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New Administrative Proceedings – More Effective Consumer Protection[1]

Zsuzsanna Árva
PhD, Associate Professor
University of Debrecen, Faculty of Law,
Department of Administrative Law (Debrecen, Hungary)
E-mail: arva.zsuzsanna@law.unideb.hu

Abstract. The following study presents new developments in the field of administrative proceedings in Hungary. It outlines the implementation of new regulations destined to simplify and accelerate the administrative procedure, inter alia, by the use of automated decision making and summary procedures, the institution of a new method for calculating administrative time limits, and a differentiated procedure in the case of proceedings initiated at the motion of administrative authorities. The paper also analyses the changes in legal remedies available to clients appealing against decisions rendered during an administrative procedure. The author concludes that the overall direction of change is positive; however, during the implementation of the new rules, temporary difficulties may occur.

Keywords: administrative procedure, procedural reform, Hungary, administrative time limits, remedies in the administrative procedure, administrative enforcement procedures

1. Introduction, Background

Of the recent changes affecting public administration, one of the most influential and controversial modifications involved the introduction of new procedural rules as part of a legislative package. In terms of the proceedings of administrative bodies, the former Act CXL of 2004 on the General Rules of Administrative Proceedings and Services (hereafter referred to as *General Proceedings Act*) was replaced by Act CL of 2016 on General Public Administration Procedures (hereafter referred to as *Administrative Procedure Act*). However, Act I of 2017 on the Code of Administrative Court Procedures (hereafter referred to as *Court Procedures Act*) along with changes in court organization related to administrative actions were

1 The paper was written within the framework of programmes managed by the Ministry of Justice, aimed at the improvement of the quality of legal education.

also part of the package. In relation to the formulation of the new administrative procedural rules, 180 laws, 420 government and 470 ministerial decrees have been reviewed at least partly due to which the general rationale accompanying the bill highlighted that the ratification of the Administrative Procedure Act may also be interpreted as a deregulatory process.[2] This procedural reform also affected the proceedings of the customer protection authorities in several respects.

In consideration of the fact that the Administrative Procedure Act introduced numerous innovations compared to the General Proceedings Act effective before 2017, it is worth providing an overview of those new legal institutions that may be truly relevant in terms of the customer protection procedures and which enable us to evaluate the reforms themselves. The Administrative Procedure Act has brought about noticeable changes for the general public as well in terms of the administrative procedural law as a whole; the most sensitive and most widely discussed aspect of this involved the restructuring of the system for legal remedy. Even though there were several more novel features introduced by the law, it was this segment that received the most attention from the press, mostly without being aware of the detailed arrangements. The rationale accompanying the bill and the scholarly publications, however, mostly highlighted the principles of simplification, the acceleration of the administrative proceedings, and the cooperation between the different authorities in connection with the new code, which is closely associated with changes in the rules of implementation and the relevant approach. This paper also examines these meeting points, scrutinizing changes from the perspective of consumer protection.

2. Simplification

Based on papers presented at conferences discussing the Administrative Procedure Act,[3] the key point of changes involved simplification as the General Proceedings Act was detested mostly because the large quantity of regulations included in it at the outset already continued to increase until it became ineffective as a result of which a meticulous procedural law crystallized, which was rather complex and included numerous detailed arrangements. As opposed to this – and as also presented by Barnabás Hajas in his excellent overview that used specific numerical data to support his statements –,[4] the extent of the Administrative Procedure Act

2 The Government of Hungary: Bill no. T/12233 on the General Rules of Administrative Proceedings, Budapest, 2016. 53. http://www.parlament.hu/irom40/12233/12233.pdf (access date: 30 November 2018).

3 See, for example, the conference organized by the Department of Administrative Law of the Faculty of Law at Pázmány Péter Catholic University, titled 'Administrative Jurisdiction at the Crossroads' (10 October 2016, Budapest).

4 Hajas 2018.

as a norm makes up only about one-fourth that of the General Proceedings Act, which may be seen as a significant reduction and a major simplification in itself.

At the same time, there were numerous other forms of rationalization beyond the quantitative changes. This includes, among others, the scope of the Administrative Procedure Act: even though it also qualifies as a primary procedural law similarly to the General Proceedings Act, the absence of privileged proceedings already results in a rather emphatic and qualitative change. While the General Proceedings Act recognized and acknowledged several privileged proceedings besides removed proceedings, the Administrative Procedure Act provides no opportunity for such an application. Thus, although the scope of removed proceedings has changed and has been expanded (for example, tax and customs administration procedures were added as new ones),[5] now it is only possible for other laws to include additional rules to the Administrative Procedure Act (in line with the regulations of the Act).[6] The latter was also permitted by the General Proceedings Act (practically applying a three-level solution besides removed and privileged procedures), but in the case of privileged procedures it was the general proceedings nature of it that was pushed into the background or terminated. In view of the fact that the number of these privileged procedures increased continuously, the primacy of the entire General Proceedings Act was questioned with time as the 15 points of the Act listed only 60 types of proceedings within this group by the end of 2017.[7] Based on Section 13, para. (2), point (d) of the General Proceedings Act, this included the requirements for the marketing and supply of goods and services as well as relating to the monitoring of commercial practices with respect to the marketing and supply of goods and services and to market surveillance and market control procedures, including the proceedings related to the prescription of medicinal products, medical aids and medical technologies subsidized by the social security system, which was added to the group of privileged procedures due to the amendment by Act CXI of 2008. As opposed to this solution, the Administrative Procedure Act also expressly states that the stipulations of law on administrative proceedings not mentioned among removed procedures[8] may deviate from the stipulations of the law [the Administrative Procedure Act] only if it is allowed by law.

The lack of privileged procedures, akin to the termination of the legal institution itself, was not seen with enthusiasm in publications on public administration, and some even saw an opportunity for their gradual return practically questioning the

5 In connection with the tax administration procedures, the general rationale accompanying the bill itself also noted that these are considered to be removed procedures in the model European countries too. Bill no T/12233.

6 Administrative Procedure Act, Section 8, para. (3).

7 Hajas 2016. 33–46.

8 Administrative Procedure Act, Section 8, para. (2).

long-term sustainability of the regulation;[9] until the writing of this publication and during the one-year period passed since the Administrative Procedure Act has been in effect, there have been no steps taken in this direction.

3. The Principle of Acceleration

3.1 Automated Decision Making, Summary Proceeding, and Full Hearing

The introduction of regulations aimed at the acceleration of procedures was already started at the time of the General Proceedings Act; thus, conditional decisions appeared in 2016,[10] followed by summary proceedings in 2017, for which rules were taken over by the legislator from the concept of the Administrative Procedure Act, significantly expanding their scope. The set of rules in the Administrative Procedure Act contribute to the rapid fulfilment of procedure as a fundamental principle of administrative proceedings. One of these involves the differentiation of three types of procedures: automated decision making, summary proceedings, and full hearings; the expansion of e-administration contributed to the introduction of the first one, while Act CCXXI on the General Rules for Electronic Administration and Trust Services is also relevant in this respect. This procedure may be used when the decision does not require deliberation, there is no opposing party, all data are available for the decision, and the application of automated decision making is expressly allowed for by law or government decree. Summary proceedings have by now become widespread if the requirements are met, i.e. complete application and its enclosures, the relevant facts of the case are ascertained based on the data at the authority's disposal, and there is no opposing party in the case. In a summary proceeding, the decision must be drafted in eight days; however, if any of the specified requirements are absent, the application should be adjudicated in a full hearing, in which case a conditional decision may be made. In this respect, it is considered a guarantee that in case the decision adopted in an automated decision-making process and in a summary proceeding may not be appealed, then within five days following the delivery of the decision, the client may request the authority to re-assess the application in a full hearing, thus enabling the remediation of possible problems in this procedure.[11]

Barnabás Hajas, involved in the preparation of the code, also calls attention to the fact that the regulations of the Administrative Procedure Act truly guarantee the observation of the administrative deadline and its becoming general as,

9 See Csáki-Hatalovics 2018. 130.

10 Based on Act CLXXXVI of 2015 on Amendments Related to the Reduction of Administrative Bureaucracy.

11 Administrative Procedure Act, Section 42.

even without any special conditions, a summary procedure shall be used, while in case its prerequisites are absent, there is an opportunity for a full hearing by making a conditional decision. Compared to the General Proceedings Act, the Administrative Procedure Act specifies the scope of application for the conditional decision also by considering that the inaction of an administrative body may in certain cases harm public interest as well, which was an adverse consequence of the use of conditional decisions.[12]

3.2. 'Net' Instead of 'Gross' Administrative Time Limit

One of the most important changes in the Administrative Procedure Act related to the administrative time limit is the introduction of the 60-day deadline for full hearings in a general and 'gross'[13] manner, during which time period the case must be closed indeed. This is a fundamental change both for the clients and the administrative bodies. Several scholarly publications have highlighted the situation that even though the General Proceedings Act included regulations concerning administrative time limits and the consequences of the failure to meet them, due to the other regulations of the Act, there was very little chance for closing a proceeding requiring average administrative work within a reasonable deadline. It was also a special feature that the exact starting date of the administrative time limit and the act perceived to conclude it were added later to the regulations by the legislator. Although it was not only the General Proceedings Act that specified the administrative time limit numerically, as the preceding Act IV of 1957 on Administrative Proceedings had already done so, not even the text in force at the promulgation of the General Proceedings Act included when the time limit would expire for the authority. The unsettled legal situation was not corrected by judicial practice either; thus, at the beginning, a methodological recommendation of the General Proceedings Act Committee of Experts specified the manner of calculating the administrative time limit, which resolution, similarly to other such recommendations, was non-binding. The rule that the delivery of the decision shall also be provided within the administrative time limit was included in the General Proceedings Act for the first time as of 1 October 2009.[14] It is easy to see that prior to this, in the absence of any regulation, stipulations sanctioning cases when the deadline was exceeded could not be enforced as any date may be printed on the decisions, and due to an anomaly related to posting (e.g. in the case of a smaller authority, the sick leave of the administrator), in certain cases, the client could wait for several weeks more for the actual closing of the proceedings. Even with this element of guarantee, it

12 Hajas 2016. 21.
13 Bill no T/12233. 54.
14 See Act CXI of 2008, Section 23.

could not be known or estimated in advance when the proceeding of first instance would be closed as several aspects were not included in the administrative time limit, including the reconciliation of conflicts over competence and jurisdiction, appointment of a case officer or competent authority, duration of legal aid procedure, remedying deficiencies, the time between the call for providing any new information that may have emerged in the process of ascertaining the relevant facts and its completion, the duration of specialist authority proceedings, the duration of the suspension of the proceedings, the time needed for the translation of the application, the decision or any other documents, the time needed for the preparation of the expert opinion, or the time between the actions taken for the delivery of the decision obliging the applicant to advance the procedural costs and completion. As the need for remedying deficiencies occurred in a significant part of the cases, and in other cases experts or the use of a specialist authority were often needed because of legislation, in a large part of cases, the actual administrative time limit increased to a multiple of the time period specified in the General Proceedings Act, and as such the legal stipulation functioned only as a 'net' administrative time limit. In certain transitional situations, authorities generated disputes over competence so that with the additional time gained this way[15] they could overcome the lack of administrators encountered due to various organizational changes. This occurred occasionally and temporarily, in many cases exactly because of the transfer of competences to district offices.

As opposed to this, the time limit specified by the Administrative Procedure Act operates on a 'gross' basis; thus, based on Section 50, para. (5) of the Act, the administrative time limit shall not include the duration of suspension, stay of proceedings, and (where a conditional decision may not be adopted) the duration of default or delay of the client. Considering the fact, however, that during the years the requirements for the suspension of the proceedings have become stricter, while for the stay of proceedings the consent of the client is needed, it can be established that in the absence of the express involvement of the client the proceedings have to be concluded within the objective 60 days, which also satisfies the principle of concluding proceedings in a reasonable time as stated in Article XXIV of the Fundamental Law. At the same time, Barnabás Hajas also calls attention to the fact that in line with the regulations specified in Article P) of the Fundamental Law, natural resources, in particular, arable land, forests, and the reserves of water, biodiversity, in particular, indigenous plant and animal species, as well as cultural assets shall form the common heritage of the nation, and it shall be the obligation of the state and everyone to protect, maintain them, and preserve them for future generations. In some cases, the starting date of the administrative time limit may differ from those set out in

15 This extra time could typically last for up to several months in the absence of the settlement of the conflict of competence.

the general rules. Section 50, para. (3) of the Administrative Procedure Act also allows for a deviation from the general rules and regulations as a period longer than the administrative time limit of sixty days may be established by an act, and a shorter period may be established by legal regulation.

Such a longer time limit is established in connection with consumer protection by Act LXXXVIII of 2012 on the Market Surveillance of Products; based on Section 17, para. (4) of this Act, the administrative time limit in the market surveillance procedure of the market surveillance authority is 70 days instead of the usual 60, and the administrative time limit does not include the duration of the hearing. The administrative time limit for the public service procedures of the consumer protection authority is also stipulated by law separately, which is currently in line with the general regulations (60 days), but it is also specified separately.[16]

Based on the above, it can be stated that with the general gross time limit calculation prescribed by the Administrative Procedure Act administration has really become faster, which also had a special consequence in the transitional phase: when possible, the authorities tried to start the proceedings opened of their own motion under the rules of the General Proceedings Act, which included more favourable stipulations for them.

3.3. Regulatory Inspections, Own-Motion Proceedings

The scope of regulatory inspections is relevant also in the case of consumer protection proceedings, which is stipulated in a separate chapter by the Administrative Procedure Act (similarly to the General Proceedings Act). The legislator has also preserved a special feature of this legal institution, i.e. that it fits into the general proceedings in a special way. Thus, it may even precede it (for example, if the authority wishes to inspect the compliance with legal stipulations) or be part of the procedure itself in a given case, for example, if they wish to inspect the execution of an obligation set out by a specific regulatory decision. At the same time, due to the unique structure of the Administrative Procedure Act, which differentiates procedures opened by application and those of their own motion, it stipulates the use of the rules of own-motion proceedings to regulatory inspections, stating that the administrative time limit is not compulsory in this respect, although its use is not excluded either, as noted by Barnabás Hajas.[17] Thanks to the regulations mentioned above, the rules relevant for the actual conduct of the regulatory inspections were seemingly shortened and simplified. In reality, however, due to the rules referring to the own-motion proceedings, these could decrease in number as in the background these regulations have to be applied. It is a substantial change, however, that while the General Proceedings Act prescribed

16 Act CLV of 1997, Section 46, para. (5).
17 Hajas 2016. 25.

the recording of minutes, in the Administrative Procedure Act, we cannot find such a stipulation related to the conclusion of the regulatory inspection, except for those cases when the authority finds an infringement. To remedy this absence, the Administrative Procedure Act includes a stipulation according to which in case of the 'success' of the regulatory inspection conducted upon the client's request, i.e. if the authority does not find any infringement, it issues an official instrument to that effect, while in the own-motion regulatory inspections the authority shall issue an official instrument on its findings at the client's request. Besides this, however, Barnabás Hajas – who participated in the development of the procedure – highlighted that the proper documentation of the proceeding is also the responsibility of the authority, which is of critical importance, especially when starting an administrative proceeding.[18] This is particularly true in the case of consumer protection inspections, where the opportunities for mystery shopping and sampling are prescribed by the act on consumer protection.

The inclusion of administrative proceedings under a separate chapter was an important structural change from the perspective of consumer protection procedures as well, along with the specification of the rules of regulatory inspections, the latter of which also included the addition of the regulation according to which the legislator provides 8 days for the proceedings in the case of non-specified time limits, which is relevant especially in terms of starting own-motion procedures after and due to regulatory inspections.

Thus, as opposed to the General Proceedings Act, the Administrative Procedure Act made a clearer distinction between proceedings initiated by application and at the authority's own-motion, the latter of which is discussed in a separate chapter (Chapter VIII of the Administrative Procedure Act), which only includes the deviations from the procedures initiated based on application. In connection with the administrative time limit – which is becoming more objective anyway –, we can find additional constraints here as there is no place for stays in own-motion proceedings, and it is only the duration of the suspension of the proceeding that does not count into the administrative time limit. As for exceeding the administrative time limit, the legislator added the sanction that in the case of own-motion proceedings if the authority has exceeded twice the duration of the administrative time limit, apart from establishing the infringement and from issuing an order for bringing the infringement to an end or for ensuring that legality is restored, no other sanctions may be imposed. In that case, new proceedings may not be opened against the same client under the same considerations of fact and law.[19]

Although in the case of consumer protection the majority of the procedures are started based on application, we still cannot regard these as proceedings as initiated upon request but only as procedures opened indirectly by request to

18 Ibid.

19 Administrative Procedure Act Section 103, paras (2)–(4).

which the rules of the own-motion proceedings shall be applied. Even though the constraints affecting the administrative time limit certainly guarantee the principle of the conclusion of proceedings within a reasonable time, and they also facilitate the enforcement of fundamental rights, it is also obvious that for the authorities it used to be a challenge initially to fully comply with the new regulations and in such cases to acquire the necessary evidence and then conclude the case within the time limit prescribed. Although the own-motion proceedings are opened against specific clients, in general, they serve the purposes of protecting the public interest, and this is especially true for cases like the consumer protection proceedings. The lack of legal consequences due to exceeding the time limit runs contrary to the idea of protecting the wide range of consumers. Therefore, in this respect, the changing attitude certainly represents challenges for the authorities. It is especially important for district offices to harmonize this with the scope of cases specified in Section 47/C, para. (5) of Act CLV of 1997 on Consumer Protection (hereafter referred to as Consumer Protection Act), in which the authorities are obligated to use fines; thus, in case the infringement affects a wide range of consumers or if legal stipulations aimed at the protection of people under eighteen years of age were infringed.

4. Cooperation and Juxtaposition

Due to the varied nature of authorities involved in consumer protection[20] as well as the operation of the central market surveillance information system and the purposes of improving efficiency, it is of special importance how procedural law guarantees cooperation between the different authorities. The principle of single-contact administration had already been introduced by the General Proceedings Act as part of the implementation of Directive 2006/123/EC of the European Parliament and the Council on services in the internal market; however, the Administrative Procedure Act made the system of rules applicable to specialist authorities even more specific and simple, while related procedures and preliminary procedures were added as new elements.[21] Of these, the facilitations regarding related procedures are relevant for consumer protection in themselves as in certain specific case types (e.g. the registration of vehicles imported from abroad) the client has to initiate several procedures built on one another, and in these types of cases they can already receive more information based on which the client may request the direct transfer of documents to the

20 On the former system of general and special authorities, see: Joó–Szikora 2010. 363–388, while in terms of the current situation see: Árva 2018. 295–312.

21 Hajas 2016. 21–22.

other authorities.[22] At the same time, both the regional[23] and central[24] reforms in public administration exert an effect that further enforces cooperation as in the integrated administrative organizations besides the general model of cooperation (as the specialist authority procedures) other, alternative solutions may also be used, 'which result in simpler and faster procedures',[25] while also considering the specific, real-life situations.

The Administrative Procedure Act preserved the institution already introduced by the General Proceedings Act, which enables the authority to conclude the case not with a resolution but the conclusion of an administrative agreement between the authority and the client, adding that in such a case the agreement shall include a solution beneficial both for the client and the public interest. Although the conclusion of the administrative agreement may also be prescribed by law in certain cases – what is more, certain types of cases may conclude with an administrative agreement and not a resolution (e.g. establishing technical inspection stations based on the formerly effective regulations) –,[26] the administrative agreements are concluded voluntarily in the majority of cases. The classical area of this legal institution besides construction is consumer protection, whereby the principle of juxtaposition was facilitated from the nineties already instead of the traditional authority feature.[27] This has been preserved by the Consumer Protection Act to this day,[28] with its means of enforcement and framework provided by procedural regulations themselves. The Administrative Procedure Act has made it clear that the administrative agreement is also an agreement concluded by the public administration authority. Yet it has also preserved the asymmetry between the rights of the parties. In case of a breach of such agreements by the client the contract qualifies as directly enforceable;[29] based on it the execution may be started, a situation which has to be accepted by the client. In case of possible infringements by the authority however, the client has to turn to an administrative court for a decision or enforcement. The latter may be done within maximum 30 days after becoming aware of a breach of contract. However, prior to turning to the court, the client also needs to call the attention of the authority to perform.

22 Administrative Procedure Act, Section 45.
23 See also Barta 2013. 145–153, 164–176.
24 For more details, see: Árva 2018. 302–306.
25 Bill no T/12233. 53.
26 Government Decree no 302/2009 (XII.22.) on the detailed procedural regulations for authorizing inspection stations and the content of administrative agreements to be concluded with the inspection station made the establishment of the station possible only with an administrative agreement; however, the currently effective Government Decree no 181/2017 (VII.5.) has abandoned this practice.
27 Bencsik 2013. 348–349.
28 Consumer Protection Act, Section 47, para. (6).
29 Based on the terminology used in the General Proceedings Act, however, the Administrative Procedure Act stipulates this with identical content.

As opposed to the supremacy nature of law enforcement by the authorities, it is also relevant in terms of consumer protection procedures that among the stipulations concerning the client there are separate guarantees for minors and persons with disabilities, based on which the Administrative Procedure Act would also like to ensure the protection of rights specified in Article XV of the Fundamental Law.

5. Legal Remedies

The conclusion of the proceeding of first instance may be followed by appeals procedures, the transformation of which was or seemed to be conspicuous for the general public as well. At the same time, the rationale for the law also stated that it is only in 0.5% of the several million administrative cases initiated annually that an appeal is submitted. However, in a significant portion of these cases (almost in a fifth of them), judicial review was also initiated,[30] which means that cases affected by legal remedy would most likely make it to the courts anyway, while in one third of the case types appeals were excluded already based on the General Proceedings Act. In terms of the legal remedy system as a whole, the rationale also pointed out that making judicial review the main appeal tool also facilitates the uniformity of jurisprudence, and due to judicial independence, it also contributes to the reduction of the risk of corruption.[31]

In terms of the appeals system, recently, procedural laws continue to differentiate between almost the same two large groups: the first one includes the possibilities that may be requested by the client, while the second one those initiated by the authorities. The latter was considered to be a decision review system by the General Proceedings Act. As opposed to this, the Administrative Procedure Act returned to the denomination of own-motion appeals. In connection with the first group, truly radical transformations took place in the sense that administrative actions have become the general rule, and the opportunity for an appeal against the resolution was narrowed down to two cases: if it was brought by the head of a district office or a body of a municipal government other than the council of representatives or by the local branch of a law enforcement agency. Considering the division of powers between the district offices and the clerk, however, this change does not actually have such a great effect as one would think at first glance. Prior to the creation of the district system, the clerk was considered to represent the general administrative authority at the lowest level, which body was obligated to act in approximately 500 types of official cases. After the creation of district offices, these cases have gradually been transferred

30 Bill no T/12233. 54.
31 Bill no T/12233. 54.

to the district offices. This is a currently ongoing process. The organization of the system of consumer protection was most recently transformed by Government Decree no 387/2016 (XII.2.) on the designation of the consumer protection authority; according to this Decree, in administrative cases related to consumer protection, the district (Budapest district) office of the Budapest and county government offices – while in certain specific cases the district office (Budapest district) of the Budapest and county government offices according to county seat – as well as the minister responsible for consumer protection shall act.[32] The main responsibilities and powers of the minister extend primarily to tasks of a management and legislative nature as well as the conclusion of cooperation agreements. A significant part of specific administrative activities of first instance are completed by the district (in certain cases the county seat district) offices and only in a smaller part by the Government Office of Pest County; thus, in the bulk of administrative cases, appeals are available as a legal remedy. In consideration of the fact that the cases falling within the competence of the Government Office of Pest County are primarily of the second instance to start with,[33] against whose decisions the Administrative Procedure Act does not provide additional appeal options either, and its other first instance competences cannot be matched with the definition of the administrative action, it can be stated that the opportunity for appeals is provided in consumer protection cases. Thus, the Government Office of Pest County performs the tasks related to the publication of the court decision according to the Consumer Protection Act in the case of the judicial review of the administrative decision and contributes to the validity of the administrative agreement to be concluded by the district office acting within a consumer protection competence and the district office according to the county seat.[34] Besides this, the organization of trainings, public interest claims have to be reported to this body, and it manages the account at the Hungarian Treasury, where the consumer protection fines are credited, and it provides price control in connection with natural gas delivered by pipeline, public waste disposal services, waste water disposal, and overhead reduction by utilities companies.

Although the number of legal remedies available upon request has decreased since the effective date of the Administrative Procedure Act from four to two, the deletion of the resumption proceeding can hardly be felt in practice, while the rules of the procedures of the Constitutional Court have become obsolete, as noted by Barnabás Hajas.[35] In this respect, it is important in terms of the consumer protection procedures that consumer protection also has relevance to fundamental rights, as, contrary to the previous constitution, Article M, Section

32 387/2016. (XII. 2.) Government Decree, Section 1, para. (1).
33 387/2016. (XII. 2.) Government Decree, Section 1, para. (4).
34 387/2016. (XII. 2.) Government Decree, Section 4, paras (2)–(3).
35 Hajas 2016. 23.

(2) of the current Fundamental Law stipulates that Hungary shall ensure the conditions of fair economic competition, act against any abuse of a dominant position, and shall protect the rights of consumers.[36] The wording undoubtedly reflects the model typical of countries on the continent, in which the states protect and provide consumer rights primarily by ensuring the aspects of competition.[37] At the same time, raising it to the level of fundamental rights has had not only institutional but also procedural consequences due to which in these cases it is also possible to issue a constitutional complaint based on the court decision.

Thus, as a result of the above changes, appeals procedures and administrative actions remained in the new code as redress procedures available upon request by the client. The latter of the two has become more general; however, based on those mentioned above, actually in consumer protection cases the appeals procedures may still be used. In terms of the detailed arrangements, it represents a change that the appeal shall be reasoned, and in the appeal only those new facts may be introduced of which the client was unaware during the proceedings in the first instance or was unable to rely on such facts for reasons beyond their control. Thus, the Administrative Procedure Act ended the opportunity available for many years that enabled appeals due to all kinds of, often 'made-up', reasons; i.e., the client had the option to 'save' certain evidence for the appeal procedure itself and not reveal it unless the procedure in the first instance turned out to have an unfavourable result. This way, appeals have not only become secondary tools but are also bound to explanation. At the same time, the authority still has the option to modify or repeal the decision infringing the law based on the appeal or in the absence of an adverse party, and if it agrees with those included in the appeal it may also revoke its non-infringing decision or may modify it in line with those included in the appeal.[38] In the absence of all these opportunities, the decision in the second instance (in case of infringement of the law) is examined, but in connection with its decision it is not bound to those included in the appeal. Thus, in a given case, a decision imposing a consumer protection fine may even be aggravated (if new infringements are identified). A stipulation specifically aimed at the acceleration of the procedure is the one that specifies that if the information for bringing a decision is insufficient, or if otherwise deemed

36 At the same time, all this was interpreted by the Constitutional Court in its resolution no 8/2014 (III. 20.) in a way that 'from the second sentence of Section (2) of Article M), such an obligation emerges for the state which applies (in consideration of the constitutional values included in the Fundamental Law) to the establishment and maintenance of an institutional system protecting the rights of consumers and acting against any abuse of a dominant position, moreover to the adoption of laws ensuring the rights of consumers'. This, however, does not mean that the constitutional complaints built on this would be accepted without solid reasoning. See, for example, Constitutional Court Resolution no 3305/2018 (X. 1.) and in connection with financial consumer protection: Veres 2013. 179–183.

37 Bencsik 2013. 340.

38 Administrative Procedure Act, Section 119, paras (1)–(2).

necessary, the authority of second instance shall ascertain the relevant facts of the case and shall adopt a decision. This makes possible to avoid a situation whereby the authority of second instance only annuls the decision obliging the authority of first instance to start a new proceeding, which contributes to the actual and meaningful conclusion of the cases.[39]

The stipulation according to which there is no opportunity for appeals in the case of automated decision making and summary procedures seems to be less important in terms of consumer protection as in such cases (as already noted) a decision in full hearing may be requested within 5 days.

In connection with the administrative actions, which have become the primary means of legal remedy due to the Administrative Procedure Act, the Act includes only the most important issues as regulated in detail by Act I of 2017 on the Code of Administrative Court Procedures, while the organizational changes affecting administrative courts are stipulated by Act CXXX of 2018. It should be noted in this regard that the reform package at the end of 2016 consisted of three parts; thus, it also had stipulations affecting the court system, which, however, were annulled by Resolution No 1/2017 (I. 17.) of the Constitutional Court in a preliminary constitutional review procedure due to the infringement of the rules related to cardinality. The act on administrative courts promulgated on 21 December 2018, however, was ratified by the Parliament with a qualified majority, and thus it expressly includes the cardinality clause. It does not fall within the scope of this paper to introduce the new law in detail; yet, it should be noted that it establishes the administrative tribunals and the Higher Administrative Court.

Although administrative actions fall outside the competence of administrative bodies, the acceleration of the proceedings as an objective has prevailed in these procedures as well. This way, the formerly general cassation powers of the courts came to an end and were replaced by reformatory powers as a general rule, due to which the restarting of the cases at the administrative bodies may be avoided along with a possible new legal remedy procedure and in a worse case a repeated annulment and obligation to start a new procedure, as a result of which the actual conclusion of a case could be delayed by years because of the net regulation of the administrative time limit discussed above.

39 Administrative Procedure Act, Section 119, para. (6).

6. Enforcement

The final possible phase of administrative procedures is represented by the enforcement proceeding, the prerequisite of which is to have a final decision and the lack of voluntary performance.[40] The Administrative Procedure Act left behind the use of *res judicata* as a technical term in administrative proceedings, which was difficult to interpret anyway for the clients.[41] In consideration of the differences between the material and formal legal force and the terminology used in the model German-Austrian jurisprudence, the Administrative Procedure Act introduced the concept of the decision becoming definitive, which plastically expresses that the final decision may not be changed by the administrative authority except for the cases set out by law. The decision becomes definitive with the delivery of the decision, which becomes enforceable if the obligor fails to comply with the obligations.

Unless otherwise provided for by an act or government decree, or a municipal decree in administrative actions of local authorities, enforcement procedures shall be carried out by the state tax authority.[42] In such a case, the rules of the Administrative Procedure Act do not even have to be used[43] as tax administrative procedures belong to the group of removed procedures, and the enforcement proceedings of the tax administration are specified by Act CL of 2017 on the Rules of Taxation. In consideration of the fact that the consumer protection regulations fall within the general scope, the collection of consumer protection fines takes place now in line with the rules relevant to public debts found in tax administrative proceedings.

However, as the Administrative Procedure Act also makes the formulation of additional rules possible as described above, it is a significant change affecting enforcement that the resolution of the first instance of the consumer protection authority may be declared enforceable immediately if a legal consequence has to be established against the client breaching the administrative agreement or due to environmental reasons or for the protection of the physical, intellectual, emotional, or moral development of minors or in the case of any commercial or communication Internet website with unlawful content. In these cases, the consumer protection authority actually publishes its resolution irrespective of legal remedy.[44]

40 Administrative Procedure Act, Section 132.
41 Rationale added to Section 82 of the Administrative Procedure Act, Bill no T/12233. 90.
42 Administrative Procedure Act, Section 134, para. (1).
43 Administrative Procedure Act, Section 131, para. (2).
44 Consumer Protection Act, Section 51, para. (1).

7. Conclusions

The Administrative Procedure Act has achieved real simplification and acceleration in many respects. The implementation of the main objective, however, is somewhat overshadowed by Act CXXV of 2017 on administrative offences effective as of 1 January 2017, which prevails as a general code of sanctions. With the code taking effect, the formation of temporary rules became necessary, as included in Act CLXXIX of 2017 on the Temporary Rules for Sanctioning Administrative Offenses and Amending Certain Laws in Connection with the Reform of Administrative Procedural Law and Repealing Certain Stipulations of Law. Section 10 of this Act inserted a referring rule into the Act on Consumer Protection, which authorizes the Government to stipulate the additional procedural rules to be used by the consumer protection authority (acting as an administrative authority) in decrees; such a decree, however, has not been enacted until this publication. At the same time, the objectives to stop the fragmentation of the Administrative Procedure Act and ensure its permanence are understandable; however, the large number of referring rules act counter to the work of legal practitioners. The simplification of procedural law is only one, albeit significant part of law enforcement, as the administrative authorities otherwise have to use the rather diverse substantive rules, which is especially true in such a new legal field as consumer protection.[45]

The gross concept of the administrative time limit also clearly helps the rapid conclusion of proceedings. However, rapid procedures only partly make the operation of public administration effective, while in other cases it might work against the detection of violations of law as the authorities have to conclude the case within 60 days by all means. This is especially true for typical own-motion proceedings in the case of consumer protection, whereby, on the one hand, the procedural rule has to be enforced, according to which if the authority has exceeded twice the duration of the administrative time limit, apart from establishing the infringement and from issuing an order for bringing the infringement to an end or for ensuring that legality is restored, no other sanctions may be imposed, and new proceedings may not be opened against the same client under the same considerations of fact and law, while Section 47/C, para. (5) of the Consumer Protection Act specifies those cases in which the authority is obligated to apply fines.

Thus, overall, the changes certainly point in a positive direction. However, for the authorities applying the law, an adequate time has to be provided not only for the management of procedural changes but also for that of organizational alterations, and during this transitional period even the efficiency of enforcement may be undermined temporarily.

45 It was also highlighted by László Trócsányi that in new legal areas like consumer protection 'new legislation is pouring out' [author's translation]. Available at: http://www.jogiforum.hu/hirek/37755 (access date: 1 December 2018).

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Criminal Law Protection of Personal Secrets in Hungary

Viktor Bérces
PhD, Assistant Professor
Pázmány Péter Catholic University,
Faculty of Law and Political Sciences (Budapest, Hungary)
E-mail: berces.viktor@jak.ppke.hu

Abstract. The study analyses in detail and from a wide perspective the criminal law regulation applicable to the protection of personal secrets in Hungarian law. The author presents the historical development and comparative law context of the criminal substantive legal norms which defend personal secrets, especially in view of persons whose occupations or professions require handling such privileged information. Several norms applicable to specific professions (the clergy, the medical profession, and attorneys at law) as well as their implications in the light of the provisions of criminal and civil procedural law are also explored. The author concludes that it would be advantageous to use the expression 'occupation' in a wider sense and that the Hungarian Criminal Code should exemplify the secrets which often occur in everyday life and the exposure of which fits into the offending behaviour. Also, criminal and civil procedure should use the same rules for the exemption of persons bound by secrecy from having to testify as witnesses.

Keywords: personal secret, criminal law, privacy, clergy, medical profession, attorneys, privileged information, breach of secrecy

1. The Object of Inquiry

The scope of criminal acts related to secrets is widely defined both on the level of laws and legal science. The common basis for these delinquencies is constituted by personal secrets, the definition of the conceptual features of which is generally accepted. One example for this is that the information constituting the basis for personal secrets is only known in a narrow circle and also that the owner has a legitimate interest in preserving this information. Of course, these criteria should also be met with regard to the further types of secrets that are generated from personal secrets in order to be able to define them as criminal acts.

My study focuses on perhaps the most ancient type of secrets, i.e. the question of *personal secrets*, as well as on the analysis of the concepts of the three ways of their manifestation, which include *confessional secrets*, *medical secrets*, and *attorney–client privileged information*. The reason why I have undertaken this task is perhaps that the statutory regulation of the three above-mentioned categories is rather incomplete, the content-related criteria of these have mostly been defined by legal science and judicial practice in recent decades. Thus, the study of the question may primarily be based on case-law solutions, but I strongly believe that further references regarding the above categories would be necessary on the level of the Hungarian Criminal Code (hereinafter referred to as: the Btk.) and the Hungarian Criminal Procedures Act (hereinafter referred to as: the Be.) alike, taking into account the frequency of the situations that they affect as well as the legal disadvantages arising from the violation of these types of secrets.

2. Introduction. The History of the Regulation and the Dogmatic Implications of the Violation of Personal Secrets (Section 223 of Btk.)

2.1. Comparative and Historical Overview

In criminal law enforcement, quite a number of types of secrets are familiar: personal data,[1] special personal data, the privacy of letters, the secrets related to the secrecy of elections and referendums, business secrets, classified data, bank secrets, securities secrets, etc.[2] Some of them are mentioned in the Btk., while the interpretation of some other types of secrets only becomes clear from judicial practice or different positions of jurisprudence. I do not venture into analysing all the concepts of various secrets from a dogmatic and practical point of view in one single study, but what I am striving for instead is to present the forms of manifestation of personal secrets, which, in my view, are the ones that mean the basis for these other categories and which require the most complex interpretation.

The violation of personal secrets is indicated as a statutory definition in the criminal code of nearly all EU Member States. From these, I would like to highlight the German and Austrian statutory rules as these are the systems that by their nature most resemble the Hungarian legislative solutions.

1 The development of the legal protection of personal secrets chronologically precedes the emergence of the protection of personal data, and the subject of regulation is also a narrower group of data and facts (a personal secret of a private individual always qualifies as a personal data at the same time). Jóri 2009.

2 Tóth 2005. 57–58.

Pursuant to the provisions set out in the German Criminal Code, those who disclose any data related to another person without being authorized to do so commit a crime. In law, the scope of those persons who, as special subjects, may commit such crimes, is defined. This group includes medical doctors, dentists, pharmacists, psychologists, attorneys, patent agents, public notaries, financial advisors, tax advisors, auditors, marriage counsellors, social workers, employees of insurance companies, public servants, experts, etc. Thus, it is defined by the German law in which occupations or activities it is possible to violate personal secrets. Such behaviour is sanctioned more severely if the person engages in it with the aim of gaining benefits.[3]

The Austrian Code also limits the punishability of the act of divulging professional secrets: pursuant to this, those who disclose any of the data obtained in the course of exercising one of the professions defined in the law commit the crime of 'violating professional secrets'. In the law, healthcare, social security, and official sectors are specifically mentioned, based on which:

> […] those who communicate or utilize any data on another person's health status commit a crime if such data was entrusted to them, or such data became accessible to them during exercising their profession related to curing patients, the supply of medicine, the management of the medical institution, or the performance of social security-related tasks, and the disclosure of such secret causes a violation of interests [Section 121(1)]. A crime will be committed by any experts appointed by the court or another authority as well if they disclose the secret obtained in their capacity as experts [Section 121(3)].[4]

As regards the Hungarian regulation, the idea of the unlawfulness of violating secrets emerged as early as in the so-called Csemegi Code: the source of law, as the 'forerunner' of personal secrets, provided for professional secrets, the obligors of which included public officials, lawyers, physicians, surgeons, pharmacists, and midwives.

2.2. The Concept of Personal Secret in Hungarian Criminal Law

A *personal secret as a concept of criminal law* first emerged in the ministerial justification of Act V of 1961. This explanation of the law regarded it as a primary goal to define the subjective scope in the regulation of violating personal secrets. In the justification, the scope of the applicability of the crime was extended as

3 There is no such element of statutory definition in the Hungarian law as this belongs to the conceptual scope of another crime. Belovics–Molnár–Sinku 2015. 281.

4 Id. 281–282 (transl. by the author).

compared to the earlier criteria by having formulated the secrecy obligation for all the persons who exercised a profession in general. [The legal protection ensured by the earlier BHÖ (the Official Compilation of Criminal Rules), however, only extended to those types of secrets whose disclosure jeopardized the reputation of a family or a person. It is obvious that the current definition excluded quite a number of such factors from the scope of secrecy, in the case of which confidentiality would have been highly desirable for the offended party].

When examining the concept of personal secrets, first of all, it will be necessary to clarify the legal literature standpoints on the definition of secrets. The criterion – according to which in this case we are talking about an item of data, a fact, or a circumstance that is known to a rather narrow group of persons and that can become known to a limited range of persons – can be regarded as a 'common denominator' to a certain extent. Thus, the subject of legal protection is not the secret itself but one of its external forms of manifestation.[5]

Busch thinks that 'the criminal law protection of personal secrets is built on that in our society, any and all persons can be required to keep personal secrets who come in possession of such secrets in any way whatsoever'.[6] Törő states that we can only talk about secrets as long as only a narrow group of persons is familiar with a fact or an item of data, as long as it is possible to keep such secrets. Public disclosure, however, should always be interpreted in relative terms.[7]

The concept of personal secrets has not been defined by any of our criminal codes. This is also missing from the Criminal Code currently in force (the Btk., i.e. Act C of 2012) as well. However, the definition of a personal secret as all such confidential facts, circumstances, or data familiar only to a narrow group of persons and keeping them secret, which is a legitimate interest of the person concerned,[8] the disclosure of which will involve a violation of the interests of the offended party (judicial decision, i.e. BH No 2004: 170), can still be regarded as one that has governing effect. Such data may include the personal, family, pecuniary situation, the health status of a passive subject or any other knowledge of their personal habits. However, there are specific statutory provisions referring to the cases of violating financial secrets, business secrets, and classified data.

Personal secrets may affect a high number of the passive subject's interests: besides the protection of personality, I would also list the interests of uninterrupted participation in primary and secondary communities in this category as, through violating personal secrets, the family and social connections of the offended party are also damaged or jeopardized.

5 Busch 2011. 39.
6 Busch 2011. 39 (transl. by the author).
7 Törő 1979. 434.
8 Busch 2011. 40.

There are several positions taken in legal literature regarding setting up the categories of personal secrets, from which I would like to highlight Kereszti's attempt at classification:

> Based on its form of manifestation, personal secrets can be so-called notional secrets (they are only fixed in the minds of the insiders), material secrets (they are fixed in some tangible form such as facts or data written down, photographed, or recorded as an image or audio recording). As regards their content, they may be of a personal or moral nature (such as the offended party's illness, mental or physical defect, as well as other circumstances that involve family, moral or social judgment), or related to property or substance (like the offended party's pecuniary position, debts, creditability, bank or savings deposits, etc.).[9]

2.3. The Delinquent Behaviour and the Offender

The *delinquent behaviour* is the disclosure of the personal secret. The concept of this includes all such acts as consequence of which the information that constitutes the subject matter of the personal secret becomes known. Accordingly, the delinquent behaviour may be both active and passive, so the criminal act can be committed by action or default (omission, inaction). It holds no relevance either how many persons become familiar with the personal secret in question.[10]

However, the facts of the action can only be established if the delinquent behaviour is undertaken without a well-substantiated reason. Also, it is a well-established regulatory practice that, based on certain interests, the criminal codes allow the disclosure of data, facts, circumstances, etc. that otherwise qualify as personal secrets: among others, those cases can be listed here during which the apparent wrong-doers meet their legal obligations to supply data[11] or to notify the authorities.[12] The case of approval by the offended party can also be listed in this category. Based on the above line of thought, the punishability of the act is excluded if it does not pose a danger to society.

Busch states:

> [T]he witness to the crime is in a peculiar situation regarding this criminal act. The witness is not obliged to testify if they are obliged to secrecy and if they have not been exempted from their secrecy obligation. If, however,

9 Horváth–Kereszti–Maráz–Nagy–Vida 1999. 172–173.

10 Those who secretly record the content of a conversation conducted with them do not commit a crime, not even if this is done in another person's private household (judicial decision no BH 2014. 134).

11 E.g. reporting exculpatory evidence, giving a testimony.

12 E.g. the obligation to report bribery in the case of public officials.

> the witness testifies, they will not commit a crime, as in such a case, the unlawfulness of the action is missing, as the exploration of the criminal act qualifies as a substantiated reason.[13]

Belovics thinks that the above-mentioned case is in the conceptual scope of the permission in the law, as the Be. 'leaves it to the witness whether they would like to use their right to refuse giving testimony. If the witness testifies despite their not having been exempted from their obligation of secrecy and they disclose the personal secret before the authority, the witness will not commit a crime, with regard to the permission in the law.'[14]

The crime is a delictum proprium, i.e. it can only be committed by a person who has the necessary personal qualifications: based on this, the requirements of this statutory definition can only be met by those who gain possession of secrets through their occupations or public mandates (judicial decision no BH 2004: 170). I would like to note that if the offender is a public official at the same time, then their act will qualify as official misconduct if the disclosure of the secret is coupled with the purpose of gaining unlawful advantages or causing unlawful disadvantages.

Occupation is defined as all such regularly performed activities which are pursued by the offender in exchange for a consideration; however, it holds no significance whether the legal relationship is regulated by the rules of civil law or labour law. Public mandates include such activities which are performed by the offender for some public or social organization without receiving any consideration. No personal qualification is required for the participants of committing the crime, i.e. the crime can be committed by anybody in the capacity of an instigator or accomplice.

From my point of view, I believe that it is unnecessary to make a distinction between the concepts of occupation and public mandates in the law as both cases suggest an activity aimed at performing work. It is irrelevant from the aspect of statutory definitions what institution the offender performs the activity in question for or in exchange for what consideration they do so or whether they perform the activity for free or not. This means that it would make sense to simplify the wording of the law in the following way: a criminal act is committed by a person who *discloses a secret that they became aware of during practising their profession, without a substantiated reason*.

Personal secrets *can only be violated intentionally*, where both *dolus directus* and *dolus eventualis* may come up. Accordingly, the offender must be conscious of that a) the secret that they possess is a personal secret and that b) the circumstance that justifies its disclosure is not well substantiated. Regarding the latter, although

13 Busch 2011. 40.

14 Belovics–Molnár–Sinku 2015. 282–283.

the possibility of a mistaken assessment of the threat of the action to society may come up as a reason for exclusion from punishability but only if the offender had good reason to make such a mistake. The criminal act has no negligent form.

The establishment of the *realization phase of the criminal action* is adjusted to whether the offending behaviour is demonstrated verbally or in a written form. In the case of verbal statements, one cannot talk of attempts as the criminal act is completed by communication in the presence of another person and by the other person becoming aware of such information. In the case of a written offence, however, an attempt will become possible if the offender does his/her best to expose the information, but the result, i.e. the other party's becoming aware of such information, is not achieved for some reason. Consequently, an attempt at violating a personal secret can be established if a letter containing a personal secret is posted by mail and if it does not reach the addressee for some other reason, etc.[15]

The *causing of a material breach of interest* is regulated by the Btk. as a classified case: in such cases, the offender will be held liable even if it is only their negligence that extends to the current result. The following can, for example, be regarded as a material breach of interest: negative points occurring in the passive subject's career, moral acknowledgement, or family relationships, but all those financial advantages as consequence of which the offended party loses their job or any other source of income can also be listed here.[16]

The number of *crimes committed depends on the number of passive subjects*. If the offending behaviour is demonstrated with regard to several personal secrets concerning the same passive subject, then these acts should be regarded as a natural unit. Such crimes are exclusively punishable following a private motion.

3. The Canonical Law and Criminal Law Aspects of the Concept of Confessional Secrets

As regards *the secrecy obligation*, there is no considerable difference between canonical law and secular law: both types of cases require absolute secrecy from the clergymen conducting the holy confession. 'In the holy confession, […] it is important that the priest be aware of the weight of his task and to be appropriately prepared and qualified to perform his task […]. He should be fully aware of what he may allow himself and his penitent in this position of confidentiality.'[17]

Based on the Codex Juris Canonici (hereinafter referred to as: CIC), holy confessions can be made before all such members of the clergy who are entitled to perform the activity of confession. However, Háda points it out that a holy

15 Belovics–Molnár–Sinku 2015. 283.
16 Id. 196.
17 Háda 2012. 8.

confession to priests of another rite 'requires a very high level of experience from the confessor, as the faculties given to the confessors may be different'.[18] However, the freedom of the penitents to choose the clergyman that they would like to confess their sins to cannot be denied. This rule of the canon law puts extra emphasis on the importance of the confidential relationship between the worshipper and the priest, thus indirectly suggesting the importance of secrecy as well.

It is expressed in Canon 220 of the CIC that 'no one is entitled to unlawfully damage any other person's reputation, nor can the universal right to the protection of privacy be breached'.[19] As regards the importance of this principle, there is some overlap at the level of international treaties, as Article 12 of the Universal Declaration of Human Rights provides that 'no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks'.[20] Thus, the regulatory principles of canonical law and international law can be considered homogeneous based on the above.

The *importance of keeping confessional secrets* is also emphasized in the rules set out in foreign canon law. Münsterischer Kommentar explains all this by the preservation of the authenticity of ecclesiastical preaching: 'if a servant of God loses his authenticity, this may also lead to his dismissal from service'.[21]

Kanonisches Recht approaches these questions from the aspect of personality rights: it expressly describes confessional secrets as an aspect of the right to reputation and the right to privacy. All this means that respecting such rights is justified not only in the case of the believers but also in the case of all persons who perform holy confessions.[22]

Géza Kuminetz states as follows:

> [T]he basis of this right is the human person himself and his dignity. More precisely, the basis is the interiority of the person, i.e. respect for the forum of conscience, which has a double dimension: on the one hand, a person will disclose his own inner world to a person that he finds worthy for it, a person that he would like to share this with. On the other hand, a person will always protect himself from those who would like to find out the secret of his personality unlawfully. This is what is protected by the virtue of modesty. Respecting the latter is what we call ontological respect […]. It is this ontological respect that reputation is built on, which indicates a

18 CIC, Canon 991, see Háda 2012. 41.
19 Cf. CIC, Canon 220 and CCEO, Canon 23, see Háda 2012. 42.
20 Háda 2012. 42.
21 According to Lüdicke 1987. 220/2 in Háda 2012. 42.
22 Aymanns–Mörsdorf 1997. 109 in Háda 2012. 42.

> person's honour in society. The basis for this, on the other hand, is moral respect, and this is what the law safeguards.[23]

The author also makes distinction between the right to reputation and the right to privacy. 'Although the right to reputation and the right to privacy are very similar, they are not equivalent. The right to reputation is meant to protect external honour, while the right to the respect of privacy protects internal honour, so that no one finds it out unlawfully. Such items of information may gravely damage a person's reputation, i.e. his honour as well.'[24]

Anyway, the 'private autonomy of canon law' has been expressed in several areas in the past few centuries besides the holy confession as, for example, in: the so-called private penitence, the sacramental seal, the freedom of choosing the confessor, the scope of procedural rules regarding the confession priests, the mail secrets, or the secrecy obligations of ecclesiastical archives.

In summary, it can be stated that the confessor is the primary obligor of confidentiality, and it is only the penitent who can exempt him from such obligation. 'The permission of the penitent should be express and given absolutely freely so that the confessor can freely use this permission outside the confession'.[25] The secondary obligors of the confessional secret are all those who may obtain any kind of information from the holy confession.

As regards *the rules of secular law*, one can only find very scarce references to the protection of confessional secrets as personal secrets. The definitions 'confession – holy confession' fundamentally belong to the conceptual apparatus of the Roman Catholic Church, which is why the terminology used by secular law should extend the legal evaluation of those actions during which the penitent shares the information qualifying as personal secrets to a clergyman of his or her own choice to a broader scope. The use of the expressions 'clergyman' or 'information concerning personality rights' may prove to be an appropriate way to do so. The relevant laws completely follow this method of solution: pursuant to the provisions set out in Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and on the Legal Status of Churches, Religious Denominations and Religious Communities, a clergyman will not be obliged to share the information affecting personality rights that he has become aware of during his religious service with any public authority.[26]

A fundamental regulatory discrepancy can be observed in the case of the rules on the obstacles of hearing witnesses in our procedural system as the information that constitutes the subject of confessional secrets is viewed as an absolute

23 Kuminetz 2010. 283 (transl. by the author).
24 Kuminetz 2013, in Háda 2012. 43 (transl. by the author).
25 Császár 1944. 117 in Háda 2012. 10–11 (transl. by the author).
26 Section 13(3).

obstacle to witness hearing by the provisions set out in Act XIX of 1998 on the Rules of Criminal Procedure (Be.), while the same is considered only a relative obstacle to witness hearing by Act III of 1952 on the Rules of Civil Procedure (hereinafter referred to as: the Pp.). Based on this, a clergyman and a member of an organization performing religious activities who performs religious rituals as his profession cannot be heard as a witness according to the provisions of the Be. as these persons have a secrecy obligation with regard to these items of information by virtue of their occupation.[27] The grammatical interpretation of this provision of the law suggests that such persons shall not even be summoned as witnesses.

However, from the grammatical interpretation of the Pp., one can conclude that the clergyman is free to decide during the procedure whether he would like to give a testimony or he refuses to do so with reference to reasons of conscience or canon law or by quoting the lack of exemption received from the owner of the secret. The text of the rule says that those persons who are obliged to keep secrets by virtue of their occupation (see e.g. clergymen) may refuse to give a testimony if they would breach their secrecy obligation by testifying, except if they were exempted from this obligation by the affected person.[28]

It also becomes obvious from the above that by using the expression 'clergyman', the Be. contains a specific reference to the relationships affecting the privacy of the church and the worshippers, while the Pp. fails to do so as it exclusively provides on persons 'who are obliged to secrecy through their occupation'.

I think that this regulatory conflict in itself does not run counter to the provisions set out in the Fundamental Law of Hungary; still, the homogenization of our procedural codes would be necessary with regard to the definition of the obstacles to giving a testimony and the legal consequences thereof.

4. The Appearance of Medical Secrets as Personal Secrets in the Healthcare Acts of Hungary

'One of the characteristics of medical activity is that it definitely affects personality rights, the medical doctor inevitably restricts these rights by recording the concrete medical history. This is why trust, reliance, the sincere disclosure of the medical history and the symptoms are required, but these may be misused by both sides. Thus, trust has a higher ranking ethical requirement in this situation.'[29] The definition in Act XLVII of 1997 on the Management and Processing of Patient Data (hereinafter referred to as: the Eüak.) says that medical secrets include the healthcare and personal identification data that the data manager becomes aware of

27 Section 81(1), point a).
28 Section 170(1), point c).
29 Lomnici 2013. 22 (transl. by the author).

during the medical treatment; furthermore, any other data regarding the necessary medical treatment, one that is in progress or has been completed as well as those that have been shared with regard to the medical treatment [Section 3, point d)].

Based on the secrecy obligation, healthcare workers as well as any other persons who have a legal relationship aimed at work with the healthcare provider are subject to a secrecy obligation regarding any and all data and facts on the health status of the patient as well as any other data and facts that they have become aware of during the provision of healthcare services, without any time limitation, irrespective of whether they have become aware of these data directly from the patient – during their examination or medical treatment – or indirectly from the healthcare documentation or in any other way. The secrecy obligation does not refer to those cases where the patient has given exemption from this or if the data supply obligation is prescribed by law (for example, in a criminal procedure).[30]

The health service provider, except for the affected person's elected GP and the forensic medical expert, is also bound by the secrecy obligation towards the health service provider which was not involved in the medical examination, the establishment of the diagnosis, the medical treatment or the performance of the surgery, except if the communication of the data was necessary for setting up the diagnosis or the further medical treatment of the affected person.[31]

As long as the healthcare documentation on the patient also contains data that affect the right of another person to a personal secret, the right of review can only be exercised with regard to the specific part that refers to the patient.

Both the data manager and the data processor are obliged to keep the medical secret, except if the interested party or their statutory representative has given their written consent to the forwarding of the healthcare data and the personal identification data, with the restrictions specified therein; furthermore, if the obligatory forwarding of the healthcare data and personal identification data is required by law.[32]

Act CLIV of 1997 on Healthcare (hereinafter referred to as: the Eütv.) contains a high number of procedural rules which are directly related to the importance of the (legal) institution of medical privacy. First of all, it should be highlighted that the persons involved in the provision of healthcare services are only entitled to communicate any and all healthcare and personal data that they have become aware of during the provision of the healthcare services to the eligible persons, and subsequently they will also be obliged to treat these data confidentially. In my opinion, it is this 'patient right' that can be regarded as one of the starting points

30 Getting familiar with the healthcare documentation. Information on the data managed during the provision of healthcare services and the rights of the affected persons. http://www.tesz.co.hu/static/media/files/2016/eu_dok_megismerese_borito_0328_v5.pdf (accessed: 10.03.2017).

31 http://kmmk.hu/wp-content/uploads/2016/01/Az-egeszsegugyi-es-a-hozzajuk-kapcsolodo-szemelyes-adatok-vedelmerol.pdf (accessed: 10.03.2017).

32 Eüak. (Act XLVII of 1997 on the Management and Processing of Patient Data), Section 7(1).

for medical privacy. The patient is also entitled to make a statement on who they would like to give information to on their condition, the expected outcome of their disease, and whom they would like to exclude from the partial or complete knowledge of their healthcare data.

The limitation of the persons who are present in medical situations also belongs to the conceptual scope of the confidentiality regarding medical treatments and patient care. The keeping of medical secrets may be jeopardized in lack of listing this in the law. It is not a coincidence that both the Eütv. and the Eüak. contain cogent rules regarding the right to be present.

The Eütv., quite rightly, specifically provides on the circumstances of conducting the examinations as well: as a general rule, the medical treatments should be performed in such a way that no other person could see or hear these without the patient's consent (except if this is unavoidable in an emergency situation). Thus, according to the law, the patient, as a general rule, is entitled to a situation where only those persons are present during their examination and medical treatment whose participation is necessary for administering the healthcare service or to the presence of whom they have previously given their consent.[33]

The above rule is also confirmed by the Eüak., based on which, besides the doctor who administers the medical treatment and other healthcare provider staff members, it is only those persons to whose presence the patient has given their consent to who may be admitted during the medical treatment.[34] Healthcare information, which, if not disclosed, may result in the deterioration of the patient's condition, may be communicated to the person who provides further patient care and medical care without the consent of the affected patient.

The information that falls within the scope of medical secrets can be used in criminal proceedings whenever the need for this emerges. These data may be related to the accused person, the victim, or the witness alike.

Data are usually gathered as early as in the investigation phase: after ordering an investigation, in order to explore the facts of the matter, the prosecutor or, with

33 Eütv. (Act on Healthcare), Section 25(5).

34 By respecting the human rights and dignity of the patient, another person may be present without the consent of the affected party if the regime of the medical treatment requires that several patients be treated at the same time; a professional staff member of the police may be present if the medical treatment is administered to a detainee; a member of the penitentiary institution in a service relationship as long as the medical treatment is administered to a person who is serving his sentence involving imprisonment in the penitentiary institution and this presence is necessary for ensuring the security of the person providing the medical treatment as well as for preventing the patient's escape; these persons may also be present if this is made necessary by the patient's personal security from the interest of prosecution and the patient is in a condition that does not allow them to make a statement; those persons who earlier treated the affected person for a medical condition or who was permitted by the head of the institution or the person responsible for information security to do so for a professional-scientific purpose (except if the affected person has expressly protested against this), Eütv. (Hungarian Act on Healthcare), Section 25(5).

the prosecutor's approval, the investigation authority may request data supply on the suspect (on the reported person or the person who can be accused of having committed the act) from the healthcare organization and the related data management unit, according to the rules on inquiries, if this is made necessary by the nature of the case. Providing such data cannot be refused.[35]

Pursuant to the provisions set out in the Be, the court, the prosecutor as well as the investigation authority may contact any and all healthcare institutions maintained by the state or the municipality for requesting information, data, or asking for documents to be delivered to them. For these, the relevant authority may set a deadline of a minimum eight days and a maximum thirty days. The contacted party will be obliged to restore any data that have been coded or incomprehensible in any other way to their original condition preceding delivery or communication and to make the content of the data cognizable to the inquiring party. The contacted institution will be obliged to perform the data supply, which includes especially the processing, the written or electronic capturing, or the forwarding of the data, free of charge, as well as to perform the task or to communicate the obstacle to such performance within the prescribed deadline.

If the request refers to the communication of personal data (i.e. medical secrets), this may only concern such and as many items of personal data as are absolutely necessary for fulfilling the purpose of the request. In the request, the exact purpose of the data management and the scope of the requested data should be indicated. If, as a result of such request, an item of data that is unrelated to the purpose of the inquiry becomes known to the requesting party, the data should be deleted.[36]

The legal obtaining of data that constitute medical secrets cannot only take place through requests but also through other official coercive measures. Based on these, a search may also be conducted at the healthcare institution if the statutory conditions defined by the Be. are met. However, if such coercive measures are aimed at finding a document that contains healthcare data, then it is exclusively the court that will be entitled to order such a search, and the procedural activity can only be performed in the prosecutor's presence.[37] It is also only the court that can order the seizure of documents containing healthcare data which are kept at the healthcare institution.[38]

35 See *Footnote 32*.

36 If the organization contacted fails to fulfil the request within the prescribed deadline or unlawfully refuses to fulfil the request, a disciplinary penalty may be imposed [Be., Section 71].

37 Be., Section 149(6).

38 Be., Section 151(3).

5. Interpreting Attorney–Client Privileged Information as Personal Secret Based on the Hungarian Criminal Procedures Act (Be.), the Act on Attorneys at Law (Ütv.), Ethical Rules on Attorneys' Activities, and International Case-Law

In Hungary, it is *attorney–client privileged information* that is governed by the most complex sets of rules. This is not without a reason since ethical rules governing attorneys' activities are of a constitutional significance. Rule 1/2011 (III. 21.) on Ethics for Attorneys stipulates that:

> [I]n a society based on respecting the principle of constitutionality, attorneys have a special role. Their duty goes beyond duly performing their assignment within the legal framework. Attorneys shall serve justice and represent the interests of those whose rights and freedoms they have been mandated to guarantee and protect; their duty is not merely to represent a client in a case but also to act as a consultant for this client. Respecting attorneys' profession is an essential condition of constitutionality and democracy in society. (1. 1)

In the view of Tamás Sulyok, the primary function of regulations on attorney–client privileged information is the protection of public confidence.[39] By virtue of Act XI of 1998 on Attorneys at Law (hereinafter referred to as: the Ütv.), as a general rule, attorneys shall keep confidential any data or facts acquired in the course of exercising their profession. This obligation is irrespective of the existence of the power of attorney relationship and is retained even after the termination of the attorney's activity. The confidentiality obligation also governs other documents made and possessed by the attorney if these include any facts or data in the scope of confidentiality. In the course of the inquiry conducted at the attorney's offices, the attorney shall not disclose documents or data with reference to their client but shall not hinder the inquiry either.

The client, the client's legal successor as well as the client's authorized representative may grant exemption from the confidentiality obligation. At the same time, even in the case of exemption, the attorney shall not be interrogated as a witness about facts or data he acquired as a defender.

The confidentiality obligation duly governs attorney-at-law offices and their employees, the organs of the attorney's profession and the officials and employees of the latter as well as natural and legal entities engaged in storing, archiving, and guarding electronic or printed documents containing confidential data or

39 Sulyok 2013. 132.

processing the data contained therein. To me, from the teleological interpretation of this provision, it follows, among others, that the attorney shall communicate data that are relevant for the essence of the case to his employees only with his client's approval, i.e., in principle, the confidentiality obligation is retained also with reference to the employees of the attorney's office until the client gives exemption from this.

The Ütv. allows to end the attorney's confidentiality obligation with reference to disciplinary proceedings only: on the basis of this, in disciplinary, investigative, and inspection cases launched by the Bar Association, in cases where the access to data in the scope of attorney–client privileged information is essential for the proceedings to be successful, the attorney shall be exempted from the confidentiality obligation before the administering Bar Association organs and the court, in relation to the subject of the case.[40]

Attorney–client privileged information involves not only obligations but entitlements as well. Accordingly, both in criminal and civil proceedings, there are legal arrangements established ensuring the attorney's independence in exercising his activity and guaranteeing the implementation of certain professional aspects. Consequently, being an attorney is an absolute obstacle for interrogation in the case of defence lawyers (i.e. in criminal cases)[41] and a relative obstacle in that of legal representatives (i.e. in civil cases).[42] As was outlined above, the lack of uniform regulations is unfortunate since the Ütv. clearly stipulates a confidentiality obligation for all types of cases and, considering the above regulation, the legislator creates a contradicting situation for the attorney's profession.

In the criminal proceedings, specifically identified guarantees must be implemented in the course of the investigation. The most important factor is compliance with the principle of proportionality, the essence of which is that neither interests related to investigation nor those related to attorney–client privileged information may be violated. Thus, the Be. must specifically and individually stipulate in the case of all legal institutions that may come into question in this context the scope as well as the content of intervention by the authorities. A good example for this is that, when specifying the norms of the conduct of a search, legislators state that with reference to attorney's offices this may be ordered by the court and executed in the presence of a prosecutor exclusively.[43] It raises concerns at the same time that the act restricts the

40 Sections 8(1)–(5).

41 The Be. stipulates that counsels for the defence may not be heard as witnesses on issues which have come to their cognizance or which they communicated to the defendant in their capacity as a counsel for the defence [Section 81(1)].

42 The Act on Civil Procedures (Pp.) stipulates that the attorney may refuse to be interrogated as a witness if his confidentiality obligation was violated by a witness testimony, except where exempted from this obligation by the interested party [Section 170(1)].

43 Section 149(6).

implementation of this rule exclusively to the case where the investigative action concerned aims to locate some document containing professional secrets.

It is a disputed question at the same time if the defender has an information obligation at all and, if he has, at what point this becomes applicable. I believe that this may be applicable only in extremely exceptional cases to be governed by the law by all means. In this scope, the actual relationship (authorization or delegation) is certainly not relevant. What is much more relevant is the attitude towards the attorney's role that an attorney may never assign himself the role of the defendant's 'accomplice'.

The essence with reference to attorney–client privileged information is, I believe, that any information (meaningfully) communicated between the defendant and the defender with reference to the criminal case concerned is strictly confidential. This confidentiality feature must primarily be implemented in the defendant's mind, who should regard the defender not as part of the official machinery but as his supporter. In order that the above aspects be implemented it is important that the defender commit in the service agreement in writing to keeping attorney–client privileged information confidential. In my opinion, introducing legal provisions for any form of such a written commitment for delegated defenders as well should also be considered.

The scope of data constituting attorney–client privileged information is relatively difficult to define; there are no exhaustive or exemplificative lists in relation to this issue in the Ütv. either. While it is clearly impossible to pass exhaustive provisions in this scope, with reference to the nature of certain kinds of secret, certain categories could be introduced (e.g. attorney–client privileged information constitutes especially information communicated between the defender and the defendant in speaking areas, the contents of electronic communication between the legal representative and his client, etc.). Beyond these, the act should specify that attorney–client privileged information shall only be information that qualifies as meaningful for the consideration of the defendant or the case. It should also be stipulated that the confidentiality obligation does not arise at the moment of signing the service agreement but from that of the first oral communication; what is more, the premises of the latter (e.g. public area, a court building, an attorney's office) are totally irrelevant for the obligation to arise. Whether the power of attorney is free of charge or not has no significance likewise. From all these, it can be concluded that describing the concept of attorney–client privileged information still requires legislative efforts.

As regards the *ECHR case-law in relation to interpreting attorney–client privileged information*, the number of cases before the Court can be considered significant, and decisions clearly move towards the implementation of the widest possible protection of secrets.

The court ruled against Germany in a case where authorities seized, on the basis of a judicial decision, various documents at an attorney's office. The decision maker assigned special significance to the personal (confidential) relationship between the attorney and his client as well as to the fact that the execution of the search negatively affected the attorney's professional prestige.[44] The decision ruled that the intervention implemented was not proportionate to its purpose. Sharing the view of Sándor Papp, I am of the opinion that in Hungarian regulations a house search should be prohibited where 'the disadvantages involved in the house search exceed the benefits attainable from the measure'.[45]

In the case *Domenichini v. Italy* (1996), the Court ruled that the right to private and family life was violated since the detainee's letters were inspected by the administering authority. Simultaneously, Article 6(3)(b) of the Convention (to have adequate time and facilities for the preparation of the defence) was violated by the fact that the applicant's letter to his lawyer including the justification required for submitting the cassation appeal was opened and returned to him only after the ten-day deadline of submitting it to the Court of Cassation had expired (and the attorney was able to submit it missing the deadline).

In the case *Kopp v. Switzerland* (1998), the Court also established the violation of the Convention because telephone conversations had been tapped at the applicant lawyer's office. The same conclusion was made by the Court in the case *Petra v. Romania* (1998) as well, where the essence of the legal violation was that the detainee's correspondence with the European Court of Human Rights was inspected.[46]

6. Closing Thoughts

The law currently in force lists as many as eleven statutory definitions regarding the violations of confidentiality besides the violation of personal secrets, which may lead to the difficult terrain of 'overregulation' in the future: mail fraud (Section 224 of the Btk.), criminal offences with classified information (Section 265 of the Btk.), criminal offences against public records and registers recognized as national assets (Section 267 of the Btk.), violation of confidentiality related to the judiciary (Section 280 of the Btk.), breach of seal [Section 287(1), Points c)–d) of the Btk.], criminal offences related to elections [Section 350 (1), Point f) of the Btk.], breach of trade secrecy (Section 413 of the Btk.), breach of business secrecy (Section 418 of the Btk.), illicit access to data (Section 422 of the Btk.),

44 Bérces 2014. 98.
45 Papp 1997. 31 (transl. by the author).
46 Fenyvesi 2002. 110.

covert information gathering without authorization (Section 307 of the Btk.), and unlawful integrity test (Section 308 of the Btk.).[47]

In my view, the violation of personal secrets may be regarded as the basic statutory definition of all the secrecy-related crimes. In my study, I have made an attempt at analysing such types of personal secrets regarding which there are no meaningful requirements set by either the Btk. or the Be. It is obvious that confessional, medical secrets as well as attorney–client privileged information are recognized as personal secrets; however, regarding their content-related features, one can exclusively rely on the requirements set out in other laws or in the ad-hoc decisions that become familiar through judicial practice.

The near future will see the dominance of actions running counter to the law on illicit access to data.[48] According to the ministerial justification, 'the new statutory definition is based on the international laws, and its place in the law is justified by its connection to computer-related crime'.[49] This statutory definition is special because of the mode of committing this act; however, it also protects the right to privacy, and so the legal policy reasons underlying its introduction are similar to those of the breach of personal secrets.[50]

As regards the statutory definition of the invasion of privacy (Section 223 of the Btk.), I have the following regulatory proposals:

1. In the statutory definition, it would make more sense to use the expression 'occupation' instead of the unnecessary distinction between professions and public mandates.

2. The Btk. should make references to those types of secrets, as examples, which often occur in everyday life and the exposure of which fits into the offending behaviour set out in the above-mentioned statutory definition (e.g. attorney–client privileged information, medical secrets, notary public secrets, etc.).

3. The sets of rules laid out in the Be. and the Pp. should be integrated with regard to the standardization and legal consequences of the obstacles to hearing witnesses. In my view, the Pp. should follow the system of the Be. (i.e. this quality should be stipulated as an absolute obstacle to witness hearing in the case of clergymen, medical doctors, and attorneys as well).

47 Verebics 2013. 5.

48 See crimes against information systems, the Hungarian Criminal Code, Chapter XLIII, Section 422.

49 László 2013.

50 The offending behaviours are defined rather broadly: 1. covertly searching the home or other property, or the confines attached to such, of another person; 2. monitoring or recording the events taking place in the home or other property, or the confines attached to such, of another person, by technical means; 3. opening or obtaining the sealed consignment containing communication which belongs to another and recording such by technical means; 4. capturing correspondence forwarded by means of electronic communication networks, including information systems, to another person and recording the contents of such by technical means.

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The Anti-Circumvention Procedure in the Audiovisual Media Services Directive

Zsolt Kokoly
PhD, Senior Lecturer
Sapientia Hungarian University of Transylvania (Cluj-Napoca, Romania),
Department of Law
E-mail: kokolyzsolt@sapientia.ro

Abstract. Recent challenges in the EU business sector also comprise the revision of the Audiovisual Media Services Directive (the new text in force since December 2018), the main media policy tool of the EU which establishes the legal framework for a convergent media landscape that comprises linear, non-linear audiovisual media services and, recently, also video-sharing platforms (VSPs) and user-generated content. One of the novelties in the revised text of the AVMSD is the new set of legal provisions enshrined in Art. 4 referring to the anti-circumvention procedure, a phenomenon the European media landscape has long been familiar with (i.e. broadcasters from another Member State circumventing the stricter rules of the target Member State). The need for a more transparent and efficient regulation originated in the practical difficulties of applying (pre-revision) Art. 4 by national regulating authorities (NRAs) as in many cases providers of audiovisual media services falling under another Member State's jurisdiction refused to comply with their stricter rules or did not show any willingness to collaborate. The burden of proving the existence of circumvention or the evidence base to identify has proved to be a particularly difficult task for NRAs. The amended text of the AVMSD extends the power of the Member States to trigger the anti-circumvention procedure based on reasonable cause rather than the former requirement to prove the intention of circumvention by the provider. Also, the new set of provisions allows Member States to have circumvention reasonably established. Another novelty in the anti-circumvention procedure is the mandatory opinion that is to be requested by the European Commission from the European Regulators Group for Audiovisual Media Services (ERGA). The paper proposes to discuss the evolution of anti-circumvention measures in the two versions of the AVMSD as well as the projected effect on the phenomenon of circumvention of stricter rules on the new provisions.

Keywords: EU single digital market, Audiovisual Media Services Directive, country of origin principle, circumvention of law, anti-circumvention procedure

1. Introduction

Recent challenges in the EU single market comprise, among other processes, the revision of the Audiovisual Media Services Directive (AVMSD),[1] the main media policy tool of the EU, which establishes the legal framework for a convergent media landscape and which covers all services of audiovisual content irrespective of the technology used to deliver the content. Taking into account the degree of choice and user control over services, the AVMSD makes a distinction between linear (television broadcasts) and non-linear (on-demand) services. Lately, the directive's material scope has also extended certain audiovisual rules to video-sharing (online) platforms (VPSs) such as YouTube and user-generated content shared on social media services such as Facebook.

Aspects relating to the territorial scope of the AVMSD gain importance in the context of dynamic and globally expanding cross-border broadcasting and content distribution. Establishing jurisdiction of a Member State over broadcasters is one of the key issues in this field, and the 'cornerstone' of the EU media policy in establishing jurisdiction over audiovisual media services is the country of origin principle (irrespective of the type of content involved).

The phenomenon of circumvention of law in the field of broadcasting, audiovisual media services, and online media content dissemination has been intrinsically linked over time to the development of the general framework of converging media markets and statutory instruments of European media law.

The phenomenon of 'forum shopping' for the most favourable jurisdiction became particularly attractive with commercial satellite broadcasting in the 1980s and is still attractive today for audiovisual media service providers from third countries that do not have an affiliation with a particular Member State.[2]

The Television Without Frontiers Directive (TWFD)[3] (1989) did not contain measures against alleged circumvention of stricter laws by broadcaster though in practice this phenomenon was known and the corpus of pertinent case-law[4] kept

1 Directive 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13 on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities (OJ, L 303 of 28.11.2018. 69.); Directive 2010/13/EU of European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (codified version) (OJ L 095 15.4.2010. 1).

2 Wagner 2014. 286.

3 Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the pursuit of television broadcasting activities. OJ L 298, 17.10.1989. 23–30.

4 Most notable cases including: Case C-56/96 VT4 Ltd v Vlaamse Gemeenschap [1997] ECR I-3143; Case C-212/97 Centros v Erhvervs-ogSelskabsstyrelsen [1999] ECR I-1459; Case C-11/95 Commission v Belgium [1996] ECR I-4115; Case C-14/96 Paul Denuit [1997] ECR I-2785; Case

extending and being refined, jurisprudence of the Court of Justice of the European Union (CJUE) offering guidelines for law practitioners in the broadcasting sector.

As a legal instrument, the anti-circumvention procedure has been created for inclusion in the AVMSD (2007), contained in Art. 4 and complemented by references in the Recital of the Directive. The text of the procedure was not modified for a decade (2007–2018), but the now codified version of the revised Directive has seen significant changes in the procedural aspect of the anti-circumvention procedure.

The need for a more transparent and efficient regulation was one of the key factors in the process of revision of the Directive, started in 2015 and concluded at the end of the year 2018, requiring Member States to include it in their national law by September 2020.

The revised version of the AVMSD (December 2018) strengthens the country of origin principle and extends the power of the Member States to trigger a circumvention procedure based on reasonable cause rather than the former requirement to prove intention of circumvention by the provider, a previously seemingly impossible task for national regulating authorities (NRAs).

It is rather early to speculate if the implemented anti-circumvention procedure will prove to be a more efficient tool than its predecessor, but some provisional remarks can be formulated.

In order to have a cogent understanding of the anti-circumvention procedure, principles, and procedural aspects involved, the guidance offered by relevant case-law and pertinent scholarship, it is necessary to first present its historical evolution as well as the underlying core principle: the country of origin principle.

2. The Territorial Scope of the AVMSD – The Country of Origin Principle

The country of origin principle has been intensely analysed, criticized, and endorsed over the decades under the TWFD (1989) and then the AVMSD (2007),[5] the jurisprudence of the European Court of Justice also contributing to the shaping of this debate.[6] Even though media consumption habits have undergone significant changes in this period and emerging new technologies resulted in a highly diverse audiovisual media landscape, this principle still remains the governing element

33/74 Van Binsbergen v Bestuur van de Bedrijfsvereniging [1974] ECR 1299; Case C-23/93 TV 10 SA v Commissariaat voor de Media [1994] ECR I-4795; Case C-355/98 Commission v Belgium [2000] ECR I-1221.

5 Naming here only a few titles from an otherwise abundant critical literature: Cole 2018, 2011; Weinand 2018; Wagner 2014; Craufurd Smith 2011; Polyák–Szőke 2009; Herold 2008; Kokoly 2015.

6 See supra *Footnote 4*.

for the regulatory framework for European media markets and audiovisual media offers. It states that a provider that falls under the jurisdiction of one EU Member State can rely on complying with the legal framework of (only) that specific State in order to be authorized to disseminate content across all EU Member States.

The country of origin principle creates rules both for original (sending) Member States as well as host (receiving) Member States.

Members States are required to ensure that all broadcasters of audiovisual media services falling under their jurisdiction are compliant with the national regulatory framework. This requirement also guarantees that the minimum requirements laid down by the relevant European legislation are met by all audiovisual media content providers operating in Member States.

Receiving members states are required to ensure the freedom of transmission for audiovisual media services originating from another Member State, restriction of transmission being prohibited on areas that are harmonized by the AVMS Directive.

The country of origin principle comprises the prohibition of double jurisdiction/ avoidance of absence of jurisdiction and acts as the key element in guaranteeing the freedom of transmission.

This principle is enshrined in Art. 2 of the AVMS Directive, declaring in its first paragraph that each Member State shall ensure that all audiovisual media services transmitted by media service providers under its jurisdiction comply with the rules of the system of law applicable to audiovisual media services intended for the public in that Member State.[7]

However, the scope of the Directive does not apply to audiovisual media services intended exclusively for reception in third countries and which are not received with standard consumer equipment directly or indirectly by the public in one or more Member States.[8]

Art. 2 contains in paragraphs 3 and 4 a detailed set of circumstances under which jurisdiction for media service providers can be established, organized by primary criteria such as the media service provider's head office, editorial decisions, significant part of the workforce involved in the production of audiovisual media programmes as well as ancillary or technical criteria such as the use of a satellite up-link situated in or a satellite capacity of a Member State.

A fallback clause was provided in Paragraph 5 of the old text: in case that jurisdiction could not be determined in accordance with paragraphs 3 and 4. In this case, the competent Member State was to be that in which the media service provider is established within the meaning of articles 49–55 of the Treaty on the Functioning of the European Union (TFEU).[9]

7 AVMSD Art. 2. 1.
8 AVMSD Art. 2. 6.
9 AVMSD Art. 2. 5.

Paragraph 5 was significantly modified after the conclusion of the revision process: it does not contain additional criteria for establishing jurisdiction but rather imposes requirements on Member States meant to ensure a more swift and efficient communication between all parties concerned: media service providers in Member States, NRAs, the Commission, and the competent European body (European Regulators Group for Audiovisual Media Services – ERGA).

The role of the newly inserted paragraphs is to provide more clarity in procedural aspects referring to the determination of the competent State having jurisdiction over a specific media provider.[10]

The paragraphs pertaining to establishing jurisdiction of media service providers are as follows (*emphasis* added for the newly – after the revision – inserted text):[11]

> Art. 2(3)
> For the purposes of this Directive, a media service provider shall be deemed to be established in a Member State in the following cases:
> (a) the media service provider has its head office in that Member State and the editorial decisions about the audiovisual media service are taken in that Member State;
> (b) if a media service provider has its head office in one Member State, but editorial decisions on the audiovisual media service are taken in another Member State, the media service provider shall be deemed to be established in the Member State where a significant part of the workforce involved in the pursuit of the programme-related audiovisual media service activity operates. If a significant part of the workforce involved in the pursuit of the programme-related audiovisual media service activity operates in each of those Member States, the media service provider shall be deemed to be established in the Member State where it has its head office. If a significant part of the workforce involved in the pursuit of the programme-related audiovisual media service activity operates in neither of those Member States, the media service provider shall be deemed to be established in the Member State where it first began its activity in accordance with the law of that Member State provided that it maintains a stable and effective link with the economy of that Member State;
> (c) if a media service provider has its head office in a Member State but decisions on the audiovisual media service are taken in a third country, or vice versa, it shall be deemed to be established in the Member State concerned provided that a significant part of the workforce involved in

10 Cole 2018. 10.

11 For a detailed analysis and word-for-word comparison between the original (2007) and the revised (2018) text of AVMSD, see Cole 2018. 11–25.

> the pursuit of the audiovisual media service activity operates in that Member State.
>
> Art. 2(4)
> Media service providers to whom the provisions of paragraph 3 are not applicable shall be deemed to be under the jurisdiction of a Member State in the following cases:
> (a) they use a satellite up-link situated in that Member State;
> (b) although they do not use a satellite up-link situated in that Member State, they use satellite capacity appertaining to that Member State.

The general motive of having criteria establishing jurisdiction over service providers is to make sure that no provider that qualifies as being within the scope of the AVMSD falls in a 'vacuum of jurisdiction' by not having a Member State competent to it. This was already made clear in the recitals of the very first TWFD: 'Whereas it is consequently necessary and sufficient that all broadcasts comply with the law of Member State from which they emanate.'[12]

3. Circumvention of Law

As indicated above, in the general overview, the phenomenon of circumvention of law refers to an abusive behaviour (wilful intention to elude the stricter rules of a given Member State) by media services providers, first emerging in the 1980s and still present today.

In the framework of the existing legal instruments, the country of origin principle seems to offer a great opportunity for audiovisual media service providers who want to disseminate certain content in a particular country, but who are prevented from doing so because of a stricter set of rules in that country. In such cases, these providers could simply establish themselves in a country with less strict but still EU-compatible rules and retransmit their programmes to the country that they initially intended to reach. This receiving country would basically be prohibited from imposing its own regulatory standards on the service providers.[13]

The principle that a single State has jurisdiction over a particular media service can lead to 'regulatory disjuncture', where the rules applicable to a specific service are established by country A, but the service is targeted at, or predominantly received in, country B, where different standards apply. This creates tensions between countries and concerns that fundamental social and

12 Cole 2018. 28.
13 Oster 2016. 165–168.

cultural norms are being undermined by European Union internal market rules.[14] TWFD, like AVMSD, provided a minimum standard of harmonized protection but left it open to Member States to offer higher standards of protection to be complied with by broadcasters under their jurisdiction.

Also, concerns can be voiced regarding the possibility of media service providers to easily circumvent the rules and regulations of one country by establishing themselves in another country, with little recourse to that other country on the established basis of mutual recognition of rules. The implications from a rule of law perspective would be problematic and could warp the EU audiovisual media market regulation, rendering them unsustainable in the long run.

The Court of Justice of the European Union (CJEU) has faced this issue in a wide range of cases, in which it sought to distinguish situations where the broadcaster was intentionally seeking to circumvent stricter standards in certain Member States by establishing itself in a different Member State from those in which the establishment was organic and without wilful elusion.[15]

Reflecting on the need to establish more transparency on the matter of anti-circumvention, a complete set of rules – both conceptual as well as procedural – has been included in the text of the AVMSD.

4. Provisions on Circumvention of National Rules in the AVMSD Before the Revision Process

The issue of legal jurisdiction over broadcasters and the arising practical aspects of circumvention of stricter laws have been recurrent topics also in scholarship and in professional forums of broadcasting regulators.

Besides case-law, professional forums have also made significant efforts to analyse and interpret circumvention of law: the European Platform of Regulatory Authorities (EPRA) established in 1995 as Europe's oldest and largest network of broadcasting regulators has had the issue of circumvention cases on the agenda as early as 1996.[16]

Debates for a wide variety of concrete cases of circumvention have taken place in the framework of EPRA meetings, seen by practitioners as situations 'where a broadcaster puts together a television channel aimed at the audience of a State (of reception) but establishes itself in another State (country of origin) deliberately in order to bypass (the usually stricter) rules of the State of reception'.[17]

14 Craufurd Smith 2011. 263.
15 Volman 2018. 8.
16 34th EPRA Meeting Content Regulation and New Media: Jurisdiction Challenges in a VOD Environment. Brussels, La Hulpe, 5–7 October 2011.
17 Ibid.

The adoption of the AVMSD in 2007 brought about the absolute novelty of including codified provisions on the circumvention of national rules in Art. 4 of the Directive, ensuring the right for Member States to adopt appropriate measures against the broadcasters concerned in cases involving suspected circumvention of law.

As a general rule laid down in the provisions of the AVMSD – and also in the spirit of the TFEU, which requires the EU to respect and promote the diversity of its Member States' cultures –, EU governments may not restrict which media content people can receive or what programmes foreign media service providers can retransmit in their country provided that the broadcasts comply with the EU Audiovisual Media Services Directive in the country where they originate.

At the same time, the AVMSD does not completely harmonize the rules relating to all areas to which it applies but provides only minimum harmonization. Consequently, Member States are granted the right in Art. 4(1) to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by the Directive, under the condition that they are in compliance with EU law.

Restriction of freedom of reception and retransmission by a Member State invoking the anti-circumvention procedure has been given the form of a detailed and complex set of actions, as laid down by the text of the Directive. Article 4(1) reiterates that Member States shall remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by this Directive provided that such rules are in compliance with European Union law.

> Art. 4
> 2. In cases where a Member State:
> (a) has exercised its freedom under paragraph 1 to adopt more detailed or stricter rules of general public interest; and
> (b) assesses that a broadcaster under the jurisdiction of another Member State provides a television broadcast which is wholly or mostly directed towards its territory;
> it may contact the Member State having jurisdiction with a view to achieving a mutually satisfactory solution to any problems posed. On receipt of a substantiated request by the first Member State, the Member State having jurisdiction shall request the broadcaster to comply with the rules of general public interest in question. The Member State having jurisdiction shall inform the first Member State of the results obtained following this request within 2 months. Either Member State may invite the contact committee established pursuant to Article 29 to examine the case.

> 3. The first Member State may adopt appropriate measures against the broadcaster concerned, where it assesses that:
> (a) the results achieved through the application of paragraph 2 are not satisfactory; and
> (b) the broadcaster in question has established itself in the Member State having jurisdiction in order to circumvent the stricter rules, in the fields coordinated by this Directive, which would be applicable if it were established in the first Member State.
> Such measures shall be objectively necessary, applied in a non-discriminatory manner and proportionate to the objectives which they pursue.
> 4. A Member State may take measures pursuant to paragraph 3 only if the following conditions are met:
> (a) has notified the Commission and the Member State in which the broadcaster is established of its intention to take such measures while substantiating the grounds on which it bases its assessment; and
> (b) the Commission has decided that the measures are compatible with Union law, and in particular that assessments made by the Member State taking those measures under paragraph 2 and 3 are correctly founded.
> 5. The Commission shall decide within 3 months following the notification provided for in point (a) of paragraph 4. If the Commission decides that the measures are incompatible with Union law, the Member State in question shall refrain from taking the proposed measures.

Two aspects are pertinent to these provisions: firstly, that the procedure is complex, time consuming, and particularly challenging as far as Members States relying on it carry the burden of proving intentional circumvention and, secondly, that the procedure applies only to broadcasters, not to on-demand audiovisual media services, and non-linear audiovisual media services fall under the general regulatory framework provided by the CJUE. This is to be inferred from Recital 57 of the E-Commerce Directive (non-linear audiovisual media services being not only subject to the AVMS Directive but also to the E-Commerce Directive).[18]

Nevertheless, some Member States can be considered as having introduced a specific circumvention procedure for non-linear services in their legal framework. As an example in this sense, EPRA stated that in France, Art. 43(10) of the law of 30 September 1986 on Freedom of communication states that 'if a television service or an on-demand audiovisual media service whose programmes are wholly or mostly directed at the French public is established on the territory of another Member State of the European Community or part of the European Economic Area, with the main objective of escaping from the application of French regulation, it is deemed

18 Oster 2016. 168.

to be subject to the rules applicable to services established in France, in conditions set by a decree of the Conseil d'Etat'. Article 4 of the Decree of 17 December 2010 on television services and on-demand audiovisual media services retransmitted from other European Member States sets identical conditions for television and on-demand services, namely that of transposing Article 4(2) of the Directive – thus effectively extending the scope of Article 4(2) to on-demand services.[19]

Also in the EPRA proceedings, another example is given: in the French-Speaking Community of Belgium, the legislator introduced the possibility to intervene against an on-demand media service whose provider is established in another Member State with the aim to circumvent the rules applicable to the services falling under its jurisdiction: Art. 159 § 6 of the coordinated Decree on audiovisual media services (Décret coordonné sur les services de medias audiovisuels). However, in contrast to France, it does not require a consultation of the European Commission – thus effectively introducing a sui generis rule for on-demand services.[20]

Scholars such as Craufurd-Smith indicate that Article 4 of the AVMSD should be read in the light of jurisprudence. She offers an in-depth analysis on the issue whether the abuse of law principle operates at the European level merely as a principle of interpretation or whether it is of more general application. If the former is the case, it can be used to restrict the remit of a right and thus preclude reliance on it to evade domestic or EU rules, but it cannot be used 'contra legem'. The clear limitation in the Directive of the circumvention principle to broadcast services, coupled with the jurisdictional provisions in Article 2(3) of the AVMSD, could then be seen to preclude its application to on-demand services. There is, however, a strong argument that the abuse of law principle is a general, self-standing principle of EU law.[21]

Jurisprudence in relation to circumvention of law[22] is referenced also in recitals 41 to 43 of the AVMSD, which offer further legal tools in examining situations where a broadcaster under the jurisdiction of one Member State provides a television broadcast which is wholly or mostly directed towards the territory of another Member State.[23]

Corroborating the recitals with the procedure laid down in Article 4 of the AVMSD, it transpires that the European legislator considered it to be an appropriate solution for circumvention cases, the cooperation of Member States, the codification of case-law of the Court of Justice, combined with a detailed procedure. Moreover, in Recital 42 of the AVMSD, it is stated that a Member State should assess on a case-by-case basis whether a broadcast by a media service

19 See *Footnote 17*.
20 Craufurd Smith 2011. 281.
21 Id. 282.
22 See *Footnote 4*.
23 AVMSD Recital 41.

provider established in another Member State is entirely or mostly directed towards its territory. The assessment may refer to indicators such as the origin of the television advertising and/or subscription revenues, the main language of the service, or the existence of programmes or commercial communications targeted specifically at the public in the Member State where they are received.

It is important to mention that the Court of Justice has consistently held that any restriction on the freedom to provide services, such as any derogation from a fundamental principle of the Treaty, must be interpreted restrictively.[24]

Scholars have demonstrated early on[25] that measures against alleged circumventions of stricter rules have shown that the choice of establishment because of a favourable regulatory climate as such does not prove the motive of circumvention and the fact that the overriding part of the activities take place in another Member State than the State of the primary establishment (including the fact that the media services target an audience in another Member State than the State of establishment), as such, constitutes insufficient grounds on its own for a case of circumvention.

Bearing all these in mind, it should not come as a surprise that the anti-circumvention procedure in the spirit of the AVMSD has taken place very rarely, with only a few instances of consideration and execution being known.

Even though the original text of the AVMSD did have a detailed description in Article 2 of the circumstances under which jurisdiction can be assumed, as well as a set of rules in Article 4, regarding the freedom of the Member States to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields governed by the Directive, the fulfilment of the procedure proved to be an almost impossible task for NRSAs. The main reason of impediment in the execution of the provisions enshrined in Article 4 can be traced down to two main facets: in many cases, providers of audiovisual media services falling under another Member State's jurisdiction refused to comply with their stricter rules or showed no willingness in collaboration. Also, the burden of proving the existence of circumvention or the evidence base to identify it has proved to be a particularly difficult task for NRAs.

The overly complex and lengthy character of the anti-circumvention procedure as well as the unnecessary administrative burden it represents for Member States applying it can be exemplified by means of a few cases.

The only Member State to fully execute the anti-circumvention procedure based on Article 4 in the history (which spans ten years) of these provisions was Sweden. This was the first time that the Commission decided on the application of Article 4 of the AVMSD.[26]

24 AVMSD Recital 43.

25 Dommering–Scheuer–Thorsten 2008. 859–861.

26 Commission Decision of 31.01.2018 on the incompatibility of the measures notified by the

In December 2014, Sweden notified the Commission of envisaged measures (fines) in relation to two broadcasters broadcasting to Sweden from the UK for alleged circumvention of stricter Swedish rules on alcohol advertising but then subsequently withdrew the notification. As the case was ongoing, Sweden opted for renewal and notified the Commission in January 2018 of its intent to impose measures under Article 4(4) of the AVMSD against the broadcasters. The notifying authorities assessed that the broadcasters in question have established themselves in the United Kingdom in order to circumvent the stricter Swedish rules concerning the prohibition of all forms of TV sponsorship by parties whose principal activity is to manufacture alcoholic beverages and all forms of marketing of alcoholic beverages through commercial advertising in TV programmes.

On the basis of the AVMSD, the European Commission has decided that the Swedish intention to impose their ban on alcohol advertising on two broadcasters based in the UK and broadcasting in Sweden is not compatible with EU law.

In order to impose such a ban on the UK broadcasters, Sweden should have demonstrated – under the specific procedure contained in Article 4 of the AVMSD – that the broadcasters in question established themselves in the UK *in order to circumvent* such rules. The burden of proof lies with the Member State, and the Commission found in this case that Sweden failed to prove circumvention on the part of the two broadcasters.

The issue of proving circumvention was featured in the public consultation launched in 2015, prior to the revision process, and respondents have confirmed that they considered the task difficult or very difficult. NRAs have listed a multitude of considerations explaining the legal difficulty: some considering it inappropriate to assign subjective intention to a legal person (i.e. an AVMS provider), while others arguing that while the burden of proof is high, proving circumvention is possible, for example, by looking at whether a media service provider has a history of trying to evade a particular regulation or whether it has tried to obtain a licence in the country targeted before.[27]

A significant number of NRAs have had no experience at all in attempting to prove circumvention, and only one from Netherland has reported a successful experience in dealing with anti-circumvention – however, with a case still under the TVWF Directive.[28]

Kingdom of Sweden pursuant to Article 4(5) of Directive 2010/13/EU of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services. Brussels, 31.01.2018 C(2018) 532 final.

27 ERGA Report on territorial jurisdiction – 2016. 40–41.

28 In 1994, the Netherlands proved deliberate circumvention by a channel claiming Luxembourg jurisdiction. In that case (TV10 SA v Commissariaat voor de Media – C-23/93), the Court of Justice ruled that Member States retain the right to take measures against broadcasters established in another Member State whose activity is entirely or principally directed towards its own territory, when establishment has been set up with the aim of circumventing the rules.

The Austrian NRA had also experienced two cases of trying to prove circumvention, but in both cases the Austrian licences were surrendered before formal proceedings began. The Hungarian authority has also made an unsuccessful attempt to prove deliberate circumvention, which it believes failed as it did not receive any cooperation from the Member State responsible for the service. The Belgian Conseil Supérieur de l'Audiovisuel initiated a circumvention assessment procedure but suspended it in July 2015 because in the meantime the AVMS migrated to another jurisdiction.[29]

In conclusion, it transpires that the set of legal instruments provided for in Article 4 of the AVMSD have proved in retrospective to be impractical. The legal justification behind the procedure remains valid, but the impossibility of practical execution has demonstrated the need for simplification and has also proved that it needs to be more fluid among all parties concerned.

This requirement on the one hand and the need for equal clarity on the other, as far as on-demand audiovisual media services are concerned, acted as the main foci in the issue of circumvention of law during the revision process.

5. Proposals to the Provisions on Circumvention of National Rules in the AVMSD Revision Process

In 2015, a public consultation phase was launched regarding the projected revision of the AVMS Directive, taking into consideration the multitude of changes affecting media markets and the rapidly extending IT&C developments which required the amendment of outdated fields as well as the creation and regulation of previously non-existent fields.

The revision process resulted in an abundant corpus of working documents, reports, case reviews, analyses, and renewed interest in scholarly publication and consultations, all of them contributing to a certain extent to the Proposal drafted by the Commission in 2016.[30]

The AVMSD proposal was presented in a form that levels out the derogation mechanism for both linear and non-linear services, its provision concerning circumvention. The proposed Article 4 of the Directive would continue to apply exclusively to broadcasters. Academic debate focusing on the proposal has raised the question why circumvention rules were not designed for on-demand services.

Scholars have tried to offer multiple possible answers: some pointing out that even though no explicit circumvention rules were formulated for on-demand services the regulatory approach worded in Article 3(4)–(6) of the AVMSD

29 See *Footnote 28*.

30 For recent reports, analyses, and discussion papers, see ERGA Report on territorial jurisdiction 2018, ERGA Analysis & Discussion Paper 2018, ERGA Opinion on AVMSD Proposals 2016.

reflects the provisions of the E-Commerce Directive[31] and as such is applicable to non-linear media services.[32] Others express a presumption that the Commission shied away from this particular task because a simple transposition of the current circumvention rule would not do justice to the nature of on-demand media services and would have required a more fundamental change to the provision.[33] A preference for procedural guarantees in lieu of more fundamental reforms seemed also a valid explanation.

Problems in the application of jurisdiction criteria and of the derogation/circumvention procedures have been acknowledged by various policy makers as contributing to the reduction of the effectiveness of the country of origin principle, prompting also for clarifications regarding the application of the derogation and circumvention procedures.[34]

In 2016, the European Regulators Group for Audiovisual Media Service (ERGA, created in 2014) Subgroup on territorial jurisdiction conducted a survey about the challenges faced by ERGA members as a result of the cross-border distribution of audiovisual media content. The survey revealed some cases of successful cooperation among NRAs and instances of the Directive working well but also, quite prominently, a variety of problems and a diversity of experiences with how to solve these problems amongst NRAs.

A series of common general themes emerged too: i) problems with media service providers that are trying to abuse the country of origin principle; ii) difficulties encountered with multinational services where there are stricter national rules in the country of reception (particularly in areas such as audience protection, advertising, or cultural diversity); iii) problems linked to the application of the Directive, in particular when it comes to establishing jurisdiction (Article 2), derogating from the free circulation of audiovisual media services in the EU single market (Article 3), and demonstrating the deliberate circumvention of the rules (Article 4).

On all those key issues, ERGA suggested both legislative and non-legislative solutions which, to a certain extent, were taken up by the European Commission in its original proposal, with a clear emphasis on improving (bilateral and multilateral) cooperation between Member States and amongst regulatory authorities in this area.

31 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on Electronic Commerce) OJ L 178, 17.7.2000. 1–16.

32 Wagner 2014. 289.

33 Weinand 2018. 749–750.

34 Commission Staff Working Document Ex-post REFIT evaluation of the Audiovisual Media Services Directive 2010/13/EU accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities SWD/2016/0170 final – 2016/0151 (COD).

The report made various proposals to improve the current system for linear services and find new solutions for non-linear services, in particular regarding the burden of proving the existence of circumvention or the evidence base to identify it.[35]

Generally, the proposal aimed to comply with both the subsidiarity and proportionality principles by preserving, in general, a minimum harmonization approach and improving the derogation and circumvention mechanisms. The reason behind this was to allow Member States to take their national circumstances into account. Member States have, in practice, adopted stricter rules, in particular as regards the definition of on-demand audiovisual media service, the setting-up of national regulatory authorities, the promotion of European works, and the protection of minors and commercial communications.[36]

6. The Anti-Circumvention Procedure in the Revised AVMSD

During the revision process of the AVMSD, there has been much debate regarding the refinement of criteria for establishing jurisdiction, the provisions of the anti-circumvention procedure featuring prominently in the pertinent discussion. The European Commission proposed amendments to this procedure in its Proposal presented in 2016, as well as the European Parliament and the European Council. Even though there were differences between the amendments proposed by three institutions, the final version after the completion of the legislative process can be seen as a compromise between all parties involved. Directive 2018/1808 comprises the following provisions regarding the anti-circumvention procedure:

> Art. 4.
> 2. Where a Member State:
> (a) has exercised its freedom under paragraph 1 to adopt more detailed or stricter rules of general public interest; and
> (b) assesses that a media service provider under the jurisdiction of another Member State provides an audiovisual media service which is wholly or mostly directed towards its territory, it may request the Member State

35 ERGA report on territorial jurisdiction in a converged environment – 2016. An exhaustive presentation of ERGA contribution to the revision process and its role in the revised directive would exceed the limits of this paper. More in the *Reports and Opinions* section of ERGA: http://erga-online.eu/?page_id=14.

36 Proposal for a directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities. COM/2016/0287 final – 2016/0151 (COD).

having jurisdiction to address any problems identified in relation to this paragraph. Both Member States shall cooperate sincerely and swiftly with a view to achieving a mutually satisfactory solution.
Upon receiving a substantiated request under the first subparagraph, the Member State having jurisdiction shall request the media service provider to comply with the rules of general public interest in question. The Member State having jurisdiction shall regularly inform the requesting Member State of the steps taken to address the problems identified. Within two months of the receipt of the request, the Member State having jurisdiction shall inform the requesting Member State and the Commission of the results obtained and explain the reasons where a solution could not be found. Either Member State may invite the Contact Committee to examine the case at any time.
3. The Member State concerned may adopt appropriate measures against the media service provider concerned, where:
(a) it assesses that the results achieved through the application of paragraph 2 are not satisfactory; and
(b) it has adduced evidence showing that the media service provider in question has established itself in the Member State having jurisdiction in order to circumvent the stricter rules, in the fields coordinated by this Directive, which would be applicable to it if it were established in the Member State concerned; such evidence shall allow for such circumvention to be reasonably established, without the need to prove the media service provider's intention to circumvent those stricter rules.
Such measures shall be objectively necessary, applied in a non-discriminatory manner and proportionate to the objectives which they pursue.
4. A Member State may take measures pursuant to paragraph 3 only where the following conditions are met:
(a) it has notified the Commission and the Member State in which the media service provider is established of its intention to take such measures while substantiating the grounds on which it bases its assessment;
(b) it has respected the rights of defence of the media service provider concerned and, in particular, has given that media service provider the opportunity to express its views on the alleged circumvention and the measures the notifying Member State intends to take; and
(c) the Commission has decided, after having requested ERGA to provide an opinion in accordance with point (d) of Article 30b(3), that the measures are compatible with Union law, in particular that assessments made by the Member State taking the measures under paragraphs 2 and 3 of this Article are correctly founded; the Commission shall keep the Contact Committee duly informed.

> 5. Within three months of the receipt of the notification provided for in point (a) of paragraph 4, the Commission shall take the decision on whether those measures are compatible with Union law. Where the Commission decides that those measures are not compatible with Union law, it shall require the Member State concerned to refrain from taking the intended measures.
>
> If the Commission lacks information necessary to take the decision pursuant to the first subparagraph, it shall, within one month of the receipt of the notification, request from the Member State concerned all information necessary to reach that decision. The time limit within which the Commission is to take the decision shall be suspended until that Member State has provided such necessary information. In any case, the suspension of the time limit shall not last longer than one month.

The basis for restricting non-domestic broadcasts remains the assessment that the media service provider is inappropriately relying on EU law to evade the regulations of the State of reception. In its first paragraph, the text of the AVMSD reiterates that Member States shall remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by this Directive provided that such rules are in compliance with European Union law.

Though the anti-circumvention procedure has been significantly altered as a result of the revision process, it has retained its dual structure, comprising two phases: a non-binding consultation phase [Article 4(2)] and the anti-circumvention procedure itself, which can result in the adoption of appropriate measures against the media service providers concerned [Article 4(3)–(5)].

One of the key novelties in the text of Directive 2018/1808 is the extension of the anti-circumvention procedure to all media content in order to comprise not only linear audiovisual media broadcasts but also non-linear media services.

The need for cooperation between Member States during the consultation phase is not a novelty in the text of the revised AVMSD; however, the new provisions lay great emphasis on this aspect, too, enshrining the principle of cooperation in the text of the Directive.

An analysis of the consultation phase indicates a somewhat greater level of freedom for Member States applying stricter rules and a higher level of responsibilities for Member States having jurisdiction. The wording of the new text may seem more nuanced and inclined to provide more rights to Member States applying stricter rules. Whereas the old text of the Directive stated that these Member States 'may contact' the Member State having jurisdiction with a view to achieving a mutually satisfactory solution to any problems posed, the revised text now offers the right for the latter 'to request' the Member State

having jurisdiction to address any problems identified in relation to the anti-circumvention procedure.

One of the obligations of Member States having jurisdiction remains the same, i.e. to inform the requesting Member State regarding the steps and results taken as a result of the anti-circumvention procedure. The revised text reiterates the necessity of regularly informing the requesting Member State of the steps taken to address the problems identified, but it also includes a new obligation of explaining the reasons where a solution could not be found.

The most significant changes regarding the anti-circumvention procedure in the revised AVMS is lifting the burden of proving intent. Proving intentional circumvention of law by requesting Member States has been a constant issue of debate as it was unclear if it sufficed for requesting Member States to prove circumvention by providing objective evidence, or it was mandatory that they proved the (subjective) intent of circumvention of stricter laws.

The revised procedure aims to have the debate closed as it provides clear provisions stating that Member States applying stricter rules may appeal to adduced evidence showing that the media service provider in question has established itself in the Member State having jurisdiction in order to circumvent the stricter rules. Also, the new provisions allow assessing the adduced evidence and consecutively requiring circumvention to be reasonably established, without the need to prove the media service provider's intention to circumvent those stricter rules.

Another new important element in the revised text is the enshrinement of right to defence granted for media service providers: media service providers have the opportunity to express their views on the alleged circumvention and the measures the notifying Member State intends to take.

All the amendments aim to grant a simplified and more efficient anti-circumvention procedure sustained by the pillars of swift cooperation between Member States, a clear set of criteria and establishing circumvention of stricter rules and the right for defence of the media service provider. However, the efficiency and the practical applicability of the procedure is yet a matter of time as assessment of its success can only be done after Directive 2018/1808 has been adapted by all Member States.

7. Conclusions

The revised AVMSD retains the right of Member States to impose stricter rules of services provided that they are consistent with EU laws. At the same time, it reserves the right for Member States to enact limitations to the freedom of reception and retransmission provided that it occurs under specific circumstances.

The principle of the country of origin remains intact and continues to govern the issue of jurisdiction over media services providers. The AVMSD gives jurisdiction over providers of media services to a single Member State at a time.

Provisions contained in the revised AVMSD principally relate to audiovisual media service broadcasts (linear and on-demand content). In the case of VSPs, the revised AVMSD Directive leaves the safe harbour provisions in the E-Commerce Directive intact and does not compel platforms to make use of upload filters. However, platform providers are obliged to establish efficient and transparent mechanisms that allow users to report offensive content, among other measures. In addition, the revised Directive explicitly leaves the decision to impose stricter requirements to the discretion of the Member States.

As a general overview, the new Directive confirms and facilitates the country of origin principle by ensuring transparency among Member States on jurisdiction: it will be easier to determine the country whose rules apply to each provider, thanks to a database which will contain a list of providers under Member States' jurisdiction, and this information will be publicly available.

The procedures in case of exceptions to the country of origin for TV broadcasting and video on-demand services will be aligned.

The new set of provisions relating to the anti-circumvention procedure does not differ conceptually from its predecessor text versions but is visibly simplified in its administrative course of action, with ERGA confirmed as part of the apparatus for consistent enforcement of the Directive.

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Constitutional Questions of the Situational Legitimate Defence

Ádám Mészáros
Deputy Head of Division, Senior Research Fellow,
National Institute of Criminology,
Division of Criminal Law Sciences (Budapest, Hungary)
E-mail: meszaros@okri.hu

Abstract. This study examines the problems surrounding legitimate defence as an institution of criminal law, as it is regulated by the Hungarian legislator, in an international and comparative law perspective. It further examines the compatibility of the current regulation with the requirements of the Fundamental Law of Hungary as well as the practice of the Constitutional Court. The author concludes that the pertinent text of Section 22, para. (2) of the Hungarian Criminal Code seems to be unconstitutional, rendering the wide scope of legitimate defence in comparison to the requirements of proportionality as objectionable.

Keywords: legitimate defence, Hungarian Criminal Code, proportionality, Constitutional Court of Hungary, Fundamental Law of Hungary

1. Introduction

Legitimate defence is a well-known cause of justification in Hungarian criminal law. Already the first written criminal code, the so-called *Csemegi Codex*[1] (Act V of 1878) also regulated this institution. Its main rules were almost invariable for long decades.

Significant change was brought by Act LXXX of 2009. This act introduced the so-called *preventive legitimate defence*, trying to satisfy the need for citizens to be able to safeguard their personal security and possessions by establishing different signalling and protection mechanisms. According to the law:[2]

1 The law was named in the vernacular after its legislator Károly Csemegi (1826–1899). After working as an attorney, Csemegi became a high-ranking official in the Hungarian Ministry of Justice, where he drafted the Criminal Code of 1878.

2 Translation by the author.

> Any person who uses any means of defence for his own protection and/or for the protection of others in the event of an unlawful attack shall not be prosecuted, provided that such means of protection is not recognized as a deadly weapon and if the assailant sustains injury in consequence, furthermore, if the person on the defensive has done everything within his power to avoid the injury (Section 5).

Also, this law made it clear that the person assaulted shall not be required to take evasive action so as to avoid the unlawful attack (Section 4). Before that, the judicial practice required an obligation to implement evasive measures in the event of the assault by an ascending relative, spouse, brother or sister, and persons with serious mental illness.[3]

The new Criminal Code of Hungary, Act C of 2012, while maintaining this regulation, nevertheless introduced a new legal institution, the so-called *situational legitimate defence*.

Recently, both legitimate and preventive legitimate defence, as well as the regulation of situational legitimate defence, have been at the centre of interest in jurisprudence, criminology, and legal practice. In the following, I will deal only with the latter and will have a look at it from the point of view of constitutionality.

2. Defining the Problem

Section 22, para. (2) of Act C of 2012 on the Criminal Code introduced into Hungarian criminal law with effect from 1st July 2013, the notion of *situational legitimate defence*. According to the text:[4]

> The unlawful attack shall be construed to pose an imminent danger of death if committed:
> a) against a person
> aa) at night,
> ab) by displaying a deadly weapon,
> ac) by carrying a deadly weapon, or
> ad) in a gang;
> b) by way of intrusion into the victim's home
> ba) at night,
> bb) by displaying a deadly weapon,
> bc) by carrying a deadly weapon, or

3 Supreme Court's Directive Decision 15 on the Protection of Life and Physical Integrity through Criminal Law (part III. 2.).

4 Translation by the author.

> bd) in a gang;
> or
> c) by way of illegal and armed intrusion into the fenced area of a home.

Literature[5] and jurisprudence[6] on legitimate defence has long been consistent with the fact that, in the event of the 'basic case'[7] of legitimate defence, if the unlawful attack is directed against the life of the attacked person, taking of the offender's life cannot be unlawful. The question of disproportion cannot turn up at all.

In the scope of Section 22, para. (2) of Act C of 2012, cases of unlawful attack should also be considered as if they were aimed at extinguishing the assaulted person's life when in reality the attack was not directed against life. In these cases, it is also not a criterion that the attack is directed against a person at all [Section 22, para. (2) (b) (c)].

Therefore, it follows from the text that 'considering an unlawful attack as an attack on life makes lawful the defense which may cause death even if in the concrete situation the taking of life was not necessary'.[8]

In accordance with the law, in the enumerated situations, the proportionality of the defence cannot arise, and the defender still has a legally based right to extinguish human life even though the unlawful attack does not threaten his life, moreover, it does not even target his person.

3. International Kaleidoscope

In most European countries, the Criminal Code does not contain any presumption in the field of legitimate defence. However, some countries regulate such a presumption but not the same way as the Hungarian law does. A rule similar to the Hungarian one is rare. I would like to illustrate these statements with the following examples.

The German *Strafgesetzbuch* regulates legitimate defence as follows:

> § 32 (1) A person who commits an act in self-defense does not act unlawfully.
> (2) Self-defense means any defensive action that is necessary to avert an imminent unlawful attack on oneself or another.

5 Földvári 2003. 139; Belovics 2009. 110, 117; Ujvári 2009. 101; Horváth 2014. 183; Nagy 2014. 216–217.

6 Supreme Court's Directive Decision 15 on the Protection of Life and Physical Integrity through Criminal Law (part III. 4.); the Curia of Hungary's Uniformity Decision No 4/2013 (part I. 2.).

7 No penalty shall be imposed upon a person for any action that is necessary to prevent an unlawful attack against their person or their property or against the person or property of others, against the public interest or an unlawful attack posing a direct threat in respect thereof.

8 Belovics 2017. 253.

> § 33 A person who exceeds the limits of self-defense out of confusion, fear or terror shall not be held criminally liable.[9]

According to the Swiss *Code pénal*:

> Art. 15. If any person is unlawfully attacked or threatened with imminent attack, the person attacked, and any other person are entitled to ward off the attack by means that are reasonable in the circumstances.
> Art. 16. If a person in defending himself exceeds the limits of self-defense as defined in Article 15 and in doing so commits an offence, the court shall reduce the sentence.
> If a person in defending himself exceeds the limits of self-defense as a result of excusable excitement or panic in reaction to the attack, he does not commit an offence.[10]

The French *Code pénal* contains a legal presumption after defining the right to defence in case of an attack against a person or property. However, this is not like the Hungarian regulation. According to the Code:

> Art. 122-5. A person is not criminally liable if, confronted with an unjustified attack upon himself or upon another, he performs at that moment an action compelled by the necessity of self-defense or the defense of another person, except where the means of defense used are not proportionate to the seriousness of the attack.
> A person is not criminally liable if, to interrupt the commission of a felony or a misdemeanor against property, he performs an act of defense other than willful murder, where the act is strictly necessary for the intended objective and the means used are proportionate to the gravity of the offence.
> [11]

According to the presumption:

> Art. 122-6. A person is presumed to have acted in a state of self-defense if he performs an action 1° to repulse at night an entry to an inhabited place committed by breaking in, violence or deception; 2° to defend himself against the perpetrators of theft or pillage carried out with violence.[12]

9 https://www.gesetze-im-internet.de/stgb/StGB.pdf
10 https://www.admin.ch/opc/fr/classified-compilation/19370083/index.html
11 https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070719&dateTexte=20181016
12 Id.

Similar to the French Code pénal, the *Criminal Code of Romania* also regulates a legal presumption to be used in certain situations. But not even this is similar to the Hungarian norm. In accordance with the Code:

> Art. 19 (1) An act stipulated by criminal law is justified when committed in legitimate defense.
> (2) A person is in legitimate defense when committing an act to remove a material direct, immediate and unjust attack that endangers their own person, or another person, their rights or a general interest, if the defense is proportional with the seriousness of the attack.
> (3) A person is presumed to have been in legitimate defence as defined by par. (2) when they committed an act so as to repel an individual having entered a domicile, room, annex or enclosed structure appertaining to such domicile, without any right to do so, by violence, deception, breaking in, or other such unlawful procedure, or during the night.[13]

Only the Ukrainian and the Bulgarian laws contain a similar rule as the Hungarian Criminal Act, but without a presumption. By the text of the *Criminal Code of Ukraine*:

> Art. 36
> 1. The necessary defense shall mean actions taken to defend the legally protected rights and interests of the defending person or another person, and also public interests and interests of the state, against a socially dangerous trespass, by inflicting such harm upon the trespasser as is necessary and sufficient in a given situation to immediately avert or stop the trespass, provided the limits of the necessary defense are not exceeded.
> 2. Every person shall have the right to necessary defense notwithstanding any possibility to avoid a socially dangerous trespass or request assistance of other persons or authorities.
> 3. The excess of necessary defense shall mean an intended causing of a grievous harm to the trespasser, which is not adequate to the danger of the trespass or circumstances of the defense. The excess of necessary defense shall entail criminal liability only in cases specifically prescribed in articles 118 and 124 of this Code.
> 4. A person shall not be subject to criminal liability where that person was not able, due to high excitement, to evaluate if the harm caused by that person was proportionate to the danger of the trespass or circumstances of defense.
> 5. The use of weapons or other means or things for protection against an

13 www.just.ro/wp-content/uploads/2016/01/Noul-cod-penal-EN.doc

> attack of an armed person or an attack of a group of persons, and also to avert an unlawful violent intrusion upon a dwelling place or other premises, shall not be treated as the excess of necessary defense and shall not entail criminal liability irrespective of the gravity of harm caused to the trespasser.[14]

According to the Criminal Code of Bulgaria:

> Art. 12 (1) An act shall be considered not dangerous to society where it has been committed in situation of inevitable defense against immediate unlawful attack on state or public interests, on the person or the rights of the person defending himself or of another person, by inflicting harm on the attacker within the framework of the necessary limits.
> (2) The limits of inevitable self-defense shall be considered exceeded where the defense obviously did not compare to the nature and danger of the attack.
> (3) The limits of inevitable defense shall not be considered exceeded where the attack took place through violent penetration into premises or through violent housebreaking.
> (4) The acting person shall not be punishable if he has committed the act of exceeding the limits of inevitable self-defense due to fright or confusion.[15]

4. Constitutional Requirements

Returning to the Hungarian legal system, the Fundamental Law of Hungary (25 April 2011) explicitly defines the right to defend against unlawful attack: 'Everyone has the right – in accordance with the law – to use reasonable force to protect his or her person or property from imminent bodily harm or against the peril with which he or she is threatened at the hands of an aggressor' (Article V).

At the same time, the Fundamental Law at the beginning of its chapter entitled *Freedoms and Responsibilities* states, on the one hand, that everyone shall have the right to life and human dignity (Article II). As specified by its explanation, the right to human dignity is shaped by the law as the foundation of human existence with the right to life and recognizes the right of every person to life and to human dignity.

On the other hand, the Fundamental Law provides for fundamental rights and obligations as follows:

14 https://www.legislationline.org/documents/action/popup/id/16257/preview
15 https://www.legislationline.org/download/action/download/id/7578/file/Bulgaria_Criminal_Code_1968_am2017_ENG.pdf

> The rules relating to fundamental rights and obligations shall be laid down in an act of Parliament. A fundamental right may only be restricted in order to enforce another fundamental right or to protect a constitutional value, to the extent that is absolutely necessary and proportionate to the objective pursued, and with respect to the essential content of the relevant fundamental right [Article I (3)].

4.1. The Practice of the Constitutional Court

In a previous decision, the Constitutional Court of Hungary noted that:

> Human life and human dignity form an inseparable unity and have a greater value than anything else. The rights to human life and human dignity form an indivisible and unrestrainable fundamental right, which is the source of and the condition for several additional fundamental rights. The constitutional state shall regulate fundamental rights stemming from the unity of human life and dignity with a view to the relevant international treaties and fundamental legal principles in the service of public and private interests defined by the Constitution. The rights to human life and dignity as an absolute value create a limitation upon the criminal jurisdiction of the State [Decision 23/1990 (X. 31.) on capital punishment, part V. 2.].

In another previous decision, the Court held the following statement:

> The State may only use the tool of restricting a fundamental right if it is the only way to secure the protection or the enforcement of another fundamental right or liberty or to protect another constitutional value. Therefore, it is not enough for the constitutionality of restricting the fundamental right to refer to the protection of another fundamental right, liberty or constitutional objective, but the requirement of proportionality must be complied with as well: the importance of the objective to be achieved must be proportionate to the restriction of the fundamental right concerned. In enacting a limitation, the legislator is bound to employ the most moderate means suitable for reaching the specified purpose. Restricting the content of a right arbitrarily, without a forcing cause is unconstitutional, just like doing so by using a restriction of disproportionate weight compared to the purported objective [Decision 30/1992 (V. 26.), part III. 2. 2.].

4.2. Reasoning

By regulating situational legitimate defence, the Criminal Code, giving a general authorization, allows the defender to kill the attacker in such a case when the attack is not directed at taking life (even if it is not against a person).

In my opinion, this rule cannot be necessary nor proportionate (like the smallest measure) to achieve the stated goal of the legislator.

The mentioned purpose of the law is fixed by its explanation:

> The law extends the limits of legitimate defence to ensure a more effective action against serious, violent crimes, and establishes a presumption for those cases when the attacked person may assume the attack is directed against his life. The circumstances of the unlawful attack create the opportunity to overcome the necessary level of defence. In these cases, the court does not have to examine the extent of the necessity. The law provides that a person attacked by a weapon or by night may think that the attack is aimed at the extinction of his life and that he may choose the mode of the defence accordingly. This assumption can be justified by the number of the attackers.[16]

In my judgement, strengthening public security cannot justify a restriction of the right to life. In other words, such a widening of the right to defence cannot be a necessary tool for more effective action against serious, violent crime.

In addition, the current regulation does not comply with the constitutional requirement that a fundamental right may be restricted only by respecting the substantive content of another fundamental right. With regard to all constitutional fundamental rights, it is an important question whether and under what conditions they may be restricted, limited and, in the event of their conflict, which criteria should be prioritized.

In my view, the right to defence (the right of the defendant to oppose an unlawful attack directed against themselves or their property) – if there is no explicit threat to life – must remain underneath the right to life even if the attacker entered the ground of illegality and basically had to bear the risk of the unlawful attack.

Article V of the Fundamental Law stipulates the right to defence as defined by law (see Criminal Code); however, in my view, by allowing the possibility of extinguishing an assailant's life in the event of attacks which are not life threatening, Section 22, para. (2) of the Criminal Code seems to run contrary to Article I (3) of the Fundamental Law.

16 Paragraphs 5–6 of the ministerial explanation attached to Section 22. Translation by the author.

4.3. Conclusion

Accordingly, in my opinion, Section 22, para. (2) seems to be unconstitutional as it unnecessarily and disproportionately restricts the right to life.

5. Epilogue

It is not closely related to the examination of the constitutionality of the provision cited, but it is perhaps worth mentioning that Section 22, para. (2) of the Criminal Code does not provide an explanation for the extension of the 'right of defence', except for the list of different situations, and does not impose any requirements on the defender (such as shock or justifiable aggravation). These circumstances are mentioned in Section 22, para. (3),[17] which, however, by leaving the reference in the previous regulation to the ability to recognize the necessary measure of prevention, leaves a fairly wide scope for exemption from liability.

The earlier Criminal Code, Act IV of 1978 – before being modified by Act LXXX of 2009 –, neglected the criminal responsibility of a person who exceeded the necessary measure of prevention on that score because he was unable to recognize it due to shock or justifiable aggravation [Section 29, para. (2)]. The lack of recognition ability (a capacity to recognize the socially dangerous consequences of someone's conduct) leads to the lack of capacity to be adjudged guilty, which excludes criminal liability (especially the guilt of the offender).

The new Criminal Code (2012) maintained the 2009 amendment. The ministerial explanation for both laws is the same: 'Shock or justifiable aggravation [...] is still a subjective reason to exclude criminal liability, regardless of the actual effect on the capacity to be adjudged guilty.'[18]

The commentary of Criminal Code written by the judges of the supreme court (the Curia of Hungary) also indicates that shock or justifiable aggravation cannot be a consciousness that excludes the perpetrator's recognition, will, or appreciative ability in the application of the new law but is an everyday emotional reaction that can be judged by referring to general life experience. It is a reaction to the unlawful attack; it has a causal connection with that and cannot be identified with the strong induction required for privileged manslaughter (voluntary manslaughter, see Section 161[19]).[20]

17 Any person who exceeds the reasonable force of self-defence due to shock or justifiable aggravation shall not be prosecuted.

18 Paragraph 1 of the ministerial explanation attached to Section 4 of Act LXXX of 2009; paragraphs 5–6 of the ministerial explanation attached to Section 22 of Act C of 2012.

19 Any person who commits homicide with provocation or in the heat of passion is guilty of a felony punishable by imprisonment between two to eight years.

20 Kónya 2017. 122.

Based on the above, apart from being unconstitutional, the rule contained in Section 22, para. (2) is practically largely unnecessary because if someone under an unlawful attack exceeds the necessary degree of the defence for reasons of shock or justifiable aggravation, they cannot be held liable, even if these circumstances do not affect their capacity to be adjudged guilty [CC. Section 22, para. (3)].

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Some Remarks on the Issue of Suicide in Roman Criminal Law

Tamás Nótári
Doctor of the Hungarian Academy of Sciences (DSc), Professor
Sapientia Hungarian University of Transylvania (Cluj-Napoca, Romania),
Department of Law
E-mail: tamasnotari@yahoo.de

Abstract. This paper analyses the issue of suicide in the sources of Roman law, primarily criminal law. In the course of that, it will focus on the following key points: after a few introductory remarks outlining the Roman custom of committing suicide, first, it will discuss the judgement of suicide in criminal law in general; then, it will examine the appearance of the culprit's suicide as grounds for exclusion of culpability (and the limits thereof) in sources in imperial law; finally, it will briefly analyse the legal position of suicide in military criminal law.

Keywords: Roman criminal law, ius publicum, suicide, mors voluntaria

1. Introductory Remarks

When examining the terminology, the following terms for suicide can be found in Roman sources: *mortem sibi consciscere*,[1] *manus sibi inferre*[2] (cf. Gr. autokheiria), *mors voluntaria*.[3] There are more general phrases than the above: *vitam finire*, *se occidere*, and *se interficere*, including terms that refer to the form of committing the act, i.e. jumping into the depth in the first one and self-hanging in the second one, *se praecipitare*[4] and *vitam suspendio finire*.[5]

1 Ulp. D. 21, 1, 1, 1. *Item si quod mancipium capitalem fraudem admiserit, mortis consciscendae sibi causa quid fecerit, inve harenam depugnandi causa ad bestias intromissus fuerit, ea omnia in venditione pronuntianto: ex his enim causis iudicium dabimus.*

2 Marci. D. 48, 21, 3 pr. *Qui rei postulati vel qui in scelere deprehensi metu criminis imminentis mortem sibi consciverunt, heredem non habent.*

3 Diocl. C. 6, 22, 2, 1. *Quod si futurae poenae metu voluntaria morte supplicium antevenit, ratam voluntatem eius conservari leges vetant.*

4 Diocl. C. 6, 22, 2. *Si is, qui tecum uxorem tuam heredem scripsit, quando testamentum ordinavit, sanae mentis fuerit nec postea alicuius sceleris conscientia obstrictus, sed aut impatiens doloris aut aliqua furoris rabie constrictus se praecipitem dedit, euisque innocentia liquidis probationibus commendari potest a te, adscitae mortis obtentu postremum eius iudicium convelli non debet.*

5 Vandenbossche 1952. 472.[3] Battaglini 1970. 94. Wacke 1980. 41.

In this respect, it is worth briefly considering the forms of committing suicide. Regarding slaves, we can read mostly about throwing themselves into the depth.[6] Use of a rope as means of suicide made death especially dishonourable. Servius attaches the comment to the relevant locus in Aeneis, Vergil's epic – also serving to legitimize Augustus[7] –, that in this case the pontifices[8] refused burial of the dead person: 'cautum fuerat in pontificalibus libris, ut qui laqueo vitam finisset, insepultus abiciatur'.[9]

It is not by chance that Ulpian's responsum – by referring to Neratius – prohibits mourning for enemies and persons sentenced to death owing to high treason and those who have committed suicide using a rope, while this prohibition applies only to those persons who choose other means that voluntarily put an end to their life not because of being weary of life but owing to pangs of conscience felt over the crime committed by them: 'Nec solent autem lugeri, ut Neratius ait, hostes vel perduellionis damnati nec suspendiosi nec qui manus sibi intulerunt non taedio vitae, sed mala conscientia.'[10] This manner of death seemed unnatural to the ancient Greeks and Romans because they believed that by constricting the air passages the soul cannot leave the body in a proper manner and so cannot gain passage to the other world.

Natural restrictions were placed on committing the act by poison due to the fact that in antiquity only a very limited number of toxins were known which took effect quickly and painlessly; however, they included *cicuta* (water hemlock), which served as means in numerous cases of murder and suicide although selling poisons was strictly punished by lex Cornelia de sicariis et veneficis, i.e. it was deemed by it as identical to murder.[11] The dagger and the sword were regarded as the noblest forms of voluntarily chosen death; however, it must be added that in ancient times suicide was a much more complicated and painful act by all means, requiring greater moral strength than nowadays.[12]

As a tradition that cannot be supported by specific legal sources, it is worth briefly looking at the archaic age of Rome in terms of judging suicide. The fifth

6 Wacke 1980. 45.

7 On these tendencies, see Heinze 1915, Bailey 1935, Büchner 1945, Boyancé 1963, Wallace-Hadrill 1982. 19–36, Kühn 1971, Pötscher 1977, Monti 1981, Williams 1983, Hardie 1986, Wifstrand Schiebe 1997, Adler 2003, Reed 2007.

8 On the *pontifices*, see Nótári 2011. 468.

9 Verg. *Aen.* 12, 593–603. *Accidit haec fessis etiam fortuna Latinis / quae totam luctu concussit funditus urbem. / Regina ut tectis venientem prospicit hostem / incessi muros, ignis ad tecta volare, / nusquam acies contra Rutulas, nulla agmina Turni, / infelix pugnae iuvenem in certamine credit / extinctum et subito mentem turbata dolore / se causam clamat crimenque caputque malorum, / multaque per maestum demens effata furorem / purpureos moritura manu discindit amictus / et nodum informis leti trabe nectit ab alta.*

10 Ulp. D. 3, 2, 11, 3.

11 Marci. D. 48, 8, 3 pr. *Eiusdem legis Corneliae de sicariis et veneficis capite quinto, qui venenum necandi hominis causa fecerit vel vendiderit vel habuerit, plectitur.*

12 Hirzel 1908. 243.

king of Rome, Tarquinius Priscus, to prevent citizens – who intended to escape from his despotism at the expense of their life – from committing suicide, enacted a regulation much stricter than the prohibition of suicide usual in archaic Roman law, corresponding with Greek customary law, which we can learn also from Servius's Aeneis commentary.[13] As due to the king's certain measures – during the construction of the cloaca – numerous Roman citizens took their own life, the ruler ordered that the corpse of suicides had to be strung up to the cross to let birds and wild animals clear away the dead bodies.[14] Cassius Hemina – as we learn of it also from Servius –, in his Annales, allegedly noted that this was the first occasion in Roman history when suicide was deemed as a contemptible and punishable act since thereby the perpetrator deprived the state of one citizen.[15]

On the basis of the narratives of historians, we can declare that from the earliest period of the Republic the suicide of persons in non-military status was not liable to criminal prosecution; for example, Livius lets us know that in order to avoid total forfeiture of property affecting also their families, Appius Claudius and Spurius Coppius – the two decemviri who were charged with an act punishable by death penalty before the popular assembly – had put an end to their lives before the sentence was passed. It should be noted that they were nevertheless unable to avoid forfeiture of property thereby.[16] (Legal regulation of the connection between capital punishment, suicide, and forfeiture of property – as we shall see – would be carried out only in the time of Hadrian.)[17] It is worth mentioning that at the time of the Republic suicide committed in a 'shameful' manner, i.e. by self-hanging, did not constitute the subject of the facts of a case in criminal law either.[18]

2. Judging Suicide in Criminal Law

It is highly questionable whether Roman regulation in the classical age affected at all the legal problems arising in connection with suicide or not. Although Quintilian refers to an alleged law which prescribed that those who wanted to take their own life voluntarily had to show the cause of their decision and the planned manner of committing the act to the senate – and if they had failed to do so, they could not be buried: 'Qui causas voluntariae mortis in senatu non reddiderit, insepultus abiciatur.'[19] Quintilian's narrative is hardly worth of credit since the

13 Serv. *in Verg. Aen.* 12, 607.
14 Plin. *Nat. hist.* 36, 24.
15 Serv. *in Verg. Aen.* 12, 607.
16 Liv. 3, 58.
17 Cf. C. 9, 50, 1.
18 Val. Max. *Dicta* 5, 8, 3.
19 Quint. *Decl.* 4, 337.

account he gives of this alleged law is nothing else than a historical parable for the act carried out by Euphrates, the philosopher, who disclosed his intention to commit suicide to Emperor Hadrian and took poison only when the emperor had given authorization to do so.[20] The information on the one-time law can be considered even less reliable since suicides committed by free citizens with civil (i.e. military) legal standing were not deemed as punishable in Quintilian's time, and so Euphrates's case only enriched the list of exceptions. Similarly, we cannot forget that Quintilian's work entitled *Declamationes* discusses fictitious cases, and its purpose is not to provide an authentic historical narrative but merely to enumerate cases, paradigms that can be used in the training of orators and are suitable for those who intend to acquire rhetorical skills.[21]

The statutes of a funeral association from 133/136 AD (lex collegii funeraticii Lanuvini) do not allow to provide suicides with proper funeral: 'Item placuit: quisquis ex quacumque causa mortem sibi adsciverit, eius ratio funeris non habebitur.'[22] This regulation can be supposedly attributed to the belief that the soul of suicides will not find peace even in the other world, and therefore burying anybody near them should be avoided.[23]

Lex Cornelia de sicariis et veneficis did not contain any provisions to prohibit suicide. Its only locus referring to this subject discusses a case reminding us of aberratio ictus: 'In lege Cornelia dolus pro facto accipitur, neque in hac lege culpa lata pro dolo accipitur. Quare si quis alto se praecipitaverit et super alium venerit eumque occiderit … ad huius legis coercitionem non pertinet.'[24] Accordingly, no punishment was prescribed for a person who wanted to commit suicide by throwing himself into the depth but in the course of that he fell on somebody else and striking him dead he stayed alive since his act can be classified not as dolus but only as culpa lata. Paulus emphasizes that in cases belonging to the scope of *lex Cornelia de sicariis et veneficis*, dolus – contrary to the general rule[25] – is not judged identically as culpa lata.

The case when somebody would have been obliged to prevent a third party's suicide but failed to do so constituted the subject of criminal law regulation. By the application of analogia legis, a slave was obliged to do so on the basis of senatus consultum Silanianum. The senatus consultum Silanianum originating from 10 AD ordered to punish a slave by death who did not try to prevent a violent criminal attempt against his master's life and if he knew about and took part in

20 Quint. *Decl.* 337.
21 On Quintilian, see Gwynn 1926, Kennedy 1969, Laing 1920. 515–534, Leitch 2001, Logie 2003. 353–373.
22 Riccobono–Arangio Ruiz 1940–1943, III. 99.
23 Wacke 1980. 48.
24 Paul. D. 48, 8, 7 pr.
25 Cels. D. 16, 3, 36. *Dolus culpa aequiparatur.*

such an attempt.[26] The law withdraws murder committed by poison, in secret and treacherously, from this scope since the slave could not know about it and therefore was not able to do anything against it: 'Qui occisus dicitur, si constet eum sibi quoquo modo manus intulisse, de familia eius quaestio non est habenda, nisi forte prohibere potuit non prohibuit.'[27] On the basis of *analogia*, in the same way, it was obligatory to punish slaves who albeit saw that their master turned against himself in furious rage and although they could have prevented his act they did not do anything against it: 'Qui occisus dicitur, si constet eum sibi quoquo modo manus intulisse, de familia eius quaestio non est habenda, nisi forte prohibere potuit non prohibuit.'[28] 'Si sibi manus quis intulit, senatus consulto quidem Silaniano locus non est, sed mors eius vindicatur, scilicet ut, si in conspectu servorum hoc fecit potueruntque eum in se saevientem prohibere, poena adficiantur: si vero non potuerunt, liberentur.'[29] A similar obligation bound prison guards in Rome[30] in the case of persons in preliminary custody: 'Sed si se custodia interfecerit vel praecipitaverit, militi culpae adscribitur, id est castigabitur.'[31] This obligation binds prison guards the same way since they must prevent the confined person from escaping[32] and must make sure that nobody should smuggle weapons or poison into the prison.[33] (If they kill the confined person themselves, then their act will naturally be considered homicidium [homicide].)[34]

3. The Culprit's Suicide as Grounds for Exclusion of Culpability (and the Limits Thereof)

Valuable conclusion may be drawn from the description provided by Valerius Maximus, informing us of the death of Caius Licinuis Macer praetor. Macer was charged with crimen repetundarum, and the office of the president of the quaestio was fulfilled by Cicero. Macer, to save his honour and his family from forfeiture of property, committed suicide. After that, Cicero as the president of the quaestio did not conduct the proceedings, that is, did not have forfeiture of

26 Mommsen, Th. 1899. 630.
27 Ulp. D. 29, 5, 1, 18.
28 Paul. *Sent.* 3, 5, 4.
29 Ulp. D. 29, 5, 1, 22.
30 See also Eisenhut 1972. 268.
31 Mod. D. 48, 3, 14, 3. *Sed si se custodia interfecerit vel praecipitaverit, militi culpae adscribitur, id est castigabitur.*
32 Mod. D. 48, 3, 14, 2. *Qui si negligentia amiserint, pro modo culpae vel castigantur vel militiam mutant: quod si levis persona custodiae fuit, castigati restituuntur. Nam si miseratione custodiam quis dimiserit, militiam mutat: fraudulenter autem si fuerit versatus in dimittenda custodia, vel capite punitur, vel in extremum gradum militiae datur.*
33 Marci. D. 48, 3, 4. *Cum agere custodiam vel ferrum venenumve in carcerem inferri passus est, officio iudicis puniendus est: si nescit, ob negligentiam removendus est officio.*
34 Mod. D. 48, 3, 14, 4. *Quod si ipse custos custodiam interfecerit, homicidii reus est.*

property announced as a second punishment[35] – at the same time, it remains questionable whether Cicero's act was motivated by customary law or only by his own fairness.

According to Tacitus's accounts, in the first centuries of the period of the Roman Empire, numerous citizens took their own life voluntarily to avoid being sentenced and the shame of it as well as forfeiture of property, and, accordingly, emperors gave sometimes authorization to those threatened by capital punishment for executing the sentence not yet pronounced on themselves voluntarily.[36] It occurred several times that the culprits of capital offence left significant bequests to the emperor in their testament to induce the princeps thereby to grant the option of executing other testamentary provisions.[37] However, in certain cases, emperors – especially if they wanted to make up for the deficits of the state treasury – did not dispense with total forfeiture of property even after the voluntary death of the culprit. This custom is well exemplified by the case of Drusus Libo, who was charged with high treason by Trio (the ill-famed calumniator) and who wanted to forestall the lawsuit by suicide – after the death of the culprit, the charge was invariably maintained, and during the lawsuit Emperor Tiberius put the prosecutor in possession of the property of the deceased.[38] A similar fate fell to Classicus's lot, who was charged with negligent administration of his province and who wanted to prevent the lawsuit also by suicide – the accusers insisted on conducting the lawsuit; however, enforcement of this possibility was carried out only as an exception – as we learn it from the letter of Plinius maior.[39]

With regard to judging suicide, interesting problems are raised by the criminal procedure conducted in case of crimes sanctioned in accordance with Roman law by death as principal punishment – by exile for life in case of honestiores –[40] and by forfeiture of property as a second punishment. The testament of a citizen punished by death and forfeiture of property is invalid; instead of both his testamentary and intestate heirs, the fiscus will inherit exclusively. The children of the condemned person could get a fraction of the property only through 'special fairness' of the state to escape from total impoverishment thereby.[41] At the same

35 Val. Max. *Dicta* 9, 12, 7–8. *Consimili impetu mortis C. Licinius Macer vir praetorius, Calvi pater, repetundarum reus, dum sententiae diriberentur, Maenianum conscendit. si quidem, cum M. Ciceronem, qui id iudicium cogebat, praetextam ponentem vidisset, misit ad eum qui diceret se non damnatum, sed reum perisse, nec sua bona hastae posse subici, ac protinus sudario, quod forte in manu habebat, ore et faucibus suis coartatis incluso spiritu poenam morte praecucurrit. qua cognita re Cicero de eo nihil pronuntiavit. Igitur inlustris ingenii orator et ab inopia rei familiaris et a crimine domesticae damnationis inusitato paterni fati genere vindicatus est.*

36 Tac. *Ann.* 11, 3; 16, 11; 16, 33.

37 Tac. *Ann.* 16, 11; *Agricola* 43.

38 Tac. *Ann.* 2, 27–32; Dio Cass. 57, 15.

39 Plin. *Epist.* 3, 9.

40 Mommsen Th. 1899. 1005.

41 See Seidel 1955. 66ff.

time, forfeiture of property applied only to the assets owned by the condemned person at the time of passing the judgment;[42] so, until he was condemned, the accused was able to freely dispose of his goods.[43]

Furthermore, it should be noted that by the death of the accused the criminal procedure also terminated, no death sentence could be passed post mortem rei, and, in the absence of principal punishment, pronouncing any second punishment, i.e. the initial forfeiture of property, did not lie. So, in accordance with this regulation, if the accused, forestalling the judgment to come, successfully committed suicide during the criminal procedure, then his testament remained in force, and in accordance with that his property devolved not upon the fiscus but on his testamentary inheritors.[44] We cannot know exactly when this in fraudem legis state was ended; however, it is certain that in Hadrian's time we can find a perfectly worked out regulation contrary to the above,[45] and his successors, e.g. Antoninus Pius, refined these provisions.[46]

As we can learn from the *Digest* and the *Code of Justinian*, in case of crimes that the law ordered to be punished by death, mine work, animal fight, and deportatio as principal punishment[47] and if the perpetrator was caught in the act or the charge was already brought, the accused could not prevent forfeiture of property threatening his inheritors by his suicide. Contrary to earlier practice, execution of forfeiture of property did not require adopting a sentence in compliance with

42 Gaius D. 28, 1, 8, 1. *Bona quae tunc habuit cum damnaretur, publicabuntur.*

43 Wacke 1980. 53.

44 Concerning the so-called *adoptio fraudis causa facta*, see Paul. D. 48, 20, 7, 2. *Ex bonis damnatorum portiones adoptivis liberis, si non fraudis causa facta est adoptio, non minus quam naturalibus concedi aequum est. Fraudis autem causa adoptio facta videtur, etiamsi non in reatu, seddesperatione rerum per conscientiam, metu imminentis accusationis quis adoptet in hoc, ut ex bonis, quae se amissurum cogitat, portio detrahatur.*

45 D. 48, 21, 3, 5. Also mentioned: Ulp. D. 28, 3, 6, 7; Papin. D. 29, 1, 34 pr. *Eius militis, qui doloris impatientia vel taedio vitae mori maluit, testamentum valere vel intestati bona ab his qui lege vocantur vindicari divus Hadrianus rescripsit.*; Arr. Menander D. 49, 16, 6, 7. *Qui se vulneravit vel alias mortrem sibi conscivit, imperator Hadrianus rescripsit, ut modus eius rei statutus sit, ut, si impatientia doloris aut taedio vitae aut morbo aut furore aut pudore mori maluit, non aminadvertatur in eum, sed ignomia mittatur, si nihil tale praetendat, capite puniatur. Per vinum aut lasciviam lapsis capitalis poena remittenda est et militiae mutatio irroganda.*

46 Marci. D. 48, 21, 3, 8. *De illo videamus, si quis conscita morte nulla iusta causa praecedente in reatu decesserit, an, si parati fuerint heredes causam suscipere et innocentem defunctum ostendere, audiendi sint nec prius bona in fiscum cogenda sint, quam si de criminbe fuerit probatum: an vero omnimodo publicanda sunt.*

47 Ulp. D. 28, 3, 6, 6. *Sed et si quis fuerit capite damnatus vel ad bestias vel ad gladium vel alia poena quae vitam adimit, testamentum eius irritum fiet, et non tunc cum consumptus est, sed cum sententiam passus est: nam poenae servus efficitur: nisi forte miles fuit ex militari delicto damnatus, nam huic permitti solet testari, ut divus hadrianus rescripsit, et credo iure militari testabitur. qua ratione igitur damnato ei testari permittitur, numquid et, si quod ante habuit factum testamentum, si ei permissum sit testari, valeat? an vero poena irritum factum reficiendum est? et si militari iure ei testandum sit, dubitari non oportet, quin, si voluit id valere, fecisse id credatur.*

the rules of procedure, in other words, demonstrating the guilt of the accused; guilt was presumed from purely the fact of suicide as implicit acknowledgement, thereby substantiating the lawfulness of the sentence.[48]

At the same time, the legal successors of the accused had the option to request the continuation of the lawsuit and thereby prove the innocence of the accused, on the one hand, and find another reason for the suicide, which could not be construed as a confession, on the other – the following were considered such a cause: weariness of life, painful disease, death of a beloved person, insolvency, boasting, instantaneous mental disturbance, and madness.[49] If the inheritors did not waive the option to continue the lawsuit they were lawfully entitled to, and they managed to prove either the innocence of the accused (or lack of his guilt) or the fact that he committed suicide driven by any of the above-mentioned causes, then the state treasury could not carry out forfeiture of property, i.e. could not take the inheritors' place.[50] This procedure is well exemplified by Emperor Hadrian's rescriptum, which states that a father was charged with murdering his son, and the father put an end to his life already during the term of the investigation. When the case was brought before Hadrian, the emperor decided that – in view of the fact that the father committed suicide in his pain felt over the death of his son – his property could not constitute the subject of confiscation: 'Videri autem et patrem, qui sibi manus intulisset, quod diceretur filium suum occidisse, magis dolore filii amissi mortem sibi irrogasse et ideo bona eius non esse publicanda divus Hadrianus rescripsit.'[51]

In accordance with this modification, although in the case of the culprit's suicide a death sentence can be no longer imposed as principal punishment, the expected second punishment, forfeiture of property would be pronounced and executed even in the absence thereof, specifically on the basis of the well-known principle of confessus pro iudicato est;[52] so, the suicide committed is evaluated as a kind of a confession.[53] In this case, as a matter of fact, the motives of committing suicide must also be profoundly examined – the following four conditions had to exist at the

48 Marci. D. 48, 21, 3, 1. *Ut autem divus Pius rescripsit, ita demum bona eius, qui in reatu mortem sibi conscivit, fisco vindicanda sunt, si eius criminis reus fuit, ut, si damnaretur, morte aut deportatione adficiendus esset.*; Marci. D. 48, 21, 3, 3. *Ergo ita demum dicendum est bona eius, qui manus sibi intulit, fisco vindicari, si eo crimine nexus fuit, ut, si convinceretur, bonis careat.*; Diocl. et Maxim. C. 6, 22, 2. *Si is, qui tecum uxorem tuam heredem scripsit, quando testamentum ordinavit, sanae mentis fuerit nec postea alicuius sceleris conscientia obstrictus, sed aut impatiens doloris aut aliqua furoris rabie constrictus se praecipitem dedit, eiusque innocentia liquidis probationibus commendari potest a te, adscitae mortis obtentu postremum eius iudicium convelli non debet.*

49 D. 28, 3 ,6, 7; 48, 21, 3, 4. 5; 49, 14, 45, 2.

50 D. 24, 21, 3, 8.

51 D. 48, 21, 3, 5.

52 Paul. D. 42, 2, 1. *Confessus pro iudicato est, qui quodammodo sua sententia damnatur.* Kunkel 1968. I. 111ff.

53 Mommsen Th. 1899. 438., Vandenbossche 1952. 487ff., Wacke 1980. 55.

same time for pronouncing forfeiture of property.[54] On the one hand, the sanction (at least one of the sanctions) of the crime shall be forfeiture of property also in other – so-called normal – cases. On the other hand, either the perpetrator had to be manifestus or a charge had to be brought against him in a proper procedure. Thirdly, the accused had to commit suicide not owing to any other cause, e.g. out of weariness of life (taedium vitae) or mourning over the death of his relative (luctus),[55] madness (furor), disease (morbus), or unbearable pain (impatientia doloris), but owing to his bad conscience felt over the crime committed (conscientia admissi criminis).[56] Fourthly, the culprit's guilt had to be proved on its merits – at the same time, if no other motive of suicide[57] could be found, then the act was evaluated simply as a confession.[58] Forfeiture of property could be pronounced only in case of joint existence of the above-listed conditions; both legal scientists' writings and imperial decrees took firm action against attempts at interpreting the above provisions in practice in an extensive manner.[59]

Nevertheless, certain loci of Justinian's laws seem to imply that the property of the accused must be confiscated under any circumstances if he might commit suicide driven by fear of the punishment threatening him or bad conscience.[60]

54 Wacke 1980. 55. See Marcianus D. 48, 21, 3, pr., 1–5.

55 See also Nótári T.: De iure vitae necisque. *Jogtudományi Közlöny* 1998. 11: 421ff.

56 Cf. Ulp. D. 28, 3, 6, 7; Ulp. D. 48, 9, 8; Marci. D. 48, 21, 3, 7.

57 Ulp. D. 28, 3, 6, 7. *Nam eorum, qui mori magis quam damnari maluerint ob conscientiam criminis testamenta irrita constitutiones faciunt, licet in civitate decedant. Quod si quis taedio vitae vel valetudinis adversae impatientia vel iactatione, ut quidam philosophi, in ea causa sunt, ut testamenta eorum valeant.* (The prototype of these latter cases is described by Lucian in his work *De morte Peregrini*.)

58 See also Ulp. D. 48, 19, 8, 1.

59 Paul. D. 49, 14, 45, 2; C. 9, 50, 1; C. 9, 50, 2; C. 9, 6, 5; Ulp. D. 29, 5, 1, 23. C. 3, 26, 2; Ulp. D. 24, 1, 32, 7; Flor. D. 38, 2, 28. pr.

60 Ulp. D. 28, 3, 6, 7. *Eius qui deportatur non statim irritum fiet testamentum, sed cum princeps factum comprobaverit: tunc enim et capite minuitur. sed et si de decurione puniendo vel filio nepoteve praeses scribendum principi interlocutus est, non puto statim servum poenae factum, licet in carcere soleant diligentioris custodiae causa recipi. nec huius igitur testamentum irritum fiet, priusquam princeps de eo supplicium sumendum rescripserit: proinde si ante decesserit, utique testamentum eius valebit, nisi mortem sibi conscivit. nam eorum, qui mori magis quam damnari maluerint ob conscientiam criminis, testamenta irrita constitutiones faciunt, licet in civitate decedant: quod si quis taedio vitae vel valetudinis adversae impatientia vel iactationis, ut quidam philosophi, in ea causa sunt, ut testamenta eorum valeant. quam distinctionem in militis quoque testamento divus hadrianus dedit epistula ad pomponium falconem, ut, si quidem ob conscientiam delicti militaris mori maluit, irritum sit eius testamentum: quod si taedio vel dolore, valere testamentum aut, si intestato decessit, cognatis aut, si non sint, legioni ista sint vindicanda.*; Marci. D. 48, 21, 3. pr. *Qui rei postulati vel qui in scelere deprehensi metu criminis imminentis mortem sibi consciverunt, heredem non habent. papinianus tamen libro sexto decimo digestorum responsorum ita scripsit, ut qui rei criminis non postulati manus sibi intulerint, bona eorum fisco non vindicentur: non enim facti sceleritatem esse obnoxiam, sed conscientiae metum in reo velut confesso teneri placuit. ergo aut postulati esse debent aut in scelere deprehensi, ut, si se interfecerint, bona eorum confiscentur.*; C. 9, 50, 1. pr. *Eorum demum bona fisco vindicantur, qui conscientia delati admissique criminis metuque futurae sententiae manus sibi intulerint.*

In accordance with that, in the sources, we can find reference to the point that if suicide was committed during a procedure of indictment pursued owing to a crime that did not threaten the accused with capital sentence (e.g. in case of theft), then the property of the suicide could not constitute the subject of forfeiture of property: 'Idem rescripsit eum, qui modici furti reus fuisset, licet vitam suspendio finierit, non videri in eadem causa esse, ut bona heredibus adimenda essent, sicuti neque ipsi adimerentur, si compertum in eo furtum fuisset.'[61] However, in the event that owing to the above-mentioned causes forfeiture of property was carried out, not only was intestate succession excluded but also every testamentary disposition was repealed, and only legal transactions between living persons could continue to be in effect.[62]

4. Suicide in Roman Military Criminal Law

For soldiers, all forms of desertion, i.e. running away from military obligation, was considered as serious insubordination and was sanctioned – in addition to other forms of punishment – by life imprisonment.[63] As to whether suicide committed in the army was ranked among these facts, the sources before Hadrian do not provide any information.

It does not seem to be unworthy of briefly looking at how suicide was judged in Roman military criminal law. Attempted suicide committed by a soldier – if any of the causes that allowed more lenient judgement did not exist – was sanctioned by death and in other cases by discharge (missio ignominosa); if a soldier was prompted by an intoxicated state or foolish bragging to make an attempt at suicide, then he was punished by demotion. ('Milesqui sibi manus intulit nec factum peregit, nisi impatientia doloris aut morbi luctusve alicuius vel alia causa fecerit, capite puniendus est: alias cum ignomia mittendus est.'[64] 'Qui se vulneravit vel alias mortem sibi conscivit, imperator Hadrianus rescripsit, ut modus eius rei statutus sit, ut, si impatientia doloris aut taedio vitae aut morbo aut furore aut pudore mori maluit, non animadvertatur in eum, sed ignomia mittatur, si nihil tale praetendat, capite puniatur, per vinum aut lasciviam lapsis capitalis poena remittenda est et militiae mutatio irroganda.'[65]) Romans regarded suicide committed or attempted by a soldier as cowardice, just as running away

61 Marci. D. 48, 21, 3, 2.

62 Ulp. D. 24, 1, 32, 7. *Si maritus uxori donaverit et mortem sibi ob sceleris conscientiam consciverit vel etiam post mortem memoria eius damnata sit, revocabitur donatio: quamvis ea quae aliis donaverit valeant, si non mortis causa donavit.*

63 Val. Max. *Dicta* 6, 3, 3; Suet. *Aug.* 24.

64 Paul. D. 48, 19, 38, 12.

65 Arr. Menander D. 49, 16, 6, 7.

from fight, desertio.[66] If the soldier attempting suicide was able to prove any of the above-mentioned grounds for exculpation (for example, serious illness, unbearable pain, deep mourning), he was discharged from the army: 'Qui se vulneravit vel alias mortem sibi conscivit, imperator Hadrianus rescripsit, ut modus eius rei statutus sit, ut, si impatientia doloris aut taedio vitae aut morbo aut furore aut pudore mori maluit, non animadvertatur in eum, sed ignominia mittatur, si nihil tale praetendat, capite puniatur. per vinum aut lasciviam lapsis capitalis poena remittenda est et militiae mutatio irroganda.'[67] If a soldier put an end to his life owing to pangs of conscience felt over committing some military crime, his testament became invalid, and his property devolved on the fiscus, whereas if any of the above-mentioned grounds for exculpation justified his suicide, and he had no testament, then his property was given to his intestate heirs or, if there were none, to the legion:

> …Nec huius igitur testamentum irritum fiet, priusquam princeps de eo supplicium sumendum rescripserit: proinde si ante decesserit, utique testamentum eius valebit, nisi mortem sibi conscivit. Nam eorum, qui mori magis quam damnari maluerint ob conscientiam criminis, testamenta irrita constitutiones faciunt, licet in civitate decedant: quod si quis taedio vitae vel valetudinis adversae impatientia vel iactationis, ut quidam philosophi, in ea causa sunt, ut testamenta eorum valeant. quam distinctionem in militis quoque testamento divus Hadrianus dedit epistula ad Pomponium Falconem, ut, si quidem ob conscientiam delicti militaris mori maluit, irritum sit eius testamentum: quod si taedio vel dolore, valere testamentum aut, si intestato decessit, cognatis aut, si non sint, legioni ista sint vindicanda.[68]

Although this paper focuses on the criminal law aspects of suicide, it is worth adding that Roman law contains regulations concerning the suicide of slaves that takes account of several criteria. When calculating the peculium, the owner cannot deduct the loss suffered owing to the slave's self-mutilation or suicide since a slave, too, has the right to cause damage to his own body;[69] in accordance with the aedilis curulis edictum, the seller had to specify accurately if the slave had a history of escape or suicide attempts.[70] If he had, then the slave was worth

66 See also Brand 1968. 9ff.

67 Menen. D. 49, 16, 6, 7.

68 D. 28, 3, 6, 7.

69 Ulp. D. 15, 1, 9, 7. *Si ipse servus sese vulneravit, non debet (dominus) hoc damnum deducere, non magis quam si se occiderit vel praecipitaverit: licet enim etiam servis naturaliter in suum corpus saevire, sed si a se vulneratum servum dominus curaverit, sumptuum nomine debitorem eum domino puto effectum, quamquam, si aegrum eum curasset, rem suam potius egisset.*

70 Ulp. D. 21, 1, 1, 1; Ulp. 21, 1, 17, 4.

less, except if he attempted suicide due to unbearable pain;[71] and Ulpian intends to support this case – extended to suicide attempt in addition to escape – by an unconvincing reasoning, even if purely in terms of psychological deliberations, that what a slave has attempted to commit against himself he would not shrink back from attempting with others either; in other words, he is dangerous both to himself and the public.[72]

5. Summary

By analysing the Roman law aspects, primarily the criminal law aspects of suicide, we can establish the following as main points. Roman law – just as ancient Greek law – as a general rule, did not regard suicide as a punishable act. Although committing it, more accurately, the form of committing the act – e.g. self-hanging –, might have been contemptible but did not entail legal sanction on the merits (except for the possible prohibition of mourning). Regarding suicide, imperial jurists developed a peculiar – and at the same time reversible (!) – presumption. They presumed that a person charged with an act sanctioned by capital punishment and forfeiture of property committed suicide in captivity because his bad conscience tortured him and thereby, as it were, he admitted his act – this was necessary because death terminated the procedure; if it was not possible to impose the principal punishment (death penalty), then it was not possible to impose the second punishment (forfeiture of property) either, and by this presumption they prevented culprits of lawsuits (quite often of show trials) who were sure of being sentenced from saving their property for their heirs. Military criminal law – which was significantly different from 'civil' criminal law in Rome too – sanctioned suicide attempt committed by a soldier (as desertio) by death and suicide attempt committed for excusable reasons by missio ignominosa, i.e. dishonourable discharge.

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71 Paul. D. 21, 1, 43, 4.
72 Ulp. D. 21, 1, 23, 3; Marci. D. 48, 21, 3, 6.

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Drones and Privacy-Related Issues/Concerns: Alice in Techno-Land[1]

Ferenc Zoltán Simó
Doctoral Student
University of Debrecen,
Géza Marton Doctoral School of Legal Studies (Debrecen, Hungary)
E-mail: simonfredz@gmail.com

Abstract. The paper examines the emerging technology of drones in their various forms and the difficulties posed by the regulation of this technology, in several jurisdictions, in particular in the United States of America and the European Union. The author begins by addressing the terminological difficulty in designating unmanned aircraft of different descriptions. He goes on to present the safety and operational rules instituted for these vehicles as well as the myriad of potential problems posed to privacy and security by this new technology. He concludes that a unified approach to the definition and regulation of such aircraft is necessary as current regulations lack the required level of cohesion to manage the safe application of this technology, especially when it comes to the defence of privacy rights.

Keywords: drone, UAV, privacy, Federal Aviation Authority, United States, European Union

1. Outline

When I first started to study new technologies, such as drones, and their 'troublesome relation' to privacy-related (legal) concerns, I really felt a bit like Alice as she wondered into another land, now techno-land, tumbling down another rabbit hole. I soon realized that in this world, as in Alice's wonderland, the laws, including the laws of physics, do not apply as they would normally do. This land seems chaotic, so does the relation between technology and privacy. Thus, we may even feel after tumbling down that we need to realize step by step how deep the concerns are in connection with drones. In this case, it appears

1 This study will be developed further by raising relevant issues in connection with drones concerning privacy and personal data protection law, aviation law, public international law, media law, and migration law.

similar to an uncharted territory, or, at least, there are legal areas with no real or realistic solutions offered for easing those concerns.

This paper endeavours to provide a (relatively) short introduction to the concept of drones, some technology they can integrate with, their current commercial potential and applications. I go on to analyse the legal issues of drone use along with providing an overview of the comparative regulatory framework of different jurisdictions. The concluding section deals with the possible balance between drone use and policy/law making.

When one needs to consider the effect of the development or evolution of technology, one is swamped by complex and (mostly) problematic contemporary issues. The 21st century triggered a chain reaction with several reverberations in terms of privacy-related issues since privacy may be said to be one of the most urgent issues that many scholars assume associated with technology. Hence, it looks as so we can state that what people really care about when they submit a complaint and object that their privacy has been violated is not the act of sharing technology or information itself – most people are aware that this is essential and has become usual in social life – but the unlawful, improper, and most decisively illegal use of technology.

2. The Definition of Drones

Drones, as they have become known nowadays, are said to represent a considerable progress in robotic technology, and the civilian application of drones has begun trending in media lately. The use of unmanned aircraft, such as drones, is not a novel concept, and the origins of the concept can be traced back to the 19th century, when in 1896 the first pilotless steam-powered aircraft recorded a powered flight lasting over a minute. Drones have a long history, and they have been with us for a long time. Their '(r)evolution' started long ago, and it looks as so it is one of the most rapidly progressing technologies which should not be considered to be historically stoppable. Therefore, it appears central to mention the fact that more than fifty-five years ago, in July 1963, the 4028th Strategic Reconnaissance Weather Wing, equipped with U-2 strategic reconnaissance aircraft, set off flying global missions from the Davis-Monthan Air Force Base. The event, of course, is strongly connected to the Cuban Missile Crisis in 1963. the 4080th Strategic Reconnaissance Wing at Laughlin AFB, Texas, relocated to the base and assumed (full) responsibility for all U-2 operations, focusing on long-range strategic reconnaissance and intelligence collection. As a Strategic Air Command (SAC) unit, the 4080th was re-designated after the 100th Strategic Reconnaissance Wing and also acquired Lockheed DC-130 Hercules

aircraft for the launch and control of Firebee reconnaissance drones that were the precursors of contemporary unmanned aerial systems.[2]

The revolution of drones might be seen as a novel technological advance with numerous effects on, more or less, all walks of life. The proliferation of the next generation of 'recreational' drones presents how drones will be sold as any other common consumer item. The cultural perception of the technology is moving and keeps being altered as drones are being used more often for humanitarian purposes/activities on the one hand, but they can also strongly and definitely be positioned in the prevailing (recognized) modes of postmodern governance on the other hand.

The term 'drone' is a colloquial word used to designate all types of aircraft[3] which are operated without a pilot on board and their auxiliary components, such as a control station, if relevant. In addition to drone, other terms and acronyms are also used in a wide range of scientific publications and regulatory documents. The common examples are Unmanned Aerial Vehicles (UAV), Unmanned Aircraft (UA), Pilotless Aircraft, and Unmanned Aircraft System (UAS).[4] Although those terms refer to the same concept in theory, different aviation authorities have their own preferences.[5] For example, the International Civil Aviation Organization (ICAO) uses the expression 'pilotless aircraft', whereas the US Federal Aviation Administration (FAA) and the European Aviation Safety Agency (EASA) use the term 'UAS'. Naturally, it can be stated that the terms UAV, UA, and Pilotless Aircraft refer to an aircraft which is operated without a pilot on board. Concerning UAS, one may include that the additional word 'system' refers to the ancillary components (control station, command, control data link, and so on) as opposed to the aircraft component. Within the range of drones, as they are identified, there are two main modalities: drones remotely piloted from another place [Remotely Piloted Aircraft System (RPAS)], or programmed, and fully autonomous drones.[6] But drones could be the combination of the two abovementioned major modalities. Therefore, in order not to be confused, I intend to use the term 'drone' as an over-arching concept to include all applicable modalities and components

2 For more information on early unmanned aircraft, drones, and their 'brief' history, see: Keane–Carr 2013. 558–571.

3 Of course, there are several types of aircraft, including aeroplanes with fixed wings, airships (lighter than air), and helicopters (rotary wing).

4 Zavrsnik 2016.

5 Whether a drone was an 'airplane' as a matter of law, subject to regulatory enforcement by the Federal Aviation Administration, or a 'model airplane' subject to mere policies issued by aviation regulators was largely unresolved until the decision on *Huerta v Pirker*. See Huerta v Pirker, CP-217, Board's Decisional Order No EA-5730 (National Transportation Safety Board Decisions, 18 November 2014); available at: http://www.ntsb.gov/legal/alj/OnODocuments/Aviation/5730.pdf (accessed on: 25 March 2019).

6 ICAO 2011. Unmanned Aircraft Systems (UAS), Cir. 328, Glossary. Retrieved from: https://www.icao.int/Meetings/UAS/Documents/Circular%20328_en.pdf (accessed on: 25 March 2019).

and also refer to the acronyms insofar as (any) existing laws and regulations apply any specific ones. Nowadays, it seems relevant to notice that drones can appear in various shapes and sizes and could be operated/controlled by individuals for recreational/sports or commercial purposes. Unlike traditional vehicles, such as helicopters and hot-air balloons, drones are capable of flying at lower altitudes and can harness the data-capturing potential of smart (computing) devices. And, of course, drones also differ from traditional aircraft, as they are more economical to operate and are also accessible to a wider range of the population without any difficulties. Yet, as far as terminology is concerned, drones mostly refer to aerial vehicles which can fly without a human operator or without human assistance. However, for regulatory purposes, it must be admitted that different countries and international organizations have already come up with wide-ranging definitions. In general aviation and space-related phraseology, a drone usually refers to any vehicle that can operate on multiple surfaces and/or in the air without a human being on board to control it. And, as a matter of fact, we may go even further in this respect because, as far as their varieties are concerned, they can vary in size, shape, form, speed, and a host of many other features/attributes though some jurisdictions categorize and regulate them by weight. A drone could vary from a model aircraft/toy which can be bought in a store to a large-sized aircraft sent to combat in a war zone.[7]

It can be safely stated that most of the other terminologies describe drones as Unmanned Aerial Vehicles (UAVs) or Model Aircraft, Unmanned Aerial Systems/ Unmanned Aircraft Systems (UAS).

2.1. Unmanned Aerial Vehicles (UAVs)

A UAV refers to a powered aircraft that is designed to fly with no human operator on board. The International Civil Aviation Organization (the ICAO), responsible for the codification of air traffic rules and regulation of airways, categorizes drones as UAVs. It has also coined an exclusive term defining them as Remote Piloted Aircraft Systems (RPAS).[8] The ICAO Circular on Unmanned Aircraft Systems, 2011 defines an RPAS as '[a] set of configurable elements consisting of a remotely-piloted aircraft, its associated remote pilot station(s), the required command and control links and any other system elements as may be required, at any point during flight operation'.[9] It is of primary importance to note that the term 'remote pilot' is a key concept here as it (visibly) emphasizes the fact that the system is not always unmanned and always has a pilot in command liable

7 For more information, see: Kreps 2016, Završnik 2016.
8 Kreps 2016.
9 ICAO Circular 328-AN/190.

for the flight,[10] which could also be controlled either by on-board computers or remotely piloted on/from the ground. Hence, RPASs fit into the wider category of Unmanned Aircraft Systems. The ICAO has an RPAS Panel, which has the objective to produce standards for unmanned aircraft to ICAO's Governing Council (GC) by the end of 2018.[11]

2.2. Model Aircraft

Model aircraft are defined as aircraft which are mechanically driven or launched into flight for recreational purposes and are not designed to carry persons or living creatures. According to the FAA Modernization and Reform Act, 2010, a drone may be equated with a 'model aircraft' if it weighs less than 55 pounds (approx. 25 kilogrammes) and is operated in compliance with certain safety guidelines such as flying within the operator's line of sight – below 400 feet – and providing prior notice to air traffic control operators if flying within a 5-mile radius of an airport.[12] Since model aircraft are generally recognized as being intended only for recreational purposes, they are not covered under the ambit of any international regulations and are exclusively governed by relevant national regulations, if any.

2.3. Unmanned Aerial Systems (UAS)

The term UAS, though defined similarly, is broader in its ambit and includes: the aircraft, the control system(s) on the ground, the control data link(s), and other support equipment.

While these definitions are centred around the technology and operation of drones, military journals may come up with varied definitions based on their applications or usage. For instance, the US Department of Defence Dictionary of Military and Associated Terms gives us a different definition for UAVs; thus, they are said to be: 'a powered, aerial vehicle that does not carry a human operator, uses aerodynamic forces to provide vehicle lift, can fly autonomously or be piloted remotely, can be expendable or recoverable, and can carry a lethal or non-lethal payload. Ballistic or semi-ballistic vehicles, cruise missiles and artillery projectiles are not considered unmanned aerial vehicles'.[13] Hence, based on the above-mentioned definitions, we could roughly consider drones to be unmanned aircraft/ships guided/directed by remote controls used for different purposes/

10 Council of the European Union. Towards a European Strategy for the development of civil applications of Remotely Piloted Aircraft Systems external (RPAS), Working Paper (13438/12), 6 September 2012.

11 https://www.ainonline.com/aviation-news/aerospace/2015-01-06/icao-panel-will-recommend-first-uav-standards-2018 (accessed on: 25 March 2019).

12 https://www.faa.gov/uas/publications/model_aircraft_ operators/ (accessed on: 23 March 2019).

13 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2385448 (accessed on: 25 March 2019).

functions. The (mere) fact that they might be operated/controlled without a person on board allows for a smaller design, making them less disruptive when compared to conventional aircraft.[14] In addition, it is also possible to equip a drone with a number of other devices such as Global Positioning System (GPS), cameras of several types, computers, other related systems, and so on. The (relatively) user-friendly nature of drones has already opened many ways for their uses in commercial and civilian/domestic areas. One of the studies by the Association for Unmanned Vehicles Systems International (AUVSI) offers estimation on the 'influence' of drone production since it states that the drone industry in the United States of America is able and ready to provide up to over 100,000 new jobs and add $82 billion in economic activity between 2015 and 2025.[15] Drones, therefore, are a form of technical innovation that has tapped the doors to an utterly new market, bursting with market potential. Today, the reality is that there are unlimited civil applications for drones with no doubts about that, and the potentials seem to develop at even higher rates as the technology progresses/becomes more accessible to the public. In response to this exceptional/unparalleled growth, the FAA has already decided to increase the regulation and supervision of drone operation for not only commercial operators but recreational users as well. As a start, in December 2015, the FAA introduced some changes concerning the requirements for all recreational drone operators, operators being required to register from that date on.[16]

3. The Revolutionary Applications of Drones Nowadays

Drones have a multitude of uses which have become apparent. They could be used for the quick delivery of donated organs, thereby avoiding the expense of hiring air transport or having to deal with traffic, thereby potentially saving more lives.[17] They can be used for enhancing agricultural efficiency/proficiency by identifying factors such as moisture content and nutrient availability in soil. Remote sensing through drones can be of significant use in disaster-prone areas for pinpointing and fighting fires[18] or detection of theft and pilferage of goods meant for public utilization or in detection of natural gas leaks, which can save several lives and

14 http://www.academia.edu/11845032/Privacy_law_implications_of_the_use_of_drones_for_security_and_justice_purposes (accessed on: 24 March 2019).

15 http://www.auvsi.org/auvsiresources/economicreport (accessed on: 25 March 2019).

16 FAA Announces Small UAS Registration Rule (14 December 2015); https://www.faa.gov/news/press_releases/news_story.cfm?newsId=19856 (accessed on: 24 March 2019).

17 https://dronelife.com/2016/05/17/drones-may-soon-deliver-vital-organs-across-india/ (accessed on: 25 March 2019).

18 http://www.businessinsider.in/The-fire-in-Alberta-doubledin-size-on-Saturday-and-firefighters-are-using-drones-to-fightit/articleshow/52170421.cms (accessed on: 25 March 2019).

resources.[19] Drones also find application in law enforcement agencies, aiding and contributing to border patrolling, though their cost efficiency has been questioned by many, of course, with regards to the endeavours on the US–Mexico border.[20] However, with developing technologies, such concerns can be surmounted and indisputable advantages, such as being (relatively or almost) unnoticeable/untraceable, may be able to aid in preventing human and drug trafficking, in pinpointing and reacting to border violations, and in monitoring otherwise inaccessible terrain.[21] It goes without saying that the main issue in this case is the degree of autonomy that exists with regard to the non-human components. With the rapid progress of drones, it seems obvious that several types of drones have already been in use with autonomous functionality to the extent that collisions can be avoided, and some are capable of executing general instructions as well. While regulations have generally not addressed this aspect, the circular released with the latest FAA regulations in June 2016 allowed autonomous operation, but within certain limits.[22] However, no solutions are offered to regulate larger drones as in the case of a drone taxi or having only non-pilot human passengers. While it stays in a legal grey area, this field is expected to advance along the lines of self-driven cars. Today, it can also be stated that we are witnessing a rapid progress of the use of drones in the civilian and humanitarian domain. Also, it can be admitted that more and more drones are used for objectives as diverse as, for example, news gathering, aerial inspection and surveillance, mapping of rough or inaccessible and remote terrain, crop dusting, or search and rescue operations. The civilian use of drones has already become a (harsh) reality in the European Union and in the U.S. I assume it does not really matter from our point of view whether one considers the revolution of the drones as a novel technological revolution or phenomenon or only as a sixty-year-old one – the fact remains, and the effects of this technology have already started to be visible in connection with nearly all walks of life. Thus, the production of the next generation of 'recreational' drones illustrates how drones will be sold as any other, regular consumer item.

19 https://www.businessinsider.in/Now-a-drone-that-detects-LPG-gas-leak-and-delivers-emergency-medical-kits/articleshow/48467531.cms (accessed on: 26 March 2019).

20 https://www.foxnews.com/us/federal-report-says-border-patrols-drone-program-doesnt-fly (accessed on: 25 March 2019).

21 Hambling 2016.

22 https://www.faa.gov/uas/media/AC_107-2_AFS-1_Signed.pdf (accessed on: 25 March 2019).

4. Applications of Civilian Drones: Security and Privacy Concerns

Numerous books, articles, pamphlets, and commentaries cry out for reforms, mainly for restrictions in law and policy to prop up defences against the erosion of privacy due to the ever-growing ranks of technology-based systems practices. It appears significant to mention that Hillary B. Farber enlightens us on the fact that only a few years ago one may have seen a small object flying above our head without any ideas what it could be. Today, practically, it is a view which entails no shock or surprise to see drones flying around our neighbourhood skies. Also, she reveals that in 2015 hobbyists, recreational users, and businesses purchased unmanned aerial vehicles, commonly referred to as drones, in record-breaking numbers.[23] The Federal Aviation Administration (FAA) calculates/predicts that there will be (more than) seven million drones populating our skies by 2020.[24] In addition to this, the FAA admits openly that its traditional processes for guaranteeing the safety of airplanes and helicopters are inapt for the mounting number of small drones, which, we may add, are growing even smaller: '[T]he FAA's current processes for issuing airworthiness . . . certificates were designed to be used for manned aircraft and do not take into account the considerations associated with civil small UAS [Unmanned Aircraft Systems] …'[25]

> [O]btaining a type certificate and a standard airworthiness certificate … currently takes about 3 to 5 years … [I]t is not practically feasible for many small UAS manufacturers to go through the certification process required of manned aircraft. This is because small UAS technology is rapidly evolving at this time, and consequently, if a small UAS manufacturer goes through a 3-to-5-year process to get hold of a type certificate, which allows the issuance of a standard airworthiness certificate, the small UAS would be technologically outdated by the time it completed the certification process.[26]

It is more and more often claimed that remotely piloted aircraft (RPAs) have the potential to pose a serious threat to citizens' privacy since they are capable of intruding on any person's or a business's (private) conducts either with (criminal) intent, as it can be said in the case of planned/deliberate surveillance, or accidentally in the course of other activities such as aerial photography, traffic

23 Farber 2017. 1–2.

24 https://www.faa.gov/data_research/aviation/aerospace_forecasts/ (accessed on: 22 March 2019).

25 Notice of Proposed Rulemaking: Operation and Certification of Small Unmanned Aircraft Systems, 80 Fed. Reg. 9544, 9549 (proposed: 23 February 2015) (NPRM). Available at: https://www.federalregister.gov/documents/2019/02/13/2019-00758/safe-and-secure-operations-of-small-unmanned-aircraft-systems (accessed on: 25 March 2019).

26 Ibid.

monitoring, or search and rescue. Since RPAs have become cheaper and more proficient, and, of course, this progress has not slowed down, the instruments they are able to carry have developed to become more sensitive. Thus, these techno-gadgets can provide governments, companies, and individuals alike with the cost-effective capability to observe and gather information on almost anybody, potentially without their knowledge or consent. One of the main concerns relating to drones is that they could be used to record images of other people without their consent. Drones regularly carry video cameras to allow the remote pilot to fly them. Thus, images can be recorded, and technologies could be used to equip drones with high-power zoom, microphones, and a multitude of sensors as well as GPS systems recording the location of the persons filmed.[27] The visible absence of adequate safeguards and regulations with respect to the use of drones has raised several (major) issues. These can be related to concerns such as government overreach, data aggregation, and invasion of privacy in public. It is of the essence that these concerns are recognized and concentrated on professionally by sufficient regulatory decisions.

4.1. Unauthorized Surveillance, Data Aggregation/Mass Data Collection, Potential Security Hazards, and Hacking

It is well-known that drones can be easily exploited for mass surveillance. In the context of novel technologies, such surveillance is simply conducted with the aim to reform our daily lives, with the purpose of having more detailed records about those lives.[28] On the authority of national security and terrorism, surveillance apparatuses are employed to track down and profile the citizens by the state as well as by private entities.[29] Owing to their design and size, drones can operate without being detected, letting the operator observe people without their awareness. For example, there are drones with state-of-the-art cameras that can be used to track people and vehicles from altitudes as high as 20,000 feet.[30] High-tech drones are able to carry equipment with which Wi-Fi codes can be broken and intercept text messages and mobile phone conversations without the awareness of either the communication provider or the user.[31] Drones equipped with advanced technologies can infiltrate test networks and collect unencrypted data and even set up fake access points. Although it may be argued that the

27 European Parliamentary Research Service, Civil Drones in the European Union, October 2015. http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/571305/EPRS_BRI(2015)571305_EN.pdf (accessed on 25 March 2019).

28 https://harvardlawreview.org/2013/05/the-dangers-of-surveillance/ (accessed on: 25 March 2019).

29 Zavrsnik 2016.

30 https://www.eff.org/deeplinks/2012/01/drones-are-watching-you (accessed on: 25 March 2019).

31 https://www.eff.org/issues/surveillance-drones (accessed on: 26 March 2019).

collection of data about a person as such does not violate her/his privacy interests, far-reaching compilation of data – it may be argued – could be able to reach a level of privacy intrusion.

Both data mining and aggregation refer to the method of matching different data sets to deduce novel things and make (valuable) predictions about the data subjects.[32] Apart from observation, drones accumulate large amounts of personal/private data which are of primary importance for an individual's privacy. Post collection, the aggregation of drone-collected data with other personal information, such as the details of bank accounts, phone numbers, biometrics, and so on, obtained from other resources can lead to a unique privacy infringement beyond the sheer collection of those individual data sets.[33] Another well-known privacy-related concern in connection with drones can be hacking since each and every computer source or a connected device, such as a drone, is also exposed to compromise. There have been earlier cases where even high-tech drones on patrol duty have been compromised. Thus, there is a need to ensure that adequate measures be taken to sustain high encryption standards for the data stored on the drones and strict sentencing and penalties be prescribed for unauthorized hacking of drones. There are more and more potential security hazards which can be named since the opening up of skies for the private and domestic use of UAVs allows for the risks of potential accidents caused by impacts, collisions, battery failures, failure and/or error of navigational control, and so on. The operation of UAVs notably differs from that of conventional aircraft. The traditional air traffic control system issues a command for the pilot by radio, and the pilot thereby avoids the collision. Thus, the relevant human factor can directly interfere in order to prevent incidents.

5. Drone Regulations

5.1. United States of America. General Rules for Flying a Drone in the United States of America[34]

Today, the domestic use of drones is at a relatively early stage. Most countries do not provide for exclusive regulations to govern their operations. Only a handful of countries, such as the United States of America, France, and Germany, have systematically planned on various concerns involved with the use of UAVs and have put down comprehensive legislation to regulate their applications. According to the U.S. national aviation authority, the U.S. Federal Aviation

32 http://www.dbta.com/Editorial/Trends-and-Applications/What-is-Data-Analysis-and-Data-Mining-73503.aspx (accessed on: 25 March 2019).

33 Cudd–Navin 2018.

34 https://uavcoach.com/drone-laws-in-united-states-of-america/ (accessed on: 25 March 2019).

Authority, flying a drone is legal in the U.S. though one is supposed to be aware of and comply with the drone regulations listed below before doing so. For instance, there are some special travel considerations when one is travelling to the United States of America and intends to bring their drone; the FAA lists these special considerations for foreigners who want to fly drones: they must register their drone with the FAA using the FAADroneZone portal. If drones are used for fun, they must follow the rules for recreational/hobbyist flying, but if drones are used for work, then operators must obtain a certificate from the FAA and follow the rules for commercial flying. When one travels domestically in the U.S. with his/her drone, travel is allowed by the U.S. Transportation Security Administration (TSA), but drones must be brought in carry-on luggage only. A drone is not allowed to be packed in checked luggage.[35]

Here I intend to show some other fundamental rules for flying a drone in the U.S. Recreational/Hobbyist Rules are the following: there are some 'musts' for hobby or recreation-only use, without side jobs or in-kind work, such as registering the UAV with the FAA on the FAADroneZone website, flying within visual line of sight, following community-based safety guidelines/protocols, flying within the programming of a nationwide community-based organization (CBO) like the AMA, flying a drone weighing under 55 lbs unless certified by a community-based organization, never flying near other aircraft, reporting to the airport and air traffic control tower prior to flying within 5 miles of an airport, and, of course, never flying near emergency response efforts. For commercial purposes, the 'musts' are the following: holding a Remote Pilot Certificate issued by the FAA to fly commercially, registering the UAV with the FAA on the FAADroneZone website, the UAV must weigh less than 55 lbs including payload at take-off, flying in Class G airspace, keeping the UAV within visual line of sight, and flying at or below 400 feet: during daylight or civil twilight and at or under a speed of 100 mph. One must yield way to manned aircraft and cannot fly directly over people or from a moving vehicle unless in a sparsely populated area. In addition, there are certification requirements for flying a drone in the United States of America; thus, in order to fly a drone for commercial purposes in the U.S., one must obtain a Remote Pilot Certificate from the FAA. But one should not be shocked to learn that law on technologies regarding drones may be different from one state to another. The United State of America regulates the drone industry, which clearly means dominance over manufacturing and usage. According to the Federal Aviation Administration's report, the number of drones is estimated to exceed 7 million by 2020, with recreational drones accounting for 4.3 million units.[36] As a result, to stay abreast of the accelerating pace of

35 https://uavcoach.com/drone-laws-in-united-states-of-america/ (accessed on: 25 March 2019).

36 http://www.govtech.com/public-safety/Drone-Sales-Could-Reach-7-Million-by-2020-FAA-Says.html (accessed on: 25 March 2019).

UAV use, the FAA and particular federal states have provided for an excess of legislation for their regulation. In 2012, with an endeavour to address the safety concerns and to provide for uniformity throughout the national airspace, the USA Congress passed the FAA Modernization and Reform Act. The act calls for the FAA to 'develop a comprehensive plan to safely accelerate the integration of civil unmanned aircraft systems into the national airspace system'.[37] It goes on to state that a 'model aircraft', which can be a drone, must not weigh more than 55 lbs, must be within the visual line of sight (VLoS) of the operator, and must be used solely for recreational or hobby purposes. Model aircraft are covered by Federal Aviation Regulation 101, which came into force on 29 August 2016. Now, it can be stated that any federal, state, or local agency intending to operate a drone in national airspace must have a certificate of authorization from the FAA, while the commercial use of drones is allowed in accordance with FAA regulations and guidelines for private commercial use and the state-specific guidelines. In addition, FAA has already decided to implement plans to create test ranges and designate specific airspace throughout the country to be used to operate drone flights to develop better certification and air traffic standards.[38]

5.2. The European Union

The EU has a framework of privacy and data protection legislation. The Charter for Fundamental Rights of the EU establishes, particularly, the rights to respect private and family life, home, and communications (Article 7) and addresses the protection of personal data (Article 8).[39] These rights are implemented through Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and through repealing Directive 95/46/EC (General Data Protection Regulation). The UK Human Rights Act 1998 and the European Convention on Human Rights also currently apply to the operation of surveillance drones. As far as the terminology of 'unmanned aircraft' is concerned, it can be a massive aircraft comparable to a manned aircraft in size and feature, but, of course, it may as well be a miniature consumer electronics aircraft. These days, the use of smaller, even more sophisticated craft in the Europe Union (EU) does take place, but the (satisfactory) regulatory framework has not yet been developed, having only a fragmented structure without being capable of fulfilling its main regulatory function. Fundamentally,

37 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2357657 (accessed on: 25 March 2019).
38 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2357657 (accessed on: 25 March 2019).
39 European RPAS Steering Group, Roadmap for the integration of civil Remotely-Piloted Aircraft Systems into the European Aviation System, June 2013: http://ec.europa.eu/DocsRoom/documents/10484/attachments/1/translations/ (accessed on: 25 March 2019).

in most cases, national safety rules can be applied, but the rules applicable look different from one Member State to another in the EU, and what is even more challenging is the fact that several key safeguards have not been addressed (so far) in a structured/coherent way. Some scholars have been coming up with concerns, posing rational questions which require clarification of the legal status of drones, but it is not unexpected in this field that a large number of answers might be found to enlighten us, for instance, about civil drones. Thus, the question of what a civil drone is could be answered, and such vehicles may be classified in a different way in accordance with the interpretations of different authorities. One of the memos of the European Commission has already made an attempt to respond to some repeatedly asked demanding questions concerning drones. The European Commission supposes that the term drone is used to portray any type of aircraft that is automated/computerized or programmed and can function with no pilot on board. In accordance with this authority, there are two types of drones.

> Remotely Piloted Aviation Systems (RPAS), in short a drone where the aircraft is controlled by a human pilot from a distant location. This means that there is always a pilot in control, even if remotely. These are the only types of drones that can be authorised currently, and under the new framework, for use in EU airspace. Unmanned drones. These are drones which are automatically programmed without being piloted, even remotely. These are not yet authorised for use, either by ICAO or under EU rules.[40]

Also, it can be acknowledged that the term 'civil drones' is used to cover those RPAS that are used for civilian purposes such as delivering mail or examining an oil platform out at sea. Over time, civil drones have a great potential to perform various tasks, including jobs which are dirty, dull, or dangerous for people. As for the use of civil drones, the European Commission declares that they have already been used to take over wearisome or sometimes hazardous/risky tasks which could be more efficiently or securely performed by a technological instrument. In Europe, drones are used for safety inspections of infrastructure such as rail tracks, dams, dykes or power grids, and other infrastructure facilities. There are some novel endeavours for regulating drones, one of them being the Notice of Proposed Amendment (NPA) Unmanned Aircraft System Operations in the Open and Specific Category and its Impact Assessment. On the demand of the European Commission, Member States, and other stakeholders, the Agency began to develop proposals for an operation-centric, proportionate, risk- and performance-

40 http://europa.eu/rapid/press-release_IP-14-384_en.htm (accessed 23 January 2019). http://europa.eu/rapid/press-release_STATEMENT-14-110_en.htm (accessed on: 25 January 2019).

based regulatory framework for all unmanned aircraft (UA), establishing three categories with different safety requirements, proportionate to the risk: *open* (low risk) is a UA operation category that, considering the risks involved, does not require a prior authorization by the competent authority before the operation takes place; *specific* (medium risk) is a UA operation category that, taking into consideration the risks involved, needs an authorization by the competent authority before the operation takes place and takes into account the mitigation processes identified in an operational risk assessment, except for certain standard scenarios where a declaration by the operator is adequate; *certified* (high risk) is a UA operation category that, considering the risks involved, requires the certification of the UAS, a licensed remote pilot, and an operator approved by the competent authority in order to ensure an appropriate level of safety. After the publication of an Advance-NPA 2015-10 in July 2015, a Technical Opinion in December 2015, a 'Prototype' regulation was drafted for the open and specific categories. In August 2016, the 'Prototype' regulation was published, proposing actual rules providing the necessary clarity, notably on what the responsibilities of the Member States are and what flexibility is offered to them. Similar to the United States, the EU has an attempt to provide for a detailed set of regulations for regulating the operation of drones. In December 2015, the European Aviation Safety Agency (the EASA) released the following notes: *Introduction of Regulatory Framework for the Operation of Unmanned Aircraft* and *Proposed Concept of Operations for Drones*, with reference to the regulation relating to the use and operation of drones.[41] The purpose of these notes is to offer feedback for EASA members and other stakeholders, such as manufacturers and operators, about the regulatory framework for the operation of drones. Based on their nature and purpose, the notes divide drones in the above-mentioned categories. With respect to the privacy and data protection ramifications, the EU has already released a report on the evaluation of the repercussions of drones.[42] Although it must be admitted that specific/detailed provisions have to be framed by Member States of the EU, the EASA notes provide transparency in terms of the objectives of the proposed law and the rights and duties of the stakeholders. Till the final EASA rule is published, the EASA has delegated interim rulemaking for the regulation of drones to its Member States which have promulgated national regulations.

41 https://www.easa.europa.eu/easa-and-you/civil-drones-rpas (accessed on: 25 March 2019).

42 http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/519221/IPOL_IDA(2015)519221_EN.pdf (accessed on: 25 March 2019).

6. Conclusions

We must admit there are several additional issues likely to emerge world-wide, primarily related to privacy and third-party liability, that urge us to improve integration and take into consideration the public perception of novel technologies such as drones. The regulatory framework applicable for drones is many-sided, and the paper has only attempted to highlight some associated relevant aspects of privacy and personal data protection law, aviation law. The so-called drone acts are not even close to being completed, let alone effective, but to lay them to rest seems to be too early as they can be seen as new-born babies with no relevant experience. The legal and institutional framework of privacy and data protection are bound to face new challenges offered by the use or applications of novel technologies. Regulatory endeavours may differ as while the FAA regulations categorize or classify drones by size and shape, the EASA regulations opt for more risk-based categories, and the EU regulations are focused on licences and certifications. But I dare to state that one thing remains: novel technologies, such as drones, need to be regulated, and their regulations need to be revised time after time.

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A Few Considerations with Regard to the Case-Law of the ECHR in Connection to the Enforcement of Final Judgements in the Matter of Land Resources

Szilárd Sztranyiczki
PhD, Associate Professor
Sapientia Hungarian University of Transylvania (Cluj-Napoca, Romania),
Department of Law
E-mail: sztranyiczkisz@kv.sapientia.ro

Abstract. The case-law of the ECHR, but also national jurisprudence, clearly states that each state must enforce a final and binding court decision in the matter of land ownership within a reasonable time in order for there to be an effective remedy and a just and equitable satisfaction, avoiding a sanction for the violation of Art. 6 of the Convention. In accordance with the case-law of the ECHR, the present study shows that the right to a court would be illusory if the legal order were to allow for a final court ruling to impair the litigant's right to enforcement of the judgment. In accordance with the case-law of the ECHR, the enforcing of a judicial decision must be viewed as part of the lawsuit, and an unreasonably long delay in the enforcement of a binding judgment may breach the Convention. I have reached the conclusion that a person who has obtained a final and binding judgment against the State may not be expected to bring separate enforcement proceedings at the end of legal proceedings. In such instances, State authorities carry the burden to ensure compliance with a judgment against the State.

Keywords: European Convention on Human Rights, lawsuit, land resources, enforcing a final court ruling, fair hearing within a reasonable time, judicial proceedings, sanction, impossibility to enforce

1. Introduction

Regarding disputes in the matter of land resources[1] that are in relation to a conflict between a private entity and a state authority, the latter being represented by the Land Resource Committees, the ECHR has imposed the re-evaluation of national dispute procedures by applying the civil limb of the provisions of Art. 6, paragraph 1 of the Convention.[2]

The ECHR has established the principle according to which when a civil dispute arises between a public authority and a private entity: in determining whether the provisions of Art. 6 of the Convention are applicable or not, it is irrelevant whether the State is acting in the capacity of a legal entity under private law or public law, the only relevant aspect being the legal nature of the disputed right.[3]

A significant number of decisions pronounced by the ECHR aim to enforce civil court rulings in the matter of land rights. In compliance with the provisions of Art. 6 of the Convention, states must enforce final domestic judgements without delay in the sense that the right of access to a court must also reflect in the possibility of enforcing a final, binding court decision, which cannot remain without effect to the detriment of the interested party under the rule of law. Consequently, the enforcement of a court judgement cannot be hindered, invalidated, or excessively delayed; it is each state's responsibility to create adequate and sufficient judicial support to allow for court decisions to be implemented within a reasonable, optimal, and foreseeable time.[4] The ECHR has rightfully stated that the public administration is part of the rule of law with a direct interest in a fair administration of justice. Therefore, if the public administration refuses or omits to enforce a judgement or delays to enforce a judgement, the procedural guarantees provided by the provisions of Art. 6 afforded to the litigant in the judiciary phase remain without reason.[5]

1 The Romanian expression 'fond funciar' (as defined by Art. 1 of Law no 18/1991) refers to the totality of land within the borders of Romania, regardless of use or ownership status. This expression may be translated into English in several different ways such as national land assets, land fund, or land resources. For the purposes of this paper, we have opted to use the translation given by Katherine Verdery (see: Verdery 2003. 96), that of *land resources*.

2 See Pătulea 2006. 190.

3 See Bîrsan 2005. 428 (first footnote and ECHR decision of 12.07.2001, the case of *Farazzini versus Italy*, as cited).

4 See the case of *Burdov versus Russia*, Judgement of 07.05.2002; the case of *Ruianu versus Romania*, Decision of 17.06.2003, published in the Official Gazette of Romania no 1139/02.12.2004; the case of *Costin versus Romania*, Decision of 26.05.2005, published in the Official Gazette of Romania no 367/27.04.2006. Also, see Deleanu 2005. 425.

5 See the case of *Costin versus Românie*i, Decision of 26.05.2005, published in the Official Gazette of Romania no 367/27.04.2006.

2. The Jurisprudence of the ECHR

In addition to the previously mentioned, the ECHR decided that the enforcement of a final and binding court ruling passed by a competent civil court must be considered as part of the 'right to a court' referred to by Art. 6 of the Convention, and if the state administration were to omit or delay the execution of a final court ruling, the rights guaranteed by Art. 6 of the Convention would be deprived of all useful effects, which is inadmissible.[6]

Also, in regard to enforcing judgements in the matter of land resources, it is important to note that Art. 6, paragraph 1 of the Convention only protects final, binding judicial decisions and not decisions which may be subject to review by a higher national court with the possible outcome of being overturned.[7]

In regard to determining which authorities are competent to enforce a final court ruling in the matter of land resources, the ECHR stated that Land Resource Committees have the obligation to put prospective owners (usually the beneficiaries of restitution) in possession on the basis of final court rulings establishing rights *in rem*. In the same way, regarding the requirement of bringing a separate court action before the administrative court against the refusal of a public authority to enforce a final court ruling in the matter of land resources, the ECHR stated that requiring the plaintiff to undertake other steps that would only lead to the same outcome, that of the court ordering competent authorities yet again to enforce a final court decision, would be too expensive and would breach the provisions of Art. 6, paragraph 1 of the Convention.[8] Moreover, the European Court of Human Rights stated that it would be excessive for a person who has obtained a final judgment against the State to be expected to bring separate enforcement proceedings at the end of the legal proceedings.[9]

In another case, the Court specifies that the right to a court guaranteed by the provisions of Art. 6, paragraph 1 of the Convention also protects the enforcing of a final court ruling, which cannot deprive the litigant's rights of all useful effect in a state that respects the rule of law. Consequently, the enforcing of a court ruling cannot be stopped, annulled, or postponed for a long period of time. In the light of the obligations states have as entities, which, if necessary, must uphold judicial decisions even by the use of force, in matters of enforcing rulings, the Court stated that Romanian authorities have not sanctioned any of the debtors for

6 See Pătulea 2006. 252.

7 See Bîrsan 2005. 478 (*Footnote 3*).

8 See the case of *Popescu versus Romania*, published in the Official Gazette of Romania no 770/24.08.2005.

9 See the case of *Costin versus Romania*, Decision of 26.05.2005, published in the Official Gazette of Romania no 367/27.04.2006.

failing to comply with final, enforceable court decisions, depriving the provisions of Art. 6, paragraph 1 of the Convention of all useful effect.[10]

The right to a court – in the context of Art. 44, paragraph 7 of the Constitution and Art. 603 of the Civil code – conditions the exercise of one's property rights to the tasks of complying with environmental protection laws and ensuring good neighbourliness. Compliance with environmental protection laws and the jurisprudence of the European Court of Human Rights play an important role in the present context.

The burden of environmental risks falls on the provider of public services or on the concessionaire of the services if held accountable for damaging the environment in the course of providing his services and for breaching his obligations regarding the environment that are set forth in the conditions of the concession, which must include the environmental goals of the concession provider and the obligations relating to the protection of the environment by the concessionaire, in accordance with the law. Also, the concession provider can set forth a condition which calls for specific investments that need to be made regarding the protection of the environment. These investments can be defined or can be definable based on the environmental goals that have been set forth.[11]

The leading principle in environmental law is that the 'polluter pays' for damaging the immediate environment; consequently, the concessionaire will answer for all damages that occur during the period of the concession, regardless of the object of concession.[12]

10 See the case of *Ruianu versus Romania*, Decision of 17.06.2003, published in the Official Gazette no 1139 of 02.12.2004. In this case, the plaintiff invoked the state's lack of enforcing a court ruling under which his neighbours had the obligation to demolish a building they had built on a side of his land. The building had spread farther from the limit of the property by 20 meters in length and 0.90 meters in width. Moreover, a wall and part of the roof of the home were found to occupy land owned by the plaintiff. The defendant refused to demolish the building and used up all of his practical and legal resources, formulating an appeal against the enforcing of the final judicial decision, the court dismissing the appeal. There was a dissenting opinion on this judgement, which argued that the case is about a procedure between two neighbours, who are private individuals, therefore the responsibility of the state cannot be engaged. On the contrary, the plaintiff has given up his right to ask for authorization to demolish the wall himself, at the expense of his debtors, on account of dealing with health issues and not being able to be represented by a member of his family. The state authorities have tried to persuade the neighbours of the plaintiff several times to demolish their house, by use of ordinances, sentences, summations, and bailiffs coming out to the property, wherefore state authorities cannot be accused of not being active enough. Moreover, it is argued in the dissenting opinion that in the present case the disputed right is one that has been attributed by national courts in order to demolish the house of a neighbour, such right not being protected by the Convention, unlike the rights in Art. 6. State authorities cannot be obliged to execute any kind of civil court ruling under the right to court, regardless of the circumstances of the case; the court ruling can be deprived of all useful effect due to circumstances that are independent of the State. such as the insolvency of the private debtor. Therefore, State responsibility cannot be engaged due to these circumstances.

11 See Săraru 2009. 270–271.

12 Id. 271.

The jurisprudence of the ECHR has also incurred the issue of liability concerning environmental issues, an issue that falls under the provisions of Art. 8 of the Convention, according to which:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Even though the right to a healthy environment is not guaranteed by the provisions of Article 8 – as it has been duly noticed –,[13] this right has become indirectly protected by the Convention, becoming a component of the right to a private life.

The guarantee of the right to a healthy environment places a series of positive and negative obligations upon the State, which can only be fulfilled by the latter taking all adequate and reasonable measures to protect the rights under Article 8, paragraph 1 of the Convention and mainly by following the obligation to put into place a legislative and administrative framework that is capable of efficiently preventing all prejudice against the environment and public health.[14]

In a case[15] where there had been a violation of the right to a healthy environment, the ECHR found that Romania had breached this right. The court stated in the ruling that the serious and substantial danger to the health of the plaintiffs imposed upon domestic authorities the obligation to fulfil their positive obligation to adopt reasonable and adequate measures that are capable of protecting the interested parties' rights to private life, a home, and a healthy environment.

The Court underlined the great importance of local residents' right to be informed, which implies having access to the conclusions of the preliminary

13 See Radu–Cristea 2009. 217–223.

14 Id. 219.

15 The case of *Tătar versus Romania* – court ruling pronounced on the date of 27.01.2009. In this case, the plaintiffs claimed that the technological process utilized by S.C. T.S.A. Baia Mare factory posed a threat to their lives, stating that state authorities had remained completely passive. In the ruling pronounced by the ECHR, the court stated that Romania had breached Art. 8 of the Convention by failing to comply with the positive obligation to inform the citizens of Baia Mare and the plaintiffs; this way, it was impossible for the latter to know the potential measures that could have been taken to prevent a similar accident or the way they should handle themselves if a similar accident were to happen again. In this respect, domestic authorities have an obligation to inform the citizens not only before authorizing the production but also after the occurrence of an accident.

study – that assesses an industrial plant's impact on the environment –, and their right to access to information related to the dangers that local residents can be subjected to. The Court held that Romania had ratified the Aarhus Convention on public participation in the decision-making process and on access to justice in matters concerning the environment.

The unitary character of the civil lawsuit imposes compliance with the guarantees of the right to equitable proceedings in the phase of the trial and in the phase of a forced enforcement action.

In one case,[16] the Court stated that there was no doubt that the local land resource committee – that only invoked the impossibility to enforce the court ruling (due to the lack of available land) after the enforcement proceedings had started – had the obligation to inform the plaintiffs about the motives for the lack of enforcement through a formal decision and to take all necessary measures to start enforcing proceedings of the monetary equivalent.

On the other hand, it was impossible for the plaintiffs to obtain the immediate enforcement of the said ruling, which gave them legitimate hopes of coming into the possession of the land, which ultimately led them to being deprived without justification of the satisfaction and benefit of enjoyment of their property rights over the land. In this context, a delayed enforcement of a court ruling, including an obvious delay in emitting a title of ownership, violates the right to a fair trial and does not respect property rights. Therefore, the ECHR reasonably and justly ruled that the defendant state must pay a monetary award to the interested party under the time limit and imperative provisions set forth by Art. 44, paragraph 2 of the Convention. The monetary award will be calculated to cover all prejudices, and the amount must be converted to Romanian lei at the date of payment; the taxes that are owed can also be added to the final sum. An interest will be added to the resulting sum; the percentage of the interest will be equal to the marginal interest rate used by the Central European Bank, to which three percentage points will be added.

In accordance with the case-law of the ECHR, state authorities that have the obligation to enforce a court ruling cannot create situations that make the enforcement impossible. This way, the court stated in a case[17] that even though the plaintiffs had obtained a final judicial decision from the national courts, which imposed the obligation on state authorities to put the plaintiffs in possession of a precisely identified plot of land, the court ruling was neither enforced nor annulled nor modified as a result of admitting an application for judicial review. The Court notes that only an annulment of the impugned decision or changing the initial obligation with an equivalent obligation could

16 See the case of *Tăculescu and others versus Romania*, Decision of 11.03.2008.

17 See the case of *S. Popescu versus Romania*, Decision of 02.06.2004, published in the Official Gazette of Romania no 770/24.08.2005.

cease the ongoing lack of enforcement. Considering the case-law in the matter, the Court stated that state authorities have failed to put in all necessary effort to enforce a final court ruling in favour of the plaintiff. In conclusion, Art. 6 of the Convention was breached in this case.

In another case,[18] taking under consideration the fact that the initial court ruling was not enforced, the plaintiffs have obtained a new judicial decision, which imposed the obligation on local state authorities to put the plaintiffs in possession and issue property titles to them. Motivated by an impairment of their right to enforcement of both judgments, the plaintiffs stated that Art. 6, paragraph 1 of the Convention and Art. 1 of Protocol no 1 of the Convention had been breached. The court held that the rights to a fair trial and to property had been breached as a result of the authority's lack of enforcing a court ruling on the matter of restitution of property. The court came to the conclusion that state authorities had failed to put in all necessary effort to enforce a final court ruling in a reasonable time in relation to the full and effective restitution of the plots of land to the plaintiffs and mainly in relation to the rest of the land that had been awarded by the court. This way, Art. 6, paragraph 1 of the Convention and Art. 1 of Protocol no 1 of the Convention were breached. Concerning just satisfaction, the Court imposed the obligation on state authorities to effectively return the pieces of land that had not been given back to the plaintiffs and to issue them their property titles and, in the absence of these, to pay the plaintiffs a compensation for material and moral damages. Also, the Court dismissed the Government's argument relating to their budget, meaning that a state authority cannot refuse to pay an enforceable debt as a result of its insolvency as a debtor.

Resolution no 1787 of 26 January 2011 of the Parliamentary Assembly of the Council of Europe with the title of Implementation of Judgments of the European Court of Human Rights brings attention to Romania[19] in matters related to the lack of enforcing a final court ruling as a structural problem. Consequently, state authorities are asked to take all necessary measures to resolve the aforementioned issues.[20]

According to the interpretation of the European Court of Human Rights, the right to a fair trial, set forth by Art. 6 of the Convention, not only implies that a court ruling is pronounced in a reasonable time but that it is the object of an effective enforcement in the favour of the litigant who has won the case. It is true that the Convention does not only protect human rights in theory – in this case, by awarding damages – but also imperatively orders the actual enforcement of the claim, including the monetary claim.

18 See the case of *Giuglan and others versus Romania*, Decision of 02.12.2008, published in the Official Gazette of Romania no 408/16.06.2009.

19 Together with the issues presented in the case of *Maria Atanasiu and others versus Romania*, Decision of 12.10.2010, published in the Official Gazette of Romania no 778/22.11.2010.

20 Points 7.6 and 10.3 of the Resolution.

Final civil court rulings would be useless without an effective and efficient enforcement procedure. This way, according to the provisions of Art. 6 of the Convention, an efficient procedure that allows the enforcement of court rulings is essential to maintain the rule of law. Thus, Romanian state authorities must adopt all necessary norms and use due diligence *ex officio* in order to ensure that state authorities will comply with court rulings because delaying the enforcement is not acceptable. Also, Romanian state authorities must possess adequate and sufficient legal and monetary tools that guarantee the enforcement of court rulings.

The case-law of the ECHR, but also the case-law of national courts, and the applicable laws clearly and undoubtedly claim that state authorities must enforce court rulings *ex officio*, in a reasonable time in order for there to be an effective remedy and just and equitable satisfaction, in accordance with the provisions of Art. 13 of the Convention in order to avoid court rulings for the violation of Art. 6 of the Convention. The right to a court would be illusory if the legal order of a contracting state were to allow for a final court ruling to remain unenforced and impair the litigant's right to enforcement of the judgment. The enforcing of a judicial decision must be viewed as part of the lawsuit according to Art. 6 of the Convention, and an unreasonably long delay in the enforcement of a binding judgment may breach the Convention. Under these circumstances, a person who has obtained a final and binding judgment against the State may not be expected to bring separate enforcement proceedings at the end of legal proceedings. In such instances, state authorities, who have knowledge of the enforceable title, must act with due diligence and take all necessary measures to ensure compliance with a judgment against the State, including voluntary enforcement.

3. Conclusions

To summarize, we can state the following principles that derive from the case-law of the ECHR in cases related to the enforcement of final court rulings in the matter of land resources:

– if the State administration refuses or omits to enforce a court ruling or delays the enforcing of a ruling, the guarantees set forth by Art. 6 of the Convention that the plaintiff benefited from lose their meaning;

– the passivity of state authorities cannot justify the failure to comply with an enforcement judgement because it is unreasonable to require from a person who has obtained a judgment against state authorities to bring separate enforcement proceedings or separate action against authorities to obtain the execution of an obligation;

– in some cases, the creditor may be required to undertake certain procedural steps in order to allow or speed up the execution of a judgment. The requirement

of the creditor's cooperation must not, however, go beyond what is strictly necessary and does not relieve the authorities of their obligations set forth by the European Convention on Human Rights to act from their own initiative and within a reasonable time, based on the information that they already have in order to comply with the court ruling that has been pronounced against them;

– the beneficiary's obligation required by the law to hand in a written enforcement request together with a copy of their identity card and a copy of the final court ruling invested with a declaration of enforceability are reasonable obligations. These documents are not sufficient if the creditor does not hand in the topographical/cadastral documents required by the law; however, it is important for state authorities to notify him regarding the necessity to hand in these documents;

– if the creditor denies fulfilling these reasonable legal formalities necessary for the enforcement of the court ruling – providing the topographical/cadastral documents –, it gives reason for an objective impossibility to enforce. The creditor's refusal to cooperate when state authorities cannot fulfil their obligations without his cooperation gives reason for an objective impossibility to enforce (for example, refusing to sign a report of putting into possession or the refusal of the creditor to allow access to his land for the measurement of the base area);

– it also gives cause for an objective impossibility to enforce when the court ruling forces state authorities to do something that is too late to be done or cannot be done in the moment of enforcement (for example, carrying out a procedure of putting into possession of an immovable property that has already been transferred to the state's public domain). Also, an impossibility to determine the exact measurements of the base area is another motive for an objective impossibility to enforce (for example, carrying out a procedure of putting into possession of a land without being able to measure the base area); on the other hand, state authorities' refusal to enforce a final court ruling based on arguments that have not been previously brought to the attention of the court cannot give motive for an objective impossibility to enforce. Also, a refusal to enforce, which is based on facts that have previously been analysed and dismissed by the court cannot represent motives for an objective impossibility to enforce.

– a new court ruling that orders state authorities to pay a monetary award calculated for each day of delay in enforcing the court ruling is proof that the enforcement was possible at that time, irrespective of the debtor's claims that he was in an impossibility to execute;

– state authorities cannot get out of enforcing a final court ruling on the grounds of claiming that the national law was not interpreted in the right way or on the grounds of a factual situation on behalf of national courts, calling the merits of the case into question. Even if there were a divergence in interpretation, on the basis of the rule of law in a democratic society, the final ruling of the national

courts takes precedence over the opinion of state authorities or third parties, state authorities being obligated to fully cooperate. Furthermore, in certain situations where state authorities have brought up these arguments, the European Court of Human Rights reminded them that they had not introduced the forms of appeal that the national law required against the aforementioned court ruling.

– state authorities cannot successfully invoke that there is motive for an objective impossibility to enforce a court ruling if the impossibility has not been previously established within a judicial or administrative proceeding, opposable to the creditor. A simple letter/notice/memo from the debtor in which he informs the interested party of the impossibility to execute is not motive for exoneration;

– in the event of obtaining an official order that establishes the impossibility to execute, state authorities have to take all necessary measures to ensure the execution of restitution by equivalent in accordance with land resource laws;

– in the event that state authorities invoke an impossibility to enforce because the legal situation is unclear (for example, the legal situation of the immovable property that the plaintiff needs to be put in possession of is unclear), the ECHR states that it is the state authorities' job to clarify the legal situation, and not the creditor's;

– state authorities have to refrain from acts that lead to an impossibility to execute (for example, selling the land while there is an ongoing dispute over it);

– even though the court ruling does not expressly state in the disposition that state authorities have a certain obligation (for example, there is a ruling that annuls a title of property), the ruling must be enforced because the obligation to execute a court ruling is not limited to its disposition; the reasons given by the court must also be taken into account. If the final court ruling cannot be enforced, there is a need for a separate procedure to determine the details of the enforcement; it is the duty of the state authorities to take all necessary measures.

– the faulty execution of a final court ruling, concluded by the national courts or directly by the ECHR, breaches the Convention (for example, a new court ruling for the reconstitution of a title of property over some land that was later annulled by the court);

– even if the lack of enforcement of a court ruling is the fault of a different state authority, and not the fault of the debtor authority, the state remains responsible for breaching the Convention;

– a simple statement of a state authority saying that they have already executed the court ruling is not sufficient if it is not corroborated with other means of proof;

– a procedure of appeal against enforcement cannot lead to a discussion about the substance of the dispute, calling a final decision into question;

– suspending the enforcement of a court ruling that has been pronounced against the state is in essence not contrary to the provisions of the Convention

because the state also needs to have the possibility to invoke facts that occurred after the final court ruling had been pronounced. Nonetheless, state authorities need to act with due diligence to ensure the swift execution of the ruling;

– in the absence of a court ruling that suspends the execution of a judgement, a refusal to execute a court ruling cannot be justified by the fact that there is a procedure in progress. A state authority's written decision to suspend the enforcement does not justify the lack of enforcement.

– if the creditor is unhappy with the way the enforcement was handled, state authorities have the obligation to exercise necessary diligence in establishing whether state authorities have fulfilled their obligations correctly during the course of a judiciary procedure previously initiated by the unhappy creditor;

– a state's debt that resulted from a final court ruling stays valid and has to be enforced even if the time limit for the right to request forced execution has passed according to national laws. Even if the court establishes that the time limit has passed, it does not remove the state's obligation to enforce a national ruling, taking into consideration that the ruling has not been annulled or modified.

– it is not open to a State authority to cite lack of funds or other resources as an excuse for not honouring a judgment;

– if the creditor and the debtor, who is a state authority, have mutual claims, the claims can be compensated. In this case, it is not necessary to make a distinction between local and state budget.

– formulating an appeal to enforcement in order to establish the exact sum of the debt is not contrary to the provisions of the Convention.

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Collective Bargaining and Social Dialogue in Romania

Magdolna Vallasek
PhD, Senior Lecturer
Sapientia Hungarian University of Transylvania (Cluj-Napoca, Romania),
Department of Law
E-mail: mvallasek@kv.sapientia.ro

Abstract. The European Commission considers social dialogue to be crucial for promoting both competitiveness and fairness in Europe. We can notice that countries with the tradition of social dialogue tend to have stronger and more stable economies, and they are often the most competitive ones in Europe. Starting from this fact, the European Commission considers that 'knowing the important role that social dialogue plays and the positive benefit it has on a country's economy, the challenge today is to enhance its role across all EU Member States.'[1] Although the importance of social dialogue and collective bargaining is unanimously recognized by scholars, governance, and the social partners, the Romanian situation can hardly be considered an ideal one. Numerous problems in the practice of social dialogue can be identified, having their origins in the legal regulation, the lack of traditions, and some other issues as well. In this paper, we shall briefly present the Romanian legal regulation concerning social dialogue and collective bargaining, and we intend to point out some of the most urging problems, focusing on the analysis of these issues.

Keywords: social dialogue, collective bargaining, trade union, employer, employee

1. Introductory Remarks concerning Social Dialogue in Romania

In the last few years, a massive process of legislative reforms reshaped the main institutions of social dialogue in Romania. This wave of transformations came as a response to the challenges and negative effects of the economic crisis in 2007–2008 on the Romanian labour market and as important modifications of the Romanian Labour Code at the same time, projected to add some extra flexibility to

1 European Commission 2016.

the individual labour relations. The fact is that the economic crisis did not bring totally new challenges to the labour market, but some of the persisting problems became more visible indeed. 'The economic crisis only emphasized further the existing challenges by decreasing the activity rate and increasing unemployment and growth of informal economy.'[2]

Although it is evident that the economic crisis has aggravated some of the persisting problems of the Romanian labour market, this became a real subterfuge for the government to make modifications to the labour regulations, sometimes without any discussions with the social partners or even against their opinion. Furthermore, these modifications were intensely criticized not only by the trade unions but by a large number of labour law specialists and international organizations, too.

> With concern growing over the impact of the 2011 legislative reforms on industrial relations in Romania, the ILO commissioned a study to consider the impact of these reforms on working conditions and employment relations. The study concluded that on the whole the social impact of the reforms appears to have been detrimental to social partnership, collective bargaining and the quality of employment.[3]

The study identifies some of the negative effects as follows: the difficulty for trade unions and employers' organizations to operate effectively; the negative impact on national institutions of social dialogue; the malfunctioning of the Economic and Social Council; the weakening of collective bargaining on some important fields of interest, for example, minimum wage, the large number of employees who are no longer covered by collective agreements, and other problems which seem to persist in time and are present nowadays too.

2. The Process of a Reform. Background and Labour Market Indicators

In May 2011, the new Social Dialogue Act came into force and changed the rules of the game for collective bargaining in spite of the critical voices and opinions of the social partners, some scholars, and international organizations.

As Stefania Bărbuceanu epitomized the situation:

> 2011 was characterized by several changes in the ministry of labour, while pressure at the beginning of the year continued on the Boc Cabinet,

2 Incaltarau–Maha 2014. 44–66.

3 Dimitriu–Țiclea–Chivu–Ciutacu 2013. IX.

> which survived an eighth no-confidence vote. The Minister of Labour was changed twice, putting pressure on the business continuity in the ministry. Labour legislation was also changed as the new Labour Code, based on Law No. 53/2003, was approved at the beginning of the year, followed by the enacting of the Labour Social Dialogue Code, also approved by the Romanian Government. The new laws have changed substantially the basis of the Romanian labour and social legislation and policies.[4]

In a much starker opinion, the legislative changes adopted in 2011 are considered to be 'similar to an earthquake hitting the social dialogue in Romania'.[5] Although the legislative changes were widely criticized, and some important negative effects were pointed out, it must be acknowledged that:

> [T]his legislation followed the Romanian government's passage of a broad package of economic and labour reforms comprising wide-ranging cuts in entitlements and tax rises. These reforms were aimed at achieving macroeconomic stability and reducing government budget deficits, thus satisfying conditions Romania had signed up to in agreements it had made with various international financial institutions.[6]

In order to understand the necessity of the reform, we have to observe some of the labour market indicators of that period. As the main argument for the introduction of the legislative changes was the economic crisis, we have to observe the effects of the crisis that marked the Romanian labour market. The effects of the economic crisis became visible in 2009 when public revenues started to decrease, and economic growth started to slow down. In March 2009, the Romanian Government asked for financial assistance from the International Monetary Fund and the European Union and received a loan amounting to 12.9 billion euros. In order to get the loan, Romania had to adopt some austerity measures with direct implication on the employment and labour market. These measures of the Government hit the public sector first, including wage cuts and the elimination of some bonuses. Government Emergency Ordinance No 118/2010 on measures to strengthen the state budget introduced an average net income decrease of 25% in education, 20% in health and social assistance, and 13.9% in public administration. According to the ordinance, wages in the public sector were cut by 25%, but later in 2011 wages were corrected again by 15% and in 2012 were increased to the level of 2010, while the minimum wage was kept at 600 RON. The ordinance also cut some social security benefits, for example,

4 Barbuceanu 2012. 3.
5 Roşioru 2018. 73.
6 Dimitriu–Țiclea–Chivu–Ciutacu 2013. XI.

the paid maternity leave. At the end of 2009, meal tickets and gift vouchers were abolished for employees in the public sector, and the threshold of income tax on pensions was lowered. At the same time, VAT was increased in 2010 from 19% to 24%, and health insurance became compulsory for pensioners too.[7]

The effects of the economic crisis were visible both in the unemployment and in occupational ratio, affecting more or less several sectors of the Romanian economy (constructions, for example). Considering unemployment, one of the major problems seemed to be the fact that the age and professional structure of the unemployed people does not tally with the demands of the economy and labour market. On the other hand, the surge in unemployment was a consequence of the effects of the economic crisis on the private sector as a large percentage of small and medium-sized enterprises reduced or even stopped their activities. Although there is no precise data provided in this matter, in the case of Romania, the migration of workers to other Member States, especially Italy, Spain, the United Kingdom, and Germany, is a major problem too. Based on EURES data, we can say that after 2010 the number of highly qualified workers who left the country has grown significantly.

Labour market indicators also reflect the different aspects of the crisis and of the legislative provisions introduced in order to mitigate the negative effects of the crisis. First of all, by introducing Law No 40/2011 for the modification of Law No 53/2003, the Romanian Labour Code – published in the Romanian Official Gazette No 225/31.03.2011 –, the Romanian government intended to make labour relations more flexible in order to help to create new jobs. For example, the probationary period has increased from 30 days to 90 days and from 90 days to 120 days in the case of managers. A regulation came into force which provided the employer with the possibility to reduce the work schedule from 5 days to 4 days per week, reducing also the wages when a situation of economic, technical, or structural problem occurs for a period longer than 30 days. An obligation for the employer was introduced to register the resignation of the employee, and the notice period was increased from 15 calendar days to 20 working days and from 30 calendar days to 45 working days in the case of managers. According to the new regulations, the maximum period of fixed-term employment contracts was increased from 24 months to 36 months, as it was previously. Extraordinary work (overtime) must be compensated with leisure time within 60 days instead of 30 days, as it was before. Significant modifications were also introduced in the field of temporary work or collective redundancy.

All the changes of the legal provisions and the measures regarding the flexibility of the labour market were considered beneficial overall as the number of employees was slowly recovered, and the occupational rate in 2013 was once again at the level of 2008; and based on the data provided by the European

7 Further details are presented in Vallasek–Petrovics 2018. 3–6.

Commission, by the end of the reference period 2007–2016, it exceeded that level. Starting with 2012, a significant rise in the number of part-time employment contracts became noticeable too, such contracts constituting about 18% of the total number of employment contracts.[8]

3. The Process of a Reform. International Background

Analysing the changes of the regulations brought in force in order to find answers and solutions to new challenges and finding appropriate provisions to deal with the global crisis, we can see that, regarding the reforms, the case of Romania is typical for European countries, especially when taking into account the Central and Eastern European region. For example, the structural changes in the latest decade have shown unanimously for every Member State of the European Union the increase of women's participation in the labour market or of the part-time employment contracts even though there are significant differences between the Member States in this regard. At the same time, there is considered to be a common tendency towards the decentralization of collective bargaining on a workplace level, the raising of the representativeness threshold, and neglecting the role of some institutions of social dialogue in the Central and Eastern European region, all these factors having a negative influence on the social partners.[9]

A very broad and elaborate research made on the labour market situation of the Central and Eastern European region after the economic crisis proves that the responses formulated by the governments were quite the same.[10] For example, a typical response of austerity was the wage cut, present on the Romanian labour market too. We can see as well that the flexibility of labour relations gained major importance in that period. It was a commonly used reason for the modification of labour codes to make labour relations more flexible: Labour Codes suffered amendments or were replaced by new ones, for example, in 2013 in Slovenia, 2009 and 2014 in Croatia, 2008 and 2011 in Montenegro, and in 2012 in Hungary, and the same situation existed in other countries too. These flexibility measures marked especially the institution of fixed-term employment contracts, the probationary period, the work programme, extraordinary work, temporary work, or collective redundancy.

Similar tendencies can be observed in many European countries in the field of the regulation of social dialogue. The main issue about social dialogue seems to be the shrinking power of social partners, especially of the trade unions. It is true that weakening the power of trade unions has already got a longer history.

8 http://ceelab.eu/assets/images/summary_of_outcomes_in_case_of_romania_en_final.pdf
9 http://ceelab.eu/assets/images/summary_of_outcomes_in_case_of_romania_en_final.pdf
10 Horváth I.–Hungler S.–Rácz R.–Petrovics Z. 2018.

> Throughout much of Europe unionisation rates have declined since the 1980s. While the extent of decline varies between nations, no trade union movement has implemented an effective strategy to restore the levels of the late-1970s, leading some to question the relevance of trade unionism for the twenty-first century, the future role of trade unionism and the embeddedness of unions in globalized capitalism.[11]

Other researchers draw attention to the differences concerning the problems trade unions have to cope with.

> On one hand, they face joint and growing challenges across countries (such as unemployment, the growth of precarious labour and the rise in inequality, alongside a long-term erosion of their membership base connected to fundamental structural and cultural changes). And against the background of the New Economic Governance, most of them are facing a much more streamlined neoliberal economic policy approach on the part of their national governments than in earlier decades. On the other hand, unions have to try and cope with these challenges under widely varying conditions.[12]

Apart from the situation of the actors of social dialogue, there are important evolutions in collective bargaining and its levels. For example, based on the comparative analysis of the above-mentioned multinational research on the Central and Eastern European labour markets, we can notice that in this region most of the collective agreements are concluded on the level of the employer instead of on a sectoral level.

Evaluating governments' responses to the crisis by the social partners, trying to find out to what degree social partners are satisfied with their governments' measures implemented to mitigate the negative effects of the economic crisis, the conclusion is that 'the opinion of social partners very much depended on the level of their involvement in the decision-making process. The more social partners' views had been considered during the decision-making process, the more satisfied they were with the results.'[13] And another aspect that seemed to be identical for many countries in the Central and Eastern European region is that 'employers' associations have been generally more satisfied with the government measures, especially with those aimed at the flexibilization and deregulation of the labour market.'[14]

Despite that the evolution of the Romanian labour market is in many ways identical to the above presented general tendencies, we can spot some important

11 Waddington 2014. 7.
12 Lehndorff–Dribbush–Schulten 2017. 7–8.
13 Horváth I.–Hungler S.–Rácz R.–Petrovics Z. 2018. 28.
14 Ibid.

particularities, too. These aspects are mainly based on the new Romanian regulation of social dialogue.

4. Social Partners in Romania

In a study elaborated in 2016, researcher Victoria Stoiciu concluded that '[T]he 2011 labour law reform considerably diminished employees' freedom of association and restricted the right to form unions to an extent that the ILO has criticized as non-compliant with its standards.'[15]

This opinion is quite unanimously shared by researchers and not only, and it seems to be evident when analysing the changes in the regulation of social dialogue introduced by the new Social Dialogue Act. At the same time, in parallel with the modification of the social dialogue regulations, the modification of the Labour Code in 2011 brought some limitations to the trade union leaders' rights too, for example, by abolishing the regulation containing the interdiction of dismissal for the period of their mandate extended with extra 2 years after it.

Trade unions must be independent non-profit legal entities, established to defend and promote collective and individual rights and the professional, economic, cultural, and social interests of their members towards the employers (Article 214, Section 1 of Act No 62/2011). The freedom to set up or join trade unions or employers' associations is based on Article 40 of the Romanian Constitution, stating that citizens may freely associate into political parties, trade unions, employers' associations, and other forms of association. Though this principle is clear, the actual regulation creates a situation that encumbers the use of this generally recognized right, especially for trade unions.

First of all, according to Law No 62/2011, a minimum of 15 members is required in order to form a trade union, but they have to be workers in the same establishment. Though the minimum number of the members has not changed, this compulsory condition did not exist prior to the new legislation: 15 employees working in the same branch but in different establishments could set up a professional union. It is obvious that it has become much harder, if not impossible in some cases, to establish a trade union especially considering the situation of the workplaces with fewer than 15 employees.

The Memorandum of technical comments on the draft Labour Code and the draft law on social dialogue of Romania drawn by the ILO in 2011[16] criticized this provision too. The Memorandum stated that:

15 Stoiciu 2016.

16 http://www.csnmeridian.ro/files/docs/Technical%20Memorandum%20Romania%20on%20Draft%20Labour%20Code%20and%20Draft%20Law%20on%20Social%20.pdf

> [W]hile a minimum membership requirement is not in itself incompatible with Convention No. 87, the Committee on Freedom of Association has stated that the number should be fixed in a reasonable manner so that the establishment of organizations is not hindered. What constitutes a reasonable number may vary according to the particular conditions in which a restriction is imposed but should take into account the proportion of small enterprises in the country. The Office therefore recommends that the requirement of 15 workers to establish an enterprise-level trade union be assessed against the prevalence of small businesses in the labour market with a view to ensuring that it will not hinder the establishment of unions in an important segment of enterprises.

The decline in trade union membership started almost immediately after the change of the political regime in 1989. This phenomenon was not a Romanian particularity; it was present in all the countries of our region. Still, the new requirements of Law No 62/2011 have deepened the crisis of trade union density, which dropped from about 90% – where it stood at the beginning of the 1990s – to an approximate 20–40% although reliable official data do not exist on that matter.

On the other hand, according to the legal definition, the employers' associations are non-political, non-profit, and autonomous legal entities based on the principle of free association, established to defend and promote the rights and interests of their members as they are stipulated by law, international treaties and conventions, and their own statutes.

Representativeness of the trade unions and employers' organizations gained new regulation as well by Law No 62/2011.

The conditions of representativeness are different depending on the level of the trade union or employers' organization.

At the national level, a trade union organization must have the legal status of a confederation, systemic and financial independence, the affiliated trade unions must cumulate at least 5% of the employees of the national economy and must have territorial structures in over half of the counties, including Bucharest, while an employers' organization may be representative at the national level if the members affiliated to the employers' confederation employ at least 7% of the total number of employees in the national economy, the confederation has local structures in over half of the counties of Romania (including Bucharest), and it has systemic and financial independence and the legal status of confederation.

At a sectoral level or at the level of groups of companies, the conditions for representativeness of trade unions are the following: legal status of trade union federation, systemic and financial independence, and the members affiliated must have at least 7% of the total number of employees in that particular sector

or group of companies, while an employers' organization is recognized as representative if the members of the federation employ at least 10% of the total number of the employees in the sector as well as it has systemic and financial independence and the legal status of federation.

In order to be representative at the workplace level, the legal status of trade union as well as systemic and financial independence are required, and the number of the members must be over half of the number of employees of the company, while at the workplace level the employer is representative by law.

In parallel with the new regulation concerning representativeness, the rights and protection of the trade union leaders have diminished after the legislative reforms of 2011. First of all, the amendment of the Labour Code in 2011 brought some limitations of the elected trade union leaders' rights too, for example, by abolishing the regulation containing the interdiction of dismissal for the period of their mandate extended with an extra 2 years after it.

Like this, although elected trade union leaders cannot be dismissed for reasons pertaining to the accomplishment of the mandate, they are still left without protection as their mandate terminates.

> The intention of the legislator, through the legal reforms, was to reduce the protection of trade union leaders against dismissal, in the sense that during their mandate, the employer could dismiss them on any grounds (including redundancy and capability), with the exception of those related to the accomplishment of said mandate. However, this last intention was impeded by a defective law-making method, which led to frequent non-correlations between the recent amendments and the former regulation. More precisely, the legislator did not modify Article 60(1)(g) of the Labour Code accordingly, which prohibits the dismissal of employees for the duration of exercising an elected office in a trade union body, with the exception of the dismissal for cause, in case of a serious breach of work duties or repeated breaches of work duties.[17]

This quite absurd situation persisted for many years. Finally, Article 60(1)(g) of the Labour Code was declared to be unconstitutional by the Constitutional Court.[18]

The interdiction stated in the Labour Code is doubled by the provision of Article 10 of the Social Dialogue Act, which declares that the modification and/or the termination of the employment contracts of trade union members is prohibited for reasons pertaining to their trade union membership or trade union activity and that this prohibition is applicable in the case of civil servants too.

17 Dimitriu–Țiclea–Chivu–Ciutacu 2013. 11.

18 Decision no 814/2015 of the Romanian Constitutional Court was published in the Official Gazette no 950/2015.

Another lesion to the trade union leaders' rights in the new regulation was the suppression of the right to paid time off for performing union activities during their mandate. Prior to the new provisions, based on Trade Union Law No 54/2003, the elected trade union leaders had the right to use 3–5 days per month to perform their mandated duties, without any wage cuts.

A special feature of Romanian social dialogue is the institution of employees' representatives (or workers' representatives). Their status, duties, and rights are governed by the Labour Code, stating that in workplaces with more than 20 employees, where no representative trade union organization is established, the workers can elect their representatives, who can also negotiate and sign collective agreements. Taking this provision as a starting point, it seems that we can witness a shift of power from trade unions to the representatives of employees.

> The tasks of workers' representatives, who can only be elected if there are no union members, are to ensure that workers' rights are complied with, to participate in drawing up the company's rules and generally to promote the interests of the workers. The specific consultation rights of the workplace union organization also pass to the workers' representatives, where they exist.'[19]

In spite of some similarities, there are, of course, quite important differences between trade unions and employees' representatives.

> Unlike trade union organizations, the elected representatives of employees do not have a legal definition established by law. However, in keeping with the interpretation of the provisions of Art. 221, para. (1) of the Labour Code, these employees are elected by the general assembly of employees in establishments with fewer than 20 employees and where the trade union organizations are not representative, according to the law. (…) However, in the Romanian legislation, these two types of representation are differently regulated, which requires several modifications.[20]

19 Barbuceanu 2013. 13.

20 Moarcăş Costea–Popoviciu 2013. 50–51. The modifications of the Social Dialogue Act proposed by the authors included: 'the legal status of elected representatives of employees (conditions of election, mandate, their protection, etc.) to effectively participate as partners in the social dialogue and collective bargaining; employees' representation should be empowered to bargain in full respect of the provisions of Article 5 in the ILO Convention 135/1971; as for the protection of trade union leaders, Romania needs to harmonize its present legislation with the provisions of the revised European Social Charter, meaning that their protection should be also maintained after the end of their mandate for a certain period of time, to be agreed by the social partners.'

5. Collective Bargaining and Collective Agreements

The new Social Dialogue Act is considered to mark a real turning point for the institution of collective bargaining and collective agreements, some researchers even characterizing the new regulations as being a real change of paradigm. This statement is based on the fact that though the Romanian Constitution declares in Article 41, para. (5) that the right to collective labour bargaining and the binding force of collective agreements shall be guaranteed, there have been essential modifications to the legislation of social dialogue which are not in line with that provision.[21]

The changes in the collective bargaining system introduced by the new legal provisions had a direct and immediate effect on the number of employees covered by collective agreements. Though official data is incomplete in this field, the data provided by the ILO in 2013 shows a collective agreement coverage of about only 35%, knowing that under the prior regulation the collective agreement coverage was of 97–98%. The main cause of this significant decline is the abolishment of national-level collective bargaining.

Starting from the legal provisions, collective bargaining can be defined as the negotiations between the employer or employer's association on the one hand and the trade union or the employee representatives on the other hand in order to settle the regulation of the working relations between the parties and any other problems of common interest.

Beginning with 2011, the Romanian collective bargaining system has suffered major changes, on the one hand, due to the modifications of its levels and, on the other hand, because of the new criteria used for the determination of representativeness and the sectors of the economy. As national-level collective bargaining has been abolished, the highest level of collective bargaining in Romania is the sectoral level. According to Article 133 of the Social Dialogue Act, the collective agreements concluded at the sectoral level are applicable for all employees of the companies belonging to the respective sector of activity for which the collective agreement has been concluded and who belong to those employers' associations that have signed the contract. This means that in fact not only national-level collective bargaining became impossible but cross-sectoral collective bargaining too.

Sectoral-level collective agreements can be negotiated and signed by social partners that are recognized as representative of the economic sector, and they can only be enforced if more than 50 per cent of all employees in the sector work for companies that are members of the signatory employer organizations. If this criterium is not fulfilled, the agreement will be effective only at a group of units level. The representativeness threshold is 7% of the total number of

21 Pătru 2014. 276.

employees in that particular sector. The sectors of the economy in the new system are determined according to the NACE codes of activity instead of the old system of branches of the national economy. After the old collective agreements which were concluded at a branch-level had expired, the number of sectoral-level agreements dropped dramatically to one or two per year, while in 2015 and 2016 no collective agreements had been concluded at all.

> Experts of the European Trade Union Institute explained the loss of members by the fact that, in the absence of an extension decision by the Minister of Labour, the collective agreement concluded at sector[al] level is only mandatory for employers belonging to the signatory employers' federations, so in order to avoid applying the collective agreements concluded at this level employers frequently withdraw from the employers' federation.[22]

Collective bargaining in Romania is concentrated on the workplace level. The number of collective agreements concluded at a workplace level was constantly increasing after the legislative changes. In her study, Stoiciu explains that the expected outcome of the transformation of the collective bargaining system was:

> [T]he creation of stronger sectoral and company unions and union mergers that would put an end to the fragmentation of both sectoral and company level. Contrary to expectations, this did not occur. (…) The result was a decentralized social dialogue, coexisting with high fragmentation and characterized by a power shift from umbrella organizations to the sectoral and company unions. But the power did not translate into stronger unions or higher collective bargaining coverage at company level, rather the opposite – it weakened the unions and their bargaining power.[23]

At the company level, collective bargaining is mandatory only if there are more than 20 employees at the enterprise. However, in these cases, collective bargaining is mandatory but concluding a collective agreement is not. The employer must commence the negotiations with trade unions or employee representatives, but there is no legal provision to make the concluding and signing of the agreement mandatory or, for that matter, one which would list those obligatory clauses that must be discussed between the parties.

The most important elements of such agreements are: the minimum salary at the company level, salary rights for the employees such as: meal vouchers, gift vouchers for special days, vacation vouchers/bonuses, bonuses for contribution to the company's success etc., training plans for the employees, working time and the

22 Vallasek–Petrovics 2018.
23 Stoiciu 2016. 4.

compensation for overtime and time worked during holidays and weekends, specific organization of work schedules (shifts, night-time work, flexible working time, etc.), supplementary vacation days and other days of paid leave in case of special events, compensations in case of collective redundancies, aid for employees in case of unfortunate events, and rules regarding the evaluation of employees for fitness.

As presented above, an important characteristic of the Romanian collective bargaining system is that due to the new criteria of representativeness at the enterprise level a real tendency towards the replacement of collective agreements signed by representative trade unions with those signed by employees' representatives may be noticed. At the workplace level, about 85–90% of the collective agreements are negotiated and signed by employees' representatives.[24] The shift away from trade union power to representatives of employees remained even after the amendment of the Social Dialogue Act in 2016, when a new provision was added according to which a trade union may also negotiate at the company level, even if it does not meet the representativeness criterion, if it is a member of a federation which is representative on a sectoral level.

Independent of the level on which the collective agreement was concluded, the legal provisions containing the rights of the workers are considered compulsory and minimal, collective agreements can set rights and duties only while respecting this legal framework. Derogation from the laws can only be made to the benefit of the employees. In practice, there are many situations when the collective agreement concluded on a workplace level does not contain any provision except the faithful repetition of the legal clauses from the Labour Code and the Social Dialogue Act.

6. Concluding Remarks

The legislative reform of 2011 reshaped the scene of Romanian social dialogue and collective bargaining. The modifications were considered to be similar to an earthquake, to be brutal and were widely criticized. By our days, after a few years of social dialogue practice in the new conditions, the analysis of the situation has still not resulted in optimistic and positive predictions. The collective agreement coverage and trade union density is at a dramatically low level, and there are no signs of recovery.

Unfortunately, in many countries in Europe – and not only –, we can assist to problems very similar to those presented in the case of Romania. What the future of collective bargaining and social dialogue will be is not known, but the importance of these institutions is unanimously recognized. Collective labour rights can offer a higher degree of protection for workers, and the need for

24 Id. 7.

flexibility in labour relations must not lead us to sacrifice some of the already gained collective labour rights. After all, 'the main object of labour law has always been, and we venture to say will always be, a countervailing power to counteract the inequality of bargaining power, which is inherent and must be inherent in the employment relationship'.[25]

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The 'Association in Participation' and the 'Simple Partnership' in the Romanian Civil Code[1]

Emőd Veress
PhD, Professor
Sapientia Hungarian University of Transylvania (Cluj-Napoca, Romania),
Department of Law
Senior Research Fellow Mádl Ferenc Institute of Comparative Law (Budapest, Hungary)
E-mail: emod.veress@sapientia.ro

Abstract. At present, the Romanian monist civil law regulates two types of cooperative structures or companies without legal personality: the 'societatea simplă', literally, simple company or, more precisely, simple partnership, and the 'asociere în participație', literally, association in participation. Both contracts can be used in a traditional non-commercial context but also for business purposes. Therefore, a necessity to delimitate them occurs. This article deals with the difficulties of such a delimitation: sometimes a clear borderline can be drawn, other times the association in participation contract requires that legal practitioners rely on the general rules of simple partnership, which have a complementary and subsidiary character. The objective of the present article is also to analyse the (mandatory and default) character of norms of association in participation, the decision-making procedure of this contractual structure, issues regarding representation, and transfer of partnership rights.

Keywords: legal transplant, association in participation, simple partnership, monist private law, mandate, assignment of contracts, transfer of incorporeal participations in a simple partnership

1. Consortium as 'Association in Participation'

Consortium derives from the Latin term *consors-sortis*, a composition of *cum* and *sors*, meaning persons who share the same fate,[2] meaning also fellowship,

1 This article is based on a presentation given in Gdańsk (Poland), 9 November 2018, entitled Consortium Regulations in Romania, organized by the Societas – Central and Eastern European Company Law Research Network and University of Gdańsk, Faculty of Law and Administration.

2 Angiulli 2014. 21.

partnership, and even sympathy. The term 'consortium' is used in Romanian legislation as a general term meaning association, a group of people organized for a joint purpose. For example, Law No 287/2004 on the consortium of universities defines consortium as a voluntary, general interest association established on the basis of a contract concluded in authentic form between two or more institutions of higher education, of which at least one is accredited by the state. Research and development institutes may also participate in the establishment of a university consortium. An institution of higher education or a research and development institute may be associated only to a single university consortium.

If we look for an internationally accepted definition of the consortium, we can find such definitions: 'an alliance between companies by which, in tendering for a project, they make clear to the customer that it is their desire to work together, and that their tenders have been coordinated on that basis. The companies usually exercise a great deal of care to make sure that their individual offers are such that they dovetail together and collectively comprise a complete scheme'.[3] A simpler definition may also be given, according to which a consortium agreement is where several parties join together in common purpose to contract with another party.[4]

If we have in mind these definitions, they cover, under the Romanian law currently in force, two realities:

1. the 'societatea simplă', literally, simple company or, more precisely, *simple partnership* and
2. the 'asociere în participație', literally, association in participation, translated not quite accurately as *joint venture* or as *undeclared partnership* (which is not accurate because the simple partnership is undeclared as well) or as *silent partnership* (which covers mainly the French reality between 1966 and 1978 or, as we will see, just an alternative usage of this contract).

Lacking a precise translation of this term – also used in Italian and French law – into English, I am forced to use *association in participation* as the term for the second contractual structure. Both above mentioned contractual structures lack legal personality. In this article, the focus will be mainly on the association in participation as a specific consortium under the Romanian law, but I will make frequent references to the simple partnership as well in order to give precise information on legal realities.

Romania traditionally had a regulation on the association in participation in commercial law as a contract called 'asociere în participațiune', a legal transplant from Italian law. Curiously, Romanian private law was traditionally French-

3 Cummins–David–Kawamoto 2017. 91.
4 Lew–Mistelis–Kröll 2003. 180.

oriented, but in 1887, for commercial law, the Italian 'Codice di Commercio' from 1882 was used as a model for the similar Romanian legislation. The reason was quite simple: at that time, the Italian 'Codice di Commercio' was the most modern piece of legislation for regulating business activities compared to the French 'Code de Commerce' from 1807. The 1882 'Codice di Commercio' regulated association in participation under the name of 'associazione in partecipazione'.[5]

Based on this model, the Romanian 'Codul comercial' regulated the association in participation. This regulation from the 'Codul comercial' actually remained in force until 1 October 2011. During the Soviet-type dictatorship (1945–1989), the Commercial code was not repealed but was not applied in practice either; it was in a dormant state and resurrected in 1989 after the collapse of the so-called communist regime.

In 2011, Romania opted for the monist system of private law, and thus specific commercial law was partly repealed, partly integrated into the new 'Codul civil'. The fate of the association in participation followed the second path, that of integration into the new Civil Code, under the name 'asociere în participație', with the same meaning but with a little bit more modern linguistic formulation. This association in participation exists besides the simple partnership also regulated by the Civil Code. Alongside this regulation in force from the Civil Code, there are rules regarding association in participation in the Tax code ('Codul fiscal').[6]

With the transfer to the monist private law through the actual Civil Code (adopted in 2009, substantially modified and entered into force in 2011), the problem seems complicated. Before 2011, there was a separate set of rules in the ancient Civil Code on simple partnership used in the traditional non-business environment, and, besides this, there was a separate regulation in the Commercial Code on association in participation, for business purposes. This delimitation was reflected also by the terminology: 'societate civilă', meaning civil (i.e. non-commercial) partnership, in comparison with the 'asociere în participație,' which was in its essence a commercial (simple) partnership.

In the monist system of private law, the new rules on the simple partnership ('societatea simplă') can be used not only in a regular non-business setting but also for economic purposes, mainly in any and all contexts in which the business-oriented association in participation was used before. Now the Civil Code has a separate set of texts on the partnership and another on the association in participation, with the result that the otherwise very flexible partnership rules can be applied for the functioning of an association in participation as well. Therefore, parallelism was created.

5 To further complicate the irreconcilable terminological contradictions, Italian law uses the term 'contratto di consorzio' but with a different meaning, more as a cartel in the context of competition law. French law also uses the notion of 'société en participation'.

6 For details, see *Chapter 2* below.

The simple partnership is a company without legal personality but featuring a lot of characteristics of companies. Association in participation is similarly a company without legal personality, but this can be designed much more like a classical contractual agreement, and so it is closer to the idea of consortium. Alongside these, in practice, innominate contracts are used as consortiums, mainly referred to as contracts of association, which regulate collaboration between the parties for different business purposes but without creating even a simple partnership or an association in participation.

As I stated before, in this context, I will analyse only the rules applicable to the association in participation and not the general regulation of simple partnerships. However, the Romanian Civil Code has a very short (6 articles) regulation of association in participation. Meanwhile, the regulation of simple partnerships is very detailed (67 articles), and the Civil Code states that these rules are generally applicable to companies (art. 1887), including the ones without legal personality – consequently, for association in participation as well.

In this case, simple partnership rules are applicable for associations in participation as well[7] except for two cases:

1. when the specific regulation of the association in participation contains derogatory norms;
2. when the general rules regarding simple partnerships are not compatible with the nature of the association in participation.

An association in participation can be modelled on the rules of the simple partnership or not. Therefore, while the simple partnership has incorporeal participations ('părți de interes'), this is not necessary in the case of association in participation. An association in participation can be conceived as being much closer to an ordinary contract, without the company-like features of the simple partnership such as the above mentioned incorporeal participations.

2. The Legal Nature of the Association in Participation

The law perceives an association in participation as a contract, not as a legal person. It is a form of cooperation for business purposes, which, according to the legal definition, is 'a contract whereby a person grants one or more persons a share (participation) in the profits and losses of one or more of the operations they undertake'.

7 Cărpenaru 2019. 513. Cesare Vivante considered simple partnership and association in participation as analogue contracts. Vivante 1903. 515.

This definition reflects only in part the nature and essence of this contract, i.e. the obligations of one party (of the managing partner) to share its profits. However, in order to obtain this right to have a share in the profits, the other party (or parties) undertakes to provide financing, goods, or knowledge or to perform a particular activity in the interest of the association in participation. As it was stated in the literature, 'the important terms of this type of contract other than the usual ones (such as duration, names of the members, penalties, etc.) are the consideration and the individual skills that each member brings to the consortium'.[8]

In some cases, association in participation works like a silent partnership[9] (*stille Gesellschaft* in German), but this is not a defining feature, rather it indicates the versatility of its usability. If we use by analogy the rules of simple partnership, occult or hidden partners are liable towards third parties acting in good faith as the other partners (Art. 1922, Civil Code).

Such an association in participation cannot acquire legal personality and is not a person distinct from the person of the partners. In consequence, there is no need to register the association in participation in the trade (company) register.

The only formal requirement is to conclude the contract in a written form, but this is a necessity just for the reason of pre-constituting evidence, not for validity reasons. So, in the case of the association in participation, the existence and content of this contract cannot be proven by witnesses.

The Romanian Fiscal Code, in the context of value-added taxation, declares that the association in participation does not give rise to a separate taxable person [Art. 269, para. (11)]. The legal rights and obligations regarding the value-added tax shall be borne by the partner who accounts for the revenues and expenses of the association in participation, according to the contract concluded between the parties [Art. 321 (5)]. The Fiscal Code also defines the notion of transparent tax entity, including association in participation, without legal personality, which presupposes that each association in participation member is a separate subject of taxation in the sense of corporate tax or income tax.

Also, the association in participation cannot enter into legal relationships as such. As a contract, association in participation does not have personality attributes such as the right to own property. Partners remain the owners of the assets made available to the association in participation, or assets can be transferred into the common property of the partners. The association in participation does not have a name, a seat, and a patrimony[10] and generally cannot stand before the courts (while simple partnership can).

8 Camarinha-Matos–Afsarmanesh 2003. 640.
9 Stanciu 2019. 514.
10 Vivante 1903. 515.

A third contracting party has no right towards the association in participation, and it is bound (has obligations) only to the partner with whom they have contracted.

Cross-border association in participation is also possible.

3. Flexibility, Mandatory and Default Rules

The Romanian legislator uses a general rule for flexibility, creating a legal environment, adjustable and supple. The general rule for flexibility states that, except as provided by the rules included into the Civil Code, the parties' agreement determines the form of the contract, the extent and conditions of association as well as the causes of its dissolution and liquidation.

This approach results in that the minimal set of legal rules included in the Civil Code has a mandatory nature. There is an exception because some default rules regulate the legal status of assets made available for the association in participation. In this context, the partners may agree that the goods made available for the association in participation as well as those obtained from the use of such goods will become common property.

The assets made available to the association in participation may be wholly or partly transferred to one of the partners in order to achieve the object of the association in participation, under the conditions agreed upon in the contract and in compliance with the publicity formalities stipulated by the law. Partners may stipulate the return in kind of the goods transferred to one partner of the association in participation at the end of the venture to the original owner.

Except for these default (permissive) rules, all other legal regulations in the Civil Code have mandatory nature (for example, the necessity to conclude a written contract for evidence of the association in participation or the lack of legal personality). This approach does not affect the flexibility of the association in participation because through the mandatory rules the lawmaker achieved the structural concept of association in participation and created a set of tools in order to protect creditors.

Very interestingly, according to the Civil Code, any clause establishing a guaranteed minimum level of benefits for one or some of the partners is considered unwritten.

4. Decision-Making

There are no legal rules for decision-making because the legislator gave the liberty to create the decision-making mechanism to the parties. If the private norms of the contract regulate the association in participation more like a simple

partnership, we can apply by analogy the decision-making procedures of that type of contractual cooperation.

The simple partnership decision-making procedure requires adopting decisions by way of a majority vote of the partners unless otherwise stipulated by contract or by law. The law does not specify clearly if each and every party has a single vote or the number of votes is proportional to their participation. This is left to be decided by the courts or to be determined by the contract.

There are two significant legal limitations to the majority rule (Art. 1910, Civil Code):

1. the decisions for the modification of the simple partnership contract or the appointment of a sole administrator shall be taken with the consent of all the partners;
2. a partner's obligations cannot be increased without his or her consent.

Any provision contrary to these limitations shall be deemed not to be written.

If the association in participation resembles rather a classical contract without the features of the simple partnership, then unanimity is required for any decision.

5. Representation of the Association in Participation

The association in participation is usually not represented: it is a contract, so representation is not possible. Mandatory rules determine that partners, even acting on behalf of the association in participation, contract and engage on their own behalf with third parties.

However, according to the Civil Code, if the partners conclude contracts in their capacity of members of an association in participation in relation with third parties, they are held jointly and severally[11] liable by the acts concluded by either of them. Based on this legal text, a very important question arises: if a partner makes a declaration that he is acting on behalf of an association in participation, does this isolated declaration make all partners liable towards the third party? This would run contrary to the principle of relativity of contracts (the contracts can bind only the parties who entered into them). Practically, the problem can be solved, in my opinion, based on the principle of the mandate. The association in participation creates a presumption of mandate between the partners, and if any partner declares that he is acting on behalf of such association, then practically he is representing the other parties but strictly under the conditions and for the

11 Cărpenaru 2019. 517. So, the argument that 'a consortium agreement is most frequently used… to avoid incurring joint and several liability under a partnership' does not stand in the case of Romanian law. See Edwards–Barnes 2000. 96.

purpose of the association in participation. Only in this case, the joint and several liability of the partners in the association in participation is acceptable and does not breach the principle of relativity of contracts.

Practically, this presupposes a mandate for representation, and therefore the rules regarding representation from the Civil Code are applicable. According to Article 1309 of the Civil Code, the contract concluded by the person acting as a representative, but without empowerment or exceeding the powers conferred, shall not have effect between the represented (in our case, the other association in participation partners) and the third party.

In a case in which by his conduct the represented person (the other association in participation partner, who is not participating in the conclusion of the contract) has caused the third party to reasonably believe that the representative has the power to represent him and that the representative is acting within the limits of the conferred powers, the represented person cannot rely towards the contracting third party on the lack of power to represent or the exceeding of the limits of the mandate.

Partners exercise all rights arising from contracts concluded by either of them, but the third party is held exclusively to the partner with which he contracted unless the latter has declared his quality (a member of an association in participation) at the time of the conclusion of the act.

Any clause in the association in participation agreement limiting the liability of the members to third parties is not opposable to them (to the third parties).

If the association in participation is designed more like a simple partnership, unless otherwise provided by contract, the partnership is managed by all of the partners, who have a mutual mandate to manage for the benefit of the company. The operation of any of them is valid for the others, even without their prior consent. Another option is to nominate one or more administrators. The administrator can be one of the partners or a person outside the partnership, natural or legal, and may be a Romanian or foreign person. The simple partnership is represented by the administrators with the right of representation or, in the absence of appointment, by any of the partners unless the right of representation has been stipulated by the contract for some of them only. When there are more administrators than one, without a delimitation of the powers of each administrator or determining the obligation to work together, each can administer in good faith in the interest of the partnership (Art. 1916, Civil Code). If the contract states their obligations to work together, none of them can manage the partnership without the others, even if an administrator is unable to act.

In practice, for associations in participation, one member is determined as being an 'administrative partner', leader of the association in participation or leading member of the association in participation. This does not affect the conclusions drawn previously: a mandate is necessary in order to represent the

other members, and if the conditions of the mandate are met all the partners will have a liability towards the third person.

For simple partnerships, the Civil Code states that the company is represented in court by the administrators with the right of representation or, in the absence of such an appointment, by any of the partners, unless the right of representation has been stipulated by the contract for some of them only. The partnership can be sued under the name provided in the contract or legally registered, as the case may be (for simple partnerships, special law may provide an obligation for registration). Third parties may rely on either. These rules can be applied by analogy for associations in participation only if they are structured as a simple partnership.

6. Transfer of Association in Participation 'Partner' Status

The association in participation partnership, which is a contractual position, is generally not freely transferable. However, the parties may use the procedure of contract assignment (art-s 1315–1320, Civil Code), which makes possible this transfer under certain conditions.[12]

A party may substitute a third party into the legal relationship arising out of a contract only if the performance has not yet been fully fulfilled and the other party agrees. In my opinion, this agreement is necessary in a dual way:

1. if any member of the association in participation wants to transfer his position to another person, whether or not this person is a member of the association in participation or not, all partners must approve this transfer unanimously;
2. if the members of the association in participation concluded contracts with third parties, the transfer of the association in participation 'membership' requires the prior consent rendered also by this third contracting party because the transfer influences that subsequent contract too (for example, a solvent association in participation partner, which was at least one of the motives for the conclusion of a certain contract by the third party, wants to assign his association in participation 'partnership' for a not so solvent person).

The assignment of the contract and its acceptance by the ceded contractor must be concluded in the form required by the law for the validity of the ceded contract. In the case of association in participation, this means that only a written instrument may be used as evidence for the assignment and acceptance.

12 Veress 2019. 234–236.

Very interestingly, the law indirectly creates a possibility to make an association in participation 'membership' transferable. This is possible if a party has agreed in advance that the other party may substitute a third person into the relationship arising from the contract. In such a case, the assignment shall take effect in respect of that party from the time the substitution is notified to it. If all elements of the contract are resulting from a document containing a 'to the order of' clause or equivalent, unless otherwise provided by the law, the filing of the document with the data of the new contracting party will result in the substitution of the assignee in all rights and obligations of the assignor.

The assignor shall be relieved of its obligations towards the assigned contractor from the time when such substitution takes effect. If the assigned contractor declares that he does not release the assignor, the assigned contractor may be entitled to rely on this declaration when the assignee fails to perform his obligations. In that case, the assigned contractor, under the sanction of loss of the right of recourse against the assignor, must notify the assignor on the non-performance of the obligations by the assignee within 15 days of the date of non-performance or, as the case may be, from the date on which he became aware of the non-performance.

The assigned contractor may oppose to the assignee all the objections resulting from the contract. The assigned contractor may not, however, rely on vitiated consent as well as any defence or exception arising out of his relationships with the assignor unless he has reserved that right when he has consented to substitution.

According to the law, the assignor guarantees the validity of the assigned contract. Where the assignor guarantees the performance of the contract, he shall be held as a surety[13] for the obligations of the assigned contractor.

If the association in participation is conceived more like a simple partnership, designing the contractual relations based on the creation of incorporeal participations, the rules for the transfer of such participation are applicable. Transmitting incorporeal participations to persons outside the partnership is permitted with the consent of all partners. Per a contrario, such participation is transferable between partners. Incorporeal participations may also be transferred by inheritance unless otherwise agreed by contract.

Any partner may redeem, in substitution of the rights of the acquirer, the incorporeal participations acquired by a third party without the consent of all the partners within 60 days of the date when he knew or ought to have known the assignment. Therefore, the Civil Code makes possible the transfer of incorporeal participations even in the absence of the unanimous approval of the partners, the sanction not being the voiding of such an act but the special right to redeem the transferred participations. If more than one partner exercises this right at the same time, the participations are allocated in proportion to their percentage

13 For details on the suretyship under Romanian law, see Veress 2015.

in the profit of the partnership. This option to acquire these participations also applies in the case of gratuitous transfer (Art. 1901, Civil Code).

7. Reasons and Procedure for the Dissolution and Liquidation of Associations in Participation

The law provides the reasons and procedures for dissolution and liquidation to the parties. Again, by analogy, the detailed rules created for simple partnerships can be referenced.

Dissolution intervenes in such cases as: the realization of the object of the society or the indisputable impossibility of its realization, by the consent of all partners, the court's decision on legitimate and well-founded grounds, the expiration of the duration of the partnership,[14] a nullity,[15] or other causes stipulated in the contract.

The partnership that goes into dissolution is liquidated. Liquidation shall be done, unless otherwise provided for in the contract or a subsequent agreement, by all the partners or by a liquidator appointed unanimously by them. In case of disagreement, the liquidator is appointed by the court at the request of any of the partners. The unanimity of the partners may revoke the liquidator appointed by the members of the partnership. It may also be revoked for good reasons at the request of any interested person by the court. The liquidator appointed by the court may be revoked only by the court at the request of any interested person. Both natural persons and legal persons who have the status of insolvency practitioners may be appointed as liquidators. When there are more liquidators, their decisions are taken by an absolute majority.

Liquidators may accomplish all the acts necessary for liquidation and, unless the partners have otherwise stipulated, may sell – even in bulk – the 'social goods,' conclude arbitration conventions, and enter into transactions. However, liquidators cannot initiate new operations under the sanction of personal, joint, and several liability for any damages that may result. They represent the partnership in court under the conditions provided for by the law.

After the payment of the debts, the remaining asset is intended to repay the subscribed and paid contributions by the partners, and the eventual surplus represents the net profit, which will be distributed among the partners in proportion to their share in the benefits. If the net asset is insufficient for the

14 The partnership is tacitly prolonged when, although its duration has expired, it continues to execute its operations, and the partners continue to initiate operations that fall into its object and behave as partners. Prorogation operates for one year, continuing from year to year, from the expiry date, if the same conditions are met.

15 Neither the partnership nor the partners may invoke invalidity towards third parties in good faith.

payment of the debts, the loss shall be borne by the partners according to their contribution established by the contract.

8. Insolvency

Because of the lack of legal personality, the association in participation itself cannot become insolvent. Its partners, on the other hand, can be insolvent.

Law No 85/2014 on insolvency prevention and insolvency proceedings states that any contracts under performance are considered to be maintained at the date of the opening of the insolvency procedure, as an exception from the rules of Art. 1417, the Civil Code. Any contractual clauses to automatically terminate contracts under performance, to cancel the benefit of time limits, or to declare any claim as overdue because of the opening of the insolvency procedure are null and void. Therefore, if we apply these rules to the association in participation contract, the simple fact of insolvency of a partner cannot constitute a reason for the loss of the partner status or the dissolution of the association in participation. Such power to terminate the contract is reserved to the judicial administrator.

In the case of association in participation, we cannot find specific regulations on further effects of insolvency. If we apply by analogy the regulation on the simple partnership, we will find two important rules:

> 1. the partner status in the simple partnership is lost according to the Civil Code in case of the partner's bankruptcy (Art. 1925);[16]
> 2. unless the contract stipulates otherwise, the simple partnership also ceases upon a partner's bankruptcy [Art. 1938 c)].

We can observe that insolvency is not enough;[17] bankruptcy is required[18] as a condition to produce consequences over the status of the partner and the simple partnership. While the loss of partner status in case of bankruptcy is self-evident,

16 Loss of partner status in a simple partnership occurs through assignment or forced execution of participations, death, termination of legal personality, bankruptcy, judicial restriction of capacity to act, withdrawal, and exclusion.

17 Under Romanian law, insolvency is the state of the debtor's patrimony that is characterized by insufficient funds available for the payment of certain, liquid, and due debts. The insolvency of the debtor is presumed when the debtor, after 60 days from maturity, has not paid his debt to the creditor; the assumption is relative. Insolvency is imminent when it is proved that the debtor will not be able to pay the due debts incurred at maturity with the funds available at the maturity date. Insolvency can result in the debtor being saved by reorganization, not necessarily bankruptcy.

18 Bankruptcy is a concurrent, collective, and egalitarian insolvency procedure for debtors which cannot be reorganized or whose reorganization failed, in order to liquidate the debtor's assets to cover the debts at least partially, followed by the debtor's deletion from the trade register. Bankruptcy is declared formally by a court decision.

the parties can contract out from the automatic dissolution of the partnership in case of bankruptcy of any partner through a contractual clause which determines that the simple partnership will continue to exist even in the case of a partner's bankruptcy.

If they opt for the continuation of the simple partnership, the judicial liquidator can enforce the claim of the bankrupt partner towards the partnership in two ways:

1. enforcement over the participation of the bankrupt partner (Art. 1901, Civil Code);
2. to enforce a claim towards the other partners for the payment of the value of the bankrupt partner's participation [Art. 1929(1), Civil Code].

In the first case, any partner may redeem the participations sold by the judicial liquidator, in substitution in the rights of the acquirer within 60 days of the date when the redeeming partner knew or ought to have known the transfer of the participation. If multiple partners exercise this right at the same time, the participations are allocated proportionally to the contribution of each partner to the simple partnership.

In the second case – as bankruptcy is a case through which the partner status is ceased –, the other partners are held to pay also the statutory interest calculated from the time of termination of the status as a partner in the simple partnership.

It is not really clear that these rules are fully applicable through analogy because in the case of association in participation it is not necessary to have formal but incorporeal participations ('părți de interes') such as in the case of a simple partnership. The second option, to ask the payment of the bankrupt partner's claim towards the other association in participation partner, is open in all cases.

9. Association in Participation and Public Procurement Law

One of the most varied fields where simple partnership and association in participation contracts are concluded is public procurement (Law No 98/2016 on public procurement, Law No 99/2016 on sectorial public procurements, Law No 101/2016 on remedies and appeals in respect of the award of public procurement contracts, sectoral contracts, work concession contracts, concessions of services as well as for the organization and functioning of the National Council for Solving Complaints,[19] etc.). Public procurement regulation does not differentiate between

19 Consiliul Național de Soluționare a Contestațiilor (C.N.S.C.) is an independent body with administrative-jurisdictional activity for solving public procurement disputes. C.N.S.C. consists of 11 councils, each composed of three members, one of whom is the chairman. For the proper

simple partnerships and association in participation. The public procurement rules are applicable for both forms of collaborations and also for the innominate contracts of association.

In general, there is an obligation to present the association agreement, which forms part of the tender documentation.

Where the contracting authority requests certain specific authorizations within the criteria for the exercise of the professional activity and/or the performance requirements of the contract, the requirement shall be deemed to be fulfilled in the case of the economic operators participating in the tender procedure if they demonstrate that one of the members of the association holds the requested authorization provided that the member executes the part of the contract for which the authorization is requested.

According to Law No 98/2016, the procedure of replacing the subcontractors, the specialized personnel nominated for the performance of the contract and of the members of the association during the implementation period of the contract will be regulated in a separate chapter of the methodological norms for the application of the law. However, in the methodological norms, we can find detailed rules for the replacement of subcontractors and of specialized personnel and no regulations for associated partners. By way of analogy, we can rely on the rules set forth by Art. 156 of the methodological norms, which permits the replacement of subcontractors by the contractor during the implementation of the public procurement contract only subsequent to approval by the contracting authority. If this rule is applicable for subcontractors, we must also apply it in the case of association in participation members.

As Law No 101/2016 states, any member of an association of economic operators without legal personality may use the remedies provided by the law [Art. 2, para. (2)]. Therefore, the regulation grants an individual right to use the remedies under public procurement regulation for any member of an association in participation.

functioning of the councils, an economic, a legal, and a technical adviser is assigned to each one of them.

10. Conclusions

It is undeniable that the parallel regulation of simple partnership – which can be used for business purposes as well in the context of the monist civil law – and of the association in participation gives rise to legal uncertainty. In practice, however, this issue is bridged by the use of sufficiently detailed contracts. Therefore, the courts were not called yet to clarify the legal gaps and internal contradictions in the Civil Code. The living law prevails, and contractual designs overcome potential problems inherent in legislation.

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Sapientia Hungarian University of Transylvania
RO 400112 Cluj-Napoca, Romania
Str. Matei Corvin nr. 4.
E-mail: acta-legal@acta.sapientia.ro

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