ESSAYS OF FACULTY OF LAW
UNIVERSITY OF PÉCS
YEARBOOK OF 2013

STUDIA IURIDICA
AUCTORITATE UNIVERSITATIS PÉCS PUBLICATA

151

Essays of Faculty of Law University of Pécs Yearbook of 2013

Pécs 2013

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

Responsible publisher
Berke, Gyula (dean)

Linguistic supervision
Chadwick, Clifford Shepherd

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

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

Printed by Kódex Nyomda Kft.
Responsible manager Simon, Béla
H-7627 Pécs, Rigóder u. 29. Hungary

AUTHORS

CZOBOLY, GERGELY – PhD student at the Department of Civil Procedure and Legal Sociology at the University of Pécs, Faculty of Law. His research is focused on speeding up civil procedures.

ESZTERI, DÁNIEL – official at the Budapest Police HQ (Economic Crime Department) and PhD student at the University of Pécs, Faculty of Law.

JÁVORSZKI, TAMÁS – Deputy Chief Prosecutor of Somogy County, with special fields of interest of international judicial cooperation in criminal matters and economic crimes.

KISS, MÓNIKA DOROTA – PhD candidate at the Doctoral School of the University of Pécs, Faculty of Law. She specialises in public law, her research area being direct participative democracy at local level.

KOMANOVICS, ADRIENNE – LLM, PhD, and works at the Department of Public International and European Law of the Faculty of Law, University of Pécs. Her main fields of research are protection of human rights at international and European level, monitoring of human rights standards, and the public law aspects of EU law.

MESTER, MÁTE – lawyer, part-time PhD student at the Faculty of Law of the University of Pécs, and a chief consultant of Explico, a regulatory consultancy firm specializing in CEE affairs. Earlier he took part as a strategic project leader at the National Communications Authority and also worked as head of unit at the Ministry of National Development.

MÁTYÁS, MELINDA – PhD student at the University of Pécs, Faculty of Law at the Business and Commercial Law Department. Her research fields are franchise and other legal contracts and agreements related to intellectual property, goodwill and other intangible assets.

NAGY, NOÉMI – researcher at the Institute for Linguistics, Hungarian Academy of Sciences and a PhD student at the University of Pécs, Faculty of Law. Her research is focused on language rights and minority protection in Europe.

NÁTHON, NATALIE – PhD, lawyer, working at the Court of Justice of the European Union in Luxembourg. She specializes in intellectual property law, art law, history of law, international private and public law.

PÁNOVICS, ATTILA – PhD, and works as senior lecturer at the Department of Public International and European Law, Faculty of Law, University of Pécs. His main research fields cover regional development, sustainable development and environmental rights.

POLYÁK, GÁBOR – LLM, PhD, associate professor at the ICT Law Department, University of Pécs, Facult of Law. His research fields are media law, telecommunications law copyright law and competition law.

RÁCZ, ATTILA – PhD student at the Doctoral School of University of Pécs, Faculty of Law.

SZALAY, KLÁRA – PhD student at the University of Pécs, Faculty of Law, holds an LLM in IT and Telecommunications Law, and works as senior legal advisor at the Hungarian National Assembly.

TOSICS, NÓRA – PhD student at the University of Pécs, Faculty of Law, holds an LLM in European Community Law and works as a lawyer.

TÖTTÖS, ÁGNES – legal expert at the Department of European Cooperation of the Hungarian Ministry of the Interior, responsible for legal migration issues. She is also a PhD student at the University of Pécs, Faculty of Law; she researches in the field of the EU's legal migration policy.

CONTENTS

Deterring dilatory tactics in civil litigation

CZOBOLY, GERGELY

ABSTRACT *Dilatory tactics are often the main cause of undue delay. To prevent them, legal systems – regardless of time and place – have searched for appropriate solutions. In our opinion, to solve the problem adequately we have to scrutinize and analyze the whole process leading to the use of dilatory tactics in detail. Two features should be distinguished: on the one side the intentions of the parties and their lawyers, and, on the other side, their procedural potential for causing delay. In our paper we try to prove that, in the absence of one of these two requirements, dilatory tactics will not be used, and to this end we have examined both. First, we scrutinized the reasons that may lead the parties or their representatives to protract the procedure and then we moved to the other side of the formula to examine how dilatory tactics work and, consequently, how this could be influenced. In this context we tried to identify the reasons why such tactics can influence procedure in one country more than in another.*

1. Introduction

Undue delay in litigation can occur for various reasons – for example, the overwhelming caseload of the courts, a lack of human and other resources and the inappropriate preparation and concentration of trials. Among the reasons, special attention should be paid to the use of dilatory tactics by the parties and their lawyers, which can cause significant delays, even in those countries where the average duration of proceedings is satisfactory. In countries where civil proceedings are less vulnerable to dilatory tactics, it can also substantially increase the average duration of proceedings.

The dilatory behaviour of parties and their lawyers is independent of age and geographical location, since – in our view – it arises always and everywhere for identical reasons. In the present study we rely on the assumption that *dilatory tactics are used by the parties and their lawyers only if intent and opportunity meet. In the absence of either, these tactics are not applied.* In cases where – although it could be in the power of the parties to delay the proceedings – they are not interested in doing so, they will not use such tactics. This is also the case where the parties or their lawyers are interested in delay, but – because of the lack of appropriate means in that jurisdiction – they are unable to do so. Therefore, first we will examine the reasons which lead the parties or their representatives to prolong proceedings and then we will move on and scrutinize

the operation of dilatory tactics, attempting to understand how this operation could be influenced. In this context we will try to identify the reasons why such tactics can influence proceedings more in one country than in another. *We believe that legal systems are vulnerable to dilatory tactics in different ways and for different reasons.* The reasons which can affect vulnerability include: the responsibilities of the judge and the parties in advancing the proceedings, the parties' room for manoeuvre, the existence of adequate sanctions and, finally, the litigation practice of the judge and the parties concerned. In legal systems where the responsibilities are reasonably divided, the judge has appropriate devices to manage proceedings. Also, where litigation practice is not a neutralizing influence, systems are less vulnerable than when this is not the case.

We shall then examine and systematize those procedural devices which may serve to address this problem. On the basis of our thesis, these procedural devices will be classified into two groups, depending on their aim and effect. Accordingly, we can distinguish between those devices which aim to neutralize or counter the interests of the parties and their lawyers, and those which aim to reduce the possibilities of the parties delaying proceedings.

2. Parties' and lawyers' interests in delaying proceedings

With respect to the length of a civil lawsuit, traditionally *the opposite interests of the parties* are emphasized. "It is believed, and it is often true, that the plaintiff is interested in a quick resolution of the lawsuit and the defendant in a slow completion. Perhaps it is better to put it in a slightly more complicated way: the party who believes that he has the better chance of winning hurries, whilst the party who believes he has a lesser chance of winning delays the completion of the lawsuit."[1] The party who fears losing is more likely to want to delay the proceedings, if he expects to achieve more at a later date, or he simply would like to defer the unfavourable effects of a lost case. In this case the party only wants *to gain time*. HABSCHEID formulated this as follows: "[if] the party has to calculate a priori, or during the proceedings (e.g. due to the results of the taking of evidence) on losing the lawsuit, it is natural that he will work to delay the completion of the procedure and defer the impending enforcement."[2] In this case, the debtor actually considers the lawsuit as a quasi loan, where repayment begins only after the end of the proceedings. It allows the debtor to be in a position, as if he had a loan, to fulfil his primary obligations, but without credit evaluations and approvals, or without guarantees. This solution could be

[1] Kiss, Daisy: Az ügyvédek nagy kézikönyve. Complex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft., Budapest, 2010 p. 347.

[2] Habscheid, Walther J.: A polgári per koncentrálását célzó újabb irányzatok az NSzK-ban, Olaszországban, Franciaországban és Svájcban. In: Jogtudományi Közlöny 1971/01. p. 27. (fordította: Schelnitz, György)

especially attractive, if interest rates are low. Another case is if the debtor would like to delay proceedings to hide his assets, by transferring or hiding them from the creditor.

From previous cases those should be distinguished where the economically stronger party wants to delay the lawsuit to reach a better deal with the economically weaker party, because he cannot afford a long process. In this case the financially vulnerable party would rather accept an unfavourable deal than wait for a considerably delayed judgment. In such a case the costs incurred during the procedure could also encourage the party to accept a deal, as in a prolonged procedure the costs become unpredictable and they often exceed the amount of the original claim. In this context CHIARLONI draws attention to the fact that insurance companies in Italy frequently endeavour to delay proceedings, because the "plaintiffs often prefer to settle on unfair terms rather than wait for years, and spend huge sums of money, to get their full awards."[3] In conclusion, drawn-out procedures and disproportionately high costs lead to significant losses on one side, and huge gains on the other, and so the economically stronger parties are interested in prolonging the procedures, because the delay works in their favour.

In these cases the behaviour of the party should be considered rational, since his expectations of the situation as a result of the dilatory action are favourable, and in such a case the party – based on the information available – calculates the possible benefits and risks and as a result of his evaluation makes a decision on his future litigation tactics. The level of this evaluation could be very different depending on the social and economic position of the party. A defendant with financial liquidity problems – who only wants to buy time – will plan a much lower level of consideration than a professional party who has the necessary human and other resources for a more complex analysis. For example, an insurance company regularly makes a financial analysis of their normal business operations, which makes it likely that they will act similarly with their litigation tactics.

From these cases those should be distinguished where the motivation for dilatory action could be considered – in this perspective – as irrational. This is the case where the party is motivated by emotions such as anger or a desire for revenge. In earlier cases the parties may have decided on reasonable motivation (which can be influenced by potential sanctions) in later cases they were blinded by strong emotions, which – we believe – cannot be so easily influenced by sanctions.

It is clear that the parties may be interested in delaying proceedings for varying reasons, but it is not necessarily they alone: the lawyers may also have an interest. Such cases should be viewed differently from the others, since the

[3] Chiarloni, Sergio: Civil Justice and its Paradoxes: An Italian Perspective. In: Adrian Zuckerman (ed.): Civil Justice in Crisis. Comparative Perspectives of Civil Procedure. Oxford University Press, New York, 1999 p. 276.

reasons sometimes differ from those of their clients. It may well be for the purpose of maximizing income.

ARMSTRONG notes that "the adversarial system rests on the assumption that the parties are best placed to act in their own interests. This, it can be said, ignores the fact that the parties are represented by lawyers who may not always be acting in their client's interests due to incompetence, a desire to inflate fees, or due to factors inherent to the lawyer-client relationship."[4] VERKIJK systematized the interests of the clients and their representatives and concluded that, in civil proceedings, beyond their client's interests, lawyers have various interests too.[5]

The first group is the lawyer's own interests as a good professional, in particular to represent his client in a good, professional manner, but which can sometimes lead to delay. ZUCKERMAN highlighted that lawyers sometimes prolong the procedure to enable them to serve the interests of their clients best: "self-interest finds expression not only in seeking maximal remuneration, but also in acquiring immunity from claims of negligence. In order to minimize the liability for negligence, lawyers would naturally tend to follow all procedural avenues open to their client"[6] – and this can also lead to delay. Often this explains why lawyers withhold information and submit it only at a later stage. Appropriately submitted evidence can create a great effect on the final decision and so lawyers are interested in using information and evidence in such a way. This stage of the procedure is, in several legal systems, the Appeal Court, and in this situation lawyers delay the procedure – not to increase their income, but to win the case.

In the second group the illegal interests of the lawyer can be classified – which encourage them to commit a crime. For example, money offered to the lawyer by the other party for delaying the case could persuade him to prolong the lawsuit.

The last group are the legitimate interests of the lawyers, albeit interests which are not strictly related to good professionalism. Among these, from the perspective of our topic, we should deal with the latter more closely. VERKIJK mentioned lawyers' fees as an example which is legitimate but not strictly related to good professionalism.[7] ZUCKERMAN also noted that legal representatives often have interests distinct from those of their clients, such as

[4] Armstrong, Nick: Making Tracks. In: Zuckerman, Adrian – Cranston, Ross (ed.): Reform of Civil Procedure, Essays on 'Access to Justice'. Clarendon Press, Oxford, 1995 p. 107.

[5] Verkijk, Richard: Beyond Winning: Judicial case management and the role of lawyers in the principles of transnational civil procedure. In: van Rhee, C.H. (ed.): Judicial Case Management and Efficiency in Civil Litigation. Intersentia, Antwerpen, 2008 p. 72.

[6] Zuckerman, Adrian: Reform in the Shadow of Lawyers' Interests. In: Zuckerman, Adrian – Cranston, Ross (ed.): Reform of Civil Procedure, Essays on 'Access to Justice'. Clarendon Press, Oxford, 1995. p. 65.

[7] Ibid. p. 72.

their fees. He remarks in this context, that "still, given the scope for procedural manoeuvring and low client resistance, it would be a miracle if there were no substantial connection between lawyers' financial interests and litigation practices".[8]

There are several ways of calculating lawyers' fees which can influence lawyers' attitudes in civil procedures, changing both their style and length. In consequence, different legal systems encourage lawyers to behave in different ways, but there is something common to all: lawyers try to maximise their income as far as the system allows. This is not morally wrong in itself; human nature – perfectly rationally – ensures that we all try to increase our income. Nevertheless, this natural economic interest can also be in conflict with other interests, at which point it loses neutrality in terms of value. This can also be seen in dilatory tactics, since lawyers have responsibilities to their professional community, the court and their clients, *which would be violated if they used dilatory tactics to increase their income.*

However, it would also be a mistake to assume that lawyers' actions which lead to undue delay are always aimed at increasing their income. Frequently they contribute to the opposing lawyers' dilatory tactics due to "professional solidarity". This is the case is when a lawyer asks to postpone the trial date and the opposing lawyer agrees. Lord WOOLF drew attention to this matter in his reports. He pointed out that "it may even be in the interest of the opposing side's legal advisers to be indulgent to each other's misdemeanours. Judicial experience is that it is for the advisers' convenience that many adjournments are agreed. This is borne out by the fact that, when the courts have required the client to be present to support a late application to adjourn the trial, the number of such applications has reduced dramatically."[9] HABSCHEID explains this behaviour as: "only lawyers who are compliant with their colleagues can expect favours from them in a similar situation."[10] This case can be classified to the third group of interests too. However, in this case, they are not acting in order to increase their income, but to maintain their professional relationships. This is also an interest, which can encourage lawyers to prolong the procedure.

In conclusion, we can say that, in respect of the use of dilatory tactics, different interests are evident – on one side those of the parties, and, on the other, those of the lawyers. These interests, however, come together in the hands of the lawyers themselves, who can either support or hamper each other. A lawyer can act in the interest of his client, who would prefer a long procedure, in which case he will use the necessary procedural devices to prolong the lawsuit. This strategy could also be to the advantage of the lawyer, who could be interested in a long process regardless of his client's wishes.

[8] Ibid. p. 65.

[9] Lord Woolf: Access to Justice: Interim Report, 1994. Chapter 3 Nr. 31.

[10] Habscheid, Walther J. op.cit. p. 27.

Respective levels of interest could, of course, be lower and, in extreme cases, could nullify each other.

A further observation can also be made. The parties and their *lawyers usually try to prolong the lawsuit for logical reasons*. This is important since, if a decision is a consequence of a rational decision-making process and the use of dilatory tactics is the choice of the parties and their representatives, then, *by neutralising or countering these interests, dilatory tactics can be deterred or discouraged.*

3. The distribution of responsibilities

One facet of our thesis – "intention" – has been discussed, and so we shall examine the other, which is "opportunity". By this we mean those rules which give the parties the opportunity to prolong the proceedings and cause undue delay. If the parties –the procedural rules of a country so permitting - can decide how long a procedure will take, then they can freely prolong it. However, if the conduct of the procedure does not depend on their decision, then they have no means of using dilatory tactics. Nevertheless, the procedure can also be delayed in such cases - not because of the tactics of the parties, but for other reasons.

In our study, we assume that legal systems are vulnerable in different ways to dilatory tactics and for a variety of reasons. In our opinion, the main cause of this is the fact that in each jurisdiction *the responsibilities of the judges and the parties in advancing the proceeding* are differently distributed. If the parties have the main responsibility and the conduct of the procedure depends on their decision, so does its length. In this case there are broad options for using dilatory tactics, but to ensure that the parties do not delay, responsibilities and duties should be carefully distributed. In this chapter we shall try explain how the vulnerability of legal systems could be reduced.

The methods of dilatory tactics differ in each legal system, since the manoeuvrability of the parties depends on the rules of the given legal system. Such tools may include "torpedo claims",[11] withholding or "dripping" relevant information,[12] manoeuvring for adjournments, repeating groundless requests for the withdrawal of the judge assigned to hear the case,[13] initiating satellite

[11] Sander, Florian – Breßler, Steffen: Das Dilemma mitgliedstaatlicher Rechtsgleichheit und unterschiedlicher Rechtsschutzstandards in der Europäischen Union - Zum Umgang mit sogenannten „Torpedoklagen". In: Zeitschrift für Zivilprozess 2009/2. p. 157.
[12] Rinsche, Franz-Josef: Prozeßtaktik. Carl Heymans Verlag KG, Köln, 1993 p. 62.; Prütting, Hanns In: Lüke, Gerhard – Walchshöfer, Alfred (ed.): Münchener Kommentar. C.H. Beck'sche Verlagsbuchhandlung, München, 1992 p. 1668.
[13] Grgič, Aida: The Length of Civil Proceedings in Croatia: Main Causes of Delay. In: Uzelac, Alan – van Rhee ,C.H. (ed.): Public and Private Justice – Dispute Resolution in Modern Societies. Intersentia, Antwerpen, 2007 p. 155.

litigation[14] or using related lawsuits in different courts in the hope that the hearing will be delayed pending the other decisions. The number and effectiveness of the methods depends on the given legal system and on the judge hearing the case. For example, in systems where the rules wish to ensure the right of the party to be heard at any cost and do not sanction 'by default' judgment, the non-attendance of the defendant at the trial can halt the whole procedure. Since the number of possible methods varies with time and space, we shall not examine the problem from the viewpoint of particular methods, but from that of the responsibilities of the judge and the parties.

KENGYEL points out that, "regardless of historical periods and social arrangements, the determination of the relations of power between the judge and the parties is one of the main questions of the regulation of civil procedure. Basically it determines the practicability of procedural liability."[15] In our opinion, the "opportunity" side of our thesis should be approached from the perspective of the balance of power between the judge and the parties, since this is relevant to the issue of how to reduce the vulnerability of legal systems.

Historically, different models of civil procedure were developed which distributed the procedural rights and duties of the judge and the parties in varying ways.[16] From the perspective of our topic, their influence on the conduct of the procedure has great relevance. In cases where the conduct of the procedure depends basically on the parties, they have many possibilities to prolong proceedings. If their influence is limited and the procedural powers are divided between them and the judge, their potential to cause delay is limited.

In the liberal civil procedure, party autonomy prevailed in respect of the conduct of the procedure too, and so the parties had great influence – which they frequently misused. According to HABSCHEID, the 19th century codifications, which granted unlimited autonomy to the parties, were built on the axiom that 'the "free play of powers" must prevail, so the interests of the parties, who fight for their own rights, are the most efficient catalysts to resolve the legal situation as soon as possible.[17] The error of this assumption is easily recognised if we consider that the disagreement between the parties may be only on the merits of the case, but not the conduct of the procedure. It is possible that both parties are withholding information to gain advantage over the other by submitting a relevant fact or new evidence at the right time. On the

[14] Michalik, Paul: Justice in Crisis: England and Wales. In: Zuckerman, Adrian (ed.): Civil Justice in Crisis. Comparative Perspectives of Civil Procedure. Oxford University Press, New York, 1999 p. 128.
[15] Kengyel, Miklós: A bíróság és a felek közötti felelősségi viszony a polgári perben. (Történeti és összehasonlító elemzés). Eötvös Lóránd Tudományegyetem Állam- és Jogtudományi Kara, Budapest, 1989 p. 11.
[16] Lásd: Kengyel, Miklós: A bírói hatalom és a felek rendelkezési joga. Osiris Kiadó, Budapest, 2003
[17] Habscheid, Walther J. op.cit. p. 27.

other side, we must recognise that the parties are usually represented by lawyers. In this case the "free play of powers" does not appear as clear, due to their own interests and the professional solidarity. The weakness of the system was due to *the overstretching of the limits and the misuse of the rights*. ZUCKERMAN notes – in line with the findings of Lord Woolf – that "the cause of complexity, delay and cost is due not to the nature of our procedural devices but, rather, to the excessive and disproportionate use and abuse of the procedural tools."[18] The conceptual mistake of the liberal civil procedure was that it gave the responsibilities in advancing the procedure to the parties, who misused it.

The social civil procedure had evolved at the end of the 19th century in Austria as a response to the anomalies of the liberal civil procedure. It transferred the procedural tools of case-management from the parties to the judge. "For the realisation of the social function of civil procedure, the role of the court has become crucial. As the opposite of the autonomy of the parties, Klein emphasised the court's vigorous activity."[19] Nevertheless this active judicial case management did not restrict the private autonomy of the parties; it only tried to rectify the conceptual mistakes of the liberal civil procedure. MAGYARY formulated this as follows: "[the fact that] the balance between the judge's and the parties' dominance in the procedure could be established, was due to two reasons. First, the autonomy of the parties was restricted by appropriate limitations. The party may decide to ask for judicial protection or not, but the decision is not his as to how the procedure will be managed or how long the procedure will take. If the party asks for judicial protection, he will not hinder the judge in uncovering the truth."[20] As a result, the parties and their representatives will have less room for manoeuvre to cause delay. It is, on the one hand, due to the active case management of the court, and, on the other, to the limitation of the autonomy of the parties. If the judge has an active role in the litigation and appropriate procedural tools to realise it, and at the same time, the rules do not provide easy opportunities for the parties to prolong the procedure, then dilatory tactics cannot prevail. However we should see that it is not enough to make the judge's role more active, it is also necessary to give him adequate procedural tools and to limit the rights of the parties regarding the management of the procedure. KENGYEL draws attention to the relevance of these requirements with the examples of Italian and French civil procedure. "The developments of Italian and French civil procedure point to the growth of judicial power. [However] the restriction of the limitless autonomy of the parties and the increase of their responsibility in advancing the proceedings follow the concentration of judicial case management more slowly. It seems

[18] Zuckerman, Adrian op.cit. p. 62.
[19] Kengyel, Miklós: A bírói hatalom és a felek rendelkezési joga p. 105.
[20] Magyary, Géza: Magyar polgári perjog (Harmadik kiadás). Franklin-Társulat Kiadása, Budapest, (é.n.) p. 38.

that, until these two developments are "synchronized" neither the French, nor Italian civil procedure can get rid of the common heritage of the "Roman procedure". The remains of the written, mediation and formal procedures are still visible and leave room for the parties and their lawyers to use dilatory tactics and to prolong the procedure at their will."[21]

4. Methods of deterring dilatory tactics

In the previous sections we analysed both elements of our thesis. On one side we pointed out that parties and their lawyers can be interested in causing delay for a variety of reasons, some of which are reasonable. We concluded that the use of such tactics can be prevented by neutralizing these interests. On the other side, we examined the possibility of restricting the parties' room for manoeuvre to reduce undue delay. As one way we suggested limiting the autonomy of parties in conducting the procedure, which can be achieved either by regulatory restrictions or by active judicial case management. We now examine those procedural methods which can be used to achieve our goals, namely the neutralization of these interests and the restriction of the parties' room for manoeuvre. Based on this, we classify procedural rules according to their aims into two groups.

4.1 Neutralizing interests causing undue delay

In our opinion, those interests can be influenced by legal mechanisms which are rational in the sense that the aims of those using these tactics are higher than the others. On one side we identified the interests of the parties and, on the other, of their lawyers.

To equalize the parties' interests most legal systems apply *sanctions* – most commonly fines – *and special cost rules*. These procedural devices occur as a risk for the party who must take these into account when considering such tactics. Therefore, the party has to balance the possible benefits and the risks on a hypothetical scale. The extent of the risk depends on the amount and the frequency of use of the sanction. If the risks are greater than the possible benefits, then the rational party will choose not to delay the procedure. This is the preventive effect of the sanction. It follows that the amount of the fine has to be on a level which can deter the parties. However a preventive effect can be achieved only if the sanctions are frequently and logically applied, so that their use might be reasonably expected by parties in cases where these tactics are used. Finally the party must also be aware of the consequences of these tactics and about their inevitability.

[21] Kengyel, Miklós: A bíróság és a felek közötti felelősségi viszony a polgári perben p. 59.

On the other side we identified some (rational) interests of lawyers, especially in increasing their income. If a lawyer can increase his income by causing delay, then he will be interested in doing so. This interest can be influenced by different tariff methodologies and by sanctions.

In the case of an hourly-based arrangement, the lawyer's fee depends on the hours billed. This means that, if the procedure takes longer, the lawyer can bill more hours and so his fee increases. Again, the lawyer will be interested in prolonging the procedure. The same is true when fees are calculated according to a tariff, where the lawyer can bill after every submission or procedural action he makes. If there are no restrictions on the number of the billable submissions or actions, lawyers will be interested in a longer procedure, as there will be more trials, more submissions and, as a result, higher fees. In contrast, where a tariff system is applied, but billable actions are restricted so that lawyers can ask their fee only once after a submission or type of action, they will be not interested in delay, since their income will not increase. On the contrary, they will be interested in acting as soon as possible, to get their fee earlier. As an example, we can mention the German tariff system, where lawyers' fees are calculated regardless of the working hours or the number of submissions or procedural actions, but only in respect of the procedural stage. LEIPOLD mentions as an example, "the evidence fee can also only be earned once in the same hearing. Thus, a lawyer does not earn more money when ten witnesses and three expert witnesses are heard than he gains if there is only one witness. The lawyer has an economic interest in the procedure reaching the stage of taking evidence by the court, but he has no economic interest in expanding the evidence."[22] The aim of this tariff system is to reduce the interest of the lawyer in causing delay. The same can be seen with the success fee, where lawyers are interested in winning the case and increasing the amount awarded, since their fees are calculated according to the money involved, but not according to the length of the procedure.

In LEIPOLD's opinion "the influence of cost regulation must not be underestimated and if you want to influence the reality of the procedure, you have to think about the degree to which the behaviour of the parties and especially of their representatives is influenced by economic factors."[23] This cost regulation can hinder the use of dilatory tactics by reducing lawyers' interest in cases where only the lawyer is interested in delay, but we have to note, that it does not have the same effect in cases where the delay serves the client's interests.

We have identified sanctions as another institution to influence lawyers' behaviour. The application of sanctions against lawyers is a sensitive issue due

[22] Leipold, Dieter: Limiting Costs for Better Access to Justice: The German Approach. In: Zuckerman, Adrian – Cranston, Ross (ed.): Reform of Civil Procedure, Essays on 'Access to Justice'. Clarendon Press, Oxford, 1995 p. 272.
[23] Ibid. p. 266.

to the special function and status of lawyers, and so it is regulated in very different ways. NORMAND notes that "on the whole, lawyers are the main initiator of procedural abuses and stalling tactics. Nonetheless there are few legal systems which have potential sanctions against them."[24]

The judge's sanctioning powers differ from country to country. At one end of a hypothetical scale are the common law countries, in particular the USA, and, at the other end, Germany. Whilst in the USA the Federal Rules of Civil Procedure allow, in very many cases, the use of sanctions against lawyers, the German civil procedure code (ZPO) does not allow the sanctioning of lawyers by judges.

BREYER compared the common law systems with the German and stated that, whilst a judge in a common law system can order lawyers to pay the costs of their actions, in the German system it is unimaginable.[25] By now the situation is similar in Austria. Previously, the Austrian civil procedure code (öZPO) allowed the judge to impose fines on an attorney who delays the proceedings by gross negligence.[26] This was changed by the reform of 1983, which abolished judicial disciplinary power with regard to attorneys.[27] Application of dilatory tactics in Austria is considered a violation of professional regulations and the bar has disciplinary powers in these cases.[28] The sanctioning of lawyers is also known in English civil procedure. According to the English rules, the court has the power to disallow a legal representative from recovering costs from his own client, or order that the legal representative personally pay costs to another party.[29] Examples of conduct that may justify a wasted cost order include failing to attend a hearing, causing an unnecessary step to be taken in proceedings, or prolonging a hearing by gross repetition or extreme slowness in the presentation of evidence or argument.[30]

The courts' right to impose sanctions against lawyers raises concerns. Due to the function and status of the lawyers, those procedural rules which entitle the trial court to discipline the lawyer acting in that procedure as the representative of the party, are problematic. However, lawyers have obligations not only to their clients and their professional society, but to the court also, and in cases of

[24] Normand, Jacques: Final Report: The Two Approaches to the Abuse of Procedural Rights. In: Taruffo, Michele (ed.): Abuse of procedural rights: comparative standards of procedural fairness. Kluwer Law International, The Hague, 1999 p. 246.
[25] Breyer, Michael: Kostenorientierte Steuerung des Zivilprozesses. Mohr Siebeck, Tübingen, 2006 p. 12.
[26] Normand op.cit. p. 246.
[27] Rechberger, Walther H.: Kommentar zur ZPO. Springer-Verlag, Wien, 1994 p. 558.
[28] König, Bernhard – König, Andrea: Landesbericht Österreich. In: Walter, Gerhard (ed.): Professional Ethics and Procedural Fairness. Verlag Paul Haupt, Bern, 1991 p. 196.
[29] Loughlin, Paula – Gerlis, Sephen: Civil procedure (Second Edition). Cavendish Publishing Limited, London, 2004 p. 537.
[30] Ibid. p. 538.

violation of this duty, lawyers should be sanctioned, but not directly by the trial judges. It is a possible solution that the trial judge could notify the bar of the violation for them to impose sanctions on their members.

4.2 Limiting the room for procedural manoeuvres

As another way to deter dilatory tactics, those procedural rules could be mentioned which *limit the room of the parties for procedural manoeuvres*. These are – in general – not attempting to influence the interests, but the possibilities of the parties. Two types of rule can be distinguished. In the first group we can classify legal restrictions and, in the second, those rules which provide the judge with the necessary tools for active case management.

In the first group are legal institutions such as judgment by default, the limitation of new evidence in the appeal and time limits for amendment of plea or motions for hearing evidence. As one example, we can mention the reform of Hungarian civil procedure from 2008.[31] According to the new rules relating to small claims, the plaintiff cannot change his claim after the first hearing, and the parties can present their motions for hearing evidence on or before the first day of the hearing. The purpose of these provisions was to reduce the opportunities for changing the subject of the case thereby concentrating the lawsuit. In respect of the written procedure, the principle of eventuality arises. The essence of this concept was that the Act on Civil Procedure gave a deadline for parties to submit the facts and the evidences.

In the second group those procedural rules feature which provide the judge with the tools necessary to manage the procedure. Indeed, by giving procedural tools to the judge to manage the lawsuit, the parties lose their ground for manoeuvre. Andrews states that, "under the new system of judicial case-management, it might be expected that there will be fewer opportunities for the parties to engage in adversarial manoeuvres" and, by this, a speedy and efficient civil procedure can be achieved.[32] However, this can be achieved only if the judge has adequate procedural tools to fulfil his task. Such an institution is the institution of preclusion, which is well known in the German and Austrian civil procedure, as well as in some East European countries.[33] It attempts to ensure the concentration of procedure by excluding those "attack and defence devices"

[31] Act XXX of 2008 on the amendment of the Act III of 1952 on the civil procedure

[32] Neil, Andrews: Abuse of Process in English Civil Litigation. In: Taruffo, Michele (ed.): Abuse of procedural rights: comparative standards of procedural fairness. Kluwer Law International, The Hague, 1999 p. 96.

[33] Lásd: Harsági, Viktória – Sutter-Somm, Thomas (ed.): Die Entwicklung des Zivilprozessrechts in Mitteleuropa um die Jahrtausendwende. Reform und Kodifikation – Tradition und Erneuerung. Schulthess, Zürich, 2012

of the parties which are not submitted in due time,[34] and so the violation of the obligation to support the process (Prozessförderungspflicht) can lead to the loss of a lawsuit. LEIPOLD also highlights that the risk of losing the lawsuit due to motions being excluded forces the parties to take their obligation to support the process seriously.[35] By this institution the judge can limit the opportunities of the parties to engage in adversarial manoeuvres. This has various impacts on the behaviour of the parties. On the one side, that party who believes that he has the better chance of winning is influenced to submit the facts and evidence in due time, and so his lawyer is compelled to act in accordance with this requirement since, if he does not, his client can lose the lawsuit. In this case, although the lawyer can be interested in causing delay to increase his income, he cannot risk losing the case and so must submit all relevant information to the court in due time - and without "dripping". On the other side, the party who believes that he has a lesser chance of winning cannot delay the procedure, due to the lack of procedural tools to do so.

5. Summary

In summary, we can conclude that dilatory tactics are often the main cause of undue delay. To prevent this, legal systems – regardless of time and place – have looked for appropriate solutions. In our opinion, to solve the problem adequately we have to scrutinise and analyse in detail the whole process leading to the use of dilatory tactics. Two aspects should be distinguished: on one side the intentions of the parties and their lawyers, and, on the other side, their procedural potential to cause delay. In our paper we have tried to prove that, in the absence of one of these two requirements, dilatory tactics will not be used, and so, if we wish to prevent their use, efforts should be made to ensure their absence.

As the means of neutralising the interests of the parties and their lawyers in causing delay, we have identified the existence of appropriate calculation methods of lawyers' fees, adequate sanctions and their consequent application. We have examined, in different legal systems the possibilities for sanctioning lawyers for using dilatory tactics and we have stated our opinion on the nature of those rules which empower the trial judge to discipline the parties' lawyer. We have concluded that the preventive effect can also be achieved if the judge does not directly apply procedural sanctions, but notifies the bar of the misconduct of the lawyer. As a means of limiting the possibilities of the parties using dilatory tactics, we have also identified active judicial case management,

[34] Foerste, Ulrich In: Musielak, Hans-Joachim (ed.): Kommentar zur Zivilprozessordnung (3. neubearbeitete Auflage). Verlag Franz Vahlen, München, 2002 p. 712.

[35] Leipold, Dieter In: Stein-Jonas Kommentar zur Zivilprozeßordnung (20. Auflage, 11. Lieferung). J.C.B. Mohr (Paul Siebeck), Tübingen, 1985 p. 268.

the existence of the proper tools to realise this and the necessary limitation of party autonomy.

We are convinced that a well-balanced system of these procedural tools can prevent the use of dilatory tactics, and, as a result, reduce undue delay. However, we also have to regard the natural limits of legal acts. The best procedural rules cannot achieve their goal if they are not properly applied. This falls, primarily, upon judges and only secondarily on the legal culture of the parties and their lawyers. In a system where the judge has the duty and the necessary tools to prevent undue delay, the main responsibility is his. However, this does not mean that we can ignore the responsibilities of the parties and their lawyers. They use dilatory tactics in their own interest. In the absence of intention and conduct these tactics would not be used and so, to fulfil their responsibility, judges have to use their case management devices and power.

Bitcoin: Anarchist money or the currency of the future?

ESZTERI, DÁNIEL

ABSTRACT *In January 2009 the Japanese software-designer SATOSHI NAKAMOTO invented a virtual currency named Bitcoin and released software for managing transactions in the new money. It consists solely of bits and bytes, but we cannot see it as a coin or banknote on the market. There is no cover in terms of gold or stocks, for example – in fact, nothing but the source code of the software which consists of thirty-one thousand lines of code. NAKAMOTO wanted to create a currency immune to potentially predatory bankers and politicians and so the currency and the mechanism to acquire Bitcoin were controlled entirely by software. The payment system is completely decentralised and so contains no central organisation which monitors transactions. Many people use this new currency to pay for services or products on the Internet, since it is no less safe than traditional payment systems.*

In this paper I will first introduce the basic parameters and functions of the alternative currency, and will deal especially with security and privacy issues relating to the virtual money. After that I will examine the value of Bitcoin on the online market, especially answering questions such as how we can acquire it. After this the legal background will be presented and suggestions made for its possible regulation, whilst its likely role in criminal behaviour is suggested.

The paper was written in order to stimulate interest in this special, new currency, its working mechanisms, advantages and possible dangers, and because it represents a unique paradigm-shift, not simply in cyberspace, but in real-world payment systems also.

The paper also has a supplementary role, since there is scarcely any detailed material on the topic available in national or international scientific literature.

1. Introduction

We can make money in many different ways. We can earn it, receive it as a present, steal it, counterfeit it or find it in the street. These ways are traditional in our everyday world, whether legal or illegal, but what happens when a new type of money is invented?

There is a new virtual money, Bitcoin, which exists only on the internet. It is an independent currency consisting only of bits and bytes, but not represented by bank notes or physical coins. There is no cover in terms of gold or stocks, for

example – in fact, nothing but the thirty-one thousand lines of the software's source code.[1]

The life of this unique virtual currency started in November 2008, when a formerly unknown person, calling himself SATOSHI NAKAMOTO posted his famous essay on the internet concerning the creation of a currency which exists only in virtual space.[2]

No-one had previously heard of this mysterious individual, and even the 'great old experts' of cryptography remained silent when they saw the name. The pseudonym NAKAMOTO was only the online profile of a mysterious, faceless hacker who claims to be a software-engineer living in Japan.

The e-mail address used to publish the paper was registered by an anonymous German domain-registration company, and we can find no other information on the internet. Since then, this interesting person has disappeared into the endless depths of cyberspace for ever, even though he answered question in his thesis which had baffled the experts dealing with cryptography and digital currencies since the birth of the world-wide-web.[3] Bitcoin software was released at the beginning of 2009 and the first Bitcoin transactions were made using a network established according to NAKAMOTO'S thesis. This works much as does a decentralised peer-to-peer network (as BitTorrent technology, used for file-sharing via the internet).

The Bitcoin phenomenon immediately raises questions. What is Bitcoin? How much is a Bitcoin worth? How can we pay with this new kind of money? What can we purchase in Bitcoin? How can we obtain, or earn Bitcoin? How does the network operate? Is it safe? What kind of legal framework is involved? Can the currency be used for illegal activities? The paper tries to answer these questions.

2. Brief history of virtual money

History of money was heavily influenced by virtualisation, and the first event in this was the introduction of credit cards, which reduced money-circulation by banks. After credit cards there appeared digital money, which holds its value in lines of digital code authenticated by the bank's digital signature. Digital money must accord with the classical functions of money,[4] absorb new functions such as security, anonymity, acceptance, different

[1] Davis, Joshua: The Crypto-Currency, http://www.newyorker.com/reporting/2011/10/10/111010fa_fact_davis [16.10.2011.]
[2] Nakamoto, Satoshi: Bitcoin: A Peer-to-Peer Electronic Cash System, http://bitcoin.org/bitcoin.pdf [17.10.2011.]
[3] Wallace, Benjamin: The Rise and Fall of Bitcoin, http://www.wired.com/magazine/2011/11/mf_bitcoin/ [17.06.2012.]
[4] The classic money functions are: medium of exchange, circulating medium, store of value, accounting function.

denominations, offline working, different operating systems and hardware dependence.[5]

Before the coming of Bitcoin, many scientists had already taken up the question of an independent, anonymous and decentralized virtual form of money. The first of these, at the beginning of the 90s, was TIMOTHY MAY and his cyberpunk-enthusiasts,[6] who tried to popularise his theories on the internet, thinking that privacy-protection would be the most important question in the following years. Members of this group shared their opinions via an electronic mailing list called 'Cyberpunks electronic mailing list' founded by May. These theories are summarised in the book 'Crypto Anarchy, Cyberstates, and Pirate Utopias', edited by PETER LUDLOW.[7]

DAVID CHAUM also dealt with the problem in the 90s, and tried to issue totally virtual money – Ecash. His idea failed since both government and card issuer were crucial to the system.[8]

WEI DAI improved these thoughts and came up with the idea of B-money in 1998. He said that a virtual currency has to be built on work-mechanisms, and, further, subscribers have to deal with building the resources algorithmically.[9]

NICK SZABÓ conceived Bitgold in 1998, although it was made public only in 2005.[10] According to Szabó, Bitgold has to be stored in lines of computer code, must be impossible to counterfeit, safely stored, easily transferred and verifiable. The basic issue is that the parties have to minimise trust in a third party. The parties have to share their computers' calculating powers through a network to solve cryptographic equations.[11]

These theories advanced the birth of Bitcoin since its system already contains such factors. In the next chapters the Bitcoin system's working mechanisms will be explained since this is the only decentralised money system as yet in existence.

[5] Infótér: Bitcoin, a nonkonformista digitális fizetőeszköz, http://infoter.blog.hu/2012/06/11/bitcoin_a_nonkomformista_digitalis_fizetoeszkoz [01.08.2012.]
[6] Cyberpunk is a popular genre of contemporary mass culture, a sub-genre of science fiction which takes place in the near future. In cyberpunk stories people live in a huge, overcrowded metropolis, due to which their emotional life is bleak. The feeling to be part of a nation is overwhelmed by being part of a company. Typical characters are the cybercriminal and the IT-expert.
[7] Ludlow, Peter (ed.): Crypto Anarchy, Cyberstates, and Pirate Utopias, 2001. ISBN 0-262-62151-7
[8] Zenner, Erik: Ecash – Ein existierendes Zahlungssystem im WWW, http://trumpf-3.rz.uni-mannheim.de/www/sem96s/webrum.uni-mannheim.de/bwl/zenner/seminar/ecash.htm [01.08.2012.]
[9] Dai, Wei: Bmoney, http://www.weidai.com/bmoney.txt [01.08.2012.]
[10] Szabó, Nick: Bit gold, http://unenumerated.blogspot.hu/2005/12/bit-gold.html [01.08.2012.]
[11] Infótér op. cit.

3. The essential characteristics of Bitcoin

Bitcoin (commonly abbreviated to BTC) is not a concrete, physically existing currency, but virtual money: an amount associated with a so-called virtual wallet.[12] How can we have such a wallet? First, we have to download software from the internet, which is also called Bitcoin. We can find this on the official homepage of the virtual currency.[13]

This software functions as a digital wallet on our computer after installation and stores our virtual money. Our wallet is nothing but a file on our hard drive named 'wallet.dat'.[14] It can, therefore, be stolen from us if some unauthorised person breaks into the system. In the interest of safety, it is advised to make a backup – or there are internet pages where we can upload our wallet and reach it only by using a password.[15] Bitcoin software is open-source, available for almost every operating system, updated regularly and contains every necessary function for sending and receiving Bitcoin.[16]

After successfully installing the Bitcoin-client on our computer, we need only start it and virtual transactions can begin. (How to obtain 'coins' will be explained later in the paper).

How can we send coins to each other with the wallet-software? We can generate so-called Bitcoin-addresses and these are used for financial transactions. Every user has at least one address. It works logically, similarly to an e-mail address, but we send not text messages and files to other users, but virtual coins.

Our Bitcoin address is generated automatically by the software. The computer program creates a new address for every single transaction, making the system theoretically fully anonymous and safe. When we publish one of our addresses on a public forum, the software will use it for more transactions; this happens when we publish it in the hope of donations, or use it for regular, rather than single, transactions. We cannot delete our once-created Bitcoin addresses but we can navigate among them and see how much we have received or sent.

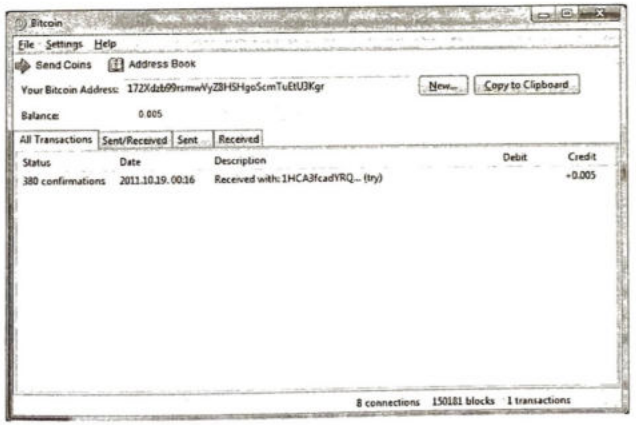
Every single Bitcoin-address consists of two parts. One is the so-called 'public key'; the other is the 'private key'. Our public key can be seen in the application on the 'Your Bitcoin Address' line, but the private key stays hidden. The readable form of the public key has 33 characters, starting with number 1 –

[12] http://hu.wikipedia.org/wiki/Bitcoin [26.10.2011.]
[13] http://bitcoin.org/ [16.10.2011.]
[14] https://en.bitcoin.it/wiki/Wallet [26.10.2011.]
[15] https://en.bitcoin.it/wiki/Securing_your_wallet [18.10.2011.]
[16] Gedda, Rodney: Google releases open-source Bitcoin client, http://www.techworld.com.au/article/380396/google_releases_open_source_bitcoin_client/ [26.10.2011.]

e.g., *1HCA3fcadYRQk5Sm3WGD2CPxsZqhdRXTY9*. If we wish to send money through the network to others, we must give them this *public key*.[17]

The software uses the private key to authenticate transactions. This key also belongs to the randomly generated Bitcoin-addresses but is invisible to other users; it functions as a specific digital signature. The software uses private keys as digital signatures to authenticate every single transaction with the virtual coins. The public and private key pairs are stored in the 'wallet.dat' file on the hard drive of the user's computer. We can only see the private keys in this file, and, if we want our Bitcoin not to be stolen, we tell them to no-one. In contrast to this, the public key must always be given to others for a successful transaction.[18] How do these transactions work, and what are the functions of these public and private key pairs?

Every single transaction made through the Bitcoin-network is published on the internet. The traditional financial institutions such as banks protect their customers' privacy as they hide the transactions from unauthorised persons. In the Bitcoin system privacy protection is solved so, that users' personal data are totally unknown, but the money transaction is made public.[19] For example, when the software generates a new address, we do not have to give any personal data. We do not have to register on the network, but simply start the application and, using the various addresses, the digital 'coins' are received and saved on the computer in our electronic wallet. Let us see an example of how the system works.



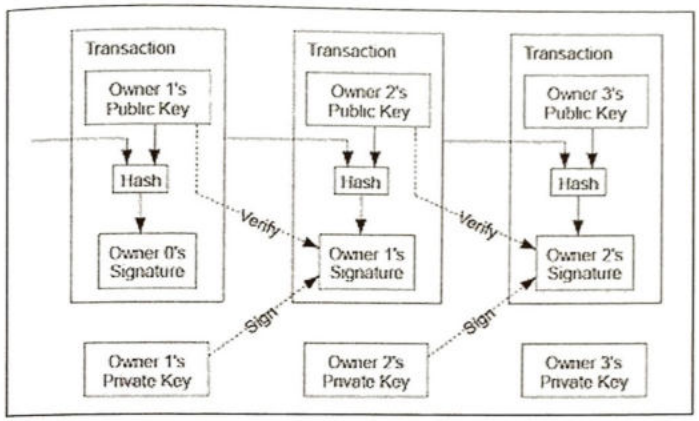
[17] http://bitcoins.hu/bitcoin_faq.htm [26.10.2011.]
[18] The Economist: Virtual Currency – Bits and Bob, http://www.economist.com/blogs/babbage/2011/06/virtual-currency [17.10.2011.]
[19] http://bitcoins.hu/bitcoin_geekeknek.htm [26.10.2011.]

Assume that Aliz wants to send Bence 10 Bitcoin. Bence gives Aliz his Bitcoin-address – that is, the public key belonging to the address. This is the 33 character code which the software displays also. If Bence has more than one address for his wallet, he could give Aliz any of them, or he can simply generate a new one for this transaction. Bence will receive the money and the software saves the amount in his virtual wallet, without reference to the address used. After Bence has told Aliz his address, Aliz simply clicks on the 'Send coins' button. In the next window she enters Bence's Bitcoin-address and the amount to be sent. Then Aliz clicks on the 'Send" button, and the human part of the transaction is over. In fact the process has not ended; the software uses Aliz's private key to confirm the transaction, as in signing a contract. The application sends the transaction (visible to all) to the network. This information is that 10 Bitcoin were sent from *'172Xdzb99rsmwVyZ8HSHgoScmTuEtU3Kgr'* public key address to *'12HnGCwvS4ES1tRC3JXeEYHuFLs9mzMjF7'* public key address. The software can be used perfectly anonymously since the private keys function as digital signatures; they are not visible on the network, and we can generate a new address for each transaction (hence the public and private key pair).

Later, when Bence wants to send this amount to Csaba, he does so in the same way. Csaba gives Bence one of his address's public keys, and then Bence sends the amount to this address. The software signs the transaction also, but now uses Bence's private key. This transaction is also visible to everyone browsing the network, as mentioned above.

If Diána wants to steal Bence's Bitcoin, she could not do so by copying Bence's public key to her digital wallet, since the transaction was signed on the network with Aliz's private key, and this signature certifies that the amount belongs to Bence. For transactions we need both the public and private keys, and Diána does not know Aliz's private key in this case.[20] The following illustrates how transactions work.[21]

[20] https://en.bitcoin.it/wiki/Introduction#Transferring_a_coin [17.10.2011.]
[21] Nakamoto, Satoshi op. cit. p. 2.



4. The decentralised network

According to the above, the Bitcoin network can be used quite safely, since stealing by changing addresses is technically impossible. Those who use the system cleverly can hide in perfect anonymity, and so the personal data protection problem is also solved, but this is no guarantee that we can spend the same amount twice – which would be a virtual form of counterfeiting. The Bitcoin system makes double spending impossible, as will be shown.

A centralised system (e.g. the classic bank-system) prevents double spending in that all transactions go through a central database which stores them and blocks 'short' transactions. The system prevents such an action if a user wants to spend unavailable funds.

The Bitcoin-system is decentralised and there is no central database, server or any organisation to verify transactions. Many decentralised virtual money ideas failed since they could avoid double spending only by using a central verification system. In this way virtual money resembled real-world currencies, as normal banking systems did such checking. It was, therefore, necessary to find a blocking mechanism to prevent Bitcoin users signing a contract with their private key before making the transaction and 'selling' the amount twice.

Solving this problem is a very simple regulation which says that only the first transaction matters; others are invalid which include the same virtual money. The operation of this rule was checked in centralised systems by an independent organ, as in a bank. The decentralised Bitcoin system, however,

solves the problem by every transaction being public and visible to anyone.[22] The system solves this problem technically in the following way.

Firstly, the system runs a hash algorithm on every transaction. Hash algorithms are unidirectional coding methods and are used to encrypt digital information. The algorithm converts the digital data to numbers, called hash-value. If this number is long enough it makes unique data totally identifiable. The hash value identifies certain data but we cannot decrypt the original - useful, since, using the number, we can easily identify the data needed.[23]

The sender digitally signs (with his private key) a pack consisting of the transaction's hash-value and the receiver's public key. It verifies that the sender wanted to send this particular sum of virtual money to the receiver.[24] There is a register of the hashes, addresses and the digital signatures on the Bitcoin-network in the so-called blocks. We can browse these blocks on the *blockexplorer.com* website. These blocks are small databases, and every single Bitcoin transaction's information can be found in them. Unlike in the traditional banking system, in the Bitcoin network it is not the accountholder's data which are public, but those of the transaction. The Bitcoin client downloads every single block from the network to the user's computer (now about 240.000 blocks or some 2 Gb), and later the new ones also. The safest bank data-system does not have such a level of redundancy.[25] The database consists of every single successful Bitcoin-transaction to be found on every single Bitcoin-user's computer, and it updates permanently through the network. At least six other computers have to legitimise a transaction on the network to be successful.[26]

In time this method will not be able to be maintained, since the growth of blocks means that the size of the transaction register will also grow.[27] This, however, is a future concern. There will be more about the role of the blocks in the later chapters of the study.

The receivers of the amount transferred can only identify themselves (and use their virtual money) if they have the private key belonging to the public key in the packet. The public and private key pairs are stored in the virtual wallet (*wallet.dat* file) on the hard-drive of our computer. These files store the most important information in the world of Bitcoin, and so it is advisable to create a backup frequently.[28] The information stored in the virtual wallet is compared with that in the blocks, and this is how the software counts how many Bitcoin we have. According to NAKAMOTO, a Bitcoin is nothing more than *a chain of*

[22] Ibid. p. 6.
[23] http://wiki.prog.hu/wiki/Hash [26.10.2011.]
[24] http://bitcoins.hu/bitcoin_geekeknek.htm [26.10.2011.]
[25] Ibid.
[26] Szedlák, Ádám: Kábítószerterjesztők is érdeklődnek az új internetes pénz után, http://www.origo.hu/techbazis/internet/20110615-bitcoin-a-torrentrol-mintaztak-az-internetes-penzt.html [18.10.2011.]
[27] https://en.bitcoin.it/wiki/Blocks [17.10.2011.]
[28] http://bitcoins.hu/bitcoin_geekeknek.htm [17.10.2011.]

digital signatures.[29] We can compare Bitcoin to registered securities in this way, since their holder is listed in their registers – together with when they were transferred to someone else.

5. Bitcoin mining

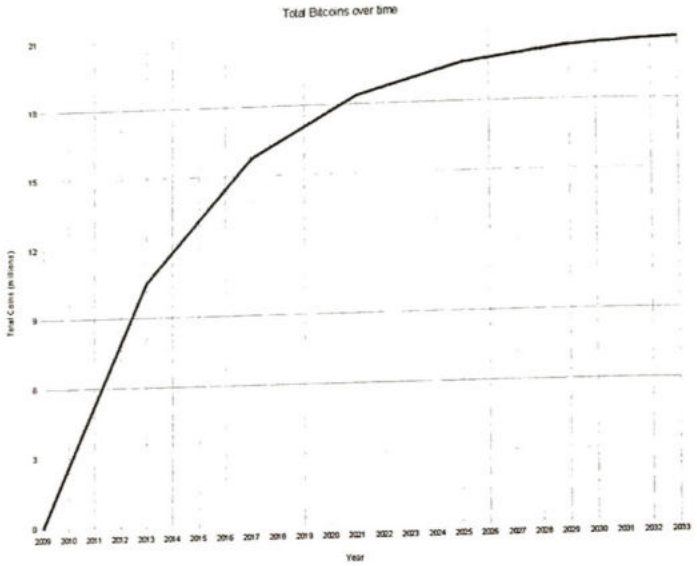
If Bitcoin has no central issuer, than how can we obtain some? We can buy from other users or we can begin to produce them ourselves.

How can we produce? The virtual coins are generated on the nodes of the Bitcoin network, when the computers find the solution to a mathematic problem.[30] If we want to be part of Bitcoin creation, then, first of all, we have to download software which uses the computing power of our computer's processor or video-card to solve such algorithmic problems on the network. These applications are called '*mining-software*' and work completely independent of the 'wallet' software.[31] When we manage to solve an algorithm, a block is created which stores virtual coins and contains every single transaction carried out with them.[32] If we find such a block today (June 2013) worth 25 Bitcoin, it appears in the virtual wallet after 10 minutes (the lead-time of the system). We can then spend it or change it freely. We can solve such algorithms alone ('solo-mining') or join a mining community known as a 'mining pool'. More than one user joins a mining pool, and they have their computers work together to create Bitcoin on the network. The difficulty in solving an algorithm depends on how many computers are joined to the network at the same time. It is more difficult to solve a problem if more computers join and easier with fewer.

Bitcoin, however, cannot be created in unlimited quantities, since they would become valueless at the same time. The system solves this problem by predetermining the maximum quantity of Bitcoin which can be created. Moreover, the amount of Bitcoin created when finding the solution to an algorithm depends on the current number of blocks on the network. One block is worth 50 Bitcoin for the first 210,000 block findings. This means that, when a miner finds the solution to a mathematical problem, he receives 50 Bitcoin in return, or this amount will be divided among the miners in a pool. According to the system, one block finding will worth 25 Bitcoin for the next 210.000 blocks, after which 12.5 coins, 6.25 and so on. In the first four years of the Bitcoin-network 10,500,000 virtual coins will be created (210,000 blocks multiplied by 50 Bitcoin).

[29] http://bitcoin.hu/?page_id=316 [27.10.2011.]
[30] http://bitcoins.hu/index.html [16.10.2011.]
[31] http://www.weusecoins.com/mining-guide.php [26.10.2011.]
[32] https://en.bitcoin.it/wiki/Block [16.10.2011.]

The amount halves every fourth year, and so in the second four-year period 5.250.000 coins will be found (210.000 blocks multiplied by 25 BTC), in the third period 2.625.000 and so on.



With time fewer Bitcoin are mined and it takes longer to mine them. The final number of Bitcoin will be 21,000,000 and the last block to produce them will do so in 2140, after which the number in circulation will be constant.[33] This process is illustrated on the following pattern.[34]

6. How much a Bitcoin worth

Our money can be changed on some special exchange web-pages, where we can change our funds (USD, EUR or even HUF) to Bitcoin using a bank wire transfer. It is accepted as a paying option by various online suppliers, and it can be used to donate to organisations. Bitcoin can be used as a totally decentralised, digitalised and anonymous virtual currency, which is backed by

[33] https://en.bitcoin.it/wiki/Introduction#Creation_of_coins [16.10.2011.]
[34] https://en.bitcoin.it/wiki/File:Total_bitcoins_over_time_graph.png [26.10.2011.]

no specific legal entity, as it is transferred via a peer-to-peer network directly between users and involving no central authority.[35]

There are more and more web-pages to be found on the internet which accept Bitcoin as a paying option. The most popular Bitcoin-USD exchange operates under the domain *mtgox.com*, and we can find public exchanges rates on *bitcoinwatch.com*.

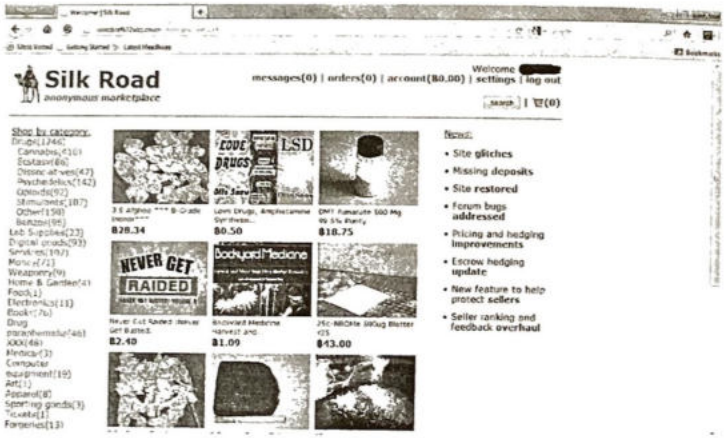
It is a little difficult to answer questions on the exact value of a Bitcoin, due to the constant and sometimes drastic exchange rate fluctuations. In 2009, soon after the Bitcoin system was created, a single unit was worth no more than a few cents. Then it was easy to earn coins: with a normal PC with which one could even mine 1,000 Bitcoin. The solving of the mathematic algorithms was much easier for computers, as fewer were connected to the net. After a while people began to discover the new currency and the possibilities in the network, and so more and more users started to mine coins, and demand rose rapidly. In December 2010 a Bitcoin was worth about 25 US cents, but three months later exchange rates had the two currencies at the same price. In June 2011, 1 BTC was worth about US$ 30 thanks to media hype[36], but media attention had its dark side also since the underworld begin to pay attention to Bitcoin too. At the end of June 2011 a hacker group attacked the Bitcoin exchange site *mtgox.com*, and managed to steal more than 60.000 user's uploaded virtual wallets. The exchange rate fell steeply and the fall lasted until the end of 2011.[37] In 2012 the rate began to rise again. We can easily check current rates on *btc.exchangerates24.com*. Bitcoin is a very new internet phenomenon, and it is hard to predict anything about its future, since stable behavioural norms have not yet emerged.

7. Market trends: from cheap jewellery to hard drugs

We know now how the system works and how we can obtain the new virtual currency, but what can we buy with it? There are several pages on the internet where we could use Bitcoin as a paying option. We can browse clothes, books, trinkets, computer parts, and there are some law firms also who accept it.[38] These are quite innocent everyday goods, but Bitcoin, due to its anonymous, decentralised system, can be a good tool in criminal hands.

[35] Grinberg, Reuben: Bitcoin: An Innovative Alternative Digital Currency (2011.04.21.). http://ssrn.com/abstract=1817857 [19.10.2011.] p. 3.
[36] http://bitcoin.hu/?p=74 [26.10.2011.]
[37] Mick, Jason: Inside the Mega-Hack of Bitcoin: the Full Story, http://www.dailytech.com/Inside+the+MegaHack+of+Bitcoin+the+Full+Story/article21942.htm [26.10.2011.]
[38] https://en.bitcoin.it/wiki/Trade#Legal_Services [18.10.2011.]

According to an article published on *gawker.com* on June 1, 2011, there is a webpage where we can buy any drug imaginable.[39] The page is called *SilkRoad* and can be visited only through a special anonymous browser called *Tor (The Onion Router)*.[40] After some search and registration effort we can look at the world's largest drug market, where we can order anything from marijuana to heroin or LSD! However, drugs are not everything: we can find tools for growing or producing drugs, or even order ammunition, registration codes for websites, licences etc. We can pay only with one type of currency: Bitcoin.[41]



Sadly, virtual money can be an excellent tool for criminal activities, because it is nearly impossible to trace who sent what amount to whom. However, in my opinion, the virtual currency will not become the prime currency of crime, as it is more likely that they are only a small group among the Bitcoin using community. Anonymous payment and money laundering were present in the crime world before Bitcoin surfaced.

Our final chapter deals with virtual money as a possible tool of online criminal activity.

[39] Chen, Adrian: The Underground Website Where You Can Buy Any Drug Imaginable, http://gawker.com/5805928/the-underground-website-where-you-can-buy-any-drug-imaginable [18.10.2011.]

[40] https://www.torproject.org/ [18.10.2011.]

[41] Fischermann, Thomas: Anarcho-Geld, http://www.zeit.de/2011/27/Internet-Bitcoins [19.10.2011.]

8. Rivals of the new currency

Bitcoin has at least three competitors on the market. The traditional internet payment options which make online commerce easier belong to the first group, the currencies of social networks and online games to the second and official national currencies to the third.

8.1 Traditional online paying options

The most common option for online payment is *PayPal*, where we can transfer our real-world money to a virtual PayPal-account, and buy, quickly and easily, goods in various online stores. It is similar to Bitcoin but lacks the decentralised and anonymous features. However, it is unlikely that Bitcoin can be a serious rival to traditional methods of payment as most customers do not care about such features. They like to see prices in EUR or USD instead of BTC and most people will accept a brand new, unknown currency only reluctantly.[42]

The only advantage of Bitcoin is that there are no transaction costs. An article mentions that employees working abroad regularly send money home to their families. A proportion of the amount transferred is taken by banks as transaction costs, and the use of Bitcoin would remove this problem.[43]

8.2 Currencies of virtual worlds

Another interesting area of online commerce is trading in online games, or so-called virtual worlds. Most online role-playing games have their own currencies and we can buy virtual goods for our avatars in the game world. Such games even exist where we can change virtual money to real-world currencies, as in Second Life.[44] *Facebook* recently introduced Facebook's credit system, with which to change our money to credits. With these credits we can buy virtual goods (e.g. virtual potatoes) in the network's applications such as *Farmville*.[45]

Developing such virtual economies takes much time and knowledge, and it also requires constant attention from the developers, who tend to charge for costs for transactions and changes. In Diablo III[46] we can even buy (for US$ in the game's real-money auction house) a magic sword for our character, but we

[42] Grinberg, Reuben op. cit. p. 13.

[43] http://bitcoin.hu/?p=1007 [20.10.2011.]

[44] Second Life is an interactive virtual reality, which is playable on the internet since 2003. Developer: Linden Lab. Homepage: http://secondlife.com/ [31.07.2012.]

[45] http://www.facebook.com/FarmVille [20.10.2011.]

[46] Diablo III is a hack and slash type online role-playing game, playable since May 2012. Developer: Blizzard Entertainment. Homepage: http://eu.battle.net/d3/en/?- [31.07.2012.]

must also pay a transaction fee.[47] Bitcoin-based commerce can be accepted more easily by online 'gamers' since it is not strange for them to trade in the virtual currencies of fantasy worlds and than exchange for real-world money. It is true that the developing companies are behind these virtual markets and pay close attention to them, but they also mean security, since users can apply to them in the case of misuse.

Bitcoin itself could be an excellent option for introducing a common virtual currency in game worlds. Software developers would save time and money were they to fix prices in a common virtual currency, whilst transfers would also be simpler. For this Bitcoin would be perfect.

8.3 Official national currencies

Could Bitcoin be a rival to official real-world banknotes and coins, the banking system behind them and the legal guarantees? In this, as in online transactions, Bitcoin has both advantages and disadvantages. Minimising transaction costs is important, but online payment can be difficult in some situations. Nevertheless, there is already a restaurant in New York where we can pay with Bitcoin.[48] Virtual money's biggest disadvantage is at the same time its greatest advantage – that is, that there is no legal entity behind it and it lacks central control. The value of a Bitcoin was 2,000 times more in June 2011 than at the beginning of 2009, but it then shrank to 1/30th following the news of hacker attacks against the exchange site. This is possible as a virtual currency's value is based only on supply and demand. Deflation being calibrated into the system and becoming better known among internet users suggests that, before long, rates will be more stable.

9. The future of Bitcoin

Behind national currencies lie government guarantees, but Bitcoin is backed by no legal entity. Facts, however, do show that there is demand for the new virtual currency and its users trust the system. The case below illustrates that such currencies do have reason to exist.

In 2011 REUBEN GRINBERG in one of his essays compared Bitcoin to the 'Iraqi Swiss dinar', as that was the only currency in history not backed by any state guarantee, by a valuable raw material such as gold or commodities, despite which it stayed on the market for over 10 years.

[47] Diablo3.hu: Tisztázzuk a hallottakat: Real-Money Auction House http://diablo3.hu/2011/08/02/tisztazzuk-a-hallottakat-real-money-auction-house/ [20.10.2011.]

[48] Roberty, Daniel: The clock is ticking on Bitcoin, http://tech.fortune.cnn.com/2011/06/17/the-clock-is-ticking-on-bitcoin/ [20.10.2011.]

An interesting monetary situation evolved in Iraq after the Gulf War of 1991. Before the war Iraqi bank-notes were printed with Swiss platens in England, but after the war, because of the embargo, this was no longer possible and so new notes were printed locally in Iraq and in China. The quality of the new notes was bad and counterfeiting began to grow. Sometimes the forged notes were of better quality than the original ones. Due to the war, the autonomous territory of Kurdistan became *de facto* independent, although it never declared itself as such *de jure*. The new, poor quality banknotes were not accepted in Kurdistan, but people continued to use the old dinars which had already been withdrawn in other parts of the country. The exchange rates of the two currencies soon started to diverge and a new currency came into being called the 'Iraqi Swiss dinar'. There was no central bank, or official exchange rate – and even no guarantee of value. However, in Kurdistan new notes were not printed and so Swiss dinars did not lose value, even if, with wear and tear, a little deflation was seen.[49]

After the 2003 US occupation of Iraq, the interim government issued new currency and allowed people to change it for Swiss dinars. The central bank gave 150 New Dinars for every Swiss Dinar. This shows that a currency can remain in use, even if not backed by government guarantee when the market accepts it as money and trusts it.[50]

10. The legal status of Bitcoin

The only certain thing that we can say about the legal status of Bitcoin, is that it is legally regulated nowhere in the world. Due to its economic behaviour, the uncontrollable, independent virtual currency bypasses every law so far made and is located in a so-called 'legal grey area'. In this chapter I shall examine Bitcoin's status in Hungarian law.

10.1 Bitcoin as money

A basic question must ask whether countries will ban Bitcoin as money. In most of the world the exclusive right to issue money belongs to the central bank of the state. We call the period in the USA between 1837 and 1866 the 'Free Banking Era' since almost anyone could issue their own money and more than 8,000 types of currency were traded on the market. If an issuer went bankrupt, closed, moved or suspended activity the issued money simply became worthless. The National Bank Act ended this practice in 1863 as it banned issuing private money.[51] Many countries use such regulations to limit competition between the private sector and the government. For example, in

[49] http://hu.wikipedia.org/wiki/Iraki_din%C3%A1r [26.10.2011.]

[50] Grinberg, Reuben op. cit. pp. 18-19.

[51] http://hu.wikipedia.org/wiki/P%C3%A9nz#Mag.C3.A1np.C3.A9nz [24.10.2011.]

Hungary the exclusive right to issue money belongs to the Hungarian National Bank.[52] Bitcoin has no central issuer, but the coins are generated in the nodes of the network by the users' computers. Anyone who runs mining software or is a member of a mining pool counts as a Bitcoin issuer. As Bitcoin is generated by various users around the globe, it would be impossible for a state to ban them in the absence of international action against mining.

At least one private currency; the Liberty Dollar, was victim of such banning action. It was developed and issued by BERNARD VON NOTHAUS in the USA between 1998 and 2011. He created it to avoid USD inflation.[53] Many people used the currency, and, after some time, the government paid attention and finally banned it as a 'false currency'. Unlike Bitcoin, Liberty Dollars were backed by gold, silver and other commodities and appeared on the market in banknote and coin form.[54] According to the justification of the judgment, the action was not to be interpreted as an attack on private currencies, but to prevent fraud and counterfeiting.[55]

Due to these problems Bitcoin cannot be classified as a traditional currency, since legal regulations cannot be applied. Could it be interpreted otherwise, as a security, a right – representing asset, an intellectual product or commodity?

10.2 Bitcoin as security

A security is a document containing the requisites prescribed by legal regulation, or data recorded, registered, and forwarded in some other way, as specified by legal regulation, and the printing and issuing of which, or publication in such form, is permitted by legal regulation. Because a security can also be data, the question is whether Bitcoin could be counted as a type of security.

10.3 Bitcoin as intangible property

We can divide a legal entity's property into active and passive parts. Active property embraces assets such as objects, intangible properties and demands.[56]

[52] Act LVIII. of 2001. about the Hungarian National Bank section 4. paragraph (2)

[53] http://en.wikipedia.org/wiki/Liberty_Dollar [26.10.2011.]

[54] Morrison, Clarke: Liberty Dollar creator convicted in Federal Court, http://www.citizen-times.com/article/99999999/NEWS01/110319006/Liberty-Dollar-creator-convicted-federal-court [18.03.2013.]

[55] Lipsky, Seth: When Private Money Becomes a Felony Offense, http://online.wsj.com/article/SB10001424052748704425804576220383673608952.html?mod=googlenews_wsj [24.10.2011.]

[56] Lábady, Tamás: A magyar magánjog (polgári jog) általános része (General part of the hungarian private law (civil law). Dialóg Campus Kiadó, Budapest-Pécs, 2002. pp. 291-292.

Intangible properties are rights which have an expressed value in money, such as the right of land use, the right of beneficial ownership, the right of intellectual property use or the right to manage the assets of another person.

If we look at the value of Bitcoin owned by a certain user and attempt to interpret it in some way, we have intangible rights. Can we interpret this as someone's intellectual property and a related right of use?

We cannot regard a certain Bitcoin amount created on the internet as an intellectual creation, since blocks are created by the user's computer solving mathematical algorithms. According to Hungarian copyright law and international norms, the solution to a mathematical problem is not protected by copyright.[57] After its creation the right to use a unit belongs to the user whose computer solved the algorithm. Due to the nature of the system, a Bitcoin does not have an owner and cannot be deemed as intellectual property, as it is merely data created by mathematical algorithms on a computer's hard drive in the virtual wallet file. The user of a unit is the person who has the wallet file on his computer.

10.4 Bitcoin as intellectual property

There could, however, be an alternative view if we look at the file which contains Bitcoin and try to analyse it legally. Wallet.dat can be found on the hard drives of computers. Its function is to hold public and private key pairs for Bitcoin. Every user has a unique file. It is possible to make a copy, but this will not double the available amount. When someone uses coins to make a transaction, the contents of the file change. Despite this, we cannot treat wallet.dat as someone's intellectual creation, since copyright law does not treat money transactions in this way. So wallet.dat is not protected by copyright law and does not belong to a user's intellectual property; it is merely a file on the computer which can be owned, used, copied and altered in content, but only by Bitcoin client software.

10.5 Bitcoin as a commodity

Treating Bitcoin as a commodity owned by someone else could be a point of view also. Given the use of electricity and the computer's computing capabilities, it emerges as a special commodity which can be traded rather than as goods or services on the virtual market. This theory is false since Bitcoin behaves more like money on the market and not as some other commodity.

We cannot classify this new virtual currency by using the existing law, but, due to its nature, Bitcoin is more akin to money than any of the possibilities mentioned above. According to civil law, money is considered as an asset and is

[57] Act LXXVI. of 1999 on Copyright, section 1. paragraph (6).

capable of appropriation.[58] Since users treat Bitcoin so and it appears on the market as currency, we can regard it as a 'thing'. Custom and Practice also shaped the behaviour with which users treat Bitcoin and use it as a valid medium of exchange on the market. Unfortunately the law was not prepared for such an invention, and so Bitcoin's legal status is not yet regulated.

11. Bitcoin as a possible criminal tool[59]

As mentioned earlier, the anonymous currency can be a perfect tool in the hands of criminals for reaching their goals. Such law enforcement been authorities as the FBI have dealt with the question recently in a major report which has already been leaked to the internet.[60] It may be interesting to examine the 'Bitcoin-problem' from this point of view also since the anonymous transfer of money seems, at first sight, to be the basis for money laundering. Is Bitcoin's appearance really so great a problem for the jurisdiction as it seems? What is the danger to the system and how can damage be prevented? In this chapter I try to answer these questions.

11.1 Advantages and dangers of the lack of central control

Due to the Bitcoin network features that users give no personal information about themselves and that there is no central control authority behind the system, the identification of suspect transactions and users or obtaining transaction logs seems impossible at first sight. Nevertheless the network has features which can help us to track transactions and link them to someone. First, every transfer is public and can be seen on www.blockexplorer.com or http://blockchain.info websites.[61] We do not have to request transaction records from authorities or financial institutions, since they can be browsed freely on the internet. Every single transfer made by a suspect Bitcoin address can be followed along the chain.

[58] Act IV of 1959 on the Civil Code (Civil Code), section 94. paragraphs (1) and (2)

[59] Note: The new Act on the Hungarian Criminal Code (Act C. of 2012 on the Criminal Code of Hungary) will come into force on 1. July 2013. The numeration of crimes will differ from that in this paper: Theft will be regulated under section 370, conduct for breaching computer systems and computer data under 423, compromising or defrauding the integrity of the computer protection system or device under section 424, and there will be a separate regulation under section 375 for fraudulent attacks which cause a certain amount of damage.

[60] Federal Bureau of Investigation, Intelligence Assessment: Bitoin Virtual Currency: Unique Features Present Distinct Challanges for Deterring Illicit Activity (24. April 2012) Online: http://cryptome.org/2012/05/fbi-bitcoin.pdf [31.07.2012.]

[61] Nakamoto, Satoshi op. cit. p. 6.

However, it is not guaranteed that the person behind a transfer can be identified since the information includes no personal data – especially not the sender's or receiver's IP address – but merely the amount transferred between two public keys.

We have to keep in mind that most people use Bitcoin as a simple, anonymous, online payment tool and not as a currency to replace real world money. Most users buy Bitcoin for a certain purpose (for example to buy something in a webshop), but sooner or later they change back to real world currencies.

It was mentioned earlier that official currencies can be changed to Bitcoin and back on some special exchange websites, such as the Japan-based *MtGox* (*http://mtgox.com*). To use services offered by the website, users have to register an account and give it an account name, password and e-mail address. This information is not too serious, but it can be a good starting point for further identification. The operators of the website could confirm whether or not someone is the user of a certain Bitcoin-address registered on their website. If the answer is yes, they could provide further information such as the registered account name, e-mail address or IP-addresses used during logins.[62] Exchange sites exist also which ask for the bank account numbers of users, and so the service providers can transfer the amount changed in real world money. A bank account's transactions and documents concerning the owner of the account mostly provide enough information to identify a person.

According to the FBI, it is good to keep in mind that some users publish their Bitcoin addresses on online forums in their comments.

11.2 Money laundering with virtual currencies

It seems that Bitcoin could be an ideal tool to hide money made by committing crime - money laundering - because of the anonymous paying opportunity and the absence of transaction costs. According to the FBI's analysis, this is possible since such attempts happened recently with other virtual currencies. These can be simple electronic payment tools such as *WebMoney*, or virtual currencies of online role-playing games such as gold in the 'World of Warcraft'.

A good example is of when an online, organised crime group changed their crime-related money to an online game's virtual currency on a special exchange website. Later they bought several virtual items using the virtual world's in-game market and sold them to other players for real-world 'clean money'.[63] Popular in-game currencies can be changed to real world money on several websites. There are also such online games where the developers have made it possible to exchange virtual money for real currencies via the game client itself

[62] Federal Bureau of Investigation, Intelligence Assessment op. cit. p. 10.

[63] Ibid. p. 7.

(for example in life-simulator 'Second Life' or in the fantasy role-playing game 'Diablo III').

To revert to our original topic, it is possible (criminally) to commit money laundering when someone uses Bitcoin-exchange as a *modus operandi*. He changes criminally acquired money to Bitcoin and than forwards this to various addresses. On the other hand it is possible to track the transactions because they are public and can be accessed by everyone on the internet. Information could also be available in the log files of exchange websites where people can change their Bitcoin to real-world currencies.

It could be difficult, however, to reach a specific exchange-website's administrators, when the HQ of the law enforcement authorities and of the company which operates the website are not in the same country. Let us take as an example a Hungarian authority which wants information about a Bitcoin public key user from the exchange site *mtgox.com*. The web page is maintained by *Tibanne Co. Ltd.* a company registered in Japan and operating the site from there.[64] From Japanese (and from almost all other foreign) authorities it is possible to obtain such data in criminal procedure via a formal legal request. The procedure can last for many months due to assessment and translation. Under Hungarian law this procedure is regulated by Act XXXVIII. of 1996 on International Legal Assistance. It can also happen that, by the time that this official legal assistance reaches the foreign authority, the company has already deleted the logs from the database (for example, the IP addresses using a certain profile). It could be expedient for Bitcoin exchange sites to maintain an online request service for law enforcement authorities, where they can ask for logs or other information rapidly. Sadly this is not the case with any website to date.

More difficulties can surface when exchange companies register themselves in countries which are not obliged by international agreement to share data and information. It is not yet the case that companies convert their homes into offshore centres, but the possibility should not be ignored.

Tracking is more difficult when the exchange is not done on the internet, but in real life, from hand to hand, or when Bitcoin from different addresses is accumulated or distributed etc.

We can find special websites tailor-made for Bitcoin laundering to maintain user anonymity. One is *http://bitcoinlaundry.com/*, a central Bitcoin-address where users can send their Bitcoin which the operator then forwards to another given address for a small fee.[65]

[64] Information about the company on the webpage of the Tokyo Chamber of Commerce: http://www.tokyo-cci.or.jp/english/ibo/2353440.htm [31.07.2012.]

[65] https://en.bitcoin.it/wiki/Bitcoin_Laundry [31.07.2012.]

11.3 Bitcoin theft

Bitcoin represents a certain value on the internet, and so we should keep in mind that they could be a possible target for thieves, as is real-world money. Despite money-laundering Bitcoin-thefts are already documented in the literature and the media, and more such incidents can be expected in the future.

The most important factor in these abuses is the virtual wallet file (wallet.dat) which contains the actual amount of a user's Bitcoin. If someone deletes this file – and had not made a backup – could lose access to the Bitcoin forever. Bitcoin will not be deleted from the system, but the user loses the public and private key pairs which are crucial for access and transactions. As already mentioned, Bitcoin is located in a 'legal grey area', but it behaves in the virtual space mostly as money, and so it is advised to treat it as money in legal practice.

According to Hungarian civil law money is treated as 'things',[66] and since, under Act IV. of 1978 on the Hungarian Criminal Code, Section 316, the subjects of theft should be only alien things, we should treat property abuses with Bitcoin as theft, at least in Hungarian relations. This classification could cause many problems due to Bitcoin's dubious legal status. Sometimes a Bitcoin-related abuse should be classified as *fraud*, *criminal conduct for breach of computer systems and computer data*, or *compromising or defrauding the integrity of the computer protection system or device* (sections 318., 300/C. or 300/E. of the Hungarian Criminal Code), or possibly an accumulation of these. We have to take every circumstance of the case in consideration to choose the correct classification. Because of its nature the computer environment is essential for Bitcoin-related abuses, and so it could be better to classify such crimes as computer crimes (sections 300/C. or 300/E. of the Hungarian Criminal Code) than theft. Even so, due to its nature Bitcoin behaves more like 'things' (e.g. money) than data. This forced classification stems from the outdated law. It would be useful in the future to update the (non-existent) regulation of virtual 'things'.

To look at some examples, the most cited event was the ominous hacking attack against exchange site MtGox, when many users' virtual wallets were stolen. If we would like to classify this crime in relation to Hungarian law, the right interpretation would be *criminal conduct for breaching computer systems and computer data (section 300/C.)* and not *theft*. According to text of the code, this type of crime is committed when a person gains unauthorised entry to a computer system or network by compromising or defrauding the integrity of the computer protection system or device, or overrides or infringes his user privileges. In the case referred to the hackers monitored and used the security gaps of the Bitcoin exchange site to break into the system and steal the virtual wallets.

[66] Civil Code, section 94. paragraph (2)

Another case arose when, in June 2011, a Trojan virus began to spread on the internet and tried – using the default access path for wallet.dat – to send the virtual wallet file to a Polish server for the cybercriminal.[67] The virus – called *Infostealer.coinbit* – was not a significant danger for Bitcoin users, because it only knew the default access path for wallet.dat, and even a simple firewall could block it when it tried to send the file through the web. In Hungarian law we should classify the virus programmer's behaviour as a crime regulated in section 300/E. of the Hungarian Criminal Code. This crime is committed by the person who, to commit the criminal activities defined in Section 300/C., creates, obtains, distributes or trades, or otherwise makes available computer software, passwords, entry codes, or other data with which to gain access to a computer system or network. If the virus had managed to send the virtual wallet to the cybercriminal, than he must be responsible for committing the crime regulated in section 300/C. too.

It is more sophisticated criminal behaviour when somebody steals virtual money not directly, but tries to impact other computers to mine Bitcoin, creating a Bitcoin-miner zombie network without the permission and knowledge of the owners of participating computers.[68] Computer networks created with such illegal intent are called botnets.[69] At first the cybercriminal needs to install – somehow – a virus on the target computer that uses its video card's or CPU's computing power to mine Bitcoin. This could be achieved most easily by spams (unsolicited bulk messages) or phishing websites. If the victim opens a link in an unsolicited advertisement message, or visits such harmful webpages where he has to give out personal information (eg. e-mail address, Facebook-profile and passwords related to them) the virus could be easily downloaded to the computer.

An example of this phenomenon was the malware named *ZeUs*, which used the computer's resources to illegally mine Bitcoin. This harmful software spread through deceptive advertisements posted to various websites in the first half of 2011.[70]

Other sources mention that larger computer networks would be ideal for cybercriminals to target for joint Bitcoin-mining (e.g. a company's or university's local network). This technique is more expedient, because effective mining typically requires excessively high calculating power.[71] Sections 300/C. and 300/E. are normative for legal classification of this behaviour also, in that

[67] Information about the virus: http://www.symantec.com/security_response/writeup.jsp?docid=2011-061615-3651-99 [08.07.2012.]
[68] Federal Bureau of Investigation, Intelligence Assessment op. cit. p. 8.
[69] http://hu.spam.wikia.com/wiki/Botnet [31.07.2012.]
[70] Segura, Jerome: Zeus, Bitcoin and the Ub3erhackers, http://blog.sparktrust.com/?p=572 [10.07.2012.]
[71] https://bitcointalk.org/index.php?topic=11506.0 [10.07.2012.]

harmful software prevents the normal functioning of a computer, in addition to which virus-distribution is also independent criminal behaviour.

The European Commission's Recommendation No. C7-0293/10 deals with such problems, and draws up good suggestions for the harmonisation of the legal framework of member states for attacks against informatics systems. *Inter alia* that creating botnets for committing cybercrime should be an aggravating circumstance in the criminal codes of member states.[72]

12. Conclusion

"Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather. We have no elected government, nor are we likely to have one, so I address you with no greater authority than that with which liberty itself always speaks. I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear."[73]

The Declaration of the Independence of Cyberspace was written by JOHN PERRY BARLOW on 8th February 1996 and its starting lines reflected whenever the regulation of the internet is in question. With its technical development, the web will always stretch the law, and so it is impossible to regulate it effectively in every detail, as there will always be zones and loopholes uncovered. The Declaration states that governments simply do not have power over this field of human activity. The Bitcoin phenomenon is a good example also, since it raises unprecedented questions - due to its modernity.

The technology behind the virtual currency is a novelty which means a paradigm shift without parallel among financial systems, and it is still unclear what may become of it, since the tools necessary for its greater evolution are still under development.

Even views exist which say that it is pointless to look at Bitcoin as money, but more as a protocol with which we can send money to everyone in the world through the internet. It is irrelevant how much a virtual unit is worth since, sooner or later, we will exchange it for real world currencies or buy different products with it.[74]

[72] Proposal for a Directive of the European Parliament and of the Council on attacks against information systems and repealing Council Framework Decision 2005/222/JHA, http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com%282010%290517_/com_com%282010%290517_hu.pdf [10.07.2012.]
[73] Barlow, John Perry: A Declaration of the Independence of Cyberspace, https://projects.eff.org/~barlow/Declaration-Final.html [26.10.2011.]
[74] http://bitcoin.hu/?p=1280 [26.10.2011.]

This exemplifies that it is now very difficult to form an opinion of this virtual phenomenon since it is too new to interpret it clearly. At first everyone on the market has to understand Bitcoin, and then the right view can be formed which should judge the new currency's possible evolution and spread. Until then, effective regulation cannot be introduced. It is, therefore, better to regard Bitcoin as money – because it was so designed and so behaves – and to interpret it as such in the market and in legislation.

Joint investigation teams as a specific form of mutual assistance

JÁVORSZKI, TAMÁS

ABSTRACT *The term 'joint investigation team' (JIT) is used worldwide in respect of various forms of law enforcement investigative cooperation and this paper will focus on such teams at EU level. Initially the JIT concept will be outlined before the development of the instrument is described from the beginning to its current legal regulation. This process, however, can be summarised quite neatly and briefly. The idea of arranging the legal basis of JITs first emerged during the Tampere European Council (October 1999). As the next significant step, the EU Council of Ministers adopted the Convention on Mutual Assistance in Criminal Matters on the 29th of May 2000 (2000 MLA Convention). The potential establishment of joint investigation teams is provided for in Article 13 of the Convention, although, owing to the delay in ratifying the 2000 MLA Convention, the Council adopted a Framework Decision on JITs on 13 June 2002. For the moment both the Convention and Framework Decision are in force as legal bases for creating JITs. This paper will highlight the special dual legal regulation for JITs and also analyse the valid legal provisions. The author will finally detail some practical problems in the field of the admissibility of evidence.*

1. Introduction

What is a joint investigation team? Perhaps the best and shortest definition is that it is a special form of cross-border legal assistance laid down in a treaty or agreement between the judicial or police authorities of at least two states. The aim of a JIT is by definition, to investigate specific individual cases. It is not possible to establish a generically competent task force for a certain type of crime; nor is it possible to set up a permanent operational team by using the JIT concept and structure.

The term "joint investigation team" is used worldwide in relation to various forms of law enforcement investigative cooperation. Depending on both the actors and the subjects, JITs can differ considerably in different parts of the world.[1] There are some non-EU legal bases which can be used to create JITs

[1] Block, Ludo: EU joint investigation teams: political ambitions and police practices. In: Rijken, Conny – Vermeiden, Gert (eds.): Joint Investigation Teams in the European Union. TM-C-ASSER PRESS, The Hague, 2006 p. 88.

combating crime, organised or otherwise. Article 30 (2) (a) of the treaty then lays down that the Council shall promote cooperation through Europol and shall, in particular, within a period of five years after the date of entry into force of the Treaty of Amsterdam. This involved, *inter alia,* enabling Europol to facilitate and support the preparation, and to encourage the coordination and carrying out, of specific investigative actions by the competent authorities of the Member States, including operational actions of joint teams comprising representatives of Europol in a support capacity.[13] In Article 30 (2), the Treaty of Amsterdam formally introduces a general provision that envisages, without any further specification, the involvement of Europol in "joint teams".

This provision is then elaborated in the Vienna Action Plan of 1998,[14] which foresees the drawing up of "an adequate legal instrument extending Europol's powers to the activities referred to in Article 30 (2) TEU" and sees the ability of Europol to „act within the framework of operational actions of joint teams" as one of the plan's priorities. Interestingly, even though the idea of JITs had been introduced two years earlier in the Working Group on Mutual Assistance in Criminal Matters, the draft of the MLA Convention existing at that time (December 1998) did not yet contain a provision on JITs.[15]

The idea of arranging the legal basis of JITs emerged during the *European Council in Tampere, Finland on 15 and 16 October, 1999*. Conclusion no. 43 called for "Joint investigative teams" to be set up without delay, as a first step, to combat trafficking in drugs and human beings as well as terrorism".[16]

As we can see from the Conclusion, the new instrument was intended to apply only to a limited number of crimes, and the role of 'Eurojust' was still unmentioned at that point.

In 1995, a Working Group on Mutual Assistance in Criminal Matters began discussions on a new Convention for mutual legal assistance in the EU, which was seen as additional to the 1959 Council of Europe's Mutual Legal Assistance Convention[17] and other existing EU instruments.

[13] Consolidated version of the Treaty on European Union, OJ C 325, 24.12.2002, p. 1.
[14] OJ C 19, 23.1.1999, p. 1.
[15] Block, Ludo: Joint Investigation Teams: The Panacea for Fighting Organised Crime? p. 9.
[16] 43. Maximum benefit should be derived from co-operation between Member States' authorities when investigating cross-border crime in any Member State. The European Council calls for joint investigative teams as foreseen in the Treaty to be set up without delay, as a first step, to combat trafficking in drugs and human beings as well as terrorism. The rules to be set up in this respect should allow representatives of Europol to participate, as appropriate, in such teams in a support capacity. TAMPERE EUROPEAN COUNCIL, Presidency conclusions, 15-16 October 1999, OJ C 124, 3.5.2000, p. 16.
[17] European Convention on mutual assistance in criminal matters, Strasbourg, 20 April 1959

In April 1996, during the drafting process, the German delegation presented a note on modern methods of cross-border investigation to the working group which discussed a total of seven modern methods of combating organised crime, including the use of "joint investigation teams". However, whereas the other six investigative methods were each outlined in detail, the "joint investigation team" concept was explained no further. In March 1999, the (then again) German Presidency forwarded a proposal to include concrete provisions on joint investigation teams in the EU MLA Convention.[18]

As the next major step, the EU Council of Ministers adopted the *Convention on Mutual Assistance in Criminal Matters on 29 May 2000 (2000 MLA Convention).* The objective was to encourage and modernise cooperation between judicial and law enforcement authorities within the EU as well as in Norway and Iceland by supplementing provisions in existing legal instruments and facilitating their application.[19]

2.1 The first generally applicable provision: Article 13 of the 2000 MLA Convention

The possibility of setting up joint investigation teams is provided for in Article 13 of the 2000 MLA Convention. As we can see, four years passed and hundreds of documents were produced between the first discussion note on JITs in the drafting process in 1996 and the finalisation of the MLA Convention in 2000.

Due to the expected slow ratification process of the MLA Convention, particularly in respect of the introduction of JITs, an attempt was made to create a separate Framework Decision on JITs with a much speedier implementation process, but this attempt failed in March 2000.[20]

While the idea actually predates the signing of the EU Convention on Mutual Assistance, it was not until the events of 11 September 2001 (9/11) that the need was felt to implement Article 13 within a much shorter time frame. The 9/11 terrorist attacks accelerated the process. Within a few days Belgium, France, Spain and the UK proposed for a Framework Decision on JITs.

At an extraordinary Council Meeting on Justice, Home Affairs and Civil Protection (20 September 2001), the Council had to adopt numerous measures, including this Framework Decision. During the Meeting this proposal was welcomed, as it would enable the investigating and prosecuting authorities to

[18] Block, Ludo: Joint Investigation Teams: The Panacea for Fighting Organised Crime? p. 6.
[19] Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 197, 12.7.2000, p. 1.
[20] Block, Ludo: Joint Investigation Teams: The Panacea for Fighting Organised Crime? p. 10.

coordinate their fight against terrorism. Political agreement on the issue was now reached virtually without discussion, and the Framework Decision on JITs was adopted soon afterwards.

Point II/1 of the Meeting's conclusions referred back to the conclusions of the Tampere European Council. Point II/2's conclusions state that:

"The Council urges that all measures be taken to ensure that the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union is ratified as soon as possible and in any event in the course of 2002. In accordance with Point 43 of the conclusions of the Tampere European Council, the Council invites the competent authorities of the Member States to set up one or more joint investigation teams without delay consisting of police officers and magistrates specialising in counter-terrorism, Pro-Eurojust representatives and, to the extent allowed by the Convention, Europol representatives, in order to coordinate current investigations into terrorism which are in any way linked."

2.2 Next step: creation of the Framework Decision

Owing to the delay in ratifying the 2000 MLA Convention the Council adopted on *13 June 2002 a Framework Decision on Joint Investigation Teams* (the "JIT Framework Decision").[21] This means that, at this moment, JITs can be based on two different legal bases, namely a Convention and a Framework Decision.[22]

Member States were convinced that the JIT instrument would provide important benefits to the law enforcement agencies of the European Union. However, experience has showed that JITs have not been widely accepted in practice by the Member States. This is a result of uncertainty about the national implementation of Article 13 of the 2000 MLA Convention and/or the 2002 Framework Decision on JITs (which contains almost the same wording). Other factors are a lack of awareness of JITs as an investigative option; and a lack of funding, as JITs can be expensive to negotiate and operate.

According to Article 4 of the 2002 Framework Decision, Member States should have taken the necessary measures to comply with the provisions of the Framework Decision by 1 January 2003. According to Article 5 of the Framework Decision it will cease to have effect when the 2000 Convention on Mutual Assistance in Criminal Matters has entered into force in all Member

[21] OJ L 162, 20.6.2002, p. 2.

[22] Rijken, Conny: Joint Investigation Teams: principles, practice, and problems. Lessons learnt from the first efforts to establish a JIT. http://www.utrechtlawreview.org/index.php/ulr/article/viewFile/28/28 [03.09.2012.]

States. This is not yet the case even today and so both instruments can still be used simultaneously as a legal basis for creating JITs.[23]

The Framework Decision in fact repeats Articles 13, 15 and 16 of the 2000 MLA Convention in almost identical terms – explaining when and how a JIT can be set up and concerning the criminal and civil liabilities, respectively, of officials. The Framework Decision has been implemented in different ways in the Member States. Some countries have adopted specific laws on JITs, or, alternatively, they have inserted JIT provisions in their respective codes of criminal procedure. Others have simply referred to the direct applicability of the 2000 MLA Convention in their legal orders. The Framework Decision will cease to have effect once the MLA Convention has entered into force in all Member States.

On 28 November 2002, the Council adopted a Protocol amending the Europol Convention – in order to enable Europol officials to take part in Joint Investigation Teams.[24]

The Council adopted a recommendation on 8 May 2003 on a model agreement for setting up a JIT,[25] hoping that the enactment of a model agreement would speed up the implementation of the Framework Decision. The Council was aware of the fact that a model agreement should be comprehensive and flexible as authorities should be able to adapt it to the particular needs and circumstances of the case in question.

The Council later adopted a Resolution on 26 February 2010.[26] The Resolution is now being used and its Appendix 1 includes a new Recommendation for the conditions of participating in a JIT; it also contains specific provisions applicable to Europol's participation.

Within a few days of the terrorist attacks in Madrid of the 11th of March 2004 the *European Council in its official statement on 25 March 2004* urged all Member States to take any measures which remained necessary to implement fully and without delay – *inter alia* – the Framework Decision on Joint Investigation Teams by June 2004. Furthermore the European Council called on

[23] European Parliament, Directorate General Internal Policies, Policy Department C Citizens' Rights and Constitutional Affairs: Implementation of the European Arrest Warrant and joint investigation teams at EU and national level. http://www.statewatch.org/news/2009/feb/ep-study-european-arrest-warrant.pdf [08.09.2012.]

[24] Council Act of 28 November 2002 drawing up a Protocol amending the Convention on the establishment of a European Police Office (Europol Convention) and the Protocol on the privileges and immunities of Europol, the members of its organs, the deputy directors and the employees of Europol, OJ C 312, 16.12.2002, p. 1.

[25] OJ C 121, 23.5.2003, p. 1.

[26] Council Resolution of 26 February 2010 on a Model Agreement for setting up a Joint Investigation Team (JIT), OJ C 70, 19.3.2010, p. 1.

Member States to ensure that Europol and Eurojust representatives should be involved in the work of joint investigation teams as far as possible.[27]

The *Hague Programme in November 2004* emphasised the importance of JITs and the fact that Member States should be encouraged to use this tool in fighting cross-border organised crime (and other serious crimes as well as terrorism) with the support of Europol and Eurojust.[28]

Policy-makers inside the EU showed distinct signs of relief when the 2000 Convention entered into force on 23 August 2005 (more than five years after its adoption!). [...] Frustration among practitioners was, therefore, understandable (and audible!). Two years, 2000 – 2002, with no legal basis and another three years, 2002 – 2005, filled with uncertainty about the legal background did not make things easier for prosecutors and police officers to set up JITs. However, both their own wish to introduce the new tool and pressure from the media were obvious. This wasted time caused - and still causes - problems in daily work on an international basis and makes it difficult to describe experiences and success stories.[29]

The next document where joint investigation teams were mentioned was the *Stockholm Programme* – which is a multiannual programme on an open and secure Europe serving the citizen. The programme was drafted in 2009 and, similarly to the Hague Programme, it also contains instructions and tasks in connection with JITs in its Pont 4.3.1.[30]

A guide to EU Member States' legislation on JITs was updated in November 2007 and a manual was also produced which guides practitioners on how to set up a JIT.[31]

In 2008 Eurojust and Europol started to elaborate a JIT manual. This manual supplements the existing Eurojust/Europol document "Guide to EU Member States' legislation on JITs". The main purpose of this manual was to inform practitioners about the legal basis and requirements for setting up a JIT and to provide advice on when a JIT can be usefully employed. The manual also attempted to clear up possible misunderstandings about JITs, to encourage

[27] Council document 7906/04 JAI, 100

[28] 2.3. [...] Police cooperation between Member States is made more efficient and effective in a number of cases by facilitating cooperation on specified themes between the Member States concerned, where appropriate by establishing joint investigation teams and, where necessary, supported by Europol and Eurojust. In specific border areas, closer cooperation and better coordination is the only way to deal with crime and threats to public security and national safety. OJ C 53, 3.3.2005, p. 9.

[29] Kapplinghaus, Jürgen: Joint investigation teams: basic ideas, relevant legal instruments and first experiences in Europe. In: 134th International training course visiting experts' papers 2006. p. 29-30.

[30] [...] Europol and Eurojust should be systematically involved in major cross-border operations and informed when joint investigative teams are set up [...]. OJ C 115, 4.5.2010, p. 20.

[31] Eurojust Annual Report 2008, p. 25.

practitioners to make use of this relatively new tool which can aid their investigations, and to generally help develop international cooperation in criminal matters. The manual sought to draw on shared practical experience as well as material from seminars and meetings. As a living document, the manual is updated regularly, particularly in response to practical casework experience.[32]

On 23 September 2009, Eurojust and Europol published the first Joint Investigation Teams Manual. The Manual was updated on 4 November 2011 by an Annex with updated material. The manual informs practitioners of the legal basis and requirements for setting up a JIT and gives advice as to when it can be usefully employed. The manual explains the concept, legal framework, and requirements for a JIT. The structure of a JIT is outlined, including explanations of the roles of the team and the team leader. The manual illustrates a JIT operation and explains the role that Eurojust and Europol can play. Each chapter cites the relevant legal basis and also offers explanations of the legal text, advice on best practice, and recommendations drawn from experience. The manual also provides advice on how to draft a written JIT Agreement and a model with phrasing suggestions is attached in the Annex.[33]

3. When to set up a JIT?

How can we define cases where the setting up of a JIT is justified? Article 13 (1) of the 2000 MLA Convention [Article 1 (1) of the Framework Decision] contain no provision about the seriousness threshold of criminality or any other qualifying criteria. The wording clarifies that the enumeration is not exhaustive and so JITs may also be eligible for investigating smaller cross-border cases, especially in border regions. This is the case despite the fact that JITs are usually considered in case of investigating more serious forms of criminality.

3.1 Request to set up a JIT

2000 MLA Convention Article 13 (2) [Framework Decision Article 1 (2)] provides that the establishment of a JIT will be preceded by a request by one of the Member States. Although it does not directly refer to a request for mutual assistance, the provision refers to Article 14 of the 1959 MLA Convention. This deals with the obligatory content of the MLA request (such as the authority making the request, the object of and the reason for the request, where possible, the identity and the nationality of the person concerned and, where necessary, the name and address of the person to be served. Therefore, the term 'request' in the cited provisions must be considered as a formal MLA request and the general requirements from the 1959 MLA Convention for making such a request must

[32] Ibid. p. 22.

[33] Eurocrim 3/2009, ID 0903065, p. 81.

be met. Furthermore, such a request must contain proposals for the composition of the team.

In practice, participants usually outline the content of the agreement during a coordination meeting or meetings organised by Eurojust. The role of coordination meetings is very important in the course of the preparatory phase since, during them representatives of the competent judicial and investigative authorities discuss strategy, coordinate their investigative measures, share information gathered and more frequently agree to set up JITs.

4. Leadership of the JIT

Every JIT needs a team leader or leaders. Under MLA Convention Article 13 (3) (a) [Framework Decision Article 1 (3) (a)] the leader of the team shall be a representative of the competent authority participating in criminal investigations from the Member State in which the team operates.

One interpretation of this is that the JIT is under one permanent leadership, based on the JIT's main seat of operations. Another interpretation is that the leader should come from the Member State in which the team happens to be whenever carrying out its operations. Experiences so far suggest that Member States prefer the option of having more than one team leader rather than opting for one with overall responsibility.[34] Naturally a clear leadership structure is essential for members of the JIT.

Because JITs are mainly initiated in more complex cases in which more countries are involved, it is not clear from the outset from which country the team leader must be chosen when more states are involved. It is likely that more team leaders will be nominated and that each of them takes the lead for those operations taking place in their own country and that the coordination is done by the team leaders together. When, during the life of the team, the focus of the investigations moves from one state to another, it must be possible to move the team to the other state and to nominate a team leader from that Member State.[35]

Let us examine a case where a JIT was set up with the assistance of Eurojust. The case was opened at Eurojust for 'VAT carousel' fraud and there were ongoing parallel investigations conducted in three Member States. Three persons were designated as team leaders from the Member States involved (two prosecutors and one police officer). This example supports the practice that Member States are more willing to assign a leader from each participant State rather than only one with an overall responsibility.

[34] Joint Investigation Team Manual, pp. 9-10.

[35] Rijken, Conny – Vermeiden, Gert: The legal and practical implementation of JITs: The bumpy road from EU to Member State level, In: Rijken, Conny – Vermeiden, Gert (eds.): Joint Investigation Teams in the European Union. TM-C-ASSER PRESS, The Hague, 2006 p. 15.

5. Subdivision of JIT members

According to Article 13 (4)-(6) and (12) of the 2000 MLA Convention [Article 1 (4)-(6) and (12) of the Framework Decision] JIT members could be subdivided into three groups: members, seconded members and so-called "visiting" members.

5.1 Members

These law enforcement or judicial practitioners are from Member States where the team operates. They have full authorisation in the JIT and there is no further need to define their status.

5.2 Seconded members

Possibly the most exciting question related to the JIT is the procedural position of the JIT member who operates in another Member State. According to Article 13 (4) of the 2000 MLA Convention [Article 1 (4)-(6) and (12) of the Framework Decision], members of the joint investigation team from Member States other than the Member State in which the team operates are referred to as being 'seconded' to the team. This means that these members operate within a criminal justice system that is not their own; they may have little or no knowledge of the local language and the criminal justice system of this state. Interpreting this provision, we must add that a person who is a seconded member for one operation can be a member in another operation, namely, when that operation takes place on the territory of his home country. Therefore the qualification is relative and important that the instrument is used in a flexible way. In any case, the substance of the distinction is not the name itself but the different jurisdiction of these two positions.

The first distinction is that, according to the first sentence of Article 13 (3) (b) of the 2000 MLA Convention [Article 1 (3) (b) of the Framework Decision] the team shall carry out its operations in accordance with the law of the Member State in which it operates. This provision is supported by subparagraph 10 of the Preamble of the Framework Decision. Under this subparagraph a joint investigating team should operate in the territory of a Member State in conformity with the law applicable to that Member State. These provisions are based on the general principle articulated in Article 3 (1) of 1959 MLA Convention, which Convention serves as a legal basis for the 2000 MLA Convention. (This fact stems from the Preamble of the 2000 MLA Convention which stipulates that one of the aims of the establishment of the Convention is to supplement the 1959 MLA Convention recognising that the provisions of the Convention remain applicable to all matters not covered by the 2000 MLA Convention. Further, in accordance with Article 1 (1) (a) of 2000 MLA

Convention, the purpose of the Convention is to supplement the provisions and facilitate the application between the Member States of the European Union, of the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 [...].). This subparagraph provides that the requested Party shall execute in the manner provided for by its law any letters rogatory relating to a criminal matter and addressed to it by the judicial authorities of the requesting Party for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents.

As a result of this requirement, a seconded member needs to be aware of both substantive and procedural law of the host country. It may be awkward when, during the life of the team, the focus of the investigation moves from one state to another.

The other delicate question in connection with the status of the seconded member that should be resolved is organisational. The seconded member is under the authority of the team leader. This person can entrust the seconded member as well as excluding him from carrying out certain investigative measures. At the same time the seconded member remains part of the hierarchy in his home country. In this respect he has two superiors: the JIT leader as well as his superior in the country of origin. The seconded member might receive instruction from both sides. In cases where these instructions differ or even contradict one another, the seconded member will face a dilemma. The 'collective leadership' requires that the JIT leader stays in close contact with the superiors of the seconded members of his team in order to coordinate the strategy of the investigation and to avoid contradicting instructions. If this coordination is not carefully realised, the outcome of a JIT can be seriously affected.[36]

The second substantial distinction stems from Article 13 (5) of 2000 MLA Convention /Framework Decision Article 1 (5)/. In accordance with this provision seconded members of the joint investigation team shall be entitled to be present when investigative measures are taken in the Member State of operation. However, the leader of the team may, for particular reasons, in accordance with the law of the Member State where the team operates, decide otherwise. As we can see, the right of presence for seconded members could be restricted.

5.3 Visiting members

We have to mention the third group of non-members (the so-called visiting members) coming from Third States or from organisations inside the EU (e.g. Eurojust, Europol and OLAF). The rights conferred upon members and

[36] Mayer, Markus: Sociological aspects regarding the set up and management of a joint investigation team, In: Rijken, Conny – Vermeiden, Gert (eds.): Joint Investigation Teams in the European Union. TM-C-ASSER PRESS, The Hague, 2006 pp. 212-213.

seconded members do not apply to non-members unless the agreement setting up a team provides otherwise [Article 13 (12) of 2000 MLA Convention, Framework Decision Article 1 (12)].

6. Dispensing with the issuing of letters rogatory: the heart of the matter of the legal instrument

The substance of the JIT instrument is inherent in Articles (7) and (9) of the 2000 MLA Convention /Framework Decision Article 1 (7) and (9)/. According to these provisions where the joint investigation team needs investigative measures to be taken in one of the Member States setting up the team, members seconded to the team by that Member State may request their own competent authorities to take those measures. Those measures shall be considered in that Member State under the conditions which would apply if they were requested in a national investigation. A member of the JIT may, in accordance with his or her national law and within the limits of his or her competence, provide the team with information available in the Member State which has seconded him or her for the purpose of the criminal investigations conducted by the team.

The purpose of these provisions is to avoid the need for an MLA request, even when the investigative measure requires the exercise of a coercive power, such as the execution of a search warrant. This is one of the main benefits of a JIT. The consequence of these provisions is that information from such a measure will be directly available for the JIT and be used in further investigations by that team irrespective of the country where the investigation took place. The fact that, in this case, information can be shared without any formalities is based on the principle of mutual trust between the members of the JIT. Nevertheless JIT members are the only ones who can make use of this opportunity. When an outsider Member State or a third State should be requested, issuing MLA request is not dispensable [as it is stipulated in the Article 13 (8) of the 2000 MLA Convention [Article 1 (8) of the Framework Decision].

7. Admissibility of evidence

Under Article 13 (10) (a) of the 2000 MLA Convention /Article 1 (10) (a) of the Framework Decision/, information lawfully obtained by a member or seconded member while part of a joint investigation team which is not otherwise available to the competent authorities of the Member States concerned may be used – *inter alia* – for the purposes for which the team was set up [...]. This provision necessitates dealing with the admissibility of evidence.

As mentioned above, a joint investigation team should operate in the territory of a Member State in conformity with the law applicable to that

Member State. Therefore the information could be regarded as lawfully obtained only in the case when evidence-gathering process was in accordance with the procedural rules of the given Member State where the investigative action was carried out. The problem is that the rules in the Member States related to gathering and admissibility of evidence may differ significantly.

One delicate topic should be mentioned in this context. The admissibility of evidence gained from the interception of telecommunications could be judged in a very different way in various Member States. There are some Member States where the admissibility of these data is permitted by the examining or investigative judge. This is the situation in Hungary for example, where the prosecutor applies to the investigating judge to obtain permission,[37] although it is known that in the UK, for example, such information is inadmissible.

The question may be more complicated if the evidence acquired by the interception of telecommunications is classified and should, therefore, be handled as confidential. However, the termination of classification is an essential prerequisite of admissibility of such evidence in court. The termination process may also be subject to the permission of a third actor who does not participate in the JIT.

Such discrepancies, of course, necessitate preliminary discussions by JIT members about the essential procedural rules which might influence the admissibility of evidence in court.

8. Conclusions

The phenomenon of international cross-border crime necessitates an effective response from the law enforcement authorities' side. New tools of international legal assistance have been developed during recent years and the creation of international markets and the abolition of international frontiers has accelerated this process. One of the mutual legal assistance tools is the instrument of the joint investigation team.

The introduction of JITs in the EU was based on the assumption that the traditional way of cross-border judicial cooperation in criminal investigations through MLA requests was outdated and ineffective. JITs were believed to have added value over these old-fashioned methods, particularly in multilateral investigations. The greatest innovation of the instrument that there is no need for an MLA request between the authorities and they can exchange information and evidence directly. Another clear advantage of JITs is the building of mutual trust between Member States. To make this tool functional and effective, not only Member States are required to create the necessary legal framework, both at international and domestic levels, but a positive atmosphere is vital and this involves complete trust between law enforcement authorities and their members across borders.

[37] Act XIX of 1998 on Criminal Proceedings Article 206/A.

The constitutional regulation of local government in Hungary

KISS, MÓNIKA DOROTA

ABSTRACT *In Hungary, local government (that is, local authorities as constitutional institutions) is subject to totally new regulation at practically all levels. The new Constitution of 2011 deals with local communities in detail, in contrast to the previous Constitution of 1949. Following changes to the Constitution, Parliament adopted the 2011 Act on Local Government in Hungary - and other legislation connected with municipalities and districts. Over and above laws enacted by the central government, local authorities are empowered to adopt legislation within their own specific areas, the individual features of their byelaws being derived from the new Constitution.*

This study deals primarily with the constitutional rules, and especially with those problems which have evoked the interest of a number of specialists. It also introduces the basic formulae of Acts relating to communities. During the process of legislation more problems arose, some of which are still unresolved. Some concern the monitoring of local authorities, but there are several unanswered queries which relate to the electoral system, direct participative democracy, the financial and economic situation of communities and their institutions and the executive organs of their representative bodies (the councils). The new regulations also attempted to resolve earlier problems, but largely without success.

1. General overview of Constitutional[1] Regulation

In the hope of achieving a broad consensus, fairly wide-ranging discussions were initiated in 2010-2011 between the Government and local authorities (LAs) through the latters' Associations. The Government's main aim was to introduce intensive and wide-ranging innovation. Every organisation adopted its own position in relation to formulating new regulations – inevitably, with varying results.

In 2010 an *ad hoc* preparatory committee was set up to give substance to the legislative principles of the new Constitution (2011),[2] but Parliament paid did

[1] The Hungarian National Assembly (Parliament) adopted the new Constitution under a new designation. The 'Fundamental Law of Hungary'. In this study the term 'new Constitution' is used.

not pay much attention to the committee's working paper in that, while some concepts appeared in the new Constitution others were ignored.

In addition to the new Constitution, Parliament also adopted the new Act on Local Government.[4] Consequently, in 2012 two Acts regulated local government: the previous Act on Local Government dating from 1990[5] and the new Act. Parliament decided on those elements of the earlier Act which should remain in force until January 1 2013. and the provisions of the new Act were to come into force at different times. Several elements were already law on 1 January 2012, others on 1 January 2013, whilst the remainder will come into force only after the next general election – specifically in October 2014.[6]

The new Constitution laid down those matters which can only be dealt with by means of a Cardinal Act – and these are: the Act on Local Government, the Act concerning Elections, and the Regulatory Act on the Dissolution of a Representative Body.

The new Constitution deals with local government in a new way. It mainly comprises the right to local government, the local exercise of power, the law-making process, the scope of duties and competences, partnerships, associations and co-operations, legal supervision over local authorities, the representative body (council) and its executive organs, economic and financial management, elections and dissolution.

2. Specific rules of the new Constitution

2.1 The right to local government

In Hungary local authorities are established to administer public affairs and exercise public power at local level. A local referendum may be held on any matter within the area of responsibility and competence of local authorities as defined by law. The rules of local government are defined by a Cardinal Act.[7]

According to the new Constitution, Hungary is organised into *counties*, *towns* and *villages*, and towns can be organised into districts.[8] The citizens eligible to vote in counties and municipalities have the right to local

[2] The preparatory ad hoc committee presented its working paper to Parliament H/2057 on 20 December 2010.

[4] The Act on Local Government in Hungary of 2011 No. CLXXXIX. was promulgated in the Hungarian Official Gazette on 28 December 2011 (Hungarian Official Gazette 2011. Nr. 161. pp. 39436-39473.)

[5] Act on Local Government of 1990 No. LXV.

[6] The significant provisions of the new Act on Local Government came into force on 1 January 2013, but several powers were exercised from 1 January 2012.

[7] Article 31, Section (1) – (3)

[8] Article F, Section (1) – (2)

government.[9] The voters exercise their communal rights to this by electing representatives – directly or indirectly – or by local referendums. The purpose of the right to local government is to demonstrate and enable the will of the public in an open, democratic way.

In Hungary there is a *two-tier* local government system which consists of *municipal* (local) and *territorial* (county) communities. Municipal authorities function in villages, in towns, settlements with town status (which are newly designated townships), towns with county status and in Metropolitan (Capital) Districts. The capital itself has a two-tier system made up of itself as a single, overriding entity and of the individual districts. Counties are territorial authorities and local authorities are legal entities.

Local authorities are a component of public administration and make up one of its principal subsystems.[10] As can be seen, there are no significant changes to municipalities and territories, except in respect of the newly designated townships. These are an innovation in that, although they did exist earlier, they did so only as towns, without this special rank.

Settlements with town status (also known as towns with micro-regional status) are regulated only by the new Act on Local Government. The new Constitution does not regulate them since they do not create extra, additional communities.

Within the village sector there is a further status of 'major village'. This status does not imply an independent community unit and it can be regarded as a single, traditional village. Earlier, those villages could acquire this status which had at least 5,000 inhabitants on their administrative territory and which, in addition, had started the process of becoming a town. Currently, acquiring 'large village' status is easier since this needs only 3,000 inhabitants within its boundaries.

According to the new Act, towns with county status remain special communities within Hungary. Formerly, there were two ways to acquire this status. One was that 'county towns' (the actual seats of administration in the counties) legally became 'towns with county status' (*ipso jure*), whilst towns with more than 5,000 inhabitants could apply to Parliament with no further conditions. Now, neither the new Act nor the new Constitution covers the designation of a 'town with county status'. This means that, in future, there will be no further towns with more than 5,000 inhabitants able to request this status.

[9] For more detailed information and the innovation segments see: Tilk, Péter: Comments on Hungarian local government and regional development. In: Drinóczi, Tímea – Takács, Tamara (ed.): Cross-border and EU legal issues: Hungary – Croatia. Faculty of Law, University of Pécs – Faculty of Law, J. J. Strossmayer University of Osijek, Pécs – Osijek, 2011 pp. 595-606.

[10] There are two subsystems of public administration in Hungary: the state and local government subsystems.

In recent years there have been attempts to establish local authority regions, either to replace county councils or to supplement them, although none was finally accepted. There are, however, further quasi-territorial units which can be regarded as public administrative regions or sub-regions, although, these do not qualify as local authorities. The main purposes of these are to serve central state administration organs and also to coordinate and implement activities which cross county boundaries.

2.2 Local exercise of power

The framework for the local exercise of power comes from the new Constitution, the substantial rules from the earlier Local Government Act, and procedural rules from the Act concerning Elections.[11]

There are two ways to exercise power: direct and indirect. The indirect is the main way and is effected by the elected representatives (councillors). The direct forms involve various legal institutions such as a local referendum, a public initiative, a public hearing, a village meeting, the right to petition and so on. One feature is that the new Constitution directly regulates only local referendums and dispenses with other forms. In Hungarian public law, the direct and indirect forms of the exercise of local power are equal

Under the new Constitution, the responsibilities and competences of local authorities are exercised by local representative bodies (councils). These bodies or councils are headed by mayors. County representative bodies (County Councils) elect one of their members to serve as Chairman for the duration of their mandate, whilst local councils may elect committees and establish offices as defined by a Cardinal Act.[12]

The main way in which a council functions is by holding sessions. The rules stipulate that *sessions are public*. This is reinforced by the fact that *closed sessions* can only be held in special circumstances as detailed in the new Act. Every session is recorded and the electorate has the right to inspect all documents from all public sessions. Closed sessions are separately recorded, and in such cases, the right of inspection must obviously be restricted.

The council has a quorum if more than half of the councillors are present at the session. Decisions, for the most part, need only a simple majority, which can be achieved by 50% + 1 of the votes of the councillors present. Some decisions need a qualified majority (e.g. the making of byelaws, calling a local referendum; defining the function and organisation of, partnerships and associations with other local authorities). If a qualified majority is required more than half of all elected representatives (not merely of those present) must concur.

[11] Act on Election of 1997 No. C. (Chapter XV, Articles 132-146.)
[12] Article 33, Section (1)–(3)

Each council must hold at least six sessions per year, but in their own byelaws they can decide on more than six. In practice, the larger municipalities hold sessions two or three times per month (sometimes weekly) whilst the smaller will probably hold them monthly. The actual number of sessions depends on those issues which need discussion and decision.

The main form of direct local power is the *local referendum*. This may be held on any matter within the responsibility and competence of local authorities as defined by law. In Hungary the council concerned decides the conditions and specific procedural rules of a local referendum.

Local referendums are categorised as statutory, facultative or invalid. A statutory local referendum refers to territorial issues, to establishing a joint representative body and to matters defined by higher authority. A local referendum cannot be held in relation to: local taxes, the budget, personal issues, the organisational and functional system of the council and dissolution.

The result of a local referendum is binding on the council, and it can be initiated by a petition from 10% to 25% (determined by the Council) of those eligible to vote,[13] by the committees, by a minimum of 25% of all councillors and by the Committee of a local NGO. The council must hold the local referendum within four months if initiated by the voters, and the petitioners decide the subject. A notary (equivalent to a Town Clerk, Municipal Chief Executive or Chief Administrative Officer = CEO or CAO) must certify the list of signatures, following which the initiative, complete with signatures, may be submitted to the mayor.

A local referendum is valid if more than half of the citizens eligible to vote take part; and the decision requires the agreement of more than half of those actually voting.

Where there is a public initiative, voters can propose consultation on all issues within the competence of the local authority, and the council must discuss any issue raised by 5-10% (as decided by the local authority) of the citizens eligible to vote.[14] Initiatives mostly include some proposal for resolution.

The *public hearing* is a relatively novel legal institution, being established by the previous Act on Local Government in 1990. All municipalities have to hold a public hearing at least once per year, and this must be advertised at least one month in advance on the notice-board of the mayor's office, on the official web-site or in the official journal of the local authority.

For a public hearing, the voters and the committee members of the local NGO may take directly any public issues or proposals to the council, who must give adequate answers to those participating during the hearing or, in writing,

[13] All representative bodies have to confirm the exact number of eligible voters and how many (from 10-25%) are needed to initiate a local referendum.
[14] The councils must also confirm the exact number of eligible voters and how many (from 5-10%) are needed to register a question for consultation.

within 15 days.[15] The public hearing is not a decision-making forum, and voters can only pose questions of public interest, make proposals, express their views and question the work of the council.

In rural villages an alternative forum is found which is known as the *village meeting*. This institution was regulated first by the third Council Act of 1971 during the socialist era, although local councils initially introduced village meetings under their own byelaws. Parliament later recognised the significance of these meetings in public life and introduced regulations in the third Local Government Act of 1971. Today, the village meeting has also an important role in the villages, despite which it is only a facultative and not a decision-making forum. Councils usually hold them in respect of major public issues - e.g. seasonal tasks, reporting matters concerning the budget schedule, consultations on future plans; discussions on minority issues, loan applications, preparing for law-making procedure etc). In villages there is a strong relationship between the village meeting and the public hearing and they are often held together once or twice per year.

The councils of villages with fewer than 500 inhabitants may hold a local referendum at the village meeting, but more than half of all voters must be present to make a valid decision. In practice, few villages use this opportunity.

In addition, the local authority may ask for information, propose decisions and express their views to competent bodies.[16] When exercising their *petition right*, the competent bodies must give a substantive answer to the local authority within 30 days.

In recent years some ideas have been aired to improve direct local power (e.g. the reconsideration of issues invalid for local referendums and their validity period etc.) The utilisation level of local public power is, in fact, very low and many communities have never held a local referendum or a local public initiative. Voters should recognise the significance of direct participation in public life and initiate local referendums, take part in citizens' meetings and establish relationships with councillors and mayors.

2.3 Public affairs

In administering public affairs at local level, local authorities should, as far as the law allows, adopt decrees, make decisions, undertake administration, decide on their organisation and operation, exercise their rights as owners of local authority property, decide their budgets and manage their finances

[15] For detailed information see Kiss, Mónika Dorota: New aspects of local government of Europe – What we can learn from each other. In: Balogh, Zsolt György et all (ed.): Studia Iuridica Auctoritate Universitatis Pécs Publicata: Essays of Faculty of Law University of Pécs Yearbook of 2011. Pécsi Tudományegyetem Állam- és Jogtudományi Kar, Pécs, 2011 pp. 141-156.

[16] Article 32, Section (1)

accordingly. They are also to engage in entrepreneurial activities with those assets and revenues available for the purpose, – but without jeopardising the performance of their compulsory tasks, decide on the types and rates of local taxes, create local authority symbols and establish local decorations and honorary titles, ask for information, propose decisions and express their views to competent bodies, be free to associate with other local authorities, form alliances for the representation of interests, cooperate with the local authorities in other countries within their competences and be free to affiliate with organisations of international local government and to exercise further statutory responsibilities and competences.[17] Acting within their competences, local authorities should adopt local decrees to regulate those local social relations not regulated by an Act or under the authority of an Act,[18] but local decrees must not conflict with any other legislation.[19]

The duties and powers of councils fall into two groups, one of which is transferable and the other not. Hence, some duties may be delegated to the executive organs (the executive arms or personnel) of the council. For example, social cases may be delegated to committees or to the mayor. Duties which cannot be transferred are basically: law-making, adopting byelaws, defining the organisational and functional system, calling a local referendum, deciding on the budget and economic situation, initiating a Constitutional Court process, defining territorial development and initiating a territorial procedure.

Different sizes of community (villages, towns, towns with micro-region status, towns with county status, the capital and its districts, counties) handle different tasks. These duties depend primarily on the economic situation, population numbers and the size of the administrative territory of a given local authority.

Local authorities have *compulsory* and *facultative* duties. The compulsory tasks are not detailed in the new Act, but are always detailed in sectoral Acts.

Local authorities can undertake and solve any facultative tasks and public services which do not belong to other organisations. The voluntary tasks are laid out in the new Act in catalogue form: territorial development, medical and social welfare services, environmental hygiene, sport and youth affairs, local taxes, tourism, national or ethnic cases, local public transport, public safety, housing management, local culture; public libraries, the homeless, national and civil defence matters (including disaster emergency services), local public employment, district heating, market-trading, nursery and elementary schools,[20] maintaining public parks and open spaces, car-parks, street-lighting, chimney-sweeping and registering public places.

[17] Article 32, Section (1)

[18] Article 32, Section (2)

[19] Article 32, Section (3)

[20] According to the Act on National Public Education of 2011 No. CXC. Article 2, this task belongs to State Administrative Affairs from 1 January 2013.

Between 2004 and 2012 local authorities implemented several public services and tasks through the multifunctional micro-regional associations which were established in 2004. According to the Act,[21] all communities must join a micro-region to cooperate with others. The original territories of the micro-regional associations and their seats were taken under control by the Act, but changes were allowed in terms of the actual territories. Some communities took advantage by changing associations, if they felt this to be in their interest.

The main goal of these associations was the unified development of communities and a qualitative establishment of public services. The legal status of micro-regional associations was provided by the 2004 Act, although councils also had the right to formulate certain local arrangements with the agreement of the association. Micro-regions as quasi-territorial units were not entitled to exercise local government functions.

On 1 January 2013 a new legal institution known as a township was born. Townships are not local government units. This peripheral territorial division surrounding one or more communities is roughly equal to a micro-region, although it is designed for different functions. Its terms of reference concern implementing various public administrative functions derived from an Act or Decree (e.g. operating a document bureau, a Court of Guardians and a child welfare agency, low level environmental protection), but no local authority responsibilities.

Both multifunctional micro-regions and townships divided the opinions of specialists and politicians. Some say that these solutions, planned to achieve a higher level of implementation of local public services, cannot perform their roles. To establish state administrative organs at local level, townships were taken under control, but public opinion believes that townships will obstruct local government work, since they were established by a centralised state concept.

2.4 Law-making and decisions

The making of local laws is the *exclusive privilege* of the council, but this can be done only by qualified majority voting (QMV). Certain matters are specified in the new Act for which a council is responsible and which it must regulate. Basically these comprise the local budget and general financial affairs, a register of assets and holdings, its own organisation and functional system, local referendums, people's initiatives etc. Sectoral Acts may also authorise councils to create laws on a given topic.

Decrees are of two types: *implementation decrees* which can be adopted by authorisation of an Act, and *regulatory decrees* which can be adopted without

[21] Act on Multifunctional Micro-regional Associations of Municipalities of 2004 No. CVII.

the authorisation of an Act. The utilisation ratio of the two types is significant in that councils almost invariably legislate by means of the first.

Local decrees may not conflict with any other legislation. In respect of the hierarchy of legislation, the lower law may not contradict the higher, despite which, there are no legal relations among the decrees of the different levels of local authorities.

Decrees cannot reprise any form of rule to avoid conflict with other legislation.[22] Previously this requirement was not covered by any Act, which is why, in many cases a number of higher-level rules existed. This caused complications and difficulties in interpretation and in the implementation of local law.

The mayor and the district notary sign the adopted decrees and the notary sends them to the government office.[23] They are then promulgated in the official local government gazette or in any special ways determined by local law.

In the capital there are specific rules in force regarding law-making due to the two-tier local government system. An Act determines which local authority (that of the capital or of its districts) may pass a law implementing a given subject, with the exception of the introduction of local taxes, since in this case, both have the right to do so.

In local authorities there are two types of *decision*: *special* and *normative*. A decision can be adopted both by simple majority and by QMV, as defined by the new Act or by local law. Normative decisions, as with decrees, must also be promulgated in a specific local way and they must also be sent to the government office for legal monitoring.

The main way to improve the process of creating law is envisaged in a new legal institution, the 'law-making initiative'. The initiative is not an unfamiliar solution in European countries,[24] and in Hungary there is a similar legal institution. However, this does differ somewhat in that the peoples' initiative applies to all competences of the council, although the council is not obliged to pass a law on one specific subject. Councillors are obliged only to discuss the topic of the initiative, and so it would be a statutory matter for the council if the topic concerned its authority.

2.5 Autonomous administration, organisation and operation

Pending regulation of autonomous administration, organisation and operation, councils have relative freedom in law-making. There are only a few constitutional principles connected with the internal system of local

[22] Act on Legislation of 2010 No. CXXX. Article 3.

[23] Government offices are responsible for the legal supervision of local authorities.

[24] E.g., in Estonia. Maeltsemees, Sulev: Local Government in Estonia. In: Horváth M., Tamás (ed.): Decentralization: Experiments and Reforms. Local Government and Public Service Reform Initiative, Budapest, 2000 p. 77.

government. There are constitutionally statutory and facultative organs (executive arms) and the statutory organs must function in every community (e.g. mayors and councils as mentioned in the new Constitution), whilst the facultative organs (e.g. the mayor's office and committees) may function at will. Under the new Act, the councils have the following executive organs or personnel formally regulated: the mayor, notary, any sub-municipal council, committee, association, mayor's office (and the joint local government office).

Councils decide on their own internal organisation and functions by their own byelaws. The main functions of their organs or executive arms cover the monitoring, preparation and implementation of decisions, although they are subordinate to the council.

Several *committees* must be elected: a finance committee (in municipalities with more than 2,000 inhabitants), a committee to oversee municipal property and assets and an audit committee for incompatibility cases etc. Other committees can be established at the discretion of the council in respect of sectoral affairs (such as agriculture or local industry) and committees function either continuously or on an ad hoc basis.

The chairman and more than half of the members of a committee have to be elected from among the councillors, whilst the other members can be elected from the public. The committee structure allows civil participation in public life and in controlling the local authority's work.

The council also has the right to set up a *sub-municipal council* on its administrative territory, the main goal of which would be to look after the specific interests of their separate residents and their housing (e. g. in recreation areas, holiday resorts and industrial zones),

The *mayor* is an additional executive organ and also a political figure in municipal life. The council elects one deputy mayor but can elect more. The latter exercises his or her authority under the mayor's direction. It is a new feature of the changes that the deputy mayor need not be elected from among the councillors; in fact, anyone can assume the responsibility. The deputy mayor, however, is not an organ, since he or she is subordinate to the mayor. The office of mayor may be either full-time or part time.

Mayors and chairmen of county councils may, exceptionally, undertake administrative responsibilities and competences in addition to their local duties by virtue of an Act or of a Government Decree.[25] Mayors fulfil the responsibilities of mayor by decisions of the council and on their own authority. They may also stipulate the tasks concerning the organisation, preparation and implementation of local authority decisions, decide on state administrative and other social cases within their competence, delegate power to administrators, regulate the issuing of official copies, exercise the employer's right over the notary, exercise a similar right over the deputy mayor and the heads of local authority institutions.

[25] Article 34, Section (3)

The *mayor's office* is a peculiar establishment. Earlier there had to be such an institution in each municipality, but under the new Constitution its function is purely optional or facultative. The mayor's office is headed by the mayor and its work is operated and organised by the notary (town clerk). It has own organisational and functional regulation adopted with the approval of the council. The mayor's office implements decisions made locally, carries out its statutory duties and handles the various administrative affairs.

Employer's rights over the mayor's office are exercised by the notary, whilst in those villages where councils have established a district notary office, employer's rights over the civil servants are exercised by the district notary. The appointment of civil servants of the district notary's office is possible only with the consent of the mayor – which, from a legal perspective, means the right to veto. Incidentally, the district notary's office – in contrast to the mayor's office – was not an organ of the council. The new Act on Local Government introduced a new institution to replace the district notary office under the name of *Joint Local Authority Office*, but this can be regarded as a specific organ of the council.

The *notary* and the *deputy notary* are appointed by the mayor on an open application basis, and since 2013 the notary has been an organ, a full executive arm, of the council.

The notaries in the Hungarian legal system exercised both public administrative and local government duties – roughly on a 2:1 basis. Their duties are curiously comprehensive. It was a general professional view that notaries were vested with so many administrative responsibilities and such a variety of powers that they simply could not perform efficiently. It certainly is a fact that notaries had a huge range of responsibilities and it is clearly impossible that this could have helped to improve local administration.

Currently, judgement of the legal status of notaries[26] is rather erratic. Whilst the new Act was being prepared in 2010-2011, some suggested separating notaries from the councils; others suggested the opposite. Previously the notaries were not executive organs of the councils, although they were appointed by them. This means that the councils in the form of the mayors exercised employer's rights over the notaries and could give them instructions. At the same time the notaries also had significant duties in relation to the councils. This could provoke an uncomfortable situation between the notaries and the councils, which could turn into confrontation. The hierarchical relationship between the two caused considerable confusion and the notaries had to accept many difficulties caused by the councillors to fulfil their legal and professional responsibilities in the face of local political pressure.

[26] The civil servants' legal status is regulated by the Act on Civil Servants of 2011 No. CXCIX. Civil servants are notaries, district notaries, deputy notaries, clerks, administrators, senior officials, managers etc.

When the authority of the notaries was re-examined, new legislation removed a great deal from the scope of duties of notaries and delegated this to township offices. Specifically, the new Act integrated the notaries' local government role into the work of the councils, and in this way the relationship between notaries and councils deteriorated.

Finally, a new regulation appeared to the effect that *the associations* are also organs of the councils (previously, neither associations nor any co-operations or partnerships were so ranked). Councils establish associations to achieve rational and effective co-operation with neighbouring communities and an Act may decide the affairs which may be undertaken only through an association.

2.6 Associations, co-operations, partnerships

The associations in local government can be grouped in various ways. One such way is where there are such *national associations* which represent the general interests of local authorities. These are: the National Association of Small Towns, the National Association of County Councils, the National Association of Municipalities, Micro-municipalities and Micro-regions, the National Association of Towns with County Status, the Association of Hungarian Local Authorities, the Hungarian Association of Villages. Each association functions under its own byelaws and they have their own organisation, scope of duties and authority.

According to recent legislation, there are methods for becoming a national association. The district central local authorities secede from the national association and on their behalf the settlements with town status set up their own association.

In addition, there are further two establishments which function between state and local government level: the Conciliatory Forum of Government – Local Authorities (2006), and The National Co-operational Forum of Local Authorities (2010). Through these institutions, central and local government can initiate bilateral arbitration, negotiations or discussions which affect the communities, their economic and financial situation, fundamental rights or other significant areas.

Since Hungary is a partner in the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities,[27] local authorities have the right to join any *foreign* local government association. Outside this, both internally and externally, recent years have seen local communities also developing cooperation on the basis of neighbouring interrelationships.

Local authorities and state organs should cooperate to achieve community goals and an Act may define compulsory responsibilities and competences for local authorities, who are then entitled to proportionate budgetary and other

[27] Madrid Convention of 1980.

financial support to carry out these duties. An Act may, in fact, require them to perform such duties through associations.[28]

Functional associations were established to carry out local tasks, since many authorities are unable to handle them alone and so collaborate with others. The state, in fact, frequently uses subvention payments to motivate local communities to co-operate and, under the previous Act on Local Government, a local authority could form functional associations (institutional associations relating to educational and cultural affairs such as nursery and elementary schools), an administration association (a district notary's office) and an organisation of neighbouring authorities (joint representative bodies). The freedom to associate declared by the Act was, however, theoretical as, in practice, many communities were forced to associate with others, even when this had not been planned, due to financial and economic circumstances as well as to the wide range of statutory duties.

2.7 Legal supervisory system

In Hungary a special form of legal supervision over all local government has been in operation since 2012. The new system represents a considerable change from the earlier monitoring process in respect of central government's conceptions. The present regulation cannot be seen as an all-inclusive solution, although it deals with the monitoring mechanism in more detail than did the previous system.

Local authorities send their new regulations or decrees to their metropolitan or county office immediately after their publication. If the metropolitan or county office finds these in any way unlawful, it may apply to any court for their review.[29]

The office may apply to a court to rule that a local authority has neglected its statutory legislative obligations, and, if this continues beyond the date determined by the court, the court will instruct, at the request of the office concerned, the head of the office to adopt the measures needed to rectify the error.

It should be noted that all legal supervision of local authorities is exercised through metropolitan and county offices[31]

Current professional opinion tends to regard this supervision as reasonable, since the rules came into force before the other provisions of the new Act.

In the course of legal supervision, government offices can choose from a *wide range of measures.* They can request information, make a legal objection, call for a session of the council, initiate a Constitutional Court process, initiate a normal court process, sue the mayors responsible, declare a breach of legal

[28] Article 34, Section (1)–(2)
[29] Article 32, Section (4)
[31] Article 34, Section (4)

responsibilities, withdraw the right to legislate, penalise and/or provide professional help to the local authorities. The supervisory process may well, of course, have been undertaken later – i.e., after the event.

The main aim of legal supervision is to improve the legal functioning of a community. The procedure is not concerned with labour and civil service disputes, and the public administrative process and court proceedings are determined by law with decisions subject only to the discretionary authority of the council concerned.

It is a fact that the recent provisions have produced numerous changes. The most significant change is that the government official has the right to create a local law if a council does not fulfil its statutory law-making responsibilities.

Despite the changes, there are omissions. For example, the new Act does not regulate the right to suspend the implementation of decisions which conflict with legislation. Some say that this right should be included in the new Act to achieve effective supervision over local authorities. Without this right, conflicting and unlawful decisions can be enforced and retained even if the government office sees the error and objects. It is a problem that councils are not forced to accept such objections from the government office; they can continue as they wish, although, as a last resort, the government office can appeal for stronger action against the council at fault and the head of the office can turn to a court of law or to the Constitutional Court. However, this process is extremely complex and time-consuming.

In addition, several problems have arisen in connection with the *interpretation* of certain constitutional principles, such as how to interpret the rule concerning the banning of local government regulations in cases of conflict. In the absence of any provision in the regulations relating to different local authorities, it follows that any ban can concern only that particular local authority and its own regulations.

Further, there are no rules concerning *liability for damages* caused by the government office. What is to happen with cases where that office made a mistake during its monitoring and this mistake caused a financial loss for a local authority? Some professionals recommend, that, in such cases, the government office should be responsible for the damage caused as a 'joint and several' guarantor, and, moreover, that it should also impeach the senior government official.[32]

[32] Fogarasi, József: A helyi önkormányzatok és a jogharmonizáció néhány összefüggése 1990-2012 között III [Some issues of local government and judicial harmonisation between 1990-2012 III.] In: Comitatus Önkormányzati Szemle 2012/210. p. 31.

2.8 Economic management

The property or properties of local authorities are public properties which are to be used for the purpose of performing their duties.[33] An Act may define conditions for, or the Government may consent to, any borrowing (to a statutory limit) or to any other commitment by local authorities with the aim of preserving their budget balance.[34]

The *budget* of local authorities consists of two parts: a) revenue from the central budget; b) own resources. Revenue from the central budget includes a number of items: transferred revenue, normative state contributions, central subventions, subventions for statutory purposes, resources from the Health Insurance Foundation - and other subventions. The 'own resources' sector covers properties and other assets, but, in addition, these are supplemented by local taxes, fees charged by local offices, other funds received, net loans and credits, profits from own business and rents. Local taxes are basically of three types: property taxes; communal taxes and activity taxes (e.g., the local business tax).

The *property and assets* of the local authorities support the public services and theit basic duties, and, accordingly, some assets such as items of nominal equity or capital value – are not marketable (public roads, parks, monuments, water and waterworks, cemeteries etc). Such assets or properties cannot be alienated. There are a few other non-marketable assets such as public buildings and institutions, protected natural areas, public areas of aesthetic value plus some stocks and shares and commercial paper. Beyond that, local authorities also have assets produced by their business activities, but these are not allowed to affect their statutory duties.

Local authorities do, of course, have various expenses, the main items being the operating expenses of the authority and its institutions, the building up of reserve funds and development costs.

The state has delegated more statutory tasks to local authorities without providing adequate financial support. For this reason, the communities have had to use their own assets, and this, in turn, has impoverished many. Most, if not all, local authorities need credit and have been forced to borrow. This means that they incur serious, unplanned financial pressure, in many cases bringing them to the verge of insolvency.[35] Meanwhile, the state demands that they be financially self-sufficient, but today this is almost impossible.

[33] Article 32, Section (2)
[34] Article 34, Section (5)
[35] Local authority debt already exceeds one trillion (one thousand billion) Forints in 2012, a huge figure.

2.9 Elections and dissolution

Electors exercise *universal* and *equal suffrage* to elect their local representatives (councillors) and mayors by direct, secret ballot, in elections allowing the free expression of the will of electors and in the manner defined by law. Local councillors and mayors are elected for five years, as laid down in the Act, and the mandate of councils ends on the day of the next national elections. If elections are not held due to a lack of candidates, the mandate is extended until the date of interim elections. The mandate of mayors ends on the day of the election of the new mayor.[36]

Local councils may decide to dissolve themselves, as defined by the Act, and. Parliament may dissolve any local representative body which violates the Fundamental Law (the Constitution) on a proposal by the Government after consultation with the Constitutional Court. Voluntary and mandatory dissolution will also terminate the mandate of mayors.[37]

According to central regulation, the right to dissolve a council was taken from the electorate by the decision in 1993 by the Constitutional Court,[38] the rationale being that this right could obstruct continuous and substantive local government work.

Whilst the new Constitution was being drafted, there were suggestions that the dissolution of a council, whether by its own decision or that of Parliament, should not automatically end the mandate of the mayor also, but finally this proposal was not accepted.

In municipalities where the population is below 10 000, voting takes place on the *individual list* principle, but where it exceeds 10,000, the *constituency* .principle applies. The ballot-papers of a municipality's *individual list*, of the *constituency* and the *mayors* include the candidates' names in alphabetical order, but the ballot-papers used in the capital and in the counties include simply the names of nominating committees in the order pre-determined by the electoral committee. The electorate has no influence on the order (on the ballot-paper) of the names proposed by the nominating committee and on the distribution of the surplus votes. Voters cast their vote without knowing who has a serious chance of winning the election. Currently, the 1997 Act on Elections declares that the names of the five candidates heading a list must appear on the ballot-paper.

Recently, Parliament introduced a new legal institution under the name *Previous electoral registration* and laid down particular rules and principles in the new Constitution – which attracted national and international (professional) attention in the media. Many are convinced of the impropriety of the arrangement. As for the purport of the electoral registration, the citizens eligible

[36] Article 35, Section (1)–(3)
[37] Article 35, Section (4)–(6)
[38] Constitutional Court Decision No. 22/1993. (IV. 2.)

to vote can vote only if they announce themselves in advance as intending to exercise their voting right. This prompts constitutional queries as the voters can no longer freely exercise their fundamental right to vote. The regulation also makes a distinction between Hungarian citizens inside and outside the state: citizens living on the territory of Hungary can only register themselves electronically or personally, but citizens living outside Hungary can register themselves in writing by conventional mail. This is a serious problem in a democratic constitutional state when the Constitutional Court has only limited authority to audit the rules of the Constitution, and so the fundamental voting right may become a political tool for manipulation.

3. Summary

In the preparation of the new Constitution in Hungary in 2010-2011, both specialists and politicians were divided. Some say that the constitutional procedure was not necessary; others – the government party politicians – say that it was time to enact a new Constitution. A fair number of communities believe that the centre (the state) will be stronger and local authorities fewer, due to the new Constitution and other legislation.

At all events, any recent judgements or thoughts could be no more than supposition, since the new legislation has introduced a great deal of unsettling change. Despite the professional negotiations between the government and the local authorities, a large number of communities are very dissatisfied with the current and prospective legal situation. The question remains of why Parliament did not call a national referendum on the matter of the legislative changes. There were national consultations on two occasions, but these (legally unregulated) processes did not have the serious and rational impact of a national referendum. At some future point a national referendums may be proposed in the hope of enabling serious work among government politicians, local authorities and society.

Age discrimination: A normative gap in international human rights law

KOMANOVICS, ADRIENNE

"Older people do not have a strong say in politics and media. Their rights are often ignored and sometimes totally denied. The fact that a clear majority of the elderly are women may also have contributed to this lack of political attention."

Thomas Hammarberg[1]

ABSTRACT *Population ageing is one of humanity's greatest achievements – and also one of our greatest challenges. Older men and, due to the feminization of ageing, older women to a greater extent, face specific problems including reduced access to job opportunities, increased dependency, declining capacities, poverty, abuse, and harmful traditional practices. Older persons constitute a vulnerable group of society requiring special measures of protection. Nevertheless, beyond the prohibition of discrimination on the grounds of age, existing human rights mechanisms rarely address the specific concerns of the elderly. Even so, old age-related standards are scattered throughout various international human rights treaties. This paper argues that a treaty dedicated to the rights of older persons, a systematic and comprehensive articulation of how human rights apply to older people, would enhance visibility and would contribute to a greater awareness of age-related issues. A specific convention on older persons would foster a paradigm shift from older people being considered as no more than the recipients of welfare to rights holders with responsibilities. Nonetheless, filling in the normative gap cannot in itself be a substitute for political will and real determination on the part of individual States. A treaty is only as good as those States willing to comply with it.*

1. Introduction

The period since 1945 has witnessed an unprecedented expansion in human rights instruments, at both global and regional levels. Beyond setting out a

[1] Former Commissioner for Human Rights of the Council of Europe (2006-2012), Human Rights Comments, http://commissioner.cws.coe.int/tiki-view_blog_post.php?postId=65 [30.11.2012.]

catalogue of human rights and freedoms, these instruments established various methods for securing state compliance with their obligations arising from the treaties. Some of these documents concentrate on a certain set of rights, such as civil and political rights, or economic, social and cultural rights,[2] while others cover a select human rights issue, such as racial discrimination, torture or enforced disappearance[3] or apply to select populations, including women, children,[4] migrant workers or people with disabilities.[5]

These instruments are, however, age-blind. While covering some age-related aspects, existing international human rights law does not explicitly recognise older people. Even less do they take into consideration that older people do not constitute a homogenous group. Older migrants, old women or the indigenous old face multidimensional discrimination and, consequently, are particularly at risk.

Contemporary society often regards older persons as being incapable of being independent. They are regarded as simply dependants who receive certain social benefits.[6] This approach, however, can no longer be maintained. This paper argues for a shift of paradigm and, consequently, the need for adopting a

[2] At global level: the International Covenant on Economic, Social and Cultural Rights (1966) and the International Covenant on Civil and Political Rights (1966). In Europe: the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and the Protocols attached to it; the European Social Charter (1961) and the European Social Charter (Revised) (1996). In America: the American Convention on Human Rights (1969) and the Additional Protocol to the ACHR in the area of Economic, Social and Cultural Rights (1988). In Africa: African Charter on Human and Peoples' Rights (1981).

[3] From the treaties prepared within the United Nations, see: International Convention on the Elimination of All Forms of Racial Discrimination (1965), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (1984), and International Convention for the Protection of All Persons from Enforced Disappearance (2006). Available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx [30.11.2012.]

[4] See e.g. Csapó, Zsuzsanna: Fegyverekkel szemben, fegyverekkel kézben. Nemzetközi jogi védőháló a fegyveres konfliktusokban érintett gyermekek oltalmára. IDResearch Kft. – Publikon Kiadó, 2011, especially pp. 13-18.

[5] From the treaties prepared within the United Nations, see: Convention on the Elimination of All Forms of Discrimination against Women (1979), Convention on the Rights of the Child (1989), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), Convention on the Rights of Persons with Disabilities (2006). Available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx [30.11.2012.]

[6] ECLAC: Ageing and the protection of human rights: current situation and outlook (April 2011), Document submitted to the First Session of the Open-ended Working Group on strengthening the protection of the human rights of older persons, convened from 18 to 21 April 2011, p. 16. http://www.inpea.net/images/ECLAC_Ageing_and_the_protection_of_human_rights.pdf [30.11.2012.]

specific international document dedicated to the issues and problems faced by older people. The paper does not aim at thoroughly exposing the complex economic, societal, physiological and cultural factors of age and ageing; it is restricted to an analysis of the human rights aspect of longevity. It starts in Part Two with a few definitions, and provides a few illustrative sets of statistical data in Part Three. This is followed in Part Four by a brief survey of existing legal instruments. Part Five discusses the need for a human-rights-based approach and argues for the development of a specific age-related convention. Part Six describes the rights to be included in the recommended convention on older persons. A more detailed elaboration of the age-related rights will be the topic of another paper; here analysis is restricted to the brief enumeration and short description of these rights. Finally, the paper concludes with some observations upon the phenomena of ageing in Part Seven.

2. Definitional issues

As a starting point, various concepts pertinent to our subject have to be defined. Firstly, the concept of *old age* can be approached from different standpoints, including chronological, physiological and social age.[7] Chronological age is essentially biological in nature. Nowadays, this is defined as beginning at 60 or 65 years. Physiological age is linked to chronological age, and relates to the loss of functional capacities. Finally, social age refers to the attitudes and behaviours that are regarded as being appropriate for a given chronological age group. There are various terms referring to the – by large, identical – concept including older persons, elderly persons, the elderly, older adults, senior citizens, or even "*tercera edad*" (third age or old age in English).[8] These will be used interchangeably throughout this paper.

Discrimination is defined as any distinction, exclusion, restriction or preference that has the purpose or effect of annulling or restricting the recognition, enjoyment or exercise, on an equal basis with others, of human rights and fundamental freedoms in the political, economic, cultural, social, or

[7] Ibid. p. 14.

[8] The Committee on Economic, Social and Cultural Rights (CESCR) provides the following overview: "The terminology used to describe older persons varies considerably, even in international documents. It includes: "older persons", "the aged", "the elderly", "the third age", "the ageing", and, to denote persons more than 80 years of age, "the fourth age". The Committee opted for "older persons" (in French, *personnes âgées*; in Spanish, *personas mayores*), the term employed in General Assembly resolutions 47/5 and 48/98. According to the practice in the United Nations statistical services, these terms cover persons aged 60 and above (Eurostat, the statistical service of the European Union, considers "older persons" to mean persons aged 65 or above, since 65 is the most common age of retirement and the trend is towards later retirement still)." CESCR General Comment No. 6, para. 9.

any other sphere of public and private life.[9] The prohibited grounds of discrimination may include race, colour, ethnicity, sex, age, sexual orientation, language, religion, political or any other type of opinion, national or social origin, economic position, migrant, refugee or displaced person status, place of birth, stigmatised infection or contagious condition, disability or any other social condition.[10]

Existing global human rights treaties, however, do not generally list "age" as a prohibited basis of discrimination. Nevertheless, those lists are illustrative and non-exhaustive and usually include an open-ended category ("other status"). Thus, treaty bodies are entitled to consider age-related discrimination.[11]

Under these circumstances, and based on the definition of other conventions,[12] "*age discrimination*" means any distinction, exclusion or restriction based on age which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. In a less legally complex formulation, age discrimination is "when someone is treated differently, with an unreasonable or disproportionate impact, simply because of their age."[13]

The next two concepts to be clarified are direct and indirect discrimination. In the well-developed practice of the European Union, *direct discrimination* consists of treating someone differently solely because of his or her specific characteristic, like "age" in our case. In other words, direct discrimination is discrimination caused when one person is treated less favourably than another is, has been or would be treated in a comparable situation.[14] *Indirect discrimination* is more complex in that a rule or practice which seems neutral in fact has a particularly disadvantageous impact upon a person or a group of

[9] See e.g. Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women, and Article 2 of the Convention on the Rights of Persons with Disabilities. See also the definition of discrimination in Article 2 of the Preliminary Draft Inter-American Convention on Protection of the Human Rights of Older Persons, CAJP/GT/DHPM-37/12 (30 April 2012).

[10] Article 2 of the Preliminary Draft Inter-American Convention on Protection of the Human Rights of Older Persons, op. cit.

[11] Paras. 23 and 24 of Follow-up to the Second World Assembly on Ageing: Report of the Secretary General, UN General Assembly, 66th Session, A/66/173, 22 July 2009, available at http://www.globalageing.org/ageingwatch/report%202.pdf [30.11.2012.]

[12] Article 1(1) of the Racial Convention and Article 1 of CEDAW.

[13] HelpAge: Briefing Paper for the 1st session of the OEWG on Ageing, Document submitted to the First Session of the Open-ended Working Group on strengthening the protection of the human rights of older persons, convened from 18 to 21 April 2011 p. 3.

[14] An advertisement for a "young, dynamic person" could potentially exclude older persons from applying. Further examples: upper age limits on credit or micro-finance that prohibit older people accessing finance.

persons having a specific characteristic.[15] The author of the rule or practice may have no idea of the practical consequences, and so intention to discriminate is not relevant.[16] Indirect discrimination occurs when a seemingly neutral condition has the effect of operating to the detriment of older persons.

Multiple discrimination appears as an essential component of any analysis, particularly considering that age-related discrimination is often compounded by other grounds of discrimination, such as sex, socio-economic status, ethnicity, literacy levels or health status. The Preliminary Draft Inter-American Convention on the Protection of the Human Rights of Older Persons[17] lists several grounds for discrimination which complement age discrimination and so lead to multiple discrimination. Thus women, disabled persons, persons of different sexual orientations or gender identities, migrant persons, persons living in poverty or social exclusion, persons of African descent and persons belonging to indigenous peoples, homeless persons, persons in prison and persons belonging to traditional peoples face aggravated discrimination at an advanced age.[18]

The last concept to be covered is *ageism*, which can be defined as "the stereotyping and prejudice against older people that can lead to age discrimination."[19] Ageism manifests itself in mistreatment, "ranging from stereotypic and degrading media images to physical and financial abuse, unequal treatment in the workforce, and denial of appropriate medical care and services."[20] To tackle this phenomenon,[21] States must introduce measures to

[15] An example of indirect discrimination is a situation where the employer selects only part-time workers for redundancy, when a large number of these are older workers.

[16] See e.g. Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180 of 19.7.2000, p. 22 and Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303 of 2.12.2000, p. 16. See also Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM (2008) 426 final.

[17] CAJP/GT/DHPM-37/12 (30 April 2012)

[18] Article 6 (e) of the Preliminary Draft Inter-American Convention.

[19] Working Paper prepared by Mrs Chinsung Chung, Human Rights Council Advisory Committee, A/HRC/AC/4/CRP.1 (4 December 2009), para. 8.

[20] Parliamentary Assembly of the Council of Europe: Promoting active ageing – capitalising on older people's working potential. Report by Denis Jacquat. 18 November 2010. Point 35.

[21] "All too often, older persons face employers' negative perceptions of older workers; age limits, penalties and denials of service imposed by insurance service providers and financial institutions; preconceived notions and negative attitudes on the part of medical staff; and rationing of health care." Point 57 of the Report of the Secretary General (Follow-up to the Second World Assembly on Ageing, A/67/188, 2012).

promote the transmittal of a dignified image of old age, to remove prejudice and stereotypes.[22]

Having thus clarified the most important concepts, the next part aims to highlight the demographic developments of the last sixty years and to identify the challenges so caused.

3. The problem: statistics

According to a UN survey, world population is ageing at an unprecedented rate. Older people will outnumber children for the first time in history in 2050.[23] The Population Division of the Department of Economic and Social Affairs of the UN Secretariat stated that "[t]he number of older people over 60 years is expected to increase from about 600 million in 2000 to over 2 billion in 2050. This increase will be the greatest and most rapid in developing countries, where the number of older people is expected to triple during the next 40 years. By 2050 over 80 per cent of older people worldwide will be living in developing countries."[24] In addition, ageing is gender-related in that women tend to live longer than men, and more older women than men live alone.[25]

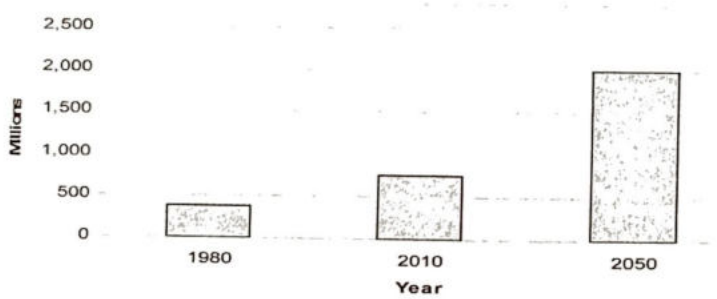


Figure: Population aged 60 and over: 1980, 2010, and 2050[26]

[22] See e.g. Article 18(h), 22(a)(1) of the Preliminary Draft Inter-American Convention.
[23] Summary of the Report of the Secretary-General to the GA. The report (A/66/173) is submitted pursuant to the General Assembly resolution 65/182 of December 2010.
[24] Population Division of the Department of Economic and Social Affairs of the United Nations Secretariat, *World Population Prospects: the 2008 Revision*, http://esa.un.org/unpp [30.11.2012.]
[25] CEDAW General Recommendation No. 27, para. 5.
[26] Source: United Nations (2009). *World Population Prospects, 2008 Revision*, available at http://social.un.org/index/Ageing/DataonOlderPersons/ADemographicsCharts.aspx [30.11.2012.] See also United Nations, Department of Economic and Social Affairs, Population Division (2011). *World Population 2010 (Wall Chart)*. ST/ESA/SER.A/307,

The major consequences and challenges of population ageing are:

- Access to (decent) employment.
- Adequate income support.
- Increase in the dependency ratio. Family structures are changing, resulting in shrinking social support networks.
- Increasing longevity resulting in the prevalence of a number of long-term chronic conditions (Alzheimer's disease, Parkinson's disease, HIV/AIDS, cancer, heart disease and respiratory diseases), loss of capacity, physical and mental disability, increased personal care needs, and the challenges this poses to families as well as the health and social services.
- The higher number of women among the elderly.
- The inequality and discrimination experienced by women throughout their lifetime is exacerbated in old age.[27]
- The autonomy of older persons, including treatment with dignity, their right to privacy and intimacy and the right to die with dignity.[28]

Inevitably, transition towards demographic maturity necessitates the development of standards of protection of human rights of elderly persons. Older people's rights continue to be neglected by existing human rights treaties, and so systematic articulation of how human rights apply in the context of old age would be highly recommended.

4. Survey of the current human rights framework

This part of the paper is organised in two sections. In the first, legally binding instruments, both global and regional, are reviewed, whilst the second focuses on "soft law" documents.

4.1 Legally binding international norms

4.1.1 Protection at international level

The *Global Declaration of Human Rights* (UDHR), adopted by the United Nations General Assembly in 1948 in response to the atrocities of World War II, is a non-binding resolution. Nevertheless, it is now regarded as the consensus of global opinion on fundamental rights, and considered by some to have

at http://esa.un.org/unpd/wpp/Documentation/pdf/WPP2010_Wallchart_Plots.pdf [30.11.2012.]
[27] CESCR drew attention to the situation of older women who "have spent all or part of their lives caring for their families without engaging in a remunerated activity entitling them to an old-age pension, and who are also not entitled to a widow's pension". CESCR General Comment No. 6, para. 20.
[28] Articles 7 and 14 of the Preliminary Draft Inter-American Convention.

acquired the force of international customary law.[29] For our purposes, the most relevant provisions are Article 1 (Freedom and Dignity), Article 2 (Enjoyment of Rights without Distinction) and Article 25(1). The last provides that "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family. This includes food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, *old age* or other lack of livelihood in circumstances beyond his control."[30]

The *International Covenant on Civil and Political Rights* (1966), in Articles 2(1) and 26,[31] prohibits discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The formulation "such as" indicates that this is not an exhaustive list, and so distinction related to age may amount to discrimination on the ground of "other status".[32]

Article 2(2) of the *International Covenant on Economic, Social and Cultural Rights* (1966) is similar to Article 2(1) of the ICCPR, referring to "other status" as a prohibited ground of distinction.[33] In addition, the Covenant provides for several specific rights relevant to the challenges which older persons face. These include the right to the enjoyment of the highest attainable standard of physical and mental health (Article 12), the right to social security (Article 9), the right to adequate standard of living, including food, clothing and housing (Article 11), the right to work (Articles 6 and 7) and the right to education (Article 13).

In 1995, the Committee on Economic, Social and Cultural Rights, the treaty body entrusted with the monitoring of the implementation of the Covenant, adopted General Comment No. 6 offering the first detailed interpretation of the

[29] On the debate over the enforceability and legal status of the Declaration, see e.g. Smith, R.K.M.: International Human Rights, Oxford, 2010, pp. 37-38.

[30] Emphasis added.

[31] Article 2(1) guarantees without distinction the rights recognised in the Covenant, while Article 26 is a fully-fledged / independent anti-discrimination provision.

[32] See Human Rights Committee, *Love et al. v. Australia*, Communication No. 983/2001, *Schmitzde-Jong v. The Netherlands*, Communication No. 855/1999, *Solís v. Peru*, Communication No. 1016/2001 and *Althammer et al. v. Austria*, Communication No. 998/2001, available at http://www2.ohchr.org/english/bodies/hrc [30.11.2012.]

[33] See CESCR General Comment No. 6, paras. 11 and 12: "Another important issue is whether discrimination on the basis of age is prohibited by the Covenant. Neither the Covenant nor the Global Declaration of Human Rights refers explicitly to age as one of the prohibited grounds. Rather than being seen as an intentional exclusion, this omission is probably best explained by the fact that, when these instruments were adopted, the problem of demographic ageing was not as evident or as pressing as it is now. This is not determinative of the matter, however, since the prohibition of discrimination on the grounds of "other status" could be interpreted as applying to age. ..."

specific obligations of States parties to the ICESCR regarding older persons and their rights.[34]

The focus of the *Convention on the Elimination of All Forms of Discrimination Against Women* (1979) is one of the several vulnerable groups of the society. As argued above, old women face multiple discrimination: the ongoing, as well as the cumulative, impact of gender inequalities become most pronounced in old age.[35] The Convention itself includes only one specific reference to old age: Article 11(1)e) prohibits discrimination against women in the field of social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave.

Given the gender-related nature of ageing, the Committee on the Elimination of Discrimination against Women, in 2010, adopted General Recommendation No. 27 on older women and the protection of their human rights under the Convention. In this document, the Committee draws attention to the fact that

"While both men and women experience discrimination as they become older, older women experience ageing differently. The impact of gender inequality throughout their lifespan is exacerbated in old age and is often based on deep-rooted cultural and social norms. The discrimination that older women experience is often a result of unfair resource allocation, maltreatment, neglect and limited access to basic services. [...]

The discrimination experienced by older women is often multidimensional, with the age factor compounding other forms of discrimination based on gender, ethnic origin, disability, poverty levels, sexual orientation and gender identity, migrant status, marital and family status, literacy and other grounds. Older women who are members of minority, ethnic or indigenous groups, internally displaced or stateless often experience a disproportionate degree of discrimination."[36]

The General Recommendation specifies several aspects of discrimination of older women, such as those suffered in the employment sector, in marriage and family life, those related to participation in public life, access to education,

[34] Committee on Economic, Social and Cultural Rights, General Comment No. 6, "The economic, social and cultural rights of older persons". E/1996/22, annex IV, para. 22.

[35] These impacts include "economic security, as gender-based discrimination against women in employment throughout their lives may lead to disproportionately lower incomes and pensions compared with men; adequate housing, as in many societies older women face obstacles to inheriting housing, land and property; and access to productive resources which are essential to ageing with dignity. Differences in life expectancy also mean women are more likely to be older carers for their spouses but then rely on institutional or state supported care themselves." (References omitted.) UN Office of the High Commissioner for Human Rights: Normative standards in international human rights law in relation to older persons. Analytical Outcome Paper, August 2012, pp. 11-12.

[36] Paras. 11 and 13 of CEDAW General Recommendation No. 27.

work and pension benefits, health, social benefits, as well as negative stereotyping, neglect and violence.

The *Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (1990) contains only a brief reference to old age in its non-discrimination provision. Nonetheless, the Convention is unique in the sense that age is listed as one of several prohibited grounds for discrimination.[37]

The *Convention on the Rights of Persons with Disabilities* (2006) includes references to older persons in Article 25(b) on health, and in Article 28(2)(b) on an adequate standard of living and social protection. There are additional references to age-appropriate access to justice in Article 13 and to age-sensitive measures of protection in Article 16 (freedom from exploitation, violence and abuse).[38]

The *International Labour Organization* has also given due consideration to the situation of older workers. Two of its earlier conventions[39] were revised and replaced by Convention No. 128 on Invalidity, Old-Age and Survivors' Benefits Convention (1967).[40] Another relevant instrument is Convention No. 102 concerning Minimum Standards of Social Security.[41] Finally, several recommendations deal with issues such as old-age benefits,[42] older workers[43] and termination of employment.[44]

[37] Article 1(1) and Article 7 of the ICMW.

[38] Other relevant provisions of CRD that can potentially benefit older persons include Article 5 on non-discrimination, Article 9 on accessibility, Article 12 on equal recognition before the law, Article 19 on living independently and access to in-home, residential and other community support services, Article 20 on personal mobility, and Article 26 on habilitation and rehabilitation to maintain maximum independence.

[39] Convention No. 35 concerning Compulsory Old-Age Insurance for Persons Employed in Industrial or Commercial Undertakings, in the Liberal Professions, and for Outworkers and Domestic Servants (entry into force: 18 July 1937), and Convention concerning Compulsory Old-Age Insurance for Persons Employed in Agricultural Undertakings (entry into force: 18 July 1937). See http://www.ilo.org/ilolex/english/convdisp1.htm [30.11.2012.]

[40] Convention concerning Invalidity, Old-Age and Survivors' Benefits (entry into force: 1 November 1969) Adoption: Geneva, 51st ILC session (29 June 1967).

[41] Adoption: Geneva, 35th ILC session (28 June 1952). Entry into force: 27 April 1955. – See also Convention No. 111 concerning Discrimination in Respect of Employment and Occupation. Adoption: Geneva, 42nd ILC session (25 June 1958, entry into force: 15 June 1960).

[42] Recommendation concerning Invalidity, Old-Age and Survivors' Benefits. Adoption: Geneva, 51st ILC session (29 June 1967).

[43] Older Workers Recommendation No. 162 in 1980, on the prevention of discrimination and equal treatment of workers, irrespective of their age.

[44] Termination of Employment Recommendation No. 166 of 1982, providing that age should not constitute a valid reason for termination, subject to national retirement legislation.

4.1.2 Scrutiny in the framework of the Global Periodic Review

The Global Periodic Review (UPR), set up in 2006 is a relatively new monitoring agency where every UN Member State reports to the Human Rights Council on its human rights record. As it became clear from the analysis of the various documents issued during the first cycle (2008-2011), older persons have remained invisible in the UPR.[45]

4.1.3 Regional human rights instruments.

While certain developments have taken place in the American and African systems, at the moment there is no specific regional human rights treaty dedicated to the protection of the elderly.[46] Various provisions of the foundational instruments of the regional human rights mechanism, however, are relevant for older persons.

Article 3 of the *European Convention on Human Rights* (1950)[47] on the prohibition of torture and *inhuman or degrading treatment* or punishment, imposes positive duties on States Parties to protect vulnerable individuals from ill-treatment or undignified conditions. This clearly includes the protection of older persons from violence, abuse, neglect, ill-treatment, undignified conditions, disproportionate use of force or restraint, or denial of essential medication or aids. Article 8 on the right to respect for private and family life

[45] International Network for the Prevention of Elder Abuse: Strengthening Older People's Rights: Towards a UN Convention (2010), p. 7. Available at http://www.inpea.net/images/Strengthening_Rights_2010.pdf [30.11.2012.]On the major thematic issues discussed during the review see http://www.upr-info.org/database/statistics/ [30.11.2012.] On UPR generally see e.g. Komanovics, Adrienne – Mazur-Kumrić, Nives: The Human Rights Council and the Global Periodic Review: A novel method of promoting compliance with human rights. In: Drinóczi, T. – Župan, M. – Ercsey, Zs. – Vinković, M. (eds.): Contemporary legal challenges: EU – Hungary – Croatia (Pécs – Osijek 2012); Haász, Veronika – Szappanyos, Melinda: Az ENSZ tagállamok emberi jogi helyzetét értékelő egyetemes időszakos felülvizsgálat (UPR). *Föld-rész*, 2011/1. pp. 71-83.; Komanovics, Adrienne: Keresztűzben Genfben. Magyarország emberi jogi helyzetének értékelése az ENSZ Emberi Jogi Tanácsában, Föld-rész, IV. évfolyam (2011), 2-4. szám, pp. 7-27.

[46] The first steps have been, however, taken in this direction: the Steering Group on Human Rights of the Council of Europe (CDDH) has given a mandate to a working group comprised of experts from the Council of Europe Member States (CDDH-AGE) to explore possibilities for adoption of a *non-binding* document on the human rights of the elderly. See http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/cddh-age/default_EN.asp[30.11.2012.]

[47] Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No: 005, 4 November 1950.

might also be relevant in certain circumstances. Therefore, the right to privacy can be interpreted as including personal privacy in residential or nursing homes, freedom from the violation of family life by separating spouses in institutional care, the prohibition of social isolation in such homes or the proscription of the infringement of physical and psychological integrity by poor quality care. The latter does not amount to ill-treatment and so are not affected by Article 3.

In the case of *Schwizgebel v. Switzerland*,[48] the European Court of Human Rights had to deal with the issue of age in relation to a child-adoption dispute. The case concerned the refusal of an adoption application by a single Swiss woman on the ground of her age which was 47 at the time of the application. Adoption by a single parent is possible under Swiss law; nonetheless her application to adopt a second child was refused by the Swiss courts. Albeit the domestic courts did not call into question her child-raising capacities or her financial resources, the applicant's age (47 and a half at the time of her last application) and the age difference in relation to the child played an important role in the dismissal of her application. In her application to the European Court of Human Rights, she claimed among other things that she had been discriminated against in comparison with other women of her age, who were able nowadays to give birth to children of their own. She relied in substance on Article 14, taken together with Article 8 of the Convention. Having found that the applicant had been subjected to a difference of treatment, the Court found that MS SCHWIZGEBEL'S age-difference with the child to be adopted constituted an objective and reasonable justification for the difference in treatment. In view of the lack of uniform European standard, evidenced by the different solutions by the member States of the Council of Europe as regards the age of the adopter or the age-difference between the adopter and the child, the Swiss authorities had considerable discretion to decide on such matters. The Swiss rules seemed to be consonant with the solutions adopted by the majority of the member States of the Council of Europe. In those circumstances the Court found no violation of Article 14 taken together with Article 8.[49]

The European Social Charter (1960)[50] is silent on the specific problems of the elderly since ageing was not such a topical issue at the time of the adoption of the Charter. A few decades later, however, Article 4 of the Additional Protocol to the European Social Charter (1988)[51] obliged States Parties to enable older persons to remain full members of society for as long as possible, to choose their life-style and to lead independent lives, and to guarantee support

[48] Application no. 25762/07, judgment of 10 June 2010.

[49] This case also shows the "relativity" of the concept of old age: what may be considered a high age in one case (e.g. 47 in *Schwizgebel*) might not be so in other circumstances.

[50] CETS No. 035, 18 October 1961.

[51] Additional Protocol of 1988 extending the social and economic rights of the 1961 Charter, Strasbourg, 5 May 1988, CETS No.: 128.

for older persons living in institutions respecting their privacy and participation in decisions. In view of the demographic changes, *the Revised European Social Charter* of 1996 declared that every elderly person has the right to social protection, and integrates *verbatim* Article 4 of the Additional Protocol.[52]

The last milestones of our European review are the European Code of Social Security[53] which contains provisions dedicated to old-age benefit (see Part V, Articles 25 to 30), and Chapter 2 of the European Convention on Social Security[54] providing for invalidity, old age and death pensions.

Article 4(5) of *the American Convention on Human Rights* (1969) prohibits punishment for people under 18 or over 70 years of age. Apart from Article 9(1) on the right to social security in old age and disability, the *Article 17 of* Additional Protocol in the Area of Economic, Social and Cultural Rights (*Protocol of San Salvador*, 1988)[55] includes a specific article on the protection of the elderly:

"Everyone has the right to special protection in old age. With this in view the States Parties agree to take progressively the necessary steps to make this right a reality and, particularly, to:

a/ Provide suitable facilities, as well as food and specialised medical care, for elderly individuals who lack them and are unable to provide them for themselves;

b/ Undertake work programs specifically designed to give the elderly the opportunity to engage in a productive activity suited to their abilities and consistent with their vocations or desires;

c/ Foster the establishment of social organisations aimed at improving the quality of life for the elderly."

In Africa, Article 18(4) of *the African Charter on Human and Peoples' Rights* (1981)[56] provides that the aged shall "have the right to special measures of protection in keeping with their physical or moral needs". Article 22 of the 2003 Protocol[57] to the Charter focuses on the concerns of elderly women, and obliges States to provide protection to elderly women.

[52] Part I, para. 23 and Part II, Article 23 of European Social Charter (revised) (1996) CETS No.: 163.

[53] CETS No. 048.

[54] CETS No. 078.

[55] The American Convention on Human Rights ("Pact of San José, Costa Rica"), adoption: 22 November 1969, entry into force: 18 July 1978. The Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador), adoption: 17 November 1988, entry into force: 16 November 1999. – The basic documents of the inter-American system are available at http://www.oas.org/en/iachr/mandate/basic_documents.asp [30.11.2012.]

[56] Adoption on 27 June 1981, entry into force on 21 October 1986. Available at http://www.achpr.org/instruments/achpr/ [30.11.2012.]

[57] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003), adoption on 7 November 2003, entry into force on 25

Article 33 of the *Arab Charter on Human Rights* (2004) provides for outstanding care and special protection for the older persons.[58]

Old age considerations are also taken into account in the *Charter of Fundamental Rights of the European Union*[59] e.g. in Article 21(1) prohibiting discrimination based on age, in Article 25 affirming the rights of older people to lead a life of dignity and independence and to participate in social and cultural life, and in Article 34(1) acknowledging entitlement to social security in old age.

As is clear from the brief survey above, the rights of older persons are not adequately addressed or protected through the existing human rights system. The normative gap, i.e. the lack of relevant provisions in human rights law is accompanied by an implementation gap: human rights treaties do not provide adequate monitoring of age-related rights and treaty bodies rarely ask questions about the rights of older persons.[60]

The human-rights-based approach, however, has taken on great importance, which is evidenced by the latest developments in the Americas and in Africa. Accordingly, the African Commission has drafted a Protocol on the Rights of Older Persons in Africa.[61] Likewise, Latin American States have been actively working towards the development of a regional convention on the rights of older people. The preliminary draft of this convention was submitted to the Permanent Council of the Organisation of American States in April 2012.[62] In

November 2005. Available at http://www.achpr.org/instruments/women-protocol/ [30.11.2012.]

[58] Article 33(2): "The State and society shall ensure the protection of the family, the strengthening of family ties, the protection of its members and the prohibition of all forms of violence or abuse in the relations among its members, and particularly against women and children. They shall also ensure the necessary protection and care for mothers, children, *older persons* and persons with special needs and shall provide adolescents and young persons with the best opportunities for physical and mental development." (Emphasis added) The Charter is reprinted in 12 *International Human Rights Reports* 893 (2005).

[59] Official Journal of the European Union, 2007/C 33/01. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0001:0016:EN:PDF [30.11.2012.]

[60] International Network for the Prevention of Elder Abuse: Strengthening Older People's Rights: Towards a UN Convention (2010), p. 7. Available at http://www.inpea.net/images/Strengthening_Rights_2010.pdf [30.11.2012.]

[61] The draft Protocol on the Rights of Older Persons came up for discussion at the 48th Ordinary Session of the African Commission on Human and Peoples' Rights (ACHPR) in November 2010. It will be submitted to the African Union in the near future. See http://www.achpr.org/sessions/49th/intersession-activity-reports/older-disabled/ and http://www.achpr.org/sessions/52nd/info/agenda/ [30.11.2012.]

[62] Preliminary Draft Inter-American Convention on Protection of the Human Rights of Older Persons CAJP/GT/DHPM 37/12 – available through http://www.oas.org/consejo/cajp/personas%20mayores.asp [30.11.2012.] The mandate was created by OAS General

Europe, the Steering Committee for Human Rights (CDDH) of the Council of Europe has decided in February 2012 to create a new drafting group (CDDH-AGE) in view of elaborating, under the CDDH's authority, a non-binding Council of Europe instrument on the promotion of the human rights of the elderly. So far, the group has held two meetings.[63] Finally, at global level an Open-ended Working Group on Ageing was established by the General Assembly through its resolution 65/85 as an important step in the quest for the protection and promotion of human rights of older persons.[64]

4.2 "Soft" law instruments

The developments were more encouraging in the field of non-binding documents. The most important milestones are the following.

In 1991, the UN General Assembly adopted the *United Nations Principles for Older Persons*,[65] encouraging governments to incorporate them into national programmes whenever possible. The Principles called for action in many areas, structured around the keywords of independence, participation, care, self-fulfilment and dignity. These Principles were followed by the *Vienna International Plan of Action on Ageing*, adopted at the (first) World Assembly on Ageing in 1992.[66]

The Madrid International Plan of Action on Ageing (MIPAA, 2002), adopted at the Second World Assembly on Ageing, and endorsed by the General Assembly in its resolution 57/167,[67] provided a basis for national action on ageing. It offered recommendations and guidance to countries on developing and implementing policies and programmes on ageing. In its observations, MIPAA encouraged States to promote the participation of older persons as citizens with full rights, and to assure that persons everywhere are able to age with security and dignity. MIPAA recognised older persons as contributors to, not just beneficiaries of, economic and social development. MIPAA emphasised inclusion of older persons in deciding policies, rather than having policies designed for them. MIPAA also placed greater emphasis on developing

Assembly resolution AG/RES. 2726 (XLII-O/12), "Protecting the Human Rights of Older Persons."

[63] 21-23 March 2012 and 24-26 September 2012. See http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/cddh-age/default_EN.asp [30.11.2012.]

[64] See further http://social.un.org/ageing-working-group/index.shtml [30.11.2012.]

[65] Implementation of the International Plan of Action on Ageing and Related Activities (UN Principles for Older Persons), UNGA resolution 46/91 (16 December 1991) of 16 December 1991. See http://www.unescap.org/ageing/res/res46-91.htm [30.11.2012.]

[66] Vienna International Plan of Action on Ageing adopted at the First World Assembly on Ageing. UN GA resolution 37/51 on the question of ageing, 3 December 1982.

[67] Madrid International Plan of Action on Ageing, adopted at the Second World Assembly on Ageing, and endorsed by the General Assembly in resolution 57/167, see http://www.c-fam.org/docLib/20080625_Madrid_Ageing_Conference.pdf [30.11.2012.]

countries, due to the expected rise in the number of older persons in those States.[68] The three priority directions of the Madrid Plan of Action were (1) older persons and development, (2) advancing health and well-being into old age, and (3) ensuring enabling and supportive environments.

Besides the Vienna and the Madrid Plan of Action, the *UN General Assembly* was vigorous in adopting a variety of *resolutions* relative to old age. These include:

- the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;[69]
- the Standard Minimum Rules for non-custodial measures (the Tokyo Rules);[70]
- the Declaration on fundamental principles of justice for victims of crimes and abuse of power;[71]
- the Declaration on the elimination of violence against women,[72] and
- the Declaration of the rights of indigenous peoples.[73]

Worth mentioning also is the establishment by the General Assembly of an *open-ended working group on ageing* for the purpose of strengthening the protection of the human rights of older persons.[74] The working group was set up to consider the existing international framework of the human rights of older persons and to identify possible gaps and how best to address them. So far it has held three substantive sessions.[75]

5. The way forward: development of a specific old-age-related convention

The survey of international and regional human rights instruments, as well as the practices of monitoring bodies and human rights mechanisms provides clear

[68] UN Department of Economic & Social Affairs, Division for Social Policy & Development: The Madrid International Plan of Action on Ageing. Guiding framework and toolkit for practitioners & policy-makers (2008), pp. 10-11. Available at http://social.un.org/index/LinkClick.aspx?fileticket=8iGbix56gs%3d&ta-bid=502 [30.11.2012.]

[69] General Assembly resolution 43/173 of 9 December 1988, Principle 5(2) (special measures for older persons).

[70] General Assembly resolution 45/110 of 14 December 1990, Principle 2(2) (non-discrimination by reason of age).

[71] General Assembly resolution 40/34 of 29 November 1985, Principle 3 (non discrimination by reason of age).

[72] Resolution 48/104 of 20 December 1993.

[73] General Assembly resolution 61/295 of 13 September 2007, Article 22 (special protection of indigenous elders).

[74] UN General Assembly resolution 65/182 of 21 December 2010. http://social.un.org/index/Ageing.aspx

[75] See http://social.un.org/ageing-working-group/ [30.11.2012.]

evidence of a normative and implementation gap in specifically elderly-targeted standards. With a view to identifying the general areas that may be covered by a future convention, the UN Secretary General highlighted the most important challenges faced by older person in a report prepared in 2011. The topics thus recognised included age-related discrimination; poverty; violence, abuse and neglect; and lack of specific measures and services.[76]

In addition to the commonly known concerns of the elderly such as discrimination in the labour market, scarce resources resulting in inadequate facilities, insufficient level of social security, social protection and health care services, there are other areas related to the experience of older persons that are generally overlooked. These include (restricted) access to employment, discrimination in the field of financial services by banks and insurance companies, and discrimination or difficulties in access to goods, services, housing and justice. Furthermore, older persons too often face psychological violence, like verbal abuse, threats, humiliation or bullying; domestic violence and violence related to widowhood, which is more prevalent against elderly widows (women) than against elderly widowers (men) or younger people. There is a sad tendency of placing older persons in long-term care (residential institutions) where they risk isolation and exclusion from society. Crisis situations also disproportionately affect older people.[77] Finally, the challenges include the rights relevant at the end of life, and access to palliative care.[78]

Notwithstanding the complexity of the problem, *low political priority* is given to ageing issues. This is due to a combination of several factors, including the fact that older persons are not usually an organised and visible group which demands attention; at the same time other groups of people or issues are more visible or considered more pressing. Another reason is the lack of resources, or competition among different social groups for scarce resources. A lack of human resources (not enough people to implement a policy) or lack of human

[76] Follow-up to the Second World Assembly on Ageing: Report of the Secretary-General, UN General Assembly, Sixty-sixth session, A/66/173, 22 July 2011, paras. 9-16.

[77] See e.g. the pension reforms introduced after the 2008 economic crisis. In his "human rights comments", Thomas Hammarberg, former Commissioner for Human Rights of the Council of Europe, emphasised that "[i]n the wake of the economic crises several countries have been forced to reform their pension systems. The risk that several generations will face poverty as they grow old is all the more prevalent." See: Elderly across Europe live in extreme hardship and poverty, posted on 5 August 2010, http://commissioner.cws.coe.int/tiki-view_blog_post.php?postId=65 [30.11.2012.]

[78] UN Office of the High Commissioner for Human Rights: Normative standards in international human rights law in relation to older persons. Analytical Outcome Paper, August 2012, pp. 3-4.

capacity (people with insufficient training) also contributes to the "invisibility" of older persons.[79]

Although the elderly population is the fastest growing proportion of society, the rights of elderly persons are not protected under international law. Arguably, the failure to explicitly recognise age as a ground for discrimination, and the reliance on the 'catch-all' category of "and other status" is not sufficient. The old age-related standards are scattered throughout various international human rights treaties. There is no dedicated protection regime for the older persons' rights. In addition, attention concentrates on a *narrow range of rights*, usually economic and social, e.g. adequate standard of living, limited access to health care and social security. Existing human rights treaties are silent on issues like elder abuse, long-term care and palliative care. Finally, existing treaties fail to address, and fight against, ageism and deeply entrenched negative attitudes towards older persons.

Unfortunately, this *normative gap* is not counterbalanced by effective monitoring mechanisms. Treaty bodies have failed to systematically address the rights of older people. Similarly, little reference is made to the elderly in the Global Periodic Review carried out by the Human Rights Council.[80] In the absence of legally binding age-related treaty, *implementation* of the principles (Vienna, Madrid) has remained weak.

The HRC Advisory Committee argued that "[j]ust as women, children, and the disabled have been recognised as distinct groups requiring special care and concern under the existing human rights regime, the elderly population must be recognised as a distinct group whose human rights are protected by international law."[81] Presumably, a specific convention would change negative attitudes, increase the visibility of older persons, and provide an international framework by which to protect elderly populations.[82] Under these circumstances, development of specific standards related to the elderly would give more visibility to age-related issues, would raise the awareness of all actors concerned. A specific convention would clarify State obligations with respect to older persons and the establishment of a treaty monitoring body, modelled on other UN and regional human rights treaties, would, hopefully, contribute to the strengthening of international protection. Such a convention would also have an impact on the UPR, under which all human rights commitments and obligations

[79] UN Department of Economic & Social Affairs, Division for Social Policy & Development: The Madrid International Plan of Action on Ageing. Guiding framework and toolkit for practitioners & policy makers (2008), p. 18. Available at http://social.un.org/index/LinkClick.aspx?fileticket=8iGbix5_6gs%3d&tabid=502 [30.11.2012.]

[80] International Network for the Prevention of Elder Abuse (INPEA): Strengthening Older People's Rights: Towards a UN Convention (2010), p. 7.

[81] Working Paper prepared by Mrs Chinsung Chung, Human Rights Council Advisory Committee, A/HRC/AC/4/CRP.1 (4 December 2009), para. 60.

[82] Ibid. para. 64.

of the State under review are monitored.[83] Bringing the relevant provisions together in one comprehensive document would represent added value, and coherence.

Finally, a specific convention on the elderly would further promote a rights-based approach to ageing policies. In line with the Madrid Action Plan, the traditional approach, which considered older people as simply recipients of welfare, has to be replaced with a new approach. This rights-based approach regards older persons as *subjects of law*, rather than simply *beneficiaries*.[84] As ECLAC noted, "[t]he point of departure is no longer the provision of assistance to people who have certain needs, but rather the existence of persons with certain rights which the State and the rest of the society must uphold."[85] A modern perspective on ageing persons "views them as agents rather than objects of change, recognises them as contributors to, not just beneficiaries of, economic and social development".[86]

6. Towards a convention on the rights of older persons

Older persons are not the only ones to face discrimination. At different points in time, other social groups, women, children, persons with disabilities, have also voiced the same concerns, and this has led to the adoption of specific international instruments. As mentioned above, the drafting process of an old-age convention is already at an advanced stage in America and Africa, and there are various efforts to do the same at the UN level, while in Europe only a non-binding document is envisaged.

This paper advocates a specific age-related convention, whether at global or at regional level. Since the detailed analysis of each suggested provision would go beyond the objective of this paper, it will be restricted to a brief enumeration of the catalogue of rights to be included in the convention.

The concept of "older persons" has already been covered in Part Two of this paper. Suffice it here to say that, while the concept of "older persons" is widely debated, it presumably covers persons aged 60 or over. *The substantive provisions* of the convention could include a wide range of rights. In listing them, the logic is the following: while human rights are interrelated,

[83] ECLAC: Ageing and the protection of human rights: current situation and outlook (April 2011), Document submitted to the First Session of the Open-ended Working Group on strengthening the protection of the human rights of older persons, convened from 18 to 21 April 2011, pp. 50-52.

[84] Ibid. p. 14.

[85] Ibid. p. 20.

[86] UN Department of Economic & Social Affairs, Division for Social Policy & Development: The Madrid International Plan of Action on Ageing. Guiding framework and toolkit for practitioners & policy makers (2008), p. 11.

interdependent and indivisible,[87] for reasons of simplicity the list relies on the division of rights along "generations". Hence it starts with civil and political rights (points 1 to 12), followed by economic, social and cultural rights (points 13 to 21). Finally, provisions dedicated to either specific situations or specific groups within the elderly complete the list (points 22 to 25).

1) Right to equality and non-discrimination
2) Right to life, liberty and security of person
3) Right to physical, mental and emotional integrity, and to a dignified treatment; right to autonomy
4) Prohibition of torture and other cruel, inhuman or degrading treatment or punishment, freedom from violence and abuse
5) Right to equality before the law
6) Right to access to justice
7) Right to privacy and intimacy
8) Right to information
9) Right to participate in the social, cultural and political life of community
10) Right to vote
11) Rights to property and inheritance
12) Right to education
13) Right to an adequate standard of living, freedom from poverty
14) Right to decent work
15) Rights of older people in care
16) Rights of older carers
17) Rights of people with dementia
18) Right to health
19) Right to social security
20) Right to food
21) Right to housing; right to a healthy environment
22) Rights of older women
23) Rights of indigenous older persons
24) Rights of older detainees
25) Rights in humanitarian emergencies

The monitoring mechanism could be modelled on the various Committees established by existing global human rights treaties. Such a Committee would have the power to consider state reports and individual communications (petitions). No possibility for inter-state complaints is suggested as this procedure has never been used under the existing human rights treaties.[88] In respect of the inquiry procedure, the Committee Against Torture and the

[87] Office of the United Nations High Commissioner for Human Rights: Human Rights Indicators. A Guide to Measurement and Implementation (UN, 2012), p. 11. http://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf [30.11.2012.]

[88] See http://www2.ohchr.org/english/bodies/petitions/index.htm [30.11.2012.]

Committee on the Elimination of Discrimination Against Women may, on their own initiative, carry out inquiries if they have received reliable information containing well-founded indications of serious or systematic violations of the conventions in a State party.[89] The introduction of such a mechanism might be considered in view of certain specific situations such as harmful traditional practices, abuse in institutional care, older detainees, or humanitarian emergencies.

In respect of the admissibility criteria of individual petitions, special attention must be paid to certain age-related difficulties such as poverty, illiteracy, lack of information, and speaking indigenous languages other than the country's official language, all of which may bar access to the Committee. Further, in the context of advanced age, the requirement that a case be heard "within reasonable time" has a significant importance, not only before domestic authorities but before the Committee also.

7. Conclusions

The growth of the older population affects the entire world. Population ageing will have far-reaching and unpredictable consequences for all countries. The argument of this paper is that ageing cannot be considered simply as a biomedical problem, since this leads to the unfortunate perception of ageing as an abnormal or pathological phenomenon.[90] There must be a paradigm shift from the perception of older persons as a "social burden" to one which emphasises the human rights implications of ageing.

The international community has developed protection mechanisms targeted at the protection of the rights of specific, at times vulnerable, groups, including, women, children, minorities, migrant people, disabled people or indigenous population. Older people constitute an ever-growing segment of population, having age-specific needs and problems. Existing human rights mechanisms do not guarantee adequate protection inasmuch as these treaties and procedures do not necessarily provide the rules tailored to the situation of older persons. Even if these rules were given broad interpretation and/or adapted to address age-related issues, poor implementation by States hampers the effective realisation of these rights. Inevitably, a specific treaty on older persons would not *per se* offer a solution to this implementation gap, and international rules cannot be a substitute for the political will (and economic capacity) of States. Nevertheless, such a convention would enhance the visibility of older people and foster awareness of their contribution to society.

[89] Article 20 of CAT and Articles 8 to 10 of the Optional Protocol to CEDAW.

[90] Thematic study on the realization of the right to health of older persons by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, A/HRC/18/37 of 4 July 2011, para. 13.

Most importantly, however, contemporary solutions must do away with the approach of considering the elderly as simply beneficiaries of age-related measures. The new convention must embrace a rights-based approach and recognise the valuable contribution of older people to the common good.[91]

[91] Preambulary para. (r) of the Preliminary Draft Inter-American Convention on the Human Rights of Older Persons, CAJP/GT/DHPM-37/12, 30 April 2012.

Relevant issues related to franchise agreements

MÁTYÁS, MELINDA

ABSTRACT *Franchising has entered a mature stage in Hungary, and the creation of the new Civil Code has questioned the need for codification. However, the Codification Committee has finally voted for codification.*

The franchise is a complex relationship between market players based on a specialised agreement. It is highly important from a market perspective, as the number and influence of franchise-based enterprises have increased significantly.

The franchise agreement is an atypical, sui generis agreement unregulated by the Civil Code; it is an independent type of contract which combines distinct types of legal transaction.

A major issue in national law is the need for codification in each country. Due to the complexity of the typical franchise document, the basic franchise agreement, it has not appeared in Private Law codes. However the need for creating a legal framework and for regulating this type of contract is increasing. The rules and regulations under the aegis of UNIDROIT suggest that the franchise is, perhaps, ready to be taken into national legislation.

In Hungary the current Civil Code does not regulate such types of contract and only statutes and basic laws restrict the actions of the parties. Hence a franchise agreement must comply with the national rule of law and with the Ethical Code, although the new Civil Code will treat it as a distinct and separate type of contract.

1. Introduction

Franchising has entered a mature stage in Hungary, and the creation of the new Civil Code has raised the question of a need for codification. In addition, the Codification Committee has finally voted for codification.

The franchise is a complex relationship between market players based on a specialised agreement. It is highly important from a market perspective, as the number and influence of franchise-based enterprises have increased significantly.

Investment declined heavily following the crisis and market players were deterred from engaging in business. The decrease in the activities of SMEs (small and medium-sized enterprises) will have a serious impact on the economy. Partnerships and strategic alliances could be one solution for market players as these contractual relationships share skills, knowledge, and abilities

and may enable survival in difficult market conditions. With the franchise system, an already established and successful business concept and a brand can be 'lent' to an independent partner, and, according to MICHAEL E. GERBER the more commonly used form of franchising can help market players to emerge and support continuing development, which has stalled due to the crisis. The relationship, in fact, focuses on long-term development within a market segment.

Franchising today is a, updated form of the system originally developed in the 1960s, having become an important tool for many companies expanding globally. It is mutually beneficial for both parties, as it can expand with a relatively low level of investment and help in reaching geographically remote customers. In addition, the franchise partner provides an entry into an established and well-functioning system, whilst protecting its independence.

However a need for codification cannot be based on the important role of the franchise agreement. According to VÉKÁS LAJOS, the importance of contracts does not necessarily depend on whether or not they are written in a Codex.[1]

2. The franchise agreement

The basis of the franchise form of business is the agreement, although franchising cannot be described only as an agreement, since the relationship between the parties is highly complex, as is also the legal relationship.[2]

The agreement is a framework which secures the cooperation of the parties, the structure of the business entity, the levels of cooperation and the most important rights and obligations. It regulates the basis of the legal relations of the franchise contract. It is the foundation of the more complex cooperation of the parties, although it formulates several different legal ties beyond this. The structure of the agreement ensures that it evolves into a complete network which can later operate on a wide scale. The services offered can then be considered as agreements independent of each other.[3] The nature of these agreements, however, depends on the type of franchise agreement. Every single point in the agreement plays a crucial part in the complex structure, and fulfilling such an agreement involves satisfying each and every element. The structure of the agreement is built on the economic objectives of the legal transaction,[4] and in a substantive legal transaction, there are several contract types present:

[1] Vékás, Lajos: Egy új polgári törvénykönyv történelmi időszerűségéről, Magyar Tudomány, 2001/12 http://www.matud.iif.hu/01dec/vekas.html [01.10.2012.]
[2] Darázs, Lénárd: A franchise díjak rendszere, Gazdaság és jog, 2011/10. p. 9.
[3] Nochta, Tibor: Franchise és franchise- szerződés, In: Studia Iuridica no.123. p. 226.
[4] Lukács, Mónika – Sándor, István – Szűcs, Brigitta: Új típusú szerződések és azok gyakorlata a gazdasági életben, HVG-Orac Lap- és Könyvkiadó Kft. Budapest 2003. p. 194.

- *licence agreement* (trademark, know-how, patent rights)
- *leasing contract* (permission given by the franchisor for the use of equipment or the rental of plant and premises)
- *sales contract* (the purchase of equipment)
- assignment (the engagement or liability of the seller to share know-how, do marketing, provide guidance, and ensure overall improvement by supporting and nurturing the system)
- *supply contract* (for providing raw materials etc.)
- *insurance* (in case of loss, damage, and theft of equipment)
- *suretyship contract* (the franchisor can act as surety or bondsman for a bank loan)
- *loan agreement* (the franchisor provides credit funds).

Therefore the contract involves all the legal transactions necessary to achieve the economic objectives and emphasises the mutual responsibility of the parties for the operation of the joint venture.[5] When interpreting such contracts, their own features should be considered in respect of achieving their common economic objectives.

In addition, and in respect of business operations, the *operations manual* is hugely important in providing the core element (or rather the basic inputs) for the entrepreneur when finally starting business. This document is the bottom line of the franchise, the know-how to operate the business successfully. Besides the contract itself, this manual provides the basics of the franchise agreement, where the content depends on the business profile.[6] The operations manual gives the 'green light' to the enterprise.[7] All the technical details and information regarding the daily operations are included (minimum supply level, employee training, etc.). Since the contract focuses on the long-term, these details are easily modified if a changing environment so demands (development, innovation etc).

The franchise agreement is an atypical, *sui generis* agreement unregulated by the Civil Code; it is an independent type of contract which combines distinct types of legal transaction. In terms of the economy, it is not rare for contracts evolve and adjust to business relationships, deviating from the classical. Several enterprises used franchise agreements without realising that a franchise system was created, as economic needs in the USA created the phenomenon of leasing. Economic conditions also created special legal, contractual relationships which differ significantly from the traditional. Companies with established brands started to market their business plans and concepts (due to a lack of funds) and

[5] Jenovai, Petra – Papp, Tekla – Strihó, Krisztina – Szeghő, Ágnes: Atipikus szerződések, Lectum Kiadó, Szeged 2011. p. 231.
[6] Kiss, István: Franchise A-Z-ig, Dasy, Budapest, 2002. p. 32.
[7] Gerber, Michael E.: A vállalkozás mítosza,http://www.scribd.com/doc/80480397/11/A-vallalkozasfejlesztesi-program [23.04.2012.]

created this special type of relationship - which benefits both parties. These contracts are the means of settling legal relationships and they are very much the product of the 20th century.[8]

3. The content of the franchise agreement

Due to the complexity and diversity of franchise-based relationships, it is impossible to consider all the elements, and only the most important are emphasised in this study. A core element of the franchise agreement is to define the common economic objectives, which are the key to long-term co-operation. It defines the heart of the agreement, and provides assistance in interpreting the agreement. Each element can be modified due to changing conditions only with regard to these objectives. The franchise agreement is usually based on a long-term business relationship between the parties and usually lasts for a specific time period with the possibility of renewal – perhaps at the cost a renewal fee. Setting a long period for the contract is not easy - and even harder if the network is still growing. An indefinite period enables the franchisor to get rid of unwanted partners, and the renewal fee does provide him with certain revenue. These conditions must be included in the contract in order to avoid future conflict. Further, the geographical region must be defined, where the franchisee can enforce his rights. The contract involves an exclusivity clause in which the franchisor ensures and provides the ultimate use of the rights to the franchisee, without sharing them with other parties, so excluding competition. The obligation of confidentiality and the restriction of further operations in the market after the contract is terminated or expires are characteristic of franchise agreements. In this way the franchisor makes precautionary steps, protects his rights and avoids the misappropriation of his trade secrets (know-how, industrial property rights) as well as allowing the franchisee to become his competitor.

The rights and obligations of the parties must be well defined and clearly stated to avoid any possible future legal conflict and any difficulties concerning the burden of proof.

A basic requirement for entering a franchise system involves testing the applicants as to whether they satisfy all the criteria of the agreement. Selecting

[8] Here we may mention the root of a franchise in view of the evidence of legal relationships similar to franchises. In medieval France some rights exclusive to the king (levying and collecting taxes, approving the establishment of markets) were given to high-ranking individuals for a certain fee. Literally the franchise means privilege, autonomy. It was also the word for the tax-free privilege of the nobility. Fees paid for these rights ('royalties') came from these payments due the king. The word franchise was also used in England, in the XVIII century, but it meant the right to undertake a business (e.g., running a brewery). Nowadays the definition is not the same but the use of the word 'franchise' has gained importance once again in the XX century.

good partners is a strategically important issue, since the success of the whole business is at stake. It is extremely important for franchisors who share their products, services, brand and goodwill, since customers will identify only the franchise itself, as a whole, regardless of the different parties. Therefore the franchisor first draws a picture of the ideal partner and then selects from the potential partners those who satisfy the requirements. The written contract involves the personal agreement of the parties providing them with the authority for different rights (use of trademarks, brands, and any other reserved rights of the franchisor). Any changes to the rights are automatically announced, and the franchisor can charge extra fees or cancel the contract in the case of inappropriate behaviour by the franchisee.

The provisions of the contract must be as detailed as possible, but should not be too narrow, since the business is fully detailed in the operations manual. The basic requirements regarding the content of the contracts are included in the Ethical Codex of the Hungarian Franchise Association, which is agreed to be mandatory for all members of the association.

"The agreement should reflect the interest of the members of the franchise network, in order to ensure that the industrial property rights and copyrights of the franchisor are well protected, and to maintain the mutual identity of the parties and the good reputation of the franchise network. All agreements and contracts must be written in all the languages of countries in which the franchise is to be established, and the signed contracts and agreements must be handed to the franchisor immediately. Apart from this, the franchise agreement must also contain the rights and obligations of the parties, as well as their responsibilities. Beyond the franchise-related legal relations, the parties can only exist as independent enterprises. This criterion is not satisfied if either the franchisee or the franchisor is part or member of some form of a business or enterprise owned by the other party, or if there is any other legal relationship between them.

The franchisor can run several different business units, but is liable for operating at least one business unit by itself."[9]

4. Franchise legislation

Regarding franchise legislation, the content and the levels of regulation differ significantly. When analysing the legislation, the technical rules and the state and legal regulations must be separated. The technical rules are contained in the Code of Ethics of the Franchise Associations, which are mandatory for all members. The market mechanism created the legal relations, and the parties themselves shaped the frame and content of the system. It is arguable however, whether the rules and ethical norms created by specific market conditions are appropriate for such a complex system.

[9] Franchise Ethical Code

In the *United States*, the home of franchising, the franchise is regulated at federal level, from which the member states can deviate to some extent. The first federal law relating to franchising was the 'Automobile Dealers' Day in Court Act of 1956. It aimed to protect dealers from the market power of the manufacturers.

In 1979 the Federal Trade Commission Rule decree defined all the information that the franchisors needed to provide to the franchisees about the system. In this way the franchisees were aware of the information needed and of expectations and so could make informed decisions about the franchise agreements.

Further rules of franchising are related to competition law. Despite this, judicial precedents provide answers to several franchise-related questions.

At international level, the UNIDROIT Guide to International Master Franchise Arrangements (2007) should be mentioned, as this defines and regulates the national and international principles, practice and rules of franchising.

The *European regulation* of the franchise system is divided between national law and EU policy.

The EU enabled the free trade of products, services, labour and capital between its member countries by creating a single market. EU legislation examined the franchise agreements ultimately in competition law. The reasons are its conflict with the ban on cartels and the restrictive effects on competition. In the famous Act of 1986, the 'Pronuptia' case, the European Court of Justice officially approved the European legal status of the franchise agreement, highlighting the fact that it did not restrict competition itself. Therefore franchise agreements are not against European laws of competition and are not considered as illegal forms of competition. Later the Court of Justice, as well as the 'Yves Rocher franchise' confirmed that the system stimulated competition and had a positive impact on the market.

The biggest issue in *national laws* is the need for codification in each country. Due to the complexity of the basic document of the franchise, the franchise agreement, it has not appeared in Private Law codes. However the need to create a legal framework and to regulate this type of contract is increasing. The rules and regulations under the aegis of UNIDROIT suggest that the franchise is now ready to be a part of national legislation.

The franchise appeared relatively late in the post-socialist countries of Central and Eastern Europe and its development accelerated after the change of regime. However it stalled following the crisis, although the crisis itself has had a lesser impact on this sector than on the independent SMEs. This is what encourages governments to support the establishment of a domestic franchise system, either with the help of international franchises, or by networking already established firms. This would enhance the growth of the SME sector.

Analysing the legal environment before entering a market is vital. To be able to enter the Hungarian market, an enterprise must comply with the domestic

legal environment and with Hungarian law. Evidence shows that the provisions of 'books' and sample contracts used in Hungary do not in most cases comply with Hungarian statutes, and foreign owners usually want to include such requirements in the contracts.[10] Besides this, Civil Law, the strict competition law, consumer protection, advertising and other related legal rules and statutes must be also analysed well before entering the market.

The expanding networks must be aware of this, although the Hungarian authorities are also responsible for verifying and monitoring the franchise agreements. EU law represents an important part of the Hungarian legal system.

When analysing the technical rules (within Europe), the European Franchise Federation plays an important role, and describes the main principles of the franchise itself in the European Code of Ethics for Franchising. The members of the associations agreed in the statutes to apply the rules and regulations of the Code and implement it among their networks and so the Code represents the basic European ethical and legal document for a franchise, even though it is not considered a legal source, but provides technical direction and support in making agreements. It contains the contracting standards used at domestic and international levels, agreed as mandatory for all its members, and so represents good 'Custom and Practice' for legal relations. Each National Franchise Association complies with the European Franchise Codex as a basic requirement of membership.

The Hungarian Franchise Association is a self-organised, autonomous, professional syndicate and is the advocacy forum of domestic franchise enterprises. It has its own statutes, ethical Code, and governing principles. Despite advocacy, it provides aid in expanding the domestic franchise network and in operating in an ethical way. The forum provides an opportunity for discussing problems, observations, and recruitment. Its Ethical Code and its two principles – which reflect those of the European Code – define those expectations and requirements the members must satisfy.

In the Hungarian franchise market, the players are mostly international brand names (McDonald's, Burger King, Subway, Dairy Queen, KFC, Yves Rocher, MEXX, Marks & Spencer). However the number of Hungarian businesses is also growing (Fornetti, MOL, Don Pepe, BioHair). Integration is harder for foreign owners, despite the fact that statutes are more strictly applied internationally Franchise agreements are regulated by national legal systems, and by governing principles, by the common law. The Ethical Codes of Franchise Associations also play an important part in regulation.

[10] Nochta, Tibor – Kecskés, András – Márton, Mária: Kereskedelmi magánjog, Kódex Nyomda, Pécs 2009. p. 305.

5. Domestic regulation

In Hungarian law the current Civil Code does not regulate such types of contract, and statutes and the rule of law restrict the actions of the parties[11] (a franchise agreement must comply with the national rule of law and with the Ethical Code also). However the new Civil Code will include it as a distinct and independent type of contract.

Earlier drafts (the Vékás draft in 2007, the 'eventual draft', Rule CXX in 2009) ruled out the necessity of codification. Only the latest proposal of the Drafting Committee summarises the core of franchise agreements within a statute, and includes it in the Code for Common Law. The need for codification has been reviewed several times in the literature,[12] although the Codification Committees has so far disagreed. It now appears in the new Proposal for the Civil Code (Proposal) expected to come into effect in 2014 as a specific type of contract.

6. The question of codification

Regarding codification, it was an important issue whether those elements of the franchise- based legal relation which characterised the network systems had already crystalised and whether these elements were ready to be part of a Codex.

The franchise agreement – as well as any other agreement and contract – is tied to the rules of the operative Code of Civil Law. Besides all the contract-based rules, it also applies franchise-based statutes. The legal definition of know-how, business secrecy, company reputation, co-operation and obligations of the parties, and the ethical rules must be taken into account when analysing franchise agreements.[13]

Until the elaboration of the Proposal in 2012, the different views were not committed to codification; nor did the legal literature argue for codification.

[11] Nochta, Tibor – Kovács, Bálint – Nemessányi, Zoltán: Magyar polgári jog - Kötelmi jog Különös rész, Dialóg Campus Kiadó 2010. p. 277.

[12] For example Miskolci–Bodnár, Péter: A franchise-szerződésekről, Gazdaság és Jog 1995/7-8.p. 23.; Rátky, Miklós: A franchise szerződés jogi aspektusai, Közgazdasági és Jogi Könyvkiadó, Budapest 1994., Fuglinszky, Ádám: A franchise- szerződések helye a szerződési rendszerben „Megérett-e a kodifikációra a franchise?" ELTE ÁJK joghallgató dolgozata 2002, Kalló, Ágnes: A franchise szerződés megszűnése az amerikai jogban, Magyar Jog 1993/4., Csécsy, György: Adalékok a franchise fogalmának meghatározásához, Jogtudományi Közlöny 1995/ 5-6. p. 232.

[13] Lukács, Mónika – Sándor, István – Szűcs, Brigitta: Új típusú szerződések és azok gyakorlata a gazdasági életben, HVG-Orac Lap- és Könyvkiadó Kft. Budapest, 2003. p. 199.

HARASZTI MIHÁLY, MISKOLCI BODNÁR PÉTER, RÁTKY MIKLÓS did argue for codification, but several authors were strongly against it (CSÉCSY GYÖRGY, VÉKÁS LAJOS, FUGLINSZKY ÁDÁM).

The criticism against codification includes the ideal of 'freedom of contract' which states that foreign franchisors usually target those countries where they are given greater freedom, where they can use their own forms of contract.[14]

According to the disposition principle, the parties can deviate from the provisions of law by mutual agreement, and so the regulations of the Civil Code apply only to subsidiary rules. Where the aim of the contract is clear, then the standard or norm is the contract itself.

In the author's opinion, despite these concerns, foreign enterprises are much more interested in economic and cultural conditions than legal requirements regarding their products and services when choosing a target country or a potential partner. The franchise-based statutes are less relevant if the business concept has a future in the specific country. The reason is that the franchisor is more interested in whether the enterprise can generate enough revenue for the franchisees to pay their (franchise) fees and also remain profitable. This contrary opinion, however, is not well supported.

The other major contrary opinion is that franchise-based relationships in Hungary are still in a growth stage. In fact, these relationships are so complex and diverse, that encapsulating the rules and main characteristics of these relationships is very hard. This was the reference point in earlier drafts for non-inclusion in the Code: there are no common core elements of franchise agreements. This is a technical issue, since, if the statutes are too general and too broad, then it would not be effective and would not provide a base or guideline for the judges. Too narrow statutes on the other hand can lead to the exclusion of several legal relationships from the scope of law.[15] Professor VÉKÁS LAJOS stated in 2001 that these agreements have no homogeneous legal subjects in their complex content and so the legislator acts correctly, if, instead of involving it in a Codex, a separate regulation is applied, or the ruling is left to the 'Terms and Conditions', or to model rules.[16]

Domestic franchise enterprises have grown significantly in number in the last few years – despite the economic crisis – and more and more established enterprises have chosen this way to expand their businesses (e.g., BioHair and Tom Market; Sugar Shop is at the entry stage and Tesco would like to establish a new retail network). Hence change can occur in the future.

Further arguments support the concept: Codification can end the subordinated situation to which the franchisee is subject. The potential franchise partners are usually from SMEs who can then be more dependent on the more

[14] Csécsy, György: Adalékok a franchise fogalmának meghatározásához, Jogtudományi Közlöny 1995/5-6. p. 232.

[15] Lukács, Mónika – Sándor, István – Szűcs, Brigitta op. cit. p. 202.

[16] Vékás, Lajos op. cit.

experienced franchisors. However they are not subject to consumer protection statutes, since, as they establish their enterprises, they do business only within their official scope. Business people and enterprises join an already established and successful franchise network because of the safety which the business provides.[17] They are assumed to act deliberately. In addition, it is important to mention that the core of the franchise relationship is that both parties strive for success.

The franchisor is interested in the development, growth and stability of its partners, the network, and its goodwill. The bigger and more successful the enterprise is, the more attractive it becomes, not just for customers, but for potential partners also. In the case of the franchise, it is not just the product or service which should be sold, but the whole network 'must be marketed'. Marketing is, of course, a two-sided coin and new partners are needed for both expansion and growth.

It is often argued that codified statutes would make things easier for the Courts, although judges are not left without support due to a lack of specific regulation, since the general rules and statutes concerning the contract, and the mutual agreement between the parties - the agreement itself - should provide sound guidelines. At the same time constitutive theories would also provide help.[18]

Several ways exist to regulate franchising: the *lex specialis*, regulation by a new law, or in the Civil Code among other contracts are examples. It would also be possible to regulate by statutes, which are, in respect of their content, related to franchise-based legal relationships (for example statutes related to intangible assets, intellectual property etc). Regulation could also be effected in lower-level statutes, by government decree.

In Hungary, however, the concept is now to regulate franchise-based legal relationships at legislative level in the new Civil Code. In the light of the economic significance of such contracts, regulation would be best ensured by including it in the Code. Franchise-based relationships have been one of the most rapidly developing sectors of the economy in recent years and are not subject to geographical, language or cultural barriers.[19] In addition marketing and growth strategies can be used successfully in many businesses which require little capital investment, but which can earn serious profit and allow SMEs to compete in the market. The government has, in fact, targeted the creation and growth of franchise networks in the Business Development Programme of the Széchenyi Plan. Consequently, although the importance of a

[17] Kalló, Ágnes: A franchise szerződés megszűnése az amerikai jogban, Magyar Jog 1993/4. p. 233.
[18] Lukács, Mónika – Sándor, István – Szűcs, Brigitta op. cit. p. 203.
[19] Franchise-ba adható – e az ön vállalkozása? CEO magazin XI. évf. 2010/1.

contract or agreement does not necessarily depend on whether or not it is written in a Code, legal institutions must target inclusion.[20]

It is interesting to note that Licensing, a form of contract not unlike the franchise, is no longer included in the current draft, and is still regulated by particular norms. The question is why the legislature would decide not to include this form of contract in the new Civil Code whilst doing so with the franchise agreements.

An analysis of international regulatory systems shows that a need for codification has not yet appeared in West European countries or the United States; neither has it been discussed. In the US only the Ethical Codes regulate the nature of the legal relationship, although several cases can be found in judicial law concerning the franchise relationship, proving the long existence of the franchise in the USA. Rules for franchising can also be found in Canada, but only for the purpose of regulating the contract proposal of the franchisor.

Several rules exist in West European countries concerning franchising (for example, in France and Italy) but in general, state rules concerning the legal relationship of the parties are not found within a franchise agreement.

The need for codification has arisen in certain countries of the Balkans,[21] despite the fact that franchising is relatively new in this region, and has develop rapidly only recently.

7. The regulation of the Proposal

Systematically, agreements can be found among the contracts under specific titles such as Distribution Agreements and Franchise Agreements. The legislature does not relate this to user obligations or other types of contract. This reflects its complexity, and combinative nature.

With the *Distribution Agreement* the distributor is allowed to market and sell the goods. The manufacturer sells specific goods in a specific location (or region) to the distributor, who then markets those goods under its own name, at its own will and for its own profit. The parties share the practice of marketing rights, perhaps also with the manufacturer.

The *Franchise Agreement* covers the issue of intellectual property and the production and sale of goods and services - for which the franchisee pays a fee. The Proposal also highlights the fact that the franchisee acts on his own will and is independent of the franchisor.

The Proposal defines the 'franchise' as 'a legal lease'. However he term 'lease' does not reflect the essence of the legal relationship. The use of rights for a specific period of time is allowed, as in a franchise agreement, but in the latter the relationship is much more complex. The author considers that the

[20] Vékás, Lajos op. cit.
[21] Tamara, Milenkovic Kerkovic: The new direction in enact franchising regulation in Serbia, Facta Universitatis Economic and Organization 2008/3. p. 211.

terminology should not be changed, since the term 'franchise' is internationally recognised and translation into Hungarian is unnecessary.

With a lease the core of the agreement is not leasing, but the leasing of rights. In a franchise relationship, however, the franchisor shares not merely his intellectual property, but also provides continuous training for the franchisee, supports his marketing activity and fulfils other sets of complex activities. The use of the rights only would not produce a synergic relationship, in which both parties are interested in achieving their economic objectives.

For this reason, the use of the term 'legal leasing' is not appropriate; the term 'franchise' is well known universally; to make any change would be irrational.

The regulation details only the important elements covered by the legal relationship. It aims to summarise the substantive rules, avoiding elaboration and excessive minute detail. The most important or core rights and obligations of the franchisor and the franchisee are included in the law. These include, for example, the supply obligation of the franchisor, the right to monitor and control franchisees, the protection of the reputation of the franchisor and the rules concerning the expiry of the contract and the termination of the legal relationship between the parties.

The franchisor is subject to *supply obligation,* if the contract restricts the access of the franchisee to raw materials. If the franchisor does not satisfy this obligation, then the franchisee has the right to acquire the materials from elsewhere. Such restrictions can be found in some form in many franchise relationships (e.g. McDonald's). However, in several business cases it does not apply (for example, in securities dealing, or in any other activity where there are no raw materials or tangibles).

The protection of reputation is included in every contract and is extremely important for the owner of the rights, since the success of the entire system depends on enterprises which are independent of the owner himself.

Decisional authority is related to the sale of goods and services and to the protection of the reputation of the network and of the goods concerned – hence the right to monitor whether these obligations are being met.

Regarding contract termination or expiry, it is worth mentioning that, in reality, no contract and no franchise agreement can last indefinitely. A legal relationship is always concluded for a specific period and so a normal termination in a franchise is conceptually impossible. There is a pragmatic reason for this, evolving from this concept. The Ethical Code of Franchising prohibits agreements for an indefinite time and the Code of the Franchise Associations specifies the use of fixed-term contracts.

There will certainly be future arguments on this issue concerning the technical rules and the new Civil Code, although it is doubtful whether market players would introduce the use of indefinite-term contracts. Franchisors are interested in fixed-term contracts, since renewing a contract earns them a fee from the franchisees. Therefore the related rule of the Proposal is not correct and – from the perspective of the franchise relationship – cannot be interpreted.

Hence the possibility of termination does exist, but there is no rationale available concerning the reasons which might lead to this. Consequently, if the parties do not decide this issue, then either party can terminate the contract with no reason stated but applying a period of notice, only if the contract runs for an indefinite period. However, for the above reasons, there is no such contract.

There is no provision relating to territorial rights (exclusivity), to the retention of business secrets or to the continuous training of the franchisee. These are not regulated, even though they deal with issues of great importance in franchise relationships.

Basically there are several provisions in the proposal of the Drafting Committee concerning the new Civil Code, but it is strange that, if the Codification Committee has decided on codification, they have not worked out policy concerning franchise agreements more fully. It is, however, likely that, in the future, codification itself will not bring about any significant change. The parties can solve the issues concerning their legal relationships, and if there is anything which they cannot arrange, the law will provide guidance. The parties can therefore, ignore the dispositive rules of the law. Regarding franchise agreements in general, it is also worth mentioning that, due an excellent Ethical Code conflicts do not reach the court.

8. Conclusion

Franchise systems came into being due to developing economic conditions. The franchise agreement is a type of economic contract which is affected by the technical rules, although both state rules and judicial practice in this field are limited.

In Hungary franchising evolved after the change of regime and has become an important form of business. Including it in the law proves that the core elements of this contractual relationship have evolved and that these elements are ready to become part of the Civil Law. Further, the legislature does not want to limit the freedom of enterprises from excessive rules. It would also be impossible due to the complexity of the franchise and because of the complex relationships which it creates.

The fact that the franchise agreement has not yet been legally regulated, and, therefore, that the parties enjoy greater freedom concerning the content of the agreement does not mean that there are no minimum requirements, criteria which must be satisfied. For the franchise parties, the general provisions of the law of contract and the technical rules provide clear guidelines to concluding an agreement. Hence the author is of the opinion that the codification of the franchise-based legal relationship is unnecessary.

Net Neutrality in the European Union: is the internet in danger?

MESTER, MÁTÉ

ABSTRACT *Differentiating between certain data packages is a network management tool widely used by internet access providers today. Throttling and blocking VOIP or file-sharing services, or providing quality services only for a higher fee are examples of such differentiation. These tools have been used for decades in order to maintain resilient, secure and quality high-capacity networks. However, it may be anti-competitive and detrimental to the information society if providers abuse these i-practices in order to ensure a better position in the market.*

Net neutrality is a principle requiring that network operators treat every data package on their network equally (neutrally) and which emerged in connection with anti-competitive practices. In the European Union, a regulatory debate has started as to whether there is a need for direct intervention regarding traffic management solutions in order to ensure the free and open character of the internet. This simple-looking issue, if treated wrongly, however, may have unforeseeable detrimental effects on the internet as we know it today. It is not by accident that some regard net neutrality as the Pandora's Box of the internet, indicating that extra precautions are required.

This paper deals with the legal aspects of the net neutrality debate. By introducing how the concept emerged since it first appeared, and what legislative or non-legislative steps have been taken in the European Union during the last few years, the discussion underlines the possible negative effects of overregulation. It is suggested that the current electronic communication regulatory framework of the EU is sufficient to tackle any issue that may arise under net neutrality in the coming years. Whilst the paper takes a relatively strong position against introducing more detailed or specific regulation, it also aims to invite others to reflect on how net neutrality should be treated in the European Union.

1. Introduction[1]

It is often heard today that internet service providers abuse their market positions and control over the network by differentiating between data packets.

[1] The draft script was submitted to publication on December 1, 2012. All information contained herein thus refers to status quo at the time of the submission.

Such complaints surround issues such as blocking or throttling file-sharing, and blocking or overcharging for VOIP services on mobile networks. In recent internet networks, established traffic management solutions had been widely used for a long time.[2] From economic, legal and social points of view, however, it may be detrimental if service providers abuse their market positions by setting unique quality and pricing conditions, prioritising, blocking or throttling data packets or services resulting in discriminatory market conditions.

The concept of net neutrality, requiring equal treatment of data packets transferred through the networks, emerged in order to define and counter these practices. Some argue that the net neutrality principles should be enshrined in law in order to allow for control over detrimental traffic management techniques and ensure heavy competition on these markets. However, as in many regulatory issues, the question whether to regulate net neutrality or not is a difficult question to decide. The issue not only divides academics and experts, but also legislators. In accordance with the global debate, the question whether additional regulation is justified in relation to net neutrality began to emerge in the EU also a few years ago.

The debate is highly important as the net neutrality principle, in particular any legislation based on it, may have a direct and major influence on the future of the internet. This simple looking question could significantly change how future networks, and so the internet, may function. Net neutrality also brings up other questions such as what is the basic role of the internet service provider in the internet ecosystem. How and to what extent should traffic and content carried by the internet be regulated? Is there any right to check and discriminate in terms of the data sent and, if yes, on what grounds? To what extent should human rights be respected? How and by whom should network developments be financed? What business models will define the internet? What services will be available and at what price? These questions are important for legislative institutions. In addition, a legislator has to assess the economic and social impacts of the legislative proposals. Adopting a law sometimes has greater negative impacts than the absence of any regulation. It is no coincidence that many believe net neutrality to be the 'Pandora's box' of the internet, arguing that the surrounding debate may lead to unforeseen consequences.[3]

This paper introduces this dilemma from a legal point of view. It is not intended to describe each and every aspect of net neutrality; the paper rather contributes to the debate by introducing the legal aspects, in particular those relating to the EU. Since the debate is complex, what must be avoided is

[2] Network Neutrality: Challenges and responses in the EU and in the U.S., A study requested by the European Parliament's Committee on the Internal Market and Consumer Protection, IP/A/IMCO/ST/2011-02, PE457.369

[3] Thierer, Adam: FCC Opens the Net Neutrality Pandora's Box a Bit More, The Technology Liberation Front, April 18, 2007, http://techliberation.com/2007/04/18/fcc-opens-the-net-neutrality-pandoras-box-a-bit-more/ [27.08.2012.]

shaping an opinion based on simplistic reasoning and so the following points are not meant to end the debate but, rather, to provide alternatives to it.

2. What is the main problem?

The net neutrality issue stems from the basics of the functioning and operating of the internet (and electronic communication networks). Clearly, the main reason of the immense development of the internet was its unregulated and equal nature at the very beginning. Anyone could join this open platform and was able to share freely any sort of content under equal conditions with anyone. This meant, in practice, that the transfer of data packages was based on a first-come first-served principle, took place neutrally without discrimination. This functionality completely changed how we communicate today. By now it is taken for granted that we can access any legal content we wish at any time we want and could share it with anyone without any constraint. What is more, the internet, as a platform and phenomenon, is now also associated with basic human rights. In modern society open and free access to the internet is widely considered to be an important guarantee of fundamental rights.

The internet however, has not only become essential in today's world due to the revolution it meant in communication: immense competition in services and innovative business models emerging in connection with the internet have changed the entire economy. It is a platform where the conditions for competition are ideal and where an unlimited number of successful business models may be established. Competition contributes to greater choice, affordable prices and better services for consumers and so consumers have become used to accessing legal content and services by using applications of their choice, sometimes completely free of charge. Statistical indicators linked to the internet and the information society (usage, penetration, access, speed and digital literacy) have become a main factor in social and economic competitiveness.

These social and economic features are not always obvious, however, and could be in conflict since the free internet that completely changed our world and communication is, in reality not totally free. Most of the time access to the internet is in some way limited. For example, consumers must pay for internet access and other services, resulting in differentiated conditions of use. There are many reasons for this: building, operating and continuously developing networks and services which make up the internet require huge investment and consume vast sums of money. Hence it must all be profitable to support such development. This is the only way for the money invested to provide some return and this is the only way for internet operators (and the entire internet sector) to further invest and develop.

In addition, internet take-up and data traffic are constantly increasing, and this trend will continue in the coming years. This puts an extra burden on

operators, especially if they wish to comply with the principle of equal and non-discriminatory treatment of data packages. More and more users willing to use services generate more and more data. The capacity of networks is, however, limited and cannot serve all user needs without constraint. Limited capacity may have a direct negative effect on user experience. In order to ensure a basic quality for all users, network providers have long used some form of traffic management techniques, which are contrary to the principles of equal treatment and 'first-come first-served'. However, such network management practices are justified and used in almost every network in order to ensure reliable and quality communications.

There might, however, be cases where commercial agreements and traffic management techniques mean that users cannot access, or have only limited access to certain information and services. In addition, it might happen that users are not allowed to share certain information freely or to use certain applications and services freely. Commercial agreements and practices behind profitable business models ensure both the economically critical returns on investment and the reliable provision of services. In some networks certain services are not available (for example VOIP) for some users, or might be available but with different quality (for example IPTV, time-sensitive services). Agreements may also be in effect to ensure that certain content or services (for example online video sharing) are only available to the users of a network in an appropriate quality if the content provider pays for the higher data traffic for the network provider. These practices may restrict free access and competition.

The principles of net neutrality and profitability, therefore, appear to be in conflict when operating internet networks. The most common reason for this is the need to ensure an adequate financial return. Usually the market can resolve these anomalies, but there might be cases when automatic market reactions are not enough. Depending on the level of competition, some sort of intervention, for example detailed regulation, might be needed to ensure that the internet can be accessed by users under equal conditions for an affordable price and in state-of-art quality. Until now such regulations were mainly targeted at network operators to ensure a level playing-field in infrastructure terms, but there are signs that open access and free use of internet are somehow still restricted by operators. The concept of net neutrality is intended to provide a regulatory answer to such practices. It attempts to define the underlying principles that may limit undesirable traffic management practices from jeopardising the open and free character of the internet.

3. What is (could be) net neutrality?

Provided that the fundamental problem is quite abstract, a single and widely accepted concept of net neutrality does not yet exist. The concept is flexible and has constantly changed since it first appeared. Net neutrality is a complex issue

which may influence various stakeholders over the entire value chain, ranging from content providers through distributors to the end-user. The concept has, and may still have, so many meaning which contributes to this diversity. There are many who feel the need to be involved in the debate as well. Politicians, lawyers, economists and civil representatives are all active in formulating a wide range of positions regarding net neutrality. Amongst many other conditions, this flexibility was one of the main reasons for net neutrality to become rapidly a highly publicised issue and to be included on the regulatory agenda. Almost every legislator, institution, regulator, political player or civil organisation dealing with the internet is able to find a favourable interpretation of net neutrality, leading either to regulation or to deregulation.

Hence it is much easier, even from a legal point of view, to describe the main features of the net neutrality problem than to describe precisely the concept itself. Certainly, net neutrality is a regulatory issue and it is about non-discriminatory and open access to information and equal transmission of data. Neutrality in this context means that the treatment and transmission of data packages is done on the 'first-come first-served' principle and no package is prioritised (best-effort service). Notwithstanding this, if users are informed in advance, it is generally acceptable to differentiate between certain data packages in order to avoid congestion in traffic or preserve network integrity. If such practices are duly justified, they do not harm the principle of net neutrality. On the other hand, when an internet operator provides differentiated high quality or high speed access for specific users and content or for specific services (managed service), it is usually considered as infringing net neutrality (two-lane internet). It is generally regarded as being contrary to the net neutrality principle when the blocking or throttling of content is based on an agreement which distorts competition.

In fact, the concept of net neutrality was introduced as a competition issue in the United States in an application submitted to the Federal Communications Committee.[4] A group of technology companies applied to the committee to ensure open and unrestricted access for internet users to legal content and services, including free communication between the users. The companies aimed to limit the internet providers' control over the data sent or received by their users. However, the concept of net neutrality became wellknown when Comcast, a cable-TV company located also in the United States, started to limit the peer-to-peer file sharing services claiming that they put a high burden on the network and cause a significant decrease in the company's income from paid content.[5] It must be noted, however, that the level of competition regarding

[4] McCullagh, Declan: Tech companies ask for unfiltered Net, CNET News, November 18, 2002, http://news.cnet.com/2100-1023-966307.html [27.08.2012.]

[5] Broache, Anne: Net neutrality may not resolve Comcast vs. BitTorrent, CNET News, November 30, 2007, http://news.cnet.com/Net-neutrality-may-not-resolve-Comcast-vs.-BitTorrent/2100-1028_3-6220802.html, [27.08.2012.]

electronic communications networks in the United States, where usually only two competitors of fixed internet services are available (duopolistic market), is lower than in the European Union.[6] This indicates that the concept of net neutrality may also have a different importance in the United States than in the European Union.

Still, net neutrality is not only about ensuring unrestricted transfer of data and sufficient conditions of market competition. For instance, another competition aspect of net neutrality is how to share the income of network providers and the income generated by service providers (e.g. Google) using the very same network equally. In addition, net neutrality could also be a legal principle aimed to ensure that users are able to freely access and share information or use applications and services of their choice. From a legal point of view, net neutrality may also be a specific regulatory issue such as requiring reasonable traffic management, prohibiting throttling and blocking of services, ensuring switching of operators or requiring specific service quality or transparency. Last but not least, net neutrality is also a human rights issue since practices limiting users' access may infringe the fundamental rights of expression, information, privacy and data protection.

This indicates that all legislators meet difficulties in trying to ensure net neutrality by legislation: the concept is simply too vague and flexible to be put into law. In consequence, net neutrality is not enshrined in law worldwide. There are only two examples, one in Europe, where a specific law was adopted to ensure net neutrality. However, a law is yet to appear in the EU, where the Commission defers the adoption of a proposal, perhaps for good reason.

4. What is the current regulation in the European Union?

The idea of regulating net neutrality first appeared during the last review of the European Union electronic communications regulatory framework in 2009. Believing that net neutrality was a popular issue among members of the European Parliament, during negotiations it proposed that guarantees ensuring a free and open internet should become part of the *aquis*. As a result, the Commission, on the initiative of Parliament, annexed a declaration regarding net neutrality to the revised European Union electronic communications framework. Since then the concept of net neutrality has been taken aboard as a regulatory objective and principle. It is to be pursued by national regulatory authorities who will promote the ability of end-users to access and distribute information or run applications or services of their choice.[7]

[6] Network Neutrality: Challenges and responses in the EU and in the U.S., p. 47.

[7] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (OJ 24.4.2002, L108), Article 8 (4) g.

However, there were provisions in the EU electronic communications framework that could have contributed to a neutral internet before the declaration was added. In addition, new specific requirements were introduced during the revision.[8] For instance, when subscribing to an electronic communications service, the contract should clearly specify information on any conditions limiting access to and/or use of services and applications, including the minimum service quality levels offered. The user must be informed also about any procedures put in place by the undertaking to measure and shape traffic and how those procedures could impact on service quality. Moreover, operators may be required to publish transparent, comprehensive, comparable and up-to-date information regarding such conditions. In order to avoid degradation of the service and hindering or slowing down traffic over networks, minimum quality of service requirements could be set by national regulatory authorities. Net neutrality can also be ensured by the provisions requiring that users should be able to change their provider most rapidly, including 'porting their number' within one working day, and that subscriber contracts shall not require an initial commitment period that exceeds 24 months.

Hence, there are already a number of legal provisions which can be utilised to ensure net neutrality in the EU without having adopted a specific piece of legislation. Accordingly, the European Commission did not then adopt any legislative proposals but only put forward in the declaration that it undertook to preserve the open and neutral character of the internet and to monitor the impact of market and technological developments on net freedoms, and report whether additional guidance or action is needed. By having this declaration annexed to the European Union electronic communications regulatory framework, however, the European Parliament achieved its primary goal. The concept of net neutrality gained a foothold in the EU terminology, so opening the door for further specific regulations. In spite of this, no major step forward has been taken since then. This is because, in line with the academic and professional debate, the positions of the relevant EU institutions and legislators are also in conflict as to whether additional specific regulation is needed.

5. What positions have emerged to date?

5.1 EU institutions

That net neutrality is indeed high on agenda is shown by the many assessments carried out on the subject by various EU institutions. The Commission ran a public consultation during which the industry and

[8] Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (OJ 24.4.2002, L108), Article 20 (1), 21, 22 (3), 30 (6)

stakeholders were invited to share their opinion.[9] It also organised a joint summit with the European Parliament on net neutrality.[10] Later, based on the outcome of the public consultation, the Commission adopted a communication on whether there is any need for direct regulation and if yes, then what actions could ensure a neutral internet.[11] According to this, net neutrality mostly concerns changing operators, reasonable traffic management, service quality and transparency. In addition, the European Commission noted in the document that net neutrality is basically a competition issue.

Importantly, the communication concluded that, whereas few examples of blocking and throttling indeed exist in the EU,[12] such practices cannot be evaluated without enough information on any extra fees applied or the economic consequences. Such practices need further investigation. Regarding traffic management techniques, the Commission recognises that, if duly applied, differentiating, redirecting and filtering of data packages are standard practice indispensable for avoiding traffic congestion in modern networks. The Commission noted that, whereas misuse of these practices should be contrary to net neutrality, and as such must be avoided, regulation should also respect established innovative business models and commercial agreements. Concerning transparency and service quality requirements, the communication concluded that, based on the complaints by users, the main problem is the difference between advertised and actual speeds and so a balanced approach is needed between detailed and simple information about electronic communications services.

Yet, the European Commission emphasised in the communication that there is not enough evidence that net neutrality problems indicate a need for regulatory intervention in the EU and that more time is needed to allow measures of the revised EU regulatory framework to have their effect. What is more, the communication outlined that there is broad consensus on the continuous need for investment and innovative business models in providing electronic communication services. There is also need to develop and improve high capacity broadband networks and so the proposed measures should not be detrimental to these. Nevertheless the Commission put forward in the communication that it may initiate more stringent measures (in the form of guidance or general legislative measures) to ensure competition and choice for

[9] Report on the public consultation on "The open internet and net neutrality in Europe", 9 November 2010

[10] Summit on "The open internet and net neutrality in Europe", 11 November 2010, Brussels

[11] The open internet and net neutrality in Europe, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, COM(2011) 222 final, Brussels, 19.4.2011

[12] There was an example of slowing down of P2P traffic in France, Greece, Lithuania, Poland and the United Kingdom, blocking of VOIP in Austria, Germany, Italy, the Netherlands, Portugal and Romania.

consumers if significant and persistent problems are substantiated. It also invited the Body of European Regulators of Electronic Communications (BEREC), consisting of national regulatory authorities of Member States, to investigate the issues surrounding net neutrality.

The Council of Europe published a declaration regarding net neutrality concluding that traffic management practices need to be proportionate in order to ensure quality services and network security.[13] It also added that there is an emerging risk that basic human rights and open access principles are violated. The European Data Protection Supervisor adopted an opinion in which he put forward that more guidance is needed on traffic management solutions, especially in cases where processing of the data requires the prior consent of the data owner.[14] The European Parliament contributed to the debate adopting a resolution regarding net neutrality. It concluded that regulation and further guidance is needed at EU level, in particular regarding the implications of net neutrality in the mobile market and the issues arising from consumers changing providers.[15] An analytical study on net neutrality was also delivered to Parliament. The study confirmed that, since the conditions in the electronic communications market are different from those in the USA, it would be premature to decide on the need for further regulation in the EU.[16] Ministers in the Council of the European Union also adopted council conclusions on net neutrality, emphasising that further investigation is needed, and invited the Commission to prepare a report on related problems.[17]

5.2 National Regulatory Authorities

On the grounds of the Commission's request, BEREC ran a public consultation, carried out an assessment and adopted (draft) guidance regarding the issues of the net neutrality debate. During this process, BEREC concluded that transparency and changing providers are basic to a neutral and open internet and that information about services should be accessible, easily

[13] Declaration of the Committee of Ministers on network neutrality, Council of Europe, Adopted by the Committee of Ministers on 29 September 2010 at the 1094th meeting of the Ministers' Deputies, https://wcd.coe.int/ViewDoc.jsp?id=1678287&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383, [27.08.2012.]

[14] Opinion of the European Data Protection Supervisor on net neutrality, traffic management and the protection of privacy and personal data, Brussels, 7 October 2011

[15] European Parliament resolution on the open internet and net neutrality in Europe, 17 November 2011, Strasbourg, P7_TA(2011)0511

[16] Network Neutrality: Challenges and responses in the EU and in the U.S

[17] Adoption of Council conclusions: Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions - "The open internet and net neutrality in Europe", Council of the European Union, Brussels, 1 December 2011, 17904/11

understandable, relevant, comparable and accurate.[18] Apart from that, operators should publish general information about services in parallel with specific information regarding any applicable restriction (e.g. guaranteed and real traffic speeds). As regards service quality, BEREC mainly investigated means allowing for comparing services and concluded that no further intervention or regulation is needed if a sufficient number of competing services are available at an affordable price and that switching between operators is ensured (which is mostly the case in the European Union). According to BEREC, even the IP interconnect market has been operating sufficiently without any particular regulation in place and it is very rare in the European Union that a network address cannot be reached.[19] What is more, these practices automatically ceased due to consumer pressure at the retail market. Regarding competition BEREC noted that it may indeed infringe upon net neutrality if vertically integrated internet service providers abuse their market power (by blocking certain services or applications) but added that such practices could be easily avoided if transparency and low-cost switching is appropriately ensured.[20]

Leading national regulatory authorities so far published studies or guidance and only made a commitment to follow respective market, technology and regulatory developments. For instance, the British regulator OFCOM confirmed that, although 'best effort' and managed services may exist in parallel, basic elements of the service might need some level of protection.[21] OFCOM also believes that defining minimum service quality requirements is the most appropriate tool for ensuring net neutrality. Blocking or discriminating should be left to be solved by the market itself. OFCOM also emphasised that it must be ensured that appropriate and sufficient information about the services is available for consumers. In France ARCEP is of the opinion that healthy competition is necessary for ensuring the neutral character of the internet, but traffic management solutions that require further investigation may indeed emerge in the future.[22] The NMIAH of Hungary ran a public consultation concerning net neutrality. In the preparatory documents published alongside the consultation, the Hungarian regulator concluded that national legal requirements widely ensure transparency and so provide a major barrier against the emergence of practices infringing net neutrality. Even though no significant problem was detected in Hungary regarding transparency, NMIAH, as other

[18] BEREC Guidelines on Transparency in the scope of Net Neutrality: Best practices and recommended approaches, December 2011, BoR (11) 67
[19] Differentiation practices and related competition issues in the scope of Net Neutrality: Draft report for public consultation, 29 May 2012, BoR (12) 31
[20] BEREC Guidelines for Quality of Service in the scope of Net Neutrality: Draft for public consultation, 29 May 2012, BoR (12) 32
[21] An assessment of IP-interconnection in the context of Net Neutrality: Draft report for public consultation, 29 May 2012, BoR (12) 33
[22] Ofcom's approach to net neutrality, 24 November 2011

regulators, will monitor the market in the future and assess whether further action is needed, inviting operators to self-regulate.

5.3 Market Players

In spite of the fact that the issue of net neutrality did not trigger specific legislation in the EU, to date many market players have felt that they should develop their own position on the subject as a bad regulatory approach may significantly influence the future of the entire sector. Market players are lobbying for keeping the debate within reasonable limits. Usually they argue that discriminatory extra fees are not applied for content providers should they only use the basic internet, but operators are also keen on being free to negotiate and enter into agreements on how data actually reaches the user.

Since network operators have gained huge experience in network management in the last few decades they argue that they know best how traffic should be optimally managed. In many cases they refer to the concept of adapting networks, which enables operators to design network structure freely, to choose the applicable technology and to use solutions to optimise user experience. Appropriate operation also requires that operators should be able to limit partially the traffic of non-critical applications for the sake of time-sensitive services. Networks improve daily and new business models emerge to answer user needs. This may also result in differentiated services provided for an extra fee.

Apart from these, in the spirit of transparency operators publish the traffic management techniques applied in their network and the parameters of minimal and average user experience. They claim that, whereas open access is ensured for all, actual user experience may depend on the type of technology and the subscription. Market players also argue that the level of competition is indeed sufficient within the European Union because a relatively high number of operators and services are available and users are empowered to switch between them without extra costs or burden. Regarding human rights, operators claim that they have no interest in restricting such fundamental principles within the existing legal constraints.

5.4 Member States

Of the 27 Member States of the EU only the Netherlands has introduced a specific law aimed to preserve net neutrality.[23] The law, which prohibits internet providers to differentiate between data packages and to supervise data traffic, triggered intense debate. Under the Dutch law, operators may only control

[23] Ot van Daalen, Door: Netherlands first country in Europe with net neutrality, May 8, 2012, Bits of Freedom, https://www.bof.nl/2012/05/08/netherlands-first-country-in-europe-with-net-neutrality/ [27.08.2012.]

traffic if it is indispensable to ensure security and to avoid congestion. It is also forbidden to monitor and analyse traffic data without the prior explicit consent of the user in the Netherlands. The new regulation also introduced a provision extensively limiting the cases (for instance if the user is in arrears with payment) when the operator is legally allowed to switch off the users' access.

Many critics emerged regarding this approach in the Netherlands. Perhaps the most obvious effect was the drastic change in prices. Internet access fees increased immediately after the new law came into effect as providers, unable to charge higher fees to users of higher bandwidths, divided network operating costs equally.[24] The success of the regulation is, therefore, doubtful. Around the time of its adoption, NEELIE KROES, Vice-President of the European Commission responsible for the Digital Agenda, published a statement underlining that intrusive legislative actions should be avoided in cases where the market is sufficiently competitive and operators should not be forced to provide the internet in full.[25] She also added that rather consumers should be entrusted to make their own choice, for which she was planning to publish recommendations.

6. What comes next?

In the light of the above, it appears that a consensus is missing for adopting a specific regulation for net neutrality in Europe. The only improvement in the subject so far was a second public consultation initiated by the Commission in preparation of a foreseen recommendation.[26] It must be noted, however, that, should it be published, the recommendation will have no binding effect and the Commission did not publicly admit any plan to prepare a legislative proposal concerning net neutrality.

Still, in the EU the debate is not yet over. Since net neutrality, including underlying traffic management practice, is a complex technological, economic, legal and political issue, it is not feasible to have a simple 'yes or no' reaction. Certainly, the possible capacity of networks and the level of user experience will be very important for the evolution of the internet. However, users have various demands also and may prefer various kinds of use. Such differences

[24] Lazanski, Dominique: Leading Dutch Telecom raises rate after Net Neutrality enforcement, The Commentator, 20 July 2011, http://www.thecommentator.com /article/319/leading_dutch_telecom_raises_rates_after_net_neutrality_enforcement [27.08.2012.]

[25] Vice-President Kroes to propose action on consumer choice and "net neutrality", MEMO/12/389, Brussels, 29 May 2012)

[26] On-line public consultation on "specific aspects of transparency, traffic management and switching in an Open Internet", http://ec.europa.eu/information_society/digital-agenda/actions/oit-consultation/index_en.htm [27.08.2012.]

trigger differentiated service quality which does not necessarily jeopardise the evolution of the internet.

It may be feasible that the issue of net neutrality is valid in the USA, but it might be very dangerous if the debate does not remain within reasonable limits in the EU where the market structure and level of competition are quite different. This implies that different, more cautious regulatory intervention is needed here – or, perhaps, is not necessary at all. On the other hand, Europe lags behind in the global competition. Any new restriction, overregulation or encumbrance hampering the ICT services sector will negatively affect the competitiveness of the whole EU.

Although the two-lane internet has been possible for a decade now from a technological point of view, it is still not prevalent enough to have a direct effect on general user experience. Either user demand does not exist or the business model is not tempting enough for providers. The market usually knows what is and is not good for it, and it is especially true in the EU where the level of competition alone appears to be sufficient to hold operators back from abusing their market position and infringing the principle of net neutrality.[27]

It is not contrary to economic development and competitiveness either if users are required to pay higher fees for better user experience and higher service quality. Innovation has driven the internet to be as we know it today, something that we cannot live without. It is a reasonable request that market players should be able to introduce new services and innovative business models on this platform. Innovation and competition are ultimately beneficial for users. The reason why the internet went through such a tremendous development was its inherent unregulated nature. Should the net neutrality principle get out of hand, we may fall into the trap of overregulation and cause unforeseeable and irreparable harm to this ecosystem.

What is more, every new regulation implies extra cost for operators and users. This is not only since providers would need to share network-operating costs between users equally – as was the case in the Netherlands. Every new piece of legislation produces new tasks for operators and causes additional compliance costs. This is especially true if regulation is aimed at those network management solutions which are inherently implemented to reduce costs and ensure profitability and sustainability. The legislator may cause even more harm if targeting these. As long as a basic service quality is provided for each and every user, it is worth leaving some freedom to the operators to run differentiated services and allow users to sign up as they wish.

Regulators are usually not the best at evaluating the impacts of legal provision, especially in technological matters. This in practice means that, contrary to intentions, users might not finally benefit from net neutrality regulation. Fortunately, user demand, technology and market development are always ahead of regulation and we can hope that competition and self-

[27] Network Neutrality: Challenges and responses in the EU and in the U.S

regulation arising from the dynamics present in the market will protect the internet from reaching such an overregulated stage as was to be avoided by net neutrality proponents in the beginning.

Policies and legislation on autochthonous languages in the United Kingdom*

NAGY, NOÉMI

ABSTRACT *The increasing use of English as a global lingua franca and its status as the de facto official language of the United Kingdom often obscures the fact that the territory of the UK has never been a linguistically homogeneous one. On the contrary, there are numerous other tongues spoken in the country, inter alia, so-called autochthonous languages. Aspirations to build a British Empire, however, always entailed the use of one language which led to the persecution of all others. The process of linguistic colonialisation started as early as 1066 following the Norman invasions, and from that time British monarchs used various means to reach their goal. In addition to military conquest and enforced plantations, there were a series of legislative measures enhancing the process of anglicisation, completed by the introduction of universal state-supported education at the end of the 19th century.*

The aim of this paper is three-fold. First, to introduce the history of Irish, Scottish Gaelic and Welsh; second, to present official policies and legislation dealing with them from the beginning until today; and, third, to evaluate their legal position and future prospects in the light of the historical and sociopolitical context. In addition to the common trends in the process of decline, specific differences in the histories of autochthonous languages will be highlighted.

1. The linguistic landscape of the United Kingdom and the politics of British monolingualism

In the era of globalisation, the increasing use of English as a global lingua franca "leads many to conclude that the issues of societal multilingualism are ones which British people do not have to confront".[1] However, the situation is precisely the opposite: the territory of the United Kingdom has never been a linguistically homogeneous one.

* This research was realized in the frames of TÁMOP 4.2.4.A/2-11-1-2012-0001 „National Excellence Program – Elaborating and operating an inland student and researcher personal support system". The project was subsidized by the European Union and co-financed by the European Social Fund.

[1] Dunbar, Robert: Language Legislation and Language Rights in the United Kingdom. In: European Yearbook of Minority Issues 2002/3. p. 95.

Although there is no legal document declaring any particular language to be the UK's official language, English is the language of legislation, public administration and jurisdiction (with some exceptions where other languages can also be used), and so it should be considered as having *de facto* official status. In addition to English, however, there are numerous other languages spoken in the country: autochthonous or indigenous languages, immigrant languages,[2] and sign languages.[3] Autochthonous languages can be divided into two groups: (insular) Celtic languages such as Cornish, Irish, Manx, Scottish Gaelic and Welsh, and Germanic languages such as Scots and its variant spoken in Northern Ireland, Ulster-Scots. Insular Celtic languages are further diversified into the *Q-Celtic* (*Goidelic*) vs. *P-Celtic* (*Brythonic*) isoglosses, Irish, Scottish Gaelic and Manx belonging to the former, whilst Welsh, Cornish and Breton belonging to the latter. All three branches of modern Gaelic languages – Irish (*Gailge*), Scottish Gaelic (*Gàidhlig*), and Manx (*Gailg*) – descend from Old Irish, sharing a common literary norm until the 17th century.[4]

Legislation was very late in trying to handle this complex linguistic situation in a way which accepts and respects the existing linguistic diversity. Indeed, for centuries, British monarchs and governments had pursued an *English only* policy towards linguistic minorities. Aspirations to build a British Empire always involved the necessity of using one language, a tendency which prevailed from the very beginning. The first[5] recorded legislative measure concerning the language issue is the *Statute of Pleading 1362* which – ironically, written in Norman French – imposed English as the language of pleadings in all courts. Though the Act *expressis verbis* directed against the use of French[6] (Latin was to remain the language of written records), it greatly affected the speakers of other languages, as well:

[2] According to recent data, in London there are over 300 languages spoken by children of school-age. See, Von Ahn, Michelle – Lupton, Ruth – Greenwood, Charley – Wiggins, Dick: Languages, ethnicity, and education in London. http://repec.ioe.ac.uk/REPEc/pdf/qsswp1012.pdf [14.11.2012.] p. 3.

[3] British Sign Language as a language in its own right was recognised by the British Government on 18 March 2003. It is spoken by 125,000 Deaf adults, about 0.3 % of the population of the United Kingdom. In Northern Ireland, Irish Sign Language is also used.

[4] Glaser, Konstanze: Minority Languages and Cultural Diversity in Europe – Gaelic and Sorbian Perspectives. Linguistic Diversity and Language Rights Series 2007/3. pp. 61-62.

[5] According to *Ager*, British official language planning for English started much earlier, with King Alfred's decision in 880 to translate the materials of education into Anglo-Saxon, with the consequence that the Wessex form became the written standard. Ager, Dennis: Ideology and Image: Britain and Language. Multilingual Matters Series 2003/124. p. 63.

[6] *Ager* opines that the shift from French to English was "a deliberate choice… by the elite who had to decide, at the insistence of the French King, whether they wished to retain their lands in France or opt to give these up so that their possessions were entirely in England." Ibid. p. 75.

Because it is often shewed to the King… of the great Mischiefs which have happened… because the laws, customs and statutes of this realm be not commonly holden and kept in the same realm, for that they be pleaded, shewed, and judged in the French tongue, which is much unknown in the said realm, so that the people which do implead, or be impleaded… have no knowledge nor understanding of that which is said for them or against them…, the King… hath ordained… that all pleas… shall be pleaded, shewed, defended, answered, debated, and judged in the English tongue, and that they be entered and enrolled in Latin.[7]

The 1362 Statute was so ineffective that French remained the standard language of parliamentary statutes until 1489,[8] and that of the law courts well into the 17th century. The first comprehensive English-only policy was imposed during the Commonwealth by *An Act for turning the Books of the Law, and all Proces and Proceedings in Courts of Justice, into English* (1650), and *An Additional Act concerning the Proceeding of the Law in English* (1651). (With the Restoration in 1660 these were repealed.)[9] The *Proceedings in Courts of Justice Act of 1730* required the use of English in all courts of justice in England and Wales, and in the courts of exchequer in Scotland, in written records as well. This law was repealed by the *Civil Procedure Acts Repeal Act* in 1879, however, its Irish "equivalent", the *Administration of Justice (Language) Act (Ireland) 1737* is formally still in force in Northern-Ireland.[10] The final blow on autochthonous languages was struck by the introduction of universal state-supported education at the end of the 19th century assigning English as the sole medium of instruction through the *Act to provide for public Elementary Education in England and Wales* (1870) and the *Education (Scotland) Act* (1872). In Ireland, the system of national schools was set up in 1831 based on the so-called *Stanley letter*, and had been ruled by government regulations until the first parliamentary legislation was enacted in 1875 (*The National School Teachers (Ireland) Act*).[11]

In the following, I will introduce the history of autochthonous linguistic minorities of the UK as well as official policies and legislation dealing with them from the beginning until today. The fifth chapter will evaluate the future prospects of the UK's minority languages in the light of legal and sociopolitical contexts, whilst in the final chapter a general overview and conclusions will be

[7] In: Morris, Ruth: Great Mischiefs – An Historical Look at Language Legislation in Great-Britain. In: Douglas A. Kibbee (ed.): Language Legislation and Linguistic Rights. John Benjamins Publishing Company, 1998. p. 34.

[8] Ager, Dennis op. cit. p. 64.

[9] Morris, Ruth op. cit. pp. 32-35.

[10] Dunbar, Robert: Language Legislation… pp. 96-97.

[11] Hyland, Áine – Milne, Kenneth (eds.): Irish Educational Documents Vol.1. Church of Ireland College of Education, Dublin, 1987 pp. 98-136.

provided. Due to the limitations of space, and also because legislative measures exist mainly regarding Irish, Scottish Gaelic and Welsh, I will only deal with these in detail.

2. The story of Irish

The first waves of Celtic tribes settled on the British Islands in the 8th century BC. By the 5th century AD, indigenous peoples living under Celtic rule had become fully integrated into the Gaelic culture and they all spoke the same language.[12] The ancient *Ogham* runes were replaced by the Latin alphabet in the 5th century when Christianity was introduced into Ireland. The 7-9th centuries are considered as the golden age of the Old Irish language (the oldest vernacular tradition in Western Europe), when the first Irish language documents were written (Europe's oldest written records after Greek and Latin).[13]

In the absence of centralised power, however, the island became an easy prey for Viking raids in the 9th century and they were expelled only in 1014 after *Brian Bóruma* united the Irish tribal kingdoms.[14] In 1169 Ireland had to face the Anglo-Norman invasions which began with the official purpose and the Papal support of bringing the Irish Church and State to order. The invaders brought to the relatively self-contained Gaelic culture a number of languages (Norman French, Welsh, Flemish, English).[15] The linguistic situation had narrowed to an Anglo-Irish bipolar system only by the 14-15th century, roughly parallel to the contraction of the English colony to the "Pale" (Dublin and its hinterland).[16] Even there, Anglo-Irish settlers had assimilated into Irish society to such an extent that the Parliament of *Kilkenny* in 1366 passed a law (written in Norman French) bringing them to order:

"Whereas... many English... forsaking the English language, manners, mode of riding, laws and usages, live and govern themselves according to the manners, fashion, and language of the Irish enemies; ... it is ordained and established, that every Englishman do use the English language, and be named by an English name, ... use the English custom, fashion, mode of riding and apparel...; and if any English, or Irish living among the English, use the Irish language amongst themselves, ... his lands and tenements... shall be seized..."[17]

[12] Byrne, F. J.: A korai ír társadalom (I-IX. század). In: Moody, T. W. – Martin, F. X. (eds.): Írország története. Corvina Kiadó, Budapest, 1999 pp. 27-39.
[13] Hughes, Kathleen: A korai keresztény aranykor Írországban. In: Moody, T.W. – Martin, F. X. op. cit. pp. 50-59.
[14] De Paor, Liam: A viking háborúk kora (IX-X. század). In: Moody, T.W. – Martin, F. X. op. cit. 60-70.
[15] Crowley, Tony: The Politics of Language in Ireland 1362-1922 – A Sourcebook. Routledge, London and New York, 2000 p. 12.
[16] Pintér, Márta: Nyelv és politika Írország történetében. Pannon Egyetemi Kiadó, Veszprém, 2008 p. 43.

While Gaelic literature lived its renaissance in the 13-16th centuries, colonial literature was permeated with stereotyping attitudes towards the Irish language and culture, which aimed to prove the conquerors' superiority and to legitimate the subjection of Irish people.[18] The earliest and most influential author was *Giraldus Cambrensis* who accused the Irish of political treachery, laziness, paganism, incest and bestiality.[19] The Irish aristocracy eventually began to embrace these negative stereotypes and increasingly turned away from its native culture.[20] Nevertheless, at the end of the 15th century Gaelic language and culture were still dominant throughout the colony.[21]

After the coronation of Henry VIII as king of Ireland in 1541, Ireland became the first scene of England's colonial aspirations. Since the Irish Catholic Church did not have the least intention of entering the Anglican Church, ethnic and linguistic fractionalisation became sharper and developed along religious lines. Royal practice towards the Irish language was, at least initially, somewhat ambivalent. On the one hand, legislation forced people to use English (see for example, the 1537 *Act for the English Order, Habit and Language),*[22] on the other hand – obeying the doctrine of the Reformation that religious instruction should be delivered in the vernacular – it could not completely ban the use of Irish either. Elizabeth I even sent a Gaelic fount for the translation of the Bible.[23] The easiest solution to this dilemma was to convert native Irish into English-speakers once and for all. Tudor monarchs realised fairly early that this goal can be achieved successfully by means of

[17] Crowley, Tony: The Politics of Language in Ireland... p. 15.
[18] Pintér, Márta: Egy nyelvpolitika-történeti vizsgálat eredményei: Az írországi nyelvcsere történeti beágyazottságának nyelvpolitikai szemléletű vizsgálata. In: Váradi, Tamás (ed.): Alkalmazott Nyelvtudományok Konferencia kötet. MTA Nyelvtudományi Intézet, Budapest, 2007 p. 131.
[19] Crowley, Tony: The Politics of Language in Ireland... p. 13.
[20] Pintér Márta: Nyelv és politika Írország történetében p. 193.
[21] Crowley, Tony: Wars of Words: The Politics of Language in Ireland 1537-2004. Oxford University Press, New York, 2005 p. 12.
[22] "[H]is Majesty doth hereby intimate unto all his said subjects of this land, of all degrees, that whosoever shall, for any respect, at any time, decline from the order and purpose of this law, touching the increase of the English tongue, habit, and order, or shall suffer any within his family or rule, to use the Irish habit, or not to use themselves to the English tongue, his Majesty will repute them in his noble heart . . . whatsoever they shall at other times pretend in words and countenance, to be persons of another sort and inclination than becometh the true and faithful subjects." In: Crowley, Tony: The Politics of Language in Ireland pp. 21-23.
[23] Crowley, Tony: Wars of Words pp. 9-35.

education, and so in 1570 Elizabeth ordained the setting-up of free English-language schools.[24]

Ireland under the Tudors was the scene of permanent carnage. The war in Ulster, the most recalcitrant province to anglicisation was so devastating that by the end of the 16th century Ulster had become practically deserted. The decisive defeat of the Irish forces at the Battle of Kinsale in 1601 and the subsequent *Flight of the Earls* (the self-exile of the Gaelic chieftains to Catholic Europe) in 1607 are considered as the first steps towards the end of Gaelic Ireland.[25] Rebellion against the English Crown was always followed by banishment and the plantation of loyal Protestant subjects – which occurred three times during the 17th century: firstly, after the Battle of Kinsale, secondly, by Oliver Cromwell between 1641 and 1651, and thirdly after the Williamite wars.

Victory over the Jacobites gave the Protestant landed class complete power. The notorious *Penal laws* formed a series of statutes with the intention of denying civil rights to Catholics (and Presbyterians). However, they did not contain any linguistic provisions which, according to *Pintér*, indicates that "by the turning point of the 17th century to the 18th century the concept of power and wealth, and that of the Irish language and culture had effectively separated: the poor Irish-speaking peasantry did not threaten the positions of the English-speaking Protestant community, furthermore, the Catholic elite, crucial from the viewpoint of power and wealth, had by then largely used the English tongue".[26]

In the 18th century, negative prejudices towards Irish gradually reached the lower classes. The spread of modern national politics paradoxically accelerated language shift: first, because its language medium was exclusively English, and second, because it mobilised the, so far mainly Irish-speaking, masses who, for the purpose of political visibility, were also required to use English.[27] By the 1730s, around two-thirds of the Irish population spoke Gaelic as their everyday language (1.340.000 of a total of two million). However, "English was slowly but surely winning the war of languages": in 1799, of a population of more than four and a half million, there were about 800.000 monoglot Gaelic speakers whilst half of the population spoke the language by preference.[28]

The beginning of the 19th century witnessed the passage of the *Acts of Union* (1801) to create a United Kingdom of Great Britain and Ireland. The fate of the Irish language was influenced by an unfortunate split between the political and cultural wings of Irish nationalism which cannot simply be reduced to a conflict between the Irish-Catholics and Anglo-Protestants. Whilst political nationalists considered the Irish language as an unnecessary, divisive factor, cultural

[24] *An Act for the Erection of Free Schools.* In: Crowley, Tony: The Politics of Language in Ireland p. 27.
[25] Crowley, Tony: Wars of Words p. 36.
[26] Pintér, Márta: Nyelv és politika Írország történetében p. 196. (translation mine)
[27] Ibid. p. 146.
[28] Crowley, Tony: Wars of Words pp. 72-79.

nationalists showed significant interest from the antiquarian perspective but paid little attention to the vernacular.[29]

State elementary education was introduced in 1831. "*Bata Scóir*" (a tally stick used to hit students when they spoke Gaelic) quickly spread as primary schools were set up throughout the country, resulting in the prohibition of Gaelic as a medium of instruction.[30] The Great Famine also had disastrous effects: Death and emigration led to a decline in Ireland's population of some 20 percent (from 8 million to 6.6 million) between 1845 and 1851.[31] At that time 1.5 million people (23%) spoke Irish, of whom 320.000 (5%) were monoglots. By 1901, due to massive emigration and loss of a language which was linked with poverty and backwardness, of a total population of 4.5 million, there were only 650.000 Gaelic speakers (15%) including 21.000 monoglots (0.5%).[32]

In political terms, the second half of the 19th century and the beginning of the 20th century can be characterised by constitutional and revolutionary opposition and aspirations. "The passing of the third Home Rule Bill in 1914 appeared to be a significant victory for constitutional nationalism. By then, however, the development of militant forms of both Republicanism and Unionism meant that the constitutional route was to be bypassed. Pearse's prophecy of 'the coming revolution' was to be realised in three outbreaks of war: the Easter Rising of 1916, the Anglo-Irish War of 1919–21, and the Irish Civil War of 1922–23."[33] The constitution of 1922 gave the *Saorstát* the status of Dominion within the Commonwealth, while the six counties of Ulster decided to have autonomy under the British Crown.

From that time on, the story of Irish is a different one in the Republic of Ireland and in Northern Ireland.[34] As for the latter, due to its association with Irish nationalism, the Irish language was treated with hostility by the first devolved government until the dissolution of the Stormont Parliament (1921-1972). In education, Irish was tolerated as an optional foreign language only in secondary schools.[35] The first Irish-medium primary schools were opened in

[29] Pintér, Márta: Nyelv és politika Írország történetében p. 197. In other words, cultural nationalists wanted to make Irish a living language on the basis of the literary norm without taking into consideration the spoken vernacular.
[30] Ní Ríordáin, M.: Where did it all go right? The socio-political development of Gaeilge as a medium for learning mathematics in Ireland. Published proceedings of Mathematics Education and Society 6th Conference, Berlin, March 2010. p. 3.
[31] Mullin, James: The Great Irish Famine. http://www.jrbooksonline.com /PDF_Books/irish.pdf [14.11.2012.] p. 25.
[32] Pintér, Márta: Nyelv és politika Írország történetében pp. 153-154.
[33] Crowley, Tony: The Politics of Language in Ireland p. 175.
[34] For the developments in the Republic of Ireland after 1921, see the author's paper forthcoming in Jogtörténeti Szemle 2012/3: Az ír nyelvi paradoxon (Paradox of the Irish Language).
[35] Ní Ríordáin, M. op. cit. p. 6.

Belfast in the 1970s, but initially did not receive any state support. Irish-language broadcasting was banned until 1982. The situation began to improve in the 1980s when Northern Ireland came under direct rule from Westminster.[36]

The *Anglo-Irish Agreement* (1985) between the United Kingdom and the Republic of Ireland[37] established an intergovernmental conference for settling the Irish question. The idea was that if the Republic of Ireland could have a voice in the governance of Northern Ireland, the tension between the two communities might subside. The Republic of Ireland pledged that it would not seek to reunite Ireland until a majority of the people of Northern Ireland so want. Due to strong opposition by the unionists, the agreement did not put an end to political violence, but, nevertheless, cooperation between the two governments has proved to be a landmark in the peace process.[38]

Evidence for this is the *Good Friday (Belfast) Agreement* (1998) which recognised "the importance of respect, understanding and tolerance in relation to linguistic diversity, including in Northern Ireland, the Irish language, Ulster-Scots and the languages of the various ethnic communities, all of which are part of the cultural wealth of the island of Ireland."[39] The British Government committed itself to take resolute action to promote language, facilitate its use in private and public life (where there is an appropriate demand), and seek to remove restrictions which would discourage the development of the language.[40] The *North-South Language Body*, run together by the Government of the Irish Republic and the devolved government of Northern Ireland[41], is responsible – through one of its two agencies, *Foras na Gaeilge* – for promoting the Irish language in both parts of the Irish island.

3. The story of Scottish Gaelic

Scotland was first settled by Gaels arriving from Ireland in the 4th century. By the mid-6th century the monastery at *Iona* had become a major centre of Christianity and learning, spreading the influence of Gaelic civilisation. After the Roman withdrawal from Britain, Scotland consisted of four kingdoms:

[36] Dunbar, Robert: Language Legislation pp. 122-123.
[37] http://cain.ulst.ac.uk/events/aia/aiadoc.htm [14.11.2012.]
[38] Keneally, Kevin G.: Northern Ireland: The Anglo-Irish Treaty of 1985 – Protestant Opposition to Political Representation for the Catholic Minority: The Apartheid of the United Kingdom. In: Suffolk Transnational Law Journal 1986/10. pp. 425-440.
[39] http://www.nio.gov.uk/agreement.pdf [14.11.2012.] Economic, Social and Cultural Issues, point 3.
[40] Ibid. point 4.
[41] The Northern Ireland Assembly – established in 1999 under the *Northern Ireland Act 1998* – was suspended on several occasions, the longest suspension being from 14 October 2002 until 7 May 2007. The Northern Ireland Act itself did not contain any linguistic provisions.
http://www.legislation.gov.uk/ukpga/1998/47/contents [14.11.2012.]

Gaels and Picts in the north, Britons (later Welsh) in the central parts of Scotland, and Angles in the south. The Gaelic *Kingdom of Dál Riata* united with the Picts in 730 to form the Kingdom of *Alba*, and later also annexed the Brythonic kingdom. From the amalgamation of the Picts and Gaels, incorporating neighbouring Britons, Anglo-Saxons and the Norse, eventually emerged the Scots nation and ethnic group.[42]

Use of the Gaelic language had spread throughout Scotland by the 9th century, culminating in the 11th to 13th centuries, but was never the main language of the south-east of the country. After the division of Northumbria between Scotland and England in the mid-10th century, the Scottish kingdom encompassed a great number of English people, and large numbers arrived after the Norman invasions as well. These people spoke a northern variety of Old English, the earliest form of the language which eventually became known as Scots.[43]

After 1070, when *Malcolm Canmore* married the English princess, *Margaret*, a feudal system was gradually established, based on Gaelic tradition but administered first in French and later in English. In 1286 the House of Canmore died out under which Gaelic customs had been maintained, if only partially. Although most of the mainland of northern Scotland and the western islands remained massively Gaelic-speaking, "by now the Kings of the Scots had become, in language, culture and sympathy, almost wholly French".[44]

After the Scottish Reformation removed the one institution common to both Gaelic and Lowland Scotland, the Roman Catholic Church (Treaty of Edinburgh, 1560), there was bitter feeling on the part of Lowlanders towards Highlanders, who mainly remained Catholic. Lowlanders began to consider the language of the Gaels as alien, equated with barbarity and popery.[45] *James VI*, King of Scotland, who became King of England and Ireland in 1603 as *James I*, sought to break the unity of the Gaelic cultural zone which stretched from the South of Ireland to the Scottish Hebrides. Under his 'plantation policy', English and Lowland Scots were planted in both Ulster, and the Highlands of Scotland.[46]

The first legal measures specifically directed towards the extirpation of the Gaelic language and its culture were the *Statutes of Iona* of 1609 which provided for the introduction of Protestant ministers into Highland parishes and

[42] Stephens, Meic: Linguistic minorities in Western Europe. Gomer Press, 1976 pp. 52-53.
[43] Ibid. p. 79.
[44] Ibid. pp. 55-57.
[45] Until the late 15th century the Gaelic language was known in Scots (then known as *Inglis*) as *Scottis*, and in England as *Scottish*. From around the early 16th century, Scots speakers gave the Gaelic language the name *Erse* (Irish), and thereafter it was the Middle English dialects spoken within the Kingdom of Scotland, that they referred to as *Scottis* (Scots). Ibid. p. 58.
[46] Dunbar, Robert: Language Legislation, p. 101.

the education of chief's heirs in Lowland schools. The Statutes were ratified by an *Act of the Privy Council* in 1616 prescribing that "the vulgar Inglishe toung be universallie planit, and the Irishe language, whilk is one of the chief and principall causis of the continewance of barbaritie and incivilitie amongis the inhabitants of the Ilis and Helandis, be abolisheit and removit."[47] After the 1707 ratification of the *Treaty of Union*, under which the kingdoms of England and Scotland were united into the Kingdom of Great Britain, the status of English has been further enhanced in Scotland.

The *Jacobite Risings* (1689-1746) – although Jacobitism was not a distinctly Gaelic ideology – served the British monarchs as a pretext to "solve the Highland problem" once and for all. The Battle of Culloden in 1746 was followed by ethnic cleansing and curbing the power of chiefs over their clans. Subsequent acts prohibited the wearing of traditional garb, and required the surrender of any kind of weapons. Gaelic culture had to suffer from potato famines as well, coupled with the notorious *Highland Clearances*. Due to extensive sheep-farming, the vast majority of Highlanders were forced to emigrate to the sea coast, the Scottish Lowlands, and the North American colonies.[48]

By the beginning of the 19th century, the pastoral viability of the land was ruined, the Gaelic culture and clan society devastated. The Highland population consisted of only 335.000 people with 300.000 Gaelic monoglots, while the emigration of Gaels had resulted in colonies of Gaelic-speakers in the industrial towns of the south. Some of these emigrants greatly contributed to the promotion of Gaelic culture and language. The Edinburgh Society for the Support of Gaelic Schools for example was founded in 1811 with the aim of teaching the scriptures[49] solely through the medium of Gaelic and later English. Gaelic thus became the language of the Church of Scotland in the Highlands, and a strong Protestant tradition was founded. In 1843, however, there was a secession away from the Church of Scotland, "partly caused by the profound unease felt [because of] its sanctioning of the clearances". By 1851 the Free Church had opened 712 schools where Gaelic was the predominant language.[50]

From the end of the 19th century Gaelic faced its most serious challenge: the introduction of universal state-supported education. Under the *Education Act (Scotland) of 1872* the use of Gaelic was actively discouraged in schools. The '*maidecroachaidh*', a stick on a cord, was used by teachers to stigmatise and punish children speaking Gaelic in class. The most talented students left their

[47] Glazer, Konstanze op. cit. p. 65.
[48] Ibid. pp. 65-66, 83.
[49] Although a Scottish Gaelic version of the Bible was published in London in 1690, it was not widely circulated, instead an Irish Gaelic translation dating from the Elizabethan period was in use. The lack of a well-known translation until 1767 may have contributed to the decline of Scottish Gaelic.
[50] Stephens, Meic op. cit. pp. 62-63.

homes to seek opportunities elsewhere, and although not all of them were lost to Gaelic culture – many educated Gaels became prominent in such organisations as *An Comunn Gaidhealach*, leader organisation of the Scottish Gaelic language movement, founded in 1891 –, the life of the Gaels in the Lowlands developed as a separate unity from that in the Highlands where Gaelic became the language of a residual crofter working-class.[51] By the end of the 19th century (1891 census), there were only 254,000 Gaelic-speakers, representing about 6.3% of the population, a significant number of these still being monoglots.[52]

In the mid-20th century there was a turning point in the fortunes of the Gaelic language in the areas of contemporary literature, broadcasting and education (Gaelic was introduced as a medium of instruction in the country primary schools of the Highlands and Islands in 1958). By then, however, most of the last monoglot speakers had died (only 974 were enumerated at the 1961 census).[53] A sign of an ever more permissive attitude towards Gaelic by Government was the requirement of a Gaelic-speaking member in the Land Court, and that evidence in Gaelic became allowed in law-courts within the bilingual areas.[54]

Of the political parties only the Scottish National Party has made any official commitment to Gaelic (and Scots) but even this party has been more committed to the issue of self-government than that of the language. The struggle for political independence of Scotland has been particularly vehement since the end of the 19th century. The first Home Rule Association had been founded in 1886, followed by several others during the 1910s and 1920s, to be merged as the Scottish National Party in 1932.[55] In 1975, the British Government announced a detailed plan for establishing elected Assemblies for Scotland and Wales, with legislative powers to the Scottish Assembly in addition to those proposed for its Welsh counterpart (the reason would be that Scotland already had its own legal system, whereas Wales did not). Despite a vote of 51.6% in favour of devolution at the 1979 Scottish referendum, the Scotland Act 1978 was not put into effect because "Yes" votes did not receive the support of 40% of the electorate.[56] Twenty years later, following a successful second referendum, the Scottish Parliament was created under the *Scotland Act of 1998*,[57] which, unlike its Welsh counterpart (but like the Irish one), was silent on the language issue. Scottish Gaelic has gained some official recognition only recently.

[51] Ibid. pp. 63-65.
[52] Dunbar, Robert: The ratification by the United Kingdom of the European Charter for Regional or Minority Languages. http://www.ciemen.org/mercator/pdf/WP10-def-ang.pdf [14.11.2012.] p. 11.
[53] Stephens, Meic op. cit. pp. 66-67.
[54] Ibid. p. 70.
[55] Ibid. p. 87.
[56] http://www.scotland.gov.uk/About/Factfile/18060/11550 [14.11.2012.]
[57] http://www.legislation.gov.uk/ukpga/1998/46/contents [14.11.2012.]

4. The story of Welsh

The first Celtic groups arrived in the British Isles in the 8th century BC, and were conquered by the Romans in the 1st century AD. On the withdrawal of the Romans in the 5th century, the Britons emerged as a free people, Romanized and Christianized, with their language and customs untouched. By the middle of the 6th century a part of them "had become conscious of their unity in face of growing threat from Anglo-Saxon aggression. They called themselves *Cymry* (fellow-countrymen), their country *Cymru* and their language *Cymraeg*. To the Anglo-Saxons they were known as *Wealas* (foreigners), from which the modern English form of their name has developed".[58]

It has often been noted that the history of Wales is the history of the Welsh language. Indeed, Meic *Stephens* recalls that, in medieval times the Welsh word for 'language', *iaith*, was used synonymously with *cenedl*, 'nation'. Throughout the period of Welsh independence Welsh was the language of government, administration and law. Welsh was enriched and purified by the bardic schools which flourished for over a thousand years, to disappear only in the 16th century.[59]

By 1100 Normans had overrun large areas of eastern and southern Wales, establishing in the Marches their own authority. The law in these areas was Anglo-Norman and the languages used in the records were Latin and French, with Welsh admitted in evidence. Welsh independence came to an end with *Edward I*'s conquest in 1284. The *Statute of Rhuddlan* provided for the administration of English law in parts of Wales ruled directly by the Crown, but no attempt was made to proscribe the Welsh language in the courts[60] (until the 1362 Statute of Pleading).

In the 15th century the political and economic life of Wales became increasingly integrated with that of England. Ironically, in 1485 it was a largely Welsh army which put Henry, descended from the Tudors of Penmynydd in Anglesey, on the English throne, followed by the destruction of Welsh independence.[61]

The *Acts of Union* passed in 1536 and 1542, although superficially giving Welsh people equal rights with the English, proclaimed English as the only official language in Wales:

"All Justices... and all other officers and ministers of the lawe shall proclayme and kepe... all courtes... in the Englisshe Tonge... And also from hensforth no personne or personnes that use the Welsshe speche or langage

[58] Stephens, Meic op. cit. pp. 146-147.
[59] Ibid. pp. 149-150.
[60] Ibid. p. 150.
[61] Ibid. p. 151.

shall have or enjoy any maner of office or fees... onles he or they use and exercise the speche or langage of Englissche".[62]

As in the case of Irish and Scottish Gaelic, language shift started among the nobility who began to send their sons to be educated in England, and opened their own schools on the English model. By 1585 the process went so far that the greater part of the nobility neither could read nor write Welsh.[63]

As for religious worship, during the Middle Ages, Latin had been used in church services but Welsh for religious instruction. In 1549, the *Act of Uniformity* insisted that all parish churches were to use the English Book of Common Prayer. However, in 1563 Elizabeth I passed the *Act for the Translating of the Bible and the Divine Services into the Welsh Tongue* which laid down that a copy of the Bible should be placed in every parish church, so that "such as do not understand the said language, by conferring both tongues together, the sooner attain to the knowledge of the English tongue".[64]

The 1588 translation of the Bible by Bishop *William Morgan* made Welsh one of the first European languages which was not the language of the State, to become a medium of the scriptures following the Reformation. As Stephens points out, it was the status accorded to Welsh by the Act of 1563, and its regular use as the official language of worship which appear to be the principal reason why Welsh held its ground so successfully in comparison with other Celtic languages.[65] Welsh was spoken even in the mid-19th century by approximately 70 percent of the population in their everyday lives, with a very high proportion of monoglots.

The decline of Welsh is usually attributed to the Industrial Revolution entailing the influx of English-speaking labourers, and the introduction of public education in the mid-19th century. *The Blue Books of 1847* (officially entitled *Reports of the Commissioners of Inquiry into the State of Education in Wales*) gave a disastrous opinion on the Welsh language describing it as "the language of slavery", "a vast drawback to Wales, and a manifold barrier to the moral progress and commercial prosperity of the people", "a decided impediment to the mental improvement of the people", "a great obstruction to the improvement of the people", "a nuisance and an obstacle", "a serious disadvantage" etc. The Commissioners concluded that only the mastery of English could save Wales from the final destruction.[66]

[62] Cited by Kathryn Jones, Steve Eaves and Gareth Ioan: Creating a Truly Bilingual Wales: Opportunities for legislating and implementing policy. http://www.iaith.eu/uploads/report_on_welsh_langugae_legislation.pdf [14.11.2012.] p. 11.
[63] Matsubara, Koji: Indigenous Languages Revitalized? – The Decline and Revitalization of Indigenous Languages Juxtaposed with the Predominance of English. Shumpūsha, Yokohama, 2000 pp. 28-29.
[64] Stephens, Meic op. cit. pp. 153-154.
[65] Ibid. pp. 154-155.
[66] Matsubara, Koji op. cit. pp. 7-13.

No matter how hateful The Blue Books were (Welsh people referred to them as "*Brad y Llyfrau Gleision*" or the "Treachery of the Blue Books"), they had their effect. Welsh poets gave up the legacy of bards, and according to *Edwards*, common people were eager to acquire the English language which "would enable «Gallant Little Wales» to pursue its imperial mission honourably".[67] Nevertheless, this attitude could not have been general which is well illustrated by the notorious "*Welsh Not*". The Welsh Stick was suspended round the neck of any pupil caught speaking Welsh, and in the course of the school day it passed from neck to neck. The unfortunate holder of the NOT at end of the day was thrashed.[68] The adoption of this barbarous tool in most schools in Wales in the 19th century proves that children wanted to speak Welsh.

The *1870 Elementary Education Act* brought about the total eviction of Welsh as the medium of instruction. Welsh became a subject taught only half an hour a day in primary schools. Even the University College of Wales, founded in 1872, could not teach Welsh as a living language.[69]

The first half of the 20th century saw the most serious crisis of the history of Welsh. The great exodus of Welsh-speaking persons due to the economic depression of the 1930s; service in the Armed Forces by many of Wales's youth during World War II and after; the destruction of many Welsh-speaking communities for industrial or military purposes; and the constant influx of English people all contributed to the decline of Welsh as a vernacular,[70] which is reflected by census data: in 1901 half the population, some 929.800 persons were Welsh-speaking with 280.900 (15%) monoglots, but fifty years later their numbers fell to 714.686 (28.9%).[71]

On the other hand, Welsh people have always been keen on promoting and fighting for their language, and endurance had its result: from the 1940s onwards, the position of Welsh has been strengthening in every field of life, to an extent incomparable to other Celtic languages. Primary schools in the Welsh-speaking areas began to use Welsh as a medium of instruction for certain subjects in 1927, and the first Welsh-language primary school was opened in 1939. After the adoption of the *Education Act 1944*, a series of Welsh-language primary and secondary schools (the first one in 1956) were opened in English-speaking areas as well, and Welsh became a degree subject at all colleges of the University of Wales.[72]

The *Welsh Courts Act 1942* repealed the language clause in the Act of Union of 1536, and provided that "the Welsh language may be used in any court in

[67] Edwards, H. T: The Eisteddfod. Cardiff, University of Wales Press, 1990. p. 23. Cited by Matsubara, Koji op. cit. p. 14.
[68] Ibid. pp. 17-19.
[69] Ibid. pp. 20-24.
[70] Ibid. p. 25.
[71] Stephens, Meic op. cit. p. 146.
[72] Ibid. pp. 184-186.

Wales by any party or witness who considers that he would otherwise be at any disadvantage by reason of his natural language of communication being Welsh". This Act also made the provision of an interpreter obligatory, but all proceedings were to continue to be recorded in English.[73]

Political nationalism, which had made little progress in the years following World War I (from 1921 onwards there was a succession of Home Rule Bills at Westminster, all defeated), was invigorated. The demand for self-government has been led, since 1945, by *Plaid Cymru* (the Welsh Nationalist Party), while *Cymdeithas yr Iaith Gymraeg* (the Welsh Language Society), formed in 1962, has emphasised the precedence of language over self-government and the need of revolutionary means, thus becoming the most emblematic figure of Welsh nationalism. Following public demonstrations led by the Society, in 1963 the Minister for Welsh Affairs announced the establishment of a committee "to clarify the legal status of the Welsh language and to consider whether changes should be made in the law".[74]

As a consequence, the *Welsh Language Act 1967*,[75] after stating in its Preamble that "it is proper that the Welsh language should be freely used by those who so desire in the hearing of legal proceedings in Wales", in five short sections admitted the oral use of Welsh in court, and gave the relevant Minister the right to authorize the production of a Welsh version of any documents required or allowed by the Act. The first complete case heard entirely in Welsh in a Crown Court was held in 1973.[76]

The *Broadcasting Acts 1980 and 1981* established *Sianel Pedwar Cymru* (S4C), the Welsh language television channel, while the *Education Reform Act 1988* made Welsh one of the four core subjects in the curriculum for all students in Wales between age of 5 and 16, independently of the language of instruction.[77]

Without question, the most important law in support of Welsh was (until 2011) the *Welsh Language Act 1993*[78] which provided that the Welsh and English languages be treated equally in the public sector, "so far as is both appropriate in the circumstances and reasonably practicable". The Act was based on the "administrative enabling" or "planning-based" model, but did not create any language rights.[79] Instead, it required public bodies to prepare a

[73] Morris, Ruth op. cit. p. 45.
[74] Stephens, Meic op. cit. pp. 165-173.
[75] http://www.legislation.gov.uk/ukpga/1967/66/contents [14.11.2012.]
[76] Stephens, Meic op. cit. pp. 175-176.
[77] Dunbar, Robert: International Comparisons: Celtic Cousins – Language Legislation for Welsh and Scottish Gaelic. http://www.cba.org/cba/dublin2009/pdf/Dunbar_Dublin%20Presentation%20Wales%20and%20Scotland%2017%2008%2009%20FINAL%2013%2008%2009.pdf [14.11.2012.] pp. 3-4.
[78] http://www.legislation.gov.uk/ukpga/1993/38/contents [14.11.2012.]
[79] Dunbar, Robert: International Comparisons p. 4. The only exception in Subsection 22 (1) reiterates the wording of Section 1 of the Welsh Language Act 1967: "in any legal

Welsh Language Scheme – to be approved by *Bwrdd yr Iaith Gymraeg*, the Welsh Language Board – indicating their commitment to the equality of treatment principle.

The rise of Plaid Cymru in the 1960s obliged the Government to take the demand for self-government seriously. However, the 1979 referendum was such a resounding defeat (79.7% against) that it killed off any prospects of devolution for a generation. After a well-organised Yes Campaign, the *Government of Wales Act 1998* was accepted with a narrow majority (50.3 % in favour). Although the National Assembly of Wales (unlike those of Scotland and Northern Ireland) originally had no power to initiate primary legislation, the Government of Wales Act (unlike its Scottish and Northern Irish counterparts) contained several linguistic provisions. Most importantly it required the National Assembly to prepare standing orders and subordinate legislation bilingually,[80] thus further securing the status of Welsh.

5. Recent developments and the way forward: prospects for minority languages in the United Kingdom

In the last two decades, under the influence of European trends, there has been a favourable shift in UK language policy. This is manifested in, on the one hand, ratifying important European instruments, and, on the other, establishing devolved governments for Northern Ireland, Wales and Scotland. The 1998 *Human Rights Act*[81] enshrines the European Convention of Human Rights as British law, containing specific mention of language rights as components of the right to liberty and security, the right to a fair trial, and the prohibition of discrimination. In 2001, the United Kingdom ratified the *European Charter for Regional or Minority Languages*, Part III of which applies to Welsh, Scottish Gaelic and Irish.[82] These languages are now present at the European Union level as well. Irish became the EU's 21st official and working language on 1 January

proceedings in Wales the Welsh language may be spoken by any party, witness or other persons who desires to use it, subject in the case of proceedings in a court other than a magistrates' court to such prior notice as may be required by rules of court; and any necessary provision for interpretation shall be made accordingly".

[80] Sections 47 and 66(4). http://www.legislation.gov.uk/ukpga/1998/38/contents [14.11.2012.]

[81] http://www.legislation.gov.uk/ukpga/1998/42/contents [14.11.2012.]

[82] Scots and Ulster Scots (despite that they have often been argued as being mere dialects of English), and by subsequent declarations Cornish and Manx, are also recognized for the purposes of Part II of the Charter. See, the First evaluation report of the Committee of Experts on the application of the ECRML in the United Kingdom 2004.
http://www.coe.int/t/dg4/education/minlang/report/evaluationreports/ukecrml1_en.pdf [14.11.2012.] p. 4.

2007 (although Ireland had joined the EEC in 1973, Irish had until then been accorded only Treaty Language status).[83] On 15 July 2008 the Council of Ministers granted the status of co-official language to Welsh and Scottish Gaelic which means that Scottish Gaelic and Welsh speakers can now write to EU bodies in their mother tongue and receive a reply in that language. UK Ministers are also entitled to use these languages at Council meetings.[84]

Due to these developments, all of the three autochthonous languages dealt with in this paper have increasingly gained solid official support. In the following, legal and demographic contexts (two highly important factors influencing future prospects of a language) of each language will be evaluated.

5.1 Welsh in Wales

Although equal bilingualism is far from being a reality, the extensive application of Welsh Language Schemes greatly expanded the visible presence of Welsh in Wales (on public buildings, bilingual signs, notices, forms, documents, pamphlets etc.), facilitated the use of the language in public services, and increased the need for Welsh-language skills in the public sector, an important stimulus to Welsh-language acquisition.[85] Thanks to the *Government of Wales Act 2006*[86] it is now possible for the Welsh Assembly to pass (primary) legislation on the Welsh language. An extremely important step towards an individual-rights based model was the recent adoption of the *Welsh Language (Wales) Measure 2011*.[87] The Measure confirms the official status of Welsh – making it the only language that is *de jure* official in any part of the United Kingdom –, ensures linguistic *rights* in the provision of services (including the right to appeal a decision to the Welsh Language Tribunal), and establishes the post of Language Commissioner with strong enforcement powers to protect the rights of Welsh speakers. The Measure abolishes the Welsh Language Board and the system of language schemes, instead imposing duties on public bodies to use the Welsh language.

Welsh also performs well in demographic terms. The 2001 UK census indicated that 582.368 persons or 20.8% of the population of Wales were able to

[83] Council Regulation (EC) No 920/2005 of 13 June 2005
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32005R0920:EN:NOT [14.11.2012.]

[84] Welsh and Scottish Gaelic thus joined Catalan, Basque and Galician, on which co-official status was conferred in 2005. O Riain, Sean: Irish and Scottish Gaelic. A European Perspective.
http://www.nbuv.gov.ua/Portal/natural/nvvnu/filolog/2010_7/R4/Riain.pdf [14.11.2012.]

[85] Huws, Catrin Fflur: The Welsh Language Act 1993: A Measure of Success? In: Language Policy 2006/5. pp. 141–160.

[86] http://www.legislation.gov.uk/ukpga/2006/32/contents [14.11.2012.]

[87] http://www.legislation.gov.uk/mwa/2011/1/contents [14.11.2012.]

speak the Welsh language.[88] This is an increase in both numbers of speakers and percentages as compared to 1991 (510.920 persons, 18.7%) which, in turn, was an increase in numbers but a slight decline in percentage as compared to 1981 (508.207 persons, 18.9%).[89] The positive trends reflected in censuses together with an increasingly favourable legal environment might give a reason for guarded optimism concerning the future of Welsh.

5.2 Scottish Gaelic in Scotland

Scottish Gaelic is almost totally absent from the public domain. Although the Standing Orders of the Scottish Parliament do permit the use of Gaelic in parliamentary debates and before committees, it is not possible to legislate in Gaelic. Since 2001, parties to civil proceedings have been allowed to give oral evidence in Gaelic in sheriff courts in Portree (the Isle of Skye), and Lochmaddy and Stornoway (the Western Isles); however, a person wishing to do so must make written application to the court in advance of the hearing.[90] Scotland's first law specifically directed at the language, the *Gaelic Language (Scotland) Act 2005*[91] was closely modelled on the Welsh Language Act 1993 in terms of the *Bòrd na Gàidhlig*'s consultative role (comparable to that of the former Welsh Language Board) and the introduction of *Gaelic Language Plans* (similar to the Welsh Language Schemes). Nevertheless, this Act is significantly more limited – in terms of both its scope and the powers of the Bòrd – than the Welsh one.[92] The purpose of the Act – "securing the status of Gaelic as an official language of Scotland commanding equal respect to the English language" – is to be achieved through a national Gaelic language plan to be prepared by the Bòrd. The (first) National Plan for Gaelic 2007-2012[93] focused on "sustaining a vibrant Gaelic language", namely language acquisition, usage, status and corpus. The somewhat broader developmental areas of the (second) National Plan for Gaelic 2012-2017[94] include, *inter alia,* communities, the workplace, arts, media and tourism. The purpose of both plans is "to secure an increase in the number of people learning, speaking, and using

[88] Census 2001 – Report on the Welsh language. http://www.ons.gov.uk /ons/rel/census/census-2001-report-on-the-welsh-language/report-on-the-welsh-language/index.html [14.11.2012.] p. 39.
[89] Dunbar, Robert: The ratification p. 10.
[90] In other courts, pursuant to the 1981 case of *Taylor v. Haughney*, Gaelic-speakers can only use their language if they can demonstrate an insufficient command of English. Dunbar, Robert: International Comparisons pp. 10-11.
[91] http://www.legislation.gov.uk/asp/2005/7/contents [14.11.2012.]
[92] Huws, Catrin Fflur op. cit. p. 149.
[93] http://www.gaidhlig.org.uk/Downloads/National-Plan/National%20Plan%20for%20Gaelic.pdf [14.11.2012.]
[94] http://www.gaidhlig.org.uk/Downloads/National%20Gaelic%20Langauge%20Plan%202012%20-%202017.pdf [14.11.2012.]

Gaelic in Scotland". Census data suggest, however, that this will be a long and hard process.

The 2001 UK census revealed a continued decline in the proportion of Scottish Gaelic speakers. In 2001, 58.652 people reported themselves as being able to speak Gaelic (1.2% of the total population of Scotland) as compared to 65.978 persons or 1.4% in 1991.[95] The rate of decline, though significant, is only about half of that occurred between 1981 and 1991, and the number of younger speakers of the language has increased which – if revival efforts will be continuing – could give some hope for the survival of Scottish Gaelic.

5.3 Irish in Northern Ireland

The situation of Irish in Northern Ireland in legislative terms is far less secured than those of Welsh in Wales or even Scottish Gaelic in Scotland. Although the *Northern Ireland Act 2006* inserted a new section into the 1998 law which makes reference to Irish, it provides no more than "the Executive Committee shall adopt a strategy setting out how it proposes to enhance and protect the development of the Irish language."[96] The Executive's Programme for Government 2011–15 indeed includes a strategy for the Irish language as a building block of priority 4, "building a strong and shared community", but the strategy itself is in the early stage of development.[97]

As for demographics, 1991 and 2001 census data[98] show that the percentage of Irish speakers remains roughly 10% of the population, although there is a significant increase in terms of numbers: in 1991, 142.003 people reported themselves as having "some knowledge" of Irish, while in 2001, 167.490 people did so. However, compared to the situation of Welsh and Scottish Gaelic, only a very small percentage of these people are native speakers, and only a few of them speak Irish fluently and regularly, which makes the language movement in Northern Ireland a basically revivalist phenomenon.[99]

[95] http://www.gro-scotland.gov.uk/files1/stats/gaelic-rep-english-tables.pdf [14.11.2012.]
[96] Section 15 (28D). http://www.legislation.gov.uk/ukpga/2006/53/contents [14.11.2012.]
[97] See the Official Report of the Committee for Culture, Arts and Leisure published on 20 September 2012. http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Committee-Minutes-of-Evidence/Session-2012-2013/September-2012/IrishUlster-Scots-Strategies-DCAL-Briefing/ [14.11.2012.]
[98] The 1911 census recorded 28,729 Irish speakers in the six counties of the province of Ulster which became Northern Ireland after the Government of Ireland Act in 1920. (Crowley, Tony: Wars of Words. p. 180.) This was the last time Irish speakers of Northern Ireland had been enumerated before 1991.
[99] Dunbar, Robert: The ratification p. 16.

6. Summary and final conclusions

According to *Dunbar*, the "histories of minority languages in the UK tell a similar story, and these histories are obviously related: The institutional and legal ascendancy of the English language as the sole medium of public and societal discourse has marginalized and consequently weakened all other languages."[100]

As early as 1066, when the Normans conquered the British Isles, the process of linguistic colonialisation started, at that time French and Latin being the sole languages of officialdom. No later than the 14th century, however, English became the one "true" language of the realm (see for example the Statute of Pleading 1362 or the Statutes of Kilkenny 1366). Coupled with religious antagonism, anglicisation took a particularly strong shape under Henry VIII. It was during his reign that the Principality of Wales was formally incorporated into England and English became the language of the courts in Wales. Although Scotland managed to maintain its autonomy from England for a considerably longer period, the erosion of the Scottish Gaelic language already began in the 11th century, when it was displaced in public administration by Norman French and later English. The process of anglicisation has been further strengthened after the ascension of James VI of Scotland to the English throne, and was completed by the introduction of universal state-supported education at the end of the 19th century assigning English as the sole medium of instruction.

When considering this story carefully, it is evident that British monarchs have consistently endeavoured to achieve linguistic homogenisation by establishing a common language and by extirpating all other languages spoken throughout the realm.[101] However, we have to disagree with *Ager* who tries to depoliticise the linguistic issue by alluding to the fact that the British government has never designated English as the UK's official language. More specifically, he claims that "the indigenous languages have generally given way to English without the benefit of specific policy decisions"[102] and "English was imposed through sociolinguistic processes affecting the social order, religion and education, rather than through legislation on status."[103] These sociolinguistic processes, however, had been deeply rooted in political and legislative measures. Apart from physical violence associated with initial military conquest and repeated deportations (which, we might add, were based

[100] Dunbar, Robert: Language Legislation p. 96.

[101] We might conclude that this kind of language policy used to serve the higher purpose of imperialist efforts towards a unified realm and a single British identity. Let us only think of the overseas colonies, where British monarchs pursued the same policy which they had already tried out on their "inner" language minorities.

[102] Ager, Dennis: Language policy in Britain and France: the processes of policy making. Continuum International Publishing Group, 1996. p. 49.

[103] Ibid. p. 47.

on well-established political decisions), and the – partly demographic – processes accompanying industrialisation, there had been a series of policy measures and pieces of legislation which launched these "self-propelled" social processes, or were their catalysts. Even when not being expressly related to the language issue, they undoubtedly had an impact on the status of minority languages for a long time.

Despite the common elements and trends in the process of decline, the prospects for Scottish Gaelic and Irish are more constrained than those for Welsh, which is well reflected in terms of both the demographic and the legislative context. The reason can be found in the legal history of autochthonous languages, where specific differences are highly visible.

Gaelic has not become a *political* issue in Scotland (Scottish nationalism has been more concerned about self-government), or a main factor of *national identity* as Welsh in Wales or Irish in Northern Ireland. However, being a political issue had different consequences for Welsh and Irish. In Wales, all political parties took up the cause of the Welsh language, while in Northern Ireland Irish was strongly associated with Irish nationalism, thus for long was treated with hostility. "Attitudes towards the language remain one dividing point between the nationalist and unionist communities in Northern Ireland."[104] Unlike Irish, Scottish Gaelic had no strong *cultural* movement either to champion its cause, and unlike Welsh, it gained little official support by either central or local government. In terms of *depopulation*, Irish and Scottish Gaelic had to suffer serious blows, while Welsh did not. Following a devastating war, by the end of the 16th century Ulster became practically deserted, and the population was "supplemented" by Protestant English and Scots. In turn, Scottish Gaelic speakers were forced to emigrate during the Highland Clearances. The situation was exacerbated by the disastrous potato famines in the middle of the 19th century. The situation of the Irish language is further shadowed by a Catholic vs. Protestant conflict, Irish being mainly connected to the Catholic people. As for Welsh, in turn, the language movement has never been divided by *religious* antagonism. On the contrary, the status accorded to Welsh by the Act of 1563 on the translation of the Bible into Welsh, and its regular use as the official language of worship appear to be the principal reason why Welsh held its ground so successfully. Another important element in the story of Scottish Gaelic is that it has never been the *only* language used in Scotland: in the southern territories, a northern variety of Old English (later known as Scots) was spoken. The relationship between Highlanders and Lowlanders has not always been without tension – which also had significant consequences for the fate of Scottish Gaelic.

We may conclude that the prestige of all three indigenous languages examined in this paper has been increasingly advanced in terms of both official recognition and general attitudes, in the broader European context as well:

[104] Ager, Dennis: Ideology and Image p. 56.

autochthonous minority languages are becoming "trendy". Provided that favourable trends continue, there is a chance that Irish, Scottish Gaelic and Welsh will long remain parts of the valuable linguistic diversity of the United Kingdom and Europe.

The case of Silk Sandals and Jeff Koons: Appropriation in art, copyright infringement and fair use

NÁTHON, NATALIE

What is originality? Undetected plagiarism.
(Dean William R. Inge)

Contemporary art "is so imprisoned in the present that juxtaposing new works with old ones allows you to rediscover a connection between history and the history of art"
(Jeff Koons)

ABSTRACT *The paper deals with an overview regarding the so-called appropriation in art. The author presents – through a lawsuit (Blanch v. Koons, 2006) – the question of appropriation in art; whether the latter falls under the fair use doctrine or it constitutes copyright infringement. The present analysis will concentrate on the case-law of the United States, although the problem exists in several European countries (there are far more copyright lawsuits regarding appropriation in art in the United States). The essay wishes to summarize the legal literature, the recent publications and overviews, finally the effects of the past twenty years of case-law on the present procedures.*

1. Introduction

JEFF KOONS is a visual artist, an "agent provocateur", who re-invents himself constantly and faces the conflicts, legal debates and anger directed towards him with a remarkable self-confidence. His works are popular, widely known, exhibited all over the world in museums, art galleries and even in the château de Versailles. He has been the subject of much critical commentary,[1] but he is constantly present in the art world.[2]

[1] In 1988, he created a piece entitled Michael Jackson and Bubbles, a life-sized gold statue of the singer with his pet chimpanzee, Bubbles. The statue was later sold by Sotheby's auction house for $5.6 million. Some of his pieces have been controversial, including a series of photos, paintings and sculptures entitled Made in Heaven, which show him and Ilona Staller, a former Italian adult film star and ex-wife. Source:

He is best known for incorporating into his artwork objects and images taken from popular media and consumer advertising, a practice that has been referred to as "neo-Pop art"[3] or (perhaps unfortunately in a legal context) "appropriation art".[4] His sculptures and paintings often contain such easily recognisable objects such as toys, celebrities, photographs and popular cartoon figures. His activity, which can also be called "collage painting", his ways to work and thinking can well be described by AUGUSTE RODIN's quotation: "I invent nothing; I rediscover".

KOONS has been the subject of several previous lawsuits during the past decade for copyright infringement. In the late 1980s, he created a series of sculptures for an exhibition, he took two-dimensional photographs and created three-dimensional reproductions (taken from such sources as commercial postcards and syndicated comic strips).[5] Although many of the source images were under copyright protection, KOONS did not ask for permission to use them. In separate cases based on three different sculptures, the courts concluded that KOONS'S use of the copyrighted images infringed on the rights of the copyright holders and did not constitute fair use under the copyright law.[6] In the *Blanch v. Koons* case – which I will analyze – the court reached a completely different conclusion, which significantly changed the present case-law; we will discuss in detail the case and the conclusions the court of appeal reached.

In the present overview I will try to present, through a lawsuit, the question of appropriation in art, whether this falls under the fair use doctrine or

Nguyen, Helen: U. S. Court of Appeals for the Second Circuit: Artist's rendering creates copyright controversy, Daily Record, November 16, 2006.

[2] „Since 1979, Koons has been making art that provokes thought" wrote I. Michael Danoff in a catalogue for a Koons show at the Museum of Contemporary Art in Chicago. „Koons communicates through a heightened sense of symbolism. He attaches a profusion of meaning to the things he sees and likewise to those objects he presents as art". Hays, Constance L.: A Picture, a Sculpture and a Lawsuit, New York Times, September 19, 1991.

[3] In the 1980s there was a renewed interest in the Pop Art of Andy Warhol and contemporaries. Warhol died in 1987, but he had long before inspired a whole generation of new artists. It should be noted that Neo-Pop Art is not really a new art movement, but rather an evolution of the old Pop Art movement. Neo-Pop Art consists of a revised form of Pop Art adapted from its forefathers, a rebirth of recognizable objects and celebrities from popular culture with icons and symbols of the present times. Source: http://www.arthistoryarchive.com/arthistory/popart/Neo-Pop-Art.html [25.11.2012]

[4] Ames, E. Kenly: Note, Beyond Rogers v. Koons: A Fair Use Standard for Appropriation, 93 Colum. L. Rev. 1473, 1477–80 (1993)

[5] One of the most famous cases was Rogers v. Koons, 960 F.2d 301

[6] See Rogers v. Koons, 960 F.2d 301 (2d Cir.), cert. denied, 506 U. S. 934, 113 S.Ct. 365, 121 L.Ed.2d 278 (1992); Campbell v. Koons, No. 91 Civ. 6055, 1993 WL 97381, 1993 U. S. Dist. LEXIS 3957 (S. D. N. Y. Apr.1, 1993); United Feature Syndicate v. Koons, 817 F.Supp. 370 (S. D. N. Y.1993).

constitutes copyright infringement. The present analysis will concentrate on the case-law of the United States, although the problem exists in several European countries (there are a few cases especially in the United Kingdom,[7] [8] and France[9]) since there are far more copyright lawsuits regarding, amongst other matters, appropriation in art in the United States than in Europe.[10] I would also emphasise that case law in the United States has changed significantly in the past twenty years. Another important factor is the inconsistency of case-law is that it is difficult to understand certain questions -especially for lawyers educated on the basis of Continental/Roman law. Recent cases – especially *Fairey v The Associated Press* (a claim that an iconic Obama poster infringes AP photo copyright) and *Friedman v Guetta* (a copyright case involving an altered photograph) – also show that fair use through litigation is ineffective. Many factors are taken into consideration, but there are no clear guidelines for visual artists, and probably a balance should be established for the future.

As Professor PETER JASZI states, "KOONS may have caught the very leading edge of a profound wave of change in the social and cultural conceptualisation of copyright law. This would specifically mean the emergence of an understanding that is at least incipiently »postmodern« in nature"[11] and "(...) the overall trend of court decisions between 1989 and 2005 (and the present) is

[7] Lydiate, Henry: Appropriation, Art Monthly, Issue 285, April 2005.

[8] In the United Kingdom (UK), a more conservative approach is taken by copyright law. Fair dealing with a copyright work is permitted for the specific and limited purposes of: non-commercial research; private study; criticism or review of a published work; or news reporting current events (but not using photographic works). Also unlike the US, UK law offers no statutory guidance on what is fair and so UK courts have developed a set of judge-made considerations for deciding whether any dealing is fair on the facts of each case: its purpose, nature and amount; alternatives to the dealing; the nature of the copyright work in question; and the effect of the dealing on the copyright work. There are no UK court decisions directly on Appropriation Art. The general approach of UK courts to fair dealing was established by the High Court in 1972: "it is not a fair dealing for a rival in trade to take copyright material and use it for his own benefit" – the so-called Seventh Commandment copyright rule (thou shalt not steal). Source: Lydiate, Henry: Artquest, http://www.artquest.org.uk/articles/view/appropriation-art-and-fair-uses1 [26.11.2012]

[9] Dusollier, Séverine: Le droit d'auteur et l'appropriation artistique, Art'Icle, Février 2006, p. 8–9. and Entrialgo, Frédérique: La notion d'auteur comme objet de l'art, ESBAM [enseignements théoriques] – 2005/2006

[10] Although there are relatively few cases that address fair use in the visual arts because most disputes are settled out of court – likely because of the uncertainty as to which legal standard a court might apply. For the cases that do go to trial, there is no consistency in the holdings to create precedential guidelines for future would-be fair users. See Burr, Sherri L.: Artistic Parody: A Theoretical Construct, 14 Cardozo Arts & Ent. L. J. 65, 67 (1996).

[11] Jaszi, Peter: Is There Such a Thing as Postmodern Copyright? Tulane Journal of Technology and Intellectual Property (Fall 2009), 12 Tul. J. Tech. & Intell. Prop. 105.

to allow greater latitude for the claim of the new artwork being transformative". "There is more sympathy in the legal environment – maybe it has gone too far"[12] said ROBERT J. KASUNIC, principal legal adviser at the U. S. Copyright Office in Washington commenting on the changing of case law.

Developments in the XXI century have reached the art world and artists as well. Originality, authenticity and creativity do not have limits; newer solutions and techniques come to the surface, artists are influenced by technology as much as by society itself. The world is on a constant fast track: to become unique and original has always been the main objective of the artist: and the law should follow the changes and adapt to the new circumstances.

As an artist's use of a new medium to create a different art form, developments in the new digital information technologies and new techniques of fabrication from the biological and material sciences will change our world and the ways in which we relate to them. These changes are likely to be reflected in the art world. As in the past, artists and their art will be the vanguard of creating a new culture in which we live. The importance of context and of artists' intentions gave rise to the "appropriation" of art as the subject of another artist's art, and the issue of whether art could be rightly understood if its original context were changed or ignored. It further challenges traditional notions of copyright and of moral rights, and raises the question of whether art belongs exclusively to its original cultural context or it should be considered outside of that context.[13]

2. Appropriation in art

Appropriation in the arts is the use of pre-existing objects or images with little or no transformation applied to them.[14] Although it has always been

[12] Grant, Daniel: Color This Area of the Law Gray, Wall Street Journal, January 29, 2009.

[13] Shapiro, Daniel: What The New Millennium Might Bring, 19 Cardozo Arts & Ent. L. J. 105

[14] Raphael's Judgment of Paris (c 1515) triggered one of the most sustained and substantial sequences of copying and counter-copying in Western Art. Raphael's painting became lost but his employee, Marcantonio Raimondi, made an etched copy of it which survived. A few years after the copy was made, the general demand for copies of the original work was so great that Marco Dente da Ravenna made a slavish copy of it. Three centuries later, Manet used part of Raphael/Raimondi's original as the basis for his work Le déjeuner sur l'herbe. Manet used the group of three figures in the bottom right-hand corner of the original work as the heart of his new work, updating their clothing to contemporary garb and adding the naked women. Nearly a century later, Picasso paraphrased Manet's work in an extensive series of paintings, drawings, sculptures and linocuts he executed between 1959 and 1961, Les Dejeuners. The classic case of appropriation art in recent years is Rogers v. Koons, 751 F. Supp. 474 (S. D. N. Y. 1990) aff'd 960 F.2d 301 (2d Cir. 1992), *see* Leibovitz v. Paramount

present in the history of art, the movement took a new start in the United States in the 1970s-80s.

Appropriation can be understood as "the use of borrowed elements in the creation of a new work". Historically artists have borrowed and copied existing expression without objection or conflict. In the visual arts, "to appropriate" means to properly adopt, borrow, recycle or sample aspects (or the entire form) of man-made visual culture. Other strategies include "re-vision, re-evaluation, variation, version, interpretation, imitation, parody or allusion". Appropriation as we have already mentioned above can also consist of a three-dimensional work (for example sculpture) created from a two-dimensional artwork (as a cartoon, photograph, drawings, etc.) Essentially the new artwork recontextualises or transforms whatever it borrows to create the new work.

Often, the artist's technical skills are less important than his/her conceptual ability to place images in different settings and, thereby, change their meaning. Appropriation is an accepted way of creation, as ROBERT MOTHERWELL[15] said: "Every intelligent painter carries the whole culture of modern painting in his head. It is his real subject, to which anything he paints is both a homage and a critique, and everything he says is a gloss". Appropriation art has been commonly described "as getting the hand out of art and putting the brain in".[16] Some appropriation art does not implicate copyright law at all. For example, MARCEL DUCHAMP exhibited ready-made objects such as a urinal, a bicycle wheel, and a snow shovel as works of art. However, when the borrowed image is under copyright protection, appropriation art risks infringing the rights of the copyright owner.[17]

The appropriation artists are interesting because their authorship relation to their work appears to be compromised from the start by the inclusion of large components of other people's artworks, sometimes almost unmediated. Our traditional conception of the artist holds artists responsible for every aspect of

Pictures Corp., 137 F.3d 109 (2d Cir. 1998) pp. 474 (S. D. N. Y. 1990), among others. Source: http://www.law.harvard.edu/faculty/martin/art_law/image_rights.htm [25.11.2012] and Entrialgo, Frédérique: La notion d'auteur comme objet de l'art, ESBAM [enseignements théoriques] – 2005/2006

[15] American Abstract Expressionist painter (1915–91)

[16] Regarding appropriation Andrea Blanch, photograph and plaintiff in the case of Blanch v. Koons, in her blog states that "I think there should be more consideration for the original artist and the art that is appropriated. It is very possible that Koons' honest intention was to make a cultural statement, but I still believe that it's not good enough. If I were dead, fine. But I'm a living person, and he should have asked my permission. Bottom line". http://andreablanchblog.com/?s=koons&.x= 0&.y= 0 [24.11.2012]

[17] Landes, William M.: Copyright, Borrowed Images and Appropriation Art: An Economic Approach (December 2000). U Chicago Law & Economics, Olin Working Paper No. 113. Available at SSRN: http://ssrn.com/abstract= 253332 [24.11.2012]

their creations: as ERNST GOMBRICH[18] suggested, "every one of [an artwork's] features is the result of a decision by the artist".[19]

3. The lawsuit Blanch v. Koons[20](2006)

On commission from the defendants, the Deutsche Bank AG, a German corporation, and The Solomon R. Guggenheim Foundation, a New York non-profit corporation, defendant JEFF KOONS created a collage painting, initially for display in Berlin, Germany, in which he copied, but altered the appearance of part of a copyrighted photograph taken by the plaintiff ANDREA BLANCH. After seeing the painting on subsequent display at the Guggenheim museum in New York City, BLANCH brought an action for copyright infringement in New York (Southern District Court). The district court found in its judgment that KOONS's appropriation of BLANCH's photograph was fair use.[21]

To create the artwork in question (named "Niagara",[22] part of seven paintings in total, the „Easyfun-Ethereal" paintings) KOONS culled images from advertisements or his own photographs, scanned them into a computer, and digitally superimposed the scanned images against backgrounds of pastoral landscapes. He then printed colour images of the resulting collages for his assistants to use as templates for applying paint to billboard-sized, 299.7 x 431.8 cm canvasses. The artwork in question was exhibited at the Deutsche Guggenheim Berlin from October 2000 to January 2001.[23]

[18] Sir Ernst Hans Josef Gombrich (1909 –2001) was an Austrian-born British art historian. He is the author of many works of cultural history and art history, including The Story of Art, a book widely regarded as one of the most accessible introductions to the visual arts.

[19] Irvin, Sherri: Appropriation and Authorship in Contemporary Art. British Journal of Aesthetics 45 (2005), 123–137.

[20] 396 F. Supp. 2d 476, 479 (S. D. N.Y 2005)

[21] Ibid.

[22] "Niagara" consists of fragmentary images collaged against the backdrop of a landscape. The painting depicts four pairs of women's feet and lower legs dangling prominently over images of confections -a large chocolate fudge brownie topped with ice cream, a tray of donuts, and a tray of apple danish pastries – with a grassy field and Niagara Falls in the background. The images of the legs are placed side by side, each pair pointing vertically downward and extending from the top of the painting approximately two-thirds of the way to the bottom. Together, the four pairs of legs occupy the entire horizontal expanse of the painting (396 F. Supp. 2d 476, 479 (S. D. N.Y 2005)).

[23] The photograph depicts a woman's lower legs and feet, adorned with bronze nail polish and glittery Gucci sandals, resting on a man's lap in what appears to be a first-class airplane cabin. The legs and feet are shot at close range and dominate the photograph. Koons inverted the orientation of the legs so that they dangle vertically downward above the other elements of "Niagara" rather than slant upward at a

KOONS drew the images in "Niagara" from fashion magazines and advertisements. One of the pairs of legs in the painting was adapted from a photograph (Silk sandals by Gucci) by plaintiff ANDREA BLANCH, an accomplished professional fashion and portrait photographer.[24] The BLANCH photograph used by KOONS in "Niagara" appeared in the August 2000 issue of Allure magazine. KOONS did not seek permission from BLANCH or anyone else before using the image.[25] [26]

In first instance the court found on November 1, 2005 that KOONS's "Niagara" did not infringe BLANCH's "Silk Sandals" because its use of the image from "Silk Sandals" constituted fair use. The court determined that the purpose and character of KOONS's use was "transformative" and therefore favoured by copyright law. BLANCH's copyrighted work was "banal rather than creative" and so the nature of the copyrighted work weighed in favour of KOONS and the other defendants. Although the women's legs are the "focal point of interest" in BLANCH's photograph, the image is of limited originality, so "the amount and substantiality of the portion used in relation to the copyrighted work as a whole" was neutral between the parties. Further, BLANCH's photograph could not have captured the market occupied by "Niagara," so that the final factor, the effect of the use upon the potential market for the copyrighted work favoured the defendants. Based on its conclusion, each of the statutory factors concerning fair use either favoured the defendants or was neutral between the parties.[27]

BLANCH appealed against the judgment and the Appeal Court also held that artist's use of the photograph was fair use.

4. The discussion: the fair use doctrine and art

While there may be evidence of copying of a copyrighted work, not all copying is legally actionable.[28] One of the rights accorded to the owner of copyright is the right to reproduce or to authorise others to reproduce the work

45-degree angle as they appear in the photograph. He added a heel to one of the feet and modified the photograph's coloring. The legs from "Silk Sandals" are second from the left among the four pairs of legs that form the focal images of "Niagara." (396 F. Supp. 2d 476, 479 (S. D. N.Y 2005)

[24] During her career of more than twenty years, Blanch has published her photographs in commercial magazines, in photography periodicals and collections; and in advertisements for clients selling products.

[25] 396 F. Supp. 2d 476, 479 (S. D. N.Y 2005)

[26] Allure paid Blanch $750 for Silk Sandals. For Niagara, Koons reported receiving $126,877, and in 2004 Sotheby's appraised his painting at $1 million.

[27] Ibid.

[28] Copyright Litigation Handbook (Database updated October 2012) (edited by: Dowd, Raymond J.), Part II. Litigation, Chapter 13. Answer and Defenses, II. Reviewing Defenses, Copyright Litigation Handbook § 13:22 (2nd ed.)

in copies. This right is subject to certain limitations.[29] One of the more important limitations is the doctrine of "fair use".

The doctrine of fair use has developed through a substantial number of court decisions over the years and has been codified in section 107 of the copyright law. As the Supreme Court explained in 1994, "[f]rom the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfil copyright's very purpose, '[t]o promote the Progress of Science and useful Arts." The fair use doctrine is critical to prevent "rigid application" of copyright law protections from "stifl[ing] the very creativity which that law is designed to foster."[30]

The fair use doctrine creates a limited privilege for those other than the copyright owner to use the copyrighted work in a reasonable manner.[31] Fair use is an equitable doctrine that permits several specific uses of a work that are not infringing uses; for example, one sub-category of the fair use doctrine is parody. Under the fair use doctrine, an author can use the work of another author without either payment to the copyright owner or the permission of the copyright owner. In effect, the fair use doctrine serves as a form of compulsory license and permits uses that have not otherwise been licensed.[32]

The four-part test[33] can be summarized as follows: in determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;

[29] Sections 107 through 118 of the copyright law (title 17, U. S. Code); http://www.law.cornell.edu/uscode/text/17/107: [25.11.2012]
§ 107. Limitations on exclusive rights: Fair use: (…) the fair use of a copyrighted work, including such use by reproduction in copies (…) or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.
[30] Fisher, William W., III; Cost, Frank; Fairey, Shepard; Feder, Meir; Fountain, Edwin; Stewart, Geoffrey; Sturken, Marita: Reflections on the Hope Poster Case, Harvard Journal of Law & Technology Spring, 2012 (25 Harv. J. L. & Tech. 243)
[31] Hustler Magazine Inc. v. Moral Majority Inc., 796 F.2d 1148, 13 Media L. Rep. (BNA) 1151, 230 U. S. P. Q. 646 (9th Cir. 1986)
[32] Quentel, Debra L.: "Bad Artists Copy, Good Artists Steal": the Ugly Conflict between Copyright Law and Appropriationism." 4 UCLA Entertainment Law Review 4 (Fall 1996): 39–80.
[33] The four fair-use factors were originally formulated and were later codified under 17 U. S. C. § 107 in 1976. The seminal case in which the Supreme Court analyzed and applied the four fair-use factors was Campbell v. Acuff-Rose Music, Inc., 510 U. S. 569 (1994), *see* Butt, Rachel Isabelle: Appropriation Art and Fair Use, 25 Ohio St. J. on Disp. Resol. 1055

and (4) the effect of the use upon the potential market for or value of the copyrighted work.

The four-part test also allows flexibility through a case-by-case application by the courts.[34] This same flexibility, however, requires courts to make judgments about the original subject matter entitled to protection. Traditional application of the fair use doctrine to visual works of art involves a comparison of the relation of the second work to the first work to determine if infringement has occurred. Fair use requires the court to compare the nature of the first work and the amount taken in relation to the whole. To determine whether two works are substantially similar, the [court] performs a two-part analysis[35] – an extrinsic and an intrinsic test. The "extrinsic test" is an objective comparison of specific expressive elements.[36] The "intrinsic test" is a subjective comparison that focuses on "whether the ordinary, reasonable audience" would find the works substantially similar in the "total concept and feel of the works".[37] In applying the two-part test, the court "inquire[s] only whether "the protectable elements, standing alone, are substantially similar" and "filter[s] out and disregard[s] the non-protectable elements".[38]

However, with artists who appropriate images, the fair use test is inadequate. Historically, appropriation artists, by definition, use the images of their predecessors.[39]

The distinction between what is fair use and what is infringement in a particular case will not always be clear or easily defined. "Neither the examples of possible fair uses nor the four statutory factors are to be considered exclusive".[40] There is no specific number of words, lines, or notes that may

[34] More on fair use in the United States: Beebe, Barton: An Empirical Study of U. S. Copyright Fair Use Opinions, 1978–2005, 156 U. Pa. L. Rev. 549, 579–80 (2008).
[35] The U. S. Court of Appeals for the Ninth Circuit took a two-step approach in 1977 in its leading case Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp. The first step, which establishes probative similarity, is the "extrinsic" step through which courts examine a list of particular criteria to determine the substantial similarity of ideas with the aid of expert testimony and analytic dissection. For the determination of unlawful appropriation, the court refers to an "intrinsic" step, which looks at "the response of the ordinary reasonable person" to determine the substantial similarity of expression; at this stage, the court prohibits the use of expert testimony or dissection. *See* Manta, Irina D., Reasonable Copyright (March 15, 2012). 53 Boston College Law Review 1303 (2012). Available at SSRN: http://ssrn.com/abstract= 2022783 [29.11.2012]
[36] Cavalier v. Random House, Inc., 297 F.3d 815, 822 (9th Cir. 2002)
[37] Kouf v. Walt Disney Pictures & Televison, 16 F.3d 1042, 1045 (9th Cir. 1994)
[38] Cavalier v. Random House, Inc., 297 F.3d 815, 822 (9th Cir. 2002)
[39] Beebe, Barton: An Empirical Study of U. S. Copyright Fair Use Opinions, 1978–2005, 156 U. Pa. L. Rev. 549, 579–80. (2008)
[40] Peter Letterese And Associates, Inc. v. World Institute Of Scientology Enterprises, 533 F.3d 1287, 1308, 87 U. S. P. Q.2d 1563 (11th Cir. 2008); Campbell, 510 U. S. at

safely be taken without permission. Acknowledging the source of the copyrighted material does not substitute for obtaining permission. Copyright protects the particular way authors have expressed themselves. It does not extend to any ideas, systems, or factual information conveyed in a work.[41] The fair use doctrine, as stated by the court in another procedure, also involving – and referred to several times later on in the present essay – a use of a photograph by KOONS "permits other people to use copyrighted material without the owner's consent in a reasonable manner for certain purposes".[42]

Finally it shall be noted that "[c]ourts have concluded that the scope of fair use should be broader, even for imaginative works, including artwork, if the art has been publicly released by the artist".[43]

Let us examine the artwork based on the criteria of fair use, taking into consideration the judgment of the court of appeal.

In general, the practice of fair use should be demonstrated by showing that proper credits were given to the author and that the portions reproduced were for a limited purpose not in direct competition with the author. The manner of proving fair use at a trial is by direct evidence showing several elements.[44]

4.1 The purpose and character of the use

The first – the purpose and character of the use–is typically determined by looking at the issue whether the defendant's use of the plaintiff's work was "transformative" – that is, whether the defendant used the plaintiff's work for some new and different purpose, or whether the defendant's use merely supplanted the plaintiff's work. In resolving the question of transformativeness, much seems to depend on how broadly or narrowly the purposes of the two works are defined, but that categorisation is hardly ever accompanied by any discussion of the proper level of generality.[45] It is a very difficult question because no single interpretation of art is ever right, not even the artist's own. He or she can tell us the intent of the work, but the actual meaning and significance

577–78, 114 S.Ct. at 1170–71; Greenberg v. National Geographic Soc., 533 F.3d 1244, 1281, 87 U. S. P. Q.2d 1768 (11th Cir. 2008)

[41] See also: http://www.law.cornell.edu/uscode/text/17/107 [24.11.2012]

[42] Rogers v. Koons, 960 F.2d 301, 308 (2d Cir. 1992)

[43] Kelly v. Arriba Soft Corp., 336 F.3d 811, 820, 67 U. S. P. Q.2d 1297 (9th Cir. 2003); *see* also Art, Artifact, Architecture and Museum Law § 7:108

[44] American Jurisprudence Trials (Database updated December 2012), Copyright Infringement Litigation (edited by Palo, Catherine), J. D. 77 Am. Jur. Trials 449 (Originally published in 2000)

[45] Boyden, Bruce E.: Levels of Transformativeness, June 15, 2011, http://law.marquette.edu/facultyblog/2011/06/15/levels-of-transformativeness/ [25.11.2012]

of the art, what the artist achieved, is a very different matter,[46] the courts' consideration and the balancing of the facts is a difficult task.

According to the court the purpose and character of KOONS's use was "transformative" and therefore favoured by copyright law. The use of the photograph was transformative, since it was used as part of artist's commentary on the social and aesthetic consequences of mass media. The artist copied a reasonable portion of the photograph to fulfil his purpose of conveying the "fact" of the photograph to viewers, and his use had no deleterious effect upon the potential market for or value of the photograph. The court of appeal in its judgment states: "the purpose of the investigation is whether the new work merely "supersedes the objects" of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message, in other words, whether and to what extent the new work is "transformative" (…). According to the case-law "ordinarily reproducing work in a different medium is not transformative". But "if the purpose and function is changed by the new medium, then transformation may be sustained.[47]

Such transformative works thus lie at the heart of the fair use doctrine's guarantee of breathing space". Copyright law does not exist in this country to reward the labour of the artist, but instead assures the artist that their original expression will be protected, while at the same time encourages others to build upon that artist's ideas by transforming that original expression into something new.[48] By forcing the viewer to see something new in something old and commonplace, the appropriation artist transforms the original work into art with a new "expression, meaning [and] message.[49]

KOONS asserted – and BLANCH did not deny it – that his purposes in using BLANCH's image are sharply different from BLANCH's goals in creating it. "I want the viewer to think about his/her personal experience with these objects, products, and images and at the same time gain new insight into how these affect our lives". The sharply different objectives that KOONS had in using, and BLANCH had in creating, "Silk Sandals" confirm the transformative nature of the use.[50]

If "the secondary use adds value to the original – if [copyrightable expression in the original work] is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings –

[46] Sister Wendy Beckett (born 1930-), South African-born British nun

[47] Elvis Presley Enterprises, Inc. v. Passport Video, 357 F.3d 896 (9th Cir. 2004)

[48] Butt, Rachel Isabelle: Appropriation Art and Fair Use, 25 Ohio St. J. on Disp. Resol. 1055

[49] Campbell v. Acuff-Rose Music, Inc., 510 U. S. 569, 579 (1994).

[50] Blanch v. Koons, 467 F.3d 244

this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society".[51]

In the frame of the first factor the court examines the commercial use as well. Copies made for commercial or profit-making purposes are presumptively unfair. "The crux of the profit/non-profit distinction is not whether the sole motive of the use is monetary gain[,] but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."[52]

In the present case, KOONS made a substantial profit from the sale of "Niagara". Deutsche Bank paid KOONS $2 million for the seven "Easyfun-Ethereal" paintings. KOONS' net compensation attributable to "Niagara" was $126,877. Allure paid BLANCH $750 for "Silk Sandals." Although BLANCH retains the copyright to the photograph, she has neither published nor licensed it subsequent to its appearance in Allure. At her deposition, BLANCH testified that KOONS's use of the photograph did not cause any harm to her career or upset any plans she had for "Silk Sandals" or any other photograph in which she has rights. She also testified that, in her view, the market value of "Silk Sandals" did not decrease as the result of KOONS's alleged infringement.[53]

"Whether [the] use [in question] is of a commercial nature or is for non-profit educational purposes" is an explicit part of the first fair-use factor.[54]

The court of appeal stated that "we do not mean to suggest that the commercialism of the use by the secondary user of the original is not relevant to the inquiry, but here, since the "new work" is "substantially transformative," "the significance of other factors, [including] commercialism, are of [less significance]". We therefore "discount [...] the secondary commercial nature of the use."

4.2 The nature of the copyrighted work

Although the short story writer and novelist DONALD BARTHELME once said that "...the principle of collage is the central principle of all art in the 20th century", that doesn't mean that all collage, artwork using different kind of visual art under copyright protection will not constitute copyright infringement.

The court of appeal recalled that it "calls for recognition that some works are closer to the core of intended copyright protection than others, with the

[51] The Supreme Court noted in the Campbell case, however, a finding of transformativeness „is not absolutely necessary for a finding of fair use" Campbell, 510 U. S. at 579

[52] Gorman, Eric D.: Appropriate Testing and Resolution: How to Determine if Appropriation Art is Transformative „Fair Use" or Merely an Unauthorized Derivative? 43 St. Mary's L. J. 289

[53] Blanch v. Koons, 467 F.3d 244

[54] 17 U. S. C. § 107(1)

consequence that fair use is more difficult to establish when the former works are copied[55]" and "the next fair use factor asks what is the nature of the work that has been copied. Where the original work is factual rather than fictional the scope of fair use is broader." Whether the original is creative, imaginative, or represents an investment of time in anticipation of a financial return also should be considered.[56]

The court of appeal disagreed with the district court's characterisation of BLANCH's photograph as "banal rather than creative." Accepting that "Silk Sandals" is a creative work, though, it does not follow that the second fair-use factor, even if it somewhat favours BLANCH, has significant implications on our overall fair-use analysis, "the creative nature of artistic images typically weighs in favour of the copyright holder".

4.3 The amount and substantiality of the portion used in relation to the copyrighted work as a whole

Factors considered in determining whether the use of a copyrighted work is fair include the amount and substantiality of the portion used in relation to the copyrighted work as a whole.[57] The above is the third factor. The question is whether "the quantity and value of the materials used are reasonable in relation to the purpose of the copying"[58] and [t]he analysis is both quantitative and qualitative".[59] It is also interesting to mention, as the court stated earlier, that "(...) reproduction of a work in its entirety may sometimes be fair[60] and the fact that the portion of the copyrighted work used constitutes an insubstantial portion of the infringing work does not justify a finding of fair use.

The question is whether, once KOONS chose to copy "Silk Sandals", he did so excessively, beyond his "justified" purpose for doing so in the first place-whether the use was "reasonable in relation to the purpose of the copying."[61] It seemed to the court that KOONS'S copying of "Silk Sandals" was indeed reasonable when measured in the light of his purpose, to convey the "fact" of the photograph to viewers of the painting (...) and in the light of the quantity, quality, and importance of the material used.

[55] Campbell, 510 U. S. at 586, 114 S.Ct. 1164.

[56] Rogers v. Koons, 960 F.2d 301, 309 (2d Cir. 1992)

[57] Corpus Juris Secundum (Database updated September 2012), Copyrights and Intellectual Property, Karl Oakes, J. D. V. Rights Conferred; Infringement, Other Violations, and Remedies, A. In General, 3. Fair Use

[58] Blanch v. Koons, 467 F.3d 244

[59] Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U. S. 539, 105 S. Ct. 2218, 85 L. Ed. 2d 588 (1985)

[60] Hustler Magazine, Inc. v. Moral Majority, Inc., 606 F. Supp. 1526 (C. D. Cal. 1985), judgment aff'd, 796 F.2d 1148 (9th Cir. 1986).

[61] Blanch v. Koons, 467 F.3d 244

4.4 The effect of the use on the potential market for or value of the copyrighted work

"In considering the fourth factor, our concern is not whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives, but whether the secondary use usurps the market of the original work".[62] Blanch acknowledges that she has not published or licensed "Silk Sandals" subsequent to its appearance in Allure. She had never licensed any of her photographs for use in works of graphic or other visual art and KOONS'S use of her photograph did not cause any harm to her career or upset any plans she had for "Silk Sandals" or any other photograph, nor had the value of "Silk Sandals" decreased as a result of Koons's alleged infringement.

In the light of these admissions, it is plain that "Niagara" had no deleterious effect "upon the potential market for or value of the copyrighted work."

As we can conclude, all fair-use factors greatly favoured KOONS. By recontextualising the image, KOONS had, in fact, altered and transformed it in an attempt to force viewers to see the original work and its significance differently. The doctrine of fair use, therefore, could properly be executed since KOONS's use of BLANCH's photograph transformed the expression of the art.[63]

5. Conclusion

"I've got nothing to express! I simply search for images and I invent. I invent... only the image counts, the inexplicable and mysterious image, because all is mystery in our life."[64]

RENÉ MAGRITTE's particular style of surrealism has become a favourite, with his works appearing in advertising and on album covers and book jackets. Whilst most people assume that these images were his own invention, many were, in fact, sourced from film posters, scientific journals and literature. Appropriation is a form of cultural plundering that is prominent in much of contemporary art today – but it also pervades the work of RENÉ MAGRITTE. Many of the themes and motifs in his art derive from writers such as the surrealist anti-hero LAUTRÉAMONT, LEWIS CARROLL and EDGAR ALLAN POE, and from the work of other artists such as DERAIN, PICASSO and DE CHIRICO, as well as from the regular recycling of elements of his own paintings.[65]

[62] NXIVM Corp., 364 F.3d at 481–82.

[63] Gorman, Eric D.: Appropriate Testing and Resolution: How to Determine if Appropriation Art is Transformative "Fair Use" or Merely an Unauthorized Derivative? 43 St. Mary's L. J. 289

[64] Rene Magritte, interview with Maurice Bots (1951)

[65] Matheson, Neil: Something Borrowed... Something New, Tate Etc. no 22, 50–7 Summer 2011

As we can see from the present paper, appropriation has always been present in the history of art, and we can affirm that it is a well-established way of artistic expression, not only as a movement that has developed different kinds of technique, but the legal qualification of these acts, as copying and/or using an artwork have significantly changed. Naturally many types of artwork exist, with indefinite possibilities of use, and so, once more, we cannot give a uniform legal opinion: the fair use test is inadequate for works of art by artists who appropriate images.

Several questions arise, among the most important being: does an artist produce a copy of a given artwork, rather than develop it into a new work of his own? Is there a visual connection between the works? Is one substantially deriving[66] from the other? How does the average person see it?

[66] „Substantial" in this context means qualitatively, not quantitatively. The test is applied by a "non-visual expert" (in other words, the person in the street, not an artist, art historian or curator) by placing the two works side by side and asking whether there is a visual connection: in other words, is the essential shape, form, configuration or perspective of the earlier work substantially present in the later work. If so, there is a connection, and the later work will have failed the "originality" test. As for example: a world of difference between Monet's Le déjeuner sur l'herbe and Picasso's cubist version of it decades later; if Picasso had not made reference to the original in his own title, few people are likely to have made the 'connection'. *See* Lydiate, Henry: Originality, Art Monthly issue 243, March 2001

Fostering Partnership in EU Cohesion Policy for the period 2014-2020*

PÁNOVICS, ATTILA

ABSTRACT *This paper presents an analysis of the Draft General Regulation[1] proposed by the European Commission, and focuses on partnership in the processes of the EU's second largest budgetary area during the 2014-2020 programming period which is crucial in respect of sustainability. It looks at what partnership means in the European context of multi-level governance, and emphasises the importance of effective and efficient partnership as a horizontal principle of European Structural and Cohesion Funds.*

The principle of partnership has, for a long time, been one of the key principles of EU Cohesion Policy, prescribing multi-tier (supranational, national and sub-national) and multi-actor (public authorities, private and civil organisations) participation of different stakeholders in Cohesion Policy-making, throughout the whole programme cycle. Decision-making is thus no longer dominated by an administrative hierarchy, but by complex relations between these actors.

EU funding is a powerful mechanism designed to help the regions in their economic and social restructuring and in promoting economic, social and territorial cohesion and solidarity. EU Funds are one of the most important public financial sources to support public investments in the future financial period. Given their share of the EU budget (more than one-third), Cohesion Policy instruments are key in boosting Europe's economic competitiveness, and creating more and better jobs.

In the design of the financial and operational framework of Cohesion Policy for the period 2014 to 2020, the partnership principle has again gained in importance and also now includes the so-called Partnership Contracts (or Partnership Agreements) between the European Commission and the EU

* The research reported in this paper supported by the European Union and co-financed by the European Social Fund (grant agreement no. TÁMOP-4.2.1.B-10/2/KONV-2010-0002).

[1] European Commission (2011), Proposal for a Regulation of the European Parliament and of the Council of 6 October 2011 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund covered by the Common Strategic Framework and laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1083/2006, COM(2011) 615 final, 2011/0276 (COD), Brussels, 6.10.2011

Member States. The paper identifies the benefits and added value of partnership, and analyses the role and legal nature of the Partnership Contract as a new feature of EU Cohesion Policy proposed by the Commission. Finally, it draws attention to the need for a Code of Conduct on Partnership at European level.

1. Introduction

EU Cohesion Policy[2] has traditionally been considered as a useful tool to advance in the economic integration of the European Union by helping less developed regions in their convergence process with more developed ones. It is founded on the financial solidarity between the EU Member States whose contributions to the EU budget is given to the less affluent regions and vulnerable social groups. It has risen in political and economic significance from the beginning of 1975, and is still crucial for ensuring competitiveness and economic development[3] while taking into account regional specificities. Undoubtedly, without the Cohesion Policy of the EU, economic, social and territorial disparities would be greater across the EU, especially in the less developed regions.

EU Cohesion Policy has been gaining relevance in the European budget since the creation of the European Regional Development Fund (ERDF) in 1975,[4] to become today one of the main instruments of EU intervention. *Structural and Cohesion Funds*[5] (EU funds) account for one third – at €347 billion – of the current EU budget for the period 2007-2013, making this *the second largest spending line* within the EU budget after the Common Agricultural Policy.[6] That is the reason why Cohesion Policy is permanently at the centre of the debate about the effectiveness of the EU budget.

Cohesion Policy must not be seen as merely an instrument for achieving the objectives of sectoral policies. It has been used more and more in relation with other European policies and not only for its original (economic) purpose. It is heavily intertwined with some of them such as Research and Development and

[2] Due to its characteristics Cohesion Policy is often referred as Regional Policy or Regional Development Policy of the EU.

[3] Unfortunately, the EU's different "agendas" have always been formulated in line with a growth paradigm that accentuated and prioritised the quantitative expansion of economies.

[4] OJ L 73., 21.3.1975, pp. 1-7.

[5] Structural Funds are made up of the European Regional Development Fund (ERDF) and the European Social Fund (ESF). The Cohesion Fund, which was set up in 1994, provides funding for environmental projects and trans-European network projects.

[6] EU funds amounted to €344 billion of the total €975 billion EU budget for the 2007-2013 period.

Innovation Policy (R+D+I), Social and Employment Policy, Common Agricultural Policy, Competition Policy, and so on.

European regions are still facing striking economic, social and environmental disparities, partly as a natural consequence of the last two enlargements and the global financial and economic crisis, even though these disparities have shrunk over the past decade through the active contribution of EU Cohesion Policy. EU Cohesion Policy is a major investment tool at the disposal of the EU to boost growth, employment and competitiveness across EU regions, in line with the *Europe 2020 strategy*[7] and the necessity of fiscal discipline. In the light of the current economic situation and the increasing scarcity of public resources, EU financial instruments are expected to play an even stronger role in the 2014-2020 programming period. Moreover, EU funds will have a key role to play in supporting financial instruments that can leverage private investment and so multiply the effects of public finance.

2. The challenge of partnership as a horizontal principle

The concept of "partnership" has many meanings. Generally speaking, it refers to joint activities, and refers to a certain degree of engagement and commitment of the partners and reasonable empowerment. Partnership is *much more than simple cooperation* between different stakeholders. Successful partnership must be based on *a long-term perspective* of real participation, *providing equal opportunities* for other partners to play an active role alongside the public authorities.

Partnership must be seen in close connection with the *multi-level governance* approach in the EU.[8] The principle of partnership, as defined by the Community Strategic Guidelines 2007-2013,[9] is based on reinforced multi-level governance. Multi-level governance – that cannot be limited to "inter-institutional

[7] The Europe 2020 strategy, adopted by the European Council in June 2010, builds on lessons learned from the earlier Lisbon Strategy of the EU, recognising its strengths but addressing its weaknesses. The objective of Europe 2020 is to turn the EU into a smart, sustainable and inclusive economy, delivering high levels of employment, productivity and social Cohesion. The strategy is focused on five ambitious goals in the areas of employment, innovation, education, poverty reduction and climate/energy. European Commission: EUROPE 2020 - a strategy for smart, sustainable and inclusive growth, COM(2010)2020

[8] Marks, Gary: Structural Policy and Multilevel Governance in the EC. In: Cafruny, Alan – Rosenthal, Glenda (ed.): The State of the European Community. Lynne Rienner, New York, 1993 pp. 391-410.; Hooghe, Liesbet (ed.): Cohesion Policy and European Integration: Building Multi-Level Governance. Oxford University Press, Oxford, 1996; Leonardi, Robert: Cohesion Policy in the European Union: The Rebuilding of Europe. Palgrave, London, 2005

[9] There are some other key principles that underpin EU Cohesion Policy: additionality, concentration and programming.

governance" – describes a new model of policy coordination between such actors through vertical and horizontal networks at local, regional, national and EU levels. It helps to reduce coordination and capacity gaps in policy-making in terms of information, resources, funding, administrative and policy fragmentation.[10]

Multilevel governance is necessary to implement partnership with all socio-economic and civil society stakeholders in the framework of "multi-actors governance" at every level.[11] The system of multi-level governance varies between the Member States of the EU and also between regions within the EU Member States. National governments and sub-national actors have different degrees of participation in decision-making and power. For example, the involvement of local and regional authorities will largely depend on the following three factors:

- the political-administrative system of the Member States (centralised or decentralised);
- whether systems of fiscal equalisation are in place;
- the overall financial significance of EU funds for the respective State.[12]

All Structural instruments covered by the EU funds are governed by the general principles of support such as partnership, multi-level governance, equality between men and women, sustainability and compliance with applicable EU and national law. Partnership does not cover only *"vertical" partnership* within the public sphere, i.e. between the European Commission, the Member States, regional, local and other public authorities at different levels. It also implies close and real cooperation between public authorities at national, regional and local levels and with the private and third sectors. Moreover, partners should be actively involved throughout the *whole programme cycle:* preparation, implementation, monitoring and evaluation.

EU legislation is key in defining the scope and application of the partnership principle, since that principle is one of the cornerstones of EU Cohesion Policy. As a horizontal principle, the term 'partnership' requires effective and efficient cooperation between different actors: EU institutions and bodies, national parliaments and governments, public authorities, official consultative structures,

[10] See in particular OECD Policy Brief "Bridging the gaps between the levels of government": http://www.oecd.org/regional/regional-policy/43901550.pdf [31.10.2012]
[11] Cohesion Policy – Play the partnership card, Open letter to the Council, the European Parliament and the European Commission on the Partnership principle in the Common regulation. The full letter can be accessed on: http://www.epha.org/IMG/pdf/FINAL_Joint_letter_Play_thePartnership_Card of__061112.pdf [31.10.2012]
[12] The Partnership Contracts – how to implement multilevel governance and to guarantee the flexibility of Cohesion Policy, Briefing note of the European Parliament's Policy Department Structural and Cohesion Policies, PE 474.553, Brussels, 29.05.2012 p. 9.
http://www.qren.pt/np4/np4/?newsId=1334&fileName=partnerships_contracts.pdf [31.10.2012]

public agencies, private deliverers, academia (universities), research institutes, mass-media, small and medium-sized enterprises (SMEs), business networks, research institutes and clusters, representative bodies such as social partners and a range of non-governmental organisations (NGOs).

Nevertheless, partnership is also a tool for sustainable development (sustainability) that is a main goal of the European Union.[13] Its earliest roots can be found in the Treaty of Rome of 1957, when the European Social Fund (ESF) was set up.[14] The main principles by which it operates were laid down as part of the general reform of the Structural Funds in 1988.[15] The principle of partnership was also established as a common instrument for the Structural Funds.

In the beginning, partnership focussed on traditional economic and social actors only; Council Regulation 1083/2006/EC[16] now lays considerable emphasis on the involvement of the so- called *'civil society organisations'* (CSOs). Partnership includes "any other appropriate body representing civil society": the economic and social partners (the main employer and union federations), environmental partners, NGOs, and bodies promoting gender equality.[17]

Under Article 11 of the General Regulation, Member States shall involve the relevant partners in the different stages of programming. Further, they shall designate the most representative partners at national, regional and local level in the economic, social, environmental or other spheres "in accordance with national rules and practices". Each year, the Commission shall consult the organisations representing the economic and social partners at European level.

3. The advantages and limits of partnership

Partnership and participation form an essential part of EU regional development processes. The balance of EU funding, the number of programmes and the most suitable architecture must be developed in partnership with stakeholders in the Member States and in negotiations with the European Commission.

The advantages attributed to the partnership principle can be summarised as follows:

- enhancing collective commitment and ownership of EU policies;

[13] See Art. 3(5) of the Treaty on European Union (TEU).
[14] See Art. 124 of the Treaty.
[15] See Regulation (EEC) No 2052/1988
[16] Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999.
[17] See Article 11 of Council Regulation 1083/2006/EC

- increasing the visibility of the EU and the added value of EU funds in the Member States;
- giving a higher profile for diverse view-points and knowledge in the programmes (increasing the available knowledge, expertise and view-points in the strategies' design and implementation);
- making EU funds responsive to the needs of actors on the ground;
- strengthening democracy by bringing EU Cohesion Policy closer to the citizens (improving legitimacy);
- ensuring greater transparency and accountability in decision-making processes (and transparency in the allocation of funds fosters correct implementation);
- improving governance and effectiveness of the delivery system of the EU funds (in order to avoid repetition of past mistakes);
- contributing to better efficiency of public expenditure and public policies;
- improving the assessment of the effects of Cohesion Policy;
- developing simplification, particularly in the project selection procedure.

The acknowledgement of partnership is in fact *common across all EU Member States* to a greater or lesser degree. All governments seem to be well aware of the desirability of partnership structures, and the overall implementation of the partnership principle seems to have improved over the years. The application of the partnership principle would have perhaps been expected more in the longer-standing Member States, where the relative importance of EU Cohesion and Structural Funds is lower.

There are several factors leading to the success or failure of the partnership principle in Cohesion Policy. In general, the effectiveness of the different Structural instruments depends on sound policy, regulatory and institutional frameworks. Investments can only have optimal impact if an appropriate policy, legal and administrative framework is in place.

In practice, the implementation of EU funding provides several challenges to the participating actors. These conditions have given rise to a shared management system, between the European, national, sub-national (regional and local) levels. Regional development requires highly complicated decision-making processes, and the capacities of different stakeholders vary widely. Experience shows however that there are wide differences across the Member States on the *application* of the partnership principle, depending on national institutional set-ups and political cultures.

National ministries (especially the national Ministries of Finance), or executive agencies dependent on those ministries are normally the key national administrations supporting, coordinating and sometimes controlling the drafting processes that have been set up in Member States on programming the national development strategies. There is real evidence of a structured dialogue between high and middle level officials from different ministries in the preparation of national development strategies.

There is also clear evidence of a *real desire* by central administrations to reach out to other NGOs as civil society stakeholders. In certain specific programme areas including issues of gender equality or equality for persons with disabilities, environmental concerns, and ethnic minority considerations, the selection of NGOs was relatively straightforward. In such activities NGOs are quite prominent throughout Europe, and enjoy a high reputation for their work among the general public. In other, more horizontal or multi-sectoral areas, such as economic competitiveness, education, unemployment or poverty reduction, the choice of NGOs was occasionally more difficult.[18]

At national level, partnership processes can take place:

- through the involvement of formal consultative mechanisms (such as Economic and Social Committees or Chambers of Commerce),
- through direct participation, and
- quite frequently through a mixture of both approaches.[19]

Partnership is a key principle for programming and implementation of EU Cohesion Policy, but the *impact* of partnership-building so far is limited. Public authority actors always perceive partnership in programming as more or less problematic. From a critical perspective the following major additional requirements have to be taken into account when considering partnership in the programming procedure:

- conflicts of interest,
- lack of guidelines, and
- the often constrained position of local and regional authorities.

There is a general feeling that the partnership process works well at the strategic planning level, but can be less effective when it comes to deciding on actual programmes and projects. It is also often seen as time consuming and requiring extra-effort without a real added value. Civil society organisations (CSOs) always welcome the opportunities to participate in the identification of priorities and the planning and execution of programmes, but the *capacity* of civil society to respond to opportunities remains limited. Only a few NGOs have the necessary structures and staff, while others lack the resources to fully participate in decision-making. This leads some authorities to remark on the relatively small returns they receive in terms of input when compared to the consultation efforts they make, and the growing administrative expenses.

Partnership processes must generally be *encouraged and facilitated* by the pivotal national authorities. In order to mobilise fully all involved, representation of local and regional stakeholders, social partners and civil

[18] Governance and partnership in regional policy, Ad hoc note of the European Parliament's committee on Regional Development, PE 397.245, Brussels, 04.01.2008 p. 5.
http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/pe_397245_/pe_397245_en.pdf [31.10.2012]

[19] Ibid.

society in both the policy dialogue and implementation of Cohesion Policy should be strengthened.[20]

Effective and efficient involvement of all stakeholders should be performed at the earliest stages of the design and adoption of programming documents (Partnership Contracts, Operational Programmes, etc.), so that the recommendations can be discussed by partners in working groups and incorporated before the political decision on approval by national authorities is taken. Finally, particular attention shall be paid to innovative activities in the context of partnership, and continuous capacity-building of the partners is crucial: technical assistance resources should be made available to economic and social partners and civil society in all Operational Programmes (OPs).[21]

4. The new framework of EU Cohesion Policy

EU Cohesion Policy is an EU policy offering substantial added value and has its own *raison d'être*: economic, social and territorial Cohesion. According to Article 174 of the Treaty on the Functioning of the European Union (TFEU), in order to promote its overall harmonious development, the Union shall develop and pursue its actions leading to the strengthening of its economic, social and territorial Cohesion, and in particular shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions such as rural areas, areas affected by industrial transition, and regions which suffer from severe and permanent natural or demographic handicap.

The strategic dimension of EU Cohesion Policy is provided through *Council Regulation (EC) No 1083/2006* (hereinafter: the General Regulation), the Community strategic guidelines on Cohesion (hereinafter: the Strategic Guidelines),[22] the National Strategic Reference Frameworks (NSRFs) and the OPs.[23] The structure of the OPs should also reflect the focus of EU interventions on Europe 2020 objectives.

EU Cohesion Policy plays a pivotal role on the way towards full achievement of the EU 2020 goals, though national public spending cannot only be used to co-finance but also to finance investments which are complementary and linked to EU funded projects. EU Cohesion Policy is implemented through

[20] Fifth report on economic, social and territorial Cohesion, Report from the Commission, November 2010: http://ec.europa.eu/regional_policy/sources/docoffic/official/reports/Cohesion5/pdf/5cr_en.pdf [31.10.2012]

[21] Measures of technical assistance can be aimed at all partners, beneficiaries of the funds and the general public.

[22] OJ L 291/11 OF 21.10.2006

[23] OPs present the priorities of the countries and their regions. The implementation of the OPs is organised by "managing authorities" (MAs) in the Member States.

programmes which run for the duration of the *seven-year budget cycle* of the European Union. The EU budget covers all of the Union's activities, and only complements national budgets. It is the responsibility of the EU Member States to utilise the EU support appropriately and enhance the Cohesion in their countries.

The *Multiannual Financial Framework* (hereinafter: MFF) translates into financial terms the political priorities of the EU for at least 5 years. Article 312 TFEU provides that the MFF is laid down in a regulation adopted unanimously by the Council of the EU after obtaining consent from the European Parliament. It sets annual ceilings for EU expenditure as a whole and for the main categories of expenditure.

The forthcoming Multiannual Financial Framework (MFF 2014-2020) will present the budgetary priorities of the Union for the years 2014 to 2020. The process started with the Commission tabling its proposals for a regulation laying down the next MFF[24] and a legislative package[25] in 2011. These proposals opened a period of negotiation which should conclude with the adoption of the Regulations by the European Parliament and the Council before 2014.[26]

The negotiations on MFF 2014-2020 take place from 2011 to 2013 and involve the European Commission, the European Parliament and the Council, and should take into account the opinions of the European Economic and Social Committee (EESC) and the Committee of the Regions (CoR). Among the policy areas of the EU that the proposed MFF 2014-2020 allocates funding to, economic, social and territorial cohesion is both most important in terms of financial allocation and have been most controversial in negotiations so far.

In principle, it takes 12-18 months to agree on the legal bases for all the multi-annual programmes and projects which will be financed under the MFF. The negotiations were expected to be concluded by the end of 2012. The

[24] COM(2011) 398 final, Brussels, 29.6.2011.

[25] European Commission: Proposal for a Regulation laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund covered by the Common Strategic Framework and laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund, COM(2011)615; Proposal for a Regulation on specific provisions concerning the European Regional Development Fund and the Investment for growth and jobs goal, COM(2011)614; Proposal for a Regulation on the Cohesion Fund, COM(2011)612

[26] Unfortunately, the whole setting and the rather tight timelines make quite clear that in practice the programming task for the period 2014-2020 is going to be a rolling procedure, and the planning for the disbursement of the EU funds available from 2014 onwards has to start in 2012. Operational Programmes (OPs) have to be developed in parallel to the Partnership Contracts and process management and coordination mechanisms will be essential to meet the timelines prescribed by the Draft General Regulation.

Council and the European Parliament should have reached an agreement during 2012 to adopt the new legal bases in 2013.

This means that in order to allow these programmes to start in January 2014, a political agreement on the ceiling in the MFF should be taken no later than 18 months before the framework comes into force. The absence of the new financial framework would considerably complicate the adoption of new programmes. If there is no agreement before the end of 2013, the 2013 ceilings will be extended to 2014, plus a 2% inflation adjustment.[27]

The programming process for the period 2014-2020 foresees two major new elements, and both of them aim at more effective policy coordination between the European Commission and the EU Member States:

- the *Common Strategic Framework* (CSF) at EU level which is intended as an overarching strategic guidance, and
- the *Partnership Contract* at national level which is proposed by the Member State concerned and is subject to approval by the Commission.

In order to promote the harmonious, balanced and sustainable development of the EU, the CSF will translate the Europe 2020 objectives and targets into concrete investment priorities for Cohesion Policy, rural development and maritime and fisheries policy.[28] It contains the EU's top priorities and applies to all EU funds:

- the European Regional Development Fund (ERDF),
- the Cohesion Fund,
- the European Social Fund (ESF),
- the European Agricultural Fund for Rural Development (EAFRD), and
- the European Maritime and Fisheries Fund (EMFF).

All these funds pursue complementary policy objectives and their management is shared between the Commission and the Member States. To be able to deliver greater European added value, they need to both concentrate their support on EU priorities and coordinate with other EU policies and financial instruments.

Where relevant, EU funds should exploit the potential for synergies not only between the five EU funds but also with other EU instruments, such as Horizon 2020,[29] Erasmus for All,[30] or the LIFE programme.[31] As regards programming

[27] http://europa.eu/newsroom/highlights/multiannual-financial-framework-2014-2020/index_en.htm [31.10.2012]

[28] For 2007-13, EU cohesion policy focuses on only three main objectives: 1. Convergence (solidarity among regions), 2. Regional Competitiveness and Employment, 3. European territorial cooperation.

[29] Horizon 2020 is the EU Framework Programme for Research and Innovation.

[30] Erasmus for All is the new programme proposed by the European Commission for education, training,
youth and sport to be started from 2014: http://ec.europa.eu/education/erasmus-for-all [31.10.2012]

architecture, the structure of the OPs should also reflect the focus of EU interventions on Europe 2020 objectives. The balance of funding, the number of programmes and the most suitable architecture must be developed in partnership with stakeholders in the Member States and in negotiations with the Commission.

This Draft General Regulation provides in Article 9 eleven objectives common to all the EU funds, called "thematic objectives", which are directly linked to Europe 2020 strategy and should be translated into concrete actions in the CSF to be adopted by the European Commission. On the other hand, the objectives of Cohesion Policy in the new framework are reflected in the Article 81.2 of the proposed General Regulation:

- "Investment for growth and jobs",
- "European territorial cooperation".[32]

Within the target "Investment for growth and jobs" we can find 3 different types of region by GDP per capita:[33]

1) Less developed regions – those with GDP per capita below 75% of the average GDP of the 27 Member States (EU27);
2) Transition regions[34] – those with GDP per capita between 75% and 90% of the average GDP of the EU27;
3) More developed regions – those with GDP per capita above 90% of the average GDP of the EU27.

5. Partnership Contracts 2014-2020

In *2013*, on the basis of the CSF adopted by the Commission, each Member State will be asked to draw up, in cooperation with its partners and in dialogue with the Commission, a Partnership Contract.[35] In these documents they will assess their development needs and define their national priorities supporting their National Reform Programmes and the achievement of their national targets for delivering on the Europe 2020 Strategy.

The Partnership Contract can be considered to be a *major contractual link* between the Member States and the European Commission. These documents will set out the commitments to concrete actions to deliver the objectives of the Europe 2020 Strategy. Through Partnership Contracts agreed with the Commission, Member States will commit to focusing on fewer investment priorities. They are new methods for cooperating with the Member States that

[31] LIFE is the EU's financial instrument supporting environmental and nature conservation projects. http://ec.europa.eu/environment/life [31.10.2012]

[32] The latter will be financed exclusively by the ERDF.

[33] See Art. 82.2 of the Draft General Regulation.

[34] Transition regions replace the "phasing-out" and "phasing-in" regions of the period 2007-2013.

[35] See Art. 14 of the Draft General Regulation.

will make it easier for all necessary funding to be promptly mobilised and allocated efficiently for the achievement of a resource-efficient and competitive economy delivering social and territorial Cohesion and poverty reduction.

The Partnership Contract should translate the elements set out in the CSF into the national context and set out firm commitments to the achievement of Union objectives through the programming of the EU funds. According to the Draft General Regulation the Partnership Contracts for 2014-2020 will *replace the National Strategic Reference Frameworks* (NSRFs)[36] of the current period, and foresee additional requirements as compared to the NSRFs.[37]

In operational terms, the Commission proposes to conclude Partnership Contracts with each Member State. In 2012 the Commission provided each Member State with a *country position paper* outlining the analysis of the Commission services of the main challenges and funding priorities relevant for the EU funds in the programming period 2014-2020. These position papers, and the ensuing dialogue with the Commission, should serve to guide the elaboration of the Partnership Contract and the OPs both in terms of their content, in particular in relation to the prioritisation of development needs and concentration of support, as well as in terms of the presentation of information.

The contractual quality of the new agreements – compared to the current strategic framework – opens new opportunities for Member States' *binding commitments* towards goals and implementation of Cohesion funding, and the possibility to hold Member States accountable for the commitments made. Member States will outline in their Partnership Contract how they plan to coordinate the different EU funds. Nonetheless, there is *sufficient flexibility* for Member States and regions to focus on investments in line with their own development needs and challenges set out in their National Reform Programmes.

The Contracts require more substantiated elements of policy coordination, compared to the NSRF in the current period, in many respects:

- the Partnership Contracts have to be submitted together with the OPs;[38]
- this should happen within three months after approval of CSF at Union level;[39]
- each Contract should include numerous provisions which represent the result of fairly comprehensive policy coordination.[40]

[36] In the current period NSRF is the name of the overarching guidance document at Member State level.

[37] For example, an integrated approach to territorial development and for the regions most affected by poverty, or a summary assessment of the fulfilment of the ex-ante conditionalities.

[38] Except for the European Territorial Cooperation (ETC) programmes which can be delivered later due to the need for negotiations with neighbouring countries.

[39] According to the Draft General Regulation, the Commission then has three months for revision and in total the adoption procedure should not take longer than six months starting from the delivery of the Partnership Contract to the Commission.

The Partnership Contract will contain notably:

- thematic objectives;[41]
- investment priorities for each thematic objective;
- conditions which will be pre-requisites to EU funding;[42]
- targets which Member States plan to reach by the end of the programming period, as well as performance indicators and milestones.

The intended content of the Contract can be sub-divided into three sections:[43]

- strategy, thematic objectives and indicative financial allocations and also a list of OPs;
- strategies for integrated approaches to territorial development and for regions most affected by poverty;
- arrangements for an effective and efficient implementation.

The Partnership Contract has to outline the application of horizontal principles and policy objectives for the implementation of the EU funds, including the arrangements for the partnership principle as referred to in Article 5 of the Draft General Regulation. The national (and regional) strategies and objectives on which such a Partnership Contract would be based should be the result of a broad consultation process involving all governance levels and stakeholders, including the organised civil society. An indicative list of partners and a summary of the actions taken to involve those partners and their role in the preparation of the Partnership Contract and the progress report[44] must be set out.

6. Conclusions

The European Union is working hard to move decisively beyond the crisis and create the conditions for a more competitive economy with higher

[40] Such as the integrated approaches to territorial development as well as in support of geographical regions with the highest levels of poverty, or the main results and financial allocations according to thematic objectives.

[41] Member States can choose out of a menu of 11 objectives in line with the "Europe 2020" strategy.

[42] Failure to achieve progress may lead to suspension or cancellation of funding. Conditions linked to macro-economic conditions have already existed for the Cohesion Fund, but the process of the suspension of funding will now be more automatic and extended to all funds. The Commission may also decide to suspend all or part of programme payments when the conditions linked to the direct implementation of the policy were not fulfilled by the agreed date.

[43] Each of these parts includes several sub-sections.

[44] By 30 June 2017 and by 30 June 2019, the Member State shall submit to the Commission a progress report on implementation of the Partnership Contract as at 31 December 2016 and 31 December 2018 respectively (as defined in Article 46 of the Draft General Regulation).

employment. In the coming years Europe has to tackle its Structural weaknesses, including thorough Cohesion Policy interventions and targeted investments notably in R&D, innovation, education and technologies that are beneficial for all sectors in acquiring competitiveness.

EU Cohesion Policy has consistently proved its added value for the EU. It is traditionally regarded as the expression of solidarity among regions. Cohesion Policy benefits the entire EU by strengthening the internal market and increasing economic convergence to ensure a financially stable, competitive and prosperous Europe and thus enhance the welfare of citizens. Nevertheless, it must be noted that its impact is often difficult to measure.

Regional policy is uniquely placed to contribute to the delivery of the Europe 2020 Strategy's objectives as a *'place-based policy'* which promotes multi-level governance and public-private partnerships within integrated strategies. Cohesion Policy is the most important investment vehicle of the EU to achieve the objectives of the Europe 2020 Strategy.[45] It constitutes the largest EU source of investment in the real economy.

Multi-level governance at European, national, regional and local level and effective cooperation between the various levels of government are fundamental to ensuring the quality of the decision-making process, strategic planning, improved absorption capacity of EU funds and therefore the successful and efficient implementation of EU Cohesion Policy. The legislative proposals of the European Commission underline the need for an effective involvement of public and private stakeholders in EU Cohesion Policy. The Commission went beyond simple acknowledgement of partnership, committing itself more during programme planning and implementation to truly open-ended participatory processes where the actual outcome really remains open.

The Commission strongly believes that genuine and profound partnership greatly improves the effectiveness and overall success of the EU's Cohesion Policy, and the new Cohesion Policy proposals represent a new approach with improvements in several areas. Nevertheless, EU funds can only have their optimal impact if an appropriate policy and a legal and administrative framework are in place.

EU legislation *still leaves too much room* for national interpretation and implementation of the partnership principle. Successful partnership still relies largely on whether a tradition of consultation and participation is part of the national and political culture. Major obstacles, which vary from country to country, and sometimes also within countries, still remain.

Experience in the current period (2007-2013) shows that some EU Member States have difficulties in absorbing large amounts of EU funds in a limited period of time. At the same time, the financial situation in some Member States has made it more difficult to release funds to provide national co-financing. Those Member States which are the main beneficiaries of the EU Cohesion

[45] In particular for SMEs, sustainability and energy efficiency.

Policy demonstrate low absorption capacity in general, there are delays of projects and the overall assessment is that a good deal of money is left unabsorbed.[46]

EU Cohesion Policy has *very high demands* on the programming period 2014-2020. At a time when public money is scarce, effectiveness and efficacy are more needed than ever. Based on the experience of the previous period, only a broadly drawn partnership system of cooperation and consultation with a relatively high level of experience and expertise disseminated throughout can have largely positive experiences. In these difficult times the imperative to make the most of every euro of public expenditure call for the improvement of the effectiveness with an increased focus on results.

For post-2013 EU Cohesion Policy, programme structures and regulations should facilitate the implementation of the partnership principle. In April 2012, the Commission had presented a *working paper on a European Code of Conduct on Partnership* in order to ensure a stronger involvement of civil society in all phases of Cohesion Policy (project planning, development, monitoring and evaluation).[47] It should be established at European level through a Delegated Act of the Commission,[48] after the adoption of the new General Regulation. The Code of Conduct lays down *minimum requirements* for national authorities to ensure a high quality involvement of partners.

The Commission has presented an outline of the principles that should guide EU countries when they organise the participation of the relevant partners in the different stages of the implementation of the EU funds. A number of stakeholders (regional and local authorities, economic and social partners, NGOs, etc.) have provided reactions to this document.[49]

An integrated approach of Cohesion Policy has to cover all stages of the policy cycle, and require the involvement of all levels of governance (EU, Member States, regional and sub-regional authorities, municipalities), stakeholders and civil society in strategic planning, programming and decision-making processes. Based on the new Code of Conduct, the European Commission will strengthen the propagation of partnership in the Member States, support the wide dissemination of good practice and play a more pro-active role as guardian of this horizontal principle of EU Cohesion Policy.

[46] EU funds must be spent by the end of the second year after their allocation ('N+2 rule').

[47] Commission staff working document, The partnership principle in the implementation of the Common Strategic Framework Funds - elements for a European Code of Conduct on Partnership, SWD(2012) 106 final, Brussels, 24.4.2012

[48] See Art. 290 TFEU

[49] See http://ec.europa.eu/esf/main.jsp?catId=67&langId=en&newsId=8012 [31.10.2012]

The constitutional law approach to publicity and media in the light of social science results*

POLYÁK, GÁBOR

ABSTRACT *Regulatory decisions related to the media, whether of the constitutional court or of the authorities and normal courts of law, include attitudes connected to the function, the effects and the technical and economical environment of the media. Some of these are explicitly reflected in the law or regulation as a result of the decision, whilst others affect decision-making indirectly. However, it is evident that decisions on the responsibility, scope and limits of the media are not independent of the decision-maker's attitude, knowledge and ideas about the media. There are few other areas of law which so obviously necessitate the interdisciplinary approach and consideration of knowledge related to media studies, economics, technology, sociology and the political sciences. The experiences of legislative decision-making, however, confirm the convictions that the preparation of decisions tends not to rely on legal knowledge, that media regulation is fundamentally regarded as a legal issue and that non-legal experience and knowledge play a merely superficial and simplified role in influencing decision-making.*

1. Democratic public opinion

The media and publicity have been defined by the vision of the Hungarian Constitutional Court as 'democratic public opinion'. In practice, the constitutional court makes a somewhat laconic reference to the content of democratic public opinion and the conditions of its implementation. The decisions of the Constitutional Court lead us to conclude that public opinion is democratic if information is 'complete and impartial' or if it is based on 'complete, balanced and realistic' information.[1] Its significance is the fact that 'diverse views are essential in a pluralistic democratic society'. Diverse views enable the independent individual to have a choice and the variety of competing arguments contributes to the early solution of existing social problems.[2] Ultimately, democratic public opinion makes possible the 'grounded participation of the individual in social and political procedures'.[3]

* The research was financed by the Bolyai János Research Scholarship.

[1] Decision 37/1992. (VI. 10.) of the Constitutional Court

[2] Decision 18/2004. (V. 25.) of the Constitutional Court

[3] Decision 30/1992. (V. 26.) of the Constitutional Court

Publicity is therefore the platform of gaining information which is obliged to give and capable of giving an authentic image of the presumed objectivity of reality. The 'individual' is more of a receptive party for publicity rather than its active generator, however, the individual is expected to be a critical appraiser who is capable of expressing an independent point of view. The concept of publicity is linked to a concept of democracy in which alternative decisions and the information required to make decisions are provided by the appointed representatives of the specific points of view, although decisions are always made in front of the widest possible audience following a rational and argumentative debate considering all conflicting points of view. This publicity is successful if, in open and rational debate, it leads to a unanimous decision.

On the other hand, we cannot have sufficient insight into publicity functioning as a political institution if a larger part of public communication is not included in the definition of publicity. If we disregard the actual content of the media filling public space, we end up with a hypothetical construction of public communication and the description of a minor circle of media consumption which scarcely exists in reality.

This is visible in Decree AB 165/2011 (12.20): 'By the end of the 20th century the concept of political publicity – meaning the sphere of operation of the 'press' – was redefined. According to widely accepted views, a depoliticised publicity of consumer culture emerged which seems to be losing regular contact with public life, politics and the practice of political power.'[4] At the same time 'the individual has become a consumer, or, at best, an interactive consumer.' Such expansion of the concept of publicity is an important change in basic legal practice even if the Constitutional Court has hardly drawn any conclusions regarding media regulation.

2. Technological, economic and media-consuming starting points supporting constitutional arguments

During the course of establishing the framework for media regulation, constitutional courts have always relied on non-legal factors, which have helped to give substance to abstract constitutional standards. Typically, in such cases, however, the legislatures do not refer to the results of social science research but simply establish allegedly well-known facts.

Frequency reduction is the factor most often referred-to. This technological factor has had considerable significance in establishing the constitutional regulation of electronic media. Frequency reduction cannot only be interpreted as a technological, but also as a media market factor which imposes significant limits on the possibility of entering the electronic media market. However, in

[4] Decision 165/2011. (XII. 20.) of the Constitutional Court

the 2000s even the Constitutional Court referred to it as a basically outdated technological starting point.

In basic legal practice the effect on behaviour and opinion formation is often referred to as a reason for the establishment of electronic media regulation. Media effect and research into media usage represent an important direction of the results of media science research which appear in the constitutional argument as the justification for the significant effects of electronic and, more recently, the audio-visual media have on the public.

'Democratic public opinion' is ultimately none other than one of the possible interpretations of social publicity which regarding its function and mode of operation is consistent with the theory of JÜRGEN HABERMAS about civil publicity.

The most important professional lesson of the latest Decree (165/2011. (XII. 20.) AB) issued by the Hungarian Constitutional Court is that the Constitutional Court had to face the difficulty caused by the previous outdated arguments concerning the scope of media regulation. However, it does not consider the issue that the considerable importance television has taken on was born in a media environment in which the main feature was scarcity.

It is obvious that television as a medium would take on a different kind of significance if merely a few channels were available to the viewers instead of almost a hundred Hungarian language channels which, as the Constitutional Court points out, are increasingly competitive with other audio-visual services to maintain the viewers' interest. Nowadays, there is no single medium which, in general, has a unique influential force; it might merely influence through its content service. It, however, should not lead to what the legislature have done during the course of passing media law and what the arguments of the Constitutional Court imply, namely, a general expansion of the scope of media regulation with its rigour, including all media. On the contrary, if television is no longer a special medium then there is no need to observe special rules about it, in fact, it is necessary to review all the instruments of media regulation and media politics.

3. Technological and economic conditions

3.1 Pluralism as an answer to scarcity of capacity

The course of change regarding the media system is ultimately determined by the development of communication devices and infrastructure so the history of media can also be interpreted as the history of technology. Further and further media technological advances have direct influence, among other things, on the production of media products, their usage, the functions of the media and the control exercised over it. In this respect, the technological environment is a decisive factor in the legal regulation of the media.

From the perspective of media history and media technology, pluralism – according to the practice of the Constitutional Court, the concept of democratic public opinion – came into existence in a well-defined technical environment. This regulatory principle was established by the various constitutional courts and other bodies protecting fundamental rights at the time of the division of monopoly on radio and television public service in the 1970s and 1980s. The establishment of the media system's framework was indeed essentially characterised by the scarcity of broadcasting facilities: broadcasting radio and television programmes exclusively used terrestrial frequencies – cable broadcasting was not common anywhere until the mid 80s[5] – and frequencies used for that purpose are not widely available anywhere. This technical environment shaped the market of radio and television broadcasting which was strikingly different from the market of printed press.

The significant part of the success which the principle of pluralism enjoyed is due to the fact that, throughout the transformation of the media system in the 1970s and 1980s, it was perfectly capable of creating a balance between economic and public policy interests. It was necessary to help the new actors – commercial and public media – enter the market as well as distribute and use the available transmission capacities under strict regulation. It opened the media market to non-state actors thus allowing freedom of expression in new forums and at the same time it did not limit the state's scope of regulation, in fact, it confirmed it which transformed the state from a factor restricting freedom of expression into a factor actually ensuring freedom of expression.

In its early decisions media regulation was justified by the German Constitutional Court because of its 'special situation' (Sondersituation). The 'special situation' arose because of the scarcity of transmission frequencies and significant financial demand which broadcasting generated. The end of the 'special situation' did not challenge the need for regulation, but 'it might require a larger scale operation and different instruments in a situation where there are inevitably few broadcasters than in a situation where transmission is no longer confined to a few broadcasters.[6] In the Red Lion case law the Supreme Court of the United States justified the constitutionality of the Fairness Doctrine – requiring the disclosure of conflicting opinions – which has since been repealed due to the scarcity of frequencies.[7] The significance of the scarcity of frequencies in media regulation has been acknowledged by the European Court of Human Rights as well but it came to a conclusion even back in 1993 that the scarcity of frequencies and channels do not justify the restriction of broadcasting.[8]

[5] Holznagel, Bernd: Rundfunkrecht in Europa. J.C.B. Mohr, Tübingen, 1996.
[6] BVerfGE 57, 295.
[7] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367. (1969)
[8] Informationsverein Lentia v. Austria (1993. 11. 24.; Ser. A 276)

The Hungarian Constitutional Court stated in 1992 that the regulation of radio and television broadcasting should reconcile the practice of fundamental rights with the scarcity of technological conditions.[9] The issue of the development of communication technologies and their regulatory effects were first addressed in Decree 18/2000. (VI. 6.) AB: 'The highly influential phenomenon of the present era of social and political development is the unprecedented degree of publicity.' This publicity is defined by the continuously widening range of telecommunication, mass communication and multi-communication technology and their previously unimaginable devices and means, accessing information and being informed, the potential and the actually exerted forms of influence. The Constitutional Court clearly stated in Decree 1/2007 (I. 18.) AB that 'the frequency limit argument is becoming less and less technically justified [...] it is not expected to become entirely devoid of purpose but it does not in itself justify the special state regulations (beyond the regulations on printed press) concerning the operation of radio and television broadcasting. Technological changes concerning the media do not simply justify the transcendence of the argument regarding the scarcity of frequencies: rapid technological changes have taken place and are still taking place in the world of information transmission, requiring continuous revision and unobstructed legislation. The result is 'technological development which has brought about a change in the structure of mass communication'.

In the interpretation of media freedom, a kind of technological determinism still prevails: the technological factor plays a decisive role in defining the framework of media freedom. However, not only does technological development widen the range of content services but it also brings about a change in the structure of publicity and the behaviour of the media consumer. In a media environment where each viewer has access to the same limited number of channels, certain content produces a significantly more marked effect than in an environment where viewers are divided or indeed individualised - which, in addition, is based on the conscious selection of content and continuous feedback.

The key features of the current media system are characterised by increased, in fact, unlimited storage capacity, the spread of solutions encouraging user control, feedback and interaction as well as the widespread and cross-border usage of technologies supporting content service. As a result, a gradual change in the roles of the media market is taking place – it becomes less effective to make content service providers comply with any regulation, which increases the significance of content provider network – along with a change in consumer behaviour. However, access to the media system in this environment can be

[9] Decision 37/1992 (VI. 10.) of the Constitutional Court

limited by 'bottlenecks'[10] – technological and economic obstacles – whilst, on the other hand, both access to a wider range of content and the means of control over content can spread only gradually among the various groups in society. All of these factors must be taken into consideration in the course of defining the constitutional framework of the media system.

3.2 Multi-player media market, abundant content supply?

The scarcity of frequency argument was refuted by technological development even in the second half of the 1980s although terrestrial broadcasting remained a dominant factor in the media system until the mid '90s. Cable and satellite television enabled broadcasting a considerably larger amount of content – even across borders – which allowed service providers to choose the most advantageous media regulatory environment.[11] Pluralism, however, remained the most important keyword concerning regulation which did not change even when the online media content becoming more competitive made it obvious that the media system was characterised by abundance and not scarcity. Digital media is characterised by the continuous expansion of data storage, data processing and data transmission capacity and – as emphasised by the Constitutional Court – television programmes are in an almost constant battle with other audio-visual services for the attention of viewers.[12]

There is an ever-present issue concerning media science about how the increasing amount of content represents the widening range of content. The number of competing content services and service providers is not necessarily, in itself, a guarantee that the particular service providers hold distinct political, ideological and cultural views. Moreover, minority views or views unacceptable for the majority are divisive and ultimately threaten viewer ratings contradicting economic rationality.[13] The variety of content supply is limited by the economic competition between commercial content providers – whether financed by advertisements or subscription services – over the same segment of viewers – aged 18-49 – which ultimately results in 'negative quality competition'.[14]

[10] See more about it: Polyák, Gábor: A médiarendszer kialakítása. A piacra lépés és a hozzáférés alkotmányjogi, közösségi jogi és összehasonlító jogi elemzése. HVG-Orac, Budapest, 2010.
[11] Ibid.
[12] Decision 165/2011. (XII. 20.) of the Constitutional Court
[13] As Mihály Gálik stated 'If [...] viewer preferences shift to the centre then the rational programme structure in the model of commercial television is the middle course for every broadcaster even in the case of competition or specifically in the case of an oligopolistic market system.' (Gálik, Mihály: Médiagazdaságtan. Aula, 2003, Budapest)
[14] Gounalakis, Georgios: Medienkonzentrationskontrolle versus allgemeines Kartellrecht. In: Archiv für Presserecht, 2004/5. p. 395.

ARIÑO describes the situation as 'multi-channel paradox': 'the growing number of available channels and the possibility of interactive usage on their own do not ensure the freedom of choice consumers might have.' Firstly, more channels do not necessarily increase diversity; more often than not it creates more of the same kind. Secondly, the decisive factor is not the potentially smaller effect of the media but the actual effect the media have on citizens. The latter can be measured by the number of consumers and not by the number of channels. Viewing habits have not significantly changed in the past few years and the change has not been so radical to support the claim that consumers are now entirely independent of the influence of the media.'[15] BARENDT goes even further by stating that it is public monopoly which best ensures the pluralism of media content.[16] This view is justified by Steiner's model which – if certain conditions are fulfilled – points out 'the paradox according to which the differences in consumer preferences might cause the competition to actually decrease diversity, contrary to what might happen in a monopoly'.[17] Assuming that viewers watch programmes exclusively according to their own preferences, every broadcaster is interested in targeting the larger viewer groups and so the competing services will necessarily create a group of viewers whose preferences appear in none of the services.[18]

However convincing these ideas may sound, they do not consider several factors mainly because they take a previous state of the media system into account, roughly that of the 1990s. The increasing supply of content and greater availability and competitiveness of internet-based content services and the fusion of television and internet content on the level of consumer devices resulted in – although they certainly do not reach every group of users – changes in the media market. According to all available surveys, television is still the most important source of information, although improved internet access has significantly diversified information consumption. According to the solicited research data of the National Media and Communications Authority, 20 per cent of the population use the internet as the main source of information. This research indicates that 63 per cent of the population use the television and 4 per cent use the printing press as the primary source of information.[19] Research solicited by the Standards Media Monitor has revealed that the most

[15] Ariño, Mónica: Versenyjog és pluralizmus az európai digitális műsorszolgáltatásban: az űr kitöltése. In: Gálik, Mihály (ed.): A médiakoncentráció szabályozása, Gondolat Kiadó, Budapest, 2011 p. 204. [Ariño, Mónica Competition Law and Pluralism in European Digital Broadcasting: Addressing the Gaps, Communications & Strategies, no. 54, 2nd quarter 2004]
[16] Idézi Feintuck, Mike – Varney, Mike: Médiaszabályozás, közérdek, törvény. AKTI-Gondolat, Budapest, 2010 p. 87. [Feintuck, Mike – Varney, Mike: Media Regulation, Public Interest and the Law, Edinburgh University Press, Edinburgh, 2006]
[17] Gálik, Mihály: op. cit. p. 274.
[18] Ibid. pp. 274-276.
[19] http://mediatorveny.hu/dokumentum/174/ipsos_kutatas_2011_vegleges.pdf

frequently used sources of information are the largest internet portals, followed by national television and radio.[20] It should be added that the internet sources of information are typically used by people aged under 40 and information consumption is limited to national and civil service media and county newspapers among 70 per cent of the consumers. Television market itself has undergone a major change; thematic channels have strengthened considerably and their overall viewer ratings match those of the general interest channels.[21]

Further possibilities of content transmission have undoubtedly made it easier to enter the media system. The technological and economic obstacles of entering the media system are significantly easier to overcome compared to those of the dual media system but of course it does not mean that every content provider offers equally attractive contents which all have an equal chance of reaching the public. An easier access to the market involves a reduction of costs concerning the production of certain contents even when there are considerable differences between the content services regarding their costs, aims, quality and characteristics and the so-called premium contents (films, sport, live shows) are still only available for the economically stronger service providers. However, it is the expression of opinion on issues connected to public life which reaches the general public at a low cost.

Ultimately, this is leading to the development of a media system in which the variety of the media supply is given and it is present independently from the regulatory means encouraging variety. This, on the other hand, does not mean that every member of the public has an equal chance regarding technology, knowledge and an ability to consciously and critically use the media. These potential limits can become important elements of the future image of publicity and media image, and, instead of encouraging the supply-side of media regulation to strengthen the means of creating diversity, they emphasise the means that enhance the chance of accessibility for the media consumer-side.

4. Media effect

The significance of the regulation of media effect derives from the that, the greater the effect on behaviour and opinion is attributed to it, the more vulnerable is the public considered to be and the greater is the interference found acceptable to counteract that vulnerability. The vulnerability of the public

[20] Mérték Médiaelemző Műhely: Hírfogyasztás, pluralizmus, demokratikus részvétel. A sokszínű tájékozódás esélyei. http://mertek.eu/jelentesek/hirfogyasztas-pluralizmus-demokratikus-reszvetel-a-sokszinu-tajekozodas-eselyei [20.12.2012]
As part of the research people were asked which of the listed media they had chosen the previous week to watch or read political, current and public life news, articles and programmes.

[21] Mérték Médiaelemző Műhely: Válságtünetek – mi történik a magyar médiapiacon? http://mertek.eu/jelentesek/valsagtunetek-mi-tortenik-a-magyar-mediapiacon

highlights the media as a decisive factor in the political, cultural and socialisation processes. The effects of the media can be long- or short-term or planned or unplanned; these effects, according to related research, can range rather widely from propaganda to imparting knowledge, defining reality and creating meaning.[22] 'The analysis of these effects is absolutely necessary for the legislator and the law enforcement to take a position on the definition of the unique responsibility the media assume.'[23]

It was in 2007 when the Constitutional Court first referred to the fact that 'the opinion-forming effect of radio and television broadcasting and the persuasive power of motion pictures, sounds and live coverage are much greater than those of other social information services'.[24] The Hungarian Constitutional Court is not alone among the organisations protecting fundamental rights to express this opinion. For instance, not only did the German Constitutional Court hold its opinion on the effect of broadcasting in 2007 but it came to the conclusion that these effects actually strengthen with the increase and differentiation of the supply.[25] According to this opinion, the widespread effects, relevance and outstanding persuasive power of the electronic media and its credibility, the appearance of empathy and the comfort of availability are all unique threats which necessitate the active formation of media freedom in the interest of protecting the public.[26] The effect the electronic media produce on the public appears in the legislation of the Court of Human Rights as a factor influencing regulation.[27]

FARGO has cited examples of American case law which deal with the effects of violent content on behaviour.[28] In the 'James contra Meow Media' case the appellate court had to make a ruling on whether film makers and video game manufacturers may be held liable for a fatal school shooting. According to the court, in order to claim for compensation, it has to be confirmed that the content producers deliberately or carelessly encouraged the perpetrator. The court ruling did not evaluate the social scientific aspect of media violence; it merely

[22] McQuail, Denis: A tömegkommunikáció elmélete. Osiris Kiadó, Budapest, 2003 p. 367. [McQuail, Denis: McQuail's Mass Communication Theory (6th edition), SAGE Publications Ltd, 2010]

[23] Hoffmann-Riem, Wolfgang: Medienwirkung und Medienverantwortung. In: Hoffmann-Riem, Wolfgang: Wandel der Medienordnung. Reaktionen in Medienrecht, Medienpolitik und Medienwissenschaft, Nomos, Baden-Baden, 2009 p. 684.

[24] Decision 1/2007. (I. 18.) of the Constitutional Court

[25] BVerfG, 1 BvR 2270/05 (11.9.2007) p. 116.

[26] BVerfGE 90, 60.; BVerfGE 97, 228.

[27] Informationsverein Lentia v. Austria 38. bek., Jersild v. Denmark (1994. 09. 23.; Ser. A 298) sec. 31.

[28] Fargo, Anthony L.: Social Science Research in Judge's First Amendment Decisions. In: Reynolds, Amy – Barnett, Brooke (ed.): Communication and Law. Multidisciplinary Approach to Research, Lawrence Erlbaum Associates, Mahwah-New Jersey-London, 2006.

analysed the predictability of the damage it can cause. In the 'Interactive Software Association contra St. Louis County' case the court examined the constitutionality of the Decree according to which the purchase and use of video games require parental approval. According to the judgement based on the testimony of two doctors and the social scientific analyses cited by them, there was indicated a correlation between violent contents and violent behaviour. Thus, it is in the considerable interest of the state to comply with the regulation analysed. The appellate court overruled the judgement,[29] stating, among other things, that the court of first instance relied wrongly on the social scientific data. In its judgement the testimonies stating that children who play violent video games display more aggression, reveal no more than vague generality; part of various other studies cited in the first instance decision are confusing, unconvincing and irrelevant. In another case ('American Booksellers Association Inc. contra Hudnut', 1985) the appellate court found it both contradictory and confusing to interpret the study on the effect of pornographic content on the public.[30] However, American courts tend to exercise caution and consider it justifiable to restrict programmes with sexual content, even in cases when, in the course of the procedure, no social scientific evidence is found about the alleged harmful effects of the media.

The latest decision of the Hungarian Constitutional Court attempts to approach the media effect in a more subtle way. According to the decision, 'further technological development has made the various media types show less separate «media convergence» and so the reasoning behind the effect mechanism cannot force the media content, as it previously did, into categories based simply on the different broadcasting networks transmitting them'. This made the Constitutional Court draw the conclusion that, apart from television, other medium types also cause 'unique effects'. This unique effect – motion pictures, sounds, and live coverage – is the characteristic of audio-visual media content since motion pictures have a unique power of influence over human thinking. On the other hand, the decision points out that, in the case of television and – without any special reason, radio – 'the public is a more passive recipient of the broadcast media content than in the case of any other media device'. Further, 'these media services reach the public simultaneously' and 'currently they reach a significant part of society'. The line of thought supporting the view of the unique nature of television concludes, however, that 'the audio-visual media content has an inherently different way of influencing the public' whether they reach the public via television or other on-demand or online services.

[29] There is a discrepancy between the two judgements regarding the fundamental issue of whether video games fall under the First Amendment or not. According to the district court they do but the appellate court disagrees.
[30] Cited by Fargo, Anthony L. cit. p. 34.

The conclusion is not at all in line with the already simplistic idea about 'television' as a still homogenous service which, regarding audio-visual content, obviously does not put television into the same category as the 'radio' and which does not lose sight of the fact that television compared to other audio-visual services still has unique characteristics. On the other hand, this conclusion is sufficient for the Constitutional Court to treat the traditional television (linear) and on-demand audio-visual services as a unity.

It can be concluded that, in fundamental legal practice and in media regulation in general, the interaction between the media and the public appears exclusively as the effect of the media on the public.[31] However, media studies research – either as an independent field of research or different directions of the research into media effects[32] – distinguishes between media usage and media effect. Media effect basically assumes the public to be passive where the members are exposed to the effects the media exert on them. In contrast, media usage is about an approach supposing a more active interaction between the public and the media. Of course, effect and usage in media consumption are not rigidly separated from each other; BLUMER and KATZ, for instance, started analysing behavioural patterns in media usage in order to understand the effects of the media.[33]

The media effect research has developed and examined several theories ranging from the media as a projectile striking the public causing 'permanent harm'[34] with its messages, to the media whose recipients perceive the messages selectively reinforcing their own beliefs, to the media with messages depending on individual interpretation. The history of media effect research is not unidirectional in the sense that it originated from the idea of a great media effect leading to a more and more limited one. There are several existing different and conflicting theories. The difficulty of an unambiguous stand is clearly seen in the practice of fundamental rights, where television is believed to have a considerable power of influence and can be characterised by a positively passive form of media consumption. MARSHALL MCLUHAN described television – to quote him – 'lukewarm', as a medium which requires active reception on the part of the viewers: the pixels of the imperfect image of the television have to be linked by the viewers.[35] Even if technological development and the growing resolution of receiving sets question the prevalence of viewer activity, the assumption points out that there are several aspects to be

[31] Schweiger, Wolfgang: Mediennutzung. Eine Einführung. VS Verlag für Sozialwissenschaften, Wiesbaden, 2007.
[32] Bajomi-Lázár, Péter: Média és társadalom. Antenna Könyvek, PrinXBudavár, Budapest, 2006.
[33] Cited by Schweiger, Wolfgang: op. cit. p. 60.
[34] Bajomi-Lázár, Péter op. cit. p. 122.
[35] Griffin, Em: Bevezetés a kommunikációelméletbe. Harmat Kiadó, Budapest, 2001 p. 328. [Griffin, Em: A First Look at Communication Theory, 8th edition, McGraw-Hill Humanities/Social Sciences/Language, 2011]

considered when evaluating media effect. In the summary of ROLAND BURKART: 'It would not be surprising if the results of media effect research produced so far made somebody believe that the media are powerless and ineffective contrary to the previous assumption of their omnipotence.'[36]

The most significant – although not necessarily conscious – influence on media regulation and the enforcement of fundamental rights was the cultivation theory of GEORGE GERBNER. This influence was all the more considerable because GERBNER'S research coincided with the first decisions on the media made by the Constitutional Court; it was the media system of the 1970s and 1980s which provided the basis for GERBNER'S research and the decisions of the court. According to cultivation theory the media – specifically television in GERBNER'S research – favours and cultivates particular elements of reality while it overshadows some others.[37] Thus, the media do not simply mediate but also shape reality: the more media content people consume the more likely they are to consider the image from the media as reality in the long run. In addition, television homogenises the public: people consuming a lot of television programmes hold similar opinions about political and economic issues regardless of their social status.[38] Criticising the theory, KORNÉL MYAT claims that 'the theory suggests that television mimics external objective reality so it can be held to account for the mistakes it makes. The objective reality is the right model to which the distorted worldview of the media has to be adjusted.'[39] If that is the case, then the regulation of the media can and should ensure the balance between reality and the image of the media. It perfectly suits the general concept of media regulation and it clearly reflects democratic public opinion even in the interpretation of the Constitutional Court.

According to an assumption made approximately the same time as GERBNER'S theory 'the media – especially the news media – do not primarily tell us what to think, but what to think about.'[40] The so-called agenda theory, formulated by MAXWELL MCCOMBS and DONALD SHAW, attributes a limited influence to the media contrary to the cultivation theory, but it still supposes that the media is able to control public discourse among a wide circle of the public. Therefore, it continues to legitimise the solutions for regulation which protect the public against the one-sided influence of the media. Even if MCCOMBS and SHAW[41] do not claim that agenda-setting is equally effective in

[36] Burkart, Roland: Kommunikationswissenschaft. Böhlau Verlag Wien-Köln-Weimar, 2002.
[37] Cf. Bajomi-Lázár, Péter: op. cit. p. 127.
[38] Griffin, Em: op. cit.
[39] Myat, Kornél: Médiaelméletek és a késő-modern médiakörnyezet. In: Médiakutató 2010/2. p. 51.
[40] Bajomi-Lázár, Péter: op. cit. p. 129.
[41] In Hungarian see:. McCombs, Maxwell E. – Shaw, Donald L.: A tömegmédia témakijelölő funkciója. In: Angelusz, Róbert – Tardos, Róbert – Terestyéni, Tamás (ed.): Média, nyilvánosság, közvélemény, Gondolat Kiadó, Budapest, 2007 pp. 252-261. [McCombs, Maxwell E. –Shaw, Donald L.: The Agenda-Setting Function of Mass Media, Public Opinion Quarterly 1972/2. pp. 167-187.]

the case of every member of the public, they think the more people are interested in a topic without being certain about it, the more receptive they become when it is on the agenda.[42] The so-called selective perception theory can also fit the agenda theory. According to the former members of the public search and receive messages identical to their opinion in the first place. Similarly to these theories, according to the so-called two-stage theory, messages of the media reach a large part of the public through opinion-shaping members of the public. The agenda theory, however, raises the question of who makes decisions on the agenda drawn up by the media.[43] According to the so-called framing theory, the framework of interpretation offered by the media is established by the economic and political elite to maintain their own position.[44] This approach necessitates regulatory action against media concentration.

Research adopting the media usage approach, necessarily believes in a limited behaviour and opinion-shaping ability, and they base their opinion on the idea that the public are, in a way, a conscious part of the selection and interpretation of the media content. In support of this approach the first media scientific idea has been the so-called usage-gratification model.[45] In the 1970s, ELIHU KATZ, JAY G. BLUMLER and MICHAEL GURVICH devised a model[46] according to which people use the media to satisfy some of their needs - most commonly for obtaining information, connection or entertainment. The active selection and reception of media content always serves the achievement of the desired effect. Decisions on media consumption are based on 'functional calculation'[47] and media consumption is initiated by the public and not by the media. According to this approach the media 'on the whole, have only a limited influence on the public because the media adjust to the attitude and ideas of the people using them'.[48] There have been several research studies based on the model a significant part of which justified the assumptions of the model regarding the usage of the latest communication devices and forms.[49] Despite

[42] Griffin, Em op. cit p. 374.
[43] Bajomi-Lázár, Péter op. cit.
[44] Ibid. p. 131.
[45] Bajomi-Lázár, Péter op. cit.; Burkart, Roland: op. cit. p. 222.
[46] In Hungarian see: Katz, Elihu – Blumler, Jay – Gurevitch, Michale: A tömegkommunikáció használata az egyének által. In: Angelusz, Róbert – Tardos, Róbert – Terestyéni, Tamás (ed.): Média, nyilvánosság, közvélemény, Gondolat Kiadó, Budapest, 2007 pp. 210-228. [Originally see in: Blumler, Jay – Katz, Elihu (eds): The uses of mass communication: current perspectives on gratification research, SAGE Publications, 1975]
[47] Schweiger, Wolfgang op. cit. p. 61.
[48] Bajomi-Lázár, Péter op. cit. p. 134.
[49] Schweiger, Wolfgang op. cit. p. 64.

the criticisms[50] that can be expressed against the approach, the usage gratification model has considerably broadened the horizon regarding the ideas about the interaction between the media and the public.

STUART HALL'S coding-decoding model goes even further, compared to all the other theories, putting the public before the media and assuming an active media usage.[51] According to HALL, the meaning of the media content becomes clear during usage, and the interpretation of the meaning is influenced by several factors connected to the production and the reception of the content. As stated in the theory, however, the content has a prevailing meaning according to the intention of the deliverer. The recipient might have various attitudes towards it: some recipients accept the prevailing meaning (in fact, they attribute the same meaning to it), whilst others only partly accept the dominant meaning. A third group repudiate it, attributing contradictory meaning to it. Empirical research connected to the theory has not justified the decisive role of social status in interpreting the meaning.[52]

The results of research on media effects – naturally, only superficially presented here – shows variety, which leads to the conclusion that the vulnerability of the public to the messages of the media is gradually but perceptibly decreasing in the current media system. As referred to in connection with the technological environment, the user controls – and, in fact, shapes – the available content supply more and more effectively. As a result of the considerable increase in content supply, the definition of time and other conditions regarding availability, in essence, the fusion of media supplier and editorial positions and increasing interactivity, user control will grow. The supply of content for the ever-widening circle of users is not provided by the institutionalised content suppliers, but by the users' own preferences and conscious decisions. It is the regulatory solutions that have the least control over the freedom of the media which encourage such user behaviour either by ensuring the abundant supply of suitable devices – for example interactive digital receiver sets – or encouraging user awareness. However, it is necessary to consider in the course of revising the framework of media freedom that these possibilities encourage the kind of user behaviour which makes them choose contents that are suitable for their interests and beliefs in the first place. This user behaviour discourages the realisation of democratic public opinion and emphasises the importance of instruments developing user awareness.

[50] Myat, Kornél: op. cit.
[51] In Hungarian see: Hall, Stuart: Kódolás – dekódolás. In: Angelusz, Róbert – Tardos, Róbert – Terestyéni, Tamás (ed.): Média, nyilvánosság, közvélemény, Gondolat Kiadó, Budapest, 2007 pp 131-143. [Originally see in: Hall, Stuart – Hobson, Dorothy – Lowe, Andrew – Willis, Paul: Culture, Media, Language, Routledge, 1980]
[52] Researches of David Morley is cited by Myat, Kornél: op. cit. p. 55.

5. Publicity

The standard of democratic publicity describes the state of the social publicity in which active and conscious members of the public find all information and contradictory opinions in connection with public affairs in order to state their opinion. This, however, also means a resolution of the interpretation of publicity on the part of the Constitutional Court. Regarding its functions and method of operation, democratic public opinion is none other than the civil society of HABERMAS. The Constitutional Court supports this ideal of publicity even if 'the depoliticised publicity of consumer culture' appears in its latest decision on the media in which neither public debate nor rational arguments are decisive.[53]

The constitutional significance of publicity originates from the assigned mediatory and monitoring function. The term itself refers both to a transparent function of the state and the active participation in public affairs.[54] Publicity is an informal assurance of democratic operation which considers a well-informed and consensus-seeking public as essential participants in democratic decision-making. The concept of publicity necessarily has a normative dimension.[55] This is clearly seen in HABERMAS'S concept of publicity. The normative concept of publicity assumes a political publicity of which defining characteristic is 'the principle of general availability'. 'Publicity from which well-defined groups are *ex ipso* excluded is not only imperfect but it is not publicity at all.'[56] According to Peters the normative model of publicity is further characterised by a general openness to topics and comments and a discursive structure which ensures that 'the definition of problems and debates over suggestions for their solutions are decided by argument.'[57]

The Habermasian publicity concept was defined by GERHARDS as discursive-republican publicity, in which publicity is the mediator between the centre and the periphery – the electors, non-governmental organisations representing the interest of citizens and corporations – of political processes. Democratic will-formation originates from the periphery in a public platform provided by civil organisations and it is conveyed to the centre of political decision- making via political parties. This ideal will-formation process rarely

[53] Decision 165/2011. (XII. 20.) of Constitutional Court
[54] In Hungaraian see: Peters, Bernhard: A nyilvánosság jelentése. In: Angelusz, Róbert – Tardos, Róbert – Terestyéni, Tamás (ed.): Média, nyilvánosság, közvélemény, Gondolat Kiadó, Budapest, 2007 pp 614-617.
[55] Wimmer, Jeffrey: (Gegen-)Öffentlichkeit in der Mediengesellschaft. Analyse eines medialen Spannungsverhältnis. VS Verlag für Sozialwissenschaften, Wiesbane, 2007 p. 64.
[56] Habermas, Jürgen: A társadalmi nyilvánosság szerkezetváltozása, Századvég – Gondolat, Budapest, 1993 p. 150.
[57] Peters, Bernhard op. cit. p. 619.

takes place in practice; HABERMAS is, ultimately, satisfied with constant feedback between decisions made in the centre and public will-formation on the periphery. Rational argument has a decisive role in the Habermasian public sphere which ultimately leads to some kind of consensus.[58] GERHARDS sets the Habermasian concept of publicity against the model of publicity primarily devised by the liberal Bruce Ackerman which attributes a less significant role to publicity. According to this, model publicity is available for everyone; however, the particular citizens are represented by operators elected in collective and fundamentally democratic elections. This concept of publicity does not define the standard evaluation of the particular comments since it considers public comment as the principle function of publicity rather than argument and consensus-seeking. The only expectation participants in the discourse have to fulfil is mutual respect.[59]

Even the difference between these approaches might lead to dissimilar regulatory conclusions. Based on the original Habermasian concept, it is easy to justify a regulatory concept of roles which endeavours to balance public opinions modifying even the media supply of the particular media service providers. This publicity, which CRISTOPH ENGEL aptly calls 'opinion planned economy',[60] functions successfully if the opinions considered relevant appear in it according to their importance. In contrast, the publicity which GERHARDS considers liberal is more open to new topics and operators, and, as a result, the outcome of debate is much more unexpected. The implementation of this publicity does not require the balance of opposing views; it is much more based on an 'equal chance of communication' where, instead of the representation of various views as a result of the communication process in the focus of regulation, the emphasis is on participating in the communication process and unrestricted access to the communication system.[61]

Although the Habermasian concept of publicity satisfies constitutional intentions, it cannot be easily harmonised with everyday media usage. HABERMAS'S concept received extensive criticism, stating that it 'is utterly utopian - and misleading at the same time – since a platform where only a limited and exceptional rationality determines the viability of the discourse and the opportunity for action, fundamentally misinterprets the prospects and limits

[58] Gerhards, Jürgen: Konzeption von Öffentlichkeit unter heutigen Medienbedingungen. In: Jarren, Otfried – Krotz, Friedrich (Hrsg.): Öffentlichkeit unter Viel-Kanal-Bedingungen, Nomos, Baden-Baden – Hamburg, 1998, p. 28.
[59] Gerhards, Jürgen: op. cit. p. 31.
[60] Christoph Engel is cited by Never, Henning: Sokszínűség utasításra - a médiarendszer kialakítására vonatkozó szabályozás célszerűsége versenyjog-elméleti megközelítésben. In: Gálik Mihály, szerk.: Tanulmányok a médiakoncentráció szabályozás tárgyköréből, Budapesti Közgazdaságtudományi Egyetem Alapítvány, Kézirat, 2007 p. 58.
[61] Hoffmann-Riem, Wolfgang: Regulierung der dualen Rundfunkordnung. Grundfragen. Nomos Verlagsgesellschaft, Baden-Baden, 2000 p. 100.

of human communication.[62] Regarding this approach, the commercialisation of mass media is one of those factors which eliminate civil publicity by considering 'the production of agreement' as their main task to have a product, person or idea accepted.[63] Summarising the criticisms, CSÁSZI LAJOS stated that Habermasian publicity, fundamentally means 'publicity of white middle-class men' omitting 'lower classes and plebeian publicity, the political and cultural elite, women, consumerism and the platforms of the bourgeois which cannot be linked to coffee-houses and the press'.[64]

With commercial television becoming widespread since the 1990s, the interpretation of publicity has changed the same way as media research: actual everyday media consumption receives more and more attention and the media consumer seems less and less vulnerable. According to CSÁSZI, the common characteristic of the new interpretations of publicity is the 'emphasis on interaction between private and public life instead of contrasting these two spheres'.[65] In mass media and the tabloid, so-called plebeian, publicity people discuss actual everyday problems using everyday language.[66] The resulting 'subjective mass public' does not displace the civil public; on the contrary, it expands it with previously absent topics, operators and manners of speech.[67] The comprehension of the current media system is helped by the ritual model of communication. Thus, (commercial) media usage is not unlike religion, where voluntary participation, regular and repetitive actions, rituals help foster common values and shape identity. The media consumers of this publicity are not vulnerable, passive victims but active participants in the operation of the media.

Views on the media and publicity have definitely changed direction in the past few years and the reconsideration of the relationship between the media and the public and understanding everyday media consumption have become a prime factor. A common feature that characterises all these approaches is that they are not adopted to replace civil/political publicity but to complement it. It is undeniable that the quality of democracy depends crucially on the power of political publicity to achieve its own goals. The constitutional interpretation considers publicity as none other than political publicity but understanding the operation of political publicity and the expectations about it, presupposes the necessity to consider further approaches to publicity.

[62] Silverstone, Roger: Médiaerkölcs. Napvilág Kiadó, Budapest, 2010.
[63] Habermas, Jürgen op. cit. p. 282.
[64] Császi, Lajos: A Mónika-jelenség kulturális szociológiája, Gondolat Kiadó, Budapest, 2011 p. 36.
[65] Ibid.
[66] Bajomi-Lázár, Péter: Média és politika. Antenna Könyvek, PrintXBudavár Zrt., Budapest, 2010 p. 169.
[67] Concept of Michael Warner analysed by Császi Lajos op. cit. pp. 37-39.

The constitutional approach – and the Hungarian Constitutional Court in this respect is certainly not alone – ultimately, is more like a legal ivory tower which all but hides not only reality, but the results of other scientific studies endeavouring to describe reality. The constitutional foundations of media freedom still consider the media system and media consumption of the 1990s as its starting point and it assigns the aims and means to develop the media system accordingly. What this regulation still focuses on is the content provider instead of the media consumer, scarcity instead of economic obstacles to widely available capacity and restrictions and rules instead of conscious media usage. If the vision of constitutional approach diverges considerably from everyday media experiences, then media regulation based on this is necessarily doomed to failure. Considering the results of social science, it is essential, even if only on rare occasions, that these results provide media regulation with clear guidelines.

The pathway to the First Ottoman Constitution

RÁCZ, ATTILA

ABSTRACT *The reform movements in the Ottoman Empire date from the beginning of the eighteenth century when several measure were introduced in order to halt the decline in the power of the Empire following serious military defeats around the end of the 17th century. The first such attempts involved re-organising the military system and military technology. At the same time, the Ottomans took an interest in Western culture and society, searching for new inspiration. Following the French Revolution, nationalistic ideas began to penetrate the Empire, and then reform – not only of the military system, but also of state administration – became vital for the Ottomans. The most significant feature of the innovations was the emergence of the idea of an Ottoman state, composed of peoples of various nationalities and religions and based on secular principles of sovereignty – contrary to the medieval concept of an Islamic empire. The concept of Tanzimat (literally, the Reform Movement) was inspired by Europe in order to bring a Western style of thinking and a similar model of public administrative to the Ottoman Empire. The significance of this era is that the initiative for modernisation came from government officials who became the vanguard of the Reform Movement, with the compliance of the Sultan. The emergence of a group known as the Young Ottomans gave birth to a new concept for the Ottoman Empire in its efforts to reconcile Western political instruments with traditional Islamic law and Ottoman theory and practice. These efforts led to the period known as Birinci Meşrutiyet or, in other words, the First Constitutional Era.*

1. Early reform attempts in the Ottoman Empire

The power of the Empire culminated in 1683 when the Empire lost the Battle of Vienna. Military defeat following its failure to seize Vienna represented a pivotal period in the balance of power between the Ottoman Empire and its Western adversaries, consequently opening a new era in Ottoman relations with Europe. After the once-glorious Ottoman Army had suffered a series of defeats at the hands of the European powers, it had become apparent that the Empire was no longer able to continue with its expansionist ambitions and overcome its

likely enemies.[1] The Ottoman Empire entered a long depression and had to face both external and internal challenges. The internal challenge was consisted of nationalist movements in the provinces, the declining power of central government and the decreasing effectiveness of its army. In brief, the *kul*[2] (slave) and *timar*[3] (fief) systems degenerated.[4] On the other hand, advanced technology and an economic system relying increasingly upon industry, constituted the backbone of the external challenge. Recognising that the old religious and military institutions no longer met the needs of the empire in the modern world forced the Sultans to understand western superiority and accept the need for change. It is not surprising that the first attempts to stop the decline of the Ottoman state were related to the re-organisation of the military system.

1.1 The Tulip Era

The reform movements in the Ottoman Empire date back to the beginning of the eighteenth century and several measures were introduced to halt the decline in the power of the Empire. The reformers who began to influence political developments after the 17th century, tried to restore the Golden Age of SÜLEYMAN I (1520-1566). The years between 1718 and 1730, following the Treaty of Passarovitz, are called *Lale Devri*, literally the Tulip Era,[5] and the

[1] Tuck, Christopher: 'All Innovation Leads to Hellfire': Military Reform and the Ottoman Empire in the Eighteenth Century. In: The Journal of Strategic Studies, Vol. 31, No. 3 (June, 2008), pp. 467-502, p. 467.

[2] The *kul* or "Servant of the Sublime *Porte*", was the tool or instrument of the central power. Devoted servants of the Sultan were entrusted with important military and administrative duties and shared governmental responsibilities. They were sometimes given *timar*-lands and appointed to important posts, even as governors in the provinces. Inside the mechanism of the military and administration body the absolute power of the potentate was ensured by the kul system.

[3] The *Timar* system was one in which the projected revenue of a conquered territory was distributed in the form of temporary land grants among the *Sipahis* (cavalrymen) and other members of the military class including Janissaries and other *kuls* (slaves) of the sultan. They were given as compensation for annual military service, for which they received no pay. In rare circumstances women could became *Timar* holders. This position however was restricted to women who were prominent within the imperial family, or high-ranking members of the Ottoman elite. *Timars* could be small, when they would be granted by governors, or large, which then required a certificate from the Sultan, but generally the fief had an annual value of less than twenty thousand *akces* (Ottoman silver coin).

[4] Toker, Hülya: Turkish Army from the Ottoman Period until Today, In: International Review of Military History, No. 87. pp. 105-123., p. 107. p. 107.

[5] Tulip is an indication of the life style of that period and the first steps towards Westernisation have been taken. It is believed that the origin of this flower was in Iran, and it has been grown in Turkey for a very long time. The tulip, which went to Europe from Turkey, was brought back from the Netherlands to İstanbul later, and in the reign

main feature of the era was a continuous peace. The sultan AHMED II, and his chief minister, Grand Vezir IBRAHIM PAŞA, decided to avoid war at all costs. At the same time, the Ottomans took an interest in Western culture and society searching for new inspiration. The mutual interests of the French and the Ottomans determined where the Turkish public officials would look for inspiration.[6] The Ottoman Porte sent YIRMISEKIZ MEHMET ÇELEBI as a plenipotentiary envoy to the court of LOUIS XIV in 1720. As BERKES noted, in addition to the diplomatic mission of YIRMISEKIZ MEHMET ÇELEBI which was to seek an alliance with France, he was instructed by IBRAHIM PAŞA to visit the fortresses, factories and works of French civilisation in general and report on modern French institutions which might be appropriate for Turkey.[7] To introduce the military methods of the West, the *Porte* opened new schools and translated some European scientific works into Turkish. The Ottomans tried to modernise the military in the manner of the Western countries, mainly of France, and in fact, there is no doubt that modern mathematics were introduced into the Ottoman Empire through military education.[8] It is unfortunate that religious places[9] were the only ones where social developments could be discussed, since the Muslim preachers in such places were far removed from advocating any new western influences – the reason for the Tulip Era's early demise being a reactionary revolt.[10]

1.2 Reforms during the reigns of MAHMUT I and MUSTAFA III

The first serious reform Initiative in the field of military organisation was achieved during the reign of MAHMUT I (1730-1754), who continued wars with Russia and Austria and called military experts to Istanbul.[11] The Sultan entrusted the Frenchman CLAUDE ALEXANDRE, COMTE DE BONNEVAL (1675-1747) with improving the army - especially the artillery. BONNEVAL came to Istanbul, became a Muslim and then took the name of HUMBARACI AHMED PAŞA.[12] In 1734 he founded the *Hendesehane* (School of Engineers) for the

of Ahmed III people were proudly raising tulips in a very personal way. Tulips were the delight and pride of every garden and were by far the best-known flower of this period.

[6] Berkes, Niyazi: The Development of Secularism in Turkey. Hurst, London, 1964, p. 34.

[7] Ibid. p. 26.

[8] Akgün, Seçil: The emergence of the *Tanzimat* in the Ottoman Empire, http://dergiler.ankara.edu.tr/dergiler/19/834/10541.pdf [11. 10. 2011.] p. 2.

[9] medrese; religious school; mosque: building for praying; *tekke*: kind of monastery,

[10] Akgün, Seçil op. cit. p. 3.

[11] Toker, Hülya op. cit. p 107.

[12] Tuck, Christopher op. cit. p. 490.

training of technicians in modern artillery.[13] He also formed the Grenadiers with three hundred soldiers and added twenty-two grenadiers brought from France through the efforts of three military officers and himself. Later he founded a new (salaried) body of grenadiers called the *Humbaracı* Unit.[14] MAHMUD I in fact, wanted to abolish Janissary organisations and found a new European style army, but he could not find the courage to do this, fearing the outbreak of a rebellion. Sultan MAHMUD I died whilst returning from Friday prayers in 1754. During his reign the Ottomans lost no land and even regained land from Serbia and Austria. Innovations and reform were predominantly military but not in any planned way since they were restricted to the special efforts of the Sultan and certain statesmen. Reforms were, moreover, often blocked by groups who felt their interests threatened.

MUSTAFA III (1757-1774) was a defender of innovation and wanted to introduce Western style military reforms. During the Russo-Turkish War (1768-1774) FRANCOIS BARON DE TOTT, an artillery officer of French nationality and Hungarian origin was invited by the Sultan to train cannoneers in rapid artillery fire, to modernise ordnance, introduce the use of pontoons and to build a new line of defence line for the Dardanelles. These ambitions support the earlier notion that the Turkish problem was essentially military and technological.[15]

1.3 Reforms of SELIM III

In 1789, when Europe was shaken by the French Revolution, SELIM III (1789-1807) succeeded to the Ottoman throne. Following the French Revolution, nationalistic ideas began to penetrate into the Empire, and then reform became inevitable. For this purpose, SELIM III began to prepare his own reform project. The Sultan, in fact, issued a command to civil, military and religious dignitaries that they set out their own views on the causes of the weakness of the Empire, and their proposals for reform. They presented their replies in the form of *hiyiha* (memoranda or reports) and in the end, three different views emerged. One sought to regain the military glories of the Ottoman Golden Age by reverting to its military methods, whilst others proposed to reconcile French-style training and weapons with the existing military order. Finally, the radicals who believed that the old army was incapable of reform, urged the Sultan to set up a new one, trained, equipped and armed from the start along European lines.

[13] Öztas, Sezai and Candan, Ahmet Said: Renewal Efforts in the Ottoman Education System until *Tanzimat*. In: World Applied Sciences Journal, IDOSI Publications, 2012. 19 (8), pp. 1225-1338. p. 1226.
[14] Toker, Hülya op. cit. p. 107.
[15] de Tott, François Baron: François Baron de Tott emlékiratai a törökökről és a tatárokról (edited by dr. Tóth Ferenc), Vasi Szemle, Szombathely, 2008.

Hence, in 1792 and 1793 the Sultan promulgated a whole series of new instructions which came to be known collectively as the *Nizam-ı Cedid* (New Order). The *Nizam-ı Cedid Ordusu*, the ;new corps of regular infantry, trained and equipped on European lines was established. In order to finance the new army a new institution, namely *İrad-ı Cedid Hazinesi* (a special new fund) was set up, A few soldiers and officers of the New Order learned European languages so as to be able to read and translate European military manuals.[16] In diplomatic relations a balance-of-power policy was introduced. Regular and permanent Ottoman ambassadors were sent for the first time to some European capitals such as London, Paris, Vienna, Berlin, and the Empire could participate in contemporary diplomatic events. Meanwhile many Europeans arrived in the Ottoman capital and bilateral relations were accepted in the diplomatic field.[17] SELIM III's reign was the period when the old and new institutions lived side by side. Despite the encouraging results achieved by the *Nizam-ı Cedid*, reforms went too far and too fast. This produced serious opposition to SELIM III and, according to INALCIK, the desire to create a regular army under his direct command threatened not only the dominant position of the Janissaries in the administration and military system but also the interests of the *ayans* (nobility). In addition, his financial measures created widespread discontent in the country, and both public opinion and the *Ulema* (the highest religious corporative) turned against him.[18]

SELIM III was deposed and murdered as a result of the Janissary revolt of 1807, and his *Nizam-ı Cedid* Army was scattered by his opponents.[19]

1.4 Reforms of MAHMUD II

The meantime, the most influential *ayans* of Rumelia marched against Istanbul together with their army, seized the capital, put down the uprising, and put MAHMUD II (1808-1839) on the throne, and the most influential of these, ALEMDAR MUSTAFA PAŞA, gained the position of Grand Vezir. The nobles had not previously created a united front against the Janissary corps in the history of the Ottoman Empire, but now the *ayans* of Rumelia and Anatolia united against the reactionaries in order to control the central government and guarantee their position in the provinces.[20] In the first days of MAHMUD II on the throne,

[16] Toker, Hülya op. cit. p. 107.
[17] Karpat, Kemal H.: The Transformation of the Ottoman State, 1789-1908. In: International Journal of Middle East Studies, Cambridge University Press Vol. 3, No. 3 (Jul., 1972), pp. 243-28.1 p. 253. http://www.jstor.org/stable/162799 [15.06.2011.]
[18] Inalcık, Halil: Political Modernization in Turkey, in; From Empire to Republic, Istanbul, 1995, p. 129
[19] Ibid.
[20] Shaw, J.S. – Shaw: E.K.: History of the Ottoman Empire and Modern Turkey. Vol. II., Camridge University Press, Cambridge, 1977 pp. 275-276.

ALEMDAR MUSTAFA PAŞA invited high officials, governors, pashas, and nobles from all over the Empire to sign the *Sened-i İttifak* (Charter of Alliance) was signed; this was recognised by the Sultan. The *Sened-i Ittifak* can be seen as the first important document from the point of view of constitutional order. Whilst the Charter of 1808 restricted the sovereign power of the Sultan for the first time in Ottoman history, it also delegated some authority to a Senate Body of *Ayans*.[21] The reform idea existed among some statesmen, and the Ottoman embassies in Europe founded during SELIM III's period served as channels for Western liberal ideas into the empire.

The most significant of the innovations initiated by MAHMUD II was the emergence of the idea of an Ottoman state, composed of peoples of diverse nationalities and religions, based on secular principles of sovereignty - contrary to the medieval concept of an Islamic empire.[22] Following the suppression of the Janissaries, Mahmud established a new army according to European standards, known as *Asâk:ir-i Mansure-i Muhammediye* (The Victorious Soldiers of Muhammed).[23] Military instructors were imported from Prussia for training new army although the previous Sultans had preferred France.[24] The traditional uniform was rejected and a tight jacket with a wide and loose-fitting trousers and also boots were approved. Additionally the fez was chosen as a hat.[25] In 1834 the Military College, a significant institution which was going to play an important role in Turkish political life, was established.[26] On June 15th 1826 MAHMUD II successfully destroyed and dissolved the Janissary corps, thus setting the Ottoman reform on a new course.[27]

First and foremost, MAHMUD II wanted to centralise the structure of state administration. In 1836 the title of Grand Vezir was changed to Prime Minister, and he became coordinator of the activities of ministers. The position of the *Sadûret Kethüdası*, the office of the lieutenant of the Grand Vezir, was changed first to *Umûr-u Mülkiye Nezareti* (Ministry of Civil Administration Affairs), and then, simply, to *Nezaret-i Dahiliye* (Ministry of Interior). The office of *Reisü'l-küttab* became *Nezaret-i Hariciye* (Ministry of Fo,reign Affairs), and the Ministry of Judicial Pleas renamed *Nezaret-i Deavi* (the Ministry of Justice) was established in the same year. In 1839, the *Nezaret-I Ticaret* (Ministry of Trade) was set up. The Hafeature-i Amire (Imperial Treasury) was joined to the *Darphane-i Amire* (Imperial Mint), and they became *Maliye Nezareti* (Ministry of Finance). Under the chairmanship of the Prime Minister the *Mecİis-i Vükela*

[21] Lewis, Bernard: The Emergence of Modern Turkey. Oxford University Press, 2002, p. 74
[22] Berkes, Niyazi op. cit. p. 95.
[23] Öztas, Sezai – Candan, Ahmet Said op. cit. p. 1227.
[24] Toker, Hülya op. cit. p. 109.
[25] Ibid.
[26] Ibid. p. 108.
[27] Ibid.

(Council of Ministers) was created.[28] The government was known as the *Bab-ı Ali*, or, as Europeans term it, the Sublime Porte. A regular salary system was established and penal statutes were issued in respect of state officials. Ranks and titles of officials were reorganised, and the Ottoman bureaucratic hierarchy was brought into line with modern practice in this period. In addition to all of these arrangements, the Sultan established a series of advisory councils such as the *Dar-ı Şiirayı Askeri* (Strategic Council of the Army) in order to execute military reforms and the *Mecİis-i Valayı Ahkam-ı adliye* (Supreme Council of Judicial Ordinances). Following the Greek Revolt of 1821, in 1833 the *Tercüme Odası* (Translation Office) was established to handle the translation of official papers and to train the new generation of Ottoman bureaucrats in order to replace the Greeks who had traditionally performed this function.[29] This office became not only the institution of diplomats and educated bureaucrats of the state, but also one of the most important sources of the new Osmanli intelligentsia, who were known as the Young Ottomans and turned into the leaders of Westernisation. The movement was created by young and middle-ranking Ottoman bureaucrats in 1865. The central idea of the Young Ottomans, whose ideas otherwise show a great deal of variety and inconsistency, was that reforms should not only be based on imitation of the West, but also on a genuine but modern understanding of Islam in order to create *İttihadı Anasır* (Unity of the Elements). The Young Ottomans became the first Muslim thinkers to try to reconcile Western political instruments with traditional Islamic law and Ottoman theory and practice, seeking to promote the principle of representation by establishing historical precedent. Their emphasis was on the progressive rather than the conservative aspects of Islam. They believed that participating in a parliamentary system of government would foster in both non-Muslim and Muslim subjects a feeling of belonging to the same *vatan* (fatherland),[30] because of having a single Ottoman status with the same rights and obligations regardless of differences in race, religion, and language.[31]

From the beginning of the nineteenth century, the traditional structure of the Ottoman Empire began a huge transformation, not only in its institutions but also in its political philosophy.

[28] Seyitdanlioğlu, Mehmet: The Rise and Development of Liberal Thought ın Turkey Hacettepe Üniversitesi Edebiyat Fakültesi Dergisi, Cumhuriyetimizin 75 Yılı Özel Sayısı, Ankara, 1976. pp. 151-161. p. 154.
[29] Ibid.
[30] The Young Ottomans, notably Namik Kemal, developed the concepts of fatherland (*vatan*), political identity, and loyalty to the state within the framework of the Ottoman-Muslim culture.
[31] Karpat, Kemal H. op. cit. p. 279.

2. Tanzimat Era

The *Tanzimat* Era is one of the most notable periods of Turkish history. *Tanzimat* (literally reorganisation or reordering) concept was used in the meaning of arranging, improving and reviewing the existing State structure which is made up of a series of legal and administrative reforms implemented in the Ottoman Empire in the nineteenth century.

In fact, the *Tanzimat* Era began with the announcement of the Gülhane Rescript in 1839 and ended in 1876, when the first Western-style Ottoman constitution was promulgated.[32] The concept of *Tanzimat* was inspired in Europe and brought Western-style thinking and administrative models to the Ottoman Empire. The significance of this era is that the initiative for modernisation came from government officials, who became the vanguard of the Reform Movement, with the compliance of the Sultan. Consequently, the bureaucracy strengthened its power and the Sublime Porte, as the centre of government was known, became more than ever the real headquarters of the Ottoman Empire.

2.1 Hatt-ı Sharif of Gülhane – the beginning of the Tanzimat Era

Hatt-ı Sharif of Gülhane, literally the Noble Rescript of the Rose Chamber, was the first of many edicts which stressed the importance of modernising the political, administrative, social, military, and educational systems of the Ottoman Empire. This document led up a new period in the existence of the Empire and can be considered as a semi-constitutional document. The *Hatt-ı Sharif* of Gülhane was proclaimed on November 3rd in 1839 only several months after MAHMUD II had died and his son ABDÜLMECID I (1839-1861) had taken over the Sultanate.[33] The Gülhane Rescript was announced by Prime Minister MUSTAFA RESID PASHA to his audience, which included all Ottoman nobles, statesmen and dignitaries as well as representatives of foreign states, ambassadors, the Greek and Armenian Patriarchs and the Chief Rabbi. After its proclamation, the Edict was published in the official state newspaper and its French translation was sent to various European states and to the embassies in Istanbul.[34] This was in no way an Ottoman constitution for the purpose of limiting the powers of the Sultan since the Sultan himself had issued it and could abrogate it at his will. The Gülhane Edict was, therefore, not an enforceable constitution, even though the Sultan had called the curse of God upon any violators. However, it can be considered as a proto-constitutional

[32] Akgün, Seçil op, cit. p. 1.
[33] Ibid. p. 6.
[34] Ibid. p. 1.

document, as it included a promise by the Sultan to abide by any law enacted by the legislative machinery. At the same time the Edict formalised the new interpretation of the scope and responsibility of the state, including the protection of security of life, honour, and property, and the stipulation of equal justice for all subjects regardless of religious affiliation. All subjects were guaranteed that their basic rights would be respected. The document is especially significant for its recognition of equal rights in education and in government administration for Muslim as well as non-Muslim subjects, thereby adopting egalitarian principles. The *Tanzimat* Edict of 1839, although devised in the context of Ottoman tradition and expressing particular goals rather than abstract principles, encompassed many of the ideals contained in the Declaration of the Rights of Man and the Citizen of 1789.[35]

The first point introduced by this document was that it guaranteed security of life, honour and property, for all people. The *Hatt-i Sharif* propounded that all people, no matter their religion, language, or culture, should enjoy these fundamental freedoms. The most outstanding aspect of the Edict was that it was the promise of the Sultan to extend imperial concessions to all Ottoman subjects, regardless of their religion or affiliation. By this Edict all the Ottoman subjects were granted /equal citizenship.[36] The Edict was not appreciated neither by Muslims or non-Muslims and all Ottoman subjects were given the status of *Osmanli*. Leaders of the non-Muslim communities lost their privileges and authority over their *millet*[37] to the central government. It was even noted that the Greek Patriarch after observing MUSTAFA RESID PASHA rolling up the Edict upon the completion of his recital, and tuck it in his belt, remarked: "I hope it will never leave the case it is now tucked in."[38]

Another remarkable element of the Edict was a regular system of assessing taxes instead of the *iltizam* system.[39] A regular system of taxes would alleviate some of the financial instabilities that existed in the Empire at this time and this new tax system involved every person paying taxes assessed according to his wealth. The last policy prescribed related to the military. The Edict guaranteed a

[35] Ibid. p. 13.
[36] Karpat, Kemal H. op. cit. p. 258.
[37] The *Millet* system is the way in which the Ottoman Empire allowed religious minorities control over their own affairs, including education and judicial affairs and was headed by a religious leader.
[38] Akgün, Seçil. op. cit. p. 13.
[39] *Iltizam* was a system of tax collection, familiarly known as "tax-farming", whereby local officials or notables were given a contract to collect taxes as a commission. Whilst the state became increasingly unable to supervise or even occasionally check on conditions of tax collections in the provinces, *iltizam* became a byword for extortion of cash and goods from craftsmen and peasants. Thus the tax farmers were able to collect higher taxes than in fact were contracted for, pocketing the difference. The result was that the state was blamed by ordinary people in the provinces both for the extortionate tax rates, and for its failure to protect the raiser-producers of the Empire.

fair and regular system for the conscription of the troops needed and for the duration of their service.

The Gülhane Edict only reflected features of earlier Western revolutions. The outcome of these was the appearance of he rationalist and secular mentality, expressed as the Declaration of Rights of Men and Citizens, against hierarchical society and th privileges of the nobility. The *Hatt-ı Sharif* of Gülhane responded to the administrative changes which occurred among the Western states during the post-revolution eras and so it showed more of a reformative rather than a revolutionary character. Muslims were unhappy to be regarded as equal with the infidels, whilst their counterparts were disturbed that they would be losing some communal privileges. Beyond any question, however, the Gülhane Edict ensured the framework for liberal development in the Ottoman Empire. The Edict, whilst acknowledging Islamic principles, paved the way for the introduction of new laws in the coming years.

2.2 Imperial Reform Edict of 1856

The *Islâhat Fermânı* (Imperial Reform Edict) of I856 represents another important stage in the transformation of the Ottoman State. It was issued to reaffirm the provisions of the rescript of 1839, much of which had been delayed in implementation. It was an edict of the Ottoman government and part of the *Tanzimat* reforms. Sultan ABDÜLMECID I promised equality in education, government appointments, and the administration of justice to all subject of the Empire regardless of religious affiliation. The decree is often seen as a result of British and French influence for their help to the troubled Ottoman state against Russia in the Crimean War (1853-1856). The year of the rescript coincided with the Treaty of Paris of 1856, whereby the Ottoman Empire was admitted into the community of nations and became subject to the provisions of international law as applied to "civilized nations." The Imperial Reform Edict of 1856, which "was in many ways the *magnum opus* of Lord Stratford" was prepared in collaboration with the French ambassador and Austrian *internuncio* to the Porte and was accepted as a whole by the Ottoman government.[40] Sultan ABDÜLMECID I declared:

"The guarantees promised on our part by the *Hatt-ı Hümayun* of Gülhane, and in conformity with the *Tanzimat*, to all the subjects of my Empire, withoutful distinction of class or of religion, for the security of their persons and property and the preservation of their honour, are today confirmed and consolidated, and effective measures will be taken in order that they may have their full and entire effect. (…). Te organisation of the police in the capital, in the provincial towns and in the rural districts shall be revised in such a manner as to give to all the peaceful subjects of my empire the strongest guarantees for

[40] Davison, Roderic H.: Reform in the Ottoman Empire 1856-1876, Princeton, 1963., p. 43.

the safety both of their person and property. (…) Such being my wishes and my commands, you, who are my Grand Vezir, will, according to custom, cause this Imperial Firman to be published in my capital and in all parts of my Empire; and you will watch attentively, and take all the necessary measures that all the orders which it contains be henceforth carried out with the most rigorous punctuality."[41]

3. The Ottoman Constitution of 23rd December, 1876

The most important step along the pathway to the rule of law was made by the promulgation of *Kanun-u Esâsî*, literally the Main Law or Fundamental Law, which also set up the period known as the First *Meshrutiyet* or First Constitutional Period. This constitution was not the result of a movement based on the will of the people, but was realised by means of the Young Ottomans. Ottoman constitutionalism that would introduce Ottoman parliamentarianism as a consequence of the conflict between the ruling elite of the Sublime Porte and conservatives which had been continuing since the *Tanzimat* Period. The leader of modernist faction, MIDHAT PAŞA,[42] who led the process of dethroning Sultan ABDUL AZIZ and helped Sultan ABDÜLHAMID II (1876-1909) to ascend the throne,[43] prepared a 57 Article memorandum, *Kanun-ı Cedid* (the New Law). This draft proposed a parliamentary government in its full form. MIDHAT PAŞA designed a government model which adopted the political responsibility of the *Vükela*, (Council of Ministers) before the *Mebusan Meclisi* (Assembly of Representatives). That was totally unacceptable to the Sultan. Since ABDÜLHAMID II wished to prevent the dominance of MIDHAT PAŞA, the Sultan ordered SAIT PAŞA to study the French Constitution,[44] and he added annotations to various clauses. Following this, SERVER PAŞA was appointed head of *Kanun-ı Esâsî* Preparation Committee, called *Cemiye-i Mahsusa* (Private Committee). The committee was composed of a total of 28 delegates, and, alongside 3 Christian members there were also representatives of the Ottoman religious class. The text named *Heyet-i Vükela* was approved following vehement

[41] Rescript of Reform – Islahat Fermanı (18th February 1856) http://www.ata.boun.edu.tr/Department%20Webpages/ATA517/Rescript%20of%20Reform,%2018%20February%201856.doc [12. 09. 2012.]

[42] Shaw, Stanford J.: The Central Legislative Councils in the Nineteenth Century Ottoman Reform Movement before 1876. In: International Journal of Middle East Studies, Cambridge University Press, Vol. 1, No. 1 (Jan. 1970), pp. 51-84. p. 83. URL:http://www.jstor.org/stable/162065. [18.03.2011]

[43] Buzpinar, Tufan: opposition to the Ottoman Caliphate in the earls years of Abdulhamid II: 1877-1882, In. Die Welt des Islams, New Series, Vol. 36, Issue 1 (Mar., 1996), pp. 59-89, p. 60. http://www.jstor.org/stable/3693438. [15.06.2011]

[44] Shaw, J. S. and Shaw, E. K., op. cit. p. 154.

discussion and then submitted for approval. Kanun-u Esâsî was proclaimed as a kind of *ferman anayasa* by Sultan ABDÜLHAMID II on the 23rd of December, 1876. The.*Kanun-u Esâsî* had 12 sections and a total of 119 articles.[45]

3.1 Sovereignty

The first section defined the nature of the state and of the Sultan. According to Article 3 of the *Kanun-u Esâsî,* Ottoman sovereignty was united in the person of the sovereign of the supreme *Kalifat* of Islam, a position belonging to the eldest of the princes of the dynasty of Osman and conforming to the rules established *ab antiquo*. Further, the Sultan now enjoyed seniority rule which had been practised since AHMET I. It could be seen that sovereignty did not belong to the nation or national representatives but to the Sultan himself. All the other institutions were only valid thanks to his existence. Whilst in the old days, the source of sovereignty depended on religion and tradition, after the enactment of constitutional monarchy it would gain its primacy from a secular document. The Sultan became the noblest body of the state. By virtue of Article 6, the liberty of the members of the Imperial Ottoman dynasty, their property, both real and personal, and the Civil List during their whole life were guaranteed by all and so the *Kanun-u Esâsî* secured for the Ottoman dynasty their estates and their revenue rights. According to the Article 5, the Sultan was 'irresponsible' (i.e., bore no responsibility) and His person was sacred. Article 7 enumerates the sovereign rights of the Sultan as follows: "He creates and cancels the appointments of ministers; he confers grades, functions and insignia by his orders, and confers investiture on the chiefs of the privileged provinces, according to the forms determined by the privileges granted to them; his is the right to coin money; his name is pronounced in mosques during public prayer; he concludes treaties with other powers; he declares war and makes peace; he commands both land and sea forces; he directs military operations; he carries out the provisions of the *Şeriat* (the sacred law) and of the other laws; he oversees the administration of public measures; he cancels or commutes sentences pronounced by the criminal courts; he summons and prorogues the General Assembly; he dissolves, if he deems it necessary, the Chamber of Deputies, provided that he directs the election of new members."[46]

[45] The Ottoman Constitution, Promulgated the7th Zilbridje, 1293 (11/23, December, 1876), The Amarican Journal of International Law, Vol. 2, No. 4. Supplement: Official Documents (Oct., 1908), pp. 367-387. http://www.jstor.org/stable/2212668 [15.06.2011]

[46] Ibid.

3.2 Public rights of Ottoman subjects

The next part of the constitution (Articles 8-26) enumerates the public rights of Ottoman subjects. All subjects of the empire area are called Ottomans, without distinction and irrespective of the faith they profess. The status of an Ottoman is acquired and lost according to conditions specified by law. Articles 9 and 10 emphasise personal liberty, which is wholly inviolable, on condition of non-interference with the liberty of others. Beyond this, it states that no one can suffer punishment, under any pretext whatsoever, except in cases determined by law, and according to the forms prescribed by law. On the strength of Article 11, Islam is the state religion but, whilst maintaining this principle, the state will protect the free exercise of the faiths professed in the Empire, and uphold the religious privileges granted to various bodies, on condition of public order and morality not being interfered with Article 15 ensured free education, on condition of conforming to the law. Equality before the law was declared under Article 17 as follows: "All Ottomans are equal in the eyes of the law. They have the same rights, and owe the same duties towards their country, without prejudice to their religion." Under Articles 18 and 19, eligibility for public office was conditional on knowledge of Turkish, which was proclaimed the official language of the State, and all Ottomans were admitted to public office, according to their fitness, merit and ability. Article 20 declared that the assessment and distribution of taxes are to be in proportion to the assets of each taxpayer, in conformity with the laws and special regulations. Property, real and personal, of lawful title, were guaranteed by Article 21.

3.3 The Ottoman Parliament

Whilst executive power was directed by the Sultan, the power of legislation was dual. According to the constitution, the General Assembly was composed of the Chamber of Nobles or the Senate, and the Chamber of Deputies. Therefore the General Assembly was divided into *Heyet-i Ayan* (Assembly of Notables) and *Meclis-i Mebusan* (Assembly of Representatives) and they were united under the title of *Meclis-i Umumi* (The General Assembly). This meant a two-chamber system. No-one could be a member of both chambers at the same time. The president and the members of the Senate, who had to be at least 40 years of age, were named directly by the Sultan for life but the number of Senators could not exceed one-third of the number of the members of the Chamber of Deputies.[47]

The *Meclis-i Mebusan*, regardless of all the restrictive clauses, was the first representative legislative body in Ottoman-Turkish history. Amongst Ottoman institutions, the only elected body was *Mebusan*. Acording to Article 71, every

[47] Ibid.

member of the Chamber of Deputies represented the whole of the Ottoman nation and not exclusively the district which had elected him. The constitution fixed the number of Deputies at one Deputy for 50,000 male inhabitants of Ottoman nationality and the election procedure was laid down by law. Article 68 restricted eligibility in the following terms: "They cannot be elected as deputies: who are not of Ottoman nationality, who, by virtue of a special regulation in force, enjoy the immunities attached to a foreign service which they exercise, who do not know Turkish, who are not 30 years of age, who are in the service of a private individual, who are bankrupt, who are of notoriously bad character or who have been judicially sentenced (unless pardoned), who do not enjoy their civil rights and who claim foreign nationality. After the end of the first period of four years, one of the conditions of eligibility of a delegate is that he shall know how to read Turkish and, as far as possible, write the language."[48] The head of the *Mebusan Assembly* was appointed by the Sultan after considering three candidates. The Constitution ranked the *Ayan Meclisi* above the Representatives and both Chambers would be opened with the *İrade-i Seniye* (declaration of the Sultan) at the beginning of November and closed at the beginning of March - again with the *irade-i seniye*. The right to extend or curtail the period of legislation was vested in the *Hukuk-u Mukaddese-i Sultani* (Sacred Rights of the Sultan). Under Article 46 all the members of the General Assembly had to take an oath of loyalty to the Sultan - and to the country - to observe the Constitution, to perform the duty entrusted to them and to abstain from every act contrary to their duty. In this system the national representatives were not loyal to the constitution but to the Sultan.

Legislative power was restricted according to the Sultan's approval and the Constitution limited legislative power by the concept of *vazife-i muayyene* (specific duty) although there was no exact definition of *vazife-i muayyene*. Once a *Mebus* (member of parliament) introduced legislation, the proposal would be sent to the *Şurayı Devlet* (State Council) which had no representative status. This Bill would then be formulated as a Law by the Council. The Ayan Assembly was responsible for checking the Bill by considering the superior sovereignty rights of the Sultan but even after completing this whole process, the Bill would mean nothing unless approved by the Sultan. The Sultan's absolute power of veto was the most crucial aspect of the enactment process based on Articles 53 and 54.[49]

3.4 Council of Ministers

According to Article 27 the Grand Vizier was invested by the Sultan, and the *Vükela* (Council of Ministers) was assembled under the presidency of the Grand Vizier. The other Ministers were nominated by Imperial *Irade* (decree). The

[48] Ibid.
[49] Ibid.

powers of the Council of Ministers comprised all of the important affairs of State whether internal or external. Those of its deliberations which had to be submitted for the Sultan's sanction were validated by an Imperial *Irade*. Each Head of a Ministerial Department administered, within the limit of his powers, the affairs which belonged to his department; those beyond this limit he referred to the Grand Vizier. The Grand Vizier attended to the reports addressed to him by the Heads of the different departments either by referring them, if necessary, to the Council of Ministers and then presenting them for Imperial sanction, or, alternatively, by judging himself or submitting them for the decision of the Sultan. Since the Sultan had the authority to appoint and suspend all the members of the *Vükela*, under these circumstances, the Council of Ministers could not remain a political body with the right to determine action independent of the Sultan. At the same time, it did not enjoy a relationship with the Assemblies based on a vote of confidence.

3.5 The first elections

To summon the first Ottoman Parliament some legal arrangement had to be made. On 28th of October, 1876, *Meclisi Vükela* (the Council of Ministers) announced the principles to be followed in elections by passing a seven-article *Talimat-ı Muvakkate* (Temporary Regulations).[50] In general, the Ottoman election would be conducted according to these. In the capital and its surroundings (İstanbul, İzmit and the provinces), on the other hand, elections were to be based on a government declaration dated January 1, 1877. Since the elections which would produce the first assembly were prepared hastily, a government regulation was consulted. As might have been guessed, in the first constitutionalist period, the rights to elect and be elected were limited. The election concept envisaged an indirect (two-phase) election. In order to have voting competency, it was obligatory to possess a certain property or be a taxpayer. Finally, after conducting elections, a group of voters who were mostly members of a city assembly (*Meclis-i Umumi-i Vilayat)* were accepted as secondary voters, and the first Ottoman parliament was inaugurated on March 19th, 1877. This Ottoman *Mebusan* Assembly with 69 Muslims and 46 non-Muslims (a total of 115 members)[51] was a radical innovation for the world of Islam. The Sultan was now sharing his legislative power with an Assembly, so legalising his own political power. In his *nutk-u iftitahi* (opening speech) Sultan ABDÜLHAMID II who had realised his objective of a constitutional establishment, quite interestingly created a relationship between civilisation and the principles of democratic legislation principle with these words: "I

[50] Gelez, Philippe:Towards a Proslopography of the Deputies from Bosnia-Herzegovina in the First Ottoman Parliament. In: Herzog, Cristoph – Sharif, Malek (ed.)The First Ottoman Experiment in Democracy. Ergon Verlag, Würzburg, 2010. p. 283.
[51] Shaw, J.S. and Shaw, E.K., op cit. p. 181.

considered it necessary to base laws on the general will and hence I proclaimed a Constitution."

3.6 Endgame

The first *Mebusan* term lasted slightly longer than three months. Legislative action which commenced in March 1877 lasted until the 28th June. The Assembly entered its second legislative term with a new election. This second term which started in December 1877 with new members could only survive as far as February 1878. At the end of the crisis resulting from the 1877-78 Ottoman-Russian War, Sultan ABDÜLHAMID II, deeming it necessary, suspended the *Meclis-i Umumi* (General Assembly) on the 14th February, 1878, abolished the *Meclis-i Mebusan* (Parliament) and a new absolutist regime was initiated in the empire. This was not at all consistent with the Constitution. The *Kanun-u Esâsî* had given the Sultan the right to suspend and dissolve.[52] Dissolution was based on Article 35 of the Ottoman Constitution, but the Sultan exercised his right merely to suspend (covered by Article 7). By these measures the *Tanzimat* period, as well as the First Ottoman Constitutional period, came to an end.

[52] Huri, Türsan: Democratization in Turkey-Role of Political Parties P.I.E.-Peter Lang, Brussel, 2004, p. 29.

Wanted! In search of runaway productions – film tax incentives in Europe

TOSICS, NÓRA – SZALAY, KLÁRA

ABSTRACT *The film industry is an extremely mobile sector; the choice of location for film productions is based on business decisions strongly influenced by incentives available in many countries worldwide. The last decade has seen growing competition to attract big-budget – mainly American – productions in order to benefit from the investment and work opportunities they represent. The main tools of this 'arms race' are different forms of local tax incentives for the film industry: tax deductions, tax credits and combined tax incentives. This article aims to map the context of these incentives, presenting the various forms of tax benefits available in EU Member States. It gives an insight to the criticisms and concerns voiced regarding the efficiency of competing incentives, and provides an overview of the European Commission's initiative to set limits to the competition.*

1. The history of film tax incentives

Film tax incentives as a means of providing economic support to the film industry were used for the first time in the United States. The stimulus for a new funding model emerged following the recession of the 1960s. In 1963 American film production was at its lowest, featuring, in total, 121 new films, and in the next year, 1964, the proportion of foreign films was at its peak (361 foreign films featured in the US as opposed to 141 American). With escalating financial difficulties and decreasing studio capacity, the number of American films shot outside the country, mainly in the UK, was on the rise.[1] The phenomenon of so-called "runaway productions" appeared. The term describes those films which were intended for first release in the US but were actually filmed in another country, a phenomenon that has remained a key factor of American film policy ever since. It was to reverse this trend that the US started to use film tax incentives.[2] The first measure to introduce such incentives in the US, the Domestic Film Production Act of 1971 was, in effect, until the mid-1980s, until

[1] Dirks, Tim: The History of Film, The 1960s, The End of the Hollywood Studio System, The Era of Independent, Underground Cinema, Part 1; http://www.filmsite.org/60sintro.html [25.11.2012.]

[2] Bakker, Gerben: The Economic History of the International Film Industry, University of Essex, 2010., http://eh.net/encyclopedia/article/bakker.film [25.11.2012.]

the Hollywood and Californian film industries strengthened their positions again. In the 1980s, the first European film tax incentives were started (France, 1985; Ireland, 1987; Luxemburg, 1988), without, however, giving rise to sharp competition at this stage.

The next turning point happened in the second half of the 1990s when Canadian Provinces introduced tax credit systems. These measures, coupled with favourable exchange rates and nearly 70% lower wage costs, resulted in another wave of runaway productions from the US. To counterbalance the loss of big budget productions, the US responded with launching a second generation of tax incentives. Given the fundamental changes that had taken place in the world media market by the end of the 90s – in particular, mass media consumption and the multiplication of global film distribution alternatives – this second wave of tax incentives became the starting point of a global competition.

At the same time, competition has evolved among the US States. Recognising the competitive edge embodied by tax incentives, the States were keen to enact similar schemes competing with one another. In 2002 only five States had tax incentive schemes in place, by 2010 – with a federal tax incentive system introduced in 2004 – the number had reached forty-four, of which twenty-eight offered tax credits for film productions shot on-location.[3]

On the other hand, a growing number of other countries worldwide started to introduce such incentives. At present, we can see ever-sharpening global competition, not only among the US, Canada and European countries, but also Australia, New Zealand, South Africa, and more recently, Taiwan, Singapore and South Korea.[4]

This competition is also visible among EU Member States. As we shall see in this article, the essential ambition to protect national or European film industry against American film productions did not hinder European countries in exploiting the economic potential of big budget productions.

2. Tax incentives in the European Union

As opposed to the US where film production is mainly governed by market principles, in Europe, there has been a tradition of state support to national film production with a cultural objective. As compared to the US, the film industry in Europe is significantly less market-based. Whilst at the turn of the century an

[3] Luther, William: Movie Production Incentives: Blockbuster support for Lacklustre Policy, Tax Foundation Special Report, January 2010, No. 173, p. 2. http://taxfoundation.org/sites/taxfoundation.org/files/docs/sr173.pdf [25.11.2012.]

[4] Oxford Economics: Economic Impact of the UK Film Industry, Supported by the UK Film Council and Pinewood Shepperton plc, July 2007, http://www.ukfilmcouncil.org.uk/media/pdf/5/8/FilmCouncilreport190707.pdf [25.11.2012.]

average European film cost €500,000, was 70-80% state-financed, grossed €800,000 and reached an audience of 150,000; the average American film cost €15 million, was nearly 100% privately financed, grossed €58 million, and reached an audience of 10.5 million.[5] Thanks to national and European film subsidy systems, the number of European films rises year by year (between 2005 and 2009 the increase reached 28%),[6] However, the ratio of American films is constantly and significantly higher on the European market (by 2010 it had reached 68%).[7] From the very beginning, European film policy was governed by the ambition to reverse the dominance of the American film industry but over the years, European countries have also recognised the economic benefits of attracting – mainly American – big budget productions.

The first tax incentives to promote film production in Europe appeared in the 1980s. The first support scheme including a tax break was introduced in France in 1985, by means of the so-called SOFICA investment funds. These funds aim to attract private savings into the French film industry. Decisions on capital are made by the funds, while investors are entitled to tax allowances on the basis of their shares. This model does not include a direct economic link between investor and film production. Albeit the scheme is not culturally oriented *per se*, in order to minimise risks, investment funds usually provide smaller amounts to a number of film productions, which may give an opportunity for cultural considerations.[8]

The first European film tax incentive comparable to the US model was introduced in Ireland in 1987, making tax deduction available for companies – later for private individuals – directly investing in film production. In contrast to the SOFICA, a central element of this model is the direct link between investor and film producer. The investment remains an economic decision, but the financial advantages (typically a share of the profit of the film production) and other incremental advantages for the investor are made more appealing by the tax allowance offered by the state. Similarly to the US, the direct model has been the one to gain general application across Europe. Luxemburg in 1988 and the UK in 1992 introduced tax relief schemes allowing for a tax deduction after in-country production expenses.

It was not until the millennium, however, that a bigger wave of tax incentives started in Europe. Not only a growing number of European countries

[5] Bakker, Gerben, op. cit.

[6] Digital Revolution – Engaging Audiences, A Cine-Regio report in collaboration with Filmby Aarhus, by Michael Gubbins, MCG Film&Media, February 2011

[7] European Audiovisual Observatory, Press Release: 3D drives European box office to record high in 2010 as market share for European film drops, Strasbourg, 9 May 2011, http://www.obs.coe.int/about/oea/pr/mif2011_cinema.html [25.11.2012.]

[8] Eperjesi, János: Filmipar Európában – 6. Rész, Közvetett támogatások, az adókedvezmények szerepe és jelentősége, http://www.filmtett.ro/cikk/2697/filmipar-europaban-6-resz-kozvetett-tamogatasok-az-adokedvezmenyek-szerepe-es-jelentosege [25.11.2012.]

introduced film tax incentives, but the amount of the incentives was also gradually raised and tax credits (deductions from the tax payable) were added to tax deductions. With the conditions of tax credits becoming more and more advantageous (the maximum caps were gradually raised or even eliminated), the fiscal advantages started to resemble direct subsidies. Measures once considered as an ancillary economic incentive became the main driving force, in some cases replacing market-based investment decisions.

The next in line to introduce tax deduction was Belgium – in 2002, followed by France, which decided to complement its overall film subsidy scheme with a new type of tax incentive in 2004. The new incentive opened up the possibility for film production companies to benefit from tax credits, initially up to €1 million. In the very same year, Hungary also introduced a tax incentive scheme, combining tax deduction and tax credit in order to attract financial investment from other sectors into film-making. The Hungarian scheme is based on donations from investors who enjoy a tax relief in return.

In 2006, the UK also introduced a combined incentive system with tax deduction and a payable tax credit scheme. However, unlike the Hungarian system, these advantages are available to film production companies exclusively. The complex tax relief scheme of Italy, introduced in 2008, aims to promote both the activities of film production companies and attract investment from outside the film sector by means of tax deduction and tax credit opportunities. The increasing focus of the support schemes to attract foreign productions is demonstrated by the fact that both Italy and later France introduced separate tax incentives for foreign films made in the country. As mentioned earlier, besides the introduction of new types of incentive, existing ones have also been intensified. In Ireland for example the maximum amount liable for tax incentive has gradually increased to €50 million over the years.

The following section describes the various tax incentive schemes introduced in Europe with special focus on Hungary and the UK. These two countries demonstrate well how tax incentives are put to use in countries with different economic backgrounds and film production capacities and may result in unexpected competition in the European marketplace.

2.1 Tax incentives serving new and old film locations: the examples of Hungary and the UK

2.1.1 Hungary

In the Central East European region, Hungary was the first, and for long the only, country to introduce a comprehensive support scheme for the film industry, including a financial incentive to encourage the localisation of big

budget foreign films.[9] The film tax – incentive regime was originally approved in 2004, and its aim is to attract investment into the industry from companies operating outside the sector. In this aim, the tax relief is granted to undertakings which are subject to corporate tax in Hungary and provide support to film production without any economic return from the film. The measure enables companies to deduct the amount of their support – which may not exceed 20% of the film production budget – both from their taxable income and from their payable tax. In other words, this means that the support can be used on the one hand to lower the corporate tax base (as an expenditure which can be paid off). Likewise, it can be used to reduce the tax to be paid, allowing for a nominal yield equal to the current re of corporation tax. This is now 19% so giving 119 units of tax benefit in exchange for 100 units of support. The tax benefit may not exceed 70% of the tax liability of a company in a tax year, but excess amounts can be transferred to the following three tax years.

The tax incentive is available for films made by Hungarian producers (co-producers) or for films by foreign producers made (fully or partially) in Hungary with the involvement of an undertaking liable to Hungarian tax (called films produced to order, production services or lease work). In order to benefit from the fiscal advantage, the film production needs to meet the cultural test provided in the Hungarian legislation. The tax benefit may be claimed up to 20%[10] of the direct film production costs, provided that direct Hungarian production costs[11] amount to at least 80% of the total production budget. If direct Hungarian production costs are lower, the benefit reaches 25% of direct Hungarian production costs.[12]

The taxable profits of the investor are €2.35m and the corporate tax rate is 19%. The financial situation of the investor looks as follows depending on his contribution to a film production:

[9] The Czech Republic introduced a new support scheme with a similar aim in 2010.

[10] According to paragraph 2, point 25 of the Act II of 2004 on Motion Picture of Hungary, direct film production cost is a "payment included in the budget of the given film financially settled by the producer of the film, or in the case of a commissioned film, by the Hungarian enterprise participating in production, such payment is confirmed by a receipt, and the payment conforms to the conditions set out in the present law".

[11] According to paragraph 2, point 29 of the Act II of 2004 on Motion Pictures of Hungary, direct Hungarian film production cost is "the group of direct film production costs which take the form of tax obligation or compulsory contribution, or which creates tax or compulsory contribution liability in Hungary and which conform to the requirements set out in the present law".

[12] According to the construction of the Motion Pictures Act, the basis for the calculation of the eligible amount is 125% of the direct Hungarian production costs, and benefits may be granted up to 20% of this sum.

	Without tax incentive	*A*	*B*
Profit before donation	*€2 350 000*	*€2 350 000*	*€2 350 000*
Contribution to the film	-	*€200 000 (20% of total budget)*	*€175 000 (25% of total budget)*
Tax base	*€2 350 000*	*€2 150 000*	*€2 175 000*
Tax liability (19%)	*€446 500*	*€408 500*	*€413 250*
Tax credit	-	*€200 000*	*€175 000*
Payable tax	*€446 500*	*€208 500*	*€238 250*

The impact of the Hungarian tax benefit is underlined both in Hungarian and international analyses. The key to success, according to English literature, rests on putting in place a high quality infrastructure parallel to the introduction of the tax incentive, and on an intensive promotion strategy in the United States. In 2008, Hungary introduced a dedicated development-tax incentive scheme to expand its film infrastructure, for investments in film- and video production studios worth at least 100 million HUF.[13] On this basis, investors may benefit from a tax credit worth up to 80% of their tax liability over a maximum of 10 years. As a result, production capacity multiplied; four new studio complexes opened in addition to besides the original Mafilm studio.[14]

This infrastructure mainly serves films produced to order, the number of which is year by year on the rise. Whilst, in 2004, only 7 foreign productions were made in Hungary, the number rose to 49 in 2010.[15] Certificates on qualifying expenditure are issued by the National Film Office (Nemzeti Filmiroda). The amounts covered by these rose from 0.63bn HUF to 7.29bn HUF[16] between 2004 and 2010 (although, interestingly, according to the budgetary statements, based on the tax declarations, the amount of tax benefits were only 4.5bn HUF).[17] At the same time, this period has also seen a considerable rise in Hungarian film expenditure. Some data reveal a ten-fold

[13] European Commission decision, State aid N646/2007 – Hungary, Development tax benefit for investments in film and video production facilities – amendment of the scheme N651/2006 on Development Tax Benefit, Brussels, 30.4.2008.
[14] Raleigh, www.raleighstudios.com; Korda, www.kordafilmstudio.hu; Astra, www.astrafilmstudio.hu; Stern, www.sternfilm.com [25.11.2012.]
[15] „A Time szerint Európa új Hollywoodja lehet Budapest", http://hvg.hu/kultura/20100719_time_budapest_film [25.11.2012.]
[16] http://www.nemzetifilmiroda.hu/# [25.11.2012.]
[17] Legislative proposal T/3927 on the execution of the 2010 budget of the Hungarian Republic, Chapter XLII. Main incomes of the central budget, Annexes, http://www.parlament.hu/irom39/03927/adatok/fejezetek/42mell.pdf [25.11.2012.]

rise, from 3 bn to 36 bn HUF in the given period.[18] According to the Korda studio, the Hungarian film industry produced 23 billion HUF in export value in 2010 through foreign productions – which accounted for a 20% rise in comparison to preceding years.[19] The film studio also emphasised the impact on employment: "whilst, a few years ago, foreign productions brought their own staff, today about 90% of the staff working on the scenery is Hungarian". According to their statistics "each and every forint given by the Hungarian state for film production brings two-and-a-half forints in return". In the case of Hungarian films, however, the economic impact is less attractive. According to the statistics of the National Film Office, the number of new feature films was 26 in 2004 and 37 in 2010, whilst the number of viewers dropped significantly over the same period from 1.3 million to 0.578 million.

The introduction of the Hungarian film tax-incentive scheme had an impact on film production in other European countries also. It was mainly the Czech film industry which was hit by the measures. Although the Czech Republic had considerable filming history and infrastructure, the introduction of the Hungarian fiscal incentives led to a market collapse in film production in the Czech Republic. By 2005, Hungary had reached the same level of income from foreign film productions as the Czech Republic, and it managed to attract more and more foreign productions in the following years.[20] As a result, according to data from the Czech Film Commission, film production expenditure dropped from 7.17 billion CZK in 2002 to 3.52 billion CZK by 2008. Income generated through foreign productions dropped from 4.54 billion CZK to 705 million CZK in the same period.[21] In order to defend its economic positions, the Czech film industry had long demanded the introduction of an incentive scheme and this eventually entered into force on 1 January 2010. In contrast to the Hungarian system, the Czech scheme rests on direct state grants to film production companies. The amount of support may reach 20% of Czech film production costs (eligible Czech production costs may not exceed 80% of the total production budget). The definition of eligible costs is somewhat less generous than in the Hungarian scheme, but the annual budget is significantly

[18] Presentation of Abacus-Consult Kft., http://www.ahkungarn.hu/fileadmin /ahk_ungarn/Dokumente/Bereich_CC/Veranstaltungen/2011/2011-05/2011-05-11_Recht_und_Steuern_Aktuell_HLB/20110511_HLB_rendezveny_FINAL__2_.pdf [25.11.2012.]
[19] Csapó: Hollywood meghajol a magyar filmesek előtt, http://fn.hir24.hu/ nagyinterju/2011/12/14/hollywood-meghajol-a-magyar-filmesek-elott/ [25.11.2012.]
[20] Rousek, Leo: Czech Movie Industry Loses Business to Hungary, the Wall Street Journal, 24 July, 2009. http://online.wsj.com/article/SB124838757272177229.html [25.11.2012.]; Ratner, Paul: Film Production in Prague, 12.07.2010., 21 http://www.expats.cz/prague/article/prague-entertainment/film-production-in-prague/ [25.11.2012.]

higher in the Czech Republic than the fiscal aid forecast in Hungary[22] (400 million CZK in 2010, approximately €15.7 million; €1,000 million CZK annually from 2011, approximately €39.2 million).[23] It is to be seen, how the operation of this support scheme will further influence competition among film locations in Europe. It may have an impact not only on the countries in Central and Eastern Europe, but also on established film locations such as the UK.

2.1.2 The United Kingdom

As early as 1992, the UK Finance Act provided the opportunity for production companies liable for corporate tax in the UK to deduct filming costs incurred in the country (generally over three years; in case of low budget films, since the 1998 amendment, immediately). This was completed by the Finance Bill of 2006, increasing the available tax incentives and thereby incentivising film production in the UK.[24]

In addition to these benefits, the film tax incentive, in effect from 1 January 2007, provides for enhanced tax deduction as well as for payable film tax credit. This scheme allows for an additional tax deduction of a certain proportion of qualifying UK costs, depending on the total production expenditure. Deduction may reach 80% of qualifying UK costs for films with a production budget of up to £20 million, and 64% for films with a higher production budget. In addition, the payable tax credit allows film production companies to claim a cash payment for tax losses after applying the enhanced tax deduction, with an upper limit of 80% of the qualifying UK costs. The limit of this cash payment is 25% of the tax loss for films with a production budget of up to £20 million, and 20% in case of films with a higher production budget. Apart from this benefit, however, the tax loss can no longer be set against income, or relieved in any other way. UK costs exceeding the 80% threshold and costs incurred outside the UK are subject to normal tax rules.

The functioning of the tax incentive may be illustrated by the following example: a film production company produces a film with total pre-production, photography and post-production expenditure of £10 million, all of which is UK expenditure. The film was commissioned by a distributer who pays £11 million for the completed film. Since the film costs less than £20 million, it qualifies for enhanced tax deduction of up to 80% of UK expenditure and the payable tax credit rate is 25%.

[22] European Commission decision, State aid N 98/2010 – Czech film support scheme, Brussels, 17.6.2010

[23] Based on exchange rates 15 November, 2012

[24] HM Revenue&Customs: Reform of Film Tax Relief, http://www.hmrc.gov.uk /films/reforms.htm [25.11.2012.]

Income (I)	*£11 million*
Expenditure (E), of which eligible UK cost is: x%	*£10 million, of which eligible UK cost is 100%*
Actual trading profit (I-E)	*£1 million*
Additional deduction (AD) (80% of UK expenditure)	*£8 million*
Adjusted trading profit (loss) (I-E-AD)	*£7 million*
Payable tax credit	*£1.75 million*

Source: European Commission decision, State aid N 461/2005 – UK film tax incentive

The maximum aid intensity of the UK tax incentives (state funded proportion compared to the total production costs of the films subsidised) is 24% for films with a total production expenditure of up to £20 million and 19.2% for films with a higher production budget. Only those film production companies are eligible for the tax incentive that are subject to corporate tax in the UK and – apart from co-productions – have full control over, and are responsible for the complete film, including principal photography, post-production and completion of the film. In case of co-productions, the co-producing production company must have a real and active involvement in producing the film. Furthermore, in order to be eligible, at least 25% of the film's total budget should be incurred in the UK and the film itself must be a culturally British film as defined by the UK cultural test.[25]

According to a study on the economic impact of the UK film industry published in 2010,[26] the tax incentive is a necessary and effective means to ensure and to develop the international competitiveness of the British film sector. The study emphasises the increasing global pressure and the expansion of tax incentives all over the world. In this context, it specifically highlights the example of Hungary to demonstrate that countries with lower wages and price levels may also decide to implement tax incentive schemes and to provide state funding for infrastructure.[27] Thus, initially less known filming locations may become serious competitors. According to their calculations, as a result of the film tax incentives – taking also into account the devaluation of the British pound – by 2010, the costs of film production had become 40% lower in the UK than in the USA. Moreover, based on these estimates, 2010 was the first year

[25] In the case of co-productions, the fulfilment of the criteria of the European Convention on Cinematographic Co-Production is equivalent.

[26] Oxford Economics: Economic Impact of the UK Film Industry, Supported by the UK Film Council, Framestore Ltd, Cinesite Ltd, Double Negative Ltd,and Pinewood Shepperton plc, June 2010, http://www.ukfilmcouncil.org.uk/media/pdf/i/r/The_Economic_Impact_of_the_UK_Film_Industry_-_June_2010.pdf [25.11.2012.]

[27] Oxford Economics (2010) p. 88.

when British costs were even lower than those in the Czech Republic (by 7%). The study calculates similar results until 2015, meaning that the British film industry should continue to attract 10-15% of global film production, with an annual foreign investment worth £750 million or more in the sector. Without the film tax relief in place, the share of the UK in global film production would drop by 5-10% according to the study, resulting in an annual loss of about £600 million.[28]

2.2 Tax incentives in other Member States of the European Union

2.2.1 Ireland

Ireland was among the first in Europe to recognise the incentive effect of tax reliefs for the film industry. In Ireland, a tax incentive scheme was initially introduced in 1987, gaining broader application following the 1993 reforms.[29] The tax incentive provides a possibility for tax deduction for corporate investors and – since 1993 – for private individuals investing into film production. The proportion of the production budget eligible to the tax incentive, the maximum amount of relevant investment per film and the amount of deduction have all been gradually increased over the years.[30]

According to current rules (in effect since 2009) companies and individuals investing in film production may deduct the total amount of their investment from their tax base. Companies may invest up to €10,160,000 this way (€3,810,000 per film), whilst for individuals, this cap is €50,000 annually.[31] Investments eligible for the tax relief may amount to 80% of the total production budget of a given film, which may not exceed €50 million. The amount to be spent on location in Ireland should at least equal the amount eligible for tax deduction: in cases where a producer raises 80% of the total

[28] Oxford Economics (2010), pp. 91-92.
[29] Barrett, Paddy: Ireland's tax breaks for film & TV production, http://www.obs.coe.int/oea_publ/sequentia5.pdf.en [25.11.2012.]
[30] Commission decisions State aid NN 49/1997, N 32/1997 – Ireland, "Section 35/481" tax based film investment incentive; State aid N 237/2000 – Ireland, Extension of aid schemes to film and TV production, Brussels, 25.9.2000; State aid N 387/2004 – Ireland, Tax relief for investment in film, Brussels, 1.12.2004; State aid N 151/2006 – Ireland, Tax relief for investment in film - Modification of scheme N 387/2004, Brussels, 16.5.2006; State aid NN 10/2009 (formerly N 487/2008) – Ireland, Irish film support scheme, Brussels, 10.3.2009
[31] Irish tax and Customs: Film Relief, http://www.revenue.ie/en/tax/it/leaflets/it57.html [25.11.2012.]

production budget from investors thereby benefiting from tax deductions in Ireland, this amount needs to be spent in the country.[32]

The economic effect of the Irish tax incentive may well be illustrated by the 57 qualifying film projects in 2010. According to calculations, this generated a total of €165 million in-country spend, resulted in maintaining 10,000 job and offered approximately 26-28% net benefit to film and television producers.[33]

2.2.2 Luxemburg

In Luxemburg, a tax incentive for film production has been in place since 1988. In case the film project meets the eligibility criteria (such as being mainly produced in Luxemburg and being foreseeably profitable), production companies subject to corporate tax in Luxemburg are issued with an audiovisual investment certificate covering expenses incurred in the country. Holders of the certificate may reduce their taxable income by the relevant amount, up to 30% of the tax base. The certificate may be used by the production company, but it may equally be sold to other companies subject to taxation in Luxemburg, which can also use them to reduce their taxable income. Selling the certificate often serves all parties; it helps to raise funds for the production company and reduces the taxable income of the profitable buyer company.[34]

2.2.3 Belgium

Belgium introduced its tax incentive scheme in 2002. Companies resident and subject to corporate tax in Belgium[35] may be granted a tax deduction on their taxable profits up to 150% of their investment in an audiovisual production with a maximum limit of €750,000 (equivalent to an investment of €500,000). Since its adoption, the incentive scheme has channelled considerable investment into the film sector and haw also generated an increase in employment. Investment in the film sector in 2003 was valued at €5 million, which rose to €80 million by 2008; figures for new jobs were estimated to have risen to 7,600

[32] Irish Film Board: Financing your film, Tax Incentives, Section 481 Cultural Test, http://www.irishfilmboard.ie/financing_your_film/Section_481_Cultural_Test/29 [25.11.2012.]
[33] Irish Film Portal: Tax break locked until the end of 2015, http://irishfilmportal.blogspot.com/2011/01/tax-break-locked-on-until-end-of-2015.html [25.11.2012.]
[34] Cineuropa Industry Report: Financing, Tax shelter – Luxembourg, 28/6/2006; lsd. http://cineuropa.org/2011/dd.aspx?t=dossier&l=en&tid=1365&did=75778 [25.11.2012.]
[35] In 2009, the European Commission approved the prolongation of the scheme under the condition that the Belgian authorities do not require Belgian nationality (e.g. incorporation in Belgium) in order to benefit from the tax deduction, see European Commission decision, State aid N 516/2009 – Belgium, Belgian film tax shelter extension, Brussels, 22.12.2009

during the same period.[36] According to the data of the Belgian Ministry of Finance, the tax incentive secured €600 million financing for audiovisual work between 2003 and 2011.[37]

2.2.4 France

The complex French film support scheme was extended in 2004 to include tax relief in relation to film production, followed by a tax incentive scheme specifically targeting foreign films produced in France in 2009.

The 2004 allowance may be claimed after those feature films, documentaries and animations that receive automatic funding are fully, or mainly shot in French or a regional language used in France, and are filmed principally on French territory. The scheme provides for a 20% tax credit for film production costs incurred in France not exceeding €1 million (and in case of feature films and documentaries, an amount of €1,150 per minute, for animations €1,200 per minute). The scheme has been extended to feature films intended for television viewing in 2005.[38]

The 2009 incentive targets those foreign film productions that spend at least €1 million on French territory, and, in the case of feature films, have at least five shooting days in France. The tax credit is available for those production companies liable for corporate tax in France that have undertaken to realise the production of a film in France for a foreign producer. The incentive allows for a 20% tax credit on eligible expenses and may amount up to €4 million. Should this amount exceed the amount of corporate tax due, the remaining amount is paid to the company directly by the state.[39]

According to a study commissioned by the Centre National du Cinéma et de l'Image Animée (CNC) in 2011, these tax allowances are not sufficient to compete with other European countries. The study stresses that the relatively low cap (€1 and €4 million respectively, compared €4 and €10 million in Germany, or €50 million in Ireland) as well as the narrow definition of eligible French costs make other European destinations more attractive.[40]

[36] Media: Impact of Tax Shelter – Economic Impact, http://www.umedia.eu/en/tax-shelter/economic-impact-134 [25.11.2012.]

[37] Location Flanders: The Belgian Tax Shelter System, http://www.locationflanders.be/production-guide/financing-and-incentives/the-belgian-tax-shelter-system/ [25.11.2012.]

[38] Commission Nationale du Film Francce: Les crédits d'impôts, http://www.filmfrance.net/pdf/fr/Chapitre_03_2.pdf [25.11.2012.]

[39] European Commission decision, Aide d'Etat N106/2009 – Crédit d'impôt pour les oeuvres cinématographiques étrangères, Bruxelles, le 2.7.2009; Commission Nationale du Film France

[40] Goodfellow, Melanie: Screen Daily: French film tax incentive less attractive than key EU counterparts, says CNC, http://www.screendaily.com/news/europe/french-film-tax-incentives-less-attractive-than-key-eu-counterparts-says-cnc/5032329.article [25.11.2012.]

2.2.5 Malta

Malta introduced incentives for film production in 2005. First of all, it applies a reduced corporate tax rate for companies working in the film sector (5% instead of the general rate of 35%). Further, it allows for a refund of the 18% VAT on goods and services related to film production. In addition, film productions are granted direct support of up to 22% of Maltese production costs (32% for difficult or low budget films).[41] Moreover, Malta also provides an investment tax benefit to generate investment in film industry infrastructure (depending on the size of the company, a tax credit of 30-50% of eligible Maltese costs is available). As a result, the past years have seen a steady increase in the number of films made in Malta.[42]

2.2.6 Italy

Italy introduced a tax incentive scheme in 2008 in order to boost local film production. Investors in film production are entitled to a tax credit of 40% of their contribution, up to a maximum amount of €1 million in a tax year. Film production companies making "Italian" films (films with mainly Italian or European contributors, or filmed principally in Italy or Europe) are eligible for a 15% tax credit on expenses incurred in Italy, to a total of €3.5 million in a tax year.

In addition, similarly to the 2009 French tax incentive, Italy also provides a separate tax credit for foreign films produced in Italy, where the overall, creative control is carried out by a foreign company, and production is carried out in cooperation with a production company liable for corporate tax in Italy. In this case, the Italian production company is entitled to a tax credit of 25% on Italian production costs up to €5 million. Moreover, the Italian incentive system incorporates two further allowances in the area of film production. Profits of production companies invested in the production of "Italian" films are not regarded as taxable income. Companies outside the film sector investing their

[41] Malta Film Commission: Cash Rebate – Financial Incentives for the Audiovisual Industry, http://www.mfc.com.mt/page.asp?p=14253&l=1 [25.11.2012.]; Tax Credits, http://www.mfc.com.mt/page.asp?p=14254&l=1 [25.11.2012.]; Commission decisions State aid N605/2007 and State aid N613/2009 – Financial Incentives for the Audiovisual Industry Regulations, Brussels, 28.11.2007; Financial Incentives for the Audiovisual Industry Regulations (prolongation of State aid N605/2007), Brussels, 8.12.2009

[42] FinanceMalta: The Film Servicing Sector in Malta, http://www.mfc.com.mt/page.asp?p=14254&l=1 [25.11.2012.]

profits in a film production may also deduct the amount of investment from their taxable income, up to 30% of their tax base.[43]

2.3 Other similar initiatives in Europe

Film tax incentive schemes are the focus of the current article. At the same time, for the sake of completeness, we should mention that a similar effect may be achieved for instance by means of direct subsidies. In 2007, the Netherlands, for example, decided to convert their tax incentive scheme into a direct subsidy system.[44] In fact, if a tax credit is not limited to a certain percentage of the payable tax, as we have seen in several cases, or if it may be transferred to the next financial year and/or the state pays the amount in excess of the tax due, the two types of measure are practically equivalent.[45] In view of the similar outcome of the different types of subsidy, it is not surprising that film journalists often refer to direct subsidies aimed at incentivising the production of foreign films as tax incentives too.[46]

Germany also chose the way of direct support, introducing the German Film Fund (DFFF - Deutscher Filmförderfonds) in 2007 as a new, federal support system. The Film Fund provides €60 million annual support to film productions with a budget over €1 million that spend at least 25% of their production budget in Germany.[47] The support amounts to 16 or 20% of German spend and may reach €10 million. According to the statistics of the Fund, in 2010, the support scheme generated investment of €340 million in German film production.[48]

The success of the German Film Fund generated similar action in Austria in 2010. The difference between the two schemes is that, in Austria, support amounts to 25% of Austrian spend and that – given the different size of the

[43] Italian Film Commission: Regulations introduced in Italy regarding tax benefits for the film industry

[44] Davies, Adam P. – Wistreich, Nicol: The Film Finance Handbook: How to Fund Your Film, 2007 Netribution Limited; Commission decision State aid N 291/07 – The Netherlands Film Fund – Implementation Regulation for feature films and supplementary regulations for investments in film, Brussels, 10.7.2007; State aid N 524/2009, Brussels, 22.12.2009; State aid N 371/2010, Brussels, 15.11.2010

[45] Luther, William, op. cit. p. 6.

[46] For instance in the case of the German Film Fund: The Hollywood reporter: German Film Fund brings nearly $ 500 million in 2010, http://www.hollywoodreporter.com/news/german-film-fund-brings-500-73922 [25.11.2012.]; or in the case of the Czech direct support scheme: Film New Europe: EU approves Czech film tax incentives, http://www.filmneweurope.com/news/czech/eu-passes-czech-film-tax-incentives [05.03.2012.]

[47] European Commission decision, State aid N 695/2006 – Germany, German Film Fund, Brussels, 20.12.2006

[48] The German Film Fund: The Hollywood reporter, 2010, op. cit.

countries – the Austrian scheme has an annual budget of €7.5 million.[49] The Austrian example clearly shows that competition is not limited to tax incentives alone. A further example of this is the Czech support system mentioned above which was introduced under pressure from the Hungarian film tax incentive scheme.

3. The future of competing incentives: questions in America and Europe

3.1 American criticism of the 'arms race'

While the number of film tax incentives is steadily increasing, the past years have seen some studies questioning the economic efficiency of these measures in the United States.[50] One of the most dedicated critics of the arms race among the states is the Washington-based Tax Foundation. According to their estimate, states have spent almost $6 billion on tax breaks in the past decade, although these incentives have failed to live up to expectations: the jobs created by the film industry are mostly temporary positions and there was no sufficient return to compensate for lost state revenue.[51] They highlight the fact that how much film incentives cost taxpayers and how much has been gained through it remains a mystery in most support schemes. In their opinion, studies stressing the positive impact of the tax breaks on film production, job creation and investment do not take into account the activities which would have taken place without the tax incentive and do not consider opportunity costs, those alternatives which, as a result, went unfunded.[52]

The 2010 edition of the 'Paper of the Michigan Senate Fiscal Agency' came to a similar conclusion. "The nature of the credit and the resulting activity is such that, under current (and any realistic) tax rate, the state will never be able to make the credit 'pay for itself' from a state revenue standpoint, even when the credit generates additional private activity that would not have otherwise

[49] Source: European Commission decision, State aid N 96/2010 – Austria, Fimstamdort Österreich, Brussels, 31.8.2010

[50] Schonauer, R. Joshua: Star Billing? Recasting State Tax Incentives for the „Hollywood" Machine; Ohio State Law Journal, 2010. Vol. 71:2

[51] Henchman, Joseph: Poor Reviews Prompt States to Cry Cut! on Film Tax Incentives, June 18, 2011, http://news.heartland.org/newspaper-article/2011/06/18/poor-reviews-prompt-states-cry-%E2%80%98cut%E2%80%99-film-tax-incentives [25.11.2012.]

[52] Cobb, Kathy: Roll the credits… and the tax incentives – Cities, states and even countries spar for film production business, but at what cost? September 1, 2006, http://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=1309 [25.11.2012.]

occurred."[53] The same doubts were formulated in 2004 by Greg ALBRECHT, chief economist for Louisiana's Legislative Fiscal Office: "even if 100% of the reported production amounts were being spent on purchasing goods and services from Louisiana suppliers, the economic benefits would not be sufficient to provide tax receipts approaching the level necessary to offset the costs of tax credits."[54]

According to the critics, the positive impact on the overall economy is also unfounded: "when film tax credits do hit their mark and induce more local film production, the resulting stimulus to overall economic activity appears to be rather modest."[55] The Tax Foundation considers the current system of competing tax incentives clearly disadvantageous: "The only thing these incentives create is the need for ongoing credits and subsidies".[56] This leads to a race to the bottom; the only beneficiary of the competing incentives is the film industry, all other parties lose.

The Tax Foundation describes three possible solutions to the 'arms race' among US States.[57] On the one hand, it considers that individual States may decide to stop subsidising the movie industry on a unilateral basis: they may conclude that there is no point in continuing to compete with the generous incentives of some States (e.g. Louisiana and Michigan). Those countries that offer few other advantages to the film industry would thereby certainly lose their tax-induced film productions. At the same time, they would free up resources for other, more long-lasting objectives.[58] Indeed, in 2010-2011, several American States decided to abolish or to suspend their tax benefits (Arizona, Arkansas, Idaho, Iowa, Kansas, Maine, New Jersey, Washington), and there were initiatives to decrease or to end the incentives in a number of other States as well (Alaska, Connecticut, Georgia, Hawaii, Michigan, Missouri, New Mexico, Rhode Island, Wisconsin). Other States, however, preferred to pursue, or even increase their incentives (for example California, Utah, and Virginia introduced further incentives).[59]

[53] Zin, David: Film Incentives in Michigan, Issue Paper of the Michigan Senate Fiscal Agency, September 2010, http://www.senate.michigan.gov/sfa/Publications/Issues/FilmIncentives/FilmIncentives.pdf [25.11.2012.]

[54] Albrecht, Greg, in: Nothdurft, John, The Heartland Institute, Policy Documents: Film Tax Credits: Do They Work?, http://heartland.org/policy-documents/film-tax-credits-do-they-work [25.11.2012.]

[55] New England Public Policy Center at the Federal Reserve Bank of Boston, in: Nothdurft, John, The Heartland Institute, Policy Documents: Film Tax Credits: Do They Work?, http://heartland.org/policy-documents/film-tax-credits-do-they-work [25.11.2012.]

[56] Cineuropa Industry Report: Financing - Study: Film Tax Credits, Production Incentives Fail to Spur Economic Growth, 8/2/2010, http://cineuropa.org/2011/dd.aspx?t=dossier&l=en&tid=1365&did=134997 [25.11.2012.]

[57] Luther, William op.cit. 15-16. o.

[58] Ibid.

[59] Henchman, Joseph op. cit.

On the other hand, all States currently operating tax incentives for the film sector could abolish these benefits by way of common agreement. This solution, based on voluntary cooperation, has the practical disadvantage that a State breaking the agreement would be able to draw large benefits to the detriment of the others. If one State breaks the pact, competitive forces would drive others to follow suit, giving rise to a new 'arms race'.

The third alternative could be the federal solution. Some authors suggest that Congress should use its Commerce Clause to end "the economic war among the States" and prevent States from "using financial incentives to include companies to locate, stay, or expand in the State."[60] At the same time, the Tax Foundation recognises that the use of the powers embodied in the Commerce Clause would give rise to a new precedent which may well usher additional problems going beyond the film sector.

In our view, these criticisms are a very useful indication of the negative effects of tax incentives. At the same time, to better understand the background of the criticism of the Tax Foundation, it is useful to note that they are not only critical of film tax benefits, but of all sector-specific tax breaks. In their view, whereas competition among tax systems may be useful, sector-specific tax competition incentives do nothing but transfer wealth from the many to the few.[61] Another noteworthy point is the fact that although the organisation emphasises the lack of thorough examination regarding film tax incentives and takes into account a number of economic issues, it does fail to take global competition for film production into consideration. Indeed, in case of abolishing the benefits in the US, there may be a possibility that all States lose film production activities to the benefit of their European and other international competitors. This issue, the global determination of tax incentive schemes, has been a key point in the public debate among Member States and interested parties following the publication of the European Commission's issues paper on the review of the Commission's Cinema Communication.[62]

3.2 The European policy regarding film tax incentives

3.2.1 State aid rules for film support

Unlike the US States, Member States of the European Union are not entirely free to decide upon the introduction of state support measures, such as tax

[60] Burstein, Melvin and Rolnick, Arthur of the Federal Reserve Bank of Minneapolis, in: Henchman, Joseph, op. cit.

[61] Luther, William, op. cit. p. 16.

[62] Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of Regions on certain legal aspects relating to cinematographic and other audiovisual works, Brussels, 26.09.2001, COM(2001)534 final

incentives. The European Commission's control over the granting of state subsidies is one of the specificities of the acquis communautaire.[63]

The current conditions to be met by film support measures are described by the Commission's 2001 Communication on certain legal aspects relating to cinematographic and other audiovisual works (referred to as the Cinema Communication).[64] The Cinema Communication sets out the following criteria:

- *Cultural objective*: aid must be directed towards a "cultural product", i.e. the Member State must ensure that the product receiving funding (in accordance with the principle of subsidiarity) is cultural in nature according to verifiable national criteria.
- *Limited territorialisation*: the producer must be free to spend at least 20% of the film budget in other Member States. It is therefore possible to prescribe a maximum spend of 80% of the production budget on the territory of the State that is actually providing the aid for the film or television programme.
- *Complementary character*: the intensity of the aid provided by the Member State must in principle be limited to 50% of the production budget, except for difficult and low budget films.
- *Prohibition of aid supplements for specific film-making activities*: aid supplements to separate film-making activities such as post-production, which would aim at attracting certain work processes to a given country, are not allowed.[65]

With the increase of tax incentives over the past years, the State aid decisions of the European Commission show a marked move, examining more and more closely the compatibility of tax measures with the conditions of the cultural exemption, in particular with the cultural criterion.[66]

In the Issues Paper[67] marking the beginning of the review process of the Cinema Communication in 2011, the European Commission services took the view that current rules are insufficient to control the subsidy race in Europe.

[63] See for instance Sinnaeve, Adinda: How the EU manages subsidy competition, Speech prepared for presentation on Fenruary 27, 2004, at Reining in the Competition for Capital, a conference organised by Professor Ann Markusen at the Humphrey Institute at the University of Minnesota, http://www.hhh.umn.edu/img/assets/6158/sinnaeve_paper.pdf [25.11.2012.]

[64] Communication on certain legal aspects relating to cinematographic and other audiovisual works, op. cit.

[65] Tosics, Nóra: Audiovizuális politika, in: Kende, Tamás – Szűcs, Tamás: Bevezetés az Európai Unió politikáiba, Complex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft., Budapest, 2011

[66] Broche, Jérôme – Chatterjee, Obhi – Orssich, Irina – Tosics, Nóra: State aid for films: a policy in motion?, Competition Policy Newsletter 2007/1.

[67] European Commission: Issues Paper – Assessing State aid for films and other audiovisual works, online:http://ec.europa.eu/competition/consultations/ 2011_state_ aid_films/issues_paper_en.pdf [25.11.2012.]

3.2.2 Review of State aid rules: the Commission's concerns regarding the 'arms race' in tax incentives

On the occasion of the 2009 extension of the European Commission's Cinema Communication, the Commission signalled that, among other tendencies, the "competition among some Member States to use State aid to attract inward investment from large-scale, mainly US, film production companies" may require a refinement of the State aid rules. In the 2011 Issues Paper, the Commission services voiced concerns that attracting these productions "with subsidies may ensure that these high profile films are made in Europe rather than elsewhere, [but] such subsidies distort competition among European production locations." The Issues Paper highlights that the 50% maximum aid intensity foreseen in the present Communication allows for a very high aid amount in such cases. Although it recognises that support for these film productions may indirectly support European film services and have positive spill-over effects to other sectors, overall, it takes a critical view of the 'arms race' in tax incentives and the resulting situation. "To the extent that this use of public subsidies in effect leads to competition with other Member States, this is detrimental both to the sector and to European taxpayers."

In the Issues Paper, the Commission services emphasise the primary objective of the State aid rules of the Treaty, namely to avoid such competition. They describe two main problems. On the one hand, profits linked with these productions are retained largely outside the EU "and therefore do not necessarily contribute to the long-term sustainability of the sector." On the other hand, they point out that – unlike their European competitors – American big productions have no difficulty obtaining private finance ("the question is not whether the film will be produced but only where this will be done."), therefore, the necessity of such subsidies is "not evident".

The Issues Paper recalls the time of the elaboration of the present Cinema Communication, when the phenomenon of competing incentives did not arise and so could not be taken into account. At this stage, however, limits needed to be set to the subsidy race.

3.2.3 Proposed rules to control the subsidy race

Following the publication of the Issues Paper, the European Commission invited all interested parties to submit comments. This public consultation showed that an important number of Member States still view tax incentives as a useful tool for supporting their film industries. A large number of participants voiced concerns that Europe may lose ground in the global competition and did not demonstrate awareness of the inefficiencies at European level.

Notwithstanding these comments, the European Commission pursued the objective to control the subsidy race and included relevant rules in the draft

revised Cinema Communication, published in March 2012. The draft acknowledges the positive effects of international productions on national film industries, but – in line with the Issues Paper – it views the subsidy race harmful to competition within the Community and makes an attempt at its control.

In concrete terms, the draft – in parallel with tightening the rules on territorial requirements – considers that it is not justified to define the aid amount based on the production costs incurred in a given country. Therefore, it suggests that the basis for tax incentives should be calculated taking into account all production expenditure within the European Economic Area (EEA). Member States could only require a film production to spend the actual aid amount – in the case of tax incentives, the actual amount represented by the tax benefit – in their territory.

Moreover – in line with some comments received during the public consultation – the draft makes a distinction between support for European and for foreign productions, and suggests stricter, regressive intensity rules for foreign productions. In the case of foreign films with a production budget higher than €10 million, aid intensity would be limited to 30%, and foreign films with a production budget higher than €20 million could benefit from an aid intensity of a maximum of 10%.

These new provisions would have an effect on all tax incentives in the EU. The decrease of maximum aid intensity is foreseen to limit competition for big budget productions – and thus have an effect on participation in worldwide competition. On the other hand, the requirement to take all production expenditure within the EEA into account would affect the original aim of national tax incentives, i.e. to attract productions to a given country. It is no wonder, therefore, that a large number of Member States and market players have voiced concern in the course of the second round of public consultation on the draft Communication. The influence of these concerns and of the Commission's dedication to protect competition will be manifested in the revised Cinema Communication.

4. Concluding remarks

The aim of this article was to explain and illustrate the subsidy race to attract big budget foreign productions, with particular emphasis on EU Member States. For the time being, a number of issues raised in this article remain unanswered, whilst Europe attempts to find a new balance between cultural aid and the rationale for economic incentives, between the negative impacts of the subsidy race and the pressure to participate in the global competition for film locations, between the short term goals of the Member States' film industries and the strategic interests of the European film sector, as well as issues of competence and subsidiarity between Member States and the European Union.

As we have seen in the past years, critical voices have emerged concerning this growing global subsidy race. In the U.S., several States decided to unilaterally revise their tax incentive schemes. A similar trend is not visible among the Member States of the EU. So far, the signs were pointing more towards the broadening and intensifying of this competition. However, in the context of the ongoing review of the Cinema Communication, the Commission is making an attempt to set limits to this subsidy race in the interests of the Internal Market.

The underlying issues of the current public debate remain unchanged. How are we to increase the competitiveness of the European film sector? What is the future of European film? Besides thriving Hollywood and Bollywood, is there a future for a similarly successful European "Jollywood"?

Although competition for big budget productions may help to keep the economic base of the European film industry, and to sustain and increase current capacity, they do not serve in the interest of strengthening the whole of the European film industry. Data of the European Audiovisual Observatory are thought-provoking; in 2010 the market share of European films had dropped to its lowest point in the past five years (25.3% as opposed to 68 % in the US).[68]

According to analysts, the key to the success of the European audiovisual sector lies in its capacity to change how it reaches and builds larger regional and global audiences.[69] The strategic issues of the European film sector include overcoming the fragmentation of the European film industry, boosting the distribution of European films, improving commercial conditions, strengthening European co-productions and moving towards a more market-driven approach. However, looking at these issues leads us beyond the scope of our present paper. One thing is certain: no matter how appealing the fast and spectacular results of a successful tax incentive scheme may be, these benefits should not override the long-term, strategic goals and ambitions of the European film industry.

[68] European Audiovisual Observatory, Lumiere database, http://www.obs.coe.int/about/oea/pr/mif2011_cinema.html [25.11.2012.]

[69] Opinion of the American Assembly: http://ec.europa.eu/competition/consultations/2011_state_aid_films/american_assembly_en.pdf [25.11.2012.]

The intra-EU mobility right of third-country nationals in the European Union

TÖTTŐS, ÁGNES

ABSTRACT *Although the free movement of persons constitutes a cornerstone of EU law, the free movement of non-EU citizens has so far been neglected – for a number of reasons. This paper aims to show the intra-EU mobility rights now current in European migration law, comparing the features of provisions managing short- and long-stays of third-country nationals within the European Union.*

The mobility provisions of the various legal migration directives are briefly introduced, but the paper focuses mainly on the intra-EU mobility rights of third-country nationals as employees. The study explores the limitations which are still obstacles in the way of achieving the highest level in implementing this form of free movement, whilst at the same time, dealing with the safeguarding of national interests from both migration and labour law perspectives.

The research reveals that, although the mobility rights of third-country nationals should be improved at European level, Member States are reluctant to take any further step from the present situation, which is characterised by national concerns preventing the mutual recognition of residence permits.

1. What does mobility mean?

There are numerous possible definitions or notions of what mobility means, especially when comparing it to the phenomenon of migration. As an everyday term, mobility can simply mean the ability to move freely, but that contains no indication of the movement's actual length in terms of time and distance. EU terminology tends to define mobility in a somewhat narrow context, that is, as intra-EU mobility – the ability to move freely within the European Union, as originally provided exclusively for citizens of the EU for employment purposes. The right has its origins in the Founding Treaties of the European Communities, but at that time of course, the notion of intra-EU mobility was conceived within very narrow borders – that is, exclusively for worker citizens of the Member States.

The Treaty of Rome came into force on January 1st, 1958, founding the European Economic Community, and in Article 48 it set out one of the Four Basic Freedoms of what was to be the Common Market, namely, the free movement of workers. Under this, a citizen of a Member State, if seeking employment in another Member State, has, firstly, the right to enter that state

and engage in employment without a visa and, secondly, the right to reside on the territory of that state throughout the employment. In order to avoid diverging national rules in different Member States, directives and regulations were adopted which covered Union citizen workers and their family members, increasingly expanding this freedom, which was initially valid only for employees and service providers.[1]

Based on the aim of creating a common market, Community rules originally only provided free movement for job seekers and workers. However, it was then realised that guaranteeing these mobility rights is essential also for persons staying for other purposes such as for trainees or for family members of employees. The rules, therefore, were modified to cover a wider group of people, and, as a result, free movement and residence rights were expanded to cover further EU migrants. This process continued until the point was reached where, in fact regardless of purpose, but subject only to certain conditions, such as sufficient resources and health insurance, all EU citizens and their family members (regardless of nationality) currently enjoy the right to free movement and residence. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States[2] summarised and re-regulated the previous EU legislation, and created a single directive for the rules on the entry and residence, for various purposes, of EU citizens and their family members in another Member State. "Thus, through successive Treaty amendments, the adoption of secondary legislation and the case law of the European Court of Justice, free-movement rights were gradually decoupled from "market citizenship" and extended to non-economically active EU citizens."[3]

"Voices calling for the preservation of a personal scope of European citizenship freedoms and benefits limited to the nationals of the EU Member States are losing ground, and are in tension with the de facto gradual promulgation and expansion of EU freedoms and non-discrimination to TCNs (Third Country Nationals) in the EU. Through the enactment of their European freedoms, non-EU nationals are progressively brought into the European

[1] Wetzel, Tamás: A bevándorlás kérdése Magyarországon. Publikon Kiadó, Budapest, 2011 pp. 58-59.

[2] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance) OJ L 158, 30.4.2004, pp. 77–123.

[3] Wiesbrock, Anja: Free Movement of Third-Country Nationals in the European Union: The Illusion of Inclusion. In: European Law Review 2010/35. (August) p. 456.

citizenry."[4] CARRERA and WIESBROCK make this statement when trying to define the "citizens" on whom that the Stockholm Programme and its Action Plan focus. Yet the idea of approximating the rights of third-country nationals with those of EU citizens arose earlier and so, when examining the notion of the intra-EU rights of third-country nationals several regulations and directives can be examined.

"When combined with the increasing importance given by the EU to the 'freedom of movement' or 'cross-border situations' of TCNs (intra-EU mobility) in the EU Directives on long-term residents' status, the blue card, researchers and students, the answer to the question of who are the 'citizens' to be empowered by the Stockholm Programme and Action Plan takes us beyond the individual categorised as 'national' and towards unexpected venues and political subjectivities. (...) Such an argument would be naïve without duly acknowledging the existence of limitations and (legal) conditions that still apply in the EU legal system to TCNs when having access to and enjoying these European citizenship-like and citizenship-related freedoms, benefits and rights."[5] This paper therefore intends to show the intra-EU mobility rights presently existing under EU rules on immigration, as well as search for the limitations that still form obstacles in achieving the highest level of free movement of third-country nationals, especially migrant workers within the European Union. The main reason for doing so is that "ever since the outset of European co-operation, the free movement of persons has constituted a cornerstone of Community law. Yet, the free movement of non-EU citizens has so far been neglected as a potentially powerful source of economic growth in the European Union."[6]

2. EU instruments governing the mobility of third-country nationals

2.1 Short-stay mobility

We have to distinguish between rules regulating stays on the territory of the EU for up to three months and stays exceeding three months. Uniform Schengen visas[7] for stays up to 3 months ("short stays") are issued on the basis

[4] Carrera, Sergio – Wiesbrock, Anja: Whose European Citizenship in the Stockholm Programme? The Enactment of Citizenship by Third Country Nationals in the EU. In: European Journal of Migration and Law 2010/12. pp. 337–359.

[5] Ibid.

[6] Wiesbrock, Anja op. cit. p. 455.

[7] Visa Code Article 2 (2) a): "visa" means an authorisation issued by a Member State with a view to transit through or an intended stay in the territory of the Member States of a duration of no more than three months in any six-month period from the date of first entry in the territory of the Member States.

of the rules set out in the Visa Code[8] and are, in general, valid for travel to and within the Schengen Area.[9] Since the objective of these provisions, namely the establishment of the procedures and conditions for issuing visas for transit through or intended stays in the territory of the Member States not exceeding three months in any six-month period, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Union level, the Visa Code was adopted in the form of a regulation.

As a regulation provides full harmonisation, Schengen States consequently issue visas according to completely harmonised rules and so it is ensured that, regardless of which Member State makes the decision, it is based on the same set of criteria and the same procedure. These are the conditions under which Member States can mutually recognise each other's decisions, which is the key precondition for free movement within the Schengen Area provided by a visa issued by any of the Schengen States. This achievement of free movement can be enjoyed not only by Schengen visa holders, but also by long-stay visa holders[10] and residence permit holders, as well, who are also allowed to travel to other Member States for three months in any six-month period.

Therefore we can see that complete mutual recognition exists in the case of decisions concerning entry and stay of third-country nationals for short stays within the Schengen Area. This originates from the fact that full harmonisation is provided by the regulations setting out provisions on visa decision-making and border crossing. Yet, even in this case Member States ensured that, in certain cases, they are consulted,[11] even if the decision-making lies within the competence of another Member State. Nonetheless, from time to time certain Schengen States raise the possibility of restoring internal border checks when certain migration trends seem to threaten public security.

[8] Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) OJ L 243, 15.9.2009, pp. 1–58.

[9] The Schengen area and cooperation are founded on the Schengen Agreement of 1985. The Schengen area represents a territory where the free movement of persons is guaranteed. The signatory states to the agreement have abolished all internal borders in lieu of a single external border.

[10] Regulation (EU) No 265/2010 of the European Parliament and of the Council of 25 March 2010 amending the Convention Implementing the Schengen Agreement and Regulation (EC) No 562/2006 as regards movement of persons with a long-stay visa OJ L 85, 31.3.2010, pp. 1–4.

[11] Visa Code Article 22 (1) A Member State may require the central authorities of other Member States to consult its central authorities during the examination of applications lodged by nationals of specific third countries or specific categories of such nationals.

2.2 Long-stay mobility

Contrary to provisions governing short-stay rules, provisions concerning migration exceeding three months are laid down by directives at Union level, since certain flexibility is needed for Member States to be able to adapt their national provisions to EU rules. This is to take into account their already existing system of residence and long-term residence permits which has been formed in a way reflecting the Member State's own historical background, cultural and economic ties as well as institutional systems. Several directives concerning legal migration lay down, among other rules, the conditions under which these categories of third-country nationals and their family members may reside in a Member State other than the one where they first acquired immigrant status, yet these directives only cover certain groups of third-country national migrants.

The European Commission primarily aimed to approach the legislation of legal migration of third country nationals from an economic point of view. Accordingly the Commission proposed a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities on 11 July 2001.[12] No matter how noble the intention of the Commission was to create an EU-wide harmonised system for a very wide range of third-country migrants, i.e. to follow a horizontal approach in order to cover both the groups of employees and self-employed persons, the negotiation of the Directive has revealed many problems. "The proposal, which closely followed the 1999 Tampere Programme's milestones, was finally withdrawn because representatives of certain EU Member States expressed deep concern about the possibility of having 'more Europe' in these nationally sensitive fields."[13]

The Hague Programme of November 2004, continuing the implementation of the initiatives of the Tampere Programme, stressed that legal migration plays an important role in strengthening the knowledge-based European economy, economic development and also contributes to the implementation of the Lisbon Strategy. In order to facilitate the adoption of a new draft Directive, the European Commission initiated an extensive consultation with its 'Green Paper on an EU approach to managing economic migration'[14] with Member States, other European institutions, international organizations and NGOs, and other

[12] Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities /COM/2001/0386 final – CNS 2001/0154/

[13] Carrera, Sergio – Faure Atger, Anais – Guild, Elspeth – Kostakopoulou, Dora: Labour Immigration Policy in the EU: A Renewed Agenda for Europe 2020, CEPS Policy Brief No. 240, 5 April 2011, p. 3.

[14] COM (2004) 0811final: Green paper on an EU approach to managing economic migration

interested parties as to what would be the best type of legislation at Community level in relation to the reception of economic migrants from third countries.

The primary objective of the consultation launched by the Green Paper was to find the most appropriate form of regulation in the Community on the reception of migrants for economic purposes from third countries, and to discover what would be the added value of the establishment of such a Community framework. The Hague Programme also referred to the Green Paper and the consultation, which will form the basis of a policy plan on legal migration including admission procedures capable of responding promptly to the changing labour market demand.

The result of this consultation was the continuation of the sectoral approach of laying down migration rules for certain chosen groups of migrants instead of covering a wider scope of third-country nationals by a harmonised set of criteria. "The main justification was that, by doing this, the common European policy would be in line with the political priorities and legal regimes applying in most EU Member States."[15] The Political Plan on Legal Migration[16] was the way in which the Commission envisaged a framework directive – together with four further directives covering four specific groups of economic migrants. "The main result of the approach advocated by the "Policy Plan on Legal Migration" has been the emergence of a hierarchical, differentiated and obscure European legal regime on labour immigration which accords different rights, standards and conditions for entry and stay to different groups and countries of origin of TCN."[17] Consequently the different existing directives concerning legal migration of third-country nationals contain diverging rules on intra-EU mobility, as well, if they contain such provisions, since not all of them set out mobility rights.

2.2.1 The first Directives laying down provisions on mobility

According to *Council Directive 2003/109/EC on third-country national long-term residents*[18] a long-term resident shall acquire the right to reside in the territory of Member States other than the one which granted him/her the long-term residence status, for a period exceeding three months, provided that the conditions set out in Chapter III are met. The Long-term Residence Directive therefore creates a sui generis status for third-country nationals choosing long-

[15] Carrera, Sergio – Faure Atger, Anais – Guild, Elspeth – Kostakopoulou, Dora op. cit. p. 4.
[16] Communication from the Commission – Policy Plan on Legal Migration {SEC(2005)1680} /COM/2005/0669 final/
[17] Carrera, Sergio – Faure Atger, Anais – Guild, Elspeth – Kostakopoulou, Dora op. cit. p. 3.
[18] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents OJ L 16, 23.1.2004, pp. 44–53.

term migration with rights attached to such strong status and approximates their status to that of nationals.

Yet certain aspects of the rules hinder the effective application of mobility rights attached to the EC long-term status. Although there is a preferential way in which long-term residents can receive residence status in another Member State, this is subject to certain conditions and the second Member State can actually check almost all the admission criteria. Furthermore in cases of an economic activity in an employed or self-employed capacity, Member States may even examine the situation of their labour market and apply their national procedures regarding the requirements for, respectively, filling a vacancy, or for exercising such activities. SKORDAS as a result criticised these provisions very firmly: "The LTR Directive cannot, however, be considered a milestone in the European integration process, because, in fact, the Member States have retained substantial authority to regulate the access of long-term residents to their respective labor markets. The Directive is inherently discriminatory because it excludes long-term residents from the Community freedom of the movement of persons in the internal market. Only "marginal" mobility between two Member States is foreseen and even that can be further restricted and regulated by the second Member State utilising various methods, including the application of a quota system. The denial of this economic freedom, which is one of the fundamental pillars upon which the Community is based, deprives immigrants of the opportunity to possess an "EU Green Card." This card would enable immigrants to move freely in the EU in search of work and to participate, on an equal footing with EU citizens, in the various self- organisational structures, networks and entrepreneurial activities that characterise the essence of European integration. The lack of full economic integration of immigrants in the Community is likely to increase their reliance on the welfare safety net of the Member States, which is exactly what the LTR Directive intends to avoid."[19]

Furthermore, due to the fact that it only provides mobility for those having a long-term resident status after five years of residence in a Member State, can be disadvantageous in the light of certain national provisions, since, for example, in Finland this duration of stay already entitles foreigners to apply for citizenship. Furthermore almost all the countries have their parallel national long-term residence permits, and national rules usually offer more preferential conditions of application, especially for certain special groups of migrants. Therefore, many of the long-term migrants choose to apply for national long-term residence permits, which, on the contrary, do not provide the right to intra-EU mobility.

[19] Dr. Skordas, Achilles: Leg. dev.: Immigration and the market: the Long-term Residents Directive In: Columbia Journal of European Law 201 (2006) http://www.cjel.net/print/13_1-skordas [05.11.2012.]

Since student mobility benefits global economic development by promoting the circulation of knowledge and ideas, the mobility of students who are third-country nationals studying in several Member States must be facilitated, as must the admission of third-country nationals participating in Community programmes to promote mobility within and towards the Community.[20] Member States should, therefore, facilitate the admission procedure for the third-country nationals who participate in EU programmes, enhancing mobility towards or within the Union.[21] In the case of students, the conditions for pursuing part of their studies or complementing the studies carried out in the first Member State with related courses in another Member State, is governed by Article 8 of *Directive 2004/114/EC*.[22] According to this, a third-country national who has already been admitted as a student and applies to follow in another Member State part of the studies already commenced, or to complement them with a related course of study in another Member State is to be admitted by the latter Member State. This should be within a period that does not hamper the pursuit of the relevant studies, whilst leaving the competent authorities sufficient time to process the application, if he/she meets both the general and specific conditions set out in the Directive. The Commission in its report[23] on the implementation of the Directive revealed a crucial need for amendments to the Directive, especially as regards, among other factors, the strengthening of mobility clauses and stimulation of synergies with EU programmes that facilitate third country nationals' mobility into the EU.

Mobility provisions of researchers are governed by Article 13 of *Directive 2005/71/EC*.[24] Provided the researcher stays only up to three months in the second Member State, the research may be carried out on the basis of the hosting agreement concluded in the first Member State, yet if the researcher stays longer than 3 months, Member States may require a new hosting agreement. Therefore the "preferential" provisions for researchers on their mobility right do not go any further than those of the Schengen mobility rights provided for residence permit holders in any case. The only special condition which it sets out is the lack of need for an additional hosting agreement in the

[20] Directive 2004/114/EC Preamble (16)
[21] Directive 2004/114/EC Article 6(2)
[22] Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service
OJ L 375, 23.12.2004, pp. 12–18.
[23] Report from the Commission to the European Parliament and the Council on the application of Directive 2004/114/EC on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service /COM/2011/0587 final/
[24] Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research
OJ L 289, 3.11.2005, pp. 15–22.

second Member State. Regardless of how small a step it is towards real intra-EU mobility rights, the report[25] of the Commission revealed that mobility provisions of researchers has been incorporated into national legislation by only 17 Member States. In the other Member States national legislation does not explicitly stipulate that researchers who have been issued a permit in another Member State can work on their territory without an additional work permit, which may result in legal uncertainty and will hinder even this minor form of the right to intra-EU mobility.

The Commission reports, therefore, reveal a crucial need for amendments to the Directives on the migration of students and researchers, which modification is planned to be submitted in one single Directive to be proposed in December 2012. This proposal will be based on the outcome of a public consultation[26] launched online by the Commission, which is also used to identify gaps as well as indicate the path on which the Commission intends to introduce modifications.

2.2.2 Mobility provisions of migrant workers

One of the objectives of the *Directive 2009/50/EC*[27] on the EU Blue Card (created especially for highly skilled migrants) is to ensure their mobility between Member States. According to Chapter V of the Directive, after eighteen months of legal residence in the first Member State as an EU Blue Card holder, the person concerned and his family members may move to a Member State other than the first Member State for the purpose of highly qualified employment. Yet, even in the case of preferred highly skilled migrants, the mobility provisions are far from mutual recognition. As soon as possible, but no later than one month after entering the territory of the second Member State, the EU Blue Card holder and/or his employer must present an application for an EU Blue Card to the competent authority of that Member State. He must also present all the documents proving the fulfilment of the conditions set out in Article 5 for the second Member State. The second Member State may decide, in accordance with national law, not to allow the applicant to work until a positive decision on the application has been taken by its competent authority.

[25] Report from the Commission to the Council and the European Parliament on the application of Directive 2005/71/EC on a specific procedure for admitting third-country nationals for the purposes of scientific research
/COM/2011/0901 final/
[26] http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2012/consulting_0024_en.htm [05.11.2012.]
[27] Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment
OJ L 155, 18.6.2009, pp. 17–29.

It can be evaluated rather simplistically as: "Significantly, after a stay of eighteen months in one EU country, under certain conditions a Blue Card holder may travel to another country to seek employment without going through the usual national procedures for admission."[28] However, is it really true that it is a significant step forward? COLLETT sees it in a more realistic way: "The Blue Card scheme, proposed in late 2007 amid much fanfare, is intended to help the EU win the 'global battle for talent'. But what does it offer the potential high-flier from outside the EU? The short answer is: not as much as it could."[29] Can we talk about mutual recognition or any preferential treatment as for the admission criteria because of the very fact that the third-country national already has an EU Blue Card in one of the Member States? Not really. GYENEY says that, instead of following the original concept and creating one single document that would be valid in all the Member States and providing right to stay and work, the Directive basically sets out provision for issuing a second Blue Card according to the discretion of a second Member State.[30]

Therefore, the simple truth is that the second Member State can – literally – check every single criterion for admission once again. Furthermore, "as long as recognition of qualifications, salary levels and labour demand continue to vary so greatly between Member States, the right of mobility offered under the Blue Card scheme will remain insubstantial in real terms."[31] Being even more pessimistic, one might even say that the EU Blue Card not only not stipulates intra-EU mobility of highly skilled migrants, but even forbids it in the first 18 months of stay. On the other hand, having a residence permit issued according a Member State's national admission scheme does not forbid its holder to apply for another residence permit in a second Member State at any time. It is, of course, true that, in this case, the years spent separately in the different Member States cannot be added together when applying for EU long-term residence status. What do the mobility provisions of the EU Blue Card Directive actually mean? What they really provide, apart from preferential rules as for gaining EU long-term residence, is the possibility to submit an application from the territory of the EU, either from the first or from the second Member State.

Not only the second admission procedure, but also certain circumstances in the first Member State actually function as obstacles to gaining the first EU Blue Card and, accordingly, to using mobility rights in a second Member State.

[28] Boswell, Christina – Geddes, Andrew: Migration and mobility in the European Union. Palgrave Macmilan, Great Britain, 2011 p. 95.
[29] Collett, Elizabeth: Blue Card and the 'global battle for talent'. EPC Commentary, 28.05.2009, p. 1.
[30] Gyeney, Laura: Jó lépés, jó irányba? A Tanács 2009/50/EK irányelve a harmadik országbeli állampolgárok maga szintű képzettséget igénylő munkavállalás céljából való belépésének és tartózkodásának feltételeiről. In: Iustum Aequum Salutare VII. 2011/1. p. 79.
[31] Collett, Elizabeth op. cit. p. 2.

In countries with a weak economic situation, the salary threshold which all Member States are obliged to apply in the case of Blue Card holders can be considered to be so high that highly qualified third-country nationals can rarely fulfil this admission condition. In other Member States, it can be the parallel national status which hinders the use of the EU Blue Card scheme, just as in the case of an EU long-term residence permit. If national schemes for highly qualified migrants offer more preferential rules, third-country nationals might finally not choose to apply for an EU Blue Card and so will not be given mobility rights either. The system is, therefore, "complementary: it does not replace Member States' own schemes for attracting high-skilled workers, or prevent them from offering more advantageous terms of entry on a national basis. This was a key issue in the negotiations, and reflects the fact that EU Member States are increasingly competing against each other for the most talented workers."[32]

Even if an EU Blue Card is received in the first Member State, the condition for exercising intra-EU mobility rights is that an 18-month period should elapse before doing so. Unfortunately many of the Member States failed to transpose the Directive in time and this resulted in a high number of non-notification infringement procedures started by the Commission. A further result was also that, in these "lazy" Member States, migrants were deprived of the right to apply for an EU Blue Card immediately after the transposition deadline (19 June 2011) of the Directive. This meant that calculating the 18-month-long period and also exercising the mobility right, start later. Consequently the question arises: can a migrant be derived of his/her right to exercise mobility rights because of the late transposition of the Directive in certain Member States? If we say that the migrant had fulfilled all the admission criteria and so would have been given an EU Blue Card in due time, we still have to face the question of who had decided whether that person had really fulfilled all the criteria - including labour market assessment - or did not pose a threat to public order?

Sánchez says that "this situation is likely to change with the Reform Treaty, which has followed the path opened by the Charter of fundamental rights. Although it could be regarded as an insignificant amendment in the wording, the fact that the Article 79 of the Treaty on the Functioning of the European Union refers expressly to the 'conditions governing freedom of movement and of residence in other Member States', might have an impact in the margin of appreciation to develop this legal basis. Indeed, the explicit reference to free movement establishes a direct link with the dynamics of the internal market."[33]

[32] Collett, Elizabeth op. cit. p. 1.
[33] Iglesias Sánchez, Sara: Free movement of Third Country Nationals in the European Union? Main Features, Deficiencies and Challenges of the new Mobility Rights in the Area of Freedom, Security and Justice. In: European Law Journal Vol. 15 2009/6. (November) p. 797.

Presently two proposals for new Directives are currently under negotiation in the Council of the EU and the European Parliament, with implications for two categories of third-country national, namely the intra-corporate transferees and seasonal workers. The latter one is not intended to set out provisions on mobility, since it covers only short-term migration of third-country nationals.

The proposal[34] for a Directive on intra-corporate transfers foresees geographical mobility for intra-corporate transferees (ICTs) in accordance with Mode 4 of the World Trade Organisation's General Agreement on Trade in Services (GATS). The idea behind the new proposal is that managers and experts of multi-national companies, who have an uncommon knowledge, and therefore no labour market test would be necessary for their admission to the national labour markets, should be provided with a specific set of admission criteria and rights including the right of intra-EU mobility. Under the proposed Directive, intra-corporate transferees would be allowed to work in different entities of the same transnational corporation located in different Member States and this category of third-country national would be able to reside and work in one or more second Member States on the basis of a residence permit obtained in the first Member State, as long as the duration of a transfer does not exceed twelve months.

The proposal of the Commission reveals only a few procedural rules on how decision-making concerning the ICT permit that is meant to provide a real mobility right within twelve months is supposed to be take place. According to the proposal, the applicant should submit to the competent authority of the second Member State(s), before his or her transfer to that Member State, the documents relating to the transfer to that Member State and provide evidence of such submission to the first Member State. Apart from the fact that this envisaged procedure seems to be quite burdensome, the proposal does not deal with the question of what the role of the second Member State is in this procedure other than receiving the documents submitted, it does not set out the division of competences between the first and the (sometimes several) second Member States concerned in case of an ICT entrusted with work to be carried out in several Member States even within twelve months.

Therefore, the negotiations in the Council's relevant Working Party will probably lead to Member States opposing such vague rules. They may take into account practical points of view and might lead to not going any further from the already existing mobility schemes. These are, firstly, the short-term scheme (which is close to mutual recognition as set out by the Schengen rules) and the Directive for stays in another Member State not exceeding three months, and, secondly, the long-term mobility scheme (basically, the EU Blue Card scheme in which the second Member State can actually recheck all the admission

[34] Proposal for a directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer /COM/2010/0378 final - COD 2010/0209/

criteria) if the stay exceeds three months. What seems most likely in the current political context is that the Member States would be reluctant to use the tool of mutual recognition of decisions in residence permit cases and would only accept the mobility rights laid down by the already existing mobility provisions found scattered in different EU legislative acts on migration.

2.3 Obstacles to labour migration

Labour migration is increasingly being considered by Member States as one of the potentially important means to solve the problem of the EU's ageing population and the increased demand for certain types of skills, even though the global economic downturn has impacted on the demand for labour across the EU.[35] Besides the specific mobility rights provided to certain categories of third-country nationals under the EU's migration Directives described above, the EU *acquis* contains a number of additional provisions which may affect the migrant's decision to reside in another Member State, especially if their purpose is to enter a Member State's labour market. The most recently transposed directive on the EU Blue Card also sets out that "it is also necessary to take into account the priorities, labour market needs and reception capacities of the Member States."[36]

Labour migration is a Member State competence, meaning that, for instance, Member States have the right to determine the number of immigrants entering their territory for the purpose of employment. This right is even set out in the primary source of EU law, namely in Article 79 (5) of the Treaty on the Functioning of the European Union. This affirms that "this Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed."

Member States also enjoy discretion as regards regulating access to the labour market. All Member States make use of specific approaches to identify and manage labour demands, with some using a combination of tools. These include drawing up occupation lists, analysing employer needs on a case-by-case basis and the setting of quotas or limits.[37] Both the creation of occupation lists, as well as the more direct case-by-case assessment of employer needs can be viewed as a form of labour market situation analysis. As a result of the fact that there is no single labour market, and so even those who have gained

[35] Section 6 of Stockholm Programme, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:EN:PDF [05.11.2012.]

[36] Directive 2009/50/EC Preamble (7)

[37] EMN Synthesis report: Satisfying labour demand through migration, 2011 p. 53. http://www.statewatch.org/news/2012/feb/ep-study-labour-demand-and-migration.pdf [05.11.2012.]

residence rights in one Member State would have to face such labour market tests when trying to mobilise themselves within the territory of the EU. WIESBROCK, therefore, argues that, "by subjecting third-country nationals to numerous nationally determined requirements, the very *raison d'être* of the mobility provisions is undermined. Rather than enjoying free-movement rights on the basis of a status acquired under Union law, third-country nationals continue to be subject to national discretion when intending to move to another Member State."[38]

Further, Member States have the right to maintain or introduce national residence permits for any employment purpose. Preamble (7) of Directive 2009/50/EC introducing the EU Blue Card clearly sets out that "this Directive should be without prejudice to the competence of the Member States to maintain or to introduce new national residence permits for any purpose of employment. The third-country nationals concerned should have the possibility to apply for an EU Blue Card or for a national residence permit." In cases of both the EU Blue Card and the EU long-term residence permit, the right of Member States to apply parallel national rules for the same group of migrants covered by EU law results in national statuses competing with the permits issued on the basis of EU Directives.

3. Conclusions

As can be seen, mobility rights can be exercised to a different extent depending on the status of the third-country national (e.g. EU long-term legal residents in one EU Member State, highly qualified Blue Card holder, student, researcher etc.). Yet, "immigration law, as in any other material field of law, has to be developed in a systematic way, so that the rules enacted are suitable to deploy their functioning in a coherent and comprehensive manner. This holds particularly true for the different norms which contain provisions for intra-community mobility, inasmuch as they regulate the same reality for different groups of people who are likely to change their situation from one status to another."[39]

Another conclusion is that "the position of third-country nationals differs significantly from that of EU citizens, as they do not enjoy a right to free movement on the basis of primary Union law. This means that third-country nationals only obtain the opportunity to reside in a second Member State if this is provided for under secondary legislation and if they comply with all the conditions contained in this."[40] Further, the currently available mobility schemes for third-country nationals are far from real mobility rights - that is, the true level of free movement that can most effectively reached by mutual

[38] Wiesbrock, Anja op. cit. p. 455.
[39] Iglesias Sánchez, Sara op. cit. p. 801.
[40] Wiesbrock, Anja op. cit. p. 459.

recognition accepted as a result of fully harmonised admission criteria. For stays exceeding three months, there is no comprehensive immigration policy with regard to first admission, which seriously constrains the possibility of granting mobility rights to all third-country nationals legally residing in the Member States. "Mobility rights as they exist today cannot even be considered as a limited extension of free movement rights, because they are based in opposite principles and have been enacted in a very different way."[41] The principle of the mutual recognition of national residence authorisation is enshrined neither in the Treaties nor in the Directives. "The limited scope of the mobility and their restrictive application in the Member States constitutes a missed opportunity to generate the full inclusiveness of third-country nationals in the internal market. It also contradicts the objectives formulated in the 2009 Stockholm Programme to approximate the rights of legally resident third-country nationals to those of EU citizens and to encourage labour migration as a way of increasing the EU's competitiveness."[42]

The crisis seems to have led to a more cautious approach on behalf of Member States. Therefore these priorities and needs produce the various tools which serve the special interests of Member States, e.g. the protection of labour opportunities for their own nationals. "In this context, it is not surprising that a key paradox persists within the EU: skills shortages and bottlenecks coexist with areas of persistent high unemployment. Differing levels of economic growth and employment create simultaneous shortages and excesses of labour across Europe, which is due in part to heavily regulated labour markets and low labour market mobility. For this reason releasing the potential of labour mobility is one of the key issues in the Lisbon process and the European Employment Strategy. The Integrated Guidelines for Growth and Employment (2005-2008) calls upon Member States to "improve the matching of labour market needs through the modernisation and strengthening of labour market institutions, (...) removing obstacles to mobility for workers across Europe within the framework of the EU treaties".[43]

If the EU wants to attract workers and enhance the competitiveness of the Union, the right of mobility should be granted at least by creating simplified admission procedure, and showing flexibility. "The current legislation lacks the flexibility required to address the realities of the modern labour market."[44] It is true that other provisions within the EU *acquis* may also influence migrants'

[41] Iglesias Sánchez, Sara op. cit. p. 805.
[42] Wiesbrock, Anja op. cit. p. 455.
[43] http://www.iza.org/en/webcontent/publications/reports/report_pdfs/iza_report_19.pdf [05.11.2012.]
[44] Collett, Elizabeth op. cit. p. 2.

decisions, such as the portability of social security rights[45] and the recognition of degrees and diplomas,[46] but as for directives on legal migration it is clearly less bureaucratic and less burdensome admission rules and providing rights close to those of Union citizens including real mobility rights. Therefore "*the status quo is not an option*. With growth, and more Europeans in more productive jobs, we can achieve the outcomes which meet Europeans' expectations and values. By acting in the areas that matter most, we can advance European integration. Growth and jobs is a truly European agenda."[47]

[45] The social security rights of mobile third-country nationals are regulated by Council Regulation 1231/2010 which extended EU social security coordination regulations to third-country nationals.

[46] The migration Directives 2011/98/EU (Single Permit), 2009/50/EC (Blue Card), 2003/109/EC (Long Term Residents) and 2004/114/EC (Researchers) all provide for equal treatment in regard to the recognition of diplomas. This right to equal treatment makes Directive 2005/36/EU (plus later amendments on the recognition of professional qualifications) applicable to third-country nationals in two situations: when moving to a second Member State and seeking recognition for a diploma acquired outside the EU but recognised in the first Member State; and, more generally, if they have EU qualifications.

[47] Commission Communication on European Values in a Globalised World, at 3, COM (2005) 525 final/2 (Mar. 1i, 2005).

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 professzor 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