Marcel Szabó | Laura Gyeney | Petra Lea Láncos [Eds.]

Hungarian Yearbook

of International Law and European Law

2024

Nomos

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New Beginnings – A New Era in the Life of the Hungarian Yearbook of International Law and European Law (instead of Editorial)

Foreword to Vol. 12 (2024) of the Hungarian Yearbook of International Law and European Law

Marcel Szabó – Laura Gyeney – Petra Lea Láncos – Sándor Szemesi[*]

Eleven years ago, in 2013, the first issue of the Hungarian Yearbook of International Law and European Law was published, which, according to the Editorial Introduction, "[was] compiled in the common effort of all Hungarian law faculties' departments for international and European law."[1] In founding the Hungarian Yearbook, we were guided by the desire to present abroad the achievements of Hungarian international law (and European law) scholarship, which had been marginalized during the socialist era for known political reasons (and the pursuit of the so-called "Soviet view of public international law").[2] 100–150 years ago, the scientific achievements of Hungarian international jurisprudence were at the forefront of the world at that time, because of the numerous practical international law problems that arose in Hungary because of the Austro-Hungarian Empire. For example, the first textbook on international law in Hungarian (titled in English: 'European International Law') was published 148 years ago, in 1876,[3] and

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1 Marcel Szabó, 'Introduction', *Hungarian Yearbook of International Law and European Law,* Vol. 1, 2013, p. xi.

2 About the foundation and the mission of the Hungarian Yearbook, *see* Marcel Szabó, 'The Past, Present and Future of the Hungarian Yearbook of International Law and European Law: An Evolving Story', *Netherlands Yearbook of International Law,* Vol. 50, 2019, pp. 169–182.

3 István Kiss, *Európai nemzetközi jog,* Eger, 1876.

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the Hungarian Branch of the International Law Association celebrated its centenary just one year ago, in 2023, as we commemorated in last year's issue of the Hungarian Yearbook.[4]

The first 11 volumes of the Hungarian Yearbook (2013–2023) were published by Eleven in The Hague, which, thanks to the publishing house and especially to its director Selma Hoedt, made it possible for the Hungarian Yearbook to be published abroad (in one of the cradles and centers of international law, the seat of several international judicial forums), rather than in the home country (Hungary), in a unique way in the Central and Eastern European region. In the past decade or more, the Hungarian Yearbook has achieved a number of outstanding professional achievements: it is now indexed by Scopus and ERIH Plus, it is included in the HeinOnline database, and it is included in the list of journals of the Hungarian Academy of Sciences. We cannot be grateful enough to Eleven and Selma personally for all the professional support we have received over the past decade.

But this volume marks the beginning of a new era in the life of the Hungarian Yearbook. Our 2024 issue will be published by Nomos and the journal will be gold open access, meaning that all our articles will be available in full for free after publication. We hope that this change will be beneficial for our authors (who will have immediate 'international visibility' in the Hungarian Yearbook) and of course for the journal (as the number of clicks and links to our articles will also influence the professional value of the Hungarian Yearbook and its position among law journals). We would like to thank the Pázmány Péter Catholic University and the National Media and Infocommunications Authority (NMHH) for their support in ensuring the conditions for Gold Open Access status.

In the past years, the editors of the Hungarian Yearbook have always introduced the current issue with an Editorial, explaining their position on a current issue of international law or EU law (in our 2023 issue, Petra Lea Láncos explored the question of what is the language of Hungarian science: Hungarian or English[5]). This year, instead of an Editorial, we

4 Vanda Lamm, 'On the Centennial of the Hungarian Branch of the International Law Association', *Hungarian Yearbook of International Law and European Law,* Vol. 11, 2023, pp. 99–106; Péter Kovács, 'A Tribute to the Two ILA Conferences Organized in Hungary', *Hungarian Yearbook of International Law and European Law,* Vol. 11, 2023, pp. 107–114.

5 Petra Lea Láncos, 'Editorial Comments: What Should Be the Language of (Hungarian) Legal Scholarship?', *Hungarian Yearbook of International Law and European Law,* Vol. 11, 2023, pp. 9–17.

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felt it appropriate to commemorate the biggest change in the Hungarian Yearbook's post-founding history.

On behalf of the entire Editorial Team, we wish you a good read and hope you enjoy the current Volume of our Hungarian Yearbook.

Budapest, 31 July 2024

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Part I
Hungary in the European Union: 2004–2024: from the Accession to the 2024 EU Presidency

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What Can We Expect from the 2024 Hungarian EU Presidency?

Balázs Tárnok[*]

Abstract

This paper examines the political and policy framework of the 2024 Hungarian EU Presidency, with a focus on the factors influencing its agenda and the key policy issues it aims to address. The 2024 Hungarian EU Presidency marks Hungary's second term as the rotating president of the Council of the European Union. Drawing on the experience gained during its Presidency in 2011, Hungary faces numerous challenges in shaping the EU agenda amidst geopolitical uncertainties and institutional changes. The paper begins by outlining the rotating presidency system, emphasizing its role as an 'honest broker' in facilitating EU legislative processes and fostering cooperation among Member States. It then analyses the 2011 Hungarian EU Presidency. The paper further discusses the factors shaping the 2024 Hungarian EU Presidency, including the institutional cycle change following the European elections and the geopolitical context marked by the Russian-Ukrainian conflict and Middle East crises. It also examines the seven key policy issues identified by Hungary for its EU Presidency, such as strengthening competitiveness, addressing demographic challenges, promoting enlargement, shaping cohesion policy, strengthening defence policy, combating irregular migration, and a farmer-centered EU agricultural policy. The manuscript was closed on 28 June (before the beginning of the Hungarian EU Presidency).

Keywords: EU Presidency, Presidency of the Council of the European Union, Hungary, rotating presidency, joint presidency programme

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1. Introduction

On 1 July 2024, Hungary will commence its second term as the rotating presidency of the Council of the European Union (2024 Hungarian EU Presidency), as the last country of the Spanish-Belgian-Hungarian presidency trio. The three Member States have collaborated on a Joint Presidency Programme[1] which was endorsed by the General Affairs Council on 27 June 2023.[2] In January 2025, Poland will assume the presidency following Hungary, as the initial member of the subsequent Polish-Danish-Cyprian trio.

During its Presidency, Hungary's task will be to shape the issues on the EU's agenda in the second half of 2024 in accordance with the common interests of the 27 Member States, acting as an 'honest broker'. While the scope for shaping the agenda is limited, there is an opportunity to advance issues that are significant from the Hungarian perspective.

Hungary already carried out an EU Presidency in 2011, thus the experience gained during that time can assist in the implementation of the 2024 Hungarian EU Presidency. However, this year the Hungarian government faces numerous additional challenges in relation to its Presidency. On one hand, in geopolitical terms, the Hungarian Presidency occurs during an extremely sensitive period. Not only the Russian aggression against Ukraine and the ongoing war, but also the security situation in the Middle East, especially the situation in Israel and Iran, may affect the Hungarian Presidency. Furthermore, the Hungarian government must anticipate and prepare for unforeseen crisis situations, too, that may arise in the second half of 2024. However, the Hungarian Presidency is also influenced by foreseeable factors, among which the most important is the renewal of the EU institutions following the European Parliament elections. This process, while limiting the Hungarian Presidency's scope of action in many aspects, also presents Budapest with extraordinary opportunities to participate in shaping EU politics. Hungary has also identified seven key policy issues that may be in the hearth of its EU Presidency, namely promoting enlargement in the Western Balkan countries, combating illegal migration, shaping the

1 18-month Programme of the Council (1 July 2023 – 31 December 2024), Brussels, 20 June 2023, at https://data.consilium.europa.eu/doc/document/ST-10597-2023-INIT/en/pdf.

2 General Affairs Council, 27 June 2023, at www.consilium.europa.eu/en/meetings/gac/2023/06/27/?fbclid=IwAR3hvk8PEkAeyyIL2biKzqUSE2QdmdrYUMjtvYD0G2cC4cpcYoTDtdjCpCo.

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future of cohesion policy, improving the EU's competitiveness, addressing demographic challenges in the continent, strengthening defence EU-level policy and the facilitating the adoption of the 2025 EU budget.

This article is a legal analysis and deliberately refrains from engaging with political debates and perspectives. Its focus is on the legal dimensions and the policy issues, aiming to provide an objective and comprehensive examination without being influenced by the prevailing political discourse.

2. Rotating Presidency of the Council of the European Union

The presidency of the Council of the European Union (Council) rotates among the EU Member States every six months, a system integral to the early stages of European integration. Every six months, a Member State assumes the presidency of the Council of the EU to facilitate the smooth operation of the EU legislative process. During its six-month term, the presidency leads meetings at all levels within the Council, ensuring the coherence of the EU's activities. Member States holding the presidency collaborate closely in groups of three, known as 'trios', a system introduced by the Lisbon Treaty in 2009. The trio establishes long-term objectives and formulates a common agenda that outlines the issues to be addressed by the Council over an 18-month period. Based on this agenda, each of the three countries develops its own more detailed six-month programme.

The presidency is responsible for advancing the Council's work on EU legislation, ensuring the consistency of the EU's agenda, orderly legislative processes, and cooperation among Member States. To achieve this, the presidency must act as an impartial and neutral mediator, an 'honest broker'.

The presidency has two primary functions. *(i)* Firstly, it plans and chairs meetings in the Council and its preparatory bodies. This includes chairing meetings of various Council configurations (excluding the Foreign Affairs Council) and the Council's preparatory bodies, such as the Permanent Representatives Committee (Coreper), as well as working parties and committees dealing with specific topics. It also organizes formal and informal meetings in Brussels and in the country holding the rotating presidency. This task involves not only planning and chairing Council meetings (including informal meetings held in Hungary) but also organizing and chairing Council working groups and preparatory committees, and coordinating the EU's position in international organizations on matters of internation-

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al significance. The Council meets in ten different configurations, each chaired by the Member State holding the six-month presidency, except for the Foreign Affairs Council, which is chaired by the High Representative of the Union for Foreign Affairs and Security Policy.

Council meetings are prepared by Council working groups and preparatory committees. Some of these are permanent but their actual number varies depending on the issues on the EU agenda. The Council currently has around 137 Council working groups and preparatory committees,[3] including several with several sub-groups dealing with specific policy areas. There are currently around 32 Council working groups and preparatory committees with a permanent or elected President. In case of the latter, the rotating Presidency does not have a major role to play, but they also mean additional duties for the rotating Presidency, which is to ensure the coordination of the Council's decision-making as a whole. This means that overall Hungary will have to chair around 157 Council preparatory groups (including the sub-groups) in 2024.[4]

Additionally, it is customary for Council presidencies to host informal ministerial meetings, typically in the Member State holding the rotating presidency. These meetings, which are not formally considered Council meetings, aim to facilitate collective reflection and exchange of views in an informal setting.

(ii) Secondly, the presidency represents the Council in its interactions with other EU institutions, particularly the Commission and the European Parliament. It strives to reach agreement on legislative matters through trilogue negotiations, informal meetings, and Conciliation Committee sessions. The presidency closely collaborates with the President of the European Council and the High Representative of the Union for Foreign Affairs and Security Policy to achieve these objectives.

3 Council Decision 2009/937/EU of 1 December 2009 adopting the Council's Rules of Procedure, as amended by Decision (EU) 2022/1242 of 18 July 2022.

4 Csaba Zalai, 'Recruiting the Presidency Staff and Setting Up the Personnel Framework for the Hungarian EU Presidency', *in* Tibor Navracsics & Balázs Tárnok (eds.), *The 2024 Hungarian EU Presidency*, Ludovika University Press, 2024, pp. 117–126.

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3. The 2011 Hungarian EU Presidency

Following the April 2010 elections, the newly formed Hungarian government had only six months to prepare for the Presidency. Concurrently, radical changes in domestic policies, rapid legislative activity, particularly in media law, and an unconventional economic policy aimed at deficit reduction, led to confusion and consternation. Additionally, the European economic crisis that began in 2008 posed significant challenges to the Hungarian Presidency.[5]

The Hungarian Presidency programme in 2011,[6] under the slogan 'Strong Europe', outlined its Presidency tasks around four main priorities: *(i)* Promotion of economic growth through enhancing economic governance, focusing on job creation, and social inclusion: The Presidency aimed to promote the sustainability of public finances, fiscal discipline, and economic growth simultaneously. It spearheaded negotiations on the legislative 'six-pack' and initiated EU-level efforts to address Roma issues, resulting in the adoption of an EU Roma Strategy. *(ii)* Strengthening common policies while maintaining competitiveness and core values: Focus areas included internal cohesion, the future of the Common Agricultural Policy, energy security, water-related policies, and the Danube Region Strategy. *(iii)* Bringing the Union closer to its citizens: Objectives encompassed the preservation and promotion of cultural diversity, facilitating the accession of Romania and Bulgaria to the Schengen area, elaboration of a European refugee status, strengthening judicial and home affairs cooperation, and incorporating the Charter of Fundamental Rights into the Treaties. Migration and asylum issues increasingly dominated discussions, partly due to the 'Arab Spring' and Schengen expansion debates. *(iv)* Responsible continuation and credibility of the enlargement process, global engagement: Priorities included the conclusion of accession negotiations with Croatia, initiating accession talks with Iceland, promoting the effective functioning of the European External Action Service, and continuing the Eastern Partnership Program. Hungary prioritized concluding accession negotiations with Croatia, successfully closing negotiations on 30 June 2011, largely due to Hungarian diplomatic efforts.

5 'Hat hónap egy erősebb Európa szolgálatában. Áttekintés az Európai Unió Tanácsának magyar elnökségéről 2011. január–július', *Európai Tükör,* Vol. 16, Issue 7, 2011, pp. 94–155.

6 A magyar EU-elnökség prioritásai, at https://2010-2014.kormany.hu/download/a/d1/10000/A%20magyar%20EU-elnökség%20prioritásai.pdf.

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Even though the 2011 Hungarian EU Presidency had to address unexpected events such as the Arab Spring and the Fukushima nuclear disaster, it achieved significant successes, including Croatia's accession, the adoption of the economic six-pack, the Danube Region Strategy, and the European Roma integration strategy. The 2011 Hungarian EU Presidency concluded with 103 closed legislative and non-legislative dossiers, 43 of which were agreed with the European Parliament, while the number of Council and Presidency conclusions adopted reached 60.[7] A total of 261 Presidency meetings were held, of which 17 were ministerial meetings, 9 were ministerial conferences, 104 were senior official meetings and 131 were expert meetings. The Presidency hosted 120 civil society events in line with the Hungarian objectives. In Brussels, there were 2,300 working groups chaired by Hungary, and 45 official ministerial councils.[8] Despite lacking relevant prior experience, Hungary prepared an ambitious Presidency programme, demonstrating capability in managing technical tasks during the government transition and maintaining institutional consensus on numerous policy issues.[9]

4. Factors Determining the 2024 Hungarian EU Presidency

4.1. Institutional Cycle Change

Among the foreseeable factors determining the work of the Hungarian EU Presidency, the most important one is the renewal of the EU institutions following the European Parliament (EP) elections, which occurred between 6 and 9 June 2024.

Informal discussions regarding EU leadership positions, including the President of the European Commission, the European Council, and the EU High Representative for Foreign Affairs and Security Policy, commenced immediately after the European elections. On 27 June, EU leaders agreed on the EU's political leadership for the next five years. Ursula von der Leyen was nominated as president of the European Commission, Kaja

7 Enikő Győri, 'The Context of the 2011 EU Presidency, Policy Successes and Challenges' *in* Navracsics & Tárnok (eds.) 2024, pp. 17–38.

8 Ferenc Robák, 'Experiences Gleaned from the Implementation of Hungary's 2011 EU Council Presidency' *in* Navracsics & Tárnok (eds.) 2024, pp. 39–48.

9 Ferenc Gazdag, 'Thirteen Years Later – Experiences from the 2011 Hungarian EU Presidency' *in* Navracsics & Tárnok (eds.) 2024, pp. 49–58.

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Kallas as the High Representative for Foreign Affairs and Security Policy, while António Costa was elected as president of the European Council.[10] Von der Leyen and Kallas's nominations were not final since they require confirmation by the European Parliament. Costa, a former prime minister of Portugal, will take office on 1 December.

The inaugural session of the European Parliament will place on 16 and 18 July 2024. The European Parliament shall elect its President, and also confirmed Ursula von der Leyen as the President of the European Commission for the next term. After this, each Member State will nominate Commissioner(s), with the Commission President responsible for allocating portfolios among the Commissioners-designate. The European Parliament must approve the Commissioners by an absolute majority. The Commissioners-designate are going to be heard in the European Parliament. This will take place in the European Parliament during the fall. Once the European Parliament approves the President and Commissioners, the European Council formally appoints them by qualified majority.

A principal focus of the Hungarian Presidency will be to facilitate a smooth institutional transition. According to Tibor Navracsics, the experience of the past three periods of institutional cycle change, that is the Swedish, Italian and Finnish Presidency in 2009, 2014 and 2019, suggest that countries holding the presidency during a period of renewal of the EU institutions are successful when they act in the role of a pragmatic and mediating presidency rather than an ideological and initiating one.[11]

Institutional dynamics will impact the Hungarian Presidency in various ways. Initial phases of the EU Presidency may witness reduced legislative activities in traditional terms. It is imperative for the new European Parliament to expedite the resumption of legislative work, as a failure to convene trialogue discussions during the Hungarian Presidency could lead to a suspension of legislative activities for up to a year. Concurrently, Member States' positions will undergo continuous negotiation within the Council. According to Bálint Ódor, Head of Hungary's Permanent Representation to the EU, trialogues are expected to resume in October or November, provid-

10 *See* at www.euronews.com/my-europe/2024/06/27/eu-leaders-agree-on-top-jobs-ursula-von-der-leyen-antonio-costa-and-kaja-kallas.

11 Tibor Navracsics, 'The Predictably Unexpected Event: EU Presidencies in a Period of Institutional Shifts' *in* Navracsics & Tárnok (eds.) 2024, pp. 59–72.

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ing an opportunity for the Hungarian Presidency to contribute meaningfully to EU legislation.[12]

4.2. Geopolitical Context

The Hungarian Presidency coincides with a notably sensitive period from a geopolitical standpoint. The Russian-Ukrainian conflict continues to dominate the agenda of the EU and is anticipated to remain a significant focus for the EU in the foreseeable future.[13] The EU has thus far implemented thirteen rounds of sanctions against Russia in support of Ukraine.[14] The European Council, in its conclusions of 21 March 2024, affirmed the EU's commitment to providing Ukraine with comprehensive political, financial, economic, humanitarian, military, and diplomatic support for as long as necessary and at the required intensity.[15] Member States continue to demonstrate their dedication to supporting Ukraine against Russian aggression, which serves as a pivotal political backdrop for the Hungarian EU Presidency. Despite Budapest's opposition to further EU sanctions on Russia, the Hungarian government, acting as an honest broker during its Presidency, has limited scope to alter the prevailing political stance. However, it can facilitate critical discussions regarding the EU's sanction policy and foster political and professional debates on its review.

During the latter half of 2024, the Hungarian EU Presidency may confront additional challenges stemming from the Middle East crisis, specifically involving Israel's military engagements with Hamas and the broader Iran-Israel conflict. On 7 October 2023, Hamas, a group supported by Iran and classified as a terrorist organization, launched an unexpected attack on southern Israel from Gaza. In response, the Israeli military initiated a significant military campaign in the Gaza Strip, including a large-scale ground invasion that started on 27 October, with these operations ongoing. In 2024, another conflict escalated in the Middle East between Iran and Israel. On 1 April, Israel carried out airstrikes on an Iranian consulate

12 Bálint Ódor, 'The Challenges of Implementing the 2024 Presidency from a Brussels Perspective' *in* Navracsics & Tárnok (eds.) 2024, pp. 91–104.

13 Steve Gutterman, 'The Coming Year May Not End the War In Ukraine. But It Could Decide The Outcome', *Refrl.org*, 23 February 2024, at www.rferl.org/a/ukraine-russia-war-2024-outcome/32832266.html.

14 *See* at www.consilium.europa.eu/en/policies/eu-response-ukraine-invasion/.

15 *See* at www.consilium.europa.eu/media/70815/sn00008-en24.pdf.

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complex in Syria. In retaliation, Iran and its affiliated groups conducted airstrikes and drone attacks within Israel on 13 April, followed by Israel's retaliatory strikes in both Iran and Syria. Consequently, EU Member States agreed to impose new sanctions on Iran aimed at restricting drone and missile production.[16]

The outcome of these crises remains uncertain. Therefore, the Hungarian Presidency must be well-prepared for the possibility of further escalation in these Middle Eastern conflicts, as well as other unforeseen crisis situations.

5. Key Policy Issues of the 2024 Hungarian EU Presidency

On June 18, 2024, the Hungarian Government unveiled the programme, priorities and visual identity of the 2024 Hungarian EU Presidency. The logo of the Presidency incorporates the Rubik's Cube, representing problem-solving and strategic thinking, while also echoing Hungary's approach to addressing European challenges.[17] The motto of the Presidency, on the other hand, turned out to be more controversial: 'Make Europe Great Again'. While several European politicians echoed their criticism over choosing this Donald Trump-inspired slogan,[18] the Hungarian Government argued that the logo reflects on the key policy priority of the Presidency, competitiveness of Europe, symbolizing the perception that Europe can become an independent global player.[19]

The programme and priorities of the Presidency was also presented on June 18. Earlier, in 2023, the Hungarian government delineated seven pivotal policy domains that, according to their contemporary understanding, could represent high-priority areas for the Hungarian EU Presidency during the latter half of 2024.[20] The Hungarian Presidency's programme

16 *See* at www.euronews.com/my-europe/2024/04/22/eu-countries-agree-to-slap-new-sanctions-on-iran-to-curtail-drone-and-missile-production.

17 *See* at https://hungarian-presidency.consilium.europa.eu/en/presidency/visual-identity/.

18 *See* at www.telegraph.co.uk/world-news/2024/06/19/viktor-orban-criticised-for-make-europe-great-again-slogan/.

19 *See* at https://hungarian-presidency.consilium.europa.eu/en/news/make-europe-great-again-the-official-priorities-social-media-pages-and-visuals-of-the-hungarian-presidency-unveiled/.

20 Balázs Péter Molnár *et al.*, 'Policy Challenges and Opportunities for the 2024 Hungarian EU Presidency' *in* Navracsics & Tárnok (eds.) 2024, pp. 73–84.

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is structured around seven priorities: acceptance of a New European Competitiveness Deal; the reinforcement of the European defence policy; a consistent and merit-based enlargement policy; stemming illegal migration; shaping the future of the cohesion policy; addressing demographic challenges; and a farmer-oriented EU agricultural policy.[21]

5.1. Strengthening Competitiveness

According to János Bóka, Minister responsible for EU Affairs, strengthening the Union's global competitiveness will be a 'central priority' of the 2024 Hungarian EU Presidency.[22] This also means that all other priorities are to be derived from this objective.[23]

The EU has faced enduring challenges in terms of competitiveness over several decades, ceding significant competitive advantage to global counterparts.[24] This trend has been further exacerbated in recent years by escalating energy costs, the economic and trade ramifications of the conflict in Ukraine, and protectionist policies implemented by major global competitors, notably the US and China.[25] The prevailing European challenges pertaining to competitiveness and trade policy present the prospect of sustained engagement in various areas during the upcoming presidency term. These areas include addressing conflicts between the EU and China concerning corporate subsidies, leveraging the Eastern opening strategy to mitigate decoupling effects, ensuring compliance with carbon dioxide quotas, mitigating national distortions, addressing the needs of both small and large enterprises, fostering innovation clusters, engaging in interna-

21 *See* at https://hungarian-presidency.consilium.europa.eu/en/programme/programme/.

22 *See* at www.hungarianconservative.com/articles/current/minister_janos_boka_conference_hungarian_eu_presidency_goals_competitiveness/.

23 *See* at https://hungarytoday.hu/key-priority-of-hungarys-coming-council-of-eu-presidency-is-competitiveness/.

24 Long-term Competitiveness of the EU: Looking beyond 2030, Brussels, 16 March 2023, COM(2023) 168 final.

25 Ursula von der Leyen, 'European Competitiveness and the role of research, innovation and education', Speech, 19 February 2024, Berlin, at https://ec.europa.eu/commission/presscorner/detail/en/speech_24_927.

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tional trade negotiations, and enhancing the commercial standing of labor-intensive agricultural sectors.[26]

The Hungarian Presidency is anticipated to undertake efforts to address these challenges and aim to strongly prioritize European competitiveness, specifically concentrating on establishing a framework to enhance productivity and narrow the growth and innovation differentials between the EU and its global rivals. Bureaucratic hurdles, particularly burdensome for small enterprises, have the potential to stifle entrepreneurial activity. Consequently, enhancing the resilience of small and medium-sized enterprises (SMEs) is deemed imperative, given their significant role in both EU and national economies, as well as in the labor market. Streamlining administrative processes can mitigate unwarranted barriers for businesses and contribute to enhanced regulatory frameworks.[27] Furthermore, the Hungarian Presidency endeavors to safeguard against the adoption of protectionist measures and market-distorting practices within the EU that could impede foreign investment and jeopardize international trade, potentially leading to the formation of trade blocs.[28]

According to the official programme, the adoption of a New European Competitiveness Deal is a key priority of the Hungarian presidency to restore economic development and create the conditions for sustainable growth, deepen the internal market, focus on supporting small and medium-sized enterprises, promote the green and digital transition in partnership with European economic stakeholders and citizens, international cooperation, and ensure the stability and sustainability of jobs.[29]

5.2. Addressing Demographic Challenges

Addressing demographic challenges is intricately linked to enhancing the competitiveness of the EU, as perceived by the Hungarian government. The EU is grappling with a significant demographic crisis, characterized by a decline in the active population, which in turn impacts consumption,

26 Gábor Kutasi *et al.*, 'The EU's Competitiveness and Trade Policy from the Perspective of the 2024 Hungarian Presidency' *in* Navracsics & Tárnok (eds.) 2024, pp. 141–164.
27 Molnár *et al.* 2024.
28 Id.
29 *See* at https://hungarian-presidency.consilium.europa.eu/en/programme/priorities/.

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investment, and economic vitality.[30] Even though the EU has a longstanding history of endeavoring to achieve objectives related to income, parental employment, and gender equality, there has been much less attention paid to a comprehensive family policy.[31]

The 2024 Hungarian EU Presidency presents a valuable opportunity for Hungary to explore strategies to tackle this challenge and advocate for the adoption of measures and recommendations aimed at countering demographic decline across EU Member States. Moreover, the Presidency is poised to facilitate the sharing of Member State experiences and best practices concerning family policies, a dimension that could be further strengthened under Hungarian leadership.

Another critical aspect of the Presidency will be to underscore the necessity of improving the situation of young people and the role of local communities in fostering their prosperity at the local level, which can indirectly contribute to achieving demographic objectives.[32] The Demographic Toolbox[33] published by the European Commission on 11 October 2023 can serve as a valuable resource in this endeavor.

5.3. Promoting the Enlargement Process and the EU–Western Balkans Summit in Hungary

Since Croatia's accession, the EU has experienced a phenomenon known as enlargement fatigue over the past decade,[34] leading to a deceleration in accession negotiations. A significant factor contributing to the current slowdown in the enlargement process is the absence of a clear timeframe

30 Vasilis Margaras, *Demographic trends in EU regions*, EPRS – European Parliamentary Research Service, PE 633.160 – January 2019, at https://ec.europa.eu/futurium/en/system/files/ged/eprs-briefing-633160-demographic-trends-eu-regions-final.pdf.

31 Jane Jenson, 'Beyond the National: How the EU, OECD, and World Bank Do Family Policy' *in* Rense Nieuwenhuis & Wim van Lancker (eds.), *The Palgrave Handbook of Family Policy*, Palgrave Macmillan, 2021, pp. 45–68.

32 Molnár *et al.* 2024.

33 *Demographic Change in Europe: A Toolbox for Action.* Brussels, 11 October 2023, COM(2023) 577 final.

34 Milada Anna Vachudova, 'EU Leverage and National Interests in the Balkans: The Puzzles of Enlargement Ten Years On', *Journal of Common Market Studies,* Vol. 52. Issue 1, 2014, pp. 122–138.

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for accession, stemming from a lack of political will.[35] This lack of political will understandably makes it challenging for decision-makers in candidate countries to undertake politically sensitive and far-reaching reforms, which engenders a similar lack of political will on the side of the candidates.[36]

According to the official programme, the Hungarian Presidency will aim for a consistent and merit-based enlargement policy focusing on the Western Balkans.[37] The enlargement of the Western Balkans has long been of strategic importance for Hungary, owing to geographical proximity and shared historical ties that have fostered political and economic connections. Over the past decade, the Hungarian government has consistently advocated for the region's early integration into the EU. The enlargement of the Western Balkans will therefore most likely be a priority of the 2024 Hungarian EU Presidency. However, given the status of accession negotiations (involving Montenegro, Serbia, Albania, North Macedonia, and Turkey), it is unlikely that any negotiating country will conclude negotiations or join the EU during the Hungarian Presidency. The Hungarian Presidency yet aims to convene negotiations and expedite the process, in the course of which an EU-Western Balkans Summit is also planned during the Hungarian Presidency.

Apart from the enlargement process, it is worth mentioning the European Political Community (EPC). All EU candidate and potential candidate countries, as well as non-EU member states of the European Economic Area, are members of the EPC. In recent years, this forum has evolved into a high-level political consultation platform, where heads of state and government discuss critical issues affecting Europe as a whole. Given that the biannual EPC Summit is hosted by the Member State holding the Presidency in the second half of each year, organizing this summit will also be a top priority for the Hungarian Presidency.[38]

35 Tyyne Karjalainen, 'EU enlargement in wartime Europe: three dimensions and scenarios', *Journal of the Academy of Social Sciences,* Vol. 18, Issue 5, 2023, pp. 637–656.

36 'Serbia's EU aspirations delayed due to lack of political will', *Euractiv.rs,* 9 March 2021, at www.euractiv.com/section/politics/short_news/serbias-eu-aspirations-delayed-due-to-lack-of-political-will/.

37 *See* at https://hungarian-presidency.consilium.europa.eu/en/programme/priorities/.

38 Molnár *et al.* 2024.

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5.4. Shaping the Future of Cohesion Policy

Enhancing territorial cohesion and reducing developmental disparities among Member States and regions stands as one of the primary objectives of European integration. The 2024 Hungarian EU Presidency will be a pivotal period for the strategic future of cohesion. The discourse on the future of cohesion is characterized by a conflict between the principles of personal and territorial cohesion.[39] The proposed multi-speed Europe presents particular risks in this regard, as it undermines the fundamental principle of convergence, while institutionalizing the longstanding asymmetry within the European Union between core and peripheral regions, as well as between old and new Member States.[40] Ongoing preparatory efforts for the reform of EU cohesion policy post 2027 present a unique opportunity for regional and local stakeholders to influence the stance of European institutions at an early stage.

As emphasized in the Presidency programme, the Hungarian presidency will aim for a high-level strategic debate on the future of cohesion policy, including its role in promoting competitiveness and employment, as well as in addressing demographic challenges.[41] The Hungarian Presidency is likely to encompass the mid-term review of cohesion programs, along with the anticipated release of the Commission's Cohesion Report in 2024. The Hungarian EU Presidency may chair the General Affairs Council on cohesion policy, while the period of the Presidency will provide Budapest the opportunity to host informal ministerial meetings, and other professional events enhancing the policy-oriented debates on the future of cohesion policy, all of which can contribute to disseminating the main findings of these reports and conveying political messages, including potential Hungarian proposals for the development of a new cohesion policy. The Ninth Cohesion Report, expected from the Commission in early 2025, immediately

39 Future of EU Cohesion Policy Post-2027. Placing Local and Regional Public Services at the Core of Economic, Social, and Territorial Cohesion. Council of European Municipalities and Regions (CEMR) Position Paper, CEMR Policy Committee, 6–7 December 2023, at www.ccre.org/img/uploads/piecesjointe/filename/231129_CEMR_position_paper_on_future_of_Cohesion_Policy_PC_version-0.pdf; European Commission, The future of Cohesion Policy, at https://ec.europa.eu/regional_policy/policy/how/future-cohesion-policy_en.

40 Bernadett Petri, 'Cohesion Policy under Redesign: What Will the European Union Fund in the Future?', *in* Navracsics & Tárnok (eds.) 2024, pp. 191–204.

41 *See* at https://hungarian-presidency.consilium.europa.eu/en/programme/priorities/

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following the conclusion of the Hungarian Presidency, will significantly influence the future trajectory of the policy.

5.5. Strengthening European Defence Policy

After the Russian aggression against Ukraine, it is evident that we can no longer take Europe's security for granted. Defence issues are becoming more important and visible than ever before. The need for the EU to take greater responsibility for its own security and to develop and reinforce an autonomous EU capacity to act, including the EU's coordinated approach to strengthening the protection of critical infrastructure, has been a key issue on the agenda for years.

The 2024 Hungarian EU Presidency, in addition to the implementation of the Strategic Guidelines[42] setting out the main directions of EU defence policy for the next ten years, will place particular emphasis on encouraging the strengthening of the European Defence Technological and Industrial Base (EDTIB), including defence innovation and the enhancement of defence procurement cooperation between member states.[43] In this context, Hungary supports the long-term inclusion of the contribution to both defence research and the defence industry into the EU budget.[44] The mid-term review of the European Defence Fund (EDF) and the Council Decision establishing the European Peace Facility (EPF) are also due to take place during the Hungarian EU Presidency. Meanwhile, reflection on the future of the Permanent Structured Cooperation (PESCO) will also begin in preparation for the 2025 review. In the field of crisis management, leadership and governance, the promotion of the Strategic Compass targets to be achieved by 2025 (Rapid Reaction Capability, full operational capability of the Military Planning and Command Capabilities) is also a likely priority for the Hungarian Presidency.[45]

42 A Strategic Compass for Security and Defence – For a European Union that Protects Its Citizens, Values and Interests and Contributes to International Peace and Security, Brussels, 21 March 2022, at https://data.consilium.europa.eu/doc/document/ST-7371-2022-INIT/en/pdf.

43 *See* at https://hungarian-presidency.consilium.europa.eu/en/programme/priorities/.

44 Molnár *et al.* 2024.

45 Id.

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5.6. Combating Irregular Migration with a Special Focus on the External Dimension

Combating irregular migration has been a key policy issue for Hungary in the past decade. Following the surge in irregular migration after 2015, the Hungarian government pursued a robustly migration-critical approach, implementing physical and legal barriers that resulted in significant conflicts with the EU. Alongside other Central European countries, Budapest rejected the mandatory distribution of asylum seekers, viewing it as an infringement on its sovereignty.[46]

In 2024, both the European Parliament and the Council of the EU endorsed the new Pact on Migration and Asylum,[47] presented by the European Commission in 2020, as part of the ongoing reform of the EU's migration and asylum system that commenced in 2016.[48] The Hungarian government expressed concerns about the new Pact on Migration and Asylum, specifically about disproportionately bearing the burden of asylum procedures and the selective interpretation of solidarity.[49] Consequently, Hungary indicated that the pact, set to be enforced from 2026, can't be implemented in its current form[50] (Slovakia also declared its unwillingness to implement the new system).[51]

Conversely, Hungary supports the concept of enhanced cooperation in the external dimension of migration, closer collaboration with affected third countries, and the strengthening of return activities. According to the Presidency programme, illegal migration and human smuggling must

46 Viktor Marsai, 'Hungary's Migration Policy', *in* Navracsics & Tárnok (eds.) 2024, pp. 233–250.

47 European Commission, Pact on Migration and Asylum, 11 April 2024, at https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum_en.

48 'MEPs approve the new Migration and Asylum Pact', Press Release, European Parliament, 10 April 2024, at www.europarl.europa.eu/news/en/press-room/20240408IPR20290/meps-approve-the-new-migration-and-asylum-pact.

49 'Government Rejects EU Migration Pact due to Mandatory Admission of Asylum Seekers', *MTI-Hungary Today,* 21 December 2023, at https://hungarytoday.hu/government-rejects-eu-migration-pact-due-to-mandatory-admission-of-asylum-seekers/.

50 'Gulyás: EP has made a "bad decision" by endorsing new migration pact', *AboutHungary.hu,* 12 April 2024, at https://abouthungary.hu/news-in-brief/gulyas-ep-has-made-a-bad-decision-by-endorsing-new-migration-pact.

51 Jan Lopatka & Gabriela Baczynska, 'Slovakia will not implement new EU migration rules, says PM', *Reuters.com,* 16 April 2024, at www.reuters.com/world/europe/slovakia-will-not-implement-new-eu-migration-rules-says-pm-2024-04-16/.

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be curbed. In this respect, the Hungarian presidency will pay particular attention to the external dimension of migration, including efficient cooperation with relevant third countries, more effective returns, and innovative solutions for rules on asylum. The Hungarian government also intends to highlight the importance of external border protection and the need for EU funds for this purpose.[52] Furthermore, the evaluation of the annual Schengen cycle will coincide with the tenure of the Hungarian Presidency, offering an additional opportunity to underscore the importance of external border protection and EU funding for border security.

5.7. A Farmer-Centered EU Agricultural Policy

Even though the agricultural policy was not part of the pivotal policy domains earlier delineated by the Hungarian government,[53] it eventually became a priority of the 2024 Hungarian EU Presidency. After the farmer demonstrations. all over the EU in early 2024, the policy's political relevance increased.

The Hungarian Presidency programme highlights that extraordinary weather conditions due to climate change, rising input costs, increasing imports from non-EU countries, and overly stringent production regulations have significantly undermined the sector's competitiveness. The convergence of these challenges has endangered the livelihoods of European farmers. According to Budapest it is therefore crucial to reframe agriculture as part of the solution to climate change by engaging farmers in sustainable production practices, rather than viewing it as a contributing factor.[54]

The Hungarian Presidency will urge the Agriculture and Fisheries Council to leverage the institutional transition period to guide the new Commission in shaping the Union's post-2027 agricultural policy. This policy should aim to foster a competitive, resilient, and farmer-friendly agricultural sector. Promoting sustainable agriculture is a key priority, aiming to achieve a rational balance between the strategic objectives of the European Green Deal, the stabilization of agricultural markets, and ensuring a decent standard of living for farmers.[55]

52 *See* at https://hungarian-presidency.consilium.europa.eu/en/programme/priorities/.
53 Molnár *et al.* 2024.
54 *See* at https://hungarian-presidency.consilium.europa.eu/en/programme/priorities/.
55 Id.

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5.8. Other Tasks and Duties

The 2024 Hungarian EU Presidency is charged with establishing overarching policy guidelines in specific policy areas to facilitate the implementation of the new strategic agenda for the period 2024–2029.[56] The development and adoption of this Strategic Agenda fall under the jurisdiction of the European Council. At the conclusion of the Belgian Presidency, in late June, EU leaders have collectively discussed and agreed the EU's direction and goals for 2024–2029.[57] Hungary will be the first to preside over the Council while integrating the priorities outlined in the 2024–2029 Strategic Agenda into its activities.[58]

Additionally, during the Hungarian EU Presidency, Hungary will play a crucial role in coordinating the EU as a unified negotiating bloc at the 29th Conference of the Parties to the UN Framework Convention on Climate Change (COP29)[59] and the UN Biodiversity Summit. Traditionally, it is the responsibility of the Member State holding the rotating presidency to coordinate the development of the EU's common position, negotiate, and adopt Council conclusions that establish the general EU stance for negotiations within the Council working party, achieved through unanimity.

6. Conclusion

The 2024 Hungarian EU Presidency faces a multitude of challenges within the EU's institutional framework and the broader geopolitical context. Due to the renewal of the EU institutions, the 2024 Hungarian EU Presidency will be much rather a political one. The Hungarian Presidency's role as an honest broker rather than an ideological initiator will be crucial in navigating this transition.

As pointed out by Bálint Ódor, even though the effectiveness of presidencies is primarily assessed by the number and significance of closed cases, the success of the Hungarian Presidency will not be primarily judged based on the regular indicators, such as the number and significance of closed

56 European Union Strategic Agenda 2024–2029, at www.consilium.europa.eu/hu/policies/strategic-agenda-2024-2029/.
57 *See* at www.consilium.europa.eu/en/policies/strategic-agenda-2024-2029/.
58 Molnár *et al.* 2024.
59 Conference of the Parties (COP), at https://unfccc.int/process/bodies/supreme-bodies/conference-of-the-parties-cop.

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legislative dossiers. Instead, the evaluation will focus on how the Hungarian Presidency contributes to ensuring a smooth institutional transition and implementing the new strategic agenda for the 2024–2029 period.[60] János Bóka is of the view that the success of the 2024 Hungarian EU Presidency will be measurable based on three aspects, namely whether the Hungarian Presidency *(i)* facilitated a smooth institutional transition in areas where the Council has a role, *(ii)* acted as an honest broker, and *(iii)* managed to shape the political discourse in a way that subsequent presidencies cannot detach themselves from it (in those policy areas prioritized during the Hungarian EU Presidency).[61]

Navigating the unique challenges the Hungarian government must face in the second half of 2024 requires strategic planning, effective coordination, and diplomatic finesse. The Hungarian Presidency's success will depend on its ability to act as an honest broker and address the diverse needs of Member States. A successful Presidency has the potential to positively influence Hungary's reputation for many years to come and enhance its effectiveness in promoting its interests within EU decision-making processes.

60 Ódor 2024.

61 Tibor Navracsics, 'Senki nincs az EP-ben, akinek fontos lenne a pártcsalád nélküli Fidesszel való szolidaritás', *Telex.hu,* 2 May 2024, at https://telex.hu/kulfold/2024/05/02/navracsics-boka-janos-soros-eu-elnokseg-eselyei-programja-europai-tanacs.

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The Gradual Shaping of Hungarian Law by Consecutive Preliminary References

The Experiences of the Last 20 Years

Miklós Zoltán Fehér – Réka Somssich[*]

Abstract

Since the 'Big Bang' accession of 2004, Hungary has been the second most active Member State from the EU-10 in initiating preliminary ruling procedures, after Poland which is in the lead. After 20 years of membership, we can conclude with good reason that Hungarian courts are effectively and efficiently using this form of judicial cooperation at all levels of the court system. In addition, experience shows that often the questions referred to the ECJ have significant repercussions, raising new questions sent to the Court. These are not only finetuning the European case law but have an important impact on the national law too, shaping it step by step.

Keywords: preliminary ruling, Hungary, VAT, usufruct, consumer contracts

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3. Conclusions 64

1. Introduction

The past 20 years have transformed the EU in profound ways. The accession of new Member States and the departure of the United Kingdom, the Lisbon Treaty, the sovereign debt crisis, the migration crisis, the COVID-19 pandemic, the increased focus on the rule of law in Member States, and as of lately Russia's war on Ukraine – to name the most significant elements of this process – have also had a great impact on the workload and the

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functioning of the CJEU. Not only have the competences of the EU spread to new areas of law during these years, prompting new litigation and preliminary ruling procedures in these areas, but some of the cases that come before the ECJ and the General Court also tend to raise more complex and sensitive issues than before. The CJEU has also had to find new ways to deal with the fact that with the accession of 13 new Member States since 2004 the number of judges at the ECJ and the General Court had almost doubled. In 2015, the CJEU underwent a major reform, whereby the Civil Service Tribunal, established in 2005, ceased to exist and returned its competences to the General Court, which in turn has seen the number of its judges doubled, *i.e.* to two judges per Member State.[1]

For the fall of 2024 another, possibly even more significant reform is foreseen, intended to relieve the ECJ of some of its workload and enable it to focus resources on the more significant cases that shape union law and the EU itself. The modification of the Statute of the CJEU, as already agreed upon by the European Parliament and the Council of the European Union as co-legislators,[2] will transfer the competence to hear preliminary ruling cases to the General Court in certain areas of union law,[3] thereby activating, for the first time, Article 265(3) TFEU, originally inserted in the Treaty by the Treaty of Nice in 2001.

Such transfer of competences to the General Court raises a number of questions.[4] On the one hand, institutional and procedural conditions must

1 *See* Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union; and Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2016 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants. For a critical evaluation of the 2015 reform, *see* Alberto Alemanno & Laurent Pech,'Thinking justice outside the docket: A critical assessment of the reform of the EU's court system', *Common Market Law Review,* Vol. 54, Issue 1, 2017, pp. 129–175.

2 *See* the Draft Regulation of the European Parliament and of the Council amending Protocol No 3 on the Statute of the Court of Justice of the European Union, adopted in first reading by the Council on 19 March 2024, at https://data.consilium.europa.eu/doc/document/PE-85-2023-INIT/en/pdf.

3 These areas are the common system of value added tax (VAT), excise duties, the customs code, the tariff classification of goods under the combined nomenclature, compensation and assistance for passengers whose transport services are delayed or cancelled or who are denied boarding, and the scheme for greenhouse gas emission allowance trading.

4 For a preliminary assessment of the reform and some of the questions it raises, *see* Daniel Sarmiento, 'On the Road to a Constitutional Court of the European Union:

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be created under which the General Court, which currently only hears cases of direct actions, is enabled to fulfil its new duties. These must also ensure that in cases where the competent union court is not *prima facie* obvious the matter is actually dealt with by the jurisdiction to which the Statute of the CJEU has assigned competence.[5] The transfer of competences may have the unintended consequence of undermining the acceptance of the preliminary rulings if they were to be perceived to be of inferior quality delivered by a lower court. To ensure that national courts do not doubt that the General Court is up to the task, the ECJ should exercise constraint and let the General Court work without being overruled too often.[6] It will be interesting to see whether the courts of the Member States continue to present preliminary ruling requests with the same willingness knowing that they will be dealt with by the General Court instead of the ECJ, or whether they will try to steer their cases to the ECJ by inflating their importance by, for example, systematically raising questions relating to the interpretation of primary union law, including the Charter of Fundamental Rights.[7]

The reform will also have a considerable impact on Hungarian requests for preliminary ruling as one of the areas where the transfer of competence

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The Court of Justice After the Transfer of the Preliminary Reference Jurisdiction to the General Court (Editorial Note)', *Croatian Yearbook of European Law and Policy*, Vol. 19, 2023, pp. VII–XVII; Davor Petrić, 'The Preliminary Ruling Procedure 2.0', *European Papers,* Vol. 8, Issue 1, 2023; Sara Iglesias Sánchez, 'Preliminary Rulings before the General Court Crossing the last frontier of the reform of the EU judicial system?', *EU Law Live Weekend Edition,* No 125, 17 December 2022, pp. 15–16; Michal Bobek, 'Preliminary Rulings before the General Court: What Judicial Architecture for the European Union', *Common Market Law Review,* Vol. 60, Issue 6, 2023, pp. 1515–1550.

5 In that regard see also the amendments of the Rules of Procedure of the Court of Justice, at https://data.consilium.europa.eu/doc/document/ST-7225-2024-INIT/en/pdf, and of the General Court, at https://data.consilium.europa.eu/doc/document/ST-7226-2024-INIT/en/pdf, submitted to the Council for approval in February 2024.

6 In exceptional cases, where the there is a serious risk of the unity or consistency of union law being affected, the Court of Justice may review the decisions of the General Court pursuant to Article 62 *et seq.* of the Statute of the CJEU.

7 According to recital (8b) of the approved text of the Draft Regulation, "[…] the Court of Justice will retain jurisdiction where the request for a preliminary ruling raises independent questions of interpretation of primary law, public international law, general principles of Union law or the Charter, having regard to their horizontal nature, even where the legal framework of the case in the main proceedings falls within one or more of the specific areas […]."

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will take place, VAT, is an area where Hungarian requests are abundant[8] and will most likely continue to be so in the future. Other areas such as the compensation and assistance to passengers[9] and the tariff classification of goods under the Combined Nomenclature[10] have also seen several Hungarian preliminary ruling procedures in past years. It will therefore be interesting to see how Hungarian judges adapt to the new judicial architecture of the EU in which preliminary ruling procedures will undoubtedly continue to play a central role, in particular as 20 years ago they have proven ready, willing and able to cooperate with the CJEU as soon as the accession of Hungary to the EU empowered them to raise questions of union law and request preliminary rulings from the ECJ. From the Member States that joined in 2004, it was Hungary whose courts presented the first two preliminary references and seeing the relevant statistics we can easily conclude that Hungarian courts remained active in initiating references ever since. The average number of references from Hungarian courts is around 20 each year, which is in certain years very close to the number of references emanating from France[11] and definitely higher than the Czech references[12] (a country which joined the same year and is approximately of the same size).

It is widely known that the preliminary ruling procedure constitutes one of the pillars of the 'complete system of judicial protection' of the EU beside direct actions that may be brought straight before the union courts. National courts are 'functional' union courts in the sense that it is before national courts that private parties may bring cases involving issues of

8 As of 21 April 2024, 62 of the overall 286 Hungarian preliminary ruling procedures related to VAT directly or indirectly.

9 *See e.g.* Judgment of 29 September 2022, *Case C-597/20, LOT*, ECLI:EU:C:2022:735; the requests for a preliminary ruling in cases *C-476/18, PannonHitel, C-771/21, Wizz Air Hungary* and *C-51/22, PannonHitel* have been withdrawn by the national courts after the parties in the main proceedings have settled their dispute.

10 *See e.g.* Judgment of 9 April 2014, *Case C-74/13, GSV*, ECLI:EU:C:2014:243; Judgment of 8 September 2016, *Case C-409/14, Schenker*, ECLI:EU:C:2016:643; Judgment of 16 November 2023, Case C-366/22, *Viterra Hungary*, ECLI:EU:C:2023:876.

11 For instance, in 2022, the number of Hungarian preliminary references was 20, while French courts sent 23 cases to the Court the very same year (Annual Report of the Court 2022, Judicial statistics, p. 5.).

12 In 2018 Hungarian courts referred 29 cases to the court, while Czech courts referred only 12. The numbers for 2019 are 20 – 5, and not to count the years of the pandemic for 2022 20–13. (Annual Report of the Court 2022, Judicial statistics, p. 5.).

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union law.[13] Private parties lack standing before the union courts to call into question the conformity of national law with union law, as they are not entitled to initiate infringement proceedings *vis-à-vis* Member States under the Treaties, a prerogative of the European Commission (Article 258 TFEU) and other Member States (Article 259 TFEU). Preliminary ruling procedures are therefore frequently rooted in national litigation concerning the conformity of national law with union law, and in particular administrative law litigation, where the applicants claim that the decision of the national authority or the national law underlying the decision is contrary to union law. It is also not surprising that the conformity of national law may be raised at the same time by private parties before national courts and by the European Commission before the ECJ[14] – and as some of the examples below will illustrate, this phenomenon has also occurred in cases relating to Hungarian legislation. From among the Hungarian preliminary ruling procedures of the past two decades several groups of cases may be identified where later cases seek further clarification regarding the consequences of a previous judgment of the ECJ, delivered either in an infringement procedure or a preliminary ruling procedure.

There might be several reasons for such consecutive references. One might be that the judgment in the previous proceedings is itself not sufficiently clear or its application is not obvious when it comes to cases with slightly different facts. Another reason might be that there are some doubts regarding the compatibility of the national law aiming to implement the judgment. The consecutive cases – sometimes amounting to a dozen in a particular area throughout several years – contribute not only to the finetuning of EU law but to the gradual shaping and aligning of national law too. This shaping results in a gradual evolution of the legal area concerned.

Below we will give a general overview of those areas – VAT, unfair contract terms, free movement of capital, transfer of company seat and gambling – which were primarily affected by such consecutive references. We will try to show how Hungarian law has developed under the effect of the preliminary ruling procedures and why it was crucial for the Hungarian courts to seek further guidance from the ECJ on certain topics.

13 Koen Lenaerts *et al.*, *EU Procedural Law*, Oxford University Press, Oxford, 2023, p. 3.

14 Incidentally, private parties may have originally set into motion the Commission's infringement procedure by way of a complaint.

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2. Consecutive Preliminary References Gradually Shaping Hungarian Law

2.1. VAT Cases Concerning 'The Paid Consideration Condition' and the Compensation Due for Withholding Excess VAT

In the 'paid consideration condition' VAT cases a first ruling of the ECJ in an infringement case prompted several 'follow-up' preliminary ruling procedures over the years in which the national courts have requested further guidance concerning the consequences of the original judgment and the adequacy of national legislation and administrative practice implementing that judgment. These resulted in a judgment and three reasoned orders so far.[15]

In 2006 the Commission initiated infringement proceedings against Hungary in relation to national legislation that required taxable persons whose tax declaration for a given tax period recorded an 'excess' within the meaning of Article 183 of Directive 2006/112[16] to carry forward, in certain cases more than once, that excess or a part of it to the following tax period where the taxable person had not yet paid the supplier the full amount for the purchase in question. After the pre-litigation phrase was concluded without Hungary conceding, the Commission brought an action before the ECJ in 2010 pursuant to Article 258 TFEU seeking a declaration that Hungary has failed to fulfil its obligations under Directive 2006/112. In its judgment the ECJ did in fact find the legislation in question to be in breach of Article 183 of Directive 2006/112. The ECJ declared that Article 183 does not permit Member States to impose a condition relating to the payment of the amount due for the transaction in question on the exercise of the right to a refund of a deductible VAT excess and thus, by precluding the refund of a VAT excess where the consideration, including VAT, due for the transaction on which the deductible VAT arises has not yet been paid, Hungary has exceeded the limits of the freedom available to the Member

15 Judgment of 28 July 2011, *Case C-274/10, Commission v Hungary*, ECLI:EU:C:2011:530; Order of 17 July 2014, *Case C-654/13, Delphi Hungary Autóalkatrész Gyártó*, ECLI:EU:C:2014:2127; Judgment of 23 April 2020, *Cases C-13/18 and C-126/18, Sole-Mizo and Dalmandi Mezőgazdasági*, ECLI:EU:C:2020:292; Order of 20 June 2023, *Case C-426/22, Sole-Mizo*, ECLI:EU:C:2023:517; Order of 10 April 2024, *Case C-532/23, Lear Corporation Hungary*, ECLI:EU:C:2024:316.

16 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

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States under Article 183 of Directive 2006/112.[17] The ECJ also found that, given that the national legislation at issue provides for tax periods from one month to a year in duration, this may create a situation in which certain taxable persons, do not, because of the repeated carry-over of an excess, obtain a refund of that excess within a reasonable period.[18]

The Hungarian legislation was subsequently modified to comply with the judgement and the condition relating to the paid consideration was repealed. However, as it is often the case with national tax legislation found to be at odds with union law, new questions have arisen concerning the compensation that taxable persons who were previously caught by the legislative provision were entitled to. Following the initial judgment of the ECJ the Hungarian legislator adopted the rules for refunding the excess VAT. Under these rules the taxable persons could claim refund of the excess VAT that could not have been claimed previously due to the legislation in question.

In procedures brought before the national courts, certain companies claimed that a simple possibility of a one-off refund of existing excess VAT is not adequate compensation for all the periods during which the excess VAT was withheld due to the condition set out in the legislation found to be incompatible with union law. The companies claimed that they were entitled to default interests, within the statute of limitations, for all the sums of excess VAT that they had previously not been refunded. Upon a request for a preliminary ruling by the *Szombathelyi Közigazgatási és Munkaügyi Bíróság*, the ECJ indeed affirmed, in a reasoned order pursuant to Article 99 of the Rules of procedure of the Court[19] that, under the case law of the Court, when the refund to the taxable person of the excess VAT is not made within a reasonable period, the principle of fiscal neutrality of the VAT system requires that the financial losses incurred by the taxable person owing to the unavailability of the sums of money at issue be compensated through the payment of default interest.[20] The ECJ also reiterated that in the absence of EU legislation, it is for the internal legal order of each

17 Judgment, *Case C-274/10, Commission v Hungary*, para. 54.

18 Id. para. 55.

19 Under Article 99 of the Rules of procedure the ECJ may decide to rule by reasoned order where a question referred for a preliminary ruling is identical to a question on which the ECJ has already ruled, where the reply to such a question may be clearly deduced from existing case law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt.

20 Order, *Case C-654/13, Delphi Hungary Autóalkatrész Gyártó*, para. 32.

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Member State to lay down the conditions under which such interest must be paid. Those conditions must however comply with the principles of equivalence and effectiveness; that is to say that they must not be less favourable than those concerning similar claims based on provisions of national law or be arranged in such a way as to make the exercise of rights conferred by the EU legal order practically impossible.[21] The ECJ also made clear that under the case law, a national court which is called upon to apply provisions of union law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation.[22]

Although it was clear from the order of the ECJ that the legislation adopted after the judgment in the infringement case should have provided for adequate compensation for the financial losses incurred by reason of the withholding of excess VAT by means of default interest, the precise conditions of the calculation of these interests remained unclear.

The Hungarian tax authority subsequently adopted an administrative practice relying on previously enacted provisions of the Code of Fiscal Procedure that provided for an interest rate equal to the base interest rate of the Hungarian National Bank for any reimbursement of tax that was a result of a declaration by the Constitutional Court, the Supreme Court or the CJEU finding that the tax provision in question was in breach of the Fundamental Law, any other rule of law in case of municipal legislation or union law, respectively. This administrative practice was later assessed by the *Kúria* (the supreme court of Hungary), which found that these rules shall indeed be applied, by analogy, for the compensation of periods between tax declarations, whereas for the period where these interests were due following a request for compensation by the taxable person but before the tax authority has actually paid them, the rules relating to the 'late' interest rate shall apply, which amounts to the double of the base interest rate of the Hungarian National Bank.

In a series of cases, certain companies again questioned the legislative provisions and the practice of the Hungarian tax authorities. They argued that the sum due by way of interest on the amount of excess deductible VAT which was not recoverable because of the paid consideration condition should also be determined by applying a rate corresponding to double

21 Id. para. 35.
22 Id. para. 38.

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the Hungarian National Bank's base rate: namely, the interest rate applied in other cases where the tax authority's payment was overdue. In two preliminary ruling procedures, the *Szegedi Közigazgatási és Munkaügyi Bíróság* and the *Szekszárdi Közigazgatási és Munkaügyi Bíróság* raised a series of questions relating to the relevant periods of the calculation of the different interests as well as the conformity with union law of the procedural requirements relating to the claims for interest. This time, the ECJ delivered a judgment. Although the requests for preliminary ruling did not directly call into question the adequacy of applicable the interest rates, but rather inquired as to which interest rate should be applied to which period, the ECJ nevertheless found that the principles of effectiveness and fiscal neutrality exclude the application of an interest rate corresponding to the national central bank's base rate, where that rate is lower than the rate that a taxable person who is not a credit institution would have to pay to borrow a sum equal to that amount and where the interest on the excess VAT concerned runs for a given reporting period without the application of interest to compensate the taxable person for the monetary erosion caused by the passage of time following that reporting period up until the actual payment of that interest.[23] On the other hand, the ECJ found that a five-year limitation period may be applied on requests for payment of interest on excess deductible VAT retained in breach of union law.[24] Furthermore, the ECJ also stated that in cases which relate to claims in respect of a refund of excess VAT retained in breach of union law the payment of interest due because the tax authority has not paid within the time limit set may be made dependent on the submission of a specific request. This is so, notwithstanding the fact that in other cases such interest is awarded automatically, and may be applied from the end of a period of 30 or 45 days within which the administration is required to deal with such a request, and not necessarily from the date on which the excess was accrued.[25]

One would think that by then all questions relating to the refund and the compensation of the unlawfully retained excess VAT had been raised and answered. Yet, as we have seen, the ECJ, in *Sole-Mizo and Dalmandi*, called into question the appropriateness of the interest rate equivalent to the base

23 Judgment, *Cases C-13/18 and C-126/18, Sole-Mizo and Dalmandi Mezőgazdasági*, para. 49.
24 Id. para. 60.
25 Id. para. 69.

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interest rate of the Hungarian National Bank and set a requirement relating to the applicable interest rates that proved difficult if not impossible to comply with. In 2020 the Hungarian legislation was modified to take into account the judgment and the applicable interest rate was set at a level that corresponded to the base interest rate of the Hungarian National Bank plus two percentage points. The legislation also allowed the taxable person to reclaim the difference between the new rate and the interest originally provided for by a final decision of the tax authority.

Having received a new request for a preliminary ruling from the *Szegedi Törvényszék*, the ECJ once again decided by way of reasoned order. Although the ECJ recalled that under the case law Member States are entitled to lay down default interest at a flat rate in order to ensure compensation according to rules which are easily managed and supervised by the tax authorities,[26] it went on to state that while Hungarian legislature has indeed adjusted the level of the applicable interest rates, it seems that it did not fully take into account the lessons of the *Sole-Mizo and Dalmandi* judgment. The latter concerned the period that should have been covered by such interest, in particular in order to remedy the effects of the monetary depreciation.[27] The ECJ went on to find that it is for the referring court to affirm whether the rate and method of calculating the interest imposed by the Hungarian legislature results in the applicant in the main proceedings being deprived of adequate compensation for the loss caused by the unavailability of the sums concerned or whether it offsets the economic burden of the applicant in the main proceedings.[28]

Finally, in the latest request for a preliminary ruling the *Fővárosi Törvényszék* raised several new questions relating *inter alia* to the possibility of an extension to new tax periods of the original claim for interests due in relation to the excess VAT withheld. This reference was made in view of the evolution of the case law of the ECJ and the national supreme court that had unfolded in the meantime. Once again the ECJ decided by way of order and found, in essence, that if the taxpayer has only become aware of the possibility of extending the period for which it originally claimed interests following new case law, the second claim for payment of interest

26 Order, *Case C-426/22, Sole-Mizo*, para. 45.
27 Id. para. 50.
28 Id. para. 52.

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must be regarded as supplementing the first claim if they relate to the same infringement of union law.[29]

2.2. Cases Relating to the Cancellation of Usufruct Rights over Agricultural Land

Another series of cases where preliminary ruling procedures were intertwined with an infringement procedure related to legislative provisions adopted in 2013 whereby rights of usufruct and use over agricultural land were terminated, with the exception of those belonging to close relatives of the owner of the agricultural land in question.[30]

Already in 2014 the Commission opened an infringement procedure, whereas at the same time several natural and legal persons had filed court actions against the administrative decisions of the Hungarian authorities deleting those rights from the property register on the basis of the relevant legislative provisions. These court cases lead to two requests for preliminary ruling by the *Szombathelyi Közigazgatási és Munkaügyi Bíróság* in 2016. The referring court asked the ECJ in essence whether Articles 49 and 63 TFEU and Articles 17 and 47 of the Charter of Fundamental Rights of the EU precluded national legislation which extinguishes rights of usufruct and rights of use over agricultural land, without providing compensation for the financial loss which cannot be claimed in the context of the settlement of accounts between the parties. The question was also raised whether such legislation discriminates against nationals of other Member States, having regard to the fact that the continuation of rights of usufruct and rights of use depended on proof of the existence of a close family tie with the owner of the agricultural land.

In its judgment, the ECJ first considered the objections raised by the Hungarian government relating to the admissibility of the questions. One of these related to the fact that since the usufruct contracts at issue in the main proceedings were entered into before the accession of Hungary to the EU, their validity depended exclusively on the rules of national law in

29 Order, *Case C-532/23, Lear Corporation Hungary.*

30 Judgment of 6 March 2018, *Cases C-52/16 and C-113/16, SEGRO and Horváth*, ECLI:EU:C:2018:157; Judgment of 21 May 2019, *Case C-235/17, Commission v Hungary*, ECLI:EU:C:2019:432; Judgment of 10 March 2022, *Case C-177/20, Grossmania*, ECLI:EU:C:2022:175; *Case C-419/23, Nemzeti Földügyi Központ*, pending.

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force when they were concluded. In that regard, the ECJ found that these rights still existed on 30 April 2014 and they were cancelled and deleted from the property register not pursuant to legislation which was in force and produced all its effects in their regard before the date of Hungary's accession to the EU, but exclusively by virtue of the provisions at issue in the main proceedings, which were adopted nearly 10 years after Hungary's accession.[31]

After stating that the Treaty provisions on free movement of capital were applicable to the case at hand,[32] the ECJ went on to find the national provisions in question to be contrary to Article 63 TFEU. According to the ECJ, legislation such as that at issue in the main proceedings, which provides for the extinction of rights of usufruct acquired by contract over agricultural land, including those held as a result of an exercise of the right to free movement of capital, restricts that freedom on account of that fact alone. The legislation deprives the person concerned both of the ability to continue to enjoy the right which he has acquired and of the ability to dispose of that right.[33] Although the requirement relating to the existence of a close family tie between the usufructuary and the owner of the land is a criterion which is ostensibly independent of the usufructuary's nationality and the origin of the capital, and is therefore is not directly discriminatory, the legislation operates to the disadvantage of nationals of other Member States more than Hungarian nationals, and is thus liable to conceal indirect discrimination based on the usufructuary's nationality or the origin of the capital.[34]

As regards the possible justifications raised by Hungary, the ECJ has held, first, that the legislation in question did not appear to be appropriate to achieve the objectives relied upon by the Hungarian Government and that these objectives had no direct connection with the legislation. The required family tie does not guarantee that the usufructuary farms the land concerned himself and that he has not acquired the right of usufruct at issue for purely speculative purposes. Similarly, it cannot be assumed that a person outside the owner's family who has purchased a usufruct over such land would not be in a position to farm that land himself and that the purchase would necessarily have been made for purely speculative

31 Judgment, *Cases C-52/16 and C-113/16, SEGRO and Horváth*, para. 40.
32 Id. paras. 50–60.
33 Id. paras. 61–66.
34 Id. paras. 67–74.

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purposes.[35] As regards the assertion that the legislation had intended to sanction infringements of the applicable exchange control rules, the ECJ held that even if it were so, it would still be necessary to check that the legislation is not disproportionate to that objective. Other measures with less far-reaching effects could have been adopted for the purpose of penalising any infringements of the applicable exchange control legislation, such as, for example, administrative fines.[36] Although the case law accepts that a measure restricting a fundamental freedom may be justified where its purpose is to combat wholly artificial arrangements, aimed at circumventing the national legislation concerned, in order to comply with the principle of proportionality, such a measure should enable the national court to carry out a case-by-case examination in order to assess, *inter alia*, the abusive or fraudulent conduct of the persons concerned. However, according to the ECJ, it was apparent the legislation at issue in the main proceedings did not satisfy any of these requirements. Even assuming that the legislation in question could be regarded as having been adopted with the specific aim of combating artificial arrangements, a general presumption of abusive practices cannot be allowed. Namely, it cannot be inferred from the mere fact that the holder of a right of usufruct is a legal person or a natural person who is not a close relative of the owner that the conduct of such a person when acquiring the right of usufruct constituted an abuse.[37]

While the preliminary ruling procedures were pending before the ECJ, the infringement procedure also reached the litigation stage as the Commission filed its action in 2017. The Commission submitted that by adopting the legislation Hungary had failed to fulfil its obligations under Articles 49 and 63 TFEU and Article 17 of the Charter of Fundamental Rights. By the time the ECJ delivered its judgment in the infringement procedure, the *SEGRO and Horváth* cases had already been closed, therefore the ECJ mainly relied on its findings in the preliminary ruling procedures to conclude that the provisions infringed Article 63 TFEU and Article 17 of the Charter.[38] Whereas in *SEGRO and Horváth* the ECJ had bypassed the question whether the legislation infringed Article 17 of the Charter, stating that it was not necessary to examine Articles 17 and 47 of the Charter in order to resolve the disputes in the main proceedings, in the infringement

35 Id. paras. 81–94.
36 Id. paras. 95–107.
37 Id. paras. 108–126.
38 Judgment, *Case C-235/17, Commission v Hungary,* paras. 54–58.

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procedure the ECJ was bound to address the question as it was one of the forms of order sought by the Commission in its action. In a significant development of its case law, the ECJ has, for the first time, found a Member State to be in breach of a provision of the Charter of Fundamental Rights.[39]

Before new legal provisions could have been adopted to deal with the consequences of the two judgments, another preliminary ruling request was put before the ECJ in a case where a company had requested the reinstatement of its right of usufruct relying on the judgment in *SEGRO and Horváth*. The *Győri Közigazgatási és Munkaügyi Bíróság* essentially asked the ECJ whether the mandatory effects of preliminary rulings required that the national courts disregard the national legislation at issue on the ground that it contravenes union law and order the competent authorities to reinstate the rights of usufruct which have been deleted. In its judgment the ECJ, having regard to the specifics of the case, addressed the issue of final national administrative decisions which have been adopted on the basis of national legislation found later to be in infringement of union law. In that regard, the ECJ first recalled that in accordance with the principle of the primacy of union law, national courts must disapply national legislation that contravenes a provision of union law having direct effect, where it is not possible to interpret that legislation in accordance with union law.[40] The ECJ held that in accordance with the principles of effectiveness and sincere cooperation under Article 4(3) TEU, particular circumstances may require a national administrative body to review a decision that has become final, while stating that in this context a balance must be struck between the requirements of legal certainty and legality under union law.[41] According to the ECJ, in the absence of specific rules in union law on how to remedy the consequences of an infringement of Article 63 TFEU in the circumstances of the case, measures such as the reinstatement of unlawfully deleted rights of usufruct may be applicable. However, the national court must ascertain whether such reinstatement was not precluded by objective and legitimate obstacles, such as the acquisition in good faith by a new owner of the land

39 Id. paras. 59–89 and 123–129. Hungary argued that a separate examination of an infringement of the Charter was not possible in an infringement procedure. Advocate General Saugmandsgaard Øe has examined this question in detail in his opinion, coming to the conclusion that the ECJ lacked jurisdiction to give a ruling on Article 17 of the Charter as requested by the Commission, *cf.* Opinion, *Case C-235/17, Commission v Hungary*, ECLI:EU:C:2018:971, paras. 55–126.

40 Judgment, *Case C-177/20, Grossmania*, paras. 29–32.

41 Id. paras. 47–62.

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in question. If this were the case, the former holders of the rights of usufruct shall be awarded appropriate compensation to remedy the economic loss resulting from the cancellation of their rights.[42] The ECJ also reminded that, by virtue of the principle of State liability for loss or damage caused by national legislation in breach of union law, individuals have a right to compensation in accordance with the conditions laid down by the case law.[43]

Meanwhile, negotiations between the Commission and the Hungarian government had concluded and new legislation was adopted to implement the judgments in *SEGRO and Horváth* and *Commission/Hungary*. The new provisions established a standardised procedure for the request for the reinstatement of the right of usufruct as well as compensation based on the value of the right of usufruct and the period during which that right could not be exercised due to the provisions found to have infringed union law. The legislation provided for the reinstatement of rights save for certain cases where either or both of the parties involved was deemed to have acted in bad faith for the purposes of the request. These new legislative provisions are the subject-matter of a new preliminary ruling procedure,[44] where the *Győri Törvényszék* asks the ECJ whether the new legislation should have provided for a mandatory examination of the circumstances of the original acquisition of the right of usufruct for the purposes of determining whether the right may be reinstated. In the case before the national court, the owner of a land objected to the reinstatement of a right of usufruct terminated by the previous legislation on the grounds that the original right of usufruct was created in contravention of the national rules applicable at the time. Ironically, the contravention of national rules at the time of the acquisition of the right of usufruct was one of the unsuccessful justification grounds relied on by the Hungarian government in *SEGRO and Horváth* and *Commission/Hungary.* This justification was dismissed by the ECJ, which stated that such contravention of national rules did not warrant a systematic termination of the rights of usufruct.[45]

Concerning the *SEGRO and Horváth* cases, it is worth noting that their implementation had considerable effect on the Hungarian jurisprudence. Both the *Kúria* and the Constitutional Court expressed diverging views

42 Id. paras. 63–68.
43 Id. paras. 69–72.
44 *Case C-419/23, Nemzeti Földügyi Központ*, pending.
45 Decision No. Kf.V.39.162/2020/5.

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on the constitutional implication of the judgments. As a result of this divergence, the Constitutional Court even quashed the *Kúria*'s decision in a case applying the *SEGRO* judgment. In this case (and in similar cases concerned with the same legal problem) no preliminary reference was made – and indeed, this was excluded as the problematic issue was of constitutional nature concerning reverse discrimination. In a national case before a first instance administrative court *(Győri Közigazgatási és Munkaügyi Bíróság)*[46] which reached the level of the *Kúria*, the issue was whether Hungarian nationals could also rely on the *SEGRO and Horváth* judgments. The question was whether they could request the reregistration of their right of usufruct in the land register from which it was deleted by virtue of the national legislation found in breach of the free movement of capital by the ECJ in *SEGRO and Horváth* or, alternatively, such right is only available for EU citizens who can efficiently rely on the free movement of capital provisions. Thus, the issue was whether reverse discrimination (*i.e.* Member States treating their own national less favourably than EU citizens) is allowed under Hungarian constitutional law. In its judgment,[47] the *Kúria* found that enforcing CJEU judgments only in cases where EU law should be applied would result in reverse discrimination and such a discrimination can – according to the *Kúria* – only be avoided if national legislation is disapplied in these purely domestic cases, too. The Constitutional Court[48] annulled the *Kúria*'s decision. It argued that the primacy of union law and Article E of the Fundamental Law, authorising the transfer of exercise of certain powers to the EU institutions, do not allow – not even in exceptional circumstances – the extension of the scope of union law in areas not falling under union law. Disapplying national law in a non-EU context would run counter to the principles of reserved sovereignty and restrictive interpretation of national agreements.

It not only flows therefore from the judgment that the elimination of reverse discrimination cannot be deduced from Article E, but at the same time it seems that reverse discrimination as such does not violate the Fundamental Law and there are no other constitutional principles under which such a situation could be remedied.

46 Decision No. K.27.384/2018/10.
47 Decision No. Kf.V.39.162/2020/5.
48 Decision No. 16/2021. (V. 13.) AB of the Constitutional Court.

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2.3. Cases Relating to Unfair Terms in Consumer Contracts

The Hungarian cases[49] relating to the interpretation of Directive 93/13/EEC[50] on unfair terms in consumer contracts also illustrate the way in which the interpretation of a given EU legislative instrument or a legislative provision develops through subsequent cases as national courts seek further guidance and clarification from the ECJ. In certain instances, discontent with national legislation or the case law of the higher courts inspires new references by lower courts, until every new aspect of the problem is resolved, or at least until the ECJ has had the opportunity to rule on them.

It is perhaps symptomatic of the socioeconomic conditions of the era that the very first preliminary ruling request made by a Hungarian court following the 2004 accession, and as it happens, also the first reference

49 Judgment of 10 January 2016, *Case C-302/04, Ynos,* ECLI:EU:C:2006:9*;* Judgment of 9 November 2010, *Case C-137/08, VB Pénzügyi Lízing,* ECLI:EU:C:2010:659; Judgment of 4 June 2009, *Case C-243/08, Pannon GSM*, ECLI:EU:C:2009:350; Judgment of 26 April 2012, *Case C-472/10, Invitel,* ECLI:EU:C:2012:242; Judgment of 30 May 2013, *Case C-397/11, Jőrös*, ECLI:EU:C:2013:340; Judgment of 21 February 2013, *Case C-472/11, Banif Plus Bank*, ECLI:EU:C:2013:88; Judgment of 30 April 2014, *Case C-26/13, Kásler and Káslerné Rábai,* ECLI:EU:C:2014:282; Order of 3 April 2014, *Case C-342/13, Sebestyén*, ECLI:EU:C:2014:1857; Judgment of 12 February 2015, *Case C-567/13, Baczó and Vizsnyiczai*, ECLI:EU:C:2015:88; Judgment of 1 October 2015, *Case C-32/14, ERSTE Bank Hungary*, ECLI:EU:C:2015:637; Judgment of 3 December 2015, *Case C-312/14, Banif Plus Bank*, ECLI:EU:C:2015:794; Judgment of 31 May 2018, *Case C-483/16, Sziber*, ECLI:EU:C:2018:367; Judgment of 5 June 2019, *Case C-38/17, GT,* ECLI:EU:C:2019:461; Judgment of 20 September 2018, *Case C-51/17, OTP Bank and OTP Faktoring*, ECLI:EU:C:2018:750; Judgment of 14 March 2019, *Case C-118/17, Dunai*, ECLI:EU:C:2019:207; Order of 22 February 2018, *Case C-126/17, ERSTE Bank Hungary*, ECLI:EU:C:2018:107; Order of 21 November 2017, *Case C-232/17, VE*, ECLI:EU:C:2017:907; Order of 21 November 2017, *Case C-259/17, Rózsavölgyi*, ECLI:EU:C:2017:905; Judgment of 11 March 2020, *Case C-511/17, Lintner,* ECLI:EU:C:2020:188; Judgment of 8 October 2019, *Case C-621/17, Kiss and CIB Bank,* ECLI:EU:C:2019:820; Judgment of 19 September 2019, *Case C-34/18, Lovasné Tóth,* ECLI:EU:C:2019:764; Order of 8 November 2018, *Case C-227/18, VE*, ECLI:EU:C:2018:891; Judgment of 2 September 2021, *Case C-932/19, OTP Jelzálogbank and Others,* ECLI:EU:C:2021:673; Judgment of 31 March 2022, *Case C-472/20, Lombard Lízing,* ECLI:EU:C:2022:242; Order of 6 December 2021, *Case C-670/20, ERSTE Bank Hungary,* ECLI:EU:C:2021:1002; Judgment of 27 April 2023, *Case C-705/21, AxFina Hungary*, ECLI:EU:C:2023:352, Order of 9 April 2024, *Case C-628/23, AXA Bank Europe and Others*, ECLI:EU:C:2024:317. Still pending before the ECJ at the time of the submission of the manuscript were *Case C-565/23, Cofidis Magyarországi Fióktelepe, Case C-630/23, AxFina Hungary* and *Case C-47/24, Cofidis Magyarországi Fióktelepe.*

50 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

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from the new Member States, was related to Directive 93/13/EEC. The *Szombathelyi Városi Bíróság* has asked the ECJ for the interpretation of Article 6(1) of the Directive, under which Member States are to adopt legislation whereby unfair terms used in a contract concluded with a consumer are not binding on the latter. However, since the facts of the case occurred prior to the accession of Hungary to the EU, the ECJ found that it lacked jurisdiction to answer the questions of the national court.[51]

Of those relating to Directive 93/13/EEC several Hungarian preliminary ruling procedures dealt mainly or incidentally with the question of whether national courts are required to examine of their own motion the unfair nature of a term in a consumer contract,[52] and the consequences to be drawn from a finding that a term is unfair.[53] Some cases related to the unfair nature of different arbitration clauses and jurisdictional terms,[54] as well as procedural provisions determining which court was competent to hear actions alleging unfair contractual terms.[55] Certain cases related to the particular role public notaries played in the drawing up and the enforcement of mortgage loan contracts, the nature of these notarised instruments, and how the unfair nature of a contractual term may be raised in the context of the judicial review of the contract's enforcement.[56]

A good number of Hungarian preliminary references concerning Directive 93/13/EEC relate to loan contracts denominated in foreign currencies. Following the 2007–2008 economic crisis and the deterioration of the exchange rate of the Hungarian forint compared to the currencies these contracts were denominated in, consumers experienced a sharp rise in the amount of their monthly instalments, leading to widespread foreclosure and litigation.[57]

51 Judgment, *Case C-302/04, Ynos,* paras. 34–38.

52 Judgments in *Case C-137/08, VB Pénzügyi Lízing, Case C-243/08, Pannon GSM*, *Case C-397/11, Jőrös, Case C-472/11, Banif Plus Bank, Case C-51/17, OTP Bank and OTP Faktoring, Case C-511/17, Lintner, etc.*

53 Judgments in *Case C-397/11, Jőrös, Case C-472/11, Banif Plus Bank, etc.*

54 Judgments in *Case C-137/08, VB Pénzügyi Lízing, Case C-243/08, Pannon GSM*, Order in *Case C-342/13, Sebestyén, etc.*

55 Judgment in *Case C-567/13, Baczó and Vizsnyiczai.*

56 Judgments in *Case C-32/14, ERSTE Bank Hungary, Case C-34/18, Lovasné Tóth.*

57 *See* in more detail: Miklós Zoltán Fehér, 'From Kásler to Dunai. A Brief Overview of Recent Decisions of the CJEU in Hungarian Cases Concerning Unfair Terms in Consumer Contracts', *Hungarian Yearbook of International Law and European Law,* Vol. 7, 2019, pp. 289–302.

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In 2013 the *Kúria* requested a preliminary ruling in relation to one of the controversial terms that most of these loan contracts contained: the term that allowed the lender to calculate the amount of the monthly instalments owed by the consumer in accordance with the selling rate of exchange of the foreign currency it applied. In *Kásler and Káslerné Rábai* the ECJ found that the national court may find such a term to constitute the 'main subject-matter of a contract' only in so far as it laid down an essential obligation of that agreement which, as such, characterised it. The ECJ also excluded that the contractual term in question constituted 'remuneration', the adequacy of which could not be the subject of an examination as regards unfairness under Directive 93/13/EEC.[58] It went on to interpret the requirement of transparency of contractual terms laid down by Directive 93/13/EEC as requiring not only that the relevant term be grammatically intelligible to the consumer, but also that the contract sets out transparently the specific functioning of the mechanism of conversion for the foreign currency and the relationship between that mechanism and that provided for by other contractual terms relating to the advance of the loan, so that that consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences of these terms.[59] Finally, the ECJ answered the question of the *Kúria* relating to the possible substitution of an unfair term with a national legal provision in the affirmative by stating that the Directive does not preclude a rule of national law enabling the national court to remedy the invalidity of an unfair term by substituting it with a supplementary provision of national law.[60]

The judgment in *Kásler and Káslerné Rábai* had several consequences. First, the *Kúria* adopted a uniformity decision[61] to give guidance to lower courts and ensure uniform application of the law in cases relating to consumer loan contracts denominated in foreign currencies. In the decision, the *Kúria* concluded that the contractual term considered in *Kásler and Káslerné Rábai* was unfair because the financial institution did not provide any direct service to the consumer, and therefore it constituted an unjustified cost for the consumer. According to the *Kúria*, these terms were also unfair because the economic reasons for their application were not clear, not intelligible and not transparent to the consumer. The *Kúria* decided that

58 Judgment, *Case C-26/13, Kásler and Káslerné Rábai,* paras. 44–59.
59 Id. paras. 62–74.
60 Id. paras. 76–84.
61 Decision No. 2/2014 PJE.

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the buying and selling rates applied in foreign exchange loan contracts as rates of conversion were to be replaced by the official foreign exchange rate of the Hungarian National Bank. The *Kúria* also considered another term frequently applied in loan contracts, namely contractual clauses allowing for the unilateral amendment of a contract, and has found that these terms were only fair as long as they complied with a set of principles such as clear and intelligible drafting, objectivity, effectivity and proportionality, transparency, *etc.*

Second, in 2014 the Hungarian Parliament adopted legislation to implement the judgment in *Kásler and Káslerné Rábai* and the uniformity decision of the *Kúria*. The new legislation declared the contractual term relating to the application of different exchange rates, discussed above, to be unfair. The contractual clauses allowing for a unilateral amendment of the contract were presumed to be unfair with the possibility for financial institutions to demonstrate in court proceedings that they satisfied the conditions defined by the *Kúria*. The new legislation provided for the settlement of accounts by the lenders as a consequence of the unfair nature of the two terms in question, while also setting out a series of procedural rules relating to ongoing court procedures. The Hungarian legislator also prescribed a mandatory transformation of contracts, which were to be denominated in Hungarian forints, to exclude any future escalation of consumer burdens in relation to fluctuations in the exchange rate of the foreign currency in which the contract was originally concluded.

It is no surprise that several subsequent Hungarian preliminary ruling procedures dealt with the different provisions and the consequences of this legislation. In *Sziber* the ECJ was asked to assess certain procedural requirements of the new legislation, such as the obligation of the applicant to amend the application after the two unfair terms discussed above had been removed from the contract by stating the legal consequences sought in the event of a finding that the contract or part of it was invalid due to further unfair terms, with the exclusion of the possibility of *restitutio in integrum*, and to specify the amounts considered to have been paid on the basis of such terms. The ECJ 'approved' these provisions on the condition that it was possible to effectively challenge these unfair terms and to restore the legal and factual situation that the consumer would have been in, had those unfair terms not existed.[62]

62 Judgment, *Case C-483/16, Sziber,* paras. 30–55.

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In *OTP Bank and OTP Faktoring* the ECJ found that the terms relating to the foreign exchange rate risk, *i.e.* that the consumer exclusively wore the burden of the change of the exchange rate of the currency in which the contract was denominated – were not excluded from the scope of the Directive, as these were not covered by the statutory provisions.[63] The ECJ further clarified the requirement for a contractual term to be drafted in plain intelligible language as concerns the term relating to the foreign exchange rate risk.[64]

In *Dunai,* the ECJ concluded that Directive 93/13/EEC precluded legislation that would prevent a national judge from cancelling the loan contract on the basis of the unfair nature of a term relating to exchange rate risk where it was found that that term is unfair and that the contract cannot continue to exist without that term. The ECJ also found that whereas in *Kásler and Káslerné Rábai* it had ruled that a national court may substitute an unfair contractual term with supplementary provision of domestic law in order to ensure the continued existence of the contract, that possibility was limited to cases in which the cancellation of the contract in its entirety would expose the consumer to particularly unfavourable consequences. This appeared not to be applicable in the case at hand, as it seemed that the continuation of the contract would be contrary to the interests of the consumer.[65]

Recent Hungarian cases relating to Directive 93/13/EEC still mainly deal with loan contracts denominated in foreign currencies. In *Lombard Lízing* the ECJ considered whether it was compatible with the Directive for the highest court to guide lower courts by way of a non-binding opinion to declare a contract valid or effective between parties where that contract cannot continue in existence because a term relating to its main subject matter is unfair.[66] As regards the consequences of a finding that a term relating to the main subject matter of the contract is unfair, the ECJ basically reiterated its earlier case law by adding that if the national court takes the view that it was not possible to restore the parties to the situation they would have been in if the contract had not been concluded, the onus is on

63 Judgment, *Case C-51/17, OTP Bank and OTP Faktoring,* paras. 51–69.
64 Id. paras. 72–77.
65 Judgment, *Case C-118/17, Dunai,* paras. 34–55.
66 Judgment, *Case C-472/20, Lombard Lízing,* paras. 33–34.

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that court to ensure that the consumer is ultimately in the position he or she would have been in if the term held to be unfair had never existed.[67]

In *Kiss and CIB Bank* the ECJ was once more called upon to consider the requirement of drafting contractual terms in plain, intelligible language. The ECJ found that in the context of contractual terms in a consumer loan contract which specified the exact amount of management charges and of a disbursement commission to be borne by the consumer, their method of calculation and the time when they have to be paid, it was not indispensable that all of the services provided in return for the amounts concerned were given in detail.[68]

Most recently, in *AxFina Hungary* the preliminary ruling request by the *Győri Ítélőtábla* concerned the compatibility with Directive 93/13/EEC of the approach based on the opinion of the advisory body of the *Kúria*, according to which national courts should declare contracts that contained unfair terms which placed the exchange risk on the consumer to be valid by adapting the consumer's obligations by judicially amending the contract. According to the opinion the contract's validity should be upheld either by changing the currency of the contract and the corresponding interest rate, or by setting a ceiling for the exchange rate of the currency. The ECJ found that such an amendment of the contract by the national court was precluded by the Directive, as the national court's powers cannot extend beyond what is strictly necessary to restore the contractual balance between the parties and to protect the consumer from the particularly unfavourable consequences which could result from the annulment of the contract at issue.[69] Following the delivery of the judgment the *Kúria* abandoned this approach and has chosen to uphold the validity of the contract by eliminating the exchange risk of the consumer altogether, *i.e.* by applying the exchange rate and the interest rate applicable at the time of the conclusion of the contact to settle the accounts. The *Kúria* requested a preliminary ruling – presumably to make sure this new solution was in line with the Directive and the case law in *C-630/23, AxFina Hungary* –, this is currently pending before the ECJ.

While this overview of the Hungarian cases concerning Directive 93/13/EEC is far from exhaustive, and although only the aspects deemed the most important were highlighted from the individual cases mentioned,

67 Id. paras. 40–60.
68 Judgment, *Case C-621/17, Kiss and CIB Bank,* paras. 30–45.
69 Judgment, *Case C-705/21, AxFina Hungary*, paras. 35–49.

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this study illustrates how Hungarian courts have made use of the preliminary ruling procedure to map the precise content of, and the requirements imposed by the Directive with the assistance of the ECJ. Step by step, case by case the Hungarian courts have sought clarification on both procedural and substantive issues to resolve, in line with union law, the complex legal questions that the widespread application of consumer loan contracts denominated in foreign currencies have raised.[70]

2.4. Cases Concerning the Cross-border Transfer of Seat or Conversion

While the previous set of cases all concerned the clarification of a judgment (or judgments) of the ECJ delivered in a Hungarian case, seeking its further and deeper interpretation, the *Cartesio* case started with the quite obvious aim of urging the Court to review its case law in *Daily Mail.* In the English case *Daily Mail* the ECJ found that the Treaty articles on the freedom of establishment do not entail the right for companies to transfer their seats to another Member State. It maintained that companies are the creatures of national laws and therefore these states have the right to define the connecting factor between them and their companies.[71] But the *Daily Mail* judgment was delivered in the late 80's and company mobility became much more intensive after that. Even follow-up case law, especially the *SEVIC* case,[72] concerning the cross-border merger of companies showed major progress in the interpretation of freedom of establishment articles – yet the doctrine of *Daily Mail* was not overruled. It was however repeatedly discussed that *Daily Mail* should be revisited either by the Court or

70 It must also be noted that the issue of consumer loan contracts denominated in foreign currencies was not unique to Hungary and that several questions relating to such contracts, and unfair terms in consumer contracts in general, have quite naturally been brought before the ECJ by national courts of other Member States. That being said, national courts not only revisit or further advance issues previously raised by courts of their own Member State, but are in a constant dialogue with the national courts of the other Member States as well through the preliminary ruling procedure and the judgments of the ECJ.

71 Judgment of 27 September 1988, *Case C-81/87, Daily Mail,* ECLI:EU:C:1988:456, para. 19.

72 Judgment of 13 December 2005, *Case C-411/03, SEVIC,* ECLI:EU:C:2005:762.

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revised through harmonisation measures.[73] The 1997 draft proposal of the Commission on the cross-border transfer of a company' registered office or de facto head office to another Member State was finally not channelled into the legislative procedure and processes came to a stalemate.[74] In 2006 a Hungarian regional court, the *Szegedi Ítélőtábla*, finally had the opportunity to challenge the ECJ about the actual scope of the freedom of establishment in a case where a Hungarian company wanted to transfer its seat to Italy while retaining its status under the Hungarian law.[75] The Court insisted on its earlier case law by confirming that a Member State has the power not to permit a company governed by its law to retain that status if the company intends to reorganise itself in another Member State by moving its seat to the territory of the latter, thereby breaking the connecting factor required under the national law of the Member State of incorporation.[76] In the same judgment, however, the ECJ distinguished the situation in *Cartesio* from a hypothetical one where the company would not want to transfer its seat, but wants to convert into a company form governed by another Member State thereby changing the applicable law. In such a case the Member State of incorporation could not require the winding-up or liquidation of the company, in preventing that company from converting itself into a company governed by the law of the other Member State, to the extent that it is permitted under that law to do so.[77] With this addition the ECJ took a step further towards finetuning the principle of the freedom of establishment. At the same time, however, it should be underlined that with this addition it seems to have overstepped the powers it is entrusted with to interpret EU law. It has namely answered a question which was not asked from it and does not have any factual links with the case at hand. According to the case law the function of the ECJ in preliminary rulings is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or

73 Federico M. Mucciarelli, 'Company 'Emigration' and EC Freedom of Establishment: Daily Mail Revisited', *European Business Organization Law Review,* Vol. 9, Issue 2, 2008, pp. 267–303.

74 Dubravka Aksamovic, 'Transfer of Corporate Seat in EU: Recent Developments', *Athens Journal of Law,* Vol. 5, Issue 4, 2019, pp. 419–434.

75 Judgment of 16 of December 2008, *Case C-210/06, Cartesio,* ECLI:EU:C:2008:723.

76 Id. para. 111.

77 Id. para. 112.

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hypothetical questions.[78] Meanwhile, the issue of converting into the legal form of another Member State was definitely a hypothetical issue as this is not what the Hungarian company, Cartesio wanted to do. Still, it was this very sentence which generated a new reference in the *Vale* case.[79] This time, the case was more about the compatibility of Hungarian legislation with the *Cartesio* judgment than a finetuning or further development of EU law. In the instant case in which the reference was made in 2010 there was a former Italian company which was deleted from the Italian company register for having moved to Hungary. The owners of the Italian company wanted to register a new Hungarian company with the same name as the Italian company and asked the Commercial Court in Budapest to indicate that VALE Costruzioni was the predecessor in law to VALE Építési, the new Hungarian company. The assets of the Italian company were fully transferred to the New Hungarian entity.[80] The Hungarian Commercial Court refused to state this information in the registry arguing that a company which was incorporated and registered in Italy cannot, by virtue of Hungarian company law, transfer its seat to Hungary and cannot obtain registration there in the form requested. In fact, what Vale wanted was a conversion into the legal form a Member State in the sense of the newly established principle of the *Cartesio* judgment, in particular, the wording "if it is permitted under the law to do so". In its judgment the ECJ continued its line of reasoning developed in its earlier case law *Überseering* and *Sevic* and found that

> "Articles 49 TFEU and 54 TFEU must be interpreted as precluding national legislation which enables companies established under national law to convert, but does not allow, in a general manner, companies governed by the law of another Member State to convert to companies governed by national law by incorporating such a company".

78 Judgment of 12 of June 2003, *Case C-112/00, Schmidberger*, ECLI:EU:C:2003:333, para. 32; Judgment of 8 of September 2009, *Case C-478/07, Budějovický Budvar* ECLI:EU:C:2009:521, para. 64.

79 Judgment of 12 of July 2012, *Case C-378/10, Vale*, ECLI:EU:C:2012:440.

80 The transfer of assets is an essential feature of the effective application of para. 111 of the *Cartesio* judgment according to Péter Metzinger – who represented *Cartesio* and later *Vale* in the respective cases – as without the continuity of assets one could not speak of a real conversion (Péter Metzinger, 'A társaságok szabad letelepedése a Cartesio ügy után: Hogyan tovább nemzetközi székhelyáthelyezés?', *Európai Jog,* 2009/2., pp. 8–15.)

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In *Vale* the ECJ therefore made clear that the Hungarian law was not in line with what was laid down in the *Cartesio* judgment. The *Vale* judgment was followed up some years later by an amendment in Hungarian law[81] which made cross-border conversion possible. At the same time, *Cartesio* and *Vale* also had an effect on EU level, with the 2019 Mobility Directive[82] codifying the main findings of the above cases and supplementing them with the necessary secondary legislation.

2.5. Gambling Cases Concerning the Prohibition of Slot Machines in Amusement Arcades

From the series of gambling cases[83] concerning the prohibition of slot machines in amusements arcades that reached the ECJ from Hungary, the *Berlington* judgment and the order rendered in *Pólus Vegas* may be considered consecutive cases where the latter sought the interpretation and proper application of the former. The *Berlington* case was initiated at national level after the Hungarian legislator significantly changed gambling legislation in 2011 and 2012, respectively. First, it increased the flat rate for tax without a transitional period in the case of slot machines operating outside casinos, and then it prohibited operating such machines outside casinos. The applicants in the main proceedings were gambling companies with mostly EU clientele which were operating slot machines in amusement arcades. They claimed compensation for the damage they allegedly suffered, resulting from the application of certain provisions of the 2011 and 2012 amendments. According to the applicants, the alleged damage resulted from the imposition of gambling taxes which they had paid, the depreciation of their slot machines and the expenses incurred in the main proceedings.[84] The *Fővárosi Törvényszék* had doubts about the compatibility of the natio-

81 *See* Act LXI of 2017 on the amendment of certain acts to enhance the legal competitiveness of business environment.

82 Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions.

83 Judgment of 11 of June 2015, *Case C-98/14, Berlington*, ECLI:EU:C:2015:386; Judgment of 22 of June 2017, *Case C-49/16, Unibet*, ECLI:EU:C:2017:49; Judgment of 28 February 2018, *Case C-3/17, Sporting Odds*, ECLI:EU:C:2018:130; Order of 4 of June 2019, *Case C-665/18, Pólus Vegas*, ECLI:EU:C:2019:477.

84 Judgment, *Case C-98/14, Berlington,* para. 20.

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nal measures with EU law and sent fifteen questions to the ECJ on the interpretation of EU law. It wished to ascertain not only the compatibility of the amendments with EU law, but also the conditions of awarding damages on the basis of the *Brasserie du pêcheur* and *Factortame* case law. In its judgment, the ECJ came to the conclusion that national legislation prohibiting the use of slot machines outside casinos without any compensation or transitional period, constitutes a restriction on the freedom to provide services guaranteed by Article 56 TFEU.[85] At the same time, it made clear that this article is intended to confer rights on individuals, in such a way that its infringement by a Member State, including as a result of its legislative activity, gives rise to a right of individuals to obtain from that Member State compensation for the damage suffered as a result of that infringement. To receive compensation however, the infringement must be sufficiently serious and there must be a direct causal link between the infringement and the damage sustained, which is for the national court to determine.[86]

Following the judgment, many claims for compensation were submitted by former gambling service providers. However, the jurisprudence at national level reflected diverging interpretations. Some decisions refused those claims where no cross-border element could be identified, meaning that the providers could not ascertain their clients were mainly non-Hungarian EU citizens.[87] Other decisions at second instance found that under the *Anomar* case law,[88] even the theoretical breach of EU law could suffice in order to establish cross-border relevance.[89] This uncertainty concerning the significance of the cross-border element led to the next preliminary reference in the *Pólus Vegas* case. In this case, a first instance court, the *Fővárosi Közigazgatási és Munkaügyi Bíróság,* faced with the strongly diverging judicial approaches asked the ECJ whether in the case of operating slot machines the cross-border element should be presumed, as there is a potentiality that citizens of other Member States will try to access these services.

85 Id. para. 52.

86 Id. para. 106.

87 *See* the following judgments: P.22.701/2015/35, p. 26; P.21.074/2016/14, p. 3; P.24.991/2016/33, p. 11. Réka Rákos, *Az uniós jog megsértéséért fennálló tagállami kártérítési felelősség: Pürrhoszi győzelem? A Francovich-doktrína érvényesítése és alkalmazása a magyar jogban*, OTDK dolgozat, 2023, p. 26.

88 Judgment of 11 of September 2003, *Case C-6/01, Anomar*, ECLI:EU:C:2003:446.

89 *See* the following judgments: 8.Pf. 21.280/2018/8, p. 8; 5.Pf.20.097/2019/6/II, p. 11; 5.Pf.20.270/2019/6/II, p. 7; 5.Pf.20.800/2018/7/II, p. 11; 5.Pf.21.081/2016/6/II, p. 21; 8.Pf.20.231/2017/8, p. 6. *See* Rákos 2023, p. 27.

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The ECJ decided to rule in the case by way of an order (instead of a judgment) arguing that the referring court could clearly deduce the answers from the existing case law. This is even more interesting in the light of the fact that the decision is not completely in line with the overall conclusions in the *Anomar* case to which no reference is made in the order. First, the ECJ argued that in *Berlington* the reason why the Court found that Article 56 TFEU was breached was that the clientele of the applicants in the main proceedings was partly from EU Member States. If, however, the case before the national court is of purely internal nature and does not show any connection to one of the freedoms, the cross-border element cannot be presumed for the mere eventuality that non-Hungarian EU citizens might have access to such services.[90]

The order in *Pólus Vegas* led to a controversial situation in Hungary – similarly to the post *SEGRO* case law – where those amusement arcades which operated slot machines but could not provide proof that they had clients from other Member States did not receive compensation, while those which could prove such a cross-border element, were awarded considerable damages as a result of the very same legislation. Moreover, ever since the Constitutional Court's 2021 decision it is undisputed that Article E cannot be given a broader interpretation and EU law cannot be applied in purely domestic situations, not even if it results in reverse discrimination.

3. Conclusions

"Learning to talk" – was the title of an article written by the later Advocate General Michal Bobek published only some years after the Eastern enlargement, giving a first impression of the early experiences with preliminary ruling procedures from the new Member States.[91] The above cases show that in Hungary the use of the procedure not only resulted in a genuine dialogue between the referring courts and the ECJ, but became a real conversation with the contribution of many actors who often further specified earlier questions put forward by their colleagues or approached the same legal issue from a different angle. The fact that references generate more and more questions shows that the successful application of EU law and

90 Order, *Case C-665/18, Pólus Vegas,* paras. 23–24.

91 Michal Bobek, 'Preliminary Rulings, the Courts of the New Member States and the Court of Justice', *Common Market Law Review,* Vol. 45, Issue 6, 2008, pp. 1611–1643.

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confirms that preliminary references are in most of the cases not isolated decisions, but are embedded in a set of judgments and their essence can only be assessed in light of this line of decisions. Consecutive preliminary references are evidence that the application of the judgments of the ECJ is an integral part of the legal work of national judges and that EU law is in fact in use.

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Impact of Hungary's EU Membership on Criminal Law

A Retrospective Analysis

Judit Szabó[*]

Abstract

On the 20th anniversary of Hungary's accession to the EU, it is perhaps worthwhile to look at the judgments of the CJEU that were either initiated by Hungarian judges or are significant because of the Hungarian dimension of the underlying proceedings and their impact on Hungarian law. In this retrospective analysis, however, it must be borne in mind that the initiatives in the field of criminal law are to be interpreted in a particular way: criminal law is special in the sense that national courts do not essentially apply EU law, and the referrals in criminal cases concern primarily procedural issues in the area of freedom, security and justice. The focus of the judgments presented in this study is therefore essentially on mutual recognition and enforcement of decisions and the ne bis in idem principle. In addition to the effectiveness of the initiatives, the analysis also looks at the direct impact of the CJEU's response to EU law issues raised in national case law on both national and European legislation and practice. Despite the seemingly small number of Hungarian criminal initiatives, Hungarian courts have been able to have a significant impact on the application of the law in other Member States, particularly in mutual recognition, deepening the understanding of this term. The study also aims at analyzing the Bob-Dogi and Aranyosi-Caldařaru judgments, which have strengthened the foundations of loyal cooperation and have been fundamental in determining it.

Keywords: mutual recognition, mutual trust, ne bis in idem, preliminary rulings, judicial cooperation in criminal matters

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1. Introduction

Hungary joined the EU on 1 May 2004, and this also meant a new task for the Hungarian courts: as courts of the Member States, they had to ensure the effective enforcement of EU law. To ensure that national courts interpret and apply EU law in a uniform manner throughout Europe, the CJEU, as the body responsible for the administration of justice in the EU, cooperates with national courts. This cooperation takes place in the framework of the preliminary ruling procedure provided for in Article 267 TFEU. The preliminary ruling procedure is therefore a form of cooperation between national courts and the CJEU.[1] This procedure, which is essentially a judicial protection procedure, allows a national court to ask the CJEU for a preliminary ruling in a case pending before it if it has doubts about the validity of EU law or its interpretation in a particular case. This is the inalienable and indefinite right[2] of all national judges under the Treaties.[3]

Between 1 May 2004 and the closure of this paper, the Hungarian courts referred a total of ten preliminary questions to the CJEU. However, if we consider the interaction indicated in the title of this paper, this number is almost double the number of cases with Hungarian implications, which, although not initiated as a domestic initiative, had a significant impact on Hungarian legislation and jurisprudence.

The following table lists these cases in chronological order,[4] with the case number and, where available, the name of the famous case; cases of Hungarian initiative are in italics:

1 Katalin Gombos, *Bírói jogvédelem az Európai Unióban – Lisszabon után,* Complex, Budapest, 2011, pp. 222–223.

2 *See also* Judgment of 23 November 2021, *Case C-564/19, IS,* ECLI:EU:C:2021:949, paras. 68–70.

3 *Cf.* Article 490 of the Hungarian Code of Criminal Procedure (Act CX of 2017, 2017 Code of Criminal Procedure).

4 The table does not include cases where the Hungarian government only intervened as a quasi-intervener.

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Table 1

	Case no.	**Designation**
1.	*C-328/04*	*Vajnai – red star*
2.	C-161/06	SkomaLuxsro[5]
3.	*C-404/07*	*Katz*
4.	*C-205/09*	*Eredics*
5.	*C-45/14*	*Balázs-Papp*
6.	C-129/14 PPU	Spasic[6]
7.	C-340/14	Trijber[7]
8.	*C-25/15*	*Balogh*
9.	C-241/15	Bob-Dogi[8]
10.	C-404/15, C-659/15	Aranyosi – Caldararu[9]
11.	*C-390/16*	*Lada*
12.	C-453/16	Özçelik[10]
13.	C-268/17	AY[11]
14.	C-220/18	ML[12]
15.	*C-564/19*	*IS*
16.	*C-136/20*	*LU*
17.	*C-131/21*	*KI*
18.	*C-147/22.*	*Alstom*

Judging whether the number of initiatives seems sufficient is beyond the scope and purpose of this study. In any case, it can be stated that the initiatives in the field of criminal law are to be interpreted in a specific way: criminal law is special in the sense that national courts do not basically apply EU law, and the Hungarian proposals in criminal matters are, and

5 A key issue in the case was the lack of Hungarian translations of customs legislation.
6 The suspect was arrested in Hungary.
7 The main proceedings involves victims who are Hungarian citizens.
8 In the main proceedings, the Hungarian court issued an EAW, the refusal of which was the subject of the preliminary ruling procedure.
9 The case concerned the judgment of the conditions of detention in Hungary.
10 In the main proceedings, the Hungarian court issued an EAW, the refusal of which was the subject of the preliminary ruling procedure.
11 The main proceedings concerns corruption activity committed by a senior executive of a company of major importance for the Hungarian national economy.
12 The case concerned the judgment of the conditions of detention in Hungary.

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have been, primarily concerned with procedural issues in freedom, security, and justice. In this context, it should also be pointed out that, compared to the EU sources of law in this area, the Hungarian legislation often contains fundamentally stricter rules,[13] and the implementations are basically complete. In my view, this is also the reason for the relatively low number of criminal law initiatives.

Having said the above, the aim of this study is to provide a summary review of the cases and judgments of Hungarian relevance adopted by the CJEU since our accession, which have both challenged the Hungarian legislator and had a significant impact on national criminal law, and to provide an insight into the impact of European criminal law on Hungarian procedural and substantive law by looking at the aftermath of the individual decisions.

2. Cases Initiated by Hungarian Courts

Before presenting the specific cases, it is not unreasonable to give an account of the statistics of the last 20 years, as far as Hungarian initiatives in the criminal law aspect are concerned, as this allows us to draw further conclusions about the effectiveness of the proceedings.

Table 2

	Court of origin	**Case no.**	**Result**
1.	Budapest-Capital Regional Court	C-328/04.	order – manifest lack of jurisdiction of CJEU
2.	Budapest-Capital Regional Court	C-404/07.	judgment
3.	Szombathely District Court	C-205/09.	judgment
4.	Budapest-Capital Regional Court of Appeal	C-45/14.	order – manifest lack of jurisdiction of CJEU
5.	Budapest Environs Regional Court	C-25/15.	judgment
6.	Szombathely District Court	C-390/16.	judgment
7.	Central District Court of Pest	C-564/19	judgment

13 *Cf. e.g.* the rules on the use of native language [Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings – and its implementation in Sections 8 and 78 of the 2017 Code of Criminal Procedure].

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	Court of origin	**Case no.**	**Result**
8.	Zalaegerszeg District Court	C-136/20	judgment
9.	Central District Court of Buda	C-131/21	order – manifest lack of jurisdiction of CJEU
10.	Budapest-Capital Regional Court	C-147/22	judgment

In 30 % of the cases,[14] the CJEU found that it lacked jurisdiction: in one case the underlying circumstance arose before our accession, while in other two cases the direct considering of the Charter of Fundamental Rights in criminal proceedings was at issue. In addition, in none of the cases cited was there any previous precedents in the case law of the CJEU which could be taken into account by analogy regarding the *erga omnes* effect. In the remaining 70 % of the cases, the CJEU answered the question on the merits, and two decisions regularly referred to the international doctrine of mutual recognition *(C-25/15, C-136/20)*.

2.1. Rejected Cases

2.1.1. The Vajnai Case

The peculiarity of the first Hungarian criminal law initiative[15] is that the underlying act itself, and even the first instance judgment on it, was rendered before Hungary's accession to the EU, so the court of second instance was able to initiate a preliminary ruling procedure.[16]

According to the underlying historical facts, in February 2003, the then vice-president of the Workers' Party showed a red star with a diameter of five centimeters, which was placed on his clothes, to the people present at an event organized by the party in Budapest, where about 30–50 people attended, in addition to the representatives of the press, and wore it visibly on his clothes until the police patrol that secured the scene acted. The district court therefore found him guilty of the offence of using an authoritarian

14 At the date of the closure of this manuscript (15 April 2024), no preliminary ruling procedure initiated by Hungary was pending before the CJEU.

15 For more details on the priority of this case, *see* Szabolcs Hornyák, 'C-138/04 – A Vajnai Ügy', *in* András Osztovits (ed.), *EUB 70 study volume*, Budapest, 2023, p. I.1.

16 Pursuant to Section 226(1) of Act XIX of 1998 on Criminal Procedure (1998 Code of Criminal Procedure).

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symbol and placed him on probation for one year. The accused appealed against the judgment, which was noted by the prosecutor, to be acquitted.

The court of appeal suspended the appeal proceedings and asked the CJEU to answer the question whether the provisions of the Hungarian Criminal Code in force at the time prohibiting the use of authoritarian symbols were in line with the Community principle of non-discrimination and whether the EU provisions referring to fundamental freedoms[17] allow a person who wishes to display a symbol reflecting his political convictions to do so in any Member State.

In its decision of 6 October 2005,[18] the CJEU stated, first, that it had no jurisdiction in respect of legislation which did not fall within the scope of EU law and where the subject-matter of the dispute was in no way connected with any of the situations covered by the provisions of the Treaties. In the present case, the Hungarian legislation, as applied to the main proceedings, does not fall within the scope of EU law and, consequently, it clearly lacks jurisdiction to answer the question referred by the *Fővárosi Bíróság* (Budapest-Capital Regional Court).

Another interesting aspect of the case is that the accused subsequently appealed to the ECtHR against the final judgment of conviction, complaining that his prosecution for wearing the red star violated Article 10 ECHR, but the Strasbourg court did not uphold his claim.[19]

2.1.2. The Balázs-Papp Case

The underlying case also focused on the applicability of the EU Charter of Fundamental Rights. According to the facts in the main proceedings, two policemen were patrolling the market in Érd when they noticed a person selling telescopic batons ('vipers'). During the stop, the police officers committed several irregularities, including the taking of those objects without a receipt.

In the pre-trial phase, the court terminated the criminal proceedings against the accused for lack of a legal charge, as it considered that the indictment did not contain any intent required by the legislator for the

17 *See* Article 6(1) TEU; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Articles 10–12 of the EU Charter of Fundamental Rights.

18 Order of 6 October 2005, *Case C-328/04*, *Vajnai*, ECLI:EU:C:2005:596.

19 For more on *Vajnai* and the criticism of this preliminary ruling initiative, *see* Hornyák 2023.

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offence to be established. The prosecution subsequently corrected the indictment and resubmitted it, based on which the court of first instance did not find the police defendants criminally liable and acquitted them of the charges against them.

However, the court of appeal held that the prosecutor's procedure may violate several provisions of the EU Charter of Fundamental Rights, in particular the principle of the prohibition of double jeopardy for the same act. The Hungarian court asked the CJEU for guidance on whether the prosecution procedure complied with the Charter.

In its order of 19 June 2014,[20] the CJEU held that the facts of the case did not contain any element of EU law which would allow it to be concluded that the main proceedings concerned the interpretation or application of a rule of EU law other than the Charter. However, where a point of law does not fall within the scope of EU law, the CJEU has no jurisdiction to rule on it and the provisions of the Charter which may be relied on cannot in themselves confer jurisdiction.

2.1.3. The KI Case

In the underlying case, the prosecutor's office charged KI with multiple counts of theft from grocery stores, including one count of food theft under HUF 20,000. Police action had already been taken against the accused for the latter theft, and the police imposed an on-the-spot fine on KI as part of an infringement procedure. KI undertook to pay the fine, which was confirmed by his signature. However, he subsequently failed to pay the fine within the time limit, and the district court imposed a 10-day detention as alternative sanction. If the police impose an on-the-spot fine and the offender accepts the decision imposing the fine, the decision becomes final without the intervention of a court. However, since the decision imposing the on-the-spot fine was not taken by a court, it did not result in *res iudicata*, so the prosecution could prosecute the same offence, even.

The district court in the criminal case had doubts as to the compatibility of this practice with the principle of *ne bis in idem*, and therefore suspended the criminal proceedings, and referred the matter to the CJEU. The reference for a preliminary ruling concerned the interpretation of Article 50 of the Charter in the context of Article 4 of the Seventh Additional Protocol to ECHR and the case law of the ECtHR.

20 Judgment of 19 June 2014, *Case C-45/14*, *Balázs and Papp*, ECLI:EU:C:2014:2021.

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In its order of 1 September 2021,[21] the CJEU found no connection with EU law, came to the same conclusion regarding jurisdiction as in the *Vajnai* or *Balázs-Papp cases*.

2.1.4. Conclusions

In the Hungarian cases that were not examined on the merits, it can be said that the acts governing the underlying criminal proceedings did not have a *prima facie* EU law aspect, and Article 51(1) of the Charter of Fundamental Rights[22] contains a clear provision on the applicability of the Charter. However, the specificity of all cases is that they could have been referred to the Hungarian Constitutional Court on the grounds of unconstitutionality,[23] which the courts concerned did not do.

At the same time, in these decisions of Hungarian initiative, the CJEU has reaffirmed[24] with effect in all Member States the requirements for questions which may be the subject of a preliminary ruling by the Member States, and has provided further proof that the EU institutions, while endeavoring to comply with the provisions of EU law, fully respect the sovereignty of the Member States.

21 Judgment of 1 September 2021, *Case C-131/21, KI*, ECLI:EU:C:2021:695.

22 "The provisions of this Charter are addressed, with due regard for the principle of subsidiarity, to the institutions, bodies, offices and agencies of the Union and to the Member States insofar as they are implementing Union law. Accordingly, within their respective spheres of competence and within the limits of the powers conferred on the Union by the Treaties, they shall respect the rights and observe the principles set out in this Charter and shall promote the application thereof."

23 Pursuant to Article 25 of Act CLI of 2011 on the Constitutional Court: if a judge, in the course of the adjudication of an individual case pending before him, is required to apply a legal rule which he finds to be contrary to the Fundamental Law or which has already been found to be contrary to the Fundamental Law by the Constitutional Court, he shall – in addition to suspending the court proceedings – initiate an application to the Constitutional Court to declare the law or legal provision contrary to the Fundamental Law or to exclude the application of the unconstitutional law.

24 *See inter alia* Judgment of 26 February 2013, *Case C-617/10, Åkerberg Fransson,* ECLI:EU:C:2013:105, para. 22; Order of 13 February 2020, *Case C-376/19, MAK TURS case,* ECLI:EU:C:2020:99, para. 22.

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2.2. Decisions of Merit

The CJEU examined the Hungarian initiatives beyond the above-mentioned, and issued a decision and judgment in these cases. However, in most of the cases, it disagreed with the legal position of the initiating court or reformulated the question itself, extending it to the EU legal level, which – in two cases[25] – was also anticipated by the interventions of other Member States.

2.2.1. The Katz Case

The criminal case referred to in the title is the first in which the Hungarian court had doubts about a specific procedural issue. The underlying case was a so-called substitute private prosecution[26] brought by György Katz against the defendant for the crime of fraud causing particularly great damage. Mr. Katz applied to the court to be heard as a witness in the proceedings. The referring court rejected that application on the ground that, since the prosecutor could not be a witness either, the same applied, in its view, to the private prosecutor. However, after the pleadings had been heard, the court of first instance reopened the evidentiary procedure and initiated a preliminary ruling procedure. His motion specifically concerned the question of whether – the national court should be – given the possibility to hear the victim as a witness in a substitute private prosecution procedure.

In its judgment of 9 October 2008,[27] the CJEU first held that György Katz is a victim[28] and held that the Framework Decision 2001/220/JHA must be interpreted as not obliging the national court to allow a victim of a

25 *See* Judgment of 9 June 2016, *Case C-25/15, Balogh*, ECLI:EU:C:2016:423; and Judgment of 6 October 2021, *Case C-136/20, LU*, ECLI:EU:C:2021:804.

26 The action of a substitute private prosecutor is a special way of enforcing a criminal claim under Hungarian criminal procedural law. In addition to the prosecutor's indictment (public prosecution), Hungarian law allows the victim to bring and represent the prosecution in certain minor offences (private prosecution). The substitute private prosecution in the main proceedings is the third way of asserting a criminal claim: it allows the victim to act, inter alia, if the prosecutor drops the prosecution's case. Private prosecution must be distinguished from the assertion of a civil claim as a private party.

27 Judgment of 9 October 2008, *Case C-404/07*, *Katz*, ECLI:EU:C:2008:553.

28 *Cf.* Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA), Article 1(a): "victim is a natural person who

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criminal offence to be heard as a witness in a substitute private prosecution. However, in the absence of that possibility, the victim must be allowed to make a statement which may be taken into evidence, since it is for the referring court to ensure that the taking of evidence in criminal proceedings does not, taken as a whole, infringe the requirements of a fair trial under Article 6 ECHR.

One of the interesting aspects of the case was that the private prosecutor as the person concerned, requested the Court to interpret the reference for a preliminary ruling in a broader sense and to examine whether the Framework Decision required that certain investigative powers of the prosecution authority should also be conferred on the substitute private prosecutor. However, the CJEU firmly rejected this proposal and stated that in the direct cooperation between the CJEU and the national courts established by the Treaties, the parties do not have the right of initiative but only the possibility to submit observations. This also means that only the national courts can refer questions to the CJEU, not the parties to the main proceedings, and that only the national court can decide which questions to refer to the CJEU, the content of which cannot be changed by the parties.

2.2.2. The Eredics Case

The victim was also at the center of the Hungarian initiative that followed in due course: the question to be decided concerned the interpretation of the concept of victim and the possibilities of regulating the mediation procedure in the Member States.

In the underlying criminal case, the first defendant was the director of a primary school and kindergarten (school) in a small town, and the second defendant was the managing director of a limited liability commercial and service company (Hotel Ltd.) operating in the same small town. Under the Phare program, a project fund provided a grant to the school for the financing of a forest trail under a framework contract concluded in 2003. The project manager on behalf of the school was the first defendant. The fund agreed to provide 80.15 % of the trail funding and the grant was paid in February 2004. *VÁTI Magyar Regionális Fejlesztési és Urbanisztikai Nonprofit Korlátolt Felelősségű Társaság* (VÁTI Kht.) supervised the imple-

has suffered harm directly caused by an act or omission in breach of the criminal law of a Member State."

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mentation of the project and was liable for the settlement of accounts with the grant.

Under the contract between the defendants, the second defendant undertook to organize, prepare, and provide a venue for training for the basic mushroom expert exam, as well as to organize study trips and meetings, for a fee of HUF 1,200,000 (approximately EUR 4,270 at the time). As proof of the performance of this contract, the second defendant issued a performance report on behalf of the Hotel Ltd. and made it available to his co-defendant, who then paid the final invoice from the school's current account.

In fact, the basic course in mushroom picking undertaken under the contract was not actually carried out, and the invoice and the performance log issued to certify the performance of the contract were false. The first defendant filed these false documents, as well as the minutes and evaluation report of a study tour that was not actually carried out, in the project file. In this report, even the name of the team leader was forged. The file was sent to VÁTI Kht. as proof of the fulfilment of the obligations under the above-mentioned contract. The prosecutor's office eventually indicted him with the offence of damaging the financial interests of the European Union.

During the investigation, the first defendant denied criminal responsibility, but in the proceedings before the court he pleaded guilty of the crime he was charged with and filed a motion for mediation to terminate the criminal proceedings or to reduce the sentence without limitation.[29]

At the trial, VÁTI Kht. agreed to the mediation proceedings as a quasi-victim, and the Hungarian court suspended the criminal proceedings to allow the mediation proceedings to proceed. However, the prosecution appealed against this decision.

The municipal court which initiated the preliminary ruling procedure asked the CJEU the following questions in relation to Council Framework Decision 2001/220/JHA: whether the concept of victim in mediation proceedings should include a victim who is not a natural person; which offences, under the Framework Decision, can be covered by mediation, under what conditions and at what stage of the proceedings; and whether the possibility of mediation in criminal cases should be generally available, subject to the indiscriminate preconditions laid down by law.

29 Pursuant to Section 221/A of the 1998 Code of Criminal Procedure, in force at the time.

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In its judgment of 21 October 2010,[30] the CJEU pointed out that it had already decided that the concept of victim for the purposes of the Framework Decision applied only to natural persons.[31] This interpretation is not altered by the fact that some Member States provide for mediation in criminal matters even where the victim is a legal person. The CJEU also held that the Hungarian legislator did not exceed the limits of its discretion when it decided to allow the use of mediation only in cases of offences against the person, transport and property, a decision which is essentially based on legal policy reasons. The interesting thing about the judgment was that although the Hungarian government had already contested the Court's jurisdiction to answer the first question, CJEU held that there was a clear EU legal interest in interpreting all provisions of EU law in a uniform way to avoid future differences of interpretation,[32] and therefore answered the other questions.[33]

2.2.3. The Balogh Case

The next case to be examined by the CJEU also focused on a procedural issue: however, the specificity of the case was that the initiative did not question the compliance of the entire domestic legal environment with EU law, but was originally intended to examine a subsidiary issue, the bearing of criminal costs arising from translation.

In the main proceedings, the *Landesgericht Eisenstadt* sentenced the Hungarian national to 4 years and 6 months imprisonment for the crime of aggravated burglary and ordered him to pay the costs of the proceedings. The Austrian court counted the pre-trial detention in the imprisonment. The Austrian court forwarded this judgment to the International Criminal Law Division of the Ministry of Justice (MoJ) in Hungary, which forwarded it to the Budapest District Court as the competent court for recognition of the validity of the Austrian decision.

The judgment of the foreign court was in German, and the Hungarian court had to translate it. The focus of the reference for a preliminary ruling was Directive 2010/64/EU of the European Parliament and of the

30 Judgment of 21 October 2010, *Case C-205/09, Eredics and Vassné Sápi*, ECLI:EU:C:2010:623.

31 *Cf.* Judgment of 28 June 2007, *Case C-467/05, Dell'Orto,* ECLI:EU:C:2007:395.

32 *Case C-205/09, Eredics,* para. 33.

33 For more on the case and the criticism of the preliminary ruling initiative, *see* Balázs Elek, 'C-205/09 – Az Eredics ügy' *in* Osztovits (ed.) 2023, I.2.

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Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, under which the right to translation was granted to the accused in criminal proceedings, with the costs incurred being borne by the State. According to the diverging Hungarian legal positions, in proceedings in Hungary for recognition of the validity of a foreign court's judgment, which was brought because the defendant was convicted abroad, the language of the proceedings is Hungarian, translation is necessary for the conduct of the proceedings, and this cannot be linked to the right to use the native language, so the defendant must bear the translation costs of those special proceedings in Hungary. In addition, the foreign proceedings constitute the main proceedings for the purposes of the special procedure, and therefore, since the foreign court has ordered the defendant to bear the costs of the criminal proceedings, he must also bear all the costs of the special procedure.

In its order for a preliminary ruling, the court sought an answer to the question whether the special proceedings under Hungarian law should be included in the definition of criminal proceedings under the Directive, or whether the definition of criminal proceedings should be understood to mean only and exclusively those proceedings which end with a final decision on the criminal liability of the accused.

In its judgment of 9 June 2016 in *Balogh*, the CJEU based its decision on the fact that the competent Austrian authorities in the main proceedings had informed the Hungarian Ministry of the criminal conviction handed down by the *Landesgericht Eisenstadt via* ECRIS, to enable it to incorporate the information thus transmitted into its register. At the same time, MoJ requested the Austrian judicial authority to send the judgment and, once received, forwarded it to the Budapest Environs Regional Court for recognition of the judgment in Hungary, which also meant the entry of the decision on criminal liability in the Hungarian criminal register, for which act, under the applicable national law, this special procedure is unavoidable. The CJEU noted that, at the same time, Directive 2010/64/EU aims to ensure the right to interpretation and translation for defendants who do not speak or understand the language of the proceedings, facilitating the exercise of that right to ensure a fair trial. And since it was clear to the CJEU that the defendant had received a translation of the German-language judgment in the Austrian proceedings and that, therefore, in the context of the special procedure for the entry of that judgment in the Hungarian criminal record, a new translation of the judgment was not necessary, it was not justified in terms of the objectives pursued by the directive, namely the

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enforcement of the defendant's right of defense and his right to effective judicial protection.

However, the CJEU also underlined that, according to the so-called ECRIS Framework Decisions,[34] the entry of a conviction handed down by a court in the convicting Member State in the criminal record of the central authority of the Member State of the defendant's nationality must be based directly on the transmission of information on these convictions in the form of a code by the central authorities concerned *via* ECRIS. In other words, the entry in the criminal record of a Member State should not depend on the prior and systematic application of a procedure for the recognition by a court of a judgment in another Member State, such as the Hungarian special procedure, and even less on the transmission of the judgment itself for recognition to the Member State of the defendant's nationality. In conclusion, this is in breach of the principle of mutual recognition and EU provisions do not allow for a special procedure for the recognition of the validity of a criminal conviction handed down in another Member State, which is necessary for such convictions to be considered in new criminal proceedings and which could lead to a reclassification of the offence committed and a reduction in the sentence imposed.

The novelty of the judgment is that the CJEU has for the first time established the relationship between ECRIS Framework Decisions and the mutual recognition of judgments, setting out the framework of the obligation to register.

The judgment in *Balogh* has fundamentally shaken up the Hungarian procedural system regarding the recognition of non-Hungarian convictions: the judgment required legislative action,[35] as previously the transmission of criminal data to Hungary automatically entailed the obligation to adapt the national conviction to Hungarian law.

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34 Council Framework Decision 2009/315/JHA of 26 February 2009 on the organization and content of the exchange of information extracted from criminal records between Member States and Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA.

35 *See* in more detail Márta Balogh *et al*., 'A nem magyar ítéletek hazai büntetőeljárásban való részvételének újabb kérdései II.', *JURA,* 2022/1, pp. 5–27; Judit Szabó, 'A tagállami ítélet érvényessége' *in* László Kis & Judit Szabó (eds.), *Az európai büntetőjog gyakorlata*, Wolters Kluwer, Budapest, 2023, Chapter IV/1.1; Barbara Mohácsi, 'Külföldi ítéletek elismerése', *Jogászvilág*, 2 August 2016; László Angyal-Szűrös *et al*., 'Mit köszönhet a bűnügyi együttműködés az Európai Unió Bíróságának?', *Európai Jog,* Vol. 23, Issue 5, 2023, pp. 26–37.

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The judgment is now a milestone in the application of EU law on mutual recognition in criminal matters, and its importance is outstanding:[36] although it is not of relevance in relation to the Translation Directive,[37] the Balogh judgment is a reference point in CJEU judgments on mutual recognition of judgments in other Member States, albeit somewhat indirectly, through *Lada* analyzed below.[38] The significance of the latter decision, by referring to *Balogh*, is that it essentially confirmed the acceptability from an EU law perspective of the Hungarian regulatory environment, which changed significantly because of *Balogh*.[39]

2.2.4. The Lada Case

As I predicted above, the focus of the so-called *Lada case* was identical to that of *Balogh*: it dealt with the transformation of non-domestic judgments. In the main proceedings, the *Landesgericht Wiener Neustadt* sentenced the Hungarian defendant to 14 months imprisonment for attempted burglary of property of high value and ordered him to serve 11 months of the sentence, while suspending 3 months of the sentence. The Austrian court forwarded the judgment to the MoJ, which forwarded it to the Szombathely District Court for the procedure for the recognition of the foreign judgment.

In *Balogh*, the Advocate General's Opinion was presented on 20 January 2016, and the Court delivered its judgment on 9 June 2016. The significance of these two dates lies in the fact that in the meantime, on 19 May 2016, the Szombathely District Court referred a question for a preliminary ruling on

36 For more on the significance of the judgment, *see* Judit Szabó, 'C-25/15 – A Balogh Ügy' *in* Osztovits (ed.) 2023, I.3.; István Ambrus, 'A ne bis in idem elve a legújabb európai joggyakorlatban, kitekintéssel a princípium érvényesülésére különböző jogterületek találkozása esetében', *Európai Tükör,* Vol. 22, Issue 3, 2019, pp. 121-135.

37 *See* Stijn Lamberigts, 'Case C-25/15 Balogh – The Translation and Interpretation Directive and (Questionable) Special Procedures', European Law Blog, 7 March 2016; and Gwynedd Parry, 'Language Rights in Criminal Proceedings and BREXIT: What Have We Got To Lose?', European Human Rights Law Review, 2017, Issue 2, pp. 155–168. The CJEU itself – in its annual report – listed its decision in the category of the right to use the mother tongue, see at https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-03/ragp-2016_final_en.pdf.

38 Judgment of 5 July 2018, *Case C-390/16, Lada*, ECLI:EU:C:2018:532.

39 Id. para. 40. The CJEU's judgment analyzed the Hungarian legal provisions in force between 1 September 2013 and 31 December 2017; in the absence of an express question, it could not even have had jurisdiction to take stock of the new legislation.

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the above case concerning the relationship between Framework Decision 2008/675/JHA[40] and the Hungarian special procedure and the interpretation of the *ne bis in idem* principle.

Following the delivery of the judgment in *Balogh*, the Szombathely District Court – as an answer to the specific question of the CJEU – maintained its request for a preliminary ruling on the grounds that the CJEU had not taken a position on the Framework Decision.

In its decision of 5 July 2018 in *Lada*, the CJEU recalled its judgment in *Beshkov*[41] and confirmed that Framework Decision 2008/675/JHA obliges Member States to ensure that previous convictions handed down in a Member State are considered in the same way as national convictions. It also covers situations where a person previously convicted in a Member State is prosecuted in a Member State other than the one in which he was previously convicted. The CJEU has stressed that proceedings for recognition of a foreign conviction do not constitute a new criminal case, but that the purpose of the special procedure is to give a decision recognizing a conviction handed down in a Member State the same effect as a conviction handed down by a Hungarian court. Given that the Hungarian legislation requires an examination of whether the fundamental rights of the person concerned have been respected by that court, this may, save in exceptional circumstances, call into question the principle of mutual trust.

To sum up, the Framework Decision precludes making the consideration of a previous conviction handed down in another Member State subject to a prior national recognition procedure, in the context of which the conviction must be reviewed but does not preclude an examination of the individual case in the specific circumstances of the case.

However, this finding was nothing new for practitioners, as there have been no other significant developments in the interpretation of mutual recognition since the publication of the *Balogh* judgment.[42]

40 Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings.

41 Judgment of 21 September 2017, *Case C-171/16, Beshkov*, ECLI:EU:C:2017:710.

42 For a detailed critique of the judgment, *see* László Kis, 'C-390/16 – A Lada Ügy' *in* Osztovits (ed.) 2023, I.4.

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2.2.5. The IS Case

The following preliminary ruling initiative was less relevant to the legal practitioners, but rather took on a politicized tone in the form of reservations about the rule of law in Hungary.[43] In the criminal proceedings underlying the initiative, IS, a Turkish-born but Swedish citizen who does not speak Hungarian, was prosecuted for misuse of firearms or ammunition. A Swedish-Hungarian interpreter was appointed to help the accused understand the criminal proceedings. There was no information on how the interpreter was selected by the investigating authority, whether his skills were checked and whether he was understood by the investigating authority. IS, who was detained in Hungary on 25 August 2015, was questioned as a suspect on the same day, but refused to testify on the grounds that his counsel did not appear at the trial. IS was subsequently released. Attempts to deliver the letter were returned with an 'unclaimed' message from the address previously provided. According to Hungarian law, the presence of the accused at the preliminary hearing is mandatory, which can be ensured by a European and/or international arrest warrant issued by the court, but this is subject to the condition that the prosecution proposes in the indictment that the accused be sentenced to a custodial sentence to be carried out. However, in the case in question, the prosecutor's office requested a fine and proposed that the proceedings be conducted in absentia.

In the light of the facts of the main case, the referring district court asked the CJEU whether EU law should be interpreted as requiring the mandatory registration of independent translators and interpreters or, failing that, the monitoring of the quality of their work. If so, and if, first, there is no such register in the Member State concerned and, second, the quality of the interpreting cannot be ascertained, must EU law be interpreted as meaning that in that case criminal proceedings in absentia cannot be brought.

At the same time, the district court – not directly related to the facts of the case – also dealt with the level of income and judicial self-administration, which ensures the independence of judges, and asked the Court questions in this area as well.

Following the initiation of the preliminary ruling procedure, the Hungarian Prosecutor General submitted a legal remedy on the ground of legality, as a result of which the *Kúria* ruled that, as the questions raised were

43 *Cf.* the introductory part of the final explanatory memorandum to Act X of 2023 and the amendment to Section 63 of certain laws on justice related to the Hungarian Recovery and Resilience Plan.

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irrelevant to the resolution of the main case, the request for a preliminary ruling was unlawful: the Hungarian court could not refer the case to the CJEU to establish that the law of the Member State was not in conformity with the fundamental principles protected by EU law. The order of the *Kúria* found an infringement without annulling the decision to refer the case back to the CJEU for a preliminary ruling.

In the meantime, the President of the Budapest-Capital Regional Court, acting in his capacity as employer of the judges of the Pest Central District Court, initiated disciplinary proceedings against the judge who had submitted the request for a preliminary ruling, on the grounds set out in the order of the *Kúria*, which he subsequently withdrew within a month.

In view of these recent developments, the district judge referred two further questions to the CJEU: On the one hand, he also sought an answer from the CJEU to the question whether the rules governing the preliminary ruling procedure should be interpreted as precluding a Member State court of last instance from declaring an order of a lower court which has initiated a preliminary ruling procedure to be unlawful without affecting its legal effect; if so, whether EU law should be interpreted in such a way that, in the light of that interpretation, the Member States' contrary positions of principle should be disregarded. On the other hand, must the principle of judicial independence be interpreted as precluding disciplinary proceedings against a judge for having initiated the preliminary ruling procedure.

In its judgment of 3 November 2021,[44] the CJEU has firmly established that only the CJEU shall and can examine the admissibility and therefore the relevance and necessity of the questions raised in the preliminary ruling procedure. A decision of the national supreme court of a Member State which deprives the CJEU of its exclusive jurisdiction must be disregarded by the lower courts of that Member State. The role of the preliminary ruling procedure in Union law and the smooth functioning of cooperation between the CJEU and the courts of the Member States should also be ensured by the fact that no disciplinary proceedings may be brought against a national judge for having initiated a preliminary ruling procedure, which is also a guarantee of the fundamental principle of judicial independence.

In summary, the rule that no disciplinary proceedings may be brought against a national judge for having initiated a preliminary ruling procedure also protects the uniform interpretation of EU law, the smoothness of the preliminary ruling procedure and the independence of judges.

44 *Case C-564/19, IS.*

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As far as the specific criminal proceedings are concerned, the authorities of the Member States are obliged not only to ensure the translation, but also to ensure the quality of the translation. If the latter cannot be verified, this may also be an obstacle to the prosecution in the absence of the accused.

As I have already mentioned above, the CJEU's judgment[45] had significance in Hungarian public dialogue, both the Hungarian *Kúria* and the Office of the Prosecutor General issued notices,[46] and the Hungarian legislator expressly provided for the exclusion of legal remedies against judicial initiatives for preliminary rulings in the light of the CJEU decision.[47]

2.2.6. The LU Case

Contrary to the above, the judgment presented below has had an impact not only on Hungarian but also on international jurisprudence. In the main proceedings, in June 2018, an Austrian authority, the administrative authority of first instance in Weiz imposed a fine of EUR 80 on LU, on the ground that LU, as the driver of a vehicle involved in a road traffic offence committed on 28 December 2017 in Gleisdorf (Austria), committed an offence by failing to comply with the request of that administrative authority to identify the person who was driving or stopped the vehicle in question within the time-limit prescribed by Austrian law. The Austrian authorities forwarded the decision imposing the fine to the Zalaegerszeg District Court for enforcement under Framework Decision 2005/214/JHA on the mutual recognition of financial penalties.[48] The Austrian authorities have also indicated that this offence is a breach of road traffic rules within the meaning of the Framework Decision and that decisions on such offences must be recognized and enforced without any consideration of the double criminality of the act.

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45 For more on the domestic significance and criticism of the judgment *see* András Bertaldó, 'C-564/19 – Az IS Ügy' *in* Osztovits (ed.) 2023, 1.6.

46 *See* at www.kuria-birosag.hu/hu/sajto/kuria-kozlemenye-az-europai-unio-birosaga-c-56419-szamu-ugyben-hozott-itelete-vonatkozasaban; at www.ugyeszseg.hu/az-europai-unio-birosaganak-c-564-19-szamu-ugyeben-a-legfobb-ugyesz-nem-sertett-unios-jogot-mivel-a-jogorvoslati-kezdemenyezese-nem-az-elozetes-donteshozatali-eljaras-hanem-a-magyar-buntetoeljaras/.

47 *See* Section 490(4) of the 2017 Code of Criminal Procedure, as in force from 1 June 2023.

48 Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties.

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The Zalaegerszeg District Court had doubts that although the Austrian authorities had indicated that the offence fell into the category of 'behavior in breach of road traffic rules', LU's act was more of a disobedience to an official order, and automatic enforcement would therefore overly broaden the scope of the traffic offences catalogued.[49] The question referred to the CJEU by the Hungarian court was whether, as an executing authority, it has any further discretion to refuse recognition and enforcement in the event of the designation of the listed forms of conduct by the issuing Member State, or whether it must enforce the Member State decision without discretion if the Member State authority indicates one of the types of conduct listed. In the second question, whether, if discretion is available, the authority of the executing Member State should argue that the conduct indicated in the decision of the issuing Member State does not correspond to the conduct described in the list.

In its judgment of 6 October 2021,[50] the CJEU recalled at the outset that the principle of mutual recognition implies a restrictive interpretation of the grounds for non-enforcement. The choice of the category of offence indicated in the certificate is based on the legal classification of the issuing Member State, which the executing Member State authority may not challenge, since to do so would be precisely contrary to the principle of mutual recognition as the cornerstone of criminal judicial cooperation. If there is no indication that the certificate is manifestly not in conformity with the underlying decision, or that it is incomplete or has not been sent, or that it contains a category of offence to which the double criminality check does not apply, the executing authority in the Member State has no further leeway and must execute it without delay.

In summary, under these conditions, the CJEU held that the Zalaegerszeg District Court could not refuse to recognize and enforce the decision imposing the sanction forwarded to it by the Austrian authorities.

With this decision, the CJEU confirmed its statement in *Melloni*,[51] in which it also stated that the principle of mutual trust does not allow Member States to review each other's decision before implementation. The

49 It should be stressed that the Hungarian court deciding on the issue of recognition and acceptance did not challenge the application of the presumption of objective liability, since the presumption allows the fine for a traffic offence to be imposed indirectly on the operator of the vehicle. *See also* judgment of 5 December 2019, *Case C-671/18, Centraal Justitieel Incassobureau*, ECLI:EU:C:2019:1054.

50 Judgment of 6 October 2021, *Case C-136/20, LU*, ECLI:EU:C:2021:804.

51 Judgment of 26 February 2013, *Case C-399/11, Melloni*, ECLI:EU:C:2013:107.

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reason behind the decision is clearly the principle of mutual trust, which is the basis of cooperation in the field of European criminal justice. It can also be concluded that in this proceedings initiated by Hungary the CJEU interpreted the concept of mutual trust as an irrefutable principle that can only be challenged in exceptional circumstances, primarily from a fundamental rights perspective, and therefore the judgment is of landmark importance in international jurisprudence, especially in the issue of the comparability of conflicting criminal law classifications.[52]

2.2.7. The Alstom Case

The last case initiated by Hungary until the closure of this paper, also involving Austria, focused on the clarification of the *ne bis in idem* principle,[53] as far as the admissibility of prosecutorial termination decisions is concerned, the analysis was on the *bis*. According to the facts of the main proceedings, criminal proceedings was initiated against a Hungarian national defendant in Austria in August 2012 for several offences, including suspected bribery committed between 2005 and 2010. In the Austrian proceedings, several suspects and witnesses were questioned, and other evidence was obtained, but the defendant was at an unknown location and was not questioned and no coercive measures were taken to trace him. In November 2014, the Austrian prosecutor's office decided to terminate the criminal proceedings against the defendant. The reason for the decision was that the investigation carried out up to that point had led to the conclusion that there were no grounds for further prosecution, as there was insufficient evidence – amounting to a conviction – that the defendant

52 For more on the domestic significance and criticism of the judgment, *see* Tamás Palkó, C-136/20 – Az LU Ügy' *in* Osztovits (ed.) 2023, 1.5.

53 The CJEU has already interpreted the content of the principle and the scope of the exceptions to its application on several occasions, *see e.g.* Judgment of 25 June 2018, *Case C-268/17, AY,* ECLI:EU:C:2018:602; Judgment of 5 June 2012, *Case C-489/10, Bonda,* ECLI:EU:C:2012:319; Judgment of 11 December 2008, *Case C-297/07, Bourquain*, ECLI:EU:C:2008:708; Judgment of 10 March 2005, *Case C-469/03, Miraglia,* ECLI:EU:C:2005:156; Judgment of 24 November 2020, *Case C-510/19, Openbaar Ministerie,* ECLI:EU:C:2020:494; Judgment of 16 June 2005, *Case C-105/03, Pupino,* ECLI:EU:C:2005:386; Judgment of 27 May 2014, *Case C-129/14 PPU, Spasic,* ECLI:EU:C:2014:586; Judgment of 9 March 2006, *Case C-436/04, van Esbroeck*, ECLI:EU:C:2006:165; Judgment of 28 September 2006, *Case C-150/05, van Strateen*, ECLI:EU:C:2006:614). In its most recent decision, the CJEU dealt with the *idem* element of the principle, *i.e.* the question of the identity of the facts, *see* Judgment of 21 September 2023, *Case C-164/22, Juan*, ECLI:EU:C:2023:684.

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and his suspected accomplices had committed the bribery offences. Under Austrian law, there is no appeal against this decision, but the prosecution may, under strict conditions, decide to continue the proceedings until the statute of limitations has expired if further evidence is obtained. The decision was reviewed several times, but each time it was concluded that the proceedings could not be continued, inter alia because the criminal liability for the offence had expired in Austria in 2015 at the latest. In April 2019, the Hungarian Investigating Prosecutor General's Office filed an indictment with the Hungarian court charging the defendant with the same bribery offence. The tribunal terminated the proceedings in the first instance as it considered that the Austrian prosecution had already dealt with this offence with final effect, but the Court of Appeal ordered the first instance court to conduct a new trial, as it considered that the Austrian investigation was not sufficiently thorough, that it cannot be clearly established from the documents whether this order was based on a sufficiently thorough and complete assessment of the evidence, and that the accused was not even questioned.

In the retrial, the tribunal made a reference for a preliminary ruling. The questions were, first, whether the prosecution could take a decision resulting in a final judgment without the involvement of the court and, second, whether a decision leaving open the possibility of continuing the proceedings could fall within the scope of ne bis in idem.

In its judgment of 19 October 2023,[54] the CJEU, referring to its previous judgments cited above, held that any authority involved in the criminal justice system has the power to issue a decision to terminate or acquit, so a decision to terminate taken by the prosecution may also have a *ne bis in idem* effect, even if the decision was taken without the involvement of the court, and even if it does not take the form of a judicial decision. In the present case, after analyzing the question of *res iudicata*, the Court concluded that the decision of the Austrian public prosecutor to terminate the proceedings could be regarded as final, since the criminal liability for the act was time-barred under Austrian law. However, the CJEU emphasized that the content of the decision must also be examined, since only a decision taken following an assessment of the merits of the case can have a

54 Judgment of 19 October 2023, *Case C-147/22, Central Investigating Prosecutor's Office,* ECLI:EU:C:2023:790
The case was named after the Hungarian law enforcement agency accused of misusing the subway construction contracts that were the original subject of the main case.

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ne bis in idem effect: the mere acquittal or termination of the proceedings, even in the absence of evidence, does not exclude that condition from being fulfilled. In other words, if the reasoning of the decision itself indicate that no detailed investigation has been carried out, this may undermine mutual trust and mutual recognition between Member States, which is the very basis of the protective effect of a final decision taken in another Member State based on the *ne bis in idem* principle.

The question arises as to the extent to which the second Member State initiating proceedings should review or reassess the final decision or proceedings of the first Member State. In this context, the CJEU has explained that it would be contrary to the principle of mutual trust if the investigation of the other Member State had to be examined in detail and then unilaterally decided whether it was sufficiently substantiated. Instead, the principle of loyal cooperation[55] applies, *i.e.* the investigating authority or prosecutor's office of the second Member State must seek the assistance of the prosecutor's office of the first Member State, in particular as regards the applicable national law and the grounds on which the decision taken following the investigation was based. Even after such consultation, only in exceptional cases can such a conclusion be reached that the investigation was not sufficiently detailed, a conclusion which may be based on the national law of the first Member State which took the decision, the grounds for the decision and any additional information. In essence, an inadequate investigation may be inferred by the prosecution of the second Member State if, for example, the suspect has not been questioned, whereas the first Member State would reasonably have been obliged to take all measures to ensure that this was the case.

In its judgment, the CJEU essentially formulated the principle that cooperation between investigating authorities and prosecution services of the Member States should be based on respect for the principle of loyal cooperation and the exercise of loyal cooperation through consultation, precisely in order to strengthen mutual trust, and thus, while not introducing anything new in the area of the *ne bis in idem* principle, it drew attention to one of the cornerstones of EU cooperation in criminal matters, which has been discussed only to a limited extent,[56] confirming its previous judgments.

55 Article 4(3) TEU.

56 *E.g.* Judgment of 22 December 2008, *Case C-491/07, Turansky*, ECLI:EU:C:2008:768; Judgment of 29 June 2016, Case *C-486/14, Kossowski*, ECLI:EU:C:2016:483; also *cf.*

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2.2.8. Conclusions

The Hungarian submissions in criminal matters dealt with issues of a mainly procedural nature in the area of freedom, security and justice. Despite the seemingly small number of initiatives, the Hungarian courts have been able to have a significant impact on the application of the law in other Member States, particularly in mutual recognition, and have deepened the understanding of this term.

Of course, the existence or non-existence of an international resonance should not be a benchmark for the case, the focus should rather be whether the question to be decided refers to a problem that is present in the law and practice of other Member States, or fills a vacuum, providing a new interpretation of EU law.

It is perhaps worth mentioning that the network of European legal advisors set up by the Hungarian judicial administration[57] could play a significant role in identifying the EU relevance of a case and thus, where appropriate, in initiating decision-making procedures: half of the initiatives come from its members.

However, not only preliminary rulings initiated by Hungary, but also those initiated by other Member States have had a significant impact on the application of Hungarian law. It is beyond the scope of this study to list all the cases, but regarding the interaction and dialogue, it is essential to mention two cases, which have a Hungarian relevance, and which have brought about radical changes in legislation, beyond the scope of case law. Interestingly, both were published in 2016, the same year as the Balogh judgment.

Judit Szabó, *A ne bis in idem elve az európai jogalkalmazásban,* Doctoral Thesis, Debrecen, 2022.

57 The basic task of the European Law Advisors' Network is to provide legal advice on theoretical and practical questions relating to the application of Community law, on any question concerning the scope of primary and secondary law rules, on any question concerning the preliminary ruling procedure, on the legal structure of the EU, on the functioning of its other legal instruments, on the interpretation of the Council of Europe's legal procedures and on the interpretation of the judgments and case law of the ECtHR. Consultation of the expert advisors is not an obligation but an opportunity for judges, and the members of the ELAN, while respecting the independence of the judiciary, are committed to providing professional assistance to any colleague serving in the Hungarian judiciary who has a question on EU law during their judicial activity.

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3. Cases Involving Hungary

3.1. The Bob-Dogi Case

According to the facts of the main case, a Romanian lorry driver caused a speeding accident in Hungary, resulting in serious injuries to the driver of another vehicle. The Hungarian authorities sent a European Arrest Warrant (EAW) to the Romanian authorities requesting the arrest and surrender of the lorry driver. However, the Romanian authorities refused to execute the EAW on the grounds that the Hungarian authorities had failed to issue a national arrest warrant which could have formed the basis for the issuance of an EAW. According to the Romanian authorities, an EAW can only be issued based on a previous national arrest warrant, but not independently. Following a reference from the *Curtea de Apel Cluj*, the CJEU had to decide whether the execution of an EAW could be refused in the absence of a national arrest warrant.

In its judgment of 1 June 2016,[58] the CJEU stated that a national arrest warrant prior to an EAW can only be an arrest warrant issued by a judicial authority, *i.e.* a prosecutor's office or a court. In the reasoning of its judgment, the Court explained that the application of that requirement results in a two-level protection of the procedural rights and fundamental rights of the requested person, since the judicial protection afforded at the first level when a national judicial decision such as a national arrest warrant is adopted is complemented by the judicial protection which must be afforded at the second level when an EAW is issued.

In Hungarian case law, this meant that if the Hungarian national arrest warrant was not issued by a court, the EAW could only be issued on the basis of a national arrest warrant issued by the prosecution or by the investigating authority, but with the approval of the prosecutor, so in this case the arrest warrant of the investigating authority, which is not a judicial authority for the purposes of the Framework Decision, must be approved by the prosecutor. If the information on the form does not indicate that this is the case, the CJEU has stated that, in the first instance, direct consultation based on mutual trust must be initiated; but if no such national arrest warrant has in fact been issued, the executing authority cannot execute the EAW.

58 Judgment of 1 June 2016, *Case C-241/15, Bob-Dogi*, ECLI:EU:C:2016:385.

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In other words, the CJEU's judgment in *Bob-Dogi*[59] requires a national arrest warrant issued by a judicial authority as a condition for the execution of the EAW, as this is not always included in the form, and it is necessary to obtain it at short notice if the suspect does not consent to surrender.

This meant that from June 2016, as a departure from previous practice, the Hungarian judicial authority had to pay increased attention to the fact that the EAW could not be issued on its own but had to be preceded by a national arrest warrant, called the 'pink warrant',[60] based on the color of the previous form.

It is a different matter that neither the *Bob-Dogi* decision nor the current Code of Criminal Procedure allows for any appeal against the issuance of an arrest warrant,[61] whether domestic or foreign (European or international). This does not mean, however, that the lawfulness of the warrant itself or of the measures taken cannot be challenged: for example, there is no obstacle to the initiation of a prosecutorial review of the lawfulness of an unlawful warrant during the investigation, and there is also a right of appeal against detention following arrest based on an unjustified warrant.[62]

59 On the significance of the judgment, see also Anita Zsuzsanna Nagy, 'Európai elfogatóparancs az Európai Unió Bírósága és a Kúria döntéseiben', Kúriai Döntések, Vol. 65, Issue 4, 2017, pp. 547–552; Sándor Berczeli, 'Az európai elfogatóparancs kibocsátása' in Kis & Szabó (eds.) 2023, Chapter II/2.1.1; Andre Klip, 'A Next Level Model for the European Arrest Warrant', European Journal of Crime, Criminal Law and Criminal Justice, Vol. 30, Issue 2, 2022, pp. 107–126.

60 This is also reflected in recent legislation: *cf.* Section 119(1)(c) of the 2017 Code of Criminal Procedure: "The court, the public prosecutor's office and the investigating authority may, in the case of an offence punishable by imprisonment, issue an arrest warrant by decision in order to order the custody of the accused or of a person reasonably suspected of having committed the offence, if the suspected person or the person reasonably suspected of having committed the offence is detained abroad, the conditions for issuing an international arrest warrant or an EAW are fulfilled and the transfer or extradition of the suspected person or the person reasonably suspected of having committed the offence to Hungary is justified." In comparison, Section 73/A (1) of the 1998 Code of Criminal Procedure in force at the time of the decision merely referred back to the rules of the domestic arrest warrant with regard to the European or international arrest warrant.

61 Section 119(4) of the 2017 Code of Criminal Procedure: "There shall be no legal remedy against the issuance of an arrest warrant." Section 73(9) of the 1998 Code of Criminal Procedure contained the same rule.

62 Furthermore, a specific legal remedy is provided by the procedural provision which excludes the ordering of detention in the case of the voluntary appearance of the person subject to the arrest warrant, if the basis for the order would be solely the previous unavailability of the person concerned [Section 119(4) second sentence of the 2017 Code of Criminal Procedure]. It should also be emphasized here that a

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3.2. The Aranyosi-Caldařařu Case

The CJEU judgment of 2016, described below, also has a Hungarian relevance and impact to this day. The international importance of the judgment, which was already anticipated, is illustrated by the fact that the Czech, Irish, Spanish, French, Lithuanian, Hungarian, Dutch, Austrian, Romanian, and Dutch governments intervened.

The joined cases were because the *Generalstaatsanwaltschaft Bremen* had to decide on the surrender of two defendants: Pál Aranyosi, a Hungarian national, was requested by the Hungarian and Romanian authorities to be extradited from Germany for the purpose of prosecution for multiple burglary and Robert Căldăraru, a Romanian, was requested by the Romanian authorities for the purpose of execution of his sentence. Both persons were arrested by the German authorities in Bremen and there were doubts about whether they could be extradited to a country where the conditions of detention in prisons violate fundamental rights protected by EU law, as repeatedly ruled by the ECtHR in Strasbourg.[63] The *Generalstaatsanwaltschaft Bremen* has asked the CJEU to answer this question, and whether extradition can take place if Hungary guarantees that the conditions of detention are in line with the requirements of human treatment.

The CJEU joined the two cases because of the similarity of the EU law issues. In its judgment of 5 April 2016,[64] the Grand Chamber emphasized that the principle of mutual recognition, which is the cornerstone of judicial cooperation in criminal matters, applies in the area covered by the Framework Decision,[65] and that the executing judicial authority is therefore, as a general rule, obliged to execute the EAW and may refuse execution only on the mandatory and discretionary grounds listed in the Framework

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domestic arrest warrant cannot be issued for the purposes of a foreign arrest warrant if the participation of the person detained abroad can be achieved by other means, in particular by a procedural act (interrogation) carried out by means of a request for legal assistance, by using telecommunication equipment or by temporarily transferring the detained person (*cf.* Chapters CI and CII of the 2017 Code of Criminal Procedure).

63 *Varga and others v. Hungary*, Nos.14097/12, 45135/12, 73712/12, 34001/13, 44055/13, 64586/13, 10 March 2015.

64 Judgment of 5 April 2016, *Case C-149/03, Aranyosi and Căldăraru*, ECLI:EU:C:2016:198.

65 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

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Decision, or may request guarantees as conditions for surrender in the cases also exhaustively listed therein.

The CJEU has established that, exceptionally, the execution of an EAW can be suspended,[66] but only if one of the Member States commits a serious and persistent breach of fundamental EU values[67] and this has been established in the so-called Article 7 procedure.[68]

The CJEU has laid down a two-step test for assessing a potential threat of infringement in the issuing Member State. *(i)* As a first step, the court in the executing State must examine the general conditions of detention and whether there are systemic problems in the issuing Member State. In doing so, it must consider objective, reliable, accurate and sufficiently up-to-date data demonstrating general and systematic disorder, whether in relation to specific groups or to specific prisons. Such data may be available from various sources, such as judgments of international courts, national courts, the Council of Europe, or UN bodies. Where the executing judicial authority is satisfied that there is systematic and generalized disorder, it must in a *(ii)* second step examine whether, in the circumstances of the case, there are serious and substantiated reasons to believe that the person concerned would be exposed to a real risk of inhuman or degrading treatment or punishment in the issuing Member State because of his or her transfer. To this end, the executing judicial authority may request additional information from the issuing judicial authority, which the latter, if necessary, with the assistance of the central authority, shall send to the executing judicial authority within the time limit set out in the request.

The executing judicial authority may consider any other information at its disposal. If the executing judicial authority rules out the existence of a real risk of inhuman or degrading treatment, the person concerned must be surrendered to the issuing Member State. However, if the authority establishes that there is a real risk of inhuman or degrading treatment of the person subject to the EAW, the execution of that warrant must be postponed but it cannot be abandoned.

66 Id. Recital (10).

67 *E.g.* human dignity, freedom, democracy, equality, the rule of law, respect for human rights and in particular the rights of minorities (Article 2 TEU).

68 The Council, acting by most four-fifths of its members and after obtaining the consent of the European Parliament, may, on a reasoned proposal from a third of the Member States, the European Parliament or the Commission, determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2 (Article 7 TEU).

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If the executing judicial authority decides to postpone, the executing Member State shall inform Eurojust, stating the reasons for the delay. A Member State which experiences repeated delays in the execution of EAW by another Member State shall inform the Council accordingly. This obligation may help to identify problems in the implementation of the Framework Decision. Neither the Member State nor the individual may abuse the right to postpone execution.

If the executing judicial authority rules out that the person concerned is in real danger of being subjected to inhuman or degrading treatment in the issuing Member State, it must execute the EAW. However, this decision does not limit the possibility for the person concerned to challenge the lawfulness of the conditions of his detention in the issuing Member State after the surrender.

To sum up, the CJEU has long interpreted the Framework Decision as a basis of mutual trust, as it requires all Member States to respect the fundamental principles of the EU and if a Member State violated these principles in relation to human rights, the Article 7 procedure would be triggered. However, in view of the non-existent practice of this procedure, this meant that no enforcing Member State could invoke a violation of human rights to suspend enforcement. Thus, the *Aranyosi and Căldăraru* judgments[69] are the first cases where the CJEU has developed a test for an exception to the principle of mutual recognition without recourse to a separate EU procedure, explicitly invoking human rights.[70]

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69 On the significance and criticism of the judgment, see Petra Bárd, 'Aranyosi and Căldăraru', Fundamentum, Vol. 20, Issue 2–4, 2016, pp. 103–106; Balázs Lehoczki, 'A kibocsátó tagállamban fennálló fogvatartási körülmények az európai elfogatóparancs végrehajtását megelőző vizsgálatának korlátai', Acta Humana, Vol. 6, Issue 3, 2018, pp. 63–69; Gergő Czédli, 'Az európai elfogatóparancs kibocsátása' in Kis & Szabó (eds.) 2023, Chapter II/4.4; Szilárd Gáspár Szilágyi, 'Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant', European Journal of Crime, Criminal Law and Criminal Justice, Vol. 24, Issue 2–3, 2016. pp. 197–219; Koen Bovend'Eerdt, 'The Joined Cases Aranyosi and Căldăraru: A New Limit to the Mutual Trust Presumption in the Area of Freedom, Security, and Justice?', Utrecht Journal of International and European Law, Vol. 32, Issue 83, 2016, p. 112.

70 The judgment of 25 July 2018, *Case C-220/18 PPU, ML*, ECLI:EU:C:2018:589 can be seen as a continuation of *Aranyosi*. The CJEU clearly stated that any examination of the conditions of detention in the issuing Member State prior to the execution of an EAW must be limited to the penitentiary institutions in which the person concerned is specifically intended to be detained. A further important finding in the case is that the right to lodge a complaint is not in itself sufficient to exclude the existence of

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In addition, as I indicated above, to this day we receive almost every month a request, typically from German judicial authorities (prosecutors) for the Hungarian authorities to provide information and guarantees on the appropriate conditions of execution of sentences following the transfer.[71]

4. Conclusion

It is generally accepted in the literature[72] – and consistently supported by the relevant case law of the CJEU[73] – that the preliminary ruling procedure is a dialogue between the CJEU and national courts to achieve the correct interpretation and uniform application of EU law. Similarly, in criminal judgments, there is a difference in the perspective of national courts and the CJEU on the application of EU law: while the CJEU, in interpreting EU law, seeks an interpretation of the law that is binding on all Member States and applies throughout the Union, national courts necessarily apply EU law in addition to national law within the framework of their national jurisdiction. This different perspective is one of the reasons for the different interpretations of the questions raised in the preliminary ruling procedures. If the question posed asks too much about an interpretation of EU law arising from a specific problem of national law, the CJEU often reinterprets it, puts it in a different light and answers the question in the way it has reformulated it.[74]

It is clear to see how in some cases the CJEU's response to questions of EU law raised in national case law has had a direct impact on both

a real risk of inhuman treatment, but that the possibility of such a remedy may be considered when deciding whether to surrender the person concerned.

71 The provision of information and guarantees is a joint responsibility of the Hungarian Ministry of Justice and the Hungarian Prison Service.

72 *See e.g.* András Osztovits, *Az előzetes döntéshozatali eljárás legfontosabb elméleti és gyakorlati kérdései*, KJK-Kerszöv, Budapest, 2005; Ágnes Czine *et al.*, *Az előzetes döntéshozatali eljárás a büntető ügyszakban*, HVG ORAC, Budapest, 2006; Michal Bobek, 'Learning to talk: preliminary rulings, the courts of the new Member States and the Court of Justice', *Common Market Law Review,* Vol. 45, Issue 6, 2008, pp. 1611–1543; Paul Craig & Grainne de Burca, *EU Law. Text, Cases, and Materials, Sixth Edition*, Oxford University Press, Oxford, 2015, pp. 464–544.

73 Judgment of 29 March 2022, *Case C-132/20, Getin Noble Bank*, ECLI:EU:C:2023:366, para. 71; Judgment of 17 May 2023, *Case C-176/22, BK and ZhP*, ECLI:EU:C:2023:416, para. 26.

74 *See* in more detail the summary reports of the jurisprudence analysis of the *Kúria* on preliminary Ruling procedures (2013, 2024), at https://kuria-birosag.hu/hu/joggyakorlat-elemzo-csoportok-osszefoglaloi.

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national and European legislation and practice. This is precisely one of the purposes of the preliminary ruling procedure: the national judge essentially steps outside the national framework and, as an EU judge, influences the jurisprudence of the other Member States. However, EU's involvement in criminal matters, especially in the area of substantive criminal law, is limited but perhaps the acceleration of EU legislation in the area of freedom, security and justice, in the light of the challenges of today's global action ––the fight against crimes against children, trafficking in human beings for various purposes, money laundering and terrorist financing – and the deepening of mutual recognition and mutual trust, will change this phenomenon.

And then, after another 20 years, there will be more cases of outstanding Hungarian initiative or involvement to report.

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20 Years in the EU

Two Decades of the Membership of Hungary and the Environmental Liability Directive

Gábor Kecskés[*]

Abstract

Hungary accessed the EU 20 years ago, on 1 May 2004. Prior to and amidst the accession process, Hungary had to harmonize its legal system to the EU legal system which lasted for at least a decade long period. After the accession, as a EU Member State, Hungary may also formulate and modify the legal system of the EU, such as the environmental law of the EU. The present article briefly highlights the main pillars of EU environmental law for the member states, and focuses on a narrower field by taking into account the EU environmental liability issues with regard to the Hungarian aspects and implementation. While the basics of environmental protection and the environmental competences of the EU are enshrined in the founding treaty and other primary norms (for instance, the treaties the EU ratified), the main secondary legal source of environmental liability in the EU is Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (Directive or Environmental Liability Directive or ELD). Although it has been modified several times since then, it still remains the basic norm in the environmental field by establishing the regulatory framework based on principles as polluter pays and prevention. The present study provides an overview on the Hungarian legislative steps on its implementation.

Keywords: EU, Hungary, Environmental Liability Directive, polluter pays principle, prevention

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1. The Origins of EU Environmental Law and Liability Regulation

The integration of environmental protection and the convergence of environmental policies and legislation are now becoming increasingly important aspects of EU-based integration. Although economic integration was historically regarded as the primary objective of European integration, the emergence of environmental law in the 1970s and the growing interdepen-

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dence of the economy and the environment led to the emergence of a common goal of environmental protection.

Following the 'golden age' of international environmental law, which commenced in the 1990s with the 1992 Rio World Summit[1] and the 1998 Aarhus Convention[2] being signals of such relevance, the legislative action of the EC (later, EU) has progressed at a faster pace. From the 2000s onwards, the Union's policy-making era in environmental law is still being progressed, which has also implied the institution of environmental liability. This significantly expanded the scope of EU's secondary sources of law (thus adopting a directive as a secondary source is the most frequently used form of law in environmental legislation). The directives, however, serve a more interventionist function than the one of imposing liability. It is important to note that even in the case of an *explicit* provision, they are not in themselves capable of legally imposing liability, since the implementation mechanisms of the Member States may specify that.

The integration of environmental issues, both in terms of harmonising the Member States' divergent standards and of integrating them into the EU's wide-ranging system of action, have been defined over the decades, primarily at the level of action plans. However, it should be noted that these are not legally binding.[3] In accordance with Article 4(2)(e) TFEU the environmental protection is a shared competence between the Union and the Member States. Pursuant to the cited part, "the Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6."

The latter articles reflect on the exclusive competence of the EU (Article 3) and the EU's (residual, subsidiarity) competence to carry out actions

1 Earth Summit, United Nations Conference on Environment and Development (UNCED). Rio de Janeiro, Brazil, 2–14 June 1991. On the outcomes, *see* Report of the United Nations Conference on Environment and Development. A/CONF.151/26/Rev.1, (vol. I), Corr. 1.

2 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. Aarhus, Denmark, 2161 UNTS 447, 38 ILM 517 (1999).

3 This is a solution which has created an opportunity for the states to review their environmental policies, their 'legal environment', and to adapt them to harmonisation. The integrative approach can be observed in almost all areas, from the landscape protection to the issue of pollutant emissions from motor vehicles. Alexandre Kiss & Dinah Shelton, *Manual of European Environmental Law,* Cambridge University Press, Cambridge, 1993, pp. 512–518.

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to support, coordinate or supplement the actions of the Member States (Article 6). Therefore, both the EU and the Member States may formulate and adopt binding acts in that area, provided that the Treaties confer on the Union competence shared with the Member States in that particular area (subsidiarity).[4]

Originally, the EC, the predecessor of the EU, initially sought to approximate and unify the rules on civil liability for damage caused by waste,[5] which closely follows from the initial exclusive economic objective of European integration. However, the issue highlights the specificity of the EU in the field of environmental liability, namely the necessity to unify and approximate the different regulatory structures of the Member States, even at the cost of creating their own (secondary) rules. This has consistently been the fundamental principle of the EU liability framework, which the EU and its predecessor, the EC, have been developing since the late 1980s both at the level of primary (*e.g.* Single European Act) and secondary legislation. Consequently, in comparison with the liability clauses of the Member States (which are typically established in a civil law regime and not in the common law system) and the instruments provided by international law, the EU, by declaration and by virtue of its specific legal situation, is unable to play a pivotal role in the creation of liability rules. Nevertheless, several solutions have been devised to clarify liability issues in the Member State-EU relationship. One of the most significant of these is that, in the event of a Member State allegedly infringing the rights of a third party in accordance with the rules of the EU, the third party can only hold the EU liable for the infringement conduct and the resulting damage.

It is worth analysing the issue at the level of the primary sources of EU law, namely the founding treaties (and their subsequent amendments). The abstract and mostly general objectives contained in these treaties reflect the views and ideas of European integration on the environment and liability for damage, which are already expressed in secondary sources of EU law (mostly in regulations and directives). In the system of EC policies, environmental issues and environmental protection were first given broad recognition in the Single European Act (Subsection VI, Title VII – Environment), signed in 1986 and which entered into force in 1987. This

4 Article 2(2) TFEU.

5 *See e.g.* Council Directive 84/631/EEC of 6 December 1984 on the supervision and control within the European Community of the transfrontier shipment of hazardous waste, which applies the principle of civil liability.

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is noteworthy because it is the first time that environmental protection is mentioned in the Treaties, and at the level of primary legislation.. Furthermore, the polluter pays principle has been incorporated into Article 174(2) EEC Treaty of the Treaty establishing the EEC (now Article 191 TFEU). This effectively means that the polluter must bear the costs of prevention.[6] However, this requires the implementation of secondary legislation to transform the polluter pays principle into an effective principle of liability and compensation within the domestic legislations.[7]

Following the Maastricht Treaty on EU in 1992, Article 130r of Title XVI (Environment) of the Treaty establishing the EC (now also Article 191 TFEU) addresses the core elements of Community environmental policy. In addition to the fundamental objectives, this article also outlines the fundamental principles of the common environmental policy, which now include certain principles of liability for damage in the event of environmental damage. In the former Article 130r(2), the Treaty sets forth the precautionary principle, the principle of prevention, the principle that environmental damage should be rectified at source, and the polluter pays principle. It is important to note that, following the reform of the treaties, the Lisbon Treaty (2007 Treaty of Lisbon amending the Treaty on EU and the Treaty establishing the EC), signed in 2007 and entered into force in 2009, incorporated almost entirely the relevant provisions of the 1992 Maastricht Treaty (including all four environmental principles) in its Title XX, Article 191.

These principles (prevention, precaution, polluter pays, compensation at the source), as evidenced by the primary sources of law, are part of environmental policies and not only basic principles of liability. This is

6 Article 191(2) TFEU: "Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay."

7 As for the causation issue of the polluter pays principle, *see* Youri Mossoux, 'Causation in the Polluter Pays Principle', *European Energy and Environmental Law Review*, Vol. 19, Issue 6, 2010, pp. 279–294. From the Hungarian legal literature, see a very fruitful discussion between Fruzsina Bögös and Katalin Sulyok. *Cf.* Fruzsina Bögös, 'A környezetvédelmi törvény 102. §-ának értelmezése a 2004/35/EK irányelv rendelkezései tükrében', *Közjogi Szemle,* Vol. 11, Issue 4, 2018, pp. 21–30; and Katalin Sulyok, 'Az okozatiság követelmények fontossága a szennyező fizet elv érvényesítésében az uniós és a hazai joggyakorlat tükrében – válasz dr. Bögös Fruzsina tanulmányára', *Közjogi Szemle*, Vol. 11, Issue 4, 2018, pp. 31–39.

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because the founding treaties, which are the primary sources of law, do not explicitly address liability issues. Rather, they are only in the sphere of secondary sources of law that they are given real meaning and detailed regulation. In light of the inherent incompleteness of the regulatory system in the Member States, both Article 130r of the former Treaty establishing the EC and the current Article 191 TFEU grant the Community and the Union the authority to establish rules on specific aspects of the environment that give rise to common action, including, of course, any rules on environmental liability (particularly in view of the fact that environmental protection is a shared competence between the Union and the Member States). Nevertheless, the secondary sources of EU law are considerably more closely and specifically linked to the subject of environmental liability, whilst the scope of these rules can be derived from primary sources.

2. Environmental Liability in the EU – The Directive 2004/35/EC

A landmark development in the field of environmental liability within the EU, namely the Environmental Liability Directive[8] was adopted by the Council and the European Parliament on 21 April 2004. It entered into force within ten days, on 30 April 2004. The Directive was initially amended in 2006 by Directive 2006/21/EC.[9] The Directive (2006/21/EC), which first came into force on 1 May 2006 and gave Member States a two-year deadline for implementation, sets out a three-year period for the Member States to comply with the implementation obligation. However, it was not until the summer of 2010 (*i.e.* after a three-year delay) that all Member States managed to implement the Directive. The two other amendments to the Directive (which left the liability methodology essentially unchanged) were made by Directive 2009/31/EC[10] and Directive 2013/30/EU.[11]

8 For more on the Directive, *see* Gerd Winter *et al*.,'Weighing up the EC Environmental Liability Directive', *Journal of Environmental Law*, Vol. 20, Issue 2, 2008, pp. 163–191.

9 Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006 on the management of waste from extractive industries and amending Directive 2004/35/EC.

10 Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006.

11 Directive 2013/30/EU of the European Parliament and of the Council on safety of offshore oil and gas operations and amending Directive 2004/35/EC.

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The obvious objective of the Directive is to establish a framework for environmental liability based on the polluter pays principle in order to prevent and remedy environmental damage (Article 1). In this context, the definition of liability represents an inherent conceptual element that extends beyond the polluter pays principle. This latter principle may be considered more of a principle than a legal obligation.

The Directive addresses two principal areas, where it makes a clear differentiation according to the typology of liability, with regard to the environmental liability form: *(i)* firstly, it applies the principle of objective liability for activities involving high risk (the existence of a causal link between the tort and the damage);[12] *(ii)* secondly, in the case of activities not involving increased and high risk, the imputability, the behaviour of the operator (intentionality, reckless negligence) must also be examined. In this latter form, the liability is dominated by the fault approach.[13]

The Directive assigns liability for damage to the term 'operator'[14] and the scope of their activities. The Directive thus applies the principle of civil liability and does not require the State to pay compensation in express terms if the operator cannot be identified or is unable to compensate for the environmental damage caused. Ultimately, the Member States retain discretion to determine whether or not to provide compensation for environmental damage. In the event that the damage is caused by the State itself or by a State-owned entity, the State is obliged to compensate as the polluter (*cf.* the polluter pays principle). Nevertheless, this analysis of liability does not constitute the clear recognition of state responsibility (which is also missing from general international law too). Rather, it represents the application of liability based on civil law principles pertaining to property rights.

It is important to note, however, that according to Article 3(3) of the Directive, without prejudice to the relevant national legislation, the Directive does not give individuals a right to compensation for environmental damage or the imminent threat of such damage. In the context of liability

12 *See* Article 3(1) of the Directive and the list of activities in Annex III of the Directive.

13 In fact, the principle of negative definition applies here, since the text of the Directive implicitly 'reads' that this category does not include activities involving increased risk.

14 *See* Article 2(6) of the ELD, which reads as follows: the 'operator' means "any natural or legal, private or public person who operates or controls the occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity or the person registering or notifying such an activity".

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for damage, it is imperative that priority be given to claims brought by individuals. However, the Directive is addressed to Member States and its scope extends to environmental damage, which is a concept of damage at the level of States rather than individuals. In the case of damage to the environment, the State having jurisdiction must be assigned the means of action. As other forms of damage to individuals, such as traditional damage (damage to health, damage to property, loss of property), are not encompassed by the Directive, claims brought by these individuals or entities are not covered by the Directive.

The Directive's explicitly mentioned aim is to establish a framework for environmental liability based on the polluter pays principle. This is with the intention of preventing and remedying environmental damage [Article 2(1)(a)].[15] In order to achieve this, the definition of liability is an inherent conceptual element.

The Directive also includes the obligation of prevention (Article 5) and cooperation between Member States (Article 15). The Directive leaves the creation of financial guarantees to the Member States, without establishing an international financial fund in the traditional sense. Although it is acknowledged that the Union is capable of providing assistance to individual Member States in various ways, including the adoption of financial assistance instruments, this could ultimately be aligned with the principle of cooperation between Member States as set out in Article 15.

The principle of the polluter's obligation to pay compensation for environmental damage is one that imposes financial liability on the economic operator whose actions or omissions have caused the damage in question. A comparison of this idea with Articles 5 to 10 of the Directive[16] reveals

15 The term 'environmental damage' means: "damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species. The significance of such effects is to be assessed with reference to the baseline condition, taking account of the criteria set out in Annex I. Damage to protected species and natural habitats does not include previously identified adverse effects which result from an act by an operator which was expressly authorised by the relevant authorities in accordance with provisions implementing Article 6(3) and (4) or Article 16 of Directive 92/43/EEC or Article 9 of Directive 79/409/EEC or, in the case of habitats and species not covered by Community law, in accordance with equivalent provisions of national law on nature conservation."

16 In this context, the secondary legislation provides for prevention and remedial actions, as well as their costs, cost allocations and limitation period for recovery of costs.

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a detailed and unprecedented process of elaboration of the polluter pays principle. It is where the Directive has brought about a fundamental change, and it can be stated with confidence that the polluter pays principle is now an integral part of the extensive body of EU *acquis communautaire*.[17]

There are necessarily exceptions to the polluter pays principle as a relatively objective principle. The Directive defines the grounds for exceptions from liability,[18] *i.e. (i)* damage caused by armed conflict, state of war, civil war or insurrection; or *(ii)* damage caused by an exceptional, unavoidable and inevitable natural phenomenon are not covered by the Directive.

Nor does the Directive apply to damage caused as a result of activities falling within the scope of specific international treaties[19] or as a result of activities in the field of national defence, international security or protection against natural disasters.[20]

Moreover, the Directive does not affect the obligations of Member States under international treaties, provided that such treaties regulate the activities falling within the scope of the Directive in a more detailed and comprehensive manner. Furthermore, other international obligations of Member States under international treaties are not affected by the Directive if they regulate more strictly and/or more comprehensively the question of activities falling within the scope of the Directive. In fact, according to Article 4(2) of the Directive, the

> "Directive shall not apply to environmental damage or to any imminent threat of such damage arising from an incident in respect of which liability or compensation falls within the scope of any of the International Conventions listed in Annex IV, including any future amendments thereof, which is in force in the Member State concerned."

17 *See* Kristel De Smedt, 'Is Harmonization of Environmental Liability Rules Needed in an Enlarged European Union?', *Review of European Community and International Environmental Law*, Vol. 13, Issue 2, 2004, pp. 164–174; Hubert Bocken, 'Financial Guarantees in Environmental Liability', *European Energy and Environmental Law Review*, Vol. 15, Issue 1, 2006, pp. 13–32; Monika Hinteregger (ed.), *Environmental Liability and Ecological Damage in European Law*, Cambridge University Press, Cambridge, 2008, p. 697; Lucas Bergkamp & Barbara Goldsmith (eds.), *Environmental Liability Directive – A Commentary*, Oxford University Press, Oxford, 2013, p. 408; Henrik Josefsson, 'The Environmental Liability Directive, the Water Framework Directive and the Definition of Water Damage', *Environmental Law Review*, Vol. 20, Issue 3, 2018, pp. 151–162.

18 *See* Article 4 of the Directive.

19 *See* Article 4(2)-(4) of the Directive and Annex IV.

20 *See* Article 4(6) of the Directive.

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Among the treaties listed in Annex IV, Hungary is party to a number of such treaties.[21] Furthermore, according to Article 4(4) of the Directive, the Directive

> "shall not apply to such nuclear risks or environmental damage or imminent threat of such damage as may be caused by the activities covered by the Treaty establishing the European Atomic Energy Community or caused by an incident or activity in respect of which liability or compensation falls within the scope of any of the international instruments listed in Annex V, including any future amendments thereof."

Hungary is also a party to the 1963 Vienna Convention on Civil Liability for Nuclear Damage and to the Joint Protocol for the Implementation of the 1960 Paris Convention on Civil Liability in the Field of Nuclear Energy and the 1963 Vienna Convention.[22]

The obligation of prevention (Article 5) and cooperation between Member States (Article 15) are included in the Directive as a matter of principle, as in many international treaties, while the desirable but not obligatory system of financial guarantees (Article 14) differs from the method used in treaties, where it is frequently an obligation. The Directive leaves the margin of appreciation and discretion of guarantees to the Member States, without creating an international financial fund.

As regards the question of *ratione temporis* (temporal scope), the Directive does not apply to damage occurring before 30 April 2007, if it is the result of a specific activity which took place before that date and was completed before that date. The Directive therefore applies to damage caused by an emission, event or incident occurring after the entry into force, provided that the damage *(i)* arise from activities carried out after that date; or *(ii)* from activities carried out before that date but not yet completed at the end of that date. The Directive also recognises an objective limitation period of 30 years from the date of the harmful emission, event or incident.[23]

21 For example, the 1992 Convention on Civil Liability for Oil Pollution Damage and the 1992 Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage.

22 Government Decree No. 130/1992 (IX. 3.) on the implementation of the Joint Protocol on the Application of the Vienna Convention on Civil Liability for Nuclear Damage and the Paris Convention on Civil Liability in the Field of Nuclear Energy, signed on 20 September 1989.

23 See Articles 17 and 19 of the Directive.

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In summary, the Directive's 'added value' in this area can be demonstrated on multiple levels. *(i)* On the one hand, for the first time, it set out the environmental liability guidelines for a *sui generis* entity (as the EU). *(ii)* On the other hand, the theory and practice of environmental liability, excluding other types of damage from its scope, is unprecedented in the field of international law, and thus serves as a novelty kind of benchmark for future legislative efforts on similar subjects. *(iii)* Thirdly, the secondary source of law of the EU provides a detailed explanation of the inherent elements of the polluter pays principle, which extend beyond the legal definition of principles and can be interpreted in the language of legal obligations. This is in contrast to other rules, where such elements are not present. *(iv)* Fourth, the deliberate and clear duplication of liability forms may be a useful solution when regulating certain complex or high-risk activities (where a given standard covers both activities involving increased risks and other activities). *(v)* Finally, the Directive does not prevent Member States from adopting more stringent provisions on the prevention or remediation of environmental damage. This can be considered an example of the *subsidiarity principle*.

3. Transposition of the Directive in Hungary

The accession to the European integration was a primary political aim of Hungary after the 1990 system change and the newly adopted multiparty and free market system, and the implementation of environmental norms was the forerunner of several harmonisation outcomes.[24]

Four Member States, namely Latvia, Lithuania, Hungary and Italy had transposed the Directive by the implementation deadline of 30 April 2007. By 2010, however, all countries had completed their transposition obligations. As regards Hungary, the domestic transposition of the Directive actually consisted of a wave of implementation in 2007 and a subsequent series of minor, sporadic amendments until 2015. In the initial phase of harmonisation, which spanned up to 2007, amendments were introduced to align the legislation with the Directive. The following is a non-exhaustive list of the most significant amendments: *(i)* Act LIII of 1995 on the General Rules of Environmental Protection; *(ii)* Act LVII of 1995 on Water

24 *See* Allan Tatham, 'European Community Law Harmonization in Hungary', *Maastricht Journal of European and Comparative Law*, Vol. 4, Issue 3, 1997, pp. 249–283.

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Management; *(iii)* Act LIII of 1996 on Nature Conservation; *(iv)* Act XLIII of 2000 on Waste Management (not in force), later by Act CLXXXV of 2012 on Waste as of 1 January 2013); *(v)* Government Decree No. 90/2007 (IV. 26.) on the rules for preventing and remedying damage to the environment; *(vi)* Government Decree No. 91/2007 (IV. 26.) on establishing the extent of damage caused to the natural environment and on the rules of remedying the damage; *(vii)* Government Decree No. 92/2007 (IV. 26.) amending Government Decree No 219/2004 (VII. 21.) on the protection of underground waters; *(viii)* Government Decree No. 93/2007 (IV. 26.) amending Government Decree No. 220/2004 (VII. 21.) on the rules of protecting the quality of surface waters.

Nevertheless, the minor and sporadic, non-comprehensive amendments made after 2007 until 2015 represent more implementation solutions, focusing on specific requirements of the Directive. It shall be noted that the Civil Code (Act V of 2013) is certainly compatible with the Environmental Liability Directive (notwithstanding that the Directive does not address the civil liability of individuals) under clear implementation.

With regard to Hungary, financial guarantees are in principle provided by four insurance companies in accordance with the provisions of the Environmental Liability Directive. However, this is not generally mandatory in Hungary, except for the amendments to the Act LIII of 1996 on Nature Conservation in 2005 and 2008, which are not yet sufficient and should be included in more environmental legislation. It is also worth noting that Hungary has not yet established a financial fund to cover the costs of preventing and remedying environmental damage in cases where the responsible party is unable to pay or cannot be identified. A further suggestion specific to Hungary is that the environmental insurance market is relatively small, and consequently the environmental clauses in insurance contracts and general terms and conditions for property insurance are no longer sufficient. It is therefore necessary to introduce more specific and clearer provisions to address environmental damage. It is also necessary to supplement the institution of independent environmental insurance, as it is currently limited in Hungary. This is mainly due to the fact that these insurance schemes do not, as a rule, take into account environmental damage or pollution resulting from 'normal' operations. Furthermore, they are limited to pollution resulting from accidents only.

In accordance with Article 101 of Act LIII of 1995 on the General Rules of Environmental Protection, the user of the environment is obliged to provi-

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de environmental security (for his activity as defined in a separate government decree) and may also be obliged to take out environmental insurance to ensure the financing of the remediation of unforeseeable environmental damage caused by his activity. The user of the environment or the operator is liable for the environmental damage caused by them and for the costs of prevention and remediation. According to a 2020 amendment (already not in force but the implemented part of Act LIII of 1995 on the General Rules of Environmental Protection is still in force),[25] in the event of failure to do so or ineffectiveness, the authority or court entitled thereto may restrict the performance of the activity or may suspend or ban it until the conditions it established are ensured (Article 101). This amendment is more consistent with the stipulations of the Environmental Liability Directive.

Act LIII of 1996 on Nature Conservation states in Article 73 (Insurance and Security), as amended in 2005 and 2008 by the Hungarian lawmaking bodies, that

> "any legal person, other organisation, private entrepreneur or full time farmer using hazardous substances in protected natural areas or pursuing activities otherwise dangerous to the character or conditions of the natural value shall – in accordance with separate legislation – provide security or draw up an insurance contract."

Furthermore, any individual or entity that utilises the environment is required to obtain environmental insurance to guarantee the financing of the remediation of unforeseen natural damage caused by their activities. However, in two sectors, the legislator has already acted earlier than in the two main sectoral laws discussed above. This has been achieved through the introduction of minor amendments to the law and the adoption of a government decree, which have made the role of financial guarantees in the sectoral standards on environmental liability more effective. On the one hand, following the amendment of Act XLVIII of 1993 on Mining, Article 41(7) provides that

> "in order to provide financial cover for the obligations of the mining operator arising from mining activities, the Minister shall, in the concession contract and the Mining Supervisory Authority in the permit, require the conclusion of an insurance contract or the provision of a guarantee, taking into account the offer of the mining operator."

25 *See* Act LI of 2020.

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Furthermore, the aforementioned financial cover must also include compensation for damage to the mine and the obligation to carry out landscape restoration, including environmental damage and rehabilitation work on waste treatment facilities.

In contrast, with regard to Act CLXXXV of 2012 on Waste, a government decree has already entered into force on this subject, which also contains detailed rules on certain property securities. However, the operator's obligation to provide a security, the amount and the way of its calculation, regulated by Government Decree No. 19/2014 (VIII. 1.) on waste management activities related to electrical and electronic equipment, cannot be considered to be in the general environmental interest. In accordance with Article 14(1) of the Government Decree, the environmental insurance is but one of the potential forms of property security. In addition, Government Decree No. 314/2005 (XII. 25.) on the environmental impact assessment and the unified environmental authorisation procedure also requires specific regulations regarding the provision of security and the establishment of a reserve fund for the purpose of compliance with the Directive.

Thus, although the enactment of a government decree on the satisfactory provision of financial guarantees remains pending under Act LIII of 1995 on the General Rules of Environmental Protection and Act LIII of 1996 on Nature Conservation, Hungary appears to comply with the financial guarantee requirements of the EU Environmental Liability Directive in the latter sector through the amendment of the Mining Act and the Government Decree linked to the Waste Act.

It has to be stated that one of the most disastrous environmental damages in the EU and definitely in Hungary was the red mud disaster in Kolontár in 2010, which really tested the Hungarian liability rules. That disaster and its legal implications however hardly justified the environmental liability rules, since the scale of environmental damage as well as the seriousness of the disaster was really unprecented (not just in Hungary but mostly in Europe too). That meant that the operator (which went bankrupt almost immediately after the exceptionally serious disaster and the company was later nationalized by the Hungarian lawmaker) was unable to compensate the damage, which exceeded 115 million euros (later compensated, partly by the central budget of Hungary). It is worth noting that the European Parliament adopted a resolution 'lessons learned from the red mud diaster'

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in 2015.[26] With regard to the Directive, the European Parliament noted that "the 2010 red mud disaster was Hungary's worst industrial catastrophe", and recognised the rapid and effective intervention of the national authorities. The resolution confirmed that the cause of the disaster was the poor implementation of EU laws and the poor performance of the site operator, it also called for ensuring appropriate inspection in Member States and better disaster prevention by using best available techniques, and called on the Commission and Member States for further steps and proposals and better implementation based on transparency and involving local authorities.

As for the latest environmental implementation review for Hungary, the country report of 2022[27] reflects that "Hungary implemented a project to process and publish cases of damage (under the ELD) in the Environmental Liability Database. The project was led by the Ministry of Agriculture and involved the regional authorities in 2020–2021." The review also confirmed that

> "a mandatory financial security system for liabilities under the ELD has not been fully introduced yet. However, as of now, this system mostly deals with waste management where the Act on Waste requires, under certain circumstances, the licensee to have a financial deposit, bank guarantee or environmental insurance. […]. In 2019 […] Hungary received three priority actions for compliance assurance. There has been no progress on the first action related to public information about promoting compliance, monitoring and enforcement. There has been some progress on the action to ensure there is more information on how professionals dealing with environmental crime work together."

The report emphasized that more progress is necessary in Hungary for financial security for liabilities, the environmental liability directive guidance and publication of information on environmental damage.[28]

26 European Parliament resolution of 8 October 2015 on lessons learned from the red mud disaster, five years after the accident in Hungary (2015/2801(RSP)), 2017/C 349/09.

27 Environmental Implementation Review 2022. Country Report of Hungary. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. European Commission, Brussels, 8 September 2022, SWD(2022) 259 final.

28 Environmental Implementation Review 2022. Country Report of Hungary, p. 45.

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4. Review of the Directive

In 2010, the ECJ delivered a landmark judgment in the so-called *ERG* case (C-378/08).[29] This case concerned the interpretation of the Directive. The Grand Chamber of the ECJ held that where the conditions for the application of this directive are not met in the case of environmental pollution, such a situation falls within the scope of national law. This is in compliance with the rules of the Treaty and without prejudice to other acts of secondary law.[30] In relation to the polluter pays principle, the judgment stated that

> "the legislation of a Member State may provide that the competent authority has the power to impose measures for remedying environmental damage on the basis of the presumption that there is a causal link between the pollution found and the activities of the operator or operators concerned due to the fact that their installations are located close to that pollution."[31]

In certain instances, the competent authority may also impose measures to rectify environmental damage on operators subject to the Directive, regardless of any fault, negligence or intent. However, the competent authority must establish a causal link between the activities of the operators subject to the remedial measures and the pollution in question, in accordance with the national provisions governing the taking of evidence.[32]

It can be concluded from the above that the case law of the CJEU provides a significant source of guidance and direction for EU environmental law, which is characterised by a multitude of action programmes and directives. This is particularly relevant given that environmental protection has been an integral part of European law for several decades. After being established at the level of primary legislation, environmental protection is now becoming an increasingly significant aspect of the *acquis communautaire* and its objectives, particularly through the influence of secondary sources of law.

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29 The case concerned a reference for a preliminary ruling in which the polluter pays principle played a significant role, in relation to national legislation conferring on the public authority the power to impose on private undertakings the implementation of remedial measures without an investigation to determine who is responsible for the pollution. Judgment of 9 March 2010, *Case C-378/08, ERG and others,* ECLI:EU:C:2010:126.

30 Id. para. 70.

31 Id. para. 56.

32 Id. para. 65.

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In 2016, an implementation summary report[33] was adopted to examine the outcome of the implementation of the Directive between 2007 and 2013. This included an evaluation carried out under the Commission's Regulatory Fitness and Performance Programme (REFIT). The report indicates that considerable progress has been made at the national level, including at the European level, in addressing and preventing certain environmental damage. Nevertheless, the REFIT identifies a number of additional factors that have contributed to the observed differences in the impact of the Directive. These include the necessity for standardisation of the registration of damage covered by the Directive and the importance of public participation and involvement. It is often the case that measures to prevent damage to biodiversity from becoming significant are not taken, based on the incorrect assumption that preventive measures can only be taken if it is known that the damage will become significant.

A year later, a *Multi-Annual Work Programme 2017–2020 – 'Making the Environmental Liability Directive more fit for purpose'* was adopted in response to REFIT, to assist national governments in a consultative way. In this context, the Commission proposed the implementation of the Directive's objectives by outlining three distinctive pillars of the Work Programme. The first expectation of the programme is that all stakeholders should provide the Commission with reliable data, which is essential for evaluation and decision-making. The second pillar of the Work Programme calls for the implementation of tools and measures to enhance the effectiveness of the Directive's implementation by Member States. The third pillar is to guarantee the availability and enforceability of financial guarantees by Member States.

In 2018, the Commission initiated the drafting of the document *'Improving financial security in the context of the Environmental Liability Directive'*. This was completed in May 2020 and provides an overview and analysis of financial security at national and EU level.

33 Report from the Commission to the Council and the European Parliament under Article 18(2) of Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage. COM/2016/0204 final, at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016DC0204. In addition, in the same year, the European Parliament adopted a resolution on the implementation of the Environmental Liability Directive (2016 Resolution of the European Parliament on the Implementation of the Environmental Liability Directive), at www.europarl.europa.eu/doceo/document/TA-8-2017-0414_EN.html.

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In 2019, the Directive was amended by *Regulation (EU) 2019/1010*, which harmonised and simplified Member States' reporting obligations in the field of environmental legislation. The new regulations, which have been in effect since 26 June 2019, require Member States to report to the Commission on the experience gained in implementing the Directive.

In 2020, the *Multi-Annual ELD Rolling Work Programme (MARWP) for the Period 2021–2024 – 'Making the Environmental Liability Directive More Fit for Purpose'*[34] had also been adopted by national experts of the Member States for the sake of guidance on key issues, training programmes on the Directive as well as strengthening follow-up mechanisms, and better stakeholder engagement.

The aforementioned documents and mechanisms are likely to have a profound impact on the implementation of the Directive at the national level. This is because they will also have the potential to incorporate 20 years of experience of the practical application of the Directive.

5. Conclusion

The EU's relevant actions in this area can be measured in terms of habitats, natural characteristics in need of local and regional protection, the protection of certain animal and plant species, on the basis of tackling climate change and other sub-areas (*e.g.* consumer protection). The majority of these issues inherently involve specific liability issues, therefore particular attention must be paid to the development of the relevant liability modalities, even if *sui generis* rules and concepts of liability are not to be found in the EU legal system. If liability is considered within the context of the dual system of domestic law and international law, it becomes evident that the situation is rather vague and fragmented. The 27 liability regimes of the current 27 Member States, in conjunction with the hundreds of obligations undertaken under international treaties, serve to illustrate the necessity for action by the EU and its aspiration for unification and harmonization.

However, as integration deepens and new competences emerge, the system of shared competences, which determines the scope of the EU and the Member States, is becoming increasingly indispensable. Moreover, the

34 *See* Multi-Annual ELD Rolling Work Programme (MARWP) for the Period 2021–2024 – 'Making the Environmental Liability Directive More Fit for Purpose', at https://commission.europa.eu/system/files/2020-11/eld_mawp-approved.pdf.

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differing environmental characteristics, environmental education and environmental awareness of the Member States collectively guarantee the urgent need of EU environmental law and the environmental liability regime.

In terms of the transposition and implementation of the Directive in Hungary, it can be stated that Hungary has implemented the Environmental Liability Directive in an exemplary manner at EU level, within the deadline set by the Directive. In the initial phase of implementation in 2007, the legislature primarily introduced amendments to the principal sectoral legislations (general protection on the environment, nature conservation, legislation on waste, etc.), with the objective of ensuring direct compliance with the Directive. Nevertheless, there are still a number of potential issues for improvement to submit regular reports and assessments to the Commission and to assist the Commission in the interpretation of environmental damage on a common EU level.

The aforementioned REFIT requirements also include the clarification, where possible, of the concepts of significant damage, significant risk and significant adverse impact under the Directive. These concepts, in their current, rather general wording, provide Member States with a wide and discretionary range of interpretation, making it difficult to treat the concept of damage and damage events uniformly at EU level.

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10 Years of the European Banking Union, 20 Years of Hungarian EU Membership

Still No Uniform Application of the Single Rulebook of the Banking Union in Resolution Decisions

László Szegedi – Bálint Teleki[*]

Abstract

The regulation and supervision of the post-Great Financial Crisis banking market of the EU poses many challenges to the EU institutions and the Member States. After the establishment of the three European Supervisory Authorities (EBA, ESMA, EIOPA) in 2014, the first steps were made to create the European Banking Union (EBU), with its Single Supervisory Mechanism (SSM), Single Resolution Mechanism (SRM) and European Deposit Insurance Scheme (EDIS). In this article, we focus on the SRM, especially the incoherent application of the Single Rulebook by the Single Resolution Board (SRB), and other factors interfering with the decision-making, such as banking nationalism. We present three major cases from the SRB's – not so extensive – case law. The so-called Veneto Paradox draws attention to the problems caused by the incoherent interpretation of systemic importance in the EBU. The ABLV Latvia case discusses the connections between anti-money laundering, prudential supervision and bank resolution. The MKB case emphasises the consequences of political influence in the banking sector.

Keywords: ABLV Latvia case, MKB case, European Banking Union, Single Rulebook, single resolution mechanism

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1. Introduction

In 2024, Hungary will celebrate its 20th anniversary within the EU, while the European Banking Union (EBU) was created ten years ago. Therefore, it is worth exploring how the financial integration of this unique area of the Single Market has been transformed due to the Great Financial Crisis of 2008–2012 (GFC) with a particular emphasis on the EBU. The last two decades of the EU integration have been characterized by several crisis management cycles, from which the GFC-related EBU led to several fundamental changes. This included the creation of a three-pillar structure (Single Supervisory Mechanism, SSM; Single Resolution Mechanism, SRM, and European Deposit Insurance Scheme, EDIS) along with a clear shift of banking supervision competencies towards EU-level actors like some newly established EU agencies as well as the ECB as the central institution of EU-level banking supervision. Moreover, the post-GFC regulation of the EU also envisaged the creation of a Single Rulebook for the whole sector, stabilizing this market segment, enabling effective EU-level regulation and supervision for the EU-level actors and preventing further crisis cycles. Yet, recent years' resolution decisions have shown that the Single Rulebook has been applied somewhat incoherently in light of some leading cases. At the same time, the rulebook's uniform (and coherent) application could also be undermined by the territorially segmented structure of the EBU and banking nationalism, just like the unclear relationship between EU-level actors.

Regarding methodology, we focus on three significant cases from the last decade of the EBU, emphasizing this area's unique territorial clusters. As a result, the selected case studies reflect that the EBU incorporates Member States within and outside of the SSM and SRM schemes. Regardless of that, the banking market parent companies within these schemes often have branches outside of the SSM/SRM (like in the case of Hungary), and the Single Rulebook still applies to all Member States. Therefore, we explore this evolutionary road of the EBU by presenting three different pillars, namely *(i)* the pillar of single regulation (all EU-countries); *(ii)* the pillar of single supervision by mainly new EU actors (yet non-eurozone members like Hungary are supervised by national actors under the same EU regulation). *(iii)* Finally, the third pillar of our analysis, in a broader sense, reflects the Member States' further opportunities (banking nationalism) to influence their banking sector directly or indirectly, which might hinder the coherent application of the Single Rulebook.

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The purposes of this paper are: *(i)* to describe the evolution of the EBU and its Single Rulebook by evaluating these three resolution decisions of recent years, and *(ii)* to explore common patterns of the decisions concerned, which could potentially hinder the coherent application of the EBU's Single Rulebook.

The paper is structured as follows: Section 2 presents the evolution of the EBU, focusing on national and new EU-level actors and the regulation of resolution cycles. Section 3 discusses the three main resolution cases. Section 4 summarizes our conclusions and notes the future policy implications in this last section.

2. The Structure of the EBU

2.1. The Evolution of the EBU

The EBU is closely linked to the GFC. As the de Larosiére Report identified, financial and monetary imbalances, inappropriate regulation, weak supervision, poor macroprudential oversight, and various market failures led to the crisis of the European banking sector.[1] As such, the cross-border activities of several market players and the integrated financial market could no longer be regulated and supervised on a national level. The fragmented European financial supervision with former 3L3 Committees was mainly responsible for enhancing coordination and cooperation between national supervisory bodies without real powers. The 'too big to' approach could also be applied in the context of the European Internal Market. The EU responded quickly to the crisis by establishing a supervisory network called the European System of Financial Supervisors (ESFS), which followed the Report's recommendations. The ESFS consists of the European System Risk Board (ESRB), which conducts the macroprudential financial supervision, and the European Supervisory Authorities (ESAs, Authorities), which are in charge of microprudential supervision. Key competencies have been transferred to the new European Authorities – the European Banking Au-

1 Report of the High Level Group of Financial Supervision in the EU, chaired by Jacques de Larosiére (de Larosiére Report), at http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf.

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thority (EBA), the European Securities and Markets Authority (ESMA) and EIOPA (European Insurance and Occupational Pensions Authority).[2]

Yet, due to the euro crisis at the beginning of the 2010s, it was inevitable to restructure (*vis-á-vis* further expand) the ESFS on the institutional landscape with the three-pillar model of the EBU. The first pillar, the Single Supervisory Mechanism (SSM), led to the delegation of banking supervision powers to the ECB. At the same time, the Single Resolution Mechanism (SRM)[3] strengthened the EU agencification process by creating the new Single Resolution Board (SRB) combined with a Single Resolution Fund (SRF) as financial support for EU-level banking resolutions. The European Deposit Insurance Scheme (EDIS),[4] the third pillar of the EBU, has not yet been finished and is a subject of constant political debates. Additionally, the agencification process also continued in the 2020s. The new Anti-Money Laundering and Countering the Financing of Terrorism Authority (AMLA)[5] will operate in 2025 as the EU-level coordinating authority over national authorities to ensure the correct and coherent application of EU rules. AMLA will directly supervise those financial sector entities exposed to the highest risk of money laundering and financing of terrorism.

One of the reform's further cornerstones was the creation of a Single Rulebook (at the EU level) applicable to all financial institutions in the internal market. However, our analysis intends to demonstrate that there is often an apparent deficit in the coherent (uniform or proper) application of the Single Rulebook, even if this has been one of the main reasons for the ESFS and EBU reforms.

2.2. The Old and New Actors of the EBU

The creation of the ESFS and the EBU led to the shift of powers from national competent supervisory authorities (National Competent Authorities,

2 Id. p. 57.

3 Regulation (EU) No. 806/2014 of the European Parliament and of the Council of 15 July 2014 on establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (SRMR).

4 EDIS is still only a proposal, *see* at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015PC0586.

5 AMLA is still only a proposal, *see* at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0421.

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NCA) to several EU-level actors, mostly newly created after the GFL or embedded with new powers as a crisis management step. Even if NCAs are still responsible for the day-to-day supervision of financial institutions of the single market, these are the new EU-level actors.

The EU agencification in the last decades marks the era when the EU seeks new governance mechanisms by creating these 'inbetweener' EU bodies, which function between EU institutions and Member States while having regulatory and supervisory tasks over the market participants.[6]

The EU (decentralized) agencies, as the primary type of inbetweener bodies, have been created to respond to crises from inadequate risk assessment and crisis management at the national level combined with the lack of such capacities at the EU level. This new era with a shift of implementation competencies of EU policies towards relatively independent EU agencies[7] separated from the often too bureaucratic, too politicized, and too generalist functioning of the Commission.[8] The agencification process reached its most intensive period in the 2000s as new EU agencies were established (or 'upgraded') with substantial new powers regarding the Single Market (European Food Safety Authority, EFSA in 2002; European Chemicals Agency, ECHA in 2007; European Medicines Agency, renamed as EMA in 2004), while financial agencies marked the newest era of agencification.[9] Scholars call this phenomenon 'crisis-driven agencification' as, in many cases, the reason behind establishing a new EU agency was and is some crisis, regardless of whether it is the BSE disease, the Eurozone crisis, or any other.[10]

6 Michelle Everson *et al.*, 'European Agencies in between Institutions and Member States' *in* Michelle Everson *et al.* (eds.), *European Agencies in between Institutions and Member States*, Kluwer Law International, The Netherlands, 2014, pp. 3–9.

7 Michael Kaeding & Esther Versluis, 'EU Agencies as Solution to Pan-European Implementation Problems' *in* Everson *et al.* (eds.) 2014, pp. 73–87.

8 Michelle Everson & Ellen Vos, 'EU Agencies and the Politicized Administration' *in* Johannes Pollak & Peter Slominski (eds.), *The Role of EU Agencies in the Eurozone and Migration Crisis,* Palgrave Macmillan, 2021, p. 26 (Everson & Vos 2021a); Robert D. Keleman, 'The Politics of 'Eurocratic' Structure and the New European Agencies', *West European Politics,* Vol. 25, Issue 4, 2002, p. 112.

9 László Szegedi, 'EU Expert Bodies in Light of the Glyphosate Saga and the Dieselgate Scandal – Cross-Sectoral Lessons to Be Learned in the Era of Emerging Risk Factors and Constant Crisis Management?', *Európai Tükör*, Vol. 25, Issue 3–4, 2022, pp. 94–116.

10 Michelle Everson & Ellen Vos, 'European Union Agencies' *in* Marianne Riddervold *et al.* (eds.), *Palgrave Handbook of EU Crises,* Palgrave Macmillan, 2021, pp. 319–328

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Even if the number and powers conferred upon them have increased substantially in the last decades, EU agencies have no detailed (sector-neutral) Treaty basis (incomplete constitutionalism).[11] The CJEU solved this problem in its judgment, explicitly dealing with one of the new financial agencies (ESMA) by referring to agencies as (functional) EU entities created by the EU legislature without having a considerable measure of discretion (limited by other actors and judicial review guaranteed before the CJEU).[12] Regarding the scientific side, the agencies' position has been reinterpreted in light of the *ESMA judgment*. This judgment concluded that any task conferred upon the Commission that cannot be carried out due to the lack of technical expertise could be left to EU agencies, stressing the agencies' primary role to function as bodies of technical expertise.[13]

The SSM ensures that an EU actor supervises systemically important credit institutions without the abovementioned conferral concerns of EU agencies. Legally, the ECB has a clear Treaty basis with even stricter independence criteria. Yet, functionally, the ECB's direct banking supervisory role and mandate of technical expertise could be considered similar to that of agencies. At the same time, the ECB operates as an EU-level actor over a certain policy area of banking supervision.[14]

The division of competencies between the national and EU actors within the SSM has been based essentially on the systemic importance of credit institutions (size of the bank, significance at the EU and the Member State-level banking sector, importance of cross-border activities). In addition, the regulation itself provides the ECB with a flexibility clause to allow the ECB to take over the direct supervisory role from the Member States for less significant banking market participants if needed.[15]

(Everson & Vos 2021b); László Szegedi, *Az európai közigazgatás fejlődése és szabályozása,* Dialóg Campus, Budapest, 2018, pp. 88–94.

11 Everson & Vos 2021b, pp. 319–328.

12 Judgment of 22 January 2014, *Case C-270/12, United Kingdom v Parliament and Council,* ECLI:EU:C:2014:18. Everson & Vos 2021a, pp. 31–37.

13 Id. p. 3.

14 Jacques Pelkmans & Marta Simoncini, 'Mellowing Meroni: How ESMA can help build the single market', *CEPS Commentaries,* 18 February 2018, pp. 5–6; Everson *et al.* 2014, pp. 241–262; Herwig C. H. Hofmann, 'Monetary Policy and Euro Area Governance in the EMU' *in* Herwig C. H. Hofmann *et al.* (eds.), *Specialized Administrative Law of the European Union – A Sectoral Review,* Oxford University Press, Oxford, 2019, p. 246.

15 SSMR, Article 1; Jens-Hinrich Binder *et al.*, *Brussels Commentary – European Banking Union*, Nomos/Hart, Bloomsbury Publishing, London, 2023, pp. 1–13.

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The central actor of the EBU's second mechanism (SRM) is the Single Resolution Board (SRB), established as an EU agency that decides on the resolution of financial market participants in crisis. The financial basis for this is the Single Resolution Fund, mainly composed of contributions from the banking market participants. The SRB is mandated to take emergency action, as it can respond to a crisis caused by the insolvency of a banking market participant by examining alternative means, ultimately deciding on the resolution based on a public interest test (continuity of critical functions, significant adverse impact on financial stability, protection of public resources, creditors and ultimately client assets).[16]

Regarding competencies, the SRB acts directly as the resolution authority for the most significant systemic risk market participants identified by the ECB's banking supervision role (complemented by banking groups with less significant cross-border activities). At the same time, it has a coordinating role *vis-à-vis* national resolution authorities in other cases. Thus, there is a clear link between the SSM and the SRM mechanisms, complemented by the EU legislator's introduction of a flexible open competence clause, just like in the SSM regime. This has allowed the SRB to decide directly on the resolution of national-level market participants to ensure a consistent application of strict (single) resolution standards. Yet, the SRM also covers a larger group of banks than the SSM,[17] while the case studies presented in this paper also demonstrate how the formal same categorization as systemically important banks might have led to resolution decisions made on different levels.

In our analysis, we follow the structures of these mechanisms as different pillars: *(i)* the pillar of single regulation (all EU countries), and *(ii)* the pillar of single supervision/resolution by mainly new EU actors (yet national actors supervise the banks of non-eurozone members like Hungary under the same EU regulation). *(iii)* Finally, the third pillar of our analysis, in a broader sense, reflects the Member States' further opportunities (banking nationalism) to influence their banking sector directly or indirectly, which might hinder the coherent application of the Single Rulebook.

16 SRMR, Article 1(2); Binder *et al.* 2023, pp. 453–461.

17 Katalin Mérő, 'The Banking Union and the Central and Eastern European countries' *in* Krisztina Arató *et al.* (eds.), *The Political Economy of the Eurozone in Central and Eastern Europe: Why In, Why Out?,* Routledge, New York, 2021, p. 117.

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2.3. The New Rules of the EU-level Resolution Regime

The Single Resolution Mechanism (SRM) is triggered by 'failing-or-likely-to-fail (FOLTF)' banks. The FOLTF determination remains the discretionary assessment of the supervisor or the resolution authority. Resolution should be initiated after determining whether an entity is failing or is likely to fail and that no alternative private sector measures would prevent such failure within a reasonable timeframe. The fact that an entity does not meet the requirements for authorisation should not justify *per se* the entry into resolution, especially if the entity remains or is likely to remain viable. An entity should be considered to be failing or likely to fail where it infringes or is expected, shortly, to infringe the requirements for continuing authorization, where the assets of the entity are, or are likely shortly to be, less than its liabilities, where the entity is, or is likely in the near future to be, unable to pay its debts as they fall due, or where the entity requires extraordinary public financial support except in the particular circumstances laid down in the SRM Regulation (SRMR).[18] The SRM, therefore, aims to resolve failing banks in an orderly manner with a minimum burden on taxpayers and the real economy. By this, the key objectives are: *(i)* to strengthen confidence in the banking sector; *(ii)* to prevent bank runs and contagion; *(iii)* to minimize the negative relationship between banks and sovereigns; and *(iv)* to eliminate fragmentation in the internal market for financial services.[19]

The organizational structure of the Single Resolution Mechanism is even broader than described above, with the actors as follows *(i)* the European Central Bank; *(ii)* the Single Resolution Board (SRB); *(iii)* the Single Resolution Fund (SRF); *(iv)* the Board of Appeal of the SRB; *(v)* the national resolution authorities (NRAs); and *(vi)* also the European Commission and the Council, as well as the ECON Committee of the European Parliament play some minor roles in the process.

In practice and general, the SRB is the main actor ('The Board shall be responsible for the effective and consistent functioning of the SRM').[20] The second most important player, the ECB, has functions and competencies due to its EU-level supervisory function (SSM):

18 SRMR, Recital (57); Binder *et al.* 2023, pp. 678–684.

19 *See* at www.consilium.europa.eu/en/policies/banking-union/single-resolution-mechanism/.

20 SRMR, Article 7(1).

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> "To restore trust and credibility in the banking sector, the European Central Bank (ECB) is currently conducting a comprehensive balance sheet assessment of all banks supervised directly. Such an assessment should assure all stakeholders that banks entering the SSM, and therefore falling within the scope of the SRM, are fundamentally sound and trustworthy."[21]

The Commission and the Council have a certain extent of control over the resolution. The Commission is empowered to turn to the Council in objection to the resolution scheme adopted by the SRB. The Council can oppose the SRB's decision (either the necessity of resolution or the discretionary measures involved) or make material modifications regarding the amount of the fund provided by the SRF. However, the Commission has an extremely brief time to make its objections, and it is only 12 hours before the SRB approves the scheme.[22]

The most important preventive tools of SRM are recovery planning and resolution planning, regulated by the BRRD.[23] Recovery plans shall include, where applicable, an analysis of how and when an institution may apply, in the conditions addressed by the plan, for the use of central bank facilities and identify those assets which would be expected to qualify as collateral. The competent authorities of the Member States assess recovery plans.[24]

On the other hand, when drawing up the resolution plan, the resolution authority shall identify any material impediments to resolvability and, where necessary and proportionate, outline relevant actions for how those impediments could be addressed. The resolution plan shall consider relevant scenarios, including the event of failure, which may be idiosyncratic or occur during broader financial instability or system-wide events.[25] The SRB and NRAs prepare resolution plans within the forum of IRTs. IRTs are the main forum where the SRB and NRAs cooperate in resolution activities

21 SRMR, Recital (13).

22 *See* at www.consilium.europa.eu/en/policies/banking-union/single-resolution-mechanism/.

23 Directive (EU) No 2014/59 of the European Parliament and of the Council of 15 May 2014 on establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (BRRD).

24 Id. Articles 5–6.

25 Id. Article 10.

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(resolution planning and preparation of resolution schemes).[26] The Single Resolution Board (SRB) adopts the resolution plans. Whenever a resolution process is initiated in front of the SRB, the resolution plan is considered – and is always referred to in the decisions of the SRB.

Given the relatively large number of actors involved, the SRB has a relatively small playing field regarding discretionary decisions – formally meeting the CJEU's requirements on conferral of powers limits. Nevertheless, as presented in the cases below, the SRB has to make decisions on its own from time to time.

3. Recent Resolution Decisions within and outside of the EBU

Even if the reforms described above meant to pave the way for 'more Europe in financial/banking regulation and supervision,' all three cases of the SRB discussed below also support the existence of so-called banking nationalism in the European financial market. Financial nationalism is an economic strategy that employs financial levers, including monetary policy, currency interventions, and other interaction methods with local and international financial systems, to promote the nation's unity, autonomy, and identity.[27] Banking nationalism – a sub-category of financial nationalism – is commonly understood as a government policy favoring the banking system's domestic/national ownership over foreign ownership.[28] In all the cases hereunder, national interests were present in the sense of the definitions above and had an impact on the outcome of the resolution/winding-up processes.

In this article, we apply the approach of three pillars followed by other scholars,[29] how the state influences the banking system: regulation, supervision, and ownership. These three factors are interconnected. As

26 *See* at www.srb.europa.eu/en/content/introduction-resolution-planning.

27 Juliet Johnson & Andrew Barnes, 'Financial nationalism and its international enablers: The Hungarian experience', *Review of International Political Economy*, Vol. 22 Issue 3, 2015, p. 53; Katalin Mérő & Dóra Piroska, 'Bankunió és banknacionalizmus – A magyar eset kelet-közép-európai kontextusban', *Politikatudományi Szemle*, Vol. 36. Issue 1, 2017, p. 148.

28 Id.

29 Krisztián Németh, 'Ötéves a Bankunió – Politikai célok, közgazdasági elméletek, gyakorlati eredmények', *Gazdaság és Pénzügy,* Vol. 6, Issue 2, 2019, p. 152; Mérő & Piroska 2017, pp. 151–155; Mérő 2021, pp. 116–134.

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Spendzharova concludes, the levels of foreign ownership and domestic bank internationalization (acquisitions) are essential determinants of domestic regulatory preferences, *i.e.* banking nationalism determines the Member State-level attitude towards European regulatory approaches.[30]

As mentioned above, these pillars could substantially impact the Single Rulebook approach of the EU's post-crisis reform, as the single regulation and especially single supervision (resolution) policy goals technically and practically differ within and outside the Eurozone members. At the same time, this could be complicated by the Member States' further measures towards banking nationalism.

3.1. The Veneto Paradox – Still Territorially Segmented Resolution?

One of the first cases in which SRM intervention was essential was the one dubbed in the literature as the Veneto Paradox. In mid-2017, the SRB was called upon to resolve *Banco Español S.A.*, a systemically important bank (supervised by the ECB), and *Banco Popolare di Vicenza* and *Veneto Banca* in Italy. The NRA resolved the Spanish bank based on a plan agreed by the SRB (the bank was later fully taken over by the Santander Group). In contrast, for the Italian banks, the whole process remained under the jurisdiction of the NRA, allowing the Italian resolution authority to act under much more favorable national rules.[31]

In the Italian case, it was clear that the classification of banks below the direct supervisory level (systemically important) for resolution purposes (due to some aspects of the public interest test) was changed by the SRB (compared to its previous position), due to the ECB's over-capitalization approach, differences in the ratings of the national central bank and regulatory heterogeneity.[32] The different rating compared to the ECB, which criti-

30 Aneta B. Spendzharova, 'Banking union under construction: The impact of foreign ownership and domestic bank internationalization on European Union member-states' regulatory preferences in banking supervision', *Review of International Political Economy*, Vol. 21, Issue 4, 2014, pp. 949–979.

31 Ioannis G. Asimakopoulos, 'The Single Resoulotion Board as a New Form of Economic Governance' *in* Herwig C. H. Hofmann *et al.* (eds.), *The Metamorphosis of the European Economic Constitution,* Edward Elgar, Cheltenham, 2019, pp. 279–301.

32 Pablo Iglesias-Rodríguez, 'The Concept of Systematic Importance in the European Banking Union Law' *in* Mario P. Chit & Vittorio Santoro (eds.), *The Palgrave Handbook of European Banking Union Law,* Palgrave Macmillan, 2019, p. 203.

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cized the former's overcapitalization approach, can be justified on banking market grounds.[33] Still, in any case, the different ratings of EU-level players could be detrimental, especially given the intertwining competencies of the SSM and SRM. For the same reasons, an over-emphasis on placing one Member State over another EU actor could be even riskier. Finally, the heterogeneity in national ratings is based on the fact that the SSM Regulation, which covers the Member States of the EBU on a territorial basis, and the EU-wide CRD IV Regulation (the latter is complemented by the guidelines of the European Banking Authority, which also increase regulatory 'diversity') compete in the definition of systemic importance.[34] Moreover, the classification of Italian banks, considered systemically important under SSM but not for resolution purposes, ended up being systemically important for state aid purposes.[35]

The process raised severe concerns about the entire SRM and its supposed 'single' nature. In their analysis of the case of the two Italian banks, Donnelly and Asimakopoulos use the expression 'bending and breaking the Single Resolution Mechanism', pointing out explicitly that Italian authorities were lobbying the Commission for leeway in applying the provisions of the BRRD, ultimately creating an atmosphere of economic nationalism, which is rather unattractive for foreign investors.[36] Despite the massive state aid package, EU officials argued that EBU principles were not breached. However, the truth is that the Commission approved this state aid package, although the SRB did not find the resolution necessary and gave the whole case back to Italian authorities.[37] Most importantly, these were two smaller banks from the Veneto region of Italy, where they played an important role, but not from the aspect of the Italian banking system. The Commission

33 According to Corbet and Larkin's analysis, after the crisis, the European Banking Authority's EU regulation, which focused on risk and the soundness of individual banks' balance sheets, made it harder for non-commercial and other alternative banks (such as savings and loan associations) to operate. Shaen Corbet & Charles Larkin, 'Has the Uniformity of Banking Regulation Within the European Union Restricted Rather than Encouraged Sectoral Development?', *International Review of Financial Analysis,* Vol. 53, October 2017, pp. 48–65.

34 Iglesias-Rodríguez 2019, p. 203.

35 Id.

36 Shawn Donnelly & Ioannis G. Asimakopoulos, 'Bending and Breaking the Single Resolution Mechanism: The Case of Italy', *Journal of Common Market Studies*, Vol. 58, Issue 4, 2020, pp. 856–871.

37 *See* at www.euractiv.com/section/banking-union/news/liquidation-of-italian-banks-shows-limits-of-banking-resolution-rules/.

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accepted Italy's argument that extending the losses further could affect the Northern region's financial stability and regional economy,[38] *i.e.* not the whole Italian economy.

Some commentators criticised the public interest threshold underlying the SRB's decisions in the Veneto case; the head of the EBA commented, in a veiled critique of the SRB, that:

> "The decision that there was no EU public interest at stake in the crises of two ECB-supervised banks that were hoping to merge and operate in the same region with combined activities of around 60 billion EUR sets the bar for resolution very high."[39]

If the SRB measures the public interest threshold accordingly in the future, only very few banks could be eligible for the resolution mechanism. In this case study, the SRB, in practice, exercised a fairly broad discretion to assess and reassess the systemic importance criteria (also overriding the ECB's rating) and relied on the Italian central bank's rating. This approach indicates that the co-decision regime theoretically limits the discretion of the EU agency (SRB). Still, the two-round re-rating contains inherent dilemmas, and in addition to the single EU-wide assessment, which is allowed by the regulatory regime, has clearly been compromised and might as well undermine the coherent application of the Single Rulebook – which was the underlying goal set by the SRM and the EBU. Moreover, the Veneto Paradox revealed three different categorizations of the same market participant under SSM, SRM, and state aid law. This could hinder not just the coherent application of the Single Rulebook but the functioning of the Single Market in a broader sense.

3.2. The ABLV Decision – Nobody's Baby?

This case exemplifies how systemic importance can vary according to the 'nature' of the resolution case. In 2017, the Latvian ABLV Bank (ABLV) was

38 Id.
39 Iglesias-Rodríguez 2019, p. 204.

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suspected of money laundering, which necessitated its resolution. (Notably, this case is still open at the Member State level.[40])

By virtue of their ownership, the founders and majority shareholders, Oļegs Fiļs and Ernests Bernis, held the ABLV Latvia Bank's controlling interest. Other bank shareholders are its top managers, officers, long-term business partners and customers.[41] For over ten years, the two bank co-owners of ABLV mentioned above have been ranked first in the annual Top of Latvia's Millionaires collated by the business newspaper Dienas Bizness. In 2017 – when the ABLV money laundering scandal started – Olegs Fils was the first on the list of Latvia's 100 most affluent millionaires, and Ernests Bernis was ranked second.[42]ABLV is Latvia's third-largest lender, with representative offices in many Commonwealth of Independent States (CIS) countries. The bank was privately held and was one of three Latvian banks directly supervised by the ECB.[43] Based on this data, its relevance was systematic in the Latvian banking market.

Money laundering concerns had previously been reported to the bank by the Latvian supervisory authority in 2016 and by the US Treasury Department's Financial Crimes Unit (FinCEN) in 2018 (the latter leading to mass deposit withdrawals). FinCEN made the allegation that the management, the shareholders, and the employees of the bank institutionalized money laundering activities as part of the bank's business model.[44] In May 2016, the FCMC (the Latvian financial supervisory authority) fined ABLV over EUR 3 million and issued a reprimand against the board member responsible for anti-money laundering activities at the bank. In 2017, the bank conducted a six-month inspection after suspicion was raised that the bank circumvented sanctions imposed against North Korea. On 24 November 2017, the FCMC and ABLV concluded another administrative agreement in which the parties agreed to dismiss the matter without drafting an administrative act, imposing monetary fines or applying any other sanctions. The

40 *See* at www.bank.lv/en/news-and-events/news-and-articles/press-releases/16324-customers-of-ablv-bank-as-who-have-not-applied-for-the-guaranteed-compensation-yet-can-do-so-for-another-month.

41 *See* at https://financelatvia.eu/wp-content/uploads/2017/12/LKA_ENG_ABLV.pdf.

42 *See* at https://eng.lsm.lv/article/economy/economy/ablv-bank-owners-top-latvias-millionaires-list.a254259/.

43 *See* at www.bankingsupervision.europa.eu/press/pr/date/2018/html/ssm.pr180224.en.html.

44 Németh 2019, p. 146.

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ABLV decided to continue improving its internal control system.[45] Consequently, ABLV could be considered a systematically important Latvian bank with prominent owners, and the Latvian supervisory authority has taken the necessary steps to comply with the requirements of the EBU.

Eventually, the ECB declared ABLV insolvent in 2018, but the SRB ruled that the public interest did not justify (the EU-level) resolution. The SRB claimed that ABLV does not provide critical services for the financial system of Latvia and that a bank failure would not have led to a significant erosion of economic stability, given the lower degree of financial embeddedness for the Latvian banking system or on a cross-border basis. As the SRB decision says:

> "However, the above rankings are not representative of the extent of the impact that the failure of the Institution (ABLV Bank) could have on the financial system and the real economy of Latvia or other Member States. […] As regards the relevance of the Institution (ABLV Bank) in the financial markets in Latvia, the impact of the failure of the Institution (ABLV Bank) on the total liquidity in the money market is not expected to be significant."[46]

There has been more criticism of the system of separation of competencies (EU and Member State levels) and, again, of the incoherent application in implementing banking regulation. Anti-money laundering action, while being at the Member State level back then in terms of competence, should have been included in the risk assessments of the ECB by treating money laundering risk as a business risk.[47] As Németh notes, there is a concern that the ECB does not consider banks in small Member States that are otherwise significant in terms of market size (as cited above, ABLV was the third largest Latvian bank, with the highest capital buffer that could be imposed) as eligible for (EU-level) resolution purposes. This, again, could undermine faith in the consistency of the functioning of the EBU and the coherent application of the Single Rulebook. The author also noted that, given the 'nature' of the case, the SRB also had to decide not to use the

45 Id.

46 Decision of the Single Resolution Board of 23 February 2018 concerning the assessment of the conditions for resolution in respect of ABLV Bank, AS (SRB/EES/2018/09); paras. 100–102.

47 Krisztián Németh, 'Ötéves a Bankunió – Politikai célok, közgazdasági elméletek, gyakorlati eredmények', *Gazdaság és Pénzügy,* Vol. 6, Issue 2, 2019, pp. 136–153; *see also* at www.fca.org.uk/news/speeches/conduct-risk-briefing.

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resources of the Single Resolution Fund to rescue a bank involved in money laundering and its customers with precarious backgrounds.[48]

In this case, the SRB was forced to make a decision that involved a reasonably wide discretionary assessment of systemic importance and money laundering risk. In doing so, it overruled and replaced the ECB's assessment, which, even if raising concerns about the above-mentioned case-law doctrines, at least provided a kind of EU response – albeit delayed. The ABLV case also shows that the co-decision system must still be further developed, as the European Court of Auditors[49] pointed out. Moreover, the risk of the Single Rulebook's incoherent application was also evident again.

Additionally, the ABLV case also provoked one further step in the crisis-driven evolution of the European tendency called 'agencification', as Diessner claimed in his 2022 article[50] – where he examines some of the Member State-level reactions to the establishment of the EU's own Anti-Money Laundering Agency (AMLA). As the EU's new decentralized agency, AMLA will start its operations in 2025. Germany supported this process and was a contender for hosting this agency – the latter became a reality since then, as the AMLA has become seated in Frankfurt-am-Main, just next to the ECB.[51] Diessner puts it:

> "This is largely due to the significant overlaps between anti-money laundering and financial supervision, the latter of which is currently under the auspices of the Single Supervisory Mechanism housed at the Frankfurt-based European Central Bank. Among others, a major money laundering scandal at the ECB-supervised Latvian bank ABLV in 2018, which FinCEN first flagged, put the central bank on the spot for its lack of information and powers in anti-money laundering."[52]

Kirschenbaum and Véron suggested in their paper back in 2018 that a new anti-money laundering agency – they called it EAMLA – should be estab-

48 Id.

49 Within the framework of the resolution mechanism, cooperation difficulties can be detected between the different actors (*see* paras. 119–143 of the European Court of Auditors' Special Report No 13/2017 and paras. 26–44 of Special Report No 2/2018).

50 Sebastian Diessner, 'More questions than answers? The EU's new Anti-Money Laundering Authority', *LSE European Politics and Policy blog,* 22 September 2022.

51 *See* at https://ec.europa.eu/commission/presscorner/detail/en/ip_24_972.

52 Diessner 2022.

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lished, mainly because of the experiences of *ABLV Latvia*.[53] Therefore, the shift of another former national competence towards the EU level became apparent due to the *ABLV* case, since AMLA will directly supervise those financial sector entities exposed to the highest risk of money laundering.

3.3. The Hungarian MKB Case – Another Case of Banking Nationalism or Preventive Resolution Planning?

First and foremost, in contrast to the Member States involved in the previous two cases, Hungary is not a member of the EBU. Therefore, although the European (banking) regulatory framework is naturally binding for the Hungarian financial sector, supervision and resolution remain in the hands of the national authorities (Hungarian Central Bank, MNB).

The Hungarian MKB Bank got into trouble due to the GFC starting in 2008. It suffered one of the largest losses among Hungarian banks, mainly due to its exposure to extremely poor-quality real estate project loans, constituting an above-average share of the bank's portfolio. Its owner, the *Bayerische Landesbank*, also needed state aid and was bailed out by the State of Bavaria (of Germany) in 2008 with a EUR 10 billion subsidy and had to sell its Hungarian subsidiary by the end of 2016. This has been concluded under the restructuring agreement – approving the state aid – by the European Commission.[54] MKB Bank's resolution plan aimed to achieve the general resolution key objectives by implementing the following subsequent steps:[55] *(i)* Rationalizing MKB Bank's operations, restructuring group-wide investments, cutting operating costs, improving efficiency, and restoring profitability. In the reorganization framework, MKB's loss-producing and excessively capital-absorbing business operations, which did not serve the core commercial banking activities, were wound down. The focus was on planning the medium-term strategy, particularly from a risk management perspective. *(ii)* Removing the assets that caused the problems that led to the resolution order using sale-of-business and asset separation as resolution tools. In the context of the asset separation, the 'toxic' assets that could not be sold on the market were taken over by

53 Joshua Kirschenbaum & Nicolas Véron, 'A better European Union architecture to fight money laundering', *Bruegel Policy Contribution*, Issue 19, 2018, pp. 1–29.

54 Krisztina Földényiné Láhm *et al.*, 'Bankszanálás mint új MNB-funkció – az MKB Bank szanálása', *Hitelintézeti Szemle*, Vol. 15, Issue 3, 2016, p. 9.

55 Id. p. 12.

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the (Hungarian) Resolution Fund as resolution trustee, with the purchase price provided by the Resolution Fund. Notably, the former transaction was subject to approval by the European Commission for the compatibility of state aid with the internal market, which was granted in 2015. *(iii)* At the end of the process, the sale of MKB Bank was carried out on market terms (sale-of-business is used as a resolution tool). The MNB considered compliance with two criteria when assessing the sale: compliance with the EU State aid framework, which considers price maximization based on a market-private investor approach as a primary consideration; and the resolution authority's approach of aligning financial stability interests with the price. A consortium, the best bidder, ultimately acquired MKB Bank's valuable assets.

First, we must understand the broader context of the Hungarian banking sector to understand this case's gravity. According to Várhegyi, the Hungarian Government – in power since 2010 – has increasingly sought to take control of the banking sector, which was decisively in foreign hands before 2010.[56] As noted by the experts, the intention to create a domestic ownership-dominated Hungarian banking sector was the clear intention of the members of the later Orbán government back in 2009.[57] Yet the European tendency in the 2010s was parallel to that.

On the one hand, gaining ownership was done by creating the merged Hungarian Development Bank (*Magyar Fejlesztési Bank*, MFB) and strengthening the Eximbank, controlled by the all-time government, and by making financing opportunities other than their core function. On the other hand, the government sought to take over the commercial banking sector.[58] This was achieved by strengthening the undercapitalized mutual savings banks and acquiring some foreign-owned branches offered for sale, thus creating an opportunity for the government to place the banks in the hands of owners close to their political community.[59] As a result, the

56 Éva Várhegyi, 'Tulajdonosi és piacszerkezeti változások a magyar bankszektorban', *Külgazdaság*, Vol. 67, Issue 11–12, 2023, pp. 50–51 (Várhegyi 2023a); Éva Várhegyi, *A bankrendszer elfoglalása,* Tea, Budapest, 2023, pp. 124–144. (Várhegyi 2023b).

57 Júlia Király, 'A bankszektor átalakítása' *in* Bálint Magyar & Júlia Vásárhelyi (eds.), *Magyar Polip 3: A posztkommunista maffiaállam,* Noran Libro, Budapest, 2015, p. 176.

58 Várhegyi 2023a, p. 50.

59 Id.

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share of the Hungarian banking sector's assets controlled by the political leadership increased from 4 to 29 per cent between 2010 and 2022.[60]

There are, however, further interpretations of this process. Kovács emphasizes that by 2016, the share of domestic-owned banks in the Hungarian banking sector indeed continued to increase. Although the highest share in the region, this share was only about to get close to the domestic ownership ratio of the banking sector in the Western European countries. In the case of other CEE countries, domestic control is typically a result of state ownership due to unsuccessful or delayed privatization. In contrast, domestic control is typically a result of Hungarian private ownership caused by government measures and purchases.[61] Scholars also point out that the continued departure from neoliberal economic policies should be followed by an active economic policy that relies on domestic/national ownership and develops internal resources.[62] (After 2008, there was an era of understandable scepticism towards the neoliberal paradigm, which had declared the 'omnipotent market' that can regulate itself successfully.)

Várhegyi and Király claim that to create a more concentrated banking market structure', the MNB, as the Hungarian Central Bank (and main banking supervisor/resolution authority), has also become much more potent: it has fully absorbed financial supervision and then, using the Hungarian Resolution Act,[63] which was newly enacted back then, it has also gained control over banks.[64] The *MKB resolution case* served the government's political interest in the concentration of the banking market.

60 Várhegyi 2023a, p. 51; Katalin Mérő, 'Várhegyi Éva: A bankrendszer elfoglalása – Hogyan állítja szolgálatába a bankokat a politikai hatalom? (Magyar Narancs könyvek, Tea Kiadó, 2023, 254 oldal) című könyvéről', *Külgazdaság*, Vol. 67, Issue 9–10, 2023, pp. 67–79.

61 Kovács 2016, p. 20.

62 Dani Rodrik & Arvind Subramaninan, 'The Primacy of Institutions (and What This Does and Does Not Mean)', *Finance and Development*, Vol. 40, Issue 6, 2003, pp. 31–34; Laurence E. Lynn, 'What is a Neo-Weberian State? Reflections on a Concept and its Implications', *NISPAcee Journal of Public Administration and Policy*, Vol. 1, Issue 2, 2008, pp. 17–30; György Matolcsy, *Egyensúly és növekedés 2010–2019 – Sereghajtóból éllovas,* Magyar Nemzeti Bank, Budapest, 2020, pp. 205–231; Csaba Lentner, *Közpénzügyek és államháztartástan,* Nemzeti Közszolgálati és Tankönyv Kiadó, Budapest, 2013, pp. 39–42.

63 Act XXXVII of 2014 on the further development of the institutional system to strengthen the safety of certain actors in the financial intermediary system (Hungarian Resolution Act).

64 Éva Várhegyi, 'Háború és béke', *Mozgó Világ*, Vol. 41, Issue 3, 2015, p. 68; Király 2015, p. 193.

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The frequently changing assessment of the bank's financial situation during the process is noteworthy. Before the MNB approved the purchase, the MNB required a vast amount (EUR 270 million) of recapitalization. Just a few months after the purchase by the government, the MNB considered the financial situation of the MKB so problematic that it urgently brought it under its protective wing and did it with the help of the already-mentioned Hungarian Resolution Act.[65]

Even if Hungary is not yet a member of the EBU, the *MKB resolution case* could be assessed using the three-pillar methodology. Regarding the regulation, the Single Rulebook had to be considered and supported by the Hungarian resolution framework. Regarding the supervision/resolution, the MNB had a decisive role, not the EU-level actors. These actors, however, although not always necessarily serving the coherent application of the Single Rulebook, still can function as a guarantee of the checks-and-balances system above the national authorities. It cannot be denied that the *MKB resolution case* was carried out soundly, both legally and technically.[66] Nevertheless, contemplating the big picture, one might perceive this case as an example of banking nationalism even if this term might have a neutral meaning. Regarding the third pillar of our analysis, this third resolution case clearly refers to the potential impact of the ownership structure used by a Member State/government.

4. Conclusions – Perfect Time to Celebrate or to Evaluate?

In our analysis, we have presented that the EBU has become indispensable in addressing the vulnerabilities in the post-GFC European banking market.[67] With its establishment, significant organisational and regulatory changes have occurred in the implementation of EU law. Competence rules have linked the SSM and SRM, giving EU actors a flexibility clause. As a strengthened EU actor, the ECB was empowered with a direct banking supervision competence. Two EU agencies have complemented this; from 2025, there will be three of them (EBA, SRB, AMLA). These are entrusted with regulatory, supervisory, coordinating, and, in some cases, direct implementation powers. Additionally, the indirect implementation powers

65 Várhegyi 2015, p. 68; Király 2015, p. 193.
66 Földényiné Láhm *et al.* 2016.
67 Péter Halmai, *Mélyintegráció – A Gazdasági és Monetáris Unió ökonómiája,* Akadémiai, Budapest, 2020, p. 322.

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of national banking authorities have also been amended, as the direct implementation-based organizational structure of the EBU above has been established. Nevertheless, as initially envisaged by the founding fathers, it isn't easy to imagine EU actors fully taking over Member States' primary role in implementing the EU *acquis*. The flexibility of direct and indirect implementation competencies could strengthen the shock-absorbing capacity of the EBU. Finally, the corpus of EU legislation in banking regulation and supervision has significantly been expanded over the last decade.

In the words of Lamfalussy, a system has been created whereby the authorities take over the management of 'systemically important banks' to prevent contagion.[68] The devil is in the details yet again, as the definition of a 'systemically important bank' seems to vary widely across the different sub-systems of the EBU. Thus, strengthening regulatory and enforcement actors at the EU level has not necessarily led to a coherent application of the Single (banking) Rulebook. This is clearly illustrated by the three case studies presented in our paper. It has already been proposed that a common approach to the systemic importance of the EBU's law should be introduced and coherently applied both in the SSM and the SRM. This would limit the scope of discretionary and divergent interpretations of the concept of systemic importance in both the SSM supervision process and the SRM resolution process, which would result in greater legal clarity, certainty and predictability of the decision-making processes of the EBU.[69]

The lack of uniform and coherent application of the EBU's law can also be traced back to the tendency called banking nationalism. This is often used as a value-neutral category, yet it can undermine the original goals of the presented EU-level reform measures. Moreover, the three case studies have made it clear that this phenomenon is also present in different country clusters of the EU, namely in founding Member States, which are otherwise the inner circle in terms of SSM and SRM. Similarly, it exists in a Member State with a relatively more minor banking sector (although still with significant banking players at the EU level) that joined the integration later and in the Hungarian system, which can be labelled as an outsider to the EBU regarding supervision/resolution.

Uniform and coherent application of the EBU law also faces legal obstacles and challenges of the nature of organizational sociology. The ECB has

68 Christopher Lamfalussy *et al*., *Lámfalussy Sándor – Az euró bölcse,* Matthias Corvinus Collegium, Budapest, 2014, pp. 165–166.

69 Iglesias-Rodríguez 2019, p. 208.

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been strengthened among the EU institutions but is inevitably dependent on the other two agencies, and it is yet to be seen how it will be able to cooperate with the third. The SRB is also trying to develop its own organizational 'self-image' alongside the ECB – even by opposing the ECB's position and relying instead on national actors. The fact that the agency is trying to find its role is also linked to the fact that, legally speaking, the status of these agencies is hardly regulated by the Treaties, so that the delegation of powers to them is still basically limited, yet their number is growing. In many cases, these agencies act as intermediaries between the EU level, national bodies, and, ultimately, market participants, even by directly implementing EU law. The uniform regulation of the internal market, which is now more than 30 years old, and the coherent application of the related legislation can also be hindered by an increasingly 'crowded' system of EU and national actors. The upcoming years will probably improve the dilemma of competence conflicts between the different actors and develop a coherent application of EBU law to give us further opportunities to celebrate anniversaries.

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Part II
Anniversary: The 100th Anniversary of the Establishment of the Magyar Nemzeti Bank (Hungarian Central Bank, 1924–2024)

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Viable Solutions for the Introduction of Digital Central Bank Money in the EU

Zsolt Bujtár[*]

Abstract

In 2023, 93 % of the world's central banks were considering the introduction of digital central bank money. This paper examines the definition of digital central bank money, its significance, possible forms and the risks of, as well as the legislative environment for its introduction in the EU. In the concluding part of the paper, the author also reviews the draft legislative package, the Digital Euro Package, published by the European Commission in June 2023, in which the legislator proposes to regulate the legal framework for the possible introduction of the digital euro. Central banks seem to provide important information only to the financial professionals. But from time to time, central banks come also in the spotlight. One such significant event could be the emergence of digital central bank money. By this article the author pays tribute to the 100-year-old Hungarian central bank, the Hungarian National Bank.

Keywords**:** CBDC, fiat money, DLT, DEAN, Digital Euro Package

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1. Introductory Thoughts

Central banks are playing a crucial role in our life by providing trust and security in our financial system. Although usually it is a financial crisis when they come to centerfold, but from time to time, central banks can

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be for other reasons as well in the spotlight. Probably one such significant event will be the introduction of digital central bank money. With this article the author pays tribute to the 100-year-old Hungarian central bank, the Hungarian National Bank.

More than 93 % of the world's central banks are actively considering the introduction of central bank digital currency (CBDC) in 2023.[1] Already in 2019, the World Bank and the International Monetary Fund (IMF) started experimenting with a pseudo digital central bank currency.[2] China has been developing and testing a digital yuan since 2014.[3] The commitment to creating digital central bank currencies is illustrated by the fact that smaller economies, with different motivations, have embarked on unsuccessful and rather dangerous attempts to introduce new types of national currencies (the Marshall Islands in 2018, creating a sovereign national cryptocurrency and El Salvador adopting bitcoin as its official currency in 2021).[4,5] In parallel with this process, major economic powers such as China, the EU, Japan and Canada, already mentioned above, have been weighing up the pros and cons of introducing central bank digital currency since the second half of the 2010s. And in 2020, the US has also entered the race to adopt CBDC with the concept of the digital dollar – with the US dollar's role as

1 Anneke Kosse & Ilaria Matta, 'Making headway – Results of the 2022 BIS survey on central bank digital currencies and crypto', *BIS Papers*, No 136, at www.bis.org/publ/bppdf/bispap136.pdf.

2 Berman Ana, *IMF and World Bank Launch Quasi-Cryptocurrency in Exploration of Blockchain Tech,* at https://cointelegraph.com/news/imf-and-world-bank-launch-quasi-cryptocurrency-in-exploration-of-blockchain-tech?

3 Joel Slawotsky, 'US Financial Hegemony: the Digital Yuan and Risks of Dollar De-Weaponization', Fordham International Law Journal, Vol. 44, Issue 1, 2020, p. 86.

4 The problems during implementation can be traced back to two causes. One is that a cryptocurrency, which enjoys greater credibility *vis-à-vis* the national currency, which will continue to function as the official currency, could be forced out of circulation, devaluing the domestic currency. Another problem arises if an independent legal entity is entrusted by the government with the issuance and management of the new currency. It is no coincidence that the IMF has warned the Marshall Islands that the risks in this case significantly outweigh the potential benefits of implementation. Cali Haan, *Marshall Islands Promotes its SOV National Cryptocurrency Development Fund at UN Blockchain Summit in New York,* at www.crowdfundinsider.com/2019/06/148086-marshall-islands-promotes-its-sov-national-cryptocurrency-development-fund-at-un-blockchain-summit-in-new-york/.

5 *See* at www.reuters.com/world/americas/el-salvador-approves-first-law-bitcoin-legal-tender-2021-06-09/.

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the world's currency in mind.[6] In June 2023, the European Commission proposed a legislative package, the Digital Euro Package, which would allow the legislator to create the legal framework for the possible introduction of central bank digital currency. In October 2023, the Governing Council of the European Central Bank announced that, following a two-year test phase, it would launch a preparatory period for the next two years.[7]

Financial technology service providers are now developing the first round of Fintech solutions for commercial banks. First, they offered cheaper digital solutions for lending, transfers and investments compared to traditional banking services. The second round of Fintech solutions brought new digital applications in the areas of regulatory compliance and insurance. The third round of Fintech services focus on blockchain technology, which typically attempt to cover and expand the full range of financial services through smart contracts and automated solutions in the context of Decentralized Finance (DeFi). While the first two Fintech solutions 'merely' cover the intermediaries of the financial system, central bank digital currency has the potential to transform the entire financial system, as the introduction of new money is not a simple change of form, but raises issues of substance beyond technological challenges, redefining the framework of monetary policy, up to the sovereignty of the national economy. The technologies used are still in their infancy, and in many cases the legislator is still in the process of developing regulation, but no state has yet implemented full regulation. Nevertheless, the global (internet-based) nature of the market means that there will be no opportunity to adopt mature technology and legal regulatory solutions, since it is precisely rapid change that may force entities into early adoption. Therefore, it is important to identify risks extensively, to use sufficiently robust (reliable) technology and to implement with caution. In addition, maintaining confidence in the financial system requires wide dissemination of information, gradual introduction, parallel operation with the maintenance of existing national currencies. This will enhance the financial freedom of less digitally literate entities, without infringing their rights, while at the same time enabling national economies to respond in a meaningful and timely manner to the

6 Shane Tews, *The potential of the digital dollar: highlights from my conversation with Jim Harper*, at www.aei.org/technology-and-innovation/the-potential-of-the-digital-dollar-highlights-from-my-conversation-with-jim-harper/.

7 *See* at www.ecb.europa.eu/press/pr/date/2023/html/ecb.pr231018~1l1a014ae7.en.html.

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challenge of introducing digital central bank money, the latter impacting significantly on their competitiveness.

Accordingly, the paper first reviews the concept of central bank digital currency and its importance in the financial system, then outlines the background to the introduction of central bank digital currency, and then describes the risks of introducing CBDC, followed by the pre-types and possible forms of CBDC. Finally, the paper will briefly elaborate on the characteristics of the digital euro that will emerge from the new legal environment created by the draft legislative package of the EU as the legal regulatory framework for the introduction of CBDC, with particular reference to anonymity and data protection.

2. Definition and Significance of Digital Banknotes and Coins

2.1. Definition of Digital Banknotes

Central bank digital currency is widely defined as central bank money in digital form, which is different from the traditional form of reserve and account balances.[8] It clearly follows from this definition, as defined by the BIS and the seven largest central banks, that central bank digital currency cannot in any way be implemented as a privately issued currency. In the case of fiat money, the State has a monopoly on the right to issue money, which it has entrusted to the central bank and which it should not give up in the future, precisely in order to exercise its monetary policy powers. Technological developments and the emergence of crypto-assets raise the possibility of a CBDC based on distributed ledger technology (DLT). However, DLT-based crypto-assets rely on an independent computer network, which, whether *proof of work* or *proof of stake,* does not allow the central bank to have full control over issuance, and thus a monopoly on issuance. The solution would be a computer network based on DLT but managed from a central office, or a similar network protected by encryption, which would operate with full control of the central bank in the future. The members of the this centrally controlled DLT network would be the primary dealers (in government securities) and those financial service providers, which authorized to deposit funds with the central bank.

8 Bank of Canada *et al.*, *Central bank digital currencies: foundational principles and core features,* Report No 1 in a series of collaborations from a group of central banks, 2020, p. 3.

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This differs from the range of privately owned digital payment instruments such as Paypal or Ripple. In the case of Ripple, the computer network is centralized, so it is no coincidence that commercial banks are keen to work with the Ripple developer community on digital domestic and international payment solutions.[9] However, the advantage of DLT can undoubtedly be exploited by creating a centralized network of central bank ownership. This solution would have the advantage over the current two-tier banking system for fiat money in that its digital nature could make it faster and more efficient than the current form of fiat money to process international payments and deliver public transfers to recipients. In addition, DLT technology could allow for a more targeted use of monetary policy instruments, both in time and among users – precisely by involving smart contracts.

2.2. The Importance of Central Bank Digital Currency

A major driver for the introduction of central bank digital currency has been the emergence of crypto-assets at the intersection of finance and technology, whose limited, but increasingly widespread, monetary functions have broken down the boundaries of national economies. These quasi-payment instruments enable almost instant cross-border payments between continents. Crypto-assets and the blockchain technology that supports them give central bank digital currency a special significance in two respects. The emergence of Facebook with over two billion users with Deum[10] (formerly Libra) as a potential global digital currency and the emergence of stablecoins such as Tether and USDC are important catalysts for the rapid emergence of CBDC. The latter, stablecoins, seek to achieve the stability of the gold monetary system, *i.e.* to dampen the significant price volatility that is typical of crypto-assets, by issuing crypto-assets in the form of stablecoin backed by a stable portfolio of foreign exchange assets or gold collateral that is considered to be of stable value.[11] (For crypto-assets,

9 *See* at https://fintechzone.hu/ripple-kriptovaluta-blockchain-deviza-atutalas/.

10 *See* at https://developers.diem.com/docs/technical-papers/the-diem-blockchain-paper/.

11 Typically, gold and silver, but in China copper and silver. Milton Friedman & Anna J. Schwartz, 'Has government any role in money' *in* Anna J. Schwartz (ed.), *Money in Historical Perspective*, Oxford University Press, Oxford, 1987, p. 295.

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daily movements of 15–20 % are not uncommon, nor is the loss of 85 % of the local peak market value within just a few months – as has been the case for Bitcoin over the past 15 years.) Stablecoins have become an attractive crypto money market asset due to their price stability (as taxable income is based on exiting the crypto-asset, so it is only advisable to exit the crypto ecosystem as a last resort). This affords stablecoins a similar role as highly liquid money market funds in the crypto-asset market, with the latter having a market capitalization (market value) of almost USD three billion. For money market funds, the unsustainable level of the assumed fixed net asset value of USD 1, as an unsubstantiated assumption, caused significant liquidity problems during the 2007–2009 crisis, threatening the global financial system.[12] This problem could reoccur with stable money in the crypto-asset market, the fundamental difference being that in this case not only is redemption at a fixed USD 1 no longer feasible, but redemption cannot take place due to a lack of sufficient liquidity. In this case, the default may be triggered by the fact that there is no full foreign exchange cover or that the foreign exchange or precious metal collateral is invested in less liquid assets than the cash and government securities in the course of the operation of the stablecoin.

The above suggests that central bank digital currency is a digital version of the current fiat money. An important difference is that it is not just a new form of electronic money in the form of CBDCs, but an implementation of digital fiat money based on blockchain or similar technology. The technological basis is in the content of the smart contracts, in particular the fact that this form permits the implementation of the pre-programmable money feature, which allows for the very rapid issuance of money and without the need for new technology, new or differently functional issuance of money (further issuance of money) in a very short time (even minutes), instead of the previous days or weeks required for postal services.

The above makes it necessary to create a competitor for this global competitor, which will be the central bank, the sole manager of the monetary

12 The bankruptcy of Lehmann Brothers on 15 September 2008 not only led to the collapse of the commercial bond market, but also to the demise of the Reserve Primary Fund, the first money market fund, with the Reserve Primary Fund failing to maintain a net asset value per unit of USD 1 for the first time on that day. On 14 October 2016, new money market fund regulations in the US came into force to prevent this false sense of security by replacing the previous fixed (USD 1) NAV calculation system with a mandatory flexible NAV calculation for institutional primary funds and tax-exempt municipal money market funds.

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policy. The other factor that raises the need for CBDCs *vis-à-vis* stablecoin is the need to maintain the dominance of fiat money instruments. This could take the form of central bank digital currency, or a set of money market instruments denominated in such currencies. Without this, there is a real risk that the predominance of decentralized (DLT-based) financial instruments could drastically reduce the effectiveness of monetary policy, which could have a destabilizing effect on the economy.

3. The Risks of Introducing Central Bank Digital Currency

3.1. The Monetary Policy Risks of Introducing Central Bank Digital Currency

Central bank digital currency presents many opportunities for monetary policy, but also new challenges. A form of CBDC without a financial intermediary (centralized CBDC), where the central bank would directly hold the accounts of all entities, including households and businesses, would be a significant administrative burden on the central bank, even with the possibilities offered by modern technology. The reintegration of commercial banks into central banks, *i.e.* a single-tier banking system, would be feasible only at considerable risk, precisely because of the diversity of the banking system and the weight of money market funds. What definitively renders this form of CBDC unfeasible is precisely the well-established system of monetary transmission in the two-tier banking system, where financial intermediaries implement elements of the central bank's monetary policy with respect to individual market participants. Financial intermediaries implement monetary policy objectives through channels such as credit and monetary aggregates, interest rates, asset prices and market interest rates. In the absence of an intermediary system, the central bank's role as lender of last resort would theoretically be fulfilled towards itself. The use of this instrument of last resort would leave scope for excessive central bank intervention: in effect, direct monetary (self-)financing of the public budget, sometimes without even a proper assessment of the risks involved.

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3.2. The Social Risks of Introducing Central Bank Digital Currency

The main risk of central bank digital currency is a loss of confidence in the financial system. This can take the form of a lack of confidence in the new currency, but also a loss of existing financial confidence.

One of the key arguments for the introduction of CBDC is its potential to involve hundreds of millions of underserved people globally. The reason why the pool of people excluded from financial services is so wide is that low-income people find it unattractive or financially unaffordable to have accounts with traditional banks, but they are also not part of the potential target market for financial service providers themselves. The problem may be exacerbated by functional or total illiteracy. However, high mobile phone penetration can provide extremely cheap access to technology, physical distance and even the ability to deal with illiteracy problems. In this segment of society, building and maintaining trust is particularly difficult, as illustrated by the challenges faced during Covid-19 vaccination. It is therefore important to gradually build and maintain this trust through the gradual introduction of a robust, reliable, identifiable CBDC in parallel with a fiat national currency.

Trust in the financial system is also fragile, especially if a currency is introduced too quickly, or is not preceded by adequate education, or where there is a failure to achieve a breakthrough in the use of the new type of money among commercial service providers and consumers.

4. Pre-types and Possible Implementations of Central Bank Digital Currency

4.1. Pre-types of CBDC

For CBDC, crypto payment instruments such as Bitcoin and Ripple can serve as a forerunner. However, these blockchain-based payment instruments are only partially competitive with today's cross-border international payment systems in terms of speed. Indeed, crypto payment instruments offer a significant competitive advantage over international instant payments, such as SWIFT-based multi-day transfers. However, with thousands of transactions per second, only the third generation crypto device Solana can compete with cashless payment systems (VISA, Mastercard, Paypal)

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with its speed of 65,000 transactions per second, which is exactly the same as the processing speed of a VISA transaction.[13]

The central banks themselves provide an example of a pre-type of digital currency with the instant settlement system RTSG.[14] In the US, the Federal Reserve wired transfer network (Fedwire) and the New York Clearing House Interbank Payment Systems (CHIPS), and in the Eurosystem, the EU's euro-based instant digital settlement system TARGET2 play this role.[15] For the EU, TARGET2 is used to settle the equivalent of the total GDP of the euro area on a weekly basis, involving nearly a thousand financial service providers. However, the fact should not be overlooked that the participants are professional financial service providers who operate the highly cyber-secure computerized system and settle in a short time and, moreover, they already have a significant trust in each other as members of a system that has been in operation for over 20 years.

4.2. Possible Forms of CBDC Implementation

Looking at the possible types of CBDC, the range of possible types is two to two variations of four aspects, so that the current number of realistically feasible alternatives is eight.[16]

There are two basic types of fiat money, according to the form in which they are presented: money in the form of an account receivable and money with a separate physical appearance (tokens). In the case of the former, although the financial settlement of the transaction takes place immediately, the actual financial settlement is only made at a later stage. An example of the former is the immediate virtual settlement of a purchase by credit card, where the funds are credited to the merchant's account only a few

13 Szilárd Márton, A Solana és a harmadik generációs blockchain hozhatja el a bitcoin végét?, at https://concordeblog.hu/2021/08/30/a-solana-es-a-harmadik-generacios-blockchain-hozhatja-el-a-bitcoin-veget/.

14 RTSG (Real Time Gross Settlement) is an instant digital settlement system developed by central banks since 1975 and now used by 90 central banks, which has been further developed to operate not only in the form of cash settlement but also in the form of securities settlement. *See* at www.bis.org/cpmi/publ/d22.pdf.

15 Steven L. Schwarcz, 'Regulating Digital Currencies: Towards an Analytical Framework', *Boston University Law Review,* Vol. 102, Issue 4, 2022, p. 1079.

16 Wouter Bossu *et al.*, *Legal aspects of Central Bank Digital Currency: Central Bank and Monetary Law Considerations,* IMF Working Paper No. WP/20/254, November 2020, pp. 9–10.

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days later. In contrast, money with its own physical appearance, like cash, is transferred to the other party either at the time of payment or in the form of a physical representation of the money (electronic data overlay). Central bank digital currency can also appear as a digital form (in the form of computer data) among the moneys with its own physical appearance, but also as a claim based on the RTSG systems mentioned above as a settlement instrument. In this respect, the account-based CBDC is embodied in the digital dollar,[17] the token-based CBDC is embodied in the digital euro,[18] while the Chinese digital yuan (Digital Currency Electronic Payment – DCEP)[19] attempts to combine the advantages of both in a part token, part account form.

There are also two types of accounting: centralized and decentralized accounting. The decentralized, non-centralized, typically blockchain-based, acceptance of central bank digital currency as legal tender already carries significant risks, mainly in terms of cyber security. Blockchain-based CBDC is feasible in a centralized form but requires an adequately secure infrastructure to be developed and operated under central bank ownership. In this respect, despite the higher initial cost, the centralized form is a realistic alternative to maintain the issuance of money and thus control over monetary policy.

In terms of issuance, the two types that can be distinguished are the single-tier, central bank-issued CBDC; and the two-tier, CBDC, the latter being created by recognizing commercial bank-issued debt as a liability of the central bank. Both versions may be relevant because of similar risks. However, in the case of a two-tier CBDC, a clear legal guarantee of full central bank commitment is needed to build confidence in the financial system for the new money, as mentioned above. As regards issuance, a third version exists in principle, where the central bank makes a full commitment to the tokens of a private issuer, but this form is only a theoretical assumption for several reasons. On the one hand, this solution would also imply a partial renunciation of monetary policy autonomy. On the other hand, the central bank would not only give up the benefits of printing money

17 Charles H. Giancarlo *et al.*, *The Digital Dollar Project. Exploring a US CBDC*, May 2020, at www.banking.senate.gov/imo/media/doc/Giancarlo%20Testimony%20Addendum%206-30-202.pdf.

18 Central Bank Digital Currencies and a Euro for the Future, A Thematic Report Prepared By The European Union Blockchain Observatory & Forum, 2021.

19 David Pan, *CoinDesk 50: How the People's Bank of China Became a CBDC Leader,* at www.coindesk.com/coindesk-50-how-peoples-bank-china-became-cbdc-leader.

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(seniorage) when setting up this CBDC, but would also lose the possibility of regulating the money supply.[20]

The fourth approach to CBDCs is to issue either general purpose or retail CBDCs or limited CBDCs based on the user base of the members of the central bank's digital clearing system (wholesale). General use goes beyond the current central bank clearing circle and could provide those excluded from financial services with access to the new currency.

From the above, we may conclude that two of the two alternatives of the four types of CBDCs are not really realistic alternatives, since the limited-use type already exists (see RTSG) and performs well in a limited range but is not suitable for attracting a large and financially excluded population. The private-issue CBDC does not yet, *de jure*, meet the conditions for becoming a legal tender and is not even suitable for implementing central bank monetary policy in the absence of full control over the money supply. However, it is also clear that a combination of the benefits of account-type CBDCs with blockchain tokens is likely needed to build and maintain financial confidence, in order to achieve broad transparency and to maximize the benefits of technology.

5. Legal Possibilities for the Introduction of Central Bank Digital Currency in the European Monetary Union (EMU)

5.1. Legal Options for the Introduction of CBDC in the EMU prior to the Digital Euro Package

The financial system of the EU, the EMU, in the absence of full accession by all Member States, presupposes the dual monetary system of the euro and the national currencies of the non-Eurozone Member States over a longer period of time. The link between the two currency groups is established by the European Central Bank: by the duality of its governing bodies (Executive Board and Board of Governors) and by the coordination of the common monetary policy and the supervision of the financial system. It is therefore necessary to talk separately about the digital euro as a single currency and the digital currencies of the non-Eurozone countries.[21] While the digital euro is in competition for the role of global currency, the CBDCs of

20 Friedman 1987, p. 295.

21 The digital euro outlined in the Digital Euro Package will be available to natural and legal persons in all EU Member States, although payment service providers from

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the non-member countries cannot participate in this competition because of their negligible economic strength. However, besides this apparent disadvantage, this also serves as an advantage in that the non-Eurozone Member States (including Hungary) can continue to pursue an independent monetary policy, which the CBDC can maintain and reinforce. In what follows, the paper first presents the general legal regulatory options for the digital euro.

When examining the EU acquis, the choice of primary EU law on which to base the CBDC issuance depends on the form of the digital euro and the purpose of its issuance.[22] If the digital euro were to be issued with a limited scope of use, *i.e.* only available to central bank customers, the Eurosystem could invoke the TFEU chapter on monetary policy as a legal basis, according to which the ESCB (European System of Central Banks) is responsible for the definition of monetary policy and the smooth operation of the payments system.[23]

If the digital euro were to be issued by the ESCB as a two-tier and general retail CBDC, *i.e.* issued through accounts held at the Eurosystem and thus also available for use by households and private entities, the legal basis in the Eurosystem would also be the primary legislation governing the ECB's operations.[24] The legal basis for the two-tier issue would be the provision on clearing and payment systems in the Statute of the ESCB and the ECB.[25]

If the digital euro were to be created in a centralized form for the clearing system and to have a limited use, *i.e.* to be issued only as a means of settlement for specific types of payments, processed by a dedicated payment infrastructure accessible only to eligible participants, the most appropriate legal basis would again be primary legislation[26] and the provision on clearing and payment systems in the Statute of the ESCB and the ECB.[27]

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non-euro area Member States will be subject to the rules set out in the Digital Euro Package, thus ensuring full protection against money laundering and terrorist financing. *See* Proposal for a Regulation of the European Parliament and of The Council on the provision of digital euro services by payment services providers incorporated in Member States whose currency is not the euro and amending Regulation (EU) 2021/1230 of the European Parliament and the Council Preamble, Sections 4–5.

22 European Central Bank, *Eurosystem: Report on digital euro,* November 2020, pp. 24–26.

23 Article 127(2) TFEU.

24 Id.

25 TFEU, Protocol No. 4, Article 17.

26 Article 127(2) TFEU.

27 TFEU, Protocol No. 4, Article 22.

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If and when the digital euro is issued as an equivalent to a banknote, *i.e.* as a token-type CBDC, the most appropriate legal basis for issuance would no longer be the above-mentioned legislation, but the TFEU provision on the ECB's and national central banks' monopoly on the issuing of banknotes,[28] again, in conjunction with the Statute of the ESCB and the ECB.[29]

On the basis of the above, it can be concluded that the TFEU provision on the monopoly for banknote issuance[30] and the reference to it in the banknote issuance provisions of the Statute of the ESCB and the ECB[31] would give the Eurosystem a very wide margin of discretion to issue different types of CBDCs.[32] It is also important to note that within the Union, only the Governing Council of the ECB is empowered to authorize the issue of euro banknotes. Given the ECB's independence, it cannot be obliged to do so by any other EU institution, and therefore only this ECB body can decide on the introduction of CBDCs.[33] Since the ECB and the national central banks are entitled to issue banknotes accepted as legal tender, the TFEU's monopoly on banknote issuance does not allow for the introduction of private tokens as legal tender with a central bank commitment, nor the central bank commitment necessary for becoming a CBDC.[34]

It can be concluded from the above that all eight possible forms of central bank digital currency could have been included in the euro by amending central bank regulations[35] even before launching the Digital Euro Package.

28 Article 127(2) TFEU.
29 TFEU, Protocol No. 4, Article 16.
30 Article 128(1) TFEU.
31 TFEU, Protocol No. 4, Article 16.
32 European Central Bank 2020, pp. 24–26.
33 Article 128(1) TFEU.
34 Zsolt Bujtár, 'A digitális jegybankpénz bevezetésének kihívásai Magyarországon és az Európai Unióban' *in* Bence Kis Kelemen & Ágoston Mohay (eds.), *A technológiai fejlődés jogi kihívásai: Kézikönyv a jogalkotás és jogalkalmazás számára*, PTE ÁJK, Pécs, 2021, pp. 34–36.
35 Article 128(1) TFEU and Article 16 of Protocol No. 4 on the Statute of the European System of Central Banks and of the European Central Bank.

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5.2. A Stand-alone Digital Euro Package as the Next Step in the Regulatory Process

In October 2023, the Governing Council of the European Central Bank announced the start of a preparation phase of two years following the two-year investigation phase.[36]

The aim of this preparation phase is to lay the foundations for a possible digital euro: by finalizing the rulebook and selecting the service providers that will develop the digital platform and defining the development framework for the infrastructure that will operate and support the digital euro.

In support of this process, the European Commission published a legislative package proposal, the Digital Euro Package, in June 2023. The legislative package consists of a Regulation establishing the legal framework for a possible digital euro (Proposed Digital Euro Regulation), a Regulation on the provision of digital euro services by payment services providers incorporated in Member States whose currency is not the euro and a Regulation on the legal tender of euro coins and banknotes (Proposed Legal Tender Regulation). In the legislative process, the European Central Bank would have the possibility, after approval by the European Parliament and the Council, to introduce a digital euro market alongside the current euro fiat money, if and when the European Central Bank takes a positive decision.[37]

Looking at the legal framework, it is important to note that the European Commission's Digital Euro Bill proposal takes into account not only the existing PSD2,[38] but also the amendments to the Payment Services Directive 3 (PSD3) and Payment Services Regulation (PSDR), which will enter into force later. It further takes account of the Directive on the prevention of the use of the financial system for the purpose of money laundering or terrorist

36 *See* at www.ecb.europa.eu/press/pr/date/2023/html/ecb.pr231018~1l1a014ae7.en.html.

37 *See* at www.cliffordchance.com/content/dam/cliffordchance/briefings/2023/07/what-does-the-european-commissions-digital-euro-proposal-mean-for-the-future-of-money-in-the-eu.pdf.

38 Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC.

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financing (AMLD5)[39] and the amendments to the AMLD6 and AMLR, which are expected to enter into force later.

5.2.1. Characteristics of the Digital Euro

Following the completion of the European Central Bank's test phase for the introduction of the digital euro in 2023, the main characteristics of a potential digital euro have been summarized at the end of the preparation phase:[40] widely accepted and easy to use; free for basic use; usable for any digital payment in the euro area; not requiring an online connection (it can also be used offline); offering the highest possible protection of privacy; inclusive, leaving no one behind; settling payments instantly; secure; risk-free (just like money issued by the central bank); usable for payments at the point of sale and person-to-person.

From among the above, three important factors need to be highlighted. First and foremost, the digital euro will also be a currency issued and accepted by the European Central Bank and, if approved, will be equivalent to the euro banknotes and coins currently in circulation.[41] The second most important factor is that it will provide its users with the highest level of data protection.[42] Finally, it will also be directly usable offline up to a pre-loaded limited amount of money.[43] It can be concluded from the above and from the summary of the preparation phase that the digital euro will be retail in terms of users, decentralized in terms of settlement, tokenized in terms of appearance and centralized in terms of issuance, with strong cryptographic elements, but not necessarily using DLT technology.

39 Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU

40 *See* at www.ecb.europa.eu/euro/digital_euro/investigation/profuse/shared/files/dedocs/ecb.dedocs231018.en.pdf, p. 3.

41 European Central Bank, *A stocktake on the digital euro,* Summary report on the investigation phase and outlook on the next phase, 18 October 2023, p. 8.

42 "[T]he settlement infrastructure would not be able to trace the information to back a specific user thanks to hashing and other cryptographic techniques." Id. p. 39.

43 Id. pp. 11–14.

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5.3. Data Protection Aspects

Of the digital central bank currencies, the Chinese is considered the most likely competitor to the digital euro, but the Chinese central bank digital currency is also noteworthy for being the one that is closest to widespread adoption. According to Zetzsche *et al.*,[44] one of the two systemic catalysts for central bank digital currency is precisely the Chinese central bank digital currency. The Chinese central bank set up a research group almost 10 years ago, in 2014, to study the feasibility and practical use of central bank digital currency.[45] And in 2019, the Digital Currency/Electronic Payment (DCEP) was tested, albeit on an experimental basis.

The Chinese central bank research team's summary[46] identified the need for a retail payment instrument as the reason for the creation of the DCEP, namely a digital payment instrument that is secure, inclusive and capable of meeting the needs of the digital age. Consequently, the DCEP has a dual role as a digital currency: in addition to its digital form (Digital Currency), it also serves as an Electronic Payment.[47]

A DCEP is both an account and a token, *i.e.* a hybrid form that can have different denominations and is created through a series of crypto-assets.[48] This latter fact allows us to assume that DCEP is DLT-based, as this is not explicitly discussed in the DCEP White Paper.

Despite advanced testing, DCEP still faces serious barriers in international financial markets. Just as the spread of the traditional version of the Renminbi is hampered by capital controls, a virtually fixed exchange rate

44 Dirk Andrea Zetzsche *et al.*, 'Sovereign Digital Currencies: The Future of Money and Payments?', *University of Hong Kong Faculty of Law Research Paper,* No. 2020/053, p. 5.

45 Mahima Duggal, *The Dawn of the Digital Yuan: China's Central Bank Digital Currency and Its Implications,* Institute for Security and Development Policy, Stockholm-Nacka, 2021, p. 20; Michael A. Peters *et al.*, 'Cryptocurrencies, China's sovereign digital currency (DCEP) and the US dollar system', *Educational Philosophy and Theory,* Vol. 54, Issue 11, 2022, pp. 1713–1719.

46 People's Bank of China, *Progress of Research & Development of E-CNY in China*, Working Group on E-CNYE Research and Development of the People's Bank of China, July 2021, at www.pbc.gov.cn/en/3688110/3688172/4157443/4293696/20210716145846918 71.pdf, 3.2, p. 8.

47 Id. p. 3.

48 Id. 3.2.1, p. 7.

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regime and the fragmented nature of the money and capital market,[49] the same constraints apply to central bank digital currency.

In the case of DCEP, another factor that hinders trust is the perceived or real lack of anonymity. The PBOC has committed not to disclose data to third parties and to provide dedicated staff for data management and a firewall to implement security and privacy procedures.[50] However, this may not be sufficient to exclude access by the state to data generated by the use of the DCEP, which may later serve as a basis for, or be a part of financial behavior models.

The European Central Bank's anonymity project[51] has been investigating the creation of a CBDC issued by the central bank with cash-like characteristics, using a two-tier control structure that is partially anonymous and ensures the combating of money laundering and the fight and against the financing of terrorism. This is important because it will enable it to offer a secure solution, in line with the legislation in force (and in particular with the legislation in preparation to combat money laundering and terrorist financing – see above), which will help build and maintain trust. This latter trust is important for two reasons, not only to ensure that end-users actually use the digital euro, but also to ensure that it is capable of expanding the monetary toolbox.

User data protection is already well supported by the digital euro infrastructure through the use of chip technology[52] and by specifically limiting the use of data by payment service providers.[53]

The digital euro will be available to a wide range of end-users following the onboarding process after the introduction of the digital euro, who will either be natural persons or business users. Onboarding is the process when an end-user uses the digital euro for the first time. For natural person end-users, when they first interact with a payment service provider with the digital euro, the payment service provider will carry out the identification

49 Eszter Boros & Marcell Horváth, 'Digitális renminbi: szintlépés az USA-Kína geopolitikai versengésben?' *in* Ádám Banai & Benjámin Nagy (eds.), *Egy új kor hajnalán – pénz a XXI. században*, Magyar Nemzeti Bank, Budapest, 2021, pp. 68–94.

50 People's Bank of China 2021, 3.2.5, p. 7.

51 European Central Bank, Exploring anonymity in central bank digital currencies, 2019/4, pp. 10–11.

52 "A tamper-proof chip with pre-installed software that can store confidential and cryptographic data and run secure applications." European Central Bank 2023, p. 13.

53 "[…] the settlement infrastructure would not be able to trace the information to back a specific user thanks to hashing and other cryptographic techniques." Id. p. 39.

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process by adding the KYC function and assigning a unique digital euro account number (DEAN) to the new end-user.[54] In addition to the latter, it will also be possible to use other identifiers and to request a physical card, and access to the digital euro application for each online and offline transaction will be granted to the new natural person who joins the digital euro as a completion of the onboarding process.

For business users, the above process can be carried out by issuing several DEANs for several service contracts. An extension of the service is also offered, allowing the use of digital euros at POS or virtual terminals and access to digital euros.[55]

The above processes are important from the perspective of data protection because only a limited amount of data is required to process payment transactions. The ECB's anonymity project has also identified additional data protection options (such as rotating public keys, zero-knowledge proof and enclave computing) for the use of shared ledger technology in digital euro payments.[56] For offline transactions, due to their small amount, the legislator would require an even lower level of identification, similar to small cash transactions.[57]

In the case of the digital euro, offboarding is also an important part of the end-user's process of using the digital euro.[58] This is when the digital euro balance is transferred to the end-user's bank account. Before the application that enables the use of the digital euro payment service would become unavailable, it will be necessary to remove the possibility of incoming and outgoing digital transactions that are pending or ongoing, similar to a payment account closure in the current practice.

Inclusiveness is an important objective and feature of the digital euro, as it is for central bank digital currencies in general. The access of potential end-users to traditional banking service providers is more limited due to limited geographical and educational access on the Asian and African continents. Nevertheless, in the case of the digital euro for end-users, the European Central Bank intends to make payment by app available to those for whom traditional banking is too expensive or unavailable and thus to ensure the possibility of using the digital euro for payments between

54 Id. pp. 19–20.
55 Id. p. 20.
56 Id. p. 11. European Central Bank 2019.
57 Proposal for a Regulation of the European Parliament and of the Council on the establishment of the digital euro, Article 37.
58 European Central Bank 2023, pp. 21–22.

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natural persons and business service providers, between natural persons and natural persons, and between public authorities and natural persons.

6. Conclusion

The study explored the drivers for the introduction of central bank digital currency and, after presenting its background, the paper elaborated on the possible theoretical alternatives of a central bank digital currency that is also fit for the challenges of the digital age. Finally, the author examined the legal environment of the digital euro, noting that the possibilities for the introduction of the digital euro were already available before the Digital Euro Package of 2023. The Package makes a clear proposal for a retail-like centralized CBDC, maintaining and even expanding the infrastructure for the operation of the digital euro to digital payment service providers. This is implemented in such a way that data protection and anti-money laundering considerations are also given high priority. The ECB is not expected to take a decision on the introduction of the digital euro until the end of 2026 at the earliest, after a further two-year assessment period.

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The Main Characteristics of Central Bank Regulation in the Light of Universal Developments

Zsolt Pfeffer[*]

Abstract

Central banks play a prominent role in the lives of various nations and their economies. They were created in different political, legal and economic environments in each country, their development and legal regulations were closely intertwined with state arrangements and government structures. A fundamental question arises as to what basic common characteristics can be determined in the development history of central banks. Legal sources for central banks, issues of state transformation, financial sovereignty, the financial relationship with the state or central bank independence can be mentioned as common regulatory elements and foundations that can be used to describe the special status, legal basis and role of these banks. The study presents these main issues through historical examples.

Keywords**:** central bank, financial sovereignty, central bank independence, National Bank of Hungary, central bank privileges

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1. Introductory Thoughts

The establishment of the National Bank of Hungary (MNB) in 1924 was an important milestone in Hungarian history, as well as financial and banking history. Although the idea of an independent Hungarian banknote-issuing national bank arose much earlier, its establishment in the 1840s "[…] encountered an insurmountable obstacle on the rock bastion of the royal will, and the nation's desire for this remained unfulfilled". This, notwithstanding the fact that "[…] the national, *i.e.* banknote-issuing banks were already the most abundant sources of credit for people around the world at that time."[1] The importance of such a bank can be understood when taking a look at its definition: "A central bank is a bank set up to handle government trans-

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1 Miksa Faragó, *A Kossuth-bankók kora: a szabadságharc pénzügyei*, Nyugat, Budapest, 1912, pp. 5–6.

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actions, coordinate and regulate commercial banks, and most importantly, regulate the country's money supply and credit."[2]

Different countries followed different paths when establishing their central banks,[3] according to their historical, state development, political and financial situation. In the literature, two central bank formation models are usually distinguished: the classical path and the Prussian path. The former is characterized by a central bank that is relatively independent, but later comes under state control, while in the case of the Prussian path, the close relationship with the state is emphasized. The creation of the English, French and Swiss central banks can be classified as following the classical model, while the development of the Russian and Austrian central banks followed the Prussian path – apart from the eponymous bank.[4]Financial, political and economic crises are particularly important in central bank establishment processes. On the one hand, "Financial crises can also encourage the establishment of central banks. For example, Sveriges Riksbank and the Bank of Japan were once expected to cope with chaotic domestic financial markets."[5] The founding of the Austrian National Bank in 1816 can also be mentioned in this context, since this bank "was born in the context of state bankruptcy",[6] while according to György Kövér, it was "typically destined for the role of a state banker".[7] On the other hand, in many cases, the financing needs of public finances called into being the institutions exercising central banking functions in the given country. In this respect, the Bank of England, founded in 1694, or the Banque de France, founded in 1800, can be mentioned. Budget demands aimed at ensuring the financial coverage of various war efforts were of decisive importance. "The Bank of England was thus created as a way to serve the military interests of

2 Paul Samuelson, *Közgazdaságtan*, Közgazdasági és Jogi Könyvkiadó, Budapest, 1976, p. 396.

3 *See also* for the (central) bank history: Sándor Matlekovits, *Nemzetgazdaságtan. A jogtanulók igényeihez igazítva,* Eggenberger, Budapest, 1874, pp. 523–536.

4 Sándor Ligeti, 'A központi bankok önállósága a tőkésországokban', *Közgazdasági Szemle*, Vol. 28, Issue 4, 1981, p. 454.

5 Han Miaio, *Central Bank Regulation and the Financial Crisis. A Comparative Analysis,* Palgrave Macmillan, London, 2016, p. 16.

6 Ágnes Kovácsné Sipos, *A jegybanki függetlenség fejlődéstörténetének vizsgálata a XVIII. századtól napjainkig*, Budapesti Gazdasági Főiskola, Budapest, 2014, p. 66.

7 Id.

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the British Empire."[8] The direct precursor to this was the decisive defeat suffered by the English naval fleet from King Louis XIV of France in 1690, necessitating the acquisition of funds from the state for its reconstruction.[9] In exchange for the loans, Parliament granted the right to issue new notes and to manage government deposits, later restricting the establishment of larger banks, thereby narrowing the opportunities for competition among banks and investors.[10] So, in exchange for loans and financial support, they received state-enforced competitive advantages and restrictions on competitors in services,[11] all the while the bank owed allegiance to the state.[12] This 'loyalty' was important because banking patents and privileges were granted for a specific period,[13] thus requiring renewal from time to time until the amendments introduced by the 1844 regulation appeared.[14]So initially, the 'bank of the state' function was dominant, in contrast with the role of the 'bankers' bank'.[15] In this early stage, selected banks, which were competitors of commercial banks, increasingly performed commercial and modern central banking tasks. In the 18th and19th centuries, within a state's territory, not just one bank held the right to issue banknotes; for example, in the US, with due consideration to the absence of a federal, unified central banking structure, by the 1880s, more than two thousand banks issued banknotes, but by the turn of the century, this number had increased to fifty-six thousand.[16] "The right to issue banknotes is important,

8 Scott N. Duryea & William Pitt, 'The Bank of England, And the 1797 Suspension of Specie Payments: Central Bank War Finance During The Napoleonic Wars', *Libertarian Papers*, Vol. 2, Art. No. 15, 2010, p. 2.

9 Michael Littlewood, 'John Tiley and the Thunder of History' *in* Peter Harris & Dominic de Cogan (eds.), *Studies in the History of Tax Law*, Vol. 9, 2019, pp. 67–68.

10 Duryea & Pitt 2010, pp. 2–4. *See also* regarding American development "The greatest source of the Bank's power was its role as the depository of government funds. All federal revenues including those form tariff receipts and federal land sales went into the Second Bank's vaults. This gave it an immense advantage over all other banks in the nation." Sharon Ann Murphy, *Other People's Money: How Banking Worked in the Early American Republic*, Johns Hopkins University Press, 2017, p. 5.

11 J. Lawrence Broz & Richard S. Grossman, 'Paying for privilege: the political economy of Bank of England charters, 1694–1844', *Explorations in Economic History,* Vol. 41, Issue 1, 2004, pp. 50 and 58.

12 Duryea & Pitt 2010, pp. 2–4.

13 Id.

14 Broz & Grossman 2004, pp. 50 and 58.

15 Alexander Thiele, 'The Independence of the ECB' *in* Thomas Beukers *et al., The New European Central Bank: Taking Stock and Looking Ahead,* Oxford University Press, Oxford, 2022, pp. 238–239.

16 Kovácsné Sipos 2014, p. 237, in footnote 601.

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but alone is not sufficient for the central, special position of a national bank."[17] By the turn of the 20th century, a significant milestone in central banking development took place for most European central banks, wherein they enjoyed unrestricted monopolies in banknote issuance within their respective countries. Initially, central banking and commercial banking functions were not distinct; in exchange for royal privileges, selected banks assumed the role of financing the state budget.[18] As the responsibilities of central banks expanded in the 19th and 20th centuries, these banks gradually transitioned from being the 'bank of the state' to becoming the 'bankers bank'. This process was accelerated when they acquired the monopoly on banknote issuance. Central banks primarily became responsible for money supply and fulfilling the role of the lender of last resort, with an emphasis on maintaining price stability.[19] This meant that central banks, as non-profit-seeking institutions, refrained from competing with other commercial banks in their own business activities.[20] Consequently, the question of central bank independence became crucial, as these tasks could be more efficiently carried out by eliminating dependencies on the government,[21] unlike the previous role when the government relied on privately-owned banks endowed with exclusive rights and competitive advantages.

The National Bank of Hungary (MNB) was established in 1924 and celebrates its 100th anniversary in 2024. This milestone offers an opportunity to review the fundamental legal, financial, and political questions regarding the establishment of central banks, to examine whether there are common universal legal solutions and characteristics that define the establishment and operation of central banks.

2. Common Characteristics of Legal Regulations

The first common characteristic is the emergency situation leading to the establishment of the central bank. In the case of the emergence of central banks in England and France, the primary reason to establish and operate

17 Id. pp. 152–153.
18 Id. p. 262.
19 Thiele 2022, pp. 238–239.
20 Dieter Ziegler, *Zentralbankpolitische "Steinzeit"? Preußische Bank und Bank of England im Vergleich Geschichte und Gesellschaft*, Vergleichende Unternehmensgeschichte, Vol. 19, Issue 4, 1993, p. 477.
21 Thiele 2022, pp. 238–239.

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wartime financing mechanisms. A notable feature in the case of the Bank of England is that in 1694, the securities of creditors providing loans to the crown were linked to state revenues, effectively tying up royal resources as collateral. This arrangement was facilitated by a tax law, the Tonnage Act, providing the necessary legal framework.[22]

The second fundamental issue is that of legal sources. The primary legal source is legislation, which can recognize the right to issue banknotes and regulate the legal tender. The establishment of the Bank of England is interesting because, in a unique manner, its recognition occurred through a tax law (the Tonnage Act) due to its aforementioned collateral nature, making the duration of taxation important. These taxes were imposed for a period of four years, requiring the monarch (King William III) to convene Parliament for their renewal, as otherwise, he would have been left without funds. Thus, periodically, the monarch had to turn to legislature, a solution that mitigated the risk of an autocratic exercise of power. One cornerstone of modern constitutional thinking remained that the executive power was tied to the legislature in ensuring adequate financial resources.[23] The 1742 law was the first renewing act ('rechartering act') that was not associated with a tax law.[24] However, the starting point was a charter received by the Bank on 27 July 1694. This was subsequently confirmed by a separate law; its temporal validity was for a definite period, from 1 August 1694, to 1 August 1705,[25] and, as will be discussed below, it had to be periodically renewed before expiration. In addition to laws as legal sources, royal privileges and decrees were also prominent, as seen in German history in the 18th century. For instance, on 23 September 1753, Frederick the Great issued a significant charter *(Octroy für die in Berlin errichtende Giro- und Wechsel-Banque)* containing substantial privileges for a newly established bank. While initially prosperous, due to problems and merchant distrust, a royal decree on 17 December 1764, ordered the dissolution of the shareholders'

22 Anson Willis, *Our Rulers and Our Rights: or, Outlines of the United States Government; its Origin, Branches, Departments, Institutions, Officers, and Modes of Operation*, 1863, p. 224.

23 Littlewood 2019, pp. 69–70.

24 Richard S. Grossman, *Unsettled Account. The Evolution of Banking in the Industrialized World Since 1800*, Princeton University Press, Princeton, 2020, p. 172.

25 James John Wilkinson, *Relating to the Public Funds; & the Equitable & Leg Remedies with Respect to Funded Property; including the Practice by Distringas, & under the Statutes 1 & 2 Vict. c. 110,* Saunders & Benning, London, 1839, p. 33.

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committee.[26] Consequently, the next milestone was the establishment of the Royal Bank on 17 June 1765[27] *(Königliche Giro- und Lehnbank),* which operated as a state institution with a complete, independent administration, while benefiting from royal guarantees and privileges.[28]

Just as the enactment of a law can be significant, so too can its absence be noticeable and grievous for a nation. In the first half of the 19th century, both in Austria and Hungary, the banknotes of the Austrian National Bank were in circulation, although their legality was not recognized by the Hungarian Parliament, and their 'patent was not sanctioned'. However, due to lack of sufficient strength, Hungary had to acquiesce to this situation, and this stance was 'repaid' by Austria by not providing adequate branch networks or redemption options in Hungary.[29] Financial sovereignty and prerogatives fundamentally mean that a state can freely decide, among other things, on the unit of account, the issuance of banknotes and coins,[30] declaring them legal tender, set penalties for counterfeiting, prohibit the use of foreign currencies within the territory, and regulate the banking system, value, and money supply.[31] (This is just one possible approach; in the literature, the elements of financial sovereignty are defined in various ways.)[32] In the absence of, or in case of a limitation of financial sovereignty, legislative powers are not fully comprehensive, and financial measures can cause serious grievances, such as the unilateral decision made by the Austrian ruler in 1811 to devalue the circulating banknotes, resulting in a reduction of their value by one-fifth. The legality of these actions was

26 *Jahrbuch für die amtliche Statistik des preussischen Staates, Vol. 2,* Statist. Bureau, 1867, p. 28.

27 László Gerő *et al., Közgazdasági Enciklopédia III. kötet,* Jacini-Müller, Athenaeum Irodalmi és Nyomdai Részvénytársulat Kiadása, Budapest, 1930, pp. 33–34.

28 *Jahrbuch für die amtliche Statistik des preussischen Staates, Vol. 2,* Statist. Bureau, 1867, p. 28.

29 Miksa Faragó, *A Kossuth-bankók kora: a szabadságharc pénzügyei*, Nyugat, Budapest, 1912, pp. 6 and 12.

30 "Clearly the only person who can declare tokens to be 'legal tender' is the individual who can compel everyone to obey the rules. We call this person 'the sovereign' (or if it is an institution we call the institution the 'sovereign power.'" Julia Hoyle & Geoffrey Whitehead, *Elements of Banking: Made Simple*, Heinemann, London, 1987, p. 13.

31 Christoph W. Herrmann, 'Play Money? Contemporary Perspectives on Monetary Sovereignty' *in* Rebecca Adler-Nissen & Thomas Gammeltoft-Hansen, *Sovereignty Games: Instrumentalizing State Sovereignty in Europe and Beyond*, Springer, 2008, p. 67.

32 *See e.g.* Gábor Horváth, 'Monetáris szuverenitás és digitális jegybankpénz', *Pénzügyi Szemle,* 2022/4, pp. 540–544.

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questionable as they were carried out without the knowledge and consent of the estates. Although the king has the prerogative of coinage, the right to issue bad banknotes is not included. The government's devaluation system amounted to nothing more than a tax increase lacking legal legitimacy, as it disregarded the constitutional right of the estates to offer or refuse tax concessions.[33]

Generally, constitutions institutionalize central banks, which may contain the most important relevant rules – including independence where applicable – but legally, this is not indispensable. However, if a constitution contains overly detailed rules for banks and the monetary system, and these are further detailed in separate laws, this may result in confusion rather than improvement[34] of bank relations. Therefore, it must be carefully considered which provisions should actually be formulated at the constitutional level, if the constitutional power deems it justified to incorporate them into the constitution's text at all. Yet, even constitutional protection does not provide a complete guarantee, especially regarding independence, as law and reality can diverge; hence, efforts must be continuously made to maintain independence. As Kenneth Rogoff put it,

> "As anyone who has worked at a central bank understands, central bank independence is rarely granted by constitutional decree, and even where it is, the letter of the law has little meaning if political support is lacking. In reality, central bank independence is fragile, and something that has to be earned every day. […] To maintain their relevance, and to protect the independence of monetary policy during a period of growing populism, central bankers cannot afford to sit on their laurels."[35]

In the case of the European Central Bank, there is also a 'constitutional' basis to be examined, as it may be argued that the relevant European Union treaty could be considered a constitution in formal, substantive, and subjective terms.[36]

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33 Gyula Kautz, *A nemzetgazdasági eszmék fejlődési története és befolyása a közviszonyokra Magyarországon*, Heckenast Gusztáv, Pest, 1868 (reprint 1987), pp. 194 and 202.

34 Iván Szentiványi, *Bankjog*, Közgazdasági és Jogi Könyvkiadó, Budapest, 1988, p. 51.

35 Kenneth Rogoff, *Is This the Beginning of the End of Central Bank Independence?*, The Group of Thirty, Washington D.C, 2019, p. 19.

36 Philip Brentford, 'Constitutional Aspects of the Independence of the European Central Bank', *International and Comparative Law Quarterly*, Vol. 47, Issue 1, 1998, pp. 75–79.

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Among legal sources, another significant legal feature is the temporal limitation of authority. In English legal development, the original law set the duration of privileges for 11 years, with the government having the option to decide, with a one-year notice period, to repay the loan and withdraw the privileges. However, this did not occur, and accordingly, between 1694 and the last Continuance Act in 1844, Parliament renewed them nine times. The obligation to renew resulted in periodic renegotiation, ensuring that the parties remained mutual 'hostages' to each other.[37] Interesting conclusions can be drawn from the fact of how much earlier before the expiration of privileges they accepted the extension. Out of the nine occasions, four were accepted one year or less before the expiration, while in other cases, longer periods remained (five, eight, eleven, twelve, or nineteen years). Therefore, if the privileges were not renewed before expiration, the bank lost its status as a central bank, but could continue to operate as a private bank. For example, the First Bank of the United States was authorized for 20 years in 1791, but there was debate over its extension, and it was ultimately not renewed and expired in 1811. Similarly, the Second Bank of the United States received rights for 20 years[38] in 1816, but these were not renewed in 1836, it thus operated as a private corporation until its dissolution in 1841.[39]

So, the central bank's legal status and privileges depended on the government's decision and were valid essentially for a specified duration. It is worth noting that such regulatory models based on a definite period existed in the 20th century, also during the interwar period. In Hungary, for example, the establishment of the National Bank of Hungary was for a period of 20 years according to Act IV of 1924. This Act granted the patent, *i.e.* the exclusive right to issue banknotes, whose extension was requested by the National Bank of Hungary assembly in 1938. Therefore, the Hungarian Parliament (the National Assembly) passed the relevant law[40] in that year, considering that

37 Broz & Grossman 2004, p. 58.

38 On the constitutionality of this, *see* the US Supreme Court in *McCulloch v Maryland*, 17 U.S. 316 (1819).

39 Michael Coblenz, 'The Fight Goes on Forever: Limited Government and the First Bank of the United States', *Southern Illinois University Law Journal*, Vol. 39, 2015, pp. 407–441; *see also* Cynthia Clark (ed.), *The American Economy: Essays and primary source documents,* ABC-Clio, Oxford, 2003, pp. 22–23.

40 Act XXV of 1938 on the amendment of Act V of 1924, detailed explanation attached to Article 1.

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> "Generally, an essential prerequisite for a successful central bank policy is the systematic planning and determination of leadership for an extended period, which cannot be achieved if there is uncertainty as to whether the central bank can continue its operations after the expiration of the initial privilege."[41]

One cornerstone and the 'Holy Grail'[42] of central bank regulation is central bank independence, which has a vast literature, considering that "The history of central banks is the history of various conflicts with governments."[43] According to Csontos, "[f]rom an economic perspective, central bank independence first and foremost means that the central bank does not have to perform fiscal or quasi-fiscal tasks," but it does not mean that "the central bank can do whatever it pleases,"[44] as state within a state situations can lead to anomalies.[45] Accordingly, the theoretical starting point for central bank independence is that the government transfers certain economic policy (financial policy) powers to a financial institution (bank) it selects or creates, and in order to prevent short-term, politically motivated, but later harmful, government economic policies with inflationary consequences, it ensures the legal and political conditions for the central bank's independence. The question of central bank independence has a specific history, it is possible to examine in which areas what rights are granted to central banks by the legal regulations.[46] The question of central bank independence cannot be examined without considering the political and ideological environment. For example, the communist systems (parties) exhibit tendencies of power concentration which naturally seals the fate of central bank independence, and is supported by the necessary ideological argumentation. Iván Szentiványi wrote in 1977 in line with the spirit of the time, "[i]n the case

41 Act V of 1924 on the establishment and patent of the Magyar Nemzeti Bank, Act XXV of 1938 on the amendment and addition of Act V of 1924.

42 Paul Wachtel & Mario I. Blejer, 'A Fresh Look at Central Bank Independence', *Cato Journal,* Vol. 40, Issue 1, 2020, pp. 118–119.

43 Sándor Ligeti, 'A központi bankok önállósága a tőkésországokban', *Közgazdasági Szemle*, Vol. 28, Issue 4, 1981, p. 454.

44 László Csontos, 'Mire szolgál és mit jelent a jegybank függetlensége?', *Beszélő*, Vol. 5, Issue 1, 1996, p. 49.

45 *See e.g.* about the German situation after World War I: Carl-Ludwig Holtfrerich, 'Monetary policy in Germany since 1948: national tradition, international best practice ideology?' *in* Jean-Philippe Touffut (ed.), *Central Banks as Economic Institutions,* Edward Elgar Publishing, Cheltenham, 2008, p. 24.

46 Kovácsné Sipos 2014, pp. 261–272.

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of central banks... it is common for supervision and control to be the responsibility of the highest state administrative authority (Cabinet or its equivalent)."[47] Vladimir Lenin expressed that the financial oligarchy uses monetary circulation to intensify the exploitation of the working masses, devalues real wages through excessive money issuance, and the working class has no means to prevent this. His words were summarized as:

> "In the central banks of modern capitalist states, a handful of capitalists act at their whims. They engage in all sorts of possible and impossible machinations with money to increase their profits."[48]

Another viewpoint worth quoting is that of Yevgeny Preobrazhensky, who stated that banknote printing is like a "machine gun in the capable hands of finance, with which one can fire at the backside of the bourgeois order."[49] However, even in democratic states, interventionist intentions are not unheard of – despite being prohibited by legal regulations. For example, during election campaigns, various requests may arise from the government, especially if high unemployment rates are negatively impacting the candidate's (re)election chances. According to evidence from the so-called Nixon tapes, Richard Nixon, the President of the US, exerted pressure on Arthur Burns, the then-chairman of the Federal Reserve System, to pursue an expansionary (stimulative for the economy, but inflationary) monetary policy before the 1972 election. It seems that the pressure worked, and "Nixon was re-elected, but as they say, the rest is history."[50] All of this is related to the fact that politicians are interested in gaining and maintaining voter trust to achieve reelection. Various welfare expenditures, tax cuts, and investments increase prosperity, but a demand shock not only boosts economic performance but also inflation. Thus, long-term interest in price

47 Id. p. 30.

48 Genrikh Abramovich Kozlov, *A pénz és a pénzforgalom elmélete*, Pénzügyminisztériumi Lap- és Könyvkiadó Vállalat, Budapest, 1951, p. 75.

49 Niall Ferguson, *A pénz felemelkedése. A világ pénzügyi történelme,* Scolar Kiadó, Budapest, 2010, p. 109.

50 Jerry L. Jordan & William J. Luther, 'Central bank independence and the Federal Reserve's new operating regime', *The Quarterly Review of Economics and Finance,* Vol. 84, May 2022, p. 511. *See e.g.* Nixon's statement below "I know there's the myth of the autonomous Fed […] [short laugh] and when you go up for confirmation some Senator may ask you about your friendship with the President. Appearances are going to be important, so you can call Ehrlichman to get messages to me, and he'll call you." Christina Parajon Skinner, 'Central Bank Activism', *Duke Law Journal*, Vol. 71, Issue 2, 2021, p. 310.

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stability is not aligned with short-term political interests, which justifies entrusting the issue of price stability to an institution outside the government structure, namely, the central bank.[51] Additionally, theories and research on the political business cycle describe the phenomenon where politicians make various short-term decisions aligned with electoral cycles to secure their reelection. William Nordhaus and Edward Tufte, for example, assume that voters are naive, with short memories, where the past and future don't matter when voting, instead, it is current economic events that are decisive. Therefore, the later inflationary effects of a political decision are irrelevant, as the price must be paid after the elections anyway.[52] (In this context, mention can also be made of partisan and opportunistic theories.)[53] Thus, it is necessary to distinguish between legal regulation and political possibilities and objectives outside the legal framework. Mention must also be made of state structures, as the legal status of central banks fundamentally aligns with state frameworks, depending on them. Accordingly, federal states and supranational entities (such as the EU) may have their own central banks or organizations fulfilling such functions. When a new state or joint entity is formed, it is necessary to address the central bank issue in line with the changes to financial sovereignty. For example, after the Austro-Hungarian Compromise of 1867, a new situation arose with the birth of the Austro-Hungarian Monarchy, which also determined the structure, tasks, and fate of the future joint central bank. The Compromise left the central bank issue open, so the privilege of the Austrian National Bank remained intact, but the economic union in the Monarchy would have not have allowed for the establishment of independent central banks. Consequently, in 1878, a joint central bank with a dualistic structure was established through the reorganization of the patented Austrian National Bank.[54] Accordingly, Act XXV of 1878 on the establishment and patenting of the Austro-Hungarian Bank, Section 1 declared:

> "Without prejudice to the right vested in each state of the Austro-Hungarian Monarchy to establish independent central banks, and mutually

51 Péter Bihari, 'A jegybanki függetlenség és elszámoltathatóság a válság előtt és után', *Közgazdasági Szemle*, Vol. 64, June 2017, pp. 574–577.

52 Thomas D. Willett, *Political Business Cycles: The Political Economy of Money, Inflation, and Unemployment*, Duke University Press, 1988, p. 373.

53 *See e.g.* Brian Snowdon & Howard R. Vane, *Modern Macroeconomics: Its Origins, Development and Current State,* Edward Elgar Publishing, Cheltenham, 2005, pp. 536–537.

54 Kovácsné Sipos 2014, pp. 67–69.

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recognized, without being used for the next 10 years, the establishment of an Austro-Hungarian bank is decided for the period from 1 July 1878, to 31 December 1887."

However, this did not mean that there were no positions supporting the establishment of an independent Hungarian central bank (for example Kálmán Széll or Béla Földes could be mentioned in this context).[55] However, if a country ceases to exist (breaks up), then it is naturally necessary to reconsider the question of the central bank as well. After the dissolution of the Austro-Hungarian Monarchy in 1918, history also moved on from the Austro-Hungarian Bank, making it necessary for Hungary to establish its own independent financial system, which eventually took place in 1924. Another example is the German development. The establishment of German unity in 1871 led to the founding of the Reichsbank in 1875,[56] but as a result of the division following World War II, new central bank structures were established in both German states. In the Western Zone, *the Bank deutscher Länder (BdL)* was established in 1948,[57] which was succeeded by the Deutsche Bundesbank in 1957.[58] The German Democratic Republic (GDR) had its own financial system, so after the fall of the Berlin Wall in 1989, the central bank of the GDR *(Staatsbank der DDR)* also had to be reorganized to meet the requirements of the two-tier banking system. The central bank of the GDR operated under this name from 1968 (formed from the *Deutsche Notenbank*); it carried out money issuance according to political objectives, refinanced financial institutions, managed the accounts of state-owned enterprises and the state, and also performed supervisory tasks. The two-tier banking system based on the West German orientation was introduced on 1 April 1990, and the *Deutsche Kreditbank* was established with the involvement of the *Staatsbank*, relying on its offices and employees.[59] The agreement establishing the Economic and Social Union

55 Id. p. 71.

56 *See* German Bank Act of 30 January 1875, *Journal of the Statistical Society of London,* Vol. 38, Issue 2, June 1875, pp. 267–282.

57 Ralph Michael Wrobel, 'Deutsche Bundesbank als Modell Aus Politik und Zeitgeschichte', *D-Mark,* 2018/27, pp. 24–25.

58 Id.

59 Hasko Hüning *et al.*, *Finanzmetropole Berlin Strategien Betrieblicher Transformation*, Springer-Verlag, 2013, pp. 245–247.

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(Währungs-, Wirtschafts- und Sozialunion), abbreviated as WWSUVtr,[60] brought about fundamental changes, as the exercise of central banking functions shifted to the West German side from 1 July 1990 (the introduction of the Deutsche Mark as the common currency),[61] in accordance with the legislative obligation stipulated in the WWSUVtr (the cessation of central banking functions). The WWSUVtr specifically regulated the rights of the Bundesbank, which the GDR was required to provide within its territory (for example, the GDR's agencies, especially the police, were required to protect the branches of the Bundesbank, ensure freedom of movement, document traffic, and provide the possibility of carrying service weapons for its employees). The history, operation, and nomenclature of the German central banks were not only dependent on economic and financial circumstances but also closely intertwined with the fate of German statehood.[62] The power and organization of German, and other countries' central banks were also influenced by pre-war and wartime German territorial expansion. For example, in 1938, the National Bank of Bohemia and Moravia was established from the Czechoslovak National Bank, and accordingly, the fate of the Austrian National Bank was sealed with its incorporation into the German Reich and the extension of laws pertaining to the Reichsbank. Following the war, the affected countries had to take necessary steps to restore their central banks in light of their regained sovereignty.[63]

The demise of the former Soviet central bank, the Gosbank, and the establishment of the Central Bank of the Russian Federation are remnants of the last days of the Soviet Union. Maintaining financial sovereignty in the 15 Soviet member republics became more and more difficult. In 1990, for example, Estonia and Lithuania decided to establish their own central banks. Russia declared its sovereignty on 12 June 1990, and shortly after, the Russian Supreme Soviet decided to establish an independent central bank. The Soviet and Russian central banks operated in parallel and in competition with each other, each bank could decide which jurisdiction

60 Vertrag über die Schaffung einer Währungs-, Wirtschafts- und Sozialunion zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik. *See* Gesetzblatt der Deutschen Demokratischen Republik, Teil I, Nr. 34, 1990, pp. 331–351.

61 Holger-René Bruckhoff, *Zur Entwicklung der Zentralbanken und der Bankaufsicht in Deutschland und in den Nederlanden*, Peter Lang GmbH, Frankfurt am Main, 2010, pp. 41–42.

62 *See e.g.* James J. Sheehan, *German history, 1770–1866,* Clarendon Press, Oxford, 1989, pp. 14–24.

63 Kovácsné Sipos 2014, pp. 204 and 207.

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they wished to fall under, and the chaotic situation was intensified by the fact that in December 1990, a few days apart, the Soviet and Russian legislatures adopted contradictory laws on central banks. The law declared Gosbank's independence from administrative authorities and its accountability to the legislature, while Russian law also provided for the central bank's independence from the government without recognizing the jurisdiction of any Soviet central body. Boris Yeltsin's advisor, Boris Fyodorov considered Western models as guiding principles when creating the law. The law was passed extremely quickly by the Russian legislature, and it was a *'coup de grâce'* to the Soviet Union, as the Gosbank was considered a symbol of Russian sovereignty. The Soviet and Russian central banks operated in parallel until August 1991 (the coup); Gosbank ceased to exist on December 20, 1991. Boris Yeltsin wanted to pass legislation on the subordination of the Central Bank of the Russian Federation in November 1991, but the bank vehemently protested (foreign investor confidence and the need for stability were considered important). Finally, the Russian Supreme Soviet unanimously prevented this plan, however, the issue of the bank's independence was followed by continuous debates and conflicts.[64]

3. Final, Summarizing Thoughts

In universal history, there are numerous political and economic reasons as to why the need or idea for establishing a central bank emerged at a particular time. Legal sources, governmental frameworks, independence, the question of financial sovereignty, or the roles played in state finances have followed different paths. Crises, bankruptcies, transformations of sovereignty, credit demands, and the stabilization of the financial environment are the key drivers that shape the conditions for the establishment and operation of central banks. We must not forget the 'national' character, as the 'central' bank is also 'national' in nature. Accordingly, it is necessary to imbue the descriptors referring to the central banks' significance in a country's life and its place in state affairs with content.

The National Bank of Hungary has been operating continuously for 100 years, experiencing and surviving various political systems. In general, it can be said that both the different governments and the National Bank

64 Juliet Johnson, *Priests of Prosperity: How Central Bankers Transformed the Postcommunist World,* Cornell University Press, 2016, New York, pp. 70–77.

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of Hungary itself had to find their place within changing systems: during the interwar period, under communist dictatorship, amid the political and economic transformations of the regime change, or on the path to EU accession. Fulfilling this task has been marked by periods of war, or political and economic crises.

Independent central banks can also be considered a fourth branch of power, as they are responsible for areas of economic policy that traditionally belonged to the government for a long time.[65] However, there are also approaches that deny the recognition of independent central banks as a separate branch of power. According to Paul Tucker, although central banks are isolated from daily politics, they cannot be considered an independent branch alongside the legislature, the executive, and the judiciary, as they are subordinate to them. Their decisions can be challenged in courts, their rules can be overridden by law, and the law regarding their independence can be changed or revoked. (He mentions the European Central Bank as an exception, as its rules are governed by an internationally binding treaty that can only be amended unanimously.[66]) However, he acknowledges that in some countries, central banks can be considered as one of the 'non-elected powers' just like judges, generals, or where they exist: established churches.[67] Therefore, it may be the case that a central bank is so independent that it exceeds the socially optimal level.[68] To illustrate how significant the management of finances can be as a source of power, it is sufficient to quote the words of the founder of the banking dynasty, Amschel Mayer Rothschild (1744–1812): "Give me control of a nation's money supply, and I care not who makes its laws!"[69] Andrew Jackson, the American president, also expressed concerns about a central bank endowed with excessive power, stating that:

65 Ireneusz Kras, 'Independence of Central Bank as a Basis for Institutional Politics of Monetary Policy', *Polish Political Science Yearbook,* Vol. 41, 2012, p. 446.

66 Paul Tucker, *Unelected Power: The Quest for Legitimacy in Central Banking and the Regulatory State,* Princeton University Press, 2018, pp. 18–19.

67 Id. p. 3.

68 Guy Debelle & Stanley Fischer, 'How Independent Should a Central Bank Be?' *in* Jeffrey C. Fuhrer (ed.), *Goals, Guidelines, and Constraints Facing Monetary Policymakers*, Federal Reserve Bank of Boston, Boston, Conference Series No. 38, 1994, p. 196.

69 Holger Lang, *Die (r)evolutionäre Weiterentwicklung unseres Geld- und Finanzsystems zur Überwindung der aktuellen Geld- und Finanzkrise*, BoD – Books on Demand, 2012, p. 137.

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"Controlling our currency, receiving our public moneys, and holding thousands of our citizens in dependence, it would be more formidable and dangerous than the naval and military power of the enemy."[70]

70 Andrew Jackson, 'Veto Message, July 10, 1832' *in* George Rogers & Editor Taylor, *Jackson versus Biddle: The Struggle over the Second Bank of the United States,* D.C. Heath and Company, Boston, 1949, pp. 11–12.

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Part III
Developments in International Law

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The Prisoners of Hope

Reflections on the Constitutional Aspects of Life Imprisonment

Krisztina Lukács – Antal Tamás Tóth[*]

Abstract

The term 'actual life imprisonment' (ALI) is contained in the second sentence of Article IV(2) of the Fundamental Law of Hungary. However, it would be in vain to look for the legal institution by this name in the Hungarian Criminal Code or any other Hungarian legislation, because the only reference we find there is that in certain cases of life imprisonment the possibility of parole is excluded. Besides the designation of this legal instrument, there are of course a number of questions concerning its application. The most important questions concern the relationship between the top norm of the Hungarian legal system, the Fundamental Law, and the de facto life sentence. These can be answered by the Hungarian Constitutional Court, who has already dealt with this subject and proceedings related to ALI are currently pending before it. However, it has not yet taken a position on the compatibility of this legal instrument with the Fundamental Law. In the framework of the present study, we attempt to take stock of the possible aspects of such a constitutionality assessment, reviewing the history of ALI, its regulation in Hungarian law, the main international legal requirements governing it and the case law of the Constitutional Court.

Keywords: actual life imprisonment, Hungary, ECtHR, right to hope, hope of release

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1. Introduction

Although life imprisonment has been part of the Hungarian legal system for several decades, actual life imprisonment (ALI) was only introduced as

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a new concept in Hungarian law a few years ago. Since then, the ECtHR has detailed its objections to the new legal instrument in several judgments rendered against Hungary. In addition, the Hungarian Constitutional Court has also issued a number of decisions on the subject, however, it yet to take a position on the constitutionality of the ALI.

In the present study, following an overview of the regulation of ALI in Hungarian law, we present the requirements surrounding this institution stemming from the ECHR (Convention) as they follow from the relevant ECtHR practice. Analyzing the case law of the Constitutional Court, we also try to identify the most important constitutional law criteria that, in our view, govern the substantive analysis of ALI's conformity with the Fundamental Law.

2. History of the Development of Life Sentence in Hungarian Law

In medieval Hungary, deprivation of liberty for life did not appear as an independent punishment, but as a specific feature of certain forms of imprisonment. For example, in the case of galley slavery, the low chance of survival resulted in life imprisonment. Imprisonment for life as an independent punishment in Hungary appeared only in 1723 in the *Corpus Juris Hungarici*.[1]

Since life imprisonment was for a long time the second gravest sanction in the Hungarian legal system after the death penalty, its fate was influenced by the perception of the death penalty. In Hungary, the 1843 bill on the Criminal Code[2] was the first to propose the abolition of the death penalty, making imprisonment the generally applicable punishment.[3] Later, it was the first written Hungarian penal code, the Csemegi Code[4] which gave priority to imprisonment, by reducing the number of death sentences (and

1 Barna Mezey, 'A hosszú tartamú szabadság-büntetés a joghistóriában', *Börtönügyi Szemle*, Vol. 24, Issue 2, 2005, p. 3.

2 Despite the fact that it did not become a law, the 1843 Criminal Code proposal is of great importance for the development of Hungarian criminal law.

3 András Polgár, *Ad dies vitae. Az életfogytig tartó szabadságvesztés szabályozása, gyakorlata és végrehajtása, PhD thesis,* Pécs, 2017, p. 6.

4 Act V of 1878, the Hungarian Criminal Code on offences and misdemeanors. It was the first Hungarian-language criminal code containing comprehensive criminal law. The general part was in force until 1951 and the special part until 1962.

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the number of offences punishable by death).[5] The Csemegi Code also regulated the form of imprisonment, which could last up to a lifetime.[6] The Code excluded parole in two cases: if the convict was a foreigner or was a repeat offender of certain offences.[7]

The need to re-regulate criminal law in Hungary arose following the two world wars and the communist takeover in Hungary. Thus, the Criminal Code of 1950 (1950 Penal Code)[8] was born, which transformed the general part of criminal law.[9] The 1950 Penal Code dedicated death penalty and imprisonment to be the main forms of punishment,[10] providing for imprisonment for life or for a fixed term.[11] In terms of substance, the Csemegi Code and the 1950 Penal Code rules[12] were very similar. The difference lay in the fact that the rules on parole were not contained in the 1950 Penal Code itself, but in its implementing Law-Decree No 39 of 1950.

The next Criminal Code, Act V of 1961[13] did not contain provisions for life imprisonment. Instead, it provided that imprisonment should be imposed for a fixed term.[14] This solution of the legislator is significant in two aspects.[15] *(i)* On one hand, It was not obvious to the legislator whether life imprisonment was necessary in addition to the death penalty. *(ii)* On the other hand, without life imprisonment, the scope between the death penalty and fixed-term imprisonment was too broad, reducing the courts' leeway in imposing a sentence. These dilemmas were resolved by the legislator a decade later by amending the provisions of Act V of 1961 by Law-Decree 28 of 1971, which reintroduced life imprisonment into the Hungarian legal system.[16]

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5 According to Balla's assessment, the Csemegi Code "was essentially custodial in its system of sanctions." Lajos Balla, 'Az életfogytig tartó szabadságvesztés büntetéskiszabási gyakorlata', *Magyar Rendészet,* Vol. 14, Issue 4, 2014, p. 44.

6 Csemegi Code, Section 22. Imprisonment is either for life or for a fixed term.

7 Id. Section 49.

8 Act II of 1950 on the general part of the Criminal Code.

9 Kálmán Györgyi, *Az új Büntető Törvénykönyv kodifikációjának története,* at https://ujbtk.hu/dr-gyorgyi-kalman-az-uj-bunteto-torvenykonyv-kodifikaciojanak-tortenete/.

10 1950 Penal Code, Section 31.

11 Id. Section 32(1).

12 Balla 2014, p. 45.

13 Act V of 1961 on the Criminal Code of the Hungarian People's Republic.

14 Id. Section 37.

15 Balla 2014, p. 46.

16 Law-Decree 28 of 1971, Section 5: "Section 37 of the Criminal Code shall be replaced by the following provision: Imprisonment shall last for life or for a fixed term […]."

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The next reform was the adoption of Act IV of 1978 on the Criminal Code (the Hungarian Criminal Code between 1978 and 2012), which also distinguished between fixed-term and life imprisonment. The Explanatory Memorandum to the original text of the 1978 Criminal Code explained that

> "the humanism of the proposal is expressed in the fact that it does not exclude life imprisonment from the possibility of parole. The hope of this may encourage the prisoner to behave correctly when serving his sentence. However, it is consistent with the severity of the sentence that the convicted person must remain of good behavior for a long period.'[17]

The Code therefore allowed for parole after a minimum of twenty years. Life imprisonment acquired a new status following the Constitutional Court's *Decision No. 23/1990. (X. 31.) AB* abolishing the death penalty. With the abolition of the penal provisions relating to the death penalty, life imprisonment became the gravest punishment in the Hungarian penal system.[18]

The regulation was substantially amended in 1993,[19] giving the criminal court the power to determine the earliest date of release on parole as part of the sentencing process. On the other hand, it excluded the possibility of parole if the person sentenced to life imprisonment was sentenced to life imprisonment again. Consequently, after the adoption of the 1993 amendment to the 1978 Criminal Code, the application of the so-called ALI became possible in Hungary.

In 1998, the Hungarian legislator once again amended the provisions on parole in the case of life imprisonment.[20] According to the new legislation, the court, after a complex analytical consideration of the factors relevant to the imposition of the sentence, could conclude that a person sentenced to life imprisonment should be excluded from the possibility of parole. In the event of such a decision by the court, there was no legal possibility for the prisoner to be released, with one exception: if the President of the Republic granted a pardon.

17 Explanatory Memorandum to Act IV of 1978 on the Criminal Code, Section 47.
18 Ágnes Czine,'Életfogytiglan, élethossziglan a büntetésvégrehajtási intézetben, avagy a 40 évig tartó remény, *Miskolci Jogi Szemle,* Vol. 14, Special Issue 2, 2019, p. 151.
19 Act XVII of 1993 amending criminal legislation, Section 6.
20 Act LXXXVII of 1998 amending criminal legislation, Section 5.

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3. Current Legislation

Actual life imprisonment is not a separate penalty under the current Hungarian Criminal Code[21] (2012 Criminal Code) but the gravest form of life imprisonment, in which the prisoner is not eligible for parole. From the point of view of the constitutionality of this legal institution, it is decisive that the Fundamental Law, which entered into force on 1 January 2012, stipulates in Article IV(2) that 'actual life imprisonment' may be imposed only for the intentional commission of a violent crime. In Hungarian legislation the Fundamental Law is the only legal norm that refers to the legal institution of ALI by this name.

The 2012 Criminal Code retained the concept governing the rules on life imprisonment of the 1978 Criminal Code. Under Section 42 of the 2012 Criminal Code, the sentencing court shall, in the case of life imprisonment, determine the earliest date of parole or exclude the possibility of parole. Section 44(1) of the 2012 Criminal Code lists the 18 offences for which the court may exclude the possibility of parole. According to Section 44(2) the possibility of parole shall be excluded if the offender is a violent multiple recidivist or an offender who committed a crime under the Section 44(1) of the 2012 Criminal Code in a criminal organization.[22]

The legislator brought the provisions of the Criminal Code in line with the provisions of Act CCXL of 2013 on the Enforcement of Penalties, Measures, Certain Coercive Measures and the Detention for Misdemeanors (Criminal Law Enforcement Act). It did so by introducing[23] the mandatory pardon procedure for life sentenced prisoners excluded from the possibility of parole[24] among the provisions of the Criminal Law Enforcement Act According to the legislative explanatory memorandum, the amendment

> "ensures that the Hungarian legal system complies with the requirement of the ECtHR in its judgment of 20 May 2014 in the case of *Magyar v Hungary* that in the case of an ALI there should be a procedure for examining whether the reasons for the sentence in terms of criminal policy still exist, once a sufficient period of imprisonment has elapsed."[25]

21 Act C of 2012 on the Criminal Code, Sections 41–42.
22 A similar restriction was contained in the 1978 Criminal Code, Section 47 in connection with the release on parole of persons sentenced to fixed-term imprisonment.
23 Act LXXII of 2014 amending the Criminal Law Enforcement Act, Section 109.
24 Criminal Law Enforcement Act, Sections 46/A-46/H.
25 Explanation of Act LXXII of 2014, General Explanation.

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Under the new rules[26] a prisoner sentenced to a life sentence and excluded from the possibility of parole is subject to an *ex officio* pardon procedure (mandatory pardon procedure). The penitentiary institution detaining the convicted person will notify the Minister responsible for justice in order to initiate the mandatory pardon procedure once the convicted person has served 40 years of the sentence. However, the prisoner must give consent to the procedure. In the absence of consent or refusal to give such consent, the mandatory pardon procedure may not be carried out. The Minister responsible for justice must act within 60 days of receiving notification from the prison. In doing so, he shall obtain the personal data and documents necessary for the decision to be taken and shall notify the President of the *Kúria*. The latter shall, without delay after the notification, take steps to appoint a five-member Board of Pardon and Paroles. This *ad hoc* Board, composed of judges in criminal cases, must examine within 90 days of receiving the documents whether there are grounds for a reasonable presumption that the purpose of the sentence can be achieved without further deprivation of liberty. The investigation procedure shall end with a reasoned opinion, which the Board of Pardon shall send to the Minister of Justice along with the file. Within 15 days of the submission of the documents, the latter will submit a recommendation to the President of the Republic. It may not depart from the opinion of the Board of Pardon. The decision on the pardon is then taken by the President of the Republic, acting in his discretion. In his decision, he is not bound by the recommendation of the Minister of Justice and is not obliged to give reasons for his legal position. If the convicted person has not been pardoned, the mandatory pardon procedure must be repeated after two years.

Summarizing the legal provisions in force, it can be concluded that in Hungary the ALI is still not a separate type of penalty, but the gravest form of imprisonment, in which the possibility of parole is excluded. Although Article IV(2) of the Fundamental Law refers to this form of imprisonment as actual life imprisonment, this designation is not mentioned in the 2012 Criminal Code or in any other legislation. However, due to legislative changes in the light of international requirements, deprivation of liberty in the case of ALI does not necessarily last until the death of the prisoner, since the mandatory pardon procedure may result in the release of a prisoner serving ALI.

26 Criminal Law Enforcement Act, Section 46/A.

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It is the mandatory pardon procedure that is at the center of the criticism by the ECtHR. Its two main objections can be summarized as follows: *(i)* on the one hand, the period of 40 years for the periodic review of the mandatory pardon procedure is too long compared to ECtHR requirements. *(ii)* On the other hand, the fully discretionary nature of the decision of the President of the Republic and the lack of justification of the decision mean that there is no guarantee of review.[27]

4. The Case Law of the ECtHR Regarding Life Imprisonment

The amendment of the relevant national provisions confirms that the development of Hungarian law concerning the legal institution of ALI has been directly influenced by the practice of, and requirements formulated by the ECtHR. In the following, we present the development of the ECtHR's practice and the system of requirements established. While several further international documents whose provisions are also applicable to Hungary and have an impact on the development of Hungarian legislation could also be mentioned in this regard, however, we refrain from a detailed description of these.[28]

The case law of the ECtHR on the imposition of life imprisonment has undergone significant changes over the past decade. In the following, we provide a chronological overview of the ECtHR's decisions regarding Hungary and other countries that have had an impact on the adjudication of cases and legislation in Hungary.

The ECtHR's initial jurisprudence pointed in the direction that life imprisonment is compatible with the requirements of the Convention. It also considered that a decision taken in a clemency procedure, rather than in a judicial procedure, whether judicial or non-judicial, was appropriate and admissible for the purpose of considering the possibility of release. In *Kafkaris versus Cyprus*,[29] the ECtHR confirmed its previous position that life imprisonment is not *per se* prohibited. However, it found that if the sentence is *de facto* and *de jure* 'irreducible', this violates Article 3 ECHR, *i.e.* the prohibition of torture and inhuman or degrading treatment or punishment. The main criterion for assessing whether the duration of

27 *See T.P. and A.T. v Hungary*, Nos. 37871/14 and 73986/14, 6 March 2017, paras. 48–49.
28 *See* the details of international regulation in Czine 2019, pp. 147–151.
29 *Kafkaris v Cyprus,* No. 21906/04, 12 February 2008.

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the sentence is reducible is whether the sentenced person has prospects of release. Where the State provides for a review of a life sentence, either by commutation or by remission of a certain part of the sentence or by conditional release, the regime complies with the requirements of Article 3 ECHR. In the present case, the ECtHR took into account the fact that in Cyprus, the release on parole of a person sentenced to life imprisonment could only be granted on the basis of a decision of the President of the Republic, approved by the Attorney General. The ECtHR considered that this was not a mere legal or theoretical possibility, since 9 people sentenced to life imprisonment were granted parole in 1993, 2 in 1997 and 2 in 2005, all on the basis of a decision taken by the President of the Republic. The ECtHR therefore considered that the applicant was not deprived of all possibilities of release and did not find a violation of the ECHR in the case.

In line with the above, in its judgment in *Iorgov (II) versus Bulgaria*[30] the ECtHR confirmed that where national law provides for the possibility of review for the purposes of commutation, remission, termination or parole of a life sentence, the decision, despite its non-judicial nature, is in accordance with Article 3 ECHR. It may be concluded from this that the Hungarian rules governing the mandatory pardon procedure also met the requirements developed by the ECtHR regarding life imprisonment.

The first Hungarian-related decision on this issue, in the case of *Törköly versus Hungary*[31] is noteworthy. Formally, it is 'only' an admissibility decision and not a judgment on the merits. More importantly, the ECtHR rejected the application in this particular case because the applicant was not deprived of the hope of release. Indeed, the Hungarian judgment provided for the possibility of parole – *i.e.* a review of the sentence – for the applicant after 40 years (at the age of 75). Since the possibility of the applicant's release was not excluded, the Hungarian criminal court did not impose an ALI, so that the ECtHR did not examine in detail the other features of the Hungarian legislation. The *Törköly* judgment may therefore give the impression that the ECtHR was satisfied with the 40-year review period provided for in the Hungarian legislation, which is longer than the European practice. However, the crucial point in this particular case was that the Hungarian court did not impose an ALI but 'only' a life sentence, which did not exclude the possibility of parole. Having established that the

30 *Iorgov (II) v Bulgaria*, No. 23295/02, 2 September 2010.
31 *Törköly v Hungary,* No. 4413/06, 5 April 2011.

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convicted person was guaranteed the possibility of release, the ECtHR did not specifically assess when the review would take place.

The next important milestone in the assessment of life imprisonment in chronological order is the judgment rendered in *Vinter and others versus the United Kingdom*.[32] In this case, the ECtHR confirmed that a life sentence can be considered compatible with Article 3 ECHR if the law of the State Party provides for the possibility to initiate review by the sentenced person and, at the same time, regulates the mechanism for such a review. In the ECtHR's interpretation, detention is lawful if it is based on adequate penological grounds. Such grounds are punishment, deterrence, protection of society and rehabilitation of the offender. Several of these grounds may prevail at the same time when the sentence is handed down, but during the execution of the sentence, the validity of each ground changes over time, calling into question the legality of upholding the sentence. It is therefore necessary to periodically review these penological grounds during the implementation of a life sentence. If, after a certain period of time, the basis for the sentence no longer exists due to the successful rehabilitation of the sentenced person, the possibility of a reduction of the sentence should be provided for. The ECtHR has underlined that it is not competent to lay down rules on the review procedure. It is therefore left to the States Parties to decide whether to provide for judicial or administrative review. The ECtHR also refrained from setting a date for review. However, taking into account that, on the basis of a comparative analysis of the relevant international legal rules and the practice of States Parties, the time between the imposition of a sentence and the review of the conviction is generally 25 years, the ECtHR considers that a review should be carried out after 25 years for the first time and periodically thereafter.[33] The ECtHR has also pointed out that a person sentenced to life imprisonment has the right to

32 *Vinter and others v the United Kingdom*, (GC), Nos. 66069/09, 130/10, 3896/10, 9 July 2013.

33 The judgment found that 9 of the 47 Council of Europe Member States have no life imprisonment at all: Andorra, Bosnia and Herzegovina, Croatia, Montenegro, Norway, Portugal, San Marino, Serbia and Spain. The maximum length of imprisonment in these countries ranges from 21 years (Norway) to 45 years (Bosnia and Herzegovina). In Croatia, a maximum of 50 years' imprisonment can be imposed for aggravated offences. Life imprisonment is part of the legislation in the 38 remaining Member States. In addition to the United Kingdom, the ECtHR has identified six Member States where a system of clemency exists but does not apply for certain serious crimes or sentences. One of these states is Hungary.

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know, at the time of sentencing, what conditions they must meet in order to be released and when and how their sentence may be reviewed.

In summary, the judgment entails that a sentence of life imprisonment is compatible with Article 3 ECHR only if the possibility of review exists and the rules for such review are known at the time the sentence is imposed. With due consideration to these requirements, in its judgment *Murray versus the Netherlands*[34] the ECtHR pointed out that the possibility of an institutional review, introduced subsequently by legislative amendment, during the execution of an ALI, can avoid a conflict with Article 3 ECHR, even if the sentenced person has already served a longer period of his sentence.

At this point, it is worth briefly touching on the categories of 'hope of release' and 'right to hope' introduced by the ECtHR in *Vinter and others*. These terms are not mentioned in the ECHR, but the academic literature has used these categories when discussing ECtHR practice, since *Vinter and others* sets the criterion for the reviewability of life imprisonment.[35]

According to the Cambridge Dictionary,[36] hope is something good that we want to happen in the future. However, hope is not a legal concept, but a meta-juristic factor with several contexts that are difficult to approach in a precise way.

Irish judge Ann Power-Forde[37] has added a short but often quoted concurring opinion to the *Vinter and others* judgment, in which she refers to the right to hope. In her opinion, she recalls not only the right to human dignity, as examined by the German Federal Constitutional Court in the context of life imprisonment, but also the idea of atonement and reparation. The judge deduces the inhuman and degrading nature of life imprisonment from the denial of this possibility. However, not everyone agrees with the idea of the right to hope. For example, in a later dissenting opinion in *T.P. and A.T. versus Hungary*, the Lithuanian judge Egidijus Küris[38] contrasts the right to hope of convicted persons with the crushed hope of those in society who have suffered the effects of the crime.

34 *Murray v Netherlands*, No. 10511/10, 10 December 2013.
35 Sarah Trotter, 'Hope's Relations, A Theory of the 'Right to Hope' in the European Human Rights Law', *Human Rights Law Review*, Vol. 22, Issue 2, 2022, p. 3.
36 Cambridge Dictionary, at https://dictionary.cambridge.org/dictionary/english/hope.
37 *Vinter and others v the United Kingdom,* Nos. 66069/09, 130/10, 3896/10, 9 July 2013.
38 *T.P. and A.T. v Hungary*, Nos. 37871/14 and 73986/14, 4 October 2016, Dissenting opinion, para. 22.

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In Hungarian scholarly literature, too, opinions are divided on the right to hope. Such a category is not included in the Hungarian Fundamental Law (entered into force in 2012), nor did it appear in the previous Constitution. Such a fundamental right therefore does not exist in the Hungarian legal system.[39] According to some opinions, those who commit the most serious crimes give up their human dignity. As a consequence, they do not deserve to be punished by the court on the basis of the concept of human dignity and its guarantees under the rule of law.[40] According to another view, one of the most important tenets of constitutional criminal law, the basic pillar of sentencing, is the principle of proportionality. According to this principle, the court must impose a proportionate punishment, *i.e.* a punishment that is proportionate to the gravity of the offence committed. If the sentenced person is released from a life sentence, it follows that he has not served the proportionate sentence, *i.e.* he has not been punished in the manner prescribed by the sentence and in proportion to the offence committed. Thus, the sentence is not proportionate if it has not been carried out in its entirety.[41]

Almost a year after *Vinter and others*, the ECtHR in *László Magyar versus Hungary*[42] reiterated its earlier finding that the compatibility of life imprisonment with Article 3 ECHR can be evaluated based on whether there is possibility of release. In the present case, since the prisoner was excluded from the possibility of parole in the judgment, the ECtHR examined the legislation and practice of presidential pardon in the context of the possibility of review. In its judgment the ECtHR stated that it was not convinced that the applicant's sentence could actually be reduced because there was no practice of presidential pardon in Hungary in respect of the ALI. Furthermore, there was no legislation which clearly defined the requirements to be met and the conditions to be taken into account when considering a prisoner's application for pardon. Under the relevant Hungarian law, neither the Minister of Justice, nor the President of the Republic is obliged to give reasons for their decision, so the detainee may not be aware of what they must do to obtain clemency. Nor does the legislation guarantee that

39 Polgár 2017, p. 26.

40 Balázs Gellér, 'Az emberi élethez és méltósághoz való jog és az új Btk., különös tekintettel a büntetési rendszerre és a jogos védelemre' *in* Péter Hack (ed.), *Az új Büntető Törvénykönyv. Hagyomány és megújulás a büntetőjogban*, Bibó István College ELTE, Budapest, 2013, pp. 63–68.

41 Polgár 2017, p. 126.

42 *László Magyar v Hungary*, No. 73593/10, 13 October 2014.

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the detainee's efforts to obtain their release will be taken into account by the decision-maker. The ECtHR therefore doubted whether the sentence imposed on the applicant was of a moderate duration within the meaning of Article 3 ECHR and found it to be in violation of the Convention. In view of the systemic problem identified in the specific case and the nature of the violation found, the ECtHR further considered that, in order to ensure the proper enforcement of the sentence, Hungary should reform, preferably by legislation, the system of review for *de facto* life imprisonment sentences.

In *Harakchiev and Tolumov versus Bulgaria*[43] the ECtHR followed its the findings in the Hungarian case. It pointed out that the absence of a procedure for the reduction of life imprisonment is in itself a sufficient basis for finding a violation of Article 3 ECHR. In such a case, it is not necessary to meet any further conditions, *e.g.* proof that the prisoner has served such a long period of their sentence that the continuation of detention can no longer be justified.

In *Bodein versus France,*[44] the ECtHR assessed a specific form of review, namely, the institution of judicial review in French law. The Court found that it allows for the possibility of release after 30 years from the beginning of the deprivation of liberty. This period was considered by the ECtHR to be acceptable in light of the discretion available to the States and no violation of Article 3 ECHR was established. In determining whether the French legislation was compatible with the Convention, the Court attached particular weight to the fact that this period included any form of deprivation of liberty, including pre-trial detention.

The next decision regarding Hungary was taken after the entry into force of the mandatory pardon procedure,[45] as detailed above. In the case of *T.P. and A.T.*[46] the ECtHR held that the 40-year period that a prisoner sentenced to life imprisonment must serve before they can hope for a first pardon is much longer than the maximum period recommended for review by national laws and international legal consensus. The cooling down period under the new Hungarian legislation therefore exceeds, according to the ECtHR, the limits of the discretion granted to the Member State. The ECtHR also referred to its earlier decision in *László Magyar*, stating that the

43 *Harakchiev and Tolumov v Bulgaria*, Nos. 15018/11, 61199/12, 8 October 2014
44 *Bodein v France*, No. 400410, 13 November 2014
45 On 1 January 2015.
46 *T.P. and A.T. v Hungary*, Nos. 37871/14 and 73986/14, 4 October 2016.

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presidential pardon does not ensure the *de facto* or *de jure* reducibility of the life sentence. Furthermore, the ECtHR expressed a number of concerns regarding the mandatory pardon procedure introduced by the amendment of the Criminal Law Enforcement Act. For example, it criticized the lack of discretional grounds and time limits for the President of the Republic's decision to grant release, and the fact that neither the President of the Republic, nor the Minister of Justice are required to give reasons for their decision. For the reasons set out above, the ECtHR was not satisfied that the applicants' sentence of life imprisonment could be reduced for the purposes of Article 3 of the Convention and therefore found a violation of the Convention.

Summarizing its practice, in *Hutchinson versus United Kingdom*[47] the ECtHR confirmed the criteria it considers when reviewing the compatibility of national rules life imprisonment with Article 3 ECHR. These are *(i)* the nature of the review (both judicial and administrative channels are acceptable); *(ii)* the scope of the review (legal basis for continuation or discontinuance); *(iii)* the conditions of the review (what behavior the prisoner must show in order to be released); *(iv)* the timeframe for the review (maximum 25 years from the date of the sentence).

In its decision in *Kruchió and Lehóczki versus Hungary,*[48] the ECtHR recalled the findings of the judgment rendered in *T.P. and A.T.*. Considering that *(i)* the mandatory pardon procedure in Hungary is only available after 40 years of imprisonment, and *(ii)* that the mandatory pardon procedure lacks adequate guarantees, it again found a violation of Article 3 ECHR.

It should be noted that the 40-year cooling down period is, according to the ECtHR, equally long whether it is about the ALI or 'simple' life imprisonment cases, where the possibility of parole is not excluded. This was confirmed by the ECtHR in *Bancsók and László Magyar versus Hungary (No 2).*[49] The earliest date of parole for the two applicants was set by the domestic court at 40 years. The fact that the applicants could not hope to be released from their sentences until they had served at least 40 years was sufficient for the ECtHR to find that their life sentences could not be regarded as reducible within the meaning of Article 3 ECHR.[50]

47 *Hutchinson v the United Kingdom,* (GC), No. 57592/08, 17 January 2017.
48 *Kruchió and Lehóczki v Hungary,* Nos. 43444/15 and 53441/15, 14 January 2020.
49 *Bancsók and László Magyar v Hungary,* Nos. 52374/15 and 53364/2015, 28 January 2022.
50 Id. para. 47.

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In *Blonski and others* and *Horváth and others versus Hungary*[51] the ECtHR confirmed the position adopted in *Bodein* regarding the time period for reviewing release.[52] In *Blonski and others*, 7 applicants and in *Horváth and others*, 12 applicants were subject to parole, the earliest of which was between 30 and 40 years. According to the ECtHR, such long waiting periods constitute a violation of Article 3 ECHR.[53]

The lessons learned from the ECtHR practice in the cases presented can be summarized in the following principles. The ECtHR has taken note that the States Parties may impose life imprisonment for particularly serious crimes on adult offenders, and that the imposition of such a sentence is not in itself incompatible with the provisions of the ECHR. However, it is a condition that the sentence of life imprisonment may be reduced *de jure* and *de facto*. In order to assess this, the ECtHR must be satisfied that the sentenced person has a real chance of being released. The key issue in this context is the periodic review to be carried out after a maximum period of 25 years in line with ECtHR standards and with the application of the guarantees provided for in the legislation. Accordingly, where national law allows for a review of a life sentence with a view to its reduction, remission, termination or parole, it complies with the requirements of Article 3 ECHR (*de jure* requirement). However, the State Party must also provide at least one concrete case where the person sentenced to ALI has actually been released (*de facto* requirement). Nevertheless, the sentence is not irreducible merely because in a given case it lasts until the prisoner's death. A violation of Article 3 ECHR cannot therefore arise even where a prisoner sentenced to life imprisonment has the right under national law to be considered for release, but parole is refused on the well-founded and justified ground that they remain a danger to society.

The ECtHR therefore considers the application of the ALI to be in conformity with the ECHR if the above guarantees are regulated by law and applied. However, according to the decisions of the ECtHR, the amended Hungarian legislation, which entered into force on 1 January 2015, does not meet these requirements, despite the introduction of the mandatory

51 *Blonski and others v Hungary*, Nos. 12152/16 and 6 other applications, 23 October 2022; *Horváth and others v Hungary,* No. 12143 and 11 other applications, 2 March 2023.

52 Instead of the 30 years imposed in the *Bodein* case, the ECtHR takes 26 years into account in its reasoning. *See e.g.* the reasoning in *Bancsók and László Magyar v Hungary*, para. 45.

53 Id. para. 16.

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pardon procedure. According to the ECtHR, the application of the ALI in individual cases therefore constitutes grounds for finding a violation of the ECHR.

It should be noted that in 2024 the Hungarian Parliament adopted the Thirteenth Amendment of the Fundamental Law of Hungary, according to which

> "A cardinal law shall specify the intentional offences committed against a child in respect of which the President of the Republic may not exercise his or her individual right of clemency under paragraph (3)(n)."[54]

At the very least, it is questionable to what extent this provision of the Fundamental Law is in line with the requirements arising from the ECtHR's practice. The amendment to the Fundamental Law is also likely to affect the practice of the Constitutional Court (to be discussed in the next Section).

5. Cases before the Constitutional Court of Hungary

The Hungarian regulation of life imprisonment raises serious questions not only in relation to the international requirements applicable to Hungary, but also in relation to the Fundamental Law, which is at the apex of the Hungarian legal hierarchy. This is well illustrated by the submissions to the Constitutional Court in the context of the ALI. Indeed, the Constitutional Court is competent to examine whether this legal instrument is in line with the requirements of the Fundamental Law. In the forthcoming section of the article, we attempt to show the constitutional contexts in which the Hungarian Constitutional Court's practice in relation to the ALI has developed and is still developing.

To date, there have been only two cases before the Constitutional Court where the constitutionality of the ALI was at the heart of the case. In neither case, however, did the Constitutional Court carry out a substantive constitutional review, therefore, these decisions provide little guidance for answering the questions raised. At the same time there are several other pending proceedings which provide an opportunity for the Constitutional Court to examine the compatibility of ALI with the Fundamental Law and to formulate a substantive position on the merits.

54 Fundamental Law of Hungary, Article 9(8), entered into force on 1 July 2024.

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5.1. Decisions of the Constitutional Court on the Constitutionality of the ALI

The earliest decision on ALI was taken in a procedure based on a judicial initiative. The Constitutional Court ruled in *Order No. 3013/2015. (I. 27.) AB* that the proceedings should be terminated because of the significant modification on the Criminal Law Enforcement Act. The petition was filed by a judge of the Szeged Court of Appeal,[55] seeking a decision that the provisions of the former law on ALI[56] were contrary to the ECHR. At the time of the initiation of the procedure, Hungarian law did not yet include the mandatory pardon procedure; this amendment was made after the submission of the judicial initiative. The essence of the motion was that the ALI cannot be reduced *de jure*, because the legal institution itself excludes the possibility of parole. The Constitutional Court noted that the Criminal Law Enforcement Act introduced a mandatory pardon procedure as a form of review effective from 1 January 2015. In light of this, the Constitutional Court considered that the petition had become obsolete and the Constitutional Court terminated its procedure without examining the merits.

The other related decision was taken in a procedure for the interpretation of the Fundamental Law,[57] which was initiated by the Commissioner for Fundamental Rights. *Order No. 3492/2023. (XII. 1.) AB* also failed to examination the merits, because the Constitutional Court dismissed the petition. The Commissioner raised a number of issues in his petition on the basis of which he considered it necessary to interpret a specific provision of the Fundamental Law in the context of life imprisonment.

Firstly, he asked whether it follows from the prohibition of torture, inhuman and degrading treatment or punishment in Article III(1) of the Fundamental Law that a person sentenced to life imprisonment must be given the possibility of release within a specified and foreseeable period. In its order, the Constitutional Court pointed out that, under the statutory provision governing its jurisdiction, it may only interpret a provision of the Fundamental Law in the context of a specific constitutional problem

55 Act CLI of 2011 on the Constitutional Court, Section 32.

56 The Constitutional Court examined the violation of international treaties by Act IV of 1978 on the Criminal Code, Section 47/A(1) and (3), and Act C of 2012 on the Criminal Code, Section 42(2) and Section 44(1).

57 Act CLI of 2011 on the Constitutional Court, Section 38.

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if the interpretation can be directly deduced from the Fundamental Law. It also noted that the Criminal Law Enforcement Act contains provisions on the possibility of release within a specified foreseeable period of time for persons sentenced to life imprisonment. In other words, the Criminal Law Enforcement Act regulates precisely what the petitioner's question was aimed at. The Constitutional Court concluded that the legislation in force at the statutory level answered the Commissioner's question. Therefore, the question cannot be examined without consideration to the applicable law, solely by interpreting the Fundamental Law. Thus, the Constitutional Court saw no procedural possibility to examine the merits of the specific question submitted by the Commissioner.[58]

The petitioner also raised the question whether it follows from Article III(1) of the Fundamental Law that the latest date when the possibility of release is to be considered (general maximum) must be determined at legislative level. With this, the Commissioner was actually referring to a requirement that has also been expressed by the ECtHR: a statutory provision enshrining the date for mandatory review. In this context, the Constitutional Court held that, as regards the question regarding the level of regulation, no requirement can be derived from Article III(1) of the Fundamental Law *per se*. And the specific question cannot be answered by interpreting Article III(1) of the Fundamental Law. Therefore, there was no scope to examine the merits of this issue in the present proceedings.[59]

According to the Commissioner's third question, whether the possibility of release within a reasonable period of time must in theory be guaranteed to all persons sentenced to life imprisonment, it follows from Article B(1) and Article III(1) of the Fundamental Law that this possibility must be guaranteed regardless of the substance of the law applicable at the time of conviction.[60] In essence, the Constitutional Court again pointed out, that the answer is provided by the legislation in force at the statutory level. In a procedure of this nature – that is to say, a procedure for the interpretation of the Fundamental Law – the Constitutional Court could not give an answer for lack of competence.

The foregoing shows that the Constitutional Court has so far not taken a substantive position on the constitutional issues related to ALI. The compatibility of this legal instrument with the Fundamental Law therefore

58 Order No. 3492/2023. (XII. 1.) AB, Reasoning [19].
59 Id. Reasoning [20].
60 Id. Reasoning [22].

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remains in question. However, as a hypothetical matter, it is worth taking into account the constitutional problems that could be the cornerstones of such constitutionality assessment by comparing the current regulation of ALI with certain provisions of the Fundamental Law.

5.2. To What Extent Might the Practice of the ECtHR be Relevant in the Proceedings before the Hungarian Constitutional Court?

In the context of possible future proceedings, the question may justifiably arise to what extent the decisions of the ECtHR on ALI are relevant in the development of the Hungarian Constitutional Court's jurisprudence.

The ECHR is binding because it is part of the Hungarian legal system.[61] The binding force of the text as a whole may be affected only by circumstances such as the reservation made to it or the failure to ratify the additional protocols. Hungary made a reservation to Article 6 ECHR (fair trial, access to court), which was withdrawn by the Hungarian Government in 2001. Certain protocols to the ECHR – such as Protocol No. 12 on the general prohibition of discrimination or Protocol No. 16 on advisory opinions – have not yet been ratified by Hungary, however, these are not relevant for the legal assessment of ALI.

The ECtHR case law gives substance to the provisions of the Convention by interpreting its text authentically. Its means of interpretation are determined by the ECHR itself: the ECtHR may interpret a Convention provision in judgments, decisions, advisory opinions and decisions on enforcement.[62]

As to the legal effect of ECtHR decisions, a judgment is binding on the state that was a party to the proceedings.[63] It should be added that this obligation may be loosened by practical circumstances. *(i)* On the one hand, disputes of interpretation may arise in the course of implementation between the Member States' government representatives and the Council of Europe's Committee of Ministers responsible for monitoring the implementation of judgments. Such a dispute could for example concern whether a general measure in the form of legislation is required under the judgment or as to what specific measure constitutes a remedy. If there is a dispute

61 Promulgated by Act XXXI of 1993.
62 ECHR, Articles 46(3), 47(1), and Protocol No. 16.
63 Id. Article 46(1).

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over the interpretation of the judgment on which these bodies cannot agree, the Committee of Ministers may refer the matter to the ECtHR itself for an interpretation of its own decision.[64] *(ii)* On the other hand, the ECtHR does not call into question that a Member State has a margin of appreciation regarding the implementation of a decision, typically when it concerns domestic remedies and the way in which the fundamental or human right in question is protected. The exact limits of this margin is a matter for further consideration. An extreme example is a domestic law in Russia, now a non-State Party, which empowered the Russian government to bring a case before the Federal Constitutional Court to declare that a judgment of the ECtHR is contrary to the Russian Constitution.[65]

The binding force of ECtHR decisions is the reason why the Hungarian Act on Criminal Procedure provides for the review of the related criminal case in Hungarian legislation.[66]

There is a strong divergence of academic opinion on the impact of ECtHR decisions on other States Parties beyond the specific case.[67] The ECtHR's intention, however, is clear regarding the interpretation and principles set out in its case law:

> "[the] Court's judgments are in fact intended not only to decide cases brought before it but more generally to clarify, defend and improve the rules established by the Convention, thereby helping to ensure that States comply with the obligations they have assumed as Contracting Parties."[68]

The practice of the Hungarian Constitutional Court demonstrates that it pays close attention to the interpretation of the ECtHR. In the reasoning of its decisions, it regularly refers to the case law on the relevant ECHR provision. It is important to note that the Constitutional Court referred to the Convention for the first time in its *Decision No. 23/1990. (X. 31.) AB* on the abolition of the death penalty, long before Hungary ratified the ECHR. This was a rather symbolic gesture at the time, but within a few years it became standard practice for the Constitutional Court to refer to ECtHR

64 Id. Article 46(3).

65 Péter Paczolay, 'Az Emberi Jogok Európai Bírósága, mint európai alkotmánybíróság', *Miskolci Jogi Szemle,* Vol. 15, Issue 1, 2020, p. 203.

66 Act XC of 2017 on Criminal Procedure, Section 649(4).

67 Péter Váczi, 'A nemzeti identitás és európai identitás csatája Magyarország Alkotmánybírósága és az Emberi Jogok Európai Bírósága között', *Jog-Állam-Politika,* Vol. 14, Special Issue 1, 2022, pp. 43 and 45.

68 *Ireland v United Kingdom*, No. 5310/71, 18 January 1978, para. 154.

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case law in its decisions. Thus, over time, the Strasbourg principles became an integral part of constitutional arguments in Hungary.

A different question is the extent to which the case law of the ECtHR is taken as guidance by the Constitutional Court. In *Decision No. 18/2004. (V. 25.) AB* the response of the Constitutional Court to this question was still modest. In the context of freedom of expression, however, it acknowledged that the decisions of the ECtHR shape and bind Hungarian jurisprudence.[69] Later on, the Constitutional Court expressly ruled in favor of applying the case law of the ECtHR. In *Decision No. 61/2011. (VII. 13.) AB* the Constitutional Court not only referred to the ECtHR and the Convention, but also laid down an important constitutional principle that has been followed ever since. Accordingly,

> "[i]n the case of certain fundamental rights, the Constitution formulates the substantive content of the fundamental right in the same way as an international treaty (such as the ICCPR and the ECHR). In these cases, the level of protection of the fundamental right by the Constitutional Court can in no case be lower than the level of international protection (typically that developed by the Strasbourg Court of Human Rights). It follows from the principle of *pacta sunt servanda* [Article 7(1) of the Constitution, Article Q(2)–(3) of the Fundamental Law] that the Constitutional Court must therefore follow the Strasbourg case law and the level of protection of fundamental rights set out therein, even this would not necessarily follow from its own precedent decisions."[70]

This principle has been confirmed by several subsequent Constitutional Court decisions. For example, according to *Decision No. 36/2013. (V. 12.) AB,*

> "the Constitutional Court must refrain from interpreting a given statute (or statutory provision) in such a way that the inevitable consequence would be a breach of the international legal obligation undertaken and a series of condemnations of Hungary before the ECtHR."[71]

Finally, it should also be pointed out that the relevance of ECtHR case law depends on the type of Constitutional Court proceedings. Indeed, when the Constitutional Court is examining the conflict of law with an international

69 ABH 2204, 303, 306.
70 ABH 2011, 290, 321.
71 Decision No. 36/2013. (V. 12.) AB, Reasoning [28].

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treaty such as the ECHR,[72] it necessarily takes into account the findings of the ECtHR more than in its other competences.

Of course, this does not mean that the ECtHR and the Hungarian Constitutional Court would judge a case in the same way. There are attempts in Hungarian scholarly literature to evaluate to what extent and in what ways the decisions of the ECtHR and the Constitutional Court show similarities or even differences based on the same or almost identical facts.[73] There may be a number of reasons for the difference of opinion between the two courts – from minor differences in the facts established, through the interpretation of the provisions serving as a basis for reference, to differences in the vision of the two courts, however, we shall not elaborate on these in the present paper. In summary, the Constitutional Court has referred to the case law of the ECtHR in a number of cases since 1990 and has used in its reasoning the legal principles and tests developed by the Strasbourg Court, which have thus become an integral part of the Hungarian Constitutional Court's practice.[74]

5.3. What Possible Violations of the Fundamental Law can the Constitutional Court Examine in the Context of de facto Life Imprisonment?

According to the information available on the website of the Constitutional Court,[75] at the time of finalizing the manuscript of this article, there was one relevant constitutional complaint pending. The case has been on the

72 Fundamental Law, Article 24(2)(f).

73 *See e.g.* Lénárd Sándor, 'Az Alkotmánybíróság és az Emberi Jogok Európai Bírósága előtt ugyanazon közhatalmi aktus ellen benyújtott panaszok miatt indult jogvédelmi ügyek összehasonlító értékelése, 1–2. rész', *Alkotmánybírósági Szemle*, 2020/1, pp. 31–36; and *Alkotmánybírósági Szemle,* 2020/2, pp. 30–37.

74 Péter Kovács, 'Az Emberi Jogok Európai Bírósága ítéletére való hivatkozás újabb formulái és technikái a magyar Alkotmánybíróság, valamint néhány más európai alkotmánybíróság mai gyakorlatában', *Alkotmánybírósági Szemle*, 2013/2, pp. 73–84; Marcel Szabó & Sándor Szemesi, 'A nemzetközi szerződésbe ütközés újabb vizsgálata az Alkotmánybíróság gyakorlatában: lehetőségek és korlátok', *Közjogi Szemle,* Vol. 16, Issue 2, 2023, pp. 1–8; Marcel Szabó, 'Az Alkotmánybíróság és az Emberi Jogok Európai Bíróságának gyakorlata' *in* Kinga Zakariás (ed.), *Az alkotmánybírósági törvény kommentárja,* Pázmány Press, Budapest, 2022, pp. 99–107.

75 Case fact sheet, at https://alkotmanybirosag.hu/ugyadatlap/?id=C5FB70C03EB40D1DC1258709005BE801.

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docket of the Constitutional Court twice so far, most recently in June 2020. In light of this motion, it is possible to scope of the examination to be conducted by the Constitutional Court in relation to ALI. An interesting aspect of this particular case is that the ECtHR has already found a violation of Article 3 ECHR in the petitioner's case.[76] Subsequently, the petitioner initiated a review of the judgment finding him criminally liable and imposing the ALI according to the regulations of Hungarian Code of Criminal Procedure. The *Kúria*, however, rejected this application for review by an order and it did not change the ALI penalty imposed. The petitioner therefore argues in their constitutional complaint that their conviction violates their right to human dignity guaranteed by Article II of the Fundamental Law, the prohibition of torture, inhuman or degrading treatment or punishment under Article III(1), the right to a fair trial under Article XXVIII(1) and the right to a remedy under Article XXVIII(7). From among these alleged violations, the most significant element of the petition is arguably, in light of the case law of the ECtHR, the examination of the compatibility of ALI with Article III(1) of the Fundamental Law.

The practice of the Constitutional Court provides some guidance for the assessment. The Constitutional Court has explained in detail the constitutional substance of the provision stating the absolute prohibition of torture, inhuman or degrading treatment or punishment in its *Decision No. 32/2014. (XI. 3.) AB*. In this decision, the Constitutional Court pointed out that the prohibitions listed were previously regulated by the Constitution together with the right to human life and dignity in Article 54. Accordingly, the prohibition of torture, inhuman and degrading treatment or punishment was an autonomous and unrestricted part of the right to human life and dignity. Although the Fundamental Law regulates the right to life and human dignity (Article II) and the prohibition of torture, inhuman and degrading treatment or punishment (Article III) in separate articles, this way of drafting the norms only creates a formal distinction. Thus, in the interpretation of the Constitutional Court, the prohibitions in Article III(1) are also separate, specific forms of the prohibition of the violation of the right to life and human dignity. The decision notes that this approach is in line with the content of Article 3 ECHR, as elaborated by the ECtHR, according to which the violation of these prohibitions also constitutes a vio-

76 *T.P. and A.T. v Hungary*, Nos. 37871/14 and 73986/14, 4 October 2016.

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lation of human dignity.[77] Accordingly, the Constitutional Court considered the practice of the ECtHR to be the guiding principle in defining certain conceptual elements contained in Article III(1) of the Fundamental Law.[78]

It is reasonable to conclude that the Constitutional Court would act along the lines of the principles laid down in *Decision No. 32/2014. (XI. 3.) AB* in the context of the ALI, supplementing it, if necessary, with further ECtHR jurisprudence. It is important to note, however, that in this decision the Constitutional Court examined partly the unconstitutionality of the challenged legislation and partly its conflict with an international treaty. The pending petition on ALI is different in that it only seeks the examination of the alleged infringement of the Fundamental Law. Thus, the substantive constitutionality examination in this case will presumably be limited to the compatibility of the legal instrument with the Fundamental Law.[79] The question will be to what extent the Hungarian Constitutional Court will give a different meaning and constitutional substance to the prohibition in Article III(1) of the Fundamental Law compared to the ECtHR interpretation of Article 3 ECHR.

The Hungarian Constitutional Court is bound by the petition submitted to it.[80] Therefore, in further Constitutional Court proceedings an examination in connection with Article IV(2) of the Fundamental Law may also arise. This provision of the Fundamental Law explicitly allows the imposition of an ALI in the case of a deliberate, violent crime. According to the explanatory memorandum attached to it, the provision does not exclude the possibility of deprivation of liberty for life, but it may only be imposed for committing a crime, it can only be based on the final judgment of a court, and with due regard to the criteria of necessity and proportionality. The question may arise what the constitutional substance of this provision of the Fundamental Law is and how it relates to Article III(1). A further question may be what requirements can be derived from Article IV(2) of the Fundamental Law with regard to the regulation of ALI, for example when it comes to the rules of the review mechanism regulated on the statutory level.

77 Decision No. 32/2014. (XI. 3.) AB, Reasoning [46].
78 Id. Reasoning [33]–[38].
79 However, the Constitutional Court can examine the conflict of laws with international treaties *ex officio*, *i.e.* of its own motion, in any procedure. *See* Act CLI of 2011 on the Constitutional Court, Section 32.
80 Act CLI of 2011 on the Constitutional Court, Section 52(2).

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6. Conclusions

In Hungarian criminal law, ALI is not a new type of penalty – notwithstanding the fact that the Fundamental Law has created a separate concept for this institution – but a form of life imprisonment where eligibility for parole is excluded. The debate surrounding the legal institution of ALI is still ongoing both at the international and the national level.

The main actor defining the interpretation of the legal institution at the international level is the ECtHR. The shaping role of the ECtHR is reflected in the fact that the introduction of the mandatory pardon procedure in Hungarian law for the prisoners who are serving ALI was intended to meet the requirements set by the ECtHR. In this respect however, it is still a question if the hope of release is granted to all convicted person in Hungary.

The national constitutional discourse regarding ALI takes place before the Constitutional Court, as this forum has the competence to interpret the Fundamental Law authentically. The Constitutional Court has not yet ruled on the merits of the ALI. Thus, it is the future task of the Constitutional Court to develop a *modus vivendi* in its decisions, which is consistent with its practice under Article III, is in line with international standards, including those of Strasbourg, and which is still compatible with the provision of Article IV(2) of the Fundamental Law.

Given the international and national standards governing ALI, it is reasonable to expect that the debate on this legal institution will continue at both national and international level. The question remains how these discourses will affect the regulation and application of this legal instrument and whether these will result in the further development of ALI in Hungarian law.

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A Comparative Analysis of the Hungarian Freedom of Expression Cases before the ECtHR

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Abstract

Almost 700 cases concerning Hungary have been decided by the ECtHR since it delivered its first 'Hungarian' judgment on 20 May 1999. In nearly 94 % of all the decisions concerning Hungary, the ECtHR has found against the State, confirming at least one violation of the ECHR. Around 4 % of cases concerned Article 10 ECHR. This article analyses all Hungarian freedom of expression cases before the ECtHR, discusses their merits, finding the comparative common grounds and unpacking the differences. This is all them more justified, as the Hungarian Article 10 cases have significantly contributed to the ECtHR clarifying its position, in particular, as these had covered a wide range of aspects of freedom of expression, from defamation and political speech to new forms of online communication.

Keywords: Article 10 ECHR, freedom of expression, Hungary, political speech, defamation,

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1. Introduction

Freedom of expression (FoE) is the cornerstone of every free and democratic society. It is enshrined in Article 19 ICCPR and reflected in regional human rights conventions, such as the ECHR.[1] It is essential for a healthy and vibrant society and a fundamental condition for its progress and every individual's self-fulfilment.[2]

The exercise of FoE carries with it duties and responsibilities to ensure that co-existing rights are not impeded. Therefore, in certain cases, it may be subject to formalities, conditions, restrictions or penalties.[3] Over the years, regional human rights courts, such as the ECtHR, have contributed to elaborating detailed rules based on the wording of the conventions. *(i)* First, FoE applies not only to information or ideas favourably regarded as inoffensive or indifferent, but also to those that offend, shock or disturb.[4] *(ii)* Second, the value placed on uninhibited expressions is particularly high when having a (heated) public debate,[5] irrespective of how unpalatable

1 *Cf.* American Convention on Human Rights, Article 13; African Charter on Human and Peoples' Rights, Article 9.
2 *Jersild v Denmark*, No. 15890/89, 23 September 1994, para. 31; *Perna v Italy*, No. 48898/99, 6 May 2003, para 39.
3 Lóránt Csink, 'Constitutional Rights in the Time of Pandemic', *Hungarian Yearbook of International Law and European Law*, Vol. 9, Issue 1, 2021, pp. 43–50.
4 *Karataş v Turkey*, No. 23168/94, 8 July 1999, para. 48; *Erkizia Almandoz v Spain*, No. 5869/17, 22 September 2021, para. 37.
5 Jan Oster, *Media Freedom as a Fundamental Right*, Cambridge University Press, Cambridge, 2015, p. 144.

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that perspective may be for the state.[6] *(iii)* Third, FoE also ensures the public's right to access[7] or receive information,[8] including even state-held information. *(iv)* Fourth, although there is no universally accepted definition of journalism, a wide range of contributors to the public debate are essential, since they serve as public watchdogs.[9] The heightened level of protection is also accorded to non-professional journalists, as the function of bloggers and popular social media users may be similar.[10] *(v)* Fifth, it is essential to note that unforeseeable legislation may have a chilling effect on FoE and constructive public debate.[11] *(vi)* Sixth, the new means of global communication, the Internet, provides an unprecedented platform for the exercise of FoE and has a crucial role in expressing and rapidly disseminating opinions, thereby significantly amplifying their impact on society.[12]

To decide disputes relating to FoE, the ECtHR developed a well-known three-part cumulative test based on international practice that must be applied to establish whether the interference was *(i)* prescribed by law; *(ii)* in pursuance of a legitimate aim; *(iii)* necessary in a democratic society.[13]

Hungary was the very first country in Eastern Europe to ratify the ECHR in 1992,[14] and as Eszter Polgári notes, "this remains a matter of national pride in spite of the growing number of condemnations from Strasbourg."[15] Almost 700 cases concerning Hungary have been decided by the ECtHR since it delivered its first 'Hungarian' judgment (*Rekvényi versus Hungary*) on 20 May 1999. In nearly 94 % of its decisions delivered concerning Hun-

6 *Erdoğdu and Ince v Turkey*, Nos. 25067/94 and 25068/94, 8 July 1999, para. 52.
7 *Autronic AG v Switzerland*, No. 12726/87, 22 May 1990, para. 45.
8 *The Sunday Times v the United Kingdom (No. 1)*, No. 6538/74, 26 April 1979, para. 65; *Thorgeir Thorgeirson v Iceland*, No. 13778/88, 25 June 1992, para. 63.
9 *Axel Springer AG v Germany*, No. 39954/08, 7 February 2012, para. 79; *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland*, No. 931/13, 27 June 2017, para. 126.
10 *Falzon v Malta*, No. 45791/13, 20 June 2018, para. 57; Recommendation CM/Rec(2016)4 of the Committee of Ministers to Member States on the protection of journalism and safety of journalists and other media actors, 4, II. Principles, 10.
11 *Delfi AS v Estonia*, No. 64569/09, 16 June 2015, Joint Dissenting Opinion of Judges Sajó and Tsotsoria, para. 20.
12 *Ahmet Yildirim v Turkey*, No. 3111/10, 18 March 2013, para. 54; *Cengiz and others v Turkey*, Nos. 48226/10 and 14027/11, 1 March 2016, para. 52.
13 *Handyside v the United Kingdom*, No. 5493/72, 7 December 1976, paras. 44–46.
14 ECHR was promulgated and became part of the Hungarian legal system with the Act XXXIII of 1993.
15 Eszter Polgári, 'Hungary: 'Gains and Losses'. Changing the Relationship with the European Court of Human Rights' *in* Patricia Popelier *et al.* (eds.), *Criticism of the European Court of Human Rights. Shifting the Convention System: Counter-Dynamics at the National and EU Level*, Intersentia, Cambridge, 2016, p. 295.

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gary, the Court has ruled against the State, finding at least one violation of the ECHR. Around 4 % of the cases concerned Article 10 ECHR, which states, "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." The Hungarian Article 10 cases have greatly helped the ECtHR to clarify its position on this provision, since they have covered a wide range of aspects of FoE: from defamation and political speech to new forms of online communication. This article analyses all Hungarian Article 10 FoE cases, discussing their merits, finding comparative common grounds and unpacking differences between them.

2. Cases concerning Political Speech

2.1. Rekvényi versus Hungary (1999)[16]

The case concerned a Hungarian police officer challenging a prohibition on police engagement in political activities imposed by national law. The *Független Rendőrszakszervezet* (Police Independent Trade Union) contested this prohibition before the Hungarian Constitutional Court (HCC), alleging that it violated constitutional rights and international law norms. However, the HCC dismissed the submission. The officer argued that the ban infringed his FoE guaranteed under Article 10 ECHR. The European Commission of Human Rights agreed, deeming the prohibition vague and failing the requirement of being 'prescribed by law' under Article 10(2) ECHR. While not disputing the legislative interference with FoE, the Hungarian government justified it under Article 10(2), claiming it was to depoliticise the police force during Hungary's transition to democracy. The Court recognised the political debate's importance under FoE and the need to maintain police neutrality, especially given its historical allegiance to the ruling party. It found the prohibition was indeed 'prescribed by law' and pursued legitimate aims, justifying the interference with FoE under Article 10(2). Ultimately, the Court upheld the prohibition to preserve police neutrality and effectiveness amid Hungary's transition to democracy and in the context of past experiences with totalitarianism.

16 *Rekvényi v Hungary*, No. 25390/94, 20 May 1999.

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2.2. Bukta and Others versus Hungary (2007)[17]

The case revolved around a demonstration organised by the applicants in front of a hotel in Budapest, where a reception was held to commemorate Romania's national day. The applicants, disagreeing with the Hungarian Prime Minister's (PM) decision to attend due to the negative historical significance of the event, protested without informing the police as required by law. The police dispersed the peaceful assembly, citing security concerns and non-compliance with the notification requirement. The applicants sought judicial review, arguing that the short notice made compliance impossible and that the law needed refinement. However, both the District Court and the Budapest Regional Court upheld the police's actions, emphasising the duty to inform the police regardless of the assembly's peaceful nature. The Supreme Court dismissed the applicants' petition for review, concluding that it fell outside the scope of applicable procedural provisions.

The ECtHR examined whether the dispersal of a peaceful demonstration violated the applicants' freedom of assembly under Article 11 ECHR. The government acknowledged the interference but argued it was justified under Article 11(2) ECHR. The Court assessed whether the interference was lawful, pursued legitimate aims, and was necessary in a democratic society. The restriction was deemed lawful based on a clear provision of the Assembly Act, meeting the foreseeability requirement. Regarding legitimate aims, the government cited the need to protect public order and the rights of others, such as the freedom of movement and orderly traffic circulation. However, the Court found the dispersal disproportionate, as it solely resulted from the lack of prior notification and did not consider the peaceful nature of the assembly. It concluded that the dispersal was unnecessary to achieve the aims pursued, violating Article 11 ECHR. The Court decided not to separately examine the complaint under Article 10 ECHR, given the violation found under Article 11 ECHR. As for just satisfaction, the Court deemed the finding of a violation sufficient compensation for any non-pecuniary damage suffered by the applicants.

17 *Bukta and others v Hungary*, No. 25691/04, 17 July 2007.

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2.3. Vajnai versus Hungary (2008)[18]

The case involved the then Vice-President of the *Magyar Munkáspárt* (Hungarian Workers' Party), a far-left party, who participated in a lawful demonstration in Budapest wearing a five-pointed red star, a symbol of the international workers' movement, on his jacket. The police, invoking the provision prohibiting totalitarian symbols of the old Criminal Code, instructed him to remove the star, which he complied with. Subsequently, the applicant faced criminal proceedings for wearing a communist symbol in public. He was convicted by the District Court but received no sanction for a probationary period. Upon appeal, the Budapest Regional Court referred the case to the CJEU to determine if Hungary's prohibition on such symbols amounted to discrimination under EU law. However, the CJEU declared it lacked jurisdiction to answer the question as the Hungarian provision fell outside the scope of EU law. Consequently, the Budapest Regional Court upheld the applicant's conviction, and the applicant lodged a complaint before the ECtHR, claiming that his FoE under Article 10 ECHR had been violated.

The government argued that the ban on the red star was justified under Article 17 ECHR, citing past cases where the Court rejected FoE claims when used to propagate ideologies against democratic values. However, the Court found the case distinct, as the applicant's display was within the context of a lawful political demonstration, not aimed at justifying totalitarian regimes. The Court rejected the government's argument that wearing the red star meant supporting totalitarianism, noting its historical association with left-wing political movements. While acknowledging past abuses under communist regimes, the Court found the ban overly broad, lacking a pressing social need, and disproportionately affecting political expression. The Court emphasised the importance of FoE in political speech, recognising its fundamental role in democratic societies. It stressed that restrictions on political speech should be narrowly interpreted, with any limitations requiring clear, pressing, and specific social needs. The Court found that the government had not demonstrated such a need in the case of the red star ban, especially given Hungary's stable democracy and the lack of evidence of any real threat from communist ideologies.

Furthermore, the Court noted that the ban's indiscriminate application failed to distinguish between legitimate and illegitimate uses of the red

18 *Vajnai v Hungary*, No. 33629/06, 8 July 2008.

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star, potentially chilling political expression and leading to self-censorship. Ultimately, the Court concluded that the applicant's conviction for wearing a red star could not be justified under Article 10 ECHR. It deemed the interference with the applicant's FoE disproportionate and lacking a sufficient basis in a democratic society. Therefore, it found a violation of Article 10 and ruled in favour of the applicant.

2.4. Fratanoló versus Hungary (2011)[19]

Similarly to the Vajnai case, Fratanoló, a member of the *Magyar Munkáspárt* (Hungarian Workers' Party), was initially convicted for wearing a red star at a public demonstration in 2004 but was later acquitted on appeal, with due consideration to the judgment in *Vajnai*. However, the Pécs Court of Appeal overturned the acquittal, upholding the conviction and ordering the payment of a fine, arguing that the act posed a societal danger regardless of the wearer's political affiliation, as it violated the ban on the use of totalitarian symbols under Hungarian law.

The ECtHR applied the three-part cumulative test to examine the applicant's complaint. It was acknowledged that there was indeed an interference, and the Court assessed whether it was prescribed by law and pursued a legitimate aim. The Court found that the restriction on the use of totalitarian symbols was indeed prescribed by law and pursued the legitimate aims of preventing disorder and protecting the rights of others. The government argued that the applicant's use of the red star symbolised identification with totalitarian ideas, constituting a danger to society. However, the applicant contended that using the symbol was a form of political expression and was not intended to promote totalitarianism. The Court emphasised the importance of FoE, especially in political discourse, and noted that restrictions must be narrowly interpreted. The Court compared the present case with the *Vajnai* judgment regarding the displaying of the red star and concluded that the interference was unjustified. It found that the restriction on displaying a red star was too broad and could potentially limit legitimate forms of expression. Additionally, the Court noted that the domestic court did not adequately assess the proportionality of the interference, thus failing to demonstrate a pressing social need for the restriction. Consequently, the Court ruled that there had been a violation of Article 10

19 *Fratanoló v Hungary*, No. 29459/10, 3 November 2011.

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and reserved the right to provide just satisfaction to the injured party under Article 41 ECHR.

2.5. Fáber versus Hungary (2012)[20]

The *Fáber* case centres on an event during a 2007 demonstration in Budapest, where Fáber silently displayed a so-called Árpádsávos zászló (Árpád-striped flag[21]) near an anti-racism protest organised by the *Magyar Szocialista Párt* (Hungarian Socialist Party). This occurred alongside a demonstration by MPs of the far-right party Jobbik. Following police instructions to remove the flag or leave, Fáber refused and was subsequently detained, interrogated for six hours, and fined for disobeying police orders.

The ECtHR deemed Fáber's conduct provocative and potentially disruptive to the anti-racism demonstration. Nonetheless, the Court emphasised fundamental principles governing necessity in the context of interfering with the applicant's FoE, especially when it concerns political speech. Though symbols associated with political movements are protected under Article 10 ECHR, the context is crucial in imposing restrictions, particularly when it comes to symbols of multiple meanings. In this regard, freedom of assembly protected even potentially offensive demonstrations, except those advocating for violence or rejecting democratic principles.

Acknowledging national authorities' broad discretion in managing assemblies to prevent disorder while upholding FoE, the Court stressed the need to protect the rights of all demonstrating groups, while using the least restrictive means. Assessing the case, the ECtHR found that the police intervention lacked sufficient justification, as, despite perceptions of provocation, the display of the Árpád-striped flag did not significantly disrupt the demonstration. Examining whether the display constituted a reprehensible act warranting restrictions, the Court noted subjective perceptions of offensiveness but emphasised that mere irritation or outrage could not justify limitations on FoE. While sensitive to symbols associated with totalitarian regimes, it asserted that FoE could not be restricted based solely on feelings

20 *Fáber v Hungary*, No. 40721/08, 24 July 2012.

21 It is the name of a flag which has been in constant use since the early 13th century in Hungarian heraldry. It generated lots of controversy in the 20th century, as the Hungarian Nazi government in 1944–1945 used a similar symbol as a component of their flag.

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of unease or offence. Therefore, the Court found that Fáber's rights under Article 10 ECHR had been violated.

2.6. Karácsony and Others versus Hungary (2016)[22]

The *Karácsony and others* judgment of the ECtHR is a landmark case concerning political speech, focusing on fines imposed by the Hungarian Parliament on opposition Members of the Parliament (MPs) for disruptive conduct during parliamentary sessions. The Court examined two separate cases involving acts of protest by opposition MPs during parliamentary sessions. In the first case, Mr Karácsony and other opposition party MPs displayed a placard criticising the government's alleged corruption, while in the second case, three opposition MPs protested a land transfer law by placing a wheelbarrow filled with soil on the PM's table and using a megaphone to voice their opposition. The fines proposed by the Speaker and subsequently approved by Parliament ranged from negligible to substantial amounts, and the applicants challenged them before the ECtHR, alleging a violation of their FoE under Article 10 ECHR.

The Court conducted a comparative analysis of disciplinary measures in parliaments of Council of Europe Member States, highlighting various forms of sanctions and procedural mechanisms. The government argued that the applicants hadn't exhausted domestic remedies, specifically the constitutional complaint process. However, the Court dismissed this objection, citing limitations and lack of clarity in the domestic procedure.

Examining the Article 10 allegations, the Court acknowledged the interference with FoE but deemed it legitimate to maintain parliamentary order. However, it found the interference unnecessary due to insufficient procedural safeguards. The judgment emphasised the need to balance parliamentary autonomy with protecting MPs' FoE, stressing the importance of procedural fairness in such proceedings. It highlighted the delicate balance between individual rights and effective parliamentary functioning in a democratic society, underscoring the significance of pluralism, dialogue, and compromise. In conclusion, the Court found that the *ex post facto* decision to sanction Mr Karácsony and other MP's for their conduct was not proportionate with the principles governing the restriction of political speech.

22 *Karácsony and others v Hungary*, Nos. 42461/13 and 44357/13, 17 May 2016.

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2.7. Szanyi versus Hungary (2016)[23]

In 2013, Mr Szanyi, an MP representing the *Magyar Szocialista Párt* (Hungarian Socialist Party), faced disciplinary actions for making an offensive gesture toward MPs of the Jobbik party during a parliamentary session. Citing parliamentary regulations, the Speaker proposed disciplinary proceedings against Mr Szanyi and suggested a fine for using a blatantly offensive expression. The plenary session affirmed the Speaker's proposal without offering Mr Szanyi any remedy, and his subsequent attempts to address government policies through interpellations were banned by the Speaker, who alleged that his statements were injurious to the Parliament's prestige. Mr Szanyi contested these measures, arguing that they infringed upon his FoE and aimed to stifle opposition voices, as his expressions addressed matters of public interest without intending to disrupt parliamentary proceedings.

The ECtHR examined whether actions taken against Mr Szanyi violated his rights under the ECHR. Recognising the interference with Szanyi's FoE in the fine and interpellation bans, the Court stressed the importance of maintaining order in Parliament in a proportionate and democratic way. Despite the Parliament's authority to regulate speech, the Court found the disciplinary measures disproportionate and unnecessary in a democratic society, criticising the lack of transparency and procedural safeguards. The Court emphasised the significance of protecting minority rights and political speech, even when controversial, concluding that the interference violated Article 10 ECHR. However, Mr Szanyi's claim of discrimination based on his political opinions lacked sufficient evidence and was dismissed. As far as remedies were concerned, the Court ordered the reimbursement of the fine and awarded compensation for legal expenses, stating that the finding of a violation itself provided adequate satisfaction for the non-pecuniary damage the MP had suffered.

2.8. Baka versus Hungary (2016)[24]

After serving for seventeen years as a judge at the ECtHR and then over a year at the Budapest Court of Appeal, Mr Baka was elected President of the Supreme Court of Hungary for a six-year term starting 22 June 2009.

23 *Szanyi v Hungary*, No. 35493/13, 8 November 2016.
24 *Baka v Hungary*, No. 20261/12, 23 June 2016.

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In this role, he had both managerial and judicial responsibilities, including presiding over deliberations resulting in uniformity decisions and guidance decisions, as well as leading the National Council of Justice. His tenure was marked by significant legislative reforms affecting the judiciary, in respect of which he expressed various professional opinions and concerns. Notably, he criticised bills and amendments to the retirement age of judges, highlighting constitutional issues and potential risks to judicial independence. Despite his efforts to influence legislative outcomes, Parliament proceeded with enacting controversial laws, leading to the termination of his mandate as President of the Supreme Court in January 2012, well before its expected end. Consequently, he lost certain benefits associated with his position. In addition, the legislation governing post-term benefits for outgoing presidents of the Supreme Court was amended, affecting his entitlements.

After conducting a thorough international legal analysis on judges' FoE, the Court deliberated on whether the termination of Mr Baka's contract violated his FoE. Mr Baka contended that his premature dismissal resulted from his outspoken criticism of legislative measures affecting the judiciary. At the same time, the government argued that it was a result of structural reforms within the judiciary. The Court examined the evidence and found a clear connection between Mr Baka's expressions and dismissal, dismissing the government's justifications. It scrutinised whether the interference was prescribed by law, pursued a legitimate aim, and was necessary in a democratic society. Expressing doubts about the legitimacy of the law invoked, the Court highlighted that the termination compromised judicial independence and lacked adequate safeguards against abuse. Some judges concurred with the majority's decision, emphasising the importance of protecting judicial independence, while others dissented, questioning the assessment of legitimate aim and necessity in the interference.

2.9. Magyar Kétfarkú Kutya Párt (MKKP) versus Hungary (2020)[25]

The case tackled the legality of a mobile application developed by the so-called 'joke party'[26] *Magyar Kétfarkú Kutya Párt* (Hungarian Two-Tailed Dog Party, MKKP) during Hungary's 2016 referendum, which centred on

25 *Magyar Kétfarkú Kutya Párt v Hungary*, No. 201/17, 20 January 2020.

26 Péter Szegedi, 'Viccpártok menni Európa – A Magyar Kétfarkú Kutya Párt és a Die PARTEI európai parlamenti választási eredményei'. *Parlamenti Szemle*, Vol. 6, Issue 4, 2021, pp. 45–65.

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the EU's proposal to relocate asylum seekers to Hungary amidst the migration crisis. The referendum triggered widespread concerns among opposition parties, who viewed it as potentially propagating disinformation and xenophobia. To contest the referendum, MKKP created an app called 'Cast an Invalid Vote', allowing users to share images of invalid ballot papers as a form of protest against what they perceived as an abuse of democratic processes. The *Nemzeti Választási Bizottság* (National Election Committee, NVB) swiftly condemned the app, arguing that it violated electoral laws and undermined the integrity of the voting process. The NVB's decision was partly upheld by the HCC, which deemed the sharing of photos of invalid ballot papers contrary to the fundamental purpose of a ballot paper. Subsequently, the case reached the ECtHR, where the focus shifted to the legality of restricting MKKP's FoE under Article 10 ECHR.

The ECtHR acknowledged the evolving role of digital media in political discourse and emphasised the need for restrictions on FoE to be prescribed by law and foreseeable to citizens. It scrutinised the Hungarian authorities' actions, particularly their reliance on vaguely articulated legal provisions, and concluded that the restriction on the MKKP's app was not sufficiently foreseeable and, hence violated its FoE. Furthermore, the Court underscored the significance of protecting political pluralism and media use in democratic processes, especially during sensitive electoral periods. It recognised the app as a platform for political expression, akin to traditional media outlets, and highlighted the importance of safeguarding such platforms from arbitrary restrictions. Consequently, the ECtHR decided that the applicant's rights under Article 10 had been violated. The ruling marked a significant precedent in regulating online communication during elections, emphasising the need for legal clarity and respect for fundamental rights in the digital sphere.

2.10. ATV Zrt. versus Hungary (2020)[27]

The dispute between the Budapest-based television channel ATV and the Hungarian government centred on ATV's use of the term 'far-right' in a news program discussing a statement by a *Jobbik* party's MP. Legal action ensued when the *Nemzeti Média- és Hírközlési Hatóság* (National Media and Infocommunications Authority) deemed the term a value judgment

27 *ATV Zrt. v Hungary*, No. 61178/14, 28 April 2020.

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rather than a factual statement. Despite ATV's arguments, the *Médiatanács* (Media Council of the National Media and Infocommunications Authority), acting as a second-instance authority, upheld the decision, emphasising unbiased news reporting under the Hungarian Media Act. The Supreme Court of Hungary reinstated the Media Council's ruling, imposing fines and legal costs on ATV, despite the ruling's initial overturning by the Budapest Administrative and Labour Court. Later the HCC dismissed ATV's constitutional complaint.

In its decision the ECtHR concluded that the interference aimed to ensure balanced and unbiased news coverage, falling under the legitimate aim of protecting the rights of others. The pivotal question was whether the interference was necessary in a democratic society. As a premise, the ECtHR assessed whether the term 'far-right' used by ATV was a statement of fact or opinion, given the broad interpretation of 'opinion' under the national Media Act. Domestic courts differed in their interpretation of the term, leading to uncertainty about whether ATV could have foreseen the restriction. Despite various analyses by the courts, there was no consensus on whether the term constituted an opinion or a factual statement. Considering the lack of clarity in the legislation and the divergent approaches by domestic courts, the ECtHR found the interference disproportionate and not necessary in a democratic society. Therefore, it concluded that ATV's right to FoE under Article 10 ECHR was violated.

2.11. Ikotity and Others versus Hungary (2023)[28]

As per the facts of the case, the applicants, MPs of the Hungarian Parliament representing the opposition party *Lehet Más a Politika* (Politics Can Be Different, LMP) were fined for displaying posters without permission concerning environmental degradation in certain parts of Budapest during a session. Despite their objections, both the Immunity Committee and the Parliament upheld the fines, citing a breach of parliamentary rules. The Immunity Committee argued that the posters were unnecessary for expressing views and constituted a deliberate violation of parliamentary regulations. The Parliament voted to uphold the sanctions without debate, resulting in a reduction of the applicants' monthly salaries. The applicants lodged a complaint before the ECtHR after exhausting domestic remedies.

28 *Ikotity and others v Hungary*, No. 50012/17, 10 May 2023.

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The ECtHR evaluated the opposition MPs' complaint concerning the restriction on their FoE during a parliamentary session. They examined whether the interference was lawful and necessary, considering the procedural safeguards and the legitimacy of the restrictions imposed. The ECtHR concluded that the restrictions were justified to maintain parliamentary order, emphasising the importance of parliamentary debate while acknowledging the limited latitude states have in regulating such matters. Ultimately, the Court found no violation of Article 10 ECHR, affirming the legitimacy of the parliamentary sanctions imposed on the MPs. While acknowledging the interference, the ECtHR found that the restrictions to maintain parliamentary order were proportionate. The Court examined procedural safeguards and necessity, concluding that the restrictions were justified to ensure the effectiveness of parliamentary proceedings. Therefore, the ECtHR ruled that there was no violation of Article 10 ECHR.

3. Cases Concerning Access to Information

3.1. Társaság a Szabadságjogokért versus Hungary (2009)[29]

Társaság a Szabadságjogokért (Hungarian Civil Liberties Union, TASZ) is a Hungarian NGO that sought access from the HCC to a petition submitted by a Member of Parliament regarding drug-related legislation. The HCC rejected TASZ's request on the grounds that it could not be made accessible to third persons without the petitioner's consent. The court of first instance dismissed TASZ's action against the HCC on the grounds that the MP's petition was not 'data' under the Hungarian Data Act of 1992. In the court of appeal, the first instance decision was upheld, as the court considered that the petition contained personal data of the MP and, therefore, the requested document could not be disclosed without his consent, even on the grounds of public interest.

In the proceedings before the ECtHR, TASZ argued that access to information and the dissemination of information are prerequisites of FoE, as it is not possible to form or maintain an informed opinion without knowledge of the relevant and accurate facts. TASZ stated that without the requested information, it could not take a position in a debate of public

29 *Társaság a Szabadságjogokért v Hungary*, No. 37374/05, 14 April 2009.

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interest, and it also argued that its role in this respect is like that of the press.

In its judgment, the Court stated in principle that the function of the press includes the creation of forums for public debate, but this function is not limited to the media or professional journalists. Therefore, TASZ can also be considered a social watchdog. In support of this, the ECtHR used strong words when it noted that "authorities interfered in the preparatory stage of this process by creating an administrative obstacle. The Constitutional Court's monopoly of information thus amounted to a form of censorship." In examining the three-part cumulative test, the Court found the prescribed by law and the legitimate aim to be well founded but turned to a broader interpretation of the concept of freedom to receive information. Referring to its earlier case law, it confirmed that the right to freedom to receive information basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him, and that in the present case, the MP had even held a press conference on his original petition. In addition, the Court observed that the applicant had finally sought information on the MP's petition excluding his personal details. On this basis, the Court found a violation of Article 10 ECHR.

3.2. Kenedi versus Hungary (2009)[30]

Mr Kenedi is a historian who has focused his research on Soviet-style state structures and the state security services of dictatorships. In September 1998, he requested information from the *Belügyminisztérium* (Ministry of the Interior) on the operation of the *Állambiztonsági Szolgálat* (State Security Service) in the 1960s. The Ministry refused to comply with the request in November 1998, claiming that the requested material had been classified for 50 years in October 1998 for state security reasons. The court of first instance upheld the historian's claim, finding that the material requested was necessary for his scientific research. The Ministry wanted to appeal to the Supreme Court but was late in submitting its material. Thus, the appeal was rejected. The Ministry would then have given Mr Kenedi access if he signed a confidentiality agreement. The historian refused to do so.

30 *Kenedi v Hungary*, No. 31475/05, 26 May 2009.

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Consequently, the Ministry continued trying to block the court's decision, and Mr Kenedi was denied full access to the requested documents.

In his application to the ECtHR, Mr Kenedi invoked Article 6 ECHR and complained of the lengthy non-enforcement of the court judgment authorising his access to documents dating back to the 1960s. He also invoked Article 10 ECHR and the Court held that the complaint also fell to be examined under the said Article. The Court found that the stubborn reluctance of the Hungarian authorities prevented Mr Kenedi from having full access to the documents necessary for his research so that the first element of the three-part cumulative test, prescribed by law, could not be met since the authorities' practice amounted to arbitrariness. The Court also observed that "access to original documentary sources for legitimate historical research was an essential element of the exercise of the applicant's right to freedom of expression."[31] In addition, the procedure was excessively long, and it violated both Articles 6 and 10 ECHR.

3.3. Magyar Helsinki Bizottság versus Hungary (2016)[32]

The *Magyar Helsinki Bizottság* (Hungarian Helsinki Committee, MHB) is an NGO that requested the names of public defenders and the number of their annual assignments from 28 police departments to be used for a national survey. 17 of these departments provided the requested data, and in 7 of the remaining 10 cases, the data were provided after first instance court proceedings. In the remaining three cases, the police departments argued that the data could not be released because, firstly, they were not of public interest and, secondly, the public defenders were not members of any state, municipal or public body. The cases were eventually referred to the Supreme Court, which ruled in all three instances that the requested data could not be disclosed because they were not of public interest but the personal data of the public defenders.

Before the ECtHR, the Hungarian government argued that the right of access to data of public interest cannot be derived from the ECHR. The Court noted a perceptible evolution in favor of the recognition, under certain conditions, of a right to freedom of information as an inherent element of the freedom to receive and impart information enshrined in

31 *Cf. Társaság a Szabadságjogokért v Hungary*, paras. 35–39.
32 *Magyar Helsinki Bizottság v Hungary*, No. 18030/11, 8 November 2016.

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Article 10 ECHR. Although the Court has previously held that it is difficult to derive from the ECHR a general right of access to administrative data and documents, a decision to refuse access to administrative documents which are readily available may constitute an interference with Article 10 ECHR, in particular, where access to the information is instrumental for the individual's exercise of their right to FoE.

In this context, the ECtHR also established a set of test-like criteria,[33] parts of which can be examined to determine whether there has been interference. The elements are: the purpose of the information request, the nature of the information sought, the role of the applicant and whether the information is ready and available. Of particular note is the ECtHR's insistence that the social watchdog function can be exercised not only by the press and NGOs but also by academic researchers, authors of literature, bloggers and popular users of social media. In the light of this, although it found the conditions prescribed by law and legitimate aim to be fulfilled, the ECtHR held that the government had failed to demonstrate that the prohibition on the disclosure of data contributed to the protection of the personal data of the public defenders and was therefore not necessary in a democratic society.

3.4. Szurovecz versus Hungary (2019)[34]

Mr Szurovecz, a journalist from an online portal, approached the *Debreceni Befogadó Központ* (Debrecen Reception Centre) of the *Bevándorlási és Állampolgársági Hivatal* (Office of Immigration and Nationality, BÁH) under the Ministry of Interior with a request to write a newspaper article on the situation of refugees, including interviews with them and, if they clearly agree, their photos. The BÁH rejected the request because it would violate the refugees' privacy rights and endanger their safety. After exhausting national remedies, Mr Szurovecz turned to the ECtHR, complaining that the refusal to grant the permit – at the height of the refugee crisis – breached his right to FoE under Article 10 ECHR.

The ECtHR observed that Mr Szurovecz wanted to ascertain on the spot the inhuman and degrading situation revealed by other sources (such as the

33 It is interesting that in their concurring opinion Judges Sicilianos and Raimondi stated that although it looked like ECtHR's evolutive interpretation, it is not in reality a genuine innovation.

34 *Szurovecz v Hungary*, No. 15428/16, 8 October 2019.

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Hungarian Commissioner for Fundamental Rights), and the Court stated that the gathering of information is an essential part of the exercise of the profession of journalist, a protected sub-prerogative of press freedom. Moreover, unnecessary obstacles to exercising this right have a chilling effect on media professionals, preventing them from fulfilling their role as public watchdogs. The Court found that Hungary satisfied the first two elements of the three-part cumulative test, but the necessity part of the test of pressing social need was not fulfilled. In fact, at the time of the application, a large number of refugees were arriving in Hungary, and the government was campaigning in paid spots in the media that there was a severe refugee crisis in the country. In the Court's view, in that situation, a newspaper article based on the journalist's personal experience could have helped inform the public about a very vulnerable group, namely refugees who are not even familiar with local customs and language.

Although the ECtHR found that there is no common practice among ECHR State Parties regarding refugee centres and access for journalists, and a wider margin of appreciation could, therefore, be envisaged, in this particular case, the Court found that the local authorities had not sufficiently weighed up the importance of the public interest. In the ECtHR's view, the refugees' privacy is, of course, important, but the journalist had made it clear that he would only publish their photos and words with their written consent.

Moreover, the Court noted in principle that Hungary's argument that Mr Szurovecz could have obtained the information from other sources (such as those published by the BÁH) was not acceptable since, on the one hand, personal investigation means a different perspective and, on the other hand, State Parties cannot decide for journalists on the technique they use to carry out their work. On this basis, the ECtHR ruled that the applicant's right to receive and impart information envisaged in Article 10 ECHR had been violated.

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4. Cases concerning Defamation

4.1. Karsai versus Hungary (2009)[35]

Mr Karsai is a historian and university professor who has written numerous articles on the role of the Hungarian authorities in the extermination of Jewish and Roma communities during World War II (especially under PM Pál Teleki between 1939 and 1941). In 2004, Mr Karsai published an article in a weekly newspaper in which he criticised the right-wing and extreme right-wing media for praising the former PM, which he called "cautious Jew-bashing". The article referred several times to another historian, Mr Török, although the criticism was not explicitly directed at him. Mr Török brought an action against Mr Karsai for prejudicing his reputation. The Hungarian courts were not of the same opinion: the court of first instance dismissed the action, while the court of appeal and the Supreme Court found that, although the specific sentence did not name Mr Török, the article as a whole was capable of damaging his reputation.

The ECtHR found the first two elements of the three-part cumulative test to be satisfied by Hungary, but found the necessity part to be lacking the pressing social need criterion. The Court accepted the argument that the article in its entirety could apply to Mr Török but considered the main issue to be whether Mr Karsai's article constituted a statement of fact or value judgment. This is to be decided by the national authorities and courts, which have a wide margin of appreciation, but in the event of a dispute, the ECtHR can have the 'final say'. Although the ECtHR in the present proceedings considered that there were factual grounds for the allegation, as Mr Török had indeed taken an active role in publicly commenting the actions of the former PM, it nevertheless qualified Mr Karsai's writing as a value judgement, as it did not refer to the other historian, but to his role as represented and voiced by him in the right-wing media.

The Court also observed that the article was part of a heated public debate in which the press should enjoy the highest level of protection. Furthermore, the Court pointed out that Mr Török had written many articles on the subject, thereby voluntarily exposing himself to public criticism. The civil sanction (namely, the duty to retract in a matter which affects Mr Karsai's professional credibility as a historian) imposed by the Hungarian courts can also have a chilling effect on the debate surrounding history in

35 *Karsai v Hungary*, No. 5380/07, 1 December 2009.

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the country. On this basis, the Court found that applicant's right to FoE had been violated.

4.2. Ungváry and Irodalom Kft. versus Hungary (2013)[36]

Mr Ungváry, a historian dealing with 20th century Hungarian history, published an article in 2007 on the relationship between state security and student movements in the 1980s. The article also presented Mr Kiss, who was a judge of the HCC at the time of the publication of the article. Mr Ungváry's research suggests that Mr Kiss acted as a 'hardliner' against the student peace movement Dialogue and was an 'official contact' of state security.[37] The magazine's next issue included Mr Kiss's position, who denied the allegations. A week later, Mr Ungváry reiterated what he had stated in the original article in a television interview and called Mr Kiss a 'bastard' and 'main bastard'. Mr Kiss initiated both criminal and civil proceedings: the first one against Mr Ungváry, the second one against him and the newspaper, asking for their joint responsibility to be established. The court of first instance found in favour of Mr Kiss, claiming that Mr Ungváry and the newspaper had damaged his reputation and published untrue statements. The court of appeal, however, took the view that the allegations were value judgments, not statements of fact. The Supreme Court followed the position of the first instance court and held the historian and the newspaper jointly liable.[38]

At the beginning of its decision, the ECtHR noted the prominent role of the press in democratic societies but also stressed that the press must 'refrain from pure sensationalism'. The Court concluded that the relevant article was mainly factual, although the judgment refers to the content of the article as constituting an opinion in several paragraphs, therefore, the wording of the judgment does not help clarify the legal qualification

36 *Ungváry and Irodalom Kft. v Hungary*, No. 64520/10, 3 December 2013.

37 Mr Kiss was the deputy secretary of the Communist Party Committee of the city of Pécs between 1983 and 1988. In the article, Mr Kiss was not described as an official agent by Mr Ungváry.

38 It should be noted here that in the criminal proceedings, the courts of different levels also reached different decisions, but the Supreme Court eventually acquitted Mr Ungváry, *i.e.* "the final outcome of the proceedings differed fundamentally between the civil and criminal cases: on the basis of the same facts, Mr Ungváry was convicted in the former and acquitted in the latter." András Koltay, 'Ungváry Krisztián perei Magyarországon és Strasbourgban', *In Medias Res*, Vol. 7, Issue 1, 2014, p. 135.

https://doi.org/10.5771/9783748946526 https://www.inlibra.com/de/page/agb - Open Access -

of the article. The ruling is based on the fact that Mr Kiss is a public figure with a duty of tolerance, especially when a historian criticises his 1980s' role. In addition, the Court stated that Mr Kiss also used the press to publicise his own position. As a third concept, the Court considered the notion of official contact to be broad in scope and described it as a fact-related value judgment. In addition, the ECtHR also observed that some of the allegations exceeded the limits of journalism, scholarship and public debate. Considering the above, it is not easy to understand why the ECtHR nevertheless concluded that there had been a violation of Article 10 ECHR.

By way of explanation, it should be mentioned that the Court considered it essential that Mr Kiss had indeed written reports (even if not addressed to the authority) and that he was also holding an elected public office at the time of the publication of the article. Moreover, according to the ECtHR, the Hungarian courts did not take sufficient account of the fact that the article did not deal solely with Mr Kiss's role but also sought to present a broader context. The Court found that the fine imposed (namely, the duty to pay a considerable amount of money in damages and legal costs) could also have a chilling effect. In relation to the other applicant, namely the newspaper, the ECtHR found that since the archived material on Mr Kiss was only available to private individuals, the press had no means of verifying its content, which, moreover, was provided by a respected historian. For this reason, the Court held that Article 10 ECHR had been violated in respect of both applicants.

4.3. Uj versus Hungary (2011)[39]

Mr Uj, a Hungarian journalist, wrote an article about a world-famous Hungarian state-owned company's wine claiming that "hundreds of thousands of Hungarians are proudly, even devoutly, drinking this shit; it is fed (watered) to the much-suffered people, and at least twice (tle: state-owned enterprise) paid for by them". The company sued Mr Uj and the Hungarian courts convicted him for defamation and then for libel, with the Supreme Court also upholding the conviction. The reasoning behind the judgments was that characterising a wine as shit was unnecessarily insulting and infringed the company's good reputation.

39 *Uj v Hungary*, No. 23954/10, 19 July 2011.

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The ECtHR, in its judgment, stated that what Mr Uj described is within the scope of FoE, even if it was exaggerated and provocative. The Court observed that the company had the right to defend itself and its products from defamatory-like allegations, but there is a fundamental difference between the reputation and dignity of a person and the commercial reputation of a company: the latter has no moral dimension. The article, as a whole, was more about the problematic aspects of state ownership than the wine itself, and thus, it was of public interest. In light of the above, the Court decided that there was a breach of Article 10 ECHR.

5. Cases concerning Online Communication

5.1. Szima versus Hungary (2012)[40]

The applicant was a retired senior police officer who served as the chairperson of the *Tettrekész Magyar Rendőrség Szakszervezete* (Tettrekész Police Trade Union) at the time of the case and authored several articles on the Trade Union's website, which fell under her editorial control. Her articles covered topics such as underpayment of police officers, allegations of nepotism and undue political influence within the police, as well as qualification concerns regarding senior police officers. Following the publication of these articles, she was found guilty of incitement to insubordination and was fined and demoted. The applicant submitted a complaint because the condemnation of certain statements she had published on the Internet violated her right to FoE, in particular, because she could not prove the truthfulness of the allegations challenged.

The Court noted that the right to FoE under Article 10 ECHR was guanarteed for everyone, including members of the armed forces. However, in analysing the proportionality of the punitive measures restricting the applicant's right to express critical opinions, the Court must examine the extent to which the right to FoE of a member of the police is restricted to prevent disorder within the police force, which is organised as a hierarchical body requiring discipline essential to the performance of its duties. Therefore, concerning the views expressed on the senior police officers' management practices, the Court shared the view of the domestic courts and accepted that these allegations, even if they were predominantly value judgments, were

40 *Szima v Hungary*, No. 29723/11, 09 October 2012.

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capable of causing disobedience by potentially discrediting the legitimacy of police action, in particular since the applicant had not provided any clear factual basis for her claims. Given these considerations, the punishment imposed on the applicant was deemed proportionate.

5.2. Magyar Tartalomszolgáltatók Egyesülete and Index Zrt. versus Hungary (2016)[41]

Magyar Tartalomszolgáltatók Egyesülete (Association of Hungarian Content Providers, MTE) and Index Zrt. judgment by the ECtHR is a landmark case concerning the liability of a self-regulatory body of Internet content providers (MTE) and an Internet news portal (Index.hu) for vulgar and offensive online comments posted on their websites. At the time of the case, both MTE and Index.hu allowed users to leave comments on the publications published on their portals without any editing or moderation by the applicant. In that context, both applicants included in their General Terms and Conditions a clause providing that the content of the comments was the responsibility of the authors. In addition, the applicants operated a Notice and Take-Down System (NTDS) whereby anyone could report unlawful comments for removal.

MTE published an opinion article on its website regarding the unethical and misleading business conduct of a company. Users also commented on the article under pseudonyms. Index.hu wrote about the opinion as well, including the full article, to which users also reacted in the form of comments. The company concerned filed a complaint before the national courts, arguing that the opinion was falsely offensive and that the subsequent comments infringed on its right to reputation. As a result, the applicants removed the contested comments and argued that they were an intermediary service provider under Hungarian law and, therefore, they should not be held liable for the comments made by users. The national court partially upheld the claim, maintaining that the company's right to reputation had been infringed, as the comments were offensive, defamatory and humiliating, and exceeded the acceptable limits of Article 10 ECHR. The court also rejected that the applicants were merely intermediaries and had an exclusive obligation to remove certain content in the event of a complaint since the comments constituted edited content and were the same as letters from readers, making the applicants legally liable for publishing the comments, even though they were subsequently removed.

41 *Magyar Tartalomszolgáltatók Egyesülete and Index.Hu Zrt v Hungary*, No. 22947/13, 2 May 2016.

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After the national proceedings, the Court held that the Hungarian courts had not struck an appropriate balance between the competing rights, as they accepted at face value that the comments were unlawful because they damaged the reputation of the company. The Court highlighted that although the comments were offensive and vulgar, in the present case, they did not amount to clearly unlawful speech. Regarding the liability of the applicants, the Court held that the Hungarian courts had failed to carry out a proportionate analysis of the actual authors and the legal liability of the applicants. In the Court's view, the fact that the applicants provide a platform for third parties with an NTDS to exercise their FoE by publishing comments constituted a specific journalistic activity and, in that context, it pointed to its existing practice whereby

> "punishing journalists for promoting the dissemination of the opinions of others expressed in the context of an interview would seriously undermine the contribution of the press to public affairs and should not be envisaged without a particularly strong justification."

5.3. Magyar Jeti Zrt. versus Hungary (2019)[42]

The applicant company (*Magyar Jeti Zrt.*) is the operator of a Hungarian news portal (444.hu), which challenged the national courts' unnecessary restriction of its FoE by finding it liable for posting a YouTube hyperlink providing access to defamatory content on its website. The video in question contained an interview with the head of the Roma minority municipality, who expressed his concerns about the situation of the Roma community after a group of football supporters had earlier made racist statements and threats against the local students of a school who were mainly of Roma origin. In describing the events, the leader described the football supporters as members of a right-wing party, Jobbik. The interview was uploaded on YouTube by the media. The applicant company published an article about the incident on its website, including a YouTube video hyperlink. The political party *Jobbik* initiated defamation proceedings for linking the description of football supporters with the party by using the term 'Jobbik'.[43] It claimed that the party's right to reputation had been infringed by publishing a hyperlink to the YouTube

42 *Magyar Jeti Zrt. v Hungary*, No. 11257/16, 3 March 2019.
43 In Hungarian Jobbik means 'Better than others' and also 'Rightist'.

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video. The applicant company was found liable for disseminating defamatory statements in breach of the political party's right to reputation.

The Court emphasised the vital role of hyperlinks in facilitating Internet functionality and distinguished their use from traditional publishing, highlighting that hyperlinks merely direct users to existing material rather than providing the content itself. The Court outlined factors to be considered under Article 10 ECHR regarding whether hyperlinking could incur liability, stressing the need for individual assessments in each case. It criticised Hungarian domestic law for imposing strict liability for disseminating defamatory material, which hindered a meaningful evaluation of the applicant company's right to FoE. The imposition of strict liability for hyperlink usage could impede the free flow of information online, discouraging authors and publishers from utilising such links if they lack control over the linked content.

5.4. Index Zrt. versus Hungary (2023)[44]

In another case, Internet news portal Index Zrt. brought a claim to the Court challenging a decision by national courts to order the company to pay compensation for the publication of a story told by a third party, which the courts found to be false and defamatory. The publication concerned was a story about the Hungarian President's conduct during military service, part of a media initiative to counter a smear campaign. The applicant complained that the article concerned a public figure and a matter of public interest; thus, the order to pay compensation violated its right to FoE.

The Court disagreed with the national courts' finding that FoE did not apply to the applicant company's conduct. The domestic courts did not examine the whole article published by the applicant company but focused on a part of it taken from its general context. The Court reiterated that, in proceedings such as the present case, national courts are called upon to consider whether the context of the case, the public interest or the intention of the author of the article challenged justified the possible use of a dose of provocation or exaggeration. However, having regard to the reasons given by the national courts in their decisions, the Court considered that the national courts unduly detached the contested statement from its context and its apparent purpose and failed to take into account in their assessment any

44 *Index.hu Zrt. v Hungary*, No. 77940/17, 7 September 2023.

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contribution which the article might have made to the debate on a matter of public interest since the information in question was not entirely free of political significance and was likely to arouse public interest in the way in which the President approached and carried out his duties. As regards the accuracy of the information and how it was obtained, the Court stressed that the applicant company was bound by 'duties and responsibilities' under Article 10 and, therefore, had to act in good faith to provide accurate and reliable information in accordance with journalistic ethics. The Court therefore considered that imposing objective liability on the applicant company for the reproduction of statements made by third parties, irrespective of whether the author or publisher acted in good or bad faith and by the duties and obligations of journalists, was difficult to reconcile with existing case law. Finally, the Court concluded that the national courts had applied standards inconsistent with the Court's practice, and found a violation of Article 10 ECHR.

6. Cases concerning Other Aspects of FoE

6.1. Csánics versus Hungary (2009)[45]

The applicant worked as a trade union leader and had regular disputes with the managing director of the company that employed him. In the context of a planned acquisition of a company, the company's employees called on the trade union to protest by organising a demonstration in front of the Parliament building. The applicant, as the leader of the trade union, made a statement to a newspaper, following which the managing director of the company brought an action against the applicant for defamation of character and asked the court to prohibit the applicant from further infringement and to order him to make reparation for the facts complained of. The national courts finally found that there had been an infringement of reputation, ordering the applicant to publish a rectification and pay the proceedings' costs. The applicant submitted the case to the Court, claiming that the decisions of the domestic authorities had infringed his right to FoE under Article 10 ECHR.

In its examination, the Court held that the case consisted of two related statements, the first of which was a general assessment, while the second was a statement of fact. The Court pointed out that, as regards the statement of

45 *Csánics v Hungary*, No. 12188/06, 20 January 2009.

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facts, the applicant should have been allowed to substantiate his allegation since well-founded and factual allegations may be published, irrespective of their tone and their offensive nature towards another person. The Court also stressed that, given the large number of employees and the expression of an opinion concerning a matter of public interest there was little scope for restricting it. Since the tone of such collective labour disputes is generally heated and they are in the employees' interests, the statements must be afforded a high level of protection. Consequently, the Court found that Hungary infringed Article 10 ECHR.

6.2. Tatár and Fáber versus Hungary (2012)[46]

In the *Tatár and Fáber* case, the interference with FoE was related to an 'illegal assembly'. In the context of an event that the applicants described as a 'political performance', they put dirty clothes on a rope attached to the cordons around the Hungarian Parliament. According to the applicants, the symbolic meaning of this expression of opinion was to show 'the nation's dirty laundry'. The applicants spent thirteen minutes on the site. During that time, they answered several questions addressed to them by journalists present. The applicants explained that the 'performance' was intended to be a provocative event and was therefore not announced to the police in advance and that the preparation of the event was also carried out in secret, with only a few journalists invited and no other protesters participating. After the event, the applicants left the site voluntarily. Later, one of the police departments in Budapest imposed a fine of 205 euros each on the applicants for the offence of abusing the right to assembly, as it considered that the event constituted an 'assembly' which should have been reported to the authorities three days earlier. During the national court proceedings, it was established that the event had been publicly announced and, therefore, constituted an 'assembly' under the Hungarian Assembly Act. Thus, the applicants should have been aware of the obligation to notify the authorities.

The Court pointed out that the rights of assembly guaranteed by Article 11 ECHR are specific to the rights guaranteed by Article 10 ECHR because the gathering of people in public places may raise certain public policy issues. However, the Court pointed out that the mere fact that an expression of opinion takes place in a public space does not necessarily render such an event

46 *Tatár and Fáber v Hungary*, Nos. 26005/08 and 26160/08, 12 September 2012.

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an assembly. In this context, the Court notes that there are several definitions of assembly in different national legal systems. Given that, even though the event was announced on the Internet, there was no deliberate gathering of participants and that there is no evidence that the purpose of the announcement was to invite not only journalists but also other participants, the Court held that the purpose of the 'political performance' in question was to convey a message through the media and not to gather people directly. This, moreover, would have been practically impossible during the thirteen minutes of the performance. According to the Court, the approach taken by the national authorities to the concept of assembly is not consistent with the justification for the reporting obligation, since the application of the rule not only to assemblies but also to expressions of opinion would create a prior restriction incompatible with the free expression of ideas. This could undermine the right protected under Article 10 ECHR.

6.3. Matúz versus Hungary (2014)[47]

In the *Matúz* case, the Court examined the limits regarding the duty of loyalty of journalists working for state or public television companies and the restrictions that can be imposed on their access to public affairs. The applicant was a television journalist employed by the public service broadcasting company *(Magyar Televízió Zrt.)* and the head of the company's trade union. He worked as editor and presenter of a periodical and cultural programme, which concerned interviews with various figures of cultural life. Concerning his activities, the applicant was under a duty of professional secrecy and could not disclose any information which came to his knowledge in the context of his employment. Following the appointment of the new Director of Culture, the applicant alleged that the new Director had cut out parts of the programme, which constituted censorship.

Shortly afterwards, the applicant published a book containing parts and letters of recorded interviews, which he claimed that according to the instructions of the new cultural director had not been included in the cultural programme. In the introduction to the book, the applicant stated that the book described the censorship system in state television. Following the publication of the book, the applicant was dismissed because he had breached the non-disclosure clause in his employment contract by publishing the book. In the

47 *Matúz v Hungary*, No. 73571/10, 21 October 2014.

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court hearing, the applicant argued against his dismissal, claiming that he had received the internal correspondence in his capacity as the head of the trade union to take action against the alleged censorship. However, the national court ruled that the applicant was not exempt from the duty of loyalty because of his position as a trade union leader. The applicant submitted to the Court that the dismissal of his publication had infringed his right to FoE. As a journalist and leader of the national television company's trade union, he had the right and the duty to inform the public of the alleged censorship within the company. The Court applied the test it had developed in its practice, which is used in cases where the restriction on FoE arises from the obligation of professional confidentiality concerning the employer's right to exercise control over its employees. Applying the test, the Court considered the following criteria: *(i)* public interest involved in the disclosed information; *(ii)* authenticity of the information disclosed; *(iii)* the damage, if any, suffered by the authority as a result of the disclosure in question; *(iv)* the motive behind the actions of the reporting employee; *(v)* whether, in the light of duty of discretion owed by an employee toward his or her employer, the information was made public as a last resort, following disclosure to a superior or other competent body; and *(vi)* severity of the sanction imposed. As a result of its examination, the Court highlighted the importance of the right to FoE on matters of general interest: the applicant's professional obligations and responsibilities as a journalist on the one hand, and the duties and responsibilities of employees towards their employers on the other. Having weighed the different interests involved in the case, the Court concluded that the dismissal of the applicant was in breach of the ECHR.

6.4. Kincses versus Hungary (2015)[48]

The applicant submitted to the Court that his right to FoE had been infringed as he had been fined for criticising a judge while acting as a legal representative in one of his cases. In the case concerned, the applicant, representing a hunting association, appealed to the national court requesting the court to open proceedings to examine the competence of the judge hearing the case at first instance. The court forwarded the request to the *Békés Megyei Ügyvédi Kamara* (Békés County Bar Association), which initiated disciplinary proceedings against the applicant based on his submission. The *Szegedi Ügyvédi*

48 *Kincses v Hungary*, No. 66232/10, 27 January 2015.

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Kamara Fegyelmi Bizottsága (Szeged Bar Association Disciplinary Committee) subsequently imposed a fine of 770 euros on the applicant for a serious breach of discipline, considering that the tone and wording of the submission were unacceptable and prejudicial to the reputation of the Bar.

The Court first pointed out that Article 10 ECHR applies not only to information and ideas favourably received or not considered offensive or indifferent but also to information and ideas that are offensive, shocking or disturbing. It further stressed that FoE also protects not only the content of the ideas and information expressed but also the form in which they are communicated. However, in its examination of the necessity of the interference, the Court underlined that the expression 'authority of the court' implies, in particular, the view that the court is the appropriate forum, as accepted by the public, for the establishment of legal rights and obligations and the settlement of disputes in this respect. Moreover, the public has respect and confidence in the ability of the court to fulfil this function, and the work of the court, which guarantees justice and plays a fundamental role in the rule of law. It therefore, needs to enjoy public trust and be protected from unjustified attacks. The Court indicated that a clear distinction must be drawn between criticism and insult and that, therefore, if the sole purpose of the expression of an opinion is to insult the court or the members of that court, the appropriate sanction does not, in principle, constitute a violation of Article 10 ECHR. In the present case, the Court held that, although a legal professional is necessarily entitled to express an opinion on the administration of justice, his criticism cannot go beyond certain limits. Accordingly, the Court concluded that there was no infringement of FoE.

6.5. Herbai versus Hungary (2020)[49]

The *Herbai* case is particularly notable for the fact that, contrary to the majority position of the Second Instance Court and the HCC, the Court ruled that FoE does not only apply to public issues in the strict sense. The applicant at the time of the case was a bank employee who had started a blog on a subject related to his work activity. The bank dismissed him on the grounds of loss of confidence and the employer's legitimate interest. The applicant challenged the termination before the national courts, which ultimately dismissed the claim on the basis that the overlap between the subject matter of the blog and

49 *Herbai v Hungary*, No. 11608/15, 5 February 2020.

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the applicant's professional activities suggested that the employee intended to share information on the blog relating to his professional activities. The applicant lodged a constitutional complaint against the decision, arguing that the professional blog and the articles published on it fall within the scope of the protection of the fundamental right to FoE and information, which the courts failed to consider.

The Court emphasised that the employment relationship cannot be excluded from the scope of Article 10 and that the State must, therefore, guarantee certain rights linked to FoE in the context of employment relationships between private parties. The practice of the Court recognises the importance of the principle of mutual trust and confidence in the employment relationship; however, it cannot imply unconditional and absolute loyalty. Furthermore, the Court stressed that national courts should balance the conflicting interests of the applicant and the employer, which was not adequately performed in the case at hand. Accordingly, the Court held that the State had failed to fulfil its obligation to protect rights in relations between private parties under Article 10, in breach of the ECHR.

6.6. Mándli and Others versus Hungary (2020)[50]

The applicants were journalists of various online news portals (including Index.hu, 24.hu, nol.hu and hvg.hu) who received accreditation from the *Magyar Országgyűlés Sajtóirodája* (Hungarian Parliament's Press Office) to report on one of the sessions. Although the applicants had been informed of the rules governing the reporting of events in the Parliament, they made recordings in an unauthorised manner and location, which were published on the news portals. Following the incident, the accreditation of the applicants was suspended, and the editors-in-chief of the relevant media outlets were informed of the decision, stating that the journalists had continued to record despite repeated warnings from the press office, resulting in the suspension of their access for violation of the rules.

The Court stressed that suspending the applicants' accreditation to enter the Parliament building for almost five months had adverse consequences, as it prevented them from obtaining first-hand and direct information on the work of the Parliament and the events taking place in the building based on their personal experience. These were essential aspects of the applicants'

50 *Mándli and others v Hungary*, No. 63164/16, 12 October 2020.

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duties as journalists. The Court also emphasised that the reason for the sanction was not the disclosure of information on matters of a political nature but the place and manner in which it was obtained. As regards the method of imposing the sanction, the Court pointed out that the assessment of procedural safeguards must be adapted to the parliamentary context, bearing in mind the generally recognised principles of parliamentary autonomy and the separation of powers. Nevertheless, the Court concluded that the sanction imposed by the Parliament's bodies infringed the applicants' rights to FoE for lack of adequate procedural safeguards.

7. Comparison of Cases

The present article proposes different aspects to consider when comparing the Hungarian FoE cases and their assessment. First, it can be argued that there are systemic legal issues and challenges regarding the interpretation and safeguarding of rights enshrined in Article 10 ECHR when it comes to cases involving Hungary.

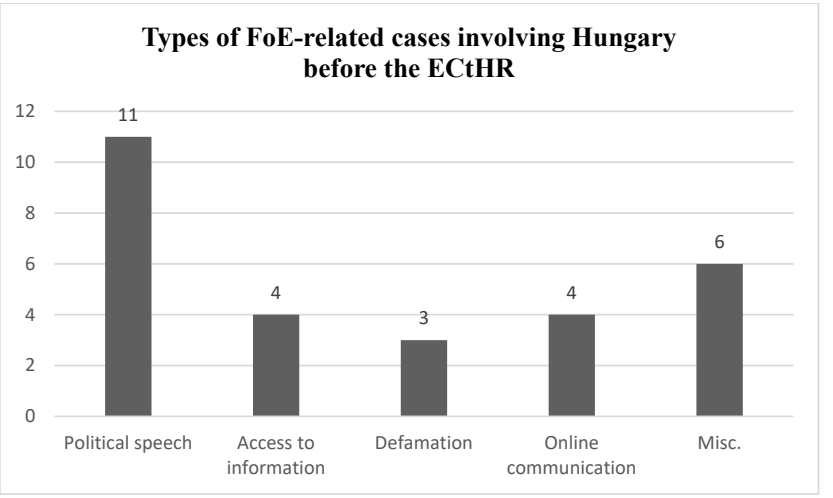

Figure 1: Composition of cases concerning Article 10 and Hungary
Source: own editing

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Our analysis indicates that challenges related to FoE and communication are not limited to specific domains[51] but permeate various aspects of societal interaction, ranging from political speech to whistleblowing.[52] As for the former category, the ECtHR's case law has consistently emphasised the importance of freedom of public and political debate, highlighting the critical role of FoE in a democratic society.[53] Acknowledging broader limits of acceptable criticism, issues related to public debate and forms of political expression,[54] while laying down narrow limitations on denying access to information,[55] the Court's precedent system seems comprehensive and consistent. It asserts that in a democratic system, government actions must be subject to scrutiny not only by legislative and judicial authorities but also by the media[56] and public opinion.[57] Subsequently, it can be concluded that the abovementioned principles and judgments underscore the Court's commitment to upholding FoE as a fundamental pillar of democracy, ensuring accountability and transparency in governance.

Nonetheless, the consistent presence of violations across multiple categories suggests a systemic issue rather than isolated incidents in cases involving Hungary as the respondent.

51 János Tamás Papp, 'Recontextualizing the Role of Social Media in the Formation of Filter Bubbles' *Hungarian Yearbook of International Law and European Law*, Vol. 11, 2023, pp. 136–150.

52 Gergely Ferenc Lendvai *et al.*, 'Whistleblowing as a Form of Expression: Comprehensive Overview of the Concept of Whistleblowing and Its Freedom of Expression Aspects, with Particular Reference to the Case Law of the European Court of Human Rights', *Juridical Tribune*, Vol. 14, Issue 2, 2024, pp. 210–226.

53 Dirk Voorhoof & Hannes Cannie, 'Freedom of Expression and Information in a Democratic Society. The Added but Fragile Value of the European Convention on Human Rights', *International Communication Gazette*, Vol. 72, Issue 4, 2010, pp. 413–414.

54 Gergely Ferenc Lendvai *et al.*, 'A politikai kampány láthatáron lévő uniós szabályozása', *Európai Jog*, Vol. 24, Issue 3, 2024, pp. 1- 9.

55 Wouter Hins & Dirk Voorhoof, Access to State-Held Information as a Fundamental Right under the European Convention on Human Rights', *European Constitutional Law Review*, Vol. 3, Issue 1, 2007, pp. 117–126.

56 Gergely Gosztonyi *et al.*, 'Hungarian Digital Media Cases Before Supranational European Courts', *Hungarian Yearbook of International Law and European Law*, Vol. 11, Issue 1, 2023, pp. 295–317.

57 Voorhoof & Cannie 2010, p. 413.

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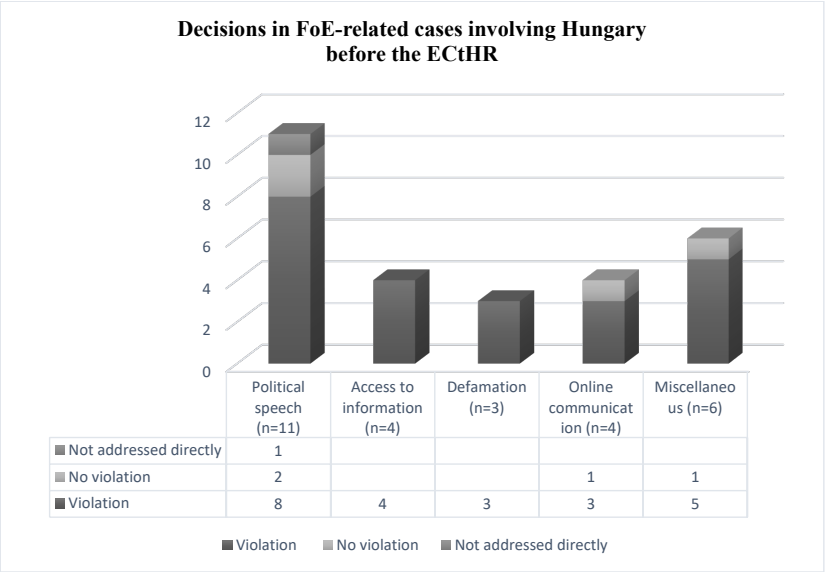

	Political speech (n=11)	Access to information (n=4)	Defamation (n=3)	Online communication (n=4)	Miscellaneous (n=6)
Not addressed directly	1				
No violation	2			1	1
Violation	8	4	3	3	5

Figure 2: Analytical statistics of the cases per categories
Source: own editing

Out of twenty-eight FoE cases since Hungary's accession to the EU in 2004, only in four cases did the Court find no violation of Article 10 ECHR, leaving a margin of circa 86 % that when Hungary acts as respondent in such cases, a violation will be found. Such a high rate is staggering, even more so in the context of access to information and defamation, where, in all cases, Hungary was found violating the rights guaranteed under Article 10 ECHR.

On another critical note, as seen from the above comprehensive presentation of cases, in most cases, the last part of the three-part cumulative test, namely, necessity, was scrutinised by the ECtHR. Though arguments can be made that the necessity segment of the three-part cumulative test can be improved,[58] the statistics envisage a troubling judicial pattern where applicants consistently face incorrect interpretation of laws and must wait multiple years for justice to be served when their FoE is in question.[59] The above pattern is even more alarming in cases related to political speech and access to

58 Janneke Gerards, 'How to improve the necessity test of the European Court of Human Rights', *International Journal of Constitutional Law*, Vol. 11, Issue 2, 2013, pp. 473–488. https://doi.org/10.1093/icon/mot004

59 Maria Filatova, *Reasonable Time of Proceedings: Compilation of Case-law of the European Court of Human Rights*, Council of Europe Publishing, Strasbourg, 2021.

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information, categories where there is strong intersectionality with public issues, yet in both categories, the domestic courts apparently decide incorrectly on the issues presented. Especially in the case of the right to access to information, a novel pattern can be discerned where public bodies exercising their "censorial power of an information monopoly"[60] hinder the free flow of information, raising questions on the efficacy of the regulation on information gathering and the possible emergence of a chilling effect in the fields of journalism, legislation and historical research.

Lastly, it is worth emphasizing a rather technical perspective, namely, the costs of the continuous violation of Article 10 ECHR.

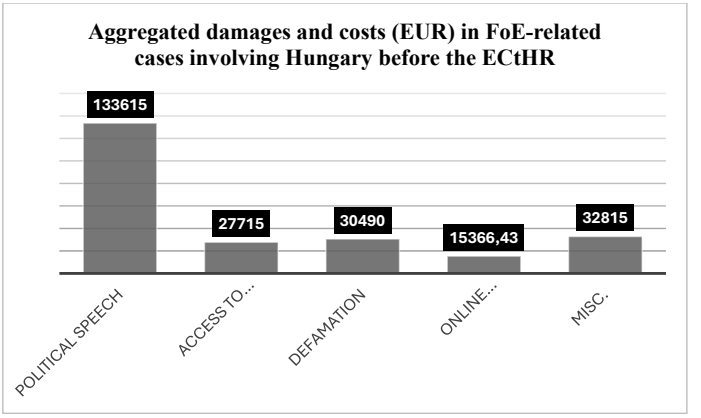

Figure 3: A detailed overview of the total amounts to be paid in euros without considering simple interest rates
Source: own editing

As illustrated by the figure above, the Court held that significant amounts are to be paid to the applicant in the majority of violation decisions. In total, Hungary was judged to pay 240,001.43 euros in 24 cases; however, it is to be underlined that the Baka judgment is an outlier in the statistics, as it involved an imposition of 100,000 euros in costs and damages alone. Nonetheless, from the above analysis, if one wishes to challenge the Hungarian domestic courts' decision concerning their FoE or right to access to information, one has an approximate 86 % success rate in doing so, and the

60 Dirk Voorhoof, 'European Court of Human Rights: Case of TASZ v. Hungary', *IRIS*, Vol. 7, Issue 1, 2009, p. 1.

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process may result in around 8,125 euros on average in damages and costs to be paid by the government.[61]

8. Conclusion

Cases involving Hungary on issues regarding Article 10 ECHR had a significant effect in developing FoE case law. In the context of political speech, for instance, the facts of the *Fáber, Vajnai* and *Fratanoló* cases present high similarity as they all concern speech through symbols. The ECtHR also made efforts to develop and refine the interpretation of offensive symbols, resulting in a situation that no such cases had been presented before the ECtHR for over a decade now. After the *Delfi* case,[62] the MTE and Index.hu case also gave a clearer explanation on intermediary liability.[63]

On analysing the three-part cumulative test, it seems that "among the criteria used to protect Article 10 ECHR, the lack of a pressing social need in a democratic society is the most common reason for a violation,"[64] the first two parts (prescribed by law and legitimate aim) provided less frequent grounds for decisions against Hungary. Moreover, the ECtHR also designated numerous cases as 'key cases'[65] such as the *Karácsony and others* case or the *Magyar Helsinki Bizottság* case, where substantial theoretical developments of the interpretation of Article 10 were made by the Court, creating a more interconnected, thorough and from a scholarly standpoint, comprehensive guidance to understand and analyse cases at hand.

Considering all Hungarian Article 10 ECHR FoE cases, it seems clear that despite the fact that in the vast majority of the cases there was a breach of Article 10 ECHR, they have still significantly contributed to the ECtHR clarifying its position more accurately, as they have covered a wide range of aspects of FoE.

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61 $\%_{\text{political speech}}$=14846,11; $\%_{\text{access to information}}$=6928,75; $\%_{\text{defamation}}$=7622,5; $\%_{\text{access to information}}$=5122,143; $\%_{\text{misc.}}$=6563.

62 *Delfi AS v Estonia*, No. 64569/09, 16 June 2015.

63 Gergely Gosztonyi, *Censorship from Plato to Social Media. The Complexity of Social Media's Content Regulation and Moderation Practices*, Springer Nature Switzerland AG, Cham, 2013, p. 126.

64 Judit Bayer, 'Az Emberi Jogok Európai Bíróságának 10. cikkel kapcsolatos joggyakorlatának egyes súlypontjai'. *Állam- és Jogtudomány*, Vol. 58, Issue 4, 2017, p. 128.

65 *Cf.* at www.echr.coe.int/selection-of-key-cases.

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The Problems and Contradictions of the 'Awareness Constraints' of General Suffrage

Analysis of the Right to Vote for Children and Persons under Guardianship, with Particular Attention to the Hungarian Practice

Gábor Kurunczi[*]

Abstract

This paper deals with the question of the so-called 'awareness constraints', which include the problems of age-related voting rights and the rights of persons whose ability to vote is limited because of their lack of discernment. It examines the regulatory background and constitutional problems surrounding the two areas on the basis of international conventions and practice, as well as relevant views outlined in scholarship. With regard to age-related restrictions, the paper analyzes the possible alternatives (e.g. the possibility of lowering the voting age, or the substitute model), and in the case of persons under guardianship, it evaluates the trends in international practice, looking at how Hungarian practice fits into these trends, and what possibilities for further development there are. One of the main conclusions of the research is that there is a tension between the two types of 'awareness constraints', since there are similar arguments against minors' right to vote, as there are arguments in favor of the full extension of the right to vote for persons under guardianship. This double standard makes it much more difficult to achieve any progress in the area of 'awareness constraints'.

Keywords: equal right to vote, family suffrage, guardianship, mental disabilities, discrimination

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1. Introductory Thoughts

The principle of the generality and equality of the right to vote is of particular importance when taking a fundamental rights approach to electoral law. In fact, by the second half of the 20th century, the view had become generally accepted that the right to vote was not merely a constitutional duty of the state, which could not be constitutionally enforced by the individual, but a human right which the state had a duty to guarantee, and that when it failed to do so, any rightful claimant could enforce it.[1] This clearly goes back to the idea that a democratic state can only exist if it derives its power directly or indirectly from the people. In this respect, the question of who can be considered a part of the concept of people is of particular importance. In this context, it is generally accepted that 'people' is primarily a community of citizens.[2] However, not everyone who belongs to the people has the right to vote. Over the centuries, the right to vote has always applied with certain limitations regarding the eligibility of natural persons. These frameworks (which, conversely, could also be called limitations[3]) have of course been opened up over the decades, and as censorship declined, the active right to vote has become an all-embracing concept. Nevertheless, the right to vote has not become completely general, *i.e.* there are still

1 Ákos Domahidi, '[Választójog]', *in* András Jakab (ed.), *Az Alkotmány kommentárja I-II.*,Századvég, Budapest, 2009, p. 2474.

2 Gábor Kurunczi, *Az egyre általánosabb választójog kihívásai. Az általános és egyenlő választójog elvének elemzése a magyar szabályozás tükrében,* Pázmány Press, Budapest, 2020, pp. 19–22; Heather Lardy, 'Citizenship and the Right to Vote', *Oxford Journal of Legal Studies*, Vol. 17, Issue 1, 1997, pp. 75–100.

3 Myers defined the right to vote according to the following criteria: persons who register on the electoral roll, and meet the eligibility criteria (*e.g.* reaching the age of 21) are eligible to vote. William Fenton Myers, *Woman and the Law, Including Rights and Duties of Citizenship (1918)*, Kessinger Legacy Reprints, 2010, p. 515. Magruder emphasized the requirements of being 21 years of age, possessing US citizenship, and having a permanent residence in the state in question as the conditions for eligibility to vote. Frank Abbott Magruder, *American Government with a Consideration of the Problems of Democracy,* Allyn and Bacon, Boston (*etc.*), 1921, p. 353.

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limitations[4] that exclude certain people from voting.[5] Examples include the right to vote being linked to age, the requirement of discernment (these two conditions are the focus of this paper), or the right to participate in public affairs. In addition, when examining the fundamental right to vote, the issue of equality inevitably arises. Equality of suffrage[6] in legal terms means that everyone's vote is worth the same. That is, each voter has the same number of votes (this can be considered as the formal requirement of equality of suffrage), his/her vote carries the same weight (this can be seen as the substantive requirement of equality of suffrage), and each of the elected representatives represents approximately the same number of citizens/voters.

The present paper deals with the issue of the so-called 'awareness constraints' as one of the limitations to the generality of the right to vote. By 'awareness constraints' I mean aspects assessed in the context of voters' discernment, which, in this reading means a kind of political discernment. This, in other words, means that the voter concerned is a member of the political community who has the capability of selecting members of the representative body.[7] The term 'awareness constraints' does not, therefore, imply a requirement that only voters who are capable of making a rational, well-considered decision, taking into account economic and political considerations when casting their vote, should be allowed to participate in elections. To require this would, in my view, be completely contrary to the principle of the generality of the right to vote, as it would essentially result in a quasi-censorship of literacy and knowledge. In exercising their

4 Kropf concludes in the context of the limitations on suffrage that although the right to vote has been expanded and broadened throughout history, it still has its limits today. The author cites, for example, restrictions on the right to vote on the grounds of disability. Martha E. Kropf, *Institutions and the Right to Vote in America,* University of North Carolina at Charlotte, Charlotte, 2016, pp. 80–83.

5 Bodnár explicitly states that general suffrage means that all natural persons have the right to vote and to stand as a candidate, but that this right is subject to restrictions. Eszter Bodnár, 'A Velencei Bizottság választási ajánlásainak érvényesülése a magyar szabályozásban és bírósági gyakorlatban', *Jogtudományi Közlöny*, Vol. 73, Issue 3, 2018, p. 142.

6 In the context of electoral equality, Ipsen emphasizes that the importance of achieving electoral equality varies from one type of electoral system to another, but that it should be taken seriously everywhere and that efforts should be made to solve any problems that may arise in connection with this principle. Jörn Ipsen, *Staatsrecht I. Luchterhand Verlag*, Neuwied und Kriftel, Berlin, 2002, p. 33.

7 Eszter Bodnár, *A választójog alapjogi tartalma és korlátai*, HVG ORAC, Budapest, 2014, p. 185.

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right to vote, voters do not necessarily have to make a rational choice. The completeness of the right to vote (also given its fundamental rights nature) means, among other things, that voters do not have to decide on the basis of economic and political analyzes for whom to vote, but it is sufficient to base their decision on emotional factors, family conventions or even habit (of course, not excluding the first option). Thus, when I use the term 'awareness constraints', I mean the existence of a political discernment of the electorate.[8]

As far as the above interpretation of the concept of 'awareness constraints' is concerned, it is important to point out that almost all electoral systems currently in use in the world contain one or more restrictions that seek to guarantee that voters are capable of making an informed choice. (*e.g.* sets a minimum age limit or excludes people with mental disabilities from the active and passive electorate).[9] 'Awareness constraints' can therefore be interpreted as requiring a kind of political 'maturity' (*i.e.* the ability of the voter concerned to perceive what is happening in the outside world and to evaluate it in some way and 'use' this information in making a decision) in order to exercise the right to vote.[10] Now, the definition of political 'maturity' is, of course, the result of a balancing exercise: *e.g.* whether or not a 16-year-old person has this maturity is a matter for the sovereign decision of the state (*i.e.* whether or not the state includes them among the subjects of people's sovereignty). On the other hand, it could be argued that the reason for the existence of 'awareness constraints' is the state's duty to protect the integrity of the electoral system. According to Fiala, this means that the state must exclude from the exercise of the right to vote those voters who, for example, due to a total or partial lack of ability of discernment, are unable to make responsible decisions when exercising their right to vote.[11] This is because in their case there would be a high risk that someone else

8 It is important to emphasize, therefore, that the existence of 'awareness constraints' does not mean that a person who has the right to vote is a person who is 'aware', and that a person who has not reached the age of 18 and is therefore not entitled to vote is an 'unaware' person.

9 *Cf.* Stefan Olsson, 'Children's Suffrage (A Critique of the Importance of Voter's Knowledge for the Weel-Being of Democracy)', *The International Journal of Children's Rights*, Vol. 16, Issue 1, 2008, pp. 62–67.

10 For the reasons and rationale for this *see* and *cf.* Claudio López-Guerra, 'Enfranchising Minors and the Mentally Impaired', *Social Theory and Practice*, Vol. 38, Issue 1, 2012, pp. 115–138.

11 János Fiala, 'A fogyatékossággal élő személyek választójogának kérdései a Kiss Alajos kontra Magyarország döntés tükrében', *Fundamentum*, 2010/3, p. 109.

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would make the decision for them, someone else would exercise their right to vote. Indeed, the protection of the integrity of the electoral system is primarily linked to the objective duty of the state to protect institutions pertaining to the context of the right to vote. Within this framework, the state, as the guarantor of the fundamental right, is obliged to protect the rights guaranteed by the fundamental right, and is also obliged to protect the institution of the fundamental right in the course of its enforcement – this, in turn, includes the protection of the purity of the election.

In the framework of the present paper, based on an analysis of international conventions and court decisions, as well as the legal environment of the individual countries, statistical data, and relevant literature, I will examine whether it is necessary to limit the right to vote on the basis of the 'awareness' of voters as defined above, and what possible directions can be identified in this context. In my analysis, I will also pay attention to the contradiction between age restrictions on the right to vote and the right to vote for people with intellectual disabilities discernible from international conventions and practice, as well as the literature. My hypothesis is that there is a significant contradiction in the reasoning behind the two elements of 'awareness constraints', which seems almost impossible to resolve at present.

2. Voting Rights for Children? The Dilemma of Family Suffrage

One of the 'awareness constraints' on general suffrage is the age limit, the primary reason for which is that the legislator presumes that a voter must be of a certain age to be able to make a considered and prudent decision when casting his or her vote. According to Schreiber, linking the right to vote to age guarantees that participation in elections takes place with an appropriate degree of maturity, intelligence, and responsibility.[12] However, the question is whether this age limit can be defined with sufficient objectivity. Is it even possible to define it precisely? Going further, we can also ask whether age limits are necessary at all. And if the answer to this question is no, what are the possible solutions and what are their constitutional pitfalls.

12 Wolfgang Schreiber, *Kommentar zum Bundeswahlgesetz*, Varl Heymanns Verlag, Köln, 2009, p. 308; Ludwig Beckman, *The Frontiers of Democracy – The Right to Vote and its Limits*, CPI Antony Rowe, Chippenham and Eastbourne, 2009, p. 91.

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2.1. General Aspects and Concepts Related to Age-related Voting Rights

The age limit on voting rights has historically been, and still is, a recognized limit on voting rights around the world. The need for an age limit is already mentioned by Constant in his writings.[13] In an international comparison, if we look at the constitutions of some European states, we can see that all of them apply age limits as a condition for both active and passive suffrage. In most European states, the active voting age is set at 18. The only general exception to this is Cyprus, where Article 63(1) of the Cypriot Constitution stipulates that only citizens aged 25 or over and resident in the country have the right to vote. However, in Italy, for example, Article 58(1) of the Constitution stipulates that only voters aged 25 or over can elect a senator. But there are also examples of the opposite 'direction'. In Austria, the voting age has been lowered to 16 following an amendment to the constitution, under Article 26 (the situation is similar in Scotland and Malta).[14]

However, despite the above, the question of whether it makes sense to link the right to vote to age is, in itself, a question. It is apparent that voting age has been steadily decreasing throughout history. Domahidi is of the view that

> "the most proportionate method of restricting the right to vote is to impose an objective condition on whether someone is sufficiently mature and prepared to express their views on political issues […] and the most appropriate method is age-censorship."[15]

As a general rule, therefore, citizens of voting age are eligible to vote, *i.e.* the age limit is usually set at 18. It is quite clear that the political 'maturity' and political discernment of an individual does not depend on the age of majority, since a person below the age of majority can have this kind of discernment, while a person of age can also lack it.[16] This is supported,

13 Benjamin Constant, *A régiek és a modernek szabadsága,* Atlantisz, Budapest 1997, p. 114.

14 Looking at non-European states' practices, only a few states have higher or lower age limits for active voting (*e.g.* Fiji, Kuwait, Lebanon, and Malaysia have 21 years, Japan and Cameroon 20 years, South Korea 19 years, Indonesia and Sudan 17 years). Bodnár 2014, p. 188.

15 Domahidi 2009, pp. 2471–2494.

16 In today's legal understanding, there are two approaches to children's voting rights: on the one hand, that children are excluded from the right to vote, and on the other, that they have the right to vote but cannot exercise it in their own interest – for lack of maturity. András Jakab, 'Vajon a gyermekek választójoga az alkotmányjogi válasz

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among other things, by an empirical study conducted in Germany, which shows that there is only little difference in political participation, values and attitudes towards political parties between 16 and 17-year-olds and young adults who are already eligible to vote.[17] Schanda also finds that minor citizens are also members of the nation as a political community, and their exclusion from political rights is not self-evident.[18] Yet, the main limit to general suffrage today is the age limit. With this, however, roughly 20 % of society is excluded from the right to vote. This creates a democratic deficit, since a significant part of society does not express an opinion in elections. However, it is questionable whether the inclusion of minors in the electoral process is the most appropriate way to address this deficit.[19]

From time to time,[20] therefore, the argument that these age limits should be changed (in particular, lowered) arises, and in many cases, it is claimed that they should be linked to the family as the most basic unit of society.[21] Schanda argues that the most common argument for children's voting rights is that it would help the sustainable development of society, forcing policymakers to take greater account of the needs of future generations.

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a mai demokráciák fenntarthatósági kihívásaira?' *in* Nóra Chronowski *et al.* (eds.), *A szabadságszerető embernek. Liber Amicorum István Kukorelli*, Gondolat, Budapest, 2017, p. 493.

17 Ursula Hoffmann-Lange & Johann de Rijke, '16jährige Wähler – erwachsen genug? Die empirischen Befunde' *Zeitschrift für Parlamentsfragen*, Vol. 27, Issue 4, 1996, pp. 572–585.

18 Balázs Schanda, 'A jog lehetőségei a család védelmére', *Iustum Aequum Salutare*, Vol. 8, Issue 2, 2012, pp. 77–88.

19 Dániel Gábor Antali, 'Egyenlőbbek az egyenlők között, avagy a kiskorúak után járó választójog' *in* Dániel Gábor Antali *et al.* (eds.), *Kérdőív az alkotmányozásról 2011,* Pólay Elemér Alapítvány, Szeged, 2011, p. 87.

20 Maura Priest, 'Why children should be allowed to vote?', *Public Affairs Quarterly*, Vol. 30, Issue 3, 2016, pp. 215–238.

21 The importance of the family is also reflected in the constitutions of European countries. Ireland's Constitution recognizes the family as the natural, primary, and fundamental community of society. The Polish Constitution states that the Republic of Poland protects the family, motherhood and fatherhood. In addition to the above, the Italian Constitution also recognizes the family as a natural unit based on marriage. In Hungary, the concept and importance of the family was enshrined in the Fundamental Law and has been given constitutional protection, but of course, the Hungarian Constitutional Court has also taken a number of decisions on the protection of families. In its *Decision No. 43/2012. (XII. 20.) AB*, the Constitutional Court stated that the life of the newborn child, as a value to be protected, follows from the state's obligation to protect institutions, since the family is the basis for the survival of the nation.

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The theoretical consideration is that this would bring the community of voters closer, more in line with the community of citizens, the people.[22] Schanda, therefore, believes that the political representation of minors is an existing and legitimate issue: because the right to vote is not general today.[23] He argues that rethinking the right to vote could be a way of creating a new intergenerational social contract, institutionalizing a future-oriented approach that the democratic community desperately needs.[24]

In this vein, during the 20th century, both in Hungary and in other countries (especially in Germany[25]), the issue of children's voting rights and family suffrage was raised. Germany is worth highlighting in this respect because it is the country where the most heated debates on the right of minors to vote have taken place.[26] In Hungary, the first draft of the Fundamental Law still contained a provision on family suffrage, but the finally adopted text no longer contained this provision.

In light of the above, and in order to understand further aspects, it is first of all important to make a conceptual clarification and distinction. The right to vote for children and the right to vote for the family are not equivalent concepts in terms of their implementation. In the case of the former (which, to be clarified later, can be seen as one of the main models), there is no age limit to the right to vote, so that even newborn citizens have the right to vote. The main issue here for some of the other submodels will be how the child can 'exercise' his or her right to vote until the child becomes able to cast their vote. By contrast, the family voting model does not result in the abolition of the age limit, but in fact 'rewards' parent(s) with children with one or more extra votes, so that in essence the child has no voting rights by default, but the system only gives the parent(s) some extra vote(s).

22 Schanda 2012, pp. 77–88.

23 Balázs Schanda, 'Családi választójog – alkotmányjogi képtelenség vagy a fenntartható demokrácia biztosítéka?', *Magyar Jog*, Vol. 57, Issue 10, 2010, pp. 608–611.

24 Schanda 2012, pp. 77–88.

25 According to Pfadenhauer, an important aspect of the social impact of children's suffrage is that, in addition to the churches, the introduction of children's voting rights has been raised from time to time at federal level, but has generally been met with a sterile debate. Björn Pfadenhauer, *Das Wunsch- und Wahlrecht der Kinder und Jugendhilfe – Entwicklungslinien, rechtliche Grundlegung und institutionelle Bedingungen*, Zugl. Dissertation an der Universität Duisburg-Essen, 2011, pp. 1–265.

26 Johanna Fröhlich, 'Alapkérdések a családi választójog vitájában', *Pázmány Law Working Papers*, 2011/20, p. 3–4.

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2.2. Age as a Limit to the General Suffrage in Light of International Law, Hungarian Legislation and Practice

Following this overview of general issues pertaining to age and voting rights, let us examine the relevant international law, Hungarian legislation and practice.

First, it is important to note that international documents unanimously recognise age as a legitimate limitation to the right to vote. For example, General Comment No. 25 of the UN Human Rights Committee[27] in paragraph 10 considers the setting of a minimum age for voting to be reasonable. Opinion No. 190/2002 of the Venice Commission explicitly states that the right to vote should be subject to an age limit, the upper limit of which may be reaching the age of majority.[28] And the Final Document of the Copenhagen Conference (in subsection 7.3.), and the Inter-Parliamentary Union Declaration on the Criteria for Free and Fair Elections (in point 2(1)) identify adult citizens as eligible to vote. It is also important to point out that the UN Convention on the Rights of the Child, while granting children a number of political rights (such as freedom of expression, freedom of assembly and the right of association),[29] does not provide for the right to vote.

In the ECtHR's jurisprudence, the link between the right to vote and age is only indirect. In the *case of W, X, Y and Z versus Belgium*, the ECtHR held that the age limit for the right to vote and the fact that in Belgium the age of 40 years was required to become a member of the Senate were compatible with the ECHR.[30] And in the case of *Hirst versus the United Kingdom*, the ECtHR ruled that the age requirement could be justified by the need to ensure the maturity of voters in elections.

With regard to international 'trends', it is worth noting (especially since in Europe it is mainly in Germany that the right to vote for minors has emerged as a real narrative) that the German Constitutional Court has also

27 UN Human Rights Committee (HRC), ICCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote) The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, 12 July 1996, CCPR/C/21/Rev.1/Add.7.

28 Point I.1.1(a) of Venice Commission Opinion No. 190/2002.

29 Article 13 or Article 15 of the UN Convention on the Rights of the Child, signed in New York on 20 November 1989.

30 *W, X, Y and Z v Belgium*, No. 6745–6746/74, 30 May 1975.

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examined the minimum age of eligibility for voting and found it to be constitutional, mainly justifying it with historical and customary traditions.[31]

In Hungary, Article XXIII(1) of the Fundamental Law states that all citizens of voting age have the right to vote. In other words, the Fundamental Law does not set an age limit, but follows a concept that can be interpreted using the Civil Code. The Civil Code, in turn, does not talk about the age of majority, but about who can be considered a minor. Accordingly, a minor is someone below the age of eighteen. A minor becomes an adult by marriage. However, this means that persons who have reached the age of 16 and who have married at that age under the Civil Code can also have the right to vote, since majority thus acquired is only possible if all the rights attached to it are simultaneously granted. This could even be an argument for lowering the voting age.

2.3. Children's Voting Rights versus Family Voting Rights – Emerging Constitutional Conflicts, Models, Possible Solutions

Following this brief look at national and international practice, let us examine the possible models for minors' right to vote.[32]

Although the right to vote for minors has not yet been implemented in any real form anywhere in the world (at most the age limit has been lowered, see Austria, Scotland, and Malta), several models have been developed on a theoretical level. One model is to give children the original right to vote by lowering or abolishing the voting age, without involving anyone else in the right to vote. Another model is to increase the number or weight of the parents' votes (based on their original voting rights) taking into account their number of children. The third model is the so-called 'derivative parental suffrage', where the child has the right to vote from birth, but is represented by their parents when they are still a minor.[33] In what follows, I will look at the possible problems of implementing these models and the constitutional conflicts arising in connection with them.

31 Bodnár 2014, p. 189.
32 Olsson argues for children's right to vote: Olsson 2008, pp. 55–76.
33 Fröhlich 2011, p. 4.

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2.3.1. Questions Surrounding Children's Original Right to Vote

The original right of children to vote is achieved by lowering or abolishing the voting age and allowing children to vote directly. Within this model, we can distinguish between two approaches. One of them is that the voting age should be abolished completely, *i.e.* the right to vote should be conferred on citizens as soon as they acquire the capacity to exercise their fundamental rights.[34] However, this solution may pose a number of difficulties. First of all, it is important to clarify what is meant by the concept of fundamental legal capacity and how it differs from civil legal capacity. In the latter case, as a general rule, the full capacity to act depends on the fulfilment of an objective age limit. Civil legal capacity is also dependent on the existence of a capacity of discernment, the lack or limited existence of which may also result in a restriction of civil legal capacity. By contrast, the capacity to act expresses whether the persons concerned (the subjects of the fundamental right) can exercise (or directly exercise) their rights.[35] Under fundamental rights capacity, the holder of a fundamental right may exercise and enforce the rights conferred on them by the constitution or by law, either individually or through another person. In respect of the right to vote, this means that a person has the fundamental legal capacity if he or she has the right to vote and is able to exercise it.[36] In the case of minors, the latter question may be difficult to answer under the original model of suffrage. The scope for the exercise of fundamental rights by children, including the exercise of personal rights, will increase with age as the capacity to make decisions about the consequences of the exercise of rights develops. In light of the above, the fundamental constitutional problem with the original model of children's suffrage – which requires the direct participation of the child in the electoral process – is that a minor who is incapacitated or excluded is physically and mentally unable to meet the expectations that electoral systems require of voters.[37] This would make direct voting almost unfeasible. It is, of course, possible that a 14-year-old minor (on a case-by-case basis)

34 In the case of a live birth, the natural person concerned acquires fundamental legal capacity from the moment of birth, as opposed to civil legal capacity, which in the case of a live birth is acquired from the moment of conception (until birth, as a so-called conditional legal capacity). János Sári & Bernadette Somody, *Alapjogok – Alkotmánytan II*, Oriris, Budapest, 2008, p. 54.

35 Id. 55.

36 Bodnár 2014, pp. 78–85.

37 For example, to appear before the electoral commission, request a ballot box, sign the register and, last but not least, make a responsible decision.

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could readily meet these requirements, but it is practically impossible to develop a differentiated age-appropriate regulation, especially in view of the fact that in this case, a solution would also have to be found for a newborn baby to cast its vote directly, on its own.

An other approach could be to lower the voting age. The issue of lowering the voting age was also examined by Daniel Hart and Robert Atkins in a study where they analyzed the readiness of US minors aged 16–17 in relation to the right to vote. The hypothesis of the research was that 16 and 17-year-olds should be given the opportunity to exercise their right to vote. This was supported by the view that a 16-year-old minor is no different in citizenship from a young adult aged 18 – empirical research does not support the assumption that 16 or 17-year-olds are socially immature. It is therefore unjustified to disenfranchise them. The researchers also consider it important to lower the voting age, as this would encourage governments to make demographically favorable decisions, with due consideration to the 'new' segment of the electorate.[38] We have seen examples of lowering the active voting age in Austria and Scotland (and Malta), where the current age of eligibility is set at 16.[39] In the case of this solution, the legislator would, in fact, be changing the presumption established within the framework of the 'awareness constraints' (that below a certain age there is no adequate sense of political responsibility and awareness, *i.e.* ultimately no capacity to act under fundamental rights). Under the latter approach, in order to protect the integrity of the electoral system, the legislator excludes persons below this age from the right to vote, by linking voting not to the age of majority, but to a lower age limit. In my view, this solution would be expedient, as it would neither violate the principle of equality of voting rights (since the minor would have neither fewer, nor more votes) nor the requirement of personal participation in voting (since the minor would cast their vote personally). The lower age limit could be 16, as in Austria, or even lower.[40]

38 Daniel Hart & Robert Atkins, 'American Sixteen- and Seventeen-Year-Olds are ready to vote', *The Annals of the American Academy of Political and Social Science,* Vol. 633, The Child and Citizen (January 2011), pp. 201–222.

39 The voting age is currently 16 in Brazil, Cuba, Somalia, and Nicaragua, and 17 in Timor-Leste, Indonesia, Sudan, and North Korea. Jakab 2017, p. 491.

40 When considering the lowering of the active voting age, the question arises how to justify that the constitution-maker and the legislator consider a person qualified to decide on the composition of a representative body but, at the same time, unqualified to negotiate a major sale and purchase agreement on their own. However, this can be easily answered if the reason for lowering the voting age is to ensure the fullest

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2.3.2. Dilemmas Surrounding Original Parental Suffrage

The second possible model is the implementation of original parental voting rights. Original parental voting means that additional votes go directly to the parent(s), depending on the number of children in the parent's custody. In this case, the age limit would be left untouched by the electoral system, essentially 'rewarding' the parent(s) with extra votes. However, this solution raises a number of serious problems. On the one hand, would both parents have the right to vote in this case? Would only married parents be entitled to vote, or would it also apply to parents in different relationships and divorced parents? Would this right be affected by the exclusion or restriction of parental custody? Would there be one vote for each child or one vote for all children? If only one parent (some proposals suggest only the mother[41]) could exercise the extra vote, how would the parents who share custody decide whom the cast the extra vote shall be for (especially if they have different political views)? Many questions such as these can be raised about this model.[42] In addition to the fact that these questions would be difficult or impossible to answer,[43] there are other tangible problems. One such issue is the equality of voting rights. According to Kis, equality of suffrage is an absolute requirement (for example, a voter is not allowed to cast more than one identical vote at a time).[44] In connection with this argument, it is worth mentioning the position of the Hungarian Constitutional Court. In its *Decision No. 22/2005. (VI. 17.) AB*[45] the Court stated that the right to vote expresses the equal value of the members of the political community who are entitled to vote, and that equality of the electorate must be realized not only on the day of the election but throughout the entire electoral process (in the latter case, the parents' plural voting right would

possible enforcement of the social contract (*i.e.* people's sovereignty) and if the limits of civil capacity are approached from the point of view of the protection of the individual (since legal transactions covered by the Civil Code directly affect the individual, whereas the exercise of the right to vote can in fact be assessed as an expression of the citizens' opinion arising from the social contract). For similar issues, *see also* Isabel Rupprecht, *Das Wahlrecht für Kinder. Verfassungsrechtliche Zulässigkeit und praktische Durchführbarkeit*, Nomos, Baden-Baden, 2012.

41 In 2011, the press also suggested the alternative of giving one extra vote to each family with children, regardless of the number of children. Fröhlich 2011, p. 9.

42 For some of the questions, *see* Antali 2011, p. 87.

43 In her study, Fröhlich offers several possible solutions. Fröhlich 2011, p. 9.

44 János Kis, *Alkotmányos demokrácia,* Indok, Budapest, 2000, pp. 69–72.

45 The Hungarian Constitutional Court ruled in a similar way in its *Decision No. 47/2006. (X. 5.) AB* and *Decision No. 32/2004. (IX. 14.) AB*.

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be difficult to reconcile with the principle – for example in the case of a recommendation). In its *Decision No. 33/2000. (X. 20.) AB*, the Hungarian Constitutional Court emphasized that legislation must express the equality of voters: it must not make unjustified distinctions between groups of voters, for example, because of their place of residence or, indirectly, because of their political views or national or ethnic origin. On this basis, votes can have nearly equal weight if it is possible for an equal number of voters to decide on a mandate. Thus, in addition to the difficult issues mentioned above, an additional vote for parents would clearly violate the principle of equality of voting rights. Therefore, this solution should be rejected.

2.3.3. Problems of derivative parental voting rights

The third model is the so-called derivative parental voting solution, which may also be referred to as a substitute model.[46] Under this model, the voting age would be abolished altogether, but the active voting rights granted to the child would be exercised not by the child but by the parent or legal guardian as a proxy. Nopper argues that children should have the right to vote from birth because all citizens, regardless of their age, have the capacity to exercise public rights. Nevertheless, until they reach the age of majority they are unable to make decisions and exercise these rights through their guardian.[47] This option would be very similar to the so-called proxy voting model[48] used in the United Kingdom[49] and France[50],

46 This model is also known as Demeny Voting, because Paul Demény, among others, formulated such a proposal in 1986. Paul Demeny, 'Pronatalist Policies in Low-Fertility Countries: Patterns, Performance and Prospects' *Population and Development Review,* Vol. 12, 1986, pp. 335–358. This means that the parent exercises the child's voting rights instead of the child, with each parent having half the vote. Warren C. Sanderson, 'A Near Electoral Majority of Pensioners', *Population and Development Review*, Vol. 33, Issue 3, 2007, pp. 543–554.

47 Kalus Nopper, *Minderjährigenwahlrecht – Hirngespinst oder verfassungsrechtliches Gebot in einer grundlegend gewandelten Gesellschaft?*, Tübingen, 1999, p. 1.

48 John Wall, 'Why Children and Youth Should Have the Right to Vote: An Argument for Proxy-Claim Suffrage', *Children, Youth and Environments*, Vol. 24, Issue 1, 2014, pp. 108–123.

49 Fröhlich 2011, p. 10.

50 About the French model, *see e.g.* Michel Verpeaux, 'A francia példa. A választásokon való részvétel feltételei, avagy "az állampolgárok és választópolgárok"' *in* Ákos Cserny & András Téglási (eds.), *Tanulmányok a választási eljárás aktuális kérdéseiről*, Nemzeti Közszolgálati és Tankönyv Kiadó, Budapest, 2013, pp. 119–127.

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whereby a person who is unable to attend an election for a specific reason but is on the electoral roll can vote by proxy.[51] However, according to Venice Commission's Opinion No. 190/2002, stringent rules should be laid down for voting by proxy: for example, by setting a maximum number of voters a proxy can represent.[52] Of course, there are also several concerns surrounding the substitution model. One of these is the lack of immediacy of the voter's choice. According to Schanda, however, this argument does not hold water. In his view, the substitution model would, as a matter of course, give greater weight to children and to those who are the legitimate representatives of the interests of minor children, *i.e.* parents.[53] However, a further argument against the substitution model may be that the child's guardian may not necessarily put the child's interests first, when voting on the child's behalf. This fear is of course legitimate, as is the case with the original right of parental choice. In conclusion, although the substitution model may be based on international examples and would thus be a more constitutionally justifiable solution to the right to vote for minors than the original parental right to vote,[54] it would still raise a number of difficulties in implementation.[55]

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51 According to Rutherford, "representation is the normal system of delegation of voting rights. In fact, the whole system of democracy may be regarded as conferring on elected representatives the right to represent their constituents." Jane Rutherford, 'One Child, One Vote: Prixies for Parents', *Minnesota Law Review*, Vol. 82, Issue 6, 1998, pp. 1463–1525.

52 Venice Commission Opinion No. 190/2002, point 3.2.2.1.

53 Schanda 2012, pp. 77–88.

54 At the same time, Reimer emphasizes in a study that, in his view, the derivative parental right to vote should be based on the assumption that the voter (*i.e.* the parent) can cast the child's vote in the child's interest, and that if the derivative parental right to vote is regarded as a substantively separate right of the voter, it does not violate the principle of equality of voting rights. Franz Reimer, 'Nachhaltigkeit durch Wahlrecht? Verfassungsrechtliche Möglichkeiten und Grenzen eines "Wahlrechts von Geburt an"', *Zeitschrift für Parlamentsfragen*, Vol. 35, Issue 2, 2004, pp. 322–339.

55 In addition to the above models, there is another possible 'solution': the possibility of vote retention. In essence, this would mean that children could collect up to their 18 years of age any votes they have not previously cast, and then cast them all at once when they reach the age of majority. Alessandra Casella, 'Storable Votes', *Games and Economic Behavior*, Vol. 51, Issue 2, 2005, pp. 391–419. A similar idea is outlined by Rehfeld, who argues that children are entitled to only a fraction of the vote until they reach adulthood, *i.e.* they can exercise their right to vote from a certain age (*e.g.* 12), but their vote is worth less and is only complete when they turn 18. Andrew Rehfeld, 'The Child as Democratic Citizen', *The Annals of the American Academy of Political and Social Science,* Vol. 633, The Child and Citizen (January 2011), pp. 141–166. These

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2.4. Conclusions

It is clear that the right to vote for children is a recurring topic, but one that has not been introduced yet because of the difficulties surrounding its implementation. An analysis of this issue, however, confirms the hypothesis that any change to extend general suffrage is made when the legislator sees some political advantage to it.[56] However, this political turning point for children's suffrage has not yet taken.

The replacement model, or, more conservatively, lowering the voting age,[57] would be fully feasible, while at the same time respecting relevant constitutional principles. However, it is also apparent that this solution is a very divisive issue in professional circles. Antali, for example, opines that some people may decide to have children in exchange for additional rights and benefits.[58] In Beckman's view, children should not be given the right to vote, as it is not in their interest to be involved in casting a ballot.[59] For my part, however, I share Schanda's view that it is important for the future of society that the legislator open up elections to young people and encourage politicians to make decisions that help young people as constituents. Jakab also shares this view.[60] He argues that long-term sustainability is the key to the survival of the democratic state. This requires the recognition of those aspects that underpin it, such as the issue of children's suffrage (ensuring demographic sustainability). In this context, quoting Toynbee, he reminds us that civilizations are born and grow through successful responses to successive challenges. In this context, he also points out that by affording children the right to vote, governments faced with an ageing population can move away from short-term goals towards long-term goals and craft decisions that benefit families.[61] In my view, extending the right to vote would

solutions, in my view, face a problem of principle: votes are not capital that can be collected and stored and then used as you wish. It can only be exercised at a given time, based on a decision taken at that time. It goes without saying that this solution would seriously undermine the principle of equality of suffrage.

56 Kurunczi 2020, p. 179.

57 They argue in favor of lowering the age: Michael S. Merry & Anders Schinkel, 'Voting rights for older children and civic education', *Public Affairs Quarterly*, Vol. 30, Issue 3, 2016, pp. 197–213.

58 Antali 2011, p. 87.

59 *Cf.* Beckman 2009, pp. 103–106, and 119.

60 András Jakab, 'Fenntarthatóság az európai alkotmányjogban', *Közjogi Szemle*, Vol. 9, Issue 3, 2016, p. 4.

61 Jakab 2017, pp. 486, 488, and 489.

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also reduce the democracy deficit currently 'caused' by disenfranchising an important demographic (minors) through age censorship.[62]

3. Questions Concerning the Right to Vote of Persons under Guardianship

Another element of 'awareness constraints' is the lack of ability of discernment. In Hungary, the former Constitution provided for automatic grounds for exclusion,[63] whereas under the current Fundamental Law, exclusion from the right to vote can only be based on a special court decision.

Even among the grounds for restriction, the restriction of the right to vote on the grounds of lack of ability of discernment (which therefore primarily affects people with intellectual disabilities) raises specific issues.[64] In this respect, there is a fundamental contradiction that electoral systems must deal with. *(i)* First, the non-discriminatory exercise of the right to vote, as a fundamental political right, requires that it be accessible to all. *(ii)* Second, as mentioned in respect of age restrictions, the state has a duty to protect the integrity of the electoral system[65] and as a corollary, to protect electoral institutions.[66] It follows not only that the State must guarantee the exercise of the right to vote, but also that it must ensure that not

62 In this context, it is important to underline the position of Holste, who argues that, given that Members of Parliament have a free mandate, they represent all people, and therefore they must also represent the interests of those who did not elect them (including children) in their parliamentary work. Therefore, in his view, there is no need to extend the generality of the right to vote. Heiko Holste, 'Wahlrecht von Geburt an: Demokratie auf Abwegen?', *Die Öffentliche Verwaltung*, 2005/3, pp. 114–115.

63 According to this, a person was not entitled to vote if they were *(i)* subject to guardianship or exclusion from exercising public affairs; *(ii)* serving a sentence of imprisonment or a sentence of compulsory treatment in an institution ordered in criminal proceedings.

64 *See e.g.* 'Mental Disability and the Right to Vote (Notes)', *The Yale Law Yournal*, Vol. 88, Issue 8, 1979, pp. 1644–1664; Joseph Fishkin, 'Weightless Votes', *The Yale Law Journal*, Vol. 121, Issue 4, 2012, pp. 1353–1354.

65 *Cf.* Beckman 2009, pp. 165–166.

66 According to Pozsár-Szentmiklósy, the basis of a democratic society is a community of persons of equal dignity, who should enjoy the full range of rights to political participation. A decision to exclude persons from participation on the grounds of limited capacity of discernment continues to breach this principle, but the purpose of the restriction can only be the protection of other fundamental rights or other constitutional values in a very remote context. Zoltán Pozsár-Szentmiklósy, 'Politikai részvételi jogok az Alaptörvényben' *in* Marianna Fazekas (ed.), *Jogi Tanulmányok 2012. I-II. kötet: Az Eötvös Loránd Tudományegyetem Állam- és Jogtudományi Doktori*

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only the State itself, but also other individuals, refrain from infringing it. Consequently, in certain cases the State will be obliged to protect the voter from other voters to ensure the exercise of the right to vote and to safeguard the fairness of the election. As regards the lack of ability of discernment as an element limiting the right to general suffrage, the latter is of primary importance. This is because, as will be seen below, the full extension of the right to vote to persons whose right to vote is restricted because they lack discernment raises the possibility of a breach of the purity of elections.

3.1. The Problem of the of Ability of Discernment – the Concept of Disability

Before examining the above issues in depth, it is important to define disability, as the restriction of the right to vote due to lack of ability of discernment primarily affects people with intellectual disabilities. The definition of disability also has a particular impact on how governments and other organizations treat people with disabilities.[67] There are many approaches, models, and classification systems for determining who qualifies as disabled. The best-known classification system is the International Classification of Impairments, Disabilities, Handicaps (ICIDH), established by the WHO in 1980. In 2001, the WHO replaced the ICIDH with a new classification system, the International Classification of Functioning, Disability and Health (ICF).[68] The broadest definition of disability is a person with a disability. It is also used in the UN Convention on the Rights of Persons with Disabilities (CRPD), which defines a person with a disability as any person who has a long-term physical, mental, intellectual or sensory impairment which, together with a number of other limits, may limit that person's full, effective and equal participation in society. This concept is also used in Hungary in the Act on the Rights of Persons with Disabilities and Ensuring their Equal Opportunities.

Iskoláinak III. konferenciája, ELTE Állam- és Jogtudományi Kar, Budapest, 2012, p. 191.

67 György Könczei (ed.), *A fogyatékosság definíciói Európában: Összehasonlító elemzés*, ELTE Bárczi Gusztáv Gyógypedagógiai Kar, Budapest, 2009, p. 7.

68 Michael Maschke, *Fogyatékosságpolitika az Európai Unióban*, Multiszolg Bt., Budapest, 2010, p. 33.

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However, people with disabilities cannot be treated as a homogeneous group in terms of voting rights: people with physical and sensory impairments cannot be excluded from the right to vote. In this case, the aim is specifically to facilitate the exercise of the right (*e.g.* by making polling stations more easily accessible or by facilitating the means of voting, by providing mobile ballot boxes).[69] By contrast, in respect of people with intellectual disabilities, the various jurisdictions have always limited their right to vote in some way.[70]

3.2. The Relationship between the Ability of Discernment and the Right to Vote in Light of International Practice

Having clarified the notion of disability, it is important to review the international and Hungarian practices related to the relationship between the capacity to discern and the right to vote.

In international law, there has recently been a growing emphasis on extending the right to vote to people with disabilities.[71] General Comment No. 25 of the UN Human Rights Committee states that it is an objective and reasonable restriction to deny the right to vote to a person who lacks the ability of discernment. By contrast, under CRPD, States Parties shall guarantee persons with disabilities the ability to exercise their political rights on an equal basis with others and undertake to ensure that persons with disabilities may participate effectively and fully in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right to stand for election.[72] The assessment of this article, however, is quite varied. It was only in 2011 that the first reports were published (*e.g.* the country report on Tunisia[73]), in which the Com-

69 In the US, a special law was passed in 2002 to promote the voting right of people with disabilities (Help America Vote Act of 2002). *See e.g.* Arlene Kanter & Rebecca Russo, 'The Right of People with Disabilities to Exercise Their Right to Vote Under the Help America Vote Act', *Mental and Physical Disability Law Reporter*, Vol. 30, Issue 6, 2006, pp. 852–857.

70 Bodnár 2014, p. 199.

71 Id. p. 204.

72 For an analysis of the text of the Convention, *see* Sándor Gurbai, *A gondnokság alá helyezett személyek választójoga a nemzetközi jog, az európai regionális jog és a komparatív közjog tükrében*, Pázmány Press, Budapest, 2016, pp. 29–74.

73 Implementation of the International Convention on the Rights of Persons with Disabilities. Initial report submitted by Tunisia. 14 July 2010, CRPD/C/TUN/1.

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mittee recommended the adoption of legislation to grant voting rights to persons with disabilities, including those under guardianship, on an equal basis with others.[74] In doing so, the CRPD Committee has expressed the view that restricting or denying the right to vote on the basis of disability results in discrimination in the area of political participation.[75] In September of the same year, the CRPD Committee also evaluated Spain and in its concluding observations recommended that the Spanish Government review all relevant legislation to ensure that all persons with disabilities, regardless of impairment, legal status or place of residence, have the right to vote and participate in public life on an equal basis with others.[76] In September 2013, the Committee also came to the same conclusion with respect to Hungary. They therefore called on Hungary to review Article XXIII(6) of the Fundamental Law, which – based on a court decision – allows for the exclusion of a person on the grounds of lack of ability of discernment, as it violates Article 29 CRPD.[77]

The practice of organizations operating under the aegis of the Council of Europe is also quite varied. In its Opinion No. 190/2002 the Venice Commission identified a lack of discretion as a legitimate ground for deprivation. This means that the grounds for disqualification must be laid down by law, the requirement of proportionality must be respected and exclusion must be based on a judicial decision.[78] Following the publication of this opinion, however, the ECtHR ruled in *Alajos Kiss versus Hungary* that

> "disenfranchisement has an impact on the social status and personal identity of individuals. The loosening and severing of ties to the community of constituents acts as a stigma, diminishing the self-worth of the individual, while serving as evidence to the community of the inferiority of the other."

The case was based on the fact that the complainant, Alajos Kiss, had been placed under a guardianship order restricting his capacity to act, and had therefore automatically lost his right to vote. The ECtHR found the

74 Charles P. Sabatino, 'Guardianship and the Right to Vote', *Human Rights*, Vol. 45, Issue 3, 2020, pp. 16–17.
75 Gurbai 2016, p. 54.
76 Id. p. 55.
77 For the UN position, *see* Tamás Verdes, '"Tekintet nélkül a károsodásra" – Az ENSZ fogyatékossággal élő személyek jogai bizottságának álláspontja a fogyatékos emberek választójogának korlátozásáról', *Fundamentum,* 2011/ 3, pp. 92–94.
78 Point I.1.1(d) of Venice Commission Opinion No. 190/2002.

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purpose of the challenged measure to be legitimate, namely, to ensure that only voters capable of weighing the consequences of their decisions and make an informed and considered choice participate in public affairs. It also accepted that this is an area where the national legislator should be given wide discretion to decide whether restrictions on the right to vote can be justified in modern times. However, the ECtHR could not accept the argument that the exclusion of persons under guardianship from the elections, irrespective of their actual ability of discernment, would still be acceptable. Indeed, if a restriction of fundamental rights affects a particularly vulnerable group of society (such as people with mental disabilities) that has suffered significant discrimination in the past, the discretion of the state is significantly narrower. According to the ECtHR, deprivation of the right to vote without individual judicial assessment, based solely on the fact of guardianship on grounds of mental disability, is incompatible with the ECHR.[79] In the wake of the case of *Alajos Kiss* and the international human rights developments that have taken place in the meantime (see the CRPD, analyzed above), the Venice Commission's position has evolved, and in 2011 the body added to its Opinion No. 190/2002 that the principle of general suffrage implies that there is no discrimination against persons with disabilities, and that they can exercise their right to vote under the same conditions as other citizens.[80]

In addition to the *Alajos Kiss case*, it is worth reviewing the practice of the ECtHR in other cases related to the capacity of discernment. In *Hirst versus the United Kingdom,*[81] the court held that the purpose of the right to vote is to ensure that as many voters as possible participate in elections and that the state must endeavor to guarantee this. In this context, the judgment also ruled that the right to vote is not a privilege, *i.e.* it cannot be considered exceptional. This is also true for persons who are incapacitated or disqualified from voting. Also, in a judgment in the case of a person serving a prison sentence, the ECtHR ruled that exclusion from voting

79 *Alajos Kiss v Hungary*, No. 38832/06, 20 May 2010; Bodnár 2014, p. 106.

80 According to Venice Commission Report No. 584/2010 (Revised interpretative declaration to the Code of Good Practice in Electoral Matters in the participation of people with disabilities in election): "People with disabilities should therefore be able to exercise their right to vote and participate in political and public life as elected representatives on an equal basis with other citizens. The participation of all citizens in political and public life and the democratic process is essential for the development of democratic societies."

81 *Hirst v the United Kingdom*, No. 74025/01, 6 October 2005.

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must be based on a judicial decision and must take account of individual circumstances.[82]

Following this overview of the practice of international organizations and courts, let us now take a look at the practice of individual countries.[83] We can distinguish the following approaches: in some European countries, political participation is conditional upon full capacity and their legal systems include automatic or quasi-automatic exclusion.[84] In this case, exclusion is the consequence of incapacity, *i.e.* courts do not specifically examine whether the person concerned would otherwise be able to exercise their right to vote. This is also the case in Germany, where people who have been placed under guardianship are excluded from the right to vote, and guardianship covers all their affairs.[85] The other extreme is when the right to vote is not restricted at all on grounds of ability of discernment. But this approach characterizes only a small number of states.[86] The middle ground solution is represented by states that decide by examining whether a person is capable of participating in the election. In some countries, legislation provides for general exclusion, but with the possibility of individualized assessment (*e.g.* Estonia, Malta), while in others, the rule is that everyone has the right to vote, but there is a specialized assessment that can result in exclusion (in Spain and in France[87]).[88] In this context, it is

82 *Frodl v Austria*, No. 20201/04, 8 April 2010. In this case the ECtHR also established a test, according to which it is important for the proportionality of the exclusion that the judge decide on a case-by-case basis.

83 For country practices, *see also* Anna Maria Neagoe, 'The Right to vote of Persons with Disabilities', *Journal of Law and Administrative Sciences,* 2015/Special Issue, pp. 715–726.

84 Such countries are *e.g.* Belgium (Article 61 of the Belgian constitution regulates the grounds for exclusion in a special law), Denmark (Article 29 of the Danish constitution states that "Every Danish citizen […] shall have the right to vote in parliamentary elections unless they are declared incapacitated. […]"), Greece (according to Article 51(3) of the Greek Constitution: "The law may not restrict the right to vote, except […] for the case of persons who are incapacitated […]"), Lithuania (Article 56(2) of the Constitution excludes persons who are incapacitated), Poland (Chapter IV of the Polish Constitution) and Portugal (Part III of the Constitution entrusts the regulation to a special law).

85 Bodnár 2014, p. 207.

86 *E.g.* Austria, Finland, Italy.

87 In France, being placed under guardianship automatically entails exclusion from voting, but the courts supervising the electoral roll have the right to register the person under guardianship in a special procedure if it is not established that they are incapable of voting. Bodnár 2014, p. 209.

88 Gurbai 2016, pp. 161–249.

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also worth highlighting a decision of the Czech Constitutional Court from 2010, where it ruled that the right to vote can only be restricted on the basis of an individualized assessment of mental disability, and that a general rule that those incapacitated have no right to vote cannot be applied.[89] The Hungarian legislation, as described in the next section, can be classified among the latter group of states. Giving an overview of national practices, in 2010 the Fundamental Rights Agency of the EU (FRA) analyzed the legislative restrictions of the right to vote on grounds of guardianship in the 27 Member States. It shows that only a few countries (*e.g.* Austria, Finland, Sweden, the Netherlands, Italy, the UK, *etc.*) ensure an unconditional and unrestricted right to political participation for people with mental health problems and intellectual disabilities. However, most Member States allow for the exclusion of persons with disabilities from the right to vote, either automatically or on the basis of an individualized assessment.[90]

3.3. Critical Analysis of the Hungarian Practice

In light of the international practice described above, it is worth examining the extent to which Hungarian regulation is in line with this apparently non-uniform and ever changing international trend – which is currently tending towards full openness on the main point. A further question to be answered is whether the protection of the integrity of the electoral system can be considered a legitimate aim of the restriction of the right to vote due to a lack of ability of discernment.

3.3.1. Hungarian Legislation in Relation to Guardianship Proceedings and the Right to Vote

The Electoral Procedures Act of 2013 introduced significant changes to the previous legislation on exclusion for lack of ability of discernment,[91]

89 Id. p. 190.

90 Enikő Gothárdi, 'A gondnokság alá helyezett személyek választójogáról', *Magyar Jog*, Vol. 64, Issue 6, 2017, pp. 331–332.

91 For more on the Hungarian regulatory history of the right to vote for persons with disabilities, *see* Péter Komlós, 'A fogyatékkal élő személyek szavazati jogának korlátozása a választójogi (és más) törvények tükrében Magyarországon', *Kultúra és közösség*, 2013/1, pp. 33–42.

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since the earlier rule (automatic exclusion) could no longer be upheld. The current legislation therefore provides that the court must make a separate provision for exclusion in guardianship proceedings. This means that the court can decide to place someone under guardianship, but not deprive them of their right to vote,[92] and the exclusion from voting on grounds of incapacity can also be repealed even if the person in question remains under guardianship.[93] If we compare this Hungarian legislation with the international principles detailed above, we can conclude that it is in line with ECHR rules and ECtHR practice, however, it contravenes provisions of the CRPD.[94]

3.3.2. The legitimacy and proportionality of Hungarian legislation

The most common argument justifying exclusion from voting on the grounds of ability of discernment, and accepted by the ECtHR as a legitimate aim,[95] is that the state has the right to protect the integrity of its electoral system. Indeed, participation in the democratic life of a society presupposes a certain intellectual capacity, and therefore the right to vote can be restricted on this basis. With regard to the right to vote as a fundamental right, this also means that the state may, under strict conditions, exclude persons from exercising the right to vote, even on the grounds of limited ability to discern. The legitimate aim of the restriction will therefore be to maintain a fair electoral system, free of electoral abuses, and the necessary means of achieving this will be to ensure the possibility of exclusion. It is questionable, however, whether the proportionality requirement is met when applying the fundamental rights test.

Bodnár holds that the biggest problem with a system based on automatic exclusion is that it makes the right to vote entirely dependent on the existence of full capacity. However, persons placed under guardianship do

92 According to the guidelines for applying the law, the court shall exclude from the right to vote a person who has reached the age of majority and whose capacity to exercise the right to vote is *(i)* permanently or periodically severely reduced or periodically and recurrently impaired due to a mental state, mental retardation or addiction, or *(ii)* permanently and completely lacking due to a mental state or mental retardation.

93 Eszter Párkányi, 'A cselekvőképességet érintő eljárások dilemmái', *Esély*, 2014/5, p. 12.

94 *Cf.* Ákos Cserny & Attila Péteri, *Választójogi és népszavazási kommentárok*, Wolters Kluwer, Budapest, 2017, pp. 26–27.

95 *Alajos Kiss v Hungary*, cited above.

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not form a homogeneous group (a person who does not know the concept of money can be placed under guardianship just as well as a person who has been lying in a coma for years). In other words, such a system does not individualize. Another major problem, she argues, is that many people without the ability of discernment are not placed under guardianship.[96] For my part, I fully agree with this position. However, it must also be seen that the Hungarian legislation does not follow this direction. The Fundamental Law and Hungarian legislation are nevertheless subject to criticism, claiming that they do not comply with the CRPD.[97] Those who oppose the exclusion of people with intellectual disabilities for any reason argue mainly that people with intellectual disabilities are equal members of society and that their intellectual disability alone is not a reason to exclude them from the most important fundamental political right. In my view, however, this view is as one-sided as the view of those who might argue for automatic exclusion. The state's duty to protect constitutional institutions clearly requires the protection of the integrity of the electoral system: that is, to avoid any abuse of the right to vote. Indeed, if all people with an intellectual disability had the right to vote, a great number of people with severe disabilities would need such assistance that there would be a risk others would in effect vote for them.

With regard to the proportionality of the restriction of the right to vote of persons placed under guardianship, it is important to underline that Hungarian legislation only allows for restriction based on an individualised assessment. It is this individual court decision that guarantees the proportionality of the restriction, since deprivation of the right to vote is not automatic. The possibility of an individualized assessment and its separability from the guardianship review ensure, at the legislative level, that only those persons whose intellectual disability (reduced ability of discernment) effectively prevents them from exercising their right to vote are excluded from the suffrage. Thus, the restriction can be considered proportionate.

96 Bodnár 2014, p. 205.
97 Cserny & Péteri 2017, p. 158.

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3.3.3. Methodology and Practical Experience of Electoral Restrictions in Guardianship Legal Proceedings in Hungary

The Hungarian Electoral Procedures Act is implemented by the national courts. In guardianship proceedings the decision on exclusion from voting is a matter for experts. The court of first instance deciding on exclusion relies primarily on the medical expert opinions, also taking into account the findings of a personal interview with the person under guardianship and the testimony of witnesses.[98] During the personal interview, the person assessed must be asked questions to substantiate the expert's opinion, from which it is possible to determine the existence or lack of an ability of discernment necessary for exercising the right to vote.[99] For example, "Do you follow public events?", or "When was the last election in Hungary?", or "Do you know who is the current Prime Minister of Hungary?"[100] Thus, besides the expert's opinion (which is also shaped by the interview), the questions put to the defendant during the procedure are of particular importance.

A number of standards have been developed in international practice to measure electoral capacity. In the US, a test was developed as early as the 1980s, in which the person was asked to provide only minimal data, such as name, address and nationality, in order to be included on the electoral roll.[101] Then, in 2007 a US working group published a study stating that exclusion from voting can take place if the court finds that the person cannot, with or without reasonable accommodation, express a specific intention to participate in the electoral process.[102] On this basis, and taking into account, among other things, the above considerations, psychiatrists have developed a tool to measure capacity to vote. This Competence Assessment Tool for Voting (CAT-V) includes questions measuring the abilities of a potential voter. For example, "What will the people of this state do today

98 Nóra Kerekné Jakó & Tünde Vida-Sós, 'Választójog a gondnokság alá helyezési perek tükrében' *in* Judit Tóth (ed.), *Ünnepi kötet Dr. Tóth Károly címzetes egyetemi tanár 70. születésnapjára*, SZTE ÁJTK, Szeged, 2015, p. 108.

99 Kerekné Jakó & Vida-Sós 2015, p. 108.

100 Id. p. 109.

101 Paul S. Appelbaum, 'I vote. I count: Mental Disability and the Right to Vote', *Psychiatric Services*, Vol. 51, Issue 7, 2000, p. 850.

102 American Bar Association Recommendation and Report, from Symposium: Facilitating Voting as People Age: Implications of Cognitive Impairment. Approved by the ABA House of Delegates on August 13, 2007, p. I.

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to elect a new Governor?" or "When the election for Governor is over, how will they decide who the winner is?" and, referring to an imaginary situation, "If you had to decide based on the information you know, who would you vote for?" To assess these questions, the CAT-V test developed a scoring system to measure the person's ability to vote to decide whether it is justified to exclude them. However, alongside this test, a number of other trends have emerged, showing great diversity.[103] The situation is further complicated by the different standards applied by the UN Commission on Human Rights and the CRPD Committee; the different requirements of the Council of Europe structure of the Venice Commission and the ECtHR *vis-à-vis* the Council of Europe Commissioner for Human Rights and the Committee of Ministers of the Council of Europe and the Parliamentary Assembly; and the different direction taken by the European Commission and the FRA. It is clear that it is very difficult to formulate questions in court proceedings in such a way that it is possible to draw conclusions with a high degree of certainty as to the capacity of the person under assessment.

Given the difficulty of measuring the capacity to vote, it is worth taking a look at the statistical data gleaned from judgments rendered in such cases. I asked the National Office for the Judiciary[104] (NOJ) to provide me with the relevant data, from which it can be concluded that, when aggregated over the years 2014–2017, 98 % of persons with totally incapacitated were also excluded from exercising their right to vote. The figure is 66 % for partially incapacitated persons. From these numbers we can conclude, that in almost all cases of guardianship proceedings in which the capacity to act is completely restricted, the court also deprives the person under assessment of their right to vote. However, the same claim also holds true for guardianship proceedings where the capacity to act is only partially restricted – here the rate is over 66 %.

103 Gurbai 2016, pp. 270–283.

104 The NOJ is the administrative body of the Hungarian judicial system. In Hungary, there is a model of so-called judicial self-administration, *i.e.* the courts perform administrative tasks independently of other state bodies. Since 2012, this task is carried out in Hungary by the NOJ, which is also responsible for the statistical analysis of sentencing practices.

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3.4. Conclusions

The above statistics also show that in most guardianship proceedings, courts also deprive the defendant of their right to vote. However, in my view, these statistics and the questions used as examples (which may easily be considered as inadequate measures of voter capacity) do not in themselves lead to the conclusion that the legislation must be changed – in a fully permissive direction, free of any restrictions. As I emphasized earlier, the state must guarantee the integrity of the electoral system as part of its duty to protect the institutions, which would be difficult to imagine at present other than by providing the possibility of exclusion. In my view, the above statistics and the questions asked in the procedure demonstrate that the fault lies in the application of the law. Indeed, if the courts were able to develop a uniform test of eligibility that could measure eligibility for voting in an effective and more objective way, the quasi-automatic disenfranchisement that is still very often observed in practice could be avoided. Contrary to current practice, this aptitude test, in my view, should not be primarily aimed at assessing the person's knowledge of electoral law and political life[105] – in many cases this can lead to erroneous conclusions. Indeed, an effective aptitude test should seek to successfully assess the capacity of the person tested to become a subject of people's sovereignty, *i.e.* to participate in the expression of political will. In other words, it is primarily a way of assessing whether the person concerned understands what the election is about. Laying down the test questions should be the result of a complex, expert exercise. In my opinion, the CAT-V test, as described in the US practice, could be used as a starting point. The questions asked should therefore be primarily designed to effectively measure the ability of the respondent to understand the purpose of the elections. Such a question could be, for example, "What do people/voters have to do to elect representatives?" or "What will be the basis for deciding who wins the election?". A test with questions of this or similar content and an associated scoring system would, in my view, be an effective way of screening those who really lack the ability of discernment to participate actively in elections.[106]

105 The questions (such as "*When was the last election in Hungary?*") point strongly in this direction.

106 It is worth noting that for countries that apply full extension, there is also the possibility of organizing an education session for voters with intellectual disabilities to help them exercise their right to vote. See: Martin Agran *et al.*, '"I Never Thought

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Therefore, in my view, it would not be necessary to amend the Hungarian Fundamental Law and the legislation to solve the problem, instead, a uniform test and practice in applying the law should be established, which would allowed for an effective application of individualized assessment.

4. A Double Standard in 'Awareness Constraints'? – Conclusions

As we have seen above, 'awareness constraints' still raise important questions and dilemmas concerning the generality of the right to vote. It is striking, however, that while the exclusion of minors from voting is presented as a necessary and justified restriction, in the case of persons with reduced capacity to act, there are stronger voices that reject any such restriction. This, however, is a double standard: were we to accept that even the most severely mentally handicapped should have the right to vote, then all minors should also be granted the right to vote. The arguments against the full extension of the right to vote to minors are, in my opinion, no different from the arguments in favor of granting the right to vote to persons with intellectual disabilities.[107] If we accept as a legitimate argument that persons with intellectual disabilities are also full members of the political community (*i.e.* they are subjects of people's sovereignty), and this membership cannot be restricted in any way merely because of their lack or limited capacity of discernment (*i.e.* in their case, we do not consider it justified that their reduced or totally lacking capacity of discernment could be grounds for restricting their fundamental legal capacity), then it is no longer justified to maintain the presumption that only citizens who have reached the age of majority, or a certain age, may become members of the political community. Therefore, if we do not even allow for the possibility of individual assessment and exclusion of persons with intellectual disabilities, we cannot credibly argue for the automatic exclusion of minors from the right to vote. In other words, if arguments put forward for the exclusion of minors are accepted, the possibility of individualized assessment cannot be rejected in the case of the persons with intellectual disabilities.

About It": Teaching People with Intellectual Disability to Vote', *Education and Training in Autism and Developmental Disabilities*, Vol. 50, Issue 4, 2015, pp. 388–396.

107 Similar points are raised by András Jakab, who argues that children's voting rights are a 'side effect' of the right to vote for the mentally disabled. Jakab 2017, p. 497.

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On this basis, it can be concluded that the issue of 'awareness constraints' of the right to vote is still topical today – the only question is whether the international community as well as the constitutional and legislative bodies of the individual countries will reconsider the scope of these restrictions and take another step towards ensuring actual general suffrage.

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Is it an International Contract?

The Definition of International Character and Universal Application in Conflict-of-laws Conventions and in Other International Legal Instruments on Sales Contracts

Miklós Király[*]

Abstract

The starting point for the application of private international law is the perception of the international character of a legal relationship. This is also the case with international conventions and other instruments aimed at unifying conflict of laws. However, it is not easy to determine which factors give rise to an international situation. The legal literature has been wrestling with this question for decades. This paper compares the different documents designating the applicable law for international sales and contracts from this perspective. This comparative analysis stretches from the 1955 Hague Convention to the 2015 Hague Principles to demonstrate the different approaches. The second part of the study focuses on the partly related problem of universal application. The author concludes that the diverging solutions of domestic conflict of laws infiltrate the norms of uniform conflict of laws instruments in the first area under examination. However, the need for universal application is generally accepted in relation to conflict of laws instruments.

Keywords: Hague Conventions, private international law, Rome Convention, Rome I Regulation, unification of conflict of laws

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1. Introduction – International Character

The definition of the international nature of a private law fact situation and its precise description have long been the subject of conflict of laws literature.[1] After all, it is only in the event of an international background that the laws of different states are in competition and conflict, therefore the need for a solution based on private international law (PIL)[2] arises. This is the set of circumstances when there is a doubt about the substantive law applicable to a contract.[3] A particularly important consequence of the international nature of contracts is that it opens the way to the parties' choice of law as well.[4] The different instruments of PIL offer diverging solutions in this respect. An interesting question is whether the conventions and other legal instruments aimed at the unification of private international law have managed to find a common denominator in the definition of international character. This paper is mainly devoted to this subject, comparing the different documents having the aim of creating a uniform set of conflict of laws rules.

The definition of international character understandably arises in the context of the unification of conflict of laws, including in the documents (typically conventions) concerning international sales, as a prerequisite for their application. The situation is complicated by the fact that a contract can be linked to another state at several points, so the foreign element can manifest itself in many ways. For example, in addition to the place of habitual residence or places of business of the parties, it may be their nationality or the place where the contract is negotiated, concluded, or performed, the subject of the contract (goods) abroad or even the place of

1 Georges R. Delaume, 'What is an International Contract? An American and a Gallic Dilemma', *International & Comparative Law Quarterly,* Vol. 28, Issue 2, 1979, pp. 258–279; Giesela Rühr, 'Private international law: Foundations' *in* Jürgen Basedow *et al.* (eds.), *Encyclopedia of Private International Law*, Edward Elgar, Cheltenham, 2017, pp. 1380–1390, especially p. 1380; Kurt Siehr, *Das Internationale Privatrecht der Schweiz*, Schulthess, Zürich, 2002, p. 5. *See also* Franco Ferrari (ed.), *Rome I Regulation. Pocket Commentary,* Sellier, Munich, 2015, p. 47; Robert Magnus, 'Der grenzüberschreitende Bezug als Anwendungsvoraussetzung im europäischen Zuständigkeits- und Kollisionsrecht', *Zeitschrift für Europaisches Privatrecht,* 2018/3, p. 507.

2 The terms conflict of laws and private international law (PIL) are used in this paper interchangeably.

3 Ulrich Magnus & Peter Mankowski (eds.), *Rome I Regulation, Commentary, European Commentaries on Private International Law*, *ECPIL, Vol. II,* Sellier, Otto Schmidt, Cologne-Munich, 2017, p. 72.

4 Id. p. 76.

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payment. A separate question is whether the choice of law of the parties as a subjective factor can internationalize an otherwise domestic relationship, this way triggering the application of PIL.

1.1. The 1955 Hague Convention

In terms of its material scope, the 1955 Hague Convention[5] applies to the international sale of movable property.[6] *'La présente Convention est applicable aux ventes à caractère international d'objets mobiliers corporels.'* From the general wording, and the absence of specific provisions, the Convention also covers consumer transactions.[7] However, Article 1 of the Convention, cited above, does not specify the international character, although, as it was reported, this was already the subject of considerable discussion, especially in relation to party autonomy, at the 1928 Hague Conference that prepared the future Convention.[8] The 1955 Hague Convention only indicates that it is not sufficient for the parties to agree on the applicable law or the identity of the judge or arbitrator.[9] Nor did it define the notion of contract or contract of sale, leaving the question of definition essentially to the law of each Contracting State, and above all to the law of the forum adjudicating the dispute. Although the sale of goods is an age-old transaction with a traditional content, in certain mixed transactions, such as those involving the future production of goods, it may be appropriate to clarify the nature of a contract from the point of view of the applicability of the 1955 Hague Convention.[10]

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5 Convention of 15 June 1955 on the law applicable to international sales of goods. The Convention was ratified by Denmark, Finland, France, Italy, Niger, Norway, Sweden and Switzerland.

6 1955 Hague Convention, Article 1: "This Convention shall apply to international sales of goods."

7 Magnus & Mankowski (eds.) 2017, p. 489.

8 Conférence de la Haye de Droit International Privé, Actes de la Sixième Session Tenue du 5 Au 28 Janvier 1928 (Imprimerie Nationale 1928), p. 295.

9 1955 Hague Convention, Article 1(4). Ole Lando, 'The 1955 and 1985 Hague Conventions on the Law Applicable to the International Sale of Goods', *The Rabel Journal of Comparative and International Private Law,* Vol. 57, Issue 1–2,1993, p. 162.

10 This issue, in substantive law unification, is dealt with in Article 3 of the UN Convention on Contracts for the International Sale of Goods (Vienna Sales Convention, CISG). But the CISG does not define the concept of sale either, although it can be deduced from the regulation of the rights and obligations of the seller and the buyer.

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1.2. Rome Convention

Continuing the analysis of the different PIL Conventions, the Rome Convention of 1980 created under the aegis of the European Community,[11] which applies to contractual obligations, not just sales, does not specify the concept of contractual obligations either. As far as the criterion of international character is concerned, Article 1(1) of the Convention states that it "shall apply to contractual obligations in any situation involving a choice between the laws of different countries." A certain ambiguity may arise from the terms of the official English version of the Rome Convention,[12] since, in English legal language, the expression "choice between the laws" can refer to both classical conflict of laws rules and to the choice of law in a narrow sense: a possibility for the parties to the contract to select the applicable law. The German wording of the Convention, on the other hand, already makes it clear that it applies to factual situations that contain a foreign element and are thus connected with the legal systems of different States.[13] A similar view is provided by the Giuliano/Lagarde report,[14] which can be considered as the official commentary of the Rome Convention. It refers to a "conflict between two or more legal systems" in the analysis of Article 1 of the Convention. Nevertheless, it is a fact that a part of the legal literature regrets the imprecision of the final (English) text of the Rome Convention, saying that this wording could raise the question of the application of the Convention, even if two Italian parties agree to purchase an Italian product but insert a clause on the choice of English law in their contract.[15] In a broad interpretation, the situation of "choice between the laws of different countries" described in Article 1 may in fact arise in such a case. Even more so because the Rome Convention does not contain the limitation of the 1955 Hague Convention, already indicated above, that it is not sufficient

11 At present, the Rome Convention is applied only by Denmark, since it was replaced by the Rome I Regulation.

12 Rome Convention, Article 1.1: "The rules of this Convention shall apply to contractual obligations in an any situation involving a choice between the laws of different countries."

13 *"Sachverhalten, die eine Verbindung zum Recht verschiedener Staaten aufweisen."*

14 Report on the Convention on the law applicable to contractual obligations by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor University of Paris I, Official Journal, C282, 31 October 1980, pp. 1–50. (Giuliano – Lagarde Report).

15 Richard Plender, *The European Contracts Convention, The Rome Convention on the Choice of Law for Contracts,* Sweet and Maxwell, London, 1991, pp. 47–48.

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for the parties to agree on the applicable law or the person of the judge or arbitrator to make a fact situation international.

1.3. The 1986 Hague Convention

The 1986 Hague Convention,[16] which has not entered into force, has already gone further than its predecessor and, in line with the Vienna Sales Convention,[17] therefore with a view to the unification of substantive law, it would have been applied primarily where the contract of sale was concluded between parties having their places of business in different States.[18] This was supplemented – probably in the wake of the quoted provision of the Rome Convention – by a further possibility, according to which the 1986 Convention would apply "in all other cases involving a choice between the laws of different States",[19] with the proviso that here it is not sufficient for the international element to be manufactured by an agreement on the governing law or forum alone.[20] Even so, there may be some uncertainty as to what intensity of international strand or connection is actually required. Might it be sufficient to come under the umbrella of the 1986 Hague Convention, as Lando suggests, that a contract between French parties uses an English standard form, which of course points towards English law?[21] Most probably not. If the direct choice of the governing law of the parties cannot trigger the application of the Convention, then the selection of a standard form is not sufficient to achieve this result either.

16 Convention on the Law Applicable to Contracts for the International Sale of Goods (Concluded December 22, 1986).
17 CISG, Article 1(1).
18 Compare the wording of 1986 Hague Convention, Article 1(a) and CISG, Article 1(1).
19 The French text is even clearer: *'dans tous les autres cas où la situation donne lieu à un conflit entre les lois de différents Etats, à moins qu'un such conflit ne résulte du seul choix par les parties de la loi applicable, même associé à la désignation d'un juge ou d'un arbitre.'* 1986 Hague Convention, Article 1(b).
20 1986 Hague Convention, Article 1(b).
21 Lando 1993, p. 162.

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1.4. The Rome I Regulation

Returning back to the EU, the English version of the text of the Rome I Regulation[22] adopted in 2008 has been refined compared to its predecessor, the Rome Convention, no longer using the ambiguous phrase "choice between the laws of different countries", but instead capturing the international nature of a contractual relationship in its Article 1(1), by referring to "situations involving a conflict of laws, to contractual obligations in civil and commercial matters."[23]

It should be noted that the English version of the Rome I Regulation is not a perfect solution either, and an ideal description probably does not exist at all, because here the broad interpretation of the term 'conflict of laws' may raise questions, since this technical term may refer to jurisdictional issues in Anglo-Saxon legal systems, not only to the rules of designating the applicable law.[24] On the other hand, the Rome I Regulation does in fact apply, even if the contracting parties choose the law of a purely domestic situation, thus internationalising it,[25] although it is true that in this case it is only choice of law in the substantive sense, which cannot replace the application of mandatory rules of the otherwise applicable law.[26] Most authors, interpreting the phrase 'in situations involving a conflict of laws', accept that a question of private international law is involved where there is 'reasonable' doubt as to the applicable state law.[27] However, even this expression is rather flexible, and requires further interpretation in the light of the circumstances. On one hand, if certain connecting factors specifically highlighted in a relevant conflict rule, such as habitual residence of the

22 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I Regulation).

23 Article 1(1) in German: *"Diese Verordnung gilt für vertragliche Schuldverhältnisse in Zivil- und Handelssachen, die eine Verbindung zum Recht verschiedener Staaten aufweisen."*

24 Ferrari (ed.) 2015, p. 41.

25 *See* Article 3(3) of the Rome I Regulation; and Ferrari (ed.) 2015, p. 41. *See also* Christoph Reithmann & Dieter Martiny (eds.), *Internationales Vertragsrecht, Das internationale Privatrecht der Schuldverträge, Ninth edition,* Otto Schmidt, Köln, 2022, pp. 35–36.

26 Rome I Regulation, Article 3(3).

27 Magnus & Mankowski (eds.) 2017, p. 72.

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parties,[28] occur in different countries, there is obviously an international fact situation under the umbrella of private international law. On the other hand, if only a marginal element of the facts is rooted abroad, (for example, some negotiations were conducted in a foreign country between two local companies concluding a sales contract), there is still an internal situation. However, an accumulation of such elements may already result an international case requiring the designation of the applicable law. Developing the above-described circumstances further, for example, not only the negotiations between two local companies were conducted abroad, but the contract itself was concluded there, and the location of the subject matter of the contract is abroad as well. This could tip the scales towards international character.

1.5. The 1994 Mexico City Convention

The 1994 Mexico City Convention[29] on the law applicable to contracts contains a specific provision on the international nature of contracts. Its Article 1 declares in general terms that the Convention applies to international contracts. It then also defines the international character, according to which a "contract is international if the parties thereto have their habitual residence or establishments in different States Parties or if the contract has objective ties with more than one State Party."[30] It should be stressed that the requirement of an objective connection precludes the possibility that the connection with more than one State is reflected solely in the choice of law of the parties.

28 For example, Article 4(1)(a) of the Rome I Regulation: "a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence."

29 Inter-American Convention on the Law Applicable to International Contracts, signed in Mexico, D.F., Mexico, on 17 March 1994, at the Fifth Inter-American Specialized Conference on Private International Law (CIDIP-V). Ratified by Mexico and Venezuela.

30 Mexico City Convention, Article 1.

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1.6. The 2015 Hague Principles

The 2015 Hague Principles on Choice of Law,[31] while always bearing in mind that it is a non-binding instrument, unlike a convention, also provides a definition of international character, offering a new approach to the issue. Article 1(2) of the Hague Principles essentially considers all contracts to be international "unless each party has its establishment in the same State and the relationship of the parties and all other relevant elements, regardless of the chosen law, are connected only with that State."[32] This definition, which is the reverse of the solutions described so far, excludes only purely domestic situations, giving the broadest possible interpretation of the term 'international'. The solution is admittedly inspired by the 2005 Hague Convention on Choice of Court Agreements.[33] A double test follows from this approach. A contract is international if the parties are established in different States. However, if this condition is not fulfilled, the contract may be still international if not all the relevant elements, such as the conclusion or performance of the contract, are linked to a single State.[34] Of course, it is a question of assessing the elements 'relevant' to the international nature of a contract, so the Commentary on the Principles states that the mere fact that the place of pre-contractual negotiation took place abroad or that the contract was written in a particular language does not change the domestic character of the contract.[35]

It is worth noting that the definition of international fact situation is also faced by domestic private international law. For example, the new Hungarian PIL Code[36] defines the applicable law in "private law relationships with

31 Principles on Choice of Law in International Commercial Contracts, Hague Conference on Private International Law, 2015.

32 Hague Principles, Article 1(2).

33 The Convention of 30 June 2005 on Choice of Court Agreements Article 1(2): "For the purposes of Chapter II, a case is international unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State." *See also* the Hague Principles Commentary, paras. 1.13 – 1.15, at www.hcch.net/en/instruments/conventions/full-text/?cid=135.

34 Id. paras. 1.16 – 1.20.

35 Id. para. 1.19.

36 Hungarian Act XXVIII of 2017 on Private International Law, Section 1. *See* Tamás Szabados, 'The New Hungarian Private International Law Act: New Rules, New Questions', *The Rabel Journal of Comparative and International Private Law,* Vol. 82, 2018, pp. 972–1003.

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a foreign element", without further specifying the nature of this 'foreign element'. The 2011 Polish Private International Law Act[37] takes a slightly different approach, defining the applicable law "for private law relationships connected with more than one State" in its Article 1. Similarly, the PIL Code of Uruguay passed in 2020, probably following the approach of the Mexico City Convention, refers to a factual background connected with several national legal systems.[38] The Austrian PIL Code refers to matters involving foreign countries,[39] the Swiss Code simply addresses 'international matters'.[40] The well-known questions of interpretation, for example as to the strength of the presumed connection, may arise here too. Even so, the Italian,[41] Japanese[42] or Dutch Acts,[43] for example, are silent on this very question.[44]

2. The Question of Universal Application

The next logical question, following the detection of international character of a sales contract, whether the relevant international convention (or other instrument) will be applied only to fact situations which relate to the Contracting States or, regardless of this limit, to all international fact situations and disputes which are within its material scope. The answer to

37 Act on Private International Law Dated 4 February 2011. Basedow *et al.* (eds.) 2017, pp. 3621–3633.

38 General Law of Private International Law of 27 November 2020, Article 1. The German translation is available: *The Rabel Journal of Comparative and International Private Law,* Vol. 85, 2021, pp. 907–925.

39 Bundesgesetz vom 15. Juni 1978 über das internationale Privatrecht (IPR-Gesetz), Section 1(1): "*Sachverhalte mit Auslandsberührung sind in privatrechtlicher Hinsicht nach der Rechtsordnung zu beurteilen, zu der die stärkste Beziehung besteht.*" (From a private law point of view, matters involving foreign countries are to be assessed according to the legal system with which there is the strongest relationship.)

40 Bundesgesetz über das Internationale Privatrecht (IPRG) vom 18. Dezember 1987 Article 1: "*1 Dieses Gesetz regelt im internationalen Verhältnis: […]*"

41 Reform of the Italian System of Private International Law, Law of 31 May 1995, No 18. Basedow *et al.* (eds.) 2017, pp. 3329–3343.

42 Act on the General Rules of Application of Laws, Act No 78 of 2006. Basedow *et al.* (eds.) 2017, pp. 3344–3357.

43 Dutch Civil Code, Book 10 on the Conflict of Laws, 2011. Basedow *et al.* (eds.) 2017, pp. 3553–3584.

44 Lajos Vékás, 'A külföldi elem a nemzetközi magánjogi tényállásban', *Jogtudományi Közlöny,* Vol. 74, Issue 10, 2019, pp. 377–386.

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this question has an obvious impact on the range of application of PIL instruments.

2.1. The 1955 Hague Convention

The Hague Convention of 1955, as was described above, gave uniform conflict of laws rules applicable to all international sales. It also follows that it does not only determine the law applicable to disputes that are linked in some way to the Contracting States, for example by the habitual residence of the seller or buyer.[45] So, if a dispute between an English seller and a Hungarian buyer is brought before, say, a Swedish ordinary court, it will apply the 1955 Hague Convention to determine the governing law, since Sweden has ratified the Convention, even though the United Kingdom and Hungary are not Contracting States. In addition, two of the countries, Sweden and Hungary, are also members of the European Union, the judicial fora of which would otherwise apply the Rome I Regulation. In reality, the different conflict of laws routes could often lead to the law of the seller's country in both cases, because the above-mentioned PIL instruments would apply the law of the seller's habitual residence or place of business, as a rule.

This solution also presupposes that Article 25 of the Rome I Regulation regulates its relationship with existing international conventions, along the lines of its predecessor, the Rome Convention, but worded differently. It establishes the primacy only of international conventions concluded previously and containing only conflict of laws rules, and only if not, exclusively Member States are parties to them. The Regulation therefore does not affect the application of international conventions to which one or more Member States are parties at the date of adopting the Regulation, *i.e.* on 17 June 2008, and which lays down conflict of laws rules in respect of contractual obligations. However, as a Regulation between Member States, it takes precedence over conventions concluded exclusively between two or more Member States as regards the matters covered by the Regulation.[46] The

45 On universal application in respect of the Rome Convention: Ferrari (ed.) 2015, pp. 70–71.

46 Rome I Regulation, Article 26, List of Conventions. The list was published by the Commission in 2010. The list typically includes treaties on legal aid and judicial cooperation with third countries.

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Rome I Regulation would therefore allow the application of the 1955 Hague Convention on the law applicable to international sales, taking into account that three non-EU States[47] have acceded to it, but would no longer allow the application within the Union of the 1986 Hague Convention or a similar instrument that may enter into force at a later date. This solution is both logical from the point of view of protecting European integration as a single legal space and represents a kind of checks and balances system providing equilibrium between EU and global unification in this area, giving rules for their potential collision.

Further modifying the above-described fact situation, if a transaction were concluded between a seller with a place of business in Germany and a buyer with a place of business in Hungary, they would already be leaving the world of conflict of laws and the Swedish forum would have to apply the Vienna Sales Convention, the flagship of global substantive law unification, unless the parties to the sales contract excluded it.

2.2. The Rome Convention

In theory, the justification for universal application, or even its questionability, could be raised even more strongly in the case of the conflict of laws instruments of the EU, since they are not international conventions open to all states, but laws of a regional integration. At one time Lord Wilberforce argued before the House of Lords, albeit in a non-judicial capacity, that the Rome Convention should apply only to contracts that were in some way connected with the European Communities. Theoretical arguments could be found in support of this position, since it was probably not decisive for the establishment of the Common Market and the free movement of goods that the law applicable to transactions not at all connected with the Communities should be determined by the same rules of private international law.[48]

Nevertheless, it is clear from the text of the norm that the Rome Convention is not limited to designating the law applicable to contractual relations having their origin in the Union, Article 1 of which provides that the "Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries." This is supplemented by

47 Niger, Norway, and Switzerland.
48 Plender 1991, pp. 53–54.

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Article 2, on the application of the law of non-contracting States, which states that any law specified under this Convention shall apply, even if that law is the law of a non-contracting State. As early as 1980, the Commission of the European Communities explained that the Convention applies very broadly, not only where there is a choice between the laws of different Member States, but also where there is a conflict between the laws of two non-member States in contractual relations.[49] The need for universal application was also made clear by the Giuliano/Lagarde Report in its commentary to Article 2.[50] The obvious advantage of this solution is that it is not necessary for EU Member States to maintain and apply two different sets of conflict of laws – one for intra-EU cross-border transactions and another for international contractual relations.

2.3. The 1986 Hague Convention

The 1986 Hague Convention, while specifying the scope of the Convention and the international character of the sale – referring to the fact that the seller and the buyer have their places of business in different States or to all other cases involving a choice between the laws of different States – is not restrictive, so that, if it were to enter into force, it would not limit itself to the legal relations of the Contracting States; in other words, it would be universally applied.[51]

2.4. Rome I Regulation

The Rome I Regulation also follows its predecessor in this respect, essentially reproducing the text of the Rome Convention in its Article 2. If possible, the wording is even clearer, because the former title 'application of law of non-contracting States' has been changed to 'universal application'. This makes it clear that the Regulation applies to all international situations, so that it is not possible to retain a parallel conflict of laws

49 Id. p. 54.
50 Giuliano – Lagarde Report, pp. 8, and 13.
51 The 1986 Hague Convention, Article 1.

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for situations outside the European Union.[52] The Rome I Regulation also applies to situations involving purely third States; in other words, where there is no connection with the Member States at all.[53] However, it should be noted that the Rome I Regulation was adopted at a time when Article 65 of the former EC Treaty only gave the European Community the power to lay down rules of private international law, with reference to the need to ensure the proper functioning of the internal market, which would not necessarily imply that it would be universally applicable. This restriction was not, however, recognized by the CJEU in its opinion on the Lugano Convention,[54] where it stressed the need for the uniformity of private international law, including in matters involving non-member States,[55] and interpreted this question of legal basis in a generous, pro-integration way.[56] It can also be argued that the application of the Brussels I Regulation and the free movement of judgments in commercial and civil matters within the Union will be facilitated if the applicable law is designated on the basis of uniform conflict of laws rules, irrespective of the forum.[57]

52 Ferrari (ed.) 2015, p. 71; Similarly, Pippa Rogerson, *Colliers's Conflict of Laws*, *Fourth edition,* Cambridge University Press, Cambridge, 2013, p. 293; Martiny (eds.) 2022, p. 29.

53 Christian Von Bar & Peter Mankowski, *Private International Law*, *Volume II, Special Part, 2nd edition,* C.H. Beck, München, 2019, p. 3.

54 Opinion of 7 February 2006, *Opinion No 1/03 pursuant to Article 300(6) EC:* "Community competence to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters." ECLI:EU:C:2006:81.

55 Ferrari (ed.) 2015, p. 73.

56 '131. Finally, the legal basis for Community rules, and in particular the requirement of the proper functioning of the internal market laid down in Article 65 EC, is not in itself relevant in assessing whether an international agreement is detrimental to Community rules. Indeed, the legal basis of an internal rule is determined by its main component, whereas the rule, the effects of which are to be examined, may be an ancillary component of that rule. The Community's exclusive competence is intended, inter alia, to ensure the effective application of Community law and the proper functioning of the system established by Community rules, irrespective of any limits laid down by the Treaty provision on which the institutions have relied in order to adopt- those rules.'

57 Ferrari (ed.) 2015, p. 73.

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2.5. Mexico City Convention

Unlike the Rome Convention, for example, the Mexico City Convention is not intended to be universally applicable. It therefore applies only "if the parties thereto have their habitual residence or establishments in different States Parties or if the contract has objective ties with more than one State Party."[58] The fact situation should be connected to State Parties.

The above cited provision also means that the parties' choice of law, in other words their subjective decision, is not a sufficiently close link to make this Convention applicable, as has already been said. At the same time, the law designated by the Convention applies, under Article 2, even if it is not the law of a Contracting State.[59]

The next step in sequence could be to examine the universal application of the 2015 Hague Principles, but given that it is a non-binding document, with no ratifying and acceding states, this question is not open to interpretation or consideration.

3. Conclusions

To sum up, it seems that there is no generally accepted method for defining the international character of fact situations, even at the level of conflict of laws conventions. The various legal instruments try to achieve the same objective by different means, namely, to distinguish between purely domestic and international situations and to decide which foreign elements are relevant. The diverging solutions of domestic conflict of laws thus infiltrate the norms of uniform conflict of laws instruments.

The need for universal application is fairly general in relation to conflict of laws instruments,[60] at least as regards conventions of PIL. One of the incentives for this claim of widespread application is certainly the desire for predictability for the international harmony of decisions; in other words, to designate the substantive law for as many international situations as possible based on the same conflict of laws rules.

58 Mexico City Convention, Article 1.

59 Mexico City Convention, Article 2: "The law designated by the Convention shall be applied even if said law is that of a State that is not a party."

60 With the above introduced exception of the Mexico City Convention.

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Human Rights Denied

Forced Evictions and Housing Injustice in the Democratic Republic of Congo

Francesco Seatzu[*]

Abstract

The Democratic Republic of Congo (DRC) grapples with a pervasive and alarming phenomenon of forced evictions orchestrated by multinational corporations operating within its cobalt and copper mining sites. The investigative report by Amnesty International and the DRC-based Initiative for Good Governance and Human Rights documents a troubling pattern of systematic disregard for the fundamental rights and dignity of affected populations, compounded by a stark failure on the part of mining operators to adhere to extant national legislation designed to mitigate the deleterious impacts of forced evictions attendant to mining pursuits. This article endeavors to contribute to the ongoing discourse surrounding human rights violations within the DRC by analyzing the complex international legal doctrines implicated by the egregious human rights violations arising from the implementation of mass forced eviction in the Kolwezi region of the DRC. Of particular concern is the infringement upon the human right to adequate alternative housing, a fundamental tenet enshrined within international human rights framework. In light of the humanitarian crisis precipitated by the forced evictions realized in the region of Kolwezi, it is evident that direct and concerted international intervention is indispensable to uphold the rule of law, safeguard human rights, and facilitate the sustainable recovery and rehabilitation of affected communities within the DRC. This article thus concludes by proffering pragmatic recommendations for the implementation of sustainable recovery programs and the establishment of judicial mechanisms to afford redress for the grievous human rights abuses perpetrated against vulnerable populations within the DRC's mining regions.

Keywords: forced evictions, adequate housing, Democratic Republic of Congo, mining, health

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1. Introduction

The practice of forced evictions, coupled with threats, intimidation, and deceptive tactics, has emerged as a recurring concern attributable to multinational corporations operating within cobalt and copper mining sites in the Democratic Republic of Congo (DRC),[1] as delineated in a recent inquiry conducted by Amnesty International. Entitled 'Fuelling Change or the Status Quo?', this report, jointly authored with the DRC-based Initiative for Good Governance and Human Rights, scrutinizes the human rights ramifications of four prominent development projects situated in the Kolwezi mining region in the southeastern precincts of the nation: namely, Kolwezi Copper and Cobalt Mine, Mutoshi Mine, Metalkol RTR, and Kamoa-Kakula Mine.[2]

Secretary General Agnès Callamard of Amnesty International underscores the imperative cessation of these evictions, frequently orchestrated to facilitate the expansion of industrial mining endeavors, due to their catastrophic implications for affected populations.[3] Instead of benefiting from the developmental dividends of the burgeoning mining sector, communities domiciled within the Kolwezi vicinity are forcibly displaced from their residential abodes and agricultural land holdings to accommodate the exigencies of largescale mining undertakings.[4] The report documents a discernible pattern of disregard evinced by mining operators toward the rights of affected populations, evincing scant regard for extant national legislation designed to mitigate forced evictions attendant to mining pursuits. Entire settlements, such as Mukumbi, have been razed to the ground, thereby precipitating a state of despondency and uncertainty amongst inhabitants like Kanini Maska and Papy Mpanga, who have shared their poignant narratives with Amnesty International.[5]

1 For more information, *see* at www.africanews.com/2023/09/12/cobalt-copper-mining-leading-to-forced-evictions-in-dr-congo-amnesty-international/.
2 References to the report can be found at https://maniamedia.co.ug/2023/09/13/cobalt-copper-mining-leading-to-forced-evictions-in-dr-congo-amnesty-international/.
3 For further references, *see* at www.amnesty.ie/congo-cobalt-copper/.
4 Id.
5 *See also* Amnesty International, *Democratic Republic of the Congo: Industrial Mining of Cobald and Copper for Rechargeable Batteries Is Leading to Grievous Human Rights Abuses*, at www.amnesty.ie/congo-cobalt-copper/. (Amnesty International Report No1).

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Given the DRC's preeminence as the principal supplier of cobalt, an elemental constituent in rechargeable batteries pivotal to the electronics and electric vehicle industries, its role in the global energy transition cannot be overstated.[6] While Amnesty International acknowledges the imperative of decarbonizing the economy, it cautions against perpetuating human rights violations in the process.[7]

The quest for expansion by mining entities, particularly in Kolwezi, has precipitated the involuntary displacement of thousands of individuals, thereby imperiling their entitlements to shelter, education, healthcare, and communal coexistence.[8] Against the backdrop of global endeavors aimed at curbing carbon emissions and embracing renewable energy sources, it is imperative to ensure that this transition is executed consonant with human rights principles and affords protection to vulnerable communities.[9]

The historical specter of colonial exploitation and the contemporary predilection for profit maximization underscore the urgency of adopting a human rights-based approach to the energy transition in the DRC.[10] President Tshisekedi's vision of positioning the country as a 'climate solution country' presents a unique opportunity to champion climate justice and underscore the intrinsic linkage between human rights and a fair and sustainable energy transition.[11]

This article contributes further to the discourse on human rights violations within the Democratic Republic of Congo by analyzing the international and domestic legal doctrines implicated in the human rights violations arising from mass evictions in Kolwezi, particularly focusing on the right to adequate alternative housing. It argues that international intervention is imperative to uphold the rule of law and assist the DRC in its recovery. The subsequent sections outline the rationale behind the mass evictions in

6 *See* Georgina Higgs, *DRC: The Endurance of Child Labour in Artisanal Cobalt Mining*, at https://csapiemonte.it/sites/default/files/The%20Endurance%20of%20Child%20Labour%20in%20Artisanal%20Cobalt%20Mining.pdf.

7 *See* at www.africanews.com/2023/09/12/cobalt-copper-mining-leading-to-forced-evictions-in-dr-congo-amnesty-international/.

8 *See* Amnesty International, *"This Is What We Die For." Human Rights Abuses in the Democratic Republic of the Congo Power the Global Trade in Cobalt,* www.amnesty.org/en/wp-content/uploads/2021/05/AFR6231832016ENGLISH.pdf. (Amnesty International Report No2).

9 Id.

10 For further references to this issue, *see* at https://drcprecop27.medd.gouv.cd/en/yangambi.php.

11 Id.

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Kolwezi, the humanitarian consequences of the demolitions, and explore legal frameworks at both international and domestic levels. Finally, the article assesses whether the human rights abuses resulting from the mass evictions in Kolwezi warrant direct international intervention, concluding with recommendations for sustainable recovery programs and judicial recourse for affected individuals and communities.

2. The Contextual Backdrop of the Mass Forced Evictions in the Kolwezi Mining Region

The contextual backdrop of the mass forced evictions in Kolwezi sets the stage for understanding the gravity and implications of these actions. In the southeastern reaches of the DRC, the Kolwezi mining region has emerged as a locus of contention consequent to the resurgence of extensive copper and cobalt extraction activities since 2015.[12] Spearheaded by Compagnie Minière de Musonoie Global SAS (COMMUS), a collaborative venture between China's Zijin Mining Group Ltd and the DRC's state mining enterprise, Générale des Carrières et des Mines SA (Gécamines), this enterprise has precipitated profound sociopolitical and humanitarian ramifications within the environs of Cité Gécamines.[13] This residential enclave, home to an estimated 39,000 inhabitants, has long been characterized by multi-room dwellings equipped with essential utilities, alongside educational and medical infrastructures.[14]

However, the resumption of mining operations has engendered a wave of involuntary displacements, with residents caught unawares until the conspicuous placement of red crosses on their abodes signified impending demolitions.[15] Inadequate compensation packages proffered by COMMUS have forced residents into substandard living conditions, bereft of funda-

12 *See* Amnesty International, *DRC: Powering Change or Business as Usual?*, at www.amnesty.org/en/latest/news/2023/09/drc-cobalt-and-copper-mining-for-batteries-leading-to-human-rights-abuses/. (Amnesty International Report No3).

13 Congo communities forcibly unprooted to make to make ways for mines critical to EV's, Amnesty report says, at https://energy.economictimes.indiatimes.com/news/power/congo-communities-forcibly-uprooted-to-make-way-for-mines-critical-to-evs-amnesty-report-says/103626131 (Energyworld.com).

14 *See e.g.* Amnesty International Report No2.

15 Id.

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mental amenities[16] Meanwhile, proximate to the Mutoshi project overseen by Chemicals of Africa SA (Chemaf), the conflagration of Mukumbi settlement by military personnel has underscored the stark realities of dispossession and marginalization faced by local communities.[17]

Accounts of Kanini Maska and others depict the devastation wrought upon their homes and livelihoods, epitomizing the egregious human rights violations inherent in the pursuit of economic expansion.[18] Similarly, the Metalkol Roan Tailings Reclamation (RTR) project, managed by a subsidiary of Eurasian Resources Group (ERG), has become ensnared in controversy following the coerced displacement of agrarian populations from their ancestral lands.[19]

Despite persistent protests and advocacy endeavors, redress remains elusive, with corporate entities absolving themselves of culpability for the plight endured by affected communities.[20] Thus, the Kolwezi mining region stands as a microcosm of the deleterious nexus between industrialization and human suffering, underscoring the imperative for prompt international intervention to redress the systemic human rights transgressions that pervade this domain.[21]

2.1. Human Rights Violations and Abuses in the Kolwezi Mining Region

The expansion of mining activities in the Kolwezi region has precipitated a myriad of human rights abuses, profoundly affecting the socio-economic fabric and well-being of local communities.[22] Vulnerable populations, alrea-

16 *See* Amnesy International Report No3.

17 Id.

18 Id.

19 For futher informations on this project, *see* at https://miningdataonline.com/property/587/Metalkol-Roan-Tailings-Reclamation-(RTR)-Mine.aspx.

20 Al Jazeera, *Mining of cobalt, copper in DRC leading to human rights abuses: Report*, at www.aljazeera.com/news/2023/9/12/mining-of-cobalt-copper-in-drc-leading-to-human-rights-abuses-report.

21 *See* Timothy Mwangeka Makori, *Artisanal Mines, Governance and Historical Generations in the Congo Copperbelt,* Ph.D. thesis, University of Toronto, 2019, at https://tspace.library.utoronto.ca/bitstream/1807/95913/3/Makori_Timothy_M_201906_PhD_thesis.pdf.

22 *See* Allie Constantine & Ismail Wolff, *The Dark Side of Technology: Coltan Mining in the DRC and its Human Rights and Environmental Impacts*, at https://globalforestcoalition.org/the-dark-side-of-technology-coltan-mining-in-the-drc-and-its-human-rights-and-environmental-impacts/.

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dy grappling with poverty, have borne the brunt of these abuses, exacerbating their precarious circumstances. Displaced from their homes and ancestral lands without adequate compensation or alternative accommodations, residents have been thrust into destitution and homelessness.[23] Moreover, the disruption of livelihoods has perpetuated cycles of poverty, leaving families without means of sustenance or access to essential services.

The forced displacement has also disrupted access to education for school-aged children, further entrenching intergenerational cycles of deprivation. Families uprooted from their communities face significant barriers to accessing education, as children are forced to abandon their schools and communities, disrupting their academic progress and future prospects.[24] The loss of stable housing and social support networks further compounds the challenges faced by displaced families, exacerbating their vulnerability and marginalization.

Additionally, the elderly, stripped of their homes and support networks, have been left vulnerable and marginalized, compounding the humanitarian crisis unfolding in the region. For many elderly individuals, displacement has resulted in social isolation and diminished access to essential services, exacerbating existing health concerns and diminishing their quality of life.[25] Without adequate support or resources, elderly residents are left to navigate the challenges of displacement alone, further exacerbating their vulnerability and marginalization.

The systemic nature of these human rights abuses underscores the urgent need for intervention to address the root causes of displacement and ensure the protection of affected communities. Governments, mining companies, and international stakeholders must prioritize the rights and well-being of displaced populations, ensuring access to adequate housing, education, and social support services.[26] Additionally, robust mechanisms for accountability and redress must be established to hold perpetrators of human rights abuses accountable and provide justice for affected communities. Only through concerted action and collaboration can the human rights and dignity of displaced populations in the Kolwezi mining region be safeguarded and upheld.

23 *See also* Paul D. Ocheje, 'In the Public Interest: Forced Evictions, Land Rights and Human Development in Africa', *Journal of African Law,* Vol. 51, Issue 2, 2007, pp. 173–214.

24 *See* Energyworld.com.

25 *See* Amnesty International Report No2.

26 Id.

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2.2. The International Response

Despite the egregious human rights violations and mass forced evictions perpetrated by multinational mining corporations operating in the DRC, the response from international actors and accountability mechanisms has been limited. The only exception to this was the action brought in April 2012 by a consortium of human rights organizations, including *Action contre l'impunité pour les droits humains* (ACIDH) and *La Fédération internationale des ligues des droits de l'homme* (FIDH), that filed a formal complaint with the Belgian National Contact Point (NCP) against the Forrest Group, a conglomerate engaged in mining activities within the DRC.[27] This complaint alleged multiple breaches of the OECD Guidelines on the Production of Forest Reproductive Materials[28] by the Forrest Group and its subsidiaries, specifically concerning their complicity in forced evictions and their failure to prevent demolitions in the Kolwezi mining region.[29]

Despite the initiation of mediation procedures by the Belgian NCP, a conclusive determination regarding corporate responsibility was impeded by a paucity of verifiable evidence, ultimately resulting in the divestiture of the Forrest Group's interests in the affected mining ventures. Following the impasse, the NCP suggested that the Forrest Group engage in philanthropic initiatives as a means of restitution, but this proposal faced significant opposition from the victims, who deemed such measures insufficient to redress the profound socio-economic and humanitarian consequences of the forced evictions.

Additionally, diplomatic inquiries conducted by the Belgian Consul-General in 2012, aimed at elucidating the circumstances surrounding the evictions, yielded inconclusive findings, underscoring the formidable challenges inherent in ensuring accountability and regulatory oversight over corporate conduct in transnational operations. Despite these efforts, the complexity of corporate structures and the lack of cooperation from the implicated companies hindered the ability to fully uncover the extent of their involvement in the human rights abuses.

27 *11.11.11 et al. vs. George Forrest International SA,* 24 November 2004, at www.oecdwatch.org/complaint/11-11-11-et-al-vs-george-forrest-international-sa/.

28 The guidelines are available at www.oecd.org/agriculture/forest/documents/oecd-guidelines-on-the-production-of-forest-reproductive-materials.pdf.

29 Id.

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2.3. The International Community's Justification for the Forced Mass Evictions in the Democratic Republic of Congo

The global community is increasingly cognizant of the prevalent issue of modern slavery within the DRC. Multinational corporations such as Apple, BMW, Google, Samsung, Volkswagen, and Tesla, which heavily rely on cobalt for their production processes, have purportedly initiated various initiatives to ameliorate the conditions within cobalt mining operations.[30] Despite their claims, these initiatives have come under scrutiny for their inadequacy in addressing the systemic issues underlying the exploitation and human rights violations within the cobalt mining industry.

One of the prominent initiatives purportedly aimed at improving conditions is the Cobalt for Development program.[31] This initiative ostensibly seeks to enhance safety standards by providing training to mine operators and workers.[32] However, the effectiveness of such programs remains questionable, particularly in the context of artisanal cobalt production, which predominantly involves small-scale miners operating under precarious conditions.[33] Similarly, the Fair Cobalt Alliance has been established with the purported goal of promoting fair labor practices and improving working conditions in cobalt mines.[34] Despite these efforts, the reality on the ground paints a starkly different picture, with reports indicating little to no improvement in the lives of those engaged in cobalt mining activities.[35]

Critics argue that these initiatives serve more as a facade to appease public scrutiny rather than effecting substantial change.[36] Much like the government's justifications for forced evictions in Congo, these initiatives are viewed as mere token gestures aimed at deflecting attention from the

30 Victoria Audu, 'The Back End of Genocide: How the Rush for Congo's Cobalt is Killing Thousands', *The Republic,* 23 November 2023.

31 Further informations on this issue is available at https://cobalt4development.com/.

32 Id.

33 *See e.g.* Daniel Krummel & Patrick Siegfried, 'The Dark Side of Samsung's Value Chain: The Human Costs of Cobalt Mining "BLOOD, SWEAT AND COBALT", *Journal of Geoscience and Environment Protection,* Vol. 9, Issue 2, 2021, pp. 182–203.

34 Informations on the programme is available at www.faircobaltalliance.org/.

35 *See* Hadassah Arian, *The Contradictions of a Clean Cobalt Commitment: An assemblage analysis of how the label of responsible cobalt sourcing enables actors to govern the local realities of the artisanal cobalt miners in the Democratic Republic of Congo*, at: https://studenttheses.uu.nl/bitstream/handle/20.500.12932/71/Hadassah%20Arian%20Thesis%20Contradictions%20of%20a%20Clean%20Cobalt%20Commitment%20July%202021.pdf?sequence=1&isAllowed=y.

36 Id.

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pervasive human rights abuses and exploitation prevalent in the cobalt mining industry.

Furthermore, the persistent prioritization of profit over the well-being of workers and local communities by these corporations has drawn condemnation from the international community, humanitarian organizations, and human rights advocates.[37] Despite mounting pressure, tangible improvements in working conditions have been minimal, reinforcing the perception that these initiatives are primarily aimed at placating shareholders and maintaining the *status quo*.

3. Treaty-Based Safeguards for Property Rights, Housing, and Prevention of Forced Evictions

The delineation and safeguarding of the right to private property, housing, and the proscription of forced evictions have long been focal points within the realm of human rights jurisprudence.[38] Traditionally, property rights have been perceived as serving the interests of privileged segments of society.[39] However, the recognition of the human right to adequate housing and the prevention of involuntary displacements have gained near-universal acceptance as essential for the protection of vulnerable populations.[40]

Far from being surprising, this is the case, given that the realization of the human right to housing is of utmost relevance for the enjoyment of all fundamental rights, including socio-economic rights.[41] Moreover,

37 Id.

38 *See e.g.* Sarah Fick & Michel Vols, 'Best Protection Against Eviction? A Comparative Analysis of Protection Against Evictions in the European Convention on Human Rights and the South African Constitution', *European Journal of Comparative Law and Governance*, Vol. 3, Issue 1, 2016, pp. 40–69; Malcolm Langford, 'A Sort of Homecoming: The Right to Housing' *in* Mark Gibney & Sigrun Skogly (eds.), *Universal Human Rights and Extraterritorial Obligations,* University of Pennsylvania Press, Philadelphia, 2010, pp. 166–193.

39 *See* recently Erik Olin Wright, 'The Class Analysis of Poverty', *International Journal of Health Services*, Vol. 25, Issue 1, 1995, pp. 85–100; *see also* Seth W. Norton, 'Poverty, Property Rights, and Human Well-Being: A Cross-National Study', *Cato Journal*, Vol. 18, Issue 2, 1998, p. 233.

40 *See e.g.* Miloon Kothari *et al.*, *The Human Right to Adequate Housing and Land,* National Human Rights Commission, New Delhi, 2006, at https://hlrn.org.in/documents/the_human_right_to_adequate_housing_and_land.pdf.

41 *See* Christophe Golay, *The Right to Housing,* Human Rights Programme of the Europe-Third World Centre (CETIM), 2007, pp. 2–60.

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housing remains one of the most essential human needs, yet millions of disadvantaged people around the world do not possess adequate housing.[42] However, achieving a universally accepted interpretation of this right has proven challenging, especially given the need to reconcile property rights with the progressive mandates outlined in UN human rights treaties.[43] Consequently, the precise duties and obligations incumbent upon states in this context have often remained nebulous.[44]

To address this uncertainty, oversight committees governing prominent UN conventions have endeavored to provide elucidation by promulgating specific interpretations, guidelines, and procedural safeguards.[45] These resolutions delineate the procedural prerequisites that state parties must adhere to before undertaking coercive evictions. Furthermore, both domestic and international case-law play pivotal roles in clarifying the guarantees enshrined in the right to adequate housing and protection against forced evictions, as delineated in major UN and regional African human rights instruments.[46]

Notably, the Democratic Republic of Congo, as a signatory to pertinent international conventions, is bound by treaty obligations that recognize the right to adequate housing and safeguard against forced evictions.[47] These

42 *See e.g.* Miloon Kothari, 'Priority Issues and Impediments to Realizing the Right to Adequate Housing' *in* Berma Goldewijk *et al.* (eds.), *Dignity and Human Rights: The Implementation of Economic, Social, and Cultural Rights,* Brill, Leiden, 2002, p. 63.

43 *See also* Idowu Ajibade & Damilola S. Olawuyi, 'Climate change impacts on housing and property rights in Nigeria and Panama. Toward a rights-based approach to adaptation and mitigation', *in* Dominic Stucker & Elena Lopez-Gunn (eds.), *Adaptation to Climate Change through Water Resources Management Capacity, Equity and Sustainability,* Routledge, London, 2014.

44 *See* Kaara Martinez, 'In The Face of Financialization: Cities and the Human Right to Adequate Housing', *The Italian Yearbook of International Law,* Vol. 30, Issue 1, 2021, pp. 107–130.

45 For further references on this issue, *see* Bret Thiele, 'The Human Right to Adequate Housing: A Tool for Promoting and Protecting Individual and Community Health', *American Journal of Public Health,* Vol. 92, Issue 5, 2002, pp. 712–715; United Nations Centre for Human Rights, *Human right to adequate housing,* Geneva – New York, 1993.

46 *See* Scott Leckie, *From housing needs to housing rights: an analysis of the right to adequate housing under international human rights law,* The International Institute for Environment and Development, London, 1992.

47 Democratic Republic of the Congo has ratified the following UN human rights treaties: ICCPR, ICESCR, CAT, CEDAW, CRC, CERD, CRPD.

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conventions encompass the UDHR,[48] the ICESCR,[49] the African Charter on Human and Peoples' Rights,[50] and the ICCPR,[51] which mandate the prevention of arbitrary interference with individuals' homes and ensure the preservation of freedom of movement.

3.1. The Universal Declaration of Human Rights (UDHR)

The Universal Declaration of Human Rights (UDHR), a landmark document adopted by the UN General Assembly in 1948, stands as a cornerstone in the evolution of human rights law globally.[52] Its significance lies not only in its symbolic value but also in its profound impact on shaping the framework of international human rights norms.[53] While the Declaration itself does not possess legally binding force, its principles and standards have gained widespread acceptance and recognition as customary international law, serving as a guiding beacon for nations worldwide.[54]

Central to the Declaration is Article 17, which articulates the fundamental right to property. This provision asserts that every individual, regardless of nationality, ethnicity, or social status, holds the inherent right to own property.[55] Whether held individually or collectively with others, this right is deemed inviolable and sacrosanct. Importantly, Article 17 explicitly pro-

48 UNDH, adopted and proclaimed by the United Nations General Assembly by resolution 217A (III) on 10 December 1948.

49 ICESCR, GA Res 2200A (XXI), 21 UNTS 3, entered into force January 3, 1976.

50 Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ('Banjul Charter'), CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), 27 June 1981. The Democratic Republic of Congo signed the African Charter on Human and Peoples' Rights (African Charter) on 28 December 1988.

51 ICCPR, GA Res 2200A (XXI), 21 UNTS 171, entered into force March 23, 1976.

52 *See e.g.* P.R. Ghandhi, 'The Universal Declaration of Human Rights at Fifty Years: Its Origins, Significance and Impact', *German Yearbook of International Law,* Vol. 41, 1998, pp. 206–251.

53 *See* Mashood Baderin & Manisuli Ssenyonjo, 'Development of International Human Rights Law before and after the UDHR' *in* Manisuli Ssenyonjo (ed.), *International Human Rights Law: Six Decades after the UDHR and Beyond*, Routledge, London 2010, pp. 1–26.

54 *See* Hurst Hunnum, 'The Status of the Universal Declaration of Human Rights in National and International Law', Georgia Journal of International and Comparative Law, Vol. 25, Issue 1, 1996, pp. 287–397.

55 *See* Carolina Olarte-Bácares, 'Article 17 – The Right to Property' *in* Humberto Cantu Rivera (ed.), *The Universal Declaration of Human Rights – A Commentary,* Brill, Leiden, 2023, pp. 395–422.

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hibits any arbitrary deprivation of property, affirming the principle that property rights are integral to human dignity and autonomy. By enshrining the right to property, the UDHR affirms the foundational role of property ownership in fostering economic security, individual autonomy, and social stability. Moreover, it underscores the responsibility of states to enact laws and policies that safeguard property rights and prevent unjust confiscation or expropriation. In essence, Article 17 serves as a bulwark against arbitrary state action and reinforces the principle of the rule of law in protecting the fundamental rights and freedoms of all individuals.[56]

However, the practical application of Article 17 in the context of the DRC presents intricate challenges. Following the nation's independence, there has been a notable erosion of adherence to national laws, resulting in the emergence of informal settlements and ambiguous property rights regimes.[57] Consequently, there exists uncertainty regarding the extent to which individuals residing in these informal settlements are afforded protection under the right to property. Furthermore, the notion of 'arbitrary deprivation' of property, as elucidated in Article 17, is characterized by a lack of precise definition within the realm of international law.[58] Nonetheless, it is construed to encompass situations where individuals are divested of their property without adherence to due process, including adequate notification and the opportunity for meaningful participation.

In the context of the DRC, forced evictions frequently transpire devoid of proper notification or substantive consultation with affected communities.[59] For instance, eviction notices are often issued retrospectively, post-commencement of demolitions, thus depriving individuals of the chance to challenge the eviction or explore alternative arrangements.[60] Furthermore, consultations conducted by authorities tend to be cursory, lacking meaningful engagement with affected communities, thereby exacerbating

56 *See* Elisabeth Wickeri & Anil Kalhan, *Land Rights Issues in International Human Rights Law*, at www.ihrb.org/pdf/Land_Rights_Issues_in_International_HRL.pdf.

57 *See* Lassana Koné *et al.*, *Land reform and protection of communities' rights*, at www.forestpeoples.org/sites/fpp/files/publication/2017/05/drc-legality-seminar-english-web_0.pdf; *see also* Valérie Rosoux, 'The Two Faces of Belgium in the Congo', *European Review of International Studies,* Vol. 1, Issue 3, 2014, pp. 16–38.

58 *See* Theo R. G. van Banning, *The Human Right to Property,* Intersentia, Antwerp, 2022, p. 25.

59 *See* Carolien Jacobs & Antea Paviotti, *The right to decent housing in a context of urban displacement and fragility,* Leiden University, 2017, at https://scholarlypublications.universiteitleiden.nl/handle/1887/58552.

60 Id.

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the infringement upon property rights.[61]Consequently, these actions unequivocally constitute instances of arbitrary deprivation of property rights, contravening the safeguards enshrined in Article 17 of the UDHR. Hence, there arises an urgent imperative for the implementation of robust legal frameworks and procedural safeguards aimed at ensuring the efficacious protection of property rights in the DRC. Such measures are indispensable for upholding the principles of justice and equity, thereby safeguarding the rights and dignity of all individuals.

3.2. The International Covenant on Economic, Social and Cultural Rights (ICESCR)

The obligation to uphold and safeguard the right to housing is enshrined within the framework of the ICESCR,[62] to which the DRC is a signatory,[63] thereby establishing binding obligations. The right to housing is explicitly articulated in Article 11(1), which states: "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food clothing and housing [...]." The supervisory committee, namely the ESCR Committee, in its General Comments Nos. 3[64] and 9 expound upon the obligations incumbent upon states under the CESCR, mandating each party to utilize: "all means at its disposal to give effect to the rights recognized in the Covenant [...] [including its] legal and administrative systems."[65] For instance, a state party failing to provide essential foodstuffs, primary health care, basic shelter, or housing to a significant number of individuals is, prima facie, failing to discharge its obligations under the ICESCR.[66]

In the context of the DRC, where state agents are responsible for infringing upon the rights of its citizens, the right to an adequate standard of housing can be construed as a negative duty on the government to 'respect' or "abstain from doing anything that violates the integrity of the individual

61 Id.
62 ICESCR, Article 11(1).
63 Listed above, footnote no. 47.
64 UN Economic and Social Council, General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), E/1991/23, 14 December 1990.
65 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9: The domestic application of the Covenant, E/C.12/1998/24, 3 December 1998.
66 General Comment No. 3, para. 10.

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or infringes on his/her recognized human rights," or in simpler terms, 'duties to avoid depriving'.

Article 11(1) has been comprehensively construed and interpreted by the ESCR Committee in its General Comment No. 4.[67] This Comment outlines the obligations of states to prevent forced evictions, which include ensuring security of tenure, identifying individuals vulnerable to forced evictions, providing domestic legal remedies, and asserting that forced evictions are inconsistent with the Covenant, except in exceptional circumstances..[68] These exceptional circumstances encompass persistent behavior threatening public health or constituting criminal activity. The government of the DRC often justifies forced evictions under these exceptions.[69]

General Comment No. 7 further delineates the procedures required by a state before carrying out compulsory evictions, including genuine consultation with affected individuals, adequate notice, provision of information on proposed evictions, and the avoidance of rendering individuals homeless or vulnerable to other human rights violations.[70]

However, the evictions in the DRC have not adhered to these procedural requirements. There were no genuine consultations or fair notice provided to evictees, and the evictions took place in adverse weather conditions without alternative accommodations.[71] The government of the DRC disregarded the procedural requirements specified in the General Comments interpreting Article 11(1) and failed to adhere to its 'duties to avoid depriving'.

3.3. The International Covenant on Civil and Political Rights (ICCPR)

The International Covenants on Human Rights, namely the ICCPR and ICESCR, establish a clear distinction between civil and political rights,

67 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), E/1992/23, 13 December 1991.

68 Id. para. 8(a).

69 *See e.g.* Ana Camacho, *Ending Foreign Exploitation of Mineral Resources in the Democratic Republic of Congo*, 2023.

70 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions, E/1998/22, 20 May 1997, para. 13.

71 *See* Patrick Ilunga, *Forced evictions from DR Congo mineral-rich villages blights outlook*, at www.theeastafrican.co.ke/tea/science-health/forced-evictions-from-dr-congo-mineral-rich-villages-blights-outlook-4377410.

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such as the ownership of property, and social, economic, and cultural rights, which encompass broader entitlements like access to land, opportunities for development, and the ability to exercise self-determination over natural resources. However, these rights are strictly interrelated, requiring states to acknowledge individuals' inherent entitlement to a secure living environment free from unlawful or arbitrary eviction from their residences, lands, or communities.

In the DRC, the ICCPR holds significance as it explicitly provides for the right to a remedy within the state's domestic legal framework in Article 2(3). This provision empowers individuals to lodge complaints against the state with the UN Human Rights Committee if the state has accepted the committee's jurisdiction by ratifying the Optional Protocol specified in Article 41.[72] Given the DRC's ratification of the ICCPR and its Optional Protocol, it acknowledges the competency of the Human Rights Committee to address individual grievances.[73]

Article 17 of the ICCPR safeguards individuals' rights against arbitrary intrusions into their privacy, familial relationships, domicile, or correspondence. It serves as a cornerstone in protecting personal autonomy and integrity, ensuring that individuals can lead their lives free from unwarranted interference.[74]

Furthermore, Article 12 of the ICCPR extends the guarantee of freedom of movement and the right to choose one's place of residence, subject to certain limitations. These limitations, delineated within the framework of the ICCPR, are intended to balance individual liberties with broader societal interests such as national security, public order, and public health.[75]

However, it is crucial to interpret these exceptions narrowly to prevent abuse and ensure that the rights enshrined in the Covenant are upheld consistently and fairly. The Human Rights Committee's General Comment

72 UN General Assembly, Optional Protocol to the ICCPR, UNTS, vol. 999, p. 171, 19 December 1966.

73 The Democratic Republic of Congo ratified the Optional Protocol to the ICCPR on 1 November 1976.

74 For a commentary, *see* Paul M. Taylor, 'Article 17: Privacy, Home, Correspondence; Honour and Reputation', *in* Paul M. Taylor (ed.), *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights,* Cambridge University Press, Cambridge, 2020, pp. 458–498.

75 Paul M. Taylor, 'Article 12: Freedom of Movement of the Person', *in* Id. pp. 325–353.

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No. 27[76] provides invaluable guidance on this matter, emphasizing the importance of constraining the discretion of authorities tasked with implementing restrictions to safeguard individual freedoms effectively.

In response to forced evictions, the Human Rights Committee issued a resolution in 2004, urging governments to provide immediate restitution, compensation, or alternative accommodation to affected individuals or communities.[77] The resolution underscores states parties' obligation under the ICCPR to ensure due process, remedies, and prevention of further human rights violations in cases of lawful evictions.

During forced evictions in the DRC, the government failed to fulfill its duties and obligations under the ICCPR. The forced demolition of homes without offering restitution, compensation, or alternative housing constitutes arbitrary or unlawful interference with residents' rights to privacy, family, and home. Moreover, compelling individuals to relocate to rural areas against their will violates their right to freedom of movement and choice of residence. Article 2(3) mandates that victims receive an effective remedy from competent judicial, administrative, or legislative authorities.[78]

As stipulated in Article 215 of the Constitution of the DRC, which grants superior authority to treaties and international agreements over national laws, the ICCPR is a self-executing treaty that necessitates a competent tribunal to address the government's human rights violations resulting from mass forced evictions, thereby entitling victims to an effective remedy.[79]

3.4. The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights serves as a pivotal regional instrument in safeguarding human rights across Africa, mirroring the foundational principles outlined in universal human rights documents such as the UDHR, the ICESCR, and the ICCPR. Adopted by the Orga-

76 UN Human Rights Committee (HRC), CCPR General Comment No. 27: Article 12 (Freedom of Movement), CCPR/C/21/Rev.1/Add.9, 2 November 1999.

77 UN Commission on Human Rights, Forced evictions. E/CN.4/RES/1993/77, UN Commission on Human Rights, 10 March 1993.

78 Article 2(3) guarantees the right of persons to effective remedies, when the rights or freedoms recognised in the ICCPR are violated.

79 Article 215 reads as follows: "Lawfully concluded treaties and agreements, when published, have authority superior to that of the law. However, each treaty and agreement is subject to application by the other party."

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nization of African Unity (OAU) in 1986 and ratified by the Democratic Republic of Congo, it established the African Commission on Human and Peoples' Rights (African Commission) with the mandate to address individual and state complaints related to human rights violations.[80] In contrast to the CESCR, the African Commission operates as a quasi-judicial body, aiming to foster amicable resolutions to disputes.[81]

However, the adoption of a Protocol to the African Charter in 1998[82] paved the way for the establishment of the African Court on Human and Peoples' Rights (African Court), envisioned to provide a more formal adjudicatory platform for human rights issues.

Article 14 of the African Charter touches upon the right to property, yet it defers significant authority to national laws, granting states considerable latitude in regulating property rights.[83]

4. Domestic Enforceability of International Treaty Duties and Obligations

In general international law, it is widely acknowledged that when a state becomes a party to a binding multilateral treaty, it undertakes a responsibility to enact domestic measures necessary to fulfill its international commitments, including their integration into domestic law.[84] This principle, embedded in various national constitutions, underscores the importance of treaty obligations in shaping domestic legal frameworks.[85] Additionally, there is a growing contention that the rights articulated in documents like the UDHR, particularly Article 17(2)'s prohibition of arbitrary property

80 Further information on the tasks and activities of the African Commission is available at https://achpr.au.int/.

81 Id.

82 Organization of African Unity (OAU), Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, 10 June 1998.

83 *See* Manisuli Ssenyonjo, 'Economic, Social and Cultural Rights in The African Charter'*, in The African Regional Human Rights System – 30 Years after the African Charter on Human and Peoples' Rights,* Martinus Nijoff, Leiden, 2011, pp. 55–100.

84 For references on this duty, *see e.g.* John H. Jackson, 'Status of Treaties in Domestic Legal Systems: A Policy Analysis', *American Journal of International Law*, Vol. 86, Issue 2, 1992, pp. 310–340.

85 *See* Alejandro Chehtman, 'Constitutions and International Law' *in* Conrado Hübner Mendes *et al.* (eds.), *The Oxford Handbook of Constitutional Law in Latin America,* online edition, Oxford Academic, 13 January 2022.

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deprivation, carry the weight of *jus cogens*.[86] While this claim may be considered ambitious, the practical application of such rights in national jurisprudence, often invoked in cases of human rights violations, reflects a broad consensus and adherence to these international agreements. Consequently, the UDHR, along with treaties like the ICESCR and the ICCPR, serve as authoritative references for national tribunals when confronting oppressive or discriminatory legislation and actions by state authorities.

As legally binding instruments of international law, these treaties not only impose obligations on member states but also guide the interpretation and implementation of domestic law within the jurisdiction.[87] However, for this infusion of international human rights law into domestic legal systems to be effective, it is imperative to have an independent judiciary free from executive coercion, capable of supplementing domestic law with international human rights norms.[88]

Regrettably, the erosion of judicial independence in the DRC, marked by the removal and persecution of judges exhibiting autonomy from government influence, poses a significant impediment to the effective incorporation of international human rights standards into domestic legal frameworks.

Given these circumstances, not only are those affected by forced evictions in the DRC hindered from pursuing legal action against culpable officials under constitutional guarantees subject to judicial review, but any potential for Congolese courts to apply international human rights norms to ensure alignment between domestic legislation and Congo's international legal commitments is also obstructed.

This dual impediment underscores the urgent need for robust legal mechanisms to protect the rights of vulnerable populations and uphold the DRC's obligations under international law. It underscores the importance of an independent judiciary capable of interpreting domestic laws in accordance with international human rights standards, thereby providing avenues for justice and redress for those subjected to human rights violations. Furthermore, it emphasizes the necessity for legal reforms aimed at bolstering the rule of law and ensuring the effective implementation of

86 *See* Andrea Bianchi, 'Human Rights and the Magic of Jus Cogens', *EJIL,* Vol. 19, Issue 3, 2008, pp. 491–508.

87 *See e.g.* Alan Brudner, 'The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework', *The University of Toronto Law Journal*, Vol. 35, Issue 3, 1985, pp. 219–254.

88 *See* the Bangalore Principles of Judicial Conduct (E/CN.4/2003/65, annex).

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international human rights instruments within the Congolese legal framework.

5. Rationale Behind International Intervention

While some international legal scholars argue that efforts to promote the 'rule of law' by the human rights movement have been unsuccessful, as demonstrated by interventions in Sierra Leone, Iraq, and Afghanistan,[89] it remains imperative for universally recognized human rights to be judicially enforceable rather than mere aspirations.

International response becomes necessary when a state consistently demonstrates its unwillingness or inability to comply with its international duties and obligations. In the case of the DRC, such intervention is crucial given its persistent violations of international human rights norms, which raise concerns within the international community.

The report jointly authored by Amnesty International and the DRC-based organization *Initiative pour la Bonne Gouvernance et les Droits Humains* (IBGDH), titled 'Powering Change or Business as Usual?' puts forth various intervention modalities in response to the ineffectiveness of intergovernmental enforcement mechanisms in addressing human rights violations.[90] These modalities encompass humanitarian aid, monitoring missions, diplomatic pressure, and, as a last resort, military force in cases where a state's authorities fail to safeguard its civilians.[91] At the core of this proposition lies the principle that all signatories of the UN Charter bear the responsibility to protect not only their own citizens but also those of other nations, extending to intervening in situations of mass atrocities, such as mass murder, rape, ethnic cleansing, and deliberate starvation, irrespective of member states' inclinations toward non-intervention.[92]

Justification for international response relies not only on evidence of threats to international peace and security but also on serious breaches of

89 *See e.g.* Jane Stromseth *et al.*, *Can Might Make Rights?: Building the Rule of Law after Military Interventions,* Cambridge: University Press, Cambridge, 2006.

90 *See* Amnesty International Report No3.

91 Id.

92 *See* United Nations Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All-Report of the Secretary-General*, UN GAOR, 59th Sess., UN Doc. A/59/2005. (In Larger Freedom), stressing that the protection of human rights is important for fulfilling the objectives of development and security.

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international law, as indirectly confirmed by the recent engagement of the UN Security Council in global public health matters.[93] Addressing violations of international law concerning public health, which have resulted in serious consequences such as starvation, disease outbreaks, and reported fatalities from forced evictions, calls for an international response under the auspices of the UN Security Council. This is especially pertinent for adherents of the doctrine of international responsibility to uphold public health.[94]

The analysis indicates that the government of the DRC has violated the human right to adequate housing and the prohibition of forced evictions without due process, as outlined in several international human rights treaties. The inefficacy of human rights commissions in enforcing these treaty obligations highlights the need for decisive action by the UN to compel the DRC to adhere to its commitments. Moreover, with hundreds of thousands rendered homeless without access to basic necessities owing to their government's actions, the 'responsibility to practice public health' is unequivocally invoked.[95]

Despite efforts by certain international NGOs to address the humanitarian crisis, the magnitude of the problem surpasses their capacity. Hence, the UN must prioritize human security over state security and urge member states to intervene in the DRC to safeguard the victims of the aforementioned forced evictions and hold the government accountable for its indifference to their suffering.

Expanding further, the proposed intervention strategies must be carefully coordinated and implemented in a manner that respects the sovereignty of the DRC while also ensuring the protection of human rights and the dignity of its citizens. This could involve establishing a framework for international cooperation and assistance to address the immediate humanitarian needs of those affected by forced evictions, including providing shelter, food, clean water, and healthcare services.

93 *See e.g.* Oliver Johnson *et al.*, 'The role of the UN Security Council in health emergencies: lessons from the Ebola response in Sierra Leone', *Australian Journal of International Affairs,* Vol. 76, Issue 1, 2022, pp. 11–16.

94 *See* David P. Fidler, 'The UN and the Responsibility to Practice Public Health', *Journal of International Law and International Relations*, Vol. 2, Issue 1, 2005, pp. 41–62; *see also* International Commission on Intervention and State Sovereignty, *The Responsibility to Protect,* International Development Research Centre, Ottawa, 2001; In Larger Freedom, para. 135.

95 Johnson *et al.* 2022.

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Additionally, efforts should be made to strengthen the capacity of local institutions and civil society organizations to promote human rights, ensure accountability, and advocate for the rights of vulnerable populations. Furthermore, diplomatic pressure should be exerted on the Congolese government to adhere to its international obligations and respect the human rights of its citizens, including the human right to adequate housing and protection from forced evictions. Ultimately, the goal of international intervention should be to support the DRC in building a more just and equitable society where the human rights and dignity of all individuals are respected and protected.

6. Concluding Remarks and Practical Recommendations

The execution of evictions in Kolwezi, characterized by its lack of planning and organization, has resulted in significant and unnecessary human suffering affecting over half a million of the DRC's most vulnerable citizens. In such a crisis, identifying effective means of reconciliation poses a considerable challenge.

While international human rights law acknowledges individuals' entitlement to protection from arbitrary property deprivation by their government, the enforcement mechanisms prove ineffective when a state refuses to comply with its international duties and obligations. Moreover, the judiciary's inability to apply the law independently, often succumbing to intimidation by parties involved in forced evictions, further complicates the situation, leaving limited alternatives beyond substantial international intervention.

There exist sustainable and coherent strategies, with support from the international community, to promptly address the housing crisis. These strategies encompass various measures, including revising building codes and zoning regulations to accommodate the needs of low-income groups, providing affordable building materials and essential amenities as part of the mass evictions in Kolwezi, urban planning initiatives to utilize underdeveloped land for legal housing alternatives, and adjusting financial systems to offer accessible loans without unrealistic collateral demands for low-income and community groups. Additionally, the establishment of a truth and reconciliation commission could address the systematic abuses inflicted on the citizens of the DRC by their government.

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Addressing the repercussions of the forced evictions in the Kolwezi region through international intervention, by implementing such strategies, represents an initial step in preventing future human rights violations perpetrated by multinational corporations engaged in forced evacuations and resettlements within Congolese territory.

Congolese policymakers have demonstrated irresponsibility in steering the country towards sustainable fiscal practices and have displayed a lack of concern for citizens' well-being during the implementation of state-sponsored policies since the nation's independence.[96] The forced evictions in Kolwezi and the subsequent lack of action by the government must mark a turning point, urging the international community to no longer remain passive while the DRC government imposes widespread suffering on its people.

96 *See* Zoe Marriage, 'Divisive 'Commonality': state and insecurity in the Democratic Republic of Congo', *Third World Quarterly,* Vol. 32, Issue 10, 2011, pp. 1892–1910.

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On the Phenomenon of the Rights of Nature

Ágnes Tahyné Kovács[*]

Abstract

To protect natural environment effectively, humanity is constantly on the move. It is looking for solutions beyond the current anthropocentric regulatory models. A novel concept of environmental regulation, the Rights of Nature (RoN), was launched in Europe (2022). A previous EU study (2021) showed that the RoN concept alien to the European regulatory environment is not yet feasible on the continent. Our study highlights a very narrow slice of contemporary legal history. One of the slices of the current 50-year history of environmental law is the emergence and spread of the concept of rights of nature regulation around the world. The aim of this study is to draw attention to this recent phenomenon. Its method is descriptive-demonstrative. This paper is structured according to the geographical location of each phenomenon. It situates the phenomenon of the rights of nature within the regulatory concepts of environmental law and illustrates their common features with examples from around the world. The paper also highlights common features of the RoN concept with EU environmental legislation that make its introduction in Europe unnecessary. At the same time, these global examples show a number of lessons that can contribute to making European environmental law more effective.

Keywords: sustainability, environmental law, Rights of Nature concept, Mar Menor, legal personality

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1. Introduction – the Mar Menor Act

Facing the triple crises of global warming, biodiversity loss and severe pollution, humanity is constantly looking for ways to protect the environment effectively. In our study, we present iconic manifestations of the Rights of Nature (RoN) concept, a relatively new phenomenon that is spreading globally. The phenomenon would reach Europe in 2022. Although its effectiveness cannot yet be measured, it may provide important lessons for the development of EU environmental law.

For the first time in Europe, a court in Spain applies the Law of Legal Personality of Mar Menor[1] that grants rights to the Mar Menor – thus treating this coastal lagoon as a legal person.[2] The court case is investigating discharges from hazardous mining waste pools at the Los Blancos landfill into the coastal lagoon, thereby possibly violating the rights of Mar Menor. In accordance with the provisions of the Law, the court summoned Mar Menor's Committee of Representatives to appear in the legal proceedings.

In the court order, dated 31 August 2023, the judge informed Mar Menor of its right to appear in the proceeding as a private prosecutor, and offered a civil action in order to claim its right to reparation of damages. The court order was communicated to the Mar Menor Committee of Representatives, who are considered by the judge as Guardians. Following this court order, the Mar Menor representatives could act at the criminal case. The court order also offers actions to several NGOs (Greenpeace, ANSE, and SOS Mar Menor) and 7 city councils to appear and take action.

This marks the first ecosystem in Europe to be enshrined with legal rights under a Western legal system. Sections III and IV of the law assign legal guardianship and representation for the Lagoon to Public Administra-

1 Law No. 19/2022 adopted on 30 September 2022, *see* at www.boe.es/diario_boe/txt.php?id=BOE-A-2022-16019 or https://ecojurisprudence.org/wp-content/uploads/2022/02/Spain-Rights-of-Mar-Menor-Law.pdf.

2 In 2020, Prof. Teresa Vincente Giménez, backed by several NGOs, helped draft and propose a law recognizing "that the Mar Menor and its basin have rights to protection, conservation, maintenance, and, where appropriate, restoration." The law gives the Mar Menor – a lagoon located in Murcia, Spain – a legal personality. By August 2021, the advocates collected half a million signatures to gain a parliamentary vote on the initiative. In April of 2022, the Spanish parliament voted 274 to 53 to ratify the law granting Mar Menor legal personhood. On 13 July 2022, the Commission of Ecological Transition and Demographic Challenge of the Congress of Deputies approved the law, sending it to Spain's Senate for ratification. The Senate overwhelmingly approved the law on 21 September 2022, by a vote of 230 in favor and 3 against, officially making the Mar Menor lagoon and its basin a legal person.

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tion, with support from the local community, scientific committees, and a monitoring committee, in addition to empowering any natural person to enforce the enumerated rights of Mar Menor.

2. The Environmental Crisis Resulting in a New Phenomenon of Environmental Protection

Faced with the triple environmental crisis resulting from climate disruption, rapid biodiversity loss and widespread pollution, humanity is engaged in a long quest to protect creation. Man's relationship with nature needs to be renewed, both on an individual and on a societal level. In the course of history, depending on one's worldview, legal cultures have shaped man's relationship to nature, as shown by the legal regulation of nature conservation and environmental protection, agricultural legislation and, in many cases, international legal documents. The failure of environmental protection is mostly driven by economic profit orientation, which also strengthens the role of specific environmental law instruments. In the choice of the social regulatory instruments that are most effective for the protection of nature, the legal-philosophical consensus that underpins the legislation plays a major role. This consensus is also a function of the social processes, traditions, worldview, institutional history, geography and, last but not least, the legal family of a people or nation.

3. Control Concepts in Environmental Codifications

In recent decades, three main types of regulatory philosophies for nature conservation and environmental protection have emerged. These 'philosophies' also characterize the evolution of regulation, from narrow interpretation to more complex and perspective approaches. To a certain extent, these regulatory philosophies are also reflected in legislation, otherwise they would remain only theoretical considerations.[3]

Of the three theories with conceptual differences, the first and most widely accepted is the traditional anthropocentric. It focuses on the interests of the present generations and tries to measure everything against the recognized (and acknowledged) human interests. It regards man as separate

3 Gyula Bándi, *Környezetjog*, Szent István Társulat, Budapest, 2022, pp. 10–11.

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from and superior to nature, and considers every animate or inanimate component of nature to be valuable, as long as it serves man's actual interests.

Another step towards expanding the human-centered approach was the recognition of the protection of future generations. This philosophy is based on the principle that no generation has the right to deprive future generations of the environmental goods it possesses.[4]

Another group of regulatory philosophies are those relating to the protection and preservation of the environment or certain environmental factors per se. Unlike anthropocentrism, biocentrism puts the natural world at the top of the priority list and considers all living things in the world to be equally important, *i.e.* the lives of animals are just as important as those of humans. One of the first recognized examples of this was the Convention on Biological Diversity, adopted in Rio de Janeiro in 1992.[5]

Although it cannot be defined as a legal regulatory concept, it is an approach that is present in society and therefore ecocentrism, which gives priority to the ecosystem as a whole, also deserves mention in this context. Both living and non-living components are considered important. It deals with humans insofar as it deals with the question of how humans influence the ecosystem as a whole. The effectiveness and practical results[6] of the predominantly global anthropocentric legal regulatory approaches are now highly questionable – despite the numerous international (multilateral) conventions, declarations, obligations and institutional protective measures of the states.[7] The evaluation of the results inspires new goals while humanity is in the last hours of change, of ecological conversion.[8] A fourth variant of the consideration of the relationship between man and nature is also emerging,[9] although it is not yet consciously expressed in legislation. The protection of creation, which is also recognized and called

4 Id. p. 10.
5 Id. p. 11.
6 *See* in general Katie McShane, 'Anthropocentrism vs. Non-Anthropocentrism: Why Should We Care?', *Environmental Values,* Vol. 16, Issue 2, 2007, pp. 169–186.
7 Orsolya Csapó, 'A környezeti károkért való felelősség kérdése az Európai Unióban', *Iustum Aequum Salutare,* Vol. 3, Issue 3, 2007, pp. 139–157.
8 *See also* Márió Nobilis, 'Isten hozott ökológia?', *Vigília,* Vol. 81, Issue 5, 2016, pp. 343–352.
9 Pope Francis in his papal encyclical Laudato' Si! (2015) and in the ecclesiastical teachings that preceded it.

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upon to be implemented in Christian religious social teachings,[10] but also other religions[11,12] sets a similar focus on values and thinks similarly about nature,[13] which they identify with the created world.[14] The place and role of man is a key issue in the care of creation.[15] His responsibilities and duties for the created world as a whole encourage him to reap its benefits.

This thesis is not about comparing the philosophies behind different approaches and environmental codifications. Nor does it examine whether the failure of environmental protection is a sign of short-term (or even longer-term) economic interests prevailing over environmental interests, or whether the reasons for this lie in the ineffectiveness of legal instruments. The aim of this paper is to show that regional and global environmental protection is a central issue and that in the search for means to make it more effective in many parts of the world, a relatively new phenomenon related to the third regulatory philosophy outlined above emerges: the concept of the rights of nature. The study presents in chronological order the legal milestones at which the phenomenon has developed into an instrument of environmental protection. Finally, the similarities between the cases presented are summarized.

4. The Concept of Rights of Nature

The Rights of Nature (RoN) school of thought is wide, containing a variety of different concepts. First of all, there is a legal-philosophical aspect, where it is highlighted that RoN means a paradigmatic shift in attitudes towards nature, from today's anthropocentric approach to an ecocentric one. Closely linked to this discourse is environmental constitutionalism, whose proponents argue that RoN should be included in an overarching

10 Emese Lilla Nagy, 'Teremtésvédelem a katolikus egyház szemszögéből', *Keresztény szó,* Vol. 23, Issue 3, 2012, pp. 1–6.

11 Benedek Jávor, 'A kereszténység ökológiai küldetése', *Iustum Aequum Salutare,* Vol. 3, Issue 2, 2006, pp. 1–2.

12 Endre Béla Huff, 'Az ökoetika eredetéről', *Economica,* Vol. 9, Issue 1, 2018, pp. 57–63.

13 István Kuzmányi, '(Nem) érteni Ferenc pápát', *Keresztény szó,* Vol. 27, Issue 9, 2016, p. 5.

14 Mátyás Mérő, 'A védikus gazdasági rendszer megvalósítása a Krisna-völgyben' *in* László Zsolnai *et al.* (eds.), *Gazdaság és vallás: a gazdasági spiritualitás innovatív modelljei,* Budapest, 2022, p. 169.

15 Gyula Bándi, 'A Teremtés védelme és az emberi jogok', *Acta Humana,* Vol. 8, Issue 4, 2020, pp. 9–33.

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piece of legislation in order to give a long-lasting constitutional and ethical value to the protection and conservation of nature. (An illustration of this is Article 71 of the 2009 Ecuadorian Constitution proclaiming the right of *Pacha Mama*.) Another key component of the RoN discourse is to award natural entities 'legal personhood' in order to allow for litigation and a wider consideration of natural scientific evidence in making decisions on environmental matters. Such examples exist in the legislation and jurisprudence of Latin America, New Zealand, India and other countries. However, most of these cases have been given in specific cultural and anticolonial contexts, and the outcomes are a mix of failures and successes.

Other scholars focus on the representation issue, arguing that if natural entities were granted legal personhood, this would not only give nature standing in court, but would also give courts a wider scope to take natural scientific evidence into consideration in deciding on precaution and remediation. Finally, RoN is described as a means for indigenous peoples to uphold their rights to traditional use of natural resources, while still preserving biodiversity.[16]

The concept is an initiative, a phenomenon in many countries around the world, a regulatory concept that fundamentally rethinks the relationship between humans and nature, building on a number of local social traditions. In a rather extreme approach, radical adherents of the movement derive[17] the phenomenon directly from the emergence of human rights.

The idea that natural phenomena should have rights was first put forward half a century ago by Christopher D. Stone, a law professor at the University of Southern California.[18] In the famous *Sierra Club v Morton* case,[19] while the party that challenged the decision to build a ski resort on behalf of the valley lost, Judge William O. Douglas pointed to Stone's position in favor of conservation in his dissenting opinion. Stone developed the bioethical background for this theory.[20] He took the view that, in order

16 Jan Darpö, *Can Nature Get it Right? A Study on Rights of Nature in European Context,* Study of the European Parliament, 2021, at www.europarl.europa.eu/RegData/etudes/STUD/2021/689328/IPOL_STU(2021)689328_EN.pdf.

17 Linda Sheehahn & Wilson Grant, *Fighting for our shared future: Protecting both human rights and nature rights,* Earth Law Center, 2015, p. 1.

18 Christopher D. Stone, 'Should Trees Have Standing? Towards Legal Rights for Natural Objects', *Southern California Law Review,* Vol. 45, 1972, pp. 450–501.

19 *Sierra Club v Morton,* 405 U.S. 727 (1972).

20 *Cf.* Holmes Rolston III, *A new environmental ethics: the next millennium for life on Earth,* Routledge, 2020.

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to protect nature, trees, rivers, mountains and natural formations should have certain rights so that a designated guardian could represent their interests in court.[21]

The resurrection of RoN ideas came at the beginning of the 2000s, when the Community Environmental Legal Defense Fund (CELDF) – from the beginning, a traditional public interest law firm – launched a campaign for the adoption of a 'bill of rights' for nature at a local level in the US. In this regard, the small community of Tamaqua Borough in Pennsylvania was the first to pass a Rights of Nature Law in order to prevent the dumping of toxic waste into the community in 2006. Having evolved into an organization bringing together public interest litigators and various actors such as communities, civil society and governments, CELDF, together with the Pachamama Alliance in San Francisco, an organization for the empowerment of indigenous tribes in the Amazon, joined forces with radical and anti-colonial oriented politicians in Ecuador for the introduction of rights for nature in the Constitution in 2008. To date, this is the only Constitution in the world that has introduced the RoN.

The phenomenon of natural law is present in many parts of the world, and many lawsuits have been filed, some of which have been successful. The new paradigm has been recognized at the national, local, and judicial levels in Bolivia, New Zealand, Mexico, Brazil, India, Africa, and the US. On the South American continent, several states have elevated the law of nature to the rank of law. In 2008, Ecuador elevated the concept to constitutional status.[22] The legal personality accorded to ecosystems has so far been mainly symbolic, and it remains highly doubtful and uncertain how successful these actions can be in ensuring adequate, long-term protection of ecosystems.

While the concept has been accepted by some legal systems, it has also opened up new areas of political and legal-philosophical discourse. According to a deep-rooted – and in this sense radical – conceptualization of the relationship between humans and nature, ecosystems such as rivers, lakes, and mountains can have rights similar to those of humans as natural

21 *Cf.* Laura Schimmöller, 'Paving the Way for Rights of Nature in Germany: Lessons Learnt from Legal Reform in New Zealand and Ecuador', *Transnational Environmental Law,* Vol. 9, Issue 3, 2020, pp. 569–592.

22 The Universal Declaration of the Rights of Mother Earth (UDRME) and Article 71 of the Ecuadorian Constitution of 2009, which proclaims the right of Pacha Mama (2009).

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subjects. This entitlement is linked to the possibility of suing for the protection of nature. The movement in many parts of the world[23] is striving for a paradigm shift in which nature is at the center and humans are not dominant, but dependent on nature. In terms of weighting, this school of thought is a possible variant of the third group of regulatory philosophies mentioned above. According to this doctrine, the ecosystem has a right to the following.

First, it could acquire a certain legal personality status and, as such, have the right to 'defend itself' in court against damage and harm, including a particular development project or even environmental degradation caused by climate change. The ecosystem would be declared a 'legal entity' that has the right to be legally represented by an appointed guardian – similar to how a nonprofit organization appoints a trustee – who acts on its behalf and in its interest. This guardian is usually a person or group of people who are familiar with the condition, care and management of the ecosystem. On the other hand, they recognize that the ecosystem has the right to exist, thrive, reproduce its life cycles, and evolve naturally without human interference.[24]

As the proponents of the concept point out, the rights conferred on nature aim to ensure the 'highest level' of environmental protection, also emphasizing the link with the right to a clean and healthy environment.[25] In most cases, it is also noted that the right of the indigenous population to their habitat and culture may be affected. While efforts in the name of nature's rights are explicitly aimed at protecting natural values, they can also be used indirectly to prevent and remedy human rights violations caused by climate change, although their effectiveness has not been proven compared to traditional legal instruments.

The concept is embedded in legal cultures that are completely different from European legal cultures. According to the values that prevail, especially in Latin America, not only the relationship between man and nature has a different meaning, but also the entire social, economic, educational and legal environment. The phenomenon is often described as a means by which indigenous peoples can preserve their right to traditional use of natural resources while protecting and preserving biodiversity. Without

23 Mainly in South American countries, and India, New Zealand, Canada.

24 *See* Roderick Frazier Nash, *The rights of nature: a history of environmental ethics,* University of Wisconsin Press, 1989.

25 Rafi Youatt, 'Personhood and the rights of nature: the new subjects of contemporary earth politics', *International Political Sociology,* Vol. 11, Issue 1, 2017, pp. 39–54.

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undertaking a detailed sociological and economic analysis, we consider it necessary at this point in our study to shed light on the social processes that preceded and triggered the 2008 constitution in Ecuador. The reason for highlighting this example is that it was this state that elevated the concept to the top of the legislative hierarchy, to the constitutional level. In addition, the case of Ecuador shows many common features for Latin American states in the region.

5. What About Europe? "Can Nature Get It Right?"

Although RoN is not recognized in the EU, the preservation and protection of the environment and the notion of sustainable development has a strong constitutional position in the Treaties of the EU. We can also find the most important environmental principles on this hierarchic level of the legal system. Moreover, in secondary EU law we find all kinds of environmental issues covered by directly applicable regulations and directives that leave room for the Member States to implement them.

However, this national discretion may be limited in two ways by the doctrine of direct effect developed in the case law of the CJEU. First, national courts are called upon to disregard any national legislation that is inconsistent with clear, precise and unconditional obligations under EU law. Secondly, the public concerned, including recognized ENGOs, must be given the opportunity to bring administrative decisions under certain provisions before national courts for review. In the wake of Aarhus and the development of the principle of judicial protection of EU law, the possibilities for the public concerned to have access to justice to challenge administrative measures and inactions have been significantly enhanced in recent years. However, the situation is quite the opposite as regards the possibility to challenge such acts of the EU institutions by direct action before the CJEU. Compared with the generous attitude towards the requirements of open access to national courts, it is not too much to speak of a Janus face for the CJEU.[26]

However, the Spanish example mentioned in the introduction above shows that RoN has reached our continent. The examination of the concept in a European context preceded the Spanish case.

26 Darpö 2021, p. 58.

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In 2021, a study was published and commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee, which explored the concept of Rights of Nature and its different aspects in legal philosophy and international agreements, as well as in legislation and caselaw on different levels. The aim of the study was to analyze RoN from a legal-scientific viewpoint in order to see whether this new concept might bring added value to the field of EU environmental law. Each of the aspects of RoN was analyzed with a view to determining its key elements.

The study delves on the ideas of rights of nature in comparison with rights to nature, legal personhood and standing in court for natural entities, and analyses ECtHR and CJEU case law on access to justice in environmental decision-making. It emphasizes, in particular, the need to strengthen the requirements for independent scientific evaluations in certain permit regimes under EU law. The study also highlights the crucial importance of promoting the role of civil society as watchdog over the implementation of EU environmental law by way of a wider access to justice via both the national courts and the CJEU, which is also in line with the political priorities for delivering the European Green Deal.[27] Chapter 4 of the study deals with environmental protection in substantive EU law, both at the constitutional level (TEU and TFEU) and in secondary legislation, in regulations and directives. It is contended that the 'intrinsic value of nature' – although not found in an express provision at the constitutional level in the EU – is contained in the nature conservation directives and the case-law of the CJEU. Chapter 5 is finally the operative part of the study where the RoN concept is evaluated from the perspective of EU law on the environment. On a general level, the RoN concept is criticized for being mostly symbolic and built on anecdotal evidence. What is more important, though, is that the proponents of RoN do not succeed in showing that this is a paradigmatic shift in environmental regulation. Instead, the history of RoN shows that it faces the same reality and problems as the ordinary laws on the environment, most importantly weak enforcement. Further, the idea of giving natural entities 'legal personhood' is compared with the EU model of protecting environmental interests through ENGO representation, and it is found that there are no systematic advantages from a European perspective. Having reached this conclusion, however, the study also emphasizes the crucial importance of strengthening the role of civil society as watchdogs

27 Id.

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over the implementation of EU law in environmental matters by way of a wider access to justice via both the national courts and the CJEU.

The RoN concept offers new ideas that can be adapted to the present institutional or legal scope of the EU system. One example of an idea borrowed from the RoN school of thought is to introduce a provision on the constitutional level in the EU about the intrinsic value of biodiversity and some basic principles of ecological integrity.

As for secondary legislation, it is proposed that stronger adaptivity requirements be introduced in the relevant directives, as well as stricter environmental and ecological standards. The idea of 'ecological impact tracing' also seems interesting. A comprehensive overview of the nature conservation directives ought to be performed, and the requirements for independent scientific evaluations should be strengthened in certain permit regimes under EU law. The creation of national funds for the remedying of damage to biological biodiversity could solve the protection of natural environment. As for enforcement, it is suggested that the Commission tighten up the demands on the Member States' courts to fulfil their obligations under Article 267 TFEU to ask for preliminary rulings from the CJEU. Stricter criteria for the enforcement of environmental provisions and the creation of independent enforcement authorities should also be further investigated.

Another idea that is discussed is the establishment of the position of an Environmental Ombudsman on both the EU and national levels. One could also contemplate different measures both to strengthen the position of science in the administration and courts, and to improve the education and competence of the courts. It is finally of vital importance to introduce strict sanctions for administrative inertia in relation to obligations under EU environmental law.

RoN does not entail a shift of paradigm in law that has the capacity to save the environment from the challenges we face today. Many of the deficits that this movement criticizes modern environmental law for are general problems that have been discussed for years and which will not be remedied by introducing new labels in a system that still must be handled by humans. The dichotomy between RoN and modern European environmental law is therefore partly artificial, a symbolic construct. In the legal order of the EU – with advanced environmental law and clear obligations for the administration – we have chosen a different avenue for enabling civil society to act as a watchdog of environmental decision-making, namely to award standing in court for the public concerned and for recognized

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ENGOs. There is little reason to deviate from this system, although it needs to be strengthened in certain aspects.

Even so, the RoN school of thought contains fresh insights in its critique of current environmental law and presents ideas that can be developed within our conventional legal notions. Such an idea may be to introduce the general principle of non-regression on the constitutional level in EU law, meaning a prohibition on the Member States to undertake measures entailing environmental degradation or the weakening of environmental laws. Other principles that are lacking are at that level is those concerning environmental or ecological integrity, as well as the recognition of the 'intrinsic value of biodiversity'.

In addition, many ideas in the RoN concept can be used to improve secondary EU legislation on the environment. Most importantly, these ideas concern the improvement of the enforcement possibilities and the implementation of the Union obligations in the Member States.

6. RoN Examples

6.1. Ecuador: Appearance at Constitutional Level

On 28 September 2008, the Ecuadorian people, led by President Rafael Correa, voted overwhelmingly in favor of a new constitution that grants nature – mountains, rivers, forests, air and islands – the right to exist, flourish and develop. Ecuador is thus the first country in the world to enshrine the rights of nature in its constitution. How did this come about, one wonders? The following is a brief overview of the social processes that led to this specific instrument for the protection of nature being at the top of the Ecuadorian legal hierarchy. To understand this, we will shed light on the socio-economic dilemmas of Ecuador in the 21st century, which will show not only the relationship of the inhabitants to nature, but also the general dilemmas of Latin America in the 21st century. These challenges were largely economic.

The fate of the South American continent was strongly influenced by the world cocoa price in the 20th century, followed by the economic crisis of 1929 and the boom in banana exports from the 1950s onwards. Although Ecuador has never been one of the world's major oil producers, it has become an attractive investment destination over time. However, over time, the rich oil reserves were depleted, production became unprofitable, and

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only traces of environmental damage remained. A powerless, commodity-exporting economy that relied on oil production to overcome its economic dependence struggled with the lack of a national currency when it faced sovereignty problems after the introduction of the dollar in 2000. Intensive oil production has had a negative impact on the environment since the 1970s.

The arguments of the environmentalists, the dissatisfied natives [with the creation of the Confederation of Indigenous Nationalities and Peoples of Ecuador (CONAIE) in 1986] and the resistance of the peasantry clashed, and the demand for an alternative model of development was voiced.[28] After the natural disaster caused by El Niño (1987–1999), the economic crisis reached its peak, and in January 2000 the national currency, the sucre, was abolished and the US dollar became the national currency. Sovereignty, economic development, and ecological arguments pointed in the same direction, namely towards the realization of an alternative model of civilization, which took shape in the concept of '*sumak kawsay*' or 'living right/well'. President Raphael Correa used this intellectual trend to build an intercultural and multi-ethnic state.

> "The peculiarity of the Ecuadorian situation is that it combines the Venezuelan challenge of overcoming dependence on oil with the Bolivian need to integrate the indigenous population, thus creating a convergence of economic and social conditions of development that, within the given framework of capitalism, highlights the urgency of change in Latin America."

6.2. Some Examples of the Declaration of the RoN

The phenomenon of nature's rights can be felt in many parts of the world today. The intensity of its acceptance varies due to differences in history, ideology, philosophy of law, and legal systems. It is present in South America, Canada, India, Australia and New Zealand through various legal acts.

28 *See* Fabio Louis Bardosa dos Sandos, 'Rafael Correa kormányának dilemmái Ecuadorban: Ökológia kontra kapitalizmus, Változatok egy témára', *Eszmélet,* 2013, Issue 98, pp. 104–114.

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Another representative of the common South American geo-sociological background described above was Bolivia.[29] In 2009, a new environmental law was adopted there,[30] which gives every citizen the right to protect the environment suitable for the development of living beings. Although the Bolivian Constitution does not declare the concept of the rights of nature, it paved the way for the 2009 Law on the Rights of Mother Earth *(Madre Tierra)*.[31]

One of the first partially successful natural rights lawsuits in Ecuador was brought against a construction company in 2011 by the NGO Global Alliance for Rights of Nature (GARN) (and others). They sued on behalf of the Vilcabamba River in Ecuador because the construction company had built a road on the river and polluted it with construction debris. The Provincial Court of Loja recognized the plaintiffs' legitimate claims on behalf of the river, but the construction company did not comply with the obligations imposed on it by the judgment and they were no longer able to carry out further lobbying.[32]

In 2017, four rivers around the world filed lawsuits and won legal claims to natural phenomena.[33] The lawsuit was filed on behalf of the Whanganui River in New Zealand,[34] the Rio Altrato in Colombia and the Ganga and Yamuna rivers in India. The New Zealand case is essentially unique because Parliament passed the Te Awa Tupua Act,[35] which appointed two guardians of the river: a representative of the indigenous Maori people and a repre-

29 Cf. Paola Villavicencio Calzadilla & Louis J. Kotzé, 'Living in harmony with nature? A critical appraisal of the rights of Mother Earth in Bolivia', *Transnational Environmental Law,* Vol. 7, Issue 3, 2018, pp. 397–424.

30 The Bolivian Law *Ley Marco de la Madre Tierra y Desarrollo Integral para Vivir Bien*, Ley No. 300, 2012.

31 *See* Nohely Guzmán, 'Tierra, agroindustria y transgénicos: Conflictos sociales populares en la Bolivia de la Madre Tierra', *Perspectivas Rurales Nueva Época,* Vol. 15, Issue 30, 2017.

32 Maria Valeria Berros, 'Defending rivers: Vilcabamba in the South of Ecuador', *RCC Perspectives,* Issue 6, 2017, pp. 37–44.

33 Jerzy Bieluk, 'River as a legal person', *Studia Iuridica Lublinensia,* Vol. 29, Issue 2, 2020, pp. 11–23.

34 In March 2017, the Whanganui River in Aotearoa, New Zealand, became the first river to officially receive legal entity status. This legal personality is based on an ontological understanding of the river as an indivisible and living whole and on the spiritual lineage of the Whanganui iwi (a Maori tribe).

35 Christopher Rodgers, 'A new approach to protecting ecosystems: the te awa tupua (Whanganui River Claims Settlement) Act 2017', *Environmental Law Review,* Vol. 19, Issue 4, 2017, pp. 266–279.

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sentative of the government, who must work together to reconcile their positions with the common goal of protecting the river and its ecosystem.[36]

6.3. Local Level Appearance – the Example of the US

In the United States, the phenomenon has manifested itself at the local level. In 2010, the City Council of Pittsburgh, Pennsylvania, unanimously passed an ordinance recognizing the rights of nature as part of a ban on shale gas drilling.[37]

In 2019, the city of Toledo, Ohio, passed the Lake Erie Bill of Rights, a city ordinance[38] that gave the lake its own rights.[39] A farmer representing the Drewes Farms Partnership filed a federal lawsuit in court, claiming that his farm was liable under the ordinance for the fertilizer applied to his fields because he could not guarantee that the pollution would not enter the Lake Erie watershed. A short time later, the state of Ohio itself joined the lawsuit, arguing that it was not primarily the residents but the state that was held liable for its environmental regulations. The reasoning behind the ruling was that the law itself was 'unconstitutionally vague' and exceeded the powers of municipalities. The plaintiffs had unsuccessfully sought to uphold the Lake Erie Bill of Rights in state court.[40]

36 Tony Collins & Esterling Shea, 'Fluid Personality: Indigenous Rights and the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 in Aotearoa New Zealand', *Melbourne Journal of International Law,* Vol. 20, Issue 1, 2019, p. 197–221.

37 Oliver A. Houck, 'Noah's Second Voyage: The Rights of Nature as Law', *Tulane Environmental Law Journal,* Vol. 31, Issue 1, 2017, pp. 1–50.

38 *Cf.* Devon Alexandra Berman, 'Lake Erie bill of rights gets the ax: Is legal personhood for nature dead in the water', *Sustainable Development Law and Policy,* Vol. 20, Issue 1, 2019, Article No. 3.

39 Kenneth Kilbert, 'Lake Erie bill of rights: Stifled by all three branches yet still significant', *Ohio State Law Journal Online,* Vol. 81, 2020, pp. 227–237.

40 *See* at www.michiganpublic.org/environment-science/2020-02-28/lake-erie-bill-of-rights-declared-unconstitutional.

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6.4. Uganda

Uganda enacted its National Environmental Protection Act[41] (referred to in this section as the Act) in 2009. Section 3 of the Act provides for the right to a dignified environment.[42,43] Section 4 of the Law on the Rights of Nature states that nature has the right to exist, survive, maintain and renew itself in terms of its life cycles, structure, functions and evolutionary processes. A person has the right to bring an action in a court of competent jurisdiction if the right of nature according to the law is violated. The government takes precautionary and restrictive measures in case of activities that could lead to the extinction of species due to permanent changes in ecosystems or natural cycles. In the case of sites to which the rights referred to in paragraph 1 apply, the Minister shall require the conservation of the site by means of a regulation.

6.5. Bangladesh

In 2009, the Supreme Court of Bangladesh also issued a decision[44] that affects the rights of nature.[45] The Ministry of Environment and Forests enacted a law in 1995 requiring all industrial establishments to use sewage

41 The National Environmental Act of Uganda, 2019, at https://nema.go.ug/sites/all/themes/nema/docs/National%20Environment%20Act,%20No.%205%20of%202019.pdf.

42 Section 1 states that all people in Uganda have the right to a clean and healthy environment in accordance with the Constitution and the principle of sustainable development. Section 2 states that everyone has a duty to create, maintain and improve this environment, including the duty to prevent pollution. A person who has a right under Section 1 and is threatened by an act or omission of a person that could cause harm to human health or the environment or interfere with the performance of the obligation under Section 2 may bring a civil action against that person.

43 The petition may require the court to prevent, stop or remedy an act or omission that harms human health or the environment; to require a social and environmental risk assessment and impact assessment, an environmental assessment, monitoring, measures taken by public authorities to prevent or remedy the damage or danger; to oblige other persons to […] take measures to ensure that human health or the environment is not endangered. Id. Section 3(5).

44 *See* at www.centerforenvironmentalrights.org/news/bangladesh-supreme-court-upholds-rights-of-rivers.

45 The decision of Supreme Court of Bangladesh High Court Division (31 January 2019) is available (in Bengali) at http://nrcc.gov.bd/sites/default/files/files/nrccb.portal.gov.bd/notices/4569e59a_762b_41a2_95ca_0c462408f25c/JUDGEMENT%20OF%20HIGHCOURT.pdf.

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treatment plants to protect the rivers from pollution, but owners often ignored the law. The public interest litigation was initiated under the empowerment of Article 102 of the Constitution of Bangladesh when a lawsuit was filed by Human Rights and Peace for Bangladesh (HRPB) on 7 November 2016.[46] As a result, the judicial commission of inquiry prepared a report on illegal constructions on the banks of the Turag River. Subsequently, these persons and representatives of the buildings were made parties to the proceedings. The defendants in the proceedings were the National Government, represented by the Secretary of State, the Ministry of Shipping, represented by the Chairman of Bangladesh Inland Waterways, the Transport Authority represented by the Director-General, and the Director of the Deputy Commission of Gazipur in charge of environmental affairs.

In its judgment of 30 January 2019 and its decision of 3 February 2019, the court stated:

> "Governments around the world enact laws to protect their rivers, and courts issue guidelines. Had the courts in Bangladesh not done so, the Buriganga River could have been built on with multi-storey buildings, or the Turag River would have become a location for illegal housing associations."[47]

The Council of the Supreme Court, consisting of Justices Moyeenul Islam Chowdhury and M. Ashraful Kamal, ruled in one of its rulings that Bangladesh and humanity are in danger[48] if the rivers are not protected from the problems of navigability caused by human intervention.

In its decision, the court pointed out that no trial would have been necessary if the authorities had complied with the law, but noted that the Tureg is a living being with legal personality.[49] In its ruling, which is based on the doctrine of public trust, it stated that the role of the approximately

46 Human Rights and Peace for Bangladesh concerning the Turag River, Writ Petition No. 3503 of 2009.

47 In the days leading up to the decision, civilians protested in Kuakata, Patuakhali, demanding that the river be recognized as a living organism.

48 According to the World Bank study, four major rivers near Dhaka – Buriganga, Shitalakhya, Turag and Balu – are polluted daily with 1.5 million cubic meters of wastewater from 7,000 industries in the area and another 0.5 million cubic meters from other sources.

49 A river is a living being, a legal entity.

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450 rivers[50] is of paramount importance to the people who live there, as their livelihoods depend on them.

To implement the ruling, the court appointed the National River Conservation Commission (NRCC)[51] as the legal guardian (person *in loco parentis*), responsible for the legal protection of the river from pollution and unlawful interference (construction work).

The court ordered the state to amend the National River Protection Commission[52] (NRCC) Act (2013) to strengthen the NRCC's investigative and enforcement powers as an effective and independent institution by creating new criminal offenses and taking prompt action. The court has issued a number of enforcement provisions, such as freezing loans for construction projects, the role of education, and education to preserve the river's natural state. It has issued detailed guidance on how to inform the public about the state of rivers and biodiversity through communication and education.

Following the appeal, on 17 February 2020, the Appeals Division of the Supreme Court of Bangladesh upheld the verdict with some minor changes and dismissed the appeal. The consequences of the ruling also pave the way for cross-border cooperation, *i.e.* joint action in common river basins, in particular with regard to rivers from India.

6.6. India[53]

On 23 March 2017, the court of Uttarakhand in the Indian city of Nainital declared[54] the Yamuna and Ganges rivers to be living organisms on similar grounds as the court in Bangladesh. The activities to pollute and damage

50 South Asia is surrounded by hundreds of rivers, most of which cross borders. They are the natural contribution of the people of Bangladesh, India, Nepal and Myanmar and are closely linked to their lives.

51 The Court appointed the National River Conservation Commission (NRCC).

52 National River Conservation Commission, at http://nrcc.gov.bd/.

53 *Mohamed Salim v State Uttarkhand and others,* Writ Petition (PIL) No. 126 of 2014, 20 March 2017.

54 The decision of the Court of Uttarakhand was seen as a measure to protect India's highly regarded but heavily polluted rivers. The Ganges – revered in Hinduism as Ganga Mata or Ganga Ayya – is the lifeline for more than 500 million people in India. This river and its tributary, the Yamuna, are the two largest rivers in the country, but both are heavily polluted by industrial waste, sewage, and even the remains of corpses burned on their banks.

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the rivers were legally compared to assault and murder. The decision came about five days after the New Zealand parliament passed a bill recognizing the Whanganui River as a legal entity.[55]

The decision was made against the backdrop of the Central Government's obligation under Section 80 of the Uttar Pradesh Reorganization Act, 2000 to establish the Ganges Management Council and register Uttarakhand as a member of the Upper Yamuna Council. However, the Uttarakhand High Court found that none of the legal requirements were met.

The court ordered the government to stop illegal development of the area and ordered the central government to establish a Ganges Management Council within three months and include the state of Uttarakhand in the Upper Yamuna Council. Finally, the court banned mining in the Ganges basin and its uppermost floodplain with immediate effect.

Subsequently, on 20 March 2017, the Uttarakhand High Court issued a series of binding additional instructions, citing violations by the governments of Uttar Pradesh and Uttarakhand in cooperating with the central government in establishing the Ganges Board. The court also found that the individuals violating the state's land had not been evicted and issued an eviction order to be implemented within seven days of the date of the order. The court emphasized that the critical situation requires extraordinary protection and conservation measures for the survival of the two rivers, the Ganges and Yamuna. In this context, the court declared the Ganges and the Yamuna to be legal persons.

The resolution emphasizes the spiritual importance of these two rivers. Following the development of the Supreme Court of India's jurisprudence on the personality of Hindu deities and temple idols, the Supreme Court affirmed that the recognition of a Hindu deity or idol as a legal entity should be undertaken by those "who are entrusted with the possession and management of property". Citing the spirituality and religious beliefs of Hindus, the court noted that these rivers "support and contribute to the life and natural resources, health and well-being of the entire community". The Ganges and Yamuna rivers breathe, live and sustain communities from the mountains to the sea. Citing Articles 48A and 51A(g) of the Constitution, the court ordered that the focus of the Ganges Water Management Council, including its statutes, should be on irrigation, rural and urban water supply, hydroelectric generation, shipping, and industry.

55 Te Awa Tupua Act.

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Article 48A is the guiding principle of public order and obliges the State to protect the environment. It states that "The state is committed to protecting and enhancing the environment, as well as protecting the country's forests and wildlife."[56] Citing the fundamental obligations enshrined in the Indian Constitution, the court referred to Article 51A(g), which provides that every Indian citizen has a fundamental duty to "protect and enhance the natural environment, including forests, lakes, rivers and wildlife, and to have compassion for living beings."[57]

The court declared the natural entities to be legal persons in a certain sense: accordingly, the rivers Ganges and Yamuna and all their tributaries, streams, all their natural waters that flow continuously or intermittently, are declared legal persons, living organisms. The status of a legal person is equivalent to the rights and obligations of a living person for the protection and conservation of the Ganges and Yamuna rivers. The court's decision declares the Director of the Ganges, the Secretary-General of the State of Uttarakhand and the Advocate General of the State of Uttarakhand NAMAMI as the 'in loco parentis' (deputy) guardian for the protection, conservation and conservation of the river.

The government of the state of Uttarakhand, where the Ganges River originates, argued in its appeal that the ruling was legally untenable – simply impractical – as it could lead to complicated legal situations, including claims against the rivers, in the event of flooding or drowning.

The Supreme Court of India has overturned the above-mentioned ruling of the Uttarakhand State Court, which had granted the two rivers the same legal status as humans, and ruled that the Ganges and Yamuna rivers cannot be considered living beings.

6.7. New Zealand

Similar local initiatives in the area of natural resource rights[58] include the Te Urewera Act of 2014,[59] and the Te Awa Tupua River Protection Act of 2017, which are examples of consensus between indigenous and land

56 Constitution of India, Article 48A.
57 Id. Article 51A(g).
58 *See also* Bieluk 2020, pp. 11–23.
59 Te Urewera Law.

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management interests in New Zealand.[60] In both cases, an independent body (Whanganui iwi) was set up to represent the river.[61]

This legislation follows the 1962 decision of the Court of Appeal, which denied Maori customary ownership of the riverbed.[62] The Te Awa Tupua Act became an attempt to solve this problem, because with the 2014 Act, the Te Urewera Region ceased to be a Crown Estate National Park[63] and became a separate legal entity with "all the rights, powers, duties and liabilities" of a legal entity. Article 11(2) states that the enumerated rights shall be exercised on behalf of Te Urewera by the Te Urewera Council, which will be established specifically for the purposes of the Act. It is also stated that this advisory body is composed of members of the Tūhoe iwi and persons appointed by the Crown. The Council carries out its functions on behalf of the province it represents and may bring actions for damages or bring proceedings before the courts.

In 2017, the Whanganui River was recognized as a legal entity by the Tupua Act, bringing the historic struggle of the Whanganui iwi to a halt. The preamble to this Act states that under the Treaty of Waitangi of 1840, the Crown recognizes that ancient Māori land is the spiritual place of the Iwis. The 2017 law established the office of the Te Pou Tupua representative, with one member representing the iwi and another representing the crown.[64] The representative's responsibilities include speaking on behalf of the river and maintaining its integrity.

6.8. Canada

One of the North American examples of nature education rights is the societal will to prevent the construction of a hydroelectric power plant on a priority section of the Magpie River, which would destroy the river's ecosystem, and to stop mining activities.

In February 2021, the Muteshekau-shipu Federation announced the adoption of two parallel resolutions recognizing the river, also known as the 'Magpie River' (Muteshekau-shipu in the Innu language), as a legal

60 Bieluk 2020, pp. 11–23.
61 Te Urewera Act, Section 11(2); Te Awa Tupua Act, Section 20(1)–(2).
62 *Re the Bed of the Whanganui River,* [1962] NZLR 600 (CA).
63 Te Urewera Act, Section 51.
64 Te Awa Tupua Act, Section 19.

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entity with[65] rights. The first resolution was passed by the Ekuanitshit Innu Council in January 2021, followed by another by the Regional County Municipality (RCM) of the municipality of Minganie in the Côte-Nord region (Quebec, Canada) in February. The resolutions recognized nine rights for the river, including the right to natural development and protection, pollution relief and the right to be heard in court. The members of the Ekuanitshit Innu Council have been appointed as legal guardians of the river, primarily responsible for ensuring that these rights are respected. The founding members of the Muteshekau-shipu Association were the Ekuanitshit Innu Council, the Minganie RCM, the CPAWS Quebec and the Eaux-Vives Minganie Association.[66] The Muteshekau-shipu Association is an example of local cooperation and a common legislative process.

6.9. Colombia

In 2018, young plaintiffs in Colombia filed a special lawsuit (*tutela* is the name of the legal institution)[67] against the Colombian government, Colombian municipalities, and several companies. The plaintiffs alleged that the government failed to reduce deforestation and to achieve the goal of zero net deforestation in the Colombian Amazon by 2020 (as set out in the Paris Agreement and the 2014–2018 National Development Plan), thereby affecting the plaintiffs' fundamental rights to a healthy environment, life, health, food, and water. The court dismissed the action. They argued that the form of the Tutela action was not appropriate because of the collective nature of the problem, since it can only be applied effectively if a causal link between the fundamental right and the specific infringement can be established, the person bringing the Tutela action is directly concerned, the violation of the fundamental right is evidenced and the remedy is aimed at the elimination of an individual rather than a collective violation. The plaintiffs filed an appeal on 16 February 2018, which resulted in the Supreme Court reversing the decision on 5 April 2018, recognizing that

65 The inhabitants of Mestokosho and Ekuanitshit, the Innu community in the Gulf of St. Lawrence, see the 300 km long river as one family.

66 *See* at https://ecojurisprudence.org/initiatives/recognition-of-legal-personality-and-rights-of-the-magpie-river/.

67 *See* at http://climatecasechart.com/non-us-case/future-generation-v-ministry-environment-others/.

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"the fundamental rights to life, health, subsistence level, liberty and human dignity are inextricably linked and intertwined with the state of the environment and ecosystem."[68] It also recognized the Colombian Amazon as an 'object of rights', citing a decision by the Constitutional Court that had recognized the rights of the Atrato River.[69] The Supreme Court accordingly ruled that the Colombian Amazon has a right to protection, conservation, care and restoration. The court ordered the government to develop and implement action plans to counter deforestation in the Amazon. In its judgment, the court highlighted in particular the role of human responsibility.[70] In paragraphs 5.2 and 5.3 of the judgment, it also formulated environmental rights with regard to the interests of future generations, which are "based on an ethical obligation of solidarity", according to the court. Referring to the provisions of the Amazon Cooperation Agreement (TCA) and the 2015 Paris Framework Agreement on Climate Change, it emphasized the role of the Amazon ecosystem and the importance of its harmonious development. The court ordered the creation of an "Intergenerational Contract for Life in the Colombian Amazon (PIVAC)", the implementation of which was entrusted to the public authorities, the economy and the education system.

6.10. Argentina

In 2020, a group of non-governmental organizations (and a children's group) in Argentina filed a lawsuit[71] with the Supreme Court of Argentina against the governments of Entre Ríos province and the municipality of Victoria City, claiming that they had failed to protect ecologically sensitive wetlands.[72] The plaintiffs asked the court to declare the Paraná River Delta a 'rights holder' and an ecosystem important for climate change mitigation and adaptation, and to appoint a guardian for the protection of the rights of the Paraná Delta, who would be responsible for monitoring the conservation and sustainable use of the wetlands. The complaint referred

68 *See* STC4360–2018 number: 11001–22–03–000–2018–00319–01, Approved at the meeting of 4 April 2018, Bogotá, at https://judicialportal.informea.org/node/20.

69 Constitutional Court of Colombia, The Atrato River Case Judgment T-622/16, at http://files.harmonywithnatureun.org/uploads/upload838.pdf.

70 Id. p. 16.

71 *See also* at http://climatecasechart.com/non-us-case/asociacion-civil-por-la-justicia-ambiental-v-province-of-entre-rios-et-al/.

72 *See* the lawsuit, at http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20200702_11820_complaint.pdf.

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to conservation laws in other countries, including Bolivia, New Zealand, Colombia, Ecuador and India.

On 11 August 2020, the Court of First Instance ruled that significant and uncontrolled fires were taking place in the area examined, resulting in levels of air pollutants five times higher than the limit allowed by the normative regulation. The cumulative effect of cremation, which also follows ancient rites, requires measures in accordance with the precautionary principle. In its decision, the Court referred to the document prepared by the Ministry of Development entitled 'Comprehensive Strategic Plan for the Conservation and Sustainable Use of the Paraná Delta', which states that the delta is not only of ecological importance, but also a priority area for flood protection.

6.11. Peru

In 2019, a group of Peruvian youths filed a lawsuit against Peru, claiming that the government had failed to take the necessary measures to combat climate change. The lawsuit sought to force the president, the Ministry of the Environment, the Ministry of Agriculture and Irrigation, the Ministry of Finance, and regional governments to develop action plans to reduce deforestation in the Peruvian Amazon by 2025. The lawsuit also called for recognition of the Peruvian Amazon as an area subject to the right to protection, preservation, care and restoration, citing other conservation cases in Ecuador, Colombia and New Zealand, as well as a declaration that the environmental destruction of the Peruvian Amazon is unconstitutional. A decision on this matter is still pending.

6.12. Pakistan

In 2021, the Supreme Court of Pakistan upheld a decision by the Punjab provincial government to prohibit the construction of new or expanded cement plants in environmentally sensitive areas. The Supreme Court recognized that these cement plants could, among other things, lead to further depletion of groundwater. As part of its investigation, the court emphasized that the government must respect the precautionary principle to protect the right to life, sustainability and human dignity of the communities surrounding the project sites. In addition, the court recognized the need to protect the rights of nature by stating that "the environment as such must be protected." Peaceful coexistence requires the law to treat natural phenomena as bearers of rights.

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7. Summary of International Experience

As you can see, there are some similarities in many examples of this phenomenon. In an area of great biodiversity, most of which is also inhabited by indigenous peoples, there is a kind of environmental degradation or ongoing damage of such magnitude that it not only threatens the livelihoods of the indigenous community, but also attracts the attention of the authorities. When these factors come together, specific rights for nature are enshrined in legislation. This codification solution can best be understood as a common denominator, because there is no evidence that what natural persons cannot achieve through the legal process to protect the natural environment, the institution of a conservationist can achieve more effectively. The conservationist is therefore an intermediary between nature, indigenous peoples, the authorities and the courts. This concept is usually a multipolar conflict, not only a conflict between economic and environmental interests, but also a conflict between indigenous peoples' beliefs in nature and much more. With the appearance of the phenomenon of rights to nature, different variants of these conflicts can be identified.

The example of New Zealand shows that the interests of the indigenous people are explicitly emphasized, while the environmental interests are less in the foreground. Nevertheless, the Te Urewera Act and the Te Awa Tupua Act have been adopted as the defining reform element of New Zealand's future environmental legislation, underlining that it takes a much more balanced approach to the relationship between nature and humans than has been the case in the past. In the case of Ecuadorian legislation, the proportions have also changed, but again, the balance of interests was evident.

Another interesting difference is the different level of legislation. While in Ecuador legislation is at the top of the legislative hierarchy, in New Zealand legislation is more of a preparatory piece of legislation for reform, while in the North American examples it is located at the local, regional level.

Another difference is how nature is treated in each example. Ecuador grants rights to nature in general in its constitution, so the territorial scope here corresponds to the country's borders. The other regulations focus on a specific form of nature, which is easier to manage and more transparent in terms of the impact and implementation of the legal provisions. However, there may also be questions about where the actual boundaries of a natural phenomenon lie, especially in the case of contiguous ecosystems.

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8. How Successful are These Lawsuits?

The legal personality granted to ecosystems has so far been mainly symbolic, and it remains unclear how successful these lawsuits can be in achieving adequate long-term protection of ecosystems. Again and again, questions are raised about possible outcomes: What exactly does the plaintiff want to achieve on behalf of the injured party? Does the plaintiff seek to compel a public authority to compensate for the damage suffered? Does the party want to force another party to pay damages? Who can be held liable for these damages? Can an appointed guardian/guardian/representative be held liable if a river overflows and causes damage? Who has a say in the fate of a transboundary river (*e.g.* in India, where the Ganges and Yamuna rivers extend beyond the border of Uttarakhand)? If a lawsuit claims that climate change is a threat, how much responsibility does the activity of a particular industry bear in this regard?

However, the increasing number of natural rights lawsuits could set a precedent for national and local governments to take action to protect biodiversity by opposing mining projects that could prove destructive to a particular ecosystem. The lawsuits also draw attention to the environmental justice issues faced by marginalized communities, particularly Indigenous communities that care for and manage these vital natural ecosystems and whose livelihoods and cultural and spiritual practices depend on natural formations.

The European Parliament's study[73] examined the rights of nature in comparison to the legal personality and position of natural persons before the courts. In particular, it highlights the need to strengthen the requirements for independent scientific assessments in certain authorization schemes of EU law. However, there are strong doubts that the concept of the RoN can find a place in European legal culture. There are two approaches connected to RoN. The first is finding a way to facilitate the communication between science and law and how to apply this knowledge basis in court, while still upholding the procedural autonomy of each Member State as well as the effective implementation of EU law on the environment across the Union. The second is the legal philosophical discussion about the origin of 'rights'. Closely related to this is how the courts determine the needs

73 Darpö 2021.

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of the environment and future generations from scientific and technical evidence presented before them by representatives for those interests.

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Questions Concerning the International Status of the Holy See

Árpád Margittay-Mészáros[*]

Abstract

The purpose of this study is to provide an overview of the international legal personality of the Holy See. The study examines the international legal position of the Holy See and seeks to answer the question: Is it necessary for the Holy See having in its possession any state in order to be able to exist as a sovereign subject of international law? In order to answer this question, the international legal situation arising from the dissolution of the States of the Church and the Papal States are discussed. The study examines the international treaty-making procedures of the Holy See, as well as the diplomatic relations of the Apostolic See, and some questions related to pontifical legates, both from the point of view of international law and canon law.

Keywords: Holy See, Pope, international legal personality, international treaties, pontifical legates

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1. Introduction

In 1870, the end of the Papal States caused a serious crisis in the Holy See's one and a half thousand year history. Furthermore, the loss of the Holy See's possessions and the cessation of the Pope's secular authority posed a significant challenge to the Holy See's ability to sustain its operations based on its own sovereignty. Although the Holy See's sovereignty does not necessitate any territory from an international legal standpoint, as in the case of states, from a practical standpoint, the guarantee of its sovereign operation is ensured by a territory that is in the possession of the Holy See and where the Holy See's sovereignty is enforced. This was primarily the reason why Pope Pius IX (1846–1878) and his successors remained in the Vatican

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following the termination of the Papal States. Since the internal legislation of the Kingdom of Italy provided certain guarantees for the continued functioning of the Holy See and the Pope based on their international legal status, it was not clear from the provisions of Italian Domestic Law that the person of the Pope was completely independent of the Kingdom of Italy. Despite the primary focus of international law on states, the Holy See was also acknowledged as a subject of international law. The international legal status of the Holy See became a matter of concern after the cessation of the Pope's secular authority. Initially, this primarily affected the safeguarding of the Holy See and the Pope's own sovereignty, which was the rationale behind the so-called Roman Question, which aimed at a partial restoration of the Pope's secular authority.

2. The International Legal Status of the Holy See After the End of the Papal States

The inviolability of the Pope's person was not disputed by the Kingdom of Italy either, since the Law of Guarantees approved by King Victor Emanuel II on 13 May 1871 said so.[1] At the same time, the law also recognized the right of the Pope to send and receive envoys,[2] which is to continue to maintain diplomatic relations between him [the Holy See] and other states. Therefore, it can be inferred that despite the abolition of the Papal States by the Italians, the Pope and the Holy See as a subject of international law were still acknowledged in numerous ways. One of the most compelling evidences of this is the so-called Law of Guarantees itself.

It is absolutely necessary to emphasize that Article CIII of the General Treaty of the Congress of Vienna, dated 9 June 1815,[3] placed the majority of the territories that had made up before the States of the Church in the possession of the Holy See as a subject of international law. Therefore, all the States Parties to the treaty considered the Holy See as a subject of international law. Furthermore, Cardinal Ercole Consalvi, the Secretary of

1 N° 214. Legge sulle prerogative del Sommo Pontefice e della Santa Sede, e sulle relazioni dello Stato con la Chiesa, 13 maggio 1871, Article 1.

2 Id. Article 11.

3 General Treaty, signed in Congress, at Vienna, 9 June 1815, *in The Parliamentary Debates. Comprising the period from the First Day of February to the Sixth Day of March 1816*, London, 1816, T. C. Hansard, pp. 72–113.

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State of the Holy See was invited to the Congress as a representative of Pope Pius VII (1800–1823),[4] but it is a completely different matter that the Holy See did not become a party to the international treaty. Regardless of the fact that the Holy See did not become a party to the treaty, Secretary of State Cardinal Consalvi had conducted continuous negotiations with the Great Powers on the issues concerning the Holy See even before and during the Congress of Vienna. After the end of the States of the Church, a similar situation had existed as it did in 1870, when the Papal States ended. In both cases, the Holy See was able to survive as a subject of international law.

Prior to the Congress of Vienna, Cardinal Consalvi's task had been to represent the Pope and the Holy See in diplomatic negotiations to reclaim the Holy See's possessions and rights. The Secretary of State of the Holy See confirmed this to the Great Powers in his detailed list of reasons included in his memorandum, dated 23 June 1814.[5] By definition, Pope Pius VII did not advocate for the restoration of the States of the Church as an international legal entity. Moreover, this point is also emphasized in the memorandum of Secretary of State Cardinal Consalvi, wherein His Holiness requests the Holy See to return his personal possessions. This is due to Pope Pius VII's responsibility as the Custodian of the Patrimony of Saint Peter, and therefore he is obligated to safeguard what he had sworn to protect.[6] During this period, it became increasingly evident that, in the international legal relations of the time, the international legal status of the Pope and Holy See existed without interruption, regardless of the existence and temporary termination of the States of the Church. It should be mentioned in advance that a situation similar to the Treaty of Vienna existed in the case of the Lateran Pacts signed on 11 February 1929, since the so-called political treaty explicitly confirms the previously existing sovereignty of the Holy See as an international legal entity. In this particular instance, however, the Kingdom of Italy concluded all three treaties with the Holy See as a subject of international law, and the Kingdom of Italy acknowledged the exclusive sovereignty of the Holy See over the Vatican City State.

4 Tamás Füssy OSB, *VII. Pius pápasága. II. rész,* Szent István Társulat, Budapest, 1876, p. 351.
5 Id. pp. 315–324.
6 Id. p. 321.

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3. The Maintenance of Diplomatic Relations

Regarding the status and international legal entity of the Holy See, it is imperative to emphasize that the legal entity of the Holy See existed concurrently with the Papal States, and the two legal entities had partially distinct governmental organizational systems. Furthermore, from the point of view of the previously mentioned provision of the Law of Guarantees, according to which the Pope recognized his right to receive and send envoys, it only means the recognition of the continued exercise of this pre-existing right, since the Papal States had never maintained diplomatic relations with any other state. The establishment of diplomatic relations and the upkeep of the diplomatic organizational system have always been exclusively within the purview of the Pope and Holy See. The first statement can also be said regarding the international treaties of the Holy See, since, for example, only the Holy See had always concluded concordats and other treaties with the states, so if the Holy See had not been subject to international law, it would not have been able to conclude international treaties.

It should be emphasized that after the termination of the Papal States, the diplomatic representatives previously accredited to the Pope and the Papal envoys sent to individual states, as a general rule, continued to effectively remain in office. However, all of this occurred due to the rules of international law, and not due to the generous provision of the Law of Guarantees of the Kingdom of Italy that recognized the Pope's right to send and receive envoys. Furthermore, it is noteworthy that subsequent to the annexation in 1870, the Holy See established diplomatic relations with an increasing number of states, rendering it difficult to comprehend that the newly established diplomatic relations were between those states and a non-international legal entity. Since the establishment of diplomatic relations in international law implies state recognition, this necessarily applies to the definitive recognition of the Holy See as a subject of international law, which is final and irrevocable. It is also important to mention that the problem arose in the 20th century, when scholarly literature began to proliferate, sometimes denying or questioning the Holy See as a subject of international law, and sometimes presenting its international legal personality in an abstract manner. Although the Holy See's role in international relations and its international legal status were not the subject of debate during the previous millennium and a half, there have been no changes in international law that would affect this until today.

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4. The International Treaties

It should also be noted that, despite the termination of the Papal States, the international treaties concluded by the Holy See remained in force. Nonetheless, the circumstance pertaining to international agreements is significantly more intricate than that of diplomatic relations. It is important to emphasize that the Holy See, as an international legal entity, must be considered to have legal continuity, which is unbroken both before the existence of the Papal States and after its termination. Before the end of the Papal States, there was also an international treaty concluded by the Pope, but it clearly contained provisions relating to the Papal States. At first glance, one might assume that such an international treaty concerning the Papal States was concluded by the Pope as the sovereign of the state. However, from an international legal perspective, the question is far from simple.

On 12 February 1850, the Pope acceded to the international agreement regarding the free navigation of the Po River, which had been concluded in Milan by Austria, Modena, and Parma on 3 July 1849,[7] and formally acknowledged by the accession document signed in the city of Portici.[8] As per the title of the accession document, the Pope personally joined the international treaty that had previously been concluded by three states. Nonetheless, the preamble of the accession document specifically mentions the consent of the Papal Government [which, in this instance, clearly refers to the Government of the Papal States] using the phrase "obtain the assent of the Pontifical Government". Furthermore, although the original treaty had been concluded by the three states mentioned above, it is already stated in the preamble of the treaty that the Austrian Emperor reserved the right of the Papal States to himself. Moreover, the treaty contained an explicit provision that specifically affected the Domestic Law of the Papal States. It was agreed that ships coming from any sea would be subject to the

7 Trattato tra i Governi d'Austria, di Modena, e di Parma, sulla Libera Navigazione del Fiume Po, *in* Lewis Hertslet (ed.), *A Complete Collection of the Treaties and Conventions, and Reciprocal Regulations, at Present Subsisting Between Great Britain and Foreign Powers, and of the Laws, Decrees, and Orders in Council concerning the same; so far as They Relate to Commerce and Navigation, Slave Trade, Post-Office Communications, Copyright, etc.; and The Privileges and Interests of The Subjects of The High Contracting Parties. Vol. IX*, Butterworths, London, 1856, pp. 924–929.

8 Atto d'Accessione di Sua Santità Pontificia al Trattato conchiuso il 3 Luglio, 1849, fra i Governi dell'Austria, di Modena e di Parma, risguardante la libera Navigazione sul Fiume Po, id. pp. 929–930.

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sanitary regulations prescribed in the Austrian or Papal ports at the mouth of the river, and that such ships should not proceed on their way until the requirements of these sanitary regulations are met. It should be noted that the treaty did not originally include any other rights or obligations towards the Papal States.

In the accession document, the first paragraph following the text of the international treaty mentions the subjects of His Holiness, but clearly in the sense of the citizens of the Papal States. Simultaneously, despite the fact that the initial Signatory States of the international treaty, and both the treaty and the accession document explicitly refer the entire international treaty to the Papal States, it cannot be definitively stated that the Papal States itself would have been State Party. In other words, with the accession, the Pope personally himself became a party to the international treaty concluded by the three State Parties. Moreover, this assertion is substantiated by the precise title of the accession document, which is stated as follows:

> "Act of Accession of His Holiness the Pope to the Treaty of July 3, 1849, between the Governments of Austria, Modena, and Parma, relative to the free Navigation of the River Po."[9]

Considering that during this period the sovereigns did not become party of an international treaty, only the states under their rule, it is completely impossible that in the case of this accession document the Pope would have appeared as the monarch of the Papal States, since this fact was not indicated in the accession document. In this case, the Pope represents the Holy See itself, which appears as the subject of international law and in the sense that it exercises exclusive sovereignty over the Papal States, also as a subject of international law. By the way, this also follows from the text of the accession document itself, according to which the Pope provided Cardinal Giacomo Antonelli, Pro-Secretary of State of the Holy See, with full authorization.

During this period, the Papal States already had a distinct government from the Holy See, however, the official position of the Government's President was always held by the Secretary of State of the Holy See. Therefore, this fact alone could even mean that the Papal States actually became party to the international treaty. However, a completely different outline emerges from the text of the accession document. Cardinal Giacomo Antonelli,

9 Id. p. 935.

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Pro-Secretary of State of the Holy See, signed the accession document with the clause "saving always the right of the Holy See, which have already been before reserved".[10] It follows that, regardless of how much the Papal States are affected by the international treaty in respect of which the document of accession was signed, the Holy See appears as the primary subject of international law in the international treaty-making process. In 1860, the Legation of Romagna, which was territorially affected by the Po River and was part of the Papal States, furthermore Modena and Parma as well, became part of the Kingdom of Sardinia-Piedmont, which in 1861 became the Kingdom of Italy. Finally, in 1866, the province of Austria, the Kingdom of Lombardy-Venetia, became part of the Kingdom of Italy, and the international treaty was terminated. Since the creation of the Vatican City State, this treaty-making question has become much simpler in practice. As the Holy See also enters into international treaties on behalf of the State, however, in the event that only the State becomes a party to the agreement, it is evident that the Holy See is acting on behalf of the State and not the Holy See itself. Exceptions are made in cases where the Holy See itself is also a contracting party in parallel with the State.

As it was mentioned before, if the international legal personality of the Holy See had not existed, it would have been unable to maintain diplomatic relations and it would not have been able to conclude international treaties. A particularly excellent example of this is the Spanish Concordat dated at Madrid, 16 March 1851,[11] and the additional agreement dated at Rome, 25 August 1859,[12] which were concluded by the Holy See and were in force regardless of the existence or termination of the Papal States. As an example, we can also mention the Agreement between the Swiss Federal Council and the Holy See dated at Lucerne, 23 October 1869, on the integration of the villages of Poschiavo and Brusio in Graubünden into the Diocese of Chur,[13]

10 Id. p. 936.

11 Concordat concluded between His Holiness and Her Catholic Majesty, signed at Madrid on 16 March 1851, UNTS, Vol. 1221, No. 827.

12 Convenio adicional firmado en Roma el 25 de agosto de 1859, at https://laicismo.org/concordato-de-1851-entre-isabel-ii-y-pio-ix/184118.

13 'Übereinkunft zwischen dem Schweizerischen Bundesrate und dem Heiligen Stuhle betreffend die Einverleibung der bündnerischen Gemeinden Poschiavo und Brusio in das Bistum Chur', *Schweizerische Eidgenossenschaft. Fedlex. Die Publikationsplattform des Bundesrechts*, SR-Nummer: 0.181.1, at www.fedlex.admin.ch/filestore/fedlex.data.admin.ch/eli/cc/X/289_259_289/18700829/de/pdf-a/fedlex-data-admin-ch-eli-cc-X-289_259_289-18700829-de-pdf-a-1.pdf.

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for which the previous statement is also true. Even after the end of the Papal States, the Holy See continued to conclude international treaties, such as the two Conventions between the Swiss Federal Council and the Holy See on Church Relations, dated at Bern, 1 September 1884,[14] the Concordat with the Kingdom of Portugal, dated at Rome, 23 June 1886,[15] or the Concordat with the Republic of Colombia, dated at Rome, 31 December 1887.[16]

It is also necessary to emphasize that the so-called *Codex Pii-Benedicti*, the first uniform law book summarizing the rules of canon law (the codification work of which took place between 1904 and 1917) contained provisions on international treaties affecting the Holy See. The *Codex Iuris Canonici*[17] states that the canons of the *Codex* do not invalidate the agreements made by the Holy See with various nations and do not affect them. Therefore, despite the contrary provisions of this Code, they remain in effect in their present form.[18] It is evident that the Legislator essentially subordinates the Ecclesiastical Law to the international treaties, as he declares their continuance in force and their inviolability even in the event of explicitly contradictory provisions of canon law, as if giving priority to the international treaties. By the way, both the current effective Latin and Eastern Codes adopted the 1917 regulation with so many additions that it applies the regulation to contracts concluded not only with individual states, but also with other political organizations (*e.g.* international organizations).

5. The Pope and the Holy See

The person of the Pope should not be interpreted as the sovereign of a state, both from the standpoint of canon law and international law. In this case, the traditionally used titles *Pontifex Pontificium* and *Pontifex Maximus* are not the starting point. It is important to note that, from an international

14 'Uebereinkommen zwischen dem schweizerischen Bundesrathe und dem heiligen Stuhl, betreffend kirchliche Verhältnisse', *Schweizerisches Bundesblatt*, Vol. 3, Issue 43, 1884, pp. 657–662.

15 'Publicum de re sacra Conventum die 23 Iunii anno 1886 a S. Sede et Lusitaniae Rege initum', *Acta Sanctae Sedis*, Vol. 19, 1886, pp. 185–189.

16 'Pacta conventa inter S. Sedem et Rempublicam Columbiae', *Acta Sanctae Sedis*, Vol. 21, 1888, pp. 7–12.

17 'Codex Iuris Canoninci', *Acta Apostolicae Sedis*, Vol. 9, Pars II, 1917, pp. 11–456.

18 Id. Canon 3. *Cf.* 1983 CIC, Canon 3 and CCEO, Canon 4.

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legal point of view, the status of the Pope as a person is much more complicated than the position of sovereigns in the Middle Ages. It is first and foremost canonically necessary to define the person of the Pope and the Holy See itself in order to be able to determine the international legal status of the Holy See, but also of the Pope. It was noted before that the *Codex Pii-Benedicti,* promulgated in 1917, codified the canon law that had been in effect before, so the provisions governing Papal authority must be considered retroactively valid for previous centuries, not just after the Code came into force. The Code of Canon Law states that the Pope of Rome has supreme and complete jurisdiction over the Entire Church.[19] The legally elected Pope of Rome acquires the full power of supreme jurisdiction by divine right immediately after accepting the election.[20]

By the way, it is worth noting that on 18 July 1870, the issue of Papal primacy was declared as dogma by the Constitution *Pastor aeternus* of the First Vatican Council[21] a few weeks before the final end of the Papal States. But the issue of primacy and universal jurisdiction of the Bishop of Rome had been raised long before the creation of the States of the Church. The Papal primacy appeared in the early centuries, for example, in the letters of Pope Leo I (440–461) and Pope Saint Gregory I (590–604).[22] The codification of Eastern Canon Law commenced in 1929, although it was not published as a uniform code. However, between 1949 and 1957, Pope Pius XII (1939–1958) promulgated Eastern Law with several Motu Proprios, most recently on 2 June 1957, the Laws on Rites and Persons.[23] Canon 162 and Canon 163 of the Motu Proprio *Cleri sanctitati*[24] contained identical provisions regarding the power and jurisdiction of the Roman Pontiff as the provisions of the Latin law, specifically the Pio-Benedictine Code discussed above. The current [Latin] Code of Canon Law[25] states that the Bishop, specifically the Bishop of Rome, is the Vicar of Christ and the Shepherd of the Entire Church on this Earth. Therefore, as a result of his office,

19 Id. Canon 218, para. 1.
20 Id. Canon 219.
21 'Constitutio dogmatica Pastor aeternus', *Acta Apostolicae Sedis. Ex Actis Oecumenici Concilii Vaticani*, Vol. 6, 1870, pp. 40–51.
22 Szabolcs Anzelm Szuromi O.Praem., *Szempontok a Katolikus Egyház jogrendjének működéséhez,* Szent István Társulat, Budapest, 2010, p. 20.
23 Péter Erdő, *Az egyházjog forrásai,* Szent István Társulat, Budapest, 1998, pp. 249–250.
24 'Litterae Apostolicae Motu Proprio Cleri sanctitati', *Acta Apostolicae Sedis. Acta Pii PP. XII.*, Vol. 49, Issue 9, 1957, pp. 433–603.
25 'Codex Iuris Canoninci', *Acta Apostolicae Sedis*, Vol. 75, Pars II, 1983, pp. 1–301.

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he possesses the supreme, complete, direct, and universal ordinary power within the Church, which he freely exercises.[26]

It should be noted that the current Eastern Law follows the same rules as Latin Law, so the Code of Canons of the Eastern Churches[27] contains a similar provision.[28] The Pope is the head of the body of bishops, the body of bishops is the bearer of the supreme and complete power over the whole Church, and the body of bishops exists only together with its head, never without him.[29] In a theological sense, however, the Papal office is not only of episcopal origin, but also includes primacy due to the succession of the See of Peter. The body of bishops, as the exerciser of the supreme and complete power over the Church, does not exist without the Pope.[30] The 'unlimited' power of the Pope is further specified in the law, according to which, by virtue of his office, he not only has power over the whole Church, but also has supreme ordinary power over all particular churches and their communities.[31] However, he has the right to determine, in accordance with the needs of the Church, the personal or corporate manner in which he exercises this task.[32] There is no appeal against his judgment or decision.[33] In essence, the above provisions emphasize the complete and unlimited legislative, governmental and judicial power of the Pope, despite the fact that he can exercise his power both directly and indirectly.

In the context of international law and canon law, it is appropriate to compare the canons described above with the provision of the *Codex Pii-Benedicti*, which states *expressis verbis* that the name Apostolic See or Holy See in the *Codex* does not mean only the person of the Roman Pope, but – unless due to the nature of the case or the context of the text nothing else follows – also the congregations, the tribunals, the offices through which the Roman Pontiff administers the affairs of the Universal Church.[34] The currently effective Latin Code has a similar provision, with the exception

26 Id. Canon 331.
27 'Codex Canonum Ecclesiarum Orientalium', *Acta Apostolicae Sedis*, Vol. 82, Issue 11, 1990, pp. 1061–1363.
28 Id. Canon 43.
29 1983 CIC, Canon 336. *Cf.* CCEO, Canon 49.
30 Péter Erdő, *Hivatalok és közfunkciók az Egyházban,* Szent István Társulat, Budapest, 2003, p. 97.
31 1983 CIC, Canon 333, Section 1. *Cf.* CCEO, Canon 45, Section 1.
32 Id. Section 2. *Cf.* CCEO, Canon 45, Section 2.
33 Id. Section 3. *Cf.* CCEO, Canon 45, Section 3.
34 1917 CIC, Canon 7.

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that the name Apostolic See or Holy See in the present Code does not only denote the Pope of Rome, but – unless the contrary is apparent from the nature of the matter or the context of the text – the Secretariat of State, the Council for the Public Affairs of the Church and other institutions of the Roman Curia.[35] The Code of Canons of the Eastern Churches contains similar provisions in parallel, but it solely mentions the Dicasteries and other bodies of the Roman Curia more generally.[36] From this the conclusion can be drawn that, traditionally, both Latin and Eastern Law basically start from the fact that, in a legal sense, the person of the Pope is basically the same as the Holy See or the Apostolic See itself. However, apart from the exception rules in the Latin and Eastern Codes, the Holy See and the Apostolic See should be understood by extension to include both the person of the Pope and the Dicasteries of the Roman Curia.

The task of the Roman Curia is clearly defined by the law, according to which the Pope used to manage the affairs of the Universal Church with its help, and which performs its task in his name and with his authority for the benefit and service of the particular churches. It is composed of the Papal or State Secretariat, the Council for the Public Affairs of the Church, Congregations, tribunals, and other institutions.[37] In this case, the canonical provisions also have international legal significance, since if the Holy See is interpreted narrowly, then it means only the person of the Pope, if it is extended, then the person of the Pope is understood jointly with the Dicasteries of the Roman Curia. Here, it is necessary to note that many previous international legal documents do not even use the designation Holy See, but only the Pope is mentioned in them, such as in the Regulation concerning the precedence of Diplomatic Agents of the Congress of Vienna.

The culmination of Papal influence in international relations occurred during the Middle Ages. From the time of the Carolingians onwards, rulers considered themselves almost equal to the Pope. In the year 1075, Pope Gregory VII (1073–1085) published his twenty-seven points tenets on Papal supremacy and primacy known as *Dictatus papae*, wherein he extended the powers of the Pope to the point where he could depose monarchs. During the debate between Emperor Henry IV and the Pope regarding the fundamental principles of *Dictatus Papae*, the Pope emerged victorious. The successors of Pope Gregory VII also consistently maintained the position

35 1983 CIC, Canon 361.
36 CCEO, Canon 48.
37 1983 CIC, Canon 360.

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regarding the powers of the Pope.[38] Among the international treaties of the Holy See, the first concordat was the Concordat of Worms concluded on 23 September 1122, between Pope Callixtus II (1119–1124) and Holy Roman Emperor Henry V, which concluded the investiture war in the Middle Ages. Upon the conclusion of the treaty, the Emperor renounced the investiture of the ring and crosier on behalf of himself and his successors, but retained the investiture of the scepter, however, he lost the right to appoint the Imperial Bishop, as well as all his privileges in the Roman territory. His rights related to the investiture in the Imperial Possessions were also limited.[39] The Papal authority rose to the top of the fiefdom hierarchy, thereby being acknowledged as superior to the secular powers. This was not a matter of debate later on. The Pope also determined the order of the rulers, thus establishing himself as the most decisive leader in international relations.[40]

At the same time, in addition to the return of the former territories of the Papal States to the possession of the Holy See, the Regulation concerning the precedence of Diplomatic Agents dated 19 March 1815, incorporated into the Final Act of the Congress of Vienna dated 9 June 1815 under number XVII, cannot be ignored.[41] Although the Regulations stated that the diplomatic representatives should be ranked according to the date of the official notification of their arrival within their own class, the treaty also stipulated that the previous provision could not result in any modifications regarding the respect of the representatives of the Pope.[42] Essentially, the nuncio sent by the Pope was automatically recognized as the Dean of the Diplomatic Corp of the receiving state.[43] Furthermore, the Regulations of the Congress of Vienna classified ambassadors, Papal legates and nuncios as equals in Class I of the diplomatic hierarchy.[44] Therefore, internation-

38 Szabolcs Anzelm Szuromi, *Egyházi intézménytörténet,* Szent István Társulat, Budapest, 2003, pp. 99–100.

39 Szabolcs Anzelm Szuromi, *Medieval Canon Law. Sources and Theory,* Szent István Társulat, Budapest, 2009, pp. 181–182.

40 Katalin Siska & Sándor Szemesi, *A nemzetközi jog története,* Debreceni Egyetem Kossuth Egyetemi Kiadója, Debrecen, 2006, pp. 15–17.

41 Act No. XVII. Regulation concerning the precedence of Diplomatic Agents, *in Translation of the General Treaty, signed in Congress, at Vienna, June 9, 1815; with the Acts Thereunto Annexed,* R. G. Clarke, London, 1816, p. 147.

42 Id. Article IV.

43 Marek Šmid, *Mission. Apostolic Nuncio in Prague*, Karolinum Press, Prague, 2020, p. 17.

44 Regulation concerning the precedence of Diplomatic Agents, Article I.

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al law in diplomatic relations still ensured the privileges of nuncios and legates, who were all diplomatic representatives of the Pope.

6. The Papal Legates

There are data available regarding the institution of Papal diplomatic representatives, namely the legates, dating back to the 4th century.[45] Between the 5th and 13th centuries, the Pope accredited a completely unique, non-permanent representative as a legate, who was called *apocrisarius* or *responsalis*. It is quite certain that Pope Saint Leo the Great I (440–461) sent an *apocrisarius* to the Imperial Court in Constantinople,[46] but for example Pope Saint Gregory the Great I (590–604) was himself an *apocrisarius* in the Imperial Court in Constantinople before his pontificate, as the emissary of his immediate predecessor, Pope Pelagius II (579–590).[47] Over the centuries, the Pope regularly sent legates who represented him with full authority, but their mandate was not permanent, but *ad hoc*. The precise designation of the legate in this instance is *legatus missus,* and in the event that the emissary was a cardinal, then the title *legatus a latere* was used as a distinction.[48] Despite the fact that since the beginning of the 16th century, the Holy See has established permanent diplomatic representations under the leadership of a nuncio as a legate and, in certain instances, an internuncio or pronuncio as the head of the permanent diplomatic representation of the Holy See, the institution of the *legatus a latere*, a legate from the side of the Pope, has endured to the present day and possesses actual authority. In each case, his mandate is based on a unique measure of the Pope, which is for a specific event or time, and such a mandate is given to one of the cardinals.

Nonetheless, *legatus* in its narrow sense encompasses not solely *legatus a latere*, but also *legatus natus*, which emerged at the commencement of the second millennium. In accordance with the actual meaning of the term, the *legatus natus* is a born legate of the Holy See, who was legally associated with specific bishoprics. The *legatus natus* title was conferred upon the appointment to the given bishopric, and cannot be obtained separately.

45 Szuromi 2003, p. 192.
46 Szuromi 2009, p. 183.
47 Mihály Medvigy, *Pápa életpályák,* Panoráma, Budapest, 1991, p. 13.
48 István Késmárky, *Az esztergomi érseknek mint Magyarország prímásának jogai és kiváltságai,* Franklin Társulat, Budapest, 1896, p. 55.

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Although it is uncommon, it has endured to this day. This is similar to the title of primates, which are also attached to some episcopal sees. By the way, the Archbishoprics of Esztergom and Salzburg are the best examples of this. The *legatus natus* title was attached to both metropolitan sees, just like the primate title. It should be emphasized that the primate and *legatus natus* titles are inherently completely independent of each other. Considering that, in international law, the maintenance of the Holy See's diplomatic relations had nothing to do with the termination of the Papal States, Papal legates are discussed in Chapter V of the unified *Codex Iuris Canonici* of 1917. The *Codex Iuris Canonici* of 1983, which is currently in force, also regulates in Chapter V the pontifical legates. Although the Code of 1917 is not in force, its rules for legates include not only certain types of Papal legates known before its entry into force, but also currently known, which are not named at all in the currently effective Code.

Above all, the Pio-Benedictine Code clearly reflects the functions of the Papal legates, both secular and ecclesiastical. The Code declared that the Pope had exclusive authority to send legates to any part of the world, regardless of any secular power, with or without ecclesiastical jurisdiction.[49] It is imperative to emphasize that the aforementioned canon does not solely pertain to situations where the Holy See, as a sovereign legal entity of international law, maintains effective bilateral diplomatic relations with a state. Rather, it holds universal validity, so the Pope's authority to dispatch legates is universal and feasible even without diplomatic relations. This principle is exemplified in practice in the appointment of a legate, namely the *legatus a latere* and the apostolic delegate, namely the *delegati apostolici*.

Otherwise, the provisions of the Code will sequentially follow the historical development of each type of legate. Foremost, the law states that, in relation to the *legatus a latere*, a cardinal can receive this appointment, and his authority is limited to what the Pope entrusts him with.[50] The present law no longer regulates this separately, however, this situation persists in practice. In the case of the *legatus natus*, the office no longer comes with actual powers. Special rights of this pontifical legate attached to certain privileged episcopal sees were abolished by the Code, but not the title itself.[51] The Archbishopric of Esztergom was in a privileged position. Archbishop János Kanizsai received the appointment of Primate of Hungary and

49 1917 CIC, Canon 265.
50 Id. Canon 266.
51 Id. Canon 270.

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legatus natus from Pope Boniface IX (1389–1404) with a Bull dated 24 April 1394, which only applied to his person and Ecclesiastical Province. Then, on 17 March 1395, the Pope extended these two titles to the Archbishop's successors for the territory of the Metropolitan Archdiocese of Esztergom, while for the person of Archbishop Kanizsai alone, the Pope extended the rights to the other Hungarian Ecclesiastical Province, the Metropolitan Archdiocese of Kalocsa.[52] At the request of King László V of Hungary, during the archbishopric of Cardinal Dénes Széchy, Pope Nicholas V (1447–1455) permanently attached the title of *legatus natus* to the Hungarian Primatial See in 1452.[53] Since then, the Metropolitan Archbishops of Esztergom have been bearing the title *legatus natus* not as Archbishops, but as Primates of Hungary. However, it should be noted that the Archbishop of Esztergom, as *legatus natus*, is entitled to wear the purple even without the cardinal appointment, and every Archbishop of Esztergom has maintained and exercised this right to this day.[54] A similar situation exists in the case of the Archbishop of Salzburg. But it must be emphasized that this does not conflict with the provision of the Code, since the law abolished only the actual powers of the *legatus natus* as a pontifical legate.

The current effective *Codex Iuris Canonici*, in accordance with historical traditions, elucidates much more clearly that sending legates is not solely a sovereign right of the Pope, but also an inherent right. The current law also details the cases in which the Pope has the right to send legates. According to this, legates can be appointed, as well as transferred and recalled, to any particular churches in any country or region of the world, states or public authorities.[55] However, the law also declares that the delegates and observers of pontifical missions at international councils and conferences also represent the Apostolic See.[56] According to the applicable Code, only with regard to envoys sent to states shall the rules of international law be observed in the case of the appointment and recall of these legates.[57]

52 Norbert C. Tóth, *Az esztergomi székeskáptalan a 15. században. III. rész. Az ún. 1397. évi esztergomi székeskáptalani egyházlátogatási jegyzőkönyv,* MTA Magyar Medievisztikai Kutatócsoport, Budapest, 2021, p. 32.

53 Késmárky 1896, pp. 56–57.

54 Margit Beke, 'Egy egyházi címer születése. Megfontolások egy bíboros-prímási címer kapcsán' [in English: The birth of a church coat of arms. Reflections on a cardinal-primate coat of arms], *Magyar Sion,* Vol. 7 / 49, Issue 2, 2013, pp. 217–231.

55 1983 CIC, Canon 363, Section 1.

56 Id. Section 2.

57 Id. Canon 362.

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Regarding the envoys sent to the states, the Pio-Benedictine Code did not explicitly stipulate that the rules of international law has to be observed, but it is important to emphasize that the Holy See always acted accordingly. The previous Code, on the other hand, designated the nuncio and internuncio as envoys sent to states. Their mandate is to foster relations between secular governments and the Apostolic See, where a permanent diplomatic representation operates. They are also responsible for monitoring the status of local churches and are obligated to inform the Pope about it. Additionally, they are responsible for all other delegated powers in addition to the aforementioned two ordinary powers.[58] It is evident that, compared to the usual practice in international law, the powers and obligations of the heads of permanent diplomatic representations of the Holy See were already much broader compared to the heads of diplomatic representations of the states.

By the way, it should be noted that Ferdinand II, the King of Aragon, sent the first envoy to Pope Sixtus IV (1471–1484) in the person of Gonzalo de Beteta in 1480.[59] The first permanent diplomatic representation of the Holy See was established during the reign of Pope Alexander VI (1492–1503). The first apostolic nunciatures of the Holy See were opened in 1501 in Paris and Venice, followed by 1513 in Vienna.[60] As was previously discussed, the Regulations concerning the precedence of Diplomatic Agents of the Congress of Vienna 1815 named Papal legates and nuncios as first-class diplomatic representatives, while the internuncio was not mentioned among the second-class representatives. However, the institution of the internuncio had already appeared earlier.[61] In the 19th century, the number of internuncios as second-class permanent heads of diplomatic representations increased. Therefore, it is no coincidence that the 1917 *Codex Pii-Benedicti* mentions among the pontifical legates the internuncio in addition to the nuncio as the Pope's diplomatic representative sent to the states. The institution

58 1917 CIC, Canon 267, para. 1.

59 Roger Boase, 'María de Velasco (c. 1467–1549), Pinar's Juego trobado, the Carajicomedia, and the mystery of King Fernando's death', *eHumanista*, Vol. 37, 2017, pp. 512–527.

60 Lecture by Archbishop Jean-Louis Tauran on the theme "The Presence of the Holy See in the International Organizations", Catholic University of the Sacred Heart, Milan, Monday, 22 April 2002, The Holy See, Roman Curia, Secretariat of State, at www.vatican.va/roman_curia/secretariat_state/documents/rc_seg-st_doc_20020422_tauran_en.html.

61 G. H. Bolsover, 'The Meaning and History of the Term 'Internuncio", *Bulletin of the Institute of Historical Research*, Vol. 12, Issue 36, 1935, pp. 145–151.

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of the internuncio was also recognized by customary international law, which is proved better by the fact that it was already included in the 1961 Vienna Convention on Diplomatic Relations as an institution previously recognized by customary international law.

It is necessary to note that during the 20th century, the Holy See did not accredit as nuncios, but as pronuncios the permanent heads of diplomatic missions until 1990 in those countries that were unwilling to recognize the Pope's legate as the Dean of the Diplomatic Corp. The Holy See has abandoned this practice, as well as the appointment of internuncios. Therefore, the Holy See only accredits a nuncio to each state with which it maintains diplomatic relations. Furthermore, it is essential to mention that the powers and obligations of the Papal legates were further expanded by the current *Codex Iuris Canonici*. The law, however, defines powers and obligations that affect all Papal legates, and there are other special powers and obligations that, in addition to the above, only apply to those legates who are accredited to the states under the rules of international law.

In a certain sense, the Papal envoys hold the privileged position of remaining in office and fulfilling their duties in the event that the *Sede Vacante* commences with the death or resignation of the Pope, unlike the majority of the heads of the Dicasteries of the Roman Curia. The exception is when the Papal credential provides differently.[62] Regarding the general powers, which apply to all legates, the main task of the Papal legate is to strengthen the bond and make it more efficient between the Apostolic See and the particular churches. In this context, the legate shall inform the Holy See about the circumstances of the particular churches in his area of competence. He must provide assistance to the local bishops without causing any offense in the legitimate exercising of their authority. Furthermore, he must maintain a close relationship with the local Episcopal Conference. He must forward to the Apostolic See the names of the local bishop candidates, and may make a proposal for the appointment. He shall also carry out the information procedure on the persons of the candidates. It is also charged with supporting causes that promote peace, development, and cooperation among peoples. He collaborates together with the bishops to promote the relationship between the Catholic Church and other denominations, as well as non-Christian religions. Together with the bishops, the legate has to protect those things which pertain to the mission of the Church and the

62 1983 CIC, Canon 367. *Cf.* 1917 CIC, Canon 268, para. 1.

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Apostolic See before the leaders of the state. He also executes all the duties assigned to him by the Holy See.[63] The additional exclusive obligation of pontifical legates accredited to states under the rules of international law is to promote relations between state authorities and the Apostolic See, to discuss issues affecting the relationship between the state and the Church, as well as the preparation and implementation of concordats and other agreements.[64] During the exercise of the latter two powers, the pontifical legate is obliged to obtain the opinion of the local bishops in advance on all matters, and afterwards to inform them of the state of affairs.[65] It is also necessary to mention that, with the exception of marriages, the seat of the pontifical legation is excluded from the power of governance of the local ordinary, so in addition to the immunity provided by international law, apostolic nunciatures also enjoy a privilege similar to international law from the point of view of canon law and church governance.

7. Conclusions

In the Middle Ages, the issue of Papal primacy gradually developed, which was closely related to the role of the Holy See in international relations. Although the territorial extent of the States of the Church was gradually increasing over the centuries, the importance of the Pope's international position did not stem from his quality as a secular ruler. The Pope and the Holy See have developed a specific diplomatic organizational system over the centuries, which has been preserved in both canon law and international law to this day. For more than a millennium, it was not of particular importance from an international legal point of view to demarcate the special position of the Holy See, since the Pope was both a secular and non-secular ruler. The special international legal position of the Holy See was first demonstrated in the case of the Congress of Vienna in 1815, when the international treaty signed by the great powers returned most of the territories of the former States of the Church to the possession of the Holy See as an international legal entity. After the termination of the Papal States in 1870, the lack of secular territory did not affect the international legal position of the Holy See. From an international legal point of view, it caused

63 Id. Canon 364, paras. 1–8.
64 Id. Canon 365, Section 1, paras. 1–2.
65 Id. Section 2.

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a much more practical problem in terms of ensuring the actual sovereignty of the Holy See and the free exercise of Papal authority. In fact, the so-called Roman question solved this problem with the Lateran Pact. At the same time, the question of the international legal personality of the Holy See also raised many scientific problems during the 20th century. However, the Holy See's international treaty-making procedures and its diplomatic relations with states over the long centuries unfailingly prove the Holy See's international legal position, which is completely independent of whether a state falls under its sovereignty or not.

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Greenlights in Good Administration

Péter Váczi[*]

Abstract

There can be little doubt that one of the essential objectives of administrative law is to achieve good administration, that is, to ensure that public authorities act effectively and reliably in the public interest. In their proceedings, they must listen to the people concerned, take their views into account and act fairly, transparently and impartially, always bearing in mind the interests of the community and, at the same time, the rights of the individual. However, the way in which this principle is implemented can itself give rise to disagreement. Should the courts play a primary (or even exclusive) role in ensuring good administrative behavior, or is this better done by other means? Is it appropriate to draw from other areas of law or does the specific nature of administrative law preclude this? This paper examines two classic theories of public administration, the green light and the red light, in an attempt to synthesise the two approaches. It does so primarily from a constitutional administrative procedural perspective.

Keywords: good administration, greenlights, redlights, judicial review, procedural principles

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1. Introduction: The Lights in the Light of Good Administration

Typically, it is a subject on which most legal scholars can easily agree, if only they can agree on what they want from administrative law.[1] It cannot be emphasized enough that in European legal literature the term good administration is used mainly in the procedural sense and thus good

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1 Carol Harlow, 'Global administrative law: the quest for principles and values', *European Journal of International Law*, Vol. 17, Issue 1, 2006, p. 193.

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administration is understood as the requirement of good administrative procedure, and in this study, I will use the term in this sense throughout. Good administration is thus understood to be a set of administrative principles which set out certain requirements in relation to procedural law rather than substantive law, and which ensure not only that the executive acts in accordance with the law, but also that it acts predictably, efficiently and fairly.[2] In addition, the public authorities must exercise the powers conferred on them by law in such a way as to avoid an excessively rigid application of the law. In other words, they must not only avoid any unfair approach, but also seek to apply the legal rules in the light of social and economic realities. The extent to which good administrative behavior is achieved in this respect can be measured by the principles of proportionality and the legitimate expectations of clients, principles which most European states have now elevated to the level of doctrine and, in some cases, even to the constitutional level.[3]

The principle is far from marginal today. Nowadays, it is no longer enough for public authorities not to act arbitrarily; citizens want more. They want to know why and how public power is exercised by public administrations, and therefore they want an accountable and transparent public administration in which the decision-maker is in the best possible position to reach the best decision, by which they mean that he or she is in possession of all relevant information and has the right reasons for his or her decision.[4] The term 'right to good administration' has become something of a buzzword these days, and is found in many European and national legal sources, and even in the case law of various European courts. Nevertheless, there is some uncertainty as to its precise meaning. Therefore, for the principle to be valid, *i.e.* to serve as a solid legal basis, it is not possible to simply invoke this general principle, to 'pull it out of the hat', but it is necessary to determine in each individual case precisely what specific rule, inherent in or derivable from the principle, has been infringed in the case in question. As the content of the doctrine changes and develops

2 Lord Millett, 'The right to good administration in European Law', *Public Law*, Vol. 47, Issue 2, 2022, p. 310.

3 Theodore Fortsakis, 'Principles governing good administration', *European Public Law*, Vol. 11, Issue 2, 2005, p. 209; Péter Váczi, *A jó közigazgatási eljáráshoz való alapjog és annak összetevői*, Dialóg Campus, 2013.

4 Juli Ponce Solé, 'Good administration and European public law. The fight for quality in the field of administrative decisions', *European Review of Public Law*, Vol. 14, Issue 4, 2022, p. 1504.

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from one stage to the next, there is no doubt that it is increasingly becoming a kind of framework, a collection of procedural rules which impose new obligations on the administration.[5]

There is a fundamental divergence of views among European states on the legal nature of procedural rules. *(i)* The continental approach follows a utilitarian approach to the formulation of rules of administrative procedure, according to which good administrative procedure equals efficient administration. According to this view, procedural rules are merely means to an end, and procedural principles such as the right to be heard or the right to information are merely necessary preconditions for the ultimate efficient decision, which is to reach the right decision. *(ii)* In contrast, the common law approach provides a protective justification, focusing on the impact of the administrative decision on the citizen. The individual should not only be protected from unreasonable decisions, but also from unfair procedures, a kind of 'fair play' that goes well beyond the requirement of efficient administration. From this perspective, procedural fairness is therefore an end, not a means or a necessary by-product.[6] Of course, the two concepts are not so clearly separated in each state, and there should be no difficulty in mixing the systems.[7] The problem may arise only if the two principles lead to opposite results in each case, and full compliance with certain principles (*e.g.* making the right to make a statement without a party) may lead to a lengthy procedure, which clearly undermines the efficiency of the administration. How to ensure a balance between conflicting interests? In my view, by laying down well-defined principles which cannot backfire and have the opposite effect to that intended.

2. Methodology: Normative and Functional Method

The present research is based on a normative methodology, examining the European regulatory framework of the right to an effective remedy, standing on two pillars, the Council of Europe, and the EU. One of the cornerstones of the EU is the rule of law and respect for the fundamental rights on which it is based, as stipulated in Article 2 TEU. The implementation of

5 Fortsakis 2005, p. 210.
6 Millett 2002, pp. 312–313.
7 Hungary is rooted in continental tradition, *see* Péter Váczi, 'Fair and effective public administration', *Institutiones Administrationis,* Vol. 2, Issue 1, 2022, p. 167.

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the rule of law at national level is crucial: it is the confidence of EU citizens and national authorities in the rule of law that allows the EU to develop into an area of freedom, security, and justice. EU law provides for severe sanctions for breaches of these fundamental values, and anyone whose rights under EU law are violated has the right to an effective remedy before an independent court. Of course, by choosing a European perspective, the Hungarian legislation cannot be ignored, either, and the theoretical underpinnings provided by the legislator and the law enforcer (Constitutional Court) are explained, through a review of the relevant literature. The basic premise of this is that the essential content of the right to legal remedy is the possibility of 'legal remedy', *i.e.* that legal remedy – within the framework of the given specific regulation – includes both conceptually and in terms of content the remediability of the violation of rights.[8] The presentation of the regulation of the principle cannot, of course, be an end in itself: it is essential to look at how these requirements are reflected in the legislation under consideration, whether EU legislation has been properly implemented and, if so, what further regulation might be required. In addition to the normative methodology, the functional method is therefore also used.

3. Results: How to Give Way?

Perhaps everyone agrees that green lights are better than red lights because they give you a clear path, rather than obstructing it. However, just think what would happen if we only had green lights in traffic. What would be the warning of danger if there were no red lights? And if all this were not enough, do we need yellow lights?

Perhaps the biggest issue is that European legal systems have traditionally paid great attention to the system of guarantees of judicial review, which of course serves as an important safeguard, but this pushed other legal instruments and other equally important principles (*i.e.* certain fundamental principles of the right to good administration) somewhat into the background. Case law certainly plays an important role in the development process of European law, but, by its very nature, it only provides for

8 For the practice of the Hungarian Constitutional Court *see e.g.* Decision No. 35/2013. (XI. 22.) AB, Reasoning [25]–[27], comparing the practice of the ECtHR, *see e.g. István Nagy v Hungary*, No. 121/11, 15 October 2015; *Shahzad v Hungary,* No. 12625/17, 8 July 2021.

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case-by-case oversight rather than a complete and comprehensive system of guarantees. Therefore, it is necessary to build up additional control mechanisms and safeguards in administrative law, which, while ensuring legality, can make everyday administration both faster and cheaper.[9]

The green light theory is useful because it avoids excessive legalism in the pursuit of good administration. A legalistic definition of administrative justice would equate compliance with the grounds for judicial review, with a 'good' decision.[10] The red light theory can be seen to view the law as a matter for judicial cultivation and declaration; a sealed off regime of internal logic belonging to the judiciary. For green light commentators, judicial review needs to be viewed as a form of communicative legality, with the standards and principles identified by the courts eventually migrating to the administrative context, where they can be integrated proactively into everyday functioning and decision-making.[11] As Harlow and Rawlings say, legislation is prospective in the sense that it controls administrative activity by prescribing its bounds. Judicial review of an administrative action is primarily retrospective, although it possesses a prospective dimension. Lawyers assume and administration tacitly accepts that judicial rulings set boundaries for future conduct.[12] In my opinion, however, there is a golden medium way, as we will see under the amber light theory.

4. Discussion: Greenlights in Good Administration

4.1. The Traffic Lights Theory

"A greenlight is being kind to our future self. It's things in our life that affirm our way, they say 'go, proceed, more, please carry on."[13] The notion of traffic light theories in administrative law was first used by Harlow and Rawlings in 1948 in assessing the objectives of administrative law.[14] The

9 Solé 2002, pp. 1527–1529.
10 Fiona Donson & Darren O'Donovan, *Law and Public Administration in Ireland,* Clarus Press, Dublin, 2015, p. 22.
11 Id. p. 21.
12 Carol Harlow & Richard Rawlings, *Law and Administration*, Cambridge University Press, New York, USA, 2009, p. 40.
13 Matthew McConaughey, *Greenlights*, Crown, New York, 2020, p. 22.
14 David Stott & Alexandra Felix, *Principles of administrative law*, Cavendish Publishing Limited, London, 1997, p. 29.

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theory can be approached from several angles and derives from several questions. *(i)* Should the courts intervene in the review of administrative decisions? *(ii)* Is judicial control over administration a weapon of sound administration or an obstacle to the administrative process? *(iii)* Should governmental actions be considered suspicious or congenial? *(iv)* Should law be superior to politics or on the contrary? *(v)* Are the courts and the rule of law the answers to everything, or are legal profession and law too old fashioned?[15]

On one hand, exercising its functions, public administration shall get a certain level of discretion. On the other hand, administration should not be left uncontrolled to prevent any potential misuse or abuse of those powers. When determining the role of judicial control over public administration with an intent to prevent abuse of power and to limit administrative discretion, there are two main schools of thought as to whether the actions of the executive should be subject to strict judicial control or mainly independent of it.

"Behind every theory of administrative law there lies a theory of the state." – say Harlow and Rawlings.[16] The red light theory advocates the idea of a minimalist state, in which the main function of administrative law is to prevent the abuse of state power and to eliminate *ultra vires* through various legal means, mainly judicial review. According to this view, administrative law is nothing more than the law of checks and balances on government power, which limits the executive to a legal framework while at the same time it protects citizens from abuses and the government's 'running amok'.[17] According to the red light theory, the courts are responsible for ensuring good administrative procedure, while the emphasis is on administrative law as a kind of external constraint on government control, through the independence of administrative authorities.[18] According to this concept, the courts and the administrative authorities are warring parties, the former using the weapon of administrative law against the latter in a battle over the abuse of government power.

15 Harlow & Rawlings 2009, p. 36.
16 Id. p. 1.
17 Jack Beatson *et al*., *Administrative Law. Text and materials. Third edition,* Oxford University Press, Oxford, 2002, p. 2.
18 Juli Ponce, 'Good administration and administrative procedures', *Indiana Journal of Global Legal Studies*, Vol. 12, Issue 2, 2005, p. 554.

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The exclusivity and importance of judicial protection has been the subject of many debates in the literature. Some argue that judicial review is not the only, or even the primary, factor in protecting the legality of public administration.[19] Must the courts or other mechanisms play a primary (or even exclusive) role in ensuring good administrative procedure?

This question led to a completely different approach which is the so-called 'green light theory'. Contrary to its name, it does not welcome unrestrictedly free state action.

> "While we have so far painted 'green light' accounts as eager to promote the effective use of government power, this should not be taken as implying that such scholarship is not critical of maladministration. Rather, it emphasizes the need to proactively design frameworks to avoid such negative practices rather than centre the subject upon the reactive, individualistic remedy of judicial review."[20]

Green light views of administrative law do not declare courts as the 'first line of defence' against maladministration.[21]

While the proponents of the red light theory favor judicial control over the executive, the followers of the greenlight theory tend to put their hope in the political process. They believe that the courts may become a barrier to progress, that their control is unrepresentative and therefore undemocratic, and that their influence must be kept to a minimum. But then, how can good administrative procedure be ensured? As for me, by setting guidelines and accountability. By laying down requirements such as transparent governance, ensuring access to information, and restricting discretion into a clear legal framework. These legal principles immediately bring about internal control in public administration, rather than external control such as judicial review. A further advantage is that while judicial review is retrospective, ruling on a specific decision, the principles of good administrative procedure are forward-looking, in the sense that they define the limits of the procedure and set the course for its conduct. Of course, the above two theories cannot be separated in such a clear-cut way; in reality, administrative systems recognize and bear in mind both, combining the

19 Paul Craig, 'A new framework for EU administration: the financial regulation 2002', *Law and Contemporary Problems*, Vol. 68, Issue 1, 2004, p. 108.

20 Donson & O'Donovan 2015, p. 25.

21 Swati Jhaveri, 'Localising administrative law in Singapore', *Singapore Academy of Law Journal*, Vol. 29, 2017, p. 833.

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advantages of both systems, as an 'amber light'.[22] In my view, Hungarian legislation is also following this direction, since after the importance of judicial review gained ground after the regime change, the idea of good administration and its principles appeared in Hungarian literature after the turn of the millennium, and then at the highest level in the new Fundamental Law in 2011.

4.2. Redlights: The Importance of Judicial Review

"Courts are the primary weapon for protection of the citizen and control of the executive."[23] Binding government itself to the law (the rule of law) is a well-founded principle, requiring *inter alia* that all classes should be equally subject to the ordinary law as administered by the ordinary courts. The rule of law was to be protected by ensuring that individual public servants are responsible to the ordinary courts of the land for their use of statutory powers.

It shall be noted that in his initial works Dicey[24] was reacting to the French system of specialized administrative courts and he preferred to avoid such an approach, arguing that the 'ordinary' courts should handle cases, as in most respects the "relationships of citizens with public officials are not – and should not be radically different from relations between citizens and public bodies."[25]

This basic pre-requisite led to another important principle, the *ultra vires*, which holds that representatives of the state must exercise the powers conferred on them reasonably, in good faith, for the purposes for which the powers were conferred and without exceeding the limits of such powers.[26]

The redlight theory held deep-rooted suspicion towards executive power and sought to minimize the encroachment of the state on the rights of individuals.[27] Its major assumption is that bureaucratic and executive power of the state and its institutions, if unchecked, will threaten the liberty of all

22 Beatson *et al.* 2002, pp. 2–5.
23 Harlow & Rawlings 2009, p. 25.
24 Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution, 10th edition,* MacMillan, London, 1959, pp. 188–196.
25 Harlow & Rawlings 2009, p. 9.
26 Tom Bingham, *The Rule of Law*, Allen Lane, London, 2010, p. 60.
27 Peter Leyland & Gordon Anthony, *Textbook on Administrative Law*, Oxford University Press, Oxford, 2013, p. 5.

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individuals. So, when public bodies or executive authorities exceed their powers, judicial intervention works as a sanction. This theory looks to the model of the 'balanced constitution' accommodating the judicial control of executive power as subject to political control by the Parliament through legislation of strict rules and to legal control through judicial monitoring by the courts.[28]

This theory is connected to the theory of state, which says that the best government is the one that governs least, since wider power means more danger to the rights and liberties of citizens. As Harlow and Rawlings write:

> "Behind the formalist tradition, we can often discern a preference for a minimalist state. It is not surprising, therefore, to find many authors believing that the primary function of administrative law should be to control any excess of state power and subject it to legal, and more especially judicial control. It is this conception of administrative law that we have called red light theory."[29]

Although traditional administrative law has not always been interested in making good decisions, it has certainly been interested in the judicial review of unlawful decisions. This is an old, somewhat negative approach, in the sense that it argues against arbitrariness rather than in favor of good administration.[30]

The possibility of reviewing administrative decisions and thus holding public administrations accountable is traditionally seen as one of the first and most fundamental steps against the arbitrariness of the executive. Where the law ends, tyranny begins, and judicial review is the most effective defense against oppression. The purpose of judicial review is to force the administration to comply with procedural rules, otherwise the decision will be annulled, and the courts thus indirectly ensure the enforcement of good administrative procedure, with maximum respect for the separation of powers. Judicial protection prevents the administration from acting rashly and hastily by forcing it to comply with fundamental constitutional and other legal requirements.[31]

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28 Harlow & Rawlings 2009, pp. 22–23.

29 Aberham Yohannes & Desta G. Michael, *Administrative Law*, Teaching Material, Justice and Legal System Research Institute, 2009, p. 15.

30 Carol Harlow & Richard Rawlings, *Law and Administration*, Butterworths, London, 1997, p. 29.

31 Solé 2002, p. 1520.

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Judicial review can have a prominent role in disciplining administrative action by monitoring compliance with legal requirements during the procedure, thereby facilitating appropriate decision-making. Judicial review can take several forms, but the view that the procedural aspect of the case takes precedence and that, if such errors or deficiencies are found, the court does not review the merits of the decision has become increasingly obsolete. This solution, however, is increasingly resented by citizens, who feel that they cannot expect effective legal protection from the courts, as they feel that the merits of their case are not being advanced by judicial review.[32]

Looking beyond Europe, the landmark case of *Marbury v Madison*[33] decided by the US Supreme Court was the first case to recognize judicial supremacy and its exercise through judicial review. It is worth noting the specificity of US administrative law, in the sense that it traditionally allows for judicial review of administrative decisions, both substantive and procedural. The court has the power to annul a specific rule on the grounds that it is substantively wrong, but in most cases, this is not the route taken. It is not said that it should be repealed because it is wrong, but that it should be repealed because the decision-making process was not sufficiently open to stakeholders and society or because all relevant facts were not sufficiently examined. According to numerous authors, there are political rather than purely legal considerations behind such thinking. A judge cannot say that a decision made by a friend of the official is fundamentally wrong and therefore invalid, as this would be in open defiance of the government. Instead, he will say that there was a substantive error in the procedure that renders the decision invalid.[34]

4.3. Greenlights: The Primacy of Due Process

"Traditional administrative law emphasized the importance of judicial review, but this alone does not guarantee good administrative procedure."[35] Lawyers traditionally emphasize external control through adjudication since they look at administration from the outside. To the lawyer, law is

32 Id. pp. 1519–1520.
33 *Marbury v Madison,* 5 U.S. 137 (1803).
34 Martin Shapiro, 'Codification of administrative law: the US and the Union', *European Law Journal*, Vol. 2, Issue 1, 1996, pp. 36–38.
35 Solé 2002, p. 1506.

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the policeman; it operates as an external control, often retrospectively. The green light theory is to minimize the influence of courts which were seen as obstacles to progress, and the control which they exercise as unrepresentative and undemocratic. Lawyers regard themselves as champions of the popular cause, but there can be little doubt that the great department of state are not only essential to the well-being of the great mass of the people, but also the most significant expressions of democracy.[36]

According to Dicey, questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.[37] The rule of law means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. "Englishmen are ruled by law, and by law alone."[38]

In contrast to the red light theory, a new perspective has emerged across Europe that focuses on the quality of the decision – in particular discretionary decisions – and emphasizes good decision-making and good administrative procedure. Accordingly, public administrations must not only be lawful, but must also make correct, appropriate decisions, because that is simply what people expect of them. That is why it cannot do nothing, even if it is empowered to do anything.[39] From this perspective, the rule of law's goal of consistency and certainty is merely one aspect of a regulator's task, and to pursue it as an absolute value is not realistic. In some senses, discretion will always accompany rules, with it being inevitable that judgments will have to be made in applying legal standards to factual situations.[40] The positive exercise of public power, not merely the procedural conditioning of its exercise, lies at the heart of the subject.[41]

The green light theory maintains that the use of executive power to provide services for the benefit of the community is entirely legitimate. Thus, the function of the courts in checking executive action is a questionable activity, however, it does not favor unrestricted or arbitrary action of the state, of course.[42] It underlines the importance of administrative (procedural)

36 Harlow & Rawlings 2009, p. 37.
37 Dicey 1959, p. 48. *See also* Jhaveri 2017, p. 832.
38 Dicey 1959, p. 202.
39 Solé 2002, p. 1506.
40 Donson & O'Donovan 2015, p. 12.
41 Id. p. 22.
42 Stott & Felix 1997, p. 30.

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law to facilitate government action rather than intervening in it through judicial or political control. On this ground, principles of administrative law can be used as an enabling mechanism so that it acts as a weapon to the administrative bodies.

The issue of fairness is amplified in the context of judicial discretion within due process. As has been known since Plato, general rules never fully fit the specific facts for which they were created by the legislator. Perfect justice does not therefore presuppose perfect rules, but may be achieved by perfect discretion, whereby the legislator examines the social situation in question carefully and comprehensively, rather than mechanically applying the law as it stands, without fully examining the situation. Unfortunately, the perfect instrument of discretion is called into question by the imperfections of humans, who apply it in biased, unreasonable, and other inappropriate ways. The application of law in general can be described as an area of progression from discretion to written law over time. As social reality poses a new problem, the most appropriate first step would be to create an authority with appropriate discretionary powers, which is flexible and able to react quickly; in short, perfect for emergencies. However, as the flaws of deliberation are revealed, the focus shifts increasingly towards legislation, and the pattern can be described as follows: to do the job quickly through deliberation, and then to create the right rule, protecting citizens from the potential dangers of deliberation.[43]

In some cases, the decision of the administrative authority is clearly predetermined by the law, but in other cases the law gives the authorities a margin of discretion and merely sets limits within which the administration has a degree of discretion (*e.g.* when determining the type and level of punishment or measure in cases of misdemeanors). An administrative authority vested with discretionary powers must not only comply with the applicable law but must generally act in a fair and equitable manner. Discretionary power, in general terms, is when the public administration is empowered by law to choose from a range of legitimate options, and not based on 'legislation'.[44] This choice involves balancing public and private interests using non-legislative values to establish a general interest that is not defined by law. The choice itself therefore cannot be considered to have legal content, but administrative law must nevertheless ensure legal

43 Shapiro 1996, p. 31.
44 Ponce 2005, p. 553.

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protection for such choices to protect the individual. It is from this latter perspective that the importance of judicial review as a means of protection against arbitrary decisions can be grasped.[45] Hence, a flexible law enforcement attitude may point in the direction of justice in the case of certain unreasonable or fossilized rules, but it is a double-edged sword since it can easily lead to injustice in the event of inappropriate application. The most sensitive area of discretion is the field of administrative law enforcement, and it is therefore essential that discretionary activity be conducted along certain legal principles.

If a given institution has a wide margin of discretion, some may already feel that the exercise of the client's rights can only have a limited influence on the decision, and that it is therefore a useless and burdensome obligation for the authority in such cases. At the same time, since it is precisely in this area that judicial control is the weakest (which in an extreme case will effectively be a purely formal revision), therefore the guaranteed role of procedural principles is, in my view, even more pronounced. This view is reinforced by the case law of the CJEU, which has pointed out in several judgments that the wide discretionary power of public authorities must not lead to the erosion of certain procedural principles.[46] In any event, the discretionary powers of the public administration must be limited, in accordance with the requirement of good administration deriving from the common tradition of the rule of law in the European States.[47] In the EU, the CJEU generally grants administrative authorities' wide discretionary powers, since it does not seek to substitute the administrative authority's decision with its own judgement, it only examines whether the procedural rules have been complied with by the acting authority, whether the facts have been properly established and whether there has been no abuse of power. This narrow scope of review makes the role of procedural principles particularly important. This view was confirmed in the *Technische Universität* case,[48] where the CJEU explained that, where the public administration

45 Solé 2002, pp. 1504–1505.

46 Eric Barbier de La Serre, 'Procedural justice in the European Community case-law concerning the rights of the defence: essentialist and instrumental trends', *European Public Law*, Vol. 12, Issue 2, 2006, pp. 241–242. *See also* Judgment of 2 September 2010, *Case C-290/07 P, European Commission v. Scott SA,* ECLI:EU:C:2010:480.

47 Giacinto della Cananea, 'Beyond the state: the Europeanization and globalization of procedural administrative law', *European Public Law*, Vol. 9, Issue 4, 2003, p. 568.

48 Judgment of 21 November 1991, *Case C-269/90, Technische Universitat München,* ECLI:EU:C:1991:438.

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has such a power of appraisal, respect for the rights guaranteed by the EU legal order is of even more fundamental importance. Those guarantees include the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present.[49]

4.4. Amber Light: Balancing Between

"Leaving room both for courts and extra-judicial mechanisms to achieve good administrative procedure."[50] Initially, only the conception of red and green light theories existed. But, in 2004, two scholars, namely Wade and Forsyth shed light upon the amber element between the two theories.[51] The optimal solution can therefore be captured somewhere between the two, in the framework of a kind of 'amber' or 'yellow light' theory, which recognizes both the controlling and the reactive nature of administrative law.[52]

While the red and green light theories hold two different standpoints in administrative law, the amber light theory tends to bring a point of consensus between the two. It maintains that administrative law should apply the positive elements of both the theories, making a balance between both external as well as internal controlling mechanisms for effective public administration. The amber element between the two theories has somewhere been realized by green light theorists too. As recognized by Harlow and Rawlings, green light theory does not wish to suggest that it favors unrestricted or arbitrary action by the state. In fact, it doesn't rebut the rigidity of redlight theory to some extent.[53] In this way, the amber light theory is

49 Jurgen Schwarze, 'Judicial review of European administrative procedure', *Law and Contemporary Problems*, Vol. 68, Issue 1, 2004, pp. 94–95; Sabino Cassese, 'European administrative proceedings', *Law and Contemporary Problems*, Vol. 68, Issue 1, 2004, p. 32.

50 Beatson *et al.* 2002, p. 2.

51 William Wade & C. F. Forsyth, *Administrative Law,* Oxford University Press, Oxford, 2004, pp. 5–6.

52 Beatson *et al.* 2002, pp. 2–5.

53 Harlow & Rawlings 2009, p. 31.

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a synthesis which combines the necessity for some control over administrative decisions with concern for setting good standards of administrative conduct, effective decision-taking, accountability, and human rights.[54]

5. Conclusions

"I found all the red and yellow lights in life revealed themselves to have at least a greenlight asset in the future. Red and yellow lights eventually turn green in the rearview mirror."[55] On the way home from work, it's best to catch all the greens. Is green also the winning color in administrative law?

Alongside judicial review, the issue of administrative procedural safeguards, which is in fact the general way in which the public interest function of the administration is carried out, is a key issue for good administrative procedure. The popularity of the principle that public administrations must follow well-defined rules to make the right decision has increased dramatically in recent decades. On the one hand, the principle of the importance of procedural rules is linked to the idea of good governance, and on the other hand, the need to establish the reasons on which a decision is based is proof that the administrative authorities have acted appropriately, weighing all relevant interests, and taking all the data collected into account.[56]

The above issue is markedly different in English common law and continental legal systems. In the former, the fairness of an administrative act is matched by the possibility of being subject to a 'quasi-judicial' review at the time of its adoption, so that the authority has one eye on the possibility of a subsequent judicial review. This rather procedural approach to rights is closely linked to the institutional practice of administrative courts, which can perform functions that are elsewhere the responsibility of the government (*e.g.* remedies within the ministry). In the Anglo-Saxon tradition, once a decision becomes final, the right of appeal to the courts becomes more restricted, the legal basis for review is limited and the range of remedies available is reduced. By contrast, in the continental administrative legal system, the fairness of the procedure is guaranteed by the possibility of review by an independent judicial forum. The individual has the possibility

54 Leyland & Anthony 2013, p. 10.
55 McConaughey 2020, p. 22.
56 Solé 2002, pp. 1507–1508.

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to challenge the administrative act, but in most cases, this is only possible after the administrative decision.[57]

Attempts to specify the administrative procedure in legal terms must never lose sight of the purpose of the procedure. The first and foremost aim of procedural law must be the realization of substantive law, in our case administrative (or other public) substantive law. Public law is at the service of social welfare and the public interest, and it is this objective that procedural law must ultimately pursue. The protection of individual rights is undoubtedly an essential objective, but it is inherently secondary to the public interest.[58] There is, however, a common intersection; good governance, which ensures both the protection of the rights of individuals and hence the protection of the interests of the social majority. Where do the values of good governance come from and how do they relate to administrative law? They can be traced back to two main Western traditions of public administration. *(i)* First, to the classical service model of public administration, dominated by the public interest. *(ii)* Second, to the new organizational principles of administration that swept through European public administrations in the 1990s, when the lean values of economics, such as efficiency, took over from more people-friendly principles.[59]

Examining the development of Hungarian law, in my opinion, a pleasant trend is the strengthening of the right to legal remedy and the rise of the elements of the right to good administrative procedure, their appearance at the constitutional level and their strengthening at the level of procedural law. In my opinion, however, the two guarantee systems cannot compete with each other, but a shield can be forged from the right alloy of the two, which can provide adequate protection for the client. The less prominent yellow traffic lights could therefore be the winning color for public administration.

57 Francesca Bignami, 'Three generations of participation rights before the European Commission', *Law and Contemporary Problems*, Vol. 68, Issue 1, 2004, p. 63.

58 Klara Kanska, 'Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights', *European Law Journal*, Vol. 10, Issue 3, 2004, p. 323.

59 Harlow 2006, p. 200.

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Part IV
Developments in European Law

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The Exception that Proves the Rule?

Schengen and the Reintroduction of Internal Border Controls

Laura Gyeney[*]

Abstract

The Schengen area is a cornerstone of European integration. In recent years, however, the integrity of the Schengen area has been tested by the migration crisis, terrorism, and, not least, the COVID-19 pandemic. Some Member States have responded to these crises by maintaining border controls beyond the six-month time limit set by the Schengen Borders Code. This study aims to examine whether Member States can invoke public security considerations to reintroduce border controls for a more extended period and whether integration requirements of free movement can be balanced against the security interests of Member States in the Schengen area.

Keywords: internal borders, Schengen, border control, public security, public health

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1. Introduction

The Schengen system faces new challenges today, constantly testing the idea of a Europe without borders.[1] For example, in the autumn of 2023, Germany introduced border controls on its borders with the Czech Republic and Poland, while Slovenia introduced border controls on its Croatian-Slovenian and Hungarian-Slovenian borders. The Czech Republic, Poland, and Austria have done the same on their border sections with Slovakia, specifically in response to increasing migratory pressure and to curb the activities of people smugglers. Following the Austrian measure, Slovakia also introduced temporary border controls along the entire Slovak-Hungarian

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1 *See* at www.reuters.com/world/europe/european-countries-tighten-borders-2023-11-24/.

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border. When introducing these measures, the Member States concerned all claimed that the reintroduction of border controls would reduce the number of asylum applications lodged and the number of migrants apprehended. These Member States have extended the above measures without exception.[2]

Even if, in many cases, these measures are (or at least appear to be) only random checks, it is clear that the reintroduction of border controls threatens the very objective of integration, the functioning of the internal market without borders. It is, of course, debatable how much harm these national measures may cause to individual citizens. However, I believe that the question of intgerity of the Schengen area is a matter of principle that will determine the framework for the future functioning of the Union in the long term.

Shortly after the creation of the European Communities, it was stated that economic and political integration implied the creation of an area without internal border controls.[3] In its White Paper on the Single Market, the Commission pointed out that a European area divided by borders was "to the ordinary citizen the obvious manifestation of the continued division of the Community".[4] By abolishing internal border controls and allowing the free movement of goods, services, capital and persons, the Schengen area has become "part of our European way of life" and "a symbol of Europe's interconnectedness and of the ties between the people's of Europe".[5]

This is reinforced by the current treaty structure, where the free movement of persons and the area without internal border controls guarantees its objectives in four different places. First and foremost, as part of the objective of the TFU to establish an area of freedom, security, and justice. Article 3(2) TEU states that "[t]he Union shall offer its citizens an area of freedom, security, and justice without internal frontiers, in which the

2 In January 2024, Slovakia's Minister of the Interior said that although Slovakia will not extend border controls after 22 January 2024, if illegal migration activity increases, controls will be re-introduced.

3 Communication by the Commission of the European Common Market to the Council of the EEC and to the Member States Governments, 2 October 1962.

4 White Paper on Completing the Internal Market COM(85) 310 final, paras. 12 and 24.

5 Communication from the Commission: A strategy for a fully operational and resilient Schengen area, COM(2021) 277 final.

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free movement of persons is ensured […]."[6] Similarly, the internal market provision of the TFEU, including Article 26 TFEU, expressly establishes that "[t]he internal market shall comprise an area without internal frontiers in which the free movement of persons is ensured in accordance with the provisions of the Treaties". Finally, in terms of primary legislation, we must mention the provisions of the TFEU that apply to EU citizens, namely Articles 20 and 21 TFEU, which already guarantee the right of EU citizens to move and reside freely within the territory of the Member States, irrespective of their economic activity.

As far as secondary legislation is concerned, a key provision of the Schengen Borders Code[7] (last amended by the European Parliament and the Council in June 2024),[8] which lays down the technical rules for the lifting of border controls, states that "internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out".[9] To guarantee the fullest possible exercise of free movement, the EU legislator has laid down precise rules in the Schengen Borders Code on the exceptional cases in which border checks may be reintroduced. The common feature of these cases is that border checks can only be re-introduced on a temporary basis.

Despite these strict rules, several Member States – including Austria, Denmark, France, Germany, and Sweden – have continually renewed internal border controls since the beginning of the migration crisis in 2015, essentially rendering them permanent.[10] To justify the reintroduction of border controls, Member States have invoked various justifications, ranging from irregular migration to terrorism and the public health risks associated with the COVID-19 pandemic.

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6 Among the general provisions on the area of freedom, security and justice, this is confirmed in Article 67(2) TFEU, which states that "The Union shall ensure the absence of checks on persons at internal borders […]."

7 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders.

8 Regulation (EU) 2024/1717 of the European Parliament and of the Council of 13 June 2024 amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders. At the time of writing this article, the new regulation has not yet entered into force. For this reason, the 2016 Regulation is still used as the basis for the study. This is all the more relevant as this study focuses on the CJEU's interpretation of the relevant provisions of the existing 2016 Regulation.

9 Regulation 2016/399/EU, para. 22.

10 *See* at https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-area/temporary-reintroduction-border-control_en.

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In this study, I examine the extent to which the practices followed by the Member States in question are compatible with the requirements of EU law. The study also poses the question why the European Commission, responsible for enforcing EU law, has not been sufficiently effective in dealing with these Member States' actions and what the future consequences of the Commission's failure to act may be for European integration.

2. The Legal Framework and Actual Practice Governing Internal Border Control

Articles 25–29 of the 2016 Schengen Borders Code provide a legal mandate for the temporary reintroduction of checks at internal borders. The first category covers 'foreseeable' and 'unforeseeable' threats to the public policy or internal security of the Member State (Articles 25–28). The reintroduction of border checks may be exceptional and *ultima ratio*, in strict compliance with the principle of proportionality. The Code also maximizes the duration of the measure, between two and six months, depending on the reason for the order.

In addition, the Code also provides for the possibility of reintroducing internal border controls in exceptional circumstances where the overall functioning of the area without internal border controls is put at risk by persistent and serious deficiencies relating to external border controls. In the above cases, the Council may, as a last resort, recommend that one or more Member States decide to reintroduce border control at all or at specific parts of their internal borders. In such cases, the maximum duration of internal border controls shall be six months, which may also be extended.

From the above, it can be concluded that *(i)* it is possible to reintroduce internal border controls in exceptional cases, and *(ii)* they can only be introduced based on specific grounds and for a specific duration. While this seems to be a stringent rule, it is also worth looking at actual practice.

When Member States reintroduced checks at their internal borders in the autumn of 2015 due to illegal migration, they did so at their own discretion, initially for a period of six months. However, before the expiry of this six-month deadline, the Council proposed that Germany, Denmark, Austria, Sweden, and Norway (the latter as a Schengen-associated state) maintain checks at their internal borders for a maximum of six months. The Council justified its decision on the basis of deficiencies in border controls in Greece, which it subsequently extended three more times. After

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the expiry of the extended period for border controls proposed by the Council also expired, border controls remained unchanged – as in the first period, based on decisions taken by Member States.

The duration of the measures introduced in 2015 is very different from those introduced earlier, as some Member States have maintained border controls essentially without interruption for the past eight years. The Commission has not taken any action against this practice; it has not launched infringement proceedings, nor did it issue a negative opinion on the legality of the measures.[11]

Under Article 27(4) of the Code, the Commission may issue an opinion following a notification by a Member State. In fact, the legal text states that the Commission shall issue an opinion if, on the basis of the information contained in the notification or any other additional information provided to it, it has concerns about the necessity or proportionality of the planned reintroduction of border control at internal borders. It follows from the wording of the Code (the Commission's obligation to give an opinion) that, *a contrario,* the Commission had no concerns about reintroducing border control. This is particularly interesting in the light of the Commission's rigorous approach in other cases to Member States' behavior that threatens the single internal market – especially when Member States joined the EU with the Eastern enlargement.

Interestingly, the only case concerning Schengen border controls that have come before the CJEU so far was not an infringement action brought by the European Commission but a reference for a preliminary ruling from a national court. Although in the *Landespolizeidirektion Steiermark* case,[12] described in detail below, the Commission's Legal Service intervened on behalf of the applicant and argued that the checks had been in breach of EU law since 2017, the Commission, exercising its discretion under Article 256 TFEU, had not launched infringement proceedings in the years preceding the case. Furthermore, the Commission has not issued a public opinion on the unlawfulness of these controls since 2015.[13]

11 If a Member State intends to reintroduce border control at internal borders under Article 25, it shall notify the other Member States and the Commission at the latest four weeks before the planned reintroduction or, exceptionally, within a shorter period.

12 Judgment of 26 April 2022, *Joined Cases C-368/20 and C-369/20, Landespolizeidirektion Steiermark and Bezirkshauptmannschaft Leibnitz*, ECLI:EU:C:2022:298.

13 The Commission has only issued an opinion on Germany's reintroduction of initial checks at the height of the migration crisis. In that opinion, it considered that these

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3. Joined Cases Landespolizeidirektion Steiermark

It was in *Landespolizeidirektion Steiermark* that the CJEU first addressed the question of the legality of the reintroduction of border controls and, more specifically, their duration. According to the facts of the case, the applicant, an Austrian national, was subjected to border checks at the Austrian border on two occasions, on 29 August and 16 November 2019, when entering Austria from Slovenia, and refused to produce his identity card or passport when requested to do so by the border guards. The applicant, an expert in European and international law, asked whether this was an identity check or a border check. After being told that the driving license would lead to a border check, the applicant asked for the service number of the border guard and refused to produce his driving license, resulting in a fine of €36. He challenged the fine before the Administrative Court, which referred a preliminary question to the CJEU.

In the reference for a preliminary ruling, the main question was whether the Code allowed for the reintroduction of border controls beyond the maximum total period of six months provided for in Article 25(4) of the Code. According to the Advocate General, since serious threats to public policy or internal security cannot be defined in time, forcing Member States to abolish border controls would be unacceptable even if they continue to face a serious threat. Since they could reintroduce border controls after a certain period to combat the serious threat in question, it would be illogical to force them to abolish border controls for a short period only to reintroduce them later.[14]

This interpretation would allow Member States to override a clear and unambiguous provision of secondary law, in this case, the principle of no border controls, in the interests of their security. Considering this, the Advocate General proposed the introduction of a sliding-scale proportionality test, where the strictness of the proportionality test would increase with the duration of the border control.[15]

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measures could be justified by public policy concerns about the uncontrolled entry of third-country nationals.

14 Opinion of Advocate General Oe delivered on 6 October 2021, *Joined Cases C-368/20 and C-369/20, Landespolizeidirektion Steiermark and Bezirkshauptmannschaft Leibnitz*, ECLI:EU:C:2021:821, paras. 51–52.

15 Thus, a Member State planning to apply a derogation under Article 25(1) must, on the one hand, explain why the renewal of border checks would be an adequate measure, including an evaluation of the effectiveness of the original measure to

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The Court did not follow the Advocate General's opinion in this case. It held that if secondary law maximizes the duration of border controls, this means that there is a maximum duration of border controls beyond which they are necessarily unlawful.[16] However, the CJEU itself pointed out a loophole. Secondary law only sets a maximum duration for border checks based on the 'same threat'. Nothing prevents Member States from discovering new threats that do not mean extending the same measure formally, but reintroducing one immediately after the expiry of the maximum duration of the previous border control, based on new grounds. The question, however, is what constitutes a 'new threat'. The CJEU is somewhat vague about the specific substantive criteria that characterize a new threat. All it says is that there are two criteria for assessing whether a Member State is faced with a new threat at the end of the six-month period, namely *(i)* the circumstances necessitating the reintroduction of border control at internal borders and *(ii)* the events giving rise to the reintroduction of border control. However, it does not specify these criteria, leaving them to the discretion of Member States' law enforcement authorities.[17]

The question, however, is whether it is sufficient for one of the criteria to change or whether both must be met cumulatively. This is illustrated by the question raised by co-authors Salomon and Rijpma, asking whether the smuggling of third-country nationals from war-torn Ukraine poses a new threat compared to the smuggling of third-country nationals from Greece.[18] In an extreme reading, the mere fact that it is not the same third-country nationals who are trying to enter the EU illegally could also constitute a

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reintroduce border control. On the other hand, it must explain why it still considers the original measure to be necessary and why it does not consider a less restrictive measure than maintaining controls, such as police checks, to be sufficient. Id. para. 67.

16 According to the Court's reasoning, the system of time limits laid down in the Code is clear and precise. This is also confirmed by the intended interpretation of the legislation. A less restrictive interpretation, which would allow border controls based on the same threat to last longer than six months, could lead to the reintroduction of unlimited border controls. Free movement of persons is 'one of the main achievements of the EU' and exceptions to it must be interpreted strictly. *Joined Cases C-368/20 and C-369/20, Landespolizeidirektion Steiermark and Bezirkshauptmannschaft Leibnitz*, para. 65.

17 However, it requires Member States to provide sufficient information as to why the circumstances pose a new threat. Regulation 2016/399, Article 81.

18 Stefan Salomon & Jorrit Rijpma, 'The Promise of Free Movement in the Schengen Area – the Decision of the Court of Justice in Landespolizeidirektion Steiermark (NW)', *European Law Review*, Vol. 48, Issue 1, 2023, p. 129.

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new threat. Let us assume that this assessment is left to the national courts. That case runs the risk that the different courts will reach conflicting conclusions without referring the question for a preliminary ruling, thereby jeopardizing the uniform application of EU law.[19]

The case also raised the question of the relationship between the principle of free movement and the internal security of Member States.[20] As Article 72 TFEU emphasizes that the maintenance of law and order and the safeguarding of internal security remain the responsibility of the Member States, some national governments have interpreted this, with some justification, as allowing them to derogate from binding EU law in the event of a serious threat to public policy or internal security. On this issue, the Advocate General has taken the view that where the right to free movement conflicts with Member States' security concerns, the interests of the Member States prevail,[21] effectively pitting the two categories against each other. By contrast, the CJEU has held that free movement and internal security are conceptually linked: the right to free movement is guaranteed precisely because strict control of external borders guarantees internal security. In the Court's view, the EU legislator has, in fact, already carried out a balancing exercise between free movement and internal security – and the result of this exercise is reflected in secondary EU law.[22] In other

19 This fear is not unfounded, as in 2017, several NGOs initiated proceedings against the extension of border controls before the *Conseil d'Etat*, which ultimately did not refer the matter for a preliminary ruling. Instead, it found that the controls did not infringe EU law, essentially on the basis of similar reasoning to that of the Advocate General.

20 The conflicting interpretations of the time-limits in the Code by the CJEU and the Advocate General are the result of different assessments of the principles of EU primary law, which also determine the interpretation of certain provisions of the Code. In this respect, the key issue in the case is to assess the relationship between the principle of free movement and the competence of Member States to maintain their internal security under Article 72 TFEU, which also determines the legal framework of the Code.

21 If a Member State were forced to lift strictly necessary border controls at the end of the six-month period, it would be prevented from exercising these powers. Such a situation would also, in certain cases be contrary to Article 4(2) TEU, which guarantees respect for the national identity of the Member States, in so far as it would prevent a State from addressing a threat to its national security.

22 Similarly, in *Alimanovic*, which concerned the payment of social benefits to EU citizens, the Court of Justice ruled that a subsistence allowance could be refused without a proportionality test, beacuse the legislator had already taken account of individual circumstances by providing for the possibility of maintaining the status of worker for a certain period. Judgment of 15 September 2015, *Case C-67/14, Alimanovic*, ECLI:EU:C:2015:597.

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words, Member States cannot rely on national security or public security grounds that would otherwise be found in primary EU law beyond what is permitted under secondary law.[23]

With the ruling that EU Member States may only reintroduce border controls within the Schengen area under stringent conditions,[24] the CJEU essentially acts as a contractual guardian of the integration *acquis* of free movement, preventing the practice of Member States treating Schengen as their 'quasi-sovereign domain'.[25]

The approach of the Luxembourg forum is perfectly understandable from a purely positivist point of view: if the EU legislator has laid down a set of rules, they must be respected. The question, however, is to what extent a purely positivist position can be accepted when that set of rules has become 'obsolete'. The ECtHR has often applied the 'living instrument' doctrine to precisely such situations, *i.e.* adapting legislation and jurisprudence to present-day conditions. However, this presupposes that the current meaning of the norm in question can be changed – which, while not unthinkable even in EU law, would at least require a rethinking of the doctrines of *acte clair* and *acte éclairé*.

4. Future Uncertainties and Reform of the Legal Framework

The Austrian Administrative Court, which ruled on the above cases based on a preliminary ruling by the CJEU, concluded that the extension of internal border controls by the Austrian Ministry of the Interior since November 2017 was contrary to EU law. Nevertheless, Austria – and the other Member States – have not lifted their internal border controls.[26] On this basis, I can agree with Cebulak and Morvillo that it will be a long and bumpy road

23 Ágnes Töttős, 'The Possibility of Using Article 72 TFEU as a Conflict-of-Law Rule. Hungary Seeking Derogation from EU Asylum Law', *Hungarian Yearbook of International Law and European Law*, Vol. 9, 2021, pp. 212–232.

24 *Joined Cases C-368/20 and C-369/20*, *Landespolizeidirektion Steirmark and Bezirkshauptmannschaft Leibnitz*, paras. 65 and 74.

25 Jonas Bornemann, 'Reviving the Promise of Schengen', *VerfassungsBlog,* 28 April 2022.

26 Despite the Court's clear position that open borders are a priority for integration, the response Member States' response has been rather muted. The Austrian, German and Danish authorities have not accepted that the ECJ ruling calls for the abolition of border controls and, stressing the importance of national security, have re-extended border controls until November 2022, together with France, Norway and Sweden.

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from this decision in principle to re-establish the Schengen area without internal borders.[27] How the above-mentioned Luxembourg court decision could be enforced in practice is still unclear. The judgment provides a clear legal basis for the Commission to act the guardian of the Treaties and to enforce the Code. However, knowing that the Commission has not acted in the past against the infringements in question against the Member States – a fact for which the CJEU reprimands it in the reasoning of its judgment[28] – it is to be feared that this task will, in the future, fall to the citizens of the Member States[29] and the national courts.[30]

Of course, the question is whether the Commission has any obligation to enforce secondary EU law, especially when the CJEU has firmly established the legality of this issue in a preliminary ruling. In my view, the answer is clearly yes, all the more so because if a court of a Member State were to disregard the same judgment of the CJEU (*i.e.* the interpretation of the law from Luxembourg contained in that judgment), this would undoubtedly establish the liability of that Member State. At the same time, it is questionable whether the Commission's arbitrary passivity does not violate the principle of the rule of law,[31] especially since it indirectly acknowledged

These decisions, all effective from 12 May 2022, appear to ignore the Court's ruling just two weeks earlier.

27 Pola Cebulak & Marta Morvillo, 'Who can end the border controls within Schengen? Implementing the CJEU's judgment in NW v Steiermark.' *AdiM blog,* May 2022, p. 4.

28 *Joined Cases C-368/20 and C-369/20*, *Landespolizeidirektion Steirmark and Bezirkshauptmannschaft Leibnitz*, para. 91. Pola Cebulak & Marta Morvillo, 'Schengen Restored', *VerfassungsBlog,* 5 May 2022.

29 The main issue here is state responsibility, *i.e.* where natural or legal persons suffer material damage as a result of the reintroduction of border controls by a Member State. However, this route to the enforcement of rights is much longer and more difficult, not to mention the fact that it requires the active participation of citizens.

30 The national forum does not necessarily make use of the possibility of referring to a previous decision. In France, for example, the *Conseil d'État* has already ruled twice on the legality of internal border controls, and has not referred the matter to the CJEU on either occassion. *See* Christoph Tometten, 'Contrôles aux frontières intérieures: La CJUE met fin à une pratique illégale', *La Revue des Droits de l'Homme*, June 2022.

31 The Commission has been heavily criticised in legal literature for the fact that, while its Legal Service sided with the applicant in the present proceedings and claimed that the border controls had been in breach of EU law since 2017, it had not taken any firm action against the Member State's breach in the period before that and had not used its discretionary powers under Article 256 TFEU to initiate infringement proceedings. Salomon & Rijpma 2023, p. 133.

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the untenability of the existing practice when it initiated the legislative amendment.[32]

In this respect, the Commission argued that its silence could not be interpreted as an acceptance of the legality of the Austrian measures. In the hearing, it was keen to emphasise that it wished to approach the issue of the reintroduction of internal border controls from a political rather than a legal perspective and that it had decided to work closely with the Member States to abolish the controls.[33] Thus, instead of issuing an opinion or a letter of formal notice on the infringement in 2017, it presented a legislative proposal[34] to revise the Code, but its negotiations appear to have failed. This draft legislation proposed to widen the possibilities for Member States to reintroduce border controls, including their duration. On the other hand, it was intended to encourage Member States to replace the reintroduction of internal border controls with police checks in border areas.

The new legislative proposal[35] presented by the Commission following the adoption of its Schengen Strategy[36] in 2021 also included both elements of the previous proposal, such as the widening of possibilities for reinstatement and alternative checks in border areas. The legislative proposal,[37] which was finally approved in June 2024[38] with the aim of ensuring free movement, paradoxically extends the period for reintroducing checks at internal borders to two years, with the possibility of renewing the six-month period.[39] Moreover, the original proposal even allowed for an unlimited

32 This also reflects the general trend followed by the Commission in prioritising its role as the 'engine of integration' over its role as the 'guardian of the treaties'. *See* R. Daniel Kelemen & Tommaso Pavon, 'Law Enforcement and the Politics of Supranational Forbearance in the European Union', *World Politics,* Vol. 75, Issue 4, 2023, pp. 779–825.

33 Pola Cebulak & Marta Morvillo,'The Guardian is Absent', *VerfassungsBlog*, 25 June 2021.

34 COM(2017) 571.

35 Proposal to amend Regulation (EU) 2016/399 on the EU Code on the rules governing the movement of persons across borders, COM(2021) 891.

36 COM(2021) 277.

37 *See* Jean-Yves Carlier & Eleonora Frasca, 'For a wiser and effective management of reintroducing internal border controls: Comment on the NW judgment', *EU Migration Law Blog*, 26 June 2023.

38 Regulation (EU) 2024/1717 of the European Parliament and of the Council of 13 June 2024 amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders.

39 *See* the new Article 25a(5) of the Code.

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extension thereof in the case of renewed threats.[40] It should also be noted that the new Schengen Code also explicitly mentions secondary movements as a public policy justification for reintroducing border controls, giving Member States much more room for manoeuvre.[41] The Commission has still not issued an opinion or taken any steps to initiate infringement proceedings. It continues to use political means and negotiations to persuade Member States maintaining internal border controls to move to less intrusive measures, such as police checks.[42]

5. Recent CJEU Ruling on the Reintroduction of Internal Border Controls, from a Public Health Perspective

It was already clear at the time of the pandemic that the long-term effects of the travel bans and restrictions introduced by Member States would become apparent over time and that the question of their legality (compatibility with EU law) would be raised before both national and international fora. This was the case in the *Nordic Info BV* case, which was referred to the CJEU for a preliminary ruling.[43] The judgment, which was published by the Court in December 2023, highlights once again the complex and multifaceted relationship between the guarantee of the fundamental freedom of movement and the fight to contain the pandemic.

Nordic Info BV focused on the public health restrictions imposed in relation to the outbreak of COVID-19. At the outbreak of the pandemic, the EU introduced strict measures *vis-á-vis* third countries and between individual Member States, significantly restricting the free movement of people across its borders. While most of these measures were lifted by the end of June 2020, several Member States, including Belgium, where the plaintiff

40 *See* Article 27a(5) of the 2021 proposal.

41 "[…] a serious threat to public policy or internal security can also result from large scale unauthorised movements of irregular migrants between the Member States […]." Recital (35) of the Code. It is feared that prioritising the prevention of secondary movements over the strengthening of external border protection will place additional burdens on peripheral states, including Hungary.

42 This may also be due to the fact that an infringement procedure against the states concerned would also hamper, for example, the decision on Schengen enlargement, as Austria's veto on the dismantling of border controls at the Romanian-Bulgarian land borders would be difficult to overcome if the Commission were to take a tougher stance on the reinstatement/sustainability of internal border controls.

43 Judgment of 5 December 2023, *Case C-128/22*, *Nordic Info BV*, ECLI:EU:C:2023:951.

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in the main case, Nordic Info BV was based, maintained restrictions on international travel as a precautionary measure, fearing a possible second wave of COVID-19.[44] Nordic Info BV was forced to cancel all its trips to Sweden scheduled for the 2020 summer season due to the colour codes imposed by the Belgian ministerial decree. This color code was subsequently changed from red to orange for the region in question within a relatively short period of time, effectively lifting the travel restrictions in question. The company then brought an action against the Belgian Government for compensation for the damage it allegedly suffered as a result of the introduction and subsequent amendment of the colour codes provided for in the Ministerial Decree. It claimed, *inter alia*, that the Belgian authorities had carried out checks at the border between Belgium and other Schengen States in order to implement the travel restrictions in question, in breach of the Schengen Borders Code. The case was referred to the CJEU for a preliminary ruling, with the national court asking whether the travel bans/restrictions were compatible with the provisions of the Free Movement Directive[45] on the one hand, and the Schengen Borders Code[46] on the other. In particular, whether the police control of travel restrictions in border areas[47] constituted border checks and, if so, whether the conditions for the exceptional reintroduction of border control at these borders were met.

With regard to the first question, which concerned the compatibility of the restrictions with the directive, the Court held, first, that while Articles 27 and 29 of the directive allow restrictions on the freedom of movement

44 Among other things, it has maintained a travel ban on 'non-essential' travel to and from certain countries considered to be at high risk of infection; a quarantine and testing requirement for Belgian residents returning from those countries, and controls at or near Belgian borders to enforce these travel restrictions.

45 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

46 The main question was whether *(i)* a general ban on non-essential travel for nationals and residents intending to travel to the Red Zone and *(ii)* the imposition of entry restrictions (quarantine and inspections) on non-nationals and non-residents arriving from the Red Zone were compatible with the Directive.

47 For example, at railway stations where police officers randomly checked some passengers of international high-speed trains from neighbouring countries when they disembarked at the first station where these trains stopped after entering Belgian territory.

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for reasons of public health on epidemiological grounds, and that this applies a *fortiori to* pandemics,[48] irrespective of whether the restrictive measures are adopted in the form of an individual act or a general measure.[49] However, the CJEU placed particular emphasis on the requirement of proportionality in the form of a strict proportionality test,[50] which it also linked to the precautionary principle.

It should be noted that the proportionality of the measures taken by the Member State was examined by the CJEU as a whole in the light of the package of measures aimed at restoring freedom of movement, which led to the conclusion that the relevant provisions of the Directive did not preclude the general travel ban and the various travel restrictions (quarantine, testing) introduced by Belgium.

Concerning the second question, whether the police control of travel restrictions in border areas amounted to border checks, the Court ultimately left it to the referring court to answer this question,[51] while at the same time subtly indicating that the police checks were probably not border controls due to their specific nature.[52]

Were the court nevertheless to find so, the CJEU held that, although the Code on border controls does not explicitly mention the threat to public health as one of the grounds for reintroducing checks,[53] it could constitute a serious threat to internal security and public order.[54]

48 *Case C-128/22*, *Nordic Info BV*, paras. 52–53.

49 Id. para. 67. In that regard, I share the Court's view that, in the absence of an express provision to the contrary in a directive, the legislature may not require an individual assessment in the absence of a threat to public health. Laura Gyeney, 'Editorial Comments: Covid-19 – EU Citizenship and the Right to Free Movement in a Public Health Crisis', *Hungarian Yearbook of International Law and European Law,* Vol. 9, 2021, p. 14.

50 *Case C-128/22*, *Nordic Info BV*, para. 92. Under this test, a Member State may be required to take measures that are less restrictive of free movement within the EU, even if this would result in a lower level of protection of its legitimate interests. On the proportionality of the measures taken in the context of the pandemic, *see* id. pp. 15–16.

51 *Case C-128/22*, *Nordic Info BV*, para. 109.

52 Id. para. 116. Firstly, it stressed that the nature of the controls was to check compliance with the prohibition on crossing the border. Secondly, these checks were carried out temporarily (not systematically) and only in specific places such as airports and major international railway stations.

53 Gyeney 2021, p. 13.

54 *Case C-128/22*, *Nordic Info BV*, paras. 125–126.

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> "A pandemic of a scale such as that of COVID-19, characterised by a contagious disease capable of causing death among various categories of the population and overstretching or even overwhelming national healthcare systems, is liable to affect one of the fundamental interests of society, [...]"

and thus "[...] may be classified a serious threat to public policy and/or internal security within the meaning of Article 25(1) of the Schengen Borders Code."[55]

In summary, the Court held that the Article of the Code in question does not preclude legislation prohibiting the crossing of internal borders on public health grounds to combat the COVID-19 pandemic, provided that this did not constitute border control but merely the exercise of police powers. The reintroduction of border controls is also permissible, as the pandemic falls under the internal security/public order exception.

It is apparent from the above that the CJEU is very lenient in its assessment of otherwise stringent national measures. This may seem particularly surprising given that freedom of movement is, in the words of the Advocate General in this case, the 'dearest child' of EU law.[56] Some authors attribute the Court's lenient assessment of these measures to the fact that the Luxembourg body, just like the legislator, probably regarded the COVID-19 pandemic as a 'one-off disruption'. As such, the wide discretion (or almost *carte blanche*) granted to Member States will not have a long-term impact on the case law.[57]

In my view, the unprecedented degree of seriousness of the health crisis and the scientific uncertainty surrounding the treatment of viral diseases were much more compelling arguments for the Court's broad interpretation of the public health exception than those mentioned above. Last but not least, the fact that the measures taken by the Member States in the context of the pandemic were ultimately aimed at ensuring freedom of movement in the long term by means of short-term restrictions played an important role in the Court's decision.

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55 Id. para. 127.

56 Opinion of Advocate General Emiliou delivered on 7 September 2023, *Case C-128/22, Nordic Info BV*, ECLI:EU:C:2023:645, para. 128.

57 Danaja Fabcic Povse, 'So long and see you in the next pandemic? The Court's one-and-done approach on permissible reasons to restrict freedom of movement for public health reasons in the Nordic Info case (C-128/22) of 5 December 2023', *European Law Blog*, 19 December 2023.

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6. Conclusions

In times of crisis, citizens expect concrete responses, especially from their own Member State. One such response has been the imposition of travel bans/restrictions by Member States in the context of the COVID-19 pandemic, the police control of the enforcement of these bans, and the reintroduction of border controls at internal borders between Member States in response to migratory pressures and terrorist threats. There is no question that in a multi-level governance system, the EU must leave room for Member States to act, which is also possible under the relevant secondary legislation in the form of public interest exceptions. For example, the Schengen Borders Code allows Member States to temporarily reintroduce border controls in the event of a threat to public policy and public security, which, at least according to the recent case law of the CJEU, includes a public health crisis. While this approach may be logical from a practical point of view, it rightly raises the question of whether a restriction of a fundamental right on grounds of public health can then be considered to be fully equivalent to a restriction on grounds of public policy or public security, and why the 'founding fathers' of EU integration have in many cases explicitly mentioned public health in the except to EU law in primary law. It is precisely in light of these primary law characteristics that the CJEU – going beyond its role as quasi-legislator – has corrected legislative shortcomings in the work of the EU legislature.[58]

This case law of the CJEU is also controversial because, at the same time, the CJEU itself interprets the applicability of the derogations very strictly, both in terms of time (the duration of border controls may not exceed six months) and in terms of their compatibility with general principles of law (the measures must comply with the principle of proportionality). Compliance with these exceptions was the main issue in the *Landespolizeidirektion Steiermark* and *Nordic Info BV* cases. In both cases, the CJEU expressly based its decision on the rules laid down in secondary law, *i.e.* the Schengen Borders Code, but it reached different conclusions in the two cases due to different interpretations of these rules. While in the case of *Landespolizeidirektion Steiermark*, the exception rule for border controls

58 Under the new rules, it will now be possible to put in place harmonised temporary travel restrictions at the EU's external borders in the event of a large scale public health emergency, following a Council decision. *See* the new Articles 21a and 28 of the Code.

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was interpreted very strictly, in the case of *Nordic Info BV*, it was interpreted very broadly, also in the light of the precautionary principle.

The difference in the Court's approach is probably due to the fact that, although in both cases the Court based its decisions technically on the interpretation of secondary law, the Luxembourg court was primarily guided in these decisions by the need to enforce the requirement of free movement in primary law. While the measures taken by Member States in the context of a pandemic are ultimately aimed at ensuring freedom of movement, this is not necessarily the case in the context of measures taken by Member States to control migratory pressures and human smugglers. However, it is regrettable that in *Landespolizeidirektion Steiermark*, the CJEU no longer sought to reconcile freedom of movement with the Member States' need for security, since, at least in the Court's view, the two are conceptually linked. In its view, the right to freedom of movement is guaranteed precisely because strict control of external borders is itself a guarantee of internal security.

Even if one can agree with the conclusion of the CJEU in the *Landespolizeidirektion Steiermark* case that Member States cannot maintain border controls *ad infinitum*, one has to recognise that the CJEU interprets secondary law according to its own needs and chooses the path it considers to be the most politically expedient. All this (*i.e.* the political will or lack of it) applies all the more to the Commission, which, although it has argued in favour of free movement across the Schengen borders in the judicial process, has previously stood by and watched for many years as Member States continued to break the law.[59] Against this background, it is questionable, to say the least, how an institution that has so far been completely passive can be expected to enforce a judicial decision.[60]

The issue is becoming increasingly urgent. Starting with 1 April 2024, air and sea border controls between Romania, Bulgaria, and the Schengen area member states are abolished. A decision on the abolition of land border

59 As Bornemann notes somewhat ironically, the Commission could have taken a leaf out of the book of the plaintiffs in the main proceedings, who, with considerable professional skill, have made a persistent effort to enforce EU law. Jonas Bornemann, 'Reviving the Promise of Schengen', *VerfassungsBlog,* 28 April 2022.

60 At the same time, it must be acknowledged that the political environment (concerns about migratory pressures, the forthcoming enlargement of Schengen) is not conducive to the Commission's transformation from a political actor into a mere legal executive. *See* at www.euronews.com/my-europe/2023/12/05/austria-still-opposed-to-schengen-accession-of-romania-and-bulgaria-preventing-december-vo.

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controls is also expected soon.[61] The enlargement of the Schengen area is likely to raise further practical questions about the day-to-day functioning of an area without border controls – especially in an era of new and emerging crises.

61 The Hungarian Presidency will also aim to facilitate the finalisation of the Schengen enlargement process, in particular by fostering a consensus in the Council on the lifting of border controls at the internal land borders of Romania and Bulgaria. Programme of the Hungarian Presidency of the Council of the European Union in the Second Half of 2024, p. 24.

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The Proposals of the European Parliament to Amend the European Treaties

Robert Böttner[*]

Abstract

As a follow-up to the proposals from the Conference on the Future of Europe in May 2022, the European Parliament proposed a comprehensive catalogue of amendments of the Union's primary law in November 2023. In addition to a series of minor adjustments, the proposals contain far-reaching institutional and competence-related reforms. The focus is, of course, on strengthening Parliament's position itself, but they also address issues that would increase the Union's working capacity in the run-up to future enlargements in the Western Balkans, but also in the light of internal and international crises that put the Union to the test. The proposals are far-reaching, but do not address all of the points required for a genuine and necessary reform of the Union. This contribution tries to shed some light on the most important aspects of Parliament's proposal an put them into context. Moreover, it will make some careful predictions on the feasibility of the proposals and potential alternatives.

Keywords: passerelle, Future of Europe, Article 7, amendment, institutional reforms

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1. The Treaty of Lisbon and the Constant Need for Reform

Ever since the founding of the European Communities and later the EU, European integration *stricto sensu* has been a process of change and reform rather than the achievement of some 'final stage'. This is due internal and external transformations, geopolitical changes and the enlargement of the organization. It may be also due to the fact that treaty amendments tend to

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be more cumbersome and time-consuming the more players are involved and the more comprehensive it is. In the world of sports this is enshrined in the saying: After the game is before the (next) game.

In fact, the last constitutional reform of the EU is now almost 20 years old and was negotiated right before and during the so called Eastern Enlargement in the early 2000s and which took several years to conclude. In December 2001, the heads of the EU Member States commissioned a large convention under the leadership of former French President Valéry Giscard d'Estaing to draw up a new European treaty. As is well known, this project of a 'constitutional treaty', whose draft was proposed in 2003 by the European Convention and revised and finalized by the Intergovernmental Conference in October 2004, eventually failed. However, most of its content was carried over to the Treaty of Lisbon, which entered into force in December 2009, thus eight years after the start of the reform process.

It has now been about fifteen years that the EU has operated under the new framework. During that time, the EU has been struck by several crises, some consequent and some concurrent, which led to the use of the word 'poly-crisis' to describe the multitude of challenges that the EU faces and needs to address with the instruments it has at its disposal. Some of the problems could and can be dealt with at the level of secondary law, but *e.g.* the discussions surrounding the secondary law changes ('banking union') and international law supplements ('European Stability Mechanism') to the Union's economic constitution as reaction to the economic and the sovereign debt crisis showed changes may be required also to the EU's primary law framework. It does not come as a surprise therefore that the economic and monetary union was subject to comprehensive reform proposals from various sides, including the so called 'Five Presidents Report' of 2015[1] or the Commission's proposals of December 2017 on the European Finance Minister and the incorporation of the ESM into EU law.[2]

1 The 'five presidents' are those of the European Commission, the Euro Summit, the Eurogroup, the European Central Bank, and the European Parliament. *See* European Commission, Completing Europe's Economic and Monetary Union, Report by Jean-Claude Juncker in close cooperation with Donald Tusk, Jeroen Dijsselbloem, Mario Draghi, and Martin Schulz, at https://commission.europa.eu/document/download/261ad02b-070a-47a1-b52b-b242db48addf_en?filename=The%20Five%20President%27s%20Report%3A%20Completing%20Europe%27s%20Economic%20and%20Monetary%20Union.

2 European Commission, A European Minister of Economy and Finance, COM(2017) 823 final and European Commission, Proposal for a Council Regulation on the estab-

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For some years now, the European Parliament has also been increasingly focusing on the questions of what primary law changes are necessary on the one hand and what integration potential can still be exploited in the existing treaties on the other. In February and March of 2017 presented comprehensive resolutions on possible evolutions of and adjustments to the current institutional set-up of the EU,[3] on improvements in the functioning of the EU building on the potential of the Lisbon Treaty,[4] on budgetary capacity for the euro area,[5] and on constitutional, legal and institutional implications of a common security and defence policy under the Lisbon Treaty.[6] These documents resonate a two-tiered approach of exploiting the full potential of the existing treaty framework on the one hand and necessary treaty amendments on the other hand.[7]

In March 2017, the Commission presented the "White Paper on the Future of Europe" with reflections and scenarios for the EU by 2025.[8] It presented a variety of options for the future development of the Union ranging from a re-centering of competences to the single market to a flexible and differentiated approach among the members to stronger cooperation in all policy areas and beyond. This sparked a debate on the overall design and finality of the EU, which eventually led to an agreement between the European Commission, the European Parliament and the Council to set up the "Conference on the Future of Europe" (CoFE), a citizen-led series of debates and discussions and an unprecedented pan-European exercise

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lishment of the European Monetary Fund, COM(2017) 827 final. *See in detail* Robert Böttner, 'Der Europäische Minister für Wirtschaft und Finanzen nach den Plänen der Kommission', *Zeitschrift für europarechtliche Studien,* 2018/1, pp. 69–96; and Cornelia Manger-Nestler & Robert Böttner, 'Der Europäische Währungsfonds nach den Plänen der Kommission', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht,* Vol. 79, Issue 1, 2019, pp. 43–84.

3 Resolution P8_TA(2017)0048 of 16 February 2017, 2014/2248(INI), at www.europarl.europa.eu/doceo/document/TA-8-2017-0048_EN.html.

4 Resolution P8_TA(2017)0049 of 16 February 2017, 2014/2249(INI), at www.europarl.europa.eu/doceo/document/TA-8-2017-0049_EN.html.

5 Resolution P8_TA(2017)0050 of 16 February 2017, 2015/2344(INI), at www.europarl.europa.eu/doceo/document/TA-8-2017-0050_EN.html.

6 Resolution P8_TA(2017)0092 of 16 March 2017, 2015/2343(INI), at www.europarl.europa.eu/doceo/document/TA-8-2017-0092_EN.html.

7 Parliament's efforts are summarized in its resolution of 13 February 2019 on the state of the debate on the future of Europe, P8_TA(2019) 0098, 2018/2094(INI), at www.europarl.europa.eu/doceo/document/TA-8-2019-0098_EN.html.

8 COM(2017) 2025.

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in deliberative democracy. In its final report,[9] the CoFE presented 49 proposals and 326 specific measures, structured around nine major themes (*e.g.* climate change and the environment, EU in the world, or digital transformation). In its follow-up to the CoFE,[10] the European Commission underlines that the institutions and the Member States should make use of the untapped potential within the existing Treaties in order to respond to the CoFE's proposals, but does not rule out treaty changes where they are necessary. The latter is subject of the comprehensive resolution of the European Parliament of November 2023,[11] which is not only a resolution but a full-fledged proposal to treaty amendments in accordance with Article 48(2) TEU.[12]

2. The European Parliament's Proposals

The following sections try to categorize and analyze the proposals put forward by the European Parliament. To this end, they look at institutional changes and changes in competences separately. Thirdly, due to the importance of the Union's values as its very foundation and the difficulties that the Union had to face with regard to the rule of law, the first section will deal with this issue separately.

9 Conference on the Future of Europe, Report on the Final Outcome, May 2022.

10 Commission Communication, Conference on the Future of Europe – Putting Vision into Concrete Action, COM(2022) 404 final and the Annex. *See also* European Parliamentary Research Service, Conference on the Future of Europe – Overview of the final proposals, Annex to the briefing, PE 738.214, November 2022, at www.europarl.europa.eu/cmsdata/281672/Overview%20of%20the%20final%20proposals%20EPRS_BRI(2022)738214(ANN1)_EN.pdf, which classifies the CoFE's proposals into "EU (non-)legislative initiative" and "treaty change".

11 European Parliament resolution of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties, P9_TA(2023)0427, 2022/2051(INL), at www.europarl.europa.eu/doceo/document/TA-9-2023-0427_EN.html. *See also* the draft report by the competent committee (AFCO) at www.europarl.europa.eu/doceo/document/A-9-2023-0337_EN.html.

12 In fact, already in June 2022 the European Parliament called for a Convention for the revision of the Treaties, to which the proposals of November 2023 are added. See European Parliament resolution of 9 June 2022 on the call for a Convention for the revision of the Treaties, P9_TA(2022)0244, 2022/2705(RSP), at www.europarl.europa.eu/doceo/document/TA-9-2022-0244_EN.html.

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2.1. Protecting the Union's Values

The so-called rule of law crisis has been a pressing issue in the last couple of years. While certainly a variety of Member States show deficits in their rule of law standards,[13] notably Poland and Hungary have become the center of attention for enacting measures that disregard fundamental aspects of the rule of law principle as one of the Unions values laid down in Article 2 TEU. Article 7 TEU had been designed to counter a systematic backsliding of the Union's values. The provision allows the Member States (*i.e.* the Council and the European Council) to adopt measures that would force a 'rouge' State to resume a behavior compatible with EU law standards. The 'warning mechanism' under Article 7(1) requires a four-fifths majority in the Council (not counting the Member States concerned), whereas the 'sanction mechanism' under paragraph 2 of that provision requires unanimity in the European Council as a basis for sanctions adopted by the Council.

Two Article 7 procedures (warnings) have been initiated, one by the European Parliament against Hungary and one by the European Commission against Poland. So far, however, none of these procedures have led to tangible success, which is mostly due to the voting requirements that lead to a situation where "there is honor among thieves".[14] Against this background, the EU has adopted secondary law measures that allow withholding funds in case rule of law problems in a Member State may be detrimental to the Union's financial interests (so called 'conditionality regulation').[15]

It is thus evident that the current set-up of the Article 7 procedure is ineffective. Therefore, Parliament proposes to strengthen and reform the procedure in Article 7 TEU by ending unanimity and by making the Court

13 *See* the country chapters in the European Commission's Rule of Law Report, at https://commission.europa.eu/publications/2023-rule-law-report-communication-and-country-chapters_en.

14 *See e.g.* Robert Böttner & Nic Schröder, 'Article 7 TEU as 'Nuclear Option'? An Analysis of its Potential and its Shortcomings', *in* Robert Böttner & Hermann-Josef Blanke (eds.), *The Rule of Law Under Threat,* Edward Elgar, Cheltenham, 2024, pp. 219–238.

15 *See* most recently Jonathan Bauerschmidt, 'The Rule of Law in the European Union and the Toolbox to Defend it: Article 7 TEU, Rule of Law Report and Dialogue, Budgetary Conditionality', *in* Böttner & Blanke (eds.) 2024, pp. 196–218.

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of Justice the arbiter on the existence of a violation.[16] More specifically, it proposes adaptions to the Article 7 procedure in the following relevant elements:[17]

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a *qualified* majority ~~of four fifths of its members~~ after obtaining the consent of the European Parliament, *shall* determine *within six months of receiving a proposal whether* there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. […]
2. The ~~European~~ Council, acting by ~~unanimity on~~ *a qualified majority within six months of receiving* a proposal by one third of the Member States*, by the European Parliament, acting by a majority of its component Members, or by the Commission* ~~and after obtaining the consent of the European Parliament~~, may ~~determine~~ *submit an application to the Court of Justice on* the existence of a serious and persistent breach by a Member State of the values referred to in Article 2~~, after inviting the Member State in question to submit its observations~~.
   The Court of Justice shall decide on the application after inviting the Member State in question to submit its observations.
3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, ~~may decide to suspend certain of the rights~~ *shall decide within six months thereof to take appropriate measures. Such measures may include the suspension of commitments and payments from the Union's budget, or the suspension of* certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council *and the right of the Member State in question to hold the Presidency of the Council.* […]

In essence, three proposed amendments are remarkable. First, voting requirements in the Council, *i.e.* the representation of Member States are lifted. At the moment, it requires a four-fifths majority (currently 21 States) to issue a warning and unanimity (26 States, not counting the Member State concerned) to enable sanctions. Under the system proposed by the European Parliament, it would only take 15 States (55 % – qualified majority – of 26 States). It would still take a majority of States to activate the

16 P9_TA(2023)0427, Recital (17).
17 Id. amendments 9 through 12. Deletions are crossed out, amendments are in italics.

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Article 7 procedure, but it could not be prevented by a (very small) minority. Furthermore, Parliament proposes putting a deadline of six months on the procedure in which the Council must take a decision. It must be underlined that there will not be any automatic decision upon expiry of the six-months delay, but Council could no longer avoid taking a (positive or negative) decision indefinitely.

The most innovative proposal is the inclusion of the CJEU in the sanction procedure, a role it is currently not endowed with under Article 269 TFEU. The determination on the existence of a serious and persistent breach by a Member State of the Union's values would no longer be made by the European Council acting unanimously, but by the CJEU. This would have two clear advantages. *(i)* Firstly, it would relieve the Member States from pointing fingers at each other when it gets to sanctioning a State for a breach of the Union's values. Clearly, the specific measures/sanctions would still be adopted by the Council, *i.e.* by the Member States. But they could do so only after the CJEU switched the lever. *(ii)* Secondly, endowing the CJEU with this decision would do away with allegations of the Article 7 procedure's being too political, discretionary, or even opportunistic. On the other hand, however, this latter point may exactly be the reason why the CJEU *should not* have a say in the procedure. Determining a breach of the Union's values requires clarity on their scope. Article 4(2) TEU calls on the Union to respect the Member States' constitutional identities, which may be characterized by different approaches to, for example, rule of law or democracy. Moreover, discussions on a political rather than a judicial level allows for different tools and approaches that may be necessary to address the issue, for a backsliding in one of the Union's values does not happen by accident but rather by (political) choice.

Thus, lowering the voting requirements and installing obligatory deadlines may make the procedure more operational. Including the CJEU in the procedure, however, is not a good or bad idea *per se*, but Member States and the EU's institutions should have a serious discussion on the political or judicial character of Article 7 TEU, especially beyond the current rule of law debate. In this context, another – small – amendment is worth mentioning. Parliament proposes an addition to Article 49 TEU (accession to the Union), which would be declaratory in nature, but would make one

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thing unmistakably clear: "Member States must continue to respect the values referred to in Article 2 after their accession to the Union."[18]

2.2. Institutional Reforms at EU Level

The European Parliament's proposal contains a number of institutional reforms that, among others, aim at adapting the decision-making mechanisms in the Union to more accurately reflect a 'bicameral system' by further empowering the European Parliament and by changing the voting mechanisms in the Council.[19] In addition, the relationship between the Commission and the European Council is to be redefined by reducing the European Council's role in favor of the 'Executive'. The CJEU is also to be given new competences.

2.2.1. Strengthening the European Parliament in Relation to the Council

Strengthening the Parliament as one chamber of a genuine bicameral system at Union level includes a long-requested legislative right of initiative for the Parliament.[20] The existing *indirect* right of initiative (Article 225 TFEU), according to which the European Parliament can request the Commission to submit a proposal, is to be amended to the effect that the Parliament can independently submit a proposal within the framework of the ordinary legislative procedure (which, according to the proposal, shall apply in more cases) and introduce it into the procedure.[21] The Parliament's proposals do not, on the other hand, provide for the Council, as the second chamber, to be given such a right of initiative. However, there is no obvious reason why only one of the two (legislative) chambers should be strengthened beyond the current indirect right of initiative. A right of initiative for Parliament as the directly elected chamber is often used as an argument in favor of increased democratic legitimacy. In reality, however, it would significantly upset the institutional balance of the EU's political

18 Id. Amendment 65.
19 Id. Recitals (3) and (4).
20 *See e.g.* Andreas Maurer & Michael Wolf, *The European Parliament's right of initiative,* Study for the European Parliament, PE 655.134, July 2020, at www.europarl.europa.eu/RegData/etudes/STUD/2020/655134/IPOL_STU(2020)655134_EN.pdf.
21 P9_TA(2023)0427, Amendments 189 and 210.

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system.[22] In this setting, especially in the ordinary legislative procedure, it is the Commission's role to balance the interests of the Member States (Council) and the Union citizens (European Parliament) and to balance general with special interests.[23] This includes the drafting stage of legislative procedures, which is enshrined in the Commission's task to "promote the general interest of the Union and take appropriate initiatives to that end" [Article 17(1) TEU]. The call for a right of initiative for the European Parliament should therefore not be made hastily and without reflection, but should be made against the background of the institutions' tasks and the current system of interinstitutional agreements between Parliament and the Commission.

2.2.2. Redesigning the European Commission and Cutting back on the European Council's (Assumed) Role

The European Parliament's proposals seek to re-organize the relationship between the European Commission and the European Council, the latter being an official institution only since the entry into force of the Lisbon Treaty. The European Commission (now the 'Executive') and its President (now the 'President of the European Union') are to take on a more prominent role by curtailing that of the President of the European Council. At the same time, the increasing indirect decision-making power that the European Council has assumed in the recent past is to be reduced to the role of providing guidance. As Article 15(1) TEU reads, it "shall provide the Union with the necessary impetus for its development", but "it shall not exercise legislative functions." The proposed new relationship between the European Council and the Commission would underline the Commission's (prospective) role as European Government.[24]

22 With the same view Andrew Duff, *Towards common accord? The European Union contemplates treaty change*, EPC Discussion Paper, 31 October 2023, p. 5.

23 *See* in this regard John Temple Lang, 'How much do the smaller Member States need the Commission? The role of the Commission in a changing Europe', *Common Market Law Review,* Vol. 39, Issue 2, 2002, pp. 319–339.

24 *See* on this point in detail Robert Böttner, 'The Commission as a European Government' *in* Darren Harvey *et al.* (eds.), *Reforming the EU Treaties,* Nomos, Baden-Baden, 2023, p. 21 *ff.*

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The proposed amendment to Article 15(2) TEU[25] suggests that the office of President of the European Council should be completely replaced by that of President of the Commission. In fact, the idea of merging the President of the European Council and the President of the European Commission into a double-hatted President of the European Union is not new[26] and could probably be established already under the existing primary-law framework.[27] The double hat is linked with a change in the electoral procedure. As proposed by Parliament, the President of the Commission will henceforth be elected by the European Council,[28] but the right of nomination will be transferred to the European Parliament, which will propose a candidate to the European Council by an absolute majority (majority of component members). This will further strengthen the nexus introduced by the Treaty of Lisbon between the outcome of the European elections and the office of Commission President and could create a true lead candidate system. The Parliament already has the option of rejecting a candidate proposed by the European Council if, in the Parliament's view, he or she does not have the necessary political affiliation or – as in the case of Ursula von der Leyen – has not even participated in the electoral campaign as a lead candidate. However, it would plunge the Union into a political crisis if Parliament were to actually play this card. In contrast, a separate right of nomination is the gentler method because it forces the European Council to respect the will of the voters embodied in the parliamentary proposal unless there are compelling reasons not to do so.

The European Parliament's Committee on Constitutional Affairs' (AFCO) draft proposal to introduce a binding individual motion of censure against individual Commissioners was not included in Parliament's final resolution. What is included though and would be incorporated into primary law is the rule that Parliament can request the Commission to

25 P9_TA(2023)0427, Amendment 24: "The European Council shall consist of the Heads of State or Government of the Member States, together with ~~its President and~~ the President of the *European Union*."

26 *See* European Political Strategy Centre, A Double-Hatted President – A New Way of Governing for a Union of 27, February 2017, at www.politico.eu/wp-content/uploads/2018/02/Double-Hatted-Presidency.pdf; Christian Calliess, 'The Future of Europe after Brexit: Towards a Reform of the European Union and its Euro Area', *Yearbook of European Law*, 2021, p. 15..

27 Id. p. 7. *See also* Christian Calliess, 'Proposals to Prevent an 'Overstretch in Integration", *VerfassungsBlog*, 6 July 2023.

28 Id. Amendment 41.

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dismiss an individual Commissioner, which already applies by virtue of an agreement between Parliament and the Commission. However, the rule is tightened even further: If the Commission does not comply with the request to dismiss an individual Commissioner, the Commission as a whole must face a new favorable vote by Parliament.[29]

Also proposed by the AFCO, but not included in Parliament's resolution, is a (primary-law based) reduction in the size of the Commission to 15 members.[30] Although such a specification would be desirable, it is not necessary, as Article 17(5) TEU already stipulates *de constitutione lata* that the number of Commissioners should correspond to two thirds of the number of Member States (currently 18 Commissioners) and that the European Council can decide on a different number of Commissioners. The abolishment of the "one Commissioner per Member State" rule is favorable, as the Commission is not a representative institution.[31] As is well known, the European Council made use of this authority, but not for making the College smaller, but for keeping one Commissioner per Member State. Against this background, Commission Presidents Juncker and von der Leyen established groups of Commissioners or project teams, that rationalized the work of a Commission of 27. However, it introduced a sort of hierarchy that is problematic with regard to the principle of collegiality in the Commission.[32] This is why it was a good choice to cancel AFCO's original idea to let the Commission appoint 'undersecretaries' (or second-class Commissioners, to put it bluntly).[33]

Lastly, in addition to the High Representative for Foreign Affairs and Security Policy, a "Union Secretary for Economic Governance" is to be appointed as a mandatory Commissioner under primary law.[34] In 2017, the European Commission proposed the introduction of a European Economy

29 Id. Amendment 42.

30 *Cf.* id. Recital (7).

31 Among the proponents of a 'representative' Commission, *see* Lang 2002. Against this view, *see* Robert Böttner, 'The size and structure of the European Commission – Legal issues surrounding project teams and a (future) reduced College', *European Constitutional Law Review,* Vol. 14, Issue 1, 2018, pp. 37–61.

32 On this issue, *see* Böttner 2018, p. 42; and Robert Böttner, 'Project Teams in the European Commission – A fair balance between efficiency and politics?' *in* Michael W. Bauer *et al.* (eds.), *The European Commission in Turbulent Times*, Nomos, Baden-Baden, 2018, pp. 113–132.

33 This idea was enshrined in AFCO's amendment to Article 17(5) TEU (Amendment 47) and still resonates in Recital (7) of Parliament's resolution.

34 P9_TA(2023)0427, Amendment 40.

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and Finance Minister that would assume a multi-hatted role as chairperson of the Eurogroup, chairperson of the ESM and, of course, Commissioner and Commission Vice-President for the respective dossier.[35] Parliament's resolution does not further specify what role the proposed Commissioner for Economic Governance would assume. From the proposals in which this new Commissioner is mentioned,[36] one can infer that its institutional position would be similar to that of the High Representative. If that is the case, it would require constitutional amendments that go beyond the Commission's 2017 proposal.

2.2.3. Giving New Powers to the CJEU

Parliament proposes adaptions also to the Union's judiciary, the CJEU. Apart from some clarifications, the resolution envisages new competences for the Union courts.

As mentioned above, the CJEU would be involved in the Article 7 procedure for the sanctioning of breaches of the Union's values. Instead of the European Council, the CJEU would establish if a Member State breached the European values in a serious and persistent manner.[37] It should be noted, however, that the CJEU would only have the competence to make the determination on the existence (or not) of such a breach and only upon application by another institution (not *ex officio*). The CJEU would not act as a prosecuting authority, as the (political) decision on the sanctions would remain with the Member States (in the form of the national representatives in the Council).

The subsidiarity complaint before the CJEU is not enhanced, but at least made more visible. The CJEU already has jurisdiction to scrutinize EU legal acts for compliance with the principle of subsidiarity. An infringement of subsidiarity can be challenged in an action for annulment under Article 263 TFEU. The Member States, the European Parliament, the Council and the Commission as privileged plaintiffs are entitled to bring action before the CJEU, *inter alia* for infringement of the subsidiarity principle. The same applies to the Committee of the Regions and the national parliaments pursuant to Article 8 of Protocol No. 2 (the so-called Subsidiarity Protocol),

35 European Commission, A European Minister of Economy and Finance, COM(2017) 823 final. *See* in detail Böttner 2018.

36 P9_TA(2023)0427, Amendments 40 *in fine* and 193.

37 Id. Amendment 10.

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but their legal standing is limited to the subsidiarity principle. To date, however, the principle of subsidiarity has played virtually no role in judicial practice.[38]

In contrast, another proposed amendment is interesting, although it is only outlined and not specified in detail: Parliament suggests to confer on the CJEU the power to a pre-emptive abstract review of norms.[39] To this end, the following wording would be added to Article 19 TEU: "The Court of Justice of the European Union [...] may give preliminary rulings on whether the Union has acted ultra vires." Such an instrument would be new to the Union's judiciary, but it is not unknown in (some) national legal systems. It remains to be seen who would be entitled to file an application in such proceedings before the European jurisdiction, but it would probably be the actors who can bring an action against a legal act in the context of an action for annulment. The CJEU also already has a preventive control competence in that Article 218(11) TFEU provides for the possibility that international agreements of the Union may be submitted to the CJEU for examination of their compatibility with Union law before they are concluded. This is reasonable, so that the Union does not enter into obligations that are effective under international law but whose fulfilment is prohibited under internal law. However, it is questionable to what extent such a preventive control competence is relevant and necessary with regard to internal law.

Finally, the European Parliament would like to have legal standing in the context of infringement proceedings alongside the Member States and the Commission and proposes and amendment to Article 259 TFEU to that end.[40] However, as in the case of the right of initiative as a new privilege for the European Parliament, endowing the Parliament with legal standing in the treaty infringement procedure would upset the Union's institutional system. According to Article 17(1) TEU, the European Commission shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them and it shall oversee the application of Union law under the control of the CJEU. This is why the Commission is the primary

38 *Cf.* Diane Fromage, *Controlling Subsidiarity in Today's EU: the Role of the European Parliament and the National Parliaments,* Study for the European Parliament, PE 732.058, April 2022, p. 34, at www.europarl.europa.eu/RegData/etudes/STUD/2022/732058/IPOL_STU(2022)732058_EN.pdf.

39 P9_TA(2023)0427, Recital (19).

40 Id. Amendment 199.

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institution to initiate infringement procedures under Article 258 TFEU.[41] Even Member States that want to initiate proceedings against another State under Article 259 TFEU must first refer the matter to the Commission. The Member States' standing is justified by the European Union's character as an international (intergovernmental) organization; there is, however, no similar justification for Parliament to assume a similar role. Even without the power to press charges against a Member State for an infringement of EU law, Parliament can still bring a matter to the Commission's attention which then can decide to open proceedings against that Member State or not.

2.3. Adapting the Union's Competences and Decision-making Procedures

In addition to institutional changes, Parliament also proposes adjustments in the area of Union competences and decision-making procedures. This relates in particular to a comprehensive transition to qualified majority voting in the Council or even to the ordinary legislative procedure. In terms of content, the areas of climate and environment as well as the common foreign and security policy are to be strengthened and further supranationalized.

2.3.1. Internal Policies

Proposed amendments in the Union's internal policies essentially rest on three pillars: *(i)* enhancing the competence in environmental policy; *(ii)* creating shared competences where the Union only had coordinating and supporting competence; and *(iii)* extending some existing competences in their scope. All these proposed material changes are accompanied by a general transition from special legislative procedures to the ordinary legislative procedures in the specific legal bases or at least a transition to qualified majority voting in the Council where currently unanimity is required.

A major concern for the European Parliament as regards material competences is the field of climate, environment and biodiversity. To this end, Article 3 on the Unions aims and objectives shall be amended to include

41 *Cf.* Bernd Martenczuk, 'Artikel 17 EUV' *in* Eberhard Grabitz *et al.* (eds.), *Das Recht der Europäischen Union*, May 2023, para. 19f.

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"reducing global warming and safeguarding biodiversity in line with international agreements" in the context of the establishment of the internal market [Article 3(3) TEU].[42] The AFCO proposed therefore to upgrade the Union competence for the environment, which is currently shared between the Union and the Member States according to Article 4(2)(e) TFEU, to an exclusive Union competence and supplement it by a competence for biodiversity. However, this proposal was not included in the operative part of the final Parliament resolution, but remained in the recitals.[43] What remained, however, is a reference to "global negotiations on climate change" in the context of the Union's exclusive external competences according to Article 3(2) TFEU,[44] which is a codification of the so called ERTA doctrine on the exercise of shared competences.[45] It appears however, that the proposed change would only be declaratory in nature, as the conditions for creating an exclusive external competence elaborated in Article 3(2) TFEU remain the same, *i.e.* an external Union competence for the conclusion of an international agreement would exist only when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

As regards the scope of the environmental competence, the European Parliament proposes a number of substantial changes that are worth being presented in the context of the current legal basis of Article 191 TFEU:

Article 191

Mindful of its responsibility towards future generations, the European Union, acting in accordance with the Treaties, shall protect the natural foundations of life and animals by Union law, including by executive and judicial action.

1. Union policy on the environment shall contribute to pursuit of the following objectives: preserving, protecting and improving the quality of the environment; protecting human health; prudent and rational utilization of natural resources; promoting measures at Union and international level to deal with

42 P9_TA(2023)0427, Amendment 4.
43 Id. Recital (13).
44 Id. Amendment 69.
45 *See* Andrea Ott, 'EU External Competence' *in* Ramses A. Wessel & Joris Larik (eds.), *EU External Relations Law, 2nd edition,* Hart, 2020, p. 61; Inge Govaere, 'Implied Powers of the EU, Limits to Political Expediency and Internationally Inspired Pragmatism: Commission v Council (ERTA)' *in* Graham Butler & Ramses A. Wessel (eds.), *EU External Relations Law: The Cases in Context,* 2022, pp. 9–20.

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regional or worldwide environmental problems, and in particular combating climate change, protecting biodiversity, and implementing the Union's international obligations.

2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the *one health approach and on the* precautionary principle, as well as ~~and~~ on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. […]

3. In preparing its policy on the environment, the Union shall take account of: available scientific and technical data; environmental conditions in the various regions of the Union; the risk to cross planetary boundaries, applying a precautionary principle; the potential benefits and costs of action or lack of action; the economic and social development of the Union as a whole and the balanced development of its regions. […]

Article 191a

1. The Union shall, in line with its international obligations, pursue efforts to limit the global temperature increase and adhere to the objective of balancing Union-wide greenhouse gas emissions and removals to achieve negative emissions.

2. In the context of the adoption of any draft measure or legislative proposal, including budgetary proposals, the Commission shall endeavor to align those draft measures and proposals with the objectives referred to in paragraph 1. In the event of non-compliance, the Commission shall provide the reasons for that failure to align as part of the impact assessment accompanying the relevant proposal.

The proposed new opening of the provision resembles to some extent the horizontal clause of Article 11 TFEU, which requires that "environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development", and Article 13 TFEU with regard to animal welfare. However, the proposed amendment goes even further in that it adds a reference to the responsibility towards future generations, thus giving the environmental competence a more intertemporal aspect. This element has gained importance in recent years in climate litigation, *e.g.* directly before the German Federal Constitutional Court[46] and at least

46 German Federal Constitutional Court, Cases 1 BvR 2656/18 and others, Order of the First Senate of 24 March 2021.

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indirectly before the ECtHR.[47] The proposed new provision of Article 191a adds a new obligation (or extends existing obligations) on justifying Union measures with regard to the achievement of certain climate goals. An interesting addition is proposed to Article 83(1)(2) TFEU on criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension, as 'environmental crime' should be included in the list of offences.[48] Regardless of whether these proposals would indeed extend the scope of the environmental policy, *i.e.* are not already covered by a progressive interpretation of the provision, they would certainly put more emphasis on climate and environmental issues.

Secondly, Parliament proposes establishing shared competences on public health matters and the protection and improvement of human health, especially cross-border health threats, cross-border infrastructures as part of transport, civil protection, industry, and education especially when transnational issues such as mutual recognition of degrees, grades, competences and qualifications are concerned.[49] In fact, these policy areas are already part of the Union competences, but they are currently enshrined in Article 6 TFEU, giving the Union a competence only to carry out actions to support, coordinate or supplement the actions of the Member States. The proposed changes would leave culture, tourism, vocational training, youth and sport, and administrative cooperation (as well as economic, employment, and social policy as laid down in Article 5 TFEU) among the coordinating competences.

Thirdly, throughout the TFEU, Parliament proposes amendments to existing competences, both in substance and scope as well as in procedure. While a comprehensive list cannot be presented here, by way of example one can refer to the amendment proposed to Article 153(1)(j) to include the fight against poverty and the supporting of social housing[50] or the inclusion of a new aim of developing common objectives and standards of an education that promotes democratic values and the rule of law as well as digital and economic literacy in the education competence of Article 165 TFEU (which is to become a shared competence).[51] More importantly,

47 *Verein KlimaSeniorinnen Schweiz and others v. Switzerland,* No. 53600/20, 9 April 2024.
48 P9_TA(2023)0427, Amendment 106.
49 Id. Amendments 70 through 79.
50 Id. Amendment 134.
51 Id. Amendment 143.

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on the basis of Parliament's proposal, almost all existing legal bases that prescribe for a special legislative procedure are to be transformed to the ordinary legislative procedure, thus giving equal rights to Parliament in the legislative process and providing for qualified majority voting instead of unanimity in the Council. This is just a logical step in the line of treaty amendments that enhanced Parliament's role on its way towards a true bicameral system (see above). Crucially, Parliament's proposal also covers the flexibility clause of Article 352 TFEU.[52] A transition to qualified majority voting for this legal basis would confer onto the Union a sort of *Kompetenz-Kompetenz*[53] that would most definitely meet the resistance of the German Federal Constitutional Court.[54]

While certainly it would be good to have it inscribed in primary law, a transition to qualified majority voting or to the ordinary legislative procedure is possible already on the basis of the *passerelle* clauses in Article 48(7) TEU. The treaty-makers of the Constitutional Treaty and then the Treaty of Lisbon made a big leap forward by providing for an opportunity to change all legislative procedures to the ordinary legislative procedure without a full-fledged treaty revision, *i.e.* through a simplified treaty revision procedure. Especially the transition to the ordinary legislative procedure would enhance Parliament's role, as in those cases it acts on equal footing with the Council as co-legislator. Using the *passerelle* clauses [especially Article 48(7) TEU], these changes could be introduced even today. In fact, the use of the *passerelle* clauses is what the Commission[55] and the

52 Id. Amendment 238.

53 Lionello, Luca, 'A Leap Towards Federalisation?', *VerfassungsBlog*, 9 September 2023; *cf. also* Andrew Duff, *Towards common accord? The European Union contemplates treaty change,* EPC Discussion Paper, 31 October 2023, p. 6.

54 *Cf.* Federal Constitutional Court, Case 2 BvE 2/08 and others, Judgment of the Second Senate of 30 June 2009, para. 328: "[Article 352 TFEU] meets with constitutional objections with regard to the ban on transferring blanket empowerments or on transferring *Kompetenz-Kompetenz*, because the newly worded provision makes it possible substantially to amend treaty foundations of the European Union without the constitutive participation of legislative bodies in addition to the Member States' executive powers […]. Because of the indefinite nature of future application of the flexibility clause, its use constitutionally requires ratification by the German *Bundestag* and the *Bundesrat* on the basis of Article 23.1 second and third sentence of the Basic Law. The German representative in the Council may not express formal approval on behalf of the Federal Republic of Germany of a corresponding lawmaking proposal of the Commission as long as these constitutionally required preconditions are not met."

55 Commission Communication, A stronger global actor: a more efficient decision-making for EU Common Foreign and Security Policy, COM(2018) 647 final; Commission

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European Parliament[56] have consistently called for. There is, however, an important limit to the *passerelle* clauses that one should keep in mind during a treaty revision: It allows only to transition from a special to the ordinary legislative procedure, but it does not allow for the introduction of a legislative procedure where there is currently a non-legislative procedure in place.[57] The Treaties, however, do not follow any inherent logic in the distinction between legislative ad non-legislative procedures.[58]

2.3.2. External Action

Several changes, some of them fundamental, are also planned for the area of foreign policy. These concern the Common Foreign and Security Policy regulated in the TEU and, in particular, the general trade policy in the TFEU as well as the general rules for the conclusion of international agreements by the European Union.

It is true that the Common Foreign and Security Policy [Articles 23 *ff.* TEU] has already been supranationalized to some extent with the Treaty of Lisbon, but it is still subject to specific rules and procedures as laid down in Article 24(1)(2) TEU. This includes unanimity in the Council (and the European Council) as the default voting procedure, the exclusion of legislative acts, and a diminished role for the European Commission, the European Parliament and the CJEU. The European Parliament proposes to change this default in CFSP: Foreign policy "shall be defined and imple-

Communication, Towards a more efficient and democratic decision making in EU tax policy, COM(2019) 8 final; Commission Communication, A more efficient and democratic decision making in EU energy and climate policy, COM(2019) 177 final; Commission Communication, More efficient decision-making in social policy: Identification of areas for an enhanced move to qualified majority voting, COM(2019) 186 final. On these initiatives, *see* Robert Böttner, 'The Commission's initiative on the passerelle clauses. Exploring the unused potential of the Lisbon Treaty', *Zeitschrift für europarechtliche Studien,* 2020/3, pp. 489–508.

56 *See* most recently European Parliament resolution of 11 July 2023 on the implementation of the passerelle clauses in the EU Treaties, P9_TA(2023)0269, 2022/2142(INI).

57 Robert Böttner & Jan Grinc, *Bridging Clauses in European Constitutional Law – Legal Framework and Parliamentary Participation,* Springer, 2018, p. 33.

58 Michael Dougan, 'The Treaty of Lisbon 2007: winning minds, not hearts', *Common Market Law Review,* Vol. 45, Issue 3, 2008, p. 647; Nicholas Otto, *Die Vielfalt unionaler Rechtsetzungsverfahren*, Mohr Siebeck, 2022, p. 49; Robert Böttner, *Special legislative procedures in the Treaties,* Study for the European Parliament, PE 738.331, October 2022, p. 10.

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mented by the European Council and the Council acting by a qualified majority, after obtaining the consent of the European Parliament." On top of that, one can assume that Parliament would like to include the adoption of legislative acts in foreign policy, even though this is not quite clear and consistent in the proposal.[59] Furthermore, the CJEU "shall have jurisdiction with respect to these provisions".[60] In addition, the qualified abstention enshrined in Article 31 TEU would be crossed out[61] and the emergency brake in Article 31(2) TEU, according to which a Council member could oppose qualified majority voting (for vital and stated reasons of national policy) and demand that the matter be referred to the European Council for unanimous decision, would be watered down.[62] All in all, this would considerably cut back on veto options in foreign policy, but it is unlikely that Member States would agree on those radical changes. There are already a few options for qualified majority voting in CFSP and the *passerelles* (transition from unanimity to QMV) apply here as well. Therefore, even without an ordinary treaty amendment, there are already options to transition to more qualified majority if the political agreement among the Member States exits.

In foreign and security policy, the most far-reaching proposal is the expansion of the common security and defence policy into a genuine defence union on the basis of Article 42 ff. TEU, which "shall enable the Union to defend Member States against threats".[63] Whereas currently the performance of the tasks in the defence union "shall be undertaken using capabilities provided by the Member States" [Article 42(1) TEU], Parliament proposes that the CSDP, including the (common) procurement and development of armaments, "shall be financed by the Union through a dedicated budget in respect of which the European Parliament is a co-legislator and exercises scrutiny".[64] Moreover, the Defence Union would entail

59 The exclusion of the adoption of legislative acts is deleted in Article 24(1) TEU (Amendment 45), but retained in Article 31(1) TEU (Amendment 47). Furthermore, in none of the CFSP legal bases does Parliament introduce legislative procedures.

60 P9_TA(2023)0427, Amendments 45 and 47 through 50.

61 Id. Amendment 47.

62 The proposed wording of Article 31(2)(2) TEU according to Amendment 48: "A member of the Council may request that, for vital and stated reasons of national policy, the matter be referred to the European Council", which would decide by qualified majority in accordance with the new version of Article 24(1) TEU.

63 P9_TA(2023)0427, Amendment 51.

64 Id. Amendment 51.

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"military units, including a permanent rapid deployment capacity, under the operational command of the Union" and not only capabilities made available to the Union by the Member States (which Member States would be free to deploy additionally as a matter of course).[65] The common defence clause in Article 42(7) TEU, that was introduced by the Treaty of Lisbon, would be aligned with the wording of Article V of the North Atlantic Treaty.[66] In view of Denmark's, Sweden's and Finland's turn towards the EU and NATO in the face of Russia's war of aggression against Ukraine, a further development of European defence policy in terms of primary law cannot be ruled out. Even though the common defence in the realm of the EU would be without prejudice to the specific security and defence policy of certain Member States including their membership in NATO [see Article 42(7) *in fine* and Protocol No. 11], any intensification of defence cooperation within the EU would raise questions as to the co-existence and cooperation with the North Atlantic alliance.

Apart from the CFSP, amendments are proposed to the common commercial policy as part of the Union's foreign policy as well as to the competence and especially procedure for the conclusion of international agreements by the EU. First of all, Parliament proposes to include 'investment protection' and 'economic security' in the scope of the common commercial policy in Article 207(1) TFEU.[67] The common commercial policy is one of the Union's exclusive competences [Article 3(1)(e) TFEU] as the (external) counterpart to the (internal) customs union [Article 3(1)(a) TFEU]. The scope of this competence has been extended through various treaty amendments including the Treaty of Lisbon. However, there are still parts that commonly feature in recent free trade agreements that the Union concludes with third countries ('new generation' trade agreements) but that are not covered by Article 207(1) TFEU, thus making it necessary that the Member States ratify those agreements as well (so called 'mixed agreements').[68]

65 Id. Amendment 52.

66 Article 42(7) in the version proposed by Amendment 55: "If a Member State is the victim of ~~armed~~ aggression ~~on its territory~~, the *Defence Union and all* ~~other~~ Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. *An armed attack on one Member State shall be considered to be an attack on all Member States.* "

67 Id. Amendment 170.

68 *See* on this prominently the *Opinion 2/15* that the CJEU issued pursuant to Article 218(11) TFEU on the free trade agreement with Singapore, ECLI:EU:C:2016:992.

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Parliament also claims a stronger position at the procedural level as lid down in Article 207 and Article 218 TFEU. It wants to have a say in the authorization of negotiations[69] and be on equal footing when it gets to the distribution of information by the Commission as negotiator to the special committee appointed by the Council.[70] In accordance with the easing of voting requirements in internal polices and the parallelization with external policies, the Council would no longer be required to vote on the conclusion of an agreement by unanimity, but by qualified majority or even simple majority.[71] Moreover, Parliament proposes to do away with the distinction between parliamentary consultation or consent for the conclusion of agreements currently enshrined in Article 218(6) TFEU depending on the subject matter. Instead, all international agreements would be subject to consent given by the European Parliament.[72] This would certainly add a parliamentary dimension to the Union's foreign and especially trade policy and enhance its democratic legitimacy.

3. What's Next? Treaty Amendment and Possible Alternatives

The European Parliament has presented a comprehensive review of the current treaty framework that touches upon a number of issues that have been subject to debate in the past years. But it also leaves out some issues that clearly need to be addressed in a convention or an intergovernmental conference for the amendment of the EU Treaties, most prominently the massive reconstruction of the economic and monetary union. It is clear, however, that the proposed amendments primarily concern the status of the European Parliament itself. What is also clear is that not all of these propositions will be fully endorsed by the Member States, but it is a brave and sometimes blunt proposal that will have to be discussed in line with proposals from other institutions and players.

Among the many voices that have made suggestions on a reform of primary law is the report from the Franco-German working group ('Group of Twelve') that was presented shortly before Parliament adopted its reso-

69 P9_TA(2023)0427, Amendments 171 and 178.
70 Id. Amendment 172.
71 Id. Amendments 174 and 175.
72 Id. Amendments 180 through 182.

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lution.[73] This expert group recommends a number of changes aimed at increasing the EU's capacity to act, getting the EU enlargement ready, and strengthening the rule of law and the EU's democratic legitimacy. To this end, the report makes several recommendations to strengthen the protection of the rule of law through budgetary conditionality and procedural reforms. It also proposes, among other institutional reforms, a reduction of the size of the Commission's College to two-thirds of Member States or developing a hierarchical model, a transition in all remaining policy decisions from unanimity to qualified majority voting in the Council, accompanied by full co-decision with the European Parliament through the ordinary legislative procedure (combined, however, with a 'sovereign safety net' of recourse to the European Council where vital national interests are at stake), and an agreement between the European Parliament and the European Council as regards the election of the Commission President. There are, in fact, noticeable overlaps between the expert group's and Parliament's proposals.

The ball is now in the European Council's court. In accordance with Article 48(3) TEU, the European Council will decide whether it wishes to continue the process of amending the Treaties on the basis of the proposals received. Opinions on the idea of a treaty amendment vary among the Member States. In reaction to the final report from the CoFE, a group of thirteen States from Northern, Central, and Eastern Europe circulates a 'non-paper'[74] underlined that "Treaty change has never been a purpose of the conference", but while "they do not exclude any options at this stage", they "do not support unconsidered and premature attempts to launch a process towards Treaty change". And further: "We already have Europe that works. We do not need to rush into institutional reforms in order to deliver results." Only a few days later, Belgium, Germany, Italy, Luxembourg, the Netherlands, and Spain, supported by France, replied with a

73 Sailing on High Seas: Reforming and Enlarging the EU for the 21st Century, Report of the Franco-German Working Group on EU Institutional Reform, 18 September 2023, at www.auswaertiges-amt.de/blob/2617206/4d0e0010ffcd8c0079e21329bbbb3332/230919-rfaa-deu-fra-bericht-data.pdf.

74 Non-paper by Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Finland, Latvia, Lithuania, Malta, Poland, Romania, Slovenia, and Sweden on the outcome of and follow-up to the Conference on the Future of Europe, 9 May 2022, at https://twitter.com/SwedeninEU/status/1523637827686531072/photo/1.

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letter of their own[75] in which they declared themselves "in principle open to necessary treaty changes that are jointly defined" in an interinstitutional process involving the European Parliament, Council, and Commission. If the European Council agrees that treaty changes are necessary, it can convene by simple majority a Convention composed of representatives of the European and the national Parliaments, of the national governments, and of the Commission, that would discuss the proposals and make recommendations to an intergovernmental conference. At its meeting in March 2024, the European Council underlined that preparations for enlargement and internal reforms need to advance in parallel to ensure that both future Member States and the EU are ready at the time of accession. It announced that it will address internal reforms at an upcoming meeting with a view to adopting by summer 2024 conclusions on a roadmap for future work.[76] Whether the European Council will opt for a full-fledged, ambitious and open-ended convention or targeted changes remains to be seen. In any case, it is almost certain that any possible treaty change will be preceded by intensive and lengthy political debates and compromises. It is equally certain that not all proposals for deeper integration are capable of consensus in view of Eurosceptic tendencies – because every treaty amendment must be ratified by all member states.

75 Non-paper submitted by Germany, Belgium, Italy, Luxembourg, the Netherlands, and Spain on implementing the proposals of the Plenary of the "Conference on the Future of Europe", 13 May 2022, at https://twitter.com/alemannoEU/status/1526922932970262528/photo/2.

76 European Council of 21–22 March 2024, Conclusions, EUCO 7/24, para. 29.

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Exploring Backlash Terminology and National Judicial Resistance to the CJEU

Márton Csapodi[*]

Abstract

The concept of 'backlash' has gained significant prominence in international legal discourse in understanding the dynamics between supranational legal and institutional regimes and their constituent states. When a state shows resistance towards an international legal regime and its court, the nature, extent, purpose, means, and actors involved in the process can vary significantly. As the term 'backlash' evolves from a colloquial expression to a technical term in international law, its consistent application to different forms of national resistance becomes increasingly important. As to how backlash can be distinguished from other forms of resistance against international courts, Madsen et al. have developed a comprehensive model that categorizes resistance as either stronger (backlash) or weaker (pushback) based on well-defined criteria. Putting the CJEU as a regional international court (although with distinct characteristics) into the focus, this paper examines where national resistance to the CJEU may be positioned within Madsen et al.'s conceptual framework. Of course, resistance or non-compliance with the CJEU varies dynamically across time and space and in terms of actors. However, in recent years, a form of resistance that had previously only been speculated about has become a reality: on a few occasions, national constitutional courts (or supreme courts) have ruled that a judgment of the CJEU exceeded the powers conferred upon it, overstepping its competences. This paper situates such instances of national judicial resistance within the conceptual framework established by Madsen et al. Additionally, it explores contextual factors that provide valuable insights for a comprehensive analysis.

Keywords: backlash, CJEU, constitutional courts, resistance, constitutional pluralism

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1. Introduction

The concept of 'backlash' has gained significant prominence in international legal discourse used to describe the dynamics between supranational legal and institutional regimes and their constituent states. When a state shows resistance towards an international legal regime and its court, the nature, extent, purpose, means, and actors involved in the process can vary significantly. As the term 'backlash' evolves from a colloquial expression to a technical term in international law, its consistent application to different forms of national resistance becomes increasingly important.

In this paper, I will first review what is meant by backlash and why the question of whether we can use this adjective to describe certain forms of resistance to the CJEU arises at all. While the term is frequently used with ideological connotations, there is a growing body of scholarship attempting to provide a more precise definition. I would like to present some of the more thorough definitions that have emerged so far in the field of political science and international legal scholarship, conceived for analytical purposes. With regard to resistance to international courts, Madsen *et al.* have developed a comprehensive model that categorizes resistance as either stronger ('backlash') or weaker ('pushback') based on well-defined criteria. Considering the CJEU as a regional international court (although with distinct characteristics), this paper examines where national resistance to the CJEU can be positioned within Madsen *et al.*'s conceptual framework.

Resistance or non-compliance with the CJEU varies dynamically across time and space and in terms of actors. However, in recent years, a form of resistance that had previously only been speculated about has become a reality: on a few occasions, national constitutional courts (or supreme courts) have ruled that a judgment of the CJEU exceeded the powers conferred upon it, overstepping its competences. This paper reviews the work of authors who have already addressed the question of whether the concept

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of backlash can be applied to different patterns of resistance to the CJEU, mapping how *ultra vires* decisions can be situated within this conceptual framework.

2. Why Do We Talk About Backlash?

Why should we be concerned about the labels we give to certain court decisions? Does it make any difference if we refer to national courts' decisions taken to openly resist CJEU judgments as 'backlash' or otherwise?

The term 'backlash' is increasingly used in legal and political science literature and is often used to refer to certain types of opposition to international institutions, international law and international courts.[1] It has become one of the "buzzwords in present-day politics".[2] Many scholars are keen to apply the stamp of 'backlash' to certain actions and movements, but few do so by consistently applying a decided set of criteria. When scholarship uses the word backlash as a colloquialism, it often appears to be ideologically saturated: typically stronger actions against the progressive-liberal consensus and international order are labelled this way.[3]

1 *See e.g.* Karen J. Alter *et al.*, 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences', *European Journal of International Law*, Vol. 27, Issue 2, 2016, pp. 293–328; Erik Voeten, 'Populism and Backlashes against International Courts', *Perspectives on Politics*, Vol. 18, Issue 2, 2020, pp. 407–422; Jolyon Ford, 'Backlash against a Rules-Based International Human Rights Order? An Australian Perspective', *The Australian Year Book of International Law Online*, Vol. 38, Issue 1, 2020, pp. 175–198; Peter G Danchin *et al.*, 'Navigating the Backlash against Global Law and Institutions', *The Australian Year Book of International Law Online*, Vol. 38, Issue 1, 2020, pp. 33–77; Nicole Deitelhoff, 'What's in a Name? Contestation and Backlash against International Norms and Institutions', *The British Journal of Politics and International Relations*, Volume 22, Issue 4, 2020, pp. 715–727; Erik Voeten, 'Is the Public Backlash against Globalization a Backlash against Legalization and Judicialization?', *International Studies Review*, Vol. 24, Issue 2, 2022, pp. 1–17; Øyvind Stiansen & Erik Voeten, 'Backlash and Judicial Restraint: Evidence from the European Court of Human Rights', *International Studies Quarterly*, Vol. 64, Issue 4, 2020, pp. 770–784.

2 Deitelhoff 2020, p. 715.

3 *See e.g.* Bojan Bugarič, 'The Populist Backlash against Europe: Why Only Alternative Economic and Social Policies Can Stop the Rise of Populism in Europe', *in* Francesca Bignami (ed.), *EU Law in Populist Times,* Cambridge University Press, Cambridge, 2020, pp. 474–524; Aron Buzogány & Mihai Varga, 'The Ideational Foundations of the Illiberal Backlash in Central and Eastern Europe: The Case of Hungary', *Review of International Political Economy*, Vol. 25, Issue 6, 2018, pp. 811–828; Isabelle Hertner,

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National opposition to the CJEU in the context of the colloquial, ideologically motivated usage of term would certainly qualify as backlash. There are, however, attempts to create a definition of backlash that is at least less dependent on ideology and politics, with the aim of developing a concept that could be a tool for analysis and not an ideologically driven labelling exercise.

National opposition to an international (supranational) institution or a legal regime primarily refers to a political reaction to a development in international law. However, some actors that are not typically considered to be political can also show resistance, such as courts. These institutions are seen as the ultimate guardians of the legal systems, having the final word on the interpretation of law and constitution. While the political will is fluid and subject to a barely predictable set of interests and ideologies, we tend to expect a certain constancy and consistency from the decisions of the high courts. At the very least, we like to think that a decision of a court is not a political project but the result of autonomous considerations of legal interpretation. Since some of these ideas have obviously been transferred onto international courts, there is no doubt that opposition from national courts creates a special situation. When a conflict arises between the ultimate judicial fora of two interacting and sometimes intertwined legal systems, it can bring to the fore difficult questions on some divisive issues such as hierarchy and jurisdiction. It is no coincidence that EU lawyers are seriously puzzled when a national supreme or constitutional court decides to openly oppose a judgment of the CJEU.

The division of competences between the EU and its Member States is a sensitive legal-political issue, which makes the question of who should have the last word in this respect even more sensitive. It is for the CJEU to inter-

'Gendering European Politics: A Story of Progress and Backlash', *Journal of European Integration*, Vol. 43, Issue 4, 2021, pp. 511–517; Andrea Pin, 'The Transnational Drivers of Populist Backlash in Europe: The Role of Courts', *German Law Journal*, Vol. 20, Issue 2, 2019, pp. 225–244; Diana Margarit, 'LGBTQ Rights, Conservative Backlash and the Constitutional Definition of Marriage in Romania', *Gender, Place & Culture*, Vol. 26, Issue 11, 2019, pp. 1570–1587; Stefanie Walter, 'The Backlash Against Globalization', *Annual Review of Political Science*, Vol. 24, Issue 1, 2021, pp. 421–442; Jacques Rupnik, 'Is East-Central Europe Backsliding? From Democracy Fatigue to Populist Backlash', *Journal of Democracy*, Vol. 18, Issue 4, 2007, pp. 17–25; Hendrik Schopmans & Jelena Cupać, 'Engines of Patriarchy: Ethical Artificial Intelligence in Times of Illiberal Backlash Politics', *Ethics & International Affairs*, Vol. 35, Issue 3, 2021, pp. 329–342; Petra Guasti & Lenka Bustikova, 'Varieties of Illiberal Backlash in Central Europe', *Problems of Post-Communism*, Vol. 70, Issue 2, 2023, pp. 130–142.

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pret the Treaties authoritatively, so it is logical to conclude that it interprets the rules governing jurisdiction as they are laid down in the Treaties.[4] At this point, however, some constitutional courts also step forward, arguing that EU institutions exercise their powers by means of a constitutional conferral, and it is for the constitutional courts to verify the existence of such conferral, them being the final gatekeepers of the national legal systems. The possibility (and for a long time nothing more) of a constitutional court following this logic and declaring an EU judgement to have exceeded the powers conferred upon it has been seen by many as a nuclear weapon that could trigger a chain reaction and undermine the foundations of the integrated legal order of the EU.[5] It is therefore certainly one of the stronger forms of resistance to the CJEU from national courts.

Such resistance did not emerge for a long time, but since 2012 there have been four such cases. Therefore, it is reasonable to ask: can we talk about backlash in these cases? Can we justifiably use this term for these national judicial actions in a way that does not merely reflect a general ideologically motivated resentment towards dissenters to the European project?

3. Navigating Backlash Terminology

3.1. From Colloquialism to an Analytical Concept

The very first question we should clarify is what we are trying to describe when we refer to a 'backlash'. Clearly, 'backlash' is intended to describe some higher, stronger degree of resistance, contestation or non-compliance, and this stronger quality may rest in the form or the object of resistance, the identity of the resistor or the number of resisters, or even the social/political effects produced by the resistance. But what is the qualitative or quantitative factor that can consistently be said to turn resistance into backlash, thereby allowing us to attach a specific term to this more serious qualification?

First, it can be noted that the use of the term backlash is constantly changing and evolving, but a generally accepted definition is not yet avail-

4 Joseph H. H. Weiler & Ulrich R. Haltern, 'The Autonomy of the Community Legal Order – Through the Looking Glass', *Harvard International Law Journal*, Vol. 37, Issue 2, 1996, p. 446.

5 Id. pp. 445–446.

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able for analysis. Danchin *et al.* also note that there is no consensus in international legal literature on the precise meaning of backlash.[6] Dietelhoff observes that the term is often used as an indicator of the liberal consensus and international regimes in crisis and is often applied to instances of resistance to them.[7] According to Alter and Zürn, there is a 'political pundit's version' of the concept, which can be roughly described as a strong and direct reaction, a counter-movement, to a policy that is defined by its opponents as overreaching or going too far.[8]

However, there are attempts to create generally acceptable definitions more fit for analytical purposes. In addition to the literature on constitutional law and international law, there are, of course, descriptions in political science and social sciences that seek to neutralize the concept, distancing it from its ideological use.

3.2. Public Backlash from a Constitutional Law Perspective

Sunstein puts it rather succinctly that, from a constitutional law perspective, 'public backlash' can be defined as an "intense and sustained public disapproval of a judicial ruling, accompanied by aggressive steps to resist that ruling and to remove its legal force".[9] The same definition is used by Caron and Shirlow, with the slight change that the term 'judicial ruling' is replaced by the more general term 'system'.[10] The question is: can this definition be used for judgments issued by courts? Since the definition basically gives a description of 'public backlash', it is not easy to transpose this to judicial decisions. Were we to remove the term 'public' from the definition (or replace it with 'judicial'), we are still left with a conundrum: even if the concept of disapproval and the removal of legal force are applicable in this context, adjectives such as 'intense and sustained' or 'aggressive' are more

6 Danchin *et al.* 2020, pp. 36–37.
7 Deitelhoff 2020, p. 715.
8 Karen J. Alter & Michael Zürn, 'Conceptualising Backlash Politics: Introduction to a Special Issue on Backlash Politics in Comparison', *The British Journal of Politics and International Relations*, Vol. 22, Issue 4, 2020, p. 563.
9 Cass R. Sunstein, 'Backlash's Travels', *Harvard Civil Rights – Civil Liberties Law Review*, Vol. 42, Issue 2, 2007, p. 435.
10 David D. Caron & Esme Shirlow, 'Dissecting Backlash: The Unarticulated Causes of Backlash and Its Unintended Consequences', *in* Andreas Follesdal & Geir Ulfstein (eds.), *The Judicilization of International Law: A Mixed Blessing?*, Oxford University Press, Oxford, 2018, p. 160.

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difficult to apply to judicial rulings. What we can only deduce from this definition is what we had already suspected: that backlash, in the context of a judicial decision, is a kind of intense or extensive form of resistance.

3.3. Backlash as Power-grabbing

Similarly to Dietelhoff, Mansbridge and Shames note that the colloquial use of the term backlash in scholarship is often ideologically charged: it is used to refer to a more conservative political backlash against progressive-liberal policy developments.[11] Considering this definition inadequate for academic discourse, they also attempt to build a definition that is, so to speak, ideology-free, drawing on the political science and sociology literature. It should be noted that their study is not so much about resistance to international law and the courts, but rather resistance to various progressive movements. Nevertheless, progressive policy development is in many cases comes about by judicial decisions, a topic which they also touch on. They define backlash in terms of power (in the sense of capacity). In their view, there are three indispensable components to the concept: *(i)* conceptually, backlash can only be a reaction to something (based on the word 'back'); *(ii)* this reaction must somehow involve coercive (and not just persuasive) power; *(iii)* the aim of the reaction is for the backlashers to regain some power/capacity that they previously had.[12] They also admit that this definition will not be completely apolitical, as the political left is expected to initiate policy changes more frequently, so the resistance of the dissenting political right can be more often labeled as backlash.[13] Nonetheless, their arguments are also based on such examples. They juxtapose coercive force (the use of force or threat) with persuasive force, but at the same time acknowledge that it is often impossible to dismantle the two.[14] It could easily be argued that their third requirement is met in almost all cases when using a broad definition of power or capacity ("preferences and interests causing – or raising the probability of – outcomes") in the context of judicial resistance to jurisprudential or policy development. This definition therefore does not

11 Jane Mansbridge & Shauna L Shames, 'Toward a Theory of Backlash: Dynamic Resistance and the Central Role of Power', *Politics & Gender*, Vol. 4, Issue 4, 2008, p. 623.
12 Id. p. 627.
13 Id. p. 633.
14 Id. p. 631.

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appear useful in answering our question, namely what makes a judicial decision a 'backlash', because in this context virtually any judicial decision that resists some progressive policy change or jurisprudential development will qualify as backlash.

3.4. Defining 'Backlash Politics'

In addition to the 'political pundit's version' already mentioned above, Alter and Zürn point out that the term 'backlash' is also applied rather loosely in political science or legal scholarship, which in fact usually means branding right-wing political goals, populism or simply opposition to judicial rulings in general as backlash.[15] Accordingly, they seek to provide a definition of what the politics of backlash is in a way that is more fit for analytical purposes and less dependent on ideological preferences. The question immediately arises, of course, as to how far the concept of backlash, if understood in a strictly political sense, will be applicable to judicial decisions. Three necessary components are identified: backlash politics must *(i)* have a retrograde objective; *(ii)* be characterized by the use of extraordinary goals and tactics; and *(iii)* reach the level of "mainstream public discourse".[16] The retrograde objective, as an essential conceptual element, is derived from the grammatical meaning of the word 'backlash': it implies a backward movement, which, according to them, means a return to a previous social or legal condition. They explicitly stress that it has no normative value, is not to be confused with regressive objectives, and may therefore be intended to cover a return to a better, more desirable state of affairs.[17] By extraordinary goals/tactics they mean challenging the 'dominant script'. This implies that the backlash challenges more than a specific policy: it is directed against common values and principles, established practices, and in a broader sense, the dominant narrative of how the world around us should work.[18] The third requirement should be interpreted as meaning that the backlash movement becomes backlash politics when its aims have gained some role in the mainstream of public life and discourse, they are not wholly

15 Alter & Zürn 2020, p. 565.
16 Id. p. 564.
17 Id. p. 566.
18 Id. pp. 566–567.

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marginalized in political life.[19] Although this definition can certainly be applied to the analysis of resistance to courts/international courts,[20] in my view it can only be applied with significant distortions if the resistor is itself a court. In a broad understanding of the retrograde objective, if a court's judgment is a reversal of established practice/new jurisprudential development, or if (in the case of constitutional review, for example) it strikes down a law that is a step in the direction of social change (except, of course, if the norm itself being repealed has a retrograde aim) – the goal is always to return to the *status quo ante*. Therefore, all judgments, that represent resistance or contestation, have a retrograde objective. It can be difficult to tell whether the means/tactics used by a court for the purposes of resistance are extraordinary. Striking down a law or reversing judicial practice may seem like extraordinary measures, but at the same time are integral parts of the system. In the context of the EU, too, it depends on the conceptual basis on which we are operating: it is very rare indeed for a national court to openly challenge CJEU judgments, but in a framework of constitutional pluralism, this kind of action may be an intrinsic feature of the system. The question may arise as to what is considered a 'dominant script': one could take as a basis, for example, mainstream EU law scholarship, but then the definition of backlash would also lose its ideological neutrality. We can also apply the level of 'mainstream public discourse' to judicial decisions in this form, or even to the practical impact of the decision on jurisprudence. Here, however, too many factors would come into play that are not exclusively dependent on the content of the judgment in question, but rather on *e.g.* the prestige/influence of the court, the behavior of other courts, the attitude of the media, *etc.*

3.5. Resistance to International Courts – Backlash or Pushback?

When it comes to international law scholarship, Madsen *et al.* have attempted to establish a theoretical framework for a consistent application of the concept of backlash to resistance towards international courts. They also note that in much of the scholarship the term is used in a colloquial style to refer to resistance to international courts, which may be a way of expressing a stronger-than-usual form of resistance, but which we can no

19 Id. pp. 567–568.
20 *See* Deitelhoff 2020, pp. 715–727.

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longer use to analyze these reactions substantially.[21] In fact, this is their justification for setting up a new theoretical framework to define backlash. An important difference from the definition of Alter and Zürn is that they emphasize that the object of analysis is only the process of resistance, and not the results that follow from this process (therefore, the repercussions of the resistance in public discourse or in scholarship cannot be a decisive factor in its normative evaluation).[22] Generally, they describe actions that can potentially be considered a backlash as "most often a reaction to new socio-political or legal developments – whether they are liberal, authoritarian or unidirectional is not decisive at the conceptual level", adding, that

> "resistance to ICs [international courts] can occur both as pointed reaction to a very specific judgment or court or as an expression of general resentment to a certain socio-political development, thereby reflecting more general cleavages in society, that is then projected to the practices of an IC."[23]

Of crucial importance in their definition of backlash is the distinction between *ordinary and extraordinary resistance*. According to the authors, in-system resistance occurs in all legal systems – in the case of international courts, ordinary resistance occurs when some part of the 'audience' is dissatisfied with the direction or content of legal interpretation and therefore 'pushes back' to achieve a previous or different legal status: this 'ordinary' form of resistance is what they refer to as 'pushback'. Resistance becomes 'extraordinary' when it is directed not only against the specific legal norm or its judicial interpretation, but also generally against the authority of the international court. The explicit aim of extraordinary resistance is therefore not only to reverse or change the legal substance, but also to transform or even abolish the international court. This extraordinary resistance is what they refer to as 'backlash'.[24]

But can this distinction be applied when the ordinary or extraordinary resistance comes from a court? Madsen *et al.* discuss the wide scale of actors alongside Member States that can be involved in resistance, *e.g.*

21 Mikael Rask Madsen *et al.*, 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts', *International Journal of Law in Context*, Vol. 14, Issue 2, 2018, p. 199.
22 Id. p. 199.
23 Id. p. 200.
24 Id. pp. 202–203.

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domestic actors in national legal systems, such as politicians, NGOs and other organizations, the legal profession and academia, as well as of course national courts. Interestingly, it is precisely the resistance to the CJEU and the ECtHR that is cited as an example. However, according to the authors, a national court's decision cannot directly have an effect that would fall into the category of backlash, at most it can have a 'resembling' effect – which, however, can be transformed into a broader resistance as a result of a spillover process involving other (political) actors.[25]

4. Applying the Backlash/Pushback Distinction in EU Context

4.1. Backlash Against International Courts – by Judges?

This short summary shows that the most convenient starting point for the conceptual classification of resistance to the CJEU is the model developed by Madsen *et al.*, provided that we first address the authors' brief remark that national judicial resistance to international courts cannot, in itself, produce backlash outcomes. For if this is completely unthinkable, my brief analysis becomes somewhat redundant. I would like to argue that it is indeed conceivable that a court's decision could in itself fall into the category of backlash described by Madsen *et al.* My first point is that their argument is somewhat self-contradictory: they write that "resistance stemming from Member State courts, often the supreme or constitutional courts of the Member States, can strictly speaking not in itself produce backlash outcomes", whereas they have previously stated that "studying backlash, and more generally resistance to ICs, becomes first and foremost a study of the processes of opposing or challenging ICs, not of their outcomes".[26] It is strongly argued, therefore, that the analysis should distinguish sharply between process and outcome, even if there is otherwise a close causal link between the two. On the one hand, even if judicial decisions were incapable of producing backlash outcomes, the process itself could conceivably be a backlash. On the other hand, I would also argue that they can indeed possibly result in backlash outcomes. It is not inconceivable that a decision of a national constitutional court could explicitly denounce the authority of an international court, for example by declaring accession or membership to

25 Id. pp. 204–205.
26 Id. pp. 205. and 199.

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an international court unconstitutional. However, it is true that it is worth distinguishing the process from the outcome: it is not certain, that such a judgment would automatically terminate membership in the international court, but it would be clear that the decision itself is no longer directed against a certain jurisprudential change, but more generally against the authority of the international court itself. Thus, for example, the CJEU obstructing the EU's accession to the ECHR, rejecting the authority of the ECtHR, defending its own monopoly on the interpretation of European law, could certainly qualify as backlash.[27]

4.2. Additions to the Backlash-Pushback Distinction

There are other authors who use distinctions similar to that of Madsen *et al.*, and they may provide additional support for the analysis. Sandholtz *et al.* distinguish between 'resistance' and 'backlash' by framing actions in a similar, dual division. They do not differentiate between actors, so they use these terms to refer to the activities of the states. State-action is considered to be merely 'resistance' if it *(i)* means criticism of one or more judgments of the international court; *(ii)* shows non-compliance with one or more judgments; *(iii)* does not cooperate on specific cases; or *(iv)* criticizes the court or its judgments in general. Conversely, 'backlash' occurs when a state *(i)* ceases to cooperate with the international court altogether; *(ii)* narrows the jurisdiction of the international court; *(iii)* tightens the access to the international court; *(iv)* leaves the jurisdiction of the international court, withdraws from the treaty; or *(v)* abolishes the international court.[28] Hence, the distinction in this case is similar: backlash is that which challenges the authority of the court, while the criticism or non-compliance directed at the jurisprudence is merely resistance. However, it should be added that they are concerned only with state actions, thus providing a significantly narrower interpretative framework.

Similarly, Soley and Steininger base their distinction on whether the action is directed against a specific judgment/jurisprudence or against the institution of the international court itself. However, they use different terms and apply a fourfold division, further nuancing the categories of Madsen *et*

27 *Opinion 2/13 of the Court of 18 December 2014,* ECLI:EU:C:2014:2454

28 Wayne Sandholtz *et al.*, 'Backlash and International Human Rights Courts', *in* Alison Brysk & Michael Stohl (eds.), *Contracting Human Rights: Crisis, Accountability, and Opportunity,* Edward Elgar, Cheltenham, 2018, p. 160.

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al. They distinguish between two degrees of action against jurisprudence: objection and contestation. 'Objection' is any negative reaction or criticism, but importantly it remains in the rhetorical space without practical consequences. 'Contestation' may reach beyond a criticism of the substance of the judgment; they define it as

> "state organs or institutions engaging in it either criticize an order on the grounds of how judges have applied particular norms to the factual situation or they question the validity of the norms applied."

Actions against the institution of the international court are also twofold. 'Resistance' is when criticism is no longer directed against jurisprudence but against the institution itself, while the resistor still remains "invested in the institution and seeks to reform it from within". 'Backlash' is the next stage: it is defined as "systematic and consistent criticism as well as severe instances of non-compliance".[29] However, this is still a rather cryptic formulation, so it is important to stress that, following Caron and Shirlow, the aim of the act here is to leave/dismantle the institution or to establish an alternative institutional structure.[30]

5. National Judicial Resistance to the CJEU – Backlash or Something Less Severe?

There are now some authors who have made efforts to answer the question of whether we can apply this recently very popular adjective to given instances of resistance to the CJEU. Burchardt has analyzed how the German Federal Constitutional Court (*Bundesverfassungsgericht, BVerfG*) reacted when the CJEU's ever-expanding case law on fundamental rights led it to feel, in the author's view, marginalized. The question Burchardt poses is whether the two landmark decisions of the *BVerfG* in the 'right to be forgotten' cases, with which it put itself back on the map of European fundamental rights protection, can be considered as backlash (or pushback), or rather as merely fine examples of constructive judicial dialogue. Burchardt's

29 Ximena Soley & Silvia Steininger, 'Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights', *International Journal of Law in Context*, Vol. 14, Issue 2, 2018, pp. 240–241.

30 David D. Caron & Esme Shirlow, 'Unpacking the Complexities of Backlash and Identifying Its Unintended Consequences', *EJIL:Talk!*, 25 August 2016.

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concept of backlash is also based primarily on the criteria set out by Madsen *et al.* and additionally those described by Soley and Steininger and Sandholtz *et al.* Accordingly, she tries to answer the question whether the *BVerfG*, by seeking to limit the CJEU's fundamental rights adjudicatory function, is challenging the authority of the institution as a whole (as a court of fundamental rights), or whether it is merely attempting to set some jurisprudential limitations on it instead. According to Burchardt, the *BVerfG* went beyond contesting individual judgments with its 'right to be forgotten' decisions and showed a more structural resistance, but it did not question the authority of the CJEU, so there was no backlash.[31]

Hofmann provides a comprehensive analysis of whether the different forms and examples of resistance to the CJEU so far fit into the definition of backlash given by Madsen *et al.* He is thus not only concerned with specific cases of resistance by national courts, but analyses different patterns of political and even academic criticism. His aim is therefore to provide as comprehensive a mapping as possible of the various forms of resistance to the CJEU. His analysis concludes that, although there are sometimes instances of backlash from academia or the media, resistance most often falls into the category of pushback. However, his conclusion shows that pushback is in fact a fairly common occurrence, as resistance or non-compliance with individual judgments is not at all rare. He sees resistance to individual CJEU judgments not as a backlash but as a relatively strong form of pushback. Nevertheless, he thinks it is unlikely that backlash will become more frequent in the future, as long as the willingness to cooperate persists. Yet he believes that the examples of some Member States such as Poland and Hungary show that nothing can be taken for granted in this respect.[32]

31 Dana Burchardt, 'Backlash against the Court of Justice of the EU? The Recent Jurisprudence of the German Constitutional Court on EU Fundamental Rights as a Standard of Review', *German Law Journal*, Vol. 21, Issue S1, 2020, pp. 1–18.

32 Andreas Hofmann, 'Resistance against the Court of Justice of the European Union', *International Journal of Law in Context*, Vol. 14, Issue 2, 2018, pp. 258–274.

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6. The Four Ultra Vires Decisions

6.1. Czech Republic: Landtová and Holubec

6.1.1. The Case of Slovak Pensions – Landtová

Following the break-up of Czechoslovakia, one of the issues to be settled was the payment of pensions, *i.e.* whether former Czechoslovak citizens would continue to receive their pensions from the Czech Republic or Slovakia. The agreement between the two successor states offered the solution that the country where the employer was located at the time of the break-up would be responsible for paying the pension.[33] This solution led to cases where some pensioners, even though they had lived life-long in the territory of one of the successor States, had their pension paid by the other successor State on the basis of the residence of the employer. In the late 1990s, this was particularly detrimental to those who, although living in the Czech Republic, received a Slovak pension, as the Slovak pension was lower. Their case was eventually referred to the Czech Constitutional Court (*Ústavni soud*, ÚS), which found that this situation violated the right to financial security in old age.[34] According to the court, pensioners who worked for an employer located in Slovakia should receive from the Czech authorities, in addition to their Slovak pension, an additional amount such that the two together would be equal to the amount they would otherwise receive as pensioners in the Czech Republic.[35]

The ensuing practice was not accepted by the Czech Supreme Administrative Court (SAC), which initiated a preliminary reference procedure before the CJEU on Slovak pensions following EU accession. In 2012, the CJEU found that the ÚS judgment discriminated against nationals of other EU Member States because the supplementary pension under the ÚS decision was granted to Czech nationals instead of being equally applicable to nationals of other EU Member States, and was therefore in violation of

33 Ivo Šlosarčík, 'Uniós jog a Cseh Köztársaságban: a cseh alkotmány „európaizált" értelmezésének korlátai és az ultra vires doktrína', *in* Nóra Chronowski (ed.), *Szuverenitás és államiság az Európai Unióban: Kortárs kérdések és kihívások,* ELTE Eötvös, Budapest, 2017, pp. 71–72.

34 Ústavní Soud České Republiky Dec. II. ÚS 405/02

35 Lenka Pítrová, 'The Judgment of the Czech Constitutional Court in the "Slovak Pensions" Case and Its Possible Consequences (in Light of the Fortiter in Re Suaviter in Modo Principle)', *The Lawyer Quarterly*, Vol. 3, Issue 2, 2013, p. 88.

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EU law.[36] The CJEU's decision therefore did not seek to abolish the supplementary pension, but to ensure that Czech nationality is not a condition for the granting of the allowance. The CJEU's answer to the hypothetical question made by the referring court did not in fact establish a ban on the disbursement of the supplementary benefit in question. However, this was not how the SAC interpreted the judgment, instead it concluded that as the supplementary pension violated EU law, it is therefore inapplicable – and tried to provoke the ÚS into admitting that it could only uphold its own case law if it found that the relevant EU law was contrary to the essential core of the constitution.[37]

6.1.2. ÚS 5/12 – Holubec

The ÚS held that EU law was not applicable to the specific situation created by the break-up of Czechoslovakia.[38] It argued that the employment of those who were resident in the Czech Republic but had worked as Czechoslovak citizens in the territory of present day Slovakia, could not be retroactively found to have been engaged in cross-border employment. According to the ÚS, in absence of a cross-border element, the European Regulation on the coordination of pension schemes between Member States does not apply in the case. In the ÚS's viesw the dissolution of Czechoslovakia is not comparable to situations where EU citizens acquire their insurance time in different Member States, as the question is specifically about the consequences of a break-up of a federal state and how social security costs are to be shared between them.[39] Therefore, in addition to declaring the inapplicability of the Regulation to such cases, the ÚS also stated the following:

> "we cannot do otherwise than state, in connection with the effects of CJEU judgment of 22 June 2011, C-399/09 on analogous cases, that in that case there were excesses on the part of a European Union body, that a situation occurred in which an act by a European body exceeded

36 Judgment of 22 June 2011, *Case C-399/09, Landtová*, ECLI:EU:C:2011:415

37 Jan Komárek, 'Czech Constitutional Court Playing with Matches: the Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires: Judgmens of 31 January 2012, Pl. ÚS 5/12, Slovak Pensions XVII", *European Constitutional Law Review,* Vol. 8, Issue 2, 2012, p. 328.

38 Ústavní Soud České Republiky Dec. PL. ÚS 5/12.

39 Pítrová 2013, p. 89.

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> the powers that the Czech Republic transferred to the European Union under Art. 10a of the Constitution; this exceeded the scope of the transferred powers, and was *ultra vires*."[40]

The judgment of the ÚS was the first decision in EU history by which a national constitutional court ruled that a CJEU judgment is *ultra vires* and inapplicable. Critics of the decision argue that this would not have been necessary at all, as the CJEU ruling would only require minor amendments to make the supplementing of Slovak pensions compliant with EU law, and that open confrontation could have been avoided by mutual dialogue. Others argue that both the CJEU and the ÚS made mistakes: confrontation could have been avoided through mutual respect, cooperation and self-restraint.[41]

6.2. Denmark: The Ajos Case

In the second instance of a national court declaring that a judgment of the ECJ is *ultra vires*, a similar theme emerged, centering once more on the issue of pensions and discrimination, albeit based on age rather than nationality. The crux of the matter lay in the Danish legislative provision, according to which a Danish individual, who was dismissed by his employer at the age of 60, was not entitled to severance pay as he was already entitled to old-age pension.[42] His complaint, arguing that the Danish legislation discriminates based on age, reached the CJEU.

As directives inherently lack horizontal effect, the CJEU refrained from invoking the non-discrimination clause of the Employment Directive. Instead, the Court predicated its *Dansk Industri* judgment on the broader,

40 PL. ÚS 5/12.

41 Richard Král, 'Questioning the Recent Challenge of the Czech Constitutional Court to the ECJ', *European Public Law*, Vol. 19, Issue 2, 2013, pp. 279–280; Komárek 2012, p. 336.

42 Mikael Rask Madsen *et al*., 'Competing Supremacies and Clashing Institutional Rationalities: The Danish Supreme Court's Decision in the *Ajos* Case and the National Limits of Judicial Cooperation', *European Law Journal*, Vol. 23, Issue 1–2, 2017, p. 142; Urška Šadl & Sabine Mair, 'Mutual Disempowerment: Case C-441/14 Dansk Industri, Acting on Behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen and Case No. 15/2014 Dansk Industri (DI) Acting for Ajos A/S v The Estate Left by A', *European Constitutional Law Review*, Vol. 13, Issue 2, 2017, p. 350.

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unwritten principle of non-discrimination, declaring the Danish legislation to be, in essence, discriminatory.[43]

There was no conflict over whether the legislation was really discriminatory or not – soon after the *Dansk Industri* judgment, a legislative correction aimed at implementing the ruling was already underway. However, legal ethos in Denmark is characterized by a distinct aversion to judicial activism and a preference for ascertaining legislative intent when interpreting the law[44] – and the Danish Supreme Court stated in its Ajos judgment that the Danish EU-accession Act did not mention any possibility of nullifying national legislation based on unwritten judicial principles. Therefore, the Danish Supreme Court concluded that it would be beyond its competences to grant effect to, and apply the CJEU's judgment.[45]

6.3. Germany: Weiss and PSPP

Of all the *ultra vires* decisions of the national constitutional courts (or apex courts), it was clearly the PSPP judgment of the *BVerfG* that put the delicate 'equilibrium' between the national and the European judicial structures and particularly the scholarship concerned with European constitutionalism under the greatest stress.[46] The reason for this is perhaps not necessarily to be found in the content or legal consequence of the decision, but rather in the fact that the BVerfG is usually considered to be *primus inter pares* in the circle of European constitutional courts, its jurisprudence having effects beyond the borders of Germany.

The catalyst for the *BVerfG*'s decision was the European Central Bank's (ECB) public sector purchase program (PSPP), which essentially entails the purchasing of government bonds and bonds issued by various national and European institutions. The program was brought before the *BVerfG* by German petitioners on the grounds that it constitutes an overstepping of

43 Judgment of 19 April 2016, *Case C-441/14, Dansk Industri (DI),* ECLI:EU:C:2016:278 para. 22. While the Employment Directive (2000/78/EC) prohibited age-based discrimination, due to the lack of horizontal effect, the judicial principle had to be applied, as set out in the *Mangold* judgment. *See* Judgment of 22 November 2005, *Case C-144/04, Mangold*, ECLI:EU:C:2005:709 paras. 74–75.

44 Madsen *et al.* 2017, pp. 142 and 149; Šadl & Mair 2017, p. 361.

45 Højesteret Case no. 15/2014.

46 Arthur Dyevre, 'How Europe's Legal Equilibrium Unravelled', *EJIL:Talk!,* 28 May 2020.

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powers by the EU, more specifically by the ECB. The *BVerfG* then referred the matter to the CJEU for a preliminary ruling in 2017, asking whether the PSPP constitutes a monetization of public debt (and therefore a possible infringement of Article 123 TEU, whether it breaches the non-bailout clause (Article 125 TFEU), whether it exceeds the ECB's powers, and also whether it infringes the principle of conferral of powers, the protection of national identity or the requirement of proportionality.[47]

The CJEU answered the questions raised in its *Weiss* judgment, in which it found, subject to a proportionality test, that the PSPP did not constitute any infringement of the EU Treaties.[48] The *BVerfG* was, however, unappeased by the answers and concluded that the test carried out by the CJEU was inadequate for checking the ECB and the PSPP against the criteria they had outlined. The CJEU did not take sufficient account of the *BVerfG*'s concerns and did not ask the ECB to provide adequate justification as for the necessity and proportionality of the program.[49] For all these reasons, the *BVerfG* held that the CJEU had breached the proportionality requirement with its *Weiss* judgment and by failing to properly examine whether the ECB had potentially exceeded its powers, it had itself acted *ultra vires*.[50] This meant that Germany would not be allowed to participate in the 'unconstitutional' PSPP. However, the German judges gave the ECB the opportunity to justify the necessity and proportionality of the program within three months, so in practice the implementation of the PSPP was not jeopardized, rendering the significance of the *BVerfG*'s decision to be more of symbolic than of a practical nature.

6.4. Poland: the Constitutional Judges' Quest Against the Ever-closer Union

6.4.1. The CJEU's 'Systemic Doubts'

In recent years, the Polish Constitutional Tribunal (*Trybunał Konstytucyjny*, TK) has delivered a number of decisions in open confrontation with the CJEU (or in some cases also the ECtHR), and it is difficult to predict for how long this series will continue.

47 Orlando Scarcello, *Radical Constitutional Pluralism in Europe,* Routledge, Abingdon/New York, 2023, p. 121.
48 Judgment of 11 December 2018, *C-493/17, Weiss*, ECLI:EU:C:2018:1000, para. 158.
49 Scarcello 2023, pp. 121–122.
50 BVerfG, 2 BvR 859/15.

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In 2017, the Law and Justice government in Poland initiated a controversial reform of the National Council of the Judiciary (*Krajowa Rada Sądownictwa*, KRS), altering the appointment process for judges. One key change was shifting the majority of KRS members' election away from the judiciary to the Sejm (parliament), sparking concerns about the judiciary's independence.[51] A specific case emerged when judges contested rejections by the KRS for Supreme Court seats in 2018. Despite the appeal route to the Supreme Administrative Court (SAC), concerns arose about the lack of an effective remedy due to legislative changes. The changes meant that the TK intervened, deeming SAC's jurisdiction unconstitutional followed by a legislative amendment excluding remedy possibilities entirely.[52]

The CJEU concluded upon the SAC's referral that, although the lack of remedy for judicial appointments is not necessarily contrary to EU law (Article 19 TEU), the sudden elimination of previous remedies can give rise to 'systemic doubts'.[53] The CJEU further added that if a national court considers that a law infringes the principle of sincere cooperation under Article 4 TEU or the right to an effective remedy under Article 19 TEU, it shall disapply the national provision in question, holding also that

> "where it is proved that those articles have been infringed, the principle of primacy of EU law must be interpreted as requiring the referring court to disapply the amendments at issue, whether they are of a legislative or constitutional origin, and, consequently, to continue to assume the jurisdiction previously vested in it to hear disputes referred to it before those amendments were made."[54]

Reading between the lines, "assuming the jurisdiction previously vested in it" means for a Polish court to disregard the TK's decision that having such jurisdiction is unconstitutional.

51 *See e.g.* Commission Staff Working Document 2021 Rule of Law Report Country Chapter on the rule of law situation in Poland SWD/2021/722 final.

52 Márton Csapodi, 'Reconciling Jurisdictions in the European System of Constitutional Adjudication', *Hungarian Yearbook of International Law and European Law*, Vol. 10, 2022, p. 233.

53 Judgment of 2 March 2021, *Case C-824/18, A.B. and others*, ECLI:EU:C:2021:153 para. 129.

54 *Case C-824/18, A.B. and others,* paras. 140–142, and 150.

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6.4.2. TK K 3/21 – The Ever-closer Union Entering a 'New Phase'

Subsequently, the Polish Prime Minister requested the TK to decide on the relationship between EU law and the Constitution, and the decision K 3/21 was issued – an abstract assessment of the compatibility and relationship of the EU treaties with the Constitution. While this meant that the TK did not decide on the applicability of the CJEU judgment, at the same time it in fact ruled out its applicability.[55]

The main findings of the TK can be highlighted as follows. The first and second paragraphs of Article 1 and the third paragraph of Article 4 TEU are contrary to Articles 2, 8 and 90 of the Polish Constitution. Article 90(1) insofar as the interpretation of EU law by the CJEU leads to a 'new phase' of the 'ever closer union' in which: *(i)* the EU institutions exceed the powers transferred by the Treaty; *(ii)* the Constitution, which shall have primacy in terms of binding force and application, is no longer the supreme law of Poland; *(iii)* Poland cannot function as a sovereign democratic state.[56] The remainder of the decision can be summarized as follows: according to the TK, the second paragraph of Article 19(1) TEU (on the CJEU) is contrary to the Constitution insofar as it allows Polish courts either to disregard the provisions of the Constitution or to rule on the basis of annulled provisions of law, or to review judicial appointments.[57]

Thus, although the decision did not review the constitutionality of the relevant judgment of the CJEU, it aimed to exclude its applicability, making it clear that it reaches beyond the just-established constitutional framework.[58]

55 Csapodi 2022, pp. 233–234.

56 Trybunał Konstytucyjny Dec. K 3/21.

57 Id.

58 The press release accompanying the decision also stresses that the TK cannot interpret EU law authentically, only the CJEU can do so. Their argumentation is based on the premises that the EU treaties and their interpretation given by the CJEU are inseparable: if the latter is beyond the limits of the Polish Constitution, so is the former. *See* at https://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/11664-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej

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6.4.3. The Saga Continues: K 8/21

More than a year later, in December 2023, the quest of the TK against the CJEU continued. The crux of the matter lay in the CJEU's imposition of fines on Poland as interim measures in the Turów coal mine case and the disciplinary chamber of the Supreme Court. The Minister of Justice, acting as the public prosecutor under the Law and Justice government, contested the legality of these fines, asserting Poland's refusal to remit payment. Consequently, recourse was sought from the TK.[59] The TK's task entailed an assessment of the compatibility of the CJEU's imposition of fines as interim measures with the Polish Constitution – therefore, similarly to the K 3/21 case, not an *in concreto* review of CJEU decisions.

In summary, the TK's *K 8/21* judgment arrived at the following findings. Within proceedings before the CJEU, penalty payments may be levied against a state under Article 260 TFEU. However, the wording of the TFEU does not imply that such penalty payments may be imposed in proceedings concerning the enforcement of compliance with interim measures. The TK posited that the basis for imposing penalty payments should stem from a judgment rendered by the CJEU, pursuant to the procedure delineated in the Treaty, rather than a provisional ruling issued by the President or another judge of the CJEU.[60]

The TK contended that the concept of penalty payments as interim measures, or penalty payments for non-compliance with interim measures, has been introduced by the CJEU itself through its case law, constituting a novel competence not explicitly delineated in EU treaties. This implicit expansion of CJEU competences entails circumventing the consent expressed by EU Member States through the constitutional procedure, thereby contravening the rule of law. According to the TK, this extension of CJEU competences without the consent of Member States runs counter to the principle of Poland's sovereignty and the Polish Constitution.[61]

59 *See* at https://notesfrompoland.com/2023/12/11/polish-constitutional-court-declares-eu-fines-against-poland-violated-constitution/.

60 Trybunał Konstytucyjny Dec. K 8/21.

61 *See* at https://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/12528-okresowa-kara-finansowa-lub-ryczalt-nakladany-przez-tsue-srodki-tymczasowe-odnosza ce-sie-do-ksztaltu-ustroju-i-funkcjonowania-konstytucyjnych-organow-rzeczypospolitej-polskiej.

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7. Do Ultra Vires Decisions Qualify as Backlash?

Having provided an overview of various definitions of 'backlash' and described judgments from national constitutional or apex courts, the subsequent analysis delves into their interrelation, primarily through the lens of Madsen *et al.*'s definition. In their conceptualization of backlash, a critical differentiation lies between ordinary and extraordinary resistance. Ordinary resistance, prevalent in all legal systems including international courts, involves discontent with the trajectory or substance of legal development and interpretation, prompting efforts to revert to a previous state or alter a legal status, termed as 'pushback'. Extraordinary resistance, on the other hand, extends beyond challenging specific legal norms or interpretations to contesting the overarching authority of the international court. Unlike ordinary resistance, which aims at modifying legal content, backlash seeks to fundamentally alter or dismantle the international court concerned.

The application of this definition is not that easy, however. The fundamental question is that whether conceptually, the rejection of a judgment rendered by the CJEU based on its alleged unconstitutionality constitutes ordinary resistance (rejection of the judgment at hand) or extraordinary resistance (contestation of the authority or competences of the CJEU). One could argue, that rejecting a CJEU judgment because it is contrary to the national constitution means not only reversing a legal development, but rather an explicit or implicit systemic rejection of the CJEU's authority to have the final word in the system, to have *Kompetenz-Kompetenz*. However, whether the CJEU has (or should have) such *Kompetenz-Kompetenz* or not remains undecided, as some of the Member States (and their constitutional courts) seem to have reserved the right to have the final word for themselves.[62] These irreconcilable and opposing claims to final authority can be considered the catalysts of the idea of constitutional pluralism.[63] In a setting of constitutional pluralism, there is no pre-established hierarchy, therefore, cases where national law will prevail over supranational law, are undoubt-

62 *See e.g.* Gunnar Beck, 'The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in Which There is No Praetor', *European Law Journal*, Vol. 17, Issue 4, 2011, pp. 470–494.

63 Neil MacCormick, 'The Maastricht-Urteil: Sovereignty Now', *European Law Journal*, Vol. 1, Issue 3, 1995, pp. 259–266.

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edly inherent features of the system.[64] Furthermore, if we were to view occasional non-compliance with individual court judgments as a general challenge to the authority of the court to make legally binding decisions, then there would be no point in definitions and categorization, since all non-compliance with any judgment would mean calling into question the most fundamental authority of the court, constituting therefore a backlash.

This paper argues that from among the cases that this paper examined, only the *K 8/21* decision of the Polish TK can be considered something more than 'ordinary resistance' in the framework established by Madsen *et al.*[65] Except for the TK's *K 8/21* decision, the national court decisions examined in this paper are instances of non-compliance with individual judgments, disagreement concerning legal interpretation, especially the interpretation of overarching legal principles such as non-discrimination or proportionality. Even labeling them as non-compliance is challenging due to their very limited practical significance, as conflicts in each case were satisfactorily resolved and compliance with European law was ensured by political mechanisms.[66] These decisions are therefore instances of 'pushback', where the audience – in these cases, a national constitutional/apex court – 'pushes back' to achieve a different legal status or interpretation, being dissatisfied with the content or direction of interpretation, but remaining nevertheless invested in the CJEU, without any explicit aim of transforming or abolishing it as an institution.

As previously noted, the exception lies in the *K 8/21* decision rendered by the TK, which, to a certain extent, arguably challenges the authority of the CJEU. However, its objective is not to abolish the CJEU or withdraw from its jurisdiction; rather, it aims to provide general criticism of its functioning and self-empowerment, while also seeking to confine it within boundaries defined by the TK. Consequently, this level of resistance also fails to meet the threshold required by Madsen *et al.*'s framework to qualify as backlash. However, a more nuanced classification can be achieved through the definitions proposed by Sandholtz *et al.* and Soley and Steininger.

64 Scarcello 2023, p. 45; Neil Walker, 'The Idea of Constitutional Pluralism', *The Modern Law Review*, Vol. 65, Issue 3, 2002, pp. 336–359; Matej Avbelj, 'The Right Question about the FCC Ultra Vires Decision', *Verfassungsblog*, 6 May 2020.

65 Madsen *et al.* 2018, pp. 202–203.

66 Scarcello 2023, pp. 115–l35; Madsen *et al.* 2017, p. 142; Šadl and Mair 2017, p. 351; Komárek 2012, p. 327; Márton Sulyok, 'Is This Loyalty In Fact Disloyalty? On the Remarks of the German Government to the Commission after PSPP', *Constitutional Discourse*, 12 January 2022.

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According to Sandholtz *et al.*, a state-action is considered to be merely resistance if it *(i)* means criticism of one or more judgments of the international court; *(ii)* shows non-compliance with one or more judgments; *(iii)* does not cooperate on specific cases; or *(iv)* criticizes the court or its judgments in general. Conversely, a backlash occurs when a state *(i)* ceases to cooperate with the international court altogether; *(ii)* narrows the jurisdiction of the international court; *(iii)* tightens the access to the international court; *(iv)* leaves the jurisdiction of the international court, withdraws from the treaty; or *(v)* abolishes the international court.[67] In this framework, the Polish TK is on the brink of backlash: while its actions can be considered to be only non-compliance or a lack of co-operation in specific cases or general criticism, it can also be argued that the TK is attempting to narrow the jurisdiction of the CJEU. As detailed above, Soley and Steininger apply a fourfold distinction (objection, contestation, resistance, backlash).[68] Against this framework, the TK's actions may be considered to amount to resistance, as they arguably go beyond a mere questioning of how the CJEU's judges applied particular legal norms (contestation), and they are more generally directed against the institution itself (resistance) – but still don't qualify as backlash, which requires systematic and consistent criticism and non-compliance.

8. Conclusions

While a national constitutional court explicitly resisting a judgment of the CJEU is (or at least was for a long time) considered to have a nuclear effect on the EU legal system,[69] this paper argues that these decisions of some European constitutional/apex courts would not qualify as backlash when weighed against available definitions. Even the classification of more impetuous judgments, such as those handed down by the Polish TC, is uncertain. On the one hand, this highlights the uniqueness and resilience of the EU's legal system – a system that is capable of coming with head-on judicial collisions, often through political resolution. On the other hand, it also highlights the difficulty of applying definitions from international law and political science to judicialized EU politics.

67 Sandholtz *et al.* 2018, p. 160.
68 Soley & Steininger 2018, pp. 240–241.
69 Weiler & Haltern 1996, p. 445.

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This paper aimed to provide a comprehensive review of the available definitions in legal scholarship of the emerging concept of backlash. It has shown that although the literature is becoming broader and more precise in its definitions, some open questions remain. This is particularly true in the context of the European Union, since the literature on the concept of backlash emerged mostly in the field of classical international law and may not be applicable without modifications to a specific, *sui generis* supranational legal system such as that of the EU, where the CJEU has a number of features that distinguish it markedly from other international courts.

When *ultra vires* decisions of national constitutional/apex courts are weighed against the currently available definitions of what actions constitute a 'backlash', these definitional deficiencies are highlighted. One question that needs to be addressed is, first of all, how, and with what modifications, these definitions can be applied when a states' resistance to an international legal regime comes from the judicial branch. The question of constitutional pluralism must also be addressed: if the legal system of the EU is not a hierarchical but rather a heterarchical setup of national and supranational legal norms, and the occasional confrontation between national and supranational law is part of the normal functioning of the system, can we even apply concepts such as resistance and backlash in this framework?

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The Development of Crypto Legislation in Europe

With a Special Focus on Consumer Protection

Zsolt Halász[*]

Abstract

Experience with the issuance of crypto-assets and crypto-asset-related services over the last decade and a half shows that the diversity and complexity of services and, not least, the necessity to protect the interests of users, require regulation of both the creation (issuance) and the provision of services related to crypto-assets. In Europe, regulatory attempts have been made in several states, but the global usability of cryptoassets requires comprehensive, transnational regulatory solutions. Although such a global regulatory response is not yet in place, at least the foundations have been laid in the EU. EU regulation is an important step forward because it will at least allow the issuance of cryptoassets and the provision of cryptoasset services in all EU Member States to operate under the same rules. The creation of EU regulation could also serve as a global regulatory model. The protection of customers and consumers is a particularly essential element of the regulation, some elements of which are already covered by the EU MiCA Regulation, but the customer and consumer protection needs to be further strengthened.

Keywords: crypto legislation, consumer protection, MiCA Regulation, financial supervision, investor protection

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1. Introduction

The need, justification and possible approach to regulating cryptoassets was raised shortly after the creation of the first cryptoasset, Bitcoin, in 2009. While the need for regulation has long been a matter of debate, the experience of the past decade, the diversity and complexity of the services provided by cryptoassets and, not least, the protection of users' interests, have all led to the justification and need for regulation of both the creation (issuance) and the provision of services in relation to cryptoassets. Initially, some 'pioneering' States (*e.g.* Malta, Switzerland, Liechtenstein, Luxembourg, France, Germany) tried to find effective regulatory solutions, but these solutions varied widely in structure and content. At the same time, this diversity has also had a negative impact on regulatory effectiveness, as the assets in question are not, by their nature and technological background, tied to a specific geographical area or state, but can be used globally. Global usability would also require global regulatory responses. Such a global regulatory response is not yet in place, but it is an important step forward that the EU has at least managed to lay the foundations for such a response.

The EU regulation is a significant achievement because it will at least allow the issuance of cryptoassets and the provision of cryptoasset services to operate under the same regulatory framework in all EU Member States. The creation of EU regulation could also serve as a global regulatory model. However, after reviewing the details of the EU regulation, it can also be concluded that it is not yet a definitive and fully developed regulatory regime, but a first cross-country attempt to develop an effective regulatory structure. In my research for this paper, I have reviewed the main elements of traditional financial and capital market regulation, with a particular focus on customer and consumer protection regulation, and compared this regulatory framework with the new regulatory framework for crypto-assets. I have paid particular attention to the issue of customer and consumer protection, which is at the heart of the purpose and rationale for the whole regulatory framework.

2. Methodology

In the course of the preparation of the study, I mainly analysed the provisions of the existing EU and national legislation, and compared the relevant

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elements of the traditional money and capital market regulation and the newly created crypto regulation using the comparative method. Given the novelty of crypto regulation, there is less literature available on the subject, and I was therefore less able to rely on such sources to the extent I usually do.

3. Basic Concepts

In this paper I use the term cryptoasset as a general term. For a long time, there was no consensus on the terminology used by organisations, institutions and legislation on the subject. Different sources used different terms: digital money, cryptomoney, cryptocurrency, digital asset, virtual asset, cryptoasset, *etc.*[1]

To date, tens of thousands of different cryptoassets[2] have been created, but this new type of 'asset' is not homogeneous, as there are several sub-types within this category, based on the different characteristics and specialisation of each one. The concept of cryptoassets is therefore a comprehensive category within which we can distinguish *(i)* utility tokens; *(ii)* asset/security/investment/equity tokens; *(iii)* payment tokens; and *(iv)* hybrid tokens.[3]

Utility tokens provide immediate or deferred access to a service (or product) and their value depends on the value of that right to access. They typically have no exchange function, do not confer ownership, but are transferable. Examples are Filecoin (token for decentralised file storage), Basic Attention Token (token for digital advertising), VET (token linked to the VeChain platform supporting supply chain management).

Asset/security tokens, as their name suggests, are analogous to traditional securities. As such, they digitally represent various rights or claims

1 *See* in details Zoltán Veres, 'Szempontok a kriptopénzek fogalmának és természetének megértéséhez', *Új Magyar Közigazgatás,* Vol. 16, Issue 1, 2023, pp. 19–26.

2 *Cf.* the database at coinmarketcap.com.

3 For the categorisation of tokens, *see* FIINMA (Switzerland) ICO Guidelines, Guidelines for enquiries regarding the regulatory framework for initial coin offerings (ICOs), at www.finma.ch/~/media/finma/dokumente/dokumentencenter/myfinma/1bewilligung/fintech/wegleitung-ico.pdf?sc_lang=en&hash=C9899ACF22747D56C800C6C41A7E28AB; Armin Varnaz *et al.*, 'Rechtliche und finanzökonomische Grundlagen' *in* Sebastian Omlor & Mathias Link (eds.), *Kryptowährungen und Token*, Deutscher Fachverlag GmbH, Frankfurt am Main, 2021, p. 21; Matthias Steger, '*Bitcoin und andere Kryptowährungen (currency token) – Grundlagen der Besteuerung im Privat- und Betriebsvermögen*', Erich Schmidt Verlag, Berlin, 2020, pp. 53–54.

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against the issuer or a third party, such as a share of profits or income, voting rights or the right to dispose of an asset. The market capitalisation of security tokens is estimated to be $32.5 billion[4] in the spring of 2024, half of which is represented by the token of the highest value (Enegra Group's EGX token).

Payment tokens – often referred to as cryptocurrency in the past – are used to pay for goods and services, and to make payments. They are essentially a medium of exchange, but in many cases they are also used as a back-up. They function as quasi-money, but are not yet suitable as a measure of value due to the high volatility of their exchange rate. The most common examples are Bitcoin, Litecoin and Monero.

Hybrid tokens are virtual instruments that embody several features of utility, payment and security tokens.

The definitions in the EU legislation under the MiCA Regulation[5] use the term 'cryptoasset' as a generic term. However, it does not distinguish within the asset category according to the way the tokens are used, but categorises them according to the stability of their value. The regulatory categories depend on the fact that tokens are subject to different requirements depending on the risks they pose, and this risk classification is based on whether the crypto-assets seek to stabilise their value by anchoring them to other assets. The MiCA Regulation regulates three types of tokens based on these criteria: *(i)* asset-based tokens; *(ii)* electronic money tokens; and *(iii)* other tokens.

In line with the definitions in the MiCA Regulation, I do not consider crypto-assets to include *(i)* digital assets that are not transferable to other holders; *(ii)* cryptoassets that are unique and not substitutable with other cryptoassets, *e.g.* digital works of art and collectibles (NFTs); *(iii)* crypto-assets that are financial instruments within the meaning of the MiFID Directive[6] (typically securities based on distributed ledger technology).

4 *See* at Security Token Market database (stomarket.com).

5 Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937.

6 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

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4. The Evolution of Crypto Legislation

Over the last 15 years, many European states have adopted measures to regulate cryptoassets. These states have followed different paths. Among the different European solutions, the Maltese, German, French, Luxembourg and Liechtenstein regulatory solutions are noteworthy.

In Hungary, neither cryptoassets per se nor the crypto markets have been regulated so far. Only the rules for the taxation of private individuals' income from cryptoassets has been laid down by amending the Personal Income Tax Act.[7] Contrary to the comprehensive regulatory solutions in other European states, the mere tax laws cannot be regarded as substantive legislation on any subject. The latest development is that at the end of February 2024, the Hungarian Government published and submitted for public consultation a draft law on the markets in crypto assets.[8] Once adopted, the law will serve as a key instrument for the implementation of EU legislation.

At EU level, the European Commission presented its Digital Finance Package, including crypto regulation, in autumn 2020, which, in addition to setting out a new digital finance strategy[9] and an EU retail payments strategy,[10] included the following legislative proposals: *(i)* a proposal for a regulation on markets in crypto assets (MiCA);[11] *(ii)* a proposal for a pilot regime for market infrastructures based on distributed ledger technology (DLT);[12] *(iii)* a proposal for a regulation on digital operational resilience for

7 *Cf.* Hungarian Act CXVII of 1995 on personal income tax, Section 67/C.

8 *See* at https://kormany.hu/publicapi/document-library/a-kriptoeszkozok-piacarol-szolo-torveny/download.

9 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a Digital Finance Strategy for the EU, COM(2020) 591 final.

10 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a Retail Payments Strategy for the EU, COM(2020) 592 final.

11 Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937, COM(2020) 593 final.

12 Proposal for a Regulation of the European Parliament and of the Council on a pilot regime for market infrastructures based on distributed ledger technology, COM(2020) 594 final.

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the financial sector;[13] *(iv)* a proposal to clarify or amend certain related EU legislation on financial services.[14]

As regards the operation of cryptoassets and the provision of services related to them, the MiCA proposal was the cornerstone of the package. Prior to the EU regulation, all that the EU financial regulators (ESMA, EBA, EIOPA) could do was to issue notices to consumers warning them of the risks involved.[15]

In the last 2 years, regulatory developments in the EU have also been accelerated. In 2022, the Regulation on a pilot scheme for market infrastructures based on distributed ledger technology (crypto exchanges) (the DLT Regulation) was adopted.[16] The adoption of the DLT Regulation was an important step in itself, but the most significant step forward was the adoption of the markets in crypto assets regulation (MiCA) in May 2023. In addition to the MiCA Regulation, the Regulation on information accompanying transfers of funds and certain crypto-assets (TFR) was also adopted.[17]

The adoption of the MiCA Regulation has made necessary the introduction of crypto legislation in those EU Member States that have not yet done so, and Hungary is also in the process of adopting basic crypto rules in line with the Regulation. In those states where regulations already exist, it is necessary to harmonise them with the MiCA regulation.

13 Proposal for a Regulation of the European Parliament and of the Council on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014 and (EU) No 909/2014, COM(2020) 595 final.

14 Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2009/65/EC, 2009/138/EU, 2011/61/EU, EU/2013/36, 2014/65/EU, (EU) 2015/2366 and EU/2016/2341, COM(2020) 596 final.

15 Most recent documents: EU financial regulators warn consumers on the risks of crypto-assets, ESA 2022 15, at www.esma.europa.eu/sites/default/files/library/esa_2022_15_joint_esas_warning_on_crypto-assets.pdf; ESMA Report on Trends, Risks and Vulnerabilities, No 1, 2021, pp. 53–59, at www.esma.europa.eu/sites/default/files/library/esma50-165-1524_trv_1_2021.pdf;

16 Regulation (EU) 2022/858 of the European Parliament and of the Council of 30 May 2022 on a pilot regime for market infrastructures based on distributed ledger technology, and amending Regulations (EU) No 600/2014 and (EU) No 909/2014 and Directive 2014/65/EU.

17 Regulation (EU) 2023/1113 of the European Parliament and of the Council of 31 May 2023 on information accompanying transfers of funds and certain crypto-assets and amending Directive (EU) 2015/849.

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In the field of customer and consumer protection, there is still no legislation in the EU or elsewhere that directly regulates this particular issue. In the United States, a bill to regulate consumer protection issues related to digital commodities was proposed to Congress in 2022, but has not been discussed and adopted yet.[18]

5. Key Elements of EU Legislation in the Crypto Markets and Traditional Money and Capital Markets

5.1 The Fundaments of the Legislation

The MiCA Regulation addresses three main types of cryptoassets: asset-referenced tokens, electronic money tokens and other tokens. For each of these three categories of assets, it sets out the basic issuance and issuer requirements, lays down the requirements for the authorisation of issuers and crypto service providers, sets out the regulatory regime for the supervision of crypto services and lays down basic rules in the area of consumer and customer protection, in particular as regards customer information, white paper, transparency requirements, insider dealing and market manipulation.

The DLT Regulation regulates the operation and supervision of distributed ledger-based market infrastructures (including trading and settlement systems) and extends the provisions of the traditional capital markets regulation (MIFID, MIFIR[19]) to distributed ledger technology-based markets.

The TFR Regulation lays down rules on the information on the payer and payee accompanying transfers of funds and on the information on the originator and beneficiary of cryptoassets accompanying transfers of cryptoassets.

The new basic elements of EU crypto legislation are similar in many aspects to the key provisions of traditional money and capital market regulation. Compared to crypto regulation, traditional money and capital market regulation definitely covers more areas and sets out a much more detailed set of conditions for the operation of these areas.

18 S.4760 – Digital Commodities Consumer Protection Act of 2022, at www.congress.gov/bill/117th-congress/senate-bill/4760.

19 Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012.

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Among the similarities, we can emphasise the definition of services, the entry into the market and the subjection of institutional operations and services to supervisory authorisation, the supervision of the provision of services, certain prudential requirements (*e.g.* rules on capital requirements). The regulation of the issuance of cryptoassets, which can be equated with the issuance of securities in traditional markets, and the prevention of market abuse have a particular importance in crypto regulation, but the regulatory regime is not nearly as detailed as traditional capital market regulation[20] and the requirement to impose criminal sanctions for crypto market abuse is not yet reflected in EU regulation, unlike traditional capital market regulation.[21]

The existing EU legislation on financial and capital markets contains a detailed set of customer and consumer protection instruments, elements of which are obviously transposed into national rules in the Member States. The following regulatory issues should be underlined in this context: *(i)* definition and authorisation of financial and investment services; *(ii)* supervision of the money and capital markets; *(iii)* institutional protection and guarantee schemes (deposit insurance and investor protection); *(iv)* definition of the core content of consumer credit contracts; *(v)* requirement of written form of contracts (in the case of consumer credit contracts); *(vi)* the provision of the right of withdrawal for consumers (for consumer credit contracts); *(vii)* the requirement for adequate and effective dispute resolution mechanisms (in mortgage lending and payment services regulation); *(viii)* prohibition of collecting deposits for undertakings other than credit institutions; *(ix)* obligation to contract for the provision of payment account services and the basic account services; *(x)* special provisions on commercial communications (in the regulation of the money market and consumer credit contracts); *(xi)* rules on the sharing of liability in case of use of payment-instruments; *(xii)* obligation to inform customers in advance (in case of consumer credit contracts, payment services, investment services); *(xiii)* requirement for ex-ante information by the provider (in investment and consumer credit regulation – *e.g.* MiFID test, ability to repay test); *(xiv)* segregation of client assets (for investment and payment

20 Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.

21 Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive).

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services); *(xv)* execution of the contract in the most favourable way for the client (for investment services); *(xvi)* requirement to prepare an information memorandum for public offerings of securities; *(xvii)* the requirement to ensure trading transparency in capital market trading; *(xviii)* the prohibition and criminalisation of insider dealing and market manipulation.

However, the EU legislation does not contain any provisions on the form of money and capital market contracts (no mandatory written form) and on the substantive requirements for unilateral contract modification, in particular the provision of reasonableness, the obligation to state reasons and the preparation period. On the other hand, however, EU legislation provides for an obligation to manage complaints in the area of financial services in the context of the payment services regulation,[22] while no such provision is found for other money and capital market services.

The customer and consumer protection provisions in EU legislation may in particular cases be complemented by additional national provisions. In addition to money and capital market regulation, there are also relevant financial consumer protection provisions in private laws (Civil Codes) of the Member States, such as the Hungarian Civil Code's provision on the invalidity of fiduciary credit guarantees in the case of securing claims against consumers.[23]

The MiCA and the DLT Regulation do not fully incorporate all the relevant elements of traditional money and capital market regulation, but they do lay the foundations for the protection of clients in a considerable range of areas. These include in particular: *(i)* definition and authorisation of financial and investment services; *(ii)* supervision of the money and capital markets; *(iii)* the requirement for publication and accessibility of the service providers' general terms and conditions, and definition of the content of certain contracts; *(iv)* the requirement for ensuring non-discriminatory access to the service (although the regulation does not impose any obligation to conclude a contract); *(v)* the obligation for service providers to put in place a complaints mechanims; *(vi)* requirement for *ex ante* collection of information (assessment of the risk-bearing capacity of the customer); *(vii)* segregation of client assets (for investment and payment services); *(viii)* execution of the contract in the most favourable way for the

22 Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, Articles 99–102.

23 Hungarian Act V of 2013 on the Civil Code, Section 6:99.

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client (for investment services); *(ix)* the provision of right of withdrawal for consumers; *(x)* requirement for a specific disclosure of risks; *(xi)* equirement for the preparation of a white paper in the case of a crypto-asset issuance; *(xii)* the requirement to ensure trading transparency; and *(xiii)* the prohibition of insider dealing and market manipulation.

A specific element of consumer rights is the right of withdrawal, which is essentially linked to distance contracts under the Consumer Rights Directive,[24] because, compared to contracts concluded face-to-face, the consumer is at a disadvantageous situation as he cannot see the product he wants to buy in person. However, in the case of cryptoassets, this issue of personal inspection is, by its very nature, a difficult problem to understand. Nevertheless, the MiCA Regulation grants this right to consumers for non-asset-referenced and non-electronic money tokens,[25] without any specific justification mentioned in the preamble, provided that these tokens are not introduced for trading on trading platforms. Accordingly, the right of withdrawal is limited to direct sales by the issuer (offeror) and indirect sales by the cryptoasset service provider.[26]

In addition to the above mentioned provisions on customer and consumer protection, which are considered to be very progressive, it has to be realised that this catalogue is not exhaustive. It lacks a number of important elements, which are discussed in the following sections, and which would be well worth including in the legislation.

5.2 Status of Crypotoassets in the Private Law

In the context of considering the private law status of cryptoassets, the primary question is whether these assets should be considered as a concept of property law (thing) or as a concept of contract law (obligation). The issue is of paramount importance not only from a purely private law perspective, but also from a tax law viewpoint, and the lack of an appropriate legal categorisation of these assets creates serious problems in accounting.

24 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, Article 9.

25 MiCA Regulation, Article 13.

26 Philipp Maume, 'Consumer Protection (4)' *in* Philipp Maume *et al.*, *The Law of Cripto Assets*, Verlag C. H. Beck, München, 2022, p. 118.

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The civil law codes of several states do not define the concept of a property, but rather regulate what can be the subject of property rights (physical objects that can be taken into possession)[27] and apply the rules on property to, among other objects, money, securities and natural resources that can be used as property. Given that cryptoassets are not corporeal objects and can generally be considered neither money (disregarding the specific status of Bitcoin as legal tender in the Salvadorian legislation), nor securities, nor natural resources which can be used as property, they cannot be classified as property,[28] and therefore the rules on the protection of property and possession cannot be applied to cryptoassets. On the other hand, there may be arguments for placing cryptoassets in the sphere of property law, like intellectual property.[29]

In private law, the positioning of cryptoassets is conceivable not only in the law of property but also in the regime of contract law. Two elements of the obligations are of particular importance. The first is that the concept of an obligation generally presupposes at least two parties: a beneficiary and an obligor.[30] However, cryptoassets cannot be understood as an obligation in their own sense, since there is no obligor *vis-à-vis* the beneficiary. In contrast to a debt in the form of a claim on a bank account, which can be understood as a claim of the owner of the money as the beneficiary against the bank holding the account, in the case of cryptoassets there is in principle no account manager and no debtor. Technically it means that the holder (the owner) has access to a certain amount of cryptoassets, typically registered on a blockchain, and can dispose of them and transfer the right of access. The other fundamental contractual provision is the principle of freedom of the contractual relationship, whereby the parties are free to determine the content of the contract. Civil codes typically do not preclude the parties from stipulating the use of a foreign currency or any other

27 *Cf.* Bürgerliches Gesetzbuch (BGB – Germany), Section 90; Zivilgesetzbuch (ZGB – Switzerland), Section 641; Sachenrecht (SR – Liechtenstein), Sections 20 and 171; Act V of 2013 on the Civil Code (Hungary), Section 5:14.

28 Sebastian Omlor, 'Allgemeines Privatrecht' *in* Omlor & Link (eds.) 2021, pp. 286–287; Matthias Lehmann, 'Internationales Privat- und Zivilprozessrecht' *in* Omlor & Link (eds.) 2021, p. 211.

29 Daniel Carr, 'Cryptocurrencies as Property in Civilian and Mixed Legal Systems' *in* David Fox & Sarah Green (eds.), *Cryptocurrencies in Public and Private Law*, Oxford University Press, Oxford, 2019, pp. 179–190.

30 *Cf.* German Bürgerliches Gesetzbuch (BGB), Section 241; Hungarian Civil Code, Section 6:1.

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form of consideration, including the transfer of a cryptocurrency, to settle a monetary debt.[31]

The Austrian Civil Code (ABGB[32]) defines property as anything that is not a person and serves their benefit.[33] The ABGB distinguishes according to their nature between tangible and non-tangible property, including certain property rights, for example. Accordingly, in light of the ABGB concept of things, virtual assets and crypto-values must clearly be regarded as *things*. In my opinion, a similarly clear statement cannot be made under the civil codes of many other states.

In general, we can conclude that the private law status of cryptoassets cannot be determined, apart from the Austrian fortuitous exception, within the existing legal framework, without supplementing the private law codes to this point.[34]

This ambiguous legal environment also has implications for the private law treatment of cryptoassets. The legal treatment of the transfer of assets is not straightforward either, as the rules on the transfer of ownership would apply if the assets were considered as a thing and the rules on assignment would apply if they were considered as a claim. Although the purchase and sale of coins and tokens is mentioned in common practice, the legal treatment of the situation is far from being as simple.

This situation concerns a number of legal transactions and services based on them, which are in many aspects similar to traditional private transactions, legal situations and financial services involving money or securities, and for which a proper legal basis would be essential. In particular: *(i)* the inheritance of cryptoassets; *(ii)* capital contributions to companies in crypto assets; *(iii)* lending and other financing transactions; *(iv)* transactions of a deposit collecting nature; *(v)* currency exchange/exchange transactions; and *(vi)* data protection issues.

31 Varnaz *et al.* 2021, p. 26; Lehmann 2021, pp. 213–215.

32 Section 285 of Allgemeines bürgerliches Gesetzbuch für die gesamten deutschen Erbländer der Oesterreichischen Monarchie, StF: JGS Nr. 946/1811.

33 Niklas Schmidt, *Kryptowährungen und Blockchains*, Linde, Wien, 2019, p. 118.

34 Zsolt Halász, 'Regulating the unregulateable – Attempts in Crypto Regulation in Europe', *Hungarian Yearbook of International Law and European Law,* Vol. 10, 2022, p. 230.

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5.3 Form of Legal Transactions

To ensure the integrity of legal transactions, it is of particular importance that they are recorded accurately. The requirement for contracts to be concluded in written form, in particular online or on another durable data carrier, would therefore be essential. In the case of traditional money and capital market transactions, the confirmation of verbal transactions is now one of the most basic requirements, but in the case of crypto transactions it is not yet a regulatory requirement.

5.4 Minimum Content of Legal Transactions and Limits on Unilateral Amendments

The Hungarian financial market regulations are clear about the minimum content of the terms and conditions of the business regulations of financial institutions and consumer credit contracts. In order to protect customers, it would be appropriate that the minimum mandatory content of the terms of business of all cryptoasset providers, and, in particular, of contracts for lending in cryptoassets and the use of cryptoasset collateral, should be laid down by law. Closely related to this point is the question of clarification of the precise conditions under which unilateral changes to the contract, to the detriment of the customer, may be made. In this context, cryptoasset providers currently enjoy almost complete autonomy, subject only to the requirements of the civil law codes of their place of establishment concerning general contractual terms and conditions.

5.5 Lending in Crypto Assets

Lending in cryptoassets has now become an activity carried out by several service providers.[35] The possibility of global access to these services entails considerable risks for borrowers, in particular due to adverse and sudden exchange rate volatility. Similar risks can be identified in the case of the use of cryptoasset as collateral. It would therefore be appropriate to define who and under which requirements can enter this market, as well as the specific client protection rules that should apply to clients in order to manage the risks involved.

35 Steger 2020, pp. 49, and 123.

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5.6 Payment Services

A number of crypto service providers offer payment services similar to traditional payment services, but based on crypto. For customers, these services are deceptively similar to traditional payment services (*e.g.* issuing payment instruments in card format), but the underlying legal background is quite different. The fundamental difference is that, whereas in the case of traditional payment services, the PSD Directive[36] imposes strict liability on providers for, inter alia, technical errors, third party fraud and abuse, the business rules of crypto service providers exclude such liability entirely and there are no corresponding requirements for crypto service providers under existing legislation. Against this background, it would be highly appropriate to establish by law the liability of crypto service providers for any damage caused to their customers in connection with their activities, in particular their payment services. Several regulatory solutions to this could be envisaged, either by amending the PSD or the MiCA Regulation.[37]

5.7 Investor Protection

Within the framework of traditional capital market legislation, EU law[38] provides for an institutional guarantee scheme in all Member States to compensate customers up to a certain value of the investments and funds held in customer accounts managed by the service provider in the event of the provider's insolvency. These guarantee funds are financed by contributions of investment firms operating in each Member State. Many of the cryptoasset services specified in the MiCA Regulation are very similar to traditional investment services which are covered by the protection provided by the guarantee funds.

Such services include, in particular, the custody and administration of crypto-assets on behalf of clients, the execution of orders for crypto-assets on behalf of clients, the receipt and transmission of orders for cryptoassets on behalf of clients, and the portfolio management of cryptoassets.[39]

36 PSD Directive, Articles 71–74.

37 Louise Damkjær Christensen, 'Crypto payments–a danger to consumer protection?', *Law and Financial Markets Review*, Vol. 16, Issue 3, 2022, pp. 1–15.

38 Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes.

39 *Cf.* MiCA Regulation, Article 3(1), point 16.

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The rationale for the investor protection guarantee provided in the context of traditional investment services suggests that an appropriate investor protection guarantee fund would be justified for the very similar crypto services. Until a mandatory crypto-investor protection regime is established, there will be unjustified discrimination between investors depending on whether they invest in crypto or non-crypto assets.

5.8 Obligation to Provide Information

One of the most important means of protecting consumers is to prevent consumers from making wrong decisions. This can be achieved by requiring the service provider to inform (educate) its customers about the content and risks of transactions that pose a material risk to them prior to the use of the service (Due to the lack of such prior information, many people in Hungary have suffered extreme difficulties in the past decade and a half in the so-called foreign currency lending). It is well known that the volatility of crypto assets' exchange rates entails serious risks. These risks are present in both investment and financing transactions. It would therefore be appropriate to require cryptoasset providers generally to inform their clients, in particular those who are consumers, in advance of the risks inherent in the transaction they intend to enter into and to ensure that the content and risks of the transaction are in line with the knowledge and risk-bearing capacity of the client.

5.9 Dispute Settlement

The use of appropriate and effective dispute resolution mechanisms is a key element of the security of legal transactions. The general terms and conditions of global crypto-asset providers contain a wide variety of clauses on the law applicable to their activities and on the exclusive jurisdiction of courts around the world, which in many cases may be arbitral courts. It is easy to recognise that a forum for recourse located at an immeasurable distance from a customer's domicile, but conveniently located for the service provider, in practice in most cases prevents these customers from taking

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their potential disputes with service providers to court, with potentially serious financial consequences for the customers.[40]

This is compounded by the virtual absence of regulation of commercial communications about crypto services, which gives providers a significant marketing advantage in persuading less sophisticated customers.

6. Conclusion

Taking a brief look at recent crypto regulation in the EU, the adoption and entry into force of the MiCA and the DLT Regulation represent a clear step forward in the security of crypto issuance and services and the protection of customers. Rather than regulatory solutions in Member States with different content and depth, it was timely to move towards both regulatory convergence and regulation that would apply in Member States that have not previously regulated crypto services.

It can also be noted that this legislation is far from being ready and definitive. Comparing the regulatory frameworks for traditional money and capital markets with those for the crypto markets, the EU and national regulatory frameworks for the former are (unsurprisingly) much more detailed and provide much more stringent protection for clients in a number of areas.

In many senses, the legislation on services provided in traditional money and capital markets could be a possible benchmark for the creation of a crypto regulatory regime, although not all elements can be fully transposed. This has been recognised by actors in the EU legislative process, and EU crypto regulation incorporates many components of traditional money and capital markets regulation into its customer and consumer protection toolkit.

As much as the new regulatory framework analysed above can be seen as a step forward, the lack of a definition and categorisation of cryptoassets under private law (thing, right, claim or something else) remains a fundamental shortcoming at both EU and Member State level, which is closely linked to other regulatory issues such as *(i)* the definition of formal requirements for certain legal transactions involving cryptoassets; *(ii)* the

40 Aleksandr P. Aleksenko, 'Model Framework for Consumer Protection and Crypto-Exchanges Regulation', *Journal of Risk and Financial Management,* Vol. 16, Issue 7, 2023, p. 305.

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regulation of crypto lending and crypto collateral; *(iii)* the content of the general terms and conditions; *(iv)* unilateral modification of the general terms and conditions to the detriment of the customer; *(v)* the legal definition of the liability rules of crypto service providers for damage caused to their customers in connection with their activities, in particular their payment services; *(vi)* the obligation to inform customers in advance and the obligation for service providers to be informed in advance; *(vii)* the use of appropriate and effective dispute resolution mechanisms.

In addition to defining the private law foundations and laying down many of the missing elements of customer protection, it would be appropriate to establish appropriate rules to ensure consistency with EU data protection legislation (in particular the right to be forgotten and rectification as laid down therein), to clarify the accounting treatment of these instruments and the application of the tax rules applicable on them.

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Moving Forward: Charting the Much-Needed Evolution of the Digital Services Act

János Tamás Papp[*]

Abstract

The Digital Services Act (DSA) represents a pivotal step in the evolution of internet governance, aiming to address several critical issues that have emerged in the digital era. This article delves into the potential pathways through which the DSA could evolve to tackle three significant challenges currently facing the online world: contractual content moderation and fundamental rights, algorithmic transparency and the opt-out system, and the complexities of disinformation and the codes of conduct. (i) Firstly, the article explores the nuanced approach of the DSA towards contractual content moderation, emphasizing its minimal intervention in the substantive content of user-platform contracts. This section discusses how the DSA's focus on procedural regulation rather than substantive contract terms could impact fundamental rights and the autonomy of platform operators in defining their terms of service. (ii) Secondly, the discussion shifts to the issue of algorithmic transparency and user autonomy in an increasingly automated digital environment. It criticizes the DSA's current measures and suggests how enhanced transparency and a more robust opt-out system could empower users while addressing the challenges posed by the opacity of algorithmic decision-making. Lastly, the article addresses the handling of disinformation within the DSA framework, analyzing its current approach and proposing more stringent measures to combat the spread of false information effectively. This section evaluates the potential of codes of conduct as flexible, adaptive tools to improve content moderation practices and mitigate systemic risks posed by disinformation.

Keywords: Digital Services Act, algorithms, disinformation, content moderation, codes of conduct

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1. Introduction

The Digital Services Act (DSA) represents a cornerstone in the evolving legislative landscape of the EU, aimed at regulating online platforms and modernizing the long-standing E-Commerce Directive. The imperative for such legislative updates had become increasingly evident, necessitated by

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the rapid advancements in digital technology and the growing influence of digital platforms on societal norms and individual behaviors.

Despite its strategic intentions, the DSA exhibits several notable deficiencies that detract from its effectiveness in addressing the rising challenges of the digital age. The regulation is characterized by conceptual ambiguities and the application of excessively broad rules, which collectively fail to effectively target specific problematic areas within the digital domain. One of the primary oversights of the DSA pertains to the regulation of contract-based private content moderation. This term refers to the enforcement of platform-specific terms of service or community guidelines, which are often ambiguously defined and subject to discretionary enforcement by the platform operators. This lack of specificity and oversight leads to a heterogeneous application of moderation practices, which can undermine the consistency and fairness essential to maintaining user trust and legal compliance. Furthermore, the DSA inadequately addresses the complexities associated with algorithmic recommender systems. These systems, integral to the operational frameworks of many online platforms, shape user engagement and information consumption through personalized content delivery. The absence of specific regulatory guidelines under the DSA concerning the operation and oversight of these algorithms leaves a significant gap in the governance of practices that have substantial implications for transparency, fairness, and the propagation of biases. Additionally, the regulation falls short of tackling the pervasive issue of disinformation. In the current digital ecosystem, where information can be disseminated rapidly and across geographical boundaries, the DSA's provisions do not sufficiently confront the multifaceted challenges posed by the spread of false information. This regulatory gap is particularly concerning given the profound effects that disinformation can have on democratic integrity, public health, and social cohesion.

Nevertheless, it is crucial to acknowledge that the DSA has its merits. The Regulation establishes a foundational framework that, while not explicitly addressing all pertinent issues, provides avenues for future amendments and policy adaptations. There is inherent potential in the DSA's framework for the progressive refinement of regulations, aimed at better addressing the highlighted issues through targeted policy interventions. The subsequent sections will explore these specific limitations of the DSA, identifying shortcomings of the DSA and discussing potential improvements to better address these challenges. The objective is to provide a clear and thorough critique that highlights deficiencies within the DSA and proposes improve-

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ments. This involves a review of the existing rules and an exploration of how modifications could enhance the Regulation.

2. Contractual Content Moderation and Fundamental Rights

Several authors have extensively discussed the terms of use for social networking sites and their legal enforceability.[1] Therefore, it is not necessary here to reiterate the fundamental importance of this contractual relationship in regulating online platforms. Despite the comprehensive regulatory framework provided by the DSA, it surprisingly intervenes minimally in the substantive content of these contracts. Instead, the DSA focuses largely on regulating the processes by which these contracts' compliance is ensured. This hands-off approach to the contractual content itself retains the general *status quo*, with some important implications.

By allowing the fundamental terms of user-platform contracts to remain largely unaltered, the DSA implicitly permits platforms to continue setting their own terms of service in ways that can significantly affect user rights and responsibilities. While this offers platforms the flexibility to innovate and tailor their services to specific needs and markets, it also leaves ample room for these companies to dictate terms that may disproportionately favor their interests over those of users, especially in areas not specifically covered by the DSA. This approach also underscores a reliance on platforms to self-regulate within the broad legal boundaries set by the DSA. The regulation mandates certain standards and obligations related to transparency,[2] content moderation[3] and data protection of minors,[4] but the enforcement and interpretation of many user rights are left to the platforms' discretion through their terms of service. This can lead to inconsistencies in how user rights are protected across different platforms, potentially leading to a fragmented digital environment where user experiences and rights

1 *See* Michael Karanicolas, 'Too Long; Didn't Read: Finding Meaning in Platforms' Terms of Service Agreements', *University of Toledo Law Review,* Vol. 52, Issue 1, 2021, pp. 1–25; Mark A. Lemley, 'Terms of Use', *Minnesota Law Review,* Vol. 91, Issue 2, 2006, pp. 459–483; Aaron T. Chiu, 'Irrationally Bound: Terms of Use Licenses and the Breakdown of Consumer Rationality in the Market for Social Network Sites', *Southern California Interdisciplinary Law Journal,* Vol. 21, Issue 1, 2011, pp. 165–197.
2 DSA, Articles 15 and 42.
3 Id. Article 24.
4 Id. Article 28.

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vary significantly from one service to another. The DSA's focus on process rather than substantive contract content can be seen as a strategic choice to promote compliance without stifling innovation.[5] It establishes essential guardrails but it does not delve deeply into dictating the exact nature of the terms that govern the user-platform relationship. This allows platforms some room to maneuver in competitive digital markets but raises questions about whether this approach sufficiently protects users, particularly in an environment characterized by rapid changes and significant power imbalances between large tech companies and individual users. This approach to the contractual relationship between users and platforms, focusing on compliance processes rather than the contracts' content, reflects a delicate balance between regulation and freedom.[6] However, it also leaves open questions about the adequacy of user protection and the effectiveness of self-regulation by platforms.

This means that platform operators have the discretion to define their own contractual terms, deciding autonomously on their content moderation policies. Although the DSA somewhat achieves the goal that "what is illegal offline should also be illegal online,"[7] it does not sufficiently ensure the converse: that "what is not illegal offline should not be illegal online." The intermediaries, essentially, are put in a judge-like role without defined standards or safeguards, leading to self-implemented moderation mechanisms and procedures that lack transparency. This situation allows intermediaries to significantly influence digital law-making and fundamental rights protection, which they manage without any regulatory safeguards.[8]

Content moderation on social media platforms presents a significant challenge due to the continuous generation of vast amounts of content. For instance, Facebook employs nearly 15,000 content moderators,[9] while the entire judiciary of Hungary consists of about 2,900 judges handling

5 *See* at https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act_en.

6 Frances Burwell, *Regulating Platforms the EU Way? The DSA and DMA in Transatlantic Context,* at www.wilsoncenter.org/article/regulating-platforms-eu-way-dsa-and-dma-transatlantic-context.

7 *See* at www.consilium.europa.eu/en/press/press-releases/2021/11/25/what-is-illegal-offline-should-be-illegal-online-council-agrees-on-position-on-the-digital-services-act/.

8 Berrak Genc-Gelgec, 'Regulating Digital Platforms: Will the DSA Correct Its Predecessor's Deficiencies?', *Croatian Yearbook of European Law and Policy*, Vol. 18, 2022, pp. 58–59.

9 *See* at www.forbes.com/sites/robertzafft/2022/10/09/twitter-facebook-et-al-the-case-for-freelance-content-moderation/.

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everything from commercial to criminal cases.[10] This disparity highlights a potential issue: without platforms acting as initial filters for content moderation, courts could become overwhelmed with cases needing swift resolution regarding what constitutes illegal or harmful content. To manage this demand, governments would need to significantly enhance judicial or administrative capacities. Scholars suggest two main solutions: strengthening platform moderation through judiciary-like mechanisms, such as social media councils like that of Facebook,[11] or developing e-courts equipped for the digital age.[12] The DSA appears to lean towards the first option – privatizing content moderation. This approach alleviates the pressure on states to expand judicial infrastructure to cope with the demands of moderating digital content. The collaboration between states and large tech companies, as seen with Facebook, indicates a reliance on private entities to manage the complexities of digital content, reflecting a strategic but perhaps necessary 'invisible handshake' given the prevailing institutional limitations.[13]

By designating online intermediaries as 'watchdogs' governments effectively outsource the enforcement of online regulations to algorithmic tools. Due to the impractical transaction costs associated with manually reviewing illegal content, online intermediaries find themselves compelled to use algorithmic methods for monitoring and filtering to manage their liability. In practice, the moderation of various types of online content (including intellectual property violations, defamatory statements, dangerous and hate speech, child sexual abuse and child abuse, as well as online disinformation) and the resolution of disputes among users, are increasingly handled through automated filtering and other algorithmic approaches. The push for the broad use of algorithmic enforcement tools exacerbates the inherent tension between private ordering and traditional due process norms.[14]

10 *See* at www.parlament.hu/documents/10181/39233533/Infotablo_2021_8_igazsagszolgaltatas_2021.pdf/163e2772-6634-7348-2587-662059586ab8?t=1616150875967.

11 Gilad Abiri & Sebastián Guidi, 'From a Network to a Dilemma: The Legitimacy of Social Media', *Stanford Technology Law Review*, Vol. 26, 2023, pp. 92–142.

12 Anupam Sharma & Akhil Kumar, 'Transforming Access To Justice In The Digital Age: The Role Of E-Courts', *NUJS Journal of Regulatory Studies*, Vol. 8, Issue 2, 2023, pp. 43–57.

13 *See* at http://eulawanalysis.blogspot.com/2022/01/a-democratic-alternative-to-digital.html.

14 Giancarlo Frosio & Christophe Geiger, 'Taking fundamental rights seriously in the Digital Services Act's platform liability regime', *European Law Journal*, Vol. 29, Issue 1–2, 2023, p. 34.

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Given the vast scale, speed, and technological complexity of content moderation, it is beyond the capacity of state actors to take over this task from platforms, who currently serve as the primary agents of content moderation. This reality shapes regulatory approaches, rightly shifting the focus towards procedural rather than substantive regulation. However, Douek argues that the existing regulatory emphasis on procedural fairness in individual cases is flawed because much of content moderation operates on a broader scale, outside the scope of individual instances. Legislative mandates focused on procedural due process for individuals may have limited effectiveness in improving the overall system and could potentially hinder its ability to meet broader objectives. Douek underlines that the emphasis on providing a sense of fair treatment to individuals, while important, must be balanced against other goals such as efficiency, accuracy, and consistency in content moderation, highlighting significant trade-offs between these aims.[15] "The scale and speed of online speech means content moderation cannot be understood as simply the aggregation of many (many!) individual adjudications."[16]

The most critical issues in content moderation extend beyond the scrutiny of individual posts to encompass the overall functionality of moderation systems. Given that errors in content moderation are unavoidable, it is essential to consider which types of errors are more acceptable within these systems. Although users have the right to understand and contest specific moderation decisions, these rights do not empower them to question the broader systemic choices that dictate these decisions. These systemic frameworks are often the root of many of the biases and issues highlighted earlier. Therefore, understanding and addressing the structure and principles of content moderation systems is crucial in identifying and mitigating systemic biases that can influence broader outcomes in digital environments. Beyond the realm of content moderation, platforms engage in a variety of governance decisions that have systemic effects on user behavior and the flow of information. These decisions include the functionalities allowed by interfaces such as the ease of commenting on strangers' posts, which can influence the rate of abuse and harassment. These design choices and algorithmic recommendations significantly shape user interactions and content visibility, having an impact far beyond isolated moderation decisions. How-

15 Evelyn Douek, 'Content Moderation as Systems Thinking', *Harvard Law Review*, Vol. 136, Issue 2, 2022, p. 532.

16 Id. pp. 530–531.

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ever, these broader impacts are not readily addressable through individual rights alone. This highlights a limitation within the existing framework focused primarily on content moderation, which tends to emphasize harms to identifiable individuals rather than addressing the more extensive ways in which platforms govern and shape the digital media environment. Such a narrow focus may overlook the crucial role that platform design and systemic decisions play in influencing online media and communication dynamics.[17]

Article 14 of the DSA serves as a cornerstone for the act's broader ambitions to safeguard public discourse on online platforms. Section 14 specifically targets the preservation of freedom of expression by establishing stringent requirements for transparency and fairness in content moderation. It mandates that online platforms provide clear, comprehensible information in their terms and conditions about the rules, procedures, measures, and tools used in content moderation. This includes both algorithmic decision-making and human review processes, aimed at ensuring that legal content is not unjustly removed, and that illegal content is dealt with efficiently. The first part of Article 14 of the DSA introduces a transparency rule whereby providers of intermediary services should include appropriate information (in a clear, simple, intelligible, unambiguous and user-friendly manner) of restrictions on their services in their terms and conditions. This information

> "shall include information on any policies, procedures, measures and tools used for the purpose of content moderation, including algorithmic decision-making and human review, as well as the rules of procedure of their internal complaint handling system."[18]

In relation to the first paragraph, paragraphs 2, 3, 5 and 6 typically complement these requirements: Any significant changes must be notified to users,[19] the terms of services targeting minors must be drafted in language intelligible to children,[20] large platforms must draw up a summary of their terms and conditions[21] and the terms and conditions under which they are

17 Rachel Griffin, 'Rethinking Rights in Social Media Governance: Human Rights, Ideology and Inequality', *European Law Open,* Vol. 2, Issue 1, 2023, pp. 42–43.
18 DSA, Article 14(1).
19 Id. Article 14(2).
20 Id. Article 14(3).
21 Id. Article 14(5).

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provided must be made available in the official languages of all Member States.[22]

However, Article 14(4) is of particular interest:

> "Providers of intermediary services shall act in a diligent, objective and proportionate manner in applying and enforcing the restrictions referred to in paragraph 1, with due regard to the rights and legitimate interests of all parties involved, including the fundamental rights of the recipients of the service, such as the freedom of expression, freedom and pluralism of the media, and other fundamental rights and freedoms as enshrined in the Charter."[23]

This paragraph applies to any restrictions on the use of the services, not just decisions made regarding individual content. Instead, individual decisions are referred to in Article 20, where decisions are taken on the basis that "the information provided by the recipients constitutes illegal content or is incompatible with its terms and conditions".[24] These specific decisions may include decisions to remove information, limit its visibility, suspend the user, or stop monetization.[25] However, Article 14(4) talks about the restrictions set out in the terms of use, *i.e.* pre-established rules that limit users in any way.

The enforcement of fundamental rights in interactions between individuals, particularly on social media platforms, presents complex interpretative challenges. Unlike state actors, social media operators are not inherently bound by constitutional guarantees of freedom of expression, since these cannot typically be directly applied against them. This distinction necessitates a clear differentiation between the vertical application of fundamental rights (between individuals and the state) and their horizontal application (between individuals). In cases involving the state, the pathway for addressing rights' infringements is straightforward, as the state is the primary guarantor of fundamental rights. Conversely, when fundamental rights issues arise horizontally, any inaction may indirectly implicate the state if the legislative framework is inadequate or enforcement is lacking, thus extending the state's responsibility to third parties. In this context, it is pertinent to explore whether the state's protective obligations should extend to

22 Id. Article 14(6).
23 Id. Article 14(4).
24 Id. Article 20(1).
25 Id.

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regulating social networks to ensure freedom of speech is upheld. The DSA, referencing international standards and UN guiding principles on human rights,[26] implies that Article 14(4) elevates the relevance of fundamental rights in the relationships between online platforms and their users to an EU regulatory level. This suggests an evolving recognition of the state's role in safeguarding such rights in digital arenas, potentially mandating the adoption of specific legal provisions to effectively enforce these rights on social media platforms.[27]

Wolters and Gellert observe that the safeguards for users' fundamental rights have been strengthened under the DSA regime. This enhancement stems not only from the establishment of new redress mechanisms but also from the obligations imposed on hosting provider services to deliver decisions that are objective, non-arbitrary, diligent, and timely, and to support these decisions with a statement of reasons. However, they note that the scope of these safeguards remains somewhat limited. Despite this limitation, Wolters and Gellert argue that these new requirements represent a significant improvement compared to the previous framework, where binding legal provisions for protecting these rights were largely absent.[28]

In conclusion, while Section 14 of the DSA lays a foundational framework for protecting fundamental rights online, particularly freedom of expression, it also highlights the complexities and limitations of regulating global online platforms. It undoubtedly strengthens the enforcement of fundamental rights online, but the exact content and scope of application of the provisions are still questionable.[29]

3. Algorithmic Transparency and the Opt-Out System

While the DSA makes significant strides in setting regulatory standards, its actual impact on preventing overreach by platform operators and ensur-

26 Id. Recital (47).

27 João Pedro Quintais *et al.*, 'Using Terms and Conditions to Apply Fundamental Rights to Content Moderation', *German Law Journal,* Vol. 24, Issue 5, 2023, p. 24.

28 Pieter Wolters & Raphael Gellert, 'Towards a Better Notice and Action Mechanism in the DSA', *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, Vol. 14, Issue 3, 2023, p. 418.

29 Sebastian Felix Schwemer, 'Digital Services Act: A reform of the e-Commerce Directive and much more' *in* Andrej Savin & Jan Trzaskowski (eds.), *Research Handbook on EU Internet Law,* Edward Elgar, Cheltenham, 2023, pp. 232–252.

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ing diverse and pluralistic content is not guaranteed. The act's reliance on platforms' self-regulation and the general nature of some of its provisions may not suffice to address the evolving challenges posed by digital communication environments.[30] Algorithms are increasingly entrusted with decision-making tasks that can influence our perceptions and interactions. This influence extends beyond mere economic implications as private actors harness these tools, which are more sensitive to business needs than public interests. The autonomous nature of these algorithms introduces unpredictability and complicates accountability, potentially leading to issues such as discrimination in profiling and scoring practices. Moreover, the digital transformation over the past two decades has reshaped how we express ourselves online, significantly impacting the public sphere. While the internet has been a pivotal medium for promoting democratic values such as freedom of expression, the rise of automated decision-making systems poses new threats to these freedoms. Concerns about these systems and their implications for freedom of expression have been acknowledged by European courts, including the ECtHR, highlighting the challenges these technological advancements bring to protecting fundamental rights.[31]

The preamble states that a fundamental aspect of how online platforms operate involves the strategic prioritization and presentation of information on their interfaces, enhancing and streamlining user access to content. This is achieved through algorithms that suggest, rank, and highlight information, using text, visual cues, or other methods to organize content provided by users. Recommender systems are pivotal in shaping how users find and engage with online content, improving search functionality and overall user experience. These systems are crucial not only in elevating certain content but also in driving the widespread sharing of information and influencing online behavior. Therefore, it is essential for online platforms to maintain transparency about the functioning of these recommender systems. They must inform users clearly about how these systems affect content presentation and influence user interactions. Platforms should disclose the key parameters of these systems in a manner that is easy to understand, ensuring users are aware of how content is tailored to them, particularly

30 Caroline Cauffman & Catalina Goanta, 'A new order: the Digital Services Act and consumer protection', *European Journal of Risk Regulation,* Vol. 12, Issue 4, 2021, pp. 758–774.

31 Oreste Pollicino & Giovanni De Gregorio, 'Constitutional Democracy, Platform Powers and Digital Populism', *Constitutional Studies,* Vol. 8, 2022, p. 15.

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by explaining the main factors that influence content suggestions and the significance of these factors, including any reliance on profiling and user behavior.[32]

Transparency is of course an important step in regulation, but it is not enough in itself. Users should have increased access to information about content curation and moderation practices, including the ability to opt-out of unwanted content curation.[33] As Duek argues, the prevailing simplicity in transparency regulations can mislead regulators into implementing basic mandates that offer limited insights. Effective transparency must be purposefully targeted; the common approach of requiring platforms to disclose total enforcement numbers is simplistic and uninformative. These numbers alone fail to explain underlying trends or causes, such as increases in overall content or changes in enforcement criteria, which might affect the interpretation of data concerning *e.g.* takedown rates. Additionally, these figures don't reveal disparities across languages, regions, or demographics. Overemphasis on simplistic metrics can also lead to harmful incentives, prompting platforms to inflate their reported enforcement numbers to meet regulatory expectations and boast about their compliance. This narrow focus on simple metrics like takedown decisions overlooks the broader complexities and consequences of content moderation, such as the potential for perverse incentives and the exclusion of key stakeholders and factors from the conversation. A generic, one-size-fits-all transparency mandate not only falls short of providing meaningful information but also fails to adapt to the evolving landscape of content moderation. A more nuanced approach to transparency would inform various stakeholders – from governments to civil society – enabling them to address misinformation effectively and participate in shaping content moderation practices. Ultimately, while transparency is beneficial, not all mandates effectively serve the intended goals of informed regulation, market responsiveness, or platform accountability. Effective mandates require careful design to be truly insightful and adaptive.[34]

The DSA's strategy for enhancing algorithmic transparency and accountability has room for improvement. To tackle the problems associated with the opacity of algorithms and the 'black box society', more precise require-

32 DSA, Recital (70).
33 Frosio & Geiger 2023, p. 77.
34 Evelyn Douek, 'Content Moderation as Systems Thinking', *Harvard Law Review,* Vol. 136, Issue 2, 2022, pp. 559–562.

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ments could be implemented. These could target issues like algorithmic bias, which can create 'echo chambers' where users only encounter content that reinforces their beliefs. Further improvements could include providing more detailed explanations of the logic behind automated decisions, increased transparency regarding the data sets used for training algorithms, and stronger mechanisms for redress to address harms caused by algorithmic decisions. Such measures would significantly bolster algorithmic accountability.[35]

The traditional distinction between passive and active roles in determining the liability of online service providers is becoming increasingly tenuous. The extensive moderation activities – filtering, sorting, and optimizing content for profit – undertaken by platforms are still classified as purely technical and passive. However, the adequacy of this classification in the age of AI-driven moderation is debatable. Originally, service providers were viewed as mere intermediaries that reduced transaction costs by connecting different user groups. Nowadays, platforms in two-sided markets not only provide free services or content to attract users but also generate revenue through advertising and charging other market side users. These ad-supported platforms are designed to capture users' attention, displaying more ads and prompting users to reveal more personal data for targeted, lucrative advertising. This is part of what is known as the attention economy, where digital services are optimized to support advertising-driven business models. While some providers may still assume a passive, neutral stance, many online platforms have become active participants in shaping the digital environment. They not only control user access and transaction modalities but also influence what content users see, aiming to increase user engagement and data sharing. This involvement challenges the notion that their services are neutral and purely technical.[36]

Radical measures such as an absolute ban on the use of personalized algorithms should be ruled out, as this would violate not only freedom of speech and information, but also the freedom to conduct a business and freedom of contract of the platforms.[37] Beyond the stipulations in Article

35 Frosio & Geiger 2023, p. 77.

36 Miriam C. Buiten, 'The Digital Services Act from Intermediary Liability to Platform Regulation', *Journal of Intellectual Property, Information Technology and Electronic Commerce Law,* Vol. 12, Issue 5, 2021, p. 372.

37 Joao Tornada, 'How (Not) to Deal with the 'Bubble Effect' in Cyberspace: The Case of the EU Digital Services Act', *Brooklyn Journal of International Law*, Vol. 49, Issue 1, 2023, p. 121.

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27, providers of very large online platforms and very large online search engines that employ recommender systems are required to offer at least one alternative for each of their recommender systems that does not rely on profiling. Opt-out options on social media platforms are often positioned as giving users more freedom and control over their online experiences. However, the reality is that the opt-out model has inherent flaws that make it less than effective in guaranteeing true freedom. The very nature of an opt-out system starts from the premise that users are automatically enrolled in a certain feature or service. This means that the default setting might involve the collection of data or exposure to certain content unless a user actively takes steps to change it. Given that many users may not be technologically savvy or might overlook the importance of certain settings, the default option can lead to inadvertent consent. Additionally, the opt-out model assumes that users are informed about all the implications of the settings they are enrolled in. But with the rapid evolution of technology and the intricate ways in which data is used, even well-intentioned users might not fully grasp what they are opting out of. Social media platforms, with their extensive terms of service and privacy policies, often contain language that is dense and difficult for the average user to understand. Furthermore, even if a user successfully opts out of one feature, the interconnected nature of social media means that their data or preferences might still be influenced by other aspects of the platform. For instance, opting out of targeted ads doesn't necessarily mean a user's activities aren't still being tracked and used in other ways. Article 27 only provides an exemption from profiling in accordance with the GDPR,[38] however, it is important to recognize that even with this provision, these recommendation systems may still operate in ways that are not entirely transparent or clear to the user. This lack of transparency can occur despite the absence of profiling, as the algorithms driving these systems might still process and prioritize content in a manner that is opaque, making it difficult for users to understand why certain content is recommended to them. The DSA's measures aim to mitigate this by requiring clearer explanations of the algorithms' functioning, but achieving full transparency in the complex mechanics of these systems remains a challenging task. Also, we have to consider whether

38 Article 4(4) of 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 repealing Directive 95/46/EC (General Data Protection Regulation, GDRP).

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the user really wants to use the given platform without certain functions. The personalized timeline is fundamentally useful to the user, it relieves them from a lot of unnecessary information that he would not be interested in anyway, and in return, it may be worth it for them that some of their data is used for this purpose. We can also draw the conclusion from the regulation on Cookies that the user experience has become much worse than it was before, many people allow access to much more data due to intrusive pop-up windows.

According to Tornada, the effectiveness of the DSA in disrupting the 'bubble effect'[39] largely depends on the number of users who choose non-personalized feeds on social networks, search engines, and marketplaces. Tornada points out that since these platforms thrive on the personalized recommendation of content, the impact of this measure may be inherently limited from the start (suitability aspect). He also notes that without widespread awareness of the issues surrounding information bubbles and digital polarization, it is unlikely that there will be a significant uptake of the option to 'opt out' of personalized content. Drawing on sociological insights, Tornada argues that due to homophilic tendencies, people are inclined to engage with information and individuals that reflect their interests and opinions. Consequently, given the choice between personalized content and more diverse political and informative content on social networks, which are ecosystems driven by immediacy, entertainment, and commercial advertising, most users will prefer the former.[40]

In conclusion, while opt-out options may seem like a step towards greater freedom for internet users, they often fall short of providing genuine control, or the control that is often offered (even if it is perhaps more legal) is less desired by the users. But most importantly freedom isn't just about the ability to opt out; it is also about the ability to have meaningful choices. An opt-out system presents a binary choice, often without giving users a spectrum of options that might better suit their individual needs and preferences.

39 *See* János Tamás Papp, 'Recontextualizing the Role of Social Media in the Formation of Filter Bubbles', *Hungarian Yearbook of International Law and European Law*, Vol. 11, 2023, pp. 136–150.

40 Tornada 2023, pp. 128–129.

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4. Disinformation and Codes of Conduct

There is a growing consensus among scholars that while the DSA represents a significant step forward in regulating online platforms, it may not adequately address the complexities of disinformation and is somewhat vague on how platforms should tackle disinformation.[41] Researchers argue that the DSA's provisions, including those related to transparency and the Code of Practice on disinformation,[42] lack the robustness needed to effectively combat the evolving nature of online false information.[43] According to scholars like De Gregorio, the DSA's emphasis on transparency and accountability, although essential, does not directly tackle the root causes or the dynamic mechanisms through which disinformation spreads.[44] Additionally, other experts express concerns that the DSA might fall short in terms of enforcement capabilities and the practical challenges in monitoring compliance across diverse digital platforms.[45] These perspectives highlight the need for a more comprehensive approach that includes stronger regulatory measures and more active involvement of various stakeholders to effectively mitigate the impact of disinformation.

Other scholars also highlight that the DSA alone may not be sufficient to address the disinformation problem within the EU.[46] Currently, the protection against disinformation largely relies on the willingness of information society service providers to fulfil their duties of care regarding the content they distribute. This includes their ability to self-assess the 'systemic risks' inherent in their activities and implement preventive actions, particularly through content moderation procedures. However, the DSA does not specifically define harmful content, including disinformation, nor does

41 *See* at https://sirenassociates.com/policy-papers/the-eu-digital-services-act-overview-and-opportunities/.

42 Strengthened Code of Practice on Disinformation, at https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation.

43 Luca Nannini *et al.*, 'Beyond phase-in: assessing impacts on disinformation of the EU Digital Services Act', *AI and Ethics,* 2024, pp. 1–29.

44 Giovanni De Gregorio, *How Does the DSA Contribute to Platform Governance and Tackle Disinformation?*, at www.ippi.org.il/how-does-the-dsa-contribute-to-platform-governance-and-tackle-disinformation/.

45 Aleksandra Kuczerawy, 'The Good Samaritan that wasn't: voluntary monitoring under the (draft) Digital Services Act', *VerfassungsBlog,* 12 January 2021.

46 Alexander Peukert, 'Who Decides What Counts as Disinformation in the EU?', *VerfassungsBlog,* 24 October 2023.

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it mandate its removal.[47] Additionally, the effectiveness of these measures also depends on the capacity of relevant public authorities to monitor and enforce compliance with these obligations. Whether this approach will provide a robust enough response to the challenges disinformation poses to democratic societies is still an open question.[48]

Strowel and De Meyere present a complex proposal to fight disinformation with the tools of the DSA. The proposal advocates for instituting a comprehensive transparency principle for online platforms, aligning with standards similar to those in public administration and elements of the GDPR. This principle mandates that platforms openly disclose their operational and decision-making processes regarding the prioritization and dissemination of information. The proposal suggests that enhanced transparency concerning the design of platforms and their moderation policies would bolster accountability and enable external evaluations of the effectiveness of moderation tools. Additionally, the transparency principle would be paired with a shift in compliance responsibilities, specifically placing the onus on Very Large Online Platforms (VLOPs) to prove their compliance, acknowledging their critical role as gatekeepers in the digital space. The document calls for an expanded role for users and third parties in combating disinformation. This is where the concept of 'middleware' gains importance. Middleware, in this context, is described as software and services that introduce an editorial layer between major internet platforms and their users. This technology would empower users by providing more refined control over the content they encounter, by altering or filtering the information presented based on personal or predefined criteria. The proposal also supports extending access rights beyond traditionally vetted researchers to include non-governmental organizations and other relevant stakeholders. This would be supported by a stringent certification process to ensure the protection of online privacy and the proprietary interests of platforms. Concerns are highlighted regarding the adequacy of current enforcement mechanisms under the DSA, leading to the recommendation for the establishment of an independent EU authority dedicated to the

47 Mark Leiser, 'Reimagining Digital Governance: The EU's Digital Service Act and the Fight Against Disinformation', *SSRN,* 2023, at https://ssrn.com/abstract=4427493, p. 7.

48 Dario Moura Vicente, 'Protection against Disinformation on the Internet: A Portuguese Perspective', *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, Vol. 14, Issue 3, 2023, p. 461.

https://doi.org/10.5771/9783748946526 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

regulation of online platforms. This authority would be responsible for enforcing transparency and accountability, managing the complex dynamics between platforms, users, and regulators. It would need to be independent, transparent in its operations, and adequately resourced with expertise in data and algorithms to effectively oversee platform activities.[49]

In this regard, the DSA introduces a co-regulatory framework. This framework allows service providers to voluntarily adopt codes of conduct to mitigate the negative impacts of the spread of illegal content, as well as manipulative and abusive behaviors. Article 45(1) empowers both the Commission and the Board to support and facilitate the creation of diverse codes of conduct, aimed at enhancing the application of the DSA. These codes address two main categories of concern: illegal content, as specified in Article 3(h), and various systemic risks outlined in Article 34. The primary function of these codes of conduct is to provide detailed interpretations and enhancements of the existing legal framework. They encourage the adoption of voluntary standards that extend beyond statutory obligations or, where necessary, to develop broader guidelines that function as soft law. The DSA emphasizes the voluntary nature of adherence to these codes. However, the preamble indicates that a service provider's refusal to adopt a code, without a satisfactory explanation, may be considered when assessing compliance with DSA obligations. In cases where specific systemic risks are identified under Article 34, the Commission may invite service providers, relevant authorities, civil society organizations, and other stakeholders to collaborate in developing these codes.

Codes of conduct represent a potentially transformative aspect of the DSA. These instruments provide a strategic avenue through which the Commission can catalyze significant changes in online platform behaviors—changes that might be challenging to enforce under the rigid frameworks of legally binding EU regulations. Unlike direct legislative mandates, codes of conduct offer a flexible mechanism that allows for the implementation of substantive, adaptive measures tailored to the unique challenges posed by digital services. The real power of codes of conduct lies in their ability to extend beyond the binary classification of content as illegal or not. A significant portion of content on online platforms, while not necessarily

49 Alain Strowel & Jean De Meyere, 'The Digital Services Act: Transparency as an Efficient Tool to Curb the Spread of Disinformation on Online Platforms?', *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, Vol. 14, Issue 1, 2023, pp. 80–83.

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violating laws, can still be detrimental to public discourse and individual well-being. This includes issues like misinformation, cyberbullying, and other forms of content that contribute to a toxic online environment. Traditional legal approaches often fall short of addressing these grey areas due to their complex and evolving nature.

The Commission already noted that the Code of Practice on Disinformation is set to evolve into a formal Code of Conduct.[50] This transformation signifies a structured commitment to combating disinformation across online platforms operating within the European Union. By adopting this as a Code of Conduct, the DSA ensures that signatories, including major social media platforms and search engines, are legally bound to adhere to its guidelines. These guidelines emphasize transparency, the integrity of services, and the robustness of information systems against the pervasive issue of fake news and online disinformation. The integration of this code into the DSA framework will facilitate a more accountable and systematic approach to mitigating the spread of false information, offering clearer mechanisms for enforcement and compliance, and setting a precedent for how platforms manage the dissemination of content.

It is logical to require very large online platforms to conduct their own risk assessments, as they alone have complete access to the data they gather on users and are most familiar with the challenges posed by their services, as well as the most efficient remedies. Similarly, it is reasonable for the Commission to expect these platforms to cover the costs of ensuring compliance with the DSA regulations. A significant concern, however, is ensuring the independence of private audit firms that are competing for profit and may have conflicts of interest with the platforms they audit. Thus, a robust framework for overseeing these auditors is necessary. The DSA stipulates that audit organizations must be independent from the platforms they evaluate, possess demonstrated risk management expertise, technical competence, and maintain objectivity and professional ethics, notably through adherence to established codes of practice or standards.[51] However, there appears to be a lack of a specific supervisory framework for these auditors. Nonetheless, platforms are obligated to provide the Digital Services Coordinator of their jurisdiction or the Commission, upon reasoned request and within a specified timeframe, access to data

50 *See* at https://digital-strategy.ec.europa.eu/en/news/third-meeting-european-board-digital-services.

51 DSA, Article 28(2).

https://doi.org/10.5771/9783748946526 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

necessary for monitoring and evaluating compliance with the Regulation.[52] They are also required to grant access to researchers who meet certain criteria, for the purpose of conducting research that helps identify and understand systemic risks.[53] Benjamin Farrand points out that while the DSA prescribes more detailed obligations regarding what outcomes should be achieved, it largely leaves the methods of achieving these outcomes to the discretion of the market operators, hence perpetuating 'regulated self-regulation'. Although independent audits are mandated annually under Article 37, the platforms can select their own auditors, leading to potential 'audit capture', mirroring governance failures seen in past financial crises. Farrand critiques this model by highlighting that it relies on a system where large online operators assess themselves, continuing the ordoliberal tradition of market structuring where regulation is minimal and market driven.[54] Rozgonyi also emphasizes the importance of careful regulation in the development and modification of codes of conduct at both national and EU levels. She advocates for a process that is inclusive, open, and transparent, ensuring proper representation and thorough stakeholder consultations. Rozgonyi also calls for a clear definition of the relationship between EU and national codes of conduct and stresses the need for a distinct approach to illegal content, which should be managed through co-regulatory mechanisms, versus harmful content, which may be handled privately.[55]

Incorporating the Disinformation Code of Conduct as an official Code of Conduct within the framework of the Digital Services Act (DSA) could significantly amplify global efforts to combat disinformation through the mechanism known as the 'Brussels Effect'.[56] Given the EU's substantial market influence, platforms are often compelled to align their operational policies with EU regulations to ensure market access. Therefore, by setting robust disinformation protocols under the DSA, the EU would indirect-

52 Id. Article 31(1).

53 Cauffman & Goanta 2021, p. 771.

54 Benjamin Farrand, 'The Ordoliberal Internet? Continuity and Change in the EU's Approach to the Governance of Cyberspace', *European Law Open,* Vol. 2, Issue 1, 2023, p. 125.

55 Krisztina Rozgonyi, 'Negotiating New Audiovisual Rules for Video Sharing Platforms: Proposals for a Responsive Governance Model of Speech Online', *Revista Catalana de Dret Public (Catalan Journal of Public Law)*, Vol. 61, 2020, p. 94.

56 Dawn Carla Nunziato, 'The Digital Services Act and the Brussels Effect on Platform Content Moderation', *Chicago Journal of International Law*, Vol. 24, Issue 1, 2023, pp. 121–122.

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ly pressure global platforms to adopt these higher standards universally. This alignment facilitates the adoption of enhanced content moderation practices worldwide, bolstering the detection and mitigation of disinformation across digital platforms.

5. Conclusion

This article has critically analyzed the DSA's approach to contractual content moderation, algorithmic transparency, and disinformation, highlighting both its strengths and the areas in need of enhancement. The DSA's minimal intervention in the substantive content of user-platform contracts reflects a strategic choice that preserves platform autonomy but raises questions about the protection of user rights in the dynamic and powerful domain of online platforms. Furthermore, while the DSA promotes algorithmic transparency and offers opt-out options, these measures may still fall short of providing users with meaningful control over the automated systems that profoundly influence online environments. Lastly, the approach to disinformation and the implementation of codes of conduct, although innovative, requires robust enforcement mechanisms and a more explicit commitment to tackling the complexities of online false information effectively.

The DSA establishes a foundational legal framework that is adaptable and potentially transformative. However, its effectiveness hinges on the future development of more specific regulations and the proactive involvement of all stakeholders to refine these measures. As the regulation of the online space continues to evolve, the DSA should also progress, embracing a more granular and nuanced approach to regulation that not only addresses current deficiencies but also anticipates future challenges. It is crucial that ongoing revisions and the implementation of the DSA are informed by a balanced consideration of freedom, transparency, and the protective measures necessary to maintain a fair and safe online environment for all users. By continually adapting to technological advancements and the shifting paradigms of online interaction, the DSA can fulfil its promise as a cornerstone of digital regulation in the EU, safeguarding fundamental rights and fostering a resilient online presence for everybody.

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The Growing Significance of Scientific Advice in Shaping EU Climate Policy

The Initial Activity of the European Scientific Advisory Board on Climate Change

András Huszár[*]

Abstract

A growing trend in the world has reached the EU: the establishment of national climate change science advisory councils. Since 2021, the EU has had such an advisory body, the European Scientific Advisory Board on Climate Change, which has been very active and has already had a significant impact on the development of EU climate policy. In the summer of 2023, the Board made its recommendation for the EU's 2040 GHG emissions reduction target, which states that the EU must strive for net emissions reductions of 90–95 % by 2040, relative to 1990 levels. The European Commission has used this recommendation as a reference for its proposal for the EU to reduce its emissions by 90 % by 2040. More such impactful proposals from the Board are expected in the future. This paper presents the work of the Advisory Board so far, analyzing its main recommendations and their impact. The analysis concludes that the European Scientific Advisory Board on Climate Change actively started its work within the framework of EU climate law and has already had a significant impact on policy-making. The importance of the Board's activity is expected to grow and is worth following in the future.

Keywords: scientific advisory councils, European Scientific Advisory Board on Climate Change, EU Climate Law, science policy cooperation, climate target setting

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1. Introduction

Scientific advisory committees (SACs) represent a critical nexus between scientific research, policy development, and public awareness efforts worldwide. These entities serve as essential conduits for translating the latest sci-

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entific findings into actionable recommendations for policymakers, stakeholders, and the general public.[1] The genesis of SACs on climate change can be traced back to the emergence of scientific consensus on the reality and urgency of anthropogenic global warming.[2] These entities drew upon diverse disciplinary expertise, including climatology, atmospheric science, ecology, economics, and social sciences, to provide holistic insights into the complex dynamics of climate change and its implications for human societies and ecosystems. SACs on climate change typically operate within a defined legal or institutional framework, outlining their mandate, composition, and functions.[3] While specific mandates may vary across countries and organizations, common objectives include scientific assessment, policy advice, risk assessment, science communication, collaboration and networks. SACs conduct comprehensive assessments of the latest scientific research on climate change, synthesizing findings from peer-reviewed literature, observational data, and modelling studies. These assessments help policymakers and stakeholders understand the causes, impacts, and potential trajectories of climate change at global, regional, and local scales. SACs also provide independent, evidence-based advice to government agencies, international organizations, and other decision-makers on matters related to climate change mitigation, adaptation, and resilience. This advice may encompass the development and evaluation of climate policies, strategies, and initiatives aimed at reducing greenhouse gas emissions, enhancing climate resilience, and promoting sustainable development. SACs often assess the risks and vulnerabilities associated with the effects of climate change, such as extreme weather events, sea-level rise, biodiversity loss, and disruptions to food and water supplies. By quantifying these risks and identifying potential pathways for mitigation and adaptation, SACs help prioritize actions and allocate resources more effectively. SACs play a crucial role in communicating climate science to policymakers, stakeholders, and the general public, translating complex scientific concepts into accessible language and actionable insights. Through reports, briefings, public lectures, and media engagement, SACs raise awareness about the urgency of climate

1 Gaëlle M.N. Groux *et al.*, 'A typology of scientific advisory committees', *Global Challenges*, Vol. 2, Issue 9, 2018, pp. 1–7.

2 Sally Weaver *et al.*, 'Overview of national climate change advisory councils', *The Finnish Climate Change Report*, No. 3, 2019, at https://helda.helsinki.fi/server/api/core/bitstreams/7e78c5f3-6106-4d7d-8280-6e67e3ab4baf/content.

3 Id. p. 4.

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action and empower individuals and communities to make informed decisions. Finally, SACs on climate change actively participate in international networks and partnerships, sharing data, methodologies, and best practices to enhance scientific understanding and policy coherence across borders.[4]

2. The Origins, Legal Mandate, and Composition of the European Scientific Advisory Board on Climate Change

In the EU, it was only in the European Green Deal[5] that the idea of setting up an independent scientific advisory body to make specific recommendations to the Commission when it makes policy proposals was seriously considered. It is worth mentioning that the Commission has a research institute, the Joint Research Centre (JRC).[6] The JRC provides scientific support to the Commission on a range of issues. It has recently had a significant impact on EU climate policy. Based on JRC analysis,[7] nuclear energy has been included in the category of eligible for EU financial support under the Taxonomy Regulation.[8] One might ask why a separate scientific advisory body on climate change was needed. First and foremost, the JRC can be seen as a background institution of the Commission. In other words, it cannot be said to be an institution independent from the Commission, either in terms of its organization or its mandate. Moreover, the JRC does not formulate policy proposals but carries out analyses based on the Commission's already adopted work program and policy agenda. Therefore, the JRC is more of a think-tank than an independent scientific advisory body.

However, it was by no means a foregone conclusion that the European Scientific Advisory Board on Climate Change (ESABCC, or the Board) would eventually be established. The Commission tabled its proposal for

4 Id. p. 14.
5 *See* at https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en.
6 *See* at https://joint-research-centre.ec.europa.eu/index_en.
7 Said Abousahl *et al.*, *Technical assessment of nuclear energy with respect to the 'do no significant harm' criteria of Regulation (EU) 2020/852 ('Taxonomy Regulation')*, Publications Office of the European Union, Luxembourg, 2021.
8 Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088.

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a so-called European Climate Law (ECL) in 2020.[9] The draft, which has since been adopted, is a genuine framework legislation that includes, among other things, the legally binding objective of achieving climate neutrality in the EU by 2050.[10] This means that no more GHGs can be emitted from the territory of the EU than can be sequestered by (natural or artificial) absorption capacity. It also provides for the establishment of the ESABCC and sets out the basic legal framework for its operation.[11] However, the Commission's first proposal did not include a provision to set up the body. It merely stated that

> "When setting a trajectory in accordance with paragraph 1, the Commission shall consider the following: [...] *j)* the best available and most recent scientific evidence, including the latest reports of the IPCC."[12]

Following the publication of the proposal, experts argued[13] that a major shortcoming thereof was that it did not include the establishment of a separate European Scientific Advisory Board. The main arguments were that such a body would facilitate an unbiased scientific evaluation of targets and policy initiatives, assess the implementation of the ECL, and offer a pan-European perspective on progress and policy coherence. The authors also argued that the introduction of an independent expert advisory mechanism on climate change would bolster the credibility of analyses and policy recommendations presented by the European Commission, rather than encroaching upon or duplicating the Commission's mandate. According to them, by furnishing impartial, highly qualified, and apolitical review and guidance, the independent mechanism would reinforce political sup-

9 Proposal for a regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law), COM(2020)0080 – C9–0077/2020 – 2020/0036(COD).

10 Article 2 of Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999.

11 Id. Article 3.

12 Proposal for a regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law), COM(2020)0080 – C9–0077/2020 – 2020/0036(COD).

13 Alina Averchenkova & Lara Lazaro, *The design of an independent expert advisory mechanism under the European Climate Law: What are the options?,* at www.lse.ac.uk/granthaminstitute/wp-content/uploads/2020/09/GRI_The-design-of-an-expert-advisory-mechanism-under-the-European-Climate-Law_What-are-the-options.pdf.

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port for Commission proposals and enhance the overall legitimacy and public acceptance of the EU's transition to climate neutrality. The above cited publication also stated that the mandate of a European advisory mechanism on climate change would complement, rather than overlap with, or undermine, the role of the Intergovernmental Panel on Climate Change (IPCC). The main difference is that while the IPCC's mandate centers on assessing the state of scientific knowledge on climate change and identifying areas of consensus within the scientific community, it does not offer specific advice on targets or policy proposals, nor does it evaluate implementation progress within a specific geographical context. Failure to establish a credible independent advisory mechanism within the EU, the authors concluded, would expose the legislative implementation process to heightened political pressure. This would increase the likelihood of challenges to the analytical validity and legitimacy of assumptions and proposed policy options.

These arguments were heard and the ESABCC was finally set up in Article 3 of the adopted ECL. More specifically, the legislation reads "the European Scientific Advisory Board on Climate Change established under Article 10a of Regulation (EC) No 401/2009". This means that the body was finally created in the legislation establishing the European Environment Agency (EEA).[14] The relationship between the EEA and ESABCC is complementary. At the same time, the 2009 Regulation clarifies that the independence of the ESABCC "shall be beyond doubt" and complements the work of the EEA "while acting independently in discharging its tasks".[15] The same legislation provides for the composition of the board and how its members are selected. The Advisory Board comprises 15 senior scientific experts spanning various pertinent disciplines. No more than two members from the same Member State can serve on the Advisory Board. The Board members are elected for a four-year term, extendable once. The selection process considers scientific excellence, experience in conducting scientific assessments and providing relevant advice, broad expertise in climate and environmental sciences or other fields crucial for the Union's climate goals, and professional experience in interdisciplinary settings within an international context. Furthermore, Advisory Board members serve in their

14 Regulation (EC) No 401/2009 of the European Parliament and of the Council of 23 April 2009 on the European Environment Agency and the European Environment Information and Observation Network.

15 Id. Article 10a(5).

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personal capacity, offering their opinions independently of Member States and Union institutions. It is a somewhat unusual solution that the rules regarding the composition and mandate of the institution are found in different legislation. This does not facilitate transparency and may provide an opportunity for "less conspicuous" changes to the rules related to the Board, given that while the ECL is a politically important piece of legislation, the EEA regulation is much less in the spotlight.

The legal mandate of the Board is stated in Article 3 ECL, foreseeing that it "shall serve as a point of reference for the Union on scientific knowledge relating to climate change by virtue of its independence and scientific and technical expertise." The Advisory Board's responsibilities encompass reviewing the most recent scientific findings from IPCC reports and climate data, particularly concerning information pertinent to the Union, providing scientific counsel, and generating reports on existing and proposed Union measures, climate targets, indicative greenhouse gas budgets, and their alignment with the objectives outlined in the ECL, and the Union's international obligations under the Paris Agreement. It shall contribute to the exchange of independent scientific insights in areas such as modelling, monitoring, promising research, and innovation aimed at emissions reduction or enhancing removal efforts. It will identify necessary actions and opportunities crucial for successfully achieving the Union's climate objectives. Finally, the ESABCC promotes awareness of climate change and its repercussions, as well as fostering dialogue and collaboration among scientific bodies within the Union, complementing ongoing initiatives and endeavors.

It should be noted that the legislation formulating the Board's mandate specifically indicates that the recommendations must be based not only on the documents of the IPCC but also on the documents of The Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) and other international bodies. IPBES is a body on biodiversity loss that produces reports that are similar to what the IPCC issues for governments.[16] This direction is particularly important in the sense that it should be an important element of the policies related to climate change to not restrict their focus on merely aspects of climate change. In many cases,

16 *See* at www.ipbes.net/.

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what may seem favorable from a purely climate point of view, 'shifts' the negative impact onto other, important environmental aspects.[17]

The ECL also creates a relationship between the ESABCC and national climate advisory bodies by mentioning on the one hand that the ESABCC may take into account the work of national bodies, and on the other hand, it calls upon the Member States to establish national bodies and if they do so, report them to the EEA, and with it, to the ESABCC.[18]

3. The Work Programmes of the ESABCC

Each year, the ESABCC publishes a work programme setting out its tasks for the period. So far, the Board has drawn up a total of three work programmes, the first one is for the year 2022.[19] At the beginning of the first work programme (FWP), the ESABCC presented, among other things, the circumstances of its creation and its key baseline data. The names of the Board members and its budget were also included. The FWP also included a summary of policy developments related to climate change in the EU. The Board stated that they will start working on two major files in 2022. In chapter 3.3 of the FWP, the ESABCC set out in more detail the six areas in which it will start working and exactly how it plans to work in each of them. The main activities included *(i)* supporting the EU's input to the 2023 global stocktake;[20] *(ii)* supporting the setting of the EU's 2040 climate target and the 2030–2050 greenhouse gas budget; *(iii)* addressing policy responses to the energy crisis; *(iv)* exploring sectorial mitigation solutions, in particular for land use, forestry, and agriculture, and their links with adaptation; *(v)* pursuing the strategic and operational development of the ESABCC; and *(vi)* finally, the Board also stated that it will start to engage in a dialogue with key stakeholders, encompassing EU institutions, national climate change advisory bodies, EU science and research networks, and the civil society to gain deeper insights into expectations and perspectives.

17 Ram Lakhan Singh & Pradeep Kumar Singh, 'Global Environmental Problems' *in* Ram Lakhan Singh (ed.), *Principles and Applications of Environmental Biotechnology for a Sustainable Future*, Springer, Singapore, 2017, pp. 13–41.

18 Article 3(3)–(4) ECL.

19 European Scientific Advisory Board on Climate Change, Annual work programme 2022, Adopted on 28 June 2022, at https://climate-advisory-board.europa.eu/about/description-of-the-ecl-and-the-legal-mandate/2022-work-programme-of-the.pdf/@@display-file/file.

20 *See* at https://unfccc.int/topics/global-stocktake.

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The FWP noted that the main framing elements of the document were the EU policy developments and the expectation "to guide and advise on existing and proposed policies having an impact on the achievement of EU's long-term climate goals." The first work programme referred to the fact that the functioning of the Board in 2022 was still hampered by several factors, e.g. that the Secretariat had only been fully staffed from the second half of the year. However, it is apparent that the panel wanted to focus on numerous aspects from the very beginning of its work. Thus, it set itself tasks related to the relevant issues for the short term and for the long term, and it has also started its work on specific GHG-emitting sectors as well as on building institutional relationships.

The second work programme (SWP)[21] for 2023 follows a similar structure to the first. One new element has been added: a chapter reporting on the first work programme for 2022. The latter chapter reports that the ESABCC has added a seventh action point to the six identified in the FWP, as it considered the point particularly relevant to achieving the EU's climate objectives (more on this in the next chapter). In 2022 the Board carried out mainly preparatory activities in the areas identified. It adopted some internal operational documents. It is worth highlighting that it issued its first recommendation on a specific matter, precisely the one mentioned above, which was not originally included in the FWP: Guidance on the implementation of the TEN-E regulation.[22] Also noteworthy is that the Board decided to become a member of the International Climate Councils Network (ICCN),[23] and participate in its meetings. Another important development is that the ESABCC has stated that it will link its work programme to the EU's expected policy agenda for the given year, to make its work as relevant as possible. Importantly, the SWP notes that EU climate policy is already shifting from policy development to policy implementation. This will also have implications for the Board's work, as it will have to put more emphasis

21 European Scientific Advisory Board on Climate Change, Annual work programme 2023, Adopted on 20 December 2022, at https://climate-advisory-board.europa.eu/about/description-of-the-ecl-and-the-legal-mandate/2023-work-programme-of-the.pdf/@@display-file/file.

22 European Scientific Advisory Board on Climate Change: Towards a climate-neutral and climate-resilient EU energy infrastructure: Advice on scenario guidelines for trans-European networks for energy, adopted on 14 November 2022, at https://climate-advisory-board.europa.eu/reports-and-publications/towards-a-climate-neutral-and-climate-resilient-eu-energy-infrastructure-recommendations-to-acer/20221114-lettertoacer_adviceonten-e_scenarioguidelines.pdf/@@display-file/file.

23 *See* at https://climatecouncilsnetwork.org/.

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on monitoring progress. The SWP has not only defined specific activities but also outlined four axes along which it defines its activities. These are to *(i)* provide input and advice to ensure effective implementation of agreed policies; *(ii)* work on mitigation options; *(iii)* scope further activities on adaptation; and to *(iv)* continue engaging with experts and stakeholders. The 8 activities specifically identified were located along these axes.

The third work programme (TWP)[24] for 2024 is the longest of the three documents so far and follows the established structure. The Panel has already issued several recommendations and other publications (five in number)[25] in 2023, which are described in more detail in the next chapter. The previously defined focus areas have not changed for 2024, these include *(i)* the EU 2040 target; *(ii)* policy gaps and opportunities regarding the progress towards EU climate neutrality; *(iii)* carbon dioxide removals in the EU; *(iv)* strengthening climate mitigation and resilience of EU agriculture; *(v)* climate adaptation and resilience; *(vi)* scenarios for the planning and development of the EU's energy-system wide infrastructure; *(vii)* expert and stakeholder engagement.

It is clear that by the third year, the Board's work programme has been broadly outlined and has started to follow a similar pattern year after year. Most of its work follows EU climate policy activities, but the Board also has initiatives of its own (*e.g.* on carbon removals or agriculture or climate adaptation). Perhaps the least attention in the work so far has been given to stakeholder dialogue, which deserves more emphasis. It is encouraging that the 2024 work programme includes a specific mention of the Central and Eastern European region, with whose scientific community the Panel plans to engage in a dialogue.[26] The growing number of national SACs in the EU does not yet include any from this region. As mentioned earlier, the ECL currently merely calls upon Member States to establish such national bodies, but this is not yet a legal obligation. However, the ESABCC has already proposed[27] that this should become an EU legal requirement in the future.

24 European Scientific Advisory Board on Climate Change: Annual work programme 2024, Published on 5 January 2024.

25 *See* at https://climate-advisory-board.europa.eu/reports-and-publications.

26 ld. p. 6.

27 European Scientific Advisory Board on Climate Change: Towards EU climate neutrality Progress, policy gaps and opportunities, Assessment Report 2024, at https://climate-advisory-board.europa.eu/reports-and-publications/towards-eu-climate-neutra

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4. Reports and Other Publications of the ESABCC

Among the activities of the ESABCC, the recommendations published in writing are the most influential in terms of policymaking. As can be seen from the chapter above, the ESABCC already issued such a document in the year of its formation. However, in the course of its operation until April 2024, the ESABCC issued a total of six reports and publications to the various bodies of the EU.

The first recommendation came in an interesting form. The Board made recommendations to the EU Agency for the Cooperation of Energy Regulators (ACER) in the framework of a public consultation.[28] The Board has made this recommendation under its statutory power. Namely, Article 12 of Regulation 2022/869 of the European Parliament and of the Council of 30 May 2022 on guidelines for trans-European energy infrastructure provides that the ESABCC "may, on its own initiative, provide input on how to ensure compliance of scenarios with the Union's 2030 targets for energy and climate and its 2050 climate neutrality objective." This language also appears in other EU legislative acts.[29] In other words, EU law does not establish the formulation of recommendations as an obligation, but as an opportunity for the Board, leaving it to the discretion of the ESABCC to issue them. The legislation also requires that ACER "shall take duly into account that input [...] and shall provide reasons where it has not, or has only partly, taken into account the recommendations". This is a key element in the effectiveness of scientific advisory councils. If and when there is no follow-up of recommendations, their enforcement is much more doubtful. Nevertheless, it is not the topic of this study to analyze the recommendations in detail, but at the same time, every 'first document' deserves special attention from a newly established body. The recommendation was created in a very special, but important area from the point of view of climate

lity-progress-policy-gaps-and-opportunities/esabcc_report_towards-eu-climate-neutrality.pdf/@@download/file.

28 *See* at www.acer.europa.eu/sites/default/files/documents/Official_documents/Public_consultations/PC_2022_EG_09/ScenariosGL_20221006_DRAFT_for_PC_0.pdf

29 Article 35(7) of Regulation (EU) 2024/573 of the European Parliament and of the Council of 7 February 2024 on fluorinated greenhouse gases, amending Directive (EU) 2019/1937 and repealing Regulation (EU) No 517/2014 or Article 30 (2) of Regulation (EU) 2024/590 of the European Parliament and of the Council of 7 February 2024 on substances that deplete the ozone layer, and repealing Regulation (EC) No 1005/2009.

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change, the area of energy, more specifically the energy infrastructure of the EU. Energy supply and use are responsible for more than 75 % of the EU's total greenhouse gas emissions,[30] so without the transformation of this sector, there is no chance of achieving the climate neutrality goal. In addition, the energy infrastructure is a so-called critical infrastructure, that is essential for maintaining normal social functioning. Nevertheless, its operation faces significant challenges due to the increasingly negative effects of climate change (*e.g.* increasingly frequent and stronger storms, extreme temperatures, *etc.*).[31] Among the recommendations given by the Board, three key ones should be highlighted: compliance with climate targets at all times, adaptation to a complex and constantly changing world, and conducting a transparent and inclusive process. These three key recommendations can be said to be the cornerstones of EU climate policymaking. The first recommendation is to restate what is included in the ECL, that is, that EU policies must be in line with, and cannot conflict with climate change goals. The second emphasizes the importance of another major area of climate change policies: adaptation. The third refers to the transparency of processes, which can also be interpreted generally and broadly. In the finally adopted guideline,[32] ACER does not explicitly refer to the recommendations made by the ESABCC. However, the document does include the importance of consistency with climate objectives. The second recommendation may be linked to the point in the document that in order for "scenarios [to] remain meaningful despite an unpredictable alteration of assumptions, a quick-update process shall be established". Moreover, the text provides the opportunity for the ESABCC to "propose the activation of the quick-update process". Finally, the ACER guideline also contains a section for "Criteria for a transparent, inclusive and streamlined development process" where, in line with the ESABCC recommendation, it is stated, inter alia, that "the development of scenarios shall follow as much as possible an open process to involve stakeholders, enabling a broad participation". "To ensure key stakeholders are appropri-

30 *See* at https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/energy-and-green-deal_en.

31 Roberto Schaeffer *et al.*, 'Energy sector vulnerability to climate change: A review', *Energy*, Vol. 38, Issue 1, 2012, pp. 1–12.

32 Framework Guidelines for the joint TYNDP scenarios to be developed by ENTSO for Electricity and ENTSO for Gas "TYNDP Scenarios Guidelines", at www.acer.europa.eu/sites/default/files/documents/Official_documents/Acts_of_the_Agency/Framework_Guidelines/Framework%20Guidelines/FG_For_Joint_TYNDP_Scenarios.pdf.

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ately consulted and have the opportunity to interact among themselves" the guideline invites ENTSO to "create a Stakeholder Reference Group" and the ESABCC can become an observer to this group. Given that the document does not explicitly refer to the recommendations made by the ESABCC, it cannot be unequivocally confirmed that the above points were included on the basis of the recommendations, but they do not contradict them.

In the FWP, the ESABCC already indicated that it intends to follow a two-step approach concerning its recommendations regarding the determination of the EU's 2040 climate target. In their second publication from January 2023,[33] the ESABCC wanted to put on the table statements of principle importance as the first step, which are more general, and only later add the detailed, numerical recommendations. The recommendation's main message was that the European Commission should follow an approach that is "systematic, transparent, and guided by EU values". This general recommendation was followed by five more detailed recommendations that the European Commission should take into account: *(i)* the scientific and legal context; *(ii)* the physical limits to global emissions and the EU's 'fair share'; *(iii)* the transformation scenarios towards net zero greenhouse gas emissions by 2050 for the EU; *(iv)* the implications of different pathways in terms of side effects, co-benefits, resilience, and feasibility; and *(v)* the use of value judgments.

The most interesting of the five recommendations concerns value judgment. The document explains the above points in more detail. The ESABCC draws attention to the fact that, in connection with the four other points, value judgments are necessarily made during climate target setting, however, this should be communicated transparently and should be guided by "the foundational values and principles of EU law". The Board also explains in detail what it thinks in this regard. They note that the ECL explicitly cites various principles in its recitals, encompassing those of the EU as well as those outlined in the Charter on Fundamental Rights of the EU: principles related to sustainable development, the precautionary principle, the 'polluter pays' concept, the 'do no significant harm' principle

33 European Scientific Advisory Board on Climate Change: Setting climate targets based on scientific evidence and EU values: Initial advice to the European Commission on an EU-wide 2040 climate target and a greenhouse gas budget for the 2030–2050 period, adopted on 16 January 2023, at https://climate-advisory-board.europa.eu/reports-and-publications/setting-climate-targets-based-on-scientific-evidence-and-eu-values-initial-recommendations-to-the-european-commission/initial-advice-to-the-european.pdf/@@display-file/file.

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of the European Green Deal, the 'energy efficiency first' principle of the Energy Union, as well as principles of proportionality, subsidiarity, and the Commission's dedication to better law-making principles. They also note that Article 4.5 of the ECL "provides a more specific list of issues that the European Commission is to consider when proposing its 2040 target." These include the best available scientific evidence, just and fair transition, as well as environmental effectiveness. The main reason why it is important to talk about these principles is that decisions about climate goals (but in a broader sense also during other climate policy decisions) may cause conflicts between, for example, cost-effectiveness and social aspects. In the face of such contradictions, the decisions made necessarily take one aspect into account at the expense of the other. The Board draws attention to the fact that the Commission must always present and justify these transparently.

The Board's third[34] and fourth[35] recommendations focused primarily on the energy sector. The third recommendation specifically focused on the solution to the energy crisis that was at its peak at the time. Meanwhile, general recommendations have also been made in this area, the observance of which also serves to achieve the goal of climate change mitigation, not only in times of crisis. An example is the recommendation that the EU and its Member States

> "should pursue further reductions in energy demand, both through technical (energy efficiency, in particular through an accelerated renovation of the building stock) and non-technical (behavioral changes) approaches."

The fourth recommendation is the most technical of the six published. In this context, the panel provided recommendations on methodologies for a harmonized energy system-wide cost-benefit analysis at EU level. This doc-

34 European Scientific Advisory Board on Climate Change: Aligning policy responses to rising energy prices with the long-term climate neutrality objective, adopted on 7 February 2023, at https://climate-advisory-board.europa.eu/reports-and-publications/addressing-the-energy-crisis-while-delivering-on-eus-climate-objectives-recommendations-to-policy-makers/2023-02-07-recommendationspolicyresponsesenergycrisisclimateneutrality.pdf/@@display-file/file.

35 European Scientific Advisory Board on Climate Change: Towards a decarbonised and climate-resilient EU energy infrastructure: recommendations on a harmonised EU energy system-wide cost–benefit analysis, adopted on 15 March 2023, at https://climate-advisory-board.europa.eu/reports-and-publications/towards-a-decarbonised-and-climate-resilient-eu-energy-infrastructure-recommendations-on-an-energy-system-wide-cost-benefit-analysis/advice-on-a-harmonised-eu.pdf/@@display-file/file.

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ument can be interpreted as a continuation of the first recommendation, which also focuses on energy, but fewer general conclusions can be drawn from it. However, the recommendations are largely similar to those of the first recommendation, emphasizing *e.g.* consistency with climate objectives, transparency, and the importance of stakeholder involvement.

The fifth recommendation[36] issued by the Board is discussed in detail in the next chapter. The sixth recommendation already cited above again brought a new color to the Board's work compared with the previously issued documents. In this document, for the first time, the ESABCC recommended a series of concrete policies "to put the EU on track towards climate neutrality". The 359-page long document is by far the longest published by the Board. The recommendation is divided into two major parts, one on the actions to be taken up to 2030 and the other on the policies needed after 2030. The recommendation is addressed not only to EU institutions or the Commission but also directly to Member States. This is another novelty in the work of the Board. Follow-up on most of the recommendations will be possible in the next period, given that the document is recent (January 2024) and most of it is aimed at proposing or completing legislation, which takes time. However, references to this recommendation are expected to appear in the legislative proposals published by the Commission. In addition, it is expected that the ESABCC recommendations may be invoked as arguments by stakeholders in the legislative, co-decision process e.g. in the discussions on the phasing out of fossil fuel subsidies or the extension of the EU carbon pricing mechanism. As mentioned above, among the recommendations, it is worth highlighting that the ESABCC proposes that the ECL should make it mandatory for Member States to set up national climate advisory bodies. This proposal, if implemented, would raise the importance of scientific input in climate legislation in EU Member States to a new level.

36 European Scientific Advisory Board on Climate Change: Scientific advice for the determination of an EU-wide 2040 climate target and a greenhouse gas budget for 2030–2050, Published on 15 June 2023.

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5. Scientific Advice for the Determination of an EU-Wide 2040 Climate Target and a Greenhouse Gas Budget for 2030–2050, as well as its Effect on the EU Commission's Proposal

In June 2023, the Panel issued its most eagerly awaited recommendation yet on setting the EUs' 2040 climate target.[37] This recommendation to the Commission is based on the latest scientific knowledge, regarding which target number to propose to the Member States for adoption. The proposal is based on a detailed analysis of more than 1000 EU scenarios, for which a separate database has been created by ESABCC.[38] The proposal builds on the 'initial' recommendation previously published by the Board and presented above. The context of the recommendation is that the ECL requires the EU to adopt an intermediate greenhouse gas target for 2040.[39] This legislation mandates the European Commission to propose such a target, accompanied by a projected indicative EU greenhouse gas budget for the 2030–2050 period. These should be based on the best available science and take into account the advice of the ESABCC. The report suggests maintaining the EU's cumulative greenhouse gas emissions budget between 2030 and 2050 at a range of 11–14 Gt CO2eq. This aligns with constraining global warming to 1.5°C, with minimal or temporary deviations from that target. To reach this objective, the ESABCC recommends that the EU aim for substantial net emissions reductions of 90–95 % by 2040, compared to 1990 levels. The document confirms that the current EU target of at least 55 % reduction compared to 1990 "enables reaching the recommended 2040 target range and climate neutrality by 2050". This also means that the Board does not recommend any changes to the 2030 climate goal.

The EU Commission tabled its proposal on the EU's 2040 climate target in February 2024.[40] In this communication, it recommended reducing

37 European Scientific Advisory Board on Climate Change: Scientific advice for the determination of an EU-wide 2040 climate target and a greenhouse gas budget for 2030–2050, Published on 15 June, at: https://climate-advisory-board.europa.eu/reports-and-publications/scientific-advice-for-the-determination-of-an-eu-wide-2040/scientific-advice-for-the-determination-of-an-eu-wide-2040-climate-target-and-a-greenhouse-gas-budget-for-2030-2050.pdf/@@display-file/file.

38 Emissions scenario database of the European Scientific Advisory Board on Climate Change, hosted by IIASA European Scientific Advisory Board on Climate Change, 2023, at https://data.ece.iiasa.ac.at/eu-climate-advisory-board.

39 Article 4(3) ECL.

40 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions

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the EU's net greenhouse gas emissions by 90 % by 2040 relative to 1990. It is apparent that the Commission's recommendation falls within the ESABCC's recommendation range, but at the same time it represents the least ambitious target. The suggested objective stems from a detailed impact assessment,[41] which thoroughly examined the consequences of three target alternatives for 2040: a reduction of up to 80 % compared with 1990 levels, maintaining a linear trajectory from 2030 to 2050, a reduction of 85–90 %, and a reduction of 90–95 %. As the Commission notes the latter is "the only option that corresponds to the advice of the ESABCC". It is important to note that the communication released does not impose legally binding duties at this point. Instead, it initiates a discussion that will lead to a legislative proposal following the European elections in June 2024. The reception of the proposal was mixed on the part of the Member States. Many supported it, although several of them expressed reservations.[42] So far, there is no sign of the ESABCC's recommendation being referred to – for or against – in the political debates among the Member States. This may change during the discussion of the legislative proposal. As regards the consideration of the ESABCC's recommendations, the Commission's communication only indicates that its recommendation is "in line with the scientific advice by the ESABCC". The detailed impact assessment however makes many more references to the ESABCC document. First, it notes that the ESABCC's advice is "reflected throughout the Impact Assessment and comparisons with the ESABCC's analysis are made where appropriate." That is, it looks at the ESABCC study as a kind of reference point, and it also explains where there are differences between the two. It is mentioned as a prominent reference in the impact assessment that, based on the material of the ESABCC, the Commission rejected scenarios above a 95 % reduction from its analysis. When the impact assessment talks about why the 90 % goal is the preferred option, it starts with pointing

Securing our future Europe's 2040 Climate Target and Path to Climate Neutrality by 2050 Building a Sustainable, Just and Prosperous Society {SEC(2024) 64 final} – {SWD(2024) 63 final} – {SWD(2024) 64 final}.

41 Commission Staff Working Document Impact Assessment Report Part 1 Accompanying The Document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Securing our Future Europe's 2040 climate target and Path to Climate Neutrality by 2050 Building a Sustainable, Just and Prosperous Society {COM(2024) 63 final} – {SEC(2024) 64 final} – {SWD(2024) 64 final}.

42 *See* at www.euractiv.com/section/energy-environment/news/eu-countries-express-conditional-support-for-2040-climate-target/.

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out that it is the only target that matches the ESABCC recommendation. Nevertheless, there are many other arguments why the Commission picked that goal, but its consistency with the scientifically proven recommendation is listed first. Consequently, there is a direct link between the Commission's communication and the ESABCC recommendation, perhaps the strongest so far in EU policymaking, but certainly not the last.

6. Conclusions

I have shown above that the ESABCC started its operation with full steam ahead based on its mandate in the ECL. It has already started to operate within all the mandates it was given. In this context, the Board made specific policy recommendations, both to the European Commission, the EU agencies, and directly to the Member States. The ESABCC actively contacted the scientific community and national scientific climate advisory bodies both in Europe and worldwide. In its longest publication to date, it critically analysed the EU's current policies and identified gaps in terms of achieving the 2030 and 2050 climate goals. I have demonstrated on several points that during policymaking, the ESABCC's recommendations were referenced and accepted in multiple ways. The EU Commission's communication on the 2040 EU climate target specifically referred to the fact that the proposed climate target is in line with the ESABCC recommendation. The detailed impact assessment drew on many points from the Board's study during the technical analysis. So far, in the case of specific legislative proposals, no evidence has been found that any text referred to the opinion of the ESABCC. However, it is more than likely that this will happen in the future. It is expected that – following the EU elections – the new Commission will submit its legislative proposal on the EU's 2040 climate goal for adoption. There is little chance that the proposal will be contrary to the previous communication. If this is the case, a reference to the opinion of the ESABCC will probably also be included in the proposal. This is all the more likely to be the case because the ECL stipulates that the opinion of the ESABCC must be taken into account when defining climate goals. This obligation is also included in other EU legislation, and seeing the Board's activity so far, it will certainly use this opportunity to form an opinion. Legislative proposals are also expected based on documents related to the steps necessary to achieve the 2030 climate goals. These may not necessarily be created solely because of ESABCC's proposal, but they will certainly be

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taken into account. In summary, the ESABCC has already become a visible part of EU policymaking. In addition to the national climate advisory bodies, their scientific input becomes more significant in the EU climate policy legislation. The extent to which this input helps the social acceptance of individual policies, or how politics will receive them, and the extent to which non-scientific aspects appear in the ESABCC's activities, may be evaluated with time.

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Post-Lisbon Criminal Legislation in the EU

Results and Tendencies

Bence Udvarhelyi[*]

Abstract

The Treaty of Lisbon which fundamentally reformed the judicial cooperation within the EU vested the EU legislator with reinforced legislative powers. On the basis of the legal harmonization competences of Articles 83(1) and 83(2) TFEU, several directives were adopted which determine minimum rules relating to criminal offences of sanctions in different fields. At the same time, legal experts and the EU institution recognized the need for an effective and coherent criminal policy at the level of the EU, as a result of which, several guidelines were issued which contain requirements for the admissibility and content of the future criminal legislation and specify the criminal law principles which the EU directives has to comply with. Based on these documents, the coherence of EU criminal law has significantly been increased, the structure and the content of the criminal law directives have become more and more unified which is beneficial both for the legislation and the application and interpretation of the legal acts. The objective of the paper is to present and analyze the criminal law directives adopted after the Treaty of Lisbon, through which the tendencies of the developing EU criminal policy and the observance of criminal law principles during EU legislation can also be shown.

Keywords: EU criminal law, Treaty of Lisbon, legal harmonization, European criminal policy, Manifesto on European Criminal Policy

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1. Introductory remarks

With the Treaty of Lisbon, the judicial cooperation in criminal matters became the integral part of the area of freedom, security and justice[1] which belongs to the shared competences between the EU and the Member

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1 Title V TFEU.

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States.[2] With the abolishment of the pillar system introduced by the Treaty of Maastricht, the former third pillar was transformed into the Community legal order and became a supranational policy.[3] Therefore it is not an exaggeration to state that the Lisbon Treaty placed the EU criminal law on a new contractual basis.

The Treaty of Lisbon vested the EU with broad legislative competences in the field of substantive and procedural criminal law, as a result of which extensive criminal legislation began in the EU. At the same time, another tendency could be observed which aims to harmonize and increase the coherence of the EU criminal legislation, to lay down the basic principles of EU criminal law, and to establish a more uniform and coherent criminal policy at the level of the EU. The first step of this process was the publication of the so-called Manifesto on European Criminal Policy[4] by an expert group called 'European Criminal Policy Initiative' in 2009, which tried to draw up a balanced and coherent concept of criminal policy.[5] The document listed the fundamental principles of the European criminal law (the requirement of a legitimate purpose, the *ultima ratio* principle, the principle of guilt, the principle of legality, the principle of subsidiarity and the principle of coherence), which should be recognized as a basis for every single European legal instrument dealing with criminal law. After the adoption of the Manifesto, the EU institutions also acknowledged the risk of the lack of a coherent European criminal policy and adopted several – non-binding – communications and conclusions, in which the European Commission,[6] the Council[7] and the European Parliament[8] also refer to the

2 Article 4(2)(j) TFEU.

3 Ester Herlin-Karnell, *The Constitutional Dimension of European Criminal Law*, Hart Publishing, Oxford – Portland, 2012, p. 34; Steve Peers, *EU Justice and Home Affairs Law*, Oxford University Press, Oxford – New York, 2016, p. 22.

4 Petter Asp *et al*., 'Manifesto on European Criminal Policy', *Zeitschrift für Internationale Strafrechtsdogmatik*, Vol. 4, Issue 12, 2009, pp. 707–716.

5 Helmut Satzger, 'Der Mangel an Europäischer Kriminalpolitik. Anlass für das Manifest der internationalen Wissenschaftlergruppe European Criminal Policy Initiative', *Zeitschrift für Internationale Strafrechtsdogmatik*, Vol. 4, Issue 12, 2009, pp. 692–693.

6 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, COM(2011) 573 final.

7 Draft Council conclusions on model provisions, guiding the Council's criminal law deliberations, 16542/2/09 REV 2, 27 November 2009.

8 European Parliament resolution of 22 May 2012 on an EU approach to criminal law [2010/2310(INI) – P7_TA(2012) 208].

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guiding principles of the European criminal law and intend to delineate guidelines for the admissibility and content of the future criminal legislation. After the adoption of the Treaty of Lisbon, the slow development of the European criminal policy can be observed, which is indispensable for a coherent criminal legislation at the EU's level.

This paper aims to present and analyze the results of the legal harmonization of the EU in the field of substantive criminal law. The study examines the criminal law directives adopted after the entry into force of the Treaty of Lisbon in detail, through which it also aims to highlight the tendencies of the consideration of the fundamental criminal law principles in the EU legislation and the current situation of the developing EU criminal policy. In this context, it is important to emphasize that the article only deals with the substantive criminal law directives of the EU, therefore the criminal procedure instruments will not be included in the paper.

2. EU Criminal Law after the Treaty of Lisbon

The general legal harmonization competence in the field of substantive criminal law can be found in Article 83(1) TFEU.

> "The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis."

For the use of the EU's legal harmonization competence under Article 83(1) TFEU two cumulative criteria are required to be met, whose exact meaning, however, is not precisely defined by the Treaty. *(i)* The first requirement is the 'particular seriousness' of the crime, which means that a certain level of graveness needs to be reached in order to justify EU's legislative competence. *(ii)* The second requirement is the 'cross-border dimension' of the offence, which is defined by three alternative criteria: nature, impact, or special need to combat the areas of crime on a common basis.[9] A crime can

9 Martin Böse, 'Justizielle Zusammenarbeit in Strafsachen' *in* Jürgen Schwarze (ed.), *EU-Kommentar*, Nomos, Baden-Baden, 2012, p. 1073; Perrine Simon, 'The Criminalisation Power of the European Union after Lisbon and the Principle of Democratic

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be considered to have a cross-border dimension by nature when the offence involves the crossing of borders, *e.g.* in case of trafficking in human beings. The cross-border dimension results from the impact of the offence when the crime does not involve the crossing of borders, but typically affects more than one state, *e.g.* in case of environmental offences, where pollution does not stop at the borders.[10] The last requirement (the special need to combat the offence on a common basis) means that criminal law on the level of the EU has to have an added value function in the fight against serious transnational criminal offences.[11] The Treaty lists ten criminal offences (so-called 'eurocrimes'), which meet the aforementioned criteria, therefore can be subject to harmonization: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime. However, the Treaty does not provide an exhaustive enumeration, because on the basis of developments in crime further criminal offences could be added to this list by the Council acting unanimously, with the consent of the European Parliament. In 2022, based on this authorization, the Council established that the violation of Union restrictive measures also meets the requirements of the Treaty and therefore can be subject of legal harmonization.[12]

Article 83(2) TFEU regulates the ancillary harmonization competence of the EU.

> "If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonization measures,

Legitimacy', *New Journal of European Criminal Law*, Vol. 3, Issue 3–4, 2012, pp. 247–248.

10 Fabian Dorra, *Strafrechtliche Legislativkompetenzen der Europäischen Union. Eine Gegenüberstellung der Kompetenzlage vor und nach dem Vertrag von Lissabon*, Nomos, Baden-Baden, 2013, pp. 195–200; Petter Asp, *The Substantive Criminal Law Competence of the EU*, Jure Bokhandel, Stockholm, 2012, pp. 86–87.

11 Valsamis Mitsilegas, 'EU Criminal Law Competence after Lisbon: From Securitised to Functional Criminalisation' *in* Diego Acosta Arcarazo & Cian C. Murphy (eds.), *EU Security and Justice Law. After Lisbon and Stockholm*, Hart Publishing, Oxford – Portland, 2014, pp. 115–116; Valsamis Mitsilegas, *EU Criminal Law After Lisbon. Rights, Trust and the Transformation of Justice in Europe*, Hart Publishing, Oxford – Portland, 2016, p. 59.

12 Council Decision (EU) 2022/2332 of 28 November 2022 on identifying the violation of Union restrictive measures as an area of crime that meets the criteria specified in Article 83(1) of the Treaty on the Functioning of the European Union.

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directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned."

While Article 83(1) TFEU limits the criminal competence of the EU to certain areas of criminal offences where there is a special need to combat them on a common basis, Article 83(2) TFEU generally enables the use of criminal law if it is essential to the effective implementation of a Union policy.[13] For the application of this harmonization competence two requirements have to be fulfilled: on the one hand there has to be a need for previous harmonization measures in the policy area which the EU legislator intends to criminalize, and on the other hand, the criminal sanctions have to be essential for the effective implementation[14] of the aforementioned harmonized Union policy.

With the legal basis of the harmonization competence of Article 83(1) TFEU, the EU legislator has adopted seven directives: on trafficking in human beings,[15] sexual abuse and sexual exploitation of children and child pornography,[16] attacks against information systems,[17] counterfeiting of the

13 André Klip, *European Criminal Law. An Integrative Approach*, Intersentia Publishing, Cambridge – Antwerp – Portland, 2012, p. 166.

14 *See* in details, Jacob Öberg, 'Union Regulatory Criminal Law Competence after Lisbon Treaty', *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 19, Issue 4, 2011, pp. 290–293.

15 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (Human Trafficking Directive).

16 Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA (Sexual Exploitation Directive).

17 Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA (Cybercrime Directive).

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euro and other currencies,[18] terrorism,[19] money laundering[20] and fraud and counterfeiting of non-cash means of payment.[21] Based on the ancillary harmonization competence of Article 83(2) TFEU, two further directives were issued on the criminal sanctions for market abuse[22] and on the fight against fraud to the Union's financial interests by means of criminal law.[23] Furthermore, there are other ongoing criminal legislations based on Article 83(1)[24] and Article 83(2)[25] TFEU which will or are planned to be finished in 2024. However, since they were not published in the Official Journal of the EU at the time of the closure of the manuscript, this paper will not analyze these legislative proposals.

According to Article 83 TFEU, which is also confirmed by the adopted secondary legal acts,[26] the EU legislator can use its legal harmonization competence by adopting minimum rules concerning the definition of crim-

18 Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA (Counterfeiting Directive).

19 Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA (Terrorism Directive).

20 Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law (Money Laundering Directive).

21 Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA (Non-Cash Payment Directive).

22 Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (Market Abuse Directive).

23 Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law (PIF Directive).

24 Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence [COM(2022) 105 final]; and Proposal for a Directive of the European Parliament and of the Council on the definition of criminal offences and penalties for the violation of Union restrictive measures [COM(2022) 684 final].

25 Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC [COM(2021) 851 final].

26 Article 1 of the Human Trafficking Directive, Article 1 of the Sexual Exploitation Directive, Article 1 of the Cybercrime Directive, Article 1 of the Counterfeiting Directive, Article 1 of the Terrorism Directive, Article 1 of the Money Laundering Directive, Article 1 of the Non-Cash Payment Directive, Article 1(1) of the Market Abuse Directive, Article 1 of the PIF Directive.

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inal offences and sanctions.[27] This so-called 'minimum harmonization' imposes the obligation on the Member States to fulfil the minimum requirements prescribed in the EU standards.[28] It means that the Member States have to criminalize and punish the behaviors specified in the EU legal acts, but they can neither supplement the criminal definitions with additional elements that narrow the punishability, nor they can prescribe less severe sanctions than those defined by the directives of the EU.[29] However, the Member States are entitled to introduce or maintain stricter rules than the regulation of the EU directives, *e.g.* by criminalizing other conducts or introducing more serious penalties.[30]

Under the provisions of the Treaty, minimum rules can be adopted in connection with the definition of criminal offences and sanctions. However, the legislative practice of the EU interprets its competence broadly compared to the narrow grammatical meaning of the Treaty, and in addition to definition of criminal offences and sanctions, the directives often include other elements as well. Regarding the definition of offences, directives can define the elements of the crimes, *i.e.* the description of the prohibited conducts. Directives can also cover ancillary conducts (instigating, aiding and abetting) as well as the attempt to commit the offence. Apart from offences committed by natural persons EU legislation can also regulates the liability of legal persons for the committed crimes. As regards to sanctions,[31]

27 Asp 2012, pp. 110–127; Klip 2012, pp. 162–163, 166–167.

28 Böse 2012, pp. 1077–1078.

29 Krisztina Karsai, 'Büntetőjogi jogközelítés az Európai Unióban' *in* Ferenc Kondorosi & Katalin Ligeti (eds.), *Az európai büntetőjog kézikönyve*, Magyar Közlöny Lap- és Könyvkiadó, Budapest, 2008, p. 443; *See also* Dorra 2013, pp. 219–222; Martin Böse, 'Kompetenzen der Union auf dem Gebiet des Straf- und Strafverfahrensrechts', *in* Martin Böse (ed.), *Europäisches Strafrecht mit polizeilicher Zusammenarbeit*, Nomos, Baden-Baden, 2013, pp. 157–158.

30 Christoph Safferling, *Internationales Strafrecht. Strafanwendungsrecht – Völkerstrafrecht – Europäisches Strafrecht*, Springer Verlag, Heidelberg – Dordrecht – London – New York, 2011, p. 417; Helmut Satzger, *Internationales und Europäisches Strafrecht. Strafanwendungsrecht – Europäisches Straf- und Strafverfahrensrecht – Völkerstrafrecht*, Nomos, Baden-Baden, 2016, p. 144; Katharina Schermuly, *Grenzen funktionaler Integration: Anforderungen an die Kontrolle europäischer Strafgesetzgebung durch den EuGH*, Peter Lang Verlag, Frankfurt am Main, 2013, p. 56; Krisztina Karsai, 'The legality of criminal law and the new competences of the TFEU', *Zeitschrift für Internationale Strafrechtdogmatik*, Vol. 11, Issue 1, 2016, pp. 30–31. *See also* Klip 2012, pp. 166–167.

31 On the critical analysis of the harmonization affecting sanctions, *see further* Helmut Satzger, 'The Harmonisation of Criminal Sanctions in the European Union. A New Approach', *Eucrim – The European Criminal Law Associations' Forum*, 2/2019, pp.

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the directives usually use the requirement of effective, proportionate and dissuasive penalties which was elaborated by the CJEU.[32] Furthermore, the EU legislator often determines of the type (*e.g.* imprisonment, fines, community service) and/or the level of the penalty (minimum penalties) which could be imposed to natural or legal persons having committed the criminal offences defined in the directives, as well as the aggravating and the mitigating circumstances. Furthermore, the EU directives often contains provisions in connection with jurisdiction and other issues closely related to definition of criminal offences and sanctions (*e.g.* the statutory limitation period or criminal law cooperation and exchange of information with Member States and EU bodies).[33]

3. Harmonization of the Criminal Offences

One of the main element of the criminal law directives of the EU is the definition of the criminal offences which fall under their material scope. For this purpose, the EU directives determine the objective and subjective factual elements of the criminal offences, which the Member States have to implement into their national criminal law system.

116–119; Robert Kert, 'Die Angleichung von Strafen in der Europäischen Union', *Miskolci Jogi Szemle*, Vol. 14, Special Issue 2, 2019, pp. 7–20.

32 Judgment of 21 September 1989, *Case C-68/88, Commission v Greece*, ECLI:EU:C:1989:339, para. 24.

33 *See* in details: Asp 2012, pp. 95–102; Bernd-Roland Killmann, 'Systematisierung' *in* Ulrich Sieber *et al.* (eds.), *Europäisches Strafrecht*, Nomos, Baden-Baden, 2014, pp. 296–301; Dorra 2013, pp. 79–91, and 222–229; Klip 2012, pp. 179–211, and 316–330; Peers 2016, pp. 197–209; Péter Csonka & Oliver Landwehr, '10 Years after Lisbon – How "Lisbonised" is the Substantive Criminal Law in the EU?', *Eucrim – The European Criminal Law Associations' Forum*, 4/2019, pp. 264–265; Samuli Miettinen, *Criminal Law and Policy in the European Union*, Routledge, London – New York, 2013, pp. 134–142; Valsamis Mitsilegas, *EU Criminal Law*, Hart, Oxford – Portland, 2009, pp. 87–90.

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3.1. Actus Reus Elements of the Criminal Offences

The criminal law directives require the criminalization of the following offences.

Human Trafficking Directive	Offences concerning trafficking in human beings (Article 2)
Sexual Exploitation Directive	Offences concerning sexual abuse (Article 3)
	Offences concerning sexual exploitation (Article 4)
	Offences concerning child pornography (Article 5)
	Solicitation of children for sexual purposes (Article 6)
Cybercrime Directive	Illegal access to information systems (Article 3)
	Illegal system interference (Article 4)
	Illegal data interference (Article 5)
	Illegal interception (Article 6)
	Misuse of tools used for committing offences (Article 7)
Counterfeiting Directive	Offences concerning counterfeiting of the euro and other currencies (Article 3)
Terrorism Directive	Terrorist offences (Article 3)
	Offences relating to a terrorist group (Article 4)
	Public provocation to commit a terrorist offence (Article 5)
	Recruitment for terrorism (Article 6)
	Providing training for terrorism (Article 7)
	Receiving training for terrorism (Article 8)
	Travelling for the purpose of terrorism (Article 9)
	Organizing or otherwise facilitating travelling for the purpose of terrorism (Article 10)
	Terrorist financing (Article 11)
	Other offences related to terrorist activities (Article 12)
Money Laundering Directive	Money laundering offences (Article 3)
Non-Cash Payment Directive	Fraudulent use of non-cash payment instruments (Article 3)
	Offences related to the fraudulent use of corporeal non-cash payment instruments (Article 4)
	Offences related to the fraudulent use of non-corporeal non-cash payment instruments (Article 5)
	Fraud related to information systems (Article 6)

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	Misuse of tools used for committing offences (Article 7)
Market Abuse Directive	Insider dealing, recommending or inducing another person to engage in insider dealing (Article 3)
	Unlawful disclosure of inside information (Article 4)
	Market manipulation (Article 5)
PIF Directive	Fraud affecting the Union's financial interests (Article 3)
	Money laundering (Article 4(1))
	Active and passive corruption (Article 4(2))
	Misappropriation (Article 4(3))

As can be seen, some of the directives (*e.g.* the Counterfeiting Directive and the Money Laundering Directive) only limits its scope to one criminal offence, while other directives (*e.g.* Terrorism Directive) cover a wide range of punishable acts and prescribe extensive criminalization. In addition to specifying the definition of criminal offences, several directives also address other issues arising from the nature of the crime. For this purpose, for example, the Sexual Exploitation Directive contains provisions in connection with the age of sexual consent and the criminalization of consensual sexual acts by the Member States,[34] the Money Laundering Directive defines the catalogue of the predicate offences of money laundering and the determines special rules for proving them,[35] and the PIF Directive specifies the concept and categories of public officials (Union and national officials) as perpetrators of passive corruption and misappropriation.[36]

During the definition of the punishable conducts, the EU legislator must pay close attention to the requirement of the legitimate purpose and the principles of *ultima ratio* and subsidiarity, which have very close relation to each other. The first requirement, which guarantees the legitimacy of criminal law,[37] means that the EU legislator can only exercise its criminal competences in order to protect fundamental interests, if these interests can be derived from the primary legislation of the EU; the constitutions of the Member States and the fundamental principles of the EU Charter of Fundamentals Rights are not violated; and the activities in question could cause

34 Articles 2(b) and 8 of the Sexual Exploitation Directive.
35 Articles 2(1), and 3(3)–(4) of the Money Laundering Directive.
36 Article 4(4) of the PIF Directive.
37 Maria Kaiafa-Gbandi, 'The Importance of Core Principles of Substantive Criminal Law for a European Criminal Policy Respecting Fundamental Rights and the Rule of Law', *European Criminal Law Review*, Vol. 1, Issue 1, 2011, p. 14.

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significant damage to society or individuals.[38] According to the *ultima ratio* principle, criminal law can only be used as a last resort.[39] It means that criminal law should be reserved for the most serious invasion of interests if all other measures have proved insufficient to safeguard that interest. Less serious misconducts are more appropriately treated with other, *e.g.* civil law or by administrative sanctions.[40] Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.[41] Accordingly, it has to be ensured that the decisions will be taken as closely to the citizens as possible.[42] It can therefore be seen that these principles determine when and under which conditions the EU is entitled to use criminal law measures and require the EU legislator to prove the necessity of the application of criminal measures at EU law. As a consequence of these principles, criminal law has to signify an added value compared to other less restrictive measures, which is also an essential requirement of Article 83(1)–(2), as we have already seen.[43]

For the compliance with the principles of *ultima ratio* and subsidiarity, several positive examples can be found in the directive. Some legal acts only require the criminalization of the more serious forms of the criminal offences concerned, and leaves the opportunity to the Member States use non-criminal means for the less severe conducts. The PIF Directive, for example, gives the Member States the right to prescribe sanctions other than criminal sanctions (*e.g.* civil or administrative sanctions) in case of bagatelle offences, *i.e.* if the criminal offence involves damage or advantage of less than EUR 10,000. It means that the criminalization and the application of criminal sanctions is only mandatory if the perpetration is over the afore-

38 Asp *et al.* 2009, p. 707.

39 *See further* Tamás Lukácsi, 'Az *ultima ratio* elve az Európai Unió jogában', *Állam- és Jogtudomány*, Vol. 56, Issue 2, 2015, pp. 20–46.

40 Asp *et al.* 2009, p. 707; Ester Herlin-Karnell, 'Subsidiarity in the Area of EU Justice and Home Affairs Law – A Lost Cause?', *European Law Journal*, Vol. 15, Issue 3, 2009, p. 356.

41 Article 5(3) TEU.

42 Asp 2012, p. 184.

43 Bernd Hecker, *Europäisches Strafrecht*, Springer, Berlin – Heidelberg, 2012, p. 281; Perrine 2012, p. 252.

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mentioned threshold.[44] Similarly, the Sexual Exploitation Directive refers to the discretionary right of the Member States whether to criminalize certain consensual conducts (*e.g.* consensual sexual activities between peers, who are close in age and degree of psychological and physical development or maturity, in so far as the acts did not involve any abuse; or production and possession of pornographic material by the producer solely for his/her private use provided that the act involves no risk of dissemination of the material).[45] Furthermore, the Cybercrime Directive and the Market Abuse Directive do not require the Member States to punish with criminal punishments each conducts, they can use criminal means only 'at least for cases which are not minor' or 'at least in serious cases'.[46] However, the concept of minor or serious cases is not defined directly by these directive, but is referred to the discretion of the Member States.

However, alarming tendencies can also be observed in connection with the observance of the aforementioned principles. Some of the criminal law directives punish several preparatory criminal conducts which sometimes can only abstractly jeopardize the protected legitimate legal interest. The Cybercrime Directive and Counterfeiting Directive prescribe the Member States to punish as a criminal offence several preparatory criminal conducts (*e.g.* production, sale, procurement for use, import, receipt, acquisition, possession, distribution or otherwise making available) regarding different tools (*e.g.* instruments, computer programmes, passwords, access codes, security features) used for committing the offences.[47] The Terrorism Directive criminalize a number of preparatory conducts (*e.g.* providing or receiving training for terrorism, travelling for the purpose of terrorism, organizing or otherwise facilitating travelling for the purpose of terrorism) which are only very distantly related to the perpetration of concrete terrorist offence, and which has to be punishable even if the perpetrator did not intend to commit a specific terrorist crime, or his/her act was not related to an actually committed terrorist act.[48] In case of this expanding criminalization

44 Article 7(4) of the PIF Directive.
45 Articles 5(8) and 8 of the Sexual Exploitation Directive.
46 Articles 3–7 of the Cybercrime Directive, Articles 3–5 of the Market Abuse Directive.
47 Article 7 of the Cybercrime Directive, Article 3(1)(d) of the Counterfeiting Directive.
48 Articles 7–10 of the Terrorism Directive. *See* in details, Ferenc Sántha, 'A terrorcselekmény és a terrorizmus kapcsolódó egyéb bűncselekmények' *in* Ákos Farkas (ed.), *Fejezetek az európai büntetőjogból*, Bíbor, Miskolc, 2017, pp. 69–73; Róbert Bartkó & Ferenc Sántha, 'Az Európai Unió jogalkotása és hatása a terrorcselekmény hazai büntetőjogi szabályozására' *in* Krisztina Karsai *et al.* (eds.), *Ünnepi kötet Dr. Nagy*

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tendency, the compliance with the *ultima ratio* principle is highly questionable, because the criminal sanctioning of these behaviors cannot in every case be justified with a legitimate purpose.

During the definition of the criminal offences, the European legislator also has to observe the *lex certa requirement* which derives from the principle of legality and legal certainty. This criterion requires that criminal law regulations should be clear and precise, so that individuals may ascertain unequivocally what their rights and obligations are and are able to predict actions that will make him criminally liable. This means that criminal law provisions must define offences in a strict and unambiguous way: the objective and the subjective prerequisites for criminal liability as well as sanctions which could be imposed if an offence is committed have to be foreseeable.[49] The description of conduct which is identified as punishable under criminal law must be worded precisely in order to ensure predictability as regards its application, scope and meaning.[50]

The criminal law directives of the EU usually tries to respect the *lex certa* principle as far as possible, therefore, the secondary legal acts often lists the possible punishable conducts in a very exhaustive way. However, in some cases it can be inappropriate and redundant, for the criminal conducts regulated in the EU legal acts often overlap and it is difficult to distinguish them from each other.[51] In the Counterfeiting Directive, for example, it could be very hard to differentiate between the receiving and the obtaining of the counterfeit currency in the practice.[52] Another problem is that the legal acts sometimes contain indefinite legal definitions. In the PIF Directive, the notion of total damage refers to the estimated damage that results from the entire fraud scheme, both to the financial interests of the Member States concerned and to the Union, excluding interest and penalties.[53] In this context, it is questionable how the term 'estimated damage' can be interpreted, since this kind of definition is difficult to reconcile with the legality requirement.[54] Therefore, in order to comply as closely as possible

Ferenc egyetemi tanár 70. születésnapjára, Szegedi Tudományegyetem, Állam- és Jogtudományi Kar, Szeged, 2018, pp. 94–100.

49 Asp *et al.* 2009, p. 708.

50 Draft Council conclusions, p. 5.

51 *See also* Asp *et al.* 2009, pp. 712–713.

52 Article 3(1)(c) of the Counterfeiting Directive.

53 Recital (4) of the PIF Directive.

54 Judit Jacsó & Bence Udvarhelyi, 'Új irányelv az uniós csalások elleni büntetőjogi védelemről', *Magyar Jog*, Vol. 65, Issue 6, 2018, p. 332.

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with the *lex certa* principle, the EU legislator should avoid the use of such indefinite legal concepts.

It is also worth pointing out that due to the differences in the criminal law systems of the Member States, the EU legislator always specially requires the criminalization of the attempt as well as the incite, aid and abet of the commission of the criminal offence.[55] Some of the EU directives punishes incitement, aiding, abetting and attempt in connection with all punishable conduct, while another part of the legal acts – especially in case of attempt – imposes the obligation to criminalize these cases only in relation to some of the prohibited behaviors. This latter situation often occurs in case of punishable conducts where attempt, incitement, aiding and abetting are conceptually excluded. As a result of the minimum harmonization, however, the Member States still have the opportunity to adopt stricter provisions, and to criminalize the attempt or the accessory conducts in connection with all the crimes regulated in the directives. In this context, however, it could be problematic, that the directives fail to give exact definitions for these notions and does not specify further which kind of criminal offences should be created to punish the inciting, aiding, abetting and attempt. In the absence of unified, autonomous EU definitions, the national criminal law regulations of the Member States has to applied, which sometimes show significant differences. Consequently, it can easily occur that same act will be punishable in one Member State, while it will remain unpunished in another Member State.[56]

3.2. Mens Rea Elements of the Criminal Offences

Regarding the *mens rea elements*, the criminal law directives of the EU basically require the punishment of intentional acts and omissions. There is

55 Article 3 of the Human Trafficking Directive, Article 7 of the Sexual Exploitation Directive, Article 8 of the Cybercrime Directive, Article 4 of the Counterfeiting Directive, Article 14 of the Terrorism Directive, Article 4 of the Money Laundering Directive, Article 8 of the Non-Cash Payment Directive, Article 6 of the Market Abuse Directive, Article 5 of the PIF Directive.

56 Costanza Di Francesco Maesa, 'Directive (EU) 2017/1371 on the Fight Against Fraud to the Union's Financial Interests by Means of Criminal Law: A Missed Goal?', *European Papers*, 3/2018, p. 1463; Krisztina Karsai, 'External Effects of the European Public Prosecutor's Office Regime', *Miskolci Jogi Szemle*, Vol. 14, Special Issue 2, 2019, p. 465; Sándor Madai, 'Nem csalás, de ámítás? Dogmatikai megjegyzések a PIF Irányelvhez', *Miskolci Jogi Szemle*, Vol. 14, Special Issue 2, 2019, p. 139.

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one directive, the Cybercrime Directive which not only determines the requirement of intent but also the commission without right.[57] Two legal acts, the Human Trafficking Directive and the Sexual Exploitation Directive refers to the negligent conducts as well, because they consider as an aggravating circumstance if the criminal offence deliberately or by gross negligence/recklessly endangered the life of the victim.[58] The preamble of the Money Laundering Directive and the Market Abuse Directive also provides the possibility for the Member States that conducts committed recklessly or by serious negligence constitute criminal offences.[59] Furthermore, the Money Laundering Directive also stipulates that the Member States have the right (but are not obliged) to take the necessary measures to ensure that the described conducts are punishable as a criminal offence where the offender suspected or ought to have known that the property was derived from criminal activity.[60] However, due to the minimum harmonization, the Member States can order the criminalization of the conducts committed by negligence in connection with the other EU directives as well, since they are free to adopt stricter provisions than that of the directives.

It can be observed that the EU legislator fully respects to principle of guilt in connection with the subjective elements of the criminal offences. This principle requires that the criminalization of certain acts must be based on the principle of individual guilt, which should be regarded as a guarantee that human dignity is respected by criminal law. The EU legislator therefore has to justify that the requirements in European legislation as to the sanctions permits the imposition of penalties which correspond to the guilt of the individual.[61] As a consequence of this principle, the EU directives cannot oblige the Member States to criminalize and punish certain behavior with strict liability, regardless of the guilt of the perpetrator.[62] Strict liability, which is therefore excluded in the EU criminal legislation,

57 Article 2 of the Human Trafficking Directive, Articles 3–6 of the Sexual Exploitation Directive, Articles 3–7 of the Cybercrime Directive, Article 3 of the Counterfeiting Directive, Articles 3–12 of the Terrorism Directive, Article 3(1) of the Money Laundering Directive, Articles 3–7 of the Non-Cash Payment Directive, Articles 3–5 of the Market Abuse Directive, Articles 3–4 of the PIF Directive.

58 Article 4(2)(c) of the Human Trafficking Directive, Article 9(f) of the Sexual Exploitation Directive.

59 Recital (13) of the Money Laundering Directive, Recital (21) of the Market Abuse Directive.

60 Article 3(2) of the Money Laundering Directive.

61 Asp *et al.* 2009, pp. 707–708.

62 Kaiafa-Gbandi 2011, p. 31.

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can be defined as a criminal liability which requires only the prohibited conduct, irrespectively of the *mens rea* of the perpetrator.[63]

4. Sanctions to Be Imposed on Natural Persons

With regard to the minimum rules relating to criminal sanctions, all directives stipulate as a general rule that Member States are required to punish the criminal offences with effective, proportionate and dissuasive criminal sanctions or penalties.[64] The requirement of effectiveness means that the sanction must be suitable for accomplishing the desired objective, *i.e.* the adequate protection of interests of the EU and the general and special prevention. The condition of proportionality requires that the selected sanction must be proportionate to the seriousness of the crime, and its effects must not exceed the extent necessary to reach the pursued goal. If there are several tools that seem suitable for achieving the given objective, the least severe one should be chosen. Finally, the dissuasive nature demands that the sanction must have an adequate deterrent force for future offenders.[65]

For the less severe punishable conducts, Some of the EU directives only stipulate the requirement of the effective, proportionate and dissuasive sanctions. In these cases the Member States are free to decide on the type and extent of the sanction. For the more serious cases, however, the EU legislator also determines the type and the level of punishment to be applied. As an effective, proportionate and dissuasive sanction, the directive primarily prescribe imprisonment. In some cases, the directives leave to the Member States to determine the minimum and/or maximum limit of the imprisonment,[66] while in other cases the directives set out the minimum level of the upper limit of the imprisonment.[67] In these cases, however, the national legislator can of course also prescribe higher maximum penalties.

63 Klip 2012, p. 203.

64 Article 4(4) of the Human Trafficking Directive, Recital (12) of the Sexual Exploitation Directive, Article 9(1) of the Cybercrime Directive, Articles 5(1) and 5(5) of the Counterfeiting Directive, Article 15(1) of the Terrorism Directive, Article 5(1) of the Money Laundering Directive, Article 9(1) of the Non-Cash Payment Directive, Article 7(1) of the Market Abuse Directive, Article 7(1) of the PIF Directive.

65 Hecker 2012, pp. 239–240.

66 Article 5(2) of the Counterfeiting Directive, Article 7(2) of the PIF Directive.

67 Ursula Nelles *et al.*, 'Strafrecht' *in* Reiner Schulze *et al.* (eds.), *Europarecht. Handbuch für die deutsche Rechtspraxis*, Nomos, Baden-Baden, 2010, pp. 2316–2318.

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The legal acts often define the range of imprisonment in a differentiated manner based on the punishable conducts, the value of or the damage caused by the offense, or other aspects. The maximum penalty in the EU directives can be the following: *(i)* at least one year of imprisonment;[68] *(ii)* at least two years of imprisonment;[69] *(iii)* at least three years of imprisonment;[70] *(iv)* at least four years of imprisonment;[71] *(v)* at least five years of imprisonment;[72] *(vi)* at least eight years of imprisonment;[73] *(vii)* at least ten years of imprisonment;[74] and *(viii)* at least fifteen years of imprisonment.[75]

The level of imprisonment in the different EU directives are also summarized in the following table:

	Hum. Tr. Dir.	**Sex. Ex. Dir.**	**Cybr. Dir.**	**Count. Dir.**	**Terror. Dir.**	**M. L. Dir.**	**Non-Cash Dir.**	**Mark. Ab. Dir.**	**PIF Dir.**
1 year		GC					GC		
2 years		GC	GC				GC	GC	
3 years		GC	AC				GC		
4 years						GC		GC	GC
5 years	GC	GC	AC	GC			AC		
8 years		GC		GC	GC				

68 Articles 3(2), 4(4), 5(2)-(3) and 6(1) of the Sexual Exploitation Directive, Article 9(3) of the Non-Cash Payment Directive

69 Articles 3(3), 4(2), 4(4), 4(7) and 5(4)-(5) of the Sexual Exploitation Directive, Article 9(2) of the Cybercrime Directive, Articles 9(2) and 9(5) of the Non-Cash Payment Directive, Article 7(3) of the Market Abuse Directive

70 Articles 3(5) Point i-ii) and 5(6) of the Sexual Exploitation Directive, Article 9(3) of the Cybercrime Directive, Article 9(4) of the Non-Cash Payment Directive

71 Article 5(2) of the Money Laundering Directive, Article 7(2) of the Market Abuse Directive, Article 7(3) of the PIF Directive.

72 Article 4(1) of the Human Trafficking Directive, Articles 3(4)–(6), 4(2)–(3) and 4(5)–(7) of the Sexual Exploitation Directive, Article 9(4) of the Cybercrime Directive, Article 5(4) of the Counterfeiting Directive, Article 9(6) of the Non-Cash Payment Directive.

73 Articles 3(5)(i)–(ii), 4(3) and 4(5) of the Sexual Exploitation Directive, Article 5(3) of the Counterfeiting Directive, Article 15(3) of the Terrorism Directive.

74 Article 4(2) of the Human Trafficking Directive, Articles 3(5)(iii), 3(6) and 4(6) of the Sexual Exploitation Directive.

75 Article 15(3) of the Terrorism Directive.

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	Hum. Tr. Dir.	Sex. Ex. Dir.	Cybr. Dir.	Count. Dir.	Terror. Dir.	M. L. Dir.	Non-Cash Dir.	Mark. Ab. Dir.	PIF Dir.
10 years	AC	GC							
15 years					GC				

Abbreviations: GC: general case(s), AC: aggravating case(s)

Regarding the determination of the upper limit of the imprisonment, it can be problematic that in some cases the EU legal acts define the criminal sanctions in a less differentiated way, as a result of which the same penalty frameworks apply to crimes with different social danger. Let us see some examples for this. In the Terrorism Directive, participating in the activities of a terrorist group is punishable with a maximum penalty of at least eight years of imprisonment regardless of whether the purpose of the terrorist group is merely to threaten with the perpetration of terrorist acts or to actually commit terrorist crimes, although the danger to the society of the two cases is clearly different.[76] In the PIF Directive, the same level of imprisonment applies to all criminal offences falling within the competence of the directive (EU-fraud, active and passive corruption, money laundering and misappropriation) if they involve considerable damage or advantage. The considerable amount of damage or advantage means more than EUR 100,000 in case of most of the criminal offences, however, in case of VAT-fraud, the threshold is EUR 10 million. The sanction framework therefore does not reflect the differences between the criminal offences.[77] In this regard, however, positive examples can also be observed. The Sexual Exploitation Directive determines the punishable conducts in details and associates each criminal act with a separate maximum penalty between one and ten years.[78]

In addition to imprisonment, EU norms exceptionally determine other sanctions as well. The Sexual Exploitation Directive, for example, stipulates that in order to avoid the risk of repetition of offences, natural person who has been convicted of any of the offences may be temporarily or permanently prevented from exercising at least professional activities involving di-

76 Articles 2(3)–(4), and 15(3) of the Terrorism Directive. *See also* Ferenc Nagy & Krisztina Karsai, 'A kerethatározat', *Büntetőjogi Kodifikáció*, Vol. 3, Issue 1–2, 2003, p. 22.

77 Articles 2(2) and 7(3) of the PIF Directive.

78 Articles 3–6 of the Sexual Exploitation Directive.

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rect and regular contacts with children.[79] The Money Laundering Directive provides the Member States the possibility to prescribe additional sanctions or measures to natural persons, however, it does not define the types of these penalties, but leaves it up to the Member States.[80] Finally, most of the directive mandatory prescribes the freezing, seizure and/or confiscation of proceeds derived from and instrumentalities used or intended to be used in the commission or contribution to the commission of the crimes.[81]

EU criminal law directives also often define cases which can be considered as aggravating or mitigating circumstances when imposing sanctions.[82] In connection with the former, most of the directives list the more dangerous and serious forms of the criminal offences concerned. However, some directives also prescribe higher level of penalty in case of these conditions,[83] while other directives do not determine higher sanctions for these cases, but only oblige the Member States to regard these cases as aggravating circumstances.[84] This duality, however, could lead to unjustified differentiation and could be incompatible with the criminal law dogmatic of some Member States. The aggravating circumstances in the directives are the following: *(i)* the crime is committed within the framework of a criminal organization within the meaning of Council Framework Decision 2008/841/JHA[85] on the fight against organized crime;[86] *(ii)* the crime is committed against a victim/child in a particularly vulnerable situation, such as a child

79 Article 10 of the Sexual Exploitation Directive.

80 Article 5(3) of the Money Laundering Directive.

81 Article 7 of the Human Trafficking Directive, Article 11 of the Sexual Exploitation Directive, Article 20 of the Terrorism Directive, Article 9 of the Money Laundering Directive, Article 10 of the PIF Directive.

82 Klip 2012, pp. 321–329.

83 Article 4(2) of the Human Trafficking Directive, Article 9(4) of the Cybercrime Directive, Article 9(6) of the Non-Cash Payment Directive.

84 Article 4(3) of the Human Trafficking Directive, Article 9 of the Sexual Exploitation Directive, Article 9(5) of the Cybercrime Directive, Article 15(4) of the Terrorism Directive, Article 6 of the Money Laundering Directive, Article 8 of the PIF Directive.

85 According to Article 1(1) of Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organized crime, criminal organization means "a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit".

86 Article 4(2)(b) of the Human Trafficking Directive, Article 9(d) of the Sexual Exploitation Directive, Article 9(4)(a) of the Cybercrime Directive, Article 6(1)(a) of the Money Laundering Directive, Article 9(6) of the Non-Cash Payment Directive, Article 8 of the PIF Directive.

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with a mental or physical disability, in a situation of dependence or in a state of physical or mental incapacity;[87] *(iii)* the commission of the crime deliberately or by gross negligence endangers the life of the victim/child;[88] *(iv)* the crime is committed by use of serious violence or causes particularly serious harm to the victim/child;[89] *(v)* the crime is committed by public officials in the performance of their duties,[90] by a member of the child's family, a person cohabiting with the child or a person who has abused a recognized position of trust or authority, or by several persons acting together;[91] *(vi)* the offender has previously been convicted of offences of the same nature;[92] *(vii)* the commission of the crime causes serious damage, or it was committed against a critical infrastructure information system;[93] *(viii)* the crime is committed by misusing the personal data of another person, with the aim of gaining the trust of a third party, thereby causing prejudice to the rightful identity owner;[94] *(ix)* the offender of the crime is an obliged entity within the meaning of Directive (EU) 2015/849[95] and commits the offence in the exercise of their professional activities;[96] *(x)* the laundered property is of considerable value, or derives from one of the defined predicate offences.[97]

Mitigating circumstances are only regulated in the Terrorism Directive. According to this provision, penalties can be reduced if the offender renounces terrorist activity and provides the administrative or judicial authorities with information which they would not otherwise have been able

87 Article 4(2)(a) of the Human Trafficking Directive, Article 9(a) of the Sexual Exploitation Directive, Article 15(4) of the Terrorism Directive.
88 Article 4(2)(c) of the Human Trafficking Directive, Article 9(f) of the Sexual Exploitation Directive.
89 Article 4(2)(d) of the Human Trafficking Directive, Article 9(g) of the Sexual Exploitation Directive.
90 Article 4(3) of the Human Trafficking Directive.
91 Article 9(b)–(c) of the Sexual Exploitation Directive.
92 Article 9(e) of the Sexual Exploitation Directive.
93 Article 9(4)(b)–(c) of the Cybercrime Directive.
94 Article 9(5) of the Cybercrime Directive.
95 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (4th AML-Directive).
96 Article 6(1)(b) of the Money Laundering Directive.
97 Article 6(2)(a)–(b) of the Money Laundering Directive.

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to obtain, helping them to prevent or mitigate the effects of the offence; identify or bring to justice the other offenders; find evidence; or prevent further offences.[98]

5. Liability of Legal Persons and Sanctions against Them

In addition to sanctioning natural persons, the EU directives also regulate the liability of legal persons and the types of sanctions applicable to them. In these matters, the EU directives contain almost identical rules.

The liability of legal persons can be established in two cases. On the one hand, legal persons can be held liable if the criminal offence concerned was committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, which is based on a power of representation of the legal person, an authority to take decisions on behalf of the legal person, or an authority to exercise control within the legal person. On the other hand, the liability of the legal persons can be established where the lack of supervision or control by a person in a leading position has made possible the commission of the criminal offences for the benefit of that legal person by a person under its authority. The directives also stipulate that the liability of a legal person shall not exclude criminal proceedings against natural persons who are perpetrators, inciters or accessories in the offences.[99]

In connection with the liability of legal persons, it has to be mentioned that there could be Member States who rejects the introduction of criminal responsibility of legal persons because it is inconsistent with the principle of guilt.[100] However, it can be stated that the EU norms completely respect the national sovereignty of the Member States in this respect, because they only oblige them to sanction the legal persons, but does not refer that the sanctions have to be criminal sanctions. Therefore, it is up to the Member States whether they fulfil their sanctioning obligation by means of criminal law or by other less restrictive measures (*e.g.* civil or administrative mea-

98 Article 16 of the Terrorism Directive.

99 Article 5 of the Human Trafficking Directive, Article 12 of the Sexual Exploitation Directive, Article 10 of the Cybercrime Directive, Article 6 of the Counterfeiting Directive, Article 17 of the Terrorism Directive, Article 7 of the Money Laundering Directive, Article 10 of the Non-Cash Payment Directive, Article 8 of the Market Abuse Directive, Article 6 of the PIF Directive.

100 Kaiafa-Gbandi 2011, p. 31.

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sures). In connection with the liability of the legal persons, the Manifesto also states that rules concerning criminal liability of legal entities must be elaborated on the basis of criminal law provisions at the national level.[101]

Concerning the sanctions, the EU directives determines the general requirements that legal persons have to be subject to effective, proportionate and dissuasive sanctions. As applicable sanctions, the EU norms exemplary list the followings: *(i)* criminal or non-criminal fines; *(ii)* exclusion from entitlement to public benefits or aid; *(iii)* temporary or permanent disqualification from the practice of commercial activities; *(iv)* placing under judicial supervision; *(v)* judicial winding-up; *(vi)* temporary or permanent closure of establishments which have been used for committing the criminal offence; *(vii)* temporary or permanent exclusion from public funding, including tender procedures, grants and concessions.[102]

It also should be pointed that the regulation of the liability of the legal persons does not seem to be justified and necessary in connection with all regulated crimes. There are criminal offences, such as the sexual exploitation of children or certain offences related to terrorist activity (*e.g.* recruitment for terrorism or travelling for the purpose of terrorism), where the commission of the crime in the name and for the benefit of a legal person is conceptually excluded.

6. Rules Affecting Criminal Procedure Law and Judicial Cooperation

In addition to the definition of criminal offences and sanctions, the EU directives also contain several other regulations in connection with criminal procedure law or judicial cooperation. Among these provisions we can find, for example, the obligation of the Member States to provide effective investigative tools for investigating or prosecuting the offences

101 Asp *et al.* 2009, pp. 708, and 711.

102 Article 6 of the Human Trafficking Directive, Article 13 of the Sexual Exploitation Directive, Article 11 of the Cybercrime Directive, Article 7 of the Counterfeiting Directive, Article 18 of the Terrorism Directive, Article 8 of the Money Laundering Directive, Article 11 of the Non-Cash Payment Directive, Article 9 of the Market Abuse Directive, Article 9 of the PIF Directive. It is important to emphasis that the first six of the listed types of sanctions are included in all directives, while temporary or permanent exclusion from public funding can only be found in the Money Laundering Directive, Non-Cash Payment Directive and PIF Directive.

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referred,[103] the exchange of information between the relevant authorities of the Member States as well as between the Member States and the EU institutions,[104] the protection and the rights of the victims of the crimes as well as the assistant and support to them,[105] the preventive measures against the criminal offences,[106] the measures to ensure the prompt removal of websites containing or disseminating criminal offences,[107] the recovery of sums unduly paid or VAT not paid in the context of the commission of the criminal offences,[108] or the statutory limitation period of the criminal offences concerned.[109]

Among the criminal procedural provisions of the EU directives, the regulation of jurisdiction deserves to be highlighted, as it appears in all legal acts. According to the directives, Member States are generally obliged to establish their jurisdiction if the crime was committed in whole or in part within their territory, or if the offender is one of their nationals. Furthermore, EU legal acts also define other grounds for which Member States may extend their jurisdiction, either on a mandatory or optional basis. These are the following: *(i)* the criminal offence was committed outside the territory of the Member State concerned, against one of its nationals or a person who is an habitual resident in its territory,[110] for the benefit of a legal person established in its territory,[111] or the offender is an

103 Article 9(4) of the Human Trafficking Directive, Article 15(3) of the Sexual Exploitation Directive, Article 9 of the Counterfeiting Directive, Article 20(1) of the Terrorism Directive, Article 11 of the Money Laundering Directive, Article 13(1) of the Non-Cash Payment Directive.

104 Article 13 of the Cybercrime Directive, Articles 14–15 of the Non-Cash Payment Directive, Article 15 of the PIF Directive.

105 Articles 11–17 of the Human Trafficking Directive, Articles 18–20 of the Sexual Exploitation Directive, Articles 24–26 of the Terrorism Directive, Article 16 of the Non-Cash Payment Directive.

106 Articles 18–19 of the Human Trafficking Directive, Articles 21–24 of the Sexual Exploitation Directive, Article 17 of the Non-Cash Payment Directive.

107 Article 25 of the Sexual Exploitation Directive, Article 21 of the Terrorism Directive.

108 Article 13 of the PIF Directive.

109 Article 12 of the PIF Directive.

110 Article 10(2)(a) of the Human Trafficking Directive, Article 17(2)(a) of the Sexual Exploitation Directive, Article 12(2)(c) of the Non-Cash Payment Directive.

111 Article 10(2)(b) of the Human Trafficking Directive, Article 17(2)(b) of the Sexual Exploitation Directive, Article 12(3)(b) of the Cybercrime Directive, Article 19(1)(d) of the Terrorism Directive, Article 10(2)(b) of the Money Laundering Directive, Article 12(2)(b) of the Non-Cash Payment Directive, Article 10(2)(b) of the Market Abuse Directive, Article 11(3)(b) of the PIF Directive.

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habitual resident in its territory;[112] *(ii)* the criminal offence was committed by means of information and communication technology accessed from the territory of the Member State concerned, whether or not it is based on its territory;[113] *(iii)* the criminal offender committed the offence when physically present on the territory of the Member State concerned, whether or not the offence is against an information system on its territory or the offence is against an information system on its territory, whether or not the offender commits the offence when physically present on its territory;[114] *(iv)* the criminal offence in connection with euro was committed outside the territory of the Member State concerned, where the offender is in the territory of that Member State and is not extradited; or the counterfeit euro notes or coins related to the offence have been detected in the territory of that Member State;[115] *(v)* the criminal offence was committed on board a vessel flying the Member State's flag or an aircraft registered there, or against the institutions or people of the Member State concerned or against an institution, body, office or agency of the Union based in that Member State;[116] *(vi)* the criminal offender provided training for terrorism to its nationals or residents;[117] *(vii)* the criminal offender is subject to the Staff Regulations at the time of the criminal offence, or is one of the officials of the Member State concerned who acts in his or her official duty.[118]

In connection with the regulation of jurisdiction, the Terrorism Directive goes the furthest, which – based on the principle of universal criminal jurisdiction – generally allows the Member States to extend its jurisdiction if the offence was committed in the territory of another Member State, even if the offence is not connected to the Member State in question at all.[119]

112 Article 10(2)(c) of the Human Trafficking Directive, Article 17(2)(c) of the Sexual Exploitation Directive, Article 12(3)(a) of the Cybercrime Directive, Article 19(1)(c) of the Terrorism Directive, Article 10(2)(a) of the Money Laundering Directive, Article 12(2)(a) of the Non-Cash Payment Directive, Article 10(2)(a) of the Market Abuse Directive, Article 11(3)(a) of the PIF Directive.

113 Article 17(3) of the Sexual Exploitation Directive.

114 Article 12(2) of the Cybercrime Directive, Article 12(2) of the Non-Cash Payment Directive.

115 Article 8(2) of the Counterfeiting Directive.

116 Article 19(1)(b)–(e) of the Terrorism Directive.

117 Article 19(2) of the Terrorism Directive.

118 Articles 11(2) and 11(3)(c) of the PIF Directive.

119 Article 19(1) of the Terrorism Directive (last sentence).

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7. Tendencies of the EU Criminal Legislation and Criminal Policy

The Treaty of Lisbon has resulted in an increasing criminal legislation at the level of the EU. Parallel with this, the European criminal policy has also emerged and begin to develop. The Manifesto and the guidelines of the EU institutions listed the most important criminal law principle which the EU have to take into consideration during the adoption of criminal law directives. As a result of this, the coherence of EU legal acts has significantly been increased, the criminal law directives have a similar structure and content, which clearly facilitates not only the EU legislation, but also the application and interpretation of the law. The directives of the EU generally try to comply with the criminal law principles as much as possible.

In addition to these positive tendencies, however, it cannot be ignored that certain problems have not been eliminated by the developing EU criminal policy. Already the Manifesto mentioned several alarming tendencies which must be observed and not be ignored:

> "criminal law must not be adopted without pursuing a legitimate purpose; the principle of ultima ratio must not be neglected; the Member States must not be obliged to pass imprecise national criminal laws; the legislation must not answer every social problem with passing increasingly repressive acts and consider this as a value in itself."[120]

If the current EU criminal law legislation is analyzed, some negative trends can still be observed. The greatest concern may be the increasing trend of criminal law repression. If we compare the directives adopted after the Treaty of Lisbon with the previous III pillar framework decisions which were replaced by these directives, it can be stated that the new legal acts usually contain more severe rules with regards to both the criminal offences and the sanctions. The post-Lisbon legislation often expanded the scope of the punishable conducts and in some cases, the directives prescribe the criminalization of certain criminal offences which could hardly be justified with the legitimizing factors of EU criminal law. The regulation of the sanctions also become stricter. While the previous framework decisions did not in all cases determine the maximum level of the penalties and often prescribed only the requirement of effective, proportionate and dissuasive sanctions, the directives stipulate almost in each case the minimum upper limit of the imprisonment, usually more strictly than the prior framework

120 Asp *et al.* 2009, p. 715.

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decisions. Most of the directives also expanded the range of aggravating circumstances. In this context, however, it is important to point out that the growth of the legal harmonization activity of the EU cannot be considered a negative tendency in itself, since uniform EU norms are necessary to ensure effective fight against cross-border crimes and to protect supranational legal interests. The real problem is that the strengthening repression and the expansion of criminalization could lead to the erosion or jeopardy of other criminal law principles as well.

A further problem which also has to emphasize is that although the vertical and horizontal coherence of the EU criminal law norms has significantly increased after the Treaty of Lisbon, shortcomings can be observed in this regard as well. The horizontal coherence of EU directives could be violated in particular if a criminal offence is subject to more legal acts, *e.g.* in case of money laundering, which is regulated by the 4th AML-Directive (which was modified with the 5th AML-Directive[121]), the Money Laundering Directive and the PIF Directive. The multi-level regulation of money laundering, however, can cause incoherence in many cases, which can be observed both in relation to the regulation of criminal offences and criminal sanctions.[122] The implementation of the different EU norms therefore can put difficult challenges on the national legislator in order to create coherent national criminal law framework that fully complies with all EU standards. The fragmented and incoherent EU regulation can therefore result in unjustified discrimination and a different level of legal protection.

The criminal law and criminal policy of the EU are constantly developing, the EU legislator must increasingly respect the basic principles of criminal law. The aforementioned negative tendencies do not in themselves undermine the legitimacy of EU criminal law, however, ignoring these dangers and risks may ultimately lead to an unacceptable criminal law

121 Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU.

122 *See* in details, Robert Kert, 'The need for implementation in the areas of money laundering, corruption and misappropriate use of funds' *in* Ákos Farkas *et al.* (eds.), *Criminal Law Aspects of the Protection of the Financial Interests of the European Union – with particular emphasis on the national legislation on tax fraud, corruption, money laundering and criminal compliance with reference to cybercrime*, Wolters Kluwer Hungary, Budapest, 2019, pp. 223–228.

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that contradicts fundamental principles and criminal law traditions.[123] In order to continuously improve EU criminal law legislation, the future EU criminal policy must find answers to these challenges.

123 Asp *et al.* 2009, p. 715.

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Part V
Case Notes

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The Protection of Public Debates and the Standards of Responsible Journalism

The Case of Index.hu versus Hungary

Helga Kovács – András Koltay[*]

Abstract

Index.hu versus Hungary is a case which touches upon the issues of the protection of reputation, freedom of expression and of the media, and the ethical obligations of the press. These issues have been a long-standing concern of the ECtHR, and the Court has accordingly handed down a considerable number of decisions on the subject, but the case law is still not sufficiently clear and nuanced on all the details involved. The article presents the judgment itself, it then turns to the analysis of the relevant case law of the ECtHR, providing also an in-depth critique of the Index.hu versus Hungary decision.

Keywords: freedom of expression, media freedom, right to reputation, media ethics, responsible journalism

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1. Introduction

The limits of media freedom and the standards of responsible journalism have long been of concern to European legal systems, and naturally to the ECtHR. Relatively few 'Hungarian cases' revolving around these issues were

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brought before the Strasbourg body. This indirectly points to soundness of the legal system and the high level of protection afforded to media freedom. However, the ECtHR recently ruled in *Index.hu versus Hungary*,[1] a case which fundamentally touches upon the issues of the protection of reputation, freedom of expression (FoE) and of the media, and the ethical obligations of the press. In Section 2, we present the judgment itself, in Section 3, we analyse the relevant case law of the ECtHR, and in Section 4, we give a critique of the decision.

2. The Judgment

In November 2014, Hungary witnessed a series of anti-government protests, followed by reports from a television news channel highlighting past wrongdoings of the protest organizers and spokespersons to discredit them. In response, a journalist at the blog *Kettős Mérce* initiated a 'solidarity initiative' to express support for the activists. This initiative encouraged people to share their minor infractions on social media using a hashtag related to the television channel.[2] Several media outlets covered this action. On 1 December 2014, the news portal Index.hu published an article titled "I was in jail with János Áder",[3] discussing the solidarity initiative, and summarized a post shared on Facebook by A.V., a former editor-in-chief of *Magyar Narancs,* a political weekly. In the post, A.V. recounted that Áder, President of Hungary between 2012 and 2022 and he were in the same military prison at a certain point of their compulsory military service as young adults. According to rumours circulating at the time, allegedly, Áder, having been drunk, fired his weapon at random. A.V. admitted that he could not remember the events well, but affirmed that this must have happened during the time of the football World Cup in Argentina.[4]

Following the publication of the article, Index.hu appended a comment emphasizing that A.V. himself expressed uncertainty about whether Áder had fired his weapon at random, suggesting that the story might be fabrica-

1 *Index.hu Zrt. v Hungary,* No. 77940/17, 19 February 2024.
2 Id. paras. 5–6.
3 *Cf.* Szabolcs Panyi, 'Mi egy börtönkapcsolat vagyunk Áder Jánossal', *Index.hu*, 1 December 2014, at https://index.hu/belfold/2014/12/01/mi_egy_bortonkapcsolat_vagyunk_ader_janossal.
4 *Index.hu v Hungary,* para. 7.

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ted, as such an act would constitute a serious military offence. Index.hu's comments also underlined that they had contacted the Office of the President for comment and would update the article upon receiving a reply.[5] Shortly after the article's publication, the Office of the President released a statement confirming that Áder had indeed been placed in military detention twice during his compulsory military service, one of which occurred during the World Cup. However, the statement clarified that the reason for his detention was not the firing of his weapon while intoxicated, but rather falling asleep on guard duty in the early hours of the morning while covertly watching a football match.[6] On the same day, Index.hu published a separate article summarizing A.V.'s story and quoting the Office of the President's denial of the allegations. The latter half of the article focused on the online initiative launched in response to the 'character assassination' of the protest organizers by various media outlets.[7] Subsequently, on 16 January 2015, Áder filed a civil action with the Budapest High Court against A.V. and Index.hu, alleging the spreading of false statements, and the infringement of his reputation.[8] The Court dismissed Áder's action against Index.hu on 20 February 2015, primarily on the basis that the company had adhered to journalistic standards. However, A.V. was ordered to pay compensation.[9] The judgment was appealed.

The Budapest-Capital Regional Court of Appeal reversed the initial judgment regarding Index.hu and ruled in favour of Áder.[10] It determined that the contested statements did not concern a matter of public interest, and were not linked to the media campaign, as Áder was not involved in either the protests, or the preceding governmental actions. Consequently, there was no need to balance Index.hu's right to FoE against Áder's right to reputation. As a result, the statement was deemed injurious to Áder, and Index.hu had failed to verify the accuracy thereof. The Court of Appeal ordered Index.hu to pay 600,000 Hungarian forints (approx. €1,500 at the applicable exchange rate at the time of the decision) to Áder.[11] Index.hu filed a petition for review before the *Kúria* (Curia of Hungary).

5 Id. para. 8.
6 Id. para. 9.
7 Id. para. 10.
8 Id. para. 11.
9 Id.
10 Id. para. 12.
11 Id.

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On 7 September 2016, the *Kúria* (the supreme court of Hungary) rejected Index.hu's petition, and upheld the second-instance court's finding that the publication in question did not involve a discussion of public interest since it did not pertain to Áder's exercise of public power but rather spread untrue statements not protected by FoE.[12] Applying the principle of objective liability, the *Kúria* held Index.hu responsible for circulating the Facebook post in question to the broader public.[13] Whether the company acted in good or bad faith was deemed relevant only for calculating damages. However, the *Kúria* reduced the damages payable to Áder to 50,000 Hungarian forints (approx. €125 at the applicable exchange rate at the time of the decision), considering factors such as the company's expression of doubt regarding the statements, presentation of their context, and subsequent publication of Áder's response. Moreover, the *Kúria* noted that its readership could discern such 'soldiers' tales' without attaching significance to them. It concluded that no serious harm had been inflicted on Áder, and his public perception remained unchanged the publication notwithstanding.[14] Subsequently, Index.hu filed a constitutional complaint, arguing that the publication concerned a matter of public interest, namely the conduct of the President of Hungary during his military service. However, on 23 May 2017, the Constitutional Court deemed the complaint inadmissible, stating that the applicant had merely contested the courts' factual assessment, which fell outside the scope of review by the Constitutional Court.[15] Index.hu referred the case to the ECtHR, raising a complaint asserting that the requirement imposed by the domestic courts to compensate Áder for non-pecuniary damage constituted a violation of its right to FoE enshrined in Article 10 ECHR. The ECtHR declared the submission admissible.[16]

The applicant contended that Áder, as a former President of Hungary and a ruling party member, was a public figure and, therefore, a legitimate subject of criticism. They argued that the publication in question pertained to matters of public interest, specifically referencing a media campaign and the President's conduct during his military service, thus falling under the protection afforded to political speech.[17] Additionally, they asserted that

12 Id. para. 13.
13 Id.
14 Id.
15 Id. para. 14.
16 Id. paras. 16–17.
17 Id. para. 18.

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their actions were in accordance with journalistic ethical standards, as they had sought comment from the Office of the President, and published the reply in full. The article presented all relevant circumstances, including the political and societal context, and expressed scepticism regarding the truthfulness of the story.[18] Furthermore, the applicant contended that applying the rule of objective liability, which holds media outlets responsible for statements originating from third parties, was inconsistent with ECtHR jurisprudence under Article 10.[19]

The government argued that the domestic courts had provided adequate and pertinent justifications to warrant the interference with Index.hu's right to FoE.[20] It contended that the statements in question did not involve a matter of public interest as they were not related to the public actions or behaviour of the President.[21] Instead, the publication of these statements amounted to the spreading of false information and a violation of the personality rights of a public figure. The government asserted that using offensive or hurtful statements to demean others did not constitute an exercise of FoE.[22] Similarly, making statements that could be defamatory did not receive protection under FoE if the speaker either knew the statements were false or failed to exercise due diligence in verifying their accuracy.[23] According to domestic law, individuals spreading false statements were subject to objective liability. The applicant could only claim their right to FoE if they were unaware of the falsity of the information. Regardless, the applicant had published the statement without verifying its accuracy with the Office of the President prior to publication.[24]

The ECtHR has established general principles regarding the necessity of interference with FoE and restrictions on political speech or discussions on matters of public interest.[25] It is to be noted that while the ECtHR acknowledges the diversity of reporting methods, it also emphasizes that editorial discretion is not unbounded. The press must adhere to ethical standards, act in good faith, base its reporting on accurate facts, and provi-

18 Id.
19 Id. para. 19.
20 Id. para. 20.
21 Id. para. 21.
22 Id.
23 Id.
24 Id. para. 22.
25 Id. para. 23; *Morice v France (GC),* No. 29369/10, 23 April 2015, paras. 124–125; *Perinçek v Switzerland (GC),* No. 27510/08, 1 October 2015, para. 198.

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de reliable information. In this regard, the ECtHR recalled the *Jersild versus Denmark*[26] and the *Pedersen and Baadsgaard versus Denmark*[27] judgments, to underline that the press must respect the rights of others and act in good faith and in an accurate manner. Furthermore, it should provide reliable and precise information adhering to journalistic ethical rules.[28]

The Court distinguishes between reporting facts – despite their controversial nature – that contribute to a debate of general public interest and making sensational allegations about an individual's private life.[29] While reporting on matters of public interest enjoys robust protection under Article 10 ECHR, sensational and lurid news aimed at satisfying curiosity about someone's private life receives narrower protection. Consequently, FoE requires a more limited interpretation in such cases.[30] The ECtHR also highlighted that news reporting based on interviews or reproducing statements of others, whether edited or not, is considered essential for the press to fulfil its role as a 'public watchdog'.[31] Punishing journalists for spreading statements made by others in interviews would impede the press's contribution to discussions on matters of public interest unless there are compelling reasons to do so. In such cases, a distinction is made based on whether the statements originate from the journalist or are quotations from others.[32]

Neither party contested that the judgments of the domestic courts constituted an 'interference' with the applicant's exercise of the right to FoE. This interference was found to be prescribed by law, specifically Article 2:45(2) of the Hungarian Civil Code [the protection of reputation] and pursued the legitimate aim of protecting the reputation or rights of others, as stated in Article 10(2) ECHR. The ECtHR was tasked with determining whether this interference was necessary in a democratic society. In doing so, it examined the decisions of the Hungarian courts, considering all the facts of the case, including the publication in question and the circumstances surrounding it.[33]

26 *Jersild v Denmark (GC),* No. 15890/89, 23 September 1994, para. 31.
27 *Pedersen and Baadsgaard v Denmark (GC),* No. 49017/99, 17 December 2004, para. 78; *Index.hu v Hungary,* para. 24.
28 Id.
29 *Cf. Armonienė v Lithuania,* No 36919/02, para. 39; *Index.hu v Hungary,* para. 25.
30 *Index.hu v Hungary,* para. 25.
31 Id. para. 26.
32 Id.
33 Id. para. 27.

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The first circumstance taken into consideration was that Index.hu published the contested statements alongside a description of a campaign initiated by another media outlet to counter allegedly defamatory reports targeting opposition activists.[34] Additionally, it clarified that the story originated from A.V., who himself was uncertain about its accuracy. Moreover, the article suggested that A.V.'s story about Áder's drunken firing of his weapon was unlikely to be true due to the lenient penalty Áder had reportedly received.[35] In the domestic proceedings against Index.hu, the courts treated the statements regarding Áder as unrelated to his official conduct and not pertaining to a matter of public interest, thus falling outside the scope of the right to FoE.[36]

The Court disagreed with the domestic courts' conclusion that the right to FoE did not apply to Index.hu's actions. While A.V.'s statements could be seen as polemical, the ECtHR observed that the only statement referred to by the domestic courts as injurious to Áder's reputation was what the article described as a 'soldier's tale'.[37] However, the domestic courts did not analyse the article as a whole; instead, they focused solely on A.V.'s account, detached from its broader context. The Court emphasized that in cases like the present one, domestic courts should consider whether the context, public interest, or the author's intention justified the possible use of provocation or exaggeration.[38] However, the Court found that the national courts, in this case, improperly isolated the impugned statement from its context and apparent goal by solely focusing on the fact that it contained an allegation about Áder's private life. Consequently, they failed to take into account any considerations regarding the possible contribution of the article to the debate on a matter of public interest.[39]

At the time, Áder was President of Hungary and a prominent politician in the governing party. Despite this, the domestic court did not find these elements relevant to their assessment, as they believed the publication did not pertain to Áder's public functions and, therefore, did not relate to a matter of public interest.[40] As previously established by the Court, although news about the private life of public figures is typically for entertainment

34 Id. para. 28.
35 Id.
36 Id. para. 29.
37 Id. para. 30.
38 Id. para. 31; *cf. Balaskas v Greece,* No. 73087/17, 5 November 2020, para. 58.
39 *Index.hu v Hungary,* para. 31.
40 Id. para. 32.

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purposes, it also contributes to the variety of information available to the public and benefits from the protection of Article 10 ECHR.[41] Additionally, the public interest extends to matters capable of generating controversy or addressing important social issues.[42]

In this case, information about the President's conduct during his compulsory military service was not of intimate nature, and did not solely concern the private sphere.[43] Its publication was not merely to satisfy public curiosity but had political relevance, potentially arousing public interest regarding the President's approach to his responsibilities.[44] Furthermore, the Court noted that the story about the President's military service was part of reporting on a media initiative that was topical at the time, and had garnered public attention and engagement.[45] The primary reason for publishing the story was to draw attention to and illustrate that initiative, aimed at countering a perceived smear campaign against organizers of an anti-government demonstration, rather than gratuitously attacking Áder. Considering this broader context, the Court concluded that the impugned statement, when viewed in its proper context, constituted a comment on a matter of public interest.[46] Additionally, Áder, as a politician, willingly subjected himself to close scrutiny by both journalists and the public, requiring a higher degree of tolerance on his part.[47] Such tolerance did not however require him to accept factual inaccuracies and he was entitled to have his reputation protected.[48] This, in turn, should have been balanced against the public interest in an open political discussion. However, the domestic courts failed to perform this balancing act, or consider the contribution of the article to public debate or the expected scrutiny of Áder's actions.[49]

Regarding the content, form and consequences of the impugned statements, the ECtHR noted that the article contained defamatory statements of fact, as determined by the domestic courts.[50] However, the *Kúria* concluded that the publication did not seriously harm Áder because of his status,

41 Id. para. 33; *cf. Dupate v Latvia,* No. 18068/11, 19 November 2020, para. 51.
42 *Index.hu v Hungary,* para. 33.
43 Id. para. 34.
44 Id.
45 Id. para. 35.
46 Id.
47 Id. para. 36.
48 Id.
49 Id.
50 Id. para. 37.

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his ability to respond publicly, and the public's relatively low regard for such stories. The Court emphasized Index.hu's obligation under Article 10 to act in good faith, and provide accurate and reliable information adhering to journalistic ethics.[51] In this regard, it highlighted that Index.hu clarified A.V.'s imperfect recollection of the story, explained contradictions in his statements, and published Áder's response promptly.[52] However, the domestic courts did not consider these contextual factors or whether the applicant endorsed, approved, or supported the story's content. Instead, they held Index.hu liable based on objective liability, as per the Civil Code, for spreading a third party's untrue and injurious statement.[53] However, considering the extensive steps taken by the author to caution readers about the unreliability of the rumour being reported, the ECtHR found it difficult to reconcile the imposition of objective liability on the applicant with its role as a public watchdog. This imposition could impede the press's contribution to discussions on matters of public interest, contrary to established case law.[54] Given the above, the ECtHR unanimously concluded that the interference was not necessary in a democratic society; therefore, Article 10 ECHR had been violated. As the applicant did not submit any claims concerning damages, the Court considered no sum in this regard.[55]

3. The Relevant Case Law of the ECtHR

3.1. Assessment of 'Necessary Interference' in the Case Law of the ECtHR

The case law of the ECtHR shows that it does not dispute that national courts have a certain margin of appreciation in assessing the necessity and scope of interference with the FoE protected by Article 10 ECHR. If it concludes that the national fora have weighed the competing interests that can be identified in the given case according to the criteria laid down by the ECtHR then "serious reasons are required to substitute its own view for

51 Id. para. 38.
52 Id. para. 39.
53 Id. para. 40.
54 Id.
55 Id. paras. 41–44.

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that of the national courts".[56] However, the ECtHR reserved for itself the ultimate power to define what necessary interference was.[57] In exercising this power, it confines itself to examining the contested interference in light of the case as a whole, and deciding whether it was "proportionate to the legitimate aim pursued", and whether the reasons put forward by the national courts or authorities to justify it are relevant and sufficient. It also includes national legislation in its examination, and assesses its compatibility in the context of the application of the ECHR. In the ECtHR's understanding, the level of protection is notoriously high for speech on public matters, with the consistently repeated formula that the permissibility of the expression is not precluded by any degree of malice, or by the seriousness or forcefulness of the publication.[58]

It is obvious that there is also a small overlap, to a greater or lesser extent, between the cases relied on by the ECtHR for the general principles and the legal assessment of the case. In *Morice versus France,*[59] the first case cited in relation to restrictions on FoE, the ECtHR identified the adjective 'necessary' in the context of necessary interference with the FoE in a democratic society as referring to a "pressing social need in a democratic society". The assessment of 'necessary interference' depends essentially on the way interests are balanced, the criteria taken into account, the broader context of the case and the sanction imposed for the infringement.

The ECtHR's case law on the legal criteria of the conflict between the FoE protected by Article 10 ECHR and the right to privacy under Article 8 has evolved in a surprising number of ways, and not necessarily in the same direction.[60] Initially, the ECtHR did not treat them as 'competing rights' but considered the FoE to be the paramount interest, considering the protection of reputation to be a narrow exception.[61] However, since 2004, it has identified reputation as part of Article 8 ECHR (right to respect

56 *MGN Ltd v United Kingdom,* No. 39401/04, paras. 150 and 155; *Palomo Sanchez and others v Spain (GC),* Nos. 28955/06, 28957/06, 28959/06 and 28964/06, 12 September 2011, para. 57; *Bédat v Switzerland,* No. 56925/08, 29 March 2016, para. 54.

57 András Koltay, *New Media and Freedom of Expression.* Hart, Oxford, 2019, p. 28.

58 *Morice v France,* paras. 124–125.

59 Id.

60 The topic is discussed in detail by Tanya Aplin & Jason Bosland, 'The Uncertain Landscape of Article 8 of the ECHR: The Protection of Reputation as a Fundamental Human Right?' *in* Andrew T. Kenyon (ed.), *Comparative Defamation and Privacy Law,* Cambridge University Press, Cambridge, 2016, pp. 265–290.

61 *Lingens v Austria,* No. 9815/82, 8 July 1986, para. 38.

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for private life), which already had to be balanced with the right to FoE,[62] but only when Article 8 could be applied in the assessment of the case. Otherwise, the protection of reputation – in terms of its importance and its impact on the relevant decision – will revert to being one of the exceptions to Article 10 ECHR.

Enforcement is not automatic; the attack on reputation must attain a certain level of seriousness ('threshold test') which prevents the exercise of the right under Article 8 ECHR.[63] In *Karakó versus Hungary*,[64] the ECtHR distinguished private life from reputation, declaring that the latter (an external evaluation of a person) is not in itself linked to one's private life. In *Axel Springer versus Germany*[65] it clearly ruled out the applicability of Article 8 ECHR to harm to reputation as a foreseeable consequence of the person's own act, meaning where the harm was not related to an invasion of privacy in the strict sense. However, the right to privacy also implies a positive obligation of the state to protect not only the privacy of the individual but also their reputation – this way, 'privacy'also covers aspects of personal identity and reputation.[66] According to the ECtHR's approach in recent precedent-setting judgments, the protection under Article 8 can be invoked – once the threshold of seriousness is attained – if the offensive statements are capable of damaging the reputation of the person concerned, and their image in their professional and social environment.[67]

The general principles relating to the fair balance between the right to privacy and FoE were set out in *Couderc and Hachette Filipacchi Associés versus France*.[68] The criteria are *(i)* the contribution of the article to a debate of general interest; *(ii)* how well-known the person concerned is, and the subject matter of the reporting; *(iii)* the conduct of the person concerned before the article was published; *(iv)* the manner in which the

62 *Radio France and others v France,* No. 53984/00, 30 March 2004, para. 31; *Chauvy and others v France,* No. 64915/01, 29 June 2004, para. 70.

63 *Roberts v United Kingdom,* No. 59703/13, 5 January 2016, para. 40; *Popovski v the former Yugoslav Republic of Macedonia,* No. 12316/07, 19 February 2007, para. 88; *A. v Norway,* No. 28070/06, 9 April 2009, para. 64; *Axel Springer AG v Germany (GC),* No. 39954/08, 7 February 2012, para. 83.

64 *Karakó v Hungary,* No. 39311/05, 28 April 2009, para. 22.

65 *Axel Springer AG v Germany,* para. 83; later *Sidabras and Džiautas v Lithuania (dec.),* Nos. 55480/00 and 59330/00, 1 July 2003, para. 49.

66 *Ion Cârstea v Romania,* No. 20531/06, 28 October 2014, paras. 29–30.

67 *Drousiotis v Cyprus,* No. 42315/15, 5 July 2022, para. 47.

68 *Couderc and Hachette Filipacchi Associés v France (GC),* No. 40454/07, 10 November 2015, paras. 83–93.

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information was obtained, and its veracity; *(v)* the content, form and consequences of its publication; and *(vi)* the severity of the sanction imposed. In *Abbasaliyeva versus Azerbaijan,*[69] which most recently referred back to the above-mentioned decision, the ECtHR included in particular among the relevant criteria for balancing competing interests: *(i)* whether the publication contributed to the debate on public affairs; *(ii)* the status (general public visibility) and past conduct of the applicant; *(iii)* the content, form and consequences of the publication (including the severity of sanctions imposed on journalists or publishers[70]).

In its case law, the ECtHR distinguishes private individuals from persons acting as political or public figures. Accordingly, while a private individual unknown to the public may claim special protection of their right to privacy, this is not the case for public figures,[71] for whom the limits of critical comment are broader, as they are inevitably and knowingly exposed to the public, and must therefore have a particularly reduced expectation of privacy.[72] In the case-by-case analysis, the criteria mentioned in the previous paragraph apply.

3.2. Protection of Untrue Statements of Fact

In the case law of the ECtHR, the concept of public interest is very broad, and includes all matters regarding which the public's curiosity and interest may be justified, that arouse or significantly affect the public's interest. These matters include major debates involving a wide range of individuals, important social issues or problems that are of interest to the public.[73]

The protection of untrue statements of fact made in relation to public affairs is the most sensitive area of protecting reputation and honour, requiring a delicate balancing act by the courts to minimize the unavoidable harm to interests arising from conflicts between FoE and other rights. The

69 *Abbasaliyeva v Azerbaijan,* No. 6950/13, 27 April 2023.
70 *Von Hannover v Germany (No 2) (GC),* Nos. 40660/08 and 60641/08, 7 February 2012, paras. 109–113.
71 *Minelli v. Switzerland,* No. 14991/02, 14 June 2005; *Petrenco v Moldova,* No. 20928/05, 30 March 2010, para. 55.
72 *Ayhan Erdoğan v Turkey,* No. 39656/03, 13 January 2009, para. 25; *Kuliś v Poland,* No. 15601/02, 18 March 2008, para. 47; *Milisavljević v Serbia,* No. 50123/06, 25 May 2021, paras. 32–34; *Von Hannover v Germany (No 2),* paras. 108–113.
73 *Couderc and Hachette Filipacchi Associés v France,* para. 103.

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degree of liability for statements made in relation to public affairs is very low in the case law of the ECtHR, which often considers the burden of proof required by national law to be too strong an interference with the FoE. Of course, it is not excluded that the ECtHR may in some cases conclude that the statement of defamatory facts goes beyond the FoE guaranteed by Article 10 ECHR, even if it was criticism of a public figure.[74] In most cases, however, expression is given greater protection by the ECtHR than by national court judgments.

The large number of cases concerning the application of Article 10 ECHR renders the ECtHR's practice extraordinarily diverse. The individual cases involve, according to their relevance, both the permanent aspects of judgments and the particular circumstances of the case concerned. Cases can be grouped according to the source of the disputed statement. At one end of the scale are the decisions in which the ECtHR must assess national decisions on the defamer's own personal statement, and at the other end, there are decisions in which the press has relayed someone else's statement. In between the two extremes are various factual variations of the above characteristics. The assessment of cases is further nuanced by the evolving set of criteria developed by the ECtHR for the freedoms protected by the ECHR.[75]

In certain cases, the ECtHR noted that the immunity of untrue statements is justified since the false fact is irrelevant in terms of the content and message of the text. In such cases, it is not necessary to prove the veracity of the fact, or the defendant cannot be expected to do so because of the circumstances of the proof required. If it has been proven that the statement is untrue, but the defamation is relatively minor and limited in scope, and its publication occurred on a matter of important public interest, and the press has also satisfied the due diligence requirements of fact-checking, FoE must prevail over the rights of the person concerned.[76]

Whether the contested statement constitutes a statement of fact or a value judgement under the general distinction criterion is also related to

74 *Keller v Hungary (dec.),* No. 33352/02, 4 April 2006. The subject is discussed by András Koltay, 'The Regulation of the Defamation of Public Figures in Europe, with Special Emphasis on the Hungarian Legal System' *in* András Koltay (ed.), *Media Freedom and Regulation in the New Media World*, CompLex, Budapest, 2014, pp. 360–382.

75 An example for this is the criteria set out for managing the conflict of FoE with the right to privacy in *Axel Springer AG v Germany,* paras. 90–109.

76 *Tønsbergs Blad AS and Haukom v Norway,* No. 510/04, 1 March 2007, para. 101.

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the provability of the statement. In many cases, the defamer is exempt from the burden of proof on the grounds that speaking on a public matter is not a statement of fact but a value judgement. Opinions are more widely protected than untrue – or disputed – facts, and their judgment is also influenced by the use of language and the way in which they are expressed. It must be assessed whether the statement was exaggerated or objective, and whether the intention was to insult, stigmatise or neither. However, the use of insulting adjectives (such as "moron", "Nazi" or "neo-Fascist") does not automatically result in the sanction being justified.[77]

The distinction between statement of fact and value judgement formed the basis of the legal reasoning in *Makraduli versus the Former Yugoslav Republic of Macedonia.*[78] Opposition politician Jani Makraduli had been convicted twice for defamation. First, he made statements criticizing the head of the Macedonian intelligence service at an official press conference of the political parties. He alleged that the said person had abused his powers to influence the Macedonian stock market. Second, outlining his own party's investigation, he said that some state-owned land had been acquired by people who had close links to the Prime Minister. The Court concluded from the circumstances of the case that both cases constituted speech on public affairs, that the statements were made by Makraduli as vice-president of his party and as a member of Parliament, at an official press conference, and were therefore part of political speech, therefore subject to the high level of protection afforded under Article 10 ECHR.[79] Reiterating its previous formulation, the ECtHR did not consider it incompatible with Article 10 ECHR to require the defendant in the defamation proceedings to prove (by a reasonable standard) the veracity of the statement. At the same time, however, it cited the judgments in *Kurski versus Poland* and *Braun versus Poland.*[80] As explained in the decisions, if a private individual is involved in an important public debate, "the obligation to prove the factual statements may deprive the applicant of the protection afforded by Article 10". It found that, since Makraduli's statements just repeated the accusations already made public in the first case, he simply "put matters that

77 Judit Bayer, 'Az Emberi Jogok Európai Bíróságának 10. cikkellyel kapcsolatos joggyakorlatának egyes súlypontjai', *Állam- és Jogtudomány,* Vol. 58, Issue 4, 2017, p. 122.

78 *Makraduli v the former Yugoslav Republic of Macedonia,* Nos. 64659/11 and 24133/13, 19 July 2018.

79 Id. para. 65.

80 *Kurski v Poland,* No. 26115/10, 5 July 2016; *Braun v Poland,* No. 30162/10, 4 November 2014, cited in *Index.hu v Hungary,* para. 75.

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were of general interest up for public debate, which, in the Court's view, is the role of politicians and members of parliament, as representatives of the electorate". According to the ECtHR, it was "an unreasonable, if not impossible, task" to require Makraduli to prove the truth of his statement. And in the second case, Makraduli's statements "remained within the limits of admissible exaggeration or provocation", and were "fair comment on issues of legitimate public interest".[81]

In *Voskuil versus Netherlands*,[82] the journalist who wrote an article on police abuse refused to reveal his internal (police) source and so was sentenced to 17 days imprisonment. The Court did not dispute the Dutch government's concern about a possible damage to the reputation of the police, especially in cases where the underlying information is false. This fear was, however, tempered by the argument that, in a democratic state governed by the rule of law, the misuse of public power is a matter on which the public has a right to be informed. Accordingly, the ECtHR established that Article 10 ECHR had been violated. The Court considers it generally acceptable that, in the case of defamatory statements, the person making the statement shall be required to prove the veracity of the statement,[83] and does not consider such provisions of national law to be contrary to the ECHR *per se*. However, the ECtHR does not allow the burden of proof to be interpreted strictly, at least not in the case of public affairs.[84] As an example of permissive discretion, the press may in certain circumstances rely on rumours, as long as it reports on matters of public interest in an otherwise acceptable manner.[85]

The admissibility criterion for value judgements is that the statement must have some (appropriate) factual basis. If the number or the nature of the facts on which the criticism is based is sufficient, the opinion expressed on the matter does not exceed the permissible limits of expression. As long as the factual basis exists, there is also usually room for false statements of fact, which will not be relevant because of the public nature of the speech. In *Morice,* the ECtHR held that the applicant lawyer had put

81 *Makraduli v the former Yugoslav Republic of Macedonia*, paras. 78–79 and 81.
82 *Voskuil v Netherlands,* No. 64752/01, 22 November 2007, para. 70.
83 *Rumyana Ivanova v Bulgaria,* No. 36207/03, 14 February 2008, para. 39; *McVicar v United Kingdom,* No. 46311/99, 7 May 2002, para. 87.
84 Toby Mendel, *Freedom of Expression: A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights,* at https://rm.coe.int/16806f5bb3, p. 59; *Dalban v Romania,* No. 28114/95, 28 September 1999, para. 50.
85 *Thorgeir Thorgeirson v Iceland,* No. 13778/88, 25 June 1992, para. 65.

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forward a value judgement with a sufficient factual basis in the newspaper *Le Monde,* and that his comments on a matter of public interest did not exceed the right to FoE. The ECtHR therefore considered the conviction of the lawyer for defamation of two investigating judges to be contrary to Article 10 ECHR. Examining the contested passages in their context, the ECtHR found that the opinion expressed constituted a value judgement rather than a mere factual statement, since it reflected primarily an overall assessment of the conduct of the investigating judges during the investigation. Furthermore, the comments had a sufficient factual basis, and were not misleading. Nor could they be considered an unjustified attack on the reputation or integrity of the two investigating judges, since their aim was to reveal serious shortcomings in the justice system.[86]

The press, in the ECtHR's view, plays a prominent role in a democratic society, and has a duty to disseminate information and ideas on political and other matters of public interest, in accordance with its duties and responsibilities.[87] However, even in the case of serious matters of public interest, Article 10 ECHR does not guarantee a completely unrestricted FoE for the press. While enjoying the protection afforded by the ECHR, in performing their duties, journalists must follow the principles of responsible journalism. In other words, they must act in good faith, provide accurate and reliable information, present the views of participants in public debate in an objective manner, and refrain from sensationalism.[88] Journalistic freedom also allows for a certain degree of exaggeration or provocation; however, insults may fall outside the scope of the protection afforded by FoE, for example, if the sole purpose of the statement is the insult itself.[89]

There are also examples where the impact of a press article has a significant bearing on the limits of the exercise of expression. Ahead of the Romanian parliamentary elections, a journalist wrote an article about one of the candidates, claiming that he was willing to make any compromise in exchange for money, and that he was prepared to betray voters, his party and his country. In his opinion piece, the journalist described the details of the dispute in arbitration between the candidate and the financial institution that lent him money. The content of this article was also distributed by third parties on election leaflets, and the candidate lost his constituency

86 *Morice v France,* para. 166.
87 *Prager and Oberschlick v Austria,* No. 15974/90, 26 April 1995, para. 34.
88 *Ungváry és Irodalom Kft v Hungary,* No. 64520/10, 3 December 2013, para. 42.
89 Id. para. 43.

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by about 100 votes. The ECtHR agreed with the national courts' view that the journalist's aim was not to criticize the candidate's activities as a public figure, but rather to expose to the public his one-sided views on the lawsuit involving two private parties. The author of the article did not comply with the minimum standard of care, namely good faith, and made a sufficiently serious attack on the candidate's reputation, in violation of his reputation and in violation of his right to privacy under Article 8 ECHR. The candidate's right to privacy therefore took precedence over the right to FoE.[90]

The press is granted significant concessions in relation to the transmission of another person's statements. According to the ECtHR, when examining interviews, a distinction must also be made according to whether the disputed statements are made by the journalist or are quotes from others instead. This is important, because punishing a journalist for helping to disseminate another person's statements would seriously hamper the press in its contribution to the discussion of issues of public interest. In *Pedersen and Baadsgaard* a Danish court fined and ordered two television journalists to pay damages for defaming the Chief Superintendent in a documentary on a criminal case. The journalists claimed that the Chief Superintendent had falsified evidence to get X convicted, which the ECtHR found to be a provable factual statement. The series of questions posed by the journalists to the viewers "left the viewers with only two options, namely that the suppression of the vital part of the taxi driver's statement in 1981 had been decided upon either by the Chief Superintendent alone, or by him and the Chief Inspector of the Flying Squad jointly". The journalists based this statement on the taxi driver's testimony, took a position on its truth, and presented it to the viewers as fact. However, they did not attempt to support the accusation with other evidence. As far as the delimitation of liability between the interviewee and the journalist is concerned, the ECtHR stated that the Danish courts had convicted Jørgen Pedersen and Sten Baadsgaard for their own statements and not for the interviewed taxi driver's statement, which did not constitute a breach of Article 10 ECHR.[91]

There are also examples where the press makes allegations, but the ECtHR classifies these statements as value judgements rather than statements of fact. In *De Carolis and France Télévisions versus France,*[92] Patrick de Ca-

90 *Prunea v Romania,* No. 47881/11, 8 January 2019, paras. 35–36.
91 *Pedersen and Baadgaard v Denmark,* paras. 69 and 75–76.
92 *De Carolis and France Télévisions v France,* No. 29313/10, 21 January 2016.

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rolis made a documentary on 11 September 2001, in which he accused Prince Turki Al Faisal of Saudi Arabia, one of the subjects of the documentary, of aiding and financing Al-Qaeda when he was head of intelligence in Saudi Arabia. Some of the statements criticized the prince for providing material support for Al-Qaeda at a time when the organization's terror projects were no longer in doubt, suggesting that he had personal responsibility for the September 11 attacks. According to the documentary, the implication was that only diplomatic considerations (the prince's appointment as ambassador to the United States and the diplomatic immunity he enjoyed as a result), and not the weakness of the charges against him, could explain his impunity. The prince successfully sued the documentary filmmaker and another journalist for defamation.

However, the ECtHR found that the judgment violated Article 10 ECHR. It again started from the premise that freedom of the press – often in the form of news reports – plays a fundamental and vital role in the proper functioning of a democratic society, and in particular, it highlighted the role of the media as a public watchdog. For this reason, punishing a journalist for helping to disseminate another person's statements during an interview would seriously hamper the contribution of the press to a democratic society, and hence would require serious justification. The documentary undoubtedly dealt with a matter of public interest, and the prince was a politically exposed person, so the possibility of restricting FoE was significantly reduced. The allegations made in the documentary were qualified by the ECtHR as value judgements, with the Court concluding that they had a sufficient factual basis.[93]

Political and investigative journalism enjoys a high level of protection, in particular because investigative journalists are prevented from reporting on matters of public interest if they risk being sentenced to prison or banned from practising their profession as a sanction for unjustified attacks on the reputation of private individuals. The chilling effect of the fear of such sanctions on the exercise of journalistic freedom is obvious and harmful to society as a whole.[94] Additionally, the task of such journalists is to inform accurately, and to warn the public about undesirable social phenomena as soon as the relevant information comes into their possession.[95] However, such journalists are also subject to the standard rules of journalism, the

93 Id. paras. 44–46, 52–53 and 57.
94 *Mosley v United Kingdom,* No. 48009/08, 10 May 2011, paras. 129 and 113–114.
95 *Cumpănă and Mazare v Romania,* No. 33348/96, 10 June 2003, para. 96.

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responsibility not to publish facts that they know or should have known to be dubious.[96]

The case law of the ECtHR is therefore clear that to establish liability for false information published on a matter of public interest, it is essential to examine the conduct of the person who disclosed it. Liability cannot be excluded either for one's own statements or for information received from others. If the applicant acted in good faith on the basis of the information available them and which they reasonably believed to be true, their statement of fact is protected by FoE even if it is subsequently proven to be false.[97] False claims by professional journalists are protected if they acted in good faith in order to provide accurate and reliable information to the public in accordance with journalistic ethics.[98]

3.3. Public Visibility and Past Behaviour of the Public Figure Concerned

The ECtHR has consistently held from the outset that the limits of permissible criticism of public figure politicians (and certain high-ranking civil servants) are wider than those applicable to average citizens.[99] A politician inevitably and consciously exposes all their expressions, manifestations and actions to the scrutiny of journalists and public opinion alike, and must therefore show a greater degree of tolerance, especially when they make public statements that are open to criticism. Of course, politicians have the right to protect their reputation, even if they are not acting as private individuals, but this protection must be balanced against the interest of the open discussion of political issues.[100] Statements made in connection with politicians and their public activities are generally afforded a high level of protection.

The allegation about a high-ranking civil servant at the mayor's office in Galați, that the private taxi business he owned was incompatible with his status as a civil servant was, contrary to the national courts' judgment, a

96 *Rumyana Ivanova v Bulgaria,* para. 65.
97 *Lepojić v Serbia,* No. 13909/05, 6 November 2007, paras. 77–78.
98 *Niskasaari and Otavamedia Oy v Finland,* No. 32297/10, 23 June 2015, para. 58.
99 *Lingens v Austria,* paras. 42, 31 and 36.
100 For example, *Oberschlick v Austria (No. 1),* No. 11662/85, 23 May 1991, para. 29; *Lopes Gomes da Silva v Portugal,* No. 37698/97, 28 September 2000, para. 30; *Unabhängige Initiative Informationsvielfalt v Austria,* No. 28525/95, 26 February 2002, para. 36.

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factually unfounded allegation, not a value judgement, and its publication therefore amounted to an invasion of privacy.[101] However, people who are considered public figures based on their profession have very little protection against criticism. A journalist criticising Turkish Prime Minister Recep Erdoğan claimed that the Prime Minister has become a "nervous wreck" and "is suffering from a psychopathic aggressive illness". The ECtHR ruled that the Turkish courts' convictions for defamation constituted an unnecessary interference with FoE. It explained that the applicant's comments and views concerned current events and had a bearing on issues such as the allegedly illegal conduct and corruption of high-ranking politicians and public figures, and the Prime Minister's alleged aggressive response to various incidents or events. There is no doubt that these were important issues in a democratic society, where the public had a legitimate interest in knowing about them, and that were part of the political debate. In this respect, the ECtHR recalled the essential function of the press in a democratic society, and that high-ranking politicians are obliged to show a higher degree of tolerance towards criticism.[102]

However, offensive opinions without any factual basis are not covered by the Convention's protection. The statement in *Petrenco versus Moldova* about the chairman of the Association of Historians, a university professor, suggesting that his university position and his subsequent career as a historian were the result of his cooperation with the security agency of the Soviet Union (CSS), could not be afforded protection. The allegation that a person cooperated with the CSS is not mere speculation but a historical fact that can and must be supported by sufficient evidence, and therefore clearly constitutes a statement of fact. The allegations were capable of seriously discrediting the applicant and his views on the question under discussion. The ECtHR made the statement of principle that a person's status as a politician or other public figure does not remove the need for a sufficient factual basis for statements that damage their reputation, even where such statements are considered to be value judgements and not statements of fact. As there was no indication that the applicant had collaborated with the CSS, it was not appropriate to make reference to the margin for 'provocation' or 'exaggeration' permitted for press products in general. The case concerned a distorted presentation of reality, for which no factual basis

101 *Jalbă v Romania,* No. 43912/10, 18 February 2014.
102 *Tuşalp v Turkey,* Nos. 32131/08 and 41617/08, 21 February 2012, paras. 44–45.

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whatsoever had been shown, therefore the allegation concerned was a mere speculation on the part of the author, whereby he overstepped the limits of acceptable comments.[103]

There is also a significant difference between the protection of public and non-public figures in relation to revisiting events of the past. In its recent case law, the ECtHR, while not considering the right to be forgotten to be absolute, recognises that, in view of the passage of time, individuals must be allowed to rebuild their lives without being confronted by members of the public with their past mistakes.[104] It is doubtful, however, to what extent the protection against FoE would be reduced if the case involved a public issue, and the information concerned a public figure. The ECtHR also considers arguments in favour of the primacy of other rights in its case law related to Article 10 ECHR.[105]

The protection of privacy under Article 8 ECHR prevails over the FoE when the purpose of the disclosure of private information is to satisfy the mere curiosity of the public, but even then it is essential that the matter does not have a bearing on any social discourse.[106] Accordingly, a politician's previous criminal conviction is an issue that, together with other public behaviour, may be a relevant factor in assessing whether they are fit to exercise political functions.[107]

The personal moral integrity of high-ranking officials is a matter of strict public scrutiny in a democratic society. Therefore, the highest-ranking officials – elected through a political process – must accept that their past public and political conduct remains subject to ongoing public scrutiny. If the disclosure did not concern the private life of the person in question but their past public behaviour, which was to some extent related to their

103 *Petrenco v Moldova,* paras. 65–66.

104 *Hurbain v Belgium (GC),* No. 57292/16, 4 July 2023, paras. 149–157.

105 For instance, *Mediengruppe Österreich GmbH v Austria,* No. 37713/18, 26 April 2022. In this case, the media were prohibited from publishing a photograph of a former prisoner who, according to the text, was a convicted neo-Nazi. The person concerned (H.S.) served his sentence and was released sixteen years before the media outlet published an article about an Austrian presidential candidate during ongoing presidential elections, which included an old photo of H.S. among right-wing politicians.

106 *Khadija Ismayilova v Azerbaijan*, Nos. 65286/13 and 57270/14, 10 April 2019; *Armonienė v Lithuania*; *Dupate v Latvia.*

107 *Schwabe v Austria,* No. 13704/88, 28 August 1992, para. 32.

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present situation, they are obliged to be more tolerant of disclosures concerning them.[108]

4. A Critique of the ECtHR's Judgment

There is no doubt that Áder was at the time of the publication Hungary's highest ranking public official, therefore, he had to be considered a politically exposed person. Both the national courts and the ECtHR have unanimously held that the (now former) President of Hungary is obliged to show a high degree of tolerance to expressions of opinion. However, on the question of whether he should also tolerate the impugned untrue statement of fact, the national courts have ruled in the negative. The reason for this was fundamentally that, on the basis of the circumstances of the case, they did not consider the statement to be related to the debate on public affairs, therefore concluded that the level of protection of personality rights that he sought was even higher. As mentioned above, the Hungarian courts came to this decision on the basis of an analysis of the specific situation and not on the basis of the theoretical suitability of the statement to be considered as one pertaining to public affairs. Thus, the Hungarian courts may have come closer to a realistic assessment of the article than the ECtHR.

4.1. Assessment of the Link to a Case of Public Interest

When defining the general basis of a certain judgment, in the majority of the cases cited from earlier case law, the public interest nature of the published information did not require any particular reasoning either by the national courts or by the ECtHR. The classification of the massacres and deportations suffered by Armenian people as genocide or their public denial (*Mihdi Perinçek versus Turkey*[109]), the malfunctions of the justice system (*Morice*, *Pedersen and Baadsgaard*), the revealing of the line of descent claiming the status of monarch of Monaco (*Couderc and Hachette Filipacchi Associés*) and the transparency of public funds being spent

108 *Ungváry és Irodalom Kft. v Hungary,* para. 64.
109 *Mihdi Perinçek v Turkey,* No. 54915/09, 29 May 2018.

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(*Timpul Info-Magazine and Anghel versus Moldova*[110]) are clearly matters of public interest.

In *Index.hu,* however, the ECtHR, somewhat detaching itself from the undoubtedly important social issues mentioned above, found that information concerning the conduct of the President of Hungary during his compulsory military service was not without political importance, and could have aroused the interest of the public with regard to the way in which the President 'approached or assumed his responsibilities'. The finding is far from conclusive, and the logical link that the ECtHR has drawn between the one-off (unproven) behaviour of the twentysomething Áder as a conscript and his professional conduct decades later is somewhat weak, as will be explained below.

The public is naturally interested in the private lives of politicians, an interest based on the assumption that, in the protected sphere of private life, everyone, including politicians, tends to be more direct and therefore more honest. Such information may even provide some insight into the credibility of the person concerned. However, it seems rather doubtful that any relevant information about the personality of a politician can be derived from his behaviour during an event occurred 36 years before, given that, by now, the basic social and existential characteristics of that personality have radically changed. The ECtHR nevertheless held that, despite the considerable distance in time, the story from decades ago could still have an influence on events in the present, meaning that, in such a highly theoretical and indirect context, there is no room for either reality or validity. The public interest, as the ECtHR itself understands it, includes matters that may give rise to controversy or concern important social issues, in which the community's members' exchange of ideas, and the public discourse on the subject are in themselves valuable.

The judgment conspicuously lacks a clear explanation of what makes this speech a public matter, nor does it define the public matter in question. On the one hand, the ECtHR stressed that the interest of the public in the way in which the President 'approached or assumed his responsibilities' has political significance. This would imply that the ECtHR classified the story as speech made concerning a public matter because of the issue of the personal credibility of politicians. On the other hand, however, the ECtHR pointed out that the communication was made against the background of

110 *Timpul Info-Magazine and Anghel v Moldova,* No. 42864/05, 27 November 2007.

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a topical event, an anti-government media campaign, and concluded that the contested statement, seen 'in its proper context', constituted a comment on a matter of public interest.[111] However, the ECtHR did not attach any importance to the fact that the case was not related to a media campaign, the event it described as 'proper context'. In other words, the occasion of the speech was a private initiative launched by a blogger in reaction to what he called a 'character assassination', as an expression of sympathy with the opposition activists, inviting people to share their own stories of minor infractions on Facebook.

The initiative did not generate a general debate; other publications and commentators did not deal with it, and only Index.hu picked it up and built its article on the part that was most interesting to it, the decades old story concerning the President of Hungary. The explicitly tabloid writing was geared towards satisfying the public's hunger for gossip. Index.hu certainly gave the source of the news and its background, but it did not consider the story of any other person worth sharing, focusing only on the recollection regarding the President of Hungary, and thus not aiming for a comprehensive or accurate presentation or reporting. The Facebook call to action in question also raises legal concerns about the good faith of the press, as the newspaper transmitted content without any fact-checking, which encouraged its target audience to share reports of violations, in essence, to knowingly discredit themselves or others.

The ECtHR noted that the domestic courts failed to assess the contribution to the public interest debate ("they failed to include in their assessment any considerations as regards the contribution of the article to debate on a matter of public interest"[112]), but it itself omitted these arguments as well. The Hungarian courts also disregarded the considerations as regards the contribution to debate on a matter of public interest because they unanimously concluded that the contested statements did not constitute speech on public affairs, since the speech was unrelated to the President's public duties, public appearance or conduct. Consequently, the public interest element was not examined in isolation from the circumstances of the case, at a theoretical level, but on the basis of the specific content of the article, and it was concluded that there was no public interest element. If a broader context had been examined, it would have left litigants vulnerable

111 *Index.hu v Hungary,* para. 35.
112 Id. para. 36.

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to uncertain circumstances, which they should not have expected at all when they brought the action.[113] Obviously, the determination of the public interest nature of a statement should not require any special consideration, as there is no need for evidence in this respect: the classification must be made by the courts on the basis of general available knowledge. The definition of the public matter must therefore be clear, and the connection of the communication to a public matter must not be vague, indirect, or require further interpretation, and thus be uncertain. The ECtHR not only failed to clarify the definition of the public matter but also disregarded the link between the communication and the public matter, and thus based its decision, essentially without justification, on the presumption of FoE standards that can be asserted with regard to public matters.

On the other hand, the ECtHR acknowledged that the national courts had assessed the contested communication as a defamatory statement, as the allegations were false. It is a general principle that communications in the public interest or that contribute to the public debate are highly protected by Article 10 ECHR, since the very concept of a democratic society is to ensure freedom of political debate and the free and open discussion of issues of public interest. According to the ECtHR, however, the protection of FoE does not extend to knowingly false statements of fact, because such statements go beyond the limits of permissible criticism.[114] The question of how the communication contributed to the debate on public affairs is therefore even more difficult to answer. Contribution to a dispute on a matter of public interest is conceptually excluded in the case of false statements of fact, and the ECtHR circumvented this situation by not assessing the contribution in terms of its result but, unlike the national courts, in terms of its mere theoretical possibility.

The judgment held that the information could have aroused the interest of the public with regard to the way in which the President approached or assumed his responsibilities.[115] This was sufficient justification for reporting the news, regardless of the fact that the story was untrue and damaging to the President's personal reputation, and there was no evidence brought forward in any of the lawsuits that the President's responsible conduct was of concern to anyone based on the article. The possibility for the ECtHR

113 For a similar approach, involving the risks inherent in the requirement of an extended context, *see* Koltay 2014, p. 383.

114 *Nilsen and Johnsen v Norway,* No. 23118/93, 25 November 1999, para. 49.

115 *Index.hu v Hungary,* para. 34.

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to use the former, hypothetical consideration was opened by the fact that the information did not fall within the strictly private sphere of life (for example, it was not of sexual nature or concerning health).

As explained by the ECtHR in another case,[116] the limits of acceptable criticism are even wider where the criticism is directed at a politician. However, when considering the limits of the right to FoE, it must also be taken into account whether the contested expression concerns the individual's private life or their conduct in an official capacity. In our view, the Hungarian courts have taken the right position on this issue and, acting consistently, have given the former the required significance. It is noteworthy that the ECtHR did not actually carry out, at least not in full, the interest balancing test it had itself previously established between the President's right to privacy protected by Article 8 ECHR and the right guaranteed by Article 10. Although the statement of reasons for the decision mentioned the public interest, the status of the politician concerned, the contribution to a debate on an issue of public interest, the classification of the statements, the specific circumstances of the case and a brief analysis of the sanction imposed, they were all from the perspective of a breach of Article 10 ECHR, while a comparison with the right to protection guaranteed by Article 8 was not made. The ECtHR did not even touch upon the aspects relating to the protection of reputation, although it had done so in other cases with similar underlying facts. In *Ruusunen versus Finland,*[117] a Finnish court convicted the author, who previously had a secret affair with the Prime Minister, for publishing a book about their relationship, for disseminating information violating personal privacy, and fined her. The court found that the passages describing intimate details in the book unnecessarily violated the core areas of the Prime Minister's protected private life. The applicant has the right to write about her own private life, but the consent of another person is always required to disclose intimate details of their private life, respectively. The political function of the Prime Minister, his public position, is irrelevant in this respect.

The ECtHR agreed with the national court's judgment and declared that the relevant principles recently set out by it must be applied when examining the necessity of an instance of interference with the right to FoE in the interests of protecting the reputation or rights of others. When the right to FoE is being balanced against the right to respect for private life, the following criteria must be taken into account: the contribution to a debate of general interest, how

116 *Lepojic v Serbia,* No. 13909/05, 6 November 2007, para. 75.
117 *Ruusunen v Finland,* No. 73579/10, 14 January 2014.

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well-known the person concerned is, what the subject of the report is, the prior conduct of the person concerned, the method of obtaining the information and its veracity, the content, form and consequences of the publication, and the severity of the sanction imposed. According to the ECtHR, the former Finnish Prime Minister was a public figure at the time the challenged book was published, and therefore had to endure more public scrutiny – which could have a negative impact on his honour and reputation – than a private individual. The book focused on the applicant's private life, but also contained elements of public interest. The publication of the book was therefore justified in so far as the public has a right to information on issues of public interest. The ECtHR also examined the severity of the sanction imposed on the applicant, which was a fine of only €300, and the fact that no entry of the conviction was made on the applicant's criminal record, and therefore found the sanction to be reasonable.[118] Similar assessments have been made in other cases.[119]

Some have argued that the Court's practice is inconsistent, because in cases where the defamatory allegations clearly relate to the professional activities of public figures (*Karakó, Polanco Torres and Movilla Polanco versus Spain,*[120] *Pipi versus Turkey* and *Ümit Bilgiç versus Turkey*[121]), the ECtHR is less willing to use the framework of the balancing test of the rights under Articles 8 and 10 ECHR, as in *Morice*. Some critics describe the ECtHR's practice as vague because sometimes, as in *Von Hannover (No 2)*[122] and *Axel Springer*,[123] it made assessments according to the five or six criteria set out in advance, while in other cases, it evaluates interference solely in light of Article 10 ECHR, applying different criteria, and further restricting the margin for manoeuvre of the national authorities of the defendant state.[124]

118 Id. para. 42–43, 47, 49 and 53.

119 *Pfeifer v Austria,* No. 12556/03, 15 November 2007; *Saaristo and others v Finland,* No. 184/06, 12 October 2010.

120 *Polanco Torres and Movilla Polanco v Spain,* No. 34147/06, 21 September 2010.

121 *Pipi v Turkey,* No. 4020/03, 12 May 2009; *Ümit Bilgiç v Turkey,* No. 22398/05, 3 September 2013.

122 *Von Hannover v Germany (No 2).*

123 *Axel Springer AG v Germany*.

124 Inger Høedt-Rasmussen & Dirk Voorhoof, 'A Great Victory for the Overall Profession of Lawyers', *Strasbourg Observers,* 6 May 2015, at http://strasbourgobservers.com/2015/05/06/a-great-victory-for-the-overall-profession-of-lawyers/#more-2848.

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4.2. Assessment of Defamatory (Untrue) Facts

The ECtHR considered the contested statements in *Index.hu* to be statements of fact and accepted that they were untrue. It was therefore expressly unreasonable (unnecessary) to invoke the element of its practice on the limits of tolerance, namely, that the person concerned was not under an obligation to tolerate factual inaccuracies. That element refers to the fact that journalistic freedom implies the possibility to use a certain degree of exaggeration or even provocation.[125] However, factual inaccuracy (in other words, irrelevant factual error) and untruthful fact material are not equally judged, nor do they enjoy the same degree of protection. However, the ECtHR did not attach any importance to this, and was therefore inconsistent even in its own practice. It is then an open question whether falsehood should be considered a provocation or mere exaggeration, given that the defamatory allegation of drunken shooting had no factual basis whatsoever.

The statement "one must not lie, not even to the detriment of a public figure"[126] was the lesson of the case in which the ECtHR declared, in relation to information that was clearly false, that such a statement of fact could not be construed as permissible 'exaggeration' or 'provocation'.[127] In another case, in *Flux versus Moldova,* the ECtHR developed an interpretation that FoE cannot give a newspaper the absolute right to accuse people of crimes in an irresponsible manner, without a factual basis, and without offering the possibility to refute the accusations. According to the judgment, the right to public disclosure of information has its limits, and a balance must be struck between this right and the rights of victims. The ECtHR also took into account that the newspaper had been ordered in the civil action to pay a relatively modest amount of damages and concluded that the applicant newspaper had acted with blatant disregard for the duties of responsible journalism and that the interference with FoE was justified.[128]

In *Index.hu,* the President's juvenile self was accused of a military offence without factual basis. The unfounded accusation of a criminal offence has been explicitly condemned by the ECtHR in other cases with similar facts.

125 *Dichand and others v Austria,* No. 29271/95, 26 February 2002, paras. 40–41.
126 Zoltán Tóth J., *A büntetőjogi rágalmazás és becsületsértés,* Médiatudományi Intézet, Budapest, 2017, p. 201.
127 *Radio France and others v France,* para. 38.
128 *Flux v Moldova,* No. 22824/04, 29 July 2008, paras. 31–32 and 43.

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In *Filatenko versus Russia,*[129] the applicant's good faith was considered beyond doubt because there was no indication that his intention was to accuse anyone of committing a criminal offence. This could hardly be said of the interviewee or the newspaper in *Index.hu*. The Facebook call to action specifically encouraged users to disclose various minor infractions voluntarily, and the applicant newspaper published such a story. The ECtHR has denied the right of national courts to consider repeated allegations of drunken shooting to be of a nature and gravity capable of damaging honour and reputation,[130] while in other cases it has stressed that national courts are in a better position to ascertain the underlying intention of the contested passages, to assess how the public would interpret and react to such sentences,[131] and to determine the relevant facts and to carry out their legal analysis.[132]

The relevant circumstance in striking a balance between the right to privacy and FoE, as explained in *Filatenko,* namely the 'modest' (€125) compensation (similar to the €300 fine imposed in *Ruusunen* as a reasonable sanction) was also met in *Index.hu,* but again the ECtHR assessed it inconsistently. It did not take the amount of damages into account at all in balancing the conflicting rights, but inferred the extent of the harm caused from it.[133] It is quite likely that it would not have done so if the amount imposed by the national courts had not been such a trivial amount, but would have constituted a significant financial burden on the media outlet concerned. The argument the ECtHR used therefore lacked persuasive force.

4.3. Assessing the Ethical Responsibilities of the Press

The press must, to a certain extent, comply with certain ethical standards. Violations of these standards, mostly set out in professional codes of conduct for journalists, can influence court decisions on the scope of media

129 *Filatenko v Russia,* No. 73219/01, 6 December 2007.
130 *Index.hu v Hungary,* para. 37.
131 *Jalbă v Romania,* para. 33.
132 *Ringier Axel Springer Slovakia, A.S. v Slovakia,* No. 41262/05, 26 July 2011, para. 109; *Soltész v Slovakia,* No. 11867/09, 22 October 2013, para. 52.
133 *Index.hu v Hungary,* para. 37.

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freedom. It is uncertain to what extent the 'enforced ethics'[134] by the courts impose a real obligation specifically on journalists, or whether only the press can be the addressee of these standards. The ECtHR has repeatedly taken a position on the issue, stating that

> "by reason of the 'duties and responsibilities' inherent in the exercise of the freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism."[135]

According to Jan Oster, the ECtHR applies standards of 'ethical journalism' and 'responsible journalism' in its jurisprudence.[136]

In *Index.hu,* the ECtHR found that the applicant had complied with the requirements of ethical, good faith journalism.[137] The applicant company specified that the source of the information did not perfectly remember the story, explained the contradictions in his statements, and published the President's reaction on the same day.[138] The applicant has not expressed any endorsement, approval or support of its content.[139]

> "As part of their role of 'public watchdog', the media's reporting on 'stories' or 'rumours' – emanating from persons other than the applicant – or 'public opinion' is to be protected where these are not completely without foundation."[140]

This reasoning is problematic for several reasons. *(i)* First, Index.hu did not wait for the reply from the Office of the President, which arrived within the expected timeframe, hours after the publication of the article. However, this time is not short enough to prevent the article, which was

134 Thomas Gibbons, '"Fair Play to All Sides of the Truth": Controlling Media Distortions', *Current Legal Problems,* Vol. 1, Issue 1, 2009, p. 311.

135 *See e.g. Fressoz and Roire v France,* No. 29183/95, 21 January 1999, para. 54; *Bladet Tromsø and Stensaas v Norway,* No. 21980/93, 20 May 1999, para. 65; *Bergens Tidende v Norway,* No. 26132/95, 2 August 2000, para. 53; *Selistö v Finland,* No. 56767/00, 16 November 2004, para. 54.

136 Jan Oster, 'The Press Freedom Jurisprudence of the European Court of Human Rights' *in* Paul Wragg & András Koltay (eds.), *Global Perspectives on Press Regulation, Vol. 1, Europe,* Hart, Oxford, 2023, pp. 247-248.

137 *Index.hu v Hungary,* para. 38.

138 Id. para. 39.

139 Id.

140 Id.

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left without reflection for a few hours, from having a harmful effect. It is short enough, however, to be expected under the rules of journalistic ethics, especially as the report was not on a topical public issue that would have justified extreme haste. *(ii)* Second, the applicant did not update the newspaper article with the President's response, but rather published it in a separate article (the original article is still available without the reflection added). *(iii)* Third, the applicant gave the report an attention-grabbing title, highlighted the untrue statements of fact in the lead of the article, and only expressed doubts about their veracity at the end of the article. This meant that, given general reading habits, most readers would not have been informed about them.

The truly ethical journalistic behaviour would have been for Index.hu to wait for the President's response, and to investigate the truth of the allegations, which could have been checked quite easily, using the tools of investigative journalism, and not only to repeat the allegations in the article but also to indicate the result of this investigation, which would in all likelihood have concluded that the allegations were not true.

4.4. Conclusions

The ECtHR highlighted two circumstances of the case, which it considered to be of paramount importance in its case law. In order to establish a connection with a public matter, it unduly broadened the range of circumstances that could be taken into account, and then identified the existence of a connection with a public matter without providing convincing reasons. The status of the person concerned was addressed formally, thereby placing the protection of FoE within a different framework. Departing from its previous forward-looking decisions, the ECtHR did not even seek to strike a fair balance between the interests protected by Articles 8 and 10 ECHR, and did not take any of its statements of principle on the protection of the privacy of public figures into account. It incorrectly assessed the circumstances of the publication of the contested statements, and misjudged the minimum care required of journalists, ignoring the fact that the newspaper had only formally provided the opportunity for a rebuttal. The newspaper had decided to publish the article before the expiry of a reasonable period of time for reply, and therefore its good faith could not have been established in any event. This should necessarily have been taken into account in the assessment of the case, since the ECtHR did not call into question the

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facts established by the national courts. The Hungarian courts examined and assessed – in the context of the applicable sanction – the diligence of the media outlet, despite the fact that they had taken their decisions with reference to the strict liability under national law. Contrary to its well-established case law in this respect, the ECtHR did not consider the nature of the sanction applied and the amount of the financial compensation to be reasonable, though the sum of it was very low, even by national (Hungarian) standards.

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Part VI
Hungarian State Practice

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Constitutional Identity in Hungary

Endre Orbán[*]

Abstract

The concept of constitutional identity appeared in the Hungarian Constitutional Court's jurisprudence along with the fundamental rights reservation and the protection of sovereignty in 2016. This paper critically analyzis the interpretative issues raised by the Hungarian concept of constitutional identity as developed by the Constitutional Court and attempts to outline how the Hungarian notion relates to the doctrinal solutions established in other legal systems. To do so, the paper first places the events associated with the concept of identity in a chronological order; it then presents and analyses the two identity decisions adopted by the Constitutional Court thus far; and finally, it makes some concluding remarks on the possible future doctrinal development of the Hungarian concept of constitutional identity.

Keywords: constitutional identity, national identity, constitutional interpretation, Constitutional Court, Hungary

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1. Introduction

The Hungarian Constitutional Court (HCC) has consistently sought to ignore the EU law aspects of the cases before it: it has neither reviewed the constitutional conformity of EU law (apart from the amendment of the founding treaties) nor did it assess the conformity of national legislation with EU law.

With regard to the first point, in its decision on the constitutionality of the Lisbon Treaty, the HCC stated the following:

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> "The CJEU has jurisdiction to give an authentic interpretation of the founding and amending treaties of the European Union and of the legislation known as secondary or derived legislation, regulations, directives and other norms of European law.
> However, there is nothing to prevent the Constitutional Court from relying on the specific provisions of the founding and amending treaties of the European Union, and in this case the Treaty of Lisbon, in relation to the case before it, without giving or requiring their own interpretation."[1]

With regard to the second point, in *Decision No. 8/2011. (II. 18.) AB* on the dismissal of government officials without justification, the HCC confirmed that "the Constitutional Court has no jurisdiction to examine whether a [national] law violates Community law".[2]

Initially, it seemed that the entry into force of the new constitution of Hungary, the Fundamental Law of Hungary would not change this approach: in *Decision No. 33/2012. (VII. 17.) AB* on the issue of the forced retirement of judges, a case of particular rule of law relevance, the HCC maintained its reticence towards the scrutiny of EU law.[3] One particularly interesting attribute of the case is that, in parallel with the proceedings before the HCC, infringement proceedings were pending before the CJEU. The HCC, however, in line with its attitude of distancing itself from EU law, relied on a creative interpretation of the law and adjudged the case as a purely constitutional case by developing the right to judicial independence as guaranteed by the Fundamental Law of Hungary.[4]

Despite this reluctant attitude,[5] the HCC has forced ordinary courts to justify their decisions when not initiating a preliminary ruling procedure. In fact, in *Decision No. 26/2015. (VII. 21.) AB*, the examination of the CILFIT conditions[6] was brought to the fore in the context of the right to

1 Decision No. 143/2010. (VII. 14.) AB, ABH 2010, 698, 703.
2 Decision No. 8/2011. (II. 18.) AB, ABH 2011, 49, 96.
3 Attila Vincze, 'Odahull az eszme és a valóság közé: az árnyék az szuverenitás-átruházás az Alkotmánybíróság esetjogában', *MTA Law Working Papers,* 2014/23, p. 11.
4 The legislation in question was also later found by the CJEU to be contrary to EU law: Judgment of 6 November 2012, *Case C-286/12, Commission v Hungary,* ECLI:EU:C:2012:687.
5 László Blutman & Nóra Chronowski, 'Hungarian Constitutional Court: Keeping Aloof from European Union Law', *ICL Journal,* Vol. 5, Issue 3, 2017, p. 341; Ernő Várnay, 'Az Alkotmánybíróság és az Európai Unió joga', *Jogtudományi Közlöny,* Vol. 62, Issue 10, 2007, p. 436.
6 Judgment of 6 October 1982, *Case C-283/81, CILFIT,* ECLI:EU:C:1982:335.

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fair trial in relation to the obligation to provide reasoning. Surprisingly, in this decision, the HCC itself examined the EU law context of the case and concluded that "in the specific case, Community law was not applicable and, therefore, there was no possibility to initiate a preliminary ruling procedure".[7]

Nevertheless, the real turning point in the HCC's approach took place in 2016, when the concept of constitutional identity appeared in the HCC's jurisprudence along with two other reservations: the fundamental rights reservation and the protection of sovereignty, which, in light of other international examples, can be termed an *ultra vires* reservation.[8]

By the time the Hungarian concept of constitutional identity emerged, other European constitutional courts had also formulated their concepts. This has attracted interest in academic literature, and an increasing number articles are being published both in Hungary and abroad on the subject matter. This phenomenon is accompanied by an increasing reliance of litigant parties on the identity clause, Article 4(2) TEU, before the CJEU.[9] The growing prominence of the issue of constitutional identity may be interpreted as a result of the migration of constitutional ideas,[10] cross-fertilization of legal systems,[11] constitutional borrowing,[12] or it could be described as a trend[13] since no normative change (neither in the founding treaties nor in the Fundamental Law of Hungary) explains the way in which the HCC changed its jurisprudence in 2016.

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7 Decision No. 26/2015. (VII. 21.) AB, Reasoning [42].

8 Beáta Bakó, 'The Recycling of the German Federal Constitutional Court's Case Law on Identity-, Ultra Vires- and Fundamental Rights Review of Hungary', *ZaöRV*, Vol. 78, Issue 4, 2018, p. 866.

9 Endre Orbán, 'Constitutional Identity in the Jurisprudence of the Court of Justice of the European Union', *Hungarian Journal of Legal Studies*, Vol. 63, Issue 2, 2022, pp. 142–173.

10 Sujit Choudhry (ed.), *The Migration of Constitutional Ideas*, Cambridge University Press, Cambridge, 2006.

11 Luke Dimitrios Spieker, 'Framing and Managing Constitutional Identity Conflicts: How to Stabilize the Modus Vivendi Between the Court of Justice and National Constitutional Courts', *Common Market Law Review*, Vol. 57, Issue 2, 2020, p. 365.

12 Rosalind Dixon & David Landau, *Abusive constitutional borrowing: Legal globalization and the subversion of liberal democracy*, Oxford University Press, Oxford, 2021, p. 144.

13 Monica Claes & Jan-Herman Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of Gauweiler Case', *German Law Journal,* Vol. 16, Issue 4, 2015, p. 919.

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In this context, a significant part of the literature stresses that the Hungarian use of the concept of constitutional identity is illegitimate due to the changes that took place concerning the competences and composition of the HCC[14] and, when interpreted in the illiberal domestic context,[15] it is seen as a weapon of populist constitutionalism.[16] Nevertheless, this prevalent interpretative framework is not employed in this paper, mainly for consequential reasons, that is, whichever view is taken, the concept of the Hungarian constitutional identity was born and has become an established phenomenon that the literature must contend with, especially in pointing out the weak and problematic points of the interpretation provided by the HCC.[17] Accordingly, while putting this framing aside, this paper attempts to critically assess the interpretative issues raised by the Hungarian concept of constitutional identity as developed by the HCC and – as no two concepts of identity are identical – to outline how the Hungarian notion relates to the doctrinal solutions established in other legal systems. To do so, the paper first places the events associated with the concept of identity in a chronological order; it then presents and analyses the two identity decisions adopted

14 Gary J. Jacobsohn & Yaniv Roznai, *Constitutional Revolution*, Yale University Press, New Haven, 2020, p. 95; Zoltán Szente, 'Constitutional identity as a normative constitutional concept', *Hungarian Journal of Legal Studies*, Vol. 63, Issue 1, 2022, p. 18; Zoltán Szente & Fruzsina Gárdos-Orosz, 'Judicial Deference or Political Loyalty?' *in* Zoltán Szente & Fruzsina Gárdos-Orosz (eds.), *New Challenges to Constitutional Adjudication in Europe. A Comparative Perspective*, Routledge, London-New York, 2018, p. 99; Kriszta Kovács, 'Reconceptualising Constitutional Identity: The Case of Hungary' *in* Kriszta Kovács (ed.), *The Jurisprudence of Particularism. National Identity Claims in Central Europe*, Hart, New York, 2023. p. 159.

15 Gábor Halmai, 'Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Basic Law', *Review of Central and East European Law,* Vol. 43, Issue 1, 2018, pp. 23–42; Tímea Drinóczi, 'Constitutional identity in Europe: the identity of the constitution. A regional approach', *German Law Journal,* Vol. 21, Issue 2, 2020, p. 124; Tímea Drinóczi & Agnieszka Bień-Kacała (eds.), *Rule of Law, Common Values, and Illiberal Constitutionalism. Poland and Hungary within the European Union*, Routledge, London, 2021; Julian Scholtes, *The Abuse of Constitutional Identity in the European Union*, Oxford University Press, Oxford, 2023, p. 201; Petra Bárd *et al*., 'Use, Misuse, and Abuse of Constitutional Identity in Europe' *in* Mark Tushnet & Dimitry Kochenov (eds.), *Research Handbook on the Politics of Constitutional Law*, Edward Elgar Publishing, Cheltenham, 2023, pp. 612–634.

16 Luigi Corrias, 'Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity', *European Constitutional Law Review,* Vol. 12, Issue 1, 2016, pp. 6–26.

17 Liora Lazarus, 'Constitutional Scholars as Constitutional Actors', *Federal Law Review*, Vol. 48, Issue 4, 2020, p. 483.

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by the HCC thus far; and finally, it makes some concluding remarks on the possible future doctrinal development of the Hungarian concept of constitutional identity.

2. Timeline

The notion of constitutional identity was first used by Justice Trócsányi in his concurring opinion attached to the decision scrutinizing the Treaty of Lisbon in 2010.[18] After a relatively long pause, it appeared again in a dissenting opinion in 2015[19] and then once more in another concurring opinion in 2016,[20] both written by Justice Varga.

Following the new emergence of the concept, the Government tabled its 7th Amendment to the Fundamental Law in 2016, which sought to make the protection of constitutional identity part of the constitution's text. However, the Government did not have a two-thirds parliamentary majority at that time, and the amendment failed. This was followed by the adoption of *Decision No. 22/2016. (XII. 5.) CC* (*first identity decision* or *2016 Decision*) just a few months later and, therefore, it has been widely shared in the literature that the HCC took its decision in order to bail out the Government.[21] Nevertheless, it is also important to note that the petition for the first identity decision had, in fact, already been placed before the HCC a year earlier.

Until the 2016 decision, constitutional identity was only sporadically mentioned in Hungarian academic literature.[22] Yet, following the HCC's

18 Decision No. 143/2010. (VII. 14.) AB, concurring opinion of László Trócsányi.

19 Decision No. 23/2015. (VII. 7.) AB, dissenting opinion of András Zs. Varga. Interestingly, here the idea of constitutional identity did not arise in the context of EU law, but in the context of the case law of the ECtHR.

20 Order No. 3130/2016. (VI. 29.) AB, concurring opinion of András Zs. Varga.

21 Zoltán Pozsár-Szentmiklósy, 'Informal Concentration of Powers in Illiberal Constitutionalism: The Case of Hungary', *Hague Journal on the Rule of Law,* 2024.

22 Barna Berke, 'Közösségi jog és a tagállamok jogrendszere: vonzások és taszítások', *Magyar Jog,* 1995/4, p. 240; Márton Sulyok, 'Nemzeti és alkotmányos identitás a nemzeti alkotmánybíróságok gyakorlatában' *in* Anna Mira Jakó (ed.), *Nemzeti identitás és alkotmányos identitás az Európai Unió és a tagállamok viszonylatában*, Generál, Szeged, 2014, pp. 58–62.

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decision, the number of publications related to the concept increased significantly, mainly focusing on the analysis of the above decision.[23]

Following the 2018 elections, the Government gained a two-thirds majority in the National Assembly once more, which finally led to the enactment of the 7th Amendment to the Fundamental Law of Hungary,[24] incorporating the protection of self-identity into the constitution's text. Since then, according to Article R(4), 'the protection of Hungary's constitutional identity is the duty of all organs of the state.' In addition, the preamble to the Fundamental Law of Hungary, titled the National Avowal, expresses that 'the protection of our identity (as) rooted in our historic constitution is a fundamental obligation of the State.'

As a result, the Fundamental Law of Hungary, uniquely in Europe, textually enshrines the obligation to protect constitutional identity, raising a relevant doctrinal question known from the literature: who is entitled to say what identity is? Can the constitutional court derive it from the constitution? Or is it rather the constitution-making power, or perhaps some other political actor?[25] In this sense, the Hungarian situation can be considered a mixed system, given that both the HCC and the constitution-making power have made use of the term. However, as Gary Jacobsohn puts it, the text is always just the starting point[26] and one must consider another layer, the interpretation of courts and other institutions. Indeed, this is what happened in Hungary; in 2021, a second identity decision was adopted by the HCC that interpreted the text inserted by the 7th Amendment of the Fundamental Law.

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23 László Blutman, 'Szürkületi zóna: az Alaptörvény és az uniós jog viszonya', *Közjogi Szemle,* 2017/1, pp. 1–14; Nóra Chronowski & Attila Vincze, 'Önazonosság és európai integráció – az Alkotmánybíróság az identitáskeresés útján', *Jogtudományi Közlöny,* Vol. 72, Issue 3, 2017, pp. 117–132; Halmai 2018; Veronika Kéri & Zoltán Pozsár-Szentmiklósy, 'Az Alkotmánybíróság határozata az Alaptörvény E) cikkének értelmezéséről', *JeMa,* 2017/1–2, pp. 5–15; Veronika Kéri, 'Gondolatok az alkotmányos identitásról', *Magyar Jog,* 2017/7–8, pp. 396–404; Barbara Kőhalmi & Anita Rozália Nagy-Nádasdi, 'Kimentés helyett kibúvás: nemzeti identitás és szolidaritás a relokalizációs határozat tükrében', *Fundamentum*, 2017/1–2, pp. 45–51.

24 Ernő Várnay, 'The Hungarian Sword of Constitutional Identity', *Hungarian Journal of Legal Studies,* Vol. 63, Issue 2, 2022, p. 86.

25 Federico Fabbrini & Oreste Pollicino, 'Constitutional Identity in Italy: Institutional Disagreements at a Time of Political Change', *in* Christian Calliess & Gerhard van der Schyff, *Constitutional identity in a Europe of multilevel constitutionalism,* Cambridge University Press, Cambridge, 2019, p. 206.

26 Gary J. Jacobsohn, *Constitutional Identity*, Harvard University Press, 2010, pp. 325 and 351.

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3. The First Identity Decision

3.1. Presentation

In the wake of the migration crisis, the Council adopted the so-called *relocation decision*,[27] based on which the Hungarian Commissioner for Fundamental Rights requested that the HCC render an abstract constitutional interpretation. The decision, adopted with a single dissenting opinion and five concurring opinions,[28] undoubtedly demonstrates a multi-layered activism of powers but one which failed to decide on the underlying issue.[29]

The HCC issued a landmark decision, where it established three control mechanisms, interpreting Article E(2) of the Fundamental Law,[30] that may – in theory – be applied to EU acts. The first control mechanism is the so-called fundamental rights reservation, intended to protect the essential content of fundamental rights. The other two reservations are the sovereignty and identity tests which may be applied in relation to each other.[31] According to the operative part of the decision:

> "the Constitutional Court may examine upon a relevant petition – in the course of exercising its competences – whether the joint exercise of powers under Article E(2) of the Fundamental Law would violate human dignity, another fundamental right, the sovereignty of Hungary or its identity based on the country's historical constitution."

27 Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

28 The decision was taken by ten of the eleven judges of the Constitutional Court at the time. According to the signatories, Justice Czine did not participate in the vote.

29 In addition to the interpretation of Article E, the Commissioner for Fundamental Rights also requested the interpretation of Article XIV(1) of the Fundamental Law, but the HCC separated this question. *See* Decision No. 22/2016. (XII. 5.) AB, Reasoning [29] *(First identity decision)*. The separated issue was placed on the agenda only in early 2024 when the HCC terminated its procedure without a decision on its merit. *See* Order No. 3044/2024. (II. 23.) AB.

30 'In order to participate in the European Union as a Member State, and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations set out in the founding treaties, exercise some of its competences deriving from the Fundamental Law jointly with other Member States, through the institutions of the European Union.' The text in force in 2016 of Article E(2) of the Fundamental Law of Hungary.

31 *First identity decision*, Reasoning [67].

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When it comes to the concept of identity, the questions is what it means and which identity elements it protects. In this regard, the decision refers to Article 4(2) TEU[32] and states that:

> "The Constitutional Court of Hungary interprets the concept of constitutional identity as Hungary's self-identity and it unfolds the content of this concept from case to case, on the basis of the whole Fundamental Law and certain provisions thereof, in accordance with the National Avowal and the achievements of our historical constitution – as required by Article R(3) of the Fundamental Law."[33]

In addition, the decision emphasizes the dynamic and evolving nature of constitutional identity, highlighting some of its elements by way of example, which are

> "identical with the constitutional values generally accepted today […] freedoms, the division of powers, republic as the form of government, respect of autonomies under public law, the freedom of religion, exercising lawful authority, parliamentarism, the equality of rights, acknowledging judicial power, the protection of the nationalities living with us."[34]

Furthermore, adopting the Lisbon decision of the German Federal Constitutional Court,[35] the HCC added to the list that

> "the protection of constitutional self-identity may be raised in the cases having an influence on the living conditions of the individuals, in particular their privacy protected by fundamental rights, on their personal and social security, and on their decision-making responsibility, and

32 The reasoning of the decision equates the concept of national identity in the TEU with the concept of constitutional identity, which may be at least implied by the bracketed insertion in the quoted TEU text in the Hungarian version of the decision: 'According to Article 4(2) TEU, "the Union shall respect the equality of Member States before the Treaties as well as their national (constitutional) identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government."' *First identity decision,* Reasoning [62]. For a discussion of the relations between the two concepts, *see* Elke Cloots, 'National Identity, Constitutional Identity, and Sovereignty in the EU', *Netherlands Journal of Legal Philosophy,* 2016/2, pp. 82–83.

33 *First identity decision,* Reasoning [64].

34 Id. Reasoning [65].

35 The German doctrine was the model in the UK, the Czech Republic, Italy and Spain. Gerhard van der Schyff, 'Member States of the European Union, Constitutions, and Identity. A Comparative Perspective' *in* Calliess & van der Schyff (eds.) 2019, p. 324.

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> when Hungary's linguistic, historical and cultural traditions are affected."[36]

The German reference draws attention to the importance of the comparative constitutional context as a source of Hungarian constitutional identity. Accordingly, we may observe that foreign references to constitutional courts's jurisprudence make up a significant part of the HCC's reasoning.[37] Consequently, with this decision, the HCC joined the choir of the constitutional courts and supreme courts, who had formulated constitutional reservations in respect of the application of EU law.[38] As for the use of its own tests, the HCC also made reference to their limits: they can only be applied in *ultima ratio* and in the framework of a constitutional dialogue 'based on the principles of equality and collegiality, with mutual respect to each other.'[39]

3.2. Critical Assessment

(i) First of all, it is worth stressing that the decision, like other identity-based decisions adopted by other constitutional courts, stems from a fundamental constitutional theoretical dilemma related to the principle of supremacy,[40] which the decision formulates as follows:

> "The Constitutional Court is aware of the fact that from the point of view of the CJEU EU law is defined as an independent and autonomous legal order (C-6/64 Costa v ENEL [1964] ECR 585). However, the European Union is a legal community with the power – in the scope and the framework specified in the Founding Treaties and by the Member States – of independent legislation and of concluding international treaties in its own name, and the core basis of this community are the international treaties concluded by the Member States. As the contracting parties are the Member States, it is their national enforcement acts that ultimately

36 *First identity decision,* Reasoning [66].
37 Id. Reasoning [33]–[45].
38 Béla Pokol names this in his concurring opinion as the constitutional courts' abstract right of resistance against the legal acts of the Union'. Id., concurring opinion of Béla Pokol, [89]–[90].
39 Id. Reasoning [33] and [63].
40 László Blutman & Nóra Chronowski, 'Az Alkotmánybíróság és a közösségi jog: alkotmányjogi paradoxon csapdájában (I.)', *Európai Jog*, 2007/2, p. 3.

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> determine the extent of primacy to be enjoyed by EU law against the relevant Member State's own law in the Member State concerned (BVerfGE 75, 223 [242])."[41]

This means that although EU law has primacy regarding its application,[42] the HCC maintains the constitution's position of primacy regarding the legal validity of EU law. Behind this stance, protecting Hungarian statehood seems to be the ultimate justification.[43] According to the HCC's formulation:

> "the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law. Consequently, constitutional identity cannot be waived by way of an international treaty – Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty, its independent statehood."[44]

(ii) Second, the above quote draws attention to the importance of the historical context. In the same vein, the operative part links constitutional identity to another vague concept of the Fundamental Law of Hungary, the historical constitution. In this respect, the Hungarian decision seems more akin to the French approach, which is also rooted in history.[45] By contrast, in the German jurisprudence, intertextually traceable in the Hungarian

41 *First identity decision,* Reasoning [32].

42 In Decision No. 2/2019. (III. 5.) AB, the HCC recognized *expressis verbis* that "EU law has a primacy of application over national law" and concluded that 'the creation of European unity,' the integration, sets objectives not only for the political bodies but also for the courts and the Constitutional Court, defining the harmony and the coherence of legal systems as constitutional objectives that follow from 'European unity'. To achieve the above, the laws and the Fundamental Law should be interpreted – as far as possible – in a manner to make the content of the norm comply with the law of the European Union." Decision No. 2/2019. (III. 5.) AB, Reasoning [21], [25] and [36].

43 The protection of statehood as an element of identity is also reflected in the decisions of other constitutional courts, *i.e.* in the jurisprudence of the Danish, French, Spanish, and German bodies. Van der Schyff 2019, p. 332.

44 *First identity decision,* Reasoning [67].

45 François-Xavier Millet, 'Constitutional Identity in France' *in* Calliess & van der Schyff (eds.) 2019, p. 148.

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decision, history plays a negative role: the essence of the eternity clause is the rejection of the historical context.[46]

In the Hungarian decision, 'self-identity based on the historical constitution' refers to another concept of the Fundamental Law of Hungary, 'the achievements of the historical constitution.'[47] Accordingly, when the HCC provided the list of values behind this concept, it added: "These are, among other things, the achievements of our historical constitution, the Fundamental Law and thus [on which] the whole Hungarian legal system is based upon."[48]

It follows from the term *achievements* that constitutional identity cannot be defined generally by the historical constitution but only by its elements that are compatible with the framework of the Fundamental Law. However, in this respect, the 2016 decision seems incomplete, as the HCC failed to link its statement to those earlier decisions in which it identified certain elements as achievements of the historical constitution.[49]

(iii) Third, the above paragraph in the first identity decision raises a further crucial question, that is, whether the HCC was ruling on the constitutional identity of the Fundamental Law or on the constitutional identity of Hungary. Internationally, there are examples for both: the German constitutional court discusses the identity of the constitution, while its French counterpart talks about the identity of the state.[50]

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46 Such an anti-historical approach is also present in the Irish identity. Van der Schyff 2019, p. 322.

47 Zoltán Szente, 'A historizáló alkotmányozás problémái – a történeti alkotmány és a Szent Korona az új Alaptörvényben', *Közjogi Szemle,* 2011/3, p. 6; András Zs. Varga, 'Történeti alkotmányunk vívmányai az Alaptörvény kógens rendelkezésében', *Iustum Aequum Salutare,* 2016/4, p. 87; Imre Vörös, 'A történeti alkotmány az Alkotmánybíróság gyakorlatában', *Közjogi Szemle,* 2016/4, pp. 44–57; Zsuzsa Szakály, 'A történeti alkotmány és az alkotmányos identitás az Alaptörvény tükrében,' *Pro Publico Bono,* 2015/2, pp. 36–37.

48 *First identity decision,* Reasoning [65].

49 In the HCC's jurisprudence, the achievements of the historical constitution appeared in the following decisions: Decision No. 33/2012. (VII. 17.) AB, Reasoning [76]–[79]; Decision No. 21/2014. (VII. 15.) AB, Reasoning [35]; Decision No. 28/2014. (IX. 29.) AB, Reasoning [13]–[14]; Decision No. 34/2014. (XI. 14.) AB, Reasoning [79]; Decision No. 17/2015. (VI. 5.) AB, Reasoning [87]; Decision No. 26/2015. (VII. 21.) AB, Reasoning [50]; Decision No. 29/2015. (X. 2.) AB, Reasoning [36]–[37]; Decision No. 16/2016. (X. 20.) AB, Reasoning [19]; Decision No. 17/2017. (VII. 18) AB, Reasoning [39].

50 Selma Josso, 'Le caractère social de la République, principe inhérent à l'identité constitutionnelle de la France?', *Civitas Europa,* Vol. 21, 2008, p. 198; Millet 2019, p. 147.

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The Hungarian jurisprudence is not clear in this regard. On the one hand, the latter approach seems to be supported by the statement that the Fundamental Law only recognizes Hungary's constitutional identity.[51] This seems to be substantiated also by the fact that although the HCC's decision interprets the Fundamental Law, the reasoning on identity control is primarily based on Article 4(2) TEU, which deals with the national identities of the Member States.[52] In fact, in the reasoning the notion of constitutional structure quoted from the TEU is converted to Hungary's constitutional identity.[53]

On the other hand, the reasoning could also lead to the conclusion that the HCC is working with a concept related to the identity of the constitution. According to the reasoning, the HCC "interprets the concept of constitutional identity as Hungary's self-identity, and it unfolds the content of this concept from case to case, on the basis of the whole Fundamental Law and certain provisions thereof".[54]

(iv) Fourth, the question regarding the substance of Hungarian constitutional identity may be raised. In this regard, it should be stressed that the HCC has only highlighted "constitutional values generally accepted"[55] when providing examples for the content of constitutional identity. This is to be welcomed since generally accepted elements are probably less conflictual in nature. Nevertheless, the question arises as to what extent these values mean more or less than the common European values contained in Article 2 TEU, and whether it is possible to regard these values as identity-defining elements if the concept of identity is expected to have some distinguishing power *vis-á-vis* other constitutional identities.[56] This issue is also raised in Justice Varga's concurring opinion, which lists some Hungarian consti-

51 This obviously runs the risk of the HCC's concept of identity becoming detached from the text of the Fundamental Law. According to Justice Stumpf, such an interpretation would threaten to create an 'invisible Fundamental Law.' *First identity decision,* Reasoning [109]. However, there are extra-constitutional sources of constitutional identity elsewhere, too, *e.g.* Austria, Belgium, UK. *See* Van der Schyff 2019, p. 311. This is qualified by Spieker as 'idiosyncratic' identity review. Spieker 2020, p. 369.

52 *First identity decision,* Reasoning [62].

53 Id. Reasoning [64].

54 Id.

55 Id. Reasoning [65].

56 Julien Sterck, 'Sameness and Selfhood: The Efficiency of Constitutional Identities in EU Law', *European Law Journal*, Vol. 24, Issue 4–5, 2018, p. 281.

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tutional-historical peculiarities that, in his opinion, define the Hungarian constitutional identity, but to which he also connects universal values.[57]

Furthermore, it is worth pointing out the risky nature of the open-ended list provided by the HCC. As the reasoning states, the "constitutional self-identity of Hungary is not a list of static and closed values",[58] implying that it is subject to change. This opens up the potential for anything to be interpreted as an identity element in the future.

(v) Fifth, three doctrinal shortcomings of the decision may also be highlighted. (a) The decision does not specify in which procedure the HCC intends to conduct any investigation related to the three reservations. In this respect, the divergence of the positions of the HCC's members in their concurring opinions is striking.[59] (b) Moreover, according to para. [56] of the Reasoning, the HCC

> "emphasizes that the direct subject of sovereignty and identity control is not the legal act of the Union or its interpretation, therefore the Court shall not comment on the validity, invalidity or the primacy of application of such Union acts.

It is, therefore, questionable as to what remains to be examined if the CC does not examine EU acts when applying these tests. A possible conclusion from para. [56] of the Reasoning is that the HCC would maintain its cautious attitude towards interpreting EU law, even when it does apply the formulated tests. It also could follow that the HCC will respect the authentic interpretative position of the CJEU as outlined in the *Lisbon decision [Decision No. 143/2010. (VII. 14.) AB]* of the HCC, and a possible conflict between EU law and the Fundamental Law may result in a preliminary ruling reference as suggested by some of the concurring opinions.[60] In this regard, however, the decision remained silent: the possible use of prelimi-

57 *First identity decision,* Reasoning [112].

58 Id. Reasoning [65].

59 According to Justice Dienes-Oehm, the HCC can only make use of the abstract interpretation procedure of the Fundamental Law and can only express its opinion before EU law is adopted. According to Justice Pokol, the examination can only take place in the *ex ante* review procedure and the Government should have the exclusive right to submit petitions in respect of EU acts. According to Justice Stumpf, besides the treaty reforms, the HCC can act based on the constitutional complaint procedure and may annul the judicial decisions contrary to the Fundamental Law, regardless of whether they applied EU law.

60 See the concurring opinions of Justice Dienes-Oehm and Justice Stumpf. *First identity decision,* [76] and [103].

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nary references was neither mentioned nor excluded by the 2016 decision. *(c)* Last but not least, the possible legal consequence of applying the formulated tests also remains unelaborated. In the penultimate paragraph of the decision, the HCC merely states that it "may examine […] the existence of the alleged violation".[61]

4. The Second Identity Decision

4.1. Presentation

Almost exactly five years after the promulgation of the first identity decision, the HCC adopted another decision with EU law relevance, acting again in the abstract interpretation procedure. *Decision No. 32/2021. (XII. 20.) AB (second identity decision* or *2021 Decision*) was awaited with great anticipation, as it was born in a period when the challenges appearing in the European judicial landscape were increasing.[62]

Unsurprisingly, both the 2016 and the 2021 decisions were inspired by asylum-related EU acts.[63] This time, the petition was prompted by a CJEU decision that declared the so-called *push-back procedure* codified by the Hungarian legislator to be contrary to EU law.[64] Nevertheless, there are also differences between the two identity decisions. The petitioner of the 2016 decision was the Commissioner for Fundamental Rights, while in the second case it was the Government. In the meantime, the text of the Fundamental Law of Hungary has also changed in that the control mechanisms formulated in the 2016 decision have appeared in the text of Article E) of the Fundamental Law.[65] Moreover, while the 2016 decision

61 According to Justice Dienes-Oehm, in such cases only a declaratory decision can be taken, and no legal consequence can be applied. According to Justice Pokol, a prohibition of application may be imposed. In Justice Varga's view, in case an EU act is contrary to the Fundamental Law, a two-thirds affirmative decision of the National Assembly shall remedy the issue.

62 Jan Zglinksi, 'The new judicial federalism: the evolving relationship between EU and Member State courts', *European Law Open,* 2023/2, pp. 361–364.

63 In fact, there was a third abstract interpretation on a similar subject between the two identity decisions: Decision No. 2/2019. (III. 5.) AB.

64 Judgment of 17 December 2020, *Case C-808/18, Commission v Hungary,* ECLI:EU:C:2020:1029.

65 The 7th Amendment of the Fundamental Law inserted another sentence into Article E(2) of the constitutional text back in 2018: "Exercise of competences under this

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did not answer all the questions raised by the petitioner, an opposite trend can be observed in the present case: although the HCC stressed that "the relevant competence of the Constitutional Court should be interpreted restrictively,"[66] it went far beyond the scope of the petition by interpreting the right to human dignity and the primary obligation of the Hungarian state to protect fundamental rights enshrined in Articles I and II of the Fundamental Law of Hungary.

The HCC reformulated the questions raised by the Government in a highly hypothetical manner by stating that

> "in the present case, when interpreting Article E(2), in the light of the wording of Article E(2) as supplemented by the Seventh Amendment to the Fundamental Law, the Constitutional Court had to assess whether, if the incomplete effectiveness of the joint exercise of competences based on Article E(2) was realized, as mentioned in the petition, such incomplete effectiveness could lead to a violation of Hungary's sovereignty, constitutional identity or fundamental rights and freedoms enshrined in the Fundamental Law (including, in particular, human dignity, which must be assessed also in the context of constitutional identity)."[67]

Accordingly, the reasoning of the second identity decision consists of three parts. First, the HCC examined whether the shortcomings of the joint exercise of powers within the EU could violate the right to human dignity.[68] Related to this, the HCC derived from the right to human dignity the so-called right to a traditional social environment. According to the decision's reasoning, the right to a traditional social environment is part of the right to self-identity and self-determination deriving from human dignity. As the HCC has put it,

> "(t)he State has an obligation of institutional protection to ensure that fundamental rights are respected. Identity and the right to self-determination deriving from human dignity can only be achieved through a process of mutual reflection upon the relevant social factors, given that

paragraph shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure.' *See also* Decision No 32/2021. (XII. 20.) AB, Reasoning [25] *(second identity decision)*.

66 Id. Reasoning [16].

67 Id. Reasoning [26].

68 Id. Reasoning [27]–[60].

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> the individual exercises his or her constitutional rights, including certain component rights deriving from the fundamental right to human dignity, as a member of the community."[69]

In the second part of its reasoning, the HCC considered whether the deficiencies in the joint exercise of powers within the EU have any consequences for Hungary's sovereignty.[70] In this regard, the HCC formulated a Solange-type principle provided for in the first operative part of the judgment, namely that Hungary may withdraw the exercise of the powers conferred on the EU as long as the joint exercise of those powers is not effective:

> "(w)here the joint exercise of competences specified in this paragraph is incomplete, Hungary shall be entitled, in accordance with the presumption of reserved sovereignty, to exercise the relevant non-exclusive field of competence of the EU, until the institutions of the European Union take the measures necessary to ensure the effectiveness of the joint exercise of competences."

The procedural condition for withdrawing a competence is "drawing the attention of the EU or its institutions to the need to exercise the competence, which is to be exercised jointly, and the EU or its institutions failing to do so."[71] The substantive condition is the manifest error of the European legal system:

> "Article E(2) of the Fundamental Law cannot be interpreted as meaning that Hungary has definitively transferred the right to exercise a given competence to the institutions of the EU if the institutions of the EU manifestly disregard their obligation to exercise a competence transferred for joint exercise in accordance with Article E(2) of the Fundamental Law, or if such joint exercise of competence is only ostensibly carried out in such a way that it manifestly does not ensure the effectiveness of EU law.[72]

In the third part, the HCC interpreted the concept of constitutional self-identity. On the one hand, it emphasized the European identity of Hungary by making reference to *Decision No. 2/2019. (III. 5.) AB* adopted in the period between the two identity decisions. In the latter decision, the HCC

69 Id. Reasoning [39].
70 Id. Reasoning [61]–[86].
71 Id. Reasoning [80].
72 Id. Reasoning [79].

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showed a pro-European approach and briefly discussed the European identity of Hungary:

> "The formation of the State of Hungary had been the first act by which the Hungarian nation expressed its European identity and throughout the historical events experienced by the country this has matured to become a solid national conviction. […] As a direct consequence of this European identity, Hungary made consistent efforts after the change of the political system to take part in the European integration and our accession was approved by a decisive national referendum."[73]

On the other hand, and this is elaborately detailed in the decision, the HCC linked constitutional identity to the concept of sovereignty.[74] As a result, the HCC concluded in the operative part of the decision that the new sentence of Article E(2) forms part of constitutional identity: "the protection of the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure shall be part of its constitutional identity."

4.2. Critical Assessment

(i) First, the context of the decision should be emphasized. The petition of the Government suggested that the HCC could rule that Hungarian public authorities should not enforce the judgment of the CJEU. On the one hand, the petitioner brought the Public Sector Purchase Programme (PSPP) decision of the German Federal Constitutional Court to the attention of the HCC,[75] aiming to draw attention to the "rebellion of the constitutional courts",[76] notwithstanding the fact that the PSPP case was in no way related to the migration policy instruments that were relevant in the present case. On the other hand, it is noteworthy that shortly before the ruling was made, the infamous decision of the Polish Constitutional Court was published,[77] exhibiting open defiance towards the primacy of EU law. The question was,

73 Decision No. 2/2019. (III. 5.) AB, Reasoning [16]. Id. Reasoning [96].
74 Id. Reasoning [87]–[110].
75 BVerfGE 146, 216.
76 István Csongor Nagy, 'The Rebellion of Constitutional Courts and the Normative Character of European Union Law', *International and Comparative Law Quarterly*, Vol. 73, Issue 1, 2024.
77 Polish Constitutional Tribunal, K 3/21.

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therefore, whether the Hungarian body would follow the Warsaw court's lead, or instead distance itself from the Polish position. Faced with this black-and-white question, the HCC chose an alternative path: while it did not deal with the CJEU judgment, which was the *á'propos* for the petition, when digging deeper into the reasoning of the decision, we can find several grey areas. Perhaps this explains why the reception of the decision has been largely positive, as different readers of the text can find the positions they can identify with in one or the other paragraph of the reasoning. Accordingly, on the part of the Government, the Prime Minister hailed the decision,[78] and the commentators also took a positive view, mainly because the ruling did not, at least not openly enter into conflict with the CJEU.[79]

(ii) Second, the expansive nature of the decision should be highlighted. The HCC went beyond the scope of the petition by analysing the right to human dignity and developing the right to a traditional social environment, which has surprising implications in the modern, globalized environment of the EU based on free movement and establishment. Until this decision, the HCC's jurisprudence treated human dignity as a fundamental right of the individual and a guarantee for the development of individual freedom.[80] In this decision, however, the HCC added a collective dimension to this right.[81] The essence of the obligation to protect the newly derived rights of the right to human dignity is that Hungary must ensure that not only must it refrain from restricting such rights, but it must ensure – even in the face of international commitments of the state – that no foreign institutions do so either.[82] As a result, in the context of European joint decision-making, the HCC held that

> "(w)here the incomplete effectiveness of the joint exercise of competences […] leads to consequences that raise the issue of violation of the right to identity of persons living in the territory of Hungary, the Hungarian

78 *See* the summary report of portfolio.hu, at www.portfolio.hu/gazdasag/20211210/meghozta-donteset-az-alkotmanybirosag-amirol-orban-viktor-reggel-beszelt-515502.

79 Nóra Chronowski & Attila Vincze, 'Full Steam Back: The Hungarian Constitutional Court Avoids Further Conflict with the ECJ', *Verfassungsblog*; Kim Lane Scheppele, 'Escaping Orbán's Constitutional Prison: How European Law Can Free a New Hungarian Parliament', *Verfassungsblog.*

80 The classical understanding of the right to human dignity is represented by Justice Marosi and Justice Schanda. *Second identity decision,* Reasoning [226] and [259]–[264].

81 "[The] 'dignity of communities' cannot be understood as a fundamental right in its own right." Decision No. 96/2008. (VII. 3.) AB, part II.3.

82 *Second identity decision,* Reasoning [37].

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> State shall be obliged to ensure the protection of this right within the framework of its obligation of institutional protection."

(iii) Third, the HCC has unprecedentedly took into account EU law: it has embraced the principle of effet utile and reversed the principle of pre-emption. The HCC stressed that the principle of effectiveness must be guaranteed not only by the Member States but also by the EU institutions.[83] It emphasized that

> "the purpose of conferring the exercise of competence is not to take the competence away from the Member States, but to ensure that the European Union, or some of its institutions, exercise them more effectively than the Member States."[84]

The HCC went on to highlight that, for the exercise of powers to be in accordance with the Fundamental Law of Hungary, it is not sufficient to establish secondary sources of law, but their effective application must also be ensured: "(o)nly in this case does the exercise of the competence comply with the condition laid down in the enabling provision in Article E(2) of the Fundamental Law."[85]

The ineffectiveness of secondary legislation or 'the ineffectiveness of the joint exercise of competences'[86] as interpreted by the HCC is a novelty in the Hungarian jurisprudence, as it has turned the principle of effectiveness against the functioning of the European legal order. Moreover, this has also allowed the HCC to create a national counterpart to the principle of pre-emption: the principle of *re-emption*. This is a *Solange*-type requirement, set out in the first operative part of the judgment, which states that national public authorities may temporarily take back competences in certain areas of EU law that have been transferred to EU institutions as long as the effectiveness criterion set by the HCC is met.

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83 Id. Reasoning [67].

84 Id. Reasoning [77]. This line of reasoning is surprising partly because the HCC mentally separates the Member States and the joint exercise of competences (*i.e.* the Member States and the EU). The wording implies that there could be an exercise of shared competences without the Member States, aiming to deprive them of their rights. However, there is no EU legislation without the participation of Member States: their representatives may remain in a minority position in the Council, but Member States still adopt the legislative acts together with the other Member States.

85 Id. Reasoning [78].

86 Id. Reasoning [51].

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Such a situation sounds like a negative type of *ultra vires* which may be caused either by an omission on the part of the EU legislator or by an ineffective piece of EU legislation.[87] Nevertheless, the 'principle of re-emption' offered by the HCC as an answer to such a scenario seems to contradict the last sentence of Article 2(2) TFEU, according to which: "Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence." On top of that, where Hungary fails to comply with its EU legal obligations, in a possible procedure under Article 260 TFEU, this certainly does not constitute a valid defence before the CJEU as it has been demonstrated precisely with regard to the push-back procedure related decision, case C-808/18, lately.[88].

(iv) Fourth, the HCC placed the concept of constitutional identity in a new framework by bringing the elements of the Jellinek definition of the state into the scope of identity. The HCC also emphasized that "constitutional identity and sovereignty are not complementary concepts, but are interrelated in several respects."[89] This means that, according to the HCC, *(a)* the preservation of constitutional identity is made possible by the preservation of sovereignty; *(b)* constitutional identity is manifested primarily through a sovereign act, that is, constitution-making; *(c)* the desire to preserve the sovereign decision-making powers of the country, the national holidays forming part of constitutional identity; and *(d)* the main elements of sovereignty as recognized in international law are closely linked to constitutional identity.[90]

At the end of the reasoning, the HCC argued similarly to Justice Varga's concurring opinion annexed to the first identity decision. Here, he stated that the historical documents marking the struggle for the country's sovereignty just like national holidays are part of the constitutional identity as they are achievements of the historical constitution.[91] Thus, in light of the decision, identity and sovereignty seem to be in a part-whole relationship, where identity is understood as the right of self-determination about the most fundamental aspects of sovereignty and the essential functions of the state.

87 Endre Orbán & Patrik Szabó, 'A 'visszafoglalás elve'. Az Alkotmánybíróság 32/2021. (XII. 20.) AB határozata az uniós jog hazai érvényesüléséről', *Közjogi Szemle*, Vol. 15, Issue 2, 2022, pp. 103–111.

88 *C-123/22, Commission v Hungary*, ECLI:EU:C:2024:493.

89 *Second identity decision,* Reasoning [99].

90 Id. Reasoning [99].

91 Id. Reasoning [101]–[110].

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(v) Fifth, just like in the case of the first identity decision, it is worth examining the doctrinal shortcomings of the decision. (a) In *Decision No. 26/2020. (XII. 2.) AB*, another decision adopted in the period between the two identity decisions, the HCC ruled that

> "[the Constitutional Court's] right to initiate preliminary ruling proceedings can be derived from the Fundamental Law, in particular, if a case involves the risk of a restriction of the fundamental rights and freedoms or of the inalienable right of Hungary under Article 4(2) to dispose of its territory, population, form of government and organisation of the State.[92]

However, the credibility of this commitment stated barely one year before the 2021 decision seems questionable: the second identity decision was indeed a case in which the HCC had to interpret Article E(2), yet it still did not make a reference for a preliminary ruling to the CJEU.

(b) When it comes to legal consequences, the decision is more specific regarding the incomplete or ineffective joint exercise of powers:

> "the Constitutional Court states [...] that the enforceability of EU acts recognised as binding under Article E of the Fundamental Law may be compromised by the ineffectiveness of competences exercised jointly with the EU."[93]

This statement, in essence, anticipates the legal consequence of the inapplicability (*Unanwendbarkeit*) familiar from German doctrine. Under the German doctrine, however, such a conclusion could only be drawn by the Constitutional Court. By contrast, the HCC's decision empowered the Government to reach such a conclusion, which may raise serious concerns about legal certainty:

> "The Constitutional Court reiterates, however, that it is beyond its competence to review in the present procedure whether the statements made in the petition are correct in this respect. Accordingly, the findings of the present decision of the Constitutional Court can implicitly be fully applicable only if the arguments presented in the petition are factually correct, the assessment of which is primarily the task of the petitioner and other organs of the Hungarian State."[94]

92 Decision No. 26/2020. (XII. 2.) AB, Reasoning [26].
93 *Second identity decision,* Reasoning [84].
94 Id. Reasoning [48].

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5. Final Thoughts

The reform of the identity clause in the Lisbon Treaty in 2009 saw the rise of the constitutional identity discourse. The spread of national reservations based on constitutional identity can be seen as the latest stage in the constitutional debate on the supremacy of EU law. For a long time, this has largely been a theoretical issue only, but recently, it has also led to decisions with serious consequences.[95] As a result, the different constitutional identities of the Member States might pose a potentially existential threat to EU law, especially if decisions denying the primacy of EU law proliferate and constitutional courts of questionable legitimacy such as the Polish Constitutional Tribunal[96] adopt decisions restricting EU law.

As far as the Hungarian constitutional practice is concerned, the HCC's jurisprudence raises several coherency issues, as outlined in the analysis above. In light of the dilemmas presented, the extent to which the 2016 decision reflected a firm vision on the part of the members of the HCC is at least questionable. The many concurring opinions and the different concepts indicate that individual constitutional judges disagreed on the direction to follow. The same is also true for the second identity decision: the two dissenting opinions and the nine concurring opinions indicate that the adopted text is a compromise of the HCC's members.

As a consequence, the two identity decisions can be evaluated mainly as 'noise creation' without any concrete consequences thus far: both identity decisions resulted from a process known as abstract interpretation of the constitution, which means that the decisions have theoretical relevance but no other concrete consequences were derived from them. As a result, the 2016 decision can be evaluated as a symbolic gesture, one which set out a theoretical reservation similar to those that have been created by other constitutional courts in Europe and which attempted to connect Hungarian constitutional identity with universal values. By contrast, the 2021 decision placed less emphasis on the comparative constitutional context and attempted to find national relevance in universal values. By relying intensively on the Hungarian struggles for freedom and linking identity with the core elements of sovereignty, the 2021 decision placed a bigger emphasis on

95 ÚS 5/12 Landtova XVII, 31 January 2012; 15/2014 Ajos 6 December 2016; BVerfGE 146, 216 (PSPP); K 3/21. The Federal Constitutional Court blocked a European arrest warrant in a December 2015 decision on the grounds of a breach of German constitutional identity, *see* 2 BvR 2735/14.

96 Xero Flor v Poland (4907/18), 7 May 2021.

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the historical context of Hungarian identity. In this regard, the decision does not even name all the achievements of the historical constitution as elements of the constitutional identity, only those parts that relate to the struggle for sovereignty.

As for the future, I consider three big doctrinal questions regarding the evolution of the Hungarian concept of constitutional identity to be of relevance. *(i)* The first is the initiation of preliminary ruling procedures, following the idea of Ingolf Pernice, where the resolution of constitutional conflicts through dialogue is a shared responsibility of the courts.[97] In this regard, it is noteworthy that fourteen out of the eighteen constitutional courts operating in the EU have already engaged in such a formal dialogue with CJEU.[98] In a similar tone, the 2016 decision seems to attach great importance to establishing a dialogue between the courts, but the HCC has never referred a question before the CJEU until now.

(ii) The second issue relates to the absolute or relative nature of Hungarian constitutional identity. The decisions are silent on this aspect. However, there are strong arguments as to why the Hungarian concept should be relative. On the one hand, constitutional amendments cannot be subject to identity analysis since Article 24(5) of the Fundamental Law excludes any review of the substance of constitutional amendments. On the other hand, Hungarian identity also includes EU membership, as underlined by the HCC. Given that the HCC emphasised Hungary's European identity, it follows that constitutional identity should be assessed as part of the multilevel constitutional system,[99] where it cannot take always precedence. To underline this approach, the HCC could introduce a proportionality test in its identity-based analysis, or, following the French jurisprudence, it could rely on constitutional amendments that would remedy identitarian breaches.

(iii) Finally, the third question is rather meta-juristic or sociological: how will the jurisprudence develop, now that the former President of the

97 Ingolf Pernice, 'The Autonomy of the EU Legal Order – Fifty Years after Van Gend' *in* Antonio Tizzano *et al.* (eds.), *Court of Justice of the European Union: 50th Anniversary of the Judgment in Van Gend en Loos, 1963–2013,* Office des publication de l'Union européenne, Luxembourg, 2013, p. 64.

98 Marek Pivoda, 'Constitutional Courts Asking Questions: A Deliberative Potential of Preliminary Reference Mechanism', *Cambridge Yearbook of European Legal Studies*, 2023, p. 7.

99 Ingolf Pernice, ‚Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-making Revisited?', *Common Market Law Review*, Vol. 36, Issue 4, 1999, pp. 703 – 705.

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HCC, who was the reporting judge of both analysed decisions, left the bench and became President of the Republic in 2024? Since, in the HCC's interpretation, the concept of identity is inherently dynamic and therefore subject to change, the Court's (and its subsequent presidents') attitude could strongly determine the future of the notion: jurisprudence could turn towards a more conflictual direction, remain symbolic as it is now, or be denounced.

Last but not least, zooming out from Hungary to the European constitutional space, the rise of constitutional identity could also lead to a further constitutionalization of EU law, the key to which is Article 4(2) TEU, which has been invoked by several constitutional courts as a legal basis of their concept of constitutional identity. Thus, Article 4(2) TEU could function as a device or a link between national constitutional claims and the European constitutional framework.

In this respect, it should be noted that a new chapter of the CJEU's jurisprudence has been opened: the practice based on Article 4(2) TEU has met with a recently developed series of cases based on Article 2 TEU, the founding values of the EU. It was precisely Hungary (and Poland) that finally linked identity-based case law with value-based jurisprudence. In 2021, both Member States challenged the so-called Conditionality Regulation on measures to be taken in case of a breach of the rule of law in a Member State to protect the EU budget.[100] In its decision, the CJEU embraced the concept of identity and held that the fundamental values enshrined in Article 2 TEU define the identity of the EU itself, from which normative obligations toward Member States derive. According to the CJEU,

> "the Member States have defined and share the values enshrined in Article 2 TEU. They define the identity of the Union as a common legal order. The Union must therefore be able to defend those values within the limits of its powers under the Treaties."[101]

Furthermore, according to the CJEU,

100 Judgment of 16 February 2022, *Case C-156/21, Hungary v European Parliament and the Council,* ECLI:EU:C:2022:97; Judgment of 16 February 2022, *Case C-157/21, Poland v European Parliament and the Council,* ECLI:EU:C:2022:98. László Detre, 'Összeálló kép: előrelépés a jogállamiság európai értelmezésében és alkalmazásában – Az Európai Unió Bíróságának a C-156/21. számú Magyarország kontra Parlament és Tanács ügyben hozott ítélete', *EU Jog online*, 2022/4.

101 *Case C-156/21, Hungary v European Parliament and the Council*, para. 127.

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> "Article 2 TEU is not simply a statement of political guidelines or intentions, but a synthesis of values which […] form part of the identity of the Union as a common legal order and which are embodied in principles which impose legally binding obligations on the Member States."[102]

The CJEU recalled that the Union respects the national identities of the Member States, which are an integral part of their fundamental political and constitutional orders, in accordance with Article 4(2) TEU. This implies that Member States have a certain margin of discretion in the application of rule of law principles.[103] Still, this is limited by the commonly shared identity of the Union: that is, the elements that can be invoked under Article 4(2) TEU are framed by Article 2 TEU.

From a European constitutional perspective, I believe that this evolution of the identity discourse is closest to the trajectory of the fundamental rights reservation: in the 1970s, the CJEU responded to the lack of protection of fundamental rights, due to apprehension coming from the German and Italian constitutional courts, by developing its own fundamental rights protection as a general principle of EU law. Now, fifty years later, one can observe that the CJEU has once again found a legal tool in primary EU law to frame the new challenge, the identity claims invoked by national constitutional courts: Article 2 TEU.

102 Id. para. 232.
103 Id. para. 233.

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The Conflict between EU Law and International Law in the Area of Intra-EU BITs

Lessons from the Hungarian Sodexo Case

Dávid Csoknyai[*]

Abstract

This article demonstrates that in the area of international investment protection (in particular in relation to intra-EU BITs) there is a conflict between EU law and international law, for which there is no legal solution acceptable from the perspective of both legal regimes. The Sodexo case and the case law illustrate that in investment protection disputes, international arbitral tribunals acting under intra-EU BITs base their position purely on international law, while the defendant Member States and the EU (in particular following the CJEU's Achmea judgment) base their position purely on EU law, resulting in a situation that seems to be irreconcilable. While the two areas of law are constantly in conflict in these disputes, investors find themselves in a situation where the guarantees of investment protection may ultimately be unenforceable.

Keywords: intra-EU BITs, Achmea, Termination Treaty, investment protection, Sodexo

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1. Introduction

In the field of cross-border, international investment, a constant battle is ongoing between international law and EU law over the past two decades.

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The parties to this battle – international arbitral tribunals and EU institutions, in particular the CJEU – have taken different approaches to bilateral investment protection treaties (BITs) concluded between Member States of the EU (intra-EU BITs). The turning point in the fight was the CJEU's *Achmea* judgment[1] and an international treaty[2] concluded by Member States to implement EU law. However, this turning point does not seem to have resolved the dispute over investment protection agreements, but merely shifted it to the national level, where national law is now in conflict with the binding norms of international law. One example of this struggle is the case of the French company Sodexo Pass International SAS, which won an award for damages against Hungary before ICSID[3] in an investment dispute, but was subsequently unable to enforce the judgment, at least through the courts.

The study seeks to answer the question of the consequences of *Achmea* for companies making an international investment in other Member States. Is there absolute justice in the conflict between international law and EU law, or is there a perpetual stalemate if neither side bows to the other? Did the EU play by the rules of international law in the battle it initiated (and was it compelled to do so?)? In the context of the *Sodexo* case, why are the Hungarian legislator's actions following *Achmea* a cause for concern? In preparing this study, I used the judgment submitted by Sodexo Pass International SAS in the Hungarian court enforcement proceedings. The study deals only with the conflict between EU law and international law, without touching on the ICSID judgment (due to its confidential content, which affects the parties' business interests).[4]

2. The Sodexo Case – Facts

Sodexo Pass Hungária Kft., a subsidiary of French-owned Sodexo, started its operations in Hungary in 1993, mainly selling meal vouchers. In Hungary, these vouchers are part of the fringe benefits (in Hungary referred to

1 Judgment of 6 March 2018, *Case C-284/16, Achmea*, ECLI:EU:C:2018:158.
2 Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union (Termination Treaty), SN/4656/2019/INIT.
3 ICSID, Case No. ARB/14/20, *Sodexo Pass International SAS v Hungary*.
4 The operative part of the judgment was made public to the press. Several Hungarian sources reported that Sodexo had won its case against Hungary. *See e.g.* https://bbj.hu/politics/polls/issues/hungary-to-pay-sodexo-eur-73-mln-in-arbitration-ruling.

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as: 'cafeteria') scheme, which is usually subsidized by the state in the form of a tax relief. Initially, the voucher market was barely regulated in Hungary, but when Sodexo entered the market, there was already a subsidy scheme in place, including meal vouchers. The main companies in the Hungarian cafeteria market at the time were Sodexo and two other French-owned companies, Le Cheque Déjeuner and Edenred.

In the framework of the 2011 tax reforms, the Hungarian legislator created the Széchenyi leisure card (SZÉP Card), which aimed to expand the availability of health related services and services promoting healthy lifestyle. Its introduction also affected the market for meal vouchers. The conditions for issuing the SZÉP Card were laid down by the legislator in such a way that the French companies concerned were not eligible for issuing SZÉP Card. The legislator also created the Erzsébet vouchers, which could be used mainly to purchase ready-to-eat meals. With the creation of the Erzsébet voucher, the legislator amended the rules on the cafeteria payments, with the effect that employers' subsidies for food purchases were only taxed favourably in case the employers provided these in the form of Erzsébet vouchers.[5] Accordingly, although the French companies could formally continue to be present on the cafeteria market, the tax rules had *de facto* eliminated their vouchers from the market.

3. The International Law Basis of the Sodexo Case

3.1. The BITs

Since the 1960s, the development of international capital flows entered a new phase, with the proliferation of Bilateral Investment Treaties (BITs), which helped attract foreign investment to capital-importing states and to protect investors from capital-exporting states, with specific legal guarantees to protect the interests of foreign investors.[6] Over time, a series of BITs were established, mainly between Western developed countries and

5 *See e.g.* Sándor Szemesi,'Egy SZÉP történet vége? A magyar cafeteria szabályozás és a nemzetközi jog', *Közjavak*, 2016/1. pp. 30–32.

6 János István Molnár, *A nemzetközi gazdasági kapcsolatok Joga I, 2nd edition,* Patrocinium, Budapest, 2016, p. 119.

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third countries. As international treaties, BITs are concluded by two contracting states and typically contain provisions widely used in international practice.[7] The foreign investor's interest is to secure the broadest possible guarantees for its business activities, while the host state's objective is to use the inflow of capital to strengthen its own economy.[8] In the agreements, both the host and the sending states make reciprocal commitments and usually include principles of fair and equitable treatment and non-discrimination.[9] The parties agree to the jurisdiction of a permanent or *ad hoc* arbitral tribunal, independent of the contracting states, to settle disputes that arise.[10] The rationale for providing for a court that is independent of the contracting states is precisely that customary international law cannot itself provide a basis for jurisdiction or procedural rules in such a cross-border investment relationship. It is reasonable to assume that, once a dispute arises, one party (the host state) will be reluctant to bring the dispute before an international court, while the other party (the investor) will not want the court of the state that is alleged to have infringed its rights to rule on the infringement, and it is advisable to regulate such situations in advance (before the dispute arises).

Since the 1980s, several EU (EEC) Member States have concluded BITs with Central and Eastern European countries, including Hungary. The French-Hungarian BIT [promulgated in 59/1987 (XI. 29.) MT Decree in Hungary] relevant for this study was concluded in 1987 and provided for non-discrimination, national treatment and most-favoured-nation treatment for investments between the two states.[11] Article 9 of the BIT designated the International Centre for Settlement of Investment Disputes (ICSID) as the court of arbitration, in particular for disputes relating to restrictions on property and compensation. On the basis of the BIT in question, Sodexo, Edenred and Le Cheque Déjeuner initiated ICSID proceedings,

7 Gary B. Born, *International Commercial Arbitration, Second Edition, Vol I,* Wolters Kluwer, Alphen aan den Rijn, 2014, p. 124.

8 Gábor Bánrévy, *A nemzetközi gazdasági kapcsolatok joga, 10th revised edition,* Szent István Társulat, Budapest, 2018, p. 75.

9 Michael J. Trebilcock, *Advanced Introduction to International Trade Law*, Edward Elgar, Cheltenham, 2015, pp. 133–134.

10 Molnár 2016, p. 125.

11 59/1987 (XI. 29.) MT Decree on the proclamation of the Agreement between the Government of the Hungarian People's Republic and the Government of the French Republic on the mutual promotion and protection of investments (in Hungarian).

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claiming that Hungary violated the provisions of the BIT by restructuring the cafeteria system.[12]

3.2. International Arbitration and ICSID

The essence of so-called mixed or international arbitration is that states are on one side of the dispute and private entities on the other.[13] The parties to the dispute do not leave it to the courts of the state that is a party to the dispute to decide their case, but take their dispute to an external court, which usually operates under its own rules and independently of the state concerned.

The Washington Convention (ICSID Convention) was adopted in 1965 to resolve disputes arising from international investments. In order for a party to a dispute to be subject to proceedings under the Convention, it must voluntarily submit to ICSID jurisdiction in the specific case, unless the contracting countries have agreed in an existing investment protection agreement to submit to ICSID dispute settlement in the event of disputes arising under that agreement.[14]

One of the dispute resolution methods of the Convention is arbitration, in which case the ICSID award is binding on the parties. The Convention does not allow for appeals, but the parties have extraordinary remedies, such as an application for review if a new fact arises or annulment under certain conditions.[15]

4. Disputes Based on BITs before Arbitral Tribunals

Following the 2004 enlargement of the EU, an interesting phenomenon emerged surrounding disputes before international arbitration tribunals based on intra-EU BITs. In disputes involving foreign investors suing (typically newly joined) Member States, the arbitral tribunals and the Member

12 ICSID, *Sodexo*; ICSID, Case No. ARB/12/21, *Edenred S.A. v Hungary*; ICSID, Case No. ARB/13/35, *UP and C.D Holding Internationale v Hungary*.

13 Tamás Kende *et al.* (eds.), *Nemzetközi jog,* Wolters Kluwer, Budapest, 2019, para. 1799.

14 Éva Horváth, *Nemzetközi választottbíráskodás,* HVG-ORAC, Budapest, 2010, p. 236.

15 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (International Centre for Settlement of Investment Disputes [ICSID]) 575 UNTS 159 (ICSID Convention), Articles 51–53.

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States, as well as the often intervening European Commission, took different positions on the validity and applicability of BITs. The cases have highlighted that arbitral tribunals approach the question of the applicability of BITs primarily from the perspective of international law, while Member States consider the question from the perspective of EU law.

To illustrate the different views, it is worth looking at some of the major cases. How are arbitration clauses normally used in BITs to be interpreted? Is there a place for intra-EU BITs in the internal market? Can the termination of a BIT be declared by applying an international norm?

In *Eastern Sugar*,[16] a Dutch company, which was an investor in the Czech sugar market, brought proceedings against the Czech Republic before an arbitration tribunal under the BIT between the Netherlands and the Czech Republic for having changed the rules of the industry to the company's disadvantage. In the Czech Republic's view, the arbitration procedure violated the principle of non-discrimination within the EU (as regards the forum selection clause) and the case should have been brought before the Czech national court.[17] The relevant international court did not share this argument of EU law and established its own jurisdiction, stating that discrimination should not be remedied by taking away rights already acquired (in this case the right to refer to arbitration), but rather by extending them.[18] Partially reiterating the above in the *Binder* case (which concerned a German national's investment in the Czech Republic), the court underlined that the replacement of "ordinary judicial remedy" by arbitration did not constitute discrimination, since both cases meant that the right to apply to the courts in the event of infringement was guaranteed.[19]

In *Eureko* (later Achmea), the Dutch company sued Slovakia before the Permanent Court of Arbitration (PCA), referring to the Dutch-Slovak BIT, because Slovakia had excluded the Dutch company from the health care market in the course of restructuring the health insurance system. Arbitration was conducted in Germany (an EU Member State). At the request of the arbitration tribunal, the European Commission prepared a detailed submission in which it raised concerns about the existence of intra-EU BITs

16 SCC No. 088/2004, *Eastern Sugar B.V. (Netherlands) v The Czech Republic,* Partial Award, 27 March 2007.
17 Id. para. 107.
18 Id. para. 171.
19 UNCITRAL, *Binder v Czech Republic,* Award on Jurisdiction, 6 June 2007, in particular para. 65.

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in the internal market.[20] The Commission referred to the case law of the CJEU, according to which the Court has exclusive jurisdiction to rule on disputes between Member States which fall at least partly within the scope of EU law, and referred to the *MOX Plant* case[21] in which the International Tribunal for the Law of the Sea (ITLOS) suspended its proceedings until the European Commission had given its answer to the question referred to it. Both parties to the case were Member States and in the the infringement proceedings, the CJEU ruled in principle that it had exclusive jurisdiction to decide disputes between Member States concerning EU law.[22] Slovakia (the defendant in *Eureko*) asked the arbitral tribunal, whether it finds that it has jurisdiction to refer the case to the CJEU for a preliminary ruling,[23] and if so, to refer questions, and based on *MOX Plant*, to suspend the proceedings. However, the arbitral tribunal pointed out that the dispute (unlike *MOX Plant*) was not between two Member States but between a private party and a State, a dispute which the CJEU had no jurisdiction to decide.[24]

Furthermore, in this case, the Commission took the view that in the EU justice system the investor should either go to a national court or notify the Commission to launch proceedings against the Member State, but an arbitration mechanism is unacceptable within the context of EU law.[25] The Commission rejected the proposal to extend the principle of preferential treatment in each BIT to investors in all Member States, as this would 'externalize' disputes concerning EU law from the jurisdiction of national courts and the CJEU. According to the Commission, the principle of mutual trust would be undermined if the possibility of recourse to external fora were to be maintained.[26] On the other hand, arbitral tribunals

20 PCA, *Eureko B.V. v The Slovak Republic,* Case No. 2008–13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, para. 177.

21 ITLOS, *MOX Plant (Ireland v United Kingdom),* Provisional Measures, Order of 3 December 2001.

22 Judgment of 30 May 2006, *Case C-459/03, Commission v Ireland,* ECLI:EU:C:2006:345, paras. 121–124. Marcel Szabó, 'A Mox Plant ügy: út az euroso-vinizmus felé?' *Európai Jog,* Vol. 10, Issue 2, 2010, pp. 18–28.

23 In *Achmea*, the CJEU ruled out the possibility of an arbitral tribunal initiating a preliminary ruling procedure. This approach also follows from *Dorsch Consult. See* Judgment of 17 September 1997, *Case C-54/96, Dorsch Consult*, ECLI:EU:C:1997:413.

24 PCA, *Eureko,* paras. 148 and 276.

25 Id. paras. 178–179.

26 Id. paras. 184–185.

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take the view that the arbitration clauses in BITs reflect the contractual will of the parties, which must prevail.

In *Eureko*, the arbitral tribunal did recognize that it had to use EU law to decide the dispute, but only to the extent permitted by the provisions of the applicable BIT and German law (the tribunal was in Germany).[27] Accordingly, the arbitral tribunal did not deal with the merits of the Commission's arguments based on EU law and decided the dispute essentially on the basis of the rules of international law.

5. Can the BITs Be Considered to Have Lapsed after EU Accession?

Articles 30 and 59 of the 1969 Vienna Convention on the Law of Treaties (VCLT) were invoked several times by the Commission and the Member States in each case. The question was whether provisions of EU law with a similar content to the BITs could 'override' the provisions of the BITs in international law terms, following the concept of 'new treaties on the same subject matter'. According to Article 59 VCLT, a new treaty identical in substance to the old one may replace the earlier if all parties to the old treaty are parties to the new one. This is so in case it can either be established from the later treaty that the parties intended to 'replace' the old treaty or the two treaties are incompatible in substance. In the present case, the question to be examined was the latter, in such a way that the BITs are the old treaty and the TFEU the new one.

In *Eastern Sugar*, the Czech Republic argued that the provisions of the BITs and EU law constitute a competing legal framework, as they regulate the same subject matter, and therefore the BITs can be considered to have been terminated under Article 59.[28] In *Eureko*, the Commission stated that, although the regime of intra-EU BITs should be dismantled, and although this has not yet taken place, the provisions of the BITs which are incompatible with EU law cannot be applied. The Commission based its reasoning on Article 30(3) VCLT, which provides that, in the case of treaties on the same subject matter, only those provisions of the old treaty which are compatible with the new treaty may be applied.[29] In international law terms, the two arguments appear to be contradictory: if the BIT has been terminated

27 Id. paras. 279–280.
28 SCC, *Eastern Sugar,* paras. 100–101.
29 PCA, *Eureko,* paras. 187–188.

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under Article 59, Article 30(3) can only be relevant insofar as a terminated treaty would apply on the same point. The question whether the BITs and the TFEU can even be considered to be treaties with the same subject matter is not obvious in itself. In *Eureko,* the Commission expressly referred to the fact that the arbitral tribunal in *Eastern Sugar* had interpreted the VCLT's concept of 'same subject matter' too narrowly, whereas the subject matter of contracts must be similar at a general level.[30]

The arbitral tribunals have consistently rejected the international law arguments of the Commission and the Member States, in particular because the fundamental freedoms of the EU do not fully cover the investor protection guarantees contained in the BITs, but are rather complementary norms.[31] Some authors argue that, although the BITs and the TFEU differ in their regulatory concept, their purpose and effect are the same: „to promote and protect investments".[32] However, the BITs are a *lex specialis* in relation to the general rules of EU law, and the principle of *lex specialis derogat legi generali* means that the BITs should apply in such cases.[33] There is also an argument that the purpose of BITs is to protect investments that have already taken place, whereas internal market freedoms only remove barriers to market access.[34] However, the latter approach is in fact an overly narrow interpretation of EU market freedoms.

In these cases, it became clear that the position of the Member States and the Commission was that the BITs had clearly been superseded by EU law, while the arbitral tribunals and investors took up a completely opposite position. The reason is that the former approach is based on EU law while the latter on international law, so the question is really whether international law should defer to EU law in similar cases or *vice versa*? The answer depends mostly on who answers this question.

30 Id. para. 191.
31 Tamás Szabados, 'A tagállamok közötti beruházásvédelmi egyezmények az uniós jogban', *Állam- és Jogtudomány*, Vol. 58, Issue 3, 2017, p. 21.
32 Hanno Wehland, 'Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?', *International and Comparative Law Quarterly,* Vol. 58, Issue 2, 2009, pp. 304–305.
33 Id. p. 305.
34 Szabados 2017, p. 20.

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6. The Relationship between BITs and EU Law Today

With the entry into force of the Lisbon Treaty, the area of foreign direct investment has become an exclusive competence of the EU, so Member States no longer have the right to act independently in this area.[35] The area of foreign investment concerns Member States' agreements with third countries, but the status of intra-EU BITs has not been clarified by the Lisbon Treaty.

Regulation (EU) 2019/2012 was created to address the situation of BITs with third countries, which allows BITs concluded by Member States to remain in force until the EU concludes an agreement with the third country. However, agreements between Member States are excluded from the scope of the Regulation.[36] Recital (5) of the Regulation recognizes that bilateral investment agreements remain binding upon Member States under public international law and will be replaced by agreements concluded by the EU over time. With this act, the EU has also recognized that BITs are valid under international law and has adopted a provision of a transitional nature.

If BITs did not automatically cease to apply with the Lisbon Treaty, why would intra-EU BITs have become inapplicable with EU accession? After all, both refer to an area of exclusive competence, the former to the common commercial policy, the latter to the internal market. The different approach may be explained by the fact that the Lisbon Treaty explicitly modified the scope of the common commercial policy (in the case of BITs), while some interpretations of the law have argued that the existence of intra-EU BITs was already contrary to EU law. Accordingly, the Lisbon Treaty in fact only extended the prohibition of intra-EU BITs to third countries.

35 Id. p. 22.

36 Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, paras. 7 and 15.

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7. Infringement Proceedings Concerning the Reform of the Hungarian Cafeteria System

The Commission found Hungarian legislation affecting the cafeteria system after 2011 incompatible with EU law, so in 2014 it launched infringement proceedings against Hungary.[37]

In its judgment, the CJEU found that the freedom of establishment and the freedom to provide services were also infringed, since only one company was allowed to carry out the specific economic activity, and there was no justification in terms of social policy for the legislation in question.[38] Restrictions on fundamental freedoms may be imposed only in case they comply with the requirements of necessity and proportionality and are designed to achieve an appropriate objective, but the CJEU did not consider that those requirements were met in the Hungarian case before it.[39]

The CJEU has answered the question of whether the changes made to the Hungarian cafeteria system are indeed contrary to EU law. However, when it comes to the three French companies, which were forced out of the cafeteria market, the EU law aspect was not the main issue, but whether Hungary had breached the provisions of the French-Hungarian BIT and whether they would be entitled to compensation. The French investors' cases were already pending before the foreign arbitration tribunal ICSID, but the proceedings of the CJEU did not play a role in the proceedings of this international court, which did not suspend its own proceedings to await a judgment from Luxembourg.[40] Thus, from an international law perspective we may conclude that it is not necessary for international fora to 'cede' their jurisdiction to the courts of EU Member States in disputes involving EU law but essentially based on an international legal relationship. Nor must they take into account the case law of the CJEU in their own proceedings, pending the outcome of an infringement procedure involving a party to the case.

37 Judgment of 23 February 2016, *Case C-179/14, Commission v Hungary,* ECLI:EU:C:2016:108, para. 1.

38 Id. paras. 164–169.

39 Id. paras. 170–174.

40 The speed and cost-effectiveness of the arbitral tribunal's conduct are also among the benefits of such fora.

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8. Achmea – a Turning Point in the Debate on BITs?

The first proceedings concerning the changes to the cafeteria system was decided in 2016 in *Edenred*, and the proceedings concerning the other two companies were still ongoing[41] when the CJEU handed down the *Achmea* judgment. These judgments both gave new impetus to the Commission's action against BITs and set out Hungary's position in its defence.

The background to the *Achmea* case was the same as the facts in *Eureko* (Eureko BV has since been succeeded by Achmea BV). The case came before the CJEU because the arbitral tribunal that decided the dispute between the company and Slovakia was based in Germany, and Slovakia appealed against the judgment of the arbitral tribunal to the regional high court. The court rejected the application, and Slovakia appealed against the decision to the Bundesgerichtshof, which asked the CJEU for a preliminary ruling.[42]

On 6 March 2018, the *Achmea* judgment was handed down, in which the CJEU stated that the autonomy of the EU legal system *vis-à-vis* national and international law and the order of jurisdiction established by the Treaties are respected by the Court's jurisdiction. The uniform application of EU law requires cooperation between national courts and the CJEU, and one of the means of achieving this cooperation is the preliminary ruling.[43] The Court has held that, even if the international court were to rule only on a breach of the BIT, it must ultimately apply or even interpret EU law, in particular fundamental freedoms, which are by their very nature part of the legal system of the Member States. The CJEU has found that arbitral tribunals are not a national court within the meaning of the TFEU (*i.e.* they are not entitled to request a preliminary ruling) and that the review of their judgments by national courts is limited.[44] The CHEU has also ruled that EU law precludes a provision in an international agreement between two Member States which allows an investor from one Member State to bring proceedings against an investor from another Member State before an

41 In *UP and CD Holding*, Hungary was ordered by ICSID in 2018 to pay EUR 23 million in damages. ICSID, *UP and C.D Holding*, para. 623.
42 *Case C-284/16, Achmea*, paras. 10–12.
43 Id. paras. 32–33 and 36–37.
44 Id. paras. 40–42 and 55–58.

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arbitral tribunal "whose jurisdiction that Member State has undertaken to accept".[45]

Some authors find the CJEU's view that there is insufficient control of arbitral awards to be unfounded, since in the case at hand it was the German court's review that led to the preliminary ruling. It is therefore conceivable that the CJEU's judgment may in fact have been directed at proceedings brought, or to be brought in the future under the BITs – as well as judgments rendered thereunder – which are governed by the rules of the ICSID Convention and are therefore not really subject to review by the national courts.[46] Indeed, the only remedies against an ICSID judgment are those provided for in the Convention.[47] In its submission in *Sodexo*, the Commission pointed out that, although *Achmea* concerned an UNCITRAL arbitration which does not completely limit the control of national courts, the ICSID rules exclude judicial review by the Member States of ICSID awards and that is why the CJEU's reasoning in *Achmea* applies to ICSID cases.[48]

9. The Sodexo Case

The *Achmea* judgment marked a major turning point in the Member States' defence. At the time of the judgment, Hungary was the subject of nine intra-EU BIT proceedings worth millions of euros, in which Hungary was now relying on the *Achmea* judgment to challenge the jurisdiction of the competent court. The CJEU's ruling also gave fresh impetus to the Commission, which had filed *amicus curiae* briefs in several cases, including against Hungary, alleging that the BITs were incompatible with EU law.[49]

In the procedure initiated by Sodexo, the Commission used the *Achmea* judgment in its submission, arguing that it also governs the French-Hungarian BIT and that in case of conflict EU law prevails over the provisions of the BIT. According to the Commission, the arbitration clause was rendered invalid by Hungary's accession to the EU, based on Article 30(3)

45 *Case C-284/16, Achmea*, para. 60.
46 Veronika Korom, 'The Impact of the Achmea Ruling on Intra-EU BIT Investment Arbitration', *Hungarian Yearbook of International Law and European Law*, Vol. 8, 2020, pp. 63–64.
47 ICSID Convention Article 53 para. (1).
48 ICSID, *Sodexo*, para. 167.
49 Korom 2020 pp. 54–55.

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VCLT.[50] Finally, the Commission stressed that the judgment in the proceedings would be unenforceable because it would be based on an invalid arbitration agreement, which became invalid with Hungary's EU accession in 2004. Therefore, national courts should refuse to enforce the judgment.[51]

By contrast, ICSID held that in *Achmea*, the arbitral tribunal established under the UNCITRAL rules was seated in an EU Member State and had to apply German law, and therefore the *Achmea* judgment concerned an *ad hoc* arbitral tribunal established under the law of Germany, an EU Member State. While the ICSID's authority as an arbitral tribunal derives from the ICSID Convention, the CJEU's judgments only apply to national courts. The court made it clear that it must only take into account the provisions of the BIT and international law, not EU law or national law, to decide the dispute.[52] ICSID did not consider the scope of the BIT and the TFEU provisions to be identical and therefore rejected the applicability of Articles 30 and 59 VCLT.[53]

Having established its jurisdiction, ICSID concluded that Hungary had violated the provisions of the BIT by taking measures to significantly deprive the company of certain rights in the course of the restructuring of the cafeteria regime, restricting its right of use and enjoyment, ultimately resulting in an indirect expropriation of Sodexo's property.[54] With this judgment, the history of the cafeteria cases before the international courts came to an end.

10. The Termination Treaty: the End of Intra-EU BITs?

From an international law point of view, the legality of the ICSID procedure cannot be challenged. The BITs were still valid and effective under international law, ICSID based its jurisdiction on the BITs and its procedure on their provisions and its own rules of procedure, and in its reasoning it made a substantial distinction between the cases on which the *Achmea* judgment was based and those referred to it. However, after *Achmea* it became clear that, from an EU perspective, intra-EU BITs were contrary to EU law.

50 ICSID, *Sodexo,* paras. 162–165.
51 Id. paras. 165 and 169.
52 Id. paras. 185–188.
53 Id. para. 192.
54 ICSID, *Sodexo*, paras. 237, 249 and 327.

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On 5 May 2020, 23 Member States concluded an international treaty (called Termination Treaty) declaring the termination of the intra-EU BITs listed in the treaty. The treaty stipulates that a BIT expires when both parties ratify the text of the agreement. In other words, the mere creation of the Termination Treaty did not automatically terminate any intra-EU BIT, but was conditional upon the Member States' declaration of their approval.[55]

According to Article 5 of the Treaty, arbitration clauses cannot be used as a legal basis for new arbitration proceedings after the *Achmea* ruling, and therefore arbitral tribunals do not have jurisdiction in proceedings initiated after 6 March 2018. The Treaty requires Member States to request the competent national court to annul or set aside, refuse to recognise or enforce a judgment rendered in arbitration proceedings.[56] Article 9 establishes the so-called structured dialogue, which offers the investor the possibility to engage in a conciliation procedure, provided that it requests a stay of the pending proceedings or undertakes to refrain from enforcing the judgment already rendered. This can be interpreted as a form of pressure on investors not to exercise their right to the procedure or to enforce the judgment. However, the structured dialogue has not been well received by investors.[57]

The provisions of the Treaty are of concern in part because, in principle, they affect proceedings and judgments still pending at the time of the *Achmea* judgment, even though the Treaty itself was only concluded in spring 2020.[58] If it is accepted that the BITs will expire upon ratification of the provisions of the Termination Treaty by the States Parties, then the BITs were still in force before that date – certainly from the point of view of international law – and it is therefore debatable whether the Treaty can legitimately deprive arbitral tribunals of jurisdiction which based their proceedings on the BITs still in force at that time.

It is also repugnant that the countries that have concluded BITs are, by their own act, retroactively terminating inter-state treaties, depriving individual investors of rights on which they have relied over the long term. This

55 Termination Treaty, Article 16.

56 Id. Articles 5–7.

57 Veronika Korom, 'Intra-EU BITs in Light of the Achmea Judgment', *Central European Journal of Comparative Law*, Vol. 3, Issue 1, 2022, p. 112.

58 The provision thus also affects *e.g.* the *UP and C.D Holding* and *Sodexo* cases, although they were announced before the Termination Treaty was adopted.

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solution is expressly contrary to the principle of the protection of legitimate expectations, which is also enshrined in the case law of the CJEU.[59]

Following the Treaty, investors and arbitration tribunals have expressed the view that unless the protection guaranteed by BITs is replaced, intra-EU investment could decline and national companies could be at a disadvantage compared to third country investors or companies could resort to *forum shopping*.[60]

11. Changes in the Hungarian Legal Environment

Following the conclusion of the Termination Treaty, the Hungarian legislator promulgated the Termination Treaty surprisingly quickly, already in June 2020, with Act LXI of 2020, and with this act immediately repealed, among others, 59/1987 (XI. 29.) MT Decree, thus the BIT became *de facto* inapplicable in Hungarian domestic law (in the absence of a promulgating act), as the dualist concept of the Hungarian legal system requires the transposition of the international treaty by a promulgating act.[61]

In reaction to the legislator's action, Sodexo tried in vain to seek enforcement of the ICSID judgment in Hungary. In its order, the Budapest Court of Appeal held that the judgment was unenforceable because the promulgating legislation was no longer part of Hungarian law, and noted that as an EU court it was obliged to take into account the findings of the *Achmea* ruling. The court referred to the provision in the Termination Treaty which allows States Parties to request national courts to refrain from recognizing and enforcing an arbitral award, and which under the treaty applies to ICSID awards.[62]

Although Sodexo won the case before the ICSID, it was unable to enforce the judgment, primarily because of the rules of the Hungarian legal system, but indirectly because of EU law. Sodexo then lodged a constitutional complaint (against the final court judgment and the Hungarian law promulgating the Termination Treaty) before the Constitutional Court.

59 Judgment of 26 March 2018, *Joined Cases C-496/18* and *C-497/18*, *Hungeod and Others*, ECLI:EU:C:2020:240, para. 100.
60 Korom 2020, p. 72.
61 Fundamental Law of Hungary, Article Q(3).
62 Budapest-Capital Regional Court 2201–3.Pkf.25.414/2020/4.

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12. The Issue of Enforceability

One of the main questions of this paper is whether the *Achmea* judgment alone automatically renders arbitral awards unenforceable within the EU? In the case of Sodexo, we are faced with a situation where, from an international law perspective, ICSID correctly established its jurisdiction based on the BIT in force at the time, but the award was nevertheless unenforceable before a national court. If we take only the *Achmea* judgment and the changed EU legal context in this context, a situation emerges in which Member States had two options after the ruling: to follow the CJEU's findings in full or instead, with due consideration to their international obligations and investors, to maintain their treaties contrary to EU law, exposing themselves to infringement proceedings.

If Member States apply the *Achmea* judgment consistently and uniformly, it is reasonable to assume that the *Achmea* judgment will indeed automatically render unenforceable arbitral awards under intra-EU BITs, since from an EU law perspective it is already beyond doubt that they are contrary to EU law. The loyalty clause, the principle of effectiveness and the requirement of uniform application of EU law give the binding EU rule such a legal force that its breach – in the present case, if the 'interests of the investors are chosen' – would constitute a serious breach of contract by the Member State and could even lead to competition law consequences (*e.g.* for prohibited state aid).

Decisions by national courts that violate EU law can also constitute an infringement by a Member State.[63] A national court enforcing a judgment rendered without jurisdiction under EU law, amounts to an infringement by the relevant Member States. The Hungarian judiciary seems to have opted for 'EU conformity' and did not consider the *Sodexo* judgment enforceable, citing the findings of *Achmea*. However, the referring court did not base its judgment exclusively on *Achmea*, but referred both to the repeal of the law promulgating the BIT and to the Termination Treaty,[64] although these are based on *Achmea* itself. The court was correct in refusing enforcement, since the BIT on which the ICSID award was based was no longer part of Hungarian law. On the other hand, from the point of view

63 Ernő Várnay, 'A tagállamokkal szembeni kötelezettségszegési eljárások jogiasodása az Európai Unióban', *Tézisek*, 2017, p. 11.

64 Kúria Pfv.21.094/2020/5, para. 4.

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of international law, the BIT was still valid and therefore bound Hungary under international law.

Section 210 of Act LIII of 1994 (Act on the Enforcement of Judgments) provides for the enforcement of judgments also in accordance with the provisions of a separate Act and international conventions. Since EU law, and thus the *Achmea* judgment, is part of the legal system of the Member States, when deciding on the enforceability of a foreign judgment, the national judge fulfils an obligation under EU law when he examines the foreign judgment in the light of *Achmea*. Meanwhile, to refuse enforcement in that light would be to breach an international treaty.

It is too early to say whether the national courts will uniformly and consistently apply the provisions of the *Achmea* ruling. Even to assume so would be presumptuous, as Member States have always been divided on the validity of BITs[65] and even after *Achmea* there was no clear unanimity that BITs should be abolished.[66] Thus, it is also difficult to say at this stage whether *Achmea* alone will indeed make it completely impossible to enforce judgments of external fora based on BITs in the EU.

So is *Achmea* relevant to an international court? It is clear from the arbitral awards and their reasoning that the answer is no. Neither in *UP and C.D Holding* nor in *Sodexo* did the ICSID find the CJEU's judgment relevant to its own proceedings, as it was considered to be a matter of domestic law for the EU and its Member States to resolve from the point of view of international law. However, as a consequence of *Achmea*, by enforcing an award based on the arbitration clauses of a Member State's BIT, the Member State, while fulfilling its international law obligation, would ultimately be in breach of EU law. Since the conflict has not been resolved either by the arbitral tribunals or by the EU, the companies concerned and the Member States find themselves in a fuzzy situation even after the *Achmea* ruling.

65 A number of states shared the Commission's view that the BITs were incompatible with EU law, but especially the older Member States did not consider the guarantees of investor protection in the BITs and EU law to be identical for their investors. Korom 2022 p. 102.

66 Not all Member States are party to the Termination Treaty. Korom 2020, p. 71.

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13. Constitutional Complaint by Sodexo

On 6 October 2020, the Constitutional Court of Hungary received Sodexo's constitutional complaint. In the complaint, Sodexo asked the Constitutional Court to declare certain provisions of Act LXI of 2020 promulgating the agreement on the termination of the BITs between the Member States to be unconstitutional and to annul them, as they violate the prohibition of retroactive legislation. The applicant also sought a declaration that the judgments of the Budapest-Capital Regional Court and the Budapest-Capital Regional Court of Appeal relating to the enforcement application are unconstitutional.[67] As regards the latter, there is a discrepancy between the reasoning of the two courts, since while the court of first instance[68] cited the consequences of *Achmea* as the primary reason for rejecting the application, the court of appeal based its judgment on the international agreement on the termination of the BITs.[69] What the judgments have in common, however, is that they directly or indirectly enforce EU law against an obligation under international law.

According to one of the considerations related to the constitutional review, since the Termination Treaty itself is of a dual nature, this should be taken into account in its constitutional assessment: on the one hand, it is an international treaty, but on the other hand, it contains, or rather implements, an obligation under EU law. This is important because each Constitutional Court has different powers to review international law and EU law. Furthermore, since the agreement is based on an obligation under EU law, its constitutional implications should be examined in the light of EU law.[70] It is questionable to what extent the Constitutional Court – which is does not review EU law in its procedures – would have taken EU law into account if the constitutionality of the challenged legal provision could be justified solely on the basis of this set of arguments.

67 Constitutional complaint, No. IV/01688/2020, I-III.
68 Budapest-Capital Regional Court 32.Vh.400.043/2020/6.
69 Lénárd Sándor, 'The Constitutional Dilemmas of Terminating Intra-EU BITs', *Central European Journal of Comparative Law.* Vol. 3, Issue 1, 2022, p. 185.
70 Id. p. 190.

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14. Closing Words

Sodexo finally withdrew its constitutional complaint on 3 January 2022 and as a result, the Constitutional Court's proceedings ceased.[71] Therefore, we do not know how the Constitutional Court would have resolved the contradiction between EU law and international law in relation to enforceability in Hungary.

Although there has been no official communication from the Hungarian Goverment or the EU, the press has noted that Sodexo reported in its 2022 financial report that Hungary had paid it compensation amounting to EUR 33.5 million on 31 December 2021, and the dispute is considered closed.[72]

It is possible that a friendly settlement was reached in the background, as the French President and the Hungarian Prime Minister met in Budapest on 13 December 2021,[73] during which it cannot be excluded that the *Sodexo* case was also discussed, and they may have worked out a solution acceptable to the parties, with Sodexo reaching an agreement with the Government of Hungary. If this was indeed the case, a case with very interesting legal problems has finally ended with a positive outcome for the company concerned (at least in the sense that Sodexo has finally obtained compensation, although the amount received is only a fraction of the amount awarded in the original judgment). Moreover, in this case, a conflict between EU law and international law that seemed unresolvable has finally been resolved through diplomatic negotiations using tools of international law.

It should be stressed that the 'resolution of the conflict' only applies to *Sodexo*, as a bilateral inter-state negotiation cannot resolve the basic conflict between EU law and international law, but it can serve as an *ultima ratio* for resolving disputes in future cases based on BITs. This may be necessary if EU law continues to treat the issue of intra-EU BITs as 'resolved'. The legality of EU acts that do not take into account international law – and the interests of investors and their home Member States – in these cases is at least questionable from an international law perspective. It is difficult

71 Order No. 3126/2022. (III. 23.) AB and Order No. 3127/2022. (III. 23.) AB.

72 Sodexo – Financial Report for First half Fiscal 2022, Issy-les-Moulineaux, April 1, 2022, paras. 41–42. The report is available for download on Sodexo's website, at www.sodexo.com/en/investors/regulated-information.

73 Orbán-Macron meeting, Budapest, 13 December 2021, at www.france24.com/en/europe/20211213-macron-to-begin-hungary-visit-with-tribute-to-orban-opponent.

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to take a clear position favoring one side over the other, since the EU has consistently invoked its own law to protect the integrity of the internal market, but in *Sodexo* we see that international law was ultimately capable of resolving the dispute. It is also true that in some cases investors have legitimately claimed damages, and the EU should take into account in its investment protection policy that European investment that has become shaky ground which may be a warning to investors, or at least a cause for concern.

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The Hungarian Blasphemy Cases

Free Speech versus Protection of Religious Communities

Lóránt Csink – László Trócsányi[*]

Abstract

Free speech is a cornerstone of democracy. So as cultural diversity and the protection of various religious communities. But what if they compete? How to handle situations when expressions infringe religions or religious people? Recently, such questions have become crucial for legal literature and jurisprudence. The present paper does not have a definite answer which democratic value to the first place. Instead, it intends to give aspects upon which the issue can be determined. For this purpose the paper first gathers the different approaches and describes the differences of several national courts and the ECtHR. Then it analyses the recent case law of the Hungarian Constitutional Court, finally it draws conclusions.

Keywords: blasphemy, free speech, mockery, protection of religious communities, religion

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1. Christian Roots of Constitutionalism

In history, Christianity and the community of European states have been intertwined in many ways. On the one hand, the cradle of Christianity

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extended further than the European cultural area. From the fourth century onwards, following the famous Constantinian turn,[1] Christianity became a dominant feature of the Roman Empire and later, the continent, and from that time onwards it was the home of the development of Christian churches and the evolution and consolidation of Christian ethical and political thought. The latter included, in particular, the concept of natural law associated with St Augustine and St Thomas of Aquino, and later with Jean Calvin, the representative of the Reformation. This tradition became so entrenched that subsequently, following World War II, it also laid the foundations for the protection of human rights under international law.[2]

Christianity has given Europe a vision. On the one hand, Christianity transmitted to Europe the values of the ancient world, including the Roman legal tradition, which is still the foundation and origin of continental European legal thought and legal literature.[3] Christianity, on the other hand, has kept the peoples of Europe together as a community for centuries, creating civilisation. In much of Central Europe, the establishment of the state and the stabilisation of political power coincided with the adoption of Christianity.

The uniqueness of Christian civilisation derives from the dogma that God not only created man in his own image, but also gave him the gift of free will, which, however, comes with personal responsibility. It is Christian faith, culture and vision that Europe has defended, promoted and disseminated through missions over many centuries. Until the age of the great discoveries and the rise of the Ottoman Empire, the international community was a 'family of nations', made up of a few dozen Christian

1 Christianity gained increasing community-forming power during the reign of the Roman Emperor Constantine I, due to the Constantinian revolution, eclipsing the pagan traditions that dominated the ancient world. The Constantinian turn was a crucial moment for the development of Western civilisation as a whole. Not only in terms of the autonomy and development of ecclesial communities or the defence of Christian beliefs, but also as a pillar of the Roman Empire and later of the Western empires. This was followed by profound social changes: the public rituals of the ancient world, such as bloody circus games or cruelty to slaves disappeared, while the requirements of Christian ethics emerged and were reinforced. At the same time, Emperor Constantine created unity within Christianity, raising up a single church in the empire.

2 Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, Random House Trade Paperbacks, 2002.

3 András Földi & Gábor Hamza, *A római jog története és institutúciói,* Nemzeti Tankönyvkiadó, Budapest, 1996, pp. 110–111.

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nations.[4] International law at the time governed relations between the so-called civilised nations that once made up the European community of Christian states in a community of political, cultural, religious and moral interest.[5]

Christianity seemed to have political relevance, too; it became an integral part of the constitutional traditions of European nations. God and Christianity appear in different ways in different European constitutions. For example, the German, Irish, Polish, Swiss, Maltese and Hungarian constitutions explicitly mention God, and do so in the context of Christianity.[6] The Hungarian Fundamental Law emphasises the nation-preserving power of Christianity, making the protection of this cultural trait a state task. The Declaration on the Rights of Man and the Citizen, which is part of the French Constitution, refers to a supreme being (‘*Être suprême*’), while the Macedonian, Slovak and Czech constitutions emphasise the values and heritage of the spirit of nature. In a significant number of European constitutions, Christianity is presented as a common constitutional tradition.

2. Is Religion a Public or Private Issue in Constitutional Cultures?

Mentioning God and Christianity in constitutions is a separate issue from the freedom of religion and the relationship between religion and public life. Since Reformation and the Enlightenment, European states have enshrined the principle of separation of church and state and ensured free practice of religion by providing for the religious neutrality of the state. Accordingly, the Universal Declaration of Human Rights of 1948 guarantees the right of everyone to religious freedom, which “includes freedom to change his religion or belief, and freedom, either individually or collectively, to manifest his religion or belief, either in public or in private, in teaching, practice and observance” (Article 18). The Universal Declaration appears to consider freedom of religion as a collective value, as a public good.

4 David J. Bederman, *The Spirit of International Law,* The University of Georgia Press, 2002, pp. 50–51.

5 Gábor Sulyok, ‘General Principles of Law as a Source of International Law’ *in* Péter Kovács (ed), *International Law – a Quit Strength,* Pázmány Press, Budapest, 2011, pp. 161–162.

6 Jean-Pierre Duprat, ‘Dieu dans les constitutions européennes’ *in Les dynamics de droit Européen en debut de siècle*. Paris, Pedone, 2004, pp. 296–297.

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However, different constitutional systems take different positions on the desired balance between the religious neutrality of the state and the public role of religion. Some countries, notably France, are more secularised, viewing religion and religious practice as a threat, evidenced by the fact that the supervision of religious denominations is carried out by the Minister of the Interior. More generally, there is a trend in the Western world to consider religion as a private matter and intend to exclude religion from public life. This can be seen, for example, in the debates seeking to remove Christian symbols from public spaces, Christian tradition and symbols from public discourse, or to withdraw public funding or benefits from church schools or other institutions.[7] This approach interprets the separation of church and state in a way that 'the less religious symbols you have in public spaces, the more neutral you are'.

Meanwhile, in other countries, such as Greece, Malta, Ireland, and certain Scandinavian and Central European countries, constitutional law does not juxtapose the freedom of religious practice with the religious neutrality of the state. Instead, it recognises the vital role of religious freedom in the search for truth and human existence, and therefore acknowledges its legitimacy in public discourse. Moreover, in Hungary and Poland Christianity is also a political issue: Christian culture and identity are the subject of public debate.

Religious freedom is central to the system of fundamental rights, because it ensures the search for the meaning of human existence and knowledge regarding the source of the universe. Religious freedom thus embraces key aspects of humanity and morality; as such it directly concerns social life. This understanding is reflected in the landmark decision of the Grand Chamber of the ECtHR in *Lautsi*.[8] The judgment considered the requirement to display a cross in classrooms as a symbol of Christianity, *inter alia* in view of the country's majority Christian culture, to be consistent with the principle of freedom of religion as stipulated in Article 9 ECHR.

The East-West divide in many areas of Europe also affects the perception of religious freedom, largely because of the regions' different historical experiences and developments. One of the cultural antidotes to foreign ideological oppression of countries east of the Iron Curtain under commu-

7 Robert P. George, *The Natural Law Foundations of International Human Rights and Religious Freedom*, The Heritage Foundation, at www.heritage.org/religious-liberty/lecture/the-natural-law-foundations-international-human-rights-and-religious.

8 *Lautsi v Italy,* No. 30814/06, 18 March 2011

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nism was the communal dimension of Christianity with its churches and institutions. In other words, during communism churches were the only shelters from communist ideology. As a consequence, the community-, nation-, and civilisation-preserving power of Christianity together with other factors, greatly contributed to regime changes all over Central Europe. This patriotic and anti-communist nature of Christianity continued to prevail in many Central European countries.

3. The EU's Relationship with Christianity

European integration started to develop on Christian democratic foundations. After the physical and moral destruction brought about by World War II, European unity was organised based on the vision of Christian democratic parties and Christian democratic political leaders. Konrad Adenauer, Robert Schuman and Alcide De Gasperi all contributed to the development of European integration in a Christian democratic spirit and laid the foundations for the so-called *'Les Trente Glorieuses'*, or the era of the Thirty Years of Plenty, up to the 1980s. The beginning of European reconstruction thus marked a return to Christian roots, a clear recognition that Christianity was the very basis of European civilisation. While other ideas also shaped the continent, such as capitalism, liberalism among others, none of these were distinctive cultural features of Europe; but were much rather global systems or ideologies.

Meanwhile, the initial orientation of European integration was merely an economic community up until the second half of the 1980s. The success and defence of the market economy was, of course, a political objective in stark contrast to the Soviet-style command-and-control system. Nevertheless, the dominant feature of integration was its strong focus on the economy. The goal of the 1986 Single European Act was the completion of the internal market and the broadening of European political cooperation, further unfolded by the Maastricht Treaty of 1992. From then on, the role of Christian democracy and Christianity was not so apparent as it had been at the beginning. Moreover, even integration principles that were rooted in Christianity, such as subsidiarity, were not fully implemented. In only a few cases has the CJEU ruled that the European Commission does not have the power to act for violation of the principle of subsidiarity.

The debate on the Constitutional Treaty in the European Convention in 2004 was a decisive moment in the relationship between the EU and

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Christianity. Aspirations for a federalist unification of Europe were divided on the question of whether it was necessary to include a reference to Europe's Christian roots in the preamble of the Constitutional Treaty. Some called for a reference to the common Christian roots, while others insisted on a secularized preamble. In the end, the cultural, religious and humanist heritage was included in the preamble, but the Constitutional Treaty failed in the ratifications by the Member States.

The TEU makes no reference to Christianity, but only to the constitutional tradition shared by the Member States in the area of fundamental freedoms. However, in view of the constant expansion of the EU's regulatory scope, its growing impact on the Member States and on the lives of their citizens, and the fact that integration is taking place on a political level going beyond the dimensions of the market and the economy, it is impossible to avoid the discourse on the EU's relationship to its heritage, to Christianity and Christian values.

4. 'Buffer zone': Free Speech versus Respect for Religious Communities

The representation of religion and the permissible limits thereof raise a number of issues that are important not only for the media, but also for governments and society in general. The way religion and certain symbols are portrayed not only determines society's perception of religion, but also affects political relations between religious groups, society as a whole and the state.[9]

There is consensus in legal literature that the grounds for restricting expressions that offend religious sensitivities is the dignity of religious communities and their members. Earlier legislation that had protected the name of God was repealed (not so long ago!).[10] Now, the grounds for protection

9 Norman Doe, 'Religion and Media Law in Europe: A Comparative Study' *in* Norman Doe (ed.), *The Portrayal of Religion in Europe: the Media and the Arts*, Peeters, Leuven – Paris – Dudley, 2004, p. 287.

10 Rumy Hasan, 'Blasphemy, Multiculturalism and Free Speech in Modern Britain' *in* Paul Clitteur & Tom Herrenburg, *The Fall and Rise of Blasphemy Law,* Leiden University Press, 2016, pp. 209–212. Interestingly, the author points out that one of the driving forces behind the abolition of blasphemy was the film Life of Brian; the opposition to the Monty Python group's work caused widespread resistance in artistic circles, which later allowed the film to be shown (practically unchanged).

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is much rather to safeguard believers from direct or indirect abuse.[11] In the modern sense, blasphemy is therefore a verbal or symbolic communication that insults the dignity of a religious person by mocking an element of religion or belief. The object of protection from blasphemy is not God or a belief, but the religious community and the religious individual.[12] One may conclude that the external side of blasphemy is that a spiritual element is mocked or criticised, while its internal side is that the dignity of the community or its member is affected.

An analysis of the case law of the ECtHR shows that the reason for restricting religiously offensive communication is not public policy, but the protection of the "rights of others", on the grounds that religiosity is one of the most defining elements of a believer's identity and approach to life.[13] Török also points out, however, that the ECtHR's landmark cases have "invariably protected the rights of the followers of the majority religion of the country or region concerned", notwithstanding the fact that in their case the 'chilling effect' of not being able or not daring to exercise their rights is hard to imagine.[14] It is also noticeable that "in cases of blasphemy, it interprets the principle of the margin of appreciation of the state in a particularly broad sense. The ECtHR is less activist in this field; it is cautious enough not to set any general, uniform European benchmark in this area. It has chosen not to fill this void in certain particularly sensitive areas either, unless there is a common European standard. Consequently, the State Parties of the Convention have a wider margin of appreciation".[15]

One country that takes a very strong position in favour of free speech in blasphemy issues is France. According to French jurisprudence, blasphemy must be direct and personal to be punishable. This is illustrated, for example, by the case of the 2005 Last Supper painting. At first instance, the Paris Court of Appeal ordered the immediate removal of the painting, in addition to imposing a daily fine of €100,000. Subsequently, in 2006,

11 Balázs Schanda, 'The Constitutional Court of Hungary on the Borderlines of Blasphemy', *Hungarian Yearbook of International Law and European Law,* Vol. 9, 2021, p. 384.

12 András Koltay, 'The Freedom and Restriction of Blasphemy: Theoretical Perspectives' *in* Jeroen Temperman & András Koltay (eds.), *Blasphemy and Freedom of Expression*, Cambridge University Press, Cambridge, 2018, p. 228.

13 Bernát Török, 'Védhetjük-e a vallás(os)okat a blaszfémiától?' *in* András Koltay & Bernát Török (eds.), *Sajtószabadság és médiajog a 21. század elején*, Complex, Budapest, 2014, pp. 198–199.

14 Id. p. 200.

15 Koltay 2018, p. 236.

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the Court of Cassation ruled that the artist had not intended to offend believers with the painting. According to the Supreme Court, the image was an artistic work, the publication of which was within the scope of freedom of expression. The parody of a religious symbol does not harm believers, since its purpose is not to offend them but to create a new art.

Also in France, a poster with the slogan *"Sainte Capot protege nous"* (Saint Condom, protect us) was published in the fight against AIDS. The Toulouse Court of Appeal ruled at first instance that the poster offended the religious sensibilities of believers. However, the Court of Cassation concluded that, since the poster was not meant to offend the Catholic community, its prohibition was unjustified.

5. The Jurisprudence of the ECtHR in Blasphemy Cases

5.1. The External Side: Speech Infringing Religious Feelings

The external side of blasphemy is to examine which communications are even capable of objectively violating the dignity of the religious community. According to Török's summary,

> "while there is consensus on the need to take action against incitement, and arguments both for and against limiting vilification are regularly made, there is almost unanimous agreement among scholars that nothing should be done about speech that falls below this threshold".[16]

Now the question arises where that 'threshold' is, *i.e.* what are the expressions that may deemed insults. Analysing the case-law of the ECtHR leads us to the criteria below.

5.1.1. Is the Criticism Objective?

A recurring element in the ECtHR's practice is whether criticism is "unduly offensive". In general, one may conclude that disagreement and criticism in itself enjoys the protection of freedom of expression. In *Giniewski*,[17] an expression questioning papal infallibility and analysing the link between the Catholic Church and the Holocaust was considered to fall within the

16 Török 2014, p. 195.
17 *Giniewski v France*, No. 64016/2000, 31 January 2006.

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scope of the freedom of expression. It can therefore be concluded that not only the content of the given expression, but also the manner in which it is made is relevant in determining whether it falls under the protection of Article 10 of the Convention.

5.1.2. Is the Criticism Personal?

One should distinguish between the criticism of ideas, intellectual products and the criticism aimed at individuals. All ideas (including religion and religious beliefs) are open to criticism, and anyone is free to express an opinion, even a strongly critical one, on scientific, public or any other writings, pictures or any other forms of communication. No one has a fundamental right not to be confronted with opinions that are contrary to their beliefs.[18] In fact, such debates promote the pluralism of society and the survival of democracy, and *vice versa*: it is against democratic discourse when legislation and law enforcement do not allow for the free exchange of opinions and convictions.

Freedom of expression is justified differently when criticism is directed at the individual rather than at an idea, and the debate turns personal. It is therefore different to criticise a religion and to criticise religious persons for their beliefs and convictions. In the latter case, it is justified for the individual to defend their dignity and reputation.

5.1.3. Who Is the Target Audience of the Expression?

The perception of an expression is also influenced by who its addressees are; the audience to whom it is addressed and to whom it is made available. It makes a difference whether the expression violates the general good or the dignity of a community. Of course, the dignity of the community must be protected even if the expression does not offend others, but it is important who the expression is originally addressed to. In *Otto-Preminger-Institut*, the ECtHR found it important that the film, which offended religious sensibilities, was intended to be shown in the predominantly Catholic

18 Emese Szilágyi, 'Nem tréfadolog – Karikatúra-ügyek a strasbourgi mérlegen' *in* Szilvia Köbel & Zoltán Tóth J. (eds.), *100 éves a magyar iszlámtörvény*, KRE ÁJK, Budapest, 2017, pp. 157 and 160.

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Tyrol.[19] Similarly, in *Klein*, the EctHR took into account that the expression insulting the Slovak bishop was published in an intellectual newspaper, in a deliberately slang style.[20]

5.1.4. Is the Speech Part of a Public Debate?

In general, political communication in the broader sense, which affects the functioning of society, is subject to increased protection. If the Church or people speaking in the name of the church are involved in the social debate, they must, like other public actors, be able to withstand strong criticism,[21] especially if the public figures themselves publicly proclaim their religiousness.

5.2. The Inner Side of Blasphemy: the Believers' Dignity

One of the criteria for determining the scope of protection of freedom of expression is the nature of the expression. Another is how it affects the personal rights and dignity of the religious community or the religious person.

Török points out that the sense of offence is subjective; what one person laughs at or shrugs off may be an outrageous defamation of religion for another. That is why, in his view, the focus should not be on the subjective offence, but on the religious convictions held by the believers, whether the communication concerns the believers' faith, the beliefs that give religion its essence or some relevant element thereof.[22] This solution seems convincing but there is an important concern: it necessarily leaves it to the secularized state power, the secular courts and legislature, to decide whether a symbol or dogma belongs to the core of religion or not. As long as this relationship is a well-known fact, the position of the secular power is acceptable, but many questions arise where it is not clear whether it is a central element of faith. And of course there are several instances where there is a debate within the community of believers, where there is no established consensus.

In such cases, if the constitutional protection of free speech is extremely narrow if it does not allow for the criticism of, or offending any beliefs.

19 *Otto-Preminger-Institut v Austria,* No. 13470/87, 20 September 1994, para. 56.
20 *Klein v Slovakia,* No. 72208/01, 31 October 2006, para. 48.
21 Schanda 2021, p. 388.
22 Török 2014, pp. 203–204.

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Even Protestantism that dominates many parts of Europe could not have emerged by this logic, since it began by questioning important parts of Catholic beliefs.

That is why the subjective aspect cannot be ignored: how much the believers themselves consider the expression to be offensive, to be an affront to their religious identity. The combination of subjective and objective sides can help determine whether there is a stronger constitutional interest supporting the protection of free speech, or conversely, its restriction.

6. The Hungarian Blasphemy Cases

Contrary to the French view, Hungarian legislation is more rigorous in protecting religion and the dignity of religious communities. Over the past decade, the Hungarian Constitutional Court was faced with three cases in which it had to decide the conflict between free speech and the protection of religious communities.

6.1. The Adoration of the Shepherds Case

In 2014 the Christmas edition of the Hungarian weekly newspaper HVG presented a picture on its cover titled "Grand Theft Christmas".[23] The cover featured a caricature in the vein of Gerard Van Honthorst's "The Adoration of the Shepherds", where the faces of the original characters were replaced by those of public figures, and the image of the baby Jesus was replaced by a pile of gold coins.

A former Member of Parliament brought an action against HVG, claiming that the picture violates the personal rights, honour and dignity of members of the Catholic community. Both the court of first instance and the court of appeal, as well as the Curia in the review proceedings decided that the image falls under the freedom of expression and dismissed the action. Subsequently, the same MP lodged a constitutional complaint.

The Constitutional Court in its *Decision No. 7/2021. (II. 19.) AB* rejected the petition. It pointed out that

23 Originally: Nagy Harácsony. In Hungarian there is only one character difference between Christmas (Karácsony) and the aggressive collection of fortune (Harács); the cover mixed the two in the caricature.

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> "when discussing public affairs, especially when the aim is to control public power or those exercising public power and to inform and draw the attention of public opinion, the form and style of expression chosen must not be inconsistently or excessively offensive, but criticism, irony, a certain degree of provocation, and, where appropriate, mildly offensive or insulting statements remain protected by the freedom of expression".[24]

It also stated that

> "the message, the purpose or the degree of offence or harm of a given expression must be assessed with due care, in addition to the content and form of the expression in question, in the light of its context within the medium and the social environment. If a community in our country has historically been subjected to serious offences, or if it is currently subject to repeated attacks, the dignity of that community within society may be considered to be more vulnerable".

The Constitutional Court agreed with the *Kúria*'s view that the authors of the picture had expressed a political opinion and that "it was neither aimed at insulting Christians nor did it convey a negative value judgement regarding believers".[25]

6.2. Demonstration against the Polish Abortion Regulation

Decision No. 6/2021. (II. 19.) AB decided in the case of a demonstration that had been organized against the Polish Catholic church supporting the complete ban on abortion in Poland. During this performance, which was later published on the internet, one of the demonstrators, feigning the act of communion, placed a white pill from a bag marked 'abortion pill' on the tongue of the other two defendants, uttering the statement "the body of Christ". The Metropolitan Court dismissed the action. Upon appeal by the plaintiffs, the Budapest Court of Appeal overturned the judgment of the court of first instance and found that the defendants had violated the plaintiffs' human dignity and right to freedom of religion. In its judgment, the *Kúria* set aside the judgment of the court of second instance and upheld the judgment of the first instance court. In its reasoning, the court of first instance pointed out that, in the social debate on the authorisation

24 Decision No. 7/2021. (II. 19.) AB, Reasoning [31].
25 Id. Reasoning [37].

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of abortion, the Church, its members and the members of the religious community concerned, who express their views firmly, are obliged, like other public figures, to tolerate strong criticism on a wider scale. However, the Constitutional Court has stressed that

> "assessments and criticisms of the religious community expressed in a public matter may by their very nature also affect members of the religious community who do not take part in the public debate. Nevertheless, it cannot be justified that, in general, the protection of the dignity of members of the religious community, by reason of their very membership of the community, be restricted to the degree as that of representatives of the religious community who participate in public life".[26]

The Constitutional Court therefore made a distinction between mockery of the Church and mockery of believers; holding that the Church's opinion on public matters could be criticised in the same way as that of public figures, but that this did not mean that the believers' religious convictions could be criticised to the same extent.

6.3. The Daily Drawing Case

At the end of 2022 the Constitutional Court was faced with quite a similar case as the one it had decided in the "Grand Theft Christmas" and the abortion demonstration case.

The Hungarian political newspaper Népszava published a caricature on 28 April 2020 called "Chronic" on its Daily Drawing column. In the left hand corner of the caricature stood the national medical officer, standing behind the lectern used at press conferences, and on the right is Jesus Christ crucified. The caricature shows the doctor looking at Christ on the cross with the following sentence in the text bubble above his head: "His primary disease was crucifixion".[27]

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26 Decision No. 6/2021. (II. 19.) AB, Reasoning [34].

27 In Hungarian the same word may mean dependency and to hang. To change the mock to English: the message is if one would refer Christ's crucifixion as hangover. The picture referred that during Covid the numbers of diseased and deaths were not real as they always referred to the primary diseases when they intended to minimise the risk of Covid.

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A Member of Parliament initiated proceedings before the court, arguing that the caricature violated the personality rights of Christian communities and the dignity of the religious community, because it caricatured the death of Jesus on the cross. The court of first instance dismissed the action because it considered that the expression mocked the communication typically conveyed by the competent national agency for disease control, not a religious symbol or event. The court of appeal, however, reversed the judgment, holding that the depiction of Jesus in the context of the epidemic was not a political expression and that the Christian denominations had not expressed their views on the epidemic. Upon review, the *Kúria* upheld the judgment of the court of appeal. It held that the use of a religious symbol in a caricature is arbitrary and self-serving if it contributes nothing to the discussion of public affairs.

Decision No. 3488/2022. (XII. 20.) AB stated that "the subject of the mockery is not religious, instead, it relates to government information and communication regarding Covid",[28] nevertheless, it displayed a negative attitude towards believers. The Constitutional Court found that "all Christian communities place the death (and resurrection) of Jesus at the centre of their theology and build their whole thought system around this event", and the caricaturing of this central element of faith must be appreciated by law.[29] The Constitutional Court also pointed out that there was no clear link between the communication of the political event (the information about Covid) and the depiction of the religious symbol, so that, in the absence of a logical link, the text offending religious sensibilities was self-serving.[30] The Constitutional Court therefore shared the view of the *Kúria* that the use of a religious symbol is not protected by freedom of expression in case it does not contribute anything to the discussion of public affairs, and rejected the petition.

On face value, the Daily Drawing case is similar to the Grand Theft Christmas and the demonstration cases. The fact that the Constitutional Court decided the case in panel without dissenting and concurring opinions (while there were many of them in the earlier cases) seems also to support the statement. In fact, the ruling is not that simple; in certain ways the Court refined its earlier position, some other ways it overruled it.

28 Decision No. 3488/2022. (XII. 20.) AB, Reasoning [34].
29 Id. Reasoning [35].
30 Id. Reasoning [37].

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The Daily Drawing case is 'somewhere between' the earlier two; it directly contained a religious symbol (Jesus on the cross), unlike the Grand Theft Christmas case, which only made a reference to religion. On the other hand, the mockery did not have a religious purpose (it targeted a specific doctor and the government), unlike the demonstration case which willingly mocked the believers. The Court decision shows that they find a mockery as religious also when the mockery of religion is 'side-effect'; does not target the religion but results it.

In these situations the Constitutional Court examines two aspects: *(i)* how closely the depiction is related to religion, and *(ii)* whether the depiction is directly related to a public issue. The Constitutional Court held that in the Daily Drawing case, the communication was not protected by freedom of expression because it was related to a central element of the Christian faith and the depiction of Jesus did not help to understand the (otherwise political) expression related to the Covid, in addition it did not contain a political message *per se*.

What is missing from the decision is that the Constitutional Court did not examine the context of the communication, when it was made public and to what audience. The Daily Drawing, as a political cartoon column in a notoriously left-wing media product, and it regularly contains articles on public affairs, mocking politicians, which is precisely the genre of the column. The "Chronic" caricature, which was the subject of a Constitutional Court case, was evaluated by the courts and the Constitutional Court as such, not as an element of the column.

It is precisely because of this procedure that the controversial publication of the Daily Drawing became widely known to members of the religious community.

7. To Conclude

The French and Hungarian cases also show that the boundaries of the freedom of expression can be drawn in very different ways. Based on the case law of the ECtHR, it is clear that there is no uniform standard in Europe to adjudicate depictions and expressions that offend religious sensibilities. The case-law shows that there is a great margin of appreciation; even severe restrictions of free speech might be in line with the Convention in case it offends believers. In its assessment, the ECtHR seems also to consider extra-legal aspects, such as the tradition, culture and the religiousness of the

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country. However, it is not easy to decide in the conflict of free speech and the protection of religious communities. Not only legislators and judges, but scholars are also divided.

Some are of the view that freedom of expression and free communication are essential in society. It is a core value of democracy; in lack of which any social system quickly becomes authoritarian. Moreover, all scientific progress begins by questioning what prevailing dominant beliefs: if the foundations of science and society could not have been questioned, we would still believe that the Earth is flat or that women should not have the right to vote. Freedom of opinion, whether popular or not, is also the key to the progress of science. This is also true of expressions that offend religious sensibilities, mock or ridicule religion. Where there are taboo topics in the society, democracy no longer exists.

Some on the other hand, are more in favour of the protection of religious communities. They claim that Europe's history is full of wars and repression on religious grounds, from the Roman Empire, through the Counter-Reformation and the Crusades, to Communist dictatorship. Members of religious communities may be concerned, not only out of sensitivity but also out of historical experience, when their religion and religiosity come under verbal attack. They are concerned that verbal attacks may lead to severe conflicts and that there is a direct link between blasphemy and the radicalisation of certain religious groups. Pragmatically, law is to secure peace within the community and if the restriction of free speech yields peace, it is worth paying the price.

Constitutional law and human rights jurisprudence can only provide criteria for determining the correct level of protection, everything else is the responsibility of the society and the individual.

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The Impact of European Law on Hungarian Conflict-of-law Rules

Vanda Vadász[*]

Abstract

Twenty years ago, on 1 May 2004, Hungary became a member of the EU. The much anticipated and celebrated move fundamentally changed the functioning and structure of the Hungarian legal system. The evolution of Hungarian conflict-of-law rules over the past two decades is a striking example of this statement. To illustrate this huge impact, this paper takes stock of the most important changes in conflict-of-law rules brought about by EU legislation. The importance of EU legislation that has become part of national law (Section 2) will be discussed in more detail in the context of conflict of laws (Section 3). The most significant changes (Section 4) will be presented in two parts: the general institutional parts (Section 4.1) are followed by the specific part modifications (Section 4.2). It is important to highlight the regulatory gaps in EU legislation and to highlight the importance of case-law in these areas (Section 4.3). The final part of the study – based on a review of legislation, cases and literature – concludes with a summary (Section 5).

Keywords: private international law, conflict of laws, EU law, codification, private international law

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1. Introduction

Although private international law is, according to classical doctrines, "neither international nor private law" in the literal sense of the word,[1] the international element in the conflict of laws renders this area of law

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1 Private international law is part of the national legal system, but it also regulates relationships that are not traditionally part of private law. László Burián, 'Európai kollíziós jog: korszak- és paradigmaváltás a nemzetközi magánjogban?' *Magyar Jog*, 2012/11, p. 697.

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particularly sensitive to the impulses of changing relationships between nations.[2] Internationalization trends have their roots in the 20th century, but in recent decades globalization has increased exponentially, affecting the volume of world trade, international tourism and, more generally, the movement of persons and the volume of foreign employment.[3] The system of norms governing international economic flows and Hungary's external economic relations have changed fundamentally.[4]

Twenty years ago, on 1 May 2004, Hungary became a member of the EU. The much anticipated and celebrated move fundamentally changed the functioning and structure of the Hungarian legal system. The evolution of Hungarian conflict-of-law rules over the past two decades is a striking example of this statement. To illustrate this huge impact, this paper takes stock of the most important changes in conflict-of-law rules brought about by EU legislation.

The importance of EU legislation that has become part of national law (Section 2) will be discussed in more detail in the context of conflict of laws (Section 3). The most significant changes (Section 4) will be presented in two parts: the general institutional parts (Section 4.1) are followed by the specific part modifications (Section 4.2). It is important to highlight the regulatory gaps in EU legislation and to highlight the importance of case-law in these areas (Section 4.3). The final part of the study – based on a review of legislation, cases and literature – concludes with a summary (Section 5).

2. The EU Accession of Hungary and the Ensuing Changes in the National Legal System

The field of private international law is one of the areas of law best suited to illustrate the impact of European law on national law: some authors

2 In the case of Hungary, this is particularly important given our very open economy. Our national income is largely generated by foreign trade. Lajos Vékás, 'Az új nemzetközi magánjogi törvényről', *Jogtudományi Közlöny*, Vol. 73, Issue 10, 2018, p. 413.

3 Carlos Esplugues, 'General Report on the Application of Foreign Law by Judicial and Non-Judicial Authorities in Europe' *in* Carlos Esplugues *et al.* (eds.), *Application of Foreign Law*, Sellier, Munich, 2011, p. 4.

4 On the relationship of recent national codes to EU Regulations, *see* Réka Somssich, 'Cohabitation of EU Regulation and National News in the Field of Conflict of Laws', *ELTE Law Journal*, 2015/2, pp. 73–78.

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say that the unification work in this area has brought about a 'legal earthquake'.[5] In addition to the strong influence of the EU, there is another trend that must be highlighted. During this period, the life relations raising the possibility of international conflicts have multiplied, even exponentially, and in addition to the quantitative change, they have also transformed qualitatively. With the changes in these characteristics, new trends have emerged in the science of international private law, and new legal institutions have become dominant or at least demanded special attention, which the increasing number of recent European national codifications have also addressed.[6] This is an important development, since EU *acquis* will gradually reduce the importance of national rules. Nevertheless, in recent years, the number of new private international law acts adopted in the different Member States has been increasing. For example, the Polish act entered into force in 2011 and the Dutch law in 2012, when the new Czech Code was also adopted. The Austrian Private International Law Act was enacted in 2004, while the Bulgarian law in 2005. The changes have also affected Hungarian international private law regulation. The 'legislative inflation' and the atomization of this area of law led to a call for rationalization on the part of legal practitioners. Therefore, the time has come for a comprehensive review of the regulation.

3. The Role of EU Law in Conflict of laws

The first Hungarian act to regulate conflict of laws and private international law in a comprehensive sense – the Old PIL Code – was adopted in 1979.[7] It marked the beginning of a new phase in the history of this field of law in Hungary, which had been shaped by judicial practice for almost forty years. The Old PIL Code was a progressive and timeless legislative feat,[8] which,

5 Esplugues 2011, p. 4.

6 Peter McEleavy, 'The Codification of Private International Law: The Belgian Experience', *International and Comparative Law Quarterly,* Vol. 54, Issue 2, 2005, p. 500.

7 Decree-Law No 13 of 1979 on private international law. In the Hungarian terminology, the name 'Code' has been adopted to refer to legal sources of private international law, as it traditionally seeks to cover the whole range of legal relationships where conflict of laws issues arise. On the other hand, the specificity of its code-like character is reflected in the function of the general part, *i.e.* that the rules it contains apply to all legal relationships within its scope.

8 In the foreword to the volume containing the preliminary studies on the codification of the new Private International Law Act, Martonyi says: "[...] this legislation is a very

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prior to Hungary's accession to the EU, was only reformed owing to the fact that the country underwent a change of political system in 1990. Certain bilateral conventions on mutual assistance also contained conflict-of-law provisions. The most important multilateral international convention was the Rome Convention,[9] which provided for the law applicable to contractual obligations between the States of the EC.[10]

EU accession has brought about a huge change in the sources and structure of conflict of laws rules. Whereas before the entry into force of the Treaty of Amsterdam the unification of conflict-of-law rules was possible only through international conventions, Article 81 TFEU (former Article 65 TEC) allows the European Parliament and the Council to legislate under the ordinary legislative procedure (with the exception of family law). As a result of this 'Copernican change', by the second half of the 2000s, secondary legislation governed significant areas of the specific part of private international law, and this was also true of an increasing part of the general rules. The process accelerated even further when the Lisbon Treaty broadened the scope of harmonization, placing an obligation on the domestic legislator to regulate.[11] From the end of the 2000s onwards, the Old PIL Code had to be amended more frequently, resulting in a radical overhaul of national PIL. The new Private International Law Act,[12] which entered into force on 1 January 2018, is a reaction to the EU's rapid process of legal unification but also a response to the national legislator's regulatory obligation under the EU.

special area of pre-transition legislation, which even at its inception stood the test of any international comparison. As with the Civil Code, it formulated its rules at a high level of abstraction and represented a legal culture of a particularly high standard, which ultimately enabled it [...] to survive in its essential elements to the present day." János Martonyi, 'Előszó', *in* Barna Berke & Zoltán Nemessányi (eds.), *Az új nemzetközi magánjogi törvény alapjai. Kodifikációs előtanulmányok*, HVG ORAC, Budapest, 2016, p. 14.

9 Convention on the Law Applicable to Contractual Obligations 1980.

10 The Rome Convention was in force in Hungary from 1 June 2006 to 17 December 2009. Within the given framework, the rules of the Rome Convention replace the rules of the Code. With the entry into force of the Rome I Regulation, the rules of the Rome Convention are no longer applicable, except in relation to Denmark.

11 Réka Somssich, 'Az uniós tagállamok szabályozástechnikai megoldásai a nemzeti jog, valamint az uniós jog viszonyának rendezésére a nemzetközi magánjog területén', *in* Berke & Nemessányi (eds.) 2016, p. 44.

12 Act XXVIII of 2018 on Private International Law (New PIL Code).

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4. Changes in the Conflict-of-laws

The regulatory burden places a complex task on national legislators. The main reason for this lies in the special relationship between private international law and other rules of national law. Conflict-of-law rules create a *loi uniforme*, *i.e.* they apply not only in the case of conflicts of laws between Member States but also in relation to third countries.[13] Moreover, they do not strictly lay down rules only on the specific aspects they are intended to regulate. They also typically regulate certain institutions of a general nature, but they do so in a non-uniform manner.

Because of their direct applicability, these rules very often trigger a deregulation process in the Member State, such as the obligation to repeal earlier rules on the same subject. In certain cases it may also be necessary to adopt implementing provisions. In the case of optional mandates for regulations, drafting certain rules may also part of the task, with a view to making use of the legislator's residual regulatory power. While regulations automatically become part of national law and enjoy supremacy over national conflict of law rules, they may necessity some groundwork by the national legislator before their entry into force. In such cases, the aim is to adapt existing conflict-of-law rules in the field in question so as not to duplicate the rules unnecessarily, but also to avoid leaving areas not covered by unification unresolved.

4.1. General Institutions

Mádl, arguing in 1968 that conflict of laws is indeed a separate branch of law, emphasized the condition of the so-called general part and its spill-over to the whole field of law as a criterion to speak of a separate branch of law.[14] It is the legal institutions falling within the general part which constitute the bulk of the theoretical questions occupying the academics investigating private international law. However, the importance of these rules does not stop at a theoretical level: the correct practical application

13 It is worth noting that this is not the case for Regulations on jurisdiction, recognition and enforcement of foreign judgments, which create a 'two-channel system' with different rules governing the relationship between Member States.

14 Ferenc Mádl, 'Új szakasz a magyar nemzetközi magánjogban? Reflexiók a magyar nemzetközi magánjogi kodifikációhoz és Világhy Miklós "Bevezetés a nemzetközi magánjogba" című munkájához', *Állam- és Jogtudomány*, Vol. 11, Issue 2, 1968, p. 301.

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of the rules of this branch of law depends mostly on a thorough knowledge and precise formulation of these rules. It is important to note that the scope of the general part of the institutions is not an exact category, and the range of methodological issues that can be included is not limited. The general part is an abstraction of science, so it is not surprising that different institutions appear in the various national legislations.

Although EU regulations cover specific areas, they also address general matters. In this area, not only do the individual regulations provide differently depending on their subject matter: their legislative solution often differs from the provisions of the national legal sources. The regulation of *renvoi* is an excellent example: while the Rome I,[15] Rome II[16] and Rome III[17] Regulations exclude it, the Succession Regulation in turn allows it. While the Old PIL Code – as a general rule – only allowed remission, the New PIL Code allows double *renvoi* if the applicable foreign law was determined on the basis of the connecting factor of citizenship.[18] Even the concept of EU public policy – where the Member States' solutions are the most similar – requires a different approach from the legal practitioner in the application of the general rule. The creation of a Regulation on general institutions of European conflict of laws, a 'Rome 0 Regulation', has been the subject of some expert reflection,[19] but the success of unification is

15 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

16 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations.

17 Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

18 New PIL Code Section 5 (1): "If the conflict-of-law rules of this Act determining the applicable law refer to a
foreign law, the substantive law rules of the foreign law that directly govern the matter shall apply."
(2) If, by virtue of this Act, the applicable foreign law is determined on the basis of nationality and the conflict-of-law rule of the foreign law *a)* refers back to Hungarian law, the Hungarian substantive law shall apply; *b)* refers onwards to a different foreign law, the substantive law rules of that law shall apply."
There has been a decades-long debate among scholars about the justification of *renvoi*, and perhaps the only undisputed result of this debate is that no overwhelming argument can be made on a purely logical basis either for its retention or its rejection. In the field of private international law, however, there is a tendency to reject *renvoi.* Geert van Calster, *European Private International Law, second edition*, Hart Publishing, Oxford, 2016, p. 8.

19 Erik Jayme & Carl Zimmer, 'Brauchen wir eine Rom 0-Verordnung – Überlegungen zu einem Allgemeinen Teil des Europäischen IPR – Symposium an der Universität

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unlikely given the differences in national rules. When applying the Regulations, the practitioner must therefore also bear in mind the supremacy of the institutions of the general part, which are regulated differently.

The New PIL Code reacts to the EU context also in its 'General Provisions'.[20] For example, as regards the application of foreign law, the Commission's research program yielded the *Madrid Principles*[21] in 2010 which were defined as a framework for future EU legislation. These whose aspects were given great emphasis in the codification of the general institutions of the New PIL Code.[22] On the other hand, the Rome Convention (and later the Rome I Regulation) was the first to allow the legislator to take into account the mandatory rules of third countries in certain cases, a revolutionary innovation at the time. The rule which has become established in European contract law[23] is reproduced in Section 13(2) of the New PIL Code, which provides for the application of the mandatory rules of other states which are closely connected with the factual situation and are of decisive importance regarding its assessment.

None of the conflict-of-law Regulations adopted by the EU contain provisions on establishing the content of foreign law. In many cases, it appear true that conflict of laws, by designating the applicable foreign law, does not in fact solve the problem but much rather creates it.[24] Indeed, practice shows that the task of determining the applicable foreign law is no simpler than that of applying it. A review of Hungarian court practice revealed several anomalies, which may have been caused by the vagueness of the Old

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Bayreuth', *Praxis des Internationalen Privat- und Verfahrensrechts*, Vol. 43, Issue 1, 2013; Rolf Wagner, 'Do We Need a Rome 0 Regulation?', *Netherlands International Law Review*, Vol. 61, Issue 2, 2014; Stefan Leible & Michael Müller, 'The Idea of a 'Rome 0 Regulation" *in* Andrea Bonomi & Gian Paolo Romano (eds.), *Yearbook of Private International Law Vol. XIV – 2012/2013*, Sellier, Cologne, 2013.

20 New PIL Code, Sections 1–12.

21 Principles for a Future EU Regulation on the Application of Foreign Law (The Madrid Principles of 2010). Project JLS/CJ/2007-I/03.

22 István Erdős, 'Illusion or Reality: The Interrelation of the Conflict of laws Rules and the Practices of State Courts and Arbitral Tribunals', *in* Miklós Király & Tamás Szabados (eds.), *Perspectives of Unification of Private International Law in the European Union*, ELTE Eötvös Kiadó, Budapest, 2018, pp. 30–31.

23 On the process, *see* Laura Maria van Bochove, 'Overriding Mandatory Rules as a Vehicle for Weaker Party Protection in European Private International Law', *Erasmus Law Review*, Vol. 7, Issue 3, 2014.

24 Péter Metzinger, 'Pro lege fori, avagy a kollíziós módszer elméleti szépsége és gyakorlati kudarca' *in* Sarolta Szabó (ed.), *Bonas iuris margaritas quaerens. Emlékkötet a 85 éve született Bánrévy Gábor tiszteletére*, Pázmány Press, Budapest, 2015, p. 216.

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PIL Code in the absence of EU guidance. The Minister of Justice shall, at the request of a court or other authority, provide information on foreign law – according Article 5(2) of the Old PIL Code. The misunderstanding arose from the fact that, while a request from the Ministry was only one of the means available, the wording in the old legislation made it the general rule in the *fora*. The Ministry so addressed lacked the capacity to deal with the growing demand from legal practitioners. The new PIL Code therefore provides that

> "[t]he court may use any means to establish the content of the foreign law, in particular the submissions of the parties, expert opinions or the related information provided by the Minister of Justice".[25]

In order to prevent protracted proceedings, the criterion of reasonableness was inserted into the New PIL Code,[26] both as a lesson from the much-quoted *Karalyos and Huber case*[27] of the ECtHR and a requirement of the Madrid Principles.[28]

The expression of the autonomy of the parties in the institution of choice of law has been a traditional element and a fundamental principle of conflict of laws since the 20th century. The directly applicable EU conflict of laws Regulations are a means of ensuring a wide choice of law, which has also played a major role in the reform of Hungarian national rules.[29] As Mádl noted, "[the] institution of choice of law is the true synthesis of legal certainty and value-oriented legal thinking."[30] This balancing role of the institution is demonstrated by the fact that – having outgrown its traditional terrain, the world of contract law – it has become a fundamental instrument of conflict of laws in the last decades, also in the EU legal instruments, in an ever-widening range of situations (non-contractual obligations, family law, succession, infringement of personal rights, *etc.*).[31] The old private

25 New PIL Code, Section 8(2).
26 "If the content of the foreign law cannot be established within a reasonable period of time, Hungarian law shall apply." New PIL Code, Section 8(3).
27 *Karalyos and Huber v Hungary and Greece,* No. 75116/01, 6 April 2004.
28 István Erdős, 'The Non-application of Foreign Law under the General Part of the New Hungarian Private International Law Act', *ELTE Law Journal*, 2021/1, pp. 11–12.
29 Lajos Vékás, *A nemzetközi magánjogról szóló törvény kommentárja*, HVG, Budapest, 2020.
30 Ferenc Mádl, 'Érték vagy jogbiztonság a nemzetközi magánjogban', *Állam- és Jogtudomány,* Vol. 28, Issue 3, 1985, p. 424.
31 Lajos Vékás, 'Európai uniós és tagállami nemzetközi magánjog', *Magyar Jog*, Vol. 64, Issue 10, 2017, p. 594.

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international law regime also allowed for a choice of law – albeit with sometimes contradictory and imprecise provisions – for a narrower range of legal relationships.[32] The New PIL Code provides for this instrument in a much greater number of cases (even in areas where it is less widespread, such as in the rules of the law of property), but more importantly, it brings a qualitative change. A section has already been inserted in the General Provisions, and since "the general provisions of private international law acts, as a coefficient of the conflict-of-law rules, encompass the whole formula of conflict-of-law rules",[33] this reflects a change of approach, in addition to the reasons of practicality.[34] As such, the rules in the specific part amount to a well thought-out and chiselled system.[35]

4.2. Specific Part

Traditionally, provisions of the specific part of conflict of laws are distinct from the more abstract rules of the general part and, mostly following the system of civil law, cover specific facts in different areas of life. It is in this area that EU law's influence is most pronounced.

If we want to present the events in a chronological order, we should start with the emergence of the contract law Regulations, as these punched the first significant hole in the overall structure of national legislation.[36] Since 11 January 2009, the law applicable to non-contractual obligations has been governed by Rome II. Less than a year later, Regulation Rome I in relation to contractual obligations, entered into force.[37] In Hungary, the legislative reaction to the Regulations – largely superseding the conflict-of-law rules of the Member States – was Act IX of 2009 amending the Old PIL Code.

32 László Burián, 'Általános részi jogintézmények szabályozása a régi és az új nemzetközi magánjogi Kódexben', *Közjegyzők Közlönye*, 2018/3, pp. 23–24.

33 Mádl 1968, p. 302.

34 With this solution, the main rules on choice of law do not need to be repeated each time in each specific section.

35 Miklós Király, 'A személyek és a felek autonómiája az új nemzetközi magánjogi törvényben', *Jogtudományi Közlöny*, Vol. 73, Issue 12, 2018, p. 513.

36 On the Hungarian judicial practice of Rome I and Rome II, *see* István Csongor Nagy, 'EU choice-of-law rules before Hungarian courts: contractual and non-contractual obligations', *Iustum Aequum Salutare*, Vol. 18, Issue 2, 2022, pp. 101–119.

37 The Regulation lays down rules for contracts concluded after 17 December 2009.

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The amending law was sharply criticised in the academic literature.[38] One of the reasons for this was that the legislator, rejecting the possibility of modernization long advocated by academics, retained the principle of *lex loci delicti commissi*, which had become obsolete (the rule had remained unchanged since the Old PIL Code was drafted) for the obligations of non-contractual tort and unjust enrichment, and ordered the law applicable to the place and time of the act or omission giving rise to the tort or delict to be the law applicable. This created a two-channel system which, in cases not covered by Rome II, provides for a different law to be applied in a technically unjustified way. The situation has been resolved by the New PIL Code, which, in line with the rules of the Regulation, now provides as a general rule that the law of the State "in the territory of which the effect of the legal fact giving rise to the obligation emerged" applies (*lex loci damni*). The exception to the general rule has also been redefined, for a similar reason, by replacing shared nationality by the law of the shared habitual residence.[39]

Following the law of obligations, directly applicable Regulations were adopted in the fields of family law and succession law, removing these matters from the scope of the national conflict-of-law rules. Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations applies from 18 June 2011. It adopts a specific solution in respect of conflict-of-law rules: it does not list them itself but refers to the 2007 Hague Protocol.[40] Since 21 June 2012 the law applicable to divorce and legal separation has been governed by Rome III, adopted in the form of enhanced cooperation.

The Succession Regulation is the latest mixed Regulation, which also addresses conflict of laws aspects. The Succession Regulation concerns

38 Lajos Vékás, 'A nemzetközi magánjogi törvény módosításáról', *Magyar Jog,* Vol. 56, Issue 6, 2009, p. 6; László Burián, 'Nemzeti tradíció, modernizáció és európai jogegységesítés', *Jogtudományi Közlöny*, Vol. 66, Issue 6, 2011, pp. 328–330; Lajos Vékás, 'Egy nemzetközi magánjogi törvény megalkotásának néhány elvi kérdéséről', *Jogtudományi Közlöny*, Vol. 70, Issue 5, 2015, pp. 293–296; Tamás Dezső Czigler, 'Vélemények nemzetközi magánjogi kódexünk 2009. évi módosításáról és az európai polgári eljárásjog fejlődési irányáról', *Magyar Jog*, Vol. 57, Issue 4, 2010, pp. 247–253.

39 New PIL Code, Sections 60–61.

40 Article 15 of the Regulation. The Community and its Member States took part in the negotiations which led to the adoption of the Protocol on the Law Applicable to Maintenance Obligations on 23 November 2007 in the framework of the Hague Conference on Private International Law.

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jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and establishes the European Certificate of Succession. It regulates succession relations for deceased testators with effect from 17 August 2015.

4.3 Gaps in EU Conflict-of-law Rules

As we have seen, the vast majority of the specific part of conflict of laws is governed by EU law inspired legislation, at least in the area covered by their scope.[41] The EU's work on the unification of conflict of laws has not yet reached the area of property law, company law, most intellectual property law,[42] the law of persons and the law of names and certain family law issues.[43]

41 It should be noted that in many cases delimitation issues arise, which it is up to case law to resolve. This is illustrated by the 2019 case cited by Szőcs, in which the Hungarian legislator was faced with the question of applicable law. More specifically, whether the adoption has resulted in the termination of the legal relationship of succession between the testator and his or her adopted biological child, adopted abroad by another person. In the case at hand, the testator, who died in 2019, was a Hungarian national with his habitual residence in Hungary, one of whose two biological children was adopted in 1989 in Germany by a German national. Under Article 1(2)(a) of the Succession Regulation, the scope of the Regulation does not extend to the personal status of natural persons or to family relationships and relationships deemed to have comparable legal effects under the law applicable to such relationships. According to the interpretation of Hungarian case law, this exclusion does not apply to the succession effects of legal relationships based on the status of a person or family law. Thus, the legal effects of a particular legal relationship based on the status of a person or family law relationship in the field of succession are already considered to be a matter falling within the scope of the Succession Regulation. Tibor Szőcs, 'A nemzetközi öröklési jog új szabályainak alkalmazása során a joggyakorlatban felmerülő néhány probléma', *in* Zoltán Nemessányi (ed.), *Nemzetközi magánjogi évkönyv 2022*, HVG ORAC, Budapest, 2022, pp. 195–196.

42 The areas covered are the following: the Rome II Regulation in Article 8 deals with intellectual property infringements in general, setting out the applicable law. The European system of design protection was established by Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, which is currently under review: the Commission submitted its proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 6/2002 on Community designs and repealing Commission Regulation (EC) No 2246/2002.

43 On the territorial and substantive scope of the Regulations and the regulatory gaps created by them: Vékás 2017, pp. 591–592; Mátyás Császár, 'Az uniós jogforrások hatása a nemzetközi magánjog általános részére', *Magyar Jog*, Vol. 60, Issue 11, 2013, pp. 670–672.

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It should be noted, however, that even Hungarian national conflict-of-law rules not covered by EU legislation are subject to the influence of EU conflict-of-law trends.[44] In this context, the rise of the habitual residence principle should be highlighted.[45] The trend in the internal conflict-of-law rules of the Member States of the EU towards replacing the connecting factor of nationality by that of habitual residence[46] can be traced back to solutions in international law. The 'conquest' of habitual residence began with the conventions adopted by the Hague Conference on Private International Law and has since been incorporated into EU instruments.[47] Its popularity continues despite the fact that there is no uniform interpretation of the definition, which varies from one legal source to another.[48]

The former Hungarian private international law legislation, adopting the mainstream scientific, codification approach of its time, was based on the principle of nationality. The New PIL Code opens up towards the principle of habitual residence: it provides a definition in the General Provisions[49]

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44 Rules made under the residual power of the legislator also seek to adapt to EU Regulations, both in terms of content and form (*e.g.* structure). Tamás Dezső Ziegler *et al.*, 'The New Hungarian Private International Law Code. A Mixture of Modern and Traditional Solutions', *Yearbook of Private International Law*, Vol. 29, 2017/2018, 2018, pp. 348–350.

45 Cavers highlights the following social phenomena as having stimulated the spread of the habitual residence principle: *(i)* the millions of displaced people who were forced to leave their countries as a result of the two world wars; *(ii)* the 'spread' of dual citizenship; *(iii)* the increase in the mobility of people due to economic pressures. David F. Cavers, 'Habitual Residence: A Useful Concept', *American University Law Review*, Vol. 21, Issue 8, 1972, p. 476.

46 Tamas Szabados, 'EU Private International Law in Hungary: An Overview on the Occasion of the 15th Anniversary of Hungary's Accession to the EU', *ELTE Law Journal,* 2018/2, p. 47.

47 It was first applied in matrimonial matters and in proceedings concerning parental responsibility for children of both spouses in a common-law relationship by Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses. Peter Stone, 'The Concept of Habitual Residence in Private International Law', *Anglo-American Law Review*, Vol. 29, Issue 3, 2000, p. 342. "Habitual residence is the most frequently occurring connecting principle in EU regulations and international treaties dealing with private international law." Draft Proposal of the New PIL Code, Section 3.

48 On the autonomous interpretation of habitual residence, *see* Pippa Rogerson, *Collier's Conflict of laws. The conflict of laws of conflict of laws, Fourth Edition*, Cambridge University Press, Cambridge, 2013, pp. 32–37.

49 "For the purposes of this Act, […] the habitual residence of an individual is the place where, based on all the circumstances of the given legal relationship, the actual center

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and appears in the specific rules on several occasions, which is a significant change. However, the principle of nationality has remained the main rule;[50] the rule has not gone so far as to repeal it, unlike, for example, the new Czech private international law regime has done.[51]

To continue, the definition of the law governing legal status of names is another area of conflict of laws where, albeit not yet regulated, but nevertheless strongly influenced by EU law. The CJEU's case law, and more specifically *Garcia Avello*,[52] was the inspiration behind the related 2009 amendment of the Old PIL Code.[53] In drafting the new law, the legislator sought to harmonize the rules with the case law that had emerged in recent years (see *Grunkin and Paul*[54] or the later *Bogendorff*[55]). The New PIL Code provides for detailed and flexible rules: the most striking change is that it gives parties a wide margin of autonomy and allows for a wide choice of law.

Conflict of laws issues related to the cross-border mobility of businesses are not regulated by EU law, but the outcome of two Hungarian-initiated preliminary rulings has strongly influenced the legal environment in this

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of the individual's life is; when determining this, the facts indicating the intention of the individual concerned shall also be taken into account." New PIL Code, Section 3(b).

50 The case law of the CJEU has established that it is contrary to the prohibition of discrimination on grounds of nationality under Article 18 TFEU for a connecting rule to favor nationals of a forum over nationals of other countries. Therefore, the Code stipulates that in determining the personal law of individuals with multiple nationalities, the law to be considered is the one with which the individual has the closest connection, rather than automatically applying Hungarian law, as was done under the old conflict-of-law rules. It is important to note, however, that the principle of nationality as a connecting factor is not prohibited in itself. Vékás 2017, p. 593.

51 However, the law of domicile, which played a prominent role in the Old PIL Code, is no longer a conflict-of-law principle in the New PIL Code.

52 Judgment of 2 October 2003, *Case C-148/02, Garcia Avello,* ECLI:EU:C:2003:539.

53 According to Section 10(2) of the Old PIL Code, "The personal law of a person shall govern the use of his name. At the request of the person concerned, the law of the other State of which he is also a national shall apply to the registration of his name at birth, in which case Section 11(2) shall not apply." Section 11(2) is the rule already referred to, as amended in 2009, providing "[i]f the individual has multiple nationalities, and one of those nationalities is Hungarian, his personal law shall be the Hungarian law, unless the individual has a closer connection with his other nationality."

54 Judgment of 14 October 2008, *Case C-353/06, Grunkin and Paul,* ECLI:EU:C:2008:559.

55 Judgment of 2 June 2016, *Case C-438/14, Bogendorff,* ECLI:EU:C:2016:401.

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area. The judgments in *Cartesio*[56] and *VALE*[57] have helped clarify the relationship between EU law and national law as regards the law applicable to companies. Subsequent case law of the CJEU[58] has led to the incorporation principle being largely superseded by the real seat doctrine in the relationship between the company and the host Member State.[59]

5. Conclusions

Over the past twenty years, the world has changed: the social and economic landscape is vastly different. As far as the world of conflict of laws is concerned, EU legislation has had an unprecedented impact on national legislation in the Member States. It should be noted that conflict of laws is a part of the legal order that is not directly affected by political, economic and social change.[60] Conflict of laws norms operate using an indirect, referential method, and they are less socially sensitive compared to substantive legal norms; their economic and social sensitivity thresholds are lower.[61] Nevertheless, the EU legislative environment has forced Hungarian regulation to undergo radical renewal: the ever-changing and expanding range of the 'large and variegated army' (Mádl) competing with our internal autonomous legislation has resulted in the Hungarian internal legislation being undermined. National legislation has become fragmented and vague,[62] challenging and often misleading the practitioner as to the source of the applicable law.[63]

56 Judgment of 16 December 2008, *Case C-210/06, Cartesio,* ECLI:EU:C:2008:723.
57 Judgment of 12 July 2012, *Case C-378/10, VALE,* ECLI:EU:C:2012:440.
58 Judgment of 9 March 1999, *Case C-212/97, Centros,* ECLI:EU:C:1999:126; Judgment of 5 November 2002, *Case C-208/00, Überseering,* ECLI:EU:C:2002:632.
59 Szabados 2018, pp. 54–55.
60 Burián 2011, p. 322.
61 Ferenc Mádl & Lajos Vékás, *Nemzetközi magánjog és nemzetközi gazdasági kapcsolatok joga*, ELTE Eötvös Kiadó, Budapest, 2018, p. 63.
62 "However, ad hoc amendments (approximating EU law) have not always been based on a uniform principle and have not led to a consistent and technically sound body of norms." Draft Proposal of the New PIL Code, General Explanation.
63 The phenomenon has also been dealt with in several articles, *e.g.* János Bóka, 'A Kúria és az ítélőtáblák joggyakorlata a nemzetközi magánjogról szóló 1979. évi 13. törvényerejű rendelettel kapcsolatban', *Kúriai Döntések*, 2015/6, pp. 655–656; János Bóka, 'A Kúria és az ítélőtáblák joggyakorlata a nemzetközi magánjogról szóló 1979. évi 13. törvényerejű rendelettel (Nmjtvr.) kapcsolatban II. rész – Az alkalmazandó joggal kapcsolatos kérdések', *Kúriai Döntések*, 2015/8, pp. 882–883.

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This problem was emphasized among the reasons for the creation of the New PIL Code, and its main purpose was to remove uncertainties. This overview of the impact of EU legislation on national conflict of laws shows that a progressive, multi-layered regulatory system has emerged. This system is constantly evolving and expanding, providing a well-functioning example of European integration and cooperation.

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Part VII
Conference Reports

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25 Years of Protecting Languages

Report on the '25 years of protecting languages – The past and the future of the European Charter for Regional or Minority Languages' International Conference Organized by Pázmány Péter Catholic University, 23–24 November 2023, Budapest

Balázs Tárnok[*]

Abstract:

Pázmány Péter Catholic University organized an international conference titled '25 years of protecting languages – The past and the future of the European Charter for Regional or Minority Languages' in Budapest on 23–24 November 2023. The conference was opened by a keynote lecture delivered by Fernand de Varennes, the former UN Special Rapporteur on Minority Issues. This was followed by thematic blocks on experiences and challenges related to the enforcement of certain provisions of the Charter, and an analysis of implementation in certain participating states. The speakers covered the international law context of the Charter and the protection of minorities and their languages, the protection and promotion of minority languages in education, media, judicial and administrative proceedings, and economic and social life, the implementation of the Charter in Hungary, Germany, Spain, as well as the work of the Committee of Experts over the past 25 years, including the evolution of its working methods and the ambivalences of state reporting practices. They also discussed the extension of the Charter obligations to Papiamentu, a minority language newly included under the Charter by the Netherlands.

Keywords: regional or minority languages, Council of Europe, European Charter for Regional or Minority Languages, Committee of Experts, protecting languages

The European Charter for Regional or Minority Languages (Charter), a convention dedicated to the protection and promotion of languages spoken by traditional minorities, is a crucial element of the Council of Europe's commitment to safeguarding national minorities. Alongside the Framework Convention for the Protection of National Minorities, it highlights the Council's dedication to fostering a Europe founded on democracy and cultural diversity. Initially proposed by the Standing Conference of Local and Regional Authorities of Europe, the Charter was adopted as a convention by the Committee of Ministers of the Council of Europe on 25 June 1992, and subsequently opened for signature in Strasbourg on 5 November 1992.

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The Charter officially came into force on 1 March 1998, marking 25 years since its implementation.

The Committee of Experts (COMEX) is responsible for the Charter's monitoring mechanism. Its duties include evaluating the status of regional or minority languages in each participating state, reporting its assessment of these states' compliance with their obligations to the Committee of Ministers, and, when necessary, encouraging participating states to achieve a higher level of commitment.

The objective of the conference was to provide a comprehensive review of the Charter's impact over the past 25 years, encompassing the drafting process and the linguistic and political contexts of its inception, as well as the experiences and achievements observed over the past three decades. Additionally, the conference examined the composition and operating methods of the Charter's Committee of Experts and assessed the future viability of the Charter's protective measures.

The conference commenced with a keynote lecture by Fernand de Varennes, former UN Special Rapporteur on Minority Issues. This was followed by thematic sessions: one addressing the experiences and challenges associated with implementing specific provisions of the Charter, another analyzing regulatory frameworks in selected States Parties, and the final session focusing on efforts to include Papiamentu within the Charter's framework.

In his opening remarks Marcel Szabó, professor at Pázmány Péter Catholic University and Justice of the Hungarian Constitutional Court, emphasized that there is still a long way to go in terms of protecting minority languages in Europe. While individual freedom is celebrated, there is a persistent lack of understanding for each other's cultures which should be addressed on a higher level in the future.

Fernand de Varennes,[1] former UN Special Rapporteur on Minority Issues, contended that in recent decades, there was a regression in the protection of the languages of national minorities. Thirty years ago, significant strides were made in safeguarding the rights of national minorities: the EU established the Copenhagen Criteria, which required EU candidate states to respect and protect minorities, while the UN General Assembly adopted the Declaration on the Rights of Persons Belonging to National

1 Title of the keynote lecture: The international law context surrounding the Charter and the protection of minorities and their languages.

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or Ethnic, Religious and Linguistic Minorities. However, de Varennes emphasized that these measures were merely promises, lacking binding and enforceable mechanisms, and merely indicated what states should strive to achieve. Despite these foundational documents, a clear regression is evident in numerous countries today concerning the protection of minority languages. The EU's reluctance to address this issue is exemplified by the European Commission's decision to reject the *Minority SafePack Initiative*. De Varennes also referenced the recent judgment by the ECtHR on 14 September 2023, rendered in the case of *Valiullina and others v Latvia*,[2] where the minority language in public schools was banned on the basis of political reasons, and the ECtHR underlined that there was no European consensus with respect to minorities' rights in the field of education. The ECtHR in this decision ignored the relevant non-binding international documents and emphasized the broad discretion afforded to states instead. Regarding the Language Charter, de Varennes acknowledged its positive impact but observed that progress has stalled, with many governments increasingly restricting minority rights. These regressive trends prompted de Varennes to publish the Proposal for a Draft Global Convention on the Rights of Minorities in 2023,[3] highlighting the urgent need for a legally binding document to protect national minority rights.

Professor de Varennes presented a comprehensive analysis of the negative trends in the protection of national minorities, including minority languages and cultures, that have emerged in recent years. Despite significant advancements in the 1990s, largely spurred by the Balkan wars, the resulting legislative measures have proved ineffective and were indeed mere promises. Currently, Europe faces another conflict, this time in Ukraine, where Russia has falsely claimed the protection of national minorities to justify its aggression. This spurious justification has negatively impacted the political discourse on the protection of national and ethnic minorities, emboldening political forces in Europe that oppose improvements in EU-level policy or the adoption of binding international measures to protect minority languages, identities, and cultures. This regression is not solely attributable to Russia's actions; it also stems from the inherently sensitive political nature of national and ethnic minority rights within European states, which undermines the broader political efforts to enhance minority

2 *Valiullina and others v Latvia*, Nos. 56928/19, 7306/20, and 11937/20, 14 September 2023.

3 *See* at www.ohchr.org/sites/default/files/2023-02/AnnexI.-A-HRC-52-27_0.docx.

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rights protection. Professor de Varennes argues that the failure to address the unresolved situation of national minorities over the past thirty years necessitates a new strategy. Instead of relying on non-binding provisions, a truly effective approach would involve the adoption of legally binding international documents, rooted in the universality of human rights and recognizing minority rights as an integral component thereof. Legally binding international provisions are seen as a potential solution to prevent the manipulation of national or ethnic minority issues for unjustified aggression, both in Europe and globally. However, achieving such progress remains uncertain, particularly in the current political climate, which is partly influenced by the repercussions of Russia's aggression against Ukraine.

Following the keynote lecture, speakers delved into the implementation of specific articles of the Charter. Jan de Groof,[4] professor at the College of Europe, highlighted that education in minority languages is particularly significant as it lies at the core of cultural identity. He emphasized that linguistic diversity remains a valuable enrichment, integral to the essence of European democratic culture. Thus, focusing education, respect for minorities should be recognized as a shared European value. He backed up his arguments with good practices, such as the establishment of universities in Romania and Macedonia in the 1990s, which are still standing today. He also highlights the role of former OSCE High Commissioner on National Minorities Max van der Stoel in the development of education law in the Balkan region. However, Professor de Groof acknowledged that a substantial portion of the population perceives linguistic diversity as a hindrance to the welfare of nation-states, viewing it as a barrier. He also noted that language rights can sometimes be abused, citing Ukraine as an example where minority rights were exploited as a pretext for Russian occupation. Furthermore, he stressed the importance of early warning mechanisms in this context.

In his lecture, Gábor Kardos,[5] professor at Eötvös Loránd University in Budapest, discussed the implementation of the Charter's provisions on the use of regional or minority languages before judicial authorities (Article 9). He emphasized that the erosion of social domains where minority languages are used, particularly in judicial settings, contributes to

4 Title of the presentation: The protection and promotion of minority language education in the context of the Charter.

5 Title of the presentation: Charter requirements regarding the use of regional or minority languages before judicial authorities.

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the 'folklorization' of these languages. Kardos identified structural issues in implementation, noting that although the Charter's implementation is supposed to be objective and not contingent on the needs and wishes of the beneficiaries, state bodies often operate on a contrary logic: they see no reason to act if there is no apparent demand. Kardos also highlighted the necessity of ensuring that judicial staff are capable of, and practically able to, use minority languages, which would encourage willingness among language users to employ their languages in judicial settings. Additionally, he pointed out that facilitating the use of minority languages and promoting multilingual legal staff can support the advancement of underrepresented groups within the judiciary, thereby making the judiciary more inclusive.

Balázs Vizi,[6] research professor at the Institute for Minority Studies of the Hungarian Research Network and professor at Ludovika University of Public Service, focused his presentation on the use of regional and minority languages by administrative authorities and public services (Article 10). He outlined various practices that enable minority language speakers, who may not be proficient in the state language, to participate in public services. This can involve using a language that, while not the state language or the citizen's native language, is mutually understood. Vizi emphasized that beyond pragmatic considerations, the use of minority languages in public administration serves to recognize the language and its speakers. He also noted that the administrative structure of the state can significantly hinder the use of minority languages. In addition, minority language speakers often refrain from using their languages in public administration, since state authorities typically fail to put into place the necessary administrative processes in minority languages. Many minority language speakers have had the experience that it is more effective to use the official language in administrative matters if they want their case handled by the public administration. Vizi therefore suggested that decentralized administration might better support minority language users, as it can provide more localized and accessible opportunities for minority language use.

Robert Dunbar,[7] professor at the University of Edinburgh, addressed the representation of minority languages in the media. He argued that the Charter, drafted in the early 1990s, appears outdated in today's digi-

6 Title of the presentation: Protection and promotion of the use of regional and minority languages by administrative authorities and public services.

7 Title of the presentation: The protection and promotion of minority language media in the context of the Charter.

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tal world. Since its inception, there have been significant technological advancements that the Charter does not account for. Dunbar highlighted the emerging impact of artificial intelligence and emphasized the necessity of integrating new technologies in delivering education and other public services. He pointed out that technological change will persist, with unpredictable implications for media and minority languages. Consequently, COMEX will need to continue adapting by creatively applying the Charter's provisions to remain relevant in the face of ongoing technological developments.

Viola Heutger,[8] former rector at University of Aruba, discussed transfrontier exchanges in Europe aimed at promoting regional or minority languages. She highlighted several best practices across the continent, focusing particularly on the Danish-German border region, where significant cooperation has occurred in recent years, resulting in the establishment of numerous exchange networks. Many of these programs target the younger generation, encouraging them to learn each other's languages. Heutger also mentioned the intensified efforts to promote the Frisian language and culture, as well as notable initiatives from Austria. Additionally, she cited the global promotion of the Yiddish language by Polish institutes as another exemplary practice in fostering minority language and cultural exchange.

Petra Lea Láncos,[9] professor at Pázmány Péter Catholic University and member of the COMEX in respect of Hungary, discussed the significance of social and economic life for minority languages. She elaborated on how economic and social contexts can benefit minorities or pose a threat to their languages. Emphasizing the importance of everyday communication, she argued that the vitality of a minority language is measured by its use in economic and social settings. When a minority language is excluded from these contexts, its vitality diminishes. Consequently, the more a minority language is utilized, the higher its prestige and social and economic value becomes.

On the second day of the conference, presenters shared their experiences with the implementation of the Charter from various States Parties. Elisabeth Sándor-Szalay,[10] professor at University of Pécs, minority ombudsperson in Hungary and member of the Advisory Committee of the Framework

8 Title of the presentation: Artikel 14 – Transfrontier exchanges – Best Practices.

9 Title of the presentation: The protection and promotion of regional and minority languages in economic and social life.

10 Title of the presentation: The implementation of the Charter in Hungary: Lessons learnt.

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Convention for the Protection of National Minorities, expressed the view that international monitoring encourages competent authorities to apply the law more systematically and rigorously. However, she noted that while organizing minority language use and education at the legislative level is essential, it can only be effective if there is a realistic chance of implementation, including adequate funding and staffing. She also observed that COMEX recommendations are not always aligned with the actual linguistic habits, expectations, and needs of the minority community concerned. At times, these recommendations may seem overly ambitious, suggesting that it might be beneficial to consider the principle that 'less is sometimes more' in certain contexts.

Robert Böttner,[11] research fellow at University of Erfurt, shared insights from Germany, where the Charter protects four minority languages (Danish, Frisian, Sorbian, and Romani) and one regional language (Low German). He explained that most Charter obligations in Germany pertain to regional or local competences, including media, culture, education, and administration. Specific legislation has been enacted to protect the Sorbian language, granting rights such as national identity, free use of Sorbian symbols, visual bilingualism, and the establishment of a consultative council within the respective *Landesparlament*.

Xabier Arzoz,[12] professor at National Distance Education University, discussed the implementation of the Charter in Spain. He clarified that Spain does not have national minorities but rather autonomies, with the country divided into 17 Autonomous Communities, six of which are officially bilingual or trilingual. Generally, the Charter is implemented at a high level in Spain; however, there are notable shortcomings, such as the use of regional or minority languages in courts and state administration, and the availability of comprehensive education in these languages. Additionally, non-official languages are largely neglected and, in some cases, are not even legally recognized.

Bastiaan David van der Velden,[13] professor at Open University of the Netherlands, discussed the recognition status of Papiamentu as a minority language to be newly included under the Charter. He noted that Papiamentu has a traditional presence in the Netherlands, having been spoken on its

11 Title of the presentation: The implementation of the Charter in Germany.
12 Title of the presentation: The implementation of the Charter in Spain.
13 Title of the presentation: Papiamentu, a minority language on the threshold of recognition.

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territory since the 18th century. In its 2019 report, the COMEX encouraged the Dutch authorities to clarify the traditional presence of Papiamentu in the European part of the Netherlands in the next monitoring round. A few months after the conference, the Netherlands extended certain Part III provisions of the Charter to Papiamentu.

Subsequently, two further members of the COMEX, Vesna Grotic,[14] professor at the University of Rijeka and member of the COMEX in respect of Croation, and Mahulena Hoffman,[15] SES chair at the University of Luxembourg and member of the COMEX in respect of Czechia, addressed horizontal aspects of the implementation of the Charter from a historic perspective. Vesna Grotic examined the past 25 years of the Charter, looked through on signatories and ratifications of the Charter also pointing out where the process stopped or was not even started. She also addressed the reasons of delays in implementing the recommendations of the Committee of Ministers in the different states which were primarily linked to the three-year reporting period. She further highlighted the proactive role of the COMEX in pointing to the languages that the government perhaps omitted to include under the Charter. Mahulena Hoffman delved into the evolution of the Committee of Experts' operating methods. She described how the Council of Ministers creatively adjusted reporting cycles and introduced interim measures to potentially enhance efficiency in the reporting process. Hoffman emphasized that the interpretation of the Charter continues to evolve, highlighting ongoing collaboration with the Advisory Committee of the FCNM.

Finally, Balázs Szabolcs Gerencsér,[16] associate professor at Pázmány Péter Catholic University, addressed the ambivalence in state reporting practices and the future trajectory of the Charter. He scrutinized the issues surrounding delays in reporting and monitoring mechanisms, including the challenge of overlapping cycles. Gerencsér identified several reasons for these delays, such as state inactivity, internal procedural deadlines not being met, and a lack of political will to amend the Charter. By contrast, Gerencsér highlighted the potential for reforming the work of COMEX without altering the Charter itself, seeing this as an opportunity to enhance efficiency. Through a SWOT analysis he suggested that streamlining

14 Title of the presentation: 25 years of the Charter – a view from within the Committee of Experts.

15 Title of the presentation: Evolution of the Committee of Experts' working methods.

16 Title of the presentation: The ambivalence of State reporting practices and the future of the Charter.

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COMEX procedures could improve the effectiveness of monitoring and reporting practices, thereby addressing some of the challenges currently faced in implementing the Charter.

The conference enriched the knowledge of the audience with exciting discussions underscoring both the achievements and ongoing challenges in implementing the Charter. Presenters highlighted significant progress achieved over the past decades, including the recognition and protection of diverse minority languages across Europe. However, persistent issues such as delays in state reporting, gaps in implementation, and varying levels of political commitment continue to hinder comprehensive adherence to the Charter's provisions. The proactive role of COMEX was emphasized as crucial in identifying overlooked languages and proposing measures to enhance monitoring efficiency, suggesting potential avenues for reform within existing frameworks to ensure greater effectiveness in safeguarding linguistic diversity and minority rights in Europe.

The authors are planning to publish their studies, prepared based on their conference presentations, in an edited volume.

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Part VIII
Review of Hungarian Scholarly Literature

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The Rhetoric of an Agreeable Hungarian Statesman About János Martonyi, Nation and Europe. In Lieu of Memoirs (Book Review)

Helena History Press, Reno, 2023, 194 p, ISBN 978–1–943–59635–5

Boglárka Koller – Péter Pásztor[*]

Besides the cover photo of a celebratory moment of the Czech, Polish and Hungarian accession to NATO in Independence, Missouri, on 12 March 1999 with Jan Kavan, Madeleine Albright, the author, and Bronislav Geremek – a telling reminder of both the possibility of, and need for Atlanticism and Central-East-European cooperation –, the title of the volume is no less eye-catching. The pithy main title fuses the weighty concepts usually played out against one another, while the subtitle advises not to expect a memoir – yet, by saying so, it implies that the rightful expectation would have been exactly that, or, at least, a personal testimony of sorts. János Martonyi's latest book is certainly a carefully assembled collection of highly wrought ideas that have defined his work as a practitioner and outstanding student of a private international law as well as a politician, a foreign minister. The title's fusion of raises a theoretical question, prompting us to wonder why Martonyi has 'nation' first and 'Europe' only in second place, especially when he placed 'Europe' first in his 1998 volume.[1] Why not the other way round, 'Europe' first, 'Nation' second? How does he, one of Hungary's best known and most respected political thinkers and former foreign affairs ministers, relate the two communities: nation and Europe? In his Introduction, he assures us that these are the two most important identities for him, and that his views on the relationship between nation and Europe, as well as national and European identity, have remained unchanged for the last twenty-five years. He affords "an unqualified primacy" to national identity

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Péter Pásztor: editor, Országút; translator of the book, pasztor.peter.t@t-online.hu.

1 János Martonyi, *Európa, nemzet, jogállam,* Magyar Szemle – Európai Utas, Budapest, 1998.

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over European identity but these attachments are compatible and "mutually reinforce each other".[2] By referring to his earlier volume, he claims:

> "The essence of the European integration process lies in upholding and even strengthening national identity. The essence of Europe lies in its diversity. […] A truly united Europe can only be created if each nation pools its cultural, historical, and linguistic heritage to enrich and fulfil European integration."[3]

In fact, if we had to identify the single most important concept of the volume, it would be identity, linking the essays, speeches, and studies spanning the three large sections of the book ("Tributes", "World Trade in the Grip of Geopolitics", and "Still Europe").

This volume is an integral continuation of Martonyi's earlier work,[4] yet it is a unique collection, as it was written in a time of crisis, during the COVID-19 pandemic. It is also a remarkably diverse volume, its greatest virtue lying in its dynamic shifts of perspective. Like a state-of-the-art camera, it can change focus instantly, offering a view of the globe from above, observing Europe in its territorial form, examining the Visegrád Group, or zooming in on Szada, delving into his personal views of seminal thinkers, such as Géza Herczegh, Otto von Habsburg, Robert Schuman, or Tom Lantos. This shifting of perspectives makes for an exhilarating reading experience: Martonyi's studies, essays, and speeches on various topics enable a simultaneous view of national, European, and international levels, as well as local and regional perspectives on law, politics, economics, and culture, always stressing the interconnectedness of these categories. Whichever way the focus changes, detail always fits the larger picture, the clear structure that gradually unfolds. It is due to this multifaceted focus that Martonyi's consistent worldview, theoretical acumen, legal expertise, and experience in foreign relations can come to bear, to afford profound insights.

As mentioned above, the concept of identity is a ribbon that binds the colorful bouquet of observations and theses the author puts forward. Profoundly significant to Martonyi, it is what intimately connects his lines

2 Id. p. 21.

3 Cited in János Martonyi, *Nation and Europe. In Lieu of Memoirs,* Helena History Press, Reno, 2023, p. 31.

4 Martonyi 1998; János Martonyi, *Mi és a világ,* Magyar Szemle Alapítvány, Budapest, 2015; János Martonyi, *Nyitás és identitás. Geopolitika, világkereskedelem,* Európa, Pólay Elemér Alapítvány, Szeged, 2018.

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of reasoning in the various disciplines of law, political science, international relations, and world economics to human experience, the individual's sense of belonging, history and reality. This ability to connect to human experience – particularly corroborated by his rhetoric, his ability to address people of all walks of life, without ever losing his refined irony, ever putting on airs – defines him as a major thinker and actor of his time.

Indeed, his view of our role in the world, particularly in the face of rapid change and perpetual crises, is a case in point. His approach to change is characterized by a blend of conservatism and a profound openness to the world. "Times do change," he writes, "and we change along with them, but we need to preserve more of what is constant – our history, our culture, our identity and our values."[5] Lasting values, elements of permanence, are essential for him in order to effectively face contemporary threats and changes in the world. However, Martonyi's aim is not to slow down change or to predict the effects of change,[6] but to seek sound, value-driven answers to these changes, while also finding the place of the individual in an increasingly heterogeneous and multi-level political, legal, economic, and cultural world.

A genuine patriot, Martonyi reaffirms the paramount importance he accords to the concept of nation and attachment to it. Throughout the text the nation occupies the apex of the collective identity structure for individuals. For Martonyi, national identity encompasses cultural heritage, historical roots, linguistic ties, and a shared spiritual community[7] that does not seek to homogenize but respects and values diversity. The latter is also very important because of his Central Europeanism: not only is he a true patriot but also a thinker who is well aware of the essence and challenges of Central Europeanism. For him, Central Europe can only be grasped in a European context, in its specific intellectual, cultural, and spiritual richness. "It bears all the elements and qualities that Europe bears, but a little more densely, a little more intensely, at a slightly higher speed," as he puts it,[8] and adds to his description: more religion, more languages, more tensions, religious diversity, anxiety, melancholy, sense of humor, complexities, and creativity. For in addition to the primacy of national identity, Central Europeanism is the regional framework that defines his identity.

5 Martonyi 2023, p. 9.
6 Id. pp. 8–9.
7 Id. p. 163.
8 Id. p. 126.

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For him, Central Europe and European identity are interlinked, and he sees the region as necessary to strengthening European identity.

Moreover, Martonyi goes on to stress rather poignantly that the nation and the state should not be equated, as their borders often do not coincide, and thus the category of homogeneous nation-state is not a good one to use. In terms of European integration, it would therefore be better to talk about a "supra-state Europe of nations"[9] rather than a supranational Europe.

Martonyi stresses the difference between the two entities, the nation and the state in the context of European integration. As this volume makes it clear, he is interested in answering the "million-dollar question"[10], *i.e.* what *finalité politique* integration is heading towards. He also considers the resolution of the sovereigntist *versus* federalist debate to be a possibility. In his speech on the 70th anniversary of the Schuman Declaration he stresses:

> "The combination and a linked implementation of the cultural concept of the nation and a genuine bottom-up federalism would thus yield the 'community of communities' or in other words, a 'supra-state Europe of nations', as dreamed up twenty-five years ago. This could resolve the contradiction between the concepts of a 'Europe of nations' and a 'supranationalist Europe', and ultimately lead to a reconciliation between sovereigntists and federalists"[11]

Thus, Martonyi manages to reconcile the irreconcilable, and bury the hatchet between the two opposing camps in academic and political discourse that make it impossible to ask the fundamental questions about the future of the EU. Martonyi also sets out a possible way forward for the renewal of European integration by stressing the need to move beyond the endless debates surrounding the competences of the Union and its Members States and institutional reforms: "The future of European integration will largely hinge on the success – or failure – of linking the cultural concept of the nation and bottom-up historical federalism."[12] As Martonyi writes: "There is no doubt that the developments of the past decades have brought me closer to de Gaulle's vision of the world, his foreign policy,

9 Martonyi 2015, p. 126, quoted in Martonyi 2023, p. 161.
10 Boglárka Koller, 'Politikai unió vagy nemzetek Európája? A millió dolláros kérdés margójára', *Európai Tükör* Vol. 24, Issue 3, 2021, pp. 5–32.
11 Martonyi 2023, p. 164.
12 Id. p. 27.

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and his vision of Europe in general."[13] Nevertheless, he frequently quotes the founding father of integration, Jean Monnet, *e.g.* when discussing COVID-19, he refers to Monnet's famous dictum that Europe is "forged in crises".[14]

Sovereignty, as Martonyi stresses at several points in the volume, is bound to the existence of a state. Regarding the nature of European integration, he asks the famous "sovereignty question": What is the EU, an international organization or a quasi-federal state? He is not satisfied with the answers textbooks and academic writings often give that neither is the case, but the EU is a *sui generis* community. Being a true lawyer, he argues that emphasizing the sui generis nature of European integration does not provide an adequate starting point for assessing how EU Law can be interpreted:

> "Is European law the system of rules established by a traditional international organization, which must be fully integrated into international law, or is it the autonomous legal order of an evolving federal state ('ever closer Union')?"[15]

Further, the question, which Martonyi raises in several of his writings in this volume, is whether European law has unconditional supremacy over the laws of the Member States, or are there limits to this supremacy?[16]

Referring to the concept of constitutional identity, which to date has a broad Hungarian and international literature,[17] he argues that there are limits to supremacy, and that this has been expressed from time to time by the constitutional courts of the Member States. In his analysis, Martonyi invokes the *ultra vires* thesis, according to which EU institutions cannot overstep the competences delegated to them by the sovereign Member States. The German Constitutional Court brought a landmark decision in

13 Id. p. 26.
14 Id. p. 28.
15 Id.
16 Id. pp. 30–31.
17 *See e.g.* András Jakab, *European Constitutional Language*, Cambridge University Press, Cambridge, 2016; László Trócsányi, *Az alkotmányozás dilemmái – Alkotmányos identitás és európai integráció*. HVG-ORAC, Budapest, 2014; Endre Orbán, 'Quo vadis, "alkotmányos identitás"?', *Közjogi Szemle*, Vol. 11, Issue 3, 2018, pp. 1–13; Norbert Tribl & Márton Sulyok, 'A gazda bekeríti házát? A Német Szövetségi Alkotmánybíróság PSPP-döntésének jelentősége és az európai integrációért viselt alkotmányos felelősség realitása', *Európai Tükör*, Vol. 23, Issue 2, 2020, pp. 7–30.

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the PSPP[18] case in 2020 expressing the limits of the supremacy of EU Law. It declared that, as long as the EU is not a federal state with a common court and jurisdiction, the German Constitutional Court, as the supreme court of a sovereign state, reserves the right to review certain decisions of CJEU in light of the principles of proportionality and subsidiarity.[19] According to Martonyi, there are limits to the supremacy of EU law, but since the constitutional systems of the Member States differ, the way in which each Member State enforces it also differs. Therefore, there is a borderline between EU and national legal systems, but it is currently not universally defined. "Where is the borderline between the constitutional core of the legal order of the Member States and the primacy of European Law?"[20] Further, taking another vantage point, the author not only focuses on the relationship between EU law and national law, but also stresses the need to interpret the relationship between international law and EU law. In other words, the dual system of relations is not sufficient to explore the normative levels in which sovereign states exist.[21] Martonyi sees an emerging heterarchy of the legal norms, which has much wider consequences for world affairs, including economic, institutional and political development.

Martonyi has several absorbing chapters exploring the realms of geopolitics, world trade, and foreign policy – a domain where he excelled not only as a profound thinker but also as an active politician and a staunch advocate of Euro-Atlantic integration.

Arguably, the most exciting chapter in the book is "Geopolitics and World Trade", in which he puts forward eight theses on the current state of the world, offering a comprehensive description 'of the world order in clearly formulated statements that encapsulate the essence of his worldview. Although he acknowledges their debatability, they appear to be the work of not only the scholar but also the practical politician. The first argument he posits is that there is no hierarchy in the world; rather, the current world order is heterarchical, with no single hegemon. Martonyi contends that a single center of the world is philosophically impossible, and anticipates the emergence of multiple centers in the future.[22] By briefly assessing the roles of the USA and China, he argues that the world will not be divided into two

18 Public Sector Purchase Programme (PSPP).
19 BVerfG, Urteil des Zweiten Senats vom 5 Mai 2020.
20 Martonyi 2023, p. 31.
21 Id. p. 36.
22 Id. p. 105.

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ideologically opposing systems, as there are and will be different groups, along with various actors and allies. Furthermore, citing examples of GATT and WTO, he argues that the policy tools of states and international actors are converging, specifically the tools of foreign policy and international trade. Although writing well before the outbreak of full-scale war between Russia and Ukraine, he emphasizes a phenomenon the world has been experiencing since 2022 in another context: trade restrictions affect the entire system not only the targeted entities.[23] Drawing on economic data, he contends that globalization is decelerating, evidenced by the decreasing need for physical transportation of goods due to technological advancements. According to him, world trade is undergoing a dramatic shift from the exchange of goods and services to the trading of data.[24] However, regional relationships have been growing stronger, and, very often, geopolitical considerations play a significant role in the establishment of new regional economic blocs and units. Martonyi underscores the intensifying competition as a current characteristic of the world order, particularly in the field of technology, including AI and biotechnology. He notes an increased rivalry among international actors in this technological race, which he predicts will further polarize societies.[25] The final thesis he presents is that future threats and dangers will become more serious. Whether humanity can address them hinges on its commitment and will to do so, yet, as he emphasizes, nothing is hopeless.

Turning the pages of the book, we find that Martonyi not only provides us with a compass for evaluating megatrends and global processes but also focuses on smaller entities and individuals. His view of history is one in which there is a place for ordinary people and great personalities who define historical periods, such as Otto von Habsburg, Géza Herczegh, or János Horváth. In addition to presenting their life stories and fates, he makes us wonder what might have happened differently had they not been present in our times. However, they are not the only ones to play a significant role in shaping history; coincidence is just as important. Yet, for all its unfathomability, he adds almost shyly, coincidence was placed in the intricate system by the one that had created it all.[26]

23 Id. p. 103.
24 Id. p. 108.
25 Id. p. 113.
26 Id. p. 38.

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Indeed, Martonyi, though an acute observer of danger and loss, is not one to defer to meaninglessness. As the idea of identity that runs through his book in many senses and on multiple levels has no room for exclusion, for replacing other identities, so his sense of tragedy affords him an inexplicable ability to "turn into a miracle",[27] as he put in his speech commemorating those that died for the nation. It is perhaps no wonder that the genuine foreign policy achievements of the country were attained when he was also involved.

27 Id. p. 87.

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András Osztovits & János Bóka (eds.), Policies of the European Union from a Central European Perspective (Book Review)

Central European Academic Publishing, Miskolc–Budapest, 2022, 280 p.
ISBN 978–615–6474–06–3

Gergely Kappel – Ágoston Mohay[*]

Countless books have been written about the policies of the EU with different perspectives in mind: some are veritable commentaries; many others were conceived as more traditional textbooks, while others undertook to provide a historical overview or a practice-oriented review of the development of EU policies – to name but a few approaches. One would, however, be hard-pressed to find all too many volumes which looked at the EU and its field of activities from the point of view of Central Europe. For historical reasons, relations with the EU have played a unique role in the lives of Central European (CE) states before they eventually joined the European integration project. Arguably – and that is the obvious starting point of the collected volume under review here – these states have retained a distinctive approach to the EU subsequent to their accession as well.

According to the editors – András Osztovits[1] and János Bóka[2] – the focus of this book is twofold: to present the implementation of EU law in Central Europe and to examine in what ways Central European proposals or applied solutions have influenced EU law-making and practice. It is easy to agree with the editors that the latter point has not been at the forefront of all too many analyses.

The book itself is divided into thirteen substantive chapters, looking at various EU policies from the abovementioned perspective. The first three studies stand out somewhat from this concept as they deal with more

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general aspects of EU law: the concept of supremacy, some foundational concepts of EU law, and the cross-cutting field of fundamental rights protection. The remaining chapters focus on either an EU policy as a whole (*e.g.* the Common Commercial Policy) or elements of certain policies (*e.g.* judicial cooperation in criminal matters) and how they relate to the Central European perspective. The book is not fully comprehensive in terms of the fields of activities of the EU as some policies or sub-policies are absent from the discussion (*e.g.* migration policy is not covered, only asylum; the internal market is only addressed in light of more specific policies), but the book nevertheless provides a rich overview of some of the most crucial Union policies and their implementation in the Central European region.

Following the Foreword by the editors explaining the concept and rationale of the volume,[3] the book starts off by contrasting the concept of the supremacy of EU law and the idea of 'legal imperialism' by Péter Metzinger.[4] The task undertaken by Chapter 1 is not an easy one: especially in recent years, many debates (both legal and political) have emerged regarding the limits of the supremacy (or perhaps more precisely, the primacy of application) of EU law, especially in light of the 'identity clause' enshrined in Article 4(2) TEU. The author essentially argues that the principle of the rule of law can and should be contrasted with the principle of democracy in the EU context. The analysis, while presenting interesting opinions rooted in legal theory and sometimes even philosophy, occasionally descends into less convincing argumentation involving references to less clear concepts such as the titular legal imperialism itself, drawing up only cursorily explained images of "perverse exaggeration(s)" of the rule of law that end up obstructing democracy. The autonomous nature of the EU legal order is also analyzed and, at times, criticized by highlighting some of the inconsistencies in CJEU case law as well as different standpoints taken by different international tribunals on the nature of EU law – the latter question logically leads to another quandary: to what extent should EU law be separated from, and treated differently from 'classic' international law. It is in the exploration of supremacy that the Central European focus becomes more visible in the chapter via an elaboration of relevant constitutional court decisions relating to EU law. Conflict of jurisdiction between

3 András Osztovits & János Bóka (eds.), *Policies of the European Union from a Central European Perspective,* Central European Academic Publishing, Miskolc – Budapest, 2022, pp. 11–12.

4 Péter Metzinger, 'In the Shadow of Legal Imperialism: The Supremacy of EU Law Over the Member States', *in* Osztovits & Bóka (eds.) 2022, pp. 13–54.

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various dimensions of judicial power within the EU is also touched upon, including the question of *ultra vires* acts of the EU, as is the alleged self-isolation of EU law. Although this chapter is the longest one in the volume, perhaps a more concise analysis with a narrower focus could have benefited its argumentation even more. Undoubtedly, however, the issues raised will influence the future direction taken by the EU.

In Chapter 2, Krzysztof Masło looks into the place and role of Fundamental Rights in the legal order of the EU.[5] An overview of the familiar history of how fundamental rights became a firm tenant of EU law is provided, and the scope of application of the Charter is elaborated upon, taking into account relevant jurisprudence as well. The author then turns to CJEU case law relevant to fundamental rights (more precisely, the EU Charter) and national judicial systems and cooperation in criminal matters, respectively. These are the most interesting elements of the chapter that provide interesting insights relevant to various Central European states. As a critique, it can be mentioned that the chapter devotes perhaps too much space to the general aspects of fundamental rights protection (one of the most widely discussed topics of EU public law), and although it does enrich the overall analysis with 'regional' examples, less attention is paid to Central European states' approaches as would be expected in the context of this volume. The author makes the valid argument that the uncertain contours of the EU Charter contribute to disputes regarding the interference of the CJEU with matters of national competence. In this regard and others, the analysis could have benefited from a broader examination of the relevant jurisprudence, including, but not limited to recent cases relating to Hungary.[6]

Chapter 3, authored by János Bóka, reflects upon some of the foundational EU issues that were also discussed by the Conference on the Future of the EU.[7] In doing so, it looks at some 'myths' that the author attributes to the EU and aims to undertake a sort of 'myth-busting'. The chapter makes

5 Krzysztof Masło, 'The Place and Role of the Fundamental Rights in the EU Legal System', *in* Osztovits & Bóka (eds.) 2022, pp. 55–72.

6 *Cf. e.g.* Judgment of 23 November 2021, *Case C-564/19, IS,* ECLI:EU:C:2021:949. *See e.g.* Ágoston Mohay & István Szijártó, 'Criminal procedures, preliminary references and judicial independence: a balancing act? Case C-564/19 IS', *Maastricht Journal of European and Comparative Law*, Vol. 29, Issue 5, 2022, pp. 629–640.

7 János Bóka, 'De-mistifying the European Union: Reflections on the margins of the conference on the future of the European Union' *in* Osztovits & Bóka (eds.) 2022, pp. 73–84. Nota bene: The conference itself and its outcomes are not discussed in

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a good number of valuable arguments and points out many evergreen questions pertaining to European integration and its theoretical foundations. To name but one, it ponders whether a European *demos* and a 'European democracy' as such exists, essentially answering both questions in the negative, emphasizing the problems of legitimacy regarding the European Parliament (EP). It is argued in the chapter that "European democracy can be contrasted with the concept of a Europe of nations or a democracy of democracies" and that the EP lacks the appropriate legitimacy to act as the true keeper of democracy in the EU as a whole. While the latter may be true, one should also bear in mind that in the EU context, 'democracy' can and should only be interpreted within the limits of the scope of EU law and the institutional framework of the EU – in other words, only relating to the exercise of the competences conferred upon the EU from the Member States, and not to the Member States in general. It is only in this context that the EP is meant to safeguard 'democracy' – and taking into account its extensive powers, especially since the Lisbon Treaty, it is undoubtedly well equipped to do so in a legal sense. With this also in mind, the true purpose of the directly elected EP, at least in our view, is not to be contrasted with national democracies but to be understood as complementary to them. As the decades-long debate concerning the 'democratic deficit' of the EU has shown, national parliaments are not in a position to effectively scrutinize the EU institutions in the overall exercise of their competences. The author's support for a possible 'red card' procedure for national parliaments is a welcome one and one that could substantially strengthen the direct influence of national legislatures on European affairs without altering the status of the EP. It is important to point out, in agreement with most of the overall arguments of the author, that the abovementioned relation of complementary legitimacy should also not be reversed: in the EP, political ideas and statements sometimes overtake legal boundaries – though this is perhaps to be expected from such a thoroughly political and politicized institution, and, to be fair, 'outputs' of the EP's political power (*i.e.* its non-legislative decisions) remain non-binding. The topics raised in this chapter, partly in reaction to the outcomes of the Conference on the Future of the EU have been and will continue to be debated for the foreseeable future, and the author provides useful arguments for a more conservative interpretation of the EU integration process. It can be noted, however, that

the paper *per se*. Instead, it constitutes a reaction to many problems raised at the Conference.

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the focus of the chapter is only partly geared towards Central European member states, not that this makes the question discussed any less relevant.

Chapter 4 delves into the Common Commercial Policy: István Csongor Nagy provides an excellent assessment of the Member States' playing field under the exclusive competence of the EU regarding said policy.[8] The author points out that, perhaps surprisingly, the margins of the CCP are not entirely clear – which in turn allows the Member States a level of 'independence' in developing their non-EU trade relations. The chapter shows that this playing field is actually significant, as the EU's competence does not cover foreign investments and investor–state dispute settlement *per se*, the EU retransferred the competence of concluding investment treaties to the Member States and, thirdly, a 'grey zone' also exists regarding measures having an impact on, but not specifically linked to trade. The paper also addresses the interaction between EU law and investment-related dispute settlement based on international law, where many milestone cases were connected to Central European states (*e.g.* the rulings in the *Electrabel* and the *Micula* cases). Tensions emanating from the exclusive nature of the EU's competence and the aim of some Central European states to favor countries from the former Eastern bloc in their trade relations are also laid bare and serve as food for thought regarding the (in the words of the author) channelling-in of Central European economic interests into the Common Commercial Policy.

In Chapter 5, András Tóth deals with the contribution of Central European countries to the development of EU competition law.[9] The author comprehensively examines the preliminary ruling procedures of the CJEU that have contributed to the evolution of European competition law. Adhering to the thematic framework of the study, this is carried out within the context of Central European member states, identifying two main areas: the issue of restriction of competition 'by object' and the relationship between EU and national competition law. Regarding the restriction of competition 'by object', the author highlights the development trajectory and application framework shaped by the CJEU's practice, drawing attention to the CJEU's narrow interpretation requirements. Concerning the above, the author introduces, in a logically structured manner, how the evaluation of

8 István Csongor Nagy, 'Common Commercial Policy and Member States Playing Fields', *in* Osztovits & Bóka (eds.) 2022, pp. 85–102.

9 András Tóth, 'Central European Countries' Competition Law Practice Contribution to the Development of EU Competition Law' *in* Osztovits & Bóka (eds.) 2022, pp. 103–118.

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new behaviors unfolds in the assessment of restriction of competition 'by object'. Within this context, the necessity of category extension analysis is emphasized to determine the required level of harm. The strength of the chapter lies in its exhaustive presentation of the issues related to the parallel application of national and European competition law, with a special focus on conditions for the realization of the *ne bis in idem* principle, for example.

Ştefan Deaconu and Andrei Lupu analyze the procurement policy of the EU in Chapter 6, examining the evolution of procurement regulations in Central and Eastern European countries.[10] They shed light on how this development unfolded compared to Western EU countries, with a specific focus on the Central and Eastern European countries, particularly Romania. In our view, a similar in-depth analysis would be worthwhile for other Central and Eastern European countries, as the authors have done in the case of Romania. Following the same logic, they explore how arbitration can be utilized as an alternative dispute resolution method regarding procurement procedures in individual countries. In this regard, the authors believe that the practice will likely lead to more robust legal solutions in the coming years. The authors consider the COVID-19 pandemic to be a defining moment in the evolution and trends of procurement procedures (especially due to state restrictions). This consideration is unquestionable, given its profound impact on various aspects of life beyond digitalization, including public health. Another significant driver of changes in European procurement policy is the circle of large procurement projects implemented through the Recovery and Resilience Facility.

In Chapter 7, Andrzej Marian Świątkowski focuses on EU labor law, social policy, and special digital employment in the context of Central and Eastern European countries.[11] The author scrutinizes the status of self-employed people working on digital platforms in Central and Eastern European countries. According to the author, the algorithmic management of work and individuals performing it appears to be the most challenging aspect in a unified sample of atypical – electronic – forms of employment. Throughout the analysis, the author draws attention to the significant asymmetry detected between the real and fictitious employment freedom

10 Ştefan Deaconu & Andrei Lupu, 'EU Public Procurement Policy' *in* Osztovits & Bóka (eds.) 2022, pp. 119–138.

11 Andrzej Marian Świątkowski, 'EU Employment Law and Social Policy and the Need to Develop Unitary Electronic Technology of Work by Central and Eastern Member States' *in* Osztovits & Bóka (eds.) 2022, pp. 139–154.

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of individuals working on digital platforms, attributed to the continuous performance evaluation of algorithms behind the platform. With sufficient detail and various studies, the author substantiates that platform workers generally work more than regular employees. The difference is even more pronounced when it comes to work during nights and non-working days, exposing them to greater negative effects on mental and physical health. Regarding status determination and entitlements, the author considers it essential to differentiate between self-employed people whose dependency level closely resembles that of employees and those who genuinely work independently. We can agree with the author's standpoint that these occupations should be treated specifically. However, the legal and employment traditions of EU Member States may create conflicts stemming from such differentiation.

Matej Kačaljak addresses the tax policy of the EU from a Central European perspective (Chapter 8).[12] The author examines how Central European Member States have contributed to the development of EU tax principles and, more broadly, EU tax policy. Within this context, he investigates the evolution of General Anti-Abuse Rules, third-party responsibility in VAT fraud, and the issue of special levies. The author examines and compares the development of General Anti-Abuse Rules, drawing on the experiences of the Czech Republic and Slovakia. He highlights that before the ATAD regulation,[13] the CJEU concluded that there was no EU general principle obliging Member States to combat abuse in the field of direct taxation. Nevertheless, there were divergent developments in the Czech Republic and Slovakia concerning direct taxes, as the Czech Supreme Administrative Court used the Halifax test as inspiration in the former. The Chapter underlines conflicts in the application of the knowledge test/doctrine between the CJEU and authorities or courts of Central European Member States in relation to VAT frauds. These national authorities and courts tend to apply the 'declared supplier' doctrine due to the difficulties in conducting knowledge tests. The author similarly examines the issue of special levies in detail, addressing the question of digital taxes and the CJEU's practice in the examination of additional taxes. He draws attention to the CJEU's main focus on whether these specific levies should be considered

12 Matej Kačaljak, 'The Policies of the European Union from an East-Central-European Perspective Tax Policy' *in* Osztovits & Bóka (eds.) 2022, pp. 155–172.

13 Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market.

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direct or indirect taxes. The author concludes that the development process is not one-sided, since the dynamics between the Member States influence the overall development of the EU.

Zsolt Hajnal analyses the formation of characteristics in European and national consumer protection law in Chapter 9.[14] The author identifies the unique features of consumer protection law, jurisdiction, and institutional systems within the Visegrád Countries (V4). He examines the issue of dual-quality goods and highlights the active role played by the countries of the V4 in addressing the matter through Directive 2019/2161/EU. Through a comprehensive analysis of legal practices, the author underlines that out of 260 completed cases, the V4 countries initiated preliminary ruling procedures in 61 cases related to unfair terms in consumer contracts, undoubtedly influencing the development of EU law. The author provides detailed insights into how individual EU Member States interpret – broadly or narrowly – the concept of consumers, in alignment with their respective legal traditions. Special attention is given to alternative dispute resolution methods for consumer grievances, and the author meticulously outlines the different definitions of warranty and guarantee claims within the V4, placing significant emphasis on traditional variations. He highlights the specific characteristics of Hungarian law in the field of warranty, however, in our view, it is also worth adding that according to the Hungarian Civil Code,

> "in the case of a contract that involves a consumer and a business party for the sale of goods treated as movable property, or for the supply of digital content and digital services, the consumer shall not be permitted to repair the defect himself or herself or have it repaired by others at the obligor's expense."[15]

Finally, the author envisions a future where consumer protection policies and rules are faced with new types of goods (*e.g.* AI), information flow, and advertising structures. In our view, this will most probably affect all legal disciplines and areas, but consumer protection undoubtedly deserves special attention.

14 Zsolt Hajnal, 'The Emergence of Member States' Characteristics in European and National Consumer Law' *in* Osztovits & Bóka (eds.) 2022, pp. 173–196.

15 Act V of 2013 on the Civil Code, Section 6:159(2a).

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In Chapter 10, Agnieszka Mikos-Sitek turns to the field of the Common Foreign, Security and Defence Policies.[16] Apart from highlighting the specificities of these policies within the EU framework (*i.e.* that these policies still retain many intergovernmental characteristics, resulting in an institutional and legal playing field that differs from 'general' Union rules), the author notes the relevance of the wider European security context, referring for instance to the accession process of Central European EU Member States to NATO as well. As the author rightly notes, these policies have newly regained their prime importance in the context of events – such as the armed conflict in Ukraine or the presence of the Russian military in Belarus – not only for Central European states, but for them maybe even more pressingly than for Member States.

Chapter 11 is devoted to Asylum Policy: Ágnes Töttős looks into a policy field that has become one of the most debated ones in recent years, where many tensions have emerged within the EU – and many Central European states have indeed been a part of the political struggle and, often, legal disputes.[17] The chapter gives an account of various conflicts, including the clash regarding the 2015 relocation decisions taken by the Council, which the author identifies as the root cause of mistrust in asylum affairs between Central European states (most notably Hungary) and the EU. Reasons behind the long-standing deadlock in asylum reform negotiations are explored, also regarding the so-called New Pact, a package of asylum (and migration) related proposals set forth by the Commission in 2020, one that was heralded as representing a more balanced view than the previous Commission's position, taking into account security-related concerns often raised *inter alia* by Central European states. Yet the position of the V4 regarding the New Pact was not necessarily all that different. Thought-provokingly, the author also mentions the concept of instrumentalization of migration as an aggressive foreign policy tool by some states, mentioning Libya and Belarus as examples. The chapter uses an impressive number of primary sources to lay out her arguments, although perhaps the scope of literature used could have been expanded further.

In the penultimate Chapter 12, András Osztovits provides a thorough examination of the present and the possible future of judicial cooperation in

16 Agnieszka Mikos-Sitek, 'Common Foreign, Security and Defense Policies' *in* Osztovits & Bóka (eds.) 2022, pp. 197–216.

17 Ágnes Töttős, 'European Asylum Policy and its Reforms from a Central and Eastern European Perspective' *in* Osztovits & Bóka (eds.) 2022, pp. 217–238.

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civil matters.[18] Firstly, the author sheds light on the fundamental approach of EU Member States from the early stages of the community, providing the reader with an understanding of the dynamics of the development of judicial cooperation in civil matters. For instance, he highlights that in order to ensure the preservation and protection of cultural and legal traditions of Member States, even a single 'veto' (*i.e.* an objection in line with Article 81(3) TFEU) from national parliaments may be sufficient to oppose legislative changes affecting family law regulations. The author comprehensively presents the EU sources of civil procedure law, conflict of laws, and the cooperation of national authorities and courts. Additionally, he emphasizes digitalization steps that accelerate and streamline cross-border taking of evidence. The author places significant emphasis on the development of mutual trust in the practice of the CJEU, an aspect that is hard to dispute. In the field of judicial cooperation in civil matters, he highlights that conflict of laws in matters of personal status and matrimonial matters are the most divisive. Within this context, the recognition of same-sex marriages in another Member State is particularly noteworthy. The chapter also considers the usefulness of setting up or designating a judicial body at the EU level with the power to designate the court between Member States to hear a case if none or to (or more) determine their jurisdiction in the case. This could be modelled on common national procedural rules that allow for a similar logic within a Member State.

Judicial cooperation in criminal matters is explored in the final part (Chapter 13) of the edited volume, authored by Balázs Elek.[19] The study gives an overview of EU harmonization in criminal matters in general (with a particularly interesting insight into semantic differences between '*intime* conviction' and 'beyond reasonable doubt'), which is followed by brief assessments of the implementation of notable EU criminal cooperation instruments and principles in Central Europe. The chapter does not fail to make the necessary connections to the ECHR where needed and also mentions a perceived occasional 'suspicion' between judicial authorities in older and newer Member States, notwithstanding the presumption of mutual trust.

18 András Osztovits, 'The Present and Possible Future of Judicial Cooperation in Civil Matters' *in* Osztovits & Bóka (eds.) 2022, pp. 239–258.

19 Balázs Elek, 'Criminal Judicial Cooperation from a Central and Eastern European Perspective' *in* Osztovits & Bóka 2022, pp. 259–279.

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The strength of this volume, as already mentioned in the introduction, lies in that it examines different EU policies with a specific regional focus. Thus, it can be recommended to all researchers and practitioners who are interested in the specificities of the implementation of different policy fields in the Central and Eastern European Member States. With the Hungarian presidency of the Council of the European Union imminent in the second half of 2024, the topicality of the volume is unquestionable, and the issues raised in it are worthy of elaboration when pondering the future of the EU – whether in an academic sense or at the political level.

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Petra Lea Láncos, Napoleon Xanthoulis, Luis Arroyo Jiménez (eds.), The Legal Effects of EU Soft Law: Theory, Language and Sectoral Insights (Book Review)

Edward Elgar, Cheltenham, 2023, 268 p., ISBN 978–1–802–20890–0

Emilia Korkea-aho[*]

From the perspective of early 2024, it appears fair to observe that EU soft law scholarship is experiencing a renaissance after years of dormancy. There have been edited collections, a research handbook, and numerous articles aimed at dissecting the nature of soft law. While I would like to be able to provide a reason for why soft law is once again in vogue, academic trends, like fashion trends, often cycle back around mysteriously, to the delight of some and the dismay of others. In this case, the resurgence of soft law scholarship is a delightful development, and this edited collection stands out as a gem in the current wave of interest.

According to the editorial blurb, this book[1] "evaluates the legal effects of soft law, its foundations and how they behave in some of the most innovative areas of EU law". While the book certainly accomplishes this task, as a whole, the collection prompts an important question for me: Why do actors believe that soft law carries legal weight? This book not only explores whether or why soft law holds legal significance (*i.e.* legal effects) and what that significance entails but also inquires into why people perceive soft law to possess legal authority. This may seem like a trivial distinction, but it is not.

While it is undeniable that legislation has legal effects, and most individuals you encounter on the street or within the corridors of the Commission Berlaymont building would likely agree, it is far more intriguing to wonder why we – from ordinary citizens to Commission officials – attribute authority to soft law. (Of course, you might encounter a legal theorist eager to challenge the assumption that legislation inherently has legal effects, or one

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1 Petra Lea Láncos *et al.* (eds.), *The Legal Effects of EU Soft Law. Theory, Language and Sectoral Insights,* Edward Elgar, Cheltenham, 2023.

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who wants to figure out the nuanced nature of those effects, but let us set that aside for now.) Understanding why we invest soft law with authority proves to be a much more compelling inquiry.

The book has nine chapters, each offering a unique perspective on the question at hand. The first part consists of three chapters, each raising theoretical stakes. In his contribution, one of the collection's three editors, Luis Arroyo Jiménez, clarifies that while soft law lacks binding force, it still exerts legal influence.[2] He argues that EU soft law goes beyond mere bindingness, introducing a typology of legal effects such as interpretation, annulment, compensation, and sanction. These are indirect, because they do not directly stem from the soft law measure itself but rather from other hard rules or principles connected to it in various ways.

Wolfgang Weiß examines the utilization of soft law in domains of decentralized enforcement.[3] In certain areas, soft law imposes a comply-or-explain burden, while in others, it simply prompts a duty to consider its contents under the principle of sincere cooperation. He argues that soft law measures issued by the Commission engender legitimate expectations among affected individuals, thereby conferring authority on soft law. Weiß considers this notion in the area of decentralized enforcement, cautiously entertaining the idea that also national authorities could be bound by EU soft law based on the legal principle of safeguarding legitimate expectations.

Verena Rošic Feguš suggests that for law to be considered valid, it does not necessarily have to be binding.[4] In more sophisticated terms, bindingness is not a prerequisite for identifying certain norms as valid law. She proposes a distinction between validity, normativity, and bindingness, advocating for a broader understanding of valid law to encompass soft law norms affecting rights and obligations. The fact that EU soft law can sometimes have binding legal effects without being inherently binding highlights the necessity for a "conceptual update".[5] Updating the conceptual approach to bindingness would provide a more accurate description of the current position of soft law within the EU legal order.

2 Luis Arroyo Jiménez, 'Beyond bindingness: A typology of EU soft law legal effects' *in* Láncos *et al.* (eds.) 2023, pp. 9–32.

3 Wolfgang Weiß, 'Reconsidering the legal effect of EU soft law in national implementation: Bindingness from an individual rights perspective' *in* Láncos *et al.* (eds.) 2023, pp. 33–52.

4 Verena Rošic Feguš, 'EU soft law: validity, normativity and 'bindingness' reviewed' *in* Láncos *et al.* (eds.) 2023, pp. 53–75.

5 Id. p. 74.

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The second part of the volume also comprises three chapters, all focusing on the role of language in persuading people that soft law holds authority.

Danai Petropoulou Ionescu and Mariolina Eliantonio demonstrate that the language used in soft law instruments plays a crucial role in establishing authority and ensuring compliance.[6] Their analysis, which focuses on EU environmental soft law measures, illustrates how these measures employ highly prescriptive language, thereby constraining the scope for discretion. To compensate for the lack of inherent bindingness, soft law relies on language and appeals to logic to create alternative forms of bindingness – such as moral, political, or social dynamics inherent within a binding instrument. The idea of alternative forms of bindingness is intriguing, and it would be beneficial in the future to consider not only the practical and legal effects of soft law but also its moral, political, and social effects.

Petra Lea Láncos, another co-editor, and Eljalill Tauschinsky conduct a comparative analysis between directives and recommendations that resemble directives to determine if their language indicates variances in their level of bindingness.[7] They construct multilingual collections of both types of documents and employ a Python language processing tool and clustering techniques to computationally examine distinctive terms. Interestingly, they show that the hortatory versus mandatory nature of a statement differs depending on the language version. This presents a challenge in accounting for such nuances in the case law of the CJEU, which assigns a crucial role to language when resolving cases brought before it.

Corina Andone and Florin Coman-Kund's chapter asserts that EU soft law should be regarded as a collection of instruments lacking legal bindingness but possessing significant practical efficacy due to their persuasive influence.[8] They argue that the effectiveness of soft law should not be evaluated solely in terms of its enforceability, but rather in its ability to persuade recipients toward desired actions. In their analysis, soft law is likened to a politician with excellent rhetorical skills! They propose a toolkit comprising

6 Danai Petropoulou Ionescu & Mariolina Eliantonio, 'Words are stones: Constructing bindingness through language in EU environmental soft law' *in* Láncos *et al.* (eds.) 2023, pp. 76–110.

7 Petra Lea Láncos & Eljalill Tauschinsky, 'Verbal markers of 'softness' in EU law? A computer-based analysis to delimit soft law and hard law focusing on directive-like recommendations' *in* Láncos *et al.* (eds.) 2023, pp. 111–141.

8 Corina Andone & Florin Coman-Kund, 'A legal-argumentative framework for persuasive EU soft law: The case of the European Commission's recommendations' *in* Láncos *et al.* (eds.) 2023, pp. 142–175.

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both legal and argumentative criteria to evaluate and improve the quality and effectiveness of EU soft law instruments.

The final part of the book introduces three sectoral studies. Robert Böttner investigates the soft law instruments issued by agencies within the European System of Financial Supervision.[9] The founding regulations of these agencies have introduced a comply-or-explain mechanism, elevating these non-binding instruments to a heightened normative status and placing pressure on national authorities to adhere to them. Following a critical examination of these mechanisms, the author advocates for a comprehensive overhaul. In situations necessitating binding rules, EU agencies should be endowed with clear decision-making powers. Conversely, where soft law suffices, it should be identified and treated as such, rather than being disguised as hard law.

Annalisa Volpato directs attention to another aspect of EU soft law, specifically technical standards.[10] Despite being private and non-binding, certain technical standards have undergone a process of legal formalization, leading the CJEU to recognize them as a part of EU law. This chapter investigates this evolution, examines the category of 'harmonized standards' and assesses the various legal implications associated with this type of technical standard. Volpato's chapter astutely observes that everyday compliance with soft law is hardly magic or the result of legal theoretical discussions. Namely, when compliance with a harmonized standard becomes the only way to prove observance of essential requirements, it is perceived as hard law by undertakings.

Emanuel Kollmann's chapter focuses on EU soft law within the telecommunications sector.[11] EU secondary legislation specifically authorizes competent EU authorities to issue certain soft law instruments while simultaneously requiring national authorities to give them significant consideration in their duties. The author argues that the legal implications of this form of EU soft law cannot be universally understood but must instead be analyzed in light of the entirety of the provisions outlined in the relevant legal frameworks, as well as the legislative intent, adoption conditions, and procedural regulations in the applicable EU legislation.

9 Robert Böttner, The comply-or-explain mechanism in the European Supervisory Authorities, or: does Meroni allow nudging?' *in* Láncos *et al.* (eds.) 2023, pp. 176–192.

10 Annalisa Volpato, 'The legal effects of harmonised standards in EU law: From hard to soft law, and back?' *in* Láncos *et al.* (eds.) 2023, pp. 193–212.

11 Emanuel Kollmann, 'Hard rules for soft law: The case of European Union telecommunications law' *in* Láncos *et al.* (eds.) 2023, pp. 213–232.

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At the outset, I mentioned that to me, this book raises the intriguing question of why people attribute significance to soft law. What prompts this belief that soft las has authority? There are numerous possible explanations. It could be because the Commission treats soft law as being relevant. It may be because the soft law measure includes the word 'shall'. It could even be that it is simply more convenient for a national regulatory authority to comply with it than explain why soft law does not have authority. Or because it represents the only means of obtaining a standard, or because soft law carries a form of validation from Luxembourg. The effects, naturally, are heavily contingent on context. Attempting to transcend each context in which the effects of soft law are evaluated (though I am not certain if we can do so) leads to another argument: that the effects of soft law are interactive. There is always an interplay, whether it is between the Commission and national authorities, hard law and soft law, or the recommendation and its language, and so on.

One aspect I find deserving of further exploration is whether the perception of soft law as authoritative poses a problem. Petropoulou Ionescu and Eliantonio argue that the blurring of boundaries between hard and soft law jeopardizes the legitimacy of EU rulemaking, impacting both the democratic principle and the rule of law. Böttner shares this concern, suggesting that the comply or explain system effectively creates disguised hard law, which is problematic.

However, if this blurring of boundaries is indeed a problem, should we strive to establish a more robust and clear distinction between binding and non-binding legal sources? Or does the ambiguity surrounding the legal effects of soft law serve a useful purpose? And, if we do manage to delineate a clear boundary between hard and soft law, will the confusion simply shift elsewhere? In my view, rather than solely focusing on establishing clear boundaries, the field of soft law scholarship should continue along the path set by this book, seeking to understand how the legal effects of soft law 'behave'. This approach also allows for a deeper understanding of how people's behavior is influenced by soft law, which is crucial for navigating the complexities of legal dynamics within the EU framework.

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Fruzsina Gárdos-Orosz & Kinga Zakariás (eds.), The Main Lines of the Jurisprudence of the Hungarian Constitutional Court. 30 Case Studies from the 30 Years of the Constitutional Court (1990 to 2020) (Book Review)

Nomos, Baden-Baden, 2002, 548 p, ISBN 978–3–8487–8561–2

Iván Halász[*]

The Constitutional Court has played a key role in Hungary's legal development over the last 30 years. This institution, established during a peaceful democratic transition and based predominantly on the continuity of law, was not without precedent, but it was certainly a novelty in Hungary. However, the past 30 years have not been a completely homogeneous period. The Hungarian Constitutional Court was an activist institution, especially in its first nine years, when László Sólyom acted as the President of the Court. Later this attitude changed and the court became more positivist. This tendency was logical and in harmony with the general trends in development of the economy and society. Maybe the transitional period needed this activism more than the comparatively consolidated post-transitional periods would have.

The final goal of this collection of studies is to contribute to an understanding of the role of the Hungarian Constitutional Court's decisions in the shaping of the constitutional order in the different periods of the new Hungarian democracy. Therefore, the Constitutional Court's history can be divided into two distinct phases: the period from 1990 to 2010 and the post-2010 period, which continues to the present day. The 2010 parliamentary elections resulted in a two-thirds parliamentary majority, which allowed for the unilateral amendment of the previous Constitution and the adoption of the new Fundamental Law in April 2011.

The Constitutional Court has operated for over three decades and its coexistence with different governments contributed to the constitutional environment in different ways and to different extents. Its operational dy-

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namics have not always been the same. From this point of view, sub-periods can be distinguished within the two main periods indicated above. Much has depended on the specific political challenges, the attitudes to trends at the time and the personal composition of its staff. Its two most active periods were in the early 1990s and the first three to four years after 2010.

This situation has of course also affected the status and work of the Constitutional Court. Its specific competences in central budgetary and economic matters have changed, the institution of *actio popularis* has been abolished and, above all, the rules for the election of judges have changed significantly. The number of judges has also increased from 11 to 15 members. The current rules are less concerned with inter-party consensus and more with the will of the parliamentary majority. There are currently only four judges out of 15 who were elected with a broader party consensus. Between 2014 and 2018, the Fidesz-KDNP governing alliance was one seat short of enjoying a two-thirds majority in the parliament.

The internal tensions between the old and new judges elected before and after 2010, which characterized the functioning of the board between 2010 and 2013, have also been resolved. The composition of the Constitutional Court is, therefore, much more ideologically and politically homogeneous than before. This does not mean complete homogeneity, but it certainly has an impact on decision-making. It should also be remembered that since 2018 the court has once again been operating in the shadow of a permanent two-thirds parliamentary majority, which has the power to amend the constitution. The Constitutional Court, however, still plays an important and irreplaceable role in the Hungarian public law system and sometimes makes important decisions of principle. This is mainly linked to our turbulent times, which are characterized by many parallel crises as well as economic and political challenges.

The current book is not the first representative and retrospective publication about the work of Hungarian Constitutional Court to have been published in a foreign language. In 1995 German scholar Georg Brunner and the first president of Hungarian Constitutional Court, László Sólyom edited a collection of papers entitled *Verfassungsgerichtsbarkeit in Ungarn – Analysen und Entscheidungssammlung 1990–1993*. The editors published this book in Baden-Baden with Nomos, the publisher of the current volume. The first retrospective book includes an introduction that is still one of the main points of reference in understanding the early development of democracy in Hungary. Several years later András Holló and Árpád Erdei (the former president and vice-president of Hungarian Constitutional

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Court) edited and published the following book in English: Selected decisions of the Constitutional Court of Hungary (1998–2001). This came out at the prestigious *Akadémiai Kiadó* in 2005.

The current selection is the third book edited by Hungarian lawyers and addressed to foreign scholars about the work and principal decisions of Hungarian Constitutional Court. This collection offers a retrospective presentation of the practice of the court since its foundation and over the past three decades. The editors have acknowledged that between 1990 and 2011 this practice was determined by the Constitution, while from 1 January 2012, it has been based on the Fundamental Law of Hungary.

The current English-language collection is based on a Hungarian volume,[1] which was published in Hungarian in 2021 and edited also by Fruzsina Gárdos-Orosz and Kinga Zakariás. The Hungarian selection contains the 100 decisions of the Constitutional Court that are the most significant according to the majority of Hungarian professors of constitutional law (*i.e.* the majority of expert opinion). The editors of the English-language book narrowed this selection down to 30 decisions of international interest, to explain the main lines and the main turns and shifts in Hungarian constitutional jurisprudence.

The authors involved in the analytical work by the editors are recognized and skilled Hungarian legal scholars with different professional backgrounds and experience. Among them, we can find research-fellows, full and associate professors. Many authors have direct work experience, long or short, at the Constitutional Court or the regular courts. One author is currently Deputy Commissioner for Fundamental Rights. Three authors are working outside of Hungary, but they are in close contact with the country of their origin. One later became a constitutional judge (in 2023).

In alphabetical order, the following authors participated in this important work Tamás Ádány, István Ambrus, Gyula Bándi, Ádám Békés, Nóra Chronowski, Lóránt Csink, Gergely Deli, Tímea Drinóczy, Mihály Filó, Péter Gárdos, Fruzsina Gárdos-Orosz, Zoltán J. Tóth, András Jakab, Máté Jenő Kiss, András Koltay, Miklós Könczöl, Petra Lea Láncos, Attila Lápossy, András Osztovits, András László Pap, Gábor Polyák, Zoltán Pozsár-Szentmiklósy, Gábor Schweitzer, Bernadette Somody, Márton Sulyok, Orsolya

1 Fruzsina Gárdos-Orosz & Kinga Zakariás (eds.), *Az Alkotmánybírósági gyakorlat – Az Alkotmánybíróság 100 elvi jelentőségű határozata 1990–2020,* HVG-ORAC, Budapest, 2021.

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Szeibert, Boldizsár Szentgáli-Tóth, Bernát Török, Réka Varga, Márton Varjú, Attila Vincze, György Vókó and Kinga Zakariás.

The editors explain the applied methods in the preface and introduction to the book. After presenting the facts on which the given decisions are based, the authors provide a doctrinal analysis of the decision the reviewed, including an explanation of the background of the case and its legal consequences. The primary purpose of this collection of analyses is to present the relevant content of the former Constitution and the current Fundamental Law as explored by the court in different specific cases. The authors highlight the reasoning behind the decision and recognize the new legal principles, introduced as a headnote and provide a thorough doctrinal analysis.

> "Accordingly, the chapters follow the following structural scheme: title, a summary of the significance of the decision, presentation of the background (including the legal context and the previous decisions), presentation of the petition, description of the operative part and the reasoning, doctrinal analysis, aftermath (both the legal context and later decisions), and bibliography. Each structural element (except for the significance of the decision) is separated under a distinct subheading, and these subheadings are highlighted in bold."[2]

The aim of the analysis of any given decision – to describe the 'landmark decisions' and the most important tendencies of the 30-year practice of the HCC – is facilitated by emphasizing the significance of the decision at the beginning of the chapter. The most important part of these subsections is the reasoning *(ratio decidendi)* supporting the operative part of the decision in order to reconstruct the content of the referred provision of the Constitution or the Fundamental Law.

> "This section presents the majority position, starting from a broad interpretation of the concept of ratio decidendi (all the legal principles that contribute to the substantiation of the operative part are included here)."[3]

The chapters of the edited book contain a doctrinal analysis of the reasoning supporting the decision of Constitutional Court,

2 Fruzsina Gárdos-Orosz & Kinga Zakariás (eds.), *The Main Lines of the Jurisprudence of the Hungarian Constitutional Court. 30 Case Studies from the 30 Years of the Constitutional Court (1990 to 2020),* Nomos, Baden-Baden, 2022, p. 8.

3 Id. p. 9.

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> "[…] taking into account the dissenting and parallel opinions and the positions in the literature, the main task of which is to assess the solutions developed in the decision. The emphasis is on conflicting positions, so the names and sources of the representatives of the different views appear only in footnotes."[4]

In their selection, the editors did not simply aim to highlight the most politically and socially sensitive constitutional decisions. If that had been their solitary aim, they would have included early decisions on reparations (restitution) and the powers of the President of the Republic. The editors were more interested in those decisions and their reasoning where the court had established something new or forward-looking. The main focus is, therefore, doctrinal.

There is, however, some disproportionality in the volume. For example, only 7 decisions cover cases before 2011 (*i.e.* the first two decades of operation). This means that the 23 other chapters focus on the politically changed period after 2010, which could be described as the era of the two-thirds dominance of the national-conservative parliamentary majority. This disproportionality is fully justified, however, because the earlier cases, especially those from the 1990s, are mostly already available in major languages to foreign researchers interested in the judicial activities and doctrinal attitudes of the Hungarian Constitutional Court. From this first period, only the following cases have been included in the selection: death penalty, abortion, retroactive transitional justice, in this connection international crimes, lustration, euthanasia and registered partnership.

Much attention has been paid to the events of 2010–2013. At that time, a panel of judges, mostly elected before 2010, was still dealing with some of the sensitive changes. The cases at the time covered issues such as the functioning of the media, the retirement of regular judges and special taxes. Other issues included the changed legal status of churches, transitory provisions of the Fundamental Law, transfer of judicial cases and the preliminary registration of voters. This registration was a novelty in Hungarian electoral legislation. Under the impact of the decision, the Hungarian parliament has changed this reform and introduced preliminary registration only for new voters living abroad.

The cases on which these decisions are based could even be described as a kind of "second transitional package" (after the "first transitional package"

4 Id.

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of the early 1990s), which gradually led to the unfolding of the current political regime. During this period, the Constitutional Court sometimes managed to persuade the parliamentary majority to change its decision. It is true that during this period there was also an intense constitutional dialogue between the Hungarian and international or European supranational organizations (mainly the Council of Europe, Venice Commission, EU, OSCE). Directly or indirectly, this dialogue affected the cases dealing with the size of prison cells, foreign currency loans and changed capacity.

The volume also deals with ideologically sensitive symbolic issues: the five-pointed red star and disfigurement of a Soviet War Memorial. One of the decisions discussed also concerned ecology: Natura 2000. A chapter also deals with cases that arose during the special legal order. The decision dealing with Hungarian constitutional self-identity is also very important, because Hungary in followed the new European constitutional discourse in this manner. The issue of proportionality is traditionally an important challenge in constitutional law.

The reviewed publication represents a very important contribution to the international presentation and promotion of the activities of the Hungarian Constitutional Court as well as the presentation of Hungarian scholars dealing with these issues or cases. The authors of the different chapters specialize in different branches of the law (constitutional law, civil law, penal law, media law, *etc*.) and represent different ideological-political camps in Hungary, but they displayed a cooperative and professional attitude in this volume, strictly following the intentions of editors. This editorial discipline was very useful for the structural homogeneity of this interesting publication. With this book, the international readership will have the possibility to appreciate the current professional dilemmas and challenges facing Hungarian constitutional judges, lawyers and scholars.

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