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BRIEF EVALUATION OF DEVELOPMENT OF EUROPEAN FAMILY LAW: SUCCESSES AND FAILURES*

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Introduction

First of all, we have to define what European family law means in this paper. In this context, the concept of European family law includes just that part of Union law which concerns cross-border matrimonial matters (divorce, legal separation, and marriage annulment), matters of parental responsibility (rights of custody, rights of access, wrongful removal or retention of a child) and those cross-border maintenance obligations which arise from a family relationship.

Nevertheless we have to state that "European family law" is wider than just the Union law and involves the conventions of the Hague Conference on Private International Law e.g. the Convention on Civil Aspects of International Child Abduction concluded in 1980.

Family law matters are of high priority in the European Union. The number of cross-border family law cases is constantly increasing. There were more than 1 million divorces in the EU Member States in 2007, of which 160 000 had an "international" element.[1] Judicial cooperation in civil matters, expanded by the Treaty of Amsterdam, aims to establish closer cooperation between the Member States of the European Union, in order to limit the barriers as far as possible, which stem from the existence of different national legal systems.

Adoption of the Treaty of Lisbon gave additional impetus to the legislation in this field which has begun in 2000 and the legal basis for judicial cooperation in civil matters was further expanded.[2]

Secondary legislations adopted after the Treaty's entry into force were typically universal in scope, respectively universal in application. This means that the EU-rule applies even if the defendant's domicile or habitual residence is not within the territory of a Member State, respectively if the norm requires the application of non-EU Member State' law.

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[1] There are around 122 million marriages in the EU, of which around 16 million are considered "international". Those marriages are international where the spouses are of different nationalities, or they live in different Member States or live in a Member State of which they are not nationals.

[2] According to Art 81 judicial cooperation in civil matters should normally be adopted under the ordinary legislative procedure [Art 81(2)], except for "measures concerning family law with cross-border implications" which should be established under a special legislative procedure with unanimity at the Council and consultation with the European Parliament [Art 81(3)]. This specific treatment of family law is justified by the particular sensitivity of such questions as well as the strength of national traditions and cultures in this field.

As a consequence of universal application, especially in case of the EU norms that determine the applicable law, or the Hague instruments that are within the scope of Member States' law enforcement, the jurisdictional barriers arising from differences in national law increasingly come to the front, enhancing as well the importance of public policy aspects. These differences arise not only when national law does not apply, and the significant differences between Member States' national laws can act also as a barrier. Both theoretical and practical issues are raised by these differences which become apparent at the present stage of the European civil procedure law's development, and they are key issues of the future development of this field of law.

The aim of this paper is to summarize the achievements and failures of European family law and to examine the impact of the variations of the Member States' national law on the further development of judicial cooperation in civil matters; what kind of interactions, feedbacks are demonstrable between the national legal systems and the EU's legal source in the field of European family law.

1. The achievements and the faults of the new Brussels II Regulation in the field of matrimonial matters

One of the first achievements of the first pillar cooperation within the area of freedom, security and justice was the Brussels II Regulation, which has been replaced by the currently effective new Brussels II Regulation[3] (it is so called Brussels IIa or Brussels II bis also) which came into force on 1st of March 2005. This Regulation is the basic instrument in the area of EU family law.

The rules of jurisdiction in matrimonial matters take seriously the objective of "access to justice" when seek to provide a solution for all situations, by making it possible to commence a divorce proceeding at a number of courts: in the territory of which the spouses are habitually resident, or the respondent is habitually resident, or the applicant is habitually resident, or the court of the nationality of both spouses.

1.1. The problems of the concept of habitual residence

The jurisdiction of a court is based on *habitual residence* and the *common nationality of the spouses.* However, the Regulation does not provide a definition for *habitual residence* and neither does it refer back to national law, thus creating uncertainty.

Nevertheless this uncertainty has not constituted an obstacle for the habitual residence to be considered in the majority of the States as a favorite connecting factor to localize persons involved in different kind of actions. It generally implies the physical presence of an adult in a country for a prolonged period of time. In certain national case-law there is also a specific minimal duration required to assume the existence of habitual residence, such as six months term considered as sufficient permanence in Germany and Austria.[4]

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[3] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, in: Official Journal L 338 , 23/12/2003.

[4] Carola Ricci: Habitual Residence as a ground of Jurisdiction in Matrimonial Disputes: From Brussels II-bis to Rome III. In: The External Dimension of EC Private International Law in Family and Succession Matters, eds: Alberto Malatesta, Stefania Bariatti, Fausto Pocar, Cedam, 2008. Padova, pp. 211–212.

In the *Swaddling case* the European Court of Justice emphasize that the phrase `the Member State in which they reside' (…) refers to the State in which the persons concerned habitually reside and *where the habitual centre of their interests is to be found.*

In that context, account should be taken in particular of the employed person's *family situation*; the reasons which have led him to move; the *length and continuity of his residence*; the fact (where this is the case) that he is in stable employment; and his intention as it appears from all the circumstances.

For the purposes of that assessment, however, the length of residence in the Member State in which payment of the benefit at issue is sought cannot be regarded as an intrinsic element of the concept of residence.

In the case of a person who has exercised his right to freedom of movement in order to establish himself in another Member State, in which he has worked and set up his habitual residence, and who has returned to his Member State of origin, where his family lives, in order to seek work conditional upon habitual residence in that State, which *presupposes not only an intention to reside there,* but also *completion of an appreciable period of residence* there.[5]

1.2. The difficulty of dual nationality

As regards nationality as a ground of jurisdiction, only the common nationality of the spouses is relevant. However, it is not clear how to deal with problems arising from *dual nationality* e.g. is there a more effective nationality in the case of spouses who hold more than one nationality? If the habitual residence would be of fundamental importance in determining the more effective nationality, the forum of jurisdiction under the Regulation would often be the same.

In the Hadadi case[6] Julianne Kokott Advocate General stated "that limiting the meaning of nationality in to the more effective nationality is not consistent with either the wording or the objectives of Regulation No 2201/2003. The system of jurisdiction in divorce proceedings provided for in the Regulation is not generally based on the idea of excluding

[5] Judgment of the Court of 25 February 1999. Robin Swaddling v Adjudication Officer – Reference for a preliminary ruling: Social Security Commissioner – United Kingdom. – Social security – Income support – Conditions of entitlement – Habitual residence. Case C-90/97. European Court reports 1999 Page I-01075.

[6] László Hadadi and Csilla Márta Meskó were both born in Hungary and married there in 1979. They then emigrated to France and acquired French nationality. Mrs. Meskó declared that, between 2000 and 2004, she was the victim of repeated acts of violence perpetrated by her husband. In February 2002, László Hadadi instituted divorce proceedings before the Pest Regional Court in Hungary. Mrs. Meskó did not learn of the proceedings until six months later. The Hungarian court granted the divorce in May 2004. Meanwhile, in February 2003, Mrs. Meskó instituted proceedings for divorce on grounds of fault before the Meaux Regional Court in France, which ruled her application inadmissible. She appealed before the Paris Court of Appeal, which ruled, on 12 October 2006, that the divorce judgment issued by the Hungarian court could not be recognized in France and therefore declared Mrs. Hadadi's divorce application admissible. László Hadadi lodged an appeal before the French Court of Cassation, which applied to the EU Court of Justice for a preliminary ruling on interpretation of Regulation 2201/2003, known as 'Brussels II' concerning the criteria to be used in determining applicable law and the member state with jurisdiction in divorce matters. Should the more effective of the two nationalities be used or should the spouses have the choice of referring the case to either of the two states of which they are nationals?

multiple grounds of jurisdiction. Rather, it expressly provides for the coexistence of several equal-ranking grounds. This necessarily entails a *right of choice* on the part of the applicant. The fact that a person possessing dual nationality can choose between the courts of two Member States which are competent exclusively on grounds of nationality is not contrary to the Regulation. The requirement in Article 3(1) (b) that both spouses must have the nationality of the court seized ensures that, when that provision is applied, both spouses have the same link to that forum and that it is not possible to seize a court the jurisdiction of which would be entirely unforeseeable or remote from the point of view of either of the spouses. (…) Determining which nationality is *more effective* would entail considerable uncertainty not least because there is no definition of that vague concept. Furthermore, such an examination might require account to be taken of a number of factual circumstances which would not always lead to an unequivocal result. At worst, it could create a conflict of jurisdiction if two courts each considered the nationality of the other Member State to be the more effective. As regards such conflicts of jurisdiction, the Regulation contains no provision that would enable a court to refer a case with binding effect to the court of another Member State."[7]

The Regulation has received a lot of criticism (Green Paper in 2005, several commentaries) due to the fact, that alternative grounds of jurisdiction and the rule of *lis pendens* motivate the parties to rush to court, which is against legal certainty and predictability. The Union law must be foreseeable by the persons concerned.

However, not the alternative grounds of jurisdiction are to be blamed for this „rushing to court", but rather the greatest fault of the Regulation: it fails to settle the issue of applicable law.

It must be noted that the new Brussels II Regulation governs only jurisdiction, not the conflicts-of-law rules which determine the substantive law applicable to the divorce. The court with jurisdiction under the Regulation must therefore determine the law applicable in accordance with domestic law.

The "blindness to the conflict of laws" for which the Regulation has been criticized in legal commentary may therefore indeed encourage a "rush to the courts" by spouses.

Instead of giving careful consideration to the institution of divorce proceedings, spouses in dispute may be tempted to rush into bringing proceedings before one of the competent courts in order to secure the advantages of the substantive divorce law applicable under the private international law rules of that forum. Such was the problem in the above mentioned case *Hadadi.*[8]

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[7] Opinion of Advocate General Kokott delivered on 12 March 2009. László Hadadi (Hadady) v Csilla Márta Meskó, épouse Hadadi (Hadady). Points 62, 65, 66. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008CC0168:EN:HTML

[8] The Court establishes that, on account of the fact that the grounds set out in Article 3 of the Regulation are alternatives, the coexistence of several courts having jurisdiction is expressly provided for, without any hierarchy being established between them. It observes that, through its wording, Article 3 of the new Brussels II regulation only refers to nationality, a link that is unambiguous and easy to apply, without providing for any other criterion relating to nationality, such as how effective it is. It also considers that it would be contrary to the purpose of this provision to give decisive weight to the "effective nationality". In fact, the need to check the links between the spouses and their respective nationalities would make verification of jurisdiction more onerous and thus be at odds with the objective of facilitating the application of the Regulation by the use of a simple and unambiguous connecting factor. The Court concludes that where, as in the Hadadi case, spouses each hold the nationality of the same two Member States, the Regulation

2. The Rome III Regulation[9]

2.1. The way to adopt the Rome III Regulation

In 2005 the Commission adopted a Green Paper on applicable law and jurisdiction in divorce matters.[10] In 2006 the Commission proposed a Regulation amending the new Brussels II Regulation – so-called Rome III – as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters.[11]

This proposal contained two significant elements: firstly, spouses would have been permitted to jointly select the competent court and, secondly, conflict of laws rules which determine the law to be applied in cross-border divorce cases would have become part of community law.

For the first time during the EC's legislative activities in cross-border matters unanimity in adopting (an amendment of) a Regulation could not be reached. By summer 2008 the Council concluded that there was a lack of unanimity on the proposal and that there were *insurmountable* difficulties that made unanimity impossible both then and in the near future. It established that the proposal's objectives could not be attained within a reasonable period by applying the relevant provisions of the Treaties.

In 2010 the issue of the Rome III Regulation took a turn for the better. Fourteen Member States addressed a request to the Commission indicating that they intended to establish enhanced cooperation between themselves in the area of applicable law in matrimonial matters and the Council adopted the Regulation (EU) No 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation on 20th of December 2010.

The differences between national laws in the field of divorce law were so enormous that only by *enhanced cooperation*[12] and after many years of struggle the Council Regulation (EU) No 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation was accepted, which apply from 21st June 2012 for 14 Member States.[13] The substantive scope and enacting terms of this Regulation should be consistent with the new Brussels II Regulation, however, it shouldn't apply to marriage annulment.

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precludes the jurisdiction of the courts of one of those Member States from being rejected on the ground that the applicant does not put forward other links with that State. The spouses may therefore seize the courts of either of the Member States of which they both hold the nationality, as they choose. In: Judgment of the Court (Third Chamber) of 16 July 2009. László Hadadi (Hadady) v Csilla Márta Meskó, épouse Hadadi (Hadady) C-168/08.

[9] Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation**,** Official Journal L 343, 29/12/2010.

[10] COM (2005) 82. http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0082en01.pdf

[11] Proposal for a Council Regulation of 17 July 2007 amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters (COM[2006] 399 final – Not published in the Official Journal).

[12] Enhanced cooperation is based on the "hope that it will then be a catalyst and that other Member States will subscribe to such initiatives". In: Paul Craig: The Lisbon Treaty: Law, Politics and Treaty Reform, Oxford University Press, Oxford, 2010, p. 449.

[13] On 12 July 2010, the Council decided to authorize enhanced cooperation between Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia in the area of the law applicable to divorce and legal separation. Lithuania has notified its intention to participate in enhanced cooperation in the area of the law applicable to

2.2. Short evaluation of the Regulation

This Regulation should create a clear, comprehensive legal framework in the area of the law applicable to divorce and legal separation in the participating Member States; provide citizens with appropriate outcomes in terms of legal certainty, predictability and flexibility.[14]

The informed choice of both spouses is a basic principle of this Regulation. The Regulation should enhance the parties' autonomy in the areas of divorce and legal separation by giving them a limited possibility to choose the law applicable to their divorce or legal separation.

An agreement designating the applicable law should be able to be concluded and modified at the latest at the time the court is seized, and even during the course of the proceeding if the law of the forum so provides.[15]

Where no applicable law is chosen, and with a view to guaranteeing legal certainty and predictability and preventing a situation from arising in which one of the spouses applies for divorce before the other one does in order to ensure that the proceeding is governed by a given law which he considers more favourable to his own interests, the Regulation should introduce harmonized conflict-of-laws rules on the basis of a scale of successive connecting factors based on the existence of a *close connection* between the spouses and the law concerned.

The above-mentioned problem of dual nationality and the habitual residence of spouses may appear during the application of this Regulation having regarded that the spouses may choose between these two connecting factors.[16] But we have to make a distinction between jurisdiction and applicable law. According to Katharina Boele-Woelki as long as the formal nationality is usually a sufficient ground for jurisdiction (See in Hadadi case) it is not adequate to determine the applicable law.[17] The ground of applicable law could be only the effective nationality of both spouses.

The Regulation ensures two "loopholes" for participating Member States to refuse the application of a provision of foreign law in a given case. One is if this provision is where it would be manifestly contrary (incompatible) to the public policy of the forum under Article 12.

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divorce and legal separation by letter dated 25 May 2012. The Regulation (EU) No 1259/2010 shall apply to Lithuania from 22 May 2014. Commission Decision of 21 November 2012 confirming the participation of Lithuania in enhanced cooperation in the area of the law applicable to divorce and legal separation (2012/714/EU)

[14] Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation; Preamble (9).

[15] Katharina Boele-Woelki notes the importance of time element in the field of choice of law. She established that the close connection with the law chosen at the time the agreement may no longer exist at the moment of the divorce. She pointed out the failure of the Article 5 of Regulation to impose any time limits for the spouses to conclude an agreement about the applicable law can be questioned. Moreover, certain circumstances and connecting factors: nationality and habitual residence might change. These changes will not be taken into account unless both spouses agree to change their initial choice of law. Katharina Boele-Woelki: For Better or for Worse: The Europeanization of International Divorce Law, in: Yearbook of Private International Law, Vol. XII. 2010. Sellier, Munich 2011. pp. 15–16.

[16] See Art. 5 and 8 of the Regulation.

[17] Katharina Boele-Woelki op. cit. pp. 18.

The European Economic and Social Committee is therefore pleased that a public policy exception clause will exclude any provisions of an applicable foreign law which, for example, might go against the EU Charter of Fundamental Rights, which is now part of primary law (with the same legal value as the treaties). Member States will invoke the international public policy of their domestic court to bring an exception to a third-country law which violates it.[18]

Article 13 called "Differences in national law"[19] allows the second "loophole" to refuse the application of the law designated by this Regulation, which is in contrary to the purpose of the norm and the enhanced cooperation.

Article 13 allows refusing the application of a provision of foreign law in two different situations:

1. if the participating Member State's law does not know the legal institution of divorce or
2. if the participating Member State's law does not deem the marriage in question valid for the purposes of divorce proceedings to pronounce a divorce.

The first exclusion got into the Regulation because of Malta (this was one of the so-called "Malta-provision"), but the second paragraph means more serious exclusion. This funds that if the marriage in question is not recognized (as a preliminary question, typically the same-sex marriages) no divorce can be granted.

This second paragraph is contrary to the Article 2 which states that "This Regulation shall not apply to the following matters, even if they arise *merely as a preliminary question* within the context of divorce or legal separation proceedings: (b) the existence, validity or recognition of a marriage."

In the European Commission's view this Article, which permits judges of a participating Member State, whose law does not provide for divorce, not to apply the same rules as the other participating Member States, is a derogation that negates the very purpose of the enhanced cooperation authorized by Council Decision 2010/405/EU.[20]

In addition this Article 13 restrained Sweden and Finland to participate in the enhanced cooperation. Sweden's criticism concerning the original proposal for a Regulation was based on the opinion that they cannot accept solutions which limit the possibility to get a divorce in certain situations. The right to divorce, as well as the right to choose who to marry, is in Sweden's opinion, fundamental.

With regard to the implementation of enhanced cooperation, Sweden regrets that it contains solutions that in practice create exceptions limiting the right to divorce for certain groups. In this context, in particular Article 13 of the implementing Regulation should be noted.[21]

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[18] Opinion of the European Economic and Social Committee on the 'Proposal for a Council regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation' COM(2010) 105 final/2 – 2010/0067 (CNS) OJ 11.2.2011.

[19] Nothing in this Regulation shall oblige the courts of a participating Member State whose law does not provide for divorce or does not deem the marriage in question valid for the purposes of divorce proceedings to pronounce a divorce by virtue of the application of this Regulation. (Art. 13)

[20] Council of the European Union, JustCiv 214. Proposal for a Council Regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, General Approach, Brussels, 1 December 2010.

[21] Council of the European Union, JustCiv 214. Proposal for a Council Regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, General Approach, Brussels, 1 December 2010.

3. Short evaluation of the new Brussels II Regulation in matters concerning parental responsibility

The issues of parental responsibilities under the Regulation mean a broad spectrum. The Regulation shall apply, in civil matters relating to the attribution, exercise, delegation, restriction or termination of parental responsibility: rights of custody and rights of access; guardianship, curatorship and similar institutions; the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child; the placement of the child in a foster family or in institutional care; measures for the protection of the child relating to the administration, conservation or disposal of the child's property.

3.1. The definition of the concept of habitual residence

Pursuant to the Regulation the main ground of jurisdiction in matters concerning parental responsibility is the *habitual residence of the child* at the time court seized, however, the regulation does not contain a definition of the concept of habitual residence.

The European Court of Justice at first in the case of "A" applicant in 2009[22] has given important guidelines to define the concept of habitual residence. It merely follows the use of the adjective 'habitual' that the residence must have a certain stability or regularity.

According to the Court's interpretation "the concept of 'habitual residence' under Article 8(1) of the Regulation must be interpreted as meaning that it corresponds to the place which reflects some *degree of integration by the child in a social and family environment*. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case.[23]

In the Case Mercredi the Court completed its opinion related habitual residence. In this case the court had to interpret the concept of the habitual residence of an infant. The Court stated that the social and family environment of the child, which is fundamental in determining the place where the child is habitually resident, *comprises various factors which vary according to the age of the child.* The factors to be taken into account in the case of a child of school age are thus not the same as those to be considered in the case of a child who has left school and are again not the same as those relevant to an infant. An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent. Consequently, where the infant is in fact looked after by her mother, it is necessary to *assess the mother's integration in her social and family environment.* In that regard, the tests stated in the Court's case-law, such as the reasons for the move by the

[22] Case C-523/07, Reference for a preliminary ruling under Articles 68 EC and 234 EC from the Korkein hallinto-oikeus (Finland), made by decision of 19 November 2007, received at the Court on the same day, in the proceedings brought by "A" Reports of Cases, 2009 I-02805. 2 April 2009.

[23] Case C-523/07, Reference for a preliminary ruling under Articles 68 EC and 234 EC from the Korkein hallinto-oikeus (Finland), made by decision of 19 November 2007, received at the Court on the same day, in the proceedings brought by "A" Reports of Cases, 2009 I-02805. 2 April 2009.

child's mother to another Member State, the languages known to the mother or again her geographic and family origins may become relevant.[24]

Other aspects were also taken into consideration when developing the Regulation, thereby creating a flexible jurisdiction system. This aspect is – first of all – the "best interests of the child".[25]

Upon comparing the rules on jurisdiction of the Regulation in matrimonial matters and matters concerning parental responsibility, we can establish that the Regulation is much more flexible in the field of parental responsibility. Nevertheless this does not mean that there are no problems.

3.2. Questions at the field of parental responsibility on the basis of case law

We have to mention that there are preparations for proposal for a Council Regulation (EU) amending Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

The Stockholm Programme recognizes the need for minimum standards to be developed in relation to the recognition of decisions on parental responsibility (including those on custody rights). The Stockholm Action Plan therefore provides for a proposal for revision of Regulation (EC) No 2201/2003, and requires the Commission to consider the possible introduction of common minimum standards in relation to the recognition and enforcement of parental responsibility decisions in other Member States, and the abolition of all intermediate decisions (exequatur) in this area.[26] Furthermore, this proposal for an amending Regulation is one of the actions identified in the recently adopted EU Agenda for the Rights of the Child[27] to make justice systems in the EU more child-friendly.

The Commission's Initiative identifies problems on the basis of case law and infringement proceedings and may, for example, relate to:

- the lack of a uniform interpretation of the term 'enforcement' in Chapter III of the Regulation amongst Member States' authorities, with some authorities interpreting it in a narrow sense of 'forced execution' and other authorities in the sense of 'any action to be taken by a public authority on the basis of a foreign judgment',
- widely differing national standards for the hearing of the child and the designation of a guardian,
- costs and delays for the recognition and enforcement of judgments, authentic instruments and agreements abroad,
- the use of the certificates provided for in Annexes I to IV of the Regulation;
- the enforcement procedure in the Member State of enforcement.[28]

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[24] Judgment of the Court (First Chamber) of 22 December 2010. Barbara Mercredi v Richard Chaffe. Case C-497/10 PPU. Reports of Cases, 2010 I-14309. Points 53–55.

[25] This principle is applied at the Article 12 (1) and (15) of the Regulation.

[26] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0171:FIN:EN:PDF

[27] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0060:FIN:en:PDF

[28] http://ec.europa.eu/governance/impact/planned_ia/docs/2013_just_003_amendment_regulation_matrimonial_parental_matters_en.pdf

4. Regulation in matters relating to maintenance obligation

After a decade of codification efforts the Council Regulation (EC) No 4/2009 was adopted on jurisdiction, applicable law, recognition and enforcement of decisions in matters relating to maintenance obligations.[29] It can be applied from 21 June 2011.
The scope of this Regulation should cover all maintenance obligations arising from a family relationship, parentage, marriage or affinity, in order to guarantee equal treatment of all maintenance creditors. For the purposes of this Regulation, the term "maintenance obligation" should be interpreted autonomously.

The Regulation has two significant improvements. One is that it has set itself the objective of harmonizing the applicable law regarding maintenance obligations, while the other improvement is the abolition of exequatur.

The text of the Regulation doesn't include the detailed rules of applicable law but refers back to the Hague Protocol of 2007[30] on this subject, which was developed within the framework of the Hague Conference on Private International Law. The differences between national laws relating to maintenance matters forced the EU legislator to adopt such legal solutions, which was unique in EU law until that time. What is the reason for this specific solution?

It was the United Kingdom who declared that it shall not adopt the regulation if the text of the regulation shall include rules on applicable law.

However, in case the regulation would not contain such rules and would refer back to the Hague Protocol, the United Kingdom could adopt the regulation, as it has happened, indeed.

5. Fields relating to family law that are not protected by Union law

Neither new Brussels II regulation nor the Rome III regulation covers the property consequences of the dissolution of the marriage.

The Member States have adopted a wide variety of criteria to determine jurisdiction as regards matrimonial property regimes. Most Member States allow spouses to choose the law applicable to the matrimonial property regime. The Commission would like to know whether this choice should be retained in a future Community instrument and, if so, which connecting factors must be taken into consideration in order to allow spouses to choose the matrimonial property regime.

In the 'EU Citizenship Report 2010: Dismantling the obstacles to EU citizens' rights', adopted on 27 October 2010[31], the Commission identified uncertainty surrounding the property rights of international couples as one of the main obstacles faced by EU citizens in their daily lives when they tried to exercise the rights the EU conferred on them across national borders.

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[29] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, 10.1.2009. OJ

[30] Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, http://www.hcch.net/upload/conventions/txt39en.pdf

[31] COM (2010) 603

This subject has been on the agenda for years. In 2006 the Commission published a Green Paper on conflict of laws in matters concerning matrimonial property regimes[32], including the question of jurisdiction and mutual recognition, that launched wide-ranging consultations on the subject.

In the Action Plan of Implementing the Stockholm Programme the Commission planned to submit a proposal for a Regulation in 2010 on the conflicts of laws in matters concerning matrimonial property rights, including the question of jurisdiction and mutual recognition, and for Regulation on the property consequences of the separation of couples from other types of unions.

In 2011 according to the Action Plan – some delay – the Commission submitted two proposals for council regulation. Because of the distinctive features of marriage and registered partnerships, and of the different legal consequences resulting from these forms of union, the Commission presented two separate Regulations: one on jurisdiction, applicable law and the recognition and enforcement of decisions *in matters of matrimonial property regimes* [COM (2011) 126], and the other on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the *property consequences of registered partnerships* [COM (2011) 127].

The Council held a public debate on two proposed regulations on the jurisdiction, applicable law and the recognition and enforcement of decisions as regards matrimonial property regimes, on the one hand, and the property consequences of registered partnerships, on the other. The Presidency noted a very large agreement on political guidelines to further advance the work at expert level.

The objective of both proposals is to establish a framework in the EU determining jurisdiction and the law applicable to matrimonial property regimes and the property consequences of registered partnerships and to facilitate the recognition and enforcement of decisions and authentic instruments among the member states.

The two proposals will complement the instruments already adopted at EU-level concerning family-related issues, such as the new Brussels II Regulation regarding matrimonial matters and parental responsibility, the Regulation on maintenance obligations, and the Rome III Regulation on the law applicable to divorce and legal separation.

Once these two new regulations are adopted, the citizens of the EU will benefit from a complete set of legal instruments covering international private law issues in the field of family matters.

Both regulations are subject to a special legislative procedure based on Article 81 (3) since they refer to measures concerning family law with cross-border implications. The Council will act unanimously after consulting the European Parliament.

The United Kingdom and Ireland have decided not to take part in these instruments[33] and Denmark will not participate also.[34]

The latest news about the current status of these proposals is that the Working Party on Civil Law Matters (Matrimonial Property Regimes and Registered Partnerships) held a

[32] COM (2006) 400

[33] According to former statements of the United Kingdom it would be impossible to harmonize legal systems that include legislation regarding property rights arising out of a matrimonial relationship with the English system, which contains no such legislation.

[34] Council of the European Union, Press Release 3207th Council meeting Justice and Home Affairs Brussels, 6 and 7 December 2012. http://europa.eu/rapid/press-release_PRES-12-509_en.htm

meeting on the 11th and 12th of February 2013 in Brussels but we have no information about the outcome of the meeting.

Conclusions

It can be stated that the Community Legislation made great achievements in the most important areas of family law but the current situation may give rise to a number of problems in matrimonial proceedings of international nature. Some of the foreign commentaries[35] are skeptical about the future of European legislation in field of family law. They succeeded in creating unanimity concerning Regulation on maintenance obligations in 2008, with a tricky solution; the Protocol on the Law Applicable to Maintenance Obligations also prevails in 25 Member States. In contrast, the Rome III Regulation is in force only in 14 Member States. The Rome III Regulation showed us the "emergency exit"[36] in the cooperation at the field of European family law. This possibility should be avoided even if there seem to be insurmountable conflicts between common law and civil law Member States, since the future of European family law depends on this, especially concerning the Commission's Proposals on Matrimonial Property Regimes and Property Consequences of Registered Partnerships.

[35] See e.g.: Maarit Jantera-Jareborg: Europeanization of Law: Harmonization or Fragmentation – a Family Law Approach, Tidskrift utgiven av Juriduska föreningen i Finland 5/2010. pp. 504–515. or Cristina González Beilfuss: The Unification of Private International Law in Europe: a Success Story? in: K. Boele-Woelki, Jo Miles and Jens Scherpe, European Family Law Series – no. 29, The Future of Family Property in Europe, 2011. Intersentia

[36] Katharina Boele-Woelki: For better or Worse op. cit. p. 25

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THE NEW LABOUR CODE IN THE MIRROR OF THE REGULATIONS OF THE EUROPEAN UNION AND THE MEMBER STATES

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1. The Constitutional Committee of the Parliament held a conference on May 22, 2011 about the Proposal of the new Fundamental Law, where my task was to give a lecture on the evaluation of the proposals to the rules of employment in the new Fundamental Law. In my lecture, which appeared in the Conference Volume, I already suggested that on the one hand, it should be laid down in the Fundamental Law, similarly to the German Grundgesetz, that Hungary is a social legal state, on the other hand, similarly to the fundamental law of more West-European countries and the American Constitution, the opinion of interest representation organisations should be asked for before passing acts involving a wider range of classes of a society. None of my proposals was included in the new Fundamental Law, moreover, the government discussed the Proposal of the new Labour Code only with the employers' interest representation organisations and sat down to negotiate with the trade unions' alliances only after they had forced the government to do so by different demonstrations and putting it under pressure. However, the forced negotiations of the government with the trade unions brought few results on behalf of the employees. It is to be mentioned here that during the modification process of the then still prevailing old Labour Code in July 2012, Act No. XCIII. dissolved the National (Labour) Interest Reconciliation Council, which laid down the legal grounds for the government to present a proposal before the Parliament without a triparti conciliation of the proposal with the labour coalition partners.

Before evaluating – using the legal-comparative method – the new Labour Code, I think it is reasonable to point out that two years ago I examined how – after the Maastricht Summit in 1991 – the directives of the European Economic Community were exchanged and altered by new directives of the European Community and how the first directives of the European Union were modified by new directives and I had to establish that the new directives – almost without exceptions – reduced the social minimum standards protecting employees' interests. While these aggravations were not or just partly taken over by the old member states of the European Union, the new European Union member states were forced to take them over by either the European Union or the IMF almost without any modifications. It seems that Immanuel Wallerstein was right when he talked about the formation of a two-circle Europe, where the inner circle is the neo-coloniser and the states belonging to the outer circle are the neo-colonised.

The new Labour Code is being examined from this aspect based on my previous legal-comparative partial analyses considering that I had already made detailed comparisons of

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the main labour law institutions with the solutions of the member states, which I published in many of my recent works during the last months. On this basis, an evaluation is being given now as a kind of synthesis of the groups of the legal institutions of the new Labour Code.

2. Consequently, the new regulations of the collective labour law are being discussed first.

a) I do not consider proper that Act No. XCIII as of 2011 abolished the National Interest Reconciliation (Labour) Council (hereinafter referred to as NIRLC) which is also known in the Benelux and Latin states, in France and among the new member states in the Czech Repubic and which was once already renamed by the first FIDESZ (Hungarian Civic Union) government for National Labour Council similarly to the Belgian institute.Instead of it, the National Reconciliation Council has been found as an opinion giving organisation, where all social organisations, public bodies and church organisations are represented, and among them only the participation of the social labour organisations is subject to conditions of representation, which is therefore discriminative and not in compliance with the regulations of the European Union. If the government had discussed the proposal before the NIRLC with its coalition partners, trade unions' demonstrations and social tension could have been avoided. Moreover, it would have been worth considering in connection with the abolishment of the NIRLC that in the NIRLC, there can be made such general tripartite collective labour agreements, through which – because of their quasi legal source character and according to the practice of the European Court of Justice – the directives of the European Union may be integrated into the national law of the member states.It is one of the reasons why it would be reasonable to re-establish the NIRLC as a national labour council and abolish the previous bureaucratic rules, which were put on it by Act No. LVIII of 2007, which had properly fulfilled a legal gap until then. In my opinion, the bureaucratic-free Spanish model would be the best solution to revive the national interest reconciliation.

b) As concerns the rights of the trade unions, they have also been cut down strongly by the new Labour Code. The new Labour Code does not contain the status security of trade union functionaries, neither does it mention the objection right of trade unions – with a delaying force –and which was possible to be brought before labour court pursuant to the old Labour Code – against the employer's measures affecting a larger group of employees in case of – among others – a work-norm increase connected with performance based payment, nor does it rule whether the trade union may represent its member before the labour court in a case against the employer. Neither does the new Labour Code rule whether – in accordance with the practice and regulations until now – the employer shall bear the operation costs of trade unions, moreover, whether the employer shall put the company's premises at trade unions' disposal after working hours or trade unions – similarly to the English and Irish situation – shall be forced to hold their consultations in restaurants and pubs near the company. For the sake of legal security, it would have been reasonable to arrange these questions in the new Labour Code, too, like in most member states belonging to the continental legal system.

c) The problem regarding the collective agreement (CA) is that while Subsection 3 of Section 277 declares the principle of 'Günstigetsprinzip' as a main rule like the law of most older member states, Section 283 cancels that by permitting a general divergence from the CA, which may even be unfavourable on the employee's side. Nor is it clear in the new Labour Code whether only one or more CAs may be concluded at a company. As concerns this, it causes a problem that Subsection 2 of Section 276 only says that the trade union

with the right for representation is entitled to conclude a CA. The right for representation is only limited to a membership of 10%. If such a trade union with this kind of membership were entitled to conclude a CA in the name of but contrary to the majority, it would be rather antidemocratic. On the other hand, another version may be that the new Labour Code, bringing the older regulation to an end – similarly to the English law – would make it possible for all trade unions with representation rights at a company to conclude their own CAsobliging their own members. In this case more CAs may simultaneously be effective within a company. This question should also have been arranged. It is also not clear whether the C A may be extended and if yes, upon what conditions. The old Labour Code regulated this question similarly to most West-European countries. It is not regulated either whether the CA may be extended and if yes, upon what conditions. However, it is positive that according to the new regulations, the CA shall be concluded in writing. Though, it is unfortunate that the registration of the CA still takes place at a national level instead of their own county/town level of the CAs, by the local labour agency since the National Labour Agency is unable to check the dumping-like CAs in terms of lawfullness.

d) The new Labour Code makes no changes to the system of the rights of the works councils (WC). Therefore, the collective decision jurisdiction remains rather restricted and formal, although it would be proper if the collective decision jurisdiction covered, similarly to the law of most West-European countries, the most important questions of employment relations such as payment according to performance, working hours, time of rest, holidays, and work and health protection. On the contrary, the right for opinion giving of the WC has been limited, since in the case of payment according to performance, the working norm may be increased by the employer without his having to ask the WC about it. The modification according to which – similarly to the German model – at the election of the WC the candidate is set by committeesinstead of trade unions is acceptable, however, it would be proper to make it possible for the representative of the trade union to take part in the meetings of the WC ex officio with the right of consultation.I consider it as an inadequacy of wording, that Section 236 only states that WC shall be elected if the number of employees at the workshop/workshop unit exceeds 50, however, it says nothing about what happens when the number of employees reaches 15. Section 269, namely, only throws the institute of shop-steward, but the new Labour Code does not even mention when the shop-steward functions, when he/she is to be elected, although this question is regulated in detail by all old member states. (See foreign literature: Prugberger, The National, Sectorial and Regional Interest Reconciliation de lege lata and de lege ferenda, Miskolc Legal Review, No. 210/2. pp. 5–12.)

3. Proceeding to the individual labour law, among the rules of the conclusion of employment contracts we can see that the information given verbally has to be sent in writing within 15 days instead of the previous 30 day interval, which is in favour of the employee. However, the list of the essential elements of employment contracts still does not contain who practices the employer's rights, and as regards payment, only the base payment has to be fixed, other regularly received suppliments to it still do not have to be set – as opposed to West European legal systems. (See foreign literature: Prugberger The Basic Rights and Obligations arising from the Employment Contract and the Employment Relations in the Recodification Draft of the Labour Code, Economic Life and Society, No. 2011/I–II., pp. 269–287.)

4. The new regulations of the modification of the employment contract mean avanti as compared to the old Labour Code.

a) According to the new regulations, in the case of a legal succession of the employer, which is mostly connected to the sale of a company, factory or their units, the employee has the right to choose whether he/she wants to work for the new employer or stay at the old one. Moreover, the new employer has the guarantor's liability for the not paid-out salaries except for the case of company-takeover in the framework of bankruptcy proceedings, when the payment guarantee fund is liable in the amount of a maximum of 3 months not paid-out salaries retroactively for one year. The regulation of the old Labour Code, according to which the successor employer was liable for the not paid-out salaries by the old employer only if he/she had 50% ownership in the old employer's company, was totally contrary to the regulations of the European Member States. /8/

b) The period of the transfer, substitution, posting and secondment, and delegation of the employee, which is regulated in the new Labour Code as a temporary modification of the employment relationship in compliance with the 'posting' directive while the old Labour Code treated it as an employer's order, is determined in 44 days each and altogether 110 days in case of the first four while in the case of the last one it can be a maximum of 2 months, which determination was made by the lagislator in favour of the employees. At the same time, owing to the increasing unemployment, the regulation of the Posting Directive according to which the temporary modification of the employment contract inclusive of posting, namely secondment and transfer, too, may last for a year and it may also be prolonged by one more year. There is only one constraint, that is if the duration of such modification exceeds one month and in the case of prolongation, the approval of the labour office is needed. This much broader possibility assures with a better chance than the old regulation and even more than the new Hungarian rules that an employee whose work is unneccessary temporarily can be kept. The new Labour Code – contrary to the old one – limits posting, secondment or transfer jointly and severally to only 44 days per year, eliminating the previously jointly used 110 days, and the possibility for a 2 months' transfer. While the new Labour Code does not even mention the possibility – regulated in the Directive – for the prolongation of posting, secondment and transfer for another year. Thus it eliminates the possibily for employers to keep employees temporarily becoming unnecessary without suffering losses and with the possibility to take them back at any time. In this respect the new Labour Code does not support employment, on the contrary it facilitates unemployment. The fact that the new Labour Codedoes not refer to the posting abroad, even indirectly, points to the same direction. /9/

c) In the sphere of the obligatory modification of the employment contract, it is the cases of the pregnant female employee and the employee who is a mother with small child/children which stand out. In the case of a pregnant employee, the aggravation as compared to the old Labour Code is that if the pregnant employee has to be exempted from work, the employer has to pay her not the average salary, but only the basic salary. This is a rather fair modification in favour of the employer. However, today when the demographic situation is so poor, in order to improve it, it would be reasonable if the labour office "ex lege" was obliged to complement the basic salary to the level of the average salary from the financial aid fund. There is a very good novelty in the new Labour Code, according to which the employer is obliged to employ the mother coming back to work from parantel leave or child care leave in partial time upon the mother's request until the child is 8 years old. According to the old rules, the employer could refuse this kind of a request and therefore the mother with a small child had to leave her job.

d) Finally, I would like to mention the institute of the so-called "Anderungskündigung", which means that the employer terminates the employee's employment relationship by offering him/her another job and if the employee does not accept it, the termination becomes effective. This solution of the German law has been taken over by the Austrian, French and Polish labour law, too. With this, the regulation of the permanent modification of the employment contract and the job transfer, which are both fixed to a mutual agreement, may be overcome. /10/

5. Chapter VIII is about the performance of the employment contract. This chapter as compared to the old Labour Code is much shorter and has been made so empty that this has resulted in total legal uncertainty and subordination on the employees' side. Pursuant to the old Labour Code when an employer gives an inaccurate or unprofessional order, the employee is obliged to call the employer's attention to that fact and has to act according to the order if the employer still insists on it. The old Labour Code regulated such a procedure on behalf of the employee. The new Labour Code does not involve such a rule at all and it only says that the employee is required to act according to the employer's orders. With this, the employee has become totally defenceless against the employer, which is capped by Section 8 subsection 3 saying that the freedom of speech of the employee may be restricted, the way and content of which – according to the last turn of Section 9 subsection 2 - may be determined by the employer. Whereas according to the legal solutions of the old member states of the European Union, either labour legal source or stable judicial legal practice appearing in authoritative ruling assures the right of the employee for criticism in order to improve working conditions. This can be applied to this question, too. This problem should have been included in Chapter VIII entitled 'The Performance of the Work Contract', which could have meant the concretization of the here referred question of freedom of opinion described in Chapter I entitled 'Introductory regulations'.
It is also to be mentioned – in connection with this – that the employee's obligation of providing personal dataalso involved in this chapter may be determined by the employer in the new Labour Code similarly to the old rules. While according to the old Labour Code the Shop Council's opinion had to be asked for by the employer, this obligation of the employer no longer exists though in most of the older Member States the employer is obliged to co-determine the circle of personal data to be given by the employee together with the Shop Council. (See the foreign source material in my article referred to at the end of points 1 and 3.)

6. The subjects of working hours, rest period, and holiday are the most neuralgic questions in the new Labour Code.

a) To start with the working hours, even Act No. XCIII of 2011 increased the ordinary working hours to 44 hours as compared to the 40 working hours determined by the Directive, true that only for one and a half years' transition period and with the condition that these excess 4 working hours will count as extraordinary working hours with an increased overtime rates. This injures seriously employees' interests for even two reasons. On the one hand because the employer may deprive the employee of three quarters of an hour without having to pay allowances and on the other hand, allowances would be owing only in case of further 4 hours' overwork per week. It is not by accident that the schedule of three times 8 hours in connection with work has developed where 8 hours are work, 8 hours are recreation after work and 8 hours are relaxation. The enforced work at the expence of both recreation and relaxation makes the worker's mental and physical regeneration more

difficult and leads to the wearing out of the worker ahead of time. All this results in nerve and physical burden and the decrease in work effectiveness and quality because of the loss of staying power, which is disadvantageous for the employer, too and it may even lead to break-down and incapacity for work. All this – as a consequence of an easily setting cronic desease and a possible incapacity for work – especially if this becomes multitudinous – may charge the state budget very strongly because of the increased expenses of health and retirement insurance and social financial aid. In order that a worker may be able to work permanently in a good physical condition and efficiently, it is important that his thoughts shall be occupied by other things than just work and that he shall be suitably relaxed, as well. The employment policy and the labour authority are not only responsible for job creation and employment encouragement, but also for preventing workforce from exhaustion. Regard for this, I disapprove of Section 92 subsection 2, which, similarly to the old rules, makes 12 working hours per day possible in case of standby-like jobs that is in case of duty. Contrary to the diplomatic definition of the Act, in the case of work forms, where the framework of working hours may be increased by a collective agreement, namely in the case of work places operating in shifts, continuously, seasonally, or where the economic efficiency may not be assured in another way due to production technology, the framework of working hours, which is determined – as a main rule – in 4 months or 16 weeks, may be prolonged to 6 months or 26 weeks.

This is a more favourable solution as compared to the one in the June draft of the new Labour Code and especially to the one of Old Labour Code, however, as opposed to the solutions of the old, inner circle member states, we can say that in most member states the framework of the working hours is determined in weeks even compared to the reference period of the Directive and generally cannot be longer than one month. The situation is the same as regards overtime. While the member states of the inner circle almost without exception restrict its maximum period per week, the new Labour Code – similarly to the old one – knows its maximum limit of 250 hours per year, which – as concerns the above described group – may be increased up to 300 hours by a collective agreement. All this is allowed by the Directive. Notwithstanding, in the member states belonging to the inner circle of the European Union, the weekly overtime is even today restricted in a similar way as the Labour Code of 1992 restricted its maximum time per week in the first period.

As regards standby and duty, Section 110 subsection 4 of the new Labour Code – as opposed to the Old Labour Code – specifies what standby and duty exactly mean. In the case of standby, the employee determines where he/she stays, however, he/she is obliged to be available for work/duty. Contrary to it, in the case of duty, it is the employer who determines where the employer has to stay. As concerns the regulations of Sections 111 and 112 of the new Labour Code, which maximize the time of the duty in 24 hours and prescribe that its time shall be counted in the time of ordinary and extraordinary working hours, and in the case of standby, they prescribe that its time, which may not exceed 168 hours per month, shall be taken into account in the average of work time, it seems that the legislator has taken into consideration the three decisions of the European Court of Justice passed in this subject. The High Court of Justice has pronounced that the period of standby shall be counted proportionally while the whole time of duty shall be taken into acoount as ordinary working hours. This court practice of the High Court Of Justice is completely in compliance with the principle of “Ot portal to portal act” in the USA, according to which the employer is obliged to pay the employee his/her full payment due for ordinary working hours for all the time from his/her entering the place of work to his/her leaving work regardless whether the employee was in duty, on standby or actually worked there. Whereas

in Hungary, the employee is paid much less for duty or standby than for work, which payment system is discussed later under point 6.

To sum up we can say that execpt for the temporary increase of the weekly working hours – which is basically not in compliance with the rules of the Directive – the regulations of working hours have become more advantageous for the employees. This is not true for workers in the public health, where the time of the monthly duty has become 84 hours instead of 72 hours. Lots of physicians leave their jobs not only in Hungary, but also in the neighbouring countries for this very reason and undertake work in the United Kingdom, the Scandinavian states or Austria. There is a factual case from Debrecen University of Medicine where a physician undertook work in England because instead of 100 working hours in Hungary, there he is obliged to work only 40 hours for four times much salary and he is even able to travel home to his family for one week per month while during his work in Hungary, his family rarely even saw him.

b) The daily rest period at the work of place is regulated by the new Labour Code practically in the same way as in the old one with the complementary rule according to which it may not exceed one hour. This amendment is good in a way that when the rest period exceeds one hour, we can rather talk about work split up over the day. Here it is worth mentioning that both the domestic small and medium-sized enterprises and the multinational companies are unwilling to give out the employee the 20 minute rest period after 6 ordinary working hours or 3 hours of overwork, and therefore employees do not have time either for eating or even fulfilling their biological needs.

c) The daily rest period – more exactly the rest period between two working days – is determined by the Directive in 11 hours and less time is assured in the United Kingdom, where at least 10 hours are to be given to employees between two working shifts. Whereas in the circle described under point a) – similarly to the old regulations – the rest period between two working days may be shortened to 8 hours, while in the case of agricultural seasonal work, it may even be 7 hours – which was not allowed according to the old Labour Code. This kind of regulation endangers the biological and mental regeneration of the workforce to a large extent and is anti-humanic and because of the reasons described under point a) it is harmful not only for all the employees, but also for employers and even the state.

d) As concerns the weekly rest period – in compliance with the old labour Code – the new Labour Code prescribes two days a week, one of them – as a main rule – has to fall on a Sunday. The other rest day is not necesseraly needed to fall on a Saturday beside Sunday, it may be given out on any other day of the week, and may even be drawn together. At work places operating continuously both rest days may be given out on weekdays, but at least one of them shall fall on a Sunday per month. This rule is more favourable that the one of the Directive in respect that the Directive prescribes 24+11 hours as weekly rest period, that is one and a half days, 24 hours from which shall be given out together and at only work places operating continuously and in more shifts the rest days may be given out on other weekdays and not on a Sunday but even in this case one of them shall fall on a Sunday once a month. Half days, that is 11 hours may be draw together and given out that way. Theoratically, every second Saturday is a rest day, however, no one work on Saturdays in the old member states, they are only on standby. Therefore, the more workers are employed at a company in the west, the less time employees have to spend on standby. In reality, the rest time at the weekends is not less, or just to a small extent in West-Europen countries than pursuant to the regulations in Hungary.

e) At the beginning the minimum extent of the ordinary holiday was defined in one month by the Directive and now it is only 4 weeks. In Hungary, both the old and the new Labour Code specify the basic holiday in 20 days, which – according to age – is increased by one day first every 3 then every 2 years until it reaches a maximum of 10 days as a supplementary holiday. The holiday thus reaches 30 days by the age of 45. As regards the time when holidays are given out, it is determined by the employer except for one quarter of the holidays. Whereas in the old member states, the minimum extent of holidays is 25–30 days, which is supplemented by holiday given based on age or a managerial position, and even suppplemented by skiing holidays in more member states and moreover, in most countries people do not work between Christmas and New Year's Eve, at most they are on standby. This way the extent of ordinary holidays in old member states is generally 5–6 weeks. In West-European countries the holiday schedule is worked out by the employer in conjunction with the works council after it has been agreed with employees. In Denmark, the employees who are unable to take out their yearly ordinary holidays during 'holiday season' are granted more days as supplementary holidays. Besides, in the old member states employees are entitled to a holiday bonus in the amount of one month salary during holidays – either in summer or in winter – with regard that they spend more money. (See foreign comparative source material: Prugberger: The Questions of the New Hungarian Regulations Regarding Working Hours, Rest Period and Holidays. Law Journal. No. 2011/11. pp. 539–549.)

7.

a) As regards the regulations of Chapter XIII on Payment of Work, the first problem arises at the connection of minimum wages with performance based wages. According to the old Labour Code, in the case of performance based payment the employee is entitled to the full amount of the minimum wages regardless of whether he/she has performed less than the minimum wages. Whereas it seams from the obscure composition of Section 137 subsection 3 of the new Labour Code that exclusively in the case of performance based payment, the payment may go under the level of the minimum wages if the employee underperforms based indeed on the unilateral decision of the employer. Due to the lack of the precise regulation of this question, the employer may decrease the payment even implicitly, without the employee's noticing it. It is true that according to the old Labour Code, the employer suffered a loss since he was obliged to pay the minimum wages even in the case of underperformance by the employee. The employer could only get rid of his/her lasy employee by ways of ordinary of extraordinary dismissal, and he was entitled to demand the payment without performance as a compensation of damages, though I am not sure that all labour courts were on this opinion. The good solution would be a middle course according to which in such cases a reconciliation comittee organised within the company or in the cases of smaller companies a regional arbitrory service officer would determine the lawfulness or unlawfulness of a measure. The party who would not agree with the decision could start an out-of-court procedure at the law court againts it within 5 or 8 days. The court could make a first instance decision in the case within a shortened period of 8 or 15 days.

b) Another problem in connection with the minimum wages is that the government is unwilling to determine uniform minimum wages and different minimum wages according to economic-geographical regions of the country, economic sectors, professions demanding different education levels are set. If minimum wages were defined at a state level without negotiations with the coalition partners, the differentiation in minimum wages on reginal

basis – in my opinion – is clearly discriminative (agreeing with the declaration of Istvan Palkovics, the President of Workers' Council on TV), however, I think the differentiation in the other cases is rather disquieting, too. None of them was perilous if minimum wages were determined during negotiations taken place in the national and regional sectoral and regional general committees with the participation of the state. In this case, however, the best solution would be to determine uniform national minimum wages within the framework of a National Workers' Council as a tripartite agreement, and in the committees it would not be possible to undergo the thus set level (Günstigkeitsprinzip).

c) As regards the granted wages attached to performance, according to Section 138, it is clearly the employer who is entitled to determine them within his/her own competence. This means that neither the opinion of the Works Council nor that of the trade union with a represenation at the company has to be asked for by the employer. The situation is the same when the employer raises the work norm forming the base for the performance-based payment. Pursuant to the old Labour Code, the employer was obliged to ask for the opinion of the Works Council, and it is another question that he/she was able to decide without taking it into account. As we compare all this with the solutions of the old EU member states, we can see that in most member states it falls under co-decision jurisdiction or standpoint jurisdiction with the Works Council regarding both questions, and as concerns the latter, the employer may not neglect taking it into consideration.

d) Regarding allowances, the new regulations are rather antisocial. While we could agree with the solution that employees working in shifts and/or for permanently operating work places are entitled to only 50% of allowances for work on Sunday, however, the employee who works in different conditions from those above and is summoned for extraordinary work on a Sunday, should be eligible for a 100% allowance in the same way as employees – otherwise working according to ordinary work schedule – who work on a bank holiday. As opposed to this, it can be concluded from the provisions of Section 143 that those who – on a bank holiday – work not according to an ordinary work schedule but are summened to work in an extraordinary way, are only entitled to a 50% allowance or free time in accordance with the employer's decision. The situation is the same in the case of overwork, too, where it is also the employer who decides whether to assure a 50% extra work allowance or free time in proportion with the work done. In the case of summoning the employee to work on his/her rest day, the employer is only obliged to provide another rest day for the employee without having to pay an allowance.

The allowances for shiftwork have also changed dramatically unfavourably for employees. Both allowances in the amount of 20 per cent paid for afternoon work and for regular work in night shifts have been ceased. Only employees working in shifts are entitled to allowances for night shiftwork though only to half of the prior 30 per cent that is to 15 per cent. According to the reasoning of the legislator, these restrictions are in full compliance with the rules of determining and paying allowances in the West-European states. The legislator, however, neglects the fact that in the West-European states this percentage represents a lot higher allowance-value as compared to that of the Hungarian wages/salaries.

In comparison with the regulations effective up to July 1, 2012, trade unions assume a 30% dicrease in wages/salaries due to the drastic fall in allowances. As a result, Hungarian wages/saleries will not even reach one quarter of the West-European wages/salaries. Therefore, this kind of payment in the future will cover only the limited costs of living, it will not be enough for founding a family and educating the future generation. Thus the government will put the country on the downward path both mentally and financially. The

goal of the government to create more job opportunities is welcome. However, the way of achieving that is rather objectionable. Pursuant to the concept of the government, the foreign companies will settle down in Hungary becasue of the cheap work force similarly to the way it happened in the far-eastern 'small-tigers'.The employment there, however, was quasi slave work for pittance and there was anexcenteration of the workforce. Nevertheless, the skilled Hungarian workforce will not be willing for this and will migrate to the inner circle of the more developed member states of the EU who are trying to neo-colonise the outer circle of the member states of the EU including the Middle-Eastern European member states and where – due to serious demographic problems – there is an increasing need for skilled workforce. If this progress continues, only the underskilled workforce whom the West companies do not need and the layers of the society which want to live from aids will stay in Hungary. All this will lead to a total economic, employment, educational and cultural policy deadlock, and thus the government will accelerate the elimination of Hungary, which was projected by Bela Pokol. (See foreign source material in my articles indicated at the bottom of points 3 and 5.)

8. As regards the regulations concerning the termination of employment relations, the two very much antisocial concepts have been left out from the new Labour Code. One of them was the possibility of employment termination at small companies without giving a reason, and the other one was the abolition of the protected age before pensioning. The first one was thrown out by the government itself because it would not have been in compliance with the Social Charter, and as concerns the second one, trade unions managed to have it repealed during the conciliation process. However, the institute of the protected age before pensioning prevails in all West-European states. As opposed to this, the new regulations of the new Labour Code relating to the termination of employment relationships are more disadvantageous in many respects to employees' interests than the similar West-European solutions. This manifests itself right at the beginning of the termination period in the case of an ordinary dismissal. Since in most of the old member states, the termination period starts not from the receipt of the written notice of dismissal of the employer, but from the week following the middle of the month or from the beginning of the subsequent month. Furthermore, in both cases of an ordinary and extraordinary dismissal, the employer is obliged tolisten to the employee and if he/she is unwilling to change his/her determination to dismiss the employee, he/she is obliged to inform the employee about it informally that is orally during the listening before the formal notice of dismissal. Such a regulation is missing from the new Hungarian Labour Code. However, as concerns the rules of severance pay, in the case of an ordinary dismissal, the Hungarian solution is more advantegous for employees in the respect that it assures the severance pay 'ex lege', while in most old member states, it is applied only if the employment relationship is terminated because of the emloyee's getting inadequate due to health reasons or economic reasons arising from the employer's interest sphere. Based on the practice formed in West-Europe, in other cases, on the basis of a mutual agreement, even in the case when the employee gives the notice of dismissal, severance pay is paid when the employment relationship is terminated, and the amount of the severance pay is adjusted to the average salary not to the payments for periods of absence, which rule the new Labour Code has expanded to the severance pay and the payment for the termination period, as well.

As concerns the collective redundancy, in spite of the fact that pursuant to the Directive regulating it, apart from the previous period, the special protection exists not from 5, but from 10 persons planned to be dismissed, most West-European states take still 5 persons

into account. Both the old and the new Hungarian Labour Code follow the Directive in this respect similarly to the other new member states. Besides, West-European countries, except for Sweden and partly the United Kingdom, require the notice of dismissal to be justified socially and therefore a redundancy plan is required to be made by the company planning the collective redundancy. Pursuant to'Tul(c)ra', it is required to make a social plan in the case of a redundancy of more than 200 employees even in the United Kingdom and it is not possible to connect redundancy with 'out placement" and dismiss employees fast on the basis of the American seniority principle. The social plan is expressively required by the French, German and Austrian statutory labour law regulations, in the other states it is the judicial practice which requires it. It is in connection with this that pursuant to the Directive about the collective redundancy, in all old member states except for Sweden, the negotiation period with the employees' representatives is 30 days as a main rule, which may be prolonged up to 60 days if necessary, and in case of a light negotiation, it may be shorted to 15 days. In most old member states besides the works councils or trade unions representing employees, the representative of the employment (labour) authority also has to participate in the negotiations with the employer and the works council has the right for opinion on the merits.

As opposed to this, it is considered in Hungary as a collective redundancy – similarly to the new member states – when at least 10 employees are dismissed. Although the representative of the employment authority is to be invited by the employerfor the negotiations, in practice it does not represent itself. The new Labour Code does not mention the requirement of a social plan as it was involved in the old one, it only prescribes that the goal of the negotiations should tend to avoid redundancy or at least reduce it, and to mitigate its consequences. At the same time, the new Labour Code shortens the negotiation period to 15 days as a main rule and this may be prolonged up to 30 days. This means that the legislator talks in vain about how the possibilities of reducing the redundancy have to be discussed during negotiations, in such a limited period of time, generally, it is the principle of seniority which prevails, which can be experienced in practice, too. At least the Romanian regulations relating to termination protection prescribe that if the economic situation of the company improves and the increase in employment is needed, the employer is obliged to re-employ the employees who were made redundant within the previous one year. Such an obligation does not exist in the Hungarian law, either. Furthermore, in case of a collective redundancy and a dismissal due to economic reasons in general, neither the works council nor the trade union having representation at the company has the right for opinion, which rule existed in the old Labour Code. As opposed to this, in Holland, nobody can be made redundant without the approval of the works council and the employment agency, and in Germany, from the time of the Hartz reform, besides collective agreements, in all cases of employment relationship terminations due to economic reasons not reaching the number of employees when it would be considered as a collective redundancy, the works council has to be listened and moreover, similarly to the Austrian law, the employees' representation may sue the collective redundancy before court.

As concerns the unlawful termination of the employment relation by the employer, as opposed to the new Labour Code, the first legal remedy in the old member states is the 'in integrum restitutio', that is the reinstatement. Moreover, the western law – similarly to the new Labour Code – sets a limit for the compensation of the fall in income and the usual damages occured in connection with the unlawful termination. At the same time, in the old member states the courts assure the possibility for the compensation of damages which were occured in reality and are expressly proved even in the United Kingdom

(compensatory award). (See foreign source materials: Prugberger: The Draft of the New Regulations of the Termination of Employment Contracts. Miskolc Law Review, 2011. Special Edition, pp. 130–154.)

9. The new regulations pertaining to atypical labour contracts make the Hungarian labour law more complete and basically positive. It is very progressive that the new Labour Code significantly broadens the circle of atypical labour contracts. It is unfortunate that the self-employment, which is treated as a 'quasi' employment relationship in the Western labour law and its rules are to be applied except for the employer's social insurance contribution, has been omitted. Furthermore, the arrangement of the work as a member of a company (co-operative, limited liability company, unlimited partnership) is missing. However, the employment relationship of managers is more modernly regulated in the new Labour Code than before. It sets a more precise definition of what a managerial employee is. The only insufficiency is that the hierarchical chain of managerial employees worked out by Fayol and taken into account in the west is not mentioned in the new Labour Code. It is also positive that the managerial employees' limited liability for the negligent omission of their supervision duty has been omitted. There are no grounds for such a limitation. It is also considered to be positive that the new regulation does not categorically forbid in the case of workforce-lending that the workforce-lending company should not perform intermediate activity, too, it only prohibits that it may not employ itself as a borrowed worker the people who it procures for a consideration. However, it should have prescribed that the workers to be lended are entitled to the minimum wages or at least half of them even when they are not borrowed, but if they work – according to the rules of the equal treatment principle – they are entitled to the same wages as the other employees. This would have been reasonable to prescribe – similarly to the French law – because in that case there would be fewer possibilities for companies to undertake collective redundancies and send their employees to a primarily agreed workforce-lending company, which lends them back to the dismissing company at a cheaper cost. Such out- and back arranging businesses should have been invalidated 'ex lege'. This would be advantageous primarily in terms of employment policy.

10. As a summary, we would like to state that in order that the Labour Code could promote competitiveness, efficient work is neeed. However, efficient work is hindered by bad work atmosphere, the feeling of being at the employer's mercy, the fear from dismissal, and the decrease in salary in inverse ratio to the increase of working hours and all this do not raise employment. Maybe, indeed it is possible that the broadening of workplaces prognostised by the government takes place, however, it will result in the migrating of skilled workforce to the neighbouring countries, where – due to demographic crisis – there is an increasing need for workers. Nevertheless, because of this, foreign companies will be discouraged to settle down in Hungary. It is to be feared that the new Labour Code – in such circumstances – will act not as a means of crisis management but rather as a crisis increasing element. In addition, the powerful limitation of interest protection role of interest representation organisations, trade unions and works councils increases this process. The new Labour Code – in the mirror of international trends and labour law regulations – is a disadvantage to employees while an advantage to the employer as regards the principle of equal treatment, which is considered very offencive in an antisocial way. This also appears in the aim of making labour law civil law-like, since in the civil law dispositivity appears only in the co-ordinate civil law relations, and legal transactions. In civil law relations, legal

transactions, where one party can make use of the other party, the civil law regulation makes dispositivity relative, moreover, by the use of legally binding minimum standards, civil law protects the weaker party. Since labour law is a field of law within the civil law, this principle should prevail in the new Labour Code, too. As opposed – in contradiction to the West-European labour law regulations – the new Hungarian Labour Code is a mere sketch in many relating questions, which can and will be used by employers for their own advantage. Therefore, it will be the primary task of the judicial practice to eliminate the slipshod work and lacks made by the legislator based on the principles of the equilibrium of interests and law, and good faith and honour. In conclusion, as a moral lesson, the best economic situation has always been and will be in the West-European countries (Germany, Austria, France and the Benelux states), where the social market economy and the economic and employment policies of the well-fare society predominate to a maximum level.

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THE DISABLED PEOPLE'S RIGHTS IN INTERNATIONAL LAW

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Introduction

"In the EU, nearly 38 million people – 10 percent of the population – live with any kind of disability. Despite continuous improvement in the situation, there are still many obstacles they face, such as transportation, access to buildings, or school, for inclusion in the workplace."[1] Handicapped live all over the world, who are mostly excluded from contemporary societies, inclusion and importance. The importance of the integration of persons with disabilities is twofold. First, because like all people they have the right to enjoy personal freedom, self-determination and self-realization. On the other hand, by integrating them to be able to connect to the social production, which would boost the country's economy. For disabled persons, we can create the possibility of self-preservation, so that they can safely keep themselves and their families, the State should not be a level of financial assistance to be provided, such as that it is not. In order to achieve better integration more sectors should be disabled-oriented.

What does that mean? It means, inter alia, the need to develop an industrial policy that would in healthy persons with disabilities an equal footing with their peers. However, this is not enough, but also through the education and development of the transport to be achieved.

1. International conventions dealing with the rights of disabled

1.1. Universal Declaration of Human Rights

In 1948, this declaration was adopted by the UN member states in the Palais de Chaillot in Paris, which means the international catalog of human rights. [2] Relevant to this, it is only a recommendation, or to states does not create any international obligations. This Convention is to "embody a general recognition that the fundamental rights and freedoms of the human being naturally belong, inalienable and equal to everyone, and that we are all born free, with equal rights and human dignity. Let us be of any nationality, sex, national or ethnic affiliation, skin color, religion, wherever we live, speak any language, or be in any other situations, the international community stated on 10th December 1948th, we're committed to dignity and a reinforcement." [3] The agreement can not be located on disability rights, but the right to life, human dignity, respect for the right to education and ensure the realization

[1] Serédiné Balogh Zsuzsanna: e-Polgárok-e a fogyatékos emberek Magyarországon napjainkban? p. 30. Szeged, 2004, http://starweb.hu/blog/downloads/e-polgarok-e-a-fogyatekos-emberek-magyar-orszagon-napjainkban.pdf (2012.04.10.).
[2] Bruhács János: Nemzetközi jog II. Különös rész. Dialóg Campus Kiadó, Budapest, 2004, p. 194.
[3] http://www.unis.unvienna.org/ (2012.09.17.)

of this right subject to the third generation. A disabled person in respect of these rights is violated, if not secured to the barrier-free access. When a disabled person is not able to get into public institutions, schools, the workplace, or to go to post office, then his/her rights to life, human dignity and the right to education are harmed, as well. Life is not merely to be understood as biological existence, but also for independent living and participation in society.

1.2. The Economic, Social and Cultural Rights, the International Covenant

December 16, 1966th was adopted by the UN Member States. This Convention does not contain any explicit rights of the disabled persons, but declares the broad range of rights protected and sets out the need for international cooperation. "States Parties to the present Covenant recognize everyone's right to education. They agree that education of the human person and human dignity, a sense of the full development of the human rights and fundamental freedoms, respect for the strengthening of action. They also agree on the States Parties also in that education, all persons should enable a useful role in a free society, promote understanding, tolerance and friendship of all nations and all racial, ethnic and religious groups and support United Nations for the maintenance of peace in order to work out."[4] 6th section of the Agreement Article lays down the right to work everyone is entitled to freely choose the right mind. People with disabilities are also entitled to this right, so that States have a duty to society of this right without discrimination to ensure appropriate conditions. You should know that the "economic rights, the right to work and the general employment rights are the social rights of the most important social security, the right to social security and social and medical assistance right includes the right to health or the protection of rights of certain vulnerable groups, cultural rights include the right to education and the right to culture in the narrow sense."[5]

Because of the economic, social and cultural rights-related areas, the question arises as to whether the economic decline of the social and cultural rights need to be returned. The answer is that to decline because of the economic situation affects the budget (suficit-deficit, inflation, deflation, and is able to increase the tax fall) and so – if we are talking about a declining economy – to reduce social assistance.

The fact that every person should be able to become a useful member of society, including the integration of people with disabilities. People with disabilities in the society of the conditions under which the enforcement of their help. The deterioration of the economic situation can not perform these tasks as an excuse, because if you can connect to people with disabilities in social production, it is likely the state will be reduced by the amount of social assistance must be provided. Disabled people will be able, at least the majority of them, to sustain themselves and their families, as well.

1.3. The vocational rehabilitation and employment (disabled persons) of the Convention on the Rights of Disabled

The agreement in Geneva, 20 June 1983, was established by the UN member states. The Convention on the rights of persons with disabilities in employment law regulates in detail. "The majority of the disability laws in the area of labor law arises because the jobs and

[4] Article 13
[5] http://alkotmanyjog.jogiforum.hu/curriculum/chapter/1283/heading/1284#1284 (2012.09.12.)

related employment rehabilitation is a key element of the social integration of people with disabilities."[6] The first article defines the concept of labor rights of disabled persons approach. States are obliged, under this provision, taking into account the fact that "the vocational rehabilitation objective is to disabled people enabling suitable employment, retention, and which must move forward, so as to allow those persons to social reintegration and reintegration."[7]

Consecutive four articles discuss the employment policy of the disabled, which establishes the equality of men and women, of working conditions in which it is possible to employ the disabled. Article number 8 pays special attention to even the geographical location, states the following:

"Measures should be taken to rural and remote communities of disabled persons living in vocational rehabilitation and employment services for the establishment and development."

The competitive economy, which is difficult to achieve, however, is desirable. In today's society, the companies are profit-driven, confined to mass production, which need a good workforce. A disabled person will not be able to meet such a target attainment of the economic, but in addition to having emolyed "healthy" workers, it should be possible for disabled people, because they are also able to produce a surplus. Not only would it be beneficial to employers, but also for the society, as it has been already mentioned as well as the disabled persons can become taxpayers. Such a move would be considered as an aspect of ensuring human rights, and the return on investment after one step of integration.

1.4. The Persons with Disabilities and the Convention on the Rights of Disabled

The Convention 2006th New York on December 13 was adopted by the United Nations General Assembly. "The Convention – as a kind of code – brings together a comprehensive and coherent way that affect the fundamental rights of people with disabilities."[8] Widely discussed in the preamble of the document the areas in which special attention should be paid to the States after the signing of the Convention. These areas include the human dignity of women and girls with disabilities double disadvantage of poverty and disability relationship, the concept of disability is changing, and so on. In addition, this Agreement refers to the earlier conventions, such as the foundations of the application of this document.

The agreements referred to are as follows:

1. Universal Declaration of Human Rights (1948)
2. On the Elimination of All Forms of Racial Discrimination International Convention (1965)
3. Economic, Social and Cultural Rights and the International Covenant on (1966)
4. International Covenant on Civil and Political Rights (1966)
5. Discrimination against Women, the Convention on the Elimination of All Forms (1979)

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[6] Jakab Nóra: A fogyatékkal élő emberek egyes alkotmányos jogainak gyakorlati érvényesülése Magyarországon a rendszerváltás után. In: Sectio Juridica et Politica, Miskolc, Tomus XXIV, 2006, p. 225.

[7] Article 1, point 2

[8] http://www.szmm.gov.hu/main.php?folderID=16485 (2012.09.04.)

6. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention against (1984).
7. Convention on the Rights of the Child (1989)
8. Migrant Workers and Members of their Families International Convention on the Protection of the Rights (1990).

Discrimination against Women, the Convention on the Elimination – 1979th December 18 New York – is closely connected to it. 16th article of the Convention clearly establishes the right of women to freely decide on their children, the number of births between the period of time, and "to have access to all the information, education and means to enable them to exercise these rights. However, it is not always the case with women with disabilities. In history, we can find documents, court cases, which have shown that women with disabilities have been artificially involuntary sterilization.[9] This kind of abuse is now discontinued, but are discouraged in most cases having a child with disabilities, or call them comments. The other problem is that before and after the birth did not take into account the health care provider of the employee due to disability, handicap, and not adapted to disabled people - for example, a blind mother the navel-treatment. [10]

Agreement on the Rights of the Child – 1989th November 20 New York, the "disabled child to" promote self-reliance "and" active participation in community life, "allowing the living conditions should be provided. Paragraph 2 and 3 states the disabled child "special care" to the right, once again underlining the support of the development of the disabled child "really benefit from" a variety of benefits, "such that they ensure the fullest possible community integration and personality fullest unfolding ... 4 shall promote the exchange of information on international calls for States Parties to improve their opportunities and their skills."[11]

The rights of disabled persons' agreement has specific measures related to children. Some practically in line with the CRC contained measures, such as the disabled children's evolving capacities on compliance (Article 3, h), the child's best interests to respect the principles and the freedom of expression and their corresponding weights (7 in Article 2, paragraph 3). The other measure goes further, more specific requirements are supported to provide adequate level of support inclusive education system at all levels (24), and that the child of one or both parents under disability must not be separated from parents (Article 23, paragraph 4.).[12]

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also refers to the International Convention on the Rights of People with Disabilities Convention. The prohibition of torture appears in Article 15[13]. The significance of this is in the medical research field, since it is known from history that research

[9] Dósa Ágnes: Összehasonlító egészségügyi jog Complex Kiadó, Budapest, 2012, p. 51.
[10] http://www.mr1-kossuth.hu/hirek/gyermekvallalas-fogyatekos-nokent.html (2012.09.05.)
[11] http://www.tegyesz.hu/file/Szakmai_informaciok/Szakirodalmi_kitekintes/konyv.pdf p. 234. (2012. 09. 05.)
[12] http://www.tegyesz.hu/file/Szakmai_informaciok/Szakirodalmi_kitekintes/konyv.pdf p. 235. (2012. 09.05.)
[13] "1. Torture and other cruel, inhuman or degrading treatment (or punishment) in all persons is prohibited. In particular, no medical or scientific experiments can be done to anyone, without the free consent of the people.
2. States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities – on an equal basis with others – torture and other cruel, inhuman or degrading treatment or punishment."

conducted on individuals who could not consent to the trials. "The first two postwar decades, even during the war, according to the usual rules for continued research in democratic countries. Although the Nazi human experiments had already become widely known, and the Nuremberg Code[14] governing human experimentation was known, all the research practice in democratic countries did not change. Although they knew that the Nuremberg Code, a lot of research on tilt (R concede unable disabilities on psychiatric patients, persons held in etc), which are democratic countries after World War II is widely done, though, the researchers majority, and the public believed that the Nuremberg Code basically applies to them, but condemning the Nazi experiments on human document."[15]

1.4.1. The rights stated in the Convention on the Rights of Disabled

The first article defines what is the purpose of the Convention. The aim is that the states of all human rights and fundamental freedoms and to full and equal exercise to protect and to ensure to all persons with disabilities and to promote respect for their inherent dignity. In order to achieve this endeavor – as is implicitly included in the first article – is not sufficient to state a passive attitude, but also actively to ensure the enforcement of these rights. This positive obligations 4 Article b), f) and g), we find that the States Parties shall undertake all appropriate measures to ensure the rights of persons with disabilities, whether legislative action is taken when a law, modify, delete, or research to support the development.

Connection with this Agreement, to draw attention to the sixth and 7 article, because they focus specifically on persons with disabilities within the multiple disadvantage groups, women's and children's rights.

The women would be less discrimination as to employment – as it is known to often in the same job role tasks of women in lower wages of these than men – but if you have disabled lives, this discrimination. The disabled child in respect of both naturally reflected in the healthy child's best interests in mind, but an injured child in respect of that interest more vigorous efforts should be a priority, and secondly, because a child's additional needs attention, need special arrangements.

A disabled child in the nature of things there are additional requirements, such as rehabilitation aids etc. to ensure.

The Convention, in particular, emphasizes the personal freedom and the right to security and cruel and degrading treatment are prohibited. These rights is in fact argues that no deprivation of liberty may be the reason for the disability, and otherwise lawfully detained persons with disabilities should also be provided the guarantees that are healthy, persons deprived of their personal liberty enjoy.

The agreement reaffirms the fundamental human rights and specifically the rights of persons with disabilities is attributed to declare. Such independent living and the right to personal mobility, which in the 19th and 20 Articles can be found.

This Article is related to the two in my opinion, since the 20th article declared the law aids and personal assistance in advance boosts achievement of independent living.

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[14] 1947. december 22.

[15] Kovács József: Az emberen végzett kutatás és szabályozásának története etikai szemszögből. In: Lege Artis Medicinae 2012, 22 (3) p. 227.

States should take all effective measures to do so, "in order that the persons with disabilities for all walks of life are addressed in the maximum independence, full physical, mental, social and vocational ability, and its full inclusion, participation, achievement and retention."

That is why the government is obliged to take these measures, more dimensions. On one side there is the state that functions as explanations, because its task is of ensuring living conditions of people in society. This is paid with the collected taxes of the population from the budget. It is often a reference to the limited budget, the implementation of certain measures. It will be understood that this reference is weak, as the national and ethnic minorities, the state can provide – and it does – conditions, take any action that this social group can promote exercise their rights, such as supporting education. Equal opportunities for the disabled, however, is far behind the European countries compared to the U.S. The disability integration is very important, not only because there are some permanent disabled persons who – as everyone else, will live in the right area, but also because of the aging of societies themselves are "harvested" persons with disabilities, as well as due to an accident. So, anyone can be included in this social group. The members of society should show solidarity to each other as they do to themselves. If the national and ethnic minorities have the opportunity to create the right environment for them to enjoy their rights, for people with disabilities it is even more essential to ensure this. You are born to be national or ethnic minority, but you can be disabled at any time.

The "action" is made in several dimensions and can also be required. First, I refer to the transport, education and the accessibility of public buildings, such as barrier-free built environment for the realization of rights obligations, on the other hand, the expansion of access to information. If the transport and education to improve accessibility is achieved, then the state budget – and at the same time members of society – burden is reduced because disabilities have an opportunity to work, with the result that they will become tax-paying citizens into and valuable members of society.

Independence, however, appears not only in this area, but also in dealing with official matters intézésénél. Public buildings should be unimpeded, and the information should be made available to people with disabilities as well as those without a disability. "Of disability, disability and people with disabilities depend on the relationship between them and their environment. Obstruction is physical, educational, social link level, if you do not have, or only hindered access of people with disabilities, all of which are open to citizens of other community systems."[16] For example, barrier-free restaurants, cinemas, museums and manay more. The Convention establishes a disability affairs committee, which you may want to present very briefly.

1.4.2. The Committee on the Rights of Persons with Disabilities

"The Convention provides to set up the Committee on the Rights of Persons with Disabilities. The Commission is responsible for the periodic reports submitted by States Parties to assess the evaluation and investigation of individual complaints, as well as general comments and recommendations.

[16] Fogyatékos személyek jogai és jogsérelmei. Betegjogi, Ellátottjogi és Gyermekjogi Közalapítvány Jogvédelmi füzetek sorozat 9, p. 10.
http://www.jogvedok.hu/www/files/5aaf76fc5e89ef6596cbec034201a6c2.pdf (2012.09.08.)

Initially there were 12 independent experts, as the number of countries which have ratified the Convention reaches sixty, then the number of members increased to 18. The Committee members – who are involved in a personal capacity as committee – appointed by the Conference of the States Parties. The Board members were selected on basis of human rights and the disabled, the state of competence and experience, further criteria for the committee is to have more regions, cultures and legal systems represented, the members of the men and women are equal, and the some members with disabilities should be among the experts.

The States Parties to the convention Committee shall consult with the selection of persons to persons with disabilities and their representative organizations."[17]

This requirement is logical, as it makes you feel, and to understand more about the problems faced by people with disabilities, as a disabled person. I can also say that they are disability experts in this subject. It is important, however, that a variety of different disability issues, as well, from which it follows directly that the people suffering from various problems and represent themselves on such a committee, or organization.

2. Europe for the disabled

The right of people with disabilities in the European Union is also a high priority. "The EU disability strategy for three main pillars. Theseas follows:

– The European Commission and the cooperation between Member States;

– Full integration of people with disabilities;

– The policy-making aspect of the disability to the fore."[18]

It is important to note that in the interests of disabled persons they established the European Disability Forum (EDF), which was sixty-six European NGOs and disabled persons from sixteen Member of the National Council.[19] "EDF is an independent and unique in its platform in Europe, which has a pro-active role in the European Union institutions and decision-makers in the direction of which are promoting the protection of the rights of persons with disabilities. The objective of their daily activities is also to pursue an impact on the legal regulation of the European Union, as each EU decision and initiative at all levels have a direct impact on European citizens with disabilities in everyday life as well."[20]

The EU accession states agreed to jointly decide on certain matters which have an impact on national law. Once the "80% of the economic policy decisions are made by the EU"[21], so that the budget can occur differently in each state, which implies support for the disabled, a change in the amounts intended to carry as well. "Gábor Kardos tested the legal nature of the rights of persons with disabilities and concludes that since these rights are closer to economic and social rights by nature, it is essential to clarify what those rights

[17] Könczei György (sorozatszerkesztő): Fogyatékosságtudományi Tanulmányok XV. Disability Studies:A KIREKESZTÉSTŐL AZ EGYENLŐSÉG FELÉ – A FOGYATÉKOSSÁGGAL ÉLŐK JOGAINAK ÉRVÉNYESÍTÉSE 2009. www.szimbiozis.net (2012.04.04.)

[18] Serédiné Balogh Zsuzsanna: e-Polgárok-e a fogyatékos emberek Magyarországon napjainkban? 30. oldal Szeged, 2004. In.:http://starweb.hu/blog/downloads/e-polgarok-e-a-fogyatekos-emberek-magyarorszagon-napjainkban.pdf (2012.04.10.).

[19] http://tasz.hu/files/tasz/imce/fogyatekosmagyar_uv.pdf p.14. (2012.09.11.)

[20] http://www.1million4disability.eu/admin/wysiwyg/assets/pdf/declaration/HU.pdf (2012.04.10.).

[21] http://www.euvonal.hu/index.php?op=kozossegi_politikak&id=13 (2012.09.10.)

contained therein and the behavior required to fulfill someone. This clarification of the European Social Charter, seems to be a solution ..."[22]

2.1. European Social Charter

The Charter of Turin, 1961. October 18 was adopted by the Member States, which "aims to citizens basic rights and strengthening the social safety."[23] "The foundations of social rights, or Europe's conscience – as usual to call Charter – but the 1961st has expanded significantly. Today, in addition to being developed in the case law of the European Social Charter is now complemented by four international conventions as well. Together, the five documents are called "Charter-package". The newly-formed hands were chronological and concise summary of the contents as follows:

- The Additional Protocol (1988.), Which is essentially the provisions of the Charter of the expansion and modernization of certain services through the incorporation of four new laws, some quarter of a century after the creation of the Charter,
- The Protocol of Amendment (formed in 1991) of the Charter more effective controls mechanism,
- The Collective Panaszjog on the provision of the Additional Protocol (1995). The Charter also controls mechanism more efficiently,
- And finally, in the new millennium, social and economic rights of performing a wide horizon Revised European Social Charter (1996).[24]

It is important to note that the Member States have the possibility to choose the Charter stated right whose agrees to perform, but in a way that "five of the selected seven rights (right to work, to organize law, collective bargaining law, labor rights, social and health assistance, the right to the right of the family to social, legal and economic protection of the rights of migrant workers and their families to protection and assistance), one should avoid."[25]

The integration of people with disabilities are also shown.

"The support of people with disabilities were treated for a long time with the support of the elderly, since the Second World War, the development of people with disabilities to support special way in the wake of the Anglo-Saxon laws. The traditional principles of aid is now out of date, and the class of persons in respect of this legislation increasingly focuses on vocational training and rehabilitation, in a word, the reintegration into society of focus. The all-important goal is to empower these people back to work and independence. The Charter reflects this principle, and after the 9th and 10 articles refer to people with disabilities, a separate level of its social right of physically or mentally disabled persons to education, vocational rehabilitation and social re-integration right. Such a right is

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[22] Jakab Nóra: A fogyatékkal élő emberek egyes alkotmányos jogainak gyakorlati érvényesülése Magyarországon a rendszerváltás után In: Sectio Juridica et Politica, Miskolc, Tomus XXIV (2006). p. 223. http://www.matarka.hu/koz/ISSN_0866-6032/tomus_24_2006/ISSN_0866-6032_tomus_24_2006_219-237.pdf (2012.09.23.)

[23] http://www.euvonal.hu/index.php?op=kerdesvalasz_reszletes&kerdes_valasz_id=100 (2012.09.10.)

[24] A szociális jogok az emberi jogok között. Jogtudatosság a szociális jogok terén. Betegjogi, Ellátottjogi és Gyermekjogi Közalapítvány Jogvédelmi füzetek sorozat 1. szám 2006. június, p. 15 http://www.jogvedok.hu/www/files/f2494007e20f145bfc08c0c41f23164a.pdf (2012.09.11.)

[25] Ibid.

inconceivable in the absence of the tools that are to pursue, therefore, the provisions of the Charter includes some of the relevant ILO recommendations are also displayed."[26]

"Persons with disabilities apart from the origin and nature of their disability have the right to vocational training, rehabilitation and resettlement."[27] The agreement initially declared general rights as the right to work, the protection of women and children within the employee, and so on, but in the 15th article specifically refers to persons with disabilities.

"The right of physically or mentally disabled persons to vocational training, rehabilitation and resettlement, ensuring to exercise their rights effectively, the Contracting Parties undertake to

1. take appropriate measures to ensure training opportunities, where necessary, in the public or private specialized institutions as well;

2. take appropriate measures to physically disabled people to work, such as specialized search services, creating employment, facilities for sheltered employment and measures to encourage employers to admit disabled persons to employment."

The 9th and 10th Articles – The right to vocational guidance and training to law – deals with ensuring the rights of the disadvantaged. Disadvantaged include not only national, ethnic minorities, or the poor mothers, but also the disabled. I think we could establish an organization that would help the handicapped people's career choice according to personal ability (endowments) properly.

2.2. Charter of Fundamental Rights of the European Union

On 29th November, 2007 the European Parliament approved the Charter of Brussels. "The Union recognizes and respects the right of persons with disabilities to ensure their independence, social and occupational integration and participation in the community life of the community."[28] Attached to this resolution includes the following: "EU Disability Strategy emphasizes an inclusive, quality education and lifelong learning, equal access to important, which are essential for people with disabilities in social life full participation in preparing and quality of life improvement." "Available in built environment, transport and thus established information and communication technologies (ICT) in both urban and rural areas are crucial for a society, which is really important to exercise human rights and offer real autonomy to its citizens and provide them with an independent, active economic and social life for the continuation of devices. Such accessibility is not less than the non-discrimination on the basis of an inclusive society is a cornerstone."[29]

Attached to this resolution includes the following:

"In this large group members have the same rights as any other European citizen. The EU has recognized that the rights of persons with disabilities may require that you pay particular attention to manage the wide range of issues that affect them. The primary objective is to ensure that disabled people can fulfill their role as citizens and perform their

[26] Szakképzésről (felnőttek) szóló 88. Ajánlás, 1950 és a Szakmai Rehabilitációról (fogyatékkal élők) szóló 99. Ajánlás, 1955. In.: Lenia Samuel: Alapvető szociális jogok. Az Európai Szociális Karta esetjoga. Európa Tanács Strasbourg, 1997. p. 194

[27] Part I, point 15

[28] Article 26

[29] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:075:0001:0004:HU:PDF p. 2

related tasks. Similarly, it is important to enjoy the same freedom in decision-making capabilities and management of their lives as non-disabled peers. Initiatives in this area have access, social inclusion and to ensure equal treatment should aim at.

As a result, the Community is a major concern that is available to all who need long-term care and support services under consideration. In addition, the EU's focus on reducing the burden of disability is to provide habilitation and rehabilitation, disability and economic consequences of social and health inequalities. The key responsibilities in this area to reduce social exclusion, barriers and barriers, the promotion of mobility and the means to exploit the opportunities offered by information technology." [30]

As you can see, the states are treated as a matter relevant to the integration of people with disabilities that requires professional training, specialized institutions to promote and encourage employers. Although it is only a very brief description of the rights of disabled people, and not detailed, it is an important rule of the Charter, since it is also confirmed that the disabled persons should not be excluded, but must be admitted.

3. Guidelines and other rules

3.1. The EU Council Recommendation 86/379/EGK

The recommendation for employment of persons with disabilities sets out the principle to access employment and occupational training. It emphasizes the elimination of discrimination and to consult[31] with persons with disabilities. "The appendix of the recommendation – which is unusually large - Appendix contains guidelines for positive action to be taken (...)"[32]

3.2. The EU Council Directive 2000/78/EC

On 27th November, 2000 it was established by the Directive. Its essence is to eliminate discrimination and promote equal working conditions. Banning discrimination of the handicapped, and the protection of such persons appears more than once in the directive and in the introduction. Article 5, however, explicitly specifies an obligation on Member States that the needs of persons with disabilities must be reasonably applied. "The principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate and any necessary measures to enable the disabled person to enable access to employment, to work in the promotion of the transfer or training, unless such measures disproportionate burden on the employer and

[30] http://ec.europa.eu/health-eu/my_health/people_with_disabilities/index_hu.htm (2012.04.10.).

[31] "Continuing and developing systems of national, regional and local authorities' consultation, coordination and participation, including in this exercice the public services and agencies, the voluntary organizations, independent professionals, the two sides of industry and the media as well as disabled people and their families." http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31986H0379:EN:HTML (2012.09.18.)

[32] In: Kálmán Zsófia - Könczei György: A taigetosztól az esélyegyenlőségig Osiris Kiadó 2002, p. 223

the member states. This burden shall not be disproportionately considered, provided that the Member is sufficiently remedied by measures of disability policy."[33]

The employer's obligation is to appear on the national level, this obligation includes the provision of flexible working hours, accessibility, assistive technology, making available for the measures discussed by the disabled person and so on. These measures are, of course, implications in the material, however, this is doubtly recovered. "The employer can provide employers rehabilitation assistance to employment require a compensating wage subsidy and cost allowances. The occupational rehabilitation wage subsidies for disabilities employed for salaries and dues in proportion to 40–100% of the cost may provide support to employers who have at least a 50% working capacity change medico-certified employees a good working environment, work organization permit, labor and health and safety conditions for their abiding by the rules. Otherwise work place, job retention at – the specified conditions are met - the less than 50% of jobs in the health-worker can determine a maximum rate of 60% wage subsidy. Another option is to help people directly involved in the work with 100% reimbursement of wages, the proportion of time spent working, if it is justified by the state of employment."[34] If you are not financially worth it, but morally yes, because the company can develop a positive image and appreciation for the opportunity, is to apply for awards.

3.3. The EU Commission Regulation 800/2008/EK

On 6th August 2008, the Committee took this Regulation which can be found in the introduction of the requirement that the employment of people with disabilities in the State, namely the society as a community of people, through the support of employers. "The disadvantaged and disabled workers, training and support for the location and the employment of disabled workers in compensation for the additional costs of the Community and the Member States' central objective of economic and social policy."[35] "The wages of disabled workers in the form of grants, support for the disabled worker is calculated based on the degree of disability, or a lump sum may be granted, provided that none of these methods lead to the individual workers concerned, the maximum aid intensity for grants."[36] This support comes from the Labour Market Fund, which serves to increase employment, so that the grant of the European Community Treaty 87 and 88 the Commission of Article 87 of the Regulation of 800/2008/EK and 88 For the purposes of Article certain categories of aid compatible with the common market in line with declaring.[37]

"The employer for disabilities people in employment relationships in the employment of the labor and social security contributions up to 60% of the amount of support may be up to one year, a minimum of twenty-four months of job seekers registered as individual jobs to a maximum period of two years if the employer

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[33] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=DD:05:04:32000L0078:HU:PDF p. 4 (2012.04.10.)
[34] http://hvg.hu/egyeb/20090623_fogyatekkal_elok (2012.09.18.)
[35] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:214:0003:0047:hu:PDF p. 9.
[36] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:214:0003:0047:hu:PDF p. 10. (2012.04.10.)
[37] http://www.ohe.hu/blog/tamogatasok-2012 (2012.09.17.)

1. public debt-free,
2. complies with the requirements of sound labor relations,
3. Flt § 8 (6), b) the obligation of jobs in the request for the 6 months prior to the submission complied with, and the job centers mediated by the employment of a person undertakes
4. Support for the 12 months preceding the application for the same or a similar position in relation to the worker arising from operating among ordinary notice did not terminate, and
5. is committed to the employment relationship for the duration of the grant laid down in the preceding paragraph does not eliminate the reason,
6. employment for at least 12 months, undertake
7. or shorter time employment to undertake proportionally less aid [General Block Exemption Regulation 41 (5)]"[38]

4. Establishing the European Community, 97/C 340/03 amending treaty agreements

4.1. Treaty of Lisbon
In this agreement – 1st December 2009 – the article on disability can be found in it. "In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation discrimination."[39]
4.2. Madrid Declaration
"2002 took place in May in Madrid is the European Disability Congress, with more than 400 participants laid a statement of disabled people's vision of future showing the year 2003, that is, the Disabled People European Year of action for the conceptual framework of the European Union, national, regional and local level both. The Madrid Declaration as "an inclusive society based on non-discrimination, coupled with positive action."[40] The declaration discusses the handicapped accessibility of everyday life and the integration of such persons.
4.3. The Amsterdam Treaty
Contract – 1999. May 1 – Emphasizes the prohibition of discrimination, which specifically include disability as a ground of discrimination, also are named. [41] In a statement to appear in the contract, which declares that disabled people needs to be considered.

"The Conference agrees that Article 100a of the Treaty establishing the European Community, when devising measures to be taken pursuant to the Community institutions take into account the needs of persons with disabilities." It's basically just a moral obligation. This agreement confirms the Community's social policy.

5. United States of America and the disabled

Without being exhaustive, I will present only one American law, which declares the rights of the disabled. We should mention a few words about the rights of people with disabilities

[38] Ibid.
[39] Article 5b
[40] Szöllősiné Földesi Erzsébet: Akadálymentes Európa felé? http://www.megvaltozott.hu/docum/akment.pdf p. 15. (2012.09.18.)
[41] Article 6a

inAmericanhistory. "The independent living movement in the U.S. started 1960 years out of Berkeley, California. The movement's founder Ed Roberts, who in 1962, after two years of fighting finally could get into the local university (formerly the California Rehabilitation Office rejected his application, because of severe physical injury). Roberts was not only disabled but still had to use iron lung because of his serious illness (polio). (...) However, the situation changed slowly, which is reflected in the fact that the movement's birth and the 1964 Civil Rights Act (hereinafter the Anti-Discrimination Act) after the adoption of Jacobus tenBroek, professor of Political Science at Berkeley - who is also the founding president of the National Association for the Blind - explained about the importance of community and acceptance of rights: they exist."[42]

The movement sought to persons with disabilities have the opportunity to decide their own destiny and lives hand.

5.1. Americans with Disabilities Act

The rights of disabled people were regulated in the United States for the first time in 1990, the Americans with Disabilities (ADA). This law prohibits discrimination based on disability in community care, commercial facilities, transportation and telecommunications.[43] "The so-called ADA model is based on civil rights, discrimination because of disability as a result of the decisions and employers 'perverse' accommodiation reasonable", ie the refusal to provide moderate conditions. Introduction of the Act defines a disability as a minority people ... the ADA in 1998 was taken to strengthen the human resources development, and the ADA, Section 508 of the new Act supplement (Workforce Investment Act of 1998). The purpose of this law is that the electronic and information technology accessibility for disabled employees and customers in order to provide for federal and state organizations, including the postal service, provided this does not result in an "extraordinary burden". In addition, the rehabilitation system is reformed, creating a so-called one-stop integrated service. One-Step Career Centers Network. The point was that an integrated system of vocational rehabilitation, adult education and other socially disadvantaged educational and training programs.[44] If we compare the ADA definition of disability that I previously analyzed by Directive 2000/78/EC[45], it is clear that the protection of the Directive is broader than the ADA's, since it is not specifically named in the concept of disability, but must articulate itself in the States.

5.2. Individuals with Disabilities Education Act

This law is the possibility of learning disabilities deal. Everyone has the right to education. This fundamental right can be found in all legal systems. In order to meet this fundamental

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[42] Lovászy: i. m. p. 4

[43] "The ADA prohibits discrimination on the basis of disability in employment, State and local government, public accommodations, commercial facilities, transportation, and telecommunications." www.ada.gov/cguide.htm#anchor62335 (2012.04.13.)

[44] Lovászy László: A fogyatékos emberek jogi helyzete az USA-ban és a megerősítő intézkedések mint jogintézmény fejlődése p. 7. www.ncsszi.hu/download.php?file_id=430 (2012.04.13.)

[45] "Directive within the meaning of the term 'disability' means a korlátozottságként, in particular from physical, mental or psychological impairments and which hinders the person from participating in professional life." www.jogiforum.hu (2012.04.13.)

fact, we need special rules for the disabled. Of this Act, the Education Program to develop the schools expect that the special remedial education and related services outlined in the children's special needs. It requires the establishment of a school that provides children with disabilities in accordance with the individual if we take into account their needs, education.[46]

Completion

The integration of people with disabilities has not been fully realized, but rather it seems we are at the beginning of this process it seems. Although considerable progress has been made, but they are far from sufficient to achieve full integration in all states. Societies must take responsibility, not only to them but also to the members to one another and for themselves as well, because eventually all of the people should show some of solidarity – sacrifices – ability and willingness. This act may be called love.

[46] "The Individuals with Disabilities Education Act (IDEA)… requires public schools to make available to all eligible children with disabilities a free appropriate public education in the least restrictive environment appropriate to their individual needs." www.ada.gov/cguide. htm#anchor62335

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PLACING AND REGULATION OF PROJECT-COMPANY IN HUNGARY WITH REGARD TO THE EUROPEAN TENDENCIES

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Introduction

In the case of those contracts, which are concluded as a result of special competition procedure, it is not rare, that the contract's obligee (i.e. the party having entered into the contract as contracting authority) prescribes the setting up of a certain type company for the performance of the contract. In the Hungarian law, previously such a special organization was the concession company and from 2009, there is relatively new legal instrument in the public procurement law, the project-company, which is not equal, but similar to the concession company from several viewpoints. In contrast to the concession company, which is a special type of companies, project-company cannot be deemed as a new company form, although the general provisions on business associations also refer to it. It is only an economic organization, which is to be set up for the executing of a certain object.

This study examines the project-company as a special actor of the performance of the public procurement contract, from the beginning (i.e. its formation), through the operation, until its termination, with all of the peculiarities of these phases.

1. Notion and object of the project-company

In the Hungarian law, the expression of "project-company" is used in several – both in wider and narrower – senses. In some cases it can be learned, that project-company generally means all economic operators, which performs the contract, which is to be concluded under the contract award procedure, without reference to the type of this procedure. In this sense, the notion covers the concession company too, since in the case of construction concessions public procurement and concession rules are applicable at the same time.

In some other cases project-companies appears within the frames of the so-called PPP (public-private partnership) projects, which particularly relates to the public procurement. In the above mentioned cases the using of project-organization would be right.

From 2011, project-company has another meaning in the Hungarian law, since it is in use in the field of real estate investments. In this sense, it is such a business association – operating in the form of regulated real estate investment company or owned fully by such a company –, which only keeps on a certain (normatively determined[1]) activity and which has no share in any other business.

[1] Act No. CII of 2011 on the regulated real estate investment companies, Article 3, paragraph (3), point a)

It is important, that from the viewpoint of this study, the notion of the project-company is much narrower: it means such an economic operator, which is set up by the winning tenderer(s) with their exclusive share for the performance of the contract, which is to be concluded as a result of the public procurement procedure. Therefore, the notion does not extend to the concession company, albeit sometimes – in the case of similar features – we refer to this legal institution and its regulation.

It is worthy to notice, that the normatively defining of this notion is needed, but up to present there is no provision like this among the interpretive provisions of the operating PPA.[2] (Although this deficiency of the regulation has already existed in the time of the prevailing of the prior PPA of 2003[3], Hungarian law-maker did not feel necessary to supply it in the new public procurement regulation in force.)

The PPA in force deals with the problem of project-company several times, firstly within the provisions on economic operators[4], than in details among the rules on the performance of the contract.[5] With regard to the contract, which is to be concluded as a result of the public procurement procedure, PPA basically states the duty to personal performance. At the same time, PPA words as exception from the rule the situation, when the party having entered into the contract as contracting authority makes possible the performance of an economic operator formed by the winning tenderer, instead of it.

As to the aim of the project-company, it is really special, since it is formed for a certain object, i.e. for the performance of the contract which is to be concluded as a result of the public procurement procedure. Due to this, regulation on project-company diverges in several aspects from the general provisions on business associations and their features, since there is a lot of limitation (mostly on the operation of the project-company), which is to be determined by the contracting authority (upon its own right) in the notice starting the contract award procedure.

In the next few pages we examine these special features of the project-company.

2. Questions on the formation of the project-company

PPA's provisions on the formation of the project-company should be examined from several directions, with regard to the above mentioned facts, namely, that the project-company has more specialties, due to the proper purpose of the company.

a) The person's general freedom to forming a company (in the case of business associations it is named as "freedom to associate") is limited, since the PPA orders this right under the will of the contracting authority, namely, if there is a possibility to form a project-company or not.

b) Freedom to choosing the type (legal form) of the organization is also limited, since contracting authority has the right not only to prescribe the formation, but the certain type of the project-company. (It is worthy to mention, that the freedom to choosing the type is *ab ovo* limited in the case of business associations, since persons can enter into partnership, but only within the legal frames (i.e. types) determined by the related act [hereinafter referred as to ABA][6]),

[2] Act No. CVIII of 2011 on the public procurement
[3] Act No. CXXIX of 2003 on the public procurement
[4] PPA, Article 27, paragraph (2)
[5] PPA, Article 129
[6] Act No. IV of 2006 on the business associations (ABA)

c) Thirdly, PPA's provision containing these rules does not tilt the balance fully for the good of the contracting authority, since it has effect only in certain directions for the operation of the future project-company, even if it has right to prescribe the formation. It means that winning tenderer(s) has the right to decide freely in any other question related to the project-company.

2.1. The formation of the project-company

As we mentioned it before, several question shall be examined related to the formation of the project-company. One of them is the base of the formation. As to the text of the PPA, on the one hand, a project-company can be formed with regard to the intention of the winning tenderer(s), if the contracting authority has allowed, but not prescribed it. (However, it is another question, if contracting authority can only allow [or as we will see it later, prescribe] the formation of the project-company or also has the right to forbid it. The current European and Hungarian public procurement practice gives no answer to this question, but there are some notices starting the public procurement procedure in the Hungarian practice, in which contracting authority expressly excluded the possibility to form a project-company.[7])

However, such a formation of a project-company is not really typical in the practice. Namely, in the lack of such a provision, which would prescribe the obligation to form a project-company, tenderers also do not think possible to form this organization. Instead of creating a new legal form, for example in the case of joint tendering, they maintain their consortial cooperation, which was formed in the first (bidding) phase of the public procurement procedure. They do this act even the formation of a project-company would have several advantages.[8] Contrary to this, some Hungarian cases are also known, in which tenderer decided to form a project-company, though the contracting authority did not prescribed it as a requirement of the participation in the procedure. [9]

On the other hand, formation of the company can be based on the expressed prescription of the contracting authority (this is typical), when contracting authority prescribes the formation of the company – in justified case – in order to the performance of the contract.[10] (The formation is justified, for instance, in the case of long-lasting contracts or investments with huge value. On the other hand, the relative independence of the company, its operation as a single unit, also helps on the transparent financial management of the company.) If contracting authority prescribed the duty to form a project-company, winning tenderer(s) has no right to hesitate, project-company has to be formed. Nevertheless, if winning tenderer(s) does not fulfill this obligation, contracting authority has a special legal tool in

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[7] See Contract notice Reg. No. 5513/2011published in Public Procurement Bulletin, No. 30/2011 (07.04.2011.); Contract notice Reg. No. 6642/2013 published in Public Procurement Bulletin, No. 49/2013 (29.04.2013.); Contract notice Reg. No. 8340/2013 published in Public Procurement Bulletin, No. 60/ 2013 (24.05.2013.)

[8] About the advantages of the formation of the project-company see: BARTA, Judit: *A projekttársaság*, In: BODZÁSI Balázs (ed.): *Ünnepi tanulmányok Balásházy Mária tiszteletére*, Budapesti Corvinus Egyetem, Gazdasági Jogi Intézet, Budapest, 2010, pp. 57–64

[9] Decision No. D.242/10/2004. of the Public Procurement Arbitration Board

[10] Participation invitation Reg. No. 31761/2010 published in Public Procurement Bulletin, No. 131/2010 (09.11.2010.)

its hand: it has the right to terminate the contract. (This question on the termination is to be examined in the last part of this study.)

It is worthy to note, that although the formation of the project-company can be prescribed by the contracting authority in order to the performance of the contract, and the company can be formed already in the course of the first (bidding) phase of the public procurement procedure, participation in a contract award procedure cannot be insisted upon the formation of such a company.

Article 4, paragraph (2) of the European Directive 2004/18/EC[11] (hereinafter referred as to Directive) creates the possibility for economic operators to submit their tender or put themselves forward as candidate jointly, as a group.[12] At the same time, Directive states, that contracting authorities have no right to prescribe the formation of a certain legal form (e.g. business association) in order to the submitting of a tender or request for participation. Nevertheless, if contracting authority chooses a certain group of economic operators as winner, it can prescribe the formation of such a certain legal form if – as to its opinion – it is necessary in order to the appropriate performance of the public procurement contract is to be concluded.

The rule worded by the Directive is clear. If contracting authority would prescribe the formation of a project-company as a prerequisite of submitting a tender, its act would harm not only the principle of equal opportunities, but other essential principles of the European Union. Namely, the duty to form a project-company could have negative influence on the winning chances of certain tenderers. This argumentation was also confirmed by the Court of the European Union (hereinafter referred as to Court) in its judgement No. C-57/01 in the Makedoniko Metro Case[13], in which questions arose with regard to the public procurement procedure, which aimed at the planning, construction and operation of the subway of Thessaloniki.

Albeit contracting authority – with regard to the provision of the Directive – cannot prescribe the formation of a project-company as a prerequisite of the participation in the public procurement process, the prescription of the mandatory formation of the company and with the specialisation of the requirements on it (e.g. minimal amount of the subscribed capital) contracting authority can substantively influence the outcome of the contract award procedure. The determination of these requirements makes possible the personalization of the contract notice, i.e. to conform it to a certain person. Therefore, some tenderers will not submit a tender with regard to the prescribed requirements, since in the case of winning they would not be able to form such a project-company, which is prescribed by the contracting authority.

It is worthy to note, that in the case, when contracting authority decides to prescribe the formation of the project-company with regard to the nature of the purchase in order to the performance of the future public procurement contract, this requirement shall be clearly set in the notice starting the contract award procedure.[14] It is also important, that contracting authority is also obliged to set its opposing requirement too, i.e. if it does not think

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

[12] Cf. PPA, Art. 25. § paragraph (1)

[13] Judgment of the Court of 23 January 2003 in Makedoniko Metro and Michaniki AE v Elliniko Dimosio Case C-57/01, ECR [2003], p. I-1091

[14] PPA, Article 27, paragraph (1)

necessary the formation of the company. It means, that contracting authority shall make clear every time, what to require from the tenderers.

Other requirements related to the project-company and demands determined by the contracting authority shall be detailed in the documentation. However, this means fairly narrow possibility, since these requirements can relate only to the legal form, minimal amount of subscribed capital, scope of the activity and control of the business organization, which is to be formed.

2.2. Legal form, subscribed capital

According to the legal form of the organization is to be formed, it should be mentioned, that PPA uses the expression "economic operator". "Economic operator" is a notion defined by the Hungarian Civil Code in force (hereinafter referred as to CC [1959])[15], which is much wider, than the notion of "business association". It covers not only the latter mentioned category, but includes the state-owned company and other state-owned economic agencies, cooperatives, housing cooperatives, European cooperative societies, European public limited-liability companies, groupings, European groupings of territorial cooperation, European economic interest groupings, companies of certain legal entities, subsidiaries, water management organizations, forest management associations, court bailiffs' offices, and private entrepreneurs. Moreover, the civil relations of the state, local governments, budgetary agencies, societies, public bodies and foundations are also subject to the provisions on economic operators in connection with their economic activities, unless otherwise provided by law with respect to these legal persons.

In the case, if "economic operator" would have another meaning with regard to the public procurement provisions, the PPA's text presumably would contain it. In the lack of such a clearing provision, we can interpret this usage, as law-maker did not intend to narrow the eligible legal forms to the business associations, but to give wider decision possibility in the course of the choosing of the legal form of the future project-company.

Contrary to this, winner tenderer(s) typically form a kind of business association, mostly limited liability company (Ltd.) or private limited company. It is due to several causes: one the one hand, it is an important viewpoint, that the realization and performance of the public procurement contract is fairly capital-intensive, which is hardly can be carried out by a limited partnership or general partnership, which operates with smaller capital, considering that there is no legal prescription on the minimal amount of the subscribed capital. (We will see it later that this advantage is really cut out by the PPA's provisions on the liability of the project-company.)

Moreover, operative PPA aims at promoting the participation of micro and SMEs in the public procurement process, which also effects the choosing of Ltd. form.

Thirdly, if a bigger undertaking wins the contract award procedure (and it has more gained contracts, which is not rare), forming a project-company could create transparency and separate handling of finances, which can be reached mainly by the above mentioned legal forms, i.e. Ltd. and private limited company. However, it is possible, that in the case of smaller (e.g. local) purchases a project-company operating as general partnership or limited partnership is also able to fulfill the duty to perform the concluded contract.

The chosen legal form of the project-company – disregard to the fact, if contacting authority has prescribed or winning tenderer has chosen it – means a kind of finality: legal

[15] Act No. IV of 1959 on the Civil Code, (hereinafter referred as to CC [1959]), Article 685, point c)

form shall be maintained during the whole period of the performance according to the PPA's provision, which expressly words the prohibition of transformation.[16] By the way, this limitation is another specialty compared to the general freedom to transform, which is typical in the case of business associations.

Moreover, the chosen legal form obviously has influence on the amount of the subscribed capital. None the less, more aspects arise. ABA determines the minimal amount of subscribed capital in the case of certain associations (namely in the case of Ltd. and (private or public) limited company). However, with regard to the fact, that in the case of project-company PPA puts the right to determine the minimal amount of subscribed capital into the contracting authority's hand, this amount – as to the intention of the contracting authority – can be higher, than the normatively determinated minimum. (We have to add, that the new PPA corrected the obviously wrong terminology of the former act, which wrongly used the word "capital" instead of "subscribed capital". Using the word "capital" suggested, that project-company can be formed only as private limited company, thus the ABA uses this expression in the case of the mentioned legal form. With the using of "subscribed capital" the new PPA solved the problem.)

There is a further limitation: founders of the project-company shall not deprive the subscribed capital and the assets other than the subscribed capital, excluding the dividend.[17] With this provision, Hungarian law-maker creates a kind of guarantee of the performance of the contract, since the fluctuation of the assets of the winning tenderer(s) does not affect the financial stability of the project-company.

Related to the project-company is to be formed, the situation of those project-companies, which operate as consortium, arise special questions and required for further examinations. In the past – and mostly at present too – was typical, that tenderers submit their tender as consortium in the case of joint bidding and after the winning of the contract award procedure, as winner tenderers, they maintain this legal form for the performance of the contract too.

As to Ödön Kuncz, consortium – as a special occasional association – is a cooperation form similar to the private law company. It has not legal personality and does not get off from its founders. Therefore it is not registered by the registry court. Rights and obligations exclusively and indirectly behove and bother the members of the consortium.[18]

If several tenderers intend to submit their tender jointly as consortium, coordinative civil association keeps the appropriate legal frame. As to the Article 568, paragraph (1) of the CC [1959] in force, "*[u]nder a memorandum of association for the foundation of a civil association the parties shall undertake the obligation to cooperate in business activities in order to achieve their common goals and to place the material contributions necessary for this at their common disposal. The parties shall be entitled to establish such associations, even without material contributions, in order to promote their common economic interests and coordinate their activities to that end*."

Civil association cannot be deemed as company in real sense, since consortial agreement does not creates such a legal personality, which would have its own legal interest. Nor the PPA, neither any other legal act invests the consortium with legal personality. A clearly contractual situation evolves, which does not keep a separate legal

[16] PPA, Article 129, paragraph (4)
[17] PPA, Article 129, paragraph (5)
[18] KUNCZ Ödön: *A magyar kereskedelmi és váltójog tankönyve*. Grill Károly Könyvkiadóvállalata, Budapest, 1944, p. 134

relation. Civil association has no legal personality. Therefore it cannot acquire rights and take on obligations independently, in its own name.[19]

As it can be seen, cooperative civil association is fully suitable for the joint (consortial) bidding in the course of the public procurement procedure. Such a cooperation form may also well function in the bidding phase of the procedure. However, consortium is much looser and more informal cooperation[20], than an economic operator or business association. Therefore a question arises: how can such a cooperation form, which operates on consortial base and can be basically defined as civil law company – without any businesslike feature – be inserted into the frames of the project-company.[21]

(During the examination of the relation of the consortium and project-company, also worthy to deal with another proper private law "occasional cooperative form"[22], namely the syndicate, since tenderers, who would submit their tender jointly, can cooperate not only as consortium, but under a syndicate contract.[23]

Syndicate contract is an atypical legal act, which always appears with subsidiary nature together with another contract establishing a business association.[24] The expression "syndicate contract" is sometimes used as a synonym for consortial contract[25], albeit in most cases it functions as a temporary – and mostly unlawful – cooperation form for business associations in the field of competition law.

Related to the public procurement, syndicate contract and the cooperation based on it has a special significance in the formation and operation of a project-company. Tenderers, who compose consortium at the public procurement procedure' first phase, form a project-company after the conclusion of the public procurement contract in order to its performance. Detailed questions and rules on the project-company's operation and activity can be regulated by the parties in a syndicate contract, which relates to the deed of association.)[26]

In the case of consortial bidding, another question arises, namely, how the changing of the composition of the consortium can be judged. This question has great importance, because the changing can also have effect on the project-company. We should refer again to the Article 4, paragraph (2) of the previously mentioned Directive, which stipulates, that in order to submit a tender or a request to participate, groups of economic operators may not be required by the contracting authorities to assume a specific legal form. However, the group selected by the contracting authority may be required to do so (e.g. business association form) when it has been awarded the contract, to the extent that this change is necessary for the satisfactory performance of the contract.

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[19] Judgement No. 3.Kf.27.267/2009/11 of the Fővárosi Ítélőtábla

[20] See BARTA op. cit., p. 58

[21] See BARTA op. cit. pp. 57–64

[22] cf. Art. 62 of the Act No. XXXVII of 1975 on the commerce and KUNCZ op. cit. p. 135.

[23] Decision No. Vj-18/2007/30 and No. Vj-10/2007/41 of the Hungarian Competition Authority

[24] BALÁSHÁZY, Mária: *Szindikátusi szerződés a társasági jog és a polgári jog határán*. In: Gazdaság és Jog, No. 5/1993, pp.16-18, p. 16 and PAPP, Tekla: *Atipikus szerződések*, Szeged, 2006, p.15 and LUKÁCS, Mónika–SÁNDOR, István–SZŰCS, Brigitta: *Új típusú szerződések és azok gyakorlata a gazdasági életben*, HVG-ORAC Lap- és Könyvkiadó Kft, Budapest, 2003, p. 22 and p. 47

[25] PAPP op. cit. p. 20

[26] About the consortial tendering see: Judgment of the Court of 23 December 2009 in Consorzio Nazionale Interuniversitario per le Scienze del Mare (CoNISMa) v Regione Marche Case C-305/08, ECR [2009], p. I-12129 and Judgment of the Court of 23 December 2009 in Serrantoni Srl and Consorzio stabile edili Scrl v Comune di Milano Case C-376/08, ECR [2009], p. I-12169

Two cases shall be mention:

a) Firstly, when the tender's submitting is made jointly as a consortium, but performance requires for a special legal form (e.g. business association).

b) Secondly, when the tender's submitting is made jointly as a consortium, but national regulation does not require for a certain legal form in order to the performance of the contract.

(We have to state, that our argumentation – with regard to both cases – is only relevant, if the formation of the project-company is expressly prescribed by the contracting authority. In the lack of such a prescription, performance of the public procurement contract can come off by the previously formed consortium.)

The adjudication of the case under point b) is simpler. Since there is no certain provision on the needed legal form for the performance of the contract, winners have the right to maintain the consortium. In this case there is only one question: how can be handled the situation, when changes in the composition of the consortium occur after the conclusion of the contract. The Court also dealt with this question in the above mentioned Makedoniko Metro judgement, when it had to take a stand, if is such a national regulation permissible, which excludes the changing of consortium's composition after the submission of the tender. (In the certain case, changing of the composition was caused by the insolvency of one of the consortium's members.)

As to the judgement of the Court, Directive does not contain any provision neither on the composition of the consortium, nor on the changing of its composition, i.e. the lawful changeability after the choosing of the winner tenderer. These cases shall always be judged under the national law.[27] On the opinion of the Court, Directive does not preclude national rules which would prohibit the changing in the composition of a group consortium taking part in a procedure for the award of a public works contract or a public works concession which occurs after submission of tenders.

In the case mentioned under point a), i.e. if national law requires for a certain legal form (e.g. Ltd., private limited company) for the operation of the project-company, cooperation of tenderers – based on consortial rules – changes by necessity. As we mentioned it before, PPA in force applies the expression "economic operators", which can be further concretized by the contracting authority during the public procurement procedure. Nevertheless, as to the operative CC [1959], economic operator does not cover the civil association form. The agreement (aimed at either civil association or syndicate) containing the frames of the cooperation can subsist, but winner tenderers do not acquit from the duty to form a project-company, if this obligation is prescribed by the contracting authority. At the same time, it is problematic, what happens, if a consortium won the contract award process, but its composition changes before the formation of the project-company due to a certain cause (e.g. insolvency).

Since the PPA does not contain any provision on the changing of the consortium's composition, the judgement of the changing occurred in the objects depends on the current judicial practice. Starting up with the fact, that public procurement contract shall be concluded with the winner organization (person) or – in the case of joint bidding – with the winner organisations (persons)[28], a narrower and a wider approach can be examined. As to the narrower (harder) approach, the consortium's composition means a strong restriction.

[27] Makedoniko Metro Judgement, point 42 and 61

[28] PPA, Article 124, paragraph (1)

Any kind of change occurring in the composition also results the changing of the winners, which means the harm of the PPA's referred provision.

As to the more flexible interpretation, winner shall be mustered from "outside", regardless of changing. It means, that winner seemingly never changes, although the whole circle of objects changes in deed. Such an approach cannot be accepted, since it would lead to the evasion of one of the main goal of the public procurement contract, i.e. the (fair) competition. Article 128, paragraph (1) of the PPA declares, that public procurement contract can only be performed by the winner tenderer or a project-company formed by the winners, with their exclusive share. Accordingly to this argumentation and as to the referred provision of the PPA, Hungarian public procurement practice adopts the second, more rigorous approach, and in general does not accept the change in the composition of the consortium.

Another interesting feature of this examination, that changing in objects also arises with regard to the modification of the public procurement contract. However, the applicability of this rule is traversed not only by the Hungarian, but the European public procurement law.[29]

2.3. Ownership structure

According to the project-company's ownership structure PPA only states, that project-company shall be formed by the winner tenderer(s).[30] Nevertheless, some paragraphs later it specifies that a share in the project-company shall not be acquired by others than the winning tenderer(s).

This specification – which appears as limitation at the same time – has significance from several viewpoints. One the one hand, in the case of concession company, (which is similar to the project-company), Article 20, paragraph (1) of the act related to it[31] only states, that concession company shall be formed by the participation of the winner tenderer. In the lack of the prescription on the minimum share of the winning tenderer(s), concession company can also be formed with the minimal, symbolic share of the winning tenderer(s), since in this case the normatively determined requirements are also fulfilled.

In contrast to the act on concessions, PPA in force excludes this possibility, when it expressively states the duty to form the project company with the exclusive share of the winning tenderer(s). (We also have to add, that the possibility of owner-changing arise further questions, which we do not examine in details in this study.)

The PPA's limitation on share is two directional. As we have mentioned above, persons (organizations) beyond the winner tenderer(s) cannot acquire share in the project-company (cf.: questions on the changing of the consistence of the consortium). At the same time, project-company cannot acquire share in any other economic operator.[32] It is important, that

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[29] See BARABÁS, Gergely: *A közbeszerzési szerződések módosításának határai a Közbeszerzési Döntőbizottság joggyakorlatában*. In: Új Magyar Közigazgatás, No. /6-7/2009, pp. 39–54, JUHÁSZ, Ágnes: *A szerződés módosításának határai a közbeszerzésben*, In: Publicationes Universitatis Miskolcinensis, Sectio Juridica et Politica, Tomus XXVIII/1., Miskolc, 2010, p. 373–393 and related decisions of the Public Procurement Arbitration Board (No. D.365/9/2007, No. D.419/9/2006, No. D.712/6/2006, No. D.655/8/2006, No. D.689/17/2009)

[30] PPA, Article 129, paragraph (1)

[31] Act No. XVI of 1991 on concessions

[32] PPA, Article 129, paragraph (4)

this limitation is general, i.e. relates not only to those economic operators, whose business activity is similar to or the same with the business activity of the project-company.

Although PPA closes certain back doors, some other questions still remain opened. For instance, PPA does not contain any provision on priority right, namely, if such a right can be freely stipulated for the founders or how the rights to vote are divided among the winner tenderers. In our opinion, in the lack of an explicit prohibitive provision, founders of the future project-company can freely determine both the rights to vote, both the priority rights with regard to certain aspects, e.g. their importance or the proportion of the assets, which were placed at the future project-company's disposal.

3. Questions on the operation of the project-company

As we mentioned before, the operation of the economic operator is to be formed in order to the performance of the public procurement contract, is limited from several viewpoints. One the one hand, it is due to the intention of the contracting authority (i.e. to the requirements are prescribed by the contracting authority in the notice on the starting of the procedure). On the other hand, they can also origin from the own nature of the purchase. For instance, project-company is formed in order to the performance of the contract, therefore not only the duration of its operation, but its activity is also limited.

3.1. Activity and its control

According to the operation of the project-company, there is an important provision, which prescribes, that project-company can perform only those activities, which are necessary in order to the performance of the public procurement contract. Moreover, its right to conclude contracts extends only for those contracts, which relate to the performance (e.g. with subcontracts).[33] Nevertheless, a question is arisen: what shall we comprehend under the expression "activity, which is necessary in order to the performance of the contract"? Basically, such an activity extends to all activities, which are necessary in order to perform the won contract. However, in certain cases it can also cover some other activities, which are only secondary compared to the performance of the contract, as a main task.

Sometimes it happens, that a project-company runs on such an activity – even if it is only secondary –, which would endanger the "main activity", i.e. the performance of the contract. In order to balk such a situation, PPA gives a right to the contracting authority as guarantee, under which it can word some requirements according to the activity in the notice starting the contract award procedure.[34] With this act, contracting authority can prescribe a further limitation and also can forbid for the project-company to do certain business activities.

In line with the control of the project-company's activity and operation, we also have to deal with the role of the board of supervision and the auditor. Namely, when contracting authority prescribed a certain legal form (business association) for the project-company, which requires the formation of the above mentioned controlling organs, winning tenderers have no right to diverge from this provision. As to the Article 33, paragraph (2) of the ABA, formation of the board of supervision is obligatory in the case of public limited company (except the case, when it applies one-tier system for controlling). None the less,

[33] PPA, Article 129, paragraph (4)
[34] PPA, Article 27, paragraph (2)

this rule is not relevant for us, since project-company can only be formed by the exclusive participation of the winner tenderers, which means the exclusion of the forming of a public limited company.

As to the provisions of the ABA, in the case of private limited company, the establishment of the board of supervision is only compulsory, if it is requested by the founders or members (shareholders) controlling at least five percent of the total number of votes. Since only winner tenderers can be members and founders of the project company, formation of the board of supervision also exclusively depends on their intention. However, from another viewpoint a new question arises: has contracting authority right to prescribe the formation of such a supervisory organ?

The third case, when the formation of the board of supervision is obligatory, when it is prescribed by law – irrespective of the form and operational structure of the company –, with regard view to the protection of public assets or to the activities in which the company is engaged. Purchases realized within the frames of public procurement are financed by public budget. Therefore the supervision of the project company's activity is justified. Nevertheless, PPA does not contain the duty to form a board of supervision, so the question still remains: can the contracting authority prescribe such an obligation with regard to its rights declared in the PPA?

PPA does not answer to our question drew up before, since it does not contain a certain provision on this case. Article 27, paragraph (2) of the PPA only states, that contracting authority has right to specify the requirements related to the control of the project company's activity. Considering that project-company can only be formed by the participation of the winning tenderers, contracting authority has only indirect right to control. This control can be realized by either the prescription of the establishment of the board of supervision or the application of an auditor.[35] Going ahead, a further interesting question is, whether – beyond the right to prescribe the formation of controlling organs – contracting authority has the possibility to prescribe the involving of certain persons (e.g. experts) into the board of supervision. In our point of view, answering to this question arises several further questions and examinations. Therefore we do not deal with it further and we dispense with the review of the potential questions.

3.2. Rights and obligation related to the performance of the contract

During the examination of the operation of the project-company it has to be stated, that rights and obligations set out in the public procurement contract shall be entitled to the project-company from the date of its formation. (Otherwise, parties shall it also stipulated in their contract at the time of its conclusion, according to the Article 129, paragraph (1) of the PPA.) Thus, in this case rights and obligations passes from the winning tenderer(s) to the project-company in a proper way, which makes a special situation, since the contract, which closes the public procurement procedure, is to be concluded between the contracting authority and the winning tenderer(s), while subcontractors, who are designated in the offer and are intended to involve to the performance of the contract, shall conclude the contracts in order to the performance with the project-company. (It is worthy to note, that in the case of PPP-projects and concession contracts also the project-company concludes the contracts with the subcontractors.)

[35] BARTA op. cit. p. 62

However, the project company's entering into the contract arises several questions, since it performs toward the contracting authority, but originally was not in contractual relation with it. From dogmatically aspect, it is questionable, if this kind of changing of subject can be deemed as succession in the contractual position. In our opinion, terminology used by the PPA (namely "rights and obligations set out therein shall be entitled to the project-company from the date of its establishment") refer to a special changing of subject, which is based on legal provision and realized on the obligor's side. In the case of this succession all rights and obligations, which are due to the original obligor (i.e. winning tenderer) pass to the new obligor (i.e. project-company). However, a further question is, if in the current case we face to the so-called legal assumption of debt or this legal institution means the transfer of the contractual position, which is not known in the operative CC [1959], but the new CC [2013] [36] already contains it.

In the case of assumption of debt – if obligee agrees – person assuming the debt shall subrogate the obligor (*intercessio privativa*) and the obligor gets away from the contract. New obligor is entitled to all rights to which the obligor was entitled in respect of the obligee.[37] Transfer of the contractual position is such a changing of subject, where not only the rights, but the obligations entitled the certain party are transferred.[38] With this act contract between the original parties ceases and a new contract comes into existence with the same content, between the party, who remains in the contract and the person, who enters into the contract.

As it can be seen, the original contract ceases not only in the case of assumption of debt, but the transfer of the contractual position and the prior obligor gets away from the contract in both cases. Contrary to this, PPA creates a special situation. Albeit the project-company is obliged to perform the contract, winner tenderer remains also liable for the performance. I.e. PPA keeps the original obligor in the contract for the future too. Such a duplication of the obligor's positions rather can be identified with another similar legal institution, the undertaking of debt, where the person undertaking the debt steps next to the original obligor (*intercessio cumulativa*). This statement can be justified by the text of the CC [2013] which states, that undertaking of debt creates joint and several liability on the obligor's side.[39] Considering that PPA creates joint and several liability on the obligor's side in the case of the project-company, we can state, that it is a kind of undertaking of debt, therefore we cannot speak about succession in the contract.[40]

3.3. Liability for the performance of the public procurement contract

The duty to perform the public procurement contract (and rights related to it at the same time) passes to the project-company, while the original obligor of the contract (i.e. the winning tenderer) does not get away. However, another question is, how does it affect the liability for the performance of the contract.

Though we have referred to the fact, that PPA makes the question of the liability clear, at first sight it is not obvious. Liability can be influenced by the legal form of the project-company is to be formed. For instance, in the case of Ltd., liability of founders (i.e. winning

[36] Act No. V of 2013 on the Civil Code (hereinafter referred as CC [2013])
[37] CC [1959], Article 332, paragraph (2)
[38] CC [2013], Article 6:208, paragraph (2)
[39] CC [2013], Article 6:206
[40] BÍRÓ, György: *Kötelmi jog. Közös szabályok. Szerződéstan.* Novotni Kiadó, Miskolc, 2010, p. 178.

tenderer(s), who are primarily obliged and responsible for the performance of the contract) would only be subsidiary under the rules of ABA. Theoretically, it would be logic, if contracting authority would prescribe such a legal form which would mean the most effective guarantee of the performance of the public procurement contract. If we are thinking in business associations, this legal form would be the general partnership or limited partnership, considering the unlimited, joint and several liability of their parties. Nevertheless, some other aspects – others, than the liability – justify the formation in other kind of business association, namely Ltd. or private limited company.

However, problematic of the liability exceeds the frames of the provisions of the ABA. Thus, PPA expressly states, that project-company and winning tenderer(s) are jointly liable for the performance of the public procurement contract.[41] For instance, in the case of choosing a legal form operating with limited liability, the collision of the PPA and ABA arises. However, a special provision gets on. In the case of the regulation of the public procurement contract, there is a collision between PPA and CC [1959]. In order to solve this situation, PPA's rules are primary and the provisions of the CC [1959] are only applicable, if PPA does not contain any special provision on the certain question, situation, related to the public procurement contract. In the case of the collision of the PPA and ABA, PPA – as *lex specialis* – primary gets on, i.e. the PPA's prescription on the joint and several liability of the project-company and the winning tenderer(s) overwrites the limited liability determined by the ABA. It means, that disregard to the chosen legal form of the operating project-company, there is no difference from liability aspect: stricter liability is applicable in the case of the default of the performance or non-performance.

4. Termination of the project-company. Non-formation of a project-company as a ground for the abrogation of the public procurement contract

Project-company has special features not only on its formation and operation, but its termination. Thus, PPA does not determine such causes, which would result in the *ipso iure* ceasing of the project-company. Instead of this, it contains cases, under which winning tenderer(s) can terminate the project-company. The PPA contains the following cases, which we examine in detail:

Project-company is formed for a determined period (or rightly, with a stipulation of a depending condition), i.e. for the time of the performance of the contract. Therefore, winning tenderer(s) may terminate the project-company, if it has performed the requirements set out in the public procurement contract and both the project-company, both the contracting authority have performed their obligations regarding settling accounts with one another.

As it can be seen, the mere performance of the contract is insufficient ground for the termination of the project-company. Moreover, parties shall settle up with each other. With this provision, Hungarian law-maker intended to avoid those cases, when performance automatically results in the ceasing of the project-company. Thus, if project-company ceases, the enforcement of any claims related to the performance (e.g. default, non-performance, delay, etc.) becomes more difficult, because the party, who has performed the contract, and against whom we would enforce the claim, does not exists furthermore. However, the provision on the joint and several liability could straighten the problem, excluding the automatic ceasing of the project-company seems to be a better solution.

[41] PPA, Article 129, paragraph (3)

One the other hand, winning tenderer(s) may also terminate the project-company, if they have completely taken over from the project-company all the rights and obligations, which relate to the public procurement contract and other contracts concluded in order to the performance of the public procurement contract.[42]

In the above mentioned two cases winning tenderers have the right to terminate the project-company.

Beyond the two examined cases of the project-company' termination, PPA also deals with a special situation, when public procurement contract concluded between the contracting authority and winner tenderers can be terminated in a proper way. PPA assures a special termination right for the party, who entered into the contract as contracting authority. If it is stipulated in the contract notice, that after a successful contract award process winning tenderer(s) must set up a business operator and the tenderer does not register the conclusion of the articles of incorporation or the acceptance of the articles of association with the Court of Registry within twenty days following the conclusion of the contract, contracting authority may terminate the public procurement contract.[43] It is true, that this act (i.e. the termination of the contract) does not afford automatically the ceasing of the project-company, but in the lack of a contract, which is to be perform there is no further need to maintain the project-company, i.e. the termination of the contract indirectly can result in the ceasing of the project-company.

[42] PPA, Art. 129, paragraph (6)
[43] PPA, Art. 129, paragraph (8)

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EMPLOYMENT POLICY OF EMPLOYEES IN SPECIAL LEGAL STATUS IN HUNGARY – IS IT IN COMPLIANCE WITH THE EU STANDARD?*

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1. Introductory Remarks – Horizontal and Vertical Factors

This paper deals with the employment policy of employees in special legal status in Hungary comparing it to the Employment package of the EU from 2012. First of all the term "employees in special legal status" will be defined, afterwards the Hungarian legislation will be presented on the topic, finally it will be examined how the issue fits into the employment policy of the EU.

The term "employees in special legal status" refers to vulnerable groups. The Act XCIII of 1993 on labor protection uses this term referring to women, disabled people, and employees with changed working ability, young employees who need a higher level of protection than ordinary employees. The analogy is the same as there are employees whose employment shall be supported and who need higher protection for example in the case of dismissal. This paper focuses on two categories: disabled people and employees with changed working ability (furthermore referred to as *target group).* Their employment is not only an issue of labor law, but an issue of the employment policy.

The employment policy of the target group in a country shall consist of different areas horizontally and vertically. Horizontally the following areas shall have co-operation in order to facilitate a feasible employment: education, rehabilitation, factual employment under the Labor Code in force, active and passive measures of the employment policy and adult protection. Vertically the areas shall cover amongst others the followings:

- Education.
  - Integrated and inclusive education in accordance with the skills (development of skills). Special education has a crucial role in this aspect.
- Rehabilitation.
  - Complex rehabilitation including medical, social and vocational rehabilitation,[1]

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- vocational rehabilitation shall focus on capability (capability approach).[2]

- Factual employment under the Labor Code in force.
  - Obligations of the employer and employee,
  - reasonable accommodation,
  - health and safety instructions,
  - collective labor law institutions (collective bargaining, trade unions, work councils)
  - special dismissal protection,
  - anti-discrimination legislation.[3]
- Active and passive measures of the employment policy.

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[1] On the rules of complex rehabilitation in Hungary see Kolosi Tamás–Tóth István György: A rendszerváltás nyertesei és vesztesei – generációs oldalnézetből. Tíz állítás a gazdasági átalakulás társadalmi hatásairól. In: *Társadalmi riport*. TÁRKI, Budapest, 2008; Lechnerné Vadász Judit, A foglalkozási rehabilitáció magyarországi helyzete. In: *Fogyatékosságtudományi tanulmányok XI*. A foglalkozási rehabilitáció Magyarországon: a szabályozás múltja, jelene, jövője. ELTE, Bárczi Gusztáv Gyógypedagógiai Kar, Budapest, 2009.; Lakatos, Gyula, A nemzeti erőforrások és a hazai foglalkoztatáspolitika kálváriája. *Valóság*, 9, 2010, pp. 65–90.; Szellő, János: *Foglalkozási rehabilitációs gyakorlat jegyzet a Nemzeti Foglalkoztatási Szolgálat munkatársai számára*. Foglalkoztatási és Szociális Hivatal, Budapest, 2010; Farkasné Jakab Eszter–Horváth Péter–Mészáros Andrea–Nagy Janka Teodóra–Petróczi Feren–Sima Ferenc–Szellő János: *Szekszárdi Szociális Műhelytanulmányok 3. A Komplex rehabilitáció*, PTE IGYK Szociális Munka és Szociálpolitikai Intézet Szekszárd, 2012; Könczei, György–Varga, Mariann: Egészségkárosodás, fogyatékosság és foglalkozási rehabilitáció. In: *Egy könyv a foglalkozási rehabilitációról*, Együttélés Kiadvány, Down Egyesület, 2000.

[2] On the capability approach see GLASS, KATHLEEN C. (1997): Refining Definitions and Devising Instruments: Two Decades of Assessing Mental Competence. *International Journal of Law and Psychiatry*, *(20) 1*, 5–33, DONELLY, MARY (2009): Best Interests, Patient Paticipation and The Mental Capacity Act 2005. *Medical Law Review, (17),* 1–29, VERMA, SARITA–SILBERFELD, MICHEL (1997): Approaches to Capacity and Competency: The Canadian View. *International Journal of Law and Psychiatry*, *(20)* 1, 35–46, HALE, BRENDA (1997): Mentally Incapacitated dults and Decision-Making: The English Perspektive. *International Journal of Law and Psychiatry*, *(20) 1*, 59–75., ATKIN, W. R. (1997): Adult Guardianship Reform – Reflections on the New Zealand Model. *International Journal of Law and Psychiatry*, *(20) 1*, 77–96, BACH, Michael (2007a): Advancing Self-Determination of Persons with Intellectual Disabilities. *Inclusion Europe, (1),* 2–5. Erre utal továbbá WILBER, H. KATHLEEN–REYNOLDS, SANDRA (1995): Rethinking alternatives to guardianship. *The Gerontologist*, *(35) 2*, 248–257.; Personal Relationships of Support between Adults: The Case of Disability, by Roeher Institute, March 2001 On the ability at work see *Ability at work. Tapping the talent of people with disability, A Good Practice Guide*. Australian Government, Australian Public Service Commission, Commonwealth of Australia, 2007.

[3] On labor law regulation see *Invalidität im Wandel*, Bundesminsiterium für Arbeit, Soziales und Konsumentenschutz, Manzsche Verlags- und Universitätbuchhandlung, Wien, 2009.; Lisa Waddington, Legislating to Employ People with Disabilities: The European and American way. *Maastricht Journal of European and Comparative Law*, 1994. Volume 1. Issue 4. pp. 367–368; Ingrid Weber, Die Gleichstellung der Frau im Erwerbsleben – Neue Chancen durch Qutenregelungen? *DB*, Issue 1. 1998. pp. 45–46; Ison, G. Terence, Employment Quotas for Disabled People: The Japanese Experience. *Kobe University Law Review*, International Edition, Issue 26. Faculty of Law Kobe University, Rokkodai, Kobe, Japan, 1992.; Benchmarking Employment Policies for People with Disabilities, ECOTEC Reserach and Consulting Limited, 2000. See also Höfle, Wolfgang–Leitner, Michael–Stärker, Lukas: *Rechte für Menschen mit Behinderung*, Linde Verlag, Wien, 2003.

  - Wage subsidies,
  - subsidies for expenditures arising from transportation, housing, adaptation of work and workplace,
  - tax reductions,
  - training,
  - quota regulation.[4]
- Adult protection.
  - System of disabled benefits created in a still onto-the-labor-market motivating way (avoidance of benefit's trap).[5]

The co-operation implies a holistic approach of the legislator taking into consideration all the policies which might affect the target group. But the policy regarding disabled people and employees with changed working ability usually does not contain such a broad aspect as there are missing areas horizontally and vertically. However, there is a general shift from the benefit-oriented policies towards an employment and labor market-oriented policy in compliance with the EU's employment strategy.

2. Who Are at Stake?

The term "employee with changed working ability" does not exist in Europe, "disabled person" is known.[6] However this is a legal term in the Hungarian legislation and as such, it must be examined whether this term equals with the concept of disabled person.

Definition of people with changed working abilities is laid down on the one hand in § 58 of IV of 1994 on the support of employment and unemployment services. According to this the legal definition clarifies "employee" and not "people". Employee with changed working abilities is people with physical and mental disability, or whose chance for the maintenance of the workplace and being employed has been decreased because of disability. Regarding the concept of employee with changed working abilities (furthermore

[4] In disabled quotas the employers are obliged to ensure that a certain percentage of their labor force is made up of disabled people. This form of positive action determines the development of the disability policy in the European countries and in Japan. In the United States on other approach developed regarding the score problems of the target group, namely the problem is seen as an employer discrimination, and this issue is viewed from a civil rights approach. In Europe there was a principal of the moral obligation of the state which led the countries to apply the quota system so that the disabled would be able to participate on the life of the society. For further reading see Lisa Waddington, Legislating to Employ People with Disabilities: The European and American way. *Maastricht Journal of European and Comparative Law*, 1994. Volume 1. Issue 4. pp. 367–368.

[5] On the issue of benefit's trap see Benchmarking Employment Policies for People with Disabilities, ECOTEC Research and Consulting Limited, 2000.

[6] See the filled-in questionnaires within the framework of Empower Project. The filled-in questionnaires can be visited under http://empower.hu/publications/category/4-filled-in-questioners (last visited 28 May, 2013). There was a conference on 26th April, 2013 within the framework of the Empower Project, where it was obvious that the participating experts from Slovakia, Poland, Croatia, Portugal and Czech Republic did not understand the Hungarian distinction made between disabled person and employees with changed working abilities.

referred to as "EWCHWA") they are people who have already been/worked on the labor market.[7]

On the other hand definition of people with changed working abilities can be also found in § 2 of Act CXCI of 2011 (in force since 1 January, 2012) on the services of people with changed working abilities. The state of health of these people is 60% or less according to the complex assessment of the rehabilitation office; within 5 years before submitting an application they have been secured for 1095 days; they do not pursuit professional or trade activity, they do not receive regular financial services. If the conditions are fulfilled, one can be entitled for services called rehabilitation or disability benefits. Employment is allowed in the case of rehabilitation benefit, and as its name implies, it is paid for a definite time and aims to place the person onto the open labor market.

The regulation on people/employee with changed working abilities is strongly connected to the contribution-payment-based social security system. That is the point why the examination of the definition is needed. There are people with changed or different working abilities, who have never been on the labor market. They are mentally disabled people with intellectual and psychosocial disability.

Definition of disabled person is laid down in § 4 of Act XXVI of 1998 on the rights of persons with disabilities and assurance of their equal treatment. This definition equals with the WHO definition of 2002. Disabled person is who has impairment, especially physical, mental, and sensory or is hindered in communications, which cause long term participation restrictions in life. Persons with mental or physical disability are included in the definition of EWCHWA, but there is a considerable part of disabled people who are not covered. Therefore not all the legal provisions apply for disabled people, which apply for EWCHWA. Some disabled people belong to EWCHWA, but mentally disabled people mainly not, as they are rarely employed.

According to the UN Convention on the Rights of Persons with Disabilities disability is an evolving concept and disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others. Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

Thus Hungarian disability concept is a complex phenomenon, reflecting an interaction between features of a person's body and features of the society in which he or she lives. In that sense the Hungarian concept is in compliance with the UN Convention. However, the definition does not involve people with psychiatric disability. In April 2013 the Government filed an amendment of Act XXVI of 1998[8] aiming to broaden the definition concept including people with communication and psychosocial impairments. (This modification should come into force on 30 Sept, 2013.)

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[7] On the definition of employee see also Mélypataki, Gábor: A munkavállaló fogalma a magyar és a német jogban a munkáltató szempontjából. *Publicationes Universitatis Miskolcinensis Sectio Juridica et Politica Tomus,* Volume 30. Issue 2. Miskolc University Press, Miskolc, 2012. pp. 521–540., Jakab, Nóra: *A cselekvőképesség elméleti háttere és munkajogi kérdései*, PhD-disszertáció, Miskolc, 2011.

[8] Modification of Nr. T/10746. http://www.parlament.hu/irom39/10746/10746.pdf (last visited 22 April, 2013)

The definition of EWCHWA was questioned by the reports of the Commissioner for Fundamental Rights.[9]

As the definitions do not equal, the legal regulations on disabled people and EWCHWA also differ. Legal regulation on disabled people is based on compensation and equal treatment; in the case of EWCHWA legal regulation is based on rehabilitation and employment policy measures (quota, financial support to the employer to maintain work and workplace).

It is very difficult to eliminate the differences between the definitions. Consequent use of them would be needed. Employee with changed working abilities is a "reserved" definition. Everybody has a notion to that group of people while handling their employment issue. It could be modified to "*people with less working abilities*", so that it involves all the categories of disability. One might feel this expression disadvantaged and discriminatory. It is also obvious that it would be reasonable to determine to whom the comparison is made. However this definition is a recommendation and open to discussion.

3. Employment Policy of the Target Group in Hungary

The employment policy regulation of disabled people and employees with changed working abilities differs. As far as employees became disabled (gained disability) on the labor market or disabled people are employed on the open labor market the provisions of employees with changed working abilities refer to disabled people as well and the distinction can not be discerned.

Specific regulation on the employment of disabled people is laid down in § 4 of Act XXVI of 1998 on the rights of persons with disabilities and assurance of their equal treatment. Disabled people are entitled for access on an equal basis with others to services, buildings, and information. Rehabilitation means improvement and maintenance of skills and support of the participation in the society. § 21 of the Act prescribes that rehabilitation services shall be introduced for the success of rehabilitation. § 11 lays down that such support services shall be introduced which have considerable impact in the course of employment.[10] § 15 refers specifically to the employment as a disabled person is entitled for integrated, if not possible, for sheltered employment.[11] In the course of employment the principle of reasonable accommodation shall be followed. This paragraph also lays down that subsidies can be granted to those who employ disabled people and need grant for the adaptation of work and workplace. This provision is also strengthened by an order of NFM Nr. 14 of 2012 (6 March) prescribing the conditions of wage subsidies (75% of the expenditures emerging because of the special needs can be covered). The subsidy can be applied for adaptation of the workplace, employing an assisting person and costs of

[9] See the following reports of the Commissioner of Fundamental Rights: accession into the labor market in AJBH-2618/2012, the working circumstances and completion of the policy 'reasonable accommodation' in AJBH-5360/2012., education system for the efficient employment in AJBH-4832/2012.

[10] For further reading see *Supported Employment – A Customer Driven Approach*. Disability Studies, Fogyatékosságtudományi Tanulmányok X., Eötvös Lóránd University, Bárczi Gusztáv faculty of Special Education, 2009

[11] On sheltered workshops see Horst H. Cramer, *Werkstätten für behinderte Menschen*, SGB – Werkstättenrecht, WerkstättenVO, Werkstätten-MitwirkungsVO, Kommentar, 4. Auflage, Verlag C. H. Beck, München, 2006.

transportation. This regulation in the Act fits into the Hungarian employment policy system presented in Act IV of 1991 on the support of employment and unemployment services, which prescribes amongst others the regulation on subsidies for the promotion of employment of employees with changed working abilities and disadvantaged people.
The provisions of employment of employees with changed working abilities include the following legal instruments:

- Stricter liability of the employer while adapting the workplace if an employee with changed working ability is employed. (Order of SzCsM-EüM Nr. 3 of 2002 (8 February).
- Rehabilitation contribution is linked to the quota regulation as an anti-discrimination legislation form. The quota is 5%, if the employer employs more than 25 people. If the number of employees with changed working ability do not reach 5% (compulsory employment), the employer has to pay rehabilitation contribution.[12] (§ 23 of Act CXCI of 2011 on the services of employees with changed working ability)
- Subsidy for adaptation of work and workplace and for wages and expenditures (§ 25 of Act CXCI of 2011 on the services of employees with changed working ability).
- Tax reduction for self employed employees with changed working ability (§ 462/A Act CLVI of 2011 on the amendment of the acts on tax and some other related acts and §§ 16/A and 16/B of Act CXXIII of 2004 on the support of employment of starters, employees over 50, mothers) It fits into the *Workplace protection action program* supporting the employment of disadvantaged groups.
- Wage subsidy based on § 16 of Act IV of 1991 on the support of employment and unemployment services.
- Accreditation of employers employing employees with changed working ability and subsidy granted to them. (Government order Nr. 327 of November 2012 16) Employment of the target group can be: durable employment (on the secondary labor market), transit employment (aims return to the primary labor market). Therefore the employment might be rehabilitation-oriented or sheltered. § 42 of the order prescribes the term "work trial" in the course of transit employment. It is a temporary employment to gain work experiences and it fits into the idea of supported employment, which is based on the *place-train- maintain* principle.
- Support can be given to training, wages, work trial, housing, self employment, transportation (government order Nr 132 of June 2009 19)
- Complex rehabilitation (order of NEFMI Nr 7 of February 2012 14) based on medical, social and vocational assessment.

The employment policy in Hungary generally has been changed into a supportive and motivating system, of which aim is growth and sustainability. Disabled people and employees with changed working abilities belong to a disadvantaged group including mothers, starters, and people over 50. In connection to the sustainable pension system[13] the

[12] The rehabilitation contribution amounts to 964 500 Ft/person/year.
[13] The Hungarian rehabilitation system is linked to the reform of disability pension system. In order not to be entitled for disability pension at active age and without a good health reason, the system working between 1997 and 2007 must have been changed. There have been financial problems behind it. Therefore this reform belongs to the sustainability approach of the Hungarian pension system. In 2007 the rehabilitation system was supervised and complex rehabilitation was

aim is to place and maintain as many people as possible on the open labor market. The target group has potential, which should be used, though employment policy is only one aspect. Amongst the active measures one can see the importance of rehabilitation. Here we have come to the holistic approach again, which requires the co-operation of the already listed areas.

Tax reduction, wage subsidies, subsidies for expenditures, transportation, housing, assist person, and quota system; these are the most common active policy measures to integrate the target group into the labor market. This seems to be a trend in Slovakia, Czech Republic, Poland, Portugal and Hungary according to a recent research carried out within the framework of Empower Project.[14] Entitlement for disabled pensions has been reduced in order to release the Hungarian Pension Fund. Therefore it can not be said that the policy on the target group would be benefit-oriented. Motivation of the potential employees and employers is a very difficult issue, because the target group needs higher protection and support, which might have counter effect on the employer's side. How to be protective but still motivating is the core issue in the course of employment of disabled people and employees with changed working ability.

4. How Does the Issue Fit Into the European Union's Employment Strategy?

The question is whether the employment strategy of the European Union deals with the employment issue of disabled people and employees with changed working ability. Article 45–55 on the workers and 145–164 of the Treaty of the European Union on the employment determines the legal basis of the EU's competence for the employment and social affairs.

Article 145 lays down: *Member States and the Union shall work towards developing a coordinated strategy for employment and particularly for promoting a skilled, trained and adaptable workforce and labor markets responsive to economic change with a view to achieving the objectives defined in Article 3 of the Treaty on European Union.*

Article 147 prescribes: *The Union shall contribute to a high level of employment by encouraging cooperation between Member States and by supporting and, if necessary, complementing their action. In doing so, the competences of the Member States shall be respected.*

Article 153 lists the areas where the Union shall support and complement the activities of the Member States:

(a) improvement in particular of the working environment to protect workers' health and safety;
(b) working conditions;
(c) social security and social protection of workers;
(d) protection of workers where their employment contract is terminated;

introduced. The assessment has been carried out by the National Rehabilitation and Social Office. The complex rehabilitation's provisions refer to EWCHAW including people who have disability. But it is important to see that the system relates to those who have already been employees, as their abilities have changed. This system does not aim to improve the abilities of mentally disabled people to be employed. See also Jakab, Nóra–Kajtár, Edit: *Empowerment Project Questionnaire Hungary* http://empower.hu/publications/category/4-filled-in-questioners (last visited 28 May, 2013)

[14] www.empower.hu (last visited 28 June, 2013)

(e) the information and consultation of workers;
(f) representation and collective defence of the interests of workers and employers, including
co-determination,
(g) conditions of employment for third-country nationals legally residing in Union territory;
(h) the integration of persons excluded from the labor market, (i) equality between men and women with regard to labor market opportunities and treatment at
work;
(j) the combating of social exclusion;
(k) the modernization of social protection systems without prejudice to point.

The recent Employment package[15] was launched in April 2012. It is a set of policy documents looking into how EU employment policies intersect with a number of other policy areas in support of smart, sustainable and inclusive growth. It was needed because 23 million people are currently unemployed across the EU – 10% of the active populations, more jobs are needed and from 2012 onwards the working age population on the EU will start to shrink. To ensure the sustainability of the welfare systems, more people need to work.

This package identifies the EU's biggest job potential areas and the most effective ways for EU countries to create more jobs. Measures are proposed in the following areas: supporting job creation, restoring the dynamics of labor markets, improving EU Governance.

Supporting job creation means stepping up job creation across the economy by encouraging labor demand, targeting hiring subsidies to new hiring, reducing the tax on labor while ensuring fiscal sustainability, promoting and supporting self employment, social enterprises and business start-ups, transforming informal or undeclared work into regular employment, boosting 'take home' pay, modernising wage-setting systems to align wages with productivity developments, fostering job creation.

Reforming labor markets means encouraging companies' internal flexibility to protect jobs in crisis times, encouraging decent and sustainable wages, making job transitions pay, reducing the labor market segmentation between those in precarious employment and those on more stable employment, anticipating economic restructuring, developing lifelong learning and active labor market policies, delivering youth opportunities and the youth employment package (see also youth unemployment analysis and youth action teams), reinforcing social dialogue, reinforcing public employment services (see also analysis of public employment services). Under investing in skills the followings are meant: coping with skills mismatches, ensuring better recognition of skills and qualifications and anticipating skills needs (EU Skills Panorama), improving synergy between the worlds of education and work. Moving towards a European labor market shall take place by removing legal and practical obstacles to the free movement of workers and by enhancing the matching of jobs and job-seekers across borders (EURES).

The improvement of EU Governance means reinforcing coordination and multilateral surveillance in employment policy by publishing a benchmarking system with selected employment indicators together with the draft Joint employment report, developing a

[15] See the Employment package http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52012DC0173:EN:NOT (last visited 26 June, 2013)

reform tracking device to keep track of progress implementing national reform programs. The link between employment policies and relevant financial instruments should be strengthened. Partnership contracts and operational programs should be prepared in the light of the priorities of the national reform programs and national job plans, and revised taking into account the country specific recommendation.

This package had a long policy background built up amongst others by the followings:

- Lisbon Strategy. The original Lisbon Strategy was launched in 2000 as a response to the challenges of globalisation and ageing. The European Council defined the objective of the strategy for the EU "to become the most dynamic and competitive knowledge-based economy in the world by 2010 capable of sustainable economic growth with more and better jobs and greater social cohesion and respect for the environment".[16]
- Communication to the spring European Council of 2 February 2005 entitled "Working together for growth and jobs. A new start for the Lisbon strategy". Communication from President Barroso in agreement with Vice-President Verheugen.[17]
- Communication from the Commission to the Council and the European Parliament of 20 July 2005 – Common Actions for Growth and Employment: The Community Lisbon Program[18]: supporting knowledge and innovation; making Europe a more attractive place to invest and work; creating more and better jobs.
- Council Decision 2005/600/EC of 12 July 2005 on guidelines for the employment policies of the Member States.[19]

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[16] On the evaluation of the Lisbon Strategy see: European Commission, Commission Staff Working Document, Lisbon Strategy evaluation document, Brussels, 2.2.2010, SEC (2010) 114 final.

[17] COM(2005) 24 final – Not published in the Official Journal

[18] COM(2005) 330 final – Not published in the Official Journal

[19] *Macroeconomic guidelines:* (1) To secure economic stability for sustainable growth. (2) To safeguard economic and budgetary sustainability. (3) To promote a growth- and employment-orientated and efficient allocation of resources. (4) To ensure that wage developments contribute to economic stability. (5) To promote greater coherence between macroeconomic, structural and employment policies. (6) To contribute to a dynamic and well-functioning EMU. *Macroeconomic guidelines:* (7) To increase and improve investment in R&D, in particular by private business. (8) To facilitate all forms of innovation. (9) To facilitate the spread and effective use of ICT and build a fully inclusive information society. (10) To strengthen the competitive advantages of its industrial base. (11) To encourage the sustainable use of resources and strengthen environmental protection. (12) To extend and deepen the internal market. (13) To ensure open and competitive markets inside and outside Europe and to reap the benefits of globalisation. (14) To create a more competitive business environment. (15) To promote a more entrepreneurial culture and create a supportive environment for SMEs. (16) To improve European infrastructure. *Employment guidelines:* (17) Implement employment policies aiming at achieving full employment, improving quality and productivity at work, and strengthening social and territorial cohesion. (18) Promote a life-cycle approach to work. (19) Ensure inclusive labor markets, enhance work attractiveness, and make work pay for job-seekers, including disadvantaged people, and the inactive. (20) Improve matching of labor market needs. (21) Promote flexibility combined with employment security and reduce labor market segmentation, having due regard to the role of the social partners. (22) Ensure employment-friendly labor cost developments and wage-setting mechanisms. (23) Expand and improve investment in human capital. (24) Adapt education and training systems in response to new competence requirements http://europa.eu/legislation_summaries/employment_and_social_policy/

- Council Decision 2008/618/EC of 15 July 2008 on guidelines for the employment policies of the Member States. Attract more people in employment, increase labor supply and modernize social protection systems, Improve adaptability of workers and enterprises to the economic situation, Invest in human capital through better education and skills[20]
- Council Decision 2010/707/EU of 21 October 2010 on guidelines for the employment policies of the Member States [Official Journal L of 24.11.2010]. Increasing labor market participation, developing a skilled workforce, improving education and training systems, Combating social exclusion.[21]
- Council conclusions of 12 May 2009 on a strategic framework for European cooperation in education and training (ET 2020). [22]
- The Europe 2020 strategy identifies three key drivers for growth, to be implemented through concrete actions at EU and national levels: smart growth (fostering knowledge, innovation, education and digital society), sustainable growth (making our production more resource efficient while boosting our competitiveness) and inclusive growth (raising participation in the labor market, the acquisition of skills and the fight against poverty).

The employment issue of disabled people and employees with changed working abilities emerge indirectly in the employment policy. It is part of the social cohesion, social protection, sustainability, growth, flexibility and security. The Employment package from 2012 contains directly applicable guidelines toward the target group within the labor market reforms and skill's investments. Especially the following three guidelines are outstanding: coping with skills mismatches, ensuring better recognition of skills and qualifications and anticipating skills needs (EU Skills Panorama), improving synergy between the worlds of education and work. In the case of disabled people and employees with changed working abilities the capacity assessment, measurement of skills, rehabilitation are crucial in order to guarantee a sustainable employment. The investment in skills has got a broader concept by prescribing the synergy between education and work. In Section I and III it was laid down that the employment of the target group requires a holistic approach of the education, employment, rehabilitation, labor law regulation and adult protection. It is appreciated that this systematic approach does emerge in the employment strategy of the EU.

5. Closing Remarks

Though, the employment issue of the target group emerges indirectly in the Employment package and employment strategy of the EU, it is obvious, that the burden and responsibility is placed onto the Member State. Guidelines have been created along which the policies can be coordinated. The Hungarian employment policy on disadvantaged

community_employment_policies/c11323_en.htm (last visited 27 June, 2013) Official Journal L 205 of 12.7.2005

[20] http://europa.eu/legislation_summaries/employment_and_social_policy/community_employment_policies/em0007_en.htm (last visited 27 June, 2013) Official Journal L 198 of 26.7.2008

[21] http://europa.eu/legislation_summaries/employment_and_social_policy/community_employment_policies/em0040_en.htm, OJ L 308 of 24.11.2010 (last visited 27 June, 2013)

[22] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:119:0002:0010:EN:PDF (last visited 27 June, 2013)

groups tries to acquire the integrating, supporting and motivating approach to contribute to the higher employment rates. However rates can be deceiving. If there is a trend of concluding employment contracts for a definite time, it might rise the numbers, however it is not sustainable, if it is not linked to support and rehabilitation services, continuous training in the case of the target group. It is the responsibility of the state how to create rehabilitation, compensation and participation oriented disability policy in line with the employment policy. A good practice of disability policy maintains benefits for security, but has a complex rehabilitation system based on modern capability assessment methods concentrating on the remained and improvable abilities. This disability policy shall focus on employment as it is the core for participation and inclusion in the society. At this point disability and employment policy of a state join together and may contribute a sustainable work-life.

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THE NEW HUNGARIAN CIVIL CODE AND THE INTERNATIONAL LAW REGULATION IN THE VIEWPOINT OF THE SUSPENSION OF PRESCRIPTION

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1. Introduction

In the recently passed years the dogmatic of prescription was revised in the European "common" private law and in the Hungarian recodification also. This paper is to examine what results of the developing European Private Law[1] are considered to be built in the "structure" of the Hungarian regulation in the field of prescription, especially in the rule of suspension. The research is also extended to the field of international civil law, because the Uncitral Convention on Limitation[2] establishes a system for prescription also.

The defects of the prescription regime in the Hungarian law particularly reveal themselves in those cases when the jurisdiction use malfunctionally its interpretational opportunity to expand more or different meaning of the dispositions from which they were framed to. These cases, which are being taken into consideration as follows, for example the prescription of the claim against the guarantor, prescription of the claim rising from the defective performance or the effect of the respite for a performance, the Hungarian prescription regime is inadequate by its simpleness.

The operative Civil Code is the act No. 4 of 1959, but a new Civil Code have been codified with the act of No. 5 of 2013. which act will become into force in 15th of March 2014, as intended. While the new CC generally did not change the prescription regime, but there are number of alterations which are to be analysed in the following.

2. Issues being treated before the suspension

2.1. The close interrelation between the specific rules of prescription

It is very dangerous to handle separately the rules of prescription regime from eachother. The features of prescription regime, as the duration of the period, its commencement, the cases of the suspension and the renewal make (or have to make) a coherent system. In the case of a relatively short period not only the date of commencement becomes more important, but also the legal conditions of the suspension.

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[1] Principles, Definition and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Christian von Bar et al. and Hugh Beale et al (ed.) Outline edition, Sellier, Munich 2009.

[2] The Convention on the Limitation Period in the International Sale of Goods (hereinafter called as Limitation Convention) was concluded at New York on 14th of June 1974.

2.2. The significance of the policy considerations of prescription

Number of the Hungarian authors deal with the policy consideration only to found the core regime (the definition and the function) of prescription.[3] But these consideration are to being counted while building the particular rules also. These consideration were hardly changed for centuries since the law systems have had adopted the obfuscating power of the time-elapse without enforcing of a right, and they are recognized in the European legal culture widely. The are the following: 1. for the debtor it is increasingly difficult to defend a claim; 2. lapse of time suggests a certain indifference on the part of the creditor towards his claim which, in turn, engenders a reasonable reliance in the debtor that no claim will be brought against him ; and 3. prescription prevents long-drawn-out litigation about claims which have become stale. Summarily: the defense of the debtor, the prevention of uncertainty and the exoneration of the courts.

2.3. The balancing interests

Beside the interest of the debtor, the creditor's one is also taken into consideration. A relatively short period of prescription gives him not so much opportunity to enforce his right, if any impediment can inhibit him. Thus the commencement and the cases of extension are to be revised.

Generally speaking in the Hungarian prescription regime, the hardly only date when the prescription period begins to run is, the day when the claim becomes due. Moreover, the claim concerning damages is begin to prescribe from the injury, not from the date of the acquiring the knowledge (of the injury and the personality of the debtor) – which claims in the most of the European systems begin to subscribe from the date until the creditor doesn't know or reasonably could have known his claims. If the Hungarian regime does not apply special date of commencement in these cases, the only reasonable and righteous solution is that the 'indiscoverability' of a claim would be counted like an impediment against claim-enforcing and would have an effect upon the running of the period. But in this letter case the Hungarian provisions for suspension are inconvient.

The balance between interests of both parties is generally threatened by agreements (about) the period of prescription or the cases in which the period would be interrupted or suspend. In this view the issues relating to the freedom of contract and to the opportunity to change (at least) the length of the period by parties' agreement become more significant.

2.4. The models for the regulation of suspension

The impediment beyond creditor's control would have an effect on the running of the prescription in different ways. In Roman law the suspension means that the period of prescription extends with the period in which the impediment has existed, we would name as *classical suspension*. The old Hungarian civil law applied this model, which has been modified by the early Hungarian Civil Code drafts (1900–1928) under the influence of the German dogmatic. In the Codification of the new Hungarian Civil Code the tendency has

[3] For example Loránt Rudolf did only took the policy considerations of explaning the defintions of prescription. See. Rudolf Loránt: Elévülés. KJK, Budapest 1961. p. 111.

also appeared that the classical Roman model for suspension is to be applicable for simplifying the rule of suspension. But this proposal of the CC Conception has not been supported by the representative either of the legal practice or of the science. Finally the model of the operative CC remained to be applied, which is not a suspension in a proper sense, rather an alternative solution for the extension of the period. We can name it the model of elongation, but it may be better to use the expression: *the delay of completion of the prescription*. With this model can be found fault in numbers of cases, but surveying the international model regulations, this model seems to be the best as general model, nevertheless lots of segments are to be revised (see as follows) in particular cases. Moreover, the European law systems combine also the classical model of suspension with certain protective period (particularly when the impediment occurs close to the end of the period of prescription) with which the original period can be extended. This may be named as *qualified suspension*. According to the following model, the court has to take into considerations the circumstances whether they trigger this protective period or not, so this model may be named as *qualified suspension depending on court deliberation.*

In the most cases the differentiation between these models is merely dogmatically. But significant problems spring up from the nature of the protective period: it is a period of prescription or some preclusive term? this period can be suspended or interrupted?

3. Survey of the international law regulations

In the viewpoint of prescription, it is worth taking into consideration some international uniform law systems. What was chosen are the Draft Common Frame of Reference[4] (furthermore referred to as DCFR) and the Uncitral Convention on the Limitation Period in the International Sale of Goods[5] (furthermore referred to as Limitation Convention). If the DCFR ever gained some mandatory force, its provisions would have to be considered also in the European contractual relationships and these provisions would "overwrite" the Hungarian civil law regulations. To prevent the problems arising from the collision of the national and the European legal regulation, it seems important to consider the provisions of DCFR during the recodification of Hungarian Civil Code. The CISG[6] Convention adopted by UNCITRAL, to which the Convention on the Limitation Period was added, already has binding force for the cross-border contracts of the Hungarian parties because Hungary is a contracting party to this Convention.

According to all the above mentioned facts, let us overview the familiar and the different provisions of the DCFR and the CISG Limitation Convention along the duration, the commencement, the cessation, the extension, and the renewal of the period.

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[4] Principles, Definition and Model Rules of European Private Law. *Draft Common Frame of Reference (DCFR)*. Christian von Bar et al. and Hugh Beale et al (ed.) Outline edition, Sellier, Munich 2009.

[5] The Convention on the Limitation Period in the International Sale of Goods (hereinafter called as Limitation Convention) was concluded at New York on 14th of June 1974.

[6] United Nations Convention On Contracts For The International Sale Of Goods (1980)

3.1. Differences in terminology

As it is stressed at the very beginning, there is no common terminology for the legal institutions of prescription. On the one hand, the Limitation Convention uses *"period of limitation"* for asserting claims, on the other hand the DCFR determines *"period of prescription"* for asserting the rights.

3.2. The duration and the commencement of the period

The DCFR sets the period in three years while the Limitation Convention in four. Both of these periods are shorter than the Hungarian one. Under the DCFR[7] the general period begins to run when the debtor has to affect performance or, in the case of a right to damages, from the time of the act which gives rise to the right. According to the Limitation Convention „the limitation period shall commence on the date of which the claim accrues"[8] but it explains further when the claim accrues: in case of breach of contract, when breach occurs, in case of defect or other lack of conformity, the claim accrues on the date which the goods are actually handed over to, or its acceptance is refused by the buyer. The DCFR and the Limitation Convention are the same in that provisions concerning the period of limitation commences in case of performance by instalment, on the date on which the particular breach occurs, in the case of each separate instalment.

In European regimes the period of prescription is generally a short period: 3, 4 or 5 years. The legal system intends to simplify their prescription regime, and bar the particular regulations for specific claims, which provide longer periods (10, 20 30 years) or shorter in other cases. General tendency in European regime is the spread of the criterion of discoverability (knowledge), which means the period does not begin to run until the creditor is not be able to assert his claim (without his fault), because he does not know about it (or reasonably it is not expectable from him).[9] This regulation was appeared also in the Hungarian system, relating to the claims concerning product liability. The Product Liability Directive of the European Union, on the other hand, provides that the three year period has to begin to run from the day 'on which the plaintiff became aware, or should reasonably have become aware', of the damage, the defect and the identity of the producer. Nevertheless neither the Limitation Convention, nor the DCFR the test of discoverability apply as date of the commencement of prescription, it is handled as a case of suspension.

The DCFR allows the parties to modify the period and the requirements for prescription. Thus, they can shorten or lengthen the period between the legal barriers provided the period may not be reduced to less than one or extended to more than 30 years.[10]

The Limitation Convention generally excludes the modification (shortening or lengthening) of the period of limitation but it allows the debtor to lengthen the period at any time during the running of the limitation period.[11] The new Hungarian CC cancels the

[7] DCFR Art. III-7: 203 para. (1)
[8] Limitation Convention Art 9. para 1.
[9] For these tendencies see: ZIMMERMANN, Reinhard: Comparative Foundations of European Law of Set-off and Prescription Cambridge University Press, Edinburgh, 2004.
[10] See DCFR Art. III-7: 601.
[11] Limitation Convention Art. 22

barrier of the modification of the period, but forbids the waiver of the exception of prescription.

Contrary to the Hungarian Civil Code, the DCFR and the Limitation Conventions set a period of maximum length for the prescription (long-stop period). This general limit is 10 years pursuant to the Limitation Convention and to DCFR as well. DCFR sets an exception to the rights to damages for personal injuries which means 32 years for prescription.

As the Hungarian Code does not recognised the knowledge as a requirement of commencement (such a subjective criterion) thus it does not apply a long-stop period (such as a period running from an objective fact). Nevertheless it is worth to deliberate the necessity of this terminal period, because it would be useful in the cases where the period begins to run from subjective fact. During the recodification of new CC the double periods concerning claims arising from deficient performance were cancelled, moreover, the objective period for the the claim concerning product liability was changed into preclusive term. In these cases it would be a plausible solution to lay on a long-stop period.

3.3. The extension and the cessation of the duration of the period of limitation

3.3.1. Suspension in case of ignorance

Inspite of the fact that numbers of European legal system recognize the above mentioned discoverability as the subjective criterion of the commencement of the prescription, the DCFR applies this rule not for the commencement, but for the suspension of the prescription.

It is worth taking into consideration that according to the provision of DCFR, the running of the period is suspended in case of ignorance. *"The running of the period of prescription is suspended as long as the creditor does not know of, and could not reasonably be expected to know of: (a) the identity of the debtor; or (b) the facts giving rise to the right including, in the case of a right to damages, the type of damage."*[12] The operative Hungarian regulation and the Limitation Convention do not regulate this case of the suspension in a separate provision. The case of ignorance is taken into account among the cases of the excusable impediments also known as preventing circumstances. The new Code sets a rule pursuant to which the period is suspended as long as the obligor is able to refuse to perform.

3.3.2. The judicial proceedings

The DCFR determines the following cases of the extension: suspension and postponement. The Limitation Convention set events which cause extension. Contrary to the Hungarian operative and new regulations, both model laws set the events in which case the period can be extended. At first sight we can perceive not only the differences in wording between DCFR, Limitation Convention and the Hungarian rules, but that DCFR regards the judicial proceedings as events affecting the running of the period of limitation in a different way from the Hungarian Civil Code. According to the DCFR the legal act as initializing the proceedings aiming to assert the claims merely suspends the passing of the period, and the

[12] DCFR Art. III-7: 301.

further running of the period depends on the "success" of the judicial proceedings. If the proceedings end with a decision which has the effect of res iudicata, the suspension ceases. [13] Contrary to this rule, the Limitation Convention regards the judicial proceedings as an event which *ceases* the limitation period. *"The limitation period shall cease to run when the creditor performs any act which, under the law of the court where the proceedings are instituted, is recognized as commencing judicial proceedings against the debtor or as asserting his claim in such proceedings already instituted against the debtor, for the purpose of obtaining satisfaction or recognition of his claim."*[14]

According to the DCFR the suspension of prescription does occur in the case when the judicial proceedings are started and it lasts until a decision which has the effect of res iudicata. If the court cannot deliver a decision on the merits of the case and if that the period has less than six month to run, the period of prescription does not expire before six months have passed after the time when the proceedings ended.

It is worth taking into consideration here that DCFR does not express the consequences in the case if the original period of limitation has already expired before the judicial proceedings ended. Whether the limitation period can be suspended if the impediment event becomes extinct after the expiration of the original limitation period is a question to be answered by the judicial practice if the DCFR shall ever become applicable.

According to the Limitation Convention if the judicial proceedings ended without decision on the merits, *"it shall be deemed to have continued to run"* (it did not cease)[15]. Thus, there is a case when the suspension came from the situation of cessation: *"If, at the time such legal proceedings ended, the limitation period has expired or has less than one year to run, the creditor shall be entitled to a period of one year from the date on which the legal proceedings ended."*

Comparing to the Hungarian regulation, the operative and the new provisions of Hungarian Civil Code regard the commencement of the judicial proceedings as an event which interrupts, i.e. ceases the period of limitation. A new period of limitation begins to run also in the case if the proceedings ended without decision binding on the merits. However, the new period shall begin to run only if a decision is delivered and has the effect of res judicata.

But not much before the enactment of the new Hungarian Civil Code, the mentioned provision was modified: bringing an action against the debtor interrupts the period *provided that* the court *have brought* a decision on the merits in the judicial proceedings. The only interpretation of this provision means that any of the claim asserting before court does not interrupts the prescription, only if the court brings a decision on the merits. According to this rule in all of the other cases, bringing an action neither interrupts (nor suspends) the prescription.

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[13] DCFR, Art. III-302. [Suspension in case of judicial and other proceedings] (1) "The running of the period of prescription is suspended from the time when judicial proceedings to assert the right are begun" (2) Suspension lasts until a decision has been made which has the effect of res judicata, or until the case has been otherwise disposed of. Where the proceedings end within the last six month of the prescription period without a decision on the merits, the period of prescription does not expire before six month have passed after the time when the proceedings ended.

[14] Limitation Convention Art. 13

[15] Limitation Convention Art. 17, par. 1.

3.3.3. Impediment beyond the creditor's control and other circumstances

The Limitation Convention declares other case of the extension. *"Where, as a result of a circumstance which is beyond the control of the creditor and which he could neither avoid nor overcome, the creditor has been prevented from causing the limitation period to cease to run, the limitation period shall be extended so as not to expire before the expiration of one year from the date on which the relevant circumstance ceased to exist."*[16] In this provision it is worth examining whether the limitation period can be extended due to the relevant circumstance if the circumstance ceases to exist on the date when the period of limitation has already expired.

"When a circumstance as defined in Art. 21 occurs, the period keeps on running. However, it does not expire at the time at which it would normally expire, unless that time is more than one year after the relevant circumstance ceased to exist. The end of that year marks the earliest possible end of the period."[17] *"Thus if, at the time the preventing circumstance ceased to exist, the limitation period had expired or had less than one year to run, the creditor is given one year from the date on which the preventing circumstance ceased to exist."*[18] The Limitation Convention does not explain which circumstances cause the period to extend, but according to the Commentary[19] these are the following: a state of war or the interruption of communications; the death or incapacity of the debtor where an administrator of the debtor's assets has not yet been appointed; the debtor's misstatement or concealment of his identity or address which prevents the creditor from instituting legal proceedings; fraudulent concealment by the debtor of defects in the goods.

Due to these circumstances, the DCFR determines a case for suspension of the period of prescription and a lot of cases for postponement of expiry. *"The running of the period of prescription is suspended as long as the creditor is prevented from pursuing proceedings to assert the right by an impediment which is beyond the creditor's control and which the creditor could not reasonably have been expected to avoid or overcome."* This rule is only relevant if the impediment occurs or subsists within the last six month of the period. But these circumstances do not automatically suspend the period, only in the case if, due to these impediments, it is unreasonable to expect to the creditor to take proceedings to assert the right. This suspension lasts six months after the impediment ceases to exist.

The DCFR, contrary to the Limitation Convention, does name other circumstances in particular headings for *postponement*: Postponement of expiry in case of negotiations[20], Postponement of expiry in case of incapacity[21], Postponement of expiry: deceased's

[16] Limitation Convention Art 21.

[17] see SMIT, Hans: The Convention on the Limitation Period in the International Sale of Goods: UNCITRAL's First Born. http://www.cisg.law.pace.edu/cisg/biblio/smit.html#ix downloaded: 11th of June 2012

[18] see I. Commentary on the Convention on the Limitation Period in the International Sale Of Goods, done At New York, 14 June 1974 by Professor Kazuaki SONO in Japanese. http://www.cisg.law.pace.edu/cisg/biblio/sono1.html#art21 downloaded: 11th of June 2012

[19] I. Commentary by Professor Kazuaki SONO op. cit.

[20] DCFR Art. III-7: 304.

[21] DCFR Art. III-7: 305.

estate[22]. In these cases the period of prescription does not expire before one year has passed after these circumstances come to an end.

The DCFR applies the regular forms of the suspension with and without defensive period. In the simple case of suspension the running of the period is suspended until the impediment does not cease, and then, it continues to run. In the special cases of suspension (postponement) there is a protective term also built in the original period, thus the duration os the period depends on the impediment fact, but it lasts six months or one year after the impediment ceases to exist. All these rules of the extension of prescription period is closely related to the classical suspension. But the Limitation Convention rather diverges from the classical suspension, because it is not the original period which is suspended, but the creditor has got a protective term of one year despite of that the period of prescription has already ceased to exit (or it is less than one year). In our opinion this latter regulation corresponds to the Hungarian one, and can be qualified as *the delay of completion of prescription.*

3.4. The renewal (cessation) of the period

Briefly we have to survey the facts which interrupt the period and the period shall begin to run again. These cases are in close relation with numbers of the suspending fact, for example the initiation judicial proceedings.

The DCFR use the term "enewal" instead of the terminology of Limitation Convention (cessation of the period), but both apply similar rules for the interrupting events. It must be noticed that both make no mention about the written notice for performance as interrupting event. The Limitation Convention, however, sets that *"Where the creditor performs, in the State in which the debtor has his place of business and before the expiration of the limitation period, any act, […], which under the law of that State has the effect of recommencing a limitation period, a new limitation period of four years shall commence on the date prescribed by that law."*[23] Thus, pursuant to this provision, the provision of the Hungarian Civil Code is applicable, and the written notice for performance interrupts the period, too.

The DCFR and the Limitation Convention regulate the acknowledgement of debtor as an event which interrupts the running the period and renews it. Pursuant the Limitation Convention: *"Where the debtor, before the expiration of the limitation period, acknowledges in writing his obligation to the creditor, a new limitation period of four years shall commence to run from the date of such acknowledgement."*[24] According to the DCFR: *"If the debtor acknowledges the right, vis-à-vis the creditor, by part payment, payment of interest, giving of security, or in any other manner, a new period of prescription begins to run."*[25] But the Limitation Convention also adds other acts by the debtor which are deemed as acknowledgement: payment of interest or partial performance of an obligation by the debtor.

[22] DCFR Art. III-7: 306.
[23] Limitation Convention Art. 19
[24] Limitation Convention Art. 20
[25] DCFR Art. III-7: 401

Taking into consideration the similar manner of the regulation, it is proposed that these acts of acknowledgement shall be incorporated to the new Hungarian Civil Code, too.

4. Suspension of prescription in the operative CC and the new CC. De lege lata.

The new CC in section titled "Suspension of period" declares that "If the obligee is unable to enforce a claim for an excusable reason, the period of prescription is suspended. The period of prescription is also suspended as long as the obligor is entitled to refuse performance."[26]

The effect of the suspension does not varies or does not depend on the different circumstances. All of the impediments lead to the same suspension. According to the actual and to the new CC the suspension means: if the creditor is not able to enforce his claim against the debtor, because of an impediment, when the impediment ceases, the creditor is able to enforce his claim in one year (three month) period, in spite of that the original period of prescription would have been elapsed or the remaining time were shorter than one year or three month. Taken into consideration of the regulation of other law system, this rule can not be handled by a classical one.

The new CC does not contain the particular rule whereas "this provision shall also be applied if the obligee has granted a respite for performance after that period of performance had passed". This change can be explain so that the postponement is also meant an excusable reason for the obligee being not able to enforce his claim, therefore the naming of this case is not necessary. But we can argue so that in the judicial practice we can hardly find law cases, when the petitioner did assign this act as the reason for "suspension" of period. Probably, respite may appear either with written notice for performance of a claim, or with the amendment of a claim by agreement (inclusive of accord), or with the acknowledgment of a debt by the obligor, which facts interrupt the prescription and renew the period, thus, these interrupting events serve more the interests of the obligee.

The new CC does not enumerate those situations which "suspend" the period of prescription neither in taxative (exhaustive) list, nor in any examples – contrary to the early drafts of Hungarian civil code (in the time of the turn of the 19th and 20th centuries and later). Thus the new CC is consistent when it does not assign the respite for performance after expiration as suspension event.

Nevertheless, *the respite for performance* needs further examinations. In the case when due to any other excusable reason the obligee is unable to enforce a claim, the claim shall remain enforceable within one year from the cessation of the hindrance or, in respect of a period of limitation of one year or less, within three months, even if the period of limitation has already lapsed or there is less than one year or less than three months, respectively, remaining therein. Thus this rule is relevant only in the case when this excusable hindrance appears close to the end of the period of limitation. In consideration of the respite for performance, if the period of prescription begins to run from this new deadline for performance, the general rule for "suspension" can not be applied in the case of 5 year period of limitation. Giving the correct purport of this rule is also problematic. If the period of limitation begins to run from the new deadline for performance, this is the commencement of the period, i.e. the period is simply lengthened, not "suspended"

[26] New CC, Art. 6: 24, para. (1)

(pursuant to the legal rule for suspension). Considering that the obligee gives the respite for performance after the expiration of the original deadline for performance, there is any excusable hindrance in the beginning of period of prescription, since the rule of suspension can be applied.

In Europe the suspension generally means that the running of the period is suspended, and if the circumstance did not impended the creditor for exercising his right no longer, the period continue to run. It makes sense of this rule of suspension only when the occurrence of the concrete impediment would reason the extension of the prescription at any time during the period. But this regulation can be criticised because that all of the impediment beyond of the creditor's control may extend the period.

But in certain cases or for certain claims there is another solution for the extension of the period beside the suspension and the postponement, this is the delay of completion of prescription. *The Hungarian regulation recognizes only the delay of completion of prescription.* When the impediment is ceased, and provided that there is relatively short period remaining from the prescription, the creditor gains a new period for enforcing his right. this period is not the original period of prescription. Thus we need to examine the nature this period also.

The new CC *refines the legal nature of the new period* (one year, three month) opened up by the cessation of the hindrance. According to the Proposal this period cannot be suspended, but it can be interrupted applying the provisions on interruption of period of limitation with the difference that the new period of limitation commenced at the time of interruption is one year or three month.

The recent judicial practice does not share this opinion. Pursuant to the opinion stated in opinion No. 1 of 2004 (on the interpretation of questions about *deficient performance*) adopted by Civil Law Chamber of the Supreme Court (Curia)[27], and to decisions on individual cases, and decisions on principles, from the Curia's viewpoint this new period has no prescription characteristics, therefore it cannot be interrupted or suspended. In this period the obligee must enforce his claim in court action in this period. We shall pay attention to the fact, that this period is not a preclusive term, in this way the court may not take the lapse of the period ex officio into consideration.

In our opinion the text of the new Code needs to be refined here. On the one hand, regulation should assign that the interruption refers only to that periods which begin to run after the lapsing of the original period of limitation. On the other hand only the enforcement in litigation could be applied for interrupting the period. Here we must point out the important change – which mentioned above – that the Proposal extinguished the double period (prescription and preclusive term) for enforcing warrant claims flowing from deficient performance, cancelling the preclusive term.

The judicial practice interpreting the operative provisions has ordered to apply the rule of suspension of prescription for the suspension of prescription against the guarantee. According to the uniformity decision No. 1 of 2007 the prescription against the guarantor is suspended, until the claim against the principal debtor is not proved to become irrecoverable (inexecutable), because the guarantor can bring an objection until this. Which objection is an impediment beyond creditor's control, the 'secondary' debtor may reject to fulfil the performance.

[27] The official name for Supreme Court is Curia from 1st of January 2012.

5. Conclusions

The new Civil Code brings significant amendments in the field of the prescription. A survey of the new provisions, the achievements of the judicial practice and certain model laws on prescription demonstrates that there are still questions which need to be answered before the new Civil Code comes into force.

In our opinion the regulation of the suspension of prescription in the existing and new Civil Code is in general suitable and represents a well rooted judicial practice, it is not necessary to differ from it. On the other hand we recommend the complementation of the regulation regarding suspension. It is a welcome fact, that the new code restricts the assertion of claims deadline regarding reasons suspending prescription, and excludes the suspension of this period. But it is clearly needed to be stated that this special regulation can apply for strictly the deadline open or still existing, following the expiry of the original prescription period.

The disclosed deficiencies and inflexibility of the regulation model implicates that it is not a disregardable idea to use advantageous regulations of other legislation, or their segments. Both for the postponement for fulfilment and the prescription of the liability guarantee as special questions, we suggest as de lege ferenda, special regulations named as intermission.

"6: 24. § (4) Against a third party (guarantee) who has to hold himself readiness, unless the debtor does not pay, the period of prescription does not begin to run until the resultlessness of the execution against the debtor has been stated (intermission).

(5) The period of prescription is also suspended if the party has given a postponement of fulfilment.

(6) In cases defined in point (4) and (5) where the intermission ended the original period continues to run, extended with the period of intermission, but the period of prescription cannot expiry less than one year running from the end of the intermission."

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THE DEVELOPMENT OF HIGHER EDUCATION OF UKRAINE UNDER INFLUENCE OF THE GLOBAL INFORMATION REVOLUTION

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Significant geopolitical transformation that occurred in the second half of XX century gave a powerful impetus for a new technological Revolution-informatization. The concept of information society appeared simultaneously with the concept of post-industrialism in the 60th – 70th of the last century. Both concepts define a new phase of civilization as a fast-paced society based on advanced technologies and modern systems of values. Beginning of the XXI century is characterized by the rapid development of global informatization process actively developed and implemented information technologies and their implementation becomes systemic nature of innovation, causing economic, political and social changes as well as changes in the spiritual realm. In the history of civilization, there were several informational revolutions that led the transformation of social relations as a result of dramatic changes in the field of information processing, which led to a new quality in the public domain. If we look on the process of the first information revolution – appropriate to say that the whole history of civilization is the history of information revolution.

Modern scientists in different countries identified a number of major events in the world of information transformation through which significant changes in social relations through the prism of fundamental changes in information processing.

The first revolution associated with the invention of writing, which led to a huge qualitative and quantitative leap. At this point there was a process that we call the transfer of knowledge from generation to generation.

The second information revolution begins in the middle of the XVI century. And is associated with the emergence of printing which drastically changed the industrial society, culture, and organization activities. This remarkable event is allowed to leave their information and become a carrier of the public. The third took place at the end of the XIX century and due to the invention of electricity, through which came the telegraph, telephone, radio, allowing transmit and collect information in any amount.

The fourth information revolution was held in 70th of XX century and connected with the invention of microprocessor technology and the advent of the personal computer. In microprocessors and integrated circuits are created computers, computer networks, and data – information communication. The countries that pioneered the computer revolution have evolutionary superiority over others, and entrepreneurs who first seized electronic business received substantial profits. This period characterized by the following fundamental innovations:

- The transition from mechanical and electrical means of conversion to electronic information;
- Miniaturization of all components, equipment, instruments, machines;
- Creation program – managed devices and processes.

The fourth information revolution has brought to the fore a new industry – information industry associated with the emergence of new technologies, techniques and technologies to create new knowledge. The main components of the information industry are information technology, especially telecommunications systems. There is the concept of "information technology", which describes a process that uses a set of tools and methods for collecting, processing and transmission of primary data to obtain information about the state as a new object or phenomenon. The increasing complexity of industrial production, social, economic and political life, changing the dynamics of processes in all spheres of human activity have led, on the one hand, to an increase in demand for knowledge on the other – to create new tools and ways to meet those needs. The fourth information revolution has given impetus to the development of a new level of life – the information industry, which is linked the emergence of new technologies, techniques and technologies to create new knowledge. The most important part of the information industry are information technology. The rapid development of computer technology and information technology have given rise to the development of society based on the use of different media and was named the Information Society.

The countries such as the United States, Japan, England and Western Europe began the fourth information revolution first, so they have a more time for developed information industry than Ukraine.

During the transition to the information society must be prepared for rapid human perception and processing large amounts of information, learning new techniques and technologies work. In addition, there was a reliance on awareness of one person and the information obtained by others. So of course the question is not only able to collect their own information, but also learn to work with information so that decisions taken and were based on collective knowledge. Thus one of the main tasks was the preparation of future specialists in the use of information and technology, and led to new challenges to education and science. What happened during the development of the Information Society in Ukraine? In 2002, realizing the need and importance of information society Verkhovna Rada of Ukraine adopts the Law "On the National Informatization Program," which includes:

– The concept of National Informatization Program;
– A set of programs for public information;
– Sectored programs and projects information;
– Regional programs and projects information;
– Programs and projects of local information government.

New Law provides for the creation of necessary conditions for citizens and society timely, accurate and complete information by making full use of information technology, information security state.

The program envisages the following main tasks:

- Creation of legal, organizational, scientific, technical, economic, financial, teaching and humanitarian conditions of information;
- The use and development of modern information technology in respective spheres of public life in Ukraine;
- Creation of national information resources;
- The creation of a national network of information of science, education, culture, health, other;
- Creation of national information and analysis support of state and local government;

- Improving the efficiency of domestic production through extensive use of information technology;
- Forming and maintaining market information products and services;
- The integration of Ukraine into the global information system.

Taking opportunity this Law, the Ministry of Education and Science of Ukraine, in 2002, in cities Dnepropetrovsk, Kharkov, Odessa, Rivne and Ostrog provide seminars – conferences devoted to the issue of organizational and pedagogical experimentation in the field of informatization in higher education. Through these measures, in higher education there are some positive developments related to innovation in the areas of entrance examinations, high school organization, curriculum renewal, development and implementation of new methods and information technology training, original educational product assessment, the step training, improvement of methods and forms of educational work, the student government and employment specialists.

This process is accompanied with the creation of documentation, which, on the one side – regulates the requirements for maintenance training and on the other – exercise enhances creativity in training competitive specialists. Outstanding role becomes changing requirements of the learning process, the role of independent work of students that teaches them the flexibility thinking, to ability to synthesize information and to devote most importantly, to determine priorities and strive for high self.

These changes have helped to improve the organization of the educational process through the introduction of new approaches to extend the implementation in the educational process of active methods and new technology training to take on the development of original educational products: electronic books, dictionaries, reference books, electronic information retrieval applications, information retrieval and expert programs, computer training programs, electronic courses and other.

For example, the Kharkov National University of Radio Electronics, which as of year 1997 have near 7000 of students, and near the 700 of faculty teachers, creates distance and virtual learning laboratory in the University base. The main purpose of this laboratory is research work for study the new information technologies. This laboratory conducting seminars, with participation of representatives of other higher educational institutions, in order to expand knowledge in the field of distance education and its introduction in University work. Summarizing the experience gained in the laboratory, in 2000, the University became co-founder of "Ukrainian Association of Distance Education", which aims to integrate the experience of various Universities in the field of distance learning, and the development and implementation of various joint projects in the field of distance education.

In one year of existence and fruitful work laboratory expands and grows into a center of distance learning priorities which are of creating a single system for training teaching materials for distance learning, a leading software to support it, the development of methodological and regulatory framework, and more. Each year, the center organizes international scientific and practical conference "Education and Virtual", which brings together representatives of the Ministry of Education and Science of Ukraine, as well as representatives from other institutions, so you can gradually adjust to develop and implement e-learning in all corners of our country. The emergence of such conferences, helping to solve such pressing issues as the development of the regulatory framework to support new learning technologies. At that time, the question is whether distance learning or a learning component that can be used in other forms learning process.

The development of distance education raises the relevance of changes in the complexity of evaluation standards preparation of training materials, because distance education, these figures should be much higher, taking into account the participation of other specialists, along with the teacher create learning materials – software, audio, video operators, designers and more.

Urgency is the issue related to the intellectual property of the teacher. Exactly how to keep their copyright and protect University content from copying and use by other persons? With this connection in Ukraine improved a new even normative framework that regulates the copyright. Educational institutions are beginning to cooperate with teachers as owner of the intellectual property. The Ministry of Education and Science of Ukraine created a form of copyright agreements for renegotiated compensation issues of intellectual work and so on. Within, the establishing creation of the overall system exchange of materials between higher education institutions, a unified system of establishing consistency and implementation of innovative technologies in the field of education.

Active work of higher education institutions in the direction of information technology leads to extremely important event in the history of education informatization of Ukraine – the adoption by the government of the state program "Information and Communication Technologies in Education and Science" in 2006–2010, which was developed by the Ministry of Education and Science of Ukraine the Decree of the President of Ukraine "on urgent measures to ensure the functioning and development of education in Ukraine" and the applicable laws of Ukraine.

In the formation of this program are actively involved leading scientists of the National Technical University, National Academy of Sciences of Ukraine, experts of ministries, departments and Universities. Tasks program was carried out on the basis of socio-economic development and the development of information and the latest achievements in the field of information.

The program was designed for five years and it has become an important part of creating information resources of Ukrainian scientific-educational environment, development of infrastructure of the national research and educational network. Development of infrastructure networks made it possible to connect to it all other Universities and academic research institutions that deepen information exchange and integration among them. The main objective of this network was high dynamic search and dissemination of scientific and educational nature – the organization of access to global electronic library of video lectures and video conferencing, the educational process of distance learning and providing opportunities for pilot testing of new telecommunications technologies and training to implement these technologies into production and business.

A significant factor in the withdrawal of education to the next level and improve the training of highly qualified specialists is not only the computerization of the educational process, but the introduction of Internet technology, the establishment of corporate networks and virtual labs that allow real-time to perform experimental research in the classroom.

This leads to the fact that the structure of computer and network resources are identified with the structure of education in which they are established. Tools Dataware combined faculties, departments and even dormitories. It becomes possible to instantly communicate and work in an online educational institution with branches located in other cities of Ukraine or even other countries. Telecommunications system begins to operate as a set of network services and terminal equipment connection.

Free access to the Internet from any computer, access to the personal page of departments, faculties and information directly via the WEB-page teacher leads to activation and acquisition of knowledge by students due to increased demand for independent work. Ability to work independently with the scientific resources of the institution, in any place convenient for the student, gives rise to the design and development of virtual research libraries.

Having a well-established network of digital libraries in higher education can solve a number of these issues:

1. To achieve a new level, completeness and timeliness of information needs of scientists through the use of new information technologies to improve the quality of research;
2. More efficient use of available scientific information resources through the creation of a new information environment;
3. The most effective use of modern information technologies;
4. Prompt informing the scientific community about the results of scientific research in higher education;
5. Coordination of research activities in the units of information services staff of the institution;
6. Entering the scientific community educational institution in the global information environment and market information;
7. Maintenance and further development of international scientific relations;
8. To inform the public about scientific research and development that will be used in the scientific establishment.

This network should be as accessible to University students, researchers and educators. Information resources as possible should be as open to their users. They can use different search engines and resources available to domestic bases of electronic documents. Search Engines arranged so that their ability to be transparent regarding the distribution of information resources at different sites and databases and the possible heterogeneity of data formats. Should be support by a variety of mechanisms of information retrieval. Search it must have sufficient detail to locate appropriate information resources. Equally important is the problem of heterogeneous data representation and data in a convenient way for the end user. Particular attention when creating an electronic library, given concordance used standards based on accepted international standards for the organization and conduct in the use of digital libraries.

Specific advantages of digital libraries is to simultaneously use different search mechanisms and means of access to national databases of electronic documents. Search Engines arranged so that their ability to be transparent regarding the distribution of information resources at different sites and databases and the possible heterogeneity of data formats. Should be support by a variety of mechanisms of information retrieval. Search it must have sufficient detail to locate appropriate information resources. Equally important is the problem of heterogeneous data representation and data in a convenient way for the end user. Particular attention when creating an electronic library, given concordance used standards based on accepted international standards for the organization and conduct in the use of digital libraries.

Summarizing, we can say that the digital library university serves as storage, but also the use of general corporate information. Library, in the information environment of the university, has a special place because it acts as an intermediary between information

resources and consumers of information, while choosing systematizing, preserving and providing better information from a huge array.

Also, it is important for the development of digital libraries, networking, digital libraries and the formation of scientific information and educational resources became the Law of Ukraine "On the National Informatization Program", which was approved by the State Program "Electronic Library", and subsequently Cabinet of Ministers of Ukraine August 17, 2011 N 956, which was approved by the Conception of the national cultural program creating a single information system library "Library-XXI". The purpose of the Program is to "improve efficiency, ensure the availability of documents that are stored in the library, archive and museum collections." The Programme will help improve the level of information culture of the population and put into scientific circulation unique documents of historical and cultural value, not only for Ukraine but also for the international community. The Programme includes:

- The system;
- Providing users access to the system using the latest information technologies;
- Issues related to the protection of the interests of copyright and related rights;
- Ensure coordination of central and local executive authorities, local self-government, cultural institutions and NGOs on accounting and systematization of documents stored in libraries, archives and museum collections;
- Cooperation between central and local executive authorities, local self-government and cultural institutions, community organizations on relevant issues;
- creating conditions for international cooperation and integration to the world of library networks;
- Conditions for integration of the individual into the global information and cultural environment.

Implementation of the Programmed covers the period 2011–2015 years, and the result of the planned work should be:

1. The current single information infrastructure that will encompass all library and archival institutions.
2. A single national depository library electronic resources.
3. Formation of the electronic catalog documents stored in the library and the State Scientific Institution "Book Chamber of Ukraine Ivan Fedorov".
4. Providing libraries to the Internet, their equipment computer equipment, software, and telecommunications equipment.
5. Conduct research to improve the intelligent search technologies and process electronic information resources.

Thus, analyzing the measures and laws that have been adopted over the last years in Ukraine, we see that the process of education informatization has become an important tool and a component of reforming the entire society. The transition system of education to a new level with its information was simply impossible. Increased use of information technology makes it possible to improve the learning process, transforming it from considering the growth of the study of information and the role of independent work. One of the important social information technologies in education is distance learning. Also plays an important role computerization of libraries: the introduction and development of libraries in new information technologies, the development and use of electronic resources, the introduction of multimedia technology, the development of networking libraries, expansion of access to the World Wide Web in higher education. Computerization ensures the formation of information culture, which in education is of specific features. The main

indicators of educational information culture is: a measure of tension need for educational information, the type of relationship to educational information and its functions; measure the use of literature, periodicals, the Internet, the degree of awareness in the field of modern information technologies of computer, internet and more.

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ASPECTS OF COMPARATIVE LAW REGARDING THE NECCESITY OF REINSERTION OF MATRIMONIAL CONVENTIONS IN THE NEW CIVIL CODE*

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The freedom of choosing the matrimonial regime ensures the set up of a practical system adapted specifically to the needs of the spouses, abilities and attitudes and therefore the matriomonial regimes based on this principle are preferable to the unique, legal and compelling matrimonial regimes. The future spouses choose the matrimonial regime by entering into a specific matrimonial convention.

The freedom to choose the specific matrimonial regime can be very broad and it allows one to choose one of the matrimonial regimes governed alternatively by law or combining them and creating an "unnamed", matrimonial regime, or may be more limited in that, and it only allows one to choose only a matrimonial regime provided by law[1].

The completion rate of matrimonial conventions is not very high especially in countries that preserve this tradition. In most cases the legal regime which is applied may be one of a comunitarian type or a separatist one, according to the choice of the legislator. Moreover in the French doctrine, many authors have noted that, sociologically speaking, most couples who marry ignore the legal regulations in this matter. Hence Professor Carbonnier's statement "People live as if family law doesn't even exist. Non-law is the essence of family relationships, while the law is an accident". Similarly, Prof. JC. Montanier notes that matrimonial law is eminently pragmatic, designed to be applied in order to meet spouses' daily problems. Being practically applicable to all married couples, matrimonial regimes are very little known, even ignored, and, there are spouses that ignore the law of the matrimonial regime and despite de legal dispositions, they live as if they are married(untill that eventually triggers a crisis and "discover" that legal regulations are far from their expectations), so there are couples who live in free union and show a keen interest to organize their economic relations after the model of a real matrimonial regime[2].

In comparative law, most systems of law enshrine this principle. The regulation of the matrimonial regime is therefore a flexible one. We distinguish between two types of regulations: some allowing a wider freedom in the completion of the matrimonial agreement and others which enshrine a freedom of choice limited to certain types of matrimonial regimes, specifically governed by law, establishing a clear number of possible variants. This latter concept is also reflected in the new legislature of the Romanian Civil Code.

The French Law is a part of the first category which is based on the idea of legal voluntarism and allows the completion of any marriage agreement (Civil Code Article 1387

* Research realised in the project POSDRU CPP107/DMI1.5/S/76851 co-financed by Operational Programme Human Resources Development 2007–2013

[1] Vasilescu, Paul: Regimuri matrimoniale, editura Universul Juridic, editia a II-a, Bucuresti, 2009

[2] JC.Montanier, Les regimes matrimoniaux, Presses Universitaires de Grenoble, 1997, pp. 7–8

fr.). The Legal regime is the one of the community of property reduced to acquisitions (Civil Code Article 1400 to 1491 fr.), together with four conventional matrimonial regimes: two models of community type (small community of movables and acquisitions and universal community of property), separation of property regime and the regime of participation in acquisitions. All these models have flexibility in character but the parties are not bound to choose only between one of them. In all cases the so-called basic imperative regime or primary system is applicable as a direct effect of marriage, regardless of the matrimonial regime chosen by the parties (art. 212–226 fr Civil Code.) [3]

The freedom of choosing the matrimonial regime implies in principle the spouses' possibility to modify during their marriage the matrimonial regime under which they were married. Changing matrimonial regime also implies the conclusion of a matrimonial convention. Please note that, although closely related to each other, the freedom to choose the matrimonial regime does not necessarily imply the freedom of changing the matrimonial regime. Conversely, from a historical point of view, countries which have traditionally recognized the right of spouses to choose the matrimonial regime, have restricted their freedom to change the matrimonial regime, setting the rule of the imutability in matrimonial regime, according to which the matrimonial regime chosen could not be changed during the marriage.

For example, the Romanian Civil Code, as well as the French Civil Code enshrines the rule of immutability of the matrimonial regime, being predominant at that time in French law, only when the Civil Code was reformed, in 1965, the rule was taken out[4]. Subject to numerous criticisms, the immutability of the matrimonial regime was abandoned by most laws. As a rule, laws that do not allow concluding matrimonial conventions, establishing a single, legal and binding regime, and thus, does not allow any modification of matrimonial regime during marriage.

Throughout the regulation conferred to the change of matrimonial regime, the New Civil Code falls into the category of flexible laws, allowing spouses during marriage to conclude conventions by which they are able to modify or replace the matrimonial regime (art. 369).

Following up signals coming from practice and doctrine, the new Civil Code seek the liberalization of patrimonial relations between spouses, giving spouses the possibility to choose between several matrimonial regimes. The proposed regulation takes certain regulatory elements of the old Civil Code, which are however adapted to ensure that the principle of equality between man and woman is honored.

The new Civil Code proposes the establishment of three matrimonial regimes: the regime of legal community, the regime of separation of property and the regime of conventional community.

The regulation proposed by the new civil code in some respects follows the solutions that the French legal system has established, reaffirming the principles that govern in general the matriomonial regimes such as: the equal rights between spouses, the freedom to choose the matrimonial regime, the principle of imuttability of the matrimonial regime and the principle of mutability in the matrimonial regime in relation to marriage.

Matrimonial regime is the bridge between the family rights, reduced to that of marriage, and civil rights, designed in a classic manner by the patrimonial rights. It borrowes features

[3] Bonomi, A.–Steiner, M.: Les regimes matrimoniaux en droit compare et en droit international prive, Ed. Droz, Geneva, 2006, pp. 56–58

[4] Avram, Marieta: Regimuri matimoniale, editura Hamangiu, 2010, pp. 26–28

from both systems, trying to develop its own legal aspect. Matrimonial regime is a pecuniary marital regulation of the conjugal status[5]. From this point of view, we see a specific object to any matrimonial regime, which is divided in a material and legal object.

The material object constitutes the pecuniar support of the legal patrimonial status of spouses and materializes the derived object of the legal regulation of the matrimonial regime. In a simplier manner the material object is formed by all the goods belonging to spouses and having different titles. An inventory of these goods is not possible nor desirable, so a few general specifications are required. First, the notion of good is contained in its most general sense, the good is a derived object of a subjective right and it is also the right itself. While for the community regimes, along with the two patrimonies belonging to spouses, appears a new own body, which, although is not a distinct heritage, forms a category of goods, the material object makes possible the usage of traditional legal tools in the matrimonial regime such as real subrogation, or the theory of co-ownership or the separation of inheritance[6].

As a system of rules, any matrimonial regime is, above all, intended to arrange the distribution of goods between spouses and to assign the powers they have over the management of their property. The distribution of goods (material object) determines the composition of each spouse's patrimony. From this point of view the matrimonial regimes are divided in, regardless the legal system in which we actually are, separation regimes (or separatist) and the community regimes (or communitarian). The division is theoretical and ideal because practically there are no pure separatist matrimonial regimes or comunitarian ones, but regimes which, to a more detailed inventory of their characteristics, present more legal elements to clearly justify labeling them as separatist ones instead of comunitarian.

This is done[7] through the influence they produce to some of the other rules governing the allocation of goods between spouses and between the ones which guide the management of marital property. Thus, in a community matrimonial regime, there must be consistency between the rules of common property acquisition and the management mechanisms of such goods, mechanisms that make the community viable. In a separatist regime, there should be a legal factor of cohesion between the property of each spouse and the duty to both participate in supporting the tasks of marriage. On the other hand, the coherence of the legal object of a matrimonial regime is reinforced by the specific rules applicable to proof and to the demonstration of the powers of managemnt and administration which spouses have on marital property.

Matrimonial regime is established by marriage. Although the future spouses have previously signed a marriage contract, the matrimonial regime that they have adopted does not produce any effect until after that date. Until the marriage is being celebrated the matrimonial agreements may therefore be modified complying with the same forms of advertising. There are also some laws that allow spouses to drawn up the marriage contract after the marriage (e.g. Swiss law and the new Spanish law of 1975 on the legal status of married women). The rule for determining the matrimonial regimes are of two kinds: legal and conventional. There are also legal systems, such as Swiss law, which can distinguish

[5] P. Vasilescu, op. cit., p. 64
[6] G. Conu-op. cit., pp. 26–27
[7] G. Conu-op. cit., pp. 26–27

three ways of determining the matrimonial regime. In Swiss matrimonial law, there are three types of matrimonial regimes: ordinary, conventional and extraordinary.[8]

Spouses are subject to ordinary matrimonial regime thus corresponding to the legal regime, which in Switzerland is the regime of participating in acquisition (are called "acquisition" the goods acquired by spouses during marriage). This applies to the operation of law without any legal act that spouses should prepare. Swiss law creates a legal presumption in favor of ordinary matrimonial regime. It can always be replaced by a conventional regime, if spouses show their wish to do so by entering into a marriage contract, or throughout the extraordinary regime, if the specific conditions provided by law occur.

Conventional matrimonial regime has a condition that spouses have expresed their willingness in a consistent way, in a marriage contract. This contract allows spouses to unable the ordinary matrimonial regime, or changing it within the limits prescribed by law, or opting for another one from the other matrimonial regimes.

Conventional matrimonial regime states that the spouses should have expressd their consent in a marriage contract. This contract allows wifes to be imune to the ordinary matrimonial regime, or to modify its limits provided by law, or either choosing another regime.

The extraordinary regime is a regime whose institution is required by law at the request of one spouse, or when necessary, or in exceptional circumstances, when the interest of a spouse, conjugal union as a whole, or even third-party creditors must be protected. According to some authors[9], this arrangement may be asimilated as marital union protection measures in a broad sense, considering the fact that the spouse is resposible to patronize the economical interests of the compromised spouse throughout his conduct or the status of the other spouse, or by an enforcement measure. Inauguration of the exceptional regime places the spouses under the separation of goods regime. Without considering it an exceptional regime, the regime of separation of property may be established by court order at the request of one of the spouses, in special cases, and also in other legal systems, such as the French law.

In every system, the law establisehes the matrimonial regime that will regulate the property relations between spouses if they have not concluded a matrimonial agreement. This is the legal regime, whose nature is very controversial.

Thus the traditionalist followers of the Convention, sustained in French doctrine by Dumoulin, who developed it for resolution of conflicts of laws in place, conforms matrimonial regime to law (or in many cases the object), to whom the spouses belong or it is presumed to belong, believes that the legal matrimonial regime corresponds to the presumed wishes of the spouses, in the sense that when they do not enter into a marriage contract, adopt this attitude because the legal regime corresponds to their will, resulting in an implied contract[10].

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[8] A. Colomer, op. cit., p. 4, Jacques Flour şi Champenois, "Les regimes matrimoniaux", Ed. Armand Colin, Paris 1995, p. 136

[9] I. Galindo-Garfias şi R. Nocedal "le regime matrimonial legal dans les legislation contemporaines", p. 565.

[10] A. Colomer, op. cit., p. 4, Jacques Flour şi Champenois, "Les regimes matrimoniaux", Ed. Armand Colin, Paris 1995, p. 136

Although in the French legal system there have been attempts to recognize, for two matrimonial regimes, the status of a legal regime (at the same time), this idea was dropped due to the practical difficulties that it caused. Such statutory regimes remained unique, but differ from one legal system to another. Thus, while in the French law, the legal matrimonial regime is currently the one of the legal community, under the German and Swiss law, the legal matrimonial regime is the one of acquisition of goods, in the Italian law the old regime of separation of goods was replaced in 1975, with the acquisition of goods regim, and in some states in Mexico it is required to choose in the marriage contract before marriage, between the conjugal society and the separation of goods.[11]

In the new Civil Code, concerning the family relations the most spectacular news can be found, given the fact that this matter is the future of the Civil Code, will be confrunted with some of the most profound news throughout the abolition of the Family Code. Thus, in the matrimonial matters, the most dramatic change is to establish the principle of autonomy of will for the spouses within the meaning of choice, within certain limits, the applicable law to matrimonial regime (following the model established by the Hague Convention of 1978 on the law applicable to the reaffirmed matrimonial regimes in the Green Paper on 17 July 2006 the European Commission on developing a European regulation on conflict of laws in matrimonial matters, jurisdiction and recognition of judgments).

If tradition makes from the matrimonial convention a family pact the law gives it the form of a contract. The general characters of the marriage contract were thus summarized in Romanian doctrine: the marriage contract is a solemn and public contract, sinalagmatic, free in its terms and in the determination of its clauses and irrevocably accessories.

Like any legal document, the marriage contract must meet certain conditions of substance and form to be considered valid.

In general the marriage contract is subject to the same background conditions as marriage, on the capacity and consent of the parties. The capacity of the intending spouses is required by law under the same conditions as for marriage. The conditions for the possibility of minors and adults to be able to conclude a marriage contract are specifically governed by the laws of each state. Personal consent of the intending spouses is always necessary, it is a prerequisite to the conclusion of the marriage contract.

In principle, the mutual consent of the intending spouses is sufficient, but there are situations in some legal systems (eg French system), where the law requires the consent of other persons in the contract of marriage, such as those in favor for marriage (even in the case of capable spouses) and those whose consent is necessary if one spouse is unable, one may conclude the matrimonial agreement. The formal requirements differ from country to country. In general, they can refer to the formalities concerning the preparation of the marriage contract and its publicity.

Thus, in French law for example, the contract of marriage is a solemn act, subject to such formalities whose failure has the result in an absolute void act (ad solemnitatem). This translates into the strict requirement of concluding the contract of marriage in front of a notary, who, being a sort of family counselor may intervene to advice the spouse on their choices and how to formulate the clauses, which can sometimes be quite complex. He gives authenticity to the elements of the contract that he registers – closing date, payments of amounts held in front of him. The simultaneous presence of parties at the moment of signing the contract is another requirement whose failure results in a void act. Each party

[11] I. Galindo-Garfias şi R. Nocedal "le regime matrimonial legal dans les legislation contemporaines", p. 565

though has the possibility to be represented by a procurator being designated by an authentic power of attorney to be present at the moment of signing the contract (this is considered to be a difference from the imposed formalities for concluding a marriage, which is not possible without a procurator).

Under the penalty of nullity of the marriage contract any change of this contract (executed before the conclusion of the marriage), must be done in the presence, and with the simultaneous consent, of all the persons that were mentioned as parties in the initial marriage contract. Even conforming with this obligations the modified document, under the penalty of inoposability to third parties, to be practically joined to the initial document, to be drawn as a continuation of the minutes of the marriage contract, and at the release of the enforceable copy or any other copies of the marriage contract, the notary is obliged to transcribe the modified document as well (failing to do so engages his responsibility)

French law provides the condition of advertising the marriage contract under the penalty of inoposability to third parties. The general formality to advertise is the mention made in the marriage document. This is limited in indicating the existence of a marriage contract and the way to be known. Specific conditions in terms of validity of the contract exist in the legal system of each country, but in a more general way, in legal systems of the Romanian–German family, the matrimonial conventions must be authenticated and are the object of many means of advertising to grant the third party rights.

In conclusion, making a comparisom with the dispositions of the new regulation, the New Civil Code denotes a certain flexibility concerning the spouses (future spouses) capacity to choose the matrimonial regime. Although, the spouses are not the same, bounded by an imperative matrimonial regime, their choice is limited to accept the legal provisions of the project that regulates one or another of the three matrimonial regimes, the one of the legal community, separation of goods and conventional community. Sure that applying the principle of freedom would harm the spouses, on one hand, because then they would have to opportunity to fraud eachother, and on the other hand, they could also fraud the interests of third parties. The legislator had chosen a way to avoid this thing as much as possible even though it means sacrificing this principle in part.

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RIGHT TO CARE IN THE EVENT OF CANCELLATION OF A FLIGHT DUE TO VOLCANIC ERUPTION

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1. Introduction

This paper takes a closer look at the judgement of the Court of Justice of the European Union ('the Court') in Case McDonagh v Ryanair.[1] In this case the Court is requested to define the scope of the obligation to provide care for passengers, imosed on air carriers by the Regulation (EC) No 261/2004 ('the Regulation').[2]

The Regulation depending on the circumstances of the travel disruption, requires air carriers to: provide passengers with assistance, such as meals, refreshments, telephone calls and hotel accommodation; offer re-routing and refunds; pay a flat-rate compensation of up to € 600 per passenger, depending on the flight distance; and proactively inform passengers about their rights.

The antecedent of this case is the eruption of the Eyjafjallajökull volcano ('volcano') which took place in Iceland from March to May 2010 and promted the closure of airspace, resulting in the cancellation of more than 100 000 flights and affecting almost 10 million air passengers. First, the case hinges on the question whether an air carrier must be released from its obligation to provide care for passengers where theirs flights have been cancelled becaues of the closure of airspace following the eruption of a volcano. Second, the Dublin Metropolitan District Court wonders whether the obligation under those provisions to provide care must be limited, in temporal or montary terms, where the cancellation of the flight is caused by extraordinary circumstances.

2. Legal context

As for the international legal context, the Convention for the Unification of Certain rules for International Carriage by Air, concluded in Montreal on 28 May 1999, was signed by the European Community on 9 December 1999 and approved by Council Decision 2001/539/EC of 5 April 2001.[3] Article 29 of the Convention states: *"In the carriage of passengers, baggage and cargo this Convention or in contract or in tort or otherwise, can only by brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right*

[1] Case C-12/11 Denise McDonagh v Rynaur Ltd [2013]

[2] Regulation of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1)

[3] OJ 2001 L 194, p. 38

to bring suit and what are their respective rights. In any such actions, punitive, exemplary or any other non-compensatory damages shall not be recoverable."

As for the European Union law, article 5 of Regulation, headed "Cancellation", states: " *(1) In case of cancellation of a flight, the passengers concerned shall: (a) be offered assistance by the operating air carrier in accordance with Article 8; and (b) be offered assistance by the operating air carrier [...] as well as, in event of re-routing when the reasonably expected time of departure of the new flight is at least the day after the departure as it was planned for the cancelled flight [...]; and (c) have the right to compensation by the operating air carrier [...]. (3) An operating air carrier shall not by obliged to pay compensation [...] if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.[...]*"

Article 9 of Regulation, headed "Right to care", reads as follows: *"(1) Where reference is made to this Article, passengers shall by offered free of charge: (a) meals and refreshments in a reasonable relation to the waiting time; (b) hotel accommodation in cases where a stay of one or more nights becomes necessary, or where a stay additional to that intended by the passenger becomes necessary; (c) transport between the airport and place of accommodation. (2) In addition, passengers shall be offered free of charge two telephone calls, telex or fax messages, or e-mails.*"

3. The dispute in the main proceedings

On 20 March 2010, the Eyjafjallajökull volcano in Iceland began to erupt. On 14 April 2010, the volcano entered an explosive phase which resulted, on 15 April 2010, in the closure of the airspace of several Member States on account of the risk represented by the volcanic ash cloud caused by the explosion. Between 15 and 23 April 2010, the competent air traffic authorities closed the airspace over most of northern Europe, including Irish airspace. From then until 17 May 2010, the airspace of a number of Member States to and from which the airline Ryanair Ltd provided services was sporadically and intermittently closed. Because of the closure of that airspace, airlines were forced to cancel around 100 000 flights between 15 and 21 April 2010 alone and 10 million passengers were unable to travel during that period. Ryanair had to cancel around 9500 flights because of the volcanic ash cloud, causing disruption to the travel plans of 1.4 million of its passengers.

On 11 February 2010, Ms McDonagh booked a flight with Ryanair from Faro (Portugal) to Dublin (Ireland) scheduled for 17 April 2010, for EUR 98. On 17 April 2010, her flight was cancelled following the closure of Irish airspace. Ryanair flights between continental Europe and Ireland resumed on 22 April 2010 and Ms McDonagh was not able to return to Dublin until 24 April 2010. During the period between 17 and 24 April 2010, Ryanair did not provide Ms McDonagh with care in accordance with the detailed rules laid down in Article 9 of the Regulation. The national court states that Ryanair was willing to provide services to its passengers, but it was not permitted to do so owing to the closure of airspace. The Commission for Aviation Regulation in Ireland has stated that the eruption of the Eyjafjallajökull volcano and the resulting airspace closures constituted extraordinary circumstances for the purposes of the Regulation. Pursuant to Article 5(3) of that Regulation, therefore, passengers whose flights had been cancelled had no basis for seeking compensation under Article 7 of the Regulation.

Ms McDonagh brought an action against Ryanair before the referring court for compensation in the amount of EUR 1 129.41, corresponding to the costs which she had

incurred during that period on meals, refreshments, accommodation and transport. However, Ryanair claims that the closure of part of European airspace following the eruption of the Eyjafjallajökull volcano does not constitute 'extraordinary circumstances' within the meaning of the Regulation but 'super extraordinary circumstances', releasing it not only from its obligation to pay compensation but also from its obligations to provide care under Articles 5 and 9 of that Regulation. The Dublin Metropolitan District Court had doubts as to the interpretation to be given to Articles 5 and 9 of the Regulation and as to the validity of those provisions. It has therefore decided to stay the proceedings and to refer some questions to the Court of Justice of the European Union for a preliminary ruling.

4. Volcanic eruption as extraordinary circumstance

By its first question the Dublin Metropolitan District Court has asked, whether article 5 of Regulation must be interpreted as meaning that circumstances such as the closure of part of European airspace as a result of the eruption of the volcano constitute 'extraordinary circumstances' within the meaning of that regulation which do not release air carriers from their obligation to provide care or, on the contrary and because of their particular scale, go beyond the scope of that notion, thus releasing air carriers from that obligation under article 5(1)(b) of Regulation, the operating air carrier is to provide care for passengers whose flights have been cancelled. By contrast with the obligation under Article 5(1)(c) of that Regulation to pay compensation, the obligation to provide care for passengers applies even where the cancellation is caused by 'extraordinary circumstances'.[4]

The problem is that the term 'extraordinary circumstances' is not defined in articles of the Regulation. Recital 14 to the regulation merely gives a few examples, by way of illustration, of events which may be regarded as extraordinary circumstances, namely cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes which affect the operation of an operating air carrier. According to the Court the words 'extraordinary circumstances' literally refer to circumstances which are 'out of the ordinary'. In the context of air transport, they refer to an event which is not inherent in the normal exercise of the activity of the carrier concerned and is beyond the actual control of that carrier on account of its nature or origin.

The Advocate General also noted in point 34 of his Opinion, that 'extraordinary circumstances' relate to all circumstances which are beyond the control of the air carrier, whatever the nature of those circumstances or their gravity. The Court noted that Regulation contains nothing that would allow the conclusion to be drawn that it recognises a separate category of 'particularly extraordinary' events, beyond 'extraordinary circumstances' referred to in Article 5(3) of that regulation, which would lead to the air carrier being exempted from all its obligations, including the obligation to provide care to passengers. When exceptional circumstances arise, the Regulation exempts the air carrier only from its obligation to pay compensation. According to the Court the European Union legislature thus took the view that the obligation on the air carrier to provide care under Article 9 of that Regulation is necessary whatever the event which has given rise to the cancellation of the flight.

For these reasons, the Court has answered to the first question is that Article 5 of Regulation must be interpreted as meaning that circumstances such as the closure of part of

[4] See Case C-294/10 *Eglītis and Ratnieks* [2011] ECR I-0000, paragraphs 23 and 24.

European airspace as a result of the eruption of the Eyjafjallajökull volcano constitute 'extraordinary circumstances' within the meaning of that regulation which do not release air carriers from their obligation to provide care.

5. Can the obligation to provide care to passengers be limited by EU law?

By its another questions, the Irish court has asked, whether the obligation under Articles 5 and 9 of the Regulation to provide care must be limited, in temporal or monetary terms, where the cancellation of the flight has been caused by extraordinary circumstances. In Ryanair's opinion the obligation on the air carrier to provide care must be limited where the cancellation is caused by extraordinary circumstances. For example, Ryanair claimes that accommodation should be limited to a fixed daily amount, namely EUR 80 per night, for a maximum of three nights. Similarly, it argues that there should also be a temporal and monetary limit on the provision of meals and refreshments and that cover of the costs of transport between the airport and the place of accommodation should be limited to the cost of a journey by public transport.

In contrast, the Court argues that in such circumstances, the air carrier is only released from its obligation to provide compensation under Article 7 of the Regulation and that, consequently, its obligation to provide care in accordance with Article 9 of that regulation remain.[5] Furthermore, the Court has held that no limitation, whether temporal or monetary, of the obligation to provide care to passengers in extraordinary circumstances such as those at issue in the main proceedings is apparent from the wording of Regulation. It follows that all the obligations to provide care to passengers whose flight is cancelled are imposed, in their entirety, on the air carrier for the whole period during which the passengers concerned must await their re-routing. According to the Court any interpretation seeking the recognition of limits on the obligation of the air carrier to provide care to passengers whose flight has been cancelled would have the effect of jeopardising the aims pursued by Regulation, in that, beyond the limitation adopted, passengers would be deprived of all care and thus left to themselves. The Advocate General has argued similarly in his opinion.[6]

For these reasons, the Court has answered to this question is that it cannot be deduced from the Regulation that, in circumstances such as those at issue in the main proceedings, the obligation referred to in Articles 5 and 9 of the regulation to provide care to passengers must be subject to a temporal or monetary limitation.

6. Are the Regulation invalid?

In the event of a negative answer on the previous question, the national court has asked whether those provisions are invalid in so far as they are contrary to the principles of proportionality and non-discrimination, the principle of an 'equitable balance of interests' enshrined in the Montreal Convention, and Articles 16 and 17 of the Charter.

First, the Court has reminded that Under a general principle of interpretation, a European Union measure must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole.[7] The Court has already had occasion to find, that Articles 5 to 7 of Regulation are not invalid by reason of

[5] See Case C-294/10 *Eglītis and Ratnieks* [2011] ECR I-0000, paragraphs 23 and 24
[6] See the Opinion of Advocate General Bot deliviered on 22 March 2012, paragraph 52
[7] See Case C-149/10 *Chatzi* [2010] ECR I-8489, paragraph 43

infringement of the principle of proportionality.[8] In that case the Court has stated that standardised and immediate compensatory measures – such as the re-routing of passengers, the provision of refreshments, meals or accommodation or the making available of means of communication with third parties – vary according to the significance of the damage suffered by the passengers and they do not therefore appear to be manifestly inappropriate merely because carriers cannot rely on the extraordinary circumstances defence.

According to the Court the fact that the obligation to provide care entails, as Ryanair claims, undoubted financial consequences for air carriers is not such as to invalidate that finding, since those consequences cannot be considered disproportionate to the aim of ensuring a high level of protection for passengers, because the importance of the objective of consumer protection, which includes the protection of air passengers, may justify negative economic consequences for certain economic operators. For these reasons, the Court has concluded that that Articles 5(1)(b) and 9 of Regulation are not contrary to the principle of proportionality.

As regards the principle of an 'equitable balance of interests' referred to in the last paragraph of the preamble to the Montreal Convention, the Court has argued that the standardised and immediate compensatory measures laid down by Regulation, which include the obligation to provide care to passengers whose flight has been cancelled, are not among those whose institution is governed by the Montreal Convention. Therefore, the Court has not assessed the validity of the Regulation in the light of the principle of an 'equitable balance of interests' referred to in that Convention.

As regards the general principle of non-discrimination or equal treatment, Ryanair claims that the obligation laid down in Articles 5(1)(b) and 9 of Regulation to provide care in a situation such as that as issue in the main proceedings imposes obligations on air carriers which, in circumstances similar to those at issue in the main proceedings, do not fall upon other modes of transport, even though passengers stranded by widespread and prolonged disruption of transport find themselves in an identical situation whatever their mode of transport.[9] The Court has already held in *IATA and ELFAA*, that Articles 5 to 7 of Regulation do not infringe the principle of equal treatment.[10] In this case, the Court has already stated that The situation of undertakings operating in the different transport sectors is not comparable since the different modes of transport, having regard to the manner in which they operate, the conditions governing their accessibility and the distribution of their networks, are not interchangeable as regards the conditions of their use and that's why the European Union legislature was able to establish rules providing for a level of customer protection that varied according to the transport sector concerned. So the Regulation do not infringe the principle of non-discrimination.

As regards Articles 16 and 17 of the Charter, guaranteeing freedom to conduct a business and the right to property respectively, Ryanair has claimed that the obligation to

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[8] See Case C-344/04 *IATA and ELFAA*[2010] ECR I-403, paragraphs 78 to 92

[9] See Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations (OJ 2007 L 315, p. 14), Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 (OJ 2010 L 334, p. 1) and Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 (OJ 2011 L 55, p. 1)

[10] See paragraphs 93 to 99

provide care to passengers imposed on air carriers in circumstances such as those at issue in the main proceedings has the effect of depriving air carriers of part of the fruits of their labour and of their investments. According to the jurisprudence of the Court, freedom to conduct a business and the right to property are not absolute rights but must be considered in relation to their social function.[11] The Charter accepts that limitations may be imposed on the exercise of rights enshrined by it as long as the limitations are provided for by law, respect the essence of those rights and freedoms, and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others. Therefore, the Court has stated that the Regulation do not breach the freedom to conduct a business and the right to property.

And finally, the Court has decided that an air passenger may only obtain, by way of compensation for the failure of the air carrier to comply with its obligation to provide care, reimbursement of the amounts which, in the light of the specific circumstances of each case, proved necessary, appropriate and reasonable to make up for the shortcomings of the air carrier in the provision of care to that passenger, a matter which is for the national court to assess.

7. Conclusions

The Court has interpreted the notion of 'extraordinary circumstances' several times. Among other things, this was the reason why the European Commission has made a comprehensive proposal for a regulation. On 13 March 2013, the European Commission made a proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air.[12] The proposal aims to improve enforcement by clarifying key principles and implicit passenger rights that have given rise to many disputes between airlines and passengers in the past; and by enhancing and better coordinating the enforcement policies carried out on a national level. Issues covered by the proposal are the following:

- Definition of "extraordinary circumstances"
- Right to compensation in case of long delays
- Right to rerouting
- Right to care
- Missed connecting flight
- Rescheduling
- Tarmac delays
- Partial ban of the "no show" policy
- Right to information

[11] See Case C-544/10 *Deutsches Weintor* [2012] ECR I-0000, paragraph 54

[12] Proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air, COM/2013/0130 final – 2013/0072 (COD)

- Handling of individual claims and complaints
- Better take into account the financial capacities of the air carriers
- Ensure better enforcement of passenger rights with regard to mishandled baggage
- Adapt liability limits in accordance to general price inflation

The proposal clearly defines the term in line with the Court's decisions, i.e. circumstances which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control. Furthermore, for further legal certainty, the proposal introduces a non-exhaustive list of circumstances to be regarded as extraordinary and of circumstances to be regarded as non-extraordinary. According to the proposal the following circumstances shall be considered as extraordinary:

- natural disasters rendering impossible the safe operation of the flight;
- technical problems which are not inherent in the normal operation of the aircraft, such as the identification of a defect during the flight operation concerned and which prevents the normal continuation of the operation; or a hidden manufacturing defect revealed by the manufacturer or a competent authority and which impinges on flight safety;
- security risks, acts of sabotage or terrorism rendering impossible the safe operation of the flight;
- life-threatening health risks or medical emergencies necessitating the interruption or deviation of the flight concerned;
- air traffic management restrictions or closure of airspace or an airport;
- meteorological conditions incompatible with flight safety; and
- labour disputes at the operating air carrier or at essential service providers such as airports and Air Navigation Service Providers.

In contrast, technical problems inherent in the normal operation of the aircraft, such as a problem identified during the routine maintenance or during the pre-flight check of the aircraft or which arises due to failure to correctly carry out such maintenance or pre-flight check; and unavailability of flight crew or cabin crew (unless caused by labour disputes) shall not be considered as extraordinary. It can be stated that the adoption of the proposal would create a clear, comprehensive legal framework in the area of ‘extraordinary circumstances’.

NOTES FOR CONTRIBUTORS
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