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Foreword, 10th Anniversary of EU Membership

In May this year it has been 10 years since Hungary acceded to the European Union. In order to celebrate this one decade anniversary, in April 2014 the Faculty of Law of ELTE University hosted an international symposium at which prominent representatives of the European legal community discussed current issues of EU law. These were either connected to the effects of accession or that are the focus of ongoing debates at the European level.

This second volume of the ELTE Law Journal is partly devoted to the publication of some of the conference papers which were presented at this conference *(Symposium).* In his article the vice-president of the European Court of Justice, *Koen Lenaerts,* summarises the Court's case law of the last decade connected to a fairly new phenomenon, that of the internet sometimes overturning traditional ways of legal thinking and reasoning. The article of *Endre Juhász*, judge at the Court of Justice of the European Union, elaborates on the impact of EU law on Hungarian law by analysing its particular influence on Hungarian civil law and commercial law in three different eras, before accession, during the accession negotiations and thereafter. *Professor Stanisław Soltysinski* discusses the importance of equal treatment between EU Member States with special regard to the effect of the 2004 enlargement. Other contributors reflected on topical European issues of common interest, most of them related to private law and mainly contract law. *Professor Ewoud Hondius* analyses recodification processes in Central and Eastern Europe and in the Netherlands from a comparative point of view, while *Professor Bénédicte Fauvarque-Cosson* presents the French contract law reforms put in a European context. *Professor Hugh Beale,* for his part, makes an in-depth comparison of the contract law section of the new Hungarian Civil Code with English law and the proposed European Sales Law.

ELTE Law Journal's aim to become a regional legal forum is reflected by the selection of three further papers which were offered for us to publish. They all have a definite connection to the Europeanization of the law and to the European Idea as a legal, cultural and moral community. *Professor Christoph Grabenwarter,* a member of the Austrian Constitutional Court, analyses the European Convention on Human Rights. His paper identifies inherent constitutional trends and tackles the role of the European Court of Human Rights in this field. *László Szegedi,* who is a Curia (Supreme Court of Hungary) clerk and lecturer at ELTE Law School, reports on the implementation concerns of the Aarhus Convention-related EU Law in Central and Eastern Europe. Last but not Least, our colleague *Professor István Varga* provides an overwhelming insight 'behind the scenes' into the recodification process of civil procedural law in Hungary which involves an international comparative approach.

Attending the conference and reading the papers was a pleasure. Let us share and spread this enrichment on the pages of ELTE Law Journal.

Budapest, 21 July 2014.

Réka Somssich
Editor of this issue

Ádám Fuglinszky
Editor in Chief

Symposium

Koen Lenaerts*

The Case Law of the ECJ and the Internet (2004 – 2014)

Introduction

It is no exaggeration to say that the new means of communication arising from use of the Internet have, in the past ten years, transformed the world in which we live. Information is now exchanged in quantities and at a speed that would have been unimaginable for previous generations and this explosion in the number and scope of human contacts, often between individuals who have never actually met, has inevitably given rise to a wide range of new legal disputes and questions.

European Union law does not exist in a vacuum and it is not therefore surprising that this revolution in electronic communications has found an echo in the caseload of the Court of Justice of the European Union (hereinafter, the 'Court'). I would like to mention five specific areas of Union law in which the Court has been called upon to rule in cases that involve communications via the Internet and to illustrate each of those by referring in detail to one case that exemplifies the kind of issues that have arisen.

Firstly, the Union's internal market rules, in particular those relating to the freedom to provide services and the free movement of goods, have given rise to several cases before the Court. A number of those related to disputes concerning online betting and, in particular, the extent to which Member States are entitled to regulate that activity, bearing in mind that it involves a provision of services to individuals many of whom are likely to be domiciled in another Member State.[1] In essence, the Court has taken the view that Member States remain free, in the absence of legislative harmonisation at EU level, to regulate online betting by means of national measures, but that any such measures must respect the principle of proportionality and must not, in particular, involve any discrimination against operators legally carrying on business in another Member State. In the context of free movement of goods, the Court has also dealt with a case arising from a preliminary reference made by the *Baranya Megyei Bíróság* (District

* Vice-President of the Court of Justice of the European Union, and Professor of European Union Law, University of Leuven. All opinions expressed are personal to the author.

[1] See, in particular, case C-46/08 *Carmen Media Group* (EU:C:2010:505) and joined cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 *Markus Stoß and Others* (EU:C:2010:504).

Court of Baranya) here in Hungary, *Ker-Optika*,[2] which related to the sale of contact lenses via the Internet, I shall return to that case later.

In another important case, *Gysbrechts and Santurel Inter*,[3] the Court was asked to provide a ruling in relation to alleged breaches of the Belgian law on distance selling. The dispute arose from transactions between a Belgian undertaking and a French customer who had made an order online by means of the company's internet site and received the goods ordered by post. When the customer failed to pay, the Belgian undertaking brought an action against him. The customer responded by lodging a complaint which led to an investigation by the Belgian Economic Inspection Board. The latter found that there had been failures to fulfil obligations to provide information on the right of withdrawal provided for by the Belgian law on consumer protection. Considering that measures taken by the undertaking to correct those failures were not adequate, the board brought criminal proceedings and it was in the context of those proceedings that a Belgian appeal court, the *Hof van Beroep te Gent,* put questions to the Court concerning the compatibility with EU law of the national prohibitions allegedly breached. In response, the Court ruled that Article 29 EC[4] does not preclude national rules which prohibit a supplier, in cross-border distance selling, from requiring an advance or any payment from a consumer before expiry of the withdrawal period, but that it *does* preclude a prohibition, under those rules, on requesting, before expiry of that period, the number of the consumer's payment card.

Secondly, the question of intellectual property protection in the context of the Internet has come before the Court on several occasions. In *Google France and Google,*[5] the Court was asked whether or not the unauthorised use of keywords for the purpose of facilitating access to internet advertising infringed registered trade marks to which those keywords were identical or confusingly similar; I shall deal with that case in more detail in a few minutes. In *L'Oréal and Others*[6] the issue was whether trade mark owners have a right to obtain injunctions against operators of online marketplaces in order to prevent sales of infringing products through those websites. In substance, the Court replied in the affirmative, holding that trade mark owners are indeed entitled to such protection. In *Scarlet Extended*[7] and *Netlog*[8] the Court was asked whether copyright owners may require an internet service provider to enforce an internet filtering mechanism in order to prevent copyright violations, either through peer to peer file sharing or through a social networking platform. The Court found that the imposition of such injunctions would not strike a fair balance between the right to intellectual property, on the one hand, and the freedom of ISPs freely to conduct their business, the right to protection of personal data and the freedom to receive or impart information, on the other hand. Consequently, the Court held

[2] Case C-108/09 *Ker-Optika* (EU:C:2010:725).
[3] Case C-205/07 *Gysbrechts and Santurel Inter* (EU:C:2008:730).
[4] Since replaced by Article 35 TFEU.
[5] Cases C-236/08 to C-238/08 *Google France and Google* (EU:C:2010:159).
[6] Case C-324/09 *L'Oréal and Others* (EU:C:2011:474).
[7] Case C-70/10 *Scarlet Extended* (EU:C:2011:771).
[8] Case C-360/10 *Netlog* (EU:C:2012:85).

that the imposition of such injunctions was precluded by EU law. Finally, in *ITV Broadcasting*[9] the question was whether the streaming service operated by an internet company infringed the TV broadcaster's right to authorise, or prohibit, any communication to the public of its programmes; in essence, the Court ruled that a streaming service of that sort did indeed breach the TV broadcaster's right.

Thirdly, the rise of the Internet has inevitably led to private international law disputes as to where cases should be litigated since it has greatly increased the number of transactions involving a buyer and seller of goods or services who are based in different Member States. In *Pammer and Hotel Alpenhof*[10] the issue was whether a consumer who has entered into a contract over the Internet may sue the other party to the contract in the Member State of his or her own domicile and, conversely, whether he or she can be sued by the other party to the contract in a Member State other than the one where he or she, as consumer, is domiciled. I shall say more about those two cases later on. Similarly, in *eDate Advertising and Martinez*[11] the Court was asked to determine, in substance, before which Member State court or courts a person could bring an action for damages where it was alleged that his or her image rights had been damaged by content made available on the Internet. The Court ruled, in substance, that under Article 5(3) of Regulation n° 44/2001 (the 'Brussels I Regulation'),[12] according to which the courts for the place where the harmful event occurred or may occur are competent to rule in cases relating to tort, delict or quasi-delict, a person who considers that his or her personality rights have been infringed by means of content published online has the option of bringing an action for damages either before the courts of the Member State in which the publisher of that content is established or before the courts of the Member State in which the centre of his or her own interests is based. That person may also, instead of bringing a single action for liability in respect of all the damage caused, sue before the courts of each Member State in whose territory content placed online is or has been accessible. Those latter courts have jurisdiction only in respect of the damage caused in the territory of their own Member State.

Also in the field of private international law, the *G* case[13] concerned a situation where an individual brought an action, whose purpose was to have certain photographs of herself that were of a pornographic nature, removed from the Internet, against the owner of the relevant domain name and internet site, in circumstances where that defendant could not be located. The civil court *(Landgericht)* in Regensburg, Germany, put questions to the Court on the interpretation of the relevant Union law rules, in particular Article 4(1) of the Brussels I Regulation, which provides that where the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall be determined by the law of that Member State, and Article 5(3) of that regulation, to which I referred a moment ago. The Court ruled, in substance, that

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[9] Case C-607/11 *ITV Broadcasting* (EU:C:2013:147).

[10] Joined Cases C-585/08 and C-144/09 *Pammer and Hotel Alpenhof* (EU:C:2010:740).

[11] Joined Cases C-509/09 and C-161/10 *eDate Advertising and Others* (EU:C:2011:685).

[12] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.

[13] Case C-292/10 *G* (EU:C:2012:142).

Article 4(1) of the Brussels I Regulation does not preclude the application of Article 5(3) of that regulation to an action for liability arising from the operation of an internet site against a defendant who is probably a European Union citizen but whose whereabouts are unknown where the court seised of the case does not possess firm evidence to support the conclusion that the defendant is in fact domiciled outside the European Union. The Court also held that European Union law does not preclude the issue of judgment by default against a defendant who cannot be located and on whom the documents instituting proceedings have therefore been served by public notice under national law, provided that the court seised of the matter has first satisfied itself that all investigations required by the principles of diligence and good faith have been undertaken to trace the defendant. However, it also decided that a default judgment issued against a defendant whose address is unknown may not be certified as a European Enforcement Order, within the meaning of Regulation No 805/2004,[14] whose objective is to facilitate the enforcement of uncontested claims.

Fourthly, two important cases where judgment was given just this year raise issues relating to data protection in the context of internet communications. The recent ruling in *Google Spain and Google,*[15] relates to the so-called 'right to be forgotten'. It concerns an individual who objects to the fact that a Google search under his name continues to direct users to newspaper reports concerning a real-estate auction that took place in 1998 connected with attachment proceedings against him under national law prompted by the social security debts that he then owed. In substance, the Court ruled in favour of that individual, holding, in particular, that under the relevant provisions of Directive 95/46,[16] the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to that person, including in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful. Moreover, when appraising the conditions for the application of those provisions, it should inter alia be examined whether the data subject has a right that the information in question relating to him personally should, at this point in time, no longer be linked to his name by a list of results displayed following a search made on the basis of his name, without its being necessary in order to find such a right that the inclusion of the information in question in that list causes prejudice to the data subject. As the data subject may, in the light of the fundamental rights conferred on him by Articles 7 and 8 of the *Charter of Fundamental Rights of the European Union,* request that the information in question no longer be made available to the general public on account of its inclusion in such a list of

[14] Regulation (EC) N° 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims [2004] OJ L143/15.

[15] Case C-131/12 *Google Spain and Google* (judgment of ECJ, 13 May 2014). In particular, points 3 and 4 of the operative part.

[16] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31; in particular, Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of that directive.

results, those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject's name. However, that is not the case if it appears, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question.

The *Digital Rights* case[17] raises the question whether Directive 2006/24[18] which, in essence, requires Member States to keep records of the existence, but not the content, of all electronic communications between individuals, as well as of the locations of the devices used to make those communications, so that this information should remain available for at least six months, if required, for the purposes of identifying and preventing serious crime, is compatible with EU law and, in particular with the right to privacy and to the protection of personal data, as well as with the principle of proportionality. I shall discuss the Court's ruling later in this speech.

Fifthly, in the context of EU competition law, the Court was called upon in *Pierre Fabre Dermo-Cosmétique*[19] to give a ruling on the legality of an absolute ban on internet sales in the framework of a selective distribution arrangement. I shall discuss the issues raised by that case more fully in the final section of this speech.

I Internal Market Law – *Ker-Optika*: The Internet and the Free Movement of Good

The last ten years have shown that the Internet has opened up new opportunities for some companies, whose activities were previously limited to one Member State, to penetrate foreign markets. That is the case, in particular, for small and medium-sized businesses which, although lacking the economic resources to set up a branch in another Member State, decide to offer their goods for sale in other Member States via the Internet. Thus, the Internet opens a window of opportunity for sales growth, whilst avoiding the risks associated with major investments.

However, Member States may decide to restrict, or even ban, the on-line sale of certain goods, in order to protect public health. That is the case, for example, in respect of certain medicines or other health-related products whose misuse may give rise to serious health risks.

It follows that the on-line sale of goods raises questions as to the scope of the jurisdiction that Member States continue to enjoy to regulate the sale of such products, notwithstanding the fact that such regulation inevitably limits the free movement of goods. In *Ker-Optika,*[20] the ECJ was confronted with that very question. The facts of the case are as follows.

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[17] Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland and Others* (EU:C:2014:238).

[18] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L105/54.

[19] Case C-439/09 *Pierre Fabre Dermo-Cosmétique* (EU:C:2011:649).

[20] *Ker-Optika* (n 2).

Ker-Optika, a limited partnership governed by Hungarian law, sold contact lenses via its Internet site. However, under the Hungarian legislation in force at that time, the selling of contact lenses required either a specialist shop with a minimum area of 18 square-meters or sales premises separated from the optician's workshop. Furthermore, sales of contact lenses could only be made where the services of a properly-qualified optometrist or ophthalmologist were used. Accordingly, the Hungarian authorities prohibited Ker-Optika from selling contact lenses. The latter challenged that decision before the District Court of Baranya which, in substance, referred two issues to the Court for a preliminary ruling.

First, the Hungarian court asked whether Directive 2000/31,[21] which approximates certain national provisions on information society services,[22] applied to a situation such as that in the main proceedings. Directive 2000/31 states that it is for the Member State where the information society service provider is established to ensure that such provider complies with those national provisions that fall within the coordinated field of the Directive. In this regard, it provides that 'Member States shall ensure that the taking up and pursuit of the activity of an information society service provider may not be made subject to prior authorisation or any other requirement having equivalent effect.'[23] It also states that 'Member States shall ensure that their legal system allows contracts to be concluded by electronic means.'[24] Second, the referring court asked whether the Hungarian legislation at issue was compatible with the Treaty provisions on the free movements of goods.

At the outset, the Court drew a distinction between the act of selling per se (which consists in the making of a contractual offer on-line and the conclusion of a contract by electronic means) and the delivery of the product sold (which often takes place via mail). Furthermore, in certain individual cases the customer obtains medical advice before the sale or the supply takes place.[25]

Next, the Court found that Directive 2000/31 is applicable to the act of selling *per se* but not to the delivery of the product sold. This is so because that directive covers the sale of goods on-line[26] and does not exclude from its scope of application the sale of medical devices such as contact lenses via the Internet.[27] The Court also pointed out that those findings were not affected by the fact that the selling or the supply of contact lenses may be subject to the requirement that the customer first obtain medical advice. In its view, '(a precautionary ophthalmological) examination is not inseparable from the selling of contact lenses, given that [i]t can be carried out independently of the act of sale, and the sale can be effected, even at a distance, on the basis of a prescription made by the ophthalmologist who has previously examined the customer.'[28]

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[21] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJL178/1.

[22] See Articles 1(2) and 2(1) of Directive 2000/31.

[23] See Article 4(1) of Directive 2000/31.

[24] See Article 9(1) of Directive 2000/31.

[25] *Ker-Optika* (n 2) para 22.

[26] See Rectial 18 of Directive 2000/31.

[27] See Article 1(5) of Directive 2000/31.

[28] *Ker-Optika* (n 2) para 37.

Accordingly, regarding the first question, the Court ruled that a 'national provision which prohibits the selling of such lenses via the Internet falls, in principle, within the scope of Directive 2000/31'.[29]

As to the second question, the Court noted that, since Directive 2000/31 only covered the act of selling per se, the rules governing the supply of contact lenses set out in the Hungarian legislation at issue in the main proceedings needed to be examined under primary EU law, that is to say under the provisions of the EU Treaties themselves.

The Court began by deciding whether the free movement of goods or the freedom to provide services was applicable to the case at hand. Drawing on its previous findings in *Doc Morris,*[30] a case involving the sale of prescription and non-prescription medicines for human use via the Internet, it ruled that 'a national measure concerning an arrangement characterised by the sale of goods via the Internet and the delivery of those goods to the customer's home is to be examined only with regard to the rules relating to the free movement of goods and, consequently, with regard to Articles 34 TFEU and 36 TFEU'.[31]

Next, referring to the *Commission v Italy* case,[32] where it classified the measures which may potentially fall within the scope of Article 34 TFEU into three different categories, the Court of Justice held that the sale of contact lenses via the Internet and the delivery of those goods constituted a 'selling arrangement'. Accordingly, in light of its well-known ruling in *Keck and Mithouard,*[33] the Court recalled that national provisions restricting or prohibiting certain selling arrangements may be regarded as preventing market access, *unless* those provisions (1) apply to all relevant traders operating within the national territory *and* (2) affect in the same manner, in law and in fact, the selling of domestic products and of those imported from other Member States.

In this regard, the Court noted that, whilst the legislation at issue applied to all traders alike, 'the prohibition on selling contact lenses by mail order (deprived) traders from other Member States of a particularly effective means of selling those products and thus significantly (impeded) access of those traders to the market of the Member State concerned'.[34] Accordingly, it reasoned that, since that legislation did not affect in the same manner the sale of contact lenses by Hungarian sellers, on the one hand, and the sale of lenses by traders from other Member States, on the other hand, it constituted a measure having equivalent effect to a quantitative restriction which was prohibited by Article 34 TFEU, unless it could be objectively justified and, furthermore, complied with the principle of proportionality.[35]

In that connection, the Hungarian government argued that its legislation sought to protect the public health of contact lens users. The Court indeed recognised that aim as a legitimate

[29] Ibid, para 40.
[30] Case C-322/01 *Deutscher Apothekerverband* (EU:C:2003:664).
[31] *Ker-Optika* (n 2) para 44.
[32] Case C-110/05 *Commission v Italy* (EU:C:2009:66).
[33] Cases C-267/91 and C-268/91 *Keck and Mithouard* (EU:C:1993:905, paras 16 and 17).
[34] *Ker-Optika* (n 2) para 54.
[35] Ibid, paras 54 to 56.

objective among those set out in Article 36 TFEU as being capable of justifying an obstacle to the free movement of goods.[36]

Next, the Court of Justice went on to examine whether the legislation at issue was appropriate for securing the attainment of the objective pursued. It replied in the affirmative. Since there are indeed risks to public health associated with the use of contact lenses, the Court of Justice found that, by reserving the supply of contact lenses to the opticians' shops which offered the services of such an optician, the legislation at issue in the main proceedings ensured the protection of the health of those users.

However, the Court of Justice also found that the legislation at issue in the main proceedings went beyond what was necessary to attain that objective because there were less restrictive alternatives to an outright ban on the sale of contact lenses via the Internet.

First, under the Hungarian law in force at the time, the sale of contact lenses by an optician was not made conditional upon a precautionary examination being undertaken or of medical advice being given. Since those medical precautions were optional for lens wearers, it was 'primarily the responsibility of each contact lens user to make use of them'.[37] In any event, the on-line seller of contact lenses could be required to publish on its website a notice reminding customers of the benefits associated with receiving the services of an optician prior to making use of contact lenses. Second, whilst it is true that the choice as to the best type of contact lenses for an individual to wear should be made by an optician, that determination needs to be made, as a general rule, only once, when contact lenses are first supplied. In that regard, it would suffice for the Member State concerned to require the customer to order his or her contact lenses in accordance with that initial prescription. A customer could also be required to undergo a new eye examination or to obtain a new medical prescription after the passage of a certain period of time.[38] Third, the Court recognised that advice given by a qualified optician may contribute to the prevention of health risks. However, it also held that a Member State may require the economic operators concerned to make available to the customer a qualified optician whose task is to give to the customer, at a distance, individualised information and advice on the use and care of the contact lenses.[39]

Accordingly, the Court of Justice ruled that Articles 34 TFEU and 36 TFEU, together with Directive 2000/31, precluded national legislation that authorised the selling of contact lenses only in shops which specialised in the sale of medical devices.

[36] Ibid, para 59.
[37] Ibid, para 68.
[38] Ibid, para 71.
[39] Ibid, para 73.

II Intellectual Property Law – Google and Google France: Internet Search and Trade Marks

In *Google France and Google,*[40] the Court was sesied of questions for a preliminary ruling, put to it by the French *Cour de Cassation,* arising from disputes concerning the use, as keywords in Google's paid internet referencing service, of signs which correspond to trade marks, without consent having been given by the proprietors of those trade marks. Those keywords had been chosen by clients of the referencing service provider and accepted and stored by that provider. The clients in question either marketed imitations of the products of the trade mark proprietor – in case C-236/08, where the trade mark proprietor was the Louis Vuitton company – or were, quite simply, competitors of the trade mark proprietor, as was the situation in the two other cases, and the trade mark owners wished to prevent the unauthorised use, by such third parties, of their trade marks as keywords for the purpose of collating internet search results.

The *Cour de Cassation*'s first question focused on the possible liability of the client who paid Google for the use of the relevant signs. In particular, it wanted to know whether the purchase and use by a third party of a keyword corresponding to a trade mark constituted, in itself , an infringement of the trade mark proprietor's exclusive right rights in that mark conferred on him or her by Article 5 of Directive 89/104.[41] The Court began by recalling that, in accordance with its own case law and by application of Article 5(1)(a) of Directive 89/104 as well as, by the same token, of Article 9(1)(a) of Regulation n°40/94[42] in the case of Community trade marks, the proprietor of a trade mark is entitled to prohibit a third party from using, without the proprietor's consent, a sign identical with that trade mark when that use is *in the course of trade*, is *in relation to goods or services which are identical with, or similar to, those for which that trade mark is registered*, and *affects, or is liable to affect, the functions of the trade mark*.[43]

The first issue to be examined was thus whether the use made of a trade mark by a client of Google, in this context, constituted use 'in the course of trade'. The Court found that, in light of the commercial purpose for which such a client stored the relevant keywords, he or she was indeed using the trade marks at issue in the course of trade.[44] Next, the Court examined whether that commercial use of the trade marks took place 'in relation to goods or services' identical or similar to those covered by the trade mark. The Court found that in case C-236/08 the answer was clear since goods were indeed being offered by a third party under a sign identical with Vuitton's trade marks in adverts displayed, following a Google search, under the heading 'sponsored links'. In the other two cases, on the other hand, the trade marks were not so displayed. Nevertheless, the Court observed that where a sign identical with a trade mark is selected as a keyword by a competitor of the proprietor of the trade mark with the aim of offering

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[40] *Google France and Google* (n 5).

[41] First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks [1989] OJ L40/1.

[42] Council Regulation (EC) 40/94 of 20 December 1993 on the Community trade mark [1994] OJ L11/1.

[43] *Google France and Google* (n 5) para 49.

[44] Ibid, paras 50 to 59.

internet users an alternative to the goods or services of that proprietor, there is a use of that sign in relation to the goods or services of that competitor.[45] It also observed that even in cases where the advertiser does not seek to present its goods or services to internet users as an alternative to those of the proprietor of the trade mark but, on the contrary, seeks to mislead internet users as to the origin of its own goods or services by making them believe that they originate from the proprietor of the trade mark, there is use 'in relation to goods or services'. The Court therefore concluded that this criterion was satisfied in all three cases.

Concerning the requirement that the use at issue should affect, or be liable to affect, the functions of the trade mark, the Court broke down its analysis into two parts, examining first whether there was any adverse effect of the trade mark's function of indicating origin. The Court held that this function is adversely affected by virtue of the fact that the trade mark is used as a keyword if the advert shown as a result does not enable normally informed and reasonably attentive internet users, or enables them only with difficulty, to ascertain whether the goods or services referred to by the advert originate from the proprietor of the trade mark or an undertaking economically connected to it or, on the contrary, originate from a third party.[46] However, the Court went on to observe that it is for the national court to assess, on a case-by-case basis, whether the facts of the dispute before it indicate adverse effects of that sort.[47] Where a third party's advert suggests that there is an economic link between that third party and the proprietor of the trade mark, the conclusion must be that there is an adverse effect on the function of indicating origin.[48] Where that advert is vague to such an extent on the origin of the goods or services at issue that normally informed and reasonably attentive internet users are unable to determine whether or not the advertiser is a third party *vis-à-vis* the proprietor of the trade mark the conclusion must also be that there is an adverse effect on that function of the trade mark.[49] On the other hand, the Court found that use of a sign identical with another person's trade mark in a referencing service such as that at issue is not liable to have an adverse effect on the advertising function of the trade mark. The adverse effect on the trade mark's function as an indication of commercial origin was, however, sufficient in itself to satisfy this criterion.

In the light of the above the Court ruled that Article 5(1)(a) of Directive 89/104 and Article 9(1)(a) of Regulation N°40/94 mean that the proprietor of a trade mark is entitled to prohibit an advertiser from advertising, on the basis of a keyword identical with that trade mark which that advertiser has, without the consent of the proprietor, selected in connection with an internet referencing service, goods or services identical with those for which that trade mark is registered, where that advertisement does not enable an average internet user to ascertain whether or not the goods or services referred to originate from the proprietor of the trade mark.[50]

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[45] Ibid, para 69.
[46] Ibid, para 84.
[47] Ibid, para 88.
[48] Ibid, para 89.
[49] Ibid, para 90.
[50] Ibid, para 1 of the operative part.

The other two questions put by the *Cour de Cassation* related to the possible liability of Google itself. The second question related to the possibility that the provider of a paid referencing service, such as Google, might be covered by Article 5 of Directive 89/104. The Court answered that question in the negative. Referring back to its analysis of the concept of use 'in the course of trade' the Court ruled that the service provider does not 'use' the trade mark for commercial purposes itself but rather enables its client to do so. The third question concerned the interpretation of Article 14 of Directive 2000/31,[51] under which the provider of an information society storage service is not liable for the information stored at the request of its client provided that it does not have actual knowledge of an illegality and that it acts expeditiously to remove that information once it acquires such knowledge. This question was important with respect to Google's potential liability before it was informed by the trade mark owner of the allegedly unlawful use of his or her trade mark. The Court held that the rule laid down in Article 14 applies to an internet referencing service provider where that service provider has not played an active role of such a kind as to give it knowledge of, or control over, the data stored. Provided it has not played such a role, that service provider cannot be held liable for the data which it has stored at the request of an advertiser, unless, having obtained knowledge of the unlawful nature of those data or of that advertiser's activities, it failed to act expeditiously to remove or to disable access to the data concerned.[52]

III EU Private International Law – Pammer and Hotel Alpenhof: Internet Travel Bookings

Article 2 of the Brussels I Regulation[53] provides that actions against a person domiciled in a Member State must, as a general rule, be brought in the courts of that State. Article 5(1) of that Regulation also provides that cases resulting from a contractual relationship may, alternatively, be decided by the courts in the place of performance of the relevant contractual obligation.

However, in the case of consumer contracts, it follows from Articles 15 and 16 of the Brussels I Regulation that, where a business, whilst not active in the Member State in which the consumer is domiciled, nevertheless 'directs its activities' to that Member State, the consumer can bring proceedings before the courts of the Member State of his own domicile and can be sued only in that Member State.[54] In two joined cases, *Pammer* and *Hotel Alpenhof*[55] the ECJ was asked by the Austrian *Oberster Gerichtshof* (Supreme Court) whether a business 'directs its activities' to a Member State within the meaning of Article 15(1)(c) of that Regulation when it uses

[51] Directive 2000/31/EC (n 21).

[52] *Google France and Google* (n 5) para 3 of the operative part.

[53] Regulation n°44/2001 (n 12).

[54] See, more particularly, Articles 15(1)(c), 16(1) and 16(2) of the Brussels I Regulation. Thus, the notion of 'consumer' under the Brussels I Regulation only covers 'passive consumers.'

[55] *Pammer and Hotel Alpenhof* (n 10).

a website to offer its services to consumers. If so, then consumers domiciled in those other States could benefit, in the event of a dispute with that business, from the more favourable rules of jurisdiction laid down by Articles 15 and 16 of the Brussels I Regulation.

In case C-585/08, Peter Pammer, who resided in Austria, wished to undertake a sea voyage on a freighter from Trieste (Italy) to the Far East. He therefore booked a voyage with the German company Reederei Karl Schlüter, through a German travel agency specialising in the sale on the internet of voyages by freighter. At the beginning of the voyage, Mr. Pammer refused to embark on the ground that the conditions on board the vessel did not, in his view, correspond to the description which he had received from the agency. He therefore sought reimbursement of the sum that he had paid for the voyage. Since Reederei Karl Schlüter reimbursed only part of that sum, Mr. Pammer brought proceedings in the Austrian courts. The German company contended that those courts lacked jurisdiction on the ground that it did not pursue any professional or commercial activity in Austria.

In case C-144/09, Oliver Heller, a German resident, reserved a number of rooms, for a period of a week, at the Hotel Alpenhof, in Austria. The reservation was made by email, since the hotel's website, which Mr. Heller had consulted, indicated an email address for that purpose. Mr. Heller found fault with the hotel's services and left without paying his bill. The hotel then brought an action before the Austrian courts for payment of that bill. In his defence, Mr. Heller raised a plea of lack of jurisdiction, submitting that, as a consumer resident in Germany, he could be sued only in the German courts.

The Court began by holding that the mere use of a website by a business in order to engage in trade does not in itself mean that its activity is 'directed to' other Member States, although, of course, any such site is necessarily accessible there. In order for the rules laid down in the Regulation to be applicable in relation to consumers from other Member States, the Court indicated that the trader must have manifested his or her intention to establish commercial relations with such consumers.

The Court then examined the evidential factors that might prove that the trader was envisaging doing business with consumers domiciled in other Member States. Such evidence might include clear expressions of the trader's intention to seek the custom of those consumers where, for example, it offered its services or its goods in several named Member States or paid a search engine operator for an internet referencing service in order to facilitate access to its site by consumers domiciled in those particular Member States.[56]

Nevertheless, other less obvious pieces of evidence may also be capable of demonstrating the existence of an activity 'directed to' the Member State of the consumer's domicile. These may include, for example, (i) the international nature of the activity itself, such as certain tourist activities, (ii) the mention of telephone numbers with the international code, (iii) the use of a top-level domain name other than that of the Member State in which the trader is established or the use of neutral top-level domain names such as '.com' or '.eu', (iv) the description of itineraries

[56] Ibid, para 81.

from one or more other Member States to the place where the service is provided and (v) the mention of an international clientele composed of customers domiciled in various Member States, in particular through accounts written by such customers.[57] Likewise, if the web site permits consumers to use a language or a currency other than that generally used in the trader's Member State, this can also constitute evidence demonstrating the cross-border nature of the trader's activity.[58] On the other hand, the Court indicated that the mention on a web site of the trader's email address or geographical address, or of its telephone number without an international code, does not constitute such evidence as that information does not indicate whether or not the trader is directing its activity to one or more Member States since that information is equally relevant for purely domestic transactions.[59]

The ECJ concluded that it was for the referring court to determine, in the light of those factors and on the basis of the evidence presented to it, whether it was apparent from the traders' websites and overall activity that they were envisaging doing business with consumers from the relevant Member States in the sense that they were minded to conclude contracts[60] with them.[61]

IV Data Protection – Digital Rights: The Limits on Data Storage by the Public Authorities

In the *Digital Rights* case,[62] the Court of Justice was asked, in essence, to examine whether Directive 2006/24[63] was valid in light of Articles 7, 8 and 52(1) of the Charter. That Directive sought to 'harmonise Member States' provisions concerning the retention, by providers of publicly available electronic communications services or of public communications networks, of certain data[64] which are generated or processed by them, in order to ensure that the data are

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57 Ibid, para 83.

58 Ibid, para 84.

59 Ibid, para 77.

60 Ibid, para 2 of the operative part.

61 It is also worth noting that in a subsequent case C-218/12 *Emrek* (EU:C:2013:666), involving a dispute between a French second-hand car dealer and his German client, in circumstances where the latter had learned of the dealer's business from acquaintances and not from the dealer's internet site – which did indeed provide contact details including French telephone numbers and a German mobile telephone number, together with the respective international codes – the Court held that Article 15(1)(c) of the Brussels I Regulation does not require the existence of a causal link between the means employed to direct the commercial or professional activity to the Member State of the consumer's domicile, namely an internet site, and the conclusion of the contract with that consumer. However, the existence of such a causal link constitutes evidence of the connection between the contract and such activity.

62 *Digital Rights Ireland and Others* (n 17).

63 Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 106/54.

64 *Digital Rights* (n 62) para 26. That data included: 'data necessary to trace and identify the source of a communication and its destination, to identify the date, time, duration and type of a communication, to identify users' ☞

available (to the competent national authorities) for the purpose of the prevention, investigation, detection and prosecution of serious crime, such as organised crime and terrorism, in compliance with the rights laid down in Articles 7 and 8 of the Charter'.[65]

Whilst it was true that Directive 2006/24 did not permit the retention of the content of communications or of any information consulted using an electronic communications network, the Court pointed out that it did make it possible to know the identity of the person with whom a subscriber or registered user had communicated and the means by which that communication was effected, as well as to identify the time and the place of the communication, and to know the frequency of the communications of the subscriber or registered user with certain persons during a given period.[66] Directive 2006/24 also allowed for the data to be retained and used without the subscriber or registered user being informed, thereby 'generat(ing) in the minds of the persons concerned the feeling that their private lives are the subject of constant surveillance';[67] in other words, to borrow the famous expression coined by George Orwell in his dystopian novel 'Nineteen Eighty-Four',[68] the feeling that 'Big Brother is watching you'.

In the Court's view, this showed that the retention of data and the access of the competent national authorities to those data, as provided for by Directive 2006/24, 'directly and specifically affect(ed) private life' which is protected by Article 7 of the Charter.[69] It also constituted the processing of personal data within the meaning of Article 8 of the Charter. Given that Directive 2006/24 limited the exercise of the rights laid down in Articles 7 and 8 of the Charter, it had to comply with the requirements laid down in Article 52(1) thereof.

In that connection, the Court observed, first, that Directive 2006/24 did not adversely affect the essence of the rights set out in Article 7 of the Charter, since it did 'not permit the acquisition of knowledge of the content of the electronic communications as such'. In the same way, the rights set out in Article 8 of the Charter were not deprived of their essence since the Directive required Member States to adopt 'appropriate technical and organisational measures against accidental or unlawful destruction, accidental loss or alteration of the data'.[70]

Second, the Court noted that Directive 2006/24 pursued two objectives of general interest recognised by the EU, namely 'the fight against international terrorism in order to maintain international peace and security'[71] and 'the fight against serious crime in order to ensure public security'.[72]

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communication equipment, and to identify the location of mobile communication equipment, data which consist, inter alia, of the name and address of the subscriber or registered user, the calling telephone number, the number called and an IP address for Internet services.'

65 Ibid, para 24.

66 Ibid, para 26.

67 Ibid, para 37.

68 Published in 1949.

69 Ibid, para 29.

70 Ibid, paras 39 and 40.

71 Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission* (EU:C:2008:461) para 363.

72 Case C-145/09 *Tsakouridis* (EU:C:2010:708paras 46 and 47).

Third, the Court examined whether Directive 2006/24 complied with the principle of proportionality. By drawing on the case law of the European Court of Human Rights,[73] it took the view that, in light of the extent and seriousness of the interference with the fundamental right to private life brought about by the provisions of that Directive, the Union's legislative discretion was reduced.[74]

Next, the Court went on to find that the retention of data in connection with electronic communications was an appropriate means of attaining the objective pursued by Directive 2006/24, as such retention was indeed a valuable tool for criminal investigations.[75]

Finally, the Court of Justice observed that 'derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary'.[76] This meant that, when adopting that Directive, the Union legislator was under the obligation to lay down clear and precise rules governing the extent of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter. However, the Court gave three reasons for its conclusion that this test was not satisfied in the case of Directive 2006/24.

The first reason was that 'Directive 2006/24 cover(ed), in a generalised manner, all persons and all means of electronic communication as well as all traffic data without any differentiation, limitation or exception being made in the light of the objective of fighting against serious crime.'[77] It thus entailed a wide-ranging and particularly serious interference with the fundamental rights of practically the entire European population.

As to the second reason, that Directive failed to provide either substantive or procedural criteria 'delimiting the access of the competent national authorities to the data and to their subsequent use for the purposes of prevention, detection or criminal prosecutions concerning offences that, in view of the extent and seriousness of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter, may be considered to be sufficiently serious to justify such an interference.'[78] In particular, the Court observed that Directive 2006/24 did not lay down any criterion identifying the persons authorised to have access to the data. Nor did it limit the use of the data retained by those persons to what was strictly necessary in light of the objective pursued. Most importantly, access by the competent national authorities to the data was not subject to a prior review by any court or independent administrative body.[79]

The third reason was that, in accordance with Directive 2006/24, data were to be retained for a minimum period of six months and a maximum of 24 months, regardless of its usefulness for the purposes of preventing serious crime. This meant that the period of retention was not determined according to objective criteria that were apt to ensure that this period was limited to what was strictly necessary.[80]

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[73] ECtHR, *S. and Marper v. the United Kingdom* [GC], (nos. 30562/04 and 30566/04, § 102, ECHR 2008-V).
[74] *Digital Rights Ireland and Others* (n 17) para 48.
[75] Ibid, para 49.
[76] Ibid, para 52.
[77] Ibid, para 57.
[78] Ibid, paras 60 and 61.
[79] Ibid, para 62.
[80] Ibid, paras 63 and 64.

Moreover, Directive 2006/24 also failed to provide for sufficient safeguards, as required by Article 8 of the Charter, to ensure effective protection of the data retained against the risk of abuse and against any unlawful access to and use of that data. In particular, this was so because providers of electronic communications services could, for reasons of economic feasibility, limit the level of security which they would apply. In addition, the irreversible destruction of the data at the end of the data retention period was not guaranteed and it was possible for the data to be retained outside the EU.[81]

Accordingly, the Court of Justice held that Directive 2006/24 was incompatible with Articles 7, 8 and 52(1) of the Charter. Consequently, that Directive was declared invalid.

V Competition Law – Pierre Fabre: Legality of a ban on internet sales

The *Pierre Fabre Dermo-Cosmétique* case[82] concerned a decision by the French Competition Authority, applying Union as well as French law, in which it decided that an absolute contractual ban on internet sales, imposed by the company of that name (hereinafter 'Pierre Fabre') on the pharmacists within its selective distribution network, could benefit neither from the block exemption provided for in Regulation n°2790/1999[83] nor from an individual exemption pursuant to Article 81(3) EC.[84] Pierre Fabre brought an action for annulment of that decision before the *Cour d'appel de Paris* (Paris Court of Appeal) which decided to send a question to the Court for a preliminary ruling. In substance, the referring court wished to know, firstly, whether the contractual clause at issue amounted to a restriction of competition 'by object' within the meaning of Article 101(1) TFEU, secondly, whether a selective distribution contract containing such a clause and falling within the scope of Article 101(1) TFEU might benefit from the block exemption established by Regulation No 2790/1999 and, thirdly, whether, the contract might alternatively benefit from the exception provided for in Article 101(3) TFEU.

On the first issue the Court ruled that, in the context of a selective distribution system, a contractual clause requiring sales of cosmetics and personal care products to be made in a physical space where a qualified pharmacist must be present, resulting in a ban on the use of the internet for those sales, amounts, in principle, to a restriction of competition by object within the meaning of Article 101(1) TFEU. However, the Court recalled that the organisation of a selective distribution network is not prohibited by Article 101(1) TFEU, to the extent that resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion, that the characteristics of the product in question require such a network in order to preserve its quality and ensure its proper

[81] Ibid, paras 67 and 68.

[82] *Pierre Fabre Dermo-Cosmétique* (n 19).

[83] Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices [1999] OJ L336/21.

[84] Since replaced by Article 101(3) TFEU.

use and, finally, that the criteria laid down do not go beyond what is necessary. The Court therefore held that a clause such as the one at issue is only prohibited where, following an individual and specific examination of its content and objective and the legal and economic context of which it forms a part, it is apparent that, having regard to the properties of the products at issue, that clause is not objectively justified. The Court added that it is for the referring court to examine whether the contractual clause at issue prohibiting de facto all forms of internet selling can be justified by a legitimate aim, but, referring to its judgment in *Ker-Optika,*[85] the Hungarian case about which I have already spoken, recalled that in the light of free movement of goods, it has not accepted arguments relating to the need to provide individual advice to the customer and to ensure his protection against the incorrect use of products, in the context of non-prescription medicines and contact lenses, to justify a ban on internet sales. The Court also stated that the aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU.[86]

The Court dealt with the second and third issues together. It found that the block exemption established by Regulation No 2790/1999 was not applicable to a selective distribution contract containing a clause that prohibited de facto the Internet as a method of marketing the products covered by the contract. As regards the exception provided for in Article 101(3) TFEU, the Court indicated that a selective distribution contract such as the one at issue may benefit, on an individual basis, from the exception provided for in Article 101(3) TFEU where the conditions of that provision are met, but that it did not have sufficient information before it to assess whether the particular contract to which the case at hand related actually satisfied the conditions set out in Article 101(3) TFEU. The Court was therefore unable to provide further guidance to the referring court in that respect.[87]

Conclusion

It is often said that human history moves more and more quickly as the years go by. Indeed, the past ten years since Hungary joined the European Union have seen momentous changes both within our Union and globally. Many of those changes, notably the rapid shift to an ever more globalised and interconnected world economy, have been driven by the communications revolution that is reflected in the cases that I have described this morning. As those cases illustrate, the Court has played its part in helping the Union to adapt its legal rules to the challenges posed by those changes, establishing a balance between our traditional ways of ordering the world and the novel issues raised by this disruptive technology.

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[85] *Ker-Optika* (n 2) para 76.

[86] *Pierre Fabre Dermo-Cosmétique* (n 19) paras 34 to 47.

[87] Ibid, paras 48 to 59.

I firmly believe that all of our Member States are in a stronger position to face these changes – technological, economic, geopolitical even – and indeed to take advantage of the opportunities that they bring, within the framework of our shared European Union, governed as it always was and continues to be, by our powerful common values and, in particular, by our firm attachment to the rule of law.

Endre Juhász*

The Influence of Union Law on Hungarian Civil and Commercial Law before Accession, during the Accession Negotiations and thereafter

As the title indicates, I would like to examine the influence of Community law, subsequently Union law, on the Hungarian civil and commercial law in three periods: before the accession of Hungary to the European Union, during the accession negotiations and after accession, while acknowledging that the first period overlaps with the second since the accession negotiations took place, of course, prior to accession. This requires some clarification regarding the terminology to be used. Before accession, the influence of Union law could primarily be understood in terms of the approximation of laws and the alignment of national legislation with Community legislation. Later, while the approximation of national laws was still in progress, a part of Union or Community law directly became part of Hungarian law.

I Before the Accession

Without going back too far in history, I would like to point out that Hungary has always shown itself receptive to taking over foreign laws or legal principles. Hungary has a significant Roman law tradition (do not forget that Latin had been an official language until the 1840s). In the period of modernisation, following the constitutional agreement with Austria in 1867, many of Hungary's economic and commercial legislative acts borrowed elements from Austrian, German and Swiss laws. After the Second World War, and throughout the nineteen seventies and eighties, the European Community (EC) was becoming an increasingly important trading partner to Hungary. By the early nineteen nineties, approximately 45 percent of Hungarian exports went to Member States of the European Community. Inevitably, this development necessitated the adaptation, at least, of measures governing technical standards and requirements for exported goods. In this way, the Community as such and its regulations became familiar within the Hungarian economy.

Nevertheless, the approximation of national laws with Community law only became a legal obligation following the conclusion of the Association Agreement between Hungary and the European Communities and their Member States (known as the Europe Agreement), which was

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signed on 16 December 1991 and, after a long ratification process, entered into force on 1 February 1994. Article 67 of the Agreement provided:

> The Contracting Parties recognize that the major precondition for Hungary's economic integration into the Community is the approximation of that country's existing and future legislation to that of the Community. Hungary shall act to ensure that future legislation is compatible with Community legislation as far as possible.

I can remember that the negotiators representing the Community had wanted this article to be expressed in more stringent terms, and certainly did not favour a text that included the softening formula 'as far as possible', but it was very difficult to find sufficiently precise wording and the Community recognised that an obligation of complete harmonisation could not be imposed upon a country in transition. Ultimately, the Community negotiators accepted the formula which we proposed, convinced by our argument that if we wished to become a member of the Community it would, in any event, be in our own interest to progress as quickly as possible. Article 68 set out specific areas in which progress was needed. They were: 'customs law, company law, banking law, company accounts and taxes, intellectual property, protection of workers at the workplace, financial services, rules on competition, protection of health and life of humans, animals and plants, food legislation, consumer protection including product liability, indirect taxation, technical rules and standards, transport and the environment.'

Only some of these areas may be considered to belong, at least in part, to civil and commercial law, namely, company law and intellectual property, competition and consumer protection. Although competition law is mostly public law – since it regulates state intervention – this branch of law concerns the conduct of private undertakings and makes provision for private remedies. In the event of infringement of competition rules, natural and legal persons may seek damages, and so it seems useful to include this area in this study.

I think that the regulation of public contracts should also be added to the list. Community legislation does not merely provide for forms and procedures in this area, but also sets out certain mandatory elements in respect of the contract documentation which, following the award, will form part of private contracts. The Europe Agreement did not refer to the harmonisation of public contracts but provided that Hungarian companies were to receive equal treatment as Community companies with immediate effect, and that Community companies would also be entitled to equal treatment in Hungary, following the expiration of a ten year transitional period.

I assume that, in this presentation, my focus must be on civil and commercial law in the traditional sense or in a strict sense. Obviously, EU regulations regarding, for example, the four freedoms (free movement of persons, goods, services, capital) affect the contractual freedom of natural and legal persons. Equally, the technical requirements in the area of, for example, food safety may be regarded as determining the content of private contracts. A further example may be found in the area of life insurance. While Community regulations aim at the creation or completion of the internal market, they contain rules that become part of the contractual relationship between the insurance companies and the policy holder (for example, in Directive 92/96/EEC, Article 31 requires information set out in Annex II to be communicated to the policy holder). But I think that I am not supposed to extend our discussions to all these areas, because

in this way, we would cover an extremely large part of Union law. Nevertheless, it is necessary to establish a special category which does not form part of traditional civil and commercial law but belongs to the Union law under the heading 'internal market'. This category includes pieces of EU legislation regulating mainly or typically contractual rights and obligations such as the contracts of commercial agents.

The Europe Agreement became part of Hungarian national law through the adoption of Act I of 1994. Article 3(2) of the 1994 Act provided that 'In the preparation and adoption of legislative acts, the requirements set out in article 67 of the Association Agreement must be met.' At the same time, the 1994 Act amended the Act on legislative procedures and required every legislative proposal having a bearing on areas covered by the Europe Agreement to be accompanied by information specifying the extent to which the proposal fulfils the requirement on approximation to the EC legislation and indicating whether it is in conformity with this legislation.

The Hungarian Government, by resolutions, had adopted several approximation or harmonisation programmes. Without being exhaustive, I would like to highlight some of them. Resolution 2174/1995 (VI. 15.) established a five year programme. At their summit meeting at Cannes on June 26-27, the European Council approved a White Paper presented by the European Commission for the preparation of the associated countries of Central and Eastern Europe for integration into the internal market of the Union. Taking into account this document, Government Resolution 2403/1995 (XII. 12.) adopted a new 'comprehensive' approximation programme. The details of the programme required further work and a programme running until December 31st 2001 was adopted by Government Resolution 2212/1998 (IX. 30.). Government Resolution 2212/1998 was subsequently replaced by Government Resolution 2280/1999 (XI. 5.), which, in turn, was replaced by Government Resolution 2140/2000, establishing a programme lasting until 31 December 2002. The Government also established the institutional framework for the implementation of these programmes, including the responsibilities of Ministers and state organisations.

After the start of the accession negotiations (31 March 1998), the approximation process was adapted so that it followed the structure of the negotiations, which regrouped the various subject areas into 31 chapters. In this new structure, we are particularly interested in the following chapters: '5 Company Law, 6 Competition, 23 Consumer Protection, 24 Cooperation in the field of Justice and Home Affairs.'

Today, in retrospect, we can see that this approximation process progressed quite well, without major difficulties. I would like to highlight the following pieces of legislation.

Company law: Act CXLIV of 1997 on Companies, Act CXLV of 1997 on the Register of Companies, Public Company Information and Court Registration Proceedings.

Intellectual property: Act XXXIII of 1995 on the Protection of Inventions by Patents, Act XI of 1997 on the Protection of Trademarks and Geographical Product Markings.

Consumer Protection: Act CLV of 1997 on Consumer Protection (Directive 92/59/EEC on general product safety, Directive 87/102/EEC concerning consumer credit, amended by Directive 90/88/EEC, Directive 98/27/EC on injunctions for the protection of consumers' interests, Commission recommendation 98/257/EC on the principles applicable to the bodies responsible

for out-of-court settlement of consumer disputes). Government Decree 44/1998 (III. 11.) on Doorstep Selling (Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises). Government Decree 17/1999 (II. 5.) on distance contracts (Directive 97/7/EC on the protection of consumers in respect of distance contracts). Government Decree 20/1999 (II. 5.) on contracts relating to the purchase of the right to use immovable properties on a timeshare basis (Directive 94/47 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis). Act CXLIX of 1997 amending Act IV of 1959 on the Civil Code, and Government Decree 18/1999 (II. 5.) on unfair terms in Consumer Contracts (Directive 93/13/EEC on unfair terms in consumer contracts). Act X of 1993 on Product liability as amended by Act XXXVI of 2002. This Act introduced a new concept in Hungarian civil and commercial law namely of kind of strict liability which was expressly taken over from Council Directive 85/374/EEC concerning liability for defective products.

Competition: Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices as amended by Act XXXI of 2003 and several Government Decrees on group exemptions [relevant article of the EC Treaty and Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, and corresponding category or block exemption regulations of the Commission].

Public Contracts: Act XL of 1995 on Public Contracts. This Act did not accomplish full harmonisation; it even provided for preference to national operators. Act CXXIX of 2003 on Public Contracts (Directive 92/50/EEC on public service contracts, Directive 93/36/EEC on public supply contracts, Directive 93/37/EEC on public works contracts, Directive 92/13/EEC on procurement procedures in the water, energy, transport and telecommunications sectors, Directive 89/665/EEC on review procedures).

Internal Market: Act LVIII of 1997 on Commercial Advertising (Directive 84/450/EEC concerning misleading and comparative advertising). Act CXVII of 2000 on Contracts of Independent Commercial Agents (Directive 86/653 on self-employed commercial agents). Government Decree 213/1996 (XII. 23.) on the Travel Organisation and Agency Activity, Government Decree 214/1966 (XII. 23.) on Travel Contracts and Travel Agency Contracts (Directive 90/314/EEC on package travel, package holidays and package tours).

There was one important glitch in the approximation process, raising a question of principle. Article 62(1) of the Europe Agreement contained the same basic provisions on competition as the EC Treaty. But we know that competition law is a very wide and complex area. During the negotiations of the Europe Agreement, there was an understanding that in cases where trade between the Community and Hungary would be affected, Community law should apply. Unable to codify all these rules, Article 62(2) simply provided that any practices contrary to this Article would be assessed on the basis of criteria arising from the application of the rules of Articles 85, 86 and 92 of the Treaty establishing the European Economic Community and on the basis of implementation rules to be defined by the Association Council. The Association Council proceeded to lay down the implementation rules in Decision 2/96 but considered it sufficient to set out procedural rules only and otherwise simply referred to the application of Community principles.

The Hungarian Constitutional Court held that the Hungarian authorities were not authorised to apply the criteria referred to in Article 62(2) [Decision 30/1998. (VI. 25.) AB of the Constitutional Court of the Republic of Hungary] directly and annulled the relevant parts of the Government Decree giving effect to the Decision of the Association Council. Even if one might have had a different view to that adopted by the Constitutional Court, the fact remained that it was imperative to respect the judgment of the Court. But it was not easy to implement. The task fell on me, as the former negotiator of the Association Agreement and the negotiator of the Accession Agreement. The Commission at the beginning clearly refused to deal with this issue. The officials said that it was a problem for Hungary and which it had to resolve itself. In any case, under international law, Hungary remained bound. After using all our powers of persuasion, we managed to get the cooperation of the Commission and together we worked out a new decision of the Association Council, which we finalised only in 2002 (Decision 1/2002). This was promulgated by Act X of 2002. Obviously, this decision of the Association Council ceased to apply from Hungary's accession to the Union.

II The Accession Negotiation

I admit that the transposition of EU law in the field of civil and commercial law did not pose any particular difficulty. The really critical issues of the negotiations were freedom of movement of persons, freedom of movement of capital (purchase of agricultural land by persons of other Member States), agriculture (level of direct income support for farmers, production quotas), state aid (tax free treatment for companies making major investments), and budgetary questions.

The Europe Agreement continued to be the legal basis of the approximation of laws but, more significantly, it was the specific commitments undertaken during the negotiations that governed the process.

Despite the fact that Hungary was able to take over the *acquis communautaire* relatively easily, some problems still arose, even in the field of civil and commercial law.

In the area of intellectual and industrial property rights, undoubtedly the immediate application of the system established by Regulation 1768/92 on the supplementary protection certificate for medicinal products could have posed difficulties for the pharmaceutical industry and for the social security system. Hungary initially requested a five-year transitional period, which was later withdrawn in the face of firm resistance from the EU. However, Hungary strongly opposed the EU position, according to which all patent holders that could not have received a product patent in Hungary because of the earlier legislation but received a market authorisation in this country would be entitled to the extension of their protection under this regulation. After long and heated discussions, a cut-off date was agreed, namely 1 January 2000, meaning that no patents which were granted market authorisation prior to that date could benefit from such protection.

It was really not an important issue but still worth mentioning that, in the 'Consumer and health protection' chapter, Hungary at the early stage of the negotiations requested a transitional period for the introduction of the threshold of 500 ECUs or Euros required for the application

of the legislation on product liability. Interestingly, the harmonisation with Directive 85/374/EEC concerning liability for defective products was completed early, already in 1993, and in this legislation the threshold was much lower, taking Hungary's general price and income levels into account. Although the lower threshold meant wider consumer protection, the Community was not willing to grant such a transitional period. Since we came to the conclusion that issues of much greater importance would arise in the negotiations, it was not considered essential to maintain this request and we therefore withdrew it.

The mutual recognition and enforcement of judgments in civil and commercial matters was expected to have a major impact, not so much on the content of civil and commercial law but on its application. During the negotiations we undertook to join the Lugano Convention of 16 September 1988, and later the Brussels Convention of 27 September 1968, but we were subsequently advised that the matter would be covered by regulation which would be directly applicable. It was therefore just a matter of waiting for the accession.

III After Accession

The accession changed the legal basis of approximation or harmonisation. In some areas the primary and secondary law of the Union became directly applicable and made the approximated national laws and regulations superfluous. In other fields, complete harmonisation was needed. Approximation in the sense of just *'getting closer'* to EU rules was not sufficient. After accession, the key word was 'transposition'. In addition, Union law as interpreted by the Court of Justice of the European Union entered into the national legal order. As such, the case law of the Court became a part of the Hungarian legal system.

In the area of competition law, Articles 81 and 82 of the EC Treaty, now Articles 101 and 102 of the Treaty on the Functioning of the European Union, and the case law of the Court of Justice became directly applicable where trade between the Member States was affected. National (harmonised) law continued to apply to agreements, decisions or practices which, although capable of restricting or distorting competition, were not considered to affect trade between Member States. While the Treaty and Regulation 1/2003 permit the coexistence of Union law and national law and tolerate some limited divergences between them, Hungarian national competition law may be regarded as substantially similar to EU law. This conclusion can be derived from the judgment of the Court of Justice of 14 March 2013 in Case C-32/11, *Allianz Hungaria.* In that judgment, the Court accepted the admissibility of this case, referred for a preliminary ruling, on the grounds that it was essentially required to interpret Union law.

By the direct application of the Union law, some new ideas and approaches were introduced into the Hungarian civil and commercial law. As an example, I mention Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of being denied boarding and cancellation of or long delay to flights. This regulation in the area of air transport significantly modified the contractual relationship between the passengers and the air transportation companies in favour of the passengers. The Court continued this course and gave a very extensive interpretation of the rights of the passengers provided for in this regulation (Joint

Cases C-402/07 and C-432/07, *Sturgeon* and C-11/11, *Folkerts*). Another example is Regulation 717/2007 on roaming on public mobile communications networks within the Community, which also modified the contractual relationship between the customers and mobile telephone companies. The Union legislature put limitations on the price of wholesale and retail services, which could be seen as an intrusion into the mechanism of the free market. Nevertheless, the Court, in its judgment C-58/08, *Vodafone,* confirmed the validity of this Regulation, stating that it does not infringe the principle of proportionality or subsidiarity.

Several judgment of the Court, as a result of references made by Hungarian courts, also contributed to the development of the Community law and consequently of Hungarian civil and commercial law. I would like, in particular, to mention Case C-210/06, *Cartesio* and C-378/10, *VALE* in the field of company law. In the area of the consumer protection, the Court has handled many cases, mostly regarding unfair terms on consumer contracts (C-243/08, *Pannon GSM,* C-137/08, *VB Pénzügyi Lízing,* C-472/11, *Banif Plus,* and C-430/13 *Baradics*). Undoubtedly, the most important case is C-26/13, *Kásler* in which potentially unfair terms in foreign currency-based credit contracts will be adjudicated upon. The judgment will be published in a few weeks. From the judgments of the Court, it is clear that terms in consumer contracts found to be unfair cannot be considered binding. Consequently, previous Hungarian legislation which gave the entitlement of the consumer only to requesting and obtaining a declaration of invalidity may not have been sufficient.

Many rules of Union law are interpreted by the Court, not as a part of civil and commercial law but linked to other fields, for example taxation or procedural law. Nevertheless, it is not excluded that if an interpretation is provided by the Court, it might have an impact not only in the context in which it is situated, but in another area of civil and commercial law. I would like to bring up some cases and perhaps it is excusable if these are cases where I was rapporteur or reporting judge.

Immovable property is a fundamental concept of civil law which rarely requires interpretation. However, this concept has great importance in the value added tax system and may constitute grounds for exemption. In Case C-532/11, *Leichenich,* the referring national court referred a question for a preliminary ruling as to whether a boat which is fixed to the bank and the bed of the river and is used exclusively for the permanent operation of a restaurant could be considered as immovable property. Essentially, the Court replied in the affirmative.

Also in the context of the application of directives on value added tax, a French court asked the question whether a sum paid as a deposit for hotel room reservations and retained by the hotel in case of cancellation by the client, is to be regarded as compensation for the loss suffered by the hotel or as supply of service for consideration. In the latter case, of course, the service is subject to VAT. The Court decided in favour of the first option (C-277/05, *Société thermale d'Eugénie-les-Bains*).

In Case C-381/08, *Car Trim,* the referring Court asked for clarification concerning the place of delivery for the application of Article 5(1)(b) of Regulation 44/2001 on the jurisdiction and recognition and enforcement of judgments in civil and commercial matters in a situation where the carriage of goods is involved. The Court was of the opinion that where it is impossible to determine the place of delivery on the basis of the contract, the place of delivery is not the place

where the goods were handed over to the first carrier but the place where the physical transfer of the goods to the purchaser took place at the final destination of the sales transactions.

Case C-204/08, *Rehder,* also concerned the interpretation of Article 5(1)(b) of Regulation 44/2001. The referring Court sought guidance, in the context of air transport of passengers from one Member State to another, on the identification of the place of the provision of services. The Court considered that one single place could not be identified, as would be the case with the delivery of goods. It decided that both the place of departure and the place of arrival could establish a territorial jurisdiction of a court.

It should be kept in mind that Hungary is a part of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) and also to the Convention on the Law applicable to Contractual Obligations (Rome, 19 June 1980). While I think that these are signs of European or international influence, they are not manifestations of the influence of Union law.

After accession, in the field of civil and commercial law, an outstanding, even historic, event was the adoption of the Civil Code by Act V of 2013 which entered into force recently, on 15 March 2014. At the end of this Act, a list enumerates the EU directives, with regard to which harmonisation has been ensured. This list mostly includes directives in the area of company law, commerce and consumer protection. Theoretically, the objective of the Code had been to codify existing law, which normally should have already been in conformity with EU law. Nevertheless, I think that the occasion was seized to correct or modify any elements of existing law found not to be in order.

Hugh Beale*

A Comparison of the Contract Sections of the New Hungarian Civil Code with English Law and the Proposed Common European Sales Law

Introduction

2014 is a year to celebrate in Hungary and the European Union. First, because it marks the tenth anniversary of Hungary's accession to the EU; and secondly because it has seen the introduction of the new Hungarian Civil Code, a project to which so many of our Hungarian colleagues contributed so much. At the same time it is a fascinating period for contract lawyers and those interested in European private law generally, because we have the possibility of a European measure of general application, the proposed Common European Sales Law (CESL).[1] The proposal is limited in scope: it applies only to sales, the supply of digital content and related services; and, if the amendments proposed by the European Parliament[2] are accepted, it will be limited to distance contracts and possibly even to internet contracts. Nonetheless, if the CESL succeeds it may be just the first in a series of measures that, ultimately, could cover increasing numbers of cross-border contracts. The model proposed is of an 'Optional Instrument' that the parties would be free to use or not to use. So it will leave the law of the Member States for domestic transactions entirely untouched – and allow parties to cross-border contracts to use a national law, or where applicable the United Nations Convention on the International Sale of Goods (CISG), instead.

I How do Approaches Differ?

This makes it appropriate to reflect on the relationship between the Member States' 'domestic' laws and the CESL, and to consider the differences between them. Our laws of contract are different not only in the terminology and the concepts that they employ, but also in the results

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1 Proposal for a Regulation on a Common European Sales Law, 11 October 2011 COM(2011) 635 final.

2 See http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A7-2013-0301&language=EN.

they produce. I have suggested before that at least some of these differences are more than the result simply of historical tradition.[3] They reflect different assumptions about the transactions to which each law is likely to apply and, in particular, the differences between the cases that lawmakers (whether legislators, judges or academic proponents of 'received doctrine') envisage coming before each system's courts. They also reflect differing assumptions about the markets in which the transactions are made; differences in philosophy; and different views of the role that the law and the courts should play. In this paper I aim to explore how the CESL, the contract sections of the new Hungarian Code and English law compare in a number of ways, and to consider the relationship between the two national systems and the CESL. For the most part I will discuss only business-to-business (B2B) contracts and I will ignore business-to-consumer (B2C) contracts. This is partly for reasons of space but mainly because of the harmonizing effect of the consumer *acquis* that is implemented in each of the three systems. This does not result in uniformity, certainly, but as far as B2C contracts are concerned it does reduce the differences between the systems very significantly.

II Key Issues and Dimensions

In terms of results (and in fact also in terms of terminology and concepts) the three laws have a great deal in common. In many situations the legal outcome will be substantially the same whichever law is applicable. But there are a number of key issues on which there are substantial differences. Moreover, the laws seem to differ in a number of key dimensions. I have selected four to discuss. These are: (1) assumptions about the relevant market; (2) individualism – the extent to which parties are free to pursue their own goals at the expense of the other party and, conversely, are expected to look after their own interests; (3) the amount of discretion left to judges through leaving them to apply general standards rather than detailed rules; and (4) the extent to which the judge is expected to interpret the contract, and so fashion the parties' obligations, to the particular context of the transaction.

My aim is not to criticize any of the laws, nor even to evaluate them in terms of criteria such as justice or efficiency, but, taking each dimension in turn, merely to see what position each law appears to occupy along the relevant spectrum. This is a speculative venture, in the sense that in order to work out the underlying assumptions, we often have to carry out 'reverse engineering' – in other words, to work backwards from the relevant provisions. This is because the policies and assumptions are not always stated. This is certainly true in a case-law system like English law, as not all judges articulate their reasons and different judges may give different reasons for

[3] See H. Beale, 'The Impact of the decisions of the European courts on decisions made by the national courts in English law' in G. Máthé and others (eds) *Panel Meeting of the 5th European Jurists' Forum* (Magyar Jogász Egylet 2009, Budapest) 209, and a revised version, 'The Impact of the decisions of the European courts on English contract law: the limits of voluntary harmonisation' (2010) 18 European Review of Private Law, 501; and also H. Beale, 'Characteristics of Contract Laws and the European Optional Instrument' in H. Eidenmüller (ed), *Regulatory Competition in Contract Law and Dispute Resolution* (CH Beck 2013, Munich) 315.

the same rule. But it is also true for the CESL, where the Group of Experts and the EU Commission sometimes gave their reasons but at other times did not.[4] In the case of the Hungarian Civil Code (HCC) the relevant documents may exist but I have not managed to find them in English.[5] So I hope I will be forgiven for guessing; and I hope that readers will be willing to tell me where I go wrong, as undoubtedly I will have done. In the case of the HCC there is the additional complication that I do not know how the provisions are supposed to be or are likely to be applied.[6]

III Good Faith and Fair Dealing

A good example of the difficulties in knowing how a provision is to be interpreted and applied comes right at the start of the HCC § 1:3 provides:

> *[Principle of good faith and fair dealing]*
> (1) In exercising rights and in fulfilling obligations the requirements of good faith and fair dealing shall be observed.
> (2) The requirements of good faith and fair dealing shall be considered breached where a party's exercise of rights is contradictory to his previous actions which the other party had reason to rely on.

Obviously any English lawyer is going to have difficulty in applying a concept that is largely unknown to English law,[7] but even those systems that recognize the concept of good faith appear to apply it rather differently. In German law, for example, § 242 BGB seems largely to have been used to enable the judges to create new doctrines to fill gaps in the Civil Code: 'there is something in this rich case law that reminds one of English case law techniques […].'[8] The CESL, by contrast, contains a separate article (Article 4) authorizing judges to develop rules to solve issues that are within the scope of application of the CESL but which are not expressly settled by it.[9]

The CESL also imposes a general duty of good faith.[10] On the face of it, the CESL provision seems very similar to § 1:3:

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[4] The reasons that were recorded will be explained in the Comments to the CESL that currently I am preparing on behalf of the Expert Group. I hope these will be made available publicly, e.g. on the Commission's website.

[5] For a while I was unsure if there was even an English translation of the HCC available. I am very grateful to my colleagues Tamas Tercsak and Sarolta Szabo (a student at ELTE who in 2013-2014 spent an 'Erasmus' year at Warwick) for locating translations for me.

[6] My colleague Dr Tekla Papp, who has spent some weeks at Warwick during 2014, was able to give me some guidance on the likely meaning of some provisions and on how the provisions of the former Code were applied. However, she had to return to Szeged before I completed this paper, so there were questions that I have not asked her. In any event, the mistakes are my own and, of course, my responsibility.

[7] A useful survey of the extent to which English law recognises good faith can be found in H. Beale (eds) *Chitty on Contracts* (31st edn, Sweet & Maxwell 2012, London) paras 1-039-1-053 (-S. Whittaker).

[8] B. Markesinis, H. Unberath and A. Johnston, *German Law of Contract* (2nd edn, Hart 2006, Oxford) 122.

[9] CESL Art 4(2).

[10] In the CESL a distinction is made between 'obligations' (of which the creditor can require performance) and 'duties' (which give rise only to remedies indicated in the relevant provision, e.g. to a claim for damages).

> *Article 2 Good faith and fair dealing*
> (1) Each party has a duty to act in accordance with good faith and fair dealing.
> (2) Breach of this duty may preclude the party in breach from exercising or relying on a right, remedy or defence which that party would otherwise have, or may make the party liable for any loss thereby caused to the other party.
> (3) The parties may not exclude the application of this Article or derogate from or vary its effects.

However, Article 2 is intended to have a limited role. Recital 31 states:

> The principle of good faith and fair dealing should provide guidance on the way parties have to cooperate. As some rules constitute specific manifestations of the general principle of good faith and fair dealing, they should take precedent over the general principle. The general principle should therefore not be used as a tool to amend the specific rights and obligations of parties as set out in the specific rules […]

Under the CESL the principal role of good faith and fair dealing may be a limited one, namely to prevent a party acting inconsistently. It may also be employed to prevent an abuse of right. The HCC provision seems to have a wider purpose. Inconsistent behaviour is explicitly prevented by § 1:3(2) and there is a separate provision prohibiting any abuse of rights.[11] That suggests that § 1:3 is to apply more broadly. Later I will argue that one or other of these provisions seems to be regarded as a general restriction.

IV A Fully Developed Market?

The first 'dimension' I would like to discuss is the extent to which each law assumes that most of the transactions to which it will apply take place in a well-developed market. The English law on remedies for breach of contract, for example, seems to assume that there is almost always a ready market in which a buyer can obtain substitute goods if the seller delivers non-conforming goods or does not deliver at all. Thus specific performance is almost never awarded in a sale of goods case.[12] Instead the buyer is expected to terminate the contract, go into the market to obtain replacement goods and claim any extra costs in an action for damages.[13] The CESL, in contrast, allows the buyer to require performance unless to require performance would be disproportionate.

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[11] § 1:5 para (1) HCC.

[12] Specific performance is not awarded if damages would be an 'adequate remedy' [see H. Beale (ed) *Chitty on Contracts* (31st edn, Sweet & Maxwell 2012, London) paras 27-005-27-018 (- G Treitel)]; and in sales cases damages are treated as adequate unless the goods are unique [e.g. *Falcke v Gray* (1859) 3 Drew 651] or completely unobtainable [e.g. *Sky Petroleum Ltd v VSP Petroleum Ltd* (1974) 1 WLR 576]. In one case damages were considered adequate even though it would take 9 months for the buyer to obtain replacement goods: *Société des Industries Metallurgiques SA v Bronx Engineering Co Ltd* [1975] 1 Lloyd's Rep 465.

[13] See Sale of Goods Act 1979, § 51.

Article 110 provides

Requiring performance of seller's obligations

(1) The buyer is entitled to require performance of the seller's obligations.

(2) The performance which may be required includes the remedying free of charge of a performance which is not in conformity with the contract.

(3) Performance cannot be required where:

(a) performance would be impossible or has become unlawful; or

(b) the burden or expense of performance would be disproportionate to the benefit that the buyer would obtain.

Likewise the expectation of the CESL seems to be that a seller whose buyer no longer wants the goods will normally find another buyer for the goods. Article 132 provides:

Requiring performance of buyer's obligations

(1) The seller is entitled to recover payment of the price when it is due, and to require performance of any other obligation undertaken by the buyer.

(2) Where the buyer has not yet taken over the goods or the digital content and it is clear that the buyer will be unwilling to receive performance, the seller may nonetheless require the buyer to take delivery, and may recover the price, unless the seller could have made a reasonable substitute transaction without significant effort or expense.

In contrast, § 6:138 HCC seems to anticipate a wide role for specific performance against either party:

[Right of requiring performance]

In the event of non-performance, the aggrieved party shall be entitled to require performance of the obligation.

I assume that this right is not wholly unqualified, and possibly a creditor who seeks to enforce the contract when the cost to the debtor would be out of proportion to the benefit to the creditor would be held to be acting contrary to good faith and fair dealing (§ 1:3) or to be abusing his rights (§ 1:5). However, it may also be that for a buyer to demand specific performance would be contrary to good faith or amount to an abuse of rights only in an extreme case. In any event the provisions seems to leave a good deal to the discretion of the judge – another of my 'dimensions' (see below). As to the seller's claim against the buyer who no longer wants the goods, I am not clear that there is any limit on the seller's right to require performance. This is because there is a such a limit in contracts for 'Works' (which I take to mean what in English law we refer to as 'services'), where the customer has the right to withdraw from the contract on payment on damages to the contractor.[14] I see no equivalent for contracts of sale.

So the HCC may be drafted on the assumption that disappointed creditors may find it hard to make a substitute contract and therefore should be able to require performance more frequently than the CESL, and certainly than English law, allows.

[14] HCC § 6:249, seemingly equivalent to *Kundigung,* § 314 (1) BGB.

V A Market that is Price-competitive

English law also seems to assume that buyers and sellers will know, or will readily be able to find out, the 'going price' for goods and services. It is very easy in England to find lists of current market prices for most goods of substantial value, whether the goods are new or second hand; and also valuation services are readily available. This may be why we have no general provisions on contracts at unfair prices. Even in a consumer contract, the adequacy of the price is excluded from review, as it is under the Directive on Unfair Terms in Consumer Contracts.[15] The only possibility of relief is if there has been unconscionable dealing, which seems to require that one of the parties is suffering from an identifiable bargaining weakness such as lack of education or extreme poverty[16] – the kind of situation which under the HCC, I assume, would fall under the prohibition on usury.[17]

The CESL also assumes that consumers do not need to be protected against high prices per se.[18] Given that most cross-border contracts will be over the internet, where price comparison is the one thing that is relatively easy for the shopper, that seems a justifiable assumption.

In contrast, the HCC retains a provision on laesio enormis, albeit in more limited form than under the former code.[19] § 6:98 now provides:

> *[Gross disparity in value]*
> (1) If, at the time of the conclusion of the contract, the difference between the value of a service and the consideration due – without either party having the intention of making a gratuitous grant – is grossly unfair, the injured party shall be allowed to avoid the contract. The contract shall not be avoided by the party who knew or could be expected to have known the gross disparity in value, or if he assumed the risk thereof.
> (2) The parties may exclude the right of avoidance provided for in Subsection (1), with the exception of contracts that involve a consumer and a business party.

Presumably the drafters felt that in Hungary there is not yet sufficient information on prices that it would be safe to get rid of the laesio enormis provision. This demonstrates that there is still a role for domestic sales law alongside the optional CESL, to provide rules that are better suited to domestic conditions.

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15 Council Directive 1993/13/EC [1993] OJ L095.

16 See generally H. Beale (ed) *Chitty on Contracts* (31st edn, Sweet & Maxwell 2012, London) chapter 7 section 3 (- H. Beale).

17 § 6:97 HCC, cf § 138(2) BGB.

18 However, one of the purposes of the withdrawal rights in an off-premises contract is to enable the consumer to check the price being charged.

19 Former § 201 did not contain the last sentence of para (1).

VI Individualism vs Protectionism

I have argued elsewhere that, at least compared to many of its continental rivals, for B2B contracts at least English law takes a very individualist stance.[20] Here I will merely point to some of its most individualistic features. Thus there are very limited controls over unfair terms: for the most part, the Unfair Contract Terms Act 1977, despite its broad title, affects only exclusion and limitation of liability clauses.[21] Even those controls are limited to the domestic market: the Act does not apply to international supply contracts and to contracts that are governed by English law only because of the choice of the parties.[22] Likewise, English law gives limited relief for mistake. Basically, a mistake as to the substance of what is being contracted for, or the surrounding circumstances (i.e. a mistake in motives for the contract), will give rise to relief only if the mistake was induced by a positive misrepresentation by the other party[23] or, in very limited circumstances, where the mistake shared by the other party.[24] English law does not recognise 'fraud by silence'[25] and does not impose any duty to disclose relevant facts, save in limited cases such as contracts of insurance, partnerships and joint ventures.[26] Lastly, we have no general duty of good faith, whether in the making or the performance of contracts.

In contrast, the HCC and the CESL both contain quite a number of protective rules, even for B2B contracts. Thus § 6:90 HCC provides

> *[Mistake]*
> (1) A person acting under a misapprehension regarding any material circumstance at the time a contract is concluded shall be entitled to contest his contract statement if his mistake had been caused or could have been recognized by the other party. The mistake shall be considered to impact a material circumstance if the party, but for the mistake, would not have concluded the contract or would have done so only on fundamentally different contract terms.
> [...]

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[20] H. Beale, 'The Impact of the decisions of the European courts on decisions made by the national courts in English law' in G. Máthé and others (eds), *Panel Meeting of the 5th European Jurists' Forum* (Magyar Jogász Egylet 2009, Budapest) 209.

[21] The Act also applies to a term in a B2B contract, if the contract is made on one party's written standard terms and the term defines what that party has to do in broad terms: then the party cannot rely on the term to render a performance that is substantially different from what the other party reasonably expected, unless the term is reasonable: see § 3(2)(b). The same provision covers cancellation clauses.

[22] Unfair Contract Terms Act 1977, ss 26 and 27.

[23] The misrepresentee will be entitled to damages if the misrepresentation was fraudulent [*Derry v Peek* (1889) LR 14 App Cas 437] or careless [Misrepresentation Act 1967, § 2(1)]. Avoidance may be available [the court has a discretion whether to allow it, Misrepresentation Act 1967, § 2(2)] for a wholly innocent misrepresentation [*Redgrave v Hurd* (1881-1882) LR 20 ChD 1].

[24] See *Bell v Lever Bros* [1932] AC 161 and *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407, which in effect limits the doctrine of common mistake to cases of initial impossibility [see at (76)].

[25] *Smith v Hughes* (1871) LR 6 QB 597.

[26] See generally, H. Beale, *Mistake and Non-disclosure of Facts: Models for English Contract Law* (Oxford University Press 2012, Oxford).

(3) The contract may not be avoided by a party who knew or could be expected to have known the mistake, or if he assumed the risk of the mistake.

The words underlined distinguish the rule clearly from, for example, German law, where a party may obtain relief under § 119(2) BGB even though the other party had no idea that the first party was mistaken (though in such a case the avoiding party may have to pay compensation for any reliance losses suffered by the other party, § 122 BGB).

In that respect CESL Article 48 is similar, but relief is expressly qualified further. The equivalent condition is that the non-mistaken party

(iii) knew or could be expected to have known of the mistake and caused the contract to be concluded in mistake by not pointing out the relevant information, provided that good faith and fair dealing would have required a party aware of the mistake to point it out.

Article 49, Fraud, gives a list of factors that should be taken into account in deciding whether good faith required disclosure:

(3) In determining whether good faith and fair dealing require a party to disclose particular information, regard should be had to all the circumstances, including:
(a) whether the party had special expertise;
(b) the cost to the party of acquiring the relevant information;
(c) the ease with which the other party could have acquired the information by other means;
(d) the nature of the information;
(e) the apparent importance of the information to the other party; and
(f) in contracts between traders good commercial practice in the situation concerned.

I do not know whether the right to avoid under HCC § 6:90 is intended to be similarly qualified by applying the provisions on good faith and fair dealing or abuse of rights. If it is not, then the HCC seems to given considerably more protection to the mistaken party than does the CESL. If the right to avoid is limited by good faith, then again rather more discretion seems to be left to the judge, as no guidance on the relevant factors is given.

On the other hand, the CESL imposes a duty of disclosure in B2B contracts. Art 23 provides

Duty to disclose information about goods and related services
(1) Before the conclusion of a contract for the sale of goods, supply of digital content or provision of related services by a trader to another trader, the supplier has a duty to disclose by any appropriate means to the other trader any information concerning the main characteristics of the goods, digital content or related services to be supplied which the supplier has or can be expected to have and which it would be contrary to good faith and fair dealing not to disclose to the other party.
(2) In determining whether paragraph 1 requires the supplier to disclose any information, regard is to be had to all the circumstances, including:
(a) whether the supplier had special expertise;
(b) the cost to the supplier of acquiring the relevant information;
(c) the ease with which the other trader could have acquired the information by other means;
(d) the nature of the information;

(e) the likely importance of the information to the other trader; and
(f) good commercial practice in the situation concerned.

I did not find any duty of disclosure in the HCC except in the case of the renewal of insurance contracts.[27]

VII Unfair Terms

I have already said that English law has only very limited controls over unfair terms in B2B contracts. In contrast, both the HCC and the CESL impose general controls over non-negotiated terms. Whether the controls are identical depends on two points of interpretation.

The first is whether the HCC provision applies to the terms taken 'one at a time' or only when the term is part of a standard set. The CESL provision applies only to terms that are part of a set of terms that was not negotiated:

Article 86
Meaning of "unfair" in contracts between traders
(1) In a contract between traders, a contract term is unfair for the purposes of this Section only if:
(a) it forms part of not individually negotiated terms within the meaning of Article 7; and
(b) it is of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing.
(2) When assessing the unfairness of a contract term for the purposes of this Section, regard is to be had to:
(a) the nature of what is to be provided under the contract;
(b) the circumstances prevailing during the conclusion of the contract;
(c) the other contract terms; and
(d) the terms of any other contract on which the contract depends.

Thus if one or more of the set of terms has been negotiated individually, none of the terms in the set can be challenged as unfair. The idea is that if a party was sufficiently knowledgeable and had enough bargaining power to negotiate one term, presumably it could have done the same with the other terms, had it wished to do so at the time.

The HCC provision, at least in the English version, is not quite clear on this point. § 6:102 provides:

[Unfair standard contract terms]
(1) A standard contract term shall be considered unfair if, contrary to the requirement of good faith and fair dealing, it causes a significant and unjustified imbalance in contractual rights and obligations, to the detriment of the party entering into a contract with the person imposing such contract term.

[27] HCC § 6:452.

Read on its own, that refers to 'a standard term' and so it seems to allow a challenge 'term by term'. However, § 6:77 defines 'standard contract terms' as

> Standard contract terms means contract terms which have been unilaterally drafted in advance by one of the parties for several transactions involving different parties, and which have not been individually negotiated by the parties.

In addition, § 6:103 on *Unfair contract terms in consumer contracts* provides that:

> (1) As regards contracts which involve a consumer and a business party, the provisions relating to standard contract terms shall also apply ... to the contract terms which have been drafted in advance by the business party and which have not been individually negotiated.

Those provisions suggest that consumers may challenge terms one by one but traders may do so only where the term is part of a set – i.e. the same rule as under the CESL.

The other doubt is over the standard to be applied. The CESL tried to indicate that a term which would be unfair in a B2C contract would not necessarily be unfair in a B2B contract, by providing that a term in a B2B contract would only be unfair if its use would be a gross deviation from good commercial practice as well as being contrary to good faith and fair dealing.[28] The HCC refers only to good faith and fair dealing. However, whether this is intended to impose a stricter standard on traders than the CESL does, I do not know.

VIII The Discretion Granted to Judges

The amount of discretion – or perhaps it would be better to use the French phrase and talk about the width of 'the power of appreciation' – also seems to vary between systems. English lawyers are scared that vague standards will lead to increased litigation, as each party may expect the standard to be applied in a way that would be in its favour, and thus think it has a good chance of winning – and will invest resources in litigation accordingly. In an extreme case, when each thinks it has a high chance of success, the two parties may in total spend as much or more than the amount at stake.[29] So traditionally there has been a preference for 'bright line rules' that make the law certain even if the rigidity of the rule may not produce a just result. The rules on termination for breach of contract are an example. The traditional approach was to categorize the terms of the contract into 'conditions' and 'warranties'.[30] Any term of importance would be categorized as a condition, and breach of condition gives the innocent party the immediate right to terminate the contract.[31]

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[28] Art 86(1)(b).

[29] See G. Priest, 'Breach and Remedy for the Tender of Non-conforming Goods' (1978) 91 Harvard LR 960, esp. at 968.

[30] See, for example Sale of Goods Act 1979, ss 11 and 12-15 – though the Court of Appeal in *Cehave NV v Bremer Handels GmbH, The Hansa Nord* [1976] QB 44 held that an express term in a sale contract need not be either a condition or a warranty: it could be an 'innominate term', see (n 32).

[31] Subject now to Sale of Goods Act 1979, ss 15A and 30A, which in cases of non-conformity or short quantity prevent a buyer from rejecting in conditions that would amount to bad faith. The legislator and the courts [see (n 32)] seemed to be moving in opposite directions!

In the 1960s the Court of Appeal developed a more flexible approach, holding that there is an intermediate category ('innominate terms') when whether or not there is a right to terminate depends on the effect of the breach in the circumstances.[32] However, in the 1980s the House of Lords reverted to interpreting some terms as conditions even when exact compliance with the term did not seem very important. Thus a requirement on a buyer under an FOB contract to give the seller 15 days' notice of the ship on which the goods were to be loaded was treated as 'of the essence' (i.e. giving notice in time was a condition) even though the contract was silent as to the importance of the term and the seller could not show that the delay had any serious consequence.[33] The result was justified on the ground that the seller should be able to know immediately whether or not it had the right to terminate.[34]

The CESL is more nuanced on this point. In a B2B contract the creditor is entitled to terminate only if the debtor's non-performance was fundamental,[35] which is an open-textured standard. The CESL has sought certainty by frequently opting for fixed periods during which rights must be exercised, rather than laying down a 'reasonable time' limit; most of the provisions in question apply only to B2C contracts[36] but some fixed periods apply also between traders.[37]

In contrast, I have already pointed to a number of provisions in the HCC which seem to leave a good deal to the discretion (or appreciation) of the judge. The same seems to be true in the situation just discussed, when a creditor seeks to withdraw from the contract, or to terminate the contract,[38] for non-performance by the debtor. The test is simply whether the performance by the debtor is still of interest to the creditor. For example, § 6:140 provides that

> *[Withdrawal, termination]*
> (1) If in consequence of non-performance the obligee's interest in contractual performance has ceased, he may withdraw from the contract, or if restitution cannot be provided in kind, he may terminate the contract, unless this Act contains provisions to the contrary.

This might be construed either as a purely subjective test – i.e. does the creditor want to receive performance or not – or as an objective test, would the reasonable creditor wish to do so? If, as I suspect, the latter is the correct interpretation, it seems to leave more to the judge than the 'fundamental non-performance test' of the CESL.

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[32] *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26.

[33] *Bunge Corp v Tradax Export SA* [1981] 1 WLR 711.

[34] [1981] 1 WLR 711, 715.

[35] CESL Art 114(1).

[36] E.g. CESL Art 111.

[37] Subject now to Sale of Goods Act 1979, ss 15A and 30A, which in cases of non-conformity or short quantity prevent a buyer from rejecting in conditions that would amount to bad faith. The legislator and the courts [see (n 33)] seemed to be moving in opposite directions!
E.g. CESL Art 121 (the buyer is expected to examine the goods 'within as short a period as is reasonable not exceeding fourteen days').

[38] In the English translation, 'withdrawal' seems to refer to the creditor ending the contract and making restitution (which seems to be equivalent to *Rücktritt* under § 346 BGB), whereas termination seems more like going over to damages (as under § 281 BGB). The CESL does not make this distinction.

IX Contextual Material

The last question or dimension that I want to consider is the extent to which the judge is required to take into account not just the document, or the words used by the parties, but also the context of the transaction. Requiring a more 'contextual' approach does not necessarily result in the law being more protective, but it does mean that the court has to be more sensitive to the background to the contract, which may favour a party who did not ensure that the document reflected precisely what the party intended.

The issue has important cost implications, especially in complex transactions that may have been negotiated over an extended period and where a large sum may be at stake. This is because the degree to which the context has to be taken into account affects directly the amount of evidence that the court may have to consider and the length of any trial.

Traditionally, English law has adopted rules that seem deliberately calculated to reduce the amount of evidence that the court needs to consider.[39] Thus the so-called 'parol evidence rule'[40] stipulated that if the contract was in writing, no extrinsic evidence could be adduced to add to, vary or contradict the written instrument.[41] The subjective intentions of the parties were normally irrelevant; what matters was the objective meaning of the words. The words of the contract were to be interpreted according to the normal or literal meaning of the words, unless either it was shown that the words had a technical or customary meaning that was different to the normal meaning, or that to give the words the normal meaning would lead to an absurd result.[42] Any statements made by one party during pre-contractual negotiations as to the meaning of the words used were to be ignored,[43] unless it could be shown that the parties had reached an agreement on a particular provision but by mistake it had been written out incorrectly. In that case the court had a discretion to 'rectify' the document to bring it into line with the prior agreement.[44] And terms would be implied into the agreement to fill any gaps in its provisions, only if that was absolutely necessary in order for the contract to be workable or represented the obvious intentions of the parties.[45]

Over the last few decades, however, English law has become much more 'sensitive to context'. It is recognized that business people drafting contracts, and even their lawyers, seldom reach the draftsman's ideal of enabling the judge to answer every conceivable question without having to raise her eyes from the document. Thus oral or other terms will quite readily be admitted to add to, vary

[39] For a fuller discussion see H. Beale, 'Relational values in English contract law' in D. Campbell, L. Mulcahy and S. Wheeler (eds), *Changing Concepts of Contract, Essays in Honour of Ian Macneil* (Palgrave Macmillan 2013) 138.

[40] See H. Beale (ed), *Chitty on Contracts* (31st edn, Sweet & Maxwell 2012, London) paras 12-096-12-112 (- A. Guest).

[41] See e.g. *Bank of Australia v Palmer* [1897] AC 540.

[42] See e.g. *Lovell & Christmas Ltd v Wall* (1911) 104 LT 85.

[43] *Prenn v Simmonds* [1971] 1 WLR 1381.

[44] On rectification see H. Beale (ed), *Chitty on Contracts* (31st edn, Sweet & Maxwell 2012, London) paras 5-110-5-145 (- H Beale).

[45] E.g. *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592 598; see H. Beale (ed), *Chitty on Contracts* (31st edn, Sweet & Maxwell 2012, London) para 13-004 (- A Guest)

or even contradict the written document,[46] unless there is a merger clause.[47] The objective approach still prevails, and courts still refuse to admit evidence of pre-contractual negotiations[48] – openly acknowledging that this is not because the evidence is not relevant, but to save the cost of what one judge called 'threshing through the undergrowth' of pre-contractual negotiations.[49] But it has long been acknowledged that in case of doubt, the 'factual matrix of the contract' must be taken into account.[50] What has perhaps changed, as the result of the speech of Lord Hoffman in the case of *Investors Compensation Scheme Ltd v West Bromwich Building Society*,[51] is that words only take their meaning from the context in which they are used, and that the question is always, in that context, how did the parties reasonably understand what was being agreed? In a recent case, the majority in the Court of Appeal held that the context should be looked at only if the literal meaning of the words would produce an absurd result.[52] The Supreme Court disagreed completely:

> [T]he court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. … If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense […][53]

The court may even interpret the contract as meaning something quite different to what the parties wrote, if it is evident that they used the wrong words or put them in the wrong order – not because the written document differed from the subjective agreement of the parties (a question English courts refuse to discuss except sometimes in the context of rectification) but because, in the context, the reasonable person would have interpreted the contract in the corrected sense.[54]

By a continuation of the same logic, Lord Hoffmann said that terms may be implied into a contract so that the contract reflects the reasonable understanding of the parties.[55] This has been more controversial,[56] but in a recent case in the High Court the judge relied on this dicta to hold that on the particular facts of the cases – a distributorship agreement – there should be

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[46] E.g. *J Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd* [1976] 1 W.L.R. 1078. The court said simply that the document did not contain the whole of the agreement.

[47] A merger clause is now treated as raising a form of estoppel, which prevents either party from arguing that there were other terms, not contained in the document: see *Peekay Intermark Ltd v Australia & New Zealand Banking Group Ltd* [2006] EWCA Civ 386 at [54]-[60] (in that case, the clause was actually to the effect that neither party relied on any representation not included in the contract, but the reasoning applies to merger clauses also).

[48] See *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38.

[49] *Inntrepreneur Pub Co Ltd v East Crown Ltd* [2000] 2 Lloyd's Rep 611, 614-615.

[50] *Prenn v Simmonds* [1971] 1 WLR 1381.

[51] [1998] 1 WLR 896, 913.

[52] *Rainy Sky SA v Kookmin Bank* [2010] EWCA Civ 582.

[53] [2011] UKSC 50 at [21].

[54] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38.

[55] *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10 at [21].

[56] P. Davies, 'Recent Developments in the Law of Implied Terms' [2012] Lloyd's Maritime and Commercial Law Quarterly 140.

implied a term that the parties would perform the contract in good faith.[57] So the supplier was liable for giving misleading information to the distributor as to when certain products would be available to the distributor and for allowing competitors to sell the same products at cheaper prices in adjoining markets.

How does the CESL compare? Merger clauses are equally effective, and the provision on implied terms is probably not very different to English law.

> *Article 68*
> *Contract terms which may be implied*
> (1) Where it is necessary to provide for a matter which is not explicitly regulated by the agreement of the parties, any usage or practice or any rule of the Common European Sales Law, an additional contract term may be implied, having regard in particular to:
> (a) the nature and purpose of the contract;
> (b) the circumstances in which the contract was concluded; and
> (c) good faith and fair dealing.
> (2) Any contract term implied under paragraph 1 is, as far as possible, to be such as to give effect to what the parties would probably have agreed, had they provided for the matter.
> […]

On interpretation, the CESL refers first to the 'common intention of the parties',[58] but in the Expert Group it was recognised that this will very seldom be ascertainable and that the crux of Article 58 is the last paragraph, which refs to objective interpretation:

> […] the contract is to be interpreted according to the meaning which a reasonable person would give to it.

There is no explicit statement that the context must be taken into account, but its importance is evident from Article 59:

> *Relevant matters*
> In interpreting a contract, regard may be had, in particular, to:
> (a) the circumstances in which it was concluded, including the preliminary negotiations;
> (b) the conduct of the parties, even subsequent to the conclusion of the contract;
> (c) the interpretation which has already been given by the parties to expressions which are identical to or similar to those used in the contract;
> (d) usages which would be considered generally applicable by parties in the same situation;
> (e) practices which the parties have established between themselves;
> (f) the meaning commonly given to expressions in the branch of activity concerned;
> (g) the nature and purpose of the contract; and
> (h) good faith and fair dealing.

[57] *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB).
[58] CESL Art 58(1).

So interpretation under the CESL is even more sensitive to context than in English law, particularly as evidence of pre-contractual negotiations and post-contractual conduct[59] are to be taken into account.

Unfortunately for me, I have to conclude my presentation on a note of uncertainty. In the HCC there seems to be only one general provision on interpretation of contracts. This is § 6:86(1):

[Interpretation of contracts]

(1) Contract terms and statements are to be interpreted in accordance with the contract as a whole.

I wonder if interpretation is considered to be something wholly for judges and not for the legislator. What the judges will make of it remains to be seen.

Conclusions

What conclusions can we draw from this brief (and probably only partly accurate) survey of the three systems? The three laws show significant variations in each of the dimensions we have looked at.

Each seems to address a different market. The HCC, very sensibly and properly, addresses the domestic market in Hungary, and fashions rules that are particularly needed there. The CESL assumes a virtual marketplace in which information is easy to come by, if you make the effort to obtain it, and in which, if there is a non-performance by one party or the other, substitutes will normally, but not necessarily, be readily available. English law seems to address a highly developed market inhabited by sophisticated players with a lot of chips that they are prepared to gamble. I suspect that English law is really aimed at the international market and is much less good at catering for smaller businesses, which seldom appear as litigants.

There is substantial variation in the degree of protection offered by the three systems. English law is clearly much less protective, much more individualistic, than either the CESL or the HCC. That is illustrated by both the rules on mistake and disclosure of facts and also by the controls over unfair terms in B2B contracts. It is harder to compare the CESL and the HCC on these two issues but probably there is not much difference overall between the two.

The HCC seems to leave much more to the discretion or appreciation of the judge than does English law; and, at least to an outsider, even more than the CESL. The audience will be much better placed to gauge this than I am. However, the degree of discretion suggests to me that, like the CESL, the HCC is drafted with relatively 'small' (i.e. low value) disputes in mind. The degree of discretion conferred on the judge would not fit well, to the English legal mind, with high value, high-risk contracts between businesses that have large resources available to fund litigation. In those cases, certainty is at a premium.

[59] Also excluded from consideration in English Law: *Whitworth Estates (Manchester) Ltd v James Miller & Partners Ltd* [1970] AC 583.

Lastly, there is the question of sensitivity to context. In their different ways, both the CESL and English law try to achieve this, though with some reservations still in English law. The Civil Code is largely silent on this point; no doubt the answer is to be found elsewhere. I look forward to finding it – on some future occasion!

Ewoud Hondius*

Recodification of Private Law in Central and Eastern Europe and in the Netherlands

A Personal Introduction

It is a pleasure to celebrate today the tenth anniversary of Hungary's accession to the European Union. So much has happened in the course of one or two generations. When I read law in Leyden in the early 1960s, I specialised in the law of the socialist nations. We would read writers such as Pashukanis[1] and Vyshinsky,[2] and study Stalin's 'solution' to the 'problem of the nationalities'. My teacher for three years was Zsolt Szirmai (1903–1973), a Hungarian-born lawyer who fled to the West, where he founded the Documentation Centre for Central and East European Law at Leyden University.[3] I continued my studies in New York with John Hazard (1909–1995), founder of the Russian Institute at Columbia University, and Zbigniew Brzezinski (1928–), the later National Security Advisor of the United States under President Jimmy Carter. The main question raised by John Hazard was what was communist in Soviet law of that time. He would for instance read the disposition in the Grazhdansky Kodeks stating tht a forced heir is entitled to a forced share of the estate. The American students in the class would immediatley qualify this as 'typically communist'. Whereupon John Hazard would turn to me to ask how the law on forced shares was in Western Europe. Which happened to be almost identical to that in Russia, which indeed at the time, with some exceptions such as in the law of property, was almost unaldulterated civil law.

At the time, students of socialist law were torn between two opposing views. One was the economic view that implosion of the socialist system was imminent. The other was the political view that communism by what Henry Kissinger called the 'domino policy' was gradually taking hold of most of the world's economies, especially in Africa, Asia and Latin America. By now, of course, we know that the implosion idea fortunately prevailed.

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1 Evgeny Pashukanis, *The general theory of law and marxism,* 1924.

2 Андрей Януарьевич Вышинский, Miscellaneous speeches.

3 See *Codification in the communist world: symposium in memory of Zsolt Szirmai (1903–1973)* (Brill 1975, Leyden) 353.

I A Topical Introduction

Central and Eastern Europe are sometimes regarded as the orphans of the European Union. Having had to overcome fifty years of socialist stagnation in the development of the law,[4] they are supposed to yearn for tutorship from the West. Although there may be some thruth in this, the West could learn a good deal from the East as well. A good example of this lies in the realm of civil law codification. Over the past decade, several Central and East European countries have recodified their civil law, and there is more to come. In this paper I intend to give a brief overview of some of these endeavours and to explore what they could contribute to issues such as the unity of the civil and commercial law as well as the position of consumer protection and of family law. In doing so, I will rely heavily on three recent publications: Péter Cserne's chapter in a volume on globalisation and private law which was edited by that author and Pierre Larouche,[5] Reiner Schulze's and Fryderyk Zoll's *The Law of Obligations in Europe – A New Wave of Codifications,*[6] and – already of some time ago – Lajos Vékás'essay on *Privatrechtsreform in einem Transformationsland.*[7] Other information will be drawn from Rudolf Welser's also slightly earlier- *Privatrechtsentwicklung in Zentral- und Osteuropa*[8] and from a mainly French language volume based on a meeting organised in Moldova by the *Association Henri Capitant,* also in 2008.[9] English language translations of Central and East European Civil Codes are widely available on the internet.[10]

I will conclude with some observations on Central and Eastern Europe and the harmonisation of private law in Europe. Russia and its allies will not be dealt with in this paper.[11] In order for this paper not to end up in only a theoretical exercise, I will add some experiences with the Dutch Civil Code, the main part of which entered into force in 1992.[12] Because of its modern

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4 Zdenek Kühn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* (Nijhoff 2011, Leiden) 311.

5 Péter Cserne, 'Chapter 4' in Pierre Larouche, Péter Cserne (eds), *National legal systems and globalization: new role, continuing relevance* (Springer 2012, Vienna) 45-88.

6 Reiner Schulze, Fryderyk Zoll (eds), *The Law of Obligations in Europe – A New Wave of Codifications* (Sellier 2013, München).

7 Vékás Lajos, 'Privatrechtsreform in einem Transformationsland' in Jürgen Basedow et al. (eds), *Aufbruch nach Europa/75 Jahre Max-Planck-Institut für Privatrecht,* (Mohr 2001, Tübingen) 1049–1064.

8 Rudolf Welser (ed), *Privatrechtsentwicklung in Zentral- und Osteuropa* (Manz 2008, Vienna) 225, with papers on Bosnia-Herzegovina (Meliha Povlakovic), Croatia (Tatjana Josipovic), the Czech Republic (Lubos Tichy), Hungary (Levente Tattay, Zoltán Nemessányi and Lajos Vékás), Poland (Jerzy Poczobut), Romania (Christian Alunaru), Serbia (József Szalma), Slovakia (Ján Lazar) and Slovenia (Verica Trstenjak).

9 *La recodification et les tendances actuelles du droit privé* (2008) 2 Studia Universitatis Babes-Bolyai, 201.

10 See, for instance, the website of the University of Edinburgh School of Law.

11 But see also the paper by Gert Brüggemeier, 'Risk and Strict Liability: the Distinct Examples of Germany, the US and Russia' [2013] ERPL 923-958.

12 The most recent translation into English is the one by Hans Warendorf, Richard Thomas and Ian Curry-Sumner, *The Civil Code of the Netherlands* (Wolters Kluwer 2013, Alphen aan den Rijn) 1301.

appearance,[13] this Code has often been used by way of model by Central and Eastern European nations, such as Poland and Russia.[14]

II A New Code for Romania

In 2011 a new Romanian Civil Code entered into force. The Code consists of seven books: on persons, on family (including legal persons), on property, on succession, on obligations, on prescription, and on private international law.[15] The Code heralds the return to the Civil Code of family law, which Western codes have traditionally included following the example of the Code Napoléon.

A new concept which the Code introduces is that of *fiducia,* a legal relationship by which one or more settlors transfer present or future rights to one or more trustees, with a maximum transfer period of 33 years. The contract is null and void if its intention is to make an indirect donation to the beneficiary. Trustees can only be credit institutions, investment management companies, insurance and reinsurance companies, public notaries and attorneys at law. In relation to third parties, the trustee will be deemed to have full ownership rights over the estate. The opening of insolvency proceedings against the trustee shall have no effect on the estate, but it will terminate the *fiducia.*[16]

The Dutch Civil Code of 1992 does not comprise the notion of trust. To the contrary: Eduard Maurits Meijers, the founding father of the Code, found this notion so alien to the structure of West European property law, that he provided an outright prohibition of *fiducia cum creditore* as it had been accepted in case-law.

The Rumanian code is available on the internet. There also is available a commercial text edition in French.[17]

III A Prague Spring

Romania is not the only Central European country with a new Civil Code. The Czechs likewise adopted a new Code, which entered into force on 1 January 2014. The Code has five parts: a general part; family law; absolute rights including property law and succession law; relative

[13] The draftsman, Eduard Meijers, actually started with his ideas in the early twentieth century, much inspired by the then recent German *Bürgerliches Gesetzbuch.*

[14] Information received from Professor Ferdinand Feldbrugge, the successor of Zsolt Szirmai in Leyden, who refers to the Russian translation of the Dutch Code by Maxim Ferschtman *(Grazhdanskii Kodeks Niderlandov).*

[15] See M. Dutu, M. Tomita (eds), *The new Romanian civil code, two years after its entry into forc/Theoretical and practical problems* (Medimond 2013, Bucharest) 273. Likewise, the Dutch have codified private international law in Book 10 of their Civil Code (not wholly uncontested).

[16] See Florentin Giurgea, 'Changes to the Romanian Civil Code: fiducia – the Romanian concept of trust' SSRN 2037041.

[17] Daniela Borcan et al.,(eds), *Nouveau Code civil roumain* (Futuroscope: Juriscope, Dalloz 2013, Paris).

rights including contracts, torts and unjust enrichment; and transitional and closing provisions. Like in Romania, the notion of trust has been introduced.[18] The Czech Commercial Code has been repealed. One part has been incorporated into the new Civil Code whilst another has become a separate new Act regulating business corporations.

The adoption of the new Czech Civil Code was preceded by in-depth academic study.[19] The Dutch have likewise prepared the new Code with academic work, very much of a comparative law nature. Under Communist rule, the Czechs – and Slovaks – were, together with the German Democratic Republic,[20] among the few Socialist jurisdictions to adopt a truly Socialist code.[21]

IV Poland: the Discussion has been Opened

In 1996, Poland decided to entrust the preparation of a new Civil code to a commission, which then prepared several drafts. In 2011, a proposal for a general part of the law of obligations was published. The Polish developments resemble those in the Netherlands, where it also took a long time before drafts were enacted and where practitioners had serious reservations about the recodification effort.[22] Not surprisingly, the Polish drafting commission has been assisted in its efforts by Dutch civil servants;[23] the main civil servant, Dr Aneta Wiewiorowska, obtained a Dutch PhD.[24]

V Hungary: a Succesful End for a Seemingly Never Ending Story[25]

Hungary has a long history of unfinished draft civil codes. True to its tradition, Hungary recently struggled to adopt a new code. A committee of experts, chaired by Attila Harmathy and later by Lajos Vékás, submitted a draft in 2008, which was not accepted. The Hungarian Parliament then adopted a government proposal, which was, however, vetoed by the President. By 2011, a new group of experts, once again including Lajos Vékás, submitted a new draft, which finally was approved. This year, on 15 March 2014, the new Hungarian Civil Code came into force. In this issue of ELTE, Hugh Beale analyses some paragraphs of the Hungarian provisions on contract law.

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[18] Lionel Smith (ed), *The worlds of tghe trust* (University Press 2013, Cambridge) 281.

[19] Klaus Westen, Joachim Schleider, *Zivilrecht im Systemvergleich/Das Zivilrecht der Deutschen Demokratischen Republik und der Bundesrepublik Deutschland* (Nomos 1984, Baden-Baden).

[20] See J. Švestka, J. Dvořák, L. Tichý (eds), *Sborník statí z diskusních fór o rekodifikaci občanskeho práva* (Wolters Kluwer 2007, Prague) 354.

[21] Th.J. Vondracek, *Nieuwe begrippen in het Tsjechoslowaakse Burgerlijk Wetboek en hun socialistiische karakter* (PhD thesis, Leiden 1981, Hague).

[22] Cserne (n 5).

[23] Aneta Wiewiorowska, *Reforming the Polish Civil Law*, presentation Humboldt University 12 February 2013.

[24] Aneta Wiewiorowska, *Consumer sales guarantees in the European Union* (PhD thesis, Sellier 2012, Utrecht, München) 345.

[25] Heading borrowed from Cserne (n 5).

VI Bulgaria and Slovenia: yet to Come?

Under socialism, *Bulgaria* adopted separate codes on family and personal status law (1949), obligations and contracts (1950) and property (1951). During the past decades, these Codes have been revised. There seems to be no interest in recodification. According to Cserne, this is because Bulgaria first needs to incorporate the EU *acquis communautaire.*[26]

Slovenia has retained the Socialist codes on succession and family law (1977). After it gained independence, Slovenia did adopt new codes on obligations (2001) and property (2002). In 2011, it adopted a new Family Code, but this was rejected in a referendum held in March 2012 because the provisions on same-sex marriage were considered too liberal.[27]

As for the other Balkan states, *Croatia* refrained from adopting a full-fledged new code, but rather introduced partial recodification in the shape of codes on succession (2003), obligations (2006) and consumer protection (2007). *Serbia* has introduced partial codifications in the areas of family law, property law, succession law, company law and labour law in the 2003-2005 period. There is no project for a complete recodification. *Bosnia-Herzegovina* has a fragmented private law with no prospect of recodification either.[28]

VII Earlier Codifications

In 1994, a new *Albanian* Civil Code encompassing 683 articles, entered into force. The Code consists of five books: a General part including Family law, the law of legal persons and prescription, ownership and property, succession, obligations, and contracts (no specific contracts). The Code continues to include traditional provisions, such as those on the ownership of a swarm of bees (Article 189).Some provisions are directly inspired by European directives. Articles 628-634 for instance reflect the 1983 EU Directive on Product Liability, Articles 635-637 the Directive on Misleading Advertising.

Of the three Baltic countries, *Estonia* adopted a new code by way of a step-to-step procedure (somewhat like the Netherlands did earlier, among others because the number of civil servants available in the Justice department was insufficiënt to do everything at once). In 1993, a new law on property was adopted, in 1994 a general part and in 2001 a law of obligations. Latvia simply re-enacted its 1937 code in 1992. The Latvian code consists of 2,400 articles in 4 books (family, succession, property, obligations), modelled after the German *Bürgerliches Gesetzbuch.* Company law is dealt with in a separate commercial code. Lithuania adopted a new civil code in 2000, which

[26] Cserne (n 5).

[27] The Code was rejected by 280,000 (55 per cent) against 233,000 (45 per cent) of votes, with a 30 per cent turnout (The Independent 26 March 2012). Earlier, all polls had predicted the opposite result.

[28] Meliha Povlakić, 'Privatrechtsentwicklung in Bosnien und Herzegowina' in Welser (n 8) 185-225.

was influenced by Dutch, Italian and Quebec law,[29] as well as by the UNIDROIT Principles of International Commercial Contracts.[30]

VIII Other Central and Eastern European Systems

In his paper on the recodification of private law in Central and Eastern Europe (referred to above), Péter Cserne distinguishes three groups of countries.[31] The first consists of nations which have opted for harmonisation with the law of the European Union member states. It has three sub-groups: Central Europe (the Czech Republic, Hungary, Poland, Slovakia and Slovenia), the Baltic states (Estonia, Latvia, Lithuania) and the Balkan countries (Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Romania and Serbia)[32]. The second group includes Belarus, Moldova, the Russian Federation and Ukraine. These countries do not try to harmonise their law with that of EU countries. The third group includes former Soviet republics in the Caucasus and Central Asia.

IX How to Cope with EU legislation

A major difficulty for the new and the prospective EU Member States has been how to cope with the many directives and regulations which form part of the *acquis communautaire.* At least three problems had to be met: whether or not to follow the text literally or to adapt it to the country's national tradition,[33] where to integrate the new text – in existing legislation such as a Code or in separate form, and, in the case of minimum harmonisation, whether to provide more protection than strictly needed. It is suggested that these issues, which also face the older Member States, are such that all countries can learn from each other. Faced with the enormity of the task, new member states often had to resort to new procedures, which may be of use to Member States of the older generation. One option frequntly adopted in order to bring the courts into line is to appoint special judges in each court who serve as internal experts as to European Union law. Another option, used in countries where the traditional courts were more difficult to win over, has been to let the Constitutional Court take the lead. Speedy information is also of major importance.[34]

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[29] Simona Selelionyte-Drukteinuene, Vaidas Jurkević, Thomas Kadner Graziono, 'The impact of the comparative method on Lithuanian private law' [2013] ERPL 959-990.

[30] See my paper in the Liber amicorum Valentinas Mikelenasn (2008).

[31] Cserne (n 5).

[32] To this I would add Macedonia, as it is usually referred to in Western Europe (Greeks prefer to call it the former Yugoslav Republic of Macedonia or FYROM).

[33] As Cserne (n 5) observes, lack of time in the early years has often led to literal translation, which was later rued.

[34] A project such as that of ERPL directed by Hans Micklitz at the European University Institute in Fiesole may be particularly inspiring. The project makes available to all users the most recent case-law on EU consumer law of that very day.

Information may also be obtained from the European Court of Justice. Putting prejudicial questions is an excellent way of getting the Courts's opinion. No suprise for central and eastern European nations, who are among the champions in using this procedure. As for the Directive of unfair contract terms of 1993 and the power it leaves to national courts to apply the directive on their own motion, the Hungarian and Slovak (and Spanish) requests outnumber those coming from other member states.

X What about Consumer Protection?

In 2012, the *Deutscher Juristentag* discussed the question whether consumer protection law should be incorporated in a single consumer protection act, such as already exists in Austria, France, Italy, Luxembourg, Portugal and Spain, or should remain in the *Bürgerliches Gesetzbuch,* at least insofar as the private law provisions are concerned. A substantial majority came out in favour of retaining the present state of affairs, under which consumer protection has largely been integrated into the civil law. The same applies in the Netherlands. Whether to enact separate codes or to integrate consumer protection into existing legislation is also an issue in Central and Eastern Europe. Many of these jurisdictions appear to have adopted the Dutch-German approach rather than the French-Italian one.[35] It is suggested that research into the reasons for adopting either of these solutions could be useful for Western Europe.

XI Family Law: In or Out?

Socialist nations have traditionally regulated family law in separate codes. This tradition now appears to be obsolete – and correctly so: new family law research shows the increasing links with contract law and the general part of the law of obligations.[36] Although inclusion in a single Code is no prerequisite for such cross-fertilisation, bringing them together seems more appropriate.

XII Europe

The upsurge in recodifications of the private law raises the question whether these may usher in the codification of the private law at the European level. In the final issue of the 2012 volume of the European Review of Contract Law, Reinhard Zimmermann (Hamburg) argues that this

[35] Some jurisdictions, such as the Czech Republic, opted for a compromise, with the main part of consumer law being incorporated into the Civil Code, while specific topics such as consumer credit law would remain regulated by specific statutes – Tichy, 'Ein neues ZGB für die Tschechische Republik (kritische Skizze)' Zeitschrift für Europäisches Privatrecht (forthcoming).

[36] Contractualisation of family law is one of the themes of this year's meeting of the International Academy of Comparative Law in Vienna (general reporter Frederick Swennen).

will not be the case.[37] From a historical perspective, Zimmermann examines the characteristics of codifications and the conditions in which they may develop. As matters stand, the prerequisites for a European codification seem to be far from ideal. There is no common language, no common court, no common narrative. The arguments in favour are weak and there is no affinity with a European identity. Also, the task is much more strenuous than anticipated now that some thirty autonomous jurisdictions, including those governed by the common law, are involved. The project for a *Draft common frame of reference* can therefore be dismissed as an 'overambitious aberration' and even CESL raises the question whether or not such harmonisation is feasible.

European harmonisation is also an issue in the countries mentioned in this paper. On the one hand there are authors who advocate closer cooperation; on the other hand there are those who are reluctant to surrender their recent hard-won legal independence.[38] Elsewhere I have defended the position that adoption of CESL, even with its in-built restrictions, would be a major step forward in the harmonisation of private law in Europe.[39]

[37] Reinhard Zimmermann, 'Codification/The civilian experience reconsidered on the eve of a common European sales law' (2012) 8 European Review of Contract Law 367-399.

[38] See, for instance, Raluca Bercea in (2008) 2 Studia Universitatis Babes-Bolyai 65-84: such harmonisation is '*non seulement douteuse au point de vue de sa constitutionnalité et légitimité, mais aussi artificielle, non-conforme à la logique même du système communautaire, inappropriée au point de vue instrumental et inouïe diachroniquement*'.

[39] Ewoud Hondius, 'Common European Sales Law: If it does not help, it won't harm either (?)' (2013) 21 European Review of Private Law 1-12. See also Ewoud Hondius and Anne Keirse, 'Does Europe go Dutch? The impact of Dutch civil law on recodification in Europe' in Reiner Schulze en Fryderyk Zoll (eds), *The law of obligations in Europe/A new wave of codifications* (Sellier 2013, München) 303-317.

Bénédicte Fauvarque-Cosson*

The French Contract Law Reform in a European Context

I Introductory Remarks on the Development of the Law in Europe

How will European law develop over the coming years of the 21st Century? This question was posed by Professor Raoul van Caenegem in 2002. His answer, based on history and comparative law, was that a

> […] truly European law ought to contain the most helpful elements of each one of the traditions across Europe'. He explained that 'different nations have traditionally approached this issue in different ways. Indeed, the age-old English instinct is to say, with Lord Denning, 'trust the judges, for they are the true guardians of the law'. The German feeling, which also goes back several centuries, is to say, with Savigny, 'trust the learned jurists, for they are the best guides through the thickets of the law'. The French instinct, on the other hand, is to say, in true Jacobin and Napoleonic vein, trust the legislator and beware of judges and jurists who pervert the codes. As none of these traditions (and I add here the many other traditions across Europe) is the sole road to salvation, a truly European law ought to contain the most helpful elements of each one of them.[1]

The civil and commercial law of each Member State is built upon three pillars, the national legal systems, EU law and the ECHR. While our national experiences influence one another, the law of the EU is built upon these reciprocal influences. In turn, our national legal systems are influenced by EU law.

Much has been written, notably in France, on the *'dialogue des juges'* which shows the way towards a constructive dialogue between national and European rules and principles. The dialogue of European scholars is also of the utmost importance; it suffices to recall what happened in the Middle Ages, when the ius commune was taught in our universities.

As European scholars, our role is primarily to train students to think comparatively, in order to build a common legal culture all over Europe (in spite of the considerable efforts that have

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[1] R. van Caenegem, *European Law in the Past and the Future* (Cambridge University Press 2002, Cambridge) 134; quoted by Lord Neuberger of Abbotsbury, Master of the Rolls, European Law Institute, 1 June 2011, 'Why a European Law Institute? http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/_15__Lord_Neuberger_of_Abbotsbury.pdf.

been made in this respect, the situation is still far from being satisfactory and I am grateful to the organisers of this conference for contributing to the development of this European perspective).

As European lawyers in the 21st century, our mission goes beyond comparative teaching. In the process of recodifying civil and commercial law (which is so important in Europe – and not only in Central and Eastern Europe but worldwide), it is also to help the legislator to set up the theoretical foundations of national and European private law in a way that ensures the consolidation of our common heritage and our common efforts to build a better Union.

Legal scholarship has played its role as a guide to the European legislator. European academics have organised themselves into various workgroups with the task of drafting legal texts which, for some of them, have become well-known private codifications. Some important networks have been set up. The principle of collaborative working is now spreading all over Europe. Building on the wealth of diverse legal traditions, a lot of scholarly efforts are put in better law-making in Europe so as to favour European legal integration and also a more vigorous European legal community.

The same phenomenon may be observed in those of our countries where the recodification of important parts of the law is envisaged. This notably occurs in France as regard contract law, a key subject for comparatists and European scholars.[2]

II The Recodification of French Contract Law: from an Academic to a Political Process

Title III of Book III of the French *Code civil* is entitled *Des contrats ou des obligations conventionnelles en général*. This part of the Code contains 280 articles and has remained practically as it stood in 1804. The French Code civil no longer reflects our French law of contracts and torts.

Actually, French contract law has considerably evolved since 1804. This evolution started as soon as 1807 with the enactment of the Code de commerce, which took away from the Code civil all *'commercial transactions'* (contracts concluded by *commerçants* for the necessity of their commerce).

In December 1904, the Minister of Justice established a large Commission composed of 61 members (with politicians, practitioners and writers), but this body never succeeded in drafting a project. The Parliament therefore proceeded with some partial reforms.

After World War II, in June 1945, a *Commission de réforme du Code civil* was set up by the Ministry of Justice, after a suggestion of the Association Henri Capitant. It was composed of 12 lawyers, and was divided into four sub-commissions (General part, Persons and Family,

[2] The law of contracts is one of the core subjects of comparative and European law. By contrast, it is relatively unimportant in the market. Indeed, even when it can be used, the imperatives of maintaining good business relationships and ensuring that transactions go ahead render the law of contract a 'rarely used tool for business people', E. A. Farnsworth, 'Comparative contract law' in M. Reimann, R. Zimmermann (eds), *Oxford Handbook of Comparative Law,* (Oxford University Press 2006, Oxford).

Obligations, Property). Under the presidency of Julliot de la Morandière, this Commission started to draft a project for a new Code civil.[3]

From 1964 to 1975, a profound modernisation of the Code civil was made by Jean Carbonnier in the field of family law, and many important legislative reforms have since been inserted in the Code.[4] Some important parts of it have undergone some modernisation: over the last decades, major reforms were adopted in family law, inheritance, law, securities, prescription. Contracts, torts and evidence should be the next candidates for reform.

So far, the evolution of the law of contracts – the same is also true for torts – took place outside the Code civil. This is largely due to the creativeness of French judges. The Cour de cassation has created new rules where the Code civil was silent (particularly in the field of pre-contractual negotiations). It also modernised existing rules and sometimes completely transformed the meaning of others. It gave a practical application to some hitherto purely academic concepts (such as the *obligation de moyens* and *obligation de résultat*). Besides, many specific provisions on contract law are to be found in some other codes, notably in the *Code de la consommation* (promulgated in 1993), or in the field of specific contracts.

This sanctuarisation of our Code civil in such an important field of the law for our economy may seem rather strange. What were the reasons for it? They have changed over time. In the Sixties, reformers were divided between capitalism and socialism.[5] In the Seventies, the legislator began to feel that he should wait for the European unification of contract law.[6] In the meantime, some Western European countries, including the Netherlands and Germany, launched major reforms. When the *Schuldrechtsreform* of 2001 came into force on January 1st 2002 there finally was a growing realisation in France that this passive attitude might not have been the best option.

The recodification of our law of obligations and evidence is on its way. It happens to be much more difficult than initially envisaged and it encounters several obstacles. It is true that this enterprise is not just about the modernisation of the law. It affects rules which date from 1804 and are carved into our Code civil. It affects a symbol. Besides, in the field of contract law, the

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[3] It first dealt with a preliminary book and Book I (persons, family), then with successions, but the texts were never submitted to Parliament. The members of the Commission were divided in opinion concerning both the ambit of the social changes that had to be accomplished and the role which should be played by the General Part (should it follow the German model or adopt a more limited approach?). L. Julliot de la Morandière, *La réforme du Code civil,* (Dalloz 1948, Paris) 117, see the special edition of the Recueil Dalloz, edited for the Bicentenary of the Code civil, 2004.) 14 ; J.-L. Halperin, *Le Code civil,* (2nd edn, Dalloz 2003, Paris) 125.

[4] Later, the division of the Code civil into 3 books was abandoned: there are now 5 books (book 5 is dedicated to rules applicable to Mayotte).

[5] J. Carbonnier referred to this *incapacité de trancher entre capitalisme et socialisme* in 'La codification dans les états de droit: le cas français' [1996] Année canonique, 96 et s.; quoted in F. Terre, Ph. Simler, Y. Lequette, *Droit civil, Les obligations*, (Dalloz 2005, Paris) n° 46, 51.

[6] J. Carbonnier, in 'L'évolution contemporaine du droit des contrats' [1985] Journées R. Savatier 29, sp. 32 : *'En 1962-64, faisons-en la confidence, quand fut entrepris un travail de réécriture sur le Code civil, si la matière des obligations fut laissée de côté au bénéfice du droit de la famille, on en donna pour argument que cette matière pourrait, dans un avenir abordable, faire l'objet d'une unification européenne. Il ne semble pas que, depuis vingt ans, la perspective se soit beaucoup confirmée. Ce qui n'interdirait pas, naturellement, à l'hypothétique législateur de consulter les droits étrangers, mais aux fins de suggestion, non pas d'unification.'*

underlying principles are different from those of 1804. In 1804, the Code civil reflected the spirit of the Enlightenment and the newly gained freedom and equality. The rules on contracts are inspired by the ideas of individualism and liberalism.

In September 2005, an *Avant-projet de réforme du droit des obligations et de la prescription* was submitted to the French Minister of Justice.[7] The *Avant-projet Catala* was drawn up in less than three years (from early 2003 to October 2005) by 34 civilian lawyers. The work was 'sponsored' – intellectually – by the *Association Capitant des amis de la culture juridique française* Great attention was paid to this *Avant-projet,* in France and all over Europe. This is why its spirit and content should be recalled, although it is clear now that the options for the French reform are very different from those followed by the 'Catala Project'.[8]

Professor Pierre Catala, chair of the Commission which drafted the *Avant-projet,* said that the initiative was due to the Principles of European Contract Law (PECL) prepared by the Lando Commission, and that this major enterprise would not only modernise our law but also provide France with a voice in the European concert.[9] Actually, this project remained too francocentric to meet these goals.

French lawyers, particularly French academics, have a real, cultural but also sentimental, attachment to their Code civil. It is a symbol. This explains that the Catala Avant-project, in spite of the growing awareness that the French law of contracts should take the ongoing Europeanisation of the law into account, was very faithful to the Code, to its style, to its emblematic rules. The first impression made by this *Avant-projet* is therefore one of continuity. Many important texts have remained unchanged; much attention was paid to not renumbering the most famous ones (for instance articles 1134 or art. 1135 para. 1). If one compares the provisions of this Avant-projet which relate to contract law[10] to the European *acquis*, the Principles on European Contract Law drafted by the Lando Commission and also against the Unidroit Principles, the conclusion is that the influence of this surrounding international and European legal environment was far too limited.[11] Many French specificities are regarded as consecrated and too little

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[7] *Avant-projet de réforme du droit des obligations et de la prescription,* [P. Catala (ed) Ministère de la Justice, Documentation française, 2006]. For a commentary, see B. Fauvarque-Cosson and D. Mazeaud, 'L'avant-projet de réforme du droit des obligations et du droit de la prescription' (2006) XI Uniform Law Review 103. The Catala project was translated into English by J. Cartwright and S. Whittaker: http://www.justice.gouv.fr/art_pix/ rapportcatatla0905-anglais.pdf. It was also translated into English by A. Levasseur (Lousiane), http://www.henricapitant.org/sites/default/files/Traduction_definitive_Alain_Levasseur.pdf. it is interesting to compare and contrast the two translations.

[8] Several meetings on contract law took place, at the *Société de législation comparée,* with a group of French and Hungarian scholars, to discuss the ongoing reforms of to contract law.

[9] P. Catala 'Il est temps de rendre au Code civil son rôle de droit commun des contrats' Jurisclasseur Périodique (JCP) 2005.I.1739; 'Bref aperçu sur l'Avant-projet de réforme du droit des obligations' (Dalloz 2006, Paris) 535.

[10] This part of the *Avant-projet Catala* on extra-contractual liability is, by contrast, very innovative in many respects. For instance, it introduced the duty to mitigate and a specific form (quite limited) of punitive damages. It also had a very controversial text regarding big companies and their liability for their 'filiales.'

[11] In actual fact, as this commission was composed of 36 drafters, each of them in charge of a specific part, the influence of these instruments varied according to the personalities of the drafters. For a general presentation of the part on contracts, see (2006) 1 Revue des contrats.

attention was paid to foreign and European general trends. However, this project was a key element in the ongoing political reform process, which started with the law of prescription.

The part of the *Avant-projet* on limitation periods *(delai de prescription)* was drafted by Philippe Malaurie and, unlike others, this part was strongly influenced by the PECL and the German reform. The law of prescription was successfully reformed in France, in June 2008 and is now inserted in the Code civil (Book III, Title XX, articles 2219 to 2254).[12] The common limit is 5 years (instead of 30 years in previous French law, and 3 years in PECL and Unidroit Principles), subject to many exceptions. The French legislator adopted a mechanism inspired by some EU directives, by PECL and by the Unidroit Principles: the limitation only begins to run once the person who holds the right knows or ought to know the facts, as a result of which he can exercise his right and there is a maximum limitation period of 20 years (cf. the 10 years adopted by PECL and Unidroit Principles).

The *Catala Avant-projet* also contains an important and innovative part on tort law, drafted by a group of scholars under the chairmanship of professors Geneviève Viney and Georges Durry. The reform of tort law is also a government's priority and a draft legislative text is ready. However, in June 2014, the reform of French tort law was not yet on the French political agenda.

After the Catala *Avant-projet* was published and handed to the Ministry of Justice, many discussions and conferences took place.[13] Various professional organisations, such as the Barreau de Paris, the *Medef* (the French employers' organisation), the Chamber of Commerce of Paris and the notaries, launched their own working groups and made critical observations and suggestions for new texts to the Ministry of Justice. Based on all these observations, a new academic project was prepared under the chairmanship of professor Francois Terré and published under the patronage of the French Académie des sciences morales et politiques. This project drew inspiration from all the various existing European and international models.[14] It was prepared in close cooperation with the civil servants who, at the French Ministry of Justice *(*within the *Direction des affaires civiles et du Sceau*), were at that time preparing the new draft legislation.

The various government's projects were made public as from July 2008.[15] It is interesting to see how much inspiration is taken for Europe, not so much for EU law but rather from those

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[12] *Loi n°2008-561 du 17 juin 2008 portant réforme de la prescription en matière civile.*

[13] As soon as October 2005 a major conference on contracts was organised by the *Revue des contrats* at the Sorbonne and in May 2006, another conference took place for the part on *Responsabilité civile;* both of them were published in the *Revue des contrats.*

[14] *Pour une réforme du droit des contrats,* (Dalloz, 2009, Paris). Sur cet Avant-projet, v. D. Mazeaud, *Une nouvelle rhapsodie doctrinale pour une réforme du droit des contrats* (Dalloz 2009, Paris) chron., 1364.

[15] On the July 2008 version, which was submitted to a large consultation, see F. Ancel, 'Genèse, sources, esprit, structure et méthode' in *La réforme du droit français des contrats* [2009] Revue des contrats, 265, 277. See also P. Ancel, Ph. Brun, V. Forray, O. Gout, G. Pignarre et S. Pimont, 'Points de vue convergents sur le projet de réforme du droit des contrats' JCP G 2008.I.21 3; R. Cabrillac, 'Le projet de réforme du droit des contrats. Premières impressions' JCP 2008.I.190.; M. Fabre-Magnan, 'Réforme du droit des contrats: un très bon projet' JCP G 2008.I.199; A. Ghozi et Y. Lequette, *La réforme du droit des contrats: brèves observations sur le projet de la chancellerie* (Dalloz 2008, Paris) chron. 2609; D. Mainguy, *Défense, critique et illustration de certains points du projet de réforme du droit des contrats* ☞

instruments which form part of the growing discipline called 'European Private law', notably the Principles of European Contract Law (PECL), the DCFR and also the Unidroit Principles.[16]

In 2014, it appears that the best way forward would be a comprehensive and coherent text (on contract, torts, quasi contract, evidence), through the parliamentary procedure (a *projet de loi*). However, realistically, the current government felt that there would never be enough time for parliamentary discussion on such important and technical issues. Besides, many consultations had already taken place: the Ministry of Justice launched a series of consultations after a first project was published in July 2008 on contract law, another one in 2010-2011 on other issues related to the *regime général des obligations* and torts.

The government issued a *Projet de loi du 27 novembre 2013 relatif à la modernisation et à la simplification du droit et des procédures dans les domaines de la justice et des affaires intérieures.* This text contains a specific article *(article 3)* authorising the government to reform the French law of contract by way of decree. Article 3 is entitled: *Simplification du droit des contrats, du régime et de la preuve des obligations.*

The *exposé des motifs* gives a long and detailed explanation of the reasons and even of the major orientations for such a reform.[17] It notably insists on the constitution goal of intelligibility of the law on the necessity to reinforce legal certainty and to contribute to the *rayonnement* and attractiveness of French law.[18]

On January 23, 2014, the French Senate refused to adopt article 3 and expressed strong opposition to the reform of contract law by way of *'ordonnance'.* However, this is not the end of the story.[19]

The text that the government still hopes to pass by way of ordonnance has 307 articles while the Titre III of the *Livre troisième* of the Code civil (that is to say Contract law) had 286 articles

(Dalloz 2009, Paris) chron 308; Ph. Malinvaud, *Le contenu certain du contrat dans l'Avant-projet Chancellerie de code des obligations ou le stoemp bruxellois aux légumes* (Dalloz 2008, Paris) *point de vue*, 2551; D. Mazeaud, *Réforme du droit des contrats: haro, en Hérault, sur le projet* (Dalloz 2008, Paris) chron. 2675.

16 See also the work accomplished in France, *Projet de cadre commun de référence. Terminologie contractuelle commune, Principes contractuels communs,* Association H. Capitant et Société de législation comparée, coll. Droit privé européen et comparé, 2008 volumes 6 and 7.

17 *Il est proposé d'aborder dorénavant dans le titre III les trois principales 'sources d'obligations' que sont les contrats, la responsabilité civile et les quasi-contrats évoqués respectivement dans trois sous-titres distincts. Les textes du deuxième sous-titre relatif à la responsabilité civile n'entrent toutefois pas dans le champ de l'habilitation, de telle sorte que ce sous-titre aura simplement vocation à accueillir, à droit constant, les textes du chapitre II (Des délits et quasi-délits) du titre IV.*

18 *Si le texte propose de moderniser le droit des obligations en introduisant de nouvelles dispositions, une grande partie du projet vise à consolider les acquis en consacrant à droit constant dans le code civil des solutions dégagées depuis plusieurs années par la jurisprudence, et connues par les praticiens. Il s'agit essentiellement de répondre à l'objectif constitutionnel d'intelligibilité de la loi, de renforcer la sécurité juridique, tout en contribuant au rayonnement et à l'attractivité du système juridique français.*

19 Article 3 was reinserted in April 2014 by the National Assembly and a *'commission mixte paritaire'* is due to meet so as to decide whether or not the text should be maintained.

in 1804; in the meantime, a few articles had been added to the new text for electronic contracts.[20] The project also has texts on evidence.[21]

If the reform is finally made, Title III of the Code civil will be reorganised and it will have three subtitles for the three main sources of obligations: contracts, *responsabilité civile* and 'other sources of obligations' (quasi-contracts).

III The Content of the Rules on Contract in the Government's 2014 Project (the 'Project')

The Project is an impressive achievement, based upon former draft projects, comparative studies and upon a large number of consultations that are now underway among practitioners. This recodification, if it were to be adopted, would entail some important changes.

In examining the content of the Project, I shall concentrate on subtitle I *Le contrat* of Title III. I shall leave out subtitle II on tort law (texts unchanged in the project itself), as well as subtitle III 'Other sources of obligations', which includes: business management, payments not due and, enrichment. I shall also leave out Title IV, which concerns the general system of obligations (*regime general des obligations,* with, for instance, texts on condition, plurality of parties, payment, restitutions, etc.) and Title IV bis on the obligation to furnish evidence *(La preuve de l'obligation,* articles 265 -307).

Chapter 1 of subtitle I *Le contrat*, entitled *Dispositions préliminaires* first defines the contract (art. 1).

It then has two major articles:

– Article 2 'principle of freedom of contract' states the principle and gives details as to its ambit. It also refers to public order and fundamental rights.

Article 2.2 explicitly states that contractual freedom does not permit the rules which concern public order to be evaded, nor any violation of fundamental rights which are recognised in a text applicable to private persons, unless this is necessary to protect legitimate interests and proportionate to the objective.

– Article 3 'principle of good faith'. The project states a general principle of good faith, both for the formation (new) and the performance of the contract. Actually, this is not profoundly innovative: in French case law, good faith plays a leading role. However, it is possible to see some inspiration from the main European and international projects, namely PECL, – art. 1 :201; Common Frame of Reference, art. 1-1 :102 and III-1 :103); Common European Sales Law in its first version of October 2001 (art. 2), and the Unidroit Principles (art. 1.7 and 1.8).[22]

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[20] P. Catala, *Bref aperçu sur l'Avant-projet de réforme du droit des obligations* (Dalloz 2006, Paris) 535, prec.

[21] As already mentioned, the new text on tort law is also ready, but it is not included in the scope of this *'loi d'habilitation'* as the government felt that it should not be passed by way of ordonnance.

[22] For brevity reasons, the main European source which will serve as a basis for examining the European influence on the provisions of the Project will be PECL.

The following articles contain definitions (4-10).

Chapter 2, on the formation of contract, fills an important gap: it contains texts on the precontractual period, which had not been envisaged by the drafters of the Civil code, because in 1804 most contracts were instantaneous. The Cour de cassation had set up various rules regarding this period; these rules are now codified, with new provisions dedicated to precontractual negotiations. In particular, two principles are enunciated: 'principle of freedom of precontractual negotiations' and 'principle of confidentiality' – this is inspired by PECL (art 2.302) and Unidroit Principles (art 2.1.16) which contain a provision on Breach of Confidentiality.

This Chapter contains rules on offer and acceptance, exchange of consents and promises of contract. By and large, these rules consecrate existing case law. There is one important deviation. While some controversial recent cases held that a promisor who had changed his mind and no longer wanted to sell what he had promised to sell could withdraw his promise when it has been accepted but not yet realised – and thus pay damages only – the *Avant-projet* takes an opposite view: such a withdrawal is deprived of any effect and the sale will proceed (a. 24). This text favours more security. It concords with the basic principle of French law, according to which specific performance – not damages – is the principal remedy for breach of contract.

Chapter 2, Section II deals with the validity of the contract.

Article 35 enunciates three conditions, necessary for the validity of a contract: consent of the parties; capacity; and licit and certain content.

Those who are familiar with French law of contracts will immediately realise that the 'cause' has disappeared. Some famous academics are still very attached to the cause: one of them, Jacques Ghestin, has even advocated the use of cause in European contract law.[23] Jacques Ghestin wrote the part on cause in the Catala project and tripled the number of texts dedicated to it. The drafters of the Catala project thought that maintaining and clarifying such a concept would create fewer problems than deleting it and having to find new devices in order to fill the gaps.

The government took an opposite view. In the *exposé des motifs* of the *projet de loi* (Nov. 2014, see above), the government insisted on the fact that if the concept of 'cause' no longer was in the texts, its main functions were maintained, in particular through the concept of illiceity and through various texts which aim at maintaining a certain equilibrium in the contract. Some authors, however, doubt that these texts will compensate for the very many purposes that the concept of 'cause' can serve.[24] Nevertheless, this judicial creativity surrounding the cause is precisely why the concept became so controversial and led to so much uncertainty. A provision entitled 'abuse of weakness' *(abus de faiblesse)* is inserted (art. 50) as a specific 'application of violence', so as to fight contractual disequilibrium when the contract is formed; nullity is the sanction. French case law has already developed the concept of *violence économique,* but its use is very limited.[25]

[23] J. Ghestin, 'Faut-il conserver la cause en droit européen des contrats?' (2005) 4 ERCL 396.

[24] D. Mazeaud, *Droit des contrats: réforme à l'horizon* (Dalloz 2014, Paris) 291.

[25] Comp. art. L. 122-8 et L. 132-1 of the C. consom.

Some countries, such as Portugal and the Netherlands, have created similar tools. The Unidroit Principles also have a similar concept (art. 3.2.7); so does the Common Frame of Reference (art. II. -7:207).

Sub-section 2 of Section 2 on validity assembles the rules on capacity and representation. It was rightly felt that capacity to contract and power to do it for others (representation) deserved new rules so as to deal with the multiple situations which can occur and due to the development of intermediaries. Instead of creating a separate Chapter, as in PECL, these provisions on representation are dealt with as a condition of validity of the contract.

Sub-section 3 of Section 2 is dedicated to the 'content of the contract'. It contains many interesting innovations. It starts with article 69 entitled 'illiceity of the contract' (which replaces part of the cause).

Article 70 deals with the 'objet' (unlike the cause, this important French concept is maintained).

Art. 71 is a new provision, which also draws inspiration from European models, and enables the judge, in some contracts [framework contracts *(contrats-cadres)* and *à execution successive*] to modify the price when there has been an abuse by the party who unilaterally fixed the price. This judicial power is not unfettered: the judge must notably take usage, market prices or the legitimate expectations of the parties into account. The judge may also grant damages or terminate the contract.

Articles 75 *(contrepartie illusoire or dérisoire des contrats onéreux),* article 76 *(clause privant de sa substance l'obligation essentielle)* and article 77 *(clauses abusives)* share the common feature of opening the way for the judicial restoration of some sort of equilibrium within the contract.

Article 77 is a controversial provision, inspired by the EU directive on unfair terms in consumer transactions and by PECL, which enables the judge to strike out unfair terms in B to B or C to C contracts (this is of course possible, by virtue of EU consumer law for B to C contract; see, in France, the relevant provisions in the Code de la consummation). Unlike PECL (art. 4: 109) and the CESL [...], no reference is made to good faith in the provision related to unfair terms *(clauses abusives).*

Traditionally, French law is hostile to the admission of *lésion*. Article 78 expressly rejects the *lésion qualifiée,* unless the law otherwise states. At first sight, this refusal to introduce *lésion qualifiée* seems to constitute a major difference in comparison with most modern European laws of contract and codifications. However, a closer look shows that the gap may not be so wide. In most legal systems, not all sorts of *lésions* are admitted. Most of the time, laesio must be qualified or subjective: this means that the breach of equilibrium must be the result of the abuse of a situation where one party depends, from an economic, moral or psychological point of view, on the other one (German law, Swiss law, PECL). In some cases, one may anticipate that the new text on *abus de faiblesse* (art. 50) or art. 75 would enable French judges to reach the same results.

There is no specific provision, in the French *avant-projet,* on 'Unfair Terms Not Individually Negotiated' (comp. Art. 4:110 PECL). It therefore seems that the general principle of good faith (art. 3) may well be the last resort for a party whose claim does not fall within the scope of article 77 but is based on the general idea that one party may have violated its duty of good faith. Section

3, on the 'Form of the contract', consecrates the principle of consensualism but insists on the possibility, for the parties, to provide otherwise. This section has specific provisions (which already are in the Code civil) on electronic contracts.

Section 4 is about the *sanctions* and it contains provisions on nullity (the distinction between absolute and relative nullity is maintained), and partial nullity (art. 93), as well as caducity (articles 94 et s.).

Chapter III deals with the interpretation of the contract.

Traditionally, in French law, contracts must be interpreted by seeking the common interpretation of the parties rather than referring to the literal meaning of the words (subjective interpretation). This solution is firmly reaffirmed. Some provisions innovate, in that they create the tools for reassessing the equilibrium of the contract. In particular, article 101 provides that in a standard form agreement *(contrat d'adhésion)* that is not negotiated, the terms must be interpreted in favour of the party who did not suggest them (Cf. *Code de la consommation,* a. L. 133-2 paragraph 2).

Chapter IV deals with the 'effects of the contract'.

Chapter IV has a new interesting provision on changes of circumstances. In Europe, it seems that only Belgium, Luxembourg, France and the United Kingdom do not fully recognise the judicial power to modify or terminate the contract when there has been an exceptional change of circumstances. The European and international projects all have provisions which consecrate it: PECL (art. 6:111), Unidroit Principles (art.6.2.1 to 6.2.3), Common Frame of Reference (art. III.- 3:502) Common European Sales Law (art. 89).

Article 104 entitled 'change of circumstances' is inspired by these texts, but it has its own originality. This text first allows a party to impose on the other party a renegotiation of the contract when, due to a change of circumstances that was unpredictable at the time of the conclusion of the contract, its performance is 'excessively onerous for the party who had not accepted assuming the risk of such a change of circumstances.' Article 104 then provides: 'in the event of a refusal or a failure of the renegotiation, the parties may, if they both agree, require the judge to adapt the contract. Should this fail, a party can ask the judge to terminate the contract, at the dates and on the conditions he decides'.

To the contrary, in the Catala project, the underlying general idea was that parties should anticipate such events and that, if they had not anticipated them, a party who wished to continue the contract should then make the necessary concessions to provide the other party with the minimum benefit sufficient to encourage him to proceed with their contractual relationship. There was no text which, as a last resort, gave the judge the power to modify the contract. The traditional explanation for this reluctance (still perceptible in article 104 of the government's project), is the fear of the severe economic consequences that such a judicial power would entail. However, why would the French courts be less suited to this job than the courts of many other countries? Unidroit Principles, PECL and CESL have rules on change of circumstances which grant such powers to the judges. In the event of a change of circumstances, the German, Austrian, Dutch, Greek, Portuguese, Italian, Danish, Finnish and Swedish courts (and these are only examples) have the power to modify the contract.

Chapter IV also contains new provisions on duration of the contract (articles 119 ff.) some of which state classic rules (such as the 'prohibition of *engagements perpétuels*'), while others are more innovative.

Section 4 of Chapter 4 relates to non-performance of contracts. It draws some inspiration from EU law. For instance, it starts with an enunciation of the various 'remedies for non-performance', an innovation that is to be welcomed as it gives a much greater clarity to this part of contract law.

French law also pays tribute to recent European trends by admitting that specific performance is not a right if it would lead to a 'manifestly unreasonable cost' (art. 129).

Another evolution, based on recent French case law and on European trends, is the introduction of termination by way of notification (art. 132,[26] 134).

This possibility is widely recognised in Germany (art. 323 of the BGB), Italy (art. 1454) and the Netherlands (art. 6:267), and in PECL (art. 9:301), UNIDROIT Principles (art 7.3.1), the Common Frame of Reference (art. III-3: 503) and CESL (art. 106, 131 et 138). For a long time in France, the prevailing view was that judicial intervention was indispensable (1184 of the Code civil). Only in recent years has this presumption begun to be challenged by the Cour de cassation, which has admitted, in some limited cases, unilateral and extrajudicial termination of the contract on the grounds of non-performance. The project remains very cautious. Firstly, termination by way of notification (or 'unilateral termination') is consecrated on an equal footing with judicial termination and not as the primary way of terminating the contract if the conditions are met. By contrast, the Unidroit Principles, PECL, the CESL and many national texts do not refer to judicial termination in the event of non-performance and only contain provisions on unilateral termination. If one party (the creditor) opts for the latter, termination takes effect after giving the debtor a formal notice *(mise en demeure)* where performance is still not forthcoming, termination can be effected on notice by the creditor, setting out his grounds for this breaking off of their relationship (article 134). Article 134 paragraph 4 adds that the debtor can challenge the creditor's decision to terminate before a court. He must prove that his own failure to perform did not justify termination. Article 136 states that the court may either confirm the termination or order performance of the contract, with the possibility of giving the debtor time to perform. The whole process, which had been already codified in the Catala project, requires a lot of patience from the aggrieved party: a creditor who has received unsatisfactory performance of goods or services cannot terminate at once. He is obliged to first issue a *mise en demeure* and then grant a deadline for performance.

Article 134 does not specify how consequential the non-performance should be and merely states that the creditor does so at his own risk. Obviously, the smallest breach of contract would not suffice to justify unilateral resolution. By contrast, PECL enables an aggrieved party to

[26] Art. 132 enumerates the conditions of termination and shows the various ways: termination by virtue of a termination clause, by notification or by the court.

terminate the contract unilaterally and immediately, but only in cases of a fundamental non-performance (PECL art 9:301; see also CISG art 49, and the Unidroit Principles, art 7:3.1).[27]

Unlike PECL, CISG and the UP, which grant the aggrieved party a right to immediate termination in the event of an anticipated fundamental non-performance (see CISG art 72, PECL art 9:304, and UP art 7.3.3), the *Avant-projet* does not give such a right.

IV Concluding Remarks on the Major Orientations of the New French Project

1. Many new European trends have inspired the work of the French *Direction des affaires civiles et du sceau,* the division of the Ministry of Justice in charge of the reform. It is to be hoped that France will soon have a new law of contracts, tort and evidence. A new, modern and more European *théorie générale of contracts* is set out in the new government's project.[28]

2. The French distinction between *contrats civils* and *contrats commerciaux* remains. Yet, in practice, it has lost much of its importance. Under our French legal systems, the rules contained in the Code civil apply to commercial contracts, unless the Code de commerce or commercial usages lead to other solutions. There are very few specific rules for commercial contracts, especially now that the law of prescription has been reformed. In our law faculties, *Contrats civils et commerciaux* are taught in the same course on the law of contracts or obligations. As limited as it is, this dualism between civil law and commercial law contracts does not reflect a modern or international conception of the law of contract. The Principles of European Contract Law (PECL) do not draw such a distinction. The Dutch and the Italians have abolished that dualism.[29] In EU laws, the dividing line is between B to B and B to C contracts.

3. The principles which currently underlie the French law of contracts have been strengthened by this new Project.
– freedom of contract
– consensualism is enunciated and in this respect, the French project may seem to resist the creeping formalism that is to be observed in EU consumer law, in the CESL and in many specific contracts.

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[27] Comp. also Cass. civ. 1ère, 13 oct. 1998, *D.* 1999, p. 197, note C. Jamin et Somm., 115, obs. P. Delebecque, *Defrénois* 1999, 374, obs. D. Mazeaud, JCP G, 1999, II, 10133, note N. Rzepecki : *'la gravité du comportement d'une partie à un contrat peut justifier que l'autre partie y mette fin de façon unilatérale à ses risques et périls.'*

[28] As had already been stressed by the drafters of the Avant-projet Catala, especially by G. Cornu in his introduction, this will enhance the supremacy of the Code civil over all other codes, ibid.

[29] During the conference organised by the Revue des contrats, (2006) 1 Revue des contrats, some French authors suggested abolishing it: see J. Mestre, D. Mazeaud, *Observations conclusives*, prec., sp. 181. O. Lando observed that, if this distinction had been abolished, it may well have incited the draftsmen to propose rules better suited to commercial transactions (2006) 1 Revue des contrats, 167, 168.

– contractual justice, coherence and good faith are reinforced. This goes along the lines of EU law, as well as of some recent codifications. In several laws (notably in German, Dutch and US law) or codifications (PECL and Unidroit principles), good faith acts as a general principle for all the phases of the life of the contract.
– unilateralism has become predominant, especially since the Cour de cassation consecrated the power of one party to unilaterally fix the price or even terminate the contract. The *Avant-projet* leaves all this unilateral power of one party, and the notification process that goes with it, in place (unilateral termination is placed on equal footing with judicial termination).
– judicial power is increased, but it is limited. This is showed, for instance, by art. 104 on change of circumstances or by art. 71 on judicial fixation of the price in cases of abuse.

4. Recodification of contract law in 2014: what place is there for public policy and mandatory rules?

Freedom of contract is the key pillar of French contract law. However, this principle is tempered by public order and fundamental rights. The Project does not state which rules are mandatory and which ones are not. In the field of general contract law, contract rules are usually not mandatory. However, the new emphasis placed on contractual justice, coherence and good faith may lead judges to have a stricter approach and restrict freedom of contract. In an international context, this may open the way for a more extensive use of public policy exception (for instance, if the applicable law does not have a general principle of good faith) or for the application of some provisions (for instance the one on unfair terms) which the judges would consider to be international mandatory rules of the forum *(lois de police).*

5. Back to Europe

During the past decade, European contract law has been a wonderful playing field for the law-making process, which has undergone great transformations, characterised by a much greater dialogue and broad openness to civil society.[30] The effectiveness and quality of the law are a real concern for European institutions. Impact assessments and statistical data become essential as part of the 'Smart regulation' process.[31] Interest in comparative law is also reviving and, as common general tends develop in the modern laws of contracts, national codifications or recodifications no longer are a tool for legal nationalism; quite the contrary.

[30] The first Communication of the Commission on European contract law was published in July 2001; by the end of 2011 and after 10 years of intense work and debates, a legislative instrument for sales contracts was adopted by the Commission. The result may seem very thin. It is in fact immense from a methodological point of view.

[31] The Communication 'Smart Regulation in the EU' COM (2010) 543 sets out the Commission's plans to further ensure the quality of regulation. Smart regulation aims at regulating where there is a need to do so while keeping costs to a minimum.

Stanisław Sołtysiński

The Importance of the Principles of Equality of the EU Member States and Economic Actors in EU law

I The Consequences of the Eastern Enlargement of the European Union: Economic Effects and the Conundrum of 'Loss' of Sovereignty

The Europe Agreements of 1997 and, subsequently, the EU accessions by the Czech Republic, Hungary and Poland in 2004 are viewed today as an inevitable and logical consequence of the fall of the Berlin Wall and the dissolution of the Soviet Union. However, even at the time of concluding the Europe Agreements, membership of our countries in the Community was by no means a foregone conclusion. Whilst participating in the Europe Agreements negotiations, I vividly remember that the joint Czech, Hungarian and Polish efforts to obtain assurances that our three countries would achieve fully-fledged membership of the European Union failed. The identical preambles of the first three Eastern Europe Agreements did not contain any promise of membership.The accession process constituted a challenge to post-socialist countries, but a voluminous *acquis communantaire* was implemented rapidly and rather successfully. Delays and difficulties in its adoption have been overcome thanks to the efforts of the political and economic actors in the new Member States and the assistance of the EU administration.

On balance, the results of the European enlargement, the tenth anniversary of which we are celebrating today, are greatly beneficial for both the old and new Member States. The implementation of the *acquis* and the obligations of the new members undertaken in the Europe and the Accession Agreements was by no means easy and cost-free but it was generally successful. From the new Member State's perspective, the main gains include both economic and political benefits. Joining the common market has enabled our economies to benefit from the freedoms of movement of goods, services, capital, and labour, which are enforced at less than equal speed. Of course, the freedom of labour has been delayed and not fully implemented, even today. However, on balance, the new Member States have undoubtedly gained a lot from their

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accession. Economic advantages also include significant direct financial assistance from Brussels. By way of example, the current 7-year EU budget provides for Poland an equivalent of about EUR 100 million. Sceptics indicate that about 70 per cent of this sum will be paid directly or indirectly to foreign EU firms. However, it is worth noting that the projects financed by Brussels will improve our road and railway infrastructure and other critically important projects aimed at modernising our economy.

Indeed, the costs of implementation of the *acquis,* which is aimed at implementing the four freedoms, involved financial and social costs but, as a rule, they constituted the necessary costs of transformation from a centrally planned economy into a free market economy.

The benefits of accession are not limited to the aforementioned economic gains. The new Member States may 'pick and choose', substantially free of charge (i.e. without a license fee), from among numerous, sometimes contradictory, legislative and organisational blueprints developed in the old Member States. Whilst some of them are similar or complementary, there are important areas where leading EU countries developed and practise diverging, if not contradictory, solutions. For instance, in the area of labour relations (in particular in the field of employee participation in the management of firms), we observe opposing policies and legal standards epitomised by the British and German governance models of labour relations. It remains to be seen if Eastern enlargement will tip the scales in favour of the UK or the German model of employee participation or whether the issue will be left to market forces.

The overall balance sheet of the EU accession by Hungary and Poland a decade ago is best illustrated by comparing the main economic indicators of our economies with those of our neighbours to the east of our countries. Moreover, the earlier tensions in Georgia and the current Ukrainian conflict demonstrate the significance of EU membership, which functions not only as a model in designing our basic economic and social policies but as an anchor of our political stability.

And yet, an overall positive evaluation of the decision to join the EU and the fact that its effects are unquestionably beneficial does not mean that we do not face difficult issues. At the outset, I should mention the 'sovereignty conundrum' upon joining the European Union and after the adoption of the Lisbon Treaty. Taking into account the positive effects of EU membership, one could expect that ethnic and nationalistic attitudes would gradually diminish and finally disappear. However, we observe that such attitudes seem to be on the rise in the majority of the new Member States. Apart from this, ethnic and nationalistic attitudes are visible also in old Member States, for instance in France, the UK, Finland and the Netherlands. The sovereignty conundrum is explained by several factors. First, many citizens of the former socialist countries feel uneasy about giving up or accepting any limitation of their newly regained independence. As explained by a Hungarian professor, 'Past communist states cannot escape becoming nation-states because the community and homogeneity necessary for the functioning of a state will be based on ethnic community'.[1] The mobilisation function is an important aspect of nationalist

[1] A. Sajo, *Protecting Nation States and National Minorities: A Modest Case for Nationalism in Eastern Europe,* (University of Chicago Law School Roundtable 1993) v. 53, 53.

ideologies. J. Breully identifies three functions of such ideologies which render nationalism an effective instrument of political action in the modern State: coordination and mobilisation of civic activities and legitimacy.[2] W. Sandurski, a prominent Polish constitutionalist, makes an interesting observation, namely that the appeal to cultural identity is often a substitute for the failure of political parties to connect their programmes with significant social interests.[3] While describing the robustness of nationalism in our region, the author draws attention to the fact that nationalism has found fertile ground in those new EU members in particular which 'are literally speaking "new" states (all three Baltic states, the Czech Republic, Slovakia and Slovenia).'[4] In his opinion, 'these new states strongly appeal to their national identity, both as a way of asserting their legitimacy in the international order and of matching a new territorial polity to an ideology which provides the necessary degree of coherence and mobilization to make a new political elite sufficiently comfortable.'[5] While agreeing that the nationalistic movements in these countries are on the rise and push the dominant elites towards more nationalistic policies than preferred thereby, I do not see any difference between the robustness of the ethnic feelings in the 'new' and 'old' states of our region. Moreover, despite the divorce between Slovakia and the Czech Republic, the latter polity has a somewhat longer state tradition than Poland. Furthermore, Lithuania has a much longer state lineage than that of Slovakia and Slovenia.

The transfer of a part of sovereign power to the supranational authority is not easy to some segments, if not to the majority, of the electorates in Poland and even more so in Hungary, the 'old' countries of the region. However, it is by no means clear that the strong identification that ethnic feelings provide (especially a strong endorsement of one's nation's independence) is hostile to a voluntary transfer of some sovereignty in exchange for a fair bundle of rights and duties at the supranational level. The 'realists' among many Poles, who see the transfer of sovereignty conundrum as a real problem, endorse the Lisbon Treaty and are even willing to accept granting further powers to Brussels institutions, providing certain conditions are met.

As long as the EU remains a community of national states, their governments play a decisive role in the Council. Hence, the question arises as to what extent, if at all, the EU constitution provides for the equal status of Member States.

Traditionally, sovereignty and equality of states have been viewed as two interrelated concepts incorporated in Art. 2.1 of the Charter of the United Nations. The principle of Sovereign Equality has been long recognised in customary international law and formally reaffirmed by the League of Nations. Because of its incorporation in the United Nations Charter, all members have to follow the principle.[6] The concept of sovereign equality of states implies, inter alia, that each

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[2] J. Breuilly, *Nationalism and the State* (Manchester University Press 1982, Manchester) 349-350.

[3] W. Sandurski, 'The Role of the EU Charter of Rights in the Process of Enlargement' in G.A. Bermann, K. Pistor, (eds), *Law and Governance in an Enlarged European Union* (Oxford and Portland 2004, Oregon) 74. The author argues that Breuilly's remarks regarding the role of ethnic policies in post-colonial states apply equally to post-communist countries of Central and Eastern Europe.

[4] Ibid, 74.

[5] Ibid.

[6] Sbugdha Nahar, Sovereign Equality Principle in International Law, <http://www.globalpolitican.com/print.asp?id=4351> accessed 24 March 2014.

state has the legal competence to participate in the UN and other international organisations on an equal footing with other states, conclude treaties, govern its internal affairs, and protect its territory.[7] Moreover, the principle endorses comity and respect *vis-à-vis* all states.

The Principle of Sovereign Equality is sometimes characterised as ius cogens. However, the UN Charter's rules on the powers of the Security Council conclusively prove that the member states are competent to derogate from it. Moreover, even in the General Assembly the principles of 'one state one vote' and unanimity hardly exist. In practice, important matters are decided on a two-thirds' majority and others on a simple majority. As such, there is no doubt that the EU constitution (i.e. the Lisbon Treaty) and its other governance rules is either a multilateral delegation of sovereign powers to the supranational organs or a limitation of the sovereign equality of the EU member states.

Polish scholars stress that each international agreement assumes a surrender of some sovereign rights, but that such practice constitutes an exercise of sovereignty.[8] Of course, there is no doubt that there are quantitive and qualitative differences between standard international covenants and the consequences of EU accession. In particular, limitations of sovereignty are material and visible when a member state is bound by regulations or directives adopted by the competent EU organs (the Council and the Commission). In all fairness, the principle of the sovereign equality of EU member states is also deeply limited by the rule of primacy of community law over our domestic laws. The latter proposition evokes a still unresolved conundrum of potential conflicts between EU law and the constitutions of the Member States.

Theories of the joint exercise of sovereign powers of EU Member States by the Community organs and the transfer of partial state powers to Brussels as an international organisation offer interesting solutions aimed at reconciling the principle of sovereign equality with EU membership. However, in all fairness, the traditional concept of sovereignty of states has been substantially eroded and redefined. Several experts in constitutional law in old and new EU Member States advocate the abandonment of the traditional principle and the development of a modern concept of the sovereign equality of states.[9]

The limitations of the traditional principle, enshrined in the UN Charter as a consequence of EU accession, seem to be justified in the light of globalisation and geopolitical realities. Recent events in Ukraine illustrate the contrast between the real value and effects of the unrestricted but formal sovereignty of our Eastern neighbour, whose independence and its borders were guaranteed by major powers a few years ago in Budapest, and the practical consequences of the limited sovereignty enjoyed by its former Comecon partners that have joined the EU.

However, in all fairness, I am not advocating a radical abandonment of the critically analysed concept of sovereign equality of states as a basis for orderly intra-community state relations. Tensions and conflicts between national interests and the policy goals of the EU should be

[7] R.H. Steinberg, 'Who is Sovereign' (2004) 40 Stanford Journal of International Law 1.

[8] See, for instance, A. Raczyńska, 'Reinterpretacja pojęcia suwerenności wobec członkostwa w Unii Europejskiej' (2001) 1 Przegląd Europejski, 113-114.

[9] W. Sadurski (n 3) 78-80.

resolved whilst taking into account that all Member States are equal despite obvious inequalities in other respects: inequality of size, cultural tradition, population, GNP per capita, etc.

Whilst constitutional covenants granting new powers to the EU Commission, the Council and the Court of Justice should be fully respected as necessary requirements of fostering cooperation and effective governance of the Community, the *residual aspects of the principle of sovereign equality* shall be taken seriously. Furthermore, limitations of this traditional principle, granted in accordance with the constitutions of Member States to the supranational organs, should be *strictly interpreted* with the aim of avoiding conflicts between the Lisbon Treaty and the constitutions of the Member States.

The temptation to think mainly in terms of national interests rather that in the interest of the common market is not alien to policy makers from large and small EU members. However, the latter countries are usually afraid to use their veto power, which is viewed as a political weapon of mass destruction and, sometimes, self-destruction.

Past intra-EU conflicts show that major member states, such as Germany, France and the UK, have resorted to open or veiled threats to use their veto powers more frequently and successfully than the other members. Examples include the UK claw-back of special tax privileges and current threats to block the Tobin tax on financial transactions.[10] In addition, Germany successfully derailed the adoption of the takeover directive in 2001 and the European Private Company project in 2012. Small and medium size EU members are frequently irritated when the Council and the Commission interpret the principle of equality along the lines that 'all states are equal but some of them are more equal than others'. Such special treatment was visible when both France and Germany violated Euro disciplines regarding permissible levels of budgetary deficits. Also, the European Commission has approved generous state aid packages for German and French-Belgian banks, while insolvent Greek and Cypriot financial institutions had to apply tough restructuring procedures, including the participation of bank creditors and large deposit-holders in covering bank losses.[11]

The EU Commission's interventions regarding 'golden shares' in partially or newly privatised companies, where states established privileged corporate rights, also reflect the principle that some states are more equal than others. For several years, it challenged 'golden shares' almost exclusively established in Southern Europe (e.g. in Portugal, Spain and Italy); then it charged similar practices in France, Britain and Benelux countries before it directed its otherwise legitimate legal crusade in Germany, although the Volkswagen special corporate rights existed earlier than those successfully defeated in other countries.[12]

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[10] The Tobin tax constitutes a taxation of transnational financial transactions (FTT), Financial Times 22 May, 2013.

[11] By way of example, in the case of *H.RE*, a German bank, the Commission, which rightly advocates the concept of 'bail in' by creditors of insolvent financial institutions, approved a state aid package which covered 95% of all the losses of the bank. See further J.P. Krahnen, *Why Bail In is not a Fata Morgana* (Goethe University, House of Finance 2013, Frankfurt) <http://screm.com/aphp?sid=5hm2t.1dsaa48>.

[12] See generally S. Sołtysiński, 'Golden Shares: Recent Developments in E.C.J. Jurisprudence and Member States Legislation' in: S. Grundmann, B. Haar, M. Merkt, P. Mülbert, M. Wallenhoter et al. (eds) *Festschrift für Klaus J. Hopt* (W. de Gruyter 2010, Berlin, New York) v.2, 2571ff.

Although the principle of sovereign equality is limited by the EU governance rules and powers granted to Community institutions, its remaining residual components permit new Member States to argue in favour of a more harmonious and balanced implementation of all four freedoms. The history of EU policy conflicts shows that the most developed economies pay more attention to the freedoms of movement of capital and goods than to the freedom of labour. Naturally, many new Member States are more concerned with the freedoms of movement of workers and, to some extent, the freedom of provision of services. These natural conflicts of policies are also reflected in the process of implementing measures promoted by the EU Commission and even in the case law of the Court of Justice.

It is also worth mentioning that whilst the principle of equality of states is not mentioned in the Lisbon Treaty but 'exists' in the residual form based on international law, the doctrine of equal treatment and non-discrimination of economic actors (i.e. companies sensu largo) is well established in articles 49 and 54 of TFEU. A recent judgement of the Court (Grand Chamber) of 5th February 2014, dealing with the Hungarian progressive turnover tax, illustrates the scope of applying the concept of indirect discrimination.[13] The Court ruled that

> Articles 49 TFEU and 54 TFEU must be interpreted as precluding legislation of a Member State relating to tax on the turnover of store retail trade which obliges taxable legal persons constituting, within a group, 'linked undertakings' within the meaning of that legislation, to aggregate their turnover for the purpose of the application of a steeply progressive rate, and then to divide the resulting amount to tax among them in proportion to their actual turnover, if – and it is for the referring court to determine whether this is the case – the taxable persons covered by the highest band of the special tax are 'linked', in the majority of cases, to companies which have their registered office in another Member State.

The foregoing decision is in line with earlier precedents of the ECJ; these explain that neither the protection of the economy of the country nor the restoration of budgetary balance justify such indirect discrimination.[14]

A deeper analysis of this and other cases implementing the four basic freedoms and initiatives of the EU Commission and the Council demonstrates that they frequently foster the interests of the companies with headquarters in the most developed economies and are organised in the form of groups. Freedoms of movement of labour and provision of less sophisticated services, that require a significant component of manual work, enjoy less interest in Brussels, and are subject to long transition periods. Of course, freedom of movement of capital is less visible and, paradoxically, entails fewer social tensions than the freedom of movement of workers. Admittedly, the reaction of the population in the old and new member states is basically similar in this respect. Foreigners are more visible than foreign capital or financial services.

Several authors argue that the risk of a new financial 'bubble' is real, because unequal treatment of economic actors is coupled with the legal rules which treat the governments and

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[13] Case C-385/12 *Hervis Sport- és Divatkereskedelmi Kft. v Nemzeti Adó- és Vámhivatal Közép-dunántúli Regionális Adó Főigazgatósága* (5 Februar 2014).

[14] See ECJ Case C-35/98, *Staatssecretaris van Financiën v B.G.M. Verkooijen* [2000] ECR I-4071, paras 47 and 48.

central banks of each Member State of the European Economic Area surprisingly equally.[15] Even German regulations aimed at assuring adequate capital requirements for credit institutions treat the obligations of all Member States and their central banks as high quality liquid assets which are completely risk-free.[16] Such an over-optimistic assessment of credit risk exists in the regulations of the majority of EU countries, despite the notorious crises of Argentina, Greece and Cyprus and the near insolvencies of Ireland and Spain. As a result, financial institutions are more than willing to invest in government bonds and extend credit to the zero risk states. Recently, a German professor put forward a provocative comment: 'The banks feed the sovereigns' ever-growing hunger for more money and sovereigns repay with the guarantee that the investment does not share the fate of a loan. But a closer look at the history of defaulting states […] reveals that such a guarantee is based on a mere fiction.'[17] Paradoxically, the equality of states and their central banks is respected only for the purpose of limiting the financial risks of the banks feeding spendthrift governments, which deserve to be treated equally but with other commercial debtors rather than benefit from their sovereign status in this field.

So far, the countries of the Visegrad Group have failed to develop a common platform advocating a harmonious and more balanced implementation of the four freedoms. Despite their overall good political relations, Budapest, Prague, Bratislava and Warsaw rarely conduct joint in-depth economic or legal studies of controversial policy issues, such as the EU Patent Package or the consequences of the close-out netting privileges proposed by the European Commission in the context of the EU Insolvency Regulation.[18] I will revisit these two issues in the next sections of this paper.

II The Demise of the Principle of Equality of Economic Actors

1 The Problem

In the preceding section, I contrasted the importance of the tenets of equality and non-discrimination of companies in TFUE against the background of limitations of the principle of equality of sovereignty of the EU member states. Now, I would like to draw the reader's attention to a new phenomenon of departures from the traditional principle of equality of economic actors by way of granting privileged status to firms of systemically important sectors ('SIFIS'). This trend is visible not only in the EU but also in many other OECD countries. I will illustrate this

[15] C.G. Paulus, 'Some Thoughts of an European about the Interrelationship of Sovereign Debt and Distressed Banks' [2014] Texas International Law Journal<http://www.tilj.org/forthcoming>; S. Merler, J. Pisany-Ferry, 'Hazardous Tango. Sovereign-Bank Interdependence and Financial Stability in the Euro Area' (2012, April) 16 Bank de France Financial Stability Review.

[16] *German Solvabilitätsverordnung* of 20 December 2012, BGB L1, 2926.

[17] Ibid.

[18] Proposal for a Regulation of the European Parliament and of the Council Regulation No. 1346.2000 on insolvency proceedings, Brussels 25 February 2014, 5983/1/14, DGZ ZA.

process, its actors and consequences by describing the lobbying successes of financial institutions, intellectual property owners and foreign investors.

Whilst new EU Members may sometime complain about the unequal attention paid by the EU organs to the balanced implementation of the four freedoms, their companies have a chance to benefit from the common market and 'catch up', provided, inter alia, that the antitrust policy of the Commission and the national antimonopoly offices keep the market reasonably open for small and medium size companies (SMEs), and in particular for new firms. However, free competition may be seriously limited if the EU and local legislators continue to grant legal privileges to firms in the most lucrative sectors of the economy dominated by firms from leading OECD countries. Apart from in the United States, there is little discussion on the consequences of this new trend. Again, the new EU member states should be vitally interested in analysing the economic and social implications of these developments.

2 The Close-out Netting Super-priorities

During the last 25 years, financial institutions have developed new legal instruments aimed at reducing their risk exposure when trading in derivatives, swaps, repurchase contracts ('repos') and other new financial instruments, in particular in the event of insolvency of a counter-party. Various types of netting transactions employ mechanisms similar to the traditional set-off or novation but they are functionally and conceptually different from the latter concepts. Close-out netting is usually described as an umbrella agreement covering a bundle of financial instruments and other transactions ('Eligible Contracts') between two parties, who have agreed that, upon the occurrence of a predefined event (default), the party 'in the money' (i.e. the non-defaulting party) may terminate all contracts covered by the netting agreement, which shall become immediately due and the party which is 'out of the money' shall pay a net amount to the counter-party. Depending upon the terms and conditions of the umbrella agreement, often described as the 'master agreement', close-out netting occurs automatically or upon the wish of the non-defaulting party. As a rule, the calculation of the net amount of all unperformed obligations is performed by the party which is 'in the money' in accordance with a contractually agreed formula. The single net payment obligation constitutes the only obligation in lieu of all terminated contracts covered by the master agreement.[19]

The close-out netting master agreement frequently covers dozens or sometimes hundreds of contracts. Netting is mainly a product of banks and other financial institutions that offer such agreements to other financial institutions or large firms of the 'real' economy. During the last two decades the denomination of 'close-out netting' has become widely used in the standard agreements drawn up by market associations, such as the International Swaps and Derivatives

[19] P. Paech, *Preliminary Draft Principles regarding the Enforceability of Close-out Netting Provisions,* UNIDROIT 2012, Study LXXVIII L-Doc. 11, January 2012, at 3.

Association (ISDA) and the International Capital Market Association (ICMA). This paper analyses the consequences of the special status of close-out netting and its underlying transactions in the event of insolvency of a party to the umbrella (master) agreement.

The prevailing model of bankruptcy law in the US and EU countries favours restructuring a failing firm's business and repayment of its debts, partially or wholly, upon the firm's reorganisation. Upon declaration of insolvency, creditors may not collect and set off their debts, even if they are due. The estate's administrator has broad powers. He may assume or reject outstanding obligations, recover pre-bankruptcy fraudulent conveyances when the debtor made payments or granted other benefits to its creditors for less than fair value, etc. The most fundamental principles of bankruptcy law are equal treatment of creditors and a directive of reorganisation of the insolvent firm rather than its liquidation by selling separate assets of the estate.

Banks and other financial institutions have long tried to receive special treatment in bankruptcy laws. In the United States, for instance, some financial transactions were insulated from the rigours of bankruptcy law in the Bankruptcy Code of 1978. Despite a gradual expansion of the scope of the special status of financial transactions in the 1980s and 1990s, until the Bankruptcy Abuse Prevention and Consumer Protection Act 2005,[20] substantial uncertainty surrounded the range of transactions and parties eligible for a statutory recognition of enforcement of close-out-netting in insolvency proceedings and close-out netting was granted almost complete immunity from the disciplines of bankruptcy laws.

The US Bankruptcy Reform Act (2005) radically expanded the definition of protected financial transactions. Companies eligible for close-out netting have been 'liberated' from bankruptcy disciplines. The privileged transactions cover, inter alia, swaps, forwards, commodity contracts, repurchase agreements (repos) and securities contracts.

The reform of 2005 granted the above privileges not only to banks and other regulated financial institutions (such as commodity brokers, forward contract merchants and stockbrokers) but to all 'financial participants, defined as a clearing organization or an entity that entered protected financial transactions worth at least USD 1 billion in national value (or USD 100 million in mark-to-market value) anytime during the preceding 15 months'.[21] This was just one example of the new principle that the big creditors should be treated with a bit more respect than lower class creditors.

The 'safe harbours' for financial products advocated by ISDA and other propagators of netting have been justified as necessary instruments for the protection of financial markets, including over the counter ('OTC') markets. Without these protections, parties to derivatives transactions, swaps and close-out netting agreements would be subject to automatic stays for extended periods. While the bankruptcy administrator (trustee of a bankrupt entity) would be allowed to assume 'in-the-money' contracts and reject 'out-of-the-money' contracts in an effort to perform a successful restructuring of the debtor. These characteristic powers of the bankruptcy

[20] Pub. L. No 109-8, §§, codified at 11 U.S.C. § 362(a) of 2000, here-and-after US Bankruptcy Reform Act 2005.
[21] § 907(b) (i) (3), as codified at 11 U.S.C § 01 (22A).

administrator are pejoratively described by financial industry lobbyists as 'cherry picking'. According to this view, losses from exposure to 'cherry picking' and other bankruptcy rigours could undermine the stability of the financial markets.

The second rationale for special treatment of parties to financial transactions is that repos, derivatives and, in particular, the netting agreements that may cover a dozen or more underlying contracts are too complex and too interconnected to be treated in the same way as other contracts. The complexity rationale is sometimes merged with the argument that many financial institutions function merely as middlemen. The whole clearing chain would become paralysed if a broker were to be exposed to bankruptcy law disciplines.[22]

The third justification in favour of special treatment of parties to financial transactions has been that the application of the bankruptcy rules to financial transactions would create a risk of market 'grid-lock' and interfere with the handling of monetary supply. US industry representatives and the Federal Reserve argued that, without special treatment, the netting and swaps markets would be destabilised.[23]

The fourth rationale aimed at justifying close-out netting stresses the fact that netting reduces the risk arising under a cluster of transactions to the net amount, thus reducing the equity amount required by banks and other regulated financial institutions by up to 85-97%.

Following its success in the US, financial institutions soon persuaded market regulators and policy makers in other jurisdictions to adopt similar 'netting friendly' laws. The crusade orchestrated by the ISDA has resulted in a proliferation of 'netting friendly' reforms of bankruptcy laws.[24] By the middle of 2011, netting agreements and the underlying financial transactions had been 'liberated' from the impact of bankruptcy laws in more than 40 countries. The EU Directive Amending the Settlement Finality Directive and the Financial Collateral Arrangements Directive provides that credit claims constitute an eligible type of collateral to financial collateral arrangements.

A prominent executive of the ISDA explains that close-out netting is an essential component of the hedging activities of financial institutions and other users of derivatives.[25] He rightly stresses that swap dealers and other traders try to limit their exposure by maintaining a matched

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[22] Arguments presented in favour and against of special treatment of financial transactions are discussed by D. Skeel and T. Jackson, 'Transaction Consistency and the New Finance in Bankruptcy' (2012) Col.L.Rev., v. 112, 152-202. See also E.R. Morrison, J. Riegel, *Financial Contracts and the New Bankruptcy Code: Insulating Market from Bankrupt Debtors and Bankruptcy Judges,* (Columbia Law School, The Center for Law and Economic Studies 2006) <http//ssrn.com.abstract=8783289> 1-5.

[23] S. J. Lubben, 'Derivatives, Netting, Insolvency, and Users' (1995) 112 Banking Law Journal, 638, 640M. Krimminger: *Adjusting the Rules: What Bankruptcy Reform Will Mean for Financial Market Contracts* (October 11, 2005) available at www.f.dic.gov. The debate in Congress in the 1980s and 1990s is summarized by D. Skeel and T. Jackson (n 22) 8-11.

[24] ISDA has over 830 members from 60 countries. They include the majority of dealer's associations that are in the business of privately negotiated derivatives and financial transactions, including cross-border deals. The ISDA publishes standard contracts for users of close-out netting agreements and templates for transactions in OTC derivatives. See P.M. Werner, 'Close-Out Netting and the World of Derivatives in Central and Eastern Europe and Beyond-ISDA's Perspective' [2012] Law in Transition, at 49.

[25] Peter M. Werner (n 24) 51.

(balanced) book of offsetting transactions: 'The result of this hedging activity is that, […] the aggregate of derivatives activity includes a large number of inter-dealer and other hedge transactions that function largely to adjust risk positions and limit exposure to market movements'.[26] The author points out that dealers do not wish to retain their exposures to unanticipated market movements. Legislative recognition of close-out netting that provides for the insulation of such agreements from the intervention of an insolvency administrator's 'cherry picking', 'claw-back' claims with regard to payments made by the insolvent entity on the eve of bankruptcy and other bankruptcy law rigours, radically limits the risk of the eligible parties (i.e. non-defaulting counterparties to financial transactions that obtained privileged status by 'netting-friendly' laws).

According to the Bank for International Settlements, close-out netting reduces the risk exposure of the non-defaulting party by up to 85%.[27] According to the British Bankers' Association, enforceable netting agreements would reduce the risk and capital requirements of their members for such transactions by 95-97%.[28] The objectives of the crusade aimed at assuring legal certainty for close-out netting master agreements drawn up by the ISDA are thus clear. Their main goals are twofold: (1) to minimise the risk of financial intermediators and (2) reduce the capital requirements of banks and other regulated financial institutions doing business in the form of close-out netting (e.g. bank capital requirements under the Basel rules).

The adverse macro-economic consequences associated with the growing privileges granted to eligible financial parties by Congress since 1978 were identified by a few legal scholars, who expressed scepticism about the soundness of the policy of granting bankruptcy priorities. Several early studies alerted legislators that if the risk of one class of creditors is lowered by Congress, it would be transferred to passive and less sophisticated creditors, such as consumers, tort claimants and employees.[29] The evidence from the crisis analysed in several legal and economic studies, published during the last five years, demonstrates that the decisions to leave the market of derivatives largely unsupervised, coupled with the special treatment of financial transactions in bankruptcy law, did not contribute to keeping systemic risk under control. On the contrary, solid data have been compiled which indicate that these legislative decisions constituted factors that had accelerated the financial crisis. Several scholars in the field of bankruptcy law presented evidence that the privileges granted to the 'eligible parties' by the US bankruptcy law reform in 2005, which had been justified as keeping systemic risks in check, actually exacerbated them. They triggered 'fire sales' of collateral of such defaulting parties as Bear Stearns, Lehman Brothers and A.I.G. by the parties 'in the money' (e.g. J.P. Morgan and

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[26] Ibid.

[27] P. Paech, *Preliminary draft Report on the Need for an International Instrument on the Enforceability of Close-Out Netting,* UNIDROIT 2011, Study LXXVIII C-Doc. 2, March 2011, 17.

[28] British Bankers' Association, Special Resolution Regime – Response to HM Treasury Consultation Document (2009) 4.

[29] See A. Schwarz, 'Security Interests and Bankruptcy Priorities: A Review of Current Theories' (1981) 10 Journal of Legal Studies 1-3, 7-8, 11-13; L.A. Bebchuk & Jesse M. Fried, 'The Uneasy Case for the Priority of Secured Claims in Bankruptcy' (1996) 105 Yale Law Journal, 857ff.

Goldman). Studies of the collapse of Bear Stearns and Lehman Brothers demonstrate how the statutory exclusions of the automatic stays first encouraged the non-defaulting parties to terminate their contracts and then to sell vast volumes of collateral.[30] J.P. Morgan's actions on the eve of Lehman Brothers' bankruptcy are the best example of the effects of the statutory immunities from the automatic stay rule. The 'party-in-the money' terminated the contract with Lehman, froze billions in securities and cash, and demanded an additional USD 5 billion payment. Due to the special treatment of derivatives, the party-out-of-money (Lehman) could not stop its privileged creditor from selling the assets by filing for bankruptcy. While the bankruptcy administrator could not 'claw back' those assets, even if a transaction was made a few hours before Lehman's bankruptcy, except for cases of actual fraud, which is almost impossible to prove.

The argument that the special treatment of the eligible financial transactions constitutes an effective mechanism reducing the contagion risk in the event of insolvency of systemically important financial firms (the so-called SIFIS), is also refuted by economic studies. A recent analysis of AIG's debacle concludes that the 'safe harbours' replaced systemic risk in one segment of the market 'by another form of systemic risk involving "fire" sales of qualified financial contracts and liquidity funding spirals'.[31] The authors of these studies revealed that creditors of Lehman, AIG, Bear Stearns and other failed financial institutions displayed surprisingly low risk-awareness, if not negligence. This explains the surprisingly insufficient attention to the creditworthiness of their clients by such preeminent Wall Street investment banks as Goldman and JP Morgan. The bankruptcy privileges dampened their incentive to screen and monitor the risks associated with their transactions.[32] Mark J. Roe demonstrated that the *super-priorities function as disincentives for market discipline and indirectly subsidise high risk derivatives and repurchase markets.* He and other authors conclude that the US Bankruptcy Code privileges decrease the derivatives and repo players ex ante market discipline.[33]

There is ample evidence that the privileges granted to the eligible financial parties have neither increased the systemic stability of the financial markets nor reduced contagion effects. On the contrary, bankruptcy super-priorities contributed to the financial crisis, encouraged simultaneous liquidation of collateral during the crisis, and exacerbated the information gap because the aforementioned special rights discourage financial counterparties from conducting solid audits. The disincentives to market discipline caused by these privileges encouraged knife-edge, systematically dangerous financing. This is illustrated, for instance, by Goldman's financing of

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[30] M. Roe, 'The Derivatives Market's Payment Priorities as Financial Crisis Accelerator' Stanford Law Review, v. 63 C, 539-590, at D. Skeel, T. Jackson (n 22*)* 12-13.

[31] V. Acharya, B. Adler, M. Richardson & N. Roubini in Acharya, T. Coleym, M. Richardson, J. Walter, *Regulating Wall Street. The Dodd Frank Act and the New Architecture of Global Finance* (Wiley 2011) 298. An eminent German expert of transnational insolvency law recently mentioned an ostensible banality that banks need a special treatment at the expense of other firms deserve closer scrutiny 'by slow thinking.' C.G. Paulus, Some Thoughts (n 15) 2.

[32] Ibid, 16.

[33] Mark J. Roe (n 30) 5ff.; D. Skeel, T. Jackson (n 22) 16ff; V. Acharya, Alberto Bisin, *Counterparty Risk Externality: Centralized Versus Over-the-Counter Markets,* (2011); <http://ssrn.com/abstract=1788187> 37.

AIG's and JP Morgan's overnight crediting of Bear Stearn. Bear's counterparties were willing to finance it for several years by way of overnight repos, until the debtor collapsed. Indeed, the alleged risk of reducing the advantages of netting and the justification of reduction of regulatory capital by credit default swaps, repos and other financial instruments covered by netting agreements has been characterised as 'trading sleight of hand' by the New York Times. The Basel Committee on Banking Supervision has proposed limiting the ways in which capital requirements can be reduced by such transactions.[34]

The privileges offered to netting contracts creditors consist of exempting them from bankruptcy law discipline. They are not subject to such insolvency law rules as prohibitions of set-offs; they do not need to return payment received from the insolvent party within a statutory period (e.g. 90 days prior to bankruptcy under U.S. Bankruptcy Code); they are not subject to the administrator's 'cherry picking' (i.e. a decision to perform or avoid a given contract), etc. As a result, such special treatment of netting disrupts the reorganisation-based nature of bankruptcy rules. The scope of those privileges is illustrated by Principle 7 (c) of the UNIDROIT Principles and Rules on the Netting of Financial Instruments, which contains a non-exhaustive list of exemptions to be granted to close-out netting parties.[35] Whilst treatment of a cluster of contracts covered by a netting agreement as a unity seems to be justified, it is worth mentioning that the proposals advocated by ISDA amount to *'mega-cherry picking'* or 'the whole cake is mine' privilege, to be assured ex ante by law and soft-law principles in favour of the beneficiaries of the close-out netting contracts.

Critics argue that the privileges granted to the netting eligible parties not only amount to an unequal treatment of other creditors but also offer special status to short-term and high risk financing arrangements at the expense of parties to less risky and longer term transactions.[36] Legislators should carefully consider extending their support to the apparent departure from the principle of equal treatment of parties to commercial transactions and substituting it with the principle of special treatment of mainly financial institutions that are 'too big to fail'. If they deserve to be granted such 'superpriorities' due to the systemic risk, this proposition should be supported by solid economic and public policy arguments. We should not close our eyes and disregard arguments to the contrary. Recent economic studies criticise the 'safe harbours' granted to qualified financial contracts (QFCs) in bankruptcy laws and, to some extent, also in the Dodd-Frank Act. They stress that the reduction of a systemic risk in one segment of the market 'is replaced by another form of systemic risk involving fire sales of QFCs and liquidity funding spirals.'[37] According to the same study, an equally strong argument against the safe harbours offered to money markets and derivatives markets is that it creates regulatory arbitrage, pushing parties

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[34] Federal Reserve, Impact of High-Cost Credit Protection Transactions on the Assessment of Capital Adequacy, SR 11-1 (January 2011).

[35] UNIDROIT 2012, CD (91) 5(a) Add., 20-22.

[36] M. Roe, 'Derivatives Markets in American Bankruptcy' [2012] Revue d' Economie Financiere, 231ff.

[37] V. Acharya, B. Adler, M. Richardson and N. Roubini in V. Acharja, T. Cooleym M. Richardson, J. Walter, *Regulating Wall Street. The Dodd Frank Act and the New Architecture of Global Finance* (Wiley 2011) 229.

> […] toward designing complex products that can help shift assets from the banking to the trading book, which are then financed using short-term repos in the shadow banking system away from the monitoring of regulators and at substantially lower capital requirements. The effective outcome is tremendous liquidity in repo markets in good times, with systemic stress and fragility when products are anticipated to experience losses.[38]

Critics also maintain that the safe harbours offered by legislators to derivatives and repo players transfer their risks to the remaining creditors. This criticism is based upon an economic theory elaborated by Modigliani and Miller, who have developed an argument that public policies aimed at mitigating financial risks should take into account their effects on an *economy as a whole* and avoid shifting risks from shoulder to shoulder. Furthermore, several economists argue that the safe harbours offered to derivatives and repos substantially contributed to the debacle of Lehman, Bear Stearns and A.J.G.[39] Another recent economic study on derivative markets and netting demonstrates that 'Netting merely redistributes wealth among a defaulter's creditors, and this redistribution does not necessarily enhance welfare'.[40] We should also not overlook the fact that several economists argue that welfare benefits of derivatives markets are speculative because of their high costs and systemic tail risk: 'The social costs of future financial crises will continue to be correlated with the high rents in the market'.[41]

So far, the EU legal framework[42] making references to netting does not provide for substantive and conflict of laws rules in the field of bankruptcy law.

In 2013 the European Commission submitted proposals on amending Council Regulation (EC) No. 1346/2000 on insolvency proceedings, which include[43] several new provisions aimed at introducing netting privileges into the framework of the Regulation. So far Directive 2002/47 restricts the benefits of the close-out netting mechanism where both parties are financial or public institutions, but several Member States, among them Germany, France, Czech Republic, Slovenia and Belgium, have exercised an opt-out option fully or partially. The two main changes advocated by the financial institutions and adopted in the Commissions' proposals involve extending netting privileges to all companies and, more importantly, introducing conflict of law rules, according to which netting agreements shall be governed by lex contractus instead of lex

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38 Ibid, 230-231.

39 J. Taylor, 'The Financial Crisis and the Policy Responses: An Empirical Analysis of What Went Wrong, National Bureau of Economic Research' (2009) Working Paper, No. w 14 631, <www.nber.org/papers/w.14631>. Skeel D.A. (2009) 4 Bankruptcy Boundary Games, Brooklyn Journal of Corporate Finance and Commercial Law, 1-22; Stulz R.M., 'Credit Default Swaps and the Credit Crisis' (2010) 1 (24) Journal of Economic Perspectives 73-92. Similar arguments against superpriorities in bankruptcy law were made much earlier by T. Bebchuk and J. Fried, 'The Uneasy Case for the Priority of Secured Claims in Bankruptcy' 4 (105) Yale Law Journal, 857-934.

40 C. Pirrong, *University of Houston* (2009), http://ssrn.com/abstract=1340660.

41 M. Singh, 'Making OTC Derivatives Safe – A Fresh Look' 2011, IMF Paper, WP//11/6617.

42 Directives on Settlement Finality 98/26/EC, Financial Collateral Arrangements 2002/37/EC and Insolvency Regulation 1246/2000.

43 Council of the European Union, Brussels 25th February 2014, 5983/1/14 REV 1, Art. 6a.

concursus. The latter proposal would mean that close-out netting provisions 'shall be governed solely by the law of the contract governing such provisions'.[44]

The above-mentioned proposals have met with strong criticism from the Belgian and French delegations. They rightly observed that the proposal to submit netting agreements to lex contractus will encourage *forum shopping* and 'give the opportunity to some creditors to escape from the collective discipline of the [insolvency] proceedings and hence, to become contractual privileged creditors (…), or to acquire a status equivalent of super privileged entities (…), which is not acceptable'.[45] The comments of the two delegations also stress that the superpriorities do not reduce global risk and constitute a factor contributing to the last financial crisis. The French-Belgian criticism echoes the warnings of the U.S. critics of netting. Countries of the Visegrad Group should therefore also analyse the problem in depth as soon as possible.

3 Special Treatment of IP Rights

Over the last 40 years, we have witnessed a significant strengthening of intellectual property rights. It was in the mid-1980s, particularly as a result of US pressure and subsequently due to the standards established under TRIPS, that the majority of its signatories had to incorporate laws ensuring effective protection of patent and other intellectual property rights. It soon turned out that the net beneficiaries of the new rules were firms from the US and a few other developed countries, whilst their markets have remained closed or difficult to penetrate by exporters of agricultural products and so-called sensitive industrial goods (e.g. textiles, steel and chemicals) from developing economies.[46] In the course of the last two decades, the Intellectual Property Alliance has continued its lobbying efforts aimed at extending the scope and duration of IP rights and sanctions for their violations. Recently, however, these repeated blanket extensions of patent and copyright terms have met with growing criticism in the US and EU. The phenomena of 'patent thickets' and 'patent trolls', coupled with a rapid increase in litigation, prompted even the Supreme Court of the United States to limit to some extent the traditional 'patent friendly' interpretation of patent laws.[47] Below, I will briefly discuss two interrelated questions: Do the newest initiatives by advocates of strengthening IP rights treat large firms and SMEs equally? Is the process of lobbying sufficiently transparent?

The Anti-Counterfeiting Trade Agreement ('ACTA') is a multilateral agreement. It was secretly negotiated and signed almost exclusively by developed countries.[48] Although ACTA is aimed at beefing up TRIPS, it was negotiated outside the WTO forum because the signatories

[44] Ibid.

[45] Note from the Belgian and French delegations, Brussels, 6 March 2014, DFD 2A, 7377/14.

[46] Compare: Integrating Intellectual Property Rights and Development Policy Report of the Commission and Intellectual Property Rights, London 2002, 22ff.

[47] See further S. Sołtysiński, *The Patent Reform Act and Recent US Supreme Court Decisions – A Correction of the Intellectual Property Policies? Patents and Technological Progress in a Globalized World* (Liber Amicorum Joseph Straus 2009, Berlin, Heidelberg) 856ff.

[48] They are: Australia, Canada, Korea, the US, Japan, Morocco, New Zealand, Singapore and the EU.

were afraid that developing countries would this time demand trade concessions. Whilst the obligatory provisions of ACTA largely overlap with those of the EU directives, some of the ACTA provisions on criminal sanctions are not clear and conflict with freedom of information and privacy rights guaranteed by several EU Member States.[49] Numerous academics deplored the fact that the ACTA initiative was a 'club approach of like-minded countries which excluded other globally important partners (e.g. Brazil, India, China and Russia) in the effort to impose agreed rules via bilateral agreements'.[50]

ACTA unexpectedly triggered massive street protests of young people, first in Poland and the Baltic States, and later on in 'old' EU Member States. Soon afterwards, these protests were supported by hundreds of intellectual property and privacy experts, leading to a rejection of the agreement by an overwhelming majority of the European Parliament in 2012. These massive and successful protests were prompted not so much by the substance of ACTA but by the lack of safeguards protecting privacy rights and, foremost, by the secret negotiations during which stakeholders (i.e. internet users), critics of strengthening IP rights and emerging market countries were not represented.

The phenomena of secrecy, lack of transparency and proper representation of all interested parties during negotiations aimed at bestowing new economic privileges have nevertheless continued apace. The recently accomplished negotiations of agreements for the unitary EU patent, and for the Unified Patent Court provide another illustration of this trend.[51] Basically, the long discussed idea of a unitary patent covering the entire EU market is sound, despite the fact that it will create new imbalances and strengthen the competitive positions of a few of the most developed EU economies, as well as innovative firms from the US and Japan.[52] New Member States ought to be prepared to make reasonable sacrifices in the interests of a long-term development of the single market. However, they should not be expected to support a new patent project which is deeply flawed and unduly favours large patent owners.[53] First, inevitable imbalances will increase because the project provides that the new unitary European patents, covering 25 EU Member States, will be granted in English, French and German. In this way, the hitherto universally followed patent law requirement that a monopoly right should be granted in exchange for the disclosure of the best method of practicing the invention and that, in principle, its specification should be published in the official language of the jurisdiction where protection is sought will be abandoned in the interests of the most advanced EU Member States and third countries where the official language is English, French or German (e.g. the US, Canada and Australia).

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[49] See Ch. Geiger, in *Workshop on the Anti-Counterfeiting Trade Agreement (ACTA)*, Expo/B/Inta, FWC/2009-01/Lot 7/25, March/2012, 55-60.

[50] Ibid 53-55.

[51] See European Commission, Proposal for a Regulation of the European Parliament and of the Council implementing enhanced cooperation in the area of the creation of unitary patent protection COM (2011) 215 final.

[52] The European Patent Office in Munich grants roughly half of its patents to US and German firms, and about 2% to applicants. Italian firms obtain about 3% of these grants. Polish firms received about 0.03% of such patents in 2011.

[53] Italy and Spain, whose R&D potentials are much stronger than those of Poland and other new Member States, refused to join the new patent project and challenged it before the Court of Justice.

Second, in principle, the same language requirements will apply during judicial proceedings before a new European Patent Court located in London, Paris and Munich. Hence, the owner of a medium-sized firm in Poland or Hungary will have to study patent specifications in three foreign languages, hire a foreign law firm and defend a patent infringement case in a foreign language.

The third important principle respected in the EU conventions to date (namely, that a defendant shall be sued in a local court and may have to defend his/her case in the local language) will also be abandoned. The importance of the official language is illustrated by the fact that a compromise Spanish and Polish proposal suggesting the use of one official language (i.e. English) was rejected by those countries whose official languages are German and French.[54] For those for whom English, French and German are foreign languages, the patent system's information function will not be fully satisfied. It will also cause a lack of legal transparency, which favours 'foreign' patentees, not only by giving them the said substantive legal procedural and language privileges but also by forcing other market actors to operate at the risk of patent infringement. This is not only because the UK, Belgium, France and Germany, the main beneficiaries of the new language regime, will be exempt from the traditional requirements of publication and conducting legal proceedings in the official language of the territory where the exclusive right is sought or enforced. The consequences of the new uniform patent package are best characterised by H. Ullrich:

> [T]he language regime produces direct and indirect costs over the lifetime of a patent for those who are not at full ease with its language, and it favours those who are familiar with it. [I]t distributes advantages and disadvantages […] it enables the linguistic beneficiaries […] to cover the entire EU market, including the language territories of the non-beneficiaries by an exclusivity at no extra cost, extra effort of care and risk avoidance, while the non-beneficiaries seeking EU-wide act exclusion are asked to cover extra costs, which other members of the majority are not willing to make themselves.[55]

As with bankruptcy superpriorities, the new language regime not only bestows legal privileges on the strongest business actors but also shifts the costs of the reform onto their weaker competitors.

The relevance of the equal treatment of official languages of EU Member States was stressed by the ECJ in the past. In case C-42/97, the Court emphasised that EU citizens and firms, especially small and medium sized enterprises, experience difficulties 'in overcoming language barriers'.[56] It explained that 'marginalization of the language may be understood as the loss of an element of cultural heritage but also as the cause of difference of treatment between economic

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[54] H. Ullrich, *Harmonizing Patent Law: The Untameable Union Patent, Max Planck Institute,* Research Paper No. 12-03, 13-15, <http://ssrn.com/abstract=2027920>.

[55] Ibid, 21–22.

[56] *Parliament v. Council,* Judgement of 23.02.1999, 1, 882-903.

operators in the Community, who enjoy greater or lesser advantages depending on whether or not the language they use is widespread'.[57]

Equal treatment of the official languages of all Members State involves costs. The joint Polish-Spanish proposal to agree on the application of only the English language was a rational compromise, especially if it were to be combined with genuine concessions for SMEs. Unfortunately, such a proposal was not contemplated by the EU Commission and not even discussed by the members of the Visegrad Group. Paradoxically, my own government pushed for an early closing of the patent package negotiations to achieve a success at the end of the Polish Presidency when many issues were still open. It changed its attitude following strong criticism by Polish business organisations and intellectual property professors.

Fourth, several prominent patent law experts demonstrated that the reduction in translation costs, advocated by the proponents of the uniform project, will mainly benefit a relatively small number of large firms which file hundreds of patent applications per annum. These imbalances will be exacerbated on the level of EU Members whose official language is English, French or German.[58] The EU patent package was adopted in 2013 when France, Germany and UK agreed that the Unitary Patent Court ('UPC') would be split into three central divisions, located in Paris, Munich and London. Bulgaria, Poland and Spain have not joined the project.

Recent research published by a London IP monthly revealed that out of €200 million to be earned by the UK economy per annum as a result of the adoption of the EU Patent Package, according to the British Government study, about 150-200 million is expected to be reaped by English law firms located mainly in London where one of the three branches of the new Patent Court has been situated.[59] By contrast, UK firms in which the inventions are developed may count to benefit from up to £40 million.

Not surprisingly, the negotiations of the European patent package were conducted largely in secrecy. Opinions of the industry, especially SMEs, university circles and judges, were largely disregarded. Dr. J. Pagenberg, a member of the EU Commission's Committee of Experts, withdrew from this body at the end of 2011. He protested against negotiations behind 'closed doors', the refusal to disclose drafts of the negotiated documents and to address the questions and proposals made by future users of the system.[60] Pagenberg also concludes that, apart from

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[57] Ibid, 899.

[58] Ibid, 13-14. The criticism that the largest firms will be the main beneficiaries of the project while advantages for SMEs are illusive was also expressed in the House of Commons of European Scrutiny Committee document: *The Unified Patent Court: Help or Hindrance,* HC 1799 (3 May 2012) 26-29, 39-41.

[59] J. Norton, *Unitary Patent Figures Don't Add Up,* Managing Intellectual Property of 16 May 2013, 2. The author writes that the government report describing benefits of the unitary patent and hosting one division of the new Patent Court (UPC) in London is misleading and government propaganda because it implied that the €200 million figure referred to the gains to the British industry.

[60] J. Pagenberg, (2012), The EU Patent Package – Politics vs. Quality and the New Practice of Secret Legislation in Brussels. *EPPLAW Patent Blog*, at 3, http://hdl.handle.net/11858/001M-0000-000E-7C60-B, 2 and 17-19. Professor Nowicka, who teaches intellectual property at A. Mickiewicz University (Poznań), showed me a reply from the EU Commission. The enclosed text of the uniform patent package contained only the Preamble and titles of all chapters, with the remaining contents deleted. Her criticism of the secrecy of the negotiation process echoes reservations made by Pagenberg and Ullrich.

numerous imperfections, the EU patent package takes into account the interest of the multinational corporations only, and disregards those of SMEs and individual inventors. The latter users of the new system should be able to apply for uniform protection in a few countries of their choice, 'combined with an efficient and affordable court system close to home and in their local language'.[61] The final negotiations about the location of the three divisions of the new Patent Court focused on the right of 'cherry picking' by law firms rather than on concessions for SMEs.

4 Bilateral Investment Protection Treaties and Arbitration (BITs)

I subscribe to the view that sees investor-protection institutions to be very important for industrial development. Judicial and administrative institutions that protect property rights and investments effectively are prerequisites of sustainable development. However, granting special privileges to foreign investors undermines the fundamental principle of equality of business actors and discriminates against local business. Moreover, it encourages the most efficient domestic firms to 'emigrate' abroad, at least by way of investing shares acquired in their domestic companies in foreign-held parent companies, thus obtaining a privileged status under the protective umbrella of BITs. It also transfers wealth from emerging markets to capital exporting countries.

In 1905, the US Secretary of State, E. Root, a Peace Prize Winner, argued that foreign investors cannot demand more rights than their local competitors:

> When a man goes into a foreign country to reside or to trade he submits himself, his rights, and interests to the jurisdiction of the courts of that country […]. It is very desirable that people who go into other countries shall realize that they are not entitled to have the laws and police regulations and methods of judicial procedure and customs of business made over to suit them, or to have any other or different treatment than that which is accorded to the citizens of the country into which they have gone; so long as the government of that country maintains, according to its own ideas and for the benefit of its own citizens […].[62]

The Calvo Doctrine provided that foreign investors may not seek protection abroad. A resolution of the General Assembly of United Nations of December 12, 1974 incorporated essential aspects of that doctrine in the Charter of Economic Rights and Obligations of States. But the BITs have completely reversed these legal standards. They have established preferential legal standards aimed at granting special status to foreign investors. Their privileges involve, inter alia:
– access to 'friendly' arbitration fora after a short period of negotiations with the host State (usually six months). This privilege is described by arbitrators as 'the best guarantee that the investment will be protected against undue infringement by the host state'.[63]

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[61] Ibid 22.

[62] E. Root, 'The Basis of Protection of Citizens Abroad' (1910) 4 American Journal of International Law 526-527. The author argued that host states are liable only if they violate 'the common standards of justice.' Ibid.

[63] *Eastern Sugar v. Czech Republic,* SCC No. 088/2004, <http://ita.law,uvic.cg>.

– protection by a plethora of capacious and sweeping clauses such as 'fair and equitable treatment, 'the MFN treatment', 'full protection and security' and assurances of 'justified expectations of the investor'. As admitted by the arbitral tribunal in EURECO v. Slovakia,[64] these concepts do not mirror protection available under EU Law. Several arbitral tribunals have held that the host country may not introduce legislative or other measures against the investor's 'justified expectations'. Some courts of capital-exporting countries have issued decisions which have contributed to a deepening discrimination against host countries in arbitration fora. For instance, the Paris Court of Appeal gave a very broad meaning to the term of 'foreign investment' as 'any kind of asset invested in connection with economic activities'.[65] Moreover, the court ruled that a legal action taken by the Czech Republic against an investor who concluded a lease contract in violation of Czech mandatory law amounts to a breach of a fundamental right of the foreign investor, 'such as the right to legal security that the state must provide under fair and equitable treatment and under which investors' legitimate trust and expectations must be protected'.[66] This shocking decision amounts to a proclamation of a new investor's right, consisting of dispensing him from respecting the host country's laws and imposing a duty on the host country to abstain from taking legal action against the investor.[67] The Paris Court of Appeal explained that filing a legal action violated the investor's *'legitimate trust and expectations'* protectable under the BIT, regardless of its legitimacy under Czech law.[68]

As a rule, BITs are incompatible with the host country's constitutional principles of equality of business actors. Intra-EU BITs are difficult to reconcile with Art. 18 of the Treaty on the Functioning of the European Union, because they discriminate against firms from those Member States which do not benefit from such treatment in a given EU country. The Czech Republic brought a case before the EU Tribunal arguing that BITs are inconsistent with the Lisbon Treaty. Several authors and NGOs criticize the substantive law and procedural privileges granted to foreign investors.[69] Several World Bank and UNCTAD studies demonstrate that there is no evidence that the BITs materially increase foreign investment.[70] Critics of BITs point, inter alia, to the contrast in the economic performance of Argentina, a country that was persuaded to execute more than 40 BITs and was exposed to dozens of foreign investment suits, and that of Brazil, which has refused to sign such agreements.

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[64] As reported by L. Peterson, Investment Arbitration Reporter, Vol. 3, No. 17, 7.

[65] *Czech Republic v. Pren Nreka,* as reported by P. Duprey in Journal of International Arbitration (2009), vol. 26(4) 591.

[66] As quoted by P. Duprey, 603.

[67] A commentator rightly stressed that enforcement of one's right is recognised by French courts as a fundamental constitutional right but it was refused to the host country.

[68] Ibid.

[69] S. Frank: *The Legitimacy Crisis in Investment Arbitration: Privatizing Public International Law through Inconsistent Decisions,* [2005] Fordham Law Review.

[70] Hollward-Dreimaier, *Do Bilateral Investment Treaties Attract FDI? Only a BIT but they Can Bite,* The World Bank 2003, 3121ff. ; UNCTAD, Bilateral Investment Treaties in the mid-1990s, United Nations, New York 1998, 6.

Evidence has been presented by researchers who allege that investment arbitration tribunals display pro-investor bias. In particular, a recent study by Gus van Harten gives rise to concern.[71] The study verified the attitude of arbitral tribunals related to several topics that are usually not regulated in investment treaties. The expansive interpretation was adopted in more than 76% of cases. For instance, parallel claims were allowed in 82% of the disputes; minority shareholders were granted the right of standing in nine out of each ten cases (92%), and a broad concept of 'investment' was adopted in almost three out of four cases (72.27%).[72] A somewhat more restrictive attitude was demonstrated with regard to the scope of Most Favoured Nations ('MFN') treatment, where respondents frequently argue that the principle covers only substantive, and not procedural, rights. It is even more disquieting that the probability of an expansive interpretation was statistically much higher than average in arbitration cases involving claimants from those leading capital exporting countries with the highest number of elite arbitrators and top law firms. In cases initiated by investors from the US, the UK and France, the probability of an expansive interpretation of treaty claims regarding ambiguous jurisdictional and substantive matters was 98.95% and 86%, respectively.[73]

The van Harten study supports the assumption that the asymmetrical claims structure and the absence of criteria of neutrality and independence of arbitrators in the relevant treaties may have an impact on their attitudes and decisions. The fact remains that BITs provide for the investor's right to sue the host country but not vice versa. This asymmetry is frequently overlooked, even by courts that decide disputes initiated by host countries in actions challenging arbitration awards. For instance, in the *Czech Republic v. Pren Nreka,*[74] the Paris Court of Appeal held that the host country's claim brought before a Czech court against a Croatian investor amounted to a violation of the principles of legal security, fair and equal treatment, 'under which investors' legitimate trust and expectations must […] be protected.'[75] In justifying its decision, the Paris Court of Appeal observed that 'the right for the host country to file a counterclaim in a proceeding may always be exercised before an arbitral tribunal […].'[76] As rightly stressed by a commentator, the right for the host State to file a counterclaim is not provided by BITs and the ICSID Convention. Moreover, it is highly doubtful whether such a right is compatible with those conventions, which establish unilateral commitments of States towards investors.[77]

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[71] Gus Van Harten, *Pro-Investor or Pro-State Bias in Investment-Treaty Arbitration? Forthcoming Study Gives Cause for Concern*, Investment Treaty News, Apr. 13, 2012, available at <http://www.iisd.org/itn/2012/04/13/pro-investor-or-pro-state-bias-in-investment-treaty-arbitration-forthcoming-study-gives-cause-for-concern/>. The study was based on an analysis of 140 publicly available awards (decisions).

[72] Ibid at 2.

[73] Ibid at 3.

[74] Cour d'Appel de Paris (CA) (Regional Court of Appeals) Paris, 1e ch., Sept. 25, 2008, 3ff, No. 2007/4675.

[75] Ibid at 28.

[76] Ibid at 8.

[77] Pierre Duprey, *Comments on the Paris Court of Appeal Decision in Czech Republic v. Pren Nreka*, 26 J. International Arbitration 591, 606 (2009). In any event, the Paris Court's argument that the host state could file a counter-claim in the arbitration proceedings is difficult to reconcile with its equally unpersuasive finding that an action for an annulment of the lease contract constituted a violation of fundamental rights of the investor.

To sum up, the asymmetry of claims structure and investors' powers to initiate arbitral proceedings in investment arbitration disputes, the lenient interpretation of conflict of interests by courts, and the lack of convincing arguments that there is a correlation between BITs and the flow of foreign investment have led to growing criticism of the legitimacy of the current regime of foreign investment arbitration.[78]

The bad experience of new EU Member States with BITs have led the Czech Republic and Slovakia to argue, albeit unsuccessfully so far, that pertinent intra-EU bilateral investment treaties are inconsistent with the EU Treaty. For instance, in the *Eastern Sugar BV (Netherlands) v. Czech Republic,*[79] the Czech Republic challenged the jurisdiction of the arbitral tribunal, arguing that the BIT executed between the Netherlands and the Czech Republic should not be applicable after the accession of the Czech Republic to the European Union because the protection of business actors in the single market belongs to the domain of the EU Treaty. In a nutshell, the arbitration tribunal rejected the respondent's argument and held that the Netherlands-Czech-BIT remains in force until it is repealed or terminated.[80] A similar objection was raised by Slovakia in *Eureko BV v. The Slovak Republic.*[81] The tribunal rejected the challenge and held that it had jurisdiction for similar reasons as those advanced by the arbitrators in the Czech Sugar case.[82]

The discussions about the legitimacy of the current regime of investor-State arbitration rarely focus on the issues of inequality and discrimination of entrepreneurs and their pernicious effects. In *Eureko v. the Slovak Republic,*[83] the tribunal mentioned the problem *en passant*, but summarily held that the argument of discrimination against some foreign business actors does not undermine its broad powers of jurisdiction under an intra-EU BIT between the two Member States.

The consequence is that in any particular case investors protected by the BIT may have wider rights than those given to investors of (other) EU Member States under the substantive provisions of EU law. The Tribunal held that granting wider protection to those investors while not affording it to investors of other EU States may violate EU law prohibitions on discrimination. But that is not a reason for cancelling a Claimant's wider rights under the BIT. More significantly, the Tribunal explained that it is even less of a reason for treating the Parties' consent to these arbitration proceedings as invalid or otherwise ineffective, particularly where the first stage of

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[78] See, e.g. Susan D. Frank, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham L. Rev. 1521; 'The Backlash Against Investment Arbitration: Perceptions and Reality' [Michael Waibel, Asha Kaushal, Kwo-Hwa Chung & Claire Balchin (eds) 2010]; Sornarajah (n 20), 631ff.; Luke R. Nottage & Kate Miles, 'Back to the Future' for Investor-State Arbitrations: Revising Rules in Australia and Japan to Meet Public Interests (2009) 26 J. Int'l. Arb. 25-58

[79] *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Partial Award, March 27, 2007, available at http://italaw.com/cases/documents/369.

[80] See further Markus Burgstaller, 'European Law and Investment Treaties' (2009) 26 J. Int'l. Arb. 181-216.

[81] *Achmea B.V. (formerly known as 'Eureko B.V.') v. The Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Admissibility and Suspension, Oct. 26, 2010 *('Eureko v. Slovakia Case').*

[82] Ibid. See the text accompanying notes 38-43.

[83] See *Eureko v. Slovakia Case* (n 36).

such consent pre-dated the relevant EU Treaties, the second stage pre-dated the Lisbon Treaty, and Claimant is an EU investor.[84]

III Concluding Remarks

How can one explain the fact that policy decision-makers are so easily 'captured' by vested interests groups, despite the lesson of the recent financial crisis and evidence presented in studies that demonstrate the adverse consequences of departures from the principle of equal treatment of business actors? Firstly, the power of lobbying organisations representing financial institutions, top intellectual property firms, and capital exporting countries stems from their financial resources and political leverage. The invisible hand of the market has thus been gradually replaced by the visible hand of the lobbyist. By way of example, it is reported that the number of lobbyists representing financial institutions at the US Senate is four times larger than the number of senators.

Secondly, general creditors, SMEs, and other economic actors from emerging markets are not only weaker financially but usually badly organised. Paradoxically, the experience of recent patent negotiations in Brussels shows that the political leverage of young users of the Internet, who protested against ACTA, was much stronger than SMEs in old and new EU Member States.

Thirdly, policy makers and executives of international organisations where economic reforms are prepared, and even market regulators, are usually inclined to approve proposals submitted by leading and well-organised industries. My own hindsight teaches that the 'gatekeepers' are usually recruited from the ranks of the supervised industries. Frequently, those officials dream of being hired by the industry they regulate. Moreover, officials of central banks and other market regulation authorities are often persuaded that granting privileges to firms in the sectors of economy subject to their control will assure a smooth functioning of the relevant industry.[85]

International organisations equipped with the task of preparing reform proposals and new conventions should try to avoid the trap or even steer clear of creating the impression that their fora are used to promote vested interests. When certain initiatives are financed by organisations representing vested interests and their recommended experts are paid from such sources, the host organisation should at least assure the presence of reputable critics of the industry proposals. At a minimum, the opposing views should be considered and given thorough explanations in a final report. Unfortunately, with both the recent EU patent package negotiations and works on UNIDROIT Principles on Netting, these standards have not been observed. For instance, *the preparatory studies and the final explanatory memorandum accompanying the UNIDROIT Draft Principles on the Netting of Financial Instruments submitted to Member*

[84] Ibid.

[85] During my chairmanship of the UNIDROIT Study Group on Netting, I was surprised that the majority of market regulators from the OECD countries and delegates of IMF, EIB and the European Commission usually approved ISDA proposals without asking difficult questions.

States did not contain a single reference to critical legal and economic studies of netting super-priorities, despite specific requests made during the works of the Study Group.[86] Organizations such as UNCITRAL and UNIDROIT are underfinanced and their executives are in a difficult situation. During the recent Uniform European Patent negotiations, the EU Commission explained that the opinions of hundreds of law professors, judges and SMEs were dismissed as the voice of alleged lobbyists or 'interest parties'.[87]

To date, meaningful reforms have stopped half-way and the elimination of the privileges constitutes the most difficult issue. Paradoxically, the UNIDROIT Close-Out Netting Project and the EU Uniform Patent rules demonstrate that industries having vested interests in the status quo try to 'capture' the policy decision-makers and obtain new privileges or 'dilute' reforms. They defend the privileges gained with the vigour of the French aristocracy that resisted reforms before the French Revolution and the Polish nobility that fought for their privileges with the elected kings before Poland's partition at the end of the XVIII century. Both groups were very much attached to their privileges and deeply convinced that they were 'too powerful to fail' and 'systemically important.

There are signals that some executives of the financial industry see the need to implement reforms that require sacrifices. Sandy Weill, the founder of the modern Citi Corporation, the largest global universal bank, publicly supports the Volcker rule that requires separation of investment banking from traditional core banking. Support has been growing for similar 'ring-fencing' proposals in Europe (e.g. Vicker and Likkanen twin initiatives). Mr. Weill's successors have been restructuring this universal bank with the aim of strengthening the role of the traditional banking and reducing the risky derivatives-trading.[88]

P. Singer, the Chairman of Elliot Associates (a lead US hedge fund) and a top contributor to Mr. Romney's election fund, has recently outlined proposals for a deep reform of the banking system that goes beyond the Volcker rule.[89] He concluded that 'conservatives who believe in free markets should also believe in sound fair markets'.[90] N. Lawson, the UK's Chancellor of the Exchequer in the 1980s, also sees that the twin doctrines of 'too big to fail' and 'systemic importance' undermined market discipline, and fostered greed and incompetence in the financial sector. Industry leaders should realise that reforms imposed from outside are usually more painful and frequently implemented too late.

The new privileges constitute examples of sectional egoism aimed at assuring leading sectors of the economy short-term benefits but they pose a serious risk to the global economy as a whole. The unprecedented success of capitalism was built on the principles of formal equality of economic actors and fair competition. Academics, business and political leaders of the Visegrad Group should be vitally interested in critically analysing the consequences of departures from

[86] However, the UNIDROIT Governing Council recommended that the Chairman's critical observations be included in the materials submitted to UNIDROIT Member States.

[87] Pagenberg (n 60) 2.

[88] Financial Times of 20 August 2012.

[89] Financial Times of 16 August 2012.

[90] Ibid. 'Capitalism in Crisis' Financial Times of 6 February 2012.

the principle of equal treatment of economic actors, because a sustainable growth of our economies and the common market cannot be achieved in a legal framework which discriminates against SMEs and grants privileges to industries and firms viewed as 'too big to fail' or 'systemically important'. Departures from the principle of equal treatment of economic actors are justified in exceptional situations and almost exclusively in favour of SMEs. Privileges bestowed to leading sectors of the economy and multinationals undermine for foundations of a free-market economy and a fair system of competition upon which the EU Single Market was established. Proliferation of quasi feudal sectorial privileges which benefit mainly economies of old Member States strengthen passions of nationalism and loss of sovereignty, especially but not only, in new Member States.

Articles

Christoph Grabenwarter*

The European Convention on Human Rights: Inherent Constitutional Tendencies and the Role of the European Court of Human Rights**

Introduction

The European Court of Human Rights (ECtHR) is a remarkable institution. Over the past 50 years, it has shown that the protection of human rights is no longer an exclusive matter for national constitutions and national courts. Human rights, as guaranteed under the European Convention on Human Rights (ECHR), have become an issue in European law and public international law.

This process has advanced considerably and has not yet come to an end. The practice under the ECHR of more than 60 years and the thousands of decisions of both the former European Commission on Human Rights and the ECtHR, clearly show that it is a success story without comparison in the history of public law. Established and ratified by the states of Western Europe against the background of the ruins of World War II and the horrors of Nazism, the ECHR, as a charter of human rights, became a necessary element of a democratic society. Twenty years ago, after having influenced the legal orders of two dozen of more or less 'old' democracies, and after their people had torn down the Iron Curtain, this remarkable instrument of European law started conquering the countries of the old communist regimes in Central and Eastern Europe. Within less than a decade, the ECHR became an undisputed legal instrument in these states too and started influencing constitutional law as well as legislation and the judiciary. At about the same time, in 1998, the new – permanent – Court began to work with higher capacity, leaving behind the former system of a Commission and a non-permanent Court.

As a direct consequence of its success, particularly in Eastern Europe but also in the 'old' member states, the ECtHR was flooded with applications. By the beginning of 2012, for instance,

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the ECtHR was faced with some 150,000 pending applications.[1] Individual applications have been increasing constantly in number ever since the right to individual application was introduced and led to the ECtHR's case overload. While the 'old' Court delivered fewer than 1,000 judgments in 38 years from 1959 to 1998, the number of judgments delivered by the 'new' Court since 1998 exceeds 14,000.[2]

At the same time the ECtHR's case law and its institutional background have changed enormously. What is its approach to interpreting fundamental rights today? What is its relationship with domestic courts and above all constitutional courts?

I The ECHR – a Constitutional Instrument on Human Rights

1 The ECHR as an Instrument of 'European public order'

The ECHR is the oldest international treaty in the field of regional human rights protection. Its development is closely linked to the end of World War II and was the answer to the systematic human rights violations in particular in the Third Reich. In the aftermath of the war, great effort was put into the development of international human rights documents with legally-binding effect. Following the Universal Declaration of Human Rights of the United Nations General Assembly of 10 December 1948 and in the face of the atrocities of Nazism, it was in Europe where the first international instrument of human rights protection was established. This was, on the one hand, a consequence of the realisation that a purely national mechanism to protect fundamental freedoms and human rights had proved woefully inadequate. On the other hand, it was an expression of the will of the democratic states of Europe to self-determination against the totalitarian communism of the Soviet regime.[3]

The ECHR as a multilateral treaty enjoys an exceptional position among international treaties in several respects. As regards their content, human rights treaties contrast with other international law in that their object is not the relationship between states but generally the relationship between individuals, who rely on human rights, and states that are obliged under international law to conform to the guarantees. Since the entry into force of Protocol No 11, the ECHR itself provides for a system of legal protection authorising the ECtHR to review judicially whether member states have complied with the guarantees, and obliges the member states to grant a right to individual application to the permanent ECtHR.[4]

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[1] ECtHR, *Annual Report 2011 of the European Court of Human Rights, Council of Europe*, www.echr.coe.int/NR/rdonlyres/77FF4249-96E5-4D1F-BE71-42867A469225/0/2011_Rapport_Annuel_EN.pdf 152ff.

[2] Ibid 14.

[3] R. Grote in R. Grote, T. Marauhn (eds), *EMRK/GG Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (Mohr Siebeck 2006, Tübingen), ch 1, para 10; E. Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (OUP 2010, Oxford).

[4] C. Tomuschat, *Human Rights Between Idealism and Realism* (OUP 2003, Oxford) 198.

In the course of time, the ECHR liberated itself from a purely international context. Through manifold influences on the legal orders and the process of implementation into the constitutions of European states, a close link between the ECHR, national constitutions and European Union (EU) law has been established. Nowadays, in Europe, fundamental guarantees form an essential, indispensable part of the constitutional structure and are spread across different legal systems. The ECHR, apart from the member states' constitutions, constitutes one of these legal systems. The member states, aligned with each other through the ECHR, have outsourced part of their substantive constitutional law to the 'complementary constitution' or 'ancillary constitution', the ECHR. It therefore seems appropriate to describe the ECHR, by reference to the ECtHR, as a 'constitutional instrument of European public order' and, by reference to literature, as part of the *ordre public européen,* as a 'European constitution of human rights', a 'substantive common European constitution', a 'constitution of human rights' or as a 'process of constitutionalisation'.[5] Especially since the entry into force of Protocol No 11 to the ECHR and in the light of 50 years of decision-making of the ECtHR, the ECHR may be described as a European constitutional instrument of human rights and thus as a partial constitution in the field of human rights; the ECtHR may be referred to as a 'European constitutional court' for human rights.[6]

2 Protocols to the ECHR: from 'à la carte' to 'all inclusive'

One of the characteristics which distinguish the ECHR from national constitutions is that only certain core human rights are legally-binding upon all member states. New human rights guarantees contained in Additional Protocols to the ECHR are binding only upon those states who have ratified the respective Protocols. The number of ratifications in respect of the Protocols varies with the Protocol concerned. Protocol No 1, which comprises three very different human rights (protection of property, the right to education, the right to free elections), and Protocol No 6 concerning the abolition of the death penalty were ratified by almost all member states,[7] including all EU member states. Protocols No 4 and No 7 have not been ratified by a large number of member states.[8] There is even greater reluctance to ratify Protocol No 12

[5] C. Grabenwarter, K. Pabel, *Europäische Menschenrechtskonvention* (CH Beck 2012, Basel) (C. Grabenwarter and K. Pabel, 'Europäische Menschenrechtskonvention') Art 2, para 3 with further references.

[6] Ibid.

[7] *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms* (Protocol No 1) CETS No: 009, www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=009&CM=&DF=&CL=ENG; *Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty* (Protocol No 6) CETS No: 114, www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=114&CM=&DF=&CL=ENG.

[8] *Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto* (Protocol No 4) CETS No: 046, www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=046&CM=&DF=&CL=ENG; Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Protocol No 7) CETS No: 117, www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=117&CM=&DF=&CL=ENG

concerning equality of treatment of all persons, which is still open to signature. So far, Protocol No 12 has been ratified by 18 states and entered into force on 1 April 2005.[9] Among the signatory states are only seven EU member states (Finland, the Netherlands, Croatia, Cyprus, Luxembourg, Romania, Spain and Slovenia) have ratified it. Protocol No 13, which contains a general prohibition on the death penalty, entered into force on 1 July 2003. So far, 42 of the 45 states who have acceded have ratified the Protocol.[10]

When considering the dates of accession, it becomes obvious that almost all Central and Eastern European states that acceded to the ECHR in the 1990s have ratified all Additional Protocols which had then already existed.

3 Case Law Strengthening the Rule of Law and Democracy

For more than 30 years the ECtHR has delivered numerous judgments that have considerably strengthened the rule of law and democracy. Beginning with a right to access to court, the case law focussed on the rights of the accused. In the course of time, the ECtHR gave a legal basis to core guarantees under the rule of law, such as the right to remain silent,[11] clarity of the law,[12] legal effect or the principle of non bis in idem.[13] Today it can be said without exaggeration that the judicial guarantees of the ECHR contain a European principle of the rule of law.[14] What is more, the ECtHR has constantly expanded the scope of political rights, in particular the freedom of expression. Beginning with cases concerning the freedom of press and defamation,[15] there is a differentiated case law on the rights of journalists,[16] the electronic media including the

[9] *Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms* (Protocol No 12) CETS No: 177, www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=&DF=&CL=ENG.

[10] *Protocol No 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances* (Protocol No 13) CETS No: 187, www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=187&CM=&DF=&CL=ENG.

[11] *John Murray v the United Kingdom* App no 18731/91 (ECtHR, 2 February 1996) 22 EHRR 29, para 45; *Saunders v the United Kingdom* App no 19187/91 (ECtHR, 17 December 1996) 23 EHRR 313, para 68; *Heaney and McGuiness v Ireland* App no 34720/97 (ECtHR, 21 December 2000) 33 EHRR 264, para 40.

[12] E.g. *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993), 17 EHRR 397, para 52.

[13] E.g. *Franz Fischer v Austria* App no 37950/97 (ECtHR, 29 May 2001), para 25.

[14] E.g. *Lavents v Latvia* App no 58442/00 (ECtHR, 28 November 2002), para 114.

[15] *Steel and Morris v the United Kingdom* App no 68416/01 (ECtHR, 15 February 2005) 41 EHRR 22

[16] Exemplary: as to the right to confidentiality of journalistic sources, see e.g. *Goodwin v the United Kingdom* App no 17488/90 (ECtHR, 27 March 1996) 22 EHRR 123 (Goodwin ECtHR), para 39; *Sanoma Uitgevers BV v the Netherlands* App no 38224/03 (ECtHR, 14 September 2010), para 54; the right to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and provide 'reliable and precise' information in accordance with the ethics of journalism: *Fressoz and Roire v France* App no 29183/95 (ECtHR, 21 January 1999) 31 EHRR 28, para 54.

internet,[17] the access to information[18] and the freedoms of civil servants[19] and judges[20]. This 'essential foundation of a democratic society' has become a backbone of all member states in Europe, notwithstanding their respective judicial traditions. Various member states were affected by the new case law on the role of investigative journalism and on the conflicts with the interests in the protection and confidentiality of journalistic sources and, above all, the protection of private life. A rough analysis shows that the ECtHR has strengthened the rights of the journalist as regards reports on topics in the public sphere or on public figures in public debates. On the other hand, it has become more sensitive as regards the protection of private life, in particular the protection of personal data.[21]

A second development has occurred through the case law on voting rights under Art 3 of Protocol No 1. Within this ambit, the required 'European standards' are clearly influenced by soft law. This may best be illustrated by giving three example:

In the Turkish electoral case of *Yumak and Sadak,* the ECtHR quotes a 2007 Resolution of the Council of Europe according to which 'in well established democracies, there should be no thresholds higher than 3 per cent during the parliamentary election'. An even more political statement is drawn from two further Resolutions and a report on elections in Turkey in which the organs of the Council of Europe urge the country to lower the 10 per cent threshold.[22]

In the *Tanase* case concerning the ban of candidates of dual nationality to stand for parliamentary elections in Moldova, the ECtHR quotes a report of the Council of Europe's Commission against Racism and Intolerance of 2007 and two Resolutions of the Parliamentary Assembly of the Council of Europe, criticising not only the raising of the threshold from 4 per cent to 6 per cent but also the ban on dual nationality candidates. In addition, the ECtHR quotes an opinion of the Venice Commission and its Code of Good Conduct in Electoral Matters concerning particular amendments to the Moldovan Electoral Code. In this judgment – as in other recent judgments – there is a separate section called 'Relevant instruments of the Council of Europe'.[23]

In *Sejdic and Finci,* the ECtHR had to deal with the ineligibility of candidates of Roma and Jewish origin and not belonging to one of the constituent peoples. In this case, the ECtHR again

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[17] As to electronic media see e.g. *Jersild v Denmark* App no 15890/89 (ECtHR, 23 September 1994) 19 EHRR 1, para 31; *Radio France and others v France* App no 53984/00 (ECtHR, 30 March 2004) 40 EHRR 29, para 39; as to internet media see e.g. *Editorial Board of Pravoye Delo and Shtekel v Ukraine* App no 33014/05 (ECtHR, 5 May 2011), paras 63ff.

[18] *Observer and Guardian v the United Kingdom* App no 13585/88 (ECtHR, 26 November 1991) 14 EHRR 153, para 59; *Thorgeir Thorgeirson* v *Iceland* App no 13778/88 (ECtHR 25 June 1992) 14 EHRR 843, para 63; *Guerra and others v Italy* App no 14967/89 (ECtHR, 19 February 1998) 26 EHRR 357, para 53.

[19] E.g. *Vogt v Germany* App no 17851/91 (ECtHR, 26 September 1995) 21 EHRR 205.

[20] E.g. *Kudeshkina v Russia* App no 29492/05 (ECtHR, 26 February 2009).

[21] E.g. *Leander v Sweden* App no 9248/81 (ECtHR, 26 March 1987) 9 EHRR 433, para 48; *Amann v Switzerland* App no 27798/95 (ECtHR, 16 February 2000) 30 EHRR 843, paras 69, 80; *Rotaru v Romania* App no 28341/95 (ECtHR, 4 May 2000), para 46; *Wasmuth v Germany* App no 12884/03 (ECtHR, 17 February 2011), para 74.

[22] *Yumak and Sadak v Turkey* App no 10226/03 (ECtHR, 8 July 2008) (Yumak ECtHR), paras 52, 58.

[23] *Tanase v Moldova* App no 7/08 (ECtHR, 27 April 2010), paras 45f, 48f, 51ff.

quoted opinions of the Venice Commission and even admitted the Commission as a third party in the proceedings. Not surprisingly, the ECtHR followed the Opinion of the Venice Commission.[24]

In conclusion: the ECtHR is establishing principles of the rule of law and democracy. In doing so, it uses the experience not only of the member states or the EU but also, and above all, of other Council of Europe organs.

II The ECtHR: An Emerging European Constitutional Court

1 From the 'old' Court to the Permanent Court

For more than 40 years, until the entry into force of Protocol No 11, the system of legal protection of the ECHR consisted of three organs, namely the European Commission on Human Rights (EComHR), the 'old' European Court of Human Rights (Court / 'old' Court) and the Committee of Ministers of the Council of Europe (Committee of Ministers).[25] In a first stage of procedure the EComHR had to examine the admissibility of an application. In case it determined an application to be admissible, it drew up a 'report' *(rapport)* on the question of whether a violation of the ECHR had occurred. Thereafter, the case could be brought before the Court. If the case was not referred to the 'old' Court within a period of three months, the Committee of Ministers decided on whether there had been a violation of the ECHR. In such way and contrary to the system, it was up to a political organ to make the legal assessment in a dispute on individual rights carried out before the Court.

Protocols Nos 11 and 14 have brought important changes to the organisational framework of the ECtHR. Today, the ECtHR functions on a permanent basis (Art 19). Its judges are independent; they are elected by the Parliamentary Assembly on the basis of a list of three candidates nominated by each member state for a period of nine years without the possibility of re-election. There are no rules securing the candidate's professional suitability comparable to Arts 253 and 255 TFEU. However, in 2010, a panel comprising seven experts was established, which gives its opinion on the candidates' suitability to the Parliamentary Assembly.

The cases brought to the ECtHR are considered in a single-judge formation, in Committees of three judges, in Chambers of seven judges or in the Grand Chamber of 17 judges (Art 26). The competence of single judges is enshrined in Art 27, the competence of the Committees and of the Chambers in Arts 27-31 ECHR. Other important organs that fulfil organisational tasks are the president and the plenary court (Art 25).[26]

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[24] *Sejdić and Finci v Bosnia and Herzegovina* App no 27996/06 et al (ECtHR, 22 December 2009), paras 22, 48ff.

[25] V. Schlette, 'Das neue Rechtsschutzsystem der Europäischen Menschenrechtskonvention: Zur Reform des Kontrollmechanismus durch dass 11. Protokoll' (1996) 56 ZaöRV 905, 906ff.

[26] For further details see C. Grabenwarter and K. Pabel (n 5) Art 8, paras 1ff.

Recently, there have been discussions about the enactment of a statute of the ECtHR which would simplify the revision procedure, just like the Group of Wise Persons recommended to the Committee of Ministers in 2006.[27] Based on the existing legal protection regime, a draft statute consisting of 65 Articles was published on behalf of the Swiss Federal Department of Foreign Affairs for the Interlaken Conference in 2010.[28]

2 The Right to Individual Application

The right to individual application is one of the cornerstones of the ECHR system as it is a procedural instrument guaranteeing the effective enforcement of the most essential human rights as part of European values. In other words, ECHR rights are given true practical relevance by virtue of individual application. Since the entry into force of Protocol No 11, the granting of the right to individual application is no longer optional for the states but compulsory (Art 34). The possibility of individuals being able to defend their rights against the state before a judge of an international court and to obtain a legally-binding judgment is a peculiarity of the ECHR system compared to other international treaties on human rights protection.[29]

3 Legal Effects of Judgments

According to Art 46(1) ECHR, the member states 'undertake to abide by the final judgment of the ECtHR in any case to which they are parties.' Final judgments of the ECtHR may not be appealed against and have formal legal force; a judgment of formal legal force has, at the same time, substantive legal force. Thus, the parties to a case are bound by the elements of a judgment. The personal scope of a judgment is limited to the parties to a case (an effect inter partes). It is only the member state being a party to a case who is, under Art 46, obliged to abide by the judgment. However, the judgment has an 'indicative effect' for other member states.[30] The material scope of protection only encompasses the facts of the case and the content of the application.

The scope of the obligation under Art 46 differs as to how the situation contravening the ECHR may be remedied. Thus, the ECtHR's competence is limited to finding a violation of ECHR rights; it may not quash laws or other acts of member states.[31] If the ECtHR holds that a state has violated the ECHR, Art 46 imposes upon this state the obligation to put an end to the breach

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[27] Council of Europe, 'Report of the Group of Wise Persons to the Committee of Ministers of 15 November 2006' CM(2006)203.

[28] H. Keller, D. Kühne, A. Fischer, 'Statut-Entwurf für den Europäischen Gerichtshof für Menschenrechte/Ein Beitrag zur Reform des Konventionssystems' [2011] EuGRZ 341.

[29] For further details see C. Grabenwarter and K. Pabel (n 5) Art 9, paras 1ff.

[30] C. Grabenwarter, 'Grundrechtsvielfalt und Grundrechtskonflikte im europäischen Mehrebenensystem – Wirkungen von EGMR-Urteilen und der Beurteilungsspielraum der Mitgliedstaaten' (2011) (C. Grabenwarter, 'Grundrechtsvielfalt') (2001) 38 EuGRZ Jg Heft 8-9 193, www.d-nb.info/1013588320/04.

[31] J. Polakiewicz, *Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte* (Springer 1993, Heidelberg) (J Polakiewicz, 'Die Verpflichtungen') 223ff; W. Okresek in K. Korinek and M. Holoubek (eds), *Österreichisches Bundesverfassungsrecht – Kommentar* (Springer 2007, Vienna), Art 46 EMRK, paras 1, 4, 8.

and to make reparation for its consequences in such a way as to restore, as far as possible, the situation existing before the breach.[32]

In order to end human rights violations, a state has to take general and/or – if appropriate – individual measures which have to be adopted into domestic law.[33] In cases of continuing human rights violations, states are obliged to put an end to it.[34] However, the member states enjoy a freedom of choice as to the means of implementing the judgment. In the light of the declaratory nature of the judgments of the ECtHR, it is generally for the states to choose the measures to be taken under national law to fulfil the obligation pursuant to Art 46, provided that the measures are compatible with the judgment's conclusion.[35]

Apart from the obligation to end human rights violations, member states have a duty under Art 46 to make reparation for the consequences of the violation. This requires that the state restores the situation existing before the breach (restitutio in integrum).[36] Therefore, in case of a violation of the right to property, states have to retransfer property unlawfully deprived of as restitutio in integrum.[37] In the context of Art 1 of Protocol No 1, the ECtHR concludes that, by ratifying, states do not only undertake to comply with the legal situation under the ECHR but also to remove all obstacles in their domestic legal system that might prevent an adequate redress of the applicant's situation.[38]

It is a purely national matter to determine what national authority is competent to implement judgments of the ECtHR. Article (start of sentence, no abbreviations) 46 does not distinguish between state functions but equally binds the legislature, the executive and the judiciary. From the ECHR's point of view, it is decisive that an end is put to the breach of the ECHR.[39]

According to Art 46(2), it is for the Committee of Ministers to supervise the execution of final judgments. Therefore, final judgments of the ECtHR have to be transmitted to the Committee of Ministers.

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[32] See also the case law in this respect, e.g. *Papamichalopoulos and others v Greece* App no 14556/89 (ECtHR, 31 October 1995) 16 EHRR 440, paras 34ff.

[33] *Scozzari and Giunta v Italy* App no 39221/98 et al (ECtHR, 13 July 1999) 25 EHRR 12 (Scozzari ECtHR), para 249.

[34] Assanidze v Georgia App no 71503/01 (ECtHR, 8 April 2004) 59 EHRR 52, para 198; J. Polakiewicz, 'Die Verpflichtungen' (n 31) 63ff, 355; J. Frowein, W. Peukert, *Europäische Menschenrechtskonvention* (Engel 2009, Kehl am Rhein) Art 46, para 6.

[35] Scozzari ECtHR (n 33), para 249; Goodwin ECtHR (n 16) para 120; *Gluhaković v Croatia* App no 21188/09 (ECtHR, 12 April 2011) para 85.

[36] G. Ress, 'Wirkung und Beachtung der Urteile und Entscheidungen der Straßburger Konventionsorgane' [1996] EuGRZ 350, 351.

[37] *Hentrich v France* App no 13616/88 (ECtHR, 22 September 1994) 18 EHRR 440, para 71.

[38] *Maestri v Italy* App no 39748/98 (ECtHR, 17 February 2004) 3 EHRR 38, para 47.

[39] C. Grabenwarter and K. Pabel (n 5) Art 16, para 4.

4 The Pilot Judgment Procedure

In order to cope with the excessive workload pressure and to facilitate the way applicants obtain redress more speedily with a relevant national remedy, the ECtHR has gradually expanded its powers over the years. Since 2004, with the express approval of the Committee of Ministers,[40] the ECtHR applies, in repetitive cases rooted in the same structural or systematic problem or other similar dysfunction in a member state, the so-called 'Pilot Judgment Procedure' (PJP). This instrument does not allow for the delivery of more judgments each year. Instead the ECtHR is able to examine more applications while deciding fewer cases. From a general perspective, the PJP aims at reconciling the interests of every 'party' involved (individuals, national authorities, the ECtHR) and it displays features of a constitutional court.[41]

The PJP enables the ECtHR to single out certain applications for priority treatment while it formally adjourns all similar applications (until it finds that a member state has failed to comply with the operative provisions of the judgment or where the interests of the proper administration of justice require a resumption of the examination) if it concludes that all these cases are rooted in the same structural or systematic problem or other similar dysfunction in a member state.[42] The PJP of the 'original type' (e.g. *Broniowski*[43], *Hutten-Czapska*[44]) requires the Grand Chamber to decide on a possible violation of ECHR rights and a connected conclusion that the underlying problem is systemic and that it has caused or may cause a multitude of individual applications. The ECtHR provides the state with guidance on the type of remedial measure to end the human rights violations and to eliminate, as far as possible, its consequences. It demands that these measures are retroactive and implemented within a set period of time. It reinforces the state's obligation to take legal and administrative measures by virtue of the operative provisions of the judgment.[45]

Independent of the type of a pilot judgment, the execution stage remains under the authority of the Committee of Ministers. Article 4(1) of the Rules of the Committee of Ministers stipulates that priority treatment must be given to the supervision of pilot judgments. The ECtHR additionally assesses the implementation of the indicated general measures so as to be able to strike out the respective pending cases as soon as the measures have been complied with.[46]

The PJP forms another element which brings the competences of the ECtHR closer to that of a constitutional court. However, its legal basis is still subject to debate[47] and execution by the Committee of Ministers is something unusual for an established 'Constitutional Court'.

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[40] Committee of Ministers, 'Resolution of the Committee of Ministers of 12 May 2004 on judgments revealing an underlying systematic problem' Res(2004)3.

[41] C. Grabenwarter, 'The European Convention on Human Rights and its Monitoring Mechanism' in M Nowak et al (eds), *Vienna Manual on Human Rights* (NWV 2012, Vienna) (C. Grabenwarter, 'The European Convention') 128ff.

[42] E. Fribergh, 'Pilot judgments from the Court's perspective' (Stockholm Colloquy, Stockholm, 9-10 June 2008), www.coe.int/t/dghl/standardsetting/cddh/Publications/Stockholm_Proceedings.pdf 87.

[43] *Broniowski v Poland* App no 31443/96 (ECtHR, 22 June 2004) 40 EHRR 21.

[44] *Hutten-Czapska v Poland* App no 35014/97 (ECtHR, 19 June 2006) 42 EHRR 15.

[45] C. Grabenwarter (n 41) 128ff.

[46] Ibid.

[47] C. Paraskeva, 'Returning the Protection of Human Rights to Where They Belong, At Home' (2011) 12 International Journal of Human Rights 433.

It is a unanimous opinion among experts that the PJP does not constitute customary international law as it does not meet the requisite requirements.[48] Therefore, its legal basis has to be found in the ECHR itself. The demand of the ECtHR expressly to include the PJP in Protocol No 14 was rejected by the Steering Committee for Human Rights on the grounds that it considered such procedure covered by the ECHR in its Protocol No 11 configuration.[49] Therefore the ECtHR now grounds the procedure on Art 46, which is supplemented by Rule 61 of the Rules of Court. The new rule provides for a stronger legal basis of the PJP.

III The Margin of Appreciation: A Flexible Instrument of European Constitutional Justice

1 The Doctrine of the Margin of Appreciation

a) The margin of appreciation and conflicting rights – a corridor for national solutions

There will always be cases in which, from a national point of view, the scrutiny exercised by the ECtHR will appear to be either of a high or a low degree. Especially the Grand Chamber, which has existed since Protocol No 11, shows that the different composition of the ECtHR in a certain case can lead to a different degree of scrutiny being exercised.[50] If the ECtHR, as it does in various cases, corrects national authorities at the expense of subjects of fundamental rights, it is possible – indeed, necessary – to demand a comprehensive approach as to the degree of scrutiny exercised in respect of particular fundamental rights or comparable case groups.

The ECtHR does not review compliance of a particular legal situation on a general basis, but only the compatibility of its application in particular cases to the individual applicant.[51] However, in its recent practice on the calculation of damages according to Art 41 ECHR, the Court increasingly makes general statements about national legal situations,[52] a practice which also shows its tendency towards being a constitutional court.

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[48] D. Milner, 'Codification of the Pilot Judgment Procedure' (ECtHR Seminar on Responding to Systematic Human Rights Violations, Strasbourg, 14 June 2010), www.londonmet.ac.uk/fms/MRSite/Research/HRSJ/Events/Pilot%20Strasbourg/David%20Milner%20paper.pdf.

[49] Steering Committee for Human Rights, 'Interim Activity Report of 26 November 2003' CDDH(2003)026, para 21.

[50] E.g. *Sommerfeld v Germany* App no 31871/96 (ECtHR, 11 October 2001), paras 41ff and *Sommerfeld v Germany* App no 31871/96 (ECtHR, 8 July 2003) (Sommerfeld 2003 ECtHR), paras 68ff; ECtHR, 22/01/2004, *Jahn and others v Germany* App no 46720/99 et al (ECtHR, 22 January 2004) 42 EHRR 49, paras 89ff and *Jahn and others v Germany* App no 46720/99 et al (ECtHR, 30 June 2005) (Jahn 2005 ECtHR), paras 106, 112ff, 116.

[51] Sommerfeld 2003 ECtHR (n 50) para 68.

[52] See e.g. the pilot judgments *Broniowski v Poland* App no 31443/96 (ECtHR, 22 June 2004) 40 EHRR 21, paras 189ff and *Assanidze v Georgia* App no 71503/01 (ECtHR, 8 April 2004) 59 EHRR 52, para 202; critical in this respect M. Breuer, Urteilsfolgen bei strukturellen Problemen – Das erste "Piloturteil" des EGMR [2004] EuGRZ 445, 451; C. Grabenwarter and K. Pabel (n 5) Art 16, para 7.

b) The margin of appreciation and judicial guarantees

In this context, two cases may be distinguished: the first case concerns the weighing of interests which is required for the access to a court or which influences the extent to which a public hearing must be held. This case applies to the situations just described. The second case concerns the conceptual side. When deciding on the scope of civil rights, the effectiveness of a remedy or on cases of double jeopardy, specific concepts must be interpreted; the interpretation is, naturally, influenced by the concepts of national law. In this context it is to be determined whether a uniform practice exists all over Europe or whether the systems are quite different. If great differences exist among the member states, a wider margin of appreciation is appropriate.

2 The Scope of the Margin of Appreciation

In national discussions about separation of powers and the degree of scrutiny exercised by the ECtHR, the democratic legitimacy of the legislator is considered decisive for its margin of appreciation. This is particularly true in respect of cases where a constitutional court decides on a measure of the national legislator. As long as the legislator in a democratic society is legitimised through elections and stays within the boundaries of national fundamental rights, when enacting laws, the constitutional court must not become active.[53] In this context, an international court might argue with the international principle of subsidiarity. However, this does not mean that the separation of powers between the national courts and the legislator dissolves. The international judge will also respect comprehensible legislative opinions which stay within the boundaries of the ECHR as long as the legislator draws upon comprehensive judgments, assumptions and forecasts.[54]

The following criteria are relevant for determining the scope of the margin of appreciation:[55]

– Diversity of national solutions: if there is no common European standard on a matter, the margin of appreciation is wider than in cases of uniform legislation throughout Europe.
– The quality and character of guarantees: a margin of appreciation is granted in respect of core guarantees as well as in respect of most of the judicial guarantees.
– Conflicting ECHR rights: in cases of conflicting ECHR rights, the balance struck will affect the various groups of persons concerned.
– The quality of the national authorities that have decided: if decisions were made by independent tribunals or a court or constitutional court, the ECtHR will more likely accept the limits of the margin of appreciation applied.

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[53] K. Korinek, 'Die Verfassungsgerichtsbarkeit im Gefüge der Staatsfunktionen' (1981) 39 VVDStRL 7, 45ff.

[54] Jahn 2005 ECtHR (n 50) Art 116: 'In that connection the FRG parliament cannot be deemed to have been unreasonable in considering that it had a duty to correct the effects of the Modrow Law for reasons of social justice [...]'.

[55] C. Grabenwarter, 'Kontrolldichte des Grund- und Menschenrechtsschutzes in mehrpoligen Rechtsverhältnissen aus der Sicht des österreichischen Verfassungsgerichtshofs' [2006] EuGRZ 487, 489ff.

– The quality of proceedings and, in particular, the reasoning: the more detailed a reasoning is and the better the right to be heard has been respected in the proceedings, the more the ECtHR is willing to accept particular national solutions.

From a constitutional perspective, the margin of appreciation is an instrument dealing with the separation of powers. The margin of the legislature under domestic law corresponds to the 'international' margin of appreciation. They both influence the control exercised by the constitutional court. While lowering the degree of scrutiny exercised, the ECHR affords a margin for different national solutions. Such plurality is not in itself incompatible with the idea of uniform human rights standards or, in other words, with constitutional standards.[56]

IV The Role of Comparative Law

If we look at the case law of the EctHR, we find a considerable number of cases where reference to the legal situation of various member states constitute one of the decisive , if not the decisive argument of the ECtHR for finding a violation or a non-violation of ECHR rights. Three examples will illustrate this point.

1 References to 'European Standards' in the ECtHR's Case Law

A first example concerns voting rights. In its recent case law on Art 3 of Protocol No 1, the ECtHR established the unwritten principle of proportionality.[57] Against this background, the ECtHR, in *Yumak v Sadak,* decided that a 10 per cent threshold imposed for the Turkish Parliament elections complyied with the ECHR.[58] The decisive argument put forward in the proportionality test was drawn from comparative law. The ECtHR pointed out that there were few states with high thresholds of 7 per cent or 8 per cent, that a third of the states had a threshold of 5 per cent and that another 13 states had even lower thresholds; the remainder of some ten states did not have a threshold at all. On that basis, the ECtHR found that no violation had occurred. It stressed that the great variety of national standards and the electoral and political background of each state, which had to be taken into account, warranted a wider margin of appreciation. While it found that a 10 per cent threshold appeared excessive, it concluded that the correctives and other safeguards in the Turkish system and especially the role of the constitutional court in enforcing these safeguards, led to its finding of a non-violation.[59]

A second example concerns the freedom of the press and TV advertising, more specifically a general ban on political advertising on Norwegian TV.[60] The proportionality test under

[56] C. Grabenwarter (n 30) 231ff.

[57] *Žd*anoka *v Latvia* App no 58278/00 (ECtHR, 16 March 2006) 46 EHRR 17, para 115; *Paksas* v *Lithuania* App no 34932/04 (ECtHR, 6 January 2011) para 101.

[58] *Yumak* ECtHR (n 22) para 147.

[59] Ibid, paras 126ff.

[60] *TV Vest As & Rogaland Pensjonistparti v Norway* App no 21132/05 (ECtHR, 11 December 2008) 48 EHRR 51.

Art 10 (2) is too influenced by a comparative analysis of the law. It showed that a vast majority of Western European countries had a ban on political advertising; many Eastern European countries, on the other hand, allowed paid political advertising. The ECtHR stated the figures: 13 countries had a ban, 10 allowed advertising, 11 provided for free airtime for political parties and/or candidates, and several states had no system of free airtime. The ECtHR found that there was no European consensus and was therefore – although somewhat reluctantly – prepared to accept that the analysis peaked in favour of allowing a somewhat wider margin of appreciation than the one usually granted with respect to restrictions on political speech. However, the reasoning following this statement shows that this is not much more than paying lip service. The ECtHR starts a critical examination of all arguments in favour of a ban but rejects them all, in particular the position of the government that there was no viable alternative to a blanket ban.[61]

An example of European consensus concerns the freedom of religion and conscientious objectors.

On 7 July 2011, the ECtHR departed from the case law of the former EComHR, according to which there was no right to alternative service for conscientious objectors.[62] In the case of *Bayatyan,* a young Jehovah´s Witness, the Grand Chamber of the ECtHR found a violation of Art 9 of the ECHR as there was no alternative service under Armenian law. The ECtHR referred to the fact that almost all member states of the Council of Europe with compulsory military service had implemented the right to conscientious objection. In particular, it referred to an obvious trend in the late 1980s and the 1990s to recognise the right to conscientious objection. It counted 19 countries that had introduced such a right after the last decision of the EComHR on the matter.[63] Lastly, the ECtHR referred to the fact that Azerbaijan and Turkey were the only states not having intruduced the right to conscientious objection, and that Armenia itself had recognised the very right.[64] In a German metaphor, this situation could be referred to as a *'Hornberger Schießen'* (i.e., coming to nothing); it was an argument which would not have been worthwhile mentioning if it were not for Art 4(3)(b). Article 4(3)(b) contains an exception to the ban on forced labour for, inter alia, service exacted instead of compulsory military service 'in case of conscientious objectors in countries where they are recognised'. The Chamber judgment of 2009 was based on that argument and thus concluded that no violation of the ECHR had occurred.[65]

2 References to Soft Law in the Council of Europe

One main function of comparative law concerns the distribution of competences between national legislators and courts on the one side and the competence to review of the ECtHR on the other side. We can draw two lessons from the case law that are reflected by the examples

61 Ibid, paras 63ff.
62 *Grandrath v Germany* App no 2299/64 (EComHR Decision, 12 December 1966) 8 YB 324.
63 *Bayatyan v Armenia* App no 23459/03 (ECtHR, 7 July 2011) (Bayatan ECtHR), paras 46f, 103.
64 Ibid, para 104.
65 Ibid, para 56.

chosen: if there is a uniform practice in the member states, there is little room for a wide margin of appreciation. If, however, national solutions vary considerably, the margin of appreciation is generally wider. If the ECtHR holds (for other reasons) that the national discretion is narrower, it is ready to restrict the margin of appreciation even if there is no common European standard. One of these reasons is the soft law generated within the framework of the Council of Europe.[66] Other arguments are drawn from international law and EU law.[67] The latter, from the point of view of democratic legitimacy, are less problematic. Consequently, focus will be put on the role of the soft law of the Council of Europe. There are three main sources of soft law, i.e., non-binding instruments which have some influence on the practice of the organs of the Council of Europe, including the ECtHR and the organs of the member states:

1. Resolutions of the Parliamentary Assembly of the Council of Europe;
2. Recommendations of the Committee of Ministers of the Council of Europe;
3. Documents of the Venice Commission.

In an increasing number of judgments, the ECtHR refers to Resolutions of the Parliamentary Assembly; this either in combination with an argument of comparative law or – in the absence of such an argument – alone. A good example for the 'combination approach' is the *Üner* case, where the ECtHR quoted a Recommendation of 2001, in which the Parliamentary Assembly recommended that the Committee of Ministers invited member states to guarantee that long-term migrants who were born or raised in the host country could not be expelled under any circumstances.[68]

3 Methods of Interpretation

Comparative law serves as a flexible tool for the ECtHR to regulate the extent of its scrutiny. It serves as a basis for the interpretation of specific words that are typical of constitutions and, above all, human rights,[69] or as an instrument to assess the weight of the interest of the respondent government in a particular national solution. This is part of the proportionality test. While constitutional courts draw their arguments from constitutional law, the ECtHR refers to the democratic legal systems of other member states.

From a methodological standpoint, it is, in both cases, an argument of systematic interpretation – with the difference being that its content is influenced by the practice of other states and their democratic decisions. At first glance, this practice seems to deserve to be favoured as in most cases it helps to improve the standard of protection of human rights.

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[66] E.g. *Üner v The Netherlands* App no 46410/99 (ECtHR, 18 October 2006) (Üner ECtHR), para 37; Bayatan ECtHR (n 63) para 107.

[67] E.g. *Zolotukhin v Russia* App no 14939/03 (ECtHR, 10 February 2009), paras 79ff; *Scoppola v Italy (No 2)* App no 10249/03 (ECtHR, 17 September 2009) 51 EHRR 323, paras 105ff; Bayatan ECtHR (n 62) 106

[68] Üner ECtHR (n 66) para 37.

[69] C. Grabenwarter (n 30) 231.

However, this approach may raise problems in cases of conflicting rights or if a widely criticised change in the fundamental rights protection (as in Hungary) is followed by the other states, which may ultimately even constitute a trend.

The last example shows that we talk not only about systematic interpretation but also about an *effet-utile* interpretation in the light of present-day conditions. The historical-systematic interpretation would lead to the opposite result as Art 4(3) contains a clear statement that it is for the member states to decide whether conscientious objection is allowed or not.

Conclusion

While the above analysis focuses only on some aspects of the constitutional character of the ECHR and the ECtHR, a more detailed analysis would not show different results. After 60 years of the ECHR and 50 years of decision-making of the ECtHR the conclusion would not change: the role of the ECHR for the development of national legal systems cannot be appreciated enough. The ECtHR is the last 'conscience' in human rights questions, a last legal instance or decision-making body similar to a constitutional court. It has, in many cases, given guidelines to the national courts – like a national constitutional court does. Sometimes it even uncovers structural problems that can only be solved by adaptation and amendment of the legal system. The amendment of the legal system is influenced by the European best practice or at least a better practice elsewhere.

The fact that the ECtHR, due to this role, is constantly faced with challenges and objections seems obvious. The tremendous workload but also the ECtHR's jurisdiction that has lately become volatile in some areas should not be concealed; one feature of the ECtHR's jurisdiction, its item-centred view, fuels this problem. Today, it is important for the member states and those inside the ECtHR to be aware of these dangers and constantly to face them. However, even critics and state reformers have to admit that the ECHR has become indispensable to all legal systems in Europe, not least to those of the Central European states.

The ECHR rights and the case law generated by the ECtHR stimulate the system of protection under constitutional law. Besides that, it increasingly supplements national guarantees. Both functions are of utmost importance and lead to better results for citizens but ultimately also for democratic states based on the rule of law. While these functions are in principle undisputed, the extent to which they are exercised has to be questioned constantly, especially in the light of recent case law. The margin of appreciation doctrine has for a long time proved to be a consistent and flexible concept. It must be shaped further in order to strike a balance between the needs of an effective control by the ECtHR, a consistency in the case law and internal practice in the field of human rights. 'Consensus' is drawn from more or less in-depth comparative analyses, whereas Council of Europe soft law cannot substitute for 'democratic legitimacy'.

Lastly, the question of democratic legitimacy of constitutional functions of an international Court is also open for discussion especially with a view to the soft law in the Council of Europe. But this is a separate topic.

László Szegedi*

The Eastern Way of Europeanisation in the Light of Environmental Policymaking?

– Implementation Concerns of the Aarhus Convention-related EU Law in Central and Eastern Europe

I The Eastern Way of Europeanisation

The domestic impact of the EU on the Central and Eastern European countries is an essential part of the Europeanisation research agenda.[1] It might be interesting to examine whether the acceding countries transpose, implement and enforce the EU *acquis* in the same way as do the EU-15 region, or if there is a specific eastern way of Europeanisation. As for the chosen policy area, the extent to which post-Communist countries guarantee certain rights for non-governmental actors regarding environmental matters could be considered as a democratic indicator, since their former state approach usually focussed on economic growth driven by industrialisation, while environmental protection was of a lower priority.

The subject of this paper is the third pillar of the Aarhus Convention-related EU legislation, the provisions of the Environmental Impact Assessment Directive (hereinafter referred to as the Directive) which guarantee the access to justice for the public concerned including NGOs in environmental matters. The Aarhus Convention (hereinafter referred to as the Convention) as mixed agreement of the European Union is a unique international legal instrument which combines the subject of environmental protection with protection of human rights and with environmental activism as enforcement tool.[2] The method of this paper is based on different

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[1] Tanja A. Börzel, Buzogány Áron, 'Governing EU Accession in Transition Countries: the Role of No State Actors' [2010] Acta Politica 158-182; Antonatea L. Dimitrova, 'The new Member States of the EU in the aftermath of new Enlargement: Do new European rules remain empty shells?' (2010) 17 (1) Journal of European Public Policy 137–148; Ulrich Sedelmeier, 'Europeanisation in New Member and Candidate States' (2006) 3 Living Rev. Euro. Gov.; Ulrich Sedelmeier, 'After Conditionality: Post-accession compliance with EU law in East Central Europe' (15) 2008 (6) Journal of European Public Policy 806-825; Gerda Falkner, Oliver Treib, 'Institutional Performance and Compliance with EU Law: Czech Republic, Hungary, Slovakia and Slovenia' (2010) 30. I. 101-1:6. Jul. Publ. Pol. 101-116.

[2] Justice and Environment, 'Report on Access to Justice in Environmental Matters' (2010) 3-4. http://www.justiceandenvironment.org/_files/file/2010/05/JE-Aarhus-AtJ_Report_10-05-24.pdf accessed 9 February 2014.

country clusters, which refer to the compliance culture of the different Member States concerned – and takes into consideration the empirical evidence gained by the implementation of certain social directives. The territorial categorisation is intended to model the national and regional approach to the observance of EU law, especially of the Directive.

Hence, this paper examines whether the territorial categorisation can be applied to environmental policymaking – especially with regard to the implementation and post-implementation concerns of the EIA Directive; and whether there is a specific eastern way of Europeanisation.

II Europeanisation of the Administrative Jurisdiction

1 Europeanisation Theories and the Accession of Central and Eastern European Countries

Most Europeanisation theories treat the Central and Eastern European region separately and, as a rule, use the pre-accession conditionality as a starting point. The legislation and institutions of candidate countries showed significant commitment towards meeting the accession criteria, which however attracted much criticism in the literature. The adoption of EU-related laws was often fast-tracked, with no effective parliamentary discussions, and limited party-political competition on socio-economic issues, as well as with the centralisation of the decision-making process.[3] As a result, the *'eastern problem'* led observers question whether EU-driven reforms would last.[4]

Gerda Falkner focussed on the transposition and implementation of certain social and employment directives. Taking the empirical evidence as a starting point, while examining whether the *misfit*[5] and the *veto player*[6] approach explain the domestic impact of the EU appropriately and precisely. According to the *misfit* theory, transposition problems arise from the conflict of the EU and national rules and institutional traditions, whereas the *veto player* theory attributes them to the large number of players in the transposition process and to the persistent conflicts of interest. Her analysis revealed that these approaches have weak explanatory power.

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[3] Sedelmeier, *Europeanisation...* (n 1) 807.

[4] Dimitrova (n 1) 138.

[5] Francesco Duina, 'Explaining Legal Implementation in the European Union' (1997) 25 (2) International Journal of the Sociology of Law, 155-179; Christoph Knill, Andrea Lenchow, 'Coping with Europe – The Impact of German and British Administration on the Implementation of EU Environmental Policy' (1998) 5 (4) Journal of European Public Policy 595-614; Tanja A. Börzel, 'Why There is No 'Southern Problem'? – On Environmental Leaders and Laggards in the European Union' (2000) 1 (7) Journal of European Public Policy, 141-162.

[6] Thomas Risse, M.G. Cowles, James Caporoso, 'Europeanization and Domestic Change: Introduction' in M. G. Cowles, James Caporoso, Thomas Risse (eds), *Transforming Europe, Europeanization and Domestic Change* (Cornell University Press 2001) 1–20; George Tsebelis 'Decision-making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism, and Multipartism' (1995) 25 British Journal of Political Science, 289-325.

Consequently Falkner's new theory – called the *worlds of compliance*[7] – took *compliance culture*, the attitude of certain groups of Member States towards the EU's policy requirements, as a starting point and set up a more elaborated system which, however, did not take the new Member States into account. On the basis of the labour market directives[8] she categorised the EU-15 into three groups.

In the law-abiding group of Denmark, Sweden and Finland, transposition is timely and in accordance with the objectives of the directives; the culture of compliance with EU requirements works as a socially integrated self-enforcing mechanism *(world of law observance).* As empirical evidence shows, in the second group of Germany, Austria, the Netherlands, Belgium, the United Kingdom and Spain, timely and appropriate transposition is subject to compatibility with national policy considerations *(world of domestic politics).* Lacking this condition, the clash with preferences of political parties, the government and advocacy groups may result in the violation of EU requirements in the long term, in an incomplete transposition or the complete failure of that. The third group of Portugal, Greece and France, is characterised by late or merely formal transposition, supported by an underlying bureaucratic attitude and the power of administrative traditions. In this case, linking transposition to internal reforms could be a means of compliance with EU requirements *(world of transposition neglect).*

To refine the theory, Falkner extended the geographical scope of the examination and separated the transposition stage from the application and enforcement of the actual transposition acts. With regard to the transposition, new Member States were able to demonstrate particularly good results; however, through the analysis of the enforcement phase, a new category was created based on the results, according to which EU requirements in this group of countries remain dead letters or – to use an official term – empty words *(world of dead letters).*[9]

As for the explanation of the newly introduced cluster, it was revealed that political debates had been unusual at the time of the accession, yet their number increased in the region at the time of transposing the directives, and so did the rate of systematic non-compliance at the enforcement and application stage. The reasons lie in the coordination problems within the relevant organisational system, the lack of capacity in the law enforcement bodies, the lack of resources available to them, and the limited nature of information systems.[10]

Dimitrova uses a similar terminology to describe the attitude towards EU norms in this region *(empty shells).* Moreover, – in her view – after the accession, obvious backsliding took place in

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[7] Gerda Falkner, Miriam Hartlapp, Oliver Treib, 'Worlds of compliance: Why leading approaches to European Union implementation are only 'sometimes-true theories' (2007) 46 European Journal of Political Research, 395–416.

[8] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L299/46.; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/43.; Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [2002] OJ L269/45.

[9] Falkner, Treib (n 1) 102-103.

[10] Falkner, Treib (n 1) 112-114.

certain fields.[11] However, it is indicative that not only the countries of this region, but also Ireland and Italy were classified as states implementing politicised transposition processes and struggling with deficient enforcement.[12]

According to Sedelmeier, the relevance of the eastern problem should not be overestimated, considering that the EU-8 countries (post-Communist new Member States) in some cases outperform old Member States; moreover, they settle infringement cases considerably faster and at an earlier stage. The reason for this is, among others, that new Member States are more inclined to perceive good compliance as appropriate behaviour.[13]

The different conclusions of the articles cited suggest that the issue calls for further and deeper research. As for the different policy areas, the *worlds of compliance* model – according to Falkner – can cover not only labour law but also the specific compliance culture of other EU policies.[14] Therefore, other policy areas should be examined to find out whether the eastern problem as such exists at all, and whether the EU requirements are indeed just empty words in the region. As such, the aim of this analysis is to examine the worlds of compliance theory on the basis of the Central and Eastern European transposition of the amended Environmental Impact Assessment Directive (Directive 85/337/EEC amended by Directive 2003/35/EC and the codification Directive 2011/92/EU).[15] Additionally similar policy patterns[16] of the social policy area have recently been identified by the Europeanisation research agenda, which could serve as a basis to broaden the scope of application of the *worlds of compliance* model.

The transposition of the environmental directives is of particular significance in post-Communist countries, because the Communist state ideology – due to rapid industrialisation – focused on economic growth, while nature tended to be seen as an obstacle to progress.[17] Environmental impact assessment, as an indicator, can show whether post-Communist administrative regimes, seeking to fulfil post-accession requirements, are capable of and willing to adopt a previously extraneous approach, which manifests in the broadest possible examination of the relevant environmental impacts, in channelling the results into the decision-making process and in ensuring public participation in the processes concerned.[18]

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[11] Dimitrova (n 1) 138.

[12] Falkner, Treib (n 1) 113.

[13] Sedelmeier, *Europeanisation…* (n 1) 807.

[14] Falkner, Hartlapp, Treib (n 7) 411.

[15] Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L156/46.; Directive 2011/92/EU of the European Parliament and of the Council of 13 Dec 2011 on the assessment of the effects of certain public and private projects on the environment [2012] OJ L 26/1.

[16] Oliver Treib, Holger Bähr, Gerda Falkner, 'Social policy and environmental policy: comparing modes of governance' in Udo Dietrichs, Reiners Wulf, Wolfgang Wessels, *The dynamics of Change in EU Governance* (1st edn, University of Cologne 2011, Köln) 103-131.

[17] Oivind Stole, 'Europeanisation in the Context of Enlargement: A Study of Hungarian Environmental Policy' (2003) 7 Arena Report, 12.

[18] Stole (n 17) 13.

As a result of the change of attitude, post-Communist administrative and legal systems might consider non-state actors as non-conformist bodies or as partners who can significantly strengthen the capacity of state actors in public policymaking.[19] However, non-state actors – as evidenced by the fact that the protection of subjective rights is the main role of the administrative jurisdiction – have rather been regarded in the region as non-conformist bodies, and not only in recent decades. This type of objective, public interest action – resulting from its indicator function – is suited for the accession countries to demonstrate their willingness to comply with the requirements formulated by the European Union.

2 Historical Aspects of the Administrative Jurisdiction

Obviously, public administration – also due to its name and function – has to represent public interest throughout all its activities while it must avoid monopolising it. And when others – for example, non-state organisations – act on the grounds of public interest, it cannot be judged as an expression of distrust towards public administration.[20]

The European aspect of the involvement of non-state actors – especially the issue of citizen suits – can also be examined in the light of how the relationship between the *state and its citizens* has been defined. The Central European region is characterised by the fact that the protection of subjective rights is the main role of the administrative judicial review system. The reason for this is that the legal developments of the second half of the nineteenth century, balancing democracy and monarchy, precluded the possibility of subjecting the responsibility of the administration to judicial review. The legal capacity of the individual was recognised, but only if and insofar as individuals were acting in their own interest, whereas 'political implications' on public affairs as such could not constitute a separate legal dispute.[21] These findings refer to the *Kaiserreich,* yet the Central and Eastern European region is also characterised by the fact that the protection of subjective rights is the main function of the administrative jurisdiction. In contrast, in France, as a result of the French Revolution, it was acknowledged that the legitimacy of the executive branch also came from the people.[22] In 1790, the revolutionary legislation of France forbade ordinary courts to exercise control over public administration and entrusted the head of the executive branch, whose consultant organ was the *Conseil d'État,* with the consideration of complaints against the administration.[23] Consequently, the principles saying that the scope of protection should be limited to subjective rights, were eliminated. The plaintiff – due to the semi-administrative nature of the judicial review system in the French model – is

[19] Börzel, Buzogány (n 1) 158-182.

[20] Hans-Joachim Koch, 'Die Verbandsklage im Umweltrecht' (2007) Heft 4 Neue Zeitschrift für Verwaltungsrecht (NVwZ), 368-379, 370ff.

[21] Johannes Masing, *Die Mobilisierung des Bürgers für die Durchsetzung des Rechts: europäische Impulse für eine Revision der Lehre vom subjektiv-öffentlichen Recht* (Duncker und Humboldt Verlag 1997, Berlin) 219.

[22] Masing (n 21) 84.

[23] Fazekas Marianna, Ficzere Lajos (eds), *Magyar közigazgatási jog – Általános Rész* (Osiris Kiadó 2004, Budapest) 464.

considered, until this day, as the plaintiff of maladministration and, thus, as 'the guardian of public interest'.[24]

There are several pros and cons concerning wider access to justice in environmental matters. Granting standing rights can reduce the democratic deficit at the EU level. At the national level – especially in a former Communist state – the extent to which non-state actors participate in both legislation and law enforcement can be perceived as a democratic indicator.[25] Local communities may respond faster to administrative decisions concerning local affairs, including the possibility of a more coordinated action. In addition, if the action is dismissed, the (local) social acceptance of the decision may be higher if the standing rights are guaranteed in general.[26] A common counterargument is that 'the enforcement of public interests must remain the role of the state itself and cannot be transferred to non-state organisations'.[27] However, the right to initiate legal action must not be denied on these grounds.[28] Another possible counterargument is the lengthiness and costliness of proceedings and the fact that environmental cases require highly qualified professionals, who are not always available to these organisations.

Nevertheless, the high number of arguments about the advantages and disadvantages of wider access to justice does not change the fact that, due to the legislative will of the EU, NGOs have become increasingly involved, while Member States must comply with EU requirements which, in certain cases, may collide with the national administrative traditions.

3 Supranational Requirements vs National Aministrative Traditions

The dilemma for the national legislator of legal systems where judicial review is intended to protect subjective rights arises from the fact that – in principle – these organisations could not initiate legal action in the absence of any violation of their subjective rights *(impairment of rights doctrine).*

EU requirements concerning procedural law affect the regulation of the present field of study in a specific way. Implementing EU requirements and EU law is the responsibility of national courts and authorities, while national autonomy in respect of the general rules of administrative procedure still applies today. However, the requirement of an effective and equivalent legal protection laid down in the case law of the European Court of Justice (hereinafter CJEU) determines which criteria national courts must fulfil when implementing EU law.[29] On account

[24] Dudás Gábor, 'A magyar közigazgatási bíráskodás néhány kérdése a francia és német modell tükrében' (1998) 3 Magyar Közigazgatás, 163.

[25] Börzel, Buzogány (n 1) 175.

[26] Dietrich Murswiek, 'Die Verbandsklage' (2005) Band 38 Die Verwaltung, 268.

[27] Hans-Detlef Horn, Walter Schmidt-Glaeser, *Verwaltungsprozeßrecht – Kurzlehrbuch mit Systematik zur Fallbearbeitung* (Boorberg R. Verlag 2000, München) 118.

[28] Koch (n 20) 371.

[29] Joined cases no. 205/82 -215/82 - *Deutsche Milchkontor GmbH and others v Federal Republic of Germany* [1983] ECR I-02633; Case C-217/88 *Commission of the European Communities v Federal Republic of Germany* [1990] ECR I-02879; Case C-222/84 - Marguerite *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR I-01651.

of the joint prevalence of Member States' autonomy and an effective and equivalent legal protection, the Union can only influence the sectoral regulations of Member States through its policies, guaranteeing wider access to justice. Through sectoral regulation, EU law, in turn, may have indirect repercussions on general procedural laws of the Member States.[30] However some indicators suggest that the procedural autonomy of Member States' could be considered as a historical term. The 'mushrooming of EU agencies'[31] as an institutional sign, newly enacted provisions on implementing acts and regulatory acts of Lisbon primary law as a legal basis show the emerging relevance of direct implementation of EU law by its own bodies. Additionally, the democratic and implementation deficit of EU law at national level was identified long ago as a major concern in creating a well-functioning harmonised internal market as cornerstone of the integration.

The relationship between the citizens and the national administrative regimes was influenced by the EU integration; therefore the isolation of national (administrative) regimes remained theoretical. Additionally the Court of Justice has emphasized the role of citizens since the Van Gend & Loos judgment in order to enforce community law against the not necessarily loyal national administration.[32] Therefore the EU uses the wider access to justice of citizens before national courts[33] as a tool to facilitate the enforcement of the EU law concerning several policy areas. As a result the *acquis* has incorporated this tool in the policy framework of the consumer protection[34] as well as of the equal treatment.[35]

In the environmental sector the European Union and international law is mobilised to an extent greater than the average because fighting against global problems can only be effective at a global level.[36] The promotion of public participation was included in the Rio Declaration as

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[30] Volkmar Götz, 'Europarechtliche Vorgaben für Verwaltungsprozessrecht' (2002) 1 Deutsches Verwaltungsblatt, 2.

[31] Herwig C.H. Hofmann, Alessandro Morini, 'The Pluralisation of EU Executive – Constitutional Aspects of 'Agencification' (2012) vol. 37 European Law Review, 419-443.; Stefan Griller, Andreas Orator, 'Everything under Control? – The 'Way forward' for European Agencies in the Footsteps of the Meroni doctrine' (2010) 1 European Law Review, 3-35.; Szegedi László 'Challenges of Direct European Supervision of Financial Markets (2012) 3 Public Finance Quarterly, 368-379.

[32] Bruno de Witte, 'The Impact of *Van Gend & Loos* on Judicial Protection at European and National Level: Three Types of Preliminary Questions' in Court of Justice of the European Union: 50th Anniversary of the Judgement in Van Gend & Loos (1963-2013), Conference Proceedings, Luxembourg, 13th May 2013 (Court of Justice of the European Union 2013, Luxemburg) 95-96.; Joseph Weiler, 'Revisiting *Van Gend & Loos*: Subjectifying and Objectifying the Individual' in Court of Justice of the European Union: 50th Anniversary of the Judgement in Van Gend & Loos (1963–2013), Conference Proceedings, Luxembourg, 13th May 2013 (Court of Justice of the European Union, 2013, Luxemburg) 13-14.

[33] See Bernhard W. Wegener, 'Rechtsschutz für gesetzlich geschützte Gemeinwohlbelange als Forderung des Demokratieprinzips?' HFR 2000, Beitrag 3, 2-10 http://www.humboldt-forum-recht.de/druckansicht/druckansicht.php?artikelid=35 accessed 5 February 2014.

[34] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests [2009] OJ L110/52.

[35] Council Directive 2000/78/EC of 27 november 2000 establishing a general framework for equal treatment in employment [2000] OJ L303/43. and Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/43.

[36] Szamel Katalin, 'A közérdek érvényesíthetősége a környezetvédelemben' in Szamel Katalin (ed), *Közérdek és közigazgatás* (MTA Jogtudományi Intézet 2008, Budapest) 235.

its 10th principle, yet it was undoubtedly the *Aarhus Convention,*[37] adopted in 1998, that collected and systematised those elements of public participation in the environmental field which had already existed in international law and in national legal systems. The European Community also signed the Convention, which is therefore considered as a mixed agreement (see *below*). Thus, although a number of relevant Community provisions had been adopted before, intense Community legislation activity (which, as a rule, manifested in the form of directives) started with regard to the subject. With the submission of Directive 2003/35/EC regulating environmental matters, the European Commission wanted to mobilise EU citizens by ensuring them procedural rights to enforce environmental community law before national courts.[38]

It is essential to examine the general objectives of the Convention and Directive 2003/35/EC as well as of its codification Directive 2011/92/EU since directives are binding as to their objective, and the Directive, by definition, intends to contribute to the implementation of the obligations arising under the Aarhus Convention.[39]

The recitals of the Aarhus Convention emphasise the role of citizens, non-governmental organisations and the private sector in environmental protection in general. The question arises whether Member States have some room for manoeuvre when implementing the objectives through transposition and if they do, how wide this room can be. As Peter Kremer and Alexander Schmidt put it, 'broad access' under Aarhus requirements is a distinct objective to be achieved by the Member State, which entails concrete requirements to ensure the protection of rights.[40] According to Wolfgang Ewer, the Rio Declaration made it clear that the tools of environmental protection must provide for action in the event of infringement of the provisions designed to fight against long-term practices that do not involve specific environmental damage.[41] This question gains practical importance with regard to reference to the direct effect of the Directive, which, in turn, raises the topic of enforceability.

A key factor regarding the enforcement of the Aarhus requirements is that, besides international law, they were also introduced to community acts – even if to directives requiring transposition. The so-called Aarhus Compliance Committee (hereinafter Compliance Committee) ensures that compliance with the Convention requirements is reviewed. If a state (as Party in terms of the international law) does not comply with the provisions of the Convention, it is possible to submit a communication to the Compliance Committee, which may

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[37] Pursuant to *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters,* opened for signature 25 June 1998, 37770 UNTS 447 (entered into force 30 October 2001) Art 20 (1).

[38] Koch (n 20) 370.

[39] Article 2 of Directive 2003/35/EC, Preamble of Directive 2011/92/EU.

[40] Peter Kremer, Alexander Schmidt, 'Das Umwelt-Rechtsbehelfsgesetz und der weite Zugang zu Gerichten – Zur Umsetzung der auf den Rechtsschutz in Umweltangelegenheiten bezogenen Vorgaben der sog. Öffentlichkeitsrichtlinie 2003/35/EG' (2007) 2 Zeitschrift für Umweltrecht [ZUR], 57-63.

[41] Wolfgang Ewer, 'Ausgewählte Rechtsanwendungsfragen des Entwurfs für ein Umwelt-Rechtsbehelfsgesetz' (2007) Heft 3, Neue Zeitschrift für Verwaltungsrecht [NVwZ] 272.

give a recommendation to ensure compliance with the Convention. Additionally, the main role of the Compliance Committee is to interpret the requirements of the Aarhus Convention.

Regarding EU law, the compliance mechanism differs greatly if a Member State does not achieve the objectives of any directive, or does not transpose a directive at all. In this case, a complaint may be submitted to the European Commission, which then may initiate infringement proceedings. A further tool for non-governmental organisations concerned is to rely on the directive's direct effect.[42] National courts (and authorities) are required to consider the supremacy of EU law as well as interpret the national law in conformity with the directive – and also refrain from the application of those national rules which contravene the EU law.[43] These doctrines which also determine the legal status of certain EU provisions in the national law does not constitute a purely coherent legal order. The argument against the directive-conform interpretation of the courts and of the direct effect of directives is that it threatens legal certainty, as it cannot substitute for the implementing act in line with the objectives concerned.[44]

As for the detailed Aarhus requirements, the Aarhus Convention defines three pillars in its structure: access to information, public participation in decision-making and access to justice. However, the resulting Directive 2003/35/EC only amended two further directives and requires Member States to ensure the pillar-based rights, including the access to justice in the areas covered by the amended secondary legislation, which approach has been followed by Directive 2011/92/EU as well. Article 10a of Directive 85/337/EC (on impact assessment), Article 15a of Directive 96/61/EC (on integrated prevention and decrease of pollution) and Article 11 of Directive 2011/92/EU broadly follow Article 9(2) of the Aarhus Convention as Member States shall ensure that NGOs as members of the 'public concerned' have access to a review procedure before a court of law or another independent and impartial body established by law. Additionally the interest of any NGO meeting the requirements concerned shall be deemed sufficient for the purpose of this Article, while these organisations shall also be deemed to have rights capable of being impaired for the purpose of this Article.

As for the enforcement of Article 9(2) of the Convention in form of the former 2003/35/EC Directive, the discretion of the national legislator in determining the national criteria became relevant in the case-law of the CJEU. Relying on the direct effect with respect to the last two sentences of Article 10a (3) of the Convention ("if the national legal system requires sufficient interest, or the impairment of a right, as a precondition to the review procedure, the interest of

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[42] Case C-271/91 *H. M. Marshall v Southampton and South-West Hampshire Area Health Authority* [1993] ECR I-4367.; Case 8/81. *Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53.; Case C-148/78 *Criminal proceedings against Tullio Ratti* [1979] ECR 01629.

[43] Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA.* [1978] ECR 00629.; Case 103/88 *Fratelli Costanzo SpA v Comune di Milano* [1989] ECR 01839.; Case C-224/97 *Erich Ciola v Land Vorarlberg* [1999] ECR I-02517.; Case C-198/01 *Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato* [2003] ECR I-08055.; Case C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co. KG* [2010] ECR I-00365.; Case C-237/07 *Dieter Janecek kontra Freistaat Bayern* [2008] ECR I-06221.

[44] Anette Prehn, *Der Einfluss des Gemeinschaftrechts auf den mitgliedstaatlichen Verwaltungsvollzug im Bereich des Umweltschutzes am Beispiel Deutschlands* (Nomos Verlag 2006, Potsdam) 187.

any non-governmental organisation shall be deemed sufficient for having rights capable of being impaired') has been excluded by legal scholars due to conditions laid down by national law.[45] However, the CJEU made it clear in its *Trianel judgement* with respect to the cited provision that Member States have no discretion in determining the criteria of national legislation.[46] The CJEU also explicitly identified certain national provisions as practically excluding the access of NGOs to justice by determining strict national criteria. An example of non-compliant national regulation is that the CJEU has held that a Swedish regulation, that reserved access to justice solely to environmental NGOs with at least 2,000 members, was not in conformity with Article 10 of the Directive (given that only a small number of associations could fulfil this condition).[47]

Certain provisions of the Convention have not been transposed into EU's secondary law. Article 9(3) of the Convention, which raised many issues, is not part of the EU *acquis* – it is therefore necessary to give a separate account of it.[48] Article 9(3) – in contrast to Article 9(2) (and the abovementioned Articles 10a, 15a and 11) – intends to ensure access (beyond the possibility of review and without prejudice to it) to administrative and judicial procedures not just for the public concerned but also for the public as a whole.[49] Regarding judicial procedures, acts and omissions by public authorities as well as by private persons can be challenged. The decisive factor is whether these acts and omissions contravene provisions of national law relating to the environment rather than compliance with the relevant provisions of the Convention and of the Directive on public participation.

Given the great importance of Article 9(3), its criteria have been interpreted on several occasions. The Aarhus Compliance Committee gave guidelines as to the interpretation of the 'criteria laid down in the national law'. In the view of the Compliance Committee the criteria of the Parties cannot be defined in a way that precludes all or almost all environmental organisations from access to justice in practice. At the same time, the states (Parties to the Convention) are

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[45] Ralf Alleweldt, 'Verbandsklage und gerichtliche Kontrolle von Verfahrensfehlern: Neue Entwicklungen im Umweltrecht – Zum Einfluss der Aarhus-Konvention und der Richtlinie 2003/35/EG auf die deutsche Rechtsordnung' (2006) Heft 15, Die öffentliche Verwaltung [DÖV], 630.

[46] Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg* [2011] ECR I-03673.

[47] Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess* [2009] ECR I-09967.

[48] 'In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above – Articles 10a and 15a (1) and (3) of the Directive – each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.'

[49] According to Article 2 of the Convention and Article 1(2) of the Directive, *'the public'* means one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups. *'The public concerned'* means the public affected or likely to be affected by or having an interest in the environmental decision-making procedures referred to in Article 2(2) (under the Convention: the public affected or likely to be affected by, or having an interest in, the environmental decision-making); for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

not obliged to establish a system of actio popularis in their national system of legal remedies.[50] It has also been confirmed that – having regard to the special character of community law – 'national law relating to the environment' includes directives even when they have not been fully transposed by a Member State.[51]

Regarding enforcement of Article 9(3), it must be noted that it may have a direct effect on primary law basis due to the *mixed agreement* nature of the Convention – as it was concluded by the Member States as 'Parties' as well as by the European Community.[52] Such agreements have the same status in the community legal order as purely community agreements in so far as the provisions of the mixed agreement fall within the scope of community competence.[53] Within the Community system the Member States fulfil an obligation in relation to the Community by concluding this kind of agreements.[54] Concerning the field of environmental protection, where the Member States and the European Union exercise shared competence, the CJEU held that the Union exercised its regulatory powers under Article 9(3), so the CJEU has jurisdiction to decide on the direct effect of a given provision of the mixed agreement.[55]

Finally, the CJEU made it clear in the *Slovak bears* case that Article 9(3) of the Convention has no direct effect in EU law, given that it does not contain a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.[56]

Legal scholars[57] have criticised the judgement of *Slovak bears* due to the lack of CJEU's jurisdiction in the light of the substantive nature of the Habitats Directive referred in the case and of the declaration attached to the Council Decision on the conclusion of the Aarhus Convention on behalf of the EC.[58] However the CJEU itself has not always applied the 'criteria

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[50] Report no. ACCC/C/2005/11 of the Aarhus Compliance Committee; http://live.unece.org/env/pp/pubcom.html accessed 10 February 2014.

[51] Report no. ACCC/C/2006/18 of the Aarhus Compliance Committee; http://live.unece.org/env/pp/pubcom.html accessed 10 February 2014.

[52] Council Decision 2005/370/EC of 17f of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters [2005] OJ L124/48.

[53] Case C-239/03 *Commission of the European Communities v French Republic* [2004] ECR I-09325;Case Case C-459/03 *Commission v Ireland* [2006] ECR I-04635.

[54] Case 12/86 *Meyrem Demirel v Ville de Schwäbisch Gmünd* [1987] ECR 03719.

[55] Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky,* [2011] ECR I-01255.

[56] Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011] ECR I-01255.

[57] Jan H. Jans, 'Who is the Referee? Access to Justice in a Globalised Legal Order: A Case Analysis of ECJ Judgment C-240/09 Lesoochranárske Zoskupenie of 8 March 2011 (May 7, 2011)' (2011)1 Review of European Administrative Law, 85-99; Alexander Schink, *Der slowakische Braunbär und der deutsche Verwaltungsprozess* (CH Beck, Die öffentliche Verwaltung 2012) 625-626, Christina Eckes, 'Environmental Policy 'Outside-In': How the EU's Engagement with International Environmental Law Curtails National Autonomy, EU Law qua Global Governance Law' (2012) 13 (11) German Law Journal, 1168.

[58] Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters [2005] OJ L124/48.

of jurisdiction check' in favour of environmental protection.[59] Additionally the CJEU expressed in the *Slovak bears judgement,* that the national courts are required to interpret the national procedure rules in conformity with the Convention (therefore safeguarding the objective of effective judicial protection of the rights conferred by EU law), regardless of the actual transposition of Article 9(3) into the EU's secondary legislation.

The case-law concerned is of high importance due to the identified activism followed by the Court, which reveals that the general principles of legal protection at national level have to be kept under review due to the emerging importance of Union citizens in the enforcement of EU law. In the Member States of our region, the judicial review of administrative decisions is intended to protect individual rights and – in principle – NGOs do not have locus standi in the absence of violation of their individual rights (individual rights doctrine). The examination of the evolution of such doctrines in the context of the related EU regulation and of the CJEU's case-law could reveal the potential effects of Union law on the administrative regulation and jurisdiction of Member States.

4 The Protection of Subjective Rights by the Administrative Jurisdiction in Central and Eastern Europe

In the Czech legal system, a party to the administrative proceedings can file a complaint to the administrative court, alleging that the decision infringed their rights.[60] The definition of who can be party in the administrative procedure is relatively broad. According to the Code of Administrative Procedure of the Czech Republic, it includes the applicant; in proceedings initiated ex officio, persons concerned who are affected by the conduct of the administrative authority; other persons concerned, if the decision may directly affect their rights or obligations; and persons who are so entitled by a special act (Article 27 of Act No. 500 of 2004).[61] However, for example, the legal interpretation of the courts is restrictive in consent procedures for issuing land use permits and building permits: as a result, only the owners of the building and plots concerned ('the neighbours') can act as parties, while others who are likely to be affected by the decision (for example flat-renters) or be affected in different ways than in terms of their property rights (e.g. the right to a favourable environment granted by the Czech Constitution) are omitted. Hence, they are not granted standing to sue these kinds of decisions either.[62] Besides, the Czech Code of Administrative Procedure recognises as parties only those entities to which such rights are granted by certain (sectoral) laws, such as the environmental impact assessment law, or the Nature Conservation Act.[63]

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[59] Case C-213/03. *Syndicat professionnel coordination des pêcheurs de l'étang de Berre v la région kontra Électricité de France* I-07357.

[60] Milieu Ltd, 'Summary Report on the Inventory of EU Member States' Measures on Access to Justice in Environmental Matters, Country Report for the Czech Republic' (2007) 11. http://ec.europa.eu/environment/aarhus/study_access.htm accessed 14 October 2013.

[61] Milieu, Country Report for the Czech Republic (2007) 11.

[62] Justice and Environment (n 2) 7.

[63] Milieu, Country Report for the Czech Republic (2007) 11.

Slovakia follows similar practice, since the precondition to have locus standi is being recognised as a participant (party) in the administrative proceedings, by claiming that the procedure or the decision of the administrative body affects their rights.[64] According to the Slovak administrative procedural law, a participant (party) is a person whose rights, legally protected interests and/or duties are the subject of the proceedings or whose rights, legally protected interests and/or duties are directly affected by the decision or even if the party claims that (Article 14(1) of Act no. 71 of 1967).[65] Parties must be able to show a direct, personal and legitimate interest and the decision should have consequences on their substantive legal position.[66] Special provisions enable the participation of non-state organisations, regardless of the conditions cited above [Article 14(2) of Act no. 71 of 1967]. The amendment of several sectoral laws in 2007 restricted the procedural rights of NGOs, excluding access to justice of NGOs in certain types of cases.[67]

In Hungary – similarly to Slovakia and the Czech Republic – judicial review is a tool of the protection of subjective rights (Law Unification Decision no. 2/2004). Act CXL of 2004 on the general rules of administrative proceedings and services (the code of administrative procedure, CAP) granted the right of standing for NGOs by recognising their legal status in the administrative proceedings.[68] In contrast to the abovementioned countries, it is the general Environmental Code[69] rather than a separate environmental impact assessment law that provides the procedural standing rights for NGOs in environmental matters. However, the related judicial practice is controversial. According to earlier Hungarian case-law, the involvement of NGOs and the recognition of their legal status in administrative proceedings depended on the inclusion of environmental authorities as consultant authorities in the prior administrative procedure. As such, excluding environmental authorities from the decision-making process potentially meant the exclusion of NGOs. Law Unification Decision no. 1/2004 of the Supreme Court of Hungary held that NGOs are entitled to the status concerned – and so to the right of standing – in proceedings where the resolution of the environmental authority as a consultant authority is required by law.

In Austria, legislation usually expressly defines which specific rights can be impaired with respect to certain parties (e.g. usually neighbours concerning noise, smell, property).[70] Consequently, the violation of these specific rights (only and exclusively) can be claimed by affected persons in court and can form a basis for their legal standing. For example, neighbours of a polluting facility may address air or water quality issues with regard to health or pollution

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64 Milieu, Country Report for Slovakia (2007) 15.
65 Milieu, Country Report for Slovakia (2007) 13.
66 Milieu, Country Report for Slovakia (2007) 13.
67 Justice and Environment (n 2) 5.
68 *2004. évi CXL. törvény a közigazgatási hatósági eljárás és szolgáltatás általános szabályairól* (Act CXL of 2004 on the general rules of administrative proceedings and services) Art 15 (5).
69 *1995. évi LIII. törvény a környezet védelméről* (Act LIII of 1995 on the general provision of environmental protection) Art 98 (1).
70 Justice and Environment (n 2) 6.

of their private wells, but may not refer to the violation of general environmental considerations.[71] The legal position of NGOs in EIA and IPPC procedures could be considered as an exception which falls under the scope of the Directive.[72]

In most of these countries, the legal position of NGOs has been regulated in specific sectoral laws (separate EIA or Environmental Act) and not in the general procedural codes. This corresponds with the concept that EU law can only influence the sectoral (procedural) legislation of Member States directly. These countries thus continue to consider judicial review as a tool to protect subjective rights. The enlargement of the EU – Austria's accession and that of states of the post-Communist region alike – did not change the general approach concerning the function of judicial review – nor the role of the administrative jurisdiction.

5 Post-accession Compliance Fatigue?

The most recent case law of the CJEU and of the Compliance Committee also deals with the restriction concerning Member States' access to justice.

The CJEU has held that – due to the general restrictive practice based on the procedural legislation of the Czech Republic – only a part of the public concerned had access to judicial review in environmental matters. Hence, in procedures for issuing land use permits, only the owners of the affected buildings and plots and their tenants have the right to initiate the review procedure, while in noise protection, nuclear and mining procedures only the investors have such rights. NGOs could only successfully state the infringement of their own procedural rights, as these were the only subjective rights they could have in the environmental procedures.[73] Consequently, the CJEU ruled against the Czech Republic for failure to transpose Article 10a (1-3) of the Directive.[74]

The relevant amendment of the EIA Act established the right of environmental NGOs to initiate a review procedure before the court against the development consent decision issued after the environmental assessment, regardless of whether they were parties to the earlier procedure.[75] Recent judgements of the CJEU have not changed the restrictive interpretation of Czech courts in general. However, a few individual decisions of regional Czech courts reflected the related case-law of CJEU with main focus on the *Slovak bears* judgement. As for the data collected by the updated version of the Milieu Study on the implementation of Article 9(3), it could be concluded that the NGOs, according to the prevailing case-law of the Czech courts as the consequence of the strict application of the impairment of rights doctrine, can claim only

[71] Milieu, Country Report for Austria (2007) 9.

[72] Justice and Environment (n 2) 7.

[73] See more at Justice and Environment: Selected Problems of the Aarhus Convention Application, (2009) 19-25. http://www.justiceandenvironment.org/_files/file/2009/09/access_to_justice_collection.pdf accessed 25 March 2014.

[74] Case C-378/09 *European Commission v Czech Republic* [2010] ECR I-00078.

[75] Justice and Environment (n 2) 50.

infringement of their procedural rights in the administrative procedures, not the substantive legality of the administrative decisions as such.[76]

As a consequence of several amendments precluding access to justice in the environmental sector, an infringement procedure was launched against Slovakia, which resulted in the withdrawal of certain amendments, including those excluding legal remedy.[77] With the 2007 amendments, the Slovak legislator weakened the procedural position of local and environmental NGOs, as a result of which they were recognised only as participating persons ('persons involved doctrine'), under the terminology of the general procedural code. This was a major step back compared to the legal position of NGOs just after accession. The scope of the amendments included the Act on the Promotion of the Construction of Highways, the Nature Protection Act and the EIA Act. Pursuant to Article 15a of Act 71/1967 on Administrative Procedure, participating persons may not appeal against the decision and may not challenge it before the Slovak courts. Consequently, access to national courts was entirely abolished in certain cases. Additionally, the Compliance Committee concluded, that public participation was not guaranteed either in the case of the Mochovce Nuclear Power Plant.[78]

In relation to Article 9(3) of the Convention, which has not been transposed to the Directive, a Slovak environmental NGO turned to the CJEU to decide on the direct effect of the Article. In the *Slovak bears judgment* the CJEU concluded that, although the relevant provision of the Convention has no direct effect, the Slovak court was obliged to interpret it in accordance with the requirements of the Convention. This was a significant development, and not only in terms of Slovakian law. In a broader context, the national courts are obliged to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of the Convention and the objective of effective judicial protection of the rights conferred by European Union law, in order to enable an environmental protection organisation to challenge before a court a decision taken following administrative proceedings liable to be contrary to European Union environmental law.[79]

In the absence of a comprehensive judicial interpretation in environmental matters, the Supreme Court of Hungary issued a new law unification decision in 2010. Law Unification Decision No. 4/2010 excluded NGOs' ordinary status as a party (client) in environmental administrative proceedings. The Supreme Court held that it would result in contra legem practice to grant NGOs an ordinary status of party in the absence of an explicit provision of other laws stipulating that in matters not regulated by the Environmental Code the Code shall be

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[76] European Commission 'Study on Implementation of Article 9.3 and 9.4 of the Aarhus Convention in 17 Member States of the European Union – Czech Republic (2012–2013)' 25-26 http://ec.europa.eu/environment/aarhus/access_studies.htm accessed 28 March 2014.

[77] Justice and Environment (n 73) 46-49.

[78] Report no. ACCC/C/2009/41 of the Aarhus Compliance Committee; http://live.unece.org/env/pp/pubcom.html accessed 10 February 2014.

[79] Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011] ECR I-01255.

applied except in nature conservation-related issues. In 2008, to curb abusive practice by NGOs (among other goals), an amendment to CAP was introduced, according to which exercising the right of party (properly notified of the initiation of the proceeding) may be subject to the party submitting a request or making a statement during the first instance proceeding.[80] According to the most recent amendment to the CAP, instead of the general status of party, NGOs are only granted the right to make a statement.[81] This does not necessarily result in the restriction of organisations' right of participation, as it does not preclude access to justice, but leaves more room for the sectoral legislator to decide on their actual right in certain sectoral proceedings. However the most recent case-law of the Supreme Court of Hungary (Curia) shows that the Law Unification Decision No. 4/2010 practically precludes access to justice of environmental NGOs concerning environmentally relevant but formally non-environmental decisions.[82]

In the case of Austria, communications submitted to the Compliance Committee must be mentioned. In 2008 the restriction of the right of access to justice was not established, given that no decisions were at stake to which the review under Article 9(2) would have applied.[83]

In its recent decision, the Compliance Committee concluded that Austria was not ensuring the standing of environmental NGOs to challenge acts or omissions of a public authority or private person in many of its sectoral laws (mainly *outside* EIA regulation); therefore, it was not in compliance with article 9(3) of the Convention.[84] The recent judgments of the CJEU (i.a. the *Slovak Brown Bear* case) have not led to changes in the jurisprudence of the national courts concerning the legal standing of environmental NGOs.[85] Within the administrative system of appeal, the competent administrative authority respectively the competent independent tribunal (i.a. *Unabhängige Verwaltungssenate, Umweltsenat*) could address both the substantial and procedural legality of administrative decisions. However, the tribunal did not function as the authority of appeal which was debated before the Administrative Court *(Verwaltungsgerichtshof)* as well as before the Constitutional Court *(Verfassungsgerichtshof)* of Austria.[86] As of 1 January 2014 the Administrative Court of First Instance *(Verwaltungsgerichte erster Instanz)* is also entitled to address both the substantial and procedural legality of challenged administrative

[80] Act CXL of 2004 Art 15 (6).

[81] Act CXL of 2004 Art 15 (6a).

[82] Rozsnyai Krisztina, Szegedi László, *The mandatory nature of Environmental Impact Assessment decisions and the legal status of local governments in administrative litigation cases in the Hungarian Supreme Court's (Curia) Judgement of 3rd December 2012.* (2013) 4 Casenotes, 48-61.

[83] Report no. ACCC/C/2008/26 of the Aarhus Compliance Committee; http://live.unece.org/env/pp/pubcom.htm> accessed 10 February 2014.

[84] Report no. ACCC/C/2010/48 submitted to the Aarhus Compliance Committee; http://live.unece.org/env/pp/pubcom. html accessed 10 February 2014.

[85] Administrative Court of Austria *(Verwaltungsgerichtshof),* Decision no. 2009/02/0239, 27 April 2012.

[86] Administrative Court of Austria *(Verwaltungsgerichtshof),* Decision no. 2009/03/0067, 30. 9. 2010, 0072; Constitutional Court of Austria *(Verfassungsgerichtshof),* Decision no. B254/11., 28 June 2011.

decisions instead of the Administrative Court, as the newly established Administrative Courts of First Instance can ascertain the relevant facts of the case ex officio or gather any evidence.[87]

In the case of the Czech Republic and Slovakia, more serious infringements of international and EU requirements and general regression could be observed. The Hungarian law was somewhat ahead of its time by formally ensuring several forms of public participation, including the extension of the party (client) status, partly due to the fact that the Aarhus Convention had been the focus of discussions as early as in the mid-90s.[88] However, because of a relatively comprehensive sectoral code, it was mainly up to the courts to interpret its genrally forumlated provisions and terms (i.e. which matters are to be recognised as environmental). Austria, on the other hand, follows the 'minimum level' approach, thus exposing itself to criticism from the organisations concerned.

Overall, it would be difficult to treat the examined states as a homogeneous group; however, these Member States, also including the formally non-post-Communist Austria, seem to have similar deficiencies concerning the implementation and enforcement of the Aarhus requirements of access to justice.

As an example of non-compliant national regulation, the former Swedish law precluded the access to justice of environmental NGOs in general.[89] In other words, a state belonging to the *world of law observance* also imposed regulations which run counter to the objectives of the Directive. CJEU also ruled in its *Trianel judgement* on the strict interpretation of the 'impairment of right' doctrine, applied in Germany, which actually does not meet the related EU Aarhus requirements.[90] It should also be mentioned that in several cases examined by the Compliance Committee, the European Commission and the CJEU, it is not the formal requirements concerning locus standi imposed by the Member States that constitutes a real barrier for NGOs; rather the prohibitively expensive nature of procedures, which can only be assessed on a case-by-case basis (Article 9 (4) of the Convention; Articles 10a (5),15a (5) and 11 (5) of the Directives concerned).[91]

Conclusion

Concluding the experience gained by the transposition, implementation and enforcement of EIA Directive, the post-implementation concerns occurred in the countries of the region: standing (and other procedural) rights in relation to the EIA regulation – that had been originally

[87] European Commission, 'Study on Implementation of Article 9.3 and 9.4 of the Aarhus Convention in 17 Member States of the European Union – Austria (2012-2013)' 19-20 http://ec.europa.eu/environment/aarhus/access_studies.htm accessed 28 March 2014.

[88] Bándi Gyula, 'A környezetvédelmi közigazgatási hatósági eljárás fogalmáról' (2007) 3 Közigazgatási Szemle 91.

[89] Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess* [2009] ECR I-09967.

[90] Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg* [2011] ECR I-03673.

[91] Case *David Edwards and Lilian Pallikaropoulos v Environment Agency and Others*.

guaranteed in the implementation acts – were abolished or a restrictive use of general provisions (or restrictive interpretation of broader standing rights) was introduced. The provisions concerned were not just 'dead letters' or 'empty shells', but backsliding also took place in certain areas. Due to the external pressure by different actors, steps were taken to ensure a minimum level of law observance, which, however, does not mean that all Aarhus requirements are currently fulfilled.

Due to the lack of sufficient empirical evidence, it is difficult to decide if the above-mentioned theories are 'sometimes true' or if the Eastern problem as such actually exists. Presenting the concerns with regard to one directive in four different countries does not seem to provide enough evidence to formulate a comprehensive theory or to criticize other ones.

The Europeanisation theory might have a positive input in this regard. One of the major tasks is to identify the compliance patterns that determine which countries belong to the same compliance culture regarding certain directives. Taking country clusters as a starting point of the categorisation I assumed that it might be the 'impairment of right doctrine' element that may link different legal systems in relation to environmental citizen suits. In other words, this doctrine, which determines the role of administrative jurisdiction, was expected to contravene the EU requirement related to the enforcement of EU Aarhus requirements and environmental law. Creating these clusters and identifying the different compliance patterns might be useful for the EU legislator in order to model the potential outcome of the future implementation processes in diverse policy areas.

István Varga*

Identification of Civil Procedure Regulatory Needs with a Comparative View**

I The Initial Steps towards the New Code of Civil Procedure in Hungary

The Government of Hungary launched the review process of the Code of Civil Procedure of 1952 currently in effect. Government Decree No. 1267/2013 (V. 17.) on the codification of civil procedure (the 'Government Decree') has ordered that a new Code of Civil Procedure, which satisfies the requirements of international standards regarding litigation in civil and commercial matters, while at the same time promotes the effective and timely enforcement of claims in such cases, be drawn up. The new Civil Code entered into force on March 15, 2014 and, in many ways, it reshapes Hungarian substantive civil law. This is another special driving factor behind the need for procedural reform to ensure a civil procedural environment with rules that enhance the enforcement of civil law claims.

The Government Decree expressly prescribes that

> [t]he concept and the theses shall be based on a survey of the needs of civil judicial practice, and on in-depth research, taking into consideration the Hungarian procedural law traditions, while utilising the achievements of modern foreign procedural law codifications. The Government Decree also emphasises that "[f]inally, they [i.e., the concept and the theses] shall comply with the requirements set forth by the European Union and international treaties.

The codification work is organised into a hierarchical structure, in which the highest decision making body is the Main Codification Committee (in Hungarian: 'Kodifikációs Főbizottság'). Its initial task is to decide upon a unified concept for the new code. The work of the Main Codification Committee is supported by the Drafting Committee (in Hungarian: '*Kodifikációs Szerkesztőbizottság*', the composition of which partially overlaps that of the Main Codification Committee), and a series of thematic and working committees. The Main Codification Committee was set up directly by Government Resolution. The head of the Main Codification Committee is

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János Németh, professor emeritus at ELTE University Faculty of Law Budapest. Its scientific secretary is *István Varga*, professor of civil procedure and Head of the Department of Civil Procedure at ELTE. The further – ex officio – members of the Main Codification Committee are the Minister of Public Administration and Justice, the President of the Supreme Court, the President of the Judiciary Office, the Attorney General, the President of the Hungarian Bar Association, the President of the Hungarian Notarial Chamber, the Secretary of State of the Prime Minister's Office responsible for Legal Affairs, the President of the Hungarian Lawyers Association and a high-ranking official of the Ministry of Public Administration and Justice, serving as the organisational secretary of the Main Codification Committee.

The methodology for the preparation of the codification is divided into two main phases: the governing principle in the first phase is a bottom-up approach; the second phase takes an opposite direction by following a top-down approach. Both phases are coordinated by the Drafting Committee, which established the thematic and working committees in its decision dated September 30 2013 (the 'Decision').

Pursuant to the Decision, in the first phase the

> […] thematic committees examining the legal dogmatics, practical problems, and modern trends in civil procedural law shall start their activities. The thematic committees shall–following the preparation of written materials and the discussion thereof at committee meetings–prepare a proposal to decide upon the preliminary issues that, as a result of survey and research activities in the thematic fields concerned, enable the Drafting Committee to present an appropriately established concept and theses, suitable for professional and public debate, to the Main Committee.

The eight ('A' through 'H') thematic committees are organised around the main topics of civil procedural law and certain current procedural issues and were established on September 30 2013 as follows:

A. Thematic Committee for the Structure of Litigation and the System of Remedies (headed by János Németh);
B. Thematic Committee for the Examination of the Role and Task Allocation between the Judge and the Parties to the Dispute (headed by Tamás Éless);
C. Thematic Committee for the Examination of Problems of Standing and Representation in Civil Law Disputes (headed by Viktória Harsági);
D. Thematic Committee for Costs of the Proceedings (headed by Edit Juhász);
E. Thematic Committee for the Examination of Different Procedural Tracks (headed by Zsuzsanna Wopera);
F. Thematic Committee for Taking Evidence (headed by Egon Haupt);
G. Thematic Committee for the Applicability of Modern Technologies in Civil Proceedings (headed by Miklós Kengyel);
H. Thematic Committee for International and European Civil Procedure and ADR (headed by István Varga and Imre Szabó).

Regarding the second phase, the Decision provides as follows:

> [f]ollowing the approval of the concept prepared […] by the thematic committees and the Drafting Committee, laying down the main content directions of the codification […] the full operation of the working committees becomes necessary, who may then act in the direction set by the concept. Due to the content overlaps and the continuity of the work, the majority of the working committees consist of experts who already participated in the thematic committees.

As for the timing, the Government Decree prescribes three main steps and three corresponding deadlines to be observed. According to these, the concept and the theses of the new Code of Civil Procedure shall be prepared by the second quarter of 2014. The public debate of the concept shall take place and be concluded by the first quarter of 2015, while the text of the new code shall be drawn up by the fourth quarter of 2016.

As the thematic committees have already started their work, and some major crossroads surfaced thereby, we briefly summarise below some of the main issues already at the heart of the discussion.

II The Methodological Placement of Comparative Analysis of Civil Procedure in the Codification Process of Procedural Law

One of the starting points of the codification of the new code of civil procedure is the preliminary assessment of those regulatory needs raised by theory and practice. On the theoretical side, the primary regulatory need manifests in the restoration of harmony with the changed substantive and procedural regulatory environment, especially the new Civil Code, as well as in the establishment of harmony with the regulatory content of non-contentious proceedings. This increases not only in numbers but also in significance, and in the elimination of theoretical gaps resulting from the procedural law legislation enacted in recent years. On the practical side, it is harder to provide a concise summary of regulatory needs; obviously here, in addition to processing the procedural law-related case law, the first task to effectuate is to make sure that the needs of each professional group within the legal community are addressed. This objective is served when the Drafting Committee, in determining the personal compositions of the thematic and working groups to be established in accordance with the Government decree,[1] does everything in its power to ensure that the representation of various groups within the legal profession – in addition to legal scholarship – is as wide and as balanced as possible.

For the optimal assessment of regulatory needs, in addition to the above-mentioned considerations, a comparative analysis of various procedural law regimes can prove to be useful.

[1] *A polgári perjogról szóló 1267/2013. (V. 17.) Korm. határozat* [Government Decree No. 1267/2013 (V. 17.) on the codification of civil procedure].

It must therefore be given an appropriate place, even if the codification is not simply the domestic synthesis of foreign regulatory precedents. Channelling certain foreign examples into the codification process may have a fertilising effect on the fine tuning of regulatory objects and directions determined by the needs of internal legal theoretical analysis and practice. It is also possible that, in response to a domestic legal issue, certain well-established foreign regulations can provide a ready-made answer, or at least can decisively influence the direction of the appropriate response. In general, in the area of procedural law legislation, the need for a comparative review of procedural law does not require extensive evidence based on codification traditions. There was no significant procedural law codification in the last century that would not have been inspired by some representative foreign codes, or the experiences or solutions of foreign jurisprudence. The options here cover a very broad scope, for example, from the Japanese reception of the German Code of Civil Procedure, the ZPO *(Zivilprozessordnung)* to the so-called Woolf reforms of the CPR of England and Wales, which, by keeping an eye on continental examples, distanced the English law of civil procedure from the Anglo-Saxon model in many respects. Naturally, we can mention here the entire twentieth century development and amendment history of the Hungarian Code of Civil Procedure, which – often to its advantage but many times to its disadvantage – can be traced back through comparative analyses. Finally, the comparative law approach has been a traditionally self-evident method for the icons of Hungarian law of civil procedure scholarship.[2]

The objective of the present study is based on the above introduced foundations, the thought-provoking, debate-inducing identification of certain potential civil procedure regulatory needs, enriching it on occasions with reference to certain notable foreign examples – because they can be utilised in the concept of the new Hungarian regulations. It is self-evident that at the present, initial phase of the codification, when we are collecting the basis for the developing a future conceptual proposed bill, an overview such as this cannot provide a detailed *micro*-comparison, concentrating on the details of specific legal institutions. At this phase, it is rather a *macro*-comparison, at the structural level of the various sources of law, starting from the fact of regulation or the lack thereof, as well as the placement of the regulation of certain civil procedure institutions within the statute that can fulfil the actual codification-support functions.[3] Accordingly, within the framework of preliminary research – and during the codification process, continuously expanding in the following, we will refer to the content, structure, and

[2] Cf. for example Gaár Vilmos, *A bizonyítás a polgári perben.* (Grill 1907, Budapest); essentially, the entire oeuvre of Sándor Plósz: *Plósz Sándor összegyűjtött dolgozatai* (MTA 1927, Budapest); Kovács Marcell, *A polgári perrendtartás magyarázata.* (2nd ed, Pesti Könyvnyomda Részvénytársaság 1927–1931, Budapest); Fabinyi Tihamér, *A választottbíráskodás.* 2. bőv. kiad. Budapest, 1926.; Sárffy Andor, *A végrehajtás megszüntetése iránti per.*(Gergely 1934, Budapest); several civil procedure related studies of Salamon Beck; Magyary Géza, *A perbeli beismerés.* (Franklin Társulat 1906, Budapest); Németh János, *Rendkívüli perorvoslatok a magyar polgári eljárásjogban.* (Akadémiai Kiadó 1975, Budapest) 11–52.

[3] Cf. for this distinction: Konrad Zweigert, Hein Kötz, *Einführung in die Rechtsvergleichung.* (3rd edn, Mohr Siebeck 1996, Tübingen) § 18, 251 and following pages.

chapter division of civil procedure laws of countries[4] that either traditionally influence Hungarian private law and civil procedure law thinking (thus, primarily the German law family), or they can be suitable and worthy examples because of their recent procedural law codification. Such preliminary research can be sufficient for the needs of a functional comparative study, which is not expressly built on the study of sources of law and serves the codification-support only at a conceptual level. In the examined countries, serving as authoritative examples, and in other countries also, the effective code of civil procedure is the primary source of the law of legal proceedings, which means that its structure is appropriate to illustrate the objects of modern regulatory needs. A second stage of a comparative analysis – from a different, but still from a *macro* perspective – will also extend, in addition to the codes of civil procedure, to the examination of other sources of law containing procedural rules (independent arbitration statutes, independent mediation statutes, and independent laws and regulation regulating special proceedings). As a first step, however, the present research will show previously assumed places of hiatus and/or potential need for change (arising on the theoretical and the practical side) compared with the effective Hungarian regulation, in connection with which we can find such structural and/or chapter organization differences in various sources of law in foreign examples, the latter of which show at the same time substantive differences and such additional regulatory control that are worth considering in the course of the Hungarian legislative process.

III The Judiciary and Civil Procedure; the Relationship between Civil Proceedings and Court Actions; Homogeneous Litigation or Unity Disrupted by Branching Rules

One imminent issue already identified in the initial phase of the debates is whether the codification of civil procedural law should take a uniform approach, meaning that there should only be one code of civil procedure governing every legal dispute, except for criminal proceedings, or whether the rules of certain special procedure currently regulated in the old code (e.g., administrative litigation, labour litigation) should be separated due to their specific features and unified in a separate code. Another crucial aspect of the 'uniformity-diversity' discussion relates to the internal structure of the new code, i.e., whether there should be one all-encompassing type of proceeding or there is a necessity to include in the code different procedural tracks with differing procedural standards (e.g., for small claims at one end and for substantial subject matter values at the other, or for certain specific subject matters and/or privileged groups of potential litigants).

Another conceptual question relates to the body of non-contentious matters (currently there are more than one hundred different procedural types with special regulations). Although the

[4] Australia, Austria, Belgium, Bulgaria, Canada, China, Croatia, the Czech Republic, England, Estonia, Finland, France, Germany, Italy, Japan, Latvia, Luxembourg, Mexico, the Netherlands, Quebec, Russia, Spain, Sweden, Switzerland and the United States.

new codification aims at concentrating primarily on the rules of legal disputes, it cannot be avoided that the process touches upon the topic of non-contentious cases. The main question in this respect is, on the one hand, the technique by which the rules of the new Code of Civil Procedure should be rendered as a subsidiary source on non-contentious matters, and on the other hand, deciding the extent to which the new code should contain detailed rules. Addressing the relationship between the numerous non-contentious matters and the main source of civil procedure has been one of the main needs articulated by basically all segments of legal practice.

1 The Relationship between the Judiciary Act and the Code of Civil Procedure

The separate regulation of *the effective organizational regulations of the courts and the code of civil procedure* can be said to be typical in an international comparative sense, and in Hungary it is also traditionally reflected in the relationship between the Judiciary Act and the Code of Civil Procedure.[5] The maintenance of independent regulation is appropriate, because, in the organisational act, it is possible to include a large number of administrative rules not having any procedural law and theoretical content without disturbing, to any extent, the theoretical 'edifice' of the Code of Civil Procedure. However, the Judiciary Act, which defines the court system and its organisational and institutional framework, must show, already at the early stage of the civil procedure codification, a certain finality which is also carried by the political will, as the details of the procedural rules are defined by the organisational framework in which they have to work effectively.[6] In the preparatory phase of the Concept, thus, three organisational questions have to be clarified with the need for finality: whether the legislature or the constituent assembly wishes to maintain: (1) the four-level organisation of the courts, (2) the organisational separation of the civil, administrative, and labour courts, and (3) the installation of general entry level jurisdiction at the district court level. While the former two are presently given, as they are regulated at the Fundamental Law level, the latter only appears at the level of legislation; nevertheless, it is a rule of similar importance, as the specification of general jurisdiction also means at the same time an organisational-budgetary development-related decision at the district court level. The four-level judiciary and the organisationally independent adjudication system of administrative and labour disputes fundamentally determines the structure of the Code of Civil Procedure and, not the least, its chapters regulating jurisdiction and competence, as well as appellate and special proceedings. Finally, the outcome of the decisions in relation to all three questions will have a fundamental effect on the answer that has to be given to that superior theoretical question during the codification process, as to whether a uniform code of civil procedures is what the legislature strives for, or they yield to the modern seduction that suggests the necessity for

[5] Cf., for example, Germany: *Gerichtsverfassungsgesetz/Zivilprozessordnung,* Austria: *Jurisdiktionsnorm/ Zivilprozessordnung.*

[6] Cf. for the dependence of procedural law to cultural and institutional systems Dieter Leipold, *Lex fori, Souveränität, Discovery – Grundfragen des Internationalen Zivilprozessrechts* (C.F. Müller 1989, Heidelberg).

the promulgation of regulations with different branches and routes based on the amount in controversy and the persons of the litigants (small claims procedures, high priority cases, litigation between business entities, cases involving consumers, etc.). Decision on all these preliminary questions at the time of the endorsement of the Concept can be expected if, prior to that, the following will become certain: whether the legislature is willing to move towards the simplification of the organisation system by amending the Fundamental Law, or the procedural rules must be promulgated in accordance with the organisation system designated by the Fundamental Law. When considering the pros and cons in the arguments for the simplification, an answer must be given in particular to the question[7] as to whether it makes sense to create, within the Code of Civil Procedure, several 'small procedure codes' with this breaking up the uniform procedural dogmatics. If so, is it a good idea to scatter and assign these small procedure codes to all entry points and appellate fora, or this should only be made possible at the district court level?[8] A potential decision that would allow the inclusion in the Code of Civil Procedure of several 'procedural orders' would, in addition to this, necessitate the re-weighting of the principles as procedural rules. All these, through the lenses of a conservative procedural legal scholar, do not seem desirable. It is worth considering, in this respect, the German example: the sharp differentiation between the procedures of the two entry fora *(Amtsgericht* and *Landgericht)* has essentially disappeared. Simultaneously with this, it makes the principles of party disposition and party presentation of evidence and negotiation relative, because the procedural legislature removed the cases subordinated to the subject matter of the litigation from the ZPO and regulated those, along with related non-contentious proceedings, in a separate statute, realising an independent procedural order.[9] One of the predominant motivations for this was actually the effort to avoid or minimise the fracture in the uniform procedural dogmatics within the leading code. This process seems to bring closer another, further-reaching organisational change in the German system of civil procedure law, which has special radiation within Europe and outside of Europe. Nothing justifies the maintenance of two different entry fora that operate essentially with identical procedural orders, and, therefore, the idea of merging the courts that can be viewed as functionally equivalent to the district court and the regional court level and, with this, achieve an only three-level civil law court system is being raised more and more frequently.[10] This German tendency – which traditionally provides guidelines for the Hungarian legislation of civil procedure – may be noteworthy in the course of the development of the Concept, because the reduction of the levels of the judiciary is on the agenda in a country where the scale of economic

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[7] We will discuss at a later point the question as to whether the rules governing the adjudication of administrative and labour disputes, which also carry the potential for simplification, should be treated separately or should be integrated into the rules governing the adjudication of civil cases.

[8] For the theoretical foundation of the issue, see: Max Vollkommer, 'Verfahrensvielfalt oder einheitlicher Zivilprozess?' [1987] Juristen Zeitung 105.

[9] *Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit ('FamFG').*

[10] Cf. most recently the wording of the leading German textbook: '[...] denn das Nebeneinander zweier Eingangsgerichte mit grundsätzlich gleicher Besetzung (*ein* Richter) und weitgehend gleichem Verfahren ist inzwischen rational kaum mehr begründbar' Othmar Jauernig, Burkhard Hess, *Zivilprozessrecht* 30. Auflage. München, 2011. § 69 Rn 2.

potential is orders of magnitude larger than that of Hungary and, as a consequence, the civil dispute resolution burden is at least as great, if not significantly larger, than that of Hungary. Looking through such lenses of a comparative legal approach, the focus of which is an increasingly differentiated court system and, in connection with this, the development of a procedural order which, based on the person of the litigants and the subject matter of the litigation, should be supposedly further differentiated too, the weight of such efforts becomes relative.

Finally, the need for uniform regulation in another sense holds another legislative task to be undertaken surely with respect to certain legal institutions that can be found in the intersection between the organisational statute and the Code of Civil Procedure. As such, it is especially problematic to place certain primary procedural rules in the Judiciary Act, as is currently the case in Sections 63–64 thereof. The cracking of the competence system with an individual judicial administrative act (which is problematic in itself, and, because of the related publication and appeal rules cannot be taken seriously, it is essentially sub rosa and therefore, one can hope, only temporarily) – unique from an international comparative aspect. If the legislature or, since the rule is embedded in the Fundamental Law, the Parliament sticks to supporting, with this method, the fundamental right to a speedy trial, (that is, the right to be tried within a reasonable time), then, despite the above criticism, such a rule that essentially results in a change of venue can be only imagined among the competence rules of the Code of Civil Procedure and at the end of the these rules. Here, both the professional and comparative law arguments unequivocally call for the amendment of the Fundamental Law and the repeal of the relevant rules of the Judiciary Act. Another conceptual question, although pointing in a different direction but also similarly reflecting the separation of the different legal branches, is the extent to which we can justify to keeping those rules presently included in the Code of Civil Procedure that are also covered by other laws and regulations. In other words, while it makes sense to give in to the forces of gravitation with respect to other primary procedural law-contents from the Judiciary Act (or other laws and regulations), at the same time, portfolio-cleaning is necessary within the Code of Civil Procedure. A typical example for this is Section 2(3) of the currently effective Code of Civil Procedure, which contains a civil substantive law (objective compensation) rule. From a sources of law perspective, such a rule should instead be included in the Civil Code or even in the Judiciary Act, which also regulates the legal personality of the courts. Of course, it can be also justified if the legislature wishes to emphasise (in a perhaps unnecessarily didactic manner) the substantive law fortification of certain procedural legal relationship parts by the integration of substantive law claims in the Code of Civil Procedure; however, in that case, it has to be implemented consistently in the course of the new codification through other procedural situations, too, and not to leave it at the level of eventuality or at highlighting the protection of the most placatory fundamental rights. There are relevant foreign examples for a solution when disputed actions, typically involving damages, are included in the procedural code in the provision regulating the disputed action supplemented by built-in civil law liability and compensation sanctions,[11] and several

[11] Cf., e.g., Sections 302, 717, and 945. Cf. in addition for the theoretical basis of this Ludwig Häsemeyer, *Schadenshaftung im Zivilrechtsstreit* (V. Decker 1979, Heidelberg).

renowned representatives of the theory of procedural legal relationship argue for a more general approach; namely, for the obligation-generating, typically compensation liability inducing nature of procedural legal relationship, not least, in order to take procedural legal relationships seriously.[12]

2 The Relationship between Contentious and Non-contentious Proceedings

The need for uniform regulation raises a regularly returning question of how the Code of Civil Procedure should relate to *non-contradictory proceedings, or, to proceedings that are not even dispute resolution proceedings in a broader sense.* In this question, the objective of the Concept is to determine the relationship between the Code and non-contentious proceedings, to which a comparative analysis of procedural law can serve with a starting point of abundant examples. Considering the legal systems we studied as reference points, it can be established that codes of civil procedure are typically not universal codifications of civil procedural law; in other words, beyond rules regarding contentious proceedings, they do not contain detailed rules governing non-contentious proceedings. Codes of civil procedure only serve as the backdrop legislation for non-contentious proceedings rules regulated in independent acts. Of course, there are countries that integrate a considerable number of non-contentious proceedings rules in their civil procedure code, but these are the exceptions,[13] and following them would lead to the unnecessary fracturing and swelling of the regulation, as well as the relativisation, of the traditional theoretical basis of procedural law. It is advisable in this context to stay with independent regulation, which is justified in itself by the often unbridgeable eclectic nature in the relationship between various non-contentious proceedings and the necessary regulatory scope of certain proceedings. The only exception that is more often embedded in civil procedure codes relates to enforcement proceedings.[14] From a sources of law perspective, the adoption of civil non-contentious proceedings into the Code of Civil Procedure can best be justified, but we should maintain our current regulation through independent sources of law because of the arguments raised in connection with other non-contentious proceedings. The example of Switzerland's new federal code of civil procedure, a good compromise between content and sources of law, could be considered: it integrates a few fundamental enforcement rules into the civil procedure code while it leaves the voluminous detailed rules in the independent, sectoral

[12] Thus, for example, Gerhard Lüke, 'Betrachtungen zum Prozessrechtsverhältnis' (1995) 108 Zeitschrift für Zivilprozess 427, 441.

[13] The recent codifications of Estonia and Latvia. There, the civil procedure code is also the non-contentious proceedings code, and includes a plethora of detailed rules of non-contentious proceedings; in the case of Switzerland – in addition to the integration of the enforcement proceedings in the code of civil procedure – several non-contentious proceedings had been generally included in the summary general procedure of the new federal level civil procedure code: *Schweizerische Zivilprozessordnung,* 5. Titel 'Summarisches Verfahren,' Section 248 and following sections. Cf. for legal policy and theoretical foundations Stephan Mazan, 'Summarische Verfahren' in Karl Spühler, Luca Tenchio, Dominik Infanger, *Basler Kommentar Schweizerische Zivilprozessordnung* (Helbing Lichtenhahn Verlag 2010, Basel) 1146 and following pages.

[14] For example, Germany, France, Spain, Italy and Bulgaria.

law (the Enforcement Act), as is the case in Hungary. In accordance with our regulatory system in force, as part of such a solution, enforcement lawsuits could remain in the Code of Civil Procedure in a theoretically even more valid and integrated manner.

3 Adjudication of Administrative and Labour Disputes

A question that will require an answer at the Concept level already is whether it makes sense to cling onto an organisation of administrative courts that stopped half way. This naturally raises the consequence-question, as to whether the asymmetric organisational solution would make it necessary to create an independent *code of administrative procedure,* with the possible second thought that the organisational and procedural innovations take turns in moving the entire process forward toward organisational and procedural independence of administrative adjudication. All this raises another, comparatively less significant question, regarding the justification and legitimacy of treating them together with the adjudication of labour disputes, which, in the long run, would obviously render the current regulation untenable, as the subject matters of lawsuits belonging to the two groups of cases have fundamentally different natures. Given the gradually increasing importance of administrative litigation, there are valid arguments supporting the regulation of both integrated into the Code of Civil Procedure and separate regulation in independent statutes. The solution of setting the course of independent regulation, however, would require additional, profound organisational reform of the judiciary, which, obviously, could not stop at the establishment of first instance, (partially) specialised administrative courts, but it would also demand an independent appellate level administrative court and perhaps even an independent administrative supreme court as well. It is also demonstrated by foreign examples that the development of administrative adjudication as an independent judicial path can be tied together with the creation of an independent procedural code.[15] Given the current, not entirely independent, Hungarian administrative court organisation system, where administrative litigation reintegrates into the ordinary court organisation system at the appellate level already, it would be difficult to justify the creation of an independent procedural code and, with this, the application of two sets of procedural rules within a single judicial organisation system. The current weaknesses and deficiencies of regulation integrated into the Code of Civil Procedure can be resolved by treating administrative litigation as special proceedings, which is the solution opted for by several new codifications of civil procedure law.[16] Of course, not touching the current Code of Civil Procedure-integrated regulation would further reinforce the treatment of administrative adjudication independently from the adjudication of labour disputes. The regulation of these latter, specifically private, law disputes would be also appropriate at the level of the special proceedings chapter of the Code of Civil Procedure, and its unified separation from administrative adjudication from the regular court

[15] See primarily the French and German regulations, as well as the newest results of comparative research: F. Rozsnyai Krisztina, Közigazgatási bíráskodás Prokrusztész-ágyban (Eötvös Kiadó 2010, Budapest).

[16] Most recently, for example, the Czech Republic chose this path.

system cannot be justified from a court organisational point of view. Foreign civil procedure systems that regulate the adjudication of labour disputes under independent organisational systems developed independent labour courts which, under no circumstances, are combined with administrative courts.[17] The Curia's administrative jurisprudence-analysis group is undertaking an ongoing and scientific documentation of case law, which will be crystallised in practical and theoretical preparatory material that will provide firm orientation and tremendous support for making decisions on the questions raised in this section.

4 Necessity of Branching Rules along the Line of Privileged Amounts in Controversy and Privileged Persons Involved in the Dispute?

Questions regarding the court system as well as the uniformity of procedural rules and the necessity of 'small procedure codes' within the scope of diversity must be answered at the level of the Concept. It was an unmistakable tendency of the procedural legislation of recent years to establish independent procedures within the Code of Civil Procedure that partially overrode its general rules and were promulgated in the name of expedition and simplification. These regulatory units drew their legitimacy either from the insignificant or especially high amounts in controversy ('small claims' proceedings and high priority cases),[18] or the type of litigants (lawsuits by business organisations between each other). Simultaneously, the legislature of the European Union has also taken the road toward the difficult-to-heal fragmentation of the civil procedures with a characteristically unnecessary and sometimes destructive activism (EU Small Claims Regulation, ADR Directive, and ODR Regulation). Behind the EU's acts is also a paradigm privileging on the basis of the person and/or amount in controversy, which is primarily consumer protection, the extent of which has already far exceeded the necessary level of EU civil procedure legislation. The guiding principle – both with regard to the jurisdiction rules previously in effect and those recently reinforced,[19] as well as the independent civil procedure of small claims and consumer (online) mediation – is the same: the ideal-typical, helpless European natural person, who was rendered helpless by the consumer society, is in need of protection.[20] The protection of typified parties considered more vulnerable and thus requiring protection (employees, insurance policy-holders, and consumers) in itself should not be rejected. It cannot be supported

[17] See, for example, in Germany, the duality of *Arbeitsgerichtsbarkeit* and *Verwaltungsgerichtsbarkeit*, representing the two independent judicial paths having separate input and completely separate appellate forum systems.

[18] The subsequent expansion amendment is more chiselled; it included in Section 386/A of the Code of Civil Procedure complaints initiated by governmental supervisory organs pointing in the direction of public interest.

[19] Cf. Articles 6 and 18 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters realizing the reform of the Brussels I. Regulation.

[20] We should distinguish this regulatory technique, based on a group of people typically considered more vulnerable (in addition to consumers, employees, and insurance policy-holders), from the unquestionable protective need for procedural regulation based not on typified but given, natural characteristics, such as children and incapacitated persons, as well as persons with limited capacity and persons with other disabilities. The civil procedures of the United Kingdom and Canada provide exemplary regulations for the protection of the latter.

with anything, however, as to why only a suspiciously simplified and expedited independent civil procedure – because it achieves this simplification and expedition by abandoning fundamental procedural rights, guarantees, and procedural principles – could only provide this protection. Going further, civil procedures (thus, primarily, the rules of small claim proceedings) and their reduced level of guarantees aiming at the protection of the more vulnerable party could easily backfire, as it is not statistically certain that this type of proceedings will be applied mostly with the more vulnerable party in the role of defendant (class action enforcement of small claims on consumers by the factoring company requiring perhaps less protection or perhaps by a multinational primary service provider). It is undisputable, at the same time, that with respect to small claims actions there are special procedures in several countries.[21] Finally, there are examples of countries where, regardless of the amount in controversy, they refer cases for simplified procedure based on other criteria[22] or, using a particularly complex solution, they try to consider the complexity of the case and the amount in controversy simultaneously.[23]

It is different with high priority cases. This is a de facto uniquely Hungarian feature, as only Japanese civil procedure, reformed recently in 2011, recognises similar amount in controversy-based special treatment (in a typical manner, Japanese regulation is also hand in hand with the system of rules regulating small claim actions). The unique nature of the regulations, from an international comparative perspective, is no accident: the fact that the amount in controversy is high does not render the case complicated per se or lend fundamental significance to it. Among other things, this realisation, the fundamental significance and, on occasion, the reflection of the concern of public interest, led the legislature when it released the condition system of high priority litigation from the bond of exclusive amount in controversy and extended it with the governmental supervisory body's right to initiate suit.[24] Beyond the lack of theoretical-dogmatic justifiability, the day-to-day experience of legal practitioners also shows that the promulgation of procedural rules pertaining to high priority cases did not result in the speedier adjudication of these cases: sometimes it was the opposite. The illusorily short deadlines and time intervals in relation to the complexity of these cases led to constant extensions of hearings and the stagnation of pending proceedings.

Finally, it is hard to figure why it is necessary to differentiate in any way among lawsuits with and without the participation of business entities under market economy conditions, especially, considering the requirement of uniform civil procedure dogmatics stemming from the Fundamental Law and the non-accidental lack of authoritative foreign examples in this area.[25]

When answering the question of the need for 'branching' independent civil procedures

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[21] Japan and Canada are good examples. Switzerland's new federal code of civil procedure has a simplified procedure, which in addition to small claim actions refers certain cases (for example rent) regardless of the amount in controversy to simplified procedure.

[22] In Spain, claims based on certain qualified documents belong in this group because of the supposedly simple nature of the evidentiary procedure.

[23] Cf. the small/fast/multi track system in England since the Woolf reform.

[24] Cf. the text effective as of December 15, 2012 of Section 386/A of the Code of Civil Procedure.

[25] Regulatory differentiation based on the person of the litigant is not entirely without example, but, obviously, the exotic solutions (for example in the civil procedure of Russia or China), which devote separate chapters, for example, to actions involving foreign parties, should not be followed.

aligned with both the persons of the litigants and the extent of the amount in controversy, a fundamental consideration is that the characteristics of the parties and the amount in controversy in themselves do not necessitate different civil procedure rules. Here, in part, a switch to a different mind-set may be necessary, as a final result of which the legislature must realise that the key to the expedition of proceedings actually should be looked for not in the special procedural rules but in the personal qualities of the judges and the organizational-structural facilities surrounding them. These have the potential to influence their workload positively. In some of the reference-countries of Western Europe, the average duration of trials is now only a few months. The opportunity for this was not created in any jurisdictions by a 'simplified' procedure, which disregards the individual specificities of cases and is filled with short deadlines, but the appropriate budgetary embeddedness of the courts, the appropriate scale of the infrastructural (IT) development of the judicial organisation and ensuring the judicial career path is made financially attractive in order to enable the judiciary to catch up with the other groups of the legal profession, and having the possibility to select its members from the pool of the best legal minds available. In sum, the primary token of rendering trials more effective and more expeditious is not the compulsive differentiation of case categories but the intellectually refined judicial persona, which is thus able to command authority and make decisions – (and which is, by the way, conspicuously absent from the vocabulary of the functionaries of the European Union's regulation-factory, predominated by a quantitative approach).

The considerations expressed – obviously not in full – in this Section II show that, even according to the most humble estimation of a litigator, simultaneously with the promulgation of the new Code of Civil Procedure, the several crucial partial areas of the law governing the judiciary (and within that the status of judges) must be rethought and regulated over a series of issues.

IV General Civil Procedure Rules and the First Instant Proceedings

Regarding the structure of the court system and the remedies available in the course of ordinary civil litigation, it has already been much debated which level of the judicial system should be rendered as the general first instance forum. In connection with this, the question where and subject to which conditions (if at all) the split between the two first instance types (currently: local and district) of court is necessary was also raised. Regarding remedies (especially extraordinary ones), a crucial point requiring a decision is how a balanced solution between disputed value-based and special importance-based admissibility can be reached in order to secure both traditional aims of extraordinary remedies, i.e., individual law enforcement and uniform case law.

In the context of parties and representation, the overwhelming subjects of the initial discussions have been standing to sue questions and the problem of class actions. This latter subject's regulatory preparation will be based on comparative analysis of different procedural traditions and on the yields of the European-level discussion of recent years, peaking in the recent Commission Communication 'Towards a European Horizontal Framework for Collective Redress.'

1 Basic Principles; Jurisdiction, Competence, and Venue

The legislation drafting technique, which had also been followed by the effective Code of Civil Procedure, following a multi-level structure – thus permeating the entire Code and the same time running through the individual parts and chapters as well – that proceeds from the general toward the specific part (general rules, first instance proceedings, appellate, and special proceedings) must be maintained. It also broadly reflects the structure of authoritative foreign codes. However, it is not clear-cut, even based on an international comparative review, as to whether there is a need for a code-level, general, introductory part; if so, what should be its characteristics of extent and content? The most important question to decide within this is that whether the basic principles of civil procedure law should be included in the legislation, as is – partially – the case with the effective Code of Civil Procedure. In this respect, only a short basic principle chapter containing three to four rules can be regarded typical of recent civil procedure codifications[26] with the caveat that here, the casting is surely the task of the code, including the definition of the role of the judge and the regulation of the extent of the judge's involvement and authority in procedure management.[27] Compared to this, it is more doubtful as to whether defining the objectives of a civil action is necessary in the code. Although the definition of the objective of the regulation at the beginning of the statute is apparently an entrenched Hungarian codification practice, at the same time such a definition at the beginning of the Code of Civil Procedure has an incomparably greater role than with regard to most laws: while in the majority of laws the definition of the objective is declarative, in the civil procedure code such a rule will determine the form of regulation, essentially affecting all of its details. Although repeating the provisions of the Fundamental Law is unnecessary,[28] the need to resolve the eternal tension between justice and the administration of justice [or, in other words, substantive truth versus finality (legal certainty)] at the beginning of the civil procedure code is justified. The Concept will have to make a recommendation for a wording – representing the essence of the law of civil procedure – that will resolve this tension-relationship. Taking into account leading foreign examples as well, it is hard to imagine that the key role in a mission statement like this is not played by the latter category. As another consequence of this, it is obvious that the principles of party disposition and party presentation of evidence must be considered as basic principles during the codification process. At the same time, we should not forget that there are also such authoritative legal systems that completely give up on the idea of special regulation of basic principles (and the objectives of statute and civil litigation) at the beginning of the statute, and they achieve their prevalence in that they consistently reflect this content of basic principles in the detailed procedural rules.[29] If such an example is followed, it is also possible to start the Code of Civil Procedure in medias res with the definition of the forum system undertaking the adjudi-

[26] For example, the new Federal Civil Procedure Code in Switzerland or the Bulgaria's new code of civil procedure.

[27] The reformed English civil procedure code contains an especially extensive regulation of this aspect.

[28] Cf. Section 1 and Section 2(1) of the Code of Civil Procedure on the one hand and Article XXVIII of the Fundamental Law on the other.

[29] Thus, for example, the German civil procedure code. Cf. Section 139 of the ZPO and the related case law.

cation of cases and the (jurisdiction, competence, and venue) rules governing the determination of the forum with authority to hear the case. In a system like this, judicial case law and procedural jurisprudence will necessarily play a leading role in the identification and detailed substantive description of basic principles.

The above idea leads to another theme that must be discussed within the scope of general rules, which is the problem of the development of the three-tier jurisdiction-competence-venue system of rules serving to determine the forum to adjudicate individual cases. In this context, it can be said that two sources of law solutions can be observed through international comparison: one of the models – on the basis of which stands the effective Hungarian regulatory system – starts from the implicit international law and international private law theoretical premise that the rules of civil procedure as a whole can and should be applied after, and on the basis that, it can be established: the sovereign state carrying the code of civil procedure has *facultas iurisdictionis* and, in a second step, competence.[30] From a starting point like this, it can be logically argued that the civil procedure code should only contain rules pertaining to competence and venue, but, as the implicit condition of its own applicability, it should not contain jurisdictional rules. The other model is less formalistic and starts from a more functional perspective. The essence of this can be pinpointed in that there is no substantial difference between the rules of venue and competence in a functional sense, as both, if the *facultas iurisdictionis* are established, provide only for territorial-based allocation and it is mostly based on overlapping connecting principles (competence/venue grounds). If this model prevails, the functional scope of the venue chapter of the civil procedure code will also extend to the regulation of jurisdiction; in other words, the rules governing venue in the civil procedure code will also govern the rules of jurisdiction.[31] At the level of the Concept, a decision has to be made as to whether the legislature wishes to move toward the implementation of this second model, because it would make[32] the amendment of effective international private law regulations necessary. The move toward this second model can be justified by several theoretical and practical reasons. We can mention among these the reform of the Brussels I Regulation and the related trend, constantly reinforced by the related EU regulations on judicial cooperation in civil matters[33] that can be captured in the derogating nature of European Union jurisdictional rules, which override parallel Member State rules and extend to third counties, too. Since the majority of the jurisdiction rules necessarily have venue-related regulatory contents, the national-level integrated regulation could simultaneously serve the objectives of harmonisation and the gradual termination of sources of law fragmentation.[34]

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[30] The *Gerichtsbarkeit – internationale Zuständigkeit* differentiation is absent from relevant Hungarian legal materials.

[31] Cf., for example, Section 12 and following sections of the ZPO, the Finnish code of civil procedure containing similar regulations, or Section 3 and following sections of the Japanese code of civil procedure. Cf. for the latter: Nishitani, Yuko, 'Die internationale Zuständigkeit japanischer Gerichte in Zivil- und Handelssachen' [2013] Praxis des Internationalen Privat- und Verfahrensrechts 289-295.

[32] Section 54 and following sections of Law-Decree No. 13 of 1979 on Private International Law.

[33] See above under footnote 19 on the 1215/2012/EU Regulation.

[34] Regarding the reference in the Code of Civil Procedure to EU sources of law that can be defined as a minimal objective, see in detail Section VIII.

2 Parties and Other Persons in the Litigation

In connection with the regulation of the parties and other persons in the litigation, two groups of problem can be identified, which definitely require a solution in the course of the codification of the Code of Civil Procedure and with regard to which the Concept must take a preliminary stance. These two areas are the issue of group litigation and the question of (mandatory) legal representation.

On the one hand, with regard to mass litigation of greater significance (environmental damage, group litigation stemming from consumer claims in product liability causes of action, or even lawsuits that can be brought based on membership of a group), some situations may arise which cannot be handled or could be disproportionately hard to handle under the current traditional group litigation formulas. These cases may require additional specialised regulatory forms of group litigation, with the caveat that we have to mention in advance that here the issue is primarily a substantive law issue and, in connection with that, simply the issue of the extension of res iudicata, and not the need for the development of a new type of action. The task of the procedural law codification in this respect is only to allow, in an efficient manner, the procedural canalisation of mass claims, exemplified by substantive law and surfaced by the situations of modern everyday life, and thus unequivocally provide rules especially for[35] the issues of authorisation to sue on one's behalf, such as the fact of the existence of the proceedings, dependency systems similar to a group of claimants, the collection of the monetary award, the escrow/fiduciary management of the award, settlement of accounts among 'class' members, and the subjective limitations of res iudicata. We can surely heavily draw functionally upon the regulatory environment and case law of the relevant traditional Anglo-Saxon legal institutions[36] even if, because of the fundamental differences in the legal-cultural and legal-sociological milieu, the opt-out model obviously cannot be the default model for our continental civil procedure law.[37] In accordance with this, a cautious procedural legislative tendency moving toward the opt-in model and bellwether trials, introduced along with res iudicata extension, can already be observed in certain authoritative and also recent European civil procedure codes.[38] It should be examined, since collective actions are connected to substantive law at numerous – and very different – points, whether collective actions can be regulated together at all. The subject matter of the complaint and the substantive law dispute is deterministic (public interest

[35] And not like the first, 2010 attempt of dilettante, deliquescent regulation based on some scarce familiarity with the Anglo-Saxon legal system derived from some stories.

[36] Class/derivative action (US), class/representative proceedings (Canada).

[37] This is confirmed by the most recent, June 11, 2013 Communication of the European Commission, which, as usual, was mistranslated into Hungarian (redress, *Rechtsschutz*), titled 'Towards a European Horizontal Framework for Collective Redress' which – in accordance with the preliminary estimates – basically does not find the opt-out type regulation adoptable. COM(2013) 401 final.

[38] Germany (introduced specifically, freshly reformed with the effective date of November 1, 2012, with respect to bellwether trials of capital market investor claims: *Kapitalanleger-Musterverfahrensgesetz, 'KapMuG'*), The Netherlands (where they established, for the first time on the continent, an institute specialising only in class action suits), and Bulgaria (as an independent type of action).

complaint and declaratory complaints of injunctive nature;[39] class action-type, collective actions are appropriate primarily in actions for damages[40]) and, in certain instances, decisions on common questions of law with a binding effect extended to all cases would be beneficial to avoid contradictory judgments.[41] No matter which regulatory model will be chosen, it has to be kept in mind that procedural law cannot take on the duty of substantive law in the regulation of the enforceability of claims, but its task is fundamentally the extension of res iudicata and the provision of procedure management appropriately legitimising it.[42]

The other set of problems indicated is the appropriate development of mandatory legal representation, the need of which is also raised by the obvious anomalies of the effective regulation. In addition to the fact that the effective Code of Civil Procedure contains a series of such illusory provisions that could be corrected by simple codification techniques,[43] the institution of legal representation and, within that, mandatory legal representation carries a more substantial, basic principle-level problem. In proceedings in which the parties are represented by counsel, nothing can justify the principles of party disposition and party presentation of evidence and their consequences, the relativity of the statement obligation and burden of proof through the various obligations to educate the court. In the course of the development of the Concept, treating the principles of party disposition and party presentation of evidence seriously, without compromise, could play the role of a guiding principle in this respect (also).

Finally, in connection with the persons involved in the litigation, we must discuss the role of the prosecutor. Modern codes of civil procedure – in contrast with other, more politically interwoven codes of civil procedure, which did not trust the parties and, thus, did not take the principle of party disposition seriously either – seemingly, as a tendency, do not cast the prosecutor in a real role in civil actions. In certain sub-areas, where the role of the prosecutor may remain intact (e.g., certain personal status lawsuits or standing to file a complaint provided under administrative oversight), the procedural law role of the prosecutor should be clarified briefly in the Code of Civil Procedure, taking into account the newest guidelines of the Curia.[44]

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[39] Section 209/B of the Civil Code, UKlaG in Germany.

[40] Thus, primarily the class action rules of the US: Federal Rules of Civil Procedure 23-23.1.

[41] Thus, e.g., in product liability or investor protection cases. For the latter, see the KapMuG in Germany or, in general, the multi district litigation in the US.

[42] Further group litigation problems that are not within the scope of class action claims are awaiting clarification during the codification process; we are just going to mention them here without further analysis: the unequivocal differentiation among the different intervention formulas *(Nebenintervention, Hauptintervention* and *Streitverkündung),* cross claim of parties in the same litigant position (cf. Section 11 of Opinion No. 2/2010. (VI. 28.) of the Civil Department of the Curia, etc.).

[43] Adjusting the amount in controversy with Section 23 or rather completely eliminating it from Section 73, fixing the system of exemptions built on an impossible-to-follow logic, defining the indeed significant cases requiring specialized knowledge other than as exceptions, etc. All this could be simply achieved by even the introduction of the requirement of mandatory attorney representation to a specific forum (e.g., the regional courts); cf. Section 78 of the ZPO.

[44] Cf. *Administrative-Labour-Civil Uniformity Decision No. 2/2012* of the Curia defining the prosecutor as an abstract public law legal entity and defining the prosecutor's role in civil actions also on the basis of comparative law.

Comparative civil procedure law will have a smaller role here for the reasons mentioned above. We have to add that this is also true because more and more rights to initiate action that typically have a public interest protection function, too (consumer protection or competition law violation sanctions), are viewed in both Anglo-Saxon and modern continental civil procedures as enforceable not through actions initiated by a state functionary but as private enforcement of rights.[45] The so-called *private law enforcement* concept still carries a lot of exploitable potential and, after building a scientific foundation and evaluating foreign experiences, it will be worth assigning it a role in the course of the development of the Concept.

3 Trial and Evidence

The most effective instrument to expedite proceedings and increase efficiency in general is not the overemphasised and preferred inclusion of more and newer short deadlines in the Code of Civil Procedure by the legislature. As we pointed out in several instances above, the guarantees of efficient and expeditious proceedings must appear briefly, chapter by chapter, in the substantive development of the specific procedural law legal institutions, and they must be enforced at the end by judges with the authority to do so. In the trial and evidentiary phase, one of the substantive guarantees with central significance is the appropriate preparation of the trial, which receives special attention in the representative codes of all legal families.[46] Further increases in efficiency can be achieved by joining this substantive preparatory hearing with a hearing where the parties appear; in other words, by conducting the hearing without interruption following the latter. A typically emphasised part of the pre-trial phase in leading legal systems is the evidence-preserving proceedings regulated generally – to further emphasise its importance – in a separate chapter.[47] It would be advisable already at the level of the Concept to agree on the fact, which can be easily accepted based on a comparative civil procedure law analysis, that the fact-finding proceedings preceding and preparing the trial (pre-trial discovery) represented by Anglo-Saxon and primarily US civil procedure codes, neither as a whole nor in their specific elements, can be implemented in a civil procedure code living in continental procedural law traditions. As we have already presented in other places in detail (and, therefore, we will not repeat it here),[48] any sort of adaptation of the institution of discovery would presume the simultaneous implementation of such a procedural law-culture and legal sociology conditions that determined the development of the detailed rules of discovery, namely the fact that

[45] Private attorney general. Cf. most recently, e.g., Matthias Weller, 'Kartellprivatrechtliche Klagen im Europäischen Prozessrecht: "Private Enforcement" und die Brüssel-I-VO.' [2013] Zeitschrift für Vergleichende Rechtswissenschaft 89-101.

[46] Cf., e.g., pre-trial conference (US and Canada), scheduling conference (Japan), and *früher erster Termin* (Germany).

[47] Pre-trial discovery (US, Canada and more recently, through Anglo-Saxon influence, Japan), but even within the continental legal family, we can find separate related chapters in several codes (especially, in more recent codes, Latvia, Croatia, Czech Republic, and Estonia).

[48] See, Varga István, 'Az összehasonlító polgári perjog alapjairól' Acta Facultatis Politico-Iuridicae ELTE, tomus XL. Budapest 2005. 113-131.

assigning different roles in the litigation is based on the clear predominance of the parties and their counsel and, parallel with this, the subordinate role of the court; the provision of the parties with rights of a public law-like nature to explore each other's evidentiary tools in the fact-finding phase taking place before the trial, as a general rule, without the involvement of the court or even without the awareness of the court of this process; the obligation of the parties to disclose evidentiary tools and evidence clearly disadvantageous to them, and the assurance of this through repressive sanctions; the maintenance of the strict temporal and qualitative bright line between the pre-trial and trial phase and, in the latter phase, the central role of the lay element (the jury), which makes the full completion of the fact-finding proceedings before the trial necessary; finally, accordingly, the integrated, even weeks-long trial, during which additional fact-finding is not allowed, and only substantive law rules (law of evidence, deliberation, burden of proof, provision of influence, etc.) play any role. From the moment the elements of the discovery are not sowed in the soil of procedural law that is based on the absolute prevalence of the adversaries and, with this, the far-reaching exclusion of the court's right to shape the proceedings,[49] (in other words, they are not utilized amidst the personal and, in a broader sense, social and sociological facilities of American civil procedure), they would generate results unacceptable for the continental approach. Hence, it is imperative to overrule the steps of the Hungarian legislature taken in these directions – and based on a far-reaching misinterpretation of Anglo-Saxon law.[50]

Besides evidence-preserving proceedings, we can find noteworthy examples for uniform regulation in separate chapters of other rules aimed at preserving the legal status-quo. We can thus find examples in several foreign civil procedure codes for the regulation of provisional measures (injunctive relief, protective measures, and registration of a legal action in the land register) in uniform chapters independent of the phase and function of the proceedings.[51] Finally, according to international litigation experience, the unequivocal, independent regulation or absence of distinction between certain evidentiary tools and evidence may raise problems. As such, the distinction between the statements of litigants and witnesses could be problematic[52] (Switzerland), and independent regulation may be justified.[53]

V Appeals

The unequivocal preliminary question of the development of the appellate system is the Concept-level response to the questions related to the organisational system of the judiciary raised in Section II above. A well-founded decision may be only made on the number of tiers the appellate system should have and the determination of whether fora with mixed first and

[49] Adversary system of procedure.

[50] Cf., e.g., the practice of cross examination surprisingly adopted in high priority cases or the Section 121/A, which is similarly an alien species in the system.

[51] Thus, e.g., the US, Sweden, Latvia, Russia, Canada, and Bulgaria.

[52] Thus, e.g., the Swiss federal code of civil procedure.

[53] Thus, e.g., Bulgaria.

second instance jurisdiction or exclusively appellate courts should be part of the system. Since, similarly to the Constitution, the Fundamental Law also requires (not so self-evidently at all, according to the international comparative analysis)[54] a regular appellate procedure, a fundamental revision of the effective structure of the appellate chapters of the code does not seem justified: it can be still organised along the regulation of appeals and extraordinary appeals. This template is followed by most foreign civil procedure codes, in which regulation is supplemented with the implementation of a few newer institutions that can be viewed, in a broader sense, as dispute resolution institutions, and so, primarily, with channelling fundamental rights violations into the civil procedure code.[55]

Conceptual questions arise mostly with respect to the permissibility of extraordinary appeals, and, in this respect, both the Anglo-Saxon and continental examples may be useful supplements to the brainstorming done in preparation of the development of the Concept.[56] Within the question of permissibility, it has to be clarified at the level of the Concept as to what roles the legislature envisages for the higher courts, especially the Curia, in the area of extraordinary appeals, in other words, what weight it wishes to assign to each of them when developing the dual task-totality of individual legal protection and legal uniformity. Since the relationship between the two can only be imagined as some sort of symbiosis and the issue is only achieving the aforementioned weight-assignment, the determination of the detailed rules of permissibility may be assigned a special role. Within the scope of permissibility, the separation of permissibility from the disputed amount as the only entry condition also requires a fundamental decision in itself. The amount in controversy and the disputed amount do not determine the significance of the case, and the latter is essentially independent from the value considerations. As such, the introduction of a chiselled permissibility criteria system is justified also with the utilisation of foreign examples extracted through international comparative analysis, in which the condition-nature of the disputed amount is not exclusive, and – precisely because of the central position of the assessment of the fundamental significance of the case – designating the permissibility decision as the subject matter of an independent appeal is not rare.[57] The most recent

[54] Cf. Varga, István, 'A jogorvoslathoz való jog – Alkotmány 57. § (5) bekezdés' in Jakab András (ed), *Az Alkotmány Kommentárja* (Századvég 2009, Budapest) 2088 and following pages.

[55] One of the existing models of solution is the definition of the direct effect of constitutional court decisions (Germany), and the other is the enforceability through independent legal remedies (effective Code of Civil Procedure: retrial). The handling in civil litigation of the decisions of the European Court of Human Rights and the Court of Justice of the European Union poses a functionally identical problem with this: the decisions of these fora are currently not built in the appellate system. In pending trials, there is a solution. (Section 155/A of the Code of Civil Procedure.) Following a final decision – if no review is available either –, however, the procedural law channelling still requires a solution (taxonomically via extraordinary appeal, cf. in addition with cause for review defined under Section 416(1)(g) of the Code of Criminal Procedure).

[56] Certiorari (US) and *Zulassung* (Germany).

[57] In German law, which is the closest in this respect also to Hungarian traditions, permissibility is decided on the basis of the disputed amount *or* (and not *and*!) fundamental significance, with the caveat that it is the judge rendering the order who makes a decision on permissibility *(iudex a quo),* and against this permissibility decision, there is a right to appeal to the reviewing forum *(iudex ad quem, Zulassungsrevision, Nichtzulassungsbeschwerde). A* similar solution in its direction could be in line with the constitutional requirements laid down earlier by the Constitutional Court.

amendment of the review rules, which can be considered forward-looking in this sense, points to such direction of a permissibility analysis, which only builds differentially on the disputed amount and fundamental significance, in which the legislature in actions for non-economic damages has unequivocally separated permissibility from the disputed amount as a condition.

VI Chapters Regulating Special Proceedings

Even a list-like presentation of the regulatory needs of certain special proceedings would exceed both the permitted length and the scope of this overview. Accordingly, here we only highlight a few special proceedings in view of the chapter division of foreign civil procedure codes subject to our review, the regulatory needs of which are clear, but its place in the sources of law – comparing the effective Code of Civil Procedure with foreign examples – raises questions that need to be answered at the level of the Concept.

Proceedings concerning the status or capacity of persons are typically included in the civil procedure codes, although the German regulations have undergone remarkable changes in recent years (considering the content of the basic principles, which is being significantly modified in these actions, as well as the multi-directional system of relationships that connects these actions to non-contentious proceedings) in which all of the status proceedings have been removed from the rules of special proceedings of the ZPO and were implanted in a statute that was also intended to serve as a code for non-contentious proceedings.[58] In addition, new chapters, induced by 'modern' substantive law legislation, have been thus codified, primarily with respect to disputes arising from various registered domestic partnerships.[59] The need for these chapters must be examined at the level of the Concept, and it must be decided if it is sufficient to deal with these cases together with family law actions, and if there is anything indeed that justifies the creation of a separate chapter (or it is worth waiting until diversity becomes less of an issue).

By providing for independent regulation of press rectification actions, the Hungarian regulatory system can be regarded as unique, because this type of action does not appear independently in any of the representative civil procedure codes we have examined. In Hungary, however, we can present several arguments for its maintenance, for example, in addition to Hungarian procedural law traditions and the voluminous judicial case law, the fact that the new Civil Code apparently regards the traditional Civil Code-Code of Civil Procedure division of labour as the starting point. (The Civil Code does not even mention press rectification, and, also, the Press Freedom Act seems to be of the same view, as it also started on the assumption that the relevant rules remain in the Code of Civil Procedure). Considering that the Press Freedom Act is a cardinal law, we can regard this system as a given, and there is no reason for changing it.

[58] See in footnote 9 above.
[59] Switzerland and Germany.

Finally, beyond the special proceedings currently regulated in the Code of Civil Procedure, the comparative analysis revealed a few subject matters, to which special proceedings are connected at the level of how chapters in the civil procedure code are organised in more than one country. These include, especially, actions related to promissory notes and other securities[60], actions aimed at the enforcement of claims arising from legal relationships related to intellectual property,[61] property disputes,[62] actions related to leases,[63] and actions for the return of illegally exported cultural objects.[64]

VII Modern Technology in Civil Actions

The codification process in its initial phase already addresses some technical issues. Special attention is paid to the possibilities of utilizing electronic means of communication between members of the judiciary as well as between the parties and the judiciary. There seems to be an implied agreement among professionals that a well-positioned introduction of such means into selected stages of the civil procedure could seriously contribute to the timely administration of cases. In this respect, the extensive experience piled up in recent years during the fully electronic administration of payment order proceedings may provide much-needed input. Another, partly technical, issue is the allocation and collection of litigation costs. It has been a recurring subject of discussion and will have to be decided now, at a conceptual level, whether the allocation and collection of costs should remain with the courts or placed with the tax authority. Various reasons have already been articulated on both sides, but consensus has not been achieved yet.

Modern technologies, primarily the use of electronic communications devices, cannot contribute to the speed and efficiency of a civil trial to an appreciable extent. With visions foretelling the opposite, certain practical foreign examples, as well as international arbitration practice, can be contrasted; however, in civil procedure systems comparable to ours, where electronic filing systems have been implemented,[65] the printing of all documents filed and filing hard copies remain the norm, and, what is more surprising, it is also required by court operation rules. This means that, to date, even in the systems usually depicted as the pioneers of modern litigation in a technological sense, we can only talk about the development of an electronic

[60] It is regulated in a separate chapter, e.g., in Germany, Austria, and Japan.

[61] It is regulated in separate chapters e.g., in The Netherlands and Latvia. The regulation of currently effective Hungarian rules, which are sporadic at times, but which can be found even today in the trademark law in a concentrated form, in a uniform manner in the Code of Civil Procedure could be justified.

[62] It is regulated in a separate chapter e.g., in Austria and Croatia.

[63] It is regulated in a separate chapter, e.g., in Austria and The Netherlands.

[64] It is regulated in a separate chapter, e.g., in The Netherlands. This solution should be considered because in Hungary, too, we can anticipate that more and more such claims – of rather significant magnitude – may arise, especially, because during the reform of the Brussels I Regulation, the EU legislature has expressed its preference of the *par excellence* regulation. Cf. the new jurisdiction rule under Article 7(4) of the Regulation 1215/2012/EU.

[65] E.g., Austria: WebERV *(elektronischer Rechtsverkehr),* which through an electronic single point customer gateway system operates with the filing of appropriately authenticated online forms.

alternative to mail delivery, and that experience shows that the system is unable to process larger, scanned exhibits, and, hence, filing is often duplicated and, with that, more cumbersome than it was in the pre-technology era. Practical experience is similar regarding the procedural practice at the major institutional fora of international arbitration: even in those institutions that are infrastructurally far better equipped than national courts, it is not the deployment of modern technology but rather the efficient development of procedural rules – also based on the consensus of the parties – and the skills of the arbitrators employed that are responsible for the better efficiency of the procedure. These examples show that the use of modern technologies in civil litigation is fundamentally a question of infrastructure and technological development, without any significant theoretical content. Hence, even the authoritative foreign civil procedure codes actually contain authorizing rules only sporadically and, in terms of the availability of technical conditions, so far only include electronic communications as an optional method. Based on these observations, there is no need to place special emphasis on the implementation of modern technologies at the level of the Code of Civil Procedure. The German ZPO, which can be hardly accused of theoretical vagueness, takes care of the question with altogether two authorization rules.[66] This regulatory technique can be adopted without further ado. With this, it can be recommended at the level of the Concept that the infrastructural questions concerned, among other things, the electronic system on the customers' side (e.g., with the appropriate development of the Customer Gateway), issues of the compatibility between the electronic fee payment system and electronic court file administration and archive maintenance obligations,[67] as well as the questions of authentication conforming with the current, latest safety levels should not burden the Code of Civil Procedure as a foreign body and with a bulky system of rules, but – just as the referenced German regulations – these questions should instead be regulated in a specialized manner at the level of regulations. The few questions with actual procedural law relevance should be regulated among the sub-rules of the traditional procedural institution concerned (e.g., the conditions when the electronic submission can be regarded as filed or the occurrence of the presumption of service in the case of electronic delivery).

[66] Section 130a and Section 130b of the ZPO, as well as the proposed Section 130c, which also would delegate to the regulation level the development of technical/electronic form-level development, whose proposed deadline in Germany is 2022.

[67] See with this regard and the technical organization, as well as, especially, the problems of data protection the latest source: Silkev Jandt, Maxi Nebel, 'Die elektronische Zukunft der Anwaltstätigkeit' [2013] Neue Juristische Wochenschrift 1570. With respect to the certain technological requirements and sub-areas and from a comparative perspective cf. Kengyel Miklós, Nemessányi Zoltán, *Electronic Technology and Civil Procedure. New Paths to Justice from Around the World* (Dordrecht 2012).

VIII Alternative Dispute Resolution Integrated in the Code of Civil Procedure

Regarding alternatives to ordinary state civil procedure, the revision of the regulation of arbitration, as the principal substitute for ordinary civil litigation, have already entered the discussion. While Hungarian arbitration law is in many instances in compliance with the UNCITRAL Model Law, its codification dates back to 1994. Furthermore, extensive judicial practice and respective recent legislation, as well as international and European developments, require the review and possibly an updating re-codification of this field of procedural law. In addition to arbitration, problems of mediation are also on the agenda – unsurprisingly also with a view to the evolving European legislative activity (ADR Directive, ODR Regulation). Various views have already been articulated regarding the introduction of mediation in the ordinary course of civil litigation, and opinions within the committees widely differ on the necessity and usefulness of court-integrated and out-of-court mediation and their respective regulatory needs. In this context, there is an ongoing comparative debate reflecting different regulatory approaches, such as a rather forced (e.g., United Kingdom) or a more relaxed (e.g., Germany) embedding of mediation in civil litigation.

1 Mediation

In part, under the many years of pressure from the EU directive and decree requirement,[68] which received a new push at the time of closing this manuscript, more countries have also integrated mediation rules in their civil procedure codes. Regarding this, two tendencies can be observed: the more aggressive regulation represented by the Anglo-Saxon legal tradition, compelling the parties of the already ongoing civil action to mediate, and the more considerate German regulation, which primarily bears in mind the essence of mediation; that it is the parties' own, joint decision, which does not allow the courts to compel the parties to mediate. In addition to this, foreign regulations typically regulate pre-trial mediation as well, mostly specifying pre-trial documented mediation and the verification thereof – with different degrees of enforceability – as the prerequisite for trial. We can find several specific solutions in different civil procedure codes, which mostly provide, within the framework of the trial, the option of mediation and primarily the opportunity for settlement that it can offer, and reflect on their legal effects and enforceability.[69] As regards the essence of the regulations, we can see mandatory mediation primarily within the Anglo-Saxon legal family,[70] which is attributable to the pre-trial phase that

[68] Published in No. L 165 of the Official Journal of the EU (June 18, 2013): Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer *('EU ODR-Regulation');* Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes *('EU ADR-Directive').*

[69] Thus, e.g., Austria, Switzerland, and France. See with an overview of the different regulatory options: Christian Fischer, Hannes Unberath, *Das neue Mediationsgesetz* (CH Beck 2013, München).

[70] E.g., England and Canada.

has a much more pronounced role in those countries.[71] Compared to the earlier EU Mediation Directive (which, fortunately, did not really contained tangible, concrete procedural rules),[72] with the ODR-Regulation and the ADR-Directive, however, a trend seems about to begin, the essence of which is apparently that mediation demands more space (enforceable in part independently of the parties will) in the civil justice system. Both the out-of-court version of mediation and the version integrated into the trial, though to different degrees, are fundamentally alien species in the system of civil trial regulation. The two latter mentioned acts, not surprisingly promulgated with a consumer protection objective, lead to the deliberate vulgarisation of an important segment of the civil justice system, and with that in the long run, it will detach larger and larger areas from the scope of the civil trial, secured by a procedural safety net and judicial legal expertise. This tendency also carries the danger that the system of civil legal protection/enforcement of claims will duplicate and at the same time, civil litigation will gradually lose its importance in favour of a system of inferior quality.[73] The modern, tendentious, compulsive imposition of court-mandated or intra-trial mediation is hard to understand through the eyes of a litigator, because the logics and corresponding basic structure of the pending civil action (or also, civil action that is about to begin!) are fundamentally different than those of mediation. Based on the observations, the commencement of the adversary proceedings to enforce claims implies the impossibility, or at least the low likelihood, of an amicable resolution of the dispute. To steer back the parties by judicial force in the direction of mediation will lead to judicial role confusion, waste of time and loss of efficiency. Hence, for all these reasons, it should be considered at the level of the Concept to stay with the gentlest level of regulation, which, in essence, only refers to the option of mediation and, in connection to this, to regulate a few procedural law institutions necessitated by the Directives: this would 'embed' mediation, to the extent necessary, in the system of adversary enforcement of claims (confidential treatment of agreements resulting from mediation and evidentiary tools, suspension of limitation and prescription period, etc.). Finally, in the light of the regulations pursuant to the Directive, it seems unavoidable that a lex imperfecta, serving to fulfil a notification function within the system of conditions of filing a proper complaint, in other words, regulating the substantive elements of the complaint, will be maintained.

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[71] Cf., e.g., in England: *Practice Direction on Pre-action Conduct*, which imposes in various way sanctions if mediation does not take place or is conducted in an inappropriate manner (stay of proceedings, fines, etc.) For the various mediation model-differences that can be explained with procedural law cultural differences with a comparative approach, cf.: Felix Steffek, 'Rechtsfragen der Mediation und des Güterichterverfahrens' [2013] Zeitschrift für Europäisches Privatrecht, 528-564.

[72] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters *('EU Mediation Directive').*

[73] See identically as one of the first reactions, the analysis, at places with acidic sarcasm, of a leading German litigator: Roth, Herbert, 'Bedeutungsverluste der Zivilgerichtsbarkeit durch Verbrauchermediation' [2013] Juristen Zeitung 637-644. (*'Das Verbraucherschutzrecht eignet sich … nicht für eine Anwendung durch den Verbraucher oder sonstige Laien.'* 638.).

2 Arbitration

The (in many respect unwarrantedly unquestioned) harmonisation of the Arbitration Act with the UNCITRAL may create the impression that the Hungarian legislature has nothing to do in the area of the primary alternative to litigation, arbitration. This view, in the light of the final, effective regulations and related judicial practice, is clearly unfounded, because the current regulatory environment of arbitration displays several dysfunctions, which – based also on the lessons of foreign examples – could be rectified through the codification of the Code of Civil Procedure. The following reasoning, which is in line with the regulations of all reference countries, can be considered as the starting point: it is the interest of both the institution of arbitration and the state that the alternative resolution of private law disputes through arbitration is practiced with the greatest possible support and coordination from and, at the same time, appropriate quality assurance by the legislature and state judicial administration of justice. A balanced effort to provide support, coordination, and quality assurance in this sense is manifested primarily in the structure of the actual text of the legislation. Accordingly, in international practice, regulations that define the extent of arbitrability (subjective and objective arbitrability), generously and, in essence, as identical to the boundaries of private-autonomous action, are typical. It can be considered typical that legal entities becoming the subjects of private law legal relationships may derogate, without any further conditions, state judicial dispute resolution and agree to conduct arbitration proceedings in legal disputes, over any matter in which they are free to make decisions in accordance with private law rules. A further manifestation of the support and coordination in general is the manifold legal assistance provided during the proceedings. In a broad sense, this includes the dismissal of the complaint without the issue of a summons if a valid arbitration clause exists, legal assistance provided during the establishment of the arbitration tribunal in charge and state judicial legal assistance provided in the area of provisional measures, as well as legal assistance provided for the evidentiary proceedings. Finally, on the common boundary of support, coordination, and quality assurance, we can find judicial review by state courts of positive jurisdictional decisions, the provision of the arbitral decisions with legal effect linked to the judgments of state courts and their definition as grounds for enforcement accordingly, and finally, specific appeal proceedings in the form of invalidation actions. Ideally, an addition to these rules is the state judicial practice, which stands on the grounds of favor arbitri that, recognising the national economy interests linked to arbitration as well, creates a balance between the support and quality assurance functions intended for these courts.

The above-mentioned equilibrium is extremely sensitive at the level of both the legislation and the related judicial practice. Typically, the balance may be disrupted with the unwarranted narrowing of (subjective and/or objective) arbitrability or the qualification of distinctly exceptional dispute resolution tools (invalidation actions or, analogous to those, reasons for denying enforcement), as ordinary appeals in terms of their contents. In the former case, the legal, cultural, and economic arguments, which ultimately render the derogability of ordinary state courts legitimate, become lost: there is mistrust by foreign parties regarding the state forum of the domestic party, mistrust of the decision in the event of the involvement of a state party in

the action to be made by the representative of that same state and of the actual expertise of the adjudicator relating to the specific dispute according to the parameters as defined by the parties. In the latter case (in other words, in the event of assigning partial appellate content to invalidation actions), the private-autonomous derogation of state judiciary proceedings, as the state dispute resolution forum, is vested with broad decision-making powers. The disruption of the equilibrium causes a series of unfavourable effects, of which we should highlight the weakening of the environment of international investment protection and the relativisation of, foreseeable options for the enforcement of claims and with this, ultimately, of legal certainty.

Several initiatives in the effective Hungarian regulations and related judicial practice (primarily the tendencies of narrowing arbitrability and broadening, as far as content goes, invalidation reasons) point to the fact that both the regulatory environment and the interpretation of the law have moved toward the disruption of the above described sensitive equilibrium, which poses no small danger.[74] In addition to this, the regulations in the Arbitration Act contain several anachronistic rules that have been left untouched since 1994, which increases the distance between the Hungarian arbitration procedure law and international standards.[75]

The codification of procedural law can present an opportunity to resolve these problems and, at the same time, to improve the quality of the Hungarian arbitration practice based on national economic interests. Several authoritative procedural law legal systems regulate arbitration in a separate chapter in their civil procedure code.[76] An arbitration chapter placed at the end of the Code of Civil Procedure, in addition to symbolising the nature of arbitration proceedings as the primary alternative to litigation, would contribute to the above-described and desirable harmony between state judicial proceedings and arbitration proceedings. This is also true, among other reasons, because a large portion of the regulatory content currently provided by the Arbitration Act primarily belongs in the civil procedure code; namely, every rule displaying state court contact points, from the dismissal of the complaint without the issue of a summons to legal assistance for the establishment of the arbitral tribunal and other instances of legal assistance, to the complete invalidation proceedings part. In Hungary, in addition to these sources of law reasons, the arbitration-related legitimacy deficit observed lately would also justify integration into the Code of Civil Procedure, which would thus contribute to the beneficial increase of the acceptability of arbitration. As such, it can be foreseen that the Concept will have to take a stance on this question. There are several available codification techniques that can be followed. In addition, the unitary perspective currently followed by the Arbitration Act could also still be utilised,[77] or even the regulation technique based on the analysis of domestic/international differences.[78]

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[74] Cf. in detail Varga István, Az objektív arbitrabilitás magyar szabályozásának története és töréspontjai in Máthé Gábor, Révész T. Mihály, Gosztonyi Gergely (eds), *Jogtörténeti Parerga* (Eötvös Kiadó 2013, Budapest) 363-378.

[75] Thus, primarily, the jurisdiction and venue rules that cannot be interpreted in an arbitration context.

[76] Thus, e.g., Germany, Austria, France, and Italy.

[77] Thus, e.g., the regulation of the German ZPO.

[78] E.g., Switzerland (federal code of civil procedure and independent law) or The Netherlands (distinction within the code of civil procedure).

IX International and European Law at the Chapter-level of the Code of Civil Procedure

Finally, numerous issues have already been raised regarding the way of handling necessary intersection points between domestic civil procedure and international (first and foremost EU law) instruments regulating certain fields of civil procedure, e.g., jurisdiction with regard to the Brussels I-recast, different levels of judicial assistance in the field of service and evidence-taking and, further the new, direct procedural instruments. These instruments will play a continuous crucial role in the codification process. In the current preparatory phase, the discussion focuses on the level of sources of law, e.g., on the need for the inclusion of a separate chapter in the new code defining the points of intersection between international, European, and domestic procedural regulatory instruments. Equally, questions on a conceptual level arise in connection with the nature of the 'new generation' of European civil procedural regulations with primary and direct regulatory content. In the respective thematic committee's initial view, one of the main tasks of the codification process will have to be to ensure the effective application of regulatory content relating to cross-border civil matters, both in a global and in a regional (European) sense. One possible way to achieve this – and thereby furthering the awareness of this dynamically evolving field of procedural law – could be the introduction of a specially prepared chapter in the new code dedicated to the respective international and European instruments and their interfaces with domestic procedural law.

In the last one and a half decades, civil justice cooperation, as one of the most dynamically developing area covered by EU legal materials, has put a very large amount of secondary[79] Community legal materials in direct interaction with the independent national procedural laws. The application of domestic civil procedure codes are increasingly permeated by decrees on jurisdiction, legal assistance, mutual recognition and enforcement, as well as new-generation, uniform proceedings. In reaction to the powerful EU influence and to the interaction we have mentioned above, several Member State codes devote a uniform (and as regards its objective too, a didactic) independent chapter to EU regulations, embedding them into the structure of the national procedural law. The prototype of this regulatory technique is Book 11 of the German ZPO, which contains only short references of application. Elsewhere, we find detailed regulations.[80] Finally, referencing EU law can also be envisaged as a part of a chapter synthesising broader, international regulations.[81] The advantage of the regulations in a separate chapter is that, instead of being sporadic, the currently applicable EU law could be easily located and reviewed by legal practitioners which, based on the experiences of practicing lawyers, would not be

[79] The relevant primary Community law, (thus, the preliminary decision-making proceedings and its details and procedural rules to be followed by the national judiciaries) have also been integrated into several national civil procedure codes (e.g., Bulgaria and Croatia). In this respect, there are unequivocal Community rules, and so it is in part only a question of legislative techniques and 'didactics' based on the examples of foreign regulations as to whether the Code of Civil Procedure should contain identical rules.

[80] Bulgaria and Croatia.

[81] See, thus, for example, in the regulation of Latvia, the separate chapter titled 'international civil procedure.'

superfluous regulatory content. Despite the fact that the centre of gravity of the cooperation falls on the area of mutual recognition/enforcement, in other words, it is concentrated in the phase after the completion of the proceedings and, thus, the connecting point of EU regulations is not the about to be filed or pending civil action, the ideal source of law placement of the integration of concentrated regulation is provided by the Code of Civil Procedure. With respect to EU sources primarily applicable to actions to be filed and pending actions, it would be appropriate to decide, at the level of the Concept, whether the concentrated, chapter-level integration of these rules into the Code of Civil Procedure should take place, and if so, whether only through periodically updated EU sources of law references or through a more explanatory and detailed substantive regulation.

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