injuries.⁴³

On the basis of the bill (T/11332), submitted to the Parliament on 22 February 2010, in case of a legal dispute involving private or legal individuals, the court approved that it is possible on demand to collectively bring an action, if the right wished to be collectively enforced in court is essentially based upon similar (objectively definable) facts. Collective bringing of an action can be proposed by any private or legal person who has a direct interest in the outcome of the litigation respectively any social structure which represents interests

⁴¹ M. Kengyel, ‘A jogérvényesítés akadályai és a „joghoz jutás” lehetőségei a polgári igazságszolgáltatásban’ [Difficulties of Prosecution of a Right and Opportunities of ‘Access-to-Justice’ in the Civil Jurisdiction] *Jogtudományi Közlöny* (1988) p. 185.

⁴² Gy. Gátos, ‘Perbeli igényérvényesítés közösségi érdeksérelem esetén. Az amerikai “Class Action”’ [Assertion of Claim at Court in Case of Offended Interests. The American “Class Action”], 2 *Magyar Jog* (1992) p. 100-103.

⁴³ T/11332 Bill ‘General Preamble’

regarding the subject of the litigation. Moreover, the attorney and the administrative organ in the attorney's cases are also entitled to initiate a collective bringing of an action. The primary aim of the project is to make the collective prosecution of a right available to social groups where the prosecution of a right is restrained by financial means and other conditions.

In lawsuits brought collectively, according to Civil Procedure Code Article 51 section a) provided that the conciliation and dropping of charges are effective exclusively with the legal representative's assent or with all plaintiffs' undivided decision, the plaintiffs unite in a *joinder of parties*. The members of the suing group can be represented by a legal representative. The advocate's contract of agency, which regulates the plaintiffs' relations, must be handed in at court under complete discretion of the lawyer. The Proposal states in particular that in case of court approval of collective bringing of an action, the plaintiff has the right to call upon the members of the group interested in the dispute to join the suit whereas otherwise it could be against laws or advocate ethical rules. However, with respect to the well-known prejudicial international experiences, it is important to prevent such abuses of 'recruitment' of plaintiffs and promise of unjustified benefits. In case of collective bringing of an action, the initiating party is responsible for advancing the legal costs resting upon the plaintiff; in addition, with the cost of legal expenses taken into account, with no respect to its exemption from charges, the initiating party is imposed upon by joint and several liabilities. With a special order, the court establishes the conditions of a collective bringing of an action that can be independently challenged by an appeal. The Proposal provides that following the disclosure of the definitive judgment, a member of the group not engaged in the lawsuit can preclude the legal force of the decision from extending it to the member's enjoyment of a right. For this possibility, the Proposal grants one year reckoned from the disclosure of the decision.

The bill was not generally successful among experts. The Budapest Bar Association,⁴⁴ in a letter addressed to the President of the Republic,⁴⁵ summed up its concerns as follows:⁴⁶

⁴⁴ Chairman: Dr. László Réti.

⁴⁵ Dr. László Sólyom, President of the Republic of Hungary (2005-2010)

[e]cluding essential constitutional regulations, the law changes the fundamental function of the legal system; in addition, it might produce major tensions that the judiciary, and legal representatives find hard to remedy, since they are not supported by normative rules and adequate preparation.’⁴⁷

The Bar disapproves that the necessary impact studies failed to be performed in the course of codification, and without them introduction of the law is highly risky in terms of legal certainty, also it might result in possible misuses and an enforcement different from the legislator’s wish.⁴⁸ However, the harmful economical influence has an effect on both the ventures obliged to pay compensation and the collective individuals as the other party in the litigation. In case of collective prosecution of a right the compensation for the individuals is often inequitable and does not satisfy the participants’ expectations. As a consequence of the expanded administration and the advocate’s and other legal costs, only a portion of the amount of money in suit is distributed among just 45% of the individuals of the collective. To become the collective bringing of an action integrated into the Hungarian legal system, the constitutional problems brought up by the law need to be resolved. Such a problem for instance is the so-called opt-out rule which conflicts with the fundamental principles when it provides that the members of the collective might withdraw from the effect of the decision within 1 year (if they were not involved in the lawsuit), thus being exempted from losing the lawsuit on the one hand, and from the charge of the *res judicata* on the other hand (in this latter one-sidedly), they might bring further actions against the defendant.⁴⁹ It means additional problems that the concept of the collective is not

⁴⁶ Before the final poll, also the Minister of Justice and Security (Dr. Imre Forgács) received a written complaint regarding the Bill. 19 February 2010. Ref.n. E/1002/35.

⁴⁷ Letter from the Chairman of the Budapest Bar Association to the President of the Republic, 4 March 2010, Ref.n. E/1003/04.

⁴⁸ In the western countries where the legal institution is well-known, the misuses of collective lawsuits are common. In the US, the masses of continuously brought big budgeted actions cause significant economic losses. H-J. Rabe, ‘Kollektivklagen’, 1 *ZEuP* (2010).; M R Bloomberg and C.E. Schumer, *Sustaining New York’s and the US’ Global Financial Services Leadership* (2007)

⁴⁹ V. Csabai, ‘Érvek pro és kontra: A csoportos kereset Magyarországon’ [Reasons, Pros and Cons: Collective Suits in Hungary], *Jogi Fórum* 12.04.2010., available at: <<http://www.jogiforum.hu/hirek/22851>>.

clearly defined. It is a constitutional requirement⁵⁰ that the terms used in the norm are clear, understandable and definitely interpretable. On the other hand, in spite of the fact that both terms have a major influence on the outcome of the lawsuit, the law does not give a proper definition of the concepts 'significantly numerous' and 'similar factual basis'. The Bar also found errors with the representative's legal status, the attorney's role and the regulations related to costs of the proceedings. Having regarded to the objections, on 10 March 2010 the President of the Republic returned⁵¹ the bill to the Parliament for reconsideration. As a reason for this, the President of the Republic expressed his concerns about the possible misuses and suggested that

'the legislators need to come up with detailed and special norms relating to certain possible scopes (such as consumer protection, product liability, competition law etc.), contrary to the Law's general regulations in effect on all scopes.'

Also, he draws attention to Act CXX of 2009 (proposition of a new Civil Code) Art. 2.961),⁵² according to which rules of collective bringing of an action could be enforceable for vindicating personal rights which can have a harmful effect. It is a stressed problem that authorizing the collective bringing of an action produces an inadequately prejudicial discrimination of the adverse, defendant party. This means that the number of plaintiffs is changeable and that the risk the members of the plaintiff party take is significantly reduced.

'The objections on the merits facing the Law could be further specified: the permissibility of the collective bringing of an action is not adequately explicit, therefore the notions of forming a group, relations among the plaintiffs and decision-making rules are not obvious nor are the rules on representation especially if the procedure is initiated by an attorney or an administrative organ. With respect to especially the chances of opt-in and opt-out, the special rules of conciliation and its approval, rules of bearing the legal costs are objectionable as well as the compensation for legal costs of the initiative social structure.'⁵³

⁵⁰ Decision 42/1997 (VII. 1.) of the Constitutional Court of Hungary

⁵¹ File No. 11332/05 the President of the Republic returns the proposal for reconsideration

⁵² This law must not be in force by the Decision 111/E/2008 of the Constitutional Court of Hungary.

⁵³ File No. 11332/05 the President of the Republic returns the proposal for reconsideration.

IV. Multi-party actions outside the EU

1. American model

The legal system of the United States of America (USA) belongs to the common law legal family⁵⁴ and it was developed through the assumption of legal principles and methods from the English law which even today have strong influence on the legal institutes, principles and the terminology of American private law.⁵⁵ In the American civil procedure whose rules are contained in the Federal Rules of Civil Procedure (hereinafter: FRCP) an individualistic, liberal model is emphasized, that is, the understanding that the main purpose of the state is to ensure protection of life, liberty and property.⁵⁶ Its main features are the guarantee of due process⁵⁷ requirements,⁵⁸ party control of the procedure and a trial by the jury. There are three stages of the procedure, pleadings which is usually followed by a pre-trial discovery and a trial⁵⁹ as a final stage.⁶⁰ The American legal system is considered to be 'the home of class action'⁶¹ but a representative action model which served as a base for the class action originates from the English system from which it was taken in the 12th century. The original class action was

⁵⁴ Along with England and the USA, Canada, Australia and the legal systems of a large number of countries in Africa, Asia and Oceania belong to the common law legal family. Gavella, op. cit. n. 2, at p. 20.

⁵⁵ Ibid.

⁵⁶ This understanding was taken over from the teaching of the English thinker and author of liberalism John Locke from 1690 which further suggests a very strong link between the English legal thought and the American legal system. Ibid., at p. 19.

⁵⁷ U. S. Const. amend. V, XIV § 1. *Nowak/Rotunda*, Constitutional Law, 1995, Ch. 13

⁵⁸ The constitutional guarantee of the 'due process' includes a ban of arbitrary and unlawful encroachment of the fundamental civil rights (life, liberty and property) and the obligation of the state to ensure a fair process for the protection of rights which have been threatened or injured. Further, the due process also includes the right to information (notification) the right to adversarial proceedings and the right to impartial proceedings. S. Eichholtz, *Die US-amerikanische Class Action und ihre deutschen Funktionsäquivalente* (Tübingen, Mohr Siebeck 2000) pp. 55-56.

⁵⁹ Institutes of civil law and common law legal family are very different and for some of the institutes from the American legal system there are no adequate terminological solutions in Croatian and Hungarian language so we give both a translation and original denomination.

⁶⁰ Eichholtz, op. cit. n. 58, at pp. 55-60.

⁶¹ Mulheron, op. cit. n. 16, at p. 9.

regulated in Rule 23 of the Federal Rules of Civil Procedure from 1938⁶² but Rule 23 was changed drastically in 1966, and the most significant change was abandoning the division of the class action to the true, hybrid and spurious. Although it was partly changed in 1998 and 2003, the essence of Rule 23 remained the same and the version which is in use today resembles greatly the 1966 version.⁶³ The latest changes of the class action procedure have been initiated because of the preoccupation about the lack of uniformity of the statutes and case law of class action procedures. Namely, the possibility that a class action brought in one of the states affects citizens residing in another state (and in some cases 49 other states) is one of the core arguments which have contributed to the success of the proposers of the Class Action Fairness Act (hereinafter: CAFA) from 2005 which federalized many class action procedures which would normally be conducted in the state court.⁶⁴

‘The importance of CAFA is that it affects two areas, that is, the jurisdiction of federal courts over multi-state class actions involving state-law claims and various types of class action settlements in federal court. In the area of jurisdiction, CAFA significantly expands the original jurisdiction of federal district courts over class actions involving state law claims giving federal courts jurisdiction over state-law class actions in cases which involve 100 or more class members and there is “minimal diversity” between the parties and that the aggregate amount in controversy for the class exceeds \$5 million. In order to expand federal jurisdiction to cover many more state-law class actions, CAFA also authorizes removal of the cases covered by the Act from state to federal court. In the area of settlements, CAFA imposes significant restrictions on both, how class counsel can be compensated for so-called “coupon”

⁶² Class action was regulated in the Equity Rule 48 from 1842 and it was used strictly in procedures which were conducted according to the rules of equity. Rule 23 from 1938 was preceded by Rule 38 from 1912 which was also used in the proceedings which were conducted according to the rules of equity. The main difference between the two Rules was in the effect of the final judgment on the absent parties which was significantly restricted in the Rule 38 in comparison to the earlier Rule 48. R. H. Klonoff, *Class Actions and other Multi-party Litigation in a Nutshell* (Thompson/West 2007) at p. 17.

⁶³ *Ibid.*, at pp. 19-23.

⁶⁴ N. M. Pace: ‘Class Actions in the United States of America: An Overview of the Process and the Empirical Literature’, p. 3., available at: <http://www.law.stanford.edu/library/globalclassaction/PDF/.../USA__National_Report.pdf>, (last accessed on 15.08.2010).

settlements⁶⁵ and also on “net loss settlements”.⁶⁶ It also prohibits settlements in which some class members receive more merely because of their closer proximity to the court house.⁶⁷

From the definition of the class action it is apparent that it differs from other presented mechanisms of collective legal protection since the class action is

‘[...] a legal procedure which enables the claims (or part of the claims) of a number of persons against the same defendant to be determined in one suit. In a class action, one or more persons (“representative plaintiff”) may sue on his or her own behalf and on behalf of a number of other persons (“the class”) who have a claim to a remedy for the same or a similar alleged wrong to that alleged by the representative plaintiff, and who have claims that share questions of law or fact in common with those of the representative plaintiff (“common issue”⁶⁸). Only the representative plaintiff is a party to the action. The class members are not usually identified as individual parties but are merely described. The class members are bound by the outcome of the litigation on the common issue, whether favorable or adverse to the class, although they do not, for the most part, take any active part in that litigation.’⁶⁹

The definition will serve for distinguishing fundamental features of the class action, that is, the parties to the proceedings, the claim and the effect of the binding judgment on the parties and others involved in the proceedings. The integrity of the analysis requires us to first look at the requirements⁷⁰ of Rule 23 of the Federal Rules of Civil Procedure which have to be satisfied in order for the court to certify a class action. There are four requirements: numerosity, commonality, typicality and adequacy of representation and additionally, class action has to belong

⁶⁵ ‘Coupon’ settlements are settlements in which class members receive, for example, coupons for discounts on future purchases of the defendant’s product.

⁶⁶ ‘Net loss settlements’ are settlements which result in monetary loss to class members.

⁶⁷ Klonoff, *op. cit.* n. 62, at pp. 24-25.

⁶⁸ ‘The class members and the representative plaintiffs common claims need to be based on the same legal theories of liability and arise from the same events or practices.’ Pace, *loc. cit.* n. 64, at p. 7.

⁶⁹ Mulheron, *op. cit.* n. 16, at p. 5.

⁷⁰ Before the court begins to examine whether the class action complies with all four requirements of Rule 23 of the Federal Rules of Civil Procedure, it is necessary to establish that i) the class exists and it is capable of ascertainment; ii) the class representatives are members of the class; iii) the claim is live, not moot. Klonoff, *op. cit.* n. 62, at p. 21.

to one of the (b)(1), (b)(2) or (b)(3) categories of Rule 23.⁷¹ It is obvious from Rule 23 that regardless of the fundamental features prescribed by the definition of the class action, the specificities of the features of a certain kind of a class action and procedural rules that apply to it are determined by the affiliation of the class action to one of the categories within Rule 23. Therefore, among these categories we have chosen the class action prescribed in Rule 23(b)(3), that is, a financial claim⁷² in the field of consumer protection.

The procedure is initiated by a damage claim class action. The plaintiffs to the proceedings have to be named. Often, from the wording of the claim it is obvious that the plaintiff has initiated the procedure in his own name and also in the name of a group of individuals who are similarly situated. In some cases the claim does not indicate initiation of a class action procedure but intention of the representatives to commence a class action procedure is obvious from the communication between the parties. Defendants are sometimes notified of the class action procedure in the moment that the plaintiffs request a certification of the class action. Independent of the manner in which the defendant has been notified of the class action procedure, the moment of his notification is considered to be the moment of the commencement of the procedure. Rules of the two-party procedure in pre-trial procedure apply to the class action procedure. In this stage if the requirements are fulfilled the parties are entitled to require transfer of the case to a federal court. The request for certification is used for establishing whether collective proceedings are more efficient than individual proceedings, if the claims of the representative plaintiffs (usually named plaintiffs) contain same factual or legal issues as the claim of the members of the

⁷¹ Each of this categories defines a certain type of class action and we can differentiate: '[i]njunctive and Declaratory Relief Class Actions under Rule 23(b)(2) and Rule 23(b)(1)(A) (civil rights cases and other suits seeking social change or to implement institutional reforms), Monetary Class Actions under Rule 23(b)(3) and Rule 23(b)(1)(B) (*mass torts, securities & shareholders*, and various other *financial injury* claims, consumer claims, antitrust cases) and Hybrids (single class action can involve multiple bases for certification and multiple theories of liability)'. Pace, loc. cit. n. 64, at p. 2.

⁷² Namely, as already mentioned, Rule 23(b)(3) and Rule 23(b)(1)(A) category is much wider and includes a large number of different forms of class action for financial damage and it is unnecessary to include all of them in the analysis since in other legal system we have also concentrated on the features of collective legal protection forms in the field of consumer protection.

group and if they are prevailing. If the court declines certification the claim is not dismissed. The plaintiffs are entitled to initiate individual proceedings to which rules of the regular two-party civil procedure apply. Also, the parties are entitled to file another request for the certification of a class action.

If the court certifies a class action, the representative plaintiffs are entitled to notify⁷³ members of the group of the commencement of the proceedings and their right to opt-out.⁷⁴ The effect of the final judgment is binding for all members of the group who do not opt-out and the members who opt-out are entitled to initiate individual proceedings. Procedural rules which apply to the regular two-party proceedings also apply to the trial in the class action procedure. The final judgment has a binding effect to the rights and obligations of all parties to the proceedings, that is, representative plaintiff, defendant and members of the group. However, judgments in class action proceedings are very rare since often parties agree to a settlement in earlier stages of the proceedings. The settlement contains a defined number of members of the group, an aggregate amount of money for resolving all claims of all class members and all costs of the proceedings, the mechanisms for distribution of the aggregate amount among the class members, the amount for attorneys' fees and other expenses. The judge is entitled to review and approve the content of the settlement.⁷⁵ In this way the rights of the class members which are not directly involved in the proceedings or reaching of the settlement between the class counsel or representative plaintiffs and the defendant are protected. In certain cases another notice

⁷³ Attorneys appointed as class counsel bear the costs of the notification of class members but in the case that parties reach a settlement or are successful at trial such expenses could be recovered from the defendants. Pace, loc. cit. n. 64, at p. 40.

⁷⁴ In other two categories, that is, class actions under Rule 23(b)(1) and (b)(2) the participation in the class is mandatory and there is no obligation of the direction of notification of class members on the certification or the right to opt-out. As an exception, the court may permit class members to step out of the proceedings, that is, to opt-out and in these situations the court usually directs an appropriate notice. Klonoff, op. cit. n. 62, at p. 22.

⁷⁵ When the judge decides whether to approve the settlement he usually considers fairness, reasonableness and adequacy of the proposed amount. Also, the judge decides on the height of attorney's fees and especially considers whether the amount will come from the aggregate amount, if there will be a common fund or the defendant will pay the fees on top of amount he had to pay to the class. Pace, loc. cit. n. 64, at p. 41.

of the content of the settlement and the right of the class members to object to the provisional terms and sometimes also to opt-out of the settlement is sent to the class members.

Unlike rather new forms of multi-party actions in legal systems of most European countries, class action in the American legal system has been existing for a relatively long time and it could be assumed that the assessment of its utility in providing legal protection for a large group of individuals whose rights have been threatened or injured should be facilitated by that fact, since there is enough basis in the doctrine and case law which could confirm these allegations. Surprisingly, it seems that although there has been a long tradition of the application of class action in the American legal system, there is no systematic monitoring of its development and there is still no detailed analysis of its real efficiency and applicability. There is still rather limited perception of class action as the 'knight in shining armor'⁷⁶ or 'Frankenstein monster'.⁷⁷ Accordingly, the critics of class action are divided to those who emphasize its efficiency to provide social change, eliminate or reduce damage from unlawful conduct and prevent similar conduct in the future; and to those who emphasize its contribution strictly to facilitation of limiting the liability for unlawful conduct of corporations and enrichment of lawyers. Nevertheless, the fact its application in realization of collective legal protection has a long tradition on the federal as well as on the state level, it is very broad⁷⁸ and the rules which

⁷⁶ This expression is used by the author of the national report on class action in the USA, Nicholas M. Pace. Pace, loc. cit. n. 64, at p. 95. Similar expressions as 'one of the most important procedural developments of the century' can be found in the work of many authors among which we will mention JP Fullam, 'Federal Rule 23- An Exercise in Utility' 38 *Journal of Air Law and Commerce* (1972) p. 369 at p. 388. See R. Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective*, (Oxford-Portland Oregon, Hart 2004) p. 4.

⁷⁷ The expression 'Frankenstein monster' originates from the case law, from the case *Eisen v. Carlisle and Jacquelin*, 391 F 2nd 555, 572 (2nd Cir 1968) (Lumbard CJ, dissenting) where it was used for the first time. 'The appropriate action for this Court is to affirm the district court and put an end to this Frankenstein monster posing as a class action'. Mulheron, op. cit. n. 16, at p. 3.

⁷⁸ It should be mentioned that most of the states in the USA have some type of a class action and the rules which regulate it do not differ significantly from Rule 23 which regulates federal class action (the state of Mississippi is an exception because it lacks a class action procedure, Virginia does not have a specific statutory claim rule, but a common law class action is allowed, Iowa and North Dakota follow the

have not been subjected to excessive change say enough of the constant and efficient character of class action. In part, this is due to the numerous legal practitioners, especially judges and lawyers, theorists and also representatives of interest groups who by constant reference to the shortcomings, necessary adjustments and corrections of the regulation on class action try to supplement it and maintain it as a vital part of the legal protection system as it was initially imagined. The understanding of the position of class action in the American legal system is concisely depicted by the sentence that class action is a mechanism ‘which is generally successful but there is considerable room for improvement’.⁷⁹

2. Multi-party actions in Croatia

The affiliation of Croatian legal system to the civil law legal family can be best seen from the rules on civil procedure which is marked with traditional features originating from Roman law and also show that Croatian procedural law rests in a certain way on the German legal system. Croatian civil procedure is regulated by the provisions of Civil Procedure Act⁸⁰ and the basic features of the procedure are the guarantee of the right to be heard,⁸¹ the principle of party control, the

Uniform Class Action Rule, Nebraska and Wisconsin follow the Field Code rule on group litigation same as California which has adopted the equivalent of FRCP 23, Missouri and North Carolina have their own version of the original form of FRCP 23, while Georgia and West Virginia have only recently adopted a new version of Rule 23, and the remainder of the states have a somewhat modified form of the Rule 23). Also, the field of application on the federal as well as on the state level is very broad and includes mass damage claims, insurance frauds and discrimination of employees, securities etc. Exclusion or limitation of the possibility for the class action procedure refer to small claims cases, domestic relations, taxpayer claims, administrative proceedings or other types of procedures under statutes with specific restrictions on class actions. Pace, loc. cit. n. 64, at p. 2., 4.

⁷⁹ Ibid., at p. 95.

⁸⁰ Official Gazette No. 53/91, 91/92, 112/99, 88/01, 117/03, 84/08

⁸¹ The constitutional guarantee of the right to be heard was not included in the original version of the Constitution from 1990. After Republic of Croatia became a party to the European Convention on human rights and fundamental freedoms from 1950 (hereinafter: ECHR) in 1997 Art. 29 of the Constitution which is almost identical with Art. 6 of the ECHR was implemented in the Constitution. Triva and Dika, op. cit. n. 3, at p. 16.

principle of party control of facts and the means of proof and the principle of immediacy.

Over the past few decades the European Union has taken large steps in ensuring free access to justice for consumers and thus significantly contributed to ensuring effective functioning of the internal market. A large number of European countries along with the possibility of direct legal protection of consumers which can be realized by launching proceedings against the merchant introduced the possibility of indirect collective legal protection, where an association for consumer protection acts as a representative of consumer interests. In the process of harmonizing legislation with the *acquis communautaire* the Republic of Croatia had to make significant adjustments in the Croatian legislation in order to ensure the same level of protection which the European Union provides in the area of consumer protection. Therefore, the Consumer Protection Act⁸² of 2003, among others, introduced the so-called joint (class, representative) action⁸³ (the equivalent of the German *Verbandsklage*) that allows abstract consumer protection and realization of their collective interests.

According to the provisions of the Consumer Protection Act, association for consumer protection as plaintiff shall be entitled to initiate court proceedings for the protection of consumers *in abstracto*, in which it will require a ban on certain conducts of the merchant, or the defendant, which has to be individually determined, that is, individualized. It shall also be entitled to demand that the defendant restrains from the usage of unallowed business practice, unfair terms in the consumer contracts or misleading and deceptive advertising. Obviously, associations for consumer protection can file a joint action only in cases where they are authorized by law to seek such protection. Since the Consumer Protection Act does not provide otherwise, associations for consumer protection would not be entitled to claim damages incurred from the certain unlawful actions of the merchant. The Act also provides for the possibility that more associations file a joint action against the same defendant and in such cases, the court would be obliged to render the same judgment in respect of all claims filed. Under the provisions of the

⁸² The Consumer Protection Act, Official Gazette no. 79/07, 125/07, 79/09

⁸³ Professor Mihajlo Dika used the term 'joint (class) action' in the 'Udružna tužba kao instrument apstraktne zaštite potrošača' [Joint claim as an instrument of abstract consumers' protection] 3 *Hrvatska pravna revija* (2003) p. 37.

Consumer Protection Act from 2003 the final judgment should have *inter partes* validity between the association as the plaintiff and a merchant as a defendant or any another defendant, if they are parties to the dispute. However, the possibility of the extension of the validity of the convicting judgment to consumers and consumers' protection associations that have not participated as a party to the dispute, would enable the binding effect of such judgments to be invoked in any future disputes against the merchant, for example, over damages. That is why in amendments to the Consumer Protection Act from 2009⁸⁴ explicit provisions were added to the Act on the effects of the final judgment on third parties and the binding judgment in proceedings concerning the protection of collective consumer rights which have been threatened or injured.⁸⁵ However, if the judgment was rejected, merchants should not be able to invoke it in future litigation against a consumer or associations for consumer protection that had not participated as a party to the dispute. This extension of subjective limits of legal validity of judgments could contribute to the full realization of the purposes for which joint action was introduced in the Croatian legal system. Namely, joint action became a genuine abstract instrument of repressive and preventive legal protection. Its abstract nature is reflected in the fact that the associations are authorized to initiate proceedings regardless of whether specific consumer rights have been threatened or violated. If the court finds that the claim is well founded, the judgment has a repressive effect in relation to the particular practice of the merchant and preventive effect in relation to future conduct of the merchant by forcing a ban on similar practices in the future. But more importantly, extension of the subjective limits of legal validity of judgments enables the same preventive and repressive legal effect of the judgment on the consumers' protection organizations and consumers who were not involved in the dispute.⁸⁶

⁸⁴ Arts. 138 and 138a of the amendments to the Consumer Protection Act (Official Gazette No. 79/08). See A. Uzelac, 'Proceedings before the court' in A. Grgić et al, *A guide to Anti-discrimination Act* (Zagreb, Government of the Republic of Croatia, Office for Human Rights 2009) p. 109.

⁸⁵ *Ibid.*, at p. 109.

⁸⁶ Dika, *loc. cit.* n. 83, at p. 37.

Soon after the introduction⁸⁷ of the joint action (or associational claim⁸⁷) in the Consumer Protection Act, this model has been extended to anti-discrimination actions in the Anti-discrimination Act⁸⁸ in 2008 making it possible for the persons and associations which themselves do not claim to be a victim, to initiate court proceedings. The requirements for active legitimation in joint (associational) action do not particularly differ from the requirements for individual anti-discrimination action and the only difference is in the stronger emphasis on the legitimation of organizations generally dealing with human rights. However, there is a great difference in the requirements which have to be met in order for the court to allow a joint claim. The organization or a body as a plaintiff, initiating the court proceedings do not have to ask for the consent of the potential victims to file the claim. But since the plaintiff has to have a legitimate interest to file the claim, it needs to prove that one of its goals is either to protect the rights and interests of the group in question or that it is generally engaged with anti-discrimination, including the protection of the right to equal treatment of the group in question. A final and binding ruling on a joint action in case discrimination is determined, has an *ultra partes* effect. Due to this effect, the court is bound by determination of discrimination not only for the parties in the proceedings, that is, association, body or other organization as the plaintiff and the natural person or legal entity as the defendant, but also for all members of the group discriminated against. This extension of the subjective limits of legal validity of the judgment enables the members of the group to invoke the prejudicial effect of this judgment in all future disputes against the defendant. Since one cannot seek damages with joint action, this prejudicial effect would be particularly interesting if the damages were to be sought by individual claims because the court would not have to establish the defendant's liability. However, if the claim for determining discrimination was rejected, it will have no effect on future disputes between the members of the group as the plaintiff and the defendant. Also, a member of the group is not precluded to file an individual anti-discrimination claim once the joint action for determination of discrimination was brought to court. In the case that the judgment rendered on the individual claim is different from

⁸⁷ Professor Alan Uzelac used the term 'associational claim' in his work. See loc. cit. n. 84, at pp. 105-108.

⁸⁸ Official Gazette no. 85/08

the judgment on the joint action, this situation could be a basis for the request to reopen the proceedings.⁸⁹

As already mentioned, collective legal protection has been introduced in Croatian legislation as a result of approaching the European and global trends in the field of legal protection. Throughout Europe, various instruments of collective redress mechanisms have been recognized for the effective realization of certain social goals. Class action has been accepted as one of the most widespread instrument of collective legal protection, although its manifestations in different legal systems differ considerably. However, what they have in common is their usage for the purpose of achieving economic and social interests of the state and also individuals. On the one hand, collective legal protection mechanisms contribute to the alleviation of the efficiency of court proceedings, saving time and resources that are usually spent on individual procedures, and to legal certainty in terms of reconciliation practice of the courts in making decisions. Overall, this largely contributes to achieving economic and social interests of the state. On the other hand, the economic interests of individuals are met by the possibility of participating in a lawsuit even in cases when they alone could not bear the costs of individual proceedings. At the same time, collective legal protection mechanisms can also serve as instrument for the achievement of social interests of individuals as well. This is reflected in the guarantee of the right of access to court which belongs to individuals as members of a particularly vulnerable group in the society. Also, as an example of the wider social significance of collective legal protection mechanisms for the state and for the individuals, there is the possibility of its use for so-called test-cases that can be used to test the effectiveness of provisions of a new law.⁹⁰

For now, it appears that the solutions which have been introduced into the Croatian legislation are adequate to achieve economic and social effects of collective legal protection. Conditionally, it could be said that a form of the joint action introduced by the Consumer Protection Act is used to a greater degree for the achievement of economic goals, while the form introduced by the Anti-discrimination Act is mostly aimed at

⁸⁹ Uzelac, loc. cit. n. 84, at p. 107.

⁹⁰ If there are laws which seem to be ambiguous or contraversial and unfairly impact particular groups, for example, a legal aid office could bring a test case to the court to test the fairness or effectiveness of such a law.

the protection of social interests. However, these two laws are *lex specialis* and they are primarily used for the regulation of specific legal areas of consumer protection and anti-discrimination and the joint action is only subsidiary regulated as one of the instruments by which this protection can be achieved. Therefore, individual solutions and their interpretation in connection with the joint action within these laws differ greatly. In order to achieve uniformity in terms of recognizing and defining joint action as an instrument of collective legal protection similar to forms of other civil law countries (in our case in the sense of provisions on *Verbandsklage* in German law) it is necessary to consider its possible regulation within the provisions of Civil Procedure Act or the special law on collective legal protection (as in the legislation of other European countries).

V. Multi-party actions and the legal aid

In the late 1970s ‘Access to Justice’ was defined as ‘enabling every citizen to vindicate his or her substantive rights, while other conceptions advocated the equal treatment of parties in pending litigation in almost absolute sense’.⁹¹

‘In a way, “access to justice” became a part of the legal services the modern welfare state provided for “disadvantaged parties”. The main aim was to reduce barriers derived from costs, duration and difficulties of communication in judicial proceedings.’⁹²

It was obvious that the term access to justice could not be confined only to legal aid in the traditional civil proceedings, but also had to include collective remedies, and so the access to justice concept was broadened to ensure the right of the consumers to a swift and affordable redress in civil courts, including the right of being represented by consumer associations.⁹³

‘In the European Union “access to justice” in the context of consumer protection has been strongly advocated for a long time. There are several communications and Green papers of the European Commission which

⁹¹ P. Moorehead and R. Pleasence, ‘Introduction’, in P. Moorehead and R. Pleasence, eds., *After Universalism, Re-engineering Access to Justice* (Oxford, Blackwell Publishing 2003) pp. 1-10.

⁹² R. Kocher, *Funktionen der Rechtsprechung* (Tübingen, Mohr Siebeck 2007) p. 95.

⁹³ *Ibid.*

stress the link between the aspect of access to justice in judicial proceedings and the proper functioning of the Internal Market.’⁹⁴

But group or ‘multi-party’ actions, as they came to be known, also faced problems being heard in court because procedural rules were usually designed for individual cases. Mass claims are usually long-running and complex cases and soak up vast amounts of court resources. These cases involve law firms in an extensive commitment of time and resources over long periods of time. Private firms were therefore reluctant to take on multi-party actions unless there was a very high prospect of success. They were even more reluctant if contingency fees were not available.⁹⁵

‘Contingency fees as a typical characteristic of civil litigation in the United States are very common in individual monetary actions. However, their use in class action is not so broad. Their main characteristic is to shift the financial risk in the event of the failure of the action from the class representatives to the class lawyer, that is, to ensure that the client only becomes liable to pay the lawyer’s fees in the event of success in the litigation.’⁹⁶

Contingency fees are not at all common in the European civil procedures. The latest amendment made in the German law⁹⁷ permitted contingency fee arrangements in specific situations. For now, their use is restricted to the arrangements between lawyers and private plaintiffs. Since it has been recognized that their main value is in alleviating access to justice in cases with a risk of high costs and an open outcome it seems that their expansion on the collective redress should be considered as well.⁹⁸

One of the most important problems was to solve the question of funding. In the absence of contingency fees, public funds were to be used. The resources of national legal aid schemes could be used to fund

⁹⁴ Green paper of the Commission of the 2 September 2000; Recommendation 98/257/EC, OJ 1998L 115/31; Directive 98/27/EG

⁹⁵ Fleming, loc. cit. n. 13, at p. 260.

⁹⁶ Mulheron, loc. cit. n. 16, at p. 469.

⁹⁷ The Federal Government introduced a new bill on attorneys’ fees in October 2007.

⁹⁸ J.T. Johansen and F. Regan, ‘An international ‘best policy’ model and Finnish Legal Aid’ in C. H. Ree and A. Uzelac, eds., *Civil Justice between Efficiency and Quality: From Jus Commune to CEPEJ* (Antwerp-Oxford-Portland, Intersentia 2008) pp. 151-189., at p. 155.

the actions. The pressure for multi-party action reforms emerged at the time when many societies began to lose faith in legal aid.⁹⁹ We can say that the declining legal aid schemes responded to the new demand, the rising of multi-party actions.

Although at the Community level there are initiatives to improve access to justice which include collective redress as one of the measures,¹⁰⁰ it is difficult to establish a Community competence for the introduction of the harmonization of collective remedies. Due to the lack of Community competence there is still no compulsory mechanism which can impose the introduction of collective remedies, contingency fees and punitive damages for its enforcement by national courts in the European Union so the problem of the improving efficiency of the collective redress by making it more available for the potential plaintiffs to use remains unsolved and needs to be approached¹⁰¹ in the future.¹⁰²

Let us see how legal aid responds to multi-party actions. First we have to establish that multi-party proceedings are not the major part of the national legal aid scheme, probably because there have not been many applications for multi-party legal aid but without legal aid funding these multi-party actions would have faced great difficulty in proceeding to court.¹⁰³ Although in some cases the general opinion is that according to the low standard application fee a class of people should be able to afford the likely cost of the proceeding. Second, the generally low profile of multi-party proceedings is reflected in the management response to such actions. Most agencies in the national legal aid scheme have not developed special guidelines, contributions formulae or policies for the proceedings.¹⁰⁴ Third, in matters where there is a 'common interest in the outcome amongst various applicants' it can cause difficulties to decide whether the presence of an applicant in a multi-party application whose personal income and assets exceeds standard allowances shall lead to the refusal of legal aid or not by assessing on a collective basis.¹⁰⁵ Fourth, in many countries¹⁰⁶ the

⁹⁹ Fleming, loc. cit. n. 13, at p. 260.

¹⁰⁰ Green paper on Damage Actions for the Breach of EC antitrust rules, COM(2005)672 final

¹⁰¹ *Manfredi* case (ECJ), case C-294-298/04, [2006] ECR I-6619

¹⁰² Hess, loc. cit. n. 98, at p. 201.

¹⁰³ Fleming, loc. cit. n. 13, at p. 264.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

application fee is not demanded of applicants whose claims are representative of a wider class of people whose interest stand to be protected by the proceedings.¹⁰⁷ Fifth, where group proceeding law does not apply and there is a high probability of plaintiffs obtaining favourable individual settlements, legal aid is unlikely to be approved for a multi-party action. Conversely, where group procedures exist legal aid may be granted for a multi-party action, even though the monetary value of individual claims is low.¹⁰⁸ Sixth, legal aid helps special groups of people (e.g. public welfare agencies, church groups) which have charitable objectives or protection of human rights to sue in the form of multi-party actions. In the multi-party civil proceedings which have been funded by the legal aid commissions¹⁰⁹ on the cross-regional basis there is no inter-commission protocol governing these types of national multi-party actions but there are cost-sharing agreements of some kind which are documented by exchanges of letters.¹¹⁰ Legal aid could be a very good means to develop multi-party actions, for example by developing policies and procedures to process the resources more effectively in the complex and long-running cases by coordination between legal aid agencies if more cases emerge.¹¹¹

Is legal aid the most appropriate option to fund multi-party cases? Should public funds support multi-party actions by legal aid funds or special funds and might alternative organizations (e.g., NGOs) provide a better way to proceed? The number of cases which have a wider public interest has been increasing and it is a new approach to rationalize the costs of proceedings considering a very large number of plaintiffs, very high cost of investigating the difficult technical issues involved and relatively modest level of likely awards of damages in most individual cases. Therefore the main engine room for the public interest litigation for the next few years will continue to be the legal aid.¹¹² The very important factors in the connection of legal aid and multi-party actions

¹⁰⁶ Eg., in Australia. See *ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*, at p. 265.

¹⁰⁹ Eg., Copper 7IUD Products case (1997), Australia, Atomic Radiation case (1997) Australia, See also *Ibid.*, pp. 269-271.

¹¹⁰ *Ibid.*, at p. 269.

¹¹¹ *Ibid.*, at p. 273.

¹¹² R. Clayton, 'Public interest litigation, costs and the role of legal aid', *Public Law* (2006) pp. 429-442 at p.442.

are the provisions of legal assistance, duty lawyer services and legal advice to individual litigants and accused, the lower fees for the members of the group of litigants, and the legal experience in the regional and cross-regional multi-party litigation.

VI. Conclusion

Comprehensive ‘massification’ in production, distribution, and consumption immanent to today’s society has had certain consequences on interpersonal relationships. Often a large number of individuals have been influenced by the negative consequences of deceptive advertising, environmental pollution or faulty products, so there was a need to create mechanisms by which the rights of individuals, threatened or injured by these actions could be adequately protected. The first forms of collective redress in the form of multi-party actions occurred within the common law legal family and the American model of class action proved to be the most successful among them. In recent decades a number of similar forms have been introduced into the legal systems of many European countries. However, this process was somewhat difficult due to the fact that it was necessary for the EU Member States to reject the concept of an individual two-party civil procedure. According to ¹¹³However, within this process certain trends are noticeable. First, while legal systems in common law legal family have certain mechanisms of collective legal protection, in most of the EU Member States which belong to civil law legal family a possibility of collective legal protection was introduced in the process of harmonization with the *acquis communautaire*. Some legal systems prescribe collective legal protection mechanisms in civil codes, in some legal systems they are prescribed by provisions of civil procedure acts and in others collective legal protection mechanisms are regulated by a special act on collective legal protection. Collective legal protection mechanisms in different legal systems differ significantly and in most part these differences come from the affiliation of the legal system to common law or civil law legal family. Namely, the biggest differences are emphasized in the perception of who is a party to the proceedings, what is the legal position of the party in collective proceedings, who is entitled to represent interests of parties and members of the group, is there a right to opt in and opt out of the proceedings, who is bound by the effect of

¹¹³ Cappelletti, op. cit. n. 18, at p. 25.

the final judgment and if only declaratory and injunctive claims are allowed or is there also a possibility for a damage claim. These differences are influenced by specificities of procedural law of countries which belong to different legal families and not the features of collective legal protection mechanisms. That is why there are categories of collective legal protection, group actions with certain features of the American class action, representative actions which include different forms in which a foundation or an organization is entitled to commence proceedings and test cases. However, this comparison provides for establishment of differences as well as similarities of collective legal protection mechanisms in several European countries which belong to civil law family and their comparison to the American model as the representative of the common law legal family. The most important feature is the perception of the purpose of collective legal protection in securing access to justice, economy and efficiency of the conduct of the proceedings, especially in procedures in which the ratio between the costs and the benefit of the proceedings does not justify individual commencement of the proceedings. That is why the forms of collective legal protection first emerged in the areas of consumer and environmental protection and gradually also in the field of anti-discrimination. Its introduction has a wider social significance and therefore the EU emphasizes the importance of securing effective instruments for achieving it. One of these instruments is guaranteed legal aid for ensuring access to justice, which has for some time been recognized as an important mechanism for the functioning of the EU internal market. However, despite the perceived importance of legal aid for ensuring access to justice within the framework of collective legal protection the EU has no jurisdiction to force the introduction of mechanisms that would encourage its development in the area of multi-party action.

The overview of the development of different models of collective redress in the legal systems of Germany, Hungary and Croatia) and its comparison to the American model engaged in this paper has shown that European countries have great difficulty in introducing multi-party action, partly due to the fact that the legal systems which belong to civil law family so far have been adapted exclusively to individual two-party civil procedure which provides for the realization of state guarantee of legal protection and also because regulations on multi-party action are

still incompatible with other regulations on civil procedure of national legal systems, and this fact further complicates its operation.

Although collective legal protection is an indicator of a positive step forward in legal systems of European countries, the process of its development within the European legal space has only begun. A lot of work will be required both on improvement and equalization of multi-party actions to develop a recognizable form which could be used in legal systems of EU Member States. Also, necessary adjustments are alignment of multi-party actions with existing mechanisms for legal protection and also finding the most adequate mechanism for achieving access to justice in the context of multi-party action in cases where such access is denied, whether by legal aid or another form of funding. Of course, in the future the EU will continue trying, as part of its legislative action, to create policies and procedures for harmonizing the existing forms of collective legal protection which should significantly contribute to its development as well.

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Dual nationality and ethnic minorities in Hungary and Croatia

I. Introduction

The paramount importance of adequate and effective protection of national minorities as a particular aspect of the protection of human rights and fundamental freedoms and also as a means for promoting stability, democratic security and peace has been repeatedly emphasized.¹ The emergence of new and original forms of minority protection, particularly by the kin-States, constitutes a positive trend insofar as they can contribute to the realization of this goal. Observing recent tendency of kin-States to enact domestic legislation or regulations conferring special rights to persons belonging to their national communities (kin-minorities) has served as a general impetus for the authors of this paper. However, the passing of an amendment to the Hungarian Citizenship Act extending citizenship to non-resident populations in neighboring states made this issue particularly topical. The Hungarian legislation must be viewed in the light of its history in the previous century: the 1920 Trianon Treaty cut off nearly two-thirds of the territory that Hungary had previously controlled, after being on the losing side in World War I. Therefore, large Hungarian minorities now live in neighbouring Slovakia, Romania and Serbia. Other parts of Europe, such as South Eastern Europe and Eastern Europe, could not escape the turmoils of the 20th century either. Expatriate populations have been produced in this part of the continent not only by 'people moving across international borders' but also by 'international borders moving across people'.²

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¹ See e.g., Art. 27 of the International Covenant on Civil and Political Rights (ICCPR); the European Charter for Regional or Minority Languages, Strasbourg, 5 November 1992, CETS No. 148; the Framework Convention for the Protection of National Minorities, Strasbourg, 1 February 1995, CETS No. 157.

² R. Bauböck, 'Stakeholder Citizenship and Transnational Political Participation: a Normative Evaluation of External Voting', 75 *Fordham Law Review* (2007) p. 2438.

This study is divided into two parts, with the first part concentrating on the legitimacy of Hungary's extension of citizenship to persons of Hungarian ancestry living abroad as well as the lawfulness of Slovakia's retaliation law, while the second part focuses on the impact of the dissolution of the former Yugoslavia on the population living in that area.

II. Lack of historical reconciliation with territorial changes: the Hungarian Citizenship Act of 2010

Even before the latest amendment of 26 May 2010, the Hungarian Citizenship Act³ provided for preferential access to nationality for foreign citizens who declared to be of Hungarian 'nationality' (ethnicity) or who had a Hungarian citizen ancestor and, in either case, had permanent residence in Hungary. Section 4 subsection (3) provided that 'upon request a non-Hungarian citizen claiming to be a Hungarian national who resides in Hungary and whose ascendant was a Hungarian citizen, may be naturalized on preferential terms', which meant exemption from the mandatory eight-years naturalization stage required from aliens.⁴ After the parliamentary elections of April 2010,⁵ one of the first legislative acts of the new conservative government was to offer citizenship for Hungarians living abroad.⁶ The new rules introduce preferential treatment for individual applications from non-citizens if

³ Act LV of 1993 on Hungarian Citizenship

⁴ The relevant provision in Hungarian: 'Az (1) bekezdés b)-e) pontjában meghatározott feltételek fennállása esetén – kérelmére – kedvezményesen honosítható az a magyar nemzetiségűnek valló, nem magyar állampolgár, aki Magyarországon lakik és felmenője magyar állampolgár volt.'

⁵ 'The Alliance of Young Democrats – Hungarian Civic Union (FIDESZ) gained a two-third majority in the Hungarian Parliament in the elections of April 2010. In December 2004, FIDESZ supported a referendum that aimed at further facilitation of access of ethnic Hungarians to Hungarian citizenship by abolishing the residency requirement. The referendum eventually failed, due to low turnout (37,5 per cent), although the rate of yes votes was 51,57 per cent. An amendment in the same spirit was proposed by FIDESZ in October 2009, but did not get the support of the then parliamentary majority.' Körtyvélyesi Zsolt and Tóth Judit, <<http://eudo-citizenship.eu/citizenship-news/306-hungarian-government-proposes-access-to-citizenship-for-ethnic-hungarians-in-neighbouring-countries>>. All Internet-sources were last accessed on 31.07.2010.

⁶ Act XLIV of 2010 amending Act LV of 1993. See further details at <<http://eudo-citizenship.eu/citizenship-news/306-hungarian-government-proposes-access-to-citizenship-for-ethnic-hungarians-in-neighbouring-countries>>.

they can prove Hungarian ancestry, or else if their origin from Hungary is ‘*probable*’ and, most importantly, *without requiring that they take up residence in Hungary*.⁷ The new act no longer requires proof of sufficient means of subsistence and a place of abode in Hungary, nor the passing of an examination in basic constitutional studies. In addition, the applicant does not have to claim to be a Hungarian national. The addressees of this opportunity are the ethnic Hungarians living mainly in Slovakia, Romania, Serbia and the Ukraine. The Act shall enter into force on 20 August 2010, to be applied with regard to applications submitted after 1 January 2011.

In response to the Hungarian legislation, and fearing that a high number of its population could become Hungarian national, *Slovakia* has departed from its previous toleration of multiple nationality. The Slovak Citizenship Act, amended the very same day as its Hungarian counterpart, stipulates that if a Slovak citizen voluntarily acquires the nationality of another State by naturalization, that is neither by marriage nor by birth, the person will automatically lose his/her Slovak citizenship.⁸ In *Romania* the relatively mild reaction to the new Hungarian law can be explained by several facts, e.g. a very severe economic crisis that Romania was facing at the time, and the key role that the political party representing the Hungarian ethnic minority in Romania plays a in preserving the majority of the incumbent government in the Romanian Parliament. In addition, Romania follows a similar policy by offering citizenship to kin-minorities in Moldavia.⁹

⁷ The new provision in Hungarian is as follows: ‘[a]z (1) bekezdés b) és d) pontjában meghatározott feltételek fennállása esetén – kérelmére – kedvezményesen honosítható az a nem magyar állampolgár, akinek felmenője magyar állampolgár volt vagy valószínűsíti magyarországi származását, és magyar nyelvtudását igazolja.’

⁸ ‘The opposition criticized the amendment as a mere reaction to the Hungarian act on citizenship and pointed out that many young people who applied for citizenship elsewhere will lose employment opportunities due to the changes. Some legal experts claim the new law is unconstitutional, as the Slovak Constitution states that the Slovak citizenship cannot be taken away against a person’s will [...]’ Dagmar Kuša, EUDO Citizenship, 27 May 2010.

⁹ Roxana Barbulescu and Andrei Stavila, EUDO Citizenship. Spiegel Online reported: ‘Romania’s president wants to increase his country’s population and is using an odd means to do so. The country is generously bestowing hundreds of thousands of Romanian passports on impoverished Moldovans. They are gratefully accepting the offer from the EU member state and are streaming into Western

There have not been major reactions on *Serbia's* part. This is due to several factors, such as the relatively low number of ethnic Hungarians living in Serbia and the fact that the Serbian government follows similar citizenship regime.¹⁰ Beside a symbolic aspect, only Serbian Hungarians could expect additional benefits insofar as they would become EU citizens. The lack of official response in *Ukraine* can be explained by several factors. First, because no political force 'owns' the region where ethnic Hungarians live, it may be strategically preferable for politicians to adopt a flexible position on matters sensitive to the voters in the region. Second, the question of the Hungarian minority in Ukraine is not as politically explosive as the Hungarian issue in Slovakia or Romania.¹¹ In the wider context, the new Hungarian law has an obvious and significant effect on the EU at large inasmuch as it will open up access to citizenship for groups residing outside the European Union on the basis of cultural or ethnic ties, which affects other EU Member States as well. The opportunity to become EU citizens, principally for ethnic Hungarians of Serbia and Ukraine, with the consequent rights attached, most notably the free movement of persons, may motivate individuals to seek Hungarian nationality. The new Hungarian nationality regime has the potential of creating large numbers of external EU citizens. The next chapters are dedicated to the examination of the compatibility of the Hungarian law and the Slovak retaliatory steps with the international obligations of Hungary and Slovakia, respectively.

Europe to work as cheap laborers. [...] And when Romania joins the Schengen zone, an area without border controls incorporating 25 European countries, in March 2011, hundreds of thousands of Moldovans with Romanian passports will finally get free entry to the EU.' 'Romanian Passports For Moldovans. Entering the EU Through the Back Door' by Benjamin Bidder, 13 July 2010, available at: <<http://www.spiegel.de/international/europe/0,1518,706338,00.html>>.

¹⁰ Serbia introduced a very similar approach to citizenship in which naturalization can be accomplished by mere proof of Serb ethnicity or other ethnic group from Serbia without residency requirement. <<http://eudo-citizenship.eu/citizenship-news/306-hungarian-government-proposes-access-to-citizenship-for-ethnic-hungarians-in-neighbouring-countries>>

¹¹ O. Shevel, 'Ukraine: Reactions to the Hungarian Citizenship Law' 12 July 2010, available at: <<http://eudo-citizenship.eu/citizenship-news/345-ukraine-reactions-to-the-hungarian-citizenship-law>>.

III. The concept of nationality and the power to grant nationality

1. Concept of nationality

There is no coherent, accepted definition of nationality in international law and only conflicting descriptions exist under the different municipal laws of states.¹² In the *Nottebohm* case the International Court of Justice stated that:

‘[a]ccording to the practice of States, to arbitral and judicial decisions and to the opinion of writers, nationality is the legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual’s connection which has made him its national.’¹³

The 1997 European Convention on Nationality (hereinafter the ECN) provides that ‘nationality’ means the legal bond between a person and a State and does not indicate the person’s ethnic origin.¹⁴ Thus, States are free to decide on the conditions of granting nationality, but the *Nottebohm* case requires a reasonable bond between the State and its national, lack of which may result in other States denying the recognition of nationality.¹⁵ The most relevant notions pertaining to nationality¹⁶ include, among others, the principles provided for by the ECN, namely the right to nationality, avoidance of statelessness, the rule that no one shall be arbitrarily deprived of his nationality, and that marriage and divorce shall not automatically affect the nationality of spouses.¹⁷ In addition, the ECN prohibits discrimination.¹⁸ Apart from

¹² M. N. Shaw, *International Law*. (Cambridge, Cambridge University Press 2003) at p. 585.; J. Hargitai, *Nemzetközi jog a gyakorlatban* [International Law in Practice] (Budapest, Magyar Közlöny Lap- és Könyvkiadó 2008) at p. 64.

¹³ *Nottebohm* case, ICJ Reports 1955, p. 23.

¹⁴ Art. 2 para a) of the European Convention on Nationality, Strasbourg, 6 November 1997, CETS No. 166

¹⁵ Hargitai, op. cit. n. 12, at p. 64.

¹⁶ *Ibid.*, at pp. 71-73.

¹⁷ Art. 4. Please note the lack of reference to avoidance of multiple nationality as an objective. Unlike previous treaties, the ECN clearly allows for multiple nationality.

these, we can mention the two principles regulating acquisition through birth – either by descent (*ius sanguinis*) or by birth in the territory (*ius soli*); the unity of citizenship within a family; and non-retroactivity.¹⁹ Article 4 of the ILC Draft Articles on Diplomatic Protection (hereinafter the Draft Articles)²⁰ also deals with the question of nationality: for the purposes of the diplomatic protection of a natural person, a State of nationality means a State whose nationality that person has acquired, in accordance with the law of that State, by birth, descent, naturalization, succession of States or in any other manner, not inconsistent with international law. The elements of this definition, in particular the power to grant nationality, the connecting factors, and the limits, if any, imposed by international law on the grant of nationality, will be examined in the next sections.

2. The power to grant nationality

a) Domestic jurisdiction of the individual state

Generally, international law does not regulate the granting of nationality by a State and the matter is regarded as one *within the domestic jurisdiction of the individual State*.²¹ Draft Article 4 of the ILC provides that it is for the State of nationality to determine, in accordance with its municipal law, who is to qualify for its nationality. The principle that it is for each State to lay down the conditions for the acquisition and loss of nationality is backed by both judicial decisions and treaties. Thus, the Permanent Court of International Justice stated in the *Nationality Decrees in Tunis and Morocco* case that ‘in the present state of international law, questions of nationality are [...] in principle within the

¹⁸ Art. 5. ECN

¹⁹ See e.g. Section 1 subsection (4) of the Hungarian Citizenship Act of 1993 (as amended): ‘[t]his Act has no retroactive effect. The legal rules that had been in force at the time of the occurrence of the facts or events affecting citizenship shall apply to Hungarian citizenship’.

²⁰ Draft Arts on Diplomatic Protection (2006), adopted by the International Law Commission at its fifty-eighth session. *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10)*

²¹ ILC Commentary to Art. 4 point (1), at p. 31. See also Shaw, *op. cit.* n. 12, at p. 585. On the distinction between citizenship (concept of municipal law) and nationality (a concept of international law), see e.g., J. O’Brien, *International law* (Cavendish Publishing Ltd. 2002) at p. 240: ‘[i]nternational law is concerned with nationality, the nexus between the person and the state.’

reserved domain'.²² Similarly, the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (hereinafter the 1930 Hague Convention) stipulates that '[i]t is for each State to determine under its own law who are its nationals'. Finally, Article 3 of the ECN, titled 'Competence of the State' provides that each State shall determine under its own law who are its nationals.

b) Connecting factors

In general, nationality will depend on some form of link with the state. Draft Article 4 of the ILC provides a non-exhaustive list of *connecting factors* that constitute acceptable grounds for the grant of nationality. The most commonly used factors are the following: birth (*ius soli*), descent (*ius sanguinis*), naturalization,²³ marriage to a national,²⁴ or acquisition of nationality as a result of the succession of states.²⁵ According to the ILC, international law does not require a State to prove *an effective or genuine link* between itself and its national as suggested in the *Nottebohm* case, as an additional factor for the exercise of diplomatic protection. Thus

[d]espite divergent views as to the interpretation of the case, the Commission took the view that there were certain factors that served to limit *Nottebohm* to the facts of the case in question, particularly the fact that the ties between Mr. Nottebohm and Liechtenstein (the Applicant State) were "extremely tenuous" compared with the close ties between Mr. Nottebohm and Guatemala (the Respondent State) for a period of over 34 years, which led the International Court of Justice to repeatedly assert that Liechtenstein was "not entitled to extend its protection to Nottebohm vis-à-vis Guatemala". This suggests that the Court did not intend to expound a general rule applicable to all States but only a relative rule according to which a State in Liechtenstein's position was required to show a genuine link between itself and Mr. Nottebohm in order to permit it to claim on his

²² (1923) PCIJ, Ser B, No 4; (1923) 2 ILR 349

²³ Most States provide that aliens may acquire nationality through naturalization by means of a period of lawful residence.

²⁴ It requires in addition a period of residence, following which nationality is conferred by naturalization. See e.g. Art. 9(1) of the Convention on the Elimination of All Forms of Discrimination against Women (1979), and Art. 1 of the Convention on the Nationality of Married Women (1957), which prohibit the acquisition of nationality in such circumstances.

²⁵ See Draft Arts on Nationality of Natural Persons in Relation to the Succession of States, adopted by the ILC at its fifty-first session (1999). *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10 (A/54/10)*

behalf against Guatemala with whom he had extremely close ties. Moreover, it is necessary to be mindful of the fact that if the genuine link requirement proposed by *Nottebohm* was strictly applied it would exclude millions of persons from the benefit of diplomatic protection as in today's world of economic globalization and migration there are millions of persons who have moved away from their State of nationality and made their lives in States whose nationality they never acquire or have acquired nationality by birth or descent from States with which they have a tenuous connection.²⁶

e) Consistency with international law

As noted above, there are limits imposed by international law on the grant of nationality. Thus, Article 1 of the 1930 Hague Convention stipulates that even though it is for each State to determine under its own law who are its nationals, this law 'shall be recognized by other States insofar as it is consistent with international conventions, international custom and the principles of law generally recognized with regard to nationality'. Similarly, the final phrase in Draft Article 4 categorically specifies that a decision on the granting of nationality is not absolute. Finally, Article 3 paragraph (2) of the ECN provides that domestic rules on nationality shall be consistent with applicable international conventions, customary international law and the principles of law generally recognized with regard to nationality. Consequently, States must abstain from interference in the affairs of other States, including, *inter alia*, the duty not to intervene in the power of other States to determine the conditions of granting nationality.²⁷ As indicated before, when granting nationality, some kind of connecting factor between the State and its national is required.²⁸ Furthermore, reflecting the development of human rights law after World War II, there is an increasing recognition that States must comply with international human rights standards in the granting of nationality.²⁹ Finally, international norms prohibit the arbitrary deprivation of nationality.³⁰ Restricting our

²⁶ Op. cit. n. 20, at p. 33. References omitted.

²⁷ O'Brien, op. cit. n. 21, at p. 148.

²⁸ Hargitai, op. cit. n. 12, at p. 65.

²⁹ See e.g. Art. 15 of the Universal Declaration of Human Rights or Art. 7 of the Convention on the Rights of the Child. See also *Re Amendments to the Naturalisation Provisions of the Constitution of Costa Rica*, Inter-American Court of Human Rights, OC-4/84, HRLJ (1984), Vol. 5, p. 161.

³⁰ In further detail see below in Chapter 4. point a).

examination to fundamental rights limits, the most relevant norm is the prohibition of discrimination based on *inter alia* race, sex, colour, language, religion, national origin, or association with a national minority.³¹ Involuntary acquisition of nationality in a discriminatory way, such as where a woman automatically acquires the nationality of her husband on marriage, is inconsistent with international law. Article 9, paragraph 1 of the Convention on the Elimination of All Forms of Discrimination against Women (1979) provides that:

[s]tates parties shall grant women equal rights to men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.³²

Further restrictions on municipal citizenship laws include the prohibition of torture or inhuman or degrading treatment or punishment,³³ the right to a fair trial,³⁴ the right to family life,³⁵ the prohibition of arbitrary expulsion,³⁶ and the prohibition on the collective expulsion of aliens.³⁷

3. Hungarian Citizenship Act: compatibility with international law

The question remains whether the Hungarian Citizenship Act of 2010 is compatible with the rules briefly outlined above. As any other State, Hungary has the power to decide in accordance with its law who are its nationals. Secondly, the connecting factor in determining who qualifies for preferential terms is Hungarian ancestry. Again, this is quite normal, keeping in mind that descent, in the form of the principle *ius sanguinis*, is regarded as one of the major connecting factors between a State and its national. Finally, none of the considerations mentioned above, such as the prohibition of interference with other States' sovereignty,

³¹ See e.g., Art. 26 of ICCPR, Art. 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

³² See also Art. 20 of the American Convention on Human Rights (ACHR); Art. 5(d) (iii) of the International Convention on the Elimination of All Forms of Racial Discrimination (1965); and Art. 1 of the Convention on the Nationality of Married Women (1957).

³³ Art. 7 of ICCPR, Art. 3 of ECHR, Art. 5 of ACHR

³⁴ Art. 14 of ICCPR, Art.6 of ECHR, Art 8 of ACHR

³⁵ Art. 8 of ECHR, Art. 17 of ACHR

³⁶ Art. 13 of ICCPR

³⁷ Art. 4 of Protocol No. 4 of ECHR

territorial integrity and political independence, or the obligation to respect human rights, in particular the prohibition of discrimination, have been violated by the Hungarian legislation. Consequently, the Hungarian law is not inconsistent with international treaties or customary international law. This takes us to the next question, namely whether the ensuing Slovak reaction to reject multiple nationality is compatible with international standards. This, in turn, requires the examination of the approach of international law towards multiple nationality and loss of nationality.

IV. Multiple nationality and the loss of nationality

1. How multiple nationality is acquired

Multiple nationality means the simultaneous possession of two or more nationalities by the same person.³⁸ Since each State is free to set up its own nationality regime, a person can acquire two or more nationalities e.g. by birth,³⁹ by marriage or by naturalization. A country may allow citizens who obtain foreign citizenship to retain their original citizenship. However, not all nations recognize that their citizens may possess simultaneous citizenship of another country. All States of a multiple national can regard the person as their own national for the purposes of the application of its law.⁴⁰ Actually, multiple nationalities can smoothly operate side by side. Problems may arise, however, when an international forum, or the authorities or courts of a third State are confronted with the problem of identifying the ‘effective’ or ‘predominant’ nationality. The choice between nationalities has an inevitably important impact on the ‘final’ decision.⁴¹ Furthermore, the political implications of extending nationality to certain groups of people, such as kin-minorities, can lead to heated internal as well international disputes.⁴²

³⁸ Art. 2(b) of the ECN

³⁹ E.g., a child born to Hungarian parents in the United States may acquire both US citizenship on the basis of *ius soli* and Hungarian citizenship on the basis of *ius sanguinis*.

⁴⁰ The Hungarian Citizenship Act stipulates in Section 2 subsection (2) that ‘[u]nless an Act provides otherwise a Hungarian citizen who is simultaneously also the citizen of another state shall be regarded as a Hungarian citizen for the purposes of the application of Hungarian law’.

⁴¹ Hargitai, op. cit. n. 12, at pp. 77-78.

⁴² *Ibid.*, at p. 80.

2. Former approach: reduction of cases of multiple nationality

According to the 1930 Hague Convention, the signatories were

‘convinced that it is in the general interest of the international community to secure that all its members should recognize that every person should have a nationality and should have *one nationality only*’.⁴³

Thus, the objective was to abolish all cases of statelessness as well as of multiple nationality. In order to achieve this goal, national legislations in most European countries have forbidden dual citizenship, while numerous bilateral agreements, international conventions, and mediating international organizations have tried to eliminate cases of dual citizenship. The 1963 Council of Europe Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality stipulated that a national of a signatory country who acquires of his own free will a second nationality automatically loses his original (former) nationality.⁴⁴

The reasons behind the underlying resistance to multiple citizenship are manifold. Firstly, multiple nationality has been regarded an anomaly for emotional and psychological reasons. Resistance to multiple citizenship is rooted in the emergence of modern nationalism, in the conviction that

‘each person has one “essential identity” characterized by a single form of national allegiance and political loyalty, and can be therefore a member of only one nation at a given point in time’.⁴⁵

Secondly, the need to guarantee national security contributed to the reluctance towards multiple nationality.⁴⁶ Thirdly, States found it desirable to avoid conflicts with other States concerning a multiple national’s military duties. Thus, the guiding principle was that persons possessing multiple nationality shall be subject to military obligations in

⁴³ Preamble, emphasis added.

⁴⁴ Strasbourg, 6 May 1963, CETS No. 043; Art. 1

⁴⁵ C. Iordachi, ‘Dual Citizenship in Post-Communist Central and Eastern Europe: Regional Integration and Inter-Ethnic Tensions’, in O. Ieda and T. Uyama, eds., *Reconstruction and Interaction of Slavic Eurasia and Its Neighboring Worlds* (Sapporo, Slavic Research Center, Hokkaido University 2006) p. 105, at p. 110.

⁴⁶ Citizenship laws in most countries have denied dual citizens access to legislative bodies, state bureaucracies, or even to certain professions or types of property considered ‘strategic’, reserving these for ‘single’ citizens. *Ibid.*, at p. 110.

relation to the Party in whose territory he was ordinarily resident.⁴⁷ In fact, this problem is no longer as relevant as it used to be due to the constantly increasing number of States which no longer require obligatory military service. According to a survey carried out in 2005, '[s]lightly fewer than half of the world's States currently enforce some form of obligatory military service'.⁴⁸ Even so, the ECN dating from 1997 still comprises several provisions on military obligations in cases of multiple nationality.⁴⁹

Fourthly, opposition to multiple citizenship has also been triggered by pragmatic State interests, such as budgetary considerations. States invariably strive for the maximization of their revenue and are not prepared to relinquish income originating from citizens. This aim, however, can easily lead to double taxation for dual nationals. A person with multiple nationality may have tax obligation to his country of residence and also to one or more of his countries of nationality. Thus, people have been discouraged from possessing multiple nationality. In order to eliminate this problem, many States have concluded tax treaties for avoiding double taxation.

Finally, it has been argued that a person's multiple nationality could strain interstate relations in connection with diplomatic protection. Similarly to the arguments listed above, this contention is no longer convincing. The ILC Draft Articles on Diplomatic Protection provide that any State of a multiple national may exercise diplomatic protection (or they can even exercise it jointly) against a third State.⁵⁰ In case of a claim against a State of nationality, the State of dominant or effective nationality might bring proceedings in respect of a national against another State of nationality.⁵¹

⁴⁷ Art. 5 of Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality

⁴⁸ D. Brett, 'Military Recruitment and Conscientious Objection: A Thematic Global Survey' (2005) p. 4. Available at:

http://www.cpti.ws/cpti_docs/brett/recruitment_and_co_A4.pdf.

⁴⁹ See Art. 21 of the ECN stipulating that '[p]ersons possessing the nationality of two or more States Parties shall be required to fulfill their military obligations in relation to one of those States Parties only', and that multiple nationals 'shall be subject to military obligations in relation to the State Party in whose territory they are habitually resident'.

⁵⁰ Draft Art 6

⁵¹ Draft Art 7

3. Growing tolerance towards multiple nationality

As noted above, the reasons behind the resistance to multiple nationality have largely disappeared during the last decades. There is an ever-growing number of multiple nationals, due to the unprecedented scale of labour migration based on the freedom of movement between the EU Member States resulting in a substantial immigrant population, growing number of marriages between spouses of different nationalities, and the principle of equality of the sexes inasmuch as children born from these mixed marriages automatically possess dual nationality. These new phenomena inevitably justify the reconsideration of the strict application of the principle of avoiding multiple nationality.⁵² Apart from the general trends outlined above, the situation is even more complicated in Central and Eastern Europe. As Iordachi summarized it, in these countries

‘[...] dual citizenship has not served as a way of integrating alien residents, but mostly as a way of reconstructing the national ‘imagined communities’. [...] There has been a revival of policies of national integration between mother countries and external kin minorities. [...] New citizenship laws in these states [Albania, Bulgaria, Romania, Hungary, and Poland] encompassed therefore an important national dimension: after decades of political isolation from Diaspora and dual citizenship prohibition, most of these states have resumed policies of “positive discrimination” toward their co-ethnics abroad.’⁵³

In response to the large-scale proliferation of multiple nationality, Hungary has terminated bilateral agreements with former socialist States excluding dual citizenship,⁵⁴ while the Hungarian Citizenship Act of 1993 opens the door for multiple nationality. Growing tolerance towards multiple nationality at international, or at least European, level is clearly evidenced by the 1997 European Convention on Nationality which does not list the objective of reducing the cases of multiple nationality among

⁵² The principle of equality of the sexes means that spouses of different nationalities should be allowed to acquire the nationality of their spouse under the same conditions and that both spouses should have the possibility of transmitting their nationality to their children. Explanatory Report to the 1997 European Convention on Nationality, point 8. – See also Iordachi, loc. cit. n. 45, at p. 110.

⁵³ Ibid., at pp. 116-17. and 124.

⁵⁴ Hungary had concluded agreements with the Soviet Union, Bulgaria, Czechoslovakia, Poland, Democratic Republic of Germany, Mongolia and Romania. See Hargitai, loc. cit. n. 12, at p. 100.

the principles in Article 4. In the Preamble, the Contracting Parties refer to ‘the varied approach of States to the question of multiple nationality’ and recognize that ‘each State is free to decide which consequences it attaches in its internal law to the fact that a national acquires or possesses another nationality’. Thus the objective in this regard is to find ‘appropriate solutions to consequences of multiple nationality and in particular as regards the rights and duties of multiple nationals’, most notably to the fulfillment of military obligations. Further, Article 14(1)a) stipulates that a State Party shall allow children having different nationalities acquired automatically at birth *to retain* these nationalities; while Article 15 provides that State Parties may determine in their internal law whether their nationals who acquire or possess the nationality of another State retain its nationality or lose it.⁵⁵ Even though in the great majority of cases multiple nationality does not cause any problem and each State of nationality can regard a multiple national as its citizen for the purposes of the application of its internal law, certain situations may arise where one of the citizenships shall enjoy priority over the other one(s). The most important example of this competitive situation is the exercise of diplomatic protection against a State of nationality. While the 1930 Hague Convention stipulated that a State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses,⁵⁶ the ILC believes that there is strong support in arbitral decisions for another position, namely that:

‘[...] the State of *dominant or effective nationality* might bring proceedings in respect of a national against another State of nationality. [...] No attempt is made to describe the factors to be taken into account in deciding which nationality is predominant. [...] such factors include habitual residence, the amount of time spent in each country of nationality, date of naturalization (i.e., the length of the period spent as a national of the protecting State before the claim arose); place, curricula and language of education; employment and financial interests; place of family life; family ties in each country; participation in social and public life; use of language; taxation, bank account, social security insurance; visits to the other State of nationality; possession and use of passport of the other State; and military

⁵⁵ Art. 15(a) provides that ‘[t]he provisions of this Convention shall not limit the right of a State Party to determine in its internal law whether [...] its nationals who acquire or possess the nationality of another State retain its nationality or lose it [...]’.

⁵⁶ Art. 4

service. None of these factors is decisive and the weight attributed to each factor will vary according to the circumstances of each case.⁵⁷

4. The loss of nationality upon acquiring nationality of another State and the 1997 European Convention on Nationality

Loss of nationality can happen either at the initiative of the individual (voluntary loss) or, and this is more important for the purposes of this study, *ex lege* or at the initiative of the State (involuntary loss). International law permits the loss of nationality *ex lege* or at the initiative of the State providing its national will not become stateless.⁵⁸ Many internal citizenship laws envisage the loss of ‘original’ nationality upon a citizen’s voluntary acquisition of another country’s citizenship. Loss of naturalized citizenship usually occurs when the naturalized citizen resided in another country for a specified time,⁵⁹ obtained citizenship through unlawful means,⁶⁰ or if he did not renounce previous citizenship. As noted above, States should remain free to take into account their own particular circumstances in determining the extent to which multiple nationality is allowed by them.⁶¹ Thus,

‘[t]he question of allowing persons, who voluntarily acquire another nationality, to retain their previous nationality will depend upon the individual situation in States. In some States, especially when a large proportion of persons wish to acquire or have acquired their nationality, it may be considered that the retention of another nationality could hinder the full integration of such persons. However, other States may consider it preferable to facilitate the acquisition of their nationality by allowing persons to retain their nationality of origin and thus further their integration in the receiving State (e.g. to enable such persons to retain the nationality

⁵⁷ ILC Draft Arts, Commentary to Art. 7 (points (3) and (5)), at pp. 44 and 46. Emphasis added.

⁵⁸ See e.g., Art. 7 para 3 of the European Convention on Nationality: ‘[a] State Party may not provide in its internal law for the loss of its nationality [...] if the person concerned would thereby become stateless,’ unless the nationality was acquired by fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant.

⁵⁹ Hargitai, *op. cit.* n. 12, at p. 69.

⁶⁰ E.g., by disclosing false or untrue data, or by concealing any consequential data or information, see, *inter alia*, Art. 9 of the Hungarian Citizenship Act of 1993.

⁶¹ Explanatory Report to the ECN, point 10

of other members of the family or to facilitate their return to their country of origin if they so wish).'⁶²

a) Prohibition of arbitrary deprivation of nationality

However, certain principles limit State discretion with regard to deprivation of nationality. The most important rule, provided for e.g., by Article 4 of the ECN, is the prohibition of arbitrary deprivation of nationality.⁶³ Deprivation of nationality may qualify 'arbitrary' if it does not comply with certain guarantees as to the substantive grounds for deprivation as well as the procedural safeguards.⁶⁴

b) Substantive grounds for deprivation

As regards the substantive grounds, deprivation must be foreseeable, proportional and prescribed by law.⁶⁵ Article 7(1) of the ECN exhaustively lists the grounds for deprivation.

Loss of nationality *ex lege* or at the initiative of a State Party

1) A State Party may not provide in its internal law for the loss of its nationality *ex lege* or at the initiative of the State Party except in the following cases:

a) *voluntary acquisition of another nationality*;

b) acquisition of the nationality of the State Party by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant;

c) voluntary service in a foreign military force;

d) *conduct seriously prejudicial to the vital interests of the State Party*;

e) lack of a genuine link between the State Party and a national habitually residing abroad;

f) where it is established during the minority of a child that the preconditions laid down by internal law which led to the *ex lege* acquisition of the nationality of the State Party are no longer fulfilled;

g) adoption of a child if the child acquires or possesses the foreign nationality of one or both of the adopting parents.

[...]⁶⁶

⁶² *Ibid.*, at point 9.

⁶³ Art. 4(c) stipulates that 'no one shall be arbitrarily deprived of his or her nationality'. This was taken *verbatim* from Art. 15(2) of the Universal Declaration of Human Rights (1948).

⁶⁴ Explanatory Report to the ECN, point 35.

⁶⁵ *Ibid.*, at point 36.

⁶⁶ Emphasis added.

It follows from the negative formulation that loss of nationality cannot take place unless it concerns one of the cases provided for in Article 7. Even so, a State may allow persons to retain their nationality.⁶⁷ A further limit to the loss of nationality is the situation where the person concerned would thereby become stateless, unless he acquired nationality by improper conduct.⁶⁸ For the purposes of this study, paragraphs a) and d) are relevant and the analysis is restricted to these grounds. Paragraph a) allows, but does not require, States Parties to provide for the loss of nationality when there is a voluntary acquisition of another nationality. The word ‘voluntary’ indicates that there was an acquisition as a result of a person’s own free will.⁶⁹ Even though paragraph a) provides absolute legal justification for the loss of nationality, which is a solution followed by many States worldwide,⁷⁰ Slovakia could base its retaliatory act on paragraph d) of Article 7, as well as on Article 15. Thus, Slovakia could argue that application for and acquisition of Hungarian nationality is contrary to its national security inasmuch as it can be regarded as a manifestation of disloyalty of a person towards his State of origin, in this case, towards Slovakia, or a violation of duties as a national.⁷¹ However, the general and vague formulation of paragraph d) makes this ground for loss a potential source of legal insecurity.⁷² Furthermore, Article 15 of the ECN uses a clear language by stipulating that any State Party might determine in its internal law that its nationals who acquire the nationality of another State lose its nationality. In addition to the prohibited grounds of deprivation of nationality, the ECN specifically addresses the issue of discrimination. Article 5 prohibits State rules or practices on nationality which amount to discrimination on the grounds of sex, religion, race, colour or *national or ethnic origin*. Consequently, loss of nationality

⁶⁷ Art. 16 and Explanatory Report to the ECN, point 58.

⁶⁸ Art. 7 para 3 of the ECN

⁶⁹ Explanatory Report to the ECN, point 59.

⁷⁰ See United States Office of Personnel Management, Investigations Service: *Citizenship Laws of the World*. March 2001., available at: <<http://www.opm.gov/extra/investigate/IS-01.pdf>>. See also the survey carried out by G. de Groot and M.P. Vink, ‘*Loss of Citizenship. Trends and Regulations in Europe*’ (Florence, European University Institute 2010), available at: <<http://eudo-citizenship.eu/docs/Loss.pdf>>.

⁷¹ See also Art. 8 para. 3(a)ii) of the 1961 Convention on the Reduction of Statelessness.

⁷² Groot and Vink, op. cit. n. 70, at p. 28.

shall be deemed arbitrary if it is based on discriminatory grounds. Quite interestingly, the Explanatory Report notes that ‘the withdrawal of nationality on *political grounds* would be considered arbitrary’,⁷³ which, however, does not appear in the text of the Convention. It is worth noting that not every type of differentiation is prohibited by Article 5. The requirement of knowledge of the national language in order to be naturalized and the facilitated acquisition of nationality due to descent or place of birth might serve as examples of justified grounds for differentiation or preferential treatment.⁷⁴ Likewise, differentiation based on language is not listed as a prohibited ground for discrimination. The Convention itself provides for the facilitation of the acquisition of nationality in certain cases.⁷⁵ Furthermore, the Explanatory Report declares that:

‘State Parties can give more favourable treatment to nationals of certain other States. For example, a member State of the European Union can require a shorter period of habitual residence for naturalisation of nationals of other European Union States than is required as a general rule. This would constitute preferential treatment on the basis of nationality and not discrimination on the ground of national origin.

It has therefore been necessary to consider differently distinctions in treatment which do not amount to a discrimination and distinctions which would amount to a prohibited discrimination in the field of nationality.’⁷⁶

c) Procedural safeguards

As regards procedural safeguards, the ECN stipulates that decisions relating to nationality shall contain reasons in writing and shall be open to an administrative or judicial review. These provisions are designed to prevent an arbitrary exercise of powers.⁷⁷

⁷³ Explanatory Report to the ECN, point 36. Emphasis added.

⁷⁴ *Ibid.*, at point 40.

⁷⁵ E.g., in the case of spouses of its nationals; children of one of its nationals; children one of whose parents acquires or has acquired its nationality; children adopted by one of its nationals; persons who were born on its territory and reside there lawfully and habitually; stateless persons and recognized refugees lawfully and habitually resident on its territory, etc. See Art. 6 para 4.

⁷⁶ Explanatory Report to the ECN, points 41-42. Emphasis added.

⁷⁷ Processing of applications within a reasonable time (Art. 10); statement of reasons in writing (Art. 11); right to an administrative or judicial review (Art. 12). Regrettably, Hungary has reservation with respect to Art. 11 and 12. See

V. Hungarian – Slovak controversy: conclusions

Apparently, the concept of nationality is subject to change because the contours of State sovereignty are becoming more porous.⁷⁸ This change is definitely evidenced by the growing tolerance towards multiple nationality. In addition, preferences granted to ethnic minorities by a kin-State can be justified on the basis of international law relating to the rights of minorities to preserve and promote their ethnic, linguistic and cultural heritage. Even though there is nothing in international law prohibiting multiple nationality, or the loss of nationality upon acquisition of nationality of another State, certain trends are clearly discernible. Multiple nationality is an everyday reality, increasingly recognized by the members of the international community. The 1997 European Convention on Nationality is neutral on the issue of the desirability of multiple nationality, thus clearly abandons the objective of single nationality characteristic of the 1963 Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality. As regards loss of nationality, the ECN expressly provides for the possibility of loss of nationality as a result of voluntary acquisition of a foreign citizenship. Nevertheless, according to a survey, less and less municipal citizenship regimes retain such restriction.⁷⁹

The Hungarian Citizenship Act as amended in May 2010 offering nationality on request to ethnic Hungarians living abroad if they speak Hungarian and have Hungarian ancestry does not violate any international obligations of Hungary. On the face of it, the Slovak retaliatory step is also compatible with international law. However, the automatic loss of nationality of native-born persons residing in the territory of Slovakia seems at least on the brink of incompatibility with international norms. Ethnic Hungarians possessing Slovak nationality acquired by birth clearly have – and wish to maintain – their link with

<<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=166&CM=8&DF=23/07/2010&CL=ENG&VL=1>>.

⁷⁸ E. Warner, 'Unilateral Preferences Granted to Foreign National Minorities by a Kin-State: A Case Study of Hungary's "Status Law"', 35 *Georgetown Journal of International Law* (2004), 379., at p. 381.; C. Margiotta and O. Vonk, 'Nationality law and European citizenship: the role of dual nationality', p. 3., available at: <<http://kcl.ac.uk/content/1/c6/07/52/58/ConstanzaMargiottaandOlivierVonk.pdf>>.

⁷⁹ Groot and Vink, op. cit. n. 70, at p. 7.

Slovakia, even after applying for and receiving another (Hungarian) nationality. Furthermore, the contention as to the incompatibility of a second citizenship with the duties as Slovak national is very vague, general and thus subject to arbitrary interpretation and implementation, in sharp contrast to the requirement of legal certainty. Finally, the protection of national minorities, which forms an integral part of the protection of human rights, does not fall within the reserved domain of States.⁸⁰ A State that hosts a national minority has a special duty to protect it, and this protection must at the very minimum include a citizenship guarantee.⁸¹

Certainly, the problem appears to be a political rather than a legal one. The Hungarian act is regrettable in the sense that it does not seem to help Hungarian minorities abroad; on the contrary, it creates a dilemma for them, while at the same time the act has provoked protest from Slovakia and put a strain on Hungary's relations with its northern neighbour. The Hungarian act is rather aimed to please constituencies at home. Similarly, the intended target of the new Slovak law is the electorate, the new rules being adopted in the midst of Slovak parliamentary elections.⁸² The political motivations behind the move became all the more apparent after the elections, since according to certain sources, the new Government plans to remove the section prohibiting multiple nationality, and until then authorities will not enforce this provision in practice.⁸³ Doubtless, the next turning point is 1 January 2011, the date set for the actual application of the new

⁸⁰ See e.g., Art. 1 of Framework Convention for the Protection of National Minorities (1995).

⁸¹ Unfortunately, the 1995 Framework Convention on National Minorities is silent on the question of citizenship affiliations of minorities as has been noted by Rainer Bauböck, available at: <<http://eudo-citizenship.eu/citizenship-forum/322-dual-citizenship-for-transborder-minorities-how-to-respond-to-the-hungarian-slovak-tit-for-tat>>.

⁸² The issue of ethnic Hungarian minority in Slovakia had been among the centre pieces of the public debate during the election. Slovakia's southern and northern neighbors are perceived as entities against which Slovak law defines itself. Where the Slovakian act has most impact? Dagmar Kusá, Country Report: Slovakia, EUDO Citizenship Observatory (European University Institute, June 2010) p. 1., available at: <<http://eudo-citizenship.eu/docs/CountryReports/Slovakia.pdf>>

⁸³

<http://index.hu/belfold/2010/07/17/elebbe_lepett_a_szlovak_allampolgarsagi_torveny/>

Hungarian citizenship rules, but presumably it will have negligible practical value for Hungarian diasporas.

VI. Dual citizenship as an instrument of protection of ethnic minorities in the Republic of Croatia

1. Introduction

The Croatian approach to dual citizenship with respect to ethnic minorities is to be exclusively perceived through the complexity of legal-political consequences originating from the fall of the former Yugoslav Federation. After becoming independent, the Republic of Croatia has mostly abolished the former legislative framework, keeping in force only those provisions which do not contradict the basic postulates of the new democratic order. Moreover, it has maintained them to the least possible extent just to avoid legal gaps. The issue of citizenship has, since the very beginning of the Croatian sovereignty, been identified as the crucial field within the first codification wave initiated in the beginning of 1991. Moreover, the Croatian Parliament adopted the Croatian Citizenship Act⁸⁴ as early as on 26 June 1991 and thus legally regulated the prerequisites for acquisition and termination of Croatian citizenship as a link between public law and affiliation of a single person to the Croatian State.⁸⁵ This link has immediate repercussions for the legal status of a person not only in terms of national but also in terms of international law. The latter particularly refers to members of ethnic minorities as its most frequent titles.

2. Dual Citizenship in the legal system of the Republic of Croatia

a) Croatian Citizenship Act (1991)

None of the provisions of the Croatian Citizenship Act (hereinafter: the Act) specifies dual citizenship *expressis verbis*. However, certain articles explicitly or implicitly suggest the possibility of Croatian citizens to possess or acquire citizenship of one or more other countries. This holds true, first of all, to Article 2 of the Act which stipulates as follows:

⁸⁴ Law on Croatian Citizenship, Official Gazette 53/1991, 70/1991, 28/1992, 113/1993, 4/1994

⁸⁵ V. Ibler, *Rječnik međunarodnog prava* (Zagreb, Informator 1987) p. 69.

‘[t]he citizen of the Republic of Croatia who is at the same time foreign citizen, shall be, before the authorities of the Republic of Croatia, deemed to be exclusively a Croatian citizen’.

The provision proclaims the *principle of exclusivity*, giving absolute priority to Croatian citizenship while aiming at the elimination of possible problems which may arise due to the presence of dual or multiple nationality. Hoping to prevent dual and multiple citizenships, the Croatian Parliament has also adopted the provision of Article 8 paragraph 1 item 2 of the Act, according to which Croatian citizenship can be obtained through naturalization by foreigners who have submitted an application for Croatian citizenship under the condition that they have already revoked other country’s citizenship or that they have presented an evidence of subsequent revocation thereof if their application is accepted.⁸⁶

In spite of the efforts to legally abolish the possibility of occurrence of dual citizenship, it has often been the case among ethnic Croats living outside the homeland. One of the ways of acquiring dual citizenship is previous revocation of the Croatian one, after which a person, pursuant to provisions of Article 15 of the Act stipulating acceptance into Croatian citizenship under privileged circumstances,⁸⁷ obtains it for the second time, without being restrained by Article 8 of the Act which prescribes the conditions for obtaining Croatian citizenship by naturalization.⁸⁸ The population of emigrants may find Article 11 of the

⁸⁶ The norm has been mitigated by a rule from Art. 8a, according to which ‘a guarantee of admission to Croatian citizenship may be issued to a foreigner who has filed a petition for admission to Croatian citizenship, and who, at the time of filing a petition did not receive a revocation of foreign citizenship or who does not have proof that he would get a revocation if he gets admitted to Croatian citizenship, if he meets all other prerequisites from Art. 8, Paragraph 1, of this Law’.

⁸⁷ Art. 15 stipulates that ‘[a] Croatian citizen who petitioned for and had his or her Croatian citizenship revoked for the reasons of acquiring citizenship in another country, which was set forth as a prerequisite by the foreign country in which he or she has place of residence for conducting a profession or a business, can regain Croatian citizenship although he or she does not meet the prerequisites from Art. 8, paragraph 1, points 1-4 of this Law’.

⁸⁸ According to Art. 8 para 1 a foreign citizen who files a petition for acquiring Croatian citizenship shall acquire Croatian citizenship by naturalization if he or she meets the following prerequisites: 1. that he or she has reached the age of eighteen years and that his or her legal capacity has not been taken away; 2. that he or she has had his or her foreign citizenship revoked or that he or she submits proof that he or

Act relevant since it determines that even emigrants and their ancestors can acquire Croatian citizenship by naturalization although they do not meet the requirements from Article 8 paragraph 1 of the Act.⁸⁹ Following the provisions of Article 11, Article 16 explicitly regulates the possibility of ethnic Croats to obtain Croatian citizenship with the residence outside the Republic of Croatia if they meet the requirement from Article 8 paragraph 1 item 5 of the Act and if they submit a written statement that they consider themselves Croatian citizens. Nevertheless, the details of the conditions under which a person can claim their affiliation to the Croatian nation are not specified by the Act.⁹⁰ Finally, it is necessary to take note of Article 30 which brought up many issues, especially in the context of non-discrimination and protection of minority rights. Pursuant to paragraph 1, a Croatian citizen is a person

she will get a revocation if he or she would be admitted to Croatian citizenship; 3. that before the filing of the petition he or she had a registered place of residence for a period of not less than five years constantly on the territory of the Republic of Croatia; 4. that he or she is proficient in the Croatian language and Latin script; 5. that a conclusion can be derived from his or her conduct that he or she is attached to the legal system and customs persisting in the Republic of Croatia and that he or she accepts the Croatian culture.

⁸⁹ The respective provision has its connection in Art. 10 of the Constitution of the Republic of Croatia, according to which the Republic of Croatia shall protect the rights and interests of its citizens living or residing abroad and promote their bonds with the homeland while entities of the Croatian nation in other countries shall be granted special care and protection. Emigrants are people who left Croatia in order to live abroad permanently. At this point, a foreigner does not necessarily have to be a member of the Croatian nation in an ethnical sense but only to have lived before on the territory which used to belong to Croatia (including the territories belonging to former states such as the Austro-Hungarian Monarchy). *Ustav Republike Hrvatske, Narodne novine*, br. 56/1990, 135/1997, 8/1998 – pročišćeni tekst, 113/2000, 28/2001, 41/2001 – pročišćeni tekst, 55/2001; J. Omejec, 'Legal Requirements for Acquiring Croatian Citizenship by Naturalization in Comparison with the Naturalization Laws of Some European and Anglo-Saxon Countries', 46 *Zbornik Pravnog fakulteta u Zagrebu* (1996) pp. 509-511.

⁹⁰ Art. 16 assures naturalization of ethnic Croats from neighbouring States, i.e., former Yugoslav Republics, particularly from Bosnia and Herzegovina, while Art. 11 facilitates naturalization of Croatian emigrants and their ancestors although not fulfilling the conditions concerning the knowledge of the Croatian language stipulated in Art. 8. I. Štiks and F. Ragazzi, 'Croatian Citizenship: From Ethnic Engineering to Inclusiveness', in R. Bauböck, et al., eds., *Citizenship Policies in the New Europe: Expanded and Updated Edition* (Amsterdam, Amsterdam University Press 2009) pp. 345-346.

who had obtained that status according to the regulations valid until the Croatian Citizenship Act came into force whereas paragraph 2 of the Article stipulates that a Croatian citizen is a member of the Croatian nation who, on the day of entry into force of the Act, did not possess Croatian citizenship but had registered residence in the Republic of Croatia and had already submitted a written statement that they considered themselves Croatian citizens.

The lenient attitude of the Croatian legislature towards dual citizenship is connected to the inclusive ethnic policy facilitating privileged naturalization to members of the Croatian nation living abroad.⁹¹ Štiks and Ragazzi warn about the radical side of these legislative solutions. According to them, these solutions were instruments for creating '*transnational nationalism*', i.e., the nationalism that had the Croatian ethnicity for its starting point for homogenization of national population. On the one side, it, in terms of Croatian citizenship, encouraged exclusion of the category of citizens whose ethnic affiliation is beyond the Croatian one and inclusion of ethnic Croats regardless of their residence, on the other.⁹² This kind of policy is about to be abandoned. In fact, the negotiations for Croatian accession to the European Union imply amendments of the Act in the context of Croatian adoption of the 1997 European Convention on Nationality which was signed by Croatia on 19 January 2005 but has never been ratified.⁹³

Consequently, the Act obviously proclaims two basic principles: the principle of the legal continuity of republic citizenship and the principle that every member of the Croatian nation (ethnic Croat) shall be considered a Croatian citizen. Such preferential treatment of members of the Croatian nation is not foreseen for other citizens of the former Yugoslavia, which has enticed serious political discussions on discrimination of ethnic minorities. The only way members of other

⁹¹ V. Đ. Degan, *Međunarodno pravo – Drugo osuvremenjeno izdanje* (Rijeka, Pravni fakultet Sveučilišta u Rijeci 2006) p. 499.; Iordachi, loc. cit. n. 45, at p. 121.

⁹² Štiks and Ragazzi, loc. cit. n. 90, at p. 339.

⁹³ After the European Convention on Nationality comes into force in Croatia, it will be much harder to members of the Croatian nation living abroad on a permanent basis to obtain Croatian citizenship if they do not meet the requirements on residing in Croatia. It is this condition that has prevented Croatian ratification of the Convention since there is a public opinion that such a breakthrough would disturb the bonds between Croatia and members of the Croatian nation living abroad, particularly in Bosnia and Herzegovina. Ibid., at p. 352.

nations could acquire Croatian citizenship was ordinary naturalization, fulfilling the conditions defined in Articles 8, 9, 10, 11 and 12 of the Act.⁹⁴ The criticism also referred to the fact that the legal prerequisites for acceptance into Croatian citizenship used to be, at their discretion, assessed by police departments and the Minister of Interior while the body in charge was not obliged to provide an explanation of the reasons for decline of an application for Croatian citizenship. The issue appeared before the Constitutional Court in 1993 when one applicant unsuccessfully insisted on amendments of Article 30 of the Act.⁹⁵

Beside the above naturalization, Croatian citizenship can also be obtained in the following three ways: by origin, i.e., having an ancestor with Croatian citizenship (*ius sanguinis*), by birth on the Croatian territory (*ius soli*) and citizenship acquired based on international treaties. Regarding the four ways of obtaining Croatian citizenship, there is a certain hierarchy which prefers the principle of *ius sanguinis* to the other three. With respect to this analysis of dual citizenship, acquisition of citizenship by naturalization and that based on international treaties are worth further discussion.⁹⁶ Throughout history, the latter has been a

⁹⁴ UNHCR – Regional Bureau for Europe, ‘Citizenship and the Prevention of Statelessness Linked to the Disintegration of the Socialist Federal Republic of Yugoslavia’, 3 *European Series* (1997) pp. 14-15.

⁹⁵ The Constitutional Court in its ruling of 24 May 1993 declared the provision of Art. 30 para. 2 of the Act being fully in accordance with the Constitution of the Republic of Croatia since the referring constitutional provisions did not imply that, on the occasion of obtaining Croatian citizenship, foreign members of the Croatian nation and foreign members of other nations and minorities should be treated equally. Rješenje Ustavnog suda Republike Hrvatske broj: U-I-147/1992, U-I-206/1992, U-I-209/1992, U-I-148/1992, U-I-207/1992 i U-I-222/1992. od 24. svibnja 1993, Narodne novine br. 49/1993. According to data of the Ministry of Interior, a total of 412,137 applications for Croatian citizenship pursuant to Art. 30 para 2 of the Act were submitted in the period from 8 October 1991 to 30 June 1995 while, in the period from 8 October 1991 to 31 December 1991, a total of 557,379 applications were submitted pursuant to Art. 30 para 1 of the Act. Loc. cit. n. 94, at p. 16.

⁹⁶ Art. 140 of the Constitution of the Republic of Croatia emphasizes that ‘[i]nternational agreements concluded and ratified in accordance with the Constitution and made public, and which are in force, shall be part of the internal legal order of the Republic of Croatia and shall be above law in terms of legal effects. Their provisions may be changed or repealed only under conditions and in the way specified in them or in accordance with the general rules of international law’.

particular *modus vivendi* in cases of disappearance and emergence of new States.⁹⁷ The succession of the former Yugoslavia is one of the most obvious examples thereof, on the occasion of which dual citizenship of people of certain categories in a hostile and post-conflict environment turned out to be a solution for other problems.⁹⁸ Croatia established, shortly after becoming independent, the first treaty of the kind with neighbouring Bosnia and Herzegovina. This treaty was signed on 21 July 1992 and is called the Treaty on Friendship and Cooperation between the Republic of Croatia and the Republic of Bosnia and Herzegovina. Article 7 of the Treaty stipulates that

‘the Republic of Bosnia and Herzegovina and the Republic of Croatia shall mutually facilitate acquisition of dual citizenship on behalf of their citizens’.⁹⁹

This represented a legal foundation for conclusion of a new bilateral treaty on dual citizenship and a thorough regulation of the matter pursuant to international conventional law. Still, the respective process was long-lasting as the corresponding act was adopted fifteen years later.¹⁰⁰

b) Consequences of the fall of the former Yugoslavia in terms of the principle of the legal continuity of Republic Citizenship

The phenomenon of dual citizenship was a legally recognized institute within the legislative framework of the former Yugoslavia. The Socialist Federal Republic of Yugoslavia was a federal State which, pursuant to the 1976 Citizenship Act, involved both federal and republic citizenship.¹⁰¹ Citizens of the former Yugoslavia had *de iure* dual citizenship but *de facto* only the federal one since republic citizenship was only a formality without a legal effect in the international community because the republics were not seen as subjects of

⁹⁷ J. Dropulić, *Statusna prava građana* (Zagreb, Vizura 2003) pp. 25-26.

⁹⁸ See Degan, op. cit. n. 91, at p. 500.

⁹⁹ J. Andrassy, et al., *Međunarodno pravo I* (Zagreb, Školska knjiga 1998) p. 286.

¹⁰⁰ Croatia signed a similar Treaty on Friendship and Cooperation with the Former Yugoslav Republic of Macedonia on 6 July 1994, but it does not include provisions on multiple nationality. Ugovor o prijateljskim odnosima i suradnji između Republike Hrvatske i Republike Makedonije, Narodne novine – Međunarodni ugovori, br. 8/1994

¹⁰¹ Zakon o državljanstvu SFRJ, Službeni list SFRJ, br. 58/1976

international law.¹⁰² The fall of the former Yugoslavia influenced the former member States in a way that each of them provided their citizens, previous holders of republic citizenship, with the new, internationally relevant citizenship. People who opted for citizenship of another member state could obtain it based on the naturalization procedure and pursuant to its citizenship act.¹⁰³

In compliance with the legal continuity of citizenship,¹⁰⁴ all the people who had acquired Croatian citizenship by 8 October 1991 were able to keep it without fulfilling any conditions.¹⁰⁵ Shortly after Croatia gained independence, the issue of the right to dual citizenship became topical among the population of ethnic enclaves, especially due to differences between the Croatian and Yugoslav Citizenship Acts.¹⁰⁶ The former republics, now independent States, are perfect examples of how laws and regulations can be based on different principles of acquisition and termination of citizenship, which, consequently, may lead to statelessness and dual (multiple) citizenship. The latter cases might be unpleasant for some (due to double taxation, conscription and the like),

¹⁰² D. Medvedović, 'Federal and Republican Citizenship in the Former SFR Yugoslavia at the Time of Its Dissolution', in M. Dika, et al., eds., *Croatian Critical Law Review* (Zagreb, Croatian Law Centre 1998) p. 39-55.

¹⁰³ See Degan, op. cit. n. 91, at p. 258; Dropulić, op. cit. n. 97, at pp. 14-17., 24., 75.

¹⁰⁴ J. Omejec, 'Initial Citizenry of the Republic of Croatia at the Time of the Dissolution of Legal Ties with the SFRY, and Acquisition and Termination of Croatian Citizenship', in M. Dika, et al., eds., *Croatian Critical Law Review* (Zagreb, Croatian Law Centre 1998) pp. 102-107.

¹⁰⁵ All the others became foreigners, no matter how long they had lived in Croatia before. Štiks and Ragazzi, loc. cit. n. 90, at p. 339.

¹⁰⁶ In that sense one can perceive an appeal of the leadership of the Serbian ethnic minority in Eastern Slavonia directed to the Yugoslav authorities to amend the legal regulations on dual citizenship and enable its acquisition in compliance with the Croatian provisions. Croatian Serbs found the amendments useful to enable the return of part of the Serbian population who left Croatia during the war since they did not want to become Croatian citizens. According to many, such circumstances lead to denaturalization of 85% of the Serbian population in Croatia. The democratic changes at the beginning of the year 2000 also gave rise to a breakthrough in the Croatian policy towards the Serbian refugees and today the Serbs easily present evidences on Croatian citizenship. The Croatian wish to join the European Union has significantly influenced the return of Serbian refugees since restitution and reparation of their material goods are one of the important political conditions for accession in the European Union. Cf., Iordachi, loc. cit. n. 45, at pp. 120., 122.; Štiks and Ragazzi, loc. cit. n. 90, at p. 347.

but may also cause conflicts between States (with respect to military service, diplomatic and consular protection, the duty of acceptance of repatriation and extradition of perpetrators of criminal acts etc.).¹⁰⁷

However, the prevailing public opinion reflects in the fact that inclination to dual citizenship in cases of succession of States may favour ethnic minorities. This fact was taken into consideration by the European Community when it, within the framework of the 1991 International Conference on the Former Yugoslavia, proposed that the right to dual citizenship should be granted to members of national or ethnic groups (minorities) who resided in the areas with special status where they were the majority population. This right was not incorporated in the final draft of provisions on special status but it was later regulated by special bilateral treaties between particular States such as the 1992 Treaty on Friendship and Cooperation between the Republic of Croatia and the Republic of Bosnia and Herzegovina.¹⁰⁸ Generally speaking, the issue of citizenship in terms of succession of States is usually regulated by international treaties (e.g., peace treaties) and constitutional or other legal acts of a new State.¹⁰⁹

3. Legal regulation of dual citizenship within the scope of relations between Croatia and Bosnia and Herzegovina

a) Dual Citizenship Treaty between the Republic of Croatia and Bosnia and Herzegovina (2007)

Members of the Croatian minority in Bosnia and Herzegovina constitute about 17.4% of the total population of the State.¹¹⁰ Although the

¹⁰⁷ M. Petrović, 'Dvojno državljanstvo – prednost ili problem?', in G. Knežević, et al., eds., *Državljanstvo i međunarodno privatno pravo* (Beograd, Centar za publikacije Pravnog fakulteta Univerziteta u Beogradu 2007) pp. 94-96.

¹⁰⁸ Andrassy, et al., op. cit. n. 99, at pp. 285-286.

¹⁰⁹ T. Džunov, 'Succession of States in Respect of Citizenship: The Case of the Former SFRY', in M. Mrak, ed., *Succession of States* (The Hague, Kluwer Law International 1999) p. 146; P. Malanczuk, *Akehurst's Modern Introduction to International Law, Seventh Revised Edition* (London, Routledge 1997) p. 169.

¹¹⁰ This refers to a datum from the 1991 census of Bosnia and Herzegovina because the latest census of 2001 did not provide data on ethnic or national affiliation of the population, so new statistic annuals of Bosnia and Herzegovina still include the data from the 1991 census. In any case, the above percentage should be viewed carefully since the armed conflict in the first half of the 1990s changed the ethnic structure of the population of Bosnia and Herzegovina to a great extent. See Second Report

Croatian ethnic group has been granted the status of a constitutive nation,¹¹¹ its members are seen as potential Croatian citizens in diaspora.¹¹² The Constitution of the Republic of Croatia did not explicitly include the Bosniaks into the list of ten minority groups with the status of autochthonous national minority,¹¹³ even though the Bosniaks made 0.47% of the Croatian population according to the latest official census from 2001.¹¹⁴

After the government of Bosnia and Herzegovina gave an incentive for legal regulation of bilateral relations regarding dual citizenship in 1999 and sent the Croatian government a corresponding draft agreement, the government of the Republic of Croatia gave necessary consent for the initiated regulation at the session of 21 November 2002 and at the same time made a decision on initiating procedure for conclusion of a treaty on dual citizenship which was to be signed by the Republic of Croatia and Bosnia and Herzegovina. The Treaty was initiated on 4 August 2005 and signed on 29 March 2007.

The background of the Treaty conclusion involved numerous cases of Bosnian citizens of Croatian origin who had already obtained Croatian citizenship pursuant to Article 16 of the Croatian Citizenship Act, i.e., by naturalization of members of the Croatian nation. Besides, one had to

Submitted by Bosnia and Herzegovina Pursuant to Art. 25, Paragraph 1 of the Framework Convention for the Protection of National Minorities, ACFC/SR/II(2007)005, 2 August 2007 p. 9.

¹¹¹ Ljudska prava u Bosni i Hercegovini 2008 (Sarajevo, Centar za ljudska prava Univerziteta u Sarajevu 2009) pp. 411-412, 414-416.

¹¹² Štiks and Ragazzi, loc. cit. n. 90, at p. 345.

¹¹³ Soon one can expect amendments of the Croatian Constitution with respect to the list of ethnic minorities. The Committee for the Constitution, Standing Orders and Political System proposed, in its draft of amendments of the Constitution of 15 June 2010, modification of the Historical Foundations as the list of national minorities (without the label 'autochthonous') should be extended to 22 national minorities, i.e., all the minorities that were registered in the official censuses. Constitutional amendments are part of the Croatian preparations for admission to the EU and include harmonization of its legal, economic and administrative system with *acquis communautaire* of the EU. Prijedlog Odluke o pristupanju promjeni Ustava Republike Hrvatske s Prijedlogom nacrtu promjene Ustava Republike Hrvatske, available at: <www.vlada.hr/hr/content/download/104744/1493080/file/15-01.pdf>, Prijedlog promjene Ustava Republike Hrvatske, available at: <<http://www.cpi.hr/download/links/hr/13388.pdf>>.

¹¹⁴ Statistički ljetopis 2009 (Zagreb, Republika Hrvatska – Državni zavod za statistiku 2007) p. 89.

take account of the provision of the Bosnian Constitution which determines that Bosnian citizens will have to make a decision on choosing between Bosnian citizenship and citizenship of another country by 2012, unless they will opt for citizenship of a country that has signed a treaty on dual citizenship with Bosnia and Herzegovina.¹¹⁵ The Treaty was aimed at permitting parallel possession of Croatian and Bosnian citizenship acquired pursuant to the terms and conditions defined by the respective legislation of each of the parties in the Treaty. Furthermore, the Treaty specified

‘the ways of resolution of conflict and duality of rights and liabilities, e.g., conscription, exercising the active and passive right to vote, assuring diplomatic and consular protection, repatriation and similar, taking account of firm factual links which refer to the applicable law and fulfilling state liabilities’.¹¹⁶

A dual citizen, being on the territory of the Republic of Croatia or of Bosnia and Herzegovina, is exclusively considered a citizen of the party on whose territory the person finds their place at that moment (Article 3), which is in compliance with application of customary international law in a way that each of the States that granted that person its citizenship may deem them as its citizens only.

Double liability to conscription is one of the inevitable repercussions implied by dual citizenship. Therefore, it is no wonder that both States paid special attention to this issue. The problem was solved in a way that every conscript shall complete military or other compulsory service in the State of their residence. One of the vital provisions is contained in Article 6 that grants the States a flexible discretionary right when deciding on the active and passive right of dual citizens to vote and stipulates that this right shall be regulated by the internal legislation of the parties. Dual citizenship also raises the issue of consular and diplomatic protection of dual citizens. The Treaty offers a solution by which a dual citizen in third countries is guaranteed diplomatic and consular protection by the party who has been invited to provide it (Article 7 paragraph 1). In case of repatriation from a third State, a dual citizen shall be repatriated to the State of their last residence, if not

¹¹⁵ Press Release, 45/06, Republic of Croatia – Ministry of Foreign Affairs and European Integration, available at: <http://www.mvpei.hr/custompages/static/hrv/templates/_firt_Priopcenja_en.asp?id=2292>.

¹¹⁶ <www.sabor.hr/fgs.axd?id=4764>

agreed otherwise by the parties pursuant to a request of the repatriated person (Article 8).

The Treaty was established for an indefinite period of time and the parties agreed that the Treaty should come into force on the date of reception of the last written notice, which is a diplomatic manner by which the parties inform each other about fulfillment of all the conditions foreseen by their internal legislations regarding entry into force (Article 11).¹¹⁷ The Treaty's subject matter, however, is extremely complex and involves a number of legal-political consequences. Therefore it is no surprise that the Treaty has not come into force yet. The next step depends on the will and efficiency of the Croatian and Bosnian leadership since pursuant to the Citizenship Agreement of Bosnia and Herzegovina, the deadline for concluding bilateral treaties with other States, including Croatia, on dual citizenship is 1 January 2013.¹¹⁸

b) Negative legal effects of dual citizenship in Croatia and Bosnia and Herzegovina

The negative side of dual citizenship of Croats in Bosnia and Herzegovina is particularly exposed at the time of parliamentary and presidential elections in Croatia because members of the Croatian nation living abroad are, according to the Constitution and law, granted the

¹¹⁷ Ugovor između Republike Hrvatske i Bosne i Hercegovine o dvojnomo državljanstvu, Narodne novine – Međunarodni ugovori, br. 9/2007

¹¹⁸ In February 2008, the Presidency of Bosnia and Herzegovina did not give consent for ratification due to a veto of the Bosniak member of the Presidency, H. Silajdžić who thought that treaties on dual citizenship include an ethnic and discriminating approach. He clarified his veto as insistence on equal treatment of all the Bosnian citizens living abroad, linking the final adoption of the document to amendments of the Bosnian Citizenship Act which, by Art. 17, stipulates that Bosnian citizenship shall be revoked to those people that opt for citizenship of another country, unless this has been regulated by a bilateral treaty on dual citizenship. The Croatian and Serbian members of the Presidency supported the Treaty since, in their opinion, amendments of Art. 17 should not be connected with the negotiations on dual citizenship but the Treaty should be amended in a due parliamentary procedure. 'Silajdžić stopirao ugovor o dvojnomo državljanstvu', available at: <<http://www.jutarnji.hr/silajdzic-stopirao-ugovor-o-dvojnomo-drzavljanstvu/242467/>>; 'Ugovor o dvojnomo državljanstvu vodi u diskriminaciju', available at: <<http://dnevnik.hr/vijesti/svijet/ugovor-o-dvojnomo-drzavljanstvu-vodi-u-diskriminaciju.html>>

right to vote.¹¹⁹ The Croatian Elections Act foresees a separate election unit for diaspora (Croatian citizens living outside the mother country) and a great majority of votes from that election unit refer to Bosnian Croats who mainly vote for nationally oriented parties (e.g., Croatian Democratic Union).¹²⁰ The seriousness of this issue is confirmed by the fact that the rights to vote and to dual citizenship in Croatia were recently discussed as part of the agenda within the European Parliament. In fact, the Resolution of 10 February 2010, wherein the European Parliament assessed the progress Croatia had achieved in 2009, calls for Croatian action in terms of questioning the policy of dual citizenship, particularly with respect to Croatian citizens with permanent residence in Bosnia and Herzegovina (item 37 of the Resolution).¹²¹ The voting system might have an effect on the results of the EU accession referendum in Croatia since there is a possibility that the votes of dual citizens decide whether Croatia will become a member of the EU or not. Dual citizenship also gave rise to arguments concerning the procedure of extradition of perpetrators of criminal acts. Almost 200 convicts, among whom there are war criminals too, are avoiding execution of the verdicts by fleeing from the State where the verdict was pronounced to the State which citizenship they also possess. The data do not refer only to the territory of Croatia and Bosnia and Herzegovina but also to Serbia; however, the manner of avoiding execution of verdicts due to dual citizenship is the same.

¹¹⁹ Art. 45 para 2 of the Constitution of the Republic of Croatia, Art. 8, 40, 41 and 42 of the Act on Election of Representatives to the Croatian Parliament and Art. 5 of the Act on Election of the President of the Republic of Croatia. *Zakon o izborima zastupnika u Hrvatski sabor*, Narodne novine, br. 116/1999, 109/2000, 53/2003, 69/2003 – pročišćeni tekst, 19/2007; *Zakon o izboru Predsjednika Republike Hrvatske*, Narodne novine, br. 22/92, 42/92, 71/97, 69/04, 99/04

¹²⁰ Štiks and Ragazzi, loc. cit. n. 90, at p. 353. According to the official results of the 2007 elections announced by the State Election Commission regarding election of representatives to the Croatian Parliament elected by Croatian citizens with residence outside Croatia, the 11th (special) election unit included as many as 404,950 registered voters which made almost 10% of the total Croatian population. *Izbor zastupnika u Hrvatski sabor koje biraju hrvatski državljani koji nemaju prebivalište u Republici Hrvatskoj u XI. izbornoj jedinici*, Narodne novine, br. 132/2007

¹²¹ European Parliament resolution of 10 February 2010 on the 2009 progress report on Croatia, available at: <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0023+0+DOC+XML+V0//EN>>.

Holders of dual citizenship are also protected by national regulations on the ban of extradition of own citizens. Croatia and Bosnia and Herzegovina signed, on 10 February 2010, an Agreement, the purpose of which was prevention of abuse of dual citizenship regarding procedures of extradition of convicts. The Agreement came into force immediately upon its signing. It is actually an amendment of earlier treaties signed by the two States in 1996 and 2004 which were aimed at regulating mutual execution of judgments considering criminal affairs¹²² as well as at enabling arrest, extradition and trial of people escaping to one of the States whose citizenship they possess. The Agreement has brought a new provision, according to which the convict's consent to serve the sentence in the State where they have escaped to will not be needed any more. The conclusion of the Agreement had mostly resulted from pressure by the EU toward potential candidate countries that intend to become members of the EU but at the same time allow such an abuse of their legal systems.¹²³

The correction of provisions on dual citizenship is based on one of the fundamental rules of international law in the sphere of citizenship specifying that the protection of own citizens in the international order by means of norms of national law must not exceed the limits set by international law because such practice would amount to violation of liabilities of international law by a State and to commitment of an international delict.¹²⁴

4. The issue of dual citizenship within the scope of relations between Croatia and Montenegro

Croatia has also entered negotiations on dual citizenship with Montenegro where the latest census of 2003 showed that the Croatian minority constituted 1.2% of the total population.¹²⁵ Referring to the Montenegrin population in Croatia, the 2001 census disclosed the data,

¹²² <<http://www.mvpei.hr/MVP.asp?pcpid=1169>>

¹²³ <<http://eudo-citizenship.eu/citizenship-news/232-croatia-and-bosnia-herzegovina-sign-agreement-to-prevent-abuse-of-dual-citizenship->>>

¹²⁴ Dropulić, op. cit. n. 97, at pp. 21-22.

¹²⁵ Crna Gora – Popis stanovništva, domaćinstava i stanova u 2003, Stanovništvo – nacionalna ili etnička pripadnost, Podaci po naseljima i opštinama, Republika Crna Gora (Podgorica, Zavod za statistiku 2004) pp. 12-13.

according to which Montenegrins made 0.11% of the total population of Croatia.¹²⁶

In September 2008 Croatia and Montenegro established a starting point for negotiations on dual citizenship, which was initiated by Croatia by sending the Montenegrin government a draft agreement on citizenship.¹²⁷ The possibility of any kind of further agreement is to be seen in the light of announced amendments of Montenegrin legislation. Hence, Montenegro signed the European Convention on Nationality on 5 May 2010 but made reservation to Article 16 of the Convention concerning protection of the former citizenship in a way that a person has the right to obtain or keep the citizenship of one State although he/she already possesses the citizenship of the other one. The reservation corresponds to the previous Montenegrin Citizenship Act which forbade dual citizenship. It should be emphasized that, parallel to the signing of the Convention, the Montenegrin government proposed amendments to their Citizenship Act, so, at this moment, it is not possible to predict how the regulation of dual citizenship between Croatia and Montenegro will end.¹²⁸

The protection of minority rights in these two States is based on a thoroughly elaborated Agreement on Protection of the Croatian Minority in Montenegro and on Protection of the Montenegrin Minority in Croatia signed between the two countries on 14 January 2009.¹²⁹ The Agreement was intended to assure the highest level of legal protection of ethnic minorities as well as preservation and development of their national identities pursuant to international treaties and other documents on human rights, fundamental freedoms and minority protection. A long list of rights therein reflects the intention of States to grant and provide the respective minorities with those rights that will contribute to expression, preservation and development of their national, cultural, linguistic and religious identity. The above Agreement was preceded by a similar Agreement signed by the State Union of Serbia and Montenegro and Croatia on 15 November 2004,¹³⁰ having contained

¹²⁶ *Op. cit.* n. 114, at p. 89.

¹²⁷ <<http://www.javno.hr/hr/hrvatska/clanak.php?id=182985>>

¹²⁸ <<http://eudo-citizenship.eu/citizenship-news/311-montenegro-signs-the-european-convention-on-nationality-but-rejects-dual-citizenship>>

¹²⁹ Narodne novine – Međunarodni ugovori, br. 9/2009

¹³⁰ *Ibid.*

provisions which ceased being valid in relation to Montenegro after this country gained independence in 2006.

5. Latest tendencies in the perception of dual citizenship of ethnic minorities in the Republic of Croatia

The political changes and strengthening of democracy at the beginning of the year 2000 indicated a new phase of perception of dual citizenship in Croatia. The efforts to reach the standards of the EU and to obtain its full membership have encouraged flexible implementation of the Croatian Citizenship Act and thus stimulated a higher level of tolerance and inclusion of ethnic minorities as well as profound sensibility towards political aspirations of ethnic minorities, although the Act has remained unchanged.¹³¹

Despite significant steps forward in the context of perception of dual citizenship and protection of ethnic minorities, some leading politicians still share a different opinion on the matter. Croatia keeps on insisting on maintaining close bonds with its diaspora (particularly with Bosnia and Herzegovina), repercussions of which are clearly seen when applying its electoral system. Nevertheless, Croatian preparation toward the EU has changed the previous perception of the Croatian ethnic diaspora in a way that these relations no longer awake only political connotations but the bonds therewith include educational, cultural and social cooperation.¹³² The EU should undoubtedly take enormous credit for generating these changes. Its interest for the issue of dual citizenship in Croatia results from the Croatian will to join the EU because the Croatian admittance will automatically mean an increase in the number of EU citizens living beyond its borders (500,000 new citizens). According to Štiks and Ragazzi, Croatia confirms the thesis that it is possible to integrate a State into a supranational organization, democratize political life and facilitate social inclusion of ethnic

¹³¹ Štiks and Ragazzi, loc. cit. n. 90, at p. 339.

¹³² Attention should be paid to a 2006 Italian Act enabling acquisition of Italian citizenship to ancestors of the Italian ethnic minority in Slovenia and Croatia populated in the areas taken from Italy in the interwar period and during World War II. The adoption of this Act caused a fierce reaction of the Croatian public, so a part of Croatian politicians accused their Italian colleagues of creating citizens with 'double loyalty', forgetting that the acceptance of the Croatian ethnic group in Bosnia and Herzegovina into Croatian citizenship has got all the features of double loyalty. *Ibid.*, at pp. 352-353.

minorities while simultaneously preserving transnational ethnic communities by application of ethnocentric acts on citizenship.¹³³

The specific Croatian position as one of the successors of a federal State justifies the existence of dual citizenship with respect to other successor States since, according to Čok

‘citizenship should be used as an instrument of protection of obtained human rights as well as for solution of vital problems of the so-called foreigners on the territory of the former State’.¹³⁴

Moreover, it is, under these circumstances, an important instrument of protection of identity of ethnic minorities if applied in a way that it does not contradict other provisions of national and international legal order.

With respect to the contemporary international community, the phenomenon of multiple nationality represents a challenge to classical forms of perception of the legal bond between an individual and the state. The examples of the Republic of Hungary and the Republic of Croatia confirm the thesis that the issue of multiple nationality is one of the most controversial and most complicated issues of international law. Multiple nationality itself can have positive repercussions for the preservation of features of the identity of ethnic minorities, but only under the condition that this right is not abused, e. g., by people convicted for committing various crimes (this particularly refers to war crimes committed on the territory of the former Yugoslavia). The purpose of dual citizenship should be establishment of cultural, educational and economic bonds between members of ethnic minorities and their kin-States, the bonds that supersede the level of protection of ethnic minorities assured by conventional forms of ethnic minority and human rights protection of international law.

¹³³ Ibid., at p. 355.

¹³⁴ V. Čok, *Pravo na državljanstvo* (Beograd, Beogradski centar za ljudska prava 1999) p. 104.

Erika Kovács*
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Croatian concerns and Hungarian experience regarding free movement of workers

I. Introductory remarks – the significance and scope of free movement of workers

Free movement of workers is one of the four fundamental economic freedoms of the common European market and a part of a broader context of free movement of persons. Ever since the foundation of the European Community, its genesis and the overall development into a supranational formation *par excellence*, the free movement of workers and its scope have intrigued professionals and have been subject of academic research. Historically, the free movement of workers had an economic character in the early beginnings of EU integration and it implied the right of entry and residence of economically active citizens of EU Member States *in favorem* mobilisation of human resources as a productivity factor and a method for improving professional activities.¹ The phrase ‘economically active citizens’ referred to workers only, excluding thereby their family members, so that gradual integration, owing to the decisions made by the European Court of Justice and secondary legislation, have created significant new improvements taking into account *inter alia* the right to respect for family life.²

The legal foundation of the free movement lies in Article 14 of the EC Treaty, which creates the internal market without barriers, including free movement of persons, as well as Articles 18 and 39 EC (now 45 TFEU), which ensure the right of free movement and residence for workers within the territory of Member States with no discrimination whatsoever

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¹ See also C. Barnard, *EC Employment Law* (Oxford, Oxford University Press 2000) p. 112.

² About history of the free movement of persons see also E. Baldoni, *The Free Movement of Persons in the European Union: A Legal-historical Overview*, PIONEUR Working Paper No. 2 – July 2003., available at: <www.obets.ua.es/pioneer/bajaarchivo_public.php?iden=40>, (last accessed on 05.06.2010).

based on nationality, with respect to employment, remuneration, and other conditions as regards work and employment.³ Free movement of workers basically encompasses the following rights: the right to accept offers of employment actually made and to move freely within the territory of Member States for this purpose, hence the right to stay in a Member State for the purpose of finding employment and working, the right to remain in the territory of a Member State after having been employed in that State, and under certain conditions even after termination of employment. However, the aforementioned rights do not apply to employment in the public service,⁴ under the condition that employment in the public service is more strictly interpreted⁵ and that it does not constitute restriction on free movement of workers based on the provided exemption from application. In other words, the exemption concerned requires a restrictive interpretation and, taking into consideration standard practice of the European Court of Justice until now, case-based treatment, i.e. by applying a ‘functional’ criterion in the assessment of every single employment in the public service.⁶ Although the free movement of workers also includes the right to establishment for the purpose of self-employment, precisely in Article 43 EC, as well as provision of services provided for in Article 49 EC, due to the complexity and numerous standpoints as regards the issue of free movement, this paper primarily focuses on a worker defined as a person who ‘for a certain period of time [...] performs services for and under the direction of another person [...] for which he receives remuneration’⁷. Or more precisely, a person who is placed in a subordinate position typical of economically dependent employment that is ‘genuine and effective’.⁸ In many cases, case law of the European Court of Justice has confirmed

³ See Arts 14, 18 and 39(1) and (2) of the Consolidated version of the Treaty Establishing the European Community, *OJ C 321 E/37-331*, 29.12. 2006. See also Arts 21, 26 and 45 of the Consolidated version of the Treaty on the Functioning of the European Union, *OJ C 83/47-199*

⁴ *Ibid.*, Art. 39(3) and (4) of the EC Treaty

⁵ Case 152/73 *Giovanni Maria Sotgiu v. Deutsche Bundespost*, [1979] *ECR* 153, para 4

⁶ See Barnard, *op. cit.* n. 1, at pp. 190-191.

⁷ Case 66/85 *Deborah Lawrie-Blum v. Land Baden-Württemberg*, [1986] *ECR* 2121, para 16 and 17

⁸ Case 53/81 *D. M. Levin v. Staatssecretaris van Justitie*, [1982] *ECR* 1035

direct effect of Articles 39, 43 and 49 of the EC Treaty,⁹ although direct effect of Article 39 does not limit authorities of a Member State to introduce restrictions on the free movement for persons under its jurisdiction based upon the principle of subsidiarity and taking into account specific characteristics and implementation of the national system of criminal law.¹⁰ Vertical and horizontal direct effect of Article 39 EC, as suggested by Barnard after a thorough analysis of Court casuistics,¹¹ offer individuals an authority to seek protection with respect to both a Member State and other private parties. This possibility reflects to a great extent a tendency of a genuine insurance for content-based and functional sense of free movement of workers as a fundamental right of any EU citizen and one of the basic functioning tenets of a complex mechanism of a common European market with no internal barriers.

At the level of secondary legislation, free movement of workers is regulated by provisions of Directive 68/360,¹² Regulation 1612/68¹³ with Annexes on the transitional measures of the Act concerning the conditions of accession of new Member States from 2004¹⁴ and 2007¹⁵ as well as by amendments to the respective Regulation, contained in provisions of Directive 2004/38/EEC of the European Parliament and Council,¹⁶ and, finally, by provisions of the original Regulation

⁹ See Case 167/73 *Commission v. France*, [1974] ECR 359; Case 13/76 *Dona v. Mantero*, [1976] ECR 1333; Case 36/74 *B. N. O. Walrave and I. J. N. Koch v. Association Union Cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*, [1974] ECR 1405.

¹⁰ See Case 13/76 *Dona v. Mantero*, [1976] ECR 1333.

¹¹ Barnard, *op. cit.* n. 1, at pp. 118-120.

¹² Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, *OJ L 257*, 19.10.1968

¹³ Council Regulation 1612/68/EEC of 15 October 1968 on the free movement of workers within the Community, *OJ L 257*, 19.10.1968

¹⁴ Annex on the transitional measures of the Act concerning the conditions of accession of the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, *OJ L 236*, 23.9.2003

¹⁵ Annex on the transitional measures of the Act concerning the conditions of accession of the Republic of Bulgaria and Romania, *OJ L 157*, 21.6.2005

¹⁶ Council and Parliament Directive 2004/38/EC on the right of the citizens of the Union and their family member to move and reside freely within the territory of the Member States, *OJ L 158*, 30.4.2004; Corrigendum to Directive 2004/38/EC, *OJ L 229*, 29.6.2004

1251/70;¹⁷ and after 2006, when it was repealed and changed, by provisions of Regulation 635/2006.¹⁸

The number of amendments to secondary legislation in the field of free movement of workers is a consequence of transition from a historically primarily economic dimension into a fundamental right of EU citizens, workers and members of their families. In order to mitigate and boost the freedom of movement, the European Court of Justice tried to extend the term ‘worker’ on many occasions,¹⁹ However, despite numerous cases and a rather ‘flexible’ interpretation, it has always taken into account in the approach to the given term a clear difference between ‘economic value’ and ‘economic nature’ of the work done.²⁰ Free movement of workers is therefore not only a fundamental freedom of the common market and a mere collection of rights and their possible restrictions, since it expands over the framework of legal definitions and institutes. It basically represents experience segments following everyday life of workers and families who move, work and live in the territory of Member States. Moreover, the efficiency of the EU citizenship and the idea of a ‘Europe without borders’ is proved by the level and success of measures taken by national entities for the purpose of alleviating handicaps of free movement and facilitate everyday problem solving as regards to education, recognition of foreign qualifications and application of social security instruments for workers and families exercising the given right. At the same time, it has achieved encouraging effects *in favorem* of the European and national labour markets by its complex mechanism of legal rules, existing practice and explicit and implicit consequences for citizens and communities of Member States.

Croatia and Hungary share a centuries-long history and cohabitation within a former state that ceased to exist in 1918. A long transnational border and members of both nations recognised as national minorities

¹⁷ Commission Regulation 1251/70/EEC on the right of the workers to remain in the territory of a Member State after having been employed in that State, *OJ L* 142, 30.6.1970

¹⁸ Commission Regulation 635/2006/EC repealing Regulation 1251/70/EEC on the right of the workers to remain in the territory of a Member State after having been employed in that State, *OJ L* 112, 26.4.2006

¹⁹ See Case 196/87 *Steymann v. Staatssecretaris van Justitie* [1988] *ECR* 6159.

²⁰ Cf. J. Shaw, et al., *Economic and Social Law of the European Union* (London, Palgrave Macmillan 2007) p. 285.

living in both countries are factors for empowering economic, political and cultural cooperation important for prosperity of their respective national markets. The prospective full membership of Croatia in the EU generates concern with respect to free movement of workers and the functioning of the national labour market. In contrast to that, the experience and practice of Hungary, a country that shared similar political and economic transition difficulties in the recent past, can give answers to open questions and offer possible modes of problem solving.

II. Freedom of movement of workers and Croatia

Freedom of movement of workers in the context of Croatian membership in the EU can be considered in two phases. The first phase, i.e., the current one, has started with the application of the Stabilisation and Association Agreement between the Republic of Croatia and the European Communities (SAA),²¹ and according to its nature, is a rather 'static period' with only a few specific characteristics. The next, second phase, will commence when Croatia becomes a full member of the EU. This latter phase is intriguing not only from the scholar point of view, but it will also cause certain repercussions to the European, and especially, we believe, to the national labour market. Moreover, its implications will considerably mark not only lives of the Croatian labour force contingent that they will exercise the free movement rights of workers, but the Croatian labour market will also be affected as a consequence of worker migrations of EU citizens from other Member States.

1. Free movement of workers under the Stabilisation and Association Agreement

The Stabilisation and Association Agreement (SAA) was initiated on 14 May 2001 in Brussels as the first important step towards mutual institutionalisation of relations between the Republic of Croatia and the European Union, and was signed in Luxembourg on 29 October 2001. Although negotiations on signing the agreement started as early as the Zagreb Summit, in November 2000, certain political circumstances in Croatia, especially relations with the International *ad hoc* Criminal

²¹ Stabilization and Association Agreement between European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part, *OJ L* 26, 28.1.2005.

Tribunal for the former Yugoslavia located in The Hague, and reticence of Member States to the aforementioned events prolonged the ratification process of the agreement. Finally, when obstacles were removed and procedures were carried out by the Croatian authorities that made Member States regain trust, the SAA entered into force on 1 February 2005 once the ratification process was completed in national parliaments.

Croatian citizens, citizens of other countries that Stabilisation and Association Agreements apply to, and those that the former European Agreements (EA) applied to, are not covered by a content-based and institutional framework of rights and commitments unified under a common denominator of 'EU citizenship'. Their right to the free movement within the boundaries of the Union thus clearly differs from the right to the freedom exercised by EU citizens.²² After a systematic analysis of the rights of economic migrants in the process of accession, Goldner Lang stresses that rights of economic migrants, citizens of the state in the process of accession, are, as a rule, very limited and equivalent to the rights of third-country citizens, but after signing the SAA/EA, in spite of earlier restrictions, they are partly extended by provisions of the corresponding SAA/EA.²³ More precisely, this would mean that SAA/EA citizens, legally employed within the territory of the EU, fall under the regime of prohibition of discrimination with respect to working conditions, remuneration, and work dismissal, provisions concerning coordination of social security systems apply to them and their family members, and the latter category also enjoys protection reserved for family members.²⁴ As to self-employment, the task of the Stabilisation and Association Council is *inter alia* to explore possibilities of mutual recognition of qualifications.²⁵ Beyond the given rights, workers of the signatory state of a SAA/EA are not entitled to the right of the free movement unless they have been previously legally employed in one of the Member States. However, their rights will be exercised only exceptionally through provisions on establishment and the possibility of the limited right to enter the territory of Member States

²² Cf. I. Goldner Lang, *Sloboda kretanja ljudi u EU: Kontekst Sporazuma o pridruživanju* [Free Movement of Persons in the EU: Context of Association Agreements] (Zagreb, Školska knjiga 2007) p. 13.

²³ *Ibid.*, at p. 14.

²⁴ *Ibid.*, at p. 49.

²⁵ *Ibid.*, at p. 51.

if the persons in question are employed as managers in companies from signatory states of the SAA/EA.²⁶ Another conditional exception with considerably limited scope, refers to bilateral agreements possibly signed earlier between Member States and the SAA/EA states on the access to employment. Following bilateral agreements, Member States have a possibility to autonomously enable access to the labour market for SAA/EA citizens within their respective territory. However, the aforementioned bilateral agreements enable them at the same time to maintain the *status quo*.²⁷

Summary representation of a far more extensive research conducted by Goldner Lang indicates very limited possibilities of the freedom of movement of workers from the SAA/EA states within the territory of the European Union, that are entirely exhausted in the rights of SAA/EA citizens legally employed earlier within the territory of the Member States as well as possibilities that may possibly be offered to workers of the states in question by bilateral agreements with Member States. In contrast to that, full membership in the European Union raises numerous questions in terms of the free movement of Croatian workers, but also of other EU citizens that would potentially penetrate the Croatian labour market.

2. Free movement of workers after Croatia's full EU membership

At the moment, the Republic of Croatia has temporarily closed 22 out of 33 negotiation chapters that constitute the process for determining harmonisation with the *acquis communautaire*.²⁸ Consequently, its full EU membership may be expected to take place within the year 2012 or 2013. Accession will primarily depend not only on Croatia's readiness and capacities to meet the criteria regards all other remaining negotiation chapters, but also on how fast ratification of the Accession Treaty is concluded in the parliaments of all 27 Member States. Full EU membership will clearly render Croatian citizens eligible of free movement of workers' rights, but also differentiate between EU Member States applying, on the one hand, transitional periods with

²⁶ *Ibid.*, at p. 58.

²⁷ *Ibid.*, at pp. 59-60.

²⁸ See

<<http://www.eu-pregovori.hr/default.asp?ru=587&gl=201007270000001&sid=&jezik=1>>, (last accessed on 17.07.2010).

restrictions and those, on the other hand, that will open up their labour markets. Experience gained through the latest enlargements of 2004 and 2007 suggest clearly that only Ireland, Sweden and Great Britain opened up their labour markets entirely and immediately to citizens of new Member States, whereas all other old Member States used various possibilities of transitional periods pursuant to models (2+3+2 years). In favour of the new Member States was only a Standstill clause, pursuant to the Accession Treaty of 16 April 2003, which made it impossible for the old Member States to introduce a more restrictive approach to labour markets for citizens of new Member States than the each of them pointed out on the day of the signing the Treaty, as well the possibility of introducing reciprocal measures, i.e. restrictions vis-à-vis old Member States.²⁹

Taking into account the aforementioned and the relevant provisions of primary legislation, the issue of the free movement of workers and its restrictions are only superficially simple. Provisions of Article 39(3) of the EC Treaty (now 45(3) TFEU) allow derogation of the rules governing the freedom of movement of workers only on the basis of protection of public policy, public security and public health, and under the condition of their strict interpretation. In contrast to that, the practice of an extensive enlargement process proves that transitional periods are used to circumvent skillfully the given primary legislation provisions *in favorem* of the protection of labour markets in old Member States. Fear of the great wave of enlargement and potential migrations based on free movement of persons that could significantly affect labour markets of old Member States have resulted in the introduction of transitional periods as a politically and legally *prima facie* correct mode of restricting provisions of the EU primary legislation. Transitional periods basically goes against the EU policy of encouraging of internal migration of workers providing workers of new Member States a specific status of EU citizens – formally confirmed by definition, but with a considerably limited range of granted rights.³⁰ Moreover, they

²⁹ Cf. R. Blanpain, *European Labour Law* (Austin, Kluwer Law International 2008) p. 273.

³⁰ S. Currie, *Migration, Work and Citizenship in the Enlarged European Union* (Surrey, Ashgate 2008) pp. 2-3.

make a clear difference between ‘first- and second-class citizens’³¹. In the 2004 enlargement, Cyprus and Malta were the only countries exempted from transitional periods due to a small number of inhabitants, specific characteristics of their geographic position, demographic structure and the fact that they *summa summarum* did not represent any danger to labour markets of old Member States.³² Future enlargements should therefore be considered on the basis of previous experience.

Croatia will become a Member State in specific conditions which are considerably different from the great waves of 2004 and 2007. The country is characterised by a relatively small number of population of only 4.5 million and that factor that it will acquire full membership as the only subject of enlargement.³³ Although the given circumstances might benefit Croatia and could be used as argument for precise and shortest possible transitional periods, it is at the same time a country closing negotiations at a moment when Europe is severely shaken by consequences of the great economic crisis, a wave of unemployment and scepticism concerning a further enlargement by some Member States. In addition to that, Croatia has a centuries-long migration genesis as a consequence of economic conditions and political developments. The period after World War II was particularly migration-encouraging with conditions of the communist repressive apparatus and dictated economic development, and problems of the war and war-affected 1990s caused great waves of migration of Croatian population throughout Europe. The greatest number of refugees and displaced persons returned to the country immediately after the end of aggression, but it is still significant that in the period from 2000 to 2007 about 300,000 Croatian citizens, i.e. about 7% of the Croatian population, lived in EU-15.³⁴ Undoubtedly,

³¹ I. Goldner Lang, ‘Transitional Arrangements in the Enlarged European Union: How Free is the Free Movement of Workers?’, 3 *Croatian Yearbook of European Law & Policy* (2007) pp. 241-271.

³² About transitional arrangements see <<http://euractiv.com/en/socialeurope/free-movement-labour-eu-27/article-129648>>, (last accessed on 17.07.2010).

³³ Cf. I. Vukorepa, ‘Croatia on the Way to EU: Labour Law and Free Movement of Workers’, 13 *Transitional Studies Review* (2006) p. 74.

³⁴ H. Vidovic, *Country Study: Croatia, Labour mobility within the EU in the context of enlargement and the functioning of the transitional arrangements*, European Integration Consortium / The Vienna Institute for International Economic Studies, 2008, pp. 7-8. Available at: <http://doku.iab.de/grauepap/2009/LM_HR.pdf> (last accessed on 18.7.2010).

the 336,000 Croats from Bosnia and Herzegovina that have Croatian citizenship and are entitled to all rights equal to Croatian citizens who actually live in Croatia,³⁵ representing thereby a great share of population in terms of the freedom of movement, may be considered by the Union an additional burden. In addition to the aforementioned, the greatest cause for introducing transitional periods³⁶ is probably also conditioned by a high rate of registered unemployment, that exceeded 17.2% in May 2010,³⁷ i.e., in June 2010 there were almost 300,000 unemployed persons.³⁸ A completely new dimension is attributed by given data to transitional periods and their function for the protection of interests of Member States and restriction of access to their labour markets. From a EU point of view, Croatia is a country that should solve its own problems independently and prove at the same time that possesses institutional capacities and mechanisms required for meeting full membership standards. We primarily refer here to unsolved problems of Croatian shipyards, since at the moment of their restructuring and cancellation of direct government support, that have been mostly used for debt recovery and workers' salaries, the number of unemployed persons will rise significantly. In other words, absence of transitional periods would represent a favourable solution to Croatian internal conditions, since the free movement of workers with no restrictions would undoubtedly affect national statistical data in terms of the unemployment rate, and consequently the reduction of pressure placed on social security measures intended for unemployed persons. A

³⁵ *Ibid.*, at p. 5.

³⁶ According to an official statement issued by Ivana Vukorepa, Head of the Working Group for Preparation of Negotiations in Chapter 'Freedom of Movement of Workers' given to the authors of this paper, the chapter in question was temporarily closed on 2 October 2009. The followings reasons are mentioned as reasons for introduction of transitional periods pursuant to models 2+3+2: 'correctness towards new Member States covered by previous enlargements (in 2004 and 2007) and the need for conducting consistent policy because of a possible benchmark effect on future EU enlargements'. Moreover, 'every Member State will independently and individually decide whether it will apply its national legislation and bilateral agreements during the transitional period or whether it will opt for application of rules governing full freedom of movement'.

³⁷ Croatian Bureau of Statistics, available at: <http://www.dzs.hr/default_e.htm>, (last accessed on 20.7.2010).

³⁸ Croatian Employment Service, available at: <http://www.hzz.hr/DocSlike/PR_20100608.pdf>, (last accessed on 20.07.2010).

high employment rate and a high GDP *per capita* of individual states prove that their workers are less motivated to leave their work therein for another Member State.³⁹ In contrast to that, due to their internal conditions, countries with a high unemployment rate and a low or lower GDP *per capita* may expect migration outflow of their own citizens towards more developed Member States, but also immigration inflow of EU citizens from 'poorer' Member States. Such relationship constellation might not be quite favourable to Croatia, since it would probably face an outflow of educated workforce and in national terms, in certain economic sectors, underpaid labour force as well as immigrations from poor Member States encompassing presumably dominantly less educated labour force. Indicators show that the Croatian employment rate of 57.1% is almost the lowest in the EU, but when compared with Bosnia and Herzegovina, Macedonia, Albania, Romania, Bulgaria, Hungary and Slovenia, with 29.4% it has the greatest migration rate of highly educated persons.⁴⁰ Moreover, 33.8% of related highly skilled persons immigrate to EU Member States.⁴¹ However, Kapural believes that a high unemployment rate and other factors encouraging migrations do not produce especially great mobility of Croatian workers, although their number, when compared to Slovenia and Hungary, is much greater abroad.⁴² *Argumentum a contrario*, given statistical indicators and concerns which the Union had expressed on the occasion of the last great enlargement about the possible 'brain drain' in new Member States, do not create a highly encouraging environment. Young, highly skilled persons, the majority being women, are mostly prone to migration and a potential 'exodus' deprives new Member States of highly qualified, younger labour force.⁴³ Recent research suggests that it is better to consider the brain drain in relation to new-old Member

³⁹ A. Čeh Časni, 'Analiza slobode kretanja radnika na području proširene EU uporabom odabranih statističkih metoda' [Analysis of Labour Mobility within EU25 Member States through the Implementation of Chosen Statistical Methods], 5 *Zbornik Ekonomskog fakulteta u Zagrebu* (2007) p. 109.

⁴⁰ *Croatia EU Convergence Report 2009*, World Bank, pp. 22-24.

⁴¹ *Ibid.*, Table 3.3., p. 25.

⁴² M. Kapural, 'Freedom of Movement of Workers in Enlarged European Union and its Effect on Croatia', in: K. Ott, ed., *Croatian Accession to the European Union: Facing the Challenges of Negotiations* (Zagreb, Institut za javne financije 2005) p. 97.

⁴³ See Blanpain, *op. cit.* n. 29, at pp. 271-272.

States on the level of individual economic sectors, and not as general national phenomena.⁴⁴ By approving of the given focus of analysis, a conclusion is drawn suggesting that after the last enlargement significant potential of migration among workers in the healthcare field has been detected, but that despite this there are no data concerning a dramatically high rate of migration and brain drain.⁴⁵ Pronounced migration of healthcare workers in Poland should therefore be considered, as pointed out, as an example of ‘spillover’ of demand for employees in the given sector, and not as brain drain.⁴⁶

Sophisticated modes of analysis and interpretation of the acquired statistical data cannot suppress Croatian specific characteristics. It is the country that recorded probable migration potential of 2.5% (92,000 persons) in 2005, whereas actual migration potential equalled 0.4% of the Croatian population older than 14 years (14,700 persons),⁴⁷ out of whom there are as many as 18% of persons with college and university education.⁴⁸ An additional increase in the unemployment rate might influence a rise in migration potentials, especially in a country which is *inter alia* characterised by a rather neglected relationship towards external migrations of young scientists and inappropriate social valorisation of the scientific area.⁴⁹ Since mid-1970s Europe has been expressing the need for skilled and professional workers, instead of a historically common request for manual workers.⁵⁰ Proficiency in foreign languages, financial possibilities and the existence of diaspora are often prerequisites for a successful migration of workers,⁵¹ and from the Croatian standpoint, these are also factors that will undoubtedly encourage outflow of qualified and educated labour force.

⁴⁴ European Integration Consortium, *Labour mobility within the EU in the context of enlargement and the functioning transitional arrangements, Final Report*, November 2009, p. 94.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ I. Božić, and S. Burić, ‘Migracijski potencijal Hrvatske – mikroanalitički aspekti’ [Croatia’s migration potential – micro-analytic aspects] 21 *Migracijske i etničke teme* (2005) p. 20.

⁴⁸ *Ibid.*, at p. 22.

⁴⁹ M. Adamović and S. Mežnarić, ‘Migration of Young Croatian Scientists’, 5 *AEMI Journal* (2007) pp. 81-92.

⁵⁰ J. R. Dobson, ‘Labour mobility and migration within the EU following the 2004 Central and East European Enlargement’, 31 *Employee Relations* (2009) p. 123.

⁵¹ *Ibid.*, at p. 129.

Independently of transitional measures, on a bilateral level or by opening labour markets for strictly specified highly skilled professionals, old Member States will additionally encourage demand and consequently affect new migrations. In such circumstances, drawbacks of the Croatian educational policy and current university entrance quota that led to a high level of deficit of certain technical occupations and a simultaneous surplus of highly skilled individuals who graduated in social studies or humanities, could seriously endanger the national labour market. In contrast to that, mobility of students and their education abroad can have twofold effects. Restrictions referring to the freedom of movement do not apply to them, so that Croatian students are *pro futuro* in the position to study freely within the territory of all Member States. Completion of their studies abroad and their possible return to Croatia might make up for the disparity noticed with respect to certain occupations. However, in case they use different schemes and possibilities enabling them to stay in the Member State where they studied, they might finally give up on the return to Croatia after having completed their study, hence their studies abroad, regardless of numerous personal benefits, from the national perspective, might only deepen the existing situation.

The new Aliens Act with related amendments⁵² has removed the observed obstacles and shortcomings with respect to existing migrations of foreigners into Croatia. By full EU membership and full application of the freedom of movement citizens of other Member States they will not be treated as foreigners in Croatia, and will not need any work and business permit. Provisions of the act in question will *pro futuro* be applied only to third country nationals, foreigners outside borders of the Union, i.e. the ones with no EU citizenship. The Labour Act⁵³ of December 2009 solved previous difficulties with respect to posted workers⁵⁴ and carried out an additional harmonisation with Directive 96/71/EC⁵⁵ and its amendments. This mostly completes harmonisation of the national labour legislation with the *acquis communautaire* in this field. The European Commission assessed that progress has been made in terms of future Croatian participation in the European Employment

⁵² Zakon o strancima (Aliens Act), Official Gazette, No. 79/07, 36/09

⁵³ Zakon o radu (Labour Act), Official Gazette, No. 149/09

⁵⁴ Vukorepa, loc. cit. n. 33, at p. 75.

⁵⁵ Council and Parliament Directive 96/71/EC concerning the posting of workers in the framework of provision of services, OJ L 18, 21.1.1997

Services network (EURES) and administrative capacities in relation to mobility and the freedom of movement of workers have been strengthened. Although good progress has been made pertaining to coordination of social security systems, The Commission believed that further continuous efforts are indispensable in order to develop administrative capacities necessary for solving a wide range of tasks in the given field.⁵⁶

Accepting the fact that 11.3 million people, i.e. 2.3% of the European citizens resides in another Member State and the circumstance that the given figure has risen by even 40% since 2001,⁵⁷ we come to a clear conclusion referring to a significant increase as to enjoying the freedom of movement as a fundamental right and one of the major freedoms of the common market. Although in the context of transitional periods this refers to a content-based limited part of EU citizenship, in comparison to citizens of old Member States, the freedom of movement of workers is a reflection of the economic situation and economic potential of every single Member State. The evolution of the free movement of workers proves a clear transition from primarily economic right to a fundamental right of European citizens with strong social foundations that cannot function without coordination of social security systems and foreign recognition of qualifications. The latter additionally depends on the level of identification and recognition of differences present in educational systems of respective Member States which they gradually harmonize through the Bologna process and strengthen via the ERASMUS programme. Bearing all the aforementioned in mind, Croatia is naturally afraid of losing part of its educated and highly skilled labour force, since the issue in question is considered by focusing on its own advantages and shortcomings, as well as benefits and difficulties that this freedom of movement might bring along. After fear, and even undisguised attempts aimed at achieving social dumping⁵⁸ by means of mechanisms of the free movement of workers, it should really be considered as '*a motor of common development and it is embodied in a system of social security, a function of freedom*'.⁵⁹

⁵⁶ European Commission, *Croatia 2009 Progress Report*, SEC(2009)1333, Brussels, pp. 29-30.

⁵⁷ Eurostat, *Statistics in focus*, 94/2009

⁵⁸ Cf. Dobson, loc. cit. n. 50, at p. 130.

⁵⁹ R. Grawert, 'Free Movement of Workers: Changing the European Society', 47 *Managerial Law* (2005) p. 78.

Transitional periods which will be applied to Croatia should prevent abrupt pressures of Croatian migrants on the European labour market. Taking into account the fact that transitional periods for Member States with full membership since 2004 and 2007 will expire in 2011 and 2013, respectively, Croatia may partly thank them for preventing possible brain drain and especially a greater external migration of young workers, a group that is mostly prone to enjoying the freedom of movement. However, although in the next several years the EU will face new waves of migration from Member States of the great enlargement, as a small country with a relatively small number of inhabitants and a high unemployment rate, owing to various regimes Member States might apply, Croatia could go through significant changes when it comes to internal and external migrations. Hungary's experience and applied practice serve probably the most adequately for assessment of Croatian perspectives.

III. Free movement of workers and Hungary

1. Introductory remarks

In the second part of the study on the Hungarian situation concerning free movement we will try to focus on the question most striking for Croatia, namely, what impact has the gradual introduction of free movement of workers in Hungary had on the national labour market. Croatian stakeholders have severe concerns about the outflow of skilled people and the adverse affect of this tendency on the domestic labour market. Therefore in this chapter the analysis will concentrate on the migration of workers in and out of Hungary and their influence on the labour market. I will try to formulate some tendencies on the basis of the experiences. I will exclude from this analysis the debatable legal issues regarding the personal and material scope of the free movement of persons, the barriers, limitations and exceptions of this freedom and the non-discrimination principle.⁶⁰ These issues are highly interesting, but analysis of them would go far beyond the scope of this article. Therefore the study centres around not only the legal questions but rather the

⁶⁰ Comprehensive analysis of the freedom of movement in the EU is provided in: El. Spaventa, *Free Movement of Persons in the European Union – Barriers to Movement in their Constitutional Context* (The Hague, Kluwer Law International 2007) and F. Weiss and F. Wooldridge, *Free Movement of Persons within the European Community* (The Hague, Kluwer Law International 2007).

consequences of free movement of persons for the labour market. We should keep in mind that restrictions on free movement towards Hungarian workers have been gradually lifted up only a few years ago and with regard to the most popular two destinations they are still in force. Due to the short period that has passed it is only possible to draw some preliminary consequences. Furthermore, Hungary is in some aspect not a typical Member State. For example, as we will see, Hungarians are remarkably *not* mobile compared to workers in other Member States. Therefore we should be cautious when drawing direct consequences from the Hungarian situation for Croatia.

2. The right to free movement in Hungary

The right to free movement in Hungary should be analysed from two points of view. Both the rights of Hungarian workers to work in another Member States and the right of other EU citizens to work in Hungary will be assessed.

a) The right of Hungarian workers to move within the EU

First, we will analyse the right of Hungarian workers to move to work in another country within the European Union. Hungary has joined the European Union in 2004 together with seven other Central and Eastern European countries and the islands of Cyprus and Malta. The Accession Treaty entered into force on 1 May 2004.⁶¹ According to the Treaty, the 'old' Member States were allowed to introduce transitional provisions on the freedom of movement of persons. The regulation on the restrictions was the same for all eight new Central and Eastern European Member States. This included that in the seven years following the accession, old Member States were allowed to apply restrictive national rules.⁶² The seven year period was divided into three sections. In the first two years Member States could opt freely for opening their labour market. Before the end of the two year period following the date of accession Member States had to notify the Commission whether they will continue applying restrictive national measures or rather employ the EU rules on free movement in the next three years. In the last two years

⁶¹ Accession Treaty between the fifteen old and ten new Member States of the EU concerning the accession of the ten countries into the EU, which was signed on 16 April 2003 in Athens, Greece and entered into force on 1 May 2004.

⁶² The restrictions on free movement for Hungarians were regulated in Annex X of the Accession Treaty.

of the seven year period restrictive national measures can only be maintained in case of serious disturbances of the labour market of the Member States concerned or the threat thereof.⁶³

Only three old Member States – Ireland, Sweden and the United Kingdom – decided to allow unrestricted access to their labour markets for workers from the new Member States. All other countries introduced a transitional period, during which nationals from the new Member States needed to require a work permit so as to work. In 2006 and 2007, additional Member States, like Italy, Finland, Greece, Spain, Portugal and the Netherlands have diminished their restrictive rules. Until the end of 2009 all Member States have completely dropped restrictions with the exemption of Austria and Germany. These two countries prolonged the restrictions until 1 May 2011. As far as the current situation of the Hungarian workers is concerned, they can take up a job freely within the EU, except in Germany and Austria.⁶⁴ In these two countries workers in general need a work permit before they can take up a job. These restrictions must end on 30 April 2011.⁶⁵

b) The right of EU citizens to work in Hungary

ba) The situation between 2004 and 2007

In this chapter we will describe which rights EU nationals enjoy who wish to work in Hungary. First, we should have a look at the situation after Hungary's accession to the EU. The new Central and Eastern European Member States, which have joined the EU on 1 May 2004

⁶³ Guarantees for both sides were included in the rules. If a Hungarian national was admitted to the labour market for at least an uninterrupted period of 12 months he gets free access to the labour market of that Member State (paragraph 2 of Annex X of the Accession Treaty). On the other hand, in an urgent and exceptional case a Member State is allowed to suspend the application of Regulation (EEC) No. 1612/68, if it undergoes or foresees disturbances on its labor market which could seriously threaten the standard of living or level of employment in a given region or occupation (paragraph 7 of Annex X of the Accession Treaty).

⁶⁴ In Austria since January 2008 there is a special regulation (called '*Fachkräfteordnung*') for the employment of certain professionals from the new Member States. In 65 trades skilled people with qualification can get work permit easier. The permit is granted by the Labour Market Services which has to examine at first whether there is a shortage of Austrian professionals in the occupation concerned.

⁶⁵ Hungarian workers need a work permit to work in Switzerland until 31 May 2011.

were not allowed to apply transitional periods towards each other based on the Accession Treaty. Consequently the nationals of these Member States and their family members have been allowed to enter the Hungarian labour market without the need to possess a work permit.⁶⁶ The employer has only had the obligation to register such workers. However, according to point 10 of Annex X of the Accession Treaty, Hungary may maintain restrictive measures towards the old Member States, which apply transitional periods towards Hungary (i.e., reciprocity clause). Hungary made use of the reciprocity clause and applied equivalent restrictions towards the old Member States, as they applied those towards Hungary.⁶⁷ Nationals of old Member States that required work permit from the Hungarian workers could take up employment in Hungary only after getting a work permit. By abolishing restrictions towards those Member States, Hungary opened up its labour market while it kept restrictions towards others that had maintained restrictions towards Hungary.

It was a purely political decision to apply the reciprocity clause and hence not to open the labour market entirely, since it was quite clear that it is unlikely that huge masses of workers from the Western European countries will overflow the Hungarian labour market. Some of the stakeholders (especially employer organisations) argued for a liberalised labour market. It was a bad sign, since Hungary has always required free movement of workers, but it was not able to apply it in its own affairs. The opening of the labour market had not been disadvantageous influence on the Hungarian labour market.⁶⁸

bb) The situation between 2007 and 2009

We have to consider the transitional arrangements regarding Member States who joined the EU in 2007, namely Romania and Bulgaria. Following the 2007 enlargement all pre-2004 Member States, with the exemption of Finland and Sweden, imposed restrictions on Bulgarian

⁶⁶ 1991. évi IV. tv. a foglalkoztatás elősegítéséről és a munkanélküliek ellátásáról, [Act. IV. of 1991 on job assistance and unemployment benefit] Art. 7(2) point b)

⁶⁷ Regulated in Government Decree Nr. 93 of 2004 (of 27 April) on the rules of labour market reciprocity and the safeguard measures to be applied following the accession of the Republic of Hungary to the European Union.

⁶⁸ J. Tóth, *Report on the Free Movement of Workers in Hungary in 2007* (September 2008) p. 85.

and Romanian citizens. Hungary did the same, as the only country from the new Central and Eastern European Member States.

Especially the accession of Romania and the question whether to open the labour market for Romanian workers generated an intense public debate in Hungary. The reason for this was that there is a huge Hungarian ethnic minority in Romania with about 1.4 million Hungarians⁶⁹ which is a great number compared to the Hungarian population (about 10 million inhabitants with 4.17 million workers⁷⁰). The government made a research to estimate the possible influence of free movement of Romanian workers on Hungary.⁷¹ This survey found that the migration potential of Romanian workers is in general high, but most popular destinations are Germany, Austria and the Mediterranean countries. Hungary is a target country only for the Hungarian minority. The survey emphasized that Romanians already work in Hungary in considerable numbers and the workforce officially appearing after the accession of Romania could just legalise the status of illegal workers. The research estimated that free movement could cause a 1 to 3% increase of workforce in the Hungarian legal labour market. Finally, the Hungarian government took a cautious view and adopted restrictive transitional measures on Romanian and Bulgarian workers. The transitory rules entered into force on 1 January 2007, when Romania and Bulgaria joined the EU.⁷² According to these rules, employers were

⁶⁹ Data of the 2002 census. Hungarians are the biggest minority with 1.431.807 people, which means 6.6% of the whole population of Romania. Available at: <<http://recensamant.referinte.transindex.ro/?pg=8>>, (last accessed on 22.08.2010).

⁷⁰ Economically active people. Source: data from the 2009 report of the National Employment Office (Állami Foglalkoztatási Hivatal). Available at: <www.afsz.hu>, (last accessed on 22.08.2010).

⁷¹ Á. Hárs and E. Sik: *Szemponatok a román-bolgár Európai Unió csatlakozás magyar munkaerőpiacra gyakorolt hatásának értékeléséhez* [Viewpoints about the effects of the accession of Romania and Bulgaria on the Hungarian labor market] (Budapest, TÁRKI November 2006) Available at: <www.tarki.hu>.

⁷² Regulations on free movement of persons are covered in the following laws: 1991. évi IV. tv. a foglalkoztatás elősegítéséről és a munkanélküliek ellátásáról, [Act IV. of 1991 on job assistance and unemployment benefit]; 355/2007. (XII.23.) Kormányrendelet a Magyar Köztársaság által a szabad mozgás és tartózkodás jogával rendelkező személyek tekintetében alkalmazott, a munkaerő szabad áramlásával összefüggő átmeneti szabályokról [355/2007. (XII.23.) government decree on transitional rules on the free movement of persons enjoying the right to free movement and residence]; 2007. évi I. tv.a szabad mozgás és tartózkodás

obliged to apply for a work permit before employing a Romanian or Bulgarian citizen. Concerning 219 jobs the procedure was accelerated and the situation of the labour market did not need to be assessed. The main reason for this restrictive policy was to protect the Hungarian labour market from a dump of cheap workforce. Moreover, since mainly Hungarian minorities were interested in migrating into Hungary, the decision intended to prevent the mass emigration of Hungarian minorities from their original place of living. The current statistics on Romanian migrants in Hungary - which I will analyze below - show that the real number of workers coming to Hungary remained below the number of the people who had planned to migrate (6%). The result of the restrictions is that the attractiveness of Hungary (and working in Hungary) has been very low even for the Hungarian minority living outside its borders.⁷³

bc) The situation after 1 January 2009

On 1 January 2009, government decree 355/2007. (XII.23.)⁷⁴ dropped all restrictions on free movement concerning all EU citizens. From 1 January 2009 Romanian and Bulgarian nationals do not need a work permit and they can enjoy the principle of free movement in Hungary. The only obligation relating to EU nationals is that their employer has to register them when starting or terminating an employment relationship. Currently, every EU citizen can take up a job in Hungary without a work permit.

3. Migration potential of the Hungarian workers

In this section I will describe the migration potential of the Hungarian population, i.e., the intention of Hungarians to work abroad. At the

jogával rendelkező személyek beutazásáról és tartózkodásáról [Act I of 2007. on the entry and residence of persons having the right to free movement and residence].

⁷³ See É. Lukács Gellérné, 'Munkaerőszűrés a minőségért: korlátozott vonzóképeség és változó jogszabályok' [Workforce filter for the quality: limited attractiveness and changing laws] in S. Illés, ed., *Magyarország vonzásában* [In the attraction of Hungary] (Budapest, Központi Statisztikai Hivatal Népeségtudományi Kutatóintézetének Kutatási jelentései 85. 2009/1.) pp. 45-46.

⁷⁴ 355/2007. (XII.23.) Kormányrendelet a Magyar Köztársaság által a szabad mozgás és tartózkodás jogával rendelkező személyek tekintetében alkalmazott, a munkaerő szabad áramlásával összefüggő átmeneti szabályokról [Government decree 355/2007 (XII.23.) on transitional rules on the free movement of persons enjoying the right to free movement and residence]

beginning of 2010, 7% of the adult population planned to go to work abroad for some weeks or months. 8% of the people answered for the inquiry that they would go abroad for several years and 5% of the people would emigrate if they had the possibility. Altogether 13% of the Hungarian adult population would go abroad for a while to work.⁷⁵ We should also consider how the migration potential has changed during the last twenty years after the fall of the communist regime and the influences that events such as the EU accession had on the migration potential. Until 2000 the altogether migration potential was about 6%. In 2001 and 2002 this proportion increased to 10% and from 2003 to 2010 it fluctuated between 12% and 16%. Following the accession to the EU there was a slight increase in the migration potential, but after reaching the peak in 2008 migration potential has slightly fallen.⁷⁶

If we analyse which kind of people are more mobile, we can make the following conclusions. Altogether, there is no gender difference in the short-term employment abroad and emigration. However, the migration potential for long-term employment abroad is higher for men than for women. As for the age distribution within the migrant workers there is a strong tendency that the higher the higher the age the less mobility. Migration potential is around 32% within young people (under 30 years) and is below 6% above 50 years old people.⁷⁷ Contrary to common belief there is no significant difference in the migration potential based on the education of the persons. Only slight differences can be noticed. For example, the migration potential of the least educated – i.e., completed only primary school – is low. The migration potential of students, entrepreneurs and unemployed persons are high; the last two categories would especially accept short-term employment abroad.⁷⁸ Migration potential is higher in the social groups of people with more chance to integrate into the new society or - quite the contrary - they have more pressure to migrate. Such groups are students (38%), Roma

⁷⁵ E. Sik, TÁRKI research in May 2010, available at: <<http://www.tarki.hu/hu/news/2010/kitekint/20100520.html>>, (last accessed on 01.08.2010).

⁷⁶ E. Sik, Survey of TÁRKI Monitor and Omnibusz, 1993-2010. Published in April 2010. Available at: <<http://www.tarki.hu/hu/news/2010/kitekint/20100422.html>>, (last accessed on 01.08.2010).

⁷⁷ Source of data: Sik, op. cit. n. 75.

⁷⁸ Ibid.

people (25%), unemployed people (16%) and people living in bigger cities or in Western Hungary (16-16%).⁷⁹

When we examine which countries are the most inviting in the eyes of the Hungarians, then traditionally by far the most people would choose Germany or Austria. After the accession to the EU, the United Kingdom became a highly popular destination as well. English language and the opening of the UK labour market evidently played a role in this aspect. In the last two years also Ireland and – albeit not an EU Member – the USA got into the five most promising countries for the Hungarian people.⁸⁰

4. Hungarians working in other Member States

a) The facts

After analyzing the migration potential of Hungarian workers, we should examine the real number of Hungarians working in the EU outside Hungary. It is difficult to get reliable data on Hungarian workers abroad from Hungarian sources, since data are better collected by the destination countries. The Directorate General for Employment and Social Affairs published a report on ‘Geographical and labour market mobility’ in June 2010. This report contains interesting data on the mobility of workers within the EU.⁸¹ If we take a closer look on the data we can conclude that Hungarians are ‘great dreamers’. When answering the question ‘do you envisage working in a country outside your country at some time in the future?’, 29% of the Hungarians said yes. This is a relatively high percentage compared to other Member States (the European average is at 17%, and in the 12 new Member States at 21%).⁸² The survey also asked the question: ‘did you ever live and/or work in a country, other than your own country?’. Surprisingly,

⁷⁹ See TÁRKI research, made by Endre Sik, available at the TÁRKI homepage: <<http://www.tarki.hu/tarkitekinto/20060505.html>>, (last accessed on 01.08.2010).

⁸⁰ Sik, op. cit. n. 76.

⁸¹ Eurobarometer *Report on ‘Geographical and labour market mobility’*. Published in June 2010 Made by the request of the Directorate General for Employment and Social Affairs. Special Eurobarometer 337/Wave 72.5 – TNS Opinion & Social. p. 52. Available at the homepage of the European Commission for Employment, Social Affairs and Equal Opportunities: <<http://ec.europa.eu/social/>>, (last accessed on 02.08.2010).

⁸² *Ibid.*, at p. 52. The number of migration potential is also higher than in the other survey. For the difference there must be methodological reasons.

Hungary has the second lowest figure saying indicating that they have gone abroad to live and work there. Only 3% of the Hungarians answered that they have lived and worked in another country in the past. This is an extremely low number, especially compared to the average of the EU 27, which is 10%. When comparing with other Eastern European countries, we can state the following: after Hungary, the Czech Republic has the second lowest level with 4 %, followed by Romania and Slovakia with 7%. The fact is that Hungary has, after Italy, the second least mobile population in the entire EU.⁸³ It is possible that Hungarians will be more mobile with the elimination of the restrictions for free movement towards Germany and Austria, since oth these countries are traditionally the most popular destinations for Hungarians. Interestingly, Germany is the most popular destination not only for Hungarians, but in general for Europeans and especially for people from the twelve new Eastern European Member States.⁸⁴

The survey also examined the role of financial incentives required to move abroad for work. The country results highlighted that people living in the new Member States require considerably more financial incentive to consider taking a job in another country or region than those in the old Member States.⁸⁵ Hungary has a high level of respondents answering that they would not move to another country or region, even if they were financially motivated to do so. No incentive would be enough to encourage 45% of those living in Hungary to take a job in another region or country – considerably higher than the EU average of 28%.⁸⁶ This figure confirms that Hungarians are not mobile. The most important conclusion is that Hungarians are not mobile compared to other EU nationals. The reasons for this fact are diverse and should be clarified.

⁸³ Ibid. The report emphasizes that the survey does not capture many of those who are currently still in another country. Therefore, there is a degree of under-reporting and actual mobility levels could be higher.

⁸⁴ According to the survey 12% of all people, who lived and worked abroad did it in Germany and this proportion was 23% within workers from the new Member States. Ibid., at pp. 90-91.

⁸⁵ Ibid., at pp. 95-99.

⁸⁶ Portugal achieved the highest percentage achieved with 52%, followed by Bulgaria and Hungary (both 45%), Malta (43%) Ireland (42%) and Austria (41%). Ibid.

b) Migration of health workers

Migration rate can be extremely different in various professions. It is more useful to consider migration on the level of individual economic sectors and not in general. There are some professions in which migration is more intense than the average. An excellent example for this is the migration of health workers, which creates an international trend and causes a severe shortage of health personnel in a significant number of countries worldwide.⁸⁷ Within Europe, there has been a growing migration of doctors from Eastern and Central European countries to Western Europe. Unfortunately, Hungary is not spared from this problem. Higher remuneration and better working conditions are strong incentives for this kind of migration.⁸⁸ The potential of massive outflow has raised concerns about doctor shortage in Hungary and several other countries that have experienced net emigration.⁸⁹

Support for the mobility of doctors has been a strong aim of the EU for a long time. This is proved by the fact that the EU has enacted Directive 93/16/EEC⁹⁰ to ease free movement of doctors, which was replaced by Directive 2005/36/EC on the recognition of professional qualifications.

⁸⁷ See the *OECD Policy Brief on International Migration of Health Workers* from February 2010 available at: <<http://www.oecd.org/dataoecd/8/1/44783473.pdf>>, (last accessed on 22.08.2010)

⁸⁸ When comparing with other OECD countries, the remuneration of doctors in Hungary is very low. In Hungary a specialist doctor receives 28,000 USD per year as remuneration, while his colleagues earn 144,000, in France, in the UK 153,000 and in Austria 177,000 USD. In comparison with the average wage in the economy, the remuneration of specialist doctors is only one-and-a-half times higher than the average wage in Hungary, while in Switzerland it is 3 times higher, and in France 4.4 times and in Austria 5.2 times higher.. However, it must be borne in mind that informal payments and incomes from private practices are not included in these figures. Informal payments are common and in case of certain specialists they often constitute a significant part of the total remuneration. The data is from 2004. See R. Fujisawa and G. Lafortune, *OECD Health Working Papers No. 41*. The remuneration of general practitioners and specialists in 14 OECD countries: 'What are the factors influencing variations across countries?' DELSA/HEA/WD/HWP(2008)5. p. 21., available at: <<http://www.oecd.org/dataoecd/51/48/41925333.pdf>>, (last accessed on 20.08.2010).

⁸⁹ *Ibid.*, at p. 38.

⁹⁰ Council Directive 93/16/EEC of 5 April 1993 to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications

Whereas the former directive provided special regulation only for doctors, the latter one contains more general provisions on the recognition of diplomas, certificates and other qualifications of health personal and architects as well. The original aim of the Directive was to recognize diplomas, certificates and other evidence of formal qualifications in specialized medicine awarded to nationals of Member States by the other Member States and thereby to have doctors the same right to take up and pursue the activities as a doctor in every Member State. The recent directive regulates not only the recognition of the qualification of doctors but extends to a larger personal scope, so to nurses, dental practitioners, veterinary surgeons, midwives and pharmacists.

According to some estimate there is a shortage of about 2500-3000 doctors in the Hungarian health care system. Both general practitioners and specialists are missing and the doctors are ageing. 25% of the general practitioners (in Hungary called family doctors) work above the pensioners' age and 62% are over 50 years old.⁹¹ In the last couple of years about 600-800 doctors left Hungary every year and about 150 arrived from abroad, most of them from Romania.⁹² Even if the numbers are not dramatic, they show a clear tendency. The government has tried to undertake some measures to prevent doctors from leaving Hungary, but without a significant increase in payment and improvement of working conditions there is little chance to stop this tendency.⁹³ One opportunity could be to educate more medicine students, however, medical education is quite expensive and education is pointless, if large proportion of graduates leave Hungary after finishing their study.⁹⁴

⁹¹ See www.webbeteg.hu. We have to admit that it is extremely difficult to get reliable figures from independent organizations or institutes.

⁹² <www.rezidens.hu>

⁹³ The government tried to introduce a system in which a doctor trainee (resident) who starts his residency in Hungary would be obliged to stay in Hungary for the duration of the residency (5 years) and the following four years. If he breached this obligation he had to pay back some part of his earlier remuneration. This measure indicated a huge protest among the residents. After coming into power of the new Conservative government in 2010, it has altered this system and abolished the obligation of the residents to stay.

⁹⁴ It is interesting that in the Semmelweis Medical School in Budapest medical education has been conducted even in English for twenty years and for financial reasons also other universities also started to introduce medical programmes in

5. EU citizens working in Hungary

When we examine the effect of opening the Hungarian labour market to the new Member States between 2004 and 2007, we can state that the volume of registered workers was relatively low and steady (between 18.000-20.000 yearly) and did not cause a worsening of the unemployment situation in Hungary. Most foreign workers were Slovaks and were employed near the Slovakian border. Participation of other nationals in the Hungarian labour market was slight.⁹⁵

From 1 January 2009 onwards, every EU citizens can work in Hungary without work permit. After analyzing the data of foreign workers in Hungary in 2009, we can draw the following conclusions. Most EU citizens working in Hungary were Romanian nationals (68% of the foreigners from the EU: 12566 persons), followed by Slovaks (13.5%: 2493 persons) and Germans (3.7%: 678 persons).⁹⁶ Most EU foreigners working in Hungary come from neighbouring countries (55%). In 2009 there was a drop in the number of economic migrants in Hungary which affected all nationals. About 60% less Slovaks and 20% less Romanians came to Hungary in 2009, than in 2008.⁹⁷

Most EU nationals possessing valid work permit in Hungary are Romanians (26.681) and Slovaks (10.484). Slovak workers' migration is interesting, which achieved its peak in 2006, when 16.659 Slovaks possessed a valid work permit. The registration of new workers shows a decreasing tendency (in 2007 9.944 people, in 2008 6.358 workers and in 2009 only 2.493 registered). By far the most significant group constitutes the Romanians which is easily understandable since most of them belong to the Hungarian minority. Since 2004, the number of the registration of new Romanian workers is slightly decreasing every year. In 2009, only 12.000 people have registered which is one-third of the number from 2004. This data proves

English and even in German. Thousands of students from Western Europe have acquired their diplomas in medical studies in this way in Hungary.

⁹⁵ Tóth, op. cit. n. 68, at p. 84.

⁹⁶ The number of Croats working in Hungary is constantly low. In 2007 only 153 Croats received work permit; in 2008, 506 and in 2009 only about 250 Croats.

⁹⁷ Z. Jósvali, *A külföldi állampolgárok magyarországi munkavállalásának főbb jellemzői 2009-ben, az ÁFSZ adatai alapján* [Main features of the Hungarian employment of foreign workers in 2009 based on the data of the ÁFSZ]. Available on the homepage of the Állami Foglalkoztatási Szolgálat: <www.afsz.hu>, (last accessed on 24.08.2010).

that the opening of the market has not had significant effect on migration in 2009. It is likely that the financial crisis has had negative influence on migration in general but is difficult to estimate precisely its effect for the near future.

In Hungary, there are some occupations, in which there is a shortage of workforces, like in health care, social care sector, household work, food industry, agricultures, engineering and building sector. The situation with these occupations is quite the same as in Western Europe. Statistics show that Hungary needs foreign workforce and the shortage in these occupations will increase in the future. Unlike other countries, Hungary does not have a comprehensive migration policy. Hungary remains in a position to only follow the international and European tendencies but does not try to form the situation and attract workers with certain occupation.⁹⁸ A further problem is the ambivalent attitude towards the ethnic Hungarian minority outside the Hungarian borders. On the one hand they serve better workforce, since they can speak the Hungarian language. On the other hand, however, governments try to prevent from attracting these people away from their home place. Nevertheless, most of the workers coming to Hungary belong to this category.⁹⁹

6. Commuting to Austria

There is a relatively high level of commuters in Hungary. According to the recent EU survey, about 2% of the Hungarians had worked in another country in the past, but did not live there, i.e. commuted. This percentage is higher than the average in the EU, which is under one percent. Only in Denmark and the Netherlands did more people commute.¹⁰⁰ Hungarians usually commute into Austria. About 15,000-18,000 workers commute from Hungary to Austria. This is the official data, but some experts assume that plenty of people work illegally and the real number is the double of the official figures. Most of them are employed in the agriculture, catering and construction industry.

There are some initiatives to facilitate cross-border mobility of workers and ease the tensions arising from it. One of them is the cross-border cooperation of trade union associations. The cooperation was created by the common initiative of an Austrian (ÖGB) and a Hungarian

⁹⁸ See Lukács, *op. cit.* n. 73, at p. 33.

⁹⁹ *Ibid.*, at pp. 55-56.

¹⁰⁰ *Op. cit.* n. 81, at p. 52.

(MSZOSZ) trade union association and is financially supported by the EU European Regional Development Fund.¹⁰¹ The main aim of the cooperation is to promote the smooth development of the labour market in the border region (Burgenland and Western-Hungary). The wage difference between Hungary and Austria lies between 1:3 and 1:5. Hungarian workers have high willingness to work in the Austrian area over the border, even if very often they are employed in jobs lower qualified than their own qualification. Besides, they earn up to 40% less than their Austrian colleagues for the same work. The main goals of the cooperation are to inform workers on cross-border employment and tax issues, take steps against the shortage of professionals in this region, guarantee the minimum social security for workers, develop legal employment, implement cross-border training programmes, provide legal advice services and eliminate prejudices.¹⁰² Such cooperation exists also between other Member States and the creating similar cooperation between Hungarian and Croatian trade unions' associations is worth considering as well.

The Austrian-Hungarian trade unions' cooperation contributes to the prevention of abuses relating to free movement of Hungarian workers. As the homepage reports illegal employments occur very often, which can last even for several years. Illegal employment is typical for the agricultural sector, transport sector and in the hotel and catering sector. In these cases employers do not register the worker in the Labour Market Service and therefore they do not have any kind of work permit

¹⁰¹ The slogan of this cooperation is: 'Future in the cross-border region' (Zukunft ImGrenzRaum – Jövő a határtérségben). The cooperation started in 2008 and is set at first for seven years. The predecessor project started already in 2002. See the homepage of the co-operation of trade union associations, available at: <www.igr.at>, (last accessed on 1.08.2010).

¹⁰² See the homepage of the co-operation of trade union associations, available at: <www.igr.at>, (last accessed on 1.08.2010). We have to bear in mind that commuting between two Member States is typical for all neighbouring countries of the EU. For example, in 2001, 18.562 workers commuted daily between Germany and Austria, 13.986 from Austria to Germany and 4.576 from Germany to Austria. There was an initiative between Germany and Austria, the so-called EURES INTERALP, supported by the EU. This cooperation was transformed to a homepage which provides information to workers and was extended to the whole Alp region (South-Tirol in Italy, Bavaria in Germany, Tirol, Vorarlberg and Salzburg in Austria, Graubünden in the Swiss). See European JobGuide, available at: <<http://www.ejg.info/>>.

and are not entitled to social security benefits and pension schemes. Another severe concern is that working time very often exceeds the permissible 48 hours and reaches 60 to 72 hours a week. Workers often do not protest against the long working hours, since they are usually hourly paid.¹⁰³

In the following we try to examine the possible consequences of commuting for the labour markets. There are assumptions that commuting has adverse affect on the labour market for both sides of the border. On the Hungarian side the employment of the professionals abroad evoked a shortage of specialists. On the Austrian side, with the easily available cheap Hungarian labour force, the pressure on the Austrian labour market and unemployment increased. We should examine whether these assumptions are true. The fact is that unemployment rate in the Austrian side of the border, in Burgenland is higher than the average in Austria.¹⁰⁴ However, the reason for the higher unemployment rate is obviously not the free movement of the Hungarian workers. This statement can be proven by the fact that unemployment rate has been higher in this region for decades. Even in the 1980s and 1990s the unemployment rates were always 1 to 3% higher here than the Austrian average.¹⁰⁵ This tendency has obviously other reasons than the free movement of workers. If we analyse the other side, we can state that in the Hungarian side of the border unemployment rate is very low.¹⁰⁶ In this region of Hungary unemployment rate is the lowest in

¹⁰³ See the description of certain real cases about abuses at the homepage of the IGR: <www.igr.at>, (last accessed on 01.08.2010).

¹⁰⁴ Unemployment rate in Burgenland in the last decades has always been slightly higher than the Austrian average. The following figures show the unemployment rates in Burgenland region and in Austria (the Austrian average is in bracket): in 2004 it was 8,7% (7.1%), in 2006 it was 8.5% (6.8%), in 2008 it was 7.4% (5.8%) and in 2009 it was 8.4% (7.2%). Source of the data is the AMS Arbeitsmarktservice (Office for Labour Market Assistance), available at: <<http://iambweb.ams.or.at/ambweb/AmbwebServlet?trn=start>>, (last accessed on 22.08.2010).

¹⁰⁵ In 1987 unemployment rate in Burgenland was 8.6%, while it was 5.6% in Austria. In 1990 unemployment rate in Burgenland was 7.6%, while the Austrian unemployment rate was 5.4%.

¹⁰⁶ Unemployment rates in the two Hungarian regions next to the Austria borders (Győr-Moson-Sopron and Vas) are the following (in brackets are the rates for whole Hungary): in 1992 in Győr-Moson-Sopron: 6.27% and in Vas: 6.63% (in Hungary: 9.26%); in 2000 in Győr-Moson-Sopron: 4.24% and in Vas: 4.6% (in Hungary:

Hungary for decades; only the region of Budapest can compete with the low numbers. However, if we analyze the figures we can clearly see that unemployment rates have been 2-3% lower than the Hungarian average for a long time. There is no change in these figures in the last few years. This indicates that low unemployment rates have other reasons than the free movement of workers. These reasons can be especially the proximity to the Western borders and thereby the good availability of cheap Hungarian workforce which attracts several companies into this region.

IV. Conclusion

As we described above there was no massive migration of Hungarians into other countries in the last few years after the lifting up of restrictions on free movement. However, Croatia can have higher mobility figures due to its different history. In the past, Croatia has had quite large migration figures which were consequences of political developments, especially the communist dictatorship and the war in the 1990s, and economic conditions, like the significant unemployment as well. These circumstances indicate that immigration of Croatians could be much higher than that of Hungarians. However, we should bear in mind that experiences clearly show that mobility potential is always much higher than the number of people who really go abroad to work. Migration of Croatians could possible cause a shortage of specialists in certain professions. It would be useful to develop a detailed migration policy, in which Croatia would estimate the future migration in the individual sectors concerned and determine the professions in which a shortage of skilled persons in the future is expected. This could provide a better chance to undertake preventing measures, like more education in some professions. By the financial help of the EU Croatian trade union associations could establish some kind of cooperation with their Hungarian and Slovenian partners. This could help to facilitate commuting of workers.

6.41%); in 2004 Győr-Moson-Sopron: 4.03% and in Vas: 5.14% (in Hungary: 6.08%); in 2009 in Győr-Moson-Sopron: 6.98% and in Vas: 9.22% (in Hungary: 9.98%). Source of data: statistics of Állami Foglalkoztatási Szolgálat [National Employment Service], available at: < www.afsz.hu >, (last accessed on 01.08.2010).

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Legislation referring to Croatia in the Austro-Hungarian Empire after the Hungarian-Croatian Compromise of 1868

I. The participation of Croatian delegates in the Hungarian Parliament after the Compromise of 1868¹

1. The compromise and its constitutional legal basis

The Kingdom of Hungary and Croatia had had more than 800 years of common historical relation before the compromise of 1868. The relations sometimes weakened, sometimes strengthened but subsequently created the basis of the Hungarian-Croatian Compromise of 1868. The common history of these two states and its different interpretation started at the end of the 11th century, at the reigning time of King Ladislaus the Saint and even led to their provisory separation in 1848. The historical questions related to the creation of state alliance between these two countries became subject of daily political propaganda among the nationalistic movements of the 19th century. The Hungarian and Croatian historiography took different points of view to determine whether Hungary conquered the territory of Croatia by occupation or by contract based on coronation. Bertalan Szemere, a Hungarian politician of the 19th century determined the relation between the two states from a political point of view to be one where Croatia is not a partner state, but part of the Hungarian territory, that melted into it not in an externally coordinated manner but in an internally coordinated one. The Hungarian historiography accepted this idea, on base of which denied the independent existence of the Croatian state and considered the latter's territory as inseparable part of the Hungarian Crown. However, the Croatian historiography reasoned about the equal relation

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of the two states on the grounds of King Coloman's coronation to be merely based on a personal union. The striking difference of these two argumentations poisoned the relations between the two states in the daily political debates regarding the legal status of minorities and their linguistic rights which resulted in the states' provisional separation in 1848. This discrepancy between the two points of view could even be observed significantly in the debates surrounding the Hungarian-Croatian Compromise that were more or less moderated after the compromise of 1868 and recurred because of the Hungarian-Croatian conflicts raised from time to time.²

² The debate was based on the book of István Horváth translated even to German, with the title '*Über Croatien, als eine Unterjochung erworbene Provinz und des Königreichs Ungarn wirklichen Teil*' that was published in Leipzig in 1844 in which he proved with a scientific research that the Hungarians occupied Croatia by their army and the opposite standpoint based on the contractual relation of the two states cannot be reasoned by using the historical sources that remained to us from that time, written by Thomas Archidiaconus with the title '*Historia Salonitana*'. J. Deér, *A magyar-horvát államközösség kezdetei* [The Beginning of the Hungarian-Croatian State] (Budapest, Különlenyomat a Jancsó Benedek Emlékkönyvből 1931) pp. 3-4., 7-11.; B. Jeszenszky, *A társországok közjogi viszonya a magyar államhoz* [The Constitutional Relation of the Partner States to the Hungarian State] (Budapest, Ráth Mór 1889) pp. 53-81.; L. Szalay, *A horvát kérdéshez* [To the Croatian Question.] (Pest, Lauffer és Stolp. 1861) pp. 20-45.; *Der Alte Verband und der neue Ausgleich Croatiens mit Ungarn. Von einem Croaten*. Separatabdruck aus dem "Vaterland" [Wien, Verlag der Redaction des "Vaterland". Druck von Alexander Eurich in Wien 1868] p. 6.; Gy. Miskolczy, *A horvát kérdés története és irományai a rendi állam korában I-II.* [The History and the Sources of the Croatian Question from the time of the Feudal State] (Budapest, Magyar Történelmi Társulat 1927) I. kötet. pp. 345-346.; K. Gulya, 'A horvát kérdés a dualista Magyarországon az I. világháború előtti években (1908-1914)' [The Croatian Question in the Dualistic Hungary Before the Time of the First World War (1908-1914)] in L. Székely, ed., *Studia historiae Universalis Recentis et Recentissimi Aevi VI.* (1972) p. 3.; F. Pesty, *Die Entstehung Croatiens.* (Budapest, Friedrich Kilian K. und Universitätsbuchhandlung 1882) pp. 73-75.; Gy. Szabad, *Forradalom és kiegyezés választóján (1860-61)* [At the Cross-roads of the Revolution and Compromise (1860-61)] (Budapest, Akadémiai Kiadó 1967) p. 400.; G. Ferdinándy, *Magyarország közjoga (Alkotmányjog)* [The Public Law of Hungary (Constitutional Law)] (Budapest, Politzer Zsigmond és fia 1902). pp. 147-148., 152., 725., 728-730.; L. Juhász, 'A horvát kérdés az 1868-ik évi kiegyezés után' [The Croatian Question after the Compromise of 1868] in Gy. Miskolczy, ed., *A gróf Klebelsberg Kunó Magyar Történetkutató Intézet Évkönyve* (Budapest, Magyar Tudományos Akadémia 1938) VIII. pp. 247-293. in this case p. 251.

As a matter of fact until the events of 1848/49 the relation of the two states can be characterized by their collaboration in wars against the Turks. As Gusztáv Gratz noted in his work about the dualism:

‘[t]he nations of the Zrínys’ and the Frangepáns cannot be distinguished by their actions and political thinking because even if they were of Croatian nationality and the Croatian people respect them among their national heroes they can at least as much be listed among the Hungarian freedom fighters, too.’³

The partner relation of Hungary and Croatia is to be proven by the fact that the *orators* sent by the *Sabor*, the Croatian parliament, took part in the work of the Hungarian General Assemblies from the early 16th century onwards. Two of the orators sat in the lower house of the general assembly and one orator in the upper house from 1625 on. The two orators being present voted right after the ‘*personalis*’, the leader of the lower house. Beside them the *protonotarius* of the Ban and the Count of Turopolje was also member of the lower house of the general assembly. The task of the orators was to inform the *Sabor* about the items on the agenda of the general assembly.⁴ The Croatian *ban* according to Act 1 after coronation of 1608 was sitting in the upper house of the general assembly beside the Lord Chief Justice and came right after the Palatine and the Lord Chief Justice in rank of the Hungarian bannerettes based on function.⁵

³ G. Gratz, *A dualizmus kora. Magyarország története 1867-1918. I-II.* [The Era of the Dualism. The History of Hungary 1867-1918. I-II.] (Budapest, Magyar Szemle Társaság 1934) I. kötet p. 57. Refers to the same the work of J. Horvat, ‘Zur Geschichte des Kroatisch-Ungarischen Ausgleichs vom Jahre 1868’ in T. Surányi-Unger et al. ed., *Donaueuropa Zeitschrift für die Probleme des Europäischen Südostens* (Budapest, Karpat-Verlag 1943) pp. 582-588 in this case p. 582; Gulya op. cit. n. 2, at p. 3.

⁴ *Der Alte Verband*, op. cit. n. 2, at p. 5.; 15.; I. Kiss, *Magyar közjog (magyar államjog)* [Hungarian Public Law (Hungarian State Law)] (Budapest, Az Eggenberg-féle könyvkereskedés kiadása 1888) p. 77.; *Die Legitimen und historischen Rechte Croatiens und der Ausgleich mit Ungarn.* (Wien, Druck und Verlag von F.B. Geitler 1871) pp. 25. -26.; I. Palugyay, *A kapcsolt részek (Slavonia-Croatia) történelmi- s jog-viszonyai Magyarországhoz* [The Historical and Legal Relations of the Joint Parts (Slavonia-Croatia) to Hungary] (Pozsony, Sieber H. örökösének nyomdája 1863) pp. 345-355.; Ferdinándy, op. cit. n. 2, at p. 150.

⁵The Ban as being the leader functionary of Croatia named by the Hungarian King was the leader of the Banal Tribunal consisted of a protonotarius and five jurors, he could issue judicial orders, he had the right to keep banderia and was obliged to bear

After the period of the neoabsolutism the two states started to approach each other and it became clear that they had to start negotiations in order to arrange their constitutional relations. During the era of the neoabsolutism the Croats had also to recognize that they cannot wait for a more favourable treatment from Austria for their loyalty manifested during 1848/49. The same royal decrees and letters patents were introduced in Croatia as in the rest of the Empire. Vienna treated Croatia-Slavonia, Dalmatia and the Hungarian Kingdom alike, as one province of the unified monarchy. It was during this time that in every constitutional legal historical work dealing with this subject the famous thought appeared, according to which: ‘those things that the Hungarians received from Imperial Vienna as punishment were given as a gift for the nationalities, too.’⁶

The compromise between Hungary and Croatia was part of the Compromise between Austria and Hungary so as to consolidate the status of the nationalities. The provisions of Act 12 of 1867 were completed by Act 30 of 1868 about the Hungarian-Croatian Compromise and Act 44 of 1868 about the nationalities. This is also proven by the fact that the Hungarian-Croatian negotiations went on in parallel with the negotiations about the Austro-Hungarian Compromise

arms on the order of the King. He was the Commander in Chief of Croatia, Slavonia and Dalmatia, and the perpetual owner of the first and second banal regiments. According to the royal charter of Mary Theresa of 1750 he was entitled to name the officers of the army and was the leader of the separate Croatian Royal Locumtennant-Council from 1767 to 1779. Palugyay, op. cit. n. 4, at pp. 314-319.; Á. Timon, *Magyar alkotmány- és jogtörténet különös tekintettel a nyugati államok jogfejlődésére* [Hungarian Constitutional and Legal History with a Special Aspect on the Legal Development of the Western States.] (Budapest, Hornyánszky Viktor Könyvkiadóhivatala 1917) pp. 742-756.; Pesty op. cit. n. 2, at p. 65.; Ferdinándy op. cit. n. 2, at pp. 147-148.

⁶ The exact quotation is from the work of M. Károlyi, *Válogatott írásai 1920-1946* [Selected Essays] (Budapest, Gondolat 1964) p. 241.; Ferenc Deák also referred to this fact in the second prescript given as answer to the royal rescript read in the parliament on 22nd June 1861. ‘[...] after that the absolutism was introduced in those territories too, on which the Hungarian laws weren’t in effect, even there where the Hungarian laws had been rejected.’ B. Sarlós, *Deák és a kiegyezés* [Deák and the Compromise] (Budapest, Gondolat 1987) pp. 77-78.; I. Ress, ‘The Hungarian-Croat Compromise of 1868’ in Ignác Romsics and Béla K. Király, eds., *Geopolitics in the Danube Region. Hungarian Reconciliation Efforts 1849-1998*. (Budapest, CEU Press 1999) pp. 177-198. in this case p. 181.; Gulya, op. cit. n. 2, at p. 3.; Pesty op. cit. n. 2, at p. 76.

within the committees and almost the same persons were members of both of these Deputations.

The negotiations regarding the compromise between Hungary and Croatia were of slow and tense character and were interrupted several times. These negotiations started after the banal conference of 13 January 1861⁷ and Ferenc Deák's in his article published in the *Pesti Napló* (Pester Diary) on 24 March the same year⁸ declared to be ready to recognize the independent existence of Croatia as a state, but the course of the process was temporally interrupted and got finalized only in 1868 by the entering into force of the Act of the Compromise. At the time when Franz Joseph travelled to Hungary to open the parliament in his opening speech of 14 December 1865, he declared his will to have the constitutional relation of Hungary and Croatia arranged for the future.⁹ Negotiations about the compromise started again by two committees of twelve members each among whom members the *Sabor* delegated on 11 March 1866 one unionist: Imre Suhaj, seven national liberals: Josip Juraj Strossmayer, Ferenc Rácski, János Perkovács, Mátyás Mrazovics, Kuslan Dragutin, Mihály Klaičs, József Vraniczány and four members of the Independence Party: Miksa Prica, Bártol Zmaics, Jovan Subotic and Avelin Csepulics. The Hungarian committee set up on 17 March

⁷ The banal conference welcomed the Diploma of October of 1860 but only as a step towards the restoration of their country's constitutional rights. They claimed for the Croatian language to be the exclusive state language, the restoration of the Croatian Court Chancery, the reorganization of the Croatian counties and the reannexation of Dalmatia to Croatia beside the recognition of „historical, legal and naturally sovereign” rights and total independence of the Triune Kingdom of (Croatia-Slavonia-Dalmatia). Szabad, op. cit. n. 2, at pp. 395-397., 400.

⁸ ‘Croatia has its own territory, has a separate status and never has been annexed into the Hungarian Kingdom but it was related to us, was our partner who casted in our rights and duties, luck and pain.’ M. Kónyi, *Deák Ferenc beszédei* [The Speeches of Ferenc Deák] (Budapest, Franklin 1889) III. köt. (1861-1866) pp. 25-26. The speech is quoted by L. Heka in his work with the title ‘Az 1868. évi horvát-magyar kiegyezés a sajtó tükrében’ [The Hungarian-Croatian Compromise of 1868 in the Mirror of the Press] in *Acta Juridica et Politica* Tomus LIV. Fasc. 9. Szeged 1998. (*Acta Universitatis Szegediensis de Attila József Nominatae*) p. 9.; Pesty, op. cit. n. 2, at pp. 78-80.; Szabad op. cit. n. 2, at p. 401.

⁹ Farkas Albert, ed., *Országgyűlési Emlékkönyv 1866-1867*. [Memories of the Parliament 1866-1867] (Pest, Heckenast Gusztáv 1867) p. 34.; Sarlós, op. cit. n. 6, at p. 130.; K. Kmetty, *A magyar közjog tankönyve*. [The Textbook of the Hungarian Public Law] (Budapest, Politzer Zsigmond és fia kiadása 1905) pp. 427-430.; Ferdinándy, op. cit. n. 2, at pp. 733-735.

1866 consisted of Ferenc Deák, József Siskovics, Pál Somssich, József Eötvös, Gyula Andrásy, Kálmán Ghyczy, Antal Csengery and Imre Mikó on the part of the House of the Representatives of the Hungarian Parliament and of László Szögyény-Marich, Antal Széchen, László Jankovich and Antal Mailáth as from the House of Lords.

The work of the committees ended up again without any result, because both committees imagined the realisation of the compromise based on their own, differing historical grounds. This characteristic of the negotiations could be also observed in the discussions between the Austrian and the Hungarian parties. The 1st paragraph of Act 42 of 1861 legislated by the *Sabor* was authoritative for the Croats that would have preferred the achievement of a trialism instead of dualism in which the three countries, namely Austria, Hungary and the Triune Kingdom were of equal status while the Hungarians would have preferred to keep Croatia on the side of Hungary in their dualist system together with Austria.¹⁰

Josip Juraj Strossmayer bishop of Djakovo was the person who played a significant role in the inefficiency of the negotiations, who considered the compromise with the Hungarians unequivocally disadvantageous for his country and tried to confute its entering into vigour by using all of his political influence.¹¹ At the end Emperor Franz Joseph with the consent of the Austrian Prime Minister Friedrich Ferdinand Beust decided that the idea of the Triune Kingdom is against the provisions of the Pragmatic Sanction and declared his will towards the *Sabor* to represent itself in the forthcoming coronation ceremony. When the Croats remained absent on the coronation of 8 June 1867 the Emperor decided to dissolve the *Sabor* and to dismiss the *Ban* József Soksevics by naming the unionist Levin Rauch to replace him.

¹⁰ Heka, op. cit. n. 8, at pp. 14-15.; E. Monori Wertheimer, *Gróf Andrásy Gyula élete és kora. I-III.* [The Life and the Era of Count Gyula Andrásy. I-III.] (Budapest, A Magyar Tudományos Akadémia kiadása 1910) I. vol. p. 448.; B. Hóman and Gy. Szekfű, *Magyar történet VII. kötet. A tizenkilencedik és a huszadik század.* [Hungarian history VIIth volume. The 19th and 20th century] (Budapest, Királyi Magyar Egyetemi Nyomda 1934) pp. 300-302.; Ress, op. cit. n. 6, at p. 186.; Juhász, op. cit. n. 2, at pp. 247-250.

¹¹ About the role of Josip Juraj Strossmayer see Heka, op. cit. n. 8, at p. 8.; Wertheimer, op. cit. n. 10, at I. vol. pp. 454-455.; Hóman and Szekfű op. cit. n. 10, at p. 302.; Horvat, op. cit. n. 3, at p. 586.; Juhász, op. cit. n. 2, at p. 248., 259., 267., 270., 287-290.

The negotiations related to the compromise between the Hungarians and the Croatian changed course afterwards and on 30 January 1868 a new committee was settled on both sides. The Croatian members of this committee were: Kálmán Bedekovics, Antal Vakanovics, Ignác Brlic, Gyula Jankovics, Jánkó Cár, János Zsivkovics, József Zsuvics, István Vukovics and Pál Battagliarini. The supplementary members were Frigyes Kraljevics and Lázár Hellenbach. The composition of the Hungarian committee remained more or less the same, henceforward included Ferenc Deák, Antal Csengery, Kálmán Ghyczy, Pál Somssich, László Szögyény-Marich, Antal Széchen, László Jankovich and Antal Mailáth. The new members were: Dániel Dózsa, Tivadar Bottka, Lajos Horváth and Lajos Vadnay.¹² The discussions led to result with these new members and the text of the Compromise Act was soon accepted and enacted as Act 30 of 1868 in Hungary and Act 1 of 1868 in Croatia. The text of the bill was clearly made by Ferenc Deák and Antal Csengery and beside them the Hungarian Prime Minister Gyula Andrassy played an immense role in the realisation of both the Austro-Hungarian and the Hungarian-Croatian Compromise even if he did not take part in the work of the second committee due to his function of Prime Minister.¹³

2. The Hungarian-Croatian common affairs¹⁴

As paragraph 3 of Act 30 of 1868 declared that both Hungary and Croatia belonged to an undivided joint State, the affaires deduced from

¹² Ress, op. cit. n. 6, at pp. 188-189.; Gratz, op. cit. n. 3, at p. 63., Heka, op. cit. n. 8, at pp. 20., 22.

¹³ Z. Ferenczi, *Deák élete* [The Life of Deák] (Budapest, Magyar Tudományos Akadémia kiadása 1904) III. kötet p. 348.; Wertheimer op. cit. n. 10, at I. kötet p. 458., 463.; B. Léderer, *Gróf Andrassy Gyula beszédei. I. kötet 1847-1848.* [The Speeches of Count Gyula Andrassy 1st Volume 1847-1848] (Budapest, Franklin társulat, 1891) 1867. november 13. A „Germania” hajón történt eset, a horvát sérelmek és a szerb kongresszus tárgyában [The event happened on the ship „Germania”, the Croatian gravamen and about the Serbian Congress] pp. 255-262. jelen esetben pp. 260-261.; Ress, op. cit. n. 6, at p. 188.; *Die Legitimen* op. cit. n. 5, at pp. 60-61.; F. Eckhart, *Magyarország története* [The History of Hungary] (Budapest, Renaissance Könyvkiadóvállalat 1940) pp. 294-297.; Sarlós, op. cit. n. 6, at pp. 250-251.

¹⁴ The Acts quoted in this chapter are from the Corpus Juris Hungarici and from the work of D. Márkus, *Magyar közjog a hatályban lévő tételes jogforrások alapján* [The Hungarian Public Law based on the Act in effect] (Budapest, Grill-féle könyvkiadó vállalat 1905).

the Pragmatic Sanction that had been declared earlier as common affairs between Austria and Hungary would be common affair between Hungary and Croatia as well. Regarding these affairs the two states had to have a common legislation with common representation and for the execution of these Acts they had to form a common government. For this reason Acts 14, 15 and 16 of 1867 on the execution of the common affairs that also obliged Croatia-Slavonia-Dalmatia from then on could not be altered without their consent. For this reason, the above mentioned Act as well as Act 12 of 1867 about the Austro-Hungarian Compromise had been translated into Croatian language and sent to the *Sabor* for being published.

The civil list, conscription, the system of defence and the legislation referring to the liability for the military service were considered to be common affairs together with cases referring to the garrisoning of the army and its sustenance. According to the law the recruit number would be determined according to the proportion of the population and the recruits should be enlisted to the regiments of Croatia-Slavonia-Dalmatia assigned to an arm that they are the most capable to fight with. Based on the common financial affairs they planned to introduce a common taxation-system, and a common legislation regarding direct and indirect taxes, namely the determination of tax categories, their assessment, collection and handling, the voting for the common budget and the acceptance of the appropriation. Beside this, the national debt became common, so national property could not be alienated without the consent of the all partner states.¹⁵ In general all financial affairs that belonged to the common financial subject of the states belonging to the Crown of St. Stephen were considered to be common. The common financial governance was executed by the common Minister of Finance whose work was supported by the delegations through adopting the common budget.

The contribution to the common costs was determined by Act 30 of 1868 which laid down that Croatia-Slavonia-Dalmatia contributed to the Hungarian part of the common Austro-Hungarian budget in a proportion of 93,6:6,4%. This quota proportion was defined for a ten-year-long period of time. The quota proportion resulted in Croatia-Slavonia-

¹⁵ The Act 43 of 1873 amended the expression 'state landed property' used by Act 30 of 1868 and defined the state property in an extensive manner to which the state forests also belong to.

Dalmatia spending 45% of its tax incomes (excluding its custom incomes) on the costs of its internal affairs. The financial needs of the internal affairs were 2.200.000 florins per year. In the case if the budget incomes of Croatia-Slavonia-Dalmatia would not reach the legally prescribed 2.200.000 florins that had to be spent on the internal affairs the financial deficit shall be advanced by Hungary to his partner state. If the 45% of the budget income exceeds the amount of 2.200.000 florins the margin had to be paid into the common budget. There was only one exception to these rules, because in case if the sum of tax incomes exceeded the costs of the internal affairs and the 6,4% contribution to the common budget, so the budget balance was positive, Croatia-Slavonia-Dalmatia could keep the surplus incomes without being obliged to use it to finance the common budget deficits from the previous years.¹⁶

Act 34 of 1873 declared that Croatia-Slavonia-Dalmatia had to turn only the incomes exceeding the 45% of its tax incomes to the financing of the common budget even if this sum did not reach the 6,4% contribution needed to the common budget declared by Act 30 of 1868. By the reannexation of the military frontiers, the financial settlement of the two state and the quota would be re-established because the financial obligations of Croatia-Slavonia-Dalmatia would increase by the increase in its territory and population.

Act 54 of 1880 declared a new financial settlement between Hungary and Croatia. According to its provisions the proportion of the Croatian contribution to the common budget decreased to 5,6% and the contribution of the Hungarians increased to 94,4%. At the same time this Act narrowed the range of incomes that can be reckoned among the budgetary tax incomes and spent on the costs of the internal affairs.¹⁷

¹⁶ Ress, op. cit. n. 6, at p. 191.; Kiss, op. cit. n. 5, at pp. 84-87.; Kmetty, op. cit. n. 9, at pp. 438-440.; Ferdinándy, op. cit. n. 2, at pp. 172-177.

¹⁷ The Paragraph 6 of the Act 54 of 1880 excluded the incomes of the customs (based on Act 12 of 1867), the taxes of the consummation of wine and meat, the priestly dues paid by the catholic population of County Belovár, the charges of the military exemption based on Act 27 of 1880, the stamp dues collected from the insurance-, the railway- and the steam-boat companies (Act 33 of 1868), the transportation taxes based on Act 20 of 1875, and the stamp dues of the post cargo letters and at the end those indirect taxes (tobacco, salt, stamp, lottery) that were paid by the population of the military frontiers where the civil public administration was introduced instead of the military one but is has not been yet reannexed to the territory of Croatia-Slavonia-Dalmatia

Beside these financial settlements the Compromise Act of 1868 declared that the Hungarian Parliament is entitled to enact everything concerning the common financial affairs and also to prepare the Appropriation Act of the budget of Croatia-Slavonia-Dalmatia, with the condition that the Appropriation should be imparted to the Croatian *Sabor*.

Next to the common Military and External Affairs and the corresponding Finances, other common affairs existed that were reasonable to be practiced in common, based on a common legislation for reasons of expediency rising from the union.. These so-called ‘affairs of common interests’, separate from the common affairs based on the Pragmatic Sanction, were ruled by Austria and Hungary in long-term contracts of ten years. This meant that the legislation of the two countries would rule these affairs according to the same principles and provisions after the compromise. The affairs of common interest between Austria and Hungary became common affairs between Hungary and Croatia-Slavonia-Dalmatia rising from their status of partner state and of their joint stately existence. The Hungarian Parliament was entitled to enact in these affairs in the presence of the Croatian Delegates of the *Sabor*.¹⁸

All cases that fell out the circle of the common affairs belonged to the legislative and executive authority of the autonomous Croatian state organs.¹⁹

¹⁸ Such affairs of common interest were: the money-, the coin- and the banknote issues, the determination of the money-system and the money rates, the examination and the affirmation of those state contracts that referred to all the states belonging to the Crown of St. Stephen. The following were also common: the affair of the banks, credit banks and insurance companies, the affairs concerning the patent rights, the measures and weights, the merchandise stamps, the model insurances and the plate-marks, the provisions referring to the authorship’s and artistic property, naval law, the merchant and the exchange law, the mine law and the commerce in general, customs, the affairs of the telegraph and post offices, of railways, ports and shipping and the affairs of those state routes and rivers in which both Hungary and Croatia-Slavonia-Dalmatia was interested. The industry, the passport, the foreign policing and the affairs of the state citizenship and the naturalization were common so, that their legislation was common but the execution of the Acts belonged to the Croatian-Slavonian-Dalmatian autonomous government. Kiss, op. cit. n. 5, at pp. 80-82.; Ferdinándy, op. cit. n. 2, at pp. 164-165.; Juhász, op. cit. n. 2, at p. 249.

¹⁹ The autonomous affairs were: the public order, the affairs of the theatrical association, theatre, press and the affairs of the public administrative units, the law of elections and its procedure, the public health, the affairs of the poor and charity, the colonization, the law of the waters, mines, the affairs related to sorage, the

3. The Croatian delegates in the Hungarian Parliament

Because of the joint state partnership and common affairs the Croatian *Sabor* sent its delegates into the Hungarian Parliament. Act 30 of 1868 settled that 29 Croatian delegates should be sent to the Hungarian Parliament, which number was increased to 34 first by Act 34 of 1873 because of the reannexation to Croatia of the military territory of Zengg and Belovár, the castle of Ivanics and the village of Sziszek and then Act 15 of 1881 increased the number of the Croatian delegates to 40 persons because of the reannexation of the military frontiers.²⁰

The Croatian Delegates were the Members of Parliament sent by the *Sabor*, the autonomous Croatian Parliament. In the negotiations leading to the compromise the question arose whether the Croatian Delegates should get into the Hungarian Parliament by direct general elections also from the territory of Croatia-Slavonia-Dalmatia, as it happened in Hungary or they should be sent indirectly by the *Sabor*. The parties decided for the latter version in the Compromise Act. The mandate of the Croatian delegates lasted until the end of the Hungarian parliamentary period and in case if the Croatian Parliament was dissolved in the meantime the Croatian delegates still kept their mandates until the newly convoked *Sabor* could send other delegates.²¹

conscription, catering, garrisoning of the army and the national defence, the demography, the public building operations, the agricultural affairs, the silviculture, the maintenance of forests, the hunting, the fishing and the prison affairs. Among the religious and public educational affairs belonged the affairs of churches, public education and pedagogical cases, affairs of the scientific and artistic associations, public cultural affairs, and affairs of the religious and educational funds. Among the jurisdiction the administration of the jurisdiction, and its supervision belonged to. O. Eöttevényi Nagy, *A magyar közjog tankönyve*. [The Textbook of the Hungarian Public Law] (Kassa, Vitéz A. Könyvkiadóvállalata 1911) pp. 286-287.

²⁰ 1868:XXX. tc. 32-33. §; Sarlós, op. cit. n. 6, at p. 251.; J. Estók, *Magyarország története 1849-1914*. [The History of Hungary 1849-1914.] (Budapest, Nemzeti Tankönyvkiadó 2004) p. 125.; Wertheimer, op. cit. n. 10, at p. 301.; Ferenczi, op. cit. n. 13, at III. kötet p. 350.; Röss, op. cit. n. 6, at p. 193.; G. Horn, *Le compromis de 1868 entre La Hongrie et La Croatie et celui de 1867 entre L'Autriche et la Hongrie (étude historique et critique)*. [The Compromise of 1868 between Hungary and Croatia and of 1867 between Austria and Hungary (Historical and Critical Essay)] (Paris, Librairie générale de droit et de jurisprudence 1907) p. 216.; *Der Alte Verband*, op. cit. n. 2, at p. 15.; Kiss, op. cit. n. 5, at p. 82.; Kmetty, op. cit. n. 9, at pp. 441-442.

²¹ 1868:30 tc. 34. §. Horn, op. cit. n. 20, at p. 218.

Act 34 of 1873 ordered that the new *Sabor* should be convoked within three months of its former dissolution.

Another question was of also importance, namely whether the Croatian delegates should act in the Hungarian Parliament as Members of the Croatian Parliament or should they be considered as Hungarian Members of Parliament who came from the territory of Croatia-Slavonia-Dalmatia? ²² This debate provided also a possibility for those who opposed to the Hungarian-Croatian Compromise by disapproving the later accepted solution, recalling that the Croatian delegates could not form a significant group in the House of the Representatives of the Hungarian Parliament that consisted of 450 members. While the Croatian delegates enjoyed the same rights as the Hungarian Members of Parliament, in practice they could only help the fight of one Hungarian Party against the other but they could not significantly influence the legislative work. ²³

The nobles of Croatia-Slavonia-Dalmatia who were earlier members of the national assembly of the Hungarian Kingdom before 1848 preserving their historical rights kept their membership in the House of Lords of the Hungarian Parliament. The 3rd Paragraph of Act 18 of 1881 declared that beside these members of the House of Lords, the Croatian *Sabor* sent three delegates to the House of Lords (instead of the two according to the Act 30 of 1868), moreover according to the provision

²² Dr. Ignác Brlic Ignác (Ignjat Brlic) one of the members of the Croatian working committee of the 1868 Compromise wrote in his letter of 29th April 1868 to his brother Andrija: '[...] schon zwei Tage zanken wir erfolglos herum über die Art unserer Vertretung im ungarischen Parlament; die Einigung wurde nur insoferne erzielt, daß der Zagraber Sabor die Abgeordneten für das Pesther Parlament kollektiv kürt, wir sind aber uneinig über den Einfluß, den unsere Abgeordneten im ungarischen Parlament ausüben sollte, um sich als staatliche Eigenheit zu behaupten, und es ist schwerlich daß wir uns einigen werden; die Mehrheit wünscht, daß die kroatischen Abgeordneten auch als ungarische zählen, die Minderheit wünscht, daß unsere Abgeordneten, nur wenn es sich um uns handelt, wie auch in gemeinsamen Angelegenheiten, ihren Einfluß auf die Entschlüsse behalten; [...]'. Horvat, op. cit. n. 3, at pp. 586-587.

²³ 'Les délégués croates n'ont guère d'autre mission que degrossir les rangs d'un parti magyar contre un autre parti magyar. [...] .on peut dire d'eux qu'ild ne sont que les spectateurs de leur gouvernement [...] et l'égalité promise á la Croatie un simple leurre.' [The Croatian delegates do not more than strengthening one Hungarian Party in spite of the other '(...) as a matter of fact they are only the spectators of their government (...) and the equality promised to Croatia is only a sham.] Horn, op. cit. n. 20, at pp. 164-165.; Juhász, op. cit. n. 2, at p. 266.

of the Act 34 of 1873 the *Ban* of Croatia-Slavonia-Dalmatia kept his membership in the House of Lords of the Hungarian Parliament. Beside him the Croatian members of the House of Lords of the Hungarian Parliament were: the Roman Catholic Archbishop of Zagreb, the Metropolitan of Karlovic, the Croatian-Slavonian Roman Catholic Diocesans and the Provost of Vrana. Act 7 of 1885 curtailed the membership of bishops who did not have a diocese, and preserved the membership rights of the bishops of Belgrade and Knin based on their historical rights saying that they owned a diocese in the era before the battle of Mohács of 1526. From the secular members the lord lieutenants of the Croatian-Slavonian-Dalmatian counties, the Count of Turopolje and the male members of those princely, count and baron families can be listed who reached their age of 24 and according to the provisions of Act 7 of 1885 reached the census of 3000 florins. Act 7 of 1885 excluded the lord lieutenants from the House of Lords of the Hungarian Parliament.²⁴

There were observable differences between the status of the Croatian members of the House of Lords based on their personal rights and the delegates of the Croatian *Sabor*. First of all the Croatian delegates of the *Sabor* were the representatives of the *Sabor's* opinion at time of voting and could only vote for Bills referring to the common affairs while the members based on their personal rights, having the title of Magnate, could had the right to vote for every legislative subject.

While the mandate of the delegates ended with the parliamentary period of the Hungarian Parliament the mandate of the members based on personal rights lasted till death and in case of the Magnates it was also inheritable. The delegates of the *Sabor* received a payment of 6.500 florins while the others did not receive any payment or fee. The daily allowances and accommodation fees of the delegates had to be paid from the common budget.

The electoral record served for the authentication of the delegate's mandate, while in case of members of personal rights Acts 7 of 1885 and Act 8 of 1886 determined the list of the participants.²⁵ In case of the *defectus seminis* of a Croatian noble family the provisions of Act 29 of 1893 were employed according to which the *Ban* reports the fact of the dying out of the male line to the Hungarian Prime Minister who issues

²⁴ Kiss, op. cit. n. 5, at p. 82.; Kmetty, op. cit. n. 9, at pp. 257-258.

²⁵ Horn, op. cit. n. 20, at pp. 221-222.

an announcement about it in unison with the Leader of the House of Lords. If within the period of six months no one confutes the fact of the *defectus seminis* the respective noble family would be stroked of the roll of the Members of the House of Lords.

The Hungarian language became the official language of the Hungarian Parliament introduced by Act 2 of 1844, with the condition that the Croatian representatives can take the floor on their own mother language.²⁶ Another exemption applied to the Croatian representatives with regard to Paragraph 9 of Act 7 of 1885 that ordered that only those persons can be members of the House of Lords of the Hungarian Parliament who can speak Hungarian. This provided the opportunity for the pessimists to make bittersweet remarks on the Hungarian-Croatian Compromise because although the Croatian representatives had the right to take a floor on their mother language why would they have done it? Who would have understood them anyhow?²⁷

Because more than the half of the 135 Members of Parliament of the Croatian autonomous Legislative Organ, of whom 90 were elected and 45 invited for their personal rights, were also members of the Hungarian Parliament, Act 30 of 1868 ordered that the bills concerning the Hungarian-Croatian common affairs should be discussed in turn and the Croatian representatives should have at least three months per year to enjoy their membership in the *Sabor* and to take part in the autonomous legislation.

In case of discussing common affairs the Croatian-Slavonian-Dalmatian banner had to be pulled up beside the Hungarian one on the building of the Hungarian Parliament. Acts concerning the common affairs were assented by the King – whose right of assent was also fortified by Act 2 of 1870 –, issued in Croatian language and sent to both the *Sabor*, the Croatian-Slavonian-Dalmatian Minister and to the *Ban*, who was responsible for its publication in the national bulletin and had to send the enactment to every administrative unit. Because the time of entering into force of the enactment in Croatia was the 15th day after the day when the

²⁶ Kmetty, op. cit. n. 9, at p. 455.; Ferdinándy, op. cit. n. 2, p. 756.

²⁷ The Croatian delegates of the *Sabor* had to have a knowledge of Hungarian language, because if not: '[f]ür wen sollen denn die croatischen Abgeordneten auf dem ungarischen Reichstage croatisch sprechen? [...] anders die sämtlichen Vertreter Croatiens mit allen Magnaten und Würdenträgern bei dem ungarischen Landtage zu der erbärmlichen Rolle eines stummen Fisches verdammt sein wollen'. *Der Alte Verband*, op. cit. n. 2, at pp. 16-17.

Act was read in both of the Houses of the Hungarian Parliament the day of the coming into force of the Act in Hungary had to be also indicated by the Croatian publication.²⁸

4. The Participation of the Croatian representatives in the Hungarian delegation

Administration of the common affairs according to Act 12 of 1867 belonged to the Common Ministers and to the delegations consisting of two times 60 Members of Parliament of the Austrian and Hungarian Legislative Organ. After the Hungarian-Croatian Compromise of 1868 Croatia-Slavonia-Dalmatia was represented in the Hungarian delegation in such manner that the House of the Representatives of the Hungarian Parliament sent 40 members into the delegation from whom 4 persons were Croatians and from the rest of the 20 members sent by the House of Lords of the Hungarian Parliament one member had to be Croatian.²⁹ The Croatian members of the Hungarian delegation were elected from the delegates sent to the Hungarian Parliament by the *Sabor*. Beside the ordinary members of the delegations also supplementary members had to be elected in case the ordinary members were hindered in exercising their duties.

The term of the delegations lasted one year and its sessions were held one year in Pest and in the next one in Vienna.³⁰ They were entitled to vote for the common budget providing for the common military and external affairs and to initiate impeachment of the Common Ministers.³¹ The Austrian and Hungarian delegations held separate sessions and kept in touch by correspondence. They could hold joint session too, but on these common sessions they could not discuss any subject in order to avoid the pretence of a common parliament, they could only vote. If the parliament was dissolved within a year the newly convoked parliament elected new members into the delegation. The delegations had to be convoked after the drafting of the common budget proposal, by taking consideration view of the parliamentary sessions. The bill of the

²⁸ V. Jászi, *Tanulmányok a magyar-horvát közjogi viszony köréből* [Essays about the Hungarian-Croatian Constitutional Relation] (Budapest, Eggenberg 1897) pp. 126-142.

²⁹ 1868:XXX. tc. 40-42. §.; Ferdinándy, op. cit. n. 2, at p. 166-167., 545.

³⁰ É. Somogyi, 'A delegáció' [The Delegation] 3-4 *Századok* (1994) pp. 465-516., in this case p. 482.

³¹ Ferdinándy, op. cit. n. 2, at p. 548., 610-613.

common budget was drafted by the Common Minister of Finance and accepted by the delegations. However, it became an Act only when the budgetary headings divided according the quota determined for every ten years were incorporated into the Hungarian national budget by the legislator of each state (Austria and Hungary). The autonomous legislative organs of the two states could not discuss about the common budget accepted by the delegations but they had to vote on it.

The Common Ministers could be impeached in political and legal way, too. Interpellation was the form of political impeachment and legal impeachment was initiated by the delegations and carried out by a group of two times 12 legally educated persons who were sent by the legislative organs of Austria and Hungary to which the jury trials served as a model.

The delegations worked in committees. In the Hungarian delegation seven different committees were created: one committee for external affairs, one for military affairs, one financial committee, one naval committee, a joint committee of these four affairs whose main task was the handling of the Bosnian affairs after its occupation, an appropriation committee and a compromise committee whose task was to keep contact with the Austrian delegation. The number of the committee members ranged from eight to twenty-four, but all members of the delegation were also members of the joint committee except the Head of the Delegation.³²

Being member of a delegation was an honour, because according to the common opinion, only the best members of the legislative organ could get into there. The ceremony of introducing delegation members to Franz Joseph during the 19th century also demonstrated the importance of their function.³³

³² Somogyi, op. cit. n. 30, at p. 485.

³³ In order to be introduced to the Emperor a document describing the introduction ceremony can be found among the delegation materials in the National Archives. According to its content the ceremony of the introduction of the delegation went on such way: '[i]n the exact time of the reception the members of the delegation assemble together in the second antechamber of the big chamber. As soon as all of them are present they are led to the secret council hall where they form line around the throne in a half-circle. The Common Ministers are already present in the secret council hall together with the Hungarian Prime Minister, the Groom of the Stole and with the Captains of the Regiment of the Guards. At this time the Groom of the Stole reports to the Emperor and his Majesty the Emperor enters into the secret council room and steps onto the throne podium in the attendance of the Groom of the Stole,

Each delegation had its official language, the Austrian held its discussions in German, the Hungarian in Hungarian with the condition - as it was declared also in the case of the Croatian delegates in the Hungarian Parliament – that the Croatian members of the Hungarian delegation could take the floor in their mother language, even if they did it only on rare occasions. Correspondence between the two delegations was conducted in their official language but they were obliged to attach an authentic translation to each message they sent.³⁴

Even if the effective handling of the common affairs could be organized successfully only this way, it has to be admitted that the delegations were the most controversial institutions of the Act 12 of 1867 regarding the Austro-Hungarian Compromise. Their creation can be attributed to the plans Ferenc Deák and Gyula Andrásy and even if they have already known at the time of drafting that the construction was a kind of a compromise settlement in the favour of the functioning of the Austro-Hungarian Monarchy but the constitutionalism of both countries was harmed for the fulfilment of this aim. Using the words of Éva Somogyi:

the Main Aide-de-Camp and the Aide-de-Camp in service. The Captains of the Regiment of the Guards form line around His Majesty beside the Groom of the Stole and the Main Aide-de-Camp. – The Common Ministers and the Prime Minister are standing left to the throne podium. Then the Main Ceremony Master and the Aide-de-Camp in service remain near the door of the reception hall. The Head of the Delegation holds his speech and His Majesty responds to it. After the speech all members of the delegation are introduced to His Majesty by the Prime minister. Then His Majesty mercifully dismisses the members of the delegation and resigns back with his attendance into the presentation room. The members of the delegation enter into the Burg from its Schweitzer Tor. All members in military service should wear their uniform (without bar of medals) and the civil members should wear “small-dress uniform” (national dress uniform or white tie) and those awarded with “vitéz” titles and the members of the cross are present without ribbon.’ The place of the ceremony was changed according to the place where the sessions of the delegations were held. If they were in Budapest, the place of the ceremony was the Castle of Buda. Also the drawn plan described the exact course of the ceremony. Magyar Országos Levéltár (National Archives of Hungary) (MOL) K8. *A közös ügyek tárgyalására kiküldött országos bizottság – delegációk anyagai* [The materials of the delegations sent to discuss the common affairs.] fasc. 5. 1871-1872. 741-742.; fasc. 6. 1873-1874. 31.; fasc. 7. 1875/76/77. 42.; Somogyi, op. cit. n. 30, at pp. 482-483.

³⁴ 1868:XXX. tc. 59. §; Ferdinándy, op. cit. n. 2, p. 292.; Somogyi, op. cit. n. 30, at p. 478., 480.

‘[t]he delegation was a weird creature of the dualistic monarchy, a vulnerable one and for want of better solution forced to be adapted to the handling of the common affairs.’³⁵

It is also arguable how effective and fluent the work of the delegations was. From the delegation materials it can be unambiguously observed that the budget was always in financial deficit regarding the military affairs, so for solving this problem they could not spend too much on external affairs. So in this point of view the delegations were forced to take the path. Their annual election, the continuous protocol tasks and the permanent rotation of the delegation members because of illness, family catastrophes and other official engagements set back the work of the delegations.³⁶

II. Legislative activity of the Croatian Parliament in the Austro-Hungarian Empire

The main constitutional document in the settlement period was the Croatian-Hungarian Settlement that established division of jurisdiction between the common and autonomous government bodies as well as the autonomous and common affairs with Hungary. The affairs that were not set as common by the Settlement were run independently by each state. ‘Common affairs’ in the Lands of the Crown of St. Stephen included financial-economic affairs, copyright, commercial and bill of exchange law, mining and maritime law; post and railways, harbours, ship building, state roads and rivers and defence affairs.³⁷ According to the Settlement finances belonged to joint jurisdiction, which had big consequences for the Croatian autonomy.³⁸ The Croatian-Hungarian

³⁵ Somogyi, op. cit. n. 30, at p. 466., 474.

³⁶ The certificates of the absence that can be found among the delegation materials are proving this statement, too. MOL K8.; *A közös ügyek tárgyalására kiküldött országos bizottság – delegációk anyagai* [The materials of the delegations sent to discuss the common affairs.] fasc. 5. 1871-1872.; fasc. 6. 1873-1874; fasc. 7.; 1875/76/77.; Ferenczi, op. cit. n. 13, at III. kötet pp. 357-359.

³⁷ Mentioned in paragraphs from 6. to 10. of the Settlement. Law I. 1868, in *Zakoni o Ugarsko-hrvatskoj nagodbi* [The laws of Hungary and Croatia Settlement] (Zagreb, naklada Knjižare Mirka Breyera 1911) p. 9-13.

³⁸ Significant is statement of Mr Rački that Settlement incomes of Croatia were higher than incomes of the Principality of Serbia – and that economically, socially, culturally and politically underdeveloped, but more independent Serbia modernised its institutions on the model of Western constitution. J. Šidak, *Studije iz hrvatske*

Parliament (Joint parliament) and the Central Government, in which also a Croatian-Slavonian Minister anticipated, were predicted to be the most important common bodies. In the Settlement Croatia was given a special autonomy in justice and home affairs (except citizenship) religion and education. The Settlement did not mention the issue of civil rights as these were, according to the division of jurisdiction, internal issues of Croatia.³⁹ The autonomous Croatian-Slavonian Land Government, the Ban and the Parliament managed the above mentioned affairs independently. The jurisdiction of the Parliament as legislative body in autonomous affairs was set by the Croatian-Hungarian Settlement, Law II from 1870 on the Organisation of the Parliament and other regulations that at least partially referred to this issue. Accordingly, the Parliament had legislative authority in autonomous affairs and the most important task of the Parliament was the procedure of passing autonomous laws of Croatia. However, in paragraph 13 of the Law II from 1870 it is written that 'the right of initiative belongs to the Crown and to the Parliament' and that the King also had the right to dissolve the Parliament and to postpone its work.⁴⁰ Although the Monarch was the second legislative factor, he could not change the text of a law, as the text was defined exclusively by the Parliament. The monarch had the right of absolute veto, and could reject the proposed law in its whole by not signing it.⁴¹ Not only the Monarch, as political executive, had certain jurisdiction in legislation, but also the Ban as chief of the Land Government had the right to co-sign every law signed by the Monarch. However, with the Monarch's assent and contra-signature only no Croatian autonomous laws came into obligatory effect yet – two further legal documents were necessary for that: the Promulgation Document and Document for Publication of Law.

povijesti XIX. Stoljeća [Studies from the Croatian history of the 19th century] (Zagreb, Institut za hrvatsku povijest 1973) p. 302.

³⁹ D. Čepulo, 'Hrvatsko-ugarska nagodba i reforme institucija vlasti' [Croatian-Hungarian compromise and reform of government institutions] 22 *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* (2001) pp. 117-130.

⁴⁰ Later on, in 1873, during the rule of Ban Ivan Mažuranić, a regulation was passed which said that in case the King dissolved the Parliament, his duty is to adjourn it within three months. N. Engelsfeld, *Povijest hrvatske države i prava od 18. do 20. stoljeća* [History of the Croatian state and the rights of 18th to 20th century] (Zagreb, Pravni fakultet u Zagrebu 2006) p. 136.

⁴¹ L. Polić, *Nacrt hrvatsko-ugarskog državnog prava – skripta* [The draft of the Croatian-Hungary civil rights – mimeographed note] (Zagreb 1912) p. 245.

Legislation in all affairs which according to the Settlement referred directly and exclusively to the Kingdom of Croatia and Slavonia fell under the jurisdiction of the Croatian Parliament, which was also stated in the paragraph 12 of Law II from 1870.⁴² The affairs concerning internal administration, judiciary, religion and education as well as certain budget issues were in incidence of the Croatian Parliament. The Parliament also had the right to enact an ordinance about its work and to enact resolutions in which it stated its opinion about operations of the Government. It also had the right to address, i.e. to refer to the Crown directly, which was quite often used in order to inform the Monarch about the problems of Croatia and to ask for solution of constitutional problems in the country. Next to the mentioned means of parliamentary control over the executive power, there were some other means: administrative control, interpellation right, right to receive petitions and right to do surveys. Despite the fact that the Croatian state did not use all the possibilities given by the Settlement, the Croatian Parliament used to be and has remained the central historical institution of Croatian people and a true guardian of its state-legal recognisability and self-importance.

1. Five-year long parliamentary operation in Settlement conditions – restricted modernisation

After acceptance of the Croatian-Hungarian Settlement it was necessary to undertake a reform with the purpose to align inner organisation with the regulations from the Settlement. In order to do so, sitting of the Parliament was continued again in November 1868 during which discussions about various issues were conducted (election of the Royal Committee for solving the Rijeka issue; election of members for the Common Parliament and a Croatian minister in the Hungarian Government; appointment of the Ban, etc.). After a shorter break, the Parliament of the Trinity Kingdom assembled again in March 1869 and continued the parliamentary discussion about drafting the law in the

⁴² This stylization was not so good, as on the ground of Art. 47 of the Croatian-Hungarian Settlement, the Croatian Parliament had the right to take part in legislation of all affairs that were not explicitly committed to the Croatian-Hungarian state union. H. Sirotković, *Ustavni položaj i organizacija rada Sabora kraljevine Hrvatske i Slavonije u građanskom razdoblju njegova djelovanja (1848-1918)* [Constitutional position and the organization of the Parliament of the Kingdom of Slavonia and the Croatia in the period of his civil action] (Zagreb, Rad Jugoslavenske akademije znanosti i umjetnosti 1981) p. 71.

Croatian-Hungarian Land Government held in August 1869 followed by the King's sanction of the Law II of 1869.⁴³

According to the said law, the Land Government represented the sovereignty with the Ban acting as head. It consisted of three departments: Department for Internal Affairs and Affairs of Land Budget, Department for Religion and Education, and Department for Justice with appointed department chairmen. The Ban was amenable to the Parliament for constitutionality and legality of governmental acts and delivered applications from the internal jurisdictions to the Monarch over the Croatian-Slavonian Minister, who beside the Ban countersigned the Monarch's acts. The Ban had the duty to take part in the work of the Parliament and answered the Parliament Members' questions.⁴⁴ At that time the discussion about the draft for building railways and the law for drying of the Lonjsko field was ongoing as well. The basis of the educational system in Croatia and Slavonia was primary school education that had to be modernized and therefore it was necessary to pass a law on primary schools. Two Bills were discussed in the Parliament, one of which was proposed by the Teacher Cooperative in Zagreb and the second one by the group of Members of Parliament. However, neither of the two Bills was put in further procedure due to impracticability of some regulations at that time. Among the requests discussed and accepted during sessions of the Parliament was the request to allow non-Serbian population in Srijem County to use Croatian language with Roman alphabet in judiciary and political bodies. In order to protect the Croatian-Hungarian Settlement, in 1870 during the reign of Ban Rauch, the Parliament passed a law saying that everyone who would request a violent change of the Croatian-Hungarian state relationship or changing of the constitution of the Kingdom of Hungary and the Kingdom of Croatia and Slavonia, would do criminal offence of 'crime of treason', or someone who would in any way show contempt or hatred, would commit the criminal offence of 'disturbance of public order'.⁴⁵ Notwithstanding that reference to change of the

⁴³ 'Law II: 1869 on Organisation of Autonomous Croatian-Slavonian-Dalmatian Land Government', in *Sbornik zakonah i naredabah valjanih za kraljevinu Hrvatsku i Slavoniju* [Anthology of laws and decrees valid for the Kingdom of Croatia and Slavonia] (Zagreb, Brzotiskom narodne tiskarnice dra. Ljudevita Gaja 1869) p. 7-12.

⁴⁴ Sirotković, op. cit. n. 42, at pp. 39-86., 75-78.

⁴⁵ 'Law XI: 1870 on change and amendment of some institutions of Criminal Law', in *Sbornik zakonah i naredabah valjanih za kraljevinu Hrvatsku i Slavoniju* (Zagreb,

Settlement was criminalized by this law, the most attention was paid to the process of drafting and passing of the new Parliamentary Election Order and new regulation in organisation of the Parliament, as the Government handed in a suggestion to the Parliament with which it overtook the imposed legal documents from 1867 with additional restrictions.

The King gave his assent to these documents in November 1870 and they were placed into the statute book of the Trinity Kingdom entitled: Law on Organisation of the Parliament as Law II/1870 and Law on Parliamentary Election Order as Law III/1870. The Law II/1870 on Organisation of the Parliament⁴⁶ contained 16 paragraphs referring to the right of assembling, postponing and dissolving the Parliament, legislative period of representatives, active and passive right to vote, scope, etc. It was stated by the Law that the King had the right to convey and dissolve the Parliament, but also the obligation that the new Parliament had to be elected and conveyed no later than three months after dissolution of the previous Parliament. Affairs of the Kingdom of Croatia and Slavonia, as stated in the Settlement, were in the scope of the Parliament. This Law kept wide range of appointed votes and added local authority of the Turopolje County and the passive right to vote was also determined relatively widely under condition of literacy and the right to exclude someone on the ground of improbity and dependence. The Law also contained regulations on internal election of parliamentary heads, regulations on Rules of Procedure for mileage and renting costs per day of session. The Law III/1870 on Election Order⁴⁷ had 27 paragraphs in six sections: number of representatives, electoral counties and the central committee, electoral deputations, right to vote, election lists and election of the representatives. Although the number of representatives stayed the same (67), high means tests were enacted for direct right to vote. Central Electoral Committees were appointed by the

Brzotiskom narodne tiskarnice dra. Ljudevita Gaja 1871) p. 324-326. Hereafter instead *Sbornik zakonah i naredabah valjanih za kraljevinu Hrvatsku i Slavoniju* will be used SZ.

⁴⁶ 'Law II: 1870 the Parliament of the Kingdoms of Dalmatia, Croatian and Slavonia and organisation of the Parliament of the same Kingdoms', in *SZ* (Zagreb, 1870) p. 283-286.

⁴⁷ 'Law III: 1870 of the Parliament of the Kingdoms of Dalmatia, Croatian and Slavonia and Electoral Order of the Parliament of the same Kingdoms', in *SZ* (Zagreb, 1870) p. 293-299.

big authority of the county, authority of the Turopolje County and local chiefs or city judges in their headquarters. This Central Electoral Committee enacted electoral districts in its jurisdiction. Parliamentary mandate lasted for three years. The above mentioned Laws were the first which were passed in parliamentary procedure. Among other Laws that were discussed and passed by the Parliament, the Law on Promulgation of Autonomous Laws should be mentioned, in which it was stated that after the King's approval of a law and the promulgation of law in the Parliament, the Law was published in a code with 15-day long *vacatio legis*.⁴⁸ Passing the Law which referred to appointment of judges and King's Court officers it was defined that all judges at King's Courts and secretaries of the Table of the Seven were appointed by the King on the Ban's proposition, whereas all other officials were appointed by the Ban.⁴⁹ As the Land Government was organised, it was necessary to organise a new administrative-territorial structure and in 1870 the Parliament accepted the new Law on Organisation of Counties which confirmed the previous number of counties.⁵⁰ The counties remained independent municipal areas and had the right to self-administration and to discuss all issues important for the population in that area. They also had the right to send applications to the Land Government and petitions to the Parliament. The adoption of the county budget, judiciary of the first instance, traffic, building of churches and schools, etc also fell under the jurisdiction of counties. County administration was constituted by the County Assembly as central organ and the County Magistrate as executive organ. The head of the County was the County Prefect, who was appointed by the King on proposition of the Ban. The Deputy County Prefect administered the county and was the executive organ of the County Assembly. Each County consisted of districts headed by a district judge who was responsible to the big County Prefect, i.e. Deputy

⁴⁸ 'Law VI: 1870 of the Parliament of the Kingdoms of Dalmatia, Croatian and Slavonia on passing of laws enhanced in the Croatian-Slavonian-Dalmatian Parliament', in *SZ* (Zagreb, 1870) p. 308-309.

⁴⁹ 'Law XI: 1870 of the Parliament of the Kingdoms of Dalmatia, Croatian and Slavonia on reorganisation of some institutions, appointment of judges and filling of lower offices in King's judiciaries in the Kingdom of Croatian and Slavonia', in *SZ* (Zagreb, 1870) p. 317-318.

⁵⁰ 'Law XVII: 1870 on Organisation of Counties', in *SZ* (Zagreb, 1871) p. 51-65.

County Prefect for administrative affairs.⁵¹ Apart from this Law on Organisation of the County, the Parliament also confirmed the Law on Restructuring Village Municipalities and Trade Markets without Arranged Magistrate.⁵² This Law first of all defined who can be a permanent member of a municipality, the condition being Croatian-Slavonian citizenship and relation with the municipality in form of a person or assets.⁵³ A municipality judge, the Count and notary as executive self-administrative organs were elected by the Municipality Board on proposition of self-administrative organ. The municipality judge was responsible to that Board for affairs concerning self-administration. The municipality had its own means and the right for own impositions, but they were under surveillance of higher organs.

2. Legislative activity of the Parliament from 1872 to 1875

The reigning of Ban Ivan Mažuranić coincided with three parliamentary assemblages: 1872/1873-1875, 1875-1878 and 1878/1880/1881, characterized by significant modernization of unequal direction and intensity. The parliamentary term until 1875 was a favourable framework for development of reform politics. From 15 June 1872, when the sitting of the parliament was opened until Mažuranić's appointment for the Ban on 29 September 1873, and from that day until the last session of the Parliament held on the 15 June 1875, the Parliament all together held 121 sessions.⁵⁴ During its reigning until 1880 Mažuranić's Government proposed 48 laws which shows that it was a Government for reforms.

However, next to Mažuranić's Government, Vakanović's Government also proposed 18 laws from which three were withdrawn from

⁵¹ In 1875, within Mažuranić's reforms the Law on Organisation of Political Administration and some other laws will be passed. These laws set complete new basis for organisation of administration, including grounding of first public services. D. Čepulo, 'Dioba sudstva i uprave u Hrvatskoj 1874. godine – institucionalni, interesni i poredbeni vidovi'[Separation of judiciary and administration in Croatia 1874th year – institutional, interest and comparative aspects], 1 *Hrvatska javna uprava* (1999) p. 227. at p. 254.

⁵² 'Law XVI:1870 on Restructuring Village Municipalities and Trade Markets without Arranged Magistrate', in *SZ* (Zagreb, 1871) p. 37-50.

⁵³ Čepulo, op. cit. n. 3, at p. 143.

⁵⁴ Saborski dnevnik kraljevinah Hrvatske, Slavonije i Dalmacije 1872-1875. I., II. [Parliamentary Diary of Croatian kingdom, Slavonia and Dalmatia. 1872-1875., I, II.] (Zagreb, 1875)

procedure, whereas for 9 of the proposed laws the procedure was overtaken by Mažuranić's Government. The proposed government laws referred to a whole range of areas: agriculture and economy, education, religion, criminal law and the system of servitude, administrative-political system, and freedom of press, social relationships and health care. The first draft proposed by Vakanović's Government was the Law on Field Monitoring Duty which imputed crime in certain cases of field damage, determined obligations of reparation and replaced the outdated regulations.⁵⁵ Furthermore, the government proposed the Law on Abolition of Corporal Punishment to the Parliament which abolished the punishment of beating since such type of punishment was inappropriate for that time and purpose.⁵⁶ The Government also proposed the Law on Constitution of the University of Franz Joseph I in Zagreb that suggested the establishment of the Theological and Juristic Faculty and some departments at the Faculty of Philosophy. But, because of certain problems, the laws were not even discussed until the ruling of Ban Mažuranić when it was passed in 1874.⁵⁷ As already mentioned, the proposed laws of the Government referred to a range of areas, and among others to the area of religion, therefore two laws in the field of religious rights, namely for emancipation of the evangelical Christians and the Jews, were proposed during that period. The Law on Equality between Jews and followers of other confirmed religions set equality between the Jews and followers of other confirmed religions concerning free professing of religion and concerning political and civil rights, and it gave the state the right of supreme surveillance regarding issues dealing with religious observances and possibility to have influence on educational plans based on the law.⁵⁸ In contrast to this Law assented already in 1873, the Law on Equality between Evangelical Christians and Followers of Other Confirmed Religions was not passed until 1898. Not only the Government had the right to propose laws, the representatives in the Parliament had this right, too. They proposed to Vakanović' Government to suspend division of collective assets, which

⁵⁵ 'Law on Field Monitoring Duty', in *SZ* (Zagreb, 1873) p. 243-252.

⁵⁶ 'Law on Abolition of Corporal Punishment', in *SZ* (Zagreb, 1873) p. 241-242.

⁵⁷ 'Law on Constitution of the University of Franz Joseph I in Zagreb', in *SZ* (Zagreb, 1874) p. 11-28.

⁵⁸ 'The Law on Equality between Jews and followers of other confirmed religions', in *SZ* (Zagreb, 1873) p. 312-313.

was accepted by the government.⁵⁹ This overview of laws shows that laws concerning organisation of judiciary and administration, as well as civil rights and freedoms, as key issues in reformation, were not at all present. The nomination of Mažuranić as Ban was the beginning of modernization with the aim to accomplish territorial integrity of Croatian lands and to establish Croatian (judicial) cultural and political identity and successful economy. After the nomination for the Ban on 20 September 1873 Mažuranić already in October of the same year started working on some laws overtaken from Vakanović. But, until 1875 Mažuranić's Government had overtaken only 8 laws proposed by the previous Government, and proposed even 26 laws on its own initiative. In the first period of the Parliament's term, Mažuranić overtook procedure in seven already proposed laws among which the most important was the Law about University of Franz Joseph I that was amended, and as such predicted four faculties with exception that the Faculty of Medicine should have been opened after fulfilment of financial assumptions. Apart from this Law, the Law on Wages, Rewards and Retirements for Educational and Clerk Staff at University⁶⁰ was passed. However, while Mažuranić's Government agreed about the law regarding the University, it disagreed with the Law on Electoral Order which increased the number of representatives in the Parliament from 67 to 77 due to annexation of the Military Frontier to Croatia. The Law on Grounding Public Mental Asylum preceded establishment of the first such institution in Croatia that was necessary and meant catching up with modern, civilised nations.⁶¹ Mažuranić also overtook the Law on Performing Public Works and Building and the Bill on Change of Some Institutions from the Article V:1870. (rental works). The first period of legislative activity shows absence of Mažuranić's own legislative initiatives, but in that period he did work on preparation of a reform plan intensively, which can be supported by the fact that already after three months from overtaking duties of Ban, he proposed laws to the Parliament which referred to fundamental issues of juridical-political system, judiciary and social relations. Special attention was paid to the Law on Responsibilities of the Ban and

⁵⁹ 'Law on Equality between Evangelical Christians and Followers of Other Confirmed Religions', in *SZ* (Zagreb, 1872) p. 267-268

⁶⁰ 'Law on Wages, Rewards and Retirements for Educational and Clerk Staff at University' in *SZ* (Zagreb, 1873) p. 29-33.

⁶¹ 'Law on Grounding Public Bedlam', in *SZ* (Zagreb, 1873) p. 302-303.

Department Heads, as this was one of the key political issues. The Law planned legal responsibility of the Ban for the most severe offences against the Settlement and the law, and responsibility of department heads was subsidiary with withdrawal and dismissal as predicted sanctions. Procedure for activation of responsibility of the Ban or department heads could have been requested by at least twenty members of Parliament in written form. This Law represented the ground assumption of transformation of the Land Government and administration into a modern and rational system independent of influence of the Central Government.⁶² By passing the Law on Judicial Authority, the principle of the judiciary's independence was established, but judges were still nominated by the King permanently and finally.⁶³ This Law divided the judiciary and administration in organisational and personal sense. Since the judiciary and administration were divided, the Ban as the head of Land executive power could no longer be the President of the Table of the Seven, and another president was to be set on that place. This was regulated by the Law on Presidency of the Table of the Seven.⁶⁴ As amendment to the Law on judicial authority, the Law on Disciplinary Responsibility of Judges, on Moving and Retiring of Judges against Their Will was adopted. This Law guaranteed the stability of judicial position and protection from external pressure. Disciplinary measures that could have been used for unconscientiously conducted and harmful performance of judicial duties were: admonition, transposition as punishment, and dismissal from the service. According to this Law, judges could not be moved without their consent, except in special cases.⁶⁵ Apart from basic laws in the field of administration and justice, and due to special social circumstances in Croatia, the Government proposed the Law on Cooperatives that went in direction of abolition of cooperatives and turning of cooperative assets into private assets followed by division of assets to families.⁶⁶ Forming of new cooperatives was forbidden by this Law, but there was still possibility of taking new male members into already existing cooperatives. Obligatory

⁶² 'Law on Responsibilities of the Ban and Department Heads', in *SZ* (Zagreb, 1874) p. 3-10.

⁶³ 'Law on Judicial Authority', in *SZ* (Zagreb, 1874) p. 147-149.

⁶⁴ 'Law on Presidency of the Table of the Seven', in *SZ* (Zagreb, 1874) p. 159-160

⁶⁵ 'Law on Disciplinary Responsibility of Judges, on Moving and Retiring of Judges against Their Will', in *SZ* (Zagreb, 1874) p. 150-158.

⁶⁶ 'Law on Cooperatives', in *SZ* (Zagreb, 1874) p. 161-168.

Defending Courts were abolished and cases that fell in their jurisdiction were transferred to district administrative organs with the right to appeal. The possibility to step out from a cooperative was also set, and the right to exit starts when cooperative members retract from a cooperative; when they are legally excluded from cooperative; when a man gets married into another cooperative; when a woman gets married from a cooperative; and when they are divided. A member could leave a cooperative without its full division, and division without confirmed land minimum was also governed. Passing the mentioned laws shows that Mažuranić already three months after taking up his position proposed laws which dealt with some central issues concerning land autonomy.

The second parliamentary period under Mažuranić's power from 5 August 1874 until 25 October 1874 was the most important and as intensive as the first, which can be proven by data stating that even 18 legislative initiatives were submitted, from which only two originated from the representatives. In the mentioned period the Government proposed laws concerning education, administration, justice and servitude, the press, economy and health care. From all the proposed laws the most important was the Law on Organisation of Political Administration which, in contrast to Croatian municipal tradition, rested on the concept of centralisation of administration and according to which the main County Prefects became the executive bodies of the Government, and county clerks received the position of land clerks.⁶⁷ The Law was set on the principle of division of powers, i.e., separation of political administration and judiciary. The Ban or his deputy was the head of the land political administration. On the ground of the new territorial-administrative system the area of civil Croatia and Slavonia was divided into eight counties and within each county there were administrative districts: sub-counties. Jurisdictions of the sub-counties were very little and they did not have the possibility of independent exercise of decisions. On the head of a county was the County Prefect who nominated by the King on the Ban's proposal. The Sub-county Prefects, who were the heads of sub-counties, and county clerks were nominated by the Ban on proposal of the County Prefect. Apart from sub-county assemblies, under chairmanship of the Sub-county Prefect,

⁶⁷ 'Law on Organisation of Political Administration', in *SZ* (Zagreb, 1874) p. 425-434.

there were also county assemblies headed by the County Prefect held once a year. The next enacted law was the Law on Organisation of Courts of First Instance which divided the first instance authority to six judicial tables as assembly courts and to district and city-delegated district courts as independent courts.⁶⁸ The Law on Clerk Classes and Incomes of Court Clerks and the Law on Official Relations of Members of State Bar and on Representing State Land in Civil Rights Affairs referred to the justice system. Next to the laws proposed to the Parliament referring to organisation of justice, the Parliament discussed many other issues that were of economic, cultural, administrative and political significance for Croatia and Slavonia and therefore it passed the Law on the Use of Press.⁶⁹ This Law was the base for development of free press, but it contained some repressive measures whereby the government kept surveillance over press. According to the Law every newspaper had to have a responsible editor, and the paper could not be printed unless it was previously filed to the attorney general and unless there was some deposit. Press offenses fell under jurisdiction of court, but in certain cases disciplinary organs could decide about banning delivery of papers. The ground law of the criminal justice reform was the Law on Criminal Procedure from 1875 based on a French model and principles of accusatory procedure.⁷⁰ A simplified investigation procedure, oral and public hearing and the principle of free rating of evidence were also introduced. Apart from that, the role of State Bar concerning decisions about accusation became more significant, duration time of investigative detention was shortened and the measures for its pronouncement became stricter. But, although the mentioned Law was very close to the Austrian Criminal Procedure Law, it did not include jury trial for criminal offences with declared imprisonment over 5 years of hard prison. The government suggested introducing jury trial only in cases of press offenses and for this reason it introduced the Law on Criminal Procedure in Press Affairs.⁷¹ This procedure, just as criminal procedure, was based on the principle of material truth, but opposed to that it also prescribed making decisions during main hearing in front of a jury court. According to the Law the jury court was

⁶⁸ 'Law on Organisation of Courts of the First Instance', in *SZ* (Zagreb, 1874) p. 445-449.

⁶⁹ 'Law on Usage of Press', in *SZ* (Zagreb, 1875) p. 355-367.

⁷⁰ 'Law on Criminal Procedure', in *SZ* (Zagreb, 1875) p. 235-354

⁷¹ 'Law on Criminal Procedure in Press Affairs', in *SZ* (Zagreb, 1875) p. 373-390.

composed of two parts, the Court Council and the Jury with 12 members, and had sessions every three months. Passing of this Law meant a step forward in judicial and political sense because it provided a good base for protection of freedom of press in Croatia and for development of political parties. In order to make trials possible, another law was necessary and that was the Law on Making Jury Address Books for Press Courts.⁷² The Law set obligations for performing jury duties, and requirements were the following: only men could act, age frame of between 30 and 60 years, literacy, minimal living period in community for a year and tax census (20 forints). Next to the Criminal Procedure Law the Government passed another law in the area of criminal justice system, and this is the Law on Probation of Convicts that set re-education instead of repression and prevention as goal of punishment.⁷³ Though passing of the Law on Organisation of Elementary Schools and Normal Schools had been seen as necessary for the previous thirteen years, it caused major conflicts and change in the relationship between the Church and the State.⁷⁴ Elementary school had a task to continue with religious and moral teaching, but they were no longer under surveillance of the Church, as there became public institutions. With this Law teachers were for the first time acknowledged as the prime actors in development of education. However, the Church did not lose the whole influence in elementary schooling, and only kept its competence concerning theory of religion and moral teaching and a teacher had to have the same religious beliefs as the majority of his/her pupils. The most noticeable consequence of this Law was the real division of the State and the Church in the field of education. But this was not its most important effect, but the effect laid in the rising of level of education and inclusion of children from wider classes into education.⁷⁵ During this period of time, apart from the Government, the representatives also proposed two laws, i.e. the Law on Abolition of punishment by shackling that abolished the punishment by shackling for convicts of

⁷² 'Law on Making Jury Address Books for Press Courts', in *SZ* (Zagreb, 1875) p. 368-372.

⁷³ 'Law on Probation of Convicts', in *SZ* (Zagreb, 1874) p. 195.

⁷⁴ 'Law on Organisation of Elementary Schools and Normal Schools', in *SZ* (Zagreb, 1874) p. 389-419.

⁷⁵ Unlike passing of Law on Organisation of Elementary School, passing of the 'Law on Organisation of Healthcare' did not cause any disputes. See it in *SZ* (Zagreb, 1874) p. 435-439

political offence and the Law on the Right to Assembly that set the right to gather in closed and open spaces.⁷⁶

The third and the fourth period of the Parliament's sitting was characterised by almost complete passivity by the Government in proposing laws which resulted in a decrease of legislative activity.⁷⁷

However, the representatives successfully proposed several laws, and some of them have to be mentioned: the Law on Grounding of the Office and Assembly for Land Statistics and the Law on Amendments to the Law on Electoral Order.⁷⁸ The new electoral order took the right previously given to organs of administration to determine borders of electoral districts, as this was prescribed by the very Election Law. The number of 77 representatives was kept, i.e. Croatia and Slavonia were divided into 77 electoral districts with one representative to the Parliament. According to regulations of the Law a Central Election Committee was elected in each county and every free royal city in order to manage elections of representatives, and electoral deputation in every electoral district. Members of the Central Electoral Committee were elected in county – the County Assembly, and in free royal city – the City Representation. Also, new categories of voters were introduced and defined and thresholds were reduced. Continuing its legislative task, the Parliament passed a whole range of laws in the last period of its sitting (August to December 1875), for example: The Law on Retirement for Middle School Teachers; the Law on Rector Elections; the Law on Foundations and Scholarships of the Croatian Department, etc. The representatives proposed five laws, from which only one referring to Amendments of Standing Orders was passed. Thus, two very important laws referring to modernisation of justice – the Law on Lawyer Order and the Law on Disciplinary Power over Lawyers and Lawyer Apprentices – were refused to be confirmed by the ruler due to the request that one of the prerequisites for practicing law was district

⁷⁶ 'Law on Abolition of punishment by shackling' and 'Law on the Right to Gather', in *SZ* (Zagreb, 1874) p. 229., p. 25-28.

⁷⁷ The government proposed the 'Law on Selling of Real Estates in Ownership of Croatian-Hungarian religious-regal and educational foundations', in *SZ* (Zagreb, 1875) p. 391-392

⁷⁸ The 'Law on Retirement for Middle School Teachers; the Law on Rector Elections; the Law on Foundations and Scholarships of the Croatian Department', in *SZ* (Zagreb, 1875) p. 133-134., p. 1021-1031.

affiliation in the Kingdom of Croatia and Slavonia whereas Hungarian citizenship was not mentioned anywhere.⁷⁹

The Parliamentary period from 1872 to 1875 was characterized by reforms of differing intensity during operation of Vakanović and Mažuranić Governments. The reform activities during the Vakanović Government were non-systematic and not thought-through whereas the Mažuranić Government worked systematically and rationally with the goal to change the nature of the Croatian legal-political system. The main goal Mažuranić wanted to achieve at the beginning was amendment to Law on Administration and Judiciary which should be the ground for modernisation of the whole autonomous system. Mažuranić proposed laws based on the model of Austrian legislation, which is understandable as he took part in government in Vienna personally.

3. Legislative activity of the Croatian Parliament from 1875 to 1878

During the parliamentary elections in August 1875 the People's Party won and the new Parliament gathered on 23 August 1875 and sat until July 1878. Legislative activity of the Parliament was mostly directed to passing laws for improvement of economy and agriculture. In his write-off the ruler himself requested rise of spiritual and material welfare from the Land Government and that had indirect impact on legislative activity of the Parliament. The proposed laws referred to agriculture, education and culture, administration and justice, such as the Law on Final Unloading of Non- Village Land which finally abolished the remains of feudal administration. Farmer's ownership was defined as well by the Law on Making Land Registry Records; the Law on Organisation of Councils for Land Culture and Its Boards; the Law on Reorganisation of School for Economy and Forestry in Križevci; the Law on Cooperative Relations in The Military Frontier; the Law on Amendment to the Law on Cooperatives; the Law on Procedure against Cattle Pest, etc. The above mentioned Laws should have set the grounds for modern agricultural production. In the field of education the government proposed the following laws: the Law on Amendment to the Law on Wages, Rewards and Retirements at University from 1874; the Law on Takeover of City Grammar School in Osijek on Burden of Land Mean; the Law on Organisation of Folk Museum in Zagreb;⁴⁸ the Law on

⁷⁹ Saborski dnevnik kraljevinah Hrvatske, Slavonije i Dalmacije 1872-1875. I., II. (Zagreb, 1875)

Constitution of School for Midwives in Zagreb, etc. The majority of the passed laws were in the field of justice, from which the following must be mentioned: the Law on Administration of Independent Land Prisons, the Law on Building and Purchase Cost Cover for Buildings serving to justice administration; the Law on Trade and Bill Jurisdiction of Court in Procedures in front of the Trade and Bill Courts; the Law on Amendment to the Law for Civil Legal Proceedings; the Law on Restrictions of Realization on Incomes of Active and Retired Military Persons and Their Widows and Orphans; the Law on Amendment to the Law on Usury; etc.⁸⁰

According to evaluation of the Parliament President, Nikola Krestić, the Parliament did a significant job in this period, if we take into consideration that 'all more important organisation laws' were passed and that we must acknowledge 'salutary importance of many laws for the development of the country'.⁸¹

4. Legislative activity of the Parliament until Mažuranić's resignation

Events that happened during that period of three years in the area of Bosnia and Herzegovina had indirect impact on the legislative activity of the Parliament as well as on the financial revision of the Croatian-Hungarian Settlement. The People's Party, which won the elections in August 1878, had the majority in the Parliament, but nevertheless, the party entered a serious crisis that ended with resignation of the Ban Mažuranić and put a halt to the reform period. The legislative activity of the Parliament in the period from its opening in September 1878 until Mažuranić's resignation in February 1880 was extremely slow, because only two from the three bills proposed by Mažuranić Government were accepted.

From laws passed by the Parliament and confirmed by the King the following should be mentioned: The Law on Amendment to Contemporary Civil Procedures Concerning Realization over Incomes of Official Persons in the Central Government in Croatia; and the Law

⁸⁰ In Mažuranić's period building of Zrinjevac was defined, where the Palace of Judiciary Table and JAZU (the Yugoslavian Academy of Science and Art) and Vraniczany Palace was to be built, cemetery Mirogoj is opened. Gj. Szabo, *Stari Zagreb [Old Zagreb]* (Zagreb, Knjižara Vasić 1941)

⁸¹ Saborski dnevnik kraljevinah Hrvatske, Slavonije i Dalmacije 1872-1875, I, II (Zagreb, 1875) p. 1068-1069.

on Organisation of Municipality⁸² which contained regulations for municipality residents, for municipal authorities (town-council, head of town and his deputy, town authorities), for incidence of municipality and regulations on supreme surveillance over new administration defined after passing of the Law on Organisation of Political Administration.

5. Parliamentary subjects and relation during the National Movement and rule of Ban Khuen Hedervary

After Ban Ivan Mažuranić was suspended as Ban, Count Ladislav Pejačević overtook this position and after a long break of five months the Parliament continued its work in June 1880. During the following several sessions the Members of Parliament discussed different propositions for draft laws, among which the following should be pointed out: the Law on Budget for Needs of Inner Self-administration of the Kingdom of Croatia and Slavonia for the Year 1880 that was passed on the ground of the renewed settlement valid for the next 10 years. Quota from the previous financial settlement of 6,44% (joint Croatian-Hungarian affairs and Hungarian-Austrian affairs) was decreased to 0,87%, and apart from the fact that Croatia got additional annual flat-rate of 20 thousand forints, it had to increase incomes of the common state treasury. Since the King with his decree, which was read during the parliamentary session in January 1881, announced administrative unification of demilitarized Military Frontier with Croatia and Slavonia, new number of representatives in the joint Croatian-Hungarian Parliament should have been settled. In order to do that, the King passed Act XV from 25 March 1881⁸³ according to which the Croatian Parliament had the right to 40 representatives in the House of Representatives and 3 representatives in the House of Lords. The Parliament also discussed amendments of the Parliamentary Electoral Order and in July 1881 accepted the changed Law on Electoral Order for the Parliament of the Kingdom of Dalmatia, Croatia and Slavonia which was objected not to have broadened the Election Law. From all of the laws passed by this Parliament we should mention the Law on Building the New Theatre in Zagreb ('the Croatian Theatre').

⁸² 'Law on Organisation of Municipality', in SZ (Zagreb, 1880) p. 179-186.

⁸³ Laws on the Hungarian-Croatian Settlement. According to original scripts issued by Ivan Bojčić, Director of the Land Archive (Zagreb, 1907) p. 61.

New parliamentary elections were held in September 1881, and after short time the new Parliament started its sitting by reading of the King's decree about union of the remaining Croatian-Slavonian frontier area with the Kingdom of Croatia and Slavonia, and at the beginning of May 1882 the Parliament adopted the read order (decree) by passing a special law. But it was also necessary to pass Contemporary Electoral Order for the united frontier area, as it was a step forward to complete unification of this area with the Kingdom of Croatia and Slavonia. In December of the same year based on the Ban's order the Contemporary Electoral Order was issued which said that the Croatian-Slavonian frontier area was divided into 35 electoral districts and each of them elects one representative. The elections were set for April 1883 and People's Party won the elections. Apart from the issue on Military Frontier that was intensely discussed, the question of Rijeka was imposed to Croatian oppositionists. Due to the fact that oppositionists, especially members of Croatian Party of Right, were very active critics of the Government, the Government suggested amendment of Article 41 of the Standing Orders (October 1882) that should introduce time limit for discussions about an issue and punishment measures of temporary exclusion from work of the Parliament. Not long after this proposition the sitting of the Parliament was postponed for over a year.

In the meantime, in September 1883 the King released Ban Pejačević of his duty and instead of appointing a new Ban in Croatia he put General Herman Ramberg in position of King's Commissioner, which meant that the Constitution was out of force. At the beginning of October people expected reestablishment of constitution, i.e. dismissal of Commissioner and appointment of Ban, so that the Parliament could continue its activity. Therefore, the King dismissed general Ramberg as King's Commissioner in December 1883 and appointed the new Ban, Károly Khuen – Hèderváry. Abolition of commissariat and appointment of Ban meant that the conditions existed for convening the Parliament which started its sitting in December 1883. Representatives elected during the elections in the Military Frontier also started working in the Parliament. Among proposed laws that had to be voted for, the representatives mostly discussed the Law on Indemnity from 1884 that ban Khuen Hedervary proposed to the Parliament and that was finally passed by the Parliament. The Parliament also passed the law which stated that the Contemporary Electoral Order for the united frontier area had to be valid also on next parliamentary elections due to be held in

September 1884. The sitting of the Parliament, during which the People's Party had majority again, started in September 1884, but there was a significant difference in comparison to the composition of the previous Parliament, because now there were even twice as many members from the Croatian Party of Right. This was one of the reasons why the majority from People's Party adopted its own proposition for change of Article 41 from the Standing Orders which made the punishment of exclusion stricter.⁸⁴ Since the frontier area was united with the Kingdom of Croatia and Slavonia, a new administration system should have been set up, and therefore the Law on Organisation of Counties and Districts was passed by the Parliament in November 1885. According to regulations from this Law, instead of previous 8 counties and 6 districts, 8 enlarged counties were established. The newly organised counties were divided into administrative districts whose range and seat was to be determined by the Land Government. County Assemblies were also established and county clerks had the 'right of place and vote' and the county conducted its self-administrative affairs. The County Prefect was the head of a county and he was nominated by the King on the Ban's proposal. During Parliament sitting in March 1887 two further draft bills were accepted i.e.: the Law on Usage of Coat of Arm of the Kingdom of Dalmatia, Croatia and Slavonia by Private Persons and Corporations and Institutions of Private Significance that enacted that in autonomous jurisdictions 'united coats of arm of these Kingdoms under the crown of St. Stephen should be used'; and the Law by which the Legal Period of the Parliament of the Kingdom of Croatia, Slavonia and Dalmatia is set to five years. Another law was passed: the Law on Organisation of Eastern-Orthodox Church Affairs and on Usage of Cyrillic in Kingdoms of Croatia and Slavonia which guaranteed church-educational autonomy to persons belonging to the mentioned religion. The term of the new Parliament with five-year long mandate, elected in June 1887, started on 1 September 1887. One of the major tasks of this Parliament was passing a unique Electoral Order for the purpose of unification of former Military Frontier area with other parts of Croatia and Slavonia. The Law on Electoral Order

⁸⁴According to changed Art. 41 of the Parliamentary Rules of Procedure, the President of Parliament since then could – due to arisen disorder in the Parliament or too harsh words – suggest exclusion of a certain representative. I. Perić, *Hrvatski državni sabor (1848-2000)* [Croatian Parliament (1848-2000)] Vol. 2 (Zagreb, Hrvatski institut za povijest: Dom i svijet 2000)

and Organisation of Parliament was passed on the sitting in June 1888 and was confirmed by the King three months later. According to the Law the number of districts was decreased from 112 to 90, and these were constituted in a way that more opposition districts were put together in one electoral district. Also, the right to vote was limited to only 2% of the population. Every electoral district elected one representative and the practice of electoral right was direct and indirect. The voters also had the right to complaint which was dealt with by boards in cities and municipalities, and one could appeal to the Royal Table of the Seven against their resolution. The Parliament of the Kingdom of Croatia, Slavonia and Dalmatia had 90 elected folk representatives and members with personal right to vote. However, total number of Parliament Members with personal right to vote could not exceed the half of the number of elected folk representatives.⁸⁵ This new Electoral Order and the new Law on Organisation of the Parliament were valid on next parliamentary elections held in 1892 during which the People's Party got the most of the 90 seats in the Parliament. During various sittings of the Parliament there were debates between representatives from the Party of Right and the government People's Party and discussions on many issues, but some laws were passed, too. For example, at this time the following laws were adopted: Law on Organisation of Land Units, the Law on Organisation of the Noble Municipality of Turopolje, etc. The work of this Parliament was characterised with many breaks, i.e. periods when the Parliament did not have its sitting for several months. After a longer break that lasted a bit longer than 11 months, the Parliament continued its work and passed new Rules of Procedure that were not changed until the end of Austria-Hungary. Khuen Hedervary decided to use it to control the work of the Parliament and to stop opposition to disturb the work of parliamentary majority with long speeches.⁸⁶ The last elections in the 19th century were held in 1897 during which 87 representatives (instead of 90) were elected, because Rijeka and Rijeka District no longer wanted to elect their two representatives. Representatives in the Parliament required new elections for Rijeka and Rijeka District, as without these two

⁸⁵ On the ground of these Laws in December 1889 the Parliament examined and adopted 'the Address Book of Noble Families Whose Members had Personal Right to Vote in the Parliament' and 'The Address Book of Nobles with Personal Right to Vote in the Parliament'.

⁸⁶ Sirotković, op. cit. n. 42, at p. 63.

representatives the Parliament was an ‘incomplete Parliament’, but this proposal was denied. This sitting of the Parliament also had several longer breaks and during its work there were different proposals referring to the reorganisation of the Parliament, passing a new electoral regulation, reform of electoral system in sense of general electoral right, etc.⁸⁷

The last parliamentary elections during rule of Ban Khuen Hedervary were held in November 1901 and the work of the Parliament was influenced by the events on the Croatian political scene, for example anti-Serb demonstrations in Zagreb, and the 1903 National Movement. Ban Khuen Hedervary was present in the Parliament for the last time during its sitting in June 1903, and soon after that he was relieved of his duty and appointed as Hungarian Minister-President. Teodor Pejačević was appointed for the new Croatian-Slavonian-Dalmatian Ban and during his rule as Ban the Parliament passed the Law on Prescribing of Financial Settlement Contracted between the Kingdom of Hungary and the Kingdom of Croatia, Slavonia and Dalmatia that was valid until the end of 1913. The National Movement in the Kingdom of Croatia and Slavonia and the crisis of dualism influenced some Croatian politicians (namely, Frano Supilo and Ante Trumbić) to engage in ‘the politics of new course’ whose main aim was to unite Croatian political powers and to establish political unity and cooperation with the Serbs and to seek cooperative agreement with everyone under threat of ‘Drang nach Osten’ / ‘Drive to the East’.

⁸⁷ Derenčin’s proposition of Bill on Elections for the Parliament was a ‘day for history’ for Croatian ‘electoral reform’, as from that time there were public national assemblies ‘for electoral reform in sense of General Electoral Law’. L. Polić, *Povijest modernoga zakonodavstva hrvatskoga* [The history of the modern Croatian legislation] (Zagreb, Akad. knjižara Gjur Trpinac 1908) p. 60.

Good governance at regional level

I. Regional development and global changes

1. Important changes

Practical and theoretical aspects of good governance¹ in the world, and Europe in particular, especially transitional countries, have significant relation with important changes. *We live in times of significant changes*. Some call it the 'Information Age' (Alvin Toffler), some the 'Digital Age' (Nicholas Negroponte), some the 'Global Age' (Kenichi Ohmae), or the 'Age of Paradox' (*Charles Exhibition*), while the titles 'Knowledge Age' or 'Learning organization' (Senge) are used more and more frequently. One could say that we live in a networked society, which requires a rethinking and redefining of history, the present and the future.²

Thus the changes may be defined in: *i) process of globalization; ii) processes of differentiation and integration; iii) process of transition*.³ Globalization is carried out through the market, politics and law, which

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¹ See 'Governance – The debate on European governance', launched by the Commission in its White Paper of July 2001, concerns all the rules, procedures and practices affecting how powers are exercised within the European Union. The aim is to adopt new forms of governance that bring the Union closer to European citizens, make it more effective, reinforce democracy in Europe and consolidate the legitimacy of the institutions. The Union must reform itself in order to fill the democratic deficit of its institutions. This governance should lie in the framing and implementation of better and more consistent policies associating civil society organisations and the European institutions. It also entails improving the quality of European legislation, making it clearer and more effective. Moreover, the European Union must contribute to the debate on world governance and play an important role in improving the operation of international institutions.

Europa Glossary, available at: <http://europa.eu/scadplus/glossary/governance_en.htm>, (last accessed on 20.09.2010).

² See Z. Lauc: 'Origins of Legal Science in Europe today', in G. Weber, Hrsg., *Europa im Blick, Sibetes gemeinsames Symposium der Universitäten Augsburg und Osijek* (München, Verlag Ernst Vogel 2006) pp. 107-123.

³ See Z. Lauc: 'Temeljni pojmovi lokalne samouprave', in *Lokalna samouprava, niozemska i hrvatska iskustva* [Fundamental Local Self-Government Terms, Local Self-Government – Croatian and Dutch Experiences] (HILS, Osijek 2006) pp. 25-35.

means that the process not only affects the economic plane, but also in the sphere of the exchange of persons and ideas.

Multiculturalism is a normal condition of the world. Real homogenization is an exception. On the one hand, we are witnessing the search for bigger and bigger integrations (economical and political), where individual parts keep converging. On the other hand, differentiation is a reality, with entities disintegrating into components. Differentiation and integration refer primarily to their administrative-territorial aspect, with the growing use of the principle of subsidiarity, but also of other principles such as proportionality, solidarity, equalization and the like. Each integration raises a question of form; namely whether strong subjectivities will remain over the parts entering the unity, or the unity will represent the main entity, with the parts becoming more peripheral. The most important question here, one might say, is where does differentiation end and how to execute integration? Final transition is imminent to every society. It is especially accentuated when there is a Copernican twist of regimes (economical, political, social and legal), which is the case with post-socialist communities. All post-socialist countries encounter more or less the same dilemmas, with similar contaminations, and with identical aspirations.⁴ Europe and the whole world are confronted with a need to reform governing institutions, intended to accelerate and provide for a high-quality decision-making process and an increase in their efficacy and democracy. The facts presented above can be reduced to the following question: how to create the government (at all levels) that would function better (more efficaciously), cost less, and would take care of an equilibrated budget. In searching for an answer to this question, we are increasingly confronted with the notions of good governance, e-government, etc.

⁴ The biggest contamination which happened on behalf of that regime can bring us under the inaugural effect, which means that everything is being done 'from the top' i.e. from the state, political party or the leader, etc. This approach and environment brings lack of ability to believe in the human being as individual where 'collective' dominates and individual emotions, motivation, intellectual and esthetical capacities are repressed. In another words, one should be loyal, quiet should, not have aspiration to be different, and so on, should be conformist and use that strategy for keeping his position. This is diametrically different from liberal capitalistic theory and practise. Finally, this is the problem presently in the countries that could be qualified as a part of transitional systems, the so called post-communist countries.

2. Relevant theories

We are of the opinion that the new challenges cannot be adequately surmounted without a systemic theory, a self-organizational theory, and a theory of autopoiesis. As technology implies a transformation of an idea into a product, the same applies to an autopoietical technology. This technology facilitates to adopt the positive and eliminate the negative, or at least reduce it to the least possible extent. Thereby, while relying on the natural laws, everything is simultaneously a part and a whole, demarcated by a membrane that ensures an entity as a unity, a sufficient openness for the cognitive, but it ensures it as a normative closeness as well. The identity and subjectivity of the parts and of the whole are thereby unthreatened, for each has its own autonomy as well as a simultaneous networking into a domain. According to Forrester, in a self-organized system, each participant is also a system manager. The stress is put on autoreferentiality, as in competition with one's self. One should start from himself/herself, defining him/herself first. Through these theories we may recognize what is allopoietical and what is autopoietical *Communal engineering*. Allopoiesis implies a 'production of something else', that a subject is not autonomous, that someone else determines its destiny. Autopoiesis implies the 'production of the self'. In other words, there is no 'either / or' but an 'and / and' approach; there is no exclusion or imposition but an understanding and agreement. An optimum is being searched for. Each individual is the most important one, from the human as a citizen to family, corporation, local and regional authorities, national and finally supranational level. What is most adequate and most natural to be executed in a (functional or territorial) entity should be conducted there in the best possible way: efficiently and in a democratic manner. Evidently, these proposals are closely connected to the principles of subsidiarity and proportionality in a horizontal and vertical distribution of power. Therefore, we are of the opinion that the EU has a chance to be formed autopoietically only if the local, regional, and national levels are also, at the same time, autopoietically formed.

3. Social development

In other words, all those processes, each by itself and in their interdependence, have their own reflections in social development. By *social development* we understand: i) *personal development*; ii)

*organizational development; iii) economical development; iv) cultural development.*⁵ We approach social development in a holistic manner. Individual development means the advancement of emotional, volitive, intellectual, aesthetic and physical capacities, added to ability for teamwork. Organizational development may be reduced to the scientific-technological revolution, to modern information technology, which requires skilful application. Economic development is focused on the realization of the most possible profit, with the least possible cost or damages (i.e., cost/benefit). Cultural development refers to the so-called social affairs such as education, health, social care, science, arts and other.

4. Multi-level governance

Modern government and administration are complex; they represent in fact a set of multi-dimensional complexities. There is an almost infinite variety of subject matter concerning government, from human rights to economic development, from environment to transport, education, science, agriculture, police, etc. Government and administration deal with the immediate and the long-term, values of individuals and aspirations of collectivities, local and global issues, citizens, groups, regions, ethnic minorities, nations, and the international community. There are interrelated levels of government: municipal, local, regional, national, and supranational.

It is widely known the engineering concerned with lower/higher, broader/narrower communities, comes to: i) deconcentration of power; ii) decentralisation; iii) local self-government.

The relation between deconcentration and decentralization is well known. Deconcentration is the finest form of transfer of functions, which means that the mere exercise of concrete duties is transferred, while retaining supervision of legality and opportunism. Decentralisation itself in many respects depends on the achieved deconcentration, but this is a higher degree, where the transferred duties are performed independently and responsibly, and only the surveillance of legality is left to the central government. Here immediately emerges

⁵ See B. Babac, Z. Lauc, *Regija i regionalizacija u Hrvatskoj, ustavno-pravni i političko-upravni aspekti* (Osijek, Pravni fakultet Osijek 1988) pp. 69-80. Region and regionalization in the Croatia, constitutional-legal and political-administrative aspects.

the problem of devolution, and this is a real decentralization and a precondition for the real local and regional self-government. We are very far away from the devolution in Croatia, while decentralization is conducted rudimentarily, not in the necessary extent and content. The process of decentralisation has to be conceptualized and performable in the partner relations between the state and the local and regional self-government. The relationship between and across levels of government is characterised by mutual dependence. Regional policy requires multi-level governance mechanisms within a coherent, forward looking, cross-sectoral, and flexible framework. For the realisation of a true local and regional self-government the *conditio sine qua non* is to find out the optimum level for deconcentration and decentralisation of power. The optimum is a measure reached by account of realising the needs and interests of the citizens, which is to be set by the following criteria: i) maximisation of efficiency, ii) maximisation of democracy and iii) minimisation of pollution. In other words, at all levels and in all forms of social organising (both in functional and territorial terms), it is necessary to generate maximal gain through production of goods and services, which is measured by economic categories such as income/per capita, etc. Furthermore, it is necessary to simultaneously achieve (European) standards of democratic political life, which is measured through exercising human rights and fundamental freedoms. It is indispensable to respect the environment, and thus going through one's life-cycle should cause the least possible air, water and soil pollution.

5. Regional development

The region is the territorial body of public law established at the level immediately below that of the state, endowed with political self-government. The region shall be recognised in the national constitution or in legislation which guarantees its autonomy, identity, powers and organisational structures. The region is the expression of a distinct political identity, which may take very different political forms, reflecting the democratic will of each region to adopt the form of political organisation it deems preferable. The region shall resource and staff its own administration and adopt symbols for its representation.

The allocation of powers between the state and the regions shall be laid down in the national constitution or in legislation in accordance with the principles of political decentralisation and subsidiarity. Under these principles, functions should be exercised at the level as close to the

citizen as possible.⁶ The region should have responsibility for all functions with a predominantly regional dimension. Relations between the state and its regions and among the regions themselves shall comply with the principles of mutual respect, cooperation and solidarity.⁷ Regional development is a broad term but can be seen as a general effort to reduce regional disparities by supporting (employment- and wealth-generating) economic activities in regions. In the past, regional development policy tended to try to achieve these objectives by means of large-scale infrastructure development and by attracting inward investment. The need for a new approach is driven by the observation that past policies have failed to reduce regional disparities significantly and have not been able to help individual lagging regions to catch up, despite the allocation of significant public funding. The result is under-used economic potential and weakened social cohesion.

A new approach by OECD work on regional development recognizes that a new approach to regional development is emerging; one that promises more effective use of public resources and significantly better policy outcomes. This involves a shift away from redistribution and subsidies for lagging regions in favour of measures to increase the competitiveness of all regions. Therefore, the basic question is: how to create the optimal development on the regional level? Maybe in the

⁶ See the core concepts and common principles on regional self-government identified by the CDLR, Helsinki Declaration on Regional Self-Government enlisted as follows: 1.1. Regional authorities are territorial authorities between the central government and local authorities. This does not necessarily imply a hierarchical relationship between regional and local authorities. 1.2. Regional self-government denotes the legal competence and the ability of regional authorities, within the limits of the constitution and the law, to regulate and manage a share of public affairs under their own responsibility, in the interests of the regional population and in accordance with the principle of subsidiarity. 1.3. Where regional authorities exist, the principle of regional self-government shall be recognized in domestic legislation and/or by the constitution, as appropriate. Conference of European ministers responsible for local and regional government, 13th Session, Helsinki, 27 – 28 June 2002.

⁷ *Ibid.* The relationship between regional authorities and other sub-national territorial authorities shall be governed by the principles of regional self-government set out in this document and local self-government set out in the European Charter of Local Self-Government and the principle of subsidiarity. Regional authorities and other sub-national territorial authorities may, within the limits of the law, define their mutual relationship and they may co-operate with each other.

PANNONIA area?⁸ At the theoretic level the main goal is to develop the autopoietic systems (the unity of entities, cognitive openness, normative closure) where the local and regional self-government are *conditio sine qua non* of the viable economic, political and cultural development. The aim is to reflect on and realize the local and regional self-government on the scientific basis, where every citizen will realize his/her needs and interests, i.e., basic human rights and liberties, where the people can reach emancipation in terms of their individualization in globalization. Regional level is optimal in the autopoietic sense. This is the synergy of 'frogs view' and 'birds view'.

6. The regions and local authorities

In exercising the powers assigned to them, regions and local authorities shall cooperate in a spirit of mutual trust and in accordance with the principle of subsidiarity. Regions and local authorities shall take all necessary measures to promote mutual cooperation, bearing in mind the control which regions may exercise over local authorities. One may say that local and regional self-government analyzes and encircles the idea of allocation of power in a horizontal sense (on the levels of legislative, executive, and judicial power) on one hand and the state apparatus control technique on the other had, everything being in a vertical relation of the higher / broader and lower / narrower territorial units (from the local and regional up to the national and supranational levels), which necessitates a democratic environment. A power distribution principle incorporates the joint decision-making forms, cooperation, and mutual checks of all types of authorities and their incumbents. We are of the opinion that high-quality horizontal power distribution is impossible without a simultaneously provided constitutionally guaranteed right to local self-government.

Therefore, it is necessary to reconsider a national state as a part of a political space wherein the governance of personal freedom, civic equality, and social justice are being realized and guaranteed, thus shaping the local and regional self-government's organization.

⁸ See Z. Lauc, 'Odnos države i samouprave promatran kroz načelo supsidijarnosti' [Realitions between the state and the self-government under observation of the principle of subsidiarity], in *200 godina slobodnog kraljevskog grada Osijeka* (Osijek, HAZU Zavod za znanstveni i umjetnički rad 2009)

Local as well as regional self-government searches for the answers on how to guarantee harmony between a citizen as an individual and institutions, as well as between the local/regional communities and the state. One should try to find solutions to the questions raised considering particularly the following elements:

- citizen participation in political decision-making directly or via elected representatives;
- execution of an (essential) portion of public affairs;
- decision on the needs and interests having a local (and general) importance;
- extent of surveillance powers of the higher organs;
- extent of local and regional units' financial independence;
- a higher-level formulation of a political-administrative organization;
- other issues.

When adopting rules, from the local to the national level, one should always have a feeling for equilibrium, i.e., the finding of the adequate criteria and standards. We deem that the *citizens' satisfaction with the quality of life, i.e., the satisfaction of their needs and interests*, should be a *criterion* for local self-government, as for assessing accuracy of a solution, while a *standard* should be their quantification (aliment, housing, procurement, socialization and affirmation up to self-actualization).

7. Regions and European Union

The European Union shall recognise the regions of its Member States and associations of a regional nature as active participants in its policies. The region shall also be entitled to take part in the decision-making process of European institutions and shall in particular have the right to have its representation within the national delegation. The region is the best form of organisation for resolving regional problems in an appropriate and independent manner. The states of Europe shall undertake to pursue as far as possible the devolution of powers to the regions and to transfer the financial resources necessary for their exercise, amending international legislation as necessary.

The Union shall try to promote a European societal model with a sustainable development of economic and social activities, prosperity of the Member States' cultures, a high level of environmental protection and *solidarity between all its regions, be it the central, peripheral or*

insular ones. It is essential to observe that when it comes to the activity resources the Union has to fulfil the principles of transparency, *good governance*, and decentralization criteria in all its campaigns.

In such an atmosphere, a constituent is a 'citizen' of Europe, which implies a share of common values and the development of feeling of affiliation pertinent to a common social and cultural milieu. This is especially topical for the post communist transitional countries. In other words, it is imperative to open up the *qualification process for a European standard of living* (through problem-solving, labour, culture and tolerance), to the individual demands for a quality life of the new Information Age. The subjects are the citizens, families and economic, social, and political institutions. A presupposition for all of that is a high-quality expression of the rules of the game.

As a consultative body, the Committee of the Regions (CoR)⁹ serves as a forum for local and regional interests, voicing them in the EU legislative procedure. Its role is to timely signify the effects that the draft legal acts might have on the citizens, communities, and regions and facilitate dissemination of European integration-oriented information to the citizens so as to obtain a higher public support to the decisions promulgated at the European level.

8. Regional self-government

During the Budapest Conference, the Conference of European Ministers responsible for local and regional government issued an '*agenda for good local and regional governance*' which contains a number of elements of regional relevance as follows:

- *principle of subsidiarity* – giving full effect to the principle of subsidiarity by defining and legislating on the competences, structures and boundaries of local and regional authorities;
- *relations between different levels of territorial administration* – fostering effective relations between different levels of territorial administration particularly between central and local authorities.

In any context good governance is characterised by the five principles of openness, participation, accountability, effectiveness, and coherence. At

⁹ The CoR, an independent institution whereby the EU's local and regional authorities participate in the European integration, was established by the Maastricht Treaty in 1993.

least three criteria: ‘accountability, effectiveness and participation’ are identical with the definition of regional self-government. The conclusions of the Budapest Conference on regional self-government, emphasize under point 7 that

‘the importance of regional self-government and the fact that it can represent an enrichment for democratic societies can help address new challenges of *good democratic governance* and, depending on circumstances, can respond to the need to deal with public affairs as close to the citizen as possible’.

Although the influence of science on State reforms in the area of regional self-government is fairly weak, the ‘good governance’ aspect and regional-taxation theory play a special role. Researchers highlight particularly the following aspects:

- division of powers between the central and regional levels, striking a balance between popular demand and the optimum provision of public services;
- creating complementarity between State units at different levels and a margin of action for the private sector with the aim of profiting from inter-sector competition. In this context, privatisation can play an important part as an alternative to regionalisation/regionalism;
- rationalisation of territorial structures with an eye to the effectiveness and efficiency of public services and the minimisation of administration costs, and finally
- evaluation of the influence and weight of increased international economic and fiscal competition on territorial structures.

At the 13th session of the Conference of European Ministers held on 27-28 June 2002 in Helsinki, aim of the Conference was to decide whether the concepts and principles of regional self-government common to the member states of the Council of Europe should be developed in the form of a legal instrument or merely left as a non-binding recommendation. Proponents of one or the other approach were not able to reach agreement. Nevertheless, the ministers did reach consensus on a number of guidelines concerning regional self-government. This was regarded as an initial constructive step towards a legally binding agreement. The final declaration of the Helsinki conference thus contains a number of principles and considerations that can be supported by all concerned and

that should meet with acceptance in all member states of the Council of Europe. In particular, the ministers were convinced that:

- 'the increasing decentralisation and devolution of government across Europe has contributed to the strengthening of democracy;
- the process of decentralisation and devolution reflects the shared conviction that economic growth, sustainable regeneration, quality public services and full democratic participation can be more effectively facilitated if governmental institutions are not overly centralised;
- it is a matter for each state to decide whether or not to establish regional authorities and which competencies they shall be provided with;
- regional self-government [...] is part of democratic governance and thus regional authorities [...] must meet minimum standards of democratic composition;
- regional authorities must be endowed with the legislative competence and the ability [...] to regulate and manage a share of public affairs under their own responsibility;
- principle of subsidiarity is to be observed;
- such a Charter must be broad enough to recognise the wide variety of democratic forms of regional self-government'.

Currently, the Utrecht Declaration on Good Local and Regional Governance (2010) which identifies challenges, among others, as: i) managing the impact of the current financial/economic crisis; ii) addressing the low level of democratic participation in public life at local and regional level; iii) reducing the complexity and cost of the current system of local and regional government and enhancing its efficiency; iv) enhancing the capacity for and quality of governance in local and regional communities or authorities; v) improving access to public services delivered at local and regional level.¹⁰

9. What is the justification for the systematic dialogue?

Ad hoc contacts already exist between the Commission and the local and regional authorities, both directly and through their associations. In response to the commitment given in the *White Paper on European governance*, the European Commission wishes to make this dialogue systematic. The following principles justify the need to involve the regional and local authorities in the formulation of European policies.

¹⁰ <[https://wed.coe.int/ViewDoc.jsp?Ref=CG\(18\)7&Language=lanEngl](https://wed.coe.int/ViewDoc.jsp?Ref=CG(18)7&Language=lanEngl)>

- *Openness* – Improved information and ownership of the Community's policy position are needed. Since they are democratically elected and close to the ground, the regional and local authorities are well placed to provide the citizen with information.
- *Participation* – The White Paper on governance affirms the need for the European and national associations of regional and local authorities to be involved with due regard for the institutional architecture of the Union and the Member States' internal organisation.
- *Coherence* – The Commission acknowledges the need for better assessment of the impact at regional and local level of Community policies in areas such as transport, energy and the environment. Analysing the impact of measures proposed at Community level will contribute to informing the different actors of the effects of these measures and guide them in their implementation tasks.
- *Effectiveness* – Some Community policies are implemented and/or have the greatest effect at regional and local level. Local government authorities are ideally placed therefore to assess the coherence and effectiveness of Community policies.¹¹

II. The Republic of Croatia

1. Governmental system

According to its Constitution (1990; 2000/2001, 58/2010), the Republic of Croatia is a unitary and indivisible democratic and social state, with the system of parliamentary democracy. In Croatia government shall be organized based on the principle of separation of powers into the legislative, executive and judicial branches (horizontal level), but limited by the right to local and regional self-government (vertical level) guaranteed by the Constitution. The principle of separation of powers includes the forms of mutual cooperation and reciprocal checks and balances provided by the Constitution and law (Article 4). Citizens shall be guaranteed the right to local and regional self-government (Article 132). This right has become equal with other human rights and fundamental freedoms. Respect of human rights is one of the eleven

¹¹ Europa, Summaries of EU legislation, available at: <http://europa.eu/legislation_summaries/regional_policy/management/g24228_en.htm>.

highest values of the constitutional order of the Republic of Croatia (i.e., freedom, equal rights, national equality and equality of genders, love of peace, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law, and a democratic multiparty system), which are the grounds for interpreting the Constitution. This is very significant because teleological interpretation is the most important method of interpretation today in Europe.

The right to self-government shall be exercised through local and regional representative bodies, composed of members elected during free elections by secret ballot on the grounds of direct, equal and general voting rights. Citizens may directly participate in administering local affairs, through meetings, referenda and other forms of direct decision-making, in conformity with law and statute (Article 132).

The units of local self-government are municipalities and towns. *The units of regional self-government are counties.* Municipalities, towns and counties are founded by law. The capital city of Zagreb may be attributed the status of a county by law. Forms of local self-government may, in conformity with law, be established in localities and parts thereof (Article 133).

In Croatia, there are 21 counties including city of Zagreb, 127 towns, 429 municipalities and 6810 settlements. The territorial organization of local and regional self-government is based on a large number of relatively small municipalities and on a formal, but unrealistic, distinction between rural municipalities and urban local units. The territory of a county is primarily based on administrative criteria, which largely ignores the highly significant natural and historical boundaries of Croatian regions. There are large differences among the municipalities with regard to the number of settlement which fall within a given municipalities. Thus, many local units are not capable of successfully conducting the minimum scope of affairs, or to sustain those affairs financially, professionally or in other ways. (See Table 1-3)

According to the case of enumeration, only the affairs that are allocated specifically to local and regional self-government units are considered 'local / regional'. In the Law on Local and Regional Self-Government there is an explicit list of these affairs. An exception is made in the scope of activities of city self-government, according to which a city can manage all affairs within the self-government scope of a commune and

all other that are concerned directly to the interest of the city if they are not within the competence of other bodies.

The structure of regional self-government is laid down in the Act on the Territories of Counties, Towns and Municipalities in the Republic of Croatia.¹² Local and regional self-government is subject of organic laws, because the organization and authority of local and regional self-government shall be passed by the Croatian Parliament by a majority vote of all representatives.¹³

2. Regional development policies

Regional development policies do not have a strong tradition in Croatia, and the role of science and research as vehicles of regional development has not been articulated. Some areas of Croatia display, for geographical, historical and cultural reasons, higher levels of regional identity (e.g. Istria, Zagreb region, Medimurje, Slavonia and Dalmatia). However, their regional identities have not yet found full expression in development processes. Development perspectives of these regions are mainly defined by their natural resources and historical heritage. Therefore, Istria and Dalmatia are focused on tourism, Slavonia on agriculture and forestry and Medimurje on entrepreneurship and crafts while Zagreb is an industrial, financial and university centre. However, higher education policy meets the regional needs more conveniently. Following the principle of harmonised regional development, the universities are located in different parts of Croatia and participate at different levels of intensity in regional development.¹⁴ This process of

¹² Official Gazette No 10/97, 124/97, 68/98

¹³ Acts that define the system and organisation on local and regional self-government: Constitution of the Republic of Croatia (OG 41/01, 55/01); Act on Local and Regional Self-Government (OG 33/01, 60/01, 129/05); Act on the Territories of Counties, Cities and Municipalities in the Republic of Croatia (OG 10/97, 124/97, 68/98, 22/99, 117/99, 128/99, 44/00, 129/00, 92/01, 79/02, 83/02, 25/03, 107/03); Act on the election of Representatives to the Representative Bodies of Units of Local and Regional Self-Government (OG 33/01, 10/02); City of Zagreb Act (OG 62/01); The Constitutional Act on the Rights of National Minorities in the Republic of Croatia (OG 155/02); Act on the Financing of Local and Regional Self-Government Units (OG 117/93, 73/00, 33/01, 59/01, 117/01, 150/02); The State Administration System Act (OG 75/93, 92/96, 48/99, 15/00, 59/01)

¹⁴ The largest university – University of Zagreb – is located in the capital city of Zagreb, while the locations of the remaining three universities follow the historical

strong expansion of educational institutions stems from the local/regional authorities' perception that universities and polytechnics are important stakeholders in the process of local development and progress. Universities are perceived not only as the main suppliers of an educated work force but also as the centres of research excellence and technological advancement needed for regional development.¹⁵

The national classification of space units for statistics (statistical regions) complying with the European statistical standard NUTS (in French: *Nomenclature des units territoriales statistiques*) was adopted only in March 2007 (Official Gazette 35/2007). Therefore, the statistical data on regions are available only by the old administrative units – counties. NUTS 1 level is Croatia as a whole, while NUTS 3 level consists of counties and uses mainly regional statistics as its source. There is also a NUTS 2 level that consists of the three non-administrative units that include the existing counties according to the historical and geographical division of Croatia.¹⁶

The most important policy documents on regional development are: National Strategy for Regional Development; the Regional Competitiveness Operational Programme (RCOP), within the new Instrument for Pre-accession Assistance (IPA).¹⁷

and geographical division of Croatia (NUTS 2 level). Therefore, the University of Rijeka is in the Istria region, Josip Juraj Strossmayer University of Osijek is in Slavonia, and the University of Split is in Dalmatia. Due to the growing educational needs of the regions, the three new universities in Dalmatia (Dubrovnik, Zadar and Pula) were established to meet the regional and local needs for human resources. For the same reason, a range of new public and private colleges and polytechnics were recently opened outside the capital city of Zagreb, in Karlovac, Požega, Šibenik, Petrinja, Knin, Vukovar, etc.

¹⁵ Faculty of law Osijek participate with the scientific project 'Europeanization of Croatian local and regional self-government', and also the program 'Good governance at local and regional level'. The Author is the main researcher in the project.

¹⁶ ERAWATCH National Profiles Croatia, available at:

<<http://cordis.europa.eu/erawatch/index.cfm?fuseaction=ri.content&topicID=613&parentID=27&countryCode=HR>>.

¹⁷ European Sustainable Development Network, available at: < <http://www.sd-network.eu/>> and <<http://www.sd-network.eu/?k=country%20profiles&s=ingle%20country%20profile&country=Croatia>>.

3. National Strategy for regional development

In order to conceive a ‘good governance’ at regional level, it is necessary to define a regional development strategy. In 2004 the Croatian government decided to make balanced regional development a national priority. Great support was provided by the EU assistance programme CARDS 2002, ‘Strategy and capacity building for regional development’, since the National Strategy for Regional Development (NSRD) had been drafted within this project in order to create a functional policy of regional development until 2013. In 2010 Croatia adopted National Strategy of regional development.¹⁸ The Strategy is important for raising the welfare of all Croatian regions and reduction of the lag in comparison with the EU average. In the light of Croatian politics towards the European Union, it is important point out that the National Strategy’s full compliance with the European Union’s cohesion policy constitutes of the most important criteria to receive assistance from EU funds.

The aim of the regional development policy is to contribute to economic and social development of the Republic of Croatia according to the principles of sustainable development by making conditions which will allow raising competitiveness of all parts of the country, and realisation of their own development potential. The task of regional development policy is to enable all regions to achieve their potential and seize opportunities for sustainable development and welfare of their citizens, while paying extra attention to areas that are lagging behind in development. To achieve this goal requires a common and concerted action by many partners. Here, all key sectors of society (the Croatian Government, regional and local government, private, scientific and civil society) are expected to decide by consensus and offer solutions on how they work together in order to achieve optimal development and prosperity of our region. In the County development strategy, for the first time, a legal requirement defines that development priorities within the county are of common interest for the whole area, all in accordance with the national strategy on regional development.

Spatial units for statistics NUTS level 2 have between 800,000 and 3 million inhabitants. The Republic of Croatia is divided into three NUTS

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<<http://www.mrrsvg.hr/UserDocsImages/STRATEGIJA%20REGIONALNOG%20RAZVOJA.pdf>>

2 regions: 1) *Northwestern Croatia*, comprises the City of Zagreb, Koprivničko-križevačka County, Krapinsko-Zagorska County, Medijumska County, Varaždinska County and Zagreb County; 2) *Middle and Eastern (Pannonian) Croatia* comprises Bjelovarsko-bilogorska County, Brodsko-posavska County, Karlovačka County, Osječko-baranjska County, Požeško-slavonska County, Sisačkomoslavačka County, Virovitičko-podravka County and Vukovarsko-srijemska County; while *Adriatic Croatia* comprises Dubrovačoneretvanska County, Istarska County, Ličko-senjska County, Primorsko-goranska County, Splitsko-dalmatińska County, Šibensko-kninska County and Zadarska County (Official Gazette no. 35/07). In the framework of the Regional Development Strategy, territorial units at the level NUTS2 are called statistic regions.

The Adriatic region encompasses the largest area (44%), next is the Pannonian region (41%) and North-West Croatia (15%). The population is differently distributed because of different density of population. North-West Croatia, which encompasses the City of Zagreb, has the greatest number of inhabitants (37.4%), then the Adriatic region (32.2%) and Pannonian Croatia (30.5%).

Analysing at the aggregated level of statistic regions, the highest portion in GDP in 2005 (48.2%) has been reached in North-West Croatia, which is 28.6% more than Croatian average. The Adriatic Croatia had a portion of 31.2%, which was somewhat lower than the average, while the worst situation was in Pannonian Croatia which reached a portion of 20.6% of Croatian GDP and 69.1% of national average.

The Croatian GDP per capita reached in 2005 was 7038 Euro. In northwestern Croatia it was 9050 Euro, in the Adriatic 6709 Euro, and in the Pannonian Croatia 4865 Euro. Comparing the data for the same year at the NUTS 2 level between EU and Croatia the regional GDP by purchasing power parity in northwest Croatia is 64% EU-27 average while the Adriatic Croatia achieves 47% of the average, and Pannonian Croatia 34.5% of the average of all members of the European Union.

Pannonian Croatia is a region with extremely favourable geostrategic position on European transport corridors Vc, VII and X and it is abundant with natural, cultural and historic values. It is also a poorly inhabited region with pronounced consequences of war, it still has large mined surfaces and potentially mined areas, which surely limits efficiency of rich natural basis and agricultural potential. The natural sources have been recognised and they are adequately used, and forestry

management, i.e., biomasses management is also satisfactory. On the other hand, the existing renewable sources of energy are still not used enough.

Other significant elements regarding the capacity of the region are the good connectedness to major centres in the region (the airport in Osijek and branched rail network), while resources lie in the buoyancy of the existing rivers and canals. Waterway rivers such as the Danube, Sava and Drava are included in the international network of waterways, while all four inland ports of Vukovar, Osijek, Slavonski Brod and Sisak are open to international traffic. There are several ports of national and regional importance. One of the program activities is strengthening of human resources in the following manner:

- development and promotion of lifelong education programs to strengthen the market needs;
- development of the labor market and employment system;
- establishment, updating and *networking with university institutions* and business entities (within the Pannonian region of Croatia, as with actors and institutions outside the region).

New measures that are necessary to introduce lie in the programme of strengthening education capacities with a view of developing local education system in accordance with the needs of the market, and encouraging improvement of quality of education. Without raising the general level of education in the areas with difficulties in development, one cannot count on reducing development disparities in relation to national average in a long-term perspective. In this respect, besides increasing the amount and quantity of scholarships, it is also necessary to invest a systematic effort in strengthening education capacities in the areas with difficulties in development. Development of local capacities in high education was precisely one of the key factors that contributed to development of under-developed areas in numerous European countries such as Sweden, Finland, Ireland and other. Therefore, it is necessary, through a close cooperation with a responsible ministry, *to create a programme for strengthening education institutions* in supported areas, which will lead to a more considerable offer of education programmes, to the improvement of their quality, and to a greater compliance with the needs of local economies and public institutions. The programme of attracting investors to the supported areas which would identify concrete possibilities of investment and elaborate additional conveniences for investors. The programme of developing regional clusters in the

supported areas that would allow networking of public, business and scientific and research sectors with the aim of strengthening regional competitiveness and specialisation of the regions.

4. Actual problems

The main role of the modern state in a democratic, market-based economy is to provide fair and equal conditions and standards as the basis for the daily life of individuals and for the economic activities of individuals and legal entities. The basic mechanism used by the state is adopting laws. Passing and enforcing acts of parliament, delegated legislation, and by-laws, monitoring their effects and providing mechanisms for correction and redress are important tasks of the modern state.

a) Lack of capacity

One of the most significant reasons for the encountered difficulties in the decentralization process is the *low capacity of local and regional government units*, which is related to the large number of relatively small local units in the country. General problem is unpreparedness of the local and regional self-government units for the process of decentralisation and the accession to the European Union.

A central problem is lack of capacities of the local and regional self-government units for the implementation of institutional reforms and economic/entrepreneurial projects. Causes for this lie in: i) insufficient understanding of political and socio-economic trends (democratisation and decentralisation); ii) lack of information about the possibilities of co-operation and financial support in a view of prospective projects; iii) lack of information, knowledge and skills for the preparation and implementation of projects. The general goal is to create local and regional self-government units as balanced and self-sustainable communities will be better prepared for the process of decentralisation and accession to the European Union. A specific goal for local and regional self-government is to have better capacities for the implementation of the institutional reform and economic / entrepreneurial projects by creating knowledge through research, its application through innovation, and through dissemination to all community members. It is also important to strengthen scientific and research capacities of the scientific community through development of

knowledge dealing with local self-government in terms of acquiring knowledge and skills related to policy-making procedure.

b) Regulatory policy and regulatory reform

A central function of any democratic government is to promote the economic and social well-being of its people. Governments seek to meet that objective in a wide variety of ways, including through policies aimed at macroeconomic stability, increased employment, improved education and training, equality of opportunity, promotion of innovation and entrepreneurship, and high standards of environmental quality, health, and safety. Regulation is also an important tool that has helped governments make impressive gains in attaining these and other desirable public policy goals. All governments have a continuing responsibility to review their own regulations and regulatory structures and processes to ensure that they promote efficiently and effectively the economic and social well-being of their people.¹⁹ The Central and Eastern European (hereinafter: CEE) countries have to review and adopt their legal frameworks to EU standards as part of the accession process.²⁰ One consequence of the steps taken in individual CEE countries to integrate within the European Union is the need to take full account of the EU law when preparing legislation on a matter that is regulated by that law. It is also necessary to set up arrangements for reviewing existing legislation for the same purpose. Consideration of compatibility must be a principal element in policy development; it is needed in order to shape the content and approach of the legislation. One important issue, particularly pertinent to CEE countries, emphasises the need to examine compatibility in depth before starting drafting. In certain matters, full implementation of EU law in a CEE country still in transition is not practicable or desirable. *Assessing the impacts of proposed laws and regulations* deals with policy assessment and Regulatory Impact Analysis (RIA), or the *ex ante* assessment of how proposed legislation and regulations will affect a country's economy, society, budget and existing laws, international agreements, etc. Through RIA, governments can improve the quality of their interventions by ensuring that the impacts, both intended and

¹⁹ The OECD Report on Regulatory Reform, Synthesis (Paris, 1997)

²⁰ See 'Checklist on law drafting and regulatory management in CEE', SIGMA Papers No.15.

unintended, of proposed legislation and regulations are assessed in advance, and form an input into decision-making. This is especially relevant for countries of Central and Eastern Europe in light of European integration and the need for economic management.²¹

The OECD Council (on 9 March 1995) recommended that the following questions always be asked when regulatory action is under consideration:

- Is the problem correctly defined?
- Is government action justified?
- Is regulation the best form of government action?
- Is there a legal basis for regulation?
- What is the appropriate level (or levels) of governments for this action?
- Do the benefits of regulation justify the costs?
- Is the distribution of effects across society transparent?
- Is the regulation clear, consistent, comprehensible, and accessible to users?
- Have all interested parties had the opportunity to present their views?
- How will compliance be achieved?

Croatia has not adequate regulatory policies.²² An important criterion for the success of regulatory reform²³ is whether regulatory systems accomplish their policy objectives. Regulatory reform is used in the OECD work to refer to changes that improve regulatory quality, that is, enhance the performance, cost-effectiveness, or legal quality of regulations and related government formalities. Croatia was not

²¹ OCDE/GD(97)126 ASSESSING THE IMPACTS OF PROPOSED LAWS AND REGULATIONS SIGMA PAPER No. 13

²² Regulatory policy can be defined as an explicit policy that aims to continuously improve the quality of the regulatory environment by maximizing the efficiency, transparency and accountability of regulation. Regulatory policy is an integrated approach to the governance and implementation of regulatory tools, institutions and practices. OECD, REGULATORY PERFORMANCE: EX POST EVALUATION OF REGULATORY POLICIES (Paris, 22. September, 2003)

²³ *Regulatory reform* concerns changes to improve regulatory quality, that is, to enhance performance, cost effectiveness or the legal quality of regulations; or to improve processes for making regulations and managing reform. See <www.oecd.org/regreform>.

participant of the SIGMA – Support for Improvement in Governance and management in Central and Eastern European Countries.²⁴

III. Instead of conclusion

Forming of Croatian local and regional self-government (bottom up) is an essential and necessary phase in the development of Croatian society after the state government of the Republic of Croatia has been constituted in its prevailing part (top down). *Theoretical premises are realization of the autopoietic organization to the lowest extent (unity, cognitive openness, normative closure), in which local and regional self-government are conditio sine qua non of sustainable economic, political and cultural development.* The true local and regional self-government in the autopoietic conception has the crucial place and role on this path. On good practice with the assistance of the contemporary theories, bearing the European environment and the Croatian tradition in mind, effectual (local and regional) government should be thought out and realized. We also proceed from the thesis that there is no true local and regional self-government without the significant decentralization of power, as well as the serious decentralization that is becoming closer to devolution (not only the delegation of authority, but also providing all the factors relevant to their realization). The thesis we proceed from is that the development of the local and regional self-government requires strengthening of the units' capacity – municipalities, towns, counties. The smallest problem is the space, then equipment, and the biggest problem is strengthening the capacities, primarily people that have to be highly motivated, highly professionally and ethically skilled, with highly professional behaviour and adequate skills and training in teamwork. The above mentioned requires an almost Copernican investment of changing disposable resources, i.e., it is necessary to invest in people, somewhat less in equipment and the least in space. Finally, all of the above requires the research of citizens' needs and interests, the most possible respect for transparency, consultation, involvement as well as control. In the context of globalization, in the process of differentiation and integration, the local and regional self-government has a chance, and it is necessary to follow the global and

²⁴ Phare and SIGMA serve the same countries: Albania, Bosnia-Herzegovina, Bulgaria, the Czsh Republic, Estonia, the Former Republic of Macedonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia.

especially the European trends but also to preserve the Croatian tradition and the Croatian identity. In this way the applicable *acquis communautaire* and *acquis* of the Council of Europe can be enriched by the Croatian theory and practice of the local self-government.

The values, standards and norms of Europe, such as good governance, are to be recognized, adopted and developed in the context of Croatian statehood. The legal (auto)regulation is essential for motivating the creation of an efficient and equitable community.

Our intention is to research causality, course and the results of the relevant events. The civil society demands the freedom of self-organizing from the family to the state, whilst legitimacy and legacy are founded on morality in the scope of the rule of law.

With regard to a potential (and necessary) *regionalization* that *de facto* and *de jure* exists in the Croatian territories throughout history, thus having its tradition and deep-rootedness in the people's awareness, it is worth supporting the idea of NUTS regionalization, i.e., that of the statistical regions. This would facilitate the formation of a regional statistics and assure a comparability of regional data, therefore being a basis for a regional policy. It is recommended to respect the existent state territory's administrative division in counties and cities/municipalities while devising such a proposal.

The sooner we become aware that *intention (vision), knowledge, teamwork, technology and finances are the most important factors of one's success or failure*, the sooner we will initiate everyone's quality development. It is essential to open and *guarantee equal chances for each individual and all regions*. The order is not a random one. It is firstly necessary to work on elevating motivation, i.e., to mobilize all those who know and can to be involved in the creation of the future. At the present level of information technology development, certain skills and training are necessary in addition to the know-how. The notion of a life-long learning, and the reform of law faculties' curriculum, is not only a phrase but also a way of life and work.

Today, it is indubitable that *human capital is by far the most important, for the investment in the motivational elevation, the acquisition of new know-how, and acquisition of skills, are a condition sine qua non of successfulness, in addition to the information technology*. Human resources (HR), particularly moral capital is becoming increasingly recognized as the most important within the human capital. Understanding, recognizing and developing of that will contribute to the

moral capital becoming our comparative and competitive advantage. *Therefore, we are of an opinion that the EU has a chance to be formed autopoietically only if the local, regional, and national levels are also simultaneously autopoietically formed.*

Croatia is a largely centralised country with uneven economic and social development. Centralisation is followed by the metropolization. *Regionalisation* has not been thoroughly, scientifically and expertly conceptualised and real decentralisation with autonomous finances (devolution) has not been implemented. This is the most evident from under-capacity of local/regional self-government in providing public services at necessary quality level. Thus, the principles of good governance are neither applied nor is a good practice being affirmed. Education and training of employees have been only recognised as a necessary precondition of capability for highly expert and ethic performance of the local and regional self-government mission.

But there is another dimension to creating the necessary framework for effective, democratic local government. *The will and capacity of central government* may be there. The development of effective, democratic local government starts with a clear understanding of the value of local democracy. Strong local government is not a threat to central government. Rather it reinforces central government by enabling local people to participate more closely in government and by providing local public services more efficiently and effectively. It allows central government to focus on its priorities, while local authorities focus on what they do best. To do this, central governments need to understand that local authorities need the competences, staff, finance and assets to be effective.

Local and regional authorities need the *capacity* to attract committed elected representatives and a cadre of competent staff and train them to deliver good local public services, to become organisations that foster good leadership and management, that engage local people, that meet high standards of public service. Capacity-building programmes build the institutions needed for effective local government. Training is a key part of capacity-building programmes.

Regulatory reform means deregulation and better regulation: improving quality of government regulation content, building a regulatory management system; improving the quality of new regulations and upgrading the quality of existing regulations.

Regional policy is an instrument of financial solidarity and a powerful force for cohesion and economic integration. Solidarity seeks to bring tangible benefits to citizens and regions that are least well-off. Cohesion underlines the principle that we all benefit from narrowing the gaps of income and wealth between our regions. Regional inequalities have various causes. They may result from longstanding handicaps imposed by geographic remoteness or by more recent social and economic change, or a combination of both. The impact of these disadvantages is frequently evident in social deprivation, poor quality schools, higher joblessness and inadequate infrastructures. In the case of some EU states, part of the handicap is a legacy of their former centrally-planned economic systems.²⁵

The major objective will be to prepare for the introduction of *EU cohesion policy* and the Structural Funds. The pre-accession funds will contribute to that effort. Croatian-developed local and regional self-government should be corrective to the centralization, excessive influence of the political power and ideological turmoil, a serious addition brought about by the civil society so as to be economically efficient, politically democratic and ecologically conscious.

Regional level is optimal in the autopoietic sense. This is the synergy of the 'frogs view' and 'birds view'. Each of us personally, especially the managers in the economy and politics, should become as soon as possible the masters in the theory of motivation, learning the relevant knowledge and creating team organization. Croatia has to work seriously on European technology and standards of making laws and other rules.

²⁵ Regional Policy, available at: <http://europa.eu/pol/images/regional_policy.jpg>, (last accessed on 10.09.2010)

Table 1 Number of population in local and regional self-government units

	Total	On average
Republic of Croatia	4.437.460	
City of Zagreb	779.145	
Republic of Croatia (excluding the City of Zagreb)	3.658.315	
Population in municipalities	1.366.219	3.214
Population in towns (including the City of Zagreb)	3.071.241	24.768
Population in towns (excluding the City of Zagreb)	2.292.096	18.635
Population in all self-government units (including the City of Zagreb)	4.437.460	8.082
Population in all self-government units (excluding the City of Zagreb)	3.658.315	6.675
Population in counties (including the City of Zagreb)	4.437.460	211.307
Population in counties (excluding the City of Zagreb)	3.658.315	182.916

Source: Republic of Croatia, Central Bureau of Statistics, 2002. Census March 31 2001, available at: <<http://www.dzs.hr/Popis%202001/popis20001.htm>>

Table 2 Local and regional self-government units according to their proportions

	Number of inhabitants		Area in km ²	
	The smallest	The biggest	The smallest	The biggest
Municipality	Civljane 137	Sveta Nedjelja 15.506	Dekanovec 6,1	Gračac 957
Town	Komiža 1.677	Split 188.694	Kastav 11,4	Gospić 967
County	Ličko-senjska 53.677	Splitsko-dalmatinska 463.676	Međimurska 730	Ličko-senjska 5.350
Town of Zagreb	779.145		640	

Sources: 1. Republic of Croatia, Central Bureau of Statistics, 2002, Census March 31 2001, available at: <<http://www.dzs.hr/Popis%202001/popis20001.htm>>, 2. Republic of Croatia, State Geodetic Directorate, 2002, Area of Counties, Towns and Municipalities in the Republic of Croatia

Table 3 *Counties in Croatia*

Counties (1000)	scare kilometers	population
Zagrebačka	3 060	309
Krapinsko-zagorska	1 229	142
Sisačko-moslavačka	4 468	185
Karlovačka	3 626	141
Varaždinska	1 262	184
Koprivničko-križevačka	1 748	124
Bjelovarsko-bilogorska	2 640	133
Primorsko-goranska	3 588	305
Ličko-senjska	5 353	53
Virovitčko-podravska	2 024	93
Požeško-slavonska	1 823	85
Brodsko-posavska	2 030	176
Zadarska	3 646	162
Osječko-baranjska	4 155	330
Šibensko-kninska	2 984	112
Vukovarsko-srijemska	2 454	204
Splitsko-dalmatinska	4 540	463
Istarska	2 813	206
Dubrovačko-neretvanska	1 781	122
Međimurska	729	118
Grad Zagreb	641	779
<i>Summa</i>	<i>56 594</i>	<i>4 437</i>

The average size in terms of the population (number of persons) is 227 822 inhabitants; the average size in terms of the geographical area (square kilometers) without of city Zagreb, is 2 795 km², with the city of Zagreb is 2 692 km².

The size of smallest in terms of geographical area is 729 km² (Međimurska), and the largest regional authority is 5 353 km² (Ličko-senjska).

The size of smallest in terms of the population is 53 677 (Ličko-senjska), and the largest regional authority is 463 676 (Splitsko-dalmatinska) without of city Zagreb.

Bence Mészáros*

Means of covert policing in international criminal cooperation

I. The concept and types of means of covert policing

Before dissecting the application of means of covert policing in international criminal cooperation, we have to clarify the concept of these means. We can speak of means of covert policing in a wider, theoretical sense, and in a narrower, material sense. In wider sense we understand covert activities of the law enforcement agencies as gathering information related to crimes and criminals without the knowledge of the target person, but necessarily by violating his or her human and civil rights (right to privacy, the secrecy of correspondence etc.) through the means of covert policing. It is a human activity, which means a special method of gathering information (e.g., observation, interception, following somebody etc.) This concept has two inevitable elements, the first one is, that this kind of activity is done without the knowledge of the target person; the second one is, that it pertains to violating the basic human or personal rights of the target person.

The means of covert policing in theoretical sense can be categorized according to the groups created about police work by Gary T. Marx (overt and non-deceptive actions, overt and deceptive actions, covert and non-deceptive actions, covert and deceptive actions)¹ into the two last groups. Wire tapping for example is a covert, but non-deceptive activity, using undercover agents is covert and deceptive at the same time.

In a narrower sense, means of covert policing are all technical equipments, hardware and software (hidden microphones or cameras, spyware etc.), which are supposed to do or to aid the information gathering, and in most cases these kind of means are essential conditions for the application of the means of covert policing understood in wider sense. However, this is not true in all cases, because several means of covert policing do not need technical support: e.g., plain view surveillance, following somebody, or to contact the target person with

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¹ G. T. Marx, *Undercover – Police Surveillance in America* (Berkeley-Los Angeles-London, University Of California Press 1988) pp. 11-12.

the help of a legend.² At the same time, wire tapping, as a means of covert policing in wider sense is unrealizable without the adequate technical equipment.

According to Hungarian law, material means of covert policing are military tools and goods. The annex of Government decree Nr. 16 of 2004 on the import, export, transfer and transit of military tools and services sets up six groups of means:

- interception tools, their components and accessories;
- tools which were built to detect the interception tools;
- tools of covert visual observation;
- tools of covert breaking and entering;
- ciphering tools;
- other tools.

As it can be seen, this decree deals with a larger circle of material means of covert policing than we do, because it lists defensive tools as well, which are supposed to prevent the information gathering by means of covert policing.

Due to the Hungarian Police Act (Act Nr. XXXIV of 1994, hereinafter: PA), and Act on Criminal Procedure (Act Nr. XIX of 1998, hereinafter: CP) the Hungarian authorities are allowed to apply seventeen types of means of covert policing³ for the purpose of law enforcement. Some of them – as we will see – play an important role in international criminal cooperation. Moreover, an inherent part of controlled delivery, as a means of covert policing is that it is applied in criminal cooperation between states. In the present chapter, when we speak of ‘means of covert policing’ without any attributives, this term always refers to the meaning in wider sense.

² I.e. fake identity.

³ These are the following means: using informants, clandestine persons, other persons who cooperate with the law enforcement agencies; gathering information with hiding the purpose of the official action (i.e., ‘nosing around’); using undercover agents; using cover documents and cover institutions, placing cover data in several registers; observation and taping of observed events; catching the perpetrator with the help of a forensic trap; substantial buying, buying in order to gain the trust of the seller, fake buying; infiltration; controlled delivery; replacing the victim by a police officer; paying reward for those who cooperate; termination of the criminal procedure for information; requesting information from several administrative registers; covert house search; observation of private homes and taping the events; interception of telecommunications; spying and using computer data.

II. Levels and laws of international criminal cooperation

International criminal cooperation means the collaboration and the mutual assistance of several states in criminal matters in order to prevent, interrupt, detect or to prove cross-border crimes, or other crimes, which have international elements in any other connection.

International criminal cooperation has a global, a regional, and a subregional level, and it can be realized between two countries as well. We can find different sources of law on these levels. On the first level we can mention any multilateral international convention,⁴ on the regional level the *acquis* of the European Union,⁵ on the subregional level the agreements, which regulate the cooperation between the Benelux or the Scandinavian states.⁶ Bilateral agreements have an important role in this field, as these documents represent the lowest level of international criminal cooperation, e.g., the Hungarian-Croatian Agreement included in this chapter (see section VI.).

Last but not least, a country's participation in international criminal cooperation is mainly determined through its own domestic laws. The regulations at this level have at least as much importance in mutual assistance in criminal matters between states as the regulations derived from international level.⁷ That is why we discuss the means of covert policing in international criminal cooperation based on Hungarian law.

III. The subjects and laws⁸ of international criminal cooperation in Hungary

Hungary's participation in international criminal cooperation – beyond the bilateral and multilateral international conventions – is defined

⁴ For example, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, signed in Vienna on the 20th of December 1988. Ratified in Hungary by Act Nr. L. of 1998.

⁵ See K. Ligeti, *Büntetőjog és bűnügyi együttműködés az Európai Unióban* [Criminal Law and Criminal Cooperation in the European Union] (Budapest, KJK-KERSZÖV 2004) pp. 25-37.

⁶ *Ibid.*, at p. 36.

⁷ P. M. Nyitrai, 'A nemzetközi bűnügyi együttműködés hazai jogának nemzetközi jogi konformitása' [The Conformity of Domestic Laws on International Criminal Cooperation with International Law] 1 *Büntetőjogi Kodifikáció* (2005) p. 24.

⁸ Evidently, there are more laws in force on international criminal cooperation in Hungary, but due to the limited extent of the present chapter, we will not introduce all of them.

through Act Nr. LIV. of 2002 on International Cooperation of the Law Enforcement Agencies (hereinafter: ICLEA) and Act Nr. CXXX. of 2003 on Mutual Assistance in Criminal Matters with the Member States of the European Union (hereinafter: EUMA). These two acts differ in two aspects. The EUMA refers only to cooperation between Member States of the EU.⁹ Another difference relates to the phase of law enforcement in which the means of covert policing are applied.

The ICLEA defines law enforcement activity among its interpretative provisions as an activity to detect and to prevent crimes in international criminal cooperation, but outside the framework of international legal aid. This concept means that the ICLEA regulates largely the actions before the beginning of the criminal procedure. According to the EUMA, the ICLEA has to be applied upon reception, execution and initiation of requests concerning judicial assistance from the Member States, or from Hungarian law enforcement agencies, which were posted before the start of criminal procedure.

After the start of the criminal procedure – when the cooperation is between Member States – only the EUMA is to be applied,¹⁰ but the ICLEA can be applied before and after the beginning of criminal procedure as well, when Hungary cooperates with a country outside the EU. Sources of law on the international level have, however, priority in the field of criminal cooperation, because both above mentioned acts are only applicable if international agreements do not have different regulations.

The Centre of International Criminal Cooperation (hereinafter: CICC) has a key role in mutual assistance in criminal matters in Hungary: this organ receives the requests from abroad, forwards the requests of the Hungarian law enforcement agencies to foreign authorities, and provides them with information about the Hungarian laws upon request. The CICC is an organ within the structure of the National Police Headquarters' Criminal Department with a nationwide jurisdiction, it coordinates the international relations of the police, and represents the Police abroad. The CICC is thus the face of the Hungarian Police

⁹ The EUMA is supposed to implement the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000. The Convention was ratified in Hungary by Act Nr. CXVI of 2005.

¹⁰ However, the EUMA orders the application of the ICLEA's rules adequately on the controlled delivery and on the secret information gathering without judicial warrant after the beginning of criminal procedure.

towards foreign countries.¹¹ According to the ICLEA, organs which are entitled to take part in international criminal cooperation are the Police, the law enforcement units of the Customs and Finance Guard, the Internal Affairs Unit of the Law Enforcement Agencies and other organs defined by law.

IV. Types of international criminal cooperation

Mutual assistance in criminal matters between states has basically two forms: legal aid and international police cooperation. The boundaries of these two fields are not completely clear,¹² but it is worth to introduce them separately, because means of covert policing are rather part of international police cooperation.

Table 1 Differences and resemblances between international legal aid and international police cooperation¹³

International legal aid (e.g.: procedural assistance)	International police cooperation (e.g.: cross-border surveillance)
It is done after the crime was committed (retroactive).	In many cases it is done to prevent or to interrupt the commission of a crime (preventive).
It is between judicial organs (courts, public prosecutor's office).	It is between police organs, or administrative authorities which have jurisdiction to investigate.
The requested state acts in its own territory.	It is possible to make investigative actions abroad.
The aim of both institutions is to realize the state's power of punishment.	
The information obtained both ways can be used as evidence in criminal procedure.	
Eventually, police cooperation is also a form of legal aid.	

If we try to decide by reading Hungarian laws, whether means of covert policing belong to the category of legal aid, or to the category of police cooperation, we get a controversial outcome. Act Nr. XXXVIII. of 1996

¹¹ R. Leyrer, 'A Nemzetközi Bűnügyi Együttműködési Központ tevékenysége' [The Function of the Centre of International Criminal Cooperation] 12 *Belügyi Szemle* (2005) p. 96.

¹² P. M. Nyitrai, 'A nemzetközi bűnügyi együttműködés területeinek összefonódása Európában: nemzetközi rendőri együttműködés és nemzetközi bűnügyi jogsegély' [The Intertwining of the Fields of International Criminal Cooperation in Europe: International Police Cooperation and International Legal Aid] 5 *Belügyi Szemle* (2004) p. 106.

¹³ The table is made by the author based on *ibid.*, at pp. 104-116.

on international legal aid (hereinafter: ILA) does not mention means of covert policing, so we could think, their application does not belong to the circle of legal aid. But the EUMA's regulation contradicts this as it lists and counts covert investigations, controlled delivery, secret information gathering without judicial warrant, and secret data obtaining with judicial warrant among the forms of procedural assistance (which is a type of legal aid according to the ILA's text). Moreover, the ILA has to be applied in the collaboration between Member States based on the EUMA, if this act does not include special and different regulation. At the same time, the ICLEA mentions these means of covert policing under the title 'forms of cooperation' and, as we could see, considers them as actions in order to detect and prevent crime, outside the frameworks of international legal aid.

V. The means of covert policing one by one

The ICLEA defines eleven forms of cooperation, out of which five can be considered as means of covert policing.¹⁴ The Hungarian law can only be applied, if an international convention exists, which regulates the form of cooperation, which is chosen to be employed.

1. Controlled delivery

Controlled delivery means observation of an illegal cargo by the police which is not arrested in order to gather more information. So it is a covert, but not a deceptive method, and the police can get new information from an actual type of crime or from a crime organization with the help of it.¹⁵ Controlled delivery, as a means of covert policing can be interpreted only in the framework of international criminal cooperation. If it happens within one country, and the cargo does not cross the border, the action can only be considered as surveillance, or perhaps surveillance combined with the application of undercover agents.

According to the ICLEA, controlled delivery may be carried out in the territory of Hungary based on the individual agreement between the

¹⁴ To be completely precise we have to note, that the cooperation form 'direct exchange of information' can involve requesting special types of data, which can be obtained only in the framework of secret information gathering according to Hungarian law.

¹⁵ Ch. Joubert, 'A titkosrendészet holland és nemzetközi vonatkozásai' [Dutch and International Aspects of Undercover Policing] 5 *Belügyi Szemle* (1997) p. 9.

Hungarian central law enforcement agency and the foreign authority. If the delay would jeopardize the success of the operation, the Hungarian law enforcement agency is allowed to receive the request directly from the competent authority of the foreign state, and it can also forward the request directly to the competent foreign authority. If the controlled delivery is carried out in the territory of Hungary, the Hungarian law enforcement agency is entitled to control and to supervise the operation. According to the individual agreement, a member of the foreign authority can escort the controlled delivery, and participation of an undercover agent is also allowed with the approval from the public prosecutor.

According to international experiences, controlled delivery is a very efficient method to detect cross-border criminal networks, and not only in relation to smuggling. This is so, because the controlled delivery supervised with the help of undercover agents can turn under certain circumstances into infiltration: when the law enforcement agency decides not to capture the arrived cargo, because the undercover agent can use the opportunity to become a member of the target crime organization.¹⁶ Beside of its efficiency we have to emphasize its dangers as well: negligent control can be a problem, when the authorities loose the cargo.¹⁷

2. Using persons, who cooperate with the law enforcement agencies

Members of law enforcement agencies could not afford not to contact the circles of criminals through informants, snitches, rewarded accomplices from the very beginning of law enforcement activity. Nowadays, this an unpleasant, but necessary part of police work. This kind of information gathering can be necessary during international criminal cooperation as well, but it can be done only if another form of cooperation, a so-called joint investigation team exists.

According to the ICLEA, the delegated member of the joint investigation team operating in Hungary is allowed to use a person to

¹⁶ Ch. Joubert, 'Undercover Policing – a Comparative Study' 1 *European Journal of Crime, Criminal Law and Criminal Justice* (1994) p. 19.

¹⁷ See B. Mészáros, 'The Controlled Delivery: a Measure of Police Cooperation in the European Union' in S. Naubauer ed., *Pandectele Române. Repertoriu de jurisprudență, doctrină și legislație* [Romanian Anthology. Selection of Essays from the Field of Jurisprudence, Law Theory and Legislation] (Timișoara, Wolters Kluwer Romania 2007) pp. 245-251.

gather information, who cooperates with the foreign authority. If the joint investigation team is operating abroad, the delegated Hungarian member of the team can employ an informant, who serves as contact for a Hungarian law enforcement agency only if the foreign state guarantees protection equivalent to Hungarian law for this person or for the information provided by him. A cooperating person provides information for the law enforcement agency based on a secret collaboration. The PA regulates three types of cooperating persons: informants, clandestine persons, other persons who cooperate with the law enforcement agencies in a covert way.

3. Application of undercover agents

The CP defines undercover agent as a member of the law enforcement agency who conceals his identity. Using undercover agents is a very efficient tool in the hands of law enforcement forces against organized crime and in the detection of the so-called victimless crimes (drug abuse, bribery etc.) The essence of covert investigation is that the agent contacts criminals with the help of a fake identity and a related cover story (i.e., legend) and gets information directly from the criminal circle. Covert investigation can be successful especially if the legend can be maintained for long time, and the clandestine agent can eventually infiltrate the crime organization and becomes a temporary member.

It is necessary to apply undercover agents in international criminal cooperation as well, because crime organizations do not respect the borders. Indeed, in many cases they use the locations in different states to hide their activity. When a crime organization, whose members were recruited from one nation, acts in another country (or in another country too), it is very hard to infiltrate for undercover agents from the 'domestic' state, because of the lack of knowledge of language, not to mention other cultural differences. The application of undercover agents in the cooperation of two countries has three variations:

- the operation of the requesting state in the territory of the requested state needs the application of the requested state's undercover agent;
- the operation of the requesting state in its own territory needs the application of the requested state's undercover agent (i.e., 'borrowing an undercover agent');

- the operation of the requesting state in the territory of the requested state needs the application of the requesting state's undercover agent (i.e., 'delegating an undercover agent').

The Hungarian regulation is controversial concerning the need of the approval from the public prosecutor,¹⁸ but in general we can say, that in most cases it is compulsory to have the permission from the public prosecutor for the application of an undercover agent, be it a foreign one in Hungary or a Hungarian one abroad.

Similar to controlled delivery, the details for the application of the undercover agent have to be laid down in an individual agreement between the two countries, which has to regulate the following issues:

- the duration of the secret operation,
- the conditions of the application,
- the rights and obligations of the undercover agent,
- the measures to apply in case of the unveiling of the undercover agent,
- information about the liability of the undercover agent for the damages caused by him.

The Hungarian agencies are obliged to notify the foreign authority, if the foreign undercover agent commits a crime according to the law of his own country. This means that the Hungarian organs should master the criminal law of the other country, but the individual agreement does not include instructions on this topic. Covert investigation is hard to imagine without committing crimes by the undercover agent, so it is essential to place instructions regarding criminal liability in the agreement. It would be more logical, if notification was compulsory in the case when the agent commits a crime by the domestic law (the EUMA already regulates the obligation in this sense).

A foreign undercover agent, as a member of foreign authority is allowed to apply a limited range of coercive measures, but there is only a small chance for this to happen, concerning the peculiarities of covert investigations. The undercover agent conceals his capacity as a member of law enforcement agency, so he can not exercise the rights deriving from this capacity without being unveiled (of course there can be a

¹⁸ B. Mészáros, 'A fedett nyomozó szabályozásának és alkalmazásának aktuális kérdései' [Current Questions of the Application and the Regulation of Undercover Agents] 2 *Belügyi Szemle* (2005) pp. 68-69.

situation, when this is unavoidable). In our opinion, bearing a service fire arm while being under cover is an explicit jeopardy to the agent. The rule, according to which the undercover agent is allowed to capture and to hold back the perpetrator caught in the act, but is obliged to give him over to the Hungarian authorities is of more importance, because a covert operation can easily turn into an arrest. The foreign undercover agent is obliged to obey the orders of the leader of the Hungarian agency, but the Hungarian authorities have to brief the agent about the actions and coercive measures he is allowed to make.

If the need for covert investigation comes up in the cooperation with a member of the EU after the beginning of criminal procedure, the rules of EUMA have to be applied, and this act regulates the content of the individual agreement equivalent to the ICLEA. If the criminal procedure is in progress in Hungary, the Attorney General of Hungary is entitled to initiate the application of Hungarian undercover agents abroad or undercover agents from a Member State in Hungary.¹⁹

4. Cross-border surveillance

Cross-border surveillance as a form of police cooperation was first regulated in the Convention Implementing the Schengen Agreement, but it is likely, that it has been already used before the adoption of its legal basis.²⁰ The point in cross-border surveillance is that a state, who keeps the suspect or the person in contact with him under surveillance in its own territory, continues the observation in the territory of another state, if this latter state gives permission.

According to the ICLEA, the Hungarian organs, which are entitled to covert surveillance, are allowed to assist the observation carried out in Hungary. At the same time the Hungarian law enforcement agency has the right to continue the observation, which has begun in Hungary in the territory of another country. Thus, the legal opportunity to cross-border surveillance – with the conditions laid down in an international

¹⁹ It is not completely clear, why it is necessary to regulate the covert investigation in details also in the EUMA, because the rules in this act are equal to the rules of the ICLEA. It would suffice, if the EUMA – like in case of the controlled delivery – only referred to the rules of the ICLEA.

²⁰ Ch. Joubert and H. Bevers, *Schengen Investigated – A Comparative Interpretation of the Schengen Provisions on International Police Cooperation in the Light of the European Convention on Human Rights* (The Hague, Kluwer Law International 1996) p. 127.

convention – is open, but the Special Service for National Security (hereinafter: SSNS), which plays a key role in the application of covert police methods in Hungary prefers and practices the giving over and taking over of target persons at the border. This is necessary because of the lack of knowledge of language and local experiences, and other conditions. To give you an example, it would be strange even for an unsuspecting and unskilled target person that eight cars, all with Hungarian license plates show up around him when he is abroad, and the Hungarian lookouts can easily get lost in an unknown territory as well.²¹

If the delay appears to be dangerous or jeopardizes the success of the operation, the foreign observer is allowed to continue surveillance without the preliminary permit from the CICC, if he notifies the Hungarian organs about the operation at the same time as crossing the state border. However, surveillance has to be stopped immediately if the competent Hungarian authority requests so after receiving the notification, or if the CICC does not give permit within five hours after receiving the request.

5. Secret information gathering and secret data obtaining

At present, there are two types of covert policing in Hungarian law: the secret information gathering (hereinafter: SIC) and the secret data obtaining (hereinafter: SDO). In 2007 there was a bill proposal, which would have merged these two types and regulated covert police methods in the framework of one institution,²² but it was not discussed in Hungarian Parliament.

²¹ Zs. Hetesy, 'A Nemzetbiztonsági Szakszolgálat szerepe a nemzetközi bűnügyi együttműködésben' [The Role of Special Service for National Security in International Criminal Cooperation] 3-4 *Magyar Rendészet* (2007) p. 84.

²² Bill Nr. T/4192. on the Secret Information Gathering for the Purpose of Law Enforcement

Table 2 Regulation of secret information gathering and secret data obtaining in Hungarian law

Secret information gathering	Secret data obtaining
<ol style="list-style-type: none"> 1. Regulated in PA. 2. Possible before and during the investigation. 3. Several methods are allowed without judicial warrant. 4. Secret house search is allowed. 5. Appointed judge at local court has the jurisdiction. 6. Incorporates many covert methods. 7. Some of the methods are allowed to use to detect any type of crime. 8. It is also supposed to prevent and to interrupt crimes. 	<ol style="list-style-type: none"> 1. Regulated in CP. 2. Only during the investigation. 3. Judicial warrant is always needed. 4. Secret house search is forbidden. 5. Investigative judge has the jurisdiction. 6. Only three methods are allowed. 7. It is allowed only by crimes defined in CP. 8. It is never preventive.

The rules concerning the methods within secret information gathering, which are allowed only with a judicial warrant (hereinafter: SIGJW) are actually equivalent to rules on the methods within SDO, but there are two important differences. In the framework of SIGJW secret house search is allowed to apply, in the case of SDO this is not possible, and, SIGJW can be in progress only before the beginning of criminal procedure, because during the investigation SIGJW has to be done due to the rules of SDO.²³

The expression used in ICLEA is somewhat deceptive, because it regulates this topic under the title ‘Secret information gathering in international criminal cooperation’, but reading the rules we can see that it is only about SIGJW. Not to mention the fact that all forms of cooperation introduced until this point are methods of secret information gathering according to Hungarian law.²⁴ According to the rules of SIGJW, upon the request of a foreign authority the Hungarian law enforcement agency – after getting a judicial warrant – is allowed to:

²³ According to this rule, the EUMA regulates only the SDO. The rules of EUMA on SDO are largely the same as the rules in ICLEA on SIG, so we do not introduce them here.

²⁴ We can find the same mistake in EUMA too: section 62 has the title ‘Controlled delivery and the methods of secret information gathering without judicial warrant’, but controlled delivery is a method of secret information gathering without judicial warrant as well.

- do covert house search, and to record the perceptions;
- observe and to record the events in a private home with the help of technical equipments;
- espy, and to record the content of letters, another postal deliveries and communication transmitted through telephone lines or through another systems of telecommunication, which are supposed to substitute telephone, with the help of technical equipments;
- espy and to use information from online communication or other type of correspondence through computer systems.

It is compulsory to have a permit, required by the law of the requesting state as well, so the covert actions listed above – which mean a strong violation of the rights of the target person – can be done in Hungary only with two warrants. The Hungarian law enforcement agency is allowed to initiate the application of these covert methods, if it got a judicial warrant granted by the rules of Hungarian law.

If there is a request on SIGJW from abroad, the Hungarian law enforcement agency forwards the obtained data to the requesting foreign authority. Beyond that,

- the communication transmitted by telecommunication networks and telecommunication systems can be redirected to the interception tool of the requesting foreign authority;
- the Hungarian law enforcement agency can record and forward the supplementary and collateral data;
- the Hungarian law enforcement agency can give technical assistance to the SIGJW carried out in another state.

The ICLEA regulates a special condition for the so called ‘interception of telecommunications’ which is – within the SIGJW – the spying and recording of the communication transmitted through telephone lines or through another systems of telecommunication, which are supposed to substitute telephone, with the help of technical equipments. This covers actually – with old fashioned wording – ‘wire tapping’.²⁵ This is only allowed – beyond the two warrants mentioned above – if the target person is in Hungary, or he is in the territory of a third state, but the interception of telecommunications is not possible without the collaboration of a Hungarian service provider, or the technical

²⁵ The purpose of most of the requests from abroad is to intercept telephones. See Hetesy, *op. cit.* n. 21, at p. 85.

equipment, which enables the interception, is in the territory of Hungary.

VI. Means of covert policing in Hungarian-Croatian criminal cooperation

Considering the amity between the two states, it is not surprising that Hungary and Croatia are bound together closely by the criminal cooperation as well. On 3 October 2008 the two states adopted in Hévíz the 'Agreement between the Government of the Republic of Croatia and the Government of the Republic of Hungary on Cooperation in the Fight Against Cross-border Crime',²⁶ which entered into force in 2009. This document is supposed to regulate the cooperation in prevention, obstruction and interruption of crimes, which are punishable at least with one year imprisonment. According to the agreement the following means of covert policing can play a role in Hungarian-Croatian criminal cooperation: cross-border surveillance (Article 12),²⁷ controlled delivery (Article 14), covert investigations (Article 15), secret information gathering (Article 18).

VII. Conclusions

Means of covert policing are an important element of international criminal cooperation, mainly in the field of fighting drug trafficking.²⁸ We can discover in the related Hungarian laws even two dogmatic errors. In our opinion, the means of covert policing are only part of the legal aid in wider sense, regarding their function, the timing of their application, and from their role in the law enforcement it emerges, that these means are part of police cooperation, and this fact should be recognized by the expressions used by the law. The other problem is that the concept of 'secret information gathering' expressed in Hungarian law is used improperly by our laws with regard to international criminal cooperation, and this can also cause difficulties in practice. We suggest a solution to these problems in two steps. On the one hand, the duplicity of SIG and SDO, which caused many problems in Hungarian law, should be eliminated, and this field should be regulated in one law. On

²⁶ Ratified in Hungary by Act LXVI of 2009.

²⁷ Art. 12 of the agreement will enter into force when Croatia becomes full member of the Schengen Area.

²⁸ See Hetesy, *op. cit.* n. 21, at p. 84.

the other hand, we also suggest to consider the solution, which has been already brought up by M. Nyitrai Péter in 2005: transforming the laws on criminal cooperation between states (ILA, ICLEA, EUMA, etc.) – which have an incoherent relation to each other – into one, uniform and comprehensive act.²⁹ We strongly promote this concept, and to add one element to it, suggest that in this uniform act a separate chapter could regulate the application of means of covert policing without contradictions.

²⁹ Nyitrai, *op. cit.* n. 7, at p. 26.

Ágoston Mohay*
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The role of national parliaments in the EU after the Lisbon Treaty

I. National parliaments in the European Union – an overview

The increased direct involvement of national parliaments in European Union matters is an intention related to the problem of the so-called democratic deficit. Similarly, increasing the indirect involvement of national parliaments through the interaction with their respective national governments in the conduct of EU policies and the establishment of national position to be represented in Brussels has equally come to the fore with the expansion of competences that the EU acts within.

The EU is seen by some as a system that suffers from a deficit of democracy. The basis of this deficit is commonly perceived as a loss of legislative power and influence that national parliaments have sustained as a result of European integration, the reason for this being the fact that legislative powers formerly exercised by national parliaments have been transferred to the European Community / Union – and in the system of the EC / EU, the institution acting as main legislator was originally the Council. In this system, the traditional executives, i.e., governmental representatives act as legislators and the national parliaments receive only indirect role according solely to national regulations for parliamentary involvement in the conduct of EU policies. As is known, the Council (or the European Commission) lacks any direct democratic legitimacy. The solution to this problem is mostly identified as the need to increase the direct powers of the parliaments involved in European integration: the European Parliament and the national parliaments of the Member states. The European Parliament, which by now has evolved into a co-legislator with the Council, is in the best position to scrutinize the Commission, but is in a much less favourable situation *vis-à-vis* the Council. Council activities accordingly need to be scrutinized at the national level as well: national parliaments should control the EU-level activities of their governments. While this requirement seems logical

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and desirable, it has taken a long time for some Member States to establish some kind of framework in which their respective national parliaments interact with the governmental representatives within the Council. Indeed, differences exist between national parliaments that engage substantially in and exert influence at the formulation of national position (see Denmark, UK, Austria, and to lesser extent for example in Finland); and those who are informed, but does not in reality influence the position of the governmental representative in Council negotiations (f. ex. Greece, Luxembourg). Obviously, some kind of institutional communication needs to exist between the EP and the national legislatures so that institutions of democratic legitimacy would enhance their powers in the EU decision-making process. Another related question that arises is whether national parliaments can (and want to) become directly involved in policy formulation at the European level. Before the Lisbon Treaty came into force, the direct involvement of national parliaments in European affairs was regulated by a protocol originally annexed to the Treaty of Amsterdam (1997). With regard to indirect involvement, as has been said, there had been a variety of solutions in Member States, mostly depending on the constitutional position of national parliaments that set the role of gaining information from the government on EU matters, engaging in discussion of EU legislative dossiers and holding governmental representatives to account for the outcome of the negotiations within the Council.¹ The Treaty of Lisbon has brought about changes concerning the situation of national parliaments, aiming to improve their position and direct as well as

¹ National parliaments use different methods of scrutiny, accompanied by quite different possibilities. This question is an autonomous topic of research on its own. See for example K. Auel and A. Benz, eds., *The Europeanisation of Parliamentary Democracy* (Routledge, Oxon 2005); K. Szalay, *Scrutiny of EU affairs in the National Parliaments of the new Member States, Hungarian National Assembly – Comparative Analysis* (Budapest 2005); C. A. Janowski, *Die nationalen Parlamente und ihre Europa-Gremien – Legitimationsgarant der EU?* (Nomos, 2005) and E. Györi, *A nemzeti parlamentek és az Európai Unió* (Budapest, Osiris Kiadó 2004). For Hungarian experiences, see K. Szalay and A. Juhász-Tóth, 'Control of EU Decision-making in the Hungarian National Assembly: the Experience of a new Member State', in Tans, Zoethout and Peters, eds., *National Parliaments and European Democracy – A Bottom-up Approach to European Constitutionalism* (Groningen, Europa Law Publishing 2007).

indirect involvement in EU decision making.² Thus, the question at hand is the following: how significant an impact do these changes really have on national parliaments' involvement in EU matters?

II. Rights of national parliaments according to EU law

The Treaty of Lisbon introduced new regulations regarding national parliaments into the Treaties, the primary law of the European Union. A new, separate article has been dedicated to national parliaments, and two protocols annexed to the Treaty on the Functioning of the European Union concern national parliaments directly. Naturally, some other provisions of the TEU and the TFEU are also relevant in relation to national parliaments.

Article 12 TEU stipulates that national parliaments 'contribute actively to the good functioning of the Union', and then gives a more detailed description of how this is to be achieved:

- by being better informed by the EU institutions and having draft legislative acts forwarded to them directly;
- by acting as 'watchdogs' of the proper application of the principle of subsidiarity
- by taking part in evaluating the implementation of EU policies in the area of freedom, security and justice, and being involved in the political monitoring of Europol and the evaluation of Eurojust's activities;
- by taking part in the procedures for any revision of the Treaties;
- by being notified of applications for accession to the Union;
- by engaging in inter-parliamentary cooperation with other national parliaments and with the European Parliament.
- Apart from these rights, although not mentioned in Article 12, national parliaments will have a further possibility relating to invoking a procedure before the Court of Justice.

In the following, we aim to analyze these provisions, and evaluate their effect on the position of national legislatures in the Union.

² Similar provisions were present in the Constitutional Treaty. For analysis of the similarities and differences between the relevant provisions see G. Barrett, "The king is dead, long live the king": the recasting by the Treaty of Lisbon of the provisions of the Constitutional Treaty concerning national parliaments', 33 *European Law Review* (2008)

1. The right of being informed on EU affairs

The right to timely access to information is an ‘improved version’ of the previously existing provision, as the new rule stipulates that there must be a minimum of eight weeks between a draft legislative act being made available to national parliaments in the official languages of the EU and the date when it is placed on a provisional agenda for the Council for its adoption or for adoption of a position under a legislative procedure. Furthermore, a ten-day period shall elapse between the placing of a draft legislative act on the provisional agenda for the Council and the adoption of a position. Exceptions are, however, possible, in cases of urgency (due reasons need to be given).³

Under the new protocol, the national parliaments will receive Commission consultation documents (which were already covered by the previous protocol), the annual legislative programme of the Commission, draft legislative acts, Council agendas (and minutes) and the annual report of the Court of Auditors.⁴ It could be noted however, that the direct forwarding of these documents does not, in practice, have too much added value, given the fact that they are already publicly available from the European Union’s online databases.⁵

Extending the mentioned six weeks to eight weeks leaves more time for the national parliaments, however in the co-decision procedure (which will become the ordinary procedure of decision making) the negotiations in the Council preparatory bodies generally takes more time than two months anyway. The decision-making process being quite long, national parliaments should have sufficient time to act in most cases. These information rights, albeit serve important safeguards for the legislative proposals arriving at national parliaments for review and eventual discussion, will not secure actual involvement in the formulation of national position and scrutiny of the representation. Indeed, to what extent the national parliament or its designated committee will discuss the issue and wishes to further engage in scrutinizing governmental

³ Protocol (No. 1) on the role of national parliaments in the European Union, Art. 4

⁴ Ibid. Articles 1-2. Draft legislative acts include not only proposals from the Commission, but also initiatives from a group of Member States, initiatives from the European Parliament, requests from the Court of Justice, recommendations from the European Central Bank or the European Investment Bank for the adoption of a legislative act.

⁵ Most notably Pre-lex and Eurlex.

representatives will depend on additional factors such as capacity, expertise, political salience and willingness to scrutinise.

2. Safeguarding the proper application of the principle of subsidiarity

The principle of subsidiarity, being the fundamental measure for allocating the exercise of competences in the EU between legislatures of different levels, is of particular importance for national parliaments. Article 5 Section 3 TEU, after outlining the principle of subsidiarity,⁶ states that national parliaments ‘ensure compliance with the principle of subsidiarity’ in accordance with the relevant protocol – a new element previously not contained in the Treaties. The Treaty of Lisbon redrafted the protocol on the application of the principles of subsidiarity and proportionality as well.⁷ The revised protocol introduced two procedures that allow national parliaments to voice their opinions on compliance (or non-compliance) with the principle of subsidiarity regarding draft legislative acts, also known as the ‘yellow and orange card’ procedures.⁸ The *yellow card* procedure is applicable under the following circumstances. Within eight weeks from the date of transmission of a draft legislative act to the parliaments, any parliament (or parliamentary chamber, in the case of bicameral parliaments) may submit a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. The European Parliament, the Council and the Commission, (and if the draft legislative act originates from them, the group of Member states, the Court of Justice, the European Central Bank or the European Investment Bank) shall take account of the reasoned opinions issued by national parliaments or national parliamentary chambers. Each national parliament has two

⁶ The slightly modified wording of the principle is as follows: ‘Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.’

⁷ This protocol originally appeared annexed to the Treaty of Amsterdam.

⁸ Treaty of Lisbon: An impact assessment, House of Lords European Union Committee, 10th Report of Session, 2007-08, p. 236., available at: <<http://www.publications.parliament.uk/pa/ld200708/ldselect/ldecom/62/62.pdf>>, (last accessed on 25.05.2010)

‘votes’.⁹ Where reasoned opinions on a draft legislative act's non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national parliaments, the draft must be reviewed.¹⁰ Following review, the institution which proposed the draft legislative act can maintain, amend or withdraw it, but it must give reasons for the decision.¹¹

The *orange card* procedure applies only to the ordinary legislative procedure (previously known as the codecision procedure), but has a more serious effect. If under the ordinary legislative procedure (OLP) reasoned opinions of national parliaments concerning the non-compliance of a proposal for a legislative act with the principle of subsidiarity represent at least a simple majority of the votes allocated to the national parliaments, the proposal must be reviewed. After the review, the Commission may amend, withdraw or maintain the proposal. However, if it chooses to maintain the proposal, it will have to justify why it considers that the proposal complies with the principle of subsidiarity in a reasoned opinion. This opinion, as well as the reasoned opinions of the national parliaments, will have to be submitted to the EU legislators, for consideration in the OLP. Before the end of first reading of the OLP, the European Parliament and the Council must consider whether the proposal is compatible with the principle of subsidiarity, taking into account the reasoning expressed by national parliaments, and also the opinion of the Commission. If the Council, by a majority of 55%, or the Parliament, by a majority of the votes cast, finds against the proposal, then ‘the legislative proposal shall not be given further consideration’ – i.e. it cannot be adopted. This is the strongest instrument that national parliaments have been provided with concerning scrutiny of European legislative drafts. It is somewhat controversial that, although the title of the protocol refers to the principles of subsidiarity and proportionality, the regulations concerning the rights of national parliaments only mention subsidiarity. National

⁹ In the case of a bicameral parliamentary system, each of the two chambers shall have one vote.

¹⁰ This threshold is lower (a quarter of parliaments) in the case of a draft legislative act submitted on the basis of Article 76 of the Treaty on the Functioning of the European Union on the area of freedom, security and justice.

¹¹ Op. cit. n. 8, at p. 237.

parliaments, it seems, may not voice their concerns regarding proportionality.¹²

Comparing the protocols in force with the previous document, it cannot be denied that national parliaments were given wider power to influence or intervene in the European decision-making process. Nevertheless, the weaknesses of these provisions must also be kept in mind. What the national parliaments actually gained via the new protocols in this regard is the right to make ‘the adoption of proposed legislation somewhat more difficult, but not necessarily to prevent it entirely’.¹³ The final decision regarding the question of conformity with the principle of subsidiarity remains in the hands of the Council and the Parliament (or the Commission, if it does withdraw or amend its contested proposal). The ‘red card’ desired by some parliaments and suggested by some scholars remains unavailable to the parliaments. Additionally, intense debate has surrounded the enforcement and application of subsidiarity and the factors that in fact should and could be taken into account by the ECJ in order to determine the level of action for the effect as required by the principle. However, it does seem very unlikely that the European institutions would push ahead a proposal that is being criticised by one third or one half of the national parliaments of the member states. Of course it needs to be kept in mind that national parliaments (and their members) do not exist on some remote, isolated political plane. On the contrary: they control and scrutinize their respective governments (and they are closely linked with them), and they are in cooperation with their European counterparts, the European political parties – and the Council and the European Parliament can in fact decide on dropping a legislative proposal. Also, the threshold for the yellow card is in fact not as hard to reach as it is ‘often too readily assessed’.¹⁴ As each national parliament has two votes, in the current situation (i. e. with 27 Member States) nine unicameral parliaments can already issue a yellow card, resulting in the review of the proposal. Notwithstanding its weaknesses, the yellow and orange card procedures do represent a step up compared to the previous

¹² Jančić refers to this discrepancy as a ‘conspicuous fallacy’ in D. Jančić, ‘A New Organ of the European Union: “National Parliaments Jointly”’, *Federal Trust Policy Commentary* (February 2008) p. 3., available at: <http://www.fedtrust.co.uk/uploads/Parliaments_Jointly.pdf>.

¹³ Barrett, op.cit. n. 2, at p. 83.

¹⁴ Jančić, op. cit. n. 12.

situation, and give the subsidiarity control mechanism at least some teeth.

3. Evaluating the implementation of EU policies in the area of freedom, security and justice, and being involved in the political monitoring of Europol and the evaluation of Eurojust's activities

According to Article 70 of the TEU, the Council may adopt measures laying down the arrangements whereby Member States, 'in collaboration with the Commission', conduct objective and impartial evaluation of the implementation of EU policies in the area of freedom, security and justice by member states' authorities. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation. In relation to Europol and Eurojust, the TEU simply states that the regulations which the European Parliament and the Council shall adopt, shall also determine arrangements for involving the European Parliament and national Parliaments in the evaluation of Eurojust's activities and lay down the procedures for scrutiny of Europol's activities by the European Parliament, together with national Parliaments.¹⁵ The real significance of these provisions no doubt depends on the future regulations. COSAC considers the mechanisms for parliamentary control to be vital in this area as the powers of Europol and Eurojust are increasing and thus sufficient democratic control over these bodies is essential – and this scrutiny can only be carried out by the national parliaments and the EP together.¹⁶ Via COSAC, national parliaments requested the Commission to consult them before presenting its actual proposals for regulations on Europol and Eurojust, and encouraged the Council and the European Parliament to also consult with national parliaments during the legislative process.¹⁷

¹⁵ See Arts 85 and 88 of the Treaty on European Union as modified by the Treaty of Lisbon.

¹⁶ Contribution of the XLI Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC), Prague, 10-12 May 2009, p. 3., available at: <<http://www.cosac.eu/en/meetings/Prague2009/XLI.pdf/contribution.pdf>>.

¹⁷ Eleventh Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny, May 2009 (Prepared by the COSAC secretariat), p. 6., available at: <<http://www.cosac.eu/en/documents/biannual/11br.pdf>>

4. Participation in the procedures for any revision of the Treaties

National parliaments are entitled to take part in the revision of the Treaties, as specified by the new modified Article 48 of the TEU, whether the revision at hand transpires via the ordinary or the simplified revision procedure. Previously, participation of national parliaments was limited to their influence over the respective governmental representative within the Council and the eventual ratification of Treaty amendment in line with national constitutional requirements.

Under the ordinary revision procedure in the Lisbon Treaty, the national parliaments shall be notified of any proposals for amendment submitted to the Council by any Member State, the European Parliament or the Commission. If a convention concerning revision is summoned, representatives of the national parliaments shall also take part in the deliberations, and the convention adopts by consensus a recommendation to a conference of representatives of the governments of the Member States. Of course, it will still be the government representatives who, after this recommendation, determine the actual amendments. The Treaty amendments will nevertheless have to be ratified by all the Member States, involving the national parliaments. The requirement of ratification of course also stands for Treaty changes adopted at intergovernmental conferences.¹⁸

Under the simplified revision procedure, the European Council will be empowered to authorize, by unanimity, the Council to adopt certain amendments (where this is expressly allowed by the TEU or the TEFU¹⁹). Any such initiative taken by the European Council shall be notified to the national parliaments. If any national parliament makes known its opposition within six months of notification, the decision shall not be adopted. This provision represents an actual, real right of veto on behalf of the national parliaments. There is no need to gather at least one third or half of the chambers, any national parliament alone will be able to block amendments to the Treaties. It is a kind of ‘negative ratification’ meaning that there is no need for real ratification, but already one ‘opposition’ (not further clarified regarding its form or content) impedes the amendment of the Treaties.

¹⁸ Whether a convention or a ‘simple’ intergovernmental conference needs to be convened is determined by Section 2 of Article 48 of the TEU.

¹⁹ Also known as the *passerelle* clause. For details of the provisions, see Sections 6-7 of Art. 48 of the TEU.

5. Being notified of applications for accession to the Union

Concerning membership applications, the only new element regarding national parliaments is the requirement that they will be notified of any such application. This provision is a logical addition, although in most cases member state parliaments will obviously already be informally informed by their Government concerning any new (possible or actual) applicant states, as membership applications are always preceded by political discussions and in fact require a unanimous vote within the Council. This is a gesture of a rather symbolic nature towards parliaments.

6. Inter-parliamentary cooperation with other national parliaments and the European Parliament

The Lisbon Treaty states that national parliaments contribute to the good functioning of the EU by taking part in inter-parliamentary cooperation with other national parliaments and with the European Parliament as well. The revised protocol on the role of national parliaments refers to COSAC (or, to be more precise, *a* conference of Parliamentary Committees for Union Affairs), and cooperation with the European Parliament – both are already existing forms of cooperation, but only COSAC (Conference of Community and European Affairs Committees of the European Union) was mentioned in the previous version of the protocol.

The Lisbon Treaty has taken a step forward concerning relations between national parliaments and the European Parliament, by providing this cooperation with an *expressis verbis* legal basis. While no explicit legal basis existed in Treaties, joint / inter-parliamentary committees had existed before to provide platform for discussion. The new protocol requires the European Parliament and national parliaments to determine – together – the ‘organisation and promotion of effective and regular interparliamentary cooperation’ within the EU themselves. The activities of COSAC were formulated somewhat differently in the previous protocol, and currently, specific mention is made of the aim that the conference shall

‘promote the exchange of information and best practice between national Parliaments and the European Parliament, including their special committees’.

While the basic aim of a Conference of Parliamentary Committees for Union Affairs is to promote inter-parliamentary cooperation between the national parliaments, the Conference shall promote the exchange of information and best practice between national parliaments and the EP – including their special committees. It may also organise inter-parliamentary conferences on specific topics, and the European Parliament’s representatives would surely be invited to such deliberations. These two activities of the Conference are new in the sense that they had not been included in the previous protocol on national parliaments, but they did exist in practice, so this novelty simply formalizes activities already underway within COSAC.²⁰

Parliamentary cooperation between the depositaries of direct democratic legitimacy at the national and the European level has the potential to influence the scrutiny of national governments. After the early years of (mild) animosity following the first direct elections of the EP, the parliamentarians have realized that they are not adversaries, and that by combining their efforts and expertise, they can have a better grip on the executive, at the national and the European level as well.²¹ The cooperation is much needed, as the European Parliament is considerably stronger *vis-à-vis* the Commission than the Council, whereas national parliaments have practically no control over the Commission, but, through scrutiny of their governments’ activities, they are (or should be) able to exert political control over the ministers taking part in the activities of the Council. As has been pointed out, there is significant difference between regulations and practices of such political scrutiny in the Member states. The increased involvement provided for by the Lisbon Treaty may, however, add to the desired salience and consciousness about EU affairs that could trigger more intense involvement.

The European Parliament is of the view that new forms and methods of pre- and post-legislative dialogue between itself and national parliaments should be developed, as the extent of cooperation is not yet sufficient.²² The EP itself urges national parliaments to ‘strengthen their

²⁰ Op. cit. n. 8, at p. 236.

²¹ See Á. Mohay, ‘Az Európai Parlament és a nemzeti parlamentek kapcsolata’, 2 *JogOk* Vol. I. (2005) p. 48-58.

²² Report on the development of the relations between the European Parliament and national parliaments under the Treaty of Lisbon (2008/2120(INI)), Committee on Constitutional Affairs, Rapporteur: Elmar Brok, p. 5., available at:

efforts’ to scrutinize national governments’ management of the spending of EU funds and the quality of national impact assessments and the manner in which national governments transpose EU law into domestic law and implement EU policies²³, and even offers them support as well concerning the effective scrutiny of their governments’ activities within the Council. The EP, however, also notes that scrutiny and control over the national governments (and the holding to account of the governments) by the national parliaments must ‘first and foremost’ be exercised according to the relevant national constitutional rules and laws. It also notes in this regard, that a mechanism for the exchange of best practices in this area would be of great benefit – a statement that we must agree with, seeing that the activity levels of the national parliaments are quite different indeed. The introduction of the new yellow and orange card procedures could also reinforce the significance of inter-parliamentary cooperation.

A truly significant step towards collaboration between the national parliaments and the EP (as the latter also notes) was the setting up and maintenance of the IPEX website and database.²⁴ It may be concluded that the existing potential of national parliaments can be used to enhance the complex system of checks and balances in the EU without risking adding ‘further layers to an already cumbersome decision making process.’²⁵

7. Addressing the Court of Justice of the European Union

National parliaments have been given the possibility to address the Court of Justice of the European Union, to invoke the principle of subsidiarity. According to Article 8 of the Protocol on the application of the Principles of Subsidiarity and Proportionality, the Court of Justice has jurisdiction in actions on grounds of infringement of the principle of

<<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2009-0133+0+DOC+PDF+V0//EN>>, (last accessed on 25.05.2010).

²³ *Ibid.*, at p. 6.

²⁴ <<http://www.ipex.eu>>

²⁵ C. H. Hofmann, ‘The Changing Role of National Parliaments in EU Affairs – Parliamentary Representation in a System of a Multi-Layer-Constitutions: Case Study of Germany and the Post-Nice Discussion’, Irish Centre for European Law, 2002, available at: <http://www.icel.ie/ac2_herwig_hof.doc>

subsidiarity by a legislative act (brought as an action for annulment²⁶) by Member States on their own (i.e. the government's) accord, or on behalf of their national parliament or a chamber thereof, in accordance with their internal legal order. Because of this provision, which is not detailed any further, the possibility that some national parliaments, 'frustrated by the ineffectiveness' of the yellow and orange cards, might try to make systematic use of the power to address the Court cannot be excluded.²⁷ It is important to note that the ability of a national parliament (or of a chamber) to initiate proceedings under Article 8 of the Protocol is not subject to the precondition that that parliament in question should have sent a reasoned opinion under Article 6 of the same Protocol – i.e. asking the government to submit a challenge before the Court of Justice is not formally connected to the fact whether a national parliament was for or against issuing a 'yellow card'.²⁸ This provision will make possible an *ex post* judicial review of the respect for the principle of subsidiarity triggered by national parliaments (meaning it can only be invoked after the act in question has been adopted), whereas the 'yellow and orange' cards are aimed at *ex ante* scrutiny of basically the same question. Note that national parliaments will not be able to commence an action for annulment directly before the Court of Justice, only via their national government. Whether the government is bound by a parliamentary request or not is left for the national law of each Member State to determine, as the reference to such activities having to be in accordance with the national legal order clearly demonstrates.

III. Are national parliaments willing to participate in EU affairs to an increased extent?

We have seen what the new Treaty provisions enable national parliaments to act within the framework of the EU. To see the full significance of these provisions, empirical data resulting from practical experiences will have to be explored in the future, but in institutional

²⁶ See Art. 263 of the Treaty on the Functioning of the European Union.

²⁷ Op. cit. n. 8, at p. 243.

²⁸ House of Lords European Union Committee: Strengthening national parliamentary scrutiny of the EU – the Constitution's subsidiarity early warning mechanism, HL Paper 101, 2005, p. 41-42., available at: <<http://www.publications.parliament.uk/pa/ld200405/ldselect/ldcom/101/101.pdf>>, (last accessed on 25.05.2010)

terms, the six month period that has elapsed between the writing of this paper and the entry into force of the Treaty of Lisbon is still quite short. There is, however, another related question that needs to be addressed: Are national parliaments actually willing to participate more actively in EU affairs?

Traditionally, experiences have shown that national parliaments often do not even use the existing possibilities to their full extent.²⁹ As has been mentioned, some national parliaments engage only minimally in the conduct of EU affairs at the national level, without substantial participation in, for example the establishment of national position. Additionally, while the so-called Barroso-initiative³⁰ has been received in a quite positive way, the various parliaments have made use of the consultation opportunity with the Commission to a varying extent. In 2007, the most active national parliaments to employ the procedure laid down in the Barroso initiative were the French senate, the German *Bundesrat* and the Czech senate. Ten parliaments only sent one single opinion, and six sent two (including the Hungarian Parliament).³¹ In 2008 the Swedish *Riksdag*, the Danish *Folketing* and Portugal's *Assembleia da República* were also very active.³² Some parliaments, however, have not sent a single opinion to the Commission.

Yet, the trend seems to be shifting, as shown by the most recent scrutiny check organized by COSAC: 36 national parliamentary chambers out of 40, representing 25 Member States have participated.³³ A number of the

²⁹ Final report of Working Group IV on the role of national parliaments. CONV 353/02, WGIV-17, p. 5., available at: <<http://register.consilium.eu.int/pdf/en/02/cv00/00353en2.pdf>>

³⁰ The Barroso-initiative originates from the Commission communication "A Citizens' Agenda – Delivering Results for Europe", Brussels, 10.5.2006. COM(2006)211 final, p. 9. Herein, the Commission undertook to transfer directly all new proposals and consultation papers to national parliaments, inviting them 'to react so as to improve the process of policy formulation'.

³¹ For details see Report from the Commission – Annual Report 2007 on Relations between the European Commission and National Parliaments, Brussels, 6.5.2008. COM(2008)237 final.

³² Report from the Commission – Annual Report 2008 on Relations between the European Commission and National Parliaments, Brussels, 7.7.2009. COM(2009)343 final, p. 4.

³³ Two participating parliaments started the check but had difficulties in completing it within the set deadline, while one national Parliament and one Chamber did not take part in the check. COSAC Secretariat – Report on the Results of the

participating parliaments also issued opinions expressing concerns over the compliance of the examined proposal with the principle of proportionality: these concerns, although outside the scope of the new protocol, are an indication of the increased interest on behalf of national parliaments regarding draft EU legislation.³⁴ The subsidiarity check also showed the importance of the direct transmission of information and documents to national parliaments, as out of the 36 participating parliamentary chambers, only 25 received information government in written and / or oral form) on the Proposal including its compliance with the principle of subsidiarity.³⁵

Perhaps, if national parliaments would be given the right to formulate proposals concerning any area of European integration, the consequence might be a more increased 'EU-awareness' not just in the national legislatures, but the national political discussion as a whole. Without increased political interest on behalf of the citizens, national parties are bound to primarily focus on national issues (even though International and European Law permeate national law in more and more areas).³⁶ The discussion whether a true European polity and a 'European people' as such exist goes far beyond the remits of this paper.³⁷ The current

Subsidiarity Check on the Commission Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession. Conference of Community and European Affairs Committees of Parliaments of the European Union, Brussels, 2010, p. 7-8. Available at: <<http://www.cosac.eu/en/info/earlywarning/successions.pdf>>, (last accessed on 25.05.2010).

³⁴ Ibid., at p. 4.

³⁵ Ibid., at p. 11.

³⁶ A clear indicator of the lack of the interest of voters in EU affairs is the constantly decreasing voting turnout of European Parliament elections. For analysis of this phenomenon see *inter alia* S. Hix and S. Hagemann, 'Could Changing the Electoral Rules Fix European Parliament Elections?', 2009, available at: <http://personal.lse.ac.uk/hix/Working_Papers/Hix_Hagemann-Can_EP_Elections_Be_Fixed-14Jan09.pdf>, (last accessed on 25.05.2010) and A. Olsson, 'The Puzzle of Voter Turnout in Elections to the European Parliament', Paper presented at the annual meeting of the Southern Political Science Association, 2006., available at: <http://www.allacademic.com/meta/p_mla_apa_research_citation/0/6/8/3/8/p68380_index.html>, (last accessed on 25.05.2010).

³⁷ For analysis see for example R. S. Katz and B. Wessels, *The European Parliament, the National Parliaments and European integration* (Oxford, Oxford University Press 1999); B. Suski, *Das Europäische Parlament: Volksvertretung*

combination of European and national rules pertaining to the involvement of national parliaments in European affairs seems to imply a more reactive position, so any development regarding a more active, policy-formulating role would require an attitudinal shift at both levels. The most recent report by the Commission on relations between itself and national parliaments suggests that the positions of national parliaments in most cases mirror the positions presented by government representatives in the Council.³⁸

All in all we may conclude that national parliaments have been given considerable new rights under the Treaty of Lisbon, which, despite some inherent weaknesses, could be used by the parliaments not only to get more involved in EU affairs, but also to influence it – provided, of course, that they act with sufficient activity. These empowerments relate to direct and indirect participation in the EU decision making processes and aim at addressing the pressing need of injecting more democracy in the increasing extent of EU legislation. For countries wishing to join the European Union, it will be an additional – and very important – challenge to prepare their national parliament and its designated committee to deal with EU affairs, and establish capacity, salience and expertise so that the country's participation would bring in additional legitimacy and strengthen democracy in the in the EU decision making processes.

ohne Volk und Macht? (Duncker & Humblot 1996); M. Jolly, *The European Union and the people* (Oxford, Oxford University Press 2007) and J.H.H. Weiler, 'The State „über alles” – Demos, Telos and the German Maastricht Decision', Jean Monnet Working Paper No. 6/95, 1995, available at: <<http://www.jeanmonnetprogram.org/papers/95/9506ind.html>>.

³⁸ Report from the Commission – Annual Report 2008 on Relations between the European Commission and National Parliaments, Brussels, 7.7.2009. COM(2009)343 final, p. 6.

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International student mobility as a driver of modern University education: Croatian and Hungarian experience with the Erasmus Program

I. Introduction

In the era of increasing globalization and internationalization, international student mobility is considered to be an integral part of modern university education. By definition, international student mobility is any form of international mobility which takes place within a student's program of study in higher education.¹ Particularly important aspect of this mobility is the *international student exchange* which has been accelerated by the need to get international education necessary to prosper in the globalized economy and society. Experts across the world have pointed out that international student exchange has outgrown its traditional role of being a tool for developing good relationships with countries and fostering mutual social, cultural, economic and political understanding; nowadays, international student exchange has become a tool for each country to be a political center of international education and cultural exchange.² Another important function of student exchange include (global) workforce development, creating wider range of study opportunities for students, setting up international benchmarking for

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¹ 'International student mobility: Report by the Sussex Centre for Migration Research, University of Sussex, and the Centre for Applied Population Research, University of Dundee' (HEFCE 2004/30)

² M. Sugimura 'International Student Mobility and Asian Higher Education: Framework for Global Network', Asia-Pacific Sub-regional Preparatory Conference for 2009 World Conference on Higher Education 24-26 September 2008, Macau, PR China. Available at: <http://www.unescobkk.org/fileadmin/user_upload/apaid/workshops/macao08/papers/1-d-3.pdf>, (last accessed on 14.07.2010)

university programs, ‘enlarging’ higher education with lower costs, creating student networks, etc. Taking into consideration of the multifaceted functions of international student exchange, it is not surprising that many countries / universities across the world view international student exchange as politically and economically efficient strategy for national development.

In the context of the current international economic crisis, the European Commission has stressed that investment in education and training is crucial. It has also underlined that while there may be a temptation in such circumstances to divert resources away from these activities, it is precisely in times of economic difficulty that investment in knowledge and skills needs to be safeguarded.³ It can also help to overcome the immobility paradox whereby even today, during a severe crisis there are unfilled vacancies in some countries and sectors, due to skills shortages. International student mobility has other positive features. It can, for example, help combat the risks of isolationism, protectionism and xenophobia which arise in times of economic crisis. Rather than being the exception, as is currently the case, international student mobility should become a natural feature of being European and an opportunity open to all young people in Europe.⁴ The Commission Communication on employment of June 2009 listed the promotion of mobility as one of the key priorities in order to overcome the present recession and boost job creation.⁵ The European Union (EU) has recognized the international education and training as well as student mobility to be service for creating a knowledge-based economy/society and initiated *inter alia* the *Erasmus Program* in 1987 with the aim to increase student mobility within EU. Since 2007, Erasmus has become a part of the EU Lifelong Learning Program. As the European Commission's flagship educational and training program for higher education students, teachers and institutions, Erasmus is enabling 200,000 students each year to study and work abroad. Also, the program supports teaching staff to teach abroad, university staff to gain training abroad and businesses to

³ A European Economic Recovery Plan, COM(2008)800, 26.11.2008, p. 15.

⁴ <http://ec.europa.eu/education/lifelong-learning-policy/doc/mobility/com329_en.pdf>

⁵ Commission Communication ‘A shared Commitment for Employment’, COM(2009)257

host students through internships.⁶ The Leuven Communiqué, adopted on 29 April 2009 by the Ministers in charge of higher education in the countries participating in the Bologna Process, stipulates that in 2020, at least 20% of those graduating in the European Higher Education Area should have had a study or training period abroad.⁷ In order to increase mobility of Croatian academic community, the Ministry of Science, Education and Sports together with the Agency for mobility and EU programs initiated the Program of bilateral mobility in higher education in the academic year 2008/2009. The J.J. Strossmayer University of Osijek (hereinafter: University of Osijek) has recognized the benefits that the Erasmus program offers to students (e.g., studying abroad, doing internships abroad, etc.), to academic staff (e.g., teaching abroad, establishing networks abroad, etc.), to higher education institutions (establishing joint (degree) programs; conducting multilateral projects, etc.) and to businesses (hosting students placements, participating in university cooperation projects, etc.). Even though numerous benefits of international student exchange and mobility in general and of Erasmus actions in particular are recognized by all 17 institutions of higher education within the University of Osijek, it seems that the fully-fledge international student / staff exchange is still a story of expectations unmet. The experience of the Faculty of Law in Osijek does not differ in this respect.

The University of Pécs has participated in the Erasmus program with increasing intensity since 1998. The main aim is to provide specific academic opportunity to students and teaching opportunity to professors and help them deepen their knowledge at partner institutions and use it in an international environment. The University of Pécs is seeking partner institutions with similar structures, multidisciplinary education and research potentials, and plan to receive more and more students from the countries which recently became eligible (for example Croatia). Currently in the 2009/2010 academic year the University has 383 ERASMUS agreements in 25 European countries which support the mobility of approximately 340 students as well as a number of teaching staff of the University of Pécs abroad. The majority of student

⁶ For more information on Erasmus see <http://ec.europa.eu/education/lifelong-learning-program/doc80_en.htm>, (last accessed on 14.07.2010).

⁷ <http://www.ond.vlaanderen.be/hogeronderwijs/bologna/conference/documents/Leuven_Louvain-la-Neuve_Communique_April_2009.pdf>

exchanges (95%) are conducted within the framework of signed Erasmus agreements between the University of Pécs and other European universities. Although the coordination of the program has developed step-by-step during the years, and the University still has some difficulties with the every-day-management of the program, especially with achieving the balance of sending and receiving students and staff, the Erasmus program is really a success story at the University of Pécs and at the Faculty of Law as well. The European Quality (E-Quality) label awarded twice recognizes the University's excellent management and promotion of the Erasmus program.

The purpose of this paper is to discuss the experience of the University of Osijek and the University of Pécs with the Erasmus program, to describe the attitudes of the students of the Faculty of Law in Osijek towards international student exchange and to suggest ways how to promote the idea of international student mobility through Erasmus and similar programs which are recognized as true drivers in the modernization of higher education institutions and systems in Europe. The 12 years history of managing and coordinating the Erasmus program at the University of Pécs can serve as a good model for the University of Osijek which has just introduced the program.

II. Erasmus program: international and national experiences

Erasmus is the European Commission's flagship educational program for higher education students, teachers and institutions. It was introduced for the first time in 1987 with the aim of increasing mobility of students and later on it became a part of the EU Lifelong Learning Program (2007-2013) together with three other sub-programs: Comenius for schools; Leonardo da Vinci for vocational education and training and Grundtvig for adult education. Students who join the Erasmus program study in another European country for a period of between three months and a whole academic year. The Erasmus program guarantees that the period spent abroad is recognized by their higher education institution in their qualification. In terms of studying full-time for first degrees, students can take part in Erasmus study mobility at any time except during the first year. Typically students will be involved in Erasmus during the third year of their degree studies. Students can take part only once in the Erasmus mobility program, and once in the Erasmus work placement during their university studies. An important element of the program is that students do not pay extra tuition fees to the university

that they visit. Students can also apply for an Erasmus grant to help cover the additional expense of living abroad. Students with disabilities can also apply for additional grant to cover extraordinary expenses. The disability dimension is a part of the EU's role to promote opportunities for the disabled.

The Erasmus work placement program enables university students to complete a traineeship period in another European country. Host organizations for student placements may be enterprises, training centers, research centers and other organizations excluding EU organizations, which coordinate EU programs (e.g. Lifelong learning programme national agencies) and the embassies of the student's home country. The length of the Erasmus work placement period is 3-12 months. The work during the internship should be full-time work (at least 30 hours/week). The work placement needs to be fully recognized by the home department. Also students who have participated in the Erasmus student exchange in the past may participate in the Erasmus work placement program. Beside the student mobility, the Erasmus program allows academic and university staff to participate in education and training.

The participants of the program have to be citizen of one of the countries within the European Union, the European Economic Area countries of Iceland, Liechtenstein and Norway or an EU candidate country such as Turkey. Switzerland is again eligible for membership since 2007, after a period of absence following the country's rejection of closer links with the European Union in the late 1990s. Higher education institutions which want to participate in Erasmus activities must have an Erasmus University Charter. The Charter aims to guarantee the quality of the program by setting certain fundamental principles. The budget for the Erasmus program amounts to nearly €7 billion for 2007 to 2013 and is intended to fund various actions by various actors participating in the program (see figure 1). Speaking in numbers, more than 4,000 higher education institutions in 33 countries are taking part in Erasmus program; more than 2.2 million students as well as 250,000 higher education teachers and other staff have participated since it started in 1987. The ambition of Erasmus program is to draw 3 million students by 2012.

Figure 1 Erasmus actions

<p><i>Students:</i> studying abroad doing a traineeship abroad linguistic preparation</p>	<p><i>Universities / higher education institution staff</i> teaching abroad receiving training abroad</p>
<p><i>Universities / higher education institutions working through:</i> intensive programs academic and structural networks multilateral projects</p>	<p><i>Business</i> hosting students placements teaching abroad participating in university cooperation projects</p>

Source: <<http://ec.europa.eu/education/lifelong-learning-program>>, (last accessed on 11.07.2010)

Participating in Erasmus program offers great opportunities for participants, particularly to students.⁸ Taking into consideration that the job market today is an international one and that upon graduation students compete not only with their national graduate counterparts but with those from other countries as well, the ability to be distinguished in the job market through qualifications and skills is crucial for professional success. Many studies show that students benefit greatly by participating in an exchange program like Erasmus.⁹ Some of the benefits include the following: development of language skills, self-assurance and independence, which are some of key components of a successful career; establishing an international network of friends; discover new (international) perspectives, demonstrating ability to live and work in the environment other than its own, etc. Even though the benefits are numerous and can significantly improve the students' employability and job prospects, there are some obstacles and barriers on the path of student exchange. According to various surveys conducted by the Erasmus Student Network,¹⁰ the most common

⁸ Naturally, academic and university exchanges have similar beneficial effects, both for people participating and for the home and host institutions, yet we shall focus in this paper only on students.

⁹ See for example report done by the Higher Education Funding Council for England (HEFCE): Attainment in higher education: Erasmus and placement Students, Issues Paper, November 2009.

¹⁰ See following reports: 'The Experience of studying abroad for exchange students in Europe', Erasmus Student Network Survey 2005, Ewa Krzaklewska, Severyn Krupnik; 'Exchange students' rights in Europe. Erasmus Student Network Survey 2006, Ewa Krzaklewska, Severyn Krupnik; 'Generation Mobility' Erasmus Student

obstacles are recognition of courses, financial situation and lack of information. Namely, not all students receive full recognition of their courses taken abroad; only in some cases are students able to cover all living costs, travel expenses or tuition fees when studying abroad, and provision of information is still considered as one of the less developed aspect in terms of content and organization (e.g., local university website is weak, etc.).

III. Research methodology

International student mobility, encouraged through the Erasmus program, offers the experience of studying, working and living in a different academic, cultural and social environment. As a result, employment opportunities and competitiveness of students who participate in some international student mobility program are higher, as well as their social consciousness. Level of tolerance and awareness of the necessity of combating all forms of discrimination is increased as well. With the goal of profiling students of the Law Faculty in Osijek, and measuring their past experiences (student mobility status) as well as the important criteria for making decisions about participation in such projects in future, a survey was conducted among the student population, during April and May in 2010, with *Paper and pencil method* (PAPI). Students were asked to fill out the questionnaires independently, with the moderator's guidance.

The measurement instrument consisted of 34 questions, out of which 20 questions were related to student mobility and 14 questions were related to socio-demography. Questions were mostly closed ones with predefined answers, except three open-ended, qualitative questions used for in-depth understanding of student responses. The predefined answers were composed of nominal and ordinal scales, where for ordinal scale the Likert scale (from 1 to 5 points) was chosen. Two pilot studies had been made: first, after setting up a draft of research questions, in order to detect all possible responses. The second pilot study was conducted after the finalization of the questionnaire, within the sample of 30 students, after which the survey remained unchanged, considering that the pilot showed readable and logic questions. Based on survey questions, the database for the data entry was made. The study included a total of 323

students, and after cleaning process and database validation, the final database consisted of 310 valid questionnaires, which were further analyzed. The respondents were students of first, second, third and fourth year of study, in the age range of 18 to 28 years, where the average age of students was 21 years, while the mode, most common age, was 20 years. As in the overall structure of the population of students of the Law Faculty in Osijek, sample was consisted of greater proportion of female students compared to male students (74% female students). The detailed sample structure is shown in Table 1.

Table 1 The structure of the sample by socio-demographic variables in %

International student mobility as a driver of modern university education...

Gender	
male	26,1
female	73,9
Total	100,0
Age	
18 - 20	44,2
21 - 23	52,3
24 and more	3,5
Total	100,0
Year of study	
first year	36,5
second year	26,1
third year	20,3
fourth year	17,1
Total	100,0
Type of study	
regular student	92,6
irregular student	7,4
Total	100,0
professional study	44,2
integrated study	55,8
Total	100,0
Plan to continue studying after graduation	
yes, specialist study	11,0
yes, doctoral studies	13,5
no	20,6
I do not know yet	54,8
Total	100,0
Settlement size	
to 5.000 inhabitants	40,9
5.000 - 10.000 inhabitants	22,1
10.000 - 50.000 inhabitants	23,1
50.000 - 100.000 inhabitants	6,9
100.000 and more	6,9
Total	100,0
Studying in the place of residence	
yes	11,7
no	88,3
Total	100,0
Currently living	
with parents	51,9
alone	23,7
with friends	24,0
with partner	0,3
Total	100,0
Standard in domestic	
standard is below the Croatian average	19,6
standard is at the level of Croatian average	70,9
standard is above Croatian average	9,5
Total	100,0

IV. Survey results

In order to analyze the preconditions that could affect the mobility of students, their general interest and final decision on participation in the exchange program, the first part of the study aimed to detect historically displayed behavior of students in terms of experience with traveling.

Descriptive analysis showed that the majority of students (91%), visited a foreign country throughout lifetime, usually during high school age. Most trips took place in Europe (98%), of which the majority of students had at least one trip to one of neighboring countries, with 42% having visited Hungary. The average trip duration was around seven days, usually with family members (very often a graduation trip), and the reasons were mainly touristic. Language, as a prerequisite for mobility of the student population, should not be a problem. Most students learned 2-3 languages throughout schooling, and 24% of them had taken additional courses during their schooling. Even 64% of students said that they made acquaintance with a foreigner, but it is likely an influence of digital platform of communication development and the internet, no necessarily face-to-face contact.

Regarding familiarity with the Erasmus project, 21% of students said that they were aware of the program, and described it as 'international student exchange program in Europe'. Most learned about the project via the website (38%), but also through conversations with colleagues (28 or the bulletin board served a source of information for 25% of students. Erasmus was graded as very interesting project where, using Likert 1-5 scale, average grade was 3.48. It is important to note that there was no statistically significant difference in the assessment of interest to the socio-demographic variables. Regardless of familiarity with Erasmus, all students were asked to review the importance of motives for engaging in (any) international exchange program. The analysis showed high importance of balancing all observed motives, where the highest ratings were given to 'benefit of employment' (4.55), 'learning language' (4.49) and 'meeting new people' (4.38), as shown in Table 2.

Table 2 Measures of central tendency of motives for involvement in international student exchange program

	Average	Std. Deviation	Median	Mod	Min.	Max.
Benefit of employment	4,55	0,700794	5	5	2	5
Learning language	4,49	0,841783	5	5	1	5
Meeting new people	4,38	0,881296	5	5	1	5
Getting to know new cultures	4,26	0,970183	5	5	1	5
Potential business contacts	4,19	0,964851	4	5	1	5
Teaching profession	4,12	0,928408	4	5	1	5
Entertainment	4,09	1,089756	4	5	1	5
Gaining independence	3,95	1,165867	4	5	1	5
Possible political contacts	3,39	1,316186	3	5	1	5

Although all motives achieved a relatively high grade (rank average rating 3.39 to 4.55), ratings above 4.3 indicate that *meeting new people* with *learning* that can result in *employment benefits*, are most likely to motivate students to participate in international exchange. Although it is noted that there was no statistically significant differences in relation to socio-demographic variables, it is possible to see differences in the level of motivation regarding to year of study. As shown in Table 3, students in the first and especially second year are more motivated to participate in international students exchange than the students being in third and fourth year.

Table 3 Average rating motives by year of study

Year of study	Gaining independence		Teaching profession	Entertainment	Meeting new people	Potential business contacts	Possible political contacts	Getting to know new cultures		Learning language	Benefit of employment
	Average	Std. Dev						Average	Std. Dev		
I	4,05		4,11	4,15	4,57	4,4	3,4	4,23	4,46	4,68	
	<i>1,075</i>		<i>0,948</i>	<i>1,113</i>	<i>0,747</i>	<i>0,893</i>	<i>1,383</i>	<i>1,014</i>	<i>0,869</i>	<i>0,586</i>	
II	4,4		4,46	4,41	4,71	4,44	3,72	4,64	4,77	4,75	
	<i>0,806</i>		<i>0,774</i>	<i>0,876</i>	<i>0,509</i>	<i>0,862</i>	<i>1,233</i>	<i>0,671</i>	<i>0,423</i>	<i>0,583</i>	
III	3,62		3,92	3,9	4,08	3,93	3,23	4,11	4,37	4,31	
	<i>1,29</i>		<i>0,918</i>	<i>1,106</i>	<i>0,971</i>	<i>0,929</i>	<i>1,283</i>	<i>0,985</i>	<i>0,991</i>	<i>0,799</i>	
IV	3,53		3,92	3,75	3,88	3,75	3,12	4	4,33	4,29	
	<i>1,362</i>		<i>0,987</i>	<i>1,169</i>	<i>1,114</i>	<i>1,064</i>	<i>1,278</i>	<i>1,066</i>	<i>0,952</i>	<i>0,798</i>	
Total	3,95		4,12	4,09	4,38	4,19	3,39	4,26	4,49	4,55	
	<i>1,166</i>		<i>0,928</i>	<i>1,09</i>	<i>0,881</i>	<i>0,965</i>	<i>1,316</i>	<i>0,97</i>	<i>0,842</i>	<i>0,701</i>	

The information above indicates that it is necessary to manage the initial enthusiasm, motivation and desire of students for additional activities and values that university education can provide. In order to gain in-depth understanding of student motivation, analysis of the importance of information required to make a decision on participation in an international exchange program was made. Measures of central tendency of the importance of information required to make a decision are shown in Table 4.

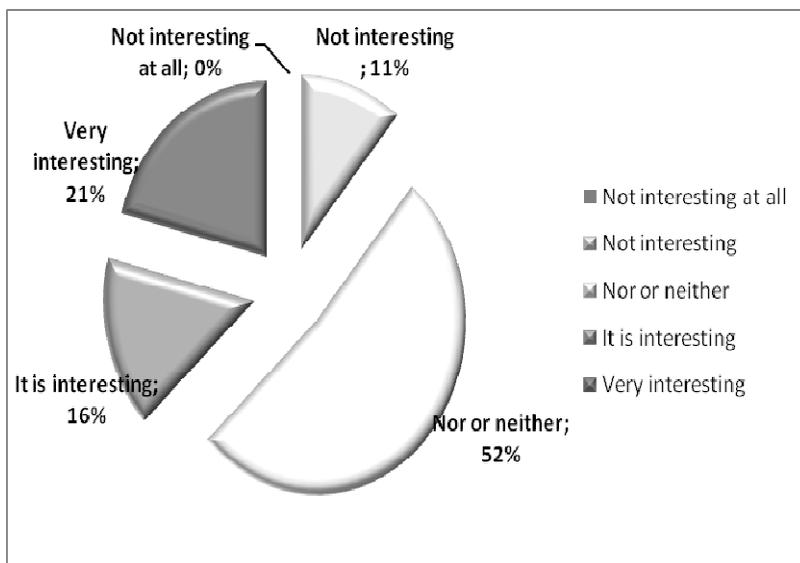
Table 4 *Measures of central tendency of the importance of information required to make a decision on participation in international exchange*

	Mean	Median	Mode
Are the passed exams recognized at (home) university?	4,45	5	5
Will I be able to pass all exams necessary for fulfilling a condition for a higher year due to the travel / exchange program?	4,44	5	5
Are my student rights prolonged for a time spent in the international exchange program?	4,38	5	5
Do I get a certificate about the participation in the international exchange program along my diploma?	4,26	5	5
Who covers all expenses abroad (e.g. travelling, accommodation, food)	4,22	5	5
What is the language of communication?	4,18	4	5
What are the criteria for an exchange student selection?	4,08	4	5
What conditions do I have to satisfy for application?	4,07	5	5
Do I have health insurance?	4,00	4	5
What is the planned length of stay?	3,99	4	5
Am I going alone or with a group?	3,92	4	5

Observed assessments suggest that it is difficult to scale the students on the importance of some information needed to make a decision on participation in international trade, since all information is given a high rating (rank of average scores from 3.92 to 4.45). However, the highest ratings were assigned to the functional information related to study (recognition of examinations, students' rights), not the journey, which indicates a clear focus and primary goal of the student – finalizing his / her studies. Therefore, it is possible to conclude that the fear of interruption of regular studying can be seen as one of the elements that influence (dis)interest in mobility. Since this conclusion is in line with international sources, it suggests that regional and socio-demographic characteristics do not significantly influence the thinking of students who express a need for certainty in the same way regardless of geographic origin.

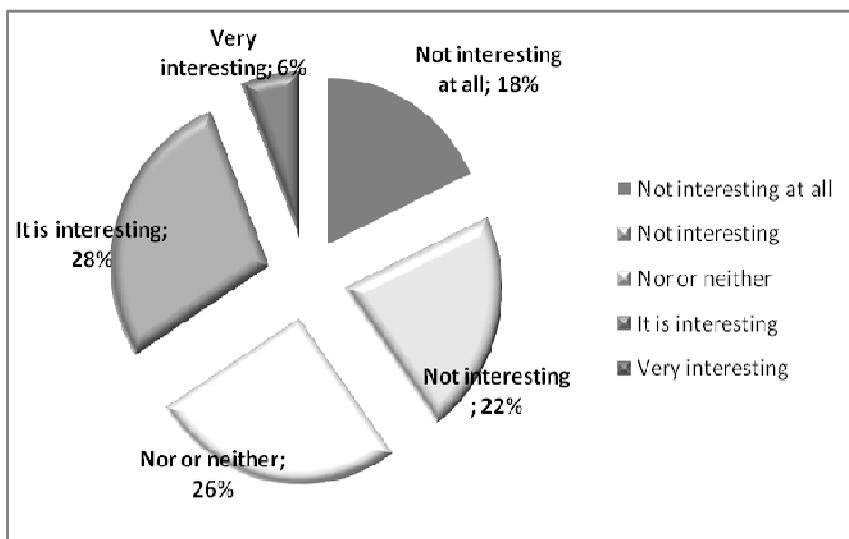
However, when analyzing the specific interest of students it is possible to conclude that 37% of students are interested in an international exchange program (a project such as Erasmus or the Erasmus itself), while the majority, 52%, is not sure if interested, which is caused by insufficient information about projects (Graph 1).

Graph 1 How much does an international exchange program, Erasmus, seem interesting to you?



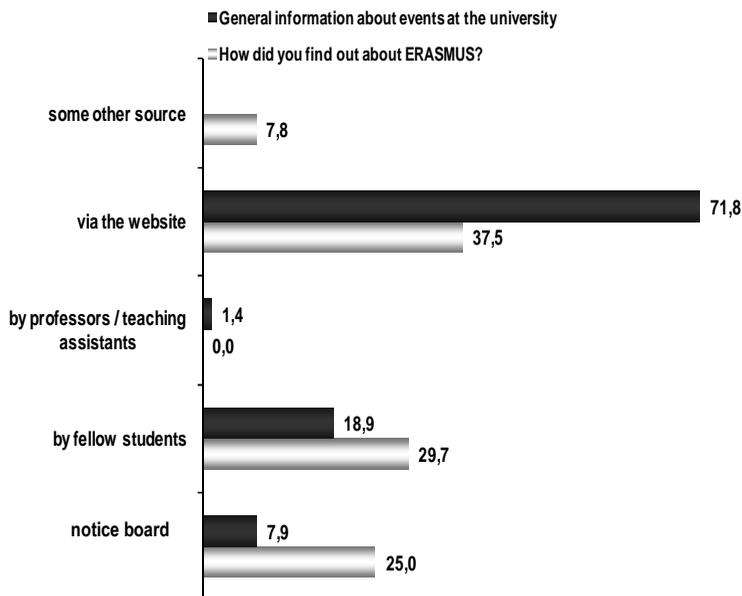
When interest is concretized, it decreases the share of students who are unsure of their answer. As shown in Graph 2, to the question of potential interest for study visit to the Faculty of Law in Pécs, a smaller number of students gives undefined answer (26% of them), while the level of interest remained at the level of the general framework of interest: 34% of them expressed their interest, of which 6% are very interested.

Graph 2 How much do you find interesting student exchange (visiting) the Law School in Pécs?



It should be noted that there is a correlation between general interest in international exchange and interest for a specific study visit in Pécs, which shows that interested students are open and willing to travel without predefined desire regarding the destination, while the destination plays an important role when it comes to undecided student. The above also shows importance of providing all needed information which could empower student in the decision-making process. Students have tendency to get informed largely via faculty web site (71%) and to a lesser extent all other sources. In the case of information about the Erasmus project, a source of information distribution was quite different, as can be seen in the Graph 3.

Graph 3 Sources of information



It is evident that in the case of Erasmus project, word of mouth and buzz between students played an important role, which is not the case with the usual student information sources.

V. Conclusion of the survey

International student mobility at Faculty of Law in Osijek is guided by social and affirmative motives, which is in line with international research and shows that the motivation of students is not affected by the geo-political or socio-demographic conditions. Higher level of motivation has been detected at the beginning of study, from students of first and second year; therefore they should be the focus of support programs aimed to increase the mobility of the student population and international trade. However, the awakening and maintaining interest until realization, certainly imply necessity of information, especially regarding the potential impact on studying. Thus, the academic community should clearly define the role of international academic exchanges in the academic program and verify the same, as yet undefined framework results in uncertainty among students, which

furthermore results in a lower level of interest in specific projects. When students are able to easily gain necessary information there is interest, both for the project in general and for specific proposals, which proves a significant correlation between the interest in international projects of exchange and interest for potential visit to Law School in Pécs. Analysis of source of information clearly demonstrates the need to widely use website as a communication channel (the internet as a platform in general) in order to further address students. On the other hand, the Erasmus project triggered outstanding live communication among students, which guarantees a genuine interest in the topic. Students' interests can be maintained and improved if the academic communities respond appropriately. In this way it is possible to maximize the social, economic and professional security of the students that their international student mobility will be adequately evaluated.

The research results suggest the next step, which is qualitatively research (in depth interviews and focus groups), within the sample of students who participate in the EUNICOP project, with the goal to understand motives, as well as expectations and satisfaction and the achieved results related to international student cooperation experience.

VI. Promotion of the Erasmus program at the University of Pécs

The survey of the University of Osijek points out the fact that university students are often unaware of the opportunities which exist, therefore information needs to be better updated and more easily accessible for them. A number of factors may contribute to keeping many students away from even considering a stay abroad: time pressure to finish their studies or training, jobs, lack of funding, lack of language skills and intercultural knowledge, as well as a general reluctance to leave 'home'. Students will be more open to mobility if the benefits of international student mobility are better explained to them. They also need to be confident of a positive outcome of their period of mobility. A crucial issue is the recognition they can expect for their stay abroad. The University of Pécs aims to increase the quality of its incoming and outgoing student mobility, therefore it has implemented several quality-control and quality measures at institutional and faculty level to achieve this aim which has to be communicated properly with the help of PR tools in order to motivate the students for taking part in mobility programs.

The University of Pécs founded in 1367 is one of the largest higher educational institutions in Hungary with high-quality research and education. At present the number of students is close to 30,000. With its ten faculties – Faculty of Adult Education and Human Resources Development, Faculty of Business and Economics, Faculty of Health Sciences, Faculty of Humanities, Faculty of Law, Medical School, Faculty of Music and Visual Arts, Faculty of Sciences, Illyés Gyula Faculty of Education and Pollack Mihály Faculty of Engineering – the University of Pécs plays a significant role in Hungarian higher education. The University offers a broad range of training and degree programs.

In order to meet the demands and the needs of the surrounding community for continuing education, the University of Pécs has started to develop its programs within the area of life-long learning. In addition, the University attaches great importance to training in the colleges for advanced studies. Nearly every Faculty offers training in the framework of this organization that encourages students to pursue their own research.

Due to the credit system, first introduced in Hungary in Pécs, an increasing number of Hungarian students participate in international study programs as an integral part of their education, and likewise, an increasing number of international students and researchers come to the University of Pécs to study and conduct research every year. Therefore, the University continuously works on expanding and improving its co-operation with other universities and international research institutions and is already part of a large network at different levels. Participation in the Erasmus program began in 1997 and the number of both outgoing and incoming students / teachers has since shown a steady increase. Beside the institutional co-ordinator, and the institutional assistant, 10 faculty co-ordinators deal with the management of the program.

Table 5 Erasmus mobility statistics between 2005-2010

Academic year	Partner countries	Incoming students	Partner universities	Outgoing students	Outgoing trainee students	Incoming teacher	Outgoing teacher
2005/2006	17	85	171	267	0	21	46
2006/2007	22	130	188	283	0	36	65
2007/2008	23	146	213	338	37	41	51
2008/2009	24	160	243	326	39	31	67
2009/2010	25	173	266	323	59	12	70

Quality-control and quality measures introduced by the University and the Faculty of Law:

- Erasmus agreements are reviewed on a regular basis by the Scholarship and Grant Board of the Faculty of Law, they can be continued or ended based on the numbers of students and staff exchanged in the previous years.
- The European Credit Transfer and Accumulation system has been adopted by and introduced at the University of Pécs to facilitate the recognition of all study credits earned in study abroad programs. The credit points received by the student at the partner institution are fully acknowledged by the Faculty of Law of the University of Pécs. The acceptance of the credits can be achieved in several points of the curriculum structure. In uncertain cases the Study and Credit Board makes the decision.
- The number of courses offered in foreign languages for national and international students has been increasing continuously; the Faculty of Law has app. 40 law courses in English, in German, in Spanish, in Italian, in French languages.
- The Faculty of Law established a strict selection criteria and procedure for outgoing students, they have to have minimum one level 'C' intermediate language examination in one of the languages of the EU, good study results, at least one fulfilled law course in a foreign language; and participation in student competitions, research activities or in social activities are advantages. Students send an application to the Scholarship and Grant Board of the Faculty (including CV, motivation letter, proof of their foreign language knowledge), then take part in an interview held by the members of the Board in the language of instruction of the applied university abroad.

- The Learning Agreement signed by the institutional and faculty coordinators of the sending and receiving institutions ensures that all credit points obtained for courses listed in the document are awarded.
- The Faculty of Law gives an additional financial support for its outgoing students beside the Erasmus grant.
- Incoming students receive an official Transcript of Records issued by the Faculty which shows the number of credits they have earned during the study period spent in Pécs.
- Incoming students have the possibility to register for courses at all Faculties of the University of Pécs. Exchange students of the Business and Humanities faculties regularly take up courses at the Faculty of Law.
- Since 2000 the University organizes a 'Hungarian language and culture' summer university, which offers the opportunity for foreign students to learn Hungarian and to get to know the Hungarian culture better..
- The University of Pécs provides dormitory placement for all incoming students at a reasonable price.
- For the incoming Erasmus students in the beginning of each semester the international relations office of the University organizes an Orientation Day, together with the Faculties and with the Erasmus student network. The main aim is to introduce the institution, the academic structure, the cultural and other events offered to the students.
- The University of Pécs offers Hungarian language courses for the incoming Erasmus students free of charge.
- The Erasmus Student Network and the Student Association of the Faculty of Law help the incoming students to integrate into the Hungarian student community, organizes various cultural and free-time programs for them. It also provides assistance for the outgoing students, helps in the publicity and the promotion of the information about the application for the program.
- The Faculty of Law set up an Erasmus tutor student system to help the incoming students to integrate into the local student community. Volunteer Hungarian students assist the international students during their stay in Pécs.
- The students taking in the Erasmus work placement program part receive a Diploma Supplement about the completed internship.

The University of Pécs makes an effort to widen the representation of the information related to the Erasmus program, with the help of PR tools, such as:

- detailed description of the program, useful information for incoming and outgoing students, regularly updated news on the program on the website of the international relations office (<<http://erasmus.pte.hu/>>);
- program news and events on the university TV;
- articles and advertisement of the program in the newspaper of the Faculty and the University (interviews with incoming and outgoing Erasmus students);
- e-mails for the students, professors, employees about the actual events, tasks and results of the program;
- advertising posters designed by the Student Association of the Faculty displayed on the Faculty Board;
- overall information for the partner institution and incoming students about the Hungarian specialties, the University, the courses offered in foreign languages, the credits, and the regional cultural and student life in the Erasmus Study Guide CD (<http://erasmus.pte.hu/study_guide2010/index.html>);
- information presentations on the Erasmus program organized by the institutional and Faculty coordinators and the student associations of the Faculty;
- informal Erasmus parties so called ‘Erasmus information exchange market’ with the participation of former and future Hungarian and international Erasmus students;
- on-line reports of former outgoing students;
- on-line database of available work placements in Europe for outgoing students.

In the 2009/10 academic year the University had 323 outgoing and 173 incoming students, the Faculty of Law sent 50 Hungarian students to its 32 European partner universities, and received 11 international students in the framework of the Erasmus program. These numbers show that there is no balance of sending and receiving students, the institution still has difficulties attracting students from European universities to spend an Erasmus period in Pécs. However the increasing number of law courses in foreign languages and the constantly developing PR tools has helped to promote the program among the Hungarian and the international students.

Attila Pánovics*
Rajko Odoša**

Environmental protection provisions in the Hungarian and Croatian Constitution

I. The importance of constitutional provisions

1. Environmental protection and sustainability

The effects of human activities have reached a level where environmental problems became global in the 20th century. Economic growth and population increase have not respected the limited resources and tolerance of the environment. Economic interests are given high priority over social and environmental interests, and we still expect economic growth to be the source of a solution. In other words, instead of managing the causes of problems, only the problems themselves are being managed by welfare societies.¹ Exhausting limited resources is to satisfy the increase of consumption rather than to meet social needs.

The proper state of the environment is a basic element of sustainability, but the concepts of sustainability by decision-makers are mostly limited to 'sustainable economic *growth*'. We must understand that the economy is not for its own sake. Economy can only serve society within the carrying capacity of the environment. Natural capital is finite and cannot necessarily be substituted by economic capital. In a limited system there is no possibility for exponential growth. It is impossible to find ways to replace some natural resources; the loss in biodiversity, for example, is often definite. Moreover, the exhaustion of natural (and social) capital may have non-linear consequences, and the impact of deterioration may cause a sudden breakdown of ecosystems after reaching a certain threshold. Growth and welfare, even in case of dramatic development in our technical knowledge, are limited by our environment. This means that environment is the condition of social

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¹ A clear distinction has to be made between welfare and well-being. Welfare in a material sense is only an important element of the values of well-being, such as knowledge, wisdom, trust, faith, and respect for dignity, co-operation or a good quality of the environment.

well-being, and economy is only a tool which transfers the natural assets to society.

A constant battle is being fought over the meaning of sustainable development in any particular case.² The most often-quoted definition of *sustainable development* was used by the Brundtland Commission, describing it as development that ‘meets the needs of the present without compromising the ability of future generations to meet their own needs’.³ Of course, sustainable development (sustainability) does not focus solely on environmental issues. Sustainability has three pillars: economy, society and the environment, since both economy and society are constrained by the carrying capacity of the environment.

In our point of view, the concept of sustainability is not itself an independent principle but rather a *directive goal*,⁴ intertwined with the concept of carrying capacity that has gained quite a lot of popularity in recent years, both in national and international circles. Sustainability is not a reference to the preservation of a particular state; however, many do identify it with the sustenance of economic growth. The essence of sustainability is to establish a *system of relations* – a culture – in which people, in their relations established with each other and with the environment, do not deplete but preserve resources for the future. Sustainability is in search for this proper system of relations, to allow next generations to also be able to meet their needs.⁵

International and national strategies, plans and programs shall be adjusted to a long-term sustainability vision, and the support of societies shall be obtained for this. The primary goal of regulation is to promote the prevention of problems, ensure sustainable resource utilization, and develop a comprehensive sustainability policy, into which mutually strengthening policies shall be integrated. Many countries have developed and implemented national sustainable development strategies

² J. Holder and M. Lee, *Environmental Protection, Law and Policy – Text and Materials* (Cambridge University Press, 2007) p. 262.

³ Report of the World Commission on Environment and Development (‘The Brundtland Commission’) United Nations General Assembly Resolution 42/187, 11 December 1987

⁴ G. Winter, ‘Environmental Principles in Community Law’, in J. H. Jans, ed., *The European Convention and the Future of European Environmental Law, The Avosetta Series (I)* (Groningen, Europa Law Publishing 2003) p. 21.

⁵ In search for the future – Summary Report of the National Council for Sustainable Development for Hungarian Society (2009) pp. 9-10.

in some form, in accordance with the mandate of Agenda 21, signed at the United Nations Conference on Environment and Development (i.e., UNCED – the Rio Earth Summit) in 1992. Sustainable development is a primary goal of the European Union (EU) as well, enshrined in its treaties since 1997. The Treaty of Amsterdam made significant progress to strengthen sustainable development as an objective of the Union and to emphasize the requirement that environmental protection be integrated in other policy areas and activities of the Union.

2. The role of national constitutions and courts

In different parts of the world many countries react to the global environmental crisis with numerous initiatives, from global⁶ to local levels. New institutions have been created and new laws, regulations, standards and policies of environmental protection have been adopted. Among all these reactions to the environmental crisis there is a special emphasis on constitutional provisions referring to environmental protection. In general, constitutions are the supreme law for the political community they govern, expressing the deepest values of society. Constitutions establish the structure and hierarchy of legal norms, delineate the relationship between national and international law, and create the basic institutions of government and describe the scope of governmental powers.⁷

Today, *more than 70%* of the world's national constitutions include explicit references to environmental rights and/or environmental responsibilities.⁸ The fact that the protection of environment or natural resources is today mentioned in 140 national constitutions, 86 of which

⁶ Beside high profile global events like UN conferences on the environment in 1972 and 1992, environmental protection is established through various legally binding or non-binding environmental regimes, within intergovernmental organisations, and through various transnational environmental advocacy networks. See K. Tews, 'The diffusion of environmental policy innovations', in G. Winter, ed., *Multilevel Governance of Global Environmental Change – Perspectives from Science, Sociology and the Law* (Cambridge, Cambridge University Press 2006) p. 236.

⁷ A. Kiss and D. Shelton, *Manual of European Environmental Law* (Cambridge, Cambridge University Press 1997) p. 15.

⁸ D. R. Boyd: *The Environmental Rights Revolution: Constitutions, Human Rights, and the Environment* (Vancouver, The University of British Columbia 2010) p. 78., available at:

<http://circle.ubc.ca/bitstream/handle/2429/23334/ubc_2010_spring_boyd_david.pdf?sequence=1>, (last accessed on 15.07.2010)

explicitly recognize the right to a healthy environment, proves that because of the threat of an environmental disaster almost the whole world (there are around 190 constitutions in force in the world today not including the constitutions of federal states) accepted the simple but immensely important premise that ‘a balanced biosphere is a physical prerequisite for life’.⁹

This radical change as compared to earlier periods does not only mean an extension of the already stated social goals, fundamental rights and institutions in constitutions, but also that the goal of the State

‘has to be further expanded from economic and social amenities to environmental well-being, fundamental rights have to be supplemented with fundamental obligations and environmental rights and institutions should be open towards representing environmental interests’.¹⁰

Among other things this means that constitutionalization of environmental protection (and the right to a healthy environment) has significant theoretical and practical legal repercussions.

Although empirical studies are lacking and causality is difficult to demonstrate, a positive relationship is assumed between environmental protection provisions in constitutions and environmental performance. Of course, the impact of constitutional environmental provisions depends on the specific culture, politics and other factors within a nation. A large number of different states have environmental provisions within their constitutions, but in many cases the effectiveness of such provisions has been questioned as they amount only to ‘policy statements’.¹¹ These provisions can be ineffective in steering and constraining legislators and policy makers at the national level.

Laws and policies affect the environment and the rights of people living in those environments. Especially national administrations have great powers to influence the state of the environment (positively or negatively, by acting or by omitting to act), but the administration is not the owner of the environment. Individuals and environmental NGOs

⁹ A. Bačić, ‘Ustavni temelji i problemi zaštite okoliša u hrvatskom i europskom pravu’ [Constitutional Foundations and Problems of Environmental Protection in Croatian and European Law] 45 *Zbornik radova Pravnog fakulteta u Splitu* (4/2008) p. 727 at p. 729.

¹⁰ Bačić, *ibid.*, at p. 730.

¹¹ T. Hayward, *Constitutional Environmental Rights* (Oxford, Oxford University Press 2005) p. 73.

must have the same amount of environmental information as the administrations have. There might be, and in practice, there are more and more divergence between the public and the administrations on the necessary degree of environmental protection. Additionally, environmental law suffers more than any other field of law from shortcomings in its implementation and enforcement. These shortcomings would require court intervention, if they are not remedied by executive regulation. Courts therefore have a crucial role to play in the protection of the environment, and the fragile state of the global environment requires the judiciary to be the guardian of the Rule of Law,¹² guardian of both human rights and the constitutions themselves.

Though administrative review mechanisms are always quicker and cheaper, they cannot substitute the judicial review of administrative acts or omissions. Public authorities are forced to comply with environmental law if their decisions are likely to be subjected to judicial review. The mere possibility that a public interest lawsuit can be instituted seems to encourage adherence to environmental rules. This particular effect was observed in many countries and is probably the most important outcome of an environmental association taking legal proceedings.¹³ Only the independent courts as arbiters can decide on the controversies between the administrations and the public, and balance the diverging interests. Moreover, for a number of reasons – length of judicial procedures, costs, the criteria for legal standing, the complexity of cases, and others – access to the courts remains the last resort for the settlement of disputes in environmental matters. Additionally, the interpretive function of the judiciary is even more important in environmental law than in other areas.

In the majority of European countries, a dual structure of courts and tribunals has been put in place: ordinary courts and tribunals on the one hand, and administrative courts and tribunals on the other. Ordinary courts and tribunals have jurisdiction in civil and criminal cases, whereas administrative courts and tribunals are empowered to settle administrative disputes. However, the powers of administrative courts

¹² L. J. Kotzé and A. R. Paterson, *The Role of the Judiciary in Environmental Governance – Comparative Perspectives* (Alphen aan den Rijn, Wolters Kluwer 2009) p. 24.

¹³ N. de Sadeleer, et al., *Access to Justice in Environmental Matters and the Role of NGOs, Empirical Findings and Legal Appraisal, The Avosetta Series* (6) (Groningen, Europa Law Publishing 2005) pp. 198-199.

may differ.¹⁴ For example, the Hungarian court system has four levels since 1 January 1999.¹⁵ It consists of 111 local and district courts (105 local courts in the major towns of Hungary and 6 district courts in Budapest), 20 county courts (19 counties and Budapest), 5 regional courts¹⁶ and the Supreme Court.¹⁷ In administrative cases, the county courts act in the first instance.¹⁸ The court will annul the infringing administrative resolution, and, if necessary, will oblige the authority to conduct a new procedure. In the field of environmental cases, courts cannot alter the administrative resolutions.¹⁹

Most European countries also have a constitutional court.²⁰ These are *sui generis* courts of law which are parts of the judiciary only in exceptional cases (when they are mentioned directly in the wording of the Constitution). Regulation of access to the constitutional court differs; direct access for natural or legal persons to the constitutional court exists only in the minority of European countries.

The national legal systems and court procedures are still designed to protect economic interest (property rights, rights to free enterprise) or personal interests, related to the person such as health, freedom of expression or non-discrimination.²¹ If only public interests are at stake, the enforcement of rules and the initiation of legal procedures are matters exclusively within the domain of governmental or administrative institutions. Environmental issues simply cannot be reduced to private or

¹⁴ L. Lavrysen, 'The Role of National Judges in Environmental Law', in T. Ormond, et al., eds., *Environmental Law and Policy at the Turn to the 21st Century, Liber amicorum Betty Gebers* (Berlin, Lexxion Verlagsgesellschaft mbH 2006) p. 84.

¹⁵ See Act No. LXIX. of 1997 on the establishment and jurisdiction of regional courts.

¹⁶ The regional courts of appeal are seated in Budapest, Debrecen, Győr, Pécs and Szeged.

¹⁷ Hungary has 20 special tribunals only in labour disputes.

¹⁸ See Chapter XX of the Act III of 1952 on Civil Procedure.

¹⁹ F. Bögös, 'The impact of ECJ judgments on the Hungarian judicial practice', in Gy. Bándi, ed., *The Impact of ECJ Jurisprudence on Environmental Law* (Pázmány Péter Katolikus Egyetem Állam- és Jogtudományi Kar, Szent István Társulat 2009) p. 46.

²⁰ In the countries that have no constitutional court, the constitutionality review is prohibited by the Constitution, or the ordinary courts and tribunals have the power of constitutionality review.

²¹ S. Prechal and L. Hancher, 'Individual Environmental Rights: Conceptual Pollution in EU Environmental Law', *2 Yearbook of European Environmental Law* (2001) p. 114.

public interests, because environmental interests are collective, diffuse and fragmented to a large extent.

3. Procedural and substantive environmental rights

Loosening the conceptual dichotomy between private and public interests makes it possible for the public, including citizens or non-governmental organizations (NGOs), to initiate or take part in administrative and judicial procedures concerning the environment. The involvement of the public can empower citizens and their organizations to assume responsibility for the environment; the result would be the improvement of the level of environmental protection.

At the national level, an increasing number of countries have included in their constitutions provisions making it an obligation for the State to ensure a healthy (clean, safe, decent, sustainable, ecologically balanced, etc.) environment to its citizens and granting rights to them. Several constitutions demonstrate that the right to a healthy and/or clean environment is a specific focus of environmental policy.

While the well-known Principle 1 of the Stockholm Declaration ('man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations')²² has inspired many national constitutional provisions since the early 1970s recognizing the right to environment as a fundamental right under domestic law, that right has not to date been transposed into a binding rule of international law of universal application.²³

These *procedural* rights have deep roots in human rights instruments, although not specifically in the environmental context. They play a substantial role in the protection of the environment and are given significant attention within the international community. This also means that within environmental law generally, there is no universally accepted *substantive* environmental right. There have been declarations which amount to 'soft law' and in terms of human rights law itself, specific substantive environmental rights have been included within two

²² Declaration of the United Nations Conference on the Human Environment, UN Doc. A/Conf.48/14/Rev.1

²³ For a more detailed discussion of this question, see M. Déjeant-Pons and M. Pallemarts, *Human Rights and the Environment* (Strasbourg, Council of Europe Publishing 2002).

regional human rights treaties. Procedural rights, on the other hand, have become commonly accepted and have become legal norms in many regions,²⁴ since it is generally supposed that public participation in environmental decision making, through consultation processes for example, can lead to better decisions as a wider range of considerations may be taken into account.²⁵ Additionally, public participation methods improve the legitimacy of decision making as, *inter alia*, the participation of citizens can potentially make decisions more democratic.²⁶ Public participation can also be an effective tool in enforcing environmental policy. Citizens and their organizations can serve as the eyes and ears of specialized state organs.

In the 1970s, discussions took place under the auspices of the Council of Europe to complete the European Convention on Human Rights by a Protocol on the right to a clean environment. These efforts failed, as no agreement could be reached on the drafting of such a right, though there was a consensus that such a right existed. Subsequently, efforts at national and international level concentrated on procedural rights of the public.²⁷

Developed under the auspices of the United Nations Economic Commission for Europe (UN ECE), the *Århus Convention* (Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters²⁸) is widely viewed as the foremost legally-binding instrument protecting the public's environmental rights. The Convention was adopted on 25 June 1998 by representatives of 35 States and the European Community²⁹ at a UN

²⁴ S. J. Turner, *A Substantive Environmental Right – An Examination of the Legal Obligations of Decision-Makers towards the Environment* (Alphen aan den Rijn, Wolters Kluwer 2009) pp. 42-43.

²⁵ B. J. Richardson, And J. Razzaque, 'Public Participation in Environmental Decision-Making', in B. J. Richardson and S. Wood, eds., *Environmental Law for Sustainability* (Oxford, Hart Publishing 2006) p. 165. et seq.

²⁶ J. Ebbesson, 'The Notion of Public Participation in International Environmental Law', 8 *Yearbook of International Environmental Law* (1997) pp. 75-81.

²⁷ Summary Report on the inventory of EU Member States' measures on access to justice in environmental matters (Milieu Ltd., September 2007) p. 21.

²⁸ <<http://www.unece.org/env/pp/>>

²⁹ By signing the Convention on 25 June 1998 and formally adopting it on 17 February 2005 the EC obliged itself to present adequate legal instruments for implementing the provisions of the Convention; see Council Decision 2005/370/EC, *OJ* 2005 L 124, p. 1.

ECE-sponsored pan-European Ministerial Conference³⁰ in the Danish city of Aarhus. The Convention entered into force on 30 October 2001 and progress of ratification is still relatively rapid. The Convention has penetrated into issues previously perceived as parts of the national *domaine réservé*, and has led to greater transparency and accountability in a wide range of international bodies and processes dealing with environmental issues on which the Parties to the Convention have an influence.

Adoption of the Convention in 1998 marked a milestone in the development of environmental rights of the public. The Convention lays down the basic rules to promote citizens' involvement in environmental matters and the enforcement of environmental law.³¹ It guarantees environmental rights by implementing Principle 10 of the Rio Declaration.³² It is generally described as having three pillars. The first pillar grants the public the right of access to information, the second deals with public participation in decision making, and the third provides for access to justice in environmental matters. These 'access principles' can perform a modest instrumental role in encouraging regulators to keep the public interest at the forefront of regulation.³³

The Convention does not create a substantive right to a clean and/or healthy environment. Rather, it creates procedural rights to assert the

³⁰ The 'Environment for Europe' process is an ECE-wide cooperation on environmental issues, established following the collapse of communism in Eastern Europe at the end of the 1980s and punctuated by a series of Ministerial Conferences (Dobris, Czechoslovakia, 1991; Lucerne, Switzerland, 1993; Sofia, Bulgaria, 1995; Aarhus, Denmark, 1998; Kiev, Ukraine, 2003; Belgrade, Serbia, 2007).

³¹ The entire preparatory period for the Convention was a unique possibility to work together with non-governmental organisations (NGOs), governments and international institutions on equal basis and demonstrated a great openness for NGO involvement.

³² 'Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.' (Principle 10 of the Rio Declaration on Environment and Development)

³³ M. Lee, *EU Environmental Law: Challenges, Change and Decision-Making* (Oxford-Oregon-Portland, Hart Publishing 2005) p. 54.

‘right to live in an environment adequate to his or her health and well-being’.³⁴ Concentration on the procedural dimensions of an environmental right can avoid certain problems in attempting to set appropriate standards to be maintained through some substantive right to the environment.

According to Article 2 of the Treaty on European Union (after the amendment by the Reform Treaty) the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. EU environmental policy must aim at a high level of protection, as specified in Article 3 of the Treaty on European Union, and Article 191(2) of the Treaty on the Functioning of the European Union.

We agree that not only does the EU need to actually move towards sustainable development; the EU also needs to win a sustained level of public support and trust, both in its existing and future Member states. Such support is best achieved by recognizing the public’s environmental rights and by giving citizens and their organizations the ability to enforce these rights.³⁵

Unfortunately, neither the Lisbon Treaty,³⁶ nor the Charter of Fundamental rights of the EU³⁷ declares the right to a healthy and/or clean environment. The Avosetta Group of environmental lawyers

³⁴ Århus Convention, Preamble, para 7

³⁵ R. Hallo, et al., *‘Greening the Treaty III: Institutional Reform, Citizen’s Rights and Sustainable Development, Proposals for the Intergovernmental Conference Preparing for the Treaty of Nice’*, p. 5., available at: <http://www.eeb.org/publication/2000/Greening_treaty_eng.pdf>, (last accessed on 15.07.2010)

³⁶ *OJ C* 83, 30.3.2010, p. 1. The Lisbon Treaty entered into force on 1 December 2009. It amends the Treaty on European Union and the Treaty establishing the European Community (the latter is renamed the Treaty on the Functioning of the European Union).

³⁷ The Charter was signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission at the European Council meeting in Nice on 7 December 2000 (*OJ C* 364, 18.12.2000, p. 1.). It contains only a vague and practically hardly effective declaration of the EU’s political obligations. Article 37 of the Charter declares that: ‘[a] high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development’.

suggested in 2002 to complement Article 37 of the Charter with the following text.

‘Everyone has the right to a clean environment. This right is subject to reasons of overriding public interest. It includes the right to participation in decision-making, the right of access to the courts and the right to information in environmental matters [...]’.³⁸

II. Environmental protection provisions in the Hungarian Constitution

1. The importance of the Hungarian Constitutional Court

The Hungarian Constitution³⁹ was fundamentally reformulated in 1989 through the roundtable negotiations, and has been modified several times since then. The transition of the political system and the establishment of a constitutional state necessarily meant a complete reshaping of the Constitution. More than 90 per cent of the text of the 1949 Constitution was changed, and all references to ideologies were removed from the text after the first elections in June 1990.

The Constitutional Court had a major role in adhering to the standards of constitutionality common in developed countries. Indeed, it has gained an influential place in the division of powers and a vital role in political life.⁴⁰ In the first phase of its existence, the Hungarian Constitutional Court had to adopt many fundamental decisions that have been important in the constitutional development of Hungary. The Constitutional Court has developed solutions to the transition of the political system, and tried to apply new rationales to classic problems (such as the question of death penalty⁴¹ or abortion⁴²). The traditional German influence has been consciously balanced by the jurisprudence of the European Court of Human Rights and the experience of foreign constitutional courts.⁴³

³⁸ Resolution of the Avosetta Conference October 11/12, 2002, Amsterdam, point 6

³⁹ Act XX of 1949

⁴⁰ A. Ágh, ‘The Permanent “Constitutional Crisis” in the Democratic Transition: The Case of Hungary’, in J. J. Hesse and N. Johnson, eds., *Constitutional Policy and Change in Europe* (Oxford, Oxford University Press 1995) p. 315.

⁴¹ Decision 23/1990 (XI. 31.) of the Constitutional Court

⁴² Decision 64/1991 (XII. 17.) of the Constitutional Court

⁴³ Especially the jurisprudence of Italian, Spanish and Portuguese courts is echoed in many decisions, but the impact of the U.S. Supreme Court can also be detected.

Because of the problems related to the system change and the weaknesses of the ‘interim’ Hungarian Constitution, the Constitutional Court had to create several new institutions in the founding phase. First of all, the activism of the Constitutional Court means that the Court has ensured a very broad protection of fundamental rights and accepted all applications whenever possible. According to the decisions of the Court, the rights to life and human dignity can be found at the top of the hierarchy of fundamental rights. These human rights cannot be limited conceptually.

Currently there is reference, to environmental protection in two different provisions in the Hungarian Constitution. In the chapter on General Provisions Article 18 declares that ‘The Republic of Hungary shall recognize and enforce everyone’s right to a healthy environment.’ Article 70/D is drawn up in the fundamental rights section (Section XII) of the Constitution and contains ‘the right of physical and mental health of the highest possible level’, but also includes among the means of realizing this right the ‘protection of the built and natural environment’.⁴⁴

Theoretically, the place of Article 18 among the General Provisions shows a central importance of environmental protection, and guarantees that it will be sufficiently acknowledged and respected in Hungary. In contradiction with this, sustainability (sustainable development) is not mentioned in the Constitution at all.

Already in 1990 József Antall, ex-Prime Minister of Hungary, and the Environmental Committee of the Hungarian Parliament applied for the abstract interpretation of the environmental provisions of the Constitution. The applicants sought the interpretation ‘in the interest of justifying future environmental law-making’. They wanted to know the exact content of the corresponding provisions and the governmental obligations resulting of the constitutional provisions.

Following long discussions, the Constitutional Court did not grasp the opportunity and rejected the application.⁴⁵ However, the Court declared that the language of the Constitution could not be interpreted as a restriction on the right to a healthy environment. The Court held, that the duties of the State must include the protection of the natural basis of life

⁴⁴ See Article 70/D para 2.

⁴⁵ Decision 996/G/1990 of the Constitutional Court, *ABH* [Decision of the Constitutional Court] 1993 p. 553.

and must extend to the establishment of institutions for the management of non-renewable resources. The State may freely choose the fundamental principles and methods by which it protects the environment and is free, moreover, to determine what specific legislative and governmental measures are to follow from the particular state responsibility to assure a healthy environment.

2. Decision 28/1994 (V. 20.) of the Constitutional Court

The exact content of the environmental provisions of the Constitutions were spelled out in another case.⁴⁶ The petitioner held that the adoption of Act II of 1993 on Land Reallocation and Land Distribution Committees and the amendment of Act II of 1992 on Transitional Rules and on entry into force of Act I of 1992 on Co-operatives led to a reduction in the degree of environmental protection guaranteed by law. The efforts of the Hungarian Parliament to secure enough land to be distributed caused a complicated side-effect of compensation and privatization because the transfer of protected areas to private ownership and to the management of agricultural co-operatives led to a situation contrary to the Constitution.

The Court held that the right to a healthy environment under Article 18 was neither an individual fundamental right or merely a constitutional duty or state goal for which the State might freely choose any means of implementation. Nor did it amount to a social right but rather to a *distinct fundamental right* exceedingly dominated and determined by its objective aspect of institutional protection.⁴⁷

The right to a healthy environment raised the guarantees for the implementation of state duties in the area of environmental protection, including the conditions under which the degree of protection already

⁴⁶ See Decision 28/1994 (V. 20.) of the Constitutional Court

⁴⁷ In Hungary, the first instance administrative authorities are basically the ten inspectorates for environmental protection, nature conservation and water ('the green authorities'). The appellate body in administrative cases is the National Inspectorate for Environmental Protection, Nature Conservation and Water. In a slight number of cases, where the latter institution was the first instance authority (for example, cases concerning transboundary issues), the Ministry of Environment and Water was the second instance level authority. In 2010, as a consequence of the reorganization of the system of government, the Ministry of Environment and Water has lost its independence, and has been integrated into the Ministry for Rural Development as a state secretariat.

achieved might be restricted, to the level of a fundamental right. In fact the right to a healthy environment was a part of the objective, institutional aspect of the right to life since it guaranteed the physical conditions necessary to enforce the right to human life. The definition of the acceptable amount of environmental degradation and of the level of protection remains the prerogative of the legislator. The Constitutional Court also recognized that there are individual rights related explicitly to environmental protection but they are primarily procedural in nature, such as the right to participate in the licensing procedure, and they do not serve specifically the purpose of environmental protection, but can be employed for this purpose among many others, such as the constitutional right of access to information of interest to the public. The Court declared that

‘the right to a healthy environment, as defined in Article 18 of the Constitution, incorporated *inter alia* the responsibility of the Republic of Hungary to ensure that the State did not reduce the degree of the conservation of nature as guaranteed under law, unless this was unavoidable in order to enforce any other fundamental right or constitutional value.’

Even in the latter event, the degree of protection cannot be reduced *disproportionately*. The measures of the State must be proportionate to the goal to be achieved. This ‘*nonderogation rule*’ was constructed by means of the analysis of the specific nature of the right in question.⁴⁸

Relying upon these findings, the duties of the State are twofold:

- In general, the State is not free to allow any deterioration of the environment or risk thereof. The right to a healthy environment *per se* is primarily an independent and self-contained protection of institutions – a distinct fundamental right exceedingly dominated and determined by its objective aspect of institutional protection. It compels the State not to regress from preventive rules of protection to protection ensured by sanctions.
- The State shall not reduce the *degree* of environmental protection ensured by legislation unless necessary to realize

⁴⁸ L. Sólyom and G. Brunner, *Constitutional Judiciary in a New Democracy – The Hungarian Constitutional Court* (University of Michigan Press 2000) p. 25.

other constitutional rights or values and even then only in proportion to the set goal.⁴⁹

The Hungarian Parliament clearly violated Arts. 18 and 70/D(2) of the Constitution since the transfer of protected areas into private ownership and the management of cooperatives led to the dismemberment of those areas and the destruction of natural treasures. The Constitutional Court held this option to be unconstitutional and declared the duty of the Hungarian State to maintain the status quo with respect to nature conservation. Since the annulment of the relevant provision of Act II of 1993 would have created an unconstitutional situation, the Constitutional Court called upon the Hungarian Parliament to meet its legislative responsibility by 30 November 1994. However, the relevant legislation was adopted only on 31 October 1995.⁵⁰ The deadline for enforcement has already been modified four times,⁵¹ because the national budget has not been able to ensure the financial resources since 1995. Actually, there are still more than 100.000 hectares of protected areas in private hands.⁵²

It is worth raising attention to the following statement in the previously analyzed Decision: '[t]he right to environment is unique in that its proper subjects can be identified as mankind and nature.' The Court also emphasized that efforts to bestow 'rights' upon 'nature' or its representative elements – such as animals and plants – and the assertion of the 'rights of yet-unborn generations' are eloquent illustrations of the same problem. However, legal responsibilities toward 'nature' and 'present and future mankind' can be determined without resorting to figurative language and legal constructs of this sort.

These sentences of the Court show the strong tension between the different approaches of ecocentrism and anthropocentrism. Since the

⁴⁹ L. Fodor, '*Környezetvédelem az Alkotmányban*' [Environmental Protection in the Constitution] (Budapest, Gondolat Kiadó – Debreceni Egyetem, Állam- és Jogtudományi Kar 2006) pp. 54-55.

⁵⁰ See Act XCIII of 1995.

⁵¹ See Act CXII of 2006; the current deadline expires on 31 December 2010.

⁵² Attila Pánovics, 'A védett természeti területek visszavásárlása Magyarországon' [The Reacquisition of Protected Natural Areas in Hungary], in *„Reformator iuris cooperandi” – Tanulmányok Veres József 80. születésnapja tiszteletére* (Szeged 2009) pp. 429-430.

famous article by Stone,⁵³ there have been arguments that nature itself or natural objects or ecosystems could have legal rights and that man should be the guardian of those rights. Despite of the fact that the majority of environmental cases affect many people, especially the future generations, the state of the environment is determined by the present human society, not the needs of the future generations or other species. We must agree that the traditional anthropocentrism of our legal systems makes it unnecessary to mention the rights of future generations and especially the rights of non-humans.⁵⁴ Such a radical interpretation is unlikely, indeed impossible, to be made on the basis of our current anthropocentric concept of human rights.⁵⁵ Therefore the Court also points out in its Decision that the right to a healthy environment cannot be included among the classic, protective fundamental rights. It is not an individual fundamental right, nor merely a constitutional duty or state goal 'in its present form'. It is instead classified as a so-called 'third generation' human right, the character of which is still under debate. One of the fundamental results of the Hungarian Constitutional Court's case-law is the elucidation of the environmental obligations of the Hungarian State. The interpretation of the relevant constitutional provisions has become applicable in other nature conservation cases⁵⁶ and in other environmental issues before the Constitutional Court.⁵⁷ It also fundamentally determined the case-law of ordinary courts in Hungary.

III. Provisions for the protection of the environment in the Croatian Constitution

Since the early 1970s Croatia has demonstrated a significant progress in environmental protection, which has been supported by the introduction of an environmental right in the 1974 Constitution. This was, unfortunately, not followed by a systematic elaboration and

⁵³ C. D. Stone, 'Should Trees Have Standing? – Toward Legal Rights for Natural Objects', 45 *Southern California Law Review* (1972) pp. 450-501.

⁵⁴ B. Majtényi, 'A jövő nemzedékek és a természeti tárgyak köztársasága?' [Republic of Future Generations and Natural Objects?], *Fundamentum* (2008) (ELTE TÁTK) p. 25.

⁵⁵ K. Bosselmann, *The Principle of Sustainability– Transforming Law and Governance* (London, Ashgate 2008) p. 136.

⁵⁶ See decisions 29/1995 (V. 25.) and 48/1997 (X. 6.) of the Constitutional Court.

⁵⁷ See decisions 14/1998 (V. 8.) and 30/2000 (X. 11.) of the Constitutional Court.

implementation of the environmental policy. At the beginning of the 1990s, when Croatia became an independent state, it was enthusiastically set to create an institutional framework for environmental policy, as well as a detailed elaboration and implementation of that policy. Arguing that in previous decades Croatia was not able to protect and improve its natural and other assets sufficiently, the Parliament of the Republic of Croatia adopted the Constitution (1990) by which citizens are guaranteed the right to a healthy environment, the Declaration on Environmental Protection in the Republic of Croatia (1992), and the Law on Environmental Protection (1994)⁵⁸ whose content is in its entirety in accordance with the principles stipulated in the Declaration and which sets the ground for environmental protection policy according to the concept of sustainable development.

1. The constitutional definition of the Republic of Croatia as a social state

A starting point for environmental development and its protection is found in the constitutional definition of the Republic of Croatia as a social state based upon the rule of law. According to Article 1 of the Constitution enlisting basic provisions, the Republic of Croatia is ordered as a 'unitary and indivisible democratic and social state'. It is important to emphasize this, because some theorists believe that the definition of the state as a social one is a basic starting point for environmental protection. Namely, a social state implies the obligation of the state authorities to enable the highest possible level of adequate life conditions and a life worthy of a human being. Nevertheless, one should be very careful with such an interpretation since

⁵⁸ The Law on Environmental Protection encompasses a substantial part of laws relating to environmental protection, and determines environmental protection starting points based on generally accepted principles and international legal standards: responsibility for environmental pollution, implementation of administrative and inspection control, obligatory elaboration of environmental strategies and environmental state reports, introduction of pollution cadastre, information system, environmental monitoring, public access to environmental information and public participation, and stimulative environmental measures. Available at: <<http://www.mzopu.hr/default.aspx?ID=3979>>, (last accessed on 15.07.2010).

‘concrete content-related foundations for environmental protection are hard to infer from this principle, seeing that the notion of a social state is not normatively defined, and in theory there are opposing opinions on its content and significance. In accordance with this, the principle of a social state as a starting point for environmental protection can only be invoked in a very general sense’.⁵⁹

Furthermore, Article 3 of the Constitution states that freedom, equal rights, national equality and equality of genders, love of peace, social justice, respect for human rights, inviolability of ownership, *conservation of nature and the environment*, the rule of law, and a democratic multiparty system – are the highest values of the constitutional order of the Republic of Croatia and the ground for interpretation of the Constitution. It is important to observe that conservation of nature and the human environment is only one high value among others and is not given an apparent priority over parallel basic values of Article 3, as there does not appear to be, a priori, a settled hierarchy.

In the same article the Constitution also states the principle of the rule of law, from which in reference to the requirement for *conservation of nature and the environment* other basic demands can be inferred:

- retention of legal regulation of the matter,
- specificity of legal norms,
- the principle of proportionality between duty and general utility.⁶⁰

Among the quoted aspects of the principle of rule of law the most interesting to us is the proportionality between public interest (general utility) and duty which are prescribed to persons. None of the directions or prohibitions through which some rights of individuals are restricted (e.g., ownership, entrepreneurship, etc.) can be unsubstantiated, and the measures by which the rights are restricted must not exceed the necessity imposed by the public interest. In accordance with this one should interpret Article 16(2) of the Constitution, which stipulates that every restriction of freedoms or rights shall be proportional to the nature

⁵⁹ J. Omejec, ‘Uvodna i osnovna pitanja prava okoliša’ [Introduction and Basic Issues of Environmental Law], in O. Lončarić-Horvat, et al., eds., *Pravo okoliša* (Zagreb, Organizator 2003) p. 54.

⁶⁰ J. Šinkovec, *Pravo okolja, Načela in međunarodnopravni prikaz* [Environmental Law, Principles in International View] (Ljubljana, Časopisni zavod Uradni list Republike Slovenije 1994) pp. 42-43.

of the necessity for restriction in each individual case. In this sense the 1999 Ruling number U-I-1156 is very important, in which the Constitutional Court of the Republic of Croatia explained the content of the principle of proportionality in a case in which it assessed how far a restriction of entrepreneurial freedoms and ownership rights can go. The principles of rule of law and conservation of nature and the environment represent a result of harmonizing global constitutional values at the beginning of the 21st century and are the highest-grade values of the constitutional system of the Republic of Croatia. These principles can only be observed and deliberated upon jointly and only in this case they represent a basis for an accurate interpretation of the Constitution of the Republic of Croatia within the field of environmental law.⁶¹

Concerning the inviolability of ownership, another protected value in Article 3 of the Constitution, theoretical interpretations undoubtedly show that ownership is not unconditionally protected in the Constitution. Although the Constitution contains ownership-related guarantees in Article 48(2) and Article 50(2) by addressing the legislator and the owner stipulating that they

‘decide, that is, manage commodities and goods in accordance with the proclaimed economic, environmental and similar values, contained in the notion of general welfare’.⁶²

Ownership also has a social function, which specifies the limits of ownership rights. It can also be said that environmental protection would be much harder to implement if the freedom of ownership was considered absolute. Restriction on ownership right is the same as restriction to an institution of government – their restriction serves the purpose of preventing misuse of freedom and democracy, but also encourages individual action in the sphere of social correlation and for the satisfaction of general and public interests.

2. The importance of Article 69 of the Constitution

Article 69 of the Constitution of the Republic of Croatia stipulates that

‘1. Everyone shall have a right to healthy life. 2. The state shall ensure the conditions for a healthy environment. 3. Everyone shall be bound, within their powers and activities, to pay special attention to public health, nature and environment’.

⁶¹ Omejec, loc. cit. n. 59, at pp. 56-57.

⁶² Ibid., at p. 64.

These three constitutional law norms serve the purpose of achieving important aims of environmental policy. Article 69(1) implies establishing a certain right directed towards everyone, which specifically consists of provisions that everyone in the Republic of Croatia has a right to healthy life. Contents of the syntagm ‘healthy life’ were in no way specified by the drafters of the Constitution; however, despite the resulting legal lacuna it can be affirmed with certainty that this constitutional provision does not guarantee the right to life as such. Such a constitutional guarantee appears in Article 21 subsection 1 of the Constitution and it refers to the prohibition of death penalty in the Republic of Croatia. The right to a healthy life from Article 69(1) was placed into the section of the Constitution which includes economic, social and cultural rights and it cannot be counted as being a personal or political right, i.e., a fundamental freedom of man and of the citizen.⁶³

Local legal theory considers the syntagm ‘right to a healthy life’ to be one of the constitutional law expressions of the broader right to ‘a healthy environment’. This interpretation is important since the right to a healthy environment was a part of the current Constitution of the Republic of Croatia between 1990 and 2001. The provision stipulated that the Republic of Croatia ‘shall ensure the right of citizens to a healthy environment’; however, the 2001 amendments replaced the ‘right of citizens to a healthy environment’ with a provision by which ‘the state shall ensure the conditions for a healthy environment’. Such a theoretical approach enables a conclusion according to which the right to a healthy environment is not entirely gone from the Croatian constitutional and legal system.

3. Other environmental norms in the Constitution of the Republic of Croatia

The Croatian Constitution contains significantly more environmental protection provisions than the Constitution of Hungary. Environmental concerns are explicitly addressed in Article 52 and Article 129a as well. In Article 52(1) of the Constitution, the Republic of Croatia offers its special protection to goods which are specified by law to be of interest to the Republic of Croatia. These goods are: sea, seashore and islands, waters, air space, mineral wealth and other natural resources, as well as land, forests, fauna and flora, other parts of nature, real estate and goods

⁶³ *Ibid.*, at p. 58.

of special cultural, historic, economic or ecological significance. Croatia looks after and offers special protection to those goods which are general goods (at everyone's disposal) and as such cannot be owned by a natural person or a legal entity. Even though Republic of Croatia is not the owner of such goods, it is as the bearer of public authority authorized and entrusted with looking after them, managing them and being accountable for them. On the other hand, all the afore-mentioned goods which do not fall into the category of general goods, and over which ownership right and other actual rights can be acquired, can be declared as goods of interest to the Republic of Croatia. In this case such goods are awarded special personal protection, i.e., the way is specified in which their owners (and attorneys of other rights) can use and exploit them. The ways in which they can be used and exploited are specified by law which has to be recognized by the owners. Most commonly this means restricting, i.e., burdening private ownership with public law system. For all restrictions of ownership rights the owners of such goods have a right to compensation, which can only be specified by law (Article 52(2)).⁶⁴

The current Constitution, including the 2010 amendments, also mentions the environment and its protection in Article 129a (previously Article 134). In this Article 'protection and improvement of the environment' are placed under the authority of units of local self-government as affairs of the 'local jurisdiction by which the needs of citizens are directly fulfilled'.

The Constitution of the Republic of Croatia together with the Declaration on Environmental Protection in the Republic of Croatia and, so-called, 'general environmental regulations' represents a main source of environmental law in the Republic of Croatia. In the lack of court practice, the possible uses of these (constitutional) provisions remain unclear. Without attempting to estimate whether the environmental norms represented in the Constitution of the Republic of Croatia are clear, specific and simple regarding legal interpretation (most common objections point to their fragmented structure and inviolability), it can still be concluded that the existence of environmental norms in the Constitution is an expression of recognizing the significance of environmental problems within the existing economic and social

⁶⁴ *Ibid.*, at pp. 62-63.

context, and serves a fundamental way of balancing different economic, political, social, cultural and environmental needs.

IV. Summary

As in the other EU Member States, most of Hungary's domestic environmental legislation implements EU environmental law. Croatian environmental law is also largely influenced by EU law. The Annex of Council Decision 2008/119/EC⁶⁵ set out the principles, priorities and conditions contained in the revised and updated Accession Partnership with Croatia. Among the priorities listed in this Accession Membership that concern legislation and implementation as well, the Council emphasized the importance of Croatia's ability to assume the obligations of EU membership, including the integration of environmental protection requirements into the definition and implementation of other sectoral policies and the promotion of sustainable development.⁶⁶

The EU Member States started accession negotiations with Croatia on 3 October 2005. The accession negotiations are advancing steadily; if the country meets all its outstanding benchmarks in time, the negotiations could be concluded this year. On 30 June 2010 Croatia opened the last three policy-related negotiating chapters⁶⁷ and provisionally closed two.⁶⁸ The negotiations of the environmental chapter are still opened. By 2012, Croatia hopes to become the 28th EU Member State, and the second, after Slovenia, among the six former Yugoslav republics.⁶⁹ Hungary is committed to speed up the accession of Croatia when Hungary will take over the EU presidency. Hopefully, the Accession Treaty will be signed towards the end of the Hungarian presidency of the Council of the EU in 2011. However, by taking part in pre-accession negotiations with the EU and acquiring the 'environmental *acquis communautaire*' a potential is being developed for building up national and sub-national legal and institutional infrastructure, as well as a real possibility of attracting financial assets directed towards the implementation of environmental protection policy. This will no doubt

⁶⁵ OJL 042, 16.02.2008, pp. 51-62.

⁶⁶ See Chapter 27.

⁶⁷ Competition policy, judiciary and fundamental rights, foreign security and defence policy.

⁶⁸ Namely, those on public procurement and taxation.

⁶⁹ <<http://www.eubusiness.com/news-eu/enlarge-belgium.5cz>>, (last accessed on 15.07.2010)

improve the Croatian system of environmental protection, and contribute to the development of legal, institutional and financial possibilities for giving shape to and implementing the environmental protection policy in accordance with the principles of European environmental protection, as well as revive and improve the communication within the government authorities, between national authorities (especially the ministries and other national authorities), and between the decision-makers and a wider public.

Without a point of reference in more concrete scientific analyzes and empirical evidence it is hard to evaluate the effect of environmental attitudes, principles and norms contained in the constitutions of Croatia and Hungary on the scope and efficiency of protection and conservation of the environment in these countries. Accepting the possibility of a positive relation between the content of constitutional provisions and the improvement of public policy and court decisions, a subjective estimate suggests that constitutional environmental protection has helped to stop a drastic deterioration in the quality of the environment.

On the other hand, there is an impression that the constitutionalization of environmental law has not had significant effect on the development of public opinion, attitudes, values and concrete behavior or action concerning environmental protection or environmental issues in general. This problem is particularly evident at the level of regional and local self-governments (which in this respect share authorities with the bodies of state government) where an insufficient capacity and competence of the local administration together with a lack of funds for the implementation of environmental regulations, incompatible economic and social priorities, a lack of political will, corruption and other social and cultural factors imply that constitutional and other norms directed towards environmental protection remain an empty word.

We are convinced that national constitutions need to be redrafted to establish compliance with the principles of sustainability. To move forward on the path to sustainable development, both countries must declare in the national constitutions that they work for sustainability (sustainable development) which gives equal weight to potentially conflicting environmental, social and economic interests, values and objectives. Declaration of sustainability as the main policy goal of these states also includes the acknowledgement of the need to integrate environmental, economic and social factors in the making of all decisions.

The emergence of a global environmental crisis is an important factor spurring the development of the right to a clean and/or healthy environment. The emergence of individual environmental rights marks perhaps the most significant shift in the focus of international environmental law.⁷⁰

A substantive human right to the environment is currently lacking on the international, the EU and the national level. Although international consensus has not been reached on whether there is a human right to the environment,⁷¹ the promotion of procedural and participation rights can be an effective means of securing environmental protection and can help in the movement towards a substantive right to a healthy and sustainable environment.⁷² National constitutions may also have the potential to add further weight to the development of a substantive right.⁷³ Drawing up a substantive environmental right especially in the national constitutions would provide a clearer legal responsibility for governments both in terms of policy and law creation. Therefore, a fundamental right of every person to live in a clean and/or healthy environment should be recognized in both countries; both national constitutions should give everyone a genuine and enforceable right to a clean and/or healthy environment. This right would not be absolute; public interests, including economic interests, might limit the scope of that right, but these public interests need to be of overriding importance for the public. The inclusion of such a substantial environmental right would guide the national institutions in the exercise of their duties, and encourage them

⁷⁰ P. Birnie, et al., *International Law & the Environment* (Oxford, Oxford University Press 2009) p. 266.

⁷¹ The most comprehensive UN report on environmental rights was written by Fatma Ksentini, the Special Rapporteur on Human Rights and the Environment; see Final Report prepared by Ms Fatma Zohra Ksentini, Special Rapporteur, Review of Further Developments in Fields with which the Sub-Commission has been Concerned: Human Rights and the Environment. UN Doc. E/CN.4/Sub.2/1994/9, 6 July 1994.

⁷² S. Darcy, et al., *Human Rights and the Natural and Cultural Environment – A New Frontier of Protection?* (Irish Centre of Human Rights, June 2009) pp. 23-24., available at:

<http://www.nuigalway.ie/human_rights/documents/final_report_for_website.pdf>, (last accessed on 15.07.2010)

⁷³ For example, Art. 23 of the Constitution of Belgium includes an explicit provision on 'the right to enjoy the protection of a healthy environment', available at: <<http://www.fed-parl.be/gwuk0002.htm#E11E2>>, (last accessed on 15.07.2010).

to act in a manner that upholds this right. Moreover, right to a clean and/or healthy environment should find its place among other fundamental rights of the Hungarian Constitution (Chapter XX).

Until now, the concept of a healthy environment in general is not linked to a corresponding direct individual right to a healthy environment that can be enforced in court.⁷⁴ Therefore, breaches of environmental law are often not adequately prosecuted. This results in shortcomings in the enforcement of environmental law at local, national and European as well as international level – as pointed out for many years. The potential benefits of recognizing the right to a healthy environment include: the enactment and enforcement of stronger and more comprehensive environmental laws; a level playing field *vis-à-vis* other rights; greater government and corporate accountability; protection of vulnerable groups who currently shoulder a disproportionate burden of environmental harms; and increased citizen participation in decisions and actions to protect the environment.⁷⁵ On the other side, constitutional provisions should provide for a combination of various state and individual duties. All persons, individually or in association with others, have a duty to protect and preserve the environment, improving the quality of life and well-being for present and future generations.

⁷⁴ L. Krämer, 'The Citizen in the Environment – Access to Justice', *Management Journal* (November 1999) p. 5.

⁷⁵ Boyd, loc. cit. n. 8, at pp. 17-18.

Tunjica Petrašević*

Implementation of preliminary ruling procedure in the legal systems of new Member States and experiences for future Member States as Croatia

I. Introduction

Preliminary ruling procedure is the main tool in ensuring the *uniformity in application* of EU law in the Member States. Most of the landmark judgments by the ECJ (e.g., *Van Gend en Loos*, *Costa v. ENEL* and *Simmenthal*) were delivered after a national court requested the European Court of Justice (hereinafter: ECJ) to give a judgment on the interpretation of EU law in a preliminary ruling procedure. Great number of researchers is analyzing different legal and political aspects of this procedure but this research is dealing mainly with the one part of the procedure – the functioning of preliminary ruling at the supranational level, before the ECJ. On the other hand, there is another aspect of the procedure – the national level and the functioning of the national courts in the course of this procedure. The role of national courts cannot be denied, because the system at supranational level, which is perfectly established, means nothing if national courts avoid using this procedure. As only national courts can initiate this type of procedure before the ECJ, this procedure highly depends on effective cooperation between ECJ and national courts.

The aim of this paper is to illustrate the implementation of the preliminary ruling procedure in national legal systems of ‘new’ member states.² In order to illustrate the application of the preliminary ruling procedure in national courts and to identify some general problems of application of this procedure at the national level, I am going to conduct comparative research of legal systems of Slovenia and Hungary.

At first it should be mentioned that the preliminary ruling procedure is a *sui generis* procedure and it is not dependent of any national procedural

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¹ See A. Buka, *Preliminary Rulings procedure in the courts of the EU Member State*, Summary of the PhD thesis (Riga, University of Latvia, Faculty of Law 2006) p. 2., available at: <http://www3.acadlib.lv/greydoc/Buka_disertacija/Buka_ang.doc>, (last accessed on 13.06.2010).

² By the term ‘new’ member states I think about twelve states which joined to EU in 2004 and 2007.

law. Article 267 of the Treaty on the Functioning of the EU (TFEU) has direct effect and it is not necessary to make any supplementary national legislation. Instead, questions regarding preliminary ruling procedure are often regulated by a combination of case law of the ECJ and general procedural codes of the different Member States.³ However, the solution adopted in some new Member States is understandable because the main purpose of those rules is to assist judges, especially those of older generation who had more difficulty absorbing EU law training, to become more and easily familiar with this important tool of EU law.

Before Hungary joined the EU, the Hungarian Parliament has amended both the Code of Civil procedure and the Code of Criminal Procedure, so the preliminary ruling procedure is implemented or it is better to say that it is supplemented by national law.⁴ In Slovenia, the preliminary ruling procedure is implemented in Article 113 of the Courts Act. But the problem is that national rules do not have always the aforementioned desirable effect. A good example is the obligatory stay of proceeding before the Hungarian courts when court decides to refer the question to the ECJ because in certain cases it may further delay the procedure. In some cases it is useful to carry out certain procedural act and measures while waiting the decision of the ECJ.

Firstly, we are going to give an overview of the importance of the preliminary ruling procedure and try to identify the role of national courts in it. Secondly, we will compare the implementation of preliminary ruling in two Member States; Slovenia and Hungary and try to suggest the best solution how to implement the preliminary ruling procedure in Croatia as future Member State. Thirdly, special reference will be made to the possibility of appeal against an order to refer the question to the ECJ because it is still much disputed. Finally, we will give some concluding remarks about the implementation of preliminary ruling procedure and suggest possible solutions how to improve the functioning of the preliminary ruling procedure before national courts.

³ M. Broberg and N. Fenger, *Preliminary References to the European Court of Justice* (Oxford, Oxford University Press, 2009) p. 3.

⁴ There are three main supplementary rules to the original treaty rule of Art. 267 TFEU; rules prescribing the stay of national procedure while waiting the ECJ ruling, the right of appeal against an order to refer the question to the ECJ and rules prescribing that Hungarian ministry of justice shall be informed about the reference. See L. Blutman, 'Preliminary references: challenges and legal conditions in Hungarian domestic law', Tomus LXV *Acta Juridica et Politica* (2004) p. 528.

II. The mechanism of preliminary ruling procedure and role of national courts in its functioning

National courts are also European courts and they are primarily responsible for the proper application of EU law. As the European Parliament had pointed out, EU law would remain a dead letter if it is not properly applied in the Member States, including by national judges, who are therefore the keystone of the EU judicial system and who play a central role in the establishment of a single European legal order.⁵

However, national courts do not have full jurisdiction to decide disputes on EU law brought before them, since the ECJ holds the sole power to declare an EU act invalid and has the final word in questions of interpretation of EU law.⁶ For this purpose, the Treaty provides a mechanism of preliminary ruling procedure, regulated by Article 267 TFEU.⁷ Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.⁸ Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.⁹ If such a question is raised in a case pending before a court or tribunal of a Member State

⁵ See European Parliament resolution of 9 July 2008 on the role of the national judge in the European judicial system, 2007/2027(INI) p. 1.

⁶ H. Briem, *The preliminary ruling procedure as part of a complete system of remedies*, Master thesis (Lund, Faculty of Law, University of Lund 2005), p. 29., available at: <[http://web2.jur.lu.se/Internet/english/essay/Masterth.nsf/0/2D469AC1BEBB44B6C1257013004071CB/\\$File/xsmall.pdf?OpenElement](http://web2.jur.lu.se/Internet/english/essay/Masterth.nsf/0/2D469AC1BEBB44B6C1257013004071CB/$File/xsmall.pdf?OpenElement)>, (last accessed on 13.04.2010).

⁷ The Court of Justice of the European Union has jurisdiction to give preliminary rulings on the interpretation of European Union law and on the validity of acts of the institutions, bodies, offices or agencies of the Union. That general jurisdiction is conferred on it by Article 19/3b of the Treaty on European Union (*OJEU* 2008 C 115, p. 13) and Article 267 of the Treaty on the Functioning of the European Union (*OJEU* 2008 C 115, p. 47). The preliminary ruling procedure is additionally regulated by the Statute of The Court of Justice of EU, by the Rules of Procedure and by Information note on references from national courts for a preliminary ruling. Consolidated version of this acts are available at the web page of the Court of Justice of EU, available at: <<http://curia.europa.eu>>.

⁸ See Art. 267(2) TFEU.

⁹ See Art. 267(3) TFEU.

with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.¹⁰

The ECJ described the role of Article 267 TFEU (ex. Article 234 EC) as

'[...]essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all States of Community.'¹¹

There is a strong consensus over the importance of preliminary ruling procedure both for uniform application of EU law but also for the whole process of the European integration. As has been pointed out in the introduction, most of the landmark judgments by the ECJ were delivered after a national court requested the ECJ to give a judgment on the interpretation of EU law in a preliminary ruling. As it has been already mentioned, under the preliminary ruling procedure, the role of ECJ is to give an interpretation of EU law or to rule on its validity, and not the application of that law to the factual situation underlying the main proceedings, which is the task of the national court.¹² It should be also mentioned that for the referring court, the preliminary ruling procedure is only one step of the national procedure.¹³

¹⁰ This is a new provision in para 4 of Art. 267 TFEU regarding a person in custody. It could be brought in connection with the new urgent preliminary ruling procedure (so called PPU – from French *procédure préliminaire d'urgence*). It is the new type of procedure or we can even say the sub-type of the preliminary ruling procedure that is applied only in the area of freedom, security and justice. See T. Petrašević, 'Novi hitni prethodni postupak za područje slobode, sigurnosti i pravde – PPU' [New urgent preliminary ruling procedure in the area of freedom, security and justice – PPU] 2 *Hrvatska javna uprava* (2010) pp. 427-463. and A. Lazowski, 'Towards the reform of the preliminary ruling procedure in JHA area', in S. Braum and A. Weyembergh, eds., *Le contrôle juridictionnel dans l'espace pénal européen*, (Brussels, Editions de l'Université de Bruxelles 2009) pp. 211-226.

¹¹ See para 2 of the Judgment in Case C-146/73 *Rheinmühlen Dusseldorf v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* ECR [1974] 139.

¹² See point 7 of the Information note, op.cit. n. 7. This practical information, which is in no way binding, is intended to provide guidance to national courts as to whether it is appropriate to make a reference for a preliminary ruling and, should they proceed, to help them formulate and submit questions to the Court.

¹³ See T. Čapeta, *Sudovi Europske unije – Nacionalni sudovi kao europski sudovi* [EU Courts – National Courts as European Courts] (Zagreb, IMO 2002) p. 251.

The effectiveness of this system is based on healthy dialogue and direct cooperation between national courts and ECJ.¹⁴ That cooperation has been very good during the years but the ECJ became overloaded and there was a risk of breakdown of cooperation. The workload of the Court of Justice, which consists mainly of references for preliminary rulings, has been a cause for concern for some years in view of the resulting delays.¹⁵

The numbers of steps to reduce the length of procedure were already taken at the supranational level and now the question is what can national courts do to improve the functioning of preliminary ruling procedure? According to the opinion of the *Working group on preliminary ruling procedure*¹⁶ national courts play a crucial role in interpreting and applying European law and have a major responsibility for ensuring that the preliminary ruling procedure works smoothly. So, the national courts as *European* courts should do everything necessary to ensure that the preliminary rulings procedure operates as efficiently and effectively as possible.¹⁷ The Working group recommends national courts to follow the Information note of ECJ but also suggests some additional steps.¹⁸ In order to ensure that necessary references are made while unnecessary ones are avoided, the Working group is of the opinion that the national judge must properly assess the need of reference. He/she will be able to do that only if he/she has a thorough knowledge of European law, including the relevant case law of the ECJ.

¹⁴ See X. Groussot, 'Spirit, are you there? Reinforced judicial dialogue and the preliminary ruling procedure', Eric Stein Working Paper No 4/2008, pp. 1., available at: <<http://www.sieps.se/>>, (last accessed on 14.04.2010).

¹⁵ The Annual Reports of ECJ show that the number of references for a preliminary ruling is rising steadily but also the time needed to proceed it. In 2009, the average duration of preliminary ruling procedure was 17, 1 month. The number of references was 302. See *Annual report*, (2009), available at: <<http://curia.europe.eu>>.

¹⁶ The General Assembly of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, meeting in Warsaw on 14 May 2007, on the proposal of the Netherlands Council of State, decided to set up a working group to formulate practical suggestions on ways of reducing the delays involved in the preliminary rulings procedure. See the webpage of the Association, available at: <http://www.juradmin.eu/en/home_en.html>.

¹⁷ See the *Report of the working group on the preliminary rulings procedure*, available at: <http://www.juradmin.eu/seminars/DenHaag2007/Final_report.pdf>, (last accessed on 19.07.2010) p. 10.

¹⁸ *Ibid.*

National judge should also have the latest information about matters referred by other courts within the EU at his disposal.¹⁹ In connection with the last, the opinion of the working group is that all references for a preliminary ruling should be published as quickly as possible so that courts have the necessary information to make an informed decision on the need for references.²⁰

The working group also suggests as a good practice that the domestic court should deal with the case as exhaustively as possible before formulating the preliminary questions. It should try to solve all the issues of fact and law involved in the case in such a way that the only aspect left is the decision of the Court of Justice on the preliminary question.²¹

The working group recommends further that it is advisable that the domestic court consults with the parties on the texts of the reference. The influence of the parties should however never be preponderant as the domestic court should always remain exclusively responsible for the reference.²²

And finally, there are some practical suggestions such as the references made should be as clear and short as possible; in case a substantial number of cases is pending before the national court which depend for their solution on the answer of the Court of Justice, that information should be provided to the Court; the referring court should, if possible and allowed by national law, try to formulate a provisional, reasoned answer for the benefit of the Court of Justice, give all relevant clarifications and indications for the benefit of the Court, and pool questions as much as possible.²³

As it is already mentioned, a perfectly established system at supranational level, which highly depends on effective cooperation between the ECJ and national courts does not mean anything if national

¹⁹ Ibid.

²⁰ The working group advises the following good practices to the courts: i) national supreme courts should publish immediately the full text of all references for preliminary rulings on the national level; and ii) national supreme courts should cooperate to publish, as soon as possible, all references for preliminary rulings on the international level. See Report, op. cit. n. 17, at p. 11.

²¹ Ibid., at p. 13.

²² Ibid.

²³ Ibid., at p. 14.

courts avoid using *properly* this procedure.²⁴ So, the conclusion is that national courts as European courts should take a more active role in ensuring that the preliminary ruling procedure operates as efficiently and effectively as possible.²⁵

III. Regulation (implementation) of preliminary ruling procedure in the new Member States and candidate countries

At first it should be mentioned that the preliminary ruling procedure is a *sui generis* procedure and it is not dependent of any national procedural law.²⁶ Article 267 TFEU has direct effect and it is not necessary to adopt any special national legislation regulating when and how a preliminary reference should be made or how a preliminary ruling should be applied by the national courts. Instead, such questions are often regulated by a combination of case law of the ECJ and general procedural codes of the different Member States.²⁷ So, the national legal rules can supplement the provision of Art. 267 TFEU but cannot in any way restrict it. To be clearer, it means that national law implementing the preliminary ruling is not necessary, but if a national legislature decides to prescribe this procedure, it cannot restrict it in any sense. Some of new Member States including Slovenia and Hungary have regulated preliminary ruling procedure by national law. In my opinion, it is perhaps better to prescribe the procedure by national law because national judges, especially at the beginning of membership in EU are not aware of this procedure at all.²⁸ If it is prescribed by national law it is more realistic to expect that national courts will really use it. It is not a question of reluctance by the national courts to use preliminary ruling procedure, it is rather question of non-familiarity with EU law and the existence of this type of procedure. But the problem is that national rules do not

²⁴ Buka, *op. cit.*, n. 1, at p. 2.

²⁵ For further discussion about that what should national courts be doing to improve preliminary ruling procedure see S. Prechal, 'National Courts in EU Judicial Structures', 25 *Yearbook of European Law* (2006) pp. 429-450.

²⁶ Blutman, *op. cit.* n. 4, at p. 528.

²⁷ Broberg and Fenger, *op. cit.* n. 3, at p. 3.

²⁸ Bobek states that an express procedural provision in the national law might smoothen the way for the more formalist judges. See M. Bobek, 'Learning to talk: Preliminary Rulings. The Courts of the new Member States and the Court of Justice', 45 *CMLR* (2008) p. 1626.

always have the desirable effect as is the case with the Hungarian supplementary rules as will be seen in a subsequent section.

1. Preliminary ruling procedure in Slovenia

The preliminary ruling procedure (*incidenčni postopek*) is implemented into Slovenian Law by Article 113a of the Courts Act (*Zakon o sodiščih*). Article 113a incorporates Article 267 TFEU but there are also some supplementary rules. It provides that, when the decision of the national court depends on the resolution of the preliminary questions concerning the interpretation or the validity or interpretation of the law of the EU, the court may issue a decision to refer the question to the ECJ.²⁹ In case of a decision of the Supreme Court or another court decision against which the regular or irregular remedies cannot be made, the Supreme Court or another court or tribunal shall issue a decision to refer a question to the ECJ.³⁰ The national court will decide about referring to the ECJ in the form of an order (*sklep*). The supplement to the original treaty rule of Article 267 TFEU is that the referring court in the decision will refer also an order to stay proceedings in accordance with the Act which governs the procedure in the case. Unlike the Treaty, the Slovenian law expressly says that against the decision to stay the proceedings there is no right of appeal.³¹ It is not clear if there is possibility to appeal against the decision to refer. Varanelli argues that both procedural codes allow a right of appeal.³² The Civil procedure Code prescribes that

‘[a]gainst the order of the court of first instance there is a right of appeal, unless this Act provides that there is no appeal. [...] If the Act provides that there is no appeal, parties may challenge that decision only on appeal against the final decision.’³³

The Criminal procedure act provides that

‘[a]ppeals against rulings of the investigating judge and against other rulings rendered in first instance may be lodged by the parties and persons

²⁹ Para 1 of Art. 113a of the Courts Act

³⁰ *Ibid.*, at para 2

³¹ *Ibid.*, at para 3

³² L. Varanelli, *Prethodno odločanje po 234. členu Pogodbe o Evropskih skupnosti* [Preliminary ruling procedure according to art. 234 of EC Treaty] (Ljubljana, Faculty of Law in Ljubljana 2004) p. 269-270.

³³ Art. 363 of the Civil procedure Code

whose rights have been violated, unless appeal is explicitly barred by the provisions of this Act. [...] No appeal shall be permitted against a ruling rendered by the Supreme Court.³⁴

During the stay of proceedings, the national court may perform only those procedural acts and may take only those decisions that do not allow any delay, if it is not tied to the question which asked the ECJ for a preliminary ruling, or if it is not subject to the final resolution of the legal dispute.³⁵ If the national court should no longer apply the provision which was the reason to refer the questions, and if the decision of the ECJ has not yet been rendered, the reference should be withdrawn. The preliminary decision of the Court of Justice is binding on the court. The court shall forward a copy of its question and the Court of Justice's ruling on a preliminary issue without delay to the Supreme Court for information. Until this time, Slovenian courts have submitted only two references. The first one was in case *Detiček*.³⁶ The question was the interpretation of Article 20 of the Brussels II bis Regulation³⁷ about the jurisdiction of a court in Member State 'A' to rule provisionally on an application to have custody of the child restored, the court dealing with the substance (disposing of the divorce proceedings) being in Member State 'B'. What is most interesting is that the Slovenian court asked for the PPU procedure to be applied.³⁸ The ECJ accepted the request and applied PPU. In connection with the discussion about the role of the parties and their representatives in the formulation of the question to be referred, it is worth mentioning that the question was formulated in its entirety by Mr. Luigi Varanelli, representative of Mrs. *Detiček*. The second reference was made by the Administrative court in case *Omejc v. Slovenia*. There question

³⁴ See Art. 399/1 of Code on criminal procedure.

³⁵ Art. 113a para 4 of the Courts Act

³⁶ Case C-403/09 *PPU. Jasna Detiček v. Maurizio Sgueglia* [Not yet published]

³⁷ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. *OJ L 338*, 23/12/2003, p. 1-29.

³⁸ See n. 10.

was the interpretation of Regulation about common agricultural policy.³⁹ The case is still pending before the ECJ.

2. Preliminary ruling procedure in Hungary

Before Hungary joined the EU, the Hungarian Parliament has amended both the Code of Civil procedure and the Code of Criminal Procedure, so the preliminary ruling procedure is implemented or, rather, supplemented by national law. I agree with Blutman's view that the aim of amendments of the Hungarian procedural rules regarding the preliminary ruling procedure is to remove any suspicion and uncertainties about this procedure.⁴⁰

There are three main supplementary rules: rules prescribing the stay of national procedure while awaiting the ECJ ruling, the right of appeal against an order to refer the question to the ECJ and rules prescribing that the Hungarian ministry responsible for judicial matters shall be informed about the reference. We are going to give an overview of Hungarian procedural rules regarding the preliminary ruling procedure and indicate the above mentioned supplements to the original treaty rule of Article 267 TFEU.

Both procedural codes prescribe the suspension of national proceedings as mandatory. Blutman is criticizing that solution because, he is interpreting the first sentence of Article 23 of the Statute of ECJ⁴¹ about the staying the national procedure only as advisory, not obligatory. I would not agree completely with him. The Information note of the ECJ also provides that 'a reference for preliminary ruling calls for the national proceedings to be stayed until the Court of Justice has given its ruling'.⁴² The ruling of the ECJ is obligatory for the referring court and

³⁹ Commission Regulation (EC) No 796/2004 of 21 April 2004 laying down detailed rules for the implementation of cross-compliance, modulation and the integrated administration and control system provided for in of Council Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers. *OJ L* 141, 30.4.2004, p. 18

⁴⁰ Blutman, *op. cit.* n. 4, at p. 529.

⁴¹ See Art. 23/1 of The Statute of the Court of Justice: '[i]n the cases governed by Article 267 of the Treaty on the Functioning of the European Union, the decision of the court or tribunal of a Member State which suspends its proceedings and refers a case to the Court of Justice [...]']

⁴² See point 25 of the Information note, *op. cit.* n. 7.

national courts have to give a final decision in case before them according to that ruling. So it is normal to expect that the national court would wait for the ruling and it is indeed the normal consequence of making a reference.⁴³ Although, the main proceeding remains pending before the referring court and that court retains also jurisdiction to take any procedural measure allowed under national law.⁴⁴ The ECJ is not empowered to take any interim relief in the course of a preliminary ruling procedure and it is exclusively for the referring court to ensure the legal protection of individual rights which they derive from EU law while they are waiting for the ECJ's ruling and the final decision of national court.⁴⁵ In this sense I agree with Blutman that it is not a good solution to completely terminate procedure while awaiting the ECJ's ruling.

As regards the right of appeal, in civil procedure of first instance it is possible to appeal against the decision to refer but not against the decision not to refer. In the second instance procedure, the appeal is possible in both cases.⁴⁶

In criminal procedures, the possibility of appeal exists both against the decision to refer as well as against the decision not to refer. There is no such distinction between in the procedure of first and second instance like in the civil procedure.⁴⁷

The referring court (*Bács-Kiskun Megyei Bíróság*) in the *Cartesio case* explains in its order for reference that if an appeal is brought against an order for reference for a preliminary ruling, the court which hears the appeal may amend the order for reference, or render the request for a preliminary ruling inoperative and order the court which made the order for reference to resume the national proceedings which had been suspended.⁴⁸ This was the case in accordance with the earlier case law

⁴³ Broberg and Fenger, op. cit. n. 3, at p. 322

⁴⁴ Ibid.

⁴⁵ But, it does not mean that the EU law remains indifferent to the issue of such protection. See in Broberg and Fenger, op.cit. n. 3, at p. 323.

⁴⁶ Blutman, op. cit. n. 4, at p. 533.

⁴⁷ Ibid., at p. 535. See also Article 155/A of Law III of 1952 on Civil Procedure provides: 'a separate appeal may be brought against a decision to make a reference for a preliminary ruling. A separate appeal cannot be brought against a decision dismissing a request for a reference for a preliminary ruling'.

⁴⁸ See para 11 of judgement in C-210/06 (*Cartesio*).

of ECJ but in the recent case of *Cartesio* the Grand Chamber of ECJ reconsidered its earlier case law.⁴⁹

Concerning the content of reference, both the criminal procedure code and civil procedure code provide the same content. So, the decision to refer shall contain the question referred, the facts of the case to the extent necessary for answering the question and the relevant Hungarian legal rules.⁵⁰ But there are some other things which should be included in the content of reference. According to Information note of the ECJ the decision by which a national court or tribunal refers a question to the ECJ for a preliminary ruling may be in any form allowed by national law as regards procedural steps. It must however be borne in mind that it is that document which serves as the basis of the proceedings before the ECJ and that it must therefore contain such information as will enable the latter to give a reply which is of assistance to the national court.⁵¹ In particular, the order for reference must:

- include a brief account of the subject-matter of the dispute and the relevant findings of fact, or at least, set out the factual situation on which the question referred is based;
- set out the tenor of any applicable national provisions and identify, where necessary, the relevant national case-law, giving in each case precise references;
- identify the EU law provisions relevant to the case as accurately as possible;
- explain the reasons which prompted the national court to raise the question of the interpretation or validity of the EU law provisions, and the relationship between those provisions and the national provisions applicable to the main proceedings;
- include, if need be, a summary of the main relevant arguments of the parties to the main proceedings.⁵²

Finally, the referring court may, if it considers itself able, briefly state its view on the answer to be given on the questions referred for a preliminary ruling.⁵³ It is a green light procedure system whereby national judges could include their proposed answers to the questions they refer to the ECJ, which could then decide within a given period

⁴⁹ For discussion about possibility of an appeal, see *infra* point III.3.

⁵⁰ Blutman, *op. cit.* n. 4, at p. 536.

⁵¹ *Ibid.*, at point 20

⁵² *Ibid.*, at point 22

⁵³ *Ibid.*, at point 23

whether to accept the proposed judgment or whether to rule itself in the manner of an appellate court.⁵⁴ It is only a possibility not duty for national courts.

The Hungarian national law requests only a part of information which is necessary to specify in order for reference. It could be a serious problem if the national judge will follow only national procedural law because the ECJ could find the reference inadmissible because the lack of information enables the latter to give a reply which is of assistance to the national court.⁵⁵ It is very important to highlight that national law implementing the preliminary ruling is not necessary, but if national legislature nevertheless decides to prescribe this procedure, it cannot restrict it in any sense. The Hungarian legislation should indicate all the information necessary to include in order for reference. In the case of partial regulation, the national judge could be misled about it and I do not really understand why Hungarian legislature has chosen this way. In my opinion, it should be amended or removed from the procedural codes. The Hungarian courts are very active in referring questions to the ECJ. For example in the first three years of membership (from 2004-2007), Hungarian courts referred 11 questions to the ECJ while the other nine 'new' Member States had altogether 14 questions.⁵⁶ It is not clear why some member states refer more question than the others. Scholars have proposed numerous explanations like variation in transnational economic activity, variation in legal culture (possibility of judicial review), variation in legal doctrine (monism v. dualism), variation in public support for integration, variation in political information and etc.⁵⁷ The list is far from exhaustive. In spite of some initial problems, all Hungarian

⁵⁴ See point 31 of the European Parliament resolution of 9 July 2008 on the role of the national judge in the European judicial system (2007/2027(INI)).

⁵⁵ For the content of the reference see Broberg and Fenger, *op. cit.* n. 3, at p. 298-303 and Information note, *op. cit.* n. 7, at point 20-24.

⁵⁶ B. Horváthy, 'After the First Lessons and Experiences – Cases Concerning Hungary before ECJ (2004-2007)', 49 *Acta Juridica Hungarica* (2008) p. 110.

⁵⁷ J.C. Carruba and L. Murah, 'Legal Integration and Use of the PR Process in the European Union', 59 *International Organization* (2008) pp. 399-418.

references were well and profoundly prepared.⁵⁸ We would like to show what the problems were, to avoid same or similar problems in Croatia as future Member State.

The first Hungarian reference was rejected by the ECJ because obvious lack of competence. It was the *Vajnai* case.⁵⁹ Mr Vajnai was sentenced because of use of totalitarian symbol – red star.⁶⁰ He appealed against the decision and the appellate court made a preliminary question to ECJ. Reference was cited ex. Art 6 of TEU, Council Directive 2000/43/EC⁶¹ and Articles 10, 11 and 12 of the Charter of the Fundamental Rights of the EU.⁶² The question arises whether a provision in one Member States prohibiting use of symbol of International labour movement (red star) is discriminatory because in some other member states it is not prescribed as an offence. As it already mentioned, the reference was rejected by the ECJ because of obvious lack of competence. However, the referring court was at fault not only because of the question of competence but also because of the invoked legal ground. The national court made a reference to the Charter which did not have any binding effect at that time.⁶³ The second Hungarian reference in *Ynos*⁶⁴ was also rejected by the ECJ but this time because of out of scope *rationae temporis*. The ECJ gave a very brief decision stating inadmissibility because the facts of the case in the main proceedings preceded Hungary's accession to the EU.⁶⁵

3. Preliminary ruling procedure in Croatia – de lege ferenda

According to the European Commission Opinion on Croatia's application for membership of the European Union

⁵⁸ Horváthy, op. cit. n. 56, at p. 110.

⁵⁹ C-328/04 *Vajnai*, [2005] ECR 8577.

⁶⁰ According to Article 269/B of the Hungarian Criminal Code 'the person who uses a symbol representing a red star (or other totalitarian symbol) in public or publicly exhibits it commits a minor offence'.

⁶¹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. OJ L 180, p. 22-26.

⁶² Charter of Fundamental Rights of the EU. OJ C 303, 14.12.2007

⁶³ The Charter become binding recently with the entering into force the Treaty of Lisbon on 1 December of 2009.

⁶⁴ C-302/04 *Ynos Kft v. János Varga*, [2006] ECR 371

⁶⁵ For detailed analysis of case see: Horváthy, op. cit. n. 56, at p. 93. and Bobek, op. cit. n. 28, at p. 1616-1617.

'[...] alignment with the *acquis* is a necessary but not sufficient condition to meet the obligations of EU membership. Croatia must also take all necessary measures to create the necessary implementing structures, to bring administrative and judicial capacities to the required level and to ensure effective enforcement.'⁶⁶

So, this pre-accession period is the right time to discuss about the problems that the national courts of Member States are facing with regard to preliminary ruling procedures and to suggest the best solution on how to implement the preliminary ruling procedure in Croatia as future Member State. It should be noted that until Croatia joins the EU, Croatian judges do not have the possibility to refer the questions to the ECJ although they will often meet and need to clarify certain European rule thanks to the process of harmonization of Croatian law with the EU law.⁶⁷

Firstly, as has been noted earlier, the preliminary ruling procedure is a *sui generis* procedure and it is not dependent of any national procedural law. But if Croatian legislature nevertheless decides to prescribe this procedure, it cannot restrict it in any sense. I already explained my opinion about why it is desirable to prescribe the preliminary ruling procedure by national law. However, I also pointed out some possible adverse effects. So far, Croatia does not have a procedural framework implementing preliminary ruling procedure. Although Article 18 of new Criminal procedure code is an exception, our analysis will be mostly *de lege ferenda*. However, it is also possible to find some other procedural provisions which could be indirectly brought in connection with the preliminary ruling procedure. Recently, the Croatian legislature (*Hrvatski Sabor*) amended Croatia's Constitution.⁶⁸ Although there is new title on *European Union* included, none of these new provisions is directly in connection with the preliminary ruling procedure.⁶⁹ Article 145 provides direct effect of EU law in the Croatian legal order. Although it is questionable whether it was necessary to include such a provision in the Constitution, it is certain that such express provision will smoothen the way for the more formalist judges to apply EU law

⁶⁶ T. Čapeta, 'Courts, Legal Culture and EU Enlargement', 1 *CYELP* (2005) p. 23.

⁶⁷ See T. Čapeta and S. Rodin, *Osnove prava Europske unije* [Basics of EU Law] (Zagreb, Narodne Novine 2010) p. 115.

⁶⁸ Application of this title is postponed till Croatia joins the EU. Amendments to the Constitution of the Republic of Croatia, Narodne novine No 76/2010

⁶⁹ Arts 143-146 of the Constitution

and in the case of suspicion in correct interpretation or validity of EU law to ask the ECJ for the ruling. Regarding criminal procedure, the Croatian Criminal procedure code was recently amended and it contains an express provision about the possibility of making a reference to the ECJ. Article 18 provides that

‘[i]f the proceeding court considers that a decision on the question of validity or interpretation of the acts and measures of EU is necessary to enable it to give judgment, the court will stay the proceeding and request the Court to give a ruling thereon.’

From the wording of this article it is clear that the stay of proceeding is obligatory if the court decides to refer the question. It is not a best solution as it has already been explained in the case of Hungary. Also, there is no any distinction between the first instance courts and the courts of last instance in the sense of obligation to refer.

Further, Article 491 prescribes that

‘the parties and persons whose rights have been violated may take an appeal from a ruling of the investigating judge and from other rulings of the court at first instance, unless the appeal is not explicitly barred by this Act. Unless otherwise prescribed by this Act, rulings rendered by the panel before and in the course of the investigation are not subject to appellate review. Rulings rendered for the purpose of preparing the trial and the judgement may be challenged only in an appeal from the judgement. Rulings rendered by the Supreme Court of the Republic of Croatia are not subject to appellate review.’

Therefore, there is a right of an appeal against an order to refer the question to the ECJ.

Article 493 se provides that: ‘[u]nless otherwise prescribed by this Act, an appeal taken from a ruling shall stay its execution’. This means that the referring court has to await the decision of the appellate court before it sends the file to the ECJ.

In the Civil Procedure Act, title XVII regulates stay, termination and suspension of proceedings. Article 212 prescribes circumstances in which the procedure shall be stayed. There in no any mentioning of the order for reference as reason for the stay of proceeding, but paragraph 1 of Article 213 states that ‘the court shall also order the stay of the proceedings if it has decided that it does not resolve a preliminary issue itself.’ The procedure is stayed by an order. It could be a basis for a preliminary reference to the ECJ. Article 378 provides that

‘[a] ruling issued by a court of first instance may be challenged by an appeal, unless this Act specifies that appeal is not permitted. If this Act explicitly provides that a separate appeal is not permitted, the ruling issued by the court of first instance may be challenged only by an appeal against the final decision.

In cases when, under this Act, a separate appeal is permitted against rulings by which the proceedings before the court of first instance are not ended, the court of first instance shall copy the record and furnish a copy of the record, together with the appeal, to the court of second instance, and shall continue the proceedings to resolve the issues to which the appeal does not relate.’

Article 379/1 provides that ‘[a] timely appeal shall stay the enforcement of the ruling, unless otherwise provided by this Act’. As in criminal procedure, national civil courts have to wait for the decision of an appellate court and then refer the question to the ECJ.

Although the above mentioned articles of the Civil Procedure Code could be a basis for using a mechanism of preliminary ruling procedure, my recommendation is to include an express provision as it is the case in the Criminal Procedure Code. I suggest that not because I think that it would be necessary to have national law implementing preliminary ruling procedure but so as to avoid possible doubts before a Croatian judge. As it is stated by Rodin, legal culture in Croatia is still largely positivistic and formalistic.⁷⁰ Čapeta explains that in the sense that

‘a view of the law as a set of written rules is not only common among Croatian judges, but also among lawyers in general and the public at large. The best example of this is the typical usage of the word ‘law’ in the media (both TV and newspapers), as well as the writings of lawyers, where it is given as zakon, meaning “statute”, and not as pravo, meaning “law”. Courts are still understood as impersonal, rational institutions, able to objectively apply legal rules, yet having no role in the law-making process. Courts, therefore, cannot have a judicial policy, as their only task is to resolve individual cases by applying objective rules of law that contain all the answers’.⁷¹

Although this opinion was stated in 2005, I think that the situation did not change significantly. So, I suggest an express provision to be included in the Civil procedure Code as it is the case in the Criminal Procedure Code but with necessary modifications to bring it in

⁷⁰ S. Rodin, ‘Discourse and Authority in European and Post-Communist Legal Culture’, 1 *CYELP* (2005) p. 1-22.

⁷¹ Čapeta, op. cit. n. 66, at p. 31.

accordance with Article 267 TFEU, the Information note of ECJ and the case law of ECJ regarding preliminary ruling procedure. By case law, I think first about the *Cartesio* ruling where the ECJ ruled that national appeal procedures can remain but the referring court is not obliged to follow the decision of its own appellate court. Having in mind the above mentioned positivistic and formalistic culture in Croatia, it is not reasonable to expect lower courts to ignore the appellate court's decision. So it would be better to exclude the possibility of an appeal.⁷²

IV. The actual questions regarding the implementation of preliminary ruling procedure – possibility of an appeal against an order to refer

1. Attitude of the ECJ

The possibility of appeal against an order to refer the question to the ECJ is very unclear. That question arose already in very first reference in the *de Geus* case and the ECJ said that an appeal is possible because the Treaty does not preclude that possibility.⁷³ This approach was confirmed again by the ECJ in *BRT*⁷⁴ and *Rheinmühlen*⁷⁵ cases. However, the opinions of Advocate Generals (AG) were substantially different. While AG Mayras in the *BRT* case followed the reasoning of the ECJ from *De Geus* case, AG Warner in *Rheinmühlen* suggested a completely opposite view, namely, that the appeal should be precluded because the discretion conferred on the national judge directly by Article 234 should not be fettered or compromised by national appellate procedures.⁷⁶ The ECJ reaffirmed its earlier attitude

‘in the case of a court against whose decisions there is a judicial remedy under national law, article 177 does not preclude a decision of such a court referring a question to this court for a preliminary ruling from

⁷² The Hungarian legislator already amended the procedural rules with the aim to exclude the possibility of appeal. It is reasonable and in accordance with the judgment of ECJ in *Cartesio*. See Article 4(2) of Law LXVII of 2009 on faster decision of disputes between enterprises.amended Art. 155/A(3) of Law III of 1952 on Civil Procedure.

⁷³ Case 3/61, *De Geus* [1962] ECR 45

⁷⁴ Case 127/73, *BRT* [1974], ECR 139

⁷⁵ Case 146/73, *BRT* [1974] ECR 139

⁷⁶ See M. Bobek, ‘*Cartesio* - Appeals Against an Order to Refer Under Article 234 (2) EC Treaty Revisited’, 29 *Civil Justice Quarterly* (2010) p. 2., available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1498032>.

remaining subject to the remedies normally available under national law.⁷⁷

But, in the recent case of *Cartesio* the Grand Chamber of ECJ reconsidered its earlier case law. It is very interesting that this case came before the ECJ just from Hungary. But, before we give the analysis of *Cartesio* and the new approach of ECJ, we would like to give short overview of the practice in Member States with special reference to Hungary and Slovenia.

2. The possibility of an appeal in Member States

There are some Member States in which the appeal against an order to refer is not possible. It is the case e.g., in Italy and Greece but most interesting is Ireland, because the well-known example of this approach is the attitude of the Irish Supreme Court in the *Campus Oil* case.⁷⁸ The Irish Supreme Court said about the possibility of an appeal that

‘[t]he national judge has an untrammelled discretion as to whether he will or not refer questions for a preliminary ruling under the article 177 and in doing so he is not in any way subject to the parties or to any other judicial authority’.⁷⁹

In the second group of Member States are e.g. Germany, Austria, Poland and Slovakia. These Member States recognize the right of appeal but that right is much disputed. The problem is the following. Upon deciding to refer a question, the national court should stay national procedure and order the referral of question. These decisions are usually in form of an order. The order for staying national procedure could be normally reviewed. The problem becomes very complex in the case when a decision to refer a question to ECJ and decision to stay national proceedings are in the same document, regardless of its formal name. The ECJ has not yet given its view on such a situation. Among all Member States the situation in the Czech Republic is the most unclear. Under the Czech law, an order for staying procedure is normally subject of review. But what happens in the case when both decisions are incorporated in the same document? Is it then possible to also review the decision to refer a question to the ECJ? According to Bobek, this

⁷⁷ See para 3 of the *Rheinmühlen* case.

⁷⁸ *Campus Oil v. Minister for Industry and Energy* [1984], C.M.L.R. 479

⁷⁹ *Ibid.*

situation has not happened in practice yet, but it is worth to mention this problem.⁸⁰

And finally, there are the some Member States which explicitly recognize the right of appeal against an order to refer. The example is the UK.⁸¹ However, contrary to what we could maybe expect, practice shows that situations in which the appellate court annuls a lower court's decision to refer are very rare. Moreover it happens that an appellate judge deciding the appeal against the decision of lower court not to refer, would decide to submit a question by himself.⁸²

3. New approach of ECJ – judgment in the *Cartesio* case

As has been already pointed out, the original approach of the ECJ was that Article 267 does not preclude a decision to refer a question to be a subject to the remedies that are available under national law.⁸³ This decision has been interpreted in the way that it allows a decision to refer to be overturned by an appellate court.⁸⁴ But, in recent case of *Cartesio* the Grand Chamber of ECJ reconsidered its earlier case law. Judgment in *Cartesio* concerns primarily corporation law and the right of the Member State of incorporation to prevent a company from transferring its seat to another Member State but the judgment is also interesting from the point of view of procedural aspects in course of preliminary ruling procedure.⁸⁵ It is very interesting that case come before the ECJ

⁸⁰ M. Bobek, op. cit. n. 76, at p. 4.

⁸¹ The right of appeal is also recognized in the Netherlands, France and Hungary.

⁸² Bobek, op. cit. n. 76, at p. 2.

⁸³ See para 3 of *Rheinmühlen* case.

⁸⁴ *Broberg and Fenger*, op. cit. n. 3, at p. 325.

⁸⁵ *Cartesio*, a company governed by Hungarian law, had its seat in Baja (Hungary). In November 2005, it filed an application with the Bács-Kiskun Megyei Bíróság (Regional Court of Bács-Kiskun), sitting as a Cégbíróság (commercial court), for registration of the transfer of its seat to Gallarate, in Italy, and, in consequence, for amendment of the reference to its company seat in the commercial register. That application was rejected: Hungarian law in force at the time did not allow a company incorporated in Hungary to transfer its seat abroad while continuing to be subject to Hungarian law as its personal law. The Cégbíróság held that such a transfer would require, first, that the company cease to exist and, then, that the company re-incorporate itself in compliance with the law of the country where it wishes to establish its new seat. *Cartesio* appealed against that decision with the Szegedi Ítéltábla (Regional Court of Appeal of Szeged). That Regional Appeal Court in turn referred a number of questions to the Court of Justice on the compatibility of Hungarian law with EC law. Available at:

from Hungary. According to Hungarian procedural law, there is possibility of appeal against an order to refer a question to the ECJ. In this case the ECJ established the *autonomy of the referring court*.⁸⁶ The ECJ was asked by the Hungarian court whether a decision of a national court referring a question to the Court of Justice can be subject to appeal which may result in an order to render the request for a preliminary ruling inoperative and an order to the court which made the preliminary reference to resume the national proceedings which had been suspended.⁸⁷ In his Opinion, AG Maduro stated that the right of any court to refer the question to the ECJ should not be the subject of an appeal.⁸⁸ He referred to the Opinion of AG Warner in case *Rheinmühlen* and added three additional points as well. Firstly, he pointed out that (then) Article 234 provides a direct communications between national courts and ECJ and it should not be dependent on other national powers or judicial instances. Furthermore, he pointed that Treaty did not foresee any kind of filter system on national level and as thirdly he said that admissibility of preliminary rulings is to be judged solely by the ECJ and not by domestic courts. So, AG Maduro gave a very clear opinion that appeal against an order to refer to ECJ should be precluded.⁸⁹ But the ECJ did not follow the Opinion completely, it is rather to say that the ECJ stayed somewhere in the middle with its reasoning. Firstly, the ECJ confirmed its previous attitude that (then)

'[a]rticle 234 does not preclude a decision of such a court referring a question to this court for a preliminary ruling from remaining subject to the remedies normally available under national law'.

Then added,

<<http://eulaw.typepad.com/eulawblog/2009/02/preliminary-reference-national-appeals-and-national-courts-case-c-21006.html>>, (last accessed on 20.07.2010)

⁸⁶ Boberg and Fenger, op. cit. n. 3, at p. 326.

⁸⁷ <<http://eulaw.typepad.com/eulawblog/2009/02/preliminary-reference-national-appeals-and-national-courts-case-c-21006.html>>, (last accessed on 20.07.2010)

⁸⁸ See point 21 of AG Maduro's Opinion. In short, Community law gives any court in any Member State the authority to refer questions for a preliminary ruling to the Court of Justice. That authority cannot be qualified by national law. I accordingly conclude that Article 234 EC precludes the application of national rules according to which national courts may be obliged to suspend or revoke a request for a preliminary ruling.

⁸⁹ See Bobek, op. cit. n. 76, at p. 4.

‘[n]evertheless, the outcome of such an appeal cannot limit the jurisdiction conferred by Article 234 EC Treaty on that court to make a reference to the Court if it considers that a case pending before it raises questions on the interpretation of provisions of Community law necessitating a ruling by the Court.’⁹⁰

The conclusion can be that national appeal procedures can remain but the referring court is not obliged to follow the decision of its own appellate court.⁹¹ The ECJ said that

‘it is for the referring court to draw the proper inferences from a judgment delivered on an appeal against its decision to refer and, in particular, to come to a conclusion as to whether it is appropriate to maintain the reference for a preliminary ruling, to amend it or to withdraw it.’⁹²

Unlike the very clear opinion of AG Maduro, there is a discussion how to implement this decision in national procedural law and what are the consequences of it. In practice, it means that the referring court is bound by the decision of the appellate court only to the extent it wishes so itself.⁹³ This turns the appellate courts in some kind of consultancy agencies, because the decision in the appellate procedure is only an advice to the lower court. But according to my own opinion it is very hard to expect that lower court will not follow the decision of higher court.⁹⁴

Bobek states that this approach of ECJ is logical consequence of the principle of primacy of EU law over national law.⁹⁵ But it is not understandable why the ECJ did not state clearly that the appeal is precluded by EU law. So, what the precise scope of this ruling will be in Members States remains to be seen but there are already some reactions of Member States.

Recently, the Hungarian legislator amended the Civil Procedure Code with the aim to exclude the possibility of appeal.⁹⁶ This amendment goes even a step further than the ECJ’s ruling in *Cartesio*. But, as far as I

⁹⁰ See para 33 of judgment in *Cartesio*.

⁹¹ See Bobek, *op. cit.* n. 76, at p. 4.

⁹² See para 96 of judgment in *Cartesio*.

⁹³ Bobek, *op. cit.* n. 76, at p. 6.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*, at p. 7.

⁹⁶ See Art. 4 (2) of Law LXVII of 2009 on faster deciding of disputes between enterprises amended Art. 155 A (3) of Law III of 1952 on Civil Procedure. These new rules came into force on 1 January of 2010.

know there are no similar changes of the Criminal procedure Code, so the regulation of the right of appeal against an order to refer the question to the ECJ in criminal procedure, remains the same as we already explained in previous section.

It is also important to mention that as consequence of the judgement in *Cartesio*, the civil and the administrative department of the Hungarian Supreme Court also adopted a joint opinion on the determination of appeals against a decision to make a reference for a preliminary ruling and the obligation of courts to make a reference for a preliminary ruling. The first point of the opinion declares that the obligation to make a reference for a preliminary ruling falls on the Supreme Court if there are no Acts that exclude the opportunity of revision (an extraordinary remedy). The court obliged decides alone (independently) about the necessity to interact directly with the Court of Justice in a review procedure on the merits of the case (or in the appellate proceeding if review is excluded).⁹⁷ In the second point, it is stated that the higher court (on the second degree) cannot examine the necessity for a request for a preliminary ruling, the content and the ground on the referred questions, where an appeal has been lodged against a decision containing an order for reference, and cannot vary the decision of the lower (first degree) court in this question (circle).⁹⁸ Finally, the Supreme courts states that the superior court cannot examine the need for a request in this stage of the proceeding, and cannot vary the decision in this circle in appellate proceedings (and in the first degree of administrative cases) when deciding on the appeal brought against the decision dismissing a request for a reference for a preliminary ruling.⁹⁹

What is now already clear is that the ruling laid down in *Cartesio* applies only if the main proceeding remains pending before the referring court. The ECJ confirmed this approach in the case *De Nationale Loterij*:¹⁰⁰

‘[f]urthermore, the interpretation of Article 234 EC in paragraph 98 of the judgment in *Cartesio* is not relevant in the main proceedings in the present case. In *Cartesio*, the Court had to consider rules of national law, relating to the right of appeal against a decision making a reference for a

⁹⁷ See point 1 of Opinion, available at: <<http://www.lb.hu/velemenypv16.html>>.

⁹⁸ *Ibid.*, at point 2

⁹⁹ *Ibid.*, at point 3

¹⁰⁰ Case C-525/06 (*De Nationale Loterij*). The case was decided on 24 March 2009, only few months after the judgment in *Cartesio* on 16 December 2008.

preliminary ruling, under which the main proceedings remain pending before the referring court in their entirety, the order for reference alone being the subject of a limited appeal.’

The Court went on in paragraph 98 of that judgment to hold that

‘the second paragraph of Article 234 EC is to be interpreted as meaning that the jurisdiction conferred by that provision of the Treaty on any national court or tribunal to make a reference to the Court for a preliminary ruling cannot be called into question by the application of such rules, where they permit the appellate court to vary the order for reference, to set aside the reference and to order the referring court to resume the domestic law proceedings. Such an interpretation cannot be applied to the main proceedings in the present case because the dispute is no longer pending before the referring court.’¹⁰¹

The ECJ struck the case out of register because it held that the issue was no more pending before the referring court. The ECJ had thus no more jurisdiction to give a preliminary ruling on the matter. According to Bobek, such an approach goes against the spirit in *Cartesio* but on the other hand it is clear that once the original case was decided, the ECJ can but acknowledge the new situation.¹⁰² What still remains unclear is whether *Cartesio* could be applied only to cases where the grounds for attacking a reference are based on EU law or whether it applies also to situations where the appeal brought is limited to issues of national *material* law or procedure only.¹⁰³ There are some theoretical explanations¹⁰⁴ but it is expected that this question will be explained by the case law of the ECJ in the future.

V. Concluding remarks

The preliminary ruling procedure is

‘essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all States of the Community.’¹⁰⁵

This procedure highly depends on effective cooperation between national courts and the ECJ, because only national courts can initiate

¹⁰¹ See para 7 of the judgment in *C-525/06 De National Loterij* [2009] ECR 2197.

¹⁰² Bobek, *op. cit.* n. 76, at p. 8.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ See n. 11.

this type of procedure. So, national courts as European courts should take more active role in ensuring that the preliminary rulings procedure operates as efficiently and effectively as possible.

The preliminary ruling procedure is a *sui generis* procedure and it is not dependent of any national procedural law. Article 267 TFEU has direct effect and it is not necessary to make any special national legislation regulating when and how a preliminary reference should be made or how a preliminary ruling should be applied by the national courts. Instead, such questions are often regulated by a combination of case law of the ECJ and general procedural codes of the different Member States. National legal rules can supplement the provision of Article 267 FEU but they can in no way restrict it. Some of the new Member States, like Slovenia and Hungary decided to regulate this procedure by national law. That solution is understandable because the main purpose of those rules could be to assist judges, especially those of older generation who had more difficulty absorbing EU law training, to become more and easily familiar with this important tool of EU law. According to my own opinion it is also maybe better to prescribe the procedure by national law because the national judges, especially at the beginning of membership in EU are not aware of this procedure at all. But the problem is that national rules do not have always the desirable effect as it is the case in the Hungarian supplementary rules (e.g. obligatory stay of proceeding before the Hungarian courts when court decides to refer the question to the ECJ and the rules prescribing the content of an order for reference). It could be a serious problem if the national judge follows only national procedural law, because, for example, in the lack of information of an order, the ECJ could find the reference inadmissible. So, it is very important that if the national legislature decides to prescribe the procedure, it should be done in accordance with Article 267 TFEU, the Information note of ECJ and the corresponding case law of ECJ on preliminary ruling procedure. Croatia as future Member still does not have full procedural framework implementing preliminary ruling procedure. Regarding criminal procedure, the Croatian Criminal procedure code was recently amended and it has express provisions about the possibility of making a reference to the ECJ. Although it is possible to find some provisions in Civil Procedure Code which could be indirectly brought in connection with the preliminary ruling procedure, my recommendation is to include an express provision as it is the case in the Criminal Procedure Code. Having in mind the positivistic

and formalistic culture in Croatia and the need to avoid possible doubts by a Croatian judge, it is better to prescribe this procedure by national law. This pre-accession period is the right time to discuss about the problems that the national courts of Member States are facing regarding the operation of preliminary ruling procedures and to suggest the best solution on how to implement the preliminary ruling procedure in Croatia as future Member State.

Anand A. Shah*

European Union enlargement and the Transatlantic relationship

I. Introduction

After six rounds of enlargement stretching over more than three decades, it would seem that there is little unexplored territory in the discourse over European Union (EU) enlargement. Reams of valuable academic literature analyze the minutia of the enlargement process and the impact of enlargement on the EU and its individual Member States. However, there is at least one aspect of the enlargement dynamic that has arguably received less attention than it deserves – the Transatlantic relationship. In some sense this is understandable. The United States of America (one half of the Transatlantic relationship) has no direct role in the enlargement process, and the Transatlantic relationship is itself a diffuse interaction between a myriad of actors – factors that militate against the study of the Transatlantic relationship as a matter of significance in the enlargement process. While acknowledging this reality, this contribution seeks to provide a better understanding of the impact the Transatlantic relationship has had on past EU enlargements as well as its likely impact on future enlargements.

A necessary antecedent to discussing the impact of the Transatlantic relationship on EU enlargement is an examination of the Transatlantic relationship itself. Therefore, the first part of this paper explores the Transatlantic relationship in a broad sense: i) defining what is meant by the term ‘Transatlantic relationship’; ii) the evolution of the Transatlantic relationship; iii) the mechanisms through which the Transatlantic relationship are conducted; and iv) the policy areas impacted by the Transatlantic relationship. The second half of the paper then addresses the impact of the Transatlantic relationship on past and future EU enlargement.

II. The Transatlantic relationship in a broad sense

1. The definition of the Transatlantic relationship

For the purposes of this paper, the term ‘Transatlantic relationship’ refers to the interaction between the United States of America (‘United

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States') on the one hand, and Europe on the other.¹ The Transatlantic relationship is asymmetric in nature.² This asymmetry is based on the fact that the United States has almost always³ acted as a single largely coherent entity vis-à-vis Europe, whereas the European side of the relationship has been made up of different entities depending on the historical and policy context concerned.

2. The evolution of the Transatlantic relationship

The asymmetric dynamic of the Transatlantic relationship is perhaps best illustrated through an examination of the evolution of the relationship. Most politicians, journalists, and perhaps even academics, when discussing the Transatlantic relationship, refer to it as a relationship that only properly began at the conclusion of World War II. In truth, the first of the three phases of the Transatlantic relationship began on the 4th of July 1776, when the leadership of the thirteen British colonies on the North American continent declared their independence from the King of Great Britain. Independence for the American colonies was finally achieved after almost seven years of war (and with the essential assistance of the French military).

This first phase of the Transatlantic relationship – dating from the late 18th century through the mid-20th century – took place in the context of Great Power politics, during which time the United States was alternatively allied with or opposed to the Great European powers of the

¹ Excluding Canada from the definition of 'Transatlantic relationship' is not to diminish the role of Canada in the interaction between North America and Europe, but simply a recognition, particularly with respect to the issue of EU enlargement, that the United States has been and remains the driving force in the Transatlantic relationship from the North American side.

² J. Howorth, 'Transatlantic Relations' in C. Hay and A. Menon, eds., *European Politics* (Oxford, Oxford University Press 2007) p. 407. at p. 408.

³ The most noteworthy exception to the United States' unity of purpose in the Transatlantic relationship was the American civil war of 1861-1865, during which both the governments of the United States and the rebel Confederate States of America sought the support of the European powers of the day. Further, the asymmetric nature of the relationship is a relative one – the centers of official American foreign policy (the White House, State Department and Department of Defense), may take slightly differing approaches to (and focus on different aspects of) the Transatlantic relationship.

day, such as the United Kingdom, France, Spain, Germany and Russia, in the military, economic and political spheres.⁴

The second phase of the Transatlantic relationship began at the close of World War II, with the start of the Cold War. The dynamics of the Cold War resembled the Great Power politics of earlier centuries, the unique factor being the existence of only two Great Powers – the United States and the Soviet Union, both of whom were locked in a continuous struggle to maintain a global balance of power between themselves. It was in the early days of the Cold War that leaders on both sides of the Atlantic, most famously George C. Marshall, who was then United States Secretary of State, laid the foundations for the ‘Transatlantic community’ that is taken for granted today.

The Marshall Plan, which extended billions of dollars in American aid to seventeen European states, including Turkey, had three main goals: 1. rebuilding the economies of Europe after the devastation of World War II; 2. containing the Soviet Union; and 3. creating the conditions necessary to build a ‘healthy and competitive rivalry’ upon which a legitimate partnership between Europe and the United States could be forged.⁵ This last goal is particularly significant in that American leaders in the late 1940s recognized that a true Transatlantic partnership could only be based on a strong and independent Europe. This idea that ‘a strong, united Europe was in the [United State’s] national interest became an article of faith with every US administration’⁶, perhaps best exemplified by President John F. Kennedy’s call in 1962 for a ‘Declaration of Interdependence’ with Europe.

The United States was thus staunchly in favor of the creation of the European Coal and Steel Community (ECSC) in 1951, viewing it as a concrete step towards European integration, and has provided equally strong support for the progressive development of the European Community and now the EU. In addition to supporting the three aims of the Marshall Plan, the United States saw the ECSC as a mechanism for ensuring closer cooperation between former European enemies, which would therefore reduce the likelihood of the recurrence of military conflict between Western European nations.⁷

⁴ Howorth, op. cit. n. 2, at p. 408.

⁵ Ibid., at p. 410.

⁶ Ibid.

⁷ D. Bereuter and J. Lis, ‘Broadening the Transatlantic Relationship’, 27 *The Washington Quarterly* (2003) p. 147. at p. 149-50.

However, given the context of the Cold War, the institution that was most influential on the development of this second phase of the Transatlantic relationship was the North American Treaty Organization (NATO),⁸ which was established with the signing of the North Atlantic Treaty in Washington, D.C. in 1949. The cornerstone of the NATO alliance was the mutual defense pact set out in Article 5 of the Treaty, which provided that

‘an armed attack against one or more of the [members of the alliance] in Europe or North America shall be considered an attack against them all.’⁹

Thus, the second phase of the Transatlantic relationship was marked by the need for a strong and unified Western Europe to support the United States in containing the Soviet Union.

It is therefore not surprising that the end of the Cold War suddenly upended this dynamic of more than four decades, and denoted the beginning of the third and current phase of the Transatlantic relationship. The period between the dissolution

‘of the Soviet Union and the September 11 terrorist attacks saw attitudes across the Atlantic begin to diverge on issues such as national sovereignty, the exercise of military power, defense capabilities, and trade and economic policy.’¹⁰

It is tempting to view yet a further phase of the Transatlantic relationship delimited by the cantankerous disagreement between the United States and certain European powers (namely France and Germany) over the Bush Administration’s push for military action against Saddam Hussein’s Iraq; in former U.S. Secretary of State Henry Kissinger’s words, this dispute represented ‘the most serious crisis in

⁸ For example, in an opinion piece, Turkey’s Foreign Minister Ahmet Davutoglu described NATO as ‘our “transatlantic house” for providing us with the necessary environment for taking our projects further for a better future. It has provided us with security and defence and it remains the core of all the Allies’ national defence policies – including those who are EU members’. A. Davutoglu, ‘Bridging an unnecessary divide: NATO and the EU’, 30 *Issues* (2009) p. 5.

⁹ The North Atlantic Treaty (1949), available at: <http://www.nato.int/cps/en/natolive/official_texts_17120.htm>, (accessed on 25 August 2010). The first and so far only instance in which Art. 5 has been invoked was in response to the 11 September 2001 terrorist attacks in the United States.

¹⁰ Bereuter and Lis, loc. cit. n. 7, at p. 147.

transatlantic relations since 1945¹¹. However, the dispute over the Iraq War was merely the most extreme example (thus far) of the dynamic in the third phase of the Transatlantic relationship where, with the evaporation of the world-wide Soviet threat,

‘the possibilities have been thrown wide open: what was previously unthinkable or dangerous has become possible, probable, commonplace, sometimes even useful or necessary. The US no longer looks at the world through the prism of European security and the North Atlantic Treaty Organisation (NATO) alone: in the globalised world, the former is no longer the major focus and the latter is no longer the key to the global US strategy. The Europeans, for their part, no longer look to the United States as the only strategic power. Within the European Union, the Europeans themselves have begun to assume strategic responsibility for managing crises beyond their borders.’¹²

Nevertheless, even in this vibrant third phase of the Transatlantic relationship, official United States policy has remained broadly supportive of a continually integrating Europe. The Clinton Administration (1992-2000) in particular

‘believed it was in the US interest to encourage a strong and unified EU to become an actor on the global stage.’¹³

As the crisis over the Iraq War revealed, within some conservative and neo-conservative circles in the United States, an integrating and enlarging Europe in the post-Cold War context was and continues to be seen as a potential rival superpower with an outlook that is ‘fundamentally different’ from that of the United States.¹⁴ However, it

¹¹ Howorth, op. cit. n. 2, at p. 411. United States Secretary of Defense Donald Rumsfeld’s January 2003 comments that there existed a ‘new’ and ‘old’ Europe with respect to new NATO members who were in support of military action against Iraq, and older members, namely France and Germany, who were opposed to military action, were particularly polarizing.

¹² ‘Reshaping EU-US Relations: A Concept Paper’, Notre Europe (2009) at p. 17.

¹³ R. Gropas, *EU Enlargement and Transatlantic Relations*, Wilson Center (Washington, D.C. 2007) at p. 5, available at: <http://www.wilsoncenter.org/topics/docs/Enlargement_Transatlantic_Relations_RubyGropas.pdf>, (last accessed on 15.08.2010)

¹⁴ *Ibid.* One author in the influential journal *Foreign Affairs* argued that ‘the political integration of the EU presents the greatest challenge to continuing US influence in Europe since World War II’. J. Cimbalo, ‘Saving NATO from Europe’, *Foreign Affairs* (2004), available at:

must be reiterated that official United States policy, and certainly the administration of Barak Obama, remains strongly supportive of European integration, and indeed, as we will see, EU enlargement.

3. Mechanisms for conducting the Transatlantic relationship

To obtain a more comprehensive view of the state of the Transatlantic relationship in its current third phase, it is useful to identify the mechanisms through which the Transatlantic relationship are conducted. As discussed above, during the first phase of the Transatlantic relationship in the era of great power politics, bilateral relations between the United States and various European powers was the order of the day. These bilateral relations remained a core mechanism of transatlantic relations during the second phase of the relationship, and remain a fundamental method of conducting the Transatlantic relationship today.¹⁵

However, in the second and now third phases of the relationship, international bodies and mechanisms have been created through which Transatlantic relations also take place. As noted above, NATO was the primary international institution through which Transatlantic relations were conducted during the second phase of the relationship; it arguably remains the most significant¹⁶ international body through which Transatlantic relations take place due to its long-established and highly developed professional administration, and, as we will discuss below, successes in engaging major strategic issues that faced, and continue to face the United States and Europe in this third phase of the Transatlantic relationship. While the collapse of the Soviet Union necessitated NATO

<http://www.cfr.org/publication/7532/saving_nato_from_europe.html?id=7532>, (last accessed on 20.08.2010)

¹⁵ A 2004 study issued by the Directorate General for External Relations indicated that, for most European governments, their relationship with the United States remains their most important bilateral relationship. 'Review of the Framework for Relations between the European Union and the United States: An Independent Study', Directorate General for External Relations, (hereinafter Review) *OJ* 2004/S 83-070340 (2004) at p. 15.

¹⁶ For example, as noted by one author: 'NATO is one of the EU's taboos. Within the framework of "NATO", EU Member States take decisions that vitally affect the security of all Europeans, and yet such decisions are not concerted among the EU's members. [...] Take, for example, the impact of the debate on NATO enlargement to Ukraine or Georgia, which affects the entire eastern policy of the Union'. A. de Vasconcelos, 'Europe's NATO', *29 Issues* (2009) at p. 1.

re-imagining its own mandate¹⁷, bodies like the Organization for Security and Cooperation in Europe, the Group of 8 industrialized nations (better known as the G8), and the World Trade Organization have also become venues for Transatlantic dialogue and decision making on core economic, good governance and conflict management matters.

The end of the Cold War also ‘coincided with the rise of Europe to quasi-superpower status’¹⁸ through the integration and expanded mandate of the European Community and now EU. This resulted in increased significance for the EU-United States conduit for Transatlantic relations.¹⁹ In recognition of this increased importance, in 1990 the United States and the European Community issued a joint Transatlantic Declaration, which focused on identifying the core beliefs and values shared by the US and Europe, and also voiced the goal of close consultation between the two sides, particularly in view of the European Community’s growing policy competences, especially under the European Political Cooperation Mechanism (now known as the Common Foreign and Security Policy).²⁰

While the Transatlantic Declaration focused on information exchange, the 1995 New Transatlantic Agenda (‘NTA’) issued by the United States and EU sought to move the relationship between the two entities into the realm of policy cooperation in four broad areas:

- promoting peace and stability, democracy and development;
- responding to global challenges such as terrorism, cross-border crime and
- environmental issues;
- expanding world trade and building closer economic relations;
- the building of person-to-person bridges across the Atlantic.²¹

¹⁷ ‘After the demise of the Soviet Union, NATO lost its original *raison d’être*; prompted by America it has sought a new relevance, partly by taking on such “out-of-area” operations as Afghanistan.’ ‘Let’s Talk – But Where: Are NATO and the European Union partners or rivals?’, *The Economist* (24 February 2005), available at: <www.economist.com>, (last accessed on 22.08.2010)

¹⁸ Howorth, op. cit. n. 2, at p. 409.

¹⁹ Review, loc. cit. n. 15, at p. 15.

²⁰ The text of the Transatlantic Declaration is available at:

<http://eurunion.org/eu/index.php?option=com_content&task=view&id=2605&Itemid=9>, (last accessed on 26 August 2010).

²¹ The text of the New Transatlantic Agenda is available at:

Along with the NTA, a Joint Action Plan was agreed upon that set out 150 actions within the four broad areas set out by the NTA that the US and EU should jointly support, including both general concepts, as well as very specific items such as restructuring the banking sector in the Ukraine.²²

To facilitate the cooperation called for by the NTA and Joint Action plan, the EU and United States also agreed to hold an annual summit between the highest levels of political leadership of the two entities, as well as additional dialogues, working groups and taskforces between United States and EU officials, including the creation of the Transatlantic Economic Partnership (1998) and the Transatlantic Economic Council (2007).²³

4. Policy areas impacted by the Transatlantic relationship

Security and defense policy, which dominated the Transatlantic relationship during its second phase, remain important areas for dialogue and action, though the definition of security in the third phase of the Transatlantic relationship has now expanded to include energy security, the global war on terrorism and nuclear nonproliferation. In addition, other areas of policy have gained importance in the Transatlantic dialogue – namely trade and economics, human rights and democracy, the environment, and the settlement of international conflicts.²⁴

With respect to the economic arena, the EU and United States constitute the ‘largest bilateral trade and investment relationship in the world’, which, at least prior to the recent global recession, amounted to approximately 31% of world trade and 53% of world Gross Domestic Product.²⁵ Given the political and economic clout concentrated in the United States and Europe, how the United States and Europe approach the major policy areas identified above as well as more broad-based strategic considerations such as the rise of new global powers like China, India and Brazil, matters significantly.

<http://www.eurunion.org/eu/index2.php?option=com_content&do_pdf=1&id=2602>, (accessed on 26.08.2010).

²² Review, loc. cit. n. 15, at p. 10.

²³ Ibid., at pp. 10-11.

²⁴ Howorth op. cit. n. 2, at pp. 415-422.

²⁵ See the website of the European Union External Action Service <http://www.eeas.europa.eu/us/index_en.htm>, (last accessed on 28.08.2010).

III. European Union enlargement and the Transatlantic relationship

As discussed earlier, during the second phase of the Transatlantic relationship the United States' support for an enlarged ECSC and then an enlarging European Community, was in line with the United States' general policy of strongly supporting Western European integration, economic growth and political stability. Thus, the United States was fully behind the European Community's enlargements in 1973 (UK, Denmark, Ireland), 1981 (Greece) and 1986 (Spain & Portugal).

With the end of the Cold War, which marked the beginning of the third phase of the Transatlantic relationship, NATO (led and dominated by the United States) and the EU together rose to the immense challenges presented by the collapse of the Soviet Union by opening both NATO and EU membership to the newly independent states of Central and Eastern Europe. In the post-cold war era the enlargement of NATO and the EU 'grew out of the twin imperatives of reuniting Europe following communism's collapse' and re-orienting the transatlantic relationship now that the Soviet threat no longer existed.²⁶ The aim of enlarging both these institutions was to entrench democratic governance across eastern and central Europe by tying these states firmly to Western Europe and North America.²⁷

However, at the beginning of the third phase of the Transatlantic relationship, the United States

'concluded that the EU alone was too weak to lead the enlargement process. Thus NATO took the lead in bringing central and Eastern Europe into the fold. Nato's membership could more easily be expanded, and extending Nato's security umbrella to countries in those regions was critical to the consolidation of democracy. Nato also contributed to reform by raising its requirements for new members, a "tough love" policy designed to reinforce positive transformation.'²⁸

Therefore, it is certainly no coincidence that 10 of the 12 countries that joined the EU in 2004 and 2007, with the exception of Cyprus and Malta, were already members of NATO. However, once NATO's security umbrella was extended to the states of central and Eastern

²⁶ R. Asmus, 'Europe's Eastern Promise: Rethinking NATO and EU Enlargement', 87 *Foreign Affairs* (2008) p. 95 at p. 97.

²⁷ *Ibid.*

²⁸ *Ibid.*

Europe, the European Union took on the primary burden of ensuring the transformation of countries like Hungary from communist states into democratic societies with free-market economies through the EU accession process.

From the perspective of the United States, in addition to the core interests of consolidating democracy and market reforms in central and eastern Europe, an expanded EU offered United States businesses a larger single market within which to conduct business, an expanded single set of tariff rules, regulatory policies and administrative and customs procedures, and an overall business environment more friendly to the United States given both it and the EU's emphasis on intellectual property protection as well as restrictive subsidy regimes.²⁹

As noted above, within some political circles in the United States the EU is and continues to be viewed as a challenge to the United States' role as sole global superpower. With respect to EU enlargement, those holding a negative view of the EU's growing importance in global affairs actually viewed EU enlargement 'as a way to impede the development of the EU'³⁰ by making its decision making mechanisms even more complex with the addition of twelve new states, as well as the fact that a large portion of the EU's resources and attention would now have to be focused on the continuing reform and development in the new member states, as opposed to global affairs. However, this is a minority view in the United States that represents old style great power politics in which the rise of one power block is *ipso facto* viewed as detrimental to another. Thus, while some commentators suggest that European 'euphoria' over the election of Barak Obama has now ended,³¹ it also remains clear that official United States policy towards EU enlargement remains strongly supportive.

With respect to the current crop of EU candidate countries – Croatia, Montenegro, the Former Yugoslav Republic of Macedonia and Turkey, as well as other aspirant countries in the Western Balkans including

²⁹ G. Burghardt, 'EU Enlargement and the Transatlantic Relationship', Speech to The Executives' Club of Chicago (2004), available at: <<http://www.eurunion.org/news/speeches/2004/040311gb.htm>>, (last accessed on 2.09.2010)

³⁰ Gropas, loc. cit. n. 13, at p. 5.

³¹ 'The Atlantic gap: The honeymoon between Europe and Barack Obama's America is over', *The Economist* (1 October 2009), available at: <www.economist.com>, (last accessed on 22.08.2010)

Serbia and Albania, the challenge facing the United States and Europe is the need to extend peace and stability from the Balkans into Eurasia.³² Croatia is of course the EU candidate country closest to joining the Union, and the United States has been vocally supportive of its candidacy, with Secretary of State Hillary Clinton last year even offering US technical assistance in locating Croatian military archives demanded by the International Criminal Tribunal for the Former Yugoslavia, which remains a point of contention in Croatia's accession process.³³ With respect to Turkey, a key member of NATO, the United States has lobbied very hard for Turkey's inclusion in the EU, arguing that further anchoring this strategic ally to the western democratic community was important to regional security and stability. However, given the controversy within the EU surrounding Turkey's accession, President Obama's strong statement in support of Turkey's accession to the EU last year was met by criticism from French President Sarkozy and other EU members states that the United States was meddling in EU affairs.³⁴

IV. Conclusion

In its second and third incarnations, the Transatlantic relationship between the United States and the nations of Europe has been a largely symbiotic one, with mutual security and prosperity the goals of actors on both sides of the Atlantic. With respect to EU enlargement, the security umbrella afforded by the American-dominated NATO alliance provided the necessary environment for the Union's enlargement during the second and current third phase of the Transatlantic relationship. In addition, the United has and continues to offer vocal and active political support to encourage the EU enlargement process. However, enlargement alone, whether with respect to the EU or NATO, is likely not a feasible mechanism for extending democracy and stability beyond the Balkans into Eurasia, and even Russia. Other tools, including partnerships that are less than full membership of NATO and the EU will be needed. The development and implementation of these tools will no doubt take place within and be impacted by the Transatlantic

³² Asmus, loc. cit. n. 26, at p. 96.

³³ A. Rettman, 'US says Croatia should join EU 'sooner instead of later'', *EU Observer* (2009), available at <<http://euobserver.com/9/29137>>, (last accessed on. 1.09.2010.)

³⁴ Ibid.

relationship, perhaps even ushering in a fourth phase of this dynamic international relationship.

Tamara Takács*

Enlargement: the ‘most successful’ policy of EU external relations?

I. Introduction

The present paper explores the assertion that enlargement is one of the most if not the most successful policy of EU external relations. The analysis will look at the EU's role as political and economic stabilizer by including new members and the main political circumstances and results of the subsequent accession rounds in the EU's history. The conditionality policy that has been employed and enforced with increasing force in the recent accessions will serve to see the EU's role of modernization, democratization and transition, in particular with regard to the Central and Eastern European countries. Our discussion will focus on the values that the EU claims to represent in its conditionality policy and highlights the contribution of EU membership to democratization, economic and legal modernization, stabilization. Through the case study of protection of minority rights, one can note that enlargement proved to be a catalyst to consolidate the relevant legal regime within the EU itself. Economic development of the new countries went hand in hand with modernization of certain competition regimes and strengthening freedom of services. Enlargement also required serious institutional adjustment from the candidate countries in the form of institutional adaptation to participate in EU lawmaking and to apply the adopted EU legislation. From the EU, actions were needed to accommodate an extended number of actors and to reform decision-making processes. It is through the political, economic, and institutional-functional dimension that the paper explores the impact of enlargement in shaping, altering the EU itself and consolidating it as a community of values. What way has the prospect of new countries and their eventual accession impacted, changed, transformed the organization? The illustrations will pinpoint the importance and relevance for Croatia on its way to EU membership as well.

II. Enlargement – the policy

In the post WWII era, the six founding countries had a common accord on pursuing the goals of first the Coal and Steel Community and then a

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more expansive range of economic cooperation in a supranational fashion in the European Economic Communities. What was considered to be a purely economic cooperation with well-understood benefits of interdependence and collaboration created the incentive to be part of the organization. The initial success of the cooperation attracted early on further aspirants to join. The geographic expansion brought in different countries with varying economic development and political interest and served the overall strategy of transformation and consolidation. The 1973 enlargement brought in the first three ‘new’ members. The UK’s application was accepted after a particularly painful period of rejection in which French President de Gaulle had repeatedly vetoed the application. Only after a new President moved out from the *Palais de l’Elysée* could the UK join the EEC.¹ The initially hesitant and at times still domestically skeptic first Northern European member was Denmark. Ireland, a poor country at its accession, has since greatly benefited from CAP assistance and Structural Funds and demonstrated the most spectacular economic development in the Union. Another early onlooker with an interest to establish the closest of ties was Turkey, whose application for associate membership in 1959 resulted in an Association agreement, the so-called Ankara Agreement in 1963. As a compromise, this association offered customs union with Turkey and acknowledged the final goal of membership. However, after the country’s official membership application in 1987, and the beginning of accession negotiations in 2005, the country’s accession prospects are still largely uncertain, due to political reasons.² The next round in 1981 welcomed the newly reinstated democracies of Portugal and Spain and hoped to help these former totalitarian regimes in political transition and economic progress, as it did, again with the enormous contribution of the financial assistance provided by Structural and Cohesion funds. The subsequent accession of Greece in 1986 served similar objectives and strategy aims by the EC, which shows that already at that point the organization took up the political role of a front-runner to promote

¹ N. Nugent, ed., *European Union Enlargement* (Basingstoke, Palgrave Macmillan 2004)

² On the salient issues of Turkey’s accession to the EU see S. Domaniç, ‘The Turkish Accession to the European Union: Mutually Beneficial? Mutually Possible?’, available at: <<http://www.isp.org.pl/files/18444490470897409001169459097.pdf>>, (last accessed on 20.08.2010).

democracy in the region and at the same time to help economies in transition. Morocco's application in 1987 was – as expected - turned down for the foreign ministers in the Council did not consider it a European country. In contrast to the Southern enlargement, accepting some of the former EFTA countries in 1995, namely Austria, Finland and Sweden was more of a confirmation that these countries were in line with the standards of the EU, rather than helping them to achieve these. In the case of some countries, namely Lichtenstein, Norway and Iceland, the European Economic Agreement ensures the application of the entirety of Internal Market-related legislation without participation in its adoption. Switzerland is connected with a matrix of bilateral agreements to the EU and enjoys full participation in the Internal Market and its advantages. Presently, the EEA countries as well as Switzerland applies the entirety of the *acquis* of the Internal Market, but does not contribute in the decision making procedure leading up to the adoption of the applicable law. This serves a practical alternative for an enlarged Internal Market without actual EU membership.³

The interest of partaking in the economic and increasingly political integration and reap the benefits of stabilization seemed relentless after events such as the end of the Cold-War. The fall of the Iron Curtain and eagerness of political and economic reforms that characterized the transition periods of the new democracies created the firm foreign policy aspiration of joining the European Communities and later European Union and to regain their place in the political, economic and cultural map of Europe. With the unyielding wish to exercise newly-regained sovereignty, joining the EU as economic entity and joining the NATO as defense organization were the two most important foreign policy aims. It appears that the skeptical motto of 'there is life outside the European Union' holds a less and less convincing effect in (this part of) Europe. Even for Iceland, a country with a comfortable EEA membership and sensitive fishing quota to safeguard, applying for EU membership

³ A. Łazowski, 'Enhanced Bilateralism and Multilateralism: Integration without Membership' 45 *CMLRev.* (2008) pp. 1433-1458., A. Łazowski, 'Box of Chocolates Integration: The European Economic Area and Swiss Model Revisited', in S. Blockmans and S. Prechal, eds., *Reconciling 'deepening' and 'widening' of the European Union* (The Hague, T.M.C. Asser Press 2007) p. 87.

seemed to be a panacea following the recent financial meltdown of the country.⁴

Presently, the countries in the ante-chamber of accession, Croatia being the closest to actually enter, are engaging in the lengthy screening process and negotiations. While the prospect of accession is there for each official candidate country, there is a divided political stance within the EU on membership of Turkey, for example, and recently one could often hear of a certain *Enlargement-fatigue* that the EU – as some claim – suffers from.

III. Conditionality policy and what it reflects – a Union of values?

Next to the unanimous decision within the Council that was needed to accept new members – and which for many years sabotaged the UK's attempts – the Treaty introduced early on the procedure for application stating that any European State may become a Member, if the Council accepts its application by unanimous decision following previous consultation with the Commission. The conditions of accession were to be laid down in an agreement between the Member states and the applicant state to be ratified by all Contracting States.⁵ Since the Single European Act, the Council must also receive assent of the European Parliament.⁶ The geographic criteria, while being subject to intense debates (i.e., where does 'Europe' end?) was recalled when Morocco's application was rejected in 1987. It is noteworthy, that besides the geographical criteria, no specific requirements were mentioned in the Treaty. Hence, there was no measure of standards set for countries joining before 1992. While the Southern countries did not live up to the level of political and economic stability and development of the then EC members, as has been said, their accession was exactly to ease such transition. In addition, until the completion of the Single Market as envisaged by the SEA as well as the Maastricht Treaty that included political policy areas into the ambit of the EU, the extent of the *acquis communautaire* was relatively easy to adjust to and harmonize with. And here comes a clear dividing line in the history of EU enlargement

⁴ *EurActiv*, 'EU to open membership talks with Iceland', 15 June 2010, available at: <<http://www.euractiv.com/en/enlargement/eu-open-membership-talks-iceland-news-49524>>, (last accessed on 20.08.2010).

⁵ See Art. 237 Treaty establishing the European Economic Community (EEC) signed in Rome on 25 March 1957 and entered into force on 1 January 1958.

⁶ Art. 8 Single European Act, *OJEC* L 169, 29.06.1987, p. 1.

policy, notably, the prospect of and explicit application for accession by the new democracies in Central and Eastern Europe. In the historical context of the end of the Cold War and of the West-East divide, and the new and eager transition towards rule of law, democracy and market economy, EU membership presented the opportunity of modernization.⁷ As these countries (except perhaps for Cyprus and Malta) all carried the inherited burden of overall modernization and economic and political transition, the EU needed to identify standards to which to measure the readiness and preparedness of these countries. Additionally, they had to incorporate some 80000 pages of legislation and jurisprudence into their legal systems. Therefore, in the process of establishing association regimes with the relevant countries, in 1993 at the European Council's Copenhagen summit laid down additional and – while not entirely specific – more explicit criteria against which each country's preparedness would be measured for candidacy and ultimately, through the accession negotiations, for accession. The Presidency Conclusions setting the so-called Copenhagen criteria expressed three categories of criteria:

- political: stable institutions guaranteeing democracy, the rule of law, human rights and respect for /protection of minorities;
- economic: a functioning market economy and the capacity to cope with competition and market forces in the EU;
- the capacity to take on the obligations of membership, including adherence to the objectives of political, economic and monetary union.⁸

The Copenhagen criteria were reinforced by the European Council in Madrid in 1995 requiring the adoption of the *acquis communautaire* and its effective implementation through appropriate administrative and judicial structures. It was not until the completion of the *Big-bang* enlargement of 2004-7 that the EU set an additional criteria reflecting its own 'limitations' and subjecting further accessions to its own capacities. Reference to the *absorption capacity* of the EU noting that the organization itself must be able to absorb new members with a

⁷ T. Haughton, 'Central and Eastern Europe', in. C. Hay and A. Menon, eds., *European Politics* (Oxford, OUP 2007) p. 132.

⁸ Presidency Conclusions, Copenhagen European Council 1993, available at: <http://www.europarl.europa.eu/enlargement/ec/pdf/cop_en.pdf>, (last accessed on 20.08.2010)

functional institutional structure reserved the right to decide when the EU is ready to accept new countries to join.⁹

These criteria reflect the EU's adherence to certain standards (set by itself or by internationally recognized standards such as ECHR) in these fields and its mission to enforce these standards from its future members. When looking at the impact of conditionality and enforcement of these standards as prerequisite of accession, it is interesting to examine how enlargement had an impact and consolidated these values internally, for the EU itself.

1. Enlargement - consolidating a set of political and human rights values

As has been pointed out, the Copenhagen criteria identified already in 1993 the above mentioned political values as being one of the most prevalent challenges for the CEE countries. Internally, the Maastricht Treaty in 1992 inserted that

‘The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy.’

‘The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.’¹⁰

It can be implied that ratification of and adherence to the ECHR with this article became an explicit accession criteria. The EU, however, did not introduce as expansively the political values as they were expressed in the Copenhagen criteria in its own system of functional principles until the adoption of the Amsterdam Treaty in 1997. Article F (1) introduced that

‘[t]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States’.

⁹ See F. Amtenbrink, ‘On the European Union’s capacity to cope with further enlargement’, in S. Blockmans and S. Prechal, eds., *Reconciling ‘deepening’ and ‘widening’ of the European Union* (The Hague, T.M.C. Asser Press 2007) p. 111.

¹⁰ Art. F Maastricht Treaty (Treaty on European Union), OJ C191, 29 July 1992.

At the same time, the Treaty requirements for accession were expanded to the requirement of respecting these newly introduced values.¹¹ Such expansion of Treaty-based accession criteria not only confirmed the Copenhagen criteria but also reflected the transformation in the character of the organization itself. The increasingly political cooperation that went beyond the economic goals of the Internal Market included since 1992 the Common Foreign and Security Policy and Justice and Home Affairs as well. In addition, the developments of fundamental rights protection in the jurisprudence of the ECJ¹² and increased role of democratic institutions such as the European Parliament¹³ granted the additional democratic parameter that the organization measured itself against.¹⁴ Additionally, the Nice Treaty foresaw sanctions for the violations of the fundamental values by any Member state in Article 7.¹⁵ What can be witnessed here is the clear parallel between developments of political and human rights principles that the EU sets for itself and its Member states, and the early establishment of the same principles for the aspirant CEE countries as a task of their preparation process.

An interesting case study can be drawn from the principle of *protection of minorities* which reveals the interplay between the conditionality policy and the EU's internal standard-setting character. Protection of minority rights, while provided by the elaborate regime of the ECHR, did not get explicit mention in the Treaties until the Lisbon Treaty. To

¹¹ Art. O: 'Any European State which respects the principles set out in Article F(1) may apply to become a member of the Union. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members.'

¹² See D. Douglas Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis' 43 *CMLRev.* (2006) p. 619.

¹³ Particularly the gradual extension of the Parliament's participation in the adoption of EU legislation first by the cooperation procedure and then by the co-decision procedure.

¹⁴ See also the German Constitutional Court's decision confirming such developments in *Wünsche Handelsgesellschaft (Solange II)* decision of 22 October 1986, BVerfGE 73, 339, case number: 2 BvR 197/83 and the adoption of the Charter of Fundamental Rights of the European Union and its proclamation as politically binding document by the EU institutions in December 2007.

¹⁵ See Art. 7 TEU.

fill the gap between various secondary legislations,¹⁶ the Lisbon Treaty introduces specifically the rights of persons belonging to minorities amongst the values that the Union is based on. However, as has been said, protection of minorities was enlisted in the Copenhagen criteria, taking into account the region's traditionally large percentage of minorities and the problems attached to the exercise of their rights. Perhaps this situation is a good example of what *Craig* and *de Búrca* describe as

'[...] the EU has been frequently criticized for its apparently greater willingness to promote and enforce human rights in its external policies than in its internal policies'.¹⁷

An evident consequence of such situation can be incoherence and double-standards. While minority rights constituted part of the rigorous monitoring process of accession negotiations, existing EU Member states did not fare too well on the issue. As an example, France refused to sign and ratify the Framework Convention for the National Minorities (which is a Council of Europe instrument) and Greece still has not ratified it. How can the EU turn blind eye for lack of protection in its members and demand effective protection from the members-to-be? Additionally, it has been noted that once a country enters the EU, the rigorous monitoring ends and this renders the initial accession criterion ineffective, pointless. For promoters of minority rights, it was clear that to achieve effective minority protection in the long term and lasting EU impact,

'[...] institutional adaptation, long-term policy diffusion and change in underlying norms would be necessary'.¹⁸

That is, underlying norms within the EU system would be necessary. Preparatory documents and discussions show that in the EP's 2004-9 term, MEPs of the CEE region were particularly active in pushing the minority rights agenda, among other reasons, to balance out the

¹⁶ Equal Treatment Directive, Council Dir. 2000/43 [2000] *OJ* L180/22; Framework Employment Directive, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

¹⁷ P. Craig and G. de Búrca, *EU law: Text, cases and materials* (Oxford, OUP 2008) p. 407.

¹⁸ G. Sasse, 'Gone with the Wind? Minority Rights in Central and Eastern Europe before and after EU Enlargement' Workshop 'Ethnic Mobilization in the New Europe', Brussels, 21-22 April 2006. p. 2.

expectations that had been set to their countries and existing inequalities by some of the 'older' Member states, as well as to secure the consistent level of protection. Particularly forceful advocacy was conducted by Hungarian MEP, *Mr Csaba Tabajdi* of the ESP group, who chaired a platform for minority protection¹⁹ and instigated active discussion with like-minded group of politicians. As has been said, the Lisbon Treaty recognizes minority protection within the fundamental values²⁰ as well as upgraded the Charter of Fundamental Rights that contains prohibition of discrimination based on membership of a national minority to be a legally binding document.²¹ Thus, without a doubt, minority protection is a value, a principle that was consolidated within the EU system as a result of the enlargement process and the accompanying interest from the newcomer members. In this case, establishing coherence between an accession criteria and internal regime generated an important improvement of protection of legal rights and reinforced the EU's image of a political actor promoting fundamental rights in the European area, in its countries but also with regard to present associate countries as well. With regard to Croatia's ongoing accession process, protection of minority rights (particularly Romas and Serbs) has been one of the most crucial and politically sensitive issues and the European Commission closely monitors it, following reports by civil society and NGOs. The most recent, 2009 Progress Report shows that despite some improvements, minority rights still need to be enhanced particularly in the area of employment.²² The standards laid down by the Employment

¹⁹ Intergroup for Traditional National Minorities

²⁰ Art. 2. 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

²¹ Art. 21(1) 'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.' Charter of Fundamental Rights, [2007] OJ C 303/7

²² Commission of the European Communities, Croatia Progress Report 2009 *accompanying the* COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL Enlargement Strategy and Main Challenges 2009-2010. COM(2009)533, available at: <[591](http://www.eu-</p></div><div data-bbox=)

Equality Directive and the primary legal texts will serve to uphold and enforce standards once membership is attained.

2. Enlargement – strengthening the economic community

It can be regarded as a hardly deniable fact that the expansion of the free trade area greatly contributes to the economic development in the region. The four freedoms and mobility they offer create optimal allocation of resources, generate incentives to catch up with competition and hence improve overall production and distribution. The EU Internal Market, furthermore, goes beyond a free trade area and encompasses a customs union as well, rendering external trade policy ‘common’ between the Member states, acting externally as the world’s largest trading bloc. Indeed, reaping the benefits of economic integration and the enlarged Internal Market was an oft-cited motive for taking new members by the EU as well as to accede to the organization. For the old Member states, enlarged EU meant enlarged market where their products could be sold, where labor costs are cheaper so they can establish new branches and receive services at lower price. For the aspirant candidates, new market for goods, services and labor for a higher price was expected. While the history of the integration shows an obvious economic improvement overall in the EU and individual countries as well (i.e., the success stories of Ireland, Spain and Portugal), disparities have also appeared, which then implied specific assistance schemes such as Cohesion and Structural Funds, greatly affirming the solidarity between Member states and – at least in the receiving countries – improving the EU’s popularity. In order to participate successfully in the EU’s Internal Market, the candidate countries since the 2004 accession were expected to gain ‘capacity to cope with competition and market forces in the EU’ based on a functioning market economy.

The 2004 enlargement was beneficial for the EU itself not only for the above discussed reasons related to the enlarged market, but also because exactly this enlarged market triggered legal developments in the economic integration that had long been due. Here I can point out at least two examples: the decentralization of enforcement of competition

rules²³ and the painful but successful adoption of the Services Directive, which latter aimed at truly consolidating to free movement of services in the Internal Market.²⁴ Another improvement relates to the external economic relations of the EU, which now with 27 members can be even more consistently and forcefully conducted by the EU in bilateral or multilateral trade relations.

3. Enlargement – triggering important institutional reforms

Joining the EU means gaining part in the decision-making structures in which the rules that the cooperation is built upon are adopted. This participation requires 1) a coherent coordination of EU policies at the national level, 2) the representation of the country's position at the EU level, most visibly in the Council, and 3) ensuring that the adopted decisions will be fully and effectively implemented at the national level.²⁵ Fundamental institutional and operation principle such as the principle of loyal cooperation secures reliability and the consistency of standards in applying the law of the EU. To prepare for this obligation, the accession process consisted of the approximation of national law to the *acquis communautaire*, in line with the previously mentioned Madrid criterion. Such approximation, harmonization implied important legal modernization introducing institutions and notions that had been formerly unknown in these post-communist countries. Here I am thinking of competition rules most prominently. The legislative modernization went hand-in-hand with the administrative and judicial modernization setting up new structures for the application and enforcement of EU standards.

At the EU level, exactly the prospect of new members pressurized the need for institutional reform. Some Member states even included a Protocol to the Amsterdam Treaty declaring that institutional redesign is indispensable condition for any future enlargement.²⁶ The reforms were

²³ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] *OJ L* 1/1

²⁴ Directive 2006/123/EC of 12 December 2006 on services in the internal market [2006] *OJ L* 376

²⁵ T. Takács, *Participation in EU decision making: Implications on the national level. Including a case study on Hungary* (The Hague, T.M.C. Asser Press 2009)

²⁶ Protocol on the institutions with the prospect of enlargement of the European Union

duly introduced by the Nice Treaty in 2002 and paved the way for the 2004 accessions in a greatly expanded institutional structure that had so needed efficiency and increased democracy. Since then, empirical studies show that the enlargement's impact on the EU decision-making processes has been positive: there is more pressure on Council members to make decisions in a speedy manner,²⁷ the European Parliament channels great variety of societal interest, and the Commission also benefits from the multicultural input and diversity. With regard to Croatia, the Treaty of Lisbon introduces changes to accommodate the country's upcoming membership, allocating seats and voting powers.

IV. Concluding remarks

The previous brief overview highlighted a certain mutual impact that enlargement has had between the joining countries and the organization itself, most visibly on the occasion of the 2004 accession. The application of conditionality policy and the actual accession of new countries have proven to be catalyst for consolidation of principles, and triggered reform of regulatory and institutional regimes within the EU. Accession also served to incentivize the EU to identify its character beyond a mutually beneficial economic cooperation to a political actor promoting democratization, legal modernization, and confirmed the EU's character and image as norm-exporter and standard setter. The EU and its present members should be consistent with the standards, otherwise the EU loses its credibility and the leverage it has in the accession negotiation processes.

²⁷ R. Dehousse, et al., eds., *Elargissement: Comment l'Europe s'adapte* (Paris, Sciences Po Les Presses 2006); P. Settembri, 'The surgery succeeded. Has the patient died? The impact of enlargement on the European Union', Jean Monnet Working Paper 04/07, available at: <<http://centers.law.nyu.edu/jeanmonnet/papers/07/070401.pdf>>, (last accessed on 20.08.2010)

Péter Tilk*

Comments on the Hungarian self-governance and regional development

I. The system of self-governments in Hungary

The Constitution of the Republic of Hungary is Act XX of 1949 as amended, the contents of which was up-dated in line with the expectations of the rule of law prevailing in a constitutional state in 1989, and thus a new Constitution was adopted then in respect of contents albeit not in respect of form. Under the Constitution, Hungary is an independent, democratic constitutional state, a parliamentary democracy. Although the Constitution does not expressly contain the principle of the separation of powers, as regards the system of its express provisions this principle permeates the whole Constitution. At the horizontal level of the separation of powers, state power is divided between the National Assembly, the Government and the courts; in addition, the President of the Republic, the Constitutional Court and local self-governments are regarded as branches of state power by several professionals in the field of public law. Among these, the Constitutional Court has a significant weight in the state organization; local self-governments should rather be classified as part of the vertical level of the separation of power and they do not represent a significant counterweight against the central power. Several reasons for this can be specified:

- local governments are not the embodiments of popular sovereignty;
- their financial support is determined by the central power to a great extent (nearly to the full extent) and according to the Constitutional Court only a situation where the lack of financing renders the functioning of a local government impossible can be deemed unconstitutional (in other words any other restriction or curtailment, however severe, cannot);
- although fundamental rights concerning local governments are safeguarded by the Constitution, they prevail ‘within the framework of the law’ and according to the Constitutional Court, Parliament has a wide scope for action in this respect.

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Under Article 42 of the Constitution the right to local government is vested in the eligible voters of the local communities; this fundamental right – like all other fundamental rights entrenched in the Constitution – is granted protection. There is only one defect in the right to local government: under an amendment of the Constitution adopted in 2010, professional members of the Hungarian Armed Forces, the Police and the national security services cannot have a passive right to vote – in any type of elections – during their service and for a period of three years commencing from the termination or abrogation thereof.

The units of self-government are also stipulated by the Constitution. Under Article 41 the territory of the Republic of Hungary is divided into the capital, the counties and the cities and communities. The capital is divided into districts and districts may be formed in other cities as well (but not in communities). The territory of Hungary is currently divided into 19 counties and the number of cities and communities together is approximately 3,200.

It is an important peculiarity that regions are not referred to by the Constitution thus these units (like the 168 micro-regions) do not enjoy constitutional protection. Nevertheless, regions – designed in different respects – do exist. The most important category is composed of the so called planning and statistical regions corresponding to NUTS 2 divisions. The counties and the capital are classified into the following seven regions:

- Western Transdanubia (counties Győr-Moson-Sopron, Vas and Zala),
- Central Transdanubia (counties Veszprém, Fejér and Komárom-Esztergom),
- Southern Transdanubia (counties Baranya, Somogy and Tolna),
- Central Hungary (Budapest and county Pest),
- Northern Hungary (counties Heves, Nógrád and Borsod-Abaúj-Zemplén),
- Northern Great Plain (counties Jász-Nagykun-Szolnok, Hajdú-Bihar and Szabolcs-Szatmár-Bereg),
- Southern Great Plain (counties Bács-Kiskun, Békés and Csongrád).

The regional units established by the amendment of Act XXI of 1996 adopted in 1999 have adequately stable public administration borders and are of a suitable size for monitoring economic and social processes in a statistically exact manner.

The possibility of replacing counties with regions was elaborated in 2006, however, the government did not command the appropriate size of parliamentary majority required for its adoption. This is the reason why several of their measures (for instance delegating legal supervisory powers over local self-governments to regional organs) failed, which led to unconstitutionality in several cases and to the lack of the legal supervision of local self-governments for years. The intention of those coming into power in 2010 and commanding a more than two-thirds majority is to strengthen the county system: among others the process of strengthening the territorial organs of state administration is a good indicator of it.

II. Regional development in Hungary

1. Between 2004 and 2006 a Minister without Portfolio was in charge of regional development, which indicated the marked importance of regional development for the Government. Under Government Decree No. 293/2004. (X. 28.) Korm. on the Powers and Responsibilities of the Minister without Portfolio in Charge of Regional Development, in effect till August 2006, this minister directed the implementation of tasks concerning territorial development, spatial planning, regional development, tourism, building and construction, and housing affairs. His essential tasks included participation in the implementation of programmes supporting Hungary from the European Structural Funds, he had the power to co-operate in the planning of the comprehensive medium- and long-term strategies concerning rural development with special regard to the implementation of priority territorial and framework programmes in Hungary, developments of priority recreational districts (for instance Lake Balaton, Lake Velence, Vértes) and tasks concerning village and agrotourism. The scope of the responsibilities of this member of the Government also covered the implementation of the international tasks at governmental level concerning territorial development, regional development, building and construction affairs, housing policy, housing affairs, and tourism. In the framework of his supervisory power within the field of territorial development, regional development and spatial planning the minister without portfolio

- directed the creation and operation of concepts and programmes of territorial development and the system of spatial planning, stipulated the detailed requirements concerning their contents,

- the order of their creation, application and maintenance, elaborated concepts, programmes and proposals grounding national territorial and regional policy;
- prepared parliamentary reports on the development of national territorial processes and the implementation of territorial developmental policy;
 - elaborated the concept of national territorial development;
 - elaborated the guidelines on supporting territorial development and decentralization, the conditions and requirements of classifying priority regions, the rules of utilization of financial means serving territorial development, put forward proposals for the ratio of central and regional funds available for territorial development;
 - elaborated the rules of the establishment and operation of entrepreneurial zones, put forward proposals for the determination of entrepreneurial zones;
 - participated in the work of regional and county territorial development councils, fulfilled the tasks in connection with participation in the National Territorial Development Council and the operation of the Council, co-ordinated the activities of the central administrative organs concerning territorial development, in particular the standpoint to be represented in the county, regional and territorial councils;
 - gave an advance opinion on county spatial planning with a view to creating a balance between spatial planning at national, priority territorial and county level;
 - fulfilled the tasks in connection with the commissioners of micro-regions;
 - facilitated research into and the analysis of regional development, concluded co-operation agreements in this field, and promoted the fulfilment of various tasks in the field of research and development;
 - created and operated a system of providing information and data concerning territorial and regional development and spatial planning, put forward a proposal for the order of obligatory data provision;
 - provided guidance for regional chief architects over their activities performed in connection with territorial, spatial and

- settlement development, with special regard to their tasks fulfilled as state administrative authorities;
- in co-operation with the Minister of the Interior provided professional guidance for the heads of the county (metropolitan) administrative offices in respect of their legal supervisory activities over the regional development councils, county development councils, territorial development councils and micro-regional development councils, and the legal control of the territorial developmental associations of local governments;
 - put forward a proposal concerning the representative of the Government in the Lake Balaton Development Council;
 - co-ordinated the tasks of the Government in connection with Lake Balaton, participated in the work of the Lake Balaton Interdepartmental Committee;
 - arranged the preparation and implementation of acts on spatial development plans;
 - took part in fulfilling government tasks concerning territorial marketing activities;
 - contributed to the elaboration of government proposals concerning the reorganization of the system of targeted and earmarked subsidies for local governments.

A further important task was to participate in defining the policy concerning the influx of capital and capital investments abroad, creating the regulatory system of investment incentives and to co-operate with organizations facilitating investment incentives, venture capital companies and financial institutions having an interest in regional development.

The Minister without Portfolio, in respect of his tasks in connection with territorial and regional development, had wide powers in the area of receiving international aids and structural funds. These include the following:

- participating in the elaboration of the implementation system of the National Development Plan;
- participating in the elaboration of the regulation and objectives of the cohesion policy of the European Union, especially the regulatory system;
- arranging the preparation of the operative programmes of regional development;

- co-ordinating regional planning in the course of drafting the National Development Plan.

In addition, the minister participated in the implementation of the government programme for the development of public administration, involving the offices directed and supervised by him, he put forward proposals concerning the application of up-to-date administrative methods and procedures, monitored and with his advice facilitated the preparatory work concerning the decisions on exercising regional powers.

A further important power of his was to exercise asset-handling, founder's and proprietary rights over certain priority organizations dealing with regional development (VÁTI Hungarian Public Nonprofit Limited Liability Company for Regional Development and Town Planning, Regional Development Holding Co.).

2. However, specifying tasks at ministerial level was not the only government measure. The Hungarian Territorial and Regional Development Office (hereinafter: HTRDO), which was established under Government Decree 195/2003. (XI. 28.) operated from 2004 under the supervision of the minister without portfolio in charge of regional development (the decree was in effect for almost three years). This office had a number of essential functions.

In co-operation with the government organs concerned, the HTRDO, *inter alia*,

- ensured the fulfilment of the tasks in the field of territorial and spatial development specified in statutes and statutory instruments pertaining to territorial and spatial development;
- co-operated in the creation and operation of concepts and programmes of territorial development and the system of spatial planning, assisted the elaboration of proposals grounding national territorial and regional policy, elaborated the concept of national territorial development;
- participated in the preparation of parliamentary reports on the development of national territorial processes and the implementation of territorial developmental policy and in the creation of the territorial division of the country;
- assisted the elaboration of the guidelines on supporting territorial development and decentralization, the conditions and requirements of classifying priority regions, the rules of the utilization of the financial means serving territorial

- development, prepared proposals for the ratio of central and regional funds available for territorial development;
- participated in the elaboration of the rules of the establishment and operation of entrepreneurial zones, prepared proposals for the determination of entrepreneurial zones;
 - assisted the work of regional and county territorial development councils, participated in the fulfilment of the tasks in connection with participation in the National Territorial Development Council, the operation of the Council, and the co-ordination of the activities of the central administrative organs concerning territorial development, in particular the elaboration of the standpoint to be represented in the county, regional and territorial councils;
 - assisted the programming and planning activities of the micro-regional development councils and their working organizations, controlled the harmony of micro-regional and national and regional programmes;
 - participated in the fulfilment of government tasks concerning the professional guidance, operation, development and control of the institutional system of territorial development;
 - prepared co-operation agreements aiming at the facilitation of research into and the analysis of regional development, and participated in the fulfilment of various tasks in the field of research and development;
 - participated in operating a system of providing information and data concerning territorial and regional development and spatial planning;
 - participated in providing professional guidance for the heads of the county (metropolitan) administrative offices in respect of their legal supervisory activities over the regional development councils, county development councils, territorial development councils and micro-regional development councils;
 - participated in defining the policy concerning the influx of capital and capital investments abroad, creating the regulatory system of investment incentives and co-operated with organizations facilitating investment incentives, venture capital companies and financial institutions having an interest in regional development, participated in the fulfilment of tasks in connection with national priority developments;

- participated in the elaboration of the implementation system of the National Development Plan, participated in the elaboration of the regulation and objectives of the cohesion policy of the European Union, and assisted the co-ordination of regional planning in the course of drafting the National Development Plan;
- prepared and participated in the implementation of the operative programme for regional development, prepared and participated in the implementation of the programmes of the community initiative INTERREG in which Hungary had a leading role, and participated in the planning and implementation of other INTERREG programmes concerning Hungary;
- operated the Brussels Office of Hungarian Regions.

3. In addition to all this, a regional co-ordinator worked in each territorial development region. The regional co-ordinator organized, co-ordinated and controlled the working of county organizers accomplishing the task of co-ordinating the tasks of micro-regions and the commissioners of micro-regions at county level. The regional co-ordinator

- co-ordinated and organized the activities of county organizers and the commissioners of micro-regions in the territory of the region;
- performed tasks in connection with organization, maintenance of connections and participation in the whole region;
- maintained contacts with central and local government organs operating in the region and with the regional directors of the Hungarian Territorial and Regional Development Office;
- monitored regional tenders and pending applications, and encouraged applications by the help of county organizers;
- attended the meetings and other events of regional development councils and territorial development councils concerning the region;
- transferred to and pooled information necessary for the performance of government activities – especially in connection with the systems of territorial, rural, economic and institutional development and support – from county organizers and the commissioners of micro-regions;
- co-ordinated the activities of regional, county, territorial, micro-regional (territorial) development councils, administrative

offices and territorial developmental associations falling in the scope of the Government Office of Territorial Policy (hereinafter: GOTP) – with a view to the accomplishment of the tasks of the GOTP concerning the operation of the network of the commissioners of micro-regions;

- facilitated – through the participation of county organizers and commissioners of micro-regions – the establishment and the work of territorial developmental associations of local governments covering the territory of more than one county or region;
- facilitated the development of the co-operation among counties and regions and the establishment and work of territorial development councils;
- participated in the process of further developing the organizational integration and decentralization of micro-regional and regional territorial development;
- monitored the implementation of programmes elaborated for handling occasional territorial economic-social conflict situations forecasted by the commissioner of the micro-region;
- collected and analysed the reports created by the commissioners of micro-regions and drafted a summary on the regional level for the Office;
- scheduled and organized the meetings of the commissioners of micro-regions;
- directed and supervised the activities of the commissioners of micro-regions stipulated in the statutory instrument.

4. The National Development Plan I., the New Hungary Development Plan and the New Széchenyi Plan¹ adopted in 2010 played an essential role in regional development.

4.1. Hungary became a Member State of the European Union on 1 May 2004, thus the implementation of the National Development Plan I. commenced in the fifth year of the 2000-2006 programming period. The improvement of the quality of life was set as the long-term objective of the National Development Plan I., the achievement of which was to be ensured by reducing the difference between the incomes in Hungary and

¹ Made on the basis of the information provided at <www.nfu.hu> and <www.rfh-rt.hu>.

the average income in the European Union. In order to achieve this comprehensive aim, four specific objectives were specified:

- improving economic competitiveness, which aimed at improving the competitiveness of the productive sector;
- better utilization of human resources through increasing employment and developing human resources;
- environment of a better quality, highly developed infrastructure including a cleaner environment;
- more balanced regional development achieved through the utilization of the natural, economic and human resource potentials of regions.

These four specific objectives were embodied in five operational programmes:

- Economic Competitiveness Operational Programme (ECOP),
- Agricultural and Rural Development Operational Programme (ARDOP),
- Human Resource Development Operational Programme (HRDOP),
- Environmental Protection and Infrastructure Operational Programme (EPIOP),
- *Regional Development Operational Programme* (hereinafter: *RDOP*).

The Regional Development Operational Programme facilitated a more balanced development of the different regions through the sustainable utilization of the internal resources of the regions, whilst the sectoral operational programmes regarded the implementation of programmes concerning particular theme areas as their prime aim.

The Managing Authority managed three priorities in the period between 2004 and 2006:

- developing the tourism potential of the regions (developing tourist attractions and tourism related services);
- developing regional infrastructure and the communal environment (improving the accessibility of regions and micro-regions lagging behind, rehabilitation of urban areas, developing the infrastructure of elementary and pre-school educational institutions);
- strengthening the regional dimension of human resource development (developing the human capacities of local public administration and civil organizations, supporting local

initiatives concerning employment, promoting co-operation between higher education institutions and local actors and supporting region-specific vocational trainings).

One important methodological breakthrough of the NDP I. was the possibility of measuring the implementation of programmes in a unified manner. Each programme of the NDP I. including RDOP featured a system of indicators, the data of which were collected by a unified monitoring information system (UMIS).

The programme level indicator of RDOP was satisfied; at least 75% of utilizable sources were allocated to the four less developed regions. All available sources could be utilized.

4.2. The Managing Authority manages seven regional operational programmes within the framework of the *New Hungary Development Plan*. Their main objectives are as follows:

- to improve regional economic competitiveness;
- to develop tourist attractions of the regions;
- to develop territorial transport infrastructure and public transport, to improve the state of local environment;
- to encourage energy saving, energy efficiency and the use of renewable energy sources;
- to develop settlements in a comprehensive and integrated manner,
- to reduce social and territorial differences within regions;
- to improve social infrastructure.

However, territories and regions have different potentials for development – due to their differences in conditions. The *South Transdanubia Region*, which is our main concern, is often referred to as the ‘model region of high environmental quality’. The South Transdanubia Region would like to become a model region of high environmental quality through preserving and utilizing in a sustainable manner its existing natural resources and cultural values. In the course of implementation the development of the following is assigned an essential role:

- innovative environmental industry and energetics,
- market driven and creative industry and cultural sector, and
- healthcare industry built on the research base of life sciences and health resorts of the region.

At present the Regional Development Holding Co. also promotes economic development, restructuring and competitiveness in the

region.² The national and regional development undertakings belonging to the holding are at the disposal of both local governments and enterprises to draw EU funds during the period between 2007 and 2013. They provide assistance in generating projects, writing and managing applications, compiling the list of resources needed, implementing complete projects, and arranging the necessary trainings. The RFH Group helps the development of small and medium sized enterprises and local governments. Its undertakings also participate in launching economically promising projects.

4.3. The *New Széchenyi Plan*, adopted in 2010, is built around seven wide issues:

- healing Hungary: healthcare industry;
- renewing Hungary: that is environmental protection and sustainability, energy efficiency – energy rationalization – energy saving;
- home building and housing programme;
- development of businesses;
- science and innovation;
- employment;
- the economy of transport and logistics.

The aim of the New Széchenyi Plan is to utilize resources in a reasonable and appropriate manner, avoid / eliminate the defects of previous programmes and foster the economic growth of the country.

Current government concepts – which are not all known in detail – do not build on the internal regional divisions of Hungary and economic development can be named as their primary aim.

The objectives to be reached in the forthcoming years are – among others – to improve the economic situation of the country, increase the competitiveness of the regions, enhance research and development and modernize the educational system.

² <www.rfh-rt.hu>

Judit Zeller*

Reproductive tourism in Europe

I. Introduction

Mr and Mrs Blood were just about to start a family when the husband got infected by an incurable disease that led to a coma. In his last moments, the wife persuaded the doctors to take sperm samples from her husband in order to be able to carry out an infertility treatment with the man's gametes. As Mrs. Blood asserted to the professionals that they were planning a child together, the sperm samples were taken from the unconscious patient, without the advice of the Human Fertilization & Embryology Authority (hereinafter: HFEA).¹ After the death of Mr Blood, his widow sought to be artificially inseminated with his sperm, but the British Authorities ruled that without a written informed consent to the infertility treatment, it was illegal to retrieve and store the gametes, and it would not be permitted to be treated with that sperm, as well as to travel to another country where she could lawfully be treated. Mrs Blood went to court, and on the second instance she won the case. The court ruled that taking and storing the sperm without a written consent was unlawful, nevertheless, the freedom of movement for services in the European Union ensures the right for citizens to seek medical services in other European countries.²

In the beginning of the 1990s dozens of German women travelled to Dutch abortion clinics to obtain abortion that was forbidden in their home country. After learning about the forbidden procedures, German border guards used to force gynaecological examinations upon women coming back from the Netherlands in search of evidence. Prosecutors also brought criminal charges against women who obtained abortions in other countries.³ Relaxing this severe practice followed only because of the vocal reaction from the media, the strengthening of the German 'pro

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¹The HFEA is the UK's independent regulator of treatment using eggs and sperm, and of treatment and research involving human embryos. It sets standards for, and issues licences to centres. See <<http://www.hfea.gov.uk>>.

² M. Brazier, 'Hard cases make bad law?' 23 *Journal of Medical Ethics* (1997) p. 341. at pp. 341-342.

³ G. Pennings, 'Legal harmonization and reproductive tourism in Europe' 19 *Human Reproduction* (2004) p. 2689. at p. 2691.

choice' movements and finally because the European Parliament in a decision from 1990 eventually suggested the Member States to enable the free decision on abortion.⁴

In Hungary, the caseload before the Parliamentary Commissioner for Civil Rights (Ombudsman) has always been a sensitive indicator of the current crucial issues in society. In the last few years several complaints were addressed to the Ombudsman and launched against fertility centres claiming the denial of certain fertility treatments – primarily surrogacy. It quickly became clear – also without the examination of the complaints – that the fertility clinics were acting in compliance with the legal regulation, and it is the corresponding regulation itself that imposes restrictions on certain fertility treatments. The Health Act of Hungary⁵ (hereinafter: Health Act) allows to perform only the procedures explicitly listed in the legal text.⁶ As surrogacy is not listed among the permitted forms of treatment – taking the Hungarian Criminal Code into consideration as well – surrogate motherhood is qualified as a biomedical research on human subjects, and is therefore a criminal offence, if it is performed without a required licence from the competent authority.

These cases are arbitrarily picked from the abundance of cross-border medical treatment. Research outcomes prove that childless couples travel abroad in increasing number to receive treatments which are prohibited or constrained in their home countries, while they are easily accessible, affordable or even financed by the social security system in other European countries.

'Many assisted reproduction techniques that are considered to be best practice in some EU member states are heavily restricted or outlawed in others, and safety measures introduced in parts of Europe are routinely violated elsewhere.'⁷

All these illustrate the nature and essence of reproductive tourism, a phenomenon the importance of which is growing rapidly, year by year. Reproductive tourism refers to a practice in which people travel across national borders in order to access reproductive technologies and ser-

⁴ Resolution on Abortion *OJ C* 096, 17/04/1990

⁵ Act CLIV of 1997 on Health

⁶ Art. 166 Health Act

⁷ Worries Mount in Europe about Reproductive Tourism, available at: <<http://www.dw-world.de/dw/article/0,,3512148,00.html>>, (last accessed on 31.08.2010)

vices – such as in vitro fertilization, gamete donation, sex selection of the future child, surrogate motherhood etc. – which are not provided, not financed or even prohibited in their home countries.⁸ Reproductive tourism is a part of the common medical tourism, nevertheless the two phenomena show some important differences which underline the application of a special approach and analysis with respect of the former. Although the expression ‘reproductive tourism’ or ‘fertility tourism’ is already embedded in the scientific terminology, it would be more convenient to use the term ‘cross-border reproductive care’. This latter phrase is more neutral, implies no judgement of the reasons of travelling abroad for medical care, has no negative connotations, and describes the phenomenon therefore more precisely.⁹

It is important to note that reproductive tourism is not a counter-balanced phenomenon, not even in Europe. There are countries that usually ‘export’ clients and other countries that usually receive patients for fertility services. The Netherlands, the United Kingdom or the Czech republic are favourite destinations of reproductive tourists, while – according to a research – almost two-thirds of cross-border patients come from four countries: Italy, Germany, the Netherlands and France.¹⁰ The Belgian statistics show that approximately 30% of patients receiving in vitro fertilization come from abroad, almost 60% of the recipients of oocyte donation are foreigners, and approximately half of the patents come from Germany and France for preimplantation diagnosis.¹¹ The role of a certain country depends on diverse indicators. In the following, I would like to identify the factors that affect the cross-border movements in fertility care. The various causes behind the phenomenon of reproductive tourism can be summarized in three major group of reasons (i) legal regulation, (ii) lack of expertise and (iii) costs.

⁸ R. J. Martin, ‘Reproductive Tourism in the Age of Globalization’ 6 *Globalizations* (2009) p. 249. at pp. 250-251.

⁹ A. P. Ferraretti et al., ‘Cross-border reproductive care: a phenomenon expressing the controversial aspects of reproductive technologies’ 20 *Reproductive BioMedicine Online* (2010) p. 261. at p. 262.

¹⁰ F. Shenfield et al., ‘Cross border reproductive care in six European countries’ 25 *Human Reproduction* (2010) p. 1361. at p. 1362.

¹¹ Pennings, op. cit. n. 3, at p. 2690.

II. Legal regulation

Cross-border reproductive care is not a new topic in Europe, as ever since assisted reproduction technologies (hereinafter: ART) began to develop, the European countries – according to the prevailing ethical, moral, religious, political and sociological opinions in their societies – regulate the field of reproductive medicine and fertility treatments differently.¹² Analyzing the regulation of ART procedures in different countries, regulatory model-groups can be formed on the basis of the five main factors described in the following.

1. Personal requirements of participation

The regulation usually sets conditions that have to be fulfilled by the person wanting to participate in the treatments. One of these conditions is the marital status or sexual orientation. Fertility treatments are sometimes accessible only for married couples or life-partners, in more liberal systems also for singles. Gays or lesbians are either not mentioned in the regulation, or the treatment is explicitly denied for them by law. Another crucial condition for participants is the age. In most cases, reaching the reproductive upper age limit is a ground for exclusion from fertility care.

2. Use of gametes

In the simplest case, ART is performed with the gametes of the partners who are foreseen to be the social and legal parents of the future child. Nevertheless, if one or both of the partners are affected by a disease that leads to the lack of gametes appropriate for ART, donated cells shall be used. Donation itself can be permitted or prohibited, if the regulation is permissive, it still can prescribe anonymity or – on the contrary – the publicity of certain personal data of the donor. Some countries allow the usage of gametes of deceased, when the retrieval occurred in the life of the participant, others not.

3. Number of embryos created and implanted

Depending on the wish of the patients of ART procedures, the domestic regulation can be too permissive or too restrictive concerning the number of embryos fertilized in vitro and implanted in the womb. In

¹² E. F. Morris, 'Reproductive tourism and the role of the European Union' 8 *Chicago Journal of International Law* (2008) p. 701. at p. 703.

some countries only a few eggs shall be retrieved from the woman, because the regulation prescribes the fertilization of all artificially retrieved eggs and the implantation of every embryo that has been created in the procedure, regardless of their quality or the age of the woman. In these countries the donation or the cryopreservation of embryos as well as the use of embryos for scientific research purposes is usually prohibited. This regulatory model can be understood as a solution that promotes the greater success rate with the implantation of the maximum number of embryos. On the other hand, the implantation of more than one embryo results in an increased number in multiple pregnancies, with all the risks involved for mother and children, and – paradoxically – in a reduction in success rate. If the state accepts the latter view, the legislator usually adopts a different regulation, namely one promoting the ‘single embryo transfer’ and allows the implantation of only one fertilized egg.

4. Dispositional rights over the embryo

In most of the European countries the legislator takes the nature of the right (or freedom) of procreation into consideration when regulating the dispositional rights over the embryo. This means that both partners have the same extent of rights, and decisions on the fate of the embryo can only be made jointly. Yet there are some countries in Europe which regulate the right of disposal differently for the female and the male partner: they usually ensure a somewhat greater extent of disposition for the female partner than for the male partner. This generally means that if the eggs are already fertilized, the decision of implantation is up to the female partner. Nevertheless partners can agree on the future disposal over the embryos. This agreement typically excludes the implantation for the case of the break-up of the partnership, or death of one of the partners.

5. Future utilization of surplus embryos

Surplus embryos – embryos created in the fertility treatment but not implanted in the uterus – can generally be used in three different ways according to the European regulatory models. They can be frozen and stored for a later use by the gamete providers themselves, donated to other couples participating in fertility treatments or offered for research institutes for scientific research. The latest reason is important, because

the European Bioethics Convention¹³ prohibits the creation of embryos only for research purposes.

The relevant elements of the national regulation of European countries according to the abovementioned 5 factors are summarized in the following chart.

Table 1 Regulation of European states

Austria ¹⁴	<ul style="list-style-type: none"> - accessible for married couples or life-partners of different sex (for the latter only after special counseling) - informed, written consent of both partners (in form of a notarized document for life-partners) - possibility of withdrawal (woman: implantation, man: fertilization) - research and donation forbidden - cryopreservation for 1 year
Belgium ¹⁵	<ul style="list-style-type: none"> - accessible for married couples or life-partners (also for partners of the same sex) - informed, written consent of both partners - gamete donation allowed - use of gametes of deceased allowed in case of previous consent - number of implanted embryos depends on the age (SET¹⁶ preferred) - research, donation and cryopreservation allowed – with informed consent - cryopreservation length: ‘reasonable time frame’
Cyprus	<ul style="list-style-type: none"> - accessible for married couples or life-partners of different sex
Czech Republic ¹⁷	<ul style="list-style-type: none"> - accessible for married couples or life-partners of different sex - informed, written consent of both partners

¹³ Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine. Oviedo, 04. 04. 1997. ETS no. 164

¹⁴ Fortpflanzungsmedizingesetz BGBl. Nr. 275/1992

¹⁵ N. Schiffino and F. Varone, ‘Regulating biomedicine in Belgium and France: neighboring countries, diverging policies’, *German Policy Studies*, available at: <http://www.accessmylibrary.com/coms2/summary_0286-33318014_ITM>, (last accessed on 12.03.2009).; Comité Consultatif de Bioéthique (Belgium): Avis no. 19 du 14 octobre 2002 relatif à la destination des embryons congelés.; Comité Consultatif de Bioéthique (Belgium): Avis no. 28 du 21 juin 2004 relatif à la procréation après de décès du/de la partenaire. Available at: <<http://portal.health.fgov.be>>, (last accessed on 12.03.2009)

¹⁶ Single Embryo Transfer

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	<ul style="list-style-type: none"> - informed written consent of the man for implantation (not older than 24 months) - research, donation and cryopreservation allowed – with informed consent
Denmark	<ul style="list-style-type: none"> - accessible for married couples or life-partners - informed, written consent of both partners and donor - implantation with extra informed written consent of the partners - research, donation and cryopreservation allowed with informed consent - premature extermination of the embryo in the case of death of one of the partners, or in the case of divorce or break-up
Estonia	<ul style="list-style-type: none"> - accessible for married couples or life-partners of different sex and single women
Finland	<ul style="list-style-type: none"> - no regulation by act – permissive practice
France	<ul style="list-style-type: none"> - accessible for married couples or life-partners of different sex living together since at least 2 years - informed, written consent of both partners – 1 month time for consideration (for the donor and his/her partner as well) - gamete donation allowed - research, donation and cryopreservation allowed – with informed consent - cryopreservation for 5 years
Germany	<ul style="list-style-type: none"> - accessible for married couples or life-partners of different sex - explicitly forbidden for single women or life-partners of the same sex - informed, written consent of both partners - implantation with extra informed written consent of the woman - research only on foreign ('imported') embryos - cryopreservation allowed only before the end of the fertilization process or in the case of 'emergency'
Greece	<ul style="list-style-type: none"> - accessible for married couples or life-partners of different sex - informed, written consent of both partners - gamete donation allowed - use of gametes of deceased allowed in case of previous con-

¹⁷ O. Dostál, 'Several remarks on new legal regulation in the sphere of assisted reproduction', in H. Konečná, ed., *Reproduction health 2007. What to do so that you have children when you want to have them* University of South Bohemia (České Budějovice 2007), p. 4. at p. 5-6., available at: <[http://www. hana-konecna.cz/download/rz2007_3.pdf](http://www.hana-konecna.cz/download/rz2007_3.pdf)>, (last accessed on 31.03.2009)

	<ul style="list-style-type: none"> - sent - surrogacy permissible
Italy	<ul style="list-style-type: none"> - accessible for married couples or life-partners of different sex - donation of gametes is banned - a maximum of three oocytes can be fertilized and every embryo has to be implanted, regardless of its quality or the age of the woman. - research, donation of embryos is forbidden
Netherlands	<ul style="list-style-type: none"> - no regulation by act – permissive practice
Norway	<ul style="list-style-type: none"> - accessible for married couples or life-partners - informed, written consent of both partners required - gamete donation is banned - cryopreservation allowed for 3 years
Spain	<ul style="list-style-type: none"> - accessible for married couples or life-partners of different sex - informed, written consent of the woman, if married, also the written consent of the husband - withdrawal of consent for the woman possible at any stage - use of gametes of deceased allowed in case of previous consent - cryopreservation allowed
Sweden	<ul style="list-style-type: none"> - accessible for married couples or life-partners of different sex - informed, written consent of the woman, written permission of the male partner - gamete donation allowed only in open form - cryopreservation allowed for 1 year
United Kingdom ¹⁸	<ul style="list-style-type: none"> - accessible for married couples or (most readily) for life-partners of different sex - no explicit prohibition for single/lesbian women (but the welfare of the child – need for a father – has to be considered) - informed, written consent of both partners in all stages of the process - gamete donation allowed - use of gametes of deceased allowed in case of previous consent - possibility of withdrawal of the consent at any stage of the treatment for both partners - cryopreservation allowed for 10 years

¹⁸ E. Jackson, *Regulating Reproduction* (Oxford-Portland-Oregon, Hart Publishing 2001)

As we see, as a result of the regulation, people can be excluded from several types of treatments, partly because the treatment itself is prohibited, partly because the persons themselves do not meet the requirements of the legal regulation. As Pennings emphasizes,

[a]ll legislation on ethical issues, including the issues generated by the application of medically assisted reproduction, raises a number of questions regarding the relationship between ethics and law. How should the legislator in a post-modern society, characterized by a multitude of groups holding different moral outlooks, react to moral conflicts? This is a basic problem for all democracies. The most obvious solution to this position is to forsake legislation. However, 'no law' is also a moral position. [...] A nation without legislation on bioethical issues supports the liberal position that every citizen should decide according to his or her moral convictions.¹⁹

III. Lack of expertise

Although special procedures of fertility treatment is not prohibited, it can take a long time until a group of experts is trained well enough and gains the necessary time of practice to perform them. A lack of expertise can emerge especially if most of the country's specialists – the most significant ones who give the leading opinion – are dedicated to a certain kind of moral or religious conviction that does not allow some treatments to be performed. This problem is nevertheless quite easy to solve – at least owing to the free movement of workers in the European Union – as specialists can be invited to the country and the level and quality of service can be ameliorated. Regarding the Hungarian model, according to Article 70/D of the Hungarian Constitution,²⁰ everyone shall have the right to the highest possible level of physical and mental health, and the state shall implement this right – among others – through the organization of health care institutions and medical care. This means that the state has to ensure the legally allowed health services at least on the basic level for everyone. Nevertheless, the lack of expertise can lead to long waiting lists. Taking into consideration the correlation between age and fertility, we can see that age is a crucial factor in fertility. Patients or clients therefore just can not afford themselves to wait – literally – for ages for a single step of intervention, because their chances

¹⁹ Pennings, *op. cit.* n. 3, at p. 2689.

²⁰ Act XX. of 1949

decrease year by year. In such cases making use of a cross-border treatment is an obvious solution.

IV. Costs

Costs as a motive for cross-border medical care is considered as a special factor amongst the reasons of reproductive tourism. The reason for this is that 'the classic argument' against reproductive tourism is inequality of access, namely that only people with good financial circumstances – usually coming from a country with a well-established legal background – can afford to travel to countries with a more inaccurate regulation, and buy themselves the services which are prohibited at home.²¹ Nowadays we can distinguish between three categories of patients: those who have to rely on the slim chance of treatments financed by the national health insurance, those who can pay for treatments allowed in their home countries but performed only in private institutions, and those who can pay for the services provided in other European countries, which are prohibited in the national law of their homes.²² In short, cost disparities play also a big role in the flow of reproductive tourism. In some countries, treatments are financed by the health insurance, in others the costs shall be born by the patients themselves.

Lower costs have made the countries of Eastern and Central Europe (Hungary, Czech Republic, Romania, Slovenia) favorite destinations for reproductive tourists. The differences in the cost of living – including the costs of medical treatments – amongst the European countries and the opportunity to make use of cross border medical care can make fertility treatments more easily accessible for some couples. Nevertheless, as most ART treatments are still too expensive for an average couple, they usually remain in the 'luxury sector' of health care.²³ In Hungary for example, the first five treatment cycles are financed by the health insurance, the costs of the following trials are borne by the patients themselves. The costs of an infertility treatment vary between 1000-1500 Euros, but taking the medical treatment into consideration that usually precedes and follows the IVF and implantation itself, the costs can encompass almost 2000 Euros.

²¹ Pennings, *op. cit.* n. 3, at p. 2690.

²² Brazier, *op. cit.* n. 2, at p. 342.

²³ L. C. Ikemoto, 'Reproductive tourism: Equality concerns in the global market for fertility services' 27 *Law and Inequality* (2009) p. 277 at p. 299.

Inequalities in connection with bearing the costs question actually the principle of equality. It is namely unjust when only people with a high socio-economic status can afford the treatments performed abroad. To solve the problem of inequality, legislators are often susceptible to recourse to the tool of restriction that is to say to deprive the financially capable people also from the opportunity to seek opportunities in a different country. If we take a closer look at the Hungarian regulation we meet precisely this 'solution'. One should notice that the personal scope of the Hungarian Criminal Code lays down that Hungarian law shall be applied to crimes conducted by Hungarian citizens abroad, which are deemed criminalized in accordance with Hungarian law.²⁴ In consequence, treatments performed on Hungarian nationals abroad that are not allowed in Hungary are criminal offences in the sense of the Hungarian law. According to Pennings, evoking the principle of inequality

'is a strange argument, especially if it is supported by those who strive for a restrictive legislation. The problem could be solved by a more permissive regulation concerning ART or by a different model of financing the treatments from the health insurance.'²⁵

Yet, the truly dangerous aspect of the differences in costs cannot be neglected: the populations of the poorer countries are exposed to exploitation by nationals of the richer. In countries, where the wages are low, people are attracted by the opportunity of 'putting their own body on the market' as a gamete donors or surrogates. The promise of large amounts of money may obviously have an effect on the informed consent of the donors. In addition, the general commercial atmosphere surrounding the recruitment of donors and the provision of infertility treatment does not promote the focusing on ethical standards.

V. Do we need a common regulation for ART?

Considering the abovementioned factors what would be the most advantageous solution for legislation on fertility treatment? Would it be best to set common European standards or to allow the national legislators to regulate? Is there a need to bar reproductive tourism or not?

In the field of biomedicine – therefore within the regulation of reproductive treatments – many attempts have been made on the international as well as on the supranational level to formulate or codify bioethical

²⁴ Art. 3 (1) of the Act IV of 1978 on the Criminal Code of Hungary

²⁵ Pennings, *op. cit.* n. 3, at p. 2690.

norms in the form of legal regulation. Yet it is a common experience that international and supranational norms reflect a highly ambivalent point of view in regulating these topics. On the one hand, they urge to formulate a common thesis which is acceptable for everyone; on the other hand they endeavor not to infringe any of the leading moral approaches followed in the states in question. This twofold ambition usually leads to empty, meaningless or – what is even more damaging – to obscure contents of the norms. If the regulation setting the common standards yet does not remain insignificant, it generally takes the stricter, more restrictive measures as a starting point, that is to say it hinders the tendencies of liberalization. This is apprehensible in the Biomedicine Convention as well, to which more European countries have not acceded – precisely because of the mentioned tendencies. The common – supranational – norm would be valuable and capable of solving the problems only if it regulated its subject meaningfully – not only symbolically – with a required precision, and if it allowed the Member States a certain scope of action.

It is questionable, whether a supranational norm coming to force today would meet these requirements. For the moment it seems that the regulation on the European level keeps us waiting. The current situation is not yet suitable to establish a consensus-based, effective regulation on the supranational level. Nevertheless, the diversity of national regulations can be regarded as a ‘research laboratory’, or as a ‘natural experiment’ from the observations of which useful information and knowledge can be derived.²⁶ ‘United in diversity’ means in this context that the experiences of certain states can be collected, systematized, and used for drawing general conclusions. The task of the organs of the European Union in this process is to facilitate the intra- and interstate dialogues that can reach out to establish a common European standard. The final decision belongs naturally to the citizens, who can shape their laws by the tools of democracy.

²⁶ Ibid.

Mirela Župan*

European judicial cooperation in cross border family matters

I. Introduction

Legal cooperation in cross border family law has gained more importance with human migrations and mobility being fostered. Legal problems concerning the family can no longer be adequately solved in a national framework because, by their very nature, they move beyond national frontiers.¹ The origins of international cooperation in cross border family cases date back to the beginning of the 20th century.² Later on it was periodically fostered on the worldwide scene, especially due to humanitarian concerns after the Second World War.³ From that point, many conventions were drafted both on regional⁴ and bilateral⁵ levels. The new decade of international judicial cooperation in family matters

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¹ M. Blair, et al., *Family law in the World Community* (Durham, Carolina Academic Press 2009) p. 30-31.

² P. M. North, *Development of rules of private international law in the field of family law* (Collected Courses of the Hague Academy of International Law, Martinus Nijhoff Publishers 1980) p. 17.

³ M. Verwilghen, *Explanatory Report on the 1973 Hague Maintenance Conventions*, Acts and Documents of the Twelfth Session 1972. (The Hague, Publication of the Hague conference on Private International Law 1975) p. 384.

⁴ Significant regional cooperation in family cases exists for a century among Scandinavian states. M. Verwilghen, 'Les realisation de L'Union nordique de droit international prive', in P. Foyer, and Simon-Depitre eds., *Institut de recherches juridiques comparative; L'obligation alimentaire en droit international privé*, Vol. II (Paris, 1987) p. 181 at p. 189. Even under the Brussels II *bis* regime special provisions are applicable to relations of Finland and Sweden with Denmark, Iceland and Norway as regards the application of the 'Nordic Marriage Convention' of 6 February 1931. See *infra* point IV.

⁵ Bilateral treaties were widespread among the former soviet communist Central and Eastern European countries. The effectiveness of universal and regional unification led to marginalization of bilateral treaties. In the overall context of this research it must be stated that Hungary and Croatia have a binding bilateral regime in cross border family matters provided by 1968 Agreement. Agreement between the SFRY and NR Hungary on mutual legal service on 7.3.1968., 3/1968 Agreement amending the Agreement between the SFRY and NR Hungary on mutual legal transactions in 1968, 25.4.1986. 1/1987. List of bilateral international agreements undertaken by succession, NN-MU 13/1997

started with the European Community's engagement. Evolution of legal and political mandate for activities of EU institutions in this field is marked as a most prominent and most intensive international judicial cooperation ever.

The focus here is on this extensive EU judicial cooperation in cross border family matters. The present chapter encompasses the following. The overview of existing modes of legal cooperation in cross border family matters (section II. Promoting judicial cooperation in cross border family matters – Europe and beyond). Next, we will look at the legal and political empowerment of the EU in this field (section III. European judicial cooperation in cross border family matters, 1. Evolution of judicial cooperation in cross border family matters – legal and political background of EU mandate), which provides a detailed analysis on basic components of European judicial cooperation in cross border family matters from the perspectives of (a) Unification of law; b) Consideration for basic human rights; c) Fostered cooperation of central authorities; d) Fostered cooperation through judicial networking.). Cost-benefit analyses are provided for on the main points of common rules on divorce, parental responsibility and maintenance obligation (section IV. 1. Brussels II bis regulation; 2. Maintenance Regulation.) Finally, the fifth chapter serves, in lieu of conclusion, to discuss future perspective of European judicial cooperation in cross border family matters.

II. Promoting judicial cooperation in cross border family matters – Europe and beyond

The scheme of European judicial cooperation in cross border family matters is twofold. On the one hand EU Member States are participating in judicial family matters centered cooperation in the framework of various international institutions; also they enter into bilateral agreements. Legal cooperation in cross border family matters in the above mentioned wider sense can be found with three international organizations. It first appeared within the framework of the Hague conference early convention on custody (1902), which is today only the first in the line of now 19 conventions regulating cross border family matters within the Hague conference on private international law

(hereinafter: HCCH).⁶ A significant endeavor in fostering legal cooperation in family matters is done within the framework of the United Nations (hereinafter: UN) as well⁷. An illustrative example to this can be the following: Article 27(4) of the UN Convention on the rights of the child (1989) particularly aims at promoting enforcement of cross border family maintenance by encouraging judicial cooperation among signatories.⁸ Furthermore, for almost half a century the EU Member States participate in fostering legal cooperation in family matters within the Council of Europe (hereinafter: CoE). Legal protection of families is to be achieved through common standards and harmonization of Member States family policies. Amongst numerous CoE instruments many conventions and resolutions directly deal with legal cooperation in cross-border family cases,⁹ focusing mainly on legal protection of children in cross border situations.

The core of modern (narrower) European judicial cooperation lies with activities of EU institutions. The dominance of EU judicial cooperation raises the issue of the prospects of EU Members States' further engagement in any other form of universal or regional judicial cooperation with third states. Discussing the doctrine of EU external powers would surely go beyond the scope of this chapter.¹⁰ However, it should be pointed out that the EU has found a way to balance the universal and regional cooperation and unification. The EU has gradually taken over competence to conclude agreements with third countries regarding family matters. In parallel to this, the competence of

⁶ The early Hague convention on custody (Convention du 12 Juin 1902 pour régler la tutelle des mineurs) is of the old conventions not applying any more. A full list of conventions is available at: <www.hcch.com>, (last accessed on 17.06.2010).

⁷ M. Blair, et al., op. cit. n. 1, at p. 61.

⁸ Art. 27(4) States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

⁹ For a comprehensive overview see: Secretariat of the Directorate General of Human Rights and Legal Affairs (DG-HL): *Council of Europe achievements in the field of law: family law and the protection of children* (Strasbourg, 2008).

¹⁰ For details see A. Malatesta, *The external dimension of EC private international law in family and succession matters* (Padova, CEDAM 2008).

Member States in these matters eroded. Since 3 April 2007 the EC has become a member of HCCH¹¹, where it now acts and accedes to conventions on behalf of EU Member States. Consequently the Council Regulation (EC) No 664/2009 was issued that established a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations.¹²

III. European judicial cooperation in cross border family matters

1. Evolution of judicial cooperation in family matters – legal and political background of EU mandate

The European Union influences private legal status of its citizens by means of policies promoting free markets and the freedom of movement of persons¹³ but also through the ideas of common identity and affiliation to modern Europe.¹⁴ While encouraging free trade, the EU raises the issue of cross border elements with respect to families to the surface but, at the same time, it contributes to frequent dilapidation of family life.¹⁵ An increase in number of disputes with international elements has a potential of unfavorable accumulation of family matters at courts.¹⁶ If the assumption that the EU actually renders private aspects of its citizens' life more difficult is accepted, it should remedy this unfavorable effect by creating sophisticated systems for dealing with

¹¹ Council Decision 2006/719/EC of 5 October 2006 on the accession of the Community to the Hague Conference on Private International Law *OJ L 297*, 26.10.2006, pp. 1-14.

¹² *OJ L 200*, 31.7.2009, pp. 25-31.

¹³ Art. 18(1) Treaty establishing the European Community – EC Treaty (consolidated version) *OJ C 115*, 9.5.2008; Art. 45. Charter of Fundamental Rights of European Union, *OJ C 2000*, 364/01

¹⁴ P. McEleavy, 'Free Movement of Persons and Cross Border Relationship', 7 *International Law FORUM du droit international* (2005) p. 153 at. p. 153.

¹⁵ L. Ackers and H. Stalford, *A Community for children? Children, citizenship and internal migration in the EU* (Aldershot, Ashgate 2004) p. 59.

¹⁶ D. Martiny, Die Zuständigkeit in Unterhaltssachen (Art. 5. Nr. 2. Brüssel I – VO, und die Rechtsprechung des EuGH (the material used by courtesy of the author), p. 1.

numerous consequences of discontinuation of life unions. The EU functions according to the principle of conferral, so an appropriate legal basis must be found for each activity.¹⁷ From a historical perspective, when the judicial cooperation of family matters was at stake pursuant to Article 220 of the pre-Amsterdam TEC the Member States initiated harmonization of several aspects pertaining to international civil procedure. The Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters¹⁸ explicitly excluded family-law-related matters from the *ratione materiae* conventional field (Article 1(2)), although the exception was made in favor of maintenance obligations.¹⁹ At that point, the Community dealt with family law issues for the first time,²⁰ although voices were raised qualifying the treatment as inappropriate.²¹ The Member States wished to additionally reinforce their cooperation in this part of *acquis* by passing the first convention on family-law-related matter within the EC: the 1990 Convention on the Simplification of Procedures for the Recovery of Maintenance

¹⁷ ‘The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.’ Art. 5(1) Lisbon TEU (ex art. 5(1) TEC). Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, *OJ C* 306/10

¹⁸ Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters *OJ L* 299, 31.12.1972 p. 0032 – 0042; consolidated version *OJ C* 27, 26. 1.1998

¹⁹ The different status of family law related issues has been justified by the fact that not only substantive law approach but also conflict of laws approaches of Member States to the issues of family law are so different that their inclusion in the field of application would endanger the objectives of mutual enforcement of judgements and harmonized implementation of the Convention. Jenard Report on the Convention on jurisdiction and the enforcement of judgements in civil and commercial matters, *OJ C* 59/1979. p. 10.

²⁰ F. Collienne, ‘Le contentieux familial provisoire: aspects de droit international privé’, in P. Wautelet, ed., *Actualités du contentieux familial international* (Larcier, 2005) p. 221 at p. 230.

²¹ ‘[...] the economically motivated nature of this instrument was neither adjusted to such a significant and frequently disputable part of family law issue’ [...] ‘nor were rights of children adequately protected thereby’. H. Stalford, ‘Old Problems, New Solutions? – EU Regulation of Cross-National Child Maintenance’ *15 Child and Family Law Quarterly* 3 (2003) p. 277 et seq.

Payments.²² It, however, never entered into force. At that time, the *acquis* dealt with family law on a sector-specific basis and only indirectly,²³ whereas the approach to family policy and its institutions was incoherent and disharmonized.²⁴ The EC institutions launched several calls for creation of ‘a coherent and integrated’ EC family policy at least by means of ‘soft-law’ mechanisms.²⁵ In the end of the 1990s, the European Parliament called for development of EU family policy with respect to cross border disputes, an action being accompanied with coordination mechanisms among the Member States aiming at protection of children. The Treaty of Maastricht provided an institutional framework for intergovernmental cooperation and authorized the EU to act in the area of judicial cooperation in civil matters.²⁶ The Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial matters²⁷ denoted the beginning of deeper involvement of the Union into family law which, since then has become a constituent part of the ‘European integration phenomena’.²⁸ Still, the Maastricht Treaty did not offer adequate

²² M. Sumampouw, ‘The EC Convention on the recovery of maintenance abroad’, in M. Sumampouw, et al., eds., *Law and reality: essays on national and international procedural law in honour of Cornelis Carel Albert Voskuil* (1990) p. 315 at p. 315 et seq.; J. Pirrung, ‘Zugang zum Recht in der Europäischen Union’, in G. Barrett, ed., *Creating a European Judicial Space – prospects for improving judicial cooperation in civil matters in the European Union. Vol. 30* (Trier, Academy of European Law 2001) p. 37.

²³ This author contributed with a more detail discussion on internal competencies of the European Union within private international family law in a paper: M. Župan and V. Puljko, ‘Shaping European Private International Family Law’ 7 *Slovenian Law Review* (2010) p. 6 et. seq.

²⁴ C. McGlynn, ‘The Europeanization of Family Law’ 35 *Child and Family Law Quarterly* (2001) p. 35.

²⁵ Resolution on Family Policy in EC, 1983. *OJ C* 184/116. Joined by other institutions: Communication from Commission on Family Policies, COM(89)363 final.; Conclusions of the Council and of the ministers responsible for family affairs meeting within the Council of 29 September 1989 regarding family policies, *OJ C* 277/2 1989.; Resolution of 14 December 1994, on protection of families and family units at the close of the International Year of the Family, *OJ C* 18/96. 1995; Resolution on the protection of families and children, *OJ C* 1999. 128/79

²⁶ Treaty on the European Union, *OJ C* 1992. 191, Art. K.1

²⁷ *OJ C* 1998. 221/1

²⁸ Borrás Report on the Convention on Jurisdiction and the Recognition and Enforcement of Judgements in Matrimonial Matters. *OJ C* 1998 221/27

replacement of the existing convention regime,²⁹ which occurred eventually when the Treaty of Amsterdam moved judicial cooperation (from the third) to the first pillar. Such 'communitarization' gave a new basis for acting in this field.³⁰ The new Chapter IV entitled 'Visas, Asylum, Immigration and Other Policies Related to Free Movement of Goods' (Articles 61 to 69), stipulated a regulation on judicial cooperation in civil matters,³¹ where Article 65 clarified the meaning of the notion of judicial cooperation in civil matters.³² The Appropriateness of Article 65 as legal basis for judicial cooperation in family matters in the term of civil matters was widely discussed.³³ These debates lost significance after the Treaty of Nice undoubtedly confirmed the Community competence explicitly determining that 'the procedure of unification applies to measures in the field of family law'. Flexible interpretations of Community jurisdiction pursuant to Article 65 have

²⁹ Subsidiary conventions signed within the framework of the third pillar only scratched the genuine *acquis* (see T. Hartley, *Temelji prava Europske Zajednice* [The Foundations of European Community Law] (Rijeka, Pravni fakultet Sveučilišta u Rijeci 2004.) p. 99-101.) since they lacked the basic attributes of *acquis communautaire* (supremacy of the Community law, jurisdiction of the Court of Justice etc.) For details see D. Chalmers and A. Tomkins, *European Union Public Law* (Cambridge, Cambridge University Press 2007) p. 131, at p. 183 and p. 281.

³⁰ Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts, *OJ C 340*, 10 November 1997. J. Basedow, 'The Communitarization of the Conflict of Laws under the Treaty of Amsterdam', *37 Common Market Law Review* (2000) p. 687 et seq.; O. Remien, 'European Private International Law' *38 Common Market Law Review* (2001) p. 53.

³¹ Communitarization was opposed by the United Kingdom, Ireland and Denmark and these countries introduced separate regime by Protocols to the Treaty of Amsterdam (then Protocols No. 4 and 5). By the entry into force of the Lisbon Treaty, pursuant to Art. 3 of Protocol No. 21 the United Kingdom and Ireland have received an opt-in related to Chapter V, whereas Denmark has been excluded from this phase of harmonisation (Art. 2). Protocol on the position of the United Kingdom and Ireland (No. 21); Protocol on the position of Denmark (No. 22), Treaty of Lisbon

³² For details see M. Župan, *Pravo najbliže veze u hrvatskom i europskom međunarodnom privatnom ugovornom pravu* [Closest connection principle in Croatian and European private international contract law] (Rijeka, Pravni fakultet Sveučilišta u Rijeci 2006) p. 267, side note 419.

³³ J. Meeusen, 'Fifteen Theses on Brussels I, Rome I and the EU's Institutional Framework', in J. Meeusen, et al., eds., *Enforcement of international contracts in the European Union: convergence and divergence between Brussels I and Rome I* (Antwerp, Intersentia 2004) p. 47.

enabled extension of the *acquis* to the matter of international family law.³⁴ In this sense, the Treaty of Amsterdam represented a real ‘hard law’ mechanism for regulating international family law issues as any cross border family issue capable of hindering market freedoms became a potential subject of harmonization.³⁵ The Action Plan of the Council and Commission on how to implement the provisions of the Treaty of Amsterdam in the area of freedom, security and justice in the best possible manner³⁶ foresaw action of the EC in the sphere of international family law in three areas: maintenance obligations, divorce and parental custody, and matrimonial property, particularly in case of divorce and discontinuity of the family union. After an ambitious programme of EU activities in the area of freedom, security and justice for the period 1999-2004³⁷ was presented in Tampere in 1999, it became one of the priority policies of the EU.³⁸ The Tampere Programme conveyed the purpose of the European judicial area.³⁹ It highlighted the need for adoption of common procedural rules in order to simplify cross border disputes, which was explicitly stated in the Chapter dealing with efficient enforcement of justice⁴⁰ and mutual recognition of judicial

³⁴ M. Jänterä-Jareborg, ‘Unification of International Family Law in Europe – A Critical Perspective’, in K. Boele-Woelki, ed., *Perspectives for the unification and harmonisation of family law in Europe* (Antwerp-Oxford-New York, Intersentia 2003) p. 194 at p. 199.

³⁵ H. Spamann, ‘Choice of Law in a Federal System and an Internal Market’, Harvard Jean Monnet Working Paper No. 8/01, available at: <<http://www.jeanmonnetprogram.org/papers/01/012601.html>>, (last accessed on 23.4.2010)

³⁶ Action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam in the area of freedom, security and justice, *OJ C/19/1*. 1999

³⁷ Tampere European Council, Presidency Conclusions, 15-16 October 1999, available at: <http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/00200-r1.en9.htm>

³⁸ Communication from the Commission to the Council and the European Parliament. Area of freedom, security and justice; Assessment of the Tampere programme and future orientations, Brussels, 2.6.2004. COM(2004)4002 final

³⁹ ‘In a genuine European area of justice individuals and businesses should not be prevented or discouraged from exercising their rights by the incompatibility or complexity of legal and administrative systems in the Member States.’ Tampere European Council, op. cit. n. 37.

⁴⁰ ‘The European Council invites the Council, on the basis of proposals by the Commission, to establish minimum standards providing an adequate level of legal

decisions.⁴¹ The key aspect of all the activities in the field of judicial cooperation in civil matters detailed in the Tampere Programme was mutual recognition of decisions.⁴² This policy was further developed by the adoption of the so-called Hague Programme: strengthening freedom, security and justice in the EU for the period 2005-2010.⁴³ Developing the mutual recognition agenda remained a priority. Its ratio was that completion of the mutual recognition programme (based on mutual recognition and enforcement of judgments), along with development of an effective cross-border litigation regime (harmonization of procedural matters being necessary to enable mutual recognition) would result in eliminating typical problems inherent in cross-border litigation.⁴⁴ The Hague Programme clearly called for the development of EU action in family law: the Commission was invited to submit proposals on maintenance, matrimonial property, and divorce. The Programme also foresaw that 'rules of uniform substantive law should only be introduced as an accompanying measure, whenever necessary to affect mutual recognition of decisions or to improve judicial cooperation in civil matters'.

aid in cross-border cases throughout the Union as well as special common procedural rules for simplified and accelerated cross-border litigation [...]'. Ibid.

⁴¹ 'In civil matters the European Council calls upon the Commission to make a proposal for further reduction of the intermediate measures which are still required to enable the recognition and enforcement of a decision or judgment in the requested State. As a first step these intermediate procedures should be repealed for titles in respect of small consumer or commercial claims and for certain judgments in the field of family litigation (e.g., on maintenance claims and visiting rights). Such decisions would be automatically recognized throughout the Union without any intermediate proceedings or grounds for refusal of enforcement. This could be accompanied by the setting of minimum standards on specific aspects of civil procedural law.' Ibid.

⁴² Ibid.

⁴³ The Hague programme: strengthening freedom, security and justice in the EU. Brussels, 13.12.2004 available at: <http://europa.eu.int/comm/justice_home/doc_centre/doc/hague_programme_en.pdf>. See also: K. Turkalj, 'Pregovori RH za punopravno članstvo u EU u dijelu koji se odnosi na pravosuđe i unutarnje poslove' [Negotiations of the Republic of Croatia for Full Membership in the EU in the Part Referring to Justice and Interior Affairs] 5 *Pravo i porezi* (2005) p. 86.

⁴⁴ Lengthy and complex procedures accompanied with high costs. P. Van den Grinten, et al., *Practical Obstacles in Cross Border Litigation* (Dewenter, Kluwer 2005)

The Treaty of Nice of February 2003 influenced the subject matter in the sense that the notion of ‘family law’ emerged for the first time in the Founding Treaties.⁴⁵ The conclusions of the European Council drawn in Laeken noted that harmonization of family law is a decisive step forward.⁴⁶ The Reform Treaty and the subsequent Lisbon Treaty directed the referring matter to Title V – area of freedom, security and justice.⁴⁷ Article 65 was replaced by Article 81. The latter upholds priority to the principle of mutual recognition of judicial and extrajudicial decisions in civil matters. A positive change arising from the modified provision reveals in the fact that action of the institutions in this area no longer needs to be justified through the functioning of the Internal Market.⁴⁸ Title V of the Treaty of Lisbon collects the old provisions that regulate the manner in which Member States can establish enhanced cooperation between themselves within the framework of the Union’s non-exclusive competences. Acts adopted within the framework of enhanced cooperation shall be found binding only for participating Member States but shall not be regarded as part of the *acquis* (Article 20(4) TEU).⁴⁹ The foundations for judicial

⁴⁵ Treaty of Nice, Amending the Treaty on European Union, The Treaties Establishing the European Communities and certain related acts, *OJ C* 80/11. 10.03.2001. In Art. 67, the following paragraph shall be added: ‘5. By derogation from paragraph 1, the Council shall adopt, in accordance with the procedure referred to in Article 251: - the measures provided for in Article 63(1) and (2)(a) provided that the Council has previously adopted, in accordance with paragraph 1 of this Article, Community legislation defining the common rules and basic principles governing these issues; - the measures provided for in Article 65 with the exception of aspects relating to family law.’

⁴⁶ It referred then to adoption of the Brussels II. Regulation. Presidency Conclusions of the European Council meeting in Laeken, 14-15 December 2001. SN/300/1/01 REV 1. n. 45.

⁴⁷ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, *OJ C* 306/10

⁴⁸ A. Fiorini, ‘The Evolution of European Private International Law’, 57 *International and Comparative Law Quarterly* (2008) p. 969 at p. 977.

⁴⁹ Due to the fact that a unanimous agreement could not be reached regarding divorce matters (Green Paper on applicable law and jurisdiction in divorce matters, COM(2005)82 final. Brussels, 14.3.2005; Proposal of Council Regulation amending Regulation (EC) No 2201/2003 as regarding jurisdiction and introducing rules concerning applicable law in matrimonial matters. COM(2006)399 final, Brussels, 17 July 2006.) it was predicted that so called ‘Rome III Regulation’ would be the

cooperation in family matters are significantly fostered with the Lisbon Treaty.⁵⁰ Article 81 TFEU extended the Union's competences in the field of judicial cooperation in family matters since decision to adopt measures no longer depends on the Internal Market criterion. Article 81 TFEU widens the actions under former Article 65 TEC aiming at ensuring effective access to justice, the development of alternative methods of dispute settlement and support for the training of judiciary and judicial staff. The principle of mutual recognition as a priority in the previously mentioned Action Programme now has its place even in a founding Treaty. An interesting Lisbon Treaty novelty in judicial cooperation in family matters relates to the legislative procedure: even though unanimity is still required with regard to family matters (Article 81(3) TFEU), a special '*PIL passerelle* clause' states that the Council may decide (on a proposal of the Commission and after consulting with the European Parliament, unanimously) that certain aspects of family law may be subject to acts adopted by the ordinary legislative procedure. It must notify national parliaments, and in the case some parliaments objects to the proposed decision within six months, the Council cannot adopt the decision. It was predicted that the *passerelle* clause would be used to adopt family matters that are politically less sensitive, f.ex. matters relating to maintenance, since they were already subject to EC regulation with Article 5(2) of the Brussels I Regulation. The final novelty regarding judicial cooperation in family matters relates to the competence of the European Court of Justice. Article 81 TFEU orders the normal preliminary procedure of Article 267 TFEU (former Article 234 EC) to apply to Title V as well. Additionally, urgent preliminary procedure is especially reserved for measures under Title V⁵¹, as it ensures rapid procedure and has already facilitated important rulings in the field of cross border family matters.⁵²

first measure of judicial cooperation in civil matters to be adopted under the enhanced cooperation provisions. See K. Boele-Woelki, 'To be or not to be: Enhanced Cooperation in International Divorce Law within the European Union', 39 *Victoria University of Wellington Law Review* (2008) p. 779 at p.786.

⁵⁰ G.R. de Groot and J.J. Kuipers, 'The new Provisions on Private International Law in the Treaty of Lisbon', 15 *Maastricht Journal* 1 (2008) p. 114.

⁵¹ Council Decision of 20 December 2007 amending the Protocol on the Statute of the Court of Justice *OJ L* 24/42, 29.1.2008

⁵² Judgment of the Court (Third Chamber) of 11 July 2008 in the proceedings brought by *Inga Rinau*, Case C-195/08 *PPU*; *OJ C* 223 of 30.08.2008, p. 19.;

The European Council has adopted the new multiannual ‘*Stockholm Programme – An open and secure Europe serving and protecting citizens*’⁵³ for the period 2010-2014. According to this Programme, regarding judicial cooperation in family matters the abolition of the exequatur would be continued. It would be accompanied by a series of safeguards, particularly measures in respect of procedural law as well as of conflict-of-law rules. The Stockholm Programme suggested the mutual recognition to be extended to fields of matrimonial property rights and the property consequences of the separation of couples.⁵⁴ The Stockholm program proclaims induction of a whole new direction of judicial cooperation in family matters: practicing alternative dispute resolution in cross border family cases.⁵⁵

2. Basic components of European judicial cooperation in cross border family matters

a) Unification of law

Substantive national family law relies on certain social and family state policy, which is based on social conditions joined with cultural, moral and religious values of certain territory.⁵⁶ Being territorial by nature, substantive family law is insufficient in responding to real social changes of modern times such as internationalization of family. Numerous social problems have a global dimension and corresponding solutions provided at a national level are insufficient.⁵⁷ At the same time, we are facing a phenomenon that family law as a traditionally national branch of law should accommodate its solutions to international requirements. Throughout history, most attempts of converging legal

Judgment of the Court (Third Chamber) of 23 December 2009 in the proceedings *Jasna Detiček v. Maurizio Sgueglia*, Case C-403/09 PPU. OJ C 63 of 13.03.2010, p. 16.; Judgment of the Court (Third Chamber) of 1 July 2010 in the proceedings *Doris Povse v. Mauro Alpage*, Case C-211/10 PPU

⁵³ The Stockholm Programme – An open and secure Europe serving and protecting citizens. OJ C 115/01, 4.5.2010

⁵⁴ *Ibid.*, at p. 13.

⁵⁵ *Ibid.*, at p. 9.

⁵⁶ A. Chloros, ‘Three decades of legal and social change – Persons and Family’, 4 *International Encyclopaedia of Comparative Law* (2007) p. 4.

⁵⁷ J. Basedow, ‘The Effects of Globalization on Private International Law’ in J. Basedow and T. Kono, eds., *Legal aspect of globalization* (The Hague, Kluwer Law International 2000) p. 2.

systems and finding unified substantive solutions to matters of family law have failed.⁵⁸ Still, voices arguing that family law is ‘readily transplantable’ are frequent and are coined with solid argumentation.⁵⁹ A group of law professors gathered within the Commission on European Family Law (CEFL)⁶⁰ seek for common principles of European family law by means of comparative analysis.⁶¹ For the time being, such ‘soft-law’ enforcement is the only possibility since harmonization of family law is beyond the scope of EU competencies.⁶² Despite that fact, intensive activities of harmonization of conflict of laws and civil procedure within private international family law could gradually close the gap between these substantive law regimes.⁶³ When unification of substantive law is not possible, it is necessary to perform unification at the level of private international law (hereinafter: PIL). Such harmonization improves legal certainty required in an area of freedom, security and justice without interfering with national substantive law. Unified PIL in the end ensures the harmony of decisions within the

⁵⁸ Some comparative law studies suggested avoiding family law institutes (f.ex. K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (Oxford, 1998) p. 40.) These presumptions have been pointed out in the discussion on European civil code, more on this by D. Möllers, ‘European Directives on Civil Law The German Approach: Towards the Re-codification and New Foundation of Civil Law Principles’, 10 *European Review of Private Law* (2002) p. 777. at p. 796.; A. Vezyrtzi, ‘The Way Towards The Unification of Civil Law in the European Union: Reflections and Questions Raised’, 15 *Columbia Journal of European law Online* 13 (2009) p. 13 at p. 14.

⁵⁹ Similar legal institutions (f.ex. community of property) are present in different legal systems. Family law regulation is gradually changing in all countries and differences among particular systems nowadays depend often only on how long it takes to bring reforms along. More on this by M. Antokolskaia, ‘The Harmonisation of Family Law’, *European Review of Private Law* (2003) p. 41.; D. Bradley, ‘A Note on Comparative Family Law’, *Oxford University Comparative Law Forum* (2005) p. 3. available at: <www.ouclf.iuscomp.org>.

⁶⁰ <<http://www2.law.uu.nl/priv/cefl/>>

⁶¹ K. Boele-Woelki, ‘Zwischen Konvergenz und Divergenz’, 73 *RabelsZ* (2009) p. 243.

⁶² H. Dohrn, *Die kompetenzen der Europäischen Gemeinschaft im internationalen privatrecht* (Tübingen, Mohr Siebeck 2004) p. 108.

⁶³ K. Boele-Woelki and A. Mom, ‘Europäisierung des Unterhaltsrechts– Vereinheitlichung des Kollisionsrechts und Angleichung des materiellen Rechts’ *Familie Partnerschaft Recht* (2006) p. 232 at p. 236.

Union and strengthens individuals' confidence in the internal market.⁶⁴ From a methodological perspective, since the *acquis* introduces measures of private international law, the aim of establishing the 'area of freedom, security and justice' pursuant to Article 67 is not substantive (i.e., one that would be achieved by substantive law unification), but conflictual justice.⁶⁵

Concretely, a discontinued life union with international elements raises a number of issues regarding rights and obligations of the union members. Those issues and obligations result from the fact of former cohabitation, community of property or common children. A court with international jurisdiction to decide upon a particular family law matter always faces a dilemma – which of the competing substantive systems to apply? If one considers that states have different provisions for every aspect of substantive law, he might arrive to difficulties when a family law issue from the domain of a national system (as an organized entity) is to be applied for a cross border milieu. The successfulness of a family relation claim with international elements depends on the applicable substantive law which again depends on the choice of legal rules applicable at court with international jurisdiction.

EU private international law legislation directly regulating family relations comprise the following instruments.⁶⁶

- Council Regulation (EC) no. 2201/2003 of 27 November 2003 on Jurisdiction and the Recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (hereinafter: Brussels II *bis* Regulation)⁶⁷ which revokes Regulation (EC) no. 1347/2000;
- Council Regulation (EC) no. 4/2009 of 18 December 2008 on Jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, referring to both children and spouses (hereinafter: Maintenance Regulation).⁶⁸

⁶⁴ Goal 3.2.3 of the Lisbon Strategy is to improve European and national legislation. Communication to the Spring European Council, Working together for growth and jobs: A new start for the Lisbon Strategy, COM(2005)24 final

⁶⁵ J. Basedow, 'The communitarisation of private international law', 73 *RabelsZ* (2009) p. 457-458.

⁶⁶ Overview and current state of affairs are available at: <http://ec.europa.eu/justice_home/fsj/civil/fsj_civil_intro_en.htm>.

⁶⁷ *OJL* 338, 1-29

⁶⁸ *OJL* 7, 10.1.2009, 1-79

- Council Regulation (EU) no. 1259/2010 of 29 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.⁶⁹

Procedural *acquis* related to significant area of family law in matrimonial matters is currently pending (see *infra* point IV).

Also, other piece of the *acquis* can be applied to issues pertaining to international family law, despite the fact they are not addressed purely to this subject matter. The indirect elements of international family *acquis* are the following.

- Council Regulation (EC) no. 1206/2001 of 28 May 2001 on Cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters;⁷⁰
- Regulation (EC) no. 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the Service in the Member States of judicial and extrajudicial documents in civil or commercial matters (Service of documents);⁷¹
- Regulation (EEC, Euratom) no. 1182/71 of the Council of 3 June 1971 Determining the rules applicable to periods, dates and time limits;⁷² and
- Regulation (EC) no. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement order for uncontested claims.⁷³
- Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters⁷⁴ is according to the Maintenance Regulation to be used by central authorities,⁷⁵

⁶⁹ *OJ L* 343, 29.12.2010

⁷⁰ According to Regulation No 2201/2003 the hearing of a child in another Member State may take place under the arrangements laid down in Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters. *OJ L* 174, 27.6.2001

⁷¹ *OJ L* 324, 10.12.2007, p. 79. This replaced the Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (*OJ L* 160, 30.6.2000, p. 37.) which is applied to the service of documents (proceedings instituted pursuant to Regulation No 2201/2003, see Art. 18(2) and Art. 11(2) of Regulation No. 4/2009).

⁷² *OJ L* 124, 8.6.1971, p. 1. This should apply according to note 41 of the Preamble of the Regulation No 4/2009.

⁷³ *OJ L* 143, 30.4.2004, p. 15. This should be applied according to Art. 68(2) of the Maintenance Regulation on maintenance obligations issued in a Member State not bound by the 2007 Hague Protocol.

⁷⁴ *OJ L* 174, 27.6.2001, p. 25.

⁷⁵ See Art. 50(2) of the Maintenance Regulation No. 4/2009.

- Council Directive 200/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain aspects of mediation in civil and commercial matters.⁷⁶

In this line, some of the instruments of European international family law in a wider sense are also formal *fontes iuris*, such as:

- the Hague Convention of 15 November 1965 on the Service abroad of judicial and extrajudicial documents in civil or commercial matters;⁷⁷
- the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children;⁷⁸
- the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction;
- the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance
- Protocol of the Law Applicable to Maintenance Obligations.⁷⁹

The significant and deep-rooted differences in the family laws of Member States (both substantive and procedural) imply that in this sensitive area any action at EU level may challenge deeply-founded legal and social principles in Member States. The inevitable reality of ever growing number of cross border family cases led to a compromise among Member States: joint action is reached at the level of eliminating ‘forum shopping’ and ‘rush to the courts’. Issues of competing jurisdictions and provisions guaranteeing equal procedural position and fair trial, ultimately leading to easier cross border enforcement, were found to be an appropriate harmonization target.⁸⁰ The ideal basis for international legal co-operation in child protection matters is the mutual recognition of decisions based on common grounds of jurisdiction.⁸¹ It

⁷⁶ OJ L 136/3, 25.4.2008

⁷⁷ See Art. 18(3) of Regulation No 2201/2003 and Art. 11(3) of the Maintenance Regulation No. 4/2009.

⁷⁸ See Arts. 60-62 of Regulation No 2201/2003.

⁷⁹ See note 8 of the Preamble to the Maintenance Regulation No. 4/2009 and <http://www.hcch.net/index_en.php>, (last accessed on 25.05.2009).

⁸⁰ D. Martiny, ‘Objectives and values of (private) international law in family law’, in J. Meeusen, et al., eds. *International family law for the EU* (Antwerpen, Intersentia 2007) p. 84.

⁸¹ M. Župan, ‘Dijete u međunarodnom privatnom pravu’ [Child in private international law], in B. Rešetar, ed., *Dijete i pravo – interdisciplinarni pristup* [Child and the law – interdisciplinary approach](Osijek, 2009) p. 223.

all corresponds to the statements expressed in the Malta declaration.⁸² The very provisions of the two basic international family law *acquis* instruments (Brussels II *bis* Regulation and Maintenance Regulation) reveal that positive law regime is based on international procedural law directed towards easier mutual recognition of judgments. The rules of international family *acquis* instruments are based on a harmonized standard of international jurisdiction (direct), proper service, elimination of procedural irregularities and avoiding simultaneous procedures adoption of opposed decisions. The overview of its basic legal provision will proceed (see the discussion *infra* chapter IV). It is notable that with these two instruments the EU *acquis* has gone far ahead in eliminating obstacles for recognition and enforcement.⁸³ Still, the model of exequatur repeal is different in these two instruments, resulting in the end with incoherent *acquis*.

The issue of placing applicable legal rules in the *acquis* has been vigorously debated in scholar circles which systematically questioned the justification and purpose of these rules within the *acquis*.⁸⁴ It is argued that in cases containing international elements it is crucial to adequately solve the enforcement of foreign decisions and intergovernmental cooperation. The Commission made a counter argument that applicable law provisions of the *acquis* should contribute to legal certainty by eliminating different applicable national rules. Consequently, the set of applicable rules in the domain of family law

⁸² Point 4. of the Malta Declaration. Malta declaration: proceeding the third Malta Judicial Conference on Cross-Frontier Family Law Issues hosted by the Government of Malta in collaboration with the Hague Conference on Private International Law (Malta, 2009) available at: <www.hcch.net/upload/maltadecl2_e.pdf>, (last accessed on 15.6.2010).

⁸³ For details see: M. Župan, 'Ukidanje egzekvatore u europskom pravu: nekoliko odabranih pitanja' [Abolishing Exequatur in European law: selected issues] 17 *Pravo i porezi* (2008) p. 65.

⁸⁴ P. Beaumont and T. West, 'Private international law of the European Union: competence questions arising from the proposed Rome II regulation on choice of law in non-contractual obligations', in R. A. Brand ed., *Private law, private international law and judicial cooperation in the EU-US relationship* (Cile Studies 2 2005) p. 17-19; M. Hellner, 'The Maintenance Regulation: A Critical Assessment of the Commission's Proposal', in K. Boele- Woelki and T. Swedrup, eds., *European challenges in contemporary family law* (Antwerp, Intersentia, 2008) p. 351., at pp. 358-359.

matter was proposed for the first time in the maintenance regime.⁸⁵ However, Article 15 of the adopted Maintenance Regulation refers to the application of the rules of the Protocol on applicable law passed with the Hague Convention on International Recovery of Child Support and Other Forms of Family Maintenance (hereinafter: Hague Protocol). The above mentioned doctrinal doubts about how that introduction of such rules would have negative results regarding the application of the entire regulation *ratione territorii*,⁸⁶ and would lead to multiple legal sources since at the global level Hague conference already issued a Hague Protocol,⁸⁷ resulted here in the deletion of the rules on applicable law from the Maintenance Regulation.

b) Basic human rights considerations

Internationalization of family life leads to internationalization of family law.⁸⁸ The progressive development of a new legal discipline, international family law,⁸⁹ is heavily impacted by two factors: globalization⁹⁰ and promotion of human rights.⁹¹ The forthcoming

⁸⁵ Rules on applicable law were an integral part of the text of the first Proposal for a Council Regulation of 15 December 2005 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations COM(2005)649 final, *OJ C* 49. Nomotechnically they were positioned in Chapter III.

⁸⁶ It was one of the reasons why the United Kingdom refused to join the unified regime. Response by the Family Law Bar Association of England and Wales to the European Commission Green Paper on Maintenance Obligations, note 33., available at:

<http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_public_en.htm>, (last accessed on 15.4.2010)

⁸⁷ Reverse subsidiary is a good argument in the sense of more acceptable global rather than regional functioning. See P. Beaumont, 'International Family Law in Europe – the Maintenance Project' *RabelsZ* (2009) p. 516.

⁸⁸ J. Murphy, *International dimension in family law* (Manchester, Manchester University Press 2005) p. 11.; N. Lowe, 'The Growing Influence of the European Union on International Family Law – A View from the Boundary' *Current Legal Problems* (2004) p. 441; A. Dyer, 'The Internalization of Family Law', 30 *U.C. Davis Law Review* (1996-1997) p. 625.

⁸⁹ B. Stark, *International family law* (Aldershot, Ashgate 2005) p. 1-3.

⁹⁰ On influence of globalization on family law see J. Basedow, 'The Effects of Globalization on Private International Law', in J. Basedow and T. Kono, eds., *Legal aspects of globalization* (The Hague, Kluwer Law International 2000) p. 2.; B. Stark,

European legislation on private international law facilitates cross border mobility, putting a positive pressure on further globalization. Promotion of human rights is one of the outcomes of globalization. At the same time, human rights protection mitigates certain unfavorable globalization effects. Promotion of human rights and judicial cooperation in cross border family matters nowadays often appear together, although it may be questioned whether human rights notions are used merely for promoting economic goals or the EU has decided to making a step forward in taking them seriously. Stronger positioning of human rights within EU has started with the creation of the Charter of Fundamental Rights in 2000.⁹² The Treaty of Lisbon integrated the Charter into the corpus of binding EU law therefore placing each EU policy in before a human rights test. This motion is particularly interesting with child related legislation.

c) Fostered cooperation of central authorities

Although the mechanism of employing central authorities to foster legal cooperation in family matters is an ultimate trend of modern law, it certainly is not a contemporary innovation.⁹³ The UN Convention on the Recovery Abroad of Maintenance (1956) is one of the oldest conventions establishing a global network of central authorities.⁹⁴ The

‘When Globalization Hits Home: International Family Law Comes of Age’, *Vanderbilt Journal of Transnational Law* (2006) p. 8.

⁹¹ H. Stalford, ‘EU family law: A human rights perspective’, in J. Meeusen, et al. eds., *International family law for the EU* (Antwerpen, Intersentia 2007) p. 107.

⁹² For an evolution on positioning of human rights within EC family law see M. Župan, ‘The Human Rights Impact on the EU Family Law’, in *Facts and Prospects of the Romanian Legal System within the context of Romania’s accession to the European Union* (Bucharest, 2007) p. 316.

⁹³ For details see M. Sardenber, ‘Judicial and administrative cooperation in family law matters: introduction’, in Wybo P. Heere ed., *International law and the Hague 750th anniversary* (The Hague, T.M.C. Asser Press 1999), W. Duncan, ‘The Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance Comments on its Objectives and Some of its Special Features’, in A. Bonomi and P. Volken eds., *X Yearbook of Private International Law* (2008) p. 313., at p. 321, 325.

⁹⁴ Significant operational problems are detected in the implementation of this Convention, for details see: W. Duncan, ‘The Development of the New Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance’, 38 *Family Law Quarterly* (2004) p. 663 at p. 666.

Council of Europe also employs this kind of legal cooperation in cross border family matters.⁹⁵ The HCCH conventions involving central authorities⁹⁶ served as a model for establishing its wider promotion within the EU. The *acquis* accepts this model, and even gives precedence to mechanism of inter-governmental administrative cooperation by central authorities over classical mechanism of private international law, when cross border child protection issues are concerned. The central authority presents an essential structure in each country to facilitate effective access to legal and administrative procedures for parents and children affected by cross-border family disputes. Within the Brussels II *bis* (Article 53) and Maintenance Regulation (Article 49) regimes each Member State designates a central authority which is given general and specific functions. In general they are to promote exchanges of information about national legislation and procedures, cooperate with each other in order to solve problems arising from the application of relevant regulations; facilitate communication between courts etc. Special functions within Brussels II *bis* are in providing assistance to holders of parental responsibility seeking to recognize and enforce decisions; help in resolving disagreements between holders of parental responsibility through alternative means to mediation; activities regarding placement of a child in another Member State, etc. (Articles 53-55). Special

⁹⁵ Esp. with three conventions: the European Convention on recognition and enforcement of decisions concerning custody of children and on restoration of custody of children (the Custody Convention) [ETS No. 105 – Luxembourg 20.05.1980]; the European Convention on the exercise of children's rights [ETS No. 160 – Strasbourg, 25.01.1996]; Convention on contact concerning children, Strasbourg, 15.05.2003.

⁹⁶ Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. *Proceedings of the Eighteenth Session 1996 II*. (The Hague 1996). p. 615.; Convention of 25 October 1980 on the Civil Aspects of International Child Abduction *Actes et documents de la Quatorzième session 1980, III*. (The Hague 1980) p. 481.; Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption. *Proceedings of the Seventeenth Session 1993, II*. (The Hague, 1993). p. 659.; Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, Final Act of the Twenty-First Session, The Hague 23. November 2007., available at: <http://www.hcch.net/index_en.php>, (last accessed on 23.5.2010)

functions within the Maintenance Regulation relate to transmission and reception of applications, initiation of the related proceedings for the establishment or modification of maintenance or for the enforcement of a maintenance decision, helping to locate the debtor or the creditor etc. (Articles 50-53).

d) Fostered cooperation through judicial networking

An important element of judicial cooperation in family matters is judicial networking. One of the most recent features of judicial cooperation in family law matters relies on cross border communication and other judicial collaboration. Foundations for a purely European judicial networking were laid down by Council Decision 2001/470/EC of 28 May 2001, which established a European Judicial Network (EJN) in civil and commercial matters. The EJN is intended to enable smoother conduct of cases with cross-border elements; it facilitates judicial cooperation among Member States judges (e.g., aid with the service of documents, taking of evidence); it aims at ensuring the proper practical application of *acquis communautaire* along with international agreements and conventions among Member States and in the end aims at the establishment and maintenance of an information system for the public about judicial cooperation in civil and commercial matters in the EU, the *acquis*, international instruments and the domestic law of the Member States, especially regarding the access to justice (Article 3(2)). The EJN is composed of four categories of members: contact points, central bodies and central authorities, the liaison magistrates; and any other appropriate judicial or administrative authority with responsibilities for judicial cooperation in civil and commercial matters (Article 2.)

The new framework for EJN was set up by a decision in 2009⁹⁷ which would apply from 1 January 2011. Among the main innovations⁹⁸ is the reinforcement of relations with other European

⁹⁷ Decision No 568/2009/EC of the European Parliament and of the Council of 18 June 2009 amending Council Decision 2001/470/EC establishing a European Judicial Network in civil and commercial matters. *OJ L* 168/35 30.6.2009

⁹⁸ a) Professional associations representing at national level in the Member States legal practitioners directly involved in the application of Community and international instruments concerning judicial co-operation in civil and commercial

Networks that facilitate co-operation between judicial systems or access to justice, but also networks established by third countries and with international organizations that are developing judicial co-operation, such as the Hague Conference on Private International Law. The EJM co-exist with other co-operational mechanisms already set up under the *acquis* or conventions. Therefore the EJM remains available even when the *acquis* or an international convention provide for specific co-operation mechanisms between competent authorities, such is the case with the Brussels II *bis* Regulation regarding parental responsibility.⁹⁹

Networking of European officers of justice has occurred on the above elaborated regional, but also on global level. The creation of a universal judicial network, the Hague International Judicial Network (HIJN) is to be viewed in conjunction of the so-called Malta process. HIJN completes the Malta declaration emphasizing the added value of direct judicial communications in international child protection cases.¹⁰⁰

matters will be members of the EJM. (Art. 2 (ii)e). b) The contact point's tasks are extended concerning the application of the foreign law of another Member State. c) Progressive establishment and updating an information system which is accessible to the public via EJM official web site is reinforced as the main source of up-to-date information.

⁹⁹ J. Simoes De Almeida, 'Background to the European judicial network in civil and commercial matters', in *International child protection* (The Judge's Newsletter vol. XV, Publication of the Hague conference on Private International Law 2009) p. 45 at p.47.

¹⁰⁰ Point 9 of Malta declaration, op. cit. n. 80.

IV. Common legal provisions relating to divorce, parental responsibility and maintenance obligation

1. Brussels II bis Regulation

The Regulation's *ratione materiae* scope includes matters of divorce, legal separation or marriage annulment (Article 1a), the attribution, exercise, delegation, restriction or termination of parental responsibility (Article 1b) which means, in particular: (a) rights of custody and rights of access; (b) guardianship, curatorship and similar institutions; (c) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child; (d) the placement of the child in a foster family or in institutional care; (e) measures for the protection of the child relating to the administration, conservation or disposal of the child's property (Article 1 c). The Regulation applies to these matters regardless the nature of the court or tribunal (Article 1). Section II. lays down the provisions on jurisdiction in divorce where the Brussels II *bis* took over the rules of its predecessor (Article 3). Section II lays down provisions on parental responsibility, which generally comes under the jurisdiction of the courts of the Member State of the habitual residence of the child (Article 8). Exceptions to the rule are found in certain cases of relocation, that is of a lawful change of residence of a child, where the courts of the Member State of the former residence of the child have already issued a judgment on parental responsibility (particularly as concerns rights of access), this matter continues to come under the jurisdiction of the courts of that State (Article 9). Further on, the spouses may accept the jurisdiction of the court adjudicating on the divorce to decide on matters of parental responsibility as well. There are some cases where parents may agree to bring the case before the courts of another Member State with which the child has a close connection, for example based on the nationality of the child (Article 12). Where a child's habitual residence cannot be established, the courts of the Member State where the child is present shall have jurisdiction. This provision applies to cases of refugee children or children internationally displaced because of disturbances occurring in their countries of origin as well (Article 13). Where it is not possible to define jurisdiction on the basis of the provisions laid down by the Regulation, each Member State may apply its national legislation (Article 14). Transfer of a case is possible, if, justified by the best interest of the child, the courts of a Member State having jurisdiction as

to the substance of the matter consider that a court of another Member State, with which the child has a particular connection, would be better placed to hear the case (Article 15). Rules on child abduction are intended to combat child abduction in the EU. Brussels II *bis* provides that a holder of rights of custody applies to a central authority or to a court for the return of an abducted child. In general, jurisdiction rests with the courts of the Member State in which the child was habitually resident immediately before the abduction. That court continues to have jurisdiction until the child is habitually resident in another Member State, subject to the assent of all persons holding rights of custody and a minimum period of 1 year of residence (Article 10). Brussels II *bis* lays down special rules if a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (Article 12). The courts are required to act expeditiously in proceedings on the application, subject to exceptional situations; the judgment is to be issued no later than six weeks after the application is lodged (Article 11(3)). The courts of the Member State to which the child has been abducted can refuse to return the child only if according to Article 13(b) of the Hague Convention of 1980 there is a serious risk that the return would expose the child to physical or psychological harm. The judge must order the return if it is established that adequate arrangements have been made to ensure the protection of the child after his or her return (Article 11(4)). If a court has issued an order on non-return, within one month of the date of the non-return order it must transfer the case file to the competent court of the Member State in which the child was habitually resident prior to removal (Article 11(6)).

Common procedural rules are based on Brussels I Regulation (Articles 16-20).¹⁰¹ The courts are required, of their own motion, to verify whether they have jurisdiction under Brussels II *bis*. If a Member State court has no jurisdiction in a matter submitted to it, it must declare of its own motion that it has no jurisdiction. Where a respondent habitually resident in a state other than the Member State where the action was brought does not make an appearance, the court with jurisdiction shall stay the

¹⁰¹ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. *OJ L* 012 , 16/01/2001 p. 0001 – 0023

proceedings in order to verify whether the respondent received the document instituting the proceedings in sufficient time to enable him to arrange for his defense. The international *lis pendet* embodied in Article 19 of the Brussels II *bis* leads to the so-called ‘rush to the courts’. Where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different Member States, the court second seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established. When the jurisdiction of the court first seized is established, the court second seized shall decline jurisdiction in favor of that court. In urgent cases the courts may also take interim protective measures relating to persons and property.

Brussels II *bis* provides for automatic recognition of all judgments without any intermediary procedure being required (Article 21). It further restricts the grounds on which recognition of judgments relating to matrimonial matters and matters of parental responsibility may be refused. In general, recognition may be refused if: recognition is manifestly contrary to public policy; the respondent was not served with the document which instituted the proceedings in sufficient time to arrange for his or her defense; and recognition is irreconcilable with another judgment. Two additional grounds for refusing recognition with judgments in matters of parental responsibility are: the child was not given an opportunity to be heard; and a person claims that the judgment infringes his or her parental responsibility, if it was issued without such person having been given an opportunity to be heard (Articles 22 and 23).

Abolition of exequatur under Brussels II *bis* is preserved regarding judgments on rights of access and return of children adopted in accordance with the Regulation. These judgments would be automatically recognized and enforced in all Member States without the need for special procedures, provided that they are accompanied by a certificate set out in Annexes III and IV (Articles 41 and 42).

A judgment on the exercise of parental responsibility can be declared to be enforceable in another Member State on the application of an interested party whereas the decision on the application for a declaration of enforceability may be appealed against (Article 33). With regard to judgments on matrimonial matters and parental responsibility, the competent court must, at the request of any interested party, issue a certificate using the standard form set out in Annexes I and II (Article

39). The enforcement procedure is governed by the domestic law of the Member State of enforcement (Article 47).

2. Maintenance Regulation

Ratione materiae it applies to maintenance obligations that arise from: family relationship; parentage; marriage or affinity (Article 1). Jurisdiction rests in general with the court of the place where the defendant or the creditor is habitually resident; or one having jurisdiction for proceedings regarding the status of a person or parental responsibility, provided that jurisdiction is not based solely on the nationality of one of the parties (thereby exorbitant jurisdiction is excluded) (Article 3). The Regulation allows a choice of court agreement with exception toward minors (Article 4). Submitting to the court without contesting its jurisdiction empowers the court with jurisdiction (Article 5). Additional subsidiary jurisdiction is provided for when none of the parties resides in the EU, in which case jurisdiction rests with the courts of the Member State of the common nationality of the parties. Exceptionally, when for legal or practical reasons it is impossible to conduct the proceeding outside the EU, the *forum necessitates* principle enables that the proceeding will be brought before the court of a Member State that is closely connected to the dispute (Article 7). The Maintenance Regulation sets limits on a proceeding to modify an existing maintenance decision whereas such claim must be brought by a debtor before the courts of the Member State where the creditor is residing, provided that the original decision was given in that state and the creditor still resides there, or provided that the creditor agrees that the dispute is decided by another court (Article 8).

Common procedural rules (Articles 9-14) are based on the Brussels I. Regulation and Brussels II *bis* Regulation. The approach of Brussel II *bis* for exequatur repeal regarding contact between parents and children and return of an unlawfully taken child has been shifted with the Maintenance Regulation concerning the exequatur of decisions on child maintenance. In general it states that a decision on maintenance obligations by one Member State is to be recognised in another Member State without any special procedure. But, if the decision was taken by a Member State bound by the Hague Protocol, its recognition may not be opposed nor its enforceability subjected to a declaration of enforceability (Article 17). Where the decision was taken by a Member State not bound by the 2007 Hague Protocol, there is a traditional

mechanism entailing a list of grounds for non-recognition: the recognition and enforceability are manifestly contrary to the public policy of the Member State where recognition and enforcement are sought; decision was taken in the absence of the defendant, who was not informed of the proceedings in sufficient time; decision is incompatible with a decision made in a dispute between the same parties by the Member State where recognition and enforcement are sought; decision is incompatible with an earlier decision in a dispute between the same parties and for the same actions by another Member State or third country (Article 24).

In all cases and regardless of any appeals, the court of origin may declare a decision as provisionally enforceable (Article 39). The Member State where recognition, enforceability or enforcement is sought may not review the substance of the decision. Enforcement is governed by the law of the enforcing Member State, although, remarkably, several additional provision of the Maintenance Regulation directly intervenes into national enforcement law.¹⁰² Detailed provision on legal aid is provided for in as much as proceedings concerning child maintenance launched through the intermediary of the central authorities benefit from free legal aid (Article 44-47).

V. Instead of conclusion: the prospects of European judicial cooperation in family matters

In the past decade an entirely new, family law centered area of judicial cooperation emerged among EU Member States. Despite the sensitiveness of the area of family law, where Member States jealously preserve the room for existing legal tradition along with cultural and social background, it has never been possible to completely separate Community law from family law issues.

Legal obstacles based on existing incompatibility or complexity of legal and administrative systems in Member States impede free movement, and hence became subject of continuous and substantial legislative activities of the EC. As presented earlier, the EC internal and external competence to regulate and foster judicial cooperation in cross border

¹⁰² For details see: M. Župan, 'Particularities of enforcing foreign maintenance decision', in V. Belaj, B. Rešetar and M. Župan, eds., *Matrimonial property aspects of divorce: International, European and National context* (Osijek, Pravni Fakultet u Osijeku 2010) (to be published).

family matters resulted with significant corpus of community legislative acts. The cornerstone of judicial cooperation is the principle of mutual recognition of judgments. Core elements can be found in the Brussels II *bis* Regulation and Maintenance Regulation, based on common minimum standards for international civil procedure, in several lines abolished exequatur and in general reduced grounds for refusing recognition of foreign judgments. Still, these regulations are applied only to some family related matters, whereas many remain outside the domain of *acquis*. The outcome of this sectoral approach is not predictable, nor is the achievement of comprehensive unification of private international family law at EU level. Initiatives for *acquis* in the matters of matrimonial property stagnates,¹⁰³ whereas the initiative for rules in matrimonial matters (so called ‘Rome III Regulation’),¹⁰⁴ which failed to get the required unanimous support of EU governments in 2008 proceeded in the form of enhanced cooperation¹⁰⁵ as was most recently discussed in Spring 2010. Later on, a proposal for a regulation has been issued,¹⁰⁶ and as previously mentioned, Council Regulation (EU) no. 1259/2010 on divorce and legal separation was adopted.¹⁰⁷ Possibly this initiative would in the end contribute to proliferation of applicable legal rules within the *acquis*. The present model of Maintenance Regulation where the benefits of smoother judgment circulation (in the form of abolished exequatur) are reserved only for the Member States bound by the Hague Protocol, is not the best possible solution. The foreseeable trend of employing alternative dispute resolution in international family cases was announced with the Stockholm Programme. EU Member States already participate in this notion through the Council of Europe¹⁰⁸

¹⁰³ Green Paper on conflict of Laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition COM(2006)400 final, Brussels, 17.7.2006

¹⁰⁴ See note 49.

¹⁰⁵ Since the proposal failed in 2008, ten EU countries (Austria, Bulgaria, France, Greece, Hungary, Italy, Luxembourg, Romania, Slovenia and Spain) decided to use the enhanced cooperation to advance the measure.

¹⁰⁶ Proposal for a Council Regulation (EU) implementing enhanced cooperation in the area of the law applicable to divorce and legal separation. COM(2010)104 final. Brussels, 24.3.2010

¹⁰⁷ Op. cit. n. 69.

¹⁰⁸ The Council of Europe recommendation R 98(1) encouraged its member states to promote family mediation. In sensitive international family disputes, where different legal regimes and cultures collide, alternative dispute resolution is a optimal mean

and universal, HCCH-related initiatives.¹⁰⁹ The possibility to use family mediation at international level should be further explored. Development of framework for alternative dispute resolution and mediation in parental child abduction cases is expected.

The achievements of regional EU judicial cooperation in cross border family matters are truly important in judicial cooperation in the field between Hungary and Croatia as well. This is all the more important, because though the EU regime is created to regulate each ‘intra-European litigation’, the most cross border cases happen between neighboring states.

for resolving transnational and international family conflicts. See R., Winter, ‘Promotion of and access to family mediation’, in *Family mediation in Europe: proceedings*, 4th European Conference on Family Law (Strasbourg, Council of Europe 2000) p. 97 at p. 112.

¹⁰⁹ The Malta declaration point 7 also encourages for urgent development of a more effective structure for the mediation of cross-border family disputes. Focus for the development of mediation services is to assist in the resolution of cross-frontier disputes concerning custody of and contact with children. Malta declaration, op. cit. n. 80.