DEVELOPMENT OF JUSTICE AND HOME AFFAIRS COOPERATION BETWEEN 2004 AND 2009 IN THE EUROPEAN UNION*

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Introduction

The so-called 'enlargement process' was an essential factor between 2004 and 2005 in the development of the European Union, the result of which was that in 2004 ten new Member States and in 2007 two other Members States joined the EU. The enlargement process, which increased the number of the Member States from 15 to 27, unlike the previous enlargements, was based on a more refined set of criteria[1] and a more structured preparation period.[2] In the area of justice and home affairs cooperation it meant the systematic screening of the legislation of the applicant countries, which ensured the full transposition of the EU acquis at the date of the accession. The enlargement although implied that as well that the justice and home affairs cooperation in the area of the implementation of freedom, security and justice must be achieved through paying regard to the peculiarities of 27 jurisdictions, which presents a great challenge to the European Union and the Member States and requires the creation of new forms of the justice and home affairs cooperation and of their legal grounds. The present paper aims to give an overview on the processes and changes in the area of justice and home affairs cooperation in the European Union from the date of the accession of Hungary[3] to the European Union, that is, in the past 5 years.

I. Major factors determining the justice and home affairs cooperation

Chiefly two major factors determined the justice and home affairs cooperation[4] in the European Union between 2004 and 2009 besides the massive enlargement mentioned

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* For the present paper I used the background material prepared by the co-workers – Petra Jeney, Péter Stauber, Adrienn Szabó, Nóra Klebercz, Anna Gyöngy, Tímea Makra and Helén Gyovai – of the Department of Justice and Home Affairs Cooperation and the Department of Immigration of the Hungarian Ministry of Justice and Law Enforcement.

[1] Copenhagen criteria, European Council, 1993

[2] It was based on the Cannes White Paper adopted by the Council in 1995 and the Agenda 2000 of 1997

[3] 1 May, 2004

[4] The justice and home affairs cooperation, as a policy of the Third Pillar of the European Union, was introduced by the Treaty on European Union (also known as the Maastricht Treaty). Pursuant to the Treaty of Amsterdam, certain areas of the cooperation were shifted under the Community Pillar, while others still stayed under the First Pillar and the general name of the area became the Area of Freedom, Security and Justice. However, in the European Union terminology the notion of 'justice and home affairs cooperation' is still extensively used, therefore in the present paper this simpler

above. One factor included the efforts made to modify the founding Treaties within the framework of the Constitutional Treaty and then the Reform Treaty of Lisbon while the other factor included the Hague Programme, which was the thematic program of the justice and home affairs cooperation between 2004 and 2009.

In the present paper at first we are going to focus on the effects of these 2 determining factors which establish the framework of the justice and home affairs cooperation, and then we are going to concentrate on the certain areas of cooperation.

1. The reform of the founding Treaties (Constitutional Treaty, Reform Treaty, Treaty of Lisbon)

The comprehensive reform of the Treaty on European Union and the Treaty establishing the European Community had been on the agenda since 2000. The Laeken Declaration[5] defined those problem areas in 2001, for which the European Convention[6] had to find effective solutions[7]. As a result of the one and a half year operation of the European Convention the Constitutional Treaty was passed and signed on 29 October, 2004, which would have brought about the institutional reform of the EU, the incorporation of the Charter of Fundamental Rights of the European Union and several other new initiatives of great importance and which would have changed considerably the regulation of freedom, security and justice. After the failure to ratify the Constitutional Treaty by all Member States, namely, that the referendums held in the Netherlands and France rejected the Treaty, the European Council outlined the intention to adopt the so-called Reform Treaty instead of the Constitutional Treaty in 2007 in Berlin.
The Reform Treaty was signed by the heads of government on 13 December, 2007 in Lisbon, which is also called the Lisbon Treaty – following the tradition that Treaties are named after the location of the signing. The Reform Treaty – provided it comes into effect[8] - will bring about material changes in the justice and home affairs cooperation, it will terminate the present division between the First and the Third Pillars[9] and it will result in

expression is going to be used throughout, including activities of the European Union as a whole, that is, the activities of the First and Third Pillar as well.

[5] The Laeken declaration, SN 300/1/01 REV

[6] The European Convention of 28 February, 2008 was charged with the task to making proposals for the founding treaties and the institutional reform of the European Union, and also to draw up an amended constitution.

[7] Solutions for: more precise division of competences between the European Union and the Member States, simplification of legal measures of the European Union and the establishment of a more democratic, transparent and effective European Union

[8] After Ireland rejected the Treaty of Lisbon in a popular referendum in the summer of 2008, the ratification process came to a halt, but another referendum is likely to be held in 2009.

[9] Under the now effective regulations, the so-called Community Pillar deals with visa, refugees, immigration and free movement of persons, judicial cooperation in civil matters and customs cooperation. The police and judicial cooperation in criminal matters still belongs to the Third Pillar under the Treaty of the European Union. The Lisbon Treaty eliminates the pillar structure and the regulations concerning justice and home affairs will come under Articles 63-69 of the Lisbon Treaty.

changes in areas of the institutional framework, procedure and competences. From an institutional point of view it should be emphasized that the European Court of Justice will have an enlarged jurisdiction, which includes jurisdiction over measures of the Third Pillar.[10] The participants in the decision-making within the Council will also change with the setting up of COSI.[11] In the decision-making process in the area of Freedom, Security and Justice the standard procedure will be co-decision, which provides an enhanced role to the European Parliament.[12] The national parliaments will take part in legislation – although only indirectly – through watching over the principles of subsidiarity and proportionality.[13] In issues of justice and home affairs the general decision-making within the Council of Ministers will be by qualified majority voting, the right of initiative of the Member States will narrow, since only seven Member States may present a proposal.[14]

In the event of the initiation of the emergency brake mechanism[15], the European Council will play an active part in the legislative process in the area of justice and home affairs cooperation, since it may debate on actual drafts and operative issues. Another essential change is the unification of legal instruments. Instead of the former Third Pillar legal instruments (e.g. framework decision), in the area of the justice and home affairs cooperation the general legal instruments (regulation, directive, decision) are to be applied.

As a summary it can be established that the Lisbon Treaty brings significant change in the justice and home affairs cooperation. On the on hand, with the abolishment of the pillar division in the European Union the distinct characteristic of this area and its state of being outside the scope of community law will end. In the course of the justice and home affairs cooperation the legal instruments adopted on the basis of the new legal grounds will completely correspond to the Community acquis and the principles of the community law

[10] In principle, the jurisdiction of the European Court of Justice will cover all areas of cooperation. Therefore all legal measures adopted within the justice and home affairs cooperation will be subject to judicial review. An action for failure to fulfill obligations can be brought against Member States which fail to implement certain directives or framework decisions, another action can be brought for the annulment of a measure which is contrary to Community law and lower level national courts may also turn to the Court for preliminary ruling from now on. The jurisdiction of the Court is only limited by Article 240b of the Treaty of Lisbon under which the European Court of Justice shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security and under Article 10 of the Protocol (10.) on Transitional Provisions the Court may suspend the review of legal measures of the Third Pillar which were adopted before the Treaty of Lisbon came into effect for five years.

[11] Article 61. D, Treaty of Lisbon

[12] Article 69. B, Treaty of Lisbon

[13] See Protocol No 1 and No 2 annexed to the Treaty of Lisbon

[14] Despite the 'communitization' of the Third Pillar, the Commission does not have the exclusive right to initiate legislation. However, the right of the Member States to do the same does narrow, since until now, any Member State or the Commission could initiate legislation (at present regulated in Article 34 (2) in TEU), but the Treaty of Lisbon stipulates that ¼ of the Member States or the Commission can initiate legislation.

[15] Treaty of Lisbon Article 69 (3)

(supremacy, direct applicability) must be fully applied to the legal instruments. They will have precedence over national laws and they can be referred to even in the lack of national transposition. Thus the current form of intergovernmental cooperation, which was strengthened by unanimous decision-making, special legal measures and the limited scope of jurisdiction of the European Court of Justice, will lose its integrity. The 'communitisation' of the Third Pillar fits the EU integration trend and this phenomenon is reflected in several decisions[16] of the European Court of Justice. The active participation of the LIBE committee of the European Parliament and the fact that the European Commission transformed certain framework decisions into directives also confirm its importance.

2. The Hague Programme

The Hague Programme[17] determined the cooperation in the Third Pillar of the EU in the past years, which set objectives for the period of 2005-2009 and carried on the aims and initiatives[18] set out in the Tampere programme and its action plans[19]. The Introduction of the Hague Programme establishes that the security of the European Union and its Member States has acquired a new urgency, especially in the light of the terrorist attacks in the United States on 11 September 2001 and in Madrid on 11 March 2004. The citizens of Europe rightly expect the European Union, while guaranteeing respect for fundamental freedoms and rights, to take a more effective, joint approach to cross-border problems such as illegal migration, trafficking in and smuggling of human beings, terrorism and organized crime, as well as the prevention thereof. Similarly to the Tampere programme, for the implementation of the Hague Programme the European Council and the European Commission adopted an Action Plan, which contains the detailed measures for the implementation of the priorities and a timetable for the adoption and implementation of measures.
The objective of the Hague Programme is to strengthen freedom (Title 3, Article 1), security (Title 3, Article 2) and justice (Title 3, Article 3). The strengthening of freedom

[16] In Case C-176/03 Commission v Council (judgment of 13 September, 2005) the European Court of Justice clarified the division between the First and Third Pillar competences regarding criminal measures. The judgment establishes that neither criminal law nor the rules of criminal procedure fall within the Community's competence unless the power is expressly conferred on it. Community legislature therefore may only take measures which relate to criminal law, if it absolutely necessary in order to resolve serious malfunctions in the application of Community objectives or to ensure the full effectiveness of some Community policies, including policies on freedom. See also Case C-440/05.
[17] The Programme was drafted by the Justice and Home Affairs Council, and then adopted by the Council for European Integration on 4-5 November, 2004. The English version can be found at http://www.statewatch.org/news/2008/aug/hague-programme.pdf
[18] Communication from the Commission to the Council and the European Parliament - Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations {SEC(2004)680 et SEC(2004)693}
[19] Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union (2005/C 198/01)

includes the management of migration flows, which is one of the most important aim to accomplish, while in the area of the strengthening of security the main goal is to achieve the principle of availability, which became a defining principle in the Hague Programme, just as the principle of mutual recognition became one of the Tampere programme. The key objective of the strengthening of justice in the Hague Programme is still the realization of cooperation based on 'mutual recognition' and mutual trust.

When assessing the Hague Programme it should be emphasized that it is quite an ambitious program, and it was clear even at the time of its adoption that when the 5-year period would over there would be still some issues to tackle. On the one hand, the Hague Programme successfully defined the political orientations of the area of justice and home affairs, primarily the need for greater internal security. These orientations remained feasible provided we put them in the appropriate light. On the other hand, the Programme is still defining due to its detailed provisions and clear structure. One of the indicators that the Programme was successful is that the preparation of the next 5-year programme in the area of justice and home affairs will be based on the collection of those elements of the Hague Programme which have not been achieved yet.

Cooperation in the area of justice and home affairs in the European Union. The cooperation in the area of justice and home affairs have become one of the most important policies of the European Union, especially through the implementation of the Hague Programme. The time of the accession of the new Member States and the beginning of the implementation of the Hague Programme overlapped, therefore it had a negative impact on this period in the justice and home affairs cooperation.

The new Member States could participate in the cooperation in the justice and home affairs on the basis of a ready-made action plan, they could not contribute to the formation of the Programme. The number of the Member States had grown to 25 and to 27 in 2007 and this fact had an inevitable impact on the legislation of the European Union. Due to the enlargement, the legislative process of the Union consisting of 27 Member States became slower due to unanimous voting system and several drafts were rejected by reason of the diverse interests of the Member States (and not only the new ones). Not once the safeguard clause had to be applied against those new Member States which joined the EU in 2004 and the past one short year since becoming members of the Schengen area proves that the new Member States meet the requirements of the Union even in the form of a closer cooperation in internal security.

II. The transformation of certain areas regarding justice and home affairs between 2004-2009

1. Police and internal security cooperation

The role of police and internal security cooperation has gained great importance in the past few years, and the quantity and significance of legislation in this area is growing rapidly. Naturally, the root cause of this growth is the global security environment which changed dramatically since 11 September, 2001, which has a direct impact mainly on the influential,

'old' and big Member States. The politicians of said states are seeking adequate solutions to the new threats at the Union level as well. Since the beginning of the 1990s when the Amsterdam Treaty came into effect it can be concluded that a great leap forward has been taken in the area of cooperation. Perhaps not the legislative aspect is the most important outcome here, but the fact that a common way of thinking and acting became accepted at a Union level regarding issues of internal security. It is also important that the law enforcement authorities, while performing their police and internal security duties, instead of focusing only on national interests, which are traditionally accepted as part of the national sovereignty, take into consideration the trans-European aspect, as well. This tendency is likely to increase in the future.

In the area of internal security cooperation the principle of availability defined in the Hague Programme gained only slow recognition. In 2005, a group called the 'Friends of the Presidency' examined the prospect of the implementation of the principle, it prepared a report[20] on its findings which was the basis of an extensive draft framework decision[21] proposed by the European Commission. The substantive debate on the draft although did not take place, since the majority of the Member States declared that regarding the exchange of law enforcement information, the regulation of the six key areas of information (DNA; fingerprints; ballistics; vehicle registrations; telephone numbers; other telecommunications data and minimum data for the identification of persons (identity, address) must be developed gradually, one by one.

After lengthy preparations two important developments were made in the implementation of the principle. The Council adopted *Council framework decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union*[22]. There are two major developments of the framework decision. One is that it standardizes the manner of the exchange of information, namely, it prescribes the use of forms when requesting information and intelligence [Article 5]. The other is that it shortens the deadline for the response to requests – the Member States have to respond to urgent requests within 8 hours, but not later than within 2 weeks [Article 4 Section 2]. It also defines the principle of national treatment as a basic one in Article 3, which means that Member States shall ensure that conditions not stricter than those applicable at national level for providing and requesting information and intelligence are applied for providing information and intelligence to competent law enforcement authorities of other Member States. The Member States have to implement the framework decision 2006/960/JHA before the end of 2008. Hungary complied with this provision by the modification of the Acts of 2002 of LIV and 2003 of CXXX within the deadline.

[20] the part of it which is accessible to the public can be found at http://register.consilium.europa.eu/pdf/en/05/st13/st13558.en05.pdf

[21] Proposal for a Council framework decision on the exchange of information under the principle of availability COM/2005/0490 final

[22] HL 2006 L 386, 29 December, 2006, 89-100.

Another important development is that *by the transposition of the Prüm Treaty into EU law*[23], from the six areas of information in three areas (DNA, fingerprints and vehicle registrations) the implementation of the principle of availability may be realized in a couple of years. The Prüm Treaty and subsequent decisions following its footsteps bring new perspectives to the cross-border exchange of information. In the three areas of information mentioned above, the law enforcement authorities may conduct automated searches.
It can be concluded that the full implementation of the availability principle is due only by a later date and for the time being to a limited extent compared to the original aims. In the next few years one of the most important aims in the new program which will replace the Hague Programme will be to carry on the working processes, to make available those areas of information which are essential in criminal prosecution and to develop technological environment and communication technology, which raises the issue of the EU standardization of minimum data contained in national registers and also the creation of trans-European databases.

Under the Treaty of Prüm on-line exchange of information will be provided by August, 2011 and its provision will be one of the major responsibilities of the Hungarian EU presidency. The growing significance of the exchange of criminal information is reflected in the fact that the Council set up a working group for the purpose of dealing with practical aspects of the implementation of the Treaty of Prüm and the framework decision of 2006/960/IB, and also to help the Member States resolve the practical difficulties. It is also an important development that under Article 2 Section 3 of the Hague Programme the Europol Convention and its protocols will be replaced by a Council decision, thus Europol will become an EU agency in the near future. Another significant achievement is that the Council decision extends the powers of Europol: while at present its sphere of competence is limited to terrorism and organized crime, in the future it will extend to all such serious crimes, which affects at least two Member States (provided the joint action of the Member States is required in the investigation). Taking into consideration all these factors, an evolving role of Europol in cooperation is to be expected in the next few years, nevertheless no executive powers are to be granted to it therefore it will not become a 'European FBI'.

Finally, mention must be made of the fight against terrorism, which is one of the most important recent aims of EU cooperation regarding internal security. Article 2 Section 2 of the Hague Programme dealt with the combating of terrorism, but naturally, we can find objectives and measures in different parts of the Programme as well which may bear relevance to the fight against terrorism. Article 2 Section 2 states that effective prevention and combating of terrorism in full compliance with fundamental rights requires Member States not to confine their activities to maintaining their own security, but to focus also on the security of the Union as a whole. Pursuant to this regulation the Programme sets out one of its major aims, that is, it obliges the Member States to use the powers of their intelligence and security services not only to counter threats to their own security, but also, as the case may be, to protect the internal security of the other Member States. In essence, the Programme hereby aims to establish a community level cooperation in the area of

[23] 2008/615/JHA and 2008/616/JHA, 23 July, 2008, under the Decisions the deadline for the establishment of on-line access of databases is August, 2011.

intelligence and security services, which constitutes a new part in the activities of the EU. It includes that under the Programme with effect from 1 January 2005, SitCen will provide the Council with strategic analysis of the terrorist threat based on intelligence from Member States' intelligence and security services and, where appropriate, on information provided by Europol.

The Programme considers the elaboration of a common EU approach regarding airline passenger data a necessity, therefore a framework decision is now being drafted on the establishment of an EU database of airline passenger data (PNR). The Programme stresses the importance of measures *to combat financing of terrorism*. Pursuant to the Programme the Commission is invited by the Council to make proposals aimed at improving the security of the storage and transport of explosives as well as at ensuring traceability of industrial and chemical precursors (substances from which other substances are formed). It also states that the Council should, by the end of 2005, develop a long-term strategy to address the factors which contribute to radicalization and recruitment for terrorist activities. We should mention also two other EU framework documents on the combating of terrorism, which were drafted under the British presidency. One of these documents is the *European Union Counter-terrorism Strategy*[24], the other is the European Union Strategy for Combating *Radicalization and Recruitment to Terrorism*[25], both of which were adopted on 1-2 December, 2005 by the Council.

In the course of the legislative process which was initiated by the Hague Programme the Council decision 2005/671/JHA of 20 September 2005 *on the exchange of information and cooperation concerning terrorist offences 'Third Money Laundering Directive'*[26], the so-called *Regulation on 'cash control'*[27] and the Regulation on information on the payer accompanying transfers of funds[28] were adopted. We should also mention that on 6 November, 2007 the Commission adopted a package containing a series of proposals, which includes the draft modification of the Council Framework Decision 2002/475/JHA on combating terrorism, a proposal on a comprehensive framework decision on airline passenger information and a communication and action plan on enhancing the security of explosives.

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[24] 14469/4/05 REV 4 The European Union Counter-Terrorism Strategy, Brussels, 30 November 2005

[25] 14781/1/05 REV 1 The European Union Strategy for Combating Radicalization and Recruitment to Terrorism, Brussels, 24 November 2005
Its main elements include: • disrupting the activities of the networks and individuals who draw people into terrorism • ensuring that voices of mainstream opinion prevail over those of extremism • promoting yet more vigorously security, justice, democracy and opportunity for all.

[26] Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing

[27] Regulation (EC) No 1889/2005 of the European Parliament and of the Council of 26 October 2005 on controls of cash entering or leaving the Community

[28] Regulation (EC) No 1781/2006 of the European Parliament and of the Council of 15 November 2006 on information on the payer accompanying transfers of funds

One of the most important elements of said package was the proposal to amend the Council Framework Decision on combating terrorism, which was initiated based upon the recognition of the fact that modern information and communication technologies play an important role in the propagation and intensification of the terrorist threat. The terrorists use the Internet as a means of dissemination of propaganda aiming at mobilization and recruitment as well as instructions and online manuals intended for training or planning of attacks. In the light of these factors the Commission proposed to update the Council Framework Decision 2002/475/JHA and also to align it with the Council of Europe Convention on the prevention of terrorism, through including public provocation to commit terrorist offences, recruitment for terrorism and training for terrorism in its concept of offences linked to terrorist activities. The Commission expects that by the amendment of the Council Framework Decision on combating terrorism, the harmonization of national provisions on public provocation to commit a terrorist offence, recruitment for terrorism and training for terrorism can be achieved, the result of which that these forms of behavior are to be punishable, even when they are committed through the Internet. The proposed amendment is also intended to ensure that existing provisions on penalties, liability of legal persons, jurisdiction and prosecution applicable to terrorist offences, apply also to these forms of behavior. The Council adopted the proposed amendment of the Framework Decision on 28 November, 2008 (2008/919/JHA) essentially in accordance with the proposal of the Commission, although in the case of public provocation to commit a terrorist offence, it did not require the Member States to take measures in contradiction of their constitutional traditions, which was one of the priorities of Hungary as well, since the practice of the its Constitutional Court on the freedom of expression.[29]

2. Borders, Schengen area, Visa

The most important legal instrument adopted in the area of border control after the adoption of the Hague Programme was the Regulation (EC) No 562/2006 on establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), which replaces the provisions for border control of the Convention implementing the Schengen Agreement.

In the Hague Programme the European Council requested the Commission to submit an evaluation of the FRONTEX Agency, which the Commission presented as a part of the 'Border Package', outlining short-term and long-term recommendations to FRONTEX.
The short-term recommendations are likely to be achieved based on the present mandate of FRONTEX. The short-term recommendations include: facilitation and rendering of the measures of FRONTEX and the Member States more effective, setting up specialized branches of the Agency in the Member States for the practical organization of joint operations and pilot projects, training border guards, carrying out risk analyses and acquiring own equipment. The long-term recommendations emphasize that the role of the Agency should be expanded as necessary in response to concrete needs, its potential should

[29] Member States shall take the necessary measures to comply with this Framework Decision by 9 December 2010.

be exploited for the benefit of the overall Schengen framework, thus it should participate in the mechanism of the Schengen evaluation and it should also cooperate more closely with third countries. The recommendations also contain the ambitional, although a bit premature idea of the European Border Guard system.

Taking into consideration the provisions of the Hague Programme, the Regulation establishing a mechanism for the creation of rapid border intervention teams and amending Council Regulation No 2007/2004 intends to solve such difficult situations, when a Member State checking and guarding an external border faces a critical situation, which it alone would only tackle with significant difficulties and would generate considerable burden on the Member State. In such a situation at the request of the Member State in question, with the co-ordination of FRONTEX, the intervention team comprising the border guards of the Member States may give assistance to the national border guards on a temporary basis.

In order to contribute to the strengthening of the area of freedom, security and justice and the application of the principle of solidarity between the Member States the European Union established for the period from 1 January, 2007 to 31 December, 2013 the External Borders Fund (hereinafter referred to as 'the Fund'). The Fund expresses solidarity through financial assistance to those Member States that apply the Schengen provisions on external borders. The Fund provides financial assistance for a long period, the resources are distributed to the Member States annually taking into account the length of their external borders and their workload at external borders, airports or consular offices.

By this time is no concrete proposal for the supplementation of the Schengen evaluation mechanism with the verification of the application of Schengen rules (it is due in February, 2009), although the Commission initiated talks with the experts of the Member States in 2008, but up to now with no tangible results.

The development of the second generation Schengen Information System was regulated in the Council Regulation (EC) No 2424/2001. Pursuant to the Regulation, it is the Commission's task to develop SIS II. Since the adoption of the said Council Regulation the legal instruments[30] of the First and Third Pillars established the legal basis of SIS II. In

[30] - Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II)
- Regulation (EC) No 1986/2006 of the European Parliament and of the Council of 20 December 2006 regarding access to the Second Generation Schengen Information System (SIS II) by the services in the Member States responsible for issuing vehicle registration certificates
- Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II)
- Commission Decisions 2007/170/EC and 2007/171/EC of 16 March 2007 laying down the network requirements for the Schengen Information System

spite of the legal background, the technical development of the system experienced several delays due to the delays in central projects managed by the Commission and the national ones managed by the older Member States. That was the reason why Hungary and the other Member States which joined the EU in 2004, although they were prepared, they could not implement SIS II because it was not yet available. As a temporary solution to the problem, in December, 2006 the Council agreed to prolong the term of SIS I+, thus the extension of the Schengen area was completed. (The project, although it required great efforts and short deadlines, was successful and it was called SISone4ALL.)

The Justice and Home Affairs Council of the European Union adopted SIS II Global Schedule (hereinafter Global Schedule) proposed by the European Commission (hereinafter the Commission) on the Council meeting of 5-6 June, 2008, which confirmed that the planned date of SIS II coming into effect is 30 September, 2009 and also approved the tasks and deadlines regulated in the Global Schedule. However, the proposed date already does not seem to be realistic. Although new date has not been set yet, but the operation of the system is likely to start in the summer of 2010.

Council Regulation (EC) No 2252/2004 on standards for security features and biometrics in passports and travel documents issued by Member States makes it obligatory to include facial images and fingerprints into travel documents. Facial images must be included in the passports within 18 months and fingerprints within 36 months following the adoption of technical specifications regarding facial images and fingerprints. The Commission Decision on technical specifications regarding facial images was adopted on 28 February, 2005, while regarding fingerprints on 28 August, 2006. Pursuant to the regulations the Member States of the EU issue such passports which contain biometric data – at least facial images.

Regarding visa policy the Hague Programme put special emphasis on the Visa Information System (VIS), which intends to facilitate common visa policy, the cooperation between national consular authorities and the exchange of visa data. The legal basis of the application of VIS is Council Decision of 8 June 2004 (2004/512/EC) and also Regulation (EC) No 767/2008 concerning the Visa Information System and the exchange of data between Member States on short-stay visas. Council Decision 2008/633/JHA concerning access for consultation of the Visa Information System by designated authorities of Member States and by Europol for the purposes of the prevention, detection and

- Council Regulation (EC) No 189/2008 of 18 February 2008 on the tests of the second generation Schengen Information System (SIS II)
- Commission Decision of 4 March 2008 adopting the SIRENE Manual and other implementing measures for the second generation Schengen Information System (SIS II) (2008/333/EC) (4 March, 2008) (notified under document number C(2008) 774)
- Commission Decision of March 2008 adopting the SIRENE Manual and other implementing measures for the second generation Schengen Information System (SIS II) (2008/334/JHA) (4 March, 2008)
- Council Decision 2008/839/JHA of 24 October 2008 on migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II) and Council Regulation (EC) No 1104/2008 of 24 October 2008 on migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II)

investigation of terrorist offences and of other serious criminal offences was adopted in 2008. Pursuant to the provisions of the VIS, when a visa application arrives at the visa authority, it has to record the data concerning the application and the applicant, and also the facial image and the fingerprint of the applicant. When the authority decides on the application (issuance of visa, discontinuation of examination, refusal of visa), the authority has to record these data as well. On receipt of each and every application, the visa authority shall check whether the applicant is registered already in the VIS. The operation of the VIS is on a regional basis. In the first designated region (North Africa, the Mashreq countries) the application of VIS is most likely to start in the middle of 2009 in embassies and consulates. Within 20 days from the commencement date of the application of the VIS in the North African region, in the course of extensive border inspection it would be obligatory to check the VIS for the time being on the basis of the number of the visa at all external borders. In the visa issuance of the embassies and consulates the application of the VIS will be gradually completed region by region, altogether in 7 regions. Political consensus will decide in which sequence the regions will apply the VIS. It is quite uncertain when specific regions will start applying the VIS, since it is dependant on whether all embassies and consulates are technically prepared to apply the VIS in the given region. Travellers, besides being checked by the registered number of their visa, will be checked against the VIS regarding their fingerprints from June 2012 at all external borders (in case of air border crossing points fingerprint checks may be introduced in 2010). However, based on information disclosed recently, the fingerprint timetable is likely to suffer delay due to, for example, the delay in the amendment of Common Consular Instructions, therefore the application of VIS in the middle of 2009 in embassies and consulates might be postponed.

In the area of visa reciprocity the Commission put its main emphasis to enable all its citizens to enter the United States without valid visa, while the Member States settled the details by bilateral visa waiver agreements with the United States.

Visa facilitation agreements were adopted in the summer of 2007 between the EU and the Western Balkan countries, Russia, Ukraine and Moldova. In the first half of 2008 the Commission opened dialogues on visa liberalization with five Western Balkan countries and presented detailed roadmaps setting clear requirements in areas such as security of documents, fight against illegal migration and areas of public policy, public security and foreign affairs in order to achieve visa liberalization.

3. Immigration and asylum

The immigration and asylum policy of the EU was influenced by two closely related processes. One was the evaluation and implementation of the aims stipulated in the Tampere Programme[31] in the framework of the Hague Programme, the other was the adoption of the interrelated European Pact on Immigration an Asylum.

Before the Treaty of Amsterdam came into force, immigration belonged to the area regulated in the Third Pillar. Following 1999, it became part of the First Pillar, which means that it became part of the Community area, and the Community adopted several norms on legal and illegal immigration[32], but in the area of economic migration no significant improvement can be observed. However, economic migration makes up a significant part of legal immigration, moreover, economic migration can be regarded as the '*source*' of legal immigration.

Following 2004, two directives of sectoral approach were adopted, and at the same time, requirements were set in connection with the admission and residence of immigrants who entered the EU for economic purposes. One is Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service33, the other is Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research which lays down the conditions for admission of third-county researchers.

With regard to the economic and demographic effects of labor migration, the Commission stressed in its Communication on Community Immigration Policy[34] that the restrictive

[31] A meeting of the European Council held in Finland, on 15-16 October 1999, launched the Tampere Programme on the establishment of an Area of Freedom, Security and Justice. All the participants agreed that persons having refugee status or subsidiary protection status must be protected in all Member States and its guarantees must be established at a Union level. The Tampere summit also called for the development of the following elements: partnership with countries of origin, the establishment of a Common European Asylum System, fair treatment of third country nationals and the management of migration flows.

[32] Pursuant to the provisions of the Tampere and the Hague Programme the most important directives adopted in the area of legal immigration are: Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research; Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service; Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents; Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

[33]This Directive shall apply to third-country nationals who apply to be admitted to the territory of a Member State for the purpose of studies. However, Member States may also decide to apply this Directive to third-country nationals who apply to be admitted for the purposes of pupil exchange, unremunerated training or voluntary service.

[34] Communication from the Commission to the Council and the European Parliament on a Community Immigration Policy;

immigration policy of the past decades cannot be maintained. One the one hand, labor shortages in some sectors are creating difficulties in a number of Member States, on the other hand, migratory pressures from the countries of origin are continuing with an accompanying increase. An increase can also be observed in illegal immigration, smuggling and trafficking. Therefore the Commission suggests opening up '*channels*' for legal immigration.
On the basis of the operational conclusions of the meeting of the European Council held in Tampere, in October, 1999, the Commission proposed harmonized Community standards on the entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities in 2001, but due to the resistance of the Member States the Commission officially withdrew the draft.
In order to facilitate the adoption of a new proposal, within the framework of the 'Green Paper on an EU approach to managing economic migration', the European Commission launched a process of in-depth discussion involving the Member States, other EU institutions, international and civil organizations and other interested parties on the most appropriate form of Community rules for admitting economic migrants from third countries. Therefore the European Council requested the Commission to present a policy plan on legal migration including admission procedures capable of responding promptly to fluctuating demands for migrant labor in the labor market before the end of 2005. The Communication of the Commission on the Policy Plan on Legal Migration[35] in December 2005 proposed those measures which have to be taken in order to fulfill the priorities defined in the Hague Programme.

The policy plan was drafted on the basis of the reflections on the Green Paper. Since most of the Member States did not support the horizontal approach in 2001, therefore the Commission proposed the application of sectoral approach and the elaboration of five new directives.[36] The other significant difference from the 2001 policy plan is that none of the five directives regulate and will regulate the right of residence for people operating as sole entrepreneurs. The European Commission tabled its proposals for the *framework directive*[37] and the *Proposal for a Council Directive on the conditions for entry and residence of third-*

http://eurlex.europa.eu/ LexUriServ/site/en/com/2000/com2000_0757en01.pdf
[35] Communication from the Commission. Policy Plan on Legal Migration COM(2005)
[36] In compliance with the Policy Plan the framework directive contains provisions for the single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State. However, other directives regulate the conditions for the immigration and residing of third country migrants in four employee categories - highly qualified workers, seasonal workers, remunerated trainees and intra-corporate transferees.
[37] Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State {SEC(2007) 1393} {SEC(2007) 1408} /* COM/2007/0638 final - CNS 2007/0229 *

country nationals for the purposes of highly qualified employment[38] on 23 October, 2007, which were accompanied by impact assessments as well.

A political consensus was reached at the COREPER meeting of 22 October, 2008 on the Directive on highly qualified employees. The framework directive is still being discussed in the Council, last time it was the Social Questions Working Party (SQWP) which discussed it on 14 January, 2009. The Czech presidency decided to request the opinion of SQWP concerning the framework directive thus complementing the work of the Working Party on Migration and Expulsion, which is responsible for the discussions on the framework directive. One of the most important achievements in the area of illegal immigration between 2004 and 2009 is the adoption of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. Besides giving full consideration to the principle of non-refoulement, the directive harmonizes national laws in relation to the removal, detention and returning of illegally staying third-country nationals.

Another area of combating illegal immigration is the drafting of the so-called *'sanctions directive'*[39], which intends to harmonize laws on sanctions on employers recruiting illegal third-country immigrants. Several community regulations and directives have been adopted in order to establish a common regulation in the field of immigration and asylum since the adoption of the Tampere Programme of 1999 and the Hague Programme of 2004. One of the aims of the common regulation in the field of immigration and asylum is the establishment of the Common European Asylum System (CEAS) which intends to harmonize national rules concerning recognition and procedure practices by prescribing minimum standards. It must be emphasized that the first phase of the common immigration regulation procedure focused on the adoption of minimum standards, which are to be elaborated in the second phase. The establishment of the System intends to achieve the aim of regarding the European Union as a single protection area and it is based on the application of the Geneva Convention and the common humanitarian values shared by all Member States. Among its major goals we can find the establishment of a common asylum procedure and the establishment of the uniform refugee status and the subsidiary protection status. In order to achieve these aims a common legal framework is being established and several directives and regulations have already been adopted. The so-called 'Tampere milestones' provided the basis for the development in the Third Pillar on Justice and Home Affairs Cooperation, therefore an agreement has been reached on the launch of the second phase of the Programme for the period of 2004-2009.

The key aims of the Programme are as follows:

- Practical cooperation between Member States based on solidarity and fair sharing of responsibility.

[38] Proposal for a Council Directive on the conditions for entry and residence of third-country nationals for the purposes of highly qualified employment from the Commission {SEC(2007) 1382}{SEC(2007) 1403}

[39] Proposal for a directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals

– Establishment and operation of the Common National Information Center.
– Establishment of the European Asylum Support Office in order to supervise the cooperation between the Member States and the Common European Asylum System
- Upgrading the quality of legislation in compliance with Community law. Through achieving coherence and quality EU legislation, secondary migration and the submission of repeated applications could be prevented.
- Exchange of information and opinions concerning statistical data in the field of asylum and migration. In this field the Council adopted a regulation on statistics on migration and international protection in 2007, which aims to compile data on the legislation of the Member States.
- Establishment of a common information center which would facilitate the flow of information between the Member States concerning immigration and refugees in the Member States.
- Emphasizing the external dimensions of immigration and asylum policy, since while the European Union spends several millions of Euros on asylum procedures, many refugees are still victims of poverty and persecution in their countries of origin. The concept of sharing the responsibility at an international level is particularly emphasized in the development of durable solutions, which are manifested in Regional Protection Programmes developed in the course of close cooperation with UNHCR and third countries. These programmes contain actions on the improvement of human rights and the strengthening of protection capacity in the countries of origin and also programs on resettlement in third countries. The Commission issued a communication on regional protection programmes in 2005, which underlined the necessity of providing direct and practical support and also of the development of local infrastructure.
- Establishment of the Aeneas program in connection with the regional programmes mentioned above, which would provide technical and financial support to third countries with a budget of 250 million Euros for the period between 2004 and 2008. The program enables the Member States to cooperate in the fields of legal and illegal immigration, the readmission and reintegration of immigrants, trafficking in and smuggling of human beings and the international protection of refugees and people forced to leave their homelands.
- Integration of refugees and persons having subsidiary protection, for which it is the European Refugee Fund which will provide funding.
- Protection of vulnerable groups, which entails the special treatment of women, children, disabled persons, single parents, and victims of any form of serious psychological or physical violence and the provision of special education.
- Dealing with mixed immigration flows at the external borders, which involves the identification and separation of persons who may need international protection and those who are illegal immigrants and aims to reduce secondary migration as a priority.

In order to achieve these aims, the European Council invited the Commission to make a report on the legal instruments of the first phase by 2007 and called for the submission of the second-phase instruments and measures by the Commission to the Council and the European Parliament with a view to their adoption before the end of 2010. At the request of the European Council, the Commission presented its Green Paper on the future common European asylum system in 2007, and the reflections given to the issues raised in the Paper provided the basis for the proposal of the policy plan on asylum on 17 June, 2007, entitled 'An Integrated Approach to Protection Across the EU'.[40] In the Policy Plan on Asylum, the Commission lists those measures which the Commission intends to propose to the Council and the Parliament in order to fulfill the aims defined in the second phase of the Common European Asylum System. The document suggests that perhaps the completion of the second phase of the Common European Asylum System might have to be rescheduled for 2012.

The Paper defines three strategic goals and measures necessary to reach them:

- Further approximation of national asylum procedures in order to improve the quality of and harmonize the international protection granted by the Member States. The Commission proposed the amendment of the directive on reception of asylum seekers[41] in 2008, and it is also going to propose the amendment of the directive on minimum standards on procedures[42], the Eurodac regulation[43] facilitating the application of the directive on minimum standards on procedures and also the qualification directive[44] in 2009. The Commission is going to launch a study on approximation of national statuses of protection in 2009, and another study in 2010 on the transfer of international protection mechanism.

- Effective practical cooperation between national administrations. The Commission believes that greater cooperation between national administrations would enhance the convergence of national practices. In compliance with the Council Conclusions of 18 April, 2008 on practical cooperation in the field of asylum, the Commission prepares a feasibility study on the establishment of the European Asylum Support Office. In accordance with the Policy Plan on Asylum, the Commission proposes the establishment of the Office in the second half of 2008 and in the meanwhile it carries on the present coordination activities.

- Ensuring a higher degree of solidarity and burden sharing between the Member States and also between the European Union and third countries. The Commission believes that the

[40] Communication from the Commission Policy plan on Asylum – An Integrated Approach to Protection Across the EU COM(2008) 360

[41] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers

[42] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status

43 Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention

44 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

means of ensuring a higher degree of solidarity between the Member States is the amendment of the Dublin regulation[45] in the autumn of 2008 and the establishment of new solidarity mechanisms including the creation of asylum expert teams in 2008 as well. In 2009 the Commission is going to launch a study on joint processing of asylum applications, review the measures of financial solidarity programmes, including the European Refugee Fund, and examine the possibilities of funding the resettlement of persons having international protection status within the EU. On 3 December, 2008 the Commission published its proposals to amend the Dublin Regulation, the Directive on Reception Conditions for asylum-seekers and the Eurodac Regulation, which the working groups are going to start discussing in the first half of 2009. No proposal has been made on the European Asylum Support Office yet.

European Pact on Immigration and Asylum

The French Presidency's Draft of the European Pact on Immigration and Asylum was adopted by the European Council in the form of presidency conclusions on 15 October, 2008. The Pact summarizes and makes the guidelines of legislation and strategic work concerning immigration and asylum policy political priorities, strictly defining the competence of the Member States and the Community regarding immigration and asylum policy and establishing the main directions and limitations of the further harmonization of immigration and asylum policy. The Pact sets a ground for the immigration and asylum part of the post-Hague Programme, therefore it may influence the justice and home affairs policy of the European Union on the long run. While drafting the Pact, the drafters took the two Commission communications[46] on immigration and asylum policy of 17 June, 2008 in consideration as well. The merit of the Pact is that it summarized and made the current processes more visible and it also answered to the negative reactions on the '*return directive*' from third countries by way of introducing the different elements of the immigration policy of the European Union. The Pact imposes certain obligations on the Member States to such extent that the Pact should be the inevitable starting point when defining Community and national strategies and also presidency priorities. The first part of the Pact on legal migration, for example, emphasizes the necessity to facilitate the reception of highly qualified workers, and the return directive was adopted by the Member States in line with the Pact.

The Pact defines five major goals: 1) to organize legal immigration, to take account of the priorities, needs and reception capacities determined by each Member State and to encourage integration, 2) to control illegal immigration by ensuring that illegal immigrants return to their countries of origin or to a country of transit, 3) to make border controls more

[45] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national

[46] Commission Communication on a common immigration policy for Europe (2008)359, Commission Communication on the Policy Plan on Asylum (2008)360.

effective, 4) to construct a Europe of asylum, 5) to create a comprehensive partnership with the countries of origin and of transit in order to encourage the synergy between migration and development.

The main components of the major goals are as follows:
1) In connection with the goal to organize legal immigration, to take account of the priorities, needs and reception capacities determined by each Member State and to encourage integration the Pact recalls that it is for each Member State to decide on the conditions of admission of legal migrants to its territory and, where necessary, to set their number. The Member States shall implement such immigration policies which facilitate to increase the attractiveness of the European Union for highly qualified workers and take new measures to facilitate the reception of students and their movement within the EU, nevertheless, the Pact emphasizes that the harmful effects of brain drain should be reduced. Beyond that, the Pact encourages Member States to regulate family migration more effectively. The Pact also invites Member States to establish such policies which promote the social and economic integration of immigrants in their host countries and which are based on the migrants' rights and duties. In this respect the Pact particularly emphasizes the importance of the exchange of information on best practices.

2) Control illegal immigration, in particular, by ensuring that illegal immigrants return to their countries of origin or to a transit country. This chapter is based on three basic principles: illegal immigrants must leave the territory of the European Union either voluntarily or they must be expelled, the Member States have to recognize expulsion decisions made by other Member States and all Member States are required to readmit their own nationals who are staying illegally on the territory of another State. In order to control illegal immigration, this part of the Pact emphasizes the necessity to conclude readmission agreements at EU or bilateral level and to achieve greater cooperation between the countries of origin and of transit under the global approach to migration. The Pact invites Member States to devise national systems to assist voluntary return and it also emphasizes that Member States shall take rigorous action against those who exploit illegal immigrants. We suggested supplementing the chapter of the Pact on the control of illegal immigration and effective expulsion of illegal immigrants with provisions for setting up incentive systems to assist voluntary return. The supplement can be found in paragraph f).

3) The chapter entitled ’Make border controls more effective’ unequivocally states that border control is the responsibility of the Member States. It emphasizes that the issue of biometric visas shall be generalized by 1 January, 2012 at the latest, and that the quality and frequency of the Schengen evaluation process must be improved as well. The Pact also invites Member States to improve cooperation and to set up joint consular services for visas. The pact examines the possibility of establishing specialized offices of Frontex and also the possibility of setting up a European system of border guards.

4) In order to construct a Europe of asylum the Pact determines the establishment of the European Asylum Support Office by 2009 a priority. The Office will co-ordinate between the Member States so as to make the exchange of information more effective and rapid and also to develop practical cooperation between national asylum authorities. Moreover, it

stresses that a single asylum procedure must be devised in 2010 if possible, but in 2012 at the latest, and uniform status for refugees and subsidiary protection status must also be established. The Pact intends to make the secondment of officials between the Member States and the effective and more rapid mobilization of existing EU programmes possible based on the solidarity principle, provided a Member States faces a massive influx of asylum-seekers. Pursuant to the Pact and on the basis of the solidarity principle, the beneficiaries of international protection must be given the opportunity to move from a Member State which is faced with specific and disproportionate pressures on its national asylum system to such other Member States which voluntarily accept their admission.
The Pact urges to strengthen cooperation with the Office of the United Nations High Commissioner for Refugees in the course of regional protection programmes[47] and to conclude agreements on facilitating the protection capacity of third countries.

5) The chapter entitled 'Create a comprehensive partnership with the countries of origin and of transit to encourage the synergy between migration and development' intends to build and strengthen close partnerships with third countries. The Pact does not only concentrate on the application of traditional strategies of development policy, but also suggests the application of forms of temporary or circular migration in this context and it also proposes to pursue policies of cooperation with the countries of origin. It clearly states that migration must become a major component in the external relations and development policy of the European Union.

4. Protection of personal data

One of the priorities of the Hague Programme focused on the exchange of information between law enforcement authorities.[48] The Commission prepared its *Proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters*[49] on the basis of the said

[47] The goal of the regional protection programmes is to facilitate the protection capacity of third countries with the help of the following main actions: improvement of the general protection capacity in the host country, establishment of an effective procedure for determining refugee status, improvement of the conditions of the refugees and voluntary commitment on the part of the Member States to provide resettlement of refugees. The participating regions in the regional protection programmes - the Western Newly Independent States (Ukraine, Moldova, and Belarus) and the African Great Lakes region (Tanzania) – were determined on a proposal by the Commission. Hungary takes part in the Ukrainian regional protection programme through developing Ukrainian host institutions of refugees and immigrants and supporting the improvement of 'medical examination centers' at the Eastern borders of Ukraine.

[48] Communication from the Commission to the Council and the European Parliament: The Hague Programme: Ten priorities for the next five years - The Partnership for European renewal in the field of Freedom, Security and Justice COM(2005) 184 final, Brussels, 10.5.2005

[49] Proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters Brussels, 4.10.2005 COM(2005) 475 final 2005/0202 (CNS)

priority of the Hague Programme. Its recent adoption[50] can be regarded as a significant step in the Third Pillar cooperation. The Framework Decision applies only to data gathered or processed by competent authorities for the purpose of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties and its scope is limited to the processing of personal data transmitted or made available between Member States. The adoption of the framework decision was preceded by fierce disputes. Although the framework decision was long-awaited and provided practical regulation, new problems arise in the area of data protection in the Third Pillar, since the Framework Decision has not given answers to a number of current questions due to several years of discussions and provisions not implemented in the Framework Decision in order to reach consensus.[51]

We should also note when considering the period in question, that information and telecommunications technologies have developed rapidly in the past few years, which posed and will pose new challenges in the area of data protection even in the future. However, in practice the Member States use different, incompatible standards in communication, which might hinder effective cooperation between them. In the area of data protection, one of the most significant regulations that were adopted since Hungary joined the EU is 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. This Directive aims to harmonies Member States' provisions concerning the obligations of the providers of publicly available electronic communications services or of public communications networks with respect to the retention of certain data which are generated or processed by them, in order to ensure that the data are available for the purpose of the investigation, detection and prosecution of serious crimes.[52] The necessity of the adoption of the Directive was confirmed by the application of various national practices and the diverse, though proportional needs of the law enforcement authorities.

It should also be emphasized that data protection within the area of police and judicial cooperation in criminal matters, especially in connection with gathering, processing and retaining information for the purpose of prosecuting criminal offences is one of the most important issues at Community level and has become one of the major factors in the relationship between the European Union and third countries. This tendency considerably affects the future of data protection in Europe. The Community must require an adequate level of protection in the cooperation with third countries, such protection that is granted to its own citizens. Not every third country is able to provide an adequate level of protection,

[50] Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters

[51] The Third Pillar Framework Decision on the protection of personal data covers only cross-border exchange of data, therefore it does not affect national rules on data processing. It is the exclusive responsibility of the Member States to establish what the adequate level of protection is, however, it would be more efficient to establish at an EU level whether a given Member State or its data processing provide adequate protection.

[52] HL L 105 , 13/04/2006 pg. 0054 - 0063

and even if they are, they have such connections to other countries, which are not able to meet the requirements, therefore it is possible, though indirectly, that the transferred and processed data will not have the adequate level of protection. The European Union intends to find solutions also for this problem, therefore the European Union and the United States jointly operate the High Level Working Group on Data Protection, which tries to reveal and record common principles of data protection and to agree on measures to implement these principles in different forms of cooperation.

5. Judicial cooperation in civil and criminal matters

In the area of judicial cooperation the efforts made so as to set up the European Area for Justice resulted in the most important achievements between 2004 and 2009. However, in order to create such a common European area for justice, where access to justice is fully available to everyone, including rendering and executing court decisions, thus it is not limited to mutual recognition and enforcement of decisions, several obstacles must be overcome.

Judicial cooperation in civil matters

In the area of judicial cooperation in civil matters, the Hague Programme defined the completion of the implementation of the programme on the mutual recognition of civil and commercial decisions a main priority. Although the implementation faced several obstacles, still, the Community made considerable achievements in this area.

In recent years there has been a significant increase in the conflict of laws legislation concerning applicable law, jurisdiction and mutual recognition of decisions.[53] Since regulations in this area have similar subject matters and overlaps may exist, therefore it is worth considering whether consolidation is required for the sake of greater consistency, transparency and easier applicability. A couple of years ago some people voiced their opinion that consolidation might provide added value, but at that time we did not have enough experience regarding conflict of laws legislation. Although consolidation would bring benefits, it would also lead to disputes over issues which have been settled long ago and would probably take a long time as well.

Neither Article 65 of the EC Treaty nor the Treaty of Lisbon provides for the harmonization of rules on civil procedure, however, administrative efforts have been made in order to create a more stimulating environment for entrepreneurs, which leads to voluntary and spontaneous harmonization (e.g. simplification of order for payment procedure, provision of facilities for an automatic administration system).

[53] Rome I (No 864/2007), European Small Claims Procedure (No 861/2007), mediation in civil and commercial matters (2008/52/EC Directive), legal aid (2003/8/EC Directive), insolvency proceedings (1346/2000/EC Regulation)

Although in the area of family law the Brussels II Regulation has neither been amended nor supplemented, the Council formally adopted a Regulation which comprehensively regulates maintenance obligations. The adoption of the Regulation on maintenance obligations is a very important achievement, and the French presidency put an end to years of discussion. Decision making concerning family law is subject to consultation procedure under the EC Treaty, which shows that it is indeed a delicate area. Legal measures aiming to facilitate cooperation in this area might touch upon issues, which are closely connected to the cultural and religious traditions of the Member States, therefore they can only be changed through long term evolution rather than the application of statutory measures. While unanimous decision making may be a necessary tool for maintaining cultural diversity in Europe, it can be an obstacle to the integration to a certain extent since it also implies that only one Member State is able to block decision making. Closer cooperation – the mechanism regulated in the Treaties in order to resolve such problematic situations, might lead to having to take into consideration too many national interests (at any rate, in the area of judicial cooperation in civil matters there are three Member States which have opted out).

European contract law is one of the priorities of the Hague Programme and it is closely related to the review of the consumer law acquis by the Competitiveness Council. However, the ambitious goal under the Hague Programme, that is, that European contract law may be applied by the contracting parties, could not be achieved due to the opposition of the Member States, although a compromise was reached on the basis of the lowest common denominator, which is reflected in the regulations adopted during the Slovenian presidency. Under the related Council documents the objective is not to define a set of rules but to present a 'toolbox' which serves as a guideline for legislators. Its added value will be reflected in its use, that is, this tool will be available to the Commission in order to table more coherent proposals which can be transposed into national laws more easily.

The implementation of e-justice is similar to the area of substantive law in that participation in projects conducted by the Union is not obligatory in principle. However, we support the work of the Information and Communication Technologies Working Group, we are planning developments in areas related to their projects and we are also working on setting up an appropriate legal environment, thus results arising from our activities may improve the everyday life of our citizens. It is in our nation's interest that national developments are implemented in compliance with the European plans.

Judicial cooperation in criminal matters

In order to fully apply the principles of mutual recognition and availability in the field of judicial cooperation in criminal matters, it is essential to build up and strengthen mutual trust between the Member States. Despite the fact that no major achievement has been made compared to the level of cooperation in 2004, it is still an evolving area.
Even if the pillar structure is abolished and some EU organizational hurdles are eliminated, discrepancies will still remain due to the diverse implementation techniques of the Member States. The non-exhaustive list of techniques includes adherence to double criminality in certain cases – owing to the fact that crimes are defined differently in the Member States,

concurrent jurisdiction cases and difficulties arising from the various levels of protection of fundamental rights.

Even in the lack of the cornerstones mentioned above, more and more steps are being taken in order to realize the principle of mutual recognition. Since the Framework decision on the European arrest warrant was adopted in 2002, the Member States have now plenty of experience about the practical application of it. The application of the framework decision is still being assessed by the Member States, therefore some smaller deficiencies have been found in the application arising from the various implementations of the framework decision by the Member States, however the European arrest warrant is now operational. In compliance with the Council Decision concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime[54], by the end of 2008, the authorities participating in the cooperation have either been set up or assigned to this task, based on the CARIN Network. The key factors of the cooperation are the efficient exchange of information and the exchange of best practices. After prolonged debates, the framework decision on the European evidence warrant was adopted, which might become one of the significant legal measures of the cooperation. The adoption of the Framework decisions on mutual recognition concerning decisions on the confiscation of crime-related proceeds and on financial penalties is a great achievement, although in other areas, such as taking account of previous convictions passed by other national courts in new criminal proceedings, executing custodial sentences or detention orders of other national criminal courts in the EU, and imposing suspended sentences or other alternative sanctions, we can also find accomplishment. We must also mention in relation to the principle of mutual recognition that the Framework decision on the recognition and enforcement of decisions rendered in absentia and also the Council Framework decision on the mutual recognition of non-custodial pre-trial supervision measures in the European Union have recently been passed. The Framework decision on the exchange of information extracted from the criminal record is also an essential element of the principle of mutual recognition, since with no information neither an effective criminal cooperation could be achieved, nor the principle of availability could be realized.

One of the strategic aims of the Hague Programme is to enable Eurojust to play a key role in the European judicial cooperation in criminal matters and to exploit the opportunities it provides and also its role shall be strengthened and developed in the cooperation. The Eurojust legislation has recently been amended, although not every ambitious goal has been reached in the course of the discussions, therefore the functions and tasks of Eurojust have not extended significantly. Nevertheless, the Treaty of Lisbon expressly provides for the establishment of the European Public Prosecutor's Office. The establishment of the European Public Prosecutor's Office has generated a heated debate in the European Union

[54] Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime

since its implementation raises several issues. Under the Council Decision adopted in the end of 2008[55], the European Judicial Network maintains privileged relations with Eurojust based on consultation and complementarity. The European Judicial Network was set up in order to facilitate cooperation between the national judicial authorities through contact points and national correspondents, which enables to establish the most appropriate direct contacts. It also helps to improve the exchange of legal and practical information and also the judicial cooperation.

There are other requirements than the ones already described in the area of judicial cooperation in criminal matters regarding proposals. They need to facilitate and make the cooperation more effective, including making the procedures simpler and more cost-effective. However, it is a real problem that more complicated and costly forms of cooperation are applied than the existing ones, due to the diverse interests and criminal justice systems of the Member States. This argument characterized the debate on proposals concerning decisions prior to the discussion.

6. Summary – an overview on the period after 2009

The following statements can be made regarding the future directions of the European justice and home affairs policy, with special regard to the next 5-year programme on justice and home affairs (Post-Hague Programme).

The transformation of the global security environment and the lasting presence of international terrorism in Europe and the threat that came with it lent exceptional significance to the justice and home affairs policy (which was regarded a specific area earlier on) to such extent that it is now an important factor in external relations. The justice and home affairs legislation is an exponentially growing area, and the security-oriented approach represented by the EU Justice and Home Affairs Council is having a great impact on other EU policies as well (e.g. carriage, transport).

The justice and home affairs cooperation has become one of the most complex and increasingly multifaceted areas in the EU, which is due to diversity of institutional systems of the Member States, the emergence and increase of cross-border challenges, the wide array of national interests and the fact that the Member States assess security risks differently. The notion is differentiation is likely to gain strength in the future dependent on the Member States' different speed of integration and their varying willingness to cooperate.

The justice and home affairs cooperation, especially in criminal matters, requires a high level of mutual trust between the Member States. In order to achieve considerable progress in cooperation and harmonization of law in this area, and also to enhance the application of the availability principle and the principle of mutual recognition, a more flexible approach is required by all Member States to reduce the scope of their national sovereignty. It is also

[55] Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network

worth mentioning that since the 2004 enlargement 25, now 27 Member States have to reach a consensus or at least try to cooperate closely in relation to certain proposals.

Taking into consideration all these factors a tendency can be observed nowadays, which implies that although the judicial area within the Third Pillar cooperation is developing fast, legislation is still slow. Although most of the objectives of the Hague Programme have been reached, some basic proposals, which are essential to the effective cooperation, have not been dealt with. An example of the latter is the failure to adopt the German proposal for the framework decision on certain procedural rights in criminal proceedings throughout the European Union. National laws concerning certain areas of the cooperation still show great variety, therefore major achievements can only be made in small steps and focusing on specific issues, however, when related proposals are being discussed, the lack of the common ground is apparent and it is hard to build on it.

Coherence and transparency will be some key requirements in the area of the justice and home affairs cooperation, including judicial cooperation in the near future in order to facilitate more effective legislation. We should also note that horizontal initiatives are gaining momentum, which contain First and Third Pillar, overlapping elements as well. This phenomenon shows that there is a need for legislative reform that would ease or eliminate the now unbearable hurdles arising from the Pillar structure.[56]

[56] Directive of the European Parliament and of the Council on the protection of the environment through criminal law, Directive of the European Parliament and of the Council amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements, Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights, Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals

POLICY LESSONS FROM THE PROBLEMS RAISED BY THE CADBURY SCHWEPPES LITIGATION

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Introduction

This paper examines the lessons that can be drawn by a national – in the specific case the UK – government from the case-law of the ECJ in direct tax matters, especially after the Cadbury Schweppes case[1]. Tax matters are highly sensitive since they are closely connected with sovereignty issues. In the last 50 years the biggest sovereignty issue was status of the European Communities (now European Union), thus resulting in the highly sensitive subject of European tax law. To assess what kind of lessons this European tax law has for national governments the most important source to be examined is the case law of the European Court of Justice (hereafter ECJ) since we can assume that the basis and scope of positive harmonisation in other than direct tax matters is not so heavily disputed as this matter.

The first part of the paper analyses the nature of tax law and the involvement of the EU in direct tax matters. The second part gives a general idea on the most important question of the subject, the application of the freedom of establishment according to Article 43 of the Treaty establishing the European Community (hereafter Treaty). The third part is preoccupied with the Opinions of Advocate Generals in tax cases since they are a good indicator to what considerations are given to different arguments, giving even such notions a thought which are not reflected in the judgments. The fourth part considers the most important case of the ECJ on direct tax issues before the Cadbury Schweppes case, especially because the UK was concerned. The fifth part presents the Cadbury Schweppes case and then the paper draws conclusions.

I. Tax, sovereignty and the EU

Taxes are a politically sensitive issue. As Williams puts it:
„In a democracy, taxes are usually part of a series of measures with specific social aims, or reflecting specific social and political values, accepted by the voters of the state through periodic elections."[2]
The same applies to corporation tax as Snape describes it:
„The law on corporation tax must, in other words, give effect to political choices. The most fundamental of those political choices is the burden of tax to be borne by the corporate sector."[3]

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[1] Cadbury Schweppes plc and Cadbury Schweppes Oerseas Ltd v Commissioners of Inland Revenue, C-196/04, [2006] ECR I-7995
[2] Williams, EC Tax Law (London: Longman, 1998), p 26

Thus the biggest issue on European level in the field of direct taxation, the differences between national tax systems, all arise from local democratic decisions, often responding to national problems.[4]

Though seemingly tax law is inherently a political issue, tax legislation has always been a technocratic matter because of the complexity of regulation.[5] As Wales quoted Revd Ian Paisley who said in connection with the 2005 Finance bill that „The parliamentary process can struggle with such technical matters" such as tax.[6] There is space to argue with the view of Radaelli considering the ever growing interest and influence of the EU in tax matters as becoming increasingly political[7], if we take a look at the judgments of the ECJ using a careful case by case analysis with always a focus on the practical effects and the technical issues. From the sovereignty viewpoint tax is important too because as Thompson notes:
„The most crucial coercive powers that the states enjoy are to tax and to command military forces." [8]

The transnational nature of the economy of the present erodes the power of taxation, the more free investments and carrying out business, the less control individual states have over them. The use of the power of taxation became more dependent on other states and international institutions. The most evident example of loss of sovereignty to international organisations is of course the European Union with supranational institutions, rules which have primacy and qualified majority voting. Nonetheless joining the EU can make states even stronger than before.[9] It can be argued that the accession to the EU cost the UK a part of its sovereignty, especially in the sensitive sector of corporation tax. However it is acknowledged that the accession was in the interest of the UK.[10] The opening up of trade and flow of capital is in the interest of most citizens (being an opportunity to increase individual wealth). Nonetheless these freedoms of economic flows are the real eroding agents to a states power to tax. Furthermore the decrease of revenue of the nation state causes the deterioration of public services and goods which is contrary to most citizens' interest.[11]

It is apparent that the integration of the European market leads to a decrease in production costs and the levelling of different production factors (infrastructure, education), the level of taxes becoming a more important factor in deciding where to locate business.[12]
Taxation before the democracy was dominant as the basis of a nation state was mainly based on force. This however came to a change with the democratic constitutions, applying constitutional rules and the rule of law to the functioning of the state. Thus the basis of

[3] Snape, Corporation Tax Reform – Politics and Public Law, (2007) BTR 374, p 404
[4] Williams, op. cit, p 23
[5] Snape, op. cit, p 383
[6] Wales, Building or Bombing Bridges, (2006) Tax Journal
[7] Snape, op. cit, p 385
[8] Thompson, The modern state and its adversaries, (2006) Government and Opposition 23, pp 30-31
[9] Thompson, op. cit, p 39
[10], Snape, op. cit, p 380
[11] Wolf, Does Globalisation Render States Impotent? (2000) BTR 537, p 537
[12] Wolf, op. cit, p 539

taxation changed from the legitimate use of violence to the representation (famous words of Lord Camden). Taxation is not an inseparable aspect of the government because of its possibility to use violence legitimately but because it represents the nation, the body of citizens (violence is no longer the basis but the instrument of the state for the ends serving its citizens' interests). This is an important historical aspect when we face the question whether the EU could have powers of taxation (with the shift of effective representation to EU institutions this being possible). All the competences conferred to the EU now are based on the notion of removing barriers of trade thus competences to remove or harmonise taxes (some of them) and not creating them (in the absence of effective representation).[13] Since the EU does not have any competences in direct taxation (above Article 94 and 95 regular approximation competences which need unanimous voting), the most important factor in the field of corporation tax is the ECJ in removing national provisions as barriers on the single market.

II. Freedom of establishment

The Member states in the absence of Treaty provisions or Community competences in the field of direct taxes have retained their sovereignty in the field of corporation tax. Nonetheless the ECJ ruled in the Schumacker case[14] that these national taxing powers must be „exercised consistently with Community law".The most important aspect of Community law in relation to corporation tax is the freedom of establishment. The right conferred by Article 43 of the Treaty is indeed a complex one. Although it seems prima facie that it is only a prohibition of difference in treatment or discrimination there is more to this fundamental freedom. It has three elements: the right to be treated as a resident, the right not to be hindered in establishing and the right to choose the appropriate form of establishment.[15] It was already confirmed in the Barbier case[16] that the exercise of rights conferred by the Treaty cannot be restricted on the basis that the purpose of the use of that right was to achieve a tax advantage.[17]

The exercise of freedom of establishment cannot be considered as an abuse if it is exercised for purposes to achieve a tax advantage because this tax advantage is not caused by the single market (it only causes companies to move without unjustified restrictions between Member states), but by the tax competition between Member states, not to be governed in the absence of relevant harmonisation competences by the Community.
With respect to the provisions of the Treaty (or the absence of it in direct tax matters) one could assume that the function of Community law and the case-law of the ECJ is to create a level play field through the application of discrimination analysis. However, there seems to be another approach to this freedom, called the obstacle approach.

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[13] Williams, op. cit, p 3
[14] Finanzamt Koln-Altstadt v Schumacker, C-279/93, [1995] ECR I-225, para 21
[15] Terra and Wattel, European Tax Law, 5th edition (The Hague: Kluwer International, 2008), p 406
[16] Barbier v Inspecteur van de Belastingdienst, C-364/01, [2003] ECR I-15013, para 71
[17] Wathelet, Case Comment, Marks & Spencers plc v Halsey: lessons to be drawn (2006) BTR 128, p 132

The obstacle approach focuses on the less favourable treatment whereas the discrimination approach focuses on the differential treatment (also inherently less favourable). The obstacle approach usually not taking into account the comparability just the restriction having effect on the exercise of fundamental freedoms.[18] The jurisprudence of the ECJ suggests that Article 43 does not only apply to direct restrictions but also to restrictions which have as their practical effect the hindering, discouraging, dissuading companies to establish themselves in other Member states.[19] The ECJ maintained its rhetoric on restrictions even in cases where the ground for the judgment was a difference in treatment, thus implying that the difference in treatment is a sort of restriction.[20]

The main problem with the obstacle approach is the examination of justifications. In the absence of a discriminatory measure the examination is aimed at reasonableness. The Member states have to justify a neutral measure and enter into discussion about the structure of their respective tax systems where they should have retained competences.[21]
The assessment of the ECJ whether there is an incompatible provision is the following. First the restriction (discrimination) has to be identified as one. If there is one, it has to be justified by the Member state concerned. If it is justified, it still has to be proportionate.
The basis of every discrimination assessment is the comparability issue. For example the question whether a branch or a subsidiary could be compared could be resolved differently if we base our assessment on the arm's length approach rather than on the fiscal unity approach (the former viewing the subsidiary as non-related to the parent company as opposed to the branch). The issue of comparability between legal forms of establishment was resolved by the ECJ in the Saint Gobain case[22] where it stated that restrictions based on the different form of establishments can be seen as difference in treatment incompatible with Article 43 (then Article 52).

Nonetheless comparability is mainly based on the subject-to-tax analysis, that is why for example in the Bosal case[23], the ECJ ruled that secondary establishments are not in a comparable situation from the viewpoint of the state of the parent company because this would mean the extension of the taxation powers of that state destructing the balanced allocation of the tax base mainly relying on the cohesion between profits and losses corresponding (principle of territoriality). Later on as we will see, however, the ECJ showed reluctance accepting the balanced allocation of taxing power as a proper justification for the discrimination on this basis.[24]

[18] Banks, The application of the fundamental freedoms to Member State tax measures: guarding against protectionism or second-guessing national policy choices? (2008) ELR 482, p. 485
[19] Park, A judge's tale: corporation tax and Community law (2006) BTR 322, p 323
[20] Banks, op. cit, p 490
[21] Banks, op. cit, p 505-506
[22] Compagnie de Saint-Gobain v Finanzamt Aachen-Innenstadt, C-307/97, [1999] ECR I-6161, para 42
[23] Bosal Holding BV v Staatssecretaris van Financien, C-168/01, [2003] ECR I-9409
[24] Terra and Wattel, op. cit, p 408

In the Avoir Fiscal case[25] already the ECJ took the leap to state that branches and subsidiaries (or companies pursuing activities through branches and subsidiaries) are in a comparable situation and the difference in treatment is not justified because their treatment for tax purposes is the same. For tax purposes there are no relevant objective differences between a branch and a subsidiary and the difference in treatment on the basis of the parent company's residence is against the freedom of establishment. Thus the freedom of establishment also covers the choice of appropriate legal form. Since the freedom is unconditional the motives of the deliberate choice to use a branch and retain the status of non-resident are irrelevant (it is not an abuse to choose because of tax purposes). When we look at comparability we not just have to look at the personal aspect of the problem but the material problem as well. The personal aspect is obviously whether two taxpayers (usually a resident and a non-resident) are in comparable situation and if so they are differently treated (without justification, above what is necessary). The material scope is obviously the income, whether income of taxpayers in a comparable situation is treated differently.

There seems to be a certain distinction between direct and indirect discrimination where the latter is usually not considered incompatible with Community law, simply by the fact that the difference in treatment does not follow from a unilateral conduct of a Member state but the co-existence of different tax regimes in the Community. The best example for indirect discrimination is the Kerckhaert case[26] where the discrimination followed out of the combination of two tax systems. In that case the ECJ ruled the absence of discrimination and considered the difference as a quasi restriction not incompatible with Community law.[27]

According to the ECJ in the Daily Mail case[28], the freedom of establishment applies not just to cases where the host state discriminates non-residents but where the state of origin restricts residents wanting to establish themselves in another Member state also.[29] A new dimension to the discrimination analysis is given by the transnational tax planning. The new schemes of tax planning are based on strategies which obviously only work in a transnational situations benefiting from the differences in national tax systems (not abuse of fundamental freedom, quasi restriction).[30]

There were several justifications used by the Member states. The justification of prevention of tax avoidance was first raised in the ICI case[31] although it is interpreted in a very restrictive way as to the proportionality of the measure. In the Lankhort-Hohorst case[32] the ECJ ruled that tax avoidance measures have to be designed to apply to purely artificial

[25] France v Commission, 270/83, [1986] ECR 273
[26] Kerckhaert and Morres v Belgium, C-513/04, [2006] ECR I-10967
[27] Lyons, What will the ECJ decide tomorrow? (2006) BTR 399, p 404
[28] R v HM Treasury, Ex p. Daily Mail and General Trust plc, 81/87, [1988] ECR 5505
[29] Rønfeldt, Marks & Spencer – Community Law Extends a Helping Hand (2006) EBLR 1715, p 1717
[30] Banks, op. cit, p 489
[31] ICI v Colmer, C-264/96, [1998] ECR I-4695
[32] Lankhorts-Hohorst v Finanzamt Steinfurt, C-324/00, [2002] ECR I-11779

arrangements aimed at avoiding tax to fulfil the proportionality requirement and the measure has to enable a case by case assessment to be compatible with Community law.[33]

Three general justifications have been regularly used by governments. The prevention of tax base or revenue erosion and the preservation of the cohesion of the national tax system were usually rejected or just not used, whereas the balanced allocation of the power to impose taxes between Member states was accepted (supported by other justifications like the risk of double dipping and tax avoidance) in the Marks & Spencer case[34]. The basis was that the home state of the parent company does not have jurisdiction over its foreign subsidiary's profits so it should not be required to allow deduction of losses also incurred outside its jurisdiction from taxes on profits generated in its jurisdiction (resembling the principle of territoriality).[35] The UK raised the argument in the FII Group Litigation case[36] that the difference in treatment was justified because any other system would have been disproportionately expensive and complex to administer what would have caused delays and legal uncertainty.[37] As Judge Park put it, it was already predictable from the Halliburton case[38] that several UK tax provisions could run counter the provisions of Community law and the jurisprudence of the ECJ.[39]

III. Advocate Generals' Opinions

A useful tool of predicting the judgments in specific cases and the views of the ECJ in general on specific issues are the Opinions of the Advocate General handed down in cases of preliminary reference. Advocate General Geelhoed pointed out in the FII Group Litigation case[40] that the UK should have been aware that some of its tax provisions would not stand the test of the ECJ as to the incompatibility to Article 43 of the Treaty since the Avoir Fiscal case.[41] Fiscal cohesion as a justification was already rejected in the FII Group Litigation case, AG Geelhoed went even further in the Thin Cap Group Litigation case[42], deeming it irrelevant to the question whether legislation is discriminatory. The Opinion of AG Geelhoed draws a more strict line between restrictions and quasi restriction (direct and indirect discrimination), saying that the disparity between tax systems (a quasi restriction) is not always a justification.

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[33] O'Brien, Taxation and the third country dimension of free movement of capital in EU law: the ECJ's rulings and unresolved issues (2008) BTR 628, p 646
[34] Marks & Spencer plc v H.M. Inspector of Taxes, C-443/03, [2005] ECR I-10837
[35] O'Brien, op. cit, p 648
[36] Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue, C-446/04, [2006] ECR I-11753
[37] Lyons, as note 27 above, p 402
[38] Halliburton Services BV v Staatsecretaris von Financien, C-1/93, [1994] ECR I-1137
[39] Park, op. cit, p 324
[40] AG Opinion in FII Group Litigation, 6 April 2006, para 146
[41] Lyons, as note 27 above, p 400
[42] AG Opinion in Test Claimants in the Thin Cap Group Litigation, C-524/04, 29 June 2006, para 90

Advocate General Poiares Maduro noted in his Opinion in the Marks & Spencer case[43] the provisions of the Treaty on freedom of establishment are not a mere prohibition of discrimination (reminiscent of the obstacle approach).[44] The principle of territoriality was rejected by Advocate General Geelhoed in his Opinion in the Denkavit case[45] on the basis that not only home states are obliged by the fundamental freedoms but the host states as well.[46]

Advocate General Léger stated in his Opinion in Cadbury Schweppes case[47] that the use of one's fundamental freedoms for the purpose of enjoying a favourable tax regime is not an abuse. The argument is based on the Avoir Fiscal case where it was made clear that the use of fundamental freedoms is unconditional, no matter the nature of the condition. Thus the motives of the use are also irrelevant. AG Léger accepted the justification of tax avoidance but only with strict limits. Measures used to prevent tax avoidance are only acceptable if they are only excluding wholly artificial arrangements aimed at avoiding tax. Then AG Léger went on to elaborate objective criteria for the assessment whether an arrangement is wholly artificial, these being the physical presence of the establishment, the genuine nature of its activities and the economic value of its activities.[48] Advocate General Léger noted in his Opinion in Cadbury Schweppes that there is a tax competition between the Member states. As Lyons puts it: „Some may regret that natural and legal persons have this level of freedom but a court-room is no place in which to expect political regrets to trump legal rights."[49]

IV. The Marks & Spencer case

The group consolidation schemes are usually not for cross-border application, nonetheless in the Marks & Spencer case the ECJ ruled that cross-border application of group consolidation can be used to terminal losses.[50] Wathelet identifies the aim of the provisions examined in the Marks & Spencer case as preventing losses of being used twice and preventing that group of companies can freely choose where to set off losses. The judgment itself can be summarized in two corresponding points: the non-resident subsidiaries that already set off their losses in the Member state where they are established cannot transfer them to the parent company in another Member state to use them for a second time and the losses have to be set off in the jurisdiction where they have occurred, only if this is not possible (exhausted all possibilities or no possible at all) can the losses be transferred.[51]

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[43] AG Opinion in Marks & Spencer, 7 April 2005, para 34
[44] Lyons, as note 27 above, p 401
[45] AG Opinion in Denkavit International BV & anr v Ministre de l'Economie, des Finances et de l'Industrie, C-170/05, 27 April 2006
[46] Lyons, as note 27 above, p 405
[47] AG Opinion in Cadbury Schweppes, 2 May 2006
[48] Lyons, as note 27 above, p 407
[49] Lyons, as note 27 above, p 406
[50] Terra and Wattel, op. cit, p 409
[51] Wathelet, op. cit, pp 128-129

In the Marks & Spencer case the restriction was identified as the absence of the possibility to transfer losses to a parent company (unlike resident group of companies) what deters companies to establish themselves in another Member state (because of the less favourable treatment in group relief).[52] The UK invoked three justifications in the Marks & Spencer case: the preservation of the power of allocation of taxing powers, prevention of double use of losses and the prevention of tax avoidance. The balanced allocation of taxing powers is a general justification in itself not acceptable, as Wathelet infers, it is another form of the protection of national revenue or tax base.

The second justification raised by the UK government was the risk of double dipping. This however cannot be considered as justifying the difference in treatment since the provisions concerned completely excluded losses of being used twice for residents and non-residents as well, thus the aim of the provision to which the difference in treatment can be imputed to was not avoiding this risk.[53] The argument that the resident and non-resident subsidiaries are not in a comparable situation is based on the principle of territoriality (without tax jurisdiction there is no relief jurisdiction). Nonetheless the principle of territoriality only applies to cases where there is a sole taxpayer involved in the case. The ECJ accepted that a resident and a non-resident may be treated differently even in tax matters but if the ground of this difference in treatment is only the fact that one is not a resident, it cannot be considered as justified.[54] The ECJ negated any attempt to show less restrictive rules in the proportionality analysis, though it gave quite clear criteria as to the interpretation of provisions concerned (if group relief is enabled where setting off losses is not possible in the home state of the subsidiary the measure is proportionate and compatible with Community law).[55] Although the provision was considered incompatible with Community law, Wathelet criticises the judgment for making high hopes to governments as to the justifications because the provision in Marks & Spencer was only ruled out on the basis of its disproportionately and not because of the lack of justification.[56]

While Rønfeldt notes that governments can use this judgment by assuming that everything in line with the justifications accepted by the ECJ (balance of allocation of taxing powers, prevention of double dipping and the free choice of jurisdiction in setting off losses) is compatible with Community law, giving a strong tool in the hands of enforcement and legislation.[57] A far bigger problem, as Wathelet identified it, is that relying on the proportionality analyses means a case by case analysis by the ECJ instead of general principles governing the negative harmonisation of direct taxes.[58] Again Rønfeldt considers the Marks & Spencer judgment focusing on proportionality rather than justification as a helping hand to Member states and a political (prudential) deviation from the case-law. It implies that in justified cases the ECJ will allow some margin for the Member states.[59]

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[52] Wathelet, op. cit, p 130
[53] Wathelet, op. cit, p 131
[54] Lyons, Case comment, Marks & Spencer: something for everyone? (2006) BTR 9, p 10
[55] Lyons, as note 54 above, p 12
[56] Wathelet, op. cit, p 132
[57] Rønfeldt, op. cit, p 1715
[58] Wathelet, op. cit, p 133
[59] Rønfeldt, op. cit, p 1722

The possibility created by the ECJ in Marks & Spencer to set off terminal losses can have counterproductive consequences. The Member states are not required by the judgment to give more favourable treatment, thus the group relief can be used in the same period of time as domestic losses encouraging parent companies with foreign subsidiaries to wind up these subsidiaries in case they have produced losses in order to set these losses of in their home jurisdiction as terminal losses, leading to „economically irrational liquidations".[60] In Rønfeldt's reading the problem with excluding companies' option to freely choose between the jurisdictions to set off their losses is the acceptance of a limited and modified justification of loss of tax revenue.[61] Another problem with Marks & Spencer is what was considered to be subsidizing other Member states by relieving own revenue. Since one of the consequences of the ECJ judgment was that the UK had to abandon taxes originally levied for profits generated on its territory for losses occurring in another Member state.[62]

V. The Cadbury Schweppes case

The CFC rules were designed to counteract the accumulation of passive income overseas subject to a lower level of taxation but still controlled by UK residents, since certain income is mobile and can be generated easily there.[63] The problem in the Cadbury Schweppes case was that the subsidiaries carried out genuine economic activities (although only intra-group) but one of the reasons for establishing them was to benefit of the lower level of tax in another Member state. Of course exercising the freedom of establishment in order to achieve tax benefits was not considered as an abuse of this right (although in Marks & Spencer the option of free choice between jurisdictions to set off losses was not allowed).[64]

The case was very peculiar because the governments argued that there was no actual disadvantage caused by the provisions concerned. Nonetheless the ECJ considered that the disadvantage was not in the amount of taxes paid but by the parent company paying taxes for somebody else. This would imply that for the ECJ a purely theoretical disadvantage caused by a difference in treatment would lead to finding a restriction without regard to evidence to the actual disadvantage and the severity of the disadvantage.[65] The latter is supported by the Lasteyrie case[66] where the ECJ noted that Article 43 of the Treaty prohibits all unjustified restrictions no matter how limited their scope or minor their importance is.

The ECJ accepted the justification of preventing tax avoidance in a limited manner, confining it to restrictions related to wholly artificial arrangements aiming at avoiding tax.

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[60] Terra and Wattel, op. cit, p 410
[61] Rønfeldt, op. cit, p 1718
[62] Terra and Wattel, op. cit, p 411
[63] Taylor and Sykes, Controlled foreign companies and foreign profits (2007) BTR 609, p 611
[64] Simpson, Cadbury Schweppes plc v Commissioners of Inland Revenue: the ECJ sets strict test for CFC legislation (2006) BTR 677, p 679
[65] Simpson, op. cit, p 680
[66] Hughes de Lasteyrie du Saillant v. Ministère de l'Economie, C-9/02, [2004] ECR I-2409

The two facets of an establishment which cannot be considered as wholly artificial are the actual establishment (physical presence) and the genuine economic activity pursued by it.[67] The ECJ focused again on the practical effects saying that in case of a proper interpretation (CFC only applicable to wholly artificial arrangements) and application of the national provisions (case by case analysis by the national courts to assess whether arrangements are wholly artificial) the provisions do not run counter Community law.[68]

One of the most important statements of the judgment in Cadbury Schweppes is that the neutralisation of tax benefits is not in itself a breach of Community law (quasi restriction), just like the world wide profits rule. This is reflecting the acknowledgement of an existing tax competition between Member states.[69] The CFC legislation can only stay in effect if it is applied to domestic situations as well being the core of the discrimination issue. But apart from that the judgment itself implies that a case by case analysis is necessary to determine whether the establishment is wholly artificial having the application of CFC rules to foreign subsidiaries as a consequence. This could be done by the proper interpretation of the motive test.[70] The motive test excludes the application of the CFC regime if the purpose of the transactions between the parent company and the foreign subsidiary was not tax reduction or the one of the main purposes of the establishment of the foreign subsidiary was not tax reduction.[71] Thus by the compatible application of the motive test, even though its scope (focusing on the subjective rather than the objective criteria) is different, the national courts could comply with the ECJs judgment not requiring a legislative change.

The only problem with the national application of the judgment is what can be considered as genuine economic activities (the ECJ only gave objective criteria to assess the actual establishment, not the activities). While the actual establishment was described as „physically exists in terms of premises, staff and equipment"[72], the only thing that the ECJ has mentioned on genuine economic activity was that the fact that the activity in question could be equally well carried out by a resident company does not render the establishment of foreign subsidiaries as wholly artificial. As Simpson suggests based on the purpose of excluding wholly artificial arrangements out of the protection offered by the fundamental freedom, the transactions have to be in a „real connection with the Member state of establishment to the extent it furthers economic and social interpenetration".[73]

H.M government first amended the provisions currently in effect in 2007 with the Finance Act of 2007 (introducing a new section 751A of ICTA) and then issued a Discussion document on Taxation of companies' foreign profits in June 2007. Since the UK judiciary showed in the Vodafone 2 case[74] that the motive test can be read in a manner compatible with Community law (what was actually intended by the ECJ) seemingly there is no need

[67] Simpson, op. cit, p 681
[68] Simpson, op. cit, p 682
[69] Taylor and Sykes, op. cit, p 618
[70] Terra and Wattel, op. cit, p 415
[71] Simpson, op. cit, p 678
[72] Cadbury Schweppes, para 67
[73] Simpson, op. cit, p 683
[74] Vodafone 2 v Revenue and Customs Commissioners [2008] CMLR 21

for legislation in the field.[75] The new section 751A of ICTA can be considered as a worse solution than the proper interpretation of the motive test, since it only reduces the apportioned profits compared to the judicial solution which exempts it. As a positive feature the new section 751A of ICTA reflects the two facets of the assessment of a wholly artificial establishment (actual establishment and genuine economic activity). Nonetheless this response was rendered inadequate because the new section 751A draws a much narrower exception than it is provided for in the judgment.[76]

The plans of a new systematical reform introduced by the Discussion document is not based on a lower level of taxation test and the division between resident and non-resident subsidiaries is bound to the type of income (active) and its artificial accumulation. All passive income can be apportioned according to the planned rules no matter resident or non-resident subsidiary. It would be a change from the entity-based approach to an income-based regime (to target that income which is not protected by the freedom of establishment – income of wholly artificial arrangements). Targeted income is limited to the control and disposition test, only mobile income which is within the control and disposition of the UK parent company can be apportioned (mobile income being easily relocated, not generated by genuine economic activities).

Conclusions

It seems that the UK government has not learned the lessons taught by the ECJ before Cadbury Schweppes and still having problems with it, not giving appropriate measures to comply with the judgment. There are several lessons learned from the case-law of the ECJ. First of all the freedom of establishment is a powerful tool in the hand of EU nationals, restrictions on it can be considered as incompatible with Community law even on a reasonableness assessment. The prohibition of discrimination applies to situations where the UK is the host states just as well when it is the home state, no matter if the companies concerned establish branches or subsidiaries. Restrictions cannot be justified by the simple protection of national tax revenue. The ECJ always tries to find a pragmatical solution in order to apply the examined provisions without limitation to the fundamental freedoms.

As to the specific lessons learned in the Cadbury Schweppes case, the first and foremost conclusion is the exclusion of wholly artificial arrangements from the protection of the freedom of establishment (the freedom being unconditional). Tax avoidance as a purpose of the exercise of fundamental freedoms does not render it an abuse (being unconditional the condition of purpose is irrelevant too). The disadvantages considered to be discriminatory restrictions can be of any scope or importance to find the national provision inapplicable.
Although we can also state that the case-law has been relaxed with the Marks & Spencer and the Cadbury Schweppes judgments, and the UK government seemed to recognise the difference between a quasi restriction and a restriction in the meaning of Article 43 of the Treaty.

[75] Taylor and Sykes, op. cit, p 619
[76] Taylor and Sykes, op. cit, p 625-628

THE DOGMATICS OF AGRICULTURAL LAW IN HUNGARY FROM AN ASPECT OF EC LAW

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1. The definition of agricultural law

The first possible question in the field of the dogmatics[1] of agricultural law is the meaning of `agricultural law´. In the present paper agricultural law means, according to the legal system in force, the totality of the rules adopted for the implementation of the agricultural policy.[2] This definition is rather general, therefore some notes are necessary.

I. The designation `agricultural law´ includes three typical connotations.[3] First, the order of provisions (as `norm´) concerns the social relations in the field of agriculture. Second, agricultural law includes the connotation of science (as `jurisprudence´), and third, the meaning of the `discipline´. The distinction can only be relative, but in the present paper it has relevance. The feature of the jurisprudence is the assessment of the legal provisions, the phrasing of *de lege ferenda* proposals and the systematization of legal provisions. Unfortunately, in the legislation in force, a logical system with coherent definitions is hardly to be found. The task of the jurisprudence is the creation of this system which is important for the interpretation of the rules.

II. The definition of agricultural law is applied in the present paper as an instrument (by the instrumental legal approach). Agricultural law is the instrument for the execution of the agricultural policy. The base of the legal provisions is a factor outside of the law (agricultural policy). Without the understanding of this policy the concerning legislation cannot be overlooked. This relation between agricultural law and agricultural policy may be new for the Hungarian jurisprudence, but the accession of the Hungarian Republic to the European Union (hereinafter referred to as `EU´) can explain this view, as after the accession the numerous provisions concerning the agriculture are adopted at community level. In the European Community (hereinafter referred to as `EC´), the agricultural

[1] I need to mention that the definition of the `dogmatics´ is also ambiguous, namely it has several connotations – see SZABÓ Miklós: *Ars iuris. A jogdogmatika alapjai*. Miskolc, 2005, Bíbor Publisher, pp. 7-8. In the present paper the dogmatics of agricultural law means the systematization of the legislation of agricultural law.
[2] As *Alois Leidwein* notices on the relationship between agricultural law and agricultural policy, "law is the clotted policy"; see LEIDWEIN, Alois: *Europäisches Agrarrecht*. Wien-Graz, 2004, Neuer Wissenschaftlicher Verlag, p. 34.
[3] See FODOR László: *Agrárjog. Fejezetek a mezőgazdasági életviszonyok sajátos szabályozása köréből*. Debrecen, 2005, Kossuth Academic Publisher of the University of Debrecen, p. 9.

provisions are created mainly in the frame of the Common Agricultural Policy[4] (hereinafter referred to as `CAP´). Here should be emphasized that this does not mean the complete abolishment of the national legislation.

Also metajuristic factors have to be understood for the appropriate interpretation of the agricultural provisions.[5] Therefore, the relevant historical, economical, social and environmental knowledge for the interpretation of legislation has to be systematized. Without this special knowledge concerning the agriculture, the legislation in force cannot be interpreted.

The relationship between agricultural law and agricultural policy has, besides the interpretation of the legislation, a further significance. The assessment of the agricultural legislation can also be achieved with a rule outside the law (these are practically the objectives of the CAP and the European agricultural model).

III. On the definition of agricultural law and the localization of agricultural law in the legal system.
III.1. According to the classical Hungarian jurisprudence,[6] on the one hand, the place of agricultural law is between public law and civil law, on the other hand, the problem of the separate legal branch of agricultural law has to be considered for the localization of agricultural law.

The base of the localization is the determination of agricultural law in the relation between public law and civil law. This distinction can be found in the works of numerous authors.[7]

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[4] *Péter Téglásy* notices that some fields of law are classified as agricultural provisions according to the Hungarian jurisprudence of agricultural law, although these fields are not adopted in the frame of the CAP, but in other community policies instead, such as consumer protection or public health. See TÉGLÁSY Péter: A magyar agrárjog átalakulása 1985/1990-2005. Korreferátum Tanka Endre: A magyar agrárjog átalakulása 1985/1990-2005 című előadásához. In: JAKAB András – TAKÁCS Péter (ed.): *A magyar jogrendszer átalakulása 1985/1990-2005. Jog, rendszerváltozás, EU-csatlakozás*. Budapest, 2007, Gondolat – ELTE ÁJK, p. 742.

[5] See FODOR: Op. cit. pp. 11-12 and TANKA Endre: Az agrárjog fogalma és helye a magyar jogrendszerben. *Magyar Jog*. 2005/7, pp. 395-396; TÓTH Lajos: *Agrárjogi tanulmányok*. Szeged, 2005, Law School of the University of Szeged, pp. 102-103.

[6] See SÁRKÖZY Tamás: A vállalati jog mint jogágazat problémájához. *Jogtudományi Közlöny*. 1979/12, pp. 795-805; SZILÁGYI Péter: *Jogi alaptan*. Budapest, 1998, Osiris Publisher, pp. 307-324; H. SZILÁGYI István – LOSS Sándor: A jogrendszer. In: SZABÓ Miklós (ed.): *Bevezetés a jog- és államtudományokba*. Miskolc, 2001, Bíbor Publisher, pp. 75-94; SZABÓ Miklós: *A jogi alapfogalmak*. Miskolc, 2002, Bíbor Publisher, pp. 33-44; PRUGBERGER Tamás: A jogrendszer tagozódásának egyes időszerű kérdései. *Jogtudományi Közlöny*, 1975/10.

[7] See PRUGBERGER: Adalékok az agrárjog jogrendszerbeli elhelyezéséhez. *Jogtudományi Közlöny*. 1990/5, pp. 178-181; VERES József: Egy lehetséges agrárjogi koncepció vázlata. In: TÓTH Károly (ed.): *Emlékkönyv dr. Kemenes Béla egyetemi tanár 65. Születésnapjára*. Szeged, Comissio Scientiae Studiorum Facultatis Scientiarum Politicarum et Juridicarum Universitatis Szegediensis de Attila József nominatae, 1993, p. 522; DOMÉ GYÖRGYNÉ: Az agrárjog fogalmi elemei és rendszere. In: DOMÉ GYÖRGYNÉ (ed.): *Agrárjog*. [Budapest], 1994, Law School of the Eötvös Lóránd University, pp. 1-9; KURUCZ Mihály: Az agrárjog fogalma, rendszere. In: VASS János (ed.):

These authors conclude that both public law and civil law appear in the agricultural law;[8] typically the relationships based on the elements of civil law are amended by public law. If the other legal branches are analysed with an adequate critique, the conclusion of the mixture of civil and public laws is equally true for the other legal branches. This ambivalent feature of agricultural law often complicates the localization of agricultural law in the legal system.[9]

The second pillar of the localization of agricultural law is a more problematical question. Before 1989/1990, according to the thesis adopted in Prague, two separate legal branches were distinguished inside the agricultural law by the single academic book edited by *Imre Seres*.[10] There is the law of arable lands and the law of co-operations. These legal branches could not include the whole field of the agricultural relations, but the education of law-students occurred by this system. A new approach and legislation was demanded by the renewed structure of the Hungarian economy and agriculture after 1989/1990. The jurisprudence which wanted to fulfil the new requirements could not decide the question whether agricultural law is a separate legal branch. For example, *Zoltán Novotni* argued for the separate legal branch feature of agricultural law,[11] but *Tamás Prugberger* disbelieves this and according to his thesis, agricultural law is a legislation with sources of different legal branches systematized by a special view of agriculture.[12]

The different approaches practically have two main reasons. The first is the criterion of a `separate legal branch´,[13] the second lays in agricultural law itself. According to the mentioned classical approaches of the criterion of separate legal branch,[14] the definite group

Agrárjog. Budapest, 1999, Law School of the Eötvös Lóránd University, pp. 5 and 9; TANKA: Op. cit. p. 400.

[8] See TANKA: A magyar agrárjog átalakulása 1985/1990-2005. In: JAKAB András – TAKÁCS Péter (ed.): *A magyar jogrendszer átalakulása 1985/1990-2005. Jog, rendszerváltozás, EU-csatlakozás*. Budapest, 2007, Gondolat – ELTE ÁJK, p. 738.

[9] On the delimitation of the civil and public laws and the localization of agricultural law, see CSÁK Csilla: Az Agrárjog rendszerbeli sajátosságai és fejlődési tendenciái. In: MISKOLCZI-BODNÁR Péter (ed.): *A Civilisztika fejlődéstörténete*. Miskolc, 2006, Bíbor Publisher, pp. 83-87.

[10] See SERES Imre (ed.): *Földjog.* Budapest, 1980, Tankönyvkiadó; and SERES (ed.): *Mezőgazdasági termelőszövetkezeti jog*. Budapest, 1983, Tankönyvkiadó. Before the academic books of Seres, see EŐRSI Gyula: *Mezőgazdasági jog*. *Földjog*. Budapest, 1955, Felsőoktatási Jegyzetellátó Vállalat.

[11] See NOVOTNI Zoltán: A magyar agrárjog fejlődésének vázlata. *Magyar Közigazgatás*, 1991/3, pp. 275-280.

[12] See PRUGBERGER: Az agrárjog tárgya, rendszere, forrásai és jogágisága. In: FODOR László-MIKÓ Zoltán- PRUGBERGER Tamás (ed.): *Agrárjog I*. Miskolc, 1999, Bíbor Publisher, pp. 3-22.

[13] On the distinction of a separate legal branch see SZILÁGYI Péter: Op. cit. pp. 310-311; JAKAB András: A jogági felosztás problematikája – különös tekintettel az agrárjogra. *Collega*. 2005/4, pp. 52-54.

[14] The theory of *Mihály Kurucz* is based on a similar classical approach. He does not designate agricultural law as a separate legal branch, only as a nascent legal branch. See KURUCZ: Agricultural law's subject, concept, axioms and system. *Journal of Agricultural and Environmental Law*, 2007/2, pp. 41-84. As to the classical approach of a separate legal branch, Kurucz noted "that

of the provisions can be classified as a separate legal branch if (a) the subject of the provisions concern the homogeneous social relations and (b) the method of the legislation is also homogeneous. [15] The homogeneous subject alone (for example the human behaviour connected to the agriculture) is not adequate for the fulfilment of the requirements of separate legal branch; the criterion of a separate legal branch requires also the homogeneous manner.[16] The determinant element of the method is the distinction between cogent and dispositive norms. But the two types of norms can be found almost in every legal branch; for example, cogent provisions in civil law, and contracts in public administrative law. Therefore this kind of method cannot be a real *differentia specifica*. For this, the author of the present paper can share the opinion of *András Jakab*. He noted that a correct criterion of separate legal branch could not be found by the legal theory to distinguish one legal branch from another; therefore, the separate legal branch feature of agricultural law could not confirmed by the legal theory. At the same time, agricultural law is a separate legal branch according to the practice, such as the system of universities (separate discipline), the huge number of provisions, the importance of the agricultural legislation in the EU and the tradition of the separate existence of the science.[17]

What kind of problems are sources for the substance of agricultural law? The historical development can give a response to this question. At the time of the evolvement of state and law, the role of agriculture in the whole national economy was determinant, compared to the other economic sectors. At that time, the relations of the agriculture were the general social affairs and the agriculture was the base of the economical legislation. Due to the development of the human civilization, the percentage of the agriculture in the national economy decreased and the legislation of agricultural sector as general social/economic relations became special affairs afterwards. Therefore, after the period of the state socialism in Hungary when the agricultural law was a separate legal branch, the question whether agricultural law is a separate legal branch has been raised again. According to the author of this work, the accession of the Hungarian Republic to the EU assured the separate agricultural law.[18] Namely, agricultural law is a distinct part in the EC law, due to the importance of the agriculture as a strategic sector of the economy of the EU. Therefore, our national legislation should correspond to the system of the EC law.[19]

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agricultural law is developing, and is annoyingly fragile, especially for those who work with it". Loc. cit. pp. 69-70.

[15] According to András Jakab, this approach of a separate legal branch was spread during the socialist period of Hungary (JAKAB: Op. cit. p. 52). Numerous authors (e.g. Miklós Szabó) contradict this theory, for him the criterion of a separate legal branch descends from the 19th century. The author of the present paper shares the opinion of these authors.

[16] See SZABÓ Miklós: *Jogi alapfogalmak*. Op. cit. p. 37.

[17] JAKAB: Op. cit. p. 54; see furthermore TÓTH: Op. cit. p. 105.

[18] Without this accession, the agriculture of Hungary would have fulfilled the requirements of a liberal economic model; see TANKA: A birtokpolitika és a földjog stratégiai kihívásai uniós tagságunk első évtizedében. *Gazdaság és Jog*. 2005/1., pp. 3-11. In the Western European literature, authors argue for the separate agricultural jurisprudence based on a similar theory (see furthermore the works of *Roland Norer*).

[19] On the different legal concepts concerning the agriculture of different nations and times (e.g. *ius georgicum, Dorfrecht, Bauerrecht*) see CSÁK: A magyar agrárjog átalakulása 1985/1990-2005.

III.2 Due to the historical development of the Hungarian legal order, the legal order of the Hungarian Republic corresponds to the German and Austrian laws. Therefore, it is logical to research the role of agricultural law in the legal order of Germany and Austria. Before going into the details, the author of this work has to emphasize that the complete analysis of the solutions of the German-Austrian jurisprudence is not the subject of the present paper. The author has only selected some of these achievements for presentation.

The Western European jurisprudence and legislation concerning agriculture has undergone a huge transformation also in the last fifty years. The Austrian and German lawyers emphasize this change with the distinction between the former class of *Landwirtschaftsrecht* and the latter category of *Agrarrecht*. The second selected accomplishment of the Austrian-German jurisprudence is the `functional´ approach of agricultural law. The third interesting issue of the German-Austrian jurisprudence is the tendencies of agricultural law in the foreseeable future. Fundamentally, as to this third case, the paper is based on the works[20] of Roland Norer.

1. The lawyers from Germany and Austria distinguish the `traditional agricultural law´ (*Traditionelles Agrarrecht* or *Landwirtschaftsrecht*) from the `modern agricultural law´ (*Modernes Agrarrecht*). The legislation concerning the agriculture in force is classified as *Agrarrecht*; it includes both *Landwirtschaftsrecht* (i.e. law of arable lands, law of agricultural inheritance and law of agricultural lease) and the fields of modern agricultural law (law of agricultural structure, law of agricultural production, law of agricultural markets, agro-environmental law, etc).[21]

2. The Austrian-German jurisprudence considers the distinction between public and private law as the base for the localization of agricultural law; according to this approach, the national agricultural law is essentially considered on the base of private law, and the common agricultural law is fundamentally considered on the base of public law. But they can not define exactly the borders of agricultural law either. Therefore, they solve the problem of the localization with a functional approach of agricultural law. According to this functional approach, agricultural law includes norms with effects on the agricultural relations in spite of the localization of these provisions in the legal order by the classical jurisprudence. These rules can also derive from norms with typical non-agricultural goals (e.g. Civil Code).[22] According to the functional approach, the borders of agricultural law cannot exactly be allocated; any general provision may become an agricultural norm. The

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Korreferátum Tanka Endre: A magyar agrárjog átalakulása 1985/1990-2005 című előadásához. In: JAKAB András – TAKÁCS Péter (ed.): *A magyar jogrendszer átalakulása 1985/1990-2005. Jog, rendszerváltozás, EU-csatlakozás*. Budapest, 2007, Gondolat – ELTE ÁJK, pp. 744-747.

[20] See for example NORER, Roland: *Lebendiges Agrarrecht*. Wien, 2005, Springer Publisher and NORER (ed.): *Handbuch des Agrarrechts*. Wien, 2005, Springer Publisher.

[21] See GRIMM, Christian: *Agrarrecht*. München, 2004, C.H. Beck Publisher, p. 18; see furthermore TURNER, George – WERNER, Klaus: *Agrarrecht*. Stuttgart, 1998, Ulmer, pp. 25-26.

[22] See LEIDWEIN: Op. cit. p. 33; see furthermore LEIDWEIN, Alois: *Agrarrecht. Europäische Regelung und österreichische Umsetzung*. Klosterneuburg, 1998, Österreichischer Agrarverlag.

European agricultural law[23] also has a broader frame of legislation than what Articles 32-38 of the EC Treaty entitle. The CAP has a strong relationship with the common commercial policy (Article 133 EC Treaty), public health (Article 152 EC Treaty), consumer protection (Article 153 EC Treaty), development cooperation (Article 179 EC Treaty), financial provisions (e.g. fraud, Article 280 EC Treaty). Today, the relationship between the CAP and the Community policy on the environment (Articles 6 and 175 EC Treaty) is one of the most actual questions of the jurisprudence.[24]

3. Norer's analysis distinguished three main opportunities of the agricultural law's tendencies: agricultural law becomes increasingly international (*Internationalisierung*), European (*Europäisierung*) and the engagement with the environmental protection continues (*Ökologisierung*).[25] The base of these tendencies is the European agricultural model with sustainable and multifunctional features.[26]

IV.1 The above definition of agricultural law concerns a well determined legislation. The present paper focuses on the agricultural legislation of the EU and the Hungarian Republic.[27] According to this view, the competence of the EU and the Member States in the process of agricultural legislation has become an important question.

With regard to three models quoted below, *Endre Tanka* analyses[28] the relationship between national and EC law as well as the state (or Community's) intervention in chronological order of the European integration:
a. The national agricultural laws were applicable only between 1945 and 1957. The role of the state intervention was significant in these national agricultural laws.
b. With the establishment of the European Community (1957-1992), an interventionist Common Agricultural Policy was created and the competence of Member States was decreased afterwards.
c. With the establishment of the EU, from 1992 (from the MacSharry Reforms of the CAP), the EC abandoned the former interventionist policy and created a more liberal agricultural model according to the results of the negotiations of the World Trade Organisation (hereinafter referred to as `WTO´). With the defeated European Constitution, the EU also tried to amend the community and national legislation (e.g. the competence of the European Parliament in the process of the legislation concerning the CAP).[29] After the failure of the European Constitution, the lawmakers of the EU have adopted a modified Treaty of Lisbon.

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[23] `Common agricultural law´ can be defined as the totality of the rules used to implement the objectives of the CAP. See LEIDWEIN: *Europäisches Agrarrecht*. Op. cit. p. 33.
[24] See NORER: Einleitende agrarrechtliche Bemerkungen. In: NORER (szerk.): *Handbuch des Agrarrechts*. Op. cit. p. 9-10.
[25] On details see NORER: *Lebendiges Agrarrecht*. Op. cit. pp. 250-384.
[26] NORER: Einleitende agrarrechtliche Bemerkungen. Op. cit. p. 15.
[27] The research concerning the agricultural social relations in an American scientific work can be distinct from the approach of the European jurisprudence. See McEOWEN, Roger A. – HARL, Neil E.: *Principles of Agricultural Law*. [-], 2007, Agricultural Law Press (Iowa University).
[28] See TANKA: Az agrárjog fogalma… Op. cit. pp. 399-400.
[29] See HORVÁTH Zoltán: *Kézikönyv az Európai Unióról*. Budapest, 2005, HVG-ORAC, pp. 428-429; see furthermore PRUGBERGER: Európai jogharmonizáció és a magyar agrárjog. In: TÓTH

The author of the present paper wants to emphasize that the CAP cannot displace the national agricultural policies. This note is particularly important for Hungary because the agriculture has a great role in the economy of the country. *Alan Greer* attracts attention to the change of the competence of the CAP:[30] the CAP becomes less community and less agricultural. He notes that the legal disciplines overemphasize the supranational feature of the CAP while the states are the real operators of the common policy. The efforts of the Member States are not equal in promoting their interests in the operation of the CAP; typically the United Kingdom and the Netherlands are negative examples. With regard to revaluation of the national level in the CAP, the Member States with active interest representation organizations can profit from the decentralization of the CAP. „There is now a 'cafeteria CAP' in which it operates more like a menu from which countries can choose those dishes most suited to their individual tastes."[31] Therefore, the Member States have greater responsibility in the process of shaping their national agricultural policy. By reason of this opportunity, Hungarian decision-makers have to create own national and regional policies of the country.

The present paper focuses on the agricultural provisions of the EU and the Member States. But the role of the international agreements concerning agriculture (`international agricultural law´ called by Norer[32]) are also determinant and they have a huge effect on the EC law and the legislation of the Member States; typically the agreements of the WTO and the Multilateral Environmental Agreements have these features.

1. WTO. The numerous provisions on international trade are adopted by the General Agreement on Tariffs and Trade (hereinafter referred to as `GATT´).[33] With the establishment of the WTO, a single organisation was created for these agreements. The agreements of the GATT in 1994 were adopted for the settlement of the debates in the international trade. The issues were the inadequate protection of the intellectual property, the incertitude in the solution of the debates and the inexplicit role of agriculture in the GATT.[34] Due to the huge role of the agricultural export in the economy of Europe, the EC accepted the agreements which have got determinant effects on the agricultural legislation of the EU.[35] In case of the offence of a member state of the WTO, the penal duties and other compensation provisions can be applied according to the multilateral agreement of the WTO.

Károly (ed.): *Acta Jur. et Pol. Szeged*. Szeged, 1999, JATE ÁJK, Tomus LV., Fasciculus 21., pp. 269-286.

[30] GREER, Alan: *Agricultural policy in Europe*. Manchester, 2005, Manchester University Press, pp. 202-216.

[31] Loc. cit. p. 209.

[32] NORER: Einleitende Agrarrechtliche Bemerkungen. Op. cit. p. 9.

[33] In Hungary, numerous agreements of the GATT/WTO were proclaimed in the Act IX of 1998.

[34] See SCHLÖDER, Franz-Rudolf: The effects of the recent GATT agreements and the bi- and multilateral agreements on the wine trade. Part II. *AIDV/IWLA Bulletin*, 1996/9, p. 17.

[35] See LEIDWEIN: *Europäisches Agrarrecht*. Op. cit. p. 35.

2. Multilateral Environmental Agreements (hereinafter referred to as `MEAs´). The importance of the MEAs has continuously increased from 1980s. These international agreements, conventions or treaties have global or regional effects. The practice of the international law has created a new dimension of the legal requirements because more and more states fulfil the environmental obligations adopted by community objectives with determinate governmental provisions. The MEAs usually oblige the lawmakers of the member states or parties of MEAs therefore these agreements cannot be applied directly but only with domestic legal transformation of the appropriate state. If a state violates the obligations of an international agreement, friendly settlement can be applied usually. Real sanctions and punishments can barely be applied against the negligent state.[36]

2. The subjects and system of agricultural law

In this part of the paper, the typical subjects of the agricultural law will be analysed mainly based on the research of *László Fodor*.[37] The author of the present paper has to emphasize that László Fodor focuses on the evolvement of the legal subjects in Western European countries, but these legal subjects are not fully integrated in the Hungarian legislation. In this part of the paper, the author also deals with the system of the European and Hungarian agricultural law according to the subjects of agricultural law. The author's system is not an absolute theory; different systematizations are also admissible when using different approaches.[38]

I. According to Fodor[39] the subjects of the agricultural legislation are agricultural activity, agricultural producer, agricultural holding and agricultural product. The definitions of first three subjects[40] are in the competence of the Member States in the EU but the category of the agricultural product was adopted in the EC law.[41] The author of the present paper details the above subjects and completes these with two other opportunities. These new admissible subjects are the classes of the `rural area´[42] and `food´ (or `foodstuff´).

1. Agricultural activity. This definition can be significant in numerous practical situations, e.g. preference in the tax law or the environmental protection law. In view of the tendencies

[36] NORER: Einleitende Agrarrechtliche Bemerkungen. Op. cit. p. 12.
[37] FODOR: Op. cit. pp. 17-54.
[38] See VASS (ed.): *Agrárjog*. Op. cit. TÓTH Lajos: *Agrárjogi tanulmányok*. Op. cit. CSÁK (ed.): *Agrárjog*. Miskolc, 2006, Novotni Publisher.
[39] Zoltán Novotni approached the definition of agricultural law on the same base: „agricultural law as the law of the professional agricultural activities includes the protection of arable lands and the process of the agricultural products." NOVOTNI: Op. cit. p. 275. Joseph McMahon concentrated on the definitions of the agricultural product, the agricultural holding and agricultural producer; see McMAHON, Joseph A.: *EU Agricultural Law*. Oxford, 2007, Oxford University Press, pp. 1-15.
[40] The category of the agricultural holding can also be found in the EC law on agricultural supports.
[41] FODOR: Op. cit. p. 22.
[42] The Act CXIV of 1997 on improvement of the agriculture concerns similar subjects like agricultural producer, agricultural product, agricultural activity and rural area (see the Preamble and Article 3).

of Western Europe, this definition can be described as a multilayer idea.[43] The definition consists of four levels. The first level as the core of the concept includes the growing of crops and the keeping of animals. The second level is really closed to the first level and means the processing and sale of the agricultural products in the primary form. The classification of the next two levels as agricultural activity is not so clear and there are some differences in the legal orders of the Member States. The third level is the secondary activities in the frame of agricultural holding (see the definition of agricultural holdings below); e.g. agrotourism in the rooms of a farm building. The fourth level means the secondary activities outside the agricultural holding. In a concrete case, this activity can also be part of the system of agricultural supports[44] (see the rural development at the definition of rural area.)[45]

Due to the direct application of the EC law in Hungary, all the phases of the definition of agricultural activity are part of the Hungarian legal order (e.g. acts on arable lands, taxes, agricultural supports).[46]

2. Agricultural producer. According to László Fodor, the term of the `producer´ or `farmer´ designates a profession of the civil society with the features of skill (e.g. diploma), and being local resident and career professional. In Hungarian legislation, the category[47] of the `family estate farmer´ can fulfil the requirements of the above definition. The family estate farmer is not a compulsory but an optional category in the Hungarian legal order and

[43] The determination of agricultural activity is also difficult in other Member States. The German Handbook includes 40 different definitions of agriculture; see KÄB: Op. cit. p. 3., and GRIMM: Von der Landwirtschaft zur Wirtschaft auf dem Lande? Gedanken zum Begriff der Landwirtschaft (1). *Agrarrecht*, 2001/1, pp. 1-3.

[44] FODOR: *Op. cit.* pp. 23-30.

[45] The expansion of the definition of agricultural activity is well modelled in the `*Zwiebeltheorie´* (onion theory) adopted by the German and Austrian member associations of the CEDR (*Comité Européen de Droit Rural*); see GRIMM: *Agrarrecht*. Op. cit. p. 10.

[46] According to the Article 3 of Act LV of 1994 on arable land (hereinafter referred to as `Tft.´) the 'agricultural activity' means growing of crops, market gardening, animal husbandry, fishing, operation of fish hatcheries and fish farms, production of seeds and propagation materials, hunting, trapping and game propagation, forestry and mixed farming; the 'secondary activity' means rural and agrotourism, handicrafts, timber production, food processing in the primary form, processing of agricultural byproducts and waste of vegetable and animal origin for purposes other than food, and direct sale of products gained from the aforementioned products, and services incidental to agricultural activities. On the determination of the definition in Hungarian legislation, see furthermore Article 2 d) of Act of XLVI of 1999; Article 2 d) of Act CXXI of 1999; Article 198 and Annex 7 I-II of Act CXXVII of 2007; Annex 6 I of Act CXVII of 1995.

[47] 'Family estate farmer' means a person under whose name a family homestead is registered in the registry of the agricultural administration body, and (1) who, as the head of the family homestead, is the subject of the rights and obligations arising in connection with the aforementioned operations, (2) who is a career professional in the field of agricultural activities, whether full time or part time in addition to secondary activities, (3) who has an educational degree in agricultural or forestry activities or, in the absence of such, is able to prove as being engaged in agricultural activities – whether full time or part time in addition to secondary activities – for at least three years, and has produced revenues by such activities, (4) whose registered residence is in the municipality where the center of operations of the family homestead is located; see Article 3 i) of Tft.

therefore this kind of agricultural producer cannot be regarded as an essential element of the Hungarian legislation contrary to the legislation of numerous Western European countries.[48] The features of the agricultural producer, created by Fodor typically concern natural persons. According to the community[49] and Hungarian[50] legislation as well as the practice of the European Court of Justice (hereinafter `ECJ´),[51] the author of the present paper does not share Fodor's opinion because the definition of the agricultural producer consists of the natural person and also the legal entity. The EC Treaty mentions but does not offer the definition of `producer´. The definitions of the secondary legislation of the EC are consistent with the jurisprudence of the ECJ.

3. Agricultural holding. The agricultural holdings can be classified by at least three approaches. In accordance with the subject of agricultural holdings, the definition includes arable lands, buildings and edifices for residential and farming purposes, machines, equipments, livestock and property rights (e.g. quotas, direct payments) with regard to jurisprudence. For the purpose of the determination of agricultural holdings, there are numerous attempts at community level by both the legislation[52] and the community jurisdiction practice.[53] The EC Treaty does not mention the category of agricultural holdings. The secondary legislation of the EC does not contain a single definition either. The ECJ noted that it is for the Community institutions to work out the definition of

[48] FODOR: *Op. cit*. pp. 30-35.

[49] See for example Annex I of Commission Regulation (EC) No 1444/2002; Article 10 a) of Council Regulation (EC) No 1259/1999; Article 2 a) of Council Regulation (EC) No 1782/2003; Article 2 (2) a) of Council Regulation (EC) No 1234/2007.

[50] See Article 3 u) 2 of Tft; Article 2 b) and Article 3 (1) of Act of XLVI of 1999.

[51] In the Case 152/79 Kevin Lee v Minister for Agriculture [1980] ECR 1495, the ECJ left the approval of part-time farmers as agricultural producers by EC law the national courts. In the Case 312/85 *SpA Villa Banfi* v *Regione Toscana* [1986] ECR 4039, ECJ noted that: Article 3 (1) of Council Directive 72/159 on the modernization of farms must be interpreted as meaning that Member States, when laying down the criteria to be fulfilled by a legal person in order to be regarded as a farmer practising as his main occupation, are not permitted to exclude certain types of such legal person from the scope of the directive solely by reason of their legal form. In the Case C-164/96 *Regione Piemonte* v *Saiagricola SpA* [1997] ECR I-6129, the ECJ confirmed that the Community legislation does not permit Member States to limit the scope of agricultural producers to natural persons alone. In the Case C-403/98 *Azienda Agricola Monte Arcosu Srl* v *Regione Autonoma della Sardegna* [2001] ECR I-103, the ECJ noted that the companies could not invoke the rights derived from the relevant Community legislation in the absence of national implementing measures.

[52] See the Annex I G/4 of Commission Regulation (EC) No 1444/2002. On detailed analysis of this regulation see MIKÓ Zoltán: Új agrárjogi alapfogalmak: a mezőgazdasági termelő, a mezőgazdasági üzem. *Gazdaság és Jog*, 2004/12, pp. 21-24. See furthermore Article 10 b) of Council Regulation (EC) No 1259/1999 and Article 2 b) of Council Regulation (EC) No 1782/2003.

[53] In the Case 5/88 *Hubert Wachauf* v *Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609, the ECJ summarised that the term of `holding´ in Article 12(d) of Council Regulation No 857/84 relating to the application of the additional levy on milk covers all the agricultural production units which are the subject of a lease, even if those units, as leased, had neither dairy cows nor the technical facilities necessary for milk production and the lease provided for no obligation on the part of the lessee to engage in milk production.

agricultural holdings.[54] Some lawyers consider that the efforts of EC law on definition of agricultural holdings are not satisfactory.[55] The author of this work submits that concrete determination of the concept of agricultural holdings is in competence of the Member States.[56]

The second approach of agricultural holdings also contains the agricultural producer as the manager of the agricultural holding.[57] The third approach means the legal forms of agricultural holdings[58] (for example in Hungary family homestead, limited partnership, limited liability company).[59]

In accordance with the first approach, the Hungarian legislation system ruled separately on the subjects of the agricultural holding until the accession of the country to the EU. Namely, the subject of the legislation was not the whole agricultural holding but only the arable land in the numerous provisions.[60] The categories of the `family homestead´[61] and the `farmstead´[62] are closer types of the Western European models of agricultural holdings.

[54] See the Case 85/77 *Société Azienda Avicola Sant'Anna* v *Istituto Nazionale della Previdenza Sociale (INPS)* and *Servizio Contributi Agricoli Unificati (SCAU)* [1978] ECR 527. In the judgment the ECJ noted that it is impossible to find in the provisions of the Treaty or in the rules of secondary community law any general uniform community definition of `agricultural holding´ universally applicable in all the provisions laid down by law and regulation relating to agricultural production. It is for the Community institutions to work out, where appropriate, for the purposes of the rules deriving from the Treaty such a definition of agricultural holding. See furthermore the Case 139/77 *Denkavit Futtermittel GmbH* v *Finanzamt Warendorf* [1978] ECR 1317.

[55] According to *Joseph Hudault*, the category of agricultural holding is negligent. He was quoted by RAISZ Anikó: Veränderungen der Agrarmarktordnungen vom Standpunkt der 50 Jahre alten CEDR aus. *Journal of Agricultural and Environmental Law*, 2007/3, p. 70.

[56] See Article 2 a) of Act of XLVI of 1999.

[57] FODOR: *Op. cit.* pp. 35-43.

[58] OLAJOS: Az agrár-üzemrendszer felépítése. In: CSÁK (ed.): *Agrárjog*. Miskolc, 2008, Novotni Publisher, pp. 189-193.

[59] On a different approach see SÜVEGES Márta: Az agrár-üzemformák jogi szabályozásának alapjai. In: HAMAR Anna (ed.): *Agrárátalakulás a '90-es években*. Volume I. Szolnok, 1999, pp. 25-112.

[60] In the Case *Lallement* v France, the European Court of Human Rights dealt with the subjects of agricultural holdings according to the integrate approach; Judgment of the 11th April 2002 (Merits), 12th June 2003 (Reparations), No 46044/99.

[61] According to Article 3 h) of the Tft, the 'family homestead' means a form of farming operations on maximum 300 hectares of land (including incorporated parcels under agricultural or forestry cultivation) in total, whether owned, leased or in the usufruct of a family, and all movables and immovables registered as part of such land, such as buildings, structures, agricultural equipment and machinery, livestock, stocks of goods etc.), operated by at least one family member in full time and other participating family members in part time employment.

[62] According to Article 3 b) of the Tft, the 'farmstead' means a complex for agricultural activities which is situated outside the limits of a settlement consisting of buildings and edifices for residential and farming purposes, and the parcel of land registered under the same number covering an area of 6000 square meters or less.

4. Agricultural product.[63] The definition of agricultural product is determinant at community level therefore the concept is universal in all Member States of the EU. The definition of agricultural product is universal but not changeless. Namely, the category has continuously been amended during the half century of the European integration.

Two parts of the EC Treaty includes important provisions on the category of agricultural product. According to the Article 32 of the EC Treaty, `agricultural products´ means the products of the soil, of stockfarming and of fisheries and products of first-stage processing directly related to these products. The definition in the EC Treaty was explained by the ECJ.[64] The ECJ interpreted the connotation of the definition of agricultural products in Article 32(1) of EC Treaty and summarized that the concept of `products of first-stage processing directly related´ to basic products must, accordingly, be interpreted as implying a clear economic interdependence between basic products resulting from a productive process, irrespective of the number of operations involved therein. The ECJ noted that the processed products which have undergone a productive process, the cost of which is such that the price of the basic agricultural raw materials becomes a completely marginal cost, are therefore excluded.[65]

Article 32(3) EC Treaty provides further guidance, noticing that the agricultural products (that are to be the subject of the CAP) are listed in Annex I to the EC Treaty (e.g. live animals, meat, fish, dairy produce, coffee, tea, spices, cereals, wine, vegetables and fruit). The collision between the general definition and the Annex I was solved by the legal practice for the priority of the Annex I.

Due to the changes in the global markets in 1960s, the scope of the legislation of agricultural products was extended to certain products of the secondary processing without the amendment of the Annex of the EC Treaty; the new rules promoted the operations on the market of these non-annex products (yogurt, chocolate, etc). Again without the modification of the EC Treaty, the scope broadened with the products of forestry only by the in the Article 308 on the general authorization in the 1980s.

The real change in the amendments of the general definition of agricultural product was in the 1990s, when the scope of the agricultural legislation concerning certain supports was extended to the non-agricultural products (e.g. biodiesel).

In accordance with the new tendencies of the development of the agricultural legislation, the definition of the `food´ or the `foodstuff´ became notable category. According to the secondary legislation,[66] food or foodstuff means any substance or product, whether

[63] See FODOR: Op. cit. pp. 43-50.
[64] Case 185/73 *Hauptzollamt Bielefeld* v *Offene Handelsgesellschaft in Firma H. C. König* [1974] ECR 607.
[65] Loc. cit.
[66] See Article 2 of the Regulation (EC) No 178/2002 of the European Parliament and of the Council laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety. The definition was inserted in the Hungarian legislation, for example in the Act XLVI of 2008 on the food law.

processed, partially processed or unprocessed, intended to be, or reasonably expected to be ingested by humans. In the opinion of the author of the present paper, there is a close relationship between food and agricultural products, in spite of the fact that the category of food can be broader than the class of agricultural products and vice versa.

5. Rural areas.[67] After numerous antecedents,[68] the rural development law has essentially become the part of our supporting and legal order through community legislation.[69] The rural development as the second pillar of the CAP is distinct from the agricultural legislation of the first pillar by two features. The first is in the regulated social relations and the second feature is the territorial scope. Namely, the agriculture (i.e. the first two levels of the agricultural activities) is the determinant part of the rural development but the rural development also includes the local industry, tourism, infrastructure development, settlement development and conservation of the local cultural and architectural tradition (i.e. the third and fourth levels of the agricultural activities). The territorial scope of the first pillar of the CAP does not focus only on the rural areas but also on the urban territories. On the contrary, the rural development intends to affect only rural areas. According to *Erkki Hollo*,[70] the category of rural areas has an important role in the modern system of the agricultural law. The author of the present paper shares the opinion of the president of the CEDR.

The determination of rural areas is primarily not an issue of law but rather an economical and sociological question. With regard to the opportunities of the determination, the rural areas cannot be defined permanently and universally.[71] The only international determination of the rural area was hitherto adopted by the Organisation for Economic Co-operation and Development (hereinafter referred to as `OECD´). According to the OECD Regional Typology,[72] `rural local units´ means areas if their population density is below 150 inhabitants per square kilometre. A complex system of rural areas has been created by the EC legislation in force;[73] i.e. Regulation (EC) No 1698/2005 of the European Council. According to this regulation, the different types of the rural areas are defined with regard to

[67] On the details see OLAJOS: A vidék. In: OLAJOS (ed.): *Vidékfejlesztési politika és támogatásának joga*. Op. cit. pp. 30-34; see furthermore OLAJOS: A vidékfejlesztési jog kialakulása és története. Miskolc, 2008, Novotni Publisher, pp. 31-34.

[68] See OLAJOS: A rendszerváltás és az agrártámogatások kapcsolata. In: CSÁK (ed.): *Ünnepi tanulmányok Prugberger Tamás professzor 70. születésnapjára*. Miskolc, 2007, Novotni Publisher, pp. 279-289.

[69] See OLAJOS: The provisions of the Rural Development in connection with the agriculture in Hungary. *Journal of Agricultural and Environmental Law*, 2006/1, pp. 3-22.

[70] See HOLLO, Erkki J.: Mission and function of CEDR in the EU. *Journal of Agricultural and Environmental Law*, 2007/3, p. 14.

[71] See KOVÁCS Teréz: *Vidékfejlesztési politika*. Budapest-Pécs, 2003, Dialóg Capus Publisher, pp. 19-31.

[72] See at (9.4.2009) http://www.oecd.org/dataoecd/35/62/42392595.pdf

[73] On the analysis of the legislation before the provisions in force, see OLAJOS: A KAP vidékfejlesztési pillére. In: CSÁK (ed.): *Agrárjog*. Miskolc, 2006, Novotni Publisher, pp. 399-416.

the distinct support provisions, for examples `Natura 2000 areas´,[74] `mountain areas´ and `areas with handicaps, other then mountain areas´[75] as well as `agricultural areas included in river basin management plans´.[76] According to these provisions, the determinations of rural areas are created in the Member States.[77]

II. According to the community legislation, three typical fields of legislation were distinguished by Fodor.[78] These are the legislation of the common market organisations, the legislation of the agro-structural policy and the provisions of the agro-quality standard. According to the author of this work, the title of rural development is more appropriate instead of the designation of agro-structural policy after 1997. Numerous authors designate the third field of the agricultural legislation as `legal harmonization´.[79] But the author of the present paper prefers the designation of agro-quality standards because this field includes not only directives but also some regulations in Hungarian jurisprudence.

The legislation of the rural development concentrates on the agricultural holdings, agricultural producers and rural areas as the territories of the fourth level of agricultural activities. The provisions on the rural development of the EC law are typically voluntary (e.g. supports of the European Agricultural Fund for Rural Development). With regard to the relationship between the community and national laws, the community provisions are based on the dominant national legislation.

Compulsory provisions can be found in the rules of common markets organisations (hereinafter referred to as `CMOs´), which focus on the category of agricultural products. In the relationship between the community and national laws, the role of the EC law is determinant and the legislation by regulations is characteristic. These provisions concern the prices, quality and trade of agricultural products. In accordance with the latest tendencies, the provisions of the CMOs concern certain relevance of agricultural holdings (e.g. property rights in the support norms). According to the Mid-term review of the CAP (since 2003), the agricultural holding has also become the determinant element of the CMOs' rules (e.g. the support of the Single Payment Scheme).

The agro-quality standards concern agricultural activities. These provisions include requirements of food safety, phytosanitary, sanitary, agro-environmental protection, etc.

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[74] See furthermore Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds and Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

[75] See Council Regulation (EC) No 950/97 of 20 May 1997 on improving the efficiency of agricultural structures.

[76] See Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for the Community action in the field of the water policy.

[77] On the rural development of other Central European countries, see SCHWEIZER, Dieter: Entwicklung der landwirtschaftilchen Betriebe und des ländlichen Raumes in den MOE-Staaten. In CSÁK Csilla (ed.): *Ünnepi tanulmányok Prugberger Tamás professzor 70. születésnapjára*. Miskolc, 2007, Novotni Publisher, pp. 354-366.

[78] See FODOR: *Op. cit.* pp. 51-54.

[79] See for example NORER: Einleitende agrarrechtliche Bemerkungen. Op. cit. p. 8.

These provisions are often directives therefore they are implemented by national norms. But quality requirements of agricultural products and foodstuffs in regulations are also elements of the agro-quality standards; e.g. Council Regulation (EC) No 510/2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs.

3. Relationship between agricultural law and environmental law

The system of the agricultural law is not permanent and not separate from the other parts of the legal order. Agricultural law is not permanent because the social relations change from time to time; for example, at the time of the accession of Hungary to the EU, a legislation of approximately 40 000 pages became part of the Hungarian legislation. Of course not only the quantity but the structure of the legislation is amended by the accession. And the agricultural law is not separate. Particularly the environmental law has a great effect on the agricultural relations.

There is also a debate on the separate feature of the environmental law. In the Hungarian jurisprudence different approaches can be found. Some authors (e.g. *Tibor Bakács*[80]) emphasized the separate feature of the environmental law. But the view of the author of this work is closer to the approach of László Fodor.[81] According to Fodor, the integrate approach of the environmental law is more acceptable at present because the environmental aspects have to be built in the legislation of all relevant social relations. Therefore the author of the present paper emphasizes that the agricultural law has to focus also on the environmental aspects and the special rules of the environmental law.

The budget of the EU since 2007 has an interesting approach on the relationship between the two fields. The environmental and the agricultural supports are under the same heading `natural resources´ in the budget.[82] The `law of natural resources´ can be an admissible approach in the context of agricultural and environmental laws in future research.[83]

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[80] See BAKÁCS Tibor: *Magyar környezetjog*. Budapest, 1992, Springer Hungarica, pp. 14-15.
[81] FODOR: *Integratív környezetjog az Európai Unióban és Magyarországon*. Miskolc, 2000, Bíbor Publisher, pp. 13-29.
[82] See KENGYEL Ákos: Az Európai Unió 2007-2013 közötti költségvetése és Magyarország érdekei. *Külgazdaság*, 2005/11-12, pp. 4-32.
[83] See furthermore PRUGBERGER: A természeti erőforrások védelmi és felhasználási jogának szakjogági megjelenése. In: GÖRGÉNYI Ilona - HORVÁTH M. Tamás - SZABÓ Béla - VÁRNAY Ernő (ed.): *Collectio Iuridica Universitatis Debreceniensis IV*. 2004, Debreceni Egyetem Állam- és Jogtudományi Kara, pp. 201-221; HORVÁTH Gergely: A környezetjog és az agrárjog közeledése, találkozása és metszete a magyar jogrendszerben. *Állam- és Jogtudomány*, 2007/2, pp. 333-355; SZILÁGYI János Ede: Az agrárjog dogmatikájának új alapjai – útban a természeti erőforrások joga felé? *Jogtudományi Közlöny*, 2007/3, pp. 112-121.

COMMUNITY PROCUREMENT IN THE ECJ CASE LAW

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During the realisation of the common market, the European Community had to face up with several challenges and difficulties. It took a long time to break down the barriers which balk the uniformity of the market. Nonetheless, there are some fields of regulation which still mean a kind of barrier. One of them, a non-tariff barrier is the public procurement which needs to regulate on Community level in view of certain factors. The public procurement is rightly and confessedly one of the most complex and complicated areas of the European Community law and the national laws at the same time. Uncountable profusion of scientific studies, books and articles deal with it. In my study, I concentrate on the case law of the European Court of Justice related to this area of jurisdiction.

The first part of the study refers to the award of public contracts within the main issue is the presentation and evaluation of the existing contract award criteria, i.e. the criterion of most economically advantageous tender and the lowest price. According to these considerations the paper also deals with a real and elusive problem of the public procurement law: the abnormally low tender and its adjudication and consequences.

Considering the procurement rules and the procurement process the selection of the appropriate tender among the tenders submitted is undoubtedly one of the most important and most interesting momentums. The selection is the work of the contracting authority but it can act only within certain legal frames. These frames are designed by the contracting authority when it appraises those conditions which the tenderers shall fit to. These kinds of conditions mostly concern on the technical facilities and expertise of tenderers who obligate to certify them.

The contracting authorities shall base the award of public contracts either to the tender most economically advantageous from the point of view of the contracting authority, either to the lowest price. The two criteria can not applicable at the same time, the contracting authority shall decide the using of the former or the latter.
The second part of the study a special and remarkable problem brings into focus, namely the in-house exception. The expression got into the common knowledge by the judgement passed by the ECJ in the Teckal case in 1999. In the last few years a single “in-house case law” has developed and made precise the content of this concept.

On the next few pages after a short outline of the legal background, I deal in detail with the awarding procedure of the contract; within I draw up the structure of the contract award criteria and the problems coming up from them.

1. Regulatory framework

The regulatory basis of the EC's public procurement basically changed in 2004. Thanks to this reform the regulation became more homogeneous and easier to survey; it is simpler to find the way in labyrinth of public procurement law but at the same time the provisions have still meant a challenge for the experts.

At present there are two Community directives in effect, which contains the main provisions on the public procurement procedure. The Directive 2004/17/EC[1] the so called Service Directive means the basis of those procurement procedures whose subject is the water, energy, transport or postal service. The Directive 2004/18/EC[2] entails the basic rules on the procedures for the award of public works contracts, public supply contracts and public service contracts ("classical sector").

An essential element of the Community procurement regulation is that according to the sectors (government procurement and services) it is divided into two parts. Before the reform of Community procurement, the "old" directives contained provisions separately for subject-matter of contracts (public works, public supplies and public services). This structure was reformed in 2004: the sector-specifically point of view remained the backbone of the regulation, which is completed by the public procurement rules of every single Member State. It is substantial, that the national rules have born by implementation as a result of the Community reform, so the relatively new national provisions mean a consolidated and harmonised system contrary the former fragmented and rarely complicated regulation.

2. Awarding of contracts

Tenderers can submit their tenders until the deadline determined in the contract notice by the contracting authority. After this time is up, the contracting authority considers the submitted tenders under different point of views which were also published in the contract notice. As a result of this awarding process the contracting authority notifies its decision and concludes the public procurement contract with the contractor.

Evaluation of tenders

First of all, in the course of evaluating the submitted tenders, the contracting authority examines if the submitted tenders fit to the conditions which were published in the contract

[1] Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 134, 30.4.2004, p. 1-113

[2] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30.4.2004, p. 114-240

notice and contract documents and considers if they are receptible, i.e. valid or invalid and therefore shall be excluded from the procedure.

Tenders are foredoomed to be invalid which were submitted after the deadline. If an offer contains abnormally low or high price or impossible obligation, it also effects invalidity. The contracting authority examines these positive (unreal high) or negative (abnormally low), undue offers which appear as special invalidity if the tenderer can not explain adequately this unreality or abnormality.

All of those tenders which were qualified valid by the contracting authority after the fully examination, shall be evaluated under the criteria published in the contract notice. Within the European Community we can distinguish absolute and relative evaluating systems. In the former case the contracting authority's examination expands only for the given tender per se without comparison with the other tenders. Unlike the relative evaluation correlates the tender to the others and it effects the ultimate gradiation between the tenders.

Contract award criteria

In the course of awarding contracts the contracting authority has the right to choose the criterion which substantiates its decision. However – according to the Community law – this right is limited. Under the Article 55 of the Directive 2004/18/EK the contracting authorities shall base the award of public contracts either on the criterion most economically advantageous tender (hereafter EMAT), either on the lowest price only, that is the contracting authority shall decide if the former or the latter will be applied.[3]

The most economically advantageous tender (EMAT)

When the award is based on the EMAT criterion from the point of view of the contracting authority, some various basic criteria shall be taken into account which link to the subject-matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion. This is a non-exhaustive list of criteria which are classified according to the subject-matter of contract and within it to the type of the contract, so for example within the quality criterion the contract authority may value the design, aesthetics, functionality, security and so on.

Considering these criteria the determination of the most economically advantageous tender is can be relatively easy because all of them can be set by quantitative factors. Complex and

[3] However the two criteria cannot be applicable at the same time, a new method, the multiple criteria decision making (MCDM) appears in the use of some countries instead of lowest price when awarding construction contracts. It consists of qualitative and quantitative factors. (The Author)

fairly complicated mathematical methods (price discounting model, prior overall weighting model)[4] are available for counting out these rates.

However, what does happen if the contracting authority also takes into consideration some other factors like social, environmental or cultural? In this case are the factors commensurable with each other?

The recent case law of the European Court of Justice (hereafter ECJ) gives us the answer when it accepts the environmental aspects as award criterion. In the Concordia-case[5] the *Korkein Hallinto-oikeus* (Finnish Supreme Administrative Court) requested for a preliminary ruling and asked the ECJ whether the Community public procurement Directives allow consideration of non-economic factors, such as the level of air and noise pollution, when deciding to whom to award a public procurement contract. In this landmark judgement[6] the ECJ declared that an economically most advantageous tender does not mean that every criteria should be economic; other than economic factors may affect on the advantageousness. It also clarified the extent to which "secondary" criteria (i.e., criteria that are not purely economic, such as environmental or social) can be taken into account at the stage at which a public procurement contract is awarded.

In the same way, in the Case EVN/Wienstrom[7] the Austrian *Bundesvergabeamt* (Federal Procurement Office) referred to the ECJ for a preliminary ruling. The Court explained that ecologically important factors (so called "green aspects") can be taken into account if they linked to the subject-matter of the public contract and they were fixed in the contract notice or contract documents. In the Case Rüffert[8], the ECJ accepted to build social aspects in the award criteria.

According to the last three cases it is obvious that the European Community firmly concentrates on extending green procurement in the Member States. The best – and most often applied – way of using '"green aspects" in the public procurement process is the building of these aspects as contract award criteria into the evaluation phase.

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[4] Communication to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the Competitiveness of the Construction Industry, DG Enterprise Working Group on Abnormally Low Tenders, Report and Recommendations of the EMAT Task Group: A methodology that permits contract award to the Economically Most Advantageous Tender, August 2003, p. 12

[5] Judgment of the Court of 17 September 2002 in the case C- 513/99, Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne ECR [2002] p. I-7213

[6] The judgement has fairly big importance, because it was the first time when the ECJ was directly and explicitly asked to clarify the extent to which environmental criteria can be considered by a public authority in the course of the awarding process. (The Author)

[7] Judgment of the Court (Sixth Chamber) of 4 December 2003 in the Case C-448/01, EVN AG and Wienstrom GmbH v Republik Österreich., ECR [2003] p. I-14527

[8] Judgment of the Court (Second Chamber) of 3 April 2008 in the Case C-346/06, Dirk Rüffert v Land Niedersachsen ECR [2008] I-00000

The lowest price: easy method, difficult problems?

Instead of the EMAT criterion contracting authorities can apply the criterion of lowest price in the course of evaluation and award process. At first sight the application of this award criterion seems to be simpler and more luminous in contrast to EMAT. However, thanks to its simplicity (namely that it can be determine by mathematic method) it brings more problems up. Besides the just now mentioned advantage, i.e. the simplicity, there is no other characteristic which may support the decision for lowest price. Unlike, according to the lowest price selection more negative consequences have arisen: by using this consideration the contracting authority can favour the less competitive domestic bidder. In this case the awarding process formally fit to the EC rules, but in fact – even if the call for proposals is available for non-domestic tenderers – it can contain a potential, covert discrimination between the tenderers.

Another problem is the collision between the use of the criterion of lowest price and the principle of "best value for money". The low (fix-cost) price does not mean that the tenderer's offer is also the best; the cheapness of the procurement does not guarantee by all means the quality. Moreover, after a while, during the realisation of the public contract the low tender gets costly and costly thanks to the incidental expenses, hidden costs and other non-financials will shape what constitutes the true final price.

According to the award criterion of lowest price a fairly hard and important issue is the existence of abnormally low tenders. The question is not only one of the most exciting questions but also means one of the biggest problems related to the public procurement. Why does it mean such an essential problem? Easy to answer: the use of abnormally low price is able to balk the emergence of fair competition and – as we have seen it before – infringe the principle "best value for money".

The problem of abnormally low tenders

Definition of an abnormally low tender (ALT)

Experts agree that the existence of abnormally low tenders means a serious problem related to the public procurement process. However, the abnormality of bids is rather can be determine as a phenomenon. There is no common definition of an abnormally low tender (hereinafter ALT), because the different national legislations on prices and social standards make it difficult to give a common European definition.

In the original 1971 Works Directive[9] the power of reject a tender applied to those tenders that were "clearly abnormally low". Under the Article 37 of the 1992 Works Directive[10]

[9] Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts, OJ L 185, 16.8.1971, p. 5-14

[10] Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, OJ L 209, 24.7.1992, p. 1-24

"[i]f, for a given contract, tenders appear to be abnormally low in relation to the service to be provided, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking account of the explanations received."

The operative Directive 2004/18/EC almost contains the same text when in its Article 55 declares that *"[i]f, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant*."

Although that all of the mentioned directives use (or used) the expression "abnormally low" the concept's content remains still unclear and there is even no common definition. The legal consequences are unambiguous: if a tender contains abnormally low price, the contracting authority shall examine it by requesting written explanation from the tenderer. After this, the contracting authority may decide if the tender is acceptable or not, in latter case the tender can be excluded. However, giving a relatively close concept of abnormally low tender keeps the prerequisite of the application of EC public procurement rules.

ALT in practice

In the course of elaboration of this concept we can lean on the recent case law of the ECJ which uses the concept ALT as the excessive deviation from the average of all other tenders submitted. This was also affirmed by the judgements in the case "*Alfonso*"[11], "*Furlani*s"[12] and "*Genova*"[13].

In the Alfonso-judgement the ECJ formulated that the Member States may require that tenders be examined when those tenders appear to be abnormally low, and not only when they are obviously abnormally low. In the other two cases the tenderers were excluded from the procedure on the ground that their tenders had to be regarded as abnormally low on the basis of the criterion laid down in the contract notice and this fact based the judicial procedure.

Besides the ECJ the Commission also regards the elaboration of this concept as important, so within the frame of the Directorate General Enterprise a Working Group on Abnormally Low Tenders (hereafter Working Group on ALT) was created. The main task of the group which works with the participation of experts from Member States is to study existing systems of contract bonds and consider how such systems contribute to prevention,

[11] Judgment of the Court (First Chamber) of 18 June 1991 in the Case C-295/89, Impresa Donà Alfonso di Donà Alfonso & Figli v Consorzio per lo sviluppo industriale del comune di Monfalcone, Regione Friuli-Venezia Giulia, Impresa Luigi Tacchino SpA and Impresa Carlutti Costruttori SRL., ECR [1991] p. I-2967

[12] Judgment of the Court (Fourth Chamber) of 26 October 1995 in the Case C-143/94, Furlanis Costruzioni Generali SpA v Azienda Nazionale Autonoma Strade (ANAS) ECR [1995] p. I-3633

[13] Judgment of the Court (Fourth Chamber) of 16 October 1997in the Case C-304/96, Hera SpA v Unità sanitaria locale nº 3 - genovese (USL) and Impresa Romagnoli SpA. , ECR [1997] p. I-5685

detection and elimination of abnormally low tenders. During this work the group also tried to give the definition of ALT.

By the Working Group on ALT a tender is assumed to be abnormally low if (1) in the light of the client's preliminary estimate and of all the tenders submitted, it seems to be abnormally low by not providing a margin for a normal level of profit, and (2) in relation to which the tenderer cannot explain his price on the basis of the economy of the construction method, or the technical solution chosen, or the exceptionally favourable conditions available to the tenderer, or the originality of the work proposed.[14]

The national legislations in the various European countries use different methods to grab the main characteristics of an ALT. In some countries following an analysis of the prices and costs, a tender is abnormally low if it provides the contractor with a profit margin which is lower than a margin which is considered to be normal and as calculated by the public authority. In some other Member States the tender is abnormally low if the price offered is less by a certain percentage than the average of the tenders submitted or discounts granted.

These are essentially arithmetic systems that measure the deviation of a particular tender price from an average of all tender prices submitted. In these countries (e.g. Belgium, Italy, Spain, Portugal, Greece) the deviation that identifies tender as being abnormally low varies between 10 % and 15 % but in some Member States this rate is not enough to identify a tender as an ALT.

However, the application of this arithmetical formula in course of adjustment of abnormally low tender has a real disadvantage, namely that in individual cases it can be misused because after consulting the contractors of its choice the contracting authority can always fix the minimum values.[15]

The Hungarian Public Procurement Council (hereafter PPC) in a single decision[16] formulates that there is no possibility to give a general definition of a tender containing abnormally low price. Under its former decisions it declares that in course of determining the abnormality the contracting authority shall compare the tender with all other tenders submitted and shall take the actual market prices into consideration.

According to the recent decisions of the PPC and the available Hungarian statistics we can fasten the followings: 20 % differences from the average price of the tenders submitted can be identified as abnormally low price (i.e. in the case of this measure of deviation the decision falls under deliberation.) If the deviation is between 30-50 % identifying ALT can

[14] http://ec.europa.eu/enterprise/construction/alo/altfin.html; Date of download: 31 October 2008

[15] Dimitri Madras – Dimitri Triantafyllou: Selection Criteria and the Award Procedure in Public Procurement, In: International Advances in Economic Research, Volume 3, Number 1, February 1997, p. 91-112

[16] Decision D. 724/17/2007 of Hungarian Public Procurement Office, Közbeszerzési Értesítő, 2008/31.

be reasonable, the contracting authority may request written explanation from the tenderer relating to the details. If the deviation exceeds 50 % the contracting authority practically always obliged to request the above mentioned explanation from the tenderer.

Related to the regulation of abnormally low price a really interesting solution is applied in the Scandinavian Member States of the European Community. In Finland, Norway, Sweden and Denmark ALT is regulated within the framework of the national competition legislation. In the same way, in Central-European Czech Republic the *Úřad pro Ochranu Hospodářské Sontéže* (Office for the Protection of Competition) deals with the public procurement rules.

Effects of an abnormally low bid

Under the Article 55 of the 2004/18/EC Directive, if tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which considers relevant, for instance related to the economics of the construction method, the manufacturing process, the technical solutions chosen, the originality of the work, etc.

After coming to hand this written explanation the contracting authority verifies the constituent elements by consulting the tenderer. If the contracting authority identifies the tender as an ALT, it rejects the tender. The above mentioned Article of the related directive contains provisions to the case when the abnormally low price appears as a result of State aid.

However, with the contracting authority's rejecting decision another problem has risen up. Namely, it is almost sure that the procurement process does not end here, but continues in front of a forum that has competency to decide the case. In the light of the decision (i.e. the bid is valid or invalid) the contracting authority concludes or not the contract with the tenderer. If so, the tenderer next in line will initiate a remedy alluding to the fact that the contractor's offer was abnormally low and it had to be invalid. On the other hand, if the contracting authority appoints the invalidity of the bid and excludes the tenderer from the procedure on the ground that its tender had to be regarded as abnormally low, this tenderer will contest the decision.

3. An old-new problem: the in-house transaction

In the European Community Law relatively fast expanded the principle, that in those cases, when a contracting authority can manage to supply a product or service in-house way, the Community procurement rules do not force it to conduct a procurement process, to procure these product or service directly from the market with the ministration of public actors.

Although, that the concept of in-house procurement *expressis verbis* does not appear in the Community Directives, but it is well-known in the case law of the ECJ as an exception of the EC procurement rules. Provisions make it possible for the contracting authorities to conclude a public procurement contract without the obligation of conduct a procedure. It

shall be noted, that it is a very special possibility of the contracting authority, which is available only those cases, when the required criteria are realised. In the event of in-house procurement, the contracting authority concludes the contract with a kind of contractor, who seemingly has single legal personality, but practically, the existence of its independency is challengeable.

In a narrow sense, in-house dealing means all those procedures, when bodies governed by public law entrusts its own institutional unit, which has no legal capacity. In a wider sense, in-house procurement also encompasses all the cases, where the contracting authority concludes the contract with an undertaking, which is quasi-independent, but controlling by the contracting authority.

The estimation of the former case is relatively easy, not like the latter, where the question, if the contracting authority shall apply procurement procedure or not, is almost always in the core of debates.

3.1. Definition of in-house procurement – the Teckal criteria

When we try to define the concept of in-house procurement, the EC procurement directives do not help. Not the case law of the ECJ, which expressly lays the conditions of an in-house procurement down in the landmark Teckal case[17].

In the case in question, the Italian court referred to the Court for a preliminary ruling a question on the interpretation of Article 6 of the then Council Directive 92/50/EEC.[18] The Article 6 provides, that the 92/50 Directive *„shall not apply to public service contracts awarded to an entity which is itself a contracting authority within the meaning of Article 1(b) on the basis of an exclusive right"*. The main question was, if the application of public procurement proceeding obligatory is, when the public authority concludes a contract with a consortium, in which the contracting authority also participates.

In the original case, there was a proceeding between the Teckal Srl. (hereinafter Teckal), on the one hand, and the Municipality of Viano (hereinafter Viano) and Azienda Gas-Acqua Consorziale di Reggio Emilia (hereinafter AGAC), on the other. Teckal is a private company operating in the area of heating services, but it also services oil- and gas-operated heating installations. AGAC is a consortium – set up by several municipalities, including Viano – to manage energy and environmental services. It has legal personality and operational autonomy. The Teckal argued, that Viano infringed the obligations coming from the Community Directive, when the municipal council directly entrusted the AGAC to manage the heating service for a number of municipal buildings. According to the Teckal, Viano should have followed the tendering procedures for public contracts instead of failing

[17] Judgment of the Court (Fifth Chamber) of 18 November 1999 in the case C-107/98, Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia, ECR [1999], p. I-08121

[18] Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, OJ L 209, 24.7.1992, p. 1-24

to invite the tenderers to make their bids. As a result of the municipal council's decision, the Teckal's possibility to make its bid was precluded.

In the preliminary ruling procedure, the Court had to judge, if Viano should have applied the Community procurement rules or not. To answer this question, it was essential to make clear the nature of the relationship, which existed between the contracting authority and the AGAC. In the case of their independency, the Community procurement directive is applicable, and the contracting authority infringed the procurement provisions. As opposed to this, when the AGAC depends on the municipality, the in-house procurement is verifiable, so the agreement does not fall into the scope of the 92/50 Directive.

As per judgement of the Court, in the course of determining if an undertaking falls into the in-house criterion or not, a double measure is applicable. The in-house exception can be determined, if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority. However, it is applicable only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments (*"structural dependency"*) and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities (*"economical dependency"*).[19] The criteria are known as "Teckal-criteria" and they are guiding principles of the Community procurement rules so far. They form not only the case law of the Court, but also make influence to the changes of the national procurement provisions.

3.2. The Stadt Halle Case[20]

Defining of the above mentioned conditions, namely the Teckal-criteria, has cardinal importance during the debates related to the in-house procurement. However, some other questions are arisen, since the Court only defined but not made the contents of the criteria clear. First, it is desire to specify, what does the *„control which is similar to that which the contracting authority exercises over its own departments"* mean.

In the *Stadt Halle case*, the City of Halle awarded without calling for tenders a service contract to the RPL Recyclingpark Lochau GmbH, hereinafter RPL Lochau). The subject of the contract was to draw up a plan for the pre-treatment, recovery and disposal of waste. The RPL Lochau is a semi-public company, in which the City of Halle owned 75,1 % of the shares. The owner of the minority of shares (24,9 %) is a private limited liability company. The Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna (hereinafter TREA Leuna) was also interested in providing the services and made an application to the Procurement Board of the Regierungspräsidium Halle for the City of Halle.

[19] Teckal Judgement, para 50

[20] Judgment of the Court (First Chamber) of 11 January 2005 in the case C-26/03, Stadt Halle and RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna, ECR [2005], p. I-1

The court referred for a preliminary ruling to the ECJ. The main question to be answered was, if the procurement directive must be applied in the case, when the contracting authority "*intends to conclude a contract for pecuniary interest with a company legally distinct from it, in whose capital it has holding together with one or more private undertakings, even if the holding is a majority one.*"[21] Otherwise, even if the private undertakings have minority participation, is it enough to state ground for the obligatory application of advertising the call for tender?

The ECJ – referring to the „semi-public" nature of the company – stated that minority participation of the private actors is enough to exclude the possibility of exercising a control, which is similar to that which it exercises over its own departments[22], that is minority ownership is enough to fail the Teckal control test. The main goal of the procurement rules is to open-up the public procurement to Community competition as wide as possible. Based on this, excluding competition in the case of these kinds of companies can not be reasonable and the public procurement rules should always be applied.

To sum up the judgement of the ECJ, it can be established, that the ECJ confirmed the Teckal-criteria, when it stated, that related to the application of the Community procurement rules, there is of no importance, whether or not the tenderer in question is itself a contracting authority.[23] However, the ECJ restricted the in-house concept with defining, that any exception to the application of the obligation of call for tender must consequently be interpreted strictly.[24]

In the course of proving in-house exemption, serving the public feature of the authority in question is essential, since it excludes any participation of the private sector, especially as an owner. Regarding the structural dependency, the criterion can be satisfied, if the contracting authority exercises control over the tenderer either by a holding company (*„single control"*), or contracting authorities jointly exercise this control (*„multiple control"*).[25]

3.3. ECJ judgements in the Coname[26] and Parking Brixen[27] case

Related to the in-house procurement, the above mentioned ECJ cases are the most remembered and most famous cases. They mean milestones in the course of the clarification of this exception. However, in 2003 two other cases came to the ECJ, which

[21] Stadt Halle Judgement, operative part 2
[22] Stadt Halle Judgement, para 49
[23] Stadt Halle Judgement, para 47
[24] Stadt Halle Judgement, para 46
[25] See more on the Stadt Halle case: HOFFER, Raoul – GASSNER, Gottfried: *Neubewertung der In-House-Vergabe bei PPPs?*, Ecolex 2005 p.17-19; HOFFER, Raoul – GASSNER, Gottfried: *EuGH „Stadt Halle": In-House-Vergabe bei PPP ausgeschlossen*, Ecolex 2005 p.183-185
[26] Judgment of the Court (Grand Chamber) of 21 July 2005 in the hase C-231/03, Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti, ECR [2005], p. I-7287.
[27] Judgment of the Court (First Chamber) of 13 October 2005 in the case C-458/03, Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG., ECR [2005], p. I-8585

influenced the specification of in-house procurement[28], and hereby the of public procurement rules.

In the *Coname case* the Municipality of Cingia de' Botti (Italy) awarded a contract directly to the Padania Acque SpA (hereinafter Padania) without competition. The Consorzio Aziende Metano (hereinafter Coname) claimed the court to nullify the awarding decision referring to the obligation of call for tender in public procurement procedure. Accordingly, disregarding the provisions related to the advertising of call for proposals is contrary to the Community procurement rules.

Under a former concluded agreement the Coname provided the maintenance, operation and monitoring of the methane gas network of the Municipality of Cingia de' Botti. However, before the termination of the agreement in question, the municipal council informed Coname, that it had entrusted another undertaking to provide these activities. The other company, namely the Padania, was mostly owned by public actors. (The Municipality of Cingia de' Botti had a participation of 0,97 %.)

The Italian court referred to the ECJ for a preliminary ruling. In its judgement the ECJ emphasized, that the participation of Cingia de' Botti is so insignificant, which can not make possible the kind of control, which the second Teckal criterion prescribes in the case of in-house exception.[29] The lack of control is supported by the fact, that the Padania is a company, which is partially open to private capital. This feature precludes the Padania from being regarded as a structure of the municipalities which form part of it. [30]

In the *Parking Brixen case*, the request for preliminary ruling was made in the course of the proceeding between the Parking Brixen GmbH (hereinafter Parking Brixen) and the Municipality of Brixen and the Stadtwerke Brixen AG, concerning the award to that company of the management of two car parks within the municipality. The Stadtwerke Brixen AG is an undertaking, which is the legal successor of the former Stadtwerke Brixen. The Stadwerke Brixen was founded by the Municipality of Brixen. It had legal personality and autonomy for enterprising. The main work of the undertaking was providing local public services, among others undertaking car parks and multi-storey car parks. The successor undertaking's activity is wider, than the predecessor company's, since it does not restricted into the area of the Municipality of Brixen, but it can be extended over the whole State or activities can be pursued at international level.
The company statute of the Stadtwerke Brixen AG declares that the participation of the Municipality of Brixen in the capital of the undertaking can not be below the absolute majority of nominal shares. However, the control rights of the municipality are proportionate to the shares owned by the municipality; although the municipality exercised direct control and influence on the activity of the predecessor company.

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[28] See more on the Coname and Parking Brixen case: KOTSCHY, B.: *Arrêts „Stadt Halle", „Coname" et „Parking Brixen"*, Revue du droit de l'Union européenne 2005 nº 4 p.845-853
[29] Coname Judgement, para 24
[30] Coname Judgement, para 26

Afterwards, the municipal council of Brixen made a decision, within the meaning, it entrusted the Stadtwerke Brixen to provide public services and undertake car park. In consideration of the management of that car park, the company collects the parking charges and pays annual fee to the municipality.

The Parking Brixen Company also undertook the management of car parks under concession contract. It argued the validity of the contract between the Stadtwerke Brixen AG, on the one hand, and the Municipality of Brixen, on the other. In its opinion, the contracting authority, i.e. the Municipality of Brixen should have to advertise the call for tenders.

After referring for preliminary ruling, the ECJ intended to clarify, whether the award of the management of public car parks is a public service contract (and then the procurement directive is applicable) or it is a public service concession (and the Community competition rules are applicable).

In its judgement, the ECJ stated, that the award of the management of public car parks is a service concession under Article 1 (4) of the Directive 2004/18/EC[31], having regard that the authority gets the fee paid by third persons for the use of car parks as compensation.[32] Since the activity in question does not fall into the scope of the procurement directive, there is no reason to state the failing of the obligation of call for tenders.

Notwithstanding, the ECJ directed the attention to the fact, that the awarding process shall fulfil certain Community principles, like equal treatment or non-discrimination on grounds of nationality or transparency, even if it is not a public service contract, but a service concession.

In the Parking Brixen case, the latter principle, namely the transparency did not satisfy entirely, since the appropriate publicity was not provided for the potential contractor, and by so doing, the impartial control of the awarding process was excluded.[33]

Moreover, the ECJ once more confirmed the criteria stated in paragraph 50 of the Teckal judgement, when it also extended this two-level-test to the service providing. On the basis of this, the application of the former mentioned general principles is excluded, if "*the control exercised over the concessionaire by the concession-granting public authority is similar to that, which the authority exercises over its own departments and if, at the same time that entity carries out the essential part of its activities with the controlling authority.*"[34] Nevertheless, in the case of Stadtwerke Brixen AG the widening of the provided activities queries the existence of this kind of control, and what is more, the

[31] "*Service concession" is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment.*
[32] Parking Brixen Judgement, para 43
[33] Parking Brixen Judgement, para 49
[34] Parking Brixen Judgement, para 62

company has such an independency which precludes the possibility to exercise the above mentioned control.[35]

3.4. Infringement procedure because of wrong application of in-house exception: the Mödling case[36]

In the course of 2004, the Commission of the European Community initiated an infringement procedure before the ECJ against Austria. The Commission argued that Austria had infringed the provisions of the Community procurement directive, when it had made a possibility for a city to award a public service contract to an undertaking without call for tenders.

The city in question, namely the City of Mödling entrusted the Mödling Abfallwirtschaftsgesellschaft GmbH (hereinafter Abfall company) to provide tasks related to waste-management in the area of the city. The Abfall Company is founded and totally owned by the City of Mödling. Soon after this decision, the body of represents of the City sold 49 % of its shares for the Saubermacher Dienstleistungs-Aktiengesellschaft (hereinafter Saubermacher Company).

In 2003, the Commission stated, that the City of Mödling had infringed the provisions of the Community procurement directive by omitting call for tenders. Austria referred to the fact that the agreement between the Abfall Company and the City of Mödling does not fall into the scope of the procurement directive, because the relationship in question is an in-house exception.[37] To clarify this question, the Commission turned to the ECJ, which stated the applicability of the Community procurement rules in the case in point.

Furthermore, the ECJ emphasized, that the agreement between the contracting authority and the company can not be regarded as an in-house transaction; therefore the City of Mödling should have to advertise call for tenders.[38] Under the recent case law of the ECJ there is an exception from the obligation of call for tenders: if the undertaking has legal personality and it is legally distinct from the contracting authority, which exercises a control which is similar to that which it exercises over its own departments and at the same time, the undertaking carries out the essential part of its activities with the controlling authority.

Nonetheless, in the opinion of the ECJ the above mentioned conditions, the already well-known Teckal criteria do not exist, since the Abfall Company was not absolutely owned by the City of Mödling, because the Saubermacher (private) company had already 49 % of the shares had. Besides such property relations, the City could not exercise a control which is similar to that which it exercises over its own departments, without respect to the majority participation (51 %).

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[35] Parking Brixen Judgement, para 70
[36] Judgment of the Court (First Chamber) of 10 November 2005 in the case C-29/04, Commission of the European Communities v Republic of Austria, ECR [2005], p. I-9705
[37] Mödling Judgement, para 14
[38] Mödling Judgement, para 29

Under these arguments, the ECJ stated the infringement of obligation, because the public service contract was concluded without application of Community procurement rules.

3.5. The ANAV judgement[39]

The request for preliminary ruling was submitted in the case in process between the Associazione Nazionale Autotrasporto Viaggiatori (hereinafter ANAV) and the autonomy of Bari and the AMTAB Servizio SpA (hereinafter AMTAV).

The AMTAB is an undertaking, which was created for providing services related to public transport. The exclusive owner – and so the exclusive entitled to exercise control over the undertaking –, is the self-government body of the city of Bari. In order to award public service contract in the field of public transport, Bari initiated an open procurement procedure, but it stopped it in a few month, and the public service contracts were awarded directly to the AMTAB Company. Referring to the breaking of Community law the ANAV appealed to court and requested the annulment of the awarding decision and other connecting legal acts.

First of all, the ECJ examined the affiliation of public transport, if it public service contract or public service concession is, like it was stated in the former mentioned Parking Brixen case, because the compensation is coming from the fares paid by travellers.[40] Article 17 of 2004/18/EC Directive, which came meanwhile into force, takes the public service concession out of the scope of the application of the procurement rules. In this manner, the obligation of advertising call for tenders does not concern on the awarding of activities, which can be regarded as public service concession. In spite of this, the ECJ strengthened its opinion represented in the Parking Brixen case: general Community principles, like transparency, shall be satisfied, but it can not be conform to the complete lack of competition.[41]

After all, the ECJ stated that the national regulation, which makes possible for a contracting authority to award public service contract directly to an undertaking, which is entirely owned by this contracting authority, is not contrary with the general Community principles, so the transparency, if the contracting authority exercises a control which is similar to that which it exercises over its own departments, and the undertaking carries out the essential part of its activities with the controlling authority.[42]

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[39] Judgment of the Court (First Chamber) of 6 April 2006 in the case C-410/04, Associazione Nazionale Autotrasporto Viaggiatori (ANAV) v Comune di Bari and AMTAB Servizio SpA., ECR [2006], p. I-3303
[40] ANAV Judgement, para 16
[41] ANAV Judgement, para 22
[42] ANAV Judgement, para, 33

3.6. The Carbotermo case[43]

The next important step on the way of clarifying the concept of in-house transactions was the judgement passed by the ECJ in the Carbotermo case. The request for preliminary ruling was submitted by the Italian court in the case in process between Carbotermo SpA (hereinafter Carbotermo) and the municipality of Busto Arsizio and the AGESP SpA (hereinafter AGESP), on awarding of public contract to an undertaking, in which the contracting authority had participation.

Carbotermo is an undertaking, which specialises in energy supply and heating management for public and private sector customers. The AGESP Holding SpA (hereinafter AGESP Holding) is a joint stock company, in which 99,98 % of the shares is owned by the municipality of Busto Arsizio and the rest 0,2 % of the shares is held by other municipalities. The AGESP is founded and totally owned by the AGESP Holding.

The municipality of Busto Artisio published a call for tenders for the supply of fuel and for the maintenance and technological renovation of the heating sets in the municipality's buildings, to which the Carbotermo submitted its tender. Meanwhile, the municipality decided to suspend and later to withdraw the call for tenders reserving the right to award the contract directly to AGESP at a later time.[44]

In its judgement, referring to the para 49 and 50 of the Teckal judgement, once more confirmed, that in the simultaneous existence of the two criteria (i.e. the structural and economical dependency) there is no person, which is legally distinct from the contracting authority, so the contract is concluded between two non-single person, therefore the transaction does not fall into the scope of the Community procurement directive.

The whole capital of the AGESP as a tenderer, is solely held by the contracting authority (alone or together with other public authorities), which suggests, that the contracting authority exercises over that company a control similar to that which it exercises over its own departments.[45] On the basis of this, in theory the Teckal criteria satisfied, even if the contracting authority concludes a public contract with an undertaking over which it exercises indirect control.

Nevertheless, with reference to the Parking Brixen case confirmed again, that even in the case of control, exercised on this manner, the main point is the "quality" of control, i.e. if the contracting authority can exercise determining influence to the determination of strategically goals and important decisions. The existence of the holding company, which is inserted in between the contracting authority and the tenderer, weakens the quality of control exercised by the contracting authority.

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[43] Judgment of the Court (First Chamber) of 11 May 2006 in the case C-340/04, Carbotermo SpA and Consorzio Alisei v Comune di Busto Arsizio and AGESP SpA., ECR [2006], p. I-4137
[44] Carbotermo judgement, para 24
[45] Carbotermo Judgement, para 37

Regarding to the second criterion, the ECJ stated the applicability of the Community procurement rules, since the company also does market activities and therefore acts as competitor of other undertakings. In the ECJ's view, the procurement directive in question prohibits the direct award of such a supply or service contract, in which the value of the supply predominates, to an undertaking, whose directorate has wide managing rights (which are also can be exercised alone) and whose shares are totally owned by another joint stock company, in which the contracting authority has the majority of the shares.[46]

In connection with the case, it is essential to realise, that although the ECJ took a stand on the narrow interpretation of the Teckal criteria, it also opened a new, second, parallel level of exceptions, which makes the application of criteria under the concept of linked administrative units possible.[47]

3.7. The Auroux case[48]

In the *Auroux case* the interpretation of in-house transaction arose in the field of public works contracts. The municipal council of Roanne authorized the mayor to sign a contract with the Société d'équipement du département de la Loire (hereinafter SEDL) for the construction of a leisure centre. The contract declared that if the SEDL entrusts third persons to carry out the work, in the course of their selection the principle of advertising and competition – laid down in the French Public Procurement Code[49] – shall be applied.

The plaintiffs, Jean Auroux and others turned to court requesting the annulment of the decision of the municipal council. They contest the validity of the decision with respect to both national and Community law. They argued that the municipal council did not fulfil the obligation of advertising the call for competition.

The French court in procedure requested for a preliminary ruling to the ECJ. In its first question the court asked, if the development agreement in question can be regarded as a public works contract under the Community procurement directive. The ECJ – with reference to its former case-law[50] – stated that if a contract contains both public works contract and another type public contract elements, the determination of the applicable Community directive shall be based on the main purpose of contract.[51] "*The mere fact the*

[46] Carbotermo Judgement, para 47

[47] See more on the Carbotermo case: DURVIAUX, Ann Lawrence: *Les relations « in house » : un pas de plus dans une direction délicate* (obs. sous C.J.C.E., 11 mai 2006, Carbotermo, aff. C-340/04, concl. C. Stix-Hackl), http://popups.ulg.ac.be/csp/document.php?id=290, date of download: 12 December 2008

[48] Judgment of the Court (First Chamber) of 18 January 2007 in the case C-220/05, Jean Auroux and Others v Commune de Roanne, ECR [2007], p. I-385

[49] Code des marchés publics

[50] Judgment of the Court (Sixth Chamber) of 19 April 1994 in the case C-331/92, Gestión Hotelera Internacional SA v Comunidad Autónoma de Canarias, Ayuntamiento de Las Palmas de Gran Canaria and Gran Casino de Las Palmas SA, ECR [1994], p. I-1329, para 29

[51] Auroux Judgement, para 37

agreement contains elements which go beyond the execution of works"[52] does not exclude the application of the procurement directive, nor the fact that SEDL uses subcontractors for the design and execution of the works.[53] With reference to the foregoing, the contract with the SEDL can be regarded public works contract.

One additional question is, that is it possible to omit the directive provisions related to the call for tenders, if the contract is concluded with a certain legal person, who itself a contracting authority is at the same time. The ECJ gave negative answer to the question, when it stated, that as it was made clear under the former judgements passed in the Teckal and Carbotermo cases, "*the only permitted exceptions to the application of the Directive are those which are expressly mentioned in it*".[54] In the present case the criteria do not satisfy, because SEDL is a semi-public company[55] and this feature precludes the possibility for Roanne to exercise control over the SEDL similar to that which it exercises over its own departments.[56]

3.8. The TRAGSA judgement[57] and the Correos case[58] – The never ending story

In the last few years courts devote more attention to the question, if agreements between public authorities can be subject of Community procurement rules. The main emphasis is taken on the value of the transaction, namely if it is below or over the Community thresholds.

In 2005 a Spanish court requested for preliminary ruling to the ECJ concerns the question whether a Member State may confer on a public undertaking a legal regime enabling it to carry out operations without being subject to procedures for the award of public service contracts. In the main proceeding the Asociación Nacional de Empresas Forestales (hereinafter Asemfo) presented a complaint against the Transformación Agraria SA (hereinafter TRAGSA). In the opinion of Asemfo, TRAGSA had abused its dominant position, when it broke the rules related to the awarding of contracts.

TRGASA is a state company, which provides essential services in the field of rural development and environmental protection. 99 % of the capital is owned by the Spanish state; the rested 1 % hold by the Autonomous Communities. Although under the Article 86 (1) the TRAGSA is a public undertaking, but it is an own unit of the public administration

[52] Auroux Judgement, para 36
[53] Auroux Judgement, para 44
[54] Auroux Judgement, para 59
[55] See „semi-public company" in Stadt Halle Judgement, para 49
[56] Auroux Judgement, para 64
[57] Judgment of the Court (Second Chamber) of 19 April 2007 in the case 295/05, Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa) and Administración del Estado, ECR [2007], p. I-2999
[58] Judgment of the Court (First Chamber) of 18 December 2007. in the case C-220/06, Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administración General del Estado, ECR [2007], p. I-12175

and therefore it has no independent decision-making power and it is not a market actor. By the Spanish state, it means, that TRGASA fall into the scope of in-house exception.

To answer the question, first of all the ECJ examined the ownership relations of the public undertaking. In the light of this, the ECJ stated that the first Teckal criterion satisfies, because the contracting authority has a possibility to exercise a control similar to that which it exercises over its own departments, regarded that TRAGSA had to execute the decisions of Autonomous Communities and could not collect fee for the services which were provided by it.[59] Regarding the second Teckal criterion, the ECJ gave positive answer again, since TRAGSA carries out more than 55% of its activities with the Autonomous Communities and nearly 35% with the State.[60]

The significance of the TRAGSA judgement stands in the fact, that it was the first time, when the ECJ stated explicitly, that if a public undertaking (like TRAGSA) under national law is obliged to provide certain kind of activities, but it is not allowed to get fee for it, there is no contract and therefore the procurement rules are not applicable. Following, the ECJ interpreted the concept of in-house transaction. The concept basically postulates, that public procurement rules are not applicable any direct, internal awarding (i.e. direct awarding to any internal unit of the contracting authority), and where there is close relationship between the contracting authority and the tenderer, even if this latter is legally distinct from the contracting authority.

In-house transaction in a wider sense has strict barriers and – as the ECJ formerly mentioned – it is applicable only in those cases, when (1) the contracting authority exercise a control over the tenderer (contractor) which is similar to that which it exercises over its own departments, and (2) most of the tenderer's activities is carried out with the controlling authority.

Although the TRAGSA judgement was welcomed by several, its effect was succumbed the expectations and leaves doubts in some questions. A few months later, related to another case, the *Correos case*, the ECJ clarified, that the conditions declared in the TRAGSA judgement are applicable in a very narrow and limited sense. However, comparing the two cases, there is a basic difference: the TRAGSA provided services exclusively for the Spanish state (or state organisations), while in the case of Correos anybody could be a consumer.

In this latter case, postal services were awarded directly, without publishing call for tenders to the Sociedad Estatal Correos y Telégrafos SA (hereinafter Correos). Correos is a public limited company; it is the universal postal service in Spain, whose capital is wholly state-owned. Before the national court, the main subject of the proceeding was a request against an administrative decision awarding, by means of the cooperation agreement liberalised postal services without a public call for tenders.[61]

[59] Tragsa Judgement, para 57-58, para 61
[60] Tragsa Judgement, para 63-64
[61] Correos Judgement, para 27

According to the Directive 97/67/EC[62] postal services "*are considered to be services of general interest*[63] *provided under conditions of free competition*"[64]. With providing these services, Member States have a right to entrust economic actors, but only in strict barriers. On the other hand, universal postal service is considered public service and therefore a question arose, if public procurement rules are applicable or not.

The Spanish court asked the ECJ if is contrary with Community rules a cooperation agreement, concluded between a wholly state-owned company providing universal portal services on the one hand and a contracting authority, on the other, which subject-matter also includes reserved and non-reserved and therefore, liberalised postal services.[65]

In its judgement the ECJ confirmed again the former case-law, when stated, that regarding reserved services public procurement rules on awarding are not applicable, since the main aim of them is to ensure the free movement of services and opening fair competition within the Member States.[66] However, this statement only concerned on reserved services, but adjudication of direct award of non-reserved postal services is much more complicated. According to the ECJ'S opinion, the direct award of non-reserved postal services is contrary with the Community law, if (1) the value is over the Community public procurement thresholds, and (2) it is considered as a contract for pecuniary interest.[67] In the case of transactions, which are below the Community public procurement thresholds, the correspondence with Community general principles like equal treatment, transparency and non-discrimination by reason of nationality shall be examined.

3.9. Applicability of in-house concept in public service concession

In the course of the ECJ's case law, there were several cases, where the main question was not only the clarifying of the in-house concept, but a pre-question, namely the drawing of the line between the public service contract and the public service concession. To recognize the border between these two legal expressions is really important: as I former mentioned in the Parking Brixen and ANAV case, the public service contract means the application of the public procurement rules, while in the case of public service concession these provisions are not used; the general Community principles, like equal treatment, non-discrimination on grounds of nationality or transparency appear as base of judgements.
However, in 2007 the case law of the ECJ turned into a new direction, the imaginable happened. In the recent case law it is obvious, that the in-house exception is a specific legal institution, which makes a possibility to omit public procurement rules in certain circumstances. The public service concession does not fall into the scope of the

[62] Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ L 15, 1998, p. 14 -25)
[63] *„services of general economic interest", SGEI*
[64] Correos Judgement, para 14
[65] Correos Judgement, para 32
[66] Correos Judgement, para 40
[67] Correos Judgement, para 69

procurement directive; therefore the exception laid down in the directive does not extend to it.

In the *Coditel case*[68] does not appear *expressis verbis* the concept of in-house, but the reference to the Teckal criteria and the Carbotermo case makes it unambiguous, that the ECJ tried to draw a parallel to the public procurement rules and extend the application of this exception. The request for preliminary ruling was submitted by the Belgian court in the case in process between Coditel Brabant SA (hereinafter Coditel) and the Municipality of Uccle and the Région de Bruxelles-Capitale and the Société Intercommunale pour la Diffusion de la Télévision (hereinafter Brutélé)[69], on awarding of public service concession to an inter-municipal cooperative society.

In the viewpoint of this study the situation and determination of inter-municipal cooperatives has no relevance, but the awarding process and the omitting of the general Community principles can be important. In 1999, the Municipality of Uccle published a call for tenders with a view to granting the right to operate a cable television network in its territory to a concessionaire. In 2000, the municipality decided to sell the network instead of awarding a public concession, but after the reception of tenders it decided against the selling, although the Coditel's bid was admissible. At the same time, the municipality joined to the Brutélé and entrusted it to manage the cable television network in its territory.

The Coditel turned to court in order to annul the joining decision of the municipality with reference the omission of general principles which should have been applicable in the course of awarding a public service concession. The Belgian court turned to the ECJ to get an answer to the question, whether "*those requirements of Community law are to be set aside in the light of the judgment in Teckal case, according to which those requirements do not apply where the concession-granting public authority exercises control over the concessionaire and where the concessionaire carries out the essential part of its activities with that authority*."[70] Although the ECJ did not use the in-house expression, it examined the first Teckal criterion, namely the control test. Then the ECJ stated, that the application of the general Community rules, like equal treatment, non-discrimination on grounds of nationality or transparency is excluded, if the control exercised by the concession-granting public authority over the concessionaire is similar to that which the authority exercises over its own departments and if, at the same time, that wholly carries out the essential part of its activities with the controlling authority or authorities.[71]

In the course of clarifying the content of "control similar to that which the authority exercises over its own departments" the ECJ made reference to the paragraph 65 of the judgement passed in *Parking Brixen* case and the paragraph 36 of the Carbotermo

[68] Judgment of the Court (Third Chamber) of 13 November 2008 in the case C-324/07, Coditel Brabant SA v Commune d'Uccle and Région de Bruxelles-Capitale, ECR [2008],
[69] Brutélé is an inter-municipal cooperative society whose members are municipalities and an inter-municipal association whose members in turn are solely municipalities. Brutélé is not open to private members., Coditel Judgement, para 16
[70] Coditel Judgement, para 21
[71] Coditel Judgement, para 26

judgement. At the same time, with reference to the paragraph 49 of the judgement passed in the Stadt Halle case, the ECJ reconfirmed that the participation of private undertaking excludes the possibility of the requested control.

4. Closing remarks

On the last few pages we got familiar with the key elements of the awarding of public contracts in the course of public procurement procedure. First and last we can word some statements:

1. It is obvious that the awarding process is a delicate point of the public procurement procedure and I reckon so it still remain for a long time. ALT exists on the dividing line of lawful and unlawful areas, sometimes in the shadow of legality. Numbers of times it wears the clothes of validity but realises an abuse of a dominant position by systematic submission of tenders below costs. Choosing the best tender from the sack of bids is not an easy work; the contracting authority shall examine step by step the tenders submitted and the decision is dangerous: the hunch of corruption or collusion easily stigmatizes but hard can wash off.
2. Regulation of the ALT forces the contracting authorities into a schizophrenic situation because there is a contrast between the interest of the contracting authority and the abnormally low price. The contracting authority – accordingly the principle "best value for money" – wants to get the best for its money. However, if it chooses the tender containing the lowest price it can fall at the same time into the trap of abnormally low price and get into the centre of charges on behalf of the other tenderers. By the way, it seems that remedy is a necessary element of public procurement process if the tender contains abnormally low price inasmuch as if the bid is valid the "second" tenderer initiates a process in front of the competent forum; if the contracting authority pronounces invalidity the tenderer will initiate a process.
3. Besides the problematic points of contract awarding process, the existence of debates concerning on in-house transactions is also perceptible. The number of the pending cases and the legally binding judgements of the EJC suggest that the in-house exception has a really important role in the field of public procurement law. However, the scope of this legal institution – which means an exception from the public procurement directive – is extremely narrow, contracting authorities try to grasp the opportunity time after time, in order to omit the procurement rules. In spite of this, the application of this exception is not so easy and successful as we can think.
4. Most of the unsuccessful application of in-house exception is based on the wrongly choose company form or the not appropriate ownership relations. The former situation we met in the Carbotermo case, where the municipal council choose the joint stock company form for its own undertaking. This form from the first suggests the profit-oriented nature of the company. However, in most cases the real problem related to the in-house exception is the appropriate rate of shares hold by the contracting authority. In the capital of the winner tenderer, namely the contractor, who got the contract by direct award, the contracting authority hold the majority of shares, but the ECJ confirms time to time, that the private sector participation in such an undertaking precludes the possibility of exercising a control which is similar to that which it exercises over its own departments, even if the private partner has the minority of the shares. Moreover, there is one more

further question: to what extent is this rule fair, if the private participation is only 0,2 % within the capital of a 98,8 % state-owned undertaking? It is noticeable, that the recent case law of the ECJ up to the present has not shown any refining in any direction in this extreme viewpoint.

5. In the course of examination of in-house exception, a further problem can be the decision-making in strategic matters. It is imaginable, that the given undertaking is wholly state-owned, but – regarded to the single legal personality – the municipal council does not have determining influence in the strategic decisions. Nevertheless, the in-house exception could be used if at the time of the foundation of this undertaking the municipal council would stipulate at the same time, that its consent or understanding is indispensable in the decision-making in strategic matters.

On the basis of the before mentioned case law it is obvious, that the law of public procurement and especially the circle of exceptions is really sensitive. Although it is necessary and both at Community and national level generally admitted that in certain cases omitting public procurement rules can be justified, it can not be a reason which is enough for the national legislative organisations to allow evading the laws or assisting to the public authorities to against the transparency and any other general Community principle.

LEGAL QUESTIONS ON THE AMENDMENT OF THE LABOUR CONTRACT, APPOINTMENT IN LABOUR AND PUBLIC RELATIONS IN THE EUROPEAN AND HUNGARIAN LEGAL SYSTEM

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1. Introduction

Before 1992 the labour relations including public relations could have been amended not only by two-sided but also by one-sided actions. It means that transfer, amendment of the scope of activities or the place of work could take place by the one-sided action of the employer, ie. without the parties' mutual agreement. The transfer ordered one-sided by the employer is known both in the private and public service existing in those Member States of the EU which follow the Francophone-Latin legal system like France, Belgium, Luxemburg, Italy, Spain and Portugal. But in the German like legal systems amendment of the labour contracts of the private service could take place only by the mutual agreement. However, in these countries (Germany, Austria, Netherlands) the acts on public service (Beamtegesetz, Ambtenari Wet) make the one-sided transfer ordered by the employer possible.

However, the German Labour law makes the amendment of the labour contract possible in a different way by two legal actions. First, the employer dismisses the employee. Second, the employee is offered a new scope of activities. If the employee does not accept the new offer, the work relationship is terminated. Compared to the Francophone-Latin one-sided transfer, in this case dismissal is linked to concluding a new labour law relation. The German law calls it as *Anderungskündigung*, which means dismissal followed by job offer in Hungarian.

This institution is important to us, because according to the German solution the Hungarian Labour Code coming into force on 1 July 1992 annulled the one-sided transfer. Therefore, in the private service the employment contract could be amended only by mutual agreement. Though, this could be avoided by dismissal followed by job offer. According to the provisions of the Hungarian public service similarly to the Beamtegesetz and Ambtenari Wet the Acts on the public servants and public officers make the transfer possible not only by mutual agreement but also by one-sided action ordered by the employer at the same place of work or to an other workplace. In this case a totally new legal relationship comes to existence.

2. Regulation in the European Union

In the light of 71/96/EC directive the temporary amendment of an employment contract might happen in two-three ways. In all cases the amendments refer to the following: the employer transfers the employee to a different workplace in the same unit or to an other at the same employer without changing the scope of activities. If the scope of activities are changed it might be posting or transfer. The third type of the amendment of the employment contract could be when the employee is sent to an other employer temporary in a way, that the latter employer is entitled to practice the employer's rights. This kind of amendment is called temporary assignment.

Taking into consideration the provisions of the directive the posting might happen as the following: A.) within the same company: a) at the same unit to an other workplace or to other scope of activities; b) to other unit with or without the same scope of activities (transfer); c) to other employer abroad or not but the rights of employer remain at the sending employer (posting); B) posting to other employer by transferring the rights of the employer - accordingly the Hungarian regulation it is temporary assignment, which might take place in Hungary or abroad.

Beside this theoretical grouping the directive sorts according to the practice following third levels: A) temporarily posting within the employer's company to other workplace, scope of activities, ie. redirection; B) temporarily posting to other company and the right to order and control of the sending employer remain untouched, ie. posting; C) sending the employee to on other company along with transferring the right to order and control, ie. temporary assignment.

By all these forms of the posting there is a general rule, ie. if the posting lasts more than one month, the consent of the Labour Authority is required. In the German law this consent might be substituted by the approval of the work council. As general rule posting could last 12 months, which might be prolonged with 12 months by the Labour Authority or in Germany by the work council.

By all form of posting presented earlier the sending employer is obliged to give detailed information to the posted workers regarding the accommodation, meal, their costs, the possibility of traveling home, type of work, management of working hours, way, amount and currency of the wage etc. The parents having small child and the pregnant women – being employee or relative of the employee – must be looked after by both employers and they must be informed about it. These information might refer how, where and when to nurse the child at the workplace and under which circumstances the parents are allowed to take the children to nursery or to school.
From a theoretical point of view the directive handles posting like the amendment of the employment contract, because the Francophone-Latin legal systems contrary to the German legal system know the one-sided amendment of the employment contract. Therefore the German Law treats posting as the employer's right to giving orders, of which influence might be felt in Hungarian Labour Code, as it contains provisions regarding posting and

temporary assignment under the rules of employment, ie. posting and temporary assignment stem from the right of employer to order.

As far as the regulations regarding nursing and pregnant women are concerned, the obligation of providing detailed information is required in the case of foreign employees. Consequently the Hungarian employees travel into uncertainty. Hereby negative discrimination prevails (§ 106 of the Hungarian Labour Code), which might be amended in a way, that the duty of providing information should be extended to the Hungarian posted workers. Furthermore, if temporary assignment takes place, it might happen by sending one or a group of employees to an other employer. It is similar to hiring out of workers. The main difference is that the latter can be carried out in a special company form, and this institution has civil law relations.

3. Crucial points of the Hungarian regulation

The employment contract and the temporary assignment can be amended only by mutual agreement. It is totally indifferent who initiated the amendment. However, in the private service the Labour Code offers the employees the opportunity to initiate the amendment of the employment contract either in the case of full and part time work, or in the case of employment contracts for an indefinite time. With this initiation the employer is obliged to deal with, but the decision depends on his/her will. The form of amendment is required in written.

Generally speaking there is one-sided amendment of the employment contract in the case of transfer, posting, temporary assignment and work by an other employer. But the legislator does not mention them among the cases of the amendment, because they are only temporarily actions and they belong to the right to order on behalf of the employee. Such an action can not exceed 44 working days a year, and all together they can not exceed 110 working days a year. Though, the latter could be extended by collective agreement. The authors do not find the 44 working day limit appropriate in all cases; it should be extended, but only under special control such as a work council's approval.

Transfer takes place within the employer and refers to the same work, which might happen beside or despite the original scope of activities. Such a work can not be against the employee's right to the average earnings. In the case of more scope of activities the employee is entitled to remuneration based on the actual work performed under the time of transfer.

Working at a work place different from the employment contract is posting. By posting the right to order and control of the employer remains. The essence of posting might be that the employer's control exists further notwithstanding the amendment of the place of work.

In the case of temporary assignment there is a more flexible connection with the sending employer, because such an action is about carrying out of work at an other employer and in favour of him. The main condition of temporary assignment is that it must happen free of charge, because if not, then it constitutes hiring out of worker. The ownership between the

two employers is an other criterion. The rights of the employer is transferred to the other employer, the sending employer is entitled to terminate the relationship.

During posting and temporary assignment transfer might happen by keeping its rules. Ordering of work at an other employer according to § 150 of the Labour Code is a sort of necessity. It might take place if the economic circumstances arising at the employer endanger the employment and consequently the termination of the employment is due. To avoid this – at least temporarily – this institution might be the solution and the rules of temporary assignment shall apply.

The above detailed rules apply in the case of employees under the Labour Code and the Act on public officers (further referred as Kjt.). In contrary the Act on public servants (further referred as Ktv.) contains several rules, which extend the right of the employer to act one-sided.

Ktv. regulates transfer and temporary assignment – in our opinion unnecessarily, and mainly repeating the Labour Code' s provisions. There is a stricter difference, ie. in the case of the public servant one-sided amendment of the appointment could also take place in special cases (like the reorganization in the public service, or the succession of the public authority). According to § 14 of Ktv. the transfer for definite or indefinite time at an other public authority constitutes the amendment of the appointment. Under the Ktv. the temporary assignment from governmental interest without the public servant's consent might also take place and its duration extend to 1 year, which might be prolonged by 1 year (§ 40/C of Ktv.)

In the case of public servants a special rule shall apply, ie. the employee might be ordered to perform work at a different place. This institution is called also transfer, the public servant's consent is not needed which might extend till 1 year and is prolonged with 1 year. This kind of transfer is in closed connection with posting because the public servant performs work under the employer's directions and instructions. § 40/D of Ktv.)

Critically speaking compared to the Western European regulation there is not any control of those assignment and transfer which exceed 1 year. Considerably this control would be necessary on the level of the work council, trade union or the labour office.

In the private service relocation does not exist – arguably – but in the public service it is a possible way to modify the appointment by mutual consent. In that case the agreement is, three folded, when the parties (two employers and the public servant) shall make consent on the scope of activities, remuneration, time of relocation etc.) The authors regard this institution appropriate and as being in compliance with the practice of the EU and find this practice required in the Hungarian private service.

THE 'BETTER REGULATION' AGENDA OF THE EUROPEAN UNION

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I. Introduction

Today the institutions of the European Union are all more conscious about the need for better regulation[1], than they were in the past. Rightly so, not least since better regulation has become a key concern, a major political issue[2] that goes far beyond the question of how the European Union can create more favourable framework conditions for competitiveness, growth and jobs. The evident crisis of legitimacy for European integration in some Member States is partly linked to the public perception of the EU as a bureaucratic monster[3]: the EU is often criticised for the volume of legislation and for producing over-complex and unwieldy legislation. The *acquis communautaire* takes up approximately 97,000 pages of the Official Journal, this certainly sounds like an awfully high number.[4] The EU needs to make sure that its legal system is fully adapted to the needs and opportunities of today and tomorrow while reflecting the best principles of law-making, and it has to put more emphasis on transparency and policy articulation.

In his book, *Europe in the Making*, Walter Hallstein described the European Community as a *remarkable legal phenomenon*, a manifestation of law on three different levels. He described the Community as i) a creation of law, ii) source of law and iii) a legal system. In fact, European law is at the heart of what makes the European Union special. The European Union itself is a creature with a relatively small budget but a very broad rule-making power, so it is predominantly regulatory in nature[5].

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[1] The notion is often referred to as 'better law-making' (and mainly in the USA and Canada as: smarter regulation). Three definitions of 'regulation' can be identified in the literature: a binding set of rules; all action designed to influence behaviour; and all forms of social control or influence. (See: John Kitching: Is Less More? Better Regulation and Small Enterprise, in: Stephen Weatherill [ed.]: Better Regulation, p. 156.). This deals with the first of these definitions.

[2] To emphasize the importance of the better regulation agenda, the European Commission e. g. has recently launched a website devoted to it. See: http://ec.europa.eu/governance/better_regulation/index_en.htm

[3] Elisabetta Olivi: The EU Better Regulation Agenda (in: Stephen Weatherill [ed.]: Better Regulation, p. 191.)

[4] But in fact, less than 25,000 European legal acts are currently in force, far less than at national level. And of these, less than 6,000 are truly independent, binding European laws. The rest are effectively executive provisions, international agreements, or updates of existing legislation. (José Manuel Barroso, Uniting in peace: the role of Law in the European Union (Speech/06/213).)

[5] Stephen Weatherill: The Challenge of Better Regulation (in: Stephen Weatherill [ed.]: Better Regulation, p. 3.)

Today's Europe moves quickly. To face up the different challenges the European Union faces inside and outside Europe, its policies and the EU law need to adapt to the fast pace of technological change, to foster innovation, to protect the welfare and safety of Europeans. To achieve these aims it is essential to review and simplify laws, streamline and remove contradictory provisions, overlaps and inconsistencies to ensure that EU legislation is clear and as unburden some for economic operators and European citizens as possible. This is the standard to which the European Union has set itself a couple of years ago, and this is why better regulation became one of the most important priorities of the European Union.[6]

In the framework of the better regulation agenda the EU has progressively developed a broad strategy to improve the regulatory environment in order to provide a more effective, efficient and transparent regulatory system for the benefit of citizens and reinforce competitiveness, growth and sustainable development, contributing to the Lisbon programme's objectives. Complex and unclear regulation imposes excessive administrative burdens, it is hard to enforce, it is often ignored, and in practice it can fail to protect the very people it is intended to help. Further, it seems that the long-term credibility of the European Union depends on its ability to review and revise laws that are obsolete, or have been undertaken by technology. But obviously it is not enough only to improve the quality of future legislation, mistakes that have been already made need to be rectified.

Of course, because of its political and institutional structure, the regulatory environment is different in the European Union from in the individual Member States. Moreover, new regulatory challenges often require complex solutions, rendered all the more difficult because of the need to reach agreement between 27 Member States. But this should not be used as an excuse for ignoring better regulation principles. On the contrary, it makes it even more important to get it right, as the consequences of bad regulation are amplified when imposed onto a more varied and complex market.[7]

The interrogation of the phenomenon of better regulation demands input not only from the perspective of law but from the perspective of politics, economics and management as well. This paper aims to identify, present and analyse the core areas as the building blocks of better regulation in the European Union. But first of all, to better understand the tools of better regulation, I consider important to summarize the evolution of the programme.

II. The evolution of the better regulation programme in the European Union

In Europe, the United Kingdom was one of the first states to focus on the burden of regulation on business with its drive to slash red tape and it can be stated that the origins of the current better regulation agenda of the European Union lies mainly in the deregulation

[6] European Commission, Better Regulation – simply explained (European Communities, 2006)
[7] Rick Haythornthwaite: Better Regulation in Europe (in: Stephen Weatherill [ed.]: Better Regulation, p. 20.)

initiatives implemented by the Thatcher and Major governments of the 1980s and early 1990s, aimed at reducing burdens of business, particularly for small firms.[8]

At European level, at least since the Delors' Commission's relance of the Single Market, policy-makers have coupled their regulatory initiatives with ceremonial self-flagellation concerning the inflexibility of EC regulation and the need to simplify and improve it since the volume of EC regulation has remarkably grown. The new approach which underpinned the 1992 initiative promised to move away from total harmonisation and make EC regulation more flexible so that it could better accommodate distinct national approaches.[9] The concrete issue of better regulation was first taken up at the European level at the Edinburgh European summit of December 1992 where the European heads of state decided to make the task of simplifying and improving the EU regulatory environment one of the Community's main priorities. Within the European Union it was in the mid-1990s that the search for better quality regulation became systematic. The Santer Commission in 1996 launched its regulatory simplification initiative (SLIM)[10] promising that the EC would do less in order to do it better. In the years that followed, the results were limited, though mainly due to the complexity of the task and the lack of real political support, nevertheless, by 2001, the SLIM initiative had reviewed 17 legislative areas during the five consecutive phases and undertook simplification and streamlining.[11]

A declaration attached to the Treaty of Amsterdam[12] set out the principles of good regulation to be respected at the European level. Further co-ordinated action was stimulated when the 2000 Lisbon European Council emphasised the need to develop better regulation as part of the ambitious project to make the European Union the most competitive and dynamic knowledge-based economy in the world. During that year, Ministers of Public Administration from across the European Union met and established the high-level Mandelkern group to look at ways of improving regulatory quality.[13] The final report of the Mandelkern group[14] was produced in November 2001 and set down seven core principles

[8] But other Member States have also tackled the issue, each from their own perspective. The Netherland has over the last 20 years in particular introduced an impressive catalogue of guidelines for legislative policy. Sweden has been active especially in the field of making the language of its law more accessible and France has engaged a vast program of codification of its statute book. (Better Regulation – Better Enforcement pp. 3–4, available at: http://ec.europa.eu/dgs/legal_service/pdf/20060504betterregulation.pdf, downloaded on 30/05/2009)

[9] R Daniel Kelemen and Anand Menon: The Politics of EC Regulation (in: Stephen Weatherill [ed.]: Better Regulation, p.183.)

[10] Commission Communication on Simpler Legislation for the Internal Market ('SLIM'), COM(1996)204 final, 8 May 1996.

[11] Daniela Weber-Rey: Latest Developments in European Corporate Governance in Light of Better Regulation Efforts (in: Stephen Weatherill [ed.]: Better Regulation, pp. 255-256.)

[12] Declaration (n. 39) on the quality of the drafting of Community legislation.

[13] Robert Baldwin: Better Regulation:Tensions aboard the Enterprise (in: Stephen Weatherill [ed.]: Better Regulation, p. 29.)

[14] There were other high level reports on European legislation, too, which have been commissioned by the institutions or Member States: see the Sutherland report (1992), the Koopmans report (1995), the Molitor report (1996) and the Lamfalussy report (2001).

of better regulation[15]. It advocated the implementation, to a stipulated timetable, of an Action Plan for Better Regulation based on core recommendations that included the suggestion that the European Commission should produce a set of indicators of better regulation and a new system of impact assessment. The Mandelkern recommendations were reinforced by the Commission's White Paper on European Governance[16].

The White Paper on European Governance identified five principles of good governance which must reinforce the general Community principles of proportionality and subsidiarity and should be applied at all levels of government, European or national. These principles are: openness, participation, accountability, effectiveness and coherence. The White Paper also provided for the improvement of the quality and effectiveness of legislative procedures and it was followed, also in 2001, by a more focused Communication on Simplifying and Improving the Regulatory Environment[17] which called for some principles for a challenge of culture and practice on regulation. Guidelines were established, which would be conductive to a legislative framework which was to be simpler, more effective and better understood. This Communication provided the foundations for the Commission's 2002 Action Plan on Simplifying and Improving the Regulatory Environment[18]. Key elements of this project were: the introduction of a two-stage impact assessment procedure, a commitment to establish minimum standards for consultation, a programme of simplification of existing regulation, and the establishment of an internal better regulation network within the Commission, involving all the Directorates-General (DGs). Other Communications in 2002 have dealt with Better Lawmaking[19], the Operating Framework for the European Regulatory Agencies[20], Minimum Standards of Consultations[21].

The Commission in March 2005, building on previous initiatives for better regulation, launched the famous 'Better Regulation for Growth and Jobs in the European Union Programme'[22], a new and comprehensive approach to better regulation in order to ensure that the legal framework of the EU meets the requirements of the twenty-first century. The special relevance of this initiative is most notably recognisable by the fact that the Commission identified better regulation as constituting one of the key measures in pursuing the objectives of the renewed Lisbon Strategy[23] focusing on delivering stronger growth and creating more jobs.[24] This new approached was based on three pillars. The first pillar

[15] The 7 principles of better regulation are: necessity, proportionality, subsidiarity, transparency, accountability, accessibility and simplicity.
[16] COM(2001)428 Final, 25 July 2001.
[17] COM(2001)726, 5 December 2001.
[18] COM(2002)278 Final.
[19] COM(2002)275 final.
[20] COM(2002)718 final.
[21] COM(2002)277 final.
[22] Communication from the Commission: Better Regulation for Growth and Jobs in the European Union, COM(2005)97 final, 16 March 2005.
[23] Communication from the Commission: 'Common Actions for Growth and Employment: The Community Lisbon Programme', COM(2005)330, of 20 July 2005, p. 4.
[24] Daniela Weber-Rey: Latest Developments in European Corporate Governance in Light of Better Regulation Efforts (in: Stephen Weatherill [ed.]: Better Regulation, pp. 256-257.)

concerns *pending legislation*. The Commission has screened all proposals that have been pending in the Council and the Parliament for a significant time. In total we are talking about 183 such proposals. In September 2005, the Commission announced its intention to withdraw 68 pending proposals as a result of this extended screening. It should be noted that it was the first time that any Commission has embarked on such an extensive exercise and decided to withdraw more than one third of the tabled proposals.[25] The second pillar entails a substantial *simplification* exercise. The objective is to screen all existing legislation with a view to its modernisation. The EU has simplified legislation before, however this time it intended to go further than just a technical exercise. On 25 October 2005 the Commission tabled a three-year action programme, which put substantially more emphasis on the economic consequences of legislation. The Member States, major European associations and the broader public have been invited to provide the Commission with their input on how to improve the overall EU regulator environment. It received more than 600 reactions on our website and 300 concrete suggestions for simplifications from Member States and representatives of industry.[26]

The lawmaking institutions of the European Union have launched the better regulation process rather later than in the United Kingdom and neither their methods nor their expectations are necessarily comparable. Moreover, better regulation in the European Union has also become inextricably linked with the question of vertical distribution of powers: which level of governance should do what and, if there is to be centralisation, at what level of intensity and/or exclusivity. Thus subsidiarity has become entwined with the better regulation agenda.[27]

III. Tools which can be applied in the framework of better regulation

III. 1. Measures to simplify existing EU legislation

The main aim of the better regulation initiative is to simplify the existing body of EU law, the *acquis communautire*. The simplification programme aims to produce benefits for market operators and citizens and thus enhance the competitiveness of the European economy. It is geared to stimulate innovation and reduce administrative burden stemming from regulatory requirements as well as to move towards more flexible regulatory approaches and to bring about a change in the regulatory culture. To achieve these objectives, the Commission has a number of tools and processes at its disposal.

Since 1957 the Community institutions have been legislating tirelessly: in 50 years, they have produced and published some 66,000 regulations, 4,200 directives, 26,000 decisions and 5,000 other normative texts and concluded some 6,500 agreements with external bodies or third countries: in all, some 108,000 legislative texts, which make up the raw material

[25] Elisabetta Olivi: The EU Better Regulation Agenda (in: Stephen Weatherill [ed.]: Better Regulation, pp. 192-193.)
[26] See above, p. 193.
[27] Stephen Weatherill: The Challenge of Better Regulation (in: Stephen Weatherill [ed.]: Better Regulation, p. 2.)

from which the *acquis communautaire* is distilled. Of course, not all of these acts are still in force, the body of law changes from day by day, any attempt to define it accurately in real time is hazardous. The analysis carried out for the 2004 enlargement and confined to binding acts (regulations, directives and decisions) estimated that the *acquis* comprised 14,500 acts (97,000 pages of the Official Journal).[28]

There is a longstanding public commitment in the form of the interinstitutional agreement on better law-making[29] to establish an ad hoc structure to expedite simplification proposals. The European Commission's rolling programme of simplification is an ambitious project. The initial focus was on the automobile, waste and construction sectors. These sectors have been selected, respectively, because of the large accumulation of EU legislation, because of the considerable importance of the sector to overall economic competitiveness and because of the number of complaints received from the economic operators. Other sectors such as foodstuffs, cosmetics, pharmaceuticals or services followed.[30] Since 2007, the simplification programme has been integrated into the Commission's (annual) Legislative and Work Programme (CLWP). It has been extended each year with new initiatives and now covers *all* policy areas.[31] The Commission reports on a monthly basis on what has been achieved and what is planned as regard the initiatives.

In October 2005, following the Commission communication on Better Regulation for Growth and Jobs in the EU, the Commission launched a new phase for the simplification of existing EU law by setting out a rolling programme, initially covering the years 2005-2008, based on the Commission's 2002 Action Plan for simplifying and improving the regulatory environment. This programme draws extensively on stakeholder input and focuses on sectoral simplification needs. It initially listed some 100 initiatives affecting about 220 basic legislative acts, to be reviewed over the following three years. Simplification should not however be seen as a Trojan horse for reducing essential regulatory protection in relation to, for instance, consumer protection or the protection of environment. The real question in each case is whether the approach originally chosen is the most effective for achieving the objectives set.[32] In its strategy to simplify the regulatory environment, the Commission uses the following methods.

III. 1. 1. Withdrawal or modification of pending legislative proposals

The Commission regularly monitors pending legislation to make sure that it is relevant and up to date and withdraws those proposals which are no longer topical, for example, where new proposals have been presented by the Commission and scientific or technical progress have made them obsolete later on (technical withdrawals)**.** On the other side, the better

[28] Better Regulation – Better Enforcement, p. 13
[29] European Parliament, Council, Commission: Interinstitutional Agreement on better law-making (2003 C321/01)
[30] European Commission: Better regulation – simply explained (European Communities, 2006, p. 11).
[31] Commission Working Document: Third progress report on the strategy for simplifying the regulatory environment, COM(2009)15.
[32] Elisabetta Olivi: The EU Better Regulation Agenda (in: Stephen Weatherill [ed.]: Better Regulation, p. 193.)

regulation action plan 2005 provided for the screening of proposals pending before the European Parliament and the Council, with regard to their relevance to the EU's growth and jobs priority and its better regulation strategy (political withdrawal).[33]

The pending legislative proposals were scrutinised according to whether the respective proposal (i) were consistent with the new Lisbon Strategy for growth and jobs, and thus able to contribute to competitiveness, (ii) met the better regulation standards, (iii) would have a realistic chance of being adopted if they were left on the table, or (iv) in the meantime, become obsolete.[34]

III. 1. 2. Repealing

Acts which, over time, have become irrelevant, unnecessary or obsolete due to technical or technological progress or the evolution of policies pursued by the European Union shall be reviewed and formally repealed. A key problem in this respect is that it can be argued that the repeal of an EU act should be followed by the repeal of the corresponding national implementing legislation. To ensure that future acts meet better regulation requirements, the Commission is making use of special clauses so that this type of simplification tools becomes standard practice. The *review clauses*[35] or *sunset clauses*[36] have been introduced into Commission legislative proposals to compel the legislator to check regularly the relevance, effectiveness and proportionality of the regulations in force and to facilitate any repeal of acts in future. Irrespective thereof, a review of existing EU legislation every couple of years has become standard practice in many areas of EU law.[37]

III. 1. 3. Codification

In parallel, the Commission is also codifying the existing secondary legislation because the aim of simplifying and clarifying Community law so as to make it clearer and more accessible to the ordinary cannot be achieved so long as numerous provisions that have been amended several times, often quite substantially, remain scattered, so that they must be sought partly in the original act and partly in the subsequent amending acts (considerable research work, comparing many different instruments, is thus needed to identify the current rules in force). For this reason the codification of rules that have frequently been amended is also essential if Community law is to be clear and transparent.

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[33] http://ec.europa.eu/governance/better_regulation/simplification_en.htm (downloaded on 26/05/2009)

[34] Daniela Weber-Rey: Latest Developments in European Corporate Governance in Light of Better Regulation Efforts (in: Stephen Weatherill [ed.]: Better Regulation, p. 257.)

[35] The *review clause* means that the legislator is compelled to check the further relevance and reasonableness of the relevant legislation in force after a certain period of time.

[36] The *sunset clause* results in the withdrawal of the relevant legislation containing such clause after a certain period of time.

[37] See above n. 34., p. 258.

On 1 April 1987 the Commission therefore decided[38] to instruct its staff that all legislative acts should be codified after no more than ten amendments, stressing that this is a minimum requirement and that departments should endeavour to codify at even shorter intervals the texts for which they are responsible, to ensure that the Community rules are clear and readily understandable.

Given that no changes of substance may be made to the instruments affected by codification, the European Parliament, the Council and the Commission have agreed, by an interinstitutional agreement dated 20 December 1994, that an accelerated procedure may be used for the fast-track adoption of codification instruments.

In 2001, the Commission announced a codification programme covering all existing EU legislation. Originally the project covered 500 acts which have been one or more times[39] amended and it is managed by the Commission's Legal Service which has contracted with the College of Bruges for part of the codification work. In 2006, the Commission re-launched its codification programme involving more than 400 acts. The codification project was scheduled for completion in 2008 but since a part of the planned work was not completed by that time, it goes on in 2009.

It comes from the foregoing that codification within the EU means bringing the basic law and subsequent amendments adopted at different times into one text (*codified version*).[40] The new act passes through the legislative process and upon adoption of the codified version, repeals all the previous act being codified, leaving a single text where previously the user had perhaps to consult a dozen different texts to obtain an accurate overview of the applicable law. This makes laws clearer and reduces the volume of the *acquis*. That is why the project for the codification of the whole of Community law, which is at present under way, is being given such high priority by the Barroso Commission.[41] Codification of cosmetics rules, for example, has allowed 45 different pieces of legislation to be brought within a single law. The European Parliament and the Council work with the Commission to ensure that the relevant acts are adopted as quickly as possible.[42] Codified acts are translated into all EU languages and published in the Official Journal (OJ).

Such codification is a noble aim, but it must be emphasized that pure codification without further adjustments seems hardly feasible. In this respect it should be noted that the technique of codification requires that the acts in question are in a 'standstill', i.e. legislation is not subject to amendments during the whole codification process. Moreover, after the adoption of a codified version the biggest advantage of the codification (creating a single legal act) is already overtaken by the first amendment of it.

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[38] COM(87) 868 PV.
[39] http://ec.europa.eu/dgs/legal_service/consolida_en.htm (downloaded on 26/05/2009)
[40] Two types of codification can be distinguished in the EU: *vertical* (when the original act and its amendments are incorporated in a single new text) and *horizontal* (when two or more original acts covering related subjects and their subsequent amendments are incorporated in a single new act).
[41] Better Regulation – Better Enforcement, p. 14.
[42] http://ec.europa.eu/governance/better_regulation/codif_recast_en.htm (downloaded on 26/05/2009)

Moreover, the technique of codification has one more downside: in going over the basis acts and their amendments, instances of incoherence and inconsistency are often exposed in the codified versions (and also between the codified version and the other laws not influenced by the codification). So, in addition to bringing all amendments into a codified version (without being allowed to change the substance of it), it is sometimes necessary to revise the law. This process is referred to as recasting.

III. 1. 4. Recasting

Thereafter, it is already anticipated within the EU institutions that the most advanced solution for simplifying the existing body of EU law is the technique of recasting, whereby amendments are incorporated in existing texts by a method of continuous codifications. The new act, like in the case of codification, passes through the full legislative process and repeals all the acts being recast. But unlike codification, recasting involves the new substantive changes, as amendments are made to the original act during preparation of the recast text.[43] Briefly, the most beneficial feature of recasting is that it simultaneously amends and codifies the legal acts in question during which priority is given to the merging of legal acts to maximise synergies and minimise overlaps and redundancies.[44] Thus, recasting instead of simply modifying the parts of the law that need to be changed, present the required amendments into a consolidated text together with all previous amendments, eliminating by this way the need for a subsequent codification procedure to integrate the amendments into the basic legal act. The first draft of recasts are prepared by the Directorates-General concerned, which consult both the team in the Legal Service dealing with the particular subject matter of the proposal and the codification group.

The technique of recast is widely used by the Commission; this is reflected in particular in the rolling simplification programme where nearly half of the planned simplification initiatives is to be done by recasting.[45] Rules on the use of the recasting technique are laid down in an interinstitutional agreement[46] which provides for special procedures to enable the legislative institutions to focus on those parts of the proposal which are new.[47]

However, it should be noted that also this technique has some disadvantages, thus the potential for use of it is constrained by some factors. On the one hand, recasting can be considered only for those Commission legislative initiatives that aim to amend existing legislation, on average 40% of the total number of Commission proposals in a year, and it is a technique which would be disproportionate in cases where legal texts are amended very often or where individual amendments are relatively limited, in which cases it would not be efficient to reproduce the whole text in a recast form. On the other hand, recasting of

[43] http://ec.europa.eu/dgs/legal_service/recasting_en.htm (downloaded on 26/05/2009)
[44] Daniela Weber-Rey: Latest Developments in European Corporate Governance in Light of Better Regulation Efforts (in: Stephen Weatherill [ed.]: Better Regulation, p. 259.)
[45] http://ec.europa.eu/governance/better_regulation/codif_recast_en.htm (downloaded on 26/05/2009)
[46] Signed on 28 November 2001.
[47] http://ec.europa.eu/dgs/legal_service/recasting_en.htm (downloaded on 26/05/2009)

legislation takes a long time and needs a large number of resources.[48] For example, if an amendment touches only 3 words in a text of 20 pages, the recasting will lead to republish the "new" 20 pages in the OJ, in all the languages. In practice, recasting is probably the future, it seems to become the best practice – especially when the Official Journal will be electronic.

III. 1. 5. Consolidation

Consolidation of EU legislative acts – just like codification – means bringing together the basic legislative act and all its amending acts in a single text. The difference between the codification and consolidation is that in the case of consolidation the resulting consolidated texts are not subject to any formal decision-making procedure and therefore do not have legal status, thus consolidation only corresponds to a pure declaratory, unofficial instrument of simplification. But in practice they do greatly facilitate access to legislation by making the law more reader-friendly and reduce the volume of texts since all consolidated texts are accessible on EUR-Lex[49] either through the specific act in question or in the Directory of Community Legislation in force. The exercise of consolidating the Community legislation and releasing it on the EUR-Lex site began in 1996[50] under the responsibility of the Office for Official Publications (OPOCE). By the end of 2008, the European secondary legislation, the legislative instruments adopted by the European institutions, had been consolidated in almost all EU languages[51] and it is planed that new legislative instruments will be consolidated as soon as amendment is published in the OJ.[52]

III. 2. The use of regulations as a simplification tool

Under certain circumstances the use of regulations instead of directives[53] can be conducive to simplification for some reasons. First of all, since regulations are directly applicable (i.e. no need for transposition into national legislation in the Member States), guarantee that all actors concerned are subject to the same rules at the same time, and focus attention on the concrete enforcement of EU provisions.[54] Moreover, the use of regulation instead of directives can also help to avoid the trap of diverging interpretations in the implementation phase in the Member States, and simplify handling pressing matters, thus guaranteeing that all Member States are subject to the same rules at the same time. In addition, this procedure has the advantage that attention is focused on practical enforcement of, and compliance with, the relevant EU provisions. In particular, the practice of *gold-plating*, whereby national bodies exceed the terms of European directives when implementing them into

[48] See above n. 44., p. 258.
[49] http://eur-lex.europa.eu/en/index.htm
[50] http://ec.europa.eu/dgs/legal_service/consolida_en.htm (downloaded on 26/05/2009)
[51] Consolidation in Bulgarian and Romanian is expected to be completed by early 2009 and in Maltese by the end of 2009.
[52] http://ec.europa.eu/dgs/legal_service/consolida_en.htm (downloaded on 26/05/2009)
[53] See Article 249 of the EC Treaty.
[54] http://ec.europa.eu/governance/better_regulation/simplification_en.htm (downloaded on 26/05/2009)

national law, can be avoided. Regulations can be amended relatively easier than the directives, and by substituting directives with regulation, the lengthy implementation procedure imposed on each Member State and the repetition of this each time there are technical amendments can be avoided.[55]

III. 3. Consultation with the stakeholders

Consultation with the interested parties is the best way to ensure that all interests have been taken into account and by seeking views from a broad spectrum of society at the right time makes it possible to test whether EU policies can fully operate in practice. That is why consultation is at the heart of the better regulation agenda in the EU.[56]

The European Commission is responsible for preparing proposals and has an obligation to consult widely before proposing legislation, therefore it is the leading institution for consultation. In fact, the Commission has a long tradition of extensive consultation through various channels: Green Papers, White Papers, communications, fora, workshops, permanent consultative groups and consultations on the Internet. These now fall within a common framework of minimum standards for consultation[57], and consultation is expressly an integral part of the impact assessment procedure (see below). The dialogue between the Commission and organisations from civil society nowadays takes many forms, and methods for consultation and dialogue are adapted to different policy fields.[58] There are also structured processes, such as the social dialogue with trade unions and employers' organisations and the dialogue between the Commission and the European and national associations of regional and local authorities.[59]

It can be stated that the Commission consults more and better than ever before. It is open and responsive to stakeholder representations - more than so many Member State administrations. According to the majority of experts the system does not need a radical overhaul but in practice there are still weaknesses in the consultation process that need to be addressed in the near future.[60]

III. 4. Use of alternative methods

There is a growing perception not only in the Member States but also at the EU level that sometimes legislation is not the solution for the problem, not even part of the solution but

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[55] Daniela Weber-Rey: Latest Developments in European Corporate Governance in Light of Better Regulation Efforts (in: Stephen Weatherill [ed.]: Better Regulation, p. 261.)

[56] Rick Haythornthwaite: Better Regulation in Europe (in: Stephen Weatherill [ed.]: Better Regulation, p. 22.)

[57] See in this regard: 'Towards a reinforced culture of consultation and dialogue – General principles and minimal standards for consultation of interested parties by the Commission', COM(2002)704 final.

[58] Better Regulation – simply explained (European Communities, 2006, p. 9.)

[59] For further information see the civil society website of the European Commission at http://ec.europa.eu/civil_society/index_en.htm

[60] See above n. 56., p. 23.

actually part of the problem.[61] For this reason, another major regulatory area where there is a scope for improvement of EU law and the simplification thereof, is the use of alternatives. The term 'alternative' covers a range of options, such as co-regulation, self-regulation, market-based instruments and, of course, the option of 'no action'.[62] There are several advantages to using these alternatives:

- they can be quicker and easier to introduce and adapt than the classic form of regulation, as most alternative tools avoid a lengthy legislative procedure,
- they can be cheaper to implement and administer. Operators strive to find the most cost-effective way of achieving objectives if they are given the scope to do so. It is in their interest to meet targets while minimising bureaucracy and costs.
- stakeholders are more involved in the implementation and monitoring of alternatives, while taps into their expertise and increases the chances of the proposal achieving its objectives.

The European Commission, Parliament and Council all signed up to the use of alternative regulatory mechanisms in their Interinstitutional Agreement on Better Law-Making[63]. In this document the law-making institutions of the EU recalled the Community's obligation to legislate only where it is necessary, in accordance with the Protocol on the application of the principles of subsidiarity and proportionality and recognised that there is a need to use, in suitable cases where the EC Treaty does not specifically require the use of a legal instrument, alternative regulation mechanism.

If the Parliament and the Council are more involved in the early consideration of alternatives and in monitoring their effectiveness they will safeguard their roles and be in a better position to judge whether each measure is achieving its objectives. For example, Green Papers could be used to foster discussions of the most appropriate means of policy delivery at Council and in Parliamentary Committees.[64] Unfortunately the use of alternatives is still sporadic at best within the EU. More needs to be done to increase awareness and spread best practice found in measures such as the EuroNCAP car safety scheme, the Emissions Trading Scheme and the self-regulation of advertising.[65]

III. 4. 1. Co-regulation

Co-regulation refers to the mechanism whereby the institutions adopt an act which specifically entrust the attainment of the objectives defined by the legislative authority to parties which are recognised in the field, such as economic operators, the social partners,

[61] Better Regulation – Better Enforcement, p. 4.
[62] See above n. 56., p. 23.
[63] European Parliament, Council, Commission: Interinstitutional Agreement on better law-making (2003 C321/01)
[64] Rick Haythornthwaite: Better Regulation in Europe (in: Stephen Weatherill [ed.]: Better Regulation, p. 25.)
[65] See above, p. 24.

non-governmental organisations or associations. Standardisation by independent bodies is an example of a well recognised co-regulation instrument.[66]

The mechanism may be used on the basis of criteria defined in the legislative act so as to enable the legislation to be adapted to the problems and sectors concerned, to reduce the legislative burden by concentrating on essential aspects and to draw on the experience of the parties concerned. The legislative act must abide by the principle of proportionality defined in the EC Treaty. Agreements between social partners must comply with the provisions laid down in Articles 138 and 139 of the EC Treaty. In the explanatory memoranda to its proposals, the Commission explains to the competent legislative authority its reasons for proposing the use of this mechanism. In the context defined by the legislative act, the parties affected by that act may conclude voluntary agreements for the purpose of determining practical arrangements. The draft agreements are forwarded by the Commission to the legislative authority. In accordance with its responsibilities, the Commission verifies whether or not those draft agreements comply with Community law, and, in particular, with the basic legislative act.[67]

A legislative act which serves as the basis for a co-regulation mechanism indicates the possible extent of co-regulation in the area concerned. The competent legislative authority defines in the act the relevant measures to be taken in order to follow up its application, in the event of non-compliance by one or more parties or if the agreement fails. These measures may provide, for example, for the regular supply of information by the Commission to the legislative authority on follow-up to application or for a revision clause under which the Commission will report at the end of a specific period and, where necessary, propose an amendment to the legislative act or any other appropriate legislative measure.The act itself only determines the framework within which the other parties may act. And the Commission's will only see that the system functions and take any corrective measures set out in the legislative act.

III. 4. 2. Self-regulation

Another option of the alternative methods within the EU is that the legislator refrains from adopting any binding text at all but leaves the economic operators, the social partners, non-governmental organisations or associations to agree for and adopt amongst themselves common guidelines to apply, particularly codes of practice or sectoral agreements. As a general rule, this type of voluntary initiative does not imply that the institutions have adopted any particular stance, in particular where such initiatives are undertaken in areas which are not covered by the Treaties or in which the European Union has not hitherto legislated. As one of its responsibilities, the Commission scrutinises self-regulation practices in order to verify that they comply with the provisions of the EC Treaty.[68]

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[66] E.g. the 'CE' marking of products indicates that the relevant product is safe, was approved and registered and may be marketed throughout the EU.
[67] See above n. 63.
[68] European Parliament, Council, Commission: Interinstitutional Agreement on better law-making (2003 C321/01)

The principle of 'comply or explain' is also part of the category of self-regulatory measures. According to EU Commissioner Charlie McCreevy, the principle of 'comply or explain' is a central element of European corporate governance.[69] It provides for more flexible and market-led regulation. The principle of 'comply or explain' was introduced with legally binding effect for the first time by Directive 2006/46/EC of 16 August 2006[70], which provides for an obligation to publish a Corporate Governance Statement. This must be transposed into national law by Member States by 5 September 2008. Pursuant thereto, all companies whose securities are admitted to trading on a regulated market and which have their corporate seats situated within the Community are in the future to provide a statement in their business reports confirming their compliance with corporate governance standards. [71]

III. 5. Impact assessment

Regulatory impact assessments are of paramount importance for better regulation. Although they are not binding, they do help the decision process and serve to evaluate the likely economic, social and environmental impacts of legislative measures, to improve the quality of proposals and to assess different options.[72] In future years, all key initiatives undertaken by the Commission will be subject to a comprehensive impact assessment. Generally speaking, a very important part of making better laws is having a full picture of their impacts already before their adoption, due to that proposals can be tailored to have the best effect, and to minimise negative side effects.

The practice of formal impact assessment began in 2003 in the Community[73] when the impact assessment procedure was introduced by the European Commission following recommendations from the Mandelkern group on better regulation in 2002. As a general

[69] See IP/06/269 of 6 March 2006.

[70] Directive 2006/46/EC of the European Parliament and of the Council of 14 June 2006, amending Council Directives 78/660/EEC on the annual accounts of certain types of companies, 83/349/EEC on consolidated accounts, 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions, and 91/674/EEC on the annual accounts and consolidated accounts of insurance undertakings 2006 OJ L224/49.

[71] Daniela Weber-Rey: Latest Developments in European Corporate Governance in Light of Better Regulation Efforts (in: Stephen Weatherill [ed.]: Better Regulation, p. 260.)

[72] Some authors, however, argue that the impact assessment is neither necessary nor useful and effective instrument. Since Article 253 of the EC Treaty contains an explicit requirement to give reasons for legislative decisions, they raise the question whether Impact Assessment is the appropriate instrument for this, especially when the *explanatory memorandum* already has a justificatory function. (See for example, Anne CM Meuwese: Inter-institutionalising EU Impact Assessment, in: Stephen Weatherill [ed.]: Better Regulation, p. 299.) It also often argued that because of the fact that the different actors use the impact assessment with different models in the back of their mind, linked to their own preferences on certain issues, the impact assessment itself cannot be considered as a really effective instrument for better regulation.

[73] Although formal impact assessments have been conducted by the Commission only as from 2003 (on the basis of the Communication on Impact Assessment COM(2002)276), a more limited forerunner of the system existed in the form of *fiche d'impact*. (Francis Chittenden, Tim Ambler and Deming Xiao: Impact Assessment in the EU, in: Stephen Weatherill [ed.]: Better Regulation, p. 284.)

purpose impact analysis tool meant to integrate, reinforce, streamline and replace all existing practices in the field of *ex ante* evaluation.[74] During 2003 this project functioned only as a pilot, but from 2004 onwards it matured gradually, and in 2005-2006[75] it became fully operational, covering all proposals in the Commission's Legislative and Work Programme (CLWP).[76]

Initially this procedure did not raise the interest of many stakeholders and commentators, which is rather surprising, given the fact that for example the American equivalent – regulatory impact analysis – has always given rise to much controversy.[77] But this approach has changed radically by the fact that the impact assessment procedure has grown out of the original pilot phase and is taken to the next level of institutionalisation, as evidenced by the presentation of the first Impact Assessment Guidelines by the European Commission in June 2005[78] and the adoption of an Inter-institutional Common Approach to Impact Assessment[79] by the three institutions in November 2005. The very new impact assessment guidelines adopted in 2009[80] replace the previous ones adopted in 2005 (and updated in 2006).

According to the impact assessment guidelines, impact assessment is a key tool to ensure that Commission initiatives and EU legislation are prepared on the basis of transparent, comprehensive and balanced evidence and is an aid to political decision-making (not a substitute for it). The impact assessment is a set of logical steps to be followed when preparing an EU proposal. It is a process that prepares evidence for political decision-makers on the advantages and disadvantages of possible policy options by assessing their potential impact.[81]

Thus, the impact assessment report of a specified Commission proposal, published together with the proposal, serves to provide *ex ante* analysis of social, economic and environmental impacts of the proposals and to summarise the results, highlighting the trade-offs between the impacts associated with the policy options.[82] The concrete aims of the impact assessment procedure are to enhance the empirical basis of political decisions and to make the regulatory process more transparent and accountable. Impact assessment may also be

[74] Anne CM Meuwese: Inter-institutionalising EU Impact Assessment (in: Stephen Weatherill [ed.]: Better Regulation, p. 287.)
[75] Impact assessment considered a rather small number of proposed acts in 2005, i.e. 76 in compared with the 133 directives published in that year, together with over 2,000 regulations, although in this latter case it has been shown that the vast majority was of minor importance, relating for example to routinely establishing the price of certain foodstuffs. (José Manuel Barroso, Uniting in peace: the role of Law in the European Union (SPEECH/06/213).)
[76] See above n. 74., p. 288.
[77] See above n. 74., p. 288.
[78] European Commission, Impact Assessment Guidelines, SEC(2005)791, 15 June 2005.
[79] European Parliament, Council and Commission, Common Approach to Impact Assessment (November 2005)
[80] European Commission: Impact Assessment Guidelines, SEC(2009)92, 15 January 2009.
[81] European Commission: Impact Assessment Guidelines, SEC(2009)92, 15 January 2009, p. 4.
[82] See above n. 74., p. 288.

seen as a means of ensuring that proposed regulation complies with a set of predetermined principles.[83] Briefly, a normative analysis of the impact assessment system might conclude that impact assessment has three main objectives[84]:

1. to challenge the need for new regulation,
2. to improve the new regulation to make it less burdensome and/or more effective,
3. to create the mechanism for review and revision of, or rescission of, the regulation at a later date.

In addition, as the impact assessment guidance states itself, the process contributes to both the Lisbon competitiveness commitments and sustainable development strategies by improving the quality of policy proposals, and keeping EU intervention as simple as possible. Finally, impact assessments explain why action is necessary and the regulatory response is appropriate, or alternatively why no action should be taken. It should also be emphasized that the Commission has made sure that the full-fledged scrutiny against the Charter of Fundamental Rights is now also an essential component of this process.[85]

It can be seen from the above that the impact assessment guidance claims that these documents can fulfil a multiplicity of roles. Thus the guidance is framed in a way that could appeal the enthusiastic of all the three of the main agendas, i.e. competitiveness, sustainable development and good governance, even though it must be recognised that there can be obvious tensions between these competing objectives. This attempt to widen the appeal of impact assessments is perhaps one of the reasons the guidance appears to be growing in complexity.[86]

The current guidelines do not define which Commission initiatives need to be accompanied by an impact assessment. This is decided each year by the Secretariat General or the Impact Assessment Board and the departments concerned. In general, impact assessments are necessary for the most important Commission initiatives and those which will have the most far-reaching impacts. This is the case for *all* legislative proposals of the Commission's Legislative and Work Programme (CLWP) and for all non-CLWP legislative proposals which have clearly identifiable economic, social and environmental impacts (with the exception of routine implementing legislation) and for non-legislative initiatives (such as white papers, action plans, expenditure programmes, international agreements). It is also the case for certain implementing measures (so called 'comitology' items) which are likely to have significant impacts.[87]

As regards the procedural questions, there are two stages in the assessment process. The first is the preparation of an initial review or road map and, where subsequently deemed

[83] Francis Chittenden, Tim Ambler and Deming Xiao: Impact Assessment in the EU (in: Stephen Weatherill [ed.]: Better Regulation, p. 274.)
[84] See above.
[85] José Manuel Barroso, Uniting in peace: the role of Law in the European Union (SPEECH/06/213).
[86] Francis Chittenden, Tim Ambler and Deming Xiao: Impact Assessment in the EU (in: Stephen Weatherill [ed.]: Better Regulation, pp. 276-277.) For example the latest version (2009) is of 49 pages, while the 2002 version (European Commission Communication on Impact Assessment COM(2002)76) was remarkably shorter, 33 pages.
[87] European Commission: Impact Assessment Guidelines, SEC(2009)92, 15 January 2009, p. 6.

appropriate, the second is the preparation of the full impact assessment. It normally takes more than 12 months to produce an impact assessment, including the periods needed for public consultation.[88] The full impact assessment process includes six key analytical steps:[89]

1. Identify the problem.
2. Define the objectives.
3. Develop main policy options.
4. Analyse their impacts.
5. Compare the options.
6. Outline policy monitoring and evaluation.

The process also provides for stakeholder consultation and the collection of expertise as an integral part of the process. However, the involvement of affected or interested parties in the impact assessments process is still to be effectively reinforced by increased consultation procedures.[90]

The lead service for the proposal is responsible for preparing the impact assessment but proposals undergoing impact assessment are subject to formal Inter-Service Consultations (ISC), and this process covers the impact assessment report and annexes, as well as the Explanatory Memorandum accompanying the draft proposal. There is an element of quality control attached to this process because where the ISC considers that the impact assessment report does not reach a satisfactory standard an unfavourable opinion may be issued.[91] The final impact assessment report has the status of a Commission Staff Working Document and is used to support arguments for the merits of the Commission's proposal in the Council and/or European Parliament. According to the Impact Assessment Guidelines the report should be no longer than 30 pages (excluding the executive summary, tables, diagrams and annexes), but if the report covers several initiatives, it may go beyond 30 pages. An executive summary (a separate document) of no longer than 10 pages must be provided as well. The report can be drafted in English, French or German, and is generally not translated. The executive summary must, however, be translated into all official languages.[92]

It is also important to mention that Member States are invited to submit national impact assessments to the Commission in order to inform preparation of the EU-wide impact assessment. However, it can be stated this happens rarely even though impact assessment is widely used tool by governments and regulators in many Member States. However,

[88] European Commission: Impact Assessment Guidelines, SEC(2009)92, 15 January 2009, p. 8.
[89] European Commission: Impact Assessment Guidelines, SEC(2009)92, 15 January 2009., p. 5. These steps were the very same in the previous Impact Assessment Guidelines, SEC(2005)791 final, of 15 June 2005.
[90] See: Daniela Weber-Rey: Latest Developments in European Corporate Governance in Light of Better Regulation Efforts (in: Stephen Weatherill [ed.]: Better Regulation, p. 261.)
[91] Francis Chittenden, Tim Ambler and Deming Xiao: Impact Assessment in the EU (in: Stephen Weatherill [ed.]: Better Regulation, p. 279.)
[92] European Commission: Impact Assessment Guidelines, SEC(2009)92, 15 January 2009, pp. 9-10.

Member States' views are sought as part of the impact assessment data collection process.[93] A comparative study of the impacts of impact assessments on EU regulation in Member States has produced some potentially more encouraging results. In a study for DG Enterprise it was concluded that where EU regulations had been subject to impact assessment within Member States the resulting compliance costs were lower than in countries where no ex ante assessment of the impacts were made.[94]

There are other real problematic issues, too, as regards the practice of the impact assessment. For example the questions like 'should Council and Parliament be allowed to ask the Commission to revisit its impact assessment?', 'what is to be done when an important proposal does not have an impact assessment accompanying it?', or 'how it could be made sure that the impact assessment has an impact but does not fetter the discretionary powers of the respective legislators too much?', which were already addressed in the Common Approach[95], but not answered unambiguously[96], must be solved. There was another main concern, but it was solved when both Council and the European Parliament have made commitment to assess the impact of substantial amendment they make to Commission proposals during the decision-making procedure.[97]

III. 6. The importance of legislative drafting

The importance of legislative drafting has been recognised more than 10 years ago within the legislative institutions of the EU. In 1998, the European Parliament, Council and Commission signed an Agreement on the quality of drafting of Community legislation[98] and in September 2003 the three institutions came together again to sign another Interinstitutional Agreement on better law-making[99], which still forms the base of today's practice. The emphasis this time was more on coordination between the three institutions of their legislative activity and, in particular, on the improvement of the coordination of their preparatory and legislative work in the context of the co-decision procedure. The three institutions committed themselves in this latter agreement to a raft of measures designed to change fundamentally the Community's approach to regulation. Those measures can be grouped in five broad themes: i) better preparation of legislation, ii) improved explanation, iii) simplification, iv) updating and condensing the *acquis*, v) improving the drafting. As regards for example the aim of better preparation of legislation, the three institutions agreed

[93] Francis Chittenden, Tim Ambler and Deming Xiao: Impact Assessment in the EU (in: Stephen Weatherill [ed.]: Better Regulation, p. 284.)
[94] Ramboll Management, 'Ex-Post Evaluation of EC Legislation and its Burden on Business', final report, (Brussels, EC, 2005)
[95] Inter-Institutional Common Approach for Impact Assessments, Council doc. 14901/05 of 14 November 2005.
[96] Anne CM Meuwese: Inter-institutionalising EU Impact Assessment (in: Stephen Weatherill [ed.]: Better Regulation, p. 295.)
[97] European Commission: Impact Assessment Guidelines, SEC(2009)92, 15 January 2009, p. 11.
[98] Interinstitutional Agreement of 22 December 1998 on Common Guidelines for the Quality of Drafting of Community Legislation (1999) OJ C73/1.
[99] European Parliament, Council and Commission, Interinstitutional Agreement on Better Law-Making (2003) OJ C321/1.

to better coordinate their legislative activity by establishing a multiannual programme and more detailed annual programmes. Moreover, according to the agreement, for each major measure an indicative timetable is to be drawn up. It can be said that this works quite well in practice, and helps establishing the agendas in each institution, avoiding either hurried discussion or discontinuity in the workload. Information on the consultation procedure is given on the website of the Commission's Secretariat-General, thereby ensuring transparency and accessibility.[100]

The question of legislative drafting is an area where the Legal Services of the three institutions have a special responsibility. It needs to be mentioned that they have drawn up a Joint Practical Guide for the drafting of Community legislation (the so-called JPG) [101] in order to develop the content and explain the implications of the total of 22 guidelines of the Interinstitutional Agreement of 1998 on quality of drafting, by commenting on each guideline individually and illustrating them with examples. According to the JPG acts adopted by the Community institutions must be drawn up in an intelligible and consistent manner, in accordance with uniform principles of presentation. That is why the JPG is intended to be used by everyone who is involved in the drafting of the most common types of Community acts. However, it should be noted that the JPG is to be used in conjunction with other more specific instruments, such as the Council's Manual of Precedents, the Commission's Manual on Legislative Drafting, the Interinstitutional style guide published by the Office for Official Publications of the European Communities or the models in LegisWrite[102]. The Legal Services give trainings on a regular basis (mainly in the form of seminars) on the quality of legislation (or more specific seminars in this matter) for EU officials and national experts who are involved in the drafting process to improve the quality of the very first drafts. It is essential since even they are lawyers – which is rarely the case –, in the most cases they have never had any training in EU legislative drafting rendering much more difficult the whole drafting process and can causing many problems later on.

The Commission has also reorganised its internal procedures within the Legal Service so that the early drafts of legislation can be checked by a team of legal revisers (the 'Quality of legislation' team) who are all lawyers with linguistic qualifications. The check on the form and presentation of draft legislation comes on top of the existing work of the lawyers in the Legal Service (in all of the teams) who have long ensure that drafts are in accordance with the Treaties and basic principles of Community law and are consistent with other legislation in the field, as well as the Community's international obligation.[103]

Legislation of high quality will not only be better placed to stand the test of time, it will also give rise to fewer problems of implementation and enforcement. It is therefore vital

[100] Better Regulation – Better Enforcement, pp. 9-10.
[101] Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of legislation within the Community institutions (European Communities, 2003). It has been widely circulated and is made available on the EUR-Lex at http://eur-lex.europa.eu/en/techleg/index.htm (downloaded on 30/05/2009).
[102] Models drafted by the Commission in 1999.
[103] Better Regulation – Better Enforcement, pp. 15-16.

that the better regulation agenda should accommodate, at every level and in each aspect of the overall design, the need to give the necessary time and attention to the requirements of legislative drafting. A holistic approach to the subject must take account of all stages of the regulatory process, from the inception of a norm to its final implementation, and – if necessary – its enforcement.[104]

IV. Results already obtained

The advent of the Barroso Commission in 2004 corresponded with the greatest institutional effort to facilitate the European business community in the fight against red tape. In the name of better regulation, the Commission started a campaign of reduction of regulation, calling for a reduction of the *acquis communautaire* by repealing, codifying, recasting or modifying 222 basic items of legislation and over 1400 related legal acts in the next three years.[105] Up to now the European Commission has already proposed about 800 legal acts for *amendment* or *repeal* under the simplification programme between 2005 and 2009. Once adopted, the *acquis* will be reduced by about 600 legal acts (around 6,500 pages of the OJ).

As regards the topic of *modification or withdrawal of pending legislation*, it can be concluded that all pending proposals made before 2004 were screened and as a result, 68 pending proposals were withdrawn in 2006. This initiative was an innovation, as it went beyond the regular withdrawal exercise of proposals no longer topical since without prejudice to the possibility for the Commission to withdraw a pending proposal of a given moment, as of 2007, the Commission integrated a regular withdrawal exercise into its annual work programme. To complete the 2005 screening, the Commission carried out a similar exercise on pending proposals made before 2006. The outcome was 10 withdrawals in 2007 and 30 in 2008 raising the total number to 108. The withdrawal of an additional 20 pending proposals is included in the Commission's work programme for 2009.[106] In parallel, the Commission has also continued *to codify* the *acquis* with a view to making it more compact and readable whilst ensuring legal certainty. The Commission has already finalised the codification of 229 acts. Of these, 142 are already adopted and published in the OJ (102 Commission acts and 40 acts of the European Parliament and the Council) and have replaced 729 previous acts (corresponding to about 1,300 pages of the OJ). [107]

Overall, the Commission has taken action since October 2005 which will reduce the *acquis* by almost 10% - about 1,300 legal acts (7,800 pages of the OJ).[108] The benefits of these and

[104] Better Regulation – Better Enforcement, p. 3.
[105] Jacopo Torriti: The Standard Cost Model: When 'Better Regulation' Fights Against Red Tape? (in: Stephen Weatherill [ed.]: Better Regulation, p. 105.)
[106] http://ec.europa.eu/governance/better_regulation/simplification_en.htm (downloaded on 26/05/2009)
[107] Commission Working Document: Third progress report on the strategy for simplifying the regulatory environment, COM(2009)15, p. 8.
[108] Commission Working Document: Third progress report on the strategy for simplifying the regulatory environment, COM(2009)15, p. 3.

other simplification measures are becoming tangible for business, citizens and public authorities.

Just to give some examples[109]:

- the new regulation on maximum residue levels (MRL) for pesticides in food and feed replaced approximately 500,000 national MRLs with 100,000 EU MRLs and helps operators, who no longer have to submit multiple application in different Member States;
- the simplification of the Community Customs Code includes the modernisation of the EU customs legislation and the creation of a paperless environment for customs authorities and traders. Electronic logging of customs declarations and accompanying documents will become the rule. Authorised traders will be able to declare goods electronically and pay their customs duties in the Member State where they are based, regardless of where the goods were brought in or taken out of the EU customs territory, or where they will be consumed. Once the integrated system is fully operational, it should generate benefits for traders estimated at -2,5 billion euro/year.
- the new 'Car Safety Package' proposal will simplify the existing regulatory environment by repealing 150 directives on the type-approval of vehicles, and introduce mandatory fitting of safety features and tyre pressure monitoring systems on passenger cars, dramatically improving vehicle safety and reducing CO_2 emission.
- the new cosmetic regulation will replace over 3,500 pages of legal texts. While maintaining the same, high level of safety standards, the proposal reduces costs for business by at least 50%.

But certainly simplification reaches further. As regards the near future, the Commission has included 33 simplification initiatives in its Legislative and Work Programme for 2009.[110] Some of these initiatives (22) are entirely new and cover policy areas such as state aid, accountancy law, enforcement of court judgements in civil and commercial matters and late payments in commercial transactions.[111] Thus, it can be concluded that the simplification programme has become inherent in any policy revisions.

V. Concluding remarks

Since the launch of the strategy for simplifying the regulatory environment, simplification has been mainstreamed into the work of the Commission. Through a range of coordinated activities, the Commission has built up a political and practical framework of action delivering tangible benefits for citizens, businesses and public administrations. In an effort to make legislation more clearer and understandable, as already mentioned above, some

[109] See the other main results in the different EU policies: Commission Working Document: Third progress report on the strategy for simplifying the regulatory environment, COM(2009)15, pp. 3-7.

[110] Commission Legislative and Work Programme 2009: Acting now for a better Europe – COM(2008)712.

[111] http://ec.europa.eu/governance/better_regulation/simplification_en.htm (downloaded on 26/05/2009)

1,300 acts, representing around 10% of the *acquis*, have already been removed from the EU law[112]

Better regulation is not necessarily about doing less, it is really about doing better. It's about ensuring that the necessary legislation is brought to effect, and that the unnecessary legislation does not stand in their way. In this sense better regulation is a win-win agenda. It is a means of securing protections for citizens without imposing unnecessary or excessive regulatory cost; it is a means of enhancing competitiveness, growth and employment, and also promotes a better quality of life. Better regulation is not about eroding essential regulatory protection; it is about achieving agreed policy goals in the most effective and efficient way possible.[113] Whilst twenty years ago policy discussion focused on 'deregulation', now the obsession is for better regulation. This evolution reflects a movement away from the simplistic notion that there is just too much regulation, some of which could be abolished, towards a more balanced perspective. The new approach is characterised by an acceptance that much regulation is necessary but also by a concern that attention must be paid to the choice and design of instrument, so that it may be well targeted to the regulatory objectives. [114] Concerns with this area of the state-industry relationship and efforts to improve it have been widely shared across the industrialised world (and of course it is still a constant theme, e.g. in the UK governments since the Thatcher era[115]) and in the international organisations, like the OECD[116].

[112] Commission Working Document: Third progress report on the strategy for simplifying the regulatory environment, COM(2009)15, p. 11.
[113] Rick Haythornthwaite: Better Regulation in Europe (in: Stephen Weatherill [ed.]: Better Regulation, p. 19.)
[114] Anthony Ogus: Better Regulation – Better Enforcement (in: Stephen Weatherill [ed.]: Better Regulation, p. 107.)
[115] Since 1997 the Labour government has continued the policy focus on regulation, albeit one discursively constructed as 'better regulation', as part of a broader programme of modernising the government. The rhetorical switch to better regulation explicitly draws attention to the quality of regulation. The Better Regulation Task Force, a business-led body, was established in 1997 to provide independent advice to government on regulatory matters. In My 2005, the government launched the Better Regulation Action Plan the objectives of which include simplifying, consolidating and reducing regulation, including that arising from the tax system, reducing the number of regulatory bodies, applying a risk-based approach to inspection and enforcement, achieving consistency in enforcement practices across local authority areas, reforming penalty systems, encouraging EU regulatory reform and ensuring appropriate implementation of EU law. The new Legislative and Regulatory Reform Act 2006, moreover, extends government powers to amend legislation by Regulatory Reform Order. (John Kitching: Is Less More? Better Regulation and Small Enterprise, in: Stephen Weatherill [ed.]: Better Regulation, pp. 164-165, 167.)
[116] See in particular: From Red Tape to Smart Tape: Administrative Simplification in OECD Countries (Paris, OECD, 2003), OECD Report on Regulatory Reform (Paris, OECD, 1997), Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance (Paris, OECD, 2002).

Although the concept of better regulation is still comparatively new in Brussels, the right rhetoric is now being used and some better regulation procedures are being put in place[117], especially within the European Commission. Nevertheless, certainly many of these tools need to be fully ingrained and we still need to see more tangible results.

However, the perception that EU laws are particularly responsible for red tap is basically wrong. Some claims of 'Brussels bureaucracy' turn out to have national laws as their source. The EU often pursues its objectives by adopting directives setting out broad principles and objectives and leaving implementation to be defined by the Member States. Member States can then choose how to meet the goals of the directive, adapting to their own institutional and administrative cultures. It is often at this stage that embellishments and refinements, not prescribed by EU law, are introduced. These can go well beyond the requirements set out in EU law, resulting in extra costs and burdens. As already mentioned, this is sometimes referred to as gold plating.[118] That is why the EU institutions called on the Member States to ensure a proper and prompt transposition of Community law into national law within the prescribed time limits, pursuant to the Presidency Conclusions of the European Council at its Stockholm, Barcelona and Seville meetings.[119]

Consequently the efforts of the EU institutions will remain incomplete if better regulation is seen as a problem just for Brussels. The reality is that the Member States face exactly the same problems when it comes to national legislation. This is why the EU intends the better regulation effort to become a common effort and not only of the EU institutions, but also of the Member States. The Member States have an essential role to play in the better regulation as they are responsible for applying and, in the case of directives, transposing EU legislation at national level. Delivery on better regulation therefore relies largely on their efforts. There is a danger of a paper-implementation culture in which the paperwork is duly completed but the practical problems are not tackled, leading to 'silent losses'. Effects of poor legislation include: non-compliance, divergent application, distortion of markets, loss of competitivity, implementation and enforcement difficulties and excessive

[117] Although some authors are not so optimistic in this regard. They claim that the drive for better regulation and efforts to promote new flexible modes of governance will be limited by many of the same forces that have stymied such initiatives in the past. The tendency to produce detailed, inflexible regulations is deeply rooted in the EC's political system. With its extreme fragmentation of political power and the distrust between EC policy-makers and the Member State administrations that implement most EC policy, the EC is simply not a polity structured to produce simple, flexible and informal regulation. For one thing, a structure containing a number of very different Member States is almost inevitably going to incorporate elements of the regulatory traditions of each. Over-regulation in this instance is a function of the weakness and permeability of Brussels to Member States' demands, rather than of an overweening excessively regulatory Commission. (See particularly: R Daniel Kelemen and Anand Menon: The Politics of EC Regulation (in: Stephen Weatherill [ed.]: Better Regulation, p. 184.)

[118] European Commission, Better Regulation – simply explained (European Communities, 2006)

[119] European Parliament, Council, Commission: Interinstitutional Agreement on better law-making (2003 C321/01)

litigation.[120] The regulatory environment can be improved only if the initiatives taken at EU level are matched by equally ambitious programmes in the Member States. It can be stated that the regulatory environment for business is to a very large extent made up of national regulations that do not originate from the EU. According to a recent Dutch study, more than half of the obstacles which were associated with European legislation resulted from additional national requirements. If the EU institutions are going for a lighter Community regulatory environment it should not be immediately filled up with new national requirements or new technical barriers at national level.[121]

It can be concluded that a clear, efficient, high quality and easily accessible regulatory environment is a precondition for respecting the principles of subsidiarity and proportionality, for improving governance and citizens' perception of the EU, and for achieving – as soon as possible – the Lisbon objectives of sustainable growth and jobs. The EU needs such results urgently, especially today, when the whole world economy has to face the financial crisis.

[120] William Robinson: Summary Report on the Seminar 'The Quality of EC Legislation and Ways to Improve it', available at http://ec.europa.eu/dgs/legal_service/seminars/nl_summary.pdf (downloaded on 26/05/2009)

[121] Elisabetta Olivi: The EU Better Regulation Agenda (in: Stephen Weatherill [ed.]: Better Regulation, p. 193.)

MONETARY SOVEREIGNTY AND THE EUROPEAN ECONOMIC AND MONETARY UNION

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Introduction

Rephrasing a quote of unknown origin slightly, one could say that there are three roads to madness: love, ambition and the study of money. There are different disciplines that deal with money: Economics, Law, Sociology, Political Science and Geography. However for a lawyer, thinking about money and especially monetary sovereignty means thinking about the nature of a relationship between the State, the individual and the economy.

The power over money has persistently been regarded as one of the core elements of statehood since the development of the notion of sovereignty by Jean Bodin.[1] The emergence of national currencies as such, i.e. money that is distinct and exclusive to the territory of a State, is seen as closely related to the formation of National States in modern times. However, national money is not always appreciated. According to the words of John Stuart Mill:

"So much barbarism still remains in the transactions of the most civilized nations that almost all independent countries choose to assert their nationality by having, to their own inconvenience and that of their neighbours, a peculiar currency of their own."[2]

The integration accomplishments of the last decades of the 20th century were a great progress on the way to the European unity. In this period, a group of European states reached a high level of economic integration that no other states with similar historical background had been able to. This form of integration, the Economic and Monetary Union became known as EMU both generally and in the technical literature. As we celebrate the first decade of European Economic and Monetary Union we should remember that the launch of EMU and the euro ten years ago marked a watershed on European integration. The establishment of EMU can be valued as a key turning point of the European integration process lasting for over half a century, whose most visible result was the introduction of the single currency. It transferred a core element of national sovereignty – monetary and exchange rate policy – to EU level, with far reaching economic and political consequences. For the international monetary system it was the most significant change at least since the end of the Bretton Woods system in the early 1970s. This paper takes a closer look on the one hand at the elements of monetary sovereignty in public international law and on the

[1] Bodin, *Les six livres de la République* (1583), Chapter X, p.211.
[2] Mill, *Principles of Political Economy* (London 1848 (1909)), p. 615.

other hand at the connection and interaction between EMU/European law and monetary sovereignty.

1. Monetary sovereignty and public international law

The purpose of this chapter is to examine the different components of monetary sovereignty and to assess the extent to which these components have or have not been restricted by rules of public international law. Monetary sovereignty encompasses a number of sovereign rights as well as policy tools. With regard to the internal dimension of monetary sovereignty, the State is free to define its unit of account, to issue banknotes and coins and to declare them legal tender, to impose criminal sanctions on counterfeiting, to prohibit the use of other currencies inside its territory, to regulate the money supply and the banking system and to determine and change the value of its currency. According to an often quoted decision of the Permanent Court of International Justice of 1929: *"It is indeed a generally accepted principle of public international law that a State is entitled to regulate its own currency."*[3] Externally, States may decide to impose exchange restrictions and controls on the flow of capital and payments, opt for a floating or fixed exchange-rate regime and define the exchange-rate vis-a-vis other currencies.[4]

If we would like to analyse the connection between monetary sovereignty and public international law, we have to study the International Monetary Found (IMF). The IMF is an organization of 185 countries, working to foster global monetary cooperation, secure financial stability, facilitate international trade, promote high employment and sustainable economic growth, and reduce poverty around the world. It can't be overemphasized that the primary function of the IMF is not to provide financial assistance to its members but to achieve certain objectives[5] in international monetary relations. As Gianviti said: *"It is first and foremost a monetary institution."*[6] With its 185 member countries, the IMF constitutes the virtually universal legal framework for the exercise of monetary sovereignty. By becoming members of the IMF, they have accepted some obligations, to that extent, limited their monetary sovereignty. In other words: membership is not an imposed restriction on sovereignty, but a deliberate self-restraint, something that is sometimes forgotten in the discourse about the waning of sovereignty.[7] That's why it may be said that full monetary sovereignty exists only in those few countries that are not members of the IMF. However, it must be emphasized that every country is free to join and to leave the IMF.

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[3] PCIJ, *Case Concerning the Payment of Various Serbian Loans Issued in France*, Urteil vom 12. Juli 1929, Serias A, Nos. 20/1, p. 44.

[4] Herrmann, Cristoph W., *Play Money? Contemporary Perspectives on Monetary Sovereignty,* EUI Working Paper RSCAS 2007/28, pp. 4.

[5] Exchange rate stability, liberalization of payments and transfers for current international transactions.

[6] Gianviti, Francois, *Current Legal Aspects of Monetary Sovereignty,* 2004, www.imf.org/external/np/leg/sem/2002/ cdmfl/eng/gianvi-pdf (10.02.08.), pp. 1.

[7] See Herrman, op.cit., pp.4.

Monetary sovereignty includes essentially three exclusive rights for a given state:[8]

- the right to issue currency, coins and banknotes that are legal tender within its territory;
- the right to determine and change the value of that currency;
- the right to regulate the use of that currency or any other currency within its territory.

According to Gianviti the first and third rights correspond to the role of money as a medium of payment. The second right reflects the role of money as unit of account. The two functions may be separated: a monetary unit of account may be represented by coins and notes bearing a different name.[9]

1.1. The issuance of currency

The right to issue currency may be exercised by the state that has sovereignty over its territory. It may be delegated to a national central bank but several states may delegate their power to issue currency to a common central bank, for example to the European System of Central Banks (ESCB) and the European Central Bank (ECB). The right to issue currency has several economic implications that go far beyond the supply of coins and banknotes to a country's economy. The central bank's right to issue currency allow it to conduct the country's monetary policy. In connection with it we have to recall the classic definition of monetary policy. Monetary policy includes a means by which central banks try to effect macroeconomic conditions by influencing the supply of money. Four main possibilities are available: 1) printing more money (now rarely used in practice), 2) direct controls over money held by the monetary sector, 3) open-market operations and 4) influencing the interest rate. A state's right to issue its currency is protected against foreign states. That's why a foreign state may not counterfeit another state's currency.[10]

1.2. The valuation of currency

The state that issues a currency may determine and change the value of that currency. It is also possible not to determine a particular value for its currency. According to the International Monetary Fund's (IMF) original Articles of Agreement, the par value of a member currency was determined in terms of gold, which created an obligation for the member to maintain exchange rates within specified margins around parity and the par value could be changed unilaterally by the member. It means – with the words of Gianviti – that *"Sovereignty was recognised even in that case."*[11]

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[8] On the attributes of monetary sovereignty, see F.A.Mann, *The Legal Aspects of Money, 5th edition*, Oxford, 1992, pp. 460-478.
[9] See Gianviti, op.cit., pp.2.
[10] See Gianviti, op.cit., pp.3-4.
[11] See Gianviti, op.cit., p.4.

Under the effective Articles of Agreement of the IMF, there are some limitations on members' right to determine or change the value of their currency:

a) A member may not determine the value of its currency in terms of gold and any other valuation is permitted.
   "Under an international monetary system of the kind prevailing on January 1, 1976, exchange arrangements may include
   (i) the maintenance by a member of a value for its currency in terms of the special drawing right or another denominator, other than gold, selected by the member, or
   (ii) cooperative arrangements by which members maintain the value of their currencies in relation to the value of the currency or currencies of other members, or
   (iii) other exchange arrangements of a member's choice.[12]
b) Each member shall avoid manipulating exchange rates or the international monetary system in order to prevent effective balance of payments adjustment or to gain an unfair competitive advantage over other members.[13]
c) A member may not engage in multiple currency practices.[14]

1.3. The use of currency

A state may regulate the use of its currency and of other currencies within its territory. It may regulate payments, impose exchange controls, prohibit the making or receipt of payments and transfer in foreign currency for domestic and international transaction, among others. The regulation of currency includes all means of payment denominated in that currency.[15] A lot of international treaties limit the parties' right to restrict international transfers and payments. Under the IMF Articles, members may restrict capital movements but need IMF approval for restrictions on the making of payments and transfers for current international transactions.[16] Nevertheless there are two exceptions.[17] The Organisation for

[12] Articles of Agreement, Article IV, Section 2(b)
[13] Ibid., Article IV, Section 1(iii)
[14] *„No member shall engage in, or permit any of its fiscal agencies referred to in Article V, Section 1 to engage in, any discriminatory currency arrangements or multiple currency practices, whether within or outside margins under Article IV or prescribed by or under Schedule C, except as authorized under this Agreement or approved by the Fund. If such arrangements and practices are engaged in at the date when this Agreement enters into force, the member concerned shall consult with the Fund as to their progressive removal unless they are maintained or imposed under Article XIV, Section 2, in which case the provisions of Section 3 of that Article shall apply."* (Ibid., Article VIII, Section 3)
[15] See Gianviti, op.cit., p.7.
[16] Ibid., Article VIII, Section 2(a)
[17] *„A formal declaration under (*a*) above shall operate as an authorization to any member, after consultation with the Fund, temporarily to impose limitations on the freedom of exchange operations in the scarce currency. Subject to the provisions of Article IV and Schedule C, the member shall have complete jurisdiction in determining the nature of such limitations, but they shall be no more restrictive than is necessary to limit the demand for the scarce currency to the supply held by, or accruing to, the member in question, and they shall be relaxed and removed as rapidly as conditions*

Economic Co-operation and Development (OECD) adopted two codes of liberalization for its members in 2007 and 2008: one for current invisible operations and the other for capital movements.[18] The EC-Treaty has also liberalized current and capital movements with some exceptions.[19]

2. Monetary sovereignty and EMU

2.1. Prehistory of Economic and Monetary Union (1958 - 1988)

The objective of this section is to represent in what legal and institutional frameworks the deepening of cooperation of economic and monetary policy among member states of the European Economic Community (EEC) has taken place in the first four decades of the integration between 1958 and 1988. The EEC-Treaty concentrated on the creation of a customs union for industrial goods, a common trade policy and a common policy for agricultural sector. The Treaty provisions on economic and monetary polices were limited in number and fairly general in nature. Apart from general references to the coordination of economic policies and to the internal and external financial stability of the member states in part one of the EEC Treaty only 7 of the 240 articles of the treaty dealt exclusively with economic, monetary and exchange rate policies.[20] In the mid-1950s, when the negotiations on the EEC Treaty started, there existed a global monetary framework under the auspices of the International Monetary Fund[21] that did not seem to require, on a regional bases, specific obligations for the coordination of monetary and exchange rate policies. Furthermore, economic and monetary policies were considered an integral part of national sovereignty and identity. An examination of the treaty provisions on economic and monetary policies and on the liberalization of capital movements shows that safeguarding the common market was the main concern of the drafters of the treaty.

The 1960s were characterized in the monetary field by a number of problem within the EEC and on a global scale. The potential risks of autonomous and uncoordinated national

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*permit." (*Ibid., Article VII, Section 3(b)); *The Fund shall make annual reports on the restrictions in force under Section 2 of this Article. Any member retaining any restrictions inconsistent with Article VIII, Sections 2, 3, or 4 shall consult the Fund annually as to their further retention. The Fund may, if it deems such action necessary in exceptional circumstances, make representations to any member that conditions are favourable for the withdrawal of any particular restriction, or for the general abandonment of restrictions, inconsistent with the provisions of any other articles of this Agreement. The member shall be given a suitable time to reply to such representations. If the Fund finds that the member persists in maintaining restrictions which are inconsistent with the purposes of the Fund, the member shall be subject to Article XXVI, Section 2(*a). *(*Ibid., Article XIV, Section 3)

[18] See OECD Code of Liberalization of Capital Movements: 2007 and OECD Code of Liberalization of Current Invisible Operations: 2008

[19] „*Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited. 2. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited."* (Article 56 of the EC Treaty)

[20] EEC Treaty, Art. 103-109

[21] The Bretton Woods system

economic and monetary policies for the emerging common market and the growing tensions between EC economies could no longer be disregarded. They underlined the need for improved cooperation on economic and monetary policies. On December 1 and 2, 1969, the Heads of State or Government of the EC countries met for their first summit conference in the Hague. The conference agreed that "a plan by stages should be drawn up by the Council…with a view to the creation of an economic and monetary union" and that "the development of monetary should be based on the harmonization of economic policies." The summit did not give any concrete instructions how EMU should be achieved. In a meeting on March 6, 1970, the Council formed a working group to draft a report analyzing the different suggestions and identifying the basic issues for a realization of EMU. Chairman of the committee was the prime minister of Luxembourg, Pierre Werner. The Werner Committee submitted its reports in May and October 1970. The main points of the Werner Report were an analysis of the achievements and the shortcomings of the EC so far, a precise definition of EMU, a strategy for its realization, the design of three stages over a period of ten years. Unfortunately, the energy recession of the mid-1970s and further monetary crises in certain member states prevented the Community measures from becoming truly effective. Coordination efforts were reduced, rather than enhanced, in the late 1970s. The goal of EMU receded farther into the distance.

In the late 1970s, the leadership of France and Germany, together with Commission President, caused a new attention to be focused on monetary coordination and stabilization. The European Council Meeting in Bremen in August 1978 officially endorsed the concept of a European Monetary System (EMS), which came into force in March 1979. The EMS features three elements:

- an exchange rate mechanism (ERM) between a participating currencies,
- the creation of ECU,
- mechanism to provide credit to the participating central banks in order to maintain the central rates agreed.

The ERM is a parity grid of bilateral exchange rate, with interventions limiting the swings in currency prices between pre-announced floors and ceilings. The currencies can fluctuate within a maximum permissible band of 2.25% on either side of their central rates. The EMS introduced the ECU, which was to serve as a new unit of account in Community affairs and as a means of payment between the Community's monetary authorities. The ECU is defined as a basket of currencies. The ECU also serves as the basis for the parity grid, with each Community currency having an ECU central rate. Finally, the EMS is underpinned by the credit mechanisms. These were already in existence before the start of the EMS, but were expanded in furtherance of the EMS Resolution.

The Single European Act (SEA) was the first major amendment to the EEC Treaty in 1986. It was adopted in order to lay down in the Treaty the competences and procedures for achieving a truly internal market by the end of 1992. The SEA contained some references to EMU. It laid the basis for the completion of a single financial market. Furthermore, for the first time, references were inserted into primary Community law to the achievement of EMU, to EMS and the ECU.

2.2. Introduction of Economic and Monetary Union (1988 – 2002)

In this section, I made an attempt to summarize the main stages of the complex process, which had resulted in creating the current form of the EMU. The European Council at its meeting in Hannover on June 27 and 28, 1988, took an important step to advance European monetary integration when it entrusted to a committee, chaired by the president of the European Commission, Jacques Delors, "the task of studying and proposing concrete stages leading towards economic and monetary union".[22] The Delors Committee Report, in some respects heavily leaning on the Werner Report of two decades before, presented a blueprint for EMU which was to be the main basis for negotiations on new Treaty provisions. The Delors Report defined EMU as the Werner Report of 1970 had done before it. EMU would imply complete freedom of movement for persons, goods, services and capital, as well as irrevocably fixed exchange rates between national currencies and, finally, a single currency. According to the Committee, a single currency was not strictly necessary to a monetary union, but commended itself for its economic, psychological and political advantages. Only a single currency would reinforce the irreversible nature of EMU. The Intergovernmental Conference (IGC) on EMU started at the meeting of the European Council in Rome in 1990 and continued throughout 1991. The IGC ended in the European Council meeting in Maastricht of 9 and 10 December 1991.This meeting agreed the Maastricht Treaty on European Union (TEU) and it was signed on 7 February 1992. The ratification of the TEU took far longer than expected and the new Treaty entered into force on 1 November 1993.

Governing monetary union, currency policy, including credit policy, and interest policy, as well as exchange-rate policy will be an exclusive competence of the Community. These exclusive competences of the Community will exercise themselves without any mediation on behalf of the Member States. Transfer of monetary sovereignty has not taken place in one step, but on the basis of a three-stage procedure. The Delors Report proposed that EMU should be attained in three stages. On the basis of the Report, the Madrid European Council decided in June 1989 that the first stage of EMU should start on July 1, 1990. The first stage of EMU comprised, on the economic level, achieving the internal market, reinforcing the Community's regional and structural policies and introducing new procedures for supervising national economic policies, incorporating specific rules for co-ordinating budgetary policy. On the monetary level, the initial stage required the complete liberalization of capital transactions, all Member States had to join to EMS and strengthened cooperation between central banks. With the conclusion and ratification of the TEU completed, the second stage of EMU could start. Pursuant to Article 116 (1) EC Treaty, the second stage started on 1 January 1994. All Member States entered the second stage of EMU. Capital and payments movements were liberalized. Each Member State prepared the status of its central bank for the third stage. Monetary policy remained for the time being in the hands of the Member States. The European Monetary Institute (EMI) – the precursor of the European Central Bank (ECB) – monitored the operation of the EMS, organized consultations between the central bank and prepared the instruments for the third stage of EMU. The Madrid European Council decided in December 1995 that the term

[22] Presidency conclusions, Hannover European Council, 27-28 June 1988

"ECU" used in the EC Treaty to refer to the European currency unit was a generic term. They agreed to call the European currency unit the "euro" and to interpret all Treaty provisions mentioning the ECU as referring to the euro.[23]

The European Central Bank was set up, replacing the EMI from June 1, 1998. Before July 1, 1998, the Council had to decide which States fulfilled the convergence criteria for the adoption of a single currency.[24] On January 1, 1999 the third stage started as between the eleven Member States which satisfied the conditions for the adoption of a single currency. There are five conditions, grouped in two classes.[25] The economic convergence criteria:

- a rate of inflation not exceeding by more than 1.5% that of the three best performing Member States in terms of price stability,
- no excessive deficit, on the basis of two reference values:
    - a current Government deficit of less than 3% of GDP and
    - a stock of Government debt of less than 60% of GDP
- the normal fluctuation margins of the EMS has to have been complied with for at least the proceeding two years,
- the average long-term interest rate must not have exceed by more than 2% that of the three best performing Member States in terms of price stability.

And there is a legal convergence criterion which means the compatibility of national legislation with the EC Treaty and the ESCB Statute. Greece and Sweden did not fulfil the conditions in 1998. Denmark and the United Kingdom obtained exceptional status in the EU Treaty, as a result of which they are free to decide whatever or not to accede to EMU. In Sweden – as in Denmark and the United Kingdom – the political will is lacking to introduce the euro. Since, Grace, Slovenia, Malta, Cyprus and Slovakia have also fulfilled the criteria and have taken part in the third stage of EMU as from January 1, 2001 (Greece), from January 1, 2007 (Slovenia), from January 1, 2008 (Malta and Cyprus) and from January 1, 2009 (Slovakia) The other Member States which acceded on May 1, 2004 the status of Member States with a derogation. Article 123(4) of the EC Treaty provided that, on the starting date of the third stage, the Council, acting by a unanimous vote of the Member States without derogation, was to adopt the conversion rates at which their currencies would be irrevocably fixed, rendering the euro a currency in its own right. On December 31, 1998 the Council fixed the conversion rates between the euro and the currencies of the eleven participating Member States. Although the participating currencies were replaced by the euro as of January 1, 1999, the use of the euro was confined to transfer payments. From January 1, 2002, euro-denominated banknotes and coins were brought into circulation. National banknotes continued to circulate as legal tender for a short period and had to be completely replaced the euro in all participating Member States by no later than two months afterwards.

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[23] Presidency conclusions, Madrid European Council, 15-16 December 1995

[24] 98/317/EC: Council Decision of 3 May 1998 in accordance with Article 109j(4) of the Treaty *(OJ L 139 , 11/05/1998 P. 0030*

[25] Protocol on the convergence criteria referred to in Article 121 of the Treaty establishing the European Community

2.3. Monetary sovereignty in the euro zone

Unlike the economic union pillar of the EMU, the monetary union implies the transfer of monetary sovereignty from the Member States to the European Community. From the beginning of the final stage of EMU, dated 1 January 1999, monetary policy, i.e. monetary-, interest- and credit policy as well as exchange-rate policy are controlled by the Community as an exclusive competence as it has been the case before by the Member States. As a consequence of the transferral of monetary sovereignty to the European Community, Member States lose any competence in this sector with the exception of the prudential supervision of credit institutions.[26]

The transferral of monetary policy to the European Community, more precisely to the ESCB, has the consequence that monetary policy is run by the Community as an exclusive competence. The ESCB is composed of the ECB and of the central banks of the Member States. The ECB has legal personality but the ESCB has not. The primary objective of the ESCB is to maintain price stability. Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Community.[27] The ESCB's four basic tasks are:

- to define and implement the monetary policy of the Community,
- to conduct foreign exchange operations,
- to hold and manage the official foreign reserves of the Member States, without prejudice to the governments of the Member States holding and managing working balances in foreign exchange,
- to promote the smooth operation of payment systems.[28]

The ECB draws up the necessary guidelines for the conduct of the common monetary policy. In so far as it is necessary for the performance of its tasks, the ECB may adopt regulations and decisions, recommendations and opinions. The Eurosystem comprises the ECB and the national central banks (NCBs) of the Member States that have adopted the euro in Stage Three of Economic and Monetary Union (EMU). There are currently 16 NCBs in the Eurosystem.

As far as the participating Member States are concerned, the ECB has the exclusive right to authorize the issue of bank notes within the Community, although both the ECB and NCBs may issue such notes. In spit of this it must be emphasized that so far only the ECB has been issuing euro bank notes. The bank notes issued by the ECB shall in the terms of the EC Treaty[29], be the only such notes to have the status of legal tender within the Community. With regard to coins, under the Treaty the Member States may issue coins subject to approval by the ECB of the volume of the issue. Never before, in modern history,

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[26] Under the EC Treaty, Art. 105 (6) *„The Council may, acting unanimously on a proposal from the Commission and after consulting the ECB and after receiving the assent of the European Parliament, confer upon the ECB specific tasks concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings."*

[27] EC Treaty, Art. 105(1)

[28] EC Treaty, Art. 105(2)

[29] EC Treaty, Art. 106(1)

has a group of fully independent states voluntarily agreed to replace existing national currencies with one new created type of money. Even while retaining political sovereignty, member governments have formally delegated all monetary sovereignty to a common authority.

However, there are other opinions. As Goodhard pointed out, through their membership in the European Monetary System, EMS countries (except Germany) had already abandoned discretionary monetary policy long before monetary union was accomplished meaning that there would be "virtually no economic cost in doing so formally and completely by moving to a full monetary union."[30] Central bank discount rates of EMS countries (1971-1998) show that basically all European countries, to different extents, followed the Bundesbank's discount rate policy. One can push Goodhard's argument further and argue that EU countries – except Germany – that entered monetary union not only did not lose monetary sovereignty, but instead regained some degrees of monetary policy influence through EMU membership. Indeed, it is arguable that Germany had been the only country that actually lost its monetary sovereignty and all other EMU member countries have obtained a voice in monetary policy decisions.[31] All EMU member countries are now represented through their national central bank governors in the ECB's Governing Council which is the main decision-making body of the European Central Bank (ECB) and is entitled the most important and strategically significant decisions for the Eurosystem.

In connection with the ECB's Governing Council it must be recall that a new voting system of the ECB's Governing Council was adopted on 21 March 2003 by the EU Council in Decision 2003/223/EC.[32] Under the new voting system, the number of governors with a voting right will not exceed 15. It can be summarised as a two-tier rotation model, which allocates NCB governors to a different groups with a specific numbers of voting rights.[33] Within each group, governors have a voting right for equal amounts of time. So a rotation system necessarily implies that there will no longer be permanent voting rights for all the members of the Governing Council as the number of the governors increases.

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[30] Goodhard, Charles, *The Political Economy of Monetary Union,* In: Peter Kenen (ed.): *Understanding Independence. The Macroeconomics of the Open Economy,* Princeton University Press, Princeton, 1995, NJ, pp. 457.

[31] Volz, Ulrich, *Monetary Integration and Policy Autonomy,* Conference Paper, Conference on „European Integration and China", Shanghai, 2006, pp.5.

[32] Decision of the Council, meeting in the composition of the Heads of State or Government of 21 March 2003 on an amendment to Article 10.2 of the Statute of the European System of Central Banks and of the European Central Bank (OJ L 83, 1.4.2003, p. 66)

[33] Tier one, which provides for two groups of governors, will start as soon as the 16th Member State enters the euro area or in other words: the overall number of governors exceeds 15. The second tier, which already provides for three groups, will commence when the number of euro area countries exceeds 21. The Governing Council may decide to postpone the start of the rotation system until the date on which the number of governors exceeds 18. On 18 December 2008 the Governing Council decided to postpone the start of the rotation system. (ECB/2008/29)

Conclusions

The present paper has tried to demonstrated that monetary sovereignty is a generally accepted element of State sovereignty and that it consist of a number of different rights including the definition of the unit of account, the issuing banknotes and coins and the establishment of an exchange rate arrangement. Through customary law, judicial decisions, a body of international law has been developed, which defines the elements of monetary sovereignty. Its attributes have been identified, and limitations have been introduced.

Analysing the history of the EMU, it can be stated that the thought of its realization has practically accompanied the European integration for more than five decades though it was realized only in the so-called long 90s. The failure of the Werner Plan indicated that in order to reach monetary union, an outer and inner economic environment free of a serious disaster, a strong and sustainable political will of Member States and an institutional and legal background must be present at the same time. These conditions reached the appropriate level at the end of the 80s and beginning of 90s that the successful realization of the Maastricht construction could be grounded. The monetary pillar of the EMU is the only area, in which the integration process reached its „final purpose" that would influence probably the development of the whole integration in a positive way both mid-term and in the long run whether or not the realization of political union can be achieved or not.

Basically I agree with Goodhard's approach, namely monetary integration is not automatically equivalent to a loss of monetary sovereignty, quite the contrary. It is a truth universally acknowledged that in the global economy the smaller a country is the less monetary sovereignty it has. As Goodhard has pointed to rightly above, the second half of the 20th century of the history of European economic integration has proved that euro zone countries – except Germany – with entering in the final stage of EMU in 1999 only theoretically lost monetary sovereignty, but practically didn't. These countries have regained instead some degrees of monetary policy influence through exercise of voting rights of their NCB governors in the ECB's Governing Council.