STUDIA IURIDICA
AUCTORITATE UNIVERSITATIS PÉCS PUBLICATA

147

Essays of Faculty of Law University of Pécs Yearbook of 2010

Pécs 2010

ESSAYS OF FACULTY OF LAW UNIVERSITY OF PÉCS
YEARBOOK OF 2010

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

Advisory Board
Andrássy, György, University of Pécs, Faculty of Law
Ádám, Antal, University of Pécs, Faculty of Law
Fábián, Gyula, Babeş-Bolyai University (Cluj-Napoca), Faculty of Law
Faludi, Gábor, Eötvös Loránd University (Budapest), Faculty of Law
Halmai, Gábor, Eötvös Loránd University (Budapest), Faculty of Social Sciences
Kecskés, László, University of Pécs, Faculty of Law
Kiss, György, University of Pécs, Faculty of Law
Lévay, Miklós, Eötvös Loránd University (Budapest), Faculty of Law
Polčak, Radim, Masarik University (Brno), Faculty of Law
Wiebe, Andreas, Georg-August University of Göttingen, Faculty of Law

Editor-in-chief
Balogh, Zsolt György, University of Pécs, Faculty of Law

Editorial Board
Chronowski, Nóra, University of Pécs, Faculty of Law
Hornyák, Szabolcs, University of Pécs, Faculty of Law
Nemessányi, Zoltán, University of Pécs, Faculty of Law
Pánovics, Attila, University of Pécs, Faculty of Law
Peres, Zsuzsanna, University of Pécs, Faculty of Law
Szőke, Gergely László, University of Pécs, Faculty of Law

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

HU ISSN 2061 8824 (Selected 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

FENYVESI, CSABA – PhD, and associate professor (habilitated) at the Department of Criminal Law and Criminalistics of the Faculty of Law at the University of Pécs.

HÉDER, MIHÁLY – Software Engineer; PhD student and research assistant of the Computer and Automation Research Institute of the Hungarian Academy of Sciences (MTA SZTAKI).

KAROLINY, ESZTER – PhD student at the Faculty of Law of the University of Pécs, working as a law reference librarian at the Faculty Library.

KIRÁLY, LILLA – senior lecturer at the University of Pécs, at the Faculty of Law, at the Department of Civil Procedural Law and a trainee judge at the Court of Appeal in Pécs.

KOMANOVICS, ADRIENNE – LLM, PhD, and associate professor at the International and European Law Department of the Faculty of Law, University of Pécs.

KŐHALMI, LÁSZLÓ – assistant professor at the Criminology and Penal Law Department, Facutly of Law, University of Pécs.

MESTER, MÁTÉ – whilst being a part-time PhD student at the Faculty of Law of the University of Pécs, graduated from the LL.M. programme 'Law and Technology' at Tilburg University in the Netherlands and now works for the National Communications Authority of Hungary.

PÁNOVICS, ATTILA – senior lecturer at the Department of International and European Law, University of Pécs, Faculty of Law. His research concerns the interpretation of sustainable development and public participation in environmental decision-making.

POLYÁK, GÁBOR – LL.M. PhD is assistant professor at the ICT Law Department at Faculty of Law, University Pécs.

PÓKECZ KOVÁCS, ATTILA – associate professor and head of the Department of Roman Law at the University of Pécs, Faculty of Law.

RÁTAI, BALÁZS – Independent Legal Researcher. PhD Student and Research Fellow of the Research Centre of Information and Communications Technology Law of the University of Pécs, Faculty of Law

SZAPPANYOS, MELINDA – PhD student at the Department of European and International Public Law, her field of research is the regional protection of human rights.

SZÁDECZKY, TAMÁS – security and defence policy expert, engineer, Certified Information Systems Auditor and PhD student at the Faculty of Law, University of Pécs.

TÖTTŐS, ÁGNES – a legal counsellor at the EU Law Department of the Ministry of Justice and Law Enforcement, who used to work for the Office of Immigration and Nationalization for five years and as a PhD student of the University of Pécs she has been carrying out researches in the field of Hungarian and European Migration Policy.

CONTENTS

The place and function of confrontation in the European Union

Csaba FENYVESI

ABSTRACT *Over the last five years, the author has undertaken research and gathered data on the national regulations of a number of EU countries regarding the use of institutionalised confrontation as an accepted method of determining the truth in criminal proceedings and/or as a technique used in crime-solving (criminalistics) where recommendations and actual practice were the object of interest.*

He sought answers to several questions:

a) Does the institution exist in the particular country?
b) If so, how is it regulated? (By law or by recommendation?)
c) If there is a law, what are the name, number, source and text?
d) Is face-to-face confrontation institutionalised in criminal proceedings and, if yes, with what attached recommendations?
e) If it exists within criminal proceedings, at which stage is it used - during investigation or in the judicial phase?
f) If confrontation exists, how effective is it? What are the views of law enforcement officers?

Basically, the author looked for answers to the main theoretical questions by means of questionnaires, personal interviews with law enforcement bodies (judges, prosecutors, barristers, police officials) and by (international) legal analysis.

1. A review of various national regulations

During this research carried out over the last 5 years, I gathered data from numerous EU countries' national regulations regarding confrontation - as well as on their recommendations and practice concerning crime-investigation tactics. For the most part, I tried to answer a number of questions by means of questionnaires and personal interviews with law enforcement bodies such as judges, prosecutors, barristers and police officers - and by legal analysis:

a) Does the institution exist in the particular country?

b) If so, how is it regulated? (By law or by recommendation?)
c) If there is a law, what are the name, number, source and text?
d) Is face-to-face confrontation institutionalised in criminal proceedings and, if yes, with what attached recommendations?
e) If it exists within criminal proceedings, at which stage is it used - during investigation or in the judicial phase?
f) If confrontation exists, how effective is it? What are the views of law enforcement officers?
g) Is face-to-face confrontation institutionalised within criminal proceedings and, if yes, with what attached recommendations?

Based on the answers, two groups appear: those countries which do not have or use the institutionalised form (the minority) and those who do (most countries). It is used both within the framework of criminal proceedings and as an investigating (truth-seeking) tool.

I shall begin my analysis by listing the countries (in alphabetical order) where it does exist and by answering the questions posed.

2. Member states of the European Union where the institution does exist

2.1 Austria

The institution was introduced to the Austrian Code of Criminal Procedure [Strafprozessordung (StPO) 1975, BGBI. Nr. 631/1975] on the 1st of October, 2002. It is interesting that it is used in the same phase as the other confrontation institution, i.e. at the identification parade.

§ 168 (1) Where confrontation between witnesses and people or items becomes necessary, confrontation must be specifically ordered. However, before confrontation takes place, the witnesses must give an exact description of the person or item, and they must also describe any distinguishing marks of the person or item

(2) Where testimonies differ in respect of significant facts or conditions, the investigating judge may order the witnesses to confront each other.

(3) Confrontation may only involve 2 people at any one time. The participants must be questioned regarding all the differences, and the answers as given to each other must be placed on record.

According to one of the legal notes, the law mentions confrontation in the 2nd and 3rd sections of paragraph 188 and paragraph 205 as having to be applied if the testimonies of two on trial differ significantly – the

subject or matter being irrelevant– they are to be retried simultaneously. Many people incorrectly confuse this process with an identity parade, where the witness must identify a person (Paragraph 168 section (1). The larger the number of persons or items with similar characteristics presented to the witness, the more weight does the identification parade bear.

§205: If the testimony of the accused differs from the testimony of a witness or from that of any other participant in a significant matter, the accused may only be confronted with this if the investigating judge believes that it is necessary in order to resolve the contradiction. In this case, the process of contradiction should proceed in accordance with paragraph 168 § section (3).

(1) The trial judge must, during the hearings of the witnesses and expert witnesses, ensure that the investigating judge observes the rules of the investigating phase, provided, that, during the hearing, these are not, by definition, impossible. The trial judge must also examine the future testimonies of the witnesses and expert witnesses to decide whether they differ from the expert reports already provided to the court.

(2) The senior judge may order a confrontation between those witnesses whose testimonies differ from each other.

(3) The witnesses and expert witnesses may not leave the trial until the trial judge grants them leave or does not order their removal. Witnesses cannot challenge each other's testimonies.

(4) After the testimonies of all the witnesses, expert witnesses and the other accused, the accused must declare if he wishes to deny any of the above.

The note adds that paragraphs 150-151 § (regarding witness evidence and paragraphs 116-117 § regarding expert witness hearing) refer first of all to the trial and it is the leading counsel who determine how witnesses are to be heard, as long as the prosecution or the defence does not propose otherwise

A violation of paragraph 248 § does not justify vacating the hearing, and during the trial, everyone present, if only by chance, must be heard as witnesses.

2.2 Bulgaria

Bulgaria also uses institutionalised confrontation and this is regarded as a way to obtain evidence in a special form of hearing. The regulations regarding confrontation are laid out on paragraph 143 § of the Bulgarian

Code of Criminal Procedure (Nakazatelno-protsesualen Kodeks), which took effect on the 29th of April 2006.

143. § Confrontation

Confrontation must take place if there is a significant conflict between the testimonies of the accused or between the testimonies of the accused and the witness, excluding the case quoted in section (2) of paragraph 123 §.

The participants in the confrontation must be questioned before the hearing as to whether they are known to each other and, if so, what their relationship is.

The participants may ask each other questions if the official conducting the confrontation allows this.

If significant differences occur in the witnesses' testimonies, then sections (1)-(3) are applicable, excluding the case of section (2) of paragraph 123 §.

Otherwise, confrontation can be used in both the investigating and the judicial phases.

According to law enforcement officers, it is highly effective in revealing the truth, and the fact that the institution has deep roots in Bulgaria makes it even more effective.

2.3 Czech Republic

According to the Czech concept, confrontation is both a legal term and one of criminalistics. It is regarded as a special form of hearing, and is used when the available testimonies are contradictory. In this case, the witness or the accused sits in front of the other witness or accused with the result that conflict inevitably arises. It is both a part of the crime-solving, investigative process and an individualistic part of the judicial process.

The regulations regarding confrontation can be found in paragraph 104/A § of the Czech Code of Criminal Procedure.

(1) A Confrontation is held if the testimony of the accused does not match that of the witness or another accused.

(2) Confrontation also takes place also when evidence from a witness does not match that of another witness or of the accused.

(3) Confrontation may only take place following a preliminary hearing and in the course of confrontation, the participants must directly reveal their statements to one another, points of conflicts must be highlighted and the participants may also question each other directly.

(4) Regulations applying to the trial of the accused and the hearing of a witness also apply to the confrontation.

(5) A juvenile (below 15) may only undergo this process if it is regarded by the court as reasonable and of the utmost necessity. The regulations of this paragraph, however, do not apply to those witnesses whose identity is kept secret.

(6) If, following the confrontation, a hearing of the participants is still necessary, they must be heard separately.

(7) Confrontation is only possible in the course of the judicial process, although, exceptionally it may be applied before the arraignment, if it is likely that this could, in fact, lead to the case being settled.

There are tactical recommendations and terms applying to the holding of confrontations:

- there must be separate, preliminary hearings of those involved in a following confrontation;
- the conflict must relate to significant differences between testimonies;
- there should be no other option to resolve this conflict of evidence.

Preparing for a confrontation:

- firstly, to consider whether the process is applicable,
- to determine goals and select questions,
- to determine who will be heard first,
- to prepare the victim for the meeting with the accused,
- to decide on suitable timing,
- to set the participants face-to-face,
- to limit the numbers participating (usually to two).

The process of confrontation:

- to inform the parties of their status in the procedure,
- to clarify whether the participants are acquainted, and, if so, how,
- to begin the confrontation,
- answers must be given directly to the other participant,
- after an answer is given, the other party may react; if not, he must explain the reason and, in this case, the first party may also react,
- if permission is granted, the participants may question and answer each other,
- if any of the participants obstructs the procedure, it must be halted
- the whole procedure must be systematically recorded verbatim and all non-verbal expressions should also be recorded.

Fundamental principles:

- confrontation may only take place if the parties request it,
- continuous supervision during the confrontation must be ensured,
- it is conducted under the active direction of a questioner, whilst the parties are continuously observed.

As a general rule, confrontation is only possible in the course of the judicial process; although, exceptionally, it may be used before a trial, if it is necessary to resolve the case.

According to law enforcement officers, it is seldom applied, but no exact statistical figures are known.

Despite the fact that it is used rarely, during the investigation process, law enforcement officers regard it as a valuable tool to resolve conflicts between testimonies and to gain new evidence.

The reason for its relatively infrequent use may, according to some law enforcement officials, be that it requires complex preparation, and that it is also risky for certain psychological reasons. These same officials may well dispute whether confrontation is a specialised type of hearing, or whether it is, rather, a specific method of crime investigation.

2.4 Estonia

The institution exists Estonia where it has the name *'vastastamine', in the Estonian Code of Criminal Procedure (Kriminaalmenetluse Seadustik).*

According to paragraph 77 §, confrontation:

(1) May be applied when there are no other means of resolving the conflict in statement form.

(2) During a confrontation, the relationship between the participants must be determined, and they must be questioned in turn regarding the facts in dispute.

(3) During a confrontation the participants' previous statements may be disclosed, and new evidence may also be submitted.

(4) With the permission of the examiner, participants may also question each other (via an intermediary) in respect of the disputed facts. If necessary, an examiner may amend the questions posed.

Paragraph 78 § is devoted to the regulations related to recording the process of confrontation:

(1) The questions and answers must be recorded in the same way (in the same form and order, and with the outcome) as they actually took place.

(2) The parties to the confrontation must certify by signature that the record is a true one.

(3) If the answers provided by the participants agree, simplified answers may be recorded.

(4) If a confronted person's previous statements are disclosed or other evidence given, these disclosed statements or submitted evidence must be shown clearly as such in the written record.

Crime-solving tactics-related recommendations are to be followed in preparing the confrontation, in its conduct and in the evaluation of the results. These are taught at the Estonian Police Academy.

The institution's effectiveness, as all investigating proceedings, is case-sensitive. It mainly depends on the investigator's qualifications and expertise, as well as on the case itself. Otherwise, in practice, the Estonians have long used confrontation and it is regarded by law enforcement officers (verified by my own personal research) as a normal and important part of the investigating process.

2.5 Finland

The word confrontation has two meanings in Finland. In a common everyday situation it is used in respect of hearings, but is otherwise used in legal language as elsewhere. The Finnish Law on Investigation (number: 11.7.1997/692) in respect of confrontation says:

The law determines under what conditions confrontation may be applied in the investigating phase. According to paragraph 32 §, the investigator may permit one of the parties to be present, or to be represented by his advocate, during the other party's hearing, but only if this does not hinder resolving the case. However, witnesses may not be subject to confrontation based on this paragraph.

Confrontation is regulated by paragraph 33/A §, of Chapter 17 of the Finnish Code of Criminal Procedure.

According to this, if the testimonies of the witnesses conflict, or if there is any other special reason to do so, the parties may confront each other. This must happen at the trial, and so the court's evaluation of the testimonies may follow immediately. These testimonies are treated as evidence.

For this reason is it important that the Finnish Law on Investigation does not allow confrontation in the investigating phase, since, if it did, the parties could influence each other, and so the court would not be able to gain an impression of the witnesses' independent testimonies.

In this way, however, those who decide the fate of the trial obtain a direct, personal, verbal testimony, and so the court may make an immediate evaluation of the inherent truth. In Finland, truthfulness plays an exceptionally important role both in the investigational phase and in the trial. Anyone who does not comply with this rule in any phase of the process or in any given situation faces serious punishment.

Since it is very seldom used in Finland, investigators, judges, prosecutors, and attorneys do not have much experience regarding confrontation. This, basically, also means that it is very hard to tell how well the system works.

2.6 France

In France, confrontation is an institution which has functioned for centuries, since the "Ordonnance Criminelle du Mois d'Aout' dedicated a separate part – (Titre XV) with the title: 'Des Récolements et Confrontations des Témoins' – to its regulation in 1670, by Louis XIV The regulations regarding confrontation also became a part of the Napoleonic Code d'Instruction Criminelle in 1808. The French Code of Criminal Procedure currently in force, the Code de Procédure Pénale (Loi du 31 décembre, 1957 et Ordonnance du 23 décembre 1958 - Titre III.) also contain regulations concerning how confrontations and hearings (interrogatoires et confrontations) are to be handled (paragraphs 114-121 §).

114 § On an accused party's first appearance, the investigating judge determines his identity informs him/her of the charges brought, and also that he/she does not have to testify. A verbatim record of this notice must be made. If the accused decides to testify, the investigating judge must register this immediately.

The investigating judge must brief the accused regarding his right to choose an advocate from the register, or request one to be appointed by the court. The latter, provided that the bar's charter contains relevant regulations, is appointed by the head of the bar, or, in his absence, by the senior judge present.

A verbatim record of this notice must be made.

From the first interview, the victim, acting as a civil plaintiff, may also have legal representation.

Following the first hearing, the accused may be released, or the court may take him/her into custody, but the accused must provide his/her address to the investigator. Further, the accused may give another

address, to which, if he/she wishes, the desired documents will be sent. If the investigation is taking place in the mother county, the address must be one within that country's administrative borders. In case the investigation is taking place overseas, a local address may also be chosen.

The accused must be warned to inform the investigating judge of all changes of address before the end of the investigational phase, verbally or via registered mail. The accused must also be warned that all notes and records sent to the address will be considered as delivered.

The issuing of this notice and the provision of addresses must be recorded.

115 § Notwithstanding the regulations of the previous paragraph, the investigating judge may, in urgent cases, take immediate action to hear the witnesses and the confrontations. Urgent cases would include situations where the witness's life was in danger, where certain evidence might disappear and as mentioned in paragraph 72 §.

116 § At the first appearance (as at the last) the accused may freely consult with his advocate.

The investigating judge may prohibit the accused from consulting his advocate for a period of ten days. This may be extended for a further ten days.

Communication between the accused and his advocate can be prohibited in no other way.

117 § The accused and the private prosecutor may inform the investigating judge of the name of their respective defence counsel or legal representative at any time from the commencement of the investigation. In case they hire more than one defence counsel or legal representative, they must name that defence counsel or legal representative to whom the official notes and summonses must be addressed, and, furthermore they also have to state whether the second counsel or representative is a member of the same law office.

118 § To question or to confront the accused and the private prosecutor, a clear statement of consent is required from them in the presence of the defence or the legal representative.

The defence must be summoned at least four days prior to the hearing by registered mail or by another form of certified notice.

Proceedings have also to be undertaken at the initiative of the defence, if the defence initiates it on the second day, at the latest, prior to the interrogation. The same applies if the legal representative of the private prosecutor initiates it.

In case the proceedings have been initiated by, according to the above rules, the defence or the legal representative of the private prosecutor, he/she is authorised to take copies of the entire proceedings or any part of them for his/her own use, although he/she cannot make further copies of them. However, he/she can any time make copies of the records of those hearings, interrogations and/or confrontations he/she attended.

119 § The public prosecutor is free to attend the interrogations and the confrontations of the accused and the hearings of the private prosecutor.

According to paragraph 338 §, confrontation may also be held before the presiding judge, at the request of the prosecutor, civil plaintiff or the accused, although it should be said that it is mainly an action typical of the preparation phase.

2.7 Greece

According to a Greek law enforcement official, the Greek system of criminal law is the most liberal in the world. The accused stands in the centre of the whole criminal procedure, and the most important principle to be considered is the presumption of his innocence. The fundamental principle is: "better to acquit a murderer, than to sentence an innocent man'.

The criminal procedure has two main phases: the investigative and the judicial. Police officers conduct the first; the second is done by the most experienced judges. Both are in written form but the trial itself is oral.

Another important principle is that judges and police officers may do anything, within the boundaries set by the constitution and criminal law, in order to resolve the case.

Hence, they may use confrontation - which exists both as a legal and as a criminalistics term.

This was detailed in Chapter 4 (paragraphs 209-232 §) of the Greek Code of Criminal Procedure ('Kóthikas Pinikis Thikonomias') No. 1493/1950, amended by Laws No. 3327/2005. and 3346/2005.

According to the most relevant, 225 §, on the hearing and identification of witnesses during confrontation:

(1) The witnesses must be heard separately, although, if necessary, they may be confronted with the accused or with another witness.

(2) If there is a chance that the witness may identify some object or person, the witness must previously be required to give a description.

Confrontation is used in both the investigational and the judicial phases although it is more frequently used in the latter.

In theory, it could prove an effective tool in the hands of police officers, judges and prosecutors, but, since it is only used if absolutely necessary (if no other means of solving the case) its effectiveness cannot be measured, and there are no studies on the subject.

Law enforcement officials do not have much experience regarding its effectiveness, mostly due to its rare usage (and, even then, only in extreme cases). The reason for this is probably that it takes a great deal of time, requires considerable experience and, above all, that it may lead the investigation astray. It is mainly the accused's lawyers who try to have it used.

2.8 Poland

The institution appears in both the criminal procedure and in criminalistics. According to §172 of the Polish Code of Criminal Procedure (6 June, 1997, Kodeks Postepowania Karnego):

"The examined persons may be submitted to confrontation in order to clarify contradictions. Confrontation is not allowed in cases specified under Article 184 §."

Confrontation may be used if two people present the facts relating to the same event differently. Its aim is to resolve any contradiction, but the differences in question have to be significant. Hence, when the two versions only differ in minor detail, confrontation is not necessary. It is only applicable when the two people are completely sure of what they claim. It need not be used when someone is unsure or do not remember certain circumstances.

Who is eligible to be confronted? All participants in the process are - with the exception of unnamed witnesses.

Possible combinations include: two accused; two witnesses; two expert witnesses, the accused and a witness. In theory, a witness or the accused may also be confronted by an expert witness.

How does it work in practice? As the first step, the agencies determine, based on previous witness testimonies, or on one of the accused, whether or not there is a conflict. Therefore, the accused must testify or give an explanation of all that is in question at least twice, or, in the case of an expert witness, must give expert evidence twice. In other words, confrontation may not be used if those in question have not yet been examined in accordance with the general rules. In the course of

confrontation, a member of the agency reads to both parties present all previous testimonies. One additional rule is that the testimony of the person supposed to be more trustworthy by the investigator/judge is read first. Then the person conducting the confrontation questions both participants regarding the point or points of conflict.

During the confrontational process, the participant's role is merely to answer questions – in contrast to what may happen during a general examination. The participants are not given an opportunity to express themselves freely, or to testify in the same manner. The reason lies in the aim of confrontation. With a general examination, the aim is to gather information regarding the case, whereas the aim of a confrontation is simply to resolve conflicts.

Because resolving conflicts is, in itself, a type of examination, the provisions that apply to examinations in general should be kept in mind during the confrontation. These regulations are found in articles (1)-(7) of paragraph 171 §.

(1) The examined person shall be granted the opportunity to express himself freely within the framework designated by the purpose of the action in question, and only afterwards may he be examined in order to complete, elucidate, or verify the statement presented.

(2) Apart from the agency which conducts the examination, the parties, defence counsel, legal representatives, experts and those listed in paragraph 416 § also have the right to examine. Questions are presented directly to the person under examination unless otherwise ordered by the agency.

(3) If the person confronted has not yet reached the age of 15, all procedural actions that he may take part in, should take place in the presence of his legal representative or guardian unless that is against the interest of the whole procedure.

(4) Leading questions (those which suggest an answer to the person being examined) are not allowed.

(5) Other inadmissible factors are:

- *to influence the statement of the examined person through coercion or unlawful threat,*
- *to apply hypnosis or chemical or technical means affecting the psychological processes of the examined person or aimed at influencing unconscious reactions of his organism in connection with the examination.*

(6) The agency which conducts the examination shall reject questions specified in section (4) as well as any questions which it finds irrelevant.

(7) Explanation by the accused, testimony or statements given or made under conditions precluding the possibility of free expressions, or obtained against the prohibitions specified in section (5), cannot constitute proof.

Confrontation may be used both in the preliminary and judicial processes, but it is more frequently applied in the former. According to Point 5 of Article (1) of Paragraph 143 §, the pre-requisite for the conduct of a confrontation is a record.

Moreover, according to section (1) of paragraph 147 §:

"The proceedings as they are recorded may be transcribed by means of sound or video recording equipment, although the persons participating in the confrontation should be warned before such equipment is activated."

According to Polish practising lawyers, it seldom happens that, during or following confrontation, participants change their testimony. This is especially true in the case of witnesses – since, in such cases, their criminal liability could be in question. The most significant advantage of confrontation is that it helps in evaluating evidence: the agency which observes participants' behaviour, will probably be able to judge the truthfulness of the testimonies. In case of the accused, it is more useful since they cannot be held accountable for not testifying truthfully, and so changing it bears no such consequences. Accordingly, confrontation is applicable as a form of tactical manoeuvre, when one of the accused has already pleaded guilty and has confessed in his testimony, whilst the other still denies it.

2.9 Lithuania

Confrontation is found both in criminalistics as a form of investigative action and in criminal procedure as a form of hearing.

The Lithuanian Code of Criminal Procedure (law number IX-785, which came into effect on the 14th of March, 2002) provides the respective regulation and offer recommendations on methodology.

According to 190 § of the Lithuanian Code of Criminal Procedure, in order to reveal, clear and resolve conflicts between testimonies identification by means of confrontation may be required.

The provisions regarding hearing the participants in the confrontation – the accused and the witness or witnesses – are:

When hearing the participants in the confrontation, it must first be determined whether the participants are acquainted, and if so, what their

relationship is. Subsequently, the participants must be heard one after the other regarding everything which made the confrontation necessary. After the testimonies, the participants may ask questions. If the confrontational testimony of one of the participants differs from the same participant's earlier testimony, the reason for this must be made clear.

Only after the testimonies are recorded and then registered, may the records, video and sound recordings of all the participants' earlier testimonies be shown.

Confrontations most often take place during the investigational phase, and so mostly before the judicial phase or trial. It is, however, also used in the latter.

Its effectiveness is inconsistent. This is the case even in the confrontation of married couples, and it is, in fact, rarely used in law enforcement.

2.10 Germany

German Criminal Procedure contains the institution of confrontation. However, it does not only mean resolving conflicts, but also identification parades which are part of the hearing, where, concealed or not, the victim(s), witnesses, or other participants in the examination procedure are confronted by the accused, for the purpose of identification.

The German name *'Gegenüberstellung'* means two types of confrontation: one is to identify and the other is to resolve all contradictions by hearings (which in exact translation rather means opposing).

The type of confrontation that aims to resolve possible conflicts (the basis of this research) is, in the German concept, the simultaneous re-hearing of two persons, who have already been heard and whose statements are significantly contradictory. It aims to resolve these by confronting simultaneously the participants with each other's respective statements. This type of confrontation is regulated by section (2) of paragraph 58 § of the German Code of Criminal Procedure, which, unlike the Hungarian provisions, does not highlight the fact that it should only be used in the case of a significant conflict or contradiction.

This legal basis provides for everything in respect of the conduct of the procedure. If necessary, the confrontation of the accused with other witnesses may be carried out in the preliminary phase.

The preliminary phase conducted by the prosecutor is neither formal nor public. At the summit of the criminal procedure, we find not the trial itself, but the preceding phase. This means that all mistakes made during the investigation are largely irreparable during the trial, since the investigation has the greatest significance.

The fact is that both confrontational hearings and identification parades have highly developed rules, and their immense, detailed literature in criminology simply reinforces their significance. The confrontational hearings form a special type of hearing where, in most cases, confrontation is used for pairs (witness-witness, witness-accused, accused-accused). Its most important aim is to resolve and explain conflicts of evidence, and before a confrontational hearing may take place, records of the police interrogation must be evaluated.

In the preliminary phase, the following questions have to be determined:

- Which conflicts need to be resolved?
- In what order should this happen?
- What forms of questioning are to be used?
- What organisational arrangements are to be made (choice of room and seating order)?
- What evidence is to be presented at the hearing and in what order?
- What is the most suitable time for the procedure?
- Which human and social bonds may have an influence on the process of confrontation (for instance: fear, social dependency).

The conflicts are recorded in a separate record or résumé. Often the opportunity is given for a typist and two police officers to be present during the confrontation. The investigator who has dealt with the case conducts the hearing, whilst the other has the task to monitor and supervise, observing the rules of conduct (suitable distances, possible ways of escape).

The participants sit in a way that prevents any assault, collusion or exchange of signals. The questions drafted in advance and asked in a manner that suits the goal of the process, are put only after the participants have received suitable warnings, according to their status in the criminal procedure, and comments are to be registered in the records verbatim. This, of course, also applies to the answers given. Should the problems not be resolved, they must be raised again.

A résumé of the method, the conduct (including participants' behaviour) and the result must be prepared. A confrontational hearing cannot be held if the witness is uncertain or afraid.

The police may not summon anyone who has not been arrested to confront anyone against his/her will. The prosecutors, however, have the authority to confront a witness or the accused, and, if necessary, they may issue an arrest warrant to do so.

In spite of so many studies dealing with the topic, among the ranks of the German lawyers specialised in criminal procedure, it is also a widespread view that, in the practice of criminalistics, not all conflicts can be resolved by confrontation. Often it is sufficient to order a rehearing or to analyse the given material evidence to solve the problem in question.

2.11 Italy

Confrontation in Italy ("confronti') is regulated by the Italian Code of Criminal Procedure, promulgated on the 22nd of September 1988, (Codice di Procedura Penale, 22 settembre 1988, n. 447). It contains the relevant provisions in the chapter named: 'Proving', under the title of: "Instruments', in the 3rd chapter, paragraphs 211-212 §.

211 § The prerequisites for confrontation:

(l) Confrontation is only allowed among parties who have previously been heard or questioned, and only if there is a difference between their testimonies regarding significant facts or circumstances.

212 § The method of confrontation:

(1) The judge, after reading out the parties' previous testimonies, asks them whether they confirm or wish to amend them and, if necessary, requests them to discuss the matter.

(2) All questions asked by the judge, the testimonies of the participants and everything said during the confrontation must be on record.

2.12 Portugal

In Portugal confrontation is regulated by the Portuguese Code of Criminal Procedure that came into force on the 17th of February, 1987 (Decreto-lei no.78/87 de 17 de Fevereiro 1987). Paragraph 146 § regulates how and when confrontation may/should be used during the criminal investigation:

Confrontation may be used between the accused, the witnesses, and between the accused and witnesses if, in the given case, there is a significant conflict between the presented versions. Confrontation may

only be used if, at the end of the procedure, it is required to have the conflict resolved.

According to investigators in the 'Portuguese Judicial Police' most confrontations (more than 95%) do not produce the desired result. They believe that only in the judicial phase is it possible to determine which party is truthful - if any at all are truthful.

In practice, due to its low rate of effectiveness, the police rarely use confrontation, since, to determine who is telling the truth, it seems more effective to gather evidence.

Confrontation is not regarded as a useful method for revealing true facts, since - in most cases, according to the investigators – and for obvious reasons - those affected by the process, have their own interests which they do not wish to reveal.

2.13 Romania

Confrontation (*"confruntarea'*) in the Romanian Code of Criminal Procedure (1969) – RCPC – is regulated in article 87-88, ('Evidence') in the following way:

87 § The subject of confrontation: If there are controversial facts in the statements of those heard in the same case, and if it is necessary to resolve the case, the respective persons are to be confronted.

88 § The rules for the procedure:

(1) The participants in the confrontation are to be heard in respect of all of the facts and circumstances where their previous statements revealed contradictions.

(2) The judges may allow the parties to ask questions of each other.

(3) The statements of the parties concerned must be recorded officially.

According to the explanatory notes gloss of the Code of Criminal Procedure:

1) In spite of "confrontation" being located in the Chapter entitled "means of evidence', the Romanian concept unanimously concurs regarding its legal nature: confrontation is a special procedural action, a supplemental means of evidence, and does not aim at gathering evidence. In this aspect, confrontation has similar effects to that of fact-finding or scene-of-crime investigation.

A fundamental principle of the Code is that all hearings of the participants are conducted separately. This means that confrontation is a rehearing (re-interrogation) of the same persons, but on a different

occasion and under different circumstances – for example, simultaneously.

Only those may be confronted, who have previously been heard as a witness, a suspect, the accused, a victim, an expert witness, etc. and only regarding those statements, or partial statements that involved relevant conflicts or contradictions.

Due to the inquisitorial nature of the Code, only judges have the authority to conduct confrontations - both during the investigation and the hearing (principally at the first trial). This is the reason why, to ensure success, section (3) of paragraph 88 § applies certain restraints :

Confrontation may be initiated ex officio, at the request of any party or the prosecutor.

In case the confrontation produces no result (for example, none of those confronted changes their previous statement), the judges will, if possible, use other evidence to eliminate. In extreme cases, the presumption of innocence is applied.

2) Advice on tactics of criminalistics:

Rules:

- Only those who are acquainted may be confronted.
- Confrontation must focus only on the relevant contradictions, and if there is more than one in the principal facts, for instance, more confrontations are recommended.
- It is important from the beginning, to know the relationship of the participants.
- Confrontation may only be used after discussing the issue with the person whose testimony seems to be truthful and if this person consents. The reason for this is that a testimony may also be amended voluntarily – which would make confrontation unnecessary. Further, it is possible that a testimony would not be changed for a number of reasons – for example, if the confrontation were to pose a threat to one of the participants, or for reasons of respect or friendship etc.
- It is also advisable to discuss the matter with the person whose testimony seems insincere since this may cause him to change his statement. If he does not, confrontation can be ordered without further notification to this person. The reason for this is to profit from the element of surprise and to forestall any form of preparation.

- Confrontation as the last possibility of a legal remedy can be considered in order to maintain the secrecy of the procedure - e.g. at the end of the investigation.
- Confrontation may be used in court, or, if one of the participants cannot appear there, at the participants' place of residence (hospital, prison, etc.)
- The legal representatives of the parties must be present at the confrontation.
- At least two judges are required (one conducting and the other supervising the confrontation process) and a maximum of two people may be confronted. If more are to be confronted, it is practical to arrange more confrontations on the same day, especially in cases where the same person has to be confronted more than once.
- The hearing always begins with questioning the person who is regarded as having testified truthfully. To allow him to become accustomed to the atmosphere and to be more confident, this person is led into court before the other person is introduced.
- The parties to the confrontation are seated before the judges facing each other.
- During the confrontation, it is essential to observe the reactions of the party whose testimony is regarded as false and it should also be considered whether this person might attempt to obstruct the process by intimidating or influencing others.

What should not be done:

- It is not advisable to confront the victim with the accused.
- It is not advisable to initiate a confrontation if it is likely to produce no result. For example, if the accused knows about the lack of evidence, he may easily repeat his denial. Whether or not to confront depends heavily on the result of the discussion with the person regarded as truthful.
- It is not advisable to confront an arrested person with one who has not been arrested if their appearance or status differs greatly - for example in clothing, personal hygiene etc
- The process of confrontation may not begin with questions regarding the previous status which the participants had in the case.
- The parties may not speak to each other unless the judges give express permission.

2.14 Slovakia

Paragraph 125 § of the Slovakian Code of Criminal Procedure (301/2005) has provisions regarding confrontation:

(1) If the testimony of the accused differs in significant respects from the testimony of a witness or co-accused and there is no other explanation for the disparity, a face-to-face confrontation of the accused with these persons may be held.

(2) In a face-to-face confrontation, the participants may question each other if the interrogator permits it.

(3) Provisions of section (1) and (2) shall not apply to the agents, protected witnesses and to witnesses whose identity is to be kept confidential.

The fundamental rules of tactics are presented in recommendations on criminalistics, and the prerequisites for using confrontation are:

- Confrontation may only be used if both participants have previously been heard,
- If there are significant contradictions between the preliminary testimonies and
- If these conflicts cannot be resolved by other means.
- Before the confrontation takes place, certain measures must be taken to prevent the parties from meeting each other.
- Immediately after arriving at the place of confrontation, the parties are to be placed in separate rooms, and, later, are to be summoned simultaneously. This rules out the possibility of any negotiation between the parties and any possibility of influencing each other.

Tactical recommendations regarding the execution of the confrontation are:

- At the beginning of the confrontation, the participants are to be informed of their rights, obligations and duties according to their status in the procedure.
- It also is necessary to inform the parties about the course of confrontation, especially that they may ask questions only if the interrogator permits them to do so.
- They also have to be instructed to refrain from all behaviour that would disturb the process of confrontation, especially verbal or physical assault.
- After these preliminaries, the questions should refer to the disputed issues. First, the questions should refer to the relationship between the parties. For instance, if they are known to each other: when and

how did they become acquainted? It is important to know whether or not they were acquainted previously or only due to the criminal offence.

- After determining the relationship, the important questions may follow.
- The person confronted should not be requestioned in respect of earlier testimony,
- The aim of the confrontation may even be achieved by simply repeating the major features of the testimony of one in the presence of the other party.
- The questions asked of both parties are aimed at resolving the contradictions and the parties may answer these. When one contradiction has been dealt with, even if unsuccessfully, it should be followed by another.
- The most important part of confrontation is when the parties being questioned actually answer, and the record of this is regarded as evidence for the court.

The main phase of confrontation is the investigation. During the trial the recordings are taken into consideration, but confrontation may be repeated, or carried out again in court.

According to law enforcement officials, its effectiveness is around 10-15%. In the other cases the parties maintain their previous statements regardless of the evidence and of the other party's statements. For these reasons, and despite its traditions, the institution is regarded as fairly ineffective.

2.15 Slovenia

In Slovenia confrontation is a technical term in both criminal procedure and criminology.

The Slovenian Code of Criminal Procedure (Zakon O Kazenskem Postopku - 1994) has provisions regarding confrontation as an evidentiary action. The theory of criminology, however, provides tactical advice on the conduct of confrontation.

The Slovenian textbooks on criminology offer different tactical advice regarding the conduct of confrontation. The primary features are:

- Before the confrontation, there is to be a short hearing of the witness/accused in which they are asked whether they maintain their previous testimonies; later they are informed that they will be subject to confrontation.
- The identity of the person who is to be confronted with a participant of the procedure should not be revealed before the confrontation.
- Confrontation should, in other words, involve surprise.
- Confrontation should be carefully prepared: Who? When? Where? The facts needing to be clarified; the order of the hearing; the method of questioning.
- The accused must first be confronted with the less important witnesses and then with the others, gradually ascending in order of importance (putting increasing pressure on the accused).
- If possible, the opportunity for the accused to communicate with any co-accused should be prevented; some even recommend that accused persons should not meet.
- Attempts should be made to reduce the influence the accused might have on a witness.
- When recording the confrontation, all answers given should be recorded verbatim; the witness/accused should answer in turn; the confrontation should not be spontaneous.

The provisions of confrontation in the Slovenian Code of Criminal Procedure are found among the regulations concerning the hearing of the accused and the witnesses. By law, these provisions lie in the sphere of judicial examination, but the very same rules apply to the main interrogations of the investigation where confrontation is also applicable.

Confrontation, as an act of gathering evidence, is not applicable in the so-called preliminary process, which, practically speaking, is an informal police investigation. However, since the preliminary process is not

formal, there is no obstacle to applying informal confrontation. The result of this may not, however, be used as evidence.

In those cases where judicial investigation is obligatory in the pre-trial phase, confrontation is usually used at that point (as an investigative action and as evidence gathering). This, however, does not rule out the possibility of the judge repeating the confrontation; on the contrary, the judge must, since the verdict may only be based upon evidence given at the main trial. If repeating the confrontation is impossible (if, for instance, a witness refuses to testify), the record of the previous confrontation conducted by the investigating judge, is to be read out at the hearing

Recently no research has been undertaken into the effectiveness of confrontation. At the same time, authors of professional literature emphasise that confrontation is a very important and effective tool in clarifying the facts of a case. It appears, therefore, that there are no special problems related to the issue.

The Slovenian law enforcement officials whom I questioned during my research, did not express special reaction related to confrontation. According to them, confrontation is a method of proof applied by courts if it seems necessary; it is regarded as an effective tool in revealing the true facts. Based on their experience, the judges are fully capable of observing and evaluating – with due care - the reactions and behaviour of witnesses or the accused.

3. Member States where the institution does not exist

3.1 England and Scotland

Neither English nor Scottish law has any such process. Instead, they have "traditional' methods of investigation and of hearing witnesses, as, in some cases, when the victim and the accused meet. This is, however, in no way similar to Continental confrontation. In the Anglo-Saxon legal system, the judge does not investigate, unlike for instance in France, where there are investigating judges.

It may sometimes occur, in civil law cases, but only during arbitration, that the arrangement phase is held outside the courtroom.

The system provides for hearing witnesses – during the basic questioning of witnesses, or cross-examination. During the hearing of the witness, the person conducting the examination links the witness's testimony to the case.

(Note that, due to the earlier Anglo-Saxon legal and historical influence, the institution is also unknown in Cyprus)

3.2 Ireland

The Irish legal system is a common law system deriving from the English system and so is an 'adversarial' rather than an 'inquisitorial' system. The criminal justice system is affected in the sense that this 'adversarial' approach confronts the prosecution viewpoint with the defence viewpoint. The judge does not take part in the investigation, the only exception being when he is called upon to issue a search warrant. Participation by the judiciary may only occur at the beginning of the procedure.

The 'An Garda Siochana' (the Irish Police Force) investigates without judicial order or supervision. Their completed investigation report is then forwarded to the Director of Public Prosecutions (DPP), who will decide if there is sufficient evidence to bring charges, or not. The DPP is not a member of the judiciary; it is an independent body whose office is a part of the Ministry of Justice. Only after negotiating with the DPP, may the 'Garda Siochana' begin the procedure.

At the beginning of the trial, both the defence and the prosecutor name their own witnesses. All witnesses are open to cross-examination by the other party also. If there is any contradiction or dispute in respect of significant facts, evidence, or testimony, the judge or the jury (directed by the judge) decide which is the true version.

In the adversarial criminal procedure, the burden of proof must be beyond any doubt. This means that the defence, by using its witnesses, will try to introduce evidence that would challenge that of the opponent. If the defence introduces evidence of its own, this also must be judged on the 'balance of probability'. Putting it simply, the defence has to prove that their version is much more likely, and so the burden of proof is rather heavier on the prosecution, than on the defence.

In the judicial phase the provisions that apply to taking the evidence into account is a mixture of common law and statutory law. The "statute' provisions are found in the "Criminal Evidence Act' of 1992.

4. The main conclusions drawn from the regulations of EU Member States

In answer to the questions posed at the beginning of my study, I may offer the following conclusions.

The relationship of legal systems based on the Anglo-Saxon model and those based on continental traditions differ noticeably in respect of confrontation. The former does not have this institution and uses other means to solve a case or to convince a judge or jury. Most of the latter, however, use the institution.

It should also be remembered that, in the continental legal systems, to some extent referring to its importance, the provisions regarding confrontation are placed in the national Codes of Criminal Procedure. These regulations, mostly short and lacking detail, are supplemented by detailed recommendations, advice, guides to criminalistics, including tactics and police technology. This is especially true in the case of those countries where the emphasis is on the investigational phase. Despite this, in the majority of Member States which have the institution, it is applied in both of the two main phases of the procedure: in the investigational one and in the judicial one as a tool of justice that seems to be an established statement.

Effectiveness varies, and it might, in fact, be said that it is generally quite low. Based on experience: due to its traditional use in Central and Eastern Europe, law enforcement officers there regard it as more important than their counterparts in Western Europe. However, it must be said that this leaves no visible mark on the overall (modest) level of effectiveness. It should, nevertheless, be noted that what foreign law enforcement officers refer to as weak effectiveness levels (even in absolute numbers of 10-15%) are close to the Hungarian figures found during my research.

Despite its modest effectiveness, I felt no significant doubt of the value of the institution in any of the above countries that might threaten the existence or future of the institution. At the same time, in those countries that do not have the institution, there seems to be no live issue concerning the need for the institution and there was certainly no clear interest in its introduction.

Communicating the EU to the world: a European Communication Policy for the external relations of the Union

Eszter KAROLINY

ABSTRACT *The European Union and the European Communities have always tried to provide information on their organisation, activities and goals to people both inside and outside their borders. Since 2005, the EU institutions have recognised the need for a coherent communication policy towards European citizens as one of the ways to ensure public support for and the legitimacy of the European integration project. There is, however, a further part of communication policy just as important: that directed towards the governments and citizens of third countries, and other international organisations. This external communication policy complements and facilitates the various types of external actions of the European Union by making them more visible and understandable. This is important for a variety of reasons in cases where the EU delivers humanitarian or development aid, when it engages in peacekeeping activities or for the European Neighbourhood Policy, where the citizens of participating states need to be informed about the possibilities the EU offers, but with a different approach than to EU citizens. In this paper, I endeavour to present the current external communication policy of the European Union in the third states with which it has contact and the communication on external policy itself. As both common sense and recent experience of integration suggest, a policy is only worth as much as the people and organisations targeted by it know about it. A successful communication policy is therefore necessary for the external policies of the EU to function well.*

1. Introduction – public relations and public diplomacy of the EU

Notwithstanding the fact that the European Union and its predecessors were rightly criticised for their lacklustre foreign policy, today we can truthfully state that the external activities of the EC/EU cover a major

area, from both geographical and thematic points of view. From trade to development aid, crisis management, promoting human rights and democracy, as well as external, or externally linked action in the environmental, energy, terrorism or freedom, security and justice fields, the Community and the Union have an influence on a wide range of topics as well as in countries near and far from the European continent. The number of people whose lives are affected by EU action has grown steadily in recent years; as has the depth of its influence. Unfortunately, the level of familiarity with the EU and its policies has not followed this trend, and general knowledge is still lacking in most areas.

This is not to say that European citizens themselves have a complete - or even an adequate - understanding of the workings of the Union: the information gap is definitely not restricted to beyond the EU's borders. Battling the "internal" lack of information as well as the missing routes for feedback, the ever-developing European Communication Policy consists of actions aimed at European citizens, proposing to establish two-way communication between them and the institutions of the EU, whilst giving them a right to be informed and to be heard. This policy, however, is a result of organic development, where the important documents attempting to establish a coherent action in this area are relatively recent and built on the ways and means of providing information and collecting feedback that have come into existence at irregular intervals since the early Communities were first conceived.

To say today that the foreign and communication policies of the EC/EU do not meet, since the one targets the external and the other the internal, would be making a highly debatable statement. For one reason, the borders of the EU are far from final; although the era of major enlargements has passed, there are still several candidate countries for Accession. Also, notwithstanding the fact that public diplomacy is meant to target foreign audiences, the EU, in this respect, is in a very special position: it does not (and will never) constitute a homogeneous polity: in any given Member State, other members will be considered as "abroad"[1], participation in EU affairs will be regarded as foreign policy. As a last point, I would also argue that, despite any differences established by scholars in political communication, several of the tools that are ultimately used in internal and external communication, are very similar,

[1] Wallström, Margot: Public diplomacy and its role in the EU's external relations. Speech given at Mortara Center for International Studies, Georgetown University Washington DC, 2 October 2008

if not identical (especially the modern-day digital, Internet-based applications).

This paper deals with the methods and tools used by the European Union (mostly by the European Commission) to promote both itself and its foreign policies in the Member States and outside its borders. As one example, since covering the whole external dimension of the EU in detail would be well beyond the scope of this article, I will use the European Neighbourhood Policy (ENP). For a comparison, I will also give an outline of the communication policy developments and goals inside the EU. These latter, as mentioned above, have been very numerous and have developed fast in recent years, as the culmination of the referendum on the Constitution crisis induced the need for Community institutions to make a real effort in "communicating Europe" and listening to citizens' opinions.

2. Communication policy inside the EU

The first point to be made when talking about the European Communication Policy is that the European institutions, and especially the European Commission, have, since their earliest incarnations, provided information on the functioning and activities of the Communities and, later, the Union. Parallel to this, both the Commission and Parliament have semi-regularly issued documents usually aimed at creating a coherent approach to this information activity. The same can be said of communication, or more precisely, of the possibilities available for the European citizens to influence EU policy directly. None of the documents, however, dealt with the use of the complete array of existing information/communication tools. In this article, I will mention both the most important tools for - and the documents concerning - the information/communication policy, in their chronological order of appearance: as the most significant documents were drafted after the Maastricht Treaty (in the 1990s and later) the tools will be the first to be described.

2.1 Tools

Media contacts or a press and information service have existed in the EU since its inception. The ECSC High Authority had a Spokesman's Group/Press and Information Service from 1953, which later expanded to the Joint Press and Information Service of the three Communities. This

service was responsible for the provision of both general information to the media and specialised information to different target groups; also for representing the Communities at fairs and exhibitions and for publications, visits and training. In 1967, the Directorate-General for Press and Information (DG X) was created, and has existed ever since with periodic name changes (since 2005: DG Communication)[2]. The newest generation of the media services include the Audiovisual Service, the Europe-by-Satellite television service, daily press conferences, an online press room and the RAPID news database, free-of-charge technical facilities. In addition to this, the separate DGs, the European Parliament[3] and the Council[4] also have press services, information officers and spokespersons.

In all Member States and, in the case of larger countries, significant regions, the European Commission operates Representations, which fill a role approximating to that of a foreign embassy. (This role is even more pronounced in the case of the Delegations functioning in third countries.) The European Parliament has also established a network of information offices (altogether 33)[5]. The role of the Representations includes the provision of information at national or regional level, in various forms and methods (press contacts, organisation of events, publishing, etc.) but experience shows that information is required – and best provided – locally.

For various purposes, therefore, several information networks were established by the European Commission in general, and by various DGs in particular. The first, in 1963, was the European Documentation Centres network, aimed at providing information and resources to research and education conducted at universities. Other general networks include Team Europe, consisting of expert speakers, and the Europe Direct relay, which developed from Info-Points Europe and Rural Information and Promotion Carrefours, but also includes a toll-free telephone and e-mail answering service, and has the goal of informing the general public. Specialised networks and relays are almost impossible to list, especially because, in addition to those founded by the DGs, several Member States established their own with or without aid from the

[2] Dumoulin, Michael: What information policy? In: European Commission: The European Commission, 1958-72 – History and memories. Office for Official Publications of the European Communities, Luxembourg, 2007 pp. 507-532.
[3] http://www.europarl.europa.eu/news/expert/default_en.htm
[4] http://www.consilium.europa.eu/showPage.asp?id=221&lang=en&mode=g
[5] http://www.europarl.europa.eu/parliament/public/nearYou/completeList.do?language=EN

EU. These are almost always related to one specific policy of the EU and endeavour to ensure that European citizens have access to all their rights stemming from Community legislation. Most networks and relays receive support from the Commission in supplies of publications, opportunities for training and, sometimes, direct financial assistance.

Although operating from the beginning of the ECSC as a department of the "Commission", the separate Publications Office[6] began its work as an interinstitutional body in 1969. Today, it is responsible for the official publications of the European Union, (Official Journal, Bulletin, Annual Report), and countless others ranging from leaflets to statistics and reports, information for children and researchers. The Publications Office also operates several online databases such as Eur-lex, CORDIS, Ted; and most of its products are available by mail order or electronically via its EU Bookshop site. This organisation also deals with the distribution of its products, and is unique in issuing documents in all 23 official languages of the EU (and sometimes others).

Since 1973, the European Commission has been monitoring the evolution of public opinion in the Member States, to help the preparation of texts, decision-making and the evaluation of its work. Eurobarometer[7] is a well-known conductor of Europe-wide opinion polls - both on topics regularly measured and in specialised areas.

Another form of receiving the – albeit politically highly influenced – opinion of European citizens are the European Parliamentary elections, which have been held since 1979, and various referendums on EU-related subjects (Accession, Enlargement, new treaties) in the Member States. These latter are obviously very different in product and information than any other means of feedback, but nevertheless they constitute a very important part of the actual communication process between the political elite and the mass of citizens in general.

Individuals have the opportunity to have their say to, for example, the European Parliament via its Correspondence with Citizens Unit, or even to petition (in specific areas) Parliament, the European Ombudsman or other institutions (as determined by the Amsterdam Treaty, see Article. 21 of the Treaty on European Union).

With the development of technology, the EU also started to appear on the Internet. The Europe portal started its operation in 1995, and since then it has evolved to be one of the largest portals available, operating in

[6] http://publications.europa.eu/
[7] http://ec.europa.eu/public_opinion/index_en.htm

over 20 languages. Europe is also trying to keep up with the Web 2.0 revolution, as Commissioners' blogs,[8] EUtube,[9] and discussion portals such as Debate Europe,[10] Your voice in Europe,[11] Europa Chats[12] etc. have been springing into existence from 2005.

2.2 Policy documents

Even as different and sophisticated tools of information provision and communication developed within the European Communities, the European institutions (mostly the Commission and Parliament) have considered the underlying question of any coordinated policy: what type of information should be given, on which principles and what kind of results should the policy target. Both the Commission and Parliament have regularly discussed these questions and issued documents describing their approach.

These documents, however, gained more weight only as the "democratic deficit" crisis hit in the late 1980s, and, at the referendums on the Maastricht Treaty, it became apparent that European citizens no longer accepted the functioning of the EU without serious doubts. As the new millennium began, the main problem turned from a lack of information to a lack of communication: in addition to easily understandable and readily available information on EU activities, citizens also wanted to have a real chance of influencing EU policy. In lieu of this, they expressed their opinion in referendums, the most notable of which were the French and Dutch votes on the Constitutional Treaty.

The year of 2005 was a turning-point in the development of European Communication Policy, but this does not mean that no actions were taken before. The European institutions, especially the European Commission, had been well aware that more needed to be done in this field since 1992 and had issued several documents to alleviate the problems.[13] In this era,

[8] http://blogs.ec.europa.eu/
[9] http://www.youtube.com/eutube
[10] http://europa.eu/debateeurope/
[11] http://ec.europa.eu/yourvoice/
[12] http://ec.europa.eu/chat/index_en.htm
[13] Information, communication, openness. Luxembourg, Office for Official Publications of the European Communities, 1994; A new framework for co-operation on activities concerning the information and communication policy of the European Union COM(2001)354; An information and communication strategy for the European Union COM(2002) 350; Implementing the Information and Communication Strategy for the European Union COM(2004)0196 and European Parliament resolution on the

the significant "access to documents" legislation[14] and case-law have also been developed.

After the Constitutional Treaty referendums, and in response to the period of reflection declared by the European Council the Commission re-evaluated its communication activities and put forward three documents to create a new framework in which the people of Europe would be able to obtain relevant information about the EU and express their opinions in connection with this. The first of these documents was the Action Plan to Improve Communication Europe,[15] which was issued by the Commission to summarise the measures to be taken inside the Commission, to "put its house in order". From the beginning, this was designed to complement the Communication Policy White Paper, and emphasised – among other things - the role of Representations, the need for internal coordination and professional staff. The Action Plan also reorganised DG Press and Communication, rechristening it DG Communication.

The second document issued was Plan D,[16] aiming at "stimulating a wider debate" between institutions and citizens. Although prompted by the need for deciding the fate of the Constitutional Treaty, its main purpose is to be able to define Europe based on the expectations and needs of citizens; this naturally means that it is not restricted to the period of reflection: the Plan D gives a foundation for a long-term consultative method of operation.

This method is based on the assumption that European citizens would like to have their voice heard by the institutions, and that forums are needed for them to express their views. These forums, in all Member States, would provide a place for "broad ranging national debates on the future of Europe". Although assistance is provided by the Commission and the European Parliament, through Representations and Offices respectively, the responsibility of organising the debates lies on the Member States. There are, naturally, no constraints as to the topic of the debates, however, Plan D mentions economic and social development, feelings toward Europe and EU's borders and role in the world as suggestions for areas in which information is to be provided and opinions

implementation of the European Union's information and communication strategy (2004/2238(INI))
[14] Regulation 1049/2001/EC
[15] Action Plan to improve Communication Europe by the Commission: SEC(2005)985
[16] Plan D for Democracy, Dialogue and Debate: the Commission's contribution to the period of reflection and beyond: COM(2005)494

listened to. Not everything happens at national level: 13 Community-level initiatives aid the national debates, such as visits by Commissioners to Member States, Commissioners' availability to National Parliaments, organisation of European Round Tables for Democracy etc.

Plan D involved a feedback process from Member States: the first stage of this ended in April, 2006. Two documents were drafted based on the resulting feedback: the first was a Citizens' Agenda,[17] summarising the Commissions' proposals and commitments to a "Europe of results", which should respond to the citizens' needs and expectations. Important points of action include deepening the single market; building solidarity, creating more employment opportunities; furthering action in the field of Freedom, Security and Justice to build a more secure Europe; continuing with Enlargement whilst listening to citizens' concerns; and a more coherent approach to the external activities of the Union. Working together is another concept introduced in the agenda: this involves listening to national decision-makers in the European legislative process. The Commission therefore decided to engage all actors in all stages of policy-making (pre-policy consultation, individual proposals, implementation).

The other document adopted by the Commission and based on the first feedback from Plan D national debates was the Communication from the Commission to the European Council on the Period of reflection and Plan D[18]. As follows from its title, this document is more closely concerned with the outcome of the reflection period and the results of the national forums organised. From the point of view of obligations on Member States, the Communication reiterates that they are primarily responsible for organising national debates, while expressing its concern that "six months after the adoption of Plan D, it must be pointed out that the involvement of Member States in the launch of national debates remains uneven."

After the extension of the period of reflection in 2006, Plan D had to continue with the knowledge gained from the first year-and-half of its operation. In November 2006, MARGOT WALLSTRÖM, Vice-President of the Commission, addressed an Information Note to the Commission[19] in which she detailed the actions planned until mid-2007. These included further local activities, cooperation with Member States and civil society,

[17] A Citizen's Agenda: Delivering Results for Europe: COM(2006)211
[18] The Period of Reflection and Plan D: COM(2006)212
[19] Information note from Vice President Wallström to the Commission Plan D – Wider and deeper Debate on Europe SEC(2006) 1553

social partners and political parties, developing the Representations and Europe Direct Centres into "European Public Spaces" for Europe-related cultural and political events, European Round Table Debates, a new Eurobarometer survey in 2007 and the re-launch of the Internet-based debates.

In 2007, the period of reflection came to an end, and, instead of the Constitutional Treaty, a Reform Treaty was drafted, and the ratification process began anew. Reflecting the passing of the stage which had given birth to Plan D, the Commission adopted a document that evaluated this initiative, but also proposed a continuing process, especially with regard to the Lisbon ratification and the European Parliament elections in 2009.[20] The continuing initiative, dubbed Debate Europe after the Plan D discussion website will concentrate on the 3rd D, democracy, by conducting citizens' consultations and debates with politicians about the position papers prepared at the consultations. It also focuses on promoting active citizenship (here cooperation with all European institutions is essential), taking into account all already existing relevant programmes. Finally, Debate Europe will continue all the successful elements/actions of Plan D.

The third of the original three documents introduced by the European Commission, the White Paper a European Communication Policy,[21] adopted on 1st February 2006, launched a consultation on the introduction of a new Communication Policy for the EU. The main starting point was the idea that delivering results is essential, but, in itself, not sufficient without providing information about them – and that the latter is important enough to afford a separate policy "on its own right".

The new policy would stem from the dual principles that every European citizen, regardless of nationality, social or educational background or any other defining factor, has a right to both receiving "fair and full information" about the European Union, and, in return, to be heard by the EU institutions, when he or she wishes to express his/her opinions. Besides establishing these rights for individuals, the White Paper also suggests building a "European public sphere" to ensure that EU-related topics have a pan-European forum of their own, where they can be discussed. This, however, would not mean the exclusion of

[20] Debate Europe – building on the experience of Plan D for Democracy, Dialogue and Debate: COM(2008)158
[21] White Paper on a European Communication Policy: COM(2006)35

European debate from the national level: the White Paper indicates the responsibility of Member States' public authorities (local, regional and national governments) to make sure that Europe is included in national or local political discourse, instead of being perceived as an extraneous issue.

The document identified five areas for action in relation to establishing the new policy. The first is the development of the basic guiding principles for communication: ideas such as freedom of expression, access to information, inclusiveness, diversity and participation are mentioned. To make a basic document to which to refer when "communicating Europe", and to enshrine these principles, the White Paper proposed the adoption of a "Charter or Code of Conduct on Communication". As the second area for action, the White Paper stresses the importance of empowering citizens, that is, making the means for debate available to all by civic education, connecting citizens with each other and with public institutions. Another part of the Communication Policy proposed would be a new and better connection to the media with presenting European events in connection to peoples' interests or in a local or regional dimension; the utilisation of new technologies is also promoted. The fourth point of action proposed was the better use of (Eurobarometer) public opinion surveys in developing new policies. Last, but not least, cooperation with other institutions, national governments and local authorities, political parties and members of civil society complete the initiatives proposed by the White Paper.

The three main documents mentioned are certainly not the only actions taken in the post-Constitution-referendums period to bring the EU closer to its citizens. Whilst only loosely related to the communication policy, several initiatives have been put forward which should make the EU more acceptable. Among these, the following should be mentioned:

- European Transparency Initiative:[22] a Green Paper to increase access to EU information (on recipients of funding, lobbyists, minimum standards of consultation)
- A Green Paper on reviewing Public Access to Documents held by institutions of the European Community:[23] aiming at improving the access based on Regulation 1049/2001/EC

[22] European Transparency Initiative COM(2006) 194

[23] Public Access to Documents held by institutions of the European Community. A review. COM(2007) 185

- Better regulation:[24] an initiative to simplify and improve EU legislation (e.g. with simplification, reduction of administrative burdens and impact assessment, cooperation with transposing Member States)
- Europe for Citizens:[25] a programme aimed at giving citizens a chance to interact; developing European identity, a sense of ownership and tolerance

All three main documents have been criticised both by other EU institutions and bodies and by other actors (members of civil society, think-tanks etc.). One of the main points of contention was that neither Plan D, nor the White Paper gave an appropriate answer to the question of how citizens' opinions will be taken into consideration when making policy. This and other problems still await solution in 2007. The positive aspect of the information / communication policy developments is that the European institutions seem to recognise the problem and are committed – both in actions and words – to finding a way to solve it.

The first tangible effects of the efforts to find a solution were presented to the public in October 2007, albeit in a provisional form, by the Commission. The several documents made public at this time were based on the results from the consultation process described in the White Paper on the European Communication Policy, and the findings of two Eurobarometer surveys conducted in 2006 on the communication policy preferences and habits of citizens[26] and decision-makers[27] of the EU. The European Commission issued a document on Communicating Europe in Partnership,[28] a proposal for an Inter-Institutional Agreement[29] on the same topic, plus the impact assessment documents[30] attached to these two on the 3rd of October 2007. In these, the Commission outlined its new proposal for a Communication Policy, which would be based on the Inter-Institutional Agreement (IIA) of the Commission, the European

[24] Better regulation COM(2006) 689

[25] Decision No 1904/2006/EC establishing for the period 2007 to 2013 the programme Europe for Citizens to promote active European citizenship

[26] Flash Eurobarometer 189a EU Communication and the citizens. General Public Survey 2006

[27] Flash Eurobarometer 189b EU Communication and the citizens. Decision Makers 2006

[28] Communicating Europe in Partnership COM (2007) 568

[29] Proposal for an Inter-Institutional Agreement on Communicating Europe in Partnership COM (2007) 569

[30] Accompanying document to the Communication Communicating Europe in Partnership Impact Assessment SEC (2007) 1265

Parliament and the Council, instead of the Charter or Code of Conduct suggested in the White Paper. Turning to content, the Communication emphasized the importance of the coherent and integrated approach to communication (mentioning, among others, communicating the EU in third countries); pointed out the necessity of empowering citizens so they would be able to participate in the EU discussions. It also put forward new ideas to aid the development of a European public sphere, such as involving politicians and journalists in internet discussions and meetings (Pilot Information Networks), re-designing the EUROPA portal, and placing more weight on public opinion surveys. Finally, the Communication, in addition to proposing the IIA (thus working together with other institutions), also mentions forms of cooperation (e.g. management partnerships) with Member State governments.

The draft IIA text contains the enshrinement of the objectives (taken from the White Paper) of giving everyone "access to fair and diverse information about the European Union" and enabling "everyone to exercise their right to express their views and to participate actively in the public debate on European issues". It recognises and details the tasks and duties of the (already existing) Inter-institutional Group on Information (IGI), lays down the procedure of adopting a common annual work plan, and the actions to make real the principle of going local. Finally, the IIA establishes monitoring, assessment and review procedures.

After more than two years of promises of major reforms and several documents that were more concepts and ideas than concrete proposals for action, the 2007 October texts seemed a refreshing change. Although still vague in several important areas (the above problem of how citizens' opinions will be channelled into decision-making is still a questionable, if somewhat clearer, subject), and failing to establish an immediately enforceable right to information (an IIA, though better than a Charter, is still not on the level of binding community legislation), the Commission outlined its plan of action for the future in information/communication matters in a promising way.

These proposals were soon followed by communications from the Commission on the better use of the Internet[31] (whilst recognising the importance of the Internet, this mostly details the reform of the EUROPA

[31] Communicating about Europe via the Internet. Engaging the citizens: SEC (2007)1742

web-portal) and audiovisual media[32] (the use of the existing and possibly of the new television and radio networks) in addressing citizens. These strategies are significant in allowing for the use of the most widely available and democratic, also most popular, information sources in Europe.

The fact that the European Communication Policy still has a long way to go was pointed out most painfully on 12 June 2008 when the Irish voters rejected the Lisbon Treaty in a referendum. The reasons were immediately investigated by a Eurobarometer survey,[33] which attributed many of the 'No' votes to feelings that the text of the treaty was incomprehensible. This view was reinforced when Taoiseach BRIAN COWEN and Commissioner CHARLIE MCCREEVY admitted that they had not read the treaty in full. Negative campaigning was successful in raising issues that are connected to European law, but not directly influenced by the Treaty, while misinformation met with little rebuttal from the 'Yes' campaign. In the campaign for the new referendum in Ireland,[34] the lessons learnt (re-learnt) from the 2008 referendum were taken into consideration.

3. External communication policy

After the overview of the tools and governing documents of the European Communication Policy, the examination of the same tools and documents concerning the "foreign (or external) information/communication" policy is the topic of this chapter. As seen above, there is no one consistent policy or set of tools for internal communication. This is even more so in the case of foreign policy, but, nevertheless, I will attempt to give a comprehensive analysis of the available instruments.

[32] Communicating Europe through audiovisual media SEC(2008)506/2

[33] Flash Eurobarometer 245 Post-referendum survey in Ireland

[34] An all-party Irish parliamentary report was published in Dublin on 27 November 2008 cleared the way for a re-run of the Lisbon Treaty referendum in Ireland. http://www.euractiv.com/en/future-eu/irish-parliament-clears-path-new-lisbon-referendum/article-177586 [2008.11.29.]

3.1 Reasons for an external communication policy

The purpose of an external information/communication policy obviously differs in various ways from relating to internal policy. In the Member States, communication policy is aimed at making the EU function more democratically, thus earning it more legitimacy. When informing the outer world about the Union and its activities, the EU seeks to promote its values and requirements to foreigners, to help them to understand and develop their perceptions of Europe. In a more practical way, however, foreign information also fulfils purposes similar to the internal: to provide help in accessing and using EU-related resources available in the country in question (although this type of information provision is always the duty of the third country's government as much as that of the EU). It is also worth mentioning that, from the beginning of the existence of the Communities, information provision in non-member countries had to accept the possibility of accusations of propaganda and even interference in internal affairs.[35]

Used in this article as an example of external communication, is the EU's Neighbourhood Policy, which, developed from 2003, is an alternative to the enlargement process. In the relevant literature[36] it is often described as using the tools of the latter without the express goal of inclusion as Member States. Expressed simply, this is done by encouraging political and economic reform, respect for human rights and fundamental freedoms, whilst offering participation in EU policies, access to the internal market and aid from Europe. The EU promotes the adoption of European values,[37] which were also expressed – although without reference to shared values[38] – in the Copenhagen Criteria for membership of 1993. There is, however, no direct question of consideration for membership. All of this can, of course, be construed as attempts by the Union to exert a heavy influence on the internal

[35] Dumoulin, Michael: op. cit. pp. 507-532.

[36] For example, see Ferrero-Waldner, Benita: The European Neighbourhood Policy: The EU's Newest Foreign Policy Instrument. In: European Foreign Affairs Review 2006/2. pp 139-142. or Dannreuther, Roland: Developing the Alternative to Enlargement: The European Neighbourhood Policy. In: European Foreign Affairs Review 2006/2. pp. 181-201.

[37] European Neighbourhood Policy Strategy Paper COM(2004) 373

[38] Bogutcaia,Galina – Bosse,Giselle – Schmidt-Felzmann, Anke: Lost in translation? Political elites and the interpretative values gap in the EU's neighbourhood policies. In: Contemporary Politics 2006/2. pp. 117-137.

functioning of the ENP countries. This, in turn, means, in the author's opinion, that the EU should consider whether the fact that the process is supposed to be in the mutual interests of both parties will be enough to grant it legitimacy in the eyes of ENP citizens, and whether a more committed information / communication policy in these countries might not help in legitimising the ENP.

3.2 Tools for external communication

If the European Union has difficulties in communicating with its own citizens, these seem small compared to the problems it encounters in putting over its message abroad. Common catchphrases about the EU being an economic giant but a political dwarf, or the infamous "whom do we call when we want to talk to Europe?" question show that, just as its foreign policy in general, the Union's external communication (which should be part of its public diplomacy)[39] has lacked consistency and efficiency, at least in the early days. In spite of developments in this area,[40] there is still much to be done. As well as other foreign policy instruments, the European Neighbourhood Policy has to work with the tools which foreign policy has at its disposal, in communication as well as other respects. After an overview of the available general tools and instruments, I will discuss those ones specifically ENP-related.

As noted previously, the European Commission is responsible, in one way or another, for a significant part of the EU's communication activities in the Member States; this is mainly the duty of the DG Communication. While DG COMM is not completely sealed off from external information / communication efforts, DG External Relations and DG Enlargement both have a considerable role to play in this area. Thus, for example, DG RELEX is responsible for the training and visits of press and communication officers and journalists from third countries; it operates a website dedicated to external affairs and the Union's role in the world etc.

The equivalent of the European Commission's Representations in third countries is the network of Delegations (over 160 delegations and

[39] Lynch, Dov: Communicating Europe to the world: what public diplomacy for the EU? EPC Working Paper No. 21. November 2005.

[40] For evidence of improvement, see, for example Rogahn, Maria – Chaban, Natalia – Bain, Jessica – Stats, Katrina: A Mediator on the World Stage? – How the EU's Commitment in Foreign Affairs is Portrayed in New Zealand and Australian Media. In: European Law Journal 2006/5. pp. 680-706.

press and information offices in just as many states) which have a history looking back to 1955, when the ECSC High Authority established a Representation in London. The first "delegations" established were precisely as much responsible for providing information as for diplomatic relations; in some cases, indeed, a press and information office (or a European Documentation Centre, as in Turkey) was established before an official "ambassador" (Head of Delegation) was appointed.[41] In 1977, a Commission communication to the European Council expressly noted that, among the responsibilities of a Delegation were:

- "to act as a contact point for those wishing to communicate with the institutions;
- to provide information on EC aims and objectives;
- to cooperate with Member States in situ and keep them informed on the implementation of EC policy;"[42]

It is also important to understand that, whilst structurally belonging to the Commission, Delegations provide services for the whole institutional network of the European Union.

While internal communication policy is largely in the hands of the Commission and the European Parliament, the place and power of the Council in external affairs makes it necessary for that institution to participate in public diplomacy. Hence, the High Representative for the Common Foreign and Security Policy/Secretary-General of the Council of the European Union has a spokesperson for media relations; and Directorate-General F of the Council is responsible for Press, Communication and Protocol. Naturally, these entities participate in both internal-EU and third country communication projects.

In special cases involving EU action, Special Representatives (EUSRs) are appointed to "promote European Union policies and interests" and "play an active role in efforts to consolidate peace, stability and the rule of law". In November 2008, there are eleven EUSRs in different regions of the world (Afghanistan, the African Great Lakes Region, the African Union, Bosnia and Herzegovina, Central Asia,

[41] Bossuat, Gérard – Legendre, Anaïs: The Commission's role in external relations. In: European Commission: The European Commission, 1958-72 – History and memories. Office for Official Publications of the European Communities, Luxembourg, 2007 pp. 339-377. This, naturally, is consistent with the originally small political role of the Communities on the international stage.

[42] European Commission: Taking Europe to the world — 50 years of the European Commission's External Service. Office for Official Publications of the European Communities, Luxembourg, 2004

Kosovo, the former Yugoslav Republic of Macedonia, the Middle East, Moldova, the South Caucasus and Sudan); they operate under the authority of the High Representative and cooperate with the Delegation of the Commission in the region.[43] In addition, an EU Special Envoy for Burma/Myanmar was appointed on 6 November 2007 to coordinate the European Union's efforts to bring about positive change in Burma/Myanmar.

Several of the communication tools mentioned in the list of internal instruments are available for third countries: some with no modification such as all Internet-based applications, portals, databases; or the press services available for foreign as well as EU-based journalists. As also mentioned, DGs concerned with foreign affairs provide services to third countries' citizens similar to the "internal" ones for European citizens. Examples include publications ordered from the Publications Office and supplied to Delegations, training, visits, news releases etc. Various programmes are organised annually with the participation of Delegations. (One good example was the 50th Anniversary Group of Projects in different parts of the world.[44]

Concerning information networks and relays, an interesting situation arose in the wake of the major reforms in European Communication Policy. The once unified worldwide European Documentation Centres network now belongs to three different DGs: the EDCs in Member States to DG COMM, those in candidate countries to DG Enlargement, and those in third countries to DG RELEX. The latter have also been renamed the EUi network in 2006, although their basic function is still to aid education and research, with the added task of informing, whenever possible, the general public also[45]. Several other information relays extend beyond the borders of the EU, enhancing cooperation with other states. There is also, situated in Brussels, an Info-Point for External Cooperation, dealing specifically with issues of EU foreign policy,[46] aiding communication between citizens and "external" DGs or Delegations.

[43] EU Council Secretariat Factsheet: EU Special Representatives (EUSRs). Representing the EU around the world in key policy areas EUSR/4 July 2007

[44] European Commission: The EU's 50th anniversary celebrations around the world. A glance at EU public diplomacy at work. Office for Official Publications of the European Communities, Luxembourg, 2007

[45] Ringrose, David: EUi-s. Presentation at the Specific Trainig Seminar for EDCs 2007. May 25, Brussels

[46] http://ec.europa.eu/europeaid/frontoffice/

3.3 References to information provision in general and specific foreign policy documents

While all of these tools are available for external communication, it is obvious that, in respect of documents, the specific area has also to be considered. In this part of the article, I refer to three recent foreign policy documents showing that the importance of giving information as well as of extracting results is well recognised by the EU political decision-makers in the external affairs area.

One of these documents is a Commission communication from 2006,[47] aimed at giving the EU's external action more coherence, effectiveness and visibility. Correct and professional information can enhance the efficiency of the policy as well as its visibility: the document proposes that all involved should integrate into their messages to the public the policy decisions already agreed upon. Increasing the visibility of EU external action, is, in the meantime, supposed to be achieved by reinforcing public diplomacy in third countries, using visitor and scholarship programmes, and strengthening cooperation between the institutions and Member States on "external" information policy issues.

An internal Commission document[48] slightly predating the above, details in more depth the Communication Strategy for the European Union's external policy between 2006 and 2009. This draft communication deals with providing information on external policy both inside and outside the EU and defines communication priorities and challenges as well as key messages. The European Neighbourhood Policy is one of the priorities mentioned, as a "relatively new policy area", which is also a "complex policy involving both strategic and technical aspects". Key messages are divided into three categories: why an EU external policy is necessary, what are its main characteristics and values and how the external action operates. The Strategy also lists the important communication tools (Delegations, networks, Internet, public events, media relations, publications) and defines the areas where they are best used. Special emphasis is placed on the language of the message: this means, on the one hand, the need to avoid EU jargon and also the provision of information in the languages spoken in the country in

[47] Europe in the World – Some Practical Proposals for Greater Coherence, Effectiveness and Visibility COM(2006) 278

[48] Draft Communication of Mrs Ferrero-Waldner to the Commission "The EU in the World" Towards a Communication Strategy for the European Union's External Policy 2006-2009 C(2006) 329

question. The latter is specifically mentioned in relation to ENP countries. Another issue highlighted is the need for different DGs dealing with external policy to work together in communication exercises, as well as the need to operate in conjunction with other EU institutions.

Another general document making the EU's actions in third countries more visible (this time in practical terms) is "Visibility Guidelines"[49] drawn up by the Information, Communication and Front Office Unit of the EuropeAid Co-operation Office of the Commission. These give detailed, practical information about how the EU's assistance should be displayed, mentioned in any type of project and in any communication exercise from press conferences to brochures and web-pages. A uniform designation of projects made possible by European aid programmes is, therefore, guaranteed.

Turning specifically to ENP documents, we note that, even at the very beginning of the Neighbourhood Policy, the provision of information was envisaged as part of the cooperation projects considered. In the Commission's Wider Europe – Neighbourhood Communication of 2003[50], for example, some of the actions proposed to "promote human rights, further cultural cooperation and enhance mutual understanding" are the establishment of European study courses, and EU information centres, the training of journalists and exchange/visit programmes, strengthening the EU's information policy in general. A PRINCE (see below, point 3) information campaign is also mentioned.

In 2006, when the Commission proposed "Strengthening the European Neighbourhood Policy",[51] in the area of people-to-people contacts, the question arose of putting a human face on the ENP. This is, from internal communication efforts, a well-known problem, and the communication mentioned "exchange and cooperation programmes" as one of the best ways to ensure its solution. Visibility considerations and the need for Member States to enhance the communication of the ENP in their own actions were also emphasised.

Probably one of the most important documents connected to the ENP, the regulation establishing the European Neighbourhood and Partnership

[49] European Commission: EU Visibility Guidelines for external action. 2005

[50] Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours COM(2003) 104

[51] Strengthening the European Neighbourhood Policy COM(2006)726

Instrument[52] also mentions the financing of supporting measures such as activities directly needed to implement this Regulation and to achieve its objectives, e.g. studies, meetings, information, awareness-raising, publication and training activities".

Referring, finally, to a non-paper[53] produced on the basis of the "Strengthening the ENP" communication, the European Commission proposes to increase involvement of civil society in the ENP, partly by providing information to the public on both the EU and the ENP. As in all communication activities, the non-biased members of civil society can be relied upon to provide information of greater credibility than could either governments or institutions of the ENP or EU. Another consideration is the closeness of civil society members to the citizens: for them, "going local" is a natural way to operate rather than a problem. As this last document deals with "promoting" the EU as well as the ENP itself, it leads us quite neatly to the last topic of this article.

4. Communicating foreign policy

Having dealt with how information is provided about the EU in the foreign policy–ENP framework, all that is left to examine is how the external actions of the EC/EU are promoted – and especially in the Member States, although several of the tools to be mentioned have impact or utility value in ENP countries also. Consequently, I shall refer to certain actions which relate to the foreign activity of the EU in general - rather than, simply, to that of the ENP, since the latter would naturally be included in these overall policy discussions as a significant part of external policy.

Starting to analyse EU documents communicating foreign policy - from the general towards the particular - the first instrument to be mentioned is the PRINCE programme, which has n functioned continuously since 1997, and which comprises a few designated topics for information, for which providing the information is prioritised and supported by the EU. One of the designated topics[54] is the "Role of the

[52] Regulation (EC) No 1638/2006 of the European Parliament and of the Council of 24 October 2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument

[53] Non – Paper expanding on the proposals contained in the Communication to the European Parliament and the Council on "Strengthening the ENP" – COM (2006) 726 final of 4 December 2006 Strengthening the Civil Society Dimension of the ENP

[54] see COM(2002) 350 or COM(2004) 196

European Union in the World". Another document referring to "Europe's borders and its role in the world" as a recommended topic of discussion in the national debates to be organised is the Commission's Plan D[55], an important part of the "communication revolution" in the Member States already discussed. The Union's role in the world is also set to be a communication priority in the Annual Policy Strategy of the Commission for 2008.[56]

Specifically dealing with communicating to the ENP, is a document put forward to the Commission by the Commissioner for External Relations[57] and which deals with the better implementation and promotion of the Neighbourhood Policy. In connection with the latter, it addresses the growing popular interest in the policy and proposes not only its inclusion in the communication priorities, but also that Commission officials should "take every opportunity to highlight the objectives, methods and achievements of ENP" whenever possible in the course of their work.

The Commission also utilises the "regular" communication tools such as a dedicated website, specific publications and the organisation of a conference in September 2007. There was also, for example, a Special Eurobarometer opinion poll[58] conducted on the "European Union and its Neighbours" in 2006, measuring European citizens' awareness of and attitudes towards the neighbouring countries and the ENP. This showed that, while the majority of the EU population may not have heard of the Neighbourhood Policy itself, they support cooperation with the countries involved and expect the potential benefits to outweigh the costs. Another Eurobarometer survey,[59] conducted in 2007, gave additional support to these findings as it showed no discernible change in attitudes towards external policy (enlargement, ENP, development etc.) in general and the neighbouring countries in particular. It seems, therefore, that the promotion of the ENP in the EU will not meet heavy resistance, although it will probably be necessary to conduct a similar opinion poll in ENP countries also, the better to understand their attitudes.

[55] Plan D for Democracy, Dialogue and Debate: the Commission's contribution to the period of reflection and beyond: COM(2005)494

[56] Annual Policy Strategy for 2008 COM(2007) 65

[57] Implementing and promoting the European Neighbourhood Policy SEC(2005) 1521

[58] Special Eurobarometer 259 The European Union and its Neighbours 2006

[59] Special Eurobarometer 285 The EU's relations with its neighbours. A survey of attitudes in the European Union 2007

5. Conclusion

Just as internal communication measures devised by the Commission were criticised for their lack of vision and novelty, their counterparts on the external side are guilty of the same. Most of the tools and policy instruments used are the same, as the underlying policy goals and guidelines seem to be worded similarly. As the two sets of documents were usually drafted in the same timeframe, this is natural: indeed, we could say that both the foreign policy and specific ENP documents follow the objectives set down in those of the ECP very well, as they refer often to visibility and information issues, and integrate them into the overall policy framework. This, however, is not sufficient to make public diplomacy effective - as it is not sufficient with internal communication policy. Local, targeted actions are needed for each foreign policy area (in a geographic and thematic sense) which communicate European values and goals. Communication policy, however, cannot solve problems caused by a lack of consistent action, especially in foreign policy, where inconsistencies among Member States' opinions and actions are always apparent. The ultimate solution for external communication, as well as for its internal counterpart, lies in the hands of Member States' governments and in their commitment to upholding European policies in all their actions.

Legal services in the European Union

Lilla KIRÁLY

ABSTRACT *In a democratic country everybody has the right to have their own way to choose from among the different kinds of legal services, such as a court, but to turn this right into practice is not so simple at all because of the high costs of the procedure at court. The financially handicapped and deprived persons do not have equal rights at courts because they cannot afford lawyers or the cost of the legal procedure.*

The roots of legal aid were established to make something in order to create equal opportunities and gradually became a legal institution with many rules. We call these rules underprivileged law, the history of which goes back to the Middle Ages but it became a social duty of the state only in the 18-19 centuries. The aim of underprivileged law is to make it possible to participate in a legal procedure despite of the fact that its costs cannot be paid by the party concerned as it cannot be the privilege of the wealthy to turn with their claims to the legal institutions of the state.

In the European Union – in the framework of law harmonization – underprivileged law lives further as legal aid. In the European Community Law one form of privileged law, legal aid, was specified as a social task by Article 44 of the Brussel I. Convention of 27 September 1968 for the first time. In the legal successor of this convention, "Council Regulation (EC) No.44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters", does not regulate legal aid because it was included in a new source of law in "Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes", enlarged with new purposes and instructions.

Legal aid – in the interpretation of the European Council – means that all persons involved in a civil or commercial dispute must be able to assert their rights in the courts even if their personal financial situation makes it impossible for them to bear the costs of the proceedings. Legal aid is regarded as appropriate when it allows the recipient effective access to justice. Legal aid should cover pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings, legal

assistance in bringing a case before a court and representation in court and assistance with or exemption from the cost of proceedings. The Member States define the threshold which a person would be presumed to able to bear the costs of proceedings. Such thresholds are to be defined in the he light of various objective factors such as income, capital or family situation.

This legal aid is a collective term for those legal institutions and other opportunities of access to justice which ensure the participation in proceedings, but legal aid means different practices in the Member States of the EU. One of the most important aims of this publication is to make a comprehensive analysis and comparison among the different kinds of solutions in order to make this legal institution more effective in the Hungarian legal system.

1. Introduction

Council Directive 2002/8/EC of 27 January 2003 "To improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes" regulates legal aid within the European Union.

Legal aid – in the interpretation of the European Council – means that all persons involved in a civil or commercial dispute must be able to assert their rights in court, even if their personal financial situation makes it impossible for them to bear the costs of the proceedings. Legal aid is regarded as appropriate when it allows the recipient effective access to justice. Legal aid should cover pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings, legal assistance in bringing a case before a court and representation in court and assistance with or exemption from the cost of proceedings. The Member states define the threshold over which a person would be presumed to able to bear the costs of proceedings. Such thresholds are defined in the light of various objective factors such as income, capital or family situation.

Legal aid is a collective term applying to those legal institutions and other opportunities of access to justice which ensure participation in proceedings, but legal aid involves different practices in the member states of the EU. One of the most important aims of this essay is to make a comprehensive analysis and comparison among the different kinds of

solutions in order to make this legal institution more effective in the Hungarian legal system.

Before the Council Directive 2003/8/EC of January 2003 there were fundamental differences in the philosophy, organisation and management of the legal aid systems in the member states, which in fact caused a cross-border litigant serious difficulties. This Directive ensuring minimum standards at adequate levels of legal aid for citizens was based on

- the residence or presence in the member states where the aid is sought,
- conditions linked to the applicant's financial means,
- conditions linked to a review of the merits or chances of success of the proceedings for which legal aid is requested

Legal aid guarantees access to justice. Legal aid systems exist in all EU member states. They differ from one another in terms of the nature and scope of the aid available and the conditions for entitlement, but the aim of all systems is the same: to ensure effective access to justice for all.

2. The development stages of legal aid opportunities prior to the birth of the Directive

Ensuring legal aid in Europe stems from the Age of Enlightenment. With the birth of the two main basic principles - equality before the law and equal rights - the main purpose was to create equal opportunities to obtain justice.[1]

The greatest problems were financial, educational and differences in social rank – and their origins were the privileges existing in feudal society. With their disappearance, and with the spread of the Enlightenment, the problem became, quite simply, social differences.[2]

European countries actively improved the opportunities for the underprivileged in society to apply to the courts by introducing Laws for the Underprivileged and reducing costs.[3]

In addition to these legislative measures, in several European countries, the protection of the poor was ensured by Legal Associations

[1] Tanay, Zsófia: Az igazságszolgáltatáshoz való hozzáférés érvényesülése az Európai Unióban. In: Jogok 2006. április p. 52.
[2] Ibid. p.52.
[3] Ibid. p.52.

and, in Germany, by the setting-up of Volksburo (Citizens' Advice Bureaux) which could be used for legal aid.[4]

In Hungary, "underprivileged law" dates from the Middle Ages and poor litigants were supported with a degree of equity for hundreds of years. Initially this was based on charity from the wealthy but later, in the later 19th century it was regarded as a social responsibility.[5]

It soon became clear that "underprivileged law" was not able to give effective help to the poor in respect of legal services. The cause of this can be sought in the internal controls of the legal institution. The range of application of "underprivileged law" is quite restricted and its benefits are available only in civil cases and in other related actions. However, it is well-known that, behind legal debates appearing as civil cases, a range of latent legal conflicts is concealed and, in these cases, the law for the underprivileged cannot help.[6]

In the 20th century, it became important to ensure equal access to the law (or, at least, its availability to a wider circle of society). Rapidly developing industrial and commercial activity demands modernisation, social changes and a clear legal base.[7]

Today, without referring to legal conflict, more and more people ask for legal advice due to the non-transparent nature of much legislation. The "underprivileged law" by its very nature was simply incapable of meeting the requirements of legal aid in anticipating or averting judicial debate, and to eliminate this deficiency free legal aid offices were established.[8]

An adequate well-functioning legal aid system was a pre-requisite of Hungary's Accession to the European Union[9] - which is based on Council Directive 2003/8/EC of 27 January 2003 "to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes".

[4] B. A.: Jogsegély vagyontalanoknak. In: Jogtudományi Közlöny 1899/17.
[5] Kengyel, Miklós: Magyar polgári eljárásjog. Kilencedik átdolgozott kiadás, Osiris kiadó, Budapest, 2008 p. 184. Vö. Faragó Dezső: Perköltség (munkadíj) az ügyvéd mint peres fél javára. In: Magyar Jog 1955/4 pp.118-119.
[6] Kengyel, Miklós: A polgári bíráskodás hétköznapjai. Közgazdasági és jogi könyvkiadó, Budapest, 1990 p. 80.
[7] Tanay, Zsófia op. cit. p. 52.
[8] Kengyel, Miklós: A polgári bíráskodás hétköznapjai. p. 82.
[9] Kengyel, Miklós: Magyar polgári eljárásjog, 2008-as kiadás. p. 184.

3. Regulation of Legal aid in European Community Law

Solving problems applicable to the whole territory of the EU and connected to legal aid is not only a current issue, but also vitally necessary work. The Union directs its attention to two important areas: first, freely available legal aid, and, second, more effective equal treatment with the consequent disappearance of discrimination.[10]

In the spectrum of Hungary's international obligations, there are many areas in which an adequate state legal aid system is lacking. We need to consider basic general principles such as turning to the courts, securing the right of protection, the equitable consideration of cases by appropriate authorities, or, simply in the most general terms, the operation of an effective legal aid system. Hungary is bound not only by the European Convention on Human Rights, but also by our membership of the EU which requires us to guarantee that our juridical system works correctly, including providing the opportunity (applicable to all members of the Union) to utilise legal aid at local court level.[11]

On the 15th and 16th of October 1999 there was held, in Tampere, a Council of Ministers meeting to deal with issues of Freedom, Security and Justice as proposed for introduction in the EU. The Council, on the advice of the Commission, then called on the European Council to introduce minimum rules throughout the EU to apply to cross-border issues.[12]

As a first step, in 2000 the Council produced a Green Paper, which examined the problems of non-resident litigants in civil cases and drew the attention of member states to these and, at the same time, requested proposals to eliminate the difficulties arising from legal aid and practice which are in conflict with the principles of the EU's founding treaties.[13]

In the Green Paper, legal aid is defined as the provision of free or low-cost legal advice or court representation by a lawyer, partial or total exemption from other costs, such as court fees, which would normally be levied, and direct financial assistance to defray any of the costs

[10] Tanay, Zsófia op. cit. p.52.
[11] Juhász, Edit: „Nép ügyvédje" – avagy a jogi segítségnyújtás hazai reformja. In: Acta Humana, 15. évfolyam, 2004/3. p. 10.
[12] Drinóczi, Tímea: A jogi segítségnyújtással kapcsolatos problémák és a kezdeti megoldási lehetőségek az Európai Unióban. In: Jura 2001/2. p. 106.
[13] Tanay, Zsófia op. cit. p.54.

associated with litigation.[14] A person threatened with proceedings or wishing to bring proceedings abroad may need legal aid at three stages:[15]

1) First: pre-litigation advice
2) Second: the assistance of an advocate at a trial, and exemption from court fees
3) Third; assistance with having a foreign judgment declared enforceable or being enforced.

Several problems arose in the course of introducing the Community Regulation of legal aid, and the solution was the Council Directive 2003/8/EC of January 2003 which improved access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.

The purpose of this Directive was that citizens of another member state can litigate under the same conditions as citizens of the state where the process was begun. Persons who start a process in another member state must be on an equal footing with a citizen residing in the state giving birth to the action, and problems arising from the fact that the process started in another state should not obstruct legal aid.[16]

The Directive applies to all civil cases (e.g. labour law, consumer protection cases) but does not apply to Administration Law cases - and here there are expressly specified cases relating to taxation and duty. This secondary source of law of the EC defines cross-border legal disputes as one where the party applying for legal aid in the context of this Directive is domiciled or habitually resident in a member state other than the member state where the court is sitting or where the decision is to be enforced. Thereafter, three forms of legal aid are detailed – preliminary legal advice, legal representation and exemption from (or the provision of adequate support for) legal costs.

The Directive comprises minimum, albeit binding, rules for all member states. It does make allowances for Custom and Practice in certain member states, but always with the proviso that these do not delay the legal process.[17]

[14] Green Paper from the Commission: Legal aid in civil matters: The problems confronting the cross-border lititgant. Brüsszel, 2000. p. 2.
[15] Drinóczi ,Tímea op. cit. p. 107.
[16] Demeter, Judit: A jogi segítségnyújtásról szóló szabályozás koncepciója. In: Jogász vándorgyűlés, 19. 2003. p. 138.
[17] Tanay, Zsófia op. cit. p.57.

The directive highlights publicity and requires the authorities concerned to disseminate information in official EU publications.[18]

At this point, it might be useful to analyse the problems due to the regulations of specific member states and the relevant solutions proposed by the Directive.

3.1 Territory

Legal aid can be applied only where the process is actually taking place and where problems arise due to national regulations.[19] Where a case in one member-state involves a citizen of another (as defendant or plaintiff), which state's legal aid system should be applied?

3.2 Eligibility

Based on the Green Paper, we are faced with 4 separate subgroups. In some member states, legal aid was given without reference to citizenship or domicile, but, in other states, foreigners were only granted limited assistance. Under some member states regulations, legal aid was given only to domiciled persons - which can lead to legal aid being denied to a state's own citizens who are not domiciled. In other states, legal aid was given regardless of domicile. Some regulations ensured this level of support for a variety of citizens domiciled or habitually resident in the state concerned.[20]

Such differences could mean that a person not domiciled in a state but who wished to start proceedings or was a defendant there, or who, during or before the proceedings was not in the state, could not apply for legal aid there. The foreign litigant in some states "fell between two stools" – that is, he was not entitled to legal aid either in his own or in the "host" state. A further problem was that, in some states, only legal entities were entitled to legal aid.[21]

The Directive declares that all Union citizens, wherever they are domiciled or habitually resident in the territory of a member state, must be eligible for legal aid in cross-border disputes if they meet the conditions laid down by the Directive. The same applies to third-country

[18] Demeter, Judit op. cit. pp.139-140.
[19] Drinóczi, Tímea op. cit. p. 107.
[20] Ibid. p. 107.
[21] Ibid. p. 108.

nationals who habitually and lawfully reside in a member state. It also declares that only natural persons are entitled to legal aid.[22]

3.3 Conditions of legal aid

It is worth emphasising that legal aid and access to the courts are fully available in many countries although in some they are accessible only to the poorest.[23] In some member states, financial benchmarks are used. These, as cases differ according to family status, assets or the income of the plaintiff, can vary. Using such criteria may seem neutral since it does not involve any discrimination based on citizenship or domicile, although it does not take into consideration the different income levels of member states. For example, a applicant who lives in a country with a high cost-of-living and whose own resources are sufficient to cover costs there, may well exceed the limits applicable in the state where the proceedings take place and where costs are lower. This applicant would not be entitled to legal aid. In other countries, the system operates on the grounds of need and does not fix any specific amounts. The applicant must certify that he is no financial position to pay the costs of the proceedings, and for this, what is generally required is some certification of his financial position from the relevant office in his country of residence."[24]

This lack of uniformity will deter many wishing to start cross-border proceedings should they come from a high-cost and wish to initiate proceedings in a lower-cost country. This comprises a subsidiary block in the pre-jurisdiction period.[25]

The Directive ordains that member states shall grant legal aid to persons who are either partly or totally unable to meet the costs of proceedings. The financial situation of a person is to be assessed by the competent authority of the member state in which the court is sitting, in the light of various objective factors such as income, capital or family situation, including an assessment of the resources of persons who are financially dependant on the applicant.

However, member states may define thresholds above which legal aid applicants are deemed partly or totally able to bear the costs of

[22] Council Dicision 2003/8/EK in Preamble Aricel 13.
[23] Drinóczi, Tímea op. cit. p. 110.
[24] Ibid. p. 110.
[25] Ibid. p. 110.

proceedings. The Directive includes the restriction that thresholds shall be defined on the basic of the criteria laid down in the Directive. Thresholds must not prevent legal aid applicants who are above the threshold from being granted legal aid if they prove that they are unable to pay the costs of proceedings as a result of differences in the cost of living between the country of domicile and that of the habitual residence of the forum.[26]

To summarise, the Directive asserts that the threshold and the principle of need are paramount.[27]

The threshold can be established by objective and uniform criteria and the obligation to define financial limits is laid on member states by the Directive, according to which, member states shall grant legal aid to persons who are partly or totally unable to meet the costs of proceedings.[28]

3.4 Differences in payments by the applicant

For illustrative purposes, let us examine three examples from the EU member states.

In England, a client must agree to pay his own legal costs from his current assets and from that part of his income above the designated threshold. The situation in Sweden is similar in respect of paying the contribution to legal aid. The latter is a proportion of the legal charges expressed in percentage terms, but it can never be higher than the net cost of legal aid and so there is a balance to be paid by the state. In the Netherlands, the applicant pays a predetermined sum for legal advice and for legal aid also. This applies to all cases, and above a specific limit the applicant also pays a supplementary charge."[29]

According to the Directive, member states may require that legal aid recipients pay reasonable contributions towards the costs of proceedings, taking all relevant conditions into account.[30]

Member states may also rule that the competent authority may decide that recipients of legal aid must refund the whole or part if their financial situation substantially improves , or if the decision to grant legal aid had

[26] Council Dicision 2003/8/EK
[27] Tanay, Zsófia op. cit. p.58.
[28] Council Dicision 2003/8/EK Article 5. Section 1., Article 3. Section 2.
[29] Drinóczi, Tímea op. cit. p. 111.
[30] Council Dicision 2003/8/EK Article 3. Section 4.

been taken on the basis of inaccurate information given by the recipient.[31]

3.5 Differences in organisation and administration

In the legal aid systems of member states, different organisational and administrational solutions are used.

In Hungary applications are considered by Legal Services, although, in some cases, the court can decide if the clamant needs aid – either as the proceedings start or afterwards.

In France there are Legal Aid Councils which are concerned with giving advice and information, acting as advocate in court or in appeals in criminal cases or legal aid. At county level these Councils, with partners, help citizens to coordinate the work of the House of Justice and Law (HJL) and the Antennae of Justice. The HJL institution functions alongside the Court of Appeal in 32 counties. HJL employers cooperate with conventional judicial institutions, and prosecutors and judges participate in the work of HJL either on a permanent or temporary basis. Lawyers provide the legal advice service. As mediators, officials delegated by the Prosecutor of the Republic, Youth Protection specialists, representatives of the Service for Injured Persons, and social workers also undertake legal aid work also. They all come under the direction of the President of the court in session and of the chief prosecutors."[32]

Legal aid is to be granted or refused by the competent authority of the member state in which the court is sitting. Legal aid applications may be submitted to either: the competent authority of the Member State in which the applicant is domiciled or habitually resident (transmitting authority); or the competent authority of the Member State in which the court is sitting or where the decision is to be enforced (receiving authority).[33]

The Directive comprises binding obligations relating to initiating and operating the main elements of the proceedings, and also to the transmitting and receiving authorities.[34] In this way, the Directive eliminates the differences between legal aid services in member states.

[31] Council Dicision 2003/8/EK Article 3. Section 5.
[32] Tanay, Zsófia op. cit. p. 56.
[33] Council Dicision 2003/8/EK Article 12.
[34] Council Dicision 2003/8/EK Article 13.section 1.

3.6 Extra costs of a foreign litigant

National legal aid systems do not consider the extra costs of a foreign litigant (translation and interpretation costs, costs of duplicated legal advice, document searches). A foreign litigant has considerable extra costs. Firstly, there is the cost of the two lawyers since a litigant may need a lawyer in his own country to consult about the law and proceedings of the host country, and secondly, a litigant also needs a lawyer in the host country - to receive advice and, if necessary, to be represented by an advocate in court.

In most cases, the host country does not give legal aid when the advice relates to alien law or concerns cases to be heard abroad. Likewise, the host country does not give legal aid for advice given by a foreign lawyer. In the country where the case is to be heard a litigant who is not physically present may have a serious problem to find a lawyer in that country who is able to act on his behalf. The litigant also has another problem – that is, to pay translation and interpretation costs. Interpretation is required in judicial processes and in consultations between a client and a foreign lawyer in cases when there is no lawyer locally available who is able to communicate with the litigant in his own language. Moreover, the travelling costs of litigants, witnesses and lawyers can be substantial."[35]

In the preamble to the Directive, we read: "The complexity of and differences between the legal systems of the member states and the costs inherent in the cross-border dimension of a dispute should not preclude access to justice. Legal aid should accordingly cover costs directly connected with the cross-border dimension of a dispute."[36]

The Directive determines the costs to be covered by the sitting courts of member states and the domicile or habitually resident courts of member state.

Legal aid granted in the member state in which the court is sitting shall cover the following costs directly related to the cross-border nature of the dispute:[37]

a) interpretation;

[35] Drinóczi, Tímea op. cit. pp. 111-113.
[36] Council Dicision 2003/8/EK in Preamble Aricel 18.
[37] Council Dicision 2003/8/EK, Article 7.

b) translation of the documents required by the court or by the competent authority and presented by the recipient which are necessary for the resolution of the case; and

c) travel costs to be borne by the applicant where the physical presence of the persons concerned with the presentation of the applicant's case is required in court by the law or by the court of that member state and the court decides that the persons concerned cannot be heard to the satisfaction of the court by any other means.

The member state in which the legal aid applicant is domiciled or habitually resident shall provide legal aid, necessary to be covered:[38]

a) costs relating to the assistance of a local lawyer or any other person entitled by the law to give legal advice, incurred in that member state until the application for legal aid has been received, in accordance with this Directive, in the member state where the court is sitting;

b) the translation of the application and of the necessary supporting documents when the application is submitted to the authorities in that member state.

In other words, the extra costs are regulated in the Directive in such a way that they are divided between sitting and domiciled or habitually resident courts of the member states.

3.7 Lack of experts and information, and language difficulties

It is obvious that a litigant needs both a foreign and a domestic lawyer (a compatriot/). The former needs to be qualified to undertake legal work before a competent court, and he has to have experience of the case and to be able to speak a common language with the litigant.

The latter must be acquainted with the legal system of the state where the proceedings are held, be able to speak the given language and give help to the applicant in contact with the lawyer of the host country."[39]

Countries need to develop cooperation in civil cases in accordance with public and professional needs and to expedite the movement of legal aid petitions between member states. The basis of the mechanism for this is the European Convention of 27 January 1997 (Strasbourg.) It sets a term (relatively short) and targets an uninterrupted judicial process."[40]

[38] Council Dicision 2003/8/EK, Article 8.
[39] Drinóczi, Tímea op. cit. p. 113
[40] Tanay, Zsófia op. cit. p.59.

First and last, European Community Law and practice shows the entitlement of a litigant to fundamental rights ensuring total equality with the citizens of countries where proceedings take place – a right independent of domicile or habitual residence in the member state.[41]

Article 50 of Council Directive 44/2001/EC directly refers to legal aid, although to a limited extent. If someone is granted legal aid before the verdict in his case is reached, he will automatically enjoy maximum benefit in the country of execution. In this way, the plaintiff (albeit to a limited extent) can receive favourable treatment as the citizens of the country of execution who take legal action and win. Article 30 of Council Directive 1347/2000/EC and Article 50 of Council Directive 2201/2003/EK regulate similarly.[42]

4. Legal Services in the EU: foreign models of legal aid

Limitations imposed by length mean that this essay can only look at Hungarian, German and English models and the reason for this selection is that German law is the nearest (for historical reasons) to Hungarian. The UK system is interesting since there is no single uniform law for the country: it differs in England, Wales, Scotland, Northern Ireland and Gibraltar.

The Directive in many ways places the regulation of legal aid in the hands of member states. Achieving a common European standard is impossible and, instead, national governments have the responsibility to determine financial parameters.[43]

In *Hungary* in 2002 a government programme with the name The Peoples Lawyer and which was an institution targeting the poor concluded an agreement with the Chamber of Solicitors.

Under the control of the Ministry of Justice, legal services and legal aid for the poor are organised. Legal Service offices operate in all county towns and in the capital as separate units since 1st January 2003. In 2006 there came an important change: from 1st January 2006 the Legal Service Offices undertake the main part of the work, and also Legal Aid. The system has now been supplemented by permanent offices located outside the principal cities, although in 2005 this was only a tentative arrangement.

[41] Juhász op. cit. p.14.
[42] Ibid. p.14.
[43] Ibid. p.13.

The Office's responsibilities include:

1) Out-of- court matters
   - On the basis of authority, deciding on applications on the basis of lack of means,
     - issuing statements in writing confirming the acceptance or rejection of applications, and
     - quantifying the number of hours allowed for legal aid;
   - in more straightforward cases the Offices' colleagues provide information, and advice on matters within their competence;
   - in cross-border cases secure support for EU citizens of validation rights
2) In litigation
   - New regulations amended the practice of appointing a lawyer, and so, post-January 1st 2008, the lawyer is appointed the Legal Office.
3) In cross-border disputes:
   - For EU citizens, affords support on the basis of lack of means to prove their rights, and
   - for Hungarian citizens to obtain Legal Aid to appear before the courts of another member state.

There are 2 main factors: the type of judicial debate, and whether the applicant has or has not the appropriate means.

In *Germany* there is a difference between support for the Legal Aid System and in relation to court costs. The Legal Aid System gives support to people of low income for the costs of advice and representation out of court. People without means are supported in respect of the rules pertaining to the costs of court action. The Legal Aid is given when the financial and personal circumstances of applicants are such that they have no financial means and have no opportunity to obtain Legal Aid.[44]

Nowadays the ÖRA (Öffentliche Rechtsauskunfts- und Vergleichstelle) in Hamburg is a model institution, giving Legal Aid to the poorest in society. When Legal aid does not result in a solution, the client can obtain no further help. ÖRA has agent function, because it clears law and fact questions and it helps for clients to avoid proceeding before court."[45]

In Bremen the citizen agent offices give legal aid, as well.

[44] http://ec.europa.eu/civiljustice/legal_aid, [2009.01.15.]
[45] Kengyel, Miklós: A polgári bíráskodás hétköznapjai. pp. 82-83.

Assistance under the Legal Advice Scheme (advice and, where necessary, representation) is given in civil cases including employment, administrative, constitutional and social cases. In criminal cases and cases involving administrative offences, only advice is given. In cases where the laws of other States must be applied, assistance under the Legal Advice Scheme is given, if there is a German connection. No assistance under the Legal Advice Scheme is granted in connection with tax cases.[46]

The German Procedure Law is based on a system of lawyers' fees and duties. The system, due to the generally shorter time taken by proceedings and more easily calculable charges, is cheaper than in England, and access to law is also more assured, legal protection being covered by a system of insurance.[47]

The choice of lawyer is also a matter for the applicant when assistance with court costs is given. Applicants must choose a lawyer and authorise him to represent them. Only where applicants are unable to find a lawyer who is prepared to do so will the presiding judge assign someone.[48]

In *England and Wales*, the Legal Service Commission (LSC) was founded by the Access to Justice Act (1999), which provides Legal aid in England and Wales. It runs the Community Legal Service (CLS) in civil matters and the Criminal Defence Service (CDS) in criminal matters. The LSC is sponsored and governed by the Lord Chancellor in a foundation system. It works in partnership with solicitors and non-profit organizations to provide these services. The LSC contracts lawyers or law offices according to the legal areas involved, and they must then provide services under strict regulation.

In Anglo-Saxon Law solicitors' and barristers' fees are based on hours. If successful, the client is refunded his costs and the lawyer's fees, but lawyers are interested in drawing out the proceedings, and so these costs can be extremely high. Support Funding (partial funding for very expensive cases which otherwise are funded privately) may be applied under a "contingency" or conditional fee agreement.[49]

A lawyer is permitted to relinquish any fee should his client lose the case, but, should the client win, the lawyer will be receive a proportion of the damages awarded. It is an oddity that that a lawyer should accept a

[46] http://ec.europa.eu/civiljustice/legal_aid, [2009.01.15.]
[47] Tanay, Zsófia op. cit. p.54.
[48] http://ec.europa.eu/civiljustice/legal_aid, [2009.01.15.]
[49] www.legalservices.gov.uk [2009.01.15.]

case where is no reason to win, and the client is in danger of bearing the fees should he lose the case.[50]

Legal aid helps with the costs of legal advice for people who cannot afford it. For most civil cases, the applicant must be "financially eligible" to receive Legal aid. To receive legal aid, the CLS looks at the applicant's disposable income, and disposable capital. In most cases the disposable income and capital of the spouse or partner will also be taken into account .If the applicant is granted legal aid, the CLS will pay the solicitor or adviser direct, but the applicant may still has to pay some of the costs, depending on his financial situation or the case.[51]

The different levels of help in civil matters are:

- Legal help to cover initial advice and assistance with any legal problem;
- Help in Court, including assistance in court where full representation is not required;
- Approved Family Aid, which includes the services covered by Legal Aid and also covers issuing family proceedings and representation in these where necessary to obtain disclosure of information from another party, or to obtain a consent order following an agreement on matters in dispute.

If the applicant is not eligible for legal aid but worries about how to pay for legal advice or representation, there are other options:

- a legal advice or law centre, which may give free advice;
- legal costs insurance, which covers legal costs;
- assistance from a trade union.

For legal aid and help in court, an applicant must be able to show that his savings (capital) and your income are below the current financial threshold.

Applications for public funding are also subject to assessment, to ensure that the merits of the case justify the granting of funds. The Legal Services Commission will consider an application against the criteria set out in its Funding Code; the exact nature of this assessment will vary depending on the type of case and the level of help required.[52]

Support funding is only available where the reasonable costs of investigation or litigation are exceptionally high.

[50] Drinóczi, Tímea op. cit. p. 109.
[51] www.legalservices.gov.uk [2009.01.15.]
[52] http://ec.europa.eu/civiljustice/legal_aid, [2009.01.15.]

Legal Representation is not available for cases outside England and Wales, except where a case is referred by the court to the European Court. Legal Representation is only available to individuals.

For legal representation you should apply through a solicitor. If you do not have a solicitor the LSC can try to help you choose one and it may also, using Legal Aid, be able to help you to prepare your application for funding. The majority of applications will need to be submitted to the Regional Office for a decision. In every case your solicitor will need to complete an application form on your behalf.[53]

The legal aid scheme in *Scotland* is administered by the Scottish Legal Aid Board (the Board), which is a Non-Departmental Public Body funded by The Scottish Executive.

There are three types of legal assistance:[54]

- *Civil advice and assistance*: oral or written advice on the application of Scots law to any particular circumstances which have arisen in relation to the person seeking advice. It is provided by a solicitor and, where appropriate, by counsel;
- *Advice by way of representation* (ABWOR): a category of advice and assistance that allows for representation by a solicitor or, where appropriate, by counsel in civil proceedings in designated courts and tribunals in Scotland
- *Civil legal aid*: a separate scheme that allows for representation by a solicitor or, where appropriate, by counsel, in civil proceedings in other designated courts and tribunals in Scotland

Advice and assistance can be granted by a solicitor if he is satisfied that the applicant is financially eligible and the subject on which he seeks advice is a matter of Scots law. A solicitor can provide advice and assistance up to a certain level of expenditure. Any work which will exceed the initial level of expenditure must have the Board's prior approval, as must any work requiring representation.[55]

Applications for civil legal aid are submitted to the Board by a solicitor acting on behalf of an applicant. The Board cannot accept applications from applicants direct. Civil legal aid will be made available if the Board is satisfied that the applicant is financially eligible, that he has probable cause (a plausible case) and that it is reasonable in the

[53] http://ec.europa.eu/civiljustice/legal_aid, [2009.01.15.]
[54] http://ec.europa.eu/civiljustice/legal_aid, [2009.01.15.]
[55] http://ec.europa.eu/civiljustice/legal_aid, [2009.01.15.]

particular circumstances of the case that he should receive civil legal aid.[56]

The Legal Aid Schemes in *Northern Ireland* can assist you to obtain the help of a solicitor (and, as necessary, a barrister) if you need legal advice or assistance in relation to a Civil matter of concern to you. The availability of Legal Aid ensures that a person of limited or modest means has access to the same legal services as persons who can afford to pay a solicitor/barrister privately.

There are three basic Legal aid Schemes:[57]

- Legal Advice and Assistance (known as the Green Form Scheme). This Scheme extends to Assistance by Way of Representation (known as ABWOR) for court proceedings in very specific cases.
- Civil Legal aid - for court proceedings in relation to specific cases.

Both of these Schemes are administered by the Commission.

The first stage in the process is to seek legal advice from a solicitor of your choice in the first instance. This initial interview is likely to determine whether or not you have a meritorious case. Your solicitor must advise you in this regard and prepare and submit to the Commission the appropriate Civil Legal aid Application Forms.

Under Legal Advice and Assistance you may be required to make a small contribution towards the cost of such advice. Your solicitor is responsible for carry out this 'Means Test' which is subject to financial limits.

You may also be required to pay a contribution for Civil Legal aid. A more rigorous test is applied to such applications. The grant of Civil Legal aid must satisfy not only the financial Means Test but also the 'Merits Test'. The test will determine e whether the applicant has any obligation to pay fees for the case.[58]

[56] http://ec.europa.eu/civiljustice/legal_aid, [2009.01.15.]
[57] http://ec.europa.eu/civiljustice/legal_aid, [2009.01.15.]
[58] http://ec.europa.eu/civiljustice/legal_aid, [2009.01.15.]

Right to information in Europe: the Council of Europe Convention on Access to Official Documents

Adrienne KOMANOVICS

> *"... it must be borne in mind that there is little value in having a perfect system which is so demanding that states are either unable or unwilling to sign up to the convention, either at all or only after a long time period needed to put all the necessary measures into place. But at the same time, there is no point in introducing a system that falls short in significant ways so that the right of access available to the public is unsatisfactory."*[1]

ABSTRACT *The Council of Europe Convention on Access to Official Documents (2009) is the first binding international legal instrument to recognise a general right of access to documents. While there are several positive aspects, such as the broad definition of the material scope, the generously stipulated group of beneficiaries, as well as the list of exemptions, the Convention nevertheless displays several shortcomings. The Convention fails to include a clear guarantee of the right of access to documents and the presumption of openness. The narrow definition of "public authorities", the failure to set clear time-frames, as well the absence of limits on state reservations seriously undermine the effectiveness of the right to information. The argument of this paper is*

[1] Explanatory Memorandum by Mr Klaas de Vries, rapporteur. In: Parliamentary Assembly: Draft Council of Europe Convention on Access to Official Documents. Report. Doc. 11698, 12 September 2008 (hereinafter PACE Explanatory Memorandum), para. 5.

that much more progressive provisions could have been adopted, arguably without the risk of limited participation in the Convention.

1. Introduction

Twelve European countries, including Hungary, signed the Convention on Access to Official Documents in Tromso, Norway on 18 June 2009.[2] Unfortunately, the first binding international treaty to lay down such a general right of access has significant flaws. The Convention fails to lay down a general statement on the right to information, the treaty applies only to a narrow range of public bodies, there are no mandatory time limits for answering requests, review bodies are not given the power to order disclosure of a requested official document; Contracting Parties are allowed to enter wide-ranging reservations when ratifying the Convention, thereby undermining the right of access.[3] The world's first treaty on access to information is unimpressive; it provides weaker guarantees than many other EU or national instruments.

The objective of this paper is to give a detailed analysis of the provisions of the Convention. At the time of writing (March 2010) only two States, Norway and Hungary expressed its consent to be bound by the Convention[4] and so it has not yet entered into force. Consequently, currently it is not possible to elaborate on its application in practice.

Even though the Council of Europe Convention is the first binding international legal instrument to recognise the right to information, it is not unprecedented. The most ambitious venture in the area of "environmental democracy" so far undertaken under the auspices of the United Nations Economic Commission for Europe has culminated in the

[2] Council of Europe Convention on Access to Official Documents (CETS No.: 205), Tromsø, 18 June 2009. See: http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=205&CM=8&DF=05/01/2010&CL=ENG. Explanatory Report: http://conventions.coe.int/Treaty/EN/Reports/Html/205.htm (15.03.2010).

[3] Draft Opinion of the Parliamentary Assembly. In: Parliamentary Assembly: Draft Council of Europe Convention on Access to Official Documents. Report. Doc. 11698, 12 September 2008 (hereinafter: PACE Draft Opinion), paras. 3-8.

[4] See. http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=205&CM=8&DF=29/10/2009&CL=ENG (15.03.2010).

adoption of the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.[5] When compared to the Council of Europe Convention, it is evident that the Aarhus Convention is, in some ways broader and, in other ways more restricted in scope - more restricted in the sense that it covers only environmental information, but broader in that it deals with other aspects of participatory rights and is not limited to access to information. The so-called first pillar of the Aarhus Convention regulates access to information, the second sets out minimum requirements for public participation in various categories of environmental decision-making, whilst the third aims to provide access to justice on environmental matters.[6]

Work has been undertaken in the European Union also. The most important instruments are Directive 2003/4 on public access to environmental information[7] imposing obligations on member states regarding environmental information held by national public authorities, Regulation 1049/2001 guaranteeing the transparency of documents of three institutions of the Union (Council, Parliament, Commission);[8] and Regulation 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.[9] Finally, the right of access was also expressed in several political instruments elaborated under the auspices of the Council of Europe.[10]

[5] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998. See http://www.unece.org/env/pp/treatytext.htm (15.03.2010).

[6] See further http://www.unece.org/env/pp/welcome.html (15.03.2010).

[7] Directive 2003/4 of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC. *Official Journal 2003 L 41/26.*

[8] Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents. *Official Journal 2006 L 145/43.*

[9] Regulation of the European Parliament and of the Council 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies. *Official Journal 2006 L 264/13.*

[10] Declaration of the Committee of Ministers of the Council of Europe on the freedom of expression and information adopted on 29 April 1982; Recommendation No. R (81) 19 on the access to information held by public authorities; Recommendation No. R (91) 10 on the communication to third parties of personal data held by public

The key element of any access regime is effectiveness. To give maximum effect to the right of access, any exemptions must be carefully circumscribed and narrowly applied, requests should be promptly responded to, states should not be allowed to invoke exemptions too readily, guarantees must be introduced against making access too expensive or burdensome.[11]

In the following chapters, an analysis of the substantive (Chapter 2) and procedural provisions (Chapter 3) of the Convention is followed by a review of the monitoring mechanism (Chapter 4) and the final provisions (Chapter 5) of the Convention. By way of conclusion (Chapter 6), the argument of this paper is that the drafters made too many concessions for the sake of wide participation in the Convention.

2. Substantive provisions

There is no actual *statement of the right of access* in either the preamble or the text of the articles. The Convention begins with the stipulation that the Convention is without prejudice to stricter domestic laws and international treaties,[12] followed by definitions.[13] The presumption of openness appears only in the preamble, according to which all official documents are in principle public and can be withheld subject only to the protection of other rights and legitimate interests. It would be more convincing and would show more commitment to the objectives of the Convention to begin with a statement of the right of access in the very first article of the binding provisions, followed by the presumption of transparency.[14]

In the actual text, this right is established in Article 2 para. (1), which provides that each contracting party shall guarantee the right of everyone, without discrimination on any ground, to have access, on request, to official documents held by public authorities. This formulation reflects the specific characteristic of the implementation, i.e. that the Convention

bodies; Recommendation No. R (97) 18 concerning the protection of personal data collected and processed for statistical purposes; Recommendation No. R (2000) 13 on a European policy on access to archives; Rec (2002) 2 on access to official documents.

[11] PACE Explanatory Memorandum, para. 4.

[12] Article 1 para. (1).

[13] Article 1 para. (2).

[14] PACE Explanatory Memorandum, para. 18.

does not provide for a complaints procedure for those whose rights have been violated.

To return briefly to Article 1 paragraph (1), the wording of this article, as explained in the Explanatory Report, makes it clear that the Convention identifies a minimum core of basic provisions. The Convention serves as a starting point for an effective right of access, and encourages parties to maintain or introduce domestic provisions that allow a more extensive right of access. It is argued that this compromise solution was chosen to attract the greatest number possible of Council of Europe member states. The implementation of more extensive rights, argues the Explanatory Report, would present difficulties to many countries and thus would hinder the accession of many Council of Europe member states.[15] The result, however, is rather unsatisfactory. The final text of the Convention imposes no further obligation on states with a progressive access regime but, regrettably, the same holds truth in respect of less transparent countries. Hopefully amendments to the Convention provide a means to strengthen the Convention's rules, thereby guaranteeing effective access rights.

As mentioned above, Article 2 para. (1) Provides that Contracting Parties shall guarantee the right of everyone, without discrimination on any ground, to have access, on request, to official documents held by authorities. The right of access applies to both natural and legal persons. Though the major *beneficiaries* in practice are journalists, anyone can make use of his/her Convention rights.[16] Article 4 para. (1) lays down that *the applicant shall not be obliged to give reasons* for his request. The whole idea behind freedom of information rules is that anyone can have access to documents of public interest. Thus, the applicant does not need to show a specific interest; nor is he required to give reasons for the request. Consequently, a person who is denied access by a public authority to a document has, by virtue of that very fact, established an interest in the annulment of the decision refusing him such access. Requestors are free to use the information for any lawful purpose, including disseminating the information or publishing it.[17]

It is not easy to link the prohibition of discrimination with the right to information. By way of example, the Explanatory Report mentions

[15] Explanatory Report, (iv) point.

[16] Explanatory Report, paras. 17-18.

[17] Explanatory Report, para. 19.

discrimination based on nationality, and so even foreigners living outside the territory of a party to the Convention can exercise this right.[18]

Whilst the rules relating to beneficiaries are very generous, this cannot be said in respect of *the scope of application* of the Convention. First of all, the term "public authorities" covers administrative authorities at national, regional and local level (e.g. central government, town councils and other municipal bodies, the police, public health and education authorities), legislative and judicial bodies as well as natural and legal persons.[19] However, the Convention makes a distinction between the functions of these organs and persons, and only documents connected to certain activities come within the scope of the Convention automatically

Therefore, it should be welcomed that all functions of the government and other administrative authorities are covered by the Convention. However, the term "public authorities" includes only the administrative functions of legislative and judicial authorities and of natural and legal persons. The problem is the actual scope of the term "administrative" function, whether and how it can be separated from other activities of these bodies. In case of natural and legal persons, the limitation set out by the Convention is that their documents is within the *ratione materiae* of the Convention only insofar as they exercise administrative authority.

By means of a separate declaration, Contracting Parties may extend the scope of the Convention to other activities of the above-mentioned bodies (the so-called *opt-in* technique). Hence, the Convention potentially covers all other activities of legislative and judicial bodies, and the public functions and public funding aspects of the operation of natural and legal persons.[20] However, there is no common definition of these notions and examples differ from one country to the other.[21] Another difficulty in connection with this "opt-in" technique is that traditional services, such as utilities, healthcare, the provision of security and even prison services, are being increasingly outsourced to the private sector so being removed from public scrutiny. This solution allows some public bodies to continue operating in the shadows.

The possibility for Parties to make a declaration, opting in to a broader concept of the term "public authorities" is better than not including those bodies or persons at all, but it falls short of ensuring their inclusion. Also,

[18] Explanatory Report, para. 18.
[19] Article 1 para. (2)a)i).
[20] Article 1 para. (2)a)ii).
[21] Explanatory Report, para. 10.

it is fair to allow State Parties a definite extra period of time to include these other functions or to do so incrementally. However, the exemptions listed in Article 3 provide sufficient safeguards to Parties even if they subscribe to the expanded definition of the term "public authorities".[22] It is good that the Hungarian government accepted the broadest concept of the term at the time of signing the Convention.[23]

The definition of "official document" is very progressive in the Convention: it includes all information recorded in any form, drawn up or received and held by public authorities. An information-based regime requires authorities to provide access to existing documents as well as to search for documents if the applicant cannot actually identify the document he wishes to receive or if it is not easily accessible and, if necessary, to extract and compile information from various documents if the requested information has not already been compiled. Regrettably, para. 14 of the Explanatory Report stipulates that the Convention does not oblige Parties to create new documents upon requests for information. This interpretation is, however, clearly inconsistent with the wording of the Convention.

The notion of "official documents" covers any information that is recorded on any form of physical medium such as written texts, information recorded on a sound or audiovisual tape, photographs, e-mails, information stored in electronic format such as electronic databases, etc.[24] In the case of information stored electronically in databases, Parties have a margin of discretion in defining this notion.[25] When processing requests for documents containing *personal data*, State

[22] PACE Explanatory Memorandum paras. 21-22.
[23] *Declaration handed over by the Minister for Justice and Law Enforcement of Hungary to the Deputy Secretary General of the Council of Europe at the time of signature of the instrument, on 18 June 2009.*
In accordance with Article 1, paragraph 2, subparagraph a.ii, of the Convention, the Republic of Hungary informs the Secretary General of the Council of Europe that, for the Republic of Hungary, the definition of "public authorities" includes the following:
- legislative bodies as regards their other activities;
- judicial authorities as regards their other activities;
- natural or legal persons insofar as they perform public functions or operate with public funds, according to national law.
[24] Explanatory Report, para. 11.
[25] Explanatory Report, para. 12.

authorities must pay due regard to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.[26]

The limitations to access to official documents permitted by the Convention fall into the following three groups.[27]

Exemptions to protect State interests	• national security, defence and international relations • public safety • the economic, monetary and exchange rate policies of the State
Protection aimed at ensuring effective government	• the deliberations within or between public authorities concerning the examination of a matter • the prevention investigation and prosecution of criminal activities • disciplinary investigations • inspection, control and supervision by public authorities
Exemptions designed to protect private interests, human rights and other rights	• privacy and other legitimate private interests • commercial and other economic interests • environment • the equality of parties in court proceedings and the effective administration of justice

In some states, the Royal Family and its Household or the Head of State enjoy a special constitutional position. The last limitation, which is not mentioned in the box above, aims at maintaining respect for this unique status. The Contracting Parties may declare (another opt-in technique) that communication with the Royal Family or the Head of State shall also be included among the possible limitations.[28]

The list of limitations in Article 3, para. (1) is exhaustive, but it does not prevent national legislation from reducing the number of reasons for limitation or formulating the limitations more narrowly, thus granting wider access to official documents.[29]

The Explanatory Report emphasises that the notion of *national security* should be used with restraint, and should not be misused in order to protect information relating to human rights violation, corruption

[26] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Strasbourg, 1981 (CETS No. 108).

[27] Article 3, para. (1). See also: http://www.access-info.org/en/what-is-the-right-to-know/44 (15.03.2010).

[28] See the declaration of Norway. *Declaration contained in the instrument of approval deposited on 11 September 2009.*

[29] Explanatory Report, para. 22.

within public authorities, administrative errors, or information which is simply embarrassing for public officials or public authorities. Disclosure of documents concerning security systems of building and communications might be restricted for *public safety* reasons. The *inspection and supervision* exemption includes tax inspections, school and university examinations, labour inspections, or inspections by social services and environmental authorities. Limitations set up to protect *private life* cover criminal records or medical files. Examples of information that may be covered by *commercial and other economic interests* include trade secrets, production procedures, trade strategies or lists of clients. The possible limitation under the *environment* exemption includes the location of threatened animals or plant species. The *court proceedings* exemption applies before domestic as well as international courts of law. Documents that are not created in contemplation of court proceedings as such cannot be refused under this limitation. The Explanatory Report emphasises that "even if the aim of the Convention is to encourage public participation in decision-making, the purpose of this limitation is to preserve the quality of the decision-making process by allowing a certain free 'space to think'".[30]

As regards *the scope of limitations*, any limitation of access to official documents must be specifically prescribed by law, be necessary in a democratic society and be proportionate to the aim of protecting other legitimate rights and interests. This follows the formulation and the three-limb test laid down in several provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[31]

Furthermore, the exemptions are subject to the following tests: firstly, access can only be denied if disclosure of the information might harm any of the interests mentioned above (the so-called harm test) and, secondly, the authority has to balance the harm caused by granting access against the public interest justifying disclosure.[32]

As to *the harm test*, the mere fact that a document concerns an interest protected by an exemption cannot justify application of that exemption. Therefore, the applicability of limitations must be assessed based on the actual information contained in the document. The public authority has to show that disclosure of the information would harm any of the public or

[30] Explanatory Report, paras. 23-34.

[31] See e.g. Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 1950 (CETS No.:005) Articles 8, 9, 10 and 11.

[32] Article (3) para. (2).

private interests.[33] Unfortunately, the threshold is low: access can be denied not only if it *would* undermine the stated interests (i.e. the risk of a protected interest being undermined must be reasonably foreseeable) but also if it *would be likely* to harm these interests - so when the risk is purely hypothetical.

The time dimension is crucial: it can easily occur that, after a certain period of time, disclosure of information no longer harms any interests. Therefore, the exceptions laid down in paras. 1 - 3 shall only apply for the period during which protection is justified on the basis of the content of the document. This again highlights the importance of the requirement that decisions be based on the content of the document, and not on the label of the file.[34]

Even if disclosure was found to be harmful to certain interests, access must be granted if there is an *overriding public interest* in disclosure. Public authorities have to balance the general interest of transparency against the interest protected by the exception. This interest must be "public", i.e. general in character (e.g. to disclose corruption or abuse of power) and must be something more severe than the "normal" public interest in disclosure of information. Access must be granted if transparency is necessary for the realisation of the objectives listed in the Preamble to the Convention. Unfortunately, neither the Convention nor the Explanatory Report gives any guidance as to the meaning and scope of the notion of "overriding public interest".

The harm test and the overriding public interest test may be carried out for each individual case or by the legislature by, for example, providing in legislation for requirements for carrying out the tests. According to the Explanatory Report, these rules can take the form of a presumption for, or against, the release of the document, or an unconditional exemption for extremely sensitive information, even though such absolute exceptions should be kept to a minimum.[35] Here the text of the Report is at variance with the provisions of the Convention, which makes the application of the harm and overriding public interest tests obligatory in the case of each and every application. Absolute restrictions are not permitted under the Convention. In any case, a total ban on the release of sensitive information is unnecessary since such documents are generally caught by one of the interests listed in Article 3,

[33] Explanatory Report, para. 37.
[34] Article 3 para. (3).
[35] Explanatory Report, para. 38.

e.g. national security, defence, international relations or crime fighting activities.

As far as *the timeframe of the exemptions* is concerned, the Convention contains only a "soft" formula: the Parties shall *consider* setting time limits beyond which the limitations would no longer apply.[36] Hence, the Contracting Parties are not obliged to determine the lifetime of the exceptions, but they are obliged to consider this possibility. This provision is a double-edged sword: it has the potential to limit the right of access inasmuch as it starts from the premise that the document is not accessible before a specific period of time has passed. However, this interpretation cannot be accepted, since the decision on disclosure must be based exclusively on the content of the document and tested against the harm and overriding public interest requirements. The Contracting Parties cannot set by legislation a time period during which documents cannot be released.

On the other hand, the rule can be interpreted in a different manner: indicating an event after which exceptions would not apply prevents abuse by the public authorities: they cannot deny access even many years after the adoption of the requested document. Undoubtedly, disclosure cannot harm any protected interest after so many years have passed. It is acceptable to provide for a time period after which documents must be released, as long as this is without prejudice to the possibility of applying for documents before that date.[37]

3. Procedural provisions

3.1 Access on request

The procedural requirements relating to the form and content of the request are kept to a minimum. Applicants may remain anonymous except when disclosure of identity is essential in order to process the request. Applicants shall not be obliged to give reasons for having access to the official document.[38]

[36] Article 3 para. (3).
[37] See a similar reasoning at http://ec.europa.eu/transparency/revision/docs/contributions/12_C3_statewatch.pdf (15.03.2010), p. 3.
[38] Article 4.

The request can be addressed to *any public authority holding the document*. As is clear from the definition of the document, the authority is obliged to deal with requests for *third-party documents* held by public authorities also.[39] If the public authority does not hold the requested official document, or if it is not authorised to process that request, it shall, wherever possible, refer the application or the applicant to the competent public authority.[40] The latter formulation is, however, contrary to Article 1 para. (2)b) providing that the term "official document" includes all information drawn up or *received and held* by public authorities. Nowhere does Article 1 require preliminary authorisation of the author of the document in order to process a request for access. In our view, the correct interpretation is that no preliminary permission is necessary.

The Convention requires the public authorities to *help* the applicant, as far as reasonably possible. Although the applicant is not obliged to have actually identified the requested document, the request should be formulated with sufficient clarity to enable a trained public officer to identify the requested document.[41] Proactive dissemination of information contributes to the accurate formulation of requests as well as to reducing the number of applications. In an open society, public authorities are expected to make available to the public generally information on how they operate, to set up public registers of documents, to provide manuals or on-line guides to the systems they employ and to facilitate direct and easy access to official documents. It is desirable that public authorities appoint freedom of information officers to assist members of the public. Training of both public authorities and of civil society is crucial to the successful implementation and use of any freedom of information scheme. Against this background, it is rather unfortunate that the Convention does not provide for public registers of documents.

The general obligation to assist includes that the public authority shall, wherever possible, refer the application or the applicant to the competent public authority.[42]

The Convention does not set out exact *time limits;* it only provides that requests shall be dealt with promptly, and the decision shall be

[39] Article 1 para. (2)b).
[40] Article 5 para. (2).
[41] Article 5 para. (1), and Explanatory Report, paras. 44-46.
[42] Article 5 para. (2), second phrase.

reached as soon as possible. Clearly, Contracting Parties must be guaranteed a certain leeway to set time limits, since a short time-frame might be too onerous for some states or some public authorities that receive a high number of requests. Access rights would be rendered ineffective if public authorities were not able to process them within the set time, thus leading to backlogs. Nonetheless, it would have been a better solution to set a relatively long time limit, e.g. 30 days, unless special circumstances justified further extension.[43]

The apparent lack of time-limits is all the more interesting when compared with the relevant provisions of the Aarhus Convention, drawn up under the *aegis* of the United Nations Economic Commission for Europe. When drafting the Aarhus Convention, states were prepared to accept a relatively strict time limit. Article 4 para. (7) provides that *"[t]he refusal shall be made as soon as possible and at the latest within one month, unless the complexity of the information justifies an extension of this period up to two months after the request."* Having this in mind, it is incomprehensible that the present Convention does not contain more exact time limits; these might well be flexible enough, but should restrict the discretion of the public authority.

The course of action the public authority may take is set out partly in Article 6 specifying the forms of access to official documents and partly in Article 8 on the review procedure. There are *four options*.

The public authority provides access to the document. This is the optimal outcome of any request.

The public authority denies access to the document. Three grounds are specified by the Convention and the Explanatory Report.[44] The public authority may deny access if the request is too *vague*, or if the request is *manifestly unreasonable*. The formulation of the latter ground for refusal is similar to one of the admissibility criteria stipulated by the European Convention on Human Rights, which provides that the Court shall declare inadmissible any individual application which is manifestly ill-founded.[45] Under this rule the Convention organ investigates whether there is *prima facie* evidence of a violation of the Convention, and so determining the question of whether the application is admissible depends upon an examination of the merits. In other words, the rule

[43] Article 5 para. (4); PACE Explanatory Memorandum, paras. 34-35.
[44] On the *substantive* grounds for refusal, see Chapter 2 (exemptions).
[45] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 1950 (CETS No.:005), Article 35. para. (3).

inevitably involves transgressions of the borderline between the formal and material laws of the Convention.

Reverting to the 2009 Convention, the Explanatory Report lists practical, formal difficulties, e.g. the request requires a disproportionate amount of searching or examination.[46] In our view, the introduction of this possibility grants too wide a discretion to public authorities. Furthermore, the provision of more direct access to a greater range of information would significantly reduce the burden on the administration to deal with individual requests. Similarly, the setting up of public registers containing up-to-date, easily accessible and transparent information, the development of user-friendly search engines, and more information published on a proactive basis would limit the workload of public authorities. Undoubtedly, these measures have considerable financial implications but they seem indispensable to the realisation of transparency. The interest of good administration does not prevail over the public interest in openness.

Quite disturbingly, the Explanatory Report mentions a third ground for refusal in addition to those listed in the Convention – namely, that *clearly vexatious requests*, such as repeated requests for the same document within a very short space of time by the same applicant may be rejected.[47]

Failure to reply within the time limit. Thirdly, if the public authority does not response within the time-frame determined by national law, this constitutes implicit denial. It should be emphasised that the Convention does not explicitly mention administrative silence, but it is covered by Article 8 para. (1), which guarantees the right to appeal in case of "implied" denial of access to a document.[48]

Providing partial access. Finally, if a limitation applies to some of the information in an official document, the public authority should nevertheless grant access to the remainder of the information it contains.[49] Nevertheless, access may be denied if the partial version of the document is *misleading* or *meaningless*; or if the release of the remainder of the document poses a manifestly unreasonable burden for the authority.

[46] Explanatory Report, para. 52.
[47] Explanatory Report, para. 52.
[48] Article 8 para. (1): "An applicant whose request for an official document has been denied, expressly or impliedly, ... shall have access to a review procedure ..."
[49] Article 6 para. (2).

Unfortunately, the notion of "meaningless" is very subjective. The public authority is clearly not in a position to deem the information meaningless. It is ignorant of the motivations of the applicant or the purpose for which the information is sought. Even though the Explanatory Report points out that the possibility of refusing information on this ground must be interpreted in a restrictive way and having regard to the applicant, in our opinion the right to access to official documents can not be made dependent upon its presumed usefulness to the applicant.[50]

As far as the "manifestly unreasonable burden" limitation is concerned, we would like to recall the suggestion made above, namely that the problem of voluminous or excessive requests should be dealt with through communication between the public authorities and the applicant, with the strengthening of proactive information and the streamlining of the administrative process, and not by the blanket refusal of more complex applications. Access to documents should not be seen as a battle between applicants and the authorities

In case of partial access, the decision should clearly indicate where and how much information has been deleted. Whenever possible, the limitation justifying each deletion should also be pointed out in the decision.[51] Finally, when a public authority refuses access to a document, it should indicate in the decision the possibilities of appealing.[52]

A public authority refusing access is required to *give reasons for the refusal*. It has to state the legal basis for refusal by reference to the relevant exception as well as an explanation of how this exception applies.[53] The authority has to indicate which limitation applies as well as show that the limitation is necessary in a democratic society and proportionate to the aim pursued. The decision has to indicate how the harm test as well as the overriding public interest test apply.

In a transparent legal order, the obligation to give reasons is not a purely formal requirement. The mere fact that a document concerns an interest protected by an exemption cannot justify the application of that limitation. Firstly, the authority has to assess whether access to the document would specifically and actually undermine the protected interest, and that there is no overriding public interest in disclosure. It is

[50] Explanatory Report, para. 59. See also PACE Explanatory Memorandum, para. 39.
[51] Explanatory Report, para. 57.
[52] Explanatory Report, para. 67.
[53] Article 5 para. (6). Explanatory Report, para. 53.

required to carry out a concrete, individual assessment of the content of the documents. Secondly, this examination must be apparent from the decision, and the decision must indicate the reasons for refusal in clear, unambiguous wording.

The duty to give reasons for individual decisions has the dual purpose of, first, allowing interested parties to know the reasons justifying the measure so as to enable them to protect their rights and, secondly, to enable the review bodies to exercise their power to review the legality of the decision.

According to the second sentence of Article 5 para. (6), the applicant has the right to receive, on request, a written decision. Seemingly, the authority as a general rule is not obliged to give a written statement of reasons. It must do so only when the applicant specifically so requests, which obviously constitutes a very low standard. However, keeping in mind that the Convention contains only minimum core rules, hopefully Contracting Parties will lay down, or already have laid down, stricter national rules.

Forms and charges for access to official documents. It is for the applicant to indicate which type of access he prefers, and the public authority should accommodate such preferences whenever possible.[54]

- Inspection of official documents on the premises of a public authority shall be free of charge, except if the documents are in archives or museums. In this case charges for services can be requested. The public authorities should enable as far as possible the consultation of a document by providing reasonable opening hours and physical facilities. It may also be justified in refusing direct access to the original version document if it is physically fragile or in poor condition.
- On request, the public authority is obliged to send a copy of the document in the form determined by the applicant (e.g. by post or electronically). A fee may be charged to the applicant for a copy of the official document, which should be reasonable and not exceed the actual costs of reproduction and delivery of the document. For providing a transparency, a tariff of charges should be published.
- Access might be granted by referring the applicant to easily accessible alternative sources, e.g. where the document is published on the internet. This again highlights the outstanding significance of proactive information to reduces the workload of public

[54] Articles 6 and 7; Explanatory Report, paras. 54-63.

authorities. In any case, the question whether a document is "easily accessible" must be assessed on a case-by-case basis, having regard to e.g. whether the applicant has access to the internet. This "easily accessible" condition also encompasses affordability: it may not be in accordance with the Convention for example, to refer somebody to purchase an expensive publication.

The Explanatory Report adds that, as good practice in many countries, where the applicant who received the document is incapable of a basic understanding of its content, the public authorities are invited to help him or her with comprehension.[55]

Review procedure. According to Article 8, an applicant whose request has been denied shall have access to a review procedure before a court *or* another independent and impartial body (e.g. an ombudsman or conciliation committee) established by law. The use of the term "or" implies that the Convention does not make the judicial remedy obligatory; a non-judicial review is sufficient. The fact that the decision of these non-judicial bodies is not binding on the public authorities deprives the system of access of effective and meaningful remedies. Even though most national systems provide for non-judicial dispute settlement, it should be left to the applicant to decide which course of action he takes – whether it be an expeditious and inexpensive procedure with a non-binding outcome or time-consuming and more costly litigation before the courts, which is, however, binding on all public authorities.

Unfortunately, it is not clear from the text of the Convention whether the court or other body can review the substance as well as the process of reaching the decision, or merely the latter. According to para. 64 of the Explanatory Report, the review body must be able, either itself to overturn decisions taken by public authorities or to request the public authority in question to reconsider its position.[56] Therefore, it might be assumed that the power of review bodies extends to the reconsideration of the merits of the decision, all the more since this is the interpretation which is most in line with the Convention's objectives, including the fostering of the accountability of public authorities.

The Convention provides for an expeditious and inexpensive review procedure, which is similar to certain national systems where an internal

[55] Explanatory Report, para. 56.

[56] PACE Explanatory Memorandum, para. 43.

review procedure is a compulsory intermediary step before a court of appeal or other independent complaints procedure.[57]

The Convention does not specify whether the powers of the review body include the power to order the disclosure of the document or are limited to either upholding or annulling the contested decision. The ambiguous formulation of Article 8 falls short of providing for a meaningful and effective domestic remedy for the right of access.

The Explanatory Report envisages the possibility of legal and disciplinary actions against public authorities that have committed a serious breach of their obligations under the Convention (e.g. intentionally destroying the document in order to prevent access or review).[58] Regrettably, nowhere does this provision appear in the Convention. Finally, no specific protection is afforded to *whistle-blowers* (to those who reveal abuses) against reprisals.

3.2 Complementary measures: proactive information

Article 9 of the Convention lists several *complementary measures*, which stipulate that the Parties shall inform the public about its right of access to official documents and how that right may be exercised. Furthermore, Parties shall also take appropriate measures to guarantee efficient administration. Therefore, States must educate public authorities in their duties and obligations, provide information on how they operate, such as data on their structures, staff, budget, activities, rules, policies, decisions, etc., manage their documents efficiently so that they are easily accessible, and apply clear and established rules for the preservation and destruction of their documents.

Proactive measures. At their own initiative and where appropriate, the public authorities shall take the necessary measures to make public official documents which they hold in the interest of promoting the transparency and efficiency of public administration and to encourage informed participation by the public in matters of general interest. According to the Explanatory Report, dissemination of information must be done on a regular basis, including the use of new information

[57] Explanatory Report, para. 66.

[58] Explanatory Report, para. 64. Although the Report contains a rather cautious formulation: "... the possibility of other legal and disciplinary actions against public authorities which have committed a serious breach of their obligations under the present Convention must not be excluded."

technologies (e.g. web pages accessible to the public) and public libraries, in order to ensure easy and widespread access.[59] In our opinion, the Convention ought to oblige the Parties to establish public registers.

4. Implementation, monitoring system

In respect of *implementation*, Article 2 provides that each Party shall take measures to give effect to the Convention at the latest at the time of entry into force of the Convention in respect of that Party. Implementation presumably involves multi-level regulation: Parties must adopt general legislation or amend existing legislation, if necessary, in order to give effect to the Convention provisions. Often, legislation is complemented by specific implementing rules. Thirdly, internal rules of procedure relating to the processing of requests or providing for proactive information, as well as the training of public officers on access to official documents might also prove indispensable.[60]

The Convention creates two monitoring bodies. The *Group of Specialists on Access to Official Documents* is an expert body, while the *Consultation of the Parties* is a political one. These bodies shall be assisted by the Secretariat of the Council of Europe in carrying out their functions.

Group of Specialists.[61] This body is composed of independent, impartial and highly qualified experts and its main function is the consideration of periodic reports submitted by the Contracting Parties. How this reporting system will actually function is not yet known. However, the Council of Europe has gathered enough experience and the mechanism will probably follow *mutatis mutandis* the technique elaborated in respect of other Council of Europe Conventions.[62] Apart from this, the Group of Specialists can express opinions, make proposals, exchange information and report on significant developments. It makes proposals for amending the Convention and formulates opinions on any proposal submitted by others.[63]

[59] Article 9; Explanatory Report, paras. 71-73.

[60] Explanatory Report, para. 20.

[61] Article 11.

[62] See e.g. Articles 15-17 of the European Charter for Regional or Minority Languages, 1992, CETS No.: 148.

[63] According to Article 19, amendments of the Convention may be proposed by any Party, the Committee of Ministers, the Group of Specialists or the Consultation of the Parties.

The Group of Specialists consists of a minimum of 10 and a maximum of 15 members. In connection with the appointment of members, each Contracting Party proposes two experts, but a maximum of one member may be elected from the list proposed by each Party. The members are elected by a Consultation of the Parties for a period of four years, renewable once. Candidates do not have to be nationals of the State by which they are nominated.[64] The Group of Specialists shall meet at least once a year, and its members shall not receive or accept any instructions from governments.

Consultation of the Parties.[65] This political body is composed of one representative per Party. It shall be convened within one year following the entry into force of the Convention in order to elect the members of the Group of Specialists. Subsequently, it meets at least once every four years. In addition to ordinary sessions, it can be convened by a majority of the Parties, by the Council of Ministers or by the Secretary-General of the Council of Europe. The functions of a Consultation of the Parties include consideration of the reports, opinions and proposals of the Group of Specialists. A Consultation of the Parties makes proposals and recommendations to the Parties, makes proposals for the amendment of the Convention or formulates its opinion on any proposal for the amendment of the Convention.

The Convention contains provisions establishing a *reporting system* which aims at ensuring effective implementation. Within a period of one year following the entry into force of the Convention in respect of a Contracting Party, the latter shall transmit to the Group of Specialists a report containing full information on the legislative and other measures taken to give effect to the provisions of this Convention. Thereafter, each Party shall transmit to the Group of Specialists before each meeting of the Consultation of the Parties an update of this information - which implies periodic reports every fourth year. Each Party shall also transmit to the Group of Specialists any information that it requests. Reports are examined by the Group of Specialists who can produce opinions and proposals.[66]

Lack of right to complain. Unfortunately, the Convention does not provide for individual petitions, and so, those whose freedom of

[64] The procedural rules shall be determined by the Council of Ministers after consulting with and obtaining the unanimous consent of all Parties. Article 11 para. (5).
[65] Article 12.
[66] Article 14.

information has been violated have no direct access to the Convention bodies. On the positive side, all documents relating to the monitoring shall be made public and easily accessible through the website of the Council of Europe.[67]

5. Final clauses of the Convention

The final clauses are essentially based on the Model Final Clauses for Conventions and Agreements concluded within the Council of Europe (1980). The Convention is open to all Member States of the Council of Europe. It enters into force after the tenth ratification - which is quite reasonable. After this, any state which is not a member of the Council of Europe or any international organisation may be invited to accede to the Convention. Other provisions relate to the territorial application, amendments, denunciation, authentic languages of the Convention as well as State declarations.[68]

The question of *reservations* is disturbing inasmuch as the Convention fails to place limits on the reservations that States may make to the Convention's provisions – highly unusual for a Council of Europe Human Rights Treaty. Thus, the general rules of the Vienna Convention on the Law of Treaties apply. According to Article 19 of the Vienna Convention "*[a] State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless ... the reservation is incompatible with the object and purpose of the treaty.*"

Considering that the Convention sets out minimum standards, allowing the entry of reservations is undoubtedly incompatible with the object and purpose of the Convention. A lack of clear-cut rules will allow states to narrow even further the scope of the Convention to "unacceptable and unpredictable levels".[69]

6. Conclusions

The present Convention is the first binding international legal instrument to recognise a general right of access to documents. The

[67] Article 15.
[68] Articles 16-22.
[69] Recommended Drafting Solutions to Seven Key Problems in the Draft European Convention on Access to Official Documents. Briefing Note, 3 March 2008, p. 8. At http://www.article19.org/pdfs/analysis/europe-access-convention.pdf (15.03.2010).

material scope of the Convention is defined broadly: "official document" means all information recorded in any form, drawn up or received and held by public authorities. The definition of beneficiaries is similarly generous: anyone can make use of his/her Convention rights without the need to show a specific interest or give reasons. As regards the exemptions, the list of protected interests in Article 3 is reasonable and exhaustive; their application is restricted by the harm test and the overriding public interest test. The Convention provides for a review procedure. Last, but not least, charges should be reasonable and kept to a necessary minimum.

However, much more progressive provisions could have been adopted - arguably without the risk of limited participation in the Convention. In respect of the *drafting process*, civil society organisations keeping abreast of the drafting were deeply concerned that the text of the treaty had been drafted over a period of just 1.5 years and meetings of the drafting group during this period had totalled only 14.5 days. Only a small number of civil society organisations were able to participate in these meetings; their contributions were not fully considered on their merits, and there was no attempt to engage in wider consultation with civil society. This is particularly problematic, given that the main purpose of the Convention is to strengthen participatory democracy.[70]

Regarding *the actual provisions*, the Convention fails to include a clear guarantee of the right of access to documents and the presumption of openness. The exclusion of several functions of the legislature and the judiciary from the scope of the Convention runs counter to the principle of transparency. Likewise, the Convention does not cover official documents held by private bodies that exercise public functions or operate with public funds.

Furthermore, the Convention fails to set clear time-frames. Notwithstanding the fact that the useful life of information is very short, states were not prepared to accept clearly defined time limits for the processing of requests. Although the Convention provides for a review procedure, the powers of review bodies are only vaguely defined. The

[70] Access Info Europe, Article 19, Open Society Justice Initiative: Letter urging the Council of Europe to give further time to reconsider the draft Convention on Access to Official Documents in light of heavy criticism from the Parliamentary Assembly of the Council of Europe. 10 November 2008. http://www.article19.org/pdfs/letters/europe-council-of-europe-access-to-information.pdf (15.03.2010).

Convention is silent on whether the review body can order disclosure of the document.

The monitoring system of the convention is quite soft[the Convention fails to provide for the right to complain to the Convention bodies. Similarly, the Convention fails to place limits on *reservations* - which seriously undermines the effective enjoyment of the right to information.

Despite the positive intentions in introducing the "modern" right of access to information, the efforts have resulted in a rather modest outcome. Serious guarantees gave way to the objective of wide participation. In fact, much depends on the actual practice of individual states after the Convention enters into force.

Real estate mafia

László KŐHALMI

ABSTRACT *The term of the real estate mafia carries different connotations. Because of this it is important to see in a semantics aspect what is concerned in this term.*

The abuse of the real estates it is not a Hungarian phenomenon. Similar crimes were presented in other post socialist countries as well. Moreover they were well known in several western countries too, for example in Germany.

The change of regime made a sweeping change in the real estate market.

The most important change was that the restrictions were cancelled. Because of this people could invest their money in buying real estates.

The members of the real estate mafia meet the old, single person who needs help at the social departments of the self-governments, at caryatid offices, at the doctors or in parks. After that they move in as friend or roomer and they force the complaining party to sign the sale and

We can not find a crime called real estate mafia in the Act of IV. 1978. (Penal code, the so called Btk.)

The safety of information is also a very important section. The public servant should download the changes more than once in a day to the central computer and to the external hard drive. They should also scan the documents.

The so called e-land register procedure should be introduced. Only the registered users could start any of the procedures. Obviously the field of the information technology should be created for attorneys, legal advisers and notaries. This could be for instance a solid administration electronic card or a card which could only be used in land registers procedures.

1. The definition of "real estate mafia"

The term "real estate mafia" bears different connotations, and, for this reason, it is important to examine its real significance semantically.

According to the definition of the Office of the Prosecutor General: "...It is a crime if someone takes, or attempts to take, possession of the real estate of a plaintiff (natural or legal entity) unlawfully. This is especially so if the means used involve violence, threat or fraud and if advantage is taken of a plaintiff's lack of power or means of defence. It is particularly the case if the crime is committed by a civil servant by a breach of duty or by the abuse of power as a civil servant so obtaining personal benefit or promising benefit to another party by committing this crime.[1]

According to the definition of Szilveszter PÓCZIK, who is one of the leading authorities on the topic: In so-called real estate mafia cases, smaller crime syndicates and criminals deprive the real estate owners of their property or tenancy rights. This crime can also be committed by corrupt civil servants, lawyers, agents or by people purporting to be buyers. Forged official documents may be used in committing these crimes as well as legal contracts drawn up under false pretences or threat of violence. Further, this crime can also be committed by putting the plaintiff in a difficult financial position or by restricting his ability to take the case to law.[2]

2. The development of the real estate mafia phenomenon in Hungary

The abuse of real estate it is not an exclusively Hungarian phenomenon. Similar crimes flourished also in other post-socialist countries. They were also well known in several western countries - for example, in Germany.

Before the change of regime it was clear that, in the countries of the Soviet bloc, if one of the countries gave birth to a new type of crime, it would spread to the other countries very rapidly (for example, in

[1] Legfőbb Ügyészség Számítástechnika-alkalmazási és Információs Főosztály és a Nyomozásfelügyeleti Főosztály 1/2003 (ÜK. 2.) számú körlevele alapján.

[2] Póczik, Szilveszter: Lakásmaffia jellegű bűncselekmények – Társadalomtörténeti és kriminálszociológiai áttekintés a rendszerváltást követő időszak egyik jellegzetese szervezett bűnelkövetési formájáról. In: Póczik, Szilveszter – Dunavölgyi, Szilveszter (Szerk.): Társadalmi összefogással a lakásmaffia ellen – Tanulmányok, dokumentumok 2002-2006. MBK Füzetek 16, Biztonságos Magyarországért Közalapítvány, Budapest, 2006 p. 39.

Hungary, it was Polish criminals who spread the so-called cylinder lock burglary[3]).

The reason for this was not only the recognised criminal exchange between the socialist countries, but also the fact that these countries' real estate policies were similar.

By the time of the change of regime, professional criminals were aware of the crime syndicates in Russian urban areas. These syndicates committed frauds with the help of lawyers, agents and corrupt public servants. They were brutal and even resorted to murder to deprive owners of their property or tenancy rights.

Such manoeuvrings in the real estate sector were also well known in the KÁDÁR era. After the communist regime had stabilised, the old inner city apartment blocks were taken into public ownership and then taken into the central sequestration and re-allocation economy.[4]

"Housing allocation" came under the jurisdiction of local councils - which was an opportunity for corruption. Socialism was a typical deficit economy, and so corruption was re-directed from the buyers (who wished to acquire property) to vendors (property owners or tenants).[5] The ambition of the dictatorship was to reorganise society totally and so efforts were made not to wipe out the bourgeois citizenry but to push it into the social background.

This ideology was effected by moving them and killing off the architecture culture. After World War II, the rebuilding of those areas of towns where they had lived (the so-called bourgeois flats) was deliberately ignored. In addition, the dictatorship wished to dilute or eliminate these homogeneous residential areas by population exchange, and, with the allocation system, disadvantaged social groups were relocated there. However, their financial and intellectual deficits meant that these groups were unable to keep this property in good condition. (For example poor, illiterate people were moved to bourgeois flats complete with fireplaces).

There were two reasons for these measures: The first was that, for the communist dictatorship, social groups with any form of independence (financial, ideological or freedom of will) meant a problem, and so the

[3] Katona, Géza: Szervezett bűnözés Magyarországon, BM Kiadó, Budapest, 2000 p. 9.

[4] Póczik Szilveszter op. cit. p. 41.

[5] Kránitz Mariann: A korrupció utolsó huszonöt éve Magyarországon (posztumusz tanulmány), Ügyészek Lapja 2006/5. p. 28.

control and disruption of such groups were major tasks for the dictatorship. (For example, they did not like any gathering of the intelligentsia - of intellectual families). The authorities, who wanted to impose dictatorship on the lower classes, remembered the time when the Jewish bourgeoisie of Budapest gave financial support to Miklós HORTHY and his circle against the Hungarian Soviet Republic. Under these circumstances, the new dictatorship was afraid that they would not be supported by this group of society. (This dismissive attitude towards the Jewish population characterised the communist dictatorship and from time to time, it showed itself in overt anti-Semitism) The second reason was the uprising of 1956. The various districts of the capital supported the uprising and fighting went on in these areas also. The new dictatorship was, therefore, politically averse to the Budapest citizenry. Infrastructural investments were also cancelled[6]. Similar measures were taken in other towns, and there was no change in this social concept - even in the KÁDÁR period of consolidation.

As a consequence of policy and of the national economy, the capital was the target of high immigration in the 70's and 80's, but the demand for real estate and infrastructure could not be met. The problem was resolved in the usual way: the right of domicile was restricted.

Applications for property could only be presented to the council if the applicant had resided for 5 years in Budapest and/or had a job there. The authority responsible for real estate cases will reject the application if ... the claimant and his/her spouse (partner) had not lived in Budapest for 5 years, and if their employment by a state corporation is less than 5 years..." [Section 8. § (1) of the 4/1974 order of the Budapest Council]

Due to the lack of residential property, tenancy rights were very valuable. The so-called second real estate market grew up to enable those who wanted to settle in the capital to meet those who wanted to sell their property or had a room to rent. Mostly tenancy and property rights were sold in the second real estate market. The advantage of this market as opposed to a formal application was that there was, in fact, real estate to be acquired and the procedure was extremely rapid, no-one having to wait for years in the process.

The typical ways to acquire property were by making a so-called support contract, by multiple property exchanges, fictitious changes and by false documentation. For all of these, corrupt public servants and agents were needed. The financial origin of the corruption was what was

[6] Póczik Szilveszter op. cit. p. 41.

known as the exit price. The real estate markets in other towns were similar but smaller. There was a busy market to be exploited in tenancy rights (for example, sub-tenancies), and lawyers, legal advisers and their clients were all part of this market.[7]

The change of regime brought sweeping changes to the real estate market. The most important was that restrictions were removed, due to which, people could invest their money in buying property. On the other hand, people who were appropriately placed wanted to convert common and co-operative assets into private property. These transactions had been treated as crime and flourished.

There is some doubt about the role of the State Estate Authority. Was their work effective and useful in its economic perspective? Of course, the political elite at the time of the change of regime was also involved in these transactions, including, for example, property speculation by parties, party officials etc.

According to Act LXXVIII of 1993 on Real Estate: In the capital and in other towns the property of local authorities can be sold to the tenants at preferential prices. This section was accepted by Parliament on the advice of the World Bank, but it can now be seen that one of the problems with real estate is this Government Directive. The privatisation of the property portfolio of the local authority meant immediate income for the authority, although in the long term, the authority's income (rent) was lost.

The new owners (ex-tenants) were happy until the first bills arrived. They then realised that owning property was not so very cheap and easy. Local authorities sold their property at extremely favourable prices. These were determined by the local purchase value of other similar property, but could not be less than three times the previous year's rent or more than 60 percent of the determined market value.

Sale contracts were concluded based on 15-30% of the purchase value. A person who could pay the full price immediately could receive other benefits, whilst a person who bought on credit paid a 10% percent deposit, with the rest payable over 25 years.[8]

The costs of energy had been kept artificially low, but after privatisation property owners understood how expensive it was to be a property-owner in the 1990s. Under socialism, energy was used

[7] Ibid p. 42.
[8] Ibid pp. 42-43.

arbitrarily, due to the so-called lump-sum price. After the change of regime, prices were based on consumption. A good number of property owners understood how hard it is, not just to repay loans, but also to pay for district heating and electricity. The poorest, however, were unable to participate in real estate privatisation. This is the reason why the ownership of the residential blocks in Budapest is mixed (local authority and private).

In the 90s money was invested in the used flat market by smaller investors, but criminals also saw the opportunity. Their money was the proceeds of crime and available as "usury credit" from criminal moneylenders. Due to the restructuring of society many people were either impoverished or in a very delicate financial situation.

3. The victims of the real estate mafia

As mentioned above, real estate privatisation was not a viable option for everyone due to their financial situation, and so privatisation for this group of people was the target of the real estate mafia. The tenant of the local authority bought the property (with a legal contract), but immediately sold it on to the moneylender.

From time to time, it happened that loans, debts and mortgages put the owners in a financially difficult situation.[9] OTP altered the rate of interest on property loans and this was another problem for the new owners. OTP further increased the interest rate and many people simply could not pay the instalments when due.

Although these measures were appealed against, the objections were rejected by the Constitutional Court.[10] Decision 32/1991 (VI. 6.) of the Constitutional Court refused to nullify the law enabling an increase in interest rates. [177 petitions with 1,796 signatures were presented by several social organizations, co-operative associations, attorneys' and lawyers' panels, village and residents' organisations. These aimed to declare section 226. § (2) of the Civil Code and sections 64-68. § of Act CIV of 1990 (Budget Act of the Hungarian Republic 1991) as unconstitutional and to nullify them.]

[9] Póczik Szilveszter: Lakásmaffia: a posztkommunista időszak egyik jellegzetes bűncselekménye társadalomtörténeti és kriminálszociológiai szempontból, Magyar Tudomány 2004/8. p. 873.

[10] The number of another decision concerning the topic is 640/B/1990 AB határozat.

Section 226. § (2) of the Civil Code was against section 2. § (1) and section 9. § (1) of the Constitution of the Hungarian Republic. These sections declare the principles of rule of law and market economy. Section 226. § (2) of the Civil Code was also against Decision 13/1990. (VI. 18.) of the Constitutional Court.

In the opinion of the proposers, these sections infringed the principle of the rule of law. According to section 2 § (1) of the Constitution, the competences of the rule of law are: legal security, confidence in contracts, the so-called intangibility of contracts and stable conditions of contracts - which cannot be changed, even by the State.

The above sections breached section 13. §. (1) of the Constitution - which declared the principle of the right to own property. In several cases, real estate owners lost their properties due to section 226. §. (2) of the Civil Code. Some proposers claimed that the increase of their interest rate enriched the State, the rate in question applying to loans for flat renovation.

These sections were recorded in section 70/A. § (1) of the Constitution. This section also referred to discrimination – which also made these sections unconstitutional in the opinion of the proposers.

The 1,500 HUF increase was discriminatory in 1991 in that it discriminated between those who could pay 50 per cent of their outstanding loan and those who could not, but, unfortunately, the Constitutional Court rejected the proposals in a disturbing decision.[11]

Against the decision of the Constitutional Court, the Office of the Ombudsman (led by KATALIN GÖNCZÖL) established that the auction of properties built or sold by the State created an unconstitutional situation and additional charges, since these properties would become the property of someone not entitled to support by the State, and so the State and the taxpayers lost. [Case: 9019/1996 OBH].

Consequently, in respect of the debts arising from so-called social property loans, the auction of these properties meant real danger for the property-owners.[12]

Unreal credit assurances are disadvantageous to creditors because they are dangerous for their right to own property – said BARNABÁS LENKOVICS the ombudsman for human rights [Case: OBH 4999/2003].[13]

[11] Judges Géza Kilényi and János Zlinszky disagreed with the decision and added their minority reports.

[12] Póczik, Szilveszter: Lakásmaffia jellegű bűncselekmények p. 43.

According to the TÁRKI investigation[14] - carried out with the support of the Ministry for Health, Social and Family Affairs in 2003, 30 per cent of Hungarian households have trouble with paying bills and loans Half a million families have debts older than 6 months.[15]

Those debtor families[16] tend to lose their homes[17] in which family cohesion is weak and where alcoholism and violence appear as frequent problems.[18] (KOLOSI et al., 2002). Help is limited because the incomes of those who apply for so-called living support are too high Those who have arrears cannot be supported. The local authorities have paid about thirty billion HUF as so-called living support in the past 10 years.

The members of the property mafia meet an old, single person in need of help at the social departments of the local authority, in palatial public offices, at a doctor's surgery or in a park. After that, they move in as friend or tenant and pressurise the victim to sign a sale and purchase contract.

They offer others property exchange deals. They pay a deposit, sign a contract and a certificate that the full purchase price was paid (although this was not done) and they then force the owner out of his property.

These property Mafiosi often find their victim by advertising. They create false official documents and sell property as owners. It often happens that they search for abandoned property, after which they forge documentation and with the help of a false owner (usually a homeless tramp) they sell the abandoned property.

By evading tax laws these same individuals rent property from people and then sell it on to one or more purchasers.

To those who cannot obtain bank-loans (then called the BAR-list, and today the KHR-list) they lend money and also offer apparently good business or investment. Naturally, the business or investment fails and they repossess the property under the terms of the mortgage.

[13] www.obh.hu [2008. 02. 02.]

[14] Magyar Háztartás Panel vizsgálat

[15] Póczik, Szilveszter: Lakásmaffiák – Társadalomtörténeti és szociológiai áttekintés, IN: Kriminológiai Tanulmányok 41. (Szerk.: IRK Ferenc), Országos Kriminológiai Intézet, Budapest, 2004 p. 145

[16] Sári, Mónika: A lakásmaffia-jelenség, Belügyi Szemle 2002/5. p. 65.

[17] Tóth, Sándor: Lakáscsalás – lakásmaffia, Belügyi Szemle, 2001/4-5. p. 62.

[18] Póczik, Szilveszter: Lakásmaffia: a posztkommunista korszak egyik jellegzetes bűncselekménye p. 873.

A further advantage for them is that those in a weak position have no social support or simply do not know whether they are eligible for any, due to a lack of information.

The problem is that 50% of the applicants have too high an income to be entitled to any basic homelessness benefit, although alone they can neither buy nor pay the rent for a property.

The state tries to compensate for increases in bills (through local authorities etc) but this means help for only a few.

The victims of the real estate mafia are, in consequence, homeless but this could have been prevented by very modest sums in support.

4. The real estate mafia from the perspective of criminal law

We cannot find a crime termed "property mafia activity" in Act IV of 1978 (Criminal Code). The term is a terminus technicus. These crimes can be found in Chapter XVIII of the Criminal Code under: Crimes against assets in the course of fraud.

According to Section 318. § (1) of the Criminal Code: "Fraud occurs when someone for illegal benefit deceives others or holds them under delusion, so causing loss."

The most common way to commit this crime is to make or hold someone under delusion[19] - except in cases of violence by the real estate mafia.

The value of the crimes committed crime (smaller, larger and significant loss (especially the latter) and the method of committing the crimes (by mafia methods, to the public harm and in a business-like way) are qualifying conditions.

To forge official private or public documents is known as fraud by use of instruments. The intellectual form of these crimes is when the criminal gives false information to the bona fide person who is responsible for preparing official public documents.

[19] Erdősy, Emil – Földvári, József – Tóth, Mihály: Magyar Büntetőjog – Különös Rész, Osiris Kiadó, Negyedik, átdolgozott kiadás, Budapest, 2007 p. 512
Balogh, Ágnes: Büntetőjog II. – Különös Rész, Jogi Szakvizsga Segédkönyvek, Dialóg Campus Kiadó, Budapest-Pécs, 2008 p. 435
Csemáné Váradi, Erika – Görgényi, Ilona – Gula, József – Lévay, Miklós - Sántha Ferenc: Magyar Büntetőjog Különös Rész 2. kötet, (Szerk.: Horváth Tibor - Lévay Miklós), Complex Kiadó Jogi és Üzleti Tartalomszolgáltató kft, Budapest, 2006 p. 422.

Such attempts to falsify the Land Register and ownership documents by giving false official private documents (sale and purchase or mortgage contracts) to the Land Register, blackmail, compulsion, infringing on personal freedom, lying and money laundering occur frequently.[20]

In cases involving a lack of will the criminals compel or deceive the victim into selling or exchanging their property at less than a fair price.

In "covered loan transactions" the creditor agrees a false sale and purchases contract with the debtor (instead of a mortgage), and usually, after the auction, the purchaser forces the former owner (living in the property) to relinquish his right of residence free of charge.

5. Measures against the real estate mafia

Measures against the real estate mafia can be effective if we analyse the for. Attorneys, notaries public, agents, brokers, staff at the local authority or land registry and even bank employees help the committers – both maliciously and unintentionally.

From 1994 a property sale and purchase contract can only be registered if an attorney, legal adviser or public notary countersigns it.

Real estate contracts in false real estate cases are always formally legal. It has happened on occasion that the lawyers for the mafia offer deals to parties who later complain parties, and so these fully understand the illegal handling of the tenant's rights. It is, of course, a mistake to generalise, and no more than a few dozen lawyers are so involved.

In June 2001, the Central Police Office in Budapest set up the "Kaptár" group (later a sub-division). It investigated more than a hundred cases and proposed to lay several charges. The experiences were that the members of the false real estate transactions are in groups (thirty-forty members in one group) and they have casual helpers. Hundreds of false real estate transactions were committed with these groups in Budapest.

In April of 2002 the Sors-Társak Association was founded. This association supports the victims in real estate mafia cases and currently about one thousand victims are registered by the Association. One of the officers of the Association said that there are more than a thousand victim in Hungary and that the criminals have connections with the police, local authorities and land registers. He also complained that the

[20] Nagy, László Tibor: A lakásmaffia-bűncselekmények empirikus vizsgálata, In: Irk Ferenc (Szerk.): Kriminológiai Tanulmányok 41., Országos Kriminológiai Intézet, Budapest, 2004 pp. 172-173.

judiciary is not effective because the courts often reject the petitions. Several victims are afraid to report anything officially, since the police cannot protect them effectively.

In November of 2002, to investigate the real estate mafia phenomenon the Constitution Committee of Parliament set up a subcommittee[21], which also investigates the tenement flats owned by local authorities. The Presgroupident of the Hungarian Bar Association, the President of the Bar Association of Budapest, the President of the Hungarian Notarial Community, the Commissioner of Police of Budapest, the heads of the Land Registers and also the President of the Sors-Társak Association reported at the hearing of the subcommittee. [22]

The body reported that real estate frauds are not committed by one organised mafia, but by several groups of criminals.

These crimes are against Confidence in the Rule of Law, and to avoid these crimes is the main aim of society and politics.

By Spring 2004, the subcommittee had finished the investigation and reported for the last time. In June 2004 the Parliament received orders on government measures against the real estate mafia (71/2004. OGY.), and meanwhile a property group was founded in the Budapest Assembly.

In March 2003 the Office of the Prosecutor-General instructed the National Institute of Criminology to investigate the real estate mafia phenomenon. After examining one third of the three hundred documents, the Institute stated that the real estate crimes are committed by cooperating groups. Also these crimes are committed in towns and damages amount to more than ten million forints. Both criminals and victims can be legal entities.

6. Government measures against the real estate mafia

The reason for the spread of the real estate mafia phenomenon was the chaotic status of the Property Register at the time of the change of regime, but we have to go back to World War II to see the real motive. By then, European-level administration was in pieces due to the dictatorship.

[21] Kenedli, Tamás: A lakásmaffia-jelenség változásai, a kormányzati és a rendőrségi intézkedések hatásai, Belügyi Szemle 2006/4. p. 117.

[22] Póczik, Szilveszter: Lakásmaffia: a posztkommunista korszak egyik jellegzetes bűncselekménye p. 875.

After the break-up in 1945 and after the secularization of 1948-1952, property registers were largely false and incomplete. Changes had been wrongly registered, and land certificates were changed to clusters of information.[23]

The 31 Legal Decree of 1972 on Property Registers and their operation did not solve the problem. The new rule attempted to revise positions as they had evolved and local authority tasks were fulfilled by Land Registers and not by the Land Registry Offices of the courts.

In 1990, the work of division and compensation were far too heavy a burden for the Land Registers; the registers were not up to date, and this alone was a major cause of property fraud. This situation lasted until 2000.

According to these, it is very important to confirm the Land Registers' work in both personal and in technical ways. In respect of the former, it is important to increase the number of civil servants, and salary increases would help their motivation for fast, professional procedures. We can count the number of decisions monthly, and t producing more should be rewarded.

Security of information is also a very important section. Civil servant should upload changes more than once a day to the central computer and to the external hard drive. They should also scan the documents.

The "E-Land Register procedure should be introduced, whereby only registered users could start any of the procedures. Obviously, the field of the information technology should be created for attorneys, legal advisers and notaries. This could be, for instance, a solid administration electronic card or a card that could only be used in Land Register procedures.

The insight from the Internet to Real Estate Registers should be free and everyone should have access to the Registers.

Association membership should be required of all real estate agents, as it is for lawyers.

If the loss of property is due to a mistake by the authority, the plaintiff should be reimbursed by the State via a reimbursement foundation. The latter should judge cases within its own competence, and if the foundation rejects a claim, the plaintiff could go to court.

Independent PIN-codes should be introduced.

[23] Reviczky, Károly: A gazdasági regiszterek, kiemelten a telekkönyvek megbízhatósága, In: Papanek Gábor (Szerk.): Jogbiztonság a magyar gazdaságban, FILUM Kiadó, Budapest, 1999 p. 71.

When selling high-value properties, a certificate from the bank should be required to prove that the purchase price was transferred.

An electronic connection should be established between the National Property Register and the Residential Address Register. There should also be a link between attorneys' offices and the HQ of the Personal Data Register

When selling high-value properties, personal IDs should be copied (naturally, with an individual's approval), and the transaction should be filmed.

The Hungarian Bar Association should regulate the legal counsel for both parties, and, if necessary, a Senior (or Patron) Attorney should be arranged.

Some of these suggestions may be controversial from the point of view of Data Protection, but if these measures are to be effective (as they can), must certainly be put into effect.

Independent NRAs in European electronic communications policy-making and regulation – The road to BEREC and beyond

Máté MESTER

ABSTRACT *Institutional independence of NRAs is a key principle of EC communications law. Under the last Review, the Commission proposed major amendments jeopardising this requirement. The 2002 Regulatory Framework also contained major shortcomings regarding NRA independence and the role of the ERG in the institutional system, and the aim of this paper is to answer how NRAs should be positioned under the New Regulatory Framework.*

To this end, the discussion elaborates on the evolution of the Regulatory Framework, on institutional independence, on regulatory competition, on the coordinated approach towards regulatory consistency and on the current review of the sector-specific regulation. The paper proposes that, in addition to independence from the state and from private enterprise, NRAs should be given sufficient discretion in respect of the Commission to be able to adapt the regulation to local market conditions or engage in general policy enforcement. Accordingly, it is demonstrated why BEREC has become the preferred institutional establishment over a centralised European communications authority.

Whilst examining academic viewpoints and the proposals submitted during the co-decision procedure of the new electronic communications package and reflecting on the compromise text, the paper shows why BEREC should be the appropriate institution to ensure regulatory consistency and the strengthened independence of NRAs during the next era of EC communications law and beyond. The conclusion attempts to establish that, in order to exploit the opportunity for BEREC to move on from self-regulation to general policy enforcement, NRAs should, in future, enjoy a more solid level of independence in European communications policy-making than today.

1. Introduction

The sector-specific regulation that has evolved over the last two decades, driven by liberalisation and harmonisation, has become a benchmark in the EU. Introducing liberalisation and harmonisation regulation, first of all to telecommunications and then to the technology-neutral electronic communications sector, has proved to be the right decision to achieve global competitiveness. Although liberalisation preceded harmonisation, the two approaches complemented each other adequately. The goals that the regulatory framework aims to achieve, the principles that it utilises for the purpose of those goals and the measures ensuring the appropriate emergence of those principles follow the correct path in overseeing the electronic communications markets throughout the EU.

So far, National Regulatory Authorities (NRAs) have proved their vitality with regard to the special functions that they must carry out under the 2002 Regulatory Framework.[1] NRAs, tightly controlled by the Commission, however, have selected and analysed the markets,

[1] 1. Framework Directive - 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, L108/33), 2. Access Directive – Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to and interconnection of electronic communications networks and associated facilities (OJ 24.4.2002, L108/7), 3. Universal Service Directive - Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (OJ 24.4.2002, L108/51), 4. Authorisation Directive - Directive 2002/20 of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (OJ 24.4.2002, L108/21)
Other measures: 1. Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 31.7.2002 L201/37) 2. Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services (OJ 17.9.2002 L249/21), 3. C(2003)497 - Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and Services, (OJ 8.5.2003 L114/45) 4. Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (OJ 11.7.2002 C 165/6)

following to the maximum the principles laid down by the Commission. Also, NRAs have regulated those markets by imposing, withdrawing or amending obligations on enterprises, applying remedies to the best of their knowledge, managing access to infrastructure and fostering investments - both by incumbents and new entrants. In some cases, NRAs have managed radio frequencies, the digitalisation of audiovisual media services and the deployment of new generation networks. NRAs, therefore, have used the entire arsenal available to them (remedies in particular) to achieve the Lisbon goals and, ultimately, to develop a single European market in electronic communications.

NRAs have achieved this by cooperating with each other, the Communications Committee (CoCom) and the Commission. They also established the Independent Regulators Group (IRG) to ensure that regulatory matters are discussed within an independent forum where all have the opportunity to participate on equal terms. Moreover, by participating in the European Regulators Group (ERG), NRAs have worked together in assisting the Commission in respect of the consistent application of the 2002 Regulatory Framework and of selected best practices. From time to time, NRAs are also given (albeit indirectly) the role of general policy-making within the ERG, and it was, in fact, this coordinated cooperation within the regulatory network which played the key role in the appropriate enforcement of the measures implemented by the 2002 Regulatory Framework. Although cooperation may not be sufficiently rapid in some cases, it does ensure that policy objectives prevail - in line with a mutual recognition of the community approach. Any regulation, however, needs to be subject to some form of regular evaluation. Technological developments and market tendencies constantly challenge the institutions enforcing the regulatory framework. To respond to these challenges, the Commission should scrutinise regulation closely, including the use of independent NRAs at the forefront of policy enforcement.

Accordingly, the 2006 Review dealt with the important concept of institutional reform.[2] One pivotal reason for launching the review was that the Commission had rendered the electronic communications market of Europe fragmented. Indeed, technological and market developments occur in more than one Member State and too many divergences may

[2] COM(2006) 334 final, Communication on the Review of the EU Regulatory Framework for electronic communications networks and services, Brussels, 29.6.2006 and COM(2007) 697 final, Reform proposals of the Regulatory Framework, Brussels, 13.11.2007, (2007/0247 (COD))

jeopardize investment on the European scale. As the review indicated, it is a key challenge for the 2002 Regulatory Framework to 'reward innovative and risky investment'.[3] Balancing investment and competition, however, is a fundamental and delicate matter in designing regulation since the long-term nature of investment may conflict with the short-term interests of competition. Arguably, both operators and consumers may benefit from European services of a cross-border nature, but only if the former are able to provide such services without bearing too much extra cost due to divergent regulatory approaches. At first sight, such European-scale services, if to be overseen by a single authority, contrast with the cornerstone of principles valid for NRAs' independence. Arguably, regulatory divergence is welcome since, ideally, it can be exploited for experimenting with best practice and promoting regulatory competition. Hence, implicit in the 2006 Review was the inherent trading-off of the conflicting interests of decentralisation and centralisation and of consistency and regulatory competition.

Whilst the Commission was moving in the right direction in ensuring independence for NRAs vis-à-vis the state and the operators, it might have taken a wrong turning in extending its powers through Article 7's procedures if assisted by a centralised institutional system designed to ensure consistency.[4] However, this only seems to be valid as long as the former regulatory network of institutions prevails and the new European authority is built upon the ERG heritage. For this reason, institutional reform will be dealt with in this paper. First, the attributes of the independent NRAs at European level will be introduced before the focus turns towards legislative and academic considerations of institutional reform and to the establishment of a European communications authority. The last section elaborates on the body which finally gained the support of all institutions of the co-decision procedure and our conclusion tries to offer recommendations for (and beyond) the New Regulatory Framework (NRF).[5]

[3] Ibid. p. 5.

[4] Article 7 of the Framework Directive

[5] 1. Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications and the Office (OJ L 337/1, 18.12.2009.); 2. Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning

2. Independent NRAs at European level

After the "buzz words" of "privatisation" and "liberalisation" have driven EU policy-making in the field of electronic communications for the last twenty years, the legislative focus is now turned towards consistency and better regulation.[6] To this end, the Commission is attempting to strengthen further its supervisory role in certain policy areas. Currently the main concerns of the electronic communications sector are the further introduction of competition rules to a consolidated market and the delivery of a more consistent regulatory approach of NRAs. The latter, however, raises the question of whether there is any need to achieve a more unanimous group of independent European regulators or to introduce a centralised regulatory approach – and, if so, whether this infringes on the independence of those regulators.

As opposed to accountability, independence usually constitutes the basic regulatory dilemma for both academics and legislators,[7] with independence usually provided to ensure regulatory consistency over time.[8] The regular components of independence (and thus accountability) are transparency, appointment mechanisms, resources (human or financial) and regular (judicial or peer) reviews. However, one should not dismiss independence as a requirement that can be achieved in theory only. As GERADIN puts it: "independence is not an abstract principle [...] its implementation requires the adoption of a series of measures, which will shelter the agency against undue pressures".[9] The concept of

the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (OJ L 337/11, 18.12.2009.); 3. Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services (OJ L 337/27, 18.12.2009.)

[6] Another goal is deregulation. However, there is great risk that deregulation cannot be achieved since the current efforts on fine-tuning regulation actually generates more regulation.

[7] For a better understanding of independence refer to the literature on Principal-Agent Theory

[8] Stern, J. – Trillas, F.: Regulation of Telecom: What works and why? In: Regulation Initiative Working Paper Series 2002/47 pp. 1-23., p. 13.

[9] Geradin, D.: The Development of European Regulatory Agencies: Lessons from the American Experience In: Geradin et al. (eds.) Regulation through Agencies in the

independence is generally connected to undue industrial and political influence and has become one of the core principles of good governance. Once a certain economic sector is liberalised, 6r5it is generally accepted that the authority overseeing it must be independent from the regulated undertakings operating on it and shall be protected from undue political influence.

However, in addition to the two dimensions of NRA independence generally acknowledged in the literature, there is a third. To ensure that NRAs perform their tasks reliably, the Commission introduced a network of institutions under the 2002 Regulatory Framework and placed NRAs at the centre. Although the institutional solution for the inconsistent application of the regulation was the establishment of a European network of institutions, the legislation granted more powers on the NRAs, thus appointing them the domestic guardians of the regulatory framework. Within the network of institutions, NRAs "are the cornerstone of the application [...] of [...] the regulatory framework [...] and play an important role in ensuring [its] consistent application".[10]

So, when setting up the institutional framework of the sector, the Commission delegated significant powers to NRAs in order to achieve market liberalisation in a consistent manner throughout the EU. With their establishment, NRAs are expressly given the responsibility to promote competition, to contribute to the development of the internal market and ultimately to ensure the rigorous application of the electronic communications sector's rules. There exist, however, reasons to limit the discretion given to the NRAs in implementing European regulation, since NRAs must be accountable to the Commission when performing regulatory tasks. The regulators must be overseen to ensure that they act in line with their mandate in an impartial and efficient manner.

The Commission, therefore, enjoys extensive control over NRAs. On the one hand, it controls effectively by the adoption and review of the recommendations for relevant markets, whilst NRAs take fully into account the recommendations that influence the market definition procedure.[11] – and, in addition, the Commission may also identify transnational markets. On the other hand, market analysis must be carried out by the NRAs whilst taking the Commission's guidelines fully into

EU, A New Paradigm of European Governance. Edward Elgar, Cheltenham, 2005. pp. 215-245., p. 230.

[10] Fifth Report on the Implementation of the Telecommunications Regulatory Package (1999), p. 9.

[11] Article 15 of the Framework Directive

account.[12] Further, control is granted to the Commission in a procedural manner by the so-called Article 7: "Procedures of the Framework Directive".

Article 7's procedures provide for a close watch over NRAs in the promotion of a consolidated internal market and are aimed at tackling divergent regulatory practices or any inappropriate application of the regulatory framework. In principle, therefore, the instruments allow the Commission to monitor NRAs, ensure regulatory consistency; limit the regulation to markets that need intervention and bring more transparency into the process.[13] In order to reach the same goals, however, there exists yet another, but less centralised, way paved by the NRAs voluntarily.

NRAs, being close to the playing field, are best placed to adapt regulation to local market conditions. They need, therefore, a certain degree of discretion, enabling them to answer market challenges appropriately. NRAs may only fine-tune regulatory intervention by selecting the best remedies and amending or withdrawing them if necessary. While the Commission directly influences market definition and analysis via the recommendations and guidelines, remedies remain the only versatile arsenal of NRAs for the accurate application of the NRF. Consequently, NRAs, in certain cases, must act independently from the Commission in order to achieve the best application of Community law with regard to domestic conditions.

Accordingly, to enhance the application of the regulations concerning telecommunications in the EU some sort of cooperation between NRAs had been desired for a long time. The idea "to share experience and points of views [...] on important issues relating to the regulation and development of the European telecommunications market"[14] was first initiated by the NRAs themselves in 1997 when they established the IRG. The IRG is an unofficial forum of the heads of the NRAs to discuss issues outside the immediate scope of the Commission.[15] Despite its

[12] Ibid. Article 16

[13] Although the Commission has no veto power over remedies it made comments on the inappropriateness or the inconsistency of the remedies imposed in many instances. See COM(2006) 28 final, Commission communication on Market Reviews under the EU Regulatory Framework - Consolidating the internal market for electronic communications, Brussels, 6.2.2006. p. 2.

[14] See IRG website: http://www.irg.eu/render.jsp?categoryName=CATEGORY_ROOT [12.02.2009]

[15] ERG (06)03 Independent Regulators Group/European Regulators Group – A guide to who we are and what we do, February, 2006 (ERG Guide)

unofficial character, the IRG has arguably had a significant input to consistent telecommunications regulation.

This input was also realised and utilised by the Commission - which then established the ERG in 2002.[16] That decision provided for the official recognition of the former IRG efforts. The *raison d'être* of the ERG was to advise and assist, at its own initiative or at request, the Commission in its decisions regarding electronic communications.[17] The ERG was another, yet less severe, tool of ensuring regulatory consistency within the 2002 Regulatory Framework. The ERG encompassed the heads of the NRAs of the 27 EU Members, the 4 EFTA States and 2 EU candidates. The decisions of the ERG were adopted by consensus during the plenary meetings, which usually took place four times a year. The majority of the work, however, had been done prior to the plenary session by the Contact Network of the senior representatives from NRAs and by Working Groups and Project Teams. A Secretariat was provided for by the Commission to assist *inter alia* the preparation of the meetings, agendas and annual reports. The Chair, mainly charged with presidential and representational functions, was elected annually from the members of the ERG. The Commission was represented at the plenary meetings of the ERG and might attend other group meetings.[18]

An important role of the ERG was to facilitate cooperation between NRAs in order to improve regulatory consistency in the application of the 2002 Regulatory Framework, especially regarding the appropriateness of regulatory instruments and remedies. Experience used to be shared between the NRAs during the work of the ERG and its subgroups whilst they may also published Common Positions, Principles of Implementation and Best Practice without being obliged to take, explicitly, account of the Commission documents. Besides these activities, however, the ERG had no implicit power to influence directly or regulate the electronic communications market of the EU; nor could it impose binding decisions on NRAs.

However, NRAs, besides being in the front line of policy enforcement, perform a balancing act between member state and Community interest, during which it may receive support from either side depending on the case at hand. Therefore, implicit in the limited power of the ERG is the possibility to extend its competence in respect of common

[16] Commission Decision 2002/627/EC establishing the European Regulators Group for Electronic Communications Networks and Services, (OJ L 200/38, 30.7.2002)

[17] Ibid. Recital 5

[18] Commission Decision 2002/627/EC Article 5

electronic communications policy enforcement in the EU, and an upgraded ERG (or any European communications authority) should also enjoy strong independence, similar to that of the NRAs, in order to fulfil its tasks appropriately.

3. Considerations for establishing a European Authority

Published in 2006, the Commission's periodic review on the 2002 Regulatory Framework outlined the main determinants of the upcoming reform.[19] To ensure consistency, the Commission seriously considered that a European communications regulatory authority should be established. It should be noted, however, that regulators are engaged in balancing the conflicting interests of long-term investment by enterprises with short-term benefits to consumers on a daily basis, whereas the institutional stability of independent NRAs should "stimulate investment and intensify competition".[20] Thus, regulatory consistency is cost-beneficial for companies, since a predictable market encourages investment. Once again, one guarantee of regulatory consistency is the independence of the authority. Arguably, this is valid for sector-specific policies at the EU level also.

It is often argued that the institutional disparities of the local NRAs lead to market fragmentation and diverging regulatory approaches significantly raise transaction costs for enterprises wishing to operate on a trans-European scale. Hence, the major reason behind the establishment of a European authority would be the lowering of those costs by providing for more centralised implementation and enforcement. The benefits of establishing a European telecommunications authority at supranational level were, unsurprisingly, investigated by the Commission as early as in 1997.[21] However, in its 1999 Review, the Commission finally dismissed the idea of establishing a European authority, finding that doing so would not provide enough added value.[22] Rather, the

[19] COM(2006) 334 final, Communication on the Review of the EU Regulatory Framework for electronic communications networks and services

[20] Nicolaides, Phedon: Regulation of Liberalised Markets: A New Role for the State? (or How to Induce Competition Among Regulators). In: Geradin et al. (eds.) Regulation through Agencies in the EU, A New Paradigm of European Governance. Edward Elgar, Cheltenham, 2005., pp. 23-43., p. 29.

[21] Article 22 of Directive 97/33 required the Commission to assess whether there was added value in setting up a European Regulatory Agency, (OJ L 199/32, 26.07.1997.)

[22] Fifth Report on the Implementation of the Telecommunications Regulatory Package, p. 9. and Final report on the study „The possible added value for a European

Commission opted to create CoCom and the ERG since it considered regulatory cooperation as offering more added value. Further, assigning regulatory tasks to one independent European authority is a way of delegating the powers conferred upon the Commission by the Treaty,[23] and the immense literature has long questioned the delegation of powers to authorities at European level.

Notably, the most commonly cited barrier to the establishment of European authorities is the authentic Meroni doctrine established by the European Court of Justice (ECJ) in 1958.[24] Although ruling under the Treaty establishing the European Coal and Steel Community, the ECJ in that case concluded that Community institutions may delegate only those powers which they hold in order to keep the balance of powers ensured by the Treaties. Even though this doctrine was adopted some 50 years ago and concerned private enterprises, it still serves as a "fundamental guarantee" of institutional balance within the Community today.[25] However, it is also subject to wide-spread criticism in the literature, which holds that the delegation of powers to Community agencies that are made accountable is a different matter from that of private enterprises with no accountability whatsoever. If interpreting the doctrine narrowly, however, we may conclude that certain regulatory authorities at European level cannot be legally established, but it is the case that the limits set by the Meroni doctrine are of specific importance in balancing regulatory and executive functions of a European authority.

Additionally, the White paper on European Governance explicitly entrusts member state governments with monitoring tasks.[26] In a narrow sense, this means that Member States should ensure that NRAs are established in order to monitor the electronic communications sector. Interpreting it broadly, however, this obligation implies that Member States shall ensure that NRAs perform their task as required by European law. EVERSON further argues that the "powers of regulatory authorities do

Regulatory Authority for telecommunications", Eurostrategies/Cullen International pp. 209-218.

[23] See for instance Thatcher, Mark: Delegation to Independent Regulatory Agencies: Pressures, Functions and Contextual Mediation, West European Politics, 2002/25, pp. 125-147. and Yataganas, X.: Delegation of Regulatory Authority in the European Union, Jean Monnet Working Paper 2001/ 3/01, Harvard Law School

[24] Case C-9/56 Meroni v. High Authority [1957-58] ECR 133, paragraph 151.

[25] Ibid.

[26] European Commission White Paper on European Governance COM(2001)428 and Article I-50 of the Treaty establishing a Constitution for Europe as signed in Rome on 29 October 2004 (OJ C 301, 16. 12. 2004) p. 21.

not merely derive from the Commission but also from the member states and other EU institutions".[27] Governments therefore should eventually supervise the performance of their NRAs which, combined with a coordination at the EU level, could be exploited in the light of regulatory competition. Identifying best practice should result in better regulatory consistency in the end.

As regards regulatory competition within the "horizontal coordination" of NRAs LAROUCHE points out that regulatory authorities may learn best practice from each other while, being closer to the playing field, they also possess a higher degree of flexibility and responsiveness.[28] He further argues that, in reaching the appropriate level of coordination, NRAs should take full account of their counterparts' decisions and should give reasons if they deviate from established practice without extra cost or delay.[29] Ambitious NRAs should nevertheless be eager to try new tools that may potentially emerge as best practice.

Although regulatory competition should have induced NRAs from smaller jurisdictions to engage in "maverick behaviour" and attempt to influence electronic communications policy, the opinions of NRAs in the second line have not been automatically backed by the Commission.[30] Indeed, NRAs from larger jurisdictions took the lead in establishing regulatory practice and have been obsessed with innovative ideas.[31] Quite often, these ideas are taken up by the Commission as a benchmark in evaluating consistency. This is no sign of regulatory competition but dominance. It has been also argued that setting a precedent value of NRA decisions might be incorrect due to the given, usually advantageous, discrepancies between the specific conditions of the regulated markets.[32] If the ERG (or IRG) would not have existed there would hardly be any

[27] Everson, Michelle: Good Governance and European Agencies: The Balance, In: Geradin et al. (eds.) Regulation through Agencies in the EU, A New Paradigm of European Governance. Edward Elgar, Cheltenham, 2005., pp. 141-163, p. 155.

[28] Larouche, Pierre: Coordination of European and Member State Regulatory Policy: Horizontal, Vertical and Transversal Aspects In: Geradin et al. (eds.) Regulation through Agencies in the EU, A New Paradigm of European Governance. Edward Elgar, Cheltenham, 2005., pp. 164-179, p. 167.

[29] Ibid. p. 168.

[30] Larouche, Pierre – de Visser, Maartje: The triangular relationship between the commission, NRAs and national courts revisited. Communications & Strategies, 2006/64, pp. 125-145., p. 134.

[31] See for instance Ofcom pioneering in functional separation and consumer protection.

[32] Ibid. p. 132.

chance for best practice in smaller NRAs to emerge. The ERG served as an institutional "equilibrium" between harmonisation and regulatory competition.[33]

Regulatory competition, as far as NRAs are concerned, endorses experimentation in differing regulatory practices of 27 regulators. Complemented with appropriately coordinated cooperation, regulatory competition appears to be most desirable. Coordination, on the one hand, was provided for by the 2002 Regulatory Framework via substantive measures including the application of competition law rules and harmonisation measures.[34] In addition, letters of comment, guidelines and recommendations issued by the Commission are usually rendered "soft law instruments".[35] On the other hand, the appropriate level of coordination was mainly secured by institutional and procedural rules, such as the Article 7 procedures, or the mutual coordination of NRAs via notifications and the ERG. Success is only guaranteed, however, if the "systematic assessment of the practices and performance of NRAs"[36] is also ensured by the Commission. Although NRA practices are subject to scrutiny, the performance of the regulators is not compared, apart from the implementation reports.

Furthermore, MAJONE emphasises, although within a slightly different context, that empowering European regulators is one (but not the only) strategy of European policy-making.[37] Another option would be self-regulation. Whilst publishing and disseminating decisions, common positions and principles of implementation and best practices, the ERG also provided for a forum of self-regulation for NRAs.[38] However, it remained a forum of self-regulation only. Seemingly, the ERG was often criticised for the non-binding character of its decisions. Although it provided for a forum for discussion at European level, it also lacked the power to enforce best practice developed by its expert groups. Insofar as

[33] Larouche, Pierre op. cit. pp. 171-174.
[34] Ibid.
[35] Ibid.
[36] Directive 97/33 required the Commission to assess whether there was added value in setting up a European Regulatory Agency, p. 36.
[37] Majone, Giandomenico: Dilemmas of European integration. Oxford University Press, Oxford, 2005, p. 99.
[38] Note: I use self-regulation here in an alternative way to that applied in the public sphere. The common interpretation of self regulation would be that it means voluntary agreements between private bodies to solve problems by taking commitments between themselves.

coordination is concerned, therefore, there was room for improvement also within the ERG's competences.

The number of proponents of a European authority is, however, rising. Among them is the Commission, which holds that, especially in technical fields, the future of regulation is to be found in European authorities. Delegating powers requiring, for instance, technical expertise to independent agencies may reduce the workload of the Commission and could result in greater credibility for the Commission due to the more independent and consistent regulation achieved by the authority. Clearly, these reasons produced enough support in the Commission to promote a European communications authority. In considering the principles of good governance, especially efficiency, the setting-up of such entities appears to be desirable also.[39] It is often said that there are too many actors within the 2002 Regulatory Framework. In this respect, externalities, economies of scale and transaction cost-saving for trans-European operators provide good economic grounds for centralisation.[40]

On the contrary, the establishment of an independent authority might replace the former "meta-regulatory" approach with undesired command-and-control practice.[41] The political sensitivity of the institutional framework means that EU states generally regard establishing a supranational agency as a threat to their competences. Indeed, the Commission sometimes behaves rather as a political agent than as an independent agency, obscuring its powers and responsibilities.[42] In addition, a new European authority might bring an extra workload and red tape for other institutions. It is often argued that the regulatory cooperation approach promoted by the 2002 Regulatory Framework was time-consuming and gave rise to possible conflicts of competence.[43]

Certainly, electronic communications policy and regulation are shaped by many different factors. Private undertakings influence politicians who

[39] Perhaps the reason why conferring regulatory tasks on a single communications authority is the standard set-up of federalist states is because those principles were first introduced there.
[40] Geradin, Damien – Petit, Nicolas: The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform, 2004, p. 12.
[41] Scott, Colin: Agencies for European Regulatory Governance: A Regimes Approach In: Geradin et al. (eds.) Regulation through Agencies in the EU, A New Paradigm of European Governance. Edward Elgar, Cheltenham, 2005., pp. 67-87., p. 78.
[42] Cave, Martin et al. (eds.): Where are we going? Technologies, markets and long-range public policy issues. European communications, Information Economics and Policy, 2006/18 (3), pp. 242-255., p. 253.
[43] Scott, Colin op. cit. p. 17.

influence governments. Governments influence both domestic and Community legislation. The latter has a direct effect on the Commission's powers as the guardian of the Treaty. The Commission exercises control over undertakings and the NRAs, and may also initiate infringement proceedings against member states under Article 10 EC. The NRAs, having their decisions subject mainly to domestic judicial review, should provide for a clear interpretation of policy objectives in particular cases and should balance concurring interests. There is judicial review over certain actions and documents of the Commission, but it has been totally absent from ERG actions and documentation.

There is, therefore, a complex, but imperfect, institutional system in the electronic communications sector of the EU, and member states are never easy to convince that NRA independence should be stronger or that the sector should be overseen by a Community-level regulator. As MAGNETTE memorably concludes, "it is reasonable to believe that:

a) governments will generally prefer to keep a given field under their control rather than delegate it to an independent agency;
b) when they find it difficult to cope with a given task by themselves (due to a lack of expertise and/or any extra resources), they will agree to delegate it, whilst preferring a weakly independent agency to a true regulatory body;
c) when they accept that they must set up an independent regulator, due to the problems of credible commitment revealed by the stakeholder pressure and/or public opinion, they prefer a national to a supranational agency;
d) they will only create a supranational agency if they fear the consequences of non-coordination;
e) EU institutions will only support an independent and supranational regulator if they think this widens EU competences and if the new regulator will not undermine their own existing and potential powers."[44]

Consequently, if perceiving EC institutions in complexity, one should realise that, any strengthening of NRA independence from national governments or the establishment of a supranational agency subsequently raises the influence of the Commission (and indirectly the Community) in the sector and vice-versa. Being aware of the aforementioned even the

[44] Magnette, Paul: The Politics of Regulation in the European Union, In: Geradin et al. (eds) Regulation through Agencies in the EU, A New Paradigm of European Governance. Edward Elgar, Cheltenham, 2005, pp. 3-22, p10

Commission concluded that "much depends on the political support or otherwise that regulators receive from governments".[45]

Certainly, a fully-fledged authority established in a strongly centralised manner has always been very unlikely to gain wide support within the EC. Although establishing a single agency in a centralised manner is a more common practice in federal regimes, the European decentralised approach is also driven by the tradition of competence-sharing and the principles of subsidiarity and proportionality, which are not easily overridden.[46] The expertise available to the ERG cannot easily be transferred to a single authority. Member states are also unwilling to give up their competence in respect of independent NRAs. On the contrary, member states endeavour to retain control in the electronic communications sector. Since electronic communications services play a key role in achieving a sound information society, the strategies set by the EC today should be consonant with the challenges of the future and must aim to gain the widest possible support. As CAVE et al. point out, in considering rapid technological development, "focus and expertise [of a specialised body] appear on balance [to the perspective and independence of a generalist body] to be more critical in the coming years".[47]

4. BEREC

Implicit in the above is that the core issue of the 2006 Review was the establishment of a new authority or body at European level as the Commission regarded the European electronic communications market as fragmented and regulatory approaches as inconsistent. Accordingly, the Commission, along with its proposal on the NRF, issued a proposal for establishing a European authority to overcome these problems.[48] In the Commission's view, the inconsistencies apparent in the sector obstruct technological development, trans-national services and investment.[49] Moreover, the best institutional solution, in the Commission's opinion,

[45] Fifth Report on the Implementation of the Telecommunications Regulatory Package (1999), p. 9.
[46] Scott, Colin op. cit. p. 7.
[47] Ibid. p. 253.
[48] COM(2007) 699 final, Proposal for a Regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority, Brussels, 13.11.2007, (2007/0247 (COD))
[49] Ibid. p. 2.

would be a central authority with fully-fledged competences pursuing harmonisation.

In reaching this conclusion, the Commission assessed whether it would be sufficient to carry out these tasks alone. It concluded, however, that, since European harmonisation would require expert knowledge and experience gained close to the markets, only a body comprising of members of NRAs could achieve these goals. The Commission also assessed whether an upgraded ERG would be the appropriate solution for inconsistency. When dismissing this option the Commission referred to the unbinding nature of ERG decisions and the institutional constraints of the ERG due to its limited resources. Notably, the Commission emphasised that a new authority must act in a transparent manner and be an accountable but independent Community institution.[50] Thus, in the proposal the Commission concluded that a separate and central European communications authority replacing the ERG would be best.

Contrary to the centralist approach which the Commission put forward in the proposal, the European Parliament emphasised that the current institutional framework had proved the vitality of co-operation on many occasions.[51] Furthermore, in order to balance diverging interests and powers present in the system, the European Parliament preferred an enhanced ERG to a central authority. Whilst the Commission intended to extend its powers in respect of the electronic communications sector and ensure consistency through a European communications authority, neither the European Parliament nor member states in the Council would have gone so far. Whilst the European Parliament found the regulatory network appropriate, member states were not keen to give up their own competences.

Consequently, the only, but welcomed, scenario left was to upgrade the ERG and strengthen cooperation within the network of institutions.[52]

[50] Ibid. p. 6.

[51] See the amendments of European Parliament legislative resolution P6_TA-PROV(2008)0450 of 24 September 2008 on the proposal for a regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority (COM(2007)0699 – C6-0428/2007 – 2007/0249(COD)) (P6_TA-PROV(2008)0450)

[52] First by the European Parliament legislative resolution P6_TA-PROV(2008)0450 of 24 September 2008 on the proposal for a regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority (COM(2007)0699 – C6-0428/2007 – 2007/0249(COD)) proposing the establishment of the Body of European Regulators in Telecoms (BERT) then by the Common position adopted by the Council with a view to the adoption of a Regulation of the European Parliament and of the Council establishing the Group of European Regulators in Telecoms (GERT) 16498/08, Brussels, 9.02.2009

To this end, under the second reading of the co-decision procedure the European Parliament strove for a consensual body built upon the ERG heritage with wide-ranging (but limited and somewhat advisory) powers. In the light of NRA independence, the approach was welcomed.

The European Parliament managed to set the new communications body at Community level as a result of compromise. Accordingly, the Body of European Regulators for Electronic Communications (BEREC) assisted by an administrative Office (Office) was established under the NRF. Notably, BEREC is built upon ERG and is designed to further the cooperation of NRAs and the Commission. The compromise text recognises the work that ERG has done in ensuring consistency and, by turning it into BEREC, inserts it into the NRF.

BEREC is not a Community agency but a body for reflection, debate and advice without legal personality. With its Board of Regulators (the Board), comprising NRA heads or high level representatives, the new body is expected to continue the ERG heritage. Since the Commission retains observer status only during the meetings of the Board, it should not influence BEREC opinions or decisions – as with ERG. By acting with a two-thirds majority, BEREC is expected to be able to decide quickly and flexibly (compared to ERG) even though plenary meetings of the Board, as with the ERG, are to be held four times per year.

The structure of BEREC is also similar to ERG. A chairman should be elected from among Board members and BEREC may be subdivided into Expert Working Groups. The Office is established to provide administrative and expert support and should comprise a Management Committee and an Administrative Manager. It is, therefore, the NRAs yet again that are exclusively appointed to facilitate cooperation within the network of institutions and ensure consistency by developing regulatory practice. Decentralisation triumphed over centralisation once more within the electronic communications sector.

Moreover, the regulation lays down wide-range guarantees ensuring independence for BEREC and the Office. Most notably, it addresses the Commission dimension of independence also. Consequently, whereas singular NRAs are not expressly required to act independently from the Commission, they are sheltered once they act as a group in BEREC. Also, both BEREC and the Office are required to operate with a high level of transparency, including publishing its decisions and procedures,

undertaking public consultations and providing information. In addition, the chairman of the Board is explicitly prohibited from taking instructions from the Commission or any other public or private group.

With regard to the budget, BEREC is primarily subsidised by the Community in an open manner. Further, member states and NRAs are called on for voluntary contributions to running costs. The staff of BEREC, whilst the number is proposed by the Management Committee and the Administrative Manager, may also be seconded from the NRAs for a temporary period of three years. As a result, BEREC is expected to enjoy strong independence in carrying out its tasks under the NRF. Independence is welcomed since it provides for sound but flexible regulatory practice based on NRA experience gained close to the electronic communications market.

The main task of BEREC is to facilitate cooperation between NRAs and between NRAs and the Commission for the ultimate sake of regulatory consistency. To this end, BEREC is called on to participate in the procedures aimed at ensuring the consistent application of the NRF. It should develop and disseminate best practice information, assist NRAs on regulatory issues, deliver opinions on draft recommendations, guidelines, NRA measures and remedies. It also possesses a control function in respect of Article 7 procedures and harmonisation. Thus, BEREC provides institutionalised control over excessive Commission actions. It is to facilitate mediation between NRAs in cross-border disputes and should monitor and report on the sector on an annual basis. On request, it may also advise the European Parliament and the Council concerning electronic communication matters and regulation. As a result BEREC, while building upon the work done by the ERG, will be a significant, if not the key, policy-making institution under the NRF.

There are, however, shortcomings in the regulations. First, none of the measures of the NRF deal with the judicial review of BEREC documents. Accountability is only ensured via transparency requirements. Although interested parties are called to consult prior to the BEREC decision, they cannot further check after it has been made.

Second, the issue of regulatory competition is not addressed in the community legislation to a desirable level. It is uncertain how regulatory practices will be selected and whether NRAs from smaller jurisdictions will be able to influence BEREC opinions. Nevertheless, decisions being based on\a two-thirds majority, there is room for regulatory competition inherent in the regulation. Although NRAs are required to contribute actively to the work of BEREC and take full account of its decisions,

they will now be able to express reservations and request that these be published. Since this measure allows NRAs to engage in "maverick behaviour" in respect of regulatory practice, it may allow regulatory competition to emerge also.

Third, the performance of the NRAs, inside or outside BEREC, is not subject to comparison. It was proposed that a more direct systematic assessment should be provided for in the NRF. Although the regulation is subject to scrutiny on a regular basis and the Commission is required to publish annual reports on the developments of the sector, the performance of NRAs is not directly compared. It is, therefore, recommended to use the requirement for BEREC to monitor and report on the sector on an annual basis for this purpose.

Nevertheless, BEREC is an evolutionary institution in electronic communications regulation, and many of the imperfections currently present in ERG regulation have been taken into account for BEREC. It will act on a two-thirds majority basis whilst also being strongly independent in all dimensions. BEREC documentation has some form of binding character as the Commission and the NRAs take full account of the whole. BEREC possesses a key role under the new Article 7 procedures and harmonisation. Since BEREC comprises NRAs, with the Commission having observer status only, the regulatory cooperation approach has proved its vitality. Accordingly, the Commission could not extend its powers to any great extent under the NRF. Although regulation ensures a higher level of consistency, it has reached this in a decentralised way once more. The Commission's intent to extend its powers through a European authority has failed; on the other hand, NRAs are given an exclusive opportunity to prove that they have the expertise to move on from self-regulation in the ERG to policy-making within BEREC.

5. Conclusion

The previous discussion on institutional reform examined the arguments for establishing a centralised European authority and for the refinement of current institutional cooperation. It concluded that, given its focus and expertise, the strengthening of the ERG is preferred to the European communications authority proposed by the Commission. However, this only seemed to be valid as long as the former regulatory network of institutions prevailed and the new European authority was to be built upon the ERG heritage. Provided that NRA independence is

beneficial for regulators close to the playing field, the answer to market fragmentation, if any, is best given by BEREC. Legal and regulatory certainty should be assured by allowing NRAs to develop best regulatory practice independently from governments, operators and even from the Commission. Once concurring interests emerge between NRAs and the Commission, BEREC is better situated to facilitate an agreement than a centralised authority. Also, investors can rely on the opinion of BEREC which represents the position of the qualified majority of NRAs.

In general, the efforts of the Commission to further strengthen the independence of the NRAs by grouping them under BEREC are welcomed. If NRAs are subject to external influence they may be unsuited to carry out the functions conferred upon them by the NRF. Hence, the guarantees of independence provided for BEREC constitute a significant evolution in regulation. However, some institutional shortcomings of the previous Regulatory Framework have not been addressed adequately under the New Regulatory Framework. Regulatory competition is still not facilitated between NRAs at a desirable level. Neither member states nor the Commission are required to monitor and compare the performance of national regulators. Small NRAs should also be better motivated to experiment and develop best regulatory practice.

The Commission, in line with the principle of accountability, should closely monitor NRAs' performance and independence. When it has doubts concerning the impartiality or appropriateness of the decision, it should first report this to BEREC, which should monitor and report on the electronic communications sector on an annual basis. In doing so, the Commission might better confirm that NRA decisions are not influenced by either politicians or enterprises and remain in line with the common policy objectives. Decisions would be supervised by a body that enjoys wide support from NRAs. Exploiting the regulatory network in such a "name and shame" approach could be an informal pressure while still respecting the independence of NRAs. BEREC is arguably best placed to address performance matters for NRAs via self-regulation. However, if this action proves to be rare the Commission may use the tools otherwise provided for it by community law. Again, the best guarantee of regulatory consistency is the independence of the authority from the government influenced by political considerations, from private enterprise and, sometimes, from the Commission, which could be ensured with the monitoring and assistance system referred to above.

Whilst all NRAs should strive to implement practices that may finally emerge as the best, the experienced ones, which usually streamline the

policies to be followed, should formally advise the less experienced. Such a practice would not infringe upon the independence of NRAs. Although BEREC provides for a pooling of expertise, NRAs are not directly required but only inspired to seek for the advice of other NRAs. They are required, however, to consult BEREC *inter alia* in accordance with the Article 7 procedures and cross-border disputes. This function of BEREC may be used to assist NRAs seeking for experienced advice. Also, allowing NRAs to have reservations concerning BEREC decisions is welcomed. In the light of regulatory competition, NRAs are encouraged to express and publish dissenting positions on regulatory matters.

In time, BEREC will provide a great opportunity for NRAs to prove their key role in policy- making for the electronic communications sector. Since BEREC is totally independent of the Commission, the latter has not reached the goals it set towards a consistent regulatory approach through a centralised European authority. On the contrary, the NRF recognises the work that NRAs have done in regulating domestic markets and developing best regulatory practice within the ERG. Consequently, NRAs participating in BEREC will be in the spotlight in the forthcoming regulatory environment and should use the chance to further strengthen their position in the sector. It is the responsibility of NRAs to prove that they have gained enough experience to move on from self-regulation to co-regulation or even direct policy- making. If NRAs continue to bear this in mind within BEREC, a centralised European authority will not be able to gain wide support in the Community during the next decade.

The Need for an EU Directive on Access to Justice in Environmental Matters

Attila PÁNOVICS

ABSTRACT *Access to justice in environmental matters is a topic of current relevance and importance – as shown by the developments which have taken place at international level, in particular with the adoption and entry into force of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (hereinafter Århus Convention). Developed under the auspices of the United Nations Economic Commission for Europe (UN ECE), the Århus Convention is widely viewed as the foremost legally-binding instrument protecting the public's environmental rights.*

The Convention is generally described as having three pillars. The first pillar grants the public the right of access to information, the second deals with public participation in decision-making, and the third provides for access to justice, i.e. the right to recourse to administrative or judicial procedures to dispute acts and omissions of private persons and public authorities violating the provisions of environmental law.

Contributing to the implementation of the Århus Convention, several legal instruments have been adopted by the EU since 2003. The European Parliament has supported the European Commission's proposal on access to justice also, but progress on this proposal has stalled in the Environment Council. It does not seem likely that this directive will be adopted at any time soon, thus raising doubts as to whether full implementation will ensue.

1. The importance of access to justice in environmental matters

It is generally supposed that public participation in environmental decision-making, through consultation processes, for example, can lead to better decisions as a wider range of considerations may be taken into

account.[1] Additionally, public participation methods improve the legitimacy of decision-making as, *inter alia,* the participation of citizens can potentially make decisions more democratic.[2]

Given the problems involved in defining a substantive environmental right, it might seem preferable to concentrate on procedural (or participatory) rights. It avoids certain problems in attempting to set appropriate standards to be maintained through some substantive right, which inevitably involves subjective value judgments.[3] The procedural dimensions of an environmental right, provided as constituent provisions of wider international agreements, have become common, whether they are related to the right to information, the right to participation in decision-making, or the right to a remedy for environmental harm. They have received widespread international support in recent international, and many regional, environmental law treaties.[4] Additionally, they are recognised and incorporated into the working practices of some international organisations such as multilateral development banks.[5]

Laws and regulations are of minor importance when they are not observed. Monitoring and enforcement are, therefore, essential for a sound environmental policy.[6] Public participation can be an effective tool in enforcing environmental policy. Citizens and their organisations can serve as the eyes and ears of specialised monitoring institutions and other state organs. It is important to emphasise that the procedural rights

[1] Richardson, Benjamin J. – Razzaque, Jona: Public Participation in Environmental Decision-Making, in: Richardson, Benjamin J. – Wood, Stephan (eds.): Environmental Law for Sustainability, Oxford, Hart Publishing, 2006, p. 165 et seq.

[2] Ebbesson, Jonas: The Notion of Public Participation in International Environmental Law, Yearbook of International Environmental Law, Vol. 8, 1997, pp. 75-81.

[3] Douglas-Scott, s.: Environmental Rights in the European Union – Participatory Democracy Or Democratic Deficit?, in: Boyle, A. – Anderson, M. (eds.): Human Rights Approaches to Environmental Protection, Oxford University Press, 1996, p. 109.

[4] Turner, Stephen J.: A Substantive Environmental Right, An Examination of the Legal Obligations of Decision-Makers towards the Environment, Kluwer Law International, 2009, pp. 11-12.

[5] Fitzmaurice, Malgosia: Some Reflections on Public Participation in Environmental Matters as a Human Right in International Law, Non-State Actors & International Law, Vol. 1, No. 2, 2002, p. 20.

[6] Manual on Public Participation in Environmental Decisionmaking, Current Practice and Future Possibilities in Central and Eastern Europe, Regional Environmental Centre for Central and Eastern Europe, Budapest, 1994, p. 47.

prescribed by the Århus Convention are not trivial. They offer a genuine opportunity for real participation.[7]

Environmental law challenges established concepts of law. Access to justice in environmental matters is a topic of actual relevance and importance, which is shown by the developments that have taken place at international level. Access to justice is an essential instrument in a democratic society to effectively challenge violations of the law and ensure its enforcement. This is even more valid when breaches of environmental law are involved, since the environment cannot defend itself and needs someone to represent its interests in order to challenge impairments of environmental law in court. Access to justice in environmental matters means giving the environment a voice when it is harmed or due to be harmed.[8] Allowing members of the public to defend the public interest in a healthy environment in court would reflect the ongoing democratisation of modern pluralistic political systems. Increased confidence in public participation as well as broadening access to judicial remedies reflects an expansive notion of democracy, which diverges from the standard liberal approach.[9]

According to the 'standard liberal' notion, standing *(locus standi)* is granted only to subjects with a private interest in a given case. The national legal systems and court procedures are still designed to protect economic interest (property rights, rights to free enterprise) or personal interests, related to the person such as health, freedom of expression or non-discrimination.[10] If only public interests are at stake, the enforcement of rules and the initiation of legal procedures are matters exclusively within the domain of governmental or administrative institutions. Environmental issues simply cannot be reduced to private or public

[7] Bell, Derek: Sustainability through Democratization? – The Aarhus Convention and the Future of Environmental Decision-Making in Europe, in: Barry, J. – Baxter, B. – Dunphy, R.: Europe, Globalization and Sustainable Development, Routledge, 2004, p. 99.

[8] Dette, Birgit: Access to Justice in Environmental Matters: the Aarhus Convention and Legislative Initiatives for its Implementation, in: Ormond, T. – Führ, M. – Bart, R. (eds.): Environmental Law and Policy at the Turn to the 21st Century, Liber amicorum Betty Gebers, Lexxion Verlagsgesellschaft mbH, Berlin, 2006, pp. 79-80.

[9] It provides for a 'reflexive modernization', essentially based on a new conception of risks; see Beck, Ulrich: Risk Society – Towards a New Modernity, Sage Publications, London, 1992, p. 155 et seq.

[10] Prechal, S. – Hancher, L.: Individual Environmental Rights: Conceptual Pollution in EU Environmental Law, Yearbook of European Environmental Law, Vol. 2, 2001, p. 114.

interests, because environmental interests are collective, diffuse and fragmented to a large extent.

Loosening the conceptual dichotomy between private and public interests makes it possible for the public, including citizens or non-governmental organisations (NGOs), to initiate or take part in administrative and judicial procedures concerning the environment. Although there is still a prevailing opinion that civil law basically serves the protection of individual rights, there are strong arguments in favour of providing for the possibility for direct legal action against polluters. Thus, civil lawsuits can play a supplementary role in terms of enforcement in cases where the environmental authorities themselves do not act.

2. The implementation gap in EU environmental law

Under the EC Treaty, the European Commission has the exclusive right to initiate new environmental legal measures at Community level. Suggestions for taking initiatives for new legislative measures come from different sources. From outside the EU institutions, lobby groups, professional organisations, researchers, environmental NGOs and other members of the public may suggest action to the Commission. However, as has already been documented in many other contexts, Article 226 of the EC Treaty provided individuals and NGOs with only a weak form of access to justice.[11]

The deficiency in the implementation of Community/EU environmental law is a recurrent phenomenon. Although the level of enforcement activity cannot be an entirely accurate indicator of levels of compliance, the Commission's annual surveys on the implementation and enforcement[12] of Community environmental law show that a high proportion of all infringement cases investigated by the Commission were in the environmental sector, notwithstanding the sector's small size relative to other policy areas such as agriculture, trade or social policy.

EU environmental policy, as laid down in Article 6 of the EC Treaty, and in particular the objective of promoting sustainable development,

[11] Macrory, R.: The Enforcement of Community Environmental Law: Some Critical Issues, Common Market Law Review, Vol. 29, 1992, p. 367.

[12] Implementation and enforcement of EU measures can be distinguished, although the two are interconnected; see: Horváth, Zsuzsanna: Az Európai Közösség környezeti jogának végrehajtása: a tagállamok kötelezettségei, Európai Jog, 2002/3., HVG-ORAC Lap- és Könyvkiadó Kft., 2002. p. 34.

require European citizens and their organisations to feel involved regarding its implementation. Extension of the right to review procedures to challenge public decisions constitutes one of the classical instruments leading to improved implementation. Where environmental complaints or petitions are not dealt with through administrative procedures, legal action is available as a last resort in solving environmental disputes.

Until now, the concept of a healthy environment in general is not linked to a corresponding direct individual right to a healthy environment that can be enforced in court.[13] Therefore, breaches of environmental law are often not adequately prosecuted. This results in shortcomings in the enforcement of environmental law at local, national and European, as well as at international level – as pointed out for many years. The Dublin European Council of June 1990 stressed that Community environmental legislation would only be effective if fully implemented and enforced by member states. In October 1996 the Commission published its own suggestions to improve the implementation and enforcement of environmental law.[14] On 14 May 1997, in its resolution on the Commission's communication, Parliament called on the Commission to produce and publicise an annual report on progress in adopting and implementing Community environmental law.

The European Commission acknowledged these shortcomings and repeatedly stressed the importance of public involvement in the enforcement of environmental law. For example, the Community's fifth environmental action programme states: "individuals and public interest groups should have practicable access to courts".[15] The Commission's progress report on the fifth action programme pointed out in accordance with the implementation and enforcement of the programme in the Community that there had been no EU action to promote practicable access to the courts for individuals and public interest groups.[16]

[13] Krämer, Ludwig: The Citizen in the Environment – Access to Justice, Resource Management Journal, November 1999, p. 5.

[14] Implementing Community environmental law – Communication to the Council and the European Parliament, COM(96)500 final

[15] See the 5th environmental action programme (EAP) of the European Community, COM(92) 23 final, p. 84.

[16] Towards Sustainability: The European Commission's progress report and action plan on the fifth programme of policy and action in relation to the environment and sustainable development, Chapter 6, Directorate-General XI (Environment, Nuclear Safety and Civil Protection), European Communities, 1997, p. 126.

3. The third pillar of the Århus Convention

On 25 June 2008 the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters[17] was adopted by representatives of 35 States and the European Community at a UN ECE-sponsored pan-European Ministerial Conference[18] in the Danish city of Aarhus.[19] The Convention entered into force on 30 October 2001 and the progress of ratification is still relatively rapid.

The adoption of the Convention in 1998 marked a milestone in the development of environmental rights of the public. The whole preparatory period for the Convention was a unique possibility to work together with NGOs, governments and international institutions on an equal basis, and it had demonstrated a great openness for NGO involvement. Indeed, the initial idea of developing a UN ECE convention on the theme was introduced by environmental NGOs at the very first session of the task force that developed the Sofia Guidelines.[20] These Guidelines were adopted at the Third Ministerial "Environment for Europe" Conference in Sofia in October 1995.

The Convention lays down the basic rules to promote citizens' involvement in environmental matters and the enforcement of environmental law. It guarantees environmental rights by implementing Principle 10 of the Rio Declaration.[21] The Convention does not create a substantive right to a clean and/or healthy environment. Rather, it creates procedural rights to assert the 'right to live in an environment adequate to

[17] http://www.unece.org/env/pp/

[18] The „Environment for Europe" process is an ECE-wide cooperation on environmental issues, established following the collapse of communism in Eastern Europe at the end of the 1980s and punctuated by a series of Ministerial Conferences (Dobris, Czechoslovakia, 1991; Lucerne, Switzerland, 1993; Sofia, Bulgaria, 1995; Aarhus, Denmark, 1998; Kiev, Ukraine, 2003; Belgrade, Serbia, 2007).

[19] The text of the Convention is available at <http://www.unece.org/env/pp>.

[20] Task Force on Environmental Rights and Obligations, Geneva, February 1994.

[21] "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making process. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided." (Principle 10 of the Rio Declaration on Environment and Development)

his or her health and well-being'.[22] To have meaning, of course, a substantive right must be accompanied by the ability to seek enforcement of that right.[23] In doing so, the Convention establishes a linkage between practical, easily understandable rights, and the more complex collection of rights included in the right to a clean and/or healthy environment.[24]

Public participation looks beyond basic political participation through periodical elections, and involves three different elements indicated by its title:

- Access to environmental information, without which any further opportunities for public participation are meaningless;
- Tautologously, public participation in environmental decision-making;
- Access[25] to justice, addressing the potential for judicial or other dispute resolution or review in respect of an environmental decision.[26]

The Convention has led to greater transparency and accountability in a wide range of international bodies and processes dealing with environmental issues on which the Parties to the Convention have an influence. A large part of the Convention was built upon existing EU legislation.[27]

The Århus Convention allows for specific requirements that NGOs have to meet in order to obtain the right of access to be retained or introduced by providing that the "public concerned" is to be understood as including "non-governmental organisations promoting environmental protection and meeting any requirements under national law".[28] While it essentially remains a matter for national law to determine what

[22] Århus Convention, Preamble. para. 7

[23] Crossen, Teall – Niessen, Veronique: NGO Standing in the European Court of Justice – Does the Aarhus Regulation Open the Door?, RECIEL, Vol. 16, Issue 3, 2007, p. 332.

[24] Stec, Stephen: Rights and duties towards a healthy environment, in: Stec, Stephen (ed.): Handbook on Access to Justice under the Aarhus Convention, REC, Szentendre, September 2003, p. 75.

[25] Although the term 'right' is avoided, the objective, structure and context of the Convention are right-oriented.

[26] Holder, Jane – Lee, Maria: Environmental Protection, Law and Policy, Text and Materials, Second Edition, Cambridge University Press, 2007, p. 86.

[27] See COM(1996) 344 final, 02.06.1996, p. 3.

[28] See Article 2(5). The distinct role for NGOs is perhaps the most significant innovation of the Convention; see Lee, Maria – Abbot, Carolyn: The Usual Suspects? Public Participation Under the Aarhus Convention, The Modern Law Review, Vol. 66 (2003), p. 86.

constitutes a sufficient interest or an impairment of a right, environmental NGOs are deemed to have an interest in environmental decision-making as well as in the judicial review procedure, sufficient for legal standing. Nevertheless, contrary to the principles established on access to the European Community Judicature,[29] if the entire population in an area is likely to be affected, then all persons may participate and bring the case to review by court.

Whereas paragraphs (1)-(2) of Article 9 concern more specifically access to justice[30] with respect to access to environmental information and public participation in the decision-making procedures of certain specific activities, paragraph (3) thereof addresses access to justice in general. Under Article 9(3) NGOs have the right not only to challenge acts and omissions by public authorities which contravene environmental law, but also act or omissions of private persons that do so.

Article 9(3), in conjunction with the quality requirements of Article 9(4), is among the most challenging provisions of the Convention. Especially Article 9(3) appears to be the most complicated element within the EU and other Parties of the Convention. Difficulties arise regarding the interpretation of the provision, and the diversity of systems where this provision is supposed to apply.

The difficult negotiations on Article 9(3) and the discussion on its scope show the importance of this provision.[31] According to the Implementation Guide to the Convention, Article 9(3) has been introduced to give citizens standing to go to court or to another review body to enforce environmental law.[32] Such access is to be provided to members of the public "where they meet the criteria, if any, laid down in (...) national law." In other words, the issue of standing is primarily determined at national level, as is the question of whether the procedures

[29] The European Community Judicature has adopted a double standard on standing which is stricter than in the EU Member States; see Pánovics, Attila: The 'Paraquat' Cases – Why is Article 230 EC Interpreted against European Environment Protection Organisations?, JURA, Vol. 13, No. 2, 2007, pp. 122-132.

[30] In the wording of Article 9(2) this means „access to review procedure before a court of law and/or another independent and impartial body established by law". While the provision focuses at courts and judicial procedures, it is not against Article 9(2) that administrative remedies be exhausted before a judicial review takes place.

[31] See http://www.unece.org/env/pp/a.to.j.htm

[32] Stec, Stephen – Casey-Lefkowitz, Susan: The Aarhus Convention, An Implementation Guide, United Nations, New York and Geneva, 2000, p. 130.

are judicial or administrative.[33] The wording as it now stands became so vague during the last negotiation round of the Convention.[34]

4. The 'Aarhus package'

The signing of the Convention by the EC reaffirmed the objective of stepping up the involvement of European citizens and their organisations in environmental matters, with a view to encouraging them to participate more fully in conserving and protecting their natural environment and, thereby, promoting sustainable development in Europe.

The Community adherence to the Convention was accompanied by a declaration whereby it admitted that its legal instruments in force did not cover fully the implementation of the obligations resulting from Article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2(2)(d) of the Århus Convention. The Community also declared that its member states[35] were responsible for the performance of these obligations at the time of approval of the Convention by the Community and would remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopted provisions covering the implementation of those obligations.[36]

A decision issued on 16 June 2006 by the Compliance Committee of the Convention provided a first interpretation of Article 9(3) and related provisions of the Convention.[37] The Compliance Committee differentiated between Article 9(2), which refers to 'members of the public concerned', and Article 9(3), which refers to 'members of the public', and completed the analysis of Article 9(3) by interpreting the expression "the criteria, if any, laid down in national law". The Compliance Committee indicated that, while the Convention does not

[33] Wates, Jeremy: The Aarhus Convention: A New Instrument Promoting Environmental Democracy, in: Cordonier Segger, Marie-Claire – Weeramantry, Judge C. C. (eds.): Reconciling Economic, Social and Environmental Law, Martinus Nijhoff Publishers, 2005, pp. 401-402.

[34] Zschiesche, M.: The Aarhus Convention – More citizens participation by setting out environmental standards?, elni Review, 2002/1, p. 28.

[35] All EU Member States are now Parties to the Convention, except Ireland.

[36] http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13&chapter=27&lang=en

[37] ACCC/2005/11 (ECE/MP.PP/C.1/2006/4/Add.2, par 35)

require states "to establish a system of popular action ("actio popularis") in their national laws", the Parties "may not take the clause (...) as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organisations from challenging acts or omissions that contravene national law relating to the environment".[38]

The Convention also requires that the procedures created provide adequate and effective remedies, and be fair, equitable and timely.[39] The requirement for 'adequate and effective remedies', including injunctive relief 'as appropriate', is likely to be relatively straightforward for EU Member states, although the availability of interim relief provokes consistent concern in an environmental context. If the environmental resource at issue has been destroyed by the time litigation has been completed, the litigants win a somewhat empty victory.[40]

The standing of environmental NGOs is a crucial aspect of the Convention. The function of legal standing rules is to determine who can initiate judicial review, thereby rationing access to scarce judicial resources and determining the distribution of decision-making powers in the relationship between courts and administrative authorities. Among the numerous possible ways to qualifying standing, two extreme positions can be identified:

- A restrictive approach, meaning that a person has standing only in cases which concern him or her directly and privately in a very narrow sense;
- A more generous, expansive approach, where *locus standi* does not depend on the connection between the subject and interest pursued at all (i.e. an *actio popularis*).

The EU Member states are found somewhere between these two positions, but there has been a general – albeit slow and heterogeneous – tendency among them to move from the first position to the latter in cases concerning the environment.[41] EU Member states belong to different traditions with some of them granting broad access to justice (including

[38] See Andrusevych, Andriy – Alge, Thomas – Silina, Mara: Case Law of the Aarhus Convention Compliance Committee (2004-2008), RACSE, Lviv, 2008, p. 43.
[39] Article 9(4)
[40] Lee, Maria: EU Environmental Law: Challenges, Change and Decision-Making, Hart Publishing, Oxford and Portland, Oregon, 2005, p. 161.
[41] Ebbesson, Jonas: Access to Justice in Environmental Matters in the EU, Comparative Environmental Law & Policy Series, Vol. 3, Kluwer Law International, The Hague, London, New York, 2002, p. 24.

actio popularis that gives the possibility to everybody to act in favour of the environment); others have a more limited approach. The majority of member states continue to require an 'interest' of the applicant for seeking judicial redress. The question is whether there is a need for the harmonisation of the law of the member states relating to legal standing in environmental cases, and, if the question is answered in the affirmative, what should be the scope and extent of such harmonisation?

On 24 October 2003 the Commission adopted a "package" of three legislative proposals to align Community legislation with the requirements of the Århus Convention. The 'legislative package' consisted of three different proposals:

- Proposal for a Regulation of the European Parliament and of the Council on the application of the provisions of the Convention on Access to information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies,[42]
- Proposal for a Council Decision on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision making and access to justice regarding environmental matters,[43]
- Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters.[44]

The Community has adopted secondary legislation with a view to implementing the Convention with respect to Community institutions and bodies (in the form of a regulation), and with respect to Member states' authorities (in the form of directives[45]). By Council Decision of 17 February 2005 the EC approved the Convention.[46]

5. The proposal for a directive on access to justice

The objective of the proposed directive is twofold: it serves to implement further the Convention and to support the enforcement of environmental rules in the member states. This is a minimum scheme and

[42] COM(2003) 622 final – 2003/0242 (COD)
[43] COM(2003) 625 final – CNS 2003/0249
[44] COM(2003) 624 final
[45] A directive binds the Member States as to the results to be achieved but leaves a margin for manoeuvre as to the specific details of implementation as directives must be transposed into the national legal framework.
[46] See Council Decision 2005/370/EC, OJ 2005 L 124, p. 1.

so a broader approach remains open to the member states, but the Commission proposes to remain within the requirements of the Convention, on subsidiarity grounds. The subsidiarity principle provides strong arguments against extensive harmonisation of the relevant national administrative procedure law in the member states. For example, Article 175 of the EC Treaty does not lay down any kind of general clause obliging member states to adopt measures which will ensure a more effective implementation of environmental legislation, even a national one.

The proposed directive laid down only the minimum requirements for access to judicial and administrative proceedings in environmental matters in order to ensure a better implementation of EU environmental law. These minimum requirements are intended both to promote compliance with the Convention and to harmonise legislation in the EU member states, with a view to preventing situations of inequality between economic operators and administrative authorities. The aims of the proposed directive cannot be achieved – adequately – at national level. The widely varying scope of legal standing, the high costs of legal action, slow procedures and other factors reduce access to justice in the member states. Moreover, national legal systems cannot be considered sufficient because they can not take into consideration the trans-national dimension of many environmental problems.

There almost no Community/EU provisions on access to national courts or to EC courts in environmental matters.[47] The provisions of the proposal require member states to grant members of the public, in particular environmental NGOs, rights of access to specific types of administrative and judicial review procedures in order to challenge acts or omissions by private persons in breach of environmental legislation.

The Draft Directive is complemented by other recent EC measures providing access to justice rights that are more specific in terms of sectoral coverage and/or context. These include Directive 2003/4/EC,[48] 2003/35/EC[49] ('Public Participation Directive') and 2004/35/EC.[50] The

[47] Krämer, Ludwig: EC Environmental Law, Sixth Edition, Sweet & Maxwell, London, p. 159.

[48] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ L 41, 14.2.2003, p. 26.

[49] Article 6 of the Convention provide in its entirety for the granting of legal standing for NGOs in connection with procedures for which public participation is required, particularly under the environmental impact assessment (EIA) and integrated

latest one on environmental liability with regard to the prevention and remedying of environmental damage confers specific rights on private persons to access particular administrative legal review procedures. These procedures are intended to enable such persons to liaise with and hold to account those competent authorities designated by member states to ensure that occurrences of environmental damage or imminent threats of such damage caused by operators of certain activities are remedied or prevented by them respectively.[51] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment[52] does not contain a provision on access to justice as Article 7 of the Århus Convention is not mentioned in its Article 9(2). This question is left to national law.

As well as the consideration of access to justice in specific directives, the Commission has put forward a more general proposal on access to justice in environmental matters, extending beyond activities covered by Article 6 of the Convention. The proposal for a directive on access to justice in environmental matters was adopted by the European Commission on 24 October 2003.[53] The proposal was founded on Article 175(1) of the Treaty and intended to put the third pillar of the Århus Convention into Community law. According to Article 175(1) of the EC Treaty, the European Community is competent to adopt measures to ensure that environmental policy objectives are met. This means that the Community has the explicit competence to introduce, in a general manner, an obligation for member states to implement a right of access to justice in favour of certain persons, especially NGOs, but the provisions

pollution prevention and control (IPPC) directives. In order to provide legal standing within the scope of these directives, the Public Participation Directive added Article 10a to the EIA directive and Article 15a to the IPPC directive; see Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, OJ L 156, 25.6.2003, p. 17.

[50] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143, 30.4.2004, p. 56.

[51] Hedemann-Robinson, Martin: Enforcement of European Union Environmental Law, Legal Issues and Challenges, Routledge-Cavendish, 2007, p. 305.

[52] OJ L 197, 21.07.2001, p. 30.

[53] COM(2003) 624 final – 2003/0246 (COD)

on access to justice in environmental matters should serve to promote and improve environmental protection.

The proposal essentially copies the relevant provisions of the Convention as regards the acts that are susceptible to judicial review. However, the notion of public authority appears somewhat more restrictively defined in Article 2(1)(a) of the proposal compared with Article 2(2) of the Convention.[54] Environmental proceedings are defined in Article 2(1)(f) of the proposal as administrative or judicial proceedings in environmental matters, before a court or other independent body established by law, which are concluded by a binding decision.[55]

One of the most contentious issues is again that of legal standing *(locus standi)*, i.e. the recognition of a sufficient status to bring legal proceedings. The proposal does not require member states to expand the rights of the public – in terms of an *actio popularis* – if they do not wish to do so. A totally open system providing for an *actio popularis* was opposed by the Commission on the ground that this goes further than the Århus Convention.

The proposal distinguishes between legal standing for members of the public and legal standing for NGOs. Individuals have standing if they have a sufficient interest or can maintain the impairment of a right, where the administrative procedural law requires this as a precondition.[56]

The admissibility of legal actions commenced by NGOs is in nearly all member states contingent upon additional standing requirements. The most common are: the NGO acts within the limits of its statute, the interests at stake must be reflected in the statute, the NGO is active in policy areas to which the initiated judicial action relates, a minimum time period of existence of the NGO, it has legal personality, the NGO is a non-profit organisation, it has a certain geographical reach, etc.

As regards *locus standi* for environmental NGOs, the Commission turned to the concept of 'qualified entities'. Although the concept of qualified entities cannot be found in the Århus Convention, there is a possibility for environmental NGOs to become a 'qualified entity'.[57] This

[54] Wennerås, Pål: The Enforcement of EC Environmental Law, Oxford University Press, 2007, p. 108.

[55] Criminal proceedings were excluded in order to avoid any interference with Article 34(2)(b) of the EU Treaty, although there would be good arguments for providing standing for environmental NGOs in criminal proceedings as well.

[56] Article 4

[57] Article 5

term was criticised by several environmental NGOs, mainly because it deviates from the Convention.[58]

Article 8 specifies four mandatory criteria to be met before a body is to be competent as a qualified entity, namely it must:

- Be an independent and non-profit-making legal person, which has the objective to protect the environment';
- Have an organisational structure which enables it to ensure the adequate pursuit of its statutory objectives;
- Have been legally constituted and have worked actively for environmental protection for a period to be fixed by the Member states of up to three years;
- Have its annual statement of accounts certified by a registered auditor for a period to be determined by the member State in which it is constituted.

With regard to the overall objective of the proposal to grant broad access, member states may not interpret these criteria narrowly.

Qualified entities are not required to have a sufficient interest or to show the impairment of a right. They are allowed to claim without any personal interest in the case of an objective breach of environmental law. Environmental law is defined reference to the objective of the law, together with an indicative list of subject matter, including soil protection and biotechnology.[59]

Though some national legal systems require potential appellants to exhaust an interim review procedure before they can access to courts, it is not requested in all member states.[60] In Article 6 the proposal envisages a preliminary interim review procedure as a precondition for the institution of environmental court proceedings.[61] A two-tiered approach is taken to review, involving first notice to the relevant public authority, allowing for reconsideration of the decision, followed by administrative or judicial proceedings. This preliminary procedure is a necessary first step for the applicant to be entitled to institute environmental proceedings according to Article 7.

[58] However, it can also be found in other EU legislation, see for example Directive 98/27/EC of 19 May 1998 on injunctions for the protection of consumer interests (OJ L 166, 11.6.1998, p. 51.).

[59] Article 2(1)(g)

[60] De Lange, F.: Beyond "Greenpeace", Courtesy of the Aarhus Convention, Yearbook of European Environmental Law, Vol. 3, 2002, p. 240.

[61] Obradovic, D.: EC rules on public participation in environmental decision-making at the European and national levels, European Law Review, Vol. 32, No. 6, p. 848.

NGOs meeting the criteria laid down in Articles 8 and 9 will automatically recognised as qualified entities and given legal standing, with no further requirements. Finally, Article 10 sets up general requirements for environmental proceedings. They should be objective, equitable, expeditious and not prohibitively expensive. It is regrettable that the draft directive has not fleshed out in detail the requirement of Article 9(4) of the Convention. In particular, no specific provisions are included concerning financial assistance (legal aid, etc.) or addressing particular procedural requirements that may constitute in practice severe obstacles encountered by private claimants, such as requirements of cross-undertakings in damages in the event of interim relief.[62]

6. The First Reading in the European Parliament and the Opinion of the European Economic and Social Committee

The European Parliament delivered its opinion on the proposal in March 2004.[63] In its first reading, Parliament proposed a number of changes to the draft directive. Most of the amendments intended to bring the proposal more in line with the Århus Convention.

The most important of these relate to broadening the definition of 'qualified entity' to include any association which 'at a given moment is involved in a specific situation requiring protection of the environment in which it is located'.[64] The proposal of the directive does not contain an explicit opening clause. The European Parliament proposed such a clause in its 5th amendment, arguing that the directive should clearly state that it establishes a minimum framework and that member states are free to grant broader access.[65] Such a clause could be important in particular in the context of Article 8 of the Commission's proposal ('Criteria for recognition of qualified entities'). This amendment can be seen as an attempt to include citizen's groupings, as in the first working document of the Commission.[66] However, these groupings would probably not be

[62] Hedemann-Robinson: op.cit., p. 313.
[63] OJ C 103E, 29.4.2004, p. 626.
[64] De Sadeleer, N. – Roller, G. – Dross, M.: Access to Justice in Environmental Matters and the Role of NGOs, Empirical Findings and Legal Appraisal, The Avosetta Series (6), Europa Law Publishing, Groningen, 2005, pp. 209-210.
[65] See Article 1(2)(a) (new)
[66] Working document (11-04-2002), Access to justice in environmental matters (http://ec.europa.eu/environment/aarhus/pdf/aarhus1.pdf)

able to fulfil the recognition requirements set up by Article 8 of the proposal, which remained unchanged.

Parliament also proposed that the amendment insert an additional criterion into Article 8, which reads: '[the entity] must have been advocating activities that do not breach good form and infringe the rule of law'. This requirement would give the member states broad leeway to refuse recognition of NGOs through the very general term of 'good form'.

The definition of 'public authority' in the proposal of the Commission was limited to the public administration of the member states. It did not include natural or legal persons performing public administrative functions in relation to the environment, as in Article 2(2) of the Århus Convention. Parliament proposed to include the Convention's definition of public authorities.[67]

Furthermore, the European Parliament suggested recalling the objective of the Convention, clarifying the mechanisms for access to justice in trans-border cases,[68] and setting up mechanisms which make it easier to go to court,[69] such as financial support for the applicant and information on how and when to institute proceedings as well as on the expected costs.[70]

The European Economic and Social Committee (EESC) also expressed general and specific comments on the proposal in 2004.[71] The Committee tried to indicate and clarify a number of aspects to meet fully the objective of the proposal.

The EESC emphasised that the concept of qualified entity is not found in the Convention, which refers only to 'the public concerned'. Other non-profit organisations, such as trade unions, socio-occupational organisations, social economy organisations, consumer associations, also play an important role in protecting the environment at local, regional, national and European level, and meet the relevant legal requirements for NGOs in each member state.[72] Therefore ,Article 8 should be extended to legal persons of which one of the objectives is to protect the environment.

[67] See Article 2(1)(ii)-(iii) of the legislative resolution (Amendment 6)
[68] See the proposed amendment of Article 5(2)
[69] For example information offices.
[70] Amendments 18-19
[71] OJ C 117, 30.4.2004, p. 55.
[72] See point 3.3.1.1.

As regards judicial actions, the wording of the proposed directive limits environmental proceedings.[73] Criminal proceedings are explicitly excluded.

Despite the fact that, according to the subsidiarity principle, judicial procedures should be laid down in national legislation, the EESC proposed to use the formula laid down in Article 9(5) of the Convention which clearly states that the Parties must provide information about access to procedures and establish 'assistance mechanisms' to remove or reduce financial and other barriers to access to justice in environmental matters. Article 10 of the proposal does not include such a reference - which makes it harder for NGOs with limited resources to have access to justice.[74]

The proposal for a directive on access to justice is still pending before the Community legislature, although its adoption would support the enforcement of environmental law in the member states. A majority of delegates were of the view that the proposal was not desirable at that stage, because a number of issues in the Commission's proposal directly concerned their competences and should, instead, have been left to their own legislation.[75] Many countries considered that the proposal was no longer necessary since most member states had ratified the Århus Convention and these countries were in any case legally bound to meet all of the requirements on access to justice. Several delegations argued also that it had not been shown that the future directive, once adopted, would have an added value and would lead to a better application and enforcement of environmental legislation in the EU.

7. The different approaches of the EU member states

The practical limitations on access to justice are often far more problematic than the legal limitations. Those countries that require subjective rights to be impaired prior to resort to judicial remedies may be reluctant to recognise, for example, the rights of NGOs. Other countries with broader, but less strictly implemented, legal traditions may have no trouble recognising broad concepts of rights.

[73] Article 2(1)(f)

[74] Points 3.3.3. and 4.6.

[75] 9967/05 Council Document ENV 275 JUSTCIV 108 INF 117 ONU 67 CODEC 490, Brussels, 10 June 2005; http://register.consilium.europa.eu/pdf/en/05/st09/st09967.en05.pdf

While environmental protection is recognised as an EC competence under Article 174(1) of the EC Treaty, the creation of common rules on access to justice has important consequences for the way national justice and the courts function – something generally considered to be in the member states' competence as it is an issue of national sovereignty. As a result, member states remain exclusively competent when it comes to access to justice in matters relating to violations of their own environmental laws.[76]

Access to justice has been under discussion within the European Commission for several years. It commissioned a first study on the issue as early as 1991,[77] although at that time there was no political will within the member states to harmonise legal regimes in order to give the public access to justice. At national level, significant developments have taken place since the early 1990s and legislation and case law have evolved considerably in favour of expanding litigation rights in environmental matters. Not only decision-makers but also legal scholars have addressed the issue on numerous occasions.[78] These legal studies have primarily focused on national legal frameworks.

In 2002, an empirical study was commissioned to provide input to the preparation of a proposal for a directive on access to justice.[79] That study

[76] Accessing environmental information in and from the European Community, A practical guide to your right to know, A report by FERN, November 2007, p. 11.

[77] Führ, M. – Roller, G. (eds.): Participation and Litigation Rights of Environmental Associations in Europe – Current legal situation and practical experiences, Frankfurt am Main, Bern, New York, Paris, 1991.

[78] See for example Deimann, S. – Dyssli, B.: Environmental rights – Law, Litigation and Access to Justice, London, Cameron May, 1995; Prieur, M.: Complaints and appeals in the area of environment in the Member States of the EU, Study for the Commission of the European Community, Limoges, 1998; Verschuuren, J. – Bastmayer, K. – Van Lanen, J.: Complaint procedures and access to justice for citizens and NGOs in the field of the environment within the EU, IMPEL Network, May 2000; Stec, Stephen (ed.): Handbook on Access to Justice under the Aarhus Convention, REC, Szentendre, September 2003; Implementation of the Aarhus Convention in the EU Member States, Justice & Environment, 2006 (http://www.justiceandenvironment.org/wp-content/wp-upload/JE2006Aarhuslegalanalysis.pdf); How far has the EU applied the Aarhus Convention?, European Environmental Bureau, 2 October 2007 (http://www.eeb.org/activities/transparency/AARHUS-FINAL-VERSION-WEBSITE-12-07.pdf)

[79] De Sadeleer, N. – Roller, G. – Dross, M.: Access to Justice in Environmental Matters, ENV.A.3/ETU/2002/0030, 2002. The study as well as the country reports can be found at http://ec.europa.eu/environment/aarhus/pdf/accesstojustice_final.pdf.

aimed to assess the current situation concerning NGO access to justice in a certain number of member states[80] and to obtain empirical data on the number of cases brought by environmental NGOs (data were collected for the period 1996-2001).

In order to obtain a comprehensive overview of the different measures adopted or in place in the member states to implement Article 9(3) of the Convention and related provisions, in 2007 the Commission undertook a stock-taking exercise of the implementation by member states of certain provisions of the access to justice pillar of the Århus Convention. The Commission contracted a consultant to prepare a study - which was carried out by (private) national legal experts within a six-month period (February–August 2007).[81] 25 country reports[82] were elaborated and the related final reports became available in September 2007.[83] The Commission had requested the member states concerned and other stakeholders to issue their comments and opinions concerning possible inaccuracies in the reports, as well as any relevant developments – either recent or to be expected in the near future – with the aim of drawing an objective picture on the implementation status of the Convention's third pillar.[84]

The study was based on four major elements of access to justice: legal standing, the effectiveness of remedies, the cost and length of procedures and transparency. The evaluation described the status quo and confirmed that the implementation status of the access to justice' provisions of the Århus Convention differs widely among member states. It classified the 25 member states in four categories ('good', 'satisfactory', 'could be better', 'unsatisfactory') and provided a table which showed that almost all countries had problems in at least one of the essential elements for the implementation of Article 9(3) of the Convention and related provisions.[85]

[80] Belgium, Denmark, France, Germany, Italy, Portugal, United Kingdom and the Netherlands.

[81] Of course, the views expressed in the national reports are those of the consultants alone and do not represent the official views of the European Commission.

[82] The study covered all Member States except Romania and Bulgaria, which had not yet joined the EU when the study was initiated.

[83] The findings can be found at the following address: http://ec.europa.eu/environment/aarhus/study_access.htm.

[84] The comments and opinions that have arrived are displayed on the Commission's website: http://ec.europa.eu/environment/aarhus/study_access.htm

[85] Summary report, p. 17.

The study found that, in most countries, the general rules for administrative and judicial procedures apply, and only a few member states have specific rules for environmental cases. Administrative review of the administrative acts and omissions is an important and useful step in member states to allow relatively quick and efficient corrections of decisions, but these mechanisms cannot substitute the judicial review as the ultimate recourse.[86] In 20 member states both administrative and judicial remedies are available, five countries[87] only provide for judicial procedures. Moreover, in a few countries, access to criminal courts is a significant means to challenge acts or omissions by public authorities. For example, breaches of environmental law usually are punished with penal sanctions in Belgian law.[88]

Most of the 25 member states recognise that environmental NGOs have a specific function on the environment. Some member states require legal personality of the organisation, which excludes *ad hoc* organisations.[89] This has led to a considerable number of different ways to organise access to justice. These criteria (for example, a democratic character of the NGO, a minimum number of members, or a certain duration of existence) and have been laid down in specific legislation but vary from one member state to another.

The rules relating to *locus standi* are deeply embedded in the respective domestic system of judicial review; they are an expression of basic constitutional concepts and function in the framework of domestic political-administrative and social cultures. Any EU intervention, even if limited to setting minimum standards, would result in a considerable degree of distortion of the established pattern of judicial review of administrative action in the member states.[90] The Milieu study emphasises that the most important element for the overall evaluation of the a national system is legal standing, since if no legal standing is granted, members of the public can hardly have access to justice.[91] If the legal order anchors *actio popularis* for the field of environmental

[86] Ibid., p. 22.

[87] Belgium, Ireland, Malta, Sweden and the United Kingdom.

[88] Lavrysen, Luc: Belgium, in: Kotzé, Louis J. – Paterson, Alexander R. (eds.): The Role of the Judiciary in Environmental Governance, Comparative Perspectives, Kluwer Law International, 2009, p. 101.

[89] Summary report, p. 20.

[90] Rehbinder, Eckard: *Locus standi*, Community Law and the Case for Harmonisation, in: Somsen, Han (ed): Protecting the European Environment: Enforcing EC Environmental Law, Blackstone Press Limited, 1996, p. 162.

[91] Summary report, p. 17.

protection,[92] this can undoubtedly be considered to satisfy fully the requirements of Article 9(3).[93] The narrowest interpretations only permit those bodies directly affected to take action.[94] In some countries, specific acts have been simply exempted from any challenge.

The costs of procedures are a decisive factor for the effectiveness of the Århus Convention since access to justice may be an illusion in environmental cases too if the costs are relatively high. Administrative cases are typically inexpensive if they do not involve extensive evidence-taking and expert opinion. The importance of judicial procedural costs are fundamentally different from those of the administrative proceedings, because while applicant in administrative processes are typically the (future) polluters, judicial proceedings are mostly initiated by the members of the public.[95] Costs are a major hurdle for access to justice,[96] and the main problem in this respect is the general rule in most member states that the unsuccessful party must bear the costs of the successful party. Such deterrents have multiple impacts on procedures and the development of environmental law. Moreover, the combination of significant length of court proceedings with the restricted or wholly excluded option of achieving an injunctive relief, which leads in practice of "academic victories" (cancelling permits for projects already completed) is in conflict with the Convention.[97]

Another deterrent to bring court action is the fact that such action has, in most member states, no suspensory effect. In those countries, the parties can request injunctive relief or other interim measures. Problems in obtaining injunctive relief have been reported as a major obstacle for effective justice in Cyprus, the Czech Republic, Spain and the United

[92] This possibility was expressly introduced by Portugal that also recognises an individual constitutional right to a clean environment. In Spain, *actio popularis* was introduced only in specific areas of environmental law.

[93] Černý, Pavel: Practical application of the Aarhus Convention in some EU countries – comparative remarks, 2009, pp. 3-4. (http://aa.ecn.cz/img_upload/98a9a0fe3779d35f22dc8d93fe87df89/Access_to_justice_collection.pdf)

[94] Belgium, Germany, Austria and Malta.

[95] Price of Justice – International Comparative Analysis on Costs of Administrative and Judicial Remedies, Justice & Environment, 2009, p. 17. (http://www.justiceandenvironment.org/wp-content/uploads/2009/12/price-of-justice.pdf)

[96] The cost of the procedures was considered to constitute an obstacle in 12 countries, and only Spain and Portugal had specific provisions to ensure that NGOs benefit from legal aid in environmental litigation.

[97] Černý: op.cit., p. 6.

Kingdom.[98] On the contrary, a special injunctive relief procedure is one of the most important means for access to justice available for environmental NGOs in Belgium.

Widespread fears arise that enhanced access to the courts for public interest actions would generate a high number of actions, flooding the judicial system.[99] An analysis of environmental cases brought by NGOs in a number of countries where NGOs have broader standing indicates that this view is not well-founded.[100] Such actions form an insignificant proportion of the overall case load and are far more successful on average then other cases taken before the judiciary. These data emphasise the highly focused and targeted nature of the legal proceedings brought by environmental NGOs. Thus, the anticipated flood of claims, the over-burdening of the courts and the disproportionate delay of important (infrastructure) projects caused by public interest groups must be seen as empirically disproved.[101]

8. Conclusions

The Århus Convention is innovative not only in highlighting and furthering the notions of access to environmental information, participation in decision-making and access to justice in environmental matters. It also penetrates into issues previously perceived as parts of the national *domaine réservé*. Governments as Parties are required by international law to make it easier for members of the public to challenge legally environmental decisions. Respective provisions under EU law increase the pressure to ensure the implementation of this requirement.

By signing the Convention on June 25, 1998 and formally adopting it on February 17, 2005 the EC obliged itself to present adequate legal

[98] Summary report, p. 13.

[99] This may be the outcome when citizen suits are added to public enforcement and is particularly likely if a reward for private enforcement is available; see: Schucht, S.: What can we learn from economics and political science analysis on the efficiency and effectiveness of policy implementation?, in: Glachant, M. (ed.): Implementing European Environmental Policy – The Impacts of Directives in the Member States, Edward Elgar Publishing Limited, Cheltenham-Northampton, 2001, p. 36.

[100] Scheuer, Stefan (ed.): EU Environmental Policy Handbook, A Critical Analysis of EU Environmental Legislation, European Environmental Bureau (EEB), September 2005, Brussels, Belgium, p. 164.

[101] Access to Justice in Environmental Matters: The Crucial Role of Legal Standing for Non-Governmental Organisations, Statement No. 5, German Advisory Council on the Environment (SRU), February 2005, p. 18.

instruments for implementing the provisions of the Convention. Major steps have been taken in recent years by the European Community in order to align its legal framework with the obligations resulting from the Convention. Important provisions with regard to access to justice have been adopted as well, but there is still a need for the adoption of further legislative measures to meet completely the objectives laid down in the Convention.

A number of legislative texts were adopted or are under preparation in EC environmental law, but further measures are necessary to adopt completely the provisions of the Convention. Of these instruments, only the proposal for a directive on access to justice has not yet been adopted. Without this directive, neither the European Community, nor member states can be considered to be in full compliance with the Convention's requirements.

Environmental law suffers more than any other field of law from shortcomings in its implementation and enforcement. These shortcomings would require court intervention, if they are not remedied by executive regulation. The directive on access to justice proposed by the Commission as well as the already adopted Community measures could empower European citizens and their organisations to assume responsibility for the environment. The implementation and enforcement deficit of environmental rules in all member states can justify further harmonisation of national administrative procedural law. The result would be the improvement of the level of environmental protection in all member states.

From an EU perspective, the competence of the EU to introduce a right of access to justice for the members of the public (individuals and/or NGOs) is limited to matters concerning the implementation of EU legislation,[102] but even a relative improvement of the state of the environment is very important. Moreover, since the environmentally less conscious member states are normally those in which implementation and enforcement deficits are the greatest, arguably one can expect the most important improvements in these countries.[103]

The lack of an access to justice directive obviously means that the EU has a major problem of non-compliance with its obligations under Article

[102] Epiney, Astrid: Division of Competence between Member States and the EC, in: JANS, Jan H. (ed.): The European Convention and the Future of European Environmental Law. The Avosetta Series (I), Europa Law Publishing, Groningen, 2003, p. 49.

[103] Rehbinder: op.cit., p. 163.

9(3) of the Århus Convention. A new directive would enable national courts to play their full role in ensuring the effectiveness of EU environmental law by enforcing the rights it grants to individuals and NGOs. The directive on access to justice would remind national courts that European citizens and their organisations do have a role to play in encouraging the application and enforcement of EU environmental legislation at member state level.[104] The Commission's proposal on access to justice proves that despite of the diversity of approaches, common approaches are at hand as well. Be it on a fairly abstract level, these may indicate the existence of general principles of EU environmental law, to be applied to the member states.

It is obvious that EU member states have a long way to go to achieve conformity with the letter and the spirit of the Convention, namely the legal standing of the members of the public as well as efficiency and scope of court review. The proposal had some aspects, which could be seen as the lowest common denominator with regard to public interest actions.[105] It is true that the proposed directive would not broaden litigation rights in some member states. In addition, the requirement for a pre-registration process could end up as a drawback for many NGOs in member states where these conditions do not exist. In other countries, however, the proposal would represent a major improvement with regard to public interest rights in environmental matters.[106]

As an aid to its policy-making on the subject, on 2 June 2008 the Commission organised a conference titled "The Aarhus Convention: how are its access to justice provisions being implemented?" to discuss the findings of the study, and take stock of the state of play with respect to access to justice at member state level, as well as possible next steps, initiatives and the most appropriate course of action in this respect.[107] Four groups were invited to participate in the conference which comment and react to the findings of this study in order to obtain a complete picture of the issue: representatives of EU member states, Community institutions, NGOs and other stakeholders.

In 2008 the Commission promised to consider the outcome of this debate when determining what would be the most appropriate course of

[104] Grant, Wyn – Matthews, Duncan – Newell, Peter: The Effectiveness of European Union Environmental Policy, Macmillan Press Ltd., 2000, p. 85

[105] Miriam Dross: Access to Justice in EU Member States, Journal for European Environmental & Planning Law (JEEPL), Vol. 2, No. 1, January 2005, p. 30.

[106] De Sadeleer – Roller – Dross: op.cit., p. 210.

[107] See http://ec.europa.eu/environment/aarhus/conf.htm

action to select in this area.[108] The representative of the European Commission declared that the top priority for the Commission was to promote awareness of the access to justice provisions of the Convention and to formulate EU legislation in this area, as well as to establish solid and efficient procedures guaranteeing procedural rights of the public.[109] The Commission is aware that access to justice for citizens or environmental NGOs through the national courts is not always available and that environmental complaints often have to be made directly to the Commission itself. It plans to look closely at the possibilities of either getting the proposed directive adopted as is, or of making necessary modifications.

Following the entry into force of the Treaty of Lisbon on 1 December 2009, the Parliament and the Council had to decide on proposals presented by the Commission on the basis of the Treaties, before that date.[110] The Commission has drawn up an indicative list of the pending proposals it presented before the entry into force of the Lisbon Treaty.[111] The proposal for a directive on access to justice, which incorporates the relevant provisions of the Århus Convention., is still pending before the EU legislature. To date, no progress has been made since the first reading in the European Parliament in March 2004; the proposal for the time being has not been further negotiated in the Council since access to justice is a very sensitive question for some member states. The Environmental Council seems unwilling to formulate its Common Position in response to the Commission's proposal. In order to make the system of legal protection established by the EC Treaty more operative, it remains crucial for the Council to adopt the proposed directive on access to justice.[112]

Until the adoption of the directive, the European Union's legal instruments in force do not fully cover the implementation of the obligations resulting from Article 9(3) of the Convention. The new European Parliament should call upon the Council to do so without

[108] Aarhus Convention Implementation Report, European Community, SEC(2008) 556, Brussels, 7 May 2008, p 28. (http://ec.europa.eu/environment/aarhus/pdf/sec_2008_556_en.pdf)

[109] Access to Justice in Environmental Matters, European Communities, 2009, p. 18 (http://ec.europa.eu/environment/aarhus/pdf/conference_summary.pdf)

[110] COM(2009) 655 final/2, 2.12.2009

[111] See Annex 4 of the Communication

[112] Pallemaerts, Marc: Compliance by the European Community with its Obligations on Access to Justice as a Party to the Aarhus Convention, An IEEP Report for WWF-UK, Institute for European Environmental Policy, June 2009, p. 45.

further delay, in view of the favourable opinion expressed by Parliament on the Commission's proposal six years ago.[113]

[113] The directive was planned to be implemented by 1 July 2006 at the latest; see amendment 23 of the EP's first reading.

Regulatory Instruments for Digital Broadcasting Systems

Gábor POLYÁK

ABSTRACT *One of the main objectives of media regulation is to protect human rights and other constitutional values which collide with the freedom of opinion; the other is to support the development of the media system. The protection of personal and community interests makes some limiting of the freedom of speech necessary, while the regulations relating to the development of the media system are basic conditions for freedom of speech. This essay – which is a summary of wider research by the author – outlines the regulatory tasks for the development of media systems and for certain instruments suitable for carrying them out. Further, it examines the relationship between the instruments of traditional media law, of telecommunication (electronic communication) regulation, and of competition law. The essay summarises the regulatory problems of market entry, "must carry" and "must offer" obligations, access under Electronic Communications law, content packaging, other 'bottlenecks' of digital broadcasting, as well as media concentration. Its main focus is the application of those instruments to the digital media sector.*

The freedom of the media means, in each case, responsibility - and not only in the sense that the content provider is responsible for certain media messages in general, but also in the sense that practising media freedom inevitably influences the political, cultural and social processes, its impact on opinion- and value-forming. All of those who join the system of mass communication as active participants have to see the social weight of their activities very clearly. However, their social responsibilities are obviously not independent of the conditions laid down by the technical and economic circumstances and from the relationship of the audience to the particular medium. The digital media system expands these responsibilities to all of those actors in the of mass communication process who (as a programme transmitter, a platform provider or a provider of digital administrative services) define the composition of the content offer with their decisions.

One of the main objectives of media regulation is protecting the rights of individuals and communities which collide with the freedom of opinion and expression; the other lies in forming the media system. The protection of personal and community interests makes some limitation of freedom of speech necessary, while the regulations concerning the forming of the media system are basic conditions for realising freedom of expression. This regulation is 'constitutive'[1] as it serves the practice of freedom of expression by providing the conditions for the functioning of the media system. The regulation serving the establishment of the media system aims 'to provide the opportunity for communicative evolvement for every participant'; the subject of the protection of this regulation is 'the method of society's communicational supplement'.[2]

Due to the need for gradual adaptation to the technical and economical environment, the establishment of the media system is a rapidly changing area of media regulation. This essay summarises the achievements of wider research into this field of regulation.[3] The objective of the research was two-fold. On the one hand, it wished to outline the regulatory tasks involved in establishing the media system and specific instruments suitable for handling these. On the other hand, it wished to examine the relationship between the instruments of traditional media law, of telecommunication (electronic communications) regulation, of the regulation of information society services, and of competition law - all in the interest of identifying those regulatory instruments which will be suitable for fulfilling the expectations of constitutional and European law relating to media regulation. It has attempted to give 'technology-neutral' and 'media political-neutral' answers to the regulatory problems.

[1] Gersdorf, Hubertus: Medienordnungsrecht. In: Eberle, Carl-Eugen – Rudolf, Walter – Wasserburg, Klaus (ed.): Mainzer Rechtshandbuch der Neuen Medien. C. F. Müller Verlag, Heidelberg, 2003. p. 84.

[2] Hoffmann-Riem, Wolfgang: Regulierung der dualen Rundfunkordnung. Grundfragen. Nomos Verlagsgesellschaft, Baden-Baden, 2000. p. 97.

[3] Polyák, Gábor: A médiarendszer kialakítása. A piacra lépés és a hozzáférés alkotmányjogi, közösségi jogi és összehasonlító jogi elemzése. [Establishing of Media System. Constitutional Law, European Law and Comparative Law Analysis of Market Entrance and Access] HVG-Orac, Budapest, 2008

1. Starting points

Legislators have great latitude for implementing the constitutional media regulatory objectives defined by the three obligations of diversity, media consumer protection, and a competitive media market; those purposes are also valid for the digital media system. Specifically, the freedom of expression can only serve the plural media system if the audience have the devices and abilities for gaining and using information ('media literacy'), as well as content providers and other market players. In other words, the key elements for realising media policy objectives could be only found in a country with a competitive regulatory environment. There is essential interaction between these purposes, and they ensure together the framework of a media system that guarantees actual choice possibilities between opinions and values.

Generally, diversity can be implemented with the varied combination of instruments ensuring internal and external pluralism. Internal pluralism concentrates on the diversity of the content in each service, whilst external pluralism ensures pluralism through the shaping of the structure of the media system.[4] However, according to the interpretation followed here, the main guarantee of diversity is 'communicational equality'.[5] This equality comes into being through free access to the communication system, which leads to the free competition of ideas, and this competition in itself results in the widest variety in the media system. In this concept, the state has to dismantle any obstacles to access. Nevertheless, this concept does not take into account the fact that free access cannot produce concentrated 'public attention' in every case. Free access cannot guarantee reaching the audience - which might lead to the concentration of public attention. In this case, free access was

[4] E.g. Feintuck, Mike – Varney, Mike: Media Regulation, Public Interest and the Law. Edinburgh University Press, Edinburgh, 2006; Hitchens, Lesley: Broadcasting Pluralism and Diversity. A Comparative Study of Policy and Regulation. Oxford and Portland, Oregon, 2006; Hoffmann-Riem, Wolffgang: Regulierung der dualen Rundfunkordnung. Grundfragen. Nomos Verlagsgesellschaft, Baden-Baden, 2000; Schulz, Wolfgang – Held, Thorsten: Regulierte Selbstregulierung als Form modernen Regierens http://www.rrz.uni-hamburg.de/hans-bredow-institut/publikationen/apapiere/10Selbstregulierungneu.PDF [2009.12.05.]

[5] Never, Henning: Vielfalt per Dekret - Zur Zielkonformität der Positiven Rundfunkordnung aus Wettbewerbstheoretischer Sicht. In: Friedrichsen, Mike – Seufert, Wolfgang (ed.): Effiziente Medienregulierung. Marktdefizite oder Regulierungsdefizite? Nomos Verlagsgesellschaft, Baden-Baden, 2004. pp. 193-214.

not able to ensure that democratic public opinion functioned, since the audience had no real possibility to get to know and consider all opinions. Regulation should, therefore, guarantee that services with the potential for 'attention-concentration' cannot abuse their position and influence public opinion in any biased way..

The freedom of speech of a media system's specific members can, in all cases, only be limited after due consideration of the technical and economic features of the media system and of the attitudes of the public (the media consumers). This, especially, can be concluded from the constitutional law's approach which accepts the subjective freedom of opinion of programme providers and other media market players– followed by the case law of the European Court of Human Rights[6] and the Hungarian Constitutional Court[7] .It can, however, also be concluded from the objective-institutional interpretation of media freedom as followed by the German Constitutional Court's case law.[8]

The national legislative space concerning the development of the media system is also essentially influenced by the freedom of services as the most important basis of media regulation in Community law. Broadcasting is incontestably a service within the terms of the Treaty of Rome, and so national legislation has to take into account Community law principles concerning restrictions to the four freedoms. According to the European Court of Justice, cultural politics, and its component (pluralism) cannot be considered as a public interest-based reason for the discriminatory limitations of broadcasting services,[9] but, as a mandatory requirement, it justifies non-discriminatory restrictions - that is, national regulation relating to the development of the media system.[10]

The digital media system is not only a multi-channel system; it is also a multi-platform system. The space of the competing content-transmitting platforms, which are really able to substitute for each other in respect of some areas of the public, to a great extent is restricted by

[6] At first in the case Informationsverein Lentia v. Austria, 1993.11.24., Ser. A 276

[7] Decision No. 37/1992. (VI. 10.) of the Constitutional Court

[8] BVerfGE 7, 198.; BVerfGE 57, 295.; BVerfGE 83, 238; BVerfGE 87, 181; BVerfGE 90, 60
For the interpretation of the case law see Hoffmann-Riem, Wolfgang: Kommunikationsfreiheiten. Kommentierungen zu Art. 5 Abs. 1 und 2 sowie Art. 8 GG. Nomos Verlagsgesellschaft, Baden-Baden/Hamburg, 2002. pp. 191. and 206.

[9] C-211/91. (Commission v. Belgium)

[10] C-288/89. (Stichting Collectieve Antennevoorziening Gouda); C-353/89. (Commission v. the Netherlands)

the points of view of both constitutional and community e-communication law: if we understand pluralism as an offer of a variety of content which is effectively available to the public, then fulfilling the obligations of pluralism cannot only be defined according to the appearance on certain platforms but with the valuation defined by means of the whole content offer appearing on traversable platforms.

The main feature of the development of the media system in a multi-channel, multi-platform media system is the possibility of access in terms of capacity rather than quantity. Access to the infrastructure primarily means access to the transmitting capacities, but this in itself is not always enough for reaching the audience. Technical and administrative devices and services occur especially on digital transmitting networks to which audience access is certain. Access regulation does not exclusively cover the regulation of capacity-division but it does include all of those regulatory instruments in general whose aim is that restricted access opportunities should not block the development of plural media system. Restricted access opportunities can arise - especially from basically limited capacity, from jurisdiction over the devices and delivery capacities that influence reaching the audience, and from the technical conditions of access. Vertical integration is not an access limitation in itself, but a feature which may possibly aggravate 'bottle-necks'.

The weight of regulation is, therefore, shifted from content providers towards other actors: to those who, basically following their business interests, decide who can reach the media system as 'speakers' - and under what conditions. The platform operators are the subjects of freedom of speech and of media freedom, and, in consequence, limitations to their decisions are necessary and equitable from the constitutional point of view, if, that is, these limitations serve the aim of developing the media system - just as an expansion of a programme service's choices causes a tightening of regulatory latitude related to certain programme services and the extent of the platforms' choices decreases the regulatory burden on the platform operator.

The audio-visual content providers and the variety of service types make the extension and redefinition of the media system's borders unavoidable – taking into consideration the expectations of legal security. It also shows the necessity for the clear and differentiated establishment of regulatory burdens. The differentiation in the regulatory burdens also needs to be valid as far as the regulation relating to 'internal pluralism' is concerned. The limiting regulations which

apply to 'concentration on the marketplace of ideas' should also adapt accordingly.

A significant shift of emphasis is underway in the regulatory devices of the media market towards sector-specific regulation. A narrow understanding of the media law limiting devices that limit still further the economic space of enterprises, and towards the regulation of the operations of the market players by means of the regulation of market entry.

The traditional Media Act's devices are continuously pushed into the background in a multi-channel, multi-platform media system. While competition law complements the devices of media law and can be used in parallel with it, e-communications law implements the exclusive regulations of the relationships in its power. Competition law is exemplary for the regulation of the media both in its viewpoints and methods, especially for the examination of power on the marketplace of ideas, but the use of examples of market definition even to consider defining the force of the regulation is necessary. Further it gives an opportunity to work on and to try new regulatory instruments. The significance of electronic communications is shown by the fact that – considering several related difficulties of interpretation – it can also take over the regulation of the relationship between programme transmitter and content provider, and, with this, defining the usable regulatory devices and conditions for application.

The main elements of the regulatory system outlined in the thesis are the following: The most important devices of the Media Act, the regulation of market entry is easing, private agreements take over the former community law solutions in the regulation of the development of the media system. The regulation primarily concentrates on those 'bottle-necks' that limit access to certain platforms in those media systems that are organized according on a private law basis and can, in this way, endanger the implementation of the regulatory aims. As a result, especially when considering consumer attitudes, it does not result in the total repulse of the regulation ensuring the operating conditions for content providers and pluralism. The media concentration's regulation complements the forming regulation of the conditions of access; the aim is to rectify the damaging effects of the 'attention-concentration appearing on the public side against free access with the regulation of the providers with power in the marketplace of ideas. The legislator has to keep in mind, connected to regulatory devices implementing the fairly uncertain aims of the development of the media

system, that regulatory solutions being optimal in theory is impracticable in several ways in practice and can increase executive burdens, so endangering legal security.

2. Regulatory instruments

2.1 Regulation of market entry and permissions

The regulation of the market entry effectively forms the structure of the media system and the operating conditions of certain providers, as a regulatory Act can only be an effective device of the development of the media system while the state owns such transmitting capacities where the potential to make the enterprises interested in taking extra burdens can be exercised during the process of market entry. This condition primarily appears in the case of terrestrial programme-transmitting capacities, not only because the terrestrial frequency is exclusively in state hands, but because, in the analogue media system, these capacities guarantee economical access for most of the public. The change of the importance of terrestrial capacities leads, at the same time, to a necessary re-evaluation of market entry as a regulatory instrument. This procedure is also strengthened by the EC telecommunications law that restricts the regulatory influencing potential of capacity division.

This re-evaluation means pushing the regulatory device into the background to a degree - if the legislator refuses to allow capacities to reach certain content providers and if he leaves the division of terrestrial capacities to the platform operator - as in other platforms. Constitutional considerations necessitate the conservation of the permission procedure – independently from the mode of the transmission – if, in its absence, the aims of media regulation are not implemented, or if the absence of regulation does not ensure the operations of market entry to be appropriate constitutionally. The selection procedure for market entry is explained by the restriction of capacities, but capacity division is not the only function of content-providing permission.[11] The operation of a licensing system – just as a registration procedure – can also be explained as conducting a previous check of appropriateness, if the state rejects the possibility of capacity division. Preliminary checking is necessary until certain persons, organizations – for example,

[11] Charissé, Peter: Die Rundfunkveranstalungsfreiheit und das Zulassungsregime der Rundfunk- und Mediengesetze. Franfurt am Main, 1999. p. 52.

considering independence from the state and limitation of media concentration – are thought to be excluded from the right to provide programmes and from the opportunity to gain further rights to provide programmes.[12] As in a multi-channel and multi-platform media system, a partial, one-sided service in itself does not cause significant distortion of the marketplace of ideas, and so exclusive conditions are suggested to tighten even more narrowly. The maintenance of the permissions system may be further explained by the requirements of the media system's transparency, especially if the regulation includes such obligations towards certain services that can be violated without any legal consequence. In these cases permission gives the opportunity to practise control and the opportunity to validate justice ultimately.

The re-evaluation of the regulation is less profound where even in the digital media system the legislator maintains the state's right (regulatory agency) for ordering capacities to certain content services. Digital terrestrial capacities are still not available indefinitely; they belong to jurisdiction of the state, and a selection procedure conducted by the regulatory agency does not necessarily mean a reduction of providers' opportunities. From the point of view of constitutional law this solution is not in itself worrying. The German regulation points to the fact that the technical development moves this regulation in such a direction that the selection procedure does not point only to one programme service but even to a service package. In this case the legislator finally retreats from his previous freedom of movement without leaving the election procedure to the platform operator. Finally, practical rather than constitutional considerations lead to where the state does not take responsibility for developing a competitive content offer.

The withdrawal of the regulation of market entry also leads to the consequence that the regulatory authority's ability to define the structure of a broadcasting system and the operating conditions of the providers ends. The Hungarian Broadcasting Act ensures a wide range of possibilities for consideration. The Constitutional Court – then, when it had already so little practical importance – stated that this Act even did not define the minimal frames that would have excluded the opportunity for arbitrary legal practice.[13] However, the wide latitude of regulatory

[12] Kogler, Michael – Kramler, Thomas – Traimer, Matthias: Österreichische Rundfunkgesetze. Verlag Medien & Recht, Wien, 2002. p. 134.; Jürgens, Uwe: Marktzutittsregulierung elektronischer Informations- und Kommunikationsdienste. Baden-Baden, 2005. p. 53.

[13] Decision No. 46/2007. (VI. 27.) of the Constitutional Court

authority with appropriate procedural guarantees can be an effective instrument for establishing the broadcasting system. It makes possible for regulatory authorities to adjust the operations of certain members to the actual conditions of the media market and especially of the marketplace of ideas.[14] The regulation of market entry therefore makes possible the different regulation of each service; this, at the same time, means huge responsibility for the regulatory agency. However, if there is no possibility to differentiate the regulatory burdens at the point of market entry, these burdens have to be arranged with great care for different services and service-types. At the same time, working out such a regulatory system must make possible the regulatory authority's forming of operating conditions for existing services in order to advance 'effective competition on the marketplace of ideas'.

In the digital broadcasting system, the permission procedures move to another element of the value chain, notably the platform operator.[15] The platform operator, that is, the provider of an electronic communications service in terms of signal transmission, basically belongs to the market entry regime of the telecommunication (electronic communications) law. All permission procedures beyond a simple announcement can only be undertaken by the radio frequency division. As platform providers (e.g. digital broadcasting multiplex operators) provide some technical functions not qualifying as an electronic communications service, and are, in fact, editors of programme packages, their regulation extends to the field of broadcasting law.[16] So frequency tenders mean the last implementation point for the regulator in the development of terrestrial platforms. The evaluation criteria applied in this procedure can significantly influence the capacity management opportunities of the platform operator, and the conditions of market entry of content providers as well. Multiplex tenders are important in establishing a digital broadcasting system and the constitutional requirements connecting to the freedom of broadcasting have to be valid during the tender.

Individual permission for market entry for each programme service can also be organised and implemented in a media system based on

[14] See Holoubek, Michael: Die Organisationsstruktur der Regulierung audiovisueller Medien - Typologie und Entwicklungstendenzen. In: Zeitschrift für Urheber- und Medienrecht 1999/10. p. 665.

[15] Communications White Paper, 80.

[16] Schulz, Wolfgang – Seufert, Wolfgang – Holznagel, Bernd: Digitales Fernsehen. Regulierungskonzepte und –perspektiven. Leske + Budrich, Opladen, 1999

private law, but these procedures are not essential. On the one hand, market entry regulation can also be the instrument for defining special requirements imposed on certain programme services adjusting to the constitutional aims of media regulation. Differentiated regulatory requirements ensure the taking into consideration of specific economical, cultural and consumer factors of the given reception area in the digital broadcasting system also. This, in fact, means the division of the public service tasks between the public service broadcasters and the private providers.

On the other hand, the market entry regulation can also serve the market entry of new, mainly free-to-air programmes with a general thematic content. Without regulation for individual market entry – especially considering certain incumbent providers' positions – there is no guarantee that the market forces and the opportunity for free market entry alone would ensure the conditions for such services to enter the market. Therefore, the regulatory intervention would definitely serve the stimulating of the media market competition and the pluralism of the media system. In the multi-platform broadcasting system, the success of this solution depends on whether the regulator can offer something in return for the extra burdens imposed on the selected provider.

2.2 Must carry

According to the "must carry" regulatory model, the platform operator has to reserve a part of the capacity for transmitting programme services defined by the regulator and can manage freely the rest of the capacity. [17] The transmission obligations can be an appropriate regulatory solution to balance the limiting of the platform operator's freedom of programme selection and the constitutional aims of the media regulation, of course depending on the actual rules. It is also suitable for enforcing the universal character of public service broadcasting. The application of these obligations is made possible by

[17] Reinemann, Susanne: Zugang zu Übertragungswegen. Zur Verfassungsmäßigkeit der Ausgestaltung privater Fernsehanbieter zu digitalen Übertragungswegen. Frankfurt am Main, 2002. p. 146.; Marsden, Christopher T.: Pluralism in the Multi-Channel Market. Suggestions for Regulatory Scrutiny. In: International Journal of Communications Law and Policy, 1999/Winter. http://www.digital-law.net/IJCLP/4_2000/ijclp_webdoc_5_4_2000.html [2009.12.05.]

the universal service directive[18], as the only exception from the general methods and conception of the infrastructure regulation laid down in the EC electronic communications law.

According to the universal service directive, "must carry" obligations may be imposed on undertakings providing electronic communications networks used for the distribution of radio or television broadcasts to the public where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcasts. So the concerned platforms – not operators – can be defined in the way that programmes with "must carry" status are available for most of the public, but the introduction of new technologies would not restrict extra burdens. The Hungarian regulatory solution that inflicts different levels of "must carry" obligations on programme transmitters according to their market positions has no constitutional basis, since, if the regulatory aims could be fulfilled by the general obligations charged on each provider, then the wider obligations concerning some stronger provider could not be considered as a proportionate intervention. On the contrary, if the general obligations are not enough by themselves to fulfil the constitutional measure, then the extra burdens have to be extended to all providers.[19]

The proportion of the obligations is determined by the method of tying down the capacities and their extent, the compensation for the programme transmitter – as is the possibility of the re-examination of the obligations.

The transparency of the media service with "must carry" status is fulfilled completely if the law defines the features of these media services according to which the existence of "must carry" status can be judged objectively, that is, it can be easily decided from a programme service whether it belongs under the "must carry" obligations. Further condition of the transparency is that the change of obligation contents should not go together with an unpredictable restriction of the transmitting capacities.

It is not clear, if the (German, Hungarian, or even in the Austrian multiplex) regulation, that ties the total or partial division of the

[18] Directive (2002/22/EC) on universal service and users' rights relating to electronic communications networks and services Art. 31; Roukens, Thomas: Weiterverbreitung un der EU heute. In: IRIS Spezial: Haben oder nicht haben. Must-Carry Regeln 2005. pp. 7-23.

[19] Act No. LXXIV. from 2007 on the Broadcasting Signal Transmission and the Digital Switch-over (Dtv.) 26. §

transmitting capacities to legislative or by permission- defined criteria can be seen as a "must carry" obligation at all. On the basis of these regulations it cannot be claimed about any of the broadcasters if it has a "must carry" status. Interpreting these regulations as "must carry" obligations, their accordance with community law is doubtful because they do not define the broadcasters in question with sufficient accuracy; they do not make the extension of the obligations clear for the programme transmitter. The directive does not give directions on the measure of 'definiteness' of media services with "must carry" status, and so thus the wide consideration of the programme transmitter does not necessarily exclude the fulfilment of this obligation, especially if the Act defines the size of the transmission capacities in question and there is provided for the settlement of disputes between the programme providers and the programme transmitters an appropriate form and procedure. Nevertheless, this solution is definitely worrying from the point of view of the transparency and the clearness of norms. If we do not interpret these Acts as "must carry" obligations, then accordance with Community law is missing because such access obligation can be set according to the electronic communications law only with the decision of the regulatory agency and on the basis of a market analysis. The constitutional aims of the media regulation do not make instructions for these obligations indispensable either. The more effective solution of the aims following these regulations is the guarantee of equal opportunities – although they are also worrying from the community law point of view. Nevertheless, the properly formed "must carry" rules are able to ensure the realization of the constitutional aims of media regulation without further regulation concerning the capacity division.

The media services with "must carry" status shall be appointed where they are necessary to meet clearly defined general interest objectives.[20] According to the case law of the ECJ[21] 'general interest objectives' can be called with great certainty the objectives, that can establish the non-discriminatory limitation of the freedom to provide services as 'provisions which are justified by imperative reasons relating to the public interest'. Not only public service broadcasters can obtain "must carry" status, but, considering the aim of the regulation, it is only reasoned to extent the "must carry" obligations onto programme

[20] Directive (2002/22/EC) on universal service and users' rights relating to electronic communications networks and services Art. 31

[21] C-250/06. (United Pan-Europe Communications Belgium SA v. Belgium)

services with controllable programme content obligations; those services are taking part in implementing the constitutional objectives of media regulation by taking up extra burdens comparing to other services.[22] The Hungarian regulation does not meet this condition. In generally, there are still such contents in the digital media system that would probably not reach the public without regulatory support. This regulation is necessary because of the role of these contents in the establishing the plural media system from constitutional side and because of the weaker negotiating position of these content providers from economic side. The function of the must carry rules can be therefore probably the ensuring the appearance for these, local, not-profit parts of the content services.

"Must carry" rules can also support the market entry of new broadcasters. By guaranteeing access to all platforms charged with "must carry" obligations these are the only effective regulatory instruments to make the legislator able to 'reward' the undertaking of extra content burdens. This regulatory solution makes the must carry obligations as an important instrument for ensuring the public function of the media.

2.3 Must offer

This regulatory instrument should be emphasized because this is the only media regulation instrument that adds to the vivification of the platforms' competition, and it moves forward the opportunities for accessing other content services with the support of the extension of the capacities. In the legal practice of competition law, the "must offer" obligation can be applied in the case of the vertical integration, that is, the broadcaster in question should provide services on the programme transmission trade as well.[23] The media regulation objectives can also explain the wider state of "must offer" obligations independently from the vertical integration in order to ensure the choice of content on each platform, to encourage the competition of platforms and to ensure the variety of content offer with this directly. In the first case, the platform operator can only stand up with such a demand against those content providers who have to justify internal pluralism. For implementing the second objective, the "must offer" rule has to be extended to the most

[22] Ibid.

[23] See C-241/91-C-242/91. (Magill); C-7/97. (Bronner)

popular programme services. With appropriate regulatory solution, programmes with internal pluralism obligation will be the most popular programme also. In a multi-platform media system, "must carry" and "must offer" rules can ensure together that the determined content reaches the audience.[24]

2.4 Capacity division under the electronic communications law

Media law is more and more out of reach of the platforms' access regulation, but meanwhile the opportunities and conditions of access are defined by competition law and especially by electronic communications law. In competition law, access obligations can be ordered in cases of vertically integrated broadcasters and in every case against a platform operator with a dominant position.[25] Telecommunications law leaves a relatively narrow space for the member state's legislator for the regulation of the relations among the content providers, the programme transmitters and the platform operators. Community law's regulation can significantly influence the capability of the broadcasting law for implementing the aims of the media regulation that entitles the broadcasting regulatory agency to accept the cultural and language variety within its authority and to unensure the implementation of policies advancing media pluralism.[26] This gives opportunities for considering the aims of the media regulation either in defining the markets wanting "ex ante" regulation or in the instructions of the obligations used by the regulatory agency.

The European e-communications regulation interrupted questions related to the regulation of the media when the European Committee defined the 'broadcasting transmission service, to deliver broadcast content to end-users' as a wholesale market susceptible to ex ante regulation. Considering the regulation in force, a serious interpretational question occurs that the actions usable in a wholesale trade situation are built on 'access' according to the definition of 'access' it can be exclusively asked for delivering electronic broadcasting service, not

[24] Valcke, Peggy: Die Zukunft der Weiterverbretungspflicht. In: IRIS Spezial: Haben oder nicht haben. Must-Carry Regeln 2005. p. 37.

[25] Irion, Kristina – Schirmbacher, Martin: Netzzugang und Rundfunkgewährleistung im deutschen Breitbandkabelnetz. In: Computer und Recht 2002/1. p. 62.

[26] Directive (2002/19/EC) on access and interconnection Art. 8.

content service;[27] the related of case law of the German regulatory agency supports the existence of the interpretational concerns.[28] Although the committee's offer, the re-examination of 2007, does not order the broadcasting transmission market into the market which needs ex ante regulation, but its reason is not these worries, but the re-evaluation of the opinions of broadcasting law. In parallel, the suggestion related to the modification of the EC telecommunication law extends the meaning of access, and so the aim of access is not only to provide an electronic broadcasting service but to offer services connected to the informational society or broadcasting content services. By accepting this suggestion, the community legislator would acknowledge that the authority of the electronic communications regulation also covers the relationship between the programme transmitters and content providers, and he would also acknowledge directly that the regulation in force does cover this relation as opposed to the interpretation of the committee.[29] The exclusiveness of the telecommunications law is still valid in respect of the regulation of these relations, and the potential of the member states' regulatory agencies has further tightened with the result that and the member states'

[27] See Garzaniti, Laurent: Telecommunications, Broadcasting and the Internet: EU Competition Law and Regulation. Sweet & Maxwell, London, 2005; Ladeur, Karl-Heinz: Rechtsproblem der Regulierung der Entgelte, der Paketbündelung und der Vertragsgestaltung im digitalen Kabelfernsehen. In: Zeitschrift für Urheber- und Medienrecht 2005/1.; Schütz, Raimund – Attendorn, Thorsten: Das neue Kommunikationsrecht der Europäischen Union - Was muss Deutschland ändern? In: MultiMedia und Recht 2002/4.; Weisser, 2003; Wrona, Stephan: Die Entgeltregulierung der der Breitbandkabelnetze. Die deutsche Breitbandkabelbranche auf dem Prüfstand der telekommunikationsrechtlichen Entgeltregulierung. In: Computer und Recht 2005/11. Opposit opinion by Roßnagel, Alexander – Sosalla, Wener – Kleist, Thomas: Der Zugang zur digitalen Satellitenverbreitung. http://www.alm.de/fileadmin/Download/Gutachten%20GSDZ/Gutachten_emr_Satellit.pdf [2009.12.05.]; Christmann, Sabine – Enßlin, Holger – Wachs, Friedrich-Carl: Der Markt für Breitbandkabel in der digitalen Übergangsphase - Ordnungspolitische Herausforderungen für die deutsche Medienpolitik. In: MultiMedia und Recht 2005/5.

[28] BK 3b-06-013/-015/R 15.

[29] Directive (2009/140/EC) amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services Art. 2 1) (a)

agencies can only interfere into these relations with the committee's permission.

Telecommunications regulatory solution based on the method of market analysis and the agency's obligation determination procedure can be set into the basic concept that only those interventions qualify as balanced and constitutional if they are rationalised by the specific features of the medium. In a multi-platform media system, this also means that there is only room for regulatory intervention if the broadcasting transmission market does not fulfil the constitutional expectations because the effective competition is blocked by any of the platform operators with significant market power. If any of the platform operators in its own geographical market is not under competitive pressure by an operator either using the same technology or other alternative technology, then, according to the electronic communications law, it has significant market power (economic power

The electronic communications law's access obligations – not considering any interpretational difficulties – can be determined in such a way that the regulatory agency instructs the application of 'fair' and sensible access conditions.[30] The obligation-determination in this way makes possible the consideration of the special situations and of role-playing, especially in the implementation of pluralism of certain content providers who need access. The regulation does not rule out that the regulatory agency considers the directives of access obligations while determining the access obligations and the effect of the absence of access on pluralism in the media system. The obligation of equality of opportunity – and also the prohibition of discrimination as used in competition law – at the same time is neither an appropriate nor necessary device for the development of the media system.[31] As it cannot ensure access to the platform to those local, community providers that are economically incapable of fulfilling even these equal conditions, their services' content is an important feature of diversity.[32] The objectives of media regulation are served by access based on equality instead of non-discrimination, which makes it possible to consider the individual circumstances of an applicant for access, and it

[30] Directive (2002/19/EC) on access and interconnection Art. 12 (1)

[31] Holznagel, Bernd: Weiterverbreitung und Zugangssicherung beim digitalen Fernsehen. In: MultiMedia und Recht 2000/8. p. 485.

[32] Reinemann, Susanne op. cit. p. 149.; Roßnagel, Alexander – Hilger, Caroline: Offener Zugang zum digitalisierten Kabel – Realität oder Zielvorstellung? In: MultiMedia und Recht 2002/7. p. 448.

ensures access for applicants based on additions to diversity, independently from the economic productivity and attractiveness. The prohibition of discrimination, on the other hand, goes beyond the constitutionally expected limitation by excluding subjective consideration based on the programme content, as it can also ensure access for services whose access could be denied by the programme transmitter based on his programme selection (editorial) freedom. The other electronic communications law obligations applicable on SMPs effectively support the implementation of media regulation objectives.

It is especially a characteristic of the Hungarian regulation of programme transmission that it contains directives that, although, formally, they do not inflict obligations defined in the telecommunications law on the providers, in terms of content, they have effects equivalent to the obligations of the directives, such as fair, reasonable and transparent access conditions, and also the use of prices based on costs.[33] In my opinion, these regulations extend the member states' space ensured by the community electronic communications law, and, in connection with programme transmission, this is fairly uncertain, even if – as the regulations relating to the national regulation do not directly restrict the selection freedom of the platform operator – they are capable of advancing the aims of the constitutional regulation of the media. The Hungarian law regulates the relation between DTT-multiplex operators and broadcasters within the framework of Telecom law's access regulation, without a clear standpoint as to whether or not this is an electronic broadcasting service. In relation to the procedure for frequency division, the member states' regulatory authorities have a wider space to regulate the use of radio-frequencies than other transmitting networks.[34] However, this does not mean that the access obligations prescribed in an Act accord with Community Law.

The e-communications law regulation of the relationship between the programme transmitters and the content providers does not take constitutional considerations into account even if the regulation frequently refers to the consideration of the pluralism obligation. In the end, it leads to a regulatory environment where the state's potential significantly tightens in respect of validating media political viewpoints at the division of programme transmitting capacities. The EC legislator

[33] Dtv. 26. §; 37. §

[34] Directive (2002/22/EC) on universal service and users' rights relating to electronic communications networks and services Annex B Point 1

did not assess the effect of the broadcasting regulation onto the constitutional media regulation. This in itself does not exclude that the telecom law leads to an appropriate environment from the viewpoint of the constitutional media regulation. Nevertheless, this consequence is rather accidental than planned, and it significantly depends on how much the national regulatory authority uses the space given for considering the viewpoints of pluralism and on what frames the Commission provides to it. The relation between the programme transmitters and the programme providers is quiet unfamiliar for the electronic communications law as a whole. The importance of that regulation for the media sector comes rather from the strengthening of the platforms' competitions and from its method of regulation is exemplary for the regulation of the media.

The uncertainty of the borders between the media law and the electronic communications law, the overlap of the regulatory areas in the case law of the regulatory authorities working in the area of media and of telecommunication also lead to uncertainty, and what is finally needed is the re-distribution of authority competencies. One possible solution for this would be the 'integration' of the different authorities. The main reason for Hungary's implementation of this integration is that the latest regulatory steps and concepts shift the regulation of the relations between programme operators and content providers from the area of media regulation to the area of telecommunication regulation. However, the convergence of media and telecommunications authorities is primarily a question of competency, and, secondly at most, a structural one. In consequence, it does not necessarily mean total structural integration. According to Hungarian law, media authority takes part in some procedures of the telecommunication authority as an 'expert agency' and with a compulsory decision competence in media-relevant aspects[35]; the definition of "concerned procedures" is however not appropriate. The integration implemented in the Austrian model that does not cover the level of decision-making could also provide an effective solution.

It is practical to consider that as a final guarantee procedure-, structural-featured solutions can be used during the formation of the organization of the regulatory authority due to the uncertainty of 'pluralism'. Consequently, what comes from the 'inner pluralist's' organizational structure is that pluralism is carried out in the regulatory

[35] Dtv. 10. § (2); 21. § (3); 27. § (2)

authority decisions, since every decision comes from an amalgamation of relevant views.[36] Structural pluralism is only capable of implementing the constitutional regulatory aim if based on real representation (wider than that of parliamentary parties) and does not omit professional views.

2.5 The regulation of content package and content selling

The relation between programme transmitter and content provider is further characterized by a serious contradiction. From one side, the regulation itself, the Committee and the member states' regulatory authorities regularly declare that the connection between the platform operator and the content provider formed for content selling is not transmission-featured. From the other side, however, they continuously fail to consider that these packaging agreements also determine the programme transmitter's decision as to the programme service for which he provides network access. As a result, the objectives and devices of the media regulation and the e-communications regulation blend in such a way that endangers the freedom of the media and due legal certainty.

Both in Austrian and German law, mobile television is the phenomenon that led to the appearance of programme aggregation and platform-operation as a separate service. The Hungarian regulation does not name it as a separate service, and, according to current regulatory conceptions, it will not happen in the future. Nevertheless, there are certain regulations that especially regulate this programme packaging activity of the programme transmitter; e.g. the transmitters shall establish the programme packages in accordance with consumer demands and the principles of reasonability, fairness and transparency, and they have to separate income from content selling from income from signal-transmission services.[37] Moreover, the DTT multiplex operator is allowed to provide a wholesale programme transmission service that, in practice, consists of the simple transmission of programme packages from third providers.[38] The regulation uses the

[36] Ladeur, Karl-Heinz: Einspeisung digitaler Fernsehprogramme – Zur Rechtsstellung von Kabelnetzbetreiber und Programmemveranstalter. Zugleich ein Beitrag Verhältnis von Medien- und Telekommunikationsrecht unter Multimediabedingungen. In: Kommunikation & Recht 2001/10. p. 501.

[37] Dtv. 37. §

[38] Dtv. 8. § (1) c)

opportunities provided by EC telecom regulation, but it is not able to solve the basic contradiction.

The regulatory solution that consequently divides the functions of transmission and content selling in programme-transmission would not violate the European telecommunication law. Furthermore, this is the only way for consequent separation of the regulation of infrastructure and content. In the frame of the latest activity – vertically integrated with an enterprise providing signal transmission or structurally and legally separated – the provider is in connection with broadcasters and other content providers, with transmission network operators and with consumers. The agreement between the telecom law regulation on access to a network with the media law regulation of content package and selling can be avoided with this solution. Content package and content selling should be regulated according to the objectives and frames of constitutional law and to the freedom of service-provision, and in the framework of electronic communications regulation, there is no need to validate foreign points of view.

2.6 Access to the 'bottle-necks' of digital broadcasting

The widening of the media value-chain is a defining feature of digital television with such new services which function as an unavoidable filter between content provider and audience. The access opportunities of the content providers to the conditional access systems, to the application programme interfaces and to the electronic programme guides significantly influence the realization of the equality of opportunity and diversity, and so their development and operation are not simply technical questions.[39] Although electronic communications directives involve the regulations of the services in question, their regulation follows a concept significantly different from the general methods of electronic communications regulation. Community law provides two instruments: the first, the principle of fair, reasonable and non-discriminatory access applied independently from the market; the second, the support of open platforms safeguarding interoperability.[40]

Fair, reasonable and non-discriminatory access is suitable, all in all, for taking into account the individual circumstances of the applicant for

[39] Varney, Eliza: Regulating the Digital Television Infrastructure int he EU. Room for Citizenship Interests? In: SCRIPTed, 2006/June p. 226.

[40] See Directive (2002/19/EC) on access and interconnection Art 5

access and for considering their influence on the development of the plural media system. It is, therefore, an appropriate instrument for achieving the aims of media regulation in relation to technical and administrative digital services and gives a balanced opportunity for a review of the regulation. However, what the conditions demand: 'fair, reasonable, non-discriminatory' - is not entirely clear.[41] The member states' legislator and regulatory authorities have significant responsibility for interpreting these conditions to consider and realize the objectives of media regulation.

The opportunity for access to these services can also be significantly supported without access obligations, if the services are based on open standards known and applicable by the competitors. Open standards are a guarantee of the ability of services to cooperate (interoperability) and the freedom of choice of consumers also. The openness of platforms is an important feature of the development of competition and of the diversity of content, even if the regulation comes with economic risks, and if market experience also shows that the open standard in itself, without the coordination of the market players and the support of the end-user devices, cannot guarantee effective market competition.[42]

2.7 Sector-specific media concentration regulation

The Hungarian Constitutional Court stated in 2007 that 'by realizing the multi-channel market, considering the full radio and television programme offer, external pluralism has been achieved'.[43] From this statement, we could conclude that there is no further constitutional reason to keep the instruments ensuring external pluralism. However, the Constitutional Court has not drawn this conclusion and, in my opinion, it could not be soundly drawn, since this statement was made concerning a media system significantly affected by the regulatory instruments ensuring external pluralism; the Constitutional Court did not examine whether pluralism exists without this regulatory environment. The Constitutional Court confused the regulatory

[41] Feintuck, Mike – Varney, Mike op. cit. p. 226.

[42] Commission of the European Communities: Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on reviewing the interoperability of digital interactive television services pursuant to Communication COM(2004) 541 of 30 July 2004 [COM(2006) 37 final]

[43] Decision No. 1/2007. (I. 18.) of the Constitutional Court

objective with the regulatory instrument in its statement: at the level of regulatory aims, external and internal pluralism cannot be understood as separate objectives. Pluralism and diversity are the characteristics of the media system and the content offer as a whole, and the legislator has latitude for choosing from the regulatory devices serving external and internal pluralism. The Constitutional Court increases the contradictory nature of its decision with the statement that the obligations ensuring internal pluralism are only aimed at those private radios and televisions 'whose opinion-forming power becomes significant'. Therefore, the legislator should define how to identify 'significant opinion-forming power' and restrict the obligation of impartiality to these. Nevertheless, if there are such, and there could be providers with significant opinion-forming power, then external pluralism has not been achieved!

In my interpretation, the main function of the media-specific concentration regulation is to complement access-based media regulation. Although free access to the media system and the transmitting capacities gives a chance for each opinion and value to reach the audience, it cannot ignore the different results of this opportunity in respect of different opinions and values. If the 'attention' of the audience is concentrated to an exaggerated extent on a few content services, then opportunity, based on equal access to the communication system, could not guarantee in itself the operation of democratic public opinion. It did not lead to the result that members of society make up their minds by considering different opinions. Therefore, the application of regulatory instruments ruling out the misuse of significant opinion-forming power by partially influencing public opinion and asserting a greater responsibility to the operation of the public sphere is justified when applied against the 'speaker' who concentrates the audience's attention.

Effective competition on the media market is only a device of media concentration control, but it is by no means its aim.[44] Media concentration control is part of the complex system ensuring the effectiveness of competition in the marketplace of ideas that aims to increase diversity by forming economic relations among media enterprises and by using the structure of the media market. Its method is by defining (in many different ways) the concept of 'power in the marketplace of ideas' which

[44] Knothe, Matthias – Lebens, Julia: Rundfunkspezifische Konzentrationskontrolle des Bundeskartellamts. In: Archiv für Presserecht 2000/2. p. 127.; Feintuck, Mike – Varney, Mike op. cit. p. 92.

necessitate regulatory intervention in the structure or behaviour of media enterprises and by retaining measures against those over-dominant programme providers to protect pluralism and diversity. These measures try to compensate for the excessive weight of some content providers through the strengthening of internal pluralism at these providers. This model is suitable for handling the risks arising from 'attention-concentration' since it guarantees a diverse content offer on channels with the most significant influence on public opinion.

Usually the definition of 'marketplace of ideas' serving as the base for regulatory intervention threshold is already mistaken in the present regulatory solutions: the regulation defines one of the media markets as the basis of the concentration regulation instead of the 'marketplace of ideas' that contains all of the (substitutive) media of information-gathering. As a result, the regulation redirects the 'power on the marketplace of ideas' only to an economic position. However, this position can only refer to the ability of the provider to form opinion indirectly. Market position (measured by audience share, the turnover on some media markets or the number of licenses) is indisputably an important influential factor, but it is certainly not its only feature. Of course, the enforcement of the regulation demands simplicity. If the objective of the regulation is to avert the danger arising from 'attention-concentration', than the adjustment of the measure of 'power on the marketplace of ideas' to audience share seems to be an acceptable starting-point.

The quality of the regulation depends on success in defining substitutable content services taking part in the forming of public opinion with different weights, and on the success of defining the 'intervention threshold' to identify the content-providers with 'dominance' on the whole marketplace of ideas. Against the significant extension of the relevant service-types, it is scarcely believable that providers without television programme service can become 'dominant'. Such definition of the 'marketplace of ideas' makes it unnecessary to maintain separate regulation limiting diagonal (cross-ownership) concentration.

The quality of regulation is significantly influenced by the actions promised against dominant providers in the 'marketplace of ideas'. If the dominant position only rules out obtaining a new licence for a content service or – with the withdrawal of certain licences – it demands the restoration of the ideal market structure as defined by law, then it does no more than weaken the supposed, very remote risk of the

violation of constitutional media regulation by distorting the structure of the media market. In the case of this regulation, the legislator identifies the constitutional risk in an inappropriate number of services and providers. Nevertheless, the digital media system is characterized by the significant extension of the media market, the increasing number of services and providers. Consequently, this risk also weakens significantly without the regulation. In this situation, the proportionate quality, and even the suitability, of the regulation are quite doubtful. However, if other legal consequences are linked to the defined market positions as an intervention threshold, namely those directed towards strengthening internal pluralism in the given service, then ex ante regulation can contribute to ensuring pluralism. This regulation, at the same time, is able to create conditions for identifying those providers with 'significant opinion forming power'; ultimately, its aim is to prescribe obligations aimed at the fewest possible for providing internal pluralism. The obligations can involve requirements concerning content – such as programme time placed at the disposal of a third party, public service duties, the requirement of impartiality, cultural or language quotas – and requirements relating to the structure and organization of the provider. The regulations ensuring internal pluralism do not remove all need for intervention, but they avert the constitutional risks arising from this. As the objective of the regulation is not to limit the dominant position, but to maintain diversity, the banning of the award of new licences as a structural intervention can be disregarded.

Due to the differences in the regulation objectives, general competition law is by no means appropriate for changing media-specific concentration control. Neither from this, nor from the maintenance of specific regulation does it result that the legislator could not rely on the general competition law as a regulatory instrument in establishing a plural media system. Media law instruments can be disregarded in all those problems that can be handled within the frames of competition law.[45] One specific issue is the control of agreements limiting competition and vertical integration. It can also be concluded that several solutions worked out in the practice of competition law have later appeared in media law. In contrast to differences in the regulatory objectives, the sector-specific regulation's methods and concepts approach the methods and concepts of general competition law.

[45] Trafkowski, Armin: Medienkartellrecht. Die Sicherung des Wettbewerbs auf den Märkten der elektronischen Medien. Verlag C.H. Bech, München, 2002. p. 235.

Ferenc Benedek, the Roman law jurist (1926-2007)

Attila PÓKECZ KOVÁCS

ABSTRACT *FERENC BENEDEK, who had a high reputation as a Professor of Roman law both among Roman law jurists in Hungary and abroad,." was one of the most distinguished figures in the history of the Faculty of Law in Pécs in the 20th century..[1] As Vice-Dean and, later, as Dean of the Faculty, he assumed an active role in directing legal education in Pécs in the second part of the 1970s. In addition, he was one of the most significant developers of the library in the history of the University of Pécs. The special library of the Faculty of Business and Economics and the international-level departmental library of the Department of Roman law are the hallmarks of his efforts in this field.*

1. Career

1.1 Studies and early career

FERENC BENEDEK was born in a small village by the name of Ozmánbük in Zala County in the Western part of Hungary on the 30th January 1926. His father, FERENC BENEDEK, and mother, JULIANNA BOGÁR, were smallholders farming their own land, who, by their self-sacrificing work, were able to ensure a good education for their three children, who all went on to obtain a university degree. FERENC BENEDEK attended the Junior Section of the Ferenc Deák Grammar School in

[1] Two Hungarian and one foreign language commemorative books were published by the students and colleagues of Ferenc Benedek in his honour. These were: Hamza, Gábor – Kajtár, István – Pókecz Kovács, Attila – Zlinszky, János (Eds.): Tanulmányok Benedek Ferenc tiszteletére (Studies in honour of Ferenc Benedek), Studia Iuridica auctoritate Universitatis Pécs Publicata 123, Pécs 1996.; Hamza, Gábor – Kajtár, István – Pókecz Kovács, Attila – Zlinszky, János (Hrg.): *IURA ANTIQUA-IURA MODERNA Festschrift für Ferenc Benedek zum 75. Geburtstag*, Studia iuridica Auctoritate Universitatis Pécs Publicata 127, Pécs 2001.; Jusztinger, János – Pókecz Kovács, Attila (Eds.): Jogtörténeti Tanulmányok IX (Studies on Legal History IX) Pécs, 2008.

Zalaegerszeg and the Senior Section of the Saint Norbert Grammar School of the Premonstratensian Order in Szombathely, where he sat his School-Leaving Certificate examinations (the Matura) in 1944. He then studied at the Theological College of Szombathely for one year. He managed to use the knowledge of philosophy and of the Bible gained there very effectively throughout his career. He started his legal studies at the Faculty of Law of the University of Pécs in 1945.[2] In his final year, on the 6th September 1950, he was appointed Student Assistant to Professor DÉNES KISLÉGI NAGY in the Institute for Economics to manage the library.[3] He expressed his profound respect for his later Heads of Department, NÁNDOR ÓRIÁS and DÉNES KISLÉGI NAGY, his Professor of Criminal Law, ALBERT IRK, who gave him a special imprint of one of his books as a gift after he passed one examination with an "Excellent" grade, and his meticulous and exacting Professor of International Law, ERNŐ FLACHBART, who attributed great importance even to the most minute detail. He wrote his degree thesis on Roman law, its topic being *"The forms of land ownership in the Late Republican Period"* In 1951, on completion of his studies, the degree of Doctor Juris was conferred on him, his diploma assessed as *Summa cum Laude*.[4] When he was a law student, the Professor of Roman law in Pécs at that time, NÁNDOR ÓRIÁS, made a considerable impression on him.[5] Following his appointment as Student Assistant, he was appointed as trainee in the Faculty of Law on 23rd November 1950.[6] His appointment was renewed for the academic year 1950-1951 by MIHÁLY KOCSIS, Dean of the Faculty, who assigned him to the Department of Civil Procedure alongside JÁNOS VINKLER, University Professor, for the academic year 1952-1953. His appointment

[2] Kajtár, István: A pécsi jogászprofesszorok emlékezete (In memory of the Professors of Law in Pécs) 1921-1945, Per aspera ad astra. Megemlékezés a honfoglalás 1100. és az Erzsébet Tudományegyetem Pécsre költözésének 75. évfordulójáról (In commemoration of the 1100th anniversary of the Hungarian Conquest and the 75th anniversary of the transfer of the Erzsébet University to Pécs).Ed.: Ferencné Nagy, Pécs 1997, pp. 61-66.

[3] Kislégi Nagy, Dénes: Életpályám emlékei (Memories of my career), Pécs 1981. pp. 7-146.

[4] The number of his diploma is: 42/1950-1951. (issued in Pécs, on 8th June 1951).

[5] Hanc, Gábor – Rozman, András: Interjú. „Nem ültem meg a saját lovasszobrom" Dr. Benedek Ferenc, Professor Emeritus (An interview. "I haven't ridden on my own equestrian statute" Dr Ferenc Benedek, Professor Emeritus), Pécsi Campus, 28th February 1996. p 4; Óriás, Nándor: Emlékeim töredékei (Fragments of my memories), Pécs 2006, p. 197.

[6] Document bearing the signature of Lipót Kauser, Dean; issued under No. 37 in Pécs on 23rd November 1950.

as Assistant Lecturer was signed by the Dean on 28th November 1952. As a young Assistant Lecturer, his responsibilities included teaching of several subjects, and so, apart from holding seminars in Roman law, he also held courses in Economics, Statistics and Civil Procedure since the compulsory workload was ten hours per week in this position at that time.[7] In this way, BENEDEK could, on the one hand, acquire immense erudition, whilst, on the other hand, he could become a direct colleague of the Professor of Roman law, NÁNDOR ÓRIÁS, and of DÉNES KISLÉGI NAGY, who delivered lectures on Economics and Statistics. Due to the extremely low remuneration as an Assistant Lecturer, and despite his heavy workload, he was allowed by the leadership of the Faculty to teach Marxist Economics for a further ten hours per week in the Industrial Section of the Economics Technical Secondary School of Pécs.[8] The beginning of BENEDEK's career bore the marks of the spirit of the '50s, and so he could not avoid the negative impact of that era. Though his work as an Assistant Lecturer was acknowledged, he could not escape the malicious denunciations typical of that time. Upon a motion of the Communist Party of Zala County, his home region, the Minister of Education ordered the Dean, MIHÁLY KOCSIS, to lead an investigation concerning the conduct of FERENC BENEDEK, Assistant Lecturer, and to submit a report of the findings.[9] In this report,it was mentioned by KOCSIS that he had already proposed the dismissal of BENEDEK from the Faculty in the spring of 1955.[10] In his report KOCSIS tried to defend BENEDEK, who had been subjected to investigation on the grounds of his father being a 'kulak' (a wealthy peasant) and an enemy of the people, for his professional and reliable work as a lecturer. However, at the same time he criticised him for having studied at the Theological College, for regularly going to church and for not being engaged in any work for the 'movement'.[11] Finally, DEAN KOCSIS again proposed BENEDEK's dismissal from the University. The answer could not have been

[7] Appointment No. 855-10-7/1954, Faculty of Political and Legal Sciences of the University of Pécs (issued on 20th 1954), bearing the signature of Mihály Kocsis, Dean.

[8] (Faculty of Political and Legal Sciences of the University of Pécs, No. 14-0122/1952-53.) Dean's consent allowing the teaching of Marxist Economics in the Industrial Section of the Economic Technical Secondary School of Pécs, No. 14-5-B/2/1953.

[9] Ref. No. 37/b-1/B-33/1955.

[10] Faculty of Political and Legal Sciences of the University of Pécs, Conf. No. 42/1954/55.

satisfactory for Zala County as, a few months later, following the letter from the Personnel Department of the University, the dismissal of Assistant Lecturer FERENC BENEDEK was proposed again by the District Committee of the Hungarian Workers' Party in Zalaegerszeg. Upon the retirement of NÁNDOR ÓRIÁS in 1955, ALADÁR HALÁSZ was appointed Head of Department of the Department of Roman law, following which BENEDEK organised and held seminars, practical courses and special classes only as a lecturer assigned to the Department of Roman law.[12] It can be regarded as little less than a miracle that he could remain at the University after such an Inquisition! One of the reasons may have been the fact that, in 1956, there had been a change in the person of the Head of Department, since NÁNDOR ÓRIÁS was replaced by ALADÁR HALÁSZ, who, since he commuted from Budapest, was a person of serious influence, and so his Assistant Lecturer could enjoy a degree of protection. FERENC BENEDEK observed the events of October/ November 1956 in a restrained manner; he spent the time on a purely voluntary basis arranging the books of the library of Roman law Seminary. Although his professional work was still needed, which was indicated by the fact that FERENC BENEDEK, Assistant Lecturer, was assigned by the Dean of the Faculty, LIPÓT KAUSER, to deliver lectures on the History of the Hungarian State and Law from 1st April – 15th September 1957[13], he was denied a salary increase as an indication of political distrust. He turned to the Employment Conciliation Committee on this ground on 10th of December 1956. His grievance was found to be well-grounded by the competent forum in its decision forcing the Dean to give him a pay-rise.[14]

[12] Bódy, Zsombor – Cieger, András: „Hagyni kell történni a sorsot" Sólyom Lászlóval beszélget Bódy Zsombor és Cieger András ("Let's let fate happen" Zsombor Bódy and András Cieger talks with László Sólyom), Századvég 2004/1. p. 141.

[13] Faculty of Political and Legal Sciences of the University of Pécs, (Pécs, 1st April 1957), No. 150/1957. (The assignment of Ferenc Benedek to deliver lectures on the history of the Hungarian state and law, Faculty of Political and Legal Sciences of the University of Pécs, (Pécs, 20th September 1957), No. 150/1957. (The revocation of the assignment of Ferenc Benedek to deliver lectures on the history of the Hungarian state and law).

[14] Minutes taken at the hearing held by the Conciliation Committee in the case of Ferenc Benedek on 13th December 1956 (signed by Lóránt Rudolf, Konrád Keszthelyi, Lajos Szilágyi and József Tóth).

1.2 University career until Professorship

He was appointed Assistant Professor by OTTÓ BIHARI, Dean of the Faculty of Political and Legal Sciences of the University of Pécs on 28th May 1960, effective from 1st June 1960.[15] As Assistant Professor, he continued holding seminars for full-time students and optional consultations for part-time students in Pécs. With the help of a State Scholarship, he conducted research on a two-month study trip to Rome in 1961. He was appointed Head of Department of the Department of Roman law, effective from 1st August 1964 upon the retirement of ALADÁR HALÁSZ and from this time on he gave lectures on Roman law to full-time students also.[16] He was appointed Associate Professor by the Deputy Minister of Culture, effective from 1st August 1965.[17] In 1969 he returned for the second time to the "Istituto di Diritto Romano e dei Diritti Orientali", led by Professor VOLTERRA, where he had the opportunity to become acquainted with nearly all of the renowned representatives of highly-regarded Italian research into Roman law. He defended his candidate's degree thesis entitled *"Jogalapnélküli gazdagodás a római jogban (Unjustified enrichment in Roman law)"* in 1969.[18], but, unfortunately, it was never published. From 1971, there was a considerable change in the work of the department when GYULA ÉLES, Assistant Lecturer, significantly helped the Head of Department by undertaking a heavy workload in terms of classes and examinations.[19] In this way, the department had two lecturers again - as in the era before the retirement of ALADÁR HALÁSZ. For the first time in the history of the Faculty of Law in Pécs he established the Scientific Students' Circle of

[15] Faculty of Political and Legal Sciences of the University of Pécs, Dean (Pécs, 1st April 1957), Document No. 206/1959-60.

[16] His appointment as Head of Department was signed by János Molnár, Deputy Minister of Culture, (Document No. 49126/1964/VI.) on 22nd July 1964. For the activities of Aladár Halász see: Benedek, Ferenc: Római jog (Roman law). In: Csizmadia, Andor (Ed.): Fejezetek a Pécsi Egyetem történetéből (Chapters of the history of the University of Pécs), Pécs, 1980. pp. 263-264.

[17] Ministry of Culture, Deputy Minister, Doc. No. 49345/1965. VI. 10th July 1965, signed by János Molnár.

[18] Before defending his candidate's degree thesis he pursued individual studies as an aspirant from 1st September 1961 to 31st August 1964, then took his examinations in Russian Language, Philosophy and Professional Subjects with "excellent" grades in 1963-1964 (see Aspirant Certificate issued by the Scientific Qualification Committee in Budapest on 6th January 1965).

[19] Benedek, Ferenc op. cit. p. 265.

Roman law for students who not only took an interest in Roman law but had a command of Latin and a modern foreign language sufficient for conducting research. Several degree theses were written based on papers originating there and several papers were awarded prizes - including the main prize at the National Scientific Students' Conferences. In the academic year of 1973-74, due to the retirement of Professor LÓRÁND RUDOLF, he delivered lectures on the Law of Obligations within the field of Civil Law.[20] JÓZSEF FÖLDVÁRI, Rector of the University of Pécs, assigned him to lead the Department of Family Law from 1st July 1976 to 30th June 1977. He applied for a University Professorship on 15th March 1978. The Faculty set up a three-member committee presided over by ANDOR CSIZMADIA, University Professor, Head of Department, for the assessment of the application. The other members of the committee were IVÁN FÖLDES and MIHÁLY SZOTÁCZKY, also University Professors and Heads of Department.[21] He was appointed University Professor by KÁROLY POLINSZKY, Minister of Education, from 1st July 1978 to the Department of Roman law of the Faculty of Political and Legal Sciences of the University of Pécs.[22]

1.3 Ferenc Benedek, Professor of Roman law

As Vice-Dean of the Faculty from October 1975 to June 1978, he also played an active role in the public life of the university. He was elected Dean of the Faculty of Law for a three-year term in July 1978. By the time of his tenure, the danger of the Faculty being closed down had been eliminated finally.[23]

[20] Faculty of Political and Legal Sciences of the University of Pécs, Dean, Document No. 50/1973-74.

[21] Item 4 on the agenda of the Faculty Council meeting. Proposal to establish a university professorship at the Department of Roman law.

[22] Minister of Education, Document No. 33.718/1978. VIII., Budapest, 27th June 1978, signed by dr. Károly Polinszky.

[23] Béli, Gábor: Epizódok a pécsi jogi kar történetéből a II. világháború után (Episodes in the history of the Faculty of Law in Pécs after the Second World War). In: Nagy, Ferencné (Ed.): Per aspera ad astra. Megemlékezés a honfoglalás 1100. és az Erzsébet Tudományegyetem Pécsre költözésének 75. évfordulójáról (Commemoration of the 1100th anniversary of the Hungarian Conquest and the 75th anniversary of the transfer of the Erzsébet University to Pécs). Pécs, 1997, pp. 67-70; On the possible termination of the Faculty of Law in Pécs see Bódy, Zsombor – Cieger, András op. cit. p. 140.

After his term of office as Dean, scientific work became his prime interest again, and he was elected to fill several offices in national scientific public life. Furthermore, he began to publish parts of his planned academic doctoral dissertation *"A tulajdonjog petitorius és possessorius védelme a római jogban (Petitorius and possessorius protection of proprietary rights in Roman law)"*.[24] He returned to the Eternal City for a third time in 1982 after the visits in 1961 and 1969. His students often recalled the stories he had told about those months and the atmosphere of small towns that only he could describe with so much enthusiasm in his unique and special style.[25] In the Hungary of the '70s and '80s, which was isolated from Western Europe, for many students in Pécs he was the link to European culture and the spiritual irradiation of German and Italian universities. During the months of his scholarship in Italy, he also paid great attention to establishing a wide range of professional contacts, mainly with Italian, German, French and Spanish jurists of Roman law. Later he managed to make good use of his widespread connections in order to develop the department library, but, unfortunately, his academic doctoral dissertation was never completed, one reason for which, apart from the great expectations imposed on him by himself, was his heavy workload in terms of classes and examinations. In fact, due to the early death of GYULA ÉLES, Assistant Professor, the number of the staff of the department decreased to one again in 1985. He had to start developing the department just as he had done 20 years earlier when he took over the department as a young Associate Professor. His work in this respect resulted in the appointment of JÓZSEF BENCE as a Part-Time Lecturer and ANDRÁS BESSENYŐ as an Assistant Lecturer to the department in the second half of the 1980s. In the meantime, on 24th April 1986 his students who used to be members of the Scientific Students' Circle organized a scientific meeting with the title *"Él-e még a római jog (Is Roman law still alive?)"*, which was also intended to be held in honour of 100-year-old NÁNDOR ÓRIÁS and 60-

[24] Faculty of Political and Legal Sciences of the University of Pécs, minutes taken at the meeting of the Faculty Council held on 28th January 1978, attachment to item 1 on the agenda (Middle-term research plan of the Department of Roman law for the years 1976-1980).

[25] Sólyom, László: Az Alkotmánybíróság hatáskörének sajátossága. Tanulmány és Ajánlás Benedek Ferencnek (The peculiarity of the jurisdiction of the Constitutional Court. Study and Dedication to Ferenc Benedek). In: Hamza, Gábor – Kajtár, István – Pókecz Kovács, Attila – Zlinszky, János (Eds.): Tanulmányok Benedek Ferenc tiszteletére (Studies in honour of Ferenc Benedek) pp. 31-34.

year-old FERENC BENEDEK.[26] At the time of the change of regime, he was the President of the Memorial Plaque Committee, the objective of which was to erect a worthy memorial at the university to the lecturers and students of the Hungarian Royal Elisabeth University who fell in the First World War.[27] From the 1990s, he spent most of his time educating the juniors on the department staff and writing his planned book on Roman civil law. He was always keen on dealing with young jurists of Roman law, as a result of which all the Roman law jurists in Pécs and several others in Hungary regarded him as their master. Unfortunately, time proved to be short for him to complete his planned book on civil law, although he had the parts on the law of property and the law of obligations published.[28] He retired at the age of 70 on 1st January 1996. On this occasion, he was awarded the title of *Professor Emeritus* by the Janus Pannonius University, while his students celebrated his 70th birthday by presenting him with a commemorative book.[29] He never abandoned Roman law, as *Professor Emeritus* he participated even more intensively in teaching and examining students. As a retired Professor, he delivered impressive lectures on Roman law to part-time students. His reliability and working capacity were highlighted by the fact that, between the ages of 70 and 80, he could always hold all his consultation hours and examinations in Roman law on the dates announced months before and never had to be substituted. He did not give up research either, exemplified by his studies on Roman criminal law published in books honouring three of his fellow Emeritus Professors (*tres faciunt collegium*), JÁNOS ZLINSZKY, JÓZSEF FÖLDVÁRI and IMRE MOLNÁR.[30] His

[26] The scientific meeting "*Él-e még a római jog (Is Roman law still alive?)*" commenced in the reference library on the ground floor at 10.30 a.m. on 24th April 1986.

[27] On 10th April 1989 the Memorial Plaque Committee announced a call for donations signed by Ferenc Benedek and László Korinek, lecturers and Zsolt Lajer, Endre Pesthy and József Szijártó, law students.

[28] Római magánjog (Dologi és kötelmi jog) [Roman civil law (Law of property and law of obligations)]. Janus Pannonius University, Faculty of Political and Legal Sciences, Pécs, 1995., p. 234.

[29] Hamza, Gábor – Kajtár, István – Pókecz Kovács, Attila – Zlinszky, János (Eds.): Tanulmányok Benedek Ferenc tiszteletére (Studies in honour of Ferenc Benedek)

[30] Tettesség és részesség a római büntetőjog forrásaiban (Perpetratorship and complicity in the sources of Roman criminal law). - A bonis bona discere. Festgabe für János Zlinszky zum 70. Geburtstag, Miskolc, Bíbor Verlag, 1998, pp. 209-230.; A felbujtó és a bűnsegéd a római büntetőjog forrásaiban (Abettor and aider in the sources of Roman criminal law), Tanulmányok Molnár Imre 70. születésnapjának tiszteletére (Studies in honour of the 70th birthday of Imre Molnár), Szeged 2004, pp.

scientific successes were based on a happy family life with his modest but supportive wife, his son, who had a successful career in law, and his three grandchildren, who ensured him happiness during his retirement years. The Second Meeting of Roman law Jurists was organised in Pécs in honour of the 80th birthday of FERENC BENEDEK on 2-3 February 2006. Roman law jurists from almost Hungarian Law Faculties attended the meeting and contributed papers on property rights. Disregarding his illness, he listened to all the presentations and took part in the discussions with the lucidity and elegance so typical of him. He continued teaching and working at the department even after the age of 80, and made his colleagues believe that he could do the impossible and defeat his fatal illness. He even spent his 81st birthday examining students. The department evaluated the first semester and defined the tasks of the second semester of the academic year 2006-2007 together with him.[31] Unfortunately, he was unable to play a part in implementing them as he died on 15th February 2007.

FERENC BENEDEK played an active role not only in the public life of the Faculty but in international scientific life also. On the establishment of the Institute for Political and Legal Sciences at the Technical University of Heavy Industry in Miskolc, he was a member of the so-called Inter-faculty Committee, at the request of the ministry, for two years, and had the power of proposal and consultation in matters concerning the personnel and the applications of lecturers and leaders.[32] In addition, between 1980 and 1990, he was a member of the Committee on Legal and Political Science of the Hungarian Academy of Science and the Doctoral and Habilitation Committees of the Universities of Szeged and Pécs. FERENC BENEDEK was also a member of the international societies "*Société Internationale des Droits de l'Antiquité*", seated in Brussels and "*Gruppo di Ricerca nella Diffusione del Diritto Romano*", seated in Rome and the Ókortudományi Társaság (Classical Studies Society), based in Budapest.

45-61. (Acta Universitatis Szegediensis de Attila József nominatae, Acta Iuridica et Politica, LXV. tom. 4. fasc.).

[31] On the 81th birthday of Benedek the staff of the Department of Roman law included Ferenc Benedek, Professor Emeritus, András Bessenyő, Associate Professor, János Jusztinger, Assistant Lecturer, and Attila Pókecz Kovács, Associate Professor, Head of Department.

[32] He was appointed member of the Inter-faculty Committee by András Knopp, Deputy Minister of Education on 3rd June 1980 (27.097/80/VII.a.), and his release was signed by András Korcsog, under-secretary of state at the Ministry of Culture on 14th January 1982 (18.577/1981).

2. Activities as a leader and a school founder

For decades, he was Head of Department of the Department of Roman law and at the same time a distinguished figure of the whole Faculty of Law in Pécs who enjoyed undisputed prestige and authority. From 1971 to 1975, he was the founder and leader of the Library of the Full-time Section of the Affiliated Department of the Karl Marx University of Economics in Pécs. His activities laid down the foundations of the Faculty Library of the Faculty of Economics in Pécs, which was established in the 1970s with the purpose of serving research and education. When he relinquished this appointment, the book stock of the library consisted of 21,000 volumes.[33] When the Council of Ministers of the Hungarian People's Republic re-organised the Full-time Section of the Affiliated Department of Karl Marx University of Economics in Pécs into the Faculty of Business and Economics at its meeting on 28th August 1975, the University of Pécs became a Higher Education institution with two faculties. The Minister of Education appointed the Dean-in-Office of the Faculty of Political and Legal Sciences, JÓZSEF FÖLDVÁRI, as Rector of the new two-Faculty Institution of Social Sciences, and so a new Dean had to be elected. On the meeting of the Faculty Council held on 29th October 1975, first ANTAL ÁDÁM, University Professor, was elected Dean and then FERENC BENEDEK, Associate Professor was elected Vice-Dean of the Faculty (20 Yes; 1 No and 1 Abstention).[34] His colleagues acknowledged and valued his efficient handling of the responsibilities of Vice-Dean and so the Faculty Council held on 11th April 1978 elected him Dean on the recommendation of JÓZSEF FÖLDVÁRI, Rector.[35] He began his term of office as Dean in an extremely tense situation as the need of developing a new Faculty structure, aiming at establishing larger organisational units by merging departments, was placed on the agenda at that time. This inevitably entailed damaging the interests of some departments and individuals. In addition, this new organisational structure terminated the position of Vice-Dean, which imposed an

[33] Minutes of handover and receipt, Affiliated Department of Karl Marx University of Economics in Pécs, on 19th November 1975.

[34] Minutes taken on the meeting of the Faculty Council of the Faculty of Political and Legal Sciences of the University of Pécs on 3rd March 1976, pp. 10-11.

[35] Minutes taken on the extraordinary meeting of the Faculty Council of the Faculty of Political and Legal Sciences of the University of Pécs on 11th April 1978, item 2 on the agenda.

increased administrative burden on the Dean himself. Although this rather unfavourable arrangement into which the Faculty was coerced was later withdrawn, BENEDEK had to serve his whole term of office as Dean without a deputy.[36] The results of his appointment as Dean included the development of the new Faculty structure and programmes for new courses, the introduction of the new Academic and Examination Regulations, the improvement of the structure of special classes and the reform of the structure of Professional Practical Courses. As Dean, he renewed the tradition of publishing a book in honour of the retiring Professors of the Faculty attaining the age of 70.[37] On the expiry of his term of office, the Faculty Council acknowledged his professional, precise and tactful operation as a leader.[38]

The reputation of BENEDEK was not only due to his position but also to the results of his educational and research activity as a Roman law jurist. He considered Roman law mainly as a historical-dogmatic introduction into teaching civil law aiming to familiarise students with the lawyers' way of thinking and the terminological basis of modern legal science. In his lectures, he focused on the institutions of Roman property law and the law of obligations and explained them in detail from a practical aspect with a sense of humour typical of him. Due to the low number of hours available, he only outlined the rest of the Roman law material. At examinations, he expected his students to know precisely the fundamental concepts and legal principles, to understand essential connections and to use appropriately the most important terms. Consequently, the strictness of his examinations was well-known nation-wide, whilst, at the same time, the subject itself was one of the most popular among law students, to which his objective attitude contributed

[36] Minutes taken on the meeting of the Faculty Council of the Faculty of Political and Legal Sciences of the University of Pécs on 10th June 1981, item 1 on the agenda (Report on the operation of the Dean of the Faculty of Political and Legal Sciences in the academic years of 1978/79, 1979/80 and 1980/81).

[37] Minutes taken on the meeting of the Faculty Council of the Faculty of Political and Legal Sciences of the University of Pécs on 10th June 1981, item 8 on the agenda; Benedek, Ferenc – Ádám, Antal – Szita, János (Eds.): Jogtörténeti tanulmányok. Emlékkönyv Csizmadia Andor hetvenedik születésnapjára (Studies on legal history: Book published in honour of Andor Csizmadia on the occasion of his 70th birthday) – Scripta historico-juridica Andreae CSIZMADIA septuagenario oblata. Studia Iuridica auctoritate Universitatis Pécs publicata 95. Pécs, 1980., p. 432.

[38] Minutes taken on the meeting of the Faculty Council of the Faculty of Political and Legal Sciences of the University of Pécs on 10th June 1981, item 1 on the agenda.

significantly.[39] He expected very much of students with a scientific interest and provided them with significant help in their early careers. As a result of this, most of the current Professors of the Faculty consider him as their master and his students who have become Professors of Civil Law teaching at Law faculties in Budapest also (for instance FERENC MÁDL and LÁSZLÓ SÓLYOM). As a Roman law jurist he was also the master of GYULA ÉLES, who died very early, ANDRÁS BESSENYŐ (as a law student he attended the lectures of RÓBERT BRÓSZ and not those of BENEDEK), ATTILA PÓKECZ KOVÁCS and JÁNOS JUSZTINGER. It is, therefore, no overstatement to claim that he was also the founder of the school of Roman law jurists in Pécs. The international-level departmental library with a book stock of 5,000 volumes and 1,000 journals significantly contributed to the successful start of the careers of young Roman law jurists in Pécs.

3. Scientific achievements

Except for the studies on Roman criminal law published in his late career, FERENC BENEDEK devoted his life to studying and researching Roman civil law by utilising his wide knowledge of law and many-sided educational experience.[40] He could rely on his good foreign language competence for his. He could, for example, deliver lectures in German and Italian, he spoke French and read Latin, Italian, English and Spanish. Although no monograph by him was published and his textbook was also left unfinished, he was one of the most famous Hungarian Roman law jurists with the highest international reputation.[41] Convincing evidence of this is the fact that MAX KASER refers to the studies by BENEDEK seven times in his "*Das römische Privatrecht*" and foreign special journals have continuously published reviews of his works since the 1970s.[42]

[39] Minutes taken at the meeting of the Faculty Council of the Faculty of Political and Legal Sciences of the University of Pécs on 24th June 1974 ("*A joghallgatók pályaválasztási indítékáról, hivatástudatáról, önmaguk helyzete értékeléséről végzett felmérés átfogó ismertetése (Comprehensive report on the survey of the motives of choosing a career path, the sense of vocation and the self-assessment of the situation of law students)*" made by György Markos, Pécs, 27th April 1997 p. 3.

[40] For the list of his publications see Pókecz Kovács, Attila: Benedek Ferenc publikációinak bibliográfiája (Bibliography of the publications of Ferenc Benedek). In Jusztinger, János – Pókecz Kovács, Attila op. cit. pp. 377-380.

[41] Bódy, Zsombor – Cieger, András: op. cit. p. 141.

[42] Kaser, Max: Das Römische Privatrecht, I. Abschn. Das altrömische, das vorklassische und klassische Recht, 2 neub. Aufl. München 1971, Beck , 416. p. 27.

Consequently, the scientific "oeuvre" of Benedek can mainly be accessed through his special studies on Roman law. He published mainly in the field of the law of persons, family law, property law and the law of obligations.

3.1 Works on the law of persons and family law

His study "*A Senatus Consultum Silanianum (Senatus Consultum Silanianum)*", published in 1963, falls within the area of the law of persons.[43] The success of the book is indicated by the fact that it induced the intensive research of the resolution of the Senate in 10 A.D. ordering the imposition of the death penalty on slaves who were under the same roof with their master when he suffered a violent death because they had let their master die instead of protecting him from attack. BENEDEK rightly points out – as a follower of IHERING and GUSZTÁV SZÁSZY SCHWARZ[44] – that this resolution of the Senate is an excellent example of the ideal legal solution between the class interest of slave-holders and the individual financial interests of the inheritors. His research findings in the field of Roman family law were published in his study "*A manus-szerzés és a házasságkötés alakszerűségei a római jogban (The formalities of manus-acquisition and marriage in Roman law)*" in 1979.[45] Based on an analysis of sources, BENEDEK argues in this work in a convincing manner for making a distinction between transactions founding *manus* and contracting a marriage. He pointed out that, contrary to the accepted common opinion, *manus*-founding transactions disappeared from Roman law quite early. Although *coemptio* existed for some time, the institution did not survive the last century of the republic either.

j, 283. p. 3. j, 593. p. 1. j, 416. p. 30. j. and 430. p. 52.; KASER, M. Das Römische Privatrecht, I. Abschn. Das nachklassischen Entwicklungen, 2 neub. Aufl. München 1975, Beck , 282. p. 68. j., 422. p. 9. j. and 604. p.

[43] Benedek, Ferenc: A Senatus Consultum Silanianum. Studia Iuridica auctoritate Universitatis Pécs publicata 28. Tankönyvkiadó, Budapest, 1963., p. 47.

[44] Hanc, Gábor – Rozman, András: op. cit. p. 4.

[45] Benedek, Ferenc: Die conventio in manum und die Förmlichkeiten der Eheschliessung im römischen Recht. Studia Iuridica auctoritate Universitatis Pécs publicata 88. Pécs, 1978., p. 31.; Benedek, Ferenc: A manus-szerzés és a házasságkötés alakszerűségei a római jogban (The formalities of manus-acquisition and marriage in Roman law). – Dolgozatok az állam- és jogtudományok köréből X. University of Pécs, Pécs, 1979., pp. 7-52.

3.2 Research into property law

His favourite field of research was Roman rights of property within property law. His first scientific publication "*Iusta causa traditionis a római jogban (Iusta causa traditionis in Roman law)*", published in Hungarian in 1959 and then in German in the journal of the Hungarian Academy of Science in 1962, established his reputation.[46] Several foreign authors have referred to this work.[47] The issues with which he dealt later (such as property acquisition in good faith, *actio Publiciana*, *dereliction*, *senatusconsultum Macedonianum* and unjustified enrichment) were already brought raised in this paper. In the field of property law his studies on *derelictio*, *iactus missilium*, *actio Publiciana*, the picking of fruits and *usucapio* are of great significance also. He started to examine issues which had been either neglected in research on Roman law or had come to a dead end, in his opinion, and so had to be examined from a different approach.

In his study "*Tulajdonszerzés gyümölcsökön a római jogban (Acquiring ownership of fruits in Roman law)*", published in 1978, he emphasises the importance of the acquisition of ownership by way of original acquisition of fruits as the end-product of agricultural production from the point of view of the safety of trade. Bona fide possessors – who are also owners in most cases – of fruitful things are in the centre of his interest; such possessors in good faith became owners upon *separatio*. In his view, the right of the losing defendants, possessors in good faith, to keep the fruits changed from the period of classical law to the period of Justinian law because Justinian increased the time period of *usucapio*.[48]

In his article „A *probatio diabolica kérdéséhez (On the issue of probatio diabolica)*", published in 1980, he contributed to a century-long

[46] A iusta causa traditionis a római jogban (Iusta causa traditionis in Roman law). Bp. 1959, Tankönyvkiadó (Studia Iuridica auctoritate Universitatis Pécs publicata 8.) p. 46; Die iusta causa traditionis im römischen Recht. - Acta Iuridica Academiae Scientiarum Hungaricae, IV.tom. (1962) pp. 117-171.

[47] Kaser, Max: Zur „iusta causa traditionis" – Bulletino dell'Istituto di Diritto Romano 'Vittotio Scialoja' (Milano) 64. vol. (1961), p. 67; Diósdi, György: Vindicatio und relatives Eigentum – Gesellschaft und Recht im griechischen-römischen Altertum, I. Bd., Berlin, 1968, pp. 68 and 85.

[48] Benedek, Ferenc: Tulajdonszerzés gyümölcsökön a római jogban (Acquiring ownership of fruits in Roman law). – University of Pécs, Dolgozatok az állam- és jogtudományok köréből IX. Pécs 1978, pp. 7-66.; Benedek, Ferenc: Eigentumserwerb an Früchten im römischen Recht. Studia Iuridica auctoritate Universitatis Pécs publicata 92. Pécs 1979., p. 38.

discussion of Roman law by highlighting the difficulty in providing evidence described as '*diabolica*', 'evil', in the case of the plaintiff encountering the difficulty of referring to a kind of derivative acquisition of ownership in the course of proving ownership of an object which is in the possession of the defendant in an action concerning ownership. If the plaintiff refers to derivative acquisition, his ownership depends on whether his predecessor was an owner or not. It follows from this that, in the case of the defendant's denial, the party initiating the case has to prove the ownership of his predecessor, too and in case of his derivative acquisition, his ownership as well, until he reaches the original acquisition in the chain of predecessors. BENEDEK rightly argues for his standpoint by stating that transference has always two options: The person acquiring may have become owner though the possibility of his not managing to acquire ownership cannot be excluded either. However, the necessarily uncertain situation becomes certain by way of *usucapio*. Consequently, in his opinion, it seems vital to treat derivative acquisitions as fact situations of *usucapio* in societies – such as ancient Rome – where the principle of bona fide acquisition in commerce and ownership registered in land registers were unknown.[49]

In his work "*Jóhiszemű tulajdonszerzés ingó dolgok felett és a "nemo plus iuris" elve (Bona fide acquisition of ownership of movables and the principle of "nemo plus iuris")*", published in 1982, he claimed that Roman law was also imbued with the principle of bona fide acquisition. The acquisitor in trade made it possible for the bona fide acquisitor in all cases of derivative acquisition to acquire ownership in consequence of *usucapio* provided he had had the object in his possession for a certain, definite period of time. The acquisition of ownership by a bona fide acquirer on the ground of *usucapio* had the consequence that Roman law did not have to 'break through' the principle of *nemo plus iuris* while at the same time it could guarantee the safety of trade.[50]

[49] Benedek, Ferenc: A probatio diabolica kérdéséhez (On the issue of probatio diabolica). In: Jogtörténeti Tanulmányok, Emlékkönyv Csizmadia Andor hetvenedik születésnapjára (Studies on legal history: Book published in honour of Andor Csizmadia on the occasion of his 70th birthday). Studia Iuridica auctoritate Universitatis Pécs publicata 95. Pécs, 1980. pp. 31-46.; Benedek, Ferenc: Zur Frage des "diabolischen Beweises'. - Studi in onore di Arnaldo Biscardi, IV.vol. Milano 1983, Cisalpino-Goliardica, pp. 445-468.

[50] Benedek, Ferenc: Jóhiszemű tulajdonszerzés ingó dolgok felett és a "nemo plus iuris" elve (Bona fide acquisition of ownership of tangible assets and the principle of „nemo plus iuris. In: Kauser Lipót Emlékkönyv (Book in honour of Lipót Kauser). Studia Iuridica auctoritate Universitatis Pécs publicata 100. Pécs 1982, pp. 39-57.

His study *„Így szórták a pénzt Rómában. A iactus missilium problémája a római jogban (Money was thrown this way in Rome. The issue of iactus missilium in Roman law)"*, published also in 1982, dealt with things of a *missilia* nature that were mainly money but could be legumes, food coupons or circus and theatre tickets thrown into the crowd of people by magistrates, by candidates to office and by anyone to appease and win common people in the period of the republic and in the period of the empire. The possessor of the *missilium* thrown into the crowd immediately acquired its ownership. This fact was explained by most authors claiming that Justinian regarded *iactus missilium* as *traditio* to an undefined individual and, according to them, ownership was immediately transferred to the acquisitor by *traditio*. BENEDEK challenges this standpoint because *traditio* will result in ownership only if the transferor himself was an owner. For this reason, according to him, it is the special nature of money thrown into the crowd that should be regarded as the speciality of regulation in relation to other *derelict* cases. Coins (*nummi*) are things, which cannot be individualised and differentiated from one another. Thus, it was the impossibility of *usucapio* and not the will of the person throwing the money that brought about the immediate acquisition of ownership.[51]

His study *"Derelictio, occupatio, usucapio"*, published in Jogtörténeti Tanulmányok V (Studies on Legal History Volume V) in 1983, dealt with the problem of abandoning (derelicting) things. This issue has been long disputed by Roman law researchers as the acquisition of derelict things (*res derelicta*) is part of the structure of Roman proprietary rights and, according to BENEDEK, the disputed questions of the acquisition of ownership and their clarification contribute to a better understanding of Roman property. Having analysed sources and controversies in special literature, he draws the conclusion that only things that have been derelicted by their owner with the intent of definitive termination of property situation can qualify as *res derelicta* thus the dereliction of possession by someone not being the owner does not concern the right of the owner. As it is often doubtful whether the person derelicting is the owner or not, the situation of those taking the derelict things into possession and intending to acquire ownership by *occupatio* is also

[51] Benedek, Ferenc: Így szórták a pénzt Rómában. A iactus missilium problémája a római jogban (Money was thrown in this way in Rome. The issue of iactus missilium in Roman law). In: Jogtudományi Közlöny XXXVII. (1982) pp. 698-706; Benedek, Ferenc: Iactus missilium. - Sodalitas. Scritti in onore di Antonio Guarino, IV.vol. Napoli (1984), E. Jovene, pp. 2109-2129.

doubtful. This ambiguous situation could only have been made unambiguous by *usucapio*. For this reason everybody who took possession of *res derelicta* necessarily fell back on *usucapio* unless the person derelicting was clearly and unambiguously the owner, and with the exception of money thrown into the crowd (*iactus missilium*) and a bird having been kept in custody and later released.[52]

In his study "Az *actio Publiciana* eredete és funkciója (The origin and function of *actio Publiciana)*", published in 1986, he states, in connection with the legal means of *petitorius*, that the key question in connection with this often debated legal institution is the reason for introducing the claim and its original function together with its relationship with *rei vindicatio*. As a result of his argument he shares the opinion that the original reason for introducing *actio Publiciana could* not have been either the protection of the acquisitor not complying with formalities or acquiring from a non-owner but it must have been meant for the real owners, in fact for the likely owners because *rei vindicatio* was available to owners capable of *usucapio*.[53]

3.3 Works on the law of obligations

The issue of unjustified enrichment is central to the life achievement of FERENC BENEDEK; he revisited this question several times and dealt with it in many of his studies.

His study *"Pénztulajdon és kondikció a római jogban (Property in the form of money and condictio in Roman law)"* was published in the first volume of *Jogtörténeti Tanulmányok (Studies on Legal History)* in 1966. In this work he draws the conclusion that money was regarded as a specific thing in a wider scope by Roman law, considering that the separate handling of considerable sums of money was more frequent in the Roman world of finance. The acquisition of property with the involvement of money was applied in payments of smaller significance

[52] Benedek, Ferenc: Derelictio, occupatio, usucapio. Jogtörténeti Tanulmányok V. Tankönyvkiadó, Budapest, 1983., pp. 7-31.

[53] Benedek, Ferenc: Az actio Publiciana eredete és funkciója (The origin and function of actio Publiciana). In: Jogtörténeti Tanulmányok VI. Tankönyvkiadó, Budapest, 1986., pp. 23-38; Benedek, Ferenc: Ursprung und Funktion der actio Publiciana. In: Studia in honorem Velimirii Pólay septuagenarii. Szeged 1985, pp. 71-91. (Acta Universitatis Szegediensis de Attila József nominatae, Acta Iuridica et Politica, XXXIII. tom. 1-31. fasc.); Benedek, Ferenc: Az actio Publiciana eredete és funkciója (The origin and function of actio Publiciana). In: Degré Alajos Emlékkönyv (Book in honour of Lajos Degré). Unió Budapest, 1995., pp. 37-58.

where the substituting function of money prevailed to a greater extent. On this ground, in the case of spending the money of somebody else in good faith, the person accepting the money unconditionally became owner, while the person paying unjustifiably was responsible to the former owner of the money on the basis of *condictio*. Thus, the acknowledgement of *consumptio nummorum* as original acquisition confined legal disputes concerning the ownership of money to a very limited scope. This solution facilitated the safety of money transactions in Roman law.[54]

His treatise "*A jogalap nélküli gazdagodási kötelem létesítő tényei a klasszikus római jogban (Facts establishing the obligation of unjustified enrichment in classic Roman law)*", published in 1967, examined the occurrences of unjustified enrichment in sources of literature (Cicero) and law. He claims that the legal means of reclaiming unjustified enrichment, *condictio*, could be initiated in classic law only if the growth of wealth entered into the wealth of the defendant as a result of enrichment with ownership (*datio*). This solution was suitable for a narrow circle of economic interests. With economic relations becoming more complex, it became necessary to make other shifts in wealth reclaimable as well. The scope of this need was widened by Roman jurists by applying a special development of law and at the same time respecting ancient traditions (leaving the term *dare oportere* found in the formula *condictio* untouched) so that other benefits were deemed to qualify as *datio* in a casuistic manner.[55]

His treatise "*Jogalap nélküli gazdagodás jogellenes és erkölcstelen magatartásból a római jogban (Unjustified enrichment from unlawful and immoral conduct in Roman law)*", published in 1984, examined two fact situations close to private criminal offences (*delictum*). One of them was available for reclaiming shifts in wealth originating from immoral conduct known as *condictio ob turpem causam* and in the second case a claim called *condictio ex iniusta causa* could be initiated against the person enriched unlawfully. According to BENEDEK, these two groups of cases should be differentiated from all other claims on the ground of

[54] Benedek, Ferenc: Pénztulajdon és kondikció a római jogban (Property in the form of money and condictio in Roman law). In: Jogtörténeti Tanulmányok I. Közgazdasági és Jogi Könyvkiadó, Budapest, 1968., pp. 251-269.

[55] Benedek, Ferenc: A jogalap nélküli gazdagodási kötelem létesítő tényei a klasszikus római jogban *(Facts establishing the obligation of unjustified enrichment in classic Roman law)*. In: Jubileumi Tanulmányok II. (Jubilee studies II) University of Pécs, Pécs, 1967., pp. 51-79.

unjustified enrichment because, in these two cases, the ground for reclaim was the fact that the conduct of the person enriching was deemed to be negative in public judgement. Immoral legal transactions were subject to public law effect, and state legal remedy for their reclaim was available, provided only that the conduct of the person enriching had been immoral and not that of the granter. Such cases included mainly grants given in order to avoid unlawful grants, recovering own property and payments made in the interest of getting service otherwise due under contract. As opposed to the first group, in fact situations of *condictio ex iniusta causa,* granting was prohibited by law. In such cases, unlawfulness made the legal transaction of transference invalid and so the grant could be reclaimed under property law also. The initiation of a claim on the ground of unjustified enrichment was expedient if enrichment occurred through using up, alienation or commingling - in which cases vindication could only be replaced by *condictio*.[56]

His study "*A condictio mint a jogalap nélküli gazdagodás visszakövetelésének perjogi eszköze (Condictio as a procedural mean of reclaiming unjustified enrichment)*", published in 1985, described the historical development of the claim in the procedures of *legis actio*, *formula* and *cognitio*.[57]

His study "*Tartozatlan fizetés a római jogban (Unowed payment in Roman law)*", published in 1987, dealt with the issue of unowed payment (*condictio indebiti*) as unjustified enrichment. One element of the fact situation of unowed payment, namely payment and the different types of fact situations belonging to this, are in the centre of the analysis. He devoted a separate subchapter to the topic of mistake and *condictio indebiti*. His treatise ended with the analysis of fact situation on the borderline of donations and unowed payment.[58]

In the field of the law of obligations, in addition to his articles on unjustified enrichment, his study "*A Senatusconsultum Macedonianum*

[56] Benedek, Ferenc: Jogalap nélküli gazdagodás jogellenes és erkölcstelen magatartásból a római jogban (Unjustified enrichment from unlawful and immoral conduct in Roman law). In: Dolgozatok az állam-és jogtudományok köréből XV. Pécsi Janus Pannonius Tudományegyetem, 1984., pp. 7-52.

[57] Benedek, Ferenc: A condictio mint a jogalap nélküli gazdagodás visszakövetelésének perjogi eszköze (Condictio as a procedural mean of reclaiming unjustified enrichment. In: Jubileumi Tanulmányok 40. Studia Iuridica auctoritate Universitatis Pécs publicata 105. Pécs 1985., pp. 29-47.

[58] Benedek, Ferenc: Tartozatlan fizetés a római jogban (Unowed payment in Roman law). In: Janus Pannonius Tudományegyetem, Dolgozatok az állam- és jogtudományok köréből XVIII. Pécs, 1987., pp. 40-68.

célja és keletkezési körülményei (The aim and circumstances of the origin of Senatusconsultum Macedonianum)", published in 1975, should also be noted. The aim of this decision of the Senate, adopted under the reign of Emperor Claudius (and presumably in 51-52) was to discharge the son of the family who became legally independent upon the death of his father from the obligation to repay the monetary loan he had asked for in the lifetime of the head of the family. If the creditor still sued (by *actio certae creditae pecuniae*), the legally independent son could object to that claim by *exceptio senatusconsulti Macedoniani*, in which he could refer to the fact that he had asked for the loan as a person under power. According to BENEDEK, encountering a problem of criminal law – money loans from usurers –, the Senate, after establishing the correct diagnosis of the danger of granting money loans to persons under power, chose an appropriate course of action when it applied the means of civil law. The Senate recognised that increasing the severity of the punishment for usurious loans would be an unworkable solution as the increase in the severity of punishment would entail an increase in the risk of usurers which they would, in turn, counter by an increase in the interest rate. Thus, the Senate put persons under power into a situation over-protected from usurers, so that it was no longer worth lending money to them.[59]

Considering his research into Roman rights of property, it is not just a coincidence that the subject matter of his textbook published for law students was the law of property and the law of obligations in Roman private law. This book would have been the core of his planned book on private law. Concise, but, at the same time, highly effective definitions enhance the basis of his textbook. Its logical structure largely contributed to the lucidity of the contents. In respect of property law, the triad of possession, ownership and rights in property owned by another party constitute its subject matter. His expounding on possession, and especially on the protection of possession, is unique and may even be considered to be of the highest quality in the Hungarian textbook literature of the 20th century. The chapter on the concept of ownership is

[59] Benedek, Ferenc: Gazdagodás visszakövetelésének perjogi eszköze (The procedural means of reclaiming unjustified enrichment). In: Jubileumi Tanulmányok 40. Studia Iuridica auctoritate Universitatis Pécs publicata 105. Pécs, 1985., pp. 29-47.

[59] Benedek, Ferenc: Tartozatlan fizetés a római jogban (Unowed payment in Roman law). pp. 40-68.

[59] Benedek, Ferenc: Zweck und Entstehungsumstände des Senatusconsultum Macedonianum. In: Jura Legesque Antiquiores necnon Recentiores. Essays in Honour of Ben Beinart, I. volume. Juta Press, Cape Town, 1978., pp. 47-66.

a model for presenting the topic, and, apart form Roman law, jurists it should also be recommended to authors dealing with modern private law who share the popular misconception that the notion of ownership cannot be defined as, according to them, its content has been widened since Roman law. He chose to describe the Roman law of obligations in a special structure similar to the modern conception, namely, by starting and finishing the description of facts giving rise to traditional obligations with the general part of the law of obligations taken in a modern sense. In respect of the system of contracts and the particular contracts, he chose not to deal with contracts classified according to their formation (formal, real and consensual) but according to their legal effect, bringing about obligations (unilateral obligations, contracts resulting in synallagmatic and unequal bilateral obligations), which aligns better with legal issues raised in practical life. Apart from its moderate size, the main merit of his textbook is its concept-centred nature, its practice-oriented approach and its lucid style. Its success is well demonstrated by the fact that it is often cited by modern works on private law and practising lawyers also have it in their libraries.[60]

3.4 Publications on Roman criminal law

The three studies on Roman criminal law published in the final phase of BENEDEK's career also illustrate his multi-coloured scientific and rich legal culture. In his work "*Tettesség és részesség a római büntetőjog forrásaiban (Perpetratorship and complicity in the sources of Roman criminal law)*", published in 1998, on the basis of the analysis of the sources of Roman law – mainly Volumes 47 and 48 of Digesta entitled *libri terribiles* – he establishes that, although the Romans did not create a general part of criminal law in the modern sense, their perceptions tally with the general concepts of perpetratorship and complicity in every detail. According to him, Roman jurists correctly realised that not only direct perpetrators, but also their accomplices fulfilling some elements of the offence deserved punishment; further, a delict might be committed by

[60] Textbooks by Benedek are as follows: Római jog IV. Dologi jog (Roman law IV. Property law). Janus Pannonius Tudományegyetem, Állam- és Jogtudományi Kar, Pécs, 1988, IV-131 p.; Római magánjog. Kötelmi jog (Roman private law. Law of obligations) Janus Pannonius Tudományegyetem, Állam- és Jogtudományi Kar, Pécs, 1992., 142 p.; Római magánjog (Dologi és kötelmi jog) [Roman private law (Property law and law of obligations)]. Janus Pannonius Tudományegyetem, Állam- és Jogtudományi Kar, Pécs, 1993, p. 234.

an indirect perpetrator and, in addition to perpetrators, aiders and abettors could also be punished. They also realised the issue of connivance, which in ancient Rome was mainly committed by failing to report a crime.[61] His study "*Önhatalom, jogos védelem és a végszükség a római büntetőjog forrásaiban (Autocratism, self-defence and emergency in the sources of Roman law)*", published in the book in honour of Földvári, he highlighted the similarities between these modern legal institutions and Roman law.[62] In 2004 he revisits the issue of complicity in his work "*A felbujtó és a bűnsegéd a római büntetőjog forrásaiban (Abettor and aider in the sources of Roman criminal law)*". There he explains that the Romans established the rules pertaining to complicity within the domain of private delicts and not public delicts. Thus, they differentiated the fact situations of abetment and psychical accessory, physical accessory and complicity, complicity and abetment and complicity and indirect perpetratorship.[63]

3.5 Scientific public life activity, awards

The scientific activities of FERENC BENEDEK also extended abroad. He delivered lectures, at, among other places, the Jagellonian University of Cracow in 1965 and 1974, at the universities of Zagreb (1967), Graz (1967 and 1972), of Vienna (1973), of Marburg (1974), of Split (1975) and of Szmolenice in Czechoslovakia (1980).

His work was honoured by several awards. The honour "Oktatásügy kiváló dolgozója (Outstanding Worker in Education)" was conferred on him in 1974, "Baranya megye tudományos és felsőoktatási díja (the Science and Higher Education Award of County Baranya)" by the County Assembly of Baranya followed in 1992, the Jubilee Diploma on the occasion in 1998 of the 75th anniversary of the commencement of legal education, and "Millenniumi Díj (the Millennium Award)" of the

[61] Tettesség és részesség a római büntetőjog forrásaiban (Perpetratorship and complicity in the sources of Roman criminal law). In: A bonis bona discere. Festgabe für János Zlinszky zum 70. Geburtstag. Bíbor Verlag, Miskolc, 1998., pp. 209-230.

[62] Önhatalom, jogos védelem és végszükség a római jog forrásaiban (Autocratism, self-defence and emergency in the sources of Roman law). In: Tanulmányok dr. Földvári József professzor 75. születésnapja tiszteletére (Studies in honour of the 75th birthday of József Földvári), Pécs, 2001., pp. 2-15.

[63] A felbujtó és a bűnsegéd a római büntetőjog forrásaiban (Abettor and aider in the sources of Roman criminal law), In: Tanulmányok Dr. Molnár Imre egyetemi tanár 70. születésnapjára (Studies in honour of the 70th birthday of Imre Molnár. Szeged, 2004., pp. 45-61.

City of Pécs. He received the "Albert Szentgyörgyi Prize" from the President of the Republic in 1994 and the "Széchenyi Prize" in 2002. Following his death, the joint meeting of the Faculty Councils of the Faculty of Business and Economics and the Faculty of Law of the University of Pécs adopted a resolution to the effect that the Special Library of the Faculty of Law and the Faculty of Business and Economics should be named after Ferenc Benedek.

Semantically enhanced representation of legal contracts for web applications

Mihály HÉDER – Balázs RÁTAI

ABSTRACT *The Carneades Contract Format (CC-F) provides a flexible and extensible representation framework for legal contracts which is capable of representing the text, the document structure and the semantics of legally binding agreements. The paper provides an overview oft the CC-F, discusses the underlying design considerations and compares it with other solutions.*

1. Introduction

Contracts are part of everyday life. Nearly all aspects of our activities are regulated by legally binding and legally enforceable agreements which define what we can or cannot do in different situations. The sheer quantity of contractual relationships which define our rights, duties and responsibilities is tremendous.

Theoretically, in most of cases, we can enter into a legally enforceable contractual relationship without any formalities, whereas, under certain circumstances, it is a statutory requirement to embed our contractual agreements into written documents. Theory and practice, however, can be far apart and we can experience an ever-growing and super-extensive use of written legal contracts. With the appearance of web applications (web-based services and electronic commerce solutions) the use of written legal contracts has multiplied during the last 15 years and has led to an extensive use of written contracts in electronic form.

Beside this phenomenon, web-based services also created a new contracting practice, which seems to have strict limitations from a legal point of view. Whenever we purchase something in a shop we enter into a sales agreement, but we rarely create a written document about this commercial transaction. In case of most web-shops, once we buy something, we immediately enter into at least two contracts: one with the shop service provider and another one with the seller. These contracts are usually written contracts. In most cases these contracts consist of general

contract terms provided by the shop owner and the seller, whereas transaction-specific pieces of contractual information (e.g. buyer, price, date) are usually stored separately. This contracting practice creates problems, because general contract terms often change, databases which store transaction specific contractual information are often restructured or simply deleted. Moreover these databases are under the sole control of one of the contracting parties. This complexity of problems makes the determination of the actual agreements content rather uncertain in a later legal dispute arising out of the transaction. Due to these defects in later legal disputes or proceedings, these types of written contract cannot fulfil the same role that made the use of paper-based written contracts so popular. These types of electronic contract simply cannot provide the same level of certainty as paper-based documentary evidence.

An obvious solution to these problems generated by web-applications (such as the extensive use of written electronic contracts, the separation of transaction-specific contractual information) can be the use of individualised, authentic, written electronic contracts in the domain of web applications. However, we do not expect contracting practice to move in this direction. There are several reasons, one of them certainly being the lack of a widely used, standard representation format for written electronic contracts, which could help to overcome these limitations. The CC-F[1] intends to be such a format.

2. Design considerations

We have formulated two major design requirements concerning the possible use of the CC-F. One was to provide support for the use of contracts in legal proceedings as documentary evidence, whilst the other was to support the processing of legal information contained in the contract.

During our work, we came to the conclusion that these two usage goals can be best achieved by creating a compound document format. Additionally, the adherence to W3C principles on web architecture[2] seemed to be a natural requirement, since the CC-F was intended for use by web applications.

[1] Mihály Héder and Balázs Rátai.Carneades contract format. http://www.carneades.hu/xml/carneadescontract/contract.xs

[2] W3C Technical Architecture Group. Architecture of the World-Wide Web.W3C Recommendation, December 2004.

2.1 Usage considerations

2.1.1 Possibility for use in legal proceedings

Documentary evidence plays a major role in proving or disproving facts in legal proceedings. The main advantage of paper-based documentary evidence over other forms of proof is that documents can be observed easily and that they provide an objective insight into past events. Moreover, paper-based documents, their content and their authenticity can be seen by anyone who can read the document.

From a practical point of view, paper-based documents are advantageous, since all the information about a past event is enclosed into the document and an average person in possession of the document can access this information directly and judge its authenticity without any special help. This is the reason why everyday contracting practice is so much focused on paper-based written contracts, in spite of the fact that statutory requirements for using written contracts can be considered rare exceptions.

To summarise, paper-based documentary evidence is widely used and preferred due to the following reasons:

- it encloses all necessary information about past events
- the enclosed information can be accessed directly
- authenticity of the enclosed information can easily be judged

Despite the fact that written electronic contracts can possess these qualities, the contracting practice that has been developed during the last 15 years in relation to web-applications did not make use of them - although these qualities are important if we would like to use written electronic contracts in legal proceeding as documentary evidence.

It is possible to reformulate these qualities into design goals, which, in the case of the CC-F, generated the following requirements:

- supporting the embedding of all information relating to the contract
- the ability to provide a pleasant, human readable representation in web-browsers
- using a solution which makes it possible to sign (or time-stamp) the contract electronically

2.1.2 Ensuring the possibility of processing legal information by machine

Rights and obligations defined by contracts are important during the whole life of a contractual relationship. Also, in case of web-applications, it is important to know what rights the users and what obligations the service providers have in their contractual relationship. This knowledge can be easily derived from contracts by people, but to extract this information from plain text by machines is quite a demanding exercise. We offer, therefore, the design requirement for the CC-F to provide support for processing legal information by machine.

The main problem is that the possible use of the information contained in a contract cannot be assessed in advance. Unsurprisingly, nobody has yet been able to create a generic framework, which could have expressed all potential information embedded into a contract. In this respect, contracts are no different from any other documents. Therefore, the task of creating a format capable of representing contractual information creates basically the same problem as representing structured information embedded in any kind of document.

For this reason, we decided to lower our expectations in relation to the representation of information contained in contracts and, instead of tackling the whole problem, we opted to create only a generic solution to support the enhancement of electronic contracts with information about the content of the contract. We have named our approach "semantically enhanced representation" - by which we intend to emphasise that CC-F is a format which can fully express the structure of a contract and which is also capable of carrying additional information ready for machine-processing.

2.2 Use of compound documents

We use compound documents in order to provide a solution that can support the embedding of all information related to the contract, and that can help the processing of contractual information by machine at the same time,. The key property of a compound document is that it contains several types of document or document fragment. The different types can be chosen to satisfy different requirements. In our case, we have a generic format to model the structure of a legal document (CC-F), in which extensions are allowed almost everywhere. Every extension contains a small document or document fragment. The role of the

extensions is to create a way to embed machine readable, semantic information into the text of the contract. Ideally, all information related to the contract is embedded somehow into an extension, which makes the CC-F document very useful in a legal procedure as documentary evidence.

We can implement other requirements by combining different types of document. We use standard tools, such as XSL Transformation, HMTL, CSS and Javascript to provide visual representation for a CC-F contract. All of these are placed in the same file as the CC-F. Using this method, the document contains not only the legal text and the machine readable information, but also the code necessary to make the document neatly formatted when opened in a browser.

2.3 Adherence to W3C principles

W3C set up a number of general directives in its Web Architecture Document on how to create XML-based data formats. Here we emphasise some of the more important points of the recommendation we considered:

- Use of XML namespaces to avoid name collisions
- Use of a namespace document
- Use of XML fragments as intended
- Use of XML Schema IDs as intended
- Develop Orthogonal Specifications (no schema dependency if avoidable)
- Use Extended elements where possible

In later sections, we will detail how our format realises these points.

3. The representation format

In the following sections, we discuss the details of our format. First, we describe the core of our concept, the CC-F, which is an XML format to model the structure of legal documents. CC-F has its own namespace, defined by an XML Schema Document. Then we discuss the Carneades Contract Compound Document (CC-D), which is comprised of a CC-F document, with additional extensions, an XSL Transformation and, optionally, an XML Digital Signature.

3.1 The CC-F

To model legal documents, we have produced a relatively simple XML Schema. The target namespace of the schema is http://www.carneades.hu/xml/carneadescontract/contract.xsd. As recommended in the W3C web architecture document, the actual Schema file is available at the location to which the namespace points.

The root of the CC-F document is always a contract element. The structure of the element is shown below.

```
<xsd:complexTypename="contractType">
    <xsd:sequence>
        <xsd:element ref="con:extension"
                     minOccurs="0"/>
        <xsd:element name="conditions"
                     type="con:conditionsType"
                     minOccurs="1"
                     maxOccurs="1"/>
        <xsd:element name="annexes"
                     type="con:annexesType"
                     minOccurs="0"
                     maxOccurs="1"/>
        <xsd:element ref="con:extension"
                     minOccurs="0"/>
    </xsd:sequence>
    <xsd:attributename="type" use="required"/>
    <xsd:attributeGroup ref="con:commonAttributes"/>
</xsd:complexType>
```

A *contract* element has a required *type* attribute, which can be a custom string. The type indicates the type of the contract. Our schema does not pre-define contract types; we let the users create them. The element has other attributes also, grouped under *commonAttributes*. The commonAttributes group contains the following:

- *id (required):* this must be a unique identifier of the element
- *date-of-creation:* the date and time when the element was created
- *entry-into-force:* the date and time when the contents of the elements come into force (e.g. a condition)
- *end-of-validity:* the date until the contents of the element are valid

- *presentation:* a custom text which may indicate the way the element should appear in the visual representation. In our implementation, we use html element names as li or ul. However, another implementation may use something else. As this attribute is intended to help with the visual rendering of the text only, the presenter software may not take it into account. The presenter software must provide a default appearance to elements without a presentation attribute, or whose presentation attribute contents cannot be interpreted or are unknown to the software.

The *conditions* element stores the main contents of the contract, while the annexes element stores the appendices. The content model of a condition is as follows:

```
<xsd:complexTypename="conditionsType">
    <xsd:sequence                                minOccurs="0"
maxOccurs="unbounded">
        <xsd:element name="reference"
                     type="con:referenceType"/>
        <xsd:element name="condition"
                     type="con:conditionType"/>
        <xsd:element ref="con:extension"
                     minOccurs="0"/>
    </xsd:sequence>
    <xsd:attributeGroup ref="con:commonAttributes"/>
</xsd:complexType>
```

The *conditions* element also has common attributes, and there is a multiple choice of reference, condition and extension elements when appending a child.

The *condition* element is the basic building-block of the format. It is used to structure the text of legal documents. It may contain plain text, *references, extensions* and other *conditions* or a combination of them. The conditions element has common attributes. The data model of a condition element is the same as the conditions element.

The *reference* element is used to refer to another part of the contract XML by its identifier. The reference element must be interpreted the same way, as the referenced element was included in its place. The reference element has only one attribute: the *targetId*, which contains the id of the referenced element. The element does not have any content.

The *extension* element creates the possibility of inserting arbitrary XML fragments almost everywhere in the contract. Any namespace is allowed as its content. It has three attributes: **id**, **text**, and *metadata*. The id attribute makes it possible to reference the given extension element from elsewhere in the document by using a reference element. The text attribute contains the text, which is to be rendered in its place in the visual representation of the contract. This piece of text should appear in a distinctive way in the visual representation, so as to call the attention to the fact that it is an annotated text. The metadata attribute designates that the given extension element is not bound to a certain portion of the text, but it provides information about the contract in general. The data model of the extension element is shown below:

```
<xsd:elementname="extension">
    <xsd:complexType>
        <xsd:choice>
            <xsd:any      namespace="##other"
                          processContents="lax"
                          minOccurs="0"
                          maxOccurs="unbounded"/>
        </xsd:choice>
        <xsd:attribute name="metadata"
                       type="xsd:boolean"
                       use="optional"/>
        <xsd:attribute name="text"
                       type="xsd:string"
                       use="optional"/>
        <xsd:attribute name="id"
                       type="xsd:string"
                       use="required"/>
    </xsd:complexType>
</xsd:element>
```

3.1.1 Schema design

An important feature of our design is that the Carneades Contract Schema and the schema of the embedded semantics are mutually independent from each other, as seen in Figure 1. In our definition, A depends on B, when there is any reference in A to B. More strictly, this means that a change in B may render some changes necessary in A in

order to keep the system working as intended. When two schemas are independent from each other, they can evolve independently. This is very important as different legal formats are maintained by different working groups.

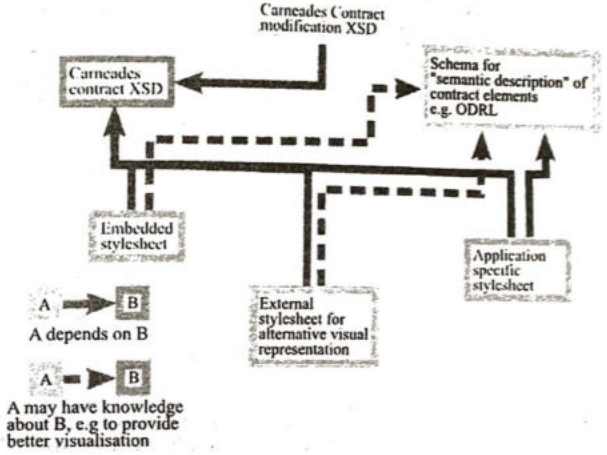

Figure 1. Schema dependency

We define another type of dependency, the optional dependency. This means that A provides a basic functionality independently from B, but there may be some additional features that depend on B. A typical example is our embedded XSLT, which provides a default visualisation for every annotation, but it recognises certain ODRL elements and visualises them differently, to achieve a better user experience. A major change in the ODRL schema may render this feature broken.

3.2 The CC Compound Document

After a CC-F XML was created, we embed the whole document into an other XML file, which contains an XSLT transformation and optionally an enveloped XML Digital Signature as well. We call the XML file which also contains the XSLT transformation CC-D. We reference the documents, which are also enveloped with an XML Digital Signature as CC-DS.

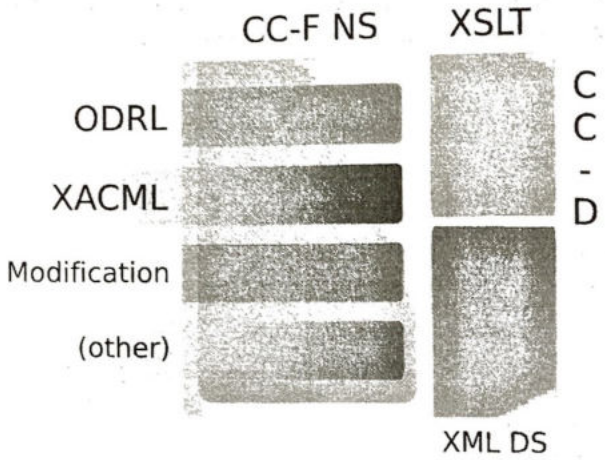

Figure 2: Schemas in a CC-D document

The rational behind this embedding is that, in this way we can create an XML file, which becomes self-representing in web browsers. At the beginning of the CC-D file, there is a processing instruction for browsers to execute the file as an XSL transformation. Then the running transformation parses the CC-F document embedded into the transformation itself, recognises the presentation elements and turns a contract into a nicely formatted XHTML page, with embedded CSS and Javascript. The CSS provides a customisable look and feel, while Javascript can provide visual annotations (e.g. a pop-up window) when the user hovers the cursor over a piece of annotated text. Actually, this XSL-generated document is a compound document itself.

As mentioned previously, everywhere in the CC-F there is the possibility of embedding valid XML from any namespace (e.g. ODRL[3] or XACML[4]) using the extension elements. (See Figure 2).

The semantic annotations in the document become simple visual annotations in this representation by default. If there are parts of the XSLT prepared to handle the particular namespaces used in the extension elements, the visual representation becomes even more informative.

[3] OASIS. Open Digital Rights Language (ODRL). odrl.net.
[4] OASIS. Extensible Access Control Markup Language (XACML)version2.0. xacml.org

A special kind of annotation is the contract modification, which we have placed in a different namespace. Using the elements of this namespace, we can produce contracts which modify other contracts. Using the original contract and the modifications, we can always derive a consolidated view of the contract. At the technical level however, the modification schema is just like an external schema to the Carneades Contract, such as XACML, ODRL or others.

Figure 3. illustrates the structure of a CC-D document.

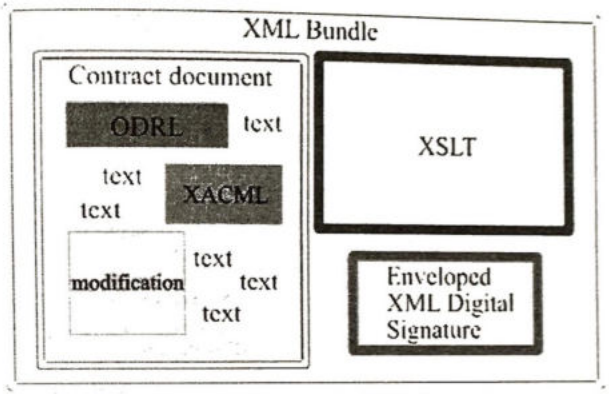

Figure 3: Structure of a CC-D document

3.2.1 Building a document

To overview how the pieces fit together, let us consider an example in which a user agrees upon the downloading of a film for a certain price. There is a legal text template given in simple text format in which the name of the user, the identifiers of the film and the price are left blank. From this, we generate the actual usage agreement. Then we convert the text into Carneades Contract format, which is a structural representation of the text, consisting of conditions, sub-conditions and annexes. After that, we annotate certain conditions with ODRL XML fragments: the parties to the agreement, the price, the item, and the conditions of use, all of which has a particular syntax in ODRL. Then we bundle this document together with an XSLT which provides a visualisation when the document is opened in a browser. Finally, one can (optionally) place

an enveloped XML Digital Signature in the document. Figure 4 illustrates this process.

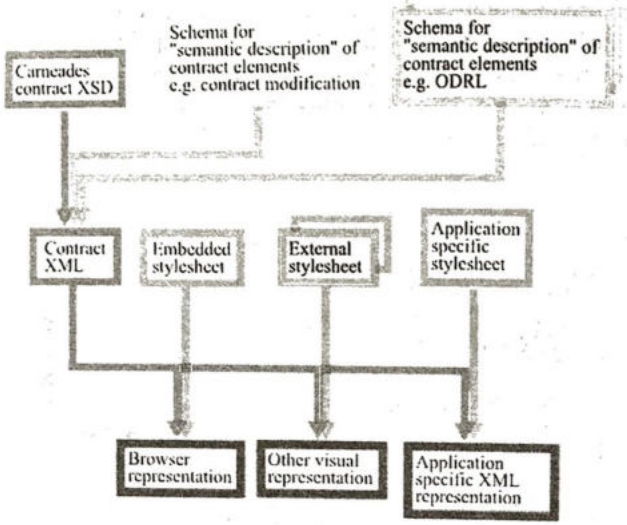

Figure 4: Assembling a CC-D document

4. Evaluation

In order to provide a better understanding of what the CC-D actually is, we find it important to summarize the useful qualities of the CC-D. Additionally we would like to provide an overview of how the CC-D compares to other contract representation formats in our assessment.

4.1 Qualities of CC-D

In our view there are many compelling characteristics of the CC-D. A very important one is that no custom system is needed to open the documents for reading; the user can use an everyday browser. Moreover, given that every embedded piece of information has a pleasant visual appearance by default, it encourages the use of embedded semantics even when there is no application to process it. Another advantage of a CC-D document is that it unifies the accessibility of the microformats and the sophisticated characteristics of the application-specific formats.

There are several practical advantages of CC-D. One of them is the possibility to store and to handle the documents in the many existing COTS and open source web-page management systems. From the point of view of future development, it is very important that, in theory, the CC schema can act as a carrier of future legal formats without modification.

Beside the visual representation, machine processing is still possible, since the source file is structured and semantically annotated. The annotations can be used to generate statistics, reasoning and performing authorisation decisions.

We do not assert that other solutions are not able to provide identical or similar advantages, but we are confident that the CC-F provides these capabilities in a uniquely simple and elegant way.

4.2 Semantically enhanced representation and other approaches to represent semantics

In order to represent the semantics of the contracts, the CC-F provides a generic solution that we call semantically enhanced representation. In the following, we present an overview of these technologies in order to explain our approach and describe its relationship with other currently available semantic technologies.

4.2.1 Semantic Web

The Semantic Web is intended to be a large framework on the internet, which enhances the ability of the web to store structured data and knowledge. To achieve this, it is crucial to mark the data in the documents found on the web and to provide meaning or semantics at the same time. This can be done by using a stack of technologies. There are many possibilities to mark and structure the data on web pages: HTML and XHTML meta tags, embedded RDF, attached RDF using GRDDL,[5] embedded RDF using RDFa[6] and there are Microformats such as hCard[7] and hCalendar.[8]

[5] GRDDL Working Group. Gleaning resource descriptions from dialects of languages. www.w3.org/TR/grddl/

[6] W3C Semantic Web Activity. Rfda. www.w3.org/TR/xhtml-rdfa-primer/.

[7] Microformats.hCard. http://microformats.org/wiki/hcard

[8] Microformats. hCalendar. http://microformats.org/wiki/hcalendar

To define the different roles, classes and relationships among data, there is RDF Schema,[9] and OWL.[10] Two of the three versions of OWL, OWL-DD and OWL-Lite are direct applications of the mathematical theory of description logics and do have formal semantics.

4.2.2 Community-driven semantic technologies

Other, community-driven semantic technologies, such as hCard do not have a defined formal semantics in the mathematical sense, but they do have a specification where the semantics are defined in English.[11] The hCard, for example, is a 1:1 mapping of the vCard which is defined in the RFC 2426 These formats (often called microformats) differ from the academic approaches, as they use (x)HTML, CSS, and arbitrary XML to mark the data, which allows standard web browsers to render them properly, without knowing the format.

4.2.3 Application-specific standards

There are application-specific standards such as ODRL or XACML, which may be characterised as semantic technologies, as they have a syntax to store data and have a definition of the meaning of the data, or semantics also. However, these are designed to be used in specific applications, rather than to be embedded in standard web pages. The latter, application-specific approach especially holds for the majority of legal formats such as P3P[12] or ODRL.

4.2.4 Semantically enhanced representation

The CC documents (CC-D) reuse the semantic vocabularies of the application specific legal formats (e.g. ODRL), by including XML fragments into the CC-Fs extension elements, but we also adhere to the most important micro-format design principle: we always provide some

[9] W3C RDF Core Working Group. RDF Vocabulary Description Language 1.0: RDFSchema. http://www.w3.org/TR/rdf-schema/.

[10] W3C Semantic Web Activity. Web Ontology Language (OWL). http://www.w3.org/2004/OWL/.

[11] The hCard, for example,is a 1:1 mapping of the vCard which is defined in the RFC 2426

[12] W3C Policy Languages Working Group. Platform for Privacy Preferences. http://www.w3.org/P3P/.

visual representation to the embedded semantic information. While a micro-format embeds the semantic information into the HTML code directly, exploiting the HTML class mechanism, we have a more sophisticated and more flexible solution to do the same. With bundled CC-F and XSLT we are able to preserve the original form of the semantic information (i.e. an XACML fragment) and to provide a nicely formatted, human readable visual representation at the same time. In this way we hope to unify the advantages of two different approaches.

4.3 W3C compound documents and CC-D

The W3C institute runs a project called Compound Document Format (CDF).[13] This effort aims to provide a recommendation on how to combine specific web standards, such as XHTML, SVG, Xforms, and others properly. The W3C has two approaches: the Compound Document Framework by Reference (CDRF) and the Compound Document Framework by Inclusion (CDIF). CDRF is in Candidate Recommendation stage at the time of writing, while CDIF is just an editors draft. In the W3Cs concept, the CDIF builds on the top of CDRF.

While we call our document a compound document, there are some differences in comparison to the W3C CDF. The main differences between our approach and the W3Cs effort are that, first, we developed a format for legal documents specifically, and, second, we provide a visual representation of them when opened in a browser, by using web technologies, whereas CDF is about how to combine certain web technologies to render them properly.

One might define our Semantically Enhanced documents as XML files that transform themselves into something like a CDIF document in the web browser. But again, given that CDIF is in a very early stage and nothing can as yet be assumed from its details and its future browser support, this statement is inappropriate (premature). For the time being we always test our documents in the current generation of web browsers and tailor the code as necessary to make them work in these.

4.4 Other contract representation formats

We have started to develop the CC-F in 2005 independently of other existing solutions. Most of our work was carried out during 2007 and

[13] W3C CDF Working Group. Compound document format. www.w3.org/2004/CDF/.

2008. During this later period, we started to evaluate our results and explore how this compares to other solutions.

There are several contract representation formats available, and the leading ones are:

- Platform for Privacy Preferences - P3P
- Open Digital Rights Language (ODRL) Initiative
- OASIS - Legal XML eContracts[14]
- Web Services Agreement Specification[15]
- IST-CONTRACT[16]

4.4.1 Platform for Privacy Preferences – P3P

P3P can be considered to be the first initiative to express legally relevant information with a standard vocabulary in the domain of web applications. P3P focuses on the expression of personal data-sharing preferences of users and personal data processing needs of web applications. P3P work was suspended in 2007 due to the lack of browser implementations and all related work has been taken up by the W3C Policy Languages Interest Group.

4.4.2. Open Digital Rights Language (ODRL) Initiative

The ODRL Initiative is developing a rights expression language (REL), which is capable of expressing rights and obligations in relation to the sale and use of digital assets.

4.4.3 OASIS - Legal XML eContracts

The OASIS eContracts XML schema is developed by the OASIS LegalXML eContracts Technical Committee, the main purpose of the schema being to describe the generic hierarchical structure of a wide range of contract documents.

The schema contains 51 elements, most used to represent structural elements of contracts (e.g. body of text, attachments), but some of the elements also encode semantic information (e.g. parties, witnesses).

[14] OASIS. Legal XML eContracts. http://www.legalxml.org/

[15] Grid Resource Allocation Agreement Protocol (GRAAP) WG. Web Services Agreement Specication. www.ogf.org/documents/GFD.107.pdf

[16] IST Contract Project. Web Services Framework for Contract Based Computing. www.ist-contract.org/

Semantics of the contracts can be expressed with metadata or external elements from other schemas.

4.4.4 Web Services Agreement Specification

Web Services Agreement Specification was developed by the Open Grid Forum. The WS-Agreement provides a protocol for establishing agreement between two parties, such as between a service provider and consumer.

The WS-Agreement format defines an extensible XML language, which is capable of expressing the contractual rights and obligations in order to help the negotiation between the service provider and the user. The WS-Agreement provides a basic, high level vocabulary to express certain contractual information like type of contract, description of qualities of a service and service guarantees.

4.4.5 IST-CONTRACT

The EU funded ist-contract project is developing frameworks, components and tools to provide advanced contract-based design, management and verification capabilities for Web Services environments.

The project has developed a specification the Contracting Language and Syntax, which intends to provide a generic framework for the expression of contractual rights and obligations.

4.5 Comparison of Carneades Contracts with other formats

In order to place the CC-F into context we have compared the above described formats with our approach based on the following factors:

- What the given format represents
- The semantic domain of the technology
- The role which an instance of the format may play in a legal dispute
- The targeted software platform

Table 1. summarises our results.

We would like to highlight how Carneades Contract unifies the advantages of the formats designed for machines (e.g. ODRL) and the ones intended for human reading (e.g. eContracts).

Format	Representation	Semantic domain	Possible role in legal proceedings	Target platform
P3P	Policy data in XML	Privacy policy	Input for expert investigation	Browser
ODRL	Rights data in XML	Digital rights	Signed input for experts	DRM products
eContracts	Written contract in XML	not specified	Documentary evidence	not specified
WS-A	Service terms in XML	Service properties	Input for expert investigation	SOA
IST-C	Contract data as objects	General metadata	Input for expert investigation	SOA
Carneades Contract	Contract text and semantic data in XML	arbitrary	Documentary evidence and signed input for experts	Browser and other systems

Table 1.: Comparing Carneades Contract and other solutions

5. Application experience

During the last year, we have tested our approach within the framework of a research project called AAI-based authorisation broker.

The AAI-based authorisation broker is an e-commerce solution based on strong identity and policy management. It is a sub-project of the Mobile Innovation Centre, which is a research and development program sponsored by the Hungarian government. The project covers the area of mobile telecommunications, the consortium partners being telecommunication equipment manufacturers, mobile operators, IT companies, other SMEs, universities and the MTA SZTAKI Research Institute.

Until now we have explored two application scenarios of the CC-F in more detail.

5.1 XACML Scenario

On a site of a domain name and web-hosting provider there are many different offers. The services are available after registration when the user agrees upon a document covering the general conditions of use. Hosting a web site or registering a domain name requires payment and additional, fixed length agreements, which are to be renewed after a certain period of time. Depending on the plan, there may be an administration interface for the web space or a control panel for the DNS.

To implement this system, a very sophisticated access control is required, which, ideally, is based on the agreements made with the user. Today, the vast majority of the sites similar to this, use a typical solution in which the information needed to access control is stored in some kind

of a database and maintained in parallel with the related legal documents. The documents are not on a per-user basis.

With semantically enhanced Carneades Contracts, and an XACML based access control system, there is no need to store information redundantly. The access information in XACML can be embedded in the corresponding legal text, which is readable for the user and for the access control system at the same time. In this way, the access and authorisation decision can be derived directly from the usage agreement documents. This allows us to have many types of customized agreement without the need to modify the access control system. Special offers, off-line made agreements can be inserted into the system seamlessly.

5.2 ODRL Scenario

A digital content provider uses CC-F enriched with ODRL when selling images, sounds, videos, etc. ODRL is an XML format - which is especially capable of expressing rights about a digital content, including the interval of usage, the types of usage, the numbers of usage and so on. It also contains detailed information about buyer and seller parties. Alice buys an mp3 from the content provider. She pays extra, because she wants to reproduce the song in 100 instances, on a CD which introduces her company. The content providers system generates a CC-D file with ODRL fragments embedded. The generator program takes information as input from Alice's registered profile at the provider, from the database of mp3 metadata, and from the details of the transaction. The generated document provides sufficient information to identify Alice, the song, the seller, the amount paid and the purpose. The document is XML signed by the seller. Alice distributes the CDs at corporate events and exhibitions. When a representative of an Artists Rights Organisation turns up, she easily proves that she has the right to redistribute the song within the given limitations.

6. Conclusions

We consider the CC-F a relatively novel approach, which is designed to support the needs of both technical implementation of web applications and that of the legal practice. The CC-F is currently under development, although it is now mature enough for the use of real-life applications. We have published the schema on our website and licensed it under LGPL.

Our next steps will include further refinement of the CC-F and the CC-Modification schema and we will explore new application scenarios also. The development of customisable template contracts for common use cases and the development of tools for the creation of custom Carneades Contracts are planned.

Freedom of Islamophobic expression v. rights and reputation of others

Melinda SZAPPANYOS

ABSTRACT *'Evil and inhuman', 'terrorists', Mohammed with a bomb-shaped turban are recent examples of Islamophobic expressions. Demonstrations, attacks, killings are some of the reactions in defence of the religious sensitivity and reputation of Muslims. A very important characteristic of the 21st century is that people from different cultures live side-by-side, and from this situation many conflicts arise. After the terrorist attack against the World Trade Centre ("9/11"), these local conflicts turned into xenophobic hysteria on the American continent and also in Europe. Freedom of expression is one of the cornerstones of democratic society in Europe, and criticising religions, religious dogmas, habits and people of a different faith has a long tradition. Due to increasing xenophobia, Islamophobic expressions are more and more frequently found. Globalisation, and the fact that people from different cultures live together, also have other consequences: Europe has become multicultural with varied interpretations of human rights, and today the composition of people to be protected by States is more heterogeneous. A major challenge for states is to maintain the level of traditional freedoms whilst protecting the rights of individuals of different cultures (who might, therefore, interpret human rights in a different way). This essay attempts to analyse one reason for the possible restriction of freedom of expression: the protection of the rights and reputation of others. We will examine how human rights can serve as a basis for restriction and under what conditions the freedom of expression can be limited by a European State.*

1. Introduction

Xenophobia is not a product of the modern age; it existed from the very beginning of the history of man, even if its subject has varied through the ages and in different geographical territories. Xenophobic feelings always arise from fear: we are afraid of things unknown and which differ from us - which is why, from the outset of the Middle Ages,

the peoples of Europe were afraid of Jews, of Afro-Americans, and, of course, of Muslims. These feelings were fostered by governments politically motivated. Creating a common enemy means that nations can be united behind a seeming common cause and so governed more effectively.

After the blocs of the Cold War era had collapsed, international relations became quite complicated. People from different cultures may live side-by-side, but this situation generates many conflicts. Among these conflicts, why should those with an Islamic character matter so much? Xenophobia fed on fear after "9/11" (the terrorist attack on the World Trade Centre) and this fear mushroomed, with previously unfocused fear now turning into real fear – specifically the fear of Islamic terrorism – of the Jihad. One way to calm fear is to discuss about it: a cornerstone of our democratic society is that everyone can have his own opinion, can express it in any form and can criticise any religion or belief. Another way is to find and punish those responsible for the attacks. However, since these terrorists had no face, people needed to look for a "whipping boy" and this was Islam, together with all Muslims. In the relatively recent past some European countries had faced this problem: that of striking a balance between Freedom of Expression (a cornerstone of democratic society) and the rights of others who happen to live in their territory but who are not a part of European civilisation. These (mainly, still unresolved) conflicts attract enormous publicity in the world's press. A few examples from the recent past are the 12 cartoons picturing the Prophet Mohammed which were published in a Danish newspaper on 30th September 2005.'[1] The same caricatures were also published in many other European newspapers, for example in "France Soir" (France) and in "Die Welt" (Germany). In the most insulting picture Mohammed was shown with a *bomb-shaped turban* and with a *smoking fuse* in his hands. A famous speech was delivered on the 12th September 2006 in the University of Regensburg by Pope BENEDICT XVI. The Pope *quoted* from a Byzantine emperor, MANUEL II PALEOLOGUS: 'Show me just what Mohammed brought that was new, and there you will only find things

[1] Response by the Danish Government to the letter of 24 November 2005 from UN Special Rapporteur on the freedom of religion or belief, Ms. Asma Jahangir, and UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mr. Doudou Diéne, regarding cartoons representing the Prophet Mohammed published in a newspaper. http://www.um.dk/NR/rdonlyres/00D9E6F7-32DC-4C5A-BE24-F0C96E813C06/0/060123final.pdf [2008.02.04.]

which are evil and inhuman - such as his command to spread by the sword the faith which he preached.'[2] On 27th March 2008 GEERT WILDERS, a Dutch extremist (member of the Freedom Party) released a short Anti-Islamic film called "The Fitna"[3] on the internet - after a broadcast of the film had been rejected by Dutch TV channels. At the 15th private birthday party (2nd February 2005) of the Hungarian Socialist Party, FERENC GYURCSÁNY, the then *Hungarian Prime Minister,* said, in connection with a friendly football match between Hungary and Saudi Arabia: 'The Saudi Kingdom is accused by many that certain families are the most active financial supporters of world terrorism. I think that there were also many terrorists among the Saudi soccer players, and our sons fought with death-defying bravery against them - so a draw away from home is a fantastic result'[4]. The consequences of these events were wide-ranging: diplomatic sanctions and threats from Islamic militants, attacks against European embassies, bomb-threats, violent demonstrations, a boycott of Danish products in Arab states, executions, etc.

What are the common offensive elements of these opinions or expressions? What is the final message of the cartoons, the Anti-Islamic film, the Pope's speech and the Prime Minister's joke? From the words used in speeches – *evil, inhuman, terrorist* – and the cartoons – Mohammed with a *bomb-shaped turban* – what appears is a general picture of what the population of the West in general thinks about Islam: the identification of terrorism with Islam. This phenomenon drew the attention of the international community also. For example *'The Commission of Human Rights [...] Alarmed at the impact of the events of 11 September 2001 on Muslim minorities and communities in some non-Muslim countries and the negative projection of Islam, Muslim values and traditions by the media, as well as at the introduction and enforcement of laws that specifically discriminate against and target Muslims.'*[5]

[2] Faith, Reason and the University Memories and Reflections (Lecture of the Holy Father). http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/september/documents/hf_ben-xvi_spe_20060912_university-regensburg_en.html [2008.02.22.]

[3] 'which is the Arabic word ("fitna") for "ordeal", "discord", or "strife". In Islam the word is mostly used to describe things that are challenging the faith with rational arguments'. http://www.fitnathemovie.info/ [2008.11.18.]

[4] Boglár, László: A szaúd-arábiai nagykövet konzultációra utazott haza. http://www.mti.hu/cikk/51327 [2008.02.22.]

[5] Commission on Human Rights resolution 2002/9. Combating defamation of religions. 61st meeting 18 April 2001 preamble, 9th phrase

Can the right to freedom of expression be limited for avoiding the creation of a "whipping boy"? Before a deeper examination of this question there are some preliminary points. The first of these is the definition - the content of the right to freedom of expression. The essay attempts to outline these elements with the help of international documents, whose *ratio loci* extends to Europe, since, after the terrorist attacks in Madrid and London, hysteria against Islam also broke out there.

2. Freedom of expression in international documents

2.1 The content of freedom of expression

The right to freedom of expression belongs to the first generation of human rights, a group which contains classical civil and political rights. This generation was the first to develop in the history of human rights and has its roots in the Declaration of the Rights of Man[6] and in the American Bill of Rights.[7]

The real development of human rights started after the Second World War as a reaction to the monstrosities which had taken place, for example, in the Nazi concentration camps. The first international treaty which contains the obligation for States to protect human rights is the Charter of the United Nations,[8] which declares in the preamble, that '... *the peoples of the United Nations determined [...] to reaffirm faith in fundamental human rights, in the dignity and worth of the human person* ...'. The Charter mentions the obligation to protect human rights again among the purposes of the United Nations.[9] From 1945 many international documents were adopted with the subject-matter of human rights, those which regulate the first generation of human rights containing freedom of expression. International documents usually detail the content of each right provided by them and regulate the possible limitations of these rights by states. Those international treaties which are binding oblige states to provide human rights for individuals who are on their territory and to establish a system for the control and fulfilment of these obligations.

[6] The document was adopted by the National Assembly of France on 26 August, 1789. See freedom of expression in 10th and 11th points.

[7] The first 10 amendments to the Constitution of the United States of America (1791). See Freedom of Speech, Press, Religion and Petition in the first amendment.

[8] Adopted in San Francisco, 26 June, 1945

[9] Charter of the United Nations, article 1, paragraph 3.

Firstly, we should mention those documents which have binding force: the international treaties. We can distinguish between two groups: international treaties adopted under the aegis of the United Nations (also called universal treaties) and regional treaties, adopted within the frame of a regional international organization.[10]

A fundamental universal international treaty, regulating classical civil and political rights was signed in 1966 - the International Covenant on Civil and Political Rights (hereinafter: ICCPR). The Covenant covers freedom of expression, and the details of its content[11]: *'1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."*[12] The ICCPR creates an organ for controlling the state obligations: the Human Rights Commission[13] The Commission has three types of procedure: state parties to the Covenant can launch a complaint against another state party,[14] the reporting system[15] and the procedure in case of communications from individuals claiming to be victims of violations.[16] The real effectiveness of this system is frequently questioned by politicians and also by experts.[17]

Among regional treaties we should take into consideration the European Convention on Human Rights[18] (hereinafter: ECHR), modified by 13 protocols.[19] The ECHR declares, that *'Everyone has the right to*

[10] The expression regional international organisation has different meanings in Public international law. In this essay under regional international organisation we understand those intergovernmental organisations, which consists most of the states of a continent. For example: Council of Europe, Organisation of American States, African Union, etc.

[11] See more in Human Rights Commission General Comment No. 10.: Freedom of expression (Art. 19) (29/06/83)

[12] ICCPR, article 19, paragraph 1 and 2

[13] ICCPR, article 28.

[14] ICCPR, article 41.

[15] ICCPR, article 40.

[16] Only if the state of the individual accessed to the Optional Protocol to the International Covenant on Civil and Political Rights, 1966.

[17] Bossuyt, Marc: International Human Rights Systems: Strengths and Weaknesses. In: Mahoney, Kathleen E. – Mahoney, Paul (eds.): Human Rights in the Twenty-first Century: A Global Challenge. Martinus Nijhoff Publishers, Dordrecht, 1993 pp. 50-55.

[18] Adopted in 1950, Rome.

[19] 14 protocols were adopted, only 13 are in force. Besides that in 2009 the 14b protocol was adopted and entered into force.

freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."[20] This European basic text establishes a stricter and more efficient control mechanism for protecting human rights than does the ICCPR: the European Court of Human Rights.[21]

Before assembling the basic elements of the definition of freedom of expression, we should also mention a document which does not have binding force: the Universal Declaration of Human Rights[22] (hereinafter: UDHR). This document has an extremely important role in public international law.[23] It represents the common position concerning the content of human rights, it is *'expressed as "a common standard of achievement for all peoples and all nations"'* and a few of its *'provisions are now rules of customary international law'*[24] The UDHR says in its article 19: *'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.'* Besides the UDHR, many international "soft law" documents were adopted on the topic of freedom of expression, freedom of religion, the balance between them and especially on the themes of hate speech and religious defamation.

The *common elements* of the content of freedom of expression are: the right to receive information and ideas, the right to impart information and ideas in any form and to do this regardless of frontiers. Consequently, on the basis of those parts of the above-mentioned treaties analysed and "soft law" documents, everyone has the right to *learn* information about Islam, to *say* anything about the Islamic religion, about its dogmas and practice,

[20] ECHR article 10, paragraph 1
[21] ECHR article 19
[22] Adopted in 1948 as a resolution of the General Assembly of the United Nations. Resolution 217(III) 10 December 1948.
[23] See more in Hannum, Hurst: The Status of the Universal Declaration of Human Rights in National and International Law. In: Georgia Journal of International and Comparative Law 25/1-2 pp. 317-352.
[24] Office of the United Nations High Commissioner for Human Rights: Fact Sheet No. 2. The International Bill of Human Rights. http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf [2010.02.06.] and Fact Sheet No. 30. The United Nations Human Rights Treaty System: An introduction to the core human rights treaties and the treaty bodies. http://www.ohchr.org/Documents/Publications/FactSheet30en.pdf [2010.02.06.]

and about Muslims; moreover everyone has the right *to realise, to materialise (film, broadcast or print)* his opinion about Islam.

2.2 Restrictions of the freedom of expression

We need to analyse the limitations to exercising the right to freedom of expression which are prescribed by the above international treaties.

The ICCPR says: the freedom of expression *'may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.'*[25]

The ECHR contains a similar, but wider, group of restrictions: *'may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'*[26]

The UDHR does not contain a possible limitation of the right to freedom of expression itself, but contains a general limitation in article 29: *'In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.'* and *'These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.'*[27]

The *common causes* of restrictions are: the protection of rights and reputation of others, the protection of national security, public order, and of public health or morals. According to the treaties, no other causes of restriction are accepted.[28] A limit to the use of these restrictions is also determined: they should be 'prescribed by law and necessary'.[29]

[25] ICCPR article 19, paragraph 3
[26] ECHR article 10, paragraph 2
[27] UDHR article 29, paragraph (2) and (3)
[28] ICCPR, article 5, paragraph 2; ECHR article 18
[29] In ECHR: 'necessary in a democratic society'

This essay deals with the first cause in detail and attempts to assemble those rights which could be violated by the exercise of freedom of expression in an Islamophobic way.

3. Can the Islamophobic character of an expression cause or justify restriction?

3.1 Obligations of States under international treaties

The ICCPR says, that '*Each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind...*'[30] establishing negative and positive obligations for states.[31] The negative side of the state obligation is that the state must refrain from violating the human rights of individuals by all branches of its government and other public or governmental authorities at whatever level.[32] The positive side of the State obligation is to ensure Covenant rights. This obligation *'will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights insofar as they are amenable to application between private persons or entities.'*[33] To summarise, states are in a difficult position: they have to respect human rights by refraining from violating them and should protect individuals from human rights violations committed by private persons or entities.

In the case of the exercise of the right to freedom of expression: a State cannot – as a negative obligation – prevent anyone from exercising this right, but must also defend the rights and reputation of others offended by an Islamophobic expression, which is a positive obligation. International treaties give the opportunity to States to resolve this possible contradiction between freedom of expression and the rights of others in that, subject to conditions, states can restrict the exercise of freedom of expression. From the formulation of the provision – '*The exercise of the*

[30] ICCPR article 2, paragraph 1
[31] Human Rights Committee's CCPR General Comment No. 31.: Nature of the General Legal Obligation Imposed on States Parties to the Covenant 26/05/2004, point 6
[32] Ibid, point 4
[33] Ibid, point 8

right [...] may therefore be subject to certain restrictions'- the result is that the restriction is not obligatory; it is only a possibility, depending on the discretionary decisions of states.

In section 2,3, the essay attempts to gather together those rights which can be violated by an Islamophobic expression so causing a restriction to the right to freedom of expression under international treaties.

3.2 Who are 'others'?

Whose rights should be protected against Islamophobic expressions? The ICCPR and also the ECHR say that states should ensure the full enjoyment of rights set forth by the treaties to all individuals within their territory.[34] According to the Human Rights Commission, the enjoyment of rights *'is not limited to citizens of state parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the state party'*.[35]

Although some aspects of these rights, for example the demonstration of one's religion or belief in worship postulates the existence of a community,[36] human rights set out by the treaties analysed are ensured to individuals. Does this mean, that an individual can turn to the Human Rights Commission or to the European Court only if he can prove that the human rights violation affected him personally? According to the Commission, the answer is "No" *'The fact that the competence of the Commission to receive and consider communications is restricted to those submitted by or on behalf of individuals (article 1 of the Optional Protocol) does not prevent such individuals from claiming that actions or omissions that concern legal persons and similar entities amount to a violation of their own rights'*.[37] Consequently, a Muslim can turn to the above-mentioned organs not only in cases when he is said to be a terrorist, but also when all Muslims are.

[34] ICCPR article 2, paragraph 1; ECHR article 1
[35] General Comment No. 31. op. cit. point 10
[36] See also ICCPR article 27
[37] General Comment No. 31. op. cit. point 9

3.3 Rights and reputations of others

What kind of rights can be violated by an Islamophobic speech or by cartoons published in a newspaper?

The usual reactions, declarations, opinions of actors of the international community on Islamophobic expressions (beside containing fragmental legal arguments) mainly reason with tolerance, solidarity, the common values of civilisations and so with morality and moral values against such actions. For example as a reaction to Geert Wilders' Anti-Islamic film 'Europe's top human rights authority, the Strasbourg-based Council of Europe, called the film "a distasteful manipulation which exploits ignorance, prejudice and fear".'[38] Also the *Secretary General of the UN*, BAN KI-MOON said: 'I condemn, in the strongest terms, the airing of Geert Wilders' offensively anti-Islamic film. There is no justification for hate speech or incitement to violence. The right of free expression is not at stake here.'[39] Because 'Humiliation of the values that are held in high esteem by people cannot be justified by the freedom of speech or copyright or sense of art. Freedom of speech and disseminating ideas do not amount to the right to insult.'[40] These abstract arguments and ideas should be translated into legal professional language, to make it useful and exploitable for States.

Firstly, for the legal answer, the catalogue of rights in the ICCPR and the ECHR should be examined closely.[41] If we check this catalogue, two provisions come into question: the right to freedom of thought, conscience and religion[42] and protection against unlawful attacks on one's honour and reputation.[43] Also the principle of non- discrimination[44]

[38] ul-Awwal, Rabi: Anti-Islam film assailed widely. http://www.dawn.com/2008/03/29/top8.htm [2008.11.18.]

[39] Statement of the UN Secretary-General, Ban Ki-moon. http://www.un.org/News/Press/docs/2008/sgsm11483.doc.htm [2008.11.18.]

[40] European governments must not give countenance to Anti-islamism! Press release of the Union of NGO's of the Islamic World. http://www.theunity.org/en/index.php?option=com_content&view=article&id=239:european-governments-must-not-give-countenance-to-anti-islamism&catid=2:basn-acklamalar&Itemid=3 [2008.11.18.]

[41] But the ICCPR and the ECHR do not limit the cause of restriction under examination to rights and reputation of others under the 'present covenant or convention'. Consequently other European treaties on human rights providing rights for individuals or regional monirities also could be taken into consideration.

[42] ICCPR article 18, ECHR article 9

[43] ICCPR article 17, paragraph 1

[44] ICCPR article 2, paragraph 1, ECHR article 14

should be considered from two aspects: the first is whether Islamophobic expressions – such as the above – violate these principles themselves. In the treaties studied, the principle of non-discrimination is mentioned many times,[45] it bans any distinction on a variety of grounds. The treaties say that each state party has to respect and to ensure to all individuals the rights recognised by the treaty in question, without distinction. This is not really a human right, but the way in which human rights should be ensured by states. In the opinion of the European Court of Human Rights (hereinafter: European Court) article 14 of the ECHR differs from the other articles enumerating human rights since its application is unimaginable without the application of another article. Article 14 cannot be violated in itself, without an offence against another right.[46] Also Protocol No. 12. Article 1 to the ECHR contains the principle of non-discrimination, with a more extended scope, introducing a general prohibition of discrimination,[47] but *'the meaning of this term [...] was intended to be identical to that in Article 14'*.[48] Consequently, referring only to the general prohibition of discrimination, freedom of expression cannot be restricted, although this does not mean that it can be neglected according to these restrictions.[49]

3.3.1 Freedom of Islamophobic expression v. right to freedom of thought, conscience and religion

Neither the ICCPR, nor the ECHR contain a provision *expressis verbis* about the relation between human rights provided by the treaties themselves; they do not create a hierarchy between rights. However, from a few provisions, the conclusion can be drawn that the right to freedom of thought, conscience and religion is somehow superior. According to the ECHR, in times of emergency states can derogate from these rights of the convention, contrary to the ICCPR, which do not allow any derogation from the right to freedom of thought, conscience and religion but can do so from that of freedom of expression. None of the treaties presents a basis for a decision as to how, in the case of conflict between these two

[45] ICCPR article 2 and 26; ECHR: article 14, as a general prohibition of discrimination, and the 12th protocol, article 1

[46] Grád, András: A strasbourgi emberi jogi bíráskodás kézikönyve. Strasbourg Bt, Budapest, 2005 p. 541.

[47] *Sejdic and Finci v. Bosnia and Herzegovina*, nos. 27996/06 and 34836/06 § 53

[48] Ibid, § 55

[49] See point 2.3.3.

rights, the state should resolve it. However, is real conflict between these rights possible?

In the ICCPR and the ECHR we find similar provisions about the content of the right to freedom of thought, conscience and religion. Its basic elements are: the freedom to *have*, to *adopt* and to *change* a religion or belief, the freedom to *manifest* a religion or a belief, either individually or in community with others and in public or private, the freedom to manifest a religion or belief in worship, observance, *practice* and *teaching* and the *liberty of parents* to ensure the religious and moral education of their children in conformity with their own convictions.[50]

If we look through the above examples, we can see no direct collision between the Islamophobic expressions used and the elements of freedom of religion. Using words with a negative meaning as criticism of the Islamic religion *does not directly prevent* anyone from being a Muslim or manifesting this religion. There is only one aspect of this form of criticism which can have an effect on being a Muslim: this is the fear of having/adopting/manifesting this religion.[51] In extreme cases such expression can intimidate the members of the criticised religious group. In these extreme cases states have to present a united front. This attitude is illustrated in article 20 of the ICCPR: *'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.'* In these cases states not only can limit freedom of expression, they must[52] do so; it is not a question: to restrict or not to restrict, how to resolve the conflict between freedom of expression and freedom of thought, conscience and religion; the limitation does not depend on states. However in this case neither are the methods of restriction determined.[53]

[50] See also Tahzib-Lie, Bahia: The European definition of freedom of religion or belief. Helsinki Monitor, 199, p. 17.

[51] Clarke, Ben: Freedom of speech and Criticism of Religion: What are the Limits? Murdoch University E Law Journal, Vol. 14, No. 2, 2007 pp. 108-109.

[52] Grinberg, Maxim: Defamation of religions v. Freedom of expression: finding the balance in a democratic society. Sri Lanka Journal of International Law. 197, 2006 p. 203.

[53] Report of the United Nations High Commissioner for Human Rights and Follow-up to the wolrd conference on Human rights, Expert seminar on the links between articles 19 and 20 of the International covenant on civil and Political Rights: „Freedom of expression and advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence", Geneva, 2-3- October 2008. A/HRC/10/31/Add.3 (16 January 2009) point 13

Another possible conflict between freedom of expression and freedom of religion comes from the spirit of the international treaties providing these rights: the exercise of freedom of expression in an Islamophobic way can offend the religious sensitivity of others. The question is whether the protection of one's religious sensitivity is an element of freedom of religion or not. Although it is not in the articles of the ICCPR and the EHCR *expressis verbis*, according to the European Court: *'respect for the religious feelings of believers [...] guaranteed in Article 9'*[54] and these feelings *'can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration; and such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society.'*[55]

After declaring that, although *'freedom of expression and freedom of religion were not contradictory but interdependent'*,[56] although in certain situations there can be conflict between them, there is one more question to be clarified: can the Islamophobic character of an expression in any form justify a restriction? From what has previously been said, it is clear that the exercise of freedom of expression in extreme cases can violate one's freedom of religion. Consequently, *stricto sensu,* if an expression – e.g. a statement, according to which everything that Mohammed brought was evil – offends the religious sensitivity (and so the freedom of religion) of someone, it can be limited on the basis of the ICCPR and the ECHR, if the restrictions fulfil the other requirements prescribed by the treaties.

[54] *Otto-Preminder-Institut v. Austria*, 13470/8,7 § 47.

[55] Ibid.

[56] Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights op. cit. point 3

3.3.2 Freedom of Islamophobic expression v. protection of reputation of others

In the ICCPR, as also in the ECHR, the reason for restriction contains the phrase '... *and reputation of others*'. In this section we attempt to examine the issue of whether, simply for the protection of the reputation of others, Islamophobic expressions can be limited. The expression 'reputation' appears only twice in the ICCPR: firstly, saying: *'No one shall be subjected to [...] unlawful attacks on his honour and reputation.'*[57] and *'Everyone has the right to the protection of the law against such interference or attacks,'*[58] and, secondly, as justifying a restriction of the freedom of expression. In the ECHR, the expression appears only once - in article 10, also as justifying a restriction of the freedom of expression. The General Comment of the Human Rights Commission on article 17 barely deals with the protection of reputation and honour, considering that this article regulates also the right to privacy in respect of family, home and correspondence, a right which is more frequently violated. It contains two statements: that the violation of one's reputation and honour can be committed by the state as well as by natural and legal persons, and that this *'... article requires the state to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks ...'.*[59] Can a Muslim's human right (the right to the protection of his reputation) be offended not by criticising his religion, but by stating that he is a terrorist (as the Saudi football players)? Clearly they can. It can also be acknowledged that the reputation of a larger, even if not so precisely definable, group is offended, for example the honour and reputation of Muslims. Consequently, to protect the reputation of others, the freedom of expression can be restricted.

3.3.3. Can states limit? How can states limit?

Can states limit? On the basis of the provisions of international documents, States can restrict freedom of expression on the basis of the ICCPR article 19, paragraph 3, point (a) and of the ECHR article 10, paragraph 2. Due to the protection of the rights and reputation of others,

[57] ICCPR article 17, paragraph 1
[58] ICCPR article 17, paragraph 2
[59] Human Rights Commission CCPR General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17): 08/04/88. point 1

this right is not absolute, but '*the restrictions enumerated under article 19 were optional, not compulsory. They therefore offered a margin of appreciation for states as to how far they may go in limiting the right.*'[60] So, if European states find that expressions with an Islamophobic character are more and more frequent and violate the rights and reputation of Muslims, *they can* limit the exercise of freedom of expression, although they do not *have to* do so. There is only one exception: '*advocacy of national, racial or religious hatred*', which has to be prevented by States, but they can still decide on the appropriate means of the limitation.

How can they limit? Both treaties, besides enumerating the possible causes of restriction in a taxative way, also contain two conditions: the restriction should be (a) prescribed by law and (b) necessary. Hence, the restriction should pass through a 'three part test'[61] for being acceptable under these treaties.

We should now revert to the principle of discrimination. This prohibition affects the whole human rights system, saying that human rights should be ensured for everyone without distinction. From the spirit of this general principle it is clear that the limitation of human rights cannot discriminate. If freedom of expression is restricted, the main rule is that (a) under the same circumstances and with the same content no one can express his opinion and (b) if freedom of expression is limited because of the protection of freedom of religion, it should concern all religions. In practice, if a state restricts freedom of expression – most frequently hate speech – by law, since it seems to be necessary in a democratic society, it can not prescribe that a hate speech (a) can be delivered by a politician, but not by a priest, or cannot prescribe that hate speech is (b) prohibited against Muslims, but not against Christians.[62]

[60] Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights op. cit. point 12
[61] For the details of the test see also Callamard, Agnès: Expert meeting on the links between articles 19 and 20 of the ICCPR: Freedom of expression and advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence, UN HCHR, October 2-3, Geneva http://www.article19.org/pdfs/conferences/iccpr-links-between-articles-19-and-20.pdf [2010.02.26.]
[62] In general, the jurisprudence of the European Court worked out those conditions under which distinction is acceptable: discriminating measure, which is based on objective and rational reason (with special respect to the aim and effects of the measure and the general principles in a democratic society) and proportionate to its aim does not violate the prohibition of discrimination. See Grád, András op. cit. pp. 541-542.

Thus, from the text of these international treaties, it is clear that any restriction of freedom of expression with an Islamophobic character should pass the 'three-part test', but the spirit involve a 'fourth part' also: the restriction itself should not be discriminatory.

4. Conclusion

Although the theme of conflict between human rights, especially between freedom of expression and freedom of religion, concerns the whole international community, the solution to this problem is waiting on the individual states. The actors in international politics can usually only provide standards, ideas, proposals, purposes to be achieved, contained by international documents, with an essentially "soft law" character, whereas international treaties – binding all contracting parties – are usually not acceptable to every state. According to relevant international treaties, the obligation of states is double-edged: to provide freedom of expression as widely as possible and to protect human rights and the reputation of others against violations committed by the exercise of the previous freedom. To fulfil this obligation the treaties provide a mere frame – that is, the basic rules about the content of human rights and the causes and conditions of their restriction by States. In spite of this general guidance, it is the States which remain responsible for providing and balancing human rights.

Limiting the freedom of expression is not compulsory for States under the treaties, but in many European countries it is necessary, because of the religious minorities (mostly Muslims) living under their jurisdiction and the xenophobic feelings frequently expressed under the name of freedom of expression. States facing this problem have to consider many factors in formulating a suitable restriction - even if it is possible in some way. They have to fulfil their international obligations; they have to consider whether or not, on the basis of the composition of the population, there is a real possibility of conflict between these two rights, and, finally, they have to decide on the appropriate measures to achieve the purpose. European states have devised many different ways to deal with this increasingly common problem, but an analysis of the factors considered by states and their solutions would be topics for a further essay.

Pillars of IT Security

Tamás SZÁDECZKY

ABSTRACT *The work gives a global overview of information technology's industrial security standards. These are widely used internationally, and include, for example, ISO/IEC 27001:2005 (the new international standard of the Information Security Management System) and ISO/IEC 27002 dealing with the practical rules for controlling information safety, the Control Objectives for Information and Related Technology (COBIT), Information Technology Security Evaluation Criteria (ITSEC), Common Criteria for IT Security Evaluation (CC), and the classic Trusted Computer Systems Evaluation Criteria (TCSEC).*

The article introduces forms of regulation in the field of IT security and their conceptual aims. It summarizes all computer security related law in Hungary in the business sector: data protection, electronic commerce, electronic communications, financial institutions and electronic signatures.

The author indicates the importance of using standards in order to strengthen computer security, and the work shows which standards are obligatory under Hungarian law and which standards are most commonly used by companies and other civil entities.

1. Foreword

In the '80s, it was thought that the huge advances of electronics and computer technology meant total priority for IT in society. In other words, when the Internet became popular and accessible for everyone, it was not only government organisations and scientists who thought that, in the '90s, everyone would shop via the Internet and that paper-based mail and data storage would be taken over by computers. Now, in the twenty-first century, we know that this was simply a dream. Why?

The intensive enhancement of technology, opportunities and purchasing power did not involve application development at the same speed and also the security of network-based activities did not reach a confidence-inspiring level. The enhancement and legal usability of public key cryptography and strong secret key algorithms made it possible for

computer users to have secure communication, but it is still not enough. The security of a computer hardware element, computer system or network needs a comprehensive approach and so the security of the weakest link determines the security level of the total system.

The aim is to consolidate the security of IT elements, systems and networks at the same level in every respect. This consolidation can be generated by an evaluation of the existing systems or by designing new ones. Assessing security levels without standard requirements is possible, but not reliable. This work introduces those procedures which enable uniformity of the levels of IT security, the legal requirements in Hungary and current practice in using standards.

2. Standards

IT security standards give a universal framework to achieve a solid level in computer systems and networks. These make assessment easier and give the possibility to use the results elsewhere - for example, as an element of quality management or of a financial audit. There are a number of standards, but all differ in their focus and approach. Some are quality standards with built-in result feedback.

According to Act XXVIII of 1995 on National Standardisation Section 6, the use of national standards should be voluntary. Legislation governing technical matters may cite the application of a national standard as being compliant with the relevant requirements laid down in legislation.

The applicability and usability of standards differ markedly[1] and the choice of a standard for a particular task needs knowledge both of standards and requirements.

2.1 TCSEC

Trusted Computer Systems Evaluation Criteria (TCSEC) was the first notable standard in the field of IT security. It was written by the Department of Defense of the United States of America in 1983, revised in 1985 and issued with ID DoD 5200.28-STD. TCSEC deals with the assessment of the level of a computer system's security. The data on the systems are the subject of state- or service secrecy, or, in other words,

[1] Muha, Lajos: Szabványok és ajánlások az informatikai biztonság területén. In: VIII. Országos (Centenáriumi) Neumann Kongresszus kiadványa. 2003. p. 501.

classified information. TCSEC, which was called the Orange Book (the colour of its cover) was a genuine military IT security standard written in the Cold War. TCSEC was created mainly for the U. S. Government and the armed forces. For the practical use of TCSEC the different services made their regulations to link their requirements to the specific situation. Army Regulation 380-19 can be an example for regulation of services. Although TCSEC is still used in U. S. government and military applications,[2] it is now obsolete.

TCSEC highlighted the significance of security policies, which need to be well-defined and enforced by the system. The policy can be mandatory (with full access control) or discretionary. Accountability must be also assured, which means that all activities in the system have to be bound to a user (identification), the user's authorization resources have to be verified (authentication), the logs have to protected and authorized personnel can easily access and process them (auditing). These requirements are met by assurance mechanisms. These mechanisms can be operational, such as system architecture, integrity, trusted facility management and trusted recovery. They can be life-cycle assurances such as security testing, design specification and verification, configuration management and trusted distribution. All of these functions have to be continuously protected against unauthorised changes. All classes described later differ in terms of the documentation required, such as test and design documentation, trusted facility manual and the security features user's guide.

The categorisation of security levels in the TCSEC is divided into four divisions and several sub-classes. These categories are:[3]

- D: Minimal Protection
- Evaluated systems, that has failed to meet the requirements for a higher division.
- C: Discretionary Protection
  - C1: Discretionary Security Protection. In this level, the separation of users and data, i.e., Discretionary Access Control (DAC) capable of enforcing access limitations on an individual basis is required.

[2] KÜRT Computer Rendszerház Rt.: Informatikai tanúsítás és audit megvalósítása Magyarországon. Kürt, Budapest, 2002. p. 16.

[3] Wikipedia: TCSEC. http://en.wikipedia.org/wiki/TCSEC [2008.10.11.]

- C2: Controlled Access Protection. More finely grained DAC, individual accountability through log-in procedures, audit trails and resource isolation are required.
- B: Mandatory Protection
  - B1: Labelled Security Protection. Informal statement of the security policy model, data sensitivity labels, Mandatory Access Control (MAC) over select subjects and objects, label exportation capabilities are required. All discovered flaws must be removed or otherwise mitigated.
  - B2: Structured Protection. Requirements are: security policy model clearly defined and formally documented, DAC and MAC enforcement extended to all subjects and objects, covert storage channels are analyzed for occurrence and bandwidth, carefully structured into protection-critical and non-protection-critical elements, design and implementation enable more comprehensive testing and review, authentication mechanisms are strengthened, trusted facility management is provided with administrator and operator segregation, strict configuration management controls are imposed.
  - B3: Security Domains. Satisfies reference monitor requirements, structured to exclude codes not essential to security policy enforcement, significant system engineering directed toward minimizing complexity, security administrator is supported, audit security-relevant events, automated imminent intrusion detection, notification, and response, trusted system recovery procedures, covert timing channels are analyzed for occurrence and bandwidth.
- A: Verified Protection
  - A1: Verified Design. Functionally identical to B3, but requires formal design and verification techniques including a formal top-level specification, formal management and distribution procedures.
  - Beyond A1. System Architecture demonstrates that the requirements of self-protection and completeness for reference monitors have been implemented in the Trusted Computing Base (TCB). Security Testing automatically generates test-case from the formal top-level specification or formal lower-level specifications. Formal Specification and Verification is where the TCB is verified down to source code level, using formal verification methods where feasible. Trusted Design

Environment is where the TCB is designed in a trusted facility with only trusted (cleared) personnel.

2.2 ITSEC

As the European equivalent of TCSEC, Great Britain, France, the Netherlands and Germany created the Information Technology Security Evaluation Criteria (ITSEC). The ITSEC version 1.2 was experimentally published in 1991 for the European Communities. ITSEC is quite similar to TCSEC in its principles and requirements, but ITSEC defines specific requirements for IT system types. ITSEC has been largely replaced by Common Criteria, which provides evaluation levels defined similarly and implements the target of evaluation (TOE) concept and the Security Target (ST) document, providing sophisticated evaluation. ITSEC defines seven evaluation levels in respect of confidence in the correctness of a Target of Evaluation (TOE). E0 designates the lowest level and E6 the highest.

The seven evaluation levels can be characterised as follows:[4]

- Level E0. This level represents inadequate assurance.
- Level E1. At this level there shall be a security target and an informal description of the architectural design of the TOE. Functional testing shall indicate that the TOE satisfies its security target.
- Level E2. In addition to the requirements for level E1, there shall be an informal description of the detailed design. Evidence of functional testing shall be evaluated. There shall be a configuration control system and an approved distribution procedure.
- Level E3. In addition to the requirements for level E2, the source code and/or hardware drawings corresponding to the security mechanisms shall be evaluated. Evidence of testing of those mechanisms shall be evaluated.
- Level E4. In addition to the requirements for level E3, there shall be an underlying formal model of security policy supporting the security target. The security enforcing functions, the architectural design and the detailed design shall be specified in a semiformal style.

[4] Information Technology Security Evaluation Criteria (ITSEC) Version 1.2. Department of Trade and Industry, United Kingdom, London, June 1991. p. 46.

- Level E5. In addition to the requirements for level E4, there shall be a close correspondence between the detailed design and the source code and/or hardware drawings.
- Level E6. In addition to the requirements for level E5, the security enforcing functions and the architectural design shall be specified in a formal style, consistent with the specified underlying formal model of security policy.

There are ten Example Functionality Classes in ITSEC.[5] These are made to give system specific requirements. Example Functionality Classes F-C1, F-C2, F-B1, F-B2, F-B3 have been derived from the functionality requirements of TCSEC classes. Example Functionality Class F-IN is for TOEs with high integrity requirements for data and programs. It can be used for example in database systems. Example Functionality Class F-AV has high availability requirements, it is recommended for industrial controllers. In Example Functionality Class F-DI the highest priority is the data integrity during data exchange. Example Functionality Class F-DC is for TOEs and has to give maximal confidentiality during the data exchange, for example these can be cryptographic systems. Example Functionality Class F-DX is meant for networks with high demands on the confidentiality and integrity of the information to be exchanged. For example, this can be in case when sensitive information has to be exchanged via insecure networks.

2.3 Common Criteria

Aimed to make an international standard, the European Communities, the United States and Canada made the Common Criteria for Information Technology Security Evaluation, shortly called Common Criteria (CC). Its version 2.0 became an international standard ISO/IEC 15408 "Common Criteria for Information Technology security Evaluation, version 2.0". In Hungary the Inter-Departmental Committee for Informatics (ITB) issued the CC v2.0 as Recommendation 16. The actual version is CC v3.1. It is freely accessible at http://www.commoncriteriaportal.org/.

The Common Criteria has three parts:[6]

- Part 1: Introduction and general model

[5] Ibid. pp. 121-150.

[6] Common Criteria for Information Technology Security Evaluation Part 1: Introduction and general model, Version 3.1 Revision 1, September 2006. p. 2.

- Part 2: Security functional requirements
- Part 3: Security assurance requirements

The Common Criteria has eleven functionality classes in which the functional requirements are detailed. These are:[7]

- Class FAU: Security audit
- Class FCO: Communication
- Class FCS: Cryptographic support
- Class FDP: User data protection
- Class FIA: Identification and authentication
- Class FMT: Security management
- Class FPR: Privacy
- Class FPT: Protection of the TSF
- Class FRU: Resource utilisation
- Class FTA: TOE access
- Class FTP: Trusted path/channels

There are several families in each class and several components in each family which are indicated as, for example, FAU_ARP.1. All the components are expressions concerning the requirement.

The assurance classes are:[8]

- Class APE: Protection Profile evaluation
- Class ASE: Security Target evaluation
- Class ADV: Development
- Class AGD: Guidance documents
- Class ALC: Life cycle support
- Class ATE: Tests
- Class AVA: Vulnerability assessment
- Class ACO: Composition

The level of security is determined by the Evaluation Assurance Levels (EALs) like the Ex levels in the ITSEC. These are:[9]

- EAL1 - functionally tested
- EAL2 - structurally tested
- EAL3 - methodically tested and checked
- EAL4 - methodically designed, tested, and reviewed
- EAL5 – semi-formally designed and tested
- EAL6 – semi=formally verified design and tested

[7] Common Criteria for Information Technology Security Evaluation Part 2: Security functional requirements, Version 3.1 Revision 2, September 2007. p. 4.

[8] Common Criteria for Information Technology Security Evaluation Part 3: Security assurance requirements, Version 3.1 Revision 2, September 2007. p. 5.

[9] Ibid. pp. 5-6.

- EAL7 - formally verified design and tested

Common Criteria is supplemented with Common Methodology for Information Technology Security Evaluation (CEM). This evaluation methodology is also standardized as ISO/IEC 18045:2008.

2.4 ITIL

The IT Infrastructure Library (ITIL) was developed by the Central Computing and Telecommunications Agency (CCTA) of the United Kingdom for supporting high quality cost-effective IT services. Thus ITIL is not only an IT security standard, but the best practice collection in the field of IT services. ITIL framework is a source of good practice in service management. ITIL is used by organizations worldwide to establish and improve capabilities in service management. It follows the Plan-Do-Check-Act (PDCA) model. Security related matters are embedded in the standard as IT service continuity issues. The ITIL was developed in the 80s, and the current version is v3 (issued in 2007) although under constant development. Now it is maintained by United Kingdom's Office of Government Commerce (OGC). The ITIL Service Management became a British Standard BS 15000 and later an international standard ISO/IEC 20000.

The library contains five key ITIL books:[10]

- Service Strategy
- Service Design
- Service Transition
- Service Operation
- Continual Service Improvement

2.5 ISO 27000 family

The United Kingdom Government's Department of Trade and Industry (DTI) was written IT security standard BS 7799. Its approach was different from the earlier standards, because it has up-down logic. All requirements are started from business needs. 'The standard established guidelines and general principles for initiating, implementing, maintaining, and improving information security management within an organization. The actual controls listed in the standard are intended to address the specific requirements identified via a formal risk assessment.

[10] ITIL Version 3 Service Strategy. Office of Government Commerce, p. 23.

The standard is also intended to provide a guide for the development of organizational security standards and effective security management practices and to help build confidence in inter-organizational activities'.[11]

The BS 7799, where the BS stands for British Standard, was issued by the British Standards Institute in 1995. This original part was called Part 1. It became an international standard, called ISO/IEC 17799:2000 "Information Technology - Code of practice for information security management".

The British Standards Institute attached a second part to BS 7799 in 1999, named BS 7799-2 or BS 7799 Part 2 "Information Security Management Systems - Specification with guidance for use." The International Organization for Standardization and the IEC adopted it to an international standard ISO/IEC 27001:2005. The standard determines the requirements for establishing, implementing, operating, monitoring, reviewing, maintaining and improving a documented Information Security Management System (ISMS) and specifies requirements for the management of the implementation of security controls. It follows the Plan-Do-Check-Act (PDCA) model. The ISO/IEC 27001 aligns with quality assurance standards like ISO 9001 or ISO 14001. It is recommended to use this standard together with ISO/IEC 17799:2005. ISO/IEC 27001 is applicable to all organisations. It has process approach.

Due to forming a new family of standards, ISO/IEC 17799:2005 was renumbered to ISO/IEC 27002:2005. New family member standards are ISO/IEC 27005 methodology independent ISO standard for information security risk management (evolved from ISO/IEC 13335-3 and ISO/IEC 13335-4) and ISO 27006 providing guidelines for the accreditation of organizations offering ISMS certification. Numerous new standards will be a part of 27000 family, like ISO/IEC 27003, intended to offer guidance for the implementation of an ISMS (IS Management System); ISO/IEC 27004 covering information security system management measurement and metrics.[12]

The content sections of the ISO/IEC 27001:2005 standard are.[13]

- Introduction
- Scope

[11] 27000.org directory: Introduction to ISO 27002. http://www.27000.org/iso-27002.htm [2008. 12. 03.]

[12] Dósa, Imre et al.: Az informatikai jog nagy kézikönyve. Complex, Budapest, 2009. p. 686.

[13] ISO/IEC 27001:2005 Information technology. Security techniques. Specification for an Information Security Management System. p. 16.

- Normative references
- Terms and definitions
- Information security management system
- Management responsibility
- Internal ISMS audits
- Management review of the ISMS
- ISMS improvements
- Annex A - Control objectives and controls
- Annex B - OECD principles and this International Standard
- Annex C - Correspondence between ISO 9001:2000, ISO 14001:2004 and this International Standard

The ISO/IEC 27002:2005 consists of the following chapters.[14]

- Introduction
- Scope
- Terms and definitions
- Structure of this standard
- Risk assessment and treatment
- Security policy
- Organization of information security
- Asset management
- Human resources security
- Physical and environmental security
- Communications and operations management
- Access control
- Information systems acquisition, development and maintenance
- Information security incident management
- Business continuity management
- Compliance

2.6 COBIT

In 1992 the Information Systems Audit and Control Association (ISACA), and the IT Governance Institute (ITGI) issued the Control Objectives for Information and related Technology (COBIT), which is a framework for IT management. COBIT is a best practice collection based on business requirements. It has not become a standard and is also not intended to be that. The current version, COBIT 4.1 has 34 high-level

[14] ISO/IEC 27002:2005 Information technology. Security techniques. Code of Practice for Information Security Management. p. 10.

processes that cover 210 control objectives categorized in four domains: Planning and Organization, Acquisition and Implementation, Delivery and Support, and Monitoring and Evaluation. Although it is not designed to collaborate with other standards, a number of mappings were made to improve collaboration and bind requirements between other standards like ITIL, ISO 27002 and PMBOK.[15]

The controlled processes by the COBIT are the following.[16]

- Plan and Organise
  - PO1 Define a strategic IT plan.
  - PO2 Define the information architecture.
  - PO3 Determine technological direction.
  - PO4 Define IT processes, organisation and relationships.
  - PO5 Manage IT investment.
  - PO6 Communicate management aims and direction.
  - PO7 Manage IT human resources.
  - PO8 Manage quality.
  - PO9 Assess and manage IT risks.
  - PO10 Manage projects.
- Acquire and Implement
  - AI1 Identify automated solutions.
  - AI2 Acquire and maintain application software.
  - AI3 Acquire and maintain technology infrastructure.
  - AI4 Enable operation and use.
  - AI5 Procure IT resources.
  - AI6 Manage changes.
  - AI7 Install and accredit solutions and changes.
- Deliver and Support
  - DS1 Define and manage service levels.
  - DS2 Manage third-party services.
  - DS3 Manage performance and capacity.
  - DS4 Ensure continuous service.
  - DS5 Ensure systems security.
  - DS6 Identify and allocate costs.
  - DS7 Educate and train users.
  - DS8 Manage service desk and incidents.
  - DS9 Manage the configuration.

[15] Guide to the Project Management Body of Knowledge (PMBOK) by Project Management Institute

[16] COBIT 4.1. Framework, Control Objectives, Management Guidelines, Maturity Models. IT Governance Institute, Rolling Meadows, IL, USA, 2007.

- DS10 Manage problems.
- DS11 Manage data.
- DS12 Manage the physical environment.
- DS13 Manage operations.

- Monitor and Evaluate
  - ME1 Monitor and evaluate IT performance.
  - ME2 Monitor and evaluate internal control.
  - ME3 Ensure compliance with external requirements.
  - ME4 Provide IT governance.

3. Legal requirements

The first and most fundamental level of requirements and unification of security is the legal basis. Legal requirements for IT security are constituted by the legislator mostly to increase public confidence in business and government processes. This confidence is achieved by various sophisticated requirements in different sectors. In this part I will introduce only the act-level regulation of different business fields - due to limitations on space.

3.1 Data protection

As a general obligation, all institutions managing and processing personal data, except private users, fall under Act LXIII of 1992 on the Protection of Personal Data and the Disclosure of Information of Public Interest. Section 10 concerning Security of Processing:

(1) Data managers, and, within their sphere of competence, data processors must implement adequate safeguards and appropriate technical and organizational measures to protect personal data, as well as adequate procedural rules to enforce the provisions of this Act and other regulations concerning confidentiality and security of data processing.

(2) Data must be protected against unauthorized access, alteration, transfer, disclosure by transmission or deletion as well as damage and accidental destruction. For the technical protection of personal data, the controller, the processor or the operator of the telecommunications or information technology equipment shall implement security measures in particular if the processing involves the transmission of data over a network or any other means of information technology.

This is not detailed and explained; no controls are built into the law. The Parliamentary Commissioner for Data Protection and Freedom of Information can supervise those data management and data processing, but has no coercive power, and publicity is effective only in government cases. The Act IV of 1978 on the Criminal Code specifies Misuse of Personal Data in Section 177/A. statement of facts:

(1) Any person who, in violation of the statutory provisions governing the protection and processing of personal data:

a) is engaged in the unauthorized and inappropriate processing of personal data;

b) fails to notify the data subject as required by law;

c) fails to take measures to ensure the security of data;

and thereby imposes significant injury to the interests of another person or persons is guilty of a misdemeanour punishable by imprisonment for up to one year, community service, or a fine.

(2) The acts described under Subsection (1) shall be upgraded to felonies and punishable by imprisonment for up to three years if they are committed by a public official in the course of discharging a public duty or in the pursuit of unlawful financial gain or advantage.

(3) Any misuse of special personal data shall be treated as a felony punishable by imprisonment for up to three years.

3.2 Electronic commerce

Act CVIII of 2001 on Electronic Commerce and on Information Society Services Section 4, Information to be provided in connection with Information Society services:

(3) Service providers shall provide general information concerning the level of security employed in the applied systems of information technology, the risk factors to which users are exposed, and the precautions they are required to take.

In this case, no obligations are declared regarding security, but informing clients is obligatory. This form of regulation generates a need for individual discretion and later the improvement of service quality through client demand. This approach is similar to quality assurance. Real obligations and aims are formed by the customers.

3.3 Electronic Communication

Act C of 2003 on Electronic Communications Section 156:

(1) Service providers shall take appropriate technical and organizational measures - jointly with other service providers if necessary - in order to safeguard the security of their services.

The focal point of this paragraph is the intended cooperation between service providers for security reasons. This means mostly access control measures.

(2) The technical and organizational measures shall be sufficient - with regard to best practices and the costs of the proposed measures - to afford a level of security appropriate to the risk presented in connection with the services provided.

This requirement suggests risk assessment and appropriate security measures. Despite significance and sensitivity of ICT area, the regulation and detailed requirements are scanty, even in decree-level regulations.

3.4 FPial sector

Financial sector is regulated by Act CXII of 1996 on Credit Institutions and Financial Enterprises (Hpt.), Act LXXXII of 1997 on Private Pensions and Private Pension Funds (Mpt.), Act XCVI of 1993 on Voluntary Mutual Insurance Funds (Öpt.), Act CXX of 2001 on the Capital Market (Tpt.) and Act LX of 2003 on Insurance Companies and Insurance Activity (Bit.).

Before 2004 the regulation of this field was similar to data protection act. Hpt. section 13. about Personnel and Material Requirements was the only obligation of security:

(1) Financial service activities may be only commenced or performed if the requirements pertaining to

d) the technological, informatics, technical, and security background and the premises suitable for carrying out the activities,

f) information and control system for reducing operating risks, and a plan for handling extraordinary situations

More details and a more precise requirement list were introduced by Act XXII of 2004 on Amendment of Acts Related to Increased Defence of Investors and Depositors and Act CI of 2004 on Amendment of Acts Related to Taxes, Contributions and Other Budget Payments. These Acts embodied requirements similar to those of the Protection of Information Systems to Hpt. 13/B. §, Mpt. 77/A. §, Öpt. 40/C. § and Tpt. 101/A. §.[17]

[17] Currently the requirements changed and moved to Government Decree No. 283/2001. (XII. 26.) of the Cabinet.

Bit. was not amended, but the same controls are recommended by the Hungarian Financial Supervisory Authority.[18]

(1) Financial institutions are required to set up a regulatory regime concerning the security of their information systems used for providing financial services and financial mediation, and to provide adequate protection for the information system consistent with existing security risks. The regulatory regime shall contain provisions concerning requirements of information technology, the assessment and handling of security risks in the fields of planning, purchasing, operations and control.

The regulatory regime refers to the system of regulations such as IT security policy, IT security laws, IT operational regulations. These regulations should be made and regularly (for example yearly) updated by the management. All users must know the relevant regulations.

(2) Financial institutions shall review and update the security risk assessment profile of the information system whenever necessary, or at least every other year.

The organisation must implement a risk assessment procedure and regular assessments. In case of usage of outsourced services, the organisation must include the outsourced areas to the assessment, also.

(3) The organizational and operating rules shall be drawn up in the light of the security risks inherent in the use of information technology, as well as the rules governing responsibilities, records and the disclosure of information, and the control procedures and regulations integrated into the system.

Roles, tasks and responsibilities have to be clearly defined without any incongruity. Scope of authority of workers has to be adequate to the role and responsibility. A Chief Information Officer (CIO) position should be formed to be responsible for IT.

(4) Financial institutions shall install an information technology control system to monitor the information system for security considerations, and shall keep this system operational at all times.

This requirement does not refer to a computer system or application, but to a set of controls and effective internal audit system. This control system has to be regularly revised, and activity and effectiveness should be measured.

[18] PSZÁF: A Pénzügyi Szervezetek Állami Felügyeletének 1/2007. számú módszertani útmutatója a pénzügyi szervezetek informatikai rendszerének védelméről. p. 3.

(5) Based on the findings of the security risk analysis, the following utilities shall be implemented as consistent with the existing security risks:

Risk assessment in paragraph (2) is the starting point of the following.

a) clear identification of major system constituents (tools, processes, persons) and keeping logs and records accordingly;

The organisation has to make an inventory of configuration. The actual state and all previous states have to be accessible and at all times up-to-date

b) self-protection function of the information technology security system, checks and procedures to ensure the closure and complexity of the protection of critical components;

At this point, the most important is the conformity of security measures with business and organisational requirements. This conformity demands proportionate defensive measures.

c) frequently monitored user administration system operating in a regulated, managed environment (access levels, special entitlements and authorizations, powers and responsibilities, entry log, extraordinary events);

Identity- and access management procedures and rules have to be created, with rules responsible for databases. Changes in position or responsibility have to appear immediately in access levels.

d) a security platform designed to keep logs of processes which are deemed critical for the operation of the information system and that is capable of processing and evaluating these log entries regularly (and automatically if possible), or is capable of managing irregular events;

Application of log analysers used widely in the industry should be used. If not, log saving, secure archiving and manual analysis is the minimum.

e) modules to ensure the confidentiality, integrity and authenticity of data transfer;

Secure channels or protocols have to be used for communication, such as HTTPS, SSL, SSH, SFTP.

f) modules for handling data carriers in a regulated and safe environment;

Data storage media, such as DVDs, magnetic tapes have to be stored securely. It is necessary to protect them against losses and incidents due to deficiencies of technical requirements, electromagnetic disturbances, technical reliability problems, and to protect them against intentional damage and access management.

g) virus protection consistent with the security risks inherent in the system.

Protection against malicious programs is necessary in servers, desktops and mobile devices.

(6) Based on their security risk assessment profile financial institutions shall implement protection measures to best accommodate their activities and to keep their records safe and current, and shall have adopted the following:

Requirements declared in this point are minimum requirements, all are obligatory.

a) instructions and specifications for using their information system, and plans for future improvements;

Every system and application has to be documented. All services must have Service Level Agreements (SLA).

b) all such documents which enable the users to operate the information system designed to support business operations, whether directly or indirectly, independent of the status of the supplier or developer of the system (whether existing or defunct);

Within the scope of availability plan, all of these acts are included.

c) an information system that is necessary to provide services and equipment kept in reserve to ensure that services can be provided without interruption, or in the absence of such equipment, solutions used in their stead to ensure the continuity of activities and/or services;

Disaster Management Plan and Business Continuity Plan are eligible for this.

d) an information system that allows running applications to be safely separated from the environment used for development and testing, as well as proper management and monitoring of upgrades and changes;

Separation of working and test environments is an industrial common necessity. Also, the personnel of these systems should be different.

e) the software modules of the information system (applications, data, operating system and their environment) with backup and save features (types of backup, saving mode, reload and restore tests, procedure), to allow the system to be restored within the restoration time limit deemed critical in terms of the services provided. These backup files must be stored in a fireproof location separately according to risk factors, and the protection of access in the same levels as the source files must be provided for;

System backup operations also should be regularly tested.

f) a data storage system capable of frequent retrieval of records specified by law to provide sufficient facilities to ensure that archived materials are stored as defined by legal regulation, or for at least five years, and able to be retrieved and restored at any time;

Data retrieval is necessary in many cases, for example, tax revenue, anti-terrorism, data protection. A complex solution for all must be implemented, such as a high-security magnetic tape data storage system.

g) an emergency response plan for extraordinary events capable of causing any interruption in services.

Disaster Management Plan and Business Continuity Plan mentioned in paragraph c) are eligible for this function.

(7) Financial institutions shall have available at all times:

Available at all times means before financial services are authorised, and thereafter on a 24/7 basis;.

a) operating instructions and models for inspecting the structure and operation of the information system developed by themselves or developed by others on a contract basis;

All software documentations must be present and up to date.

b) the syntactical rules and storage structure of data in the information system they have developed themselves or developed by others on a contract basis;

Software documentations, especially database documentation, must contain data definition.

c) the scheme of classification of information system components into categories defined by the financial institution;

The computers, systems and networks have to be classified as to sensitivity. These rules have to be documented.

d) a description of the order of access to data;

Written rules of access control must be present.

e) the documents for designating the data manager and the system administrator;

These documents have to be present in order to ascertain personal responsibilities.

f) proof of purchase of the software used;

Also as a tax revenue requirement, all software licences and invoices must be present. A software inventory is also necessary.

g) complex and updated records of administration and business software tools comprising the information system.

A software inventory satisfies this requirement.

(8) All software shall comprise an integrated system:

This paragraph defines software minimum requirements.

a) that is capable of keeping records of the data and information required for regular operations and as prescribed by law;

As mentioned above, long-term preservation is required in more fields. The software also has to facilitate this.

b) that is capable of keeping reliable records of money and securities;

Since money is nowadays mostly account money (i.e., with no physical form), reliable records are essential for trust in the financial system.

c) that has facilities to connect, directly or indirectly, to national information systems appropriate for the activities of the financial institution;

Most administrative data is changed via computer systems, such as tax revenue, statistical information. Implementation and maintaining interfaces to them is the responsibility of the organisation.

d) that is designed for the use of checking stored data and information;

Embedded controls for data self correction and correction is imperative in such large databases.

e) that has facilities for logic protection consistent with security risks and for preventing tampering.

Value and sensitivity of stored data need endeavour on hardening logical security.

(9) The internal regulations of the financial institution shall contain provisions concerning the knowledge required in the field of information technology for filling certain positions.

In other fields job descriptions contains required IT knowledge, but financial institutions have to determine them in regulations.

As the mass of requirements shows, financial sector has much more regulations than sectors above. Reason of this is the importance and significance of this field. Most citizens keep savings in those organisations. A defect in the financial institution drastically decreases trust in the sector and the financial system inducing significant losses.

3.5 Electronic signatures

Electronic signature services such as certificate issuing, time-stamping, electronic archiving are well regulated in accordance with Directive 1999/93/EC of the European Parliament and of the Council.

Act XXXV of 2001 on Electronic Signatures Section 8/B. Voluntary Accreditation is the starting point of the regulation.

(1) Service providers may devise voluntary accreditation schemes to enhance the level of their services, and to attest their organizational structure and the products and networks they use in the provision of services, information technology security requirements laid down in specific other legislation or any other criteria they choose to adhere to voluntarily.

Voluntary accreditation is a legal possibility, but all providers are accredited in another ways. Currently no voluntary accreditation system operates in Hungary, and in its place there is a strict surveillance.

Section 7. on notification

(1) The services referred to in Paragraphs a)-d) of Subsection (1) of Section 6 in connection with electronic signatures may be provided by natural persons whose permanent or habitual residence is located in Hungary or by legal persons and unincorporated organizations that are established or have business establishments in Hungary subject to notification of the Communications Authority within 30 days before commencing activities.

In contrast to electronic communication, in the case of electronic signature services the provider has to notify authorities in advance - is a stricter control.

(2) The following shall be attached with the notification:

a) service procedures,

b) general contract terms and conditions,

c) a certified copy of the document that proves the applicant and his employees have no prior criminal record as well as a copy of documents proving their qualifications,

d) proof of liability insurance coverage and access to other financial resources as specified in specific other legislation, and

e) the authentication system and time-stamping system drafted, respectively, by the certification-service-provider and time-stamping service provider.

Procedures, plans and other proofs have to be sent prior to the start of an electronic signature service. The National Communication Authority will review those documents before giving permission for the service. Section 9. on Certification Services defines the following.

(1) Prior to contracting, the service provider shall inform the recipient of the service concerning the manner of using the service, the level of security, and - where applicable - any attestation of their

organizational structure and the products and networks they use in the provision of services, information technology security requirements laid down in specific other legislation, or any other criteria they chose to adhere to voluntarily that have been attested under a voluntary accreditation scheme, and the service procedures and the contract terms and conditions, in particular the limitations defined in Subsection (2). If the inspection referred to in Subsection (3) of Section 20 is not completed at the time of commencement of the provision of services, the service provider shall inform the recipient of the service accordingly.

By this self control mechanism, clients should be informed of security measures, and so security has become a business requirement. Despite the lack of Parliamentary Act-level regulations, more governmental and ministerial decrees define regulations. However, electronic signature services are less regulated, and even self-regulation works less effectively than in the financial sector.

4. Application and results

From the standards detailed above TCSEC, ITSEC and the Common Criteria could primarily be used for evaluating hardware and software elements, but not for complex IT systems. For such complex evaluation, the ITIL, the ISO/IEC 27002 and the COBIT can be used. ITIL is the most complicated standard; its main function is IT services management, and so security is only a subsidiary topic. COBIT was published in the United States by experts dealing with financial informatics and so can be used satisfactorily in the field of finance (e.g., in banking informatics). Due to its structure, approach, and detail, ISO/IEC 27002 together with ISO/IEC 27001 are the most appropriate for using as IT security standards for designing and implementing secure systems and networks for IT experts broadly.

The application of different standards depends on the specifics of the field, international practice and the practice of the authorities involved. In respect of general business activities (where data protection and electronic commerce regulation apply) standards are rarely used, mostly due to the high cost of implementation and maintenance. European Union projects (financial support) demand the application of Common Criteria for products and ISO/IEC 27002 for organisations.[19] Firms in the

[19] Council Resolution of [6] December 2001

telecommunications sector use no standards or ISO/IEC 27001.[20] Due to the recommendations and practice of the Hungarian Financial Supervisory Authority, the financial sector mostly uses COBIT – albeit informally.[21] In the field of electronic signature services, current certification service providers use either no standards or ISO/IEC 27001.[22]

This survey shows, we feel, that a relatively low interest is shown by business in the use of international IT security standards, despite their significance and the high risk obvious in some areas. No requirement is found in Hungarian Acts of Parliament for the use of standards in IT security. There are built-in self control procedures in most Acts, but, in practice, those procedures do not work well. Higher level and more technical regulation is recommended, and increasing business requirements might enhance the security level in business fields and, therefore, at the administrative level also.

[20] Homepage of Magyar Telekom Plc. http://www.telekom.hu/rolunk/iranyelveink/minoseg_garanciai [2008.12.03.]

[21] PSZÁF op. cit. p. 3.

[22] Homepage of Microsec Ltd. http://srv.e-szigno.hu/menu/index.php?lap=bizt_gar [2008.12.04.]

The Hungarian nation inside and outside the EU

Ágnes TÖTTŐS

"There is always at least one more nation than country. In this sense, World History is similar to that game {Musical Chairs} in which the players circle whilst one chair is removed - as a result of which, one of the players has nowhere to sit."[1]

ABSTRACT *The sensitivity of the situation of Hungarian minorities outside the country has been further increased by Hungary's Accession to the EU since, as a result, Hungarians in certain countries are not affected by the country- and people-unifying effect of the Union. Further, guarding the Schengen borders has created a greater degree of separation between the Hungarians inside and outside the country.*

It is therefore a very complex task for the Hungarian state to support its nationals and the Hungarian authorities have, therefore, embarked on a policy of support for Hungarian minorities living in the neighbouring countries with the twin goals of fostering their links and increasing the sense of belonging to the Hungarian nation and, at the same time, ensuring that they feel comfortable where they live and have no wish to migrate to Hungary.

The purpose of this study is to discuss the steps that the Hungarian government and the Hungarian Parliament have taken or have tried to achieve in order to unify the Hungarian nation. Starting with the earliest bilateral agreements, the essay continues by introducing the Benefit Law, enacted in 2001. It also highlights the viewpoints representing the different attitudes to the idea of concept of granting preferential citizenship as well as those ideas which have been realised in the field, namely the Homeland Fund and the National Visa.

[1] Moldova, György: The secret of Short Life

As a result of the writer's experience as a lawyer in the Hungarian Office of Immigration and Nationality, the essay tries to show clearly the latest changes in the immigration law and their effect on the migration of ethnic Hungarians, suggesting what might be expected in the future.

1. Introduction

One of the issues figuring most prominently in post-Accession Hungary is that of minorities. Three and a half million Hungarians live in the states neighbouring Hungary – Croatia, Slovenia, Slovakia, Romania, Serbia, trans-Carpathian Ukraine, and Austria – since as a result of the redrawing of frontiers at the end of the First World War, territories with significant Hungarian populations became parts of neighbouring states. Although becoming full citizens of these states without moving from their place of birth, their descendants retained the language, culture and traditions of their old kin-state. Hungarian minorities are well organised socially and politically and play a significant role in their national political life.

However, there have been several waves of migration, when many Hungarians abroad contemplated leaving their countries to settle in Hungary, and there seems to be a renewal of this tendency since the reforms of the 1990s. The sensitivity of this situation has been further increased by Hungary's Accession to the EU on the 1st of May 2004 since, as a result, it became one of the countries on the periphery of the EU, both geographically and economically. After Accession, Hungary bordered 4 non-EU nations and accounted for 15 % of the EU's external land border. Guarding the Schengen borders from December 2007 not only means improving the border infrastructure, but also not having the right to allow all Hungarians to cross the border freely, and imposing visa requirements on them, as non-EU citizens.

It is, therefore, a highly complex task for the Hungarian state to support its nationals who find themselves on the periphery of the Hungarian nation. The Hungarian authorities have, therefore, embarked on a policy of support for Hungarian minorities living in the neighbouring countries, with the twin goals of fostering their links and increasing the sense of belonging to the Hungarian nation, and, at the same time, ensuring that they feel happy where they live and have no wish to move to Hungary. The purpose of the essay is to discuss the steps which the Hungarian government and the Hungarian Parliament have

taken or tried to take to unify the Hungarian nation, concentrating first on the Hungarian minorities beyond the EU's borders; those who are not yet affected by the country- and people-unifying effect of the Union. The research, therefore, focuses on the Hungarians living in four neighbouring countries: Romania (which joined the EU only in 2007), the Ukraine, Serbia and Croatia.

As a result of the present migration trends and social tensions, the issue of global migration is receiving increasing attention in the European Union also. However, the purpose of action should be NOT to have to react in an impromptu way to some migration-related event, but rather to be prepared to react to changes which can be foreseen or which might even precede some damaging events. To be able to act effectively, many experts emphasise the need for a comprehensive migration policy based on thorough research.

The theme of this particular investigation incorporates, as it must, significant political factors, apart from legal ones. At the same time, the author endeavours to stay impartial when discussing these issues, even though the different factors reflect in many cases specific partisan viewpoints. It is also important to emphasise that the purpose is not to give a detailed description of the current situation of Hungarians in the neighbouring countries, but to use the data and reports as a tool to understand their situation and why the topic is so up-to-date and sensitive.

2. The situation of ethnic Hungarians

It is important to distinguish[2] ethnic (or national) minorities – distinct and potentially self-governing societies incorporated into a larger state – from ethnic groups (made up of immigrants who left their national community voluntarily to enter another society). Ethnic or national minorities typically wish to remain as distinct societies alongside the majority culture, and demand various forms of autonomy or self-government to ensure their survival as distinct societies. The relationship between the majority culture and the national minorities mainly depends on the extent to which the state allows the minorities to form freely their distinct societies and maintain their connections with the mother country.

[2] The definitions and the distinguishing elements are based on: Kymlicka, Will: Multicultural Citizenship. Oxford University Press, New York, 1995., p. 19.

There are several criteria[3] by which the situation of ethnic Hungarians can be characterised, such as how their interests are legally represented, their economic situation, civic organisation, education, culture and science, their exercise of religion and mass communication. Nevertheless, at this point I would like to deal only with the issues which motivate ethnic Hungarians to leave their place of birth: those issues must be the most important, since they force great numbers of people to leave family, friends and homeland behind and choose an uncertain future.

The most authentic source for ranking the effect of specific criteria is statements made by the clients themselves about their reasons for applying for permission to settle. As a lawyer from the Office of Immigration in Hungary, I have had the chance to read these documents reflecting many of the characteristics of a person - both through the content of the statement and its style. As for the content, the most frequently mentioned reasons for wanting to leave their homeland to come to Hungary are: the economy and employment, education, and, last but not least, a longing to be Hungarian openly and freely.

2.1 Technical approach[4]

2.1.1 Economy and employment

The economic situation of the Hungarians in Romania is ambivalent. In the private sector, Hungarians in Transylvania have gained certain advantages since many of them were familiar with the economic situation and model in Hungary. They are also linked by family and friends with Hungary and benefit from business with them. On the other hand, the grave situation of Romanian state enterprises produced a rapid rise in the unemployment rate in the latter half of the 1990s. Poverty reinforced the Hungarians' inclination to emigrate and seek work abroad, primarily in Hungary. The situation of agriculture is also a cause for serious concern,

[3] The list of criteria follows the analysis of the minorities' situation on the homepage of the Government Office for Hungarian Minorities Abroad: http://www.hhrf.org/htmh

[4] The data and statements presented in this chapter are based on the reports on the situation of Hungarians presented by the Government Office for Hungarian Minorities Abroad: http://www.hhrf.org/htmh. Since this Government Office ceased to function in 2007, the description of the economic, and educational situation reflects the situation according to the 2006 reports.

since about 46% of Romania's population lives in an agricultural environment - the most unfavourable ratio in Europe. On the one hand, an important proportion of the land has been returned to its former owners and is again in Hungarian hands – but, on the other hand, the cultivation of the land lags far behind current standards.

Agriculture is the dominant form of production in Transcarpathia, but, sadly, the overall picture of the economy is one of low efficiency and backwardness in technical and organisational matters. Moreover since the Hungarians population is generally engaged in lower social status professions (due to a lack of opportunities for training in their native language), they are particularly threatened by the danger of unemployment. A major part of the region's Hungarian population survives under current circumstances by means of cross-border trade. Similarly, in the Romanian situation, many people take on illegal seasonal farm-work in Hungary, and a significant part of the male population works on various construction sites in Hungary.

The situation of Croatia and Serbia is influenced by the Balkan wars, which ruined both agriculture and industry, and where the monetary system collapsed as a result of hyperinflation. Private enterprises cannot stand on their own feet again due to the shortage of credit needed for modernisation and to the difficulties of selling their products. The ethnic Hungarian refugees – who had escaped from the Balkan wars and had afterwards returned – were confronted with problems, since state enterprises were not able to hire them and since the means necessary viticulture, agriculture and animal husbandry were totally lacking. The situation of Voivodina in Serbia is even worse, as a result of increasing centralisation; nine-tenths of the income produced in the province having been lost.

2.1.2 Education

In the early 1900s, Transylvania had a highly developed Hungarian educational network where instruction in Hungarian took place at every level, but Romanian legislation between the two world wars sought to eliminate gradually the Hungarian education system. Therefore, because of the narrowing possibilities for continuing native language education and the unresolved vocational training, a large number of Hungarian students are already forced during their primary school years to attend Romanian-language schools.

The new Education Law adopted in 1999 in Romania only partly satisfies the educational needs of Transylvania's ethnic Hungarians. The law ensures vocational education at all levels and the entrance examination in the Hungarian language as well as allowing for the establishment of Hungarian-language groups, sections, colleges, and faculties in higher education. On the other hand, the law is restrictive in respect of establishing higher education institutions with teaching in the native language. Hence it does not allow a Hungarian-language, state-funded university to be opened, but only a multi-cultural one.

Notwithstanding this, most of the problems faced by Ukrainian educational institutions, including Hungarian schools, are financial in nature. Not only were heating and electricity unavailable in a number of schools, but also those in rural areas often fail to meet the most basic hygienic requirements. Meanwhile, in several villages, many schools where instruction is given in two or three languages have become independent Hungarian schools, and the re-establishment of the Hungarian educational system is still going on today.

The Civil War in the former Yugoslavia had its effect on education also and totally destroyed the education-system in the Hungarian language. As for Croatia, the number of national Hungarian primary school students compared to the pre-war figure has dropped by one-half, and exclusively Hungarian-language education goes on in just two secondary schools. In Serbia, the law totally centralised educational decision-making and there is no voice, even at consultative level, for the representatives of ethnic minority organisations.

2.1.3 Ethnic conflicts

The status of ethnic Hungarians is often exploited by politicians in neighbouring states, usually in the run-up to elections, and there has been news of attacks on Hungarians even in those states already in the EU. The ethnic incidents in the Serbian province of Voivodina have also aroused the interest of the European Parliament, which passed a resolution calling upon the Serbian authorities to do everything in their power to end these incidents if the country wished to continue its approach to the EU, since respect fro minority rights is one of the main criteria for Accession.

2.2 Moral and legal responsibility

The feeling of belonging to a nation is the projection of family feelings to the lingual-cultural big community that we sense on a cousinly basis. As the famous French politician, Ernest Renan defined the nation: "soul, mental principle, moral consciousness".[5] Hungary has played a leading role in transforming the moral responsibility - also supported by the above practical facts - into legal form and this way the lines that later became known as the responsibility clause became a part of the Constitution of the Republic of Hungary in Act XXXI of 1989. Therefore the feeling of responsibility for the fate of Hungarian nationals beyond the border belongs to those rare themes on which the political elite after 1989 came to an agreement.

Article 6 of the Constitution of the Republic of Hungary states: "The Republic of Hungary feels responsibility for the fate of the Hungarians behind the borders, and promotes the cultivation of relations with Hungary". This responsibility clause records a one-sided and permanent responsibility, and, moreover, among the general rules of the Constitution, in the lines of the most basic principles and purposes determining the foreign policy of Hungary, is stated "As a result of all of these, the clause can be meant as a purpose of the state in the founding document of the political community, a general command which obligates the Hungarian government and public administration."[6]

The political rationale of the responsibility clause is honest in declaring the interest of the state: "The reality of the borders created as a result of the peace treaties after the first and second world wars – considering the powers and alliances of world politics – cannot be questioned, although this does not mean that special ethnic relations should be ignored. Therefore even the Constitution states that the kin-state is willing to play an active role in the life of the Hungarians beyond the borders".[7]

The rationale also indicates that a new phase had started in national policy after the change of regime. The policy of governments between the two world wars had been territorial revision, and, post-WWII, there

[5] Restitutio in integrum avagy Töryényt a külhoni magyarok Magyar állampolgárságának visszaállítására! Magyarok Világszövetsége, 2005 p. 21.

[6] Halász, Iván – Majtényi, Balázs – Szarka, László (Eds.): Ami összeköt? Státustörvények közel s távol. Gondolat Kiadó, Budapest, 2004 p. 96.

[7] Magyar Közlöny, 74. sz., 1989. október 23., 1232-33. o.

were attempts to suppress questions concerning Hungarians outside the borders. However, the fact that the change of regime was followed by migration to the kin-state strengthened government support for the policy that people should be encouraged to stay where they were born and progress there.

3. The first steps towards a united Hungarian nation

3.1 Bilateral agreements

The first bilateral agreements between Hungary and its neighbours were signed immediately after the political change. The Treaty on Good-Neighbour Relations and Cooperation between Hungary and the Ukraine was signed in 1991 and was followed by similar bilateral treaties with Croatia, Slovenia, and Russia in 1992. The 'Good Neighbour Treaty between Hungary and Romania only came into effect in 1996. Although these are only framework agreements, the documents contain provisions concerning the protection of the rights of persons belonging to ethnic minorities, and also acknowledge the redrawn borders as concluded in the Trianon Treaty. The treaties, therefore, constitute a vital contribution to the stability of certain regions.

The bilateral agreements have two major results: firstly, after signing these treaties, the countries cannot ignore the obligations included in the documents, and, secondly, the signatory states should start further negotiations on how to implement them. However, none of the agreements contain regulations confirming the authority of any particular court or any other legal mechanism. This means that, if any party does not proceed with the negotiations necessary for a treaty to be implemented, only political pressure applied by the other party or the international community can be used to persuade that party.

3.2 The benefit law

While these bilateral agreements mainly concern what the neighbouring countries should do, it is also worth noting what the Hungarian government did directly to fulfil its obligations to the Hungarians outside the country. With regard to the development of bilateral and multilateral Good-Neighbour relations in the Central European region, Act LXII of 2001 on Hungarians living in

Neighbouring States was passed by the Hungarian Parliament on the initiative, and based on the proposals, of the Hungarian Standing Conference, as the consultative body working to preserve and strengthen the identity of Hungarian communities living in neighbouring countries. Therefore, the purpose of the Act was, according to its Preamble, 'to ensure the well-being of Hungarians living in neighbouring states to their home-state, to promote their ties to Hungary, to support their identity and their links to the Hungarian cultural heritage as an expression of their belonging to the Hungarian nation'.

The main reason for creating the Law on the Benefits of Hungarians living in the Neighbouring States was that there was no such comprehensive and general law that would formalise the situation of those Hungarians. According to the concept, the purpose of the law was to help to preserve the ethnic identity of the Hungarian minorities and their mental and economic growth in harmony with the constitutional obligation of the Hungarian Republic, and in such a way as to help the Hungarians in the neighbouring states to remain where they were born.

The Act, of course, mainly applies to persons declaring themselves to be of Hungarian origin (but who are not Hungarian citizens) and who reside in Croatia, Romania, Serbia and Montenegro, Slovenia, Slovakia or the Ukraine. The government proposed granting these ethnic Hungarians the right to work - legally - for three months in Hungary, as well as giving them social and health care rights, free university education, training courses and travel allowances.[8] Among these benefits, the most important, the rights to work and to enjoy social and health care benefits, were abrogated in 2003 as Hungary conformed to EU requirements.

The move to provide welfare benefits to minority Hungarians living in neighbouring countries touched on historical sensitivities in Romania and Slovakia, who said that the law would encroach on their sovereignty. In the face of international criticism, the Hungarians embarked on consultations with neighbouring states concerning the implementation of the law and finally, on 22 December 2001, the Hungarian and Romanian governments signed a memorandum of understanding. It should also be mentioned that the Hungarian case is not an isolated one in Europe, since

[8] Persons falling within the scope of the Act are only entitled to certain benefits if they are certified by the 'Ethnic Hungarian Card' or the 'Family Member of Ethnic Hungarian Card' that can be applied for in the neighbouring countries by demonstrating probable Hungarian origine. Unfortunately as a result of the amendments in 2003, these cards only entitle the holder to relatively minor benefits.

many countries, including those neighbouring states most critical of Hungary, give privileges to their kin-minorities in laws enacted prior to Hungary's Benefit Law.

The European Union also dealt with the Hungarian Benefit Law, although the Commission in its Country Report of 2001 did not investigate the Act in the framework of human rights and minority protection, but in terms of the Common Foreign and Defence Policy. The Country Report censured Hungary for not having consulted with the neighbouring states before the Act passed into law, and so the country needed to agree on the rules of execution post hoc.

The so-called Venice Commission of the Council of Europe has also dealt with the problem of status laws. The Commission's report acknowledges that, although the state on whose territory the minorities live, is responsible for their protection, the kin-states also have a role to play in the protection and preservation of their minorities. On the other hand, the Venice Commission states that the existing framework of minority protection should be respected, and adds that a state can only enact legal provisions applying to foreign citizens if the effects apply merely domestically since, otherwise, consent would be needed from other states affected.

4. Plans going up in smoke

A series of developments produced a new situation. Firstly, the Benefit Law was partly rescinded in 2003 and so was unable to fulfil its original aim. Secondly, Accession brought travel restrictions to parts of the Hungarian periphery and generated both civil and government proposals.

4.1 The referendum on citizenship

The World Association of Hungarians was successful in collecting the required 200,000 signatures to force the Hungarian Parliament to vote on calling a referendum regarding the offering of dual citizenship to ethnic Hungarians living abroad. The then President of the Republic, FERENC MÁDL, set December 5th 2004, as the date for this binding referendum, and, to save cost, this coincided with a referendum on hospital privatisation.

The main difference between the present situation and the proposal repeatedly referred to as the dual citizenship proposal (although, more accurately, it concerns preferential citizenship) is that, according to the proposal, ethnic Hungarians would not have to move to Hungary in order to be able to apply for citizenship. The ruling socialists believed that the issue of dual citizenship should not be decided in a referendum. They opposed the idea of granting dual citizenship to ethnic Hungarians, since they believed that this could trigger a mass exodus to Hungary, which would devastate the economy. According to a survey, one in every three young ethnic Hungarians living in Transylvania would move to Hungary if they were granted citizenship.

The opposition was convinced that dual citizenship was designed, primarily, to provide a means of obtaining a Hungarian Passport, i.e., free travel opportunities for Hungarian communities in those countries likely to remain outside the EU in the long-term (Serbia, the Ukraine). Moreover, in the case of Romania, the new citizenship regulation would simply grant the same rights to Transylvanian Hungarians as would be granted to all Romanian citizens after Accession to the EU. They also argued that the preferential granting of Hungarian citizenship to ethnic Hungarians would not increase social costs, because no large-scale resettlement was expected after its introduction and most social benefits are only available for resident citizens paying taxes and making social security contributions.

The plan for a referendum sparked concern in countries neighbouring Hungary with large Hungarian minorities. Nationalists in these countries said that the planned referendum was a provocation. By contrast, the Associations of Ethnic Hungarians supported the idea of giving them the right to acquire Hungarian citizenship, and stressed that people beyond the borders would not leave their homeland should they be officially declared Hungarian citizens.

As for legal matters, dual citizenship, various rights for non-domiciled citizens and the preferential granting of citizenship is common practice in the European Union as well as in the neighbouring countries. At the same time, whether or not someone takes dual citizenship depends on whether or not the current home country accepts this For example, in Ukraine, the law forbids dual citizenship, and, if a Ukrainian Hungarian were granted Hungarian citizenship, the person would immediately be stripped of their Ukrainian citizenship. Similarly, in Romania, people of dual citizenship are deprived of certain rights.

The result of the referendum[9] is shown by the figures: a mere 37.49 % of registered voters cast their vote. 51.57 % voted Yes, but the referendum failed due to the low turnout.[10] However, evaluating the result is ambiguous and depends on which wing of Parliament does the evaluation. According to FERENC GYURCSÁNY, the (Socialist) Prime Minister, the referendum failed. He also criticised the opposition for playing with the feelings of the nation and said that he understood why the country did not confuse nationalism and responsible patriotism. By contrast, the leader of the country's Conservative opposition, ex-Prime Minister VIKTOR ORBÁN, insisted that the vote was valid, although not successful, and that the Yes vote won. He blamed the prevailing problems for the low turnout and called on the government to support dual citizenship despite the vote.

4.2 The institution of 'nation citizenship'

In November 2004, even before the extremely divisive referendum on dual citizenship, and together with the Homeland Fund which was to follow, a new proposal was drafted which focused on inserting a brand new institutional concept, 'nation citizenship' into domestic public law. The two proposals submitted were linked to each other 'as both the whole and a segment: peaceful reunification and assured prosperity is the general aim, a special tool is created (the Homeland Fund) a basically community-building support system, and Nation Citizenship would be the other special, but mainly individual level, institution of this unification.'[11] Today, of course, we already know that there is another essential difference between the two proposals: whilst the Homeland Fund is alive, the introduction of the institution of Nation Citizenship is not on the agenda.

[9] The following question was asked of Hungarian citizens on the 5th of December 2004: 'Do you think that Parliament should pass a law allowing Hungarian citizenship with preferential naturalisation to be granted to those, at their request, who claim to have Hungarian nationality, do not live in Hungary and are not Hungarian citizens, and who prove their Hungarian nationality by means of an Ethnic Hungarian Card issued pursuant to Article 19 of Act LXII/2001 or in another way to be determined by the law which is to be passed?'

[10] Országos Választási Iroda: A 2004. december 5-i népszavazás végleges eredménye. http://www.valasztas.hu/nepszav04/main_hu.html [2006. 11. 30.]

[11] Tóth, Judit: A vizionált nemzetpolgárság. In: Romániai Magyar Jogtudományi Közlöny 2005/1. p. 22.

During the parliamentary debate "it emerged that this is a unique relationship between the nation and the individual, based on ties of blood, descent and culture; it is, therefore, much more spiritual than if it were simply money-based'.[12] On the other hand, this new institution would not mean full citizenship, but would create a parallel or complementary legal relationship which would mainly help an individual to obtain a passport or travel document and would provide an opportunity for preferential visa treatment. This idea basically matches the institution of 'external citizenship', the proposal presented to the Hungarian "Establishment" by the President of the World Association of Hungarians in 2000. According to this proposal, Hungarians outside the borders would have the right to a Hungarian passport, an identity card, to work and study in Hungary and to benefit from the Hungarian health system. On the other hand, however, they would not have the right to vote or to settle in Hungary and apply for citizenship. By way of contrast, this external citizenship would have the tactical advantage that its content could be tailored to the actual situation. However, it was precisely this ambiguity or uncertainty over its content that meant the end of this proposal and forced the representatives of the Hungarian nationals to press for dual citizenship.

4.3 Greek-style identity card

A year after the unsuccessful and emotive referendum, the government suggested the introduction of a special travel document for non-domiciled Hungarians. The aim was to provide the right of free movement in the member states of the EU even without giving them preferential citizenship. The result would have been to apply the general rules making them able to spend up to 90 days in a period of 6 months within the Union.

According to the common understanding, the Greek solution could have been the model for this. Athens can accord special treatment to the Greeks living in Albania under the terms of an agreement with the European Union. Firstly, Greece issues a six-month-long visa with which ethnic Greeks living in Albania can apply for a special identity card. This entitles them to stay and work in the kin-state for an indefinite period and also to enter other member states of the EU. On the other hand, when comparing the two minorities, we see major differences. Between 1991 and 2005, a total of 130,000 special ID cards were issued. At present,

[12] Ibid. p. 25.

only the citizens of Serbia and the Ukraine need a visa to enter the territory of the EU, but the number of ethnic Hungarians in these two states alone exceeds this number. Another counter- argument is that the right to enter the member states of the EU, or the so-called Schengen territory, depends on citizenship and not on the travel document.

5. The latest reforms

The government has now produced some proposals, thought to be retaliation by the opposition in response to the negative outcome of the referendum.

5.1 Homeland Fund

During the Parliamentary debate on the proposals, a number of issues were raised. These included techniques and tools for ethnic unification, new government powers vs. ethnic issues, the support of the community or the individual, the aspirations of ethnic Hungarians beyond the borders, and also budgetary matters. Finally, the Act on the Homeland Fund[13] was made law in February 2005.

The Homeland Fund is, broadly, a separate state fund financed from three different sources: the State budget, donations from Hungarian citizens and EU funds. These funds can be used for a wide variety of purposes, and can be applied to individuals, civil associations, local authorities and also entrepreneurs outside the borders. The Homeland Programme complements the Fund by establishing a credit programme for economic development and the creation of new jobs.

5.2 Amendments to the Immigration Law

Reform lay not only in the form of new institutions; also needed was a revision of current legal provisions. The government, therefore, appointed DEZSŐ AVARKESZI to investigate both the legal background and the procedures relating to foreigners in Hungary. His investigation resulted in Amendment proposals concerning both the Act on Naturalisation and the Foreign Policy Act. The Hungarian Parliament accepted the Amendment Bill[14] unanimously on 6 June 2005. The

[13] Act II of 2005 on the Homeland Fund

[14] Act CXXXIV of 2006 on the modification of Act II of 2005 on the Homeland Fund

Amendment Act mainly changed procedural provisions: the procedures themselves became shorter and the administrative and other burdens on applicants decreased

5.2.1 National Visa

The government announced the introduction of the National Visa in its programme entitled 'Five Points concerning National Responsibility'. In accordance with this, Parliament enacted legislation on issuing a National Visa for ethnic Hungarians after concluding bilateral agreements with neighbouring states. The main point of this visa not only lies in its personal scope, but in its validity time - which differs from the norm: a single administrative action can provide an applicant with a visa for 90 days which will allow him to enter the country and, within 90 days, to have a national residence permit issued for up to 5 years. It does not entitle the holder to work or study in the country, and so the basic purpose of this new visa is to maintain the relationships between Hungary and ethnic Hungarians.

5.2.2 Preferential immigration regulations

Positive discrimination already existing under the previous immigration law is linked to the application for a residence permit and, with this preferential regulation, the Hungarian state wishes to demonstrate that it recognises its obligation to help the prosperity of ethnic Hungarian, even if they choose to leave their homeland and migrate to Hungary. Therefore, instead of having to live in the country for a continuous period of three years, no length of stay needs to be proved when applying for a residence permit if the applicant was once Hungarian or is of Hungarian origin – one or the other of these being either proved or shown to be likely.

Following the revision of the Immigration Law in 2005, the Act on Naturalisation[15] was also modified and, as a result, individuals who have Hungarian ancestry can apply for Hungarian citizenship immediately after establishing a permanent address in Hungary, and the application can be submitted to the President of the Republic within 6-12 months, instead of 21 months, as previously. Moreover, not only individuals who graduate in Hungary would be exempt from taking the citizenship

[15] Act LV of 1993 on the Hungarian citizenship

examination, but also those who study the Hungarian language outside Hungary.

6. The complex status of Hungarians

As for the present situation, ethnic Hungarians who choose to migrate to Hungary cannot be treated uniformly due to the very different nature of their country of origin. Any Hungarians coming from Austria or from the countries joining the Union in 2004 can be categorised in the first Priority Group, with the addition in 2007 of Romanian citizens. According to the latest results of immigration-related legislation, Act I of 2007 entitles foreigners belonging to this Group to ask for a Hungarian registration card by a very simple procedure, and they need not even ask for a job licence[16] since employment requires only that the Labour Centre be notified.

A major advantage for this Group and also for those who have an EU-citizen or a Hungarian citizen as a family member, is that, even with a registration card or with a specified term residence card issued for third-country national family-members, these people are free to move and reside in the EU and can establish a permanent address in Hungary - which helps them to apply for citizenship much earlier than before.

Citizens of Croatia, and, since 19 December 2009, of Serbia are exempt from applying for a tourist visa for the Schengen territory, but, if they wish to stay longer in Hungary, they also need to apply for a visa and residence permit - just as the citizens of the Ukraine. If their purpose is employment, the basis of these documents should be a work permit. Clearly, the regulations of Act II of 2007 on the Entry and Residence of Third-Country Nationals can only ease their settlement later - and any application for citizenship by the preferential rules described above.

7. Conclusion

Even though the grand concept of a comprehensive Hungarian migration policy is lacking, by a series of government and parliamentary acts, some elements of the strategy are already visible and these elements are clearly related to Hungarian ethnic minorities. The outstanding

[16] Between 2007 and 2009 citizens of Romania needed to request a work permit in order to be employed in Hungary unless exempt, for example, based on having been employed in Hungary for a year or because of belonging to a certain profession.

question concerns when these fragments can be expected to be pulled together into a clear migration policy as the basis of future legislation - instead of the present situation where legislation tries to draft some individual elements of a migration strategy.

Clearly, the Hungarian government wishes to confirm its obligation to help the prosperity of Hungarians whether they choose to live inside or outside Hungary. At the same time, resettlement in Hungary cannot be a solution to their problems. The aim should be to help Hungarians preserve their language, culture and national identity, but also to feel at home in their homeland. This duality is a conspicuous characteristic of all the proposals and enacted regulations of the Hungarian authorities.

The Hungarian example is certainly not the only minority issue within the EU, but the size of the minority and the fact that one part of the nation lives inside, and another part outside the Union, justifies attention being paid to it. GÜNTER VERHEUGEN, the ex-Commissioner responsible for Enlargement issues, said that the result of the Accession of new countries is that the field of issues with which the EU deals is broadening – something which is not a problem, but, on the contrary, highly desirable. It is, therefore, our common responsibility to prevent walls being erected between those ethnic communities that have joined the EU and those still left outside.

The Hungarian Parliament and Government should take responsibility for finding the best solution capable of meeting both the requirements of the European Union and the needs of the Hungarians beyond the borders. As shown on the homepage of the State Secretariat Responsible for Minority and Ethnic Policy of the Hungarian Prime Minister's Office: 'The Government of the Republic wishes to renew Hungarian-Hungarian relationships, the relation between the kin-state and the communities of Hungarians beyond the borders and, therefore, aims to make a conceptual change in ethnic policy. Although, since 1 January 2007, 90 % of foreign-domiciled Hungarians have lived under the same economic and political circumstances inside the European Union, neither the neighbouring countries nor the Union are able to substitute the role provided by the kin-state for its foreign-domiciled minorities.'[17]

[17] Tájékoztató a kormány külhoni magyarsággal kapcsolatos politikájáról. http://www.nemzetpolitika.gov.hu/id-949-tajekoztato.html [2009. 02. 24.]

FORMER VOLUMES OF STUDIA IURIDICA

1. *Halász* Pál: Az államfogalom meghatározásának néhány kérdése
2. *Kauser* Lipót: Hozzászólás a házassági vagyonközösség lényegesebb problémáihoz
3. *Rudolf* Lóránt: A pénzfizetési jogviszony fogalmi jegyeiről
4. *Szamel* Lajos: Az államigazgatási eljárási törvény jogorvoslati rendszere
5. *Bihari* Ottó: Az államhatalmi és államigazgatási szervek hatáskörének problémái
6. *Szotáczky* Mihály: A jogi akarat osztálytartalma
7. *Földvári* József: A visszaesés értékelése a büntetőjogban
8. *Benedek* Ferenc: A iusta causa traditionis a római jogban
9. *Losonczy* István: Adalékok a tartós és állapot-bűncselekmény kérdéséhez
10. *Kocsis* Mihály: A másodfokú büntetőbíróság ítélő hatalma
11. *Rudolf* Lóránt: A kollektív szerződés főbb elvi kérdései a szocializmusban
12. *Kovacsics* József: Községszervezetünk problémái Baranya megyében
13. *Csizmadia* Andor: A nemzeti bizottság létrejötte és jogállása 1944-45-ben
14. *Halász* Pál: Az államformatan néhány elméleti kérdése
15. *Szamel* Lajos: A szocialista demokrácia kialakulása és a polgári bürokrácia lebontása államigazgatásunkban
16. *Földvári* József: Az enyhítő és súlyosbító körülményekről
17. *Pap* Tibor: A bontás problematikája családjogunk felszabadulás utáni fejlődésének tükrében
18. *Páll* József: A családjogi törvény néhány kérdése
19. *Csizmadia* Andor: Feudális jogintézmények továbbélése a Horthy-korszakban

20. *Antalffy* György: Az állam szervezetéről a rabszolgatartó athéni demokráciában
21. *Szotáczky* Mihály: Az egyéni érdek és az osztályérdek viszonya a tárgyi jogban
22. *Kauser* Lipót: A jogügyletről
23. *Rudolf* Lóránt: A kötelem fogalmáról
24. *Csizmadia* Andor: Az egyházi mezővárosok jogi helyzete és küzdelmük a felszabadulásért a XVIII. században
25. *Halász* Pál: Állam- és jogrend a szocialista forradalomban
26. *Huszty* Lajos: A hozzátartozó a polgári jogban
27. *Vargyai* Gyula: Jobbágyfelszabadítás Esztergom megyei egyházi birtokon
28. *Benedek* Ferenc: Senatus Consultum Silanianum
29. *Bauer* Ilona: Az állammonopolista tulajdon fejlődése és osztályjellege a II. világháború után a Német Szövetségi Köztársaságban
30. *Földes* Iván: A termelőszövetkezetek üzemi-gazdasági igazgatásának néhány problémája
31. *Román* László: Az engedelmességi kötelezettség és a diszkrecionális jogkör problematikája a munkajogban
32. *Ádám* Antal: Az egyesületek a magyar társadalmi szervezetek rendszerében
33. Symposion (1963): Az államigazgatás-tudomány feladatai a szocialista országokban
34. *Rudolf* Lóránt: A szerződések megkötése
35. *Vargyai* Gyula: A legitimisták és szabad királyválasztók közjogi vitájáról az ellenforradalmi államban
36. *Ivancsics* Imre: A szakszervezetek szerepe az ipar irányításában és az igazgatásában
37. Nicolae *Tatomir*: A munka nemzetközi szervezete – Berthold *Braunstein*: Szabadság és szükségszerűség a büntetőjogban
38. *Szamel* Lajos: Az államigazgatás társadalmasításáról

39. Kazimierz *Opalek*: Általános jogtudomány – Franciszek *Studnicki*: A jogszabályok kommunikációs problémái
40. *Csizmadia* Andor: A pécsi egyetem a középkorban
41. Andor *Csizmadia*: Die Universität Pécs im Mittelalter (1367-)
42. Andor *Csizmadia*: L'université de Pécs au moyen âge (1367-)
43. *Román* László: A munkáltatói jogok természetéről
44. *Pap* Tibor: A házasságon kívüli leszármazásra vonatkozó jogalkotás fejlődése – *Budvári* Róbert: A házasságon kívül született gyermek jogállása és a természettudományos tárgyi bizonyítás fejlődése
45. Heinz *Paul*: Az anyagi felelősség szabályozása a Német Demokratikus Köztársaság munkajogában – Gerhard *Riege*: Az állampolgári jog fasiszta eltorzítása
46. *Takács* Béla: A vállalatok összevonása és az összevonások gazdasági hatása
47. *Hoóz* István: A népesedéspolitika néhány elméleti kérdése
48. Rechtshistorikerkonferenz in Pécs (1965): Die Freiheitsrechte und die Staatstheorien im Zeitalter des Dualismus
49. *Kocsis* Mihály: A jogforrások ügye a büntetőeljárásban
50. *Molnár* István: Élelmiszer-termelés – földvédelem
51. Bibliográfia: Az egyetem oktatóinak és tudományos dolgozóinak szakirodalmi munkássága 1945-1966.
52. *Kislégi* Dénes: Az incestus tilalma
53. *Hoóz* István: A népesedéspolitikai intézkedések és a gazdasági helyzet hatása a születési arányszámokra Magyarországon a két világháború közötti időszakban
54. *Fesztl* Nándor – *Tamás* Lajos: Az új gazdasági mechanizmus polgári jogi vonatkozásainak néhány problémája
55. Gerhard *Haney*: A jog és erkölcs
56. *Vargyai* Gyula: A katonai közigazgatás és az ellenforradalmi állam keletkezése
57. *Páll* József: A szerződés teljesítésének megerősítése a PTK-ban
58. *Révész* Károly: A visszaesés problémája a büntetőjogban

59. *Román* László: Munkajogunk néhány kérdése a gazdasági mechanizmus reformjának tükrében
60. *Csizmadia* Andor: A 600 éves jogi felsőoktatás történetéből (1367-1967)
61. *Vargha* László: Über die Faktoren, die das Ergebnis einer Handschriftenvergleichung hauptsächlich beeinflußen können
62. *Földvári* József: Die deterministische Begründung der strafrechtlichen Verantwortlichkeit
63. *Rudolf* Lóránt: Az adásvétel szabályozásának fejlődése a kizsákmányoló társadalmakban
64. *Molnár* István: A munkamulasztásból eredő kártérítés néhány kérdése a termelőszövetkezeti jogban
65. T. *Pap* – R. *Halgasch*: Die Rechtsverhältnisse zwischen Eltern und Kindern in der sozialistischen Gesellschaft
66. Antal *Ádám*: Problemü goszudarsztvennopravovüh i adminisztrativnopravovüh dogovorov v Vengerszkoj Narodnoj Reszpublike
67. *Román* László: A szervezeti jellegű belső szabályzatok természete különös tekintettel a kollektív szerződésre
68. *Vargyai* Gyula: Nemzetiségi kérdés és integráció. Adalékok Jászi Oszkár nemzetiségi koncepciójának értékeléséhez
69. *Judi* István: Munka és erkölcs
70. *Markos* György: A megyei tanácsi szervek tervező tevékenysége
71. *Tremmel* Flórián: A bizonyítás és a bizonyíték fogalma a büntetőeljárásban
72. Antal *Ádám*: Hauptzüge und zeitgemäße Probleme der territorialen Koordinierung in der Ungarischen Volksrepublik
73. *Molnár* István: A földtulajdon és a földnyilvántartás kapcsolata
74. *Bruhács* János: Az ENSZ kísérlete Namibia (Délnyugat-Afrika) nemzetközi státusának rendezésére
75. J. *Dehaussy*: A nemzetközi jog forrásai és a jog nemzetközi forrása – E. *Melichar:* A közigazgatási jogtudomány fejlődése Ausztriában - K. *Opalek:* A jog motivációs hatása

76. Current problems of socialist jurisprudence
77. A Magyar Tanácsköztársaság államáról és jogáról (1919-1969)
78. *Csizmadia* Andor: A pécsi egyetemalapítás 600. évfordulójára (1367-1967)
79. *Páll* József: A házastárs öröklésének néhány kérdése a haszonélvezeti jogra tekintettel
80. Entwicklungsfragen der Verwaltung in Mitteleuropa. Red. Andor *Csizmadia*
81. László *Román*: Einige theoretische Fragen des Zusammenwirkens der Gewerkschaft und des sozialistischen Unternehmens
82. Bibliográfia: Az egyetem oktatóinak és tudományos dolgozóinak szakirodalmi munkássága 1967-1971.
83. Antal *Ádám*: Verfassungsmäßigkeit und Verfassungsschutz in der Ungarischen Volksrepublik
84. Tibor *Pap*: Les exigences sociales et la modification de la loi de la famille
85. Ottó *Bihari*: L'organisation de l'État socialiste - une organisation de l'État moderne
86. József *Farkas*: Der subjektive Geltungsbereich und der objektive Umfang der Rechtskraft im ungarischen Zivilprozeß
87. József *Farkas*: (Red.) Wissenschaftliche Konferenz über die Hauptfragen des sozialistischen Vertragssystems
88. Ferenc *Benedek*: Die conventio in manum und die Förmlichkeiten der Eheschließung im römischen Recht
89. Bibliográfia: A Pécsi Tudományegyetem Állam- és Jogtudományi Kara oktatóinak szakirodalmi munkássága 1972-1976.
90. László *Román*: Über die Rechtsstellung der Arbeitgeberorgane, insbesondere in der Unternehmenorganisation
91. Antal *Ádám*: L'activité gouvernementale en Hongrie
92. Ferenc *Benedek*: Eigentumserwerb an Früchten im römischen Recht
93. József *Farkas* (hrsg.): Beiträge zu den rechtlichen Fragen des Umweltschutzes

94. Andor *Csizmadia*, Alajos *Degré*, Erika *Somfai Filóné*: Études sur l'histoire du droit de mariage de Hongrie
95. *Ádám* Antal, *Benedek* Ferenc, *Szita* János (szerk.): Jogtörténeti tanulmányok. Emlékkönyv Csizmadia Andor hetvenedik születésnapjára
96. József *Földvári*: Einige Bemerkungen zum neuen ungarischen Strafgesetzbuch
97. Emil *Erdősy*: Der technische-wissenschaftliche Fortschritt und die strafrechtliche Verantwortlichkeit
98. Lajos *Tamás*: Das Verantwortlichkeitssystem der Investitionsverträge
99. László *Vargha*: Die Teilrechtskraft im ungarischen Strafverfahren
100. *Ádám* Antal, *Benedek* Ferenc, *Farkas* József (szerk.): Kauser Lipót Emlékkönyv
101. Lajos *Szamel*: La resposabilité de l'administration pour le dommage causé
102. Bibliográfia: A Pécsi Janus Pannonius Tudományegyetem Állam- és Jogtudományi Kara oktatóinak szakirodalmi munkássága 1977-1982.
103. László *Kiss*: Possibilité de décentralisation de la législation administrative en Hongrie
104. *Ádám* Antal (szerk.): A 100 éves Kislégi Nagy Dénes tudományos, oktatói és költői életművéről
105. *Ádám* Antal (szerk.): Jubileumi tanulmányok 40.
106. Antal *Visegrády*: Die Rolle der Gerichtspraxis in der Entwicklung des sozialistischen Rechts
107. József *Farkas*: The main questions of Hungarian international civil procedure law after the codification of private international law
108. Lajos *Tamás*: Kommissionsvertrag - als einer der Rechtsrahmen für eine Kooperation
109. *Ádám* Antal (szerk.): Dr. Holub József és dr. Irk Albert pécsi professzorok munkássága
110. János *Bruhács*: Le régime international de la navigation sur le Danube

111. *Ádám* Antal (Red.): Die Promotion zum Ehrendoktor von Prof. Gerhard Haney und Prof. Gerhard Hoffmann an der Janus Pannonius Universität
112. Miklós *Kengyel*: Rechtsschutzanspruch und die Rechtsschutzbedürfnis. Beiträge zur Theorie des Klagerechts
113. Harro *Otto*: A népesedéssel kapcsolatos orvostudomány büntetőjogi határainak megvonására irányuló megfontolások a Német Szövetségi Köztársaságban - *Erdősy* Emil: Gondolatok a magzatelhajtás büntetőjogi szabályozásának kérdéséről
114. *Ádám* Antal (szerk.): Dr. Faluhelyi Ferenc tudományos, oktatói és tudományszervezői munkássága
115. László *Kecskés*: Staatliche Immunität und Verantwortlichkeit für Schäden
116. József *Farkas*: Die zivilprozeßrechtliche Stellung der Ausländer in Ungarn
117. Die Promotion von Prof. Dr. Harro Otto zum Ehrendoktor an der Janus Pannonius Universität
118. *Ádám* Antal (szerk.): Tanulmányok Szamel Lajos tiszteletére
119. *Ádám* Antal (szerk.): Szamel Lajos és Kulcsár Kálmán a Janus Pannonius Tudományegyetem díszdoktorai
120. Antal *Ádám*: Tendances du développement de l'ordre constitutionnel de Hongrie
121. Antal *Ádám*: Le contrôle de la constitutionnalité des actes administratifs et gouvernementaux en Hongrie
122. Bibliográfia: A Janus Pannonius Tudományegyetem Állam- és Jogtudományi Kara oktatóinak szakirodalmi munkássága 1983-1990.
123. *Hamza* Gábor, *Kajtár* István, *Zlinszky* János (szerk.): Tanulmányok Benedek Ferenc tiszteletére
124. *Korinek* László (szerk.): Tanulmányok Földvári József tiszteletére
125. Bibliográfia (Összeállította Ádám Antalné). A Janus Pannonius Tudományegyetem Állam- és Jogtudományi Kara oktatóinak szakirodalmi munkássága 1991-1996.
126. *Petrétei* József (szerk.): Emlékkönyv Ádám Antal egyetemi tanár születésének 70. évfordulójára

127. Gábor *Hamza*, István *Kajtár*, Attila *Pókecz Kovács*, János *Zlinszky* (hrsg.): Iura antiqua – iura moderna. Festschrift für Ferenc Benedek zum 75. Geburtstag

128. *Petrétei* József (szerk.): Emlékkönyv Bihari Ottó egyetemi tanár születésének 80. évfordulójára

129. Szerkesztési hiba folytán a sorozat 129. száma nem jelent meg!

130. *Fenyvesi* Csaba, *Herke* Csongor (szerk.): Tanulmányok Erdősy Emil professzor tiszteletére

131. A PTE Állam- és Jogtudományi Kara oktatóinak szakirodalmi munkássága 1997-2002. (Bibliográfia) Összeállította Ádám Antalné

132. *Fenyvesi* Csaba, *Herke* Csongor (szerk.): Emlékkönyv Vargha László egyetemi tanár születésének 90. évfordulójára

133. *Korinek* László, *Kőhalmi* László, *Herke* Csongor (szerk.): Emlékkönyv Ferencz Zoltán egyetemi adjunktus halálának 20. évfordulójára

134. *Korinek* László, *Kőhalmi* László, *Herke* Csongor (szerk.): Emlékkönyv Irk Albert születésének 120. évfordulójára

135. Nóra *Chronowski* (ed.): „Adamante notare." Essays in honour of professor Antal Ádám on the occasion of his 75th birthday

136. *Balogh* Ágnes, *Hornyák* Szabolcs (szerk.): Tanulmánykötet Erdősy Emil professzor 80. születésnapja tiszteletére

137. *Tremmel* Flórián, *Mészáros* Bence, *Fenyvesi* Csaba (szerk.): Orvosok és jogászok a büntető igazságszolgáltatásban. Dezső László Emlékkönyv

138. *Gál* István László, *Kőhalmi* László (szerk.): Emlékkönyv Losonczy István professzor halálának 25. évfordulójára

139. *Fenyvesi* Csaba, *Herke* Csongor, *Mészáros* Bence (szerk.): Bizonyítékok. Tiszteletkötet Tremmel Flórián egyetemi tanár 65. születésnapjára

140. *Csefkó* Ferenc (szerk.): Ünnepi kötet. Ivancsics Imre egyetemi docens, decan emeritus 70. születésnapjára

141. *Kiss* György, *Berke* Gyula, *Bankó* Zoltán, *Kajtár* Edit (szerk.): Emlékkönyv Román László születésének 80. évfordulójára

142. A Pécsi Tudományegyetem Állam- és Jogtudományi Kara oktatóinak szakirodalmi munkássága, 2003-2007 (Bibliográfia) Összeállította Kajtár Istvánné, Karoliny Eszter, Saághy Ferencné

143. *Csapó* Zsuzsanna (szerk.): Ünnepi tanulmánykötet Bruhács János professor emeritus 70. születésnapjára

144. Zsolt György *Balogh* et al. (eds.): Selected Essays of Faculty of Law University of Pécs

145. *Chronowski* Nóra – *Petrétei* József (szerk.): Tanulmányok Ádám Antal professor emeritus születésének 80. évfordulójára

146. *Andrássy* György – *Vogl* Márk (szerk.): Az emberi jogok és a nyelvek