European Integration Studies, Volume 9. Number 1. (2011) pp. 5–15.

THE ROLE AND FUNCTION OF THE PAY-AS-YOU-EARN PENSION SYSTEM IN THE HUNGARIAN PENSION SYSTEM*

JUDIT BARTA
Associate Professor, Head of Department of Commercial Law
University of Miskolc
civbarta@uni-miskolc.hu

„Old age is the most unexpected of things that can happen to man." (Leon Trotsky)

Historical review

The first appearance of the development of the socially organized forms of pension insurance is related to the formation and development of industry in Hungary. The industrialization in Hungary first began in the mining sector where the very first self-help institutions were organized for mining workers as early as from the end of the 15th century.

From the mid-18th century trade associations gathered ground in the industrial manufactories. Since workers did not receive any social benefits neither from employers nor from the state, they started to organize their own self-help associations. The first such self-help association was set up by printing workers in 1837.

State bureaucracy was regarded as a privileged class within the Hungarian society, as an evidence of this, pension rights of those working in the state administration were institutionalized by Act XI of 1885 and further developed.

In addition to the pension schemes for public service employees, there were several other pension schemes provided by the state for workers in the military forces, local authorities, railways and so forth.

The first pension law relevant to society was Act XL. passed in 1928, in which compulsory insurance was introduced for industrial and commercial workers in cases of retirement, disability, becoming a widow or an orphan. This law was of European standard, it was a novelty in legislation, based upon careful preparations and calculations. However, it had a crucial shortcoming because it excluded agricultural workers from the group of those entitled to receive social security pensions. The insurance itself was based on a form of a defined benefit scheme.[1] The law allowed the establishment of corporate pension funds acknowledged by the state together with the acknowledgement of the exisiting ones. Corporate pension fund members were exempted from the scope of state retirement

---

* It was translated by Attila Jóczik.

[1] The defined benefit scheme is a version of pay-as-you-earn systems. In this scheme there is a predetermined period of accumulation, the paid contributions are collected and invested. Because of this, the system is not able to provide pension services right from the start, only after the end of the accumulation period. The amount of pension later to be paid is predefined and contracted in this scheme and the amount of contributions is determined accordingly.

insurance. The compulsory old-age insurance for agricultural workers was organized in the 1930s.

The events of World War II also caused serious damages in the pension insurance institutions. A substantial part of the accrued capital in the pension system was used by the state to finance expenditures of war, other parts of it were destroyed or devaluated, the majority of registries and records perished. The effects of the ravages of war were significantly strengthened by the sky-rocketing inflation in 1945-46. Because of the war, the hyperinflation and other destructive effects, other financing methods had to be found to secure pension benefits, as a consequence, the previously existing pay-as-you-earn system was converted to a type of pay-as-you-go financing scheme.[2]

In the post-war years the standardization of social security institutions began, those self-insurance and social security institutions were extinguished that, in previous decades, had administered the pension provision for groups of workers belonging to various trades or professions.

After the nationalization of privately-owned companies and mines, the position of insured seniors at corporate pension funds and self-insurance funds for miners also had to be settled for, providing them pensions became the responsibility of the state. With the absence of pension wealth and private pension institutions, the organization of social security pensions at the level of society became the primary responsibility of the state, which essentially took place in the 1950s, a total of three large and two smaller, separate rule-based pension system existed that were based on seperate rules. In the individual systems, the benefits, eligibility requirements, rules and the rate of contributions were significantly different from each other.

The comprehensive codification of the social pension insurance took place by passing Act II. of 1975 and implementing its regulations, which completed the consolidation and modernization of social security. Based on common principles, the law regulated the system of social security pensions for the workers and their dependents in the society. It also laid down the key principles of the state pension insurance for the Hungarian society: dstribution in proportion to the years spent working; the requirement of social security; and the principle of a state guarantee as financing the pension fund was guaranteed by the state budget.

The road towards reforming the pension system

Although the law was born after a considerable preparatory work, there were some flaws in it: eligibility criteria were eased and certain retirement rules were relieved, as a result, overall pension expenditure was increased and the level of employer's pension contributions had to be raised from the second half of the 1970s. The need for the social security pension reform arose in those years, however, the courage for implementing those reforms brought about only minor amendments that did not deliver satisfactory results.

[2] The pay-as-yo-go (PAYG) system does not set aside any assets, pensions and other benefits are paid directly from current workers' social security contributions and taxes. Pension expenditures in a given year are covered by the received social security payments in the same year. This system does not create any reserves as it is fully dependent on the payments coming from the working generations.

Then the transition from socialism to capitalism gave a new impetus to demands for change.

Since 1989, the relationship between the social security system and the state budget has been changed, the social security system has been separated from the state budget and, in order to handle social security income and expenses, an independent Pension Insurance Fund was established in 1992.

The Hungarian Parliament passed a law on establishing voluntary mutual insurance funds in 1993, its obvious goal was to re-plant the idea of voluntary care and create its necessary institutional background.

Social security regulations have also been constantly modified, in 20 years the law was changed in more than 120 articles, some of its provisions were amended more than ten times, its regulations in relation to raising pensions consisted thirty different solutions. The continuous payment of social security pensions has become an oppressive burden. The second half of the 1990s saw a more radical transformation due to the increasing international pressure coming from the World Bank and the European Union as well as some internal (economic, social, demographic and regulatory) contradictions in the pension systems.

In line with the Maastricht Treaty, one of the accession criteria was that the ratio of the annual government deficit to gross domestic product must not exceed 3% at the end of the preceding fiscal year. Hungary was also expected to cut its long-term pension expenditure and reduce the paternalistic aspects of the state.

The need for repaying existing loans to and ask for receiving new ones from the World bank also encouraged pension spending cuts within the broader group of social expenditures together with correcting the actual errors in the existing pension system. Later, the introduction of the Chilean model of social security was suggested.[3]

The national social security pension system evolved under conditions where there was almost full employment, the vast majority of salary and wage earners worked in the public and the co-operative sector or in state-owned enterprises. The number of population steadily increased, maintaining the existing pay as you go system did not cause any particular problems. However, this almost peaceful condition changed after the post-transition period (1989): companies and cooperatives were closed down, dissolved or privatized, lots of jobs were lost, thousands of workers became unemployed or sought refuge in early retirement or in the less strict rules of disability pensions. It was this time when avoiding the payment of contributions caught on among the population. In the meantime the number of births fell and the slow process of population aging began. As a consequence, the financial balance of the pension insurance system deteriorated, the revenues (the amount of paid contributions) were not enough to cover actual pension costs any longer. The rate of pension increase remained below the actual inflation rate, furthermore the capricious nature of legislation resulted in growing injustice.

In order to transform the social security pension system, several models and concepts were hammered out. Finally, the model proposed by the Ministry of Finance - which also bore the support of the World Bank – was accepted. The targets in this model included creating the relationship between the payment of contributions and the pensions together

[3] This social security model, suggested by the experts of the World Bank, was first introduced in Chile in 1981.

with the creation of individual interests in making pension payments. In other words, the insured were allowed to see in advance that after paying mandatory pension contributions in their active age what retirement benefits they could rely on in return. The model also aimed at encouraging individual self-care, pre-saving for the old age and the transformation of the pension system had to facilitate economic development and stimulate economically efficient investments.

The three main acts providing the basic structure of the pension system reform are noted as follows:

- Act LXXX of 1997 on Persons Entitled to Social Security Benefits and Private Pension, as well as the Coverage of these Services (became effective on January the 1st, 1998);
- Act LXXXI of 1997 on the Social Insurance Pension (became effective on January the 1st, 1998);
- Act LXXXII of 1997 on Private Pension and Private Pension Funds (became effective on September the 1st, 1997).

The structure of the transformed state pension system

Apart from modernizing the pay-as-you-go pension system, the laws mentioned above allowed to add a new financial element to it.

The new private pension fund system operating on the principle of pay-as-you-earn systems has become, as a subsystem, part of the pension system. The mandatory pension system was transformed into a two-pillar system: its first pillar was a social security pension subsystem financed on a pay-as-you-go basis and requiring mandatory participation, whereas its second pillar became a private pension fund system which also required mandatory participation and it was funded on a pay- as-you-earn basis.

According to the plans, the two different pillars of the pension system would have ensured pension services in the future as three-quarters of of the pensions of those choosing the mixed system would have been paid from the first pillar and the remaining quarter would have been provided by the second pillar.

Under the new rules, those insured by the state penion scheme could voluntarily choose between two options from September, 1997 until August the 31st, 1998:

- staying exclusively in the state pension insurance scheme or
- opting for the so-called mixed system, which meant that they could remain members of the state pension system but they were also allowed to enter a mandatory private pension fund based on their voluntary choice.

New entrants to the labour market were obliged to enter the second pillar. This obligation facilitated the gradual introduction of the second pillar and it also made possible that an entirely mixed system would operate in the future.

Those who chose the mixed system were once allowed to change their mind and return to the pure state pension scheme.

The third pillar consisted of voluntary forms of individual self-care such as voluntary mutual pension funds or life insurance and pension insurance provided by various insurance companies.

Private pension fund members paid membership fees to the fund and pension contributions to the social security system. The membership fee was based on the member’s

taxable income, its actual rate was determined by the law. According to the initial statutory requirements, private pension fund members had to pay 6% of their taxable income to private pension funds in 1998, 7% in 1999 and 8% in 2000. They also had to pay a reduced contribution of 1% to the state pension fund. The contributions paid by members were transferred to their individual accounts. The payments were invested by the fund (the accumulation period was at least 15 years) and old-age pensions were supposed to be provided by using this accumulated amount. The accumulated capital on the individual account could be inherited, in other words, payments from an isured person who died during the accumulation period were awarded to beneficiaries who might take out the amount in a form of lump sum or could continue to membership in the pension fund.

Only those organizations could become the founders of private pension funds that were identified by the law: employers, professional chambers, trade associations, voluntary mutual pension funds and so on. However, among the actual founders numerous commercial banks and insurance companies could be found. In order to facilitate the independence of private pension funds, the law ordered that there could not be a direct legal relation between the founder and the private pension fund, after the establishment process, the founder would not have any rights or obligations towards the private pension fund. But it was not enough in itself to rule out the possibility of indirect relations between them. Through the operation of the pension fund and by managing its assets, the founders could realize a hefty return on their original investments.

After their foundation, private pension funds got into the ownership of members who had to operate them in compliance with the principles of local governance. Based on the principles of reciprocity and individual self-care, pension fund members jointly created the financial background for operating the fund and providing its services by putting the fund's assets together through their compulsory membership fees.

The functions of the funds were to collect and manage membership fees, to invest the contributions made by members and, finally, to organize and provide pension services determined by the law.

The services provided by the pay-as-you-earn pillar were protected by a safety system comprising of several elements: the Hungarian Financial Supervisory Authority (PSZÁF), which controlled the operation, the management and the strict regulatory requirements on financial investments, and the Gurantee Fund, which was established to handle cases of insolvency.

Originally the government estimated that around 360.000 to 500.000 ensured would choose to enter the newly-established private pension funds. In reality, the number of fund members exceeded more than two million in 2000.

Due to the contributions paid to private pension funds, a soaring deficit appeared in the state pension system as a significant part of pension contributions were channelled into the private pension funds. Responding to this shortfall, the government earmarked 20 billion forints but the actual deficit in the state pension system proved to be much higher. State bonds were issued to at least partially cover the losses and the government started to take measures to make more and more private pension fund members return to the exclusive state pension scheme: the state guarantee was extinguished, increasing the rate of paid membership fees was forbidden, whereas the rate of the social security contribution was increased and the mandatory membership of new entrants to the labour market was suspended for a few years.

The next major intervention to the private pension fund system took place in 2008, it was mainly triggered by the financial crisis and other economic reasons. Legislators tried to reduce the exisiting risks of private pension funds by the means of statutory regulations. One of the results of the legislative efforts was the introduction of the yield guarantee into the system, which was designed to preserve the real purchase value of the savings. It was achieved - either by the funds themselves or, as a last resort, by using the reserves of the Guarantee Fund - by complementing the balance of the member's individual account with the missing amount if it did not reach the state-specific rate of inflation at the time of determining pension payments. The amount of money paid for operating and managing private pension funds was also limited, determining the maximum percentage that could be deducted for these tasks from membership fee payments.

An attempt was made to the institutional transformation of the private pension fund system by taking these funds out of member ownership and allowing private companies to manage fund assets but in the end this plan failed for political reasons.

Return to the one-pillar compulsory pension system, the radical changes of 2010

Poland and Hungary, together with seven other EU member states sought to alter the way their budget deficit and public debt are calculated in the European Commission. The aim of the initiative was to be allowed by the European Union to account for the cost of overhauling their pension systems. So the amount transferred to the state pension system from the central government budget would not be part of the state deficit, the compensation for the deficit created by contributions to the private pension funds would not increase the overall deficit of the state budget.

Apart from Hungary, other Eastern European countrie such as Poland, Lithuania, Estonia, Bulgaria, Croatia, Romania, Slovakia and Macedonia were forced by the World Bank and the European Union to develop mandatory private pension fund systems financed on a pay-as-you-earn basis in the last decade.

The introduction of the private pension fund system resulted in a much higher deficit in the Pension Insurance Fund and the central budget than it was previously calculated because a major part of pension contributions appeared in the private pension funds. Retirement model studies showed that the gradual increase of retirement age made the introduction of a pay-as-you-earn element possible because it reduced pension expenditures (less people could reach the age of retirement) in those years when the private pension fund system still could not provide pension services as they were only in the phase of accumulation, taking huge sums out of the state pension system. After reaching a turning point, when private pension funds are able to pay pensions on a pay-as-you-earn basis, they also help to reduce the expenditure of the state pension system and it can be financed in the longer term despite the worsening ratio of worker to retiree.

It is estimated that if the government had been allowed to account for the membership fees paid to private pension funds as a state revenue, Hungary's budget deficit, at least on paper, would have been only about 2.4% of GDP instead of the exisiting 3.8% of GDP, which would also have been well below the maximum of 3% required by the Maastricht Treaty. However, the EU stated that the private pension funds must be considered private institutions and as such they did not fall within the scope of the accounts between other state-operated institutions, as a consequence the Hungarian request was dismissed.

A solution had to be found for reducing the budget deficit in order to avoid possible disadvantages posed by the European Union. The government saw the private pension fund system as the only possible area to come up with a solution. Instead of making further diplomatic efforts, the government quickly decided to pass a series of laws aimed at changing the compulsory private pension system. The two most important laws in this regard were Act CI of 2010 and Act CLIV of 2010. The latter one was the most drastic, in which seven other important laws were amended at one blow.

The members of mandatory private pension funds had to decide whether they wanted to remain in the private pension funds or return to the state pension system until January 31st, 2011. Those who did not declare to remain in the private pension fund system until March 1st, 2011, lost their private pension fund membership and automatically returned to the social security pension scheme. The accumulated capital on the individual accounts of those who decided to return to the state pension system was transferred to a fund specially created for this reason. They were free to make a decision on what to do with the real yield (their return on investment above the inflation rate), they were also allowed to keep that amount.

It was also stipulated that the individual accounts had to be introduced in the state pension system as well, making it possible for the insured to check the amount of their pension contributions. This is only a virtual account because the amounts on it are not accumulated in reality, since the received contributions are immediately spent on current pension payments in the state pension system.

From December 1st, 2011, those who did not return to the state pension system are not entitled to acquire additional service time from the social security pension system and are not eligible for receiving pensions from the state, they are entitled to get their pension solely from the private pension funds. The amount of the membership fee was raised to a 10% rate of the basis of pension contributions. Those private pension fund members whose pension benefits will not be enough to make a living could receive old-age allowances as an additional social benefit, which would hopefully be enough for them to maintain a minimumu standard of living. Although private pension fund members will not pay pension contributions to the state pension system and they will not be eligible to receive pension from the state, their employers together with the insured sole proprietors must keep on paying a so-called employer's pension contribution of 24%. The state pension system will be expanded with a new service in the future by introducing allowances for widows, it is intended to provide some form of heritability. Based on the accumulated payments on the individual account of the deceased, the beneficiary does not receive a widow's pension (it has been an exisiting possibility so far) but a widow's allowance if this amount is higher than the precalculated sum of the widow's pension.

The amounts of money that can be deducted for operating private pension funds have been further reduced.

Judging the law amendments from a taxonomical point of view, it can be stated that the three-pillar pension system has been eliminiated, which included the first pillar in the form of the mandatory state pension system financed on a pay-as-you-go basis, the second pillar in the form of a mandatory private pension fund system financed on a pay-as-you-earn basis and the third pillar consisting of other supplementary mutual volutary funds.

The new system includes a mandatory social security pension scheme or an also mandatory private pension fund system but it is not compulsory to choose the latter one.

The system is made complete by various forms of self-invested retirement savings accounts.

Future prospects of the private pension funds within the state pension system and the factors influencing them

98% of the private pension fund members, more than 3 million people decided to return to the state pension system until the end of February in 2011. Approximately 100.000 members remained in the private pension fund system, their number is not enough to maintain the operation of the existing 18 private pension fnnds. This will inevitably lead to the concentration of private pension funds and some of the funds will have to cease their operation as a result of the increasing competition. According to the statutory provisions, private pension funds cannot be operated if the number of their membership falls below 2,000 persons (currently, there are five private pension funds whose membership does not reach the required number), and the market conditions in previous years proved that around 10,000 members would be needed for the efficient operation of private pension funds. This size was only reached by those five private pension funds that had alrady belonged to the largest ones.

Despite the shocking changes, lots of new entrants in the labour market opted for the private pension system in 2011. Now we have every reason to ask the question: who chose well?

It is not possible to give a definite answer to this question, quot capita, tot sensus[4]. Pension services offered by the private pension funds are determined by the received contributions, they depend on the payments of the member, the length of the accumulation period and the rate of yield. The latter one is the most uncertain factor, strongly affected by the volatility of financial markets. Allowing private pension fund members to choose from several investment portfolios representing various levels of risk increases individual risks as well, whereas the majority of the Hungarian population is not mature enough yet to take full responsibility for their financial decisions.

Although the yield is guaranteed on paper (hence the institution of yield guarantee), it is not certain if the Guarantee Fund could cover the actual needs, furthermore private pension fund members cannot rely on state guarantee.

Private pension fund members can only check the accumulated amount on their individual accounts but the amount of pensions they could possibly receive in the future cannot be calculated.

There is no official estimation on the exact amount of the monthly membership fees needed for accumulating enough money to get more or less the same amount of pension provided by the social security pension scheme.[5]

---

[4] Even economic experts familiar with the changes of the pension system are divided over this issue. Some of them welcomed the changes while others were discontent with making the private pension fund system „paralyzed". According to János Kun, whose views were published in several papers, it would be the best if private pension funds vanished under the current circumstances. He claims that their weak effect on capital markets, the Hungarian economy and future pension benefits does not justify their existence. Pénzügyi Szemle, Vol. 1, 2010.

[5] According to an earlier study (2005), calculating with the original rate of 8%, a real yield of 2.7% is needed for achieving the full amount of state pension which consists of 75% of social security

According to the existing rules, new entrants in the labour market and those who do not acquire the necessary additional service time to receive pension from the state pension system will have to accumulate enough capital on their individual account to receive adequate pension. The current operation and the organzational structure of private pension funds are not efficient enough, which is further worsened by the limited level of operation expenses. Private pension funds cannot raise enough capital in case of temporary or constant insolvency, the reserve in the Guarantee Fund does not provide sufficient solution for such cases.

Those who choose private pension funds are likely to lose either partly or fully their right to receive pension from the state. The private pension fund system cannot handle the risk of becoming disabled, membership fees can only be deducted if the member receives taxable income. There can be various situations in life when a member does not get such income, in other words, payments are not accumulated on the member's individual account, reducing the amount and value of the expected retirement income. Thus, private pension fund members have to take more risks and responsibility.

Although savings on the individual account are inheritable in the accumulation period (at least 15 years), this feature cannot replace the beneficiary care provided by the state pension system, and although it is also true that private fund members are allowed to choose from four different pension services, this does not compensate for the risks originating from the imperfections of the current terms of services.

With the introduction of individual account records an important step would be taken towards transparency (the exact date is still uncertain), it would be linked to the introduction of the widow's allowance but no definite action has been taken in this respect.

The social security pension is actually a benefit-defined pension plan which means that it is determined by the amount of taxable income for pension fund and the established length of service. The rules of pension calculation are laid down by the law, making it possible for everyone to calculate the expected amount of their pension. However, some redistributive aspects of the prevailing system lead to imbalances and injustice.

The state pension system is heavily exposed to economic and demographic changes. The pay-as-you-go system is also vulnerable but its risk factors are partly different. The amount of its total revenue depends on the active age population, their employment rate, the discipline in paying contributions, the rate of deducted contributions, the number of years spent in retirement, the amount of starting pensions and the indexation of pension in payment. If there is a decrease on the side of contributors (because of economic and demographic reasons), pension payments can be reduced either by raising the official age of retirement or by limiting the amount of pensions in payment.

The state still guarantees the payment of pensions from the central budget but certain steps have been taken towards change. As it can be seen, the state pension system, does not provide full security, either.

The future role of the pay-as-you-earn scheme in the Hungarian pension system heavily depends on the retirement policy of the European Union.

---

payments and 25% of private pension payments. However, this could provide the amount of pension equal to the full state pension with those who were lifelong members of a private pension fund.

The EU does not have a comprehensive legislation for various pension systems, their financing and the harmonization of pension services, the directives related to this area were accepted to ensure mobility, that is, the free flow of labour and capital. One of these directives was Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision, Hungary complied with the provisions of this directive by adopting Act CXVII of 2007 on Ocuupational Retirement and its Institutions. The first of these occupational retirement institutions has already been established in Hungary, if it works and spreads, it will create significant competition for private pension funds.

The member states of the EU show a varied picture of existing pension systems, pay-as-you-earn pension schemes appear in many of them but not necessarily in the form of private pension funds. This is most typical of post-Socialist states where the private pension system is contribution-defined, serving as an additional pillar. In more developed member states, the function of the second pillar is mostly fulfilled by defined benefit occupational pension schemes.

The latest green paper towards adequate, sustainable and safe European pension systems (adopted by the European Committee in July, 2010) takes an integrated approach across economic, social and financial market policies and recognises the links and synergies between pensions and the overall Europe 2020 strategy for smart, sustainable and inclusive growth.

Generating adequate and sustainable retirement incomes through pension reforms and the goals of Europe 2020 are mutually reinforcing. Its 75% employment target requires employment rates significantly higher than the present levels in the age group 20 to 65. Addressing gaps in pension adequacy, which can be a significant cause of poverty among the elderly, can also contribute to achieving the Europe 2020 poverty reduction target.

Today's Europe faces a major demographic challenge, life expectancy has risen by about five years in the EU over the last 50 years. According to the latest demographic projections, a further rise of about 7 years could be expected by 2060. Combined with low fertility rates this could lead to a dramatic change in the age composition of the population. As a result of this, the old-age dependency ratio will be likely to double: at present there are four people of working age for every person over 65, there will be just two people of working-age for every person over 65 by 2060.

Providing an adequate and sustainable retirement income for EU citizens now and in the future is an important priority for the European Union. Providing an adequate retirement income is important because the growing number of retired age group will account for the bulk of consumer society. In order to maintain consumption, an adequate retirement income is needed but it must not increase public pension expenditure drastically. The continuous increase of the retirement age, the long-term employment of the retired, the reduction of the number of years in retirement will all appear as requirements in the future, which will result in reducing overall public pension expenditure.

It is more and more vigorously emphasized in the EU that state pension systems financed in a pay-as-you-go scheme should be supplemented by defined contribution or

defined benefit pension schemes, which can be realized either in the state pillar[6] or in a second, additional pillar, thus reducing public pension expenditure.

Taking into consideration the effects of the current economic crisis hitting not only Hungary but also the other member states, the demographic trends and the requirements of the EU, it can be projected that there will be a need for an additional pay-as-you-earn system, it will play a more important role in the future. The only question is if this role is played in Hungary by the remaining private pension fund system, the emerging occupational pension schemes or perhaps other new pension institutions.

If the private pension fund system holds its position in the long term, its thoughtful reregulation will become inevitable. It is necessary to transform the current institutional and organziational structure, reduce the risks of operation and asset management, tackle or share risks more effectively, rethink the current amount of membership fees based on model calculations and strictly regulate future pension benefits.

In addition, it is essential to prepare the active age population in Hungary for the need of self-reliance, familarize them with various forms of self-reliance to the widest possible extent and provide them with basic education on investment.

[6] A good example is the Swedish state pillar, consisting of a pay-as-you-go system combined with an individual account (NDC) and a premium pension scheme financed in a pay-as-you-earn manner.

European Integration Studies, Volume 9. Number 1. (2011), pp. 17–25.

DELIBERATING THE ROLE AND PLACE OF THE ENGAGEMENT AS ONE OF THE INSTITUTIONS OF FAMILY LAW: SHOULD PARTIES WHO INTEND TO GET MARRIED BE CONSIDERED AS ENGAGED AT THE SAME TIME?*

TÍMEA BARZÓ
Associate Professor, Department of Civil Law
University of Miskolc
civba@uni-miskolc.hu

1. The historical roots of engagement

In Roman law engagement *(sponsalia)* was a promise to marry which appeared in the form of a mutual question and answer but it did not result in an obligation to marry. However, the party who terminated the engagement was obliged to give back all the gifts that he/she got from his/her fiancé but those, given by the terminating party, could not be reclaimed from the other party. Subsequently another legal institution: the advance for deliberation *(arrha sponsalicia)* gained ground. The party that terminated the deliberation without proper reason lost the advance or had to pay back double the amount of advance.[1]

Engagement can also be found in *Hungarian legal traditions,* where it followed two other events: the *proposal of marriage* (asking of hand) and the *espousal*. In case of the proposal of marriage the man expressed his intent to marry the woman towards the women and her parents. If the women agreed, they either shook hands or kissed each other and exchanged the rings. This event was called espousal, betrothal or – after the turn of the century – engagement. The handshake meant a mutual promise, a kind of alignment, that the young couple is going to get married. Although the promise had no compulsory effect, in the rural area the community – based on morality and customary law – stigmatized those who terminated the engagement without grounded reason. During the engagement the young women was called fiancée (or betrothed) and the young man's name was fiancé. The engagement also resulted in changes in the legal status of the parties since they were regarded as relatives in the course of giving a witness statement or concluding a contract and from the aspects of other social relations.[2]

The number of *canonical legal cases related to engagement* was relatively high in the medieval Hungary. According to medieval canon law based on the engagement an action could be brought in order to enforce the marriage provided that there were no matrimonial impediments (*impedimentum matrimonii*). In several cases the main aim was the cancellation or invalidation of the engagement. Refraining from the intent to marry the other person had a negative message since it gave the opportunity of guessing, searching for defects or faults and therefore it could reduce the chances of the abandoned party to get

* It was translated by Ágnes Juhász. Lector in English: Rita Plajos.
[1] BRÓSZ, Róbert – PÓLAY, Elemér: *Római jog*. Tankönyvkiadó, Budapest, 1984, p. 151
[2] TÁRKÁNYI SZŰCS, Ernő: *Magyar jogi népszokások*, Gondolat Kiadó, Budapest, 1981, p. 325-330

married. The party who was left had the right to address the canonical court and ask for pecuniary compensation for the moral damage he or she had suffered.[3]

Act XXXI of 1894 on Matrimonial Law (hereinafter AML) did not give the definition of engagement, instead it simply stated that 'based on engagement it is not possible to bring an action in order to enforce marriage'. Since the AML did not regulate the creation of engagement according to legal literature the general provisions of contract law were applicable. It meant that the mutual promise of the parties, i.e. their consent was needed to enter into the engagement but there were no other formal requirements. The promise to get married could be made either orally or in writing, both with and without witnesses. Thus as to legal literature – concerning its legal nature – engagement was 'an informal contract (i.e. a contract without formal requirements), which had a restricted legal effect.'[4] In most cases engagement was accompanied with a celebration, where the fiancé and fiancée gave presents to each other and they exchanged the rings.

With regard to the *subject of the engagement* it was unambiguous that the mutual promises to get married could only be expressed by two heterogeneous, natural persons. However, there was no way to be engaged if the person was incapable or an unavoidable matrimonial impediment (pl. existing matrimony) existed related to him or her.[5] Nevertheless, the fact that the man or women was already engaged did not exclude the establishment of another (valid) engagement, i.e. it was possible to have several fiancés or fiancées at the same time. The manifestation of will had to be expressed personally and freely; these features were regarded as requirements of validity therefore coercion, error, fraud, simulation and the promise which was made only as a joke excluded the validity of the engagement.

However, according to the AML it was not possible for engaged persons to enforce marriage at courts in a lawsuit, with the assistance of a judge. Moreover all the terms aiming to ensure the creation of marriage by determining an obligation to perform in case of the failure of the marriage had to be regarded null. In case such obligations had already been performed, the original situation had to be restituted as a legal consequence *(in integrum restitutio)*.

Thus even if the parties made an agreement at the time of establishing the engagement in which they determined to perform a certain pecuniary obligation (e.g. compensation or monthly allowance, etc.) in case of failing to get married (mostly on behalf of the disappointed fiancée), this agreement had to be deemed as null, since the determined obligation clearly aimed the enforcement of the marriage. Since these kinds of terms infringed the principle of the freedom of matrimony it always resulted in nullity.[6]
Nevertheless, the AML did not exclude the right to claim for compensation from the party who terminated the engagement without a grounded reason. As to the AML, the amount of

[3] BATA Tímea: *Az eljegyzés intézménye a magyar jogrendszerben, kitekintéssel néhány európai ország szabályozására,* Jogi Fórum, Budapest, May, 2011, http://www.jogiforum.hu/files/publikaciok/bata_timea__az_eljegyzes_intezmenye_a_magyar_jogrendszerben_kitekintes_eu[jogi_forum].pdf, p. 8

[4] FODOR, Ármin (ed.): *Magyar magánjog IV. Családjog*. Budapest, Singer és Wolfner Kiadó, 1890-1897, p. 12

[5] FODOR, p. 8

[6] MESZLÉNY, Artur: *Magyar Magánjog I. kötet II. Rész. Jogforrások, Személyi és családi jog II.*, Grill Károly Könyvkiadó, Budapest, 1929, p. 2

the compensation was equal to the 'expenses which were paid in connection with the planned matrimony'. Consequently most of the expenses which stood in causal link with the failing of the marriage could be awarded as compensation.[7] Exceptionally, there was a possibility to pay the lost profit.[8]

The obligation of compensation was on the side of the party who terminated the engagement one-sidedly or gave a grounded reason for the other party to refrain from marriage. If the failing of the marriage could be led back to the act of both parties or both of them refrained there was no way for getting compensation. As to *Antal Almási*, one-sided termination was grounded if there was such a reason under which marrying the other party could not be expected with respect to day-to-day life.[9] Deciding whether the circumstances amounted to being a grounded reason remained to be in the discretionary power of the judges. (For example, the recognition of pulmonary disease could be a grounded reason for the one-sided termination of the engagement. If the young women entered into an emotional relationship with another young men (else than her fiancé) and she planned engagement with him her act could be evaluated as a grounded reason for her fiancé to terminate the engagement.) [10]

The compensation had to be paid to the innocent fiancé or fiancée and his or her relatives. The period of prescription of the claim for compensation was one year, which had to be counted from the day of the termination of the engagement.

As to Almási, the main effect of the promise to get married was *the establishment of the engagement as a legally relevant relationship in family law.* The other most important consequence was that during the engagement the parties (fiancé and fiancée) could conclude financial deals with third persons as future partners in life. These contracts could concern the engaged person's separate estate after the marriage, the dowry, the matrimonial community of acquired property, the presents given by the engaged persons or partners in marriage, on the allowance (for the man or women) and on every financial agreement, which was usual between the partners in marriage. Contracts between the engaged parties had to comply with the same formal requirements as the financial deals of the married. The need to include these deals in the form of a notarial deed has already arisen at this time. It was needed for the protection of the creditors of the engaged parties since from the moment of the engagement a presumption was applicable: the starting point was that in case financial contracts are concluded between the engaged parties, financial allocations should be deemed free of charge and the couple should be deemed as parties who are aiming to circumvent the creditors. Thus, such a financial allocation resulted in the liability of the party for the other party's debts.[11]

The engagement was terminated with

- the passing of a determined, definite period,
- the occurrence of a certain breaking condition, included in the agreement of the parties,
- the marriage of the engaged parties,

[7] FODOR, p. 16
[8] MESZLÉNYI, p. 5
[9] ALMÁSI, Antal: *Házassági jog*, In: SZLADITS, Károly (ed.): *Magyar magánjog II.*, Grill Károly Könyvkiadó Budapest, 1940, p. 20
[10] MESZLÉNYI, p. 5
[11] ALMÁSI, p. 17-18

- the death of either of the engaged parties or with the expression of death by court,
- the termination by both parties, or
- the one-sided termination of either of the engaged parties.

As to the canonical law engagement was the preparatory action of the sanctity of matrimony and it was always regarded as an institution closely linked to marriage.
The Decree „*Ne Temere*"[12] (hereinafter Decree) determined strict prerequisites for the validity of engagement. On the side of the contracting parties the capability of acting and the ability to establish an engagement were also conditions. Since the church disapproved the engagements which were made in secret, the Decree stipulates the following requirements for the validity of engagement: attendance of a parson and an ordinarius or two witnesses who sign the document. Nowadays, the legal institution of engagement lost its importance not only in everyday life but also in the church. Therefore the *Codex Iuris Canonici* intentionally avoids the expression 'engagement' and does not contain detailed rules on it.

2. The diminution of the role of engagement after 1945

The operative Act IV of 1952 on Matrimony, Family and Guardianship (Family Law Act, hereinafter FLA) omitted the legal institution of engagement. As to the ministerial preamble of the FLA this kind of provision (namely the declaration of the engagement) was natural in capitalist law but there was no need to add it in a family law act which has a socialist nature.[13]

Nevertheless, in 1963 *Endre Nizsalovszky* only partly agreed with this family law approach which excluded engagement from the 'world of law'. In his opinion engagement 'as a legal obligation in family law could survive only as a moral obligation but as a framework of establishing rights and obligations it is a single legal state of affairs.' He emphasized that the relationship between parties who want to get married should be judged under civil law rules. As to him it was permissible to regard those assets which were gained by the engaged parties during the period of engagement as part of the parties' community property provided that the engagement was followed by marriage. He highlighted that the vindication of the presents which were given with regard to the future marriage could only be applied in a narrow sense otherwise the party's obligation of returning could lead to an undesired marriage.[14]

Nizsalovszky – with reference to *Gyula Eörsi* – also suggested to consider the application of reliance interest (estoppel), which is regulated in Article 6 of the Hungarian Civil Code (hereinafter HCC), and is applied to cases where the engagement or the termination of engagement caused loss to the other party through no fault of his own. For example because he or she changed his or her work (in order to move to the place (i.e. town, village) where the other party lived) or quit her job (in order to take care of her

[12] Decree of the Roman Catholic Congregation of the Council regulating the canon law of the Church about marriage for practising Roman Catholics (2nd August, 1907), In: SÍPOS, István: *A katolikus házasságjog rendszere a Codex Juris Canonici szerint*, Pécs, 1940, p. 40
[13] A Családjogi Törvény, KJK, Budapest, 1955, p. 18
[14] NIZSALOVSZKY, Endre: *A család jogi rendjének alapjai*, Akadémiai Kiadó, Budapest, 1963, p. 73

fiancé's child, born from his former marriage) and she got a new job with significantly worse conditions.[15]

Albeit as to *Tibor Pap* engagement – in operative Hungarian family law – is purely a moral category, he recognizes the applicability of certain civil law rules, namely the reclaiming of the presents given by the parties during the engagement based on *frustrated assumption* as *causa* or upon Article 6 of the HCC on the estoppel.[16] The comment of the FLA from 1971 reflected the same point of view, whilst the comment from 1988 did not contain a single word about the engagement or the civil law questions related to this legal institution.[17]

As to the newest comment of the FLA from 2002, the engagement is known as a traditional legal institution prior to matrimony. Family law does not regulate engagement, 'it has no legal effect'.[18] However, the commentary recognized the possibility to reclaim the given gifts and the payment of compensation under Article 6 of the HCC if the promise to get married was or seemed to be based on serious intention.

3. The "stalk-back" of engagement

Notwithstanding the former opinions, *Gábor Jobbágyi* confesses that engagement stalked back to family law. His justification is dual: on the one hand, the amendment of the FLA in 1974 introduced an 'obligatory waiting period' ('quasi engagement'), i.e. the date of the nuptial ceremony can be determined by the registrar only after thirty days from the announcement of the intention to get married. At the same time Jobbágyi apprehends that this legal institution differs from the engagement in traditional sense since the formerly mentioned waiting period is compulsory and depends on the notification of intents which is a prerequisite to the matrimony, while engagement is voluntary and does not create any kind of obligation. Moreover, there are no provisions on the financial legal statements expressed by the parties during this waiting period, since the Hungarian legislator left the legal fate of these statements open contrary to the former law which contained detailed rules on the financial relations of the engaged persons. On the other hand, Jobbágyi deals with 'quasi engagement' from another aspect. From the year of 1984, Article 27 para (2) of the FLA makes it possible for the couples who intend to get married to conclude a contract before the marriage which contains provisions on their future financial relations apart from the FLA. In the point of view of Jobbágyi this legal provision is also able to prove that regarding the FLA there is a family law relationship between the persons who intend to get married.[19]

In 2007 the Family Law Handbook (*A családjog kézikönyve*, hereinafter Handbook) seemed to strengthen the opinion of Jobbágyi when it ascertained that the termination of engagement can affect the legal consequences of the statements and contracts related to the engagement. Therefore presents (e.g. jewellery) given by either of the parties can be reclaimed upon the *causa of* 'frustrated assumption' if they were given with regard to the

[15] NIZSALOVSZKY, p. 75
[16] PAP, Tibor: *Magyar családjog*, Tankönyvkiadó, Budapest, 1982, p. 79-81
[17] JOBBÁGYI Gábor: *Oktalanul eltűntetett jogintézmények; eljegyzés és hozomány*, In: Jogtudományi Közlöny. No. 6/1996, p. 245-251, p. 247
[18] SÁRI Péterné Vass Margit (ed.): *A Családjogi Törvény Magyarázata*, KJK-KERSZÖV Jogi és Üzleti Kiadó Kft., Budapest, 2002, p. 70
[19] JOBBÁGYI, p. 247-248

future matrimony, they exceed the scope of usually given presents and the marriage failed. Moreover the failing of the marriage must not be caused by the donator's own actionable conduct because – under the Article 4 para (4) of the HCC – no person shall be entitled to refer to his own actionable conduct in order to obtain advantages.[20] The failure of marriage can also result in the application of compensation rules under Article 6 of the HCC in cases where the bona fide party, who relies on the other party's promise, spends money (e.g. ordering the wedding meals, buying the wedding dress, etc.) hoping that he or she will marry the other party and thus damages arise.

The Handbook – contrary to the approach of the last fifty years – clearly ascertains that '*engagement also has some indirect legal effects*'.[21] Not only the HCC in Article 685, point b) but the Hungarian Criminal Code in Article 137 para (6) and the Code of Civil Procedure in Article 13 para (2) assign engaged persons (fiancées) as relatives.

Being a relative has an important role not only in substantive but also in procedural law, as to the following:

- In case of infringement of the memory of a deceased person the relative is entitled to file for court action. (Article 85 para (3) of the HCC)
- Bad faith and/or gratuitous promise shall be presumed in case of contracts which aimed at the concealment of assets, i.e. which entirely or partly deprive creditors of the possibility of satisfying their claim if a person concludes such a contract with a relative. (Art. 203 para (2) of the HCC)
- Under Article 82 para (1), point a) relatives cannot be obliged to make a witness or other statement on courts.

In case the engaged persons are domestic partners at the same time their relationship shall fall under the scope of the rules on domestic partners till they get married. However, the legal consequences of affairs with financial nature are exceptions since from the viewpoint of matrimonial financial law the period of the domestic partnership – in case it is followed by marriage – should be considered as part of the matrimonial cohabitation, thus matrimonial financial law provisions are applicable.

In 2008 the Hungarian Supreme Court gave the definition of engagement in a case which can prove that this legal institution did not sink into oblivion. It shall be deemed as a living legal institution which should not miss an unambiguous legal regulation. Since the definition of 'engaged person' was determined neither in the HCC nor in any other legal act, the Supreme Court had to take a stand on this question. According to the court, the notion is not known in the FLA at all, but the engagement as the mutual promise to marry – with its obligations which are mostly of moral nature – can be essentially identified with the notion of '*the person, who expresses his or her intention to get married*' or '*the person who intends to get married*'. In its judgement the Supreme Court declared that in the course of financial relations of the persons, who intend to get married, the parties shall be deemed as relatives, i.e. bad faith and/or gratuitous promise shall be presumed in case a contract entirely or partly deprives creditors of their chance to satisfy their claim.[22]

[20] c.f. Article 582, para (3) of the HCC

[21] KŐRÖS, András (ed.): *A családjog kézikönyve*, HVGORAC Lap- és Könyvkiadó Kft., Budapest, 2007, p. 21

[22] Pfv.II.20.103/2008/4.

The lack of clear regulation on engagement made the Supreme Court try to describe the period – with regard to the operative family law provisions – during which persons who intend to get married shall be deemed engaged. In this manner the Supreme Court decided that in legal sense those persons (who intend to get married) shall be deemed engaged who had already indicated their intention to marry at the registrar. This period is at least thirty days from which the registrar exceptionally can give acquittance.

Nevertheless this definition can give place for a false conclusion. Namely that in legal sense it excludes the existence of engagement before the indication of the intention which is totally controversial to the formerly developed unwritten law and the traditional provisions related to engagement. Engagement is a unity of mutual promises to get married of two, heterogeneous persons. Thus engagement is a sign not only for the parties, but for the outside world as well which expresses their togetherness and strengthens the intention and hope in their common future life and the formation of a family. This is the main reason for the HCC to deem engaged persons to be relatives. However, after engagement (exchange of rings) the relatives, members of the families also get into a relationship therefore not the announcement of the intention but the expression of the mutual promise creates the engagement.

On the other hand, as to the interpretation of the Supreme Court, in case a contract on marital property (prenuptial agreement) is entered into by the parties (who intend to get married) prior to the announcement of their intention at the registrar, due to the lack of engagement and the fact that they are not considered to be relatives, there is no legal ground for stating the ineffectivity of the contract, which aimed at the concealment of assets (as regulated in the Article 203 of the HCC).

In my opinion this statement is a danger to potential creditors and infringes the safety of commerce at the same time. It drives those who are engaged in a traditional sense but are not relatives in legal sense to conclude their financial businesses prior to the announcement at the registrar in order to avoid the consequences under Article 203 of the HCC.

It means that the creditor is obliged to prove that the party acted in a bad faith and the gratuity of the concluded contract whilst the creditor is foredoomed to failure. Proving these circumstances is hard. The need to create some provisions which can defend the interests of the creditors has already arisen in the old AML since there was a presumption concerning the contracts entered into by the engaged persons. According to this the allowances stipulated in these contracts had to be deemed gratuitous and the contracts had to be regarded as they aimed to circumvent the creditors at the same time. Such an allowance resulted in the liability of the party who got financial benefit towards the creditor of the other party.[23]

Thirdly, the legal institution of 'quasi engagement' - which means at least thirty days - is going to disappear with the adoption of the new Hungarian Civil Code. Act CXX of 2009 on the Civil Code, which have never come into effect, did not include the compulsory waiting period prior to marriage. The main aim of the prescription of the compulsory waiting period – in the operative FLA – was to avoid marriages which were concluded under momentary feelings, without mature deliberation. As to the Hungarian legislator, it is not likely enough that the application of such a compulsory waiting time is an appropriate tool for balking marriages which were entered into without deliberation since the starting

[23] ALMÁSI, p. 17-18

point of the new Civil Code is 'the self-sufficient and liable decision-making ability of the parties which appears in civil law relations.'[24] Probably in the terms of the aforementioned approach the regulation of the waiting period also will be amended.[25] With this action the legal category of engagement (quasi engagement) disappears since from that point not a legal provision but the work load of the registrar, the will of the party (who intends to get married) or the 'Saturday waiting-list' will determine the period of the engagement in legal sense which can last from one day till several months.

4. Engagement in other European civil codes

All of the European civil codes contain engagement as a legal category, except the French Code Civil. However, French judicial practice – under *ex delicto* liability – applies some legal consequences in the case of termination of engagement and recognises the financial liability of the party who terminates the engagement without having a grounded reason and he or she causes financial and/or moral damage with this act.[26]

As to Articles 45 and 46 of the Austrian Civil Code, engagement is a preliminary promise of the marriage which does not establish civil law obligation to marry. There is no way to enforce any allowance which is stipulated for the case of withdrawal. The party who did not give grounded reason for the other party's withdrawal has the right to demand compensation for his or her justified damages.

Also, under the provisions of the German Civil Code (Articles 1297-1302 of the BGB) it is impossible for the court to force the engaged person (fiancé or fiancée) to marry and clauses of penal nature shall be deemed null if the parties stipulated them for the case of withdrawal. If either party terminates the engagement he or she is obliged to pay the damage of the other party (or his or her parents) which arose in connection with the hoped, future marriage. However, in case the party terminates the engagement because of the other party's conduct or behaviour which can be deemed as a grounded reason for the termination at the same time, the party can claim for compensation. In case the marriage fails parties have the right to reclaim the presents which were given with regard to the future matrimony. If the fiancé or fiancée has died there is no way for reclaiming. Claims derived from the termination of the engagement lapse after two years.[27]

The need of the regulation of engagement also arose in the neighbouring Romania where it is regulated for the first time by Articles 266-270 of the new Civil Code (operating from 1st October of 2011). Until 2011 only matrimony was recognised by the Romanian law as a relationship with legal consequences and engagement was unregulated. The main reason for the Romanian legislator to regulate engagement is the fact that engaged persons often make arrangements or conclude deals in the hope of the future marriage which they would not do in the existence of other circumstances. Such arrangements are the changing of the residence or workplace, investments, presents, arrangements prior to wedding, etc. If engagement is followed by marriage the financial relations of the parties become part of the

[24] GÁRDOS, Péter (ed.): *Kézikönyv az új Polgári Törvénykönyvhöz*, Complex Kiadó, Budapest, 2009, p. 175

[25] BM Decree No. 6/2003. (III. 7.) of the Ministry form Home Affairs on the Registers, the Conclusion of Marriage and the Wearing of Name, Art. 36 para (1)

[26] BATA, p. 9

[27] BATA, p. 10-11

matrimony. In case the engagement is terminated grave debates can arise between the parties because of the suffered moral and financial injuries. These debates need to be regulated clearly. As to Article 266 of the new Romanian Civil Code engagement is a mutual promise between men and women which is not deemed as a prerequisite of the future matrimony. The Romanian legislator did not want to detail the features of the engagement, instead of this it entrusted it to unwritten law. Although engagement still does not make it compulsory to enter into a marriage in the future irresponsible, improvident promises, the termination of engagement without a grounded reason can have serious legal consequences in Romania. For the case of the termination of engagement the new code urges the application of *in integrum restitutio*. It means that the parties are obliged to give back in kind all the presents which were given as a sign of the engagement or during the period of the engagement with regard to the future marriage. If it is not possible to give back these presents in kind parties are obliged to reimburse the value of these presents with which they enriched. If the engaged parties make common investments during the period of engagement or they spend a considerable amount of money and the marriage is cancelled the culpable party shall pay compensation for the damages. Accordingly, the party who did not give a reason for the termination of the engagement has the right to claim for compensation for financial and non-financial damages. These kinds of claims for compensation lapse in one year.[28] In virtue of the aforementioned thoughts it can be stated that it is time to include the basic provisions of engagement and its financial legal consequences into the Family Law Book of the future Hungarian Civil Code.

[28] http://maszol.ro/torvenytar/jogszabaly_a_jegyessegrol_2011_09_23.html

European Integration Studies, Volume 9. Number 1. (2011,) pp. 27–40.

THOUGHTS ABOUT THE PROBLEMS OF THE ENFORCEMENT OF THE 'POLLUTER PAYS' PRINCIPLE[1]

CSILLA CSÁK
Associate Professor, Head of Department of Agricultural and Labour Law
University of Miskolc
civkincs@uni-miskolc.hu

1. Environmental Policy and Legal Basis of the 'Polluter pays' Principle

The general regime of environmental liability at Community level – after the Green and White Papers – was introduced in 2004.[2]. Previously, liability questions were subject to the regulations of the Member States in line with the subsidiarity principle. There are several key factors why Community level liability rules had to be enacted: firstly, economic actors could exploit differences in Member States' regulations in the hope of avoiding liability; secondly, national legislation did not ensure that the environmental clean-up could be attained after contamination; thirdly, not all Member States adopted legislation to address liability questions and therefore the 'polluter pays' principle might be injured.[3]

The objective of the Directive – namely, to establish a common framework for prevention and remedying of environmental damage at a reasonable cost of society – cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, regarding the scope of the Directive and the extent of its enforcement.
The prevention and remedying of environmental damage shall be implemented through the application of the 'polluter pays' principle and in line with the principle of sustainable development. Consequently, the fundamental principle of this Directive is that an operator whose activity has caused the environmental damage or the imminent threat of such damage is to be held financially liable, in order to induce operators to adopt measures and develop practices to minimise the risks of environmental damage so that their exposure to financial liabilities is reduced.[4]

The Directive basically covers the questions of administrative liability and stipulates its regime, while it does not include criminal and civil liability. Namely, the Directive does not apply to personal injuries; damage caused in personal property or economic loss neither

[1] This research was carried out as part of the TAMOP-4.2.1.B-10/2/KONV-2010-0001 project with support by the European Union, co-financed by the European Social Fund. It was translated by Andrea Szőllős.

[2] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

[3] Gyula Bándi (editor): *The Regulations of Environmental Protection in the European Union* pp. 411-412. Mini-Library of Environmental Protection 8. KJK Kerszöv Budapest 2004

[4] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage Preamble (2)

does it deal with the rights for such damage. The legal harmonisation of civil liability has not yet been placed on the agenda of the European Union. [5]. Although civil liability has not yet been regulated at Community level, it is worth mentioning that as concerns the Directive, it may be orientating regarding the degrees of damage during the enforcement of civil liability.

As regards the implementation of the Directive in Hungary, we can say that there are not too many changes in the general environmental regulations, as compared with the previous situation. Our national liability regime was in compliance with the Community measures. In the framework of legal harmonisation, several definitions have been complemented and amended.[6] Furthermore, the measures of the central budget relating to the environmental damage or the imminent threat of such damage have been clarified.[7]. Legal harmonisation efforts have especially affected the Act on the General Rules of Environmental Protection[8], the Act on Nature Protection[9], the Act on Waste Management[10] and the Act on Water Management.[11]

[5] Having regard for the Lugano Convention and the Proposal for a Directive of the European Parliament and of the Council on environmental liability by the European Union of 23 January 2002.

[6] Accordingly, the definition of environmental damage in line with its definition under Article 2 Sections 1-3 of the Directive has been clarified; the definition of natural resource services in line with its definition under Article 2 Section 13 of the Directive, the definitions of preventive and remedial measures in line with their definitions under Article 2 Sections 11-12 of the Directive, the definition of baseline condition in line with its definition under Article 2 Section 14 of the Directive, the definition of costs in line with its definition under Article 2 Section 16 of the Directive, and the definitions of utilization and emission standard in line with their definitions under Article 2 Sections 24-25 of the Directive have been introduced. Beyond the above written, the act also determines what kind of 'actions' shall be taken by the utilizer of the environment. This means the clarifying of the now prevailing regulations of the Environment Act since the basic elements (threat of environmental damage, halting pollution, finishing damaging, responsibility for the damage caused, restoring the state of the environment existing before the activity) have already been stipulated by the Environmental Act. Furthermore, the following amendments are still required: obligation of immediate notification of environmental authorities, obligation of taking preventive and remedial actions, the obligation of preventing further environmental damage and the degradation of natural resources services.

[7] Pursuant to Article 8 of the Directive, as a main rule, it is the operator who shall bear the costs for the preventive and remedial actions taken. Accordingly, the central budget will finance the costs of the preventing and remedial actions in cases in which this task may not be devolved to third parties with regard to the secondary liability (of the owner, the possessor/user and the vendee of the real property) implied in Sections 101 and 102 of the Environment Act. Thus the central budget will cover the costs in cases in which the party causing the damage is unknown or is insolvent or is exempted from administrative liability. In the case when the operator is exempted from administrative liability, the costs borne by him – in line with Article 8 of the Directive – will be reimbursed to him by the central budget. At the same time, the Act enables the central budget to cover the costs of preventive or remedial actions in advance in a justified case.

[8] Act LIII of 1995 (the Environment Act)

[9] Act LIII of 1996

[10] Act XLIII of 2000

[11] Act LVII of 1995

The regulations of administrative liability have been changed and implemented in accordance with the Directive the most significantly. These regulations primarily involve preventive and remedial measures.
Pursuant to the Environment Act, the operator is obliged to prevent or finish pollution, to inform authorities about pollution, to mitigate and restore damage and to prevent further damage, moreover,

- as a primary recovery obligation he is obliged to restore baseline condition of the environment,
- as a complementary recovery obligation he is obliged to substitute the damaged natural resource by a suitable natural resource and natural resource services by suitable natural resource services,
- as a compensatory remedial obligation he is obliged to take all the necessary actions until the remedial measures have finished, which are necessary for the temporary substitution of the damaged natural resource or natural resource services, and finally to bear costs.

Environment protection agency may require preventive, remedial measures to be taken or it may take them itself or get someone to do them and furthermore, if necessary it will decide on the order of restoration. The agency may require the user of the environment to give information. In case of an environmental damage having been determined in a legally binding resolution, the environment protection agency - besides obliging the user of the environment to take remedial measures – will also prescribe that a restraint on alienation and encumbrance shall be registered in the land register on the properties of the person obliged to take remedial measures which may provide adequate security to cover the costs of the remedial measures.

Environmental protection strategies, goals and means are determined in environmental policies at international, European Union and national levels. Naturally, environmental policies of different levels are in compliance with each other and harmonize. Principles of vital importance are laid down in the environmental policy of the EU, which determine the direction of environmental actions. This can be traced nationally in the governmental strategic directions (environmental policy) appearing in the National Environmental Protection Programme[12], its action programmes and in other planning documents.
The goals defined in the National Environmental Protection Programme throw light on the shortcomings, which need to be changed and developed. Some of them are as follows:

- in the framework of the establishment of a suitable, motivating sanction system, it is worth considering defining very strict prejudices with a retarding effect for illegal activities causing damage of high priority to the environment, to raise the extents of fines and environment loading fees and to expand the scope of criminal, administrative and civil law liability.
- it needs to be examined whether it is possible to establish a system which favours the users of the environment who attest law abiding behaviour (like users of EMAS)
- the self-regulating means of environment users (administrative contracts, voluntary agreements, company environmental programmes, etc.) need to be surveyed with

[12] No. 96/2009 (XII.9.) Parliament Resolution on the National Environmental Protection Program for the period of 2009-2014

the aim of improvement. Besides ensuring the necessary level of protection, with the aim of technical simplification, it is reasonable to revise whether it is necessary to maintain the system of permission or in some cases a more efficient system of registration would be better.

- it is necessary to consider that the state should delegate several tasks defined by legal regulations (acts, government decrees) definitively and with the obligation of provision to non-governmental agencies, social organisations or public domains.
- it is required to examine whether the now working, but costly legal institutions may be exchanged without injuring environmental interests by other legal constructions (etc. financing damage restorations in the circle of governmental liability, the role of the system of green-tax – deposit fee during the enforcement of waste management obligations)

While improving the regulatory system, the following principles, aspects shall be considered decisive:

- Based on the traditional principles of environmental protection, the 'polluter pays' and the 'user of the environment pays' principles, and the 'principle of prevention' shall be enforced with regard to both the producers and the consumers.
- Eco-efficient, innovative sectors requiring labour and adequate to national conditions shall be emphasized in order to contribute to the strengthening of competitiveness.
- The enforcement of environmental aspects shall gradually be expanded from the production process to the whole life cycle of the product (from planning, insuring resources to the end of the useful life cycle of the product, or its recycle, the use of the product having become waste) and thus the economic regulators shall be determined. The reimbursement of the real costs of the use of the resources shall be decisive during the formation of the concrete taxation policy measures.
- The system of securities to be given by the polluter in order to remedy the environmental damage caused by the economic activity shall be widened.

The costs of environmental damage, environmental load and the use of natural resources are rising and thus have a great impact on the economic performance, the possibilities of growth and their costs. There is a need for the application of instruments which assure that the costs of environmental load, environmental contamination or the remedy of environmental damage shall partly be borne by the causer and by this means community sources can be discharged. This goal is served by taxes and fees ('negative incentives'), which intend to compel environment loaders, polluters and damage causers to abandon their activities and to incite economical management of natural resources. The direct and indirect assistance ('positive incentives') support the execution of environment-conscious activities, measures and investments. Such special economic means is the trading of contamination rights (e.g. emission trading) and the system of securities. The above described economic regulators are present in the national environmental policy; however, they do not contribute to the effectiveness of environmental aspects properly.

2. Determination and Limitation of the 'Polluter Pays' Principle

We could find the 'polluter pays' principle in the EU environment policy even in the first action programme and since then it has always been present among the principles.

Moreover, the importance of this principle is proved by the fact that it is even included in the primary legislation and named by OECD[13] as a principle of environmental policy. In accordance with it, the costs of the damage to the environment shall be borne by the causer of the damage, the polluter. In different interpretations, the polluter pays principle can mean the costs of the enforcement of the prevailing regulations or the costs of remedying the caused environmental damage (external costs).

The theory of economics worked out the 'polluter pays' principle in the 1970s in order that the costs of environmental pollution shall be allocated between the industry and the consumers, thus the state of the environment can be sustained at an adequate level and at the same time, the so called concealed assistances provided by the state for the polluters, which deform competition at the market, can be abolished. The 'polluter pays' principle is a fundamental principle of environmental policies these days, which practically determines that the costs of preventing and remedying environmental damage shall be borne by the polluter.[14]

This establishment is confirmed by the Preamble of the Directive,[15] which says that according to the 'polluter-pays' principle, an operator causing environmental damage or creating an imminent threat of such damage should, in principle, bear the cost of the necessary preventive or remedial measures. In cases where a competent authority acts, itself or through a third party, in the place of an operator, that authority should ensure that the cost incurred by it is recovered from the operator. It is also appropriate that the operators should ultimately bear the cost of assessing environmental damage and, as the case may be, assessing an imminent threat of such damage occurring.

When interpreting the 'polluter-pays' principle, we come across a complex definition. It is worth starting from a definitive statement during interpretation. The principle is basically composed of two words: the 'polluter' and the 'pays' compound, on the basis of which we need to define and confine a personal circle and a scope of activity.[16]

The definition at Community level in the interpretation of the Commission: 'polluter is the person who directly or indirectly damages the environment or who establishes

---

[13] Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies, C(72)128, OECD, 1972.

[14] Szilvia Szabó: *The 'Polluter Pays' Principle in the Environmental Protection* Iustum Aequum Salutare III. 2007/3 pp. 215-224. www.jak.ppke.hu/hir/ias/2007/3sz/15pdf. 2011. September 28.

[15] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage Preamble (18)
Although the prescriptions of the Preamble of the Directive are referred to, it does not mean that it would be of less importance than a stipulation of the operative part of law. On the one hand, the Preamble of the Directive fulfils the reasoning obligation of law which comprises the determination the evidence of facts, aims and legal grounds. On the other hand, the Preamble is a legal document which is to be enforced in its own right. Namely, the obligations of national authorities are determined not only by the operative part of the Directive but also by the aims set in the Preamble. The role of the preambles of community legal norms is different from the method of the national legislation. See in more details: Temple Lang, John.: *The Duties of National Authorities Under Community Constitutional Law,* European Law Review, Vol. 23,No.2, April, 1998, 124-125.pp.

[16] Gyula Bándi: About Environmental Liability *Internal Affairs Review 2005. Issue 5. pp.* 3-21.

circumstances which lead to such damage.'[17] The European Commission has also declared that 'the notion of polluter … does not affect stipulations on the liability of a third party', which makes it possible to determine the polluter on one side, who is obliged to bear the costs of prevention, and the third party on the other side, who is liable for contamination and therefore is obliged to pay damages.[18] Consequently, a legal regulation becomes possible according to which the circle of the 'polluter pays' principle may be divided into bearing costs and liability. An example for this can be found in the national regulation of waste management based on the 'polluter pays' principle.

Pursuant to the Directive, 'operator' 'means any natural or legal, private or public person who operates or controls the occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity or the person registering or notifying such an activity.'[19] The operator (polluter) whose activity has caused the environmental damage or imminent threat of such damage is financially liable.

In the national environmental law, in some cases the polluter pays principle is used in a broader circle. Pursuant to Article 101 of the Environment Act anyone whose activity or negligence endangers, pollutes or damages the environment shall bear liability. This means that the national law defines the notion of damage causer in a broader sense and uses a strict, no-fault, so called objective liability regime independent of the damage causer's fault, which does not examine the damage causer's fault (whether intentional or negligent) even in cases of damage caused to protected species or natural habitats.[20]

A special adaptation of the polluter pays principle appears in several special fields of environmental protection, too. For example, without completeness, as regards waste management 'on the basis of the polluter pays principle, the producer or holder of waste or the manufacturer of the product that became waste shall pay the waste treatment costs or dispose of the waste; the polluter shall be responsible for the abatement of environmental pollution caused by the waste, for the restoration of the state of the environment and the reimbursement of damages including costs of restoration'[21]

As an interpretation of the word 'pay' from the polluter pays principle, we can say that it refers to financial reimbursement. Regarding the polluter's liability, the question may arise that what kind of activities result in liability. The scope of our Environment Act, in line with the regulations of the Directive – from April 30, 2007 - include

„a) living organisms (biotic communities), the abiotic components of the environment and the natural and man-made environment thereof;

[17] COMMISSION OF THE EUROPEAN COMMUNITIES: Recommendation. OJEC (1975) L194, p. 1.

[18] Szilvia Szabó: *The 'Polluter Pays' Principle in the Environmental Protection* Iustum Aequum Salutare III. 2007/3 pp. 215-224. www.jak.ppke.hu/hir/ias/2007/3sz/15pdf. 2011. September 28.

[19] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage Article 2. Section 6.

[20] Opinion of the Environment Act

[21] Act XLIII. of 2000 Section 4. paragraph g)

b) pursuant to the provisions of this Act, the activities that utilize, load, endanger or pollute the environment.'[22]

'The scope of the Act shall cover those natural persons, legal entities and unincorporated organizations

a) that have rights or responsibilities in relation to the environment as defined under Paragraph a) of Subsection (1);

b) that perform activities under Paragraph b) of Subsection (1) (hereinafter referred to as "user of the environment")'[23]

During the use of the environment[24] the regulations are laid down according to the character of the use. The system of licensing, compelling and penalizing stipulated in the Environment Act is based on the three basic notions[25] of the Environment Act, namely, environmental pollution – threat to the environment – environmental damage. Activities or negligence connected with these notions form the basis for the application of the polluter pays principle. Namely, the principle can be connected with all types of activities which either result in lawful use of the environment or involve unlawful, that is polluting activities. Accordingly, the responsibility implies a series of conducts on the basis of which the user of the environment is obliged to take measures and which involves conformity with legal regulations from precaution to damages. These are basically – but in all cases – activities demanding financial performance. These financial performances appear directly as external liability towards third persons, generally towards authorities, or indirectly in the circle of the activities of the user of the environment attaching to the development of a definite system of conditions.

There are different tendencies - in connection with the extent of financial fulfilment – how to define the 'polluter pays' principle. Accordingly, we can define it in a narrow and broad sense. The 'polluter pays' principle in the narrow sense means the notion involving costs necessary for preventing and supervising pollution. The 'polluter-pays' principle in the broad sense means the notion that implies beyond the costs of preventing and supervising pollution, the compensation and taxes[26], payable on the use of the environment, the costs of the cleaning up the pollution and paying for the damages. [27].

---

[22] Act LIII. of 1995. Section 2. Subsection (1)

[23] Act LIII. of 1995. (the Environment Act) Section 2. Subsection (2)

[24] 9. *"use of the environment"* means an activity involving the utilization or loading of the environment or a component thereof; 4. *"utilization of the environment"* means causing changes in the environment and making use of the environment or any of its components as natural resources;

6. *"environmental impact"* means the direct or indirect emission of a substance or energy into the environment; Section 4 of the Environment Act

[25] 7. *"environmental pollution"* means loading a component of the environment above the emission standard;

10. *"threat to the environment"* means the imminent threat of environmental damage;

13. *"environmental damage"* means any measurable adverse and significant change in the environment or any environmental media which may occur directly or indirectly, or any measurable impairment of a natural resource service which may occur directly or indirectly; the Environment Act Section 4

[26] See in greater detail: Zoltán NAGY: Questions of Support Policy in the Environmental Protection In. János Ede SZILÁGYI (ed.): Environmental Law Volume II. Studies on Thoughts in the Environmental Law Novotni Foundation Miskolc 2010. pp. 73-87., Zoltán NAGY: Taxes in the

Pursuant to the Directive, 'The prevention and remedying of environmental damage should be implemented through the furtherance of the 'polluter-pays' principle, as indicated in the Treaty and in line with the principle of sustainable development. The fundamental principle of this Directive should therefore be that an operator whose activity has caused the environmental damage or the imminent threat of such damage is to be held financially liable, in order to induce operators to adopt measures and develop practices to minimise the risks of environmental damage so that their exposure to financial liabilities is reduced.'[28]

The costs applied and prescribed by member states differ and concerning external and internal cost bearing measures, users of the environment in some member states may enjoy competitive advantage, while those in other member states may suffer competitive disadvantage.

The polluter pays principle is basically an economic principle, which - as regards its impact and consequences – conforms to the principle of liability. It often appears a synonymous notion. The proclaimed principle of the Environment Act is the principle of liability. Users of the environment shall be liable for the environmental impacts of their activities as defined in this Act and as regulated in this Act and other legal regulations.[29]. The liability for environmental impacts implies the possibility of having to take the lawful and unlawful consequences, which appear at the polluter pays principle, namely, the application of the financial means of environmental protection and the legal liability, too. Chapter 'The Basic Principles for the Protection of the Environment' of the Environment Act includes the principle of liability in the broader sense namely the performance of all kinds of conducts, activities and obligations implies liability similarly to the 'polluter pays' principle.

Chapter 'General Basis of Legal Liability'[30] gives the more precise regulations of the 'polluter-pays' principle, according to which a polluter of the environment will bear liability for the impact of his activities on the environment according to the Environment Act, as well as according to criminal and civil law, and regulatory and administrative provisions. Consequently, the liability principle also implies legal responsibility. Legal liability is the negative evaluation of a relation between an unlawful conduct and a requirement defined by a legal rule passed by the society. The basic goal of liability is to make the person testifying unlawful behaviour refrain from similar conducts in the future by the application of prejudices. The condition - upon which the liability is determined in all cases - is the unlawful conduct, the breach of obligation (objective element). The educational function can be fulfilled if the prejudice is applied against the person conducting the breach. During the interpretation of the 'polluter pays' principle we can make the conclusion that it cannot be regarded as a synonym of the principle of liability in

Regulatory System of Environmental Protection In. János Ede SZILÁGYI (ed.): Environmental Law Volume II. Studies on Thoughts in the Environmental Law Novotni Foundation Miskolc 2010. pp. 87-105.

[27] See in greater detail: Gyula Bándi: *Environment Law* Publishing House Osiris Budapest 2006. p. 606.

[28] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, Preamble (2)

[29] Act LIII. of 1995. (Environment Act) Article 9.

[30] Environment Act Article 101.

the case when the liability principle is defined as a legal responsibility (unlawful conduct) in the narrower sense.

3. The Questions of State Responsibility

The improvement of the regulations of the environmental law in Hungary has accelerated for the past decade as a result of the legal harmonisation obligation in relation to the European Community. Basically, two main directions of regulations concerning the effects on the environment have been established: the direct (permitting- forbidding) and the indirect (economic) methods of regulating. The basic of both regulatory methods is influencing the polluter's behaviour as a result of which the person liable insures the prevention of pollution and the moderation and execution of the environmental damage. Several new fields of the regulatory system of environmental protection have been established and some others have been amended, renewed. At both national and Community levels, it is still necessary – with keeping the achievements of the newly established system – to harmonize the legal fields of the environmental law and to assure the conditions of the enforcement and application.

In the West-European states it has already become a practice that operators are obliged to form provisions for liabilities and charges. There are many solutions for those who perform dangerous activities to provide securities which may be of obligatory or voluntary character. The aim of an environmental insurance policy is the same in every case that is to provide a guarantee for the restoration of potential environmental damage and at the same time it means an economic influence on the reduction of environmental load. The introduction of obligatory insurance would also solve the problem, namely that companies having caused environmental damage are exempted from liability for remedying environmental contamination by declaring themselves bankrupt.

Pursuant the Environment Act the 'polluters of the environment shall be required to provide an environmental security and may be required - under the conditions set out in specific other legislation - to obtain environmental liability insurance for the financing of clean-up operations for any unforeseeable environmental damage that may result from their activities. Polluters of the environment may set aside provisions for environmental protection purposes as specified in the relevant government decree for any environmental liabilities they may have or are certain to have in the future.'[31]

Pursuant to the Environment Act, the user of the environment and also the manager of waste, (a new element is that not only the manager of dangerous waste but also the manager of waste in the amount which increases the level set in the government decree on the obligation of waste registration or the owner of such waste) is obliged to form securities for potential environmental obligations foreseeable at the licensing of the activity. He may be required to take out an insurance policy for remedying environmental damage which cannot be foreseen. The Act clarifies the provisions for liabilities and charges, too. [32]

The government stipulates the activities, the forms and extents of securities, the conditions of their use, the rules of pay-off and their records and the regulations of environmental insurance policies by a decree. This Act lays down the legal basis for

[31] Act LIII. of 1995. (Environment Act) Article 101. Section (5)
[32] Opinion of the Environment Act

environmental liability insurance policy in Hungary. At present because of law insufficiency there is no obligatory environmental protection insurance policy adjusted to company activities, however, the polluter is liable for environmental damage on a no-fault, objective liability basis even in Hungary.

Other legal regulations like the Act on Nature Protection and the Act on Waste Management also prescribe the obligation of forming environmental protection securities. The government decree about this does not yet exist, although, there are some plans for it. On the basis of the government decree proposal we can state that the aim of the environmental protection securities is to contribute to the execution of environmental protection obligations related to the restoration of potential environmental damage and the abolishment of such activity/establishment. The environment protection security may be a bank guarantee provided by a financial institution, an amount of money deposited at a financial institution administered and tied up on a separate bank account. The type of the security may be chosen by the person obliged to be insured in his request for permission, in which the authority prescribes the obligation of providing a security. There is a need for a security to be provided by

- operators performing an activity with an significant risk for the environment;
- operators of establishments with an significant risk for the environment;
- managers of waste dumping sites;
- users of the environment in the event of environmental damage for remedial measures.

The obligations for providing a security are determined by environmental protection, nature protection and water conservancy agencies in a resolution, in which they give permission the activity with a significant risk for the environment, the operation of such establishment or waste dumping site. In the event of significant environmental damage, the agencies prescribe security providing obligations in their resolutions ordering remedial measures.

With the introduction of environmental protection securities the personal liability of the causers of environmental damage and the 'polluter pays' principle could be enforced more efficiently because the users of the environment will be obliged to provide for an amount of money in advance as a guarantee for the restoration of environmental damage. There appeared as a practical problem that those liable for environmental protection did not perform their obligations adequately and the costs of environmental damage had to be borne by the central budget because of the lack of securities.

The institute of environmental protection securities has already been introduced in several member states like in Spain, Holland and Finland and their systems may be used as an example for forming the related Hungarian regulations.

In Hungary an insurance policy is taken out to cover accident-like evenst, but while the oil bursting is accident-like, the oil leaking is regarded as damage. Insurance policies generally cover only the costs of remedial measures, namely the clearing up of the contaminating material, but they do not cover the restoration of the damage caused in the environment. However, the coverage exists only when a third party hands in a demand, because in Hungary the insurance policies know the notions of own damage and damage caused to a third party, but the environment or the environmental agency does not belong under either category.

The role of securities and the possibility of their application is not only a question of administrative law; we can find an adequate use of these institutions in the field of civil

law, as well. We must state, however, that the practicality of the use of these institutions in either administrative or civil law is rather low. Pursuant to Section 115 subsection 3 of the Hungarian Civil Code an owner may demand the termination of illegal intrusions or influences and, in the event of the presence of imminent danger, the endangered person shall be entitled to request the court to restrain the person imposing such danger from continuing such conduct and/or to order such person to take sufficient preventive measures and, if necessary, to provide a guarantee. [Section 341. subsection (1) of the Civil Code].

The prescriptions of termination, prohibition for the future, the obligation for taking preventive measures and providing securities are all prejudices for preventing the environmental damage to hapen, and moreover, they are the mkost suitablefor this. A regards their conditions, they are objective. They sanction the endangering, the abnormal process as a result of wich the damage occurs. Since the restoration of the contaminated, especially the destroyd environment is either impossible or cost so much, that the damages (or fines) do not help, the prejudices shall play a much greater role in the prevention or mediation of environmental demage. This is only possible if both those suffering the gamage and the courts pay much more attention to these regulations. Howewer at present we can say having regard to the judicial practise in cases of operators performing polluting activities courts do not order prohibition from activities or obligations of providing securities as sanctions. Ibn court of law, in the contradictory proceedings the objective conditions of the imminent threat of damage would be better testified and established. Regardless of this, it seems that this role is regarded by the society as a means that can be used during administrative supervisory agency. In cases of environmental danger not only the relation of private interest contra private interest may appear in connection with the scope of the activities of the operator, like a production activity of high priority, and also as an effect of danger on the society. In such a relation, economic interests may always influence the decision on environmental protection.

The activities of the government aimed at environmental protection are multirole including making law, establishing and operating institutions, and enforcing national and community legislation. One part of these tasks is the state liability, when the state holds secondary liability for the consequences of environmental contamination.

The environmental responsibilities of the Government include – among others – cleaning up the consequences of environmental damage or environmental emergencies if this responsibility may not be diverted to another party and providing cover for the state's liability for environmental damage and to pay for such liabilities..[33]

The central budget covers the costs of preventive and remedial measures in connection with environmental damages, in the cases where it cannot be charged to others, reimburses – in defined cases - the costs of preventive and remedial measures in connection with the prevention or mitigation of environmental damages and advances the costs of preventive and remedial measures in connection with environmental damages in the cases where immediate intervention is required.[34]

The Environment Act clarifies the regulations relating to the central budget's financing in connection with environmental danger and contamination. Pursuant to Article 8 of the Directive the polluter shall bear the costs of preventive and remedial measures as a main

[33] Environment Act Article 41 Section (5) Paragraphs c) and d)
[34] Environment Act Article 56. Section (1)

rule. Accordingly, the central budget will cover the costs of the preventive and remedial measures only if the costs cannot be charged to others with regard to the secondary liability (of the owner, the possessor/user or the vendee of the property) defined in Sections 101 and 102 of the Environment Act. Thus the central budget will finance the costs of the preventing and remedial actions in cases which the party causing the damage is unknown or is insolvent or is exempted from administrative liability. In the case when the operator is exempted from administrative liability, the costs borne by him will be reimbursed to him by the central budget. In the case when the costs of the preventing and remedial actions could not be devolved to third parties because the user of the environment or the owner of the property was unknown and these persons become known at a later date, they are obliged to bear the costs of the actions taken.

Based on judicial practice, the most frequent case of state financing is when the operator goes into liquidation and environmental load arose from its operation. Pursuant to Section 48 subsection (3) of the amended Act on Bankruptcy Proceedings and Liquidation Proceedings, in the process of liquidation the liquidator shall provide for the protection and safeguarding of the debtor's assets, such as in particular to sustain the productivity of arable lands, to carry out planting and rehabilitation works in forests, furthermore, the observation of regulations concerning environmental protection, nature conservation and protection of historical monuments, to provide a solution for any damage and contamination of the environment that of which is proven to originate from before the time of the opening of liquidation proceedings by way of cleaning up the damage or contamination during the proceedings, or by selling the assets in question in their state of contamination. Pursuant to Section 57 subsection (2) paragraph c) of the above mentioned Act liquidation expenses shall cover costs in connection with the rational termination of the debtor's business operations incurred following the time of the opening of liquidation proceedings, furthermore, the costs in connection with the protection of his assets, including the costs of clean-up of any environmental damage and contamination. Pursuant to Article 56 Section (1) point b) of Act LIII. of 1995, the central budget shall contribute to cleaning up environmental damage in cases in which this task may not be devolved to third parties or the party causing the damage is unknown or its liability for the damage cannot be enforced. Pursuant to Section 12 subsection 2 of No. 106/1995 (IX.8.) Government Decree on the Requirements of Environmental and Nature Protection during Liquidation and Bankruptcy Proceedings, the liquidator shall provide for damage and contamination of the environment that of which is proven to originate from before the time of the opening of liquidation proceedings. This means all the necessary measures to be taken – even in the lack of the debtor's assets – in order that the elimination of the dangerous waste shall take place on the burden of the central budget. The creditor has the right for eliminating the dangerous waste or having it eliminated at its own cost and the costs may be reimbursed during the liquidation proceedings as a creditor's demand.[35]

In line with Article 8 Section 2 of the Directive – pursuant to which - when the competent authority recovers the environmental damage instead of the operator, suitable financial guarantees (e.g. property or other appropriate guarantees of financial security)

[35] EBH 2001. 549. The Storage of the debtor's dangerous waste at the site of the creditor based on a storage agreement (Supreme Court Decision Fpk. Nr. VIII. 33. 535/1999.) BH 2001. 337 (Supreme Court Decision Nr. Fpk. VI. 33.618/1998.)

shall be established in order that the costs of the remedial actions taken by the competent authority can be reimbursed. At the initiative of the environmental authority, a security over the property on behalf of the Hungarian State shall be added to the land register, in cases where the costs of the preventive or remedial actions have been rectified by the central budget instead of the polluter.

4. Closing Thoughts

The new Fundamental Law in Hungary will enter into force on January 1, 2012, which will extend and strengthen further the constitutional foundations of the Hungarian environmental law, and raise to a higher level the protection of the Hungarian land and natural values. The new Fundamental Law involves the principle of sustainable development, the values of the future generations and the environment with special emphasis.[36]

The environmental provisions of the Fundamental Law can be divided into two parts. On the one hand, it controls the protection of natural resources with regard to the interests of future generations; on the other hand, it fulfils the conventional ideology about fundamental rights to a healthy environment. The Fundamental Law has drawn up the obligation of the state, according to which the state has to restructure its social and development policy having regard to the environmental protection and its liability for future generations. [37]

Important achievements of the new Fundamental Law:

- it bears or responsibility for our descendants,
- it regards sustainable development[38] as the goal of the entire humanity and with regard to this, it defines Hungary's tasks within the framework of international cooperation,

[36] See in more details: László Fodor: Nature Subjects in the New Fundamental Law. *Pázmány Law Working Papers* 2011/21 pp. 1-9, *Environmental Protection in the Fundamental Law.* Debrecen Gondolat Publishing House Faculty of Law, Debrecen University 2006. p. 205.

[37] Statement of the Hungarian Parliamentary Commissioner for Future Generations on the responsibility of the state arising from the environmental and sustainability provisions of the new Fundamental Law: Nr. JNO-258/2011.

[38] See in more details: István OLAJOS: The Sustainable Development In: OLAJOS (ed.): *Rural Development Policy and the Law of its Support*. Miskolc, 2008, Novotni Publishing House, 26. p.; See also: OLAJOS: *The Establishment and History of Rural Development.* Miskolc, 2008, Novotni Publishing House, 12-16. p. in connection with the social dimension of sustainability see: Zoltán VARGA: The Examination of the Hungarian Retirement System from the Aspect of Sustainability. *Publications Universitatis Miskolcinensis Sectio Juridica et Politica*, Miskolc University Press, Miskolc, Tomus: XXV/2. (ann. 2007), 735-754. p.; Zoltán VARGA: Measures in order of the Sustainability of the Retirement System in Hungary and other Member States of the European Union. *Collega*, 2007, Issue 2-3, 189-193. p.; Zoltán VARGA: The Current Questions of the Financial Sustainability of the Hungarian Retirement System. *The Forum of Doctoral Candidates November 13, 2007*. (Publication of the Faculty of Law, University of Miskolc), 235-240. p.; Nóra JAKAB: Thoughts on the Connection between Sustainable Development and Employment. *Studia Iurisprudentiae Doctorandum Miscolciensium, Legal Studies of Doctoral Candidates of the University of Miskolc* No. *8.,* Miskolc, Bíbor Press*,* 2007, 149-168. p.; Nóra JAKAB: *The Challenge of the Case of Disabled People in the XXIst Century.* In: Tamás MANKOVITS, Sándor

- it recognises and enforces the right of every person to a healthy environment,
- introduces the notion of national heritage and within the framework of this it regards the protection of the natural assets of the Carpathian Basin important,
- emphasises that the management and protection of national assets shall aim to safeguard natural resources in consideration of the needs of future generation,
- it draws up the obligation of protecting and sustaining all natural resources, mentioning biodiversity – in particular native plant and animal species – agricultural land, forests and drinking water and emphasizing the exemption of agriculture from genetically engineered plants and animals,
- as a constitutional rule it lays down that no pollutant waste shall be brought into Hungary for the purpose of dumping,
- it raises one element of the polluter-pays principle to fundamental law level by stipulating that a person who causes any damage to the environment shall be obliged to restore it or to bear all costs of restoration.

However, even the most developed regulations of the Fundamental Law will not be enough to maintain a sustainable society if other elements of the regulatory system, the decisions of economic operators, the values and lifestyle of the members of the society and the consumer decisions will not support the enforcement of the basic principles of the Fundamental Law.

Tamás MOLNÁR, Sarolta NÉMETH (ed.): *Publication of Spring Breeze Conference. 2007 Social Sciences*. Budapest, 2007, Publication of the National Association of Doctoral Candidates, 506-511. p.; Nóra JAKAB: New employment policies of disabled people. *Collega*, 2007, Issues 2-3. , 285-288. p. see: Anikó RAISZ: Human Rights before New Challenges – Questions of Globalisation with a special regard to WTO. *Collega*, 2006, Issues 2-3., 238-241. p., János Ede SZILÁGYI: Environmental Law in the Law of World Trade Organisation. In. János Ede SZILÁGYI (ed.): Environmental Law Volume II. Studies on the Thinking in Environmental Law. Novotni Foundation Miskolc 2010.25-51.p.

European Integration Studies, Volume 9. Number 1. (2011) pp. 41–56.

THE EXTENTIONAL INTERPRETATION OF THE PRINCIPLE OF PUBLIC BURDEN SHARING IN THE LIGHT OF EUROPEAN TAX HARMONIZATION*

ÉVA ERDŐS
Associate Professor, Head of Department of Financial Law
University of Miskolc
jogerdos@uni-miskolc.hu

1. Introductory thoughts

The principle of proportional burden sharing of taxation appears as a constitutional principle in the new Basic Law[1] of Hungary just like in the previous Constitution.[2] In the formulation of the principle of proportional burden sharing the Basic Law's and the Constitution's text is different from each other in a new way. Analysis and comparison between the old and the new texts provide an interesting comparison. The analysis of the content of equality of sacrifice - besides the comparison – brings up many other thoughts and issues to clarify which I would like to share with the readers hereby.

In my study I want to show the difference in between the old and the new law, examine and analyse the soon to be introduced nem law, so to analyse who will be obligated by the state to contribute to public affairs, what is the concept of rates and taxes. How to interpret the principle of proportional burden sharing taking into account the historical traditions and is there any relation between the principles of European tax harmonization and the principle of burden sharing laid down in the Basic Law? How does the requirements
imposed in the European tax harmonization and the principle of proportional burden sharing are related to each other, that is to say can the principle of burden sharing be interpreted extentionally taking into account the aspects of European tax harmonization, or not?

Hungary's current economic policy emphasizes the fiscal autonomy and fiscal sovereignty that is why it is refraining itself from signing the Europaktum[3], in which the Member States would recognize the introduction of a common consolidated company taxbase. The harmonization of income taxbase would limit the creation of the

---

* It was translated by Máté Lakatos.

[1] Basic Law of Hungary (25 April 2011) Article 40.

[2] 1949. évi XX. törvény - The Constitution of the Republic of Hungary, 70/I. §.

[3] Europaktum – Pact to Increase Competitiveness: reform of the EU's stability and growth pact. The promotion serves as an important part of the strategy of Europe 2020 which aims economic boom in the EU, political basic document which aims the elimination of the obstacles of single market, the boom of the European economy,
Seemore:http://kitekinto.hu/nonpolitik/2011/03/21/elerhet_lehet_a_kozos_tarsasgi
_adoalap_2011_05_23 és http://www.fidesz.hu/index.php?cikk=160165/2011_06_14

most competitive tax system – according to the Government[4]. The Hungarian government is interested in the maintenance of fiscal independence and tax competition, so it states that it is not good to exclude tax competition from the fiscal policy within the European Union. On behalf of the state's economic policy the objective is to create one million jobs, a fast-growing economy, and they want to achieve this inter alia with the stimulation of investments which is possible on the fastest way with tax cuts, reducing tax rates and with a competitive tax system. The Government is therefore declares tax competition and does not want the country to be among those that fight against harmful tax competition. I think this is an issue whether this behavior is tolerable or correct taking into account the requirements of the European tax harmonization.

The question is how far can we go with this policy of refusal to fight against harmful tax competition and where are the limits of fiscal sovereignty and fiscal independence, can we set ourselves against the tax harmonization of Europe? Further question is how the principle of burden sharing and principles set out in the tax policy of the fight against harmful tax competition relate to each other? The present study is considering these issues one after the other and seeking for answers for these questions.

2. The analysis of the content of the principle of proportional burden sharing of taxation

In this issue it is worth to start the analysis with the comparison of the rules of the old Constitution and the new Basic Law. The old Constitution's 70/I.§ contains the principle of proportional burden sharing of taxation.

2.1. The principles that the proportional burden sharing includes - extentional interpretation - European tax law considerations

Two studies were written recently about the draft regulation of the principle of proportional burden sharing from the Basic Law by two colleagues which are very informative and excellent, and on which I have based this analysis.[5]Laszlo Klicsu's study analyses the principle of burden sharing on a historical and contentional basis, he uses the Constitutional Court's practice often in the principle's interpretation. Klicsu states summarily that the principle of burden sharing involves the principle of generality, the principle of equality, the principle of taxation in conformity with somebody's performance and the prohibition of taxes with confiscational nature. According to his viewpoint these principles provide the contents of burden sharing even now from the initial claim for equality of sacrifice. According to his opinion the burden sharing includes the principle of tax exemption of subsistence level in the light of the historical interpretation, but notes that this principle is

[4] Orbán: Hungary will not sign the Europaktum Http://www.hirado.hu/Hírek/2011/03/22/13/orban_Magyarorszag_nem_irja_ala_az_europkatumot/ 2011_05_23 see also: Népszava online, 2011.március 22.

[5] See more on this topic: Klicsu László: Köztherviselés az új Alkotmányban Pázmány Law Working Papers, 2011/3. Pázmány Péter Katolikus Egyetem, Budapest http://www.plw.jak.ppke.hu 1- 7.p. és Simon István: A közpénzügyek szabályozása az alkotmányban – tervezet Pázmány Law Working Papers, 2011/16. Pázmány Péter katolikus Egyetem, Budapest, http://www.plw.jak.ppke.hu 1-41.p.

not accepted by the Constitutional Court's practice.[6] I agree with all the statements of the study I just want to add some supplements and think further the contentional requirements of burden sahring which, in the XXI. century, after we joined the European Union, can be supplemented with the principle of the prohibition of harmful tax competition[7], which indirectly may appear in the principle of burden sharing. The principle of proportional sharing of taxation includes not only the obligatory, wealth and income proportional contribution to the public revenues but, as it appears in the new Basic Law, the obligation to contribute also to the public needs with public payments. The state finances its public expenses from public revenues, public expenses include the public functions which are strongly influenced by public needs. Public revenues, public expenses, public needs, public functions, public services are all related concepts, while the old constitutional principle[8] of burden sharing approaches the content of the obligation from the side of revenues (rates and taxes, public revenues), the new Basic Law[9] places into the center of the principle of burden sharing the calculable contribution to the public needs.

Thinking this thesis one step further this would mean that the proportionate contribution to the common charges in the meantime includes that if we use the public services, we have to contribute to its expenses, so everybody must contribute to the common needs of the society according to his/her income and wealth or load-bearing capacity. Because we not only contribute to the public needs and public burdens but we also use the public services financed from these, therefore we can say that the contribution to the public services is obligatory. It does make much difference where we contribute to the public services: because if we contribute to the public services not in that state where we use them – but for example in another state where our firm is registered[10] -, or we do not contribute to the public services at
all, we do realize one basic element of the harmful tax competition, the tax evasion or tax avoidance which will lead to competition distorting processes and will result in harmful tax competition.

---

[6] Klicsu (2011) 7.p. see also 85/B/1996.AB határozat (ABH 1998,620.)- The Constitutional Court examined the isseu of the tax exemption of subsistance level, but not from the aspect of human dignity or taxation according to capacities but the 70/E.§ if the Constitution. Referred by: Klicsu(2011) 7.o.39.lábjegyzet

[7] See: Code of Conduct for Business Taxation, political resolution accepted by the ECOFIN Council in 1997, in which the concept, types and the instruments against harmful tax competition are listed. (OJ. No C 2 of 6 January 1998. p.1.) See also: Ben J. M. Terra – Peter J. Wattel: European Tax Law Kluwer Law International, Hague, pp.283-288.

[8] The Act of Constitution 1949.évi XX., Chapter XII. 70/I.§ .” Every citizen of the Republic of Hungary bears the obligation to contribute to rates and taxes in accordance to income and wealth.”

[9] Basic Law, Article 40.: „A super majority law will set forth the fundamental rules on the sharing of public burden and on the basic rules of the pension system with regard to a predictable contribution to common requirements and secure standards of living at old age.”

[10] Off-shore companies are characterized by foreign owners, who register the company abroad, where there is no or very limited tax and customs rates are in force but operating inland, where they are tax exempt so they do not pay taxes. See: Offshore cégek, adóparadicsomok 2005/8 - Mozgástér http://cegvezetes.cegnet.hu/2005/8/offshore-cegek-adoparadicsomok és Issues in international taxation, International tax advoice and evasion, Paris OECD, 1987 http://www.oecd.org/dataoecd/52/35/40210055.pdf

In this way, another important principle should be added to the principle of burden sharing – in the soon to be made cardinal law - with the content of one of the tools in the fight against harmful tax competition, namely according to this principle everyone is obligated to contribute there to the public services where it is actually used. I admit that this idea is the extentional interpretation of the principle of sharing of taxation, but with the inauguration of this idea inside the body of the law the most problematic case of tax evasion would be excluded, namely the case when someone does not contribute to the public services there where he actually uses them so we would openly put on the fight against off-shore[11] companies. In my viewpoint this principle is included in the content of the principle of burden sharing but it is not declared, so that's why it should be declared.

2.2. The main point of harmful tax competition

The most important rules of harmful tax competition is contained in two documents, one of them is the Code of Conduct for Business Taxation[12] and the other one is the OECD's report on the fight against harmful tax competition. In 1997 the European Union adopted the Code of Conduct for Busines Taxation, which is not a legal source but a political commitment which is acknowledged by the Member States by way of unilateral and voluntary obligation undertaking. The Code of Conduct represents a new means of regulation in the the harmonization of the legislation concerning direct taxes, which replaces the difficult regulatory system based on unanimity; however, it is not legally binding. The Member States voluntarily fulfill the requirement that they refrain from any legislation which would implement such tax competition which would distort competition. If such legislation would be in force in a Member State, it should assume to eliminate it as soon as possible according to the uniform practice.

The Code of Conduct reminded the unsolved question of state aids and tax allowances, and as a result of this, at the end of 1998 the European Committe issued a Communiqué clarifying what provisions are qualified as harmful with the respect to the operation of the single market.[13]

The Code can prevail with the States' voluntary, unilateral commitment - so there are no sanctions for non-compliance - but its importance is indicated by that the adoption of the Code is included among the rules that the candidates should meet. By signing the Code the States agreed that they will not introduce provisions detrimental to the Community and will terminate all such provisions until 2003.

Includes the principle as a basic thoughts that any action is injurious, which results in lower tax burden than the normal rate in the Member State. Again a basic thought if

[11] Offshore companies, tax havens 2005/8 - Mozgástér http://cegvezetes.cegnet.hu/2005/8/offshore-cegek-adoparadicsomok

[12] Code of Conduct (ECOFIN Tanács 1997. december 01-ei ülésén elfogadott az (üzleti adózással kapcsolatos magatartási szabályokra vonatkozó határozata) Celex No. 398Y0106 (01). www.europa.eu.int., lásd még In: Erdős G. - Földes G. - Őry T .- Véghelyi M.: Az Európai Közösség adója, KJK Kerszöv, Budapest 1999. 136-140. o.

[13] See the detailed analysis of the communication ld. Carlo Pinto: EC State Aid Rules and Tax Incentives: AU-Turn in Comission Policy (Part I-II.) European Taxation 8-9. (1999) In: Erdős G. - Dr. Őry T.: i.m. 32. p.

somebody contribute to the public services and public expenses in a different state where he actually use them, it will be harmful tax competition.

The Code of Conduct is not a legally binding instrument, but it clearly does have poltical force.By adopting this Code, the Member States have undertaken to

- roll back existing tax measures that constitute harmful tax competition
- refrain from introducting any such measures in the future.

The Council, when adopting the Code of Conduct, acknowledged the positive effects of fair competition, which can indeed beneficial. Mindful of this, the Code of Conduct was specifically designed to detect only such measures which unduly affect the location of business activity in the EU by being targeted merely at non-residents and by providing them with a more favourable tax treatment than that which isgenerally available int he Member States concerned. For the purpose of identifying such harmful measures the Code of Conduct sets out the criteria against which any potentially harmful measures are to be tested.

The Code of Conduct requires Member States to refrain from introducing any new harmful tax measures („standstill") and amend any laws or practises that are deemed to be harmful in respect of the principles of the Code of Conduct. („rollback").The Code covers tax measures (legislative, regulatory and administrative) which have – or may have – a significant impact of the location of business in the Union.[14]

The criteria for identifying potentially harmful tax measures include:

- an effective level of taxation which is significantly lower than the general level of taxation in the country concerned,
- tax benefits reserved for non-residents,
- tax incentives for activities which are isolated from the domestic economy and therefore have no impact on the national tax base,
- granting of tax adventages even in the absence of any real economic activitiy (off-shore rules)
- the basis of profit determination for companies in a multinational group departs from international accepted rules, in particular those approved by the OECD,
- lack of transperancy.[15]

Before the adoption of the Code of Conduct, the OECD's Report[16] was issued, making OECD the forum of the general international action against tax allowances and tax heavens. OECD launched its project in 1998 with the aim of repressing the harmful tax policy instruments, which influence business decisions in an incorrect way.

Such are the tax allowances granted to foreign investors different from national treatment and thus regarded as discriminating, positive and negative discrimination, and investment incentives. This way the given country stimulates foreign capital to flow into the country, however, economically the aim is not to attract working capital, but to avoid taxes.

---

[14]http://ec.europa.eu/taxation_customs/taxation/company_tax harmful_tax_practices/index_en.htm_2009_10_01

[15]http://ec.europa.eu/taxation_customs/taxation/company_tax harmful_tax_practices/index_en.htm_2009_10_01

[16] Harmful Tax Competition: An Emerging Global Issue OECD, Paris 1998; www.oecd.org/pdf/M00004000/M00004517.pdf

Globalisation, international trade and the boom of investments have resulted in reshaping the tax systems of the countries; the stimulation of investments by granting tax allowances has become the main goal of tax reforms, and as a result the extension of the circle of taxpayers and incomes on which taxes may be imposed. In some cases it is not considered to be harmful as a positive effect of globalization, but it has a negative effects also when taxpayers often evade their income from the State, where they use the public services but do not contribute to the public expenses and make their income litter/ multiply ("fialtatták") elsewhere.[17]

To decide whether a tax allowances is a harmful means of taxation or on the contrary, it stimulates investments is not simple. Therefore, the Report attempts to clarify the concepts in order to promote differentiating.

The OECD's Report classifies the taxation systems, which maintain harmful tax incentives, into 3 categories: [18]

a. When a given country generally imposes no or only nominal tax on incomes.
b. When a country collects significant revenues from tax imposed on income at corporate level, however, the tax system applies such incentives as a consequence of which the incomes from the geographically mobile economic and financial activities are subject to very low taxation.
c. When a country collects significant revenues from tax imposed on income at individual and corporate level, but the effective tax rate that is generally applicable at that level in that country is lower than that levied in another country.

The third category - appropriately - may not always be regarded as an incorrect tax policy, primarily because the given country imposes real tax burden on its taxable persons and has revenues from that and does not aim at a certain activity. Whereas, it reckons especially the tax heavens, the establishment of off-shore companies and tax systems belonging to the second category described above harmful.

Why do tax competition be regarded as harmful? When a certain investment incentive or state aid should be regarded harmful can be decided with a vie v. to criteria as follows:

- It distorts international investment flows.
- It discourages voluntary compliance by taxpayers.
- It re-shapes the desired level of mix of tax and public spending.
- It causes other countries to increase the tax burden of other tax basis in order to make up for the loss of revenue and
- Such measures increase the administrative costs burdens of other countries.

If in addition there are closed stimulating systems not allowing domestic taxpayers to take advantage of these special benefits besides the above, and the country does not take part in the exchange of information, and its administrative and legislative system is not open and transparent and moreover, where the taxable person is entitled to compromise with the tax authority on the tax rate to be paid, it can be stated that that tax system may provoke harmful consequences.[19]

[17] See more: Dr. Kakuk János: Legújabb eredmények a nemzetközi adózás területén, Pénzügyi Szemle 2002. 8. sz. 734-736. p.
[18] Dr. Kakuk János 736. p.
[19] Dr. Kakuk János (2002) 736-739. p.

Tax heavens (off-shore companies) cause the following damages with their distortion in competition[20]:

- Distort the trade of financial and, indirectly, real investments
- Undermine the fairness and integrity of tax systems,
- Encourage taxpayers to tax avoidance,
- Re-write the system of tax kinds and public expenses,
- Place the tax burdens from mobile sources to the less mobile sources (work, consumption, property),
- The taxpayers increase the administrative costs of the tax authorities and the conditions to fulfill their obligations.

In other to defended themselves from challenges provided by countries with more favorable tax system, many countries change its tax system in order of the competition, reduces tax rates or the tax base, or grant discounts, exemptions. To avoid all these effects the OECD and the European Union appeal the governments to wage a joint, international fight against harmful tax competition.

Both the OECD's Report and the Code of Conduct for Busines Taxation take up the fight against harmful tax competition, that the follower countries try to avoid the application of harmful tax policy instruments in their legislation.

István Simon[21] expressed his similar opinion in connection with the above mentioned - though not with the example of the fight against harmful tax competition – when he wrote that many people of today's Hungary direct their income into states with low tax rates. And this raises an important constitutional issue in his opinion, namely " can a political or state leader decide on the public money paid by the community, or taking loans to the expense of this, who does not take part in the creation of such community funds in accordance with the principle of proportional sharing of taxation? In my opinion the answer is no." [22]

The basic conceptual requirement of the principle of proportional sharing of taxation is still not satisfied in full, on the contrary there are more and more news to hear about taxpayers who shorten the state with hundreds of millions of tax income with their behaviour. The problem is that although noone wants to contribute voluntarily to the government's expenses but everyone expects the public services and institutions to perform well. Everybody uses the public services (public roads, public transport, free health care system, public financed high education etc.) we hardly even notice that we use them, but we don't want to contribute voluntarily to these expenses and even if we do, we think that it costs too much. This dual requirement can not be satisfied at the same time, that's why a declared formulation, a clarification of concepts are needed to enforce the basic public interests.

In addition to the above mentioned there are couple of open questions left in the regulation of the principle of proportional burden sharing by the Constitution and the Basic Law. In the following lets examine the content of the principle of sharing of taxation in the old Constitution and the new Basic Law.

---

[20] Harmful Tax Competition an Emerging Global Issue i.m. (1998) 16p.

[21] Simon István: A közpénzügyek szabályozása az alkotmányban – tervezet Pázmány Law Working Papers, 2011/16. Pázmány Péter katolikus Egyetem, Budapest, http://www.plw.jak.ppke.hu . 15.p.

[22] See in the same source: Simon (2011) 15.p.

2.2. The contents of the principle of proportional burden sharing in the old Constitution

The Constitution, Article 70/I.§: „All citizens of the Republic of Hungary have the obligation to contribute to public revenues on the basis of their income and wealth." The principle of proportional burden sharing set out in the old Constitution, and declared that:

- Who is required to pay to the state? (Set out the tax subjects.)
- After what may be obligatory payment imposed in general and what forms the basis for payment? (The issue of taxbase/taxsource.)
- What are the rates and taxes?
- What does the phrase „in accordance/ ont he basis of their/ to income and wealth" mean elated to contribution? (Load-bearing capacity)

1. First we can conclude on that this constitutional principle is specifically designate the persons (issue of taxpayers) who have to pay to the State. History proved that the citizens must provide the costs of the state.

.Adam Smith (1776) stated that every citizen is obliged to pay taxes according to its capacities, the tax must be universal, fair, cheap and convenient. [23] Even in the Declaration of Civil and Political Rights it appeared in the time of the French Revolution, that " to cover the policing and administrative costs everybody's contribution is essential, the costs should be divided among the citizens according to their capacity." [24] According to Klicsu this document made the taxation obligatory according to one's capacity, in the meantime it states that the state has functions to do - policing force, public administration – which has expenses and these expenses should be paid by the citizens. The old Constitution obligates natural and legal persons, unincorporated associations who has income and wealth to contribute to the burdens of the State, so the subjects of private sphere and not the public bodies. So those persons (natural, legal and non legal persons) who have income and wealth from their relations with each other. So the state does not impose taxes on its own organs until they do public functions, which are financed from public revenues and does not involved in undertakings. Why does the state collects from the private sector and from individuals the part of their income as public revenues?[25] The answer is in the characteristics of state management and entrepreneurial activity and in the differences in between them.

The characteristics of entrepreneurial activity:

- Producing or supplying (economical) activity,
- Incomes from coordinate parties and coordinate relationship,
- Business is characterized by simplicity: the actions are carried out regularly in order to get profit or gain,
- Take risk at his own risk.

In contrast, the features of state management:

---

[23] Smith, Adam: A nemzetek gazdasága 1776 An Inquiry into the Nature and Causes of the Welth of Nations, W.Strahan and T. Cadell , London, 1776, hivatkozik rá: Klicsu (2011)1.p.7 in the footnote

[24] Klicsu (2011) 2.o.

[25] Act of 1992. XXXVIII. 10.§.(2) list the types of public revenues : Forms of payment obligation tax, duties, levies, contributions, fines and charges.

- The state has public functions and does public service, and shall not engage in producing
and servicing (economic) activities in legal sense,
- The state obtains its revenues from hierarchical, public law relationships, in the form of
taxes, duties, levies, contributions, fines or fees,
- It does public services and public functions for non-commercial purposes,
- The aim is not profit but to maintain the balance of public finances,
- The state does not take risks,
- It takes part of the income generated in the private sector and centralizes it in the form of taxes, duties, levies, contributions, fines or fees. [26]

Therefore, since the state does not produce and does not provide services, it does not produce income, it has no private income, but it needs revenues to cover its expenses to maintain the public bodies, and therefore it obligates only the individuals and the subjects of the productive sector to pay public revenues.

2. The Act on Public Finances[27] divides further the natural and legal persons subject to taxation with the categories of domesic and foreign individuals, legal persons and unincorporated legal entities; and besides wealth and income makes revenues also a condition for obligatory tax payment. The taxation of citizens abroad is an issue of financial sovereignty, and has already arisen in the history of constitutions. Financial sovereignty is the part of the state's sovereignty which ensures that the State has jurisdiction on financial issues. Includes: the state declares that it has actual power over public finances and over the relevant decisions.[28] That means to whom, to what and how to extend the scope of taxation. Foreign individuals have to pay taxes in Hungary, if they acquired their income here and international agreements in respect of double taxation prevail otherwise. The APF extends tax liability to foreigners, thus widening the subjectives written in the constitution. The revenue is to increase the scope of the resources of contribution, because the revenue is usually more than the income, the income is calculated from the income with the different deductions (cost, expense ratio). [29] The holding of assets, income, revenues indicates the range of tax sources, but it is incomplete and does not mean the indication of the tax items, as Simon and Klicsu also refer to in their study. [30] The trade of goods, consumer tax, energy tax, excise tax, just to name a few of the missing tax items, are in fact mentioned in the tax items, but the text of the Constitutional does not mention them as tax items. The Constitutional Court's decision says that according to the constitutional rule, requiring the sharing of taxation, the selected economic resource can be anything, the only requirement is

[26] 1992.évi XXXVIII. Act 10.§.(2) Article
[27] 1992.évi XXXVIII. Act 10.§.(19 Article
[28] Nagy Tibor: A pénzügyi jog alkotmányos alapjai, Acta Facultatis Politico.Iuridice Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominate , Tomus V. Fasciculus 2. Budapest, 1963.39.p.
[29] See the Act of personal income tax 1995.évi CXVII. 4.§. The income definition is: Income is equal with the revenue, the revneu minus the costs, and a % of revenue.
[30] Simon (2011) 16.-19.p. ; "a jövedelem és a vagyon szavak nem adótárgyra vonatkoznak." The words income and wealth does not mean the object of the tax. Klicsu (2011) 4.p.

that it must be in connection with income and wealth or assets.[31] As Klicsu stated the Constitutional Court's practice made it clear after 2006, that the object of taxes could be almost anything, and only that tax is unconstitutional due to the 70 / I §. which, by the means of excessive tax rates, deprives the tax source of financial resources. [32] Such was the category of expected tax, which was declared unconstitutional in the Constitutional Court's decision. [33] The Constitution's "according to income and wealth" formulate includes the principles of ability to pay, capability and load-bearing capacity, as Simon explains it in his study. Simon also notes that the appropriate term draw the requirement of proportionate sharing of taxation. [34]

3. The next question is, which was raised by the principle of sharing of taxatinon, that what is the common charge?

While examining the concept of common charge we can find various concepts[35]. In Tibor Nagy's study, which was written in 1963, he did not use the concept of common charge, but he used the concept of constitutional tax. He thinks that the constitutions use the category of public taxes as tax characteristed common charges, but in his view, these points require further statutory definition.[36]

The Hungarian laws do not spell out the concept of common charge. In fact, the concept of common charge can be approached from two sides: from the perspective of the contributors, and from the state's perspective. From the perspective of the contributors the common charge means an executable and executed payment, a payment duty to the state, public payments on the taxpayer's side mean burden, expenditure but on the other side, on the state's side this is revenue, and as public revenue includes everything what the state defines as public revenue. The Constitution does not specify the common charges and public revenues but anyway it's not the purpose of the Constitution, however, more detailed laws specify them. The Act on Public Finances solve this problem and according to it the state can impose obligatory payments in the form of taxes, duties, levies, contributions, fines or fees. [37] At the same time – according to the extentional interpretation – on the government side common charges are not only the means of public revenue, but also tasks that the state should assume and finance from the collected revenues. According to these common charge - extentional interpretation – burden to the taxpayers, resulting in a loss of revenue, income or property and burden on the side of the state as well as it raises a demand for the common needs of the society and thus it means an obligation to asset public functions. However, we can conclude on that the legal literature understand exclusively state / public payments under common charges. We can find an opinion about this concept

[31] Constitutional Court's (AB) decision: 61/2006.(XI.5.) AB határozat, ABH 2006,674. referred by Klicsu (2011) 23. footnote 4.p.
[32] 620/B/1992. AB. határozat , ABH 1994,539,541,44/1997.(XI.19.)AB határozat and see the other: in Klicsu (2011) 31. footnote 6.p.
[33] 8/2007.(II.28.) AB határozat referred by: Klicsu (2011) 28. footnote 5.p.
[34] See more: Simon (2011) 13.o.- 19.p.
[35] See e.g.: http://www.cegkamat.hu/fogalomtar/article_hid=2 letöltés ideje: 2011.02.21.
[36] Nagy Tibor (1963) 44.p.
[37] 1992.XXXVIII.törvény 10.§.(2) bekezdés

in the No. 544/1997 decision of the Constitutional Court.[38] The Constitutional Court found that the legislators are not subject to unconstitutional omission, because neither the Income Tax Act nor the VAT Act does not include a tax concept, and the constitution speaks only about common charges, but it meets the legal requirements since this tax concept can be derived from the law on the Act on Tax Procedure, the Act on Public Finances and the Constitution. The Constitutional Court also argued that under the examination of the understanding of the norm the statements of jurisprudence can be taken into account as well as the Constitution's concept of burden sharing of taxation which is one of the historical law concepts used by the Constitution and which concept is clear due to its long existence. According to the Constitutional Court tax is a source of financing public expenditure. Taxes can be used to cover all kinds of public expenditure, the only requirement for using it is to spend it on the performance, costs and expenses of public functions. The State's duties are determined by the Constitution and other laws. [39] The State's right, coming form the Constitution and other laws, is to determine taxes and distribute them in order to raise funds. This privilege, that is the executive right of taxation and the establishment of the state budget, was laid down in the hands of the Parliament. [40]

4. The old Constitution's principle of sharing of taxation prescribed the contribution to the common charges, that is to say to contribute to the revenues of the state proportionally based on income and property. In the narrow sense of the principle of sharing of taxation it approaches the issue from the side of the revenues of the government. The problem is in this simplier interpretation is that the old wording of the Constitution did not say explicitly that the principle of sharing of taxation means at the same time also the commitment to contribute to the common needs.

The approach from the expenditure side of the government was missing from the text of the Constitution, although the Constitutional Court's practice[41] and the historical approach[42] of the principle of sharing of taxation already included the principle that on the basis of sharing of taxation we need to contribute to the public expenditure and to the public needs; as I already mentioned in the already referred French Declaration of Human and Civil Rights it requires the contribution to the public duties and public expenditure. But Adam Smith's principle of equality of sacrifice was formulated from the public revenue side: "Every citizen is obliged to bear taxation according to its ability, the tax should be cheap, just, general and convenient." [43]

[38] Tersztyánszkyné Dr. Vasady Éva: A Magyar Alkotmánybíróság pénzügyi tárgyú döntései, Pénzügyi Jogot Oktatók Konferenciáinak előadásai (szerkesztette: Erdős Éva) 2006-2009, Novotni Kiadó, Miskolc, 2010. 19. p.

[39] Although there are many gaps in this definition we cannot find the types and groups of public functions in these laws.

[40] Tersztyánszkyné Dr. Vasady Éva (2010) 19-20.p.

[41] Klicsu (2011) 2. footnote 1.p.

[42] Klicsu (2011) 2.p.

[43] See: Klicsu 6-7. footnote, Klicsu (2011) 1.p.

3. The contentional requirements of the principle of proportional burden sharing and the provisions of the new Basic Law

3.1. The critique of the principle of burden sharing in the new Basic Law and the contentional requirements of the principle of sharing of taxation

It can be seen from the historical examples that written words has great importance and it is important what do we mean under a definition. Let's look the formulation of the principle of sharing of taxation in the new Basic Law, and how does it meet with the contentional requirements. The Basic Law is different from the old Constitution in the conception of the principle of sharing of taxation because it defines the main point of the concept not only in a single sentence like the old one did, but deals with the principle in two different locations in three sentences. The XXX. § (1) of the Basic Law provides: "According to someone's load-bearing capacity and the participation in the economy everyone is obligated to contribute to the common needs. "XXX. (2): " In case of taxpayers with children the contribution to the common needs should be calculated considering the expenses of the child rearing."

40.§ of the Basic Law: "The basic regulations of the sharing of taxation and the pension system will be settled in fundamental laws in order to calculate a sufficient contibution to the common needs and to secure the welfare of the elder." It can be seen that the Basic Law broke with the current formulation and approaches the principle from a new aspect; it can also be seen that numerous questions require further interpretation and clarification about the analysis of the concept of the new principle of sharing of taxation. Such issues are: the concept and definition of load-bearing capacity, what does participation in the economy means, what belongs to the common needs, paraphrasing and clarifying of child-rearing expenses, and what do we mean under calculable contributions.

According to the analysis described in the previous chapter we can show what does the principle of sharing of taxation involves. The contentional elements raise additional deficiencies and the need for further clarification as follows:

1. Determination of clarification of the taxpayers, tax subjects. The Basic Law obligates everybody to contribute to the public needs. The adjunct "everyone" is too general, separate statutory definition is necessary. Another question is the issue of taxation of domestic and foreign individuals? In my opinion, the further division of foreign and domestic indivduals concerned is not the responsibility of the Basic Law, but it requires separate statutory definition and clarification.
2. The requirement of the proportional sharing of taxation is the matter of justice and proportionality.
   The question of proportionality of the old Constitution was deductible from the phrase of "according to the income and wealth". The use of the word "proper" meant[44] the proportionality, and as István Simon also noted: although the meaning of two words are not the same, however in the context of taxation they may carry similar meanings. The limit is the unjust and disproportionate taxation which is unconstitutional. The main point according to Simon - and I agree with him – is the exclusion of degressive

[44]see: Simon(2011) 13-16.p.

tax rates, when disproportionally big rates of tax would impose to those who fall into the low tax bracket due to the degressive taxation. Simon states that the boundary of the proportional sharing of taxation requires the followings:
(1) exemption of income necessary for subsistence (minimum subsistence figure)
(2) exemption of income necessary to meet the needs of the family
(3) the proportionality of the total tax burden.
In respect of the total tax burden Simon's viewpoint is that the degressivity is caused in the Hungarian tax system by the indirect taxes, and this degressive burden - especially using a flat rate of income tax - can only be moderated by the limitation of the total tax burden. He mentions in connection with the theory of confiscating tax that in the meaning of confiscating only an acceptable overtaxation can be a starting point.[45]The Constitutional Court has never examine the proportionality of the total tax burden concerning the question of proportionality, it cannot do it because it has no authority to do so but it carries out an investigation in the individual case related to the law in question. Several decisions held that the tax which deprives the taxpayer of his financial reseources is no longer a tax. [46] This statement confirms also the question of justice, namely no such tax can be just which puts unlimitedly great burden on the taxpayer. The analysis of the load-bearing capacity, however, leads us to the next question.

3. The productivity, the principle and limitations of load-bearing capacity. The Basic Law uses beyond the above mentioned theories the words "according to the load-bearing capacity, and participation in the economy" and inserts into the XXX. § (2) the limit using the issue of expenses of raising children. The general content of the definition of load bearing capacity has its limitations in the Basic Law, but this has changed comparing it to the previous constitutional text, as it changed the text of income and wealth to to specifically designated limits. Further interpretation and extraction of the limitations will be the task of fundamental laws I think, so in the absence of such, further interpretation is not necessary.
4. Specification of the concept of common charges or dues. Separate fundamental laws shall establish the concept of common charges. Anyhow it can be stated that the new Basic Law does not approach the classic principle of sharing ot taxation from the side of public revenues and public payments but from the side of expenditures and public needs. This can be a problem because the Act on Public Finances defines the types of payments to the state, while the public expenditures are not listed and defined; the Act rules that the contents and requirements of the public needs has to be regulated in separate legal sources.[47] Only the Act on Local Governments[48] among the separate laws list precisely the compulsory and optional local state functions. So there is a need to a legal source which would list and specify the functions of the state.

[45] Simon (2011) 16.p.
[46] 1531/B/1991. AB határozat: The Constitutional Court does not examine the rate of tax, only if it raises constitutional issues e.g. its rate is such high that it deprives the taxpayer from its financial resources.
1558/B/1991.AB határozat lásd: Tersztyánszkyné Dr. Vasady Éva (2010) 21.p.
[47] 1992.évi XXXVIII.tv. 9.§.(2) Article
[48] 1990.LXV.tv.8.§.

5. What do we mean exactly on contribution to the public needs? What is included exactly in the public needs? The Basic Law defines the principle of sharing of taxation from the side of expenditures. The public needs - public expenses - public functions are comcepts related to each other. The state satisfies the public needs in the form of public functions, the expenses of these functions are covered by the common charges (taxes, tax like payments) established and imposed by the state. The specification and clarification of the concept of public needs and public functions have been missing from the legal sources, but the fundamental laws passed in the future legislation could solve this problem.
6. The designation of the tax source (economic source). This element returns to the principle of load-bearing capacity because the Basic Law does not refer to the conditions of income and property, load bearing capacity and participation in the economy will take over these terms. I think that these concepts raise more problems since the tax sources are not limited and it is not clear where to draw the limit. Does the expression „according to the load-bearing capacity" includes the individual's load-bearing capacity achieved by his welfare[49], so the load-bearing capacity depends on the standard of living or it is just the load-bearing capacity of the subsistence level? The load-bearing capacity is an unstable formulation and uncertain legal concept, everyone can interpret it as he wants, and may become subject to individual assessment. The load-bearing capacity can be different with the same income for different taxpayers, it can change due to the actual spendings. The mandatory - not just governmental - payments such as loan repayments, increased running costs, increased childcare costs, can increase and change the load-bearing capacity of an individual with the same amount of income and revenues. It would not be good if the taxpayer would decide that the tax exceeds his load-bearing capacity or not. Voluntary performance is not included in the concept of taxatio, it does not fit into it, but in individual cases it can happen that the taxpayer wants to judge independently his or her load-bearing capacity because of the too general definition of the concept. Similarly, the definition of the participation in the economy is too vague. So I think that in the - soon to be made - separate law on the principle of equality of sacrifice should define the limits of tax sources, and should declare tax exemption of the minimum subsistence level.

So in the above mentioned issues separate laws may define and refine the concepts.

3.2. Summary - Final Thoughts-Conclusions

On the basis of the previous analysis it is clear that the principle of sharing of taxation in the Basic Law should be definitely should be supplemented in the following points:

1. We agree on that the focus in the conceptual formulation of the new Basic Law shifted from the public revenues, public payments to the common consumption of the society, is to the contribution to the public needs. In my view with it we get

[49] In this case my opinion is that the level of load-bearing capacity can differ from one another individually. Someone may have low standard of living and happy with it and bear more burden while the other with a higher standard of living does not want to give up his way of life and does not want to pay referring to that he got to the limits of his load-bearing capacity.

closer to the standards of EU tax harmonization because the Basic Law makes it clear, that everyone - according to his or her load-bearing capacity – have to participate to the financing of the public needs that means, frankly spoken, that everyone must contribute to the public services. From there it is only one step to declare that everyone is required to contribute to the public services where he used them. This extention of the principle of sharing of taxation the Basic Law remained in debt but the fundamental laws can compensate this omission. Laying down this principle would meet the requirements of the fight against harmful tax competition in the EU. Of course, this principle does not mean that if a Hungarian national works abroad, then he would have to pay taxes abroad, because it would affect the competence of international taxation.I do not think that the Basic Law should settle questions covered by double taxation. But in this way the tax exemption of offshore companies would be eliminated in Hungary, and the offshore companies and their owners would be taxated in the countries where they really operate, and thus using public services there but do not contribute to them. This types of behavior are defined as harmful tax competition according to the European Union's tax law and as such is prohibited. I consider it important to lay down the principle and make sure the that the formulation is clear.

2. The new Basic Law provides that the contribution has to be countable, but does not care about the taxpayers and the tax subjects that will be affected by tax liability. It is adopting a new formulation to the requirement of proportionality with the use of a proper word. This is certainly need clarification in the new Act that we need.
3. The new Basic Law provides that fundamental laws are to set the basic rules of sharing of taxation. I agree with this but the law will have to close the open doors, and should negotiate on the terms that needed to be clarified. The Basic Law left open the door that what would it mean on common charges and what forms of public revenues will it impose.
4. It should explain what does it mean on public needs, namely on what matters can the state ask for contribution? This is a very sensitive issue, and if we look at the old Constitution we can see that it only listed the most important responsibilities of the State, such as the basic health care, social security, education, high education, environmental protection, national defence etc. The current Basic Law also deals meanly with the list of state functions, and likely, if it will not be settled by laws, this situation will result in the problem of interpretation of public needs.
5. It is true that the XXX. § (2) already mentioned that „in case of a taxpayer with children the contribution to the common needs should be calculated considering the expenses of the child rearing" but this raises another question: how much should be these expenses that should be taken into consideration?
6. The 40. § mentiones that the "contribution to the public needs has to be predictable" but what do we mean under predictability? The clarification of the load-bearing capacity and the definition of the precise limits help to clarify the concept. The full clarification of the concept should be done by separate fundamental laws.

The principle of equality of sacrifice was renewed in the Basic Law, but left many open questions. The mentioned shortcomings can be settled in fundamental laws, and I think it is a necessity to be done. If special laws will not regulate the open issues, then the practice will point out the shortcomings and in the possible litigations the role of interpretation of the law will grow. The Constitutional Court's practice of interpretation related to tax issues was, however, eliminated[50] from the Constitution , that's why fundamental laws would have a particularly important role in the interpretation of these issues.

Acknowledgements
"The study / research project is part of the TÁMOP-4.2.1.B-10/2/KONV-2010-0001 project - of the New Hungary Development Plan - with the support of the European Union,and was co-financed by the European Social Fund "

[50] See: the Act of Constitution, 1949.évi XX.:32/A.§. (2) The Constitutional Court can revise laws on the budget, implementation of the budget, central taxes, fees and contributions, customs and the central conditions of the local taxes only in that case if the petition for unconstitutionality is based on the right to life and human dignity, the rights which protect personal data, the freedom of conscience and religion, or the 69.§ on breach of rights related to Hungarian citizenship and does not contain other causes.
(3) In case of unconstitutionality the Constitutional Court annuls any acts and laws. The Constitutional Court annuls laws on the budget, implementation of the budget, central taxes, fees and contributions, customs and the central conditions of the local taxes in that case if the contents of these laws breach the right to life and human dignity, the rights which protect personal data, the freedom of conscience and religion, or the 69.§ on breach of rights related to Hungarian citizenship.

European Integration Studies, Volume 9. Number 1. (2011) pp. 57–72.

SYSTEM OF LEGAL SOURCES AND LEGISLATIVE PROCEDURES OF THE EUROPEAN UNION AFTER THE TREATY OF LISBON*

JUDIT FAZEKAS
Professor of Law
Head of Department of European Law and International Private Law
University of Miskolc
joglevay@uni-miskolc.hu

Introduction

The aim of the reforms introduced by the Treaty of Lisbon was to simplify and make more transparent the system of Union legal sources and that of the decision-making procedures. However, the need for a comprehensive reform was put on the agenda long before the Treaty of Lisbon since, in the framework of the Union based on the three pillars, the legislative competences of the Union institutions were characterized by the democratic deficit[1] and by casuistic, rather complicated and thereby not transparent legislative and decision-making procedures. This can be stated even if we take into account the amendments of Treaties, especially the adoption of the Treaty of Amsterdam which has increased the legislative competences of the European Parliament to significant extent. Moreover, with the more extensive application of the comitology procedures which increased the role of the Commission in the field of legislation, and having regard to the fact of the increasing number of Union agencies, the need for reforms of legislative nature to an even more increased extent was raised up from the mid 90s.

The Laeken Declaration on the Future of the European Union adopted by the European Council in 2001 declared that the institutional framework and the legal system of the European Union have to be made more democratic, more transparent and more effective, especially by emphasising the purpose of simplifying the system of legislative procedures and that of the legal acts. After the Declaration, the European Convention was convened in 2002, which has elaborated the draft Treaty establishing a Constitution for Europe[2] by July 2003 which aimed to create the constitutional basis of the European Union. One of the most

---

* It was translated by György Marinkás, András Kardos and Tünde Forgács. Lector in English: Rita Rácz.

1 Those institutions of the European Union which are entitled to adopt legislative acts and other measures are such in which the legitimacy of the decisions are low, having regard to the fact that the decision-makers are not elected directly by the Union citizens, and up to now there are only attempts for ensuring the citizens' democratic participation.

2 The document having the title 'Treaty establishing a Constitution for Europe' was signed on 29 October 2004, and it was published on 16 December 2004 in of the Official Journal of the EU (see C 310 47). It did not enter into force due to the 'unfavourable' outcome of the French and Dutch referenda.

important innovations of the Constitutional Treaty was the radical modification of the system of legislative procedures and that of the Union legal sources, namely by introducing new legal acts (European law, European framework law, European regulation, European decision[3]), the new hierarchy of legal sources (legislative acts[4], non-legislative acts[5], delegated European regulations[6] and implementing acts[7]) and new legislative procedures in place of the accustomed, old system. However, the Constitutional Treaty did not enter into force because of the result, i.e. the negative vote of French and Dutch referenda held on the ratification thereof[8]. As a consequence, the Member States had to reconsider the opportunities of reforming the European Union, and had to take a step back from the constitutional approach which was considered, or at least it could be interpreted, as a step taken towards the creation of the United States of Europe, and had to reflect the reality of the European Union and that of the Member States in a better way through the adoption of a Reform Treaty. The Treaty of Lisbon[9] signed finally on 13 December 2007, despite the fact that it constituted the legal personality of the European Union and thereby abolished the former structure of the European Union based on the three pillars, did not take the form of a unified Treaty[10] but, returning to the application of the amendment technique, it amended the previous founding Treaties, namely the Treaty on European Union and the Treaty establishing the European Economic Community, renaming the latter and calling it as the Treaty on the Functioning of the European Union (TFEU). This solution can be considered as a step back as compared with that of the Constitutional Treaty, despite the fact that the Reform Treaty has saved, as a matter of fact, 80-90 percent of the achievements of the Constitutional Treaty, and found the necessary consensual solutions[11] for most of the matters causing problems in the ratification process. The Treaty of Lisbon entered into force on 1 December 2009 after the ratification thereof in all the Member States.[12] This paper examines that how the system of Union legal sources and that of the previous legislative and decision-making procedures were modified and changed with the

[3] Treaty establishing a Constitution for Europe, Article I-33.
[4] Treaty establishing a Constitution for Europe, Article I-34.
[5] Treaty establishing a Constitution for Europe, Article I-35.
[6] Treaty establishing a Constitution for Europe, Article I-36.
[7] Treaty establishing a Constitution for Europe, Article I-37.
[8] See also: Zoltán ANGYAL: Az európai alkotmányszerveződés ratifikációs válsága, avagy közvetlen demokrácia és az integráció kollíziója, in: *Publicationes Universitatis Miskolcinensis Sectio Juridica et Politica*, Miskolc University Press, Miskolc, 2007, pp. 175-190.
[9] Official Journal, C 306 2007, 17 December 2007.
[10] From a constitutional point of view, the most important achievement of the Constitutional Treaty would have been that it would have repealed all of the existing Treaties, i.e. all of the founding Treaties and the amending Treaties, and it would have taken the form of a unified text.
[11] Amongst others, the principle of the primacy of Union law can be mentioned here, which has been dropped out from the main text of the Treaty, however Declaration No. 17 to the Treaties confirms the principle of primacy; the Declaration No. 1 deals with the Charter of Fundamental Rights of the European Union the text of which, contrary to the Constitutional Treaty, is not enshrined in the Corpus of the Treaty on European Union, but Article 6 thereof recognizes the legally binding status of the Charter, by which the Treaty of Lisbon saved the essence of the progress represented by Part II of the Constitutional Treaty.
[12] See also: Zoltán ANGYAL: Alkotmányszerződés kontra Reformszerződés, avagy az EU működésének elsődleges jogi keretei 2009 után**,** in: *Jogtudományi Közlöny*, 2008/4, pp. 179-190.

entry into force of the Treaty of Lisbon. The present paper also deals with and answers to the question whether the European Union has progressed due to the new legal system or not, that is to say whether the objectives of making the legal system of the European Union more simple and more transparency as set out in the Laeken Declaration have been achieved or not.

2. Legal acts of the EU after the entry into force of the Treaty of Lisbon

As a consequence of the fact that the European Union was given a single legal personality and the Treaty of Lisbon abolished the former three-pillar system of the European Union in the framework of which the pillars were functioning on the basis of different rules, significant changes have been occurred in the European Union's system of legal sources and that of the decision-making procedures with the entry into force of the Treaty of Lisbon,. The number of secondary legal acts adopted by the institutions of the European Union has been decreased to a large extent and the legislative and non-legislative procedures have been defined clearly.

As regards the decrease in the number of legal acts, the number of secondary legal sources has been reduced from thirteen[13] to five[14] in the Treaty on the Functioning of the European Union. Prior to the entry into force of the Treaty of Lisbon in the first pillar five (regulation, directive, decision, recommendation, opinion)[15], in the third pillar four (framework decision, decision, common position, convention)[16] and in the second pillar three (decision, common position, joint action)[17] legal acts existed, furthermore in the framework of first pillar it was possible for the Member States to conclude conventions[18] between them. The rationalisation of these legal acts can be undoubtedly considered as an important result since there were more types of such legal acts in the different pillars, which had the very same name (for example the decision which existed in all the three pillars, or the common position existing in the second and third pillars), but they were completely different both regarding their content and their binding legal force.

With the entry into force of the Treaty of Lisbon, at present Article 288 of the Treaty on the Functioning of the European Union (hereinafter referred to as 'the TFEU') regulates the types of secondary legal acts, which does not follow the solution of the Constitutional Treaty which made a clear distinction between the different types of legal acts (European law, European framework law, European regulation, European decision and the traditional soft-law measures, i.e. the recommendation and opinion)[19], but it has returned to the types

[13] There are even more types of legal acts if, by interpreting the concept of legal act extensively, we consider the common strategies applicable in the former pillar II and the guidelines determining the general principles of the Common Foreign and Security Policy (CFSP) as separate legal acts. (See Article 12 of the former Treaty on European Union.)

[14] Jean-Claude PIRIS: The Lisbon Treaty: A Legal and Political Analysis, Cambridge University Press, UK 2010, p. 92.

[15] See EC-Treaty, Article 49.

[16] See TEU, ex Article 34.

[17] See TEU, ex Articles 12, 14, 15, 24.

[18] See EC-Treaty, Article 293.

[19] Also the denomination of European law and European framework law refers to the legislative character of those acts, while the other legal acts, which were not called as 'law' (European

of legal acts defined in Article 249 of the EC-Treaty. However, at the same time it indisputably realizes the numerical decrease, unification and unified application of the secondary legal acts in almost all fields of Union co-operation. According to the definition set out in the first paragraph of Article 288 of the TFEU to exercise the Union's competences, the Union institutions shall adopt regulations, directives, decisions, recommendations and opinions. Amongst the legally binding secondary legal acts it is the regulation and the directive which, besides the fact that with the abolition of the pillar-structure they have become generally applicable in the fields of the former third pillar, have kept their former legal character, namely the regulation remained generally applicable, entirely binding legal act, which is directly applicable in all Member States, and the directive is henceforward the most important instrument for legal harmonisation which is binding, as to the result to be achieved, upon each Member State to which it is addressed.

As regards the secondary legal acts, there is an essential change which concerns the definition of decision. In fact, the decision is the only type of legal acts the definition of which has gone through a substantial change. Article 249 of the EC-Treaty defined the decisions as addressed legal acts, declaring that the 'decision shall be binding in its entirety upon those to whom it is addressed'. The non-addressed (innominate) decisions of normative nature[20], or in other words called as sui generis decisions[21], could not be classified under that definition, nevertheless they were present in the legislative practice and were 'simply' referred to as decisions in some given Articles of the Treaty on European Union and in the EC-Treaty.[22] Likewise, sui generis decisions served/serve for the determination of Union programmes, and also the European Commission was given the power for the negotiation and conclusion of various international agreements through the adoption of decisions, furthermore the provisions on certain institutional matters were also laid down in the form of such decisions. However, the official linguistic version of some Member States[23] have made a definite distinction between addressed and sui generis decisions, which lead to disparate interpretation and triggered debates among the EU institutions, too.[24] The Treaty of Lisbon created a more unambiguous situation, by stating that as a general rule the decision is a legal act of normative content and it is binding in its entirety and generally. However, provided that a decision specifies those to whom it is

regulation and European decision) constituted the non-legislative acts. The status of recommendation and opinion has not changed; they remained non-binding soft law measures.

[20] For example, where a decision is addressed to all the Member States, it is generally binding on them.

[21] See: Jürgen BAST: Grudbegriffe der Handlungformen der EU. In: *Beltrage zum auslandischen Recht und Völkerrecht*, Band 184, 2006, pp. 445-449., Armin BOGDANDY – Felix ARNDT – Jürgen BAST: Legal Instruments in European Law and their Reform: A Systematic Approach on an Empirical Basis. In: *Yearbook on European Law*, Volume 23. Issue 1, pp. 91-136.

[22] For example, the decision adopted in the field of common foreign and security policy under Article 12 of the Treaty on EU, or the decision adopted concerning the conclusion of international agreements under Article 300(2) of the EC-Treaty.

[23] For the two types of decision different terms were used in German, Dutch and Slovenian language, for example in the German linguistic version the Entscheidung and the Beschluß, in the Dutch version the Beschikking and Besluit, and in the Slovenian version the Odlocba and the Sklep were used for the addressed and the normative, *sui generis* decisions.

[24] See the judgment in case C-370/07, Commission v Council, points 23 and 29.

addressed, it is binding only on them (Article 288, fourth paragraph TFEU). The decision of normative content does not have specific addressee(s), it imposes obligations on the institutions of the Union or on the Member States, but it does not have direct effect or binding effects on individuals. On the contrary, addressed decisions are binding on those to whom they are addressed, irrespective of being individuals (natural and legal persons) or Member States.

When dealing with the character of generally binding, normative decisions the question arises, whether there is any difference between the regulations and such decisions. There is a reasonable ground for arguing that the change creates a more unambiguous situation since now the definition laid down in the TFEU is in conformity with the previous legislative practice under which normative, or in other words, sui generis[25] decision have already existed.[26] Nevertheless, one could argue that it would have been a more practical solution to leave the two types of legal acts untouched, that is to say the form of regulation for adopting rules of general nature and that of the decision for adopting provisions of individual nature.[27]

3. Changes concerning the legal acts of the former third pillar

Concerning the provisions on legal acts, the most important modification introduced by the Treaty of Lisbon is that the legal acts enumerated in ex Article 34(2) of the Treaty on European Union, under which those acts could have been adopted in the framework of the third pillar, were eliminated due to the fact that the Treaty of Lisbon abolished the former pillar-system. Therefore, instead of the possibility to adopt framework decisions, decisions, common positions and conventions, now the legal acts to be adopted in the field of police and judicial cooperation in criminal matters can take the form of the legal acts enumerated in Article 288 TFEU, namely the form of regulation, directive or decision.

By the way, the Treaty of Lisbon excludes, in a general manner, the possibility to conclude conventions between the Member States[28], not only in the fields of the former third pillar, but also on the whole horizon of the Treaty. The reason of this amendment is that, because of the lack or protraction of their ratification by the Member States, those conventions were not proved to be effective forms of cooperation and probably that is why they were applied quite rarely.

In the field of police and judicial cooperation in criminal matters, the changes concerning the legal acts raise the question that how can be the renewal and the continuity of the application of those legal acts ensured which were adopted prior to the entry into force of the Treaty of Lisbon. It is Article 10 of Protocol (No 36) to the Treaty of Lisbon on

[25] See the judgment in case C-370/07, Commission v Council, point 29.

[26] Jean-Claude PIRIS highlights the unambiguous feature of the new legal framework. See: Jean-Claude PIRIS: *The Lisbon Treaty A Legal and Political Analysis*. Cambridge University Press, UK 2010. p. 94.

[27] De Witte, B.: Legal Instruments and Law-Making on the Lisbon Treaty p. 95-96, in Griller, S. and Jaques, Z. (eds.): *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* Springer, 2008, Wien, pp. 79-100.

[28] As regards the first pillar, it was ex Article 293 of the EC-Treaty and as for the third pillar it was ex Article 34 of the TEU which contained the general legal basis.

transitional provisions which answers that question. Pursuant to that article, for the already existing acts adopted before the entry into force of the Treaty of Lisbon the inter-governmental character of the cooperation remains the same for five years, thus the Commission cannot bring action for infringement procedure, and the jurisdiction of the Court of Justice of the European Union does not change either, unless a given legal act is amended meanwhile. Nevertheless, despite the laying down of those transitional provisions there are still some open questions. (For example, Protocol No 36 does not contain any provision which would answer to the question whether those legal acts have direct effect or not.)

4. Simplification of the legal instruments applied in the field of common foreign and security policy

The inter-governmental character of the former second pillar, i.e. the unanimous decision making, has not been altered by the Treaty of Lisbon. Nevertheless, the terminology of the legal acts has become simpler, since as from 1 December 2009 the Council or the European Council may adopt the necessary measures solely in the form of decisions, instead of the different former types of legal acts, namely the joint actions, common positions and decisions. At a first glance this change is welcomed as it serves for simplification, however, on the other hand, it can be considered as a disquieting change having regard to the fact that from now on the rather diverse objectives of the common foreign and security policy can be only by means of adoption of decisions. Moreover, as a matter of fact, these decisions certainly do not correspond with the decisions defined in Article 288 TFEU. It is because if we presume that the decisions adopted in this field do correspond with the decisions defined in Article 288 TFEU, which could be conceivable through the adoption of normative decisions, as a consequence, such an act would be recognized in the field of common foreign and security policy, which has direct effect within the Member States' legal system.[29] Thus, the peculiarities of the former second pillar do remain in the future, that is why it is inevitable to make the legal nature of the decisions adopted in the field of common foreign and security policy clear.

5. Changes in the system of legal sources

One of the innovations of the Treaty of Lisbon which aims to strengthen the transparency of the system of Union legal sources is the sharp distinction made between the legislative acts and non-legislative acts. As regards the non-legislative acts the Treaty names two types of acts, namely the delegated acts and the so-called implementing acts.[30] It introduces a transparent hierarchy among the different legal acts by establishing a delimination between the legislative acts and that of the delegated and implementing acts.

Through the detailed examination of the Treaty's provisions we can identify a fourth, other category for all those legal acts, which cannot be classified under the afore-mentioned

[29] De Witte, B.: Legal Instruments and Law-Making on the Lisbon Treaty p. 95-96, in Griller, S. and Jaques, Z. (eds.): *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* Springer, Wien, 2008, p. 90.

[30] See Articles 289, 290 and 291 TFEU.

three categories. Where the Treaties do not specify the type of act to be adopted, the institutions shall select it on a case-by-case basis, in compliance with the applicable procedures (Article 296 TFEU). Regulation, directive and decision can be adopted in all the three categories.

Although it was not apparent in the text of the Treaty, a kind of hierarchy could have been already set up among the legal acts so far in the Community legal order. It is because the case-law of the European Court of Justice has distinguished the secondary legal sources according to their legal basis which serve for the adoption thereof. On the one hand, those legal acts belonged to one of the categories the legal basis of which were the provisions of the Treaty, and have been adopted in accordance with the procedures prescribed therein. On the other hand, those acts were classified under the other category the legal basis of which was provided in an act adopted by the institutions of the Union. According to the current hierarchy these latter acts were the implementing acts and could have taken various forms.

Considering this, the creation of the third category of legal acts, namely the delegated acts is a novelty.[31] The reason why this new category of legal acts was created is that it occurred quite often that for the amendments and the tiny modifications of the original legal acts the Council acted in accordance with a simplified procedure, on the basis of the secondary legal basis thereby avoiding the rather complicated legislative procedure. The application of secondary legal basis became a customary practice in the field of many Community policies. It was used with preference for example in the agricultural and fishery policies or as regards the structural funds. As for the legitimacy of this practice, that is to say whether it was allowed in the institutional system of the Community to delegate legislative powers, it should be pointed out that the European Court of Justice (hereinafter referred to as 'the ECJ') has supported in its former case-law[32] the idea that the creation of such a new system of legal sources is needed in which there is a clear distinction between the legislative and non-legislative powers. In its judgment[33] annulling paragraphs 29(1), 29(2), 36(3) of the Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status, its reached the conclusion, that the creation of secondary legal basis[34] cannot be justified on the basis of considerations relating to the politically sensitive nature of the issue concerned or to a concern to ensure the effectiveness of a Community action.[35] The ECJ has also pointed out in its judgement

[31] This cannot be considered as a solution without antecedents, since Article I-36 of the Constitutional Treaty created the category of *delegated European regulation* the adoption of which would have been based on the delegation of power and would have served to supplement or amend certain non-essential elements of the European law or European framework law, in accordance with the delegation of power provided for by the latter.

[32] See also: judgment of the ECJ in the Köster case 25/70 of 17 December 1970; case 16/88, Commission v Council; judgment in case C-93/00, European Parliament v Council of 13 December 2001 (ECR 2001., p. I-10119); C-378/00, Commission v Council (LIFE) (ECR 2003 p. I-937).

[33] C-133/06 European Parliament v Council (ECR 2008 p. I-3189).

[34] In the referred case, as it is pointed out in Advocate General Maduro's opinion, the European Parliament claimed that the Council established a secondary legal basis in order to avoid the co-decision procedure prescribed in Article 67(5) of the EC-Treaty. In that case, the question was raised whether the Community legislatures have the opportunity to create secondary legal basis or not.

[35] Case C-133/06, paragraphs 59-67.

that the existence of an earlier practice of establishing secondary legal bases cannot reasonably be relied upon.[36] The afore-mentioned judgment of the ECJ overwrote the statements laid down in the Köster case in 1970[37] which acknowledged the legality of the comitology procedure by requiring that a transitional category should exist between the legislative and the implementing acts for the modification of the non-essential elements of the legal acts. This intention was detectable at the level of legislation even before the adoption of the Treaty of Lisbon and that is why in the regulatory procedure with scrutiny was established, as a new type of comitology procedures.[38] In the followings we will analyse the categories established by the Lisbon Treaty.

5.1. Legislative acts

Pursuant to Article 289(3) TFEU legal acts adopted by legislative procedure constitute legislative acts. Thus, under the new rules, those Union legal acts which are adopted directly on the basis of the provisions of the Treaty in accordance with the ordinary legislative procedure or special legislative procedures constitute legislative acts. Therefore, the concept of legislative act is not determined by its content but by the form of procedure applied. That concept reflects the unifying aspirations and makes clear that only the provisions of the Treaties can serve as legal basis for the adoption of legislative acts, and that they can be adopted only in accordance with the legislative procedures (being both the ordinary and special legislative procedures). This solution makes the legislative procedures of the Union more clear and transparent since before that the EC Treaty prescribed different legal acts and decision-making procedures concerning every common policy and legal basis, which led to legal debates between the institutions in many cases.

However, this solution can cause problem, too. As an example it can be mentioned that the measures relating to the support of the training of the judiciary and judicial staff are to be adopted in accordance with the ordinary legislative procedure. Consequently, the European Judicial Training programme also constitutes a legislative act, however, as for its content it is rather an act of administrative nature.[39]

Concerning the initiation of legislative acts it should be mentioned that the former initiative monopoly of the Commission, prevailing in the first pillar, has been changed under Article 289(4) TFEU provides that besides the Commission's right to initiate, legal acts can also be adopted on the initiative of a group of Member States or of the European Parliament or on a recommendation from the European Central Bank or at the request of the Court of Justice or the European Investment Bank. On the one hand, this change is the consequence of the abolition of the pillar-system and, on the other hand, it can be regarded as a step to strengthen the institutional balance.

---

[36] ib para 60.

[37] Case 25/70 *Köster* of 17 December 1970. See: Hoffman, H.: Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology meets Reality, European Law Journal (15) 2009, pp. 482-505, 494-496.

[38] See the Article 5a of Council decision 1999/468/EC as amended by decision 2006/512/EC laying down the procedures for the exercise of implementing powers conferred on the Commission.

[39] De Witte, B.: Legal Instruments and Law-Making on the Lisbon Treaty pp. 95-96, in Griller, S. and Jaques, Z. (eds.): The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty? Springer, Wien, 2008, p. 92.

5.2. Delegated acts

Pursuant to Article 290 TFEU a legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. The difference between the delegated acts and the implementing acts is that the preceding can amend the basic legislative act, thus its content affects a legislative act, but it does not take the form of a legislative act. However, the Treaty requires appropriate authorisation for the adoption of such acts and the procedure is submitted to the control of the institution which delegated the power. The Treaty prescribes as a requirement that the objectives, content, scope and duration of the delegation of power has to be explicitly defined in the legislative acts. The delimitation of the duration of the delegation of power, the so-called sunset clause ensures that the delegation of power cease to exist after the prescribed duration and the legislative institutions, i.e. the Council and the European Parliament get back their legislative power. However, the accurate determination of the objectives, content and scope will probably be challenge for the legislative institutions. The principle settled in the second part of Article 290(1) serves as a guarantee since, as a line of demarcation between the legislative and non-legislative acts, it declares that the essential elements of a legislative act cannot be supplemented or amended through the adoption of delegated acts, those can only be regulated in legislative acts.

The conditions of the delegation of power have to be defined, in an obligatory manner, in the basic legislative act in which the delegation of power is conferred on the Commission. Article 290(2) disposes two opportunities. According to the first one, the European Parliament or the Council may decide to revoke the delegation. The other opportunity for exercising control can be realized by regulating that the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act. Thus, while the first one ensures a rather general, one-time control, the latter ensures a continuous control, exercised on a case-by-case basis. Neither of the cases makes possible for the Council or for the European Parliament to submit an amended proposal. To judge which method of control is more effective[40], the time lapsed since the Treaty of Lisbon entered into force is not sufficient; and the interpretation of Article 290(2) TFEU concerning the conditions for exercising the delegated powers, also raises questions. (E.g. whether these conditions are illustrative or exhaustive). Nevertheless, it is clear that the conditions for exercising the delegation of power have to be defined in the legislative acts, and for the sake of the clear delimitation the adjective ‘delegated’ has to be inserted in the title of delegated acts.

5.3. Implementing acts (Article 291 TFEU)

Similarly to the delegated acts, the word ‘implementing’ shall be inserted in the title of implementing acts. Due to the principle of conferral it is primarily the Member States who

[40] According to Hoffman’s opinion the most effective control can be achieved by combining the above two opportunities. See: Hoffman, H. Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality, European Law Journal (15) 2009 pp. 482-505, 491-493.

have to adopt all measures of national law necessary to implement legally binding Union acts.[41] However, where uniform conditions for implementing legally binding Union acts are needed, those acts confer implementing powers on the Commission, or, in duly justified specific cases, on the Council.[42] Article 291 TFEU does not mention the agencies of the Union among those who exercise implementing powers despite the growing number of the Union's agencies and that many of them have regulatory power besides their role in the decision-making process.[43] It should also be noted that the field of common foreign and security policy is a specific policy since the High Representative of the Union for Foreign Affairs and Security Policy takes part in the execution.

Comparing the two categories of non-legislative acts, i.e. the delegated acts and the implementing acts, it can be stated that it is exclusively the Commission who can adopt delegated acts on the basis of delegation of powers. On the other hand, acts of implementing nature can be adopted by the Member States, and in exceptional cases, by the Council and by the High Representative of the Union for Foreign Affairs and Security Policy, too. The two groups differ also concerning their right of control since in the case of delegated acts it is exercised by the European Parliament and by the Council, while in the case of implementing acts it is the comitology committees consisting of the representatives of the Member States who control the adoption thereof by the Commission.

5.4. Other legally binding acts

Besides the legal acts referred to in Articles 289, 290 and 291 TFEU, there are some other legally binding acts regulated in the Treaties, which do not belong to either of the above categories. For example the decisions adopted in the field of common foreign and security policy, the international agreements concluded by the Union (Article 216 TFEU), moreover the interinstitutional agreements of a binding nature (Article 295 TFEU) and the non-implementing acts of the agencies can be mentioned in this regard. Although their number has decreased as compared with the situation before the Treaty of Lisbon, nevertheless, due to their specific character and/or function they constitute a separate group.

6. Legislative procedures

Simplification of the system of legislative procedures was among the priorities of the Laeken Declaration. Before analysing the procedures, it is worth highlighting briefly the changes carried out concerning the qualified majority voting.[44] The present so-called weighted voting system remains in force until 1 November 2014. According to that, 255 weighted votes out of the total 345 votes, representing at least half of the Member States[45], is needed for the adoption of a legal act. However, where the Council does not act on a proposal from the Commission the support of the two thirds of the number of Member

[41] Article 291(1) TFEU
[42] Article 291(2) TFEU
[43] See Hoffman, H. Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality, European Law Journal (15) 2009 p. 482-505, 502-504
[44] Article 238 TFEU and Title II of Protocol No. 36.
[45] Currently 14 votes are needed.

States is needed. Moreover, each Member State may request verification that the Member States constituting the qualified majority represent at least 62% of the total population of the Union. In cases where due to an opt-out or an enhanced cooperation not all the Member States take part in the voting, the number of votes needed for the qualified majority changes accordingly.

As from 1 November 2014, the rules on the so-called 'double majority' will come into force, thus a legal draft will be adopted provided that, on the one hand, at least 55 % of the Member States support it[46] and, on the other hand, these Member States represent at least 65% of the population of the Union. At least 4 Member States are needed to prevent the adoption of a legal act (blocking minority). Where the Council does not act on a proposal from the Commission or from the High Representative of the Union for Foreign Affairs and Security Policy, the qualified majority is defined as at least 72 %[47] of the members of the Council. These rules are complemented by two further provisions in the period from 1 November 2011 to 31 March 2017. During that transitional period, in cases where a draft legal act affects a politically sensible theme for a Member State, the Member State concerned may request that it be adopted in accordance with the previous rules on qualified majority. Furthermore, during that period they can refer to an opportunity which is similar to the so-called Ioannina compromise, namely, that instead of the 4 Member States required for the blocking minority the three-quarter of them, i.e. already 3 Member States could initiate to prevent the adoption of a legal act. This facilitated rule on blocking minority will probably make the decision- making in the Council difficult; and it will stimulate the Council to reach consensus even in cases falling under the rules on qualified majority.
Besides the counting of votes, another important change is that, by extending the ordinary legislative procedures to new areas, the areas falling under the qualified majority rule have been also increased (e.g. transport, intellectual property rights and the area of freedom, security and justice). Many experts take the view that the modifications carried out concerning the qualified majority is a benefit, since the system can become simpler, namely there is no need to re-consider the weighted votes each time when a new Member State joins the Union, and the significance of the disparities arising from the system also decreases.[48] Those who are less optimistic highlight that due to the transitional period the complexity of the present system remains until 2017, and under the new system the medium sized Member States will be under represented.[49]

6.1. Procedure for the adoption of legislative acts

As it was mentioned when dealing with the legal acts, the legislative acts are adopted in accordance with the ordinary or special legislative procedures.

An innovation of the Treaty of Lisbon is that draft legislative acts have to be forwarded to national Parliaments as well, which may send to the Presidents of the European

[46] Currently this means at least 15 Member States.
[47] Counting with the current Member States it is 20 Member States.
[48] In the framework of the present weighted votes e.g. in the case of Germany one vote represents 2.8 million citizen, while in the case of Malta, 1 vote represents 0.3 million citizen.
[49] See van den Bogaert, S.: Qualified majority voting in the Council: the first reflections on the new rules 15 MJ 1 (2008) pp. 97-108, 101-105.

Parliament, the Council and the Commission a reasoned opinion on whether a draft legislative act complies with the principle of the subsidiarity.[50] The former co-decision procedure, which is called as the ordinary legislative procedure, is applied in forty new cases and, on the whole approximately eighty-five legal basis order to apply this procedure, where the European Parliament and the Council acts as equal co-legislators.

Without enumerating all the areas falling under the ordinary legislative procedure, it is worth highlighting some specific policies. Probably the most significant modification is that the entire former third pillar, i.e. the field of police and judicial cooperation in criminal matters is placed under the ordinary legislative procedure. It is not negligible that the Treaty classifies under that co-legislative competence such important policies like the agriculture, border control, asylum, immigration and, notwithstanding some exceptions,[51] the entire field of judicial cooperation in civil matters. Even new policies fall under the ordinary legislative procedure, just like the field of intellectual property rights, sport, space, administrative cooperation, energy, tourism and the civil protection. It is also an important change that the new rules on comitology and the provisions on the citizens' initiative have to be adopted in accordance with the ordinary legislative procedure by the European Parliament and the Council.

From a substantial point of view, the course of the ordinary legislative procedure has not been changed as compared with the former so-called co-decision procedure[52]; the Treaty of Lisbon introduced merely some formal changes. For example, every single phase of the procedure is regulated in a separate subparagraph, furthermore due to a rather symbolic change which intends to indicate the equality of the two institutions, both the European Parliament and the Council accept its position after the first reading.[53]

Nevertheless, the very wide application of the ordinary legislative procedure is the result of some compromises. The Commission's 'monopoly' of the right to initiate is now abolished as it is reflected in the wording of Article 17(2) TEU: 'Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise'. In certain institutional questions[54] the Commission exercises its right to initiate together with the European Central Bank and the European Court, and in the field of judicial cooperation in criminal matters and police cooperation legal acts can be adopted on a proposal from the Commission or on the initiative of a quarter of the Member States.[55] In certain areas of Union cooperation the Treaty of Lisbon makes it possible to suspend the legislative procedure for four months and to refer the draft measure to the European Council. The so-called emergency break mechanism can also be used for legislative acts to be adopted in the field of social security if a Member State declares that a draft legislative act would affect important aspects of its social security system.[56] Within four months of

[50] See Protocol No. 1 and No 2 to the Treaty of Lisbon.
[51] E.g. measures concerning family law regulated in Article 81(3) TFEU which are adopted by the Council, acting in accordance with a special legislative procedure: the Council acts unanimously after consulting the European Parliament.
[52] See Article 251 EC Treaty.
[53] Whilst under Article 251 EC Treaty, the European Parliament accepted an opinion and the Council a common position, now under Article 294 (3) and (4) TFEU both institutions accept its position.
[54] Article 129 (3), 28 and 258 TFEU
[55] Article 76 TFEU
[56] See Aricle 48 TFEU.

the suspension, after discussion, the European Council: refers the draft back to the Council, which terminates the suspension of the ordinary legislative procedure, or it takes no action or requests the Commission to submit a new proposal. In the latter case the act originally proposed is deemed not to have been adopted. Similarly to Article 48 TFEU, the applicability of the emergency break mechanism is also provided in the field of judicial cooperation in criminal matters. The emergency break mechanism can be used where a Member State considers that a draft directive would affect fundamental aspects of its criminal justice system concerning the minimum rules on criminal procedure[57] and the minimum rules concerning definition of criminal offences and sanctions[58]. In such cases, after discussion, and in case of a consensus, within four months of the suspension the European Council refers the draft back to the Council, which terminates the suspension of the ordinary legislative procedure. In case of disagreement, at last 9 Member States can decide to establish enhanced cooperation on the basis of the draft directive concerned. The concerned Member States notify the European Parliament, the Council and the Commission, and continue to negotiate.

The other form of the legislative procedure is the special legislative procedure. Mostly, that is the case where the Treaty prescribes for the European Parliament a role differing from the co-decision and where an act is adopted by the Council not by qualified majority but when it acts unanimously. Also those procedures fall under this category where the European Parliament acts on its own initiative. The European Parliament acting by means of regulations on its own initiative can, after seeking an opinion from the Commission and with the consent of the Council, lay down the regulations and general conditions governing the performance of the duties of its Members and that of the duties of the Ombudsman. The establishment of the annual budget can also be classified as a special legislation procedure. Similarly, those cases where the Council acts with the consent of the European Parliament are also special legislative procedures. The following questions belong to the latter: adoption of the provisions on the European elections, actions to combat discrimination, provisions to strengthen the rights of the citizens of the Union, furthermore the rules on the implementation of the Union's own resources and the establishment of the multiannual financial framework.

The other type of the special legislative procedures where the Council acts by qualified majority after consulting the European Parliament. E.g. the specific programmes in the field of research and technological development can be adopted in accordance with such procedure, after consulting the Economic and Social Committee, too.

However, even after the entry into force of the Treaty of Lisbon the Council's right for acting unanimously was maintained in several sensitive areas, even though in those questions the Council has to consult the European Parliament. The following questions belong to that, without intending to give an exhaustive list: tax harmonisation, some specific fields of the area of freedom, security and justice: passports, identity cards, residence permits, measures concerning family law with cross-border implications, the establishment of the European Public Prosecution's Office, cooperation involving the police, customs and other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences of the Member States. As

[57] Article 82(3) TFEU
[58] Article 83 TFEU

regards the last two cases, a group of at least nine Member States may request that the draft directives be referred to the European Council in order to reach the unanimity. In such cases, similarly to the emergency break mechanism, the procedure in the Council has to be suspended. After discussion, and in case of a consensus, the European Council, within four months of this suspension, refers the draft back to the Council for adoption.

6.2. Procedure for the adoption of non-legislative acts

Besides the ordinary and special legislative procedures, the other large group of binding legal acts of the Union is adopted in accordance with non-legislative procedures. A part of these procedures cover the above-mentioned delegated acts, the application of which, namely the rules on revocation of delegation, will be presumably necessary to be laid down in the framework of an interinstitutional agreement.

We have also mentioned that the Council and the European Parliament lay down in advance the rules on the adoption of implementing acts, i.e. 'the rules and general principles concerning mechanisms for control by Member States', by means of regulations in accordance with the ordinary legislative procedure.[59] On the one hand this means that the complicated comitology procedures regulated by the not so transparent Council Decision[60] may be regulated only by regulations adopted in accordance with the ordinary legislative procedure and, on the other hand, we talk about comitology only provided that a legislative act serving as a basic act confers on the Commission the right to adopt implementing acts. On the basis of the rules determined by the Treaty, the new comitology Regulation, namely Regulation (EU) No 182/2011 of the European Parliament and of the Council laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers was adopted on 16 February 2011.[61] Among the innovations introduced by the new regulation it should be mentioned that the procedure has become simpler since the regulation reduced the number of comitology committees and procedures based on the previous Council Decisions of 1987 and that of 1999 as amended in 2006 from 4[62] to 2, which are the advisory procedure and the examination procedure. While under the former rules it was the Council who controlled the comitology, according to the new regulation this right is granted exclusively for the Member States, thus neither the Council nor the Parliament could intervene in the procedures, nevertheless, the Commission is obliged to inform them. The right of scrutiny for the Council and the Parliament provided for in Article 11 of the Regulation is of great importance since they can indicate to the Commission that, in their view, a draft implementing act exceeds the implementing powers provided for in the basic act. In such cases the Commission is obliged to review the draft and to inform the Council and the European Parliament whether it intends to maintain, amend or withdraw the draft.

---

[59] Article 291(3) TFEU

[60] Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ L 184, 17.7.1999, p. 23) as amended by Decision 2006/512/EC (OJ L 200, 22.7.2006., p. 11)

[61] OJ L 55, 28.2.2011, pp. 13-19

[62] Advisory procedure, management procedure, regulatory procedure, regulatory procedure with scrutiny (PRAC).

In addition, the scope of comitology procedure has been extended since besides the implementing acts of general scope it also includes the programmes with substantial implications, the common agricultural and common fisheries policies, the protection of the environment, the protection of the health of humans, animals or plants, the taxation and the common commercial policy. It is a novelty and can be considered as an advance that through the latter one the anti-dumping measures, which were out of the former comitology system, now fall under the scope of the new Regulation.[63] We can mention among the benefits of the new comitology procedure that the former rigid system has become more flexible since the Commission can choose among more options, nevertheless, the transitional parallel existence of the old system and the new procedures can raise not negligible problems. The procedures of the old system have to be made accord with the new procedures, however, it does not mean that the new rules should be applied automatically in each case since the Regulation does not affect pending procedures in which a committee has already delivered its opinion in accordance with Decision 1999/468/EC, moreover the legal effects of the PRAC procedure have to be maintained for 5 years as regards the application of the basic act which makes reference thereto.

Conclusions

In response to the questions raised at the beginning of this paper, namely whether the European integration has progressed by the Treaty of Lisbon and, in particular, whether the coherence, transparency and effectiveness of the legal system of the Union has risen and the legislation has become simpler or not, we can set forth the following statements.

The reforms introduced by the Treaty of Lisbon aimed to make the system of Union law more simply and transparent. In this respect, it is welcomed that the types of legal sources, which were formerly different concerning each pillar and, from a numerical point of view, their number was be exaggerated, became uniform and nominally decreased, notwithstanding the fact that the specialities of the Common Foreign and Security Policy still remain.

It is also an advantage that the new legislation creates a sort of hierarchy of legal sources. The system of legislative, delegated and implementing acts promotes considerably the transparency of Union legal acts in the future although some legal acts cannot be classified under those categories. The explicit distinction made between the legislative acts and that of the delegated acts is of a great significance regarding both the delimitation of competencies and the institutional balance.

The comitology procedure became simpler and hopefully through the two procedures regulated in the new comitology Regulation adopted in accordance with the ordinary legislative procedure, namely the advisory procedure and the examination procedure, the transparency of implementing acts adopted by the Commission will increase and the interinstitutional conflicts will reduce.

The reform of qualified majority voting and the increasing application of the ordinary legislative procedure also unequivocally contribute to the simplification and the enhancement of the legitimacy of Union legislation. Nevertheless, it is clear that the system

[63] Regulation (EU) No 182/2011 of the European Parliament and of the Council, Article 2, paragraph 2

of Union legislation is still rather complex because of the transitional provisions, the exceptions and the differing procedures, thus, despite the changes, it is not easy to orientate therein. Because of the short time elapsed from the entry into force of the Treaty Lisbon the question whether those reforms as a whole could really increase the effectiveness of the Union legislation cannot be answered unambiguously, however, we have reasonable ground to believe that a significant amount of the quantitative changes can turn to a qualitative changes.

European Integration Studies, Volume 9. Number 1. (2011) pp. 73–85.

FREEDOM OF INFORMARTION, DISCLOSURE, PRIVACY, AND SECRETS IN HUNGARIAN LAW

LÁSZLÓ MAJTÉNYI
Associate Professor, Head of Department of Information and Media Law
University of Miskolc
majtenyi@ekint.org

The constitutional revolution in Hungary produced certain legislative innovations that were remarkable even in the international perspective. One of these was the regulation of information rights. With the possible exception of the instatement of the Constitutional Court, no other Hungarian legislative feat won greater praise in international literature. The Data Protection Act has been recognized as the first piece of legislation since King Saint Stephen whereby Hungary has provided a model and a trend for all of Europe to emulate. The innovation essentially consisted in regulating data protection and freedom of information reciprocally, and in entrusting both rights to the same guardianship. This solution, however, entails a number of legal complications.

Providing for the two rights at the same breath, while certainly useful, does create difficulties. True enough, in the field of information rights, we often find that the moment we have managed to solve a problem the solution itself generates further obstacles. This is not the case in other fields of law. The source of the difficulty here is the inherent tension between the two information rights, which we tend to view as a mere notional impasse, when the quandary goes much deeper than that. We talk about protecting privacy, when all we really know is the object of the protection: the human being as a legal subject. However, the language of the law can only speak to the manifestations of the individual's personality, but not to the nature of that personality. I might also recall that, under the presidency of Mr. Sólyom, the Hungarian Constitutional Court , following the example of the German Constitutional Court in Karlsruhe, introduced the concept of informational self-determination, which helped us solve a number of problems that legal scholars in the U.S. had had limited success in dealing with (self-regulation, Lex Informatica, safe harbor etc.).

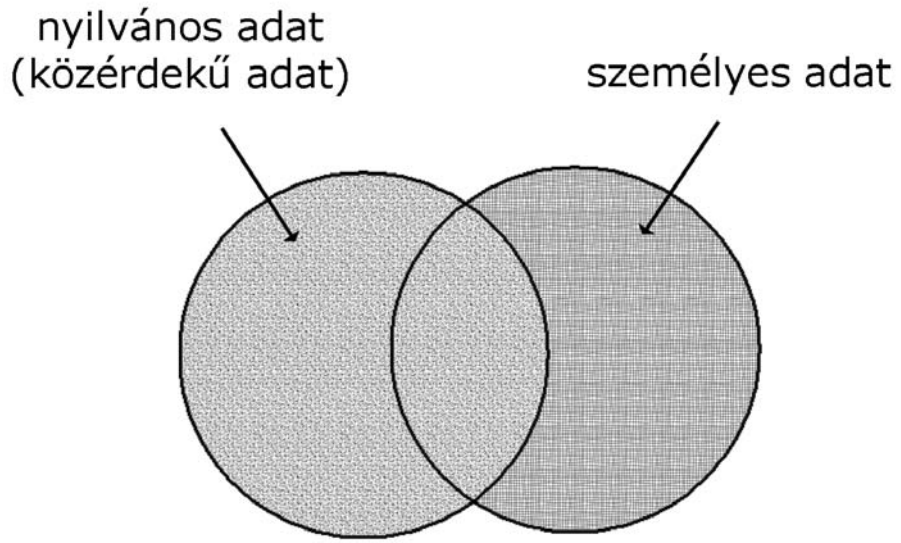
The notion of "data of public interest," as used by the Hungarian Act, turned out to be a rather peculiar one. To begin with, any foreigner new to Hungarian law will be seriously challenged by the fact that közérdekű adat ("data of public interest") and nyilvános adat ("public information") are not synonymous terms. Moreover, data of public interest, while public as a rule of thumb, may be classified on certain conditions. In fact, a state secret may constitute data of public interest — and it typically does, unless it happens to be personal data. The same applies to business secrets.

I personally have not found the equivalent of the Hungarian concept of "data of public interest" in any other legal system. It is instructive in this regard to compare and contrast the notions of data of public interest/public information as respectively used in the U.S. Freedom of Information Act[1] and the Data Protection Act of Hungary.

[1] The Freedom of Information Act 5 U.S.C.§ 552, As Amended By Public Law No. 104-231, 110 Stat. 3048

A glance at the regulatory logic in the U.S.

By way of comparison, let us look at the schematic of privacy and freedom of information regulation in the United States. In my reading of that Freedom of Information Act, this shows the following pattern:



As can be readily seen, this model does not distinguish between data of public interest and public information. The collapse of the distinction means that, in this approach, personal data may become subject to freedom of information rules. At the same time, the concept of "public information" is drawn more narrowly than its Hungarian counterpart, as it applies explicitly to data held by "government agencies," but not by certain other entities, such as the White House or Congress. Furthermore, the rules adopted in the U.S. disregard the existence of public information beyond the government's own scope of operations, presumably because they are considered to be of no consequence or concern for the regulation.

In the American approach, unlike in Hungary, freedom of information may naturally apply to personal data — in other words, personal data may be contemplated by freedom of information regulations.

To put it in yet another way: It would amount to violating the doctrine of Hungarian information law to say that the concept of freedom of information as used in that law may encompass personal data.

As a counterpart to Hungary's "data of public interest," U.S. law employs the term of "public information."

Up until its last adopted novella, Hungary's Data Protection Act had consistently used the term "data" in all contexts, without once resorting to the word "information." Even the

effective, amended version only uses "information" but once, and in quite a secondary context at that.

In the American law, "public information" is defined so as to include records (data carriers) as well as proceedings carried out in relation to those records.[2] The data carrier or medium is termed "record" — a notion that, pursuant to the enshrinement of freedom of information by electronic means, should include all electronic data carriers. In fact, all that the U.S. law accomplished by incorporating electronic freedom of information was to extend the concept of originally paper-based "record" to apply to electronic data carriers and documents as well.

Australia and New Zealand have adopted an approach — one rather unusual to us — which derives the protection of personal data or, to be more precise, access by the data subject to the information held on him, from a component right common to both data protection and freedom of information, namely from the right of access to information. In this scheme, everyone has the right to access his own data as well as public information held by the state. In my opinion, the main downside of this approach is that it makes it difficult to justify access to personal data held by the "Little Brothers" of the private sector, and it makes little or no room for recognizing informational self-determination.

Another solution unique to Hungarian privacy and freedom of information law is that it replaces the notion of document or record, which the U.S. and other countries favor, by that of data, which can be personal or of public interest in nature. By adopting this terminology as early as in 1992, Hungary's Data Protection Act hit upon one of the most modern answers possible to the fundamental challenge of the IT age.

I believe that the Hungarian law's complete disregard for matters of medium or data carrier reflects an attitude that is positively modern and, which is just as significant, unbiased toward any technology. Furthermore, it neither defines the notion of data nor makes a distinction between data and information. Assuming that the law is applied in good faith and with common sense, this failure can hardly be held against it. In short, for purposes of Hungarian law, data may refer to everything that can be known, be it in raw or processed form.

For the American law, freedom of information essentially amounts to the regulation of public information or data related to the government.

Since by definition personal data cannot be of public interest, Hungarian legislators decided that further refinement of the nomenclature was in order and introduced the notion of data subject to disclosure due to overriding public interest, defined as "any data held by or related to a natural person, legal entity, or unincorporated organization that does not fall under the definition of data of public interest but the disclosure or making available of which is ordered by law in the public interest."

Logical connections between data categories in Hungarian law

The Logical connections between data categories in Hungarian law[3] can be illustrated as follows:

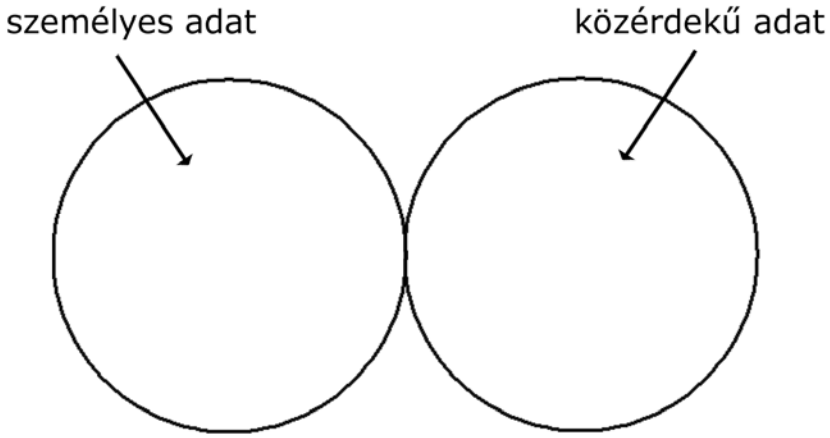
[2] The Freedom of Information Act: „§552. Public information; agency rules, opinions, orders, records, and proceedings"

[3] To paraphrase the poet Attila József, one might say that law is logic but not quite science.

Data of public interest — personal data

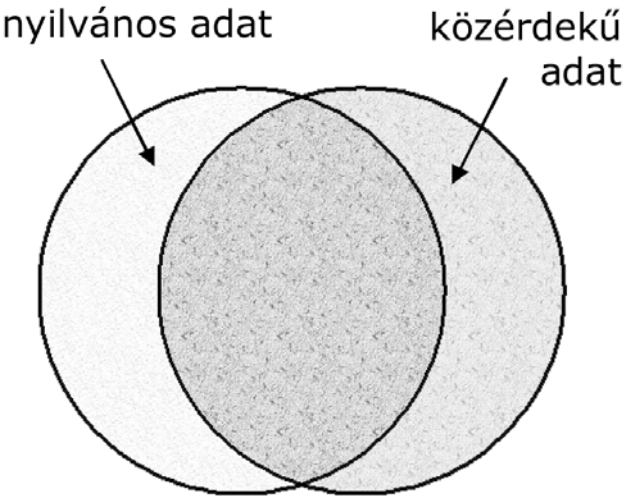
The conjunctive logical class of data of public interest and personal data is empty, given the definition of data of public interest as "any information or knowledge, not falling under the definition of personal data, processed by an organ or person performing a state or local government function or other public function determined by a rule of law, or any information or knowledge pertaining to the activities thereof, recorded in any way or any form" [emphasis mine — M.L.]. This is seconded by a Resolution of the Constitutional Court, which declares that "Information may be regarded as not being of public interest if, and only if, it constitutes personal data."

In any event, the law itself excludes any possibility for personal data to at once satisfy the definition of data of public interest. This may be illustrated as follows:



Data of public interest — public information

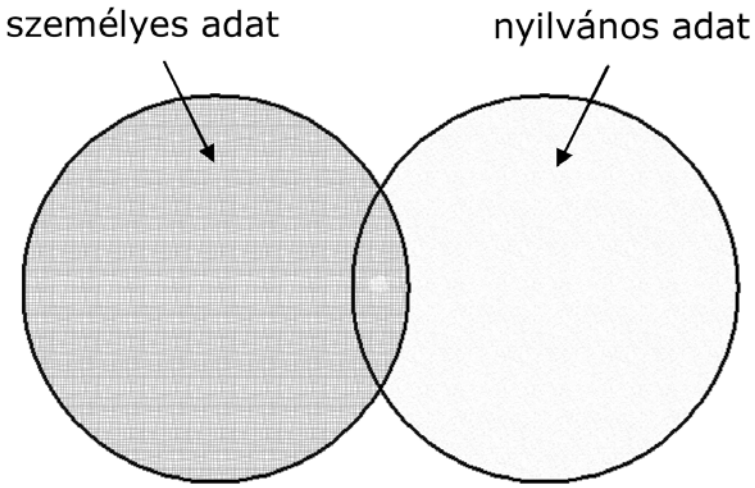
As a rule of thumb, data of public interest must be made public. Exceptions include state secrets as well as business, bank, and tax secrets held by public authorities, which are also regarded as data of public interest unless they happen to be personal data. The figure below is talkative inasmuch as it shows that the illustrated relationship remains true for both data categories even if we limit the set to records held by public authorities and disregard the existence of data beyond national borders.



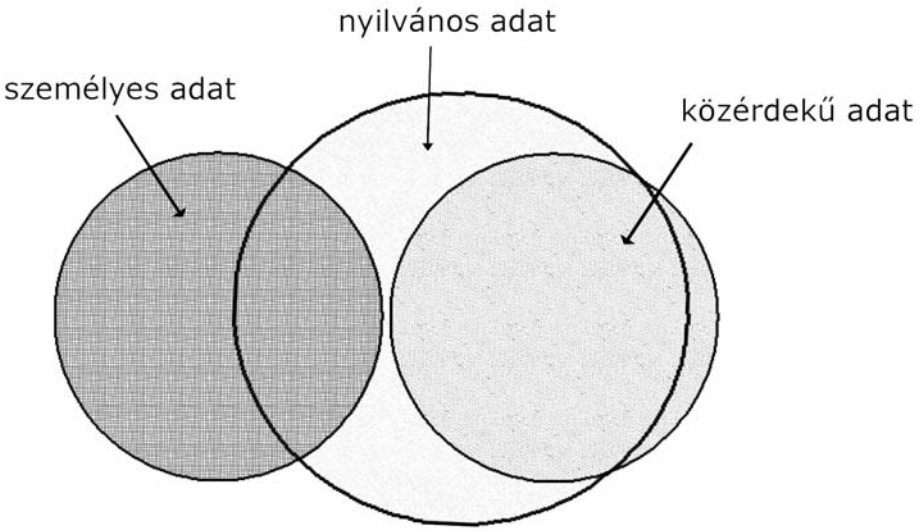
Personal data — Public information

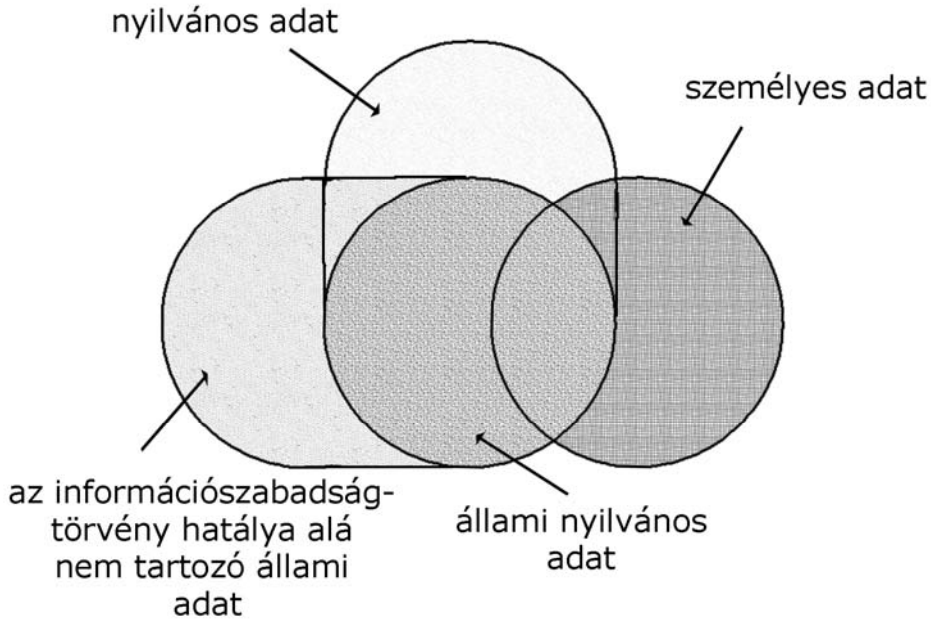
As a rule of thumb, personal data is not public in nature, although its disclosure may be ordered by law. This latter category is known as data subject to disclosure due to overriding public interest.

For me, the most distinctive feature of the Hungarian regulation is that, as we have seen, personal data can under no circumstances qualify as public information in the broad sense of the term. However, the personal data of individuals acting in their official capacity on behalf of public agencies, as well as their personal data related to this official function, fall into the category of data subject to disclosure due to overriding public interest.

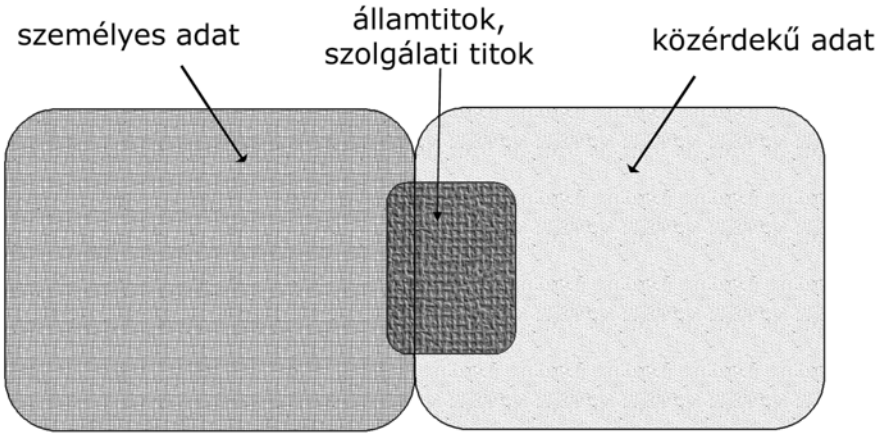


After these preliminary considerations, it is easy to draw up a schematic to illustrate the logical relationship among these three categories of data:





If we now wish to position classified information — state secrets — within this system, we will find the following:



Public interest may legitimately justify classification if information pertain to the Republic of Hungary's

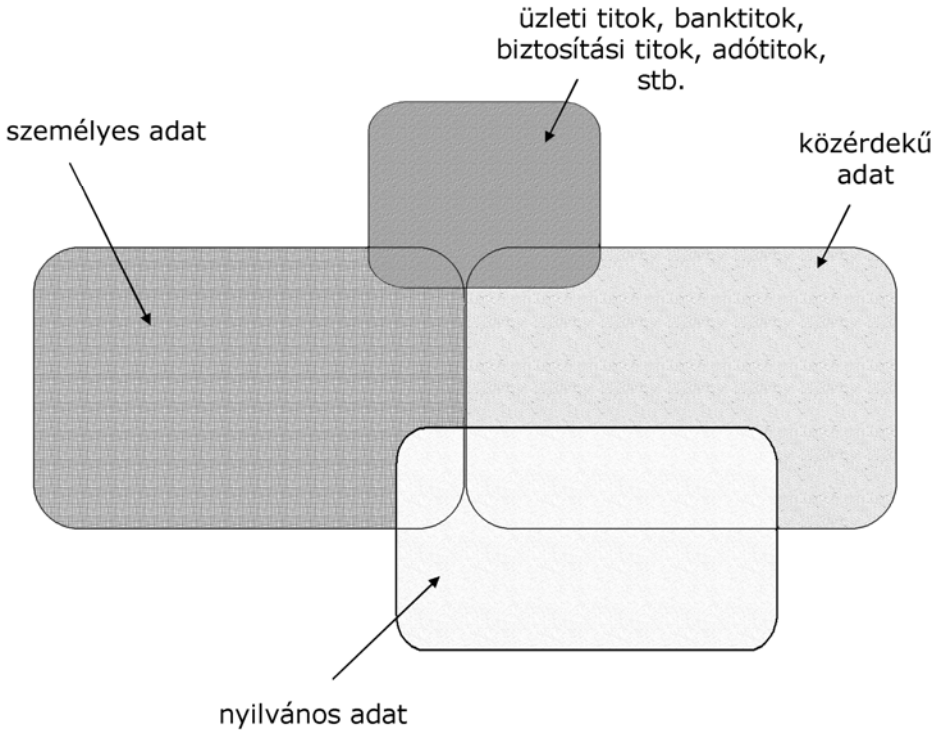
a) sovereignty and territorial integrity;
b) constitutional law and order;
c) operations involving national defense, security, criminal investigation and prevention;
d) administration of justice, central finance, and economic activities;
e) foreign/international relations;
f) prerogative to ensure the smooth operation of its government agencies free from undue influence.

"Smooth operation" as justification for classifying information would hardly pass a serious constitutional review, not least because it can easily be used as a pretext for classifying briefing documents ("data created during the preparation of a decision"), which should not normally be regarded as legitimate secrets.

Business secret (insurance, bank, tax secret etc.) — data of public interest — personal data — public information

Data not personal in nature that is held by a public authority or official is considered data of public interest, even if it is a business secret, although it is obviously not public information. The fact that a business secret that is also personal data should not be public is doubly self-evident.

The Civil Code defines "business secret" as "all of the facts, information, conclusions or data pertaining to economic activities that, if published or released to or used by unauthorized persons, are likely to jeopardize the rightful financial, economic or market interest of the owner of such secrets, provided the owner has taken all of the necessary steps to keep such information confidential." This excludes information pertaining to national and local budgets and the management of European Community funds, allowances and benefits disbursed from budgetary funds, national and local public assets, as well as information the disclosure of which is mandated by separate statutory provisions due to public interest ("data subject to disclosure due to overriding public interest").



Bank secret

Pursuant to the Banking Act, "bank secret" includes "All facts, information, know-how or data in the financial institution's possession on customers relating to the person." In this specific regard, "any person who receives financial services from the financial institution shall be considered a customer of the financial institution." [4]

Professional and vocational secrets

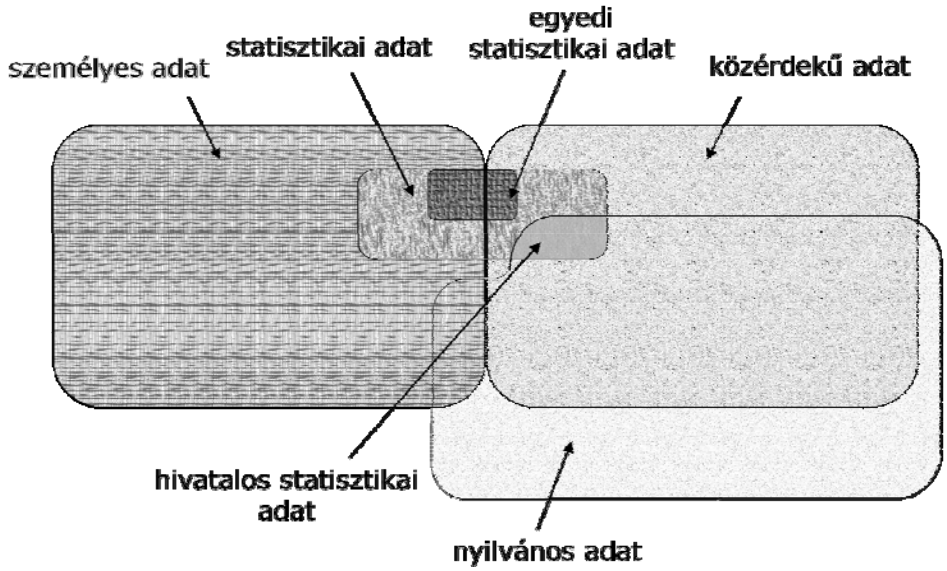
Section 170 of the Civil Procedure Act waives the obligation to testify if the testimony would reveal a professional or vocational secret. Those subject to keep a private secret confidential by virtue of their profession or vocation must in fact refuse to testify. Pursuant to Act CXL of 2004 on the General Rules Of Public Administrative Procedures and Services, vocational secrecy applies particularly to information obtained by doctors, attorneys, notaries, church ministers and other members of the clergy. [5]

Statistical data — data of public interest — personal data — individual data — public data

The Statistics Act does not expressly define the notion of "statistical data," but it is clear that it includes both individual and aggregate data collected and held for statistical

[4] § 50 (1)-(2)
[5] § 172.

purposes. The Implementation Decree accompanying the Act does offer a definition of "official statistical data" as a subset of the comprehensive term.
The key term of the Act is "individual data" — data handled for statistical purposes that may be either personal or of public interest, and which is suitable for identifying the specific legal subject who supplied it. (The Act leaves open the interpretation that state and service secrets may be individual data as well.)[6]. Individual statistical data at once personal in nature are not to be made accessible to the public, for an obvious twofold reason. It is illegal to publish individual statistical data except with the consent of the data subject.[7] Disclosure of individual data is permitted if it pertains to the public operation of a public agency, social organization, or a publicly funded organization. [8] Otherwise, individual data are to be regarded as private secrets, to be protected in accordance with certain rules at the responsibility of the entity in charge of the statistical operation. [9]



Environmental data — data of public interest — public information

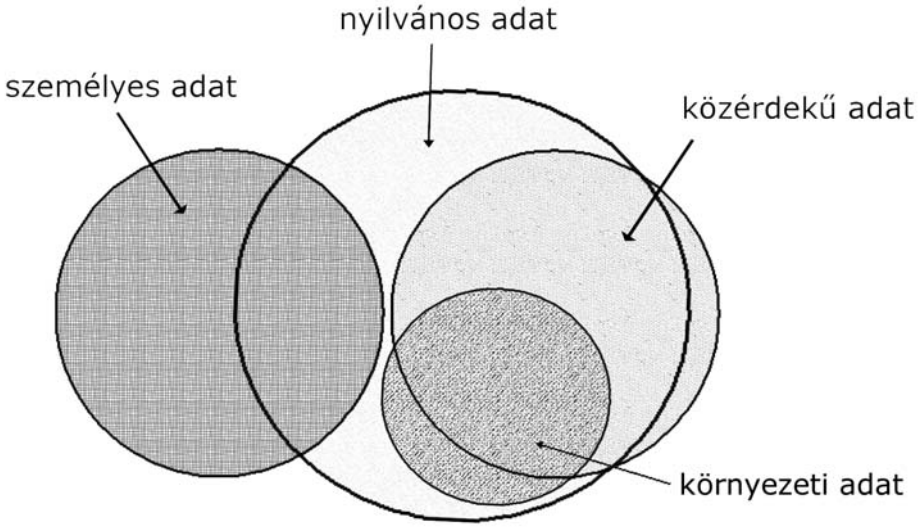
Act LIII of 1995 declares that "Everyone shall have the right to acquire knowledge about facts and information on the environment, thus, in particular, about the state of the environment, the level of environmental pollution, the environmental protection activities as well as the impacts of the environment on human health." Furthermore, "State organs and local governments shall monitor within their scope of activities the state of the environment and its impact on human health, shall keep a record of the data thus obtained, and shall make them accessible - with the exceptions established by the Act on the

[6] Statistics Act, § 17 (2)
[7] Statistics Act, § 17.§
[8] Statistics Act, § 18 (2)
[9] Act XLVI of 1993and its Implementation Decree.

Protection of Personal Data and the Publicity of Data of Public Interest - and shall provide appropriate information." In respect of the environmental use and the environmental stress and hazards caused, the disclosure obligation applies equally to entities outside the public sector. The Aarhus Convention defines "environmental information" as "any information in written, visual, aural, electronic or any other material form" concerning the environment.[10]

The signatories also agreed to require their respective environmental authorities to disclose requested information and copies of original documents, without demanding to know the nature of the applicant's interest in requesting such information.

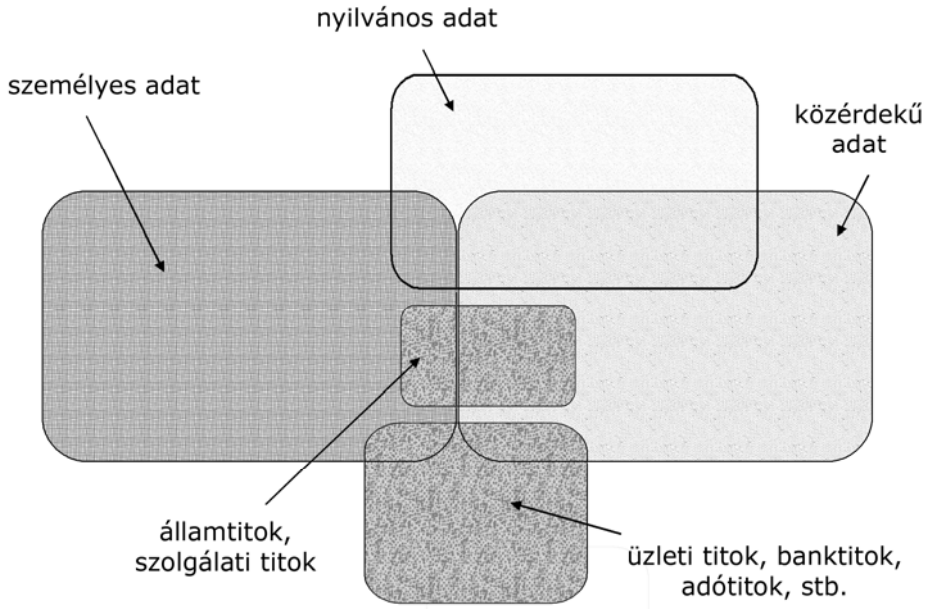
Of course, the diagram below does not account for scenarios such as touring a nuclear power plantas a private individual, measuring and collecting radiation data . Data collected in this private capacity may be kept by the individual.



3.2.9. Summary chart

This is intended to illustrate essential logical connections, although considerations of clarity and ease of reference dictated to omit a few of the data categories.

[10] *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, adopted at Aarhus, Denmark,on 25 June 1998. Promulgated in Hungary by Act LXXXI of 2001.



The data categories shown serve to reveal some of the more important general logical correlations among them.

Even though such logic-based charts often provide a schematic, simplified representation, in some way this one seems more complicated than the international alternatives I have mentioned. Perhaps surprisingly, the applicable Hungarian legal texts have turned out appreciably self-consistent and also coherent with the logic of law. This goes to suggest that simply destroying this edifice would be far less useful than properly understanding and operating it.

In conclusion, I might say that the legal construct of secrecy and disclosure in Hungary is without a doubt a curiosity, albeit not a provincial curiosity. As such, its ongoing application and comprehension seem to offer more benefit than shattering it in favor of something completely new.

SZÓJEGYZÉK AZ ÁBRÁKHOZ

nyilvános adat	public information
közérdekű adat	data of public interest
közérdekből nyilvános adat	data subject to disclosure due to overriding public interest
személyes adat	personal data

az információszabadság-törvény hatálya alá nem tartozó állami adat	government-held data not subject to the Freedom of Information Act
állami nyilvános adat	public government-held data
államtitok, szolgálati titok	state secret, service secret
egyedi statisztikai adat	individual statistical data
hivatalos statisztikai adat	official statistical data
környzeti adat	environmental data

European Integration Studies, Volume 9. Number 1. (2011) pp. 87–107.

THE PLAN FOR NEW REGULATION OF THE TERMINATIONS OF EMPLOYMENT CONTRACTS IN THE MIRROR OF THE DISMISSAL REGULATIONS OF THE MEMBER STATES OF THE EUROPEAN UNION*

TAMÁS PRUGBERGER
Professor Emeritus, Department of Agricultural and Labour Law
University of Miskolc
civprugi@uni-miskolc.hu

1. The aspects of the Subject Matter and the System of its Proceeding

The Proposal (PROPOSAL) for the new Labour Code (LC) was published on July 18, 2011./1/ In our present study we are making an attempt to examine objectively the proposed rules of the termination of employment by comparing them with the legal rules of the Member States of the European Union, especially those of the old Member States. Based on this legal comparison, we'll make our conclusions and Proposals attempting to help to improve the codification material.

2. Ordinary Termination of Employment

1) The Proposal regulates ordinary termination of employment in sections 65 to 67. In the case of a dismissal affecting the employee, the modern European labour law regulations provide larger protection against dismissal for the safety of the employees' living. In compliance with this principle, the dismissal initiated by either the employer or the employee shall be made in writing, moreover, the employer has the obligations to give the reasons for the dismissal. The reasons – even in accordance with the Proposal – shall be valid and related to the employment relationship. This specific rule is implied in our present Labour Code, and this was also further clarified by an opinion issued by the Labour Division of the Supreme Court.

This requirement is properly defined in the first two subsections of section 66 of the Proposal. The now prevailing prescription pursuant to which the employer is obliged to hear the employee before termination is still missing. All the West-European legal systems contain the obligation of hearing prior to termination initiated by the employer. We must consider as a result the fact that the original effort according to which employees at small or medium sized undertakings may be dismissed without reasoning if they are employed for less than a year is missing from the Proposal. This kind of a legal solution would be in contradiction with the European Social Charta, because pursuant to that the employer is obliged to give reasoning for termination in all cases of employment terminations. Starting from that we can question whether the possibility of neglecting reasoning in the case of the

* It was translated by Andrea Szőllős. Lector in English: Nóra Jakab.

employment termination of a retired person (Section 79 of the Proposal) may not be in contradiction with the prescriptions of the Social Charta.
It can also be a problem that Section 68 clears out the prevailing regulatations of the protection against dismissals when in the existence of such circumstances earlier the employer was not able to dismiss the employee, now he/she will be entitled to do so in the future. This means that upon ceasing of the regulated circumstances giving protection against dismissal, the notice period will automatically begin.
2) All this appears in the labour regulations of the new and old Member States of the European Union as follows:

A) In the German legal systems
a) In Germany the termination of employment by means of a dismissal is regulated by §§ 611-630 of the Civil Code (CC, *Bürgerliches Gesetzbuch*), the Protection against Dismissal Act (KschG) and the Act on Collective Dismissal (Massenentlassung) (Mentl.G).
The German Labour Law differentiates four different groups of grounds on which the termination of the employment at the employer's initiative shall be based:
a.) dismissal on the grounds of the employee's breach of the contract by not or not adequately performing his/her obligations arising from his/her service relationship;
b.) a personal feature inherent in the employee which renders the employee inadequate for his/her obligations arising from his/her labour/service contract (e.g. illness without the hope for remedy or long term illness, incapability to adapt to the technical modification of his or her job because of elderly age, e.tc.;
c.) dismissal resulting from the economic situation of the employer (betriebsbedingte Kündigung), the collective form of which is the collective redundancy (Massenentlassung);
d.) and finally, the so called 'Änderungskündigung'.
Pursuant to Section 314 of the BGB, the termination of employment by means of dismissal at the initiative of the employer shall be given in writing to the employee and it must contain the reasons for the dismissal, too. Previously, however, the employer shall notify the employee about the problem(s) with his/her performance and the fact that its continuity may or will result in dismissal. In the case of repeated smaller misconducts, the employer may warn the employee giving him/her a trial period before dismissal with the aim of making the employee improve his/her conduct. If the termination of employment takes place and the employer does not comply with the above rules by giving the notice, the dismissal is ineffective. These rules are the same in the other Member States, too.
Ordinary termination will become effective after a period of notice of at least four weeks elapsing on the fifteenth or the end of the calendar month. The maximum period of notice – depending on the years spent in the employment of a given employer – goes up to seven months. A collective or an individual contractual agreement can extend, however, cannot shorten the minimum of the statutory periods of notice. (Günstigkeitprinzip). Although, in the case of service relationship contracts (Dienstvertrag) – which mean greater freedom – regarding that the servant with a greater scope of movement may find another job/place of work easier than the employee with fixed place of work having a narrower social contact circle – the notice period is ex lege shorter. However, individual contractual agreements can extend this statutory shorter period of notice, too. (BGB 61. §) /2/
Pursuant to KschG., the following employees are protected from dismissal: a) women during pregnancy and four weeks thereafter; b) both parents on parental leave; c)

employees being on a long-term time off because of childcare or the care for a close relative; d) employees being on sick leave for the period of time defined in the Protection against Dismissal Act, and e) employees with a permanently reduced work capacity (Schwerbehinderte) /3/. People near retirement –of protected age – may not be given a notice unless – according to practice - on objective personal grounds or from economic reasons arising on the employer's side. /4/

The employee may terminate his/her employment with a two week period of notice at any time. The notice must be issued in writing though it shall not contain reasoning.

The termination of employment for a fix period of time or for the completion of specific work constituting special forms of dismissal may be executed only on the grounds involved in the employment or collective agreement. The Teilzeitbeschaftigungsgesetz (TzBfG.) also prescribes that the employee shall be notified about the notice one week before the notice period commences. When the notice period expires and the employee goes on working, the employment becomes contracted for an indefinite time. /5/

b) The Labour Law in Austria follows the German regulations as far as ordinary dismissal (Kündigung) is concerned with the Angestelltegesetz prescribing statutory obligatory period of notice (Kündigungsfrist) only for white-collar workers. The basic notice period in the case of employer's dismissal is 30 days, from 1 up to 2 years of service it is 6 weeks, between 2 and 5 years of service it is 2 months, between 6 and 15 years of service it is 3 months, more than 15 years of service up to 25 years of service it is 4 months, and over 25 years of service it is 5 months. If the termination is initiated by the employee, the notice period is 1 month. The employee may terminate his/her employment by the last day of the month (Kündigungstermin) and the notice period shall commence on the first day of the subsequent calendar month (Kündigungsfrist). /7/

As far as other questions – like the way of giving the notice and the protection against dismissals – are concerned, the Austrian Labour Law follows the German rules. /9/

c) In the Dutch labour law the employer may give a notice of dismissal to the employee with the prior consent of the works council and the employment authority. The statutory notice period of ordinary dismissal in the case of more than 5 year employment is one month, from here on it is increased by one month each time the worker has completed his/her 5th year working for the same employer and it is maximum 4 months after 15 year of employment. With mutual consent, the parties may lengthen the notice period like in other Member States; however, they may not set a shorter period of notice. Though even contractually set notice period may not exceed six months. /10/

The termination of an employment relationship by means of an ordinary dismissal with notice and its reasoning must be made in writing to be effective, which may be abandoned if it is included in a court-approved settlement or minutes. The grounds for dismissal and protection against dismissal are the same as in the German and Austrian labour law. /11/

B) In the French-Latin Member States

a) The notice period in the case of a dismissal initiated by the employer in France is governed by the Cod du travail (the French Labour Code) and Usance. According to them, the employment relation is terminated by a maximum of six months' notice period. Collective agreements – especially sectoral ones - may specify longer or shorter periods of notice.

During the period of notice the employee shall be discharged from his job for two months. This longer exemption period offsets the possibility of the more unfavourable contractual deviation of the notice period on the employee's side.
If the dismissal at the initiative of the employer is based on objective or imputable subjective reasons relating to the employee's person (see German law), the first stage of the dismissal should be the hearing of the employee in person. Afterwards, the notice period commences with the notification of the written notice of dismissal containing even the reasoning. The regulations of the protection against dismissal are similar to the ones in the German law implying the protected age, as well. /12/
b) In the Belgian labour law when a blue-collar worker is dismissed, the period of notice should be 35 days for workers who have been employed from half a year to five years and the notice period rises to 42, 56 and 84 days by every five year service is completed, reaching the maximum of 112 days after 10 year employment.
The notice period in the case of white-collar workers – with the same system mentioned above – reaches 12 months after 5 years in service. This relatively long notice period may be redeemed by decent amount of redundancy pay.
The beginning of the notice period in both employees' structures is the first day of the week – i.e. Monday - succeeding the week of the dismissal's notification.
The Dutch labour law prescribes the obligation of reasoning not only for the employer but also for the employee. However, the dismissal notice shall not always be made in writing; oral form of the dismissal notice is also acceptable. /14/ The protection against dismissal is analogous to the French regulations. Therefore, employees near retirement age are protected against dismissal. /15/ Besides, the Belgian labour law knows the so-called 'implicit' dismissal exercisable by both parties when there is a change in any element of the employment contract. /16/
The probation period - similarly to the labour law of Luxembourg - may be determined between 1 and 3 weeks. In the case of more qualified workforce, it can be 6 months or even 1 month. However, the notice period for all types of workers is statutorily ruled uniformly from 2 days to 1 month. /17/
c) In the Italian labour law, the dismissal initiated by the employer is justified by : a) a sound reason related to the employee's person, which may be the non- or inadequate performance of his/her work obligations, or indiscipline or disobedience at work; b) a statutory reason which may be related to the employee's person restraining him/her from performing his/her duties permanently and c) an economic reason in the sphere of the employer's interest or by any reason which may not be attributable to the employee.
The dismissal notice shall be made in writing and reasoning shall also be implied. The default of either the written form or the reasoning shall make the dismissal void. If the employee requires detailed reasoning after receiving the dismissal notice, the employer has 10 days after the receipt of the notice by the employee to give it. Besides, within 60 days, he/she has the right to take the dismissal notice in front of reconciliation committee. In the case of a failure of reconciliation, the notice of dismissal may be avoided before court. The system of protection against dismissal and the rules of dismissal initiated by the employee are in compliance with those of the Member States shown above. /18/
d) The Spanish Labour Law makes a distinction between dismissal based on objective reasons and reasons of disciplinary nature. Ordinary dismissal may only be made on objective grounds.

In the case of objective notice of dismissal, the reasons for dismissal may be as follows: a) a personal feature inherent in the employee which renders the employee either professionally or objectively inadequate for his/her obligations arising from his/her labour/service contract (long term illness, incapability to adapt to the technical modification of his or her job) b.) on the employer's side, the necessity for redundancy due to economic or organisational reasons involving the situation when the employee may not be longer employed full-time. Protection rules are the same as the ones in the previously mentioned Member States and dismissal notice may be given only after the protection period is over. The dismissal notice with reasoning shall be given within 14 days but 60 days the latest after the grounds for dismissal coming to the knowledge of the employer. The dismissal notice given not in compliance with these rules is reckoned as void. /19/
The period of notice is 30 days, which in the case of the employer initiated dismissal rises up to a maximum of 60 days depending on the time spent at service. Parties may agree on a longer notice period. The works council shall be notified in advance before dismissal initiated by the employer. However, the works council does not have the right to agree or disagree; it can only give an opinion. /20/
e) The Portuguese right for termination of employment relationship by dismissal requires that dismissal to be for 'just cause' or 'without just cause' in the cases of dismissals initiated by both the employer and the employee. The dismissal is for 'just cause' corresponds to the Italian categorisation of reasons for dismissal. The dismissal at the initiative of the employer is regarded as for just cause if its reasons are related to the enterprise, objective economic or organisational reasons. The dismissal is regarded as for 'without just cause' if it is for reasons that relate to losing confidence or minor misconduct.
The employer may give a notice to the employee on the grounds of 'just cause' after a 30 day period of tolerance based on the following reasons: a.) weak quality of work; b.) repeated cause of damage; c.) incapability of working in a new or more qualified position; d.) behaviour dangerous for his/her colleagues' health or causing accident risk or unwillingness to adapt; e.) lack of possibility to transfer in another position. As for the employee, the dismissal initiated by him/her can be regarded as for 'just cause', if his/her payment is not paid off, he/she is not provided by work and accident or accident risk at workplace. Moreover, the employee may give a notice on other grounds, too, 'without just cause'. /21/

C) Labour Law in the Scandinavian Member States
a) In Denmark, in the case of a worker, the dismissal is without any formal requirements and based on civil law evolved by judicial practice. However, each party shall be notified about the dismissal clearly and expressly. The notice period in the case of a dismissal at the initiative of both the employer and the employee is determined by sectoral and collective agreements, in the lack of them by employment contracts. Otherwise, based on the practice developed for permanent employment relationships, the notice period is 2 weeks.
Whereas, the legal status of servants (funktionar) and the notice period relating to them is regulated similarly to the Austrian Angestelltegesetz by the 'Funktionarlowen' (FUL). Pursuant to FUL, if the employee has a service of less than 6 months, the notice period is 1 month, with more than 6 months' service, the notice period is 6 months. In the case of workers, collective agreements do not assure notice period in the case of employment of less than a year, however, over one year of employment, they provide a notice period,

which increases by a week every time the employment reaches another year. The notice period in the case of 5-6 years of employment is 60-65 days, while in the case of a 10-year employment; it can even reach 4-5 months.
As far as the reason for dismissal in the case of a dismissal initiated by the employer is concerned, the practice differentiates between attributable and non-attributable causes on the employee's side and economic causes relating to the enterprise on the employer's side. Protection against dismissal - similarly to the Swedish and Finnish legal systems - is in compliance with the rules of the European Union. /22/
b) In Sweden as regards dismissal initiated by the employer, the causes for dismissal can be divided into personal related culpable and innocent causes, and economic reasons. If the cause of dismissal is related to the employee's personal incapability, the Swedish law allows – similarly to the Danish – the employee's transfer if a suitable job is available.
The employer –after a prior warning – should give the notice in writing including causes, while the employee is entitled to give an oral notice, too. In the case of a minimum 2 year employment, the notice period is 1 month. Thereupon, up to 10 years of employment, it is increased by one month each time the employer has completed one year employment, and after 10 years of employment, it reaches 6 months. Collective and/or employment agreements may specify longer periods of notice. Other questions are regulated similarly to the Danish law. /23/
c) In the Finnish labour law as regards employer's right for dismissal, there are objective and subjective severe causes related to the employee's person and economic reasons on the side of the employer. Protection against dismissal is regulated similarly to the previously discussed countries. In the case of an ordinary dismissal, a warning must be given one week prior to the notification of the dismissal. If the dismissal is based on economic grounds, the employee has a preferential right for employment within 90 days after the dismissal notice was given. Pursuant to the Finnish employment contract Act, the termination of an employment relationship by means of an ordinary dismissal with notice including the cause – likewise in the other Member States - must be given in writing to the employee. /24/
The notice period - in the case of a dismissal at the initiative of the employer - is 14 days if the period of employment was between 1 month and 1 year, 1 month if the period of employment was between 1 and 4 years, 2 months if the period of employment was between 4 and 6 years, 4 months if the period of employment was between 6 and 12 years, 6 months if the period of employment was more than 12 years. /25/ However, the employee is entitled to work exemption of 5 working days if the notice period is 1 month, 10 working days if the notice period is between 1 and 4 months, 20 working days if the notice period is more than 4 months. /26/

D) The Anglo-Saxon legal systems
a) The legal regulations in the United Kingdom know the ordinary dismissal with a notice, which may be based on two kinds of grounds for dismissal. The first type is based on a contractual agreement, while the other one is regulated by the Employment Rights Act of 1996, which is based on statutory grounds. In the case of a dismissal on contractual grounds, the notice period is a maximum of 6 months if it is at the initiative of the employer, and half of this period if it is initiated by the employee. Pursuant to the Employment Rights Act, in the case of a dismissal by the employer, the notice period is 1 week if the period of service was between 1 and 2 years, 2 weeks if the period of service

was between 2 and 3 years, and the notice period increases by one week after each year of service until it reaches the maximum of 12 weeks. A so-called dismissal agreement – in the cases of both contractual and statutory dismissals – may entitle the parties to waive the notice period and to agree on financial compensation instead. /27/

The causes for dismissal developed in the legal practice of the United Kingdom are as follows: a.) reasons related to the employee' ability; b.) reasons related to the conduct of the employee at the workplace including the non-performance or not correctly performance of his/her job obligations; c.) reasons of economic and structural nature (redundancy); d.) statutory prohibition from a position/job; e.) other valid reasons including causes related to the employee's person, which is an objective, non-attributable cause. Pursuant to the Employment Rights Act, all the employees, regardless of the employment period, are entitled to protection against dismissal, whereas, in the case of a contractual kind of dismissal, the employee has the right for protection only if he/she has an employment period spent at the given employer of at least a year. However, the provisions regulating when the dismissal is prohibited are in compliance with those of the above discussed EU Member States. /28/

An employee whose contract has been terminated because of economic and structural reasons, that is on the grounds of redundancy, is entitled to receive a redundancy pay. /29/

b) In Ireland the rules of dismissal with a notice are very similar to those in England. In the case of a dismissal at the initiative of the employer, pursuant to the Employment Rights Act of 1973, the employee is entitled to a notice period of 1 week, if the period of service was between 13 weeks and 2 years, 2 weeks if the period of service was between 2 and 5 years, 4 weeks if the period of service was between 5 and 10 years, 6 weeks if the period of service was between 10 and 15 years, and 8 weeks if the period of service was more than 15 years. Collective and/or employment agreements may specify longer periods of notice on the basis of the parties' agreement. The employee is entitled to a severance payment for the period of notice if the cause of the dismissal is not a breach of the contract. The Act on Unfair Dismissal of 1973 distinguished between two causes for dismissal: a.) the lack of capability and qualification; and b.) breach of contract. The employer must inform the employee about his/her intention for dismissal with reasoning prior to the actual dismissal. Only afterwards the notice of dismissal may be given to the employee in writing including the cause for dismissal. The rules of protection against dismissal are similar to the English regulations. /30/

If the dismissal is based on economic grounds, pursuant to the Redundancy Pay Act, the employees between the ages of 16 to 66 are entitled to a redundancy pay if they spent at least 104 weeks at the same employer. The amount of redundancy pay is based on a mutual agreement between the employer and the trade union, and it depends on the dismissed employee's monthly pay, the length of service period, his/her age and marital status. In the case if the employee does not accept a job transfer, he/she is entitled to only half of the compensation payment like in the English law. /31/

E) In the New Member States of Central Europe

a) In Poland the possibility for dismissal in the case of an ordinary dismissal depends on the form of the employment relationship. The employment for an indefinite period of time may be terminated by both the employer and the employee at any time. However, in the case of the dismissal initiated by the employer, one or more trade unions' - having representatives at the establishment – opinion must be asked for prior to dismissal. The employer shall

notify the trade union's representative at the establishment about his/her intention with reasoning 5 days before giving notice. The trade union's opinion may be decisive in the case of a court proceeding. The reasons arising on the side of the employer are defined by the Codex Pracy (Labour Code) and can be divided into three groups: a) the employer's losing confidence against the employee; b.) the lack of conformity to his/her colleagues on the side of the employee; c) losing positions in the board of directors or supervision directors at the employer; d) economic reasons at the establishment. /32/

In the case of a dismissal at the initiative of the employer, the employee - depending on his/her employment period - is entitled to a period of notice, which is 2 weeks in the case of a service period shorter than 6 months and 3 months if employment period is more than 3 years. Parties may agree on more favourable notice periods than those specified in the Codex Pracy. According to the developed legal practice, the notice period is usually maximum 6 months. The other form of dismissal is dismissal during probation period. Both the employer and the employee may give a notice during the probation period. If the notice is given by the employer, the employee is entitled to a notice period of 3 days in the case of a probation period of not more than 2 weeks, 1 week in the case of a probation period of more than 2 weeks, and 2 weeks in the case of a probation period of maximum 3 months. It is worth mentioning that the Polish labour law took over the institute of Änderungskündigung form the German dismissal law. /33/

b) The Czech dismissal law groups the causes for dismissal at the initiative of the employer into 4 groups: a.) causes of structural nature, which are on the side of the employer and therefore the work of the employee is redundant; b.) health reasons based on a physician's opinion, which make the employee unable to perform his/her duties defined in the employment contract (infectious diseases, etc.); c) employment incapacity, one form of which is the attributable or non-attributable not –correctly -performance of the employer's demands, another form of which is the not suitable attitude towards the given job; d.) severe or less severe, but repeated infringement of the job obligations arising from the employment contract. The employee – except for the reason under the point d.) – is entitled to a notice period of at least 1 month, however, the parties can agree on a longer notice period, too. As regards the notice period, the Czech law – similarly to the German law – specifies longer notice periods for employees with fixed employment than for employees employed by free service employment contracts, who have more possibilities to find another job/place of work.

The cases, when an employee is protected against dismissal are – except for the last case – the usual ones. During the period under which the employee is protected – like in the older Member States – it is not allowed by law to terminate employment or to notify the employee about the termination of the employment. The employee is protected against dismissal by a notice of termination in the following cases: a.) during a period when it is recognised that the employee is temporarily unable to work due to illness or injury, b.) during a period when the employee is called up for duty in the armed forces or in civil service; c.) during a period when the employee has been given long-term unpaid time off in order to hold status/public office; d.) during a period when a female employee is pregnant or on maternity leave and during a period when a female or male employee is on parental leave; e) during a period when a night worker is recognised, on the basis of a medical expert's opinion, as being temporarily unfit for night work. In the case of restructuring,

when an employee who belongs to the above mentioned categories loses his/her job, the labour authorities must find a job for him/her with a high priority.
The employee is ex lege entitled to redundancy pay only in the cases when his/her employment is terminated because of restructuring, economic reasons, and health related causes. The redundancy pay in the first case is 3 month pay/salary, while in the second case it is 12 month pay/salary. However, redundancy pay may be paid freely to the employee in the case of any kind of employment termination on the basis of a separate agreement.
During the probationary period, any party may terminate the employment relationship with an immediate effect without reasoning. However, if the employee becomes ill during the first 14 days of employment, he may not be dismissed. Namely, because the employer may not be convinced of the suitability of the newly employed person in such a short period of employment. The difference from the Hungarian regulations is that both parties must notify the other party about the dismissal 3 days prior to termination. /34/
c) In Slovakia, Sections 61-63 of the 'Codex prace' determine the requirements when an ordinary dismissal with a notice or an extraordinary dismissal shall take place. The employer may terminate employment relationship on the grounds of the following reasons grouped into four categories: a) structural causes related to the operations; b.) health related causes; c.) unsuitability for service; d.) infringement of work discipline. These circumstances are almost similar to the causes defined in the Czech Codex Prace. Otherwise, the Slovak dismissal law is similar to the Czech law. This is valid for regulations of the notice period – taken form the German law - which is diversely specified in service and employment agreements - defining longer notice period for employees with fixed employment. /35/
d) The Romanian Codul muncii differentiates between ordinary and extraordinary dismissals. In the case of an ordinary dismissal at the initiative of the employer, which is related to the employee's person, the employer may only terminate the employment relationship upon the following 4 groups of reasons: a.) severe or repeated infringement of obligations determined in collective agreements, plans of work or works agreements; b.) more than 30 day imprisonment due to criminal proceedings; c.) physical or mental incapability of the employee to fulfil his/her duties; d.) professional incompetency of the employee for the given position. /36/
Economic reasons related to the employer's operations may be namely the liquidation of a given position, place of work or structural unit or the closing-down of the company. In the case of termination due to economic reasons, regardless whether it is collective redundancy or not, the employee is entitled to one month pay/salary as redundancy pay. /37/
The basic notice period in the case of dismissal initiated by the employer is 15 days, in some cases 30 days, which increases up to 6 months according to the service period spent at the employer. In the case of termination by the employee, the notice period is 15 days, or 20 days if the employee is in a managerial position. /38/ The termination of an employment relationship by means of an ordinary dismissal with notice – no matter if it was at the initiative of the employer or the employee - must be made in writing to be effective, moreover, the employer shall even give reasoning. /39/
3) Conclusions and solutions which may be taken over in the new Hungarian Labour Code based upon the legal comparison:
a) The first is that the old and the new EU Member States determine the statutory causes for the employer's termination of an employment relationship not based on an employment

agreement. However, the Hungarian labour law does not contain such causes. This is valid for both the prevailing Labour Code and the Proposal. As regards employees' status safety, it would be useful to complete Section 65 of the Proposal with Subsection 2 enclosing such causes for dismissal as a synthesis of the rules of the legal systems of the Member States described beforehand.

Besides, it would be practical to divide the causes related to the employee's ordinary dismissal into a.) attributable and b.) non-attributable causes related to the employee's person and c.) causes related to the employer's operations (economic and structural). It would be useful not only for the sake of dogmatic clear-sightedness but also because it would be reasonable to establish the possibility to give the employee a reduced amount of redundancy pay even in the case of dismissal on the grounds of attributable causes.

Neither the prevailing Labour Code nor the Proposal contains this kind of a possibility, due to which employers take the opportunity of the institute of the extraordinary dismissal even in the cases of less severe misconduct or attributable mistakes. It would also be proper to divide the causes of ordinary dismissal on the employee's side into two groups: a.) causes related to the employer: one is related to the employer's conduct, the other is related to the condition of the operations when the employee is entitled a redundancy pay, while b) causes which are in the sphere of interest of the employee and about which the employee is not obliged to inform the employee, however, in the latter case the employee is ex lege not entitled to redundancy pay.

The justa cause (just cause) and non justa cause system on both sides in the Portuguese law and the two types of causes of employer's dismissal, namely a.) the lack of capability and qualification; and b.) breach of contract of the Irish Unfair dismissal Act may be taken into consideration explicitly from a dogmatic point of view.

b) Section 65 of the Proposal may also be amplified by the possibility of the termination of permanent employment agreements after 3 or 5 years, which solution is known from the German and other Member States' legal practice and is similar to the German Hartz IV - in order that the state granted employment - connected to the proposed extension of diploma giving education by the Hungarian employment policy - shall be effective enough.

c) Termination of the employment and notification about it may not take place during the period of protection against dismissal in none of the Member States. Termination may be executed only when this period expires. Dispatching the termination notice during the protection period may be harmful for the development of the embryo and the baby especially during the first semester of pregnancy or maternity, because the mother may become very worried. For the sake of physical and mental relaxation of the workforce, it would be reasonable to extend such protection to periods of ordinary paid holiday, too. (Section 68 subsection 2 of the Proposal)

d) Pursuant to subsection 1 of section 69 of the Proposal, when the dismissal is initiated by the employee, the employee is entitled to only 30 days of notice period. This regulation is in compliance with most of the above described foreign solutions. However, it must be considered that the cause of the dismissal is not attributable to the employee, but it is necessary due to objective causes related to the employee's person (e.g. illness or the deterioration of health condition) and the employee should have the right for redundancy pay even in the case of an ordinary dismissal instead of having to terminate his/her employment relationship with an extraordinary notice of dismissal. This would not be detrimental even for the employer since in the case of an employment termination on the

basis of such a cause the employer is obliged to pay redundancy pay even if the employee gave an extraordinary notice of dismissal with an immediate effect.
e) Section 77 of the Proposal determines the amount of severance pay in a sum equal to the employee's average wages due for the period of exemption from work, which is lower than the redundancy pay on the basis of average wages specified by the prevailing Labour Code. If the government - on behalf of the employers – determines the amount of the severance pay in the sum equal to the employer's average wages due for the period of exemption from work everywhere, as a compensation, the notice period should commence not on the next day after the day of termination but – according to the legal rules of the above mentioned Member States – on the first day of the week following the day of the receipt of the dismissal notice or on the last day of the current month or the first day of the consecutive calendar month.
f) It would be worth considering that similarly to the Austrian and Belgian law – on behalf of both the employer and the employee - the notice period shall be regulated – affecting the amount of redundancy pay, as well – differently depending on the fact whether it concerns a worker (Arbeiter) or an employee (Angesetellte). As regards employees, it would be sensible to determine a longer notice period and a higher amount of redundancy pay because of the higher quality of work. It would also be proper to take over the Polish legal regulation according to which the termination of employment by the employer is prohibited during the first 14 days of the probation period in the case the employee gets sick.
g) Finally, it would also be useful to consider that in the case of ordinary dismissal the works council and in the lack of it, the trade union having representation at the employer shall be listened to prior to dismissal and asked for an opinion and prior to the termination of employment negotiations shall be entered into with the employer. In our opinion, this would be in alignment with the new – we think sensible – Hungarian employment policy.

3. Collective redundancy

1) Sections 71-76 of the Proposal regulate the collective redundancy. The criterion in Section 71 subsection 1 is defined in compliance with the criterion of the EK Directive No. 98/59, which may be implanted in the national law alternatively. Accordingly, there is a collective redundancy – depending on the average number of employees - in the case of a dismissal of at least ten workers, when the average number of employees over the past six months is more than twenty but less than one-hundred; at least ten per cent of the workforce, when the average number of employees over the past six months is greater than one hundred, but less than three hundred; or at least thirty workers, when the average number of employees over the past six months is three hundred or more based on economic or structural reasons. It is worth mentioning that pursuant to the previous EGK Directive of No. 75/129 it was regarded as a collective redundancy if the number of employees was reduced by at by at least five employees in undertakings of 10-20 employees, though this criterion was eliminated by the new Directive and even the now prevailing Labour Code does not contain it. Another criterion of both the old and the new Directive, which may be alternatively chosen by the Member States, is that a dismissal is regarded as a collective redundancy when 20 employees are reduced within 3 months due to economic-organisational reasons. Neither the now prevailing Labour Code nor the Proposal contains

this latter criterion. The Proposal contains – similarly to the Labour Code – the first criterion literally.

Pursuant to Sections 7 and 74 of the Proposal – similarly to the prevailing law – when an employer contemplates terminations of the employment of the above mentioned number of employees for reasons of an economic nature, he/she is obliged to notify the competent authority one week before the negotiations begin. The employer is also obliged to inform in writing the employees' representatives (first the works council and only in the lack of it one or more trade unions at the undertaking and if there are none of them, the representatives delegated by the employers) regarding the number of workers likely to be affected and the period over which the terminations are intended to be carried out, the aspects of choosing the workers for redundancy and the possibilities for avoiding or reducing the number of workers likely to be made redundant (Section 7 of the Proposal)

According to subsection 3, the employer's obligation for consultation lasts until an agreement is reached but at least for 15 days. This kind of phrasing keeps the legal practice in uncertainty. Namely, negotiations may last without end in accordance with this rule and the employee will probably endeavour this. Nevertheless, the employer will stiffen and after 15 days, he/she will break up negotiations. Section 94/C subsection 3 of the now prevailing Labour Code makes it possible to prolong the consultation for 30 days. However, this is not in compliance with the Directive, either, since pursuant to the Directive, negotiations last – as a main rule – for 30 days, which period may be prolonged with another 30- day period. Though, if the agreement is reached in a short period of time, this period may be shortened to 15 days.

It is sensible that Section 7 of the Proposal took over the regulation from the prevailing Labour Code according to which the aim of the negotiations is to avoid or reduce redundancy. However, it does not mention how to select workers who are to be made redundant. Whether to use the social aspects applied in most West-European countries or the principle of seniority connected to out placement insisted by IMF and the World Bank? The prevailing legal regulations and the Proposal contain both possibilities. Furthermore, Section 73 subsections 4 and 5 seem also problematic. Namely, these sections determine that the decisive element in scheduling the terminations is the decision of the employer while in reaching an agreement it is the employer's proposal. Beyond that it has to be reported on whether the ordinary dismissals executed apart from the framework of collective redundancy during or just before the period when the reason of economic nature existed were lawful or not. These regulations expressly reflect the employer's supremacy.

To sum up the above mentioned, it seems to us that the Proposal endeavours to decrease the disadvantages of collective redundancy, however, by making it possible to reduce the employer's compulsory negotiation period to 15 days, it supports the fast redundancy based on the principle of seniority insisted by the IMF and the World Bank. In Hungary, namely, the redundancy practice at most places reflects the principle of deciding on whom to make redundant depending on the employment period starting from shorter employment period towards longer employment period. We wonder whether old Member States follow the same procedure.

2) Following the legal comparison in the order of the previous title:

A) In the German legal systems

a) In Germany the Massenentlassungsgesetz follows the first criterion of the Directive and the dismissal is regarded as a collective redundancy when at least 5 workers are to be dismissed by an employer employing between 20 and 60 workers, or at least ten per cent of the workforce is to be dismissed when the average number of employees is between 60 and 500 or at least thirty or more workers are to be dismissed when the average number of employees is 500 or more. The beginning point is the first criterion of the Directive with some amendments. When this requirement of dismissal demanded by reason of an economic nature connected to the 30 day interval exists, the employer is obliged to initiate consultation with the works council, in the lack of it with the representatives of the employees' trade unions or representatives delegated by the employers and simultaneously he/she is required to notify the regional employment authority, as well. The period defined for consultation with the employees' representatives is 30 days which may be prolonged up to 60 days. The consultation begins on the basis of the social selection plan made by the employer where the most important aspect is to negotiate the possibilities of reducing redundancy. If there remained workers who are to be dismissed in spite of all this, they are dismissed according to the social selection plan. The terminations are required to be socially justified. Likewise in the cases of ordinary dismissal, the worker dismissed by collective redundancy is entitled to a redundancy pay (Abfindung) of half month salary multiplied by the number of years spent in service. /40/

b) In Austria pursuant to the labour law, there is a collective dismissal if the number of employees is to be reduced within 30 days by at least five employees in undertakings of 20-99 employees; by at least 5 per cent of the employees in an establishment with 100-600 employees; by at least 30 or more employees in an establishment with at least 600 employees. As concerns obligations for notifications, consultation and its length, the Austrian regulations are similar to the German ones. Another similarity with the German law is that even in Austria a social selection plan shall be made and the dismissals shall be socially justified. The difference from the German legal system is that the works council has a stronger power. If the works council unanimously opposes the employer's decision, first of all because of disputing the social selection plan, the employer's decision may be attacked by both the works council and the employees affected. Those who are affected by the collective redundancy are entitled to a redundancy pay (Abfindung) like in the German law. /41/

c) In the Dutch labour law, pursuant to Wet melding Collectief Ontslag, there is a collective redundancy when the employer contemplates to dismiss 20 employees for reasons of an economic nature within a period of 90 days. In this case the employer is required to notify the works council and the employment authority 30 days prior to consultation. The duration of consultation here is also 30 days and it may be extended to 60 days. According to the established legal practice, terminations are based on a social selection plan. The employer may not execute his/her intentions for terminations in respect of both the number of the employees planned to be dismissed and the selected persons for dismissal without the prior approval of both the works council and the employment authority. The redundancy pay is determined by 'AxBxC', the opinion of the canton judges, but most of all, A and B that is age and service period. /42/

B) The French-Latin Legal Systems

a) In France pursuant to Sections 321-1 and the subsequent sections of the Cod du travail, there is a „licenciement collectif" (collective redundancy) when the employer at a company with 50 or more employees contemplates to dismiss 10 or more employees within one month. The notification obligation is similar to that of the previously described three Member States and likewise in the German/Austrian labour law, in order to execute collective redundancy the employer in France is required to make a social selection plan and enter into negotiations about it. The duration of the consultation depends in the French law on the number of employees to be dismissed: 14 days if the number of employees to be dismissed remains under 100 and 21 days if the redundancy affects between 100 to 240 employees, and 28 days if this number is over 249. Pursuant to the Cod du travail, an economic expert, who is appointed by the employment authority at the first sitting, is to be initiated in the negotiations. The works council may require a legal expert to be initiated, as well. However, the works council has only the right for giving an opinion and proposing but it has no co-decision right. The regulations concerning redundancy pay are similar to those in the German law with the exception that in the case of employment of less than a year, it is not compulsory to give a redundancy pay. /43/

b) In the Italian labour law there is a collective redundancy if 5 or more employees are contemplated to be dismissed by an employer from a company with 15 or more employees within 120 days. In this case the employer is required to inform in an open letter the representative of the trade union at the company and the biggest trade union in the region. Within 7 days from the notification the consultation is to be initiated. The duration of the consultation is 45 days and 23 days if the redundancy is likely to affect less than 10 employees. The collective agreements say that the employees contemplated to be dismissed shall be selected taking into considerations social aspects, as well, besides the quality factors of the workforce. The amount of redundancy pay equals the sum of the payment due for the termination period. In the course of redundancy those who are protected from termination will be put on a special list and will enjoy priority during job placement. In Italy the amount of redundancy pay is the average payment for 36 months. /45/

c) In Spain pursuant to the labour law, there is a collective dismissal if the number of employees is to be reduced within 90 days by 10 employees in undertakings of 100 employees; by at least 10 per cent of the employees in an establishment with 100-300 employees; by at least 30 or more employees in an establishment with at least 300 employees. The notification obligations are different from the above described solutions in a way that in Spain and Portugal - besides the employment authority and works council - the trade union operating at the undertaking is also required to be initiated in the negotiations. The duration of the consultation is 30 days and it is only 15 days if the redundancy affects less than 15 employees. If the undertaking employs more than 50 employees a social selection plan is required to be made by the employer. /46/

C) In the Scandinavian Member States

a) In Denmark it is regarded as a collective redundancy - pursuant to the 'Lov am kollektve ajkedigelser' - when at least 50 % of the employees are dismissed for reasons of an economic and structural nature at a company with employees of more than 100 within 30 days. In this case after the notifications having been sent to the works council and the employment authority, a consultation lasting for 6 weeks begins about the reduction of the

redundancy. The most important factor concerning redundancy is that it shall be on the basis of social selection and be socially justified. The employees affected by the redundancy are entitled to an average salary of 50 days. The works council has the right for recommendations while the affected employees have to right to appeal redundancy. /47/

b) In Sweden collective redundancy is also regulated by a separate act, the 'Fromjandelagen'. Pursuant to it, there is a collective redundancy - regardless of the size of the undertaking – when the employer contemplates to dismiss 5 or more employees. The employer is required to inform the regionally competent employment authority 2 months prior to the reason for dismissal. The obligation to notify the employees' representatives depends on the planned number of employees affected by the redundancy. If the number of the employees affected by the redundancy is between 5 and 25, the employer shall notify the employees' representatives - by simultaneously sending them the redundancy plan based on a socially justified selection method - 2 months, if the number is between 25 and 100, 4 months and in the case of a number of 100 employees 6 months prior to redundancy and he/she is also required to suggest the date for the commencement of the consultation, which may last for 30 days. /48/

c) In Finland the aim of the consultations with the employment authority and the works council lasting for 30 days is to cut down on the number of employees affected by redundancy. In order to achieve this, there is a special rule according to which the employer is required – while making the redundancy plan – to retrain employees who may be retrained or pre-superannuate those who are eligible for pre-retirement. However, the employer is not obliged to make a socially justified selection plan. /49/

D) In the Anglo-Saxon legal systems

a) In the United Kingdom - pursuant to TULR(C)A - when the employer intends to dismiss 100 or more employees within 90 days for reasons of an economic nature, he/she is obliged to notify the regionally competent employment authority and the employees' representative organ composed of independent delegates of the trade union 30 days prior to the planned redundancy about the date of the commencement of the consultation and the scheduling of the redundancy. The consultation period lasts – periodically – for 90 days. According to TULR(C)A , the aim of consultations is first of all – if possible - to avoid or reduce redundancy and to reduce employees' burden. In the selection of employees to be made redundant the most important criterion is - when this number is under 100 - the principle of seniority, and when this number exceeds 100, the selection is based on socially justified criteria. /50/

b) In Ireland the collective redundancy is regulated by the Protection employment Act. The dismissals are already regarded as collective redundancy when the employer contemplates to dismiss at least 5 employees at a company with 10 to 20 employees within 30 days. The Irish law also uses the first alternative of the Directive. The employer is obliged to inform the employment authority and the employees' representatives 2 weeks in advance and simultaneously to send the redundancy plan and propose a date for the commencement of consultations. The consultations last for 30 days and this period may be prolonged. The employees are primarily selected for redundancy on the basis of work-evaluation aspects. Pursuant to the Dismissal Act, the employees made redundant are entitled to an average wage for 104 weeks as a redundancy pay and during this period - upon new employment with the aim of economic reconstruction - they have a priority right for re-employment. /51/

E) In the Central-European new Member States

a) The Polish Codex Pracy uses the first alternative of the Directive as the criterion of the collective redundancy. The trade unions as the employees' representatives, in the lack of them, the works council and the competent employment authority shall be notified 20 days prior to the execution of the redundancy. The consultations –lasting for 30 days- shall be held with the participation of trade unions and the employment authority. Dismissals shall primarily be based on quality aspects and just secondarily on social ones. /52/

b) The Czech and Slovak Codex Prace – similarly to the Hungarian law – took over the first alternative of the Directive as the criterion of the collective redundancy. Consultations – like in the Directive – last for 30 days. The employer shall notify the employees' representatives and the employment authority about the redundancy schedule and the proposed date of the commencement of consultations 30 days in advance. The statutory aim of the consultations is to reduce the number of employees to be dismissed and to ease the disadvantages of the redundancy. The employees affected by the redundancy are entitled for a 3 month average salary. /53/

c) Pursuant to Sections 68-72 of the Roman Codul muncii (Labour Code) it is a collective redundancy – in compliance with the first criterion of the Directive – when 5 employees from a company employing 10 to 20 employees are dismissed. The employer shall notify the employment agency and the employees' representatives 5 days prior to the execution of terminations. The duration of consultations is 30 days, which can be shortened to 15 days. Those affected by the redundancy are entitled to redundancy pay and when the economic crises at the company is over, there is an obligatory re-employment for 9 months from the termination of the employment relationship. /54/

3) To sum up, as regards the Hungarian situation we would like to emphasize that in most EU Member States the selection of the employees for redundancy is based on social aspects. This is partly true even for the United Kingdom where in order to maintain work peace and social calmness in the cases of the dismissals of a larger number of employees, the selection of the employees is socially to be confirmed. However, in the Scandinavian states and Ireland, the quality of work and the qualification are the key factors in the selection. This latter shows up in the above described four new Member States, too. The principle of seniority itself does not come up anywhere. Taking into consideration all the above written, it would be reasonable in Hungary to co-use both the principle of social and quality-based selection method and only finally to use the time spent in the employment at the company.

In most countries the period of redundancy is 30 days and in only 3 countries it lasts for 90 days. These 3 countries are Holland, Spain and the United Kingdom. This latter solution is better for employees since the 30 day period –because it is too short – may be eluded easier. To a certain extent therefore there is a rule according to which more work plants or parts of plants are regarded as one as concerns the determination of collective redundancy, which rule shows its existence the most remarkably in the Italian law, but it also appears in the Proposal. However, considering the greater possibility for the elusion of the 30 day period, it would seem proper to leave out from the Proposal the presumption of regarding ordinary dismissals executed near the period when the problems at the undertakings emerge rightful or consider the use of the 90 day period for executing redundancy.

As the duration of consultations is concerned, it is - in almost all countries – 30 days, which period may be prolonged but it may also be shortened. Compared to that, the 15 day duration in the Proposal is too short, which in practice may bring the danger of the automatic use of the principle of seniority as a criterion for redundancy. The obligation for notifications of the employment authority and the employees' representatives in most Member States is required weeks earlier than in the Hungarian Proposal, or the prevailing Labour Code, which both require too short a period. Moreover, neither the prevailing Labour Code, nor the Proposal contains re-employment obligations for the employers after the crises ends. Neither do they regulate the situation when the employer made use of the means of transferring the employee into another position but the employee is not able to fulfil or properly fulfil the new job requirements due to personal reasons not imputable to him/her and therefore his/her employment is terminated, he/she should be eligible to redundancy pay from the company having transferred him/her into the new position. Contemporaneously, the involvement of a regulation in the Labour Code according to which the employee who contributed to the economic crises existing at the company would not be eligible to a redundancy pay would be in favour of the employers. In compensation - in order to maintain work places more efficiently - the employees' representatives should achieve that even making 5 employees redundant at companies in the size of near the border-line to be assessed as a small- or medium-sized enterprise should be regarded as a collective redundancy. From social, employment and safety policy's point of view, it would be reasonable to introduce the social selection principle in the new Labour Code at least in the cases of redundancies affecting a larger number of employees and also the solution of putting redundancy affected employees on a priority list for easier finding new employment.

4. Summary Dismissal/Extraordinary termination

Sections 78 and 79 regulate the summary dismissal, termination with an immediate effect, which – except for section 79 – is the synonym for extraordinary dismissal. It is of great importance that Section 78 subsection 1 of the Proposal defines the criterion of an extraordinary termination in the same way as the now prevailing Labour Code. Point a) defines the circumstances upon which an extraordinary dismissal may be executed similarly to the above discussed Member States, namely upon the infringement of important obligations intentionally or with gross negligence to a large extent. The now prevailing Labour Code and the Proposal both emphasize the subjective side of the infringement of obligations arising from employment contracts, which is contrary to the solutions of the old Member States, which rather apprehend the objective side of the infringement of employment contracts.

They determine primarily the serious or rude (grobe oder schwere Verletzung), or repeated infringements of obligations arising from employment contracts as the reasons for terminations with an immediate effect and the extraordinary termination. /55/ It would be worth considering that the reason defined under point a) should be rephrased similarly while point b) is problematic because of the definition causing legal uncertainty.

The reason namely 'If the employee otherwise showed a conduct, which makes the employment impossible' should be complemented – as a synthesis drawn from the phrasing of the above discussed Member States – so that the conduct making employment

impossible seriously damages the other party's or the work collective's economic, existential interests or interests of honour, health and work protection. Just to mention as an example, the law of the United Kingdom speaks of rude or repeated infringement of contractual obligations to a great extent and a seriously endangering conduct in connection with work. /55/ The French and Belgian law both emphasize the seriously condemnable character of the infringement of the contractual obligations. /56/

Section 78 subsection 2 of the Proposal – in a similar way to the West-European legal systems – prescribes that extraordinary terminations – like ordinary terminations – shall be put in writing with reasoning. However, it does not say anything about hearing prior to summary dismissals, although in all of the discussed West-European Member States it is a compulsory phase in the case of extraordinary and summary dismissals. It is only the Dutch law which makes it possible to neglect formal hearing; however, in practice the employee to be made redundant is entitled to respond to the reason of termination prior to dismissal. /57/ It would be worth considering the prescription of hearing before execution of the termination. This is how some potential misunderstandings may be cleared up.

5. The Legal Effects of Unlawful Terminations of Employment

Sections 82-84 of the Proposal stipulate the consequences of unlawful terminations of employment. As far as compensation due to the employee in these cases is concerned, Section 82 subsection 2 sets the limits as of 18 month pay due for the period of exemption. Pursuant to Section 83, the employer would be obliged for reinstatement of the employee only if the unlawful termination injured the principle of fair treatment or the employee was an employees' representative at the time of the termination. The new regulations of the Proposal want to abolish the now prevailing rule of Section 100 of the Labour Code according to which there is an obligation for full compensation and reinstatement as a main rule instead of which the labour court imposes compensation of 2 to 12 month average pay at both the employee's and the employer's (except for the case of termination resulting in discrimination) request.

On the contrary, the legal regulations in the old Member States – with a few exceptions –provide an opportunity not only for full but also for in corporeality compensation (Germany, Austria and Holland) when the termination damages even the employee's honour. In the case of the new Member States, the Codul muncii and the discussed Polish Codex Pracy, the Czech and Slovak Codex Prace stipulate that the employer shall compensate all the employee's pay dropped out and beyond this his/her actual damage. This rule also applies in most of the old Member States' legal systems – with the difference that – as opposed to the now prevailing Labour Code regulations – the pay which was given him/her as compensation from other employment relations shall not be taken into consideration. /58/. The compensation of employees is limited only in Italy and Ireland by setting a maximum limit for compensation – 15 month pay in Italy and 2 month pay in Ireland. /59/ The limit is much higher in the United Kingdom where the employee may be given a compensation pay in the amount of maximum 380 GBP weekly, and the exact amount – similarly to the principle of AxBxC of the Dutch canton court practice – depends on the employee' age, service period and weekly pay. Besides that, the compensatory damages shall also be taken into consideration, the maximum of which is 65.900 GBP /60/

In the case of unlawful terminations initiated by the employer – except for Austria, Belgium and the above discussed 3 Slavic new Member States /61/, in all legal systems – similarly to the now prevailing Labour Code – the prior demand is the reinstatement, which may be redeemed by the statutory amount of severance pay. /62/ In the Member States where this is not the case, the demand tends towards severance pay and compensation. The most refine example for that is the English solution discussed above. Taking into consideration all the above written, it would be reasonable to uphold the regulations of the now prevailing Labour Code.

Section 84 of the Proposal contains stipulations on the compensation the employer is entitled to in the case of the unlawful termination of employment initiated by the employee. The amount of compensation is equal to the average wages due for the period of exemption from work payable for the standard notice period. This amount of payment is required to be paid even when the employee does not hand his work over in the prescribed order. As far as the legal consequence of the first case is concerned, this is in compliance with the European legal system. In the second case, however, it would not be proper to use the same since it gives chances for the employer's corrupt practice to a large extent. It is much more sensible to lay stress upon the employer's the opportunity for the demand of his damages.

In the case of an obligatory payment of 5 month pay due for the period of exemption from work as an average compensation fee in the case of the termination of an employment contract made for a definite period of time by the employee, the employer would groundlessly enrich in the case of an employment relation of less than 3 months. Therefore, when the employee is employed for less than 3 months, the amount of damages should be limited to the amount of the payment for exemption from work due for only the period which is left from the definite period of time.

Regarding the possibility for the reimbursement of the actual damages of the employer beyond the above written, it would only be reasonable and not injuring equal opportunity if the limitation regarding the employee's demand for compensation towards the employer would be eliminated from the Proposal.

Notes

2 Zöllner/Loriz/Hergenrőder, Arbeitsrecht, 6. Aufl. C.H. Beck Verlag, München, 2006. 4.III. , 12.II.5.; Löwisch, Arbeitsrecht, 7. Aufl. Werner Verlag, Düsseldorf, 2004. 1.f.

3 Zöllner/Loriz/Hergenröder, 6.II.

4 Zöllner/Loriz/Hergenröder, 24.V.

5 Löwisch, 1256-1266, 1294

7 Pelzmann, Arbeitsrecht in Österreich, Rz. 135-140., in: Hennsler/Braun (Hrsg.), Verlag Dr. Otto Schmidt, Köln, 3. Aufl. 2011.Hereinafter.: H/B.

9 ibidem

10 Hoogendoorn/Rogmus, Arbeitsrecht (továbbiakban röv.: Arbr.) in Niederlanden, Rz. 18-137., H/B. 807-819.

11 ibidem

12 Weltzer/Caron, Arbr. in Frankreich, Rz. 116-128., H/B. 360-363.

14 Matray/Hübinger, Arbr. in Belgien, Rz. 93 és 110-119., H/B. 168-179

15 ibidem
16 ibidem
17 Castegnaro, Arbr. in Luxemburg, Rz. 74-75., H/B. 77-78
18 Radoccia, Arbr. in Italien, Rz. 34-37., H/B. 304-314
19 Calle/Prehm, Arbr. in Spanien, Rz. 125-127.,H/B. 1432-1434.
20 ibidem
21 Fedtke/Fedtke, Arbr. in Portugal, Rz. 86., H/B. 1090
22 Steinrück//Würtz, Arbr. in Danemark, Rz. 86-97+113-116.., H/B. 235-238.+244
23 Kurz, Arbr. in Schweden, Rz. 108+130., H/B. 1250-1253.
24 Leppa/Henne, Arbr. in Finnland, 125-130+142., H/B. 119-121+142
25 Leppa/Henne, Rz.144-148+152., H/B.324-326
26 ibidem
27 Hart/Taggart, Arbr. in Grossbritannien, Rz. 144-148+152., H/B. 334-336.
28 Hart/Taggart, Rz. 58-63., H/B.513-515.
29 Hart/Taggart, Rz. 70-71., H/B. 517.
30 Erken, Arbr. in Irland, Rz. 122-126., H/B. 1029-1030
31 Erken, Rz. 74-79., H/B. 574-577
32 Erken, Rz. 73. H/B. 574
33 Zimoch-TuhoŁka//Malinowska-Hyla, Arbr. in Pohlen, 181 H/B. 1849
34 Linhart/Ranics, Arbr. in Tschechien, Rz. 119-120. H/B. 1494.
35 Markecova/Klimanova, Rz. 11-113., H/B. 136-1363
36 Gotha, Arbr. in Rumenien, Rz. 137-155.,. H/B. 1152-1153.
37 Gotha, Rz. 146-156., H/B. 1155-1156.
38 Gotha, Rz. 137-145., H/B. 1150,sk.
39 Gotha, Rz. 166-167. H/B. 1156.
40 Zöllner/Loriz/Heldenröder , 25. I.1-3.; Löwisch, 1331-1435; Bitk. Massenentlassung nach eutpaischen und nationalem Recht, In: Ünnepi tanulmányok, III., Novotni Kiadó, Miskolc, 1997. 28. s. köv. o.
41 Pelzmann, Rz. 149-154., H/B. 956-957.
42 Hoogendoorn/Rogmas, Rz. 172-178.,H/B. 819-820
43 Welter/Caron, Rz. 19-145., H/B. 363-366.
45 Radoccia, Rz.347-353., H/B.665-667
46, Calle/Prehm, Rz. 125-135+144, H/B. 1433-1437; Fedke/Fedke, 1091. s köv.
47 Steinrücke/Würz, Rz. 116., H/B. 245.
48 Kurz, Rz.141-143., H/B. 1255
49 Leppa/Henne, Rz. 156-167., H/B. 17-130
50 Hart/Taggart, Rz. 72-78., H/B. 518-521.
51 Erken, Rz. 85., H/B.579.
52 Zimoch-Tuhołka/Malinowka, Rz.167-168., H/B. 1039-1040
53 Linhart/Ranics, Rz. 114-115., H/B. 1363-1364; Markecova/Klimanova, Rz.119-17., H/B. 1363-13-64
54 Gotha, Rz. 165., H/B. 1156-1158
55 Hart/Taggart, Rz.58-63., H/B.514
56 Welter//Caron, Rz. 114., H/B, 361.
57 Hoogendoorn//Rogmans, Rz. 150-155., H/B. 813-815

58 Löwisch, 1191.; Hennsler/Braun (Hrsg.), L. see at each country under the title of Haftung des Arbeitnehmers
59 Radoccia, Rz. 338-339; Erken, Rz. 79-82
60 Hart/Taggart, Rz. 67-68
61 Pelzmann, Rz. 195-200; Matray/Hübinger, Rz. 100; Zimoch-TuchoŁka/Malinowska-Hyla, Rz. 194; Linhart/Ranics, 115; Markecova/Klimanova, Rz. 16-127;
62 Löwisch,1191-1196; Steinrücke/Würz, Rz.119, H/B. 247; Welter/Caron, 180-186; Radoccia, 337-338; Fedtke/Fedtke,Rz.103; Calle/Prehm, Rz.123; Kurz, Rz. 156, Gotha, Rz.170

European Integration Studies, Volume 9. Number 1. (2011) pp. 109–120.

POSITION OF VICTIMS IN THE CRIMINAL PROCEDURE IN THE CONTEXT WITH REQUIREMENTS OF THE EUROPEAN UNION*

ERIKA RÓTH
Associate Professor
Head of Department of Criminal Procedure Law and Penitentiary Law
University of Miskolc
civerika@uni-miskolc.hu

Protection and safeguarding victims' rights has a relatively short history.[1] International conventions, national constitutions and other sources of national laws aimed at protecting first of all the accused against the arbitrary administration of justice and ensuring their rights. Expansion of the catalogue of accused's rights, widening the circle of guarantees may be followed in the documents concerning human rights and in the practice of the control organizations. Meanwhile the victim was a considerably unnoticed participant of the criminal procedure.[2]

Demand on strengthening the position of victims emerged only in the 70's of the last century and has become more emphasised in the special literature since the 90's. The European Union recognised only before the millenary that some questions connected with the victim's position might be its business. This might originate in the freedom of persons to travel without restrictions within the European common space as one of the classic European freedoms. The citizens of the Member States who cross the borders freely have a good chance to become victims of crime in another state (research suggests that people are about five to ten times more likely to become victims of crime during their two-week holiday abroad than during any other two weeks of the year[3]), and consequently victims in

---

* This study is the completed and edited version of the lecture read in the habilitation process on 1 December 2010. Lector in English: Rita Rácz.

1 A comprehensive research was carried out by one of the founding fathers of the Faculty, Ferenc Kratochwill who was the first dean of the Faculty. See: Ferenc Kratochwill: A sértett jogi helyzete a magyar büntető eljárási jogban. A jogi felelősség és szankciórendszer fejlesztésének elméleti alapjai c. OTKA kutatás 9. téma. (The legal status of the victim in the Hungarian Criminal Procedural Law. Theoretical basis of the legal responsibility and the development of system of sanctions. OTKA research, topic 9) ELTE Faculty of Law, Budapest, 1990. and Ferenc Kratochwill: A bűncselekmény áldozatainak kártalanítása. (Compensation of crime victims.) Kriminológiai Közlemények 38 – 39. (ed.: Klára Kerezsi). Hungarian Association of Criminology, Budapest, 1991. pp. 65 – 83. Questions of roles played by the victims in the criminal procedure were examined by Anna Kiss in her PhD thesis. Anna Kiss: A sértett szerepe a büntetőeljárásban. (The role of the victim in the criminal procedure), Miskolc, 2006.

2 The Hungarian situation was described well by Tibor Király when he wrote: 'There are only a few systems of law where the victim would be in such a subordinate procedural position as in ours.' Tibor Király: A büntető eljárási jog útjai. (Ways of the Criminal Procedural Law.) Magyar Jog, 1985/3-4, p. 258

3 Project Victims in Europe. Implementation of the EU Framework Decision on the standing of victims in the criminal proceedings in the Member States of the European Union. p. 76. The final

the criminal procedure. People victimised in a state other than their country of residence face more difficulties than in their own country including language problems and that they do not understand the legal system of the host country and should stay in a foreign country for a longer period or to return there several times. Extra costs emerging due to these circumstances should be sponsored, at least in part, by them.

This seems to be the main motivation for the European Commission when it started to elaborate the Framework Decision on the standing of victims in the criminal proceedings.[4] Of course it was not practically feasible to give more rights to the cross-border victims than to the national victims, so victims of crimes living in the state when the crime was committed have the same rights in the criminal procedure. Only Article 12 of the Framework Decision concerns especially the foreign victims.

More than 10 years ago, among the conclusions of the European Council's meeting held in Tampere on 15 and 16 October 1999 requirements were formulated, which provided basis for adoption of the Framework Decision[5] on the standing of victims in criminal proceedings of 15 March 2001. It was adopted due to the initiative by the Portuguese Republic, which I have to emphasise because the Portuguese Association for Victim Support played an active role in the examination of the actual implementation in the Member States as well.

As it is written in the Tampere conclusions minimum standards should be drawn up on the protection of victims of crimes, in particular on crime victims' access to justice and on their right to compensation for damage, including legal costs. In addition, national programmes should be set up to finance measures, public and nongovernmental, for assistance to and protection of victims. (Recital 3 of the Framework Decision)

Introductory provisions of the Framework Decision contain that Member States should approximate their laws and regulations to the extent necessary to attain the objective of affording victims of crime a high level of protection, irrespective of the Member State in which they are present. (Recital 4 of the Framework Decision)

The adoption of the Framework Decision was the first time when a so-called hard law instrument concerned the victims of crime at international level, so we can say that it was the milestone of the victim support movement. [6] Interpretation of some rules formulated in the Framework Decision has already required the decision of the European Court of Justice in the framework of the preliminary ruling procedure.

Most provisions of the Framework Decision had to be implemented very quickly into national laws, and report on implementation must have been lodged for the General Secretariat of the Council and to the Commission so that the Council shall have access to

report of the research available on the website http://www.apav.pt/vine/. (Hereafter: Project Victims in Europe)

[4] M. S. Groenhuijsen – A. Pemberton: The EU Framework Decision for Victims of Crime: Does Hard Law Make a Difference? European Journal of Crime, Criminal Law and Criminal Justice 17 (2009) p. 44

[5] Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, OJ L 82., 22.3.2001., p. 1.

[6] Project Victims in Europe. p. 7 and M. S. Groenhuijsen – A. Pemberton p. 43

measures taken by the Member States to comply with the provisions of the Framework Decision. (Article 18) [7]

Guarantees provided by the Framework Decision might be sorted in different ways:
From the point of view who enjoys the rights we can speak about two groups.

a) the majority of guarantees should be applied to all victims of crime
b) there are rights which concern only the victim who participates in the procedure as witness or party (private party, private accuser, substitute private accuser).

So safeguards for communication prescribed in Article 5 and specific assistance – among others legal assistance – provided in Article 6, were restricted only to the victims who have the status of parties to criminal proceedings. Similarly, only victims who have the status of parties or witnesses are afforded the possibility of reimbursement of expenses incurred as a result of their legitimate participation in criminal proceedings (Article 7).[8]

Taking into consideration the character of the requirements we can divide them into two types as well.

a) Some guarantees require very definitive measures ('each Member State shall guarantee', 'each Member State shall ensure')
b) while concerning other articles the instruction is quite vague and Member States shall only seek to promote or encourage something.

The difference in the formulation of the requirements means different approaches during the control of the implementation. When Member States have to have legal regulation they have to prove that the law changed. When only seeking or encouraging is required it is difficult to demonstrate that the states, which usually would like to provide more positive picture than the reality, did not transpose the requirement adequately. Many provisions have been transposed by way of non-binding guidelines, charters and recommendations. The Commission cannot assess whether these are adhered to in practice.[9]
Further problem is that the Commission has no possibility to verify the veracity of information provided for it or to request follow-up information. [10]

---

[7] The first report was sent on 16.02.2004 - COM(2004)54 final/2 -, and the second one on 20.4.2009 – COM(2009) 166 final. It is worth mentioning – as it is written in the first report – that although, Article 18 requires that by 22 March 2002 Member States should 'forward to the General Secretariat of the Council and to the Commission the text of the provisions enacting into national law the requirements laid down by this Framework Decision', on 22 March 2002 no Member State had notified the Commission of measures taken to transpose the Framework Decision. The Commission published a first report on 16 February 2004 which examined the transposition as of 25 March 2003 when only AT, BE, FI, DE, IT, IE, LU, PT, ES and SE had sent relatively complete contributions on transposition into their national legislation. The situation was very similar as regards the second report. The Commission wrote as follows: Despite Article 18 laying down an obligation for Member States to submit implementing legislation to the Commission by 22 March 2006, in November 2007 only 13 Member States (AT, DK, DE, ES, LU, NL, PT, SE, UK, CZ, HU, LT, PL) had sent relatively complete contributions. The Commission sent reminders to the Member States; the final deadline was set at 15 February 2008. This report is based on the transposal situation on 15 February 2008, almost two years after the 22 March 2006 deadline.

[8] See about it M. S. Groenhuijsen – A. Pemberton p. 46

[9] Second report: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do? uri=CELEX :52009DC0166:EN:NOT

[10] Project Victims in Europe p. 12 and M. S. Groenhuijsen – A. Pemberton ibid p. 49

Organisations of the EU entitled to control the transposition of the Framework Decision cannot evaluate the practice and they cannot review how satisfied those are the strengthening of whose rights was aimed at, i.e. victims in the criminal procedure.

To stop the gap was the aim of three organizations – the Victim Support Europe, the Portuguese Victim Support Organisation (APAV) and the Dutch research institute Intervict, affiliated with Tilburg University by supplementing the 'official' report. During the project they involved experts belonging to different organisations as ministries, criminal courts, police, NGOs, universities asking them to fill in the online questionnaire.[11]

One of the problems was - as it was written in the project report - that 'the data from different experts from the same Member States regularly conflicted with each other'.[12]

Although I think that the survey report may suffer a small number of shortcomings, most information is suitable for drawing general conclusions.

Three documents may provide, first of all, a starting point for examination of the situation of victims: the Framework Decision itself, the report prepared by the Commission on the basis of information sent by the Member States and the survey performed by the above mentioned organisations.

We have to keep in mind that prior to the Framework Decision some documents adopted at international level contained requirements aiming at the strengthening of the victim's role.[13] But these declarations, charters, recommendations which should not be despised after the adoption of the Framework Decision, as they have an effect on the states other than EU Member States and in questions different from those affected in the Framework Decision.

In order to understand the role of the Framework Decision in the national legislation and in the national judicial system we cannot avoid accounting for the fact how the position of victim has changed in our country since the last century following the formulation and adoption of the text of the Framework Decision.

The resolution of the Hungarian Government number 2002 of 1994 (17.01.) on the conception of the criminal procedure outlined the basic requirement which the draft code should have met. 'According to point 6 of it possibilities of exercising victim's rights

[11] The author was also asked to evaluate the situation in Hungary by filling in the questionnaire.

[12] Project Victims in Europe p. 19

[13] The next documents have to be mentioned as examples:
Recommendation No. R (85) 11 of the Committee of Ministers to Member States (Council of Europe) On the Position of the Victim in the Framework of Criminal Law and Procedure (I think that that recommendation is the most similar to the Framework Decision as concerns its content); Recommendation No. R (87) 21 on Assistance to Victims and the Prevention of Victimisation (which recommends the governments of the Member States to take measures in order to improve the situation of victims); Recommendation No. R(99) 19 concerning mediation in penal matters; Recommendation No. R(2006) 8 on assistance to crime victims; A/RES/40/34 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the General Assembly of the United Nations on 29 November 1985. International documents adopted before the preparation of her paper were analyzed accurately by Ilona Görgényi: A bűncselekmény áldozata a büntetőeljárás során az Európai Unióban. (Victim of crime in the criminal procedure in the European Union) In: *Az Európai Unióhoz való csatlakozás kihívásai a bűnözés és más devianciák elleni fellépés területén. (In: Challenges of the joining the European Union in the fields of crime and other deviances)* (Ed.: Miklós LÉVAY) Bűnügyi Tudományi Közlemények (Review of Criminal Sciences) 7. Miskolc, Bíbor Kiadó, 2004. pp. 267 – 301

should be broadened. Within appropriate limits it should be permitted that the victim may act as substitute private accuser.' These requirements were not consequences of the Framework Decision but suit to the international trend of strengthening the position of crime victims.

Entering into force of the new Act on Criminal Procedure was the most significant step of this process, but we have to keep in mind that during five years between the adoption and entering into force the text of the Act changed significantly. Although some modifications of the Code on Criminal Procedure concerned the position of victims, now I would like to underline only Act I of 2002, which ensured that the indictment and the decision of the court should be sent to the victim as well.

There is a modification which is directly the consequence of the Framework Decision. Article 10 requires that each Member State shall seek to promote mediation in criminal cases between the victim and the offender and that agreement reached in the course of mediation in criminal cases can be taken into account. Types of offences appropriate for that kind of mediation depend on the decision of Member States. Deadline of transposition of that Article into the national law was 22 March 2006. Reasoning of Act LI of 2006 which introduced mediation into the Code on Criminal Procedure explicitly refers to the requirement of the Framework Decision.[14]

We have to take into consideration that Hungary became member of the EU in 2004, so the first report of the Commission does not contain statements in relation to our country. But into the second report we can find measures taken by Hungarian authorities and reported by our Government.

The situation and the willingness of the Member States have not changed much between the two reporting periods. As the Commission notes in its second report the 'implementation is unsatisfactory…. [Member States] referred back to existing or newly adopted national provisions … implemented certain provisions through non-binding guidelines, charters and recommendations without any legal basis. Only a few Member States adopted new legislation to cover one or more of the articles.'[15] The Commission encouraged the Member States to provide further information concerning transposition, as well as to enact and submit the relevant national legislations under preparation.[16]

The Framework Decision contains several requirements in order to strengthen the position of victims and widen the circle of their rights. Since the comprehensive analysis of all articles is not possible in the current study I will concentrate on some problematic questions which concern the criminal procedure directly.

Article 1 of the Framework Decision, among other definitions, defines the meaning of victim. The first problem emerges at that point: some Member States do not have any legal definition of the victim and in this manner it is not easy to decide who is included under the definition of the term 'victim'. (I would like to mention that when foreign materials are translated from English into Hungarian sometimes it is not easy to find the perfect

[14] See the reasoning of the Act LI of 2006 on the modification on the Code on Criminal Procedure.

[15] Commission of the European Communities, Brussels, 20.4.2009 COM(2009) 166 final. Report from the Commission pursuant to Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA). [SEC(2009) 476] (Henceforward: The Second Report)
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0166:FIN:EN:PDF (4/12/2011)

[16] Ibid.

Hungarian word because the crime victim and the victim who acts in the procedure have different meanings in Hungarian. The Framework Decision itself contains rights concerning only victims in the criminal procedure and other ones concerning the broader circle of the crime victims.)

When the Second Report mentions that in Slovakia definition includes legal persons there is no word about the definition of the Hungarian Code on Criminal Procedure. In Hungary the victim is the party whose right or lawful interest has been violated or jeopardised by the criminal offence.[17]

The reasoning of Act XIX of 1998 mentions that the definition of the victim is the same as it was in the old Code on Criminal Procedure. According to the reasoning of Act I of 1973 (the old Code) «Although the word 'whose' refers to a natural person, victim might be a legal entity or any other organisation as well.» Whereas the Framework Decision formulates requirements regarding natural persons, it does not exclude that Member States ensure rights for non-natural persons as well. As the Court of Justice confirmed in the *Eredics* case '…having regard to the wording and the general structure of the Framework Decision, the concept of 'victim' for the purposes of the Framework Decision, as defined in Article 1 thereof, applies only to natural persons...' (paragraph 25). However there is no objection to that Member States extent the guarantees to legal entities 'since the Framework Decision does not undertake a complete harmonisation of the field in question, a decision that its provisions are also to be applicable where the victim is a legal person is one that Member States are neither prevented by the Framework Decision from taking nor obliged to take.' (paragraph 29)[18]

Article 2(2) concerns 'particularly vulnerable victims' for whom 'specific treatment best suited to their circumstances' should be provided. (We have to mention here that criteria of vulnerability are not defined and this provision is very general. In some Member States it means protection of certain persons considered vulnerable owing to their physical or mental fragility (minors and physically disabled) while others focus on situations which can lead to vulnerability (family violence, sexual offences, terrorism, trafficking in human beings) and there is a group of Member States that provides broader protection, covering all

[17] Section 51 (1) Act XIX of 1998 on Criminal Procedure

[18] Judgment of the Court (Second Chamber) of 21 October 2010 in Case C-205/09, reference for a preliminary ruling under Article 35 EU from the Szombathelyi Városi Bíróság (Hungary) in the criminal proceedings against Emil Eredics and Mária Vassné Sápi. (Not published yet in the European Court reports.)
http://eur
lex.europa.eu/Notice.do?val=524936:cs&lang=en&list=622347:cs,607535:cs,572189:cs,570623:cs,599923:cs,555s262:cs,554275:cs,524936:cs,518613:cs,509544:cs,&pos=8&page=1&nbl=36&pgs=10&hwords=&checktexte=checkbox&visu=#texte (4/12/2011)
See also the case C-467/05, reference for a preliminary ruling under Article 234 EC from the judge in charge of preliminary investigations at the Tribunale di Milano (Italy) in the criminal proceedings against Giovanni Dell'Orto. Judgment of the Court (Third Chamber) of 28 June 2007. '53. It follows from the wording of this provision that the Framework Decision applies only to natural persons who have suffered harm directly caused by conduct which infringes the criminal law of a Member State.' European Court reports 2007 page I-5557.
http://eur-
lex.europa.eu/Notice.do?val=451196:cs&lang=en&list=524936:cs,480602:cs,451196:cs,403100:cs,&pos=3&page=1&nbl=4&pgs=10&hwords=&checktexte=checkbox&visu=#texte (4/12/2011)

types of persons and situations. As it is obvious from the Report of the Commission and the Final Report of the Victims Europe Project most special measures are applied in the case when the victim took part in the procedure as a witness and not as a simple victim. The reason for such diversity – which most likely was not the intent of the authors of the Framework Decision - could be that the Framework Decision does not mention any criteria of vulnerability. We may suppose that in most Member States Recommendation 2006(8) of the Council of Europe Article 3.4. was a starting point as it was in the Victims in Europe Project.[19]

There are some rights in the Framework Decision which may serve the satisfaction of the victim. Such rights are the right to be heard, the right to be informed and the right to be protected.

Article 3 ensures the right for victims to be heard during proceedings and to supply evidence. In that relation I would like to mention only the right to be heard in common law countries. As the Report of the Commission emphasizes, victims are not parties to criminal proceedings in these countries, but the right to be heard is recognised. It is absolutely acceptable as the Final Report of the Victims Europe Project makes distinction between two forms of hearing. The first one is if the victim is witness in his own case, and the second one when he is allowed to participate in the case by adhering civil claim, taking part as private prosecutor or submitting a victim impact statement. The latter one is a special form which has been introduced in the Anglo-Saxon system of law, e.g. in England, Wales and Scotland. Providing greater participation in the criminal justice the legislator allowed the victim to make a statement about how the offence affected him and to make representation to the Parole Board. '… victim statement were envisaged as having two principal purposes: first, providing information to be taken into account by a judge when sentencing, and secondly the 'therapeutic' objective of improving victims' satisfaction with the criminal justice system'.[20]

The victim statement is not unknown in other common law states: it works not only in England and Wales, but victim statement schemes also operate in the Republic of Ireland, almost all US states, Canada, Australia and New Zealand. The way in which victim statement schemes are administered varies according to a number of facts, e.g. whether the statement is in written or oral form and, for written statements, whether they are completed by the victim themselves or by a criminal justice professional on the victim's behalf e.g. a police officer visiting the home of victims and completing a form on their behalf.

Differences are in the stage of the procedure when the victim may take a statement: in the trial or before the court procedure. Advantage of the latter one is that victim statement

---

[19] 'States should ensure that victims who are particularly vulnerable, either through their personal characteristics or through circumstances of the crime, can benefit from special measures best suited to their situation.' Project Victims in Europe p. 39

[20] James Chalmers, Peter Duff and Fiona Leverick: Victim Impact Statement: Can Work, Do Work (For Those Who Bother to Make Them). The Criminal Law Review, May 2007. p. 366. In the footnote authors refer to the Criminal Justice (Scotland) Act 2003 s. 14 (5) under which when sentencing for an offence covered by the pilot victim statement scheme, 'the court must in determining sentence have regard to so much of [the victim statement] as it considers to be relevant to that offence'. (Footnote 50)

available for authorities when the decision on prosecution is done. Interesting but not surprising is that the more serious the offence is the greater response rate was achieved.[21]

A legal provision introduced in the Netherlands in 2005 gives victims and their next of kin the legal right to speak during the court session about the consequences of the crime**.** Victims experience the right to speak as a help in coping (emotionally) with the crime and victims feel that their voice is heard and that they participate in the criminal trial.

The Intervict was asked to study the right to speak. Speaking during the court session can have positive effects, but the implementation of the law still presents problems in some cases. One of the problems was that a small minority of the victims are deprived of the right to speak. The law states that victims may only speak about the consequences of the crime, but many judges do not limit the victims in their freedom to say what they want, so victims are not interrupted or called as a witness if they speak about the desired sentence or about the factual circumstances of the crime.[22] The Deputy Justice Minister wants to give victims the right to appoint a replacement if they are unable to speak themselves and to allow more than one relative to speak.[23]

A good example of the fact that rights are in connection with each other is that the Final Report of the Victims Europe Project mentioned that participation in mediation also might be seen as a form of victim's rights to be heard.

Article 3(2) states that 'judicial authorities shall question victims only insofar as necessary for the purpose of criminal proceedings'. The extent, length and the repetitiveness[24] of questioning could be important from this point of view. We have to keep in mind that to be heard is an important right of the victim, but this benefit may turn into secondary victimisation if the interest of the victim is not respected properly. Especially hearing during the investigation and cross examination should have a negative impact. Unfortunately repetitive questioning is usually not limited in EU Member States.

If the victim knows almost nothing about the outcome of the process he/she may feel as an outsider and suppose that he is important only in the case if he can help the authorities. Some Member States provide information for victims by sending/giving information leaflets or posting most of the information on websites and/or by creating information booklets meeting the requirements of Article 4(1). The Commission accepts the Hungarian provisions emphasizing that our country has an acceptable system whereby there is an obligation on police officers, prosecutors and judges to inform victims of most of their rights.

While in most Member States victims receive information about the process and about their rights, Article 4(3) on notifying the victim of the offenders' release was correctly transposed only in a few states, and even fewer legislations complied with Article 4(4), which ensures the victim's right not to receive information on the offender's release. In this relation the Victim Support Europe recommended that all victims should be given the right

[21] http://www.scotland.gov.uk/Publications/2007/03/27152727/5 (4/12/2011)
[22] http://www.tilburguniversity.edu/topic/selfreliance/righttospeak/ (4/12/2011)
[23] http://www.rnw.nl/english/bulletin/dutch-minister-wants-expand-victims-right-speak-trials (11/09/2011)
[24] See Project Victims in Europe p. 42

to abstain from receiving information, either generally or by specifying what particular piece of information they do not wish to receive.[25]

It is possible to examine the right to be protected from different aspects: protection of the victim from intrusive media, protection of his/her private life, protection of the victim from the offender, etc. One of the problems to be solved is to reduce contact between victim and offender, in particular by providing for separate waiting areas in courts as Article 8(3) prescribes. It is worth mentioning that only three Member States, i.e. Germany, Italy and Spain sent provisions transposing this requirement. It is at least interesting that the opposite result can be drawn from the on-line questionnaire: respondents from all the three mentioned states marked that there was no obligation to provide separate waiting areas, while in Lithuania, Romania and the United Kingdom we can realise conditional and in the Netherlands unconditional obligation to do so. [26]

This shows the differences between information written in official reports and given by experts of different fields. Peculiarity of the Report prepared by the Commission was pointed out by M. S. Groenhuijsen and A. Pemberton in their study. They mentioned that 'England is well known to be the most advanced country in the Union' in providing separated waiting area, but the Commission 'only recognizes Germany sufficiently implementing this requirement, which can only be explained by the circumstance that England does not have a legal requirement that prescribes these separate waiting rooms.' [27]

The last right I would like to deal with is the right to compensation in the course of criminal proceedings. Article 9(1) obliges the Member States to ensure that the decision on compensation by the offender is taken within a reasonable time. Most Member States considered that it could be transposed by means of enforcement of civil claims joined to criminal proceedings, but common law countries do not have such kind of proceedings. Although the report says that e.g. the United Kingdom did not give information about implementation from the evaluation of the practice, it is proven that the compensation order provides solution which has priority over paying a fine and paying costs.[28] Not only the adhesion procedure but mediation and other measures in prosecution stage of the procedure may achieve this aim as well and may stimulate the offender to pay. Even if the compensation is awarded through the adhesion procedure, the enforcement remains the task of the victim. A more positive solution is if the compensation has priority over other consequences of the procedure such as fine, reimbursement of costs paid to the state etc.

Since the Commission receives information only on legislative tools or in some cases on non-binding guidelines, charters etc. in the conclusion of the Second report it summarises the experience: the implementation of the Framework Decision is not satisfactory. The national legislation sent to the Commission contains numerous omissions.

The survey made by the Victim Support agencies used two types of questionnaires. The first one contained questions regarding the legislation, but the second one tried to assess the effectiveness of the measures, the opinion of experts on how much victims are satisfied

[25] Project Victims in Europe p. 142
[26] Project Victims in Europe p. 98
[27] M. S. Groenhuijsen – A. Pemberton p. 49
[28] See Project Victims in Europe p. 110-111. Compensation order is found in Ireland, the United Kingdom, Cyprus and Malta.

with the situation, with awareness of different possibilities. And in this relation the picture is much darker.

Another question is how much Hungary is concerned with negative opinions. Although I have not weighed all aspects up, but from the report of the Commission and from the Final Report of the Victims in Europe Project it seems that we are good at the transposition of the requirements of the Framework Decision but sometimes practice is not satisfactory and, although in rare cases, legislation is incomplete.

Accused's rights – victim's rights

Without challenging the necessity of victims' protection and assuring the victims' rights in the criminal procedure and out of it, I would like to emphasize that we should not forget the guarantees concerning the suspects' rights, which have to be accepted as well.

As it was emphasized by the European Court in the case C-404/07 initiated by the Fővárosi Bíróság for preliminary ruling 'It should be added that the Framework Decision must be interpreted in such a way that fundamental rights, including in particular the right to a fair trial as set out in Article 6 of the ECHR, are respected (paragraph 48, see, in particular, case C-105/03 Pupino [2005] ECR I-5285, paragraph 59)." [29]

There is a visible fluctuation in the criminal justice: in the '80's and '90's of the last century the rights of suspects were on the flag of human rights agents. In the last 10-15 years victims' rights became underlined. If we offer rights without due consideration of their consequences that movement may cause a negative effect: to give opportunity to the victim for revenge or double the position of the accuser. It took a long time to achieve the equality of arms providing the same or at least similar position for the accused and the defence counsel as the accuser has. It is true that '…victims have for a long time been ignored in the administration of justice.'[30] They have only duties and authorities used them as useful witnesses who, in most cases, have information necessary to clarify the offence and prove the guilt of the offender. The role of the victim impact statement, which was introduced in countries belonging to the Anglo-Saxon system of law, is especially questionable. It may influence the imposition of the sentence and even the parole process. The involvement of the victim into the activities from which he traditionally was excluded in all systems of law may be dangerous or at least doubtful.

The fact that the protection of victim's rights and the rights of the accused is formulated in the same paragraph in the Action Plan Implementing the Stockholm Program shows the intent to fair treatment of both participants in the criminal procedure. 'Differences in the guarantees provided to victims of crime and terrorism across the 27 Member States should be analysed and reduced with a view to increasing protection by all means available.

[29] Judgment of the Court (Third Chamber) of 9 October 2008 in Case C-404/07, reference for a preliminary ruling under Article 35 EU from the Fővárosi Bíróság (Hungary) in the criminal proceedings György Katz v István Roland Sós. European Court reports 2008 page I-7607. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007CJ0404:EN:NOT (4/12/2011)

[30] Annika Snare: Victim Policy – Only for the Good? In: Crime and Crime Control in an Integrating Europe: Plenary presentations held at the Third Annual Conference of the European Society of Criminology, Helsinki 2003. (Ed.: Kauko Aromaa and Sami Nevala). HEUNI Publication Series No. 44, Helsinki 2004. pp. 35–36.

European law should guarantee a high standard of rights for the accused, in terms of fairness of the procedures. Detention conditions, including in prisons, should also be addressed.' [31]

The (near) future

According to the Stockholm Programme the character of the victim's protection of the EU will change. The 'signs' of it may be found in the measures taken on the basis of the Program. 'The European Council calls on the Commission and the Member States to: examine the opportunity of making one comprehensive legal instrument on the protection of victims, by joining together Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims and Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, on the basis of an evaluation of these two instruments.' [32]
At the same time from the Stockholm Programme it appears that the EU takes into consideration not only the protection of the victim but the protection of the accused as well.[33]

Afterword

After the habilitation process the European Commission submitted a proposal for a package of measures which aims at the protection of victims. One of its elements is the directive on establishing minimum standards on the rights, support and protection of victims of crime. According to that on 18 May 2011 the Commission presented a proposal for a Directive

[31] Action Plan Implementing the Stockholm Programme. European Commission, Brussels, COM(2010)171 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Delivering an area of freedom, security and justice for Europe's citizens. http://www.statewatch.org/news/2010/apr/eu-com-stockholm-programme.pdf (5/12/2011)

[32] The Stockholm Programme 2.3.4. 2.3.4. Victims of crime, including terrorism. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:en:PDF (4/12/2011)

[33] The Stockholm Programme 2.4. Rights of the individual in criminal proceedings
The protection of the rights of suspected and accused persons in criminal proceedings is a fundamental value of the Union, which is essential in order to maintain mutual trust between the Member States and public confidence in the Union. The European Council therefore welcomes the adoption by the Council of the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, which will strengthen the rights of the individual in criminal proceedings when fully implemented. That Roadmap will henceforth form part of the Stockholm Programme.
The European Council invites the Commission to:
– put forward the foreseen proposals in the Roadmap for its swift implementation, on the conditions laid down therein,
– examine further elements of minimum procedural rights for suspected and accused persons, and to assess whether other issues, for instance the presumption of innocence, needs to be addressed, to promote better cooperation in this area.
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:en:PDF (4/12/2011)

establishing minimum standards on the rights, support and protection of victims of crime.[34] The Resolution of the Council of the European Union on a Roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings (2011/C 187/01) was adopted on 10 June 2011. By that resolution the Council endorses the Roadmap and emphasizes that it will examine all proposals presented in the context of the Roadmap and intends to deal with them as matters of priority.[35] From the package of measures it is obvious that the European Commission is preparing a complex Directive on minimum standards on the position of victims of crime. Both the Resolution of the Council and the Roadmap refer to the fact that the Framework Decision was an important step in setting up a comprehensive approach to the protection of victims of crime in the EU, but 10 years after its adoption, it is necessary to revise and supplement the principles set out therein.

[34] Proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime. Brussels, 18.5.2011 COM(2011)275 final. See: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0275:FIN:EN:PDF (26/11/2011)

[35] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:187:0001:0005:EN:PDF (4/12/2011)

European Integration Studies, Volume 9. Number 1. (2011) pp. 121–135.

THE PROCESS ORDER OF THE COURT OF FINANCIAL ADMINISTRATIVE JURISDICTION IN HUNGARY (1884-1896)*

ISTVÁN STIPTA
Professor of Law
Director of the Institute of Legal History and Legal Theory
University of Miskolc
jogstipt@uni-miskolc.hu

The establishment of the domestic financial administrative jurisdiction was preceded by a serious political and unusually substantial scientific debate. The representatives of the parties in power feared that the corporation would weaken the strength of the state and the new legal aid forum would make its decisions on behalf of the taxpayers. They were also afraid that the chance for judicial review would become a means of legal opposition to the nationalist-minded opposition and the forces against the Compromise of 1867. On the contrary, in 1883 the point of view of those prevailed, who referred to the common interests of the state and the citizens, the requirement of legality and the justification of protection of the liability to taxation against the state. The result of these considerations was the enactment of Act Nr. 43 of 1883 in the court of financial administrative jurisdiction. It modified our historical constitution and regulated the relation of courts and administrative organs in a new way.

The introduction of administrative jurisdiction raised the demand for regulation of court proceedings as well. While the system and regulation of various details were being finalized, the elementary question arose as to how decision making would be regulated and how it could compensate for the advantage that the financial organs of the state had over citizens during the determination and execution of the financial services. At the same time care needed to be taken, so that the process would finish quickly and not provide an opportunity for who sought to avoid paying taxes, to procrastinate and shirk their commitments to the public. The legislation – taking such aspects into consideration – had to decide whether the legal aid organ of court character should operate in a verbal process of regulation (which provided a greater legal guarantee), or in a written process regulation (which was able to act swifter, and impose the public interest more effectively). With regards to this decision, the majority of the contemporary government personnel found the interests of state more important. This meant that the principle of verbalism was rejected and furthermore, that the compromise solution of facultative verbalism, which had been proven valuable in numerous other countries was also refused.

This essay sums up the written legislative and scientific antecedents of the process provisions of the act in the court of financial administrative jurisdiction. Then, it follows

* The essay was prepared with the help of Legal Historical Research Group of MTA-ELTE (Hungarian Scientific Academy – Eötvös Loránd University, Budapest, Hungary). It was translated by Zsuzsa Stipta. Lector in English: Duncan Bare.

the legislative debate, values the provisions concerning procedure and compares those with the standard foreign solutions of the era.

Legislative antecedents, the debate of the committee and House of Representatives

A spirited argument developed during the establishment of the court of financial administrative jurisdiction. This debate centered around the conflicting opinions of the representatives of the opposition on the one hand, and the government party on the other. Further complicating matters, the view of the financial and judicial committees of the House of Representatives (in which the government party held the majority) varied categorically with that of the rest of their party. The debate in the House of Representatives was especially intense and constructive during the phase when the process law of the motion was discussed. Unusually, even the counsel of the Upper House was able to substantially shape the course and the details enacted via due process.[1] Professional journalists also had an effect on the process of legislation. The jurist public writers particularly fought successfully against the first perfunctory proposition of the minister.[2]

None of the motions put down in the agenda of the minister of finance preparing two bills contained any detailed rules of procedure following the legal intricacies of the era. He simply took into account the acceleration of the procedure. Where it was possible, he suggested for approval the norms of legal force of the civil law action, the Articles 102-107 of the Act Nr. 54 of 1868, considered to be transitional already at the time of its enactment. The first proposition from 1881 sought to regulate the procedure of the court by decree of the ministry of finance issued in concert with the "ministers concerned". The second proposition compiled a year later, made official only those decrees issued by the ministry of finance.[3]

In accordance with the opinion of the standing committee for finances of the House of Representatives the process without any verbosity is generally needed in administrative legal disputes. This can be the only possible solution should there be a central appellate

[1] Stipta, István: Országgyűlési vita a pénzügyi közigazgatási bíróságról 1883-ban. [Debate of House of Representatives on the financial administrative court in 1883] In: Ünnepi tanulmányok Máthé Gábor 65. születésnapja tiszteletére. [Inaugural essays to the honour of Gábor Máthé for his 65. birthday] (Szerk.: Mezey Barna, Révész T. Mihály) Gondolat Kiadó. Budapest, 2006. P. 518-546.

[2] Gruber, Lajos: A pénzügyi közigazgatási bíróságról szóló javaslat. [The proposal on the financial administrative court] Jogtudományi Közlöny [Journal of Jurisprudence] 1881. (XVI. évf.) II. 19. sz. (1881. május 6.) P. 165-166.; Nyolcadik magyar jogászgyűlés. Közigazgatási bíráskodás, a IV. szakosztály vitája. Concha Győző, Lánczy Gyula és Dell' Adami Rezső véleménye. [Eighth Hungarian Assembly of Lawyers. Administrative Judiciary, the debate of Section 4. Opinions of Győző Concha, Gyula Lánczy and Rezső Dell' Adami] Jogtudományi Közlöny [Journal of Jurisprudence] 1882. (XVII. évf.) 44. sz. P. 350-352.

[3] Törvényjavaslat a pénzügyi közigazgatási bíróságról. [Bill of financial adminsitrative court] Az 1878. évi október 17-re hirdetett Országgyűlés Nyomtatványai. Képviselőház. [Printed Papers of the Parliament called together on October 17th, 1878. House of Representatives] Irományok. XXI. köt. 907. sz. iromány. Pesti Könyvnyomda. Budapest, 1881. P. 300-305. 1881. január 31. [further: First Proposal, 1881.] P. 302-303..; Az 1881. évi szeptember 24-re hirdetett Országgyűlés Nyomtatványai. Képviselőház. [Printed Papers of the Parliament called together on September 24th, 1881. House of Representatvies] Irományok. VI. köt. 152. sz. iromány. Pesti Könyvnyomda. Budapest, 1882. 219-225. p. 1882. február 7. (further: Second Proposal, 1882.) P. 221., 223.

court with one level concerning tax and fee cases. In the opinion of the committee the procedure enabling the mutual hearing of the parties cannot be required there where "clients should be called from all parts of the country [to Budapest] and kept here for days because of trivial tax and fee matters." "In most cases, the nice guarantee and the advantage of verbal, contradictory processes would turn here into a disadvantage. On the other hand, cases demanding a swift settlement would only be delayed, since the execution could not be suspended, to the disadvantage and damage of clients, and their settlement would only be hindered." The body found the procedural legal guarantees of the code of civil procedure sufficient. Only the written system was considered to be acceptable in the planned procedure of administrative court.[4]

However, the judicial committee definitely aligned to the principle of facultative verbosity, guaranteeing more integral legal aid. In this system the verbal procedure was not compulsory. However, clients had the chance to formulate their arguments verbally before the court pleading in writing.

In accordance with the body representing the more developed legal culture, it must be said that the system of a "speaker" delivering written material cannot completely guarantee that the controversial question in litigation is made completely aware to the judging court in its entirety. Written material is reported differently by speakers according to their ardor and expertise. Further, if clients cannot react to the remarks made, the court cannot fully grasp the reality of litigation in every case. Additionally, in those cases brought before the financial administrative court, the severe written form would be detrimental also because – as the reasoning went on – in this competence the whole written litigation apparel is missing and only one court can decide the controversial question sentential-wise, which makes the final judgment. The president of the judicial committee, István Teleszky (of the government party) argued pugnaciously (but unsuccessfully) for legal regulation guaranteeing a larger legal protection.[5]

Those members of the press which represented the values of lawyers also supported the verbosity principle. In accordance with the editorial article in Magyar Igazságügy (Hungarian Justice), in case of asserting the principle of verbosity "there would be many more prospects for clearing up questions complicated and obscure of financial administration and being publicized. However, in this way we will become dependent on the opinion of the financial administrative court with regards to studying the cases of an ambiguous nature."[6]

---

[4] Az állandó pénzügyi bizottság jelentése a „pénzügyi közigazgatási bíróságról" szóló törvényjavaslat tárgyában. Az 1881. szeptember 24-re hirdetett Országgyűlés Nyomtatványai. Képviselőház. [Report of the permanent financial committee on the subject of the bill concerning „financial administrative court". Printed Papers of the Parliament called together on September 24th, 1881. House of Representatives] Irományok. XIV. köt. 528. sz. Pesti Könyvnyomda. Budapest, 1883. P. 162-175. 1883. márczius 12. (in further: Financial Committee, 1883.) P. 164.

[5] Az 1881. szeptember 24-re hirdetett Országgyűlés Nyomtatványai. Képviselőház. [Papers of the Parliament called together on September 24th, 1881. House of Representatives] Nyomtatványok. Képviselőház. Napló. Szerk.: P. Szathmáry Károly. Budapest, 1883. XII. köt. [in further: Debate of the House of Representatives, 1883.] P. 326., 353.

[6] Pénzügyi közigazgatási bíróságról. Magyar Igazságügy. [On the financial administrative court. Hungarian Justice] (Szerk.: Dr. Tarnai János) XXI. köt. Budapest, 1884. P. 183.; The contemporary press dealt also with the deficiencies of the second bill. „Procedure in front of the court can hardly

During the debate in the House of Representatives concerning the regulation of the process, the majority of the government party insisted on those views espoused by the financial committee. Their representatives referred to the fact that in the administrative court procedure, one party is not in opposition with another party, rather that "thousands of parties" are in opposition with the Treasury. The financial apparatus would be completely overburdened by the representation of state interest and the litigation statement, mandatory in cases. Verbosity – as they argued – would require the participation of attorney masses that would make the procedure significantly more expensive, even to the unofficial parties. The further argument of the proponents of the written procedure was that neither accepted the amendment acts to the code of civil procedure (Act Nr. 59 of 1881), namely that verbosity would be even less reasonable with regards to a court operating in the administrative field. The representatives referred also to the notion that the party concerned could state in person in the administrative bodies making the basic decision (in the committees assessing taxes and speaking). During the debate in the House of Representatives the issue also arose, that in the event of permissive regulation of the procedural law a formal polemic might be established between the judge and the party which could undermine the authority of the court.[7]

Financial minister Gyula Szapáry specifically insisted on the procedural part of his proposition. He reasoned that in the event of the introduction of the verbal system, ten times that many judges should be employed instead of the four to six, taken earlier into account.[8] The proposition of the judicial committee, which was more interested in the aspects of legal protection, was not even supported by judicial minister Tivadar Pauler present during the session of the House of Representatives when it was introduced. Pauler sat through the fierce debate with demonstrative aloofness, silently. Among the members of the government party, only István Teleszky agreed with Dezső Szilágyi (of the opposition) who considered the enforcement of verbosity as the minimum of the rule of law.[9] However, the House of Representatives did not accept the conciliatory proposal of Szilágyi either, which would have ensured the option of verbal reply, but only for the unofficial party in the trial.[10]

be imagined without the hearing of the opposition parties, the submission of the arguments and counter-arguments and their discussion by the parties. Nevertheless, in accordance with the procedure aimed at the court which will only judge based on the data that are collected – very naturally – by the financial organs as regards achieving the financial goal, the opponent, the individual citizen can present his point of view only in the appeal against the decree. However, without the court judging not the actual circumstances illuminated by not the mutual submission of the parties or clarified from every aspect but only from the aspect of finances, based on data collected from one-sided interest." Tóth, Dezső: A pénzügyi közigazgatási bíróság. [The financial administrative court] Jogtudományi Közlöny [Journal of Jurisprudence] XVII. évf. 11. sz. (1882. március 17.)

[7] Debate of House of Representatives 1883. P. 373. Speech of József Gáll.

[8] Debate of House of Representatives 1883. P. 357.

[9] Debate of House of Representatives 1883. P. 353-360., 364-375.

[10] After the rejection Dezső Szilágyi noted in a bitter way: „We should watch out well when we want to patronize people. We should not make the representation of their justice impossible for their reassurance." Debate of House of Representatives. 1883. P. 356.

The basic categories of the act (plaintiff, complaint, deadlines)

The law enacted left essential procedural legal definitions unexplained. It called every type of legal remedy appeal. Thus, it did not distinguish demand on legal protection based on merit from petition for remedy containing formal (procedural) objection. Not even the legal content of the expression complaint appeared in the act itself.[11] The norm text did not clarify either whether appeal is extended to injuries or it can only refer to grievances. The legislature did not circumscribe the concerned ones in the case, nor did it give any general guidelines to who plaintiffs can be or who has a right to enforce a claim before the court. It did not make a distinction between private and official complaint. Therefore, nothing appeared in the text referencing or indicating to which competences the right to complaint of the administrative organs is extended. It is precisely the experiences of the operation of the financial administrative court, according to which the provision formulated in the Art. 84. Act Nr. 26 of 1896 was enacted, that ensured the right to complaint in favor of the protection of the competences of the organs and the public interest of state (Treasury), too.[12] The obvious deficiency of the regulation was that it did not regulate the procedural rights of those third parties interested and did not provide the duties of the court in connection with that, either.

In accordance with Article 6 of the Act the appeals addressed to the financial administrative court had to be handed in within 30 days counted from the delivery of the decision constituting the object of complaint. This deadline was modified from the originally planned 15 days to 30 days based on the proposition of the financial committee.[13] However, the extension of the deadline made the administrative legal protection slower. Later, in the general administrative court, Act Nr. 30 of 1929 modified this, stating that the complaint could be handed in within the 15 following days of the delivery (announcement) of the adverse judgment. The petition of appeal of financial subject against the decision of the administrative committee had to be handed in to the president of the committee; against to the decision of the speaker committee, to the royal tax controller; against the decision of the royal finance directorate, to the territorially responsible finance directorate. The act left

[11] The expression complaint appeared 16 times and the expression appeal 415 times in the 73 cases and 2192 orders – published in print – adopted by the financial administrative court between 1884 and 1896. The word complaint appeared not with an independent legal content but as a synonym in the terminology of the court.

[12] Dr. Pákey, Lajos: A közigazgatási bíróság előtti eljárásról. [On the procedure in front of the administrative court] In: A magyar közigazgatási bíróság 50 éve (1897-1949). [In: 50 years of the Hungarian administrative court, 1897-1949.] Kiadja: A Magyar Közigazgatási Bíróság. Budapest, 1947. P. 50.; Dr. Vörös, Ernő-Dr. Lengyel, József: A közigazgatási bírósági törvény magyarázata. A m. kir. Közigazgatási Bíróság anyagi jogi, hatásköri és eljárási joggyakorlata általános közigazgatási, adó- és illetékügyekben. II. köt. [The explanation of the act on administrative court. The legal practice of the Hungarian Royal Administrative Court concerning substantive law, competence and procedure. Volume 2.] Budapest, 1935. P. 1131-1132.

[13] Az 1883:XLIII. tc. a pénzügyi közigazgatási bíróságról. Jegyzetekkel, utalásokkal és magyarázattal ellátta dr. Moder Tibor. [The Act Nr. 43 of 1883 on the financial administrative court. Notes, references and explanations added by Moder, Tibor dr.] Budapest, 1883. (further: Moder 1883.) P. 10.

the question unanswered as to whether the petition of the party involved can be directly passed on to the administrative court.

If the last day of the deadline to appeal fell on a Sunday or on any other holiday in accordance with the Gregorian calendar, the petition of appeal could still be handed in on the next work day (contemporary expression: common day). The date of mailing was considered to be the date of hand-in of the appeals which arrived via mail. The administrative authorities submitted the appeals handed in within the lawful deadline to the financial administrative court. Nevertheless, they had to refuse by summons the appeals which were received late. The order was equitable, especially if we compare it to Section 1 Article 54 of Act Nr. 30 of 1929, according to which the authority of first instance could refuse the remedy as "unauthorized". The administrative organs could not refuse the petitions of remedy (in accordance with the regulation of the Act of 1883) even with the lack of competence of the administrative court, either. Article 7 of the act (passed to the common proposition of the financial and judicial committees) enabled an appeal against the summons of authority refusing the appeal within 15 days from the delivery of the decision handed in, in due time. Article 98 of Act Nr. 26 of 1896 called this remedy "resort", making a distinction from the complaint referring to the merits of the case.[14]

Additionally, Act Nr. 43 of 1883 regulated the possibility of application for extension ahead of time. In accordance with this, if the party or his legal representative could not hand in the appeal referring to the merits of the case within the lawful deadline because of an obstacle outside of his control and not able to be overcome by him, he could be excused. The financial administrative court decided in the event that this happened, as to whether the missing of the deadline was warranted or not. If the legal protection body approved the application for extension, or it qualified the appeal as handed in within the lawful deadline by changing the refusal order, it could immediately take the case being appealed under review. The provision was put in unchanged form in the act of the general administrative court.

The appeal starting the procedure of the administrative court had to be factual, the person asking for legal protection had to unambiguously have been detrimentally effected by the decisions, and had to have objections to its sections. Nevertheless, the process was simplified insofar that, if such facts could be gleaned from official documents referring to a case of appeal or in connection with one, they did not have to be proven by the private party. These documents did not have to be enclosed; it was enough to only refer to them. In the appeal the party complaining could also refer to new facts. This provision was important also from a theoretical aspect. The procedure before the administrative court could be begun on a new basis, based on the strength of those circumstances which had arisen since the new evidences or passing of the basic ruling (Article 8). Those provisions were an important means of procedural elucidation of the material truth.[15]

In accordance with the first sentence of Article 9 of the act "the president of the administrative committee, the royal tax controller and the finance directorate were obliged

[14] The financial administrative court applied the designation 'resort' without any legal ground. In its decisions with conceptual contents the court used this expression fifty times, distinguishing in content between the appeal handed in concerning a case on the merits and the resort containing procedural objections.

[15] Moder 1883. 11. p. (Reasoning to Article 8.)

to introduce the appeal arrived to him within lawful time to the financial administrative court within 8 days counted from the arrival with the trial documents enclosed." Originally, in the proposals of the minister, this period was 15 days. The shorter deadline was suggested by Ádám Lázár during the debate in the House of Representatives.[16] The content deficiency of the provision was that it did not require the explanation of the decision from the authorities, or as the revising Act Nr. 26 of 1896 formulated, the enclosing of the "informing document". As the argumentation of the decisions of the authorities was often formal, courts could become acquainted with the factual background of those same decisions as well as the motives behind those decisions; this was the key from the aspect of review only after long correspondence.

If the appeal was submitted by the tax controller in the representation of the treasury against the decision of the administrative or tax speaker committee, he was obliged to send its certified copy to the party obliged to pay a tax or fee and to enclose the certificate of posting or certificate of delivery to the appeal. This way of delivery –which provided a guarantee to the private party – was also suggested by Ádám Lázár (of the opposition) and also supported by the committee speaker Sándor Hegedűs (of the government party).[17]

The party concerned could also submit the remarks of the representative of the treasury on the appeal directly to the financial administrative court. The petition referring to this had to be forwarded to the sentencing body within 30 days following the posting of the tax controller's letter and its delivery. Before the end of this deadline the case could not be tried on merit by the financial administrative court. Those remarks which arrived after the 30-day-deadline could not be taken into consideration during the trying of the appeal. This provision made it clear that the legislature considered the procedure to be written and grounded in swift decisions based on the closed system of deadlines.[18]

In accordance with Article 10 of the act, the appeal submitted to the financial administrative court had a delaying force only in cases where that was specifically ordained by the act.[19] However, the appealing party could ask for respite of performance from the financial minister through the administrative authority concerned, during the hand-in of the appeal or after that – with an extra petition. The minister was obliged to permit the respite – if the party was "irreplaceably damaged" by the execution and if the interest of the state treasury was assured. This was an important provision but it regulated the procedure of

[16] Debate of House of Representatives 1883. P. 350.

[17] Debate of House of Representatives 1883. P. 352. The final version of the law text (with the same content as the representative's proposal) was also supported by the members of the Upper House. In: Az 1881-ik év szeptember 24-re kihirdetett Országgyűlés Nyomtatványai. [Printed Papers of the Parliament announced on September 24, 1881.] Főrendi Ház. Napló. I. köt. Szerk.: Maszák Hugó. Pesti Könyvnyomda, 1883. P. 526. (In further: Debate of the Upper House, 1883.); Moder 1883. P. 13. (Reasoning to Article 9.)

[18] The copy of the appeal did not have to be disclosed to the party if the tax inspector verbally stated the appeal during the pronouncing the decision (in the presence of the party subject to taxation and fees) and declared that he does not want to reason the appeal in written form.

[19] Like this was Act Nr. 44 of 1883 on tax management, according to Article 8 of which appeals can be of delaying effect only then, if "in the procedure of the committee the rules of the act are violated. In these cases the committee of appeal cannot deliver orders on the merits if the breach of form mentioned is seen as proven but it is obliged to annul the order appealed and to order the retrial of the case."

financial subjects basically along the logic of private law. Representative Miklós Ferenczi suggested in the (detailed) debate in favor of private parties that executive measures could not be prepared until the financial minister's decision was known. Sándor Hegedűs did not accept the proposal in the name of the financial committee because then "everyone would appeal", the parties would simply state that they have an irreplaceable damage so the common interest would be damaged and the legitimate and justified execution would fail.[20]

The private legal elements of the procedure

In accordance with the law, the financial administrative court tried the cases submitted to them in an open session. Its decisions were passed by the council of three, with the chairmanship of the president or his deputy pursuant to the valid acts and statutes. At least one of the judges in the council had to be qualified to be a judge. It was a guarantee provision that reporters of the cases could only be judges (Article 12).

Certain provisions of Act Nr. 54 of 1868 had to be applied in the decision making process of the administrative court. In accordance with this, the recital (presentation) of the trial documents was public. So that the parties and audience remained informed, the list of the cases placed in the agenda had to be posted in the court three days before their presentation. It was not necessary to inform or invite the parties. Also during the procedure of the financial administrative court, the rules of exclusion applied in private legal trials, had to be enforced. In accordance with this, the judge could prescribe the exclusion of the audience at the request of the parties or of its own motion if he found that necessary "for the public morals" or if such data arose during the trial that could endanger the reputation or interest of either party if they were made public. Against the order made in the event of the enforcement of the refusal or exclusion of publicity, nobody could apply for legal remedy.

Similarly with the contemporary rules of civil proceedings, parties and their representatives could appear on the trial accompanied by two invited people. Furthermore, they could also appear/remain even if the court excluded the audience of its own motion or at the request of the parties. The rules of civil legal procedure referred to the rules of process as well. According to this, their representatives and the audience were obliged to abstain from interruption, comments, and expression of approval or disapproval. Those who broke these rules could be ordered to leave the trial or court room – after an unsuccessful calling to order. The counsel, the verdict and its verification happened in closed session, the pronouncing of the verdict and the reasoning happened as often as possible in the same session but "under all circumstances" in public. (Articles 104-106 of Act Nr. 54 of 1868).

In accordance with Article 21 of the Act concerning the financial administrative court, the verdict could not reach beyond the petition of the parties. In connection with that, József Vidliczkay objected in the detailed debate of the House of Representatives that this principle is only applied to private legal cases since it was anchored by Article 248 of the code of civil procedure (Act Nr. 54 of 1868). "However, in this case the financial court has to administer justice of its own accord in the matter of tax paying in accordance with the

[20] Debate of House of Representatives 1883. P. 352-353; Moder 1883. P. 13. (Reasoning to Article 10).

act."[21] Contrary to this, the contemporary legislatures did not extend the principle of the operation of law onto the court stage of the administrative legal protection.

The order and means of evidence

During the debate of the House of Representatives Ádám Lázár proposed the following: Article 13 should be complemented so that the administrative court „decides in these cases by free deliberation of evidence."[22] The House of Representatives declined the proposal, although the possibility for the free deliberation of evidence had already been ensured by the legislation. In accordance with Article 15 of Act Nr. 25 of 1883 concerning usury and detrimental credit transactions, courts had not been bound by the „measures of laws concerning the complexity of evidence(s) during the determination of statement of facts of usury."

Article of 14 of the act also dealt with matters of principle. Regarding this, Article 19 of Act Nr. 4 of 1869 is normative in the field of „judging the validity of acts and orders adopted by the delegation of acts", but in a restrictive sense, represented in Article 10 of Act Nr. 40 of 1879. In accordance with the cited regulation of the Act of 1869 on the judicial powers, the judge „is obliged to proceed and pass judgments in pursuance of acts, orders established based on acts and pronounced and the conventions having legal force. The judge cannot question the validity of acts promulgated properly. However he decides on the legality of orders in several legal cases." In accordance with the previously mentioned Article 10 of Act Nr. 40 of 1879 concerning tresspasses, the court is also entitled to decide on the legality of those during applying the order of the minister or statutes on certain cases. Nevertheless, their necessity or expediency (Article 19 of Act Nr. 4 of 1869) cannot be criticized." In accordance with the Act of 1879 ,the court could not examine whether the body was convened properly in the event of enacting the statute of local authorities or the town. Neither could they examine whether the passing of the decision was made according to the rules or not.[23] In this rule was reflected the firm point of view that the necessity and expediency of adminsitrative norms could not be the subject of debate in legal cases brought before the administrative court.

Contrary to this however, Article 16 of the act concerning the financial administrative court, enabled the reparation of procedural mistakes made both during passing of the administrative resolution, as well as in the procedure before the passing of the decision. Remonstrances of clients in connection with this could be lodged independently or within the framework of appeallation concerning the merits of the case. In the event of a breach of form ,the financial adminsitrative court was entitled to annul the judgment appealed and the result of the previous procedure and to order a new decision-making process (or maybe a new procedure). If the adminsitrative court exceeded its legal powers or neglected an important procedural rule which made the decision reached in the case invalid, then the financial administrative court could annul the decision made and the previous procedure even then if the breach of form was not objected to in the appeal submitted. The decision

[21] It really occured that the party asked the court for less tax write offs than the ammount legally due. Debate of House of Representatives 1883. P. 390.
[22] Debate of House of Representatives 1883. P. 367.
[23] Debate of House of Representatives 1883. P. 375-376.

appealed and the procedure beforehand had to be annulled even if the decision was not made by the authority entitled to do so. In such cases, the financial administrative court transferred the documents to the administrative court.

In accordance with Section 5, Article 16 of the act if the statement of facts "is not properly elucidated, the financial administrative court orders the conclusion of the trial" (an extremely important principal aspect). In accordance with Article 17 detailing the disposition, the court was entitled to direct the authority charged with the submission of official data serving the completion in that case. The court was entitled to also oblige the party to make a statement or further, to furnish new data. In those cases the court set a deadline of 30 to 60 days. The court was entitled to direct the completion of trial documents also in closed sessions. The judging body could decide on the procurement of the documents necessary to decide a case appealed. It could directly order the authorities concerned to relegate the official documents. It could oblige the parties to hand in not only the data, but also the declarations. This provision assured broad ability to the financial administrative court to determine the statement of those facts which were legally relevant.

During the debate of the House of Representatives, representative Ferenc Fenyvessy defiantly suggested that that text should be completed, according to which the court "appeals to the court competent in the event that it found the interrogation of witnesses and experts necessary." The suggestion was rejected with the reason being that "this central court cannot be concerned with the questioning of witnesses."

The decision making order of the court

The rules of procedure for the judicature were only mentioned briefly in the Act. In accordance with Article 16, the court decided that "on the decision appealed on the merits", after it had determined its competence and it had decided that the administrative body making the decision was also competent and the statement of facts was also "properly" ascertained. The judging body made a decision on the merits of the case and put every other disposition in the summons. In accordance with Article 22, the verdict and the summons had to be reasoned in compliance with the classical legal procedural requirements. The verdict or summons had to be distributed to that authority for delivery and execution that submitted the appeal to the court.[24]

The important questions of detail of the judgment mechanism were summarized by the court's rules of procedure based on the authorization of the act.[25] In accordance with this, the president divided the documents of the legal debate awaiting judgment among the judges for elaboration and presentation. He had to make sure that presenters had an equal work load and that the judge presiding, received the petition(s) referring to those cases delegated to him. Article 75 concerning the rules of procedure also prescribed that the

[24] Ádám Lázár believed that this provision belonged to the standing orders but his co-representatives rejected him. Debate of House of Representatives P. 1883. 391.

[25] A m. kir. pénzügyminisztertnek 1921. számú rendelete a pénzügyi közigazgatási bíróság ügyrendje tárgyában. [The order Nr. 1921. of the Hungarian Royal Minister of Finance concerning the rules of procedure of the financial administrative court] Magyarországi Rendeletek Tára. XVII. évf. 1883. IV. füzet. Budapest, 1883. P. 1720-1743.

presenter could not change before finishing the case without any legal or other substantiated reason. This important provision served to protect judicial independence.

The next important step of the procedure was that the presenter enclosed the documents, examined the deadline of the arrival of the petition and ordered a delaying measure – if further documents were needed. In accordance with this procedure, those cases deemed urgent, had to be presented. The ranking of judgment was determined by the date of filing. The fact that the cases relating to each other be judged at the same time also had to be taken into consideration (Article 81). The deeming of legal debates as urgent necessitated that the decision of the case arranged another or was required for the continuation of a legal debate already in litigation. Also qualified as urgent, were those cases, in which swift measures or presentation with a prompt settlement being enacted by a certain law.

As a rule, cases under dispute were obliged to be decided in council meeting. The president of the council had to assure that the council meeting could gather on any day – if necessary. In accordance with Article 89 concerning the procedure, the president of the council assigned the members of the council, the presenter, the voting judges and the court clerk proceeding as a council notary. He opened and closed the session, and protected its dignity. He ensured its order and guaranteed the council's accordance with regulations.

In the council each case had to be presented orally. The president and the members with the right to vote were entitled to ask for the inspection and reading of the documents concerned. Questions could be posed to the presenter, concerning the case. As the presentation of cases was public, the list of legal debates had to be posted in the courthouse three days before their presentation. The parties concerned, did not have to be informed about or invited to this action (Article 94). From the public session only children and those that "did not appear in compliance with the dignity of the place" could be excluded. The audience could attend the council meeting with tickets signed by the council notary. The number of these was determined by the president; the rank of sign up determined the division of the tickets. The parties of the case and their representatives could present in the meeting. The audience was separated from the court by a barrier and kept "in due distance". In the first row after the barrier sat the clients and their representatives (Articles 95-96). The president could order the clearing of the court-room "for curbing of the audience in case if their disorder or inappropriate behavior". In the event of assault, resistance or more serious transgressions the person guilty could be arrested, and immediately prosecuted in front of the court (Article 97).

After the presentation of the case, the court had a closed session for deliberation (in a separate room). If a question to decide emerged, the president allowed the debate. The voting was opened by the presenting judge who read the written opinion which acted as the draft of the publication. The judge could not interrupt the presenter and the other voters during the presentation of their opinion. Neither could he limit their freedom of speech. One of its guarantee was that he himself voted last (Article 99). The decision was made with a majority of votes. In the event of a tie, the court decided. If the president did not take part in any version, he had the possibility of separating the questions and ordering a vote on them separately. Separating the questions occurred according to the "order of nature"; the fore-question had to be decided before the merits of the case, the formal question earlier than the essence of the decision and the legal claim of the demands before its conclusion. The decision made this way was the basis for deciding the rest of the questions. This "pre-decision" had to be taken into consideration, even by those who were the minority during

the deciding of the fore-question. It was an important rule that the same council had to decide on the individual questions (Article 103).

The decision was announced by the president, however until its announcement, voters could alter their opinions. After having declared the decision, the case was considered to be finally concluded. Those "grammatical and spelling mistakes" not affecting the essence of the decision, could be corrected by the president (Article 101). The content of the verdict and the reasoning which led to it, were announced by the president orally and in public. If this could not take place during one session, the day of pronouncement had to be made public by display one day earlier (Article 106). If the decision appealed was entirely approved by the court (concerning its content and reasoning) it was enough to simply refer to the decision. However, if approval occurred based on another reason, this reasoning had to be formulated separately. If the court changed the decision appealed entirely or partly, the decision and the reasoning had to be recomposed. Reports were made of the council meeting of the court where the counter-opinions with reasoning and the result of the voting were put down in writing.

Transitional provisions (rules of procedure, scope of law)

The Council of Ministers was invested with full power for regulating the rules of procedure of the financial administrative court by decrees. Article 27 of the act (oddly) stated that the rules of procedure "would take measures also" so that the debated questions of principles should be decided "in the plenary session of the financial administrative court. The agreements in principle of that session are standard until a different agreement in a plenary session is established." The rules of procedure also anchored the development of plenary sessions called to decide the debated questions of principle, the presentation of the subjects of the plenary session and the procedure of voting.

In accordance with this, the rules of procedure regulated the decision-making mechanism of the plenary session (Articles 33-54). In compliance with this, this decision-making body of the court had a quorum if more than half of the total judges were present with the exception of the president. The whole council deliberated in closed session; for the decision, the votes of the majority of those present were needed. In the event of debate, the president decided. If a question of principle emerged during the judicature, the president had to convene the plenary session of the council within eight days.

In the plenary session the case was submitted by the judge who was the presenter of the case based on the debated question of principle. His opinion was followed, occasionally by a counter motion and then deliberation. Voting occurred (as in the councils) in the order of seniority in rank, with the president voting last. At the end of voting, the agreement of principle established was pronounced by the president (with a short reasoning). Then the president appointed a committee of formulation, one member of which was the judge whose opinion was accepted by the body. Apart from this individual, the committee consisted of two other judges and a minute-taker. The leading cases had to be reasoned in detail. Should the leading case and its reasoning need confirmation, another new plenary session certified it. Cases had to be published in the official journal and sent to the financial minister.

The territorial scope of the act was extended to the "entire area of the countries of the Hungarian Crown". However, different regulations had to be enacted also in this case

concerning Croatia-Slavonia. As no administrative committees operated in this part of the country, it had to be stated that also the decisions made by the Finance Directorate (in its capacity as administrative committee) can be appealed to the administrative court. It was natural that petitions from there had to be handed in to the Finance Directorate. The submission of the appeal and the completion ordained by the court were also the duty of these organs.[26]

In accordance with Article 29 regulating the term of validity of the act, orders of administrative authorities could only be appealed against at the financial administrative court if those were made after the enactment of the law. Those appeals against decrees made before the enactment, were still decided by the financial minister. The material scope of law did not extend to the trespasses committed against public taxes; in these matters the royal courts of justice vested with judicial authority remained ones who judged. In compliance with this, the ordinary courts decided on the legality of fines imposed in the event of a breach of the law concerning direct taxes, excise goods, excise taxes and duties (Article 30).

The act came into force on January 1st, 1884. The financial minister was put in charge of its enforcement, which he did via a short general order (Nr. 81. 085.) dating from December 25th, 1883.[27] This order requested the administrative committees of judicial authorities, the royal financial directories and the royal tax inspectors, to submit the appeals against the decisions made until December 31st, 1883 to the Ministry of Finance, and the ones against the decisions made on January 1st, 1884 to the financial administrative court.

Summary, outlook

During the establishment of the financial administrative court there was an opportunity to introduce up-to-date and characteristically suitable rules of procedure for case-types. This system could have eliminated the occasional subjectivity of the presenting judge as the inevitable risk of the referendary (presenting) system. This would have been needed in the event of single-stage judicature, since in the administrative cases called into question, the state apparatus, well-equipped with documentary evidence was often pitted against citizens mostly without any means of defending themselves adequately. From a theoretical aspect, this solution would have been better from the aspect of legal protection.

During the professional and legislative debate, there was often a call for the following of the foreign solutions. It was known to the Hungarian legislatures of the era that two models of procedural law had developed in the international practice: the oral system and

[26] Ügyrend [Rules of procedure]; Pénzügyi Közlöny 1883. 51. sz. P. 1003-1030.; 2050/Pm. 1883. december 21. A pénzügyi közigazgatási bíróság ügykörét érintő számvevőségi, pénztári és gazdászati teendők ellátása tárgyában. [On the subject of dicharge of the duties concerning public accountancy, pay-office and economics concerning the rules of procedure of the financial administrative court] Pénzügyi Közlöny 1883. 51. sz. P. 1031.; 81085/Pm. 1883. december 25.; A pénzügyi közigazgatási bíróságról szóló 1883: XLIII. tc. életbeléptetése tárgyában. [On the subject of enactment of the Act Nr. 43 of 1883 on the financial administrative court] Pénzügyi Közlöny 1883. 51. sz. P. 1031-1032.

[27] Magyarországi Rendeletek Tára. [The collection of Hungarian orders] 17. évf. 1883. IV. füzet. Budapest, 1883. 243. sz. P. 1768.

optional oral system. The Hungarian solution differed from both; our financial administrative court decided the disputed administrative cases in written trial.

The procedural order of the administrative legislative activity of the English Justice of Peace followed the classical judicial model. Hence, the procedural norms of civil courts came across in the public legal decision making at first instance as well. The trial of the debated administrative cases also occurred in accordance with the contemporary English civil procedural law. Courts had wide trial procedural rights in this type of case, the content and ranking of procedural trial actions was determined by the court. The decision-making mechanism also mapped the classic judicial decision-making; the participants in the judgment had the same right to vote. The means and methods of evidence followed the forms established in the civil legal system. It occurred that the Justice of Peace listened to witnesses or directed new evidence. Thus, in England administrative legal debates were decided within contradictory frames, in oral procedure.[28]

The contemporary French administrative procedure of legal protection was an optional oral type. The procedural goal formulated in the acts concerned was an effective and cheap jurisdiction, capable of fact-finding and facilitating the statement of facts. However, the trial stage of the procedure was always public.[29] The Austrian jurisdiction decided already in 1875 to copy the French procedural system. The administrative judicial procedure before the court basically followed the procedural order of the civil courts. In the preparatory part of the trial the collection of the documents and the necessary oral listening were taken care of. The court hearing of the cases was public and oral.[30]

The legislation of Prussia was in favor of a completely oral system from 1879 onwards. The Prussian administrative legal proceeding distinguished between petitions for appeal

[28] Dell' Adami, Rezső: Igazságszolgáltatásunk és közigazgatásunk reformja az államhatalmak megosztása szempontjából. Magyar Jogászegyleti Értekezések I. [The reform of our judiciary and adminsitrative systems from the aspect of the separation of state powers. Essays of the Hungarian Lawyer Association. Vol. 1.] Budapest, 1880. P. 22-23.; Zergényi, Jenő: A közigazgatási bíróságokról. Jogtudományi Közlöny.[On the administrative courts. Journal of Jurisprudence] 1890. 42. sz. P. 330-331.

[29] Gruber, Lajos: A közigazgatási bíráskodás alakzatai Európában. I. A közigazgatási bíráskodás Francziaországban. Jogtudományi Közlöny [The forms of administrative judiciary in Europe. Vol. 1. The administrative judiciary in France. Journal of Jurisprudence] 12. évf. 36. sz. (1877. szeptember 7.) P. 286.

[30] Ludwig K. Adamovich - Bernd-Christian Funk: Österreichisches Verfassungsrecht. Dritte, neubearbeitete Auflage. [Austrian Constitutional Law. Third new edition] Springer Verlag. Wien/New York 1985. P. 325.; Wilhelm Brauneder: Osztrák alkotmánytörténet napjainkig. Friedrich Lachmayer grafikáival. Ford.: Dr. Kajtár István [The history of Austrian constitution until today. With the graphics of Friedrich Lachmayer. Translated by István Kajtár, Dr.] Pécs, 1994. P. 195.; Szabó, István: Ausztria államszervezete 1918-1955. A Pázmány Péter Katolikus Egyetem Jog-és Államtudományi Karának Könyvei. [The state organization of Austria 1918-1955. The Books of the Pázmány Péter Catholic University, the Faculty of Law] (Sorozatszerk.: Varga Csaba). Jogtudományi Monográfiák 2. (Szerk.: Schanda Balázs) PPKE JÁK. Budapest, 2010. P. 220-222.; Stipta, István: Az 1875-ös osztrák közigazgatási bíróság hatása a magyar közigazgatási jogvédelemre. Emlékkönyv Dr. Szabó András egyetemi tanár 70. születésnapjára. [The effect of the Austrian administrative court from 1875 on the legal protection of Hungarian administration. Book published in honour of the 70th birthday of Professor Dr. Szabó András] Acta Jur. et. Pol. Szeged (Szerk.: Tóth Károly). Tomus LIII. Szeged, 1998. P. 353-362.

against administrative decisions (Beschwerde) and complaints arising during the judiciary review (Klage). The petitions handed in to the administrative court had to be handed in, in written form. The law suit lacking legal ground could be immediately rejected with justified summons. The court could call upon the opponent of the plaintiff, based on a petition with legal ground in justified summons. Both decisions could be contested by asking for an oral trial.[31]

The contemporary Hungarian legislation did not strive for overall regulation in the area of procedural law, either. Therefore, neither did the act concerning administrative court contain coherent and detailed procedural rules. However, in the functioning regulations of the court the practical experiences pointing ahead beyond the case-preparation, the conducting of trial and the procedure of judicial decision making could be used. The striking deficiency of the act was that it did not contain the possibility for retrial. Later, as more petitions for this arrived to the decision-making body, they declared in many cases that there is no condition for retrial in the procedure of the financial administrative court.

*

The Hungarian financial administrative court established in 1883 enabled legal protection on one instance. The competence of the body was limited because its decision-making authority extended only to cases of direct taxes and fees. The procedure of the court was regulated by the contemporary legislature with regards to the interests of the state. Therefore, the principle of verbosity, ensuring a more complete legal guarantee, was rejected. However, the court played an important role in our domestic history of public law because it fostered the idea of the necessity for, and feasibility of individual legal protection against the state. Furthermore, its was the organizational antecedent of the administrative court, with general competence established in 1896, that ensured the rights of the parties on a broader scale and enforced the aspects of legal protection more firmly in procedural law.

[31] Gerhard Lange: Die Bedeutung des preußischen Innenministers Friedrich Albert Graf zu Eulenburg für die Entwicklung Preußens zum Rechtsstaat. [The significance of the Prussian Minister of Home Affairs Friedrich Albert Graf zu Eulenburg for developing Prussia into a Rechtsstaat (establishment of the rule of law)] Berlin, 1993. P. 45-53.; Handwörterbuch der Rechtswissenschaft. [Dictionary of Jurisprudence] (Hrsg.) Fritz Stier-Somlo und Alexander Elfter. 6. Bd. Berlin, Leipzig. 1929. P. 614-615.

European Integration Studies, Volume 9. Number 1. (2011) pp. 137–148.

ON THE CREATABLE LAW

MIKLÓS SZABÓ
Professor of Law, Head of Department of Legal Theory and Legal Sociology
University of Miskolc
jogszami@uni-miskolc.hu

For the individual admiring his/her surroundings, it is obvious from the beginning of his/her awareness that there exists an order in this world. The explanation is obvious too: Our world is a world created, and its creator (God or the Gods) has gone to the trouble of laying down laws for his creatures; one kind for the lamb and another kind for the wolf. Furthermore, it is understood that mankind, is also a part of the world which has been created, and therefore, to which the divine laws (such as the commandments declared or interpreted by Zeus, Manu, Moses, Mohamed, etc.) both apply and refer to.
However, the question is whether the same laws refer to us *the same way* as the rest of the world. In addition, are human beings considered to be social creatures the same way as wolves, ants or bees? If this is the case, then our existence is a pre-determined one. But if we are not, then we are able to lay down new laws for ourselves – in direct opposition to the other creatures which inhabit this planet. Taking this a step further: if we are self-determining, how far does our individual freedom concerning the exercising of a certain right extend? Can we do 'what we want' or 'what we must want'? Are there any, kind of barriers to our legislative activity (and if so what are they)?

The historical change of the doctrine of creatable law

The answer to the question asked above has significantly changed over time. As with almost every reflection, this one also begins recounting the deeds of the classic(al) Greeks. Since we still cannot find the legal precedents established there, namely the jurisprudence, the nature of Greek law has instead been revealed at the junction of politics and philosophy; with regards to the constellation and constitution of poleis. In short, coexistence was defined then along the following lines: the set up of cities and poleis is given by nature/ the gods, but its implementation depends on the decision of people.[1]

The argument that human association follows the order of natural laws/rules, or the physis, just like the association of wolves or ants produces two counter-arguments. First of all, experience has shown us that this is simply not true since the constitution of poleis varied. Second of all, 'nature' can not be perceived as a determination independent of human beings. Nature cannot be perceived as *empirical* because nature bears the mark of human interference to an exponentially progressive extent. On the other hand, it can also not be realized philosophically, as the concept of a 'nature' (in and of itself) is merely a

[1] The most well-known formulation of this very last thought stems from the sophist Protagoras: "Man is the measure of all things." (Recapitulated in Plato's Theaetetus, Section 152a.)

philosophical product.[2] The ideas of 'natural' and 'human' are not completely contradictory to each other, however they do represent two poles in a system where each both defines, and is defined by the other.[3] Our world is characterized by duality, and as declared in an often quoted sentence of Kant: "Two things fill the mind with ever new and increasing admiration and awe, the more often and steadily reflection is occupied with them: *the starry heaven above me and the moral law within me.*"[4] In accordance with this line of thinking, our world really consists of two worlds: a *natural* and a *moral* world.

The dilemma concerning the priority and relation of physis and nomos also refers to the character and basis of law. It asks whether law is the *product* of nature or of *humans*. In the first case, the law is *given* by nature, meaning it is a *natural* formation. However, in the second case, it is *created* by human(s) (signaling an *artificial* formation). The answer shows how extended the freedom of human practice (or will) really is; whether it is confined only to the sphere of cognition or whether applies to the area of creation as well. The answer was, even in the antiquities, that law is an artificial product beyond all rebuke, and at least in part, (with regards to positive law), a series of actions voluntarily committed by humans. Therefore, by the later centuries questions in relation to the presence, proportion and significance of the 'natural' element present in law were relegated as to how 'artificial' and 'natural' share the law. Thus, if our political 'society' (our polis) and in general our world possess dual construction, then our law (a product of our world) must as well. That leads directly to the idea of `double law` or *ius duplex*.[5]

It is well known that originally *ius, fas* and *mos* have common roots, and these roots are *sacral*. This idea of self-determination is also seen in the Roman law and jurisprudence: "Jurisprudence is the knowledge of things divine and human, and the science of what is just and unjust."[6] The law arose out of the undifferentiated norm and agglomerated from moral/custom norms (*physis*) appearing as written norm (*nomos*). Nevertheless, from the very first moment of this phenomenon, law bore the mark of this duplicity (of human and divine/natural momentum) further, namely in the duality of *ius scriptum* and *ius non*

[2] „The philosophy distinguished from myth appeared and the nature was discovered, namely the first philosopher was the human who discovered nature." Leo Strauss: *Natural Right and History.* Chicago: University of Chicago Press, 1953.

[3] "NATURE (the art whereby God hath made and governs the world) is by the art of man, as in many other things, so in this also imitated, that it can make an artificial animal." And a bit later: "For by art is created that great LEVIATHAN called a COMMONWEALTH, or STATE (in Latin, CIVITAS), which is but an artificial man." Thomas Hobbes: *Leviathan.* (1660) 'Introduction'

[4] I. Kant: Critique of Practical Reason (1788)

[5] See also: Juhász, Zita: 'De iure non scripto, avagy a korai jogfogalom duplexivitása.'[De iure non scripto, alias the duplexivity of the early definition of law] 5 *De iurisprudentia et iure publico* (2011/1) [www.dieip.hu]; Linda Ellis – Marius Tiberius Alexianu: 'Duplex Ius: Conflict and Competition between Romano-Byzantine Law and Folk Law in the Balkans.' In Linda Jones Hall (ed.): *Confrontation in Late Antiquity: Imperial Presentation and Regional Adaptation*. Cambridge: Orchard Academic, 2003. Certainly, natural law has many forms. In this article we rely on the classical version, that sets the natural law „above" the human law in so far that it is blocked voluntarily from the human interposition, and is instead given „objectively".

[6] Ulpian D.1.1.10.2.: „Iurisprudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia."

scriptum.[7] What complicates the web of *second nature* further is the *convention* sanctioned by the human.[8] The next question relates to the relationship between the two natures. For many years the merit of unwritten/divine/natural law was seen as indisputable against written/human/positive law.[9]

This relation changed in the modern era when the priority which had once been assigned to the human being by the sophists, returned again: "Custom is a second nature which destroys the former."[10] The two halves of law became equal with each other via the concept of natural law in the modern era – not irrespective of the deconsecrating of philosophical and legal thinking. The most radical step in this direction was taken by the father of natural law and international law, Grotius. He carried on from the work of Aristotle, namely the division of natural right *(ius naturalis)* and voluntary right i.e. "a LAWFUL RIGHT in the strictest sense of the word law" *(ius voluntarium)*.[11] He organized divine law under human law, which he designated as a voluntary right.[12] Although the

---

[7] Even concerning the relationship between speech and writing Greek philosophy viewed the written as being inferior to the spoken. Hence, exposition, argumentation and education had to happen in speech. E.g.: "If he […] has the power to show by his own speech that the written words are of little worth, such a man ought not to derive his title from such writings, but from the serious pursuit which underlies them." He, who expresses his thoughts in words has 'the name "philosopher," that is, "lover of wisdom".' "On the other hand, he who has nothing more valuable than the things he has composed or written, turning his words up and down at his leisure, adding this phrase and taking that away, will you not properly address him as poet or writer of speeches or of laws?" Plato: 'Phaedrus.' 278c-e. Plato in Twelve Volumes, Vol. 9 (Transl. by Harold N. Fowler) Cambridge, MA: Harvard University Press – London: William Heinemann Ltd., 1925.

[8] To the debate of nomos - physis see also G. B. Kerferd: *The Sophistic Movement*. Ch. 10. Cambridge U.P., 1981. Platon exposits the myth in the presentation of Protagoras according to which "Zeus feared that the entire race would be exterminated, and so he sent Hermes to them, bearing reverence and justice to be the ordering principles of cities and the bonds of friendship and conciliation." Plato: 'Protagoras.' 322c. (Transl. by Benjamin Jowett.) This law i.e. voluntary law, social norm (*nomos*) wining over the law of nature (*physis*) is needed for organizing order.

[9] E.g. "[11] We have said that there are two kinds of just and unjust actions (for some are written, but others are unwritten), and have spoken of those concerning which the laws are explicit; of those that are unwritten there are two kinds. [12] One kind arises from an excess of virtue or vice, which is followed by praise or blame, honor or dishonor, and rewards; for instance, to be grateful to a benefactor, to render good for good, to help one's friends, and the like; the other kind contains what is omitted in the special written law. [13] For that which is equitable seems to be just, and equity is justice that goes beyond the written law." Aristotle: *Rhetoric*. I, 13. 1374a. (Transl. by J. H. Freese) *Aristotle in 23 Volumes*. Vol. 22,. Cambridge and London: Harvard University Press – William Heinemann Ltd., 1926.

[10] Blaise Pascal: *Pensées.* 93. New York: E. P. Dutton & Co., Inc., 1958; and he goes on in 94: "There is nothing he may not make natural; there is nothing natural he may not lose."

[11] Hugo Grotius: *The Rights of War and Peace.* (Transl. A. C. Campbell) Washington – London: M. Walter Dunne, 1901 (Hyperion reprint edition 1979) p. 21. And here comes the definition of *ius naturalis*: "Natural right is the dictate of right reason, showing the moral turpitude, or moral necessity, of any act from its agreement or disagreement with a rational nature, and consequently that such an act is either forbidden or commanded by God, the author of nature." Ibid.

[12] "Now the Law of Nature is so unalterable, that it cannot be changed even by God himself. For although the power of God is infinite, yet there are some things. To which it does not extend. […]

Greeks had already formulated that natural law has no system of sanctions they believed that this was due to the power of fate and destiny to rule and order everything. Over time this trust in the power of fate and destiny disappeared. Although the validity of natural law was universally acknowledged, its role, in regards to precedence over positive law was disputed.[13]

For the Romans, thinking in regards to natural - and positive law-centered primarily on the matter(s) of the duality (of) and distinction between the *philosophical* and *practical legal* aspects of the two. The famous thesis of Celsius - *ius est ars boni et aequi*[14] - was for his contemporaries astounding and moreover outrageous much in the same way that observing it from the aspect of our recent legal conception tuned onto positivism.[15] Much more realistic was the warning of Paulus: *„non omne quod licet, honestum est"*.[16] However, even harsher is the way Modestinus composes: *„legis virtus haec est: imperare, vetare, permittere, punire"*.[17] This thesis enjoys absolute priority for the *legal praxis:* law is what was created as voluntary/positive law and is applied. Nevertheless, the demand for ordering the legal praxis under moral gauges (ultimately justice and equity) carried through maintaining the idea of law being above voluntary/positive law. Additionally, even in the works of the greatest proponents of legal positivism, voluntary law is recognized as possessing enough validity to remain independent of supposed law.[18] More precisely, the basic position is converse. After the independence of positive law from superior law that which remained, was law but not in a purely positive form.

For seizing on this duality, there is an eligible and often used distinction, namely the distinction of the definitions of *ius* and *lex* or *law* and *act*, even if this distinction is riddled with inaccuracy.[19] Law is the sum, non-creatable in its completeness, written and positive in its non-completeness. Act, on the other hand, is the part, creatable in its completeness, and as such, likely written and positive.[20] This same duality makes the simultaneousness of

Thus two and two must make four, nor is it possible to be otherwise; nor, again, can what is really evil not be evil." Ibid. p. 22.

[13] "[T]hat no human law which conflicts with the Divine law is binding; [n]ow, to say this is sheer nonsense." – warned John Austin: *Lectures on Jurisprudence.* Vol. I. London: John Murray, 1863. (5. ed: 1885.) p. 215.

[14] "Law is the art of what is good and just." D. 1.1.1.

[15] „The fact that Celsus used *bonum et aequum* as an argument in order to correct strict law– must have shocked his contemporaries. Celsus, however, obviously took great pleasure in this. [...] Celsus was the first and until the late classical legal science, only jurist who used among his arguments that of *bonum et aequum*." H. Hausmaninger: 'Publius Iuventus Celsus - The Profile of a Classical Roman Jurist.' In: W. Krawietz – N. MacCormick – G. H. von Wright (eds.): *Festschrift Summers.* Berlin: Duncker & Humblot, 1994, P. 253

[16] "Not all that is permitted is honest."D. 50.17.144. pr.

[17] "The strength of a statute is commanding, forbidding, permitting, punishing D. 1.3.7.

[18] Such is the thought of natural law identified with divine law by J. Austin, or "minimum content of Natural Law" by H. L. A. Hart.

[19] Concerning the precision of archaic laws see also e.g. Hamza Gábor: *Jogösszehasonlítás és az antik jogrendszerek*. [Legal comparison and the antique legal systems] Budapest: KJK, 1998, P. 125-130

[20] The extension from the acts towards law is provided by the introductiona of types of law e.g. perpetual law, natural law, divine law [*lex aeterna, lex naturalis, lex divina*] by St. Thomas Aquinas or the so called laws improperly and the objects metaphorically termed laws by John Austin. „If this rule is composed in writing then it is called *law* that is 'written disposition' by

the thesis that the law is both creatable and non-creatable (as well as the temporal change of this relationship) possible. Mátyás Bódig divides this temporal change first into two major eras, the pre-modern and modern eras,[21] (with the end of the 18th and beginning of the 19th century being the border between the two). From the legal historical aspect, this time period is marked by the creation of the first modern codes, such as the stellar *Code civil*.[22] The difference between these two eras is that the *function* assigned to law was apprehended differently.

Essentially, the difference between the functions of law and legislation appears in the expectation of assuring the *legal community* of *legal equality*. The first part of this, relates to the coherence of the society in question as that of a reproductive society and the *determining* component of its identity. This "coherence" is the law in modern circumstances. The same laws, and the same constitution above all, unifies us into a society organized politically, i.e. state.[23] Furthermore, this state is a *nation state,* a phenomenon relatively new in history, in spite of forces and attempts of projecting it further back.[24] Before this, communities had been ordered by the complicated, hierarchical structure of identities and loyalties into the local and universal togetherness.[25]

The second question relates to the first one: if the law is not responsible for creating a community among people, then it also can not serve as the common denominator in assuming *legal equality*. On the contrary; pre-modern and even medieval law is anchored

Izidor. Hence, act is not the same as law but its manifestation." St. Thomas Aquinas: *Summa theologiae*. Secunda secundae, 57. 1. 3.

[21] Bódig, M.: 'A jogalkotás jogelméleti problémája.' [The legal theoretical problematics of legislation] In Szabó M. (szerk.): *Jogbölcseleti előadások*. [Lectures on philosophy of law] Miskolc: Bíbor, 1998, 115. skk. Certainly, the caesura is not precise enough, since for example the school of legal history, led by Savigny, was still doctrinizing creatible law even in the 19th century.

[22] József Petrétei mentions ALR (Prussian Statue Book, 1794) and ABGB (Austrian General Civil Code, 1811) together with *Code civil* (Napoleonic Code, 1804) as they still bear the mark of natural law. Petrétei, J.: *A törvényhozás elmélete és gyakorlata a parlamentáris demokráciában*. [The theory and praxis of legislation in the parliamentary democracy.] Budapest: Osiris, 1998, P. 25

[23] It is the lack of this legally binding force – „the contract" – that in accordance with the theories of contracts separates the state of nature from the state of citizen.

[24] The flash back of „nation" becomes possible due to the fact that the elements connecting only with the achievement of middle-class status – nationality in a sense of ethnicity *(natio),* political loyality *(fidelitas)* and the political community *(communitas)* – separately or partly connected had already existed earlier. See also Szűcs, Jenő: 'A nemzet historikuma és a történetszemlélet nemzeti látószöge. Hozzászólás egy vitához.' [The historicum of the nation and the national viewing angle of historical aspect. Remarks on a debate.] In Szűcs, J. : *Nemzet és történelem. Tanulmányok*. [Nation and history. Essays.] Budapest: Gondolat, 1974, P. 92

[25] „The 'society theory' of Middle Ages records from the glossators through scolastics and Dante to early modern times five different kinds of basic human coexistence, of which the lowest four are: the 'societies' of village, town, province and kingdom *(universitas vici, civitatis, provinciae, regni)* organized under the highest social organism and *societas publica :* the *universitas populi Christiani* embodied in the church." Szűcs, J.: '»Nemzetiség« és »nemzeti öntudat« a középkorban.' ['Nationality' and 'national consciousness' in the Middle Ages.] In *work cited.* P. 213

on and characterized by a variety of exemptions, discharges, privileges, patents, numerous discriminations and in a word, inequality, all stemming from the natural-divine order.[26]

The modern political-legal order based on the thesis of popular-sovereignty places the function of formal-rational law on organizing the community and bringing them to a common point. Thus, this order is not a result of the divine or natural order but one of the *will* of the holder of sovereignty i.e. the people, regardless of however slowly and gradually the political institution (political representation) developed which was able to channel this will. In the modern era, the legislation created by way of human will had to reckon with what it uses its ability for i.e. what role it destines to the laws created by humans. The answer to this question constitutes the next borderline being within the paradigm of modern legislation at the turn of 19th and 20th centuries.

In accordance with the conception of legislation in the 19th century, "what the law has as function is to draw the frames of the political existence of the nation, the borders of the competence and autonomy of state and society and to ensure the maintenance of clarified relations that can be accepted as rightful to the members of society."[27] This approach equates with the liberal concept of the limited or "minimal" state and is rooted in the doctrine of natural law in the 18th century. This doctrine relied on both constitutional and non-constitutional legislation to anchor the conditions of the order and way of coexistence, as well as competition and cooperation in a simple, transparent and durable way (permanently if possible) and finally to guard them against any inner or outer attacks. This was meant to be fulfilled by the major constitutions and laws of the era, which were often declared immutable.

This phenomenon is exactly that which is cancelled by the legislation of the 20th century since it ascribes a totally different role to legislation. This new role is the so called *social control,* in which the law receives an *instrumental* function. Alongside the regulative function traditionally assigned to law and legislation –namely to answer the same repeatedly asked questions, and cases – the directive function, took on responsibility for answering those new questions in a new way i.e. adjusting to changing circumstances. Thus, in the 20th century the regulative state was usurped by the interfering state, which was then usurped by the engineering state, which uses law as the means of *social engineering*. Against the constant, immutable law, this brings along the dominance of law flexible, constantly adjusting to circumstances, always changing, and the new concept of legislation.[28]

---

[26] „In the Middle Ages the mechanisms of legislation were established in a way that *the defining social inequalities were manifested in them.* The law created or acknowledged anchored the hierarchical relations that had already existed even before the law..." Bódig, M.: 'A jogalkotás jogelméleti problémája' [The legal theoretical problematics of legislation], P. 115-116

[27] *ibid*. 117. o.

[28] Bódog Somló already perceived this development at the beginning of 20th century: „The interference of the state is diffusing on a continually bigger circle. However, the freedom of the people is also increasing with the changing of the current interference. Increasing state control, with increasing political freedom: that is the direction of development; – state control expending to everything and perfect freedom to determining or changing this regulation: that is the ideal of development." These are the final lines of his famous book - *Állami beavatkozás és individualizmus*. [State interference and individualism] Budapest: Politzer, 1903.

The barriers of creatable law

Thus, creatable law is the settlement of law as the object of voluntary, moreover tendential interference, the merits of which had gathered more and more ground throughout legal history. The meridian of creatable law**,** at the same time the pole and the correlation point of the abridgment of legislation, is the *absolute power of legislature*. This concentration was enabled by the engagement of legislation and sovereignty. The definition of this sovereignty as *plena potestas* was introduced by Jean Bodin. The conception of chief power understood as full powers was transferred from regal sovereignty to popular sovereignty and made the legislative power not limited or limitable by anything imaginable. The tip of the iceberg to this conceptional change was the tracing back of law to act, its identification with that, just as it was expressed in the credo of the exegetic school.[29] Leaving the question unanswered, whether there was any moment in history when these full powers had their way, we can accept it as a theoretical model that – as a discretional legislative power – can serve as the 'absolute zero**"** to the examination of limiting legislative power. In the following, we will examine the scale of these barriers and the way they can generally be observed in moderate civil states. The barriers will be divided along the lines of *extra-legal* and *inner-legal,* evoking the old distinction of Gyula Eörsi.[30]

1. The first group of barriers standing in the way of legislative power is that of the *extra-legal barriers.*

(a) The barriers of power result from the character and embedded nature of power in the law. We find the relationship between law and state and the fact commonplace that the prevalence of law is guaranteed by the state acquiring a monopoly on the use of legitimate force (Max Weber). Hence, law is order of force (Hans Kelsen) and that is why legislation is the exercising of the power of legislature (*Rechtsmacht:* Bódog Somló).[31] Thus, the fortitude concentrated and exercised by the (power of the) state is not needed only in so far as – besting the other local or particularistic social powers - it can enforce the prevailing of legal norms – hazarding the consequences (if there are any) of being paralleled with political adversaries during the forthcoming democratic elections but it is also the constitutive element of the definition of law.[32] Theoretically, we refer to this momentum by composing the authoritative, preemptive character – namely the demands on the binding

[29] „The exegetic school espoused the theory that the whole body of civil law was in the Civil Code and that every legal solution has to arise from the text of the Code indirectly, or by induction or deduction. Every legal solution will be solved eventually during investigating the expressed or hypothetical will of legislature." The words of E. Gaudemet cited by Varga Cs.: *A kodifikáció mint társadalmi-történelmi jelenség.* [Codification as social-historical phemonenon] Budapest: Akadémiai, P. 124

[30] Eörsi, Gy.: *Jog – gazdaság – jogrendszer-tagozódás*. [Law – economy – division of legal system.] Budapest: Akadémiai, 1977, P. 7

[31] Somló – adapted from John Austin – derives the definition of law from this *Rechtsmacht* „mean[ing] the rules of a power meeting generally obedience, extending to a broad circle and constant type, most superior." F. Somló: *Juristische Grundlehre*. [Legal basic study] Leipzig: Felix Meiner, 1917, P. 105

[32] E.g.: „In general, legislation the *special acting form of state authority,* the controlling power of state, the determining and defining way of establishing legal norms." Drinóczi, Tímea – Petrétei, József: *Jogalkotástan*. [Doctrine of legislation] Budapest – Pécs: Dialóg Campus, 2004, P. 73

force overtaking any other norm – of the law. As can be later seen in Section 2.a, the barriers of power can be found in the legal institutions of the separation of powers.

(b) The barriers of expedience can be placed under the range of *public policy* with the help of a classification coming into fashion nowadays. In this approach legislation serves as a means to reach the goals appointed by the (major) politics. However, the goal rationality of Weber has to be bested at three levels - sometimes not compatible with each other – in the legislation in order to reach the goal set. The first of the three levels is the *rationality of power and politics.* The question is what sort of consequences does an act (for example the introduction of property-tax or the privatization of health care) have for the party in power/ in the opposition. Secondly, the *rationality of state administration* values how a political decision can be executed. Can the decision be executed in time and at expenses that following the goal assigned by the decision still remains rational? Finally, the *rationality of object (profession-departmental policy)* values the effects of the decision to the area given (in our example on the tax incomes or health care) from the aspect of rationality. The balance of these three is what truly makes a legislative decision rational.

(c) Significant to endeavors of politics and public policy is also the *economy*, which is worth mentioning individually, moreover since it is a particularly hard barrier. The border between the logics of I do "what I want" or "what I must want" i.e. the division of political voluntarism, is not a clear one. Economical acts and conditions cannot be violated, even with any kind of intended declaration or a law enacted with any level of majority. And if the legislature neglects this, the political groups mentioned in Section 1.a will without a doubt, remind him of it. Before the legislation of the ruling power the same kind of barrier is set via the judgment of *civil society,* with the help of publicity, the general public, media, and other vehicles of opposition.

(d) The *barriers of correctness* are also of a political nature as far as a public statement on the method and order of coexistence is manifested in them. Traditionally, this is formulated as the *rightness of law*. Its most pregnant version is the thesis of *lex iniusta non est lex* written by St. Augustine i.e. the (human) law unrighteous loses its legal quality, even its binding force.[33] The connecting of justice and rationality is in the centre of the rationalist natural legal –rather *neuro-legal* - concept of Kant. In his system law is a part of the moral.[34] This thought –manifested as "justice", means the historical realization of the community of rational, autonomous creatures in the "empire of goals"- resurrected again with the Neo-Kantianism at the turn of 19th-20th century. Nevertheless, Stammler places correct law no longer amongst natural law but amongst that positive law created in some way in accordance with the "social ideal". That trend gives the *barrier of content* of legislation, and eventually it examines the *moral* rightfulness and verifiability of this content.

---

[33] Nor in this categorical formulation is the thesis the requisite of bygone days: Gustav Radbruch declared recently with regards to the Nazi legislation, that laws unequitable „to an intolerable extent" causing the state of „legal injustice" (*gesetzliches Unrecht*) instead of that which we must obey „supra-legal justice" (übergesetzliches Recht). See also: G. Radbruch: 'Gesetzliches Unrecht und übergesetzliches Recht.' In: Rechtsphilosophie. [Legal philosophy] Stuttgart: K. F. Koehler, 1956, pp. 347-57.

[34] See H. Steiner: 'Kant's Kelsenianism.' In: R. Tur – W. Twining (eds.): *Essays on Kelsen.* Oxford: Clarendon, 1986, P. 68

2. The other group of barriers constraining the legislation into frames more visible to us is that of *inner-legal barriers*. Law cannot only react on itself but it can also control, even constrain its own functioning. Naturally, "self-control" is the constraining of legislature with regards to content. In this definition, a legal barrier is also the barrier of power. Thus, the inner barriers are in direct contact with the external ones.

(a) If legislation is the exercising of power, then here the thesis of Montesquieu can be also applied: power can and must only be constrained by power. Power namely wants to acquire full power and if we want to defend freedom, we have to constrain it. Only another power can constrain it, which can only be approached if the unified sovereign power is divided into pieces which are in opposition to each other. Its institutionalization within the law is the separation of powers, commonly known as the system of checks and balances. And if the separation of powers falls into the system of the political pluralism in the 20th century, which is characterized by the resultant of the effort of power agents coordinative, then arrive at the present day: namely to legislation placed in a complicated political field of force and constrained by this field of force.[35]

However, jurisdiction can set a bar against the will of legislature not only by jurisdiction of public law but also by operating *ordinary courts*. This was something well known by all legislatures, from Justinian up to the absolutist monarchs. It was also known, that *interpretation* is the place where the will of legislature falters, which is why legislature tried the impossible undertaking of forbidding interpretation. More precisely, attempt was not impossible, theoretically it only requires the raising the level of autonomy afforded to jurisdiction to such extent so that it is equivalent to the idea and function of law itself.

(b) To this day, the heritage of natural law is preserved by the *barriers of international law* even in their evolution and character. Already Gaius identified the *jus naturale* with *jus gentium* and the area of *jus naturale* as a *philosophical* abstraction but the area of *jus gentium* as a *legal* abstraction was tackled in Rome. The natural legal character appears in the first modern documents of human rights as well – referring to the fact that these rights are not granted by the state or the sovereign but the human *as a human being* is entitled to them via their birth. Nowadays this phenomenon of human rights constraining the sovereigns prevails too, and has become positive and institutionalized to a high degree in the international political-legal system. Actually, it can and must be valued as a rejection of the binding power of international legal norms and the demand made of full powers if that state (more precisely the political power possessing the state power) refuses - on grounds of its own sovereignty - attempts at intervention and constraint arising from international organizations and forums.

(c) The *barriers of basic rights* must be distinguished from the inner legal institutional system of the separation of powers. Both stem from the same source of natural law, and they often carry the same content as human rights. This is especially true in relation to the rights afforded by constitutional freedom and the human rights of the first generation. There is nothing accidental about this. The innovations of the same social-political processes were

[35] Naturally, the „separation" of powers placed between emphasized quotation marks existed also in the past: as an order of power between persons, estates, institutes divided and balanced from the mixed administration of the Roman Republic through the battles between the Papacy and Holy Roman Empire up to the feudal structures.

institutionalized in the international norms in the same manner as the inner (constitutional) legal documents and norms.

Concerning the mechanism of the operation of human rights barriers (both historically and analytically) it was desired that *absolute* barriers be set as a first step in front of the *absolute* (legislative) power. The following supposition that *no law can be enacted* concerning the matter defended by a basic right can be called a standard text.[36] As step two, the constraining of legislature can be nuanced so that basic rights still do constitute an absolute barrier i.e. even basic rights can be constrained. However, constraint of basic rights is generally only possible with special conditions i.e. it needs an especially strong verification. The usual gage of this verification (following the practice of German constitutional court) is the test of *eligibility-necessity-proportion*. As step three, the constraint of constraining basic rights has to be considered i.e. those cases –those basic rights of special status – which cannot be constrained even in the event of the existence of conditions mentioned before. Thus, they *still* set an absolute barrier to the legislature.[37]

From the basic rights defending certain special legal objects and setting barriers before legislation, we must distinguish the principle of *equalit*y as playing the role of a *formal barrier*. Equality – and the *prohibition of discrimination* deduced from that - does not have its own guarantor. Before legislative regulation referring to *every object*, it sets the formal requirement that if legislature creates law, it should do so, so that it does not conflict with the theory of equal treatment and the prohibition of autocratic distinction.

(d) The *barrier of law dogmatics* stems not directly from legal directions but from their dogmatic processing. Legal dogmatics helps the legal practice via the establishment of definition(s), system(s) and method(s) and regulates between theory and praxis, and science and praxis. In order to be able to do so, the law must first be molded into an autonomous and coherent system that is able to complete its social functions.[38] In accordance with one

[36] E.g. The First Amendment to the United States Constitution declares: „Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ". And as Judge Black formulated: The expression „cannot make law" means „it cannot make law". See Győrfi, Tamás: *Az alkotmánybíráskodás politikai karaktere*. [The political carrier of constitutional jurisdiction.] Budapest: Indok, 2001, P. 77; and Ronald Dworkin: *Freedom's Law*. Oxford: OUP, 1996, p. 16. ff.

[37] Tamás Győrfi designates four of these possibilities: 1. those rights that cannot be limited „because after deliberation they always prove to be heavier than any other aspect put in the other scale pan" (e.g. the right to life and dignity); 2. those, „against which nothing can be put in the other scale pan" (e.g. the prohibition of unnecessary and cruel torture); 3.those that reflect „already the result coming after deliberation" (e.g. basic institutions of constitutional criminal law); and 4. the formal barrier of prohibition of discrimination. Győrfi, T.: *op.cit.* P. 93

[38] See to this question e.g. Pokol, B.: 'A jogdogmatika természetéről.' [On the nature of legal dogmatics.] 9 *Magyar jog* [Hungarian law] (1992) P. 514-515; N. Luhmann: *Rechtssystem und Rechtsdogmatik.* [Legal system and legal dogmatics.] Stuttgart etc.: Verlag W. Kohlhammer, 1974, P. 19.; Petrétei, J.: *A törvényhozás elmélete és gyakorlata a parlamentáris demokráciában*. [The theory and praxis of legislation in the parliamentary democracy.] Budapest: Osiris, 1998, P. 144; O. Behrends – W. Henckel (Hrsg.): *Gesetzgebung und Dogmatik*. [Legislation and dogmatics.] Göttingen: Vandenhoeck & Ruprecht, 1989. Szabó M.: 'A jogalkotás jogdogmatikai korlátaihoz.' [On the legal dogmatical barriers of legislation.] In Gerencsér Balázs – Takács Péter (szerk.): *Ratio Legis – Ratio Iuris. Ünnepi tanulmányok Tamás András tiszteletére 70. születésnapja alkalmából.*

formulation of the *autonomy thesis* "legal reasoning is a viable and vital form of public practical reasoning that is able to serve the task assigned to it because of its autonomy from moral and political reasoning."[39] Thus, this part of autonomy is the autonomy of argumentation and verification – within this the constitutive role of dogmatic reasoning.

The nature of legal dogmatic barrier standing in front of legislation can be demonstrated by the metaphor of "chain-novel"[40] introduced by Dworkin for the introduction of the fixity of interpretation. Let us imagine that more writers cast lots in favor of writing a common novel. Who has drawn number one will write chapter one, who has drawn number two, will go on with chapter two and so on, so that the novel will be made out of the parts connecting as a chain. In this case, the writer of the first chapter has full freedom in picking the genre, era, characters, topic, etc. The others coming after him find themselves solving the challenge of *interpretation* and *creation*. It is in this way that the legislature is constructed – if it is to be created based on an apprehensive work– on the legal dogmatic antecedents set by the predecessors. However, he will also build on that work further. He is not hog-tied, nor is he however, totally free. Even if he freed himself from the traditions, he would have to take the risk of the presumable defeat of rejecting his own basis from the beginning. And such an undertaking is qualified foremost among revolutionary circumstances as rational.

(e) Rather a *formal barrier* is created by the gage set in front of the legislation, which shows the standards of *constitutionality*. Constitutionality means *due process law* in the first place.[41] The due process of law demands that the laws enacted – whatever their content is – should be cognizable and predictable. "The due process law makes the state – in first case the legislature – have the obligation to assure that the total, certain division between areas of law and certain acts are clear, unambiguous, predictable and foreseeable concerning their operation to the recipient of the norm."[42] Lon Fuller names eight ways how the legislature can "ruin" legislation, violating the requirements of constitutionality and rule of law.[43] Making these mistakes "only" has the effect that the legislature writes itself out of the community of civilized states.

[Ratio Legis – Ratio Iuris. Festive studies to the honour of András Tamás to the occasion of his 70th birthday.] Budapest: Szent István Társulat, 2011, pp. 130-136

[39] G. Postema: 'Law's Autonomy and Public Practical Reason.' In R. P. George (ed.): *The Autonomy of Law: Essays on Legal Positivism*. Oxford: Clarendon, 1996, p. 80.

[40] R. Dworkin: 'Law as Interpretation.' In 60 *Texas Law Review* (1982) p. 527.

[41] „The consitutional state requirement of material justice can be realized staying within the institutions and guarantees serving the due process law." Decision No.9/1992. (I. 30) Decision of Hungarian Constitutional Court ABH 1992, 65.

[42] *Op. cit.*

[43] The requirements: (1) generalization of legal acts; (2) legal acts would be published; (3) no hindsight of legal acts; (4) they could be easily understood; (5) they should not be inconsistent; (6) they should not command what cannot be done; (7) a law should not change too frequently; (8) discernible relation between judgements and the laws. Lon Fuller: *The Morality of Law*. New Haven – London: Yale University Press, 1964, pp. 33-38.

Epilogue

It is easy to recognize that the barriers introduced in Sections 1. d. and a 2.a., 2.b. and 2.c are the heirs of the conception of *superior law*. Although the idea of the power of divine law and natural law constraining and overwriting human law has long since passed, in another way, this thought lives on further, in that besides the *acts optionally* creatable in accordance with the will, the *law* is still more than the arithmetical total of acts. And this surplus is exactly what makes the law law, and what exceeds the range of legislature. Perhaps it will acquire possession on this terrain, but with this motion –as a converse King Midas – even the gold will become clod in his hands and what he thinks is law, is not law but a pure commend of power now.

European Integration Studies, Volume 9. Number 1. (2011) pp. 149–161.

THE EUROPEAN ADMINISTRATIVE SPACE (EAS)*

ANDRÁS TORMA
Professor of Law, Director of the Institute of Political Sciences
University of Miskolc
jogtoa@uni-miskolc.hu

The relationship between the EU institutions and the authorities of the Member States is very complex. Nowadays this relationship works in one special space, similarly to that of the European Economic Area, which is called in the legal literature as the European Administrative Space (hereinafter referred to as 'the EAS'). This paper deals with the EAS's history, its characteristics, its future, and tries to give the best definition of EAS.

1. Definition of the European Administrative Space

The European integration achieved in the last six decades of has brought round a kind of integration and approximation of the national administrations of the Member States. This convergence was realized mainly in the aspect of functionality and value orientation. This is because the essence of the EU law is the effective cooperation. It is no longer controversial that we cannot speak only about European (EU) law, European environmental law, European competition law etc. but also about the European public administration and European administrative law.[1]

On the one hand this cooperation is realized between the EU institutions and the Member States and, on the other hand, between the Member States' administrative authorities having the same functions.[2] The Union cooperation carried out for many decades has undoubtedly created a European administrative culture and unified values which is considered as part of the *acquis communautaire* by many authors.

Theoretically speaking, the EAS is a harmonized synthesis of values realized by the EU institutions and the Member States' administrative authorities through creating and applying the EU law. (Czuczai, 1999) We can say that the EAS is a special part of the *acquis communautaire*. Actually, the EAS is a metaphor with practical consequences for the future Member States. These states have to take into consideration the administrative principles. If these states do not take into account and do not apply these principles they will not able to fulfill the requirements of the *acquis communautaire*. Those principles are established by the Court of Justice of the European Union and are set out of the legal systems of the Member States and thus, these principles are generally applicable. (Józsa,

---

* It was translated by Balázs Szabó. Lector in English: Rita Rácz.

[1] For example: Jürgen Schwarze, Eberhard Schmidt-Assmann, Sabino Cassese, Czuczai Jenő, Balázs István

[2] Czuczai Jenő: Public Administration and European integration. In: Magyar Közigazgatási Jog Különös Rész (Szerk.: Ficzere – Forgács) Osiris Kiadó Budapest, 1999. 446. old

2003)[3] If the candidate states for the EU membership do not fulfill the requirements of the *acquis communautaire* in the field of the administrative system they will not be able to join the EU.

Indeed, at the present we cannot find the administrative law as a branch of law of the *acquis communautaire* and the EU does not have own administrative authorities established in the Member States. However, it is very important that it does not mean that the EU did not lay down requirements and expectations in the last decades concerning the Member States' administrative bodies, procedures and staffs. These requirements and expectations can be called as unified administrative principles and values since they determine to a large extent the organizational and functional principles of the evolving European Administrative Space and which constitute an important guarantee of the effectiveness of EU law.

It is clear that the concept of the EAS determined above has changed a lot in the past sixty years; nowadays it has a broader definition, because we are beyond the biggest enlargement of the EU. This enlargement was the so-called Eastern enlargement when 10 new Member States joined the EU in 2004. Thus, today the EAS is more than a condition for the membership, however there is no doubt that it is also a condition thereof since there are still candidate countries (e.g. Turkey, Serbia etc.). It is important to see that the integration is not a status but rather a developing process. Obviously the level of the administrative convergence was different during the Southern enlargement (in 1981 when Greece and in 1986 when Spain and Portugal joined) and the enlargement of 1995 (Austria, Sweden, Finland) than in the Eastern enlargement of 2004 and 2007. The candidate states have to strive to reach the general level of the EU Member State's administration in the future. The base of the comparison must be the candidate state's level of administration and the average of the Member States' administration. [4] (OECD SIGMA Paper No. 27.)[5]

The EAS is still a synthesis of values which characterize, in a general manner, the complex relationship between the administration system of the EU and that of the Member States. However, the level of convergence has significantly risen since the effective enforcement of EU law requires that. Nowadays the EAS does not mean 27 different, fragmented administrative systems. This is a space, where the authorities of the EU and that of the Member States cooperate loyally and ensure together the application of EU law. Or as another author describes '... in the functional sense, the EU administration can be characterized as the separation of powers of co-operation, and the subordination of different levels.' There is no doubt, that today we can talk about the European public administration and the European administrative law![6]

---

[3] Józsa Zoltán: About the European Public Administrative Space. In : Magyar Közigazgatás 2003 No. 12, pp. 724, 725.

[4] D' Orta, C.: What for the European Administrative Space? EIPA, Maastricht, 2003

[5] OECD SIGMA/PUMA: European Principles for Public Administration. SIGMA Paper No. 27 (1999), p. 15.

[6] J. Gil Ibanez: The execution and control of the common law. Osiris Kiadó, Budapest, 2000, p. 281.

2. The development of the European Administrative System

The EU took a major step to create the EAS with the researches carried out in the European Institute of Public Administration (EIPA – Maastricht) and in the European University Institute in Florence, with the establishment of the Copenhagen criteria (1997) and with the adoption of the Treaty of Amsterdam (1997). The Council of Europe (Strasbourg) and the OECD (headquarters in Paris, France) with its SIGMA Programme had an important role in the development of the EAS. From the adoption of the Treaty of Amsterdam the EAS has been outlining strongly.

The European Institute of Public Administration was founded in 1981. Its task was to analyze the relationship between the institutions of the European Communities and that of the Member States in the field of public administration. In the legislation of the Community the directives were getting more important. Directives are binding upon the Member States as to the result to be achieved but leave it to the respective national authorities to decide how the Community objective set out in the directive is to be transposed into their national legal systems by a specified date. Famous professors were working together in the Institute and in the other European institute established in Florence, where they were researching in the field of administration with empirical methods. That time Professor Jürgen Schwarze wrote his famous, still determining monograph about the European administration law. (Schwarze, 1988)

The Copenhagen Criteria was laid down by the Heads of State or Government of the Member States in June 1993. In this document we can find the rules that define whether a country is eligible to join the European Union. The Criteria require that a state (a) has democratic institutions which guarantee the human rights and ensure the protection of the minorities, (b) has a functioning market economy, (c) and is capable of fulfilling the obligations deriving from the EU membership (i.e. the transposition and application of the *acquis communautaire*, including the Economic and Monetary Union and the political Union). When the members laid down the criteria, they fulfilled the requirements thereof, so at the end of the day the fulfillment of those criteria on behalf of the new Member States means that they join the EAS.

SIGMA was initially launched in 1992 by the OECD and the European Commission's Phare Programme to support six Central and Eastern European countries in their public administration reforms. In parallel with the expansion of the Stabilization and Association Process, SIGMA support has subsequently been extended to other countries, including all the ten countries which joined in 2004 and those two countries which joined in 2007 the EU. Its main task was to help those countries to expand their capacity of administration. The EU itself, through the European Commission, joined the SIGMA in 1999 since its Phare programme has the same aim as that of the SIGMA. In the framework of the SIGMA the EU and the OECD together formulated several different recommendations to help those states in preparing for joining the EU and with the appropriate enforcement of EU law. Two of the recommendations are important for us. The first is about preparing the national administrations for the EAS, and the second is about the principles of the European administrations. (See more at: OECD SIGMA/PUMA: Preparing Public Administrations for the European Administrative Space. SIGMA Paper No. 23. 1998. AND: OECD

SIGMA/PUMA: European Principles for Public Administration. SIGMA Paper No. 27. 1999.) [7] In the first document three principles were defined:

1.) The EU institutions cannot be substituted with national institutions, but they are obliged to cooperate.

2.) National administrations are responsible for the implementation and execution of the EU's decisions.

3.) National administrations have to be reliable, transparent and have to function in a democratic way. Despite the fact that the EU has no direct power over Member States' administrations, it exercises a strong influence on them. The expression of the so-called result obligation describes it best. The national administration must be reliable, transparent and democratic. We believe that these principles do not require a more detailed explanation.[8]

The second document, which is about the principles of European administration, states that there are principles which have to be enforced by the Member States in order to ensure the application of EU law. This is also an obligatory requirement for the candidate states and they have to make reforms to ensure that. Those principles were defined by the European Court as basic principles which have to be enforced in all the Member States. Namely, those principles are: the principle of legality, the principle of proportionality, the principle of legal certainty, the principle of legitimate expectations, prohibition of discrimination, the right to trial, the right to appeal. The principles are known widely, so we do not have to define them. However, it must be noted that the document methodizes the principles in different groups, such as: 1) reliability and predictability, 2) publicity, 3) accountability (public responsibility), 4) efficiency and effectiveness. We analyse these principles in the next chapter since these principles also characterize the EAS.

3. The main features of the European Administrative Space

The features of the EAS and the integration of the public administration in the EU have the same features. The experts' opinions are the rather uniform in that regard. These features are the followings.

A) Political stability and the enforcement of the democratic rule of law

It requires the establishment and maintenance of such a legal system which ensures the separation of powers, a democratic institutional system and the operation thereof, the enforcement of fundamental rights and freedoms, and finally the respect of minority rights. We have to highlight one of the provisions of the Treaty on European Union (hereinafter referred to as 'TEU') according to which '(t)he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to

[7] See in: OECD SIGMA/PUMA: Preparing Public Administrations for the European Administrative Space. SIGMA Paper No. 23. 1998, and OECD SIGMA/PUMA: European Principles for Public Administration. SIGMA Paper No. 27. 1999.

[8] For example : Sabino Cassese: Divided Powers : European Administration and National Administrations. In : Cassese, Sabino (ed.) : The European Administration. International Institute of Administrative Sciences and European Institute of Public Administration, Brussels, 1987.

the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.' (Article 2 TEU)

B) Sustainable and environment friendly economic development in which the principle of solidarity is dominant

Article 3, paragraph 3 of the Treaty on European Union provides as follows: '(t)he Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.' The principle of solidarity is realized primarily through the economic, social and territorial cohesion on the basis of Articles 174–178 of the Treaty on the Functioning of the European Union. This means in practice that, in order to promote its overall harmonious development, the EU coordinates their policies and activities so as to provide the sustainable development and to improve and increase the level of convergence. The EU specially takes efforts to reduce the differences of the development between the different regions all over the EU; furthermore it pays special attention to the rural areas, to the areas affected by industrial transition, to regions with very low population density and to the islands. To reach these aims the EU uses the sources of the Structural Funds and that of the European Investment Bank and other funds. On the basis of Article 175 of the Treaty on the Functioning of the European Union the Member States shall conduct their economy policies and shall conduct them in such way as, in addition, to attain those objectives.

C) Decrease of the role of national Parliaments and increase of the role of national administrations

From an institutional point of view, the winners of the European integration are the administrative authorities of the Member States, especially the central authorities and particularly the ministers. It should be borne in mind that the Council of Ministers, which consists of the ministers of the Member States, was the exclusive legislator for a long time, and now it is the co-legislator together with the European Parliament. Consequently, from the point of view of the execution of Union law, national Parliaments of the Member States are not legislators but executors. One author wrote about this topic in 2007 that 'by the fact that the Council is the central legislative body at European level and a number of competencies of the national power has been conferred on the EU (at the same time lost by national Parliaments) without the European Parliament's position to be strengthened to a similar extent, we are the witnesses of a kind of de-parliamentarisation.'[9] As a consequence, this upgraded the role of the national ministers, and devalued the role of the national Parliaments at Union level. This phenomenon is called in the legal literature as 'the democratic deficit'. The EU tries to decrease the level thereof for a long time by different means, for instance by ensuring more legislative power for the European Parliament (Single European Act, Treaty of Maastricht, Treaty of Amsterdam etc.), by involving the national Parliaments in the legislation (Article 12 of the Treaty on European Union) and by involving the European Parliament in the process of the creation and the termination of the

[9] Christian Calliess: Democracy in the European state and constitution federation. Jogtudományi Közlöny, 2007. november, p. 491.

European Commission (Articles 17 and 18 of the Treaty on European Union).[10] In our point of view, the deficit can totally disappear only if the European Parliament becomes the exclusive legislator (even if with the Council), and the European Commission becomes the government of the European Union. This is the tendency of the development, but the EU is too far from realizing that. On the other hand, the global financial crisis of 2008 has not deepened the integration, but rather encouraged and still encourages the strengthening of the national institutions of the Member States.

D) Maintenance and operation of a reliable, transparent and democratic administration

Concerning the reliability it must be assumed that the Member States are essentially free from external interference, are free to organize their administration, thus we cannot talk about administrative *acquis*. The EU is generally indifferent as to the organizational arrangements and operating methods applied by the national administrations and as to how they handle the public officials, the only point is that the public administrations have tu function in such a way that the tasks set out in the EU acts have to be fully and correctly implemented in order to achieve the Union's social, economic and political goals. The emphasis is therefore on the EU's goals, on the realization, that is to say, ultimately, on the effective application of the *acquis communautaire* and on the enforcement thereof.

To this end, the EU require, above all, that the structure and function of the administrative system have to be reliable: the provisions of EU law have to be transposed into the national legal systems in time, the various authorities have to effectively and efficiently apply them as well, and have to allow continuous monitoring thereof carried out at EU level and have to ensure appropriate means of dispute resolution. The reliability includes different elements of effectiveness: accuracy, promptness, dynamic adaptability, moreover the achievement of the main goals of the EU and that of the economic and monetary union and political union.

The EU's expectation is that the Member States' administrations should be transparent: the range of those national administrative authorities which are in communication with the EU institutions and especially with the European Commission has to be unambiguous, the levels of decision-making and competencies have to be accurately fixed and properly marked off, moreover the powers of the various national institutions have to organically fit with each other, and there should not be 'empty space' or jurisdictional overlap.

Finally, the EU's expectation is that the national administrations have to operate democratically. The requirement of democracy includes the rule of law, the respect for human rights and fundamental freedoms, multi-party system, the people's power, the party neutrality of the public officials and other practitioners of public power, the stability of laws, the predictable functioning of the administration.

If the Member States do not fulfill the above Union expectations, the European Commission and the other Member States have got the legal instruments to enforce them especially in the framework of the procedures based on Articles 114, 126, 258, 259 of the Treaty on the Functioning of the European Union.

[10] Chiti, M.P. – Greco, G. : Trattato di Diritto Administrativo Europeo. Milano, 2007

E) Enforcement of the 'European' and 'good governance' principles all over the EU: both at the level of the EU, the Member States and the local governments

Basically in this feature we have to mention the European Commission's 'White Paper on the European governance' of 2001. This outlines that in order that the EU institutions could get closer to the EU citizens, the five principles of 'good governance' have to be realized. The five principles are: openness, participation, accountability, effectiveness and the requirement of coherence.[11] The principle of openness requires that the institutions should function, in a physical sense, in a much more open way. What is more, they have to make clear for everyone that what they do and why they act, what are the decisions taken by them, and they have to communicate it in the appropriate language style and in a comprehensible form.

The principle of participation creates the validity of the decisions and, at the same time, it increases the citizens' confidence in the institutions since it ensures the right for the citizens, as well as for the various non-governmental and other organizations to have a say in the decision-making. The situation under which only the institutions concerned have the prerogative in the decision-making must be terminated.

The principle of accountability means that, on the one hand, each institution is required to explain and to make everyone understood what and why it does and, on the other hand, they have to take the responsibilities for their actions and omissions. The principle of effectiveness establishes three requirements for the institutions. On the one hand, the different policies have to be carried out in the light of clear goals and on the basis of past experiences and that of the probable future effects and in due time (timeliness). On the other hand, it requires that the decisions taken and the consequences of the decisions always have to be proportionate to the objectives set out (principle of proportionality). Thirdly, the decisions always have to taken at the most appropriate level (principle of subsidiarity).

The principle of coherence requires the realization of consistency and enforcement thereof in the different areas on behalf of the institutions. It must be made clear that the changes occurring in the world are ever more complex, thus the response given to them also have to be complex and well-coordinated (coherent).

The White Paper also states that the five principles of the good governance need to be applied all over the EU, more precisely in each Union institutions and bodies and in each authority of the Member States (both in the central authorities and in the local governments). As it can be seen clearly, it outlines such expectations that must be respected essentially by the authorities of the EU and that of the Member States. (In brackets we note that the 'good governance' and 'openness' is referred to in Article 15 TFEU. It states that in order to promote those principles the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible.)

F) Harmonization of the procedural systems or the application of such procedural rules and institutions which ensure the enforcement of EU law

It seems that there is an ever stronger accord in the past years concerning the need for the integration of the administration. The integration of the administration has to follow the

[11] European Governance: A White Paper, Commission of the European Communities. Brussels, 25.07.2001 COM(2001)428.

economic integration, because it is not allowed in the European Union that the 27 Member States execute in a different manner the acts adopted by the EU. Therefore, the unification of the administrative authorities and procedures of the Member States has been started in the EAS. This process is about the unification of the procedures of member states' administrative authorities and the administrative procedures. (It is called Europeanization.)

F/1. The overture was the recommendation of the OECD on the European principles for public administration. (See at: OECD SIGMA/PUMA: European Principles for Public Administration. SIGMA Paper No. 27. 1999.) As we have seen, this document classifies under 4 groups the requirements concerning the European administration, taking into account the general principles of law established by the European Court: a) reliability and predictability, b) openness and transparency, c) accountability (public responsibility), d) effectiveness and efficacy. [12]

Ad a) Reliability and predictability

Basically speaking, these two principles mean that the administrative bodies have to be bound by the law and have to ensure the rule of law and the principle of legality when they take their decisions and their actions. Thus, the administration can do exclusively for what it has authorization (the principle of competence). However, in when it has got authorization, it has to act (the principle of *ex officio* investigation). That is why such an administration is necessarily predictable.

Nevertheless, there are more principles which serve the principles of reliability and predictability, namely, the principle of proportionality, the principle of fair procedure, the principle of timeliness and the principle of professionalism. The principle of proportionality contains the proportionality of decisions, which means that the decisions have to be proportional with the aim pursued without causing unnecessary disadvantage for the citizens. The principle of fair procedure means that the cases have to be dealt with in an impartial manner, and covers the duty to inform on behalf of the authorities. The principle of timeliness means that the authorities have to make their decisions by the deadline set out in the law because the delay can cause injustice and can render more difficult to get the evidences. The principle of professionalism is a requirement concerning the public service: the civil servants have to be qualified, well-trained, neutral and professionally independent.

Ad b) Openness and transparency

The principle of openness means that the administration is available for the external examinations and for the citizens concerned. The principle of transparency enables the realization of the aims of control and examination. The enforcement of these two principles provide the chance for the people who are involved in the administration process to be able to be get acquainted with their rights and of course for the external bodies to revise the legality of the decisions. Being such, they are the prerequisites for the enforcement of the principles of legality, equality and accountability.

The principles of openness and transparency serve two special aims in the world of public administration. On the one hand, they serve the protection of public interest by reducing the possibility of the wrong decisions and the possibility of corruption and, on the other hand, they serve the protection of the individual rights by requiring that the decisions have to be justified rationally and by helping the interested persons to use their right to appeal.

[12] See in: Jenei György: Public Administration - management (Századvég Kiadó Budapest, 2005.)

Secrecy and discretion was a general practice, except for Sweden, in the administration until the end of the 18th century. Subsequently the principle of openness meant that the laws and the individual decisions could have been enforced if they were communicated to the persons concerned by the administrative authorities. The principles of openness and transparency, i.e. the principle of open government became fundamental principles of the democratic statehood only at the end of the 20th century.

Ad c) Accountability (public responsibility)

The accountability and public responsibility are synonymous terms. It means that in the field of administration each authority is liable for their actions and omissions before the other authorities, the courts or the legislator. On the other hand, we could say that no administrative authority can extract itself of the examination carried out by the external bodies. These examinations are very complex, and can be carried out by respecting the provisions of positive law: the examination of appeals carried out by the superior authorities, the judicial review of the decisions taken, the examination of the ombudsman or the prosecutor, or even the examination of the Parliament. The final objective of these examinations is to provide that the administrative bodies function lawfully: to ensure the enforcement of the public interest and of the individual rights.

The accountability has other aspects besides the administrative one, such as political or professional aspects. The professional literature summarizes the features of the public responsibility as follows:

- Its theoretical basis: the examination of the procedures' legality.
- Its subject: the legality of the actions of the administration.
- Its criterion: compliance with the applicable laws.
- Its direction: it has got two ways; one is within the body (superior bodies) and the other is outside the body (citizens, courts).
- Its mechanism: internal and external examinations, legal and judicial control.
- Its consequences: approval, modification, annulment, application of sanctions, compensation. [13]

Ad d) Effectiveness and efficacy

Effectiveness means the favorable ratio between the resources used and the results obtained. This is an economic category. During the history the state became the baas of public services, thus this category gained civil rights in the field of administration. This principle has already been published in the constitution of Spain in 1978 with other classical principles, such as the principle of legality, the principle of openness and the principle impartiality.

The efficacy is a value, which is related closely to the principle of effectiveness. This value shows us how successful is the performance of the administration as regards the achievement of the aims determined by the legislator. Basically speaking, it means the rating and analysis of public policies, and a prediction about how much they appear in the actions of the public servants.

[13] Cendon, A. B.: Accountability in Public Administration : Conteps, Dimension, Developments. In : Openess and Transparency in Governance : Challenges and Opportunities. (Ed. : Kelly, M.) EIPA, Maastricht, 1999

Apparently the principle of effectiveness opposes the principle of legality. The tension is real between the two terms that is why the different governments try to eliminate it, for instance by outsourcing, or by involving the private sector in public matters (PPP-projects).
F/2. Besides the OECD also the Council of Europe was trying to contribute to the Europeanization of the national administration systems. The Council of Europe was founded in 1949, and it is important to know that this is a non-EU organization. During the sixty years the Council of Europe it has elaborated many conventions and opened them to their member states for ratification, furthermore it issued a lot of recommendations for their member states. Among these conventions we have to mention the European Convention on Human Rights (1950) and the European Charter of Local Self-Government (1985). The European Charter of Local Self-Government defines a European standard for the European states concerning the minimum requirements they have to enforce as regards their local self-governments.

Among the recommendations of the Council of Europe (the Committee of Ministers) the most important one is about the 'Good administration' (2007)[14]. (Recommendation CM/REC (2007)7 of the Committee of Ministers to member states on good administration. 20 June 2007.) This document is an instrument for the unification of the member states' administration systems. All the member states have agreed that they have to develop their administration's function by rendering it more effective, efficient and cost effective. The recommendation contains an annex with model rules, which are about the harmonization of the procedures of the member states' administration systems. The model rules try to stimulate the member states to follow the provisions laid down in the document. It states different kinds of principles concerning the administrative procedures and by doing that it created a European minimum procedural standard: the subordination of the administration of the laws (Article 2), the principle of equal treatment (Article 3), decision-making within a reasonable time (Articles 7 and 13), protection of personal data (Article 9), the principle of transparency (Article 10), the principle of judicial review (Article 22), liability for the damages which were caused by administration powers (Article 23). As it can be seen, these principles are very similar to that of the OECD principles. It is very important to state that the Hungarian act on the administrative procedure (Act CLX of 2004) is fully consistent with those principles.[15]

G) Independent and fair procedure in the judicial system

In a modern state two organizations are liable for the execution of the decisions of the legislation, these are the public administration and the courts. These two organizations were separated in the 19th century and from that time they have been functioning separately. This process does not affect the fact that the courts also do enforce laws, because they apply the general law in the specific case. Naturally they operate on the basis of different aims, different procedural rules and different principles.

[14] Recommendation CM/REC(2007)7 of the Committee of Ministers to member states on good administration. 20 June 2007

[15] See in : Fábián Adrián : Az EU-jog és a tagállami közigazgatási eljárás kapcsolódási pontjai. Magyar közigazgatás 2006. évi 10. szám

The basic criteria of the rule of law are the separation of powers and the balance of these powers. In this type of system not only the courts are independents, but the judges too, they are subordinated only to the law. Nevertheless, the judges must enforce and keep the laws, furthermore they must enforce the rules of fair procedure: to hear the client and the opposite party, to decide within a reasonable time, to justify the decision, to provide possibility for appealing. In this type of the judicial system it is provided to contest the administrations decisions before the courts. This opportunity is provided within the judicial system (for instance just like in the United Kingdom) or outside of it (just like in Germany).

H) Maintenance and operation of such a public sector which performs its tasks legally, effectively and with the citizens' satisfaction

The public sector is a complex concept. It means the creation of new values, which are connected to the production of public goods and also serve them. They do not include those activities which are taken by the public power. The core of the concept is the public goods, which is manifested in the constitution as a fundamental right. The state can classify a service as a public service, and the state also can regulate it. Some of the public services are connected with the infrastructure and some of them are connected directly with the person. The infrastructural services in the modern Europe are the followings: uniform water supply, public lightning, the maintenance of public roads, the maintenance of public cemeteries, waste management, flood and drainage protection, fire protection. The range of human public services in Europe is: the maintenance of schools and kindergartens, the maintenance of educational institutions and heath and social services. (Horváth M. 2007.)

I) Armed forces and law enforcement agencies which are under civil (political) control and which operate in a politically neutral manner and in the legal frameworks

One criterion in a democratic state concerning the armed forces (army) and the law enforcement agencies (police, civil defense, fire brigade, prisons) is that they have to be under civil control. Armed forces are responsible for the external security, while the law enforcement agencies are responsible for the internal order. In the opposite case, if these are not under civil control, we talk about military dictatorship. The civil control means that the administrative bodies are managed by the government and are supervised by a minister. The neutrality in politics means that the members of the armed forces or the law enforcement agencies cannot pursue political activity. They must always act according to the laws and act loyally against the current political power.[16]

J) Enforcement of the principles of decentralization, subsidiarity and solidarity

Decentralization is one of the principles of the organization of a modern state. It means an output of the state power into the regional or local level. The reasons are various: rationality, expediency or others. The principle's general meaning is that there is a given issue to be decided and they have to make the decision where this issue comes from,

[16] See in : Horváth M. Tamás (Szerk.) : Piacok a főtéren. Helyi kormányzás és szolgáltatás-szervezés. Magyar Közigazgatási Intézet Budapest, 2007

because the source of this issue includes the most information for the decision. The Treaty of Maastricht introduced this principle at Union level in 1992. Article 5 of the Treaty on European Union (2009) confirmed this principle, with the same substance. According to the principle of subsidiarity, except for the areas which fall within its exclusive competence, the Union can act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can be better achieved at Union level. We have already referred to the principle of solidarity above. As we have mentioned, this principle is interpreted as regards the relationships among the Member States. The EU does everything to facilitate this cooperation, because this is a part of the sustainable development programme. Under Article 3 of the Treaty on European Union the EU promote economic, social and territorial cohesion, and solidarity among the Member States. As a consequence of the enforcement of these three principles the subnational organizations (regions) have already strengthened in the EU. This means that the central agencies have been pushing to the background, which is a very slow process. The positive change in this process is that the developmental differences have already been reducing among the different kinds of regions.

K) A stable, competent, highly qualified and neutral civil service (civil servants)

The principles listed below come from the principle of the rule of law. For the thousands of people, who work in the EU institutions the civil service career is a lifelong profession. That is why it is important for these civil servants to be stable, predictable, highly qualified, well trained and neutral. EU law regulates this lifelong career by Council regulation (EEC, Euratom, ESCS) 259/68 (which was amended more than a hundred times). The enforcement of EU law and the participation in the decision-making are important tasks for the civil servants in the European Union and of course for the national civil servants, too. Therefore, it is important that the requirements set out in the regulation on civil servants should be equal in the whole EU. The national civil servants and the civil servants in the European Union always meet during the decision-making and enforcement of EU law. This is a favorable process in the EU, because they get to know each other and it means that the decision-making and the enforcement of EU law can work more efficiently. The result of the regular meetings is that the EU civil servants can better understand and accept the arguments of the national civil servants, while the national civil servants can better understand and accept the arguments of the EU civil servants. Consequently the national civil servants are continuously Europeanized. That is why we can find in Article 197 of the Treaty on the Functioning of the European Union in that the enforcement of EU law is a matter of common interest. Article 45 of the Treaty on the Functioning of the European Union also declares the right of the free movement of workers. This means that the EU citizens can work, find a job, can apply for a job freely in every Member State. This right can be restricted on grounds of public policy, public security and public health. Article 45(4) states that these provisions do not apply to employment in public service, so the Member States can restrict the civil service to citizenship, or to other condition. Obviously it is because of the fact that it is about exercising the public power.[17]

[17] Idea of the European Union's organizational system. Curentul Juridic - Juridical Current. Year XII, NR. 2 (37), Tirgu-Mures, 2009

4. The future of the European Administrative Space

On the basis of the aforementioned we can draw the conclusion that the creation of the area without borders, a single geographical area, the citizenship of the Union, the internal (single) market, the economic, financial and political union by the European Union and the need for the effective enforcement of Union law requires the approximation and, in certain cases, the unification of the Member States' administrations. This process, in the longer term, will lead to convergence of national public administrations, and a really single European administration, obviously by decreasing the Member States' sovereignty. There is no doubt that in order to that the current situation cannot be maintained for a long time, whereby some elements of the management cycle, and implementing those institutions were strong separation from each other.[18] The objective of information gathering and processing, planning, coordination and control is now - of course 'just' in Union matters - at the supranational level. The actual implementation is in general realized at national level and implemented through national institutions: the preferences uniformly, but in practice a wide variety of ways. The claim was that the integration of the economic and monetary matters and the political integration must be necessarily followed by a kind of administrative integration, even if it can be considered as (perhaps) a more painful loss of national sovereignty for the Member States. This process enhances the 'European administrative law', the formation and gradual development thereof can be detected especially in the procedural rules, and the absorption of EU funds of the substantial progress, but the adoption of the Treaty of Lisbon, which has established the TEU and the TFEU, is also of a great importance. However, it can be seen that the Treaty of Lisbon did not eliminate the tension between the unity of the scope of EU law and the autonomy of the national administrations. That would be important since the Union and part of the 'European Public Administration and the European administrative law' development have a series of new challenges ahead. We can also refer to the phenomenon of globalization, to the significant increase in the number of the Member States, to the energy and environmental problems and to the fight against terrorism.[19]

[18] Lőrincz Lajos: Európai integráció – magyar közigazgatás. Magyar Közigazgatás 1998. évi 7. szám
[19] Jürgen Schwarze (ed.) : Bestand und Perspektiven des Europaischen Verwaltungsrechts. Nomos Verlag, Baden-Baden, 2008

European Integration Studies, Volume 9. Number 1. (2011) pp. 163–173.

FROM ALPHA TO OMEGA: FROM SMALL CLAIMS PROCEDURES TO HIGH PRIORITY CASES*

ZSUZSA WOPERA
Associate Professor, Director of the Institute of European and International Law
University of Miskolc
jogwoper@uni-miskolc.hu

Introduction

Stabilisation of procedural acts is one of the core elements of legal certainty. Legislators visibly disregard this principle nowadays, as we can experience for more than a decade that the modifications of the Act III of 1952 on Civil Procedure are governed by the fads of alternate justice governments or individual representatives. It was impossible to dissuade the former justice government from reintroducing the provisions concerning 'economic lawsuits' in the Part of Special Procedures, thus, in 2009 it tried to codify again that Part – under another Title, which was deleted from the Civil Procedure Code in 1992 – although harsh criticism welcomed the submissions of 2006 and 2007. According to the plans, the majority of provisions, governing actions between corporate entities, was about to enter into force on 1 January 2011. Originally, the Act LXVIII of 2009 was to introduce these new provisions into Chapter XXVI of the Civil Procedure Code; however, the Act LIX of 2010 hindered it, therefore, these provisions of the Civil Procedure Code regulating legal disputes between corporate entities as an individual type of lawsuits did not enter into force.

Introduction of new provisions concerning small claims procedures by the Act XXX of 2008 had a more fortunate outcome, nevertheless, the rules of these proceedings has been modified several times since then, moreover, practicing lawyers did not welcome this new type of procedures. Contrary to these facts, we can state that both reasons for procedural economy and effectiveness supported the introduction of these new types of lawsuits. In 2011 actions between corporate entities were incorporated into the Special Procedures in a different way as high priority cases.If we regard small claims procedures as the alpha of special provisions depending on the litigated amount, then the new justice government created the omega of the regulation in 2011 by introducing special provisions for high priority cases in the Act LXXXIX of 2011.

Within the framework of this jubilee study, I focus on analyzing the rules of these two special types of procedures, besides paying attention to the circumstances of and reasons for their introduction, which provide a genuine picture of the method and quality of legislation in procedural law after the millennium.

* This study was supported by the research contract No. K 68304 of the OTKA.

1. The importance of value limit in the field of civil matters

Almost all branches of our legal system pay attention to value limit. Two value limits are relevant in the Hungarian civil procedure law in force from the perspective of defining the importance of the case, including the competence of the court, and the appropriate type of procedure:

- Ten million HUF: it is the lower limit of 'important cases': those actions relating to property rights, where the litigated amount exceeds 10 million HUF, fall within the competence of county courts in the first instance from 1 March 2011, moreover, above 30 million HUF legal representation is mandatory (not in every type of cases),
- One million HUF: it is the upper limit of 'small claims': overdue pecuniary claims, which can only be recovered by way of order for payment procedures and which do not exceed the sum of one million HUF. From 1 June 2010 the issuance of order for payment was transposed from the competence of the court to the competence of the notary public. If the defendant files a statement of opposition, the order for payment procedure will be brought before the court as a small claims procedure.
  Based on the statistics of 2007, 32,1% of all civil actions are claims under one million HUF.[1]

The modification, entered into force in July 2011, brings further differentiation into this regulatory model dependent upon the litigated amount, which qualifies actions for the enforcement of claims exceeding 400 million HUF as high priority cases.

2. The development of rules for small claims in Hungary

The Act XXX of 2008 extended special provisions applicable for small claims procedures to the procedure in the first instance, thus ensuring the fast and cost-effective conduct of small claims in a uniform way. The Act XXX of 2008 incorporated the special provisions concerning small claims procedures, entered into force on 1 January 2009, into Chapter XXVI of the Civil Procedure Code.

2.1. Connecting the definition and rules of small claims procedures with the order for payment procedures and its consequences

The legislator connected the notion and rules of small claims procedures with the order for payment procedures; therefore, the small claims procedure always follows an order for payment procedure without any exceptions. According to the opinion of some scholars, the chapter governing small claims procedures did not create a new type of actions, but it can be interpreted as a special redress of this non-litigious proceedings.[2]

[1] The general reasoning of the Act XXX of 2008 contains the cited data.

[2] Varga István: Kisértékű perek, in: A polgári perrendtartás magyarázata, szerk: Németh János, Kiss Daisy, CompLex Kiadó, Budapest, 2010. 1468. o. (István Varga: Small claims procedures, in: The explanation of the Act on Civil Procedure, Eds.: János Németh, Daisy Kiss, CompLex Kiadó, Budapest, 2010. p. 1468.)

Amending the original wording of the provisions by the Act L of 2009, the legislator orders to apply the rules of small claims procedures not only in cases, where the lawsuit was transformed into judicial proceedings due to the defendant's statement of opposition after the issuance of order for payment, but also if they follow unsuccessful order for payment procedures, where decision was not made on the merits of the case, since e.g. the notary public refuses the application for the issue of the order for payment of his own motion under Paragraph 24 of the Act L of 2009, or terminates the procedure by dismissing the case.

These mean that two types of small claims procedures can be distinguished:

- the one follows the order for payment procedure, where decision was made on the merits and was contested by a statement of opposition, while
- the other follows non-litigious proceedings, terminated without ruling on the substance of the case (ex officio refusal, dismissal of the case).

As a consequence of the mandatory competence of the local court, the rules of small claims procedures are not applicable if the case falls within the competence of county courts in the first instance due to the subject of the case [Points b)-k) and m)-o) of Paragraph 23(1) of the Civil Procedure Code]. The same rule applies if the pecuniary claim, previously enforced by way of order for payment procedure, does not exceed one million HUF, such as e.g. actions for compensation for damages caused by persons in an official capacity within their administrative authority, or actions relating to contracts for the international carriage of goods and forwarding contracts. We can draw the conclusion that pecuniary claims deriving from such legal relationships shall be enforced by way of order for payment procedure, since its amount does not exceed the sum of one million HUF, however, if the lawsuit is transformed into judicial proceedings, then it will fall within the competence of county courts, where the provisions governing small claims procedures cannot be applied.

Both Section (3) of Paragraph 37 of the Act L of 2009 on order for payment procedures and Section (1) of Paragraph 315 of the Civil Procedure Code determine the obligation of the plaintiff to prepare for the hearings, and if one of the parties fails to do so, it results in the termination of the judicial proceedings by dismissal.

When serving the notification about the statement of opposition, the notary public requests the plaintiff to pay the due of proceedings within fifteen days of receipt of the notary public's notice on a submission addressed to the court, moreover, to describe the detailed arguments concerning the case and to submit the evidences. The latter is necessary, as in the standard form of the request for issue the order for payment it is enough to indicate the legal relationship underlying the claim and the enforced claim based on codes[3], therefore, the plaintiff can specify his claim in his detailed arguments, which is essential, since the obligor (at that time defendant) can reply on the merits of the claim when taking these arguments into account. The court dismisses the case if the plaintiff does not satisfy his obligations to pay the due of proceedings, to describe his arguments and to submit his evidences within the deadline.

[3] The list of these codes can be found on the website of the Hungarian Chamber of Civil Law Notaries under the following link: http://mokk.hu/linkgyujto/FMH_pub/KODTAR-20100528.pdf

2.2. Special rules for ensuring the appearance of parties in small claims procedures

The principles of verbalism and directness play an important role in small claims procedures in comparison with general rules of civil proceedings. The right to a trial cannot be limited in these actions in the first instance. The requirement of reaching a conclusion within a reasonable time period is strictly enforced, since the costs of litigation can amount to a many times higher sum than the litigated amount.

The first hearing bears great significance, as the aim of the regulation is to ensure that legal disputes could be resolved during the first hearing. The act destines an empathic role for the parties in preparing the hearings and in making their statements within appropriate time.

In the light of the above mentioned facts, omissions are followed by different sanctions in this case in comparison with general rules. If the defendant fails to appear at the first hearing, the defendant's statement of opposition against the order for payment does not hinder the issue of the order for payment against the defendant at the first hearing of the lawsuit transformed into judicial proceedings. Taking into account that small claims procedures are always initiated as order for payment procedures, a former civil judicial college comment (Civil Judicial College Comment No. 172, point b)) stipulated that the court is not entitled to issue the order for payment upon the defendant's failing to appear at the first hearing based on the argument that the statement of opposition against the order for payment is regarded as a defence in writing, therefore, one of the conditions set out in Section (2) of Paragraph 136 of the Civil Procedure Code is not fulfilled. However, the legislator explicitly intended to ensure the possibility of issuing the order for payment against the defendant who omitted, thus emphasizing the importance of the parties' obligation to appear at the hearings.

The Civil Uniformity Decision No. 2/2009 of the Supreme Court promulgated on 22 May 2009 reviewed the Civil Judicial Comment No. 172 and declared that in case of failing to appear at the hearing set due to the statement of opposition against the order for payment, the issue of the order for payment is not allowed – either in small claims or in any other procedures – if the statement of opposition contains counterclaim on the merits (defence).

In the light of the Civil Uniformity Decision No. 2/2009, the cited rule of the Civil Procedure Code shall be interpreted according to the followings: if the statement of opposition against the order for payment contains counterclaim on the merits, the order for payment cannot be issued, however, if the statement of opposition does not include counterclaim on the merits, the order for payment shall be issued under the condition that its further conditions set out in Paragraph 136 of the Civil Procedure Code are met (e.g. the action should not be dismissed).

In the event of any failure to appear in a subsequent hearing, the court may postpone the hearing only in exceptional and justified cases, while setting a new day in court at the same time, or - failing this - shall adjourn the hearing and render its decision relying on the information on hand.

We can identify a further aggravation: if neither of the parties appear at any hearing, or the party present does not wish to proceed with the hearing or refuses to make any statement, and the plaintiff absent did not previously request the court to proceed with the hearing in his absence in neither of the cases, the Civil Procedure Code orders to apply the dismission of the case instead of declaring the suspension of proceedings.

Evaluating the new regulation for small claims entered into force in January 2009, we can draw the conclusion that the legislator determined a too high value limit for small claims, taking both the Hungarian income and financial conditions, and the value limit set in the respective act of the European Union into account. Thus we can conclude that the value limit of 500 000 HUF would have been more justified.

3. High priority cases

The Chapter on 'High priority cases' was introduced in the Civil Procedure Code entered into force on 13 July 2011, being incorporated into the Fifth Part of the Code under Chapter XXVI as an element of a complex legislative package, which effected small claims as well. The former Chapter of XXVI on small claims became Chapter XXVII of the Code as a chapter of the Sixth Part of the Code.

In my opinion, the legislator mainly focused on criminal procedure while determining the category of high priority cases, and defined several states of affairs qualified as high priority cases in this field, such as abuse of authority, any crime committed in affiliation with organized crime, and crimes committed in respect of a particularly considerable amount, etc.

In the field of civil procedures the new regulation – which entered into force on 13 July 2011 in such way that it should also be applied to pending actions – qualifies cases as high priority cases solely based on the litigated amount.

None of other considerations, such as the significant number of parties, outstanding social or international interest, public interest or e.g. environmental interest can be taken into account when defining a case as high priority case, thus, the only underlying reason is if it exceeds the litigated amount set in the Act.

The laconic general and detailed reasoning of the Act leaves no doubt that it cannot be regarded as a mature and well-prepared act adopted as a part of a coherent legislative strategy.

3.1. Definition of high priority cases

According to the new provisions, a case is of high priority if the amount of claim enforced in an action relating to rights in property under Point a) of Paragraph 23(1) of the Civil Procedure Code, falling within the competence of county courts in the first instance, exceeds the sum of 400 million HUF.

Besides actions for condemnation, those declaratory proceedings are also regarded as high priority cases, where the litigated amount – if condemnation may be requested – would exceed the sum of 400 million HUF.

What can we draw as conclusion based on the above mentioned facts?

- A case can exclusively be considered as high priority case having regard to the value limit, moreover, if it falls within the competence of a county court. Therefore, e.g. in such an action for property rights arising out of the matrimonial relationship, which was opened in conjunction with or in the course of matrimonial proceedings, thus falls within the competence of a local court, the special rules of high priority cases cannot be applied to this action for property rights if the litigated amount exceeds 400 million HUF. It is also excluded under

Section (2) of Paragraph 386/A of the Civil Procedure Code, as it is going to be addressed later on.

- In these actions legal representation is mandatory under Point b) of Paragraph 73/A(1) of the Civil Procedure Code, which stipulates that legal representation is mandatory in those actions relating to rights in property set out in Point a) of Paragraph 23(1) of the Civil Procedure Code, where the litigated amount exceeds the sum of 30 million HUF.
- Due to the inaccurate wording of Point a) of Paragraph 386/A of the Civil Procedure Code, doubts may arise whether the rules of high priority cases are applicable to further actions belonging to the competence of county courts, falling under Points b)-o) of Paragraph 23(1), besides actions relating to rights in property set out in Point a) of Paragraph 23(1) of the Civil Procedure Code, when their litigated amounts exceed 400 million HUF. Actions with such high litigated amount can especially occur e.g. in actions for international carriage of goods and forwarding contracts, in actions relating to the protection of industrial property rights, in actions relating to financing contracts concluded with healthcare service providers, moreover, they cannot be excluded in actions for compensation for damages caused within administrative authority. In our view, the answer is affirmative; the rules of high priority cases can be applied to these cases falling within the competence of county courts.

  This interpretation is further confirmed by Section (2) of Paragraph 386/A of the Civil Procedure Code, which sets out that the provisions of the Fifth Part are not applicable to special procedures contained in Chapters XV-XXV.

Doubts may arise concerning the professionalism of the legislator, when we realize that Section (2) of Paragraph 386/A of the Civil Procedure Code excludes the application of rules for high priority cases in such special procedures, which cannot fall within the scope of Chapter XXVI ipso iure, either due to competence, or due to the subject-matter of litigation, since they compulsorily fall within the competence of local courts or they are not actions relating to rights in property.

Within the sphere of special procedures regulated in Chapters XV-XXV and specified in Section (2) of Paragraph 386/A of the Civil Procedure Code, the exclusion is rational solely in administrative actions (Chapter XX) contained therein.[4]

Taking the competence of county courts into account, we can predict or at least assume that these actions of significantly high litigated amount will primarily affect economic entities, meaning that – due to the rules of jurisdiction – those two county courts will be the most frequented in these lawsuits, as it can be expected, which are the most overburdened courts according to court statistics: the Pest County Court and the Metropolitan Court of Budapest. Will these courts be able to meet strict deadlines prescribed by law in the absence of further appointment of judges?

[4] It is extraordinary, since the Hungarian Competition Authority regularly imposes 'gigafines' exceeding the sum of 400 million HUF for unfair commercial practices against consumers, or for unfair market practices e.g. for cartel, which resoltuions can be challenged at the court under the provisions applicable to administrative actions set out in Chapter XX. See on the official website of the Hungarian Competition Authority: www.gvh.hu

I do not think that a special ground for delegation set forth in Section (1) of Paragraph 47 would mean a general solution for handling these problems of workload, which stipulates that 'The Supreme Court – for the proposal of the president of the National Council of Justice of Hungary – shall delegate another acting court of the same competence instead of the court which has jurisdiction for the hearing of the case or a definite group of actions delivered to the court within the given period of time, if reaching a conclusion within a reasonable time period cannot be ensured in another way due to the exceptional workload of the court, and the delegation does not result in the disproportionate loading of the appointed court.'

3.2. Priority proceedings – with question marks

Special procedural rules of high priority cases aim at reaching decisions in a quick way, within a short period of time through setting strict and tight deadlines and sanctioning in case of omitting these deadlines. In high priority cases, the court of first instance is obliged to order priority proceedings even without being requested. The order for priority proceedings given by the court of first instance is applicable to all sections of the proceedings, both regular and special remedies. This kind of action further enriches the number of priority proceedings, however, it is not completely evident, whether all proceedings are compulsorily regarded as priority proceedings under the act in these lawsuits, or it is a procedure, where the judge, hearing the case, orders priority proceedings under authorization by act. In the system of priority proceedings the solution applied in priority proceedings does not seem professional, or at least it is unusual that the judge, hearing the case, orders priority proceedings.

3.3. The examination of the statement of claim and setting the date of hearing

Under the Civil Procedure Code 'in high priority cases the court examines the statement of claim without delay, not later than within eight days from the time of delivery to the court, so as to determine whether it contains any remediable deficiencies, whether the case should be transferred to another venue, or as to whether the statement of claim should be rejected without issuing any writ of summons, and shall make the necessary measures.'

It means that in a case, which may be really complicated, may affect several parties, may require manifold legal interpretation and where the number of legal documents provided solely by plaintiff(s) may make huge amount, the judge has only eight days to thoroughly review the case, in order to meet his obligations to prepare for the hearings. If we solely learn about cases with more billions of litigated amounts heard by the Economic Department of the Metropolitan Court of Budapest through the press,[5] we cannot seriously believe that the court will be able to meet this statutory requirement.

Enhancing effectiveness cannot result in making measures, necessary for the preparation of the case, a simple formality, since it could endanger the success of the further hearings and can question the substantiation of the decision.

[5] Highlighting one of these cases: a case of 170 billion HUF litigated amount brought by Hungary against Deloitte (the auditor company of Postabank). http://nol.hu/gazdasag/a_magyar_allam_elvesztette_a_postabank-pert 2 September 2011.

'The first hearing shall be scheduled within 60 days from the time when the statement of claim is delivered to the court, except where another date is prescribed by law as the initial day of the time limit.'

For high priority cases, the legislator also introduces the shortening of time for scheduling the first day of hearing in comparison with the general rule of four months, as was also applied in small claims procedures (45 and 60 days), and administrative actions. Although in small claims procedures the lower litigated amount and the existence of a well-prepared action, turned from order for payment procedure into judicial proceedings, allow it, in a high priority case it seems to be an unrealistically short deadline.

In administrative actions, the situation is similar regarding that the statement of claim shall be submitted to the administrative authority and the response of the administrative authority to the claim also allows to schedule the first day of the hearing within 60 days, while emphasizing that the principle of making a decision without a formal hearing prevails as the main rule. [Section (1) of Paragraph 338 of the Civil Procedure Code] It accelerates making a decision as soon as possible that the court can schedule hearings for consecutive days in order to hear high priority cases if the circumstances of the case enable and found it.

3.4. Expert evidence in high priority cases

The general provisions of the Civil Procedure Code concerning expert evidence (Paragraphs 177-183/A) do not set a deadline for the submission of expert assessment. If the court orally orders the submission of the expert assessment, the deadline for the submission is that day of the hearing, when the expert is heard. In case of submitting the expert assessment in writing, the court determines the deadline for submitting the expert assessment in its ruling of appointing an expert. Acts do not set definite period of time in this regard, thus it depends on the discretion of the court, so it is usually 30 days, however, this period can be prolonged by the court upon the request of the expert.

Contrary to general rules, the Civil Procedure Code determines the deadline for submitting the expert assessment in high priority cases, which is 30 days as a main rule, 60 days in particularly complicated cases, and may be prolonged once with the length of the originally set deadline in justified cases, only upon the request of the expert.

In high priority cases, due to the high litigated amount – where solely the lower limit is 400 million HUF – expert evidence will presumably take place quite often, since it can be supposed that such complicated questions will arise concerning economy, engineering or building industry, etc. in these lawsuits, which require the involvement of experts.

Therefore, it is hardly acceptable that the new provisions of the Civil Procedure Code set the deadline of maximum 30 days for preparing the expert assessment in high priority cases, which can last 60 days in particularly complicated cases. This deadline may be prolonged once in exceptional and justified cases, maximum with the number of the originally set days, upon the justified request of the expert. In my opinion, for deciding a special matter affecting more fields, 30 days can be regarded as unrealistically short, while the 60 or 120 days would be appropriate.

3.5. Other provisions serving the aim of reaching a conclusion quickly and ensuring the right of parties to exercise their rights under the principle of due course of the law

In these actions the legislator does not require the fulfillment of the court's obligation to provide information under Section (3) of Paragraph 3 of the Civil Procedure Code in connection with the parties' obligation to provide the documents of the case. Accordingly, in high priority cases, the court is not obliged to inform the parties in advance concerning the facts for which the taking of evidence is required, the burden of proof, and also on the consequences of any failure of the evidentiary procedure. [Paragraph 386/J]

This prior obligation to provide information binds the court – contrary to Section (2) of Paragraph 7 of the Civil Procedure Code governing the general obligation of providing information – even if the party has a legal representative, such as in e.g. high priority cases.

Allowing diversion from the legal obligation included in Section (3) of Paragraph 3 of the Civil Procedure Code is problematic, particularly, when taking the fact into account that Opinion No. 1/2009 of the Civil College of the Supreme Court emphasized that informing about the necessity of expert evidence is an essential part of the obligation of the court to provide information regarding taking of evidence, since it is the court, which can decide on its own expertise and when it is necessary to ask for expert assistance.[6]

As the wording of the act stipulates, the court is not obliged to meet its obligation to provide information, thus, the court acts correctly, in my opinion, if it fulfils its obligation under Section (3) of Paragraph 3 of the Civil Procedure Code, when – in its view – the party adducing evidence is not completely aware of the content of its obligation concerning taking of evidence. It would especially be applicable if it also accelerates the reaching of conclusion within a reasonable period of time, which is a significant goal of these lawsuits.

In high priority cases, the maximum amount of financial penalty to be imposed is five million HUF, contrary to 500 000 HUF set by general rules. [Paragraph 386/K] It is designated to ensure that the parties exercise their rights under the principle of due course of the law that the fine can be ten times higher in high priority cases than in regular ones. It cannot be regarded as exaggerated when we take the lower limit of litigated amount in these cases (400 million HUF) into account.

3.6. Special provisions concerning partial and interlocutory judgment

In high priority cases, the court is obliged to render a partial or interlocutory judgment if the conditions set by the Civil Procedure Code are met when any of the parties initiate it and when the parties do not have any other motion for taking of evidence ordered by a

[6] Opinion No. 1/2009 (24. VI.) of the Civil College of the Supreme Court on some isseus concerning the application of provisions of the Act on Civil Procedure regarding the obligation to provide information

The information – with the exception of necessity for expert evidence – does not generally need to concern the means of proof, however, it is advisable for the court to involve them if it can be ascertained from the case file that the party cannot meet its obligation to provide information without the certain mean of proof (e.g. documents, witness). However, a party acting without legal representative shall be informed about every mean of proof available int he certain case. (Point 7) (Court Decisions, Issue 9, 2009)

court. The court may only dismiss the proposal for rendering a partial or an interlocutory judgment if its procedural conditions are not met.

The court decides on the petition at the hearing preceding the initiative for rendering a partial or interlocutory judgment at latest.

The partial and interlocutory judgment are exceptions under the principle governed by Section (1) of Paragraph 213 of the Civil Procedure Code, which states that the judgment shall cover all claims enforced in the action, or in joint cases.

Section (2) of the cited paragraph of the Civil Procedure Code enables rendering a partial judgment in the following case: the court may resolve certain claims, or certain segments of an action claim that can be adjudged separately by means of separate judgments (partial judgment), if no further hearing is required in that respect, and if the hearing has to be postponed with a view to adopting a decision regarding the other claims or an objection to offsetting.

However, it is important to add that the partial judgment may be abolished by a later decision if necessary, with respect to the outcome of a hearing pertaining to an objection of imputation or a counterclaim, or may be modified as appropriate. Consequently, it means that the partial judgment conditionally becomes enforceable, since the enforceable partial judgment can also be modified later when taking the counterclaim and objection of imputation of the opposing party into consideration. As it is a judgment, it means that the legislator created an individual exemption under the rules of res judicata in the case of partial judgment, since it authorizes the court rendering the decision for modifying its enforceable decision in its own competence later.

Although the legislator modified the rules of submitting the counterclaim and objection of imputation in the case of legal representation, entered into force on 1 March 2011, in such way that as a main rule, their submission is only possible within 30 days from the day of the first hearing, (Section (1) of Paragraph 147/A of the Civil Procedure Code), at the same time, Sections (2) and (3) of the cited paragraph allow an exemption under this deadline, thus, the submission of the counterclaim and the objection of imputation cannot be excluded in the later sections of the procedure, which may affect the result of hearings preceding the rendering of the partial judgment.

Taking all these facts into consideration, the rule set out by Section (3) of Paragraph 386/H of the Civil Procedure Code can be questioned, which stipulates that 'the court may suspend the hearing of the claims or segments of the action claim not decided by the partial judgment, till the partial judgment is not enforceable, if the circumstances of the claim justify it.'

This provision would be designated to ensure that the hearing of claims not covered by the partial judgment would only be possible after that the partial verdict becomes a res judicata judgment. However, this provision is not relevant in the case of partial judgment, since it can be modified later as was mentioned before.

Critiques can arise concerning the legislator, since among the rules of high priority cases it does not refer to Paragraph 147/A of the Civil Procedure Code as a provision applicable in high priority cases as well.

3.7. The acting court in high priority cases

Chapter XXVI of the Civil Procedure Code does not make it possible for the county court as the court of first instance to proceed in a panel on the ground that the case is particularly complicated, while it is an option e.g. in administrative actions depending on the discretion of the court. In my view, it would have been justified to ensure this possibility for the acting court in these cases as well. There are cases, where the litigated amount is high, while the case is considered simple from a legal and factual point of view, and on the other hand, it can be the opposite as well, so taking it into account, it would be founded to enable the court to act in a panel. Act LXXXIX of 2011 intended to make it possible through attaching Section (3) to Paragraph 25 of the Act LXVII of 1997 on the Legal Status and Remuneration of Judges that if the court hears high priority cases in line with Chapter XXVI of the Civil Procedure Code, then acting judges may be exempted from other work and tasks if it is necessary so that the procedural rules and deadlines can be met.

Concluding remarks

I made an attempt in my study to introduce and evaluate the two extremes of the latest regulations depending on the litigated amount: the provisions entered into force in 2009 concerning small claims procedures and the ones entered into force in 2011 regarding high priority cases.

In my opinion, the rules for small claims procedures – despite Hungarian procedural traditions – are less applied in our procedural system. I primarily find its reason in the fact that the legislator makes the applicability of these rules dependent upon the decision of the parties, since the parties can request to hear the case according to the general rules; therefore, the application of this special procedure is only an option.[7] Moreover, the parties rarely choose less advantageous and much stricter rules, even in favor of reaching a decision faster.

The general rules of high priority cases being in force are really similar – in several aspects – to the planned rules concerning actions between corporate entities, which would have been introduced by the Act LXVIII of 2009, e.g. holding hearings on consecutive days, mandatory legal representation, deadlines for the preparation of the hearings, shortening the deadlines for scheduling hearings, increasing the sum of fines, etc.

However, while the actions between corporate entities – despite the less perfect rulings – would have introduced the application of modern technology into the civil procedure, strengthening the conditions of quality judgments, in high priority cases a less consequent ruling, full of failures entered into force, where correcting the mistakes – if it is possible – will unfortunately be the task of the legislator again.

[7] According to István Varga, the legislator created a dispositive procedural law with this provision, which is unique even in international environment. In: Varga, p.1469.