Essays of Faculty of Law University of Pécs Yearbook of 2016

Studia Iuridica

Auctoritate Universitatis Pécs Publicata

154

Essays of Faculty of Law University of Pécs Yearbook of 2016

Pécs 2017

Published by University of Pécs, Faculty of Law
H-7622 Pécs, 48-as tér 1. Hungary

Responsible publisher
Kecskés, László (dean)

Linguistic supervision
Czirkóné Ormai, Judit; Hőnig, Klára; Pókay, Marietta; Zelnik, Zsófia

HU ISSN 0324 5934 (Studia Iuridica Auctoritate Universitatis Pécs Publicata)

HU ISSN 2061 8824 (Essays of Faculty of Law University of Pécs)

Printed by University of Pécs, University Print Office
Responsible manager Kittkáné Bódi, Katalin
H-7624 Pécs, Szigeti út 12. Hungary

Authors

Békési, László – PhD candidate, University of Pécs, Faculty of Law, Doctoral School.

Bień-Kacała, Agnieszka – associate professor at the Department of Constitutional Law, Faculty of Law and Administration, Nicolaus Copernicus University in Toruń and a Researcher at the Institute METRO of the Faculty of Law, Maastricht University.

Herke-Fábos, Barbara Katalin – assistant lecturer at the Department of Civil Law, Group of Family and Social Law of the Faculty of Law, University of Pécs.

Illyés, Zsolt – PhD student at the University of Pécs, Faculty of Law, guest lecturer and associate researcher at the Cluj School of Public Health, College of Political, Administrative and Communication Sciences, Babeş-Bolyai University, and member (attorney at law) of the Cluj Bar Association.

Király, Lilla – seniour lecturer, University of Pécs, Faculty of Law, Department of Criminal and Civil Procedure Law.

Malik, Éva – PhD student at the Doctoral School of the Faculty of Law, University of Pecs, Hungary.

Mezei, Kitti – PhD student (with scholarship) at the Criminal Law Department of the Faculty of Law, University of Pécs.

Mészáros, Gábor – assistant professor at Department of Criminal and Civil Procedure Law of the Faculty of Law, University of Pécs.

Nagy, Zoltán – associate professor at the Criminal Law Department of the Faculty of Law, University of Pécs.

Osiejewicz, Joanna – assistant professor, Head of the Legal Communication Laboratory, Faculty of Law and Administration of the University in Zielona Góra, Poland; attorney at law at the District Bar Council in Warsaw; enrolled in the ministerial list of sworn translators for German in Poland.

Content

Unequal treatment in certain areas of municipal employment

Békési, László

Abstract *The main objective of Act CXXV of 2003 on equal treatment and the promotion of equal opportunities is to promote conformity with the principle of equal treatment, including – inter alia – the legal relationships of municipalities. In performing the policing duties of municipalities, more specifically concerning the jobs of public domain supervisors and assistant community support officers, significant differences can be observed in the rules pertaining to the same types of employment of the Acts (Mt. and Kttv.) governing these jobs.*

In meeting their law enforcement tasks, municipalities may engage persons in assistant community support officer positions as employees, employed either directly by the municipality or, in special cases, within the framework of temporary agency work. However, as far as the requirements of equal treatment are concerned, the joint application of the two types of employment highlights problematic situations, which may also occur in other fields of temporary agency work or employment in general.

The purpose of this study is to reveal the aforesaid problems and inequalities, and to provide suggestions regarding the elimination thereof, with due consideration of EU directives.

Keywords *municipal law enforcement work, public domain supervisor, assistant community support officer, temporary work agency activities, equal treatment, derogations from equal treatment*

1. Background to the employment relationships concerned

The main objective of the Act CXXV of 2003 on equal treatment and the promotion of equal opportunities (hereinafter: Ebktv. Act) – as the title of the study implies – is to ensure and observe equal treatment, inter alia by the Hungarian State, the local and minority self-governments and the bodies thereof, in the course of establishing relationships, in their relationships, in the course

of their procedures and measures.[1] This includes employment relationship qualified by the law as employment, and (special) public service relationship as well. While preparing for this survey, however, I was confronted with cases relating to the above-mentioned legal relationships, where the principle of equal treatment, defined as a priority also in the respective directives of the European Union,[2] is not applied.

Thus, the two types of employment relationships underlying this study are employment, and public service relationship. Employment is governed by Act I of 2012 on the Labour Code (hereinafter: Mt. Act), while to public service relationship the respective rules of the Act CXCIX of 2011 on public servants (hereinafter: Kttv. Act) are to be applied.

In fact, engagement in the form of employment does occur in the public sector too, through companies established for that specific purpose. Public domain supervisors and assistant community support officers engaged in the same workplace and under the same working conditions for example, constitute a situation actually present at the level of self-governments too. Public domain supervisors are engaged – in the case I examined – as public servants (policing organ) of the self-government (municipality), while assistant community support officers are engaged in employment relationships, on a full-time basis.

Pursuant to Act CXX of 2012 on special policing responsibilities and the amendment of certain laws with the aim of addressing truancy, assistant community support officers may support the work of public domain supervisors (too).[3] An assistant community support officer is not entitled to take measures independently. He/she is obliged to carry out his/her work on public and peripheral areas, exclusively in the presence and according to the instructions of a public domain supervisor.

Under such circumstances, public domain supervisors and assistant community support officers carry out their respective work side-by-side, in a joint effort, and in our case, by performing the same ativity on a continuous, uninterrupted basis.[4] Pursuant to Section 90 para a) of the Mt. Act, the general

[1] This obligation is stipulated in Sections 4-5 of the Ebktv. Act.

[2] Inter alia, directive 2000/78/EC, and Section 5 of directive 2008/104/EC may be referred to in this respect.

[3] Section 4 subsection (1) of the Act CXX of 2012.

[4] While in Section 118 subsection (2) of Act XXII of 1992 on the Labour Code (hereinafter: Mt. Act of 1992), a continuous (uninterrupted) order of work is stipulated, under Section 90 para a) of the Mt. Act, and the term of continuity is connected to the employer's activity. This approach is correct, considering that the order of work is the same as worktime scheduling, which is in connection with the nature of the employer's activity, however continuity ("lack of interruption") is not a term to express the same. An employer's mode of operation and his activity constitutes the ground upon which this term may be based.

condition of continuous work is that the employer's activity is suspended for a period not exceeding six hours per calendar day, or exclusively for the reasons and for the duration per calendar year required by the technology employed. The legislator, in harmony with previous legislation, stipulated as an additional condition that the employer's activity shall be aimed at the provision of services meeting social public needs.

The fulfilment of the above two conditions in our case highlights the nature of the order of work actually applied. The application of this order of work (schedule) is lawful for public domain supervisors as well, considering that, in addition to allowing the applicability of the above provisions in public service relationships, the Kttv. Act enables persons exercising employer's rights to introduce a working time scheduling different from the general work schedule, namely from 8.00 a.m. to 16.30 p.m. in the period from Monday to Friday, and from 8.00 a.m. to 14.00 p.m. on Fridays, which, for both types of job is implemented in a system of working time banking.[5]

From the point of view of work assignment, for persons employed in both posts, each day of the week counts as a working day, i.e. they may be ordered to work according to the ordinary work schedule even on Sundays and on public holidays. Indeed, they may be scheduled to work in ordinary working hours on a public holiday, considering that under the respective provisions of the Mt. Act, and under the Act LXIII. of 1999 on public domain supervision (hereinafter: Ktftv. Act), they (also) perform security activities aimed at (municipal) assets protection.[6]

Likewise, according to the explanatory memorandum to the Mt. Act, employees may be ordered to work in ordinary working hours on Sundays and on public holidays, for the purpose of activities only, the carrying out of which serves public interest or is objectively necessary for the proper operation of the employer.[7]

Gyula Berke and György Kiss, *Kommentár a munka törvénykönyvéhez* (Budapest: Wolters Kluwer CompLex Kiadó, 2014), 66.

[5] Working time banking is an important tool in flexible worktime management. More specifically it means that the quantity of working hours to be done by an employee may also be allocated in a framework system.
István Horváth and Krisztina Szladovnyik, *Munkajog* (Budapest: Novissima Kiadó, 2013), 116.

[6] Section 102 subsection (3) para b) of the Mt. Act and Section 1 subsection 1 of the Ktftv. Act.

[7] General explanatory memorandum to the Labour Code (2011), Sections 101-102.

2. Legal relationships of public domain supervisors and assistant community support officers

2.1 Problems concerning compliance with the principle of equal treatment

More specifically, the Ebktv. Act already mentioned in the introduction, provides definitions for engagement relationships, including a public service relationship and an employment relationship under scrutiny, and orders for them the mandatory application of provisions relating to the requirements of equal treatment, as laid down in separate rules and laws.[8]

In relation to persons employed as public domain supervisors and assistant community support officers, the absence of the requirements of equal treatment arises because of their work assignment and the worktime for which they are scheduled (order of work). Hence, their engagement in their place of work is uninterrupted but it is performed in the framework of a shift work system at the same time. Under the applicable law, shift work may only be interpreted as an activity, pursued under employment relationship, since the only law containing provisions in this respect is the Mt. Act, while the Kttv. Act concerning a public service relationship does not prescribe the application of the relevant legislation.[9]

Nevertheless, based on its existence in practice, it can be established that shift work is present in the work of public domain supervisors as well, due to the fact that the activity of employees – in common places of work – is suspended not even for a single day of the calendar year, and in both types of job, the start of the daily working hours, by the ordered schedule, regularly varies between 06.00 a.m. and 18.00 p.m.

It can be stated that such a change is of regular nature, as each month the starting hour of the scheduled daily working time is different on at least one third of the total working days, furthermore, there is a time difference of more than four hours between the earliest and the latest work start.

With respect to working in shifts, the Mt. Act prescribes the payment of a thirty per cent shift bonus for work performed between 18.00 p.m. and 06.00 a.m., which, based on my survey, is actually paid out to the assistant community support officers for the work they have performed.[10] However, since the term of shift work is dealt with or interpreted neither by the Kttv. Act nor in the context of public service relationship, public domain supervisors are not

[8] Based on the respective provisions of Section 3 para a) of the Ebktv. Act.

[9] By Section 90 para b) of the Mt. Act, the employer's activity is shiftwork, if its duration reaches 80 hours a week.

[10] Section 141 subsection (1) of the Mt. Act.

paid such extras. Although the employer acts lawfully by the standards of the regulatory environment, however, I still believe that this sort of practice is equal to discrimination in terms of wages, against persons engaged in public service relationships, that is in the present case against public domain supervisors.

Apart from shift bonuses, in the field of wage supplements there are practices, the application of which is contrary to the requirements of equal treatment. Pursuant to Section 142 of the Mt. Act, employees – other than those entitled to shift bonus – shall be entitled to a fifteen per cent wage supplement for night work (in the period from 22.00 p.m. to 06.00 a.m.), provided that it exceeds one hour. Unlike wage supplements, extra pay for night work is also regulated by the Kttv. Act.[11] 0.45 per cent of the base remuneration (base salary) mentioned therein, specifically corresponds to an hourly supplement of HUF 174, calculated with the uniform base remuneration of HUF 38,650.

However, if the relevant provision of the Mt. Act is applied to the case of full-time assistant community support officers, and the mandatory applicable minimum wage is provided, (expressed in hourly rate, HUF 733),[12] the amount of wage supplement for night work thus obtained is only HUF 110. In other words, they are the assistant community support officers with minimum wages who are discriminated by this provision, contrary to the public domain supervisors working together with them.

Still on the issue of wage supplements, pursuant to Section 140 subsection (2) of the Mt. Act, employees required to work on public holidays in regular working time shall be entitled to a one hundred per cent wage supplement.[13] The aforementioned legal rule futher specifies that this wage supplement shall be paid for working on Easter Sunday or on Whit Sunday, or on public holidays falling on Sundays too.

Pursuant to Section 98 subsection (6) of the Kttv. Act, however, government officials and public servants obliged to perform work on a public holiday in regular working time, are "merely" entitled to time off, corresponding to twice the duration of work actually performed, as consideration for their work. Under this legislation, public domain supervisors, unlike assistant community

[11] Pursuant to Section 140 subsection (3) of the Kttv. Act, entitled to night work wage supplement is the one who, based on his/her scheduling of working time, performs work in the period from 22.00 p.m. to 6.00 a.m. The hourly rate of said wage supplement corresponds to 0.45 per cent of the base remumeration (base salary). If the work scheduled falls in the period from from 22.00 p.m. to 6.00 a.m. just partly, the night work wage supplement shall be due on a pro rata temporis basis.

[12] Based on Section 2 subsection (1) of Government Decree 430/2016. (XII. 15.).

[13] According to Section 102 subsection (1) of the Mt. Act, public holidays are 1 January, 15 March, Easter Monday, 1 May, Whit Monday, 20 August, 23 October, 1 November and 25–26 December.

support officers, in fact do not obtain any wage supplement for the work they perform on a public holiday. I think – as regards the two types of job examined – the requirements of equal treatment are not met in this field either, as time off and the rate of statutory wage supplement are not comparable in case the work is performed in regular working time, while different wages (and emoluments), which also influence the level of wage supplements are paid out.

2.2 Proposals for the solution to the problems raised

In the case under study, the fundamental issue is that the practice of equal treatment results in equality of a purely formal nature only, in fact it is insufficient for the elimination of the existing disparities. Likewise, equality cannot mean real equality in either its purpose or its implementation, but it is only designed to ensure that equal value should receive identical or similar opportunity in achieving something.[14] Although in the case of employers providing engagement under public service relationship, the occurance of cases of disparity referred to above is rare, however, the theoretical and, as we have seen, practical possibility of the abovementioned inequalities taking effect does exist, while the respective provisions of the Kttv. Act provide a basis for such development. The elimination of such differences would be highly important, considering that conformity with the principle of equal treatment concerning the social conditions of the Member States is amongst the priority aims of the European Union, in the field of employment relationships as well.

Prior to offering proposals to solve the above detailed actual problems, I think, for the sake of completeness, it is worth approximating this topic from a bit farther, and also considering other factors causing inequality which, although were not encountered in the case discussed above, still may have a good chance to occur.

The first of the concerns which I would like to highlight in connection with the Kttv. Act is that based on its regulation system, discrimination between sexes is excluded on the principle regarding waging and raise in salary. However, despite of all this, differences in remunerations still exist in the public sector, just like, in the private sector, nevertheless to a lesser extent. The possibility of difference was also present in the case I examined, but additions and extras paid, made up for that.

Thus criticism of the Kttv. Act is well based; according to the data available, since wage differences in both the public and the private sectors remain to be around 10 %.[15] Discrimination encountered in wages is not a unique or

[14] Mónika Balogh, "Javadalmazás-menedzsment és egyenlő bánásmód," *HR & Munkajog* 9 (2013): 33.

[15] Zoltán Peszlen, "A férfiak és a nők közötti diszkrimináció a munkaügyi jogviszonyokban," 2000, accessed August 10, 2017, http://www.egyenlobanasmod.hu/tanul-

special Eastern/Middle European problem, as the differences in the wages of sexes in the Member States of the European Union are also around 15-20%.[16] Such difference between the sexes has shown steady permanence since the turn of the millennium, the breaking of which, in my opinion, may only be expected from a slow change in social habits, but in order to solve the problem, this issue should be kept in the forefront, by all means.

It should be mentioned that in the public sector, irrespective of sexes, there might be differences in the wages due to the opportunities for the so-called deflection of base wages in certain cases. Thus not even in this field can it be established with absolute certainty that the principle of equal pay is fully met.

According to regulation, the base salary associated with the pay category according to a public officer's classification for the relevant year may be increased in accordance with their qualification in the year preceding the relevant year, or in the absence thereof, on the basis of the appraisal of their performance, by a public office manager, by not more than 50%, or decreased by not more than 20%, until 31 December of the relevant year.[17] A deflection of the base salary was applied in the office examined, in the case of certain public servants, as a kind of tool to equalize inequalities. The management used this opportunity in relation to junior officers, as a kind of addition to salary compensation and/or a reward to recognise performance. Beyond the partial disputability of the purpose of the application, the issue of the impartial appraisal of a public officer's performance also arises. Although the inequality regarding salaries has been solved, the issue of the neccessity of an appraisal system, regardless of the officers' scope of activities, is still worth raising. In my opinion, a new system created on the analogy of or possibly linked with the central training system (Probono), qualification and appraisal of performance would be impartial, and the deflection would exclusively preserve its original function in practice too.

It should be mentioned that due to deflections, characteristic signs connected with the defficiencies in the enforcement of equal wages are shown not only in the Kttv. Act, but also e.g. in Act CLXII of 2011 on the legal status and remuneration of judges or Act LXVIII of 1997 on the service relationship of employees of justice.[18]

---

manyok/hu/Peszlen.pdf.

[16] Beáta Nagy and Éva Fodor, "A gazdasági válság hatásai a férfiak és a nők munkaerőpiaci helyzetére Kelet-Közép-Európában**,**" *Szociológiai Szemle* 3 (2015): 18.

[17] Kttv. section 133. Article (1)

[18] Réka Bonnyai, "Az egyenlő bánásmód elve az Európai Unió jogrendszerében és a magyar jogrendszerben," 2014, accessed August 10, 2017, http://www.jogiforum.hu/files/publikaciok/bonnyai_reka__az_egyenlo_banasmod_elve_az_eu_es_magyar_jogrendszerben[jogi_forum].pdf.

When discussing appraisal of performance, the concept of personal salary as specified in the Kttv. Act is also raised. According to the provisions of the Act, personal salary differing from the regulations relating to the system of remunerations may be determined for a public officer providing outstanding performance, supported at the office of the body of representatives by qualification, or in the absence thereof, appraisal of performance, by the town clerk, chief town clerk with the approval of the mayor, lord mayor, chairman of the county general assembly.[19] In my opinion, however, in the application of the above mentioned possible new performance appraisal system, personal remuneration would be given new contents and function. If it was not interpreted by the Act as a quasi remuneration deflecting element, but a tool of determining remuneration ensuring wider differentiation, in the case of the same jobs the remuneration of public officers of category II with less salary (with a final exam) could be adjusted as compared to that of public officers of category I (with a university degree).

In this way, personal salary could completely be separated legally from deflection, which exlusively could play its part as a form associated with the appraisal of performance. This system could be advantageous concerning the appraisal of employee experience.

As regards the Kttv., it also states the principle of equal treatment in its section 13, with contents practically identical with section 12 of the Mt. Act. This fact raises several questions, because if labour market considerations are to be listed among factors that should not serve as basis for lawful differences in salaries in the public sector, then, similarly to the relevant provisions of Act XXXIII of 1992 on the legal status of public officers (hereinafter: Kjt.),[20] it would be justified to be omitted from the list of examples in the Act. The reason is that this may lead to contradiction since the concept of the Kttv. is based on the standardization and transparency of the legal status of public service officers, however, as opposed to economic employment relationships, in the public service, concerning salaries, employers are not entitled to discriminate public officers on regional differences.

In my opinion, this is a contradiction in legislation, as these considerations are either looked upon as not applicable to legal relationships falling under the scope of the Kttv. Act, or the application thereof, considering the spirit of the Kttv., in practice does not comply with the appearance of this comparability criterion.

Therefore, returning to the inequality encountered in the case examined, as a concrete step, it would be desirable to additionally supplement or amend the respective legislation referred to below, as follows:

[19] Kttv. 235. Article (1)

[20] Kjt. section 3 (1) a) states the leaving of labour market relations out of consideration.

- In the form of an addendum, the concept of shift supplement should be integrated in the text of the Kttv. Act as well, considering that for the time being, it is a concept that cannot be interpreted in the framework of public service relationship despite the fact that it may occur and it does occur in practice. The simplest solution in the given case would be if the respective passage of the Mt. Act dealing with shift supplement was adopted and integrated in the corresponding passage of the Kttv. Act – like some other passages that have already been adopted from the Mt. Act –, together with the determination of the level of such supplement. Thereby the dispositions could have a uniform impact both on those employed by public sector bodies and on those occupied under public service legal relationship.
- When performing the review of the amount of the mandatory minimum wage each calendar year,[21] the harmonization of wage supplements for night work related to employment relationships should be reconsidered. Thereby the differentiated amounts of supplements could be prevented from being materialized.
- With respect to Section 98 subsection (6) of the Kttv. Act dealing with government officials, public servants obliged to perform work on a public holiday in regular working time, the above mentioned legal rule should be amended in such a way that instead of "being entitled to time off, corresponding to twice the duration of work actually performed, as consideration for their work", officials and servants should be entitled to a wage supplement equal to the one hundred per cent wage supplement as stipulated by the Mt. Act.

The changes specified above could promote, inter alia, the conformity with the EU legal acts, as enumerated under Section 261 of the Kttv. Act.

3. Special legal relationships of assistant community support officers

Considering the above facts, it can be concluded that in the public sector, employment relationships occur through companies established for such purposes too. In the cases I examined, such situations occurred at municipality level e.g. where at the same workplace and under identical working conditions, there were full-time assistant community support officers engaged through a temporary-work agency and also assistant community support officers with contracts of employment recruited directly by the municipality's city management company. Although such a situation was created – and may

[21] Section 153 subsection (4) of the Mt. Act contains the provisions for the supervision.

be created – in special cases in connection with tackling periodical problems (such as investigations of illegal dumpings of wastes in large volumes and finding the perpetrators), there are some problematic areas even there.

As far as temporary agency work is concerned, a temporary-work agency employer is an Ltd, independent from the municipality, specialising in temporary-work agency activities, and the undertaking employer is the already mentioned city management non-profit association which employs the permanent staff of 5 directly employed assistant community support officers too. To solve periodical tasks, the association engages usually 8 to 10 people on assignment.

3.1 Remunerations and services in practice

As far as the requirements of equal treatment are concerned, the general rule is that during the time of temporary work, the same basic working and employment conditions should be ensured for a temporary agency worker as for an employee maintaining permanent employment relationship with the undertaking. According to the Mt. Act, such basic working and employment conditions include, *inter alia*, regulations regarding the amount and protection of pay, other benefits, and the requirement of equal treatment.[22]

Regarding wages, practical significance is given to the regulation of equal treatment and according to my statistics, although the wages paid to assistant community support officers performing temporary agency work are the same as those received by assistant community support officers directly employed by the user undertaking, in recent years they have considerably lagged behind e.g. the gross average wages in the national economy. Nevertheless, it should be mentioned that they still were nearly 1.5 times higher than the minimum wages and varied from time to time. Wage data of recent years are summarised in the table below:

Year	*Monthly minimum wage*[23]	*Monthly average wage of assistant community support officers performing temporary work*[24]	*Monthly average wage in the national economy*[25]
2013	HUF 98.000	HUF 145.568	HUF 230.714
2014	HUF 101.500	HUF 150.122	HUF 237.695
2015	HUF 105.000	HUF 158.726	HUF 247.924

As it is shown above, temporary agency workers have received (and continue to receive) considerably lower wages in comparison with the wage level

[22] Section 219 subsections (1)–(2) of the Mt. Act.

applied in the national economy, so the requirement of equal treatment related to the amount of wages is not yet fully met at every level in practice.

According to judicial practice, however, if there is a violation, it should be remedied, and it may not bring about the violation of or prejudice to other employees' rights. It does not create a violation of the rules relating to equal treatment if in a general wage increase situation the employer does not raise an employee's wage with regard to the forthcoming termination of his/her employment.[26] However, I have some concerns in point of this practice. In cases, inter alia, e.g. where this wage amount represents the wage of an employee received in the course of his/her last employment, he/she may be affected disadvantageously when the amount of his/her pension is determined.

The remuneration of a temporary agency worker consists not only of wage, but a considerable part is provided by cafeteria and fringe benefits. This may cause disturbance between the temporary-work agency and the undertaking. The question arising is how the undertaking is going to recoup the difference to the temporary-work agency. The principle of equal treatment assumes equal remuneration as well, which should contain the same compensation elements that are provided for assistant community support officers holding the same positions. In practice, this will assume extensive exchange of information between the undertaking and the temporary-work agency, also on the basis of previous practice,[27] which is expressly required by the current Mt. Act.[28] In practice, however, it may be a delicate question whether an association in our case engaged in the public sector, should share detailed data relating to its own remuneration system with a temporary-work agency when entering into contract with it. Therefore, in my opinion, statutory provisions regarding information transfer would absolutely be necessary.

The current Hungarian regulation does not require the user undertaking to guarantee the availability of its services (first of all welfare and travel services), but it follows from the Ebktv. Act that in the absence of objective reasons, a temporary agency worker should not be excluded from such services of the

[23] "Minimum wage statistics," KSH STADAT 2.1.50., accessed February 27, 2017, http://www.ksh.hu/docs/hun/xstadat/xstadat_eves/i_qli041.html.

[24] On the basis of wage calculations presented by temporary agency worker assistant community support officers

[25] "Employees' monthly gross average wage in the national economy," KSH STADAT 2.1.35., accessed February 27, 2017, http://www.ksh.hu/docs/hun/xstadat/xstadat_eves/i_qli012b.html.

[26] Radnay et al., *Munkajogi Döntvénytár I. kötet* (Budapest: HVG-ORAC Lap- és Könyvkiadó Kft., 2012), 324.

[27] Berke et al., *A Munka Törvénykönyvéről szóló 1992. évi XXII. Törvény magyarázata I-II.* (Budapest: Magyar Közlöny Lap- és Könyvkiadó Kft., 2008), 264.

[28] Section 217 subsections (3) and (5) of the Mt. Act.

user undertaking. On the basis of the Mt. Act there is an interpretation,[29] which includes these services within remuneration construed in a wider sense, but in my opinion, they are "merely" services and cannot be interpreted as benefits.

Considering the domestic attitude, I think the objective circumstances mentioned in the European Parliament and Council Directive 2008/104/EC on temporary agency work (hereinafter referred to as Directive),[30] which govern temporary agency at Community level, work should be listed in a statutory provision, in order to avoid situations where judicial practice provides guidance for the operation of law.

3.2 Derogations from equal treatment and the associated regulatory problems

In addition to discussing services and wages in detail, there are further particular regulations concerning the application of the above mentioned general rule relating to basic working and employment conditions as per Section 219 subsections (1)–(2) of the Mt. Act, which are worrisome from the viewpoint of the implementation of the Directive in practice.

According to the general rule, from the first day of assignment and regarding every remuneration element, a temporary agency worker is entitled to the same compensation as his/her peer directly employed by the user undertaking and performing work of equal value.

This goal, however, cannot always be achieved in practice, although equal treatment should be ensured in each individual case in compliance with the regulation.

Regarding our case, the Mt. Act mentions two exceptional cases that only require the application of the principle of equal wages from the 184th day (after the first six months) of the assignment:

1) In the case of permanent employment (employment of indefinite duration for the purposes of temporary agency work assignments and remuneration which is also ensured in the absence of engagement at the user undertaking);
2) In the case of derogations related to the employee or the user undertaking.[31]

Ad 1. The derogation of permanent employment.[32] The conditions of employment of indefinite duration for the purposes of temporary agency work

[29] Kozma et al., *Az új Munka Törvénykönyvének magyarázata* (Budapest: HVG-ORAC Lap- és Könyvkiadó Kft., 2012), 400.

[30] Section 6 subsection (4) of the Directive.

[31] Section 219 subsections (3)–(4) of the Mt. Act.

[32] Gábor Kártyás, "Csorba kiegyenlítés: a kölcsönzött munkavállalók egyenlő bánásmódhoz való joga az új munka törvénykönyve után," *Esély* 3 (2013): 40–45.

assignments and remuneration, which are also ensured in the absence of engagement at a user undertaking (downtime), must exist. The Directive considers the joint existence of these conditions to be such an advantage, which compensates the temporary agency worker for not being entitled to equal wage.[33] However, for the durations in between assignments, an employee is not entitled to remuneration in the absence of a separate agreement. According to the Mt. Act, such durations are not considered downtime, as there is no working time associated with a position.[34] Regarding the rates that may be paid for intervals, no statutory minimum is determined.

It should be mentioned that the comparative advantages of permanent employment and remuneration for the time between assignments may easily be lost. Such cases include: if in spite of a permanent contract, the employee is dismissed after a short time or if in between assignments he/she is only given symbolic remuneration, or during the term of his/her employment there are no "idle times" i.e. assignments follow each other without interruption. Unfortunately, the Mt. Act does not provide any kind of subsequent compensation for the employee in such cases. The Directive itself would expressly require this, since it states that EU Member States applying the derogations should take appropriate measures to prevent abuses.[35] It should be added that the situation of temporary agency workers excluded from equal remuneration without compensation also raises the constitutional problem of arbitrary discrimination.

It should be pointed out that it is also objectionable on the basis of the prohibition of misfeasance[36] if the employee is given less wage than his/her peer, and if he/she is employed directly and performs work of the same value, and who is merely based on a promise of permanent employement or remuneration in between assignments that never come true or are paid at low rates. With regard to the concerns listed above, if a temporary-work agency applies this derogation in particular cases it will create an uncertain legal situation.

Finally, it should also be mentioned that due to a mistranslation in section 5 subsection (2) of the Directive, the principle of equal treatment is more stringent in the Hungarian regulation than required by the EU, which, in my opinion, may considerably lessen the efficiency of temporary agency work in every field of employment.

The original English wording of the Directive provides exemption from equal treatment regarding payment to employees with permanent contracts if they continue to be paid in the period between assignments. On the other hand, the Hungarian translation of the Directive mentions temporary agency workers with continued contracts, which is difficult to construe in legal terms.

[33] Section 5 subsection (2) of the Directive.
[34] Section 146 subsection (1) of the Mt. Act.
[35] Section 5 subsection (5) of the Directive.
[36] Section 7 of the Mt. Act.

Because of the unknown term of continued contract in Hungarian law, the Mt. Act does not contain the allowance permitted here.

Ad 2. Derogations relating to employee or user undertakings. According to the derogation relating to employees, during the first 183 days of the assignment, the temporary-work agency is exempted from the observance of the principle of equal wage if the employee is deemed an employee being steadily away from the labour market.[37]

In my opinion, the derogation provided to these groups is positive, since it encourages employment, as it tries to provide allowances to the employer who hires such employees. However, from the viewpoint of employees, I think, it may have a negative influence on the employement of these groups in temporary work, since they experience difficulties in returning to the labour market even in normal cases and if they do succeed and are engaged in temporary agency work, they will receive less wages for six months due to the derogation rule. For an employee, this may result in the decrease of motivation or a low level of enthusiasm.

The employment of these persons is also associated with various contribution allowances, thus in their case we can also speak about integration programs supported by the state with regard to which the application of the rules of the Directive may be disregarded.[38]

A derogation relating to the user undertaking will be a situation, where the user undertaking employer is a business association, a non-profit organisation, or a registered non-profit organisation with majority participation of a municipality, like in our case. The legislator might have the intention to provide allowances to non-profit user undertakings, but the Directive states that its effect covers all undertakings using temporary agency work irrespective, either they are profit oriented or they are not.[39]

3.3 Summary of experience

In addition to the wide scope of derogations detailed above, certain temporary agency workers can be excluded from the effect of the principle of equal wages currently and also in the future. This may frequently occur especially in the case of employees performing short-term assignments not exceeding six months. Unfortunately, this type of assignments lasting for several months have been and are experienced most frequently in the case of assistant com-

[37] Classification is determined by section 1 (2) 1 of Act CXXIII of 2004 on the promotion of the employment of career-starting young people, unemployed aged over fifty and jobseekers following child care or care of a family member, as well as on employment with scholarship.

[38] Section 1 subsection (3) of the Directive.

[39] Section 1 subsection (2) of the Directive.

munity support officers, in line with domestic practice of temporary agency work. On the one hand, wages achievable through temporary agency work currently lag behind the amount of average wages. On the other hand, because of the inaccurate definition of derogations, which is objectionable on the basis of both the approximation of laws and the constitutional prohibition of arbitrary discrimination, their application involves legal risks for – mainly temporary-work agency – employers, therefore amendments would be desirable to the relevant statutory provisions.

It should also be mentioned that nowadays, in the labour law science, an ever increasing number of experts maintain the attitude that the "enjoyment" of employee basic rights is less and less associated in practice with the particular type of employment, but instead more and more with the fact of working itself. In accordance with this, equal treatment should be ensured for everyone, so that a temporary agency worker would be deemed not only as a "resource" but also someone who is entitled to equal employee rights in the same manner.[40]

Experts tend to think that because of the principle of equal treatment, the advantages of temporary agency work may disappear, whichever of its fields of application is considered. In practice, however, other advantages such as the decrease of administration burdens or "quick substitution" to solve periodical problems as in the case studied, or flexible headcount management are all such elements which provide compensation.

3.4 Further possibilities for inequality, and suggestions to solve the problems

Similarly to the issues of those employed in public service relationships, I would like to discuss further inequality problems occurring in connection with the employment of (permanent and temporary agency) employees and proposals to solve the issue, starting from a wider perspective. Situations giving rise to unequal treatment may occur concerning employment relationships, which did not occur in the case examined, but may be encountered at various workplaces.

As early as during the first contacts between employer and employee, various cases of discrimination may be encountered. Typically, they occur during the creation of employment relationship and the processes preceding this, such as job advertisements and job interviews. In most cases, discrimination generally occurs in such matters not individually and not necessarily based

[40] Attila Kun, "Munkaerő-kölcsönzés: taktikák a túlélésre - A kölcsönzött munkaerő sem csak erőforrás," *Adó/Online***,** March 21, 2013, accessed February 27, 2017, http://ado.hu/rovatok/munkaugyek/munkaero-kolcsonzes-taktikak-tulelesre**.**

on one particular property, but it is much rather the manner of treatment and the quality of employer behaviour, which provides basis for discrimination, though, typically apparently, the employer's act is not in conflict with any regulations.[41] Moreover, it is typical that the employer is not aware that there are so-called prohibited questions, or in what manner he/she should comply with the requirement of equal treatment in the course of such procedures.[42]

Direct discrimination may result from questions related in particular to private life, partner relationship, family life, desire to have children, place of residence, origin, religious or political convictions, judgement of political events, financial standing, state of health and sexual habits.

These questions violate the requirement of equal treatment because they imply the existence or absence of protected properties listed in section 8 of the Ebktv. Act, and/or may directly be connected with some of the protected properties. Asking such questions may also be deemed problematic relating to the protection of personal data. In fact, employer questions aimed at purposeless handling of the data of the person concerned infringes the basic principles of the Mt. Act and personal rights protected by other legislation. According to section 10 (1) of the Mt. Act employees may be asked to give declarations or provide data which do not infringe his/her personal rights and are essential from the viewpoint of creating, fulfilling or terminating employment.

It should be mentioned that in connection with the creation of employment relationships, only the regulations referred to above are in force, and there are few real sanctions used, provided they are not complied with. Thus, the protection of the equality of employees does not seem to be sufficiently effective. In my opinion, in the interest of more effective representation, employees should, for such cases, be vested with further rights set forth in the Ebktv. Act. Thus, apart from statistical proofs, some further tools should serve employees.

Still concerning the Ebktv. Act, in connection with the employment of permanent employees, the provision related to making equal opportunities plans should be mentioned, which, in my judgement, would fit in the regulations of the preference part of the Act much more, but currently is found among the final provisions.[43] Based on the provision, equal opportunities schemes shall be adopted by publicly financed institutions employing more than 50 people and legal entities being in a state majority ownership.

Regarding the recommended contents of such schemes, guidance was given by section 70/A of the Mt. Act of 1992, but none is given by the current

[41] Márton Leó Zaccaria, "Az egyenlő bánásmód elvének érvényesülése a munkaviszony létrehozásával összefüggésben," *Miskolci Jogi Szemle* 2 (2014): 127.

[42] Júlia Koltai, "A munkáltatók kiválasztással kapcsolatos szempontjai," *A munkáltatók munkavállalói kiválasztási gyakorlata a diszkrimináció tükrében - Esélyegyenlőség a munka világában* 2 (2013): 21.

[43] Kttv. section 63 (4)

regulation. I think, this guidance should also be included in the Mt. Act. If it was inserted into labour law regulation conforming to the provision of the Ebktv. Act, it could be a mandatory part of collective agreements that would bind employers immediately. This would be important, because official audits started upon requests may not examine the contents of such schemes, thus there is a significant chance for the occurrence of inequalities, there is no opportunity for the recognition of preference measures and, in particular cases, nor could they be enforced.

Currently the purpose is to make employers recognise the significance of the presence of equal opportunities schemes, however the next step is to, make employers specify, in a verifiable manner, their aims for the relevant year to ensure equal opportunities and to achieve these aims with the given means and, programmes. This would undoubtedly serve employees' interest, and promote efforts toward equal treatment.

The next topic has already been concerned about temporary agency workers and employer services. This topic, which also gives rise to serious problems, is the lack of (good) employer rules relating to rewarding and fringe benefits. It is still a wide-spread practice among employers to pay various rewards or bonuses without any objective reasons whatsoever, based on "looking at the ceiling", or even if impartial conditions and criteria have been worked out to operate a system of remunerations lawfully, they are not documented in an appropriate manner. Under such circumstances it can easily occur that in the course of using funds earmarked for recognising employees' performance or motivating them to continue to do good work, such solutions are applied which will conflict with the principle of equal treatment, or, even if practice itself is considered lawful, there are no supporting documents and evidence. With regard to the fact that the bulk of the issues raised is relatively easy to eliminate by working out appropriate rules, and that such written in-house rules offer further advantages (e.g. the transformation of rewards, bonuses, etc. into acquired rights or unwritten law is avoided), it is absolutely recommended to devote appropriate time and energy to them.

Passing on to the Mt. Act, it should be mentioned that its section 12 may also be subject to criticism, as it is unjustified to mention the principle of equal pay for equal work; however it would be more practical to leave the basic principle unchanged in a general form, and the rule of equal remuneration, along with its supplementary rules specified in section 142/A of the Mt. Act of 1992, should be included in the chapter devoted to the remuneration of work. I am of the same opinion about the term wage; it would be practical to include such a term which is deemed a definition not exclusively in relation to "equal pay for equal work" in an appropriate chapter of the Mt. Act. Hence, to keep the suitability of regulation in view, it would be also practical to arrange. The principle of equal remuneration and the term of wage in a structure in the Mt

as per the Mt. Act of 1992, supplementing this with a general definition for wage. This would be important because in practice there are defficiencies as regards the uniform use of the term wage.

As far as the principle of equal pay for equal work is concerned, I think, this is only a theory for the time being. There is too large a contrast between the statutory (over)regulation of the principle and genuine experience in legal practice. Namely, judicial practice still often handles this principle as that of equal pay for equal work, leaving the definition of work of equal value out of consideration. The latter is particularly problematic since section 12 (3) of the Mt. Act promotes dealing with the operative construction of law. Although the construction of law by the authorities shows a different picture, this has no influence on judicial practice, consequently the development of the latter would absolutely be necessary.

The statutory environment defining and delimiting the principle of equal pay for equal work is characterised by a peculiar duplicature. This duplicature, namely section 12 of the Mt. Act and section 21 f) of the Ebktv. Act results in the fact that the statutory rules are not sufficiently clear, they are a bit "sketchy", and criticizable even from a constitutional viewpoint.

If we have a broader view beyond the legal relations examined herein, it can be established that it is not quite clear how the basic principle itself can be enforced within the framework of legal relations aimed at working activities falling within the scope of civil law.[44]

It should also be mentioned that labour law regulations in a peculiar way are, for the time being, condemned to "failure" in connection with securing equality. Namely, according to the provision of the relevant regulation, the principle of equal treatment should be kept, and legal remedy applied if this principle is infringed, however the Mt. Act save only one exception,[45] does, not contain legal consequences which would be suitable for providing remedy in accordance with the provision for employees' grievances. In my view, it would be necessary to include these legal consequences in the Mt. Act, because this would play a key role in preventing grievances.

In connection with the particular case examined, some other proposals may also be put forward to solve the problems arising and to secure development. As far as the regulatory environment is concerned, from the viewpoint of editing a legal norm text, the provision calling upon the Member States to avoid abuses in connection with the application of section 5 of the Directive and especially to prevent successive assignments designed to circumvent the pro-

[44] György Kiss, "Munkajog a közjog és a magánjog határán – egy új munkajogi politika kialakításának szükségessége," *Jogtudományi Közlöny* 2 (2008): 70.

[45] According to Mt. section 83 (1) a), if the employer terminated the employee's employment unlawfully upon the employee's request, the court may restore the same, if the employment was terminated through the violation of equal treatment.

visions of this Directive, was, in my opinion, included by mistake in section 5 of the Directive governing the requirement of equal treatment. The effect of this regulation is broader than the enforcement of the basic principle of equal treatment. The "prevention of successive assignments" according to the text of section 5 subsection (5) implies the temporary nature defined as an indispensable element of the notion of temporary agency work, and requires the member states to prevent the circumvention of this provision.[46]

It would be desirable to suggest the repeal of this provision at Community level too.

In my assessment, regarding the above-mentioned derogations of the Mt. Act concerning equal treatment related to employees, it would be necessary to determine, as a statutory minimum, the rate of remuneration that may be paid for the time between assignments. If during the term of employment assignments follow each other without interruptions, subsequent remunerations at rates specified by statutory provision should be ensured for the employees.

In the case of derogations relating to the user undertaking, the wording non-profit organisation should be removed from the text of the Mt. Act, so as to comply with the provisions of the Directive.

Apart from the amendments made to the regulatory environment, I believe, in Hungary it would also be necessary to utilize the so-called bilateral funds created in the European Union on welfare grounds in the temporary agency work sector. These funds would provide a better access to trainings, in order to support thereby a wider professional development of temporary agency workers and, at the same time temporary agency work activities.

[46] István Horváth, "Így harmonizálunk mi – Az új Munka Törvénykönyve munkaerő-kölcsönzésre vonatkozó - az EU-követelményekre is figyelemmel - megállapított szabályairól," *Magyar munkajog* 1 (2014): 161.

Dissolution of political parties by the Polish Constitutional Tribunal in light of the Venice Commission's standards and decisions

Bień-Kacała, Agnieszka

Abstract *This text regards the issue of dissolution of political parties in Poland. The analyses concentrate on the Constitutional Tribunal's judgements and the standards developed by the Venice Commission. The author presents main constitutional regulations regarding political parties, further she elaborates the standards worked out by the Venice Commission in the field of position and delegalization of political parties. In a later part, she indicates decisions of the Constitutional Tribunal, which were subject to the issue of dissolution of political parties, and confronts these resolutions with the standards adopted in Europe. In the conclusion, she depicts the main similarities and differences regarding approaches towards the issue at stake. The author also raises the questions of reality concerning the used mechanisms in a situation when members of political parties, who perform the functions of state bodies, violate the Constitution and regarding the paralysis of the Constitutional Tribunal, that is a guarantor of constitutionality.*

For the purpose of the article, terms "dissolution" and "delegalization" are used interchangeably due to stylistic reasons.

In the international legal literature, the term "Constitutional Court" is equivalent to "Constitutional Tribunal". The article uses the latter notion because this phrase is used in the Constitution of the Republic of Poland.

Keywords *political party, dissolution, delegalization, constitutional tribunal, constitutional court*

1. Introduction

Political parties play a significant role in a democratic state. They shape the political system and ensure its proper functioning. Persons affiliated to the parties express their political will, become part of the authorities exercising power in a state, and hold the highest functions. Therefore, political parties represent the basic principle of freedom of association on the one hand, and the creation of a political system on the other hand. Pluralism, including the freedom of establishment and operation of political parties is necessary for the

proper functioning of a political system. Nevertheless, in any system the expression of extreme views can be observed, which may contradict the values of liberal democracy. Although these views might be discussed, it seems to be certain that, especially in Europe, some of the ideologies or methods of citizens' activities cannot be accepted at all.[1] Nevertheless, a democratic mechanism might be used to demolish the existing governmental system. From this point of view, the fundamental problem is the ability of the democratic system for self-correction, which, in turn, is directly connected to the concept of militant democracy.[2] One of the possible counterbalancing mechanisms is delegalization of the party that acts in an unconstitutional way.

In this article, the relevant regulations of the Constitution of the Republic of Poland of 1997[3] will be discussed. The functioning and delegalization of political parties will be concerned. The standards developed by the Venice Commission (European Commission for Democracy through Law) in the field of dissolution of political parties will also be presented.[4] Further, the judgements of the Constitutional Tribunal concerning the issue of delegalization of parties will be confronted with these standards.

[1] See discussion on dissolution of political parties: e.g. Sabine Leutheusser-Schnarrenberger, "Nach der Entscheidung des Bundesverfassungsgerichts im NPD-Verbotsverfahren – Kein Geld mehr für Verfassungsfeinde!?", VerfBlog, 21 January, 2017, http://verfassungsblog.de/nach-der-entscheidung-des-bundesverfassungsgerichts-im-npd-verbotsverfahren-kein-geld-mehr-fuer-verfassungsfeinde/.; Cindy Skach, **"**Political parties and the Constitution" in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford: U. Press, 2012); Richard H. Pildes, "Political parties and constitutionalism" in *Comparative Constitutional Law*, ed. Tom Ginsburg and Rosalind Dixon (Edward Elgar, 2011); Bülent Algan, "Dissolution of political parties by the Constitutional Court in Turkey: an everlasting conflict between the Court and the Parliament?," *AUHFD* 60, no. 4 (2011); Yigal Mersel, "The dissolution of political parties: The problem of internal democracy", *I·CON* 4, no. 1 (2006); Thomas Ayres, "Batasuna Banned: The Dissolution of Political Parties Under the European Convention of Human Rights," 27 B.C. *Int'l & Comp. L. Rev.* 99, (2004) http://lawdigitalcommons.bc.edu/iclr/vol27/iss1/3.

[2] More: Karl Loewenstein, "Militant democracy and Fundamental Rights," *The American Political Science Review* 1937 (31) No. 3 and No. 4; Jan W. Müller, "Militant Democracy" in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford: U. Press, 2012); András Sajó, "Militant Democracy and Emotional Politics," *Constellations* 19, no. 4 (2012) and András Sajó, "Militant Democracy and Transition towards Democracy," in *Militant Democracy*, ed. András. Sajó (Utrecht: 2004)

[3] Dz. U. Z 1997 r. Nr 78, poz. 483 ze zm. Updated, not official version (consolidated version): http://isap.sejm.gov.pl/DetailsServlet?id=WDU19970780483.;

English version http://www.sejm.gov.pl/prawo/konst/angielski/konse.htm.

[4] CDL-PI (2016) 003 Updated Compilation of Venice Commission Opinions and Reports Concerning Political Parties (hereinafter: CDL-PI(2016)003).

2. Relevant norms of the Polish Constitution

The most relevant provision concerning political parties is Art.11 of the Polish Constitution, pursuant to which the Republic of Poland shall ensure freedom for the creation and functioning of political parties. They shall be founded on the principle of voluntariness and upon the equality of Polish citizens, and their purpose shall be to influence the formulation of the policy of the State by democratic means. The provision also adds that the financing of political parties shall be open to public inspection. This regulation provides rules for the recognition of political parties in the Polish system.

Pursuant to Art.13 political parties and other organizations, whose programmes are based upon totalitarian methods and the modes of activity of nazism, fascism and communism, as well as those whose programmes or activities sanction racial or national hatred, the application of violence for the purpose of obtaining power or to influence the State policy, or provide for the secrecy of their own structure or membership, shall be prohibited. Thus, this legal rule prohibits the most devastating values of the democratic system established by political parties as well as other organisations.

Political parties are also governed by Art.58 that guarantees the freedom of association for everyone. However, the formations whose purposes or activities are contrary to the Constitution or statutes shall be prohibited. If this is the case, the courts shall decide on the refusal to register or on crossing off an association from the party registry if its activities do not comply with the law. Statutes shall specify types of associations requiring court registration, the procedure for such a registration and the forms of supervision of such associations. This type of associations encompasses political parties.

In respect to the control over political parties, it reference should be made to Art.188, stating that the Constitutional Tribunal shall adjudicate *inter alia* regarding the conformity to the Constitution of the purposes or activities of political parties.

As follows from the analysis above, the constitutional regulation is not detailed. Nevertheless, it contains the key norms about the freedom of establishment of political parties, their activities limited by the Constitution and the possibility of delegalization of these organisations if their purposes or activities do not comply with the Constitution. The judgements on the following matters are provided primarily by the Constitutional Court.

3. Standards of the Venice Commission

The main standard compiled by the Venice Commission concerns perceiving political parties as free associations of persons, which aim at expressing

their political will, participate in the management of public affairs and support their candidates during the election.[5] Thus, it is visible that in this context reference is made to the status of an individual, especially to the freedom of association, and not to the parties' relationship with state structures. The parties' primary role is the articulation of political will within the civil society. They are significant in the creation and proper functioning of democracy and in expressing the will of the Nation. That is why the freedom of association is connected to the freedom of expression. The latter, in turn, is strongly connected to political pluralism. It should be noted that in this context political parties cannot be considered as subjects constituted by the state authorities. Obviously, the rules governing their creation and activities will be specified in the provisions of the highest rank (the Constitution), and elaborated in the statutes. Administrative organs shall not be allowed to regulate the issues of this kind.

According to the Council of Europe, the fundamental values are the rule of law, democracy, separation of powers and individual rights. They shall be developed not only by the legislator, but also by political parties themselves, in the field of establishing the organisation, operation and finance.[6] Parties shall follow rules of voluntary membership, non-discrimination and transparency. Additionally the legislator shall respect the autonomy of political parties, especially in scope of their internal organisation. Any interference of authorities upon the activities of parties or organizations shall be justified by fulfilling the proportionality criteria.[7] These European values shall be recognized as the limitations of the functioning of authorities and parties.

Political parties shall act according to the Constitution and other legal regulations. Nevertheless, they can postulate changes in the applicable legal order, but only within the limits set out by legal procedures. Incitement to use violence in order to overthrow a democratic state order is unacceptable.[8] This can lead to delegalization of a political party. Thus, the mechanism of dissolution can be described as a safeguard of a democratic and liberal system.

Actions undertaken individually by members that are with no connection to the activity of a political party or that are contrary to the party's statute or activities cannot burden the party as an association itself.[9] Associations benefit from a separate protection. For that reason, delegalization of a party shall not

[5] The standards regarding political parties were compiled in the Code of Good Practice in the Field of Political Parties, CDL-AD(2009)021, adopted by the Venice Commission at its 77th Plenary Session (12-13 December 2008), see also CDL-PI(2016)003, 7-10.

[6] CDL-PI(2016)003, 9-15.

[7] CDL-PI(2016)003, 31.

[8] CDL-PI(2016)003, 55.

[9] CDL-PI(2016)003, 55-56.

result from the activities of its members, and not even those coming from its leaders. Exceptional are the cases, in which it can be proven that a representative acted on behalf of the party. In order to delegalize this institution, it must be established that activities and objectives undertaken by the statutory body (and not individual members) led to such a decision.

When it comes to the problem of delegalization, the Venice Commission took into consideration the fundamental role of political parties in the functioning of democracy.[10] In this scope, the importance of three basic principles concerning dissolution of political parties needs to be underlined. First of them is the exceptional nature of prohibition or dissolution, whereas the second refers to the proportionality to the legitimate aim pursued. The third is procedural guaranties. It must be emphasized that the procedure for dissolution of political parties should ensure the principles of fairness, due process, and openness. It shall be reiterated that the Venice Commission takes a perspective of individual rights in formulating standards regarding the issue at stake. Political parties are treated as associations of individuals. As a consequence the protection of the freedom of association, and not the issue of political pluralism plays a key role here.

Delegalization of a political party is the furthest-reaching means of interference with the freedom of association and therefore should be conducted as a last resort. For that reason, before its application, it must be examined whether a threat to a democratic rule of law really exists.[11] In some cases, implementation of less radical methods may be sufficient. Only when those measures fail, will delegalization be justified. In practice, however, the circumstances and remedies for any kind of threats and their intensity may be difficult to assess.

Based on the comparison of different legal systems, the Venice Commission pointed out the following reasons justifying dissolution of political parties: threat to the existence or sovereignty of the state; threat to the basic democratic order; threat to the territorial integrity of the state; fostering ethnic, social, or religious hatred; fostering ethnic discrimination; use or threat of violence; nazism or fascism; criminal associations; military or paramilitary associations; secret or subversive methods.[12] Nevertheless, the list is not exhaustive. The criteria are usually set out in the Constitutions, but sometimes they can be supplemented (and extended) in statutory law. The Venice Commission emphasised that the constitutional systems usually do not include all of these criteria. It is argued that accepting several of them may be recognised as part of a democratic system. However, implementation of too many of them might exceed a "critical mass" leading to a threat to political pluralism. The

[10] CDL-PI(2016)003, 54.
[11] CDL-PI(2016)003, 55-56.
[12] CDL-PI(2016)003, 59.

Polish Constitution provides a broad range of reasons for delegalization of political parties. However, this cannot be perceived as going beyond the "critical mass" in this system because of the historical backgrounds such as the long experience of totalitarianism.

Additionally, reference should be made to the Parliamentary Assembly of the Council of Europe (PACE) Resolution 1308 (2002) on Restrictions on political parties in the Council of Europe member states.[13] In this document the PACE underlines that dissolution of political parties should be regarded as an exceptional measure to be applied in cases where the party concerned uses violence or threatens civil peace and the democratic constitutional order. Thus, opportunity for a state to dissolve a political party should be tailored narrowly and applied only in extreme cases. This is because political parties play a significant role in shaping democracy and a democratic society.[14] In fact, the real problem arises when a party reveals its anti-democratic attitude after the elections and then attempts to destroy the democratic system by legal means. In practice, when a party gains majority it might no longer be dissolved and at the same time democracy might not be protected.

When it comes to procedural guarantees, the Commission indicated that delegalization of political parties shall be devoted to the judiciary because of the rules governed by this authority.[15] For that reason the prohibition or dissolution of a political party is vested in the constitutional court (e.g. Poland) or other appropriate jurisdictions (e.g. Hungary)[16] in a procedure offering all guarantees of due process, openness and fair trial.

The Venice Commission concluded in its 1998 report that the rules on prohibition of the political parties are not essential to the functioning of democracy.[17] However, if such regulations exist, they are perceived as a special privilege and protection, which raises the threshold and protects political parties from the kind of legal dissolution to which other forms of associations might be subjected. Nevertheless, such a great protection from delegalization of political parties might be destructive to the safeguards of democracy.

[13] http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17063&lang=en. October 27, 2016.
[14] CDL-PI(2016)003, 55.
[15] CDL-PI(2016)003, 56.
[16] In Hungary the competence is vested in an ordinary court: the dissolution is justified if the activity is not in conformity with the Constitution: if it infringes Art C(2) of the Fundamental Law, or calls for committing crime, or results in committing crime, or infringes rights and liberties of others. See, Act XXXIII of 1989 on the Operation and Financial Management of Parties, Act CLXXV of 2011 on the Right of Associations and Civil Organizations.
[17] CDL-PI(2016)003, 59.

Considering the presented analysis, it must be said that the CT referred to similar elements to those identified by the Venice Commission. The next section will compare the views of the Venice Commission and the CT in the following aspects: recognition of political parties (Sec. 4.1), their internal democracy (Sec. 4.2), activities of political parties and their delegalization (Sec. 4.3), and procedural requirements for the dissolution of political parties (Sec. 4.4). The section below will present the different approaches taken by both the Polish CT and the Venice Commission.

4. Relevant decisions of the Constitutional Tribunal

The CT's competence regarding adjudication of the compliance of the purposes and activities of political parties with the Constitution is associated with supervision over political parties.[18] In Poland, there are only a few decisions about delegalization of political parties.[19] Moreover, four proceedings pending before the CT have been discontinued. One was about the examination of a party's statute and was terminated since the motion was withdrawn (Pp 1/02). The other proceedings regarded the constitutionality of the activities of a political party and were stayed because of parliamentary recess (Pp 1/07). The inadmissibility of delivering a judgement was the reason for discontinuance of the proceedings in case of decisions of 24 November 2010 (Pp 1/08) and of 6 April 2011 (Pp 1/10). There were different grounds for inadmissibility. In the former case, the Tribunal stated that the character of the activities undertaken by the party did not justify its delegalization in repressive review. In the latter case, the main reason was the formal shortages in the motion. The mere Tribunal judgement concerned the compliance of the political party's statute with the Constitution in case Pp 1/99. The approach followed by the CT might indicate that the court refuses to exercise its competence to delegalize political parties, which means that the overall mechanism may be dysfunctional. Nevertheless, irrespective of the reason for refusal, the Court always provides an interpretation of constitutional regulations.

[18] Discussed in greater detail: Michał Bartoszewicz, *Nadzór nad partiami politycznymi w polskim porządku konstytucyjnym* (Warszawa: Wydawnictwo Sejmowe, 2006).
[19] The Tribunal's judgments have been partially depicted and commented in a doctrine, e.g. Joanna Uliasz, „Władza sądownicza wobec partii politycznych w Polsce – zagadnienia wybrane," *Przegląd Prawa Konstytucyjnego* 2(2011): 99-110.

4.1 Recognition of political parties

In the judgement of 8 March 2000 (Pp 1/99) the key problem discussed by the CT was the position and legality of a political party.[20] The Tribunal stated that a party is a form of implementation of the freedom of association of Polish citizens. Simultaneously, due to its ability to have an impact and shape the state's policy, it constitutes an element of the political system.

Concerning reference to the freedom of association, its general specification and limits are included in Art.58 of the Polish Constitution. Undoubtedly, this regulation also refers to political parties. Nevertheless, this provision requires some modifications derived from Art.11, Para.1 and Art.13 of the Basic Law.[21] Necessity of such modification is associated with the treatment of political parties as important and constitutionally indispensable elements of the liberal democratic rule of law. Their main function is to influence state policy, which is guaranteed by the relevant constitutional and statutory regulations. Both the place where the provisions concerning the parties are located and their content show that these formations are ranked as the "basic institutions of public political life".[22] As stated by the CT, the principle of political pluralism (Art.11) is an inviolable principle of the system because of the importance and the function of a party in a democratic state.

However, it should be noted that in relation to the right to bring a constitutional complaint, the CT adopted a different approach concerning the status of a political party. In the decision of 17 November 2010 (Ts 256/09) the CT refused to follow up the constitutional complaint lodged by a party because of incapability of bringing such a motion.[23] Lack of the abovementioned *locus*

[20] Political parties' positions within a system were widely described in a doctrine (already a historical aspect), e.g. Marek Chmaj, Marek Żmigrodzki, *Status prawny partii politycznych w Polsce* (Toruń: Wydawnictwo Adam Marszałek, 1995), as well as considering its current legal and constitutional status and comparative aspect, e.g., Aldona Domańska and Krzysztof Skotnicki, ed., *Prawne aspekty funkcjonowania partii politycznych w państwach Europy Środkowej i Wschodniej* (Łódź: Łódzkie Towarzystwo Naukowe, 2003); Jarosław Sułkowski, *Pozycja ustrojowo prawna partii politycznych w Polsce, Czechach, na Słowacji i na Węgrzech* (Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 2010)

[21] The freedom of association concerns the Polish citizens exclusively; it requires voluntariness and equality; the aim of a party shall be an influence on shaping the state's policy by using democratic methods; any restriction on the exercise of this freedom can only arise directly from the provisions of the constitution; the statutes cannot be their source.

[22] In this context the CT referred to the key material in the jurisprudence of Jan Majchrowski, "Partie polityczne w świetle nowej Konstytucji," *Państwo i Prawo* 11-12(1997): 169.

[23] The case was associated with refusing to accept financial report of a party and

standi is connected primarily to the function fulfilled by the constitutional complaint, which is a means of protection of constitutional rights. This role is not compatible with the public and legal status of a party. Constitutional freedoms or rights only aim at protecting individuals and not organisations fulfilling public functions. They define the relationships between an individual and the state and other entities of public authority. The organs of public authority are obliged to ensure the implementation of fundamental rights. The entities, which by their activities, have an impact on public authority organs, on the political system and concerning the implementation of public duties as well, are incapable to bring a complaint. This mainly regards political parties and their functioning within the sphere of public law. This is because political parties are not the beneficiaries of constitutional rights or freedoms.

In the judgment of 14 December 2004 (K 25/03) the Tribunal did not refer to delegalization but to the legal position of political parties in the context of being financed from the state budget.[24] It was stated that the fact that provisions concerning political parties were placed in Chapter I 'Republic' of the Constitution, indicated the rank attributed to these formations by the legislator. Their uniqueness lies in the fact that they do not only constitute a form of right to association but primarily, they are the form of a political organisation, which has an impact on the exercise of power. The state accepts the fundamental role of the parties in a democratic system and recognises their right to have an impact on shaping the political system. This is a public function, strongly connected to state power. Parties constitute an element of a political system and are associated with the basic institution of public political life. Therefore, it is visible that this approach towards political parties differs from the one identified by the Venice Commission.[25]

---

statutory limitations concerning the freedom of economic activity of political parties.

[24] Discussed in greater detail: Agnieszka Bień-Kacała, „Finansowanie kampanii wyborczej partii politycznej ze środków pochodzących z działalności gospodarczej," *in „Przemiany prawa wyborczego - doświadczenia nowych demokracji" Republika Czeska, Republika Słowacka, Republika Ukraińska, Rzeczpospolita Polska*, ed. Andrzej Sokala and Zbigniew Witkowski (Bydgoszcz: Wydawnictwo Kujawsko-Pomorskiej Szkoły Wyższej, 2007), 130-143, see also judgement glosses Mirosław Granat and Jarosław Sułkowski, *Przegląd Sejmowy* 1(2006): 119-133.

[25] Hungarian approach is similar to the Polish equivalent, see further Tímea Drinóczi and József Petrétei, "On the issue of the financing of Hungarian political parties," in Gerrit Manssen (Hrsg), *Die Finanzierung von politischen Parteien in Europa. Bestandsaufnahme und europäische Perspektive. (Regensburger Beiträge zum Staats- und Verwaltungsrecht)* (Frankfurt am Main: Peter Lang GmbH, 2008), 97-98. and Tímea Drinóczi and József Petrétei, "Financing political parties in Hungary (Bill T/4190)," *ICL Online Journal, Vienna Online Journal on International Constitutional Law* 3, no. 2 (2009): 109.

4.2 Internal democracy

In the already-mentioned judgement of 8 March 2000 (Pp 1/99) the CT addressed the problem of interference of the internal structure of a political party with a state authority. In this case, the Tribunal referred to its prior resolution of 24 April 1996 (W 14/95) and stated that the constitutional right of citizens to associate into political parties does not exclude the possibility that the legislator may either establish its limits or define the legal procedure to be followed. This is because freedoms of citizens are not absolute and may be subject to limitations. Nevertheless, in order to guarantee a democratic system of government, limitations should be laid down both for political parties and in order to safeguard public interests. Additionally, the organization, i.e. membership and structure, is to be based on the principles of equality and voluntariness, namely on democratic principles. Violation of any of these rules would not allow a given social organisation to be classified as a political party.

Thus, democratic principles of operation do not only concern the statutory framework but they also refer to internal affairs. Moreover, they regard the purpose of the establishment of a party, its activities, the system of authorities and the issues related to membership. Therefore, in a statute or a document equivalent to it, a party ought to clarify its position in a political system and its influence on state policy. As a consequence, the CT indicated that the postulate of "democratic methods" should not only regard the "external" activities of a party, i.e. mainly the sphere of its political activity, but also the "internal" activities relating to its structure and the rules of membership.

Nevertheless, in the judgement of 2000 (Pp 1/99) the CT stated that although the organisation of a party might be undemocratic, the institution might still fulfil its constitutional role. Therefore, the freedom to determine the internal structures and the principles of functioning of a party cannot be limited as long as the party acts constitutionally or as long as it does not fail to apply democratic methods to shape state policy. However, the lack of internal democracy must be taken into consideration in checking the constitutionality of the purposes or activities of political parties. The assessment shall always refer to a specific case, which should encompass the overall objectives of the program, statutory rules and the practices applied by a given political party. The only abstractly and absolutely defined limitations concerning freedom to shape the internal structures and the principles of operation are the prohibitions included in Art.13 of the Constitution. The autonomy of the creation of internal structures is in fact a derivative of the freedom of party establishment. An external interference is only allowed, when such a structure clearly and obviously differs from the standards of a democratic state ruled by law and its system of values. In case of doubt, presumption of compliance with the

Constitution should be applied. This means that in a democratic system an undemocratic political party can in fact exist.

4.3 Activities of political parties and their delegalization

The issue of political partys' activities was addressed by the CT in the decision of 24 November 2010 (Pp 1/08).[26] The Tribunal established that this notion could encompass the activities of both the authorities of the party and its lower-ranked members. This includes the operations in an internal sphere[27] as well as in its external equivalent.[28] For the specification of the operation of a party, the following elements can be especially helpful: activities of its higher and local authorities, its statute, accepted programs, issued directions and already concluded agreements. However, an individual behaviour of a party member that goes beyond the political program cannot be classified as the activity of the party. With regard to the principle of political pluralism and its conjunction with the freedom of association, qualifying the exact forms of a party activity as demanding the constitutional disapproval should be carefully considered. The assessment of the constitutionality of the activity requires an analysis of the facts based on the collected evidence, and should not be a mere allegation of these facts but also the survey of the intensity of the phenomenon and its consequences. Considering this, in such a case constitutional review conducted by the CT might be used as a means for political struggle. It must be said that imprecise and numerous reasons for using these measures could threaten political pluralism, which constitutes one of the foundations of the political system of the Polish Republic. Thus, the relevant reference is Art.13 of the Constitution. This provision includes a norm excluding the possibility of illegal functioning of specific political parties and other organisations. The prohibition of existence of a party falls within the authority of the registration court which shall refuse to enter it on the list of political parties, if the CT delivers a judgement stating the incompatibility of the political party's purposes with the Constitution. The court's duty also implies cancelling the party from the register (and its liquidation), if the Tribunal reach a decision indicating the incompatibility of the political party's aims or activities with the Constitution.

Nevertheless, the CT found that the inappropriateness of party practices was less than the grounds decisions were made on the prohibition of existence of political parties (Art.13 of the Constitution). For that reason delegalization would be disproportional (it would not pass the proportionality test). The basis of such recognition arises from the experience of 20th century totalitarianism,

[26] The case is connected with the bills of exchange that was used by a party for preventing its member to change parliamentary faction.

[27] E.g. in respect to the party's members or organs.

[28] E.g. in respect to the non-members, other associations or the state authorities.

including the prohibition of the existence of particular political parties and other organisations.

The decision of 6 April 2011 (Pp 1/10) is also significant when it comes to the problem of activities of a political party. The case concerned the entry into the register of graphic symbols of a party. In this respect, the Tribunal was to determine whether graphic symbols could be a subject to consideration of the constitutionality of the objectives and principles of the institution.

The Tribunal indicated that the program of the party was not clearly and unequivocally laid down in its statute. It did not directly refer to totalitarian methods and it did not express racial or ethnic hatred complying with the elements listed in Art.13 of the Constitution. The only constitutional doubts were caused by the symbols, which the party opted to register and which could be regarded as the violation of the principle of equality or the praise of fascism. The Basic Law does not specify a form in which the aims and rules of operation of a party shall be expressed in compliance with the Constitution. In understanding Art.13, the notion of a "program" is of a general character, encompassing any form of expression of the content relevant to be checked in compliance with the Basic Law. Therefore, the purposes of a party shall be appraised through the prism of the aims determined in the statute or in the program. The new symbols, which a party wants to enter into the register are also relevant from the perspective of the purposes or the rules of operation of a party. Thus, such symbols are subjects to the Tribunal's decision. The contents followed from the statute as well as from the program and other documents, including graphic symbols of a political party, define its ideological identity. This is because a graphic symbol is a form of expression of a party's members.[29]

Nevertheless, as the CT indicated each delegalization of a radical political party is an extreme means of state interference with the principle of political pluralism. This method shall be used only in the case of absolute necessity. The freedom of establishment and activity of the parties is one of the pillars of democracy. That is why in each case this should be an *ultima ratio* act, executed after the exclusion of other legal actions undertaken by the competent state authorities, in response to the illegal activities of a political party. Not without a reason, all totalitarian or extremely undemocratic regimes introduce a mono-party system or prohibit the existence of political parties.

[29] For a comparative perspective from Hungary, early years up to 2010, see Tímea Drinóczi and Nóra Chronowski, "Extracts on the decisions of the Hungarian Constitutional Court on right to expression," *Prawa Człowieka – Human Rights, Humanistyczne Zeszyty Naukowe – Humanistics – Scientific Facsicles* no. 13 (2010): 196-208. ed. Naukowi Andrzej Bisztyga and Leszek Wieczorek

4.4 Procedural requirements

It should be noted that in respect to the procedural rules on delegalization of a party, the CT was entrusted with this activity, as provided by the constitutional regulation. Nevertheless, the legislator expanded the issues and the competence of the court in the registration of political parties and responsibility for changes in the register (e.g. in the scope of the statute or the symbols used by a party) were also included in the procedure.

In the abovementioned judgement of 8 March 2000 (Pp 1/99) the CT provided a few important findings in the scope of the procedure of constitutional review of the activities and aims of a political party. The main issue concerned whether the registration court is authorised to check constitutionality. Although the Basic Law specifies the subjects entitled to initiate the proceedings before the CT,[30] the constitutional authority differentiated the procedural legitimacy of these entities. According to the doctrine, in the abstract procedure there are subjects legitimised generally and functionally.[31] The court registering political parties does not form part of these subjects. Besides hierarchical norm control, the CT shall adjudicate upon the conformity of the purposes or activities of political parties to the Constitution.[32] However, the Constitution

[30] Article 191 of the Constitution:
1. The following may make application to the Constitutional Tribunal regarding matters specified in Article 188:
1) the President of the Republic, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, 50 Deputies, 30 Senators, the First President of the Supreme Court, the President of the Supreme Administrative Court, the Public Prosecutor-General, the President of the Supreme Chamber of Control and the Commissioner for Citizens' Rights,
2) the National Council of the Judiciary, to the extent specified in Article 186, para. 2;
3) the constitutive organs of units of local government;
4) the national organs of trade unions as well as the national authorities of employers' organizations and occupational organizations;
5) churches and religious organizations;
6) the subjects referred to in Article 79 to the extent specified therein.
2. The subjects referred to in para. 1 subparas. 3-5, above, may make such application if the normative act relates to matters relevant to the scope of their activity.

[31] Aleksandra Kustra, „Trybunał Konstytucyjny," in *Prawo konstytucyjne*, ed. Zbigniew Witkowski and Agnieszka Bień-Kacała (Toruń: TNOIK, 2015), 499-500.

[32] Article 188: The Constitutional Tribunal shall adjudicate regarding the following matters:
1. the conformity of statutes and international agreements to the Constitution;
2. the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute;
3. the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutes;

does not specify the form in which these purposes shall be expressed in order to become subject to control. It is included neither in Art.11 of the Basic Law, determining the political position of a party, nor in Art.58 concerning the freedom of association and the scope of limitations of this freedom. Nevertheless, the Constitution is recognized as a legal basis for checking the constitutionality of the purposes or activities of political parties, but the mode of its control is concretized by the Act on Political Parties of 1997.[33]

Pursuant to the abovementioned law, the document, in which a party specifies its purposes, structure and the activities is the statute. This document is the main basis for policy-organisation of a party. At the same time, it is a requirement that the registration of a party, regarding its purposes must be compatible with the Constitution. The CT also emphasized that the subject of proceedings concerning the adjudication of the conformity of the purposes and activities of a party with the Constitution is the statute, i.e. a non-normative act. Therefore, it cannot be assumed that the entities that are capable of initiating proceedings concerning hierarchical compatibility of norms have power to initiate the review of non-normative acts. Moreover, due to such an established subject of review, the CT stated that concrete review indicated in the Constitution does not encompass these cases.[34] In this case, only the far-reaching similarities to statements of the registration court, pursuant to the Law on Political Parties, can be allowed for.

In the CT's opinion, despite the lack of a clear constitutional norm, concerning the diversity of the proceedings and the subject of review the adoption of an interpretation compatible with the Constitution is allowed and as a consequence the admissibility of a motion of the registration court to review the constitutionality of the statute or of a political party's purposes shall be recognised.

In the decision of 16 July 2003 (Pp 1/02) the CT referred to the types of proceedings allowed before the Tribunal. It stated that review conducted by this organ is implemented in two forms: preventive review, also described as precautionary, concerning the purposes of political parties determined in their

4. the conformity to the Constitution of the purposes or activities of political parties;
5. complaints concerning constitutional infringements, as specified in Article 79, para. 1.

[33] The currently binding Law on Political Parties of 27 June 1997 (Dz. U. z 2011 r. Nr 155, poz. 924 ze zm.; consolidated version: http://isap.sejm.gov.pl/DetailsServlet?id=WDU19970980604.)

[34] Article 193: Any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statutes, if the answer to such question of law will determine an issue currently before such court.

statute or program, and repressive review, also described as subsequent, referring to the activities of a political party.

The first type of review (preventive) regards the process of a party's formation, so the moment of checking a motion on the entry to the registry of political parties by the registration court as well as in the case of putting forward a motion on the entry of the statute's changes to the registry. In both cases, the review is initiated by the court keeping the registry of political parties. The proceedings before the CT are intermediary in their character; they constitute a certain incident in the whole proceedings (on the entry to the registry) before the court of general jurisdiction; and the overall proceedings depend on its outcome. At the same time, preventive review is abstract and in effect, it approaches the review of normative acts in line with the Constitution. The role of the Tribunal is to interpret the statute, the program and other documents, on which the activity of a party would be based. According to its findings, the CT is to determine the purposes and principles of operation of a party, which will later be confronted with constitutional standards. It follows from the nature of preventive review that it cannot lead to delegalization of a party; its aim is to prevent the registration of the party that does not fall within the scope of legal rules, alternatively to prevent the entry of changes to a statute which does not comply with legal conditions.

Repressive control is used when the doubts arise whether the activities of a party that has been already entered on the register is compatible with the Constitution. In such a case, a court is no longer capable of initiating a review before the CT. However, an expression of supervision over a party's activities is the admission of requests from the entities listed in Art.191 Para. 1 no. 1 of the Constitution. Each of them may initiate a review, if they conceive a suspicion on constitutionality of a party's activities. In this case, the role of the Tribunal is to hear the evidence in order to determine whether the party's activities violate constitutional rules. Repressive supervision may lead to delegalization of a party by the CT and to its striking out of the register of political parties.

In the context of the types of proceedings, the Tribunal stated that a new statute can only enter into force if its provisions are disclosed in the register. Until the new statute is registered, the party shall base its activities on the original one, which constitutionality has not been questioned. A party that confines itself to the entry on the register of a "facade" that is not incompatible with the Constitution, in reality that bases its activities on other unconstitutional regulations, must reckon with the application of repressive review, which focuses on the evaluation of the party's actual activity.

It may be noticed that the Polish CT's approach is rather strict. Although the CT has the appropriate competence and the specified procedure needed for the dissolution of a political party (as shown in the Pp 1/99 case), in practice this authority does not deliver such judgements. Therefore, the Polish system

cannot be described as a "militant democracy", which means a system defending itself against anti-democratic organizations. The sad consequence of the CT's approach is that one of the parties, which was subject to the adjudication of the compatibility with the Constitution in 2011, currently plays a great role in Polish society with its unacceptable symbols and opinions. Therefore, it might be argued that even a perfectly constructed mechanism of safeguarding liberal democracy could be dysfunctional in practice.

5. Conclusion

Decisions of the CT are limited when it comes to the issue of delegalization of political parties. Nevertheless, it is noticeable that certain jurisprudential tendencies in Poland are based on them. In general, they are compatible with the standards provided by the Venice Commission. However, some differences between the approaches are visible. First, they regard the perception of political parties in an etatist way, similarly to pubic authorities and reflect a departure from democratic methods of operation in terms of the internal organisation of a party. Political parties are not attributed with the possibility of using the full spectrum of individual rights and their protection. However, when it comes to a party's delegalization, the issue of combining its status with the freedom of association is dominant.

As it has been shown in the study, the existing mechanism might fail to protect the society from the activities of the party winning the elections. In this case operating the highest public positions might limit basic rights in terms of liberal democracy. If it goes hand in hand with the paralysis of the institutions protecting fundamental rights and freedoms of man and citizen, e.g. like the CT, and the situation may turn inconvenient for the free functioning of individuals. The last resort standard for delegalization of a political party is extremely strict, as established both by the Venice Commission and the decisions of the CT. In practice, it may not guarantee a real protection provided that highly unacceptable views are spread within the electorate.

The Legal Policy Objectives of Preventive Patronage

Herke-Fábos, Barbara Katalin

Abstract *Preventive patronage is a child born from the marriage of child protection and criminal law, and we do not know yet how viable it will be.*

Within the range of authority measures to be taken in the case of juveniles, preventive patronage (supplementing protection proceedings) is a next step in the field of crime prevention, as its objective is to prevent re-offending and hence committing further crimes.[1]

Those one and a half years or thereabouts that have passed since the introduction of the measure are not enough to draw far-reaching or general conclusions on the effectiveness and taxonomic place of the legal institution. On the positive side, based on my research, it has appeared in the law enforcement practice and it has been imposed in several cases. Therefore, it is not only one of the optional tools and measures, but rather a specific decision taken by the authority reflecting the severity of the exposure. At the same time, law enforcement authorities formulated several proposals to rationalize and reduce procedural burdens, in particular, bureaucratic obligations.

Given that this legal institution is of tender age, its available scientific literature is fairly scattered. Before the introduction of this legal institution, authors dealing with the topic addressed preventive patronage from a criminal law perspective, and envisaged its taxonomic place among the rules of substantive or procedural criminal law. However, according to Government Decision 1430/2011 (XII 13) on the National Social Inclusion Strategy and the governmental action plan on its implementation between 2012 and 2014, the legislator intended to introduce it into the child protection system. Besides, draft Act T /13091 on the amendment of certain acts for the purpose of protecting children submitted in November 2013[2] *(hereinafter referred to as the Draft Act) specifically states that the institution of preventive patronage shall be introduced into the child protection system within the framework of the authority measure of placement under protection.*

---

[1] Erika Filó and Erika Katonáné Pehr, *Gyermeki jogok, szülői felelősség* és *gyermekvédelem [Children's rights, parental responsibility and child protection]* (Budapest: HVG-ORAC Lap-és Könyvkiadó, 2015), 333.

[2] The Draft Act has been incorporated into the text of the Child Protection Act by Act CCXLV of 2013 on the amendment of certain acts for the purpose of protecting children.

Keywords *crime prevention, child protection, preventive patronage*

1. The role of child protection in crime prevention

Considering the fact that nowadays we can call it a tendency for minors to engage in criminal activity from a young age, it is essential that our child protection system should operate concrete, preventive crime prevention mechanisms.

Children and minors in most cases commit crimes against property. Unfortunately, they do not recoil from committing violent crimes either. The prominently high numbers of crimes against property let us conclude that the child and/or juvenile perpetrators themselves may be in compromised life situations. Due to this fact, it is justified to strengthen the supportive and social characteristics of crime prevention ensured by child protection. In cases where criminal predisposition does not stem from circumstances that endanger finances or family, supplementing child protection with criminal justice elements cannot be disputed.

However, it would be important to create a balance between support and control functions. One possible way to bring about this balance would be to lay down the cooperation conditions for child protection participants in a protocol and to create possibility for dialogue.

Crime is a societal phenomenon. This fact cannot be neglected. Consequently, the efficiency of child and juvenile crime treatment methods also requires a complex approach.

It is important for the treatment of the problem that the solutions of the treatment system should prevail together and at the same time: dealing with the family's financial difficulties and the question of the child's academic progress, as well as acting with support tools for the benefit of the deviant child.[3]

The reasons for issues hard to handle by the law lie in differences in individual development and circumstances and in the determination of maturity

[3] Klára Kerezsi, Krisztina Kovács, Eszter Párkányi and Judit Szabó, „A pártfogó felügyelet szerepe a bűnmegelőzésben, különös tekintettel a jogintézmény tervezett változásaira" ["The role of probation with supervision in crime prevention, especially with regard to the planned changes in the legal institution"] in *Kriminológiai Tanulmányok [Essays on Criminology],* ed. György Vókó (Budapest: 52. OKRI, 2015), 162.

levels.[4] This is the very reason why the lowering of the age of criminal responsibility[5] with regard to certain crimes[6] kicked up so much dust in Hungary.

Our operative penal laws bear in mind the education and protection of the juvenile. They emphasise the ultima ratio character of measures or punishments resulting in liberty deprivation.[7] The appliers of law and academic literature have_both strongly criticised the lowering of the age of criminal responsibility. The authors have mostly argued that it would have been better to provide for prevention and reaction from the institutional system of child protection. Furthermore, the person that comes into contact with the criminal justice system at a rather young age will not see the State's guarding and protective side; instead, they will rather regard the State as a medium that stigmatises them.

Hungarian child protection services (with the integration of correctional education and services)[8] are based on four pillars. State intervention adapts to the level of endangerment. Accordingly, provisions of financial and in-kind support are primarily focused on solving financial problems within family life. Child welfare services that operate on a voluntary basis within the system of services providing personal care are designed to serve the well-being of children living in families, whereas specialized child protection services offer alternatives specifically to already endangered children. Measures taken by the authorities within the circle of child protection care are organically linked to the sphere of specialized care services. The reasons for ordering these measures form the basis for the possibility of removing a child from the family environment.

I agree that it was a mistake to lower the age of criminal responsibility. I believe that preventive patronage is really a step in the right direction; in the direction of the modernisation of the institutional system of child protection. Starting off with motivational differences, it is my opinion that the crime prevention function of child protection should bear a sort of a Janus face, so that the guarding-protective characteristics are strengthened towards the perpetrators coming from socially disadvantageous situations. With regard to children

[4] Mária Herczog, „Gyerek elkövetők, felnőtt bűnök," [„Child perpetrators, adult crimes,"] *Család, Gyermek, Ifjúság Kiemelkedően Közhasznú Egyesület* no. 3 (2008): 8.

[5] Only if the child perpetrator acted with discernment, concerning which a forensic psychiatric expert opinion and a psychologist's expert opinion are required. The involvement of a child psychiatrist may also be justified.

[6] Murder, voluntary manslaughter, bodily harm, acts of terrorism, robbery, robbery through inebriation or intimidation

[7] see Article 105 of Act C of 2012 on the Criminal Code (hereinafter: CC)

[8] see Article 66/M of Act XXXI of 1997 on the Protection of Children and the Administration of Guardianship (hereinafter: Guardianship Act).

and juveniles manifesting serious forms of criminal tendencies, supplementing child protection with penal justice elements could be justified. Above all, I would favour the introduction of restorative justice elements into the child protection system. Based on the current regulations, this could be realized by executing rules of conduct[9] (restorative conference methods, mediation, community conflict resolution techniques) prescribed for those under preventive patronage[10] within the community programme centres of the Probation Service.

2. The role of preventive patronage in crime prevention

The legal-political motivation for the introduction of the legal institution is to prevent children and juveniles from recidivism and achieve their more efficient reintegration into society.

Since the beginning, the taxonomical positioning of the measure has been disputed. It is the opinion of the opponents of positioning within the institutional system of child protection that the terms of recidivism and crime prevention and their system of instruments require a penal-political approach and action, so, based on the goals of the new legal institution, it should be added to the range of substantive or procedural criminal law tools. According to research in the field of criminology, considering the result of the created mechanism, it constitutes the realisation of the intended task through the integration of a judicial response into child protection.[11]

A further disputed issue is the preventive nature of the measure and its name.

Within the meaning of criminal substantive and procedural law, the expression refers to the fact that the measure precedes or supplements the criminal procedure. If a child commits an act under the Child Protection Act, an administrative procedure is started against him or her and, depending on the preventive patronage officer's risk analysis, the Guardianship Authority may order the above measure within the framework of protection proceedings. If, based on his or her age or mental ability, the person is charged with committing a crime, or an infraction punishable with incarceration, both an administrative AND a criminal procedure are instituted against him/her. In this case use of the term 'preventive' cannot be interpreted anymore, since the child protection authorities' measure does not precede the criminal procedure, but runs along-

[9] see Guardianship Act, Section 68/D (7)

[10] Decree No. 8/2013 (IV. 29.) KIM of the Minister of Public Administration and Justice on the Activities of the Probation Service (hereinafter: Decree on the Probation Service), Section 19/K (2) b)

[11] Kerezsi, Kovács, Párkányi and Szabó, "A pártfogó felügyelet szerepe a bűnmegelőzésben," 162.

side it. Ad absurdum it can even last longer in the case where the criminal procedure terminates by way of a warning by the prosecutor, deferred prosecution or a mediation procedure, before it actually reaches the court stage.

From a criminological point of view, the measure constitutes an intervention in the field of tertiary prevention for the benefit of children or juveniles who are exposed to the risk of recidivism. The legislator draws the instrumental system from child protection, which is provided with primary and secondary levels of crime prevention.[12]

From the point of view of professions that are involved in helping children, the question of prevention is not primarily one of crime prevention, but rather one connected with the term endangerment. Naturally, the fields overlap in many ways and causal relations can be demonstrated.

3. International principles and regulations

Children's rights and the relating standard international requirements are contained in the Convention on the Rights of the Child adopted in New York in 1989, the commentaries containing interpretations by the UN Committee on the Rights of the Child and other international UN standards and guidelines and recommendations by the Council of Europe.[13]

A characteristic of the duality of regulation is that there is a division between the treatment requirements for children that have committed crimes and the issue of other childhood deviations. Treatment of the former takes place with the aid of criminal justice tools, the latter is considered the task of child protection.[14]

International guidelines and recommendations emphasise the importance of a swift, early and consistent response.

Among the most significant guarantees of the Convention on the Rights of the Child is that it guarantees children's rights in cases when they are deprived of their freedom, it emphasises the ultima ratio nature of imprisonment, prohibits torture, the application of degrading, cruel and inhuman punishments with regard to children and the arbitrary deprivation of liberty.

One of the elemental requirements is the demand for a definite term of imprisonment and for the shortest appropriate period of time. A commitment on the part of the authorities appears in relation to the rehabilitation and reintegration of juveniles serving their sentence of imprisonment.

Another elemental requirement for the states having joined the Convention is that a young person under the age of eighteen should be considered a child,

[12] Ibid.
[13] Ibid.
[14] Ibid.

even when the domestic regulations (for example, in the case of criminal responsibility, culpability or with regard to some civil law institutions) – determine different upper age limits for childhood.[15]

The UN Committee on the Rights of the Child lays down in Article 3 of General Comment No. 10 on Children's Rights in Juvenile Justice that States parties to the Convention have to work out and establish a comprehensive justice system for the young. In practice this means that within the frames of a comprehensive policy, specialised and qualified units need to be created within the institutions that proceed in criminal cases. Professional representatives should ensure the rights of children.[16]

The UN's system of regulations for juveniles is based on four pillars:

The Beijing Rules of 1985[17] deal comprehensively with juvenile crime and criminal justice. In case of juveniles, the primary goal is prevention through the creation of extensive social security, in such a way that injury to interests caused by criminal justice is minimised. The document lays down that, when deciding on the measure and type of intervention, one should have regard to the gravity and circumstances of the committed acts as well as the situation and needs of the juvenile. The document propagates the extensive application and priority of alternative sanctions for juveniles so that deprivation of personal liberty could only take place in exceptional cases and following careful consideration.[18]

The remaining important UN documents only touch upon certain subfields of regulation. It is important to mention the Havana Rules adopted in 1990,[19] the Riyadh Guidelines of 1990,[20] and the Tokyo Rules of 1995.[21]

The Havana Rules, adopted on 14 December 1990 by General Assembly Resolution No. 45/113, emphasise - in accordance with the Beijing Rules - that juvenile imprisonment can only be applied in the ultimate case (excep-

[15] Szilvia Gyurkó, "Nemzetközi dokumentumokban megfogalmazott elvárások a 18 éven aluli gyermekek büntető igazságszolgáltatási rendszeréről" ["Expectations formulated in international documents on the penal justice system for children under the age of 18"] available at:
http://unicef.mito.hu/c/document_library/get_file?p_l_id=13301&noSuchEntryRedirect=viewFullContentURLString&fileEntryId=95786.

[16] Ibid.

[17] Document entitled "United Nations Standard Minimum Rules for the Administration of Juvenile Justice" adopted by General Assembly Resolution 40/33 at the plenary meeting of the UN General Assembly on 29 November 1985.

[18] *Kézikönyv a Gyermekjogi Egyezmény Alkalmazásához [Handbook on the Application of the Convention on the Rights of the Child]* (Budapest: Család, Gyermek, Ifjúság Egyesület, 2007), 425.

[19] It concerns the protection of juveniles deprived of their liberty.

[20] It concerns the prevention of juvenile delinquency.

[21] It governs measures that do not involve deprivation of liberty.

tionally) and only for the applicable shortest necessary term. For the benefit of legal certainty and in the best interests of the child, the decision on deprivation of liberty should in all cases be taken by a court of law ensuring the possibility that the involved juvenile can be released earlier than the time recorded in the judgment.[22]

The Riyadh Guidelines emphasise the necessity of prevention, and also command attention to the emphasised importance of the creation of an adequate social environment and education when dealing with juvenile crime. The guidelines project that it can lead to a life of crime if penal sanctions are imposed upon a juvenile person before he or she reaches proper maturity, as the person may evaluate them as a "stigma" and not as a form of education.[23]

The Tokyo Rules argue that penal consequences should be minimised instead of applying a criminal policy that is centred on punishment. They emphasise the community's responsibility in crime prevention and the reduction of crime. As a result, the rules command attention to the advantages of a restorative approach.[24]

The Council of Europe has formulated a number of recommendations with regard to the prevention of juvenile crime:

- Council of Europe Recommendation No R (87) 20 on social reactions to juvenile delinquency supported liberal criminal policy recommendations with regard to juveniles and raised objections against efforts to expand imprisonment.
- Council of Europe Recommendation No R (99) 19 on Mediation in Penal Matters.
- Recommendation Rec (2000) 20 of the Committee of Ministers of the Council of Europe adopted in 2000 emphasises the role of early psychosocial intervention in the prevention of criminality. The intervention ought to respect the child's and his or her family's integrity and right to privacy, it should be proportionate and non-stigmatising and it should keep equal opportunities in mind. The target groups of early psychosocial intervention are the living spaces of children; the family, the school (day-care), peer groups and the local environment.[25]
- Council Framework Decision 2001/220 on the standing of victims in criminal proceedings adopted on March 15, 2001.
- Recommendation Rec (2003) 20 of the Committee of Ministers to member States concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, which defines penal justice for juveniles from a broad perspective: it considers as part of the system not

[22] Gyurkó, "Nemzetközi dokumentumokban megfogalmazott elvárások,"
[23] Ibid.
[24] Ibid.
[25] Gyurkó, "Nemzetközi dokumentumokban megfogalmazott elvárások,"

only conventional judicial institutions, but also the police, the probation service and penal institutions.[26] The commentary attached to the recommendation considers criminal justice for juveniles as part of a more broadly defined system.[27]

- Recommendation CM/Rec (2008) 11 on the European Rules for juvenile offenders subject to sanctions or measures adopted in 2008 boosts the role of special prevention and social reintegration within the system of juvenile penal enforcement, and it records its main principles in the field of sanctions and measures. According to the recommendation, when determining the legal sanctions, the best interests of the juvenile and the principle of proportionality should be considered foremost.[28]
- Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice formulate guarantees on the basis of the right to information and advice, the protection of private and family life, safety, the training of professionals, and a multi-disciplinary approach.[29]

With regard to the volume of the study, I will only provide a list of European Union documents concerning crime prevention while emphasising the relevant rules concerning juvenile crime:

- the Amsterdam Treaty renders the endeavour to prevent crime an organic element of the Union's police and justice cooperation;
- the Vienna Action Plan determines criminal cooperation tasks for a two-year and a five-year term from the entry into force of the Treaty;
- the closing document of the European Council's 1999 Tampere Meeting reconfirms the crime prevention goals mentioned in the Amsterdam Treaty;
- the final conclusion of the Ministerial Conference of Praia da Falesia in May 2000 was that the European crime prevention strategy should take into consideration the existing connection between organised and traditional crime;
- the crime prevention strategy elaborated by the European Commission creates the theoretical basis for the concept of crime prevention;
- for the realisation of the strategy, the Council made a recommendation for the commencement of a financing programme, which was named Hippocrates;

[26] Kerezsi, Kovács, Párkányi and Szabó, "A pártfogó felügyelet szerepe a bűnmegelőzésben," 162.

[27] Miklós Lévay, "Az Európa Tanács R (2003) 20. számú ajánlása a fiatalkorú bűnelkövetőkre vonatkozó igazságszolgáltatási rendszerről," ["Recommendation Rec (2003) 20 of the Council of Europe concerning the justice system for juvenile perpetrators,"] *Család, Gyermek, Ifjúság* no 3. (2005): 21-27.

[28] Gyurkó, "Nemzetközi dokumentumokban megfogalmazott elvárások,"

[29] Ibid.

- on May 28 2001 the so-called European Crime Prevention Network came into existence.[30]

The list of Union documents is further expanded by Opinion (2006/C 110/13) of the European Economic and Social Committee on: „The prevention of juvenile crime. Ways of dealing with juvenile delinquency and the role of the juvenile justice system in the European Union". This opinion sees the possibility for an efficient mechanism of dealing with the problem in the foundation of three major pillars: prevention, punitive-educational measures, and the societal integration and reintegration of juveniles that have committed crimes.

The European Network of Ombudspersons for Children operates as a complaints forum for the Union. Its position papers include:

- Statement on Juvenile Justice (2003).
- Position Statement on the rights of children/young people in conflict with the law.[31]
- Guidelines of the Council of Europe on child-friendly justice.

4. Domestic principles and limitations

Crime control falls under the competence of national sovereignty, but still, there are more and more expectations from the international field that serve as guidelines for the member states' criminal policies. These documents leave the majority of crime control tasks within the sphere of competence of the member states and only rarely formulate direct obligations. Their aim is to appraise goals and values to be followed from a criminality point of view, to bring national crime policies closer to each other and to strengthen types of cooperation between the member states.[32]

Over the past decades international practice has travelled a spectacular path that reflects coherent thinking, the effect of which can only be felt partly in the Hungarian practice of legislation and the application of law, even though these thoughts appear in Hungarian research and professional literature.[33]

During its sitting of October 20, 2003 Parliament adopted by Resolution No 115/2003 (X.28) the National Strategy for Social Crime Prevention (hereinafter: Strategy).[34]

[30] Andrea Borbíró, "Bűnmegelőzés, társadalmi bűnmegelőzési stratégia és az erre vonatkozó nemzetközi követelmények", http://bunmegelozes.easyhosting.hu/hatteranyagok/borbiro.pdf.
[31] Adopted by the 16th ENOC General Assembly in October 2012 in Nicosia
[32] Borbíró, "Bűnmegelőzés, társadalmi bűnmegelőzési stratégia"
[33] Herczog, "Gyerek elkövetők, felnőtt bűnök," 5.
[34] Borbíró, "Bűnmegelőzés, társadalmi bűnmegelőzési stratégia"

The fundamental document concerning the Hungarian policy of crime prevention was adopted by Parliament during its sitting on October 20, 2003 by Resolution No 115/2003 (X.28). One of the priorities of the National Strategy for Social Crime Prevention (hereinafter: Strategy), is the reduction of child and juvenile crime. In this regard, the Strategy determines the tasks of the criminal investigation and penal justice system and the role of other sectors.[35] The Strategy interprets crime prevention as a part of social policy, defining a concept which is linked to the criminal justice system, but covers a much larger spectrum in targeting the reduction of the number of criminal cases and the improvement of public safety and of the sense of security of the population. The document emphasises a systemic approach, resulting from the synergy of various forms of prevention and re-defines the role of the State and local communities within the system of crime prevention.[36]

As a part of the domestic legislative process, a new national social convergence strategy (hereinafter: Convergence Strategy) was adopted by Parliament in 2011. The most important aims of the Convergence Strategy are crime prevention, Roma integration, and conquering extreme poverty and child poverty. The government decision on the implementation of the Strategy between 2012 and 2014 lays down that the newly established institution of preventive patronage will get a place within the system of child protection with the aim to increase the efficiency of crime prevention actions and to prevent re-offending at the earliest possible stage.[37]

The National Crime Prevention Strategy (hereinafter: NCPS) replacing the former Strategy was adopted by Government Decision No 1744/2013. (X. 17.). The criminal policy goals aimed at are to strengthen public order, to increase security in public areas, to decrease and reduce the amount of crime, to mitigate the negative effects and damages caused by crime, to ensure adequate protection to individuals and families, and to increase the sense of security of the citizens.[38] The NCPS determines, as an emphasised field of intervention, the field of child and juvenile crime.[39] Accordingly, the action plan for the years 2013 to 2015, which is considered a part of the document, in point 8.2 specifies the achievable goals and the relating actions in the field of child and juvenile protection. The NCPS considers educational institutions as the most

[35] Gábor Szöllősi, 2009. 397.

[36] Andrea Borbíró, „Prelude to Hungarian crime prevention strategy," in *Handbook on criminal politics and societal crime prevention I.,* ed. Andrea Borbíró and Klára Kerezsi (2009), 148.

[37] Kerezsi, Kovács, Párkányi and Szabó, "A pártfogó felügyelet szerepe a bűnmegelőzésben," 154.

[38] Point 2.1. of Gov. decree 1744/2013. (X. 17.) on National Crime Prevention Strategy (hereinafter as NCS)

[39] NCPS point 2.4.

effective field of intervention with regard to children, while emphasising the values of learning and work. It attributes an emphasised role to the operation of the child protection signalling system and strives to create a possibility for leisure and sports activities reaching as wide a layer as possible. In this same chapter, the NCPS repeats word for word the reasons formulated in the Explanatory Notes on Draft Act No T/13091 and forming a basis for the introduction of preventive patronage. The fourth emphasised area of intervention is the prevention of recidivism. In accordance with international recommendations and guidelines, increasing the application of alternative sanctions and restorative methods is afforded a significant role.[40] The range of actions allocated to the aims includes a plan for the creation of community programme centres with the concrete intention to have at least one such centre available in each region (within the deadline formulated by NCPS). From the point of view of my topic, it is important to mention that in the point concerning the prevention of recidivism, the development of risk assessment relating to recidivism is formulated as a further action.

Government Decision No 1166/2016. (IV. 6.) on the National Crime Prevention Strategy action plan for the years 2016-2017 (hereinafter: Action Plan) formulates further goals in four emphasised intervention areas. In the field of child and youth protection the goal is to prevent and tackle conflict and violence through researching crime prevention attitude possibilities within the peer groups within the framework of a model programme. Furthermore, the Action Plan provides for the organization of crime prevention presentations[41, 42] (focusing on secondary schools). The main goals in the field of intervention named 'prevention of recidivism' are the following:

- elaboration of a methodological guide for the incorporation into government office practice of value-correctional group sessions intended for juveniles and young adults and children under preventive patronage,
- the transposition of the methodology of value-correctional group sessions by way of trainer trainings into the system of restorative justice.[43]

5. Proposals de lege ferenda

Delinquency of children of tender age and juveniles is a social phenomenon of special concern. This is the group of offenders concerning which jurisprudence, jurisdiction, social services and any other organizations coming

[40] NCPS point 8.4.2.
[41] Action Plan 2. appendix 2.2. Re-action programme.
[42] Action Plan 1. appendix 2.1. and 2.2.
[43] Action Plan 1. appendix 4.1. and 4.2.

into contact with juvenile offenders are able to do the most in order to have the youth become law-abiding citizens as adults.[44]

The system of child protection institutions is obliged to develop such institutions which deter juveniles showing deviant characteristics in their lifestyle from more grievous deviancies and committing crimes.[45]

I have followed the development of preventive patronage from its entry into force, with particular attention to Baranya county. During my research, I endeavoured to monitor the extent to which the institution of preventive patronage was able to eliminate the causes serving as a reason for the introduction of this legal institution. I concluded in my study, which was published earlier on the subject, that more time is needed to draw any conclusions; relevant opinions may be formed on the issues of effectiveness and efficiency firstly in the light of mandatory reviews. The territorial scope of the research concentrated primarily on Baranya county, and in particular on the law enforcement work of the district of Pécs. Thus, neither the time that has passed since its entry into force, nor the geographical scope of the study is suitable for drawing any far-reaching conclusions. However, the fact that the different fields of law enforcement clearly demonstrated that in the current procedural system the legal institution is not capable of addressing the problems for which it has been introduced is a point for reflection. In my opinion, the taxonomic placement of the institution is not erroneous, however, in order to make it operate effectively, bureaucratic burdens should be reduced, parallel proceedings should be eliminated, and the role of probation officers should be rethought. Moreover, it is unquestionable that, with regard to the large number of cases, the guardianship authorities applied the "new option" provided by the legislator and were not afraid to start the "test phase".

The proposal outlined below cannot be included in the procedural rules of the current guardianship administration, but it could be considered by the legislature.

In my view, the introduction of the so-called family group conference or community group conference could pave a new way in child protection care.[46]

---

[44] Lilla Kóczián, "A fiatalkori deviancia kialakulása és az alternatív bűnmegelőzési programok," ["Evolution of juvenile deviance and alternative crime prevention programs,"] in *CSALÁD, GYERMEK, VAGYON. A joggyakorlat kihívásai. Családjogi tanulmánykötet.* [*FAMILY, CHILD, AND PROPERTY. Challenges in legal practice. Collection of family law studies*], ed. Orsolya Szeibert (Budapest: HVG-ORAC Lap- és Könyvkiadó, 2012), 433.

[45] Kóczián, "A fiatalkori deviancia kialakulása," 436.

[46] A model applicable in restorative justice. Its roots go back to New Zealand; in 1989 the Act on the Protection of Children, Juveniles and their Families revolutionized juvenile judicial procedures in New Zealand. In Hungary, the conference model was launched in 2006 by the Foundation for Community Services (Közösségi Szolgál-

The Hungarian academic literature primarily sees the raison d'être of the model within the system of justice. At the same time, it can be seen that the current Hungarian child protection and judicial system lacks appropriate equipment, staffing and financial resources in the field of crime prevention relating to children under the age of 12 who commit crimes or other infringing acts, the reduction of the number of criminal offences committed by them and their reintegration. The method of the family group conference requires an interdisciplinary and intersectoral approach, and thus, effective cooperation between the assisting professions and authorities is a prerequisite for its successful implementation.[47] Based on the line of thoughts drawn up by Borbála Fellegi, from my point of view, this model could be applied effectively not only in the criminal justice system[48] but also in child protection care.

Community group conferences are event-centric, limited to the reparation of the harm caused and not mechanisms for providing full assessment of needs, rehabilitation or other social care services.[49] The conference method involves, compared to mediation, a wider range of participants in the decision making process, as not only the victim and the perpetrator participate directly in the meeting, but the family members who support them, members of their community, reference persons, representatives of the authority, assisting professionals and other representatives of the community concerned are also invited. The aim of the meeting is to jointly identify the reasons which led to the act, its consequences, the issue of responsibility, and to come to a decision on how to repair the harm caused and prevent re-offending. The impartial and neutral mediator acting at the conference is the facilitator. The facilitator's key role is to facilitate communication between the parties. During the conference, emphasis is placed upon the detailed identification of past events and the exploration of emotions.[50]

Despite a few successful domestic family group conferences, the method is spreading with difficulty. The various care and service providers and author-

tatások Alapítványa) and the Family, Child and Youth Association (Család, Gyermek, Ifjúság Egyesület).

[47] Borbála Fellegi, Út a megbékéléshez *[Road to reconciliation]* (Budapest: Napvilág Kiadó, 2009), 191.

[48] see: duties of probation officers in the context of active repentance

[49] Paul McCold, "A helyreállító igazságszolgáltatás elmélete és gyakorlata," ["Theory and practice of restorative justice,"] in: *Megbékélés és jóvátétel. Kézikönyv a helyreállító igazságszolgáltatásról [Reconciliation and reparation. Hand book of restorative justice], ed.* Mária Herczog (Budapest: Család Gyermek Ifjúság Kiemelten Közhasznú Egyesület, 2003), 76.

[50] Fellegi, Út a megbékéléshez, 79.

ities in decision-making have no appropriate motivation to test or implement alternative techniques.[51]

The same stands for the lack of decisions or interventions. This is partly explained by the fact that it is not output-controlled, the work is linked to efficiency, effectiveness, and there are no well-defined temporal, professional, or content frameworks and regulation. The main reason for this, in all certainty, lies in the tender age of the profession and all of the regulatory uncertainties that can be found in the context of aid and assistance. Resources are very tight, there is little money, professional work force, time or capacity, which allows in most cases only putting out fires and immediate threat response or not even that.[52]

It may also explain the fact that in Hungary both the population and the professionals and institutions are mainly used to official-type services, and benefits coming from higher levels. Solutions which are based on partnership, equality, self-activity and self-consciousness, respecting and granting priority to human rights, dignity and self-share have neither become generalized, nor accepted in many cases yet. Clients in Hungary are less self-conscious, but more wary of requesting help and, in the lack of client satisfaction surveys, the care workers receive no feedback on what should or could be changed, which activities are successful and which are not.[53]

Regarding the theoretical introduction of family or community group conferences,[54] the question arises at which level of the three-pillar model it could be introduced. The guardianship authority decides on ordering preventive pa-

[51] Mária Herczog, "Családi Csoportkonferencia: a konfliktuskezelés egy konstruktív módszere," ["Family group conference: a constructive method for conflict management,"] in *CSALÁD, GYERMEK, VAGYON. A joggyakorlat kihívásai. Családjogi tanulmánykötet, [FAMILY, CHILD, PROPERTY. Challenges in legal practice. Collection of family law studies,] ed.* Orsolya Szeibert (Budapest: HVG-ORAC Lap- és Könyvkiadó, 2012), 419.

[52] Ibid.

[53] Ibid.

[54] Points 4.1 and 4.2 of the Government Decision No. 1166/2016. (IV. 6.) on the 2016-2017 action plan of the National Crime Prevention Strategy urge the practical introduction of restorative justice within the administrative procedural system and set a deadline:

"4.1. Methodological guidelines should be developed to support the incorporation of values-correction group sessions targeting juveniles and young adults placed on probation and children under preventive patronage into the practice of metropolitan and county government offices.

4.2. The methodology of values-correction group sessions shall be multiplied in the restorative justice system, which is to be achieved by providing training for the probation officers in at least five counties in order to be capable of leading such groups in pairs."

tronage. Therefore, it would seem logical for the conference to be held within the organizational system of guardianship, in analogy with holding a hearing. To the contrary, in the absence of further training in this field, guardianship authorities do not have a facilitator. Moreover, the rigid and mandatory procedural rules do not allow holding a conference and it is difficult to perform even their existing duties within their competences due to the lack of personnel. Probation officers carry out mediation proceedings in the context of active repentance in the criminal proceedings, within the framework of which conference meetings are held as well. Furthermore, under Article 19/K (2) point b) of the Probation Service Decree, the probation officer performing preventive patronage duties and the case manager have the possibility to cooperate, in the frames of which probation officers may participate in the application of case-management methods if necessary. This Article lists in an illustrative manner among case-management methods the possibility of using the restorative conference method. Probation officers have the necessary qualifications and expertise, but their pedagogical knowledge concerning children of tender age is insufficient in this respect. The child welfare centres carry out mediation during the performance of their duties,[55] therefore they could "make up for" the missing expertise needed to conduct the conference and achieve its objectives, but as child welfare centres are not entitled to act as authorities, there would be no motivation to appear at the conference.

Community programme centres (established by Government Decree No 177/2012 on the Office of Public Administration and Justice) – by offering a rich supply of programmes and by the experimental application of group methods – contribute to lending variety to individual behavioural rules.[56] The community programme centre is a special institution that operates as a background institution for the Probation Service. Its most important function is to broaden the circle of alternative sanctions and restorative justice tools. Currently there is only one community programme centre operating in Hungary, in Borsod-Abaúj-Zemplén county. It is named Green Point Community Programme Centre. The NCPS has made it its goal to strengthen the application of alternative sanctions and restorative measures, and it aims to achieve this goal by increasing the number of community programme centres.[57]

The Justice Department that operates within the Administrative Division of the Government Office of Baranya County has decided – based on my theoretical reasoning – to commence the operation of a community programme

[55] Guardianship Act, Article 40/A (2) point af.

[56] Judit Szabó, *Harmadlagos megelőzés és kilépés a pártfogoltak körében. Az Országos Kriminológiai Intézet keretében végzett kutatás [Tertiary prevention and exit in the circle of people under probation with supervision. Research carried out within the framework of the National Criminology Institute]*, (2014), 35.

[57] NCPS point 8.4.2.and the relating measure.

centre[58] from September 2017 along the principles of the NCPS and Action Plan, possibly providing a new image for the institution of preventive patronage. The achieved results will be summarised by working groups that are made up of the members of the child protection signalling system and following analysis, this could give rise to valuable crime prevention observations.

[58] The operation is financed partly from earmarked funds, partly from funding from winning tenders for the „Realization of crime prevention projects", a call for which was announced by the Ministry of Internal Affairs on 27 April 2017 for the execution of goals set by NCPS.

The Smokescreen of a Daisy: Critical Notes on the EU Ecolabel scheme

Ilyés, Zsolt

Since the social relations remain buried in the tomb of products: the consumer perception is but fetishisation. A commodity is granted value created by the social relations through which it has been produced and consumed yet not inherent in the material commodity itself[1]

Abstract *From its inception, Brundtland's amnesic sustainable development umbrella covering inclusively the ecolabel schemes has been mimicking the historical dynamic of capitalism by simultaneously generating the "same" and the "new". In such a context, the aim of the present paper is to cast light on the dialectical dynamic which makes the EU Ecolabel scheme unfit for purpose and inadequate for the de-fetishisation of green commodities. Employing the tools of Marxian economics and that of critical legal studies, the study argues that as long as the deeper causes of ecological crises are sought at "unsustainable" production and consumption patterns, and not at systemic factors and tendencies, the perverse effects of the "environmental daisy" will endure. To this end, in the first two chapters I drafted a reader's guide, and presented the international and European sources of law relevant to sustainable consumption and production, and ecolabel, respectively. The second part depicts the unique dynamic of the "treadmill of accumulation", a motion which prevents the formation of a truly sustainable mode of production, and through the ecolabel proliferates new ways of fetishisation and political numbness. Moreover, my critical assessments describe how the EU Ecolabel Regulation should be amended in order to address the problem of green overproduction and overconsumption, while also recognise the obstacles to the proposed changes. The treadmill can be demolished, but only with critical thought and radical political action. Those in favour of ecological moderni-*

[1] The source of inspiration for the chosen motto: Patricia Allen and Martin Kovach, "The capitalist composition of organic: The potential of markets in fulfilling the promise of organic agriculture," *Agriculture and Human Value* 17 (2000): 226.

sation would argue that the EU ecolabel scheme is still new, we should wait, but unfortunately time has this bad habit not to.

Keywords *EU Ecolabel scheme, treadmill of accumulation, green overproduction and overconsumption, sustainable development, Marxism*

1. Prologue

1.1 Introductory Remarks

Being an integral part of both the United Nations and the European Union environmental programme, the new environmental policy instruments, or more precisely and purposefully the market-based environmental policy instruments (hereinafter referred to as *MBI*) are propagating the old paradigm's promise of a win-win situation, whereby, in the ineludible context of capitalism, the maintenance of ecosystem function and the protection of biological diversity is deemed compatible with economic development (read economic growth).

Irrespective of whether the Europe 2020 strategy for smart, sustainable and inclusive growth,[2] the Action Plan on Sustainable Consumption and Production and Sustainable Industrial Policy,[3] and the Regulation (EC) No 66/2010 on the EU Ecolabel[4] has been adopted in good faith or not, the *MBI* including the EU Ecolabel constitutes a means of deregulation under which commercial undertakings will be poised to forge market advantages out of purely ostensible or partial environmentally-friendly methods until "*the environmental shit hits the fan*."[5] The cited metaphor is particularly appropriate for it brings to mind the "treadmill of production", or more accurately the "treadmill of accumulation".[6]

[2] European Commission, *Europe 2020. A strategy for smart, sustainable, and inclusive growth*, COM(2010)2020 final (Brussels: EU, 3.3.2010).

[3] Commission of the European Communities, *Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan*, COM(2008)397 final (Brussels: EU, 16.7.2008).

[4] Regulation (EC) No 66/2010 of the European Parliament and of the Council (25 November 2009) on the EU Ecolabel, OJ L 27 (Brussels: EU, 30.1.2010), 1-19.

[5] Heather Rogers, "The greening of capitalism?" *International Socialist Review*, March 2010, accessed December 19, 2016, http://isreview.org/issue/70/greening-capitalism.

[6] As John Bellamy Foster rightly pointed out, from the perspective of the Marxian economic theory the concept of "treadmill of accumulation" is preferable to Schnaiberg's "treadmill of production", for it puts the emphasis on the accumulation of surplus

The tools of Marxian economics or that of critical legal theory, employed by the author of these lines, may not be even necessary to realise: environmental policies do not exist in vacuum. Their scope and ideological framework is shaped by an amalgam of social, economic and political realities existing within a specific historical context.

1.2 A Reader's Guide

Because for the time being Brundtland's oblivious sustainable development concept presents itself to be the only viable answer to environmental degradation, afore moving further, I feel the need to draw up a brief reader's guide:

1) The nature and the society are closely and inseparably interlinked, their development has been, is, and will be embedded in each other. Therefore, the dialectic between society and nature[7,8] is essential for understanding the ongoing ecological crises within the capitalist society. The nature-society interaction is historically determined, complex, irreversible, and non-linear.
2) The phenomenon of ecological degradation cannot be considered a special feature of capitalism. However, the universal tendencies of the capitalist mode of production (henceforth CMP)[9,10] lead to a universal "ecological rift".[11] Under the aegis of capitalism, the destruction of natural environment is incomparably more widespread and intense than in the previous modes of production of human history. The totalising tendency of market mechanisms conjointly with the capital accumulation and the temporary value augmentation embedded in the historically specific CMP, demand ever-increasing volumes of energy consumption and resource throughput, and consequently it has accelerated environ-

value. – see: John Bellamy Foster, "The Treadmill of Accumulation: Schnaiberg's Environment and Marxian Political Economy," *Organization & Environment* 18 (2005): 16.

[7] John Bellamy Foster, *Marx's Ecology: Materialism and Nature* (New York: Monthly Review Press, 2000), 141-147.

[8] For more insights see: Charles Reitz, *Materialism and Dialectics: Nature, Society, and Thought* (New York: CreateSpace Independent Publishing Platform, 2013).

[9] John G. Taylor, *From Modernization to Modes of Production: A Critique of the Sociologies of Development and Underdevelopment* (London: The MacMillan Press Ltd., 1983), 143-150.

[10] "Capitalist Mode of Production," accessed January 5, 2017, http://www.encyclopedia.com/social-sciences/applied-and-social-sciences-magazines/capitalist-mode-production.

[11] George Liodakis, "Political Economy, Capitalism and Sustainable Development," *Sustainability* 2 (2010): 2607-2612.

mental damage.

3) According to Chapter 4 of the Rio Agenda 21 final document adopted by the United Nations Conference on Environment and Development "[…] the major cause of the continued deterioration of the global environment is the unsustainable pattern of consumption and production."[12] Likewise, within the meaning of principle 8 of the Rio Declaration on Environment and Development "[…] States should reduce and eliminate unsustainable patterns of production and consumption […]."[13] These international political acclamations have been based on Adam Smith's classical economics under which consumption is seen as the sole end and purpose of all production.[14] Conversely, as it had been proven by Karl Marx, the immediate end and purpose of every capitalist production is the accumulation of surplus value.[15] The inner logic of capital consists of the unremitting self-expansion of value, which brings about large-scale production and consumption cycles, thus causing the depletion of the natural environment.[16] In the light of the above, and in particular in view of the fact that the dominant form of wealth under capitalism is surplus-value and not material wealth, the major cause of the deterioration of global environment lies in the historically specific CMP, and not in the so called unsustainable patterns of production and consumption.
4) Because of what has been said in the previous paragraph, the EU's environmental policy as a normative expression of ecological reorganisation underpinned by ecological modernisation[17] is merely re-contextualising the problems of environmental crisis, for it is unable to grasp them at their roots.[18] In a context of allegedly sustainable production and consumption patterns, the EU Ecolabel should be perceived as an emblematic example of the passive reconstruction of market conditions.
5) The source of law regulating the EU Ecolabel scheme shows that ap-

[12] United Nations Conference on Environment and Development, *Agenda 21* (Rio de Janeiro: UN, 3-14 June 1992), 18.
[13] United Nations, *Rio Declaration on Environment and Development* (Rio de Janeiro: UN, 3-14 June 1992), 2.
[14] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Oxford: Clarendon Press, 1976), 155.
[15] Karl Marx, *Grundrisse* (New York: Vintage Books, 1973), 83-108.
[16] Moishe Postone, "Critique and Historical Transformation," *Historical Materialism Journal*, 12 (2004): 65.
[17] Marteen A. Hajer, "The Politics of Environmental Discourse: Ecological Modernization and the Policy Process," *Science, Technology and Human Values* 32 (1998): 245-248.
[18] Xing Li and Jacques Hersh, "Understanding capitalism: Crises and passive revolutions," *Competition and Change* 6 (2002): 196.

parently the ecolabel was designated to empower EU citizens to make environmentally sustainable purchases, and at the same time, hoping for more sustainable and greener methods of production, to place pressure on producers and retailers through their purchase power. However, given the fact that in capitalism, the profit maximisation is the end and purpose of production, consumption may only be essential insofar as the commodities produced need to be sold. Consequently, and especially in view of the negligible power of consumers, the market will continue to distort the image of ecological problems, so they would not escape their profit frame.

The forthcoming lines shall be read in the light of the paragraphs above.

2. The Relevant Sources of Law

2.1 Sustainable Consumption and Production

In the aftermath of the World Summit on Sustainable Development,[19] and in the spirit of paragraph 14, Chapter III of the Plan of Implementation of the Johannesburg Summit,[20] the United Nations developed two umbrella programmes – the UN Environmental Programme (UNEP) and the so called Marrakech Process – to *"promote sustainable consumption and production patterns."* Although as early as 2001, a UNEP report attempted to narrow down the meaning of sustainable consumption and production (henceforth *SCP*) emphasising changing patterns of consumption and production, improving quality of life, and resource efficiency,[21] according to the literature, the notion in question continues to purport ambiguities.[22]

[19] United Nations World Summit on Sustainable Development, *Johannesburg Declaration on Sustainable Development*, A/CONF.199/20 (Johannesburg: UN, 4 September 2002), paragraph 11.

[20] United Nations, P*lan of Implementation of the World Summit on Sustainable Development* (Johannesburg: UN, 2002), 7.

[21] UNEP, *Consumption Opportunities. Strategies for Change. A Report for Decision Makers* (Geneva: UN, 2001), 12.

[22] Frank W. Geels, "A critical appraisal of Sustainable Consumption and Production research: The reformist, revolutionary and reconfiguration positions," *Global Environmental Change* 34 (2015): 1.

At EU level, the Lisbon Strategy on social and economic renewal,[23] the Renewed EU Sustainable Development Strategy,[24] and the Sixth[25] and Seventh[26] Environment Action Programme, respectively, established the broad political framework aimed at promoting *SCP*. In 2008 the European Commission adopted the Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan (*SCP/SIP*) as integral *"part of the United Nations' Marrakech Process."* The main goal of the SCP/SIP is to *"improve the energy and environmental performance of products and foster their uptake by consumers […] this includes […] using a systematic approach to incentives and procurement, and reinforcing information to consumers through more coherent and simplified labelling framework*."[27] In spite of its seemingly comprehensive scope, the *SCP/SIP* has been harshly criticised by the scientific community, NGOs,[28] and the European Environmental Bureau.[29] It is noteworthy that the EU's measures concerning *SCP* incorporate a call for participatory approach in the field of sustainability and environmental policy. For example, pursuant to the Aarhus Convention, the Renewed EU Sustainable Development Strategy targets to *"enhance the participation of citizens in decision-making."*

2.2 The European Ecolabel Scheme

The EU Ecolabel scheme as a specific form of *MBI* represents the instrumentalisation of ecological modernisation's normative philosophy, *id est* it presupposes that it is possible to remedy the decline of nature through the

[23] European Parliament, *The Lisbon Strategy 2010-2020: An analysis and evaluation of the methods used and results achieved*, Final Report, IP/A/EMPL/ST/2008-07, PE440.285 (Brussels: EU, 2010).

[24] Council of the European Union, *Renewed EU Sustainable Development Strategy*, 10117/06, YML/pc, (Brussels: EU, 9 June 2006).

[25] Decision No 1600/2002/EC of the European Parliament and of the Council (22 July 2002) laying down the Sixth Community Environmental Action Programme, OJ L 242 (Brussels: EU, 10.9.2002).

[26] Decision No 1386/2013/EU of the European Parliament and of the Council (20 November 2013) on a General Union Environment Action Programme to 2020 "Living well, within the limits of our planet", OJ L 354/171-200 (Brussels: EU, 28.12.2013).

[27] Commission of the European Communities, SCP/SIP, 3,11.

[28] Oksana Mont, "The EU and UN Work on Sustainable Consumption and Green Lifestyles" (paper presented at the Workshop on sustainable consumption and green lifestyles of the Nordic Council of Ministers), accessed October 19, 2016, http://mst.dk/media/mst/68636/Background%20paper%20D%20-%20session%205.pdf.

[29] European Environmental Bureau, *Response to the Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan*, (Brussels: EU, December 2008).

introduction of market-based incentives in the processes of production and consumption.

After the EU institutions had finally recognised that Regulation (EEC) No 880/92 on a Community eco-label award scheme was a total disaster,[30] following the public consultation of 2007, the European Commission presented its proposal for the revision of the Eco-label Regulation.[31] The proposal attempted to eliminate the main deficiencies of the former regulation by setting forth the following objectives: increasing the number of eco-labelled products, raising awareness, reducing administrative costs and other burdens on companies, and simplifying the bureaucratic procedures. The compromise with regards to the final version of the new Ecolabel Regulation had been preceded by a longsome professional debate between the European Parliament and the Council.[32] Regulation (EC) No 66/2010 on the EU Ecolabel entered into force on the 19th of February 2010. The renewed EU ecolabel-project is closely linked to the Resource Efficiency flagship initiative,[33] which in turn forms an integral part of the already mentioned Europe 2020 strategy.

According to the standards set forth by the International Organisation for Standardisation (ISO), the EU Ecolabel meets the ISO 14020 Type 1 requirements for ecolabels. Similarly to other ecolabel-schemes, the EU Ecolabel scheme operates on a voluntary basis, and it is designated to distinguish environmentally friendly products with a distinctive symbol, "the Flower", also known as the "environmental daisy". The EU Ecolabel Regulation as "*part of the sustainable consumption and production policy of the Community"* lays down the "*rules for the establishment and application of the voluntary EU Ecolabel scheme"*, and is intended to "*promote those products which have a high level of environmental performance […] the criteria with which products must comply in order to bear the EU Ecolabel (shall) be based on the best environmental performance […] (and) should be simple to understand and to use and should be based on scientific evidence, taking into consideration the latest technological developments."*

Any operator who wishes to use the EU Ecolabel shall apply to the national competent body in accordance with the rules enshrined in Article 9 of the Regulation. Application for the award of the EU Ecolabel can be submitted

[30] For more insights on development and history of the EU Ecolabel Regulation see: A.M. Farmer, editor, *Manual of European Environmental Policy* (London: Routledge, 2012), 5-7.

[31] Commission of the European Communities, P*roposal for a Regulation of the European Parliament and of the Council on a Community Ecolabel Scheme*, COM(2008) 401 final (Brussels: EU, 16.08.2008).

[32] A.M. Farmer, ed., *Manual of European Environmental Policy*, 6.

[33] European Commission, *A resource-efficient Europe – Flagship initiative under the Europe 2020 Strategy* (Brussels: EU, 2011).

with regards to almost any good or service which is supplied for distribution, consumption or use on the Community (now EU) market. Nevertheless, pursuant to Article 2 (2), the Regulation shall apply neither to medicinal products for human or veterinary use, nor to any type of medical device. Article 6 of the Regulation provides for the general requirements for EU Ecolabel criteria. In essence, these criteria emphasise the environmental performance of products, and set out the environmental requirements (and even social and ethical ones) to be met in order for a product to bear "the Flower". Once draft criteria have been drawn up for a certain product group, the European Commission must adopt measures to establish the Ecolabel criteria in question. Ecolabel criteria for specific products are subject to a complex review and approval process, after which they have been definitely approved by the EU Ecolabelling Board and the representatives of the relevant Member State. Pursuant to Article 5 of the Regulation, The EU Ecolabelling Board consists of the representatives of the national competent bodies, and of other representatives, and it has been given the assignment to *"contribute to the development and revision of EU Ecolabel criteria and to any review of the implementation of the EU Ecolabel scheme."* Accepted criteria are considered valid only for a limited period of time, following which they shall be tightened in order to reflect advances in technology.

To date, EU Ecolabel criteria have only been developed for nonperishable products and services. In 2010, The European Commission in accordance with the provisions of Article 6 (5) of the Regulation, mandated the Oakdene Hollins Research and Consulting to carry out a report on possibility and opportunity of developing Ecolabel criteria for food and feed products, *id est* on whether the scope of the Regulation should be extended to cover perishable agricultural goods and commercial animal feed products. The feasibility study found that although the idea of expanding the ecolabel to food and feed products is highly supported by both citizens and politicians, the logistics of putting into practice would be surrounded by difficulties, in particular in view of the lifecycle-oriented approach of the labelling scheme.[34] The report also highlights that the proposed extension might cause consumer confusion given the already existing EMAS logo (European Eco-Management Audit Scheme). Furthermore, the Oakdene Hollins drew attention to the fact that using the term "ecolabel" in case of food and feed products might already be problematic, for the terms "eco" and "bio" are legally protected under EU Organic Farming Regulation.[35,36] The main dissimilarities between the EU Ecolabel

[34] Oakdene Hollins Research and Consulting, "EU Ecolabel for Food and Feed Products – Feasibility Study," ENV.C.1/ETU/2010/0025 (A report for DG Environment, European Commission, Aylesbury, October 2011), 3, 53-56.
[35] Ibid. 3.
[36] *Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and*

Scheme and EMAS include lifecycle assessment versus production-oriented analysis and voluntary certification versus obligatory certification. From the perspective of environmental impact, the lifecycle analysis is favourable to its production-oriented counterpart, but the voluntary nature of the labelling scheme, given the lack of legally enforceable instruments, unavoidably leads to lower environmental standards.

3. About a treadmill decorated with daisy

3.1 A New Pseudonym for Growth

The orthodoxy, *id est* the neoliberal economics, through its concept of sustainable development advocates that the protection of the natural environment is compatible with economic development.[37, 38] As the critical and radical voices have become more and more marginalised, the umbrella term at issue – has perverted in the meantime to a mere quantitative compromise between economic growth and the display-preservation of nature[39] – embracing the idea of ecological modernisation, it has replaced the notion of "economic growth" with the motto of "green growth". Along with other similar international and regional sources of law or comprehensive strategies, the importance of green growth is stressed by the Organisation for Economic Cooperation and Development, according to which "*Green growth means fostering economic growth and development, while ensuring that natural assets continue to provide the resources and environmental services on which our well-being relies. To do this, it must catalyse investment and innovation which will underpin sustained growth and give rise to new economic opportunities*."[40]

Along the same vein, both the European Strategy for smart, sustainable and inclusive growth and the EU Ecolabel Regulation emphasise the pro-

labeling of organic products, OJ L 189 (Brussels: EU, 27.07.2007), 1-23.

[37] Michael Jacobs, "Chapter 12: Green Growth," in *The Handbook of Global Climate and Environmental Policy*, ed. Robert Falkner (Malden: Wiley-Blackwell, 2013), 197-198.

[38] *"Since its inception, UNEP has had a mandate to encourage economic growth compatible with the protection of the environment."*
– "Background," UNEP Finance Initiative, accessed July 04, 2016, http://www.unepfi.org/about/background/.

[39] Jonathan M. Harris and Brian Roach, *Environmental and Natural Resource Economics: A Contemporary Approach* (New York: Routledge (Third Edition), 2015), 26-33, 320.

[40] OECD, *Towards Green Growth. A summary for policy makers* (Paris: OECD, May 2011), 4.

motion of green growth.[41] Like any other ecolabel scheme, the EU Ecolabel scheme has chosen to focus on the non-economic value of commodities,[42] and it is based on the assumption that: (1) it is possible to provide consumers with accurate information regarding the environmental conditions of production; (2) this information would enable them to make rational and environmentally conscious consumption choices; (3) in this way the pattern and the intensity of consumption would change for the better; (4) producers and retailers would react to the changing consumer demand by changing their productive patterns.

While the criticisms addressed to EU Ecolabel usually revolve around the limited impacts and effects of the green growth promoting market-based incentive in discussion, highlighting that in particular cases it may lead to consumer confusion (the EU Ecolabel scheme runs parallel with other national ecolabel schemes), Aaditya Mattoo and Harsha Singh, co-authors of *Eco-labelling: Policy Considerations*, took a step further by arguing that ecolabelling might have adverse effects on the natural environment.[43] Working within a partial equilibrium model, the authors set up a hypothesis whereby a homologous product can be manufactured by an environmentally friendly and an environmentally unfriendly method, and presupposed that there are two types of consumers: those concerned about the environment, who are willing to pay more for environmentally friendly commodities (bearing the ecolabel), and those unconcerned, purchasing whichever good is cheaper at a certain moment. The research finds that at certain equilibrium price, if there is relatively little consumer demand for environmentally friendly commodities, the price of unlabelled products would surpass the cost of goods bearing the ecolabel until price-arbitrage sets in equating the prices of environmentally friendly and unfriendly products. The authors argue that "*this new equilibrium price based on differentiated goods will be higher than the equilibrium price under no differentiation*."[44] This new state of affairs would increase the production of both the unlabelled and ecolabelled commodities, intensifying the environmental pressure.

[41] "Green Growth and circular economy," European Commission, last modified January 25, 2017, accessed December 23, 2016, http://ec.europa.eu/environment/green-growth/index_en.htm.

[42] Gavin Fridell, "Fair-Trade Coffee and Commodity Fetishism: The Limits of Market-Driven Social Justice," *Historical Materialism* 15 (2007): 80.

[43] Aaditya Mattoo and Harsha V. Singh, "Eco-labeling: Policy Considerations," Kyklos 47 (1994): 53-56.

[44] Cathy Roheim Wessells et al., *Product certification and ecolabelling for fisheries sustainability* (Rome: FAO of UN, 2001), 18.

3.2 The Treadmill in Motion

If we abandoned the boundaries of neoliberal economics, within which the above-mentioned research was conceived, and recognise that the deeper causes of the environmental crises cannot be attributed to harmful production and consumption patterns, but instead shall be sought at systemic factors and tendencies, it would become clear that the ecolabel – aimed at bolstering green growth – is detrimental *per se*.

Those in favour of green growth oftentimes refer to the success story of the chemical company known as DuPont.[45] In a nutshell, as a consequence of voluntarily adopting the goals of the Kyoto Protocol, and thus reducing its greenhouse gas emissions to less than half, DuPont has managed to save $6 for every tone of carbon dioxide used in the production process. However, and this is the untold part of the tale,[46] DuPont following the coercive logic of capital, has invested its savings into producing more and more chemicals. DuPont's "success story" is an excellent example of how the afore-mentioned treadmill of accumulation works.

The "treadmill of accumulation theory" asserts that:

under the imperative of the self-expanding value, and precisely because of it, the ongoing economic development and growth has led to a huge demand for natural resources, and at the same time has provoked the development of technologies requiring more and more energy consumption. Whenever investments are made into various novel technologies or new industries appear, the natural resource use intensifies, and so does the destruction of the environment.[47]

In contemporary advanced capitalist societies it is a must for every commercial undertaking and state to remain competitive. For this very reason, they solidly and ceaselessly invest in eco-technology and simultaneously increase their production volume. Under the treadmill of accumulation, the power is concentrated in the hands of large producers, retailers, and states

[45] "Global Warming Profiteers: Former Skeptics See a Chance to Bolster Profits" MapCruzin, accessed December 28, 2016, http://www.mapcruzin.com/news/news112800a.htm.

[46] Rogers, "The greening of capitalism?"

[47] On the basis of Shaniberg's "treadmill of production", and appealing to the explanations offered by John Bellamy Foster and other followers of the Marxian Critical Theory, I tried to create a definition more suitable for the Marxian Tradition. For Shnaiberg's concept of the treadmill of production see: Allan Schnaiberg, David N. Pellow, and Adam Weinberg, "The treadmill of production and the environmental state," in *The Environmental State Under Pressure*, eds. Arthur P.J. Mol and Frederick H. Buttel (Amsterdam: Emerald Group Publishing Limited, 2002), 15-22.

in any mass consumer society.[48,49] Within the frames of such a bleak picture, the influenceless consumers have little, if any, control over the allocation of capital and technology. At this point, I should like to note that contrary to neoliberal economics, from the perspective of the Marxian economic thought, the eco-technology, so keenly proliferated by the ecolabel, cannot be considered an external and environmentally neutral factor. Technology itself is the result of both objectified social relations and nature-society interaction, and as such is inescapably defined by the *CMP*. The competition-driven and surplus-value-oriented *CMP* blindly exposes the global ecosystem to a great risk through the depletion on natural resources coupled with planet-wide pollution. Every single turn of the treadmill (of accumulation) – moving for now in the direction of the profitable eco-innovation – brings about intensified resource extraction and high volumes of pollutants. In accordance with logic of *CMP*, noting particularly that the creation of surplus-value incurs exponentially increasing quantity of green products, the productivity enhanced through eco-innovation leads to a rather perverse result: instead of manufacturing the same amount of goods with fewer resources, and thus ease the environmental pressure, in reality more and more commodities are being produced from the existing resources. In other words, market-based instruments including the ecolabel represent yet another state-of-the-art means of creating quasi-monopolies paying no attention to the intensity of natural resource exploitation. The above-described phenomenon is also known as the "Jevons paradox" or the "Jevons effect". The Jevons paradox, although adopts a fundamentally different approach, *as per* final result and outcome similarly to the treadmill of accumulation states that *due to the technological progress the efficiency of resource use increases (reducing the necessary amount for producing a commodity), but simultaneously, because of increasing market demand, the rate of resource consumption also rises*.[50]

The treadmill continues to work in the olden fashion but with a brand new design: painted in green and ornamented with daisy.

In the light of the reasons mentioned above, it becomes clear that the biggest shortcoming and major deficiency of the EU Ecolabel scheme is that it fails to have regard for the green overproduction and overconsumption. If the EU really wanted to achieve substantial change with the adoption of Regulation (EC) No 66/2010 on the EU Ecolabel, within the general requirements for

[48] Kenneth A. Gould, David N. Pellow, and Allan Schnaiberg, "Interrogating the Treadmill of Production: Everything You Wanted to Know about the Treadmill but Were Afraid to Ask," *Organization & Environment* 17 (2004): 300-306.

[49] Frederick H. Buttel, "The Treadmill of Production: An Appreciation, Assessment, and Agenda for Research," *Organization & Environment* 17 (2004): 333-336.

[50] John M. Polimeni et al., T*he Jevon's Paradox: And the Myth of Resource Efficiency Improvements* (London: Earthscan, 2008), 7-79.

EU Ecolabel criteria (article 6 of the Regulation), it should have provided for obligatory and quantifiable production-intensity limits, and among the goals of the secondary legislation in question, it should have included a paragraph encouraging EU citizens to consume less. Obviously, the EU could not have done it,[51] for proceeding in the interest of its citizens and truly protecting nature would have meant betrayal: the high-treason of the "free" market-based neoliberalism.

4. The nudity behind a flower-dress

4.1 Re-fetishisation

As has already been said, the EU Ecolabel scheme was designated to promote green production and consumption. Being a version of ethical consumption,[52] the green consumption ascribes consumers with the responsibility of addressing environmental problems exclusively through environmentally conscious consumptive choices.[53] For Regulation (EC) No 66/2010 specifically mentions that one of the main goals of the EU Ecolabel scheme is *"to provide consumers with accurate, non-deceptive, science-based information on the environmental impact of products"*,[54] it is only natural that the EU citizens dubbed as consumers would ask themselves: what lies behind the commodity form? By supposedly providing more detailed information with regards to the origin and production conditions of goods, the EU Ecolabel should contribute to the *de-fetishisation* of commodities.

Under the aegis of *CMP* and globalisation, as a result of exchange-value production, surplus-value extraction, and profit accumulation, the complex commodity chains along[55] with industrialisation and urbanisation have led to shopping-climate where consumers have little, if any, knowledge of and interest in the consequence of their purchasing practices. In one of his early works entitled *Economic and Philosophic Manuscripts of 1844*, Marx had pointed out that in capitalism, those social relations and objectives through which

[51] *"Symbolic attractions of resource-intensive consumption patterns are more powerful than those of sustainable consumption patterns."* – Laurie Michaelis, *Ethics of Consumption. OCEES Working Paper* (Oxford: Oxford Centre for the Environment, Ethics and Society, Mansfield College, 2000), p. 82.

[52] James G. Carrier, "Protecting the Environment the Natural Way: Ethical Consumption and Commodity Fetishism," *Antipode* 42 (2010): 672.

[53] John Conolly and Andrea Prothero, "Green Consumption: Life-politics, Risk and Contradiction," *Journal of Consumer Culture* 8 (2008):118.

[54] Regulation (EC) No 66/2010, 1.

[55] Alex Hughes and Suzanne Reimer, eds., "Part I: Commodity chains, networks and filières," in *Geographies of commodity chains* (London: Routledge, 2004), 17-81.

goods are being produced, present themselves in the solidified form of commodities proposed on the market.[56] According to the general tendency of capitalism, irrespective of the nature of consumption (environmentally friendly or unfriendly), no commodity can escape *fetishisation*, and thus no consumption can be truly green. In the Marxian sense of the word, *fetishisation* denotes the mechanism whereby capitalism hides the material and social resources used in the production process.[57] In other words, commodity fetishism, *inter alia*, shows that consumer awareness regarding the specific production conditions and processes of the consumed items is critically low, for the commodity form makes social and natural inputs nearly invisible. In capitalism workers (from factory workers to the employed software developers) have minimal control over what is produced, how many of it, and in which manner, and as a consequence are *alienated* from production.[58] The consumers are alienated as well, because they have no relationship whatsoever with the *de facto* producers (read workers), and possess no knowledge of the production process. By trying to provide consumers with more detailed information, the EU Ecolabel in fact, for want of a better word, dumbs down[59] complex environmental impacts and abstract concepts like "sustainable production" and "sustainable consumption" to simple and specific labels and symbols.[60] Instead of the *de-fetishisation* of green commodities, the EU ecolabel *fetishises* them in new and more sophisticated ways. The fetishism of the EU Ecolabel is well illustrated by the case of Pindo Deli.[61] In a case study suggestively entitled *EU ecolabel allows forest destruction. The Case of Pindo Deli*, Chris Lang *et al.* pointed out that (1) the ecological criteria for the award of the EU Ecolabel for copying and graphic paper[62] do not provide sufficient guarantees that the pulpwood used to make paper comes from *sustainably managed forest*; (2) the procedure for awarding

[56] Karl Marx, *Economic and Philosophic Manuscripts of 1844 and the Communist Manifesto*, trans. Martin Milligan, (New York: Prometheus Books, 1988), 44, 64.

[57] Karl Marx, "Volume I. Chapter I. Section 4: The Fetishism of Commodities and the Secret Thereof," in *Capital: A Critique of Political Economy* (New York: The Modern Library, 1906), 81-96.

[58] Georg Lukács, *History and Class Consciousness*, trans. Rodney Livingstone (Massachusetts: The MIT Press, 1972), 86-87.

[59] Pursuant to the SCP/SIP, the improvement of the energy and environmental performance should be achieved, inter alia, by a *"simplified labeling framework"* (sic!) – Commission of the European Communities, SCP/SIP, 3.

[60] Carrier, "Protecting the Environment the Natural Way," 687.

[61] Chris Lang et al., "EU ecolabel allows forest destruction. The case of Pindo Deli," FERN, March 2010, accessed January 4, 2017, http://www.fern.org/sites/fern.org/files/FERN_PindoDeli-final_0.pdf.

[62] European Commission, *Commission Decision of 7 June 2011 on establishing the ecological criteria for the award of the EU Ecolabel for copying and graphic paper*, C(2011) 3751, OJ L 149 (Brussels: EU, 08.06.2011), 12-14.

the EU Ecolabel is non-transparent, third persons cannot access information regarding the basis on which a certain ecolabel has been issued (the authors were interested on which bases the Pindo Deli company had been awarded with the EU Ecolabel, but neither the company in question nor the European Ecolabel Helpdesk were keen to provide a meaningful answer, while the Environment Directorate-General stated that it could not deliver information on this subject-matter for the Aarhus convention was not applicable in this case); (3) the paper products bearing the EU Ecolabel are produced by a company which – according to the official communications issued by the Indonesian Rainforest Alliance, the Indonesian Forest Stewardship Council, the WWF, the WWF Indonesia, and other group of NGOs – carries out massive and wide range environmental and social damage, and whose activity involves illegal manoeuvres. Similarly, David Manhood's pertinent work[63] presents how the superficial and flawed ecological criteria for the award of the EU Ecolabel for textiles products[64] contribute to water and air pollution. The list of examples could go on with the ethical coffee[65] and biofuels[66] next in the line.

It is thus clear that the EU Ecolabel does not provide insight into the inner mechanisms of eco-technologies or commodity chains, nor does it reveal their history deeply embedded in environmental and social relations. Furthermore, the EU's environmental daisy does not mention the workers who carry out those steps in the production process which ought to impart meaning and efficiency to the ecolabel, and at the same time it ignores the coercive nature of the market.

4.2 Tranquillisation

The European Commission through its promotional articles advocates that *"for shoppers the Flower (European Eco-label) is a reliable token of environmental care."*[67]

---

[63] David Manhood, "Digging into the European Union eco-labels for textiles," accessed January 4, 2017, http://www.olivehospitalityconsulting.com/doc/digging_into_the_european_union_label_for_textiles.pdf.

[64] European Commission, *Commission Decision of 5 June 2014 on establishing the ecological criteria for the award of the EU Ecolabel for textile products*, C(2014) 3677, OJ L 174 (Brussels: EU, 13.06.2014), 45-83.

[65] Paige West, *"Making the Market: Specialty Coffee, Generational Pitches, and Papua New Guinea," Antipode* 42 (2010): 690-713.

[66] Martha J. Groom, Elizabeth M. Gray, and Patricia A. Townsend, "Biofuels and Biodiversity: Principles for Creating Better Policies for Biofuel Production," *Conservation Biology* 22 (2008): 602-609.

[67] European Commission, "The European Ecolabel Promotional Material," (Brussels: EU, 2006), accessed 19 November, 2016, http://ec.europa.eu/environment/ecolabel/

It is noticeable that the European Commission places a strong emphasis on the moral satisfaction of consumers. The image of the consumer in the eyes of the European Commission overlaps with the concepts of *ecological citizenship*,[68] *citizen consumer* and *political consumerism*,[69] notions which assert that consumers participate in the political and economic decision-making processes but only by placing social and environmental concerns, worries, and fears in the cage of their purchase power. Hence, one of the purposes of green consumption boosted by the EU Ecolabel is to reassure consumers: they do not need to change their way of life drastically, the simple consumptive choices are more than enough to bring about change and save the nature; furthermore, there is no need for real, significant, and radical political action as the market knows best. In this way the ecolabel discourages citizens to act as critical political subjects, favouring instead the instauration of a conformist green routine. Against this background, useful conclusions can be drawn. The commodities bearing the European daisy, like any other product, put the exchange value so far before use value, and encourage consumers to believe that the green commodities have moral characteristics, which they, in reality, do not inherently possess. Furthermore, by hiding the problem of resource consumption intensity, and misleading about the immediate need for radical political action, it *fetishises* the commodities in novel and subtle ways. If we are to differentiate between fictitious and authentic reform, then consumption cannot be equated with political participation, nor is flawed information interchangeable with transparency and knowledge.

5. Instead of a conclusion

Much more could have been said about the perverse nature of the EU Ecolabel, but there are no infinite essays, and so I shall end mine on a rather sour note.

To paraphrase Jeremy Bentham in a Marxian way, history has placed mankind under the governance of two, dialectically inseparable, forces: the logic of capital and the immanency of ecological disaster. The latter should be conceived as one of the general limitations of the former. In a society where the capitalist mode of production prevails, the decisive social relations cannot contradict value-expansion. This is why Environmental law in general and the EU Ecolabel Regulation in particular are subjugated to reflect the "law of

documents/general.pdf.

[68] Andrew Dobson, "Environmental Citizenship: Towards Sustainable Development," *Sustainable Developmen*t 15 (2007): 281-282.

[69] Gert Spaargaren and Peter Oosterveer, "Citizen-Consumers as Agents of Change in Globalizing Modernity: The Case of Sustainable Consumption," *Sustainability* 2 (2010): 1888-1889.

capital". As Postone noted, capitalism gives rise to the historical possibility of a different form of growth and of production, but at the same time structurally undermines the realisation of these possibilities.[70] In the light of above, the subjectification of the objectified forms of social mediation constitutes an *a priori* condition for the creation of a proper environmental law. Without this operation the "environmental daisy" does not make spring, and the problems of green overproduction and fetishisation silenced will remain.

A treadmill flourishes, skin and bone is the nature, and so are our wills and wishes.

[70] Postone, "Critique and Historical Transformation," 68.

Taking of Evidence in the New Hungarian Code of Civil Procedure

Király, Lilla

Abstract *Act no. III of 1952 on the Code of Civil Procedure (hereinafter referred to as CCP) provides a legal framework for 200 to 230 thousand civil proceedings a year, and it constitutes a legislative background for more than one million non-litigious proceedings a year, thus the CCP represents the leading source of law within the Hungarian legal system. In its Government Decision no. 1267/2013 of 17 May 2013, the Government decided to elaborate a new Code of Civil Procedure in order to create a new procedural framework that is better suited to the more complex legal disputes of the 21st century.*[1]

In April 2016, a draft proposal on the new Code of Civil Procedure elaborated by the Ministry of Justice[2] *(hereinafter referred to as the MoJ draft proposal on the new CCP) was uploaded to the website "kormany.hu",*[3] *the publication of which was preceded by a three-year codification process. At the end of the first phase, a collection of studies entitled "Egy új Polgári Perrendtartás alapjai" (The foundations of a new Code of Civil Procedure)*[4] *was published, outlining with scientific depth the potential directions and methods of codification.*[5] *The collection of studies that covers all the central fields of civil procedural law does not only document the large professional debate on the preparations of the codification, but also served as one of the bases for the subsequent public debate and the drafting of the new piece of legislation".*[6]

At the end of the second phase, a work entitled "The draft version of the provisions and explanatory memorandum of the new Code of Civil Procedure as elaborated by the experts of the Working Committee on the New Code of Civil Procedure" (hereinafter referred to as the Experts' Draft Proposal on

[1] Commentary to the general explanatory memorandum of the Draft Bill

[2] Draft proposal on the new Code of Civil Procedure, 11 April, 2016.

[3] the source was accessed 11 May, 2016. http://www.kormany.hu/download/c/4c/a0000/20160411%20Pp%20el%C5%91terjeszt%C3%A9s_honlapra.pdf.

[4] János Németh and István Varga, ed., *Egy* új *Polgári Perrendtartás alapjai* [*The foundations of a new Code of Civil Procedure*] (Budapest: HVG Orac Publishing House, 2014.)

[5] The concept of the new Code of Civil Procedure – commissioned on the basis of the Government Decision – was adopted by the Government on 14 January 2015.

[6] Source: http://hvgorac.hu/egy_uj_polgari_perrendtartas_alapjai_kiadvany, accessed 8 June, 2016.

the new CCP)[7] *was delivered,*[8] *which was followed by the draft proposal of the Ministry of Justice, published on the website "www.kormany.hu".*

After an extremely short public debate,[9] *the MoJ draft proposal was presented to the Government in the second quarter of 2016, and Parliament started to discuss the draft bill on the new Code of Civil Procedure on 2 September 2016. The present study analyses the rules of the new Code of Civil Procedure on access to information and evidence on the basis of Act no. CXXX of 2016 on the Code of Civil Procedure (hereinafter referred to as the new CCP) adopted by Parliament and coming into force on 1 January 2018.*

Keywords *new Hungarian Code of Civil Procedure, codification, concentration of proceedings, split structure of proceedings, exigency of alleging facts and providing evidence, taking of evidence, methods and means of evidence taking*

1. Principles related to the taking of evidence

1.1 The principle of the concentration of proceedings

The legal instrument of the concentration of proceedings is intended to identify the characteristics of the parties' legal dispute as early as possible, to provide the court with all the facts and evidence necessary for the delivery of its judgement at the earliest opportunity, in other words, to determine, as early on as possible, the substantive and procedural legal framework of the

[7] Tamás Éless and István Varga ed., *A Polgári Perjogi Kodifikációról szóló 1267/2013. (V. 17.) kormányhatározat* által *elkészíteni rendelt Munkabizottsági Szakértői Javaslat Normaszöveg- és Indokolás Tervezete* [*The draft version of the provisions and explanatory memorandum of the new Code of Civil Procedure as elaborated by the experts of the Working Committee on the New Code of Civil Procedure on the basis of Government Decision no. 1267/2013 of 17 May 2013 on the Codification of Civil Procedural Law*], 30 October, 2015. (hereinafter referred to as the Experts' Draft Proposal on the new CCP), 1025 page-long manuscript

[8] The drafters handed over their proposal to the Minister of Justice on 30 October 2015.

[9] As of April 2016, the MoJ draft proposal had been discussed at national level, mainly due to the co-operation and efforts of the National Office for the Judiciary and the Curia of Hungary, for instance, an international conference entitled "New Hungarian Civil Procedure Act and the Development of European Rules of Civil Procedure" was held jointly by the Institute for Legal Studies of the Hungarian Academy of Sciences, the National Office for the Judiciary and the European Law Institute (UNIDROIT) at the Hungarian Judicial Academy on 30-31 May 2016 with the support of the Ministry of Justice

legal dispute.[10] The court and the parties should seek to have all the facts and evidence necessary for the delivery of the court's judgement in such a time as to allow the court to dispose of the dispute, if possible, at one single hearing.[11]

The raison d'être of the substantive measures of organisation of procedure is to avoid the delivery of a decision that does not definitively settle the legal dispute:[12] for this purpose, the court should endeavour to ensure that the parties put forward appropriately the essential facts necessary for the court's decision and to provide the parties with all the information necessary for the establishment of the relevant facts and the proving thereof. The court's contributive actions do not conflict with the dispositive principle and the parties' obligation to produce evidence, since the parties are free to decide whether they wish to comply with the court's "call" or not, in the latter case, they have to bear the sanctions of their non-compliance as laid down in the detailed rules.[13]

The principle of the concentration of proceedings appears to simply emphasise the importance of timeliness, however, it also implies the element of effectiveness, as one of the means of the acceleration of the adjudication of cases is the reduction of inputs (e.g. the court organises the questions to be addressed in a logical order, on the basis of which it does not allow the parties to bring forward such arguments that would be of relevance only as regards the case's details to be examined at the later stages of proceedings).[14]

1.2 The parties' obligation to assist the court in administering justice and to tell the truth

If the party brings an action in court, he becomes obligated to assist the court in dealing with his action. If he fails to comply with the above obligation, he has to bear the procedural consequences (preclusion, lack of proof etc.) of his non-compliance. This principle applies to all procedural acts, including the submission of statements, motions and pieces of evidence, as well as appearing at the court's hearing.[15]

The new CCP specifically provides for the *parties'* obligation to tell the truth.[16] "Section 8 of the CCP in force regulates the obligation of the parties

[10] Commentary to section 3 of the Draft Bill

[11] Commentary to section 3 of the Draft Bill

[12] This requirement stems from the principle of "definitive dispute settlement", defined in section 2 subsection (1) of Act no. CLXI of 2011 on the Organisation and Administration of the Courts (OAC Act).

[13] The Experts' Draft Proposal (manuscript), 2015.

[14] Commentary to section 3 of the Draft Bill

[15] We can find this obligation also in the Act III of 1952 on the Code of Civil Procedure (CCP in force) section 141 subsection (2)

[16] "The court will impose a financial penalty upon the party, who - whether deliberate-

and their representatives to tell the truth as one of the elements of the obligation to pursue litigation in good faith. In addition, it also contains certain elements that fall within the scope of the exercise of rights in good faith, but go beyond the obligation to tell the truth, such as the prohibition of delaying the conclusion of proceedings and the prohibition of causing unnecessary expenses. On the basis of an approach different from the one taken in the CCP in force, the new CCP links up the parties' obligation to assist the court in administering justice and their obligation to tell the truth, the latter being part of the former. By virtue of the obligation to tell the truth, set forth by the new CCP, the parties are obligated to reveal the truth only insofar as they wish to make a statement. The parties' obligation to tell the truth includes active and passive statements of fact alike (allegation-disaffirmation). The obligation to tell the truth also applies to representatives and interveners who make an allegation or a statement. Since the allegations of other participants to the proceedings, in particular, those of witnesses and experts (deemed to be means of evidence) are treated differently, in terms of dogmatic positions, from the allegations of the parties, the former are subject to special rules (perjury, delivery of a false expert opinion, etc.) and special legal consequences".[17]

Hence, there is a separation between the principle of good faith and the obligation to tell the truth in the new CCP: the new CCP does not precisely identify what kind of acts, carried out by the parties or other participants to the proceedings, could qualify as an exercise of rights in bad faith, and it provides a wide margin of discretion for the courts in respect of the assessment of such acts and the application of legal consequences attached thereto".[18]

The obligation to assist the court in administering justice requires active participation from the parties: they are obligated to make relevant, adequate and concise statements, having also regard to cost-effectiveness. The parties' obligation to assist the court in administering justice extends to the institution of proceedings, therefore the new CCP lays down higher criteria to be met by the plaintiff's statement of claim as well.[19]

For the purposes of achieving the objectives of civil proceedings, the obligation to pursue litigation in good faith means that the court, the parties and other participants of the proceedings have to co-operate with each other on the basis of the court's duty of care and the various requirements imposed on the parties. This obligation is manifested in the exercise of rights under the prin-

ly or as a result of gross negligence presents any facts to the case that later prove to be false." (Section 4 subsection (4) of the new CCP)

[17] Commentary to section 4 of the Draft Bill

[18] Commentary to section 5 of the Draft Bill

[19] Ibid.

ciple of due course of law and in the principle of acting in good faith, which also includes the prohibition of acting in bad faith.[20]

1.3 The court's contributive actions (substantive measures of organisation of procedure)

One of the greatest challenges for today's civil procedural law all over the world is effectiveness and speediness. In order to achieve this objective, legislators tend to introduce new legal institutions and carry out overall reforms affecting even the structure and role of the judiciary and the course of civil litigation. One of the ways legal disputes can be adjudicated within a reasonable time and soundly is to emphasise the role of the preparatory phase of the proceeding and make the parties more active in solving their dispute.[21]

Legal academic literature differentiates between substantive and procedural measures of organisation of procedure: the procedural measures of organisation of procedure include measures for the timing of the different phases of proceedings and for ensuring the continuity of proceedings (e.g. setting the date of a hearing, adjourning a hearing, setting deadlines, determining legal consequences related to procedural impediments, etc.), while the substantive measures of organisation of procedure affect the merits of the legal dispute (e.g. clarifying the legal basis and factual background of the case) and the substantive rights claimed by the parties.[22]

The court's contributive actions should effectively facilitate the exercise of the parties' right to dispose of their legal action.[23] The substantive measures of organisation of procedure are adopted by the court to organise its proceedings on the basis of the assessment of the substantive legal aspects of the parties' statements and procedural acts. The substantive measures of organisation of procedure aim to ensure the availability of all the relevant facts and statements necessary for the court to decide on the case, primarily through the clarification of the parties' allegations, but not without respect for the parties' right to

[20] Erika Herédi, "A ius nevében," ["In the name of ius,"] in *Codificatio processualis civilis, Studia in Honorem* Németh János II, ed. István Varga (Budapest: ELTE Eötvös Publishing House, 2013), 92.

[21] Laura Ervo, "Preface" in *Current Trends in Preparatory Proceedings, A Comparative Study of Nordic and Former Communist Countries*, ed. Laura Ervo and Anna Nylund (Switzerland: Springer International Publishing House, 2016), v.

[22] Zita Pákozdi, "Új intézmények a Pp. koncepciójában- az anyagi pervezetés jog-összehasonlító megközelítésben," ["New institutions in the concept of the new CCP – substantive measures of organization of procedure from a comparative legal approach,"] *Acta Universitatis Szegediendis, Forum, Acta Juridica et Politica*, IV, no. 2, (2014 [2015]): 146.

[23] Commentary to section 6 of the Draft Bill

dispose of their legal action, and by way of questioning, informing and calling upon the parties. The parties' right to dispose of their legal action entails that they are free to decide whether, in their procedural acts and statements, they wish to use and comply with the court's substantive measures of organisation of procedure.[24]

"The material of the case file necessary for the court to conclude the case can be gathered in two different ways: in the "inquisitorial system", the court is – at least in part – actively involved in investigating the facts of the case instead of the parties. In the "adversarial system", the court relies on the parties' obligation to produce evidence on the basis of their right to dispose of their legal action, and the court may be entitled to take evidence *ex officio* only in exceptional cases defined by law.[25] The substantive measures of organisation of procedure extend the scope of the adversarial system, since these measures (the court's obligation to ask certain questions and to call upon the parties to carry out certain procedural acts, to provide them with information, and the court's obligation to encourage the parties to settle their case by amicable agreement) may help those parties who are not familiar with the applicable legal provisions, are not skilled in handling their affairs or are not represented by an adequate legal representative to properly enforce their claims. By eliminating the risks and deficiencies of an excessive adversarial system, the substantive measures of organisation of procedure intend to safeguard the parties' interests and protect the parties - who make incomplete or unclear statements or put forward deficient or ambiguous petitions primarily due to their lack of legal expertise - from losing out on the legal protection of which they are the beneficiaries based on the relevant substantive legal norms. The substantive measures of organisation of procedure are limited by the requirement of fair legal process. Such measures may be adopted by the court only insofar as the latter is capable of preserving the appearance of impartiality for the litigants".[26]

At the end of the preparatory phase, the court provides the parties with general information on the facts that need to be proved and on which party has to bear the burden of proof. Upon the court's call, the parties are obliged to put forward their motions for evidence within a deadline set by the court. The court does not take into account motions submitted out of time due to the parties' fault.[27] Till the end of the preparatory phase, the parties are entitled to modify their initial statements – within the framework of the present Act – without the consent of their adversaries (modification of the statement of

[24] Commentary to section 237 of the Draft Bill
[25] The Experts' Draft Proposal (manuscript), 2015.
[26] The Experts' Draft Proposal (manuscript), 2015.
[27] Ibid.

claim – modification of the counter-plea).[28] The end of the preparatory phase, as part of the division of procedural phases, basically entails the prohibition of the modification of the statement of claim. The statement of claim is considered to be modified if the plaintiff changes the rights claimed in his statement of claim, which leads to the modification of the relevant facts, but does not necessarily entail the modification of the plaintiff's petition. Following the end of the preparatory phase, such modification of the statement of claim is allowed only if the defendant gives his – explicit or tacit – consent to the modification. An unauthorised modification of the statement of claim qualifies as a withdrawal of the petition.[29]

The court may take evidence during the preparatory phase only in cases defined by law. This provision should be interpreted in compliance with the rules on the parties' posterior motions for evidence, which allows taking of evidence to be carried out between the delivery of a court order that closes the preparatory phase and the closure of the hearing phase before the delivery of the first instance judgement.[30]

"According to the new CCP, initial statements include pieces of evidence and motions for evidence, hence, the court has limited competence in the taking of evidence, and is obliged to intervene only when necessary, in particular if the parties submit incomplete initial statements in relation to the relevant facts of the case or if there is a dispute between the parties as to which of them should bear the burden of proof as regards the given facts.

The court's substantive measures of organisation of procedure are limited by the statement of claim and the counter-plea, as well as by the rights claimed and the legal bases referred to by the parties. The system of substantive measures of organisation of procedure does not require the court to inform the parties if their factual allegations raise the necessity of the application of legal norms that have not been referred to in their claims and counter-pleas, in particular if such allegations would necessitate the modification of the claim, counter-plea or the rights claimed.[31] The above viewpoint is not shared by the members of the Meeting of the Heads of Councils of the Curia who considered it unfavourable and even unacceptable that "a statement of claim well-founded on the facts may be rejected on the basis of the sole fact that the plaintiff referred to the wrong legal title, such judicial practice is not compatible with the social mission of proceedings. The principle that the court is bound by the legal titles referred to by the parties is based on the misinterpretation of the principle that the parties delimit the subject matter of the proceedings: in reality, the court is only bound by the parties' claims and factual allegations,

[28] Commentary to section 183 of the Draft Bill
[29] Commentary to section 183 of the Draft Bill
[30] Commentary to section 220 of the Draft Bill
[31] Commentary to section 237 of the Draft Bill

but not by the legal titles referred to by them. It is the court that is given the task of qualifying the parties' legal relationship based on their allegations and the pieces of evidence brought forward by them, since the principal issue of the proceedings is whether the plaintiff's claims and factual allegations are well-founded, and not whether the legal grounds have been correctly put forward by the plaintiff".[32]

Albeit with different intensity and content and to a different extent, substantive measures of organisation of procedure are necessary in the preparatory phase, the phase dealing with the merits of the case and in second instance proceedings as well,[33] because, as part of its contributive actions, the court is obliged to clarify the facts of the case and to determine the factual background of the legal dispute.[34]

1.4 The principle of the free establishment of facts

The principle of the free establishment of facts is regulated under the title "Basic provisions related to the taking of evidence" in the chapter on the taking of evidence of Part 4 of the new CCP.[35]

"The principle of free evidence taking – in a narrow sense – includes the freedom to choose any method for the taking of evidence and the freedom of the court to use any appropriate means (e.g. witness testimony, expert opinions, inspection and documents) as a piece of evidence. The means of evidence are regulated by procedural legal norms, which set certain formal requirements, for instance, private documents with full probative value have specific formal features defined by law, and these documents are given a greater probative value, even if the court is free to assess the probative value of documents.[36] In other cases, the use of images, video- and audio-recordings as pieces of evidence without the consent of the persons concerned is, in principle, prohibited due to personality rights issues.

The principle of the free establishment of facts – in a broader sense – means that the parties are obliged to prove the veracity of their allegations in court. Their veracity can be proved by other pieces of evidence. If the allegations

[32] Letter of the Head of the Civil Department of the Curia, Mr. György Wellmann addressed to the President of the National Office for the Judiciary, 2015.E1.I.G.21/2., Budapest, 30 March, 2015.

[33] Commentary to section 237 of the Draft Bill

[34] For more, see Adél Köblös, "Hungary: Towards More Efficient Preparatory Proceedings," in *Current Trends in Preparatory Proceedings, A Comparative Study of Nordic and Former Communist Countries,* ed. Laura Ervo and Anna Nylund (Switzerland: Springer International Publishing House, 2016), 185-204.

[35] Section 263 subsections (1)-(2) of the new CCP

[36] See Constitutional Court decision No. 531/B/1997.

are proved to be true, the court remains free to use them for the establishment of the relevant facts",[37] but the proceeding court is not bound by the decision of a State authority or other court or by the facts established therein in the establishment of the factual background of the case heard by it and in the subsequent delivery of its decision, hence, there are no obstacles to a civil court establishing – on the basis of the assessment of all the pieces of evidence in its proceedings – a factual background different from the one found by a criminal court.[38]

2. Rules on the taking of evidence in first instance proceedings and the preliminary taking of evidence

2.1 The preparatory phase

The new CCP – on the basis of the split system of procedural phases introduced in first instance proceedings – separately regulates the preparatory phase and the phase dealing with the merits of the case. In the split system of proceedings, the preparatory phase aims at determining and clarifying the content and framework of the legal dispute in order to decisively define its factual and legal basis on the occasion of a single preparatory hearing following detailed and comprehensive preparatory work in writing.[39]

One of the main legal effects of the ending of the preparatory phase is that the pieces of evidence and motions for evidence submitted by the parties during that phase cannot subsequently be modified and no new evidence or motion for evidence put forward posteriorly can be accepted by the court, however, exceptions to this prohibition should be justified in cases where the modification of the statement of claim and counter-plea is allowed.[40] As a result of the separation of the preparatory phase and the taking of evidence, in principle, no evidence can be taken during the preparatory phase. Evidence in relation to the merits of the case can be taken during the preparatory phase only in cases defined by the new CCP (e.g. gathering documents and data necessary for preparing the adjudication of the case upon the parties' motions).

[37] The Experts' Draft Proposal (manuscript), 2015.

[38] BH 2003.457. (Collection of Court Decisions No. 2003.457.)

[39] Trials should be as concentrated as possible to be effective. The Recommendation Rec. 84 (5) advises the establishment of a typical procedure based on "not more than two hearings, the first of which might be a preliminary hearing of a preparatory nature and the second for taking evidence, hearing arguments and, if possible, giving judgment." European Commission for the Efficiency of Justice (CEPEJ), Compendium of "best practices" on time management of judicial proceedings, CEPEJ(2006)13, Strasbourg, 8. December 2006, point 4.3.

[40] Commentary to section 220 of the Draft Bill

The taking of evidence not in respect of the merits of the case is, nevertheless, not excluded (e.g. requirements of admissibility).[41]

The preparatory hearing starts with summarising the relevant initial statements based on the results of the written preparations, which prevents the court from misunderstanding or misinterpreting the parties' statements and enables the court to verify whether it has correctly interpreted the parties' statements and intentions. In addition, the parties may present observations.[42]

"According to the new CCP, it is considered strictly necessary in the interest of ensuring the effectiveness of the preparatory hearing that the parties be present at the preparatory hearing and that the persons present be appropriately familiar with the facts of the case and its evidentiary issues. The new CCP Bill seeks to guarantee the presence of parties or representatives who are completely prepared to engage in the litigation by prohibiting the adjournment of the preparatory hearing on the grounds that the parties or their representatives did not take reasonable care to prepare for it. The writ of summons has to contain a warning for the persons summoned of the consequences of failing to appear and be properly prepared".[43]

"The new CCP does not in principle differentiate between the regional courts' preparatory phase and the district courts' preparatory phase (uniform rules of procedure). Following the submission of a written counter-plea (or eventually a counter-claim or set-off claim), there are three ways to reach the conclusion of the preparatory phase: 1.) the court may order the provision of further written documents; 2.) the court may set the date of the preparatory hearing, or 3.) the court may close the preparatory phase without ordering the parties to submit further written materials and without holding a preparatory hearing. Thus, the court is given the competence to decide on the most appropriate method and procedural steps for preparing the case's adjudication (in oral or written form), which should be adapted to the specificities of the particular case at hand".[44]

Based on the schedule of procedural phases contained in the new CCP, in a significant number of the cases, the court may have to hold only one preparatory hearing to close the preparatory phase, and it may be able to start dealing with the merits of the case and taking substantive evidence either already at the preparatory hearing or at a subsequent hearing at the latest.[45]

There may be cases in which there is absolutely no need to hold a preparatory hearing or to order the provision of further written materials, because the legal dispute is not complicated at all (e.g. the defendant admits the plaintiff's

[41] Commentary to section 183 of the Draft Bill
[42] Commentary to section 183 of the Draft Bill
[43] Commentary to sections 188 and 189 of the Draft Bill
[44] Commentary to section 187 of the Draft Bill
[45] Commentary to section 192 of the Draft Bill

claims). In such cases, the preparation of the adjudication of the case can be carried out without holding a hearing,[46] but the court has to issue a prior warning and enable the parties to request the court to hold a hearing. If no preparatory hearing is held by the court, then the latter proceeds to close the preparatory phase by delivering an out-of-hearing order the content and legal effects of which are identical to the one rendered at a preparatory hearing. The date of the court's on-the-merits hearing has to be fixed at the same time as the order closing the preparatory phase is delivered.[47]

The preparatory phase is closed by the court's formal order that is not subject to appeal and declares the closure of the preparatory phase. As regards this type of court order, the new CCP states that, despite being a procedural order, it binds the court, which is not allowed to modify it.[48] Procedural acts to be performed during the preparatory phase can be carried out at the subsequent stages of proceedings only in cases and under conditions laid down by the new CCP.[49]

In the context of the substantive measures of organisation of procedure, the new CCP provides additional and different types of assistance to parties acting without a legal representative. Lay persons may need to be heard in person to clarify their initial statements, be assisted in exploring their opportunities in the area of evidence taking, and be informed, in respect of the facts to be proven, about the possible means of evidence, methods of proof and the conditions of evidence taking in terms of procedural law.[50]

"Additional preparatory measures may need to be taken in case of the extension of the statement of claim and the submission of a set-off claim as well. These additional measures apply only to the modified parts of the claims and

[46] The rules on "Questioning the parties without holding a hearing" (section 155 of the new CCP) serve the purpose of allowing the proceeding court to gather information, request clarification or call for the delivery of a statement from the parties without holding a hearing, which basically extends the court's scope of action in respect of the written preparation of the adjudication of the case for the merits phase of proceedings. The Draft Bill provides for the use of such action by the court only in the case of parties acting without a legal representative, since those who are represented by a legal representative have to submit their statements in writing.

[47] Commentary to sections 197 and 198 of the Draft Bill

[48] For more, see: Tamás Éless and Vilmos Ébner, "A percezúra – az érdemi tárgyalás előkészítése," ["The division of procedural phases – the preparation of the hearing on the merits,"] in *Egy* új *Polgári Perrendtartás alapjai* [*The foundations of a new Code of Civil Procedure*] ed. János Németh and István Varga (Budapest: HVG Orac Publishing House, 2014), 377-392.

[49] Commentary to section 194 of the Draft Bill

[50] Commentary to section 253 of the Draft Bill

petitions, which means that the entire preparatory phase does not have to be re-opened.[51]

2.2 The merits phase

"In the split system of procedural phases, the second phase serves the purposes of taking evidence – relevant to the legal dispute identified in the preparatory phase – and delivering a decision on the merits of the case.

In this procedural phase, the parties are given the opportunity to modify or supplement –without the consent of their adversaries – their initial statements in compliance with their obligation to assist the court in administering justice and to tell the truth and the principle of good faith. The party who makes an initial statement or modifies his earlier statement only in the merits phase despite having been given the opportunity to do so in the preparatory phase is deemed to fail to engage in reasonably expected procedural conduct. To prevent the parties from engaging in such misconduct, the new CCP provides for the possibility of imposing a fine on them". As a result of the preparatory phase, the court has to carry out targeted and, in many cases, scheduled measures of evidence taking in the merits phase; therefore, the new CCP states that the court is also entitled to fix several hearing on the merits dates at the same time, and such hearings can be held on consecutive days as well."[52]

In the – oral – merits phase, no further evidence or motion for evidence can be submitted, and the court is given the task of taking evidence and delivering a decision on the merits of the case, preferably at a single hearing on the merits.[53]

The new CCP restricts, *inter alia*, the submission of evidence and motions for evidence to the initial statements, hence, the closure of the preparatory phase essentially leads to the fixing of the framework of evidence taking. "No other pieces of evidence than the ones available at the court's hearing and capable of immediately establishing the veracity of contested allegations or immediately disproving the statement of claim can be assessed by the court".[54]

[51] Commentary to section 222 of the Draft Bill

[52] Commentary to section 183 of the Draft Bill

[53] Those foreign civil procedural codes that recognise the principle of the concentration of proceedings define its meaning, similarly to the new CCP, by the requirement to adjudicate and conclude a case at a single hearing on the merits, see, for instance, section 7 of the Lithuanian Code of Civil Procedure, and section 272, subsection (1) of the German Code of Civil Procedure. This requirement was present in section 224 of the 1911 Code of Civil Procedure drafted by Sándor Plósz and it also derives from section 141, subsection (1) of the CCP in force. Commentary to section 3 of the Draft Bill

[54] Commentary to section 214 of the Draft Bill

The presence of the parties at hearings on the merits is not indispensable, thus, the new CCP – by changing the relevant provisions of the CCP in force, which favour only the plaintiff – makes it possible for any of the parties, including the defendant to request the court to hold a hearing on the merits in their absence.[55]

2.3 The preliminary taking of evidence

The findings of the preliminary taking of evidence may be used by any of the parties in the subsequent proceedings. It is therefore not excluded that the party refers to the favourable findings of a preliminary taking of evidence requested by the other party.[56]

The preliminary taking of evidence may significantly simplify and thus shorten the proceedings, or, in the optimistic case, may avoid them if, for instance, the preliminary expert opinion on a disputed issue is accepted by both parties, who are then able to conclude an out-of-court settlement. The preliminary taking of evidence may take place – upon request – either prior to the beginning of court proceedings or in the preparatory phase.[57]

3. The rules of the new CCP on the taking and assessment of evidence

3.1 The parties' autonomy to allege facts and the method of the court's monopoly to establish the case's facts: the court's discretionary power

The main element of the court's hearings is the taking of evidence; hence, efficient evidence taking is vital to the well-functioning adjudication of cases by the court.[58] The court should not seek to reveal the truth,[59] but to ensure the

[55] Commentary to section 223 of the Draft Bill
[56] Commentary to section 338 of the Draft Bill
[57] Commentary to section 334 of the Draft Bill
[58] For more, see: István Légrádi, "Gondolatok a bizonyítás általános kérdéseihez," ["Thoughts on the general issues of the taking of evidence,"] in *Egy* új *Polgári Perrendtartás alapjai, [The foundations of a new Code of Civil Procedure,]* ed. János Németh and István Varga (Budapest: HVG-ORAC Publishing House, 2014), 443-473.
[59] "A distinction should be made between seeking legal truth (formal truth) and seeking substantive truth. The former means that the court examines the veracity of only those factual allegations that are contested by the parties, while it accepts the remainder of their allegations without questioning them. The latter entails that the court seeks to reveal the whole truth in the genuine sense of the word." in József Farkas,

fairness of proceedings: it should endeavour to establish the facts of the case by respecting the parties' right to dispose of their legal action.[60] On the basis of their private autonomy and right to dispose of their own legal action, the parties are also given the right to choose the facts that they wish to share with the court and which they refer to so as to request legal protection from the court.[61] The parties are obliged to allege only those facts that "based on the law, are capable, if proven to be true, of supporting their claim for the enforcement of their substantive rights.[62]

Within the framework of the parties' motions for evidence, the court is free to decide on the methods and means of evidence taking, as well as on the scope and chronological order of the individual measures for the taking of evidence.[63] The principle of free evidence taking has three main elements in relation to the court's discretionary power in the establishment of facts:

1) The *principle of free assessment of evidence* directly stems from the principle of free evidence taking. The court assesses whether the parties' factual allegations are supported by the pieces of evidence submitted by them or not.[64]
2) A distinction has to be made between the free assessment of evidence by the court and the court's *discretionary decision-making*, on the basis of which the court is entitled to determine the amount of damages or any other claim to be awarded at its own discretion, after weighing all circumstances of the case, provided that it cannot be established based on the opinions of experts or other evidence. The principle of discretionary decision-making does not apply to cases in which the court may take evidence *ex officio*.[65]
3) The court's freedom in respect of the assessment of evidence also extends to the parties' factual allegations: the court does not automatically consider the parties' undisputed allegations (concurrent allegations, acknowledgements) true, as it checks them against common knowledge, common experience and its official knowledge, and examines their in-

Bizonyítás a polgári perben [*The taking of evidence in civil proceedings*] (Budapest: KJK Publishing House, 1956), Scientific Library of the Institute for Political and Legal Sciences, Issue 11, 24-25.

[60] Miklós Kengyel, *Magyar polgári eljárásjog* [*Hungarian civil procedural law*] (Budapest: Osiris Publishing House, Twelfth edition, 2014), 289.

[61] Tamás Éless and Mátyás Parlagi, "Az érvényesített joghoz kötöttség," ["The prohibition of going beyond the limits of the rights claimed,"] in *Egy* új *Polgári Perrendtartás alapjai,* [*The foundations of a new Code of Civil Procedure,*] ed. János Németh and István Varga (Budapest: HVG-ORAC Publishing House, 2014), 358.

[62] Ibid. 358-359

[63] Commentary to section 278 of the Draft Bill

[64] Commentary to section 279 of the Draft Bill

[65] Commentary to section 279 of the Draft Bill

ternal coherence, i.e. it assesses them. There are cases in which the party's factual allegation is an essential element of the taking of evidence; that is why the CCP provides for the compulsory hearing of the party concerned (e.g. in actions for the establishment of origin[66]). In the process of the establishment of the case's facts, the court is entitled to assess not only the parties' allegations, but their procedural conduct as well.[67]

The court assesses not only the results of the taking of evidence, but the process of evidence taking as well: it decides on whether the means of evidence proposed is capable of proving the veracity of the factual allegation to be proved or whether the piece of evidence can be used in court (e.g. the presence of grounds for prohibiting the taking or assessment of evidence, the pieces of evidence have been obtained or used unlawfully).

Since a conclusive break with the requirement of ensuring the discovery of substantive truth,[68] courts have been required to satisfy themselves with a degree of certainty that excludes any reasonable doubts. One of the reasons behind the changed requirement is that expert opinions, more and more necessary for deciding on the merits of the legal dispute, are usually delivered with a certain level of certainty or that the court's degree of certainty may vary depending on the type of the legal action. For instance, in actions that affect the legal status of the litigants (civil status actions, actions for the establishment of origin, certain family law and guardianship actions, etc.), a higher degree of certainty is required, while in other types of actions, a lower level of certainty may also be sufficient. However, an objectively set minimum degree of certainty has to be achieved in all types of cases.[69]

The court's conviction is subjective in the sense that it results from the proceeding court's intellectual activity aimed at getting to know the case's factual background and making conclusions based on it, nonetheless, this conviction should not originate from a "peculiar" intellectual process or from "a kind of unclear emotional process or a general assumption.[70]

[66] BH 1984.453., BH 1983.196. (Collection of Court Decisions No.1984.453. and No.1983.196.)

[67] We can find this also in the Act III of 1952 on the Code of Civil Procedure (CCP in force) Section 206 subsection (2) „Upon weighing the facts based on the case file, the court shall determine, also according to its conviction, the relevance that the party's failure to appear may have as to the judgment of the case, or the party's or his counsel's non-compliance with any request, or the relevance of their refusal to answer a question, or their pleading to having no knowledge or recollection of certain specific facts."

[68] Act no. CX of 1999 on the modification of Act no. III of 1952 on the Code of Civil Procedure

[69] The Experts' Draft Proposal (manuscript), 2015.

[70] János Németh and Daisy Kiss ed., *A Polgári perrendtartás magyarázata* [*Com-*

3.2 Unlawful means of evidence

The legal literature has elaborated three theories in respect of the usability of illicit means of evidence. According to the first theory, it follows from the principle of free evidence taking that a procedural act that is not prohibited by law can be freely carried out; therefore, the unlawfully obtained pieces of evidence can be freely used. By virtue of the second theory, there is an absolute prohibition on the use of illicit evidence in civil proceedings. The third and most widespread theory – approved at international level as well – is based on the so-called principle of reciprocity, according to which the different interests – the party's legitimate private interests in evidence taking or the protection of the other party's personality rights – have to be weighed against each other in every case, and the court must when weighing those interests have due regard to the degree of unlawfulness of the obtaining and use of evidence.[71]

"The exclusion of illicit means of evidence from the taking of evidence may make it extremely difficult, if not impossible, for the parties to submit their pieces of evidence. The principle of good faith and the parties' obligation to assist the court in administering justice require the parties to act in a lawful manner and support the enforcement of rights. In the event, then, that there is a lawful method to produce evidence (it is objectively not impossible), even if that method is more difficult or more complicated than the unlawful method, the parties have to choose the lawful way of producing evidence.

The rule on the exigency of providing evidence is that the opposing party is given an option: he either approves of the use of illicit means of evidence by subsequently renouncing to object to the unlawfulness of evidence or giving his authorisation or consent to the use thereof, or takes the consequences of the exigency of providing evidence, which ultimately prevents the means of evidence from being used at an open court hearing".[72]

3.3 Rejection of a motion for evidence

According to the new CCP, the court may reject a motion for evidence, on the one hand, on the grounds defined in the CCP in force (the evidence proposed is unnecessary for passing a decision on the merits of the case, or

mentary to the Code of Civil Procedure] (Budapest: CompLex Jogi és Üzleti Tartalomszolgáltató Kft., 2010), vol. 1, 778.

[71] For more, see: Miklós Kengyel, *A polgári peres eljárás kézikönyve* [*The manual of civil procedure*] (Budapest: KJK-KERSZÖV Jogi és Üzleti Kiadó Kft., 1995), 408-410.; Adrienn Nagy, *A Polgári perrendtartásról szóló 1952.* évi *III. törvény magyarázata* [*Commentary to Act no. III of 1952 on the Code of Civil Procedure*] (Budapest: CompLex Publishing House, 2015.), commentary to section 166.

[72] The Experts' Draft Proposal (manuscript), 2015.

the party fails to comply with his obligation to advance the costs of evidence taking proposed by him) and, on the other hand, on a new ground (the motion for evidence does not include all the elements required by law).[73] In addition to these grounds for rejection, the court is bound by the prohibition of using illicit means of evidence.

The new CCP introduces, as a new element, the possibility of rejecting a motion for evidence on the grounds of economy of procedure. Thus, necessary and possible, but uneconomical taking of evidence may be rejected by the court (e.g. legal expenses are many times in excess of the amount of the plaintiff's claim).The above ground for rejection cannot be applied in legal actions where the law allows *ex officio* evidence taking.

3.4 The rules on the exigency of alleging facts and the exigency of providing evidence

The parties are under the exigency of alleging facts in the preparatory phase, while they are under the exigency of providing evidence in the merits phase.[74]

"The legislator provides for the rules on the newly introduced exigency of alleging facts within the scope of the preparatory phase. The exigency of alleging facts is based on the understanding that, in certain information-asymmetric situations, the party, without any fault on his part, may not be aware of all the pieces of information necessary for the enforcement of his substantive rights, therefore he is unable to make precise factual allegations, while the opposing party is in the possession of the missing pieces of information, but it is not in his interest to reveal them in the proceedings.

The main reason behind the introduction of the exigency of alleging facts is that in such situations the party under the exigency of alleging facts and the court are exempted from the obligation to reveal those circumstances of the case that are affected by the exigency, and the missing elements can be considered as proved facts. The new CCP, however, does not oblige the court to abide by the above rule if the court has reasonable doubts as to its application, similarly to the provisions related to the acceptance of the veracity of the parties' concurrent and undisputed statements and their acknowledgements".[75]

The party is under the exigency of alleging facts if *a)* he makes it probable that the pieces of information necessary for making factual allegations are in the exclusive possession of the opposing party, *b)* he verifies that he has taken

[73] Commentary to sections 272-274 of the Draft Bill

[74] New CCP, section 184 subsections (1)-(2): exigency of alleging facts, section 265: interests in producing evidence and exigency of providing evidence

[75] The Experts' Draft Proposal (manuscript), 2015.

the necessary measures to get and retain these pieces of information, *c)* the opposing party does not disclose the information despite having been requested by the court to do so, and *d)* the opposing party does not make it probable that the requirements as provided for under points *a)* and *b)* are not met.[76]

By virtue of the requirement of pursuing litigation in good faith, the parties are expected to give an account to the court of the relevant pieces of information that they are aware of – regardless of the general and special rules on the taking of evidence –, and to provide the court with the pieces of evidence available to them:[77] describing this set of facts as "pieces of information necessary for revealing the particular circumstances of factual allegations.[78]

The exigency of alleging facts has been recognised in the courts' case-law as well under the term of the reversal of the burden of proof.[79]

The exigency of providing evidence occurs when "it is impossible to provide full evidence […], but the relevant facts are highly likely to be present, and the court's conscience is not in favour of strictly applying the rules on the burden of proof…[80]

Certain exigencies of providing evidence are properly regulated by substantive legal norms via the reversal of the burden of proof, e.g. by establishing presumptions and temporarily true allegations to be taken into account *ex officio* by the court.

The exigency of providing evidence may be applied if "the party under the burden of proof reveals that there is an exigency of providing evidence, and there is a certain likelihood (e.g. empirical rule) that his factual allegations are true. In the event that the other party is in the possession of convincing proof to the contrary, he is able to disaffirm, without too much difficulty, the above factual allegations".[81]

The new CCP defines four situations in which the exigency of providing evidence may be applied:[82]

[76] New CCP, section 184, subsections (1)-(2): exigency of alleging facts

[77] Légrádi, "Gondolatok a bizonyítás általános kérdéseihez," 469-470.

[78] László Névai and Jenő Szilbereki, *Polgári eljárásjog* [*Civil procedural law*] (Budapest: Tankönyvkiadó, Third edition, 1974), 297.

[79] For more, see: Lilla Király and Károly László Simon, "A bizonyítási kötelezettség és a bizonyítási teher különös szabályai a gyakorlat tükrében," ["Special rules on the obligation to produce evidence and on the burden of proof in the light of the courts' practice,"] in *A polgári perbeli bizonyítás gyakorlati kézikönyve* [*A practical handbook on the taking of evidence in civil proceedings*] ed. Miklós Kengyel (Budapest: KJK Kerszöv, 2005), 143-186.

[80] József Farkas and Miklós Kengyel, *Bizonyítás a polgári perben [The taking of evidence in civil proceedings]* (Budapest: KJK-KERSZÖV Jogi és Üzleti Kiadó Kft., 2005), 62.

[81] Légrádi, "Gondolatok a bizonyítás általános kérdéseihez," 211-226.

[82] New CCP, section 265 subsections (2)-(3): interests in producing evidence and ex-

1) the data necessary for the evidence-seeking party to submit a motion for evidence is in the exclusive possession of the opposing party (or other person);
2) it is impossible for the party to provide evidence, but it would be expected from the opposing party to give evidence to disprove the party's allegations;
3) it is at least likely that the opposing party has obstructed the taking of evidence, "in such situation, the opposing party, by way of disposing of the pieces of evidence, intentionally or negligently influences the outcome of evidence taking;
4) the party would be able to provide evidence only in an unlawful manner, and the opposing party does not give his consent to the use of such evidence, in this case, the opposing party who is not interested in the taking of evidence has a right of disposal over the means of evidence.[83]

The legal consequences of the exigency of providing evidence can be avoided by the opposing party only if he makes it probable that (1) he or any other person not involved in the proceedings but having the same interests has never disposed and has never needed to dispose of the relevant data; (2) there is a third person who does not share the interests of the opposing party and also disposes of the relevant data; (3) the evidence-seeking party failed to make every effort which may reasonably be expected of him to obtain the necessary data or means of evidence (for instance, he could have done something else besides the actions he has allegedly taken); (4) it is theoretically possible for the evidence-seeking party to produce evidence beyond the opposing party's exclusive scope of control; (5) it cannot be reasonably expected from the opposing party to give evidence to refute the party's allegations; (6) the taking of evidence has not been obstructed; (7) it was not him or any other person having the same interests who has obstructed the taking of evidence; (8) the evidence-seeking party failed to make every effort which may reasonably be expected of him to prevent, or eliminate or mitigate the consequences of the obstruction of the taking of evidence; (9) the harm to be suffered by the opposing party in case of providing information or evidence, or giving his consent to the use of evidence would be disproportionately greater than the evidence-seeking party's interests in the taking of evidence; (10) he has lost his right to dispose of the data and means of evidence required due to reasons beyond his scope of control;[84] (11) the obstruction of the taking of evidence is not attributable to him.

igency of providing evidence

[83] Légrádi, "Gondolatok a bizonyítás általános kérdéseihez," 216.

[84] The notion of the scope of control was introduced into the Hungarian legal system by the 2013 Civil Code, the explanatory memorandum of which states the following: "Circumstances that cannot be controlled or influenced by the party (e.g. the tradition-

This highly differentiated regulation serves the purposes of preventing the parties from being placed in an unfair procedural situation.

In the proceedings, the parties are not obliged to allege facts. The parties are free to allege those facts that, due to lack of common or official knowledge or of examination, the court is unfamiliar with: the interested party is expected, while the other party is allowed to do so.[85]

4. Summary

The new CCP does not entail fundamental changes in the system of civil procedural law. It seeks to retain the well-established instruments, but "the introduction of new rules should be of significant benefit, otherwise the well-established legal provisions are to be maintained instead".[86] The codification of the new Code of Civil Procedure is in conformity with the legal premise of Ulpian only if it does not fall victim to the compulsion to over-regulate and […] the litigants are able to enforce their claims within a transparent, simple, fast-track and clear procedural framework.[87]

I agree with Tünde Handó, the President of the National Office for the Judiciary, in that the introduction of scientifically over-complicated legal institutions[88] (that are understandable almost exclusively by those who have a bar exam) did not serve the above purposes, and the legislator forgot about the litigants. Another predictable consequence of the over-complex wording of procedural rules is that the non-professional parties will misinterpret them, and they will need to be clarified, counselled and informed about them, which will make the proceedings unnecessarily burdensome.[89]

The codification of the new Code of Civil Procedure primarily results from the adoption of the new Civil Code[90] and from the need to align the procedural

al forms of vis maior) are beyond his scope of control."

[85] The Experts' Draft Proposal (manuscript), 2015.

[86] Digesta, IV. cfm-De constitutionibus principum, 2., Ulpianus, see in the observations of the President of the National Office for the Judiciary, Ms Tünde Handó in respect of the draft proposal on the new Code of Civil Procedure, April 2016, 2014. OBH.XXII.C.1.1./164., attachment no 1.

[87] Letter of the President of the National Office for the Judiciary, Ms Tünde Handó addressed to Minister of Justice Mr. László Trócsányi, President of the National Office for the Judiciary, 2014.OBH.XXII.C.1.1./164., 12 April, 2016.

[88] By virtue of Recommendation Rec(81)7 of the Committee of Ministers of the Council of Europe on measures facilitating access to justice, the use of strange terminology, unduly complex and too technical expressions should be avoided and the language used should be comprehensible (principle 5 on the simplification of procedural acts).

[89] the observations of the President of the National Office for the Judiciary (2016) loc. cit.n. 102.

[90] Act no V of 2013 on the New Civil Code

rules on non-litigious proceedings, increasing in quantity and importance with the Procedural Code, secondarily, it stems from social pressures, the most overwhelming of which is to prevent the backlog of court cases.[91] To address the issues raised by legal practitioners, the drafters had to take into account the courts' procedural law related case-law and the needs of other legal professions as well.[92]

The most important innovations of the new CCP are the implementation of the principle of the concentration of proceedings and the introduction of the split system of procedural phases. "In the split system, there is a preparatory phase aiming at determining the framework of the legal dispute and there is an on-the-merits phase with evidence taking. The courts' jurisprudence shows that the protraction of proceedings is often and mainly due to the fact that the CCP in force does not restrict or only partially restricts the modification of the statement of claim, allows the defendant to essentially limitlessly modify his defence in the first instance proceedings and allows the parties to submit their pieces of evidence and motions for evidence at almost any time".[93] The implementation of the principle of the concentration of proceedings can be ensured only if the taking of evidence is under the court's control and not under the parties' control, as they may be interested in the protraction of proceedings, while the court is obliged to render a lawful and well-founded decision within a reasonable time and with regard to the principle of cost efficiency.

The rules on the taking of evidence in the new CCP essentially aim to align the legal provisions in force with the newly established split system of procedural phases and to codify the courts' existing case-law, at the same time, they clarify certain notions, for instance, the principle of free evidence taking is replaced by the principle of the free establishment of facts, while the notion of the obligation to provide evidence is substituted by the parties' interests in evidence taking. A substantial change is the regulation of the involvement of private experts, and the question arises as to how the courts will cope with the problem that the opinion of a private expert commissioned by the party (the details of commissioning not being known to the court) and the opinion of a forensic expert commissioned by the court will have the same evidentiary force.

---

[91] Lajos Cserba, "A perjogi kodifikáció elé," ["Foreword to the codification of civil procedural law,"] in *Codificatio processualis civilis, Studia in Honorem* Németh János II*,* ed. István Varga (Budapest ELTE Eötvös Publishing House, 2013), 11.

[92] István Varga, "Perrendi szabályozási igények azonosítása jog-összehasonlító kitekintéssel," ["The identification of regulatory needs in civil procedure from a comparative law perspective,"] in *Codificatio processualis civilis, Studia in Honorem* Németh János II*,* ed. István Varga (Budapest ELTE Eötvös Publishing House, 2013), 489.

[93] Commentary to section 214 of the Draft Bill

Finally, "what can be the most primitive and simplest method to accelerate civil proceedings? The increase of the number of judges. Problems should not always be addressed by re-regulation, but sometimes by the appropriate assessment of existing conditions".[94]

[94] Áron Ferenczy, "Az információs technológia a polgári perekben," ["Information technology in civil proceedings2] in *Tudományos Diákest Tanulmánykötet II.,* [*Collection of studies of scientific students' evenings, Volume II,*] ed. Katalin Siska and Szűcs Lászlóné (Debrecen: University of Debrecen, Faculty of Political and Legal Sciences, DE Praetor College for Advanced Studies, 2015), 92.

Alternative Civil Dispute Resolution in numbers in Hungary[1]

Malik, Éva

> Citizens should fully enjoy EU citizenship throughout their life and feel at ease wherever they are in the EU.[2]

Abstract *Better access to juristice may be ensured by the alternative dispute resolution procedures, which may offer faster and cheaper solutions than litigation, in the case of voluntary complience or enforceability. Recently the European Union has taken significant steps not only in the field of rights protection (such as passenger rights, protection of online consumers), but also in the field of rights awareness in a community that has diverse political, administrative and legal structures and traditions. This study examines whether and to what extent the most commonly used alternative dispute resolution procedures (mediation, conciliation and arbitration) have spread in Hungary.*

Keywords *ADR, alternative dispute resolution, mediation, ODR, Conciliation, Arbitration*

1. Why alternative dispute resolution?

Recently the European Union has taken significant steps not only in the field of rights protection (such as passenger rights, protection of online consumers), but also in the field of rights awareness in a community that has diverse political, administrative and legal structures and traditions.

The EU's activities may increase the citizens' rights awareness in the Member States, increase the number of disputes "visible", regardless of the citizens "willingness" to litigate. Litigation rates vary considerably across countries,

[1] Thanks to my consultant, Lilla Király, Assistant Professor, University of Pécs, Faculty of Law for her support. I thank the Hungarian Ministry of Justice, the National Judicial Office, the Hungarian Chamber of Forensic Experts, the Arbitration Board of Government Official, the Hungarian Chamber of Commerce and Industry, the Central Statistical Office and the metropolitan and county government agencies that provided data and thus supported the present study.

[2] *The EU Justice Agenda for 2020*, October 25, 2016, http://ec.europa.eu/justice/effective-justice/files/future_justice_brochure_en.pdf., 2.

ranging from 0.3 cases in one hundred people in Finland to around four in Italy and up to almost ten in Russia.[3]

Providing access to justice is fundamental in the European Union. If we look at the figures, we may see a much diversified picture: the time needed for the civil procedings in first instance was 240 days on average in the OECD countries[4] in 2010 (and only 107 days in Japan), but 564 days in Italy. If the party/parties appeal, 788 days will pass on average until the final disposition of cases (in Switzerland only 368 days – however, in Italy one might have to wait even 8 years).[5] The costs of litigation procedures also vary. The expectable high(er) amount of the litigation cost may also hold parties back from civil litigation procedures.

Better access to juristice may be ensured by the alternative dispute resolution procedures which may offer faster and cheaper solutions than litigation procedures in the case of voluntary complience or enforceability. *The alternative dispute resolution procedures do not substitute, but complement civil litigation procedures*. There are justice systems that make alternative dispute resolution mandatory before litigation for a defined group of cases.

2. Alternative Dispute Resolution (ADR)

Certain types of alternative dispute resolution processes, although called differently, have always been present in societies.

Today, in Hungary there is a possibility to try to settle a legal dispute or part of the disputed issues with an agreement in any phase of a lawsuit.[6] Our legal procedural rules in Hungary also apply conciliation[7] and reconciliation,[8] which provide alternatives within the litigation procedure. Moreover, in B2B disputes, our effective civil law rules stipulate mandatory negotiation: the opposing parties have to try to settle the dispute out of court before submitting the petition. (However, this may be disregarded if the parties prepare jointly

[3] *"What makes civil justice effective?*", OECD Economics Department Policy Notes, No. 18 June 2013, accessed February 8, 2016. http://www.oecd.org/eco/growth/Civil%20Justice%20Policy%20Note.pdf., 7.

[4] Out of which Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Luxembourg, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and the United Kingdom are also Member States.

[5] "*What makes civil justice effective?*" finds that differences in trial length appear to be mor related to the structure of justice spending and the structure and governance of courts than to the sheer amount of resources devoted to justice.

[6] Section 148 of Act III of 1952 on (Hungarian) Civil Procedure.

[7] Section 285, ibid.

[8] Section 355, ibid.

a minutes on the opinion difference that has arisen between them).[9] The public administration authority procedure also knows a settlement procedure that may be ordered by the authority or it may also take place if the nature of the case allows it.[10]

In addition to the procedures mentioned above, there are/there may be a number of mechanisms available for the resolution of the legal disputes of the parties: agreement made in front of the lawyer or the notary public' payment order procedure may be also directed at the settlement of the dispute out of court.

The alternative dispute resolution procedures can provide a cost-effective and quick extra-judicial resolution of disputes through processes tailored to the needs of the parties. The alternative dispute resolution procedures are voluntary, confidential and may require the involvement of a third, independent person.[11]

The most widely used mechanisms structured by the legislation of alternative dispute resolution in Hungary are:

- mediation,
- conciliation, and
- arbitration.

Numerous other options are avalibale (e.g.: Early Neutral Evaluation (ENE), Fact Finding, Mini Trial, etc.), and the options may also be combined (e.g. Arb-Med,[12] Med-Arb); however, they are not really known and used in Hungary.

Each option has its advantages and disadvantages and not each of the mechanisms is applicable to all the cases; selecting the appropriate alternative dispute resolution procedure depends on the targets set as well as on the extent the parties wish to influence the process and the outcome.

The alternative dispute resolution procedure may be described along a "Dispute Resolution Continuum", with three main variables: control exercised over the outcome, control exercised over the process, and the costs of the procedure. This is supplemented by the formality and the confidential nature of the process. As the parties move from the informal process towards the more formal one, the costs increase, and the dispute becomes more public, while the control of the parties concerning the outcome diminishes. Such we

[9] Section 121/A, ibid.

[10] Section 64 and 75 of Act CXL of 2004 on the General Rules of Administrative Proceedings and Services.

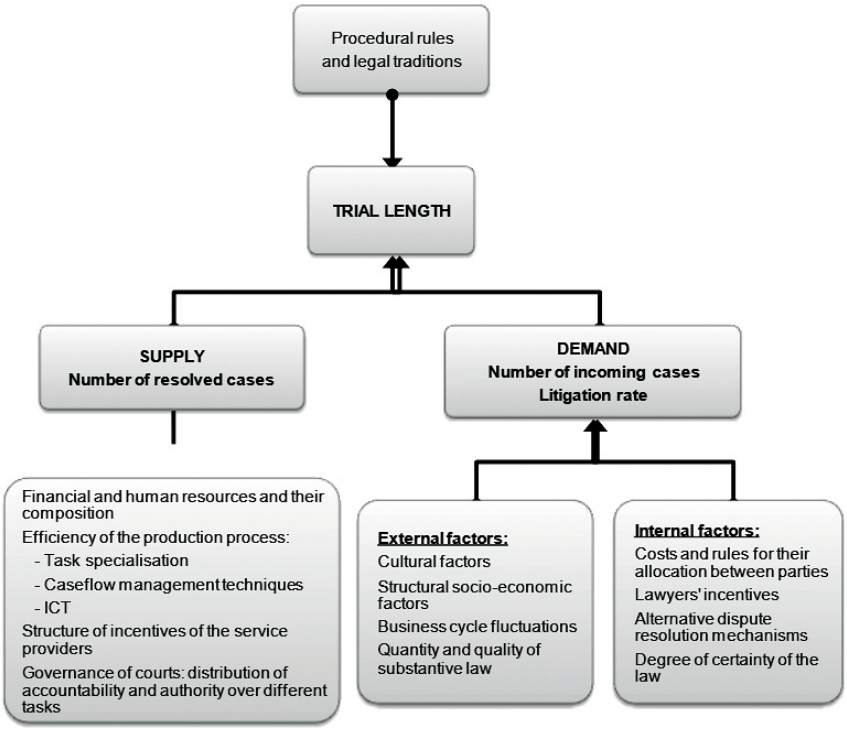
[11] See: *Alternative Dispute Resolution. Practitioners Guide*. USAID. www.usaid.gov/sites/default/files/documents/1868/200sbe.pdf., March 1, 2016.

[12] The parties set up an arbitration, but the arbitrator may try to mediate an outcome before giving a decision. Susan Blake and Julie Browne and Stuart Sime, *The Jackson ADR Handbook.* (UK: Oxford University Press, 2013), 18.

may divide the alternative dispute resolution procedures into facilitated procedures (e.g. structured negotiation without the involvement of a third party mediation), evaluating procedures (e.g. ENE) and adjudicative procedures (e.g. arbitration).[13]

The approaches of the Member States towards alternative dispute resolution procedures are influenced by e.g. whether the state has a continental or a common-law system, the existing membership of the State in regional or international organisations, etc.[14] The specific national regulations and willingness cannot be separated from the socio-cultural environment.[15]

Factors acting in the market for justice:



Source: The original table was published in English by OECD[16]

[13] *ADR Recent Development*. New Judges Seminar, Januar 5-9, 2015. Michigan Judicial Institute, http://courts.mi.gov/education/mji/New%20Judges%202015/ADR%20Recent%20Developments.pdf. accessed March 7, 2016.

[14] Melissa Hanks, "Perspectives on Mandatory Mediation," *University of New South Wales Law Journal* 39, (2012): 929.

[15] Although in the socialist era the Labor Arbitration Board as a legal entity existed, its use was non-voluntary and was rather based on the mandatory requirements of the legislation.

[16] Giuliana Palumbo et al., "Judicial Performance and its Determinants: A Cross-Coun-

3. Types of alternative civil dispute resolution defined by legislation and their use in the Member States

3.1 Mediation

Mediation is a structured procedure, however named or referred to, whereby two or more parties to a dipute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.[17] *It cannot be applied in the case of those rights and obligations in respect of which the parties do not have a disposal right according to the relevant applicable law.*[18] *Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties, as – contrarily to the litigation procedure –there is no "winner" or "loser". This is especially important for example in the case of family disputes.*

3.1.1 Mediation within the European Union

The EU issued Directive 2008/52/EC on certain aspects of mediation in civil and commenrcial matters had to be implemented by May 2011 in the Member States[19,20] There are countries where the Directive has been adapted only for solving cross-border disputes, sustaining dual legislation, as e.g. in Austria,[21] while other countries – although up to different extents – established a monist regulation that is effective for legal disputes within the country also, such as Hungary. The Directive allows the Member States to use the elements of mandatory mediation, including sanctioning as well, in order to encourage the use of mediation.

try Perspectiv,e" OECD Economic Policy Papers, no. 5, (2013), http://dx.doi.org/10.1787/5k44x00md5g8-en.

[17] Directive (EU) 2008/52/EC Article 3 a)

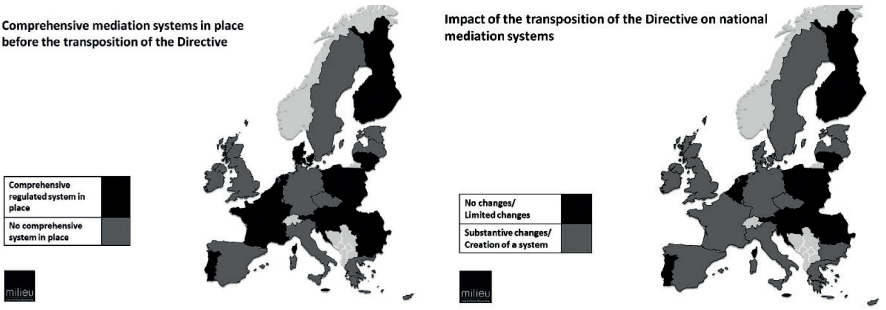
[18] Ibid. Preamble (10).

[19] Except for Denmark.

[20] Directive (EU) 2008/52/EC (1)-(4)

[21] „Bundesgesetz über bestimmte Aspekte der grenzüberschreitenden Mediation in Zivil- und Handelssachen in der Europäischen Union, EU-Mediation-Gesetz"

The impact of the Directive in the Member States varies, depending on the system that was existing prior to the effective date of the Directive in the given Member State:



Source: European Commission[22]

Five and a half year after issuing the Mediation Directive, the Policy Department C: Citizens' Rights and Constitutional Affairs of the European Parliament had a study prepared under the leadership of *Giuseppe De Palo*[23] in 2013, in order to see to what extent the Directive met the expectations, whether it solved the mediation paradox of the EU.[24] The answer is clearly NO: the mediation procedure in spite of its proven and multiple benefits is still applied in only 1 % of the civil and commercial cases within the EU.[25] *However, an inevitable merit of the Directive is that it raised awareness amongst national legislators on the advantages of mediation, by introducing mediation systems or by triggering the extension of existing mediation systems. These advantages have been brought without any significant costs on national budgets.*[26]

Several proposals and studies[27] have already been prepared to promote mediation and several good practices are in operation, as e.g. the so-called

[22] *Study for the evaluation and implementation of Directive 2008/52/EC – the "Mediation Directive"*. Final Report. October 2013. accessed April 20, 2016. http://bookshop.europa.eu/en/study-for-an-evaluation-and-implementation-of-directive-2008-52-ec-the-mediation-directive--pbDS0114825/., 32. 63.

[23] Giuseppe De Palo, professor of the Faculty of Law in Minneapolis of Hamline University and the President of the Rome-based ADR Center SpA.

[24] While the number of mediation is low, 70 % of mediation is successful.

[25] "Rebooting" the Mediation Directive: *Assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU*. Study. (2014) 1. accessed October 25, 2016. http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf.

[26] European Commission: *Study for an evaluation and implementation of Directive 2008/52/EC – the "Mediation Directive"*. Final Report. October 2013., 12-13.

[27] E.g. "Rebooting" the Mediation Directive: Assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU.

"mediation pledge", for which there are examples in Great-Britain, Ireland, Singapore, Poland, and France as well. For example, in Great Britain there are more than 4000 operating companies and 1500 lawyer offices using it, showing their commitment that prior to litigation they will consider the possibility of alternative dispute resolution. The Singapore Mediation Centre, for example, in addition to this, offers different allowances (fee allowances, 1-hour free consultation, etc.) for the organisations that apply this clause.

3.1.2 Hungary

Current Hungarian civil law on mediation comprises three layers of interlinked laws and regulations: general, supplementary and sector-specific laws.[28]

1. General mediation procedure. In Hungary, efforts may be observed for nationalizing the institution of mediation since the middle of the 90s.[29] In Hungary Act LV of 2002 on Mediation applies in civil and commercial matters[30] – which came into effect on March 17, 2003 – and defines the *general rules of mediating procedures*, including cross-border mediation procedures as well.[31] According to Section 15 of the same Act, the mediator or the legal entity submits data to the Ministry of Justice on the mediation procedures that were conducted each year. The minister received data about 560 family and 203 other civil disputes mediated in 2013, 1111 disputes in 2014,[32] and the ministry registered 1318[33] cases in 2015, out of which the family disputes dominate: family disputes represented 65 % in 2014 and 80 % in 2015 of all the disputes. The number of individual labour affair disputes that were conducted through mediation procedures was low and they took place only in about 2 % of the cases[34] (while during labour litigation procedures agreement

[28] Tibor Tajti, „Hungary," in David Richbell, *How to Master Commercial Mediation*. (Bloomsbury Professional Limited, 2015), 436.
[29] Márta Nagy, *Judicial Mediation* (Szeged: Bába, 2011), 173.
[30] The Act was affected by the EU 2002. COM 196 Green Paper on alternative dispute resolution in civil and commercial law.
[31] Additional legislation governing the activities of mediators: IM Rendelet 3/2003 (III. 13.) on the registry of mediators; IM Rendelet 3/2006 (I.26.) on the registration fee of mediators, the mediators' official education and training is regulated by IRM Rendelet 63/2009.(XII.17.); rules of judicial mediation are regulated by OBH Rendelet 20/2012. (XI. 23.)
[32] 851 successful and 260 unsuccessful procedures. Data were provided by the Hungarian Ministry of Justice.
[33] 841 successful and 477 unsuccessful procedures. Data were provided by the Hungarian Ministry of Justice.
[34] The 27 individual labor disputes that were reported in 2014 increased to 43 in 2015.

was reached in 4-5 percent of the cases),[35] and out of the commercial disputes (7 disputes of this type in 2015) hardly any were resolved in the framework of the general mediation procedure.

The Act is supplemented by provisions in the Code of Civil Procedure and by a host of ministerial orders.

2. Court mediation. The Civil Code (CC) effective as of March 15, 2014 introduced a significant change in the area of family law, because in a lawsuit directed at the dissolution of a marriage the judge may recommend for the parties the mediation procedure (Section 4:22 of the CC, voluntary), and in the lawsuits directed at the exercising of parental custody and contact keeping (Section 4:172 of the CC) it may mandatorily be orderered for the parties to participate in a medication procedure in the interest of the child involving co-operation of the parties. If the judge orders this, the parties have to appear in front of the mediator and they have to listen to the information provided. Parties may decide to submit a request for court mediation, or, alternatively, they can turn to a certified non-court mediator[36] who is registered by the Ministry of Justice. The court mediation procedure significantly differs from the general mediation procedure as regards its targets, its procedural rules and its consequences.[37] This procedure is favourable for the parties, because the court mediator[38] acts free of charge in the case of domestic and cross-border civil cases no matter whether they are started upon an order issued by the court, or they are started upon the own request of the parties, in respect of those case types that are not excluded from the procedure.[39] In 2013 there were 20 court mediators in 14 regional courts in Hungary, while in 2014 there were 120 court mediators active (41 judges and 79 court secretaries) at 20 regional courts. At the regional courts, in 2013, out of 295 cases 201 were mediated and 108 cases were closed with an agreement, while in 2014 out of the 656 mediated cases 363 were closed with an agreement.[40] In 2015, out of the already 1099 mediat-

[35] Based on the data of the National Judicial Office (OBH) and Hungarian Academy of Justice, June 27, 2016. http://birosag.hu/kozerdeku-informaciok/statisztikai-adatok/ugyforgalmi-adatok.

[36] In this case the parties have to pay the fee stipulated by the relevant law.

[37] Nagy, *Judicial Mediation*, ibid.

[38] A qualified court clerk or a judge can get an appointment for mediation from the President of the National Judicial Office (OBH).

[39] The parties have the opportunity to select a mediator from the registry updated by the Ministry of Justice, but in this case the process is not free: the hourly rate of the first and additional meetings is HUF 4,000 multiplied by the number of the parties. The mediator can request the reimbursement of the relevant certified expenditures as well.

[40] Annual Report released by the President of the OBH in 2014., accessed March 11, 2016, http://birosag.hu/sites/default/files/allomanyok/obh/elnoki-beszamolok/elnoki_beszamolo_2014.pdf., 32.

ed csases, 495 were closed with an agreement.[41] In addition to this, at the first hearing following the "unsuccessful" ending of the mediation procedure e.g. at the District Court of Kecskemét, the parties signed an agreement in about 20 % of the cases.[42]

3. Child and family protection. In addition to the general mediation procedure, the guardianship authority may also initiate, or in the interest of the child it may order the conflict to be resolved in the framework of a mediation procedure in the case of conflicts that have arisen in the procedure of regulating the contact keeping between the child and his/her relatives or its implementation.[43] The regional child protection specialised service will provide a mediator in the case of a mediation procedure that is ordered in view of the interest of the child living in his/her family or in the interest of a child fostered in the framework of a guardianship procedure according to Section 4:177 of the CC or in a mediation procedure ensured upon the request of the parents in the interest of establishing an appropriate co-operation between the parents or between the parents and the child. The mediator will provide the service to the parent and the child involved, in the framework of a supported mediation procedure at the headquarters of the regional child protection specialised service, the guardianship authority or the child welfare service, or the child welfare centre.[44] The fee of the mediation procedure is regulated by legislation,[45] the supported mediation procedure is free of charge under certain conditions[46] for the parent that fosters a child entitled to regular child protection benefits. The mediations and the conflict managing activity of the family assisting services developed as follows, based on the data of the Central Hungarian Statistical Office:[47] 5,471 (2010), 2,542 (2011), 2,600 (2012), 2,492 (2013), 2,358 (2014). This does not reflect any significant change compared to the previ-

[41] Annual Report released by the President of the OBH in 2015., accessed August 30, 2016, http://birosag.hu/sites/default/files/allomanyok/obh/elnoki-beszamolok/2015._eves_elnoki_beszamolo.pdf., 34.

[42] ibid. 35.

[43] Section (6) 132 of Act XXXI. of 1997 on the Protection of Children and Guardianship Administration. The mediation procedure in the guardianship proceedings is regulated by Section 30/A of Kormány rendelet (Government Decree) 149 /1997 (IX.10.) on Guardianship Authorities and Proceedings about Child Protection and Guardianship.

[44] ibid. Section 62/E.

[45] Goverment Decree 149/1997. (IX.10.) 30/A. (5), Section 38/D of Act LV of 2002; Section 133/A 3a, b) 3b of Act XXXI of 1997.

[46] Section 30/D (6) of Government Decree 149/1997 (IX.10.).

[47] Central StatisticAL Office (CSO): Social Yearbook of 2012. (data from 2010-2012), accessed March 14, 2016, www.ksh.hu/docs/hun/xftp/idoszaki/evkonyv/szocialis_evkonyv_2012.pdf., 129. and CSO Social Yearbook of 2013, www.ksh.hu/docs/hun/xftp/idoszaki/evkonyv/szocialis_evkonyv_2013.pdf., 140.

ous period,[48] when not even 1% of the cases got to a mediator. Involving the regional child protection specialised service might lead to an increase in the number of mediation procedures according to the expectations (after increasing the number of mediators).

4. Labour disputes. In Hungary the law level regulation of mediation started with Act XXII of 1992 on the Labour Code. The first system of the rules of agreement-mediation-arbitration was criticized a lot as the so-called mediation did not fulfil the criteria described in the international literature.[49] Act I of 2012, the "new" Labour Code ensures the possibility of conciliatory committees and arbitration – without mentioning mediation – for the participants of the world of work.

In the case of *collective labour disputes (interest related disputes)* the employer and the workshop council or the trade union may establish a conciliatory committee for resolving the disputes arising between them, they may establish even a permanent committee, the decision of which is mandatory provided there is a legal statement of subjection. In certain cases – in the case of disputes arising in connection with the utilisation of the justified costs connected to the election and operation of the workshop council and that of the welfare purpose financial assets – an arbitrator will make the decision.

Arbitration in this case is a dispute resolution procedure carried on with the voluntary participation of the parties, in the course of which an unbiased, neutral third person (or a body consisting of persons of this kind) will issue an award after hearing the standpoints of the parties, which is mandatory for the parties.[50]

In the case of collective labour disputes it is also possible to use the contribution of the Hungarian Labour Mediation and Arbitration Service [Munkaügyi Közvetítői és Döntőbírói Szolgálat (MKDSZ)].[51] 110 requests were submitted to the organisation during the last 16 years of its operation, while they were officially asked in several hundred cases to provide consulting services, for which the consent of both parties is not required.[52] A large part of the con-

[48] See: Balázs Somfai, *Relations, as the children's human right* (Budapest: HVG-ORAC, 2009), 112.

[49] Zoltán Rácz, "Quo Vadis, MKDSZ? The position of alternative dispute resolution in the field of labour law," *Publicationes Universitatis Miskolcinensis. Sectio Juridica et Politica. Tomas XXXIII* (2015): 326-334.

[50] Géza Kovács, "Labour Affair Mediation," in *Mediation. Mediation proceedings,* ed. Ágnes Sáriné Simkó (Budapest: HVG-ORAC, 2012), 409.

[51] http://www.tpk.org.hu/engine.aspx?page=tpk_MKDSZ_A_szervezetrol. accessed February 1, 2016.

[52] Kovács, "Labour Affair Mediation", 416-417.

flicts that were managed by the organisation arrived from the public sector or from companies with high stakes of the state.[53]

The alternative resolution of individual labour disputes is supported by Section 58 (3) of Act XCIII of 1990 with an administration fee allowance.[54] The general rules apply to these procedures. About 43 individual labour affair mediation cases in 2014 and about 27 in 2015 were reported to the Ministry of Justice within the framework of the general mediation procedure. At the same time the number of agreements achieved in labour lawsuits is significant – 4-5 %: 934 (2011), 828 (2012), 868 (2013), 738 (2014), 696 (2015), which also includes the number of agreements that were concluded in the framework of second instance proceedings.[55] Although the number of agreements is decreasing, the number of the litigation procedures also has a decreasing tendency.[56]

Government officers may submit public service complaints to the Hungarian Arbitration Board of Government Officials in order to enforce their demands arising from their government service legal relationship in cases defined by legislation.[57] The Arbitration Board of the Government Officials received 21 cases in 2012, this number was already 115 in 2013, 99 in 2014 and 225 (203 complaints and 22 opinion requesting letters) in 2015.[58]

5. Mediation in schools. Although the institution of mediation in education has existed since 2004, the procedure is for the resolution of disputed issues such as disputes arising in connection with the transformation of institutions, disputed issues of contracts existing between the educational institution and its maintaining entity, and reconciliations after and prior to disciplinary cases.[59]

---

[53] The activity of MKDSZ is analysed in details in the Research Report of Gyula Rézlet Institute. The results of the research are available in the study "*The social benefits of the activity of Labour Mediation and Arbitration Service*" http://www.tpk.org.hu/engine.aspx?page=tpk_MKDSZ_Hirek_rolunk_irtak and Rácz, "Quo Vadis, MKDSZ?"

[54] In the case of a successful agreement after the first trial, the fee is 50 % of the normal procedure fee. In case the parties were involved in a mediation and the court approves the settlement, the parties pay 30%-50 % of the fee plus the fee of the mediator with a limitation that the fee reduction cannot exceed 50.000 HUF.

[55] The data were supplied by the Hungarian Academy of Justice of the National Judicial Office (OBH).

[56] All the data are available on the website of OBH: http://birosag.hu/kozerdeku-informaciok/statisztikai-adatok/ugyforgalmi-adatok.

[57] Act CXCIX of 2011 on Civil Servants and Sections 358/C.-359/A. of Act III of 1952 on Civil Procedure which are on the revision of the decisions of the Arbitration Board of the Government Officials.

[58] The data were provided by the Secretary of the Arbitration Board of the Government Officials.

[59] National Crime Prevention Strategy (2013-2023), Annex I. for Government De-

EMMI Decree 20/2012. (VIII.31.) on the Operation of Educational Institutions and the Name Usage of Public Educational Institutions regulates the effective educational mediation procedure (Section 62), according to which, if the tutoring-educating institution is unable to terminate the reasons that threaten the child, the pupil with the aid of pedagogic means, or if it is justified in the interest of protecting the community of the children, the community of the pupils, may request assistance from the conflict management specialised advisers and from the service that operates in the area of youth protection and family law.[60]

"In order to prevent school violence and to resolve conflicts without any violence, in each tutoring-educating institution at least one school mediator has to be trained, who, through the application of the relevant method, is able to mitigate the conflicts that arise between parents and teachers, between teachers and teachers, between teachers and students, between students and students and between parents and students."- says the Hunagrian National Crime Prevention Strategy, for which the budget of the National Crime Prevention Council provides annually 2 million HUF until 2018, in the form of mediator training. Although the program is part of the crime prevention strategy, it is expected that school mediators will on the spot manage not only violent behaviour and conduct forms, but private law conflicts as well. *At the same time, due to the fact that the procedure is being generally spread among primary schools and it will (may) become an everyday practice for the upcoming generations, it may also have the impact that later it will be spread/more frequently used in the adulthood of the pupils as well.*

6. Mediation in the case of inheritance. The mediation procedure in inheritance cases is interesting not because of the (general mediation) procedure, but because of its enforceability. Act XXXVIII of 2010 on Inheritance Procedures stipulates that the notary public call the attention of the parties to the possibility of using mediation in disputes and the notary public approve the agreement partially or fully in his decision, thus making the agreement enforceable. There are no exact data available about the number of agreements that have been made in inheritance cases, they are included in the numeric data of the general mediation procedures.

7. Mediation in healthcare. Three types of the alternative dispute resolution have spread in the area of health care:[61]

cision 1744/2013. (X.17.) Issue 172 of 2016 Hungarian Official Gazette (Magyar Közlöny), March 30, 2016, http://www.bitegyesulet.hu/letoltesek/20150824114601/Nemzeti%20B%C5%B1nmegel%C5%91z%C3%A9si%20Strat%C3%A9gia.pdf., 74058.

[60] Section 62 (1) of EMMI (Ministry of Human Capacities) Decree 20/2012. (VIII. 31.)

[61] Alice Decastello, *Mediation in healthcare* (Budapest: HVG-ORAC, 2010), 20.

- dispute resolution implemented on an insurance basis, not investigating attributability,
- arbitration procedures specialised in healthcare disputes,
- mediation.

Health care mediation procedure[62] is regulated by Act CXVI of 2000 and EüM-IM Decree 4/2001. (II.20.)[63] in Hungary. Healthcare mediation is also based on voluntariness and confidentiality, however, its regulation deviates in a number of points from the general procedure both as regards the process of the procedure and as regards the legal consequences.[64] More than ten years have gone by since the commencement of the law, and the mediation procedure has not gained any ground in the legal disputes of health care service providers and patients. Practically there is no healthcare medication procedure that has been conducted within the Hungarian Forensic Expert Chamber.[65] Alice Decastello sees the reasons of the unsuccessfulness of healthcare mediation procedure primarily in the fact that health care service providers are reluctant to acknowledge their responsibility and insurance companies do not prefer the mediation procedure to the litigation procedure either.[66] However, this does not mean that there is no alternative dispute resolution within healthcare: ervice providers prefer 'private' out of court agreements to the official healthcare mediation procedure.

8. Mediation in Administration. In order to settle a dispute arising between the authority and the client, and between clients of conflicting interests, the authority may engage a so-called authority mediator.[67] The public administration procedure also differs from the general mediation procedure in a number of points: e.g. the mediator is engaged by the authority – and not by the parties – and the flow of information is asymmetric[68] (e.g. the authority mediator in-

[62] The authorization is based on Section 34 of Act CLIV of 1997 on Health Care.

[63] Its development was allowed by Act of CLIV of 1997 on Health Care.

[64] The responsibilities related to the management of the process were transferred to the regional chambers of judicial experts. In the process – in the absence of a separate agreement of the parties – a healthcare mediation board will act and the insurance provider (of the healthcare institution) is also a party who has the right to submit observations for example. The agreement has to be approved – fully of partly – by the insurance provider. The advantage of the process is that the patient can get compensation within four months from the date of the first meeting. In details: Decastello, *Mediation in healthcare*

[65] Thanks for the data to the Hungarian Chamber of Forensic Experts.

[66] Ágnes Sáriné Simkó, ed., *Mediation. Mediation proceedings* (Budapest: HVG-ORAC, 2012), 261-262.

[67] Section 41 of Act CXL of 2004 on the General Rules of the Administrative Procedures and Services

[68] In details András Krémer, "Mediation in Administration" in *Mediation. Mediation proceedings,* ed. Ágnes Sáriné Simkó (Budapest: HVG-ORAC, 2012), 76-79.

forms the clients about the provisions of the governing legislation of the case, about their rights that are defined in substantial law and in procedural law; and the mediator makes available to the authority the comments received from the clients concerning the subject matter of the procedure). Government Decree 185/2009. (IX. 10.) prescribes special knowledge for the profession (passing an authority mediator examination or a public administration specialist examination or equivalent); its remuneration[69] is included in IRM Decree 42/2009 (IX. 15.). The mediator may expect the reimbursement of his costs according to the rules of cost bearing. Authority mediation procedure has not spread in the field of civil cases: only 1 authority mediation procedure was conducted in 2013, 11 in 2014, and 19 in 2015 within the whole country, in four counties out of the total 20.[70,71]

3.2 Conciliation

The basic purpose and function of the procedure of the (Hungarian) Conciliation Board is to try to solve the disputed issue between the consumer and the company with an agreement; if this is not possible, to decide the case on the basis of a fast, efficient and simple enforcement of consumer rights.[72] *However, its decision binds the parties only if the company issues a statement of subjection, meaning that it depends on the one-sided approach of the company.*[73]

Conciliation Boards were established in Hungary in the beginning of 1999. The regional Conciliation Boards also provide advice upon the request of the consumer or of the enterprise in connection with consumer rights and obligations. The service may be used free of charge in the entire territory of the country.[74]

The Conciliation Board is authorized to deal with the following out of court consumer disputes:

- the quality and safety of products and services,
- the application of the product liability rules, and
- the conclusion and performance of contracts.

The conciliation boards closed 9026 cases in 2013, 10210 cases in 2014 – out of which 16 were cross-border cases – 11377 cases in 2015 – out of which 42 were cross-border cases. In year 2015, in 2651 cases the conciliation boards put forward recommendations, in 1370 cases (12 %) agreements

[69] The official fee is 5000 HUF per hour excluding VAT.
[70] 19 counties plus Budapest, the capital.
[71] The above data were supplied by the capital and county government offices
[72] http://www.bekeltetes.hu/ accessed March 7, 2016.
[73] Section 32 of Act CLV of 1997 on Consumer Protection
[74] Section 18-37 of Act CLV of 1997

were reached, while in 141 cases the procedure ended with the stipulation of obligations. Refusal was applied on 1047 occasions. Even from among the 6171 dropped cases 412 were dropped because of the (private) agreements of the parties. In 2014 from among the 10210 closed cases 1088 agreements were reached and in 329 cases the procedure was terminated because the parties agreed. From among the actual procedures - not including the cases that were ended with termination, the cases where conducting the procedure was impossible or the request was unfounded or the deficiency remediation summons were not satisfied - *in 2013 in 20.7 % of the cases, in 2014 in 22 % of the cases, while in 2015 in 25 % of the cases an agreement was achieved* either within or outside of the framework of the procedure. The willingness of co-operation of the enterprises with the conciliation boards improved[75] after amending the Act on Consumer Protection in September 2015.[76]

The essential institutional and procedural rules of conciliation boards are regulated in Section 18-37/A of Act CLV of 1997 on Consumer Protection.

3.2.1 Hungarian Financial Arbitration Board

Concerning financial consumer legal disputes, Act CLVIII of 2010 on the State Supervision of Financial Organisations established the Financial Arbitration Board on July 1, 2011: previously there had been no financial arbitration in Hungary. The Board has been operating as a separate and independent internal organisation besides the National Bank of Hungary since October 1, 2013. When the resolution of financial legal disputes was also implemented within the framework of the general conciliation system in year 2010, altogether 880 applicants used this option. In 2011 – during the first half year of the operation of the Board – it received 1196 consumer requests, and still in this year 857 cases were closed as a result of the work of altogether seven acting councils. 2012 was the first full year of financial conciliation, and by this time the number of cases had already increased, 3224 requests were submitted by the financial consumers. In 2013, they initiated procedures in 4320 new

[75] Under Section 47/C (5) e) of the same Act the consumer protection authority imposes a fine in all cases where the company violates the existing obligations of cooperation in an arbitration board proceeding, as defined in Section 29 (11). The arbitration board informs the competent consumer protection authority about the infringement acording to Section 29 (12).

[76] Hungarian Chamber of Commerce (HCC): Progress Report and analysis of the 2015 activities of the Conciliation Bodies. February 2016, Budapest. The report was compiled by Tamás Korcsog, Counsel. HCC: Progress Report and analysis of the 2014 activities of the Conciliation Bodies. February 2015, Budapest. The report was compiled by Tamás Korcsog, Counsel.

cases, and in 2014 altogether 4181 new cases were received.[77] In 2015 this number increased by 15 percent, that is, 4833 new cases were received, and out of them 42 cases were cross-border ones.[78]

The operation of the Financial Arbitration Board is based on the rules included in Sections 96-130 of Act CXXXIX of 2013 on the National Bank of Hungary. *A resolution of the Financial Arbitration Board including obligations established according to the Accounting Act*[79] *in cases defined by lawbinds all the financial institutions involved, even if otherwise they did not issue any general or specific legal statement of subjection.* (In 2015 the Board issued one resolution establishing an obligation; in 36.71 percent of the cases the parties signed agreements).

3.2.2 Consumer disputes in the European Union

A study[80] *in 2011 summarised the procedures that were available for the management of consumer disputes:*

Table 2: Identified notified and non-notified ADR schemes by Member State

Member State	Notified ADR schemes [a]	Non-notified ADR schemes [b]
AT	18	4
BE	25	14
BG	0	3
CY	1	0
CZ	20	5
DE	203	24
DK	19	2
EE	2	0
ES	75	1
FI	4	1
FR	19	16
GR	3	0
HU	18	2
IE	5	10
IT	4	125
LT	1	4
LU	5	1
LV	1	2
MT	6	1
NL	4	0
PL	4	20
PT	13	0
RO	1	1
SE	1	15
SK	0	3
SL	0	6
UK	18	21
EU	**471**	**281**

[77] The history of Financial Arbitration Board, accessed February 1, 2016, https://www.mnb.hu/bekeltetes/bemutatkozas/a-pbt-tortenete.

[78] Annual Report on the activities of Financial Arbitration Board, 2015., accessed May 2, 2016, https://www.mnb.hu/letoltes/pbt-eves-jelentes-2015.pdf., 14.

[79] Act XL of 2014 and Act XXXVIII of 2014

[80] Directorate General for Internal Policies. Policy Department A: Economic and Sci-

To facilitate cross-border trade-level, which is still low today, the European Union established an online platform (Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes), to bring assistance to "arm length" for consumers in the case of a problem and thus increase the feeling of security of consumers.[81] It offers a free-of charge electronic case management tool. On the website of each EU online trader and service provider a link to the ODR platform has to be provided.[82] The dispute will not be solved by the ODR platform, but it will assist in "channelling" the dispute into the appropriate alternative dispute resolution procedure – with the agreement of both parties. By submitting the complaint electronically and with the attachment of the relevant documents, the parties may select the appropriate ADR service provider from among the accredited service providers. Dispute resolution – depending on the ADR service provider – may be performed through the ODR platform as well.[83] In Hungary the Budapest Conciliation Board implements the tasks of the online dispute resolution contact point and it has an exclusive jurisdiction concerning the judgement of cross-border online consumer legal disputes since September 11, 2015.[84] The procedure of the Budapest Conciliation Board is free of charge.

The Directive and thus the platform may be applied to out-of court dispute resolutions concerning contractual obligations stemming from online sales or service contracts between a consumer resident in the Union and a trader established in the Union.[85] The Commission implementing Regulation (EU) 2015/1051 of July 1, 2015 regulates the modalities for the exercise of the functions of the online dispute resolution platform, the modalities of the electronic complaint form and the modalities of the cooperation between contact points.

entific Policy. *Internal Market and Consumer Protection. Cross-Border Alternative Dispute Resolution in the European Union.* June 2011. IP/A/IMCO/ST/2010-15. 17.

[81] Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes, Preamble (2).

[82] Amongst all the factors that are holding back the development of ODR, perhaps the first and most important one is the lack of awareness. The second factor is the lack of legal standards. In: Pablo Cortés and Arno R. Lodder, "Consumer Dispute Resolution Goes Online: Reflections on the Evolution of European Law for out-of-court Redress,*" Maastricht Journal of European and Comparative Law*, no 1. (March 2014.): 5-6. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2414098. The referred EU Regulation will help promoting the method.

[83] Although the platform is available in all official languages of the EU, the language of the process will be defined by the ADR service provider.

[84] Section 19 of Act CLV of 1997.

[85] Regulation (EU) No 524/2013 (15).

3.3 Online Dispute Resolution (ODR)

Online dispute resolution is not equivalent with the online variant of alternative dispute resolution procedures: this is an alternative dispute resolution procedure[86] (ADR) in an electronic environment, aided by online technology.[87] A bright future of ODR has been drawn by many scholars since the late 1990s, however, only limited number of success stories have been known.[88] It cannot be called an ODR when IT substitutes or provides assistance for only certain elements of the procedures, or it replaces the elements of traditional dispute resolution (e.g. telephone conference or video conference, but even the computerised penalty levying system).[89] Richard Susskind[90] emphasised that we may talk about ODR only if the process of the resolution of the legal dispute, but especially the phrasing of the solution is fully or mainlydone through the internet.[91,92]

The purpose of an ODR redress system is to avoid overloading the courts with low-value, high-volume dispurtes and to stay away from lengthy and costly proceedings.[93]

ODR may be applied widely starting from online conciliation through completely automated online negotiations (e.g.: eBay) up to online mediating programs (e.g.: eBay, Wikipedia). ODR is more than the online version of

[86] Procedures for non-court settlement of disputes are typically faster, cheaper and easily accessible. Alternative dispute resolution does not cover handling customer complaints directly by the trader (e.g. by their internal customer complaint department) or direct amicable settlements between the consumer and the trader. http://europa.eu/rapid/press-release_MEMO-11-840_hu.htm. accessed July 1, 2015.

[87] Ibid.

[88] Pablo Cortés and Arno R. Lodder, "Consumer Dispute Resolution Goes Online", ibid.

Pablo Cortésthe is a Senior Lecturer at the School of Law of the University of Leicester. Arno R. Lodder is a Professor of Internet Governance and Regulation, Department of Transnational Legal Studies, VU University Amsterdam.

[89] which provides legal, factual and statistical data to the Judge

[90] Head of ODR Advisory Group, President of Computers and Law Society, IT Advisor to the President of the Supreme Court.

[91] Richard Susskind, *Is this the end of the lawyers' profession? Rethinking the nature of the legal services.* (Budapest: CompLex Ltd., 2012), 196.

[92] In these days ODR still has a number of definitions. The information and communication technology is often referred to as the "fourth party" in the literature, thus emphasizing its importance in the process and as a device, it supports not only the third party, but sometimes it takes over the role of a third party, for example in the case of an automated negotiation.

[93] Mirèze Philppe, "ODR Redress System for Consumer Disputes," *International Journal of Online Dispute Resolution,* no 1. (2014): 63.

ADR: online dispute resolution may be implemented without a third, expert party as well, it may offer solutions of new types. Already today a number of online dispute resolution platforms[94] are in operation,[95] even in court practice.[96] One of the most well-known platforms is operated by eBay, on which, according to the data of 2010, 60 million disputes are resolved annually. *When the Z generation becomes adult, it is expected that it will not only lead to the widely spread use of online devices, but it may have an impact on the method of dispute resolution, and also on the use of different dispute resolution procedures*.

Online Hungarian dispute resolution operates from 2005 for disputes arising from the registration of .hu domain names. The process in not mandatory, however, preferred by the companies being much faster than the court proceedings. The decisions (54 in 2015) are open to the public and can be found on the web site.[97] Gergely L. Szőke, however, recommends to revise and amend the Hungarian Mediation Act to be more suitable for online mediation, claiming that the inflexible provisions in practice hinder the possibility of performing online mediation under the Hungarian Mediation Act.[98]

It is also worth to mention the SOLVIT system. Online dispute resolution is not unknown in public administration – public administration prefers online administration in Hungary as well: The European Union established the SOLVIT network in 2002. This network deals with cross-border cases that arise due to the possible infringement of the EU law regulating the internal market, committed by a public administration authority, provided and up to the extent these matters are not the subject matter of national or EU level legal procedures.[99]

SOLVIT tries to find a solution to the problems within 10 weeks – calculated from the day when the complaint is accepted by the local SOLVIT-centre

[94] An ODR platform is a system for the generating, sending, receiving, storing, exchanging or otherwise processing electronic communications used in ODR, and which is designated by the ODR provider in the ODR procedings - in addition to the communication platform it serves as a case management system as well. Philppe, "ODR Redress System for Consumer Disputes," 59-60.

[95] Online Dispute Resolution Advisory Group: *Online Dispute Resolution for Law Value Civil Claims.* February 2015. https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf.

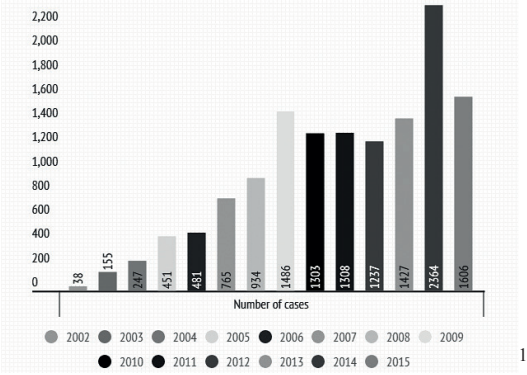
[96] For more details please see: Éva Malik, "Online Civil Dispute Resolution," *Jura*, no 1. (2016): 245-252.

[97] For more information see infomediator.hu

[98] Gergely L. Szőke, „The Possibility of Online Mediation under the Hungarian Mediation Act." *Masaryk University Journal of Law and Technology* 1, no. 1 (2007): 139.

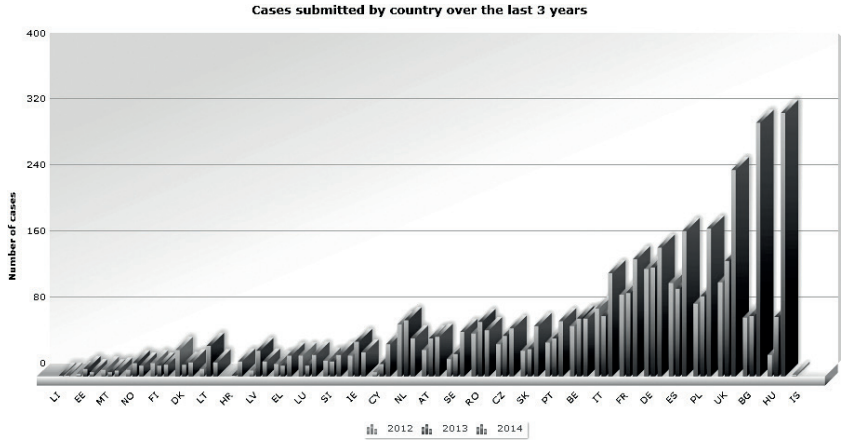
[99] Commission Recommendation of 17.09.2013 on the principles governing SOLVIT C(2013) 5869 final. 5. http://ec.europa.eu/solvit/_docs/2013/20130917_recommendation_solvit_hu.pdf.

in the country where the given problem has arisen. Using SOLVIT is free of charge, its procedure is informal. If SOLVIT finds a successful solution, it informs the applicant on what she has to do in order to implement the recommended solution. If the case cannot be solved within the framework of SOLVIT, SOLVIT closes the case and informs the applicant on the possible national or union legal remedy options. The non-resolved cases have to be reported to the Commission through a database.



[100]

The SOLVIT system helped more than 4,000 persons in solving their problems in year 2014, by clarifying the given issues or by channelling the problem to the appropriate place. Hungary is included among the countries that submitted the most complaints:[101]



[100] http://hu.euronews.com/2015/10/02/solvit-az-unios-problemamegoldo/., accessed May 6, 2016.

[101] Single Market Scoreboard. Reporting period: 01/2014 - 12/2014. http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/solvit/index_en.htm. May 19, 2016.

3.4 Arbitration[102]

Arbitration Tribunals are private courts consisting of one or more arbitrators to whom the parties – with a legal statement (arbitration clause or agreement) – present their case for a legally binding decision, instead of going to a state court.[103] Within an agreement of this kind the parties may freely agree on the rules of procedure to be observed by the arbitration tribunal, or they may stipulate the use of the rules of procedure of another standing arbitration tribunal.[104]

In addition to the procedure(s) of standing arbitration court(s), the parties may also select a so-called ad hoc arbitration court procedure. In certain states there are even health-care specialised arbitration tribunals (like in the United States and in Germany[105]).

The effect of an arbitration tribunal award is the same as that of a legally binding court verdict. Based on the New York Convention of 1958[106] the Hungarian arbitration tribunal award may be more easily enforced abroad, even in the European Union, than the order of an ordinary Hungarian court.[107] In spite of the fact that enforceability abroad used to be considered as one of the main advantages of arbitration, the number of cross-border procedures is low in Hungary. The number of the procedures of the *Arbitration Tribunal operating besides the Hungarian Chamber of Commerce and Industry* stagnated in the last five years, the number of procedures varied between 150 and 400, out of which the number of cross-border cases fluctuated between 15 and 30 yearly.[108]

---

[102] Miklós Boronkay and György Wellmann jr., "The position of the arbitration in Hungary," *Hungarian Academy of Sciences. Academy Law Working Papers*, no. 12. (2015), *http://jog.tk.mta.hu/uploads/files/mtalwp/2015_12_Boronkay-Wellmann.pdf*., accessed March 10, 2016.

[103] Éva Horváth, *International arbitration* (Budapest HVG Orac Ltd, 2010), 24.

104 Uniformity Decision No 3/2013 PJE: In a consumer contract an arbitration court condition based on a general contractual term or on a term not negotiated individually is unfair. The court is obliged to recognize the unfairness of such a condition ex folio, but it can establish its nullity only if the consumer, upon the call of the court, makes reference to it. http://kuria-birosag.hu/en/uniformity-decisions., accessed November 2, 2016.

[105] *Gutachterkommissionen and Schlichtungsstellen*

[106] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). It was prolonged in Hungary in 1962.

107 On the basis of the New York Convention the scope of refusing the enforcement of the award is narrower than on the basis of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters.

[108] http://www.mkik.hu/hu/magyar-kereskedelmi-es-iparkamara/hasznos-informaci-

It is true that Act LXXI of 1994 on Arbitration regulates arbitration, and according to this Act an arbitration tribunal procedure may be applied only if at least one of the parties is professionally engaged in business activities and the legal dispute arises out of or in connection with this activity.[109]

The *Arbitration Tribunal on Money and Capital Markets* operates also as a permanent arbitration tribunal. Its operation is regulated by Act LXXI of 1994 on Arbitration and Act CXX of 2001 on Capital Market (Section 376). However, its rules do not allow the disclosure of the data of the procedures. There are other permanent Arbitration Tribunals in Hungary, like the Arbitration Tribunal operating besides the Hungarian Chamber of Agriculture, the Sport Arbitration Tribunal or the Energy Arbitration Court. However, the case rate of the arbitration tribunals is not significant, except for the Arbitration Tribunal operating besides the Hungarian Chamber of Commerce. Professor Kecskés points out that in a sector-specific arbitration one of the clients, necessarily, is closer to the center, while the Arbitration Tribunal operating besides the Hungarian Chamber of Commerce operates in a sector-free environment, so the problem of 'distance from the center' is not signigicant.[110]

4. How to proceed?

According to Antal Visegrády, Hungary is closer to the countries where lawsuits have a short duration, nevertheless on the average lawsuits take longer in Hungary than in Germany (six months) or in France (four months). Although Hungary has the second biggest staff of judges to the propotion of the population (2800 judges), following Germany, the procedures of first instance and second instance last for one year on the average, but at the busiest courts (e.g. Pest County) the duration of the lawsuits may reach even two years.[111] In year 2014, similarly to the previous year, more than 77 % of the lawsuits were ended within one year after their receipt by the court.[112]

ok-8720 Ugyforgalom. accessed November 15, 2016.

[109] Section 3, (1) a).

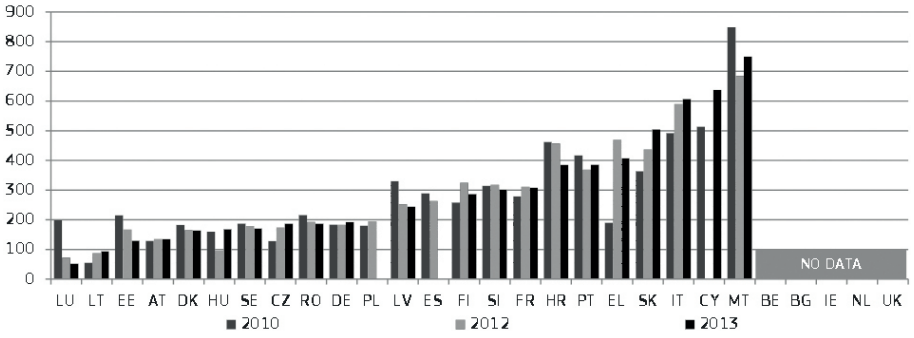
[110] László Kecskés and Józsefné Lukács, *Választottbírók könyve*. (Budapest: HVG-ORAC., 2012), 182.

[111] Antal Visegrády, "The Hungarian legal culture in the system of the EU Member States' legal culture," in *The correlation between EU law and Hungarian law*, ed. Péter Tilk (Pécs: 2016), 35.

[112] Annual Report from year 2014 released by the President of the National Judicial Office. 20-21.

In the EU, on the 2015 EU Justice Scoreboard of the European Commission, Hungary is the sixth as regards the time needed to resolve litigious civil and commercial cases (First instance/in days): [113]

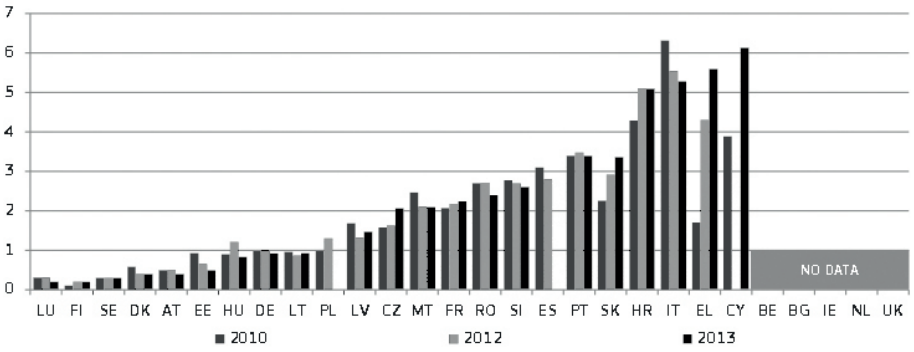
Time needed to resolve litigious civil and commercial cases* (First instance/in days)
source: *CEPEJ study*



* Litigious civil (and commercial) cases concern disputes between parties, for example disputes regarding contracts, following the CEPEJ methodology. By contrast, non-litigious civil (and commercial) cases concern uncontested proceedings, for example, uncontested payment orders. Commercial cases are addressed by special commercial courts in some countries and handled by ordinary (civil) courts in others. Comparisons should be undertaken with care, as some Member States reported changes in the methodology for data collection or categorisation (CZ, EE, IT, CY, LV, HU, SI) or made caveats on completeness of data that may not cover all Länder or all courts (DE, LU). NL provided a measured disposition time, but it is not calculated by CEPEJ.

Regarding the number of litigious civil and commercial pending cases (First instance/per 100 inhabitants), we are number seven: [114]

Number of litigious civil and commercial pending cases* (First instance/per 100 inhabitants)
source: *CEPEJ study*

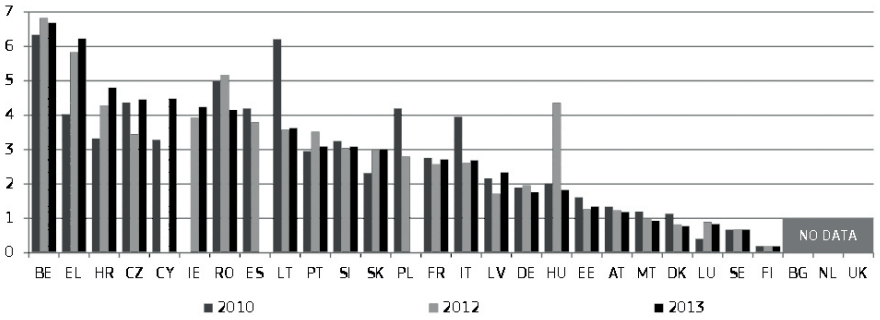


* Comparisons should be undertaken with care as some Member States reported changes in the methodology for data collection or categorisation (CZ, EE, IT, CY, LV, HU, SI) or made caveats or completeness of data that may not cover all Länder or all courts (DE, LU). Changes in incoming cases may allegedly explain variations in EL, LT and SK.

[113] European Commission: *The 2015 EU Justice Scoreboard.,* accessed March 19, 2015, http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2015_en.pdf., 9.
[114] European Commission: *The 2015 EU Justice Scoreboard*, ibid. 12.

Simultaneously with this, our civil and commercial litigation "willingness" is rather within the lower level ones within the EU – we are number 18 (there are no data about three Member States):[115]

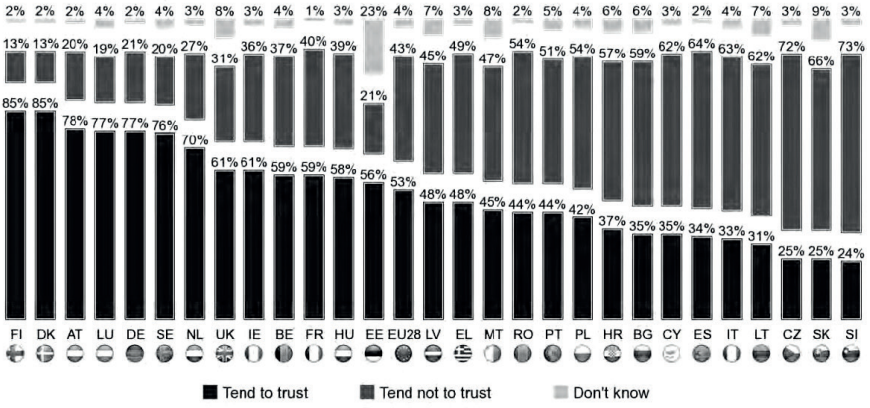
Number of incoming civil and commercial litigious cases per 100 inhabitants* (First instance, 2010, 2012 and 2013)
source: *CEPEJ study*



* Litigious civil and commercial cases concern disputes between parties, for example disputes regarding contracts, following the CEPEJ methodology. By contrast, non-litigious civil (and commercial) cases concern uncontested proceedings, for example, uncontested payment orders. Commercial cases are addressed by special commercial courts in some countries and handled by ordinary (civil) courts in others. IT: The possible misinterpretation concerning the comparison between 2010, 2012 and 2013 could be explained by the implementation of a different classification of civil cases.

However, as regards trust towards the national justice systems, according to the 2013 survey of the Eurobarometer, only 58 % of the people trust the justice system in Hungary:

Q1. Overall, would you say that you tend to trust or tend not to trust the justice system in (OUR COUNTRY)?



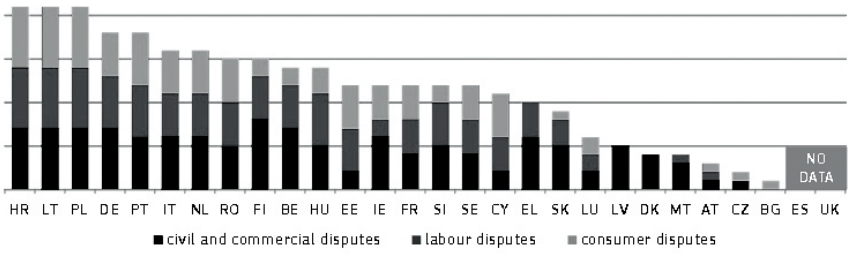
Source: Eurobarometer survey 385, November 2013 – Jurisdiction in the EU[116]

[115] Ibid. 7.

[116] European Commission: *Towards a true European area of Justice: Strengthening trust, mobility and growth.* Press release. IP/14/233. Strasbourg, March 11, 2014.

To further facilitate the rapid resolution of diputes, the EU Justice Agenda for 2020[117] encourages the Member States to promote the use of other types of non-judicial redress and remedies mechanisms developed in the EU which could offer a swift, efficient and less costly solution to disputes (e.g. mediation, alternative dispute resolution, online dispute resolution, SOLVIT, the European procedure for small value claims, and in respect of civil and commercial cases the European Small Claims Procedure and the European Account Preservation Order[118]).

Promotion of the use of ADR by the public sector*
source: *European Commission*[119]



* Aggregated indicator based on the following data: 1) websites providing information on ADR,2) publicity campaigns in media, 3) brochures to the general public, 4) specific information sessions on ADR are available upon request, 5) specific communication activities organised by courts, 6) publication of evaluations on the use of ADR, 7) publication of statistics on the use of ADR, 8) others. For each promotion tool set out in the questionnaire one point is allocated. For certain Member States additional activities may be undertaken (DE).

119

The cornerstones of alternative dispute resolution mechanisms are their costs and enforceability. It can be seen from the data that in Hungary with the about fifteen thousand civil cases reported annually, 4-5 percent of the litigated civil cases is channeled into and solved today partially or fully with alternative dispute resolution procedures.

The legislator encourages ADR in two ways in Hungary: on the one hand by discounts from the procedural fee, and on the other hand by sanctions if the agreement reached with ADR method is challenged.

The discounts consist of two systems in Hungary:

- one of the systems makes the procedure more favourable by administration fee exemptions (e.g. the procedure of the court mediator,[120] the procedures of the conciliation boards), and

[117] European Commission: *Towards a true European area of Justice: Strengthening trust, mobility and growth*. Press release. The EU Justice Agenda for 2020. A New EU Framework to Strengthen the Rule of Law., accessed April 4, 2016, http://ec.europa.eu/justice/effective-justice/files/future_justice_brochure_en.pdf., 4.

[118] Regulation (EU) No 655/2014.

[119] European Commission: *The 2015 EU Justice Scoreboard*, accessed March 19, 2015, http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2015_en.pdf., 29.

[120] Act XCIII of 1990, Section 56. (4).

- on the other hand, by litigation fee reduction (with 50[121]-70[122]- or even 90[123] percent).[124]

The sanctions in Hungary may burden the party with the cost of litigation – irrespective of wining or losing the lawsuit.[125]

Although several initiatives were launched to make alternative dispute resolution procedures more popular, in the lack of enforceability, the alternative dispute resolution does not necessarily reach its target, that is, it does not provide a fast and cheap solution, moreover: it may mean lost time and money, since the litigation procedure may be started only later.

In an ideal case the parties respect the agreement they worked out and the rate of voluntary law compliance is high – but not always. Since the effect of an arbitratiom award is the same as that of a legally binding court verdict, and the decisions of the conciliation boards are also mandatory (in certain cases only with a legal statement of subjection), the question of enforceability arises only when the compromise or decision is mediated. If the parties have resolved their dispute, they will have entered into a contract of compromise. Enforcement can be made through suing on that contract. However, it will be the enforcement of the compromise rather than the original dispute.[126] *Based on*

[121] In the case of a successful agreement after the first trial, the fee is 50 % of the normal procedure fee. In case the parties were involved in mediation (after the first trial) and the court approves the settlement, the parties pay 30%-50 % of the fee plus the fee of the mediator with a limitation that the fee reduction cannot exceed 50.000 HUF. Section 58 (3).

In line with Section 58 (9) in case the parties participated in mediation (governed by a separate Act) prior to the civil procedure, the party pays 50.000 HUF less, but minimum 50 % of the procedural fee that is otherwise payable for the legal proceeding., except a) mediation is excluded by law or b) in spite of the settlement any of the parties decide to bring an action before the Court in the subject that has been settled within the agreement, except, if the subject of the legal action is the enforcement of the agreed conditions.

[122] The fee is the 30 % of the procedural fee in case the parties mutually apply for the termination of the lawsuit. Section 58 (2) of ibid.

[123] The fee is 10 % of the procedural fee in case the parties make an agreement during the first trial. Section 58 (1) of i.m. 58.

[124] According to Section 42 (1) of Act XCIII of 1990, instead of 6% only 1 % duty is payable (between 3.000HUF and 15.000 HUF) instead of a maximum 1.5 milliopn HUF duty fee in case the parties apply for settlement summons or for immediate hearing in oral complaint. The law determines the duty fee in an arbitration procedure between 5.000 and 250.000 HUF (1%), which is more favourable than in the court prodecure (Section 55).

[125] Section 80 (3)-(6) of Act of 1952 on Civil Procedure

[126] There are three exceptions to this rule: a) in case of an express term reviving old obligations in the event of non-performance, b) the compromise is based on performance of the agreed terms, c) the compromise is ineffective. Susan Blake et al, *The*

the Mediation Directive the court or another competent authority may declare the content of the agreement to be enforceable in a judgement or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.[127] Belgium, the Czech Republic, Hungary and Italy do not explicitly require the consent of all parties to the dispute for a request for the enforceability of the mediation agreement. In Greece and in Slovakia the enforceablitiy request may be submitted even by one of the parties without the explicit consent of the other party/parties. Under Polish law, by signing the agreement the party automatically gives consent for the other party to request the court's approval for enforcement.[128] Acknowledgement and enforcement of a mediated agreement in another Member State may be implemented on the basis of Council Regulation (EC) No 44/2001,[129] and Council Regulation No 2201/2003,[130,131] and it is free of administration charges based on 57 § (1) t) of the Hungarian Act XCIII of 1990 on Duties.

The alternative dispute resolution procedure is not mandatory; at the same time the court in the appropriate cases may encourage alternative procedures by introducing their advantages. Obliging the parties to hear information on alternative dispute resolution procedures is not unknown in Hungary or in the EU; and applying it does not infringe Section 6 of the EJEE [European Convention of Human Rights].[132]

Jackson ADR Handbook, 230.

[127] Regulation (EU) No 2008/52/EC Article 6 (2).

[128] European Commission: *Study for an evaluation and implementation of Directive 2008/52/EC – the "Mediation Directive". Final Report*. October 2013. 39.

[129] Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[130] Council Regulation (EC) 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

[131] Directive 2008/52/EC, Preamble (20).

[132] The recognition of mandatory mediation is not unknown in the European Union: In Joined Cases C-317/08-C-320/08 (Rosalba Alassini & Co. contra Telecom Italia SpA & Co.) the Judgement of the Court of the European Union states that "prior implementation of an out-of –court settlement procedure, provided that that procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs – or gives rise to very low costs – for the parties, and only if electronic means is not the only means by which the settlement procedure may be accessed and interim measures are possible in exceptional cases where the urgency of the situation so requires, doues not precllude the equivalence and effectiveness or the principle of effective judicial protection." This is a substantial change compared to the Green Book of 2002 which drove the attention of the Member States to the assumption that the introduction of mandatory mediation can jeopardize accesss to justice, as it can delay or precludet

Therefore, the theoretical possibility for applying ADR is given. However, the successful application of alternative dispute resolution procedures requires appropriate political support, an appropriate institutional and cultural background, and appropriate human and financial resources.

Court proceedings.

The Hungarian Response to Terrorism: a "blank check" for the Government

MÉSZÁROS, GÁBOR

ABSTRACT *Terrorist attacks in recent years pointed out the ever-present debate of how it is possible for a constitutional democracy to response to terrorism. The attacks by the Islamic State (or earlier by the Al Khaida) made terrorism (terrorist attacks and terrorist threat as well) a reference point in the question of balancing between rule of law and security. This study discusses the issue of terrorism in a country which has not faced any terrorist attack in recent years. Therefore, the question is what was the legislative aim of amending the Fundamental Law of Hungary with a new emergency category "emergency response to terrorism". I will briefly demonstrate that it was a useless modification, which neither serves the principle of the rule of law nor means a better protection against terrorism.*

KEYWORDS *terrorism, terrorist threat, rule of law, legality, blank check, abusive power, constitutional morality*

1. The problem with terrorism in constitutional democracies

In this part I will try to clarify the possible solutions available for constitutional democracies in an age of terrorism. What kind of measures should these countries take to effectively balance between security and the rule of law and legality? According to Ulrich Sieber, the new forms of political changes such as terrorism lead to the result that the traditional criminal law cannot cope with the safeguard of liberty and security either.[1] Therefore there are two strategies in the reform of the law, on the one hand to reduce the traditional guarantees such as due process, on the other hand it is also possible to supplement or replace criminal law with other legal instruments.[2] When constitutional democracies face the threat of terrorism, there are at least two contrary values which should be taken into consideration: firstly the rule of law and other con-

[1] Ulrich Sieber, "Blurring the Categories of Criminal Law and the Law of War: Efforts and Effects in the Pursuit of Internal and External Security," in *The Rule of Law and Terrorism*, ed. Petra Bárd (Budapest: HVG-ORAC, 2015), 25.

[2] Sieber, "Blurring the Categories of Criminal Law," 25.

stitutional values which have to be preserved (such as human rights, checks and balances etc.) in the long-term and secondly, the security of the state and the nation as a whole.

1.1 Possible responses to terrorism: a State of Emergency scheme?

András Sajó[3] offers a more complex solution than the above-mentioned author, meanwhile he makes a categorization with seven various grades. He says that when a democratic state faces a threat of some kind of disaster such as terrorism, there are the following possible constitutional responses to apply: There is the "business as usual" model, the framework of which is also used by Oren Gross, and can be described as a model, in which "*ordinary legal rules and norms continue to be followed strictly with no substantive change even in times of emergency and crisis.*"[4] The second category is the "times of stress"[5] model, in which we can find counter-terrorism measures within the ordinary law. This model is very close to the "models of accommodation model" – also used by Gross –, which accepts that the ordinary legal system is "*kept intact as much as possible*" but "*some exceptional adjustments are introduced to accommodate exigency.*"[6] According to Sajó, the next category is Militant Democracy, which means that the "*rule creates the opportunity for the deformation of democracy and the imposition of a concept of the good life that does not allow for alternative forms and autonomous definition of the good life. Within the framework of the democratic process, using the mechanisms of democracy (free speech, assembly, elections), a regime may be established that dissolves democracy.*"[7] In the modern era this kind of regime is understood mostly as a fight against extremism in a regular democratic order. The most common example in Europe is the fight of West-Germany against terrorism after World War 2.[8] Sajó's fourth category is the preventive state, the

[3] See András Sajó, "From Militant Democracy to the Preventive State?" in *The Rule of Law and Terrorism*, ed. Petra Bárd (Budapest: HVG-ORAC, 2015), 69-71.

[4] Oren Gross, "Chaos and Rules: Should Responses to Violent Crisis Always Be Constitutional?" *Yale Law Journal* 112 (2003): 1021.

[5] Sajó cited Michel Rosenfeld's work: Michel Rosenfeld, "Judicial Balancing in Times of Stress: Comparing Diverse Approaches to the War on Terror," *Cardozo Law Review* 27 (2006): 2085.

[6] Gross, "Chaos and Rules," 1058.

[7] Sajó, "From Militant Democracy," 73.

[8] This occasion is well documented in: Karrin Hanshew, *Terror and Democracy in West Germany* (Cambridge: Cambridge University Press, 2012) see also Karrin Hanshew, "Sympathy for the Devil? The West German left and the challenge of terrorism," *Contemporary European History* 21 (2012).

aim of which is to use strict preventive measures, mainly regulative ones to prevent the state from possible terrorist attacks.[9] He also offers the so-called "counter-terror state" category,[10] which is a mixed regime and follows the logic of militant democracy. In this regime the state intends to preserve certain fundamental rights in a way that these rights are stinted of the people who are believed to challenge the stability of the democratic order and system. However, this model also contains a huge risk of unconstitutional discriminatory measures, as we have seen in the decision of Korematsu v. United States.[11] The next category is "war", which means that all war powers may be used. Finally, there is the possibility that the threat of terrorism leads to a state of emergency.

Concerning the possible response to terrorism, I also refer to Bruce Ackerman who stated that the "War on Terrorism" rhetoric is simply a tool in the hand of the president in order to "*fight real wars against countries*."[12] He made it clear that "terrorism" is the label used for a technique which covers "*intentional attacks on innocent civilians*."[13] He also mentioned that a war is not a technical matter, but it is a "*life-and-death struggle against a particular enemy*."[14] Ackerman also added that terrorism is not a crime and confuted that the criminal law is not suitable for dealing with the problem.[15] He made it clear that a possible second terrorist attack could occur after the first one (on 11th September of 2001), but where and when it would happen was very uncertain. Thus, within the normal law mechanism it is not allowed to apply temporary definitions. It is unacceptable in a constitutional democracy to use temporary "extra-legal" measures, the extent of which is barely limited.[16] Ackerman asserted that the possible solution against terrorist-threat should be the use of the state of emergency, which is temporary and serves as a third option in addition to war and crime.[17] In his view even the judiciary has an im-

[9] Sajó, "From Militant Democracy," 77-80.
[10] Ibid. 80-84.
[11] *Korematsu v United States*, 323 U.S. 214 (1944). In this case the Supreme Court of the United States accepted that extreme situations shall legitimate extra-legal and in a normal law sense unconstitutional measures. Therefore the court accepted that "*if the military commander believes that people of Japanese ancestry will collaborate with the Japanese, assuming the Japanese troops reach the west coast, then people of Japanese ancestry are dangerous.*" See Sajó, "From militant …," 82.
[12] Bruce Ackerman, *Before the next attack: preserving civil liberties in an age of terrorism* (New Haven – London: Yale University Press, 2006), 15.
[13] Ibid. 13.
[14] Ibid.
[15] Ibid, 39.
[16] See in details: ibid. 39-57.
[17] Ibid. 58.

portant role in balancing between security and human rights, although judges cannot themselves construct a sui generis emergency regime.[18]

I accept the viewpoint that terrorist attacks can lead to the state of emergency but I must admit that I also accept the application of criminal law measures against terrorism. In this article I will focus on the Hungarian response to the threat of terrorism, however I will demonstrate that the relevant "Emergency Constitution" rules of the Fundamental Law should not have been amended in the way the Hungarian legislators did it. Before explicating my qualm about the new rules of the Fundamental Law, I will briefly present how it is possible to handle emergencies in a constitutional democracy. This also means that in the following I will accept Ackerman's viewpoint about the link between terrorism and the state of emergency.

1.2 Emergencies and the rule of law: the internal - external debate

According to the German theorist Carl Schmitt, "*the sovereign is he who decides on the state of exception.*"[19] This definition reflects on the decision and even more on the exception and the normality dichotomy. According to Hussain, this concept of exception is in relation with the state of emergency on the basis of the political and economic crisis in the 1930s in Germany. Therefore, Schmitt tries to resolve these perils relating to the state by requiring the suspension of regular law.[20] According to Sarat, Giorgio Agamben also states that "*sovereignty is the power to decide on an exception and remove a subject from the ... law*."[21] This approach – which is called decisionist – prefers a sovereign decision against norms; and Agamben calls this exception a "kind of exclusion". Moreover, "*what is excluded in the exception maintains itself in relation to the rule in the form of the rule's suspension.*"[22] In his later work Agamben tries to specify the nature of the state of emergency which he calls " *zone of indifference.*" With his definition Agamben contradicts the internal/ external opposition theories in relation with the state of exception and focuses

[18] Bruce Ackerman, "The Emergency Constitution", *Faculty Scholarship Series* 121 (2004): 1066.

[19] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Cambridge: MIT Press, 2005), 5.

[20] Nasser Hussein, "Thresholds: Sovereignty and the Sacred," *Law and Society Review* 34 (2000): 495.

[21] Austin Sarat, "Introduction: Toward New Conceptions of the Relationship of Law and Sovereignty under Conditions of Emergency," in *Sovereignty, Emergency, Legality*, ed. Austin Sarat (Cambridge: Cambridge University Press, 2013), 2.

[22] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1998), 17-18.

rather on the characteristics of norms, judicial order and suspension. In his view the state of emergency (or state of exception, as he calls it) is "*neither external nor internal to the juridical order ... The suspension of the norm does not mean its abolition, and the zone of anomie that it establishes is not (or at least claims not to be) unrelated to the juridical order.*"[23]

In the above-mentioned concepts, the state of emergency means the suspension of the rule of law. On this decisionist basis, Oren Gross emphasizes that it is necessary for the authority to secede from the legal order if a particular case necessitates it.[24] Gross's model also contains the assumption that a rule continues to apply in general, therefore "*rule departure constitutes ... a violation of the relevant legal rule.*"[25] as a consequence, it is up to the people to *ex post* ratify the authority's extra-legal actions or punish them for any illegal conduct. This *ex post* prosecution adds some kind of legality to this "extra-legal measures model."

Others, such as Dicey and Dyzenhaus emphasize the relevance of the rule of law even in time of emergency. According to Dicey, the state of emergency ("martial law") "*means the suspension of ordinary law and the temporary government of a country or parts of it by military tribunals is unknown...*". According to the constitution, "Declaration of the State of Siege" is unknown, and that is why he offers the notion of "*permanent supremacy of law*"[26] in times of emergency as well. On this theoretical ground David Dyzenhaus queries the decisionist approach – which tries to define who decides on what in a state of emergency, or more precisely: who decides on fundamental issues of legality – upon the hypothesis that the crucial question of legal order is not the location of this above-mentioned power, but rather its quality as a legal order, through which the "*government exercises its power in accordance with law, in accordance, that is, with the rule of law or legality.*"[27] In his interpretation the responses to emergencies should also be governed by the rule of law, and in this relation the rule of law is nothing more than the rule of fundamental constitutional principles which protect individuals from the state's arbitrary action. He accepts, however that in a time of emergency democracies have

[23] Giorgio Agamben, *State of Exception* (Chicago-London: University of Chicago Press, 2005), 23.

[24] Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis – Emergency powers in theory and practice* (Cambridge: Cambridge University Press, 2006).

[25] Oren Gross, "Stability and flexibility: A Dicey business," in *Global Anti-Terrorism Law and Policy*, eds. Victor V. Ramraj and Michael Hor and Kent Roach (Cambridge: Cambridge University Press, 2005), 92.

[26] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Indianapolis: Liberty Classics, 1982), 182-183.

[27] David Dyzenhaus, "The "Organic Law" of Ex Parte Milligan," in *Sovereignty, Emergency, Legality*, ed. Austin Sarat (Cambridge: Cambridge University Press, 2013), 22.

to suspend individual rights in order to preserve themselves, but he also adds that in our modern era there are several emergencies (such as terrorism) which have no foreseeable end, and therefore they are permanent.[28] For those who are troubled with the trend that a state of emergency and therefore emergency powers could last for an uncertain period, he offers the rule of law project which contains the cooperation of the legislative and the executive power and a significant role is given to the judges. He also mentions that the rule of law means more than formal or procedural principles, which could be regulated in the constitution, and which only protect the rights concerning the manner of decision making. The rule of law principles "*do constrain the decisions of those who wield public power that protects the interests of individual subject of those decisions*."[29] This concept of the rule of law in relation to the state of emergency reflects the moral resource of law or the internal morality of law.[30] Taking everything into consideration, there is a very important task for judges in maintaining the rule of law. Although they "*cannot restrain power when it is in wrong hands*" but they have to "*carry out their duty to uphold the rule of law. If they fail to carry out their duty, they will also fail to clarify to the people what constitutes responsible government - government in compliance with the rule of law*."[31]

To summarize the above mentioned theories: there are two endpoints of the emergency theory. On the one hand, when a state deals with an emergency, it might use illegal – or I would prefer the term "extra-legal" – measures, so it is evident that the rule of law does not have a full impact on emergency policies. On the other hand, there is the nearly ultimate power of legality, and in this case the rule of law has its effect on emergency policies, practically due to the effective judicial review. The problem with this standpoint is that if on the one hand there is an ultimate judicial review power, on the other hand effective state self-defence and security might be sacrificed. Considering, for example, that a broad judicial review can entail belated emergency measures as well, in this way the state cannot fight against the emergency effectively.

Before finishing this summary I must admit that another important aspect might possibly represent the core issue of the first standpoint. If we accept that there is a constitutional authority entitled to use the law itself to suspend law,

[28] David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006)

[29] See ibid. 3.

[30] Jon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969). About this idea see also: Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge: Harvard University Press, 1996), 33-34 and Ronald Dworkin, *Justice for Hedgehogs* (Cambridge: Harvard University Press, 2013), 400-415.

[31] See Dyzenhaus, The Constitution of Law, 65.

and in this way we create an exceptional regime besides or upon the ordinary legal order – according to Dyzenhaus it means a legal black hole[32] –, we claim that responses to an emergency give rise to a dualist legal order: one which responds to normal situation, and the "emergency law" which responds to exceptional situations.[33]

2. The Hungarian response to terrorism, without terrorism

The Fundamental Law of Hungary created a sui generis state of emergency chapter, under the title Special Legal Orders, which contains Articles concerning the state of national crisis, state of emergency, state of preventive defence, and state of danger and unforeseen intrusion. Article 54 of the Fundamental Law also represents the common rules relating to special legal orders such as the possibility for the suspension or restriction of fundamental rights beyond the extent of the standards of ordinary law. This Article also contains special guarantees such as the prohibition of the suspension of the Fundamental Law and other temporary restrictions. Although the Fundamental Law has a visibly unified emergency power system, in 2015 the Hungarian Parliament – in cooperation with the government – started a countrywide campaign against mass migration and finally amended the Constitution integrating the new "Emergency Response to Terrorism" rules into it.[34]

2.1 The background to constitutional amendments

Before the new terrorism state of emergency (called Emergency Response to Terrorism) the Hungarian Parliament used ordinary legislation, which contained extra-legal measures in order to deal with the so-called emergencies such as the newly arising "mass migration crisis," which is not listed among the relevant rules of the Fundamental Law. Because of this so-called refugee crisis the Hungarian Parliament adopted two acts on 4 and 21 September 2015[35] which authorize the National Assembly to proclaim "emergency caused by immigration", without using the emergency mechanism of the Fundamental Law. As a consequence, a lot of emergency restrictions could be

[32] Ibid. 196-220.
[33] John Ferejohn and Pasquale Pasquino, "The Law of the Exception: A Typology of Emergency Powers," *International Journal of Constitutional Law* 2 (2004): 231.
[34] About the measures see: Kriszta Kovács, "Hungary's Struggle: In a Permanent State of Exception," *VerfBlog*, Marc 17, 2016,
http://verfassungsblog.de/hungarys-struggle-in-a-permanent-state-of-exception/.
[35] The Act CXL of 2015 and the Act CXLII of 2015.

used without constitutional guarantees. As I have previously stated in another study,[36] the state of emergency started to leak into the regular constitutional order. This solution from the legislator created a legal grey hole[37] in the Hungarian constitutional system. The government stated that it is a sufficient means to gain a broader vent to manoeuvre in order to manage the massive immigration crisis. Therefore "emergency caused by immigration" made the use of emergency measures possible without being dependent on the Special Legal Order of the Fundamental Law.

With the above-mentioned two acts the Hungarian Parliament also amended Act LXXX of 2007 on Asylum by creating the rules of the "Mass Immigration Crisis" (Section 80/A.), the "Temporary Appropriation Applicable During a State of Mass Immigration Crisis" (Section 80/B-80/C) and "Other Regulatory Actions Applicable During a State of Mass Immigration Crisis" (Section 80/D-80/G). It is useless to show all the sections in detail, but I have to emphasize Section 80/A which made it clear that the Government could declare the State of Mass Immigration by way of a decree on the recommendation of the Minister responsible for aliens policing on asylum matters, upon the initiative of the National Commander of the Police and the head of the refugee authority. The state of mass immigration crisis may be declared to cover the entire territory of Hungary, or specific parts of Hungary when the following conditions are fulfilled: the number of asylum-seekers entering Hungary exceeds five hundred people a day on the monthly average, seven hundred and fifty a day on the average of two consecutive weeks, or eight hundred a day on a weekly average. It is also possible to declare this kind of "state of emergency" if the number of persons in the transit zones of Hungary, except for the persons participating in providing care for the aliens, exceeds one thousand a day on the monthly average, one thousand and five hundred a day on the average of two consecutive weeks, or one thousand and six hundred a day on a weekly average. Apart from the above-mentioned cases it is also possible to declare the state of emergency when in any municipality any immigration-related situation arises that may represent a direct threat against public security, public safety or public health in that community, in particular, if a riot or similar disorder breaks out in the community or in a reception centre located in the immediate vicinity of that community, or in any other facility for the accommodation of aliens, or if any violent acts are committed.

Although these criteria were not fulfilled, the Hungarian Government extended the state of emergency for the whole country by no. 41/2016. Governmental Decree of 9th March 2016, which was extended until March 8 2017 by

[36] Gábor Mészáros, "Egy „menekültcsomag" veszélyei," [The Risks of an "Immigration Enactment,"] *Fundamentum* 2-3. (2015): 107-119.

[37] The legal grey and legal black hole phrases are used by David Dyzenhaus. See: Dyzenhaus, The Constitution of Law.

no. 272/2016. Governmental Decree of 5th September. Through the website of the Hungarian Police everyone can follow the relevant data of "captured immigrants" during the recent months.[38] If we check the website it is evident that for example in September 2016 the number did not exceed the 25 persons a day (except for one day: 9th September with the daily number of 28 persons) which means that when the Government extended the "emergency caused by immigration", the conditions for the statute were not fulfilled. The more serious problem with this so-called state of emergency is that we can hardly find any legal remedies involved in the process, in comparison for example with the Article on Special Legal Order in the Fundamental Law of Hungary.[39]

Although the Hungarian Constitution also included five instances (state of national crisis, state of emergency, state of war, state of preventive defence and unexpected attack), in 2016 the Hungarian Government initiated a constitutional amendment "*to widen the scope of constitutional emergency powers*".[40] Not to mention the referendum – called by the government after it became clear that they could not have the desired and proposed Amendment of the Constitution on the EU relocation quota be amended. This new Amendment intended to implement the "state of terrorist threat" in the Fundamental law which would entitle the government to declare the state of terrorist threat after a terrorist attack or during a period of a high threat of terrorism. In this case, the government would pass decrees that would suspend certain laws or deviate from certain laws, and it would also introduce other extraordinary measures. Although the decrees would remain effective for sixty days it would be possible for the Parliament to extend them before the sixty days expires. It would also be possible to deploy the army in order to assist the police and the national security guard.[41] After the government could not have this proposal be adopted, the story did not end. With some modifications (for example: the government would not declare the state of terrorist threat on their own, therefore would not decide on the emergence of a threat and select the relevant measures for response etc.), the Hungarian Parliament finally adopted the proposal for the modification of the Fundamental Law of Hungary, which became effective on 1st July 2016. The question is: whether there are any legal arguments behind the 6th Amendment.

[38] http://www.police.hu/hirek-es-informaciok/hatarinfo/elfogott-migransok-szama-lekerdezes.

[39] Judit Tóth, "… A hazájukat elhagyni kényszerülők emberi jogainak és alapvető szabadságainak védelmére," ["For the purpose of the protection of the human rights and fundamental freedoms of displaced persons,"] *Fundamentum* 4. (2015): 63.

[40] Kovács, "Hungary's Struggle,"

[41] Ibid.

2.2 Do we need the "Emergency Response to Terrorism" in our Constitution?[42]

In this part of the study I will try to figure out the very important issue whether there are any legal or constitutional legal foundations of the "Emergency Response to Terrorism" rules. According to Ádám Ságvári it is very atypical in the European constitutional dimension to substantiate a standalone constitutional scheme solely for the threat of terrorism and terrorist attacks.[43] According to the new rules in "*the event of a major and imminent threat of terrorist attacks, or following a terrorist attack, Parliament shall declare a state of emergency response to terrorism and simultaneously authorize the Government to introduce the emergency measures specified in a cardinal law. The duration of the state of emergency response to terrorism may be extended."*[44] I accept that the new threat did not make the amendment of the Fundamental Law necessary, but I have to confirm this affirmation with a brief analysis related to the relevant regulation of the Fundamental Law. As I have already mentioned before, it is possible for a state to observe the rules of regular legal order when a terrorist attack occurs. However, there is the possibility that the ordinary legal regulation is unable to cope with the situation with the granted legal resources. Therefore theoretically I accept that it is possible for a state facing terrorist attacks (or even threats) to use extra-legal measures. Nevertheless I must accept that the new constitutional regulation was totally unnecessary, especially if we consider the "State of Emergency" which is also regulated in the Constitution.

According to the Fundamental Law the "*Parliament shall declare a state of emergency in the event of armed actions aimed at undermining law and order or at seizing exclusive control of power, or in the event of grave acts of violence committed by force of arms or by armed groups which gravely endanger the lives and property of citizens on a mass scale.*"[45] I will argue in the following that it is possible to interpret the text "*in the event of armed actions*

[42] In this part of my study – mainly because of length restrictions – I only focus on the constitutional matters of the new regulations, therefore I will skip the analysis of the possible response to terrorism in relation to administrative law and EU law matters. For the latter see in details: Judit Tóth, "Counter-Terrorism or Anti-Terrorism in the Area of Freedom, Security and Justice without Liberty," in *The Rule of Law and Terrorism*, ed. Petra Bárd (Budapest: HVG-ORAC, 2015), 206-227.

[43] Ádám Ságvári, "Különleges jogrenddel a terror ellen – kitekintés az európai gyakorlatra," ['With Special Legal Order against Terrorism – an Outlook to the European Practice,"] *jtiblog*, February 15, 2016, http://jog.tk.mta.hu/blog/2016/02/kulonleges-jogrenddel-a-terror-ellen.

[44] First paragraph of Article 51/A of the Fundamental Law of Hungary

[45] First paragraph, point b) of Article 48 of the Fundamental Law of Hungary

aimed at undermining law and order or at seizing exclusive control of power, or in the event of grave acts of violence" of the Article in context of a potential terrorist attack, but in that case the Criminal Law appears to be ineffective. In order to answer the question, whether the Hungarian "State of Emergency" is eligible to handle a terrorist threat and terrorist attack, it is inevitable to briefly define the most relevant aspects of "terrorism." According to Jonathan Baker there are three common basic elements of all concepts of terrorism. First of all, terrorism always means some kind of violence or the threat of it. Secondly we could find political motivations and reasons behind the acts. Thirdly terrorist attacks always endanger the security of the citizens and their property.[46] According to the state of affairs of the "State of Emergency" in the Fundamental Law, it is possible to use this scheme if it is needed because of a terrorist attack. The reasons are the following: terrorist attacks are of any violent nature, it is possible to recognize the political motivation behind the acts and they gravely endanger the lives and property of citizens on a mass scale. All of these features correspond with the text of "State of Emergency."

Before stating that the regulation of "State of Emergency" in the Fundamental Law is also useful in a grave terrorist "crisis", I have to guess the meaning of "armed actions" which is a basic element in the regulation. The Fundamental Law does not explain the meaning of the notion, therefore there is no other choice than to use the relevant terminology of the Hungarian Criminal Code. According to this, armed action (in the English translation of the Criminal Law: assault by displaying a deadly weapon), shall mean that the perpetrator carries a firearm, explosives, blasting agents, an equipment or device specially designed to initiate explosions or displays a replica or imitation of the weapons referred to, in a threatening manner.[47] This enumeration is mainly equivalent with the modus operandi of a terrorist attack. To summarize what was said before I think that the "terrorist attack" element of the "Emergency Response to Terrorism" is equivalent with the "State of Emergency's" "*event of armed actions aimed at undermining law and order or at seizing exclusive control of power, or in the event of grave acts of violence committed by force of arms or by armed groups which gravely endanger the lives and property of citizens on a mass scale"* definition. This one constructs the easier aspect of the legal problem, but there are more serious constitutional qualms if we take the "*major and imminent threat of terrorist attacks*" into consideration.

The above-mentioned definition could be very dangerous if we take notice of the rather uncertain conceptual scheme of terrorism in the political/social science. It is not easy to define the notion of "threat of terrorism," and the Fundamental Law also forgot to do it, although the threat of terrorism is the main, conceptual element of the text. According to the Fundamental Law, the Parlia-

[46] Jonathan Barker, *A terrorizmus* (Budapest: Hvg, 2003), 26.

[47] Section 459, Paragraph (1) and point 5 of Act C of 2012 on the Criminal Code

ment shall declare a state of emergency response to terrorism, but it is made possible only when the Government initiates it.[48] After this action the Government shall have the power to introduce measures by way of derogation from the acts governing the administrative system and the operation of the Hungarian Armed Forces, law enforcement agencies and national security services, including measures laid down by cardinal law, and shall keep the President of the Republic and the competent standing committees of Parliament informed thereof on an ongoing basis.[49] Although the Fundamental Law makes it clear that the measures shall remain in force until the decision of Parliament on the declaration of a state of emergency response to terrorism, or in any case for no longer than fifteen days, I do not think this guarantee is sufficient to prevent the constitutional democracy from abusive measures. I asserted before that conceptual uncertainty is the main problem of the "Emergency Response to Terrorism." I also think that the Government can easily take advantage of the fact that fear, panic, urgency and necessity can lead to the acceptance of the possible restrictions to reach the supposed security.[50] That is why I agree with the panic thesis which argues that "*fear causes decision makers to exaggerate threats and neglect civil liberties and similar values, expanding decision makers' constitutional powers will result in bad policy. Any gains to national security would be minimal, and the losses to civil liberties would be great.*"[51] In accordance with the panic thesis and because of the fact that one could hardly have an impact on the "threat of terrorism" in an objective legal framework, the regulation makes it possible for the Government to use exceptional

[48] First paragraph of Article 51/A of the Fundamental Law of Hungary

[49] Third paragraph of Article 51/A of the Fundamental Law of Hungary

[50] About the relation of emergencies political necessity and the important role of the "time" in these situations see: Leonard C. Feldman, "The Banality of Emergency: On the Time and Space of "Political Necessity"," in *Sovereignty, Emergency, Legality*, ed. Austin Sarat (Cambridge: Cambridge University Press, 2010), 136-164.

[51] Eric A. Posner and Adrian Vermeule, *Terror in the Balance – Security, Liberty, and the Courts* (Oxford: Oxford University Press, 2007), 59. I also would like to clarify that the authors rejected the thesis because they think that fear does not play a negative role in decision making, or even if we accept the contrary they say that it is doubtful whether it has much influence on policy during emergencies (or at least has more influence on policy during emergencies than in normal times). They also asserted that if we accept that fear does play a negative role in decision making and does play a greater role during emergencies than in normal times, it is very doubtful whether "*these effects could be mitigated, at an acceptable cost to national security*." Finally they concluded that even if it plays a greater negative role during emergencies, it does not have a "*pro-security valence*," because fear could lead to "*libertarian panics as well as security panics*." The libertarian panic means the risk that "*the spectre of authoritarianism will constrain government's ability to adopt cost-justified security measures.*" Posner and Vermeule, *Terror,* 39.

powers for at least fifteen days, with the possibility to "extend" this power if the Parliament does not accept these measures. And how could it be possible? Without a strict legal framework, it is a "child's play" for the Government to give the "threat of terrorism" a sui generis meaning and use it as a "blank check"[52] whenever it wants.

3. Summary

Although in this brief article I mainly focused on legal and constitutional matters related to the Hungarian response to the "never seen Hungarian terrorism," it is very difficult to distinguish my conclusions from political matters. My starting point is the governmental concept that "*All the terrorists are basically migrants*", which was said by the Hungarian Prime Minister,[53] and according to the government it means that terrorism is a real threat and it creates a present danger for the country, therefore we must act quickly and effectively. If we accept this theoretical background it is not easy to prove that the Hungarian government needed a new emergency institution to defend the people when a possible terrorist attack occurs. I also asserted that the existing scheme of the "State of Emergency" in the Fundamental Law is sufficient in case the country should face grave terrorist attacks. However, the new "Emergency Response to Terrorism" is not only a second possible option for this jeopardy, because the regulation contains the concept of "threat of terrorism" which as I mentioned before is solely a blank check in the hands of the Government. With this "tool" the executive has the possibility to use exceptional powers for a duration of fifteen days, but it can be used abusively again and again as well. In times of national emergency it is possible for the government to strike the balance, but in balancing between security and liberty it also very important to be aware of the principle of the rule of law. If the constitution makes it possible for the executive branch to use exceptional emergency powers again and again, the model cannot comply with this requirement. In emergencies the constitutional institutions may also require special measures such as derogation from human rights commitments and also contain procedural guarantees which I call formal conditions. Besides this there are also material conditions – or referring to Dicey we could also use the term "constitutional morality"[54] – which consist maxims or practices such as the rule of law. The rule of law – according to Dicey – means the absolute supremacy of regular law "*as opposed to the influence of arbitrary power, and excludes the existence of arbi-*

[52] See for example Justice Sandra O'Connor declaration in the Supreme Court of the United States' decision of *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004).
[53] Kovács, "Hungary's Struggle,"
[54] Dicey, *Introduction to the*, cxli.

trariness," and the equality before the law and finally this formula "*expressing the fact that with us the law of the constitution ... are not the source but the consequence of the rights of individuals.*"[55] The material conditions include both positive law and constitutional principles and serve the same interest. Therefore if a "*legal order that observed the formal criteria of legality but which contained no positive law or other material protections of liberty would be a very odd thing, so odd that even its formal claim to be legal order would be doubtful.*"[56] If a regulation makes it possible for one branch of power to use the exceptional powers abusively the rule is odd and cannot comply with the principle of legality and the rule of law.

[55] Dicey, *Introduction to the*, 121.
[56] Dyzenhaus, "The "Organic Law"," 57.

Organised cybercrime groups and their illicit online activities

Mezei, Kitti – Nagy, Zoltán

Abstract *Our everyday lives and business transactions happen online, so too does criminal activity – more than one million people worldwide become victims of cybercrime every day. Online criminal activity ranges from selling stolen credit cards for as little as one euro, through identity-theft and child sexual abuse, to serious cyberattacks against institutions and infrastructure. Cybercrime has become a big profit-driven illegal and service-based industry. It has developed the Crime-as-a-Service business model, which provides a wide range of services such as rental botnets, denial-of-service attacks and malware development. The disadvantage of the technology development is that criminals may exploit and take advantage of modern technology for their own criminal acts. The structure of organised criminal groups is that they represent a flexible network formed by high-skilled, multi-faceted cybercriminals. They plan, organize and commit numerous cybercrimes and set up online criminal networks, which operate on a "stand alone" basis. The individual cybercriminals can be as organized, as well resourced, and as successful as many organizations.*

The present paper analyses the following:

- Cybercriminals and cybercrime groups;
- Online criminal communication and black markets;
- Dos and DDoS attacks;
- Illegal online gambling;
- Online child sexual exploitation;
- Online money laundering.

Keywords *cybercrime, Darknet, DDoS attack, child sexual exploitation, illegal online gambling, money laundering*

1. Introduction

The Internet has become an integral and indispensable part of our society and economy. People connect with each other and the world through online social networks on a daily basis, and approximately USD $8 trillion changes hands globally each year in e-commerce. Our everyday lives and business

transactions happen online, so too does criminal activity - more than one million people worldwide become victims of cybercrime every day. Online criminal activity ranges from selling stolen credit cards for as little as one euro, through identity-theft and child sexual abuse, to serious cyberattacks against institutions and infrastructure. The disadvantage of the technology development is that criminals may exploit and take advantage of modern technology for their own criminal acts.[1]

First-of-all, the present paper examines criminal networks and their activities in cyberspace. Cybercrime has become a big profit-driven illegal and service-based industry. It has developed the *Crime-as-a-Service business model*, which provides a wide range of services such as rental botnets, denial-of-service attacks and malware development. It has also lured traditional organised crime groups into cybercrime areas since it offers high financial gain with low risk. Cybercriminal groups lack the structure and hierarchy of a traditional organised crime group.[2] "The most common view on the structure of organised criminal groups is that they represent a flexible network formed by high-skilled, multi-faceted cybercriminals."[3] They plan, organize and commit numerous cybercrimes and set up online criminal networks which operate on a "stand alone" basis. Their members rarely meet or keep physical contact in person with one another, only meeting online. The core members run generally the organization.[4]

Cybercriminals started to adapt legitimate business models and imitate the operations of big companies such as eBay, Yahoo, Google and Amazon. They provide the most value for their consumers, who are not victims, but tools that criminals use to commit different crimes.[5]

2. Cybercriminals and Cybercrime groups

It is important to note that individual cybercriminals can be as organized, as well resourced, and as successful as many organizations. For example, Albert Gonzalez is responsible for one of the biggest credit card frauds in history, while he launched his scams and attacks, he also worked as a government informant for the U.S. Secret Service. Over 18 months, Gonzalez stole 45.6

[1] Péter Papp, "Hi-tech bűnözés napjainkban," *Belügyi Szemle* 52. (2001): 5.
[2] Europol, Internet Organised Crime Threat Assessment (IOCTA) (2014), 9.
[3] Tatiana Tropina, "The evolving structure of online criminality: how cybercrime is getting organised," *eucrim 4*. (2012): 162.
[4] United Nations Interregional Crime and Justice Research Institute. "Cyber threats: issues and explanations." Accessed December 11, 2016, http://www.unicri.it/special_topics/securing_cyberspace/cyber_threats/explanations/.
[5] Tropina, „The evolving structure of online criminality: how cybercrime is getting organised," 158.

million credit and debit card numbers from TJX Companies Inc., and he was responsible in the Dave & Buster's hacking job, resulting in accessing 5,000 payment cards.[6]

We can distinguish two broad categories of cybercriminals: the non-professional ones who have little or no business and technical expertise therefore, they use "off-the-shelf" malware or crimeware kits.[7] They are generally the customers of the so-called *blackhat cybercriminals* with real expertise, who run it as a business. There are also other categories with different motivation and tools such as *hacktivists* who attack to gain attention for their social cause and not motivated by profit; *grayhats* offer online services which might be valuable for legitimate companies as well as for cybercriminals (e.g. spam promoting counterfeit goods or malicious payloads with phishing URLs or malware attachments); *state-sponsored groups* are motivated by national – and often economic - interests[8] (e.g. government sponsored Chinese organised cybercrime, e.g. they conduct surveillance and cyber espionage, gathering information for economic growth and competition).[9] The individual offenders may be motivated by personal ambition or boredom, while the organisations are more likely driven by profit.

After focusing on the categories of cybercriminals, we examine more thoroughly the cybercrime groups. McGuire suggested a typology of these groups, which comprises six types of group structure with three main groups. He emphasized that "these basic organizational patterns often cross-cut in highly fluid and confusing ways" and his typology is a "best guess" based on what we currently know about cybercriminals. It is likely to change as the digital environment evolves.[10]

The first group operates fundamentally online and are assessed via reputation in their virtual activities. It can be divided into two types. First, there are the *swarms* which are large collectives, disorganised organizations without leadership, typically consisting of ephemeral clusters of individuals, active in ideologically driven online activities such as hate crimes and political resis-

[6] Megan Penn, "Organized cyber crime: comparison of criminal groups in cyberspace". (2015) accessed February 05, 2017, http://www.cyberdefensereview.org/2015/04/07/organized-cyber-crime/.

[7] According to Microsoft, malware kits are software packages designed to gain unauthorized access to victims' computers. Examples include: exploit kits, banking Trojans, Remote Access Trojans (RATs), etc. Crimeware kits are software packages that aid in internet based attacks. Examples include: Bot management consoles, compromised account checkers, abuse account creators (aka spam accounts).

[8] Shawn Loveland, "Understanding cybercrime," Microsoft (2015), 3-4.

[9] Penn, "Organized cyber crime: comparison of criminal groups in cyberspace,"

[10] Michael McGuire, Organised Crime in the Digital Age. London: John Grieve Centre for Policing and Security.

tance (e.g. Anonymous has a swarm). Secondly, there are the so-called *hubs* which are more organised with a clear, central command structure and diverse online activities from botnets to online sexual offences. The distribution of scareware often involves hub-like groups.[11] The second type of group is called *'hybrid'* since it combines both online and offline activities. There are also two types within the hybrid one: the *clustered hybrid*, which operates as a small group and focuses on specific activities or methods and the *extended hybrid*, which is similar, but a lot less centralized. The third type of group operates mainly offline but take advantage of technology development to improve their offline activities. It can be subdivided into hierarchies which are traditional criminal groups, mafia crime families who continue their activities online such as pornography, online gambling, extortion and aggregates, which are loosely organised, temporary groups without a clear purpose sometimes, their operation is ad hoc.[12]

We have chosen the title carefully, since the paper analyses the problem fairly widely rather than only focusing on the Hungarian Criminal Code's concept of criminal organization.[13] We also deal with organised crime related acts which have some organised criminal characteristics.[14] Complex illicit operations, cybercrime infrastructure, the level of specialization through division of labour show the characteristics of organised cybercriminal activities in order to gain financial or other material benefits.[15] The following characteristics can be recognized in the online environment:

Committing a single crime is not a lucrative investment: legitimate and relatively bureaucratic actions are required: domain name requisition, web-hosting rental, later on the establishment of a foundation for money laundering, application for different permits which allow them to perform legal activities but cover other ones such as online gambling.

---

[11] According to Kaspersky Lab scareware is a malicious software that tricks computer users into visiting malware-infected websites.

[12] Roderic Broadhurst and Peter Grabosky and Mamoun Alazab and Steve Chon, "Organizations and Cyber crime: An Analysis of the Nature of Groups engaged in Cyber Crime," *International Journal of Cyber Criminology.* 8 no. 1 (January - June 2014): 5-7.

[13] According to the Hungarian Act C of 2012 on the Criminal Code: 'criminal organization' shall mean when a group of three or more persons collaborate in the long term to deliberately engage in an organised fashion in criminal acts which are punishable with five years of imprisonment or more.

[14] László Korinek, *Kriminológia II.* (Budapest: Magyar Közlöny Lap- **és** Könyvkiadó Kft., 2009), 338-339.

[15] Joana Nato, "Social Network Analysis and Organised Crime Investigation: Adequacy to Networks, Organised Cybercrime, Portuguese Framework Cybercrime," in *Organized Crime and Societal Responses* ed. Emilio C. Viano (2017), 186.

It also requires financial investments: the expense of Internet access and web hosting rental, the fee for making the website, the price of the programme for website mirroring or covering their TC/IP number.

Division of labour[16] is also necessary as it appears typically in the case of crimes committed by criminal groups. The division of labour between its members and their activity in the criminal organization is generally aimed to maximize profit.[17] In the case of organised cybercrime organizations, the increasing specialization of perpetrators is typical and the tasks are divided amongst its members.[18] The knowledge of information technology is manifold so as the expertise and the designated role of the cybercriminal group members, though some tasks might be outsourced.

Coders or programmers write the malware, other software tools and design or upload a website to commit the cybercrime. As regards designing a website, there are many websites, which make available templates free of charge or for money. These templates are simple and meet basic requirements, although specialized technical knowledge is needed to create more complex ones. Legitimate business associations may also design or upload websites, even provide web- hosting services. If the cover-up activities are legal (foundation, online gambling, sale of used belongings etc.), then they can make and upload the websites without consequences. Although they must be aware of the fact that if these activities or contents (pornography, paedophilia, drug distribution, illegal gambling etc.) are considered to be illicit, then they may become perpetrators or accomplices by uploading the website. Criminals generally do these for themselves.

Distributors or vendors trade and sell stolen data or illicit goods.

Technicians maintain the infrastructure and technologies such as servers, ISPs and encryption. The server provider of the Internet access and the contracting party with the web hosting service provider who rents it are two different persons generally. The Internet access: through a legitimate service provider or through a web hosting service. Afterwards, they might use tricks to hide the subscriber or his/her computer (server), for example, when the server crosses the Hungarian border (or overseas). It raises some jurisdiction

[16] The developed division of labour can be recognized in the case of other crimes. See: Réka Gyaraki, "Az on-line elkövetett szerzői vagy szerzői joghoz kapcsolódó jogok megsértésének bűncselekménye," *Infokommunikáció* és *jog* 41 no. 6 (2010): 220.

[17] Ágnes Balogh, "The definition of criminal organization and consequences of committing crime in the framework of a criminal organization under Hungarian criminal law," *Law Series of the Annals of the West University of Timisoara* (2015): 17.

[18] Tatiana Tropina, "The evolving structure of online criminality: how cybercrime is getting organised," 158.

United Nations Interregional Crime and Justice Research Institute. "Cyber threats: issues and explanations."

related questions. It is possible that the server is in Hungary, but its content is mirrored to another country's website. Mirroring is not a complex activity, though it requires some practice.[19] Anonymous or public proxy servers can be used to hide the real servers. These "pirate servers" can play a role in some activities and they are not able to provide continuous cover. In particular, there is the distorting proxy, which can be tricky since it shows a fake IP address for the host server. Proxy chaining, proxy to proxy for example makes it possible for us to appear in one of the Caribbean Islands. Its efficiency can be impaired by the decrease of bandwidth but it can offer continuous website availability.

Cashers control drop accounts and dispatch those names and accounts to other criminals for a fee also, they manage "money mules". *Money mules* are used to transport and launder stolen money or merchandise. Tellers assist in transferring and laundering money through digital currency services and between different national currencies.

Executives select the potential victims, recruit members and also assign members to the above tasks, they are in charge of the management of the organization.[20]

Cybercrimes are deemed to be committed on a commercial scale since cybercriminals are engaged in criminal activities of the same or similar character to generate profits on a regular basis. The profit might be gained by selling illegal contents or services, or using extortion with DoS or DDoS attacks. Cybercrime industry intends to meet forbidden needs. As Mihály Tóth stated about the notion of criminal organization, it is "continuous, business-like criminal conspiracy",[21] which is also suitable for the modern cybercrime industry.

3. Online criminal communication and black markets

Organised criminal groups can use hidden networks for communication. The hacker legend Kevin Mitnick[22] presents a case in his book: an unknown person persuaded a boaster young man to get the student database of the Chinese engineering university, then to obtain the description of Boeings' safety

[19] The most popular mirroring applications are the following: Teleport Pro, Wget, WebWhacker or Webcopier. Cybercriminals prefer the registry free ones.

[20] Broadhurst et al., "Organizations and Cyber crime: An Analysis of the Nature of Groups engaged in Cyber Crime," 7.

[21] Mihály Tóth, „A bűnszervezet környéke," *Jogtudományi Közlöny*. (1997): 507.

[22] Kevin Mitnick (1963-) spent 5 years in prison due to different committed cybercrimes. He hacked the most well-known and protected IT networks and gained thousands of clients' data. Today he has his own IT security venture with significant references. He published two books: "The art of deception" (Perfect, 2003) and "The art of intrusion" (Perfekt, 2006).

technology systems from Lockheed Martin, which means basically he made him hack these information systems for these documents and after the assignment the principal became unavailable. The young hacker realized what he had done only after he heard about the hijacked Indian Boeing. The police of the United States of America found the connection between the hijacking and the hacker's activity so they caught him.[23] This method is suitable for the recruitment of people with specialized expertise. Web-based chatrooms and open forums or forums within *the Deep Web or Darknet* are ideal places for communication. The most popular English speaking criminal forum, Darkode was taken down by law enforcement in 2015 and there has not been any notable replacement so far. Two types of communication can be distinguished in relation to criminal communications: *criminal-to-criminal (C2C)* and *criminal-to-victim (C2V)*. The key to C2C communication is security and anonymization while to C2V communications it is accessibility, the ability to contact potential or targeted victims more easily, for example in this case e-mail is the simplest way and in addition to that applications are widely used such as Skype, Facebook Messenger, WhatsApp and Viber, which can be used for sending spams, social engineering, phishing etc.[24]

Most people generally use the searchable *Surface Web* – which represents a small portion of the Web – by standard engines such as Google via regular browsers. The biggest part of the Web is the so-called Deep Web – approximately 400-500 times more massive than Surface Web – and *Peer-to-Peer* (P2P) networks such as TOR, I2P and Freenet, which are often referred to as Darknet belongs to it. To access both, users need to use special search engines, which can be accessed from a TOR browser. Darknet – besides communication, – has increasingly been used for online trades, exchanging information, file sharing and transferring in recent years and its marketplaces offer worldwide access and distribution of illicit products and services (e.g. weapons, compromised data or illegal pharmaceuticals and chemicals etc.). The most well-known online black market was *Silk Road* – as an illegal version of Amazon or eBay –, which aimed to connect sellers of items ranging from drugs to assassinations-for-hire with eager customers with money to burn, though most of the hidden services relate primarily to drugs.[25] Transactions are anonymous due to the use of the *anonymization* solutions and payments are made with a so-called cryptocurrency known as *Bitcoin*, which is a purely digital, un-

[23] Kevin Mitnick and William L. Simon, *A behatolás művészete.* (Budapest: Perfekt kiadó, 2006), 27-59.

[24] Europol, IOCTA (2016), 45-46.

[25] Daniel Sui and James Caverlee and Dakota Rudesill, "The Deep Web and the Darknet, a look inside the Internet's massive black box" (2015), 5-17. Europol, IOCTA (2016), 47.

traceable means of payment posing constant challenges for law enforcement.[26] After the Silk Road's close-down some other popular black markets sprang up such as Agora and Nucleus, but eventually, all major markets went offline within a 12-month period highlighting the inherent volatility of the online black market economy.[27]

4. DoS and DDoS attacks

Organised crime uses capable opportunities for destructive attacks,[28] instead of viruses malwares which might cause serious damages in databases and software or a website defacement. First we focus on a modern crime, *extortion* on information technology networks. It is not a new phenomenon because in the early '90s Lewis Popp already sent infected discs with a virus about the medical development of curing AIDS and it activated itself after 90 days unless the unsuspecting user bought an antivirus disc for money.[29] An increasingly popular motivation for DDoS attacks is extortion, by which a cybercriminal demands money in exchange for stopping or not carrying out the attack.

During troubleshooting they send some short packets (ping) to check the connection to the host computer, which has to respond to it. They use this technical solution in the case of so-called *denial of service* or *distributed denial of service attacks (DoS or DDoS).* The attacked system receives a large volume of data packets and it cannot respond to them, which means generally sending packets as fast as possible without waiting for replies. The server is overloaded and waits for the client computer's confirmative respond in vain. The differences between DoS and DDoS are substantial. In a DoS attack, a perpetrator uses a single Internet connection to either exploit software vulnerability or flood a target with fake requests. The aim of the assault is typically to exhaust server resources (e.g., RAM and CPU). DoS attacks are either large in magnitude or long in duration, but typically not both.[30] On the other hand, DDoS attacks are different since they are launched from multiple connected

[26] Eric Jardine, "The Dark Web Dilemma - Tor, Anonymity and Online Policing. Global Commission on Internet Governance." *Paper Series: no. 21.* (2015): 5.
[27] Europol, IOCTA (2016) 47.
[28] Nándor Mezei, "Digitalizált bűnözés – digitalizált védelem," *Rendészeti Szemle,* 57. (2009): 40-45.
János Sebők, *"A harmadik világháború (Mítosz vagy realitás),"* (Budapest: Népszabadság könyvek, 2007), 88-93.
[29] Zoltán Nagy, *Bűncselekmények számítógépes környezetben* (Budapest: Ad-Librum, 2009), 257.
[30] Verizon Data Breach Investigation Report (2016), accessed January 28, 2017, http://www.verizonenterprise.com/verizon-insights-lab/dbir/2016/.

devices that are distributed across the Internet. These connected devices are the so-called *zombie computers* activated by a software to send packets. Users usually do not know that their computers are infected with a malicious software and serve criminal networks. Perpetrators use software tools for automate attacks,[31] which can be preinstalled or downloaded and unpacked (games, other programmes from websites, torrents etc.) by users. Unlike single-source DoS attacks, DDoS assaults tend to target the network infrastructure in an attempt to overwhelm it with huge volumes of traffic. Secondly, DDoS attacks also differ in the manner of their execution. DoS attacks are launched using homebrewed scripts or DoS tools (e.g., Low Orbit Ion Canon), while DDoS attacks are launched from *botnets*, large clusters of connected devices (e.g., cellphones, PCs or routers) infected with malware that allows remote control by an attacker. The botnet makes it possible to launch large-scale attacks on the less protected private (with easily obtainable personal data or sensitive information) or corporate systems with high-levelled protection by sending spam or disseminating malware.[32] This botmaster controls the botnet remotely, often through intermediate devices known as the *command and control (C&C, or C2) servers*. To communicate with a server, the botmaster uses various hidden channels, including IRC and HTTP websites, as well as popular social networks like Twitter, Facebook and even Reddit. Botnet servers are able to communicate and cooperate with other botnet servers, effectively creating a P2P network controlled by a single or multiple botmasters. Botnets-for-hire are widely available, they are often auctioned and traded among attackers in the underground economy using online marketplaces which are hard to be tracked down. Botnets can be rented and used for DDoS or other attacks. These platforms, often hiding behind the ambiguous service definition of stressors, or booters, sell *DDoS-as-a-service*. They provide their clients with a toolkit, as well as a distribution network, so as to execute their attacks on call.[33]

There is an increasing number of cases when DDoS attacks are designed to keep away a business competitor from participating in a significant event (e.g. Cyber Monday), while others are used for shutting down business websites for a long time. The target is well considered and carefully chosen. The offenders often choose websites whose operation demand continuous and undisturbed conditions (e.g. online casino websites). For example, Europol arrested key members of the extortionist DD4BC hacking group that blackmailed multi-

[31] Marco Gercke, *Understanding cybercrime: phenome, challenges and legal response.* (ITU: 2012), 17.

[32] Tropina, "The evolving structure of online criminality: how cybercrime is getting organised," 161.

[33] Imperva Incapsula, accessed November 11, 2016, https://www.incapsula.com/ddos/ddos-attacks/denial-of-service.html.

ple European companies (e.g. an online gambling company, PokerStars was confirmed as a victim) with DDoS attacks in exchange for Bitcoin payments. The group launched small DDoS attacks against companies and then asked for a ransom in Bitcoin to prevent further assaults. If the victim declined to pay, the group would then launch more powerful attacks in the following days. The extortion scheme has become a regular practice these days and there are many copycat groups who follow this lead.[34] As we can see, the conventional crimes against property – such as extortion - can be committed with the help of modern technology solutions too.

The European Union has realized the fact that botnets pose a higher level of threat to the Member States in the public and private sector too. Directive 2013/40/EU on attacks against information systems[35] came into force in 2013. It aims to introduce criminal penalties for the creation of botnets and also encourages the Member States to use more severe penalties and make available as aggravating circumstances where an attack against an information system is committed by a criminal organisation or conducted against a *critical infrastructure*[36] of the Member States. It also sets up measures against identity theft and other identity-related crimes. The above mentioned elements from the Directive are missing for example from the Hungarian Criminal Code.

For example, a specific user group of BlackEnergy attackers began deploying SCADA-related plugins to victims in the Industrial Control Systems and energy markets around the world. This indicated a unique skillset, well above the average DDoS botnet master. Since mid-2015, the BlackEnergy APT[37] group has been actively using spear-phishing emails with attached ma-

[34] Philip Conneller, "PokerStars DDoS attackers arrested by Europol, extortion group also alleged to have targeted Betfair, Neteller," accessed November 22, 2016, https://www.cardschat.com/news/pokerstars-ddos-attackers-arrested-by-Europol-extortion-group-also-alleged-to-have-targeted-betfair-neteller-18629.
Catalin Cimpanu, "DD4BC members arrested in Bosnia and Herzegovina," accessed November 22, 2016, http://news.softpedia.com/news/members-of-dd4bc-the-group-that-blackmailed-companies-with-ddos-attacks-arrested-by-Europol-498797.shtml.

[35] According to Directive 2013/40/EU: "information system means a device or group of inter-connected or related devices, one or more of which, pursuant to a programme, automatically processes computer data, as well as computer data stored, processed, retrieved or transmitted by that device or group of devices for the purposes of its or their operation, use, protection and maintenance."

[36] According to Directive 2008/114/EC: "critical infrastructure means the assets or systems essential for the maintenance of vital social functions, health, safety, security, and economic or social wellbeing of people. European critical infrastructure (ECI) is critical infrastructure in EU countries whose disruption or destruction would have a significant impact on at least 2 EU countries (e.g. electricity power plants or oil transmission pipelines)."

[37] "An advanced persistent threat (APT) is an attack in which an unauthorized user

licious Excel documents including macros to infect computers in a targeted network. When the user opens the document, there is a dialog recommending that macros should be enabled in order to view the content. Enabling the macros triggers the *BlackEnergy malware* infection. In 2015, cybercriminals used this Trojan malware to carry out a DDoS attack on the Ukrainian power grid.[38]

IPv6 and the *IoT*[39] have arrived, and with them has come an enormous expansion in DDoS attack potential.

5. Illegal online gambling

Unauthorized gambling activities are typically planned to run in the long term. The organised groups earn tax-free revenues. It has always attracted those who want to evade their taxation and other obligations.[40]

The different kinds of gambling game (poker, slot-games, blackjack, baccarat, craps and other games) and betting websites have become widespread and the fastest-growing areas on the Internet. Poker has become popular due to tournaments broadcasted by sport channels, poker websites and the advertisements of online casinos. *Online casinos* are widely available and hosted in countries with liberal laws or no regulations on online gambling. Their popularity can be explained by the higher odds and tax-free prizes (no game tax or income tax). Most of them, legitimate as well as illegal ones offer free demo games which help users to get acquainted with the casino. They can open accounts, transfer money and play games of chance. Nevertheless, players must be aware of the fact that payment might be uncertain in the case of unlawful operations. Online casinos can be used in money laundering and activities fi-

gains access to a system or network and remains there for an extended period of time without being detected. Advanced persistent threats are particularly dangerous for enterprises, as hackers have ongoing access to sensitive company data. Advanced persistent threats generally do not cause damage to company networks or local machines. Instead, the goal of advanced persistent threats is most often data theft."
Nate Lord, "What is an Advanced Persistent Threat?," accessed December 28, 2016, https://digitalguardian.com/blog/what-advanced-persistent-threat-apt-definition.

[38] Kaspersky, "BlackEnergy." accessed February 15, 2017, https://www.kaspersky.com/resource-center/threats/blackenergy?omreferrer.

[39] "IPv6 is an Internet Protocol (IP) for packet-switched internetworking that specifies the format of packets (also called datagrams) and the addressing scheme across multiple IP networks. In comparing the two protocols IPv6 expands upon the addressing and routing capabilities of IPv4 in a number of ways." Vangie Beal, "IPng – Ipv6." accessed December 28, 2016, http://www.webopedia.com/TERM/I/IPng.html.
The Internet of Everything (IoE) is a broad term that refers to devices and consumer products connected to the Internet and outfitted with expanded digital features.

[40] István Farkas and József Jávorszky, "Az illegális pénznyerő-automaták felderítése," *Rendészeti Szemle, XXXI.* (1993): 58-59.

nancing terrorism. There are players who are supposed to be insiders and play only to lose and pay in. *Online role playing games* are also used to launder money, especially massively multiplayer online role playing games (such as Second Life and World of Warcraft) provide an easy way since these games have their own type of gaming currencies (e.g. World of Warcraft has gold and League of Legends has Influence Points and Riot Points) which players can sell or buy in exchange for real money.[41] Gaming currencies seem to be attractive for cybercriminals since selling them is not illegal and these virtual gaming currencies are also still not regulated.[42]

Gambling operations are considered to be unlawful due to the fact that the organizer has no right to run the operation. Gambling activities generally belong to state monopoly. It can be transferred to others under a concession agreement, though the authorized cannot assign it to third parties. According to the Hungarian Criminal Code unlawful gambling operation can be determined if it is oriented to gain profit on a regular basis *id est* several or indefinite number of games in advance and the elapsed time is rather short between the games. In the case of Internet gambling the key factor is regularity owing to the refunded investments and financial enrichment. Organizing the game, maintaining the website, handling or accepting the stakes, paying out the prizes are all considered perpetrator's conduct. It is also an unlawful operation when the authorized person is entitled to organize legal gambling but he/she exceeds his/her authority. It is indifferent whether it gives financial benefit as a result in the end. Offering the server is determined as an accomplice's behaviour and it is irrelevant whether it is free or it is for a valuable consideration.

6. Online child sexual exploitation

Organised criminal networks play a significant role in child sexual abuse and exploitation. *Child pornography* has become a multi-billion dollar business, since the sale of *child sexual exploitation material (CSEM)* is highly profitable, with collectors willing to pay great amounts for movies and pictures depicting children in a sexual context.[43]

Users, due to anonymization and encryption, are able to follow their dark sexual desires on the Internet. Paedophiles have a deviant sexual tendency and their sexual urges are not accepted by the public, thus they pursue their culpable activities in secret. Child pornography is "any material that visually

[41] Richet, *Laundering money online: a review of cybercriminals methods*, 12.
[42] Trend Micro Forward-Looking Threat Research (FTR) Team, "The cybercriminal roots of selling online gaming currencies" (2016) 4-8.
[43] Gercke, *Understanding cybercrime: phenome,*16-23.

depicts a child engaged in real or simulated sexually explicit conduct; any depiction of the sexual organs of a child for primarily sexual purposes; any material that visually depicts any person appearing to be a child engaged in real or simulated sexually explicit conduct or any depiction of the sexual organs of any person appearing to be a child, for primarily sexual purposes; or realistic images of a child engaged in sexually explicit conduct or realistic images of the sexual organs of a child, for primarily sexual purposes".[44]

As the Internet has become widespread, it has a substantial damaging drawback: it is used as a platform for child sex offenders to communicate, store and exchange CSEM and it makes it easy for them to hunt for new victims. There are two types of *sexual extortion*: content driven, for sexual purposes, and financially driven, for commercial purposes. In both cases the aim is to obtain sexual photos or videos of the child, but with content driven extortion the offender generally demands more explicit ones and threats the victim to disseminate the photos if the child doesn't send more. With the financially driven extortion after getting the CSEM the perpetrator threats in the same way and demands money from the child in order to prevent further dissemination.[45]

Sexual predators use different platforms such as social networks (e.g. Facebook, Twitter), online games, forums and chats where *sexting* – which means exchanging sexual messages or self-generated photos via mobile phone or the Internet – begins which is part of the *grooming*[46] process.[47] This activity can lead to the sexual extortion of children by asking for self-generated photos or videos of a sexual nature and involves a process whereby they are coerced into continuing to produce sexual materials or told to perform sexual acts under the threat of disclosing or directly sending such materials to others, like family, friends etc. There is an increasing number of more extreme, sadistic, and degrading demands by perpetrators.[48] *Self-generated images* might constitute a

[44] According to Article 2 (c) of Directive 2011/92/EU of the European Parliament and the Council on combating the sexual abuse and sexual exploitation of children and child pornography

[45] Europol, IOCTA (2016) 24.

[46] It is criminalised by the Lanzarote Convention and Directive 2011/92/EU. According to the Interagency Working Group on Sexual Exploitation of Children: Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse *(Luxembourg Guidelines)* (2016) 51. "In the context of child sexual exploitation and sexual abuse, "grooming" is the short name for the solicitation of children for sexual purposes. "Grooming/online grooming" refers to the process of establishing/building a relationship with a child either in person or through the use of the Internet or other digital technologies to facilitate either online or offline sexual contact with that person."

[47] Europol, IOCTA (2016) 24.

[48] Interagency Working Group on Sexual Exploitation of Children, *Luxembourg Guidelines.* 51.

further challenge since in some jurisdictions the minor who generated and distributed them is deemed to be guilty of producing and disseminating CSEM.

The most common method to exchange *child abuse material (CAM)* is still P2P platforms, but they started to use more sophisticated ones for distribution, such as Darknet. The use of Darknet is getting more popular among perpetrators using hidden services on platforms like TOR as we have mentioned before. These platforms facilitate untraceable CSEM by allowing the sharing of images anonymously through websites, private messages and email. Another growing area is the live streaming of child sexual abuse, which poses a particular challenge for law enforcement. It also supports the so-called hands-on offending, which means after the live stream the soliciting offender travels to the spot -for the purpose of child sexual exploitation. The Internet and new technologies revive online and offline child sex tourism, it can be arranged easily with low risks and offers profitable services overseas. It is an attractive proposition to earn easy money with the crime of abuse via live streaming. These are paid services and payment is generally made through international money transfer and, less frequently, via local money transfers.[49] Organised crime represents itself on the cyberspace in the following ways: commercial sexual exploitation of children online; obtaining credit card information and getting money with them; blackmailing clients with their 'sex adventure' in order to gain financial benefits.

In our troubled world, it is typical that individuals turn to perversions and information systems offer a suitable platform for this. Organised crime is based on this demand. Tolerance towards extreme contents drives the supply to serve the interested potential clients with more marginal contents.[50]

The most endangered injured parties are children who are under the age of 18 years and entitled to special protection, whether they are acting in the online environment or offline.[51]

In the EU issues related to online content regulation are part of the Member States' jurisdiction (e.g. Germany, the UK and Hungary adapted *Internet blocking*), except child pornography.[52] There are some well-intentioned, binding international documents with clear contents[53] in this field, though there is

[49] Europol, IOCTA (2014) 28-34.

[50] Katalin Parti, *Gyermekpornográfia az interneten.* (Miskolc: Bíbor Kiadó, 2009), 48.

[51] Interagency Working Group on Sexual Exploitation of Children, *Luxembourg Guidelines.* 11.

[52] László Dornfeld, "A kibertér főbb nemzetközi és nemzeti szabályozásai," in *A virtuális tér geopolitikája,* ed. István Pintér et al. (Budapest: Geopolitikai Közhasznú Alapítvány, 2016), 63.

[53] International conventions: United Nation Convention on the Rights of the Child; Optional Protocol of the Convention on the rights of the child; Cybercrime convention; Lanzarote convention; Framework Decision 2004/68/JHA; European Directive

a tendency for further dynamic spread of child pornography due to new technology developments. *Virtual reality* (VR) devices make a good example by their consumer release in 2016. It is possible that such devices could be used to simulate abuse on a virtual child or view CSEM since VR pornography industry is already established in Asia, which means this development could be adopted easily for this disturbing purpose as well.[54] *Cloud computing* is also challenging since files are stored in a shared pool of computer resources on the Internet, it makes them accessible from any computer and storage is maintained by the cloud server without a need for installing anything. The cloud system makes it possible for the users to share their access and files with other designated users. It has already been recognized that perpetrators use cloud for the possession and distribution of CSEM.[55]

Section 204 of the Hungarian Criminal Code subjects to punishment obtaining or having in possession, producing, offering, supplying or making available, distributing, dealing with or making pornographic images of an under aged person or persons.

In order to combat child sexual exploitation it is essential to harmonise legal definitions across legal international and regional documents and also across countries (e.g. What is a child? What constitutes child pornography? Is it acceptable just to view it? Is virtual child pornography acceptable etc.). It would be also important to have agreements regarding how illegal websites are to be removed and within what timeframe. These legal gaps constitute obstacles to the work of law enforcement in different countries and, consequently, to the arrest and conviction of child abusers.[56]

7. Online money laundering

The ultimate aim is to monetise the obtained, crime-related assets in the legitimate economy. Money laundering is not tied solely to organised crime, but it is an essential part of it, providing the organised operations, economic background and making the offenders wealthy. Laundering illegally gained money

2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography

[54] Europol, IOCTA (2016) 27.

[55] Audrey Rogers, "From peer-to-peer networks to cloud computing: how technology is redefining child pornography laws" *87 St. John's L. Rev. 1013* (2013): 22., accessed December 11, 2016, http://digitalcommons.pace.edu/lawfaculty/963/.

[56] Alisdair Gillespie, "Child Abuse Images and Sexual Expolitation of Children Online," accessed January 21, 2017. http://www.ecpat.org/wp-content/uploads/2016/04/ICT.pdf.

has reached an industrial scale.[57] It is a global phenomenon and Internet contributes to offering a wide range of different money laundering methods.

The phases of money laundering in real world can be recognized in the virtual space too. Anonymity is enough for some service requisitions, which means a fake name and address is able to hide the real user. Furthermore, most of the financial transactions can be carried out anywhere and anytime. It is supported by the bank sector's interest, on the one hand, banks help the cash flow with flexible regulations, technical background, and client friendly ways, on the other hand, banks charge clients different fees during transactions, which make them interested.

Money laundering involves three distinct stages, which are recognizable in its cyber form too since criminals transfer and circulate funds within the digital economy.[58] The first phase is the so-called *placement,* when cash is moved from its source like in the following examples.

Onetime or frequent transactions to another individual, organization or foundation and the legal grounds of the transactions are indifferent and might be anything, such as charity, personal reasons or simple sympathy. In the case of legal or illegal gambling the insider gambler loses all the time. When considering money laundering through online gambling, the introduction of the possibility to pay, play and cash out using virtual currencies has added a new level of anonymity. A new generation of online casinos has emerged specifically for cryptocurrencies, some of which promote themselves on the level of anonymity, they provide the use of TOR, or are even accessible only via TOR.[59]

In the above mentioned cases the offenders may pay or transfer money also in a legal way, but then the money may go directly to terrorist groups or other organised criminal organizations. Legal literature calls this phenomenon inverse money laundering.[60]

Fraudulent online auction activity also serves as a suitable means of money laundering. An auction is supposed to be fraudulent in the following cases: selling obtained goods which originate from crime commission (dealing in stolen goods), or after transferring the money there is no movement of the goods or service fulfilment. There is an opportunity to shorten the auction by accepting the pre-set highest automate bid.

The second stage is *layering.* The primary purpose of this stage is to separate the illicit money from its source. Criminals use sophisticated layering of

[57] Csaba Bardócz, "Pénzmosási technikák," *Belügyi Szemle* XXX. (1997): 74.
[58] Europol, IOCTA (2016) 43.
[59] Europol, IOCTA (2014) 42.
[60] István László Gál, "A pénzmosás és terrorizmus finanszírozása," in *Emlékkönyv Irk Albert egyetemi tanár születésének 120.* évfordulójára ed. László Korinek and László Kőhalmi and Csongor Herke (Pécs: PTE ÁJK 2004), 39.

financial transactions that hide and make it difficult to find the link between the money and the original crime. Generally, "dirty" money lands in businesses, banks or it is placed in securities and finally the multiple transactions are untraceable for law enforcement.

In the final third *integration* stage the money which is layered through a number of financial transactions and therefore seems to result from a legitimate source is fully integrated into the financial system and can be used for any purposes.

Most organised crimes share a common denominator, which is the financial motive. Organised crime groups boost their assets and then inject them into the legal economy through different money laundering schemes.[61]

Law enforcement traces the assets likewise the criminal networks. There are two future challenges to them with regard to online money laundering: virtual cryptocurrencies and money mules. Decentralised virtual cryptocurrency systems (like Bitcoin) are vulnerable to anonymity risks. For example, Bitcoin addresses, which function as accounts, have no names or other attached customer identification so it is almost impossible to find the perpetrators behind the illegal transactions if they use Bitcoin. Furthermore, the system does not have a central oversight body, and law enforcement does not have any anti-money laundering software, which would monitor and identify suspicious transactions. Therefore they face difficulties since they cannot target one central location or entity for investigative or asset seizure purposes.[62]

In addition to traditional layering methods, cryptocurrencies use specialised laundering services called "tumblers" or "mixers". According to Europol: "'tumblers' are services, often operating on TOR, which allow users to transfer their cryptocurrencies into a pool of funds and then receive them back (minus a small commission) into newly generated 'clean' addresses, thereby breaking the financial trail".[63]

The investigation of money mule networks is a top priority both for law enforcement and the financial sector and in order to track them down they cooperate with each other (e.g. *European Money Mule Actions*). According to Europol: "money mules are individuals recruited, often by criminal organisations, to receive and transfer illegally obtained money between bank accounts and/or countries. The recruited individuals may be willing participants, however some may, initially at least, be unaware that they are engaging in criminal activity and believe they are performing a legitimate service."[64]

---

[61] Europol, Money laundering, accessed November 24, 2016, https://www.Europol.europa.eu/crime-areas-and-trends/crime-areas/economic-crime/money-laundering.

[62] FATF Report, "Virtual currencies: key definitions and potential AML/CFT risks" (2014) 9.

[63] Europol, IOCTA (2014) 42.

[64] Europol, IOCTA (2016) 43.

8. Conclusion

The exploited innovative technologies and features (e.g. anonymization, encryption and virtual currencies etc.), the increasing number of Internet users, the fast-paced development of high-tech hardware and software contribute to the expansion of cybercrime and organised crime in the cyberspace. It makes it possible for criminals to meet each other in the online world without physical connection. Most of the users are not aware of the danger of the Internet, they can easily be deceived and become the victim of a cybercrime. Their computers or mobile devices might serve criminal networks without their knowledge. The use of encryption by criminals to protect their communications or stored data represents a considerable challenge to law enforcement. DDoS attacks continue to grow in intensity and complexity. Bitcoin has also become as extortion payment in the case of DDoS attacks. Child sexual exploitation online continues to be a major concern with offences ranging from sexual extortion and grooming to self-produced CAM and live streaming, which pose particular investigative challenges. The cybercrime phenomenon intensifies the competition between the technology of safety-security companies and the technical expertise of cybercriminals. Europol and INTERPOL are committed to the fight against cybercrime, as well as tackling cyber-enabled crimes. In order to facilitate their work EU Member States and other countries must ensure efficient exchanges of information and cooperation too. Europol set up the European Cybercrime Centre (EC3) in 2013 to strengthen the law enforcement response to cybercrime in the EU and thus to help protect European citizens, businesses and governments from online crime. Alongside law enforcement, NGOs and private industry must also maintain its focus on the development and distribution of prevention and awareness raising campaigns. Law enforcement, legislators and academia need to become even more adaptive and agile in addressing this phenomenon.[65]

[65] Europol, IOCTA (2016) 10-15. According to Europol cybercrime costs EU Member States EUR 265 billion a year. European Cybercrime Centre (EC3), Combating crime in a digital age, accessed 17 January, 2017, https://www.europol.europa.eu/about-europol/european-cybercrime-centre-ec3.

The opt-out-clause of Article 114 TFEU: remarks on the Judgment of the General Court of 7 March 2013 – *Republic of Poland v. European Commission* (Case T-370/11)

Osiejewicz, Joanna

Abstract *In 2011, the Republic of Poland raised an action against the European Commission claiming that the Court should annul in its entirety Commission Decision 2011/278/EU determining transitional Union-wide rules for the harmonized free allocation of emission allowances, according to which natural gas should be the reference benchmark for emission trading. In 2013, the claim was dismissed in its entirety and Poland was ordered to pay the costs. The aim of the article is to examine whether the Republic of Poland would have another possibility to break free from the obligations imposed by the Commission, that is to apply the opt-out-clause according to Article 114 (4–5) TFEU. The article intends to prove that this way of conduct could more appropriately serve the interest of Poland than the pleas in law raised by Poland in the course of the action before the Court.*

Keywords *opt-out-clause, environmental protection, energy, European Union, emission allowances.*

1. Introduction

Environmental protection and energy are intertwined policy areas of the European Union (EU, for short). That is why it may be misleading which of these policy areas and respective EU competencies should function as the appropriate legal basis for the EU measures involving these subject matters. Applying the appropriate legal basis is of the essence, because not only does this choice determine which decision-making procedure is appropriate, but, ultimately, it also determines to what extent the Member States are able to block the enactment of a specific law.

This issue was used by the Republic of Poland in order to avoid the use of natural gas as the reference fuel for defining the heat and fuel benchmarks for the purposes of allocating allowances. On 8 July 2011, the Republic of

Poland raised a claim[1] that the Court should annul in its entirety Commission Decision 2011/278/EU of 27 April 2011[2] determining transitional Union-wide rules for the harmonized free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC of the European Parliament and of the Council. On 7 March 2013, the claim was dismissed in its entirety and the Republic of Poland was ordered to pay the costs.

The aim of the article is to examine whether the Republic of Poland had another possibility to break free from the obligations imposed by the Commission. It is maintained that for the subject in question it would be possible to apply the opt-out clause according to Article 114 (4) and (5) of the Treaty on the Functioning of the European Union[3] (hereafter: TFEU).

2. Republic of Poland v. European Commission (Case T-370/11)

In *Republic of Poland v. European Commission*, Poland disputed emission trading allowances.[4] Having regard to the Treaty establishing the European Community, and in particular Article 175 (1) thereof, Directive 2003/87[5] established a specific scheme for emission allowance trading in order to reduce greenhouse gas emissions in the EU.[6] The Directive authorized the EU to implement all necessary harmonizing measures, including the setting of benchmarks.[7] The Commission decided that natural gas should be the reference benchmark for emission trading.[8]

Poland contested this decision[9] by challenging the legal basis of the directive and claiming that the Commission's decision to use natural gas as a

[1] Action brought on 8 July 2011 — Poland v. Commission (Case T-370/11), OJ C 290/12, 1.10.2011.

[2] notified under document C(2011) 2772, OJ 2011 L 130, 1.

[3] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, 47–390.

[4] T-370/11, *Poland v. Commission*, ECLI:EU:T:2013:113, para. 3-7.

[5] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (Text with EEA relevance), OJ L 275, 25.10.2003, 32–46.

[6] T-370/11, para. 1.

[7] Directive 2003/87/EC, Art. 1a (1); T-370/11, para. 2.

[8] T-370/11, para. 9.

[9] OJ C 290/9, 1.10.2011: Poland raised the following pleas in law: 1) Infringement of the second subparagraph of Article 194(2) TFEU, in conjunction with Article 192(2) (c) TFEU, by failing to take into account particular characteristics of individual Member States concerning fuel and by calculating benchmarks on the basis of the reference

benchmark was arbitrary and unjustified.[10] Poland asserted that the Commission's decision did not consider the country's specific circumstances,[11] and would limit the state's sovereign right to determine the conditions for the exploitation of its own energy resources, as provided in Article 194 TFEU.[12] Furthermore, Poland contended that the answer to the question of whether a specific EU measure is based on the correct legal basis should be determined by considering all the provisions of the Treaty, including the provisions protecting Poland's sovereign rights in the area of energy.[13] Poland raised the argument that it never explicitly transferred any competence regarding energy exploitation or source selection to the EU and thus these sovereign rights cannot be preempted by the EU.

Poland also claimed that using natural gas as a reference benchmark would negatively impact the competitiveness of Polish companies using coal technology and in the long term would lead to an increase in greenhouse emissions. Poland argued that many businesses, rather than reducing emissions, would move their manufacturing facilities to other countries where regulations of greenhouse gases are less restrictive. Finally, Poland also noted that Polish companies may be forced to purchase more gas technology, thereby increasing the overall need for natural gas in Poland, disrupting the state's energy balance and forcing it to redefine its overall energy policy.[14]

On 7 March 2013, the General Court addressed this issue in its judgment holding that "According to the settled case-law, the choice of the legal basis for a European Union measure must rest on objective factors which are amenable to judicial review, including in particular the purpose and the content of that measure".[15] The General Court rejected all of Poland's arguments,

efficiency of natural gas and taking that fuel as the reference fuel; 2) Infringement of the principle of equal treatment and of Article 191(2) TFEU in conjunction with Article 191(3) TFEU by failing to take into account, when drawing up the contested decision, the diversity of the situations in individual regions of the European Union; 3) Infringement of Article 5(4) TEU (the principle of proportionality) by setting the benchmarks in the contested decision at a more restrictive level than attainment of the objectives of Directive 2003/87/EC requires; 4) Infringement of Article 10a, in conjunction with Article 1, of Directive 2003/87/EC and lack of competence for the European Commission to adopt the contested measure.

[10] T-370/11, para. 10.

[11] T-370/11, para. 9.

[12] Art. 194 (2) sentence 2 TFUE: "Such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c)".

[13] T-370/11, para. 16.

[14] T-370/11, para. 10.

[15] T-370/11, para. 14: "In the present case, Directive 2003/87 was adopted on the sole

holding that the directive regulating emission allowance trading was appropriately based on the EU's competence to enact environmental protection laws, and that the directive was focused on the environmental policy rather than energy.[16] The General Court further noted that, regardless of any reservation of sovereign rights in the energy sector, no general principle would prohibit the Member States from assigning that right to the EU in the area of the environmental policy. The Court went on to clearly distinguish between activities pertaining to the environmental policy and those relating to the energy policy. It noted that the second subparagraph of Article 194 (2) TFEU expressly refers to point (c) of the first subparagraph of Article 192 (2) TFEU, which means that the energy policy is only a sectoral competence of the EU.[17] The Court acknowledged, therefore, the independent and distinctive nature of the environmental policy when compared to the energy policy.[18] Although the energy policy and the environmental policy overlap, they remain independent and distinctive powers at the same time. The Court also emphasized that the EU is not precluded from regulating the energy sector through its environmental policy powers as long as the decision rests on objective factors which are amenable to judicial review, including in particular the purpose and the content of that measure.[19]

3. The competencies of the European Union in the area of environmental protection and energy

The competence of the European Union in the area of environmental protection is shared with the Member States. This implies that if the EU fails to take action to protect a given environmental objective, the Member States retain their power to legislate and to decide what they find a reasonable degree of environmental protection. The European Union is competent to pursue any environmental policy in view of achieving the objectives under the first para-

legal basis of Article 175(1) EC and Article 10a of that directive is the only legal basis of the contested decision (see, to that effect, Case C-155/07 *Parliament* v. *Council* [2008] ECR I-8103, paragraphs 34 to 38, and the case-law cited)".

[16] T-370/11, para. 14.

[17] see also C-490/10, *Parliament v. Council*, ECLI:EU:C:2012:525.

[18] T-370/11, para. 17: "Indeed, the second subparagraph [of] Article 194(2) TFEU provides that the prohibition on affecting the right of a Member State to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply applies without prejudice to point (c) of the first subparagraph of Article 192(2) TFUE. While that latter provision is only procedural in nature, it nonetheless provides specific rules relating to the environmental policy of the European Union."

[19] T-370/11, para. 14.

graph of Article 191 TFEU. These are: (1) preserving, protecting, and improving the quality of the environment; (2) protecting human health; (3) prudent and rational utilization of natural resources; and (4) promoting measures at the international level to deal with regional or worldwide environmental problems, and in particular combating climate change. The European Parliament and the Council are the actors, who act in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions. The term "action" includes not only the adoption of legislation according to Article 288 TFEU, the greatest importance of which is attached to the Directive, but also political instruments, such as resolutions and conclusions of the Council, and setting political goals.[20] Article 192 (1) and (2) TFEU does not specify the criteria for selecting the form of these actions, therefore the EU generally enjoys the freedom of choice.[21]

According to the case law of the Court of Justice of the European Union (hereafter: CJEU),[22] Article 192 (2) TFEU is an exception to the ordinary legislative procedure stipulated in Article 192 (1) TFEU and must be interpreted strictly. The CJEU found that the respective provision refers to sensitive areas affecting the territorial governance of the Member States. The common feature of these areas is either a lack of EU powers beyond the policy in the field of the environment, or the need to take unanimous decisions in the Council.[23] In accordance with Article 192 (2) TFEU, the Council acts in a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee, and the Committee of the Regions. However, the Council may make the ordinary legislative procedure applicable to the matters referred to in this paragraph. This procedure of "small footbridge" refers to fiscal measures; measures affecting town and country planning; measures affecting the quantitative management of water resources (either directly or indirectly affecting the availability of those resources); measures affecting land use (with the exception of waste management); measures affecting significantly the choice of the Member States between different energy sources and the structure of their energy supply.

Some legal problems may be inducted through the two-step procedure stipulated in Article 192 (3) TFEU,[24] according to which the general action programs setting out priority objectives shall be adopted by the European Par-

[20] Walter Frenz, *Europäisches Umweltrecht* (München: C.H. Beck, 1997), para 24.
[21] Astrid Epiney, *Umweltrecht in der EU* (Cologne et al.: Nomos 2005), 56.
[22] Christian Callies, "Art. 192 AEUV" in *EUV/AEUV. Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtcharta. Kommentar*, ed. Christian Callies and Martin Ruffert (München: Beck Juristischer Verlag 2011), para. 28.
[23] Compare: C-36/98, *Kingdom of Spain v Council*, Reports of Cases 2001 I-00779, para. 46, 49.
[24] Callies, "Art. 192 AEUV," para. 36.

liament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, and the measures necessary for the implementation of these programs shall be adopted under the terms of Article 192 (1) or (2) TFEU as appropriate. In literature on the subject, there is a dispute as to the treatment of this provision, i.e. whether it is a procedural provision,[25] or it contains a rule of jurisdiction.[26] It also shows that this provision is only of declaratory importance, aiming to make the recipient aware of the fact that for the realization of action programs it is necessary to undertake specific implementation measures on the basis of the relevant standards of competence provided in the treaty, including Article 192 (1) and (2) TFEU.[27]

According to Article 11 TFEU, environmental regulations can also be found in other EU policies, in particular the provisions concerning the internal market, agriculture, and transport. The delimitation between the environmental policy and other policies should take place with regard to the area on which the respective regulation focuses the most.

As regards EU competence in the area of energy, it was not established until the Lisbon Treaty. However, before then the EU had adopted secondary law in this area. The measures adopted at the time included directives for the internal market in electricity.[28] In addition, measures to ensure security of gas supply in the territories of the Member States[29] as well as security of electricity supply and of infrastructure investment were adopted.[30] These important regulations were introduced based on other competencies, which shows the result of a small increase in EU powers in the field of energy policy.[31]

---

[25] Epiney, *Umweltrecht*, 27.

[26] Siegfried Breier, "Die Organisationsgewalt der Gemeinschaft am Beispiel der Errichtung der Europäischen Umweltagentur," *Natur und Recht* 17 (1995): 516.

[27] Compare: Breier, "Die Organisationsgewalt," 517.; Callies, "Art. 192 AEUV," para. 36.

[28] Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC - Statements made with regard to decommissioning and waste management activities, OJ L 176, 15.7.2003, 37–56; Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (Text with EEA relevance), OJ L 211, 14.8.2009, 55–93.

[29] Council Directive 2004/67/EC of 26 April 2004 concerning measures to safeguard security of natural gas supply (Text with EEA relevance), OJ L 127, 29.4.2004, 92–96.

[30] Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment (Text with EEA relevance), OJ L 33, 4.2.2006, 22–27.

[31] Joanna Osiejewicz, *Harmonizacja prawa państw członkowskich Unii Europejskiej* (Warszawa: C. H. Beck, 2016), 199; See also: Genowefa Grabowska, "Wspólna poli-

Article 194 (2) TFEU contains a general legislative competence, on the basis of which measures are adopted to achieve the objectives of the EU energy policy. Article 194 (2) sentence 2 TFEU contains, however, the limit of the competence of sentence 1. The EU cannot take any action infringing a Member State to determine the conditions for exploiting its energy resources, its choice between different energy sources, and the general structure of its energy supply. Under Article 192 (2) point c, this restriction does not include measures affecting significantly the Member State's choice between different energy sources and the general structure of its energy supply. In formal terms, the measures adopted include regulations, directives, and decisions. In view of Article 216 TFEU, the EU may also conclude international agreements in order to achieve these objectives. Measures in the field of the energy policy are to be adopted by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions.[32] When the measure is mainly fiscal in nature, i.e. it refers to the collection of taxes in the strict sense (that is no fees or premiums), Article 194 paragraph 3 TFEU allows for the possibility of unanimity voting by the Council in accordance with a special legislative procedure and after consulting the European Parliament.[33]

4. The opt-out-clause of Article 114 TFEU

Article 114 TFEU was introduced as Article 100 a) into the Treaty of Maastricht[34] by Article of the 18 Single European Act[35] (hereafter: SEA) with effect from 1 July 1987 in order to overcome the stagnation of the integration and to confer to European internal market a new dynamism and flexibility. The very concept of the internal market that goes beyond the concept of the common market was intended to intensify the integration and to lead to the democratization of the decision-making process. A White Paper on completing the internal market, prepared by the European Commission on behalf of the EU Council and published on 14 June 1985, was a direct impetus for the introduc-

tyka energetyczna Unii Europejskiej – rzeczywistość czy utopia?," *Ekologia* 3 (2015): 24–25.

[32] Osiejewicz, *Harmonizacja, 198.*

[33] Christian Calliess*, Subsidiaritäts- und Solidaritätsprinzip in der Europäischen Union. Vorgaben für die Anwendung von Art. 5 (ex-Art. 3b) EGV nach dem Vertrag von Amsterdam* (Baden-Baden: Nomos 1999), 389.

[34] OJ C 191, 29.7.1992.

[35] OJ L 169, 29.6.1987.

tion of that legislation.[36] The Treaty of Amsterdam (1997)[37] strengthened and clarified the provisions concerning the internal market. After the conference of governments in Nice in December 2000,[38] Article 95 of the Treaty establishing the European Community (hereafter: EC Treaty)[39] remained unchanged. After the Treaty of Lisbon entered into force,[40] the approximation of the laws, currently regulated in Article 114 TFEU, has not shown significant changes. However, the content of the former Article 95 of the EC Treaty was moved into Article 114, and the content of Article 94 of the EC Treaty was moved into Article 115 TFEU, which serves to underline the role of the approximation of the laws under Article 114 TFEU.

Article 114 (4)[41] and (5) TFEU[42] regulates the so-called opting-out clauses. Their introduction reflects the concern of the Member States to race to the bottom as a result of the system of majority voting. Eligibility for stricter national regulations is included in the two-track system. Article 114 (4) TFEU refers to the maintenance of existing national provisions, and the introduction of new, more stringent regulations set out separately in Article 114 (5) TFEU. The introduction of new regulations in accordance with Article 114 (5) TFEU is reinforced by stricter conditions, because EU legislature may take into account only currently existing national regulations while adopting a harmonization measure. If the higher national level of protection is not taken into account, it can be assumed that the stronger provision of a Member State is still valid. The moment of demarcation of the applicability of Article 114 (4) and Article 114 (5) TFEU is the moment of the adaptation of the act by the

[36] Completing the Internal Market. White Paper from the Commission to the European Council, COM (85) 310 final, Mediolan 14.06.1985, Art. 26, para 2.
[37] OJ C 340, 10.11.1997.
[38] OJ C 80, 10.3.2001.
[39] OJ C 325, 24.12.2002.
[40] OJ C 306, 17.12.2007.
[41] Art. 114 (4) TFEU: "If, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 36, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them".
[42] Art. 114 (5) TFEU: "Moreover, without prejudice to paragraph 4, if, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them".

Council and the European Parliament, rather than its entry into force.[43] This follows directly from the literal wording of the words used in this provision, which was repeated in Article 294 TFEU governing the ordinary legislative procedure. "Maintaining national provisions" occurs when a given national legislation that is in force before the moment specified above continues to be in force unaltered or altered only slightly. "Introduction" is the case of adoption of a completely new act or the substantial amendment of the old act.[44] According to the Court of Justice, paragraphs 4 and 5 also apply to past events, because in the absence of transitional provisions, the new rules apply immediately to factual states that have not yet been closed.[45] The proceedings, in accordance with paragraphs 4 and 5, end only on the basis of the decision by the Commission.[46]

The basic material premise for the application of paragraphs 4 and 5 is the existence of a harmonization measure adopted pursuant to Article 114 (1) TFEU, whereas it is also possible to use Article 114 (4) and (5) TFEU to acts adopted before the entry into force of the SEA on the basis of Article 100 of the EC Treaty. Article 114 (4) TFEU does not apply directly, however, it applies to the competencies that are regulated outside Article 114 TFEU.[47] Paragraphs 4 and 5 allow only for the increase of the protection rather than its reduction. The use of such an interpretation of the provision – universally ac-

[43] Frenz, *Europäisches Umweltrecht*, para 647.

[44] Wolfgang Kahl, "Art. 114 AEUV," in *EUV/AEUV. Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtcharta. Kommentar*, ed. Christian Callies and Martin Ruffert (München: Beck Juristischer Verlag 2011), para. 38.

[45] C-270/84, *Licata v. WSA*, Reports of Cases 1986 02305, para 31: "(…) as a matter of principle, new rules apply immediately to the future effects of a situation which arose under the old rule. The application of the amending decision to the remainder of Mrs Licata's term of office does not therefore constitute a breach of the principle that measures must not be retroactive"; C-162/00, *Pokrzeptowicz v. Meyer*, Reports of Cases 2002 I-01049, para 50: "It also follows from settled case-law that new rules apply immediately to the future effects of a situation which arose under the old rules (…) that provision must be regarded as being immediately applicable and binding on the Republic of Austria from the date of its accession, with the result that it applies to the future effects of situations arising prior to that new Member State's accession to the Communities".

[46] C-319/97, *Kortas*, Reports of Cases 1999 I-03143, para 28: "a Member State is not, therefore, authorised to apply the national provisions notified by it under Article 100a(4) until after it has obtained a decision from the Commission confirming them"; C-512/99, *Germany v. Commission*, Reports of Cases 2003 I-00845, para 45: "In that context, no new legal situation can be said to have been established before the final step in that procedure has been taken. It is only then that, through approval or rejection by the Commission, a measure likely to affect the earlier legal situation arises".

[47] Kahl, "Art. 114 AEUV," para. 48.

cepted[48] – stems from its history, from the scheme of the Treaty and from their very purpose, which is to make possible the optimal, cooperative protection of the law. Article 114 (4) and (5) TFEU may be invoked by each Member State, even the one that previously voted in favor of the harmonization measure, abstained from or made a reservation to the Protocol. This possibility is also granted to the State which at the time of the adoption of the harmonization measure was not yet a member of the EU. It is enough when membership exists at the maintaining or the introduction of the stricter national standard.[49]

The strengthening of protection must be proportionate in the broad sense, which means that it has to be appropriate and necessary as well as proportionate in the strict sense, which is suitable. The States have here, however, a margin of discretion, in particular as to the extent to which protection is necessary and as to what they want to guarantee by this protection (the principle of autonomous, national risk assessment).[50] As for the condition of proportionality in the strict sense, the States should weigh, by assessing goods, the intensity of the economic treatment on the one hand and the expected uneconomical profit on the other hand.[51] With regard to the necessity and proportionality in the strict sense, the precautionary principle must also be upheld, although it is not expressed directly in Article 114 TFEU. Article 11 TFEU imposes, however, an obligation to take into account the principles contained in Article 191 (2) TFEU during the debate on the conflicting objectives of the Treaty.[52] The precautionary principle does not constitute a justification for strengthening

[48] Kahl, "Art. 114 AEUV," para. 51.

[49] C-319/97, para19: "there is nothing in the wording of Article 100a (4) of the Treaty to suggest that a State which has joined the European Union after the adoption of a particular directive may not rely on that provision vis-à-vis that directive".

[50] C-375/90, *Commission v. Greece*, Reports of Cases 1993 I-02055, para. 19: "(…) in the absence of harmonization in this field, it is for the Member States to determine, with due regard to the requirements of the free movement of goods, the level at which they wish to ensure that human life and health are protected"; see also: Astrid Epiney, "Die Rechtsprechung des EuGH zur Zulässigkeit "nationaler Alleingänge" (Art. 95 Abs. 4–6 und Art. 176 WEV). Versuch einer Standortbestimmung," in *Europa im Wandel. Festschrift für Hans-Werner Rengeling* (Köln u.a.: Carl Heymanns Verlag, 2008), 226.

[51] See more in: Wolfgang Kahl, *Umweltprinzip und Gemeinschaftsrecht. Eine Untersuchung zur Rechtsidee des bestmöglichen Umweltschutzes im EWG-Vertrag* (Heidelberg: C. F. Müller Juristischer Verlag, 1993), 204 ff.; Andreas Middeke, *Nationaler Umweltschutz im Binnenmarkt. Rechtliche Möglichkeiten und Grenzen umweltrelevanter Alleingänge im Verhältnis zum freien Warenverkehr* (Frankfurt am Main: Vico Verlag 1994), 198 ff.

[52] Art. 11 TFEU: "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".

national protection, but it may reduce expectations for the proportionality of a national measure serving to strengthen protection. Protective measures based on Article 114 TFEU, serving to preserve the precautionary principle, can be taken not only by the EU authorities but also by the Member States pursuant to Article 114 (4) and (5) TFEU.[53] This position is, however, not uniform in the doctrine.[54] Moreover, from Article 114 (6) TFEU it directly follows that a provision of the national law serving to complement protection may not constitute a means of arbitrary discrimination or a disguised restriction on trade between the Member States. The prerequisites of Article 114 (6) TFEU apply cumulatively to those of Article 114 (4) and (5) TFEU, which means that failure to comply with the conditions of any section causes the rejection of the application without the need to examine the exhaustion of other conditions.[55]

The reasons justifying the retention of national specific regulations are "major needs referred to in Article 36" or "the protection of the environment or the working environment". The reference to necessary requirements within the meaning of the judgment in Cassis de Dijon, in particular the protection of consumers and the fairness of trade, is, however, excluded. Insufficient are also the usual differences in the level of protection resulting from secondary legislation.[56] The CJEU rejected, in particular, the possibility of using within Article 114 (4) TFEU additional, more restrictive conditions of Article 114 (5) TFEU, that is "new scientific evidence" or a "particular problem".[57] The introduction of stricter national rules in accordance with Article 114 (5) TFEU, however, requires the fulfillment of a number of additional conditions, which reflects the desire to limit the individualism of the Member States for the unity of rights and the safety of functional efficiency of the internal market.[58] They have to be met cumulatively.

[53] Kahl, "Art. 114 AEUV," para 55.

[54] C-3/00, *Denmark v Commission*, Opinion of Advocate General Tizzano delivered on 30 May 2002, Reports of Cases 2003 I-02643, vers 106–114.

[55] C-3/00, para 118: "However, an application under Article 95(4) EC must be assessed in the light of the conditions laid down in both that paragraph and paragraph 6 of that article. If any one of those conditions is not met, the application must be rejected without there being a need to examine the others. Since the Commission rejected the application in the present case on the basis of the major need to protect public health, a condition referred to in Article 95(4) EC, it was not required to consider its compliance with the three other conditions set out in paragraph 6 of that article"; see also: Andreas Bücker and Sabine Schlacke, "Rechtsangleichung im Binnenmarkt – Zur Konkretisierung verfahrens- und materiellrechtlicher Anforderungen an nationale Alleingänge durch den EuGH," *Neue Zeitschrift für Verwaltungsrecht* (2004): 62-66.

[56] Kahl, "Art. 114 AEUV," para 59; critically: Bücker and Schlacke, "Rechtsangleichung," 66.

[57] C-3/00, para 59.

[58] C-3/00, para 58.

The protection of the environment or the working environment are the reasons, the occurrence of which can be the basis for the application of Article 114 (5) TFEU. The protection of health is also considered to be a further reason under Article 191 (1) TFEU, but it is only accepted as being a "part" of environmental protection.[59] The precautionary principle of Article 191 (2) and (1) sentence 2 is not a separate reason justifying the application of the provision, but it should be taken into account under the principle of proportionality, as well as in relation to "new scientific evidence" or a "particular problem".[60] The provisions introduced into internal legislations of the Member States must be based on "new scientific evidence". Such evidence does not have to be unquestionable – in individual cases there may be enough reasonable doubt that the level of protection under EU legislation is still sufficient. It requires, however, that the evidence be objective and not based on the subjective opinion of a Member State.[61] The term "new" means that the relevant evidence must occur after the adoption of the harmonization measure, and it must relate directly to the circumstances justifying the introduction of new regulations. To determine whether the "new scientific evidence" actually exists, the Commission usually obtains the position of scientific bodies (e.g. EFSA), which then takes it as its own, unless the Member State can abolish them. The result is that such positions are increasingly binding.[62]

The existence of "a particular problem" affecting the Member State is necessary in order to apply Article 114 (5) TFEU. The problem does not need to affect only a particular Member State. Rather, it may be a problem of a regional character (a particular problem in the strict sense) or a problem which, although general in nature, is characterized by regional characteristics (a particular problem in the broad sense). The problem does not necessarily need to result from a hazard occurring only in the territory of this State. In the context of general risks, local autonomies may in fact constitute a specific problem.[63] The individual path, however, is excluded, when the problem is EU-wide. According to the CJEU, the condition of the occurrence of a particular problem is not fulfilled if the harmonization at the EU level can adequately deal

[59] Christian Tietje, "Art. 95 EGV" in *Das Recht der Europäischen Union*, ed. Eberhard Grabitz and Meinhard Hilf (München: C.H. Beck, 2006), para. 129.

[60] Wolfgang Kahl, "Anmerkung zu EuG, Urt. v. 5.10.2005 (verb. Rs. T-366/03 und T-235/96): Nationale Schutzergänzungen als Gefahr für den Binnenmarkt?", *Zeitschrift für Umweltrecht* (2006): 88; Kahl, "Art. 114 AEUV," para. 62.

[61] Jan Jans and Ann v. d. Heide, *Europäisches Umweltrecht* (Groningen: Europa Law Publishing 2003), 144.

[62] Kahl, "Art. 114 AEUV," para. 63; Klaus Knipschild, "Wissenschaftliche Ausschüsse der WE im Bereich der Verbrauchergesundheit und Lebensmittelsicherheit" *Zeitschrift für das gesamte Lebensmittelrecht* (2000): 699.

[63] T-182/06, *Netherlands v Commission*, Reports of Cases 2007 II-01983, para. 65.

with local difficulties. The specificity of the problem must directly touch the evidence justifying the introduction of new regulations, i.e. the protection of the environment or the working environment, but may result from all sorts of circumstances occurring in a Member State, including economic, social, and geographic[64] ones. However, the requirements for the proof of a specific problem are very high. The case law of the CJEU indicates that, in principle, it is the central premise that practically determines whether Article 114 (5) TFEU is in general applicable.[65] In addition, the application of Article 114 (5) TFEU is limited by a temporary clause because the respective problem must occur only after the adoption of the harmonization measure. This does not preclude the prior existence of this problem in a latent form, as long as it has become apparent only after the adoption of EU solutions.

A Member State wishing to apply stricter national regulations is required to notify the Commission of these regulations and the basis of their maintenance or introduction (Article 114 (4) and (5) TFEU), whereas compliance with this obligation is a prerequisite for the effectiveness of national solutions. In view of Article 4 (3) of the Treaty on European Union (hereafter: TUE)[66] containing arrangements for the principle of loyal cooperation, the notification must take place as soon as possible,[67] and in any case before the deadline for the introduction of an EU measure, so that the Commission can take a decision within the period provided for in Article 114 (6) TFEU.[68] After the notification

[64] Silke Albin and Stefanie Bär, "Nationale Alleingänge nach Amsterdam – Der neue Art. 95 WEV: Fortschritt oder Rückschritt für den Umweltschutz?," *Natur und Recht* (1999): 189.

[65] Kahl, "Art. 114 AEUV," para. 64; Kahl, "Anmerkung," 87.

[66] Treaty on the European Union, OJ C 202, 07.06.2016, Art. 4 (3): "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

[67] C-319/97, para. 36: "In those circumstances, implementation of the notification scheme provided for in Article 100a(4) requires the Commission and the Member States to cooperate in good faith. It is incumbent on Member States under Article 10 EC (ex Article 5) to notify as soon as possible the provisions of national law which are incompatible with a harmonisation measure and which they intend to maintain in force. The Commission, for its part, must demonstrate the same degree of diligence and examine as quickly as possible the provisions of national law submitted to it. Clearly, this was not the case with respect to the examination of the notified provisions at issue in the main proceedings".

[68] Kay Hailbronner, "Der "nationale Alleingang" im Gemeinschaftsrecht am Beispiel

made by the Member States, the Commission has to approve or reject the national legislation of the country concerned within six months.[69] This regulation gives the Commission the broad right of control. Approval or rejection of legislation takes place in the form of a decision within the meaning of Article 288 (4) TFEU,[70] which requires a justification under Article 296 TFEU. However, the decision is not necessary, because in accordance with Article 114 (6) TFEU, failure to issue a decision by the Commission within the prescribed term means the approval of national provisions by a legal fiction. The deadline for the decision is reckoned from the receipt of the notification by the Commission. Exceptionally, when the case is complex and provided that human health is not at risk, this period may be extended to twelve months in total. With regard to the Commission's approval of national legislation of a Member State, the CJEU stated that it is a constitutive condition for the effectiveness of the application of stronger national legislation. Among the grounds of the judgment, the CJEU pointed out the importance of the objectives of the internal market and the approximation of the laws, which otherwise could not be sufficiently protected.[71] Until a decision is taken by the Commission, the contested harmonization measure adopted by the European Union is applied without restriction and the Member States are obliged to disable existing different national regulations and to give up the implementation of any new rules until they receive an approving decision.[72] Furthermore, nothing precludes the introduction of the direct effect of provisions contained in the directive.[73] The approval by the Commission does not have, in principle, a retroactive

der Abgasstandards für P*K*W," *Europäische GRUNDRECHTE-Zeitschrift* (1989): 101; Middeke, *Nationaler Umweltschutz,* 288.

[69] Art. 114 (6) sent. 1 TFEU: "The Commission shall, within six months of the notifications as referred to in paragraphs 4 and 5, approve or reject the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market".

[70] Art. 288 sent. 4 TFEU: "A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them".

[71] C-41/93, *France v. Commission*, Reports of Cases 1994 I-01829, para 28.

[72] C-319/97, para. 28: "As the Court has consistently held (Case C-41/93 France v Commission [1994] ECRI-1829, paragraphs 29 and 30), "measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which are such as to hinder intra-Community trade would be rendered ineffective if Member States retained the right unilaterally to apply national rules derogating from those measures and a Member State is not, therefore, authorised to apply the national provisions notified by it under Article 100a(4) until after it has obtained a decision from the Commission confirming them".

[73] Kahl, "Art. 114 AEUV," para. 68.

effect, but it is effective *ex nunc*, unless the reasons for the decision indicate otherwise.[74]

The proceedings after the notification are independent administrative proceedings not having anything to do with the legislation. The general principles of the law are to be applied, including the adversarial principle[75] reinforced with the principle of sincere cooperation as expressed in Article 4 (3) TEU. It follows that before the Commission takes a decision, the Member State must be heard. Moreover, also other Member States are to be heard, since the contested decision may cover these countries by its effectiveness.[76] However, if in the course of the proceedings before the Commission no new position may be reported, the notification of the respective Member State itself may be sufficient to consider the obligation to be fulfilled. The breach of the obligation to hear could result in the annulment of a decision taken by the Commission only if the lack of a hearing had an impact on the content of the decision.[77] The verification of the notification by the Commission is limited to the determination of the existence of the conditions laid down in Article 114 (4–6) TFEU. If these conditions are fulfilled, the Commission is not entitled to the teleological control, according to the principle of autonomous, national risk assessment, and must approve the notified measures.[78]

In the case of a negative decision, the Member State has the right to bring an action for annulment. If the Commission takes an approving decision, other Member States have the right to bring an action for the annulment of such a decision. The upholding of a complaint results in the invalidity of the decision with *ex tunc* effectiveness. Nevertheless, it is possible to initiate accelerated infringement proceedings under Article 114 (9) in conjunction with Article 258 TFEU. This process can also take place in a situation in which the approval of national legislation is the result of the adoption of a legal fiction due to the expiration of the term.[79]

Moreover, in the light of Article 267 TFEU it is possible to involve the CJEU if the national proceedings raise doubts as to whether a Member State was entitled to apply specific national rules. As a result of the extension of the term for the Commission to adopt a decision under Article 114 (6) sentence 3 TFEU, the Member State which made the notification also has the right to bring an action for the annulment of this decision. Where it is found that the

[74] C-319/97, Opinon of Advocate General Saggio, para. 30.
[75] C-315/99, *Ismeri Europa v. Court of Auditors*, Reports of Cases 2001 I-05281, para. 81.
[76] Tietje, "Art. 95 EGV," para. 141.
[77] Kahl, "Art. 114 AEUV," para. 70.
[78] Kahl, "Art. 114 AEUV," para. 69.
[79] Kahl, "Art. 114 AEUV," para. 71.

relevant Commission decision is invalid, the invalidity of this has, in principle, *ex tunc* effectiveness.[80]

In the proceedings to approve the national provisions, the burden of proof lies with the Member State, which results directly from the obligation to provide reasons for the maintaining or introduction by a Member State the enhanced protection according to Article 114 (4) and (5) TFEU. This means, however, that there is a presumption of inadmissibility to take measures to strengthen the protection that must be overthrown by the Member State concerned.[81] The issue was similarly regulated in relation to legal proceedings before the CJEU – also in this case, the Member State must provide evidence to support its position.[82]

In accordance with Article 114 (10) TFEU, harmonization measures may concern the safeguard clause, which authorizes the State to take, for one or more of the non-economic reasons referred to in Article 36 TFEU, provisional measures subject to a Union control procedure. Safeguard clauses are to be interpreted restrictively,[83] and their aim is to enable the State to cope in crisis situations.[84] Article 114 (10) could support the safeguard clauses, the foundation of which is environmental policy.[85] Justification for them can be traced in the necessary requirements within the meaning of the *Cassis de Dijon* doctrine covering environmental protection.[86] It is also possible to indicate a loophole in the law and the comparability of the facts, i.e. the existence of grounds for the use of analogy.

5. Conclusion

Challenging the legal basis of the directive and claiming that the Commission's decision to use natural gas as a benchmark was arbitrary and unjustified

[80] Kahl, "Art. 114 AEUV," para. 73.
[81] Middeke, *Nationaler Umweltschutz,* 296; Kahl, "Art. 114 AEUV," para. 74.
[82] C-128/89, *Commission v. Italy,* Opinion of Advocate General Jacobs, Reports of Cases 1990 I-03239, para. 18.
[83] C 11/82 *Piraiki – Patraiki v. Commission*, Reports of Cases 1985 00207, para. 26: "That requirement may be explained by the fact that a provision permitting the authorization of protective measures with regard to a Member State which derogate, even temporarily and in respect of certain products only, from the rules relating to the free movement of goods must, like any provision of that nature, be interpreted strictly".
[84] C-359/92 *Germany v. Council*, Opinion of Advocate General Jacobs, Reports of Cases 1994 I-03681, para. 23.
[85] Kahl, "Art. 114 AEUV," para. 79.
[86] C 302/86, *Commission v. Denmark*, Reports of Cases 1988 04607, para. 9: "In view of the foregoing, it must therefore be stated that the protection of the environment is a mandatory requirement which may limit the application of Article 30 of the Treaty".

proved to be inappropriate to reach the annulment of the Commission's decision on free allocation of emission allowances. The reference to the energy policy seemed to be obvious. Nevertheless, the CJEU indicated that energy, contrary to environmental protection, falls only under a sectoral regulation. The CJEU explicitly confirmed the competence of the EU to regulate the energy policy through environmental protection. However, challenging the competence of the Commission to legislate would also have limited impact on the situation, because the ordinary legislative procedure applies to both environmental protection and the energy policy. Moreover, as for the energy policy, there is a presumption of the EU competence to legislate, so the questioning of the competence does not seem to be essential.

The possibility to apply the opt-out-clause to this legal situation seems to be, however, an option. It might help to avoid the necessity for an action before the CJEU and would enable Poland to raise arguments in favor of the environment as such. The requirement for applying the opt-out-clause is to raise the level of protection, in particular that of environmental protection. The term of conditions of the op-out-clause as described previously in Section 3 could have been met. Apart from that, the argument of redirecting companies towards purchasing gas technology, as a consequence of the contested decision, which would increase the natural gas needs of the State concerned, disrupt its energy balance, and force it to redefine its overall energy policy, as raised in the claim, could be a suitable reason for applying the opt-out-clause. The point should be environmental protection, delivered in a formula that would best serve the interest of Poland. Of course, such a way of conduct also requires confrontation with the Commission, the result of which can hardly be predicted.

Former Volumes of Studia Iuridica

1. *Halász* Pál: Az államfogalom meghatározásának néhány kérdése
2. *Kauser* Lipót: Hozzászólás a házassági vagyonközösség lényegesebb problémáihoz
3. *Rudolf* Lóránt: A pénzfizetési jogviszony fogalmi jegyeiről
4. *Szamel* Lajos: Az államigazgatási eljárási törvény jogorvoslati rendszere
5. *Bihari* Ottó: Az államhatalmi és államigazgatási szervek hatáskörének problémái
6. *Szotáczky* Mihály: A jogi akarat osztálytartalma
7. *Földvári* József: A visszaesés értékelése a büntetőjogban
8. *Benedek* Ferenc: A iusta causa traditionis a római jogban
9. *Losonczy* István: Adalékok a tartós és állapot-bűncselekmény kérdéséhez
10. *Kocsis* Mihály: A másodfokú büntetőbíróság ítélő hatalma
11. *Rudolf* Lóránt: A kollektív szerződés főbb elvi kérdései a szocializmusban
12. *Kovacsics* József: Községszervezetünk problémái Baranya megyében
13. *Csizmadia* Andor: A nemzeti bizottság létrejötte és jogállása 1944-45-ben
14. *Halász* Pál: Az államformatan néhány elméleti kérdése
15. *Szamel* Lajos: A szocialista demokrácia kialakulása és a polgári bürokrácia lebontása államigazgatásunkban
16. *Földvári* József: Az enyhítő és súlyosbító körülményekről
17. *Pap* Tibor: A bontás problematikája családjogunk felszabadulás utáni fejlődésének tükrében
18. *Páll* József: A családjogi törvény néhány kérdése
19. *Csizmadia* Andor: Feudális jogintézmények továbbélése a Horthy-korszakban
20. *Antalffy* György: Az állam szervezetéről a rabszolgatartó athéni demokráciában

21. *Szotáczky* Mihály: Az egyéni érdek és az osztályérdek viszonya a tárgyi jogban
22. *Kauser* Lipót: A jogügyletről
23. *Rudolf* Lóránt: A kötelem fogalmáról
24. *Csizmadia* Andor: Az egyházi mezővárosok jogi helyzete és küzdelmük a felszabadulásért a XVIII. században
25. *Halász* Pál: Állam- és jogrend a szocialista forradalomban
26. *Huszty* Lajos: A hozzátartozó a polgári jogban
27. *Vargyai* Gyula: Jobbágyfelszabadítás Esztergom megyei egyházi birtokon
28. *Benedek* Ferenc: Senatus Consultum Silanianum
29. *Bauer* Ilona: Az állammonopolista tulajdon fejlődése és osztályjellege a II. világháború után a Német Szövetségi Köztársaságban
30. *Földes* Iván: A termelőszövetkezetek üzemi-gazdasági igazgatásának néhány problémája
31. *Román* László: Az engedelmességi kötelezettség és a diszkrecionális jogkör problematikája a munkajogban
32. *Ádám* Antal: Az egyesületek a magyar társadalmi szervezetek rendszerében
33. Symposion (1963): Az államigazgatás-tudomány feladatai a szocialista országokban
34. *Rudolf* Lóránt: A szerződések megkötése
35. *Vargyai* Gyula: A legitimisták és szabad királyválasztók közjogi vitájáról az ellenforradalmi államban
36. *Ivancsics* Imre: A szakszervezetek szerepe az ipar irányításában és az igazgatásában
37. Nicolae *Tatomir*: A munka nemzetközi szervezete – Berthold *Braunstein*: Szabadság és szükségszerűség a büntetőjogban
38. *Szamel* Lajos: Az államigazgatás társadalmasításáról
39. Kazimierz *Opalek*: Általános jogtudomány – Franciszek *Studnicki*: A jogszabályok kommunikációs problémái
40. *Csizmadia* Andor: A pécsi egyetem a középkorban
41. Andor *Csizmadia*: Die Universität Pécs im Mittelalter (1367-)

42. Andor *Csizmadia*: L'université de Pécs au moyen âge (1367-)
43. *Román* László: A munkáltatói jogok természetéről
44. *Pap* Tibor: A házasságon kívüli leszármazásra vonatkozó jogalkotás fejlődése – *Budvári* Róbert: A házasságon kívül született gyermek jogállása és a természettudományos tárgyi bizonyítás fejlődése
45. Heinz *Paul*: Az anyagi felelősség szabályozása a Német Demokratikus Köztársaság munkajogában – Gerhard *Riege*: Az állampolgári jog fasiszta eltorzítása
46. *Takács* Béla: A vállalatok összevonása és az összevonások gazdasági hatása
47. *Hoóz* István: A népesedéspolitika néhány elméleti kérdése
48. Rechtshistorikerkonferenz in Pécs (1965): Die Freiheitsrechte und die Staatstheorien im Zeitalter des Dualismus
49. *Kocsis* Mihály: A jogforrások ügye a büntetőeljárásban
50. *Molnár* István: Élelmiszer-termelés – földvédelem
51. Bibliográfia: Az egyetem oktatóinak és tudományos dolgozóinak szakirodalmi munkássága 1945-1966.
52. *Kislégi* Dénes: Az incestus tilalma
53. *Hoóz* István: A népesedéspolitikai intézkedések és a gazdasági helyzet hatása a születési arányszámokra Magyarországon a két világháború közötti időszakban
54. *Fesztl* Nándor – *Tamás* Lajos: Az új gazdasági mechanizmus polgári jogi vonatkozásainak néhány problémája
55. Gerhard *Haney*: A jog és erkölcs
56. *Vargyai* Gyula: A katonai közigazgatás és az ellenforradalmi állam keletkezése
57. *Páll* József: A szerződés teljesítésének megerősítése a PTK-ban
58. *Révész* Károly: A visszaesés problémája a büntetőjogban
59. *Román* László: Munkajogunk néhány kérdése a gazdasági mechanizmus reformjának tükrében
60. *Csizmadia* Andor: A 600 éves jogi felsőoktatás történetéből (1367-1967)
61. *Vargha* László: Über die Faktoren, die das Ergebnis einer Handschriftenvergleichung hauptsächlich beeinflußen können

62. *Földvári* József: Die deterministische Begründung der strafrechtlichen Verantwortlichkeit

63. *Rudolf* Lóránt: Az adásvétel szabályozásának fejlődése a kizsákmányoló társadalmakban

64. *Molnár* István: A munkamulasztásból eredő kártérítés néhány kérdése a termelőszövetkezeti jogban

65. T. *Pap* – R. *Halgasch*: Die Rechtsverhältnisse zwischen Eltern und Kindern in der sozialistischen Gesellschaft

66. Antal *Ádám*: Problemü goszudarsztvennopravovüh i adminisztrativnopravovüh dogovorov v Vengerszkoj Narodnoj Reszpublike

67. *Román* László: A szervezeti jellegű belső szabályzatok természete különös tekintettel a kollektív szerződésre

68. *Vargyai* Gyula: Nemzetiségi kérdés és integráció. Adalékok Jászi Oszkár nemzetiségi koncepciójának értékeléséhez

69. *Judi* István: Munka és erkölcs

70. *Markos* György: A megyei tanácsi szervek tervező tevékenysége

71. *Tremmel* Flórián: A bizonyítás és a bizonyíték fogalma a büntetőeljárásban

72. Antal *Ádám*: Hauptzüge und zeitgemäße Probleme der territorialen Koordinierung in der Ungarischen Volksrepublik

73. *Molnár* István: A földtulajdon és a földnyilvántartás kapcsolata

74. *Bruhács* János: Az ENSZ kísérlete Namibia (Délnyugat-Afrika) nemzetközi státusának rendezésére

75. J. *Dehaussy*: A nemzetközi jog forrásai és a jog nemzetközi forrása – E. *Melichar:* A közigazgatási jogtudomány fejlődése Ausztriában - K. *Opalek:* A jog motivációs hatása

76. Current problems of socialist jurisprudence

77. A Magyar Tanácsköztársaság államáról és jogáról (1919-1969)

78. *Csizmadia* Andor: A pécsi egyetemalapítás 600. évfordulójára (1367-1967)

79. *Páll* József: A házastárs öröklésének néhány kérdése a haszonélvezeti jogra tekintettel

80. Entwicklungsfragen der Verwaltung in Mitteleuropa. Red. Andor *Csizmadia*

81. László *Román*: Einige theoretische Fragen des Zusammenwirkens der Gewerkschaft und des sozialistischen Unternehmens

82. Bibliográfia: Az egyetem oktatóinak és tudományos dolgozóinak szakirodalmi munkássága 1967-1971.

83. Antal *Ádám*: Verfassungsmäßigkeit und Verfassungsschutz in der Ungarischen Volksrepublik

84. Tibor *Pap*: Les exigences sociales et la modification de la loi de la famille

85. Ottó *Bihari*: L'organisation de l'État socialiste - une organisation de l'État moderne

86. József *Farkas*: Der subjektive Geltungsbereich und der objektive Umfang der Rechtskraft im ungarischen Zivilprozeß

87. József *Farkas*: (Red.) Wissenschaftliche Konferenz über die Hauptfragen des sozialistischen Vertragssystems

88. Ferenc *Benedek*: Die conventio in manum und die Förmlichkeiten der Eheschließung im römischen Recht

89. Bibliográfia: A Pécsi Tudományegyetem Állam- és Jogtudományi Kara oktatóinak szakirodalmi munkássága 1972-1976.

90. László *Román*: Über die Rechtsstellung der Arbeitgeberorgane, insbesondere in der Unternehmenorganisation

91. Antal *Ádám*: L'activité gouvernementale en Hongrie

92. Ferenc *Benedek*: Eigentumserwerb an Früchten im römischen Recht

93. József *Farkas* (hrsg.): Beiträge zu den rechtlichen Fragen des Umweltschutzes

94. Andor *Csizmadia,* Alajos *Degré,* Erika *Somfai Filóné*: Études sur l'histoire du droit de mariage de Hongrie

95. *Ádám* Antal, *Benedek* Ferenc*, Szita* János (szerk.): Jogtörténeti tanulmányok. Emlékkönyv Csizmadia Andor hetvenedik születésnapjára

96. József *Földvári*: Einige Bemerkungen zum neuen ungarischen Strafgesetzbuch

97. Emil *Erdősy*: Der technische-wissenschaftliche Fortschritt und die strafrechtliche Verantwortlichkeit

98. Lajos *Tamás*: Das Verantwortlichkeitssystem der Investitionsverträge

99. László *Vargha*: Die Teilrechtskraft im ungarischen Strafverfahren

100. *Ádám* Antal, *Benedek* Ferenc*, Farkas* József (szerk.): Kauser Lipót Emlékkönyv
101. Lajos *Szamel*: La resposabilité de l'administration pour le dommage causé
102. Bibliográfia: A Pécsi Janus Pannonius Tudományegyetem Állam- és Jogtudományi Kara oktatóinak szakirodalmi munkássága 1977-1982.
103. László *Kiss*: Possibilité de décentralisation de la législation administrative en Hongrie
104. *Ádám* Antal (szerk.): A 100 éves Kislégi Nagy Dénes tudományos, oktatói és költői életművéről
105. *Ádám* Antal (szerk.): Jubileumi tanulmányok 40.
106. Antal *Visegrády*: Die Rolle der Gerichtspraxis in der Entwicklung des sozialistischen Rechts
107. József *Farkas*: The main questions of Hungarian international civil procedure law after the codification of private international law
108. Lajos *Tamás*: Kommissionsvertrag - als einer der Rechtsrahmen für eine Kooperation
109. *Ádám* Antal (szerk.): Dr. Holub József és dr. Irk Albert pécsi professzorok munkássága
110. János *Bruhács*: Le régime international de la navigation sur le Danube
111. *Ádám* Antal (Red.): Die Promotion zum Ehrendoktor von Prof. Gerhard Haney und Prof. Gerhard Hoffmann an der Janus Pannonius Universität
112. Miklós *Kengyel*: Rechtsschutzanspruch und die Rechtsschutzbedürfnis. Beiträge zur Theorie des Klagerechts
113. Harro *Otto*: A népesedéssel kapcsolatos orvostudomány büntetőjogi határainak megvonására irányuló megfontolások a Német Szövetségi Köztársaságban - *Erdősy* Emil: Gondolatok a magzatelhajtás büntetőjogi szabályozásának kérdéséről
114. *Ádám* Antal (szerk.): Dr. Faluhelyi Ferenc tudományos, oktatói és tudományszervezői munkássága
115. László *Kecskés*: Staatliche Immunität und Verantwortlichkeit für Schäden
116. József *Farkas*: Die zivilprozeßrechtliche Stellung der Ausländer in Ungarn

117. Die Promotion von Prof. Dr. Harro Otto zum Ehrendoktor an der Janus Pannonius Universität

118. *Ádám* Antal (szerk.): Tanulmányok Szamel Lajos tiszteletére

119. *Ádám* Antal (szerk.): Szamel Lajos és Kulcsár Kálmán a Janus Pannonius Tudományegyetem díszdoktorai

120. Antal *Ádám*: Tendances du développement de l'ordre constitutionnel de Hongrie

121. Antal *Ádám*: Le contrôle de la constitutionnalité des actes administratifs et gouvernementaux en Hongrie

122. Bibliográfia: A Janus Pannonius Tudományegyetem Állam- és Jogtudományi Kara oktatóinak szakirodalmi munkássága 1983-1990.

123. *Hamza* Gábor, *Kajtár* István, *Zlinszky* János (szerk.): Tanulmányok Benedek Ferenc tiszteletére

124. *Korinek* László (szerk.): Tanulmányok Földvári József tiszteletére

125. Bibliográfia (Összeállította Ádám Antalné). A Janus Pannonius Tudományegyetem Állam- és Jogtudományi Kara oktatóinak szakirodalmi munkássága 1991-1996.

126. *Petrétei* József (szerk.): Emlékkönyv Ádám Antal egyetemi tanár születésének 70. évfordulójára

127. Gábor *Hamza,* István *Kajtár,* Attila *Pókecz Kovács,* János *Zlinszky* (hrsg.): Iura antiqua – iura moderna. Festschrift für Ferenc Benedek zum 75. Geburtstag

128. *Petrétei* József (szerk.): Emlékkönyv Bihari Ottó egyetemi tanár születésének 80. évfordulójára

129. Szerkesztési hiba folytán a sorozat 129. száma nem jelent meg!

130. *Fenyvesi* Csaba, *Herke* Csongor (szerk.): Tanulmányok Erdősy Emil professzor tiszteletére

131. A PTE Állam- és Jogtudományi Kara oktatóinak szakirodalmi munkássága 1997-2002. (Bibliográfia) Összeállította Ádám Antalné

132. *Fenyvesi* Csaba, *Herke* Csongor (szerk.): Emlékkönyv Vargha László egyetemi tanár születésének 90. évfordulójára

133. *Korinek* László, *Kőhalmi* László, *Herke* Csongor (szerk.): Emlékkönyv Ferencz Zoltán egyetemi adjunktus halálának 20. évfordulójára

134. *Korinek* László, *Kőhalmi* László, *Herke* Csongor (szerk.): Emlékkönyv Irk Albert születésének 120. évfordulójára

135. Nóra *Chronowski* (ed.): „Adamante notare." Essays in honour of professor Antal Ádám on the occasion of his 75th birthday

136. *Balogh* Ágnes, *Hornyák* Szabolcs (szerk.): Tanulmánykötet Erdősy Emil professzor 80. születésnapja tiszteletére

137. *Tremmel* Flórián, *Mészáros* Bence, *Fenyvesi* Csaba (szerk.): Orvosok és jogászok a büntető igazságszolgáltatásban. Dezső László Emlékkönyv

138. *Gál* István László, *Kőhalmi* László (szerk.): Emlékkönyv Losonczy István professzor halálának 25. évfordulójára

139. *Fenyvesi* Csaba, *Herke* Csongor, *Mészáros* Bence (szerk.): Bizonyítékok. Tiszteletkötet Tremmel Flórián egyetemi tanár 65. születésnapjára

140. *Csefkó* Ferenc (szerk.): Ünnepi kötet. Ivancsics Imre egyetemi docens, decan emeritus 70. születésnapjára

141. *Kiss* György, *Berke* Gyula, *Bankó* Zoltán, *Kajtár* Edit (szerk.): Emlékkönyv Román László születésének 80. évfordulójára

142. A Pécsi Tudományegyetem Állam- és Jogtudományi Kara oktatóinak szakirodalmi munkássága, 2003-2007 (Bibliográfia) Összeállította Kajtár Istvánné, Karoliny Eszter, Saághy Ferencné

143. *Csapó* Zsuzsanna (szerk.): Ünnepi tanulmánykötet Bruhács János professor emeritus 70. születésnapjára

144. Zsolt György *Balogh* et al. (eds.): Selected Essays of Faculty of Law University of Pécs

145. *Chronowski* Nóra, *Petrétei* József (szerk.): Tanulmányok Ádám Antal professor emeritus születésének 80. évfordulójára

146. *Andrássy* György, *Vogl* Márk (szerk.): Az emberi jogok és a nyelvek

147. Zsolt György *Balogh* et al. (eds.): Essays of Faculty of Law University of Pécs, Yearbook of 2010

148. *Fenyvesi* Csaba, *Herke* Csongor (eds.): Pleadings. Celebration volume of Professor Tremmel Flórián's 70th Birthday

149. Zsolt György *Balogh* et al. (eds.): Essays of Faculty of Law University of Pécs, Yearbook of 2011

150. Zsolt György *Balogh* et al. (eds.): Essays of Faculty of Law University of Pécs, Yearbook of 2012

151. Zsolt György *Balogh* et al. (eds.): Essays of Faculty of Law University of Pécs, Yearbook of 2013

152. Attila *Pánovics*, Gergely László *Szőke* (eds.): Essays of Faculty of Law University of Pécs, Yearbook of 2014

153. Gergely László *Szőke* et al. (eds.): Essays of Faculty of Law University of Pécs, Yearbook of 2015