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Articles

István Ambrus*

Considerations for Assessing Corporate Wrongdoings – a Hungarian Approach to Whistleblowing

I The Problem[1]

Misconduct committed within and to the benefit or detriment of a company[2] or (public) institution,[3] although it often falls under one of the offences contained in Act C of 2012 on the Criminal Code ('Criminal Code'), rarely results in criminal proceedings.[4] This does not mean that such forms of conduct occur only sporadically. Investigating and proving these crimes, however, is unusually difficult,[5] and, as such, latency in this area is especially high.[6]

Nonetheless, these activities' global pervasiveness and the social and economic damage they cause[7] justify why some of the issue's legal ramifications and its institutional framework should be explored, along with certain expected (or, at least, desirable) developmental trends.

* István Ambrus (PhD) is assistant professor at Eötvös Loránd University (ELTE), Faculty of Law, Department of Criminal Law and counselor, Penal Board of Supreme Court, Hungary (e-mail: ambrus.istvan@ajk.elte.hu)

1 Though the use of the term 'whistleblowing' is not widespread in Hungarian academic literature, it generally refers to publicizing a wrongdoing that occurred in either the private or public sector.

2 In this study, the term company is used in the legal sense, and we do not use it in a manner analogous with e.g. the term 'undertaking' *(vállalkozás)* in § 8:1(1)(4) of Act V of 2013 on the Civil Code or 'business association' *(gazdasági társaság)* in § 3:88(1). Notwithstanding § 685*(c)* of Act IV of 1959 on the Civil Code or § 459(1) of the Criminal Code, the term 'economic operator' *(gazdálkodó szervezet)* is no longer used in effective Hungarian civil law.

3 Because (public) institutions are concerned with managing governmental tasks and less with profit, they clearly cannot be grouped with companies. This writing aims to highlight abuses in the public sphere, too, but for the sake of simplicity we will only use the term 'company' throughout its length.

4 For instance active economic corruption has become known 1684 times in 2014, but only 351 times in 2015. Cf. Prosecutor General's Report to Parliament in 2015. 6. (source: <http://ugyeszseg.hu/pdf/ogy_besz/ogy_beszamolo_2015.pdf> accessed 26 June 2017).

5 Janin Pascoe, Michelle Welsh, 'Whistleblowing, Ethics and Corporate Culture: Theory and Practice in Australia' (2011) 40 (2) Common Law World Review 144–173, 146.

6 David Lewis, A. J. Brown, Richard Moberly: 'Whistleblowing, its Importance, and the State of Research' in A. J. Brown, David Lewis, Richard Moberly, Wim Vandekerckhove (eds), *International Handbook on Whistleblowing Research* (Edward Elgar Publishing 2014, Cheltenham) 33.

7 Philipp Schneider, 'Mennyire lehet eredményes egy compliance program, ha a dolgozókat frusztráció vagy bosszú- és megtorlásvágy vezérli?' (2014) 62 (6) Belügyi Szemle 107–125, 107. In connection with corruption offences see Hollán Miklós, *A korrupciós bűncselekmények az új büntetőkódexben* (HVG-ORAC 2014, Budapest) 32–34.

An outcome of globalisation is that companies operate across borders. This means that the foundations of a Hungarian approach cannot be established without analysing foreign legal instruments (mainly from the English-speaking world) or literature concerned with the practical and academic aspects of the topic.

We must note at the outset that this subject cannot be examined simply from a legal or criminal law perspective; to understand it necessitates an *interdisciplinary* approach. Fully comprehending the operational mechanisms of the forms of misconduct to be discussed, especially in relation to the operational principles of multinational corporations, requires a knowledge of company, employment, and administrative law. Additionally, non-legal know-how – such as financial and, increasingly, IT proficiency – is progressively necessary.

It is already evident that handling such activities within the traditional national criminal framework (investigative authority, prosecution, criminal court) is becoming a less and less reassuring prospect. The causes for this can be found in the previously-mentioned interdisciplinary nature, the axioms of the globalized economic system, and the phenomenon of a near-permanently unfolding digital revolution. In today's so-called Big Data Era, when neither borders nor technology can block the flow of data or halt its processing, it is difficult to fight crime with traditional tools.[8] The fact that, in increasingly information-based societies, a company's greatest assets are information and data – which, due to the digital revolution, can easily be appropriated using illegal tools – only expands this problem.

Corporations' interests are threatened not just by behaviours that fall within the scope of criminal law but also by those in the purview of other legal fields, as well as potentially lawful but morally objectionable acts. To prevent, uncover, and handle such deeds, *corporate compliance activities* offer an effective solution in the most general respects. In the interest of brevity, this study will concentrate on wrongdoing that can be classified as criminal, a preventive strategy that is a subcategory of compliance known as *whistleblowing,* and possible reactions to misconduct.

Our position is that the heading of *corporate wrongdoing*[9] covers primarily and in the strictest sense the crimes included in the table below. It is worthwhile emphasising a point that often seems almost marginal in the academic literature on the subject, that abuses committed *at the expense* of corporations often have a practical significance that is at least analogous to that of behaviours conducted *for their benefit.* To this latter category we must add that abuses undertaken to the benefit of the company can also ultimately come to harm it.[10] Furthermore, it can be conceded that the matters detailed in this work cannot be considered as conclusively settled, nor do they constitute an exhaustive list. We have simply identified activities which

[8] See Nagy Tibor: 'Big Data – új (m)érték a büntetőeljárásban' in Vókó György (ed), *Tanulmányok Polt Péter 60. születésnapja tiszteletére* (HVG-ORAC 2015, Budapest) 186–194.

[9] See Alexandra Webster, 'Developments in Whistleblowing' (2015) 16 (1) Business Law International 65–75, 65.

[10] To highlight the subject's complexity, we note that a crime committed for the benefit of a company can also be directly or indirectly advantageous to the perpetrator. For example, (s)he may achieve a sales target with the aid of bribery and subsequently receive a higher commission or a promotion.

are criminal in nature and appeared to us as the most consequential. Finally, we must state that classifying a crime as being to the 'benefit' or 'detriment' of a corporation is not an exclusive categorization; it is possible for an offence to belong to both groupings.

Crimes Committed to the Benefit of the Company	**Crimes Committed to the Detriment of the Company**
Active Corruption (Criminal Code § 290)	Defamation (Criminal Code § 226)
Active Corruption of Public Officials (Criminal Code § 293)	Passive Corruption (Criminal Code § 291)
Active Corruption in Court or Regulatory Proceedings (Criminal Code § 295)	Theft (Criminal Code § 370)
Abuse of a Function (Criminal Code § 299)	Embezzlement (Criminal Code § 372)
Failure to Report a Crime of Corruption (Criminal Code § 300)	Fraud (Criminal Code § 373)
Extortion (Criminal Code § 367)	Information System Fraud (Criminal Code § 375)
Budget Fraud (Criminal Code § 396)	Misappropriation of Funds (Criminal Code § 376)
Breach of Accounting Regulations (Criminal Code § 403)	Breach of Trade Secrecy (Criminal Code § 413)
Fraudulent Bankruptcy (Criminal Code § 404)	Illicit Access to Data (Criminal Code § 422)
Breach of Business Secrecy (Criminal Code § 418)	Breach of Information System or Data (Criminal Code § 423)

According to estimates by corporate wrongdoing experts, the damage caused by corporate crime on the global level reaches 5% of companies' revenue.[11] This number on its own should justify companies undertaking effective countermeasures against wrongdoings, whether using the instruments of criminal law or other measures. According to a recent Hungarian survey, however, 94% of responding companies had no 'ethical infractions' in the last 5 years. Only of 53.9% of participating Hungarian corporations had a so-called Code of Ethics, though the international rate for this is 81%. Just 28.5% have a dedicated channel (ethics hotline), while globally this index is at 60%. Only 18% of companies check for conflicts of interest. The risk of data loss, which is made increasingly dire by technological development, is less and less recognised by Hungarian companies each year. While in 2012 36.4% of corporate chiefs thought that an exiting employee will never leave with the company's data assets, this same metric in 2016 was 61.3%. This change goes against formal logic.

The numbers above show that the standards for combating corporate wrongdoing in Hungarian-owned companies do not correspond with international norms. It would then

[11] See Association of Certified Fraud Examiners, *Report to the Nations on Fraud and Abuse. 2016 Global Fraud Story* (source: <http://www.acfe.com/rttn2016/about/executive-summary.aspx> accessed 26 June 2017).

logically follow that there is a distinct possibility that the relative loss in turnover due to these abuses also exceeds the global average. This would indicate the presence of a whole host of disadvantages; the identification of these, however, is beyond the scope of our present effort.

The dilemma can therefore be formulated as follows: There exists a category of crimes which causes quantitatively and socially remarkable damage and currently falls outside of the reach of standard criminal law tools. In fact, because of the above-mentioned reasons, it often might not even be effective to approach this category with such instruments.[12] Keeping this in mind, the primary intent of the present study is to discover which institutions, if any, are able to reduce the damage caused by corporate wrongdoing.

Today, corporate *internal investigations* or Hungarian *employers' whistleblowing systems* may be placed among the traditional institutions of criminal law or, if viewed chronologically, *before* these. We will examine how general prevention strategies can succeed within a company through responsible corporate governance and the establishment and operation of an appropriate compliance control environment, and what responsibilities corporate leadership has to owners and, potentially, other stakeholders[13] in this respect.

II The Concept and Types of Whistleblowing

Based on the English scholarship available to us, our position is that the phenomenon of whistleblowing cannot be reduced to a single and exact concept. Instead, it is only possible to grasp some of its specific characteristics.[14] In 2014, a cross-continental group of researchers released the *International Handbook on Whistleblowing Research.* It defines a whistleblower as 'an organisational or institutional 'insider' who reveals wrongdoing within or by that organisation or institution, to someone else, with the intention or effect that action should then be taken to address it'.[15] However, this general definition, according to many, could require further categorisation. It could also potentially be amended with several substantive elements.

For instance, Daniel Westman delineated three subcategories: active, passive, and embryonic whistleblowing. *Active* whistleblowing refers to individuals who make an actual disclosure, while *passive* covers employees who refuse to carry out their employer's orders when they believe these to be illegal. *Embryonic* whistleblowing can be both active and

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[12] In connection with corruption crimes, see Finszter Géza 'A korrupció nyomozása' (2011) 59 (11) Belügyi Szemle 75–97; Tóth Mihály: 'Lehet-e még újat mondani a kriminális korrupcióról?' in Tóth Mihály, Herke Csongor (eds): *Tanulmányok dr. Földvári József professzor 75. születésnapja tiszteletére* (PTE ÁJK 2011, Pécs) 154–173; Kőhalmi László, 'A korrupcióprevenció lehetőségei az üzleti szektorban' (2016) 63 (5) Magyar Jog 290–298.

[13] In the English-speaking world, stakeholders are persons or groups to which a company owes responsibility, though they cannot be regarded as owners.

[14] Günter Schirmer, Sandra Coliver: 'Resolution 2060 on Improving the Protection of Whistle-blowers' (2015) 54 (6) International Legal Materials 1130–1134, 1131.

[15] Lewis, Brown, Moberly (n 6) 33.

passive, though the individual is removed from his or her position prior to disclosure due to a lack of trust.[16]

Robert Vaughn distinguishes between legal and illegal whistleblowing.[17] The basis of this differentiation – less candidly referred to as *direct* or *indirect* whistleblowing – is whether the addressee of the disclosure has a right to initiate proceedings or sanction. An example of a situation where this is not the case occurs when whistleblowing is conducted through the media.[18]

Amanda Leiter divides whistleblowing into *hard* and *soft* variants. Under the second category she includes employee declarations which do not conflict with any company rules, legal or moral, though, according to the discloser's position, they refer to arbitrary or reckless activities.[19] Finally, the most commonly used categorisation fits whistleblowing into *internal* and *external* forms. The former contains when the disclosure takes place within one of the company's internal forums. The external whistleblower, however, divulges to an entity independent from the company. We can also speak of a *mixed* whistleblowing system if the announcer can turn to both internal and external forums.[20]

III Reflections on Whistleblowing around the Globe

Though reviews of global perspectives are usually placed at the end of academic studies, this work, unconventionally, will present this section prior to discussing the Hungarian regulations. The reason for this is not only that this area of regulation is still in its infancy in Hungary. Our view is that identifying the most important characteristics of whistleblowing – an effort which aims to go beyond its simple definition – can only be undertaken through an overview of examples from around the globe.

1 USA

The cradle of (modern) whistleblowing is undoubtedly the United States. Not only is it true that America has the most extensive body of regulation relating to the field, as well as the

16 Daniel P. Westman, *Whistleblowing: The Law of Retaliatory Discharge* (The Bureau of National Affairs 1991, Washington DC) 19–20.

17 Robert G. Vaughn, *The Successes and Failures of Whistleblower Laws* (Elgar Publishing 2012, Cheltenham) 11.

18 James Fisher, Ellen Harshman, William Gillespie, Henry Ordower, Leland Ware, Frederick Yeager: 'Privatizing Regulation: Whistleblowing and Bounty Hunting in the Financial Services Industries' (2000) 19 (3) Dickinson Journal of International Law 117–143, 128.

19 Amanda C. Leiter, 'Soft Whistleblowing' (2014) 48 (2) Georgia Law Review 425–497, 436.

20 James N. Alder, Mark Daniels, 'Managing the Whistleblowing Employee' (1992) 8 (1) The Labour Lawyer 19–70, 27; Stephen M. Kohn, *Concepts and Procedures in Whistleblower Law* (Quorum Books 2001, Westport, Connecticut) 23.

most comprehensive academic coverage,[21] but it was here that whistleblowing went through its greatest transformations, often as a result of historical circumstances. Initially, the whistleblower was viewed as a 'spy' or 'informer', and his or her disclosure was more likely to be considered treacherous than benevolent.[22] With the passage of time, the term turned increasingly neutral, while the literature started to depict the whistleblower as a simple 'informant'.[23] Lately, in no small part thanks to the corporate scandals resulting from such disclosures, the whistleblower grew into an object of public admiration. As Yale professor Jonathan Macey mentions in one of his writings, TIME Magazine, referring to those who provided effective aid to the authorities in locating certain terrorists after the 9/11 attacks, declared 2002 to be the Year of the Whistleblower.[24] According to another analysis, the appearance of whistleblowers as characters in cartoons, movies, and children's tales signifies the role's – or at least the issue's – popularity.[25]

As part of a short historical review, we may note that certain – perhaps at first glance quite radical – commentators view whistleblowing as nearly contemporaneous with the US Declaration of Independence (1776): The Congress of the newly independent union passed a law making reporting fraud and other abuses a universal civic duty on 30 July 1778, after the crew of a warship approached the lawmakers to report the cruel treatment to which their captain subjected them.[26] Others believe the first ancestor of true whistleblowing legislation was the 1863 False Claims Act, a federal legislation which offered a share of the fine imposed on those reported to the whistleblower himself, typically as a result of Civil War corruption (also referred to as *qui tam lawsuits)*.[27] This latter rule can also be viewed as a predecessor to today's whistleblowing rules because it set out guidelines for the protection of the discloser.[28]

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[21] Beyond a legal analysis, the issue is also examined from an ethical perspective by Michael L. Rich, 'Lessons of Disloyalty in the World of Criminal Informants' (2012) 49 (3) American Criminal Law Review 1493; Quorum Books 2001, Westport, 1539, 1498; Quorum Books 2001, Westport, 1507.

[22] Orly Lobel, 'Linking Prevention, Detection, and Whistleblowing: Principles for Designing Effective Reporting Systems' (2012) 54 (1) South Texas Law Review 37; Quorum Books 2001, Westport, 52, 40.

[23] Mary-Rose Papandrea, 'Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment' (2014) 94 (2) Boston University Law Review 449–544, 483.

[24] Jonathan Macey, 'Getting the Word Out about Fraud: A Theoretical Analysis of Whistleblowing and Insider Trading' (2006–2007) 105 (8) Michigan Law Review 1899–1940, 1901.

[25] Roberta Ann Johnson, 'Whistleblowing and the Police' (2006) 3 (1) Rutgers University Journal of Law and Urban Policy 74–83, 74.

[26] See Shawn Marie Boyne, 'Whistleblowing' (2014) 62 (Supplement) The American Journal of Comparative Law 425–455, 425, and Dan Meyer, David Berenbaum, 'The Wasp's Nest: Intelligence Community Whistleblowing & Source Protection' (2015) 8 (1) Journal of National Security Law & Policy 33–72, 33.

[27] Pamela H. Bucy, 'Why Punish? Trends in Corporate Criminal Prosecutions' (2007) 44 (4) American Criminal Law Review 1287. 'Disloyalty in the World of Criminal Informants' 1305, 1293. Kathleen Clark, Nancy J. Moore, 'Financal Rewards for Whistleblowing Lawyers' (2015) 56 (5) Boston College Law Review 1697. 'Disloyalty in the World of Criminal Informants' 1775, 1698.

[28] Macey (n 24) 1904.

The construction of a veritably modern federal whistleblowing regime was initiated in the 1970s mainly due to the Watergate scandal, which brought down President Richard Nixon.[29] After a number of efforts that yielded partial results, the era's two most significant legal achievements are the 1978 Civil Service Reform Act (CSRA) and the Whistleblower Protection Act (WPA) from 1989.[30] The last-mentioned unambiguously forbade the intimidation of the discloser and any retribution for disclosure.[31] The next period saw the introduction of several laws protecting the whistleblower.[32]

According to Roberta Ann Johnson, who authored a monograph on whistleblowing, the gradual spread of public interest disclosures is fundamentally the result of five factors: changes in bureaucracy (especially efforts to increase transparency), the legal environment encouraging and offering effective protection to disclosers, institutional whistleblower protections, and the perception, which could be described as cultural, that the whistleblower is no longer viewed as a hostile 'informer' but an individual acting on the interests of society.[33]

Following the Enron and WorldCom scandals, a new milestone was reached with the Sarbanes-Oxley Act of 2002 (SOX).[34] At the theoretical level, this law viewed whistleblowing as an essential element of responsible corporate management. In the vein of this conceptualisation, it intended to strengthen whistleblower protection, encouraged anonymous announcements, prescribed criminal law sanctions against those persecuting disclosers, and clarified the lawful channels for disclosure. Nonetheless, it was the target of much criticism, focusing on the high financial cost of its implementation and its discriminatory character in relation to smaller and foreign companies.[35]

The Dodd-Frank Wall Street Reform and Consumer Protection Act (commonly referred to as the Dodd-Frank Act), which amended the SOX Act, was passed in 2010 following the 2007 start and 2008 global deepening of the Great Recession and the election of Barack Obama. A relevant innovation in this legislation allowed the whistleblower to receive 10-30% of the fine imposed on the employer. This created financial incentives for would-be whistleblowers. At the same time, as immediately noted by academia, this measure could have greatly increased the number of opportunistic employees who made unsupported

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29 Stephen Coleman Tily, 'National Security Whistleblowing vs. Dodd-Frank Whistleblowing: Finding a Balance and a Mechanism to Encourage National Security Whistleblowers' (2015) 80 (3) Brooklyn Law Review 1191–1218, 1196.

30 Norm Keith, Shane Todd, Carla Oliver, 'An International Perspective on Whistleblowing' (2016) 31 (3) Criminal Justice 14–36, 15; Terry Morehead Dworkin, A. J. Brown, 'The Money or the Media? Lessons from Contrasting Developments in US and Australia Whistleblowing Laws' (2012) 11 (2) Seattle Journal for Social Justice 653–713, 654.

31 Macey (n 24) 1905.

32 Boyne believes the 1998 Military Whistleblowing Protection Act or the National Transit System Security Act as examples of these. See Boyne (n 26) 449–450.

33 Roberta Ann Johnson, *Whistleblowing – When It Works – And Why* (Lynne Rienner Publishers 2003, Boulder) 4.

34 For a Hungarian account of the Enron scandal, see Kecskés András, 'Az Enron botrány és az üzleti jog rohadt almái' (2008) 55 (6) Magyar Jog 429–440.

35 Terry Morehead Dworkin, 'SOX and Whistleblowing' (2006–2007) 105 (8) Michigan Law Review 1757–1780, 1758.

claims.[36] Partly due to this feature, the Obama era saw a spike in whistleblowers sanctioned for unlawful disclosures.[37]

In 2010, two controversial events occurred relating to the broader concept of whistleblowing. The first was the case of Chelsea (formerly Bradley) Manning. Manning leaked more than 700 000 classified documents to the operators of the WikiLeaks website and was consequently sentenced to 35 years of imprisonment in 2013. However, President Obama, in one of his last official acts, pardoned her in January 2017 and discounted her sentence by 29 years.[38] The second affair was that of former NSA and CIA officer Edward Snowden, who revealed classified information on American intelligence agencies and subsequently fled to Russia.

2 The United Kingdom

The first modern whistleblowing rules in the UK can be found in the Public Interest Disclosure Act 1998 (PIDA). This legislation allows employees to report their public or private sector employers' abuses in both internal and external forums. If the employee faces any discriminatory treatment, the employer must prove that this was not due to his or her disclosure.[39] The British regulations, according to the results of a comparative study, enabled disclosure to a much wider degree than its US counterparts. As such, crimes were not the only grounds on which disclosures could be made according to the 1998 Act; failures to comply with legal obligations, dangers to health and safety, and environmental damage could also lawfully warrant announcement.[40] Nonetheless, the unanimous academic consensus is that the PIDA was unable to fulfil the hopes associated with it even after 15 years, because, as it lacked effective protection for whistleblowers, it did not give sufficient encouragement.[41] Parliament's response to the criticism was the Enterprise and Regulatory Reform Act 2013 (ERRA), which partially amended the PIDA. On one hand, the new law restricted the number of abuses which could be uncovered via whistleblowing, and, on the other, it presupposed good faith on the whistleblower's part.[42]

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36 Meghan Elizabeth King, 'Blowing the Whistle on the Dodd-Frank Amendments: the Case Against the New Amendments to Whistleblower Protection in Section 806 of Sarbanes-Oxley' (2011) 48 (3) American Criminal Law Review 1457–1483, 1463.

37 Meghan Jason Zenor, 'Damming the Leaks: Balancing National Security Whistleblowing and the Public Interest' (2015) 3 (3) Lincoln Memorial University Law Review 61–90, 89–90.

38 Source: <https://www.nytimes.com/2017/01/17/us/politics/obama-commutes-bulk-of-chelsea-mannings-sentence.html?_r=0> (accessed 26 June 2017).

39 Keith, Todd, Oliver (n 30) 18.

40 Elletta Sangrey Callahan, Terry Morehead Dworkin, David Lewis, 'Whistleblowing: Australian, U.K., and U.S. Approaches to Disclosure in the Public Interest' (2003–2004) 44 (3) Virginia Journal of International Law 879–912, 885.

41 Webster (n 9) 66.

42 Jeanette Asthon, '15 years of Whistleblowing Protection under the Public Interest Disclosure Act 1998: Are We Still Shooting the Messenger?' (2015) 44 (1) Industrial Law Journal 29–52, 35.

3 France

Implementing the 95/46/EC Data Protection Directive, the French legislature first passed rules on public interest disclosures in 2004. This is when it introduced the institution of anonymous whistleblowing, which decreed that whistleblowers should turn to the independent and external National Commission on Informatics and Liberty *(Commission nationale de l'informatique et des libertés, CNIL).*[43] Simultaneously, the rules set out to guarantee free speech at the workplace, though that requirement can incidentally also lead to the failure of the public interest disclosure.[44]

Three laws were passed in 2013 with regard to public interest disclosures. These laid out new rules aiding transparency in relation to activities with high health or environmental risks and the pursuits of public figures, as well as fraud and economic crime.[45]

4 Supranational Developments

The Council of Europe began planning whistleblowing recommendations in 2010. As a part of this effort, a commission explored the subject, chiefly by reviewing US regulations. Based on the commission's report – which gave a concrete definition of whistleblowing – the Committee of Ministers passed Recommendation CM/Rec(2014)7. This document called for the creation of relevant regulations within member states, and it noted that these regulations should give due consideration to human rights. After this, especially due to the previously-mentioned Snowden affair, events started to speed up. Two reports were completed in January and May 2015, to facilitate safeguards for whistleblowers. These recommended setting up whistleblowing regimes in both the public and private sectors, the establishment of independent authorities to monitor these regimes, and taking steps to ensure the protection of whistleblowers who are exposed to domestic persecution.[46]

The European Court of Human Rights (ECtHR), too, had to address issues related to whistleblowing, albeit in an employment law context. In *Heinrich v Germany,* the applicant worked in a nursing home of which the Berlin government was a majority owner. Downsizing caused the staff to be overwhelmed, and the proper quality of care could no longer be maintained. In 2004, the discloser, via a legal adviser, notified the management in writing that this was the case and called on them to remedy the situation. The leadership refused, and in December 2004 the lawyer made a criminal complaint against the company. In January 2005, the nurse was laid off – supposedly due to a periodically recurring illness. The nurse attacked the dismissal in a labour court. The investigation of the nursing home was restarted in February 2005 and the carer cited as a witness, but the probe was halted in May. The Berlin Labour

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43 Robert Flanigan, Sébastien Ducamp, 'Implementing Whistleblowing Procedures in France' (2006) (1) Revue de Droit des Affaires Internationales *(International Business Law Journal)* 117–125, 119.

44 This is highlighted in Björn Fasterling, David Lewis, 'Leaks, legislation and freedom of speach: How can the law effectively promote public-interest whistleblowing?' (2014) 153 (1) International Labour Review 71–92, 89.

45 Keith, Todd, Oliver (n 30) 18.

46 Schirmer, Coliver (n 14) 1131.

Court ruled that employment could not be considered terminated, because it was ended illegally. The appellate court, however, struck down the first instance decision because it viewed the employee's reaction as disproportionate vis-à-vis the harm which prompted it. As such, the nurse was not exercising a constitutional right but breaching a duty arising from employment. The Federal Labour Court similarly rejected the appeal, as did the Federal Constitutional Court. Subsequently, the nurse turned to the ECtHR, which ultimately validated her claim and stated that the discloser utilised a constitutional right when reporting misconduct at her place of employment (and acted, fundamentally, as a whistleblower would). Based on this decision, public interest disclosures can now be fitted into the catalogue of human rights.[47]

5 Further International Examples

While a comprehensive international account is, of course, beyond the scope of this work, we wish to include a few further instances of instructive whistleblowing regulation from other nations.

The majority of European countries possess whistleblowing regimes, though these are not equally developed. In the *Netherlands,* for example, an independent ombudsman exists for handling disclosures since 2011. *Romania* already accepted whistleblowing safeguards in 2004, while *Slovenia*'s 2010 anti-corruption law contains provisions protecting disclosers as well.

A common characteristic of larger Asian countries is that they pioneer regional and local solutions instead of national whistleblowing regulations. In *China* there is no comprehensive framework, but there are guidelines which can help qualify retaliation against a public interest discloser as a criminal act. Certain types of misconduct in *India* – such as corruption or abuse of power – mandate the application of employee protection mechanisms, and the details of these must be publicised on companies' websites. *South Korea* established a state-operated system that allows anonymous disclosures relating to corruption in the public sector. The most developed regulatory framework belongs to *Japan,* where disclosing workers receive protection from dismissal and other sanctions, though the American system of financial incentives was not adopted.[48]

Finally, while there is no room for a detailed description in this study, we must mention the significant results achieved in connection with whistleblowing in *Australia* and *New Zealand.*[49]

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47 *Heinrich v. Germany,* no. 28274/08, 21 July 2011. See Peter Hauser, 'Whistleblowing: chance of risk? – new tendencies in Europe' (2013) (1) European Insurance Law Review, 51–59, 57–58.

48 Keith, Todd, Oliver (n 30) 18.

49 For Australia, see David Lewis, 'Whistleblowing Statutes in Australia: Is It Time for New Agenda?' (2003) 8 (2) Deakin Law Review 318–334.; Pascoe, Welsh (n 5) 144–173. For New Zealand, see Catherine Webber, 'Whistleblowing and the Whistleblowers Protection Bill 1994' (1995) 7 (4) Auckland University Law Review 933–957.

IV The Evolution of the Hungarian Regulatory Framework

While examining the relevant Hungarian rules, it becomes evident that its roots reach back to the middle of the socialist period – to the time of the so-called 'soft dictatorship'. Then, after a brief legislative detour, the lawmaking initiatives of the most recent period opened a fundamentally new chapter in the story of reporting abuses.

1 The Beginnings

The nearly analogous – although not entirely accurate – Hungarian terminology for whistleblowing may be the categories of *public interest discloser* or *company discloser* (*közérdekű bejelentő* and *vállalati bejelentő,* respectively*).* The first appearance of these was in legislation in effect from 1977 until Hungary's 2004 EU accession: *Act I of 1977 on Public Interest Disclosures, Recommendations, and Complaints.* According to § 4(1) of this law, 'a public interest disclosure highlights circumstances, errors or deficiencies, the remedying of which serves the interests of the community or society as a whole. It draws attention to behaviours or facts which are illegal, contrary to socialist morals or the principles of socialist economy, or otherwise offend or endanger the interests of society'. The addressee can be a state agency, a company, an institution, an association, an oversight body, etc. (Act I of 1977, § 2). It must be highlighted that this law already emphasised the protection of the discloser, and, as such, allowed anonymous reports. If, however, it became clear that the discloser acted in bad faith, his or her identity had to be revealed [Act I of 1977, § 15(3)].[50]

2 The Regime of Act CLXIII of 2009

The next stop was *Act CLXIII of 2009 on the Protection of Fair Procedure and Related Amendments.* This was not at all akin to the previous regulation, but, as the relevant parliamentary memorandum states,[51] it utilized certain solutions from the U.S. It can be emphasised that the law's general Explanatory Memorandum referred to, on the one hand, the Hungarian Constitutional Court's position on fair trial [primarily to decisions 6/1988. (III. 11.) and 14/2004. (V. 7.)]. On the other, it mentioned *expressis verbis* the *whistleblowing phenomenon,* which it defined as 'an employee of an organisation, who sets aside his/her personal interests, acts to avert harm (prevention) threatening others (the community in a narrow or broad sense) by revealing an irregularity (misconduct) detected at his/her place

[50] Of the academic legal literature of the era, cf. Aczél György, 'A közérdekű bejelentésekről, javaslatokról és panaszokról szóló 1977. évi I. törvényről' (1977) 25 (5) Magyar Jog 374–386. After the democratic transition Vass György, 'Panasz, törvény; panasztörvény, avagy úton a petíciós jog kiteljesedése felé' (1997) 47 (1) Magyar Közigazgatás 20–26.

[51] Infojegyzet (2013) 26. 3. (made by Samu Nagy Dániel; source: http://www.parlament.hu/documents/10181/59569/Infojegyzet_2013_26_kozerdeku_bejelentesek.pdf/ca01a3dd-abca-446a-a12a-60ec33ea7f69> accessed 26 June 2017).

of employment'. The law prescribed a procedural fine ranging from HUF 50,000 to 500,000 for offenders (or, with regard to legal persons, from HUF 100,000 to 5 million) [Act CLXIII of 2009 § 11(1)]. For a person making an unfounded claim, the sanction may be between HUF 50,000 and 300,000 (a falsely disclosing organisation can receive a penalty stretching from HUF 200,000 to 1 million). Furthermore, echoing its American forerunner, § 16(1) of the 2009 Act states that 'if the Authority imposed a fine due to a failure to fulfil the requirement of a fair procedure, the Authority's president may award the discloser 10% of the fine'. As can be discerned from the quote above, § 4 of the law intended to establish a Public Procurement and Advocacy Authority (according to the preamble, to increase efficiency in combating corruption), but this never materialised.

3 Developments in the 2010s

Primarily because of the legal guarantee it offers, it is necessary to highlight Article XXV of the Fundamental Law of Hungary, according to which '[e]veryone shall have the right to submit, either individually or jointly with others, written applications, complaints or proposals to any organ exercising public power'.

The current legal environment was created by *Act CLXV of 2013 on Complaints and Public Interest Disclosures* ('the complaint law'), which came into force on 1 January 2014. This law can be described as one enabling disclosures in both the state and private sectors.

According to the definition in § 1(3), a disclosure 'calls attention to a circumstance, the remedying or discontinuation of which is in the interest of the community or the whole society. A public interest disclosure may also contain a proposal'. The public interest disclosure must be evaluated within thirty days [complaint law, § 2(1)].

Moreover, the general Explanatory Memorandum – in addition to referring to the above-quoted passage from the Fundamental Law – also notes that '[a] characteristic of the new regulation is that it supports anti-corruption measures in the private sector in addition to those in the public sector, and thus it allows organisations to formulate distinct procedures for handling disclosures and to enter into agency contracts with lawyers for the receipt of disclosures (discloser protection lawyer)'.[52] The goal of this legal institution is for 'the principal (typically a business organisation) to engage the discloser protection lawyer within a tripartite legal relationship to receive, in its name, disclosures relating to the principal, either from its employees or external partners' (detailed Explanatory Memorandum).

A similarly novel solution is the creation of w*histleblowing systems* sketched out in §§ 13–16, in connection with which the law 'records the most important guarantees for the operation of the system (finality, entry into a data protection register, the prohibition on processing special personal data, the requirements for terminating data handling, notification of employees, and containment of misuse). That legal persons in a contractual relationship with

[52] For more on this, see Papp D. Gábor, 'A közérdekű bejelentő védelme' (2013) 52 (4) Ügyvédek Lapja 23–27.

the employer (subcontractors, suppliers) can also make reports in the whistleblowing system is an important requirement, as this aids the more comprehensive information of management' (detailed Explanatory Memorandum). What is more, § 14(6) decrees that 'persons having a legitimate interest in making a whistleblower report or in remedying the conduct concerned' may also make reports.

V Significant Theoretical and Practical Issues in Whistleblowing

In this section, we will highlight the most notable characteristics that must be considered during the legal regulation of whistleblowing and the creation of whistleblowing systems. Our primary aim is not to evaluate the Hungarian legal environment, however, but to present common questions within a broader perspective.

1 Who Can Blow the Whistle?

The first obvious question which may arise is *who* is entitled to make a disclosure. According to the main rule, natural persons (or the representatives of legal persons) employed or in other employment-oriented legal relationships with the company have standing. Thus, according to general opinion, a personal qualification is necessary. In addition to the above-referenced § 14(6), a clause which expands the category of qualified persons, it may also be possible to make an exception based on *chronology:* On the basis of an overriding interest, it is possible for a person previously employed by the company to disclose, too, al-though his or her legal relationship might have been terminated already at the time of the disclosure.[53]

2 The Object of Whistleblowing

Dividing whistleblowing according to its object is primarily based on whether the misconduct to be disclosed is legally or morally objectionable. If the issue in question happens to be unlawful, it must be decided whether the given activity or omission violates or compromises criminal law rules or, perhaps, another field of law (e.g. regulatory offences). According to the correct position, which we already quoted, public interest disclosures may also play a role in the previously-mentioned cases, as well as in civil law-related detriments such as negligence or violations of personal rights (e.g. those concerning reputation). Nonetheless, the most common forms of misconduct pertain to malfeasance in connection with financially valuable data. The future of whistleblowing will, increasingly, lie in criminality of this nature.[54]

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[53] In the subject's Hungarian literature, this is explicitly referred to by Szente Zoltán, 'A bennfentes informátorok (whistleblower-ek) alkalmazásának lehetőségei a korrupcióellenes küzdelemben' (2010) 2 (1) Közigazgatástudományi Közlöny 19–20.

[54] Callahan, Dworkin, Lewis (n 40) 903–904.

3 The Areas of Whistleblowing

The establishment of a whistleblowing system, as demonstrated by the effective Hungarian legal environment, can occur within both the private or public sector. In connection with the latter, the only criterion that must be noted is that such a system, due to parallelism, may sometimes conflict with disciplinary regulations in a given field, hence special attention must be paid to harmonisation.[55] This can be particularly relevant in policing.[56]

4 The Direction of Disclosure

When speaking of the direction of disclosure, we intend to differentiate between whether it should occur internally, within the company's own regime, or if it is to be targeted towards an external forum. Academic literature indicates that both solutions can have drawbacks. If the only available option is external whistleblowing, this can easily turn into fertile ground for retaliation against the discloser. On the other hand, if the opportunity is exclusively external, it can serve as a path for a disappointed employee's vendetta, perhaps after failing to receive a much-anticipated promotion. This can result in a damaged reputation, which is an essential factor in determining a company's competitiveness.[57] Keeping this in mind, our position is that a combination of internal and external whistleblowing may be the most effective solution. The Hungarian complaint law is thus especially forward-thinking in its introduction of a 'middle man', the discloser protection lawyer.

5 Is a Criminal Complaint Mandatory?

If the internal investigation conducted as a result of whistleblowing yields suspicions of a crime, the question arises whether the company has a *duty to make a criminal complaint.* § 16(3) of the complaint law states a fairly clear rule pertaining to this point: 'If the investigation of the conduct reported by the whistleblower warrants the initiation of criminal proceedings, arrangements shall be taken to ensure that the case is reported to the police'. Our attitude in relation to this solution is highly sceptical. Although § 171(1) of Act XIX of 1998 on Criminal Procedure states that '[a]nyone may lodge a complaint concerning a criminal offence,' the main rule in Hungary's system of criminal law is that an absolute duty to this effect only exists under exceptional circumstances. Consequently, establishing this duty in connection with misconduct of *any severity* hardly seems justified. On our part, to increase the efficiency of investigations, *we would endorse legislative amendments that would allow exceptions from the ex officio principle by considering it a factor against prosecution*

55 Cf. e.g. Act CXCIX of 2011 on Public Officials §§ 155–159.

56 E.g. chapter 15 of Act XLII of 2015 on the Service Status of Professional Members of Law Enforcement Agencies *('Hszt.')*

57 King (n 36) 1483.

if a lesser non-violent offence was uncovered through an employer's whistleblowing system, if it can be handled 'in-house,' and if a criminal procedure in connection with the matter does not serve a pressing social interest. It should be noted that the timeliness of criminal proceedings would also improve if, for example, a small-scale workplace embezzlement did not necessarily warrant the use of the state's punitive powers.

6 Protecting and Countering the Whistleblower

The complaint law already states in its preamble that the protection of public interest disclosers must be ensured as much as possible. Furthermore, § 11 includes the guarantee that all measures disadvantageous for the whistleblower and arising as a result of the disclosure will be unlawful (notwithstanding cases of bad faith), even if they would otherwise be legal. § 12(3) extends forms of assistance contained in Act LXXX of 2003 on Legal Aid to whistleblowers as well.

It must be noted that § 257 of Act IV of 1978 (the previous criminal code) criminalised the initiation of any disadvantageous measures against a person making a public interest disclosure up until 31 January 2013 (the offence of 'persecution of a public interest discloser'). This act is now only a regulatory offence (as per § 206/A of Act II of 2012 on Regulatory Offences, Regulatory Offences' Procedure and the Regulatory Offence Registry System). Determining which field of law should criminalise an act dangerous to a given society is fundamentally a legislative prerogative. Instead of undertaking such an endeavour, our position is that it is efficiency which must be increased in relation to both criminal and regulatory offences. Perusing the anonymised decisions available from the judiciary's database, we were only able to find a single case where judicial proceedings have been carried through to completion due to persecution of a public interest discloser, and that case ended in an acquittal.[58] This ascertains that procedural efficiency must somehow be increased.

7 Incentivizing the Whistleblower

This is a widespread solution in English-speaking countries, and, as we have seen, Hungarian lawmakers have also toyed with the idea of introducing whistleblower rewards in 2009, thus providing motivation for disclosures.[59] Due to the present circumstances in Hungary, however, the introduction of such a system will presumably be delayed – at least until

[58] The procedure was started based on a substitute legal action at the Csongrád City Court, and it was concluded on 20 January 2009 with an acquittal contained in decision 2.B.94/2008/10. When this verdict was appealed, the Csongrád County Court upheld it in decision 1.Bf.96/2009/2, delivered on 18 March 2009. When the appellant turned to the Supreme Court, the highest court in the land maintained both rulings from Csongrád on March 18, 2010.

[59] For the latest American solutions, see Kathryn Hastings, 'Keeping Whistleblowers Quiet: Addressing Employer Agreements To Discourage Whistleblowing' (2015) 90 (2) Tulane Law Review 495–527, 497–500.

whistlelowing regimes are so common and developed that it can be assumed that the majority of claims are authentic reports of abuse and not simply venal and baseless allegations.

8 Abusing Whistleblowing

To conclude this section, we may declare that a position which would not only support penalising courses of action against whistleblowers (either with tools meant for felonious or petty offences) but would also create the possibility – if a *sui generis* case is established and in addition to liability for damages – of sanctioning bad-faith whistleblowers involved in severe instances of abuse, would be a respectable one to hold.

VI Summary and Recommendations

Our present study offered guidance on how to counter corporate wrongdoing more effectively. In this instance, we gave a detailed description of whistleblowing, a form of reporting corporate wrongdoing. While we could not cover all of the phenomenon's aspects, we set out to give a general but thorough overview of the issue. Finally, we must attempt, as completely as possible, to answer our initial question: How can systems reporting and exploring corporate wrongdoing be made more effective?

1. Our position is that the proposition, which states that at least some companies must be *legally required* to set up and run whistleblowing systems, needs to be considered and debated carefully. It is possible that a threshold could be established based on revenue or the number of employees, and the establishment of a system could be mandated once this threshold is reached. Another workable approach would be to compel it for all businesses that do not have SME status.[60]

2. It is also worth considering making certain *benefits* conditional on the establishment of control systems, such as tax breaks (e.g. on corporate and dividend tax) or more lenient legal consequences if wrongdoing committed to the company's benefit (or in its name) is uncovered.

3. Contemplating the popularization of disclosure and *best practices from the United States or Western Europe* seems inevitable. Even the best-constructed whistleblowing system will remain ineffective if it is not used by employees.

4. To provide legal guarantees, it is necessary to prescribe in law an internal regulatory requirement relating to internal investigations.[61]

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[60] SMEs are micro, small and medium-sized enterprises. Support for their development is detailed in § 2 of Act XXXIV of 2004.

[61] E.g. in a manner analogous with § 24(3) of Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information.

5. Furthermore, we recommend that if an internal investigation leads to suspicions of illegal activity, *making a criminal complaint should not be generally mandatory.* In practice, it is often the difficulties associated with criminal proceedings (witness duty, legal and travel costs) that deter corporate leadership from establishing a whistleblowing system. The desired goal of legal policy would be advanced if managements could decide freely on whether to report certain crimes – though, naturally, such liberties would solely exist in relation to non-violent offences and only below a certain monetary threshold. Nonetheless, such a measure would increase the number of companies operating control mechanisms, and these companies would be more likely to communicate the regime's usefulness to their employees.

6. Today, the rules of criminal law and procedure allow for more exceptions from the principle of *ex officio.* Keeping this in mind, it would not be unreasonable to suggest that punishment for certain low-value financial misdeeds by an employee at the expense of the company should be *conditional* on a criminal complaint being made by the company.[62] For example, it would be practically convenient for both companies and the authorities to avoid prosecuting a minor embezzlement case uncovered by an internal investigation to which an employee confessed and for which he or she perhaps even already given recompense.

7. Finally, our stance is that the key to all problems arising in connection with whistleblowing systems is *the individual.* As such, it is useful in order to increase awareness and develop conscious employee behaviours to have annually recurring and mandatory training sessions, as these can provide up-to-date information on the current legal environment and continuously-changing corporate mechanisms.

[62] For a high number of crimes, this possibility would be automatically precluded due to the communal nature of the legal object. Such would be the case for the corruption offences.

Viktória Harsági*

Combining Opt-in and Opt-out Systems? – Expert Proposal for the Hungarian Regulation of Collective Redress**

Abstract: At present, collective redress in Hungary is limited to a certain narrow area, with sporadic and typically sectoral regulation being applied. In the existing forms of public interest, litigation is merely an *actio popularis.* During the recent codification of Hungarian procedural law, a working committee of experts, set up pursuant to a government decision, drew up its detailed recommendations concerning collective redress. The present article presents the essence of that expert proposal. Comparing the opt-in and opt-out systems and their combination, it is difficult to decide which model is more suitable for a certain legal system. The expert proposal, on the introduction new collective redress mechanisms into the future regulation of the Hungarian Code of Civil Procedure, suggested a compromise that provides an adequate response to the problems of both types of case (mass torts and scattered loss) by combining the opt-in and opt-out systems and applying a more refined approach. The expert proposal is essentially based on the opt-in model, but in actions where the expected value of the claim is so small (in respect of the individual actions) that it would be disproportionate due to the higher administrative costs of the opt-in system, it should be supplemented with a model based on opt-out.

A main virtue of collective redress methods is that they ensure it is possible to avoid the multiplication of cases, as well as contrasting decisions on the same issue. It is no accident that these mechanisms have acquired increasing importance in recent times.[1] This 'compact form of macro-justice' can be attractive for various reasons: it allows parallel or significantly overlapping cases to be decided efficiently, speedily, consistently and with finality, while also ensuring the equitable allocation of costs.[2] Apart from the enumerated advantages, all such

* Viktória Harsági is Chair of Department of Civil Procedural Law, Pázmány Péter Catholic University, Faculty of Law, Budapest, Hungary.

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1 Adrian Zuckerman, *Zuckerman on Civil Procedure. Principles of Practice* (Thomson Reuters 2013, London) 655.

2 Neil H. Andrews, *English Civil Procedure. Fundamentals of the New Civil Justice System* (Oxford University Press 2003, Oxford – New York) 974.

procedural mechanisms also give rise to numerous difficulties. The most striking problem is that a conflict may arise between access to justice, fair process, thoroughness and procedural economy.[3]

At present multi-party litigation in Hungary is sporadic – as compared to, for example, Poland, where group litigation in a general sense was introduced in 2010[4] – and typically sectoral regulation is applied, which means that regulation covers only specific areas of law, such as consumer protection, equal opportunity, equal treatment, competition law, environmental protection, animal welfare and protection against unfair standard contract terms and conditions. Moreover, it does not take the form of class actions or group litigation in the sense applied in the common law countries or in other European Union countries, but is merely an *actio popularis.* In the existing forms of public interest litigation, it is principally the following persons, organisations and authorities that may bring a case before the courts: public prosecutors, NGOs, private interest groups, ministers, town clerks[5] and other authorities (e.g. the Hungarian Competition Authority).[6] The newest change was brought in 2013 by an Act that guarantees for the Hungarian National Bank the right to bring an action to enforce the civil law claims of consumers.[7] Public interest litigation *(actio popularis)* in Hungary has several subtypes, but they all share the common characteristic that filing this kind of action is possible only on the basis of statutory authorization; therefore, only organisations and persons specified by law are entitled to bring such an action. The person authorised to file a public interest action does not sue for her or his own benefit. The law lays down the violation of which rights and the enforcement of which claims may give rise to the institution of a public interest action.[8]

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[3] Susan Gibbons, 'Group Litigation, Class Actions and Collective Redress: An Anniversary Reappraisal of Lord Woolf's Three Objectives' in Déidre Dwyer (ed), *The Civil Procedure Rules Ten Years On* (Oxford University Press 2009, Oxford – New York) 129.

[4] Krzysztofik Małgorazata, 'Gruppenklagen bald in Polen' (2010) 2 Deutsch-Polnische Juristen-Zeitschrift 24–25; Robert Kulski, 'Polish Perspectives and Provisions on Group Proceedings' in Viktória Harsági, Cornelius Hendric van Rhee (eds), *Multi-party Redress Mechanisms in Europe: Squeaking Mice?* (Intersentia 2014, Cambridge–Antwerp–Portland) 225–241.

[5] Highest career civil servants of local government.

[6] Miklós Kengyel, Viktória Harsági, 'Hungary – Civil Law' in Eliantionio et al. (eds), *Standing up for Your Right(s) in Europe. A Comparative Study on Legal Standing (Locus Standi) before the EU and Member State Courts* (Intersentia 2013, Cambridge–Antwerp–Portland) 332.; Viktória Harsági, 'The Need for Further Development of Collective Redress in Hungary' in Viktória Harsági, Cornelius Hendric van Rhee (eds), *Multi-party Redress Mechanisms in Europe: Squeaking Mice?* (Intersentia 2014, Cambridge–Antwerp–Portland) 172–173.

[7] Viktória Harsági, 'Kollektiver Rechtsschutz – Ungarn und der Einfluss der Europäischen Entwicklung' in Schulze, Götz (ed), *Europäisches Privatrecht in Vielfalt geeint – Der modernisierte Zivilprozess in Europa / Droit privé européen: l'unité dans la diversité – Le procès civil modernisé en Europe* (Sellier 2014, München) 221–223.

[8] László Kecskés, Lajos Wallacher, 'A csoportos jogérvényesítés formái a választottbíráskodás keretében a magyar jogban' in László Kecskés, Józsefné Lukács (eds), *A választottbírók könyve* (HVG-ORAC 2012, Budapest) 283.

So we can say that in its existing form, collective redress in Hungary is limited today to a certain narrow area. With regard to mass damages (which are not governed by the regulations in force), the joinder of parties or joinder of actions may provide a solution for the enforcement of claims, or there is the possibility of resorting to the substantive legal instrument of assignment. However, these solutions may also give rise to numerous difficulties that may hinder collective claim enforcement. For example, the permissive joinder of parties makes it possible, to some extent, to enforce diffuse interests on a collective basis. At the same time, the legal framework for this is limited: it is a disadvantage of the joinder of parties that although the parties may authorise one common legal representative, this does not (necessarily) happen in practice. They will therefore not 'speak with one voice'. The claims remain independent, and the acts of one party do not necessarily have an effect on the other parties.

It is worth mentioning that there was an attempt in 2009 to pass a law on group litigation in a general sense (Bill No. T/11332 of December 2009 on the amendment of Act III of 1952 on the Code of Civil Procedure). Following a motion put forward by two MPs – without proper consultation with experts – Parliament passed the bill that would have expanded the possibility of collective redress, granting the right to initiate an action to any private individual or legal person as well. The then President of the Republic, László Sólyom, himself a professor of law, sent the bill back to Parliament for reconsideration before the general elections, following which the newly elected Parliament removed the question from the agenda.

During the codification of Hungarian procedural law, which started in 2013,[9] Working Committee No. 3 on the codification of civil procedural law named 'Parties and Other Persons Involved in the Action, Collective and Public Interest Claims' and headed by the author – established pursuant to Government Decision No. 1267/2013. (V. 17.) on the codification of civil procedural law – drew up its detailed recommendations concerning collective redress (as part of the Expert Proposal[10] submitted to the Minister of Justice on 30 October 2015). The present article aims to present the essence of that expert proposal.

I The Basis of the Recommended Regulation

The establishment of the collective redress mechanisms is stimulated by the fact that, by uniting the strength of the group, they increase the equality of arms, and may help to remedy the inequality of resources and imbalances of power. In multi-party lawsuits, there is typically

[9] István Varga, 'Identification of Civil Procedure Regulatory Needs with a Comparative View' (2014) 1 ELTE Law Journal 135–163; István Varga, Ákos Mernyei, 'The Initial Steps Towards the New Code of Civil Procedure in Hungary' (2014) 2 International Journal of Procedural Law 1–4.

[10] István Varga, Tamás Éless (ed), *A polgári perjogi kodifikációról szóló 1267/2013. (V. 17.) Korm. határozat által elkészíteni rendelt munkabizottsági szakértői javaslat normaszöveg- és indokolás tervezete* [Draft of the norm and explanatory statement elaborated by the working committee in its expert proposal commissioned by Government Decision No. 1267/2013. (V. 17.) Korm. on the codification of civil procedural law] (30.10.2015).

a group of claimants, and according to the Expert Proposal, the new provisions in the Hungarian Code of Civil Procedure would also be limited to this situation. Based on experiences from abroad, defendants are often collective entities, enjoying advantages resulting primarily from their more substantial resources, economies of scale, knowledge, access to information and influence. On the other side, the claimants, being private individuals, join their claims and unite their strength and experience in a procedure developed for this purpose, sharing the risk of litigation while gaining greater publicity and a better bargaining position. This is also advantageous for the court, since the multiplication of proceedings, the confusion and the great number of parties hinder efficiency. If the cases were tried separately, the court would have to deal with the same questions several times. It is considered a further great advantage of collective redress mechanisms that defendants can be saved unnecessary expenses and inconvenience through them.[11] In the event of a large number of claimants there is an obvious need for proper management and control. These actions cannot be pursued otherwise than where, clearly and definitively, there is (only) 'one voice' speaking on behalf of all the claimants and this 'voice' must have experience in the management of such affairs.[12]

Comparing the opt-in and opt-out systems and their combination, it is difficult to decide which model is more suitable for a certain legal system. With regard to developing future procedural mechanisms, *it is probably expedient to differentiate.* When establishing the system, one must take account of the legal, cultural and economic situation of the given country.[13] The basis of differentiation may be that where the individual claim for compensation is substantial, the legislator (or the judge if there is more flexible regulation) may prefer the opt-in system and require the claimants to reveal their identity.[14] The solution seems to be a simple opt-in form which is easy to join and where pre-registration costs are kept low.[15] With respect to individually 'non-viable' claims, a rather high level of inactivity may be observed on the part of potential claimants. In view of this, in such cases it is the opt-out solution that seems not to violate the constitutional rights of claimants, who tend to remain passive in any case.[16] Opt-in procedures may give rise to complicated strategic dynamics, which may prevent the effective protection of consumer rights.[17] Consequently, a wise

11 Zuckerman (n 1) 664, 676.; Neil H. Andrews, 'Multi-party proceedings in England. Representative and Group Actions' [2001] Duke Journal of Comparative International Law 263.

12 Christopher Hodges, *Multi-party Actions* (Oxford University Press 2001, Oxford – New York) 73.

13 Samuel P. Baumgartner, 'Debates over Group Litigation in Comparative Perspective' [2000] International Law Forum du droit international 256.

14 Michael D. Hausfeld, Brian A. Ratner, 'Prosecuting class Actions and Group Litigation' in Paul G. Karlsgodt (ed), *World Class Action* (Oxford University Press 2012, Oxford) 550.

15 Zuckerman (n 1) 678.

16 Astrid Stadler, 'Mass Tort Litigation' in Rolf Stürner, Masanori Kawano (eds), *Comparative Studies on Business Tort Litigation* (Mohr 2011, Tübingen) 174–175.

17 Samuel Issacharoff, Geoffrey P. Miller, 'Will Aggregate Litigation Come to Europe?' (2009) 62 (179) Vand. L. Rev. 203.

compromise may lead to a solution that provides an adequate response to the problems of both types of case.

It follows that the *'one size fits all' method of thinking is not suitable* for developing the future Hungarian rules relating to collective redress. Essentially, two basic situations must be distinguished: *a)* mass torts, namely, more substantial claims for damages where a great number of aggrieved parties try to enforce claims that are also 'viable' individually and *b)* 'scattered loss', where the damage suffered by the individual is trivial but the aggregate claim amount is substantial. They are too distinct to allow a uniform approach or handling. As a matter of fact, they constitute the two ends of the scale. While in the latter situation, the main problem lies in the fact that there are too few claims, the disadvantage of the former is that there are too many claims.[18] A compromise was therefore needed that would provide an adequate response to the problems of both case types. Hence, it is expedient to differentiate with regard to devising the new procedural law mechanisms brought into being.

Pursuant to the Expert Proposal, the new Hungarian Code of Civil Procedure is to combine the two procedural systems by applying a more refined approach in order to provide an answer to both of the above-mentioned problems. To this end, it chooses the solution of amalgamating the (opt-in and opt-out) models, which may be considered rare in Europe. The regulations use the following basis of differentiation. Where the individual claim for damages is expected to be substantial, the legislator prefers the opt-in system, also requiring that the members of the group should be identifiable. As far as individually 'non-viable' cases are concerned, potential claimants are typically characterized by a high level of passivity. On account of this, in such cases a solution based on the opt-out model will presumably not violate the constitutional rights of consumers who would not usually enforce their claim individually having regard to the value of the claim.

The committee took a stand on maintaining the *actio popularis* designed for public interest enforcement and, on the other hand, it considered it necessary to create new procedural instruments to supplement it. In this way, the old and the new could be present in the legal system, coexisting side by side in a clearly distinguished way. *Actio popularis* has priority over the new solutions of collective redress that are being incorporated as new procedures into the Code of Civil Procedure.

The systemisation is based on the enforcement of public interest and the enforcement of aggregated private interests; the old and the new regulations diverge along the lines of these two notions. No essential changes are to be carried out in the existing system of rules of public enforcement, but it has been considered reasonable to include them among the rules of the Code of Civil Procedure, while it seems necessary to introduce new instruments concerning the enforcement of aggregated private interests.

With regard to the basis of the new regulation, it may be stated that there is a need for procedural law instruments that are capable of dealing with cases that are unmanageable at

[18] Compare Gerhard Wagner, 'Collective Redress – Categories of Loss and Legislative Options' [2011] Law Quarterly Review 78.

present due to their dimensions (mostly due to the large number of parties) or appear in the justice system today (in the absence of procedural solutions) in an unnecessarily scattered form, one by one, although 'joining them' could be justified. We consider it necessary to channel claims of so-called negative expected value that cannot be effectively enforced by the existing means (and which therefore often remain unenforced) into the justice system. The new form of regulation is characterised partly by a horizontal approach (see coordinated action), and partly by a sectoral approach (restricting the scope of class actions to consumer cases).

The elaboration of the system of collective redress took place in the light of European Commission Recommendation (2013/396/EU) on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under European law.

In respect of the limits and main principles of the new regulation, it may be pointed out that rules at present is restricted to the formation of groups of claimants; the basis of group formation is to be defined based on questions of fact and law, as well as the time factor; and lawyers are to take on an increased administrative burden (e.g. they are to keep a register of members entering the opt-in system, procure documents, and initiate the qualification of a person as a member of the group; this latter is to be verified later by the court).

It would be reasonable to lay down the rules relating to this procedure in a separate chapter of the new Code of Civil Procedure under the main title of 'Collective Redress'. According to the Expert Proposal, this chapter would include, on the one hand, a part consolidating the common procedural rules relating to the present *actio popularis,* thereby providing it with a framework and simplifying the task of the appliers of law by reducing the scattered and confused nature of the present regulation to a degree. On the other hand, another subchapter would contain the general procedural rules pertaining to aggregate private interest enforcement mechanisms to be newly introduced. The Expert Proposal is essentially based on the opt-in model, but for actions where the expected value of the claim is so small (in respect of the individual actions) that – already mentioned above – the opt-in system would be disproportionate due to the higher administrative costs, the system should be supplemented with a model based on opt-out. Into this latter system, one could channel cases that have not appeared in the justice system before (as these claims have not been enforced). It follows from this that this solution would not affect the effectively functioning order for payment system either; it would not divert cases from there, also having regard to the fact that no faster means can be provided for the person wishing to enforce her or his claim. In particular, those claims which the potential parties typically give on their enforcement in the absence of effective procedural means can be internalised in the opt-out system. The former (opt-in system) would be used to enforce claims that appear in the Hungarian system at present as well, but which cannot be enforced effectively enough within the existing procedural frames. Here, the primary aim would be to reduce the administrative burden on the court by joining the actions suited to this purpose.

II Coordinated Actions

1 General Character

As elaborated by the Expert Proposal, in coordinated actions the members of the group may be identified individually more easily. It is characteristic of them that these actions could also be brought as individual actions (generally having a positive expected value) and they are usually initiated as such. Individual claim enforcement, however, does not utilise the resources of the court system with due effectiveness and so it is reasonable to deal with these claims as part of one procedure (at least until the decision on the legal basis). As a result, a decrease is expected, for example, in the costs of evidence. The aim of coordinated actions is therefore to provide a swift, efficient and proportionate method for resolving cases where the individual damage is substantial enough to justify launching an individual lawsuit but, due to the number of claimants and the nature of the arising questions of law and fact, these cases cannot be adequately managed within the context of individual proceedings.

Coordinated actions are manifold and flexible procedures. They are essentially distinguished from the joinder of parties by the fact that the joining group members waive their right to designate an individual legal representative or participate in the trial or carry out procedural acts individually. The group formed this way has one common representative, so the group 'speaks with one voice'.

The essence of coordinated actions lies in 'gathering into a bunch' and coordinating cases until the common questions have been decided. The group is formed based on the opt-in system; in other words, a claimant may only become a member of the group based on her or his express declaration to this effect. According to the Expert Proposal, it is up to each party concerned to decide whether to join the group; there is no possibility for classifying a person as a group member *ex officio* or for assigning the case to the group. Joining the group is in practice carried out by registration in the register,[19] prior to which the person is to submit an application. If a party concerned fails to observe the prescribed deadline, she or he may only initiate proceedings in the form of an individual action.

This process of active initiation would distinguish coordinated actions from class actions (see point III). In the case of the latter, the represented party does not have to make a positive decision in order to be represented (although there is a possibility of opt-out).

Although initiating qualification as a coordinated action is a privilege exercised by the representative of the group, it is up to the court to decide on the question of admissibility, so the final decision on qualification is made by the court. Despite the fact that group members may be regarded as parties, their procedural rights are limited. Regardless of the number of individuals making up the group, each procedural act in the action is to be performed only once, which not only serves the interests of the group members but also those of the

[19] Pursuant to the Expert Proposal, the court would keep an electronic register of public interest, coordinated and class actions that would be available to the public free of charge.

defendant. For this very reason, it is essential to strike a balance between the rights that would be held by the claimants and defendants during the individual actions and the group's interest in the effective judicial resolution of the case in the form of one action. Having regard to the above and compared to general individual actions, this procedure is characterised by stronger judicial control, which is required for reasons of guarantee the rights of the claimants due to the limited procedural rights of the parties (e.g. with regard to making a settlement).

The scope of the judgment delivered on the common questions of fact and law extends to the whole group, but in many cases this will presumably concern only the question of the legal basis: individualisation may be required with regard to the claimed amount and so the procedure might be followed by individual (follow-on) actions. If the group loses the action, the costs are to be borne proportionally by the group members.

It seemed reasonable to remove those cases where the amount of the individual claim of an obligee having become a group member does not exceed the threshold value specified in the Act on the Order for Payment Procedure[20] (at present one million forints - ca. 3,100 EUR) from the scope of application of the rules pertaining to the mandatory order for payment procedure.

The Expert Proposal envisages concentrating coordinated actions in the Metropolitan Court of Justice of Budapest. It can be predicted that, most cases would be concentrated in this region also based on the general rules of jurisdiction. Although one cannot expect a high number of cases to be tried as coordinated actions – especially in the first years –, such actions will be of high complexity and outstanding significance. Having regard to this, it may be important that coordinated actions are tried by experienced judges specially prepared for this task within the context of specialised training. It would be worth considering exempting the judge from her or his other tasks if she or he has been assigned a case of such volume. Due to the expected small number of cases, it would not be reasonable to split them up between the different courts of justice, but instead we should endeavour to ensure that judges who have been prepared to try coordinated actions could already gain extensive experience in dealing with such types of case in the first years.

Compulsory legal representation may be justified, not only by the volume or complexity of the cases, but also by the legislator's intention that it is worth assigning certain administrative tasks relating to the case (organising the group, tasks relating to opt-in or opt-out) to the legal representative of the group of claimants with a view to relieving the court of such a workload. Besides, it is also worth drawing attention to the fact that the provisions relating to the compulsory content elements of the statement of claim impose an additional burden on the lawyer (e.g. adequately precise definition of the group). The legal representative is entitled to disclose the commencement of the action to the public in order to encourage persons concerned to join the action.

[20] For more detail, see: Viktória Harsági, 'The notarial order for payment procedure as a Hungarian peculiarity' (2012) 37 (204) Revista de Processo 177–192; Viktória Harsági, 'The notarial order for payment procedure as a Hungarian pecularity' in Reinhold Geimer, Rolf A. Schütze (eds), *Recht ohne Grenzen. Festschrift für Athanassios Kaissis zum 65. Geburtstag* (Sellier 2012, München) 343–353.

The collective nature of claim enforcement and the requirement of efficiency exclude the possibility of joining a coordinated action with another action or the possibility of a counterclaim or offset claim. The death or termination of a group member does not result in the stay of the proceedings. As opposed to this, if the representative of the group leaves the group, no longer has the capacity to sue or appear as a party in the lawsuit, or moves to an unknown place then the proceedings are stayed. A group member may leave the group even during the stay.

2 Scope

The Expert Proposal regards the coordinated action as the basic type of collective redress, the scope of which – as opposed to class actions – is not limited.

This is a procedure basically modelled for when the specified claims (for damages) of specific persons – who are identifiable and specifiable right at the beginning of the procedure – are being enforced as part one procedure. The instrument of coordinated actions may be suitable for enforcing product liability claims (e.g. actions against pharmaceutical companies), claims for damages arising from railway and air accidents, environmental pollution and industrial disasters. With regard to product liability cases that may be better schematised, the possibility of class action (compare point III) is not excluded either. The working committee that drew up the Expert Proposal is also aware that the group of aggrieved persons cannot always be as unambiguously defined as it was, for example, in the Kolontár case (cf. with the case of cyanide contamination on the Tisza, for example)[21]. It is an essential criterion for a coordinated action that it should be possible to join the cases together at least with regard to the legal basis, however, they may continue as individual actions in respect of awarding the amount.

According to the Expert Proposal, a group may be organised exclusively of claimants, whereas in the case of multiple defendants only a joinder of parties is possible.

It may be stated that there is a looser connection between the cases in coordinated actions than in class actions (compare point III.). A coordinated action basically means the coordination of the cases of the members joining the group. The link between the claims of the group members is constituted by the person of the defendant(s) and the common question(s) of law and fact.

Pursuant to the Expert Proposal, a coordinated action may be filed where one or more common questions of law or fact arising from the rights of a substantial number of, but at least ten, natural or legal persons (hereinafter: group) originating in the same or essentially similar factual basis and be asserted against the same defendant or joined defendants and decided in the frames of one legal action. In a coordinated action the person asserting her or his claim may seek:

[21] See: Harsági (n 6) 171–173; Harsági (n 7) 221–223.

a) the declaration of the infringement of his or her rights,
b) the cessation of the infringement and an injunction against the infringer to prohibit it from further infringement,
c) elimination of the injurious situation and restoring the state existing prior to the infringement,
d) the payment of a lump sum monetary compensation in an amount covering the damage caused by the infringement and compensation for the injury to rights, a refund of unjust enrichment, a monetary claim resulting from the invalidity of the contract, or
e) compensation for the damage caused by the infringement, unjust enrichment and payment of the monetary claim resulting from the invalidity of the contract in an amount that can be certified by a document.

The enumeration of points *a)-e)* does not mean the partitioning of claims; the elements in the list do not necessarily constitute alternatives and there may also be a conjunctive connection between them. Underlying this is the consideration that, according to the position of the working committee in charge of drawing up the Expert Proposal, the majority of cases to be tried as coordinated actions may be joined or coordinated only until the decision on the legal basis (this constituting the common question), while the cases require individual consideration with respect to the amounts. However, one is to take account of the fact that even this latter question may be dealt with as part of the coordinated action, provided that the claims can be schematised in accordance with those specified in point *d),* e.g. the members of the group are ready to accept lump sum compensation. In the absence of this then, following the decision on the legal basis, their cases requiring an individual approach can be pursued only in the form of individual follow-on actions. In the event of individualisation with regard to the amount, not only the differences between the cases but also the volume of evidence may burst the framework of the coordinated action and hinder these cases from being tried in the form of a coordinated action. At the same time, if each group member can certify by a document the amount of the damage resulting from the infringement, the amount of the claim arising from unjust enrichment and the invalidity of the contract, this does not mean an additional burden of such an extent for the court trying the coordinated action that it would hinder the adjudication of their cases within the context of a coordinated action. Although some individualisation is undeniably required, this may be realised without great difficulty, having regard to the fact that legal documents have the character of liquid evidence. Taking this into account, it does not seem justified that, following the decision on the legal basis, the members of the group should enforce their monetary claims in individual follow-on actions. It is with regard to this that point *e)* has been incorporated into the proposal.

In summary, where there are multiple claimants whose petitions are based on common questions of law and fact, these petitions may be brought under the 'umbrella' of a coordinated action. The coordinated action may serve as an effective and cost-saving solution to decide questions of liability, for example, concerning such a common question as to whether a vaccine may cause a specific disease. In the event of a road traffic accident where the defendant has been identified and the violation of rights affects a substantial number of

claimants, common questions may include, for example, causation and liability. The judgment delivered is binding concerning the common questions to all parties registered as members of the group. In such cases, however, after liability has been established (in the coordinated action), it is up to the individual litigants to prove (within in individually initiated follow-on actions) the fact that they have suffered harm and the extent of their loss.

This type of action is distinguished from the joinder of parties by the great number of parties. Typically, the parties also enforce their claims individually but in the present system these actions are neither effective nor easily manageable.

It seemed reasonable to limit the minimum number of cases to ten. Under this number, the coordinated action would not ensure a greater degree of effectiveness or better manageability of cases than the joinder of parties would. At the same time, incorporating a minimum threshold does not mean of course that over this number it would be impossible to choose the joinder of parties instead of collective redress mechanisms if this would seem a better solution having regard to the nature of the case. Even in countries where no such minimum threshold has been specified, one may find – at least at the level of case-law or legal academic literature – such definitions where, although no minimum number of parties is defined, the number of parties must be enough to justify resorting to the given procedural means.[22] After all, the Hungarian expert proposal gives effect to this principle as well by imposing an obligation on the court to relate, in its order on admissibility, to the circumstances based on which the case is more suitable to be tried within the framework of a coordinated action in consideration of its scope and subject-matter and the volume of evidence.

It may occur that, at the time of filing the action, the number of group members is over the threshold but it is later reduced to less than ten. Having regard to those mentioned above, in this event the court will transfer to the general rules and the members of the group will become joined parties in the action.

The proposal grants priority to public interest claims over coordinated actions in such a way that, on the basis of the judgment delivered in an action arising from a public interest claim, it is possible to file a follow-on coordinated action in respect of points *d)* or *e),* but the court trying the coordinated action is bound by the judgment delivered in the public interest action in respect of points *a)-c).*

3 Filing a Claim

The court may try a case in the framework of a coordinated action exclusively on the basis of a petition to this effect. Although one may encounter examples where qualification as a coordinated action may also take place *ex officio* abroad (e.g. in English law), the Expert Proposal, in view of the parties' right of disposition over the lawsuit, has ruled out this possibility.

[22] See: *Austin v Miller Argent (South Wales) Ltd.* [2011] Ehv LR 32.

It is a precondition for qualification as a coordinated action that the group should be defined, which takes place in the statement of claim. It is essentially through this that it becomes clear which individual claims may belong here and which may not. This is mostly a generalising characterization, but it is of crucial significance that it should be well and properly formulated. In cases where individual questions predominate, a higher degree of care is required of the court concerning the analysis of the cases and questions.

The legislative intention can be directed unambiguously at defining one or several questions which are common to the group in relation to all claims. The rules make references to such questions of law or fact arising in the action that are common; and the aim of the coordinated action is to decide these questions in such a way that the registered parties would be bound by the decision. As such, in such a situation – where a lot of applicants have similar claims, but although these claims are against the same defendant, they are separate from the aspect of their legal basis and there is no common question which, if decided, would result in a binding decision for all cases – it is not likely that a coordinated action would serve as the appropriate instrument.

A minimum ten members are required for the formation of a group. It is also sufficient to specify such a number of members in the statement of claim. The potential further group members may join at a later stage of the procedure too within the defined time frames and based on defined conditions. It is not excluded either that, (resulting from the nature of the coordinated action), a far higher number of group members could typically be specified in the statement of claim. In this latter situation, it would impose a serious burden on the court if it were compulsorily required to check the data of all the members. The Proposal therefore only requires the court to check the data of a minimum of ten group members. The rules aimed at keeping the administrative burden within reasonable limits could pose a danger through potentially extending the scope of the judgment to a party asserting her or his claim who could not be a member of the group. The filtering out of such members is also in the interests of the defendant, so it is at the defendant's initiative that such members may be excluded from the group by an order of the court.

According to the Expert Proposal, – apart from the content elements prescribed by the general rules, – the statement of claim must also contain the following:

a) an express petition to the effect that the court should adjudicate the legal dispute in accordance with the provisions of the coordinated action;

b) the specification of a minimum of ten members who had joined the group by the time of filing the statement of claim;

c) appointment of a group representative from among the group members;

d) a sufficiently precise definition of the group;

e) specification of the number and nature of the claims and of the likely number of parties;

f) description of the common questions of law and fact;

g) the circumstances that may be important from the aspect that the claim should be adjudicated in the framework of a coordinated action, including in particular the circum-

stances based on which – having regard to the volume and scope of the case and the volume of evidence – the case is more suitable to be tried as a coordinated action.

Powers of attorney made out by the group members for the legal representative are to be submitted if specially requested by the court.

The defendant must be aware of what claims she or he is exposed to in order to be able to prepare properly for her or his defence and make a well-founded decision on a potential settlement. Having regard to the fact that new parties may later join the group, at least the number and nature of the claims and the likely number of parties should be evident from the statement of claim.

The provisions relating to the internal relations of the would-be group members, including the appointment of the representative of the group, are to be laid down – if they are required at all – but not in the Code of Civil Procedure, and so the Expert Proposal deliberately refrains from laying down such rules. It merely points out that the representative of the group must come from among the members of the group. Based on the position of the committee, the representative of the group may also be a self-appointed person; it is not absolutely necessary to develop a rule concerning her or his election. The prevalence of the will of the majority of members could not otherwise be consistently carried through the regulations either, since the parties joining subsequently could not have any influence on the selection of the person of the group representative anyway. One must therefore accept that group members' right to free disposition only extends to deciding whether to join or leave the group represented by the group representative.

Group members cannot exercise their right to withdraw the claim separately. They can leave the group by opting out, and the court must consider the order acknowledging the opt-out as an order to discontinue the action in respect of the group member.

4 Legal Status of Group Members, the Group Representative and the Legal Representative

In a coordinated action, the problem of group formation is of crucial importance. It is a fundamental characteristic of this type of action that the identifiable and specifiable parties pursue their claims in a coordinated manner. Registration is a mechanism that serves to verify membership of the group effectively. Pursuant to the Expert Proposal, out of the group members only the minimum number of ten members must be specified in the statement of claim. As a matter of course, this regulation does not preclude the possibility of the legal representative specifying more members when drafting the statement of claim. With respect to a group consisting of a substantial number of members, it may be reasonable to attach the list of further members as an annex to the statement of claim. The members of the group identified in the statement of claim are recorded by the court in the register. Changes are also to be entered in the register, for example, registration of members joining the group later or deletion of members following their eventual exclusion.

A person can become a group member if she or he would otherwise be entitled to take action individually. The process of qualification as group member is begun by the lawyer. In order to establish whether a person is eligible to qualify as a group member, there may be need for documents in support of the group member's claim. For this reason and with a view to simplifying the subsequent evidentiary procedure, the proposal requires the person applying to become a member of the group to make the documentary evidence supporting her or his individual claim available to the legal representative.

The possibility of dealing with a high number of claims in one procedure presupposes that the group members speak 'with one voice', which constitutes the very essence of collective redress mechanisms. As a result, although the individual group members are parties to the coordinated action, they have restricted procedural rights. Hence, for example, they cannot choose or instruct their legal representative freely. They may be excluded from having any influence on the procedural acts.

The Expert Proposal basically endows the representative of the group with the exercise of the group members' rights, (in awareness of the fact that, having regard to compulsory legal representation, this exercise of rights takes place via the legal representative in practice). However, the representative of the group cannot do this without control. On the one hand, where a group member is dissatisfied with the conduct of the lawsuit, she or he may leave the group – after settling accounts in respect of the legal costs. On the other hand, at the stage of the proceedings where it is not possible to opt out from the group, certain procedural rights of the parties are curtailed by law only partially, (e.g. an appeal may be filed by the group representative on behalf of the group only on approval by at least the simple majority of group members). It was justified to increase judicial control over settlements due to the restricted procedural rights of the parties (see point II 8).

During the conduct of the lawsuit, the group representative is to act in such a way as to protect the interests of group members. The group representative is obliged to provide the group member with information at her or his request if such information is of relevance to the party concerning the exercise of her or his rights. Concerning questions of relevance from the aspect of the conduct of the lawsuit and the merits of the case, the group representative is obliged to provide an opportunity for the group members to expound their views if this is feasible without substantial difficulty. This rule is aimed at compensating for the reduction of the procedural rights of group members. The group representative's information obligation also serves the purpose of enabling group members to decide on potential opting out from the group.

The death of group members cannot result in proceedings being discontinued, since for a larger group this would prevent the practical functioning of the institution of coordinated action. Having regard to the fact that the procedural rights of group members – with a few exceptions – are exercised by the group representative, her or his opting out from the group, or the cessation of her or his capacity to sue or be a party to a lawsuit, or her or his moving to an unknown place is to result in the proceedings being discontinued.

The Expert Proposal narrows down the range of legal representatives to lawyers. In a coordinated action, the group of claimants has one legal representative. The right to organise and represent the group as its legal representative is granted – in accordance with what is laid down in a separate law – to lawyers. The lawyer is entitled to 'publicise' the lawsuit and thereby encourage potential group members to join the group, as well as to organise and represent the group. In a coordinated action, a greater administrative burden is imposed on the legal representative, for example in the field of the administration of joining and withdrawing group members and the advancement of legal costs. They are in charge of obtaining the documents initiating qualification as a group member, the latter being ultimately reviewed by the court. The legal representative obtains powers of attorney from the group members specified in the statement of claim. Members wishing to join the group later may submit their request to join to the legal representative; their application to this effect is to be regarded as a power of attorney granted to the legal representative.

5 Examination of Admissibility

The hearing of claims as a coordinated action is initiated in the statement of claim by the group representative, but it is the court that will ultimately decide on the admissibility of the coordinated action. The court examines whether the conditions for a coordinated action are met and whether the statement of claim contains all the prescribed content elements. The court decides on admissibility by order, which may be appealed only if the application has been rejected. The order, amongst others, defines the group, lays down the subject-matter of the action and it also specifies by what deadline and on what conditions it is possible to join or leave the group.

In the event of admissibility as a coordinated action, the court may immediately continue the hearing as a pre-trial hearing or set a date for the pre-trial hearing.

A public interest action would have priority over a coordinated action. If, in the subject-matter of the coordinated action, a public interest action is filed by an entity authorised by special regulation to do so, the court is to stay the proceedings concerning the coordinated action until the final resolution of the public interest action.

The Expert Proposal defines the relationship between coordinated actions and class actions (see point III) as follows: The judgment delivered in a class action does not apply to class members who became a group member in a coordinated action before filing the class action on the same subject-matter. Another situation that may arise in connection with the rivalry between the two types of action could be where the class action is already in progress, but some class members would potentially like to enforce their claims in a coordinated action. In this case, it is a condition that they should opt out from the class action prior to this. In the lack of such withdrawal, the court hearing the coordinated action will dismiss their claims immediately before the commencement of a legal case.

The precondition for individual claim enforcement is that the group member should leave the group.

The Expert Proposal does not consider it justified or feasible to preclude the parallel commencement of two coordinated actions, but it does not exclude the possibility of merging the actions for reasons of procedural economy.

6 Form and Deadline of Joining the Group, Opt-out from the Group

A person may announce her or his intention to join the coordinated action without the need for special permission from the court within 40 days of the publication of the notice issued following the decision on admissibility. After this deadline has passed but before the closing of the hearing preceding the delivery of the first instance judgment at the latest, the court will grant permission to join on the defendant's approval. The defendant may also be interested in granting people the possibility to join the coordinated action later (e.g. in order to reduce additional costs resulting from separate actions); at this stage, the defendant's approval is required as a precondition for the court permission.

If the obligee wants to join the action, she or he is to apply to the legal representative. The application is also deemed a power of attorney granted to the legal representative. The legal representative is to announce to the court the fact of joining without delay. The legal effects of the commencement of action set in upon this announcement to the court. The court either rejects or acknowledges the joining based on the result of the examination of admissibility. Based on the court's order granting the request to join the group, the joined group member is recorded in the register. Rejection does not hinder the enforcement of rights in the context of an individual action.

The proposal regulates the possibility of opt-out from the group in line with the two-stage structure of actions laid down by the new Hungarian Code of Civil Procedure. Following the end of the first stage, opting out from the group can take place only with the approval of the defendant but until the closing of the hearing preceding the delivery of the first-instance judgment at the latest, or prior to a court settlement reached between the parties. The member who has opted out from the group would not be able to rejoin the group.

Administration of the potential opting-out, similarly to joining, is assigned to the legal representative. This is necessary, among other reasons, because in a coordinated action group members have to advance their proportional share of legal costs, so in the event of opting-out, the withdrawing party has to settle accounts with the legal representative in respect of the costs. The settling of accounts is treated in the Expert Proposal as a precondition for opting-out.

Due to the opting-out of more members, a situation may arise where the number of group members is reduced under the statutory minimum of ten persons. In such a case, the court continues the action based on the general rules. Beginning from this time, the rules relating to the joinder of parties are duly applicable to the relationship between the group members. The representative of the group can no longer act in this capacity.

At the request of the defendant, the court will, by order, exclude from the group a member who does not meet the conditions of eligibility to be qualified as a member. This rule, if

properly applied, could also act as a filter that helps to sift out claims that do not organically fit into the scope of the given coordinated action. The application of the planned rule has to be initiated by the defendant.

7 Costs

It is in conformity with opting in the regime if the burden of advancing and bearing the costs is imposed on the group member. Potential members decide on joining the action in awareness of the fact that their decision may lead to expenses. In order to enable the party to make an informed decision, she or he needs to be informed by way of a notice on the costs that may arise for group members during a coordinated action.

Group members advance legal costs through their legal representative. If they lose the action, they bear the costs incurred proportionately. Group members registered later bear costs – arising at a time prior to the registration – in the same way as those having joined earlier. If the group loses the action, the general rule is that common costs are divided between the group members to be borne *pro rata*. Joint liability for costs would be inequitable, having regard to the volume of the action and it would deter potential group members from joining. Group members are therefore to be protected from having to share in the part of the other group members. It would be disproportionate if each claimant in the group were liable to pay all the costs arising on both the claimants' and defendant's side.

In the event of opting out, the legal representative is to settle accounts with the withdrawing member. The amount of the individual share of costs may also depend on the potential date when the group member concerned will be deleted from the register. The date of joining is not taken into account, since members joining later could otherwise draw a profit from this.

Procedural costs would include the costs of administration of the group by the group's legal representative.

As a result of the volume of the proceedings, the defendant also has a substantial cost risk, so it is with regard to this that the Expert Proposal has incorporated the requirement of security for legal costs, which does not presuppose the defendant's request to this effect and which may be applicable regardless of the domicile of group members.

8 Settlement, the Binding Force of the Judgment and Legal Remedies

In individual actions, the court does not have any special influence on court settlements; before approving them, the court only examines their conformity with the legal rules. However, the court has influence on court settlements affecting an entire coordinated action. Prior to approval, the judge is to examine conformity not only with the legal rules but also with the interests of the group. It is important that the court can use the services of experts if necessary, which was justified to increase judicial control due to the parties' restricted procedural rights.

The above-mentioned do not apply to court settlements concluded separately between a group member or individual group members and the defendant. The Expert Proposal does not anticipate any danger to the interests of group members in this case, since they can influence the conditions of the settlement unlike in the event of a settlement extending to the whole group, where the conditions are developed by and between the representative of the group, the legal representative and the defendant. From the aspect of the group, a settlement made separately is basically equivalent to opting-out from the group.

There is no obstacle either to parties making a settlement out of court and the group member opting out from the group. However, the group member has to authorise the legal representative separately to this effect, but she or he will do so in awareness of the fact that she or he is not entitled to the protection resulting from judicial control.

It is a consequence of the coordinated action that the judgment delivered in the case is binding on the parties with regard to the common issues. Registration is of crucial importance, since only those claims can enjoy the fruits and share in the burdens of the coordinated action that have been entered in the register and that are still recorded in the register at the time of closing the hearing preceding the delivery of the first instance judgment.

The assignment of the parties' procedural rights to the legal representative of the group requires the incorporation of guarantees for the group members. They may exercise control over the proceedings in two ways, on the one hand, by exercising their right of opting out and, on the other hand – at the stage of the proceedings where there is no further possibility of opting out – by their approval, which has been incorporated into the system at the required points by the Expert Proposal. Having regard to the fact that, following the closing of the hearing preceding the delivery of the first instance judgment, the group members can no longer opt out from the group, group members are to be granted a say in deciding whether to submit an appeal against the judgment. Filing an appeal requires the approval of a simple majority of group members. The same applies to a cross-appeal, review petition and cross-petition for review. Due to the complexity of coordinated actions, a longer time limit of 45 days is justified for submitting an appeal against the judgment.

III Class Action

1 Character of the Proceedings

According to the Expert Proposal, claims could be enforced in the framework of a class action if they are separately 'non-viable' and therefore have not typically appeared so far in the justice system. Based on experiences from abroad, the difficulty concerning opt-in procedures lies in the lack of attractiveness; for a claim of a smaller value, the problem of incentives may arise in connection with joining the group. It is for this reason that the Hungarian regulation of collective redress should supplemented with an opt-out type procedure.

The class action would function like a representative action, where on the one side one may find the representative claimant or her or his legal representative. In this way, one may ensure the unity of the class, 'speaking with one voice', by which the major drawback of the joinder of parties may be essentially eliminated. The class is to be treated as one unit right until enforcement; there is no individualisation.

The Expert Proposal envisages concentrating class actions in the Metropolitan Court of Justice of Budapest, similarly to coordinated actions and based on identical reasons.

Compulsory legal representation may be justified by the volume or complexity of the cases. The regulations relating to the compulsory content elements of the statement of claim impose an additional burden on the lawyer (e.g. definition of the class with adequate precision). However, since there is no group organisation, the administration of class actions – resulting from experiences from abroad – is thus not expected to be of such a scale as that of opt-in type coordinated actions. As such, there is no need to assign them to the competence of lawyers instead of the court.

2 Scope

The basic purpose of class actions is to ensure access to justice in cases where a great number of individuals are affected by another person's infringing conduct, but the individual losses are so small that this would render individual actions 'non-viable'.

With regard to small claims, it is to be taken into account that there are effective systems (e.g. the order for payment procedure) in the present regulation and therefore the new elements of the Expert Proposal are limited only to cases that do not appear in the present system. As a result, a narrower field of application had to be defined; therefore the instrument does not have general application. The narrowing down of the personal scope ensures that cases are not extracted from the scope of the order for payment procedure, which has proved effective. However, rivalry between the two procedures does not seem likely either, because based on experience the majority of cases to be enforced by way of an order for payment procedure (arrears of public utility charges, matters related to parking or condominiums etc.) are not of such a character that they could be included in this range.

The narrowing of the personal scope could also alleviate fears relating to the abusive use of opt-out type collective redress mechanisms, which fears are typical in Europe. Strict consideration is required before the legislator opens up the possibility of recourse to the new procedural instrument for the enforcement of certain types of claim. A class action may be suitable, for example, for the aggrieved parties in cartel cases to enforce their claims, or actions relating to monetary claims arising from unfair contract terms could also be tried within the framework of such actions.

Limiting the personal scope to consumers does not mean that consumer claims would be enforceable exclusively by an opt-out type class action or that they would be excluded from the scope of coordinated actions. If the coordinated action seems a more suitable procedural means with regard to the nature of the claim (e.g. in certain product liability cases), then it is

reasonable to choose that means. The possibility of choice and the initiative aimed at it will come from the representative of the group or class of claimants (group representative and representative claimant), while the decision on this is expected to unfold in practice based on the professional advice given by the legal representative.

A class action may be filed where the infringing activity of the enterprise affects a wide range of personally non-identified consumers who may be defined based on the circumstances of the infringement and where such activity may cause considerable harm to them, and their claims against the same defendant or defendants arising from the same or essentially similar factual basis or identical legal basis can be decided in the context of one action, provided that the interests of the consumers to be represented by the representative claimant are the same. It is a condition for filing a class action that the amount of the total claim of the represented class and of the individual claims of the class members can be determined and that there should be unambiguous criteria for the division of this amount. Using a class action, the person wishing to enforce her or his claim may enforce a claim for compensation for the harm resulting from the infringement, a claim for reimbursement of unjust enrichment or a monetary claim resulting from the invalidity of the contract.

Claims arising from an infringement established in a binding decision by an authority specified in a separate law or by a court based on a public interest claim are enforceable by way of a class action (follow-on class action).

There is a closer connection between the cases of class members than between those of group members in a coordinated action. The introduction of class action enables the applicant to file an action on behalf of a precisely defined group of consumers (hereinafter class) in order to enforce their homogenous claims. The requirement of this homogeneity is embodied in the formulation contained in the proposal '[…] if the interests of the consumers to be represented by the representative claimant are the same'. This formulation presupposes that the relief sought is, as a matter of course, advantageous for everyone who the representative claimant suggests representing. The rules provide a procedural mechanism for resolving cases where several people have the same interests in a given case. It is to be noted, however, that the requirement of identical interests is to be interpreted in such a strict manner that it would exclude the application of the rule even in such cases where, although the claims to be enforced in respect of a wide circle of consumers are founded on an identical or essentially similar legal basis, the interests of the consumers cannot however be regarded as the same.

The members of the class cannot be identified at the beginning of the procedure. The Expert Proposal does not deem it necessary to define a minimum threshold for the number of class members. At the same time, the infringement by the defendant has to be capable of causing substantial harm to several persons, even if the harm actually occurs in respect of a few consumers.

On the other hand, it is a precondition for applicability that the total amount of money to be paid to the class being represented (the amount of the claims the defendant's is 'exposed to') should be known. It is a further requirement that the share of the individual consumer could be established easily. This does not necessarily require that each consumer should be

entitled to an equal share, but the division must be based on unambiguous, clear and transparent criteria. In a given case the defendant should know the amount of the total claim; she or he must be able to calculate, for example, the number of infringements and the amounts that may be claimed by the individual consumers in respect of those infringements.

If the (differing) amounts of money due to the class members have to be determined individually, class action seems a less suitable method; in such cases the solution could be constituted by a coordinated action and subsequent individual follow-on actions.

Pursuant to the Expert Proposal, a class of claimants is exclusively possible; a plurality of defendants may exist only in the framework of a joinder of parties.

An earlier court judgment delivered with general effect *(erga omnes)* is binding on the court trying the class action. This rule ensures the priority of public interest claims over class actions. Following a judgment delivered in an action arising from a public interest claim, it is possible to file a follow-on class action, but the judgment delivered concerning the public interest claim is binding on the court hearing the class action.

3 Filing of the Claim, Content of the Statement of Claim

The court may decide the case in the framework of a class action exclusively based on an express application to this effect. Since the consumers are not identified at the beginning of the procedure, special significance is attributed to providing an adequately precise definition of the class. This may take place, for example, by defining the class of claimants as the consumers who purchased a specific product or some product from a product group in a precisely defined period.

Having regard to the above, it is also true that the defendant must know the amount of the claim she or he is 'exposed to' so as to be able to prepare properly for the defence and make a well-founded decision on a potential settlement. Here – as opposed to coordinated actions - the problem lies not in the possibility that further members may join, since in the opt-out type class action, the consumers coming within the definition of the class are regarded as class members automatically unless they opt out. With regard to these actions, it is the anonymity of the class members that causes a problem. It may, however, also be stated that it is from the account ledgers of the defendant himself that the data relating to the exact number of consumers concerned may be obtained. Hence, all that may be expected of the representative claimant or the legal representative is to specify in the statement of claim the probable number of consumers concerned, since this is what the court may proceed from when examining compliance with the requirements of admissibility. It is to be noted, however, that it is not necessarily in the interests of the defendant to supply the data relating to the exact number of consumers concerned and so it may be necessary to employ an accounting expert.

In comparison with coordinated actions, it emphatically applies to class actions that the typically personally unidentified class members of the class action cannot take part in the election of the representative claimant. The representative claimant is therefore self-appointed, but she or he should in any case be some (identified) member of the class.

Apart from the general content requirements, the statement of claim shall contain the following:

a) an express petition to the effect that the court shall resolve the legal dispute based on the provisions of the class action;

b) an adequately precise definition of the class;

c) specification of the probable number of consumers concerned and the number and nature of claims;

d) the designation of the representative claimant;

e) the circumstances that may be of relevance from the aspect that the claim is to be tried in the framework of a class action, including in particular those circumstances based on which – having regard to the identical interests of consumers, the volume and subject-matter of the case and the volume of evidence – the case is more suitable for being tried as a class action.

Any class member is entitled to file a class action on behalf of the class members (representative claimant).

Filing the statement of claim suspends the limitation period in respect of the class members, provided that the court makes a binding decision on the merits concluding the proceedings.

4 Legal Status of Class Members, the Representative Claimant and the Legal Representative

Pursuant to the Expert Proposal, the members of the class do not have to be identifiable by name at the beginning of the procedure, provided that the criteria for class membership can be defined at this stage. On the other hand, at every stage of the proceedings (and not only at the time of the delivery of the judgment), one must be able to establish with regard to each person whether they can be classified as a member of the represented class or not (based on whether they share the same interests).

With regard to the limits and main principles of the new regulations, it may be pointed out that present regulation is restricted to forming a class of claimants; defining the basis for class formation must take place along questions of fact and law and the time factor.

A speculative class does not meet the preconditions for the commencement of proceedings. However, this does not imply that group membership must remain permanent and closed all the while.

The representative claimant would bring the action on her or his own and the others' behalf in these procedures. A member of the represented class could (at most) exercise her or his right to opt out. The members of the class are not parties to the action; only the representative claimant is a party in the fullest meaning, she or he is the sole claimant. In contrast to the representative claimant, the represented persons cannot be ordered to pay costs either. However, they are not merely 'bystanders' who are not interested in the outcome of the case, since the delivered judgment is also binding on them.

The Expert Proposal considers it necessary to limit the personal scope to those consumers who are domiciled or residing in Hungary at the time of filing the statement of claim. It is to be feared that the consumer domiciled or residing abroad has no information on the action and therefore she or he has no possibility to opt out from the class. As a matter of course, these regulations do not prevent an individual action to be filed or the claim to be enforced in a coordinated action. This point of the Expert Proposal was developed with reference to the Belgian regulations[23].

Based on this, a consumer is to be deemed a member of the class:

a) if the consumer could also file an individual action regarding the subject-matter of the class action against the defendant or defendants, or she or he could individually assert her or his claim in an order for payment procedure;

b) if the consumer is domiciled or resident in Hungary at the time of filing the statement of claim and

c) if the consumer has not expressed her or his intention to opt out from the class.

The claimant of the class action is the representative party; the members of the class represented by him or her are not involved in the proceedings as parties; they do not have the burden of advancing or bearing the costs.

It is a fundamental requirement of fair process that before the delivery of the judgment, one should know who would be covered by the scope of that judgment. This enables those concerned to take steps in order to be able to protect their interests properly (e.g. by opting out).

The requirement of an 'identical interest' (see point III 5) has been designed to ensure a perfect overlap between the interests of the representative claimant and the represented class members. The fulfilment of this requirement is of crucial importance from the aspect of enabling the representative claimant to represent the interests of the class members properly. When examining compliance with this requirement, a distinction may be made between cases where class members have diverging interests and cases where they have conflicting interests. Where interests are merely diverging, there is a risk that the representative party may not represent firmly or stress those arguments that do not serve her or his interests. Where there are conflicting interests, the representative party's conduct of the lawsuit may undermine other members' interests. In neither case would it be reasonable for

[23] Wet tot invoeging van titel 2 "Rechtsvordering tot collectief herstel" in boek XVII "Bijzondere rechts procedures" van het Wetboek van economisch recht en houdende invoeging van de definities eigen aan boek XVII in boek I van het Wetboek van economisch recht / Loi portant insertion d'un titre 2 "De l'action en réparation collective" au livre XVII "Procédures juridictionnelles particulières" du Code de droit économique et portant insertion des définitions propres au livre XVII dans le livre 1er du Code de droit économique, Art 38; Stefaan Voet, 'European Collective Redress: A Status Quaestionis' [2014] International Journal of Procedural Law 127.; Janek Tomasz Nowak, 'The New Belgian Law on Consumer Collective Redress and Compliance with EU Law Requirements' in Eva Lein, Duncan Fairgrieve, Marta Otero Crespo, Vincent Smith (eds), *Collective Redress in Europe – Why and How?* (British Institute of International and Comparative Law 2015, London) 182.

the court to declare the class action admissible. At the same time, modern reality is rather different, since procedures initiated in the interests of collective redress are not usually managed and controlled by an individual party. Based on comparative experiences, multi-party cases are usually initiated and financed by lawyers and the representative party is merely a nominal leader.[24]

The persons represented do not need to be informed of the representative claimant's intention to file an action. They are not individually notified that the proceedings are in progress, but may learn of it only from the public data of the register or the published notice of the legal representative. It is not a requirement either that the representative claimant be appointed or elected by the members of the class concerned. The party may therefore be self-appointed and become a representative claimant, regardless of whether the represented persons have authorised him or her to represent them or not.

The representative claimant or her or his legal representative may choose freely how they are going to conduct the lawsuit on behalf of the class, but during the conduct of the lawsuit, the representative claimant shall act in a way that protects the interests of the members of the class. At the request of a class member, the representative claimant is obliged to provide the member with information, if such information is of relevance concerning the member's exercise of her or his rights. The representative party is the 'master of the case', from which it follows that she or he is also entitled to make a settlement. Such a settlement is binding on the represented persons if they have not opted out from the class prior to this. As a consequence of the nature of the proceedings, the class members cannot have any influence on the settlement process; it was therefore necessary to incorporate rules for the protection of their interests. Control over the court settlement is exercised by the court seized of the case. The court may approve the settlement only if it complies with the legal regulations and the interests of the class members. The court is to refuse approval in particular if that settlement is unfair. The court examines the interests of the group members *ex officio* and, if necessary, it shall appoint an expert.

At the same time, if a class member is discontented with the way the representative party is conducting the lawsuit, she or he may opt out from the class and enforce her or his claim individually based on her or his decision. As a matter of course, the representative claimant cannot opt out from the class.

The legal representative is authorised by the representative party to represent the case. With regard to a class action, the class of claimants has one legal representative. An authorisation to represent the class as their legal representative may be granted – as defined by a separate legal regulation – to a lawyer. Following the entry into force of the order granting the request for filing of the class action, the legal representative is entitled to disclose to the public that a class action has been filed.

In a class action, it flows from the character of the proceedings that there is a smaller administrative burden than in a coordinated action, so it does not necessarily have to be

[24] Compare: Zuckerman (n 1) 671.

assigned to the legal representative for the sake of relieving the workload of the court. Therefore, for example, the withdrawing members – unlike in with regard to coordinated actions – announce their intention to opt out directly to the court.

5 Examination of Admissibility

The representative claimant may file an action not only to assert her or his own personal interests, but also to assert the rights of those who are similarly affected by the infringement of the defendant. The proposal lays it down (see point III 4) as a condition for filing a class action that the members of the class should share the same interests. It is not reasonable for the court to decide that a class action is admissible if there may be several types of defence against the members of the class. In such a case, the representative claimant may not properly represent the interests of some class members, if such interests differ somewhat from her or his own interests and the interests of class members having the same interests as her or him. Hence, if as a result of the examination of admissibility it becomes obvious that the members of the class have competing interests, the cases are not suitable for being tried on the basis of a class action and the admissibility of the class action must be rejected. Although there is no strict restriction, the class action is however not admissible where the rights or obligations of the class members are too diverse to be brought into line with the basic objectives of the procedure. Filing a class action may be admissible only if it is certain that the procedure serves the interests of all members of the class represented.

The court seized of the case is to decide by order on the admissibility of the proceedings filed in the form of a class action within 45 days of the statement of claim being filed, following written preparation and, if necessary, hearing the parties. The order of inadmissibility is subject to appeal. In its order establishing the admissibility of the class action, the court defines – *inter alia* – the class of claimants based on characteristics suitable for identifying the class of claimants, the subject-matter of the action and the amount of the total claim of the class and the share of the amount claimed in respect of the individual members of the class or the clear criteria for division.

As opposed to coordinated actions, rivalry or parallelism of class actions is unimaginable – due to the difference in their nature –, since the effect of the judgment delivered in the class action basically extends to all members of the class. In the event of two class actions having the same subject-matter, the court shall dismiss the statement of claim filed later before the case commences *(in limine litis).* In the application of the rules of *in limine litis* dismissal, the parties mean the class and the defendant, defendants or joint defendants. If a judgment has already been delivered in the class action, it results in a *res iudicata* in respect of the class members.

The provision is intended to ensure the primacy of *actio popularis* over the class action. The proposal suggests regulating the relationship between coordinated actions and class actions by stating that the class members who, prior to filing the class action, have become group members in a coordinated action, the subject-matter of which coincides with the

subject-matter of the class action, have thereby excluded themselves from the scope of the judgment delivered in the class action. Another situation that may arise in respect of the rivalry between the two types of action is where the class action is already in progress, but some class members would potentially like to enforce their claims in a coordinated action. A precondition for this is that they should opt out from the class. In the absence of this, the court seized of the coordinated action will dismiss the class member's claim without the issue of process.

A precondition for enforcement of an individual claim is that the class member should leave the class.

6 Opting-out from the Class

Since the authenticity of opt-out systems leans on the presumed consensus of the class members, publication and thereby informing the class members of the action is important with a view to enabling them to avail of the possibility of opt-out. The consumer may become a class member in spite of her or his will, so she or he should be left with the possibility to choose freely whether to leave the class. This obviously cannot be conditioned on the defendant's approval.

The practice relating to the American opt-out system shows that class members are usually passive and do nothing. Very seldom do they take advantage of the possibility of opt-out. In consumer cases, on average less than 2% of those concerned exercise their right to opt out from the group.[25] In Australia the situation is somewhat different, empirical research has shown that people are not averse to opt-out and the rate of opt-out is a lot higher than expected (average: 13.78%, median: 5.28%).[26]

Pursuant to the Expert Proposal, a member of the class could notify the court of her or his opt-out until the closing of the hearing preceding the delivery of the first instance judgment or until the conclusion of a court settlement. The defendant's consent is not required for opting out from the class. A member who left the class would not be allowed to rejoin but opting out from the class is not an obstacle to claim enforcement in an individual action.

7 Costs

A relevant obstacle to application may be posed by the question as to who should bear the costs. The problem of bearing the costs arises in that the procedure may be commenced even without the consent of the class members and therefore they do not appear as parties to the lawsuit, nor do they bear the costs of the action. It follows from this that all the costs must be

[25] Samuel Issacharoff, Geoffrey P. Miller, 'Will Aggregate Litigation Come to Europe?' (2009) 62 (179) Vand. L. Rev. 203.

[26] Zuckerman (n 1) 693.

borne by the representative party if the class loses the action. Even if the representative claimant wins the lawsuit, there is a risk that she or he will not be able to recover all the costs from the losing party. The representative claimant's personal risk for costs may be a serious deterrent to filing such actions. Hence, in the case of opting out from the class, there is no need to settle accounts with the leaving class member.

As a result of the volume of the action, the defendant also bears a great risk for costs, with a view to which the Expert Proposal has incorporated the requirement of security for costs, which does not presuppose a request by the defendant to this effect and which can be applied regardless of the representative claimant's domicile.

8 Questions Relating to Settlement, Judgment, Res Judicata and Legal Remedies

In an action commenced on the basis of a class claim, there is no possibility to make separate settlements with individual class members as far as court settlements are concerned. However, if the identity of the class member has been revealed, there is no obstacle to him or her concluding an out-of-court settlement with the defendant, leaving the class at the same time. Nevertheless, due to the typically negligible value of the individual claim, this is expected to be a rather rare scenario.

Before granting approval, the judge is to examine compliance not only with the laws, but also with the interests of the class. It is important that the court may employ an expert for this task, if necessary. In a class action, weighing of interests would be more emphatic than in for coordinated actions, with a view to protecting the interests of claimants not attending the trial.

Being acquainted with criticism formulated concerning models from abroad, special care must be taken while developing the rules relating to settlement. The most common objection to the opt-out system is that it may lead to significant abuses in practice. It is raised as a counterargument that, in order to prevent abuses, it is possible to introduce control mechanisms: especially strong judicial control over the cases.[27]

It is a peculiar feature of a class action that, at the beginning of the action and during the action, the members of the class cannot be specified. The scope of the judgment delivered in the case extends to all consumers corresponding to the description of the class who have not opted out from it, but the identity of the individual consumers will become known when they have proved their eligibility as laid down in Point III.9. The scope of the judgment delivered in the class action does not extend to class members who, prior to the commencement of the class action, joined a coordinated action filed with regard to the same subject-matter as a group member (cf. point II 5).

[27] Christopher Hodge, *The Reform of Class and Representative Actions in European Legal Systems* (Hart 2008, Oxford) 119.

Due to the complexity of class actions in respect of the appeal of judgments, a deadline of more days is justified. An approval similar to that of coordinated actions would not be feasible due to the lack of information on the number and identity of class members.

9 Performance

The class is to be treated as a unit right until the enforcement, in this action there is no possibility for individualisation. The therefore defendant pays a lump sum to the class by way of depositing the money with the court.

It may be a life-like situation that some of the consumers concerned do not come forward (e.g. they have not kept the receipt or they may show no interest). From a legal political aspect, it would not be justified if the amount was to remain in the defendant's possession and therefore the Expert Proposal suggests its use for public interest purposes. It would be reasonable to lay down detailed rules relating to this in a separate statute. Apart from this, it will be necessary to amend the Act on Judicial Enforcement and, potentially, acts relating to insolvency procedures as well.

The court will pay the amounts due to the class members in accordance with those laid down in a separate law if they have certified their eligibility by a legal document after having come forward in response to the notice addressed to them. The members of the class may announce their claim relating to this within five years of the expiry of the deadline for performance. When the deadline has passed, the potential remaining amount is to be spent on public interest purposes in the form specified by a separate law.

IV Conclusion

The proposal would broaden the narrow frames of the present day collective redress system, retaining its good and effective elements, thereby preserving some of the tradition as well. As such, it could provide the possibility for creating the essential procedural mechanisms for cases which, due to the lack of adequate procedural means under the Hungarian regulation in force, may currently be tried only with difficulty or are not even commenced for this reason.

András Kovács*, Tihamér Tóth**, Anna Forgács***

The Legal Effects of European Soft Law and Their Recognition at National Administrative Courts

I Introduction

The aim of this article is to analyse the extent to which European Union (EU) soft law is hardened in administrative court procedures, whether national courts recognise the legal effects of soft law, and can live with the coexistence of soft and hard law.[1] References to EU soft law instruments at national level are most common in administrative law cases, especially in competition law, regulated markets, environmental law, and consumer protection law cases.[2]

The first part of the study deals with the definition and classification of various EU soft law instruments. This part gives an overview of the origins of soft law and introduces the different types of soft laws that have become important and colourful threads in the acquis communitaire's fabric.

Next, we summarise the rationale for the existence of soft law, looking at soft control within a hierarchy, enhancing transparency to the public, and maintaining consistent law enforcement. To better understand soft law, we provide analogies with the legal and economic principles of *ius dispositivum.*

Then, we explore whether formal and informal soft law instruments produce different legal and practical effects. The distinction between self-binding and external (soft) binding effects will be noted, and we will observe the extent to which law enforcers and judges can

* András Kovács is associate professor, Eötvös Loránd University, Administrative Law Department, administrative judge at Curia (the highest court of Hungary).

** Tihamér Tóth is associate professor at Pázmány Péter Catholic University, Department of Environmental Law and Competition Law, attorney at Réczicza Dentons Europe LLP.

*** Anna Forgács is assistant lecturer, Eötvös Loránd University, Administrative Law Department.

1 Following the recommendations of Oana Stefan, *Soft law in Court – Competition Law, State Aid and the Court of Justice of the European Union* (Kluwer Law International BV 2013, Alphen aan den Rijn) for further research topics. 242.

2 See e.g. Stefan (n 1) 162–165, and 275–324.

deviate from soft law norms. Sector specific insights from telecommunication regulatory cases and competition law enforcement lead us to conclude that, in the practice, EU soft law is treated as binding law before national administrative courts.

We suggest that the constitutional problems arising from this hardened role of EU soft law in national administrative courts could be cured by extending and improving the preliminary ruling procedure which would help national judges to decide cases.

II The Definition of Soft Law

1 Hard and Soft Law

When law enforcers, especially judges in EU Member States' courts, come to decide cases, they are accustomed to consider various documents, involving (hard) law, soft law and sometimes other official policy documents that do not even reach the level of soft law. Obviously, these documents have different impact on the decision they make.[3] Carefully trying to avoid the delicate issue of how to define (hard) law, this paper will focus on the role of soft law played in judicial procedures involving the review of administrative decisions at national level.

Soft law has its origins in international law, where it can have two meanings.[4] On the one hand, in a formalistic way, soft law is not a source of international law, yet regulated individuals follow it as if it was law. On the other hand, it is acknowledged as a source of law, but without a normative content, meaning that neither rights nor obligations may be conferred by it.[5]

In the creation of hard law, the forum (source), the wording (content) and the legal form play an important role.[6] If one or two of these conditions is absent (suppose the forum does not have authority to enact that law, or no rights and obligations are created due to the

[3] We should also note that the difference between these categories of documents is far from obvious at the margins.

[4] Starting our inquiry with recalling international legal principles is reasonable, since EU law, although it has evolved into a separate legal order, has its origins in international law.

[5] László Blutmann, 'In the trap of a legal metaphor: International Soft Law' (2010) 59 International and Comparative Law Quarterly 605–624, 606, or Damrosch et al., *International Law, Cases and Materials* (West Academic Publishing 2001, New York) 34.

[6] This approach follows G.M. Borchardt & K.C. Wellens, 'Soft Law in European Community Law' (1989) 14 European Law Review 267, 270, 298–301. See also: Zlatina Georgieva, 'Soft Law in Competition Law and its judicial Reception in Member States: A Theoretical Perspective' (2014) 16 German Law Journal 234. Similarly K.W. Abbott and Sindal who define 'hard law' as the form of legalisation characterised by high levels of obligation, precision, and delegation, whereas they consider that soft law occurs whenever one or more of the three dimensions are weakened. K.V. Abbot et al, 'The Concept of Legalization' (2000) 54 International Organization 3, 17–35; K. Abbott & D Sindal, 'Hard and Soft Law in International Governance' (2000) 54 International Organization 421–422. For the critic of this approach see: U. Mörth (ed), *Soft Law in Governance and Regulation – An Interdisciplinary Analysis* (Edward Elgar Publishing 2004, Cheltenham) see also in Stefan (n 1) 9-10.

ambiguous text of the law, or it was not enacted in an appropriate procedure, or was not published in the adequate form), its hard law character will be lost.[7] Normativity is also a key concept for our study.[8] Normativity is related to the content of the legal document. Legal norms are general rules created and enforced by the state to direct human behaviour.[9] We will thus consider only normative, general rules of conduct as legal norms, disregarding otherwise binding court judgements.[10]

Giving a clear definition of soft law is made difficult by the heterogeneous legal instruments that can be covered.[11] Some authors[12] describe soft law as an umbrella concept, and EU soft law as part of another umbrella, the *acquis communautaire.*[13] We must also refer to the discourse in legal literature which claims that the term itself is self-contradictory, since law is either binding or not law at all, so non-binding law, which may be the primary definition of soft law, is a contradiction that should not exist.[14]

Based on F. Terpan's classification, it must be made clear that the term of soft law does not include hard law norms, the content of which is so ambiguous that they cannot confer rights or obligations on individuals (hard law with no or soft enforcement). Trepan uses the example of the Stability and Growth Pact, which contains hard obligations but its enforcement

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7 Terpan includes non-enforceable lex imperfecta rules in the realms of soft law, see: F. Terpan, 'Soft Law in the European Union – The Changing Nature of EU law' (2014) 19 European Law Journal 1, 58–59. It must be noted that *lex imperfecta* rules exist in every national legal system; moreover, they must necessarily exist in any legal system (e.g. organisational rules). Here we refer to those binding norms which are not enforceable at courts, because they cannot even reach national courts due to the lack of a mechanism for implementation and enforcement. Another difference between *lex imperfecta* and soft law is that *lex imperfecta* rules are adopted in a legal form that is binding *per se,* even though their enforcement is mainly political in nature.

8 It is well known that natural lawyers and legal positivists hold opposing views on the nature of law.

9 Legal norms can be classified according to their legal force or binding effect. Legal norms can also divided into imperative norms, containing compulsory rules, i.e. antitrust prohibitions and telecommunication regulations, and dispositional norms, allowing the participants to define their rights and duties within the framework established by law (here the norm plays a subsidiary role in the law).

10 There are some intermediate documents between single and normative acts, for example a single decision of an authority addressed to a distinct group of people containing theoretical, generalised conclusions.

11 See for example: Terpan (n 7), Stefan (n 1) 11., E. Korkea-aho, 'EU soft law in domestic legal systems: flexibility and diversity guaranteed?' (2009) 16 Maastricht Journal of European and Comparative Law 271, 274.

12 L. Senden, 'Soft law, self regulation, and Co-Regulation in European Law: Where Do They Meet' (2005) 9.1. Electronic Journal of Comparative Law 23. <http://www.ejcl.org/> accessed: 6 September 2015; L. Senden, 'Soft law and its implication for institutional balance in the EC' (2005) 1 Utrecht Law Review 2, 79, 81, similarly M. Medelson, 'Formation of Customary International Law' (1998) 272 Hague Academy of International Law, Collected Courses 155–410, 360, in Blutmann (n 5) 610.

13 Stefan (n 1) 118, with respect to the T-115/94 *Opel Austria v Council* case, EU:T:1997:3. However, a number of authors warn that international and EU soft law cannot be handled in the same way under the umbrella concept, since in EU law these instruments are somewhere between a general statement of policy and lawmaking, which as a tertiary source is at the bottom of the hierarchy of legal sources. See also: Stefan (n 1) 10–11, Terpan (n 7) 55–56.

14 Soft law is a *contradictio in terminis* see: L. Senden, *Soft law in European Community Law* (Hart Publishing 2004, Oxford) 109, Stefan (n 1) 117, H. Hillgenberg, 'A Fresh look at soft law' (1999) 10 European Journal of International Law 500. or Blutmann (n 5) 609–610.

is dependent on the willingness of Member States to give effect to the obligations. Additionally, those cases when hard law cannot create rights or obligations must also be excluded, because it is not enforceable (hard law, no enforcement).[15] Here Trepan refers to the Common Foreign and Security Policy, which is also meant to be legally binding, but without the judicial oversight of the European Court of Justice (ECJ).

For the purposes of this paper, we will focus on the distinguishing feature between hard and soft law from the perspective of national judicial decisions. Under non-binding hence soft law norms we will understand legal norms that cannot or usually cannot be enforced through judicial proceedings. This does not mean however, that they do not have a role in judicial proceedings.[16] This interpretation is also supported by EU law as well, since Article 263 of the Treaty on the Functioning of the European Union (TFEU) explicitly excludes non-binding legal acts (recommendations and opinions) under Article 288 from the scope of the ECJ's authority.[17]

2 The Formal Classification of EU Soft Law Instruments

a) Official soft laws: recommendations and opinions

An obvious way to classify EU soft law instruments is to examine whether the given document was adopted in a form recognised by the TFEU itself. Accordingly, an act that was not adopted through an officially recognised procedure cannot become an official source of law.

Article 288 of the TFEU mentions recommendations and opinions as legal acts of the EU. These are adopted in a regulated procedure by certain institutions, based on the delegation of authority in the TFEU. Their soft law nature derives from the fact that, according to the TFEU, they shall have no binding force. In the following, we will focus on recommendations, as the application of this type of official soft law is prevalent both in the ECJ's and national courts' jurisprudence. In contrast, opinions are more like individualised

15 F. Terpan (n 7) 58–59.

16 For example, in competition law procedures, soft law documents read in conjunction with legal principles may even create rights for third parties that courts should protect, see section 3.2.2.

17 This approach conforms with the most often cited definition of soft law by Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56 Modern Law Review 64. See similarly the definition by Senden in L. Senden, 'Soft Post-Legislative Rulemaking: A Time for a More Stringent Control' (2013) 19 European Law Journal 1, 112. In adition, one of the elements of Chinkin's soft law definition is that soft laws are based solely upon voluntary adherence, or rely upon non-juridical means of enforcement. See: C. Chinkin, *Normative Development in the International Legal System in Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (D. Shleton ed, Oxford University Press 2000) 30. in Stefan (n 1) 9; 11, So, all in all, they have no legally binding force but may have practical as well as legal effects or, as Senden says, may produce practical effects. Hence, sometimes in practice they have legal effect (e.g. at courts), but not always (not bindingly).

documents relating to a specific legislative, accession or other decision and so their legal effect on third parties is not obvious.[18]

b) Unofficial soft laws

The various types of annual reports, published legislative agendas, white books, green books and guidelines interpreting hard law provisions, notices, communications, etc. all constitute documents that are not official legal acts under the TFEU, yet they may have normative content. Since their creation is not regulated, their titles can be somewhat arbitrary, even though EU institutions publishing them try to give them a name matching their content. In the following, we will refer to these as communications.

Building on Senden's approach,[19] communications may be classified according to their legal effect into four groups. There are communications that are explicitly binding and confer rights and obligations [A]; others interpret hard law (interpretative communications) [B]; other documents restrict the law enforcement discretionary powers of EU or Member State authorities (decisional communication)[C]; and there are some which do not contain any general rule of conduct, thus cannot possess any legal force [D].

Communications of type [A] have some force of law due the explicit authorisation of a hard law provision that they should create rights and obligations. We will not analyse this type any further, since their enforceability at courts is the same as for any hard law provision.[20]

As to types B and C, often there is no clear difference between interpretative and decisional communications. For example, the Communication of the Commission on waste[21] is clearly an interpretative communication, because it interprets the provisions of a directive with references to judicial case-law. Here, the point of reference at courts will therefore not be the communication itself, but the directive and the related case-law. In other cases, however, the distinction is not so clear, so we will not differentiate between these two types of communications, and the judicial enforceability of such norms will also be analysed together.

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[18] See for example: Commission Opinion COM/2011/0667 final on the application for accession to the European Union by the Republic of Croatia, Commission Opinion COM/2011/0596 final on the requests for the amendment of the Statute of the Court of Justice of the European Union, presented by the Court, Commission Opinion COM/2008/0730 final on the request from the United Kingdom to accept Regulation (EC) no 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (ROME I).

[19] Senden (n 17) 57–75 and 60–61. Senden (n 14) 219–220. For communications with binding force and without, see: Várnay Ernő, Tóth Tihamér, 'Közlemények az Uniós Jogban' (2009) 50 (4) Állam és Jogtudomány 417–472, 417–418.

[20] It is, however, worth noting that such binding soft law is never put into recommendations or opinions, since their regulated legal status expressly precludes any binding effect.

[21] COM(2007) 59 final Communication from the Commission to the Council and the European Parliament on the Interpretative Communication on waste and by-products.

III Exploring the Legal Nature of Soft Law

1 Legal Principles as an Analogy

The specific nature of soft law can be better understood by an imperfect analogy with legal principles. Scholars highlight the logical difference between rules and legal principles.[22] The difference between the two is that rules function on an 'all or nothing' basis, so in a single case it is either applicable or not – and if applicable, then it shall be applied. In contrast, legal principles are applicable to all cases or at least to a wide set of cases, yet they are not fully applicable and not without any restraints. This means that more than one legal principle may be of relevance to a given case, and the judge must assign a certain weight to each of these to deliver a balanced judgement. Legal principles can also be described as ambiguous abstract rules that should be realised through law enforcement.

Legal principles, just like soft law instruments have an important role in making abstract legal norms workable. Primary EU law usually consists of highly abstract norms. Take Article 102 TFEU as an example. None of the terms, such as undertaking, dominant position, abuse, or effect on trade, are defined by the text itself. There are no implementing regulations either. Even if the case law of the European Courts fills these norms with more precise content,[23] there is still a wide margin of appreciation, where general principles of law and soft law instruments issued by the Commission will have a role to play.

Consequently, both legal principles and EU soft laws help to fill abstract norms with content. Soft law instruments often refer to general economic and legal principles, which may give them a legal flavour. The difference between legal principles and soft law is that the former fit better into the traditional hierarchy of legal norms, while soft law instruments seem to exist in an overlapping but different dimension of the legal universe. The Court held that interpretative communications cannot modify the rules contained in hard law.[24] So, soft law documents either do not fit in traditional legal hierarchy at all, or, if they do, they occupy its very lowest position.

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[22] R. M. Dworkin, 'The Model of Rules' (1967) 35 University of Chicago Law Review 14, 23–29, 30–32. See also Jakab András, 'A magyar jogrendszer alapelemei' 2.4. footnote 45. <http://jesz.ajk.elte.hu/jakab13.html> accessed 6 September 2015. See also: Jan-Reinard Sieckmann. *Regelmodelle und Prinzipienmodelle des Rechtssystems* (Mohr Siebeck 1999, Tübingen).

[23] See for example C-27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities,* EU:C:1978:22.

[24] As for regulations, see T-9/92 *Peugeot v Commission* case, EU:T:1993:38 para 44, confirmed by C-322/93 *Peugeot v Commission*, EU:C:1994:257.

2 Ius Dispositivum as an Imperfect Analogy

In (hard) law, there are generally binding rules which always oblige persons *(ius cogens)* and there are legal rules which bind the parties unless they agree otherwise *(ius dispositivum).* We emphasise this distinction between hard laws, because the reach and nature of binding effects and the option to deviate from what is written into a soft law instrument will be of crucial importance. We shall see that the EU Commission may be bound by its own soft laws, but the option to deviate will be available, subject to giving reasons and avoiding the infringement of legal principles protecting third party interests. This makes soft law look like dispositive legal norms.

The main difference is that the legitimacy of deviation from dispositive law depends upon consensus between equal parties, whereas the deviation from soft law needs to be reasoned and to respect general legal principles in order to preserve the reliability of the legal system. We will mostly focus on the problem of deviation by the regulatory or competition authority, yet we should note that even third parties may choose not to follow soft law. However, if challenged later, they must be able to explain with persuasive authority why they believed that guidelines issued by the EU Commission to elaborate on competition concepts were flawed. Our experience is that the simplistic argument that 'soft law is not law so why should I ever bother reading it and acting in accordance' would not work before a national court.

3 Soft Law as a Useful By-product of Law Enforcement: the Self-control Effect

To understand the nature and the role of soft law, it is important to realise that the emergence of soft law is almost a necessity, which cannot be avoided or prohibited, just as it cannot be legislated that the sun rises in the west instead of the east.[25] Every efficient organisation that enforces broadly worded hard law tries to generalise the lessons of individual decisions.[26] This is necessary in order to create a coherent and unified interpretation of laws. This process is justified by the pursuit of efficiency,[27] so that not each and every decision has to be thought over and over again. Soft law can save resources and make law enforcement quicker and more consistent. Moreover, standardisation and generalisation are inevitable in bureaucratic organisations with a significant turnover of public servants in order to maintain a policy line and to eliminate arbitrary interpretation of laws. If a public authority makes individual

[25] Naturally, it can be enacted as a rule, but it cannot meet the criterion of a norm or a single decision, because such a subject cannot be the subject of a regulation; the addressee is not a legal entity, etc., so it cannot be law.

[26] The soft law limits institutional discretion, encouraging the administrators to take consistent decisions. Stefan (n 1) 16.

[27] In this case effectiveness as a goal also results in increased legal certainty, which is a separate goal in democratic states, although some aspects of the two terms are in a dichotomous relation, similarly to the principles of fair procedure and reasonable time.

adjudicatory decisions then sooner or later it will also create – even without any kind of authorisation or delegation – working documents that collect and normatively contain the generalised knowledge of the institution.

This is also true for EU institutions that are not the sole decision-maker in a certain field, but have oversight powers over the consistency or efficiency of law enforcement. Nevertheless, such normative documents will have a higher normative value if they are issued by the competent and experienced decision-making authority. The binding nature of their content 'hardens' when the institution publishing them, mostly the Commission, also takes part in the enforcement, and in this way it is in a better position to specify hard law provisions. As an example, the fields of environmental law and competition law are worth mentioning.[28]

The publication of soft law can also be seen as a self-restriction by the authority, since it makes the use of its discretionary power more legally bound. The more legally bound the discretionary powers of an authority are, the more they will be in line with the rule of law principle. It explicitly strengthens legal certainty if the decision-maker is bound by its own soft law.

Soft law documents interpreting the law are thus natural and useful by-products of law enforcement as exercised by executive institutions and courts. The judicial system is also characterised by case-specific decision-making. The publication of decisions with normative content (e.g. uniformity decisions), or the publication of jurisprudence analysis is fairly common in most national judicial systems. Some legal systems acknowledge binding decisions with normative content, which could be considered judicial law-making.[29] The scope and formality of the binding power of such judge-made normative legal acts are usually an adequate indicator of judicial independence.[30] Studies have confirmed[31] that it does not really matter

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[28] In environmental law it is only an interpretative tool to case-law, while in competition law it prescribes rules. See: COM(2007) 59 final Communication from the Commission to the Council and the European Parliament on the Interpretative Communication on waste and by-products. Compare with (n 21). However, the soft law documents mentioned in footnote 18 rarely appear in judicial decisions.

[29] For example, in Hungary, as a civil law legal regime, the Supreme Court (Curia) may publish uniformity decisions in cases of theoretical importance in order to ensure the uniform application of law within the Hungarian judiciary. Such decisions are binding on all Hungarian lower instance courts (see: http://www.kuria-birosag.hu/en/uniformity-decisions-jurisprudence-analysis). On the other hand, in common law legal regimes, precedents may be considered judge-made law with normative content [see e.g. R. Cross, J. Harris, *Precedent in English Law* (4th edn, Oxford University Press 1991, Oxford)].

[30] However, these indicators not necessarily show the independence from the executive, but rather indicators of professional qualities, personnel decisions and material resources. The reason for this is that one of the main components of judicial independence is professional autonomy, in order for the judge to be able to reach autonomous professional decisions. The lack or uneven character of this (lack of proper selection procedures and organisational resources) is often compensated by judicial law-making competences, in order to create uniformity in the judicial practice. It also shows the level of judicial independence whether these uniformity decisions are adopted by the judges themselves, or by a special committee or group of people outside the judiciary.

[31] See for example: Ződi Zsolt, 'A korábbi esetekre történő hivatkozások a magyar bíróságok ítéleteiben' (2014) MTA Law Working Papers <http://jog.tk.mta.hu/uploads/files/mtalwp/2014_01_Zodi_Zsolt.pdf> accessed 24 October 2015.

whether the highest court publishes such a normative document in the form of opinions or as binding precedent, since lower courts will be obliged to obey them in both instances.

Beyond this, there is one significant difference between authoritative court decisions and soft law instruments. A well-established and published highest court jurisprudence interpreting an abstract hard law rule will eventually become law and will be binding on everyone, since it will be enforceable at courts. For this reason, case-law and normative documents adopted by national courts shall here be excluded from scope of genuine soft law.[32] Put differently, a published, standardised interpretation of a legal issue by a high court has a higher value than similar documents issued by administrative authorities. On the other hand, this kind of case law, just like some soft law rules, will never be applied on their own, just like the normative paragraph of an act by the Parliament. Court case law will connect to one or more paragraphs of an act. Soft law, to have any binding effect, will need the additional involvement of general legal principles, such as the protection of legitimate expectations.

4 Soft Law as a Tool of Soft and Transparent Control Mechanism

Normally, the addressees of intra-institutional soft law documents are employees of the given organisation or the supervised organisation, who are expected to follow them depending on the relative professional independence of their decision-making authority. Even if the legal system would disqualify these documents, they would still emerge, surviving the above mentioned functions, but hidden in desk drawers, accessible only to insiders. Were the legislator to prohibit all these documents (circulars, normative instructions), the organisation exercising control powers would lose one of its important tools. A prohibition would thus result in employees using non-public guidance to decide cases, which is a much worse situation than allowing the use of soft law documents, even if this might cause constitutional and theoretical problems.[33]

Another driving force behind the creation of soft law is that, under the shared administration model of the EU, national authorities are responsible for enforcement, while ensuring consistency of law enforcement is the responsibility of the EU institutions (ultimately the ECJ), but also involving the Commission. The Commission, which does not possess hierarchical oversight powers, can give orientation to national authorities through soft law documents.[34]

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[32] This exclusion is clear based on the jurisprudential debate exactly on the hardening of soft law by courts. See: Stefan (n 1) 152–155, Korkea-aho (n 11) 279.

[33] Here the question is whether executive rule-making with or without a delegation of authority should be allowed.

[34] Often this is the case in competition law and sectoral market regulation, where a large number of soft law documents exist. For the same reason, soft law is prevalent in those fields of law where EU has responsibilities but lacks real competences and so it tries to counterbalance it by the adoption of soft law documents, such as employment and social policy, especially if the hard law rules international law features, such as the Lisbon Strategy, or if the division of competences between EU and member states is not entirely clear. See Stefan (n 1) 12, 15.

For example, the European Competition Network operates more like a family then a clearly regulated hierarchy of competition agencies. Soft law, coupled with the Commission's exceptional role to step in and squeeze out an allegedly incompetent national authority from deciding a case of European relevance, softly regulates cooperation between otherwise independent authorities.

A number of soft law documents published by the Commission contain provisions on what is expected from national regulatory authorities in respect of the soft law document. For example, the Commission Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU begins with a rather imperative wording: 'NRAs should proceed in the way set out below'[35], which also shows that soft law documents[36] can serve as a tool for the orientation of national regulatory authorities.[37]

5 Soft Law as a Laboratory of Hard Law – The Implementation of Soft Law

Is there a need to implement EU soft law instruments into domestic hard law? Is this another process of witnessing the 'hardening' of soft law? For example, the Commission's recommendation[38] on the relevant product and service markets within the electronic communications sector was published in Hungary in the form of a decree.[39]

We do not intend to go into any further details on the incorporation of soft law into national law, but in general it is worth noting that there exists no direct obligation to implement it: since soft law is formally not law, the questions of direct and indirect effect

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35 Commission Recommendation 2009/396/EC of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU [2009] OJ L124 para 1.

36 In the common regulatory framework for electronic telecommunications, it must be mentioned that not only soft law documents may orient NRAs, but similar questions arise in relation to letters addressed by the Commission to NRAs in individual cases. (See: T-109/06 – *Vodafone España and Vodafone Group v Commission,* EU:T:2007:384) Although the main issue regarding such letters is also the legal effect they produce, we will still exclude these from the analysis, as these are not generally applicable documents in the same way as soft law norms. Instead, they raise another question, namely the normative and binding force of *individual* decisions (or even comments).

37 There are cases when the case law of the EU Courts gives more room for national authorities. In case C-226/11 *Expedia Inc v Autorité de law concurrence and Others,* the Court explained that the Commission's de minimis notice does not bind competition authorities.

38 Commission Recommendation 2007/879/EC of 17 December 2007 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 communications networks and services [2007] OJ L344.

39 *16/2004 (IV. 24.) IHM rendelet a piacmeghatározás, a piacelemzés és a jelentős piaci erővel rendelkező szolgáltatók azonosítása, valamint a rájuk vonatkozó kötelezettségek előírása során alkalmazandó alapelvekről* [Decree 16/2004 (IV. 24.) IHM of the Hungarian Minister of Information and Telecommunication on the applicable principles regarding market determination, market evalutaion, the identification of service providers with significant market powers and regarding setting obligations on them].

cannot arise either,[40] although there are some authors who claim that soft law can have an indirect effect.[41] As opposed to these views, we would rather claim that soft law can be applied directly, just like a regulation, even though formally it does not have direct effect.[42] As such, the enforcement of recommendations and regulations is not markedly different. The single major distinction is their wording, since a regulation can create clear, precise and unconditional rights and obligations, while, at least in theory, a recommendation could not.

As far as EU competition soft law is concerned, their application is not subject to national implementation either. They can be observed by national law enforcers directly. Nevertheless, we can observe that EU soft law did influence the evolution of Hungarian substantive competition rules. For example, the *de minimis* rule for certain anti-competitive agreements was codified based upon the then existing Commission notice on *de minimis* agreements.[43] The statutory rules on leniency policy were to a great extent also modelled on the relevant European soft law document. This was partly due to the law harmonisation obligation existing under the Europe Agreements.[44] This soft law harmonisation, however, had nothing to do with the direct applicability of these instruments.

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[40] It must be noted that the Commission's guideline, which interpreted the content of the recommendation without the authorisation of the directive was implemented into Hungarian law, into a national communication *[8001/2004. (IHK 8.) IHM tájékoztató a piacmeghatározás, a piacelemzés és a jelentős piaci erővel rendelkező szolgáltatók azonosítása, valamint a rájuk vonatkozó kötelezettségek előírása során a hatóság által alkalmazandó alapelvekről (vizsgálati szempontokról)* [8001/2004. (IHK. 8.) IHM guideline on principles that the authority must use when determining the relevant market and SMP service providers and their obligations]. This legal document is not a formal legal source, because it cannot have outside effect based on the act on the hierarchy of legal sources, however, it bound the employees within the organisation. Even though, the guideline was not public, it was still relied on in judicial cases. This is the same guideline that was the subject of the ECJ's judgement in C-410/09 *Polska Telefonia Cyfrowa (PTC) sp. z o.o. v Prezes Urzędu Komunikacji Elektronicznej*, EU:C:2011:294. Here the ECJ stated that 'the 2002 Guidelines do not lay down any obligation capable of being imposed, directly or indirectly, on individuals. Accordingly, the fact that those guidelines have not been published in Polish in the Official Journal of the European Union does not prevent the NRA of the Republic of Poland from referring to them in a decision addressed to an individual' (para 34). This case shows that publication has no significance in respect of referencing a guideline. However, since it is no longer in force, we will not deal with it any further, even though it raises interesting question regarding constitutional principles. For more on the controversies of the PTC case, see: Stefan, 'European Union Soft Law: New Developments Concerning the Divide between Legally Binding Force and Legal Effects' (2012) 75 (5) The Modern Law Review 879, Stefan (n 1) 193–198.

[41] Craig, de Burca, *EU Law Text, Cases and Materials* (2nd edn, Oxford University Press 2008, Oxford) 277–278.

[42] It must be noted that there are certain regulations that are directly applicable by definition but do not have direct effect, because no rights and obligations can be created based on their text. L. Blutmann, *Az Európai Unió joga a gyakorlatban* (HVG-ORAC 2013, Budapest) 350.

[43] In 1996, the then applicable *de minimis* notice set a single 10% limit, which was codified by the Hungarian legislator. Later, when the European percentage was raised to 15% for vertical restrictions, the Hungarian competition act did not follow this move. It is also true that the Hungarian statutory exception is less sophisticated; it prohibits only horizontal price fixing and market sharing for small undertakings, whereas the European soft law instrument involves a more extensive list of hard core restrictions

[44] T. Tóth, 'The reception and application of EU competition rules: an organic evolution' in Várnay, Varjú (eds), *The Law of the European Union in Hungary* (HVG-ORAC 2014, Budapest) 244.

Regarding state aid, the Hungarian hard rules laying down the substantive and procedural rules on state aid under Article 107 TFEU include several provisions basically implementing or at least mirroring EU soft law documents.[45] In addition to procedural rules, it includes some substantive rules that rely on EU soft laws. For example, Section 5 declares that the intensity of aid cannot be higher than the intensity laid down in Community rules. The word "rule" is a broad one, involving not only hard law. Furthermore, Section 6 lays down detailed rules based upon a Commission communication[46] on the circumstances in which an undertaking can be regarded to be in such difficulty as to receive rescue and restructuring aid.

To conclude, EU communications can have hard legal consequences indirectly, through national legislation as well.

6 Is Soft Law Legitimised by Courts?

Key to the existence of soft law is the stance that courts take in relation to these legal instruments. If courts were to disregard them as no-law, simple policy documents issued by over-activist authorities, they would either disappear or become limited in their scope, regulating only inter-institutional relations within an authority.

The jurisprudence of the Hungarian Constitutional Court is an example of a cautious approach to soft law.[47] The Court stated that documents that are not regulated as a source of law in the Act on legislation are in violation of the Constitution; however, it did not annul them, but made it clear that no legal effects can derive from them. This interpretation came from an overly protective reading of the separation of legislative and executive powers,[48] nonetheless, its effect was instead to weaken the separation of these state functions. If these documents are not public and accessible to the affected individuals,[49] the authority not only

[45] *37/2011. (III. 22.) Korm. rendelet az európai uniós versenyjogi értelemben vett állami támogatásokkal kapcsolatos eljárásról és a regionális támogatási térképről* [Government decree 37/2011. (III. 22.) Korm. on the procedural rules and regional map of state aid]. Examples include definitions and the pre-notification procedure.

[46] Communication from the Commission – Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, OJ C 249, 31.7.2014, 1–28 p.

[47] See: Decision 39/2010. (IV. 15) AB of the Constitutional Court of the Republic of Hungary, ABH 2010, 1048 on the unconstitutionality of the 8001/2004. IHM guideline on principles that the authority must use when determining the relevant market and SMP service providers and their obligations; Decision 35/2009. (III. 27.) AB of the Constitutional Court of the Republic of Hungary, ABH 2009, 1097 on the normative nature of the circular published by National Police Force on how to apply wheel clamps; Decision 23/2007. (IV. 19) AB of the Constitutional Court of the Republic of Hungary, ABH 2007, 311 on the guidelines of the National Tax Authority on certain tax relieves; Decision 121/2009. (XII. 17.) AB of the Constitutional Court of the Republic of Hungary, ABH 2009, 1013 or 41/1993. (VI. 30.) AB of the Constitutional Court of the Republic of Hungary, ABH 1993, 292 or 52/1993. (X. 7.) AB of the Constitutional Court of the Republic of Hungary, ABH 1993, 407 generally on non-binding norms.

[48] Which is understandable in the light of historical experiences.

[49] Here we will not deal with the instance when only referring to it is prohibited, or it can be referred to but not made accessible.

fails to fulfil its duty to provide information, but also creates a situation endangering the rule of law and legal certainty. Legal certainty is increased whenever the decision-making authority provides information on its decision making practice and on the conduct it expects undertakings and other persons to follow.[50]

The ECJ elaborated its views on the legal effects of soft law in the *Grimaldi* case.[51] The ECJ acknowledged that recommendations are not intended to produce binding effects, even as regards the person to whom they are addressed, and consequently they cannot create rights upon which individuals may rely before national courts.[52] However, national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the *interpretation* of national measures adopted to implement them or where they are *designed to supplement* binding Community provisions.[53]

This still valid definition of *'no binding effect'* is regarded as the essence of soft law, under which 'non-binding' means, for a national judge, that the given legal rules are not enforceable in court.[54] Nevertheless, the phrase *'bound to take into consideration'* is in need of some explanation. It means that, in the course of enforcing the law, a recommendation or communication must be taken into consideration, regardless of whether the underlying hard law rule mandates this or not.[55] This legal effect of soft laws, probably not limited to formal soft laws such as recommendations,[56] could be described as a vertical indirect effect, just as with directly effective rules in an unimplemented directive. Individuals may rely on those soft law provisions whereby the EU Commission binds its hands; for example, when it comes to give significant reductions of fines for leniency applicants or for companies that prefer to settle their case. Just as for directives, third parties can rely on these rules against the state authorities, but not in a private (horizontal) dispute.

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50 In EU law context this appears in the principle of legitimate expectations (see: C-98/78 *Racke v Hauptzollamt Mainz,* EU:C:1979:14, 205-215/82 *Deutsche Milchkontor GmbH and others v Federal Republic of Germany,* EU:C:1983:233 or C-24/95 *Land Rheinland-Pfalz v Alcan Deutschland GmbH (Alcan II),* EU:C:1997:163. In Hungarian context this principle is detailed in the hard law provisions of the general administrative procedure act.

51 C-322/88 *Grimaldi* case, EU:C:1989:646. Although the judgement is about recommendations, the legal literature interprets it generally for the legal effects of soft law. See: Craig, de Burca (n 38) 210. Rideau, *Droit institutionnel de l'Union européenne et des Communautés européennes* (4ème édition L.G.D.J. 2002, Paris) 162–166. It must be noted that related to comfort letters the ECJ had reached a decision even before the Grimaldi case, stating that national courts must take them into account. See: joined cases of 253/78 and 1/79-3/79 *Procureur de la République and others v Bruno Giry and Guerlain SA and others,* EU:C:1980:188 and the judgement in C-99/79 *SA Lancôme and Cosparfrance Nederland BV v Etos BV,* EU:C:1980:193 See also: Stefan (n 1) 162.

52 *Grimaldi,* EU:C:1989:646, para 16.

53 *Grimaldi,* EU:C:1989:646, para 18.

54 Also cannot create obligations, as it will be seen later.

55 These delegations can be phrased in various ways. The study does not differentiate between 'take into account' or 'take the utmost account of', although it may show some distinctions in legal effects based on hard law. However, this could be the subject of a separate analysis.

56 See: Craig, de Burca (n 38) 210. and Rideau (n 47) 162–166.

For Craig and de Burca, the indirect effect of soft laws means that they can help interpret hard law.[57] This is certainly true, but communications sometimes go beyond this. By way of example, the Commission's leniency and settlement notices introduced highly relevant figures for undertakings seeking a reduction of their fines. They seem to fulfil more of an executive role, laying down rules which, by their very nature, should have been codified in a Commission implementing regulation.

The ECJ stated that, as far as informal soft law acts (communications) are concerned, an action for annulment is not available in cases where the adopted legal measure is not intended to have legal effects on third parties.[58] The same applies to recommendations under Article 263 of the TFEU. However, when a communication is binding or aims to create an obligation that does not exist in EU hard law then, based on a functional approach, it should be the subject of an annulment procedure.[59] This means that if the wording of the document implies binding force then, regardless of its form, it can be subject to an action for annulment available for hard law acts.[60]

More than one conclusion can be drawn from this practice. First, no obligations on third parties should be ever created by soft law. Second, even if a national judge would believe that a soft law rule has such binding effect, a national judge must take that into consideration as long as the European Court of Justice has not annulled it. This derives from that logical necessity that if a soft law document can be the subject of an action for annulment, this means the implied acknowledgement of its binding effect because otherwise an annulment would not be necessary. The same conclusion can be drawn from Advocate General Mengzi's Opinion given in a recent preliminary ruling procedure in the field of electronic telecommunications.[61]

Contrary to this, the Hungarian Constitutional Court does not annul soft law measures that are not formally regarded as law yet seem to have external effects. It is simply declared that these measures are unable to create any legal effects, in order to avoid even temporarily acknowledging their binding effect.[62] As we have mentioned above, however, this approach has a number of downsides compared to the ECJ's practice, as it can lead to hidden normative documents and less transparent law enforcement.

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57 Craig, de Burca (n 38) 277–278.

58 C-301/03 *Italian Republic v Commission of the European Communities,* EU:C:2005:727, para 19 and 24.

59 Case 22/70 *Commission v Council,* EU:C:1971:32 para 42 (*ERTA* case), C-366/88. *French Republic v Commission of the European Communities,* EU:C:1990:348, para 8, C-303/90 *French Republic v Commission of the European Communities,* EU:C:1991:424 para 24; C-325/91 *French Republic v Commission of the European Communities,* EU:C:1993:245 para 14. This latter judgement shows that it also cannot create obligations, substituting binding rights, see para 22, 23 and 31. The judgement of C-57/95 *French Republic v Commission of the European Communities,* EU:C:1997:164 para 23. is specifically about interpretative communications; Case C-27/04 *Commission v Council,* EU:C:2004:436 para 44., also the Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 *P,Dansk Rørindustri A/S and others v Commission of the European Communities,* EU:C:2005:408.

60 *French Republic v Commission,* EU:C:1991:424, para 26.

61 See: *Koninklijke KPN and Others,* C-28/15, EU:C:2016:310, para 39, 55–57, 65.

62 See (n 28).

Despite the advantages of the ECJ's approach, that it allows such documents to be created and published, it has disadvantages as well. The question of whether soft law is enforceable as law at national courts depends on the effectiveness of the procedure leading to their potential annulment. It is of crucial importance how effectively national judges can refer soft law documents for preliminary rulings on challenging their validity or to clarify their interpretation. This is also true in cases when the binding soft law norm is not in conflict with any hard law rules.

It is worth noting that, in *Grimaldi,* the ECJ held that a hard law rule may be substituted with a soft law one. It can be thus concluded that a soft law creating, or to be more precise, clarifying existing rights in relation to the public authority issuing the soft law document is not in violation of hard law; meanwhile, the one creating obligations on individuals is unlawful.

7 To Deviate or Not To Deviate: That is the Question

Laws, including cogently binding general provisions, should be applied without exceptions. Law enforcers cannot deviate; whatever creative interpretation they adopt, it must stay within the boundaries of the (hard) law rule. This principle does not hold for soft laws.

According to the settled case law of the ECJ, the Commission can be bound by its published communication or other types of soft law instruments.[63] This self-binding effect is in line with general legal principles of non-discrimination, legal certainty, and protection of legitimate expectations. Nevertheless, deviation from published soft law is only allowed if it is well reasoned and does not contradict any of the above mentioned legal principles.[64] This line of argument of the ECJ makes soft law documents binding through the general legal principles.[65]

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[63] This is called regulation by publication in the jurisprudence. See: F. Snyder, 'Soft Law and Institutional Practice in the European Community' in S. Martin (ed), *The Construction of Europe: Essays in Honour of Emile Noel* (Kluwer Academic Publishers 1994, Dordrecht, Boston) 199–201.

[64] See: C-167/04 *P JCB Services v Commission of the European Communities,* EU:C:2006:594, para 207. referring to C-189/01 *Jippes and others,* EU:C:2001:420, also to T-17/99 *Ke Kelit v Commission,* EU:T:2002:73 and *Dansk Rørindustri,* EU:C:2005:408, para 209. Also T-210/01 *General Electric v Commission,* EU:T:2005:456 para 516 (cannot deviate from rules binding itself), *the Lizin cartel* case (Case C-397/03 P *Archer Daniels Midland Company v Commission of the European Communities,* EU:C:2006:328) on the conditions of deviation, Case C-112/77 *August Topfer & Co. GmbH v Commission of the European Communities,* EU:C:1978:94 (legitimate expectations), see also T-15/02 *Judgement in case BASF v Commission of the European Communities,* EU:T:2006:74, T-71/03 *Joined Cases of Tokai Carbon v Commission,* EU:T:2005:220, T-279/02 *Degussa v Commission,* EU:T:2006:103, T-52/02 *Union Pigments,* EU:T:2005:429, C-3/06 *Groupe Danone v Commission,* EU:C:2007:88. Generally on the conditions of deviation see Stefan (n 1) 201–227. Stefan gives a comprehensive analysis of these, including the principles of non-retroactivity, rights of defence, human rights and transparency, the conflict of which may lead to the deviation from soft law documents.

[65] This non-absolute self-binding effect is also recognised by the Hungarian Supreme Court (Curia). It held that the competition authority is bound by its guidelines, but may also deviate in a certain case if it gives valid reasons for that (Curia Kfv. II. 37.076/2012/28).

The binding nature of soft law on national authorities is a more delicate question. Given the carefully balanced share of sovereign powers between national and EU institutions, even if legal certainty and the unity of the single market would demand national authorities to follow the path of the EU Commission, this is far from being obvious. Without the special legal powers of the Commission, this would not work in practice.

Recommendations issued within the framework of telecommunication regulation aim to bind not only the issuing institution but also national authorities applying them. In the same way as the Commission can deviate from its own soft laws, national authorities can also deviate, if they have good reasons to do so.[66] This rule is also valid when soft law does not expressly allow for any deviation.[67] This also stands for national courts. In a recent Dutch telecommunication case referred to preliminary ruling, the Advocate General's Opinion stressed that judicial deviation from a recommendation must be exceptional and the judge must be excessively cautious and can only deviate from the recommendation based on serious reasons.[68]

EU communications interpreting Articles 101 and 102 TFEU often include a provision, according to which 'Although not binding on them, this Notice is also intended to give guidance to the courts and competition authorities of the Member States in their application of Article 101 of the Treaty.'[69] These soft law instruments are well structured, detailed, lengthy documents,[70] often relying on EU Courts' case law and finalised following public consultation. In practice, it is hard not to take them seriously. This 'not binding, but guiding' wording of communications can be understood to reflect a *soft binding effect*. The Commission finds it important to give express mention to national law enforcers as targets of the communication and makes it clear that the Commission is in a position to guide them through the maze of EU competition rules. Certainly, the Commission cannot avoid mentioning that the communication is not binding on them, which is nothing new as long as we understand 'binding' in its traditional hard law sense: an absolute prohibition on deviating from the rule. According to our understanding, soft law instruments have a soft binding effect: law enforcers should do their best to follow them, but can deviate as long as it is explained in the decision and does not infringe general principles of EU law.

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66 C-207/01 *Altair Chimica SpA v ENEL Distribuzione SpA,* EU:C:2003:451

67 *Lizin cartel* case (Case C-397/03 P *Archer Daniels Midland Company v Commission of the European Communities,* EU:C:2006:328 and joined cases of C-80/81-83/81 and C-182/82-185/82 *Adam and others v Commission,* EU:C:1984:306, para 22.; joined cases of C-181/86-184/86 *Sergio Del Plato and others v Commission,* EU:C:1987:543, para 10.; C-171/00 P *Liberos v Commission,* EU:C:2002:17 para 35. See also in Stefan (n 1) 139.

68 C-28/15 *Koninklijke KPN and Others,* EU:C:2016:310, para 53, 64 and 66.

69 It is also added that the communication is without prejudice to any interpretation which may be given by the Court of Justice of the European Union. See, for example: Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice), (2014/C 291/01).

70 The latest agricultural guidelines occupy 37 pages in the Official Journal. COMMISSION NOTICE, Guidelines on the application of the specific rules set out in Articles 169, 170 and 171 of the COM Regulation for the olive oil, beef and veal and arable crops sectors (2015/C 431/01).

Apparently, the ECJ gives a wider margin of appreciation to national courts. The Court held in *Expedia,*[71] responding to the French Court of Cassation that national authorities are not bound to apply EU soft law instruments, and they have complete discretion to take the thresholds mentioned in the *de minimis* notice into consideration. The Court rightly referred to the wording of the notice and that it was published not in the L, but the C series of the Official Journal.[72]

The obvious difference between law and soft law becomes evident when considering behaviour contradicting the rules established therein. Any conduct against hard law will be regarded as unlawful behaviour with the legal consequences as prescribed by law. On the other hand, soft law cannot formally be infringed by undertakings. It will be always the underlying hard law provision as interpreted by a communication that can be the subject of any infringement. Only the issuing authority can be held liable for not respecting its own rules. Nevertheless, if the national authority, due to the soft binding nature of soft law, relies on the soft law rule in its decision, then the undertaking will also be bound by it in practice. Third parties may rely on them before courts reviewing the legality of the decision. Even here, EU law makes a reference to the protection of general principles of law, such as the protection of legitimate expectations.[73] The sole legal basis of invoking the infringement of soft law by an authority will not suffice to win a case. The prohibition of derogation does not come as a result of protecting carefully considered legal principles. This is simply the nature of hard law.[74]

IV Conclusions

The article aimed at demonstrating the special legal character of EU soft law documents and their effects at national level.

We observed that the legal effects of soft law documents are somewhat analogous to general principles of law, as they both help to fill abstract norms with content but unlike hard law norms, neither of them applies on an 'all or nothing' basis. Similarly, soft law can be compared to legal rules which bind the parties unless they agree otherwise *(ius dispositivum).* The EU Commission – and sometimes even national regulatory authorities and courts – may

[71] C-226/11 Expedia Inc. v Autorité de la concurrence and others, EU:C:2012:795 para 30-31.

[72] AG Kokott also argued that although national courts are not obliged to apply soft law, they should nevertheless consider the Commission's assessment and also give reasons for any divergence. Expedia opinion, EU:C:2012:544 para 39. For a similar argument see: Oana Andreea Stefan, 'Relying on EU Soft Law Before National Competition Authorities: Hope for the Best, Expect the Worst' 2013 (1) CPI Antitrust Chronicle July.

[73] Tridimas considered general principles constituting abstract propositions of law on which the legal systems are founded. T. Tridimas, *The General Principles of EU Law,* (2nd edn, Oxford EC Law Library, Oxford University Publishing 2006, Oxford).

[74] It is a different problem raising constitutional issues when the hard law itself violates general principles of law, for instance a hard law provision infringing the principle of non-discrimination.

be bound by EU soft laws, but the option to deviate will be available, subject to giving reasons and avoiding the infringement of legal principles protecting third party interests.

We argued that the adoption and especially the publication of soft law can be seen as a self-restriction of the authority, since it makes the use of discretionary power more legally bound. The more legally bound the discretionary powers of an authority are, the more they will be in line with the rule of law principle. However, at EU level another driving force behind the creation of soft law is that, under the shared administration model of the EU, national authorities are responsible for enforcement and so the Commission, which does not possess hierarchical oversight powers, can give orientation to national authorities through soft law documents.

We argued that in the course of the national law enforcement, soft law documents are not intended to produce binding effects; consequently, they cannot create rights upon which individuals may rely before national courts. However, national courts are bound to take them into consideration in order to decide disputes. Even if a national judge would believe that a soft law rule has real legal effects, and it should be annulled, the a national judge must take it into consideration as long as the European Court of Justice has not annulled it. This derives from that logical necessity that if a soft law document can be the subject of an action for annulment, when it intends to have legal effects, then this means the implied acknowledgement of its binding effect, otherwise an annulment would not be necessary.

Thus the question whether soft law is enforceable as law at national courts depends on the effectiveness of the procedure leading to their potential annulment. How effectively national judges can refer to soft law documents for preliminary rulings to challenge their validity or clarify their interpretation is of crucial importance.

Zsófia Varga*

The Application of the Köbler Doctrine by Member State Courts

I Introduction

The CJUE held in the judgment in *Köbler*[1] that Member States are obliged to make good the damage caused to individuals in cases where the infringement of EU law stems from a decision of a Member State court adjudicating at last instance.[2] The conditions of this liability are, in principle, the same as those which govern state liability under EU law in general; that is, where the rule of law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link between that breach and the loss or damage sustained by the injured parties. Under EU law, state liability is a generally applicable remedy which originates directly from EU law. It means that infringed individuals must be able to invoke state liability, notwithstanding the eventual limitations to such an action in national law.[3]

The significance of *Köbler* lies in the fact that Member State courts play a particularly important role in the application of EU law.[4] As EU law is primarily given effect by the national courts, individuals are obliged to claim the full enforcement and protection of their rights derived from EU law before national benches. It is, therefore, essential that the national courts fulfil their obligations in this regard and apply EU law correctly.

Since this seminal CJUE judgment, delivered in 2003, the principle of state liability for breaches of EU law by national courts has received considerable attention in scholarly writing. These works have already provided an in-depth analysis of a number of central issues. In that regard, the main focus has been placed on the acceptance of state liability for judicial breaches

* Zsófia Varga: PhD candidate, ELTE Law School, Administrator at the Research and Documentation Directorate of the Court of Justice of the European Union.

1 (CJUE) Case C–224/01 *Köbler* ECLI:EU:C:2003:513 [2003] ECR I-10239.

2 In *Köbler,* the CJUE held, for the first time, that the principle of state liability for breaches of EU law also applies when a breach is attributable to a Member State court. The *Köbler* judgment was therefore an extension of the already established state liability doctrine to violations of EU law by Member State supreme courts. See (CJUE) Joint cases C–6/90 and C–9/90 *Francovich and others* EU:C:1991:428 [1991] ECR I-05357.

3 Under the remedial rules of the EU, state liability is the only generally available remedy for violation of EU law by national supreme courts. Even though final judgments contrary to EU law may be reopened under special circumstances, retrial cannot be considered as a generally available remedy.

4 See, for example Koen Lenaerts, Ignace Maselis, Kathleen Gutman, *EU procedural law* (Janek Tomasz ed, Oxford University Press 2014, Oxford) 3, 13–14.

of EU law as a matter of principle.[5] Liability due to judicial errors has been criticised with regard to the principles of res judicata, and the procedural autonomy of the Member States in particular.[6] Moreover, the criterion of sufficiently serious breach of the EU norm has also been thoroughly analysed. It has notably been subject to criticism by several scholars;[7] and Scherr has already offered a detailed analysis of this criterion from a comparative law perspective.[8] Hofstötter has put the *Köbler* decision into a wider context, offering a comprehensive study of the non-compliance of national courts with their EU obligations.[9] Similarly, the potential consequences of a judicial breach of EU law under national law of several Member States have been presented in a recent publication edited by Coutron.[10]

To conclude, *Köbler* has already been extensively studied. However, the main focus of these works has remained theoretical, as they primarily offer an analysis of the doctrine with regard to the legal concept of state liability for judicial acts. Nevertheless, much less attention

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[5] See, for example Marten Breuer, 'State Liability for Judicial Wrongs and Community Law: The Case of Gerhard Köbler v Austria' (2004) 29 European Law Review 243–254; Claus Dieter Classen, 'Case C-224/01, Gerhard Köbler v. Republik Österreich' (2004) 41 Common Market Law Review 813–824, 816–817; Jan H. Jans, 'State Liability and Infringements Attributable to National Courts: A Dutch Perspective on the *Köbler* Case' in Jaap W. de Zwaan and others (eds), *The European Union: an Ongoing Process of Integration: Liber Amicorum Alfred E. Kellermann* (TMC Asser Press 2004, The Hague) 165–176, 176; Peter J. Wattel, 'Köbler, CILFIT and Welthgrove: We Can't Go on Meeting like This' (2004) 41 Common Market Law Review 177–190, 186–187; Jan Komárek, 'Inter-Court Constitutional Dialogue After the Enlargement – Implications of the Case of Professor Köbler' (2005) 1 Croatian Yearbook of European Law and Policy 7–94, 77; Pedro Cabral and Mariana C. Chaves, 'Member State Liability for Decisions of National Courts Adjudicating at Last Instance' (2006) 13 Maastricht Journal of European and Comparative Law 109–126, 123.

[6] See, for example Jan Komárek, 'Federal Elements in the Community Judicial System: Building Coherence in the Community Legal Order' (2005) 42 Common Market Law Review 9–34, 17; Takis Tridimas, 'State Liability for Judicial Acts Remedies Unlimited?' in Paul Demaret and others (eds), *European Legal Dynamics. Revised and Update Edition of 30 Years of European Legal Studies at the College of Europe? = Dynamiques juridiques européennes. Édition revue et mise à jour de 30 ans d'études juridiques européennes au Collegue d'Europe* (P.I.E. Peter Lang 2007, Brussels/Bruxelles) 147–161, 157; Wattel, Köbler, CILFIT and Welthgrove (n 5) 177.

[7] See, for example Pablo Martin Rodríguez, 'State Liability for Judicial Acts in European Community Law: The Conceptual Weaknesses of the Functional Approach' (2005–2004) 11 Columbia Journal of European Law 605–621, 614–615; Björn Beutler, 'State Liability for Breaches of Community Law by National Courts: Is the Requirement of a Manifest Infringement of the Applicable Law an Insurmountable Obstacle?' (2009) 46 Common Market Law Review 773–804, 792; Mariusz Jerzy Golecki and Bartosz Wojciechowski, 'The application of law within a multicentric legal system: economic analysis of Köbler and Traghetti' in Tadeusz Buksinski and Piotr W. Juchacz (eds), *Multicentrism as an Emerging Paradigm in Legal Theory* (Peter Lang 2009, Frankfurt am Main, 173–196) 195–197; Regina Valutyté, 'Concept of Court's Fault in State Liability Action for Infringement of European Union Law' (2011) 18 Jurisprudence 33–50, 37, 47.

[8] Kathrin Maria Scherr, *The principle of state liability for judicial breaches: the case Gerhard Köbler v. Austria under European Community law and from a comparative national law perspective* (Thesis. European University Institute, 2008); Kathrin Maria Scherr, 'Comparative Aspects of the Application of the Principle of State Liability for Judicial Breaches' in 12 *ERA Forum* (Springer 2012, 565–588).

[9] Bernard Hofstötter, *Non-Compliance of National Courts: Remedies in European Community Law and Beyond* (TMC Asser Press 2005, The Hague).

[10] Laurent Coutron, Jean-Claude Bonichot, *L' obligation de renvoi préjudiciel à la Cour de justice: une obligation sanctionnée?* (Bruylant 2014, Bruxelles).

has yet been placed on the real impact of *Köbler* on national remedies and on the application of this much-criticised doctrine by national courts. Even though there has been a great deal of speculation that the *Köbler* doctrine might remain mere theory,[11] more than a decade after the CJUE judgment, there is no analysis available to confirm or disprove this assumption.

Even so, there are some studies on the application by the national courts of the state liability doctrine in general, including EU law violations by the legislature and the executive. These papers incorporate national case-law regarding breaches of EU law by the judiciary. In this regard, the study by Granger from 2007[12] must be mentioned; this offered a comprehensive analysis of the *Francovich* case-law, covering the judicial follow-up of this judgment in the 15 'old' Member States on the basis of research conducted by the T.M.C. Asser Institute.[13] National cases have also been described by Claes in her in-depth work on the mandate of national courts in the European Constitution.[14] Moreover, in 2012, Lock provided an assessment of the case-law of German, English, and Welsh courts in order to examine the effectiveness of the state liability principle as a means of enforcing EU law, compared to the infringement procedure.[15] In his study, he pointed out the need for more detailed research in this regard.

The aim of this paper is to provide a presentation and an analysis of national cases decided on the basis of the *Köbler* liability. In the context, this work focuses on questions regarding the practice of the liability doctrine, such as to what extent is the *Köbler* doctrine applied by national courts and what is the real, practical importance of this principle. The research is based on published case-law on liability cases before Member State courts for violation of EU law by national courts of last instance.[16]

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[11] Beutler (n 6) 789–790; Dimitra Nassimpian, 'And We Keep on Meeting: (de)fragmenting State Liability' (2007) 32 European Law Review 819–838, 826; Wattel, Köbler, CILFIT and Welthgrove (n 5) 182.

[12] Marie-Pierre F. Granger, 'National Applications of Francovich and the Construction of a European Administrative Jus Commune' (2007) 32 European Law Review 157–192.

[13] Gerrit Betlem and others 'Francovich Follow-Up. Cases on State Liability for Breach of European Community Law', 22 May 2007, <*http://www.asser.nl/eel/sectors/general/dossiers-and-papers/francovich-follow-up/*> accessed 15 May 2016.

[14] Monika Liesbeth Hilde Katelijne Claes, *The National Courts' Mandate in the European Constitution* (Hart Publishing 2006, Oxford/Portland).

[15] Tobias Lock, 'Is Private Enforcement of EU Law through State Liability a Myth? An Assessment 20 Years after Francovich' (2012) 49 Common Market Law Review 1675–1702.

[16] The main sources for the identification of national cases are the following:
– ACA Europe. National reports, 'Consequences of incompatibility with EC law for final administrative decisions and final judgments of administrative courts in the Member States' 21st colloquium, Warsaw, 15 June 2008 <http://www.aca-europe.eu/index.php/en/colloquies-top-en/244-21st-colloquium-in-warsaw-from-15-to-16-june-2008> accessed 15 May 2016;
– the Commission's Annual Reports to the European Parliament on Monitoring the Application of EU Law (Annex VI: Application of Community law by national courts: a survey) <http://ec.europa.eu/atwork/applying-eu-law/index_en.htm> accessed 15 May 2016;
– bulletin *Reflets: Informations rapides sur les développements juridiques présentant un intérêt communautaire* <http://curia.europa.eu/jcms/jcms/Jo2_7063/> accessed 15 May 2016; translation in English of the issues published after 2008 are available at <http://www.aca-europe.eu/index.php/en/reflets-en> accessed 15 May 2016;

Before analysing the national case-law, a brief presentation of the CJUE judgments regarding state liability for violation of EU law by Member State courts is offered.

II The Application of the Köbler Liability

1 The CJUE Case-law

There have been so far three judgments in which the CJUE dealt with issues concerning state liability for judicial acts.[17]

The first case was *Köbler.* In its judgment, the CJUE stated that its doctrine of state liability applies to all Member State actions, including those of the judicature. Therefore, Member States are liable for breach of EU law by national supreme courts. Moreover, regarding the conditions for liability, the CJUE did not distinguish based upon the branch or department of government that had actually committed the violation of EU law. As a result, the three already established conditions for state liability also apply to judicial violations.[18] However, concerning the condition of a sufficiently serious breach, the CJUE stated that liability can be incurred only in the exceptional case where a court adjudicating in last instance has manifestly infringed the applicable law.[19]

The second case concerning state liability for judicial acts before the CJUE was Traghetti del Mediterraneo.[20] In this case, the question arose whether Italian rules, which severely restricted the possibility to hold the state liable for judicial activity, were compatible with the principle of effectiveness of the EU law, and, especially, with the *Köbler* principle. The CJUE declared the Italian rules on judicial responsibility overly restrictive and, for this reason, contrary to the EU rules.

– the Internet site of the Associations of the Councils of State and Supreme Administrative Jurisdictions of the European Union, especially the databases Jurifast <http://www.aca-europe.eu/index.php/en/jurifast-en> accessed 15 May 2016 and Dec.Nat <http://www.aca-europe.eu/index.php/en/dec-nat-en> accessed 15 May 2016;
– the Internet site of the Network of the Presidents of the Supreme Judicial Court of the European Union <http://www.network-presidents.eu/> accessed 15 May 2016*;*
– the Internet site of the Ius Commune Casebooks for the Common Law of Europe, especially the Jean Monnet Database on State Liability <http://www.casebooks.eu/JeanMonnetDatabase/-StateLiability/> accessed 15 May 2016.
Cases noted in the above-mentioned studies of Granger (n 12) and Lock (n 15) dealing with the national follow-up of the *Francovich* doctrine and in the publications of Claes (n 14) and Coutron (n 10) will also be mentioned. However, a limitation is that the study is based on cases that have been made publicly accessible either through databases or in other forms such as collections and digests of case-law. This means that there may be a limited number of judgments which were never reported and therefore were not considered.

17 We can add to this list a pending case: Case C–168/15 *Tomášová.*

18 (CJUE) *Francovich and others* (n 2).

19 This solution was adopted with regard to the specific nature of the judicial function and to the legitimate requirement of legal certainty.

20 (CJUE) Case C–173/03 *Traghetti del Mediterraneo* ECLI:EU:C:2006:391 [2006] ECR I-05177.

In the third case, a Portuguese court asked the CJUE whether national rules which require the reversal of the contested judicial decision as a precondition to a liability claim are compatible with the *Köbler* principle. Examining this provision, the CJUE concluded that EU law precludes a provision of national law which requires, as a condition for a declaration of state liability, the prior reversal of the decision that caused the loss or damage when such setting aside is, in practice, impossible.[21]

2 Member States' Position

According to the research conducted, there have been about thirty-five reported cases[22] judged on the basis of the *Köbler* principle for violation of EU law by national courts since the pronouncement of the CJUE judgment in 2003. Of them, damage has been awarded only in four occasions so far.[23]

a) Overview of the legislative restrictions

It seems useful to bring up at this point the results of the comparative research conducted by Scherr, who in 2008 revealed the restrictions in national laws regarding liability for judicial activity in general.[24] Combining her results with my findings, the following overview can be provided on national restrictions regarding judicial liability.

Almost complete exclusion of liability for judicial activity characterises five national legal systems (Bulgaria, Greece, Ireland, the Netherlands, and the UK).[25] The importance of res

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21 (CJEU) Case C–160/14 *Ferreira da Silva e Brito e.a.* ECLI:EU:C:2015:565 [2014] OJ C175 (ECJ, 9 September 2015) paras 51–52, 60.

22 The main sources for the identification of national cases see under (n 16).

23 See (FI) Korkein oikeus, tuomio, 05/07/2013, A Oy, KKO:2013:58, reported in Reflets nº 3/2013, 22–23; (IT) Tribunale di Genova, Sentenza, 31/03/2009, Fallimento Traghetti del Mediterraneo/Repubblica italiana, reported by Bruno Gencarelli, 'Rapport italien' in Coutron (n 10) 279; (SE) Justitiekanslern, Justitiekanslerns beslut 06/04/2009, Flexlink AB, reported by Frida-Louise Göransson, 'Rapport suédois' in Coutron (n 10) 493–495; (BG) Okrazhen sad Yambol, Reshenie, 26/11/2015, reported in Reflets nº 1/2016, 14. A uniform method is applied to refer to national court judgments in footnotes. Therefore, reference is made to the original language name of the court or tribunal, followed by the original name and the date of the decision, and sometimes – where usual in national law – by the number of the decision, the name of the parties, and, where available, the ECLI number of the decision. At the end, reference is made to the publication and source.

24 It should, however, be borne in mind that the same reason lies behind the apparently different restrictions. This ultimate reason is the protection of legal certainty and the final nature of the judgments rendered at last instance. Moreover, as it is evident from Scherr's analysis, generally more than one restriction applies within one legal order as well. Therefore, the following list is merely indicative. For further information, see Scherr, *The principle of state liability* (n 8) in particular 168, 227, 306, 408–409, 414, and 417.

25 (BG) *Zakon za otgovornosta na darzhavata i obshtinite za vredi* (Act on liability for damages incurred by the state and the municipalities*)* art 2; (EL) *Εισαγωγικός Νόμος του Αστικού Κώδικα* (Introductory Law to the Greek Civil Code) art 105*; Συμβούλιο της Επικρατειας* (Symvoulio tis Epikrateias, Hellenic Council of State) 2744/2000; *Άρειος Πάγος* (Areios Pagos, Supreme Civil and Criminal Court), 256/1996, both cases reported by Vassili Christianos, in Coutron (n 10) 236–237, n 33; (IR) House of Lords, 12/02/1974, *Sutcliffe v Thackrah* [1974] A.C. 727; *Pine*

judicata and the unquestionable nature of final judgments is a major impediment to judicial liability in five Member States (Croatia, France, Hungary, Italy, and Luxembourg).[26] The prior reversal of the contested judgment is a prerequisite for liability under seven national laws[27] (Belgium, the Czech Republic, Cyprus, Finland, Portugal, Slovakia, and, as far as supreme courts' liability is concerned, in Sweden).[28] The declaration of unlawfulness of the final judgment is required before asking damages from the competent authority in three Member States (Lithuania, Poland, and Spain).[29] The establishment of criminal responsibility of the judge is a precondition for state liability in three Member States (Estonia, Germany, and Romania).[30] The liability of the highest national courts is excluded in one state (Austria).[31] In

Valley Developments Ltd v Minister for the Environment [1987] I.R. 23, both cases reported by Scherr, Comparative aspects (n 8) 576, n 71; see also Marie-Luce Paris, 'Rapport irlandais' in Coutron (n 10) 262; (NL) Hoge Raad, Uitspraak, 03/12/1971, NJ 1971, 137, ECLI:NL:HR:1971:AB6788; (UK) Crown Proceedings Act 1947, s 2(5).

26 (HR) *Zakon o sudovima* (Courts Act) članak 105; (FR) *Code de l'organisation judiciaire* (Code of Judicial Organisation) art L141-1; Conseil d'État, Assemblée, décision, 29/12/1978, n° 96004, ECLI:FR:CEASS:-1978:96004.19781229, Darmont, publié au recueil Lebon; (HU) *A bíróságok szervezetéről és igazgatásáról szóló 2011. évi CLXI. törvény* (Law on the organisation and administration of the courts), 2. § (1) bek; (IT) *Risarcimento dei danni cagionati nell'esercizio delle funzioni giudiziarie e responsabilità civile dei magistrate* (Compensation for damage caused in the exercise of judicial functions and the civil liability of judges), Legge, 13/04/1988, n° 117, art 2; see also Gencarelli (n 23) 270–271; (LU) Code civil, 01/01/2004, arts 1382–1383*; Loi du 1er septembre 1988 relative à la responsabilité civile de l'Etat et des collectivités publiques* (Law on the liability of the state and state bodies), 01/09/1988, art 1, alinéa 1.

27 The CJUE has recently found, in a Portuguese case, that EU law precludes a provision of national law which requires, as a condition for a declaration of state liability, the prior reversal of the decision that caused the loss or damage, when such setting aside is, in practice, impossible. See (CJUE) *Ferreira da Silva e Brito e.a.* (n 21) para 60.

28 (BE) Code civil, 21/03/1804, arts 1382–1383; Code judiciaire, 10/10/1967, art 23; Cour de cassation, arrêt, 19/12/1991, Pas., 1992, I, n° 215., reported in ACA Europe (n 16), National report of Belgium, Question 14, point 119; (CZ) *Zákon o odpovědnosti za škodu způsobenou při výkonu veřejné moci rozhodnutím nebo nesprávným úředním postupem a o změně zákona České národní rady č. 358/1992 Sb., o notářích a jejich činnosti (notářský řád)* (Law on liability for damage caused in the exercise of public authority decision or incorrect official procedure) §8 (1); (CY) Constitution of the Republic of Cyprus, 16/08/1960, art 146.6; (FI) *Vahingonkorvauslaki* (Tort Liability Act), 31.5.1974/412, 3 luku, 5§; (PT) Lei n.º 67/2007, *Aprova o Regime da Responsabilidade Civil Extracontractual do Estado e Demais Entidades Públicas (*Law no 67/2007 on the non-contractual liability of the state and other public bodies), 31/12/2007, Artigo 13.º N. º2; Supremo Tribunal de Justiça, Acórdão 24/02/2015, Processo: 2210/12.9TVLSB.L1.S1, reported in Reflets nº 2/2015, 47–48; (SK) *Zákon o zodpovednosti za škodu spôsobenú pri výkone verejnej moci a o zmene niektorých zákonov* (č. 514/2003 Z. z.) (Law on liability for damage caused in the exercise of public power), § 3(1) (a) and (d) and (2); (SE) *Skadeståndslag* (Tort Liability Act), 1972-06-02, 3 kap, 7 §.

29 (LT) Lietuvos Respublikos Konstitucinis Teismas, Nutarimas, 19/08/2006, Bylos Nr. 23/04, reported by Regina Valutyté, 'Lithuanian report' in Coutron (n 10) 287, n 16; (PL) *Kodeks cywilny* (Civil Code) art 417^1, § 2; *Kodeks postępowania cywilnego* (Code of Civil Procedure) art 424^{1a}; *Prawo o postępowaniu przed sądami administracyjnymi* (Regulations of Proceedings in Administrative Court) art. 285a. However, this rule does not apply with regard to judgments delivered by the *Sąd Najwyższy*; (ES) *Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial* (Organic law on the judiciary) art 293.

30 (EE) *Riigivastutuse seadus* (State Liability Act) 02/05/2001, § 15(1); (DE) *Bürgerliches Gesetzbuch* (German Civil Code) § 839, Abs. 2; (RO) *Legea privind statutul judecătorilor și procurorilor* (Law on the statute of judges and prosecutors) art 96 (4).

31 (AT) *Amtshaftungsgesetz* (Public Liability Act), § 2.

addition, in several Member States, the strict criterion concerning the degree of fault on the part of the judge is an important obstacle to the allocation of damages. This appears to be the case with regard to Slovenian law, for example.[32]

However, as a reaction to the *Köbler* judgment and as far as the erroneous judgment concerns the application of EU law, several Member States' courts and legislatures created exemptions from these overly strict requirements. These cases are the subject of the next part of the paper.

On the other hand, at first sight, national provisions do not appear to exclude the theoretical possibility to hold the state liable for supreme courts' breaches in two Member States (Denmark and Latvia).[33]

The position of Malta is not clear in this regard, as liability of the state is accepted under the general regime of tort law; however, the cases filed up to date have only dealt with the executive and legislative arms of the state but not the judiciary.[34]

The following overview presents the national case-law regarding breaches of EU law by national supreme courts.

b) Case-law of the Member State courts

ba) Austria

The *Verfassungsgerichtshof* (Constitutional Court, VfGH) applied the *Köbler* conditions only two weeks after the CJUE decision, in a judgment pronounced on 10 October 2003.[35] As under Austrian law the liability of the highest courts is expressively excluded, there was no legal basis for liability actions before the civil court.[36] Nevertheless, the VfGH declared its own competence to hear such tort actions for damage caused by a judicial decision of the *Verwaltungsgerichtshof* (Supreme Administrative Court, VwGH) allegedly in breach of EU law.[37] However, the VfGH ruled out the violation of EU law by the national court in that specific case.

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32 (SI) Vrhovnega sodišča Republike Slovenije, Sodba, 12/01/2005, II Ips 714/2003, ECLI:SI:VSRS:2005:II.IPS.714.2003; Vrhovnega sodišča Republike Slovenije, Sodba, 13/11/2003, II Ips 556/2002, ECLI:SI:VSRS:2003:II.IPS.556.2002, both cases reported by Verica Trstenjak and Katja Plaustajner, 'Slovenian Rapport' in Coutron (n 10) 472, n 76.

33 (DN) *Betænkning 214/59 om statens og kommunernes erstatningsansvar* (Report on the Liability of Central and Local State bodies) 16; (LV) *Latvijas Republikas Satversme* (Constitution of the Latvian Republic), 15/02/1922, 92.pants; *Administratīvā procesa likums* (Administrative Procedure Law) 01/02/2004, 92.pants; *Latvijas Republikas Augstākās tiesas, Senāta Civillietu departamenta, spriedums,* 24/11/2010, Lietā Nr. SKC-233; see also ACA Europe (n 16), National report of Latvia, Question 14.

34 (MT) Constitution of Malta, art 46, Civil Code, arts 1030–1033; see also Scherr, *The principle of state liability* (n 8) 168.

35 (AT) VfGH, Erkenntnis, 10/10/2003, A36/00, VfSlg 17019/2003, reported by Beutler (n 6) 789, Granger (n 12) 168, n 61, and Alexandr Pelzl, 'Rapport autrichien' in Coutron (n 10) 102, n 136.

36 For more explanation, see Pelzl (n 35) 112, ns 135–136.

37 This statement on the competence of the VfGH have been subsequently confirmed at several occasions. See reference to those cases in Pelzl (n 35) 113, ns 142–143.

In a judgment delivered on 13 October 2004, the VfGH applied the conditions of state liability to a situation similar to that of *Köbler*.[38] In this judgment, the VfGH confirmed the limits of state liability for damages resulting from a decision of a national court which failed to make a request to the CJUE for a preliminary ruling. The VfGH first restated that it was not competent to review the decision of the VwGH, but could, however, examine the gravity of the violation. It recalled the stricter conditions for state liability resulting from acts committed by a national judiciary, and, applying them to the case at hand, rejected the claim. Indeed, the VfGH considered that a simple non-referral is not *per se* a sufficiently serious breach. The court pointed out that the outcome could be easily deduced from the case-law even though the question at issue had not been specifically decided upon by the CJUE. Hence, the VwGH could reasonably conclude that the correct application of EU law left no doubt as to the solution to be adopted. Moreover, the VwGH had provided a very detailed statement of reasons on the issue.[39]

In its decision dated 19 June 2013, the VfGH confirmed that the infringement by the same court of the duty to make a reference for a preliminary ruling to the CJUE does not as such trigger liability of the State.[40] The VfGH found that it is not incumbent upon it to reconsider its own decisions or the decisions made by other supreme courts in proceedings based on state liability claims. Its only task is to determine whether a specific infringement of EU law had been committed. A claim concerning the state's liability is well-founded only in the event of a manifest and sufficiently characterised infringement of EU law; and the breach of the obligation to refer a preliminary question to the CJUE does not as such trigger the liability of the state.[41] Consequently, the complaints were rejected by the VfGH.

Similarly, *Köbler* claims had been rejected on the ground of absence of manifest infringement of the EU law in other proceedings before the VfGH.[42]

bb) Belgium

In Belgium, the Civil Code had been traditionally interpreted in a way that it sets out as a condition for state liability the previous annulment of the contested decision. However, since the judgment of the *Cour constitutionnelle* (Constitutional Court) delivered on 30 June 2014, this condition does not apply in the event of manifest violation of the applicable law by the

[38] (AT) VfGH, Erkenntnis, 13/10/2004, A5/04, VfSlg 17330/2004, reported by Beutler (n 6) 790, Granger (n 12) 167–168, n 59, Pelzl (n 35) 113, n 143 and in Reflets nº 2/2005, 9.

[39] Granger (n 12) 167, n 59.

[40] (AT) VfGH, Beschluss, 19/06/2013, A2/2013 ua, VfSlg 19757, reported in Reflets nº 3/2013, 17.

[41] The VfGH confirmed that principle in several subsequent decisions. See reference to cases in Pelzl (n 35) 113, n 142.

[42] See, for example (AT) VfGH, Beschluss, 23/03/2015, E444/2015, G135/2015, A 2/2015; VfGH, Beschluss, 21/11/2013, A9/2013 ua; VfGH, Beschluss, 11/06/2015, A1/2015; VfGH, Beschluss, 11/05/2015, A3/2015; and VfGH, Beschluss, 19/11/2015, A8/2015; VfGH, Beschluss, 02/05/2011, A4/10, VfSlg 19361; VfGH, Erkenntnis, 22/09/2009, A14/08, VfSlg 18866; VfGH, Erkenntnis, 12/12/2003, A2/01 ua, VfSlg 17095, reported by Beutler (n 6) 789.

national court of last instance.[43] In this judgment, the *Cour constitutionnelle* interpreted the conformity of this requirement with the fundamental right to access to justice, as established under the Constitution and under Articles 6 and 13 European Convention on Human Rights (ECHR). The *Cour constitutionnelle* reached the conclusion that this condition does not apply in the case of manifest violation of the law by the national Supreme Court. In this regard, it pointed out the need to harmonise the requirements of judicial liability under national, EU and international law.

Moreover, in a judgment delivered on 14 January 2000, the *Cour de cassation* (Court of Cassation) arrived at the conclusion that the violation by the national court of a directly effective provision of an international agreement constitutes, in itself, a fault.[44] Therefore, there is neither a need to submit the liability of the state under the *Köbler* conditions, nor is there a need to examine whether a sufficiently serious breach occurred.

bc) Bulgaria

In its ruling dated 3 January 2014, the *Sofiyski gradski sad* (Sofia City Court) handed down a verdict in a liability case for violation of EU law by the *Varhoven administrativen sad* (Supreme Administrative Court).[45] Regarding the claim that in the main proceedings, EU rules had been erroneously applied, the *Sofiyski gradski sad* found the judgment of the *Varhoven administrativen sad* to be correct in the light of CJUE case-law. On the second claim, brought on the basis of the infringement of the obligation to submit a preliminary reference to the CJUE, the *Sofiyski gradski sad* pointed out that the relevant EU provision was sufficiently clear. As a result, the *Sofiyski gradski sad* rejected, applying the *Köbler* criteria, the liability claim lodged against the *Varhoven administrativen sad.*

Furthermore, in a judgment delivered on 8 May 2015, the *Varhoven kasatsionen sad* (Supreme Court) interpreted the national procedural rules which may provide a legal basis for a *Köbler* liability claim.[46] In fact, Bulgarian case-law had been ambiguous regarding the rules which can provide a legal basis for such liability claim. In this regard, the *Varhoven kasatsionen sad* concluded that such claims are to be judged on the basis of the national act on the liability of state and of the state bodies. Therefore, the general rules on tort liability do not apply in these cases.[47] To reach such a conclusion, the *Varhoven kasatsionen sad* has relied on the obligation of cooperation and on the principle of loyalty of the Member States under EU law.

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43 (BE) Cour constitutionnelle, arrêt, 30/06/2014, n° 99 /2014, numéro du role: 5611.

44 (BE) Cour de cassation, arrêt, 14/01/2000, C980477F, reported in ACA Europe (n 16), National report of Belgium, Question 14, point 123. The case at hand concerned Art. 28 TEC.

45 (BG) Sofiyski gradski sad, Reshenie, 03/01/2014, Pretsiz-2 EOOD/Varhoven administrativen sad, 1782/2013, reported in Reflets nº 1/2014, 16.

46 (BG) Varhoven kasatsionen sad, Opredelenie, 08/05/2015, n° 269, reported in Reflets n° 2/2015, 24.

47 This led to the result that in the case at hand, the *Varhoven kasatsionen sad* overturned the order of the *Sofiyski gradski sad*.

The court has also invoked the CJUE case-law on state liability and in particular the judgments in Francovich and in *Köbler*.[48]

In a judgment dated 26 November 2015, the Okrazhen sad Yambol (Regional Court, Yambol) has established joint and several liability of the *Varhoven kasatsionen sad,* as well as national administrative and legislative bodies for the damage sustained by a company due to the application of a national act contrary to EU law.[49] The particularity in this case is that the court rebuked all three branches of government for having applied a national law contrary to EU law. It had the possibility to do so, as the claimant itself had claimed such a cumulative breach, and sued all three branches of government. The *Okrazhen sad Yambol* pointed out the Bulgarian Parliament had infringed its obligation of cooperation enshrined under Art. 4(3) TEU by not having amended the national law which had already been subject of an infringement proceedings before the Commission. In addition, the administration had also contributed to the damages by having rendered its decision on the basis of the national provision contrary to EU law. Moreover, the *Okrazhen sad Yambol* held the *Varhoven kasatsionen sad* responsible for the breach, too. In this regard, the first instance court argued that the Supreme Court should have referred a preliminary question to the ECJ in order to evaluate the compatibility of the national law with the EU law. Given the circumstances of the case, i.e. the serious doubts regarding such compatibility, the referral should not have been avoided. At all, the *Okrazhen sad Yambol* held all the three branches of the state responsible for the damages suffered and ordered them to pay, jointly and severally, compensation to the company. One must not, however, forget that this judgment is not definitive.

bd) Finland

In its judgment rendered on 5 July 2013, the *Korkein oikeus* (Supreme Court) awarded damages in favour of the claimant on the basis of the *Köbler* doctrine.[50] The Finnish State, as the defendant party, raised the issue of jurisdiction as a preliminary point before the *Korkein oikeus*. It argued that the action concerned an administrative dispute that should have been taken to the administrative court. It also relied on the principle of res judicata, stating that the contested decision by the *Korkein hallinto-oikeus* had ended the case. The *Korkein oikeus* rejected these arguments. Referring to CJUE judgments, it stated that the Finnish rules applied in the administrative proceedings had been in breach of EU law, and, therefore, ordered the state to pay compensation to the claimant.[51] The *Korkein oikeus* had to rule out the national

[48] Even though this order is not obligatory to the national courts, it offers guidance regarding the rules which should be applied in a liability action. Moreover, it reinforces the conclusion that Bulgarian courts acknowledge and apply the principle of *Köbler* liability.

[49] (BG) *Okrazhen sad Yambol, Reshenie,* 26/11/2015 (n 23). This judgment is, however, not definitive.

[50] (FI) *Korkein oikeus, tuomio,* 05/07/2013 (n 23).

[51] After all, it seems to be due to the specific legal and factual background that the liability of Finland was established for a final judicial decision. First, he EU provision on neutral taxation was infringed from the beginning of the procedure: the legislature, the tax authority and the administrative court were all in breach in that regard. Second, the Finnish State itself had been sued, which enabled the civil court to assess the violation as to its integrity. Third, CJUE case-law has already made clear that the Finnish regulation was contrary to EU law.

provision that limited the liability of public entities in order to be able to follow up the claimant's applications.

be) France

Through its decision in *Gestas,* delivered on 18 June 2008, the *Conseil d'État* (Council of State) acknowledged that in principle it is possible to obtain damages when the content of a judgment is in manifest breach of EU law.[52] However, since the facts of the case did not give rise to any intervention of EU law, no liability was established. Even so, the judgment is of utmost importance as the *Conseil d'État* departed from its longstanding *Darmont* case-law concerning damages caused by EU law violations. According to the *Darmont* principle, the content of a judicial decision cannot be challenged by way of a state liability action once it has become final.[53] By the *Gestas* judgment, the *Conseil d'État* admitted that misconduct by a court can lead to compensation in a case where an obvious incompatibility can be found between the content of the judgment and a provision of EU law.

By its judgment delivered on 7 May 2008, the *Tribunal de grande instance de Paris* (Regional Court, Paris) dismissed a claim seeking compensation for breach of EU law by the *Cour de cassation* (Court of Cassation). The regional court concluded that an erroneous interpretation of law cannot constitute a sufficiently serious breach, notwithstanding the fact that it concerns EU law.[54] The court reached its judgment on the basis of the national rules on liability of courts. It emphasised that an erroneous judgment cannot constitute a *'faute lourde,'* a sufficiently serious breach of law.

In a series of judgments handed down on 26 October 2011, the *Cour constitutionnelle* (Constitutional Court) dealt with the question of whether the failure to make a preliminary reference can be considered as denial of justice. In this regard, it was investigated whether it can constitute, for this reason, a manifestly serious breach entailing state liability for failure to operate the public service properly.[55] However, in the absence of a violation of EU law, the *Cour constitutionnelle* dismissed the claims. Nevertheless, the *Cour constitutionnelle* reached its conclusion using the criterion set by the CJUE in *Köbler*, i.e. evaluating the manifest character of the breach, instead of evaluating it against the French *'faute lourde'* condition.

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[52] (FR) Conseil d'Etat, décision, 18/06/2008, Gestas, ECLI:FR:CESSR:2008:295831.20080618, publié au recueil Lebon, reported by Olivier Dubos, Daniel Katz and Philippe Mollard, 'Rapport francais', in Coutron (n 10) 221, in Reflets nº 2008/3, 19 and in the database JuriFast.

[53] The *Conseil d'État* reiterated that, by virtue of the general principles on state liability, gross negligence committed by an administrative court is likely to give rise to compensation. However, it also pointed out that the state cannot incur liability in cases where the alleged gross negligence resulted from the content of a judicial decision that was subsequently made final. However, it has made an exception to these rules, in line with the solution implemented by the CJUE in *Köbler.* In this regard, it ruled that liability can be incurred by the state if the content of a final judicial decision is marred by a clear violation of EU law aiming to give rights to individuals.

[54] (FR) Tribunal de grande instance de Paris, 07/05/2008, n° 04/13911, reported by Dubos, Katz and Mollard (n 52) 222–223, n 59.

[55] (FR) Cour de cassation, Arrêts, 26/10/2011, n° 1002 (10-24.250 à 10-24.262), Bull. 2011, I, nº 181, reported by Dubos, Katz and Mollard (n 52) 223–224, n 62.

bf) Germany

In its judgment handed down on 9 June 2009, the *Bundesverwaltungsgericht* (Federal Administrative Court, BVerwG), dismissed a liability claim, arguing that the breach of EU law by the German court was not sufficiently serious.[56] The BVerwG pointed out that the scope of application of the *Köbler* liability, as triggered by a breach of EU law by the German judiciary, is wider than liability for breach of official duty in terms of German law. This is because state liability under EU law applies to breaches committed by the legislature and also by the judiciary, while state liability in terms of German law does not. It pointed out that the practical enforcement of state liability as a remedy under EU law takes place in national courts, which assess whether the conditions for state liability are fulfilled. In this case, the breach of law was not sufficiently manifest to meet the requirement of a sufficiently serious breach. In this regard, the BVerwG concluded that the EU provision lacked the required level of clarity and the applicability of that provision to the case of the claimant was doubtful. Therefore, Germany was not held liable to pay damages to the claimant, since the violation of EU law by the judgment of the *Verwaltungsgericht Aachen* (Administrative Court, Aachen) had not met the threshold established in *Köbler*.

In a judgment handed down on 28 October 2004, the *Bundesgerichtshof* (Federal Court of Justice, BGH) dismissed a liability claim stating that the refusal to submit a preliminary reference to the CJUE was justified.[57] The BGH expressly acknowledged the possibility to hold the state liable for miscarriages of justice based on the principles developed by the CJUE in *Köbler*. However, after reiterating the conditions set up by the CJUE, the BGH came to the conclusion that there had been no manifest infringement in the case. In the court's opinion, the correct interpretation of the EU directive was so obvious that, based on the standards set in *Cilfit,*[58] there had been no need for the *Oberlandesgericht Koblenz* (Higher Regional Court, Koblenz) to refer the case to the CJUE for a preliminary ruling.[59]

As for two judgments rendered by higher regional courts, the *Oberlandesgericht Karlsruhe* (Higher Regional Court, Karlsruhe), on 9 March 2006,[60] and the *Oberlandesgericht Frankfurt* (Higher Regional Court, Frankfurt), on 13 March 2008,[61] they contended that state liability for miscarriages of justice could only be incurred where the infringement was attributable to a court adjudicating at last instance. These decisions did not refer to *Köbler* and *Traghetti del Mediterraneo* but to articles in German literature instead. After all, they stated

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56 (DE) BVerwG, Urteil, 09/06/2009, 1 C 7.08, NVwZ 2009, 1431, ECLI:DE:BVerwG: 2009:090609U1C7.08.0, reported in Jean Monnet Database.

57 (DE) BHG, Beschluss, 28/10/2004, III ZR 294/03, NJW, 2005, n° 11, p. 747, reported by Beutler (n 6) 788–789, Daniel Dittert, 'Rapport allemande' in Coutron (n 10) 77–78, n 80, and Lock (n 15) 1683, n 50, and 1684, n 59.

58 (CJUE) Case 283/81 *Cilfit and others* EU:C:1982:335 [1982] ECR 3415.

59 Beutler (n 6) 788–789.

60 (DE) Oberlandesgericht Karlsruhe, Urteil, 09/03/2006, 12 U 286/05, NJW-RR, 2006, n° 21, 1459, reported by Beutler (n 6) 789, Dittert (n 57) 77–78, n 80, and Lock (n 15) 1683, n 50, and 1684, n 59.

61 (DE) Oberlandesgericht Frankfurt, Urteil, 13/03/2008, 1 U 244/07, reported by Beutler (n 6) 789, n 111, and in the database Juris, para 17.

that at any rate there had been no manifest infringement.[62] Altogether, only a few cases have been so far rendered on the basis of *Köbler* claims in Germany.[63]

bg) Hungary

The *Kúria* (Supreme Court) held on 11 December 2013, that a civil court adjudicating on a liability claim cannot reassess the merits of a final judgment that has already gained res judicata, notwithstanding a violation of EU law.[64] First, the *Kúria* emphasised that a liability action cannot serve to review a judgment or re-examine a dispute that had already gained res judicata. Moreover, the illegality of the main proceedings before the administrative court must be evaluated in the light of the procedural rules. In this regard, the *Kúria* pointed out that the claimant himself had not invoked the EU law in the main proceedings. Since the court is bound by the pleas raised by the parties, the administrative court had not committed any breach in the main proceedings when it had not considered the EU law. As such, the *Kúria* as appeal court had not infringed EU law in the administrative dispute. In this regard, the also *Kúria* pointed out that the Hungarian procedural rules are in line with the principles of effectiveness and equivalence, and are also allowed in terms of the CJUE case-law.

The *Kúria* have rendered several other judgments in which it rejected the liability of the state for violation of EU law by the national courts.[65] In terms of these judgments, a liability action cannot serve to review an already finally decided matter.

bh) Italy

Following the CJUE judgment in *Traghetti del Mediterraneo,* the Italian *Tribunale di Genova,* the court which had made the preliminary reference, ordered the state to pay compensation to the claimant because of the violation of EU law by the *Corte Suprema di Cassazione*.[66] To render this judgment, the *Tribunale di Genova* set aside, and gave an interpretation *a contrario* to the national rules on judicial liability.

Nonetheless, the *contra legem* application of national rules is no longer necessary, following the recently adopted legislative modifications aiming to align national rules with the CJUE's requirements in this matter of law. The new provisions offer wider grounds to invoke liability of the state for judicial acts, and, especially clarify that the manifest violation of EU law constitutes, in itself, *'colpa grave'.* Specifically, since the entry into force of these amendments on 19 March 2015, erroneous interpretation of law, as well as assessment of facts and evidence can also give rise to liability, on condition that they are the result of gross negligence or manifest violation of law. Moreover, the new provisions specify the factors to

62 Beutler (n 6) 789.
63 (DE) BGH, Beschluss, 28/10/2004, III ZR 294/03 (n 57).
64 (HU) Kúria, ítélet, 11/12/2013, Pfv.III.22.112/2012/13, reported in Reflets n° 2/2014, 30.
65 (HU) Kúria, ítélet, 28/02/2014, Pfv.III.21.591/2013/5.
66 (IT) Tribunale di Genova, Sentenza, 31/03/2009 (n 23).

be taken into consideration when assessing the gravity of the breach. In this regard, the elements elaborated by the CJUE in the *Köbler* judgment are borrowed, in essence.[67]

bi) Lithuania

In its judgment delivered on 24 April 2008, the *Vyriausiasis administracinis teismas* (Supreme Administrative Court) acknowledged the liability of the state for final decisions of administrative courts which are contrary to EU law. However, it dismissed the claimant's request for compensation in the case at hand.[68] Acting as a court of appeal, the *Vyriausiasis administracinis teismas* concluded that the state is liable for unlawful final administrative court judgments, and administrative courts are competent to evaluate the illegality of those acts. To reach its conclusion, the *Vyriausiasis administracinis teismas* specifically referred to the Constitutional Act of Lithuania on the EU membership of the State, to the *Köbler* judgment, and to the principle of national procedural autonomy of the Member States. In this way, the *Vyriausiasis administracinis teismas* acknowledged the *Köbler* liability. However, as the main proceedings had been reopened in the meantime,[69] the *Vyriausiasis administracinis teismas* dismissed the claim for damages in the case at hand.

In two recent cases before Lithuanian courts, the *Lietuvos apeliacinis teismas* (Court of Appeal)[70] and the *Vilniaus apygardos teismas* (Vilnius Regional Court)[71] have also dealt with *Köbler* liability claims. However, both courts concluded that neither substantive EU provisions, nor the referral duty had been violated in the preliminary proceedings and the claims were therefore dismissed.

bj) Luxembourg

There has already been a liability claim before the Cour d'appel (Court of Appeal) against the state on the basis of the violation of the EU law by the *Cour de cassation* (Court of Cassation).[72] In the liability proceedings, the *Cour d'appel* referred a question to the CJUE asking whether there had actually been a violation of EU law in the main proceedings. The CJUE gave some guidance on the interpretation of the relevant EU provision, however, left to the referring court the application of these criteria to the case at hand.[73] The follow-up of this judgment before the national court is not yet available.

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67 (IT) Legge, 13/04/1988, n° 117 (n 26) art. 2. This law was amended by Disciplina della responsabilita' civile dei magistrati, Legge 27/02/2015, n° 18.

68 (LT) Lietuvos vyriausiojo administracinio teismo 2008 m. balandžio 24 d. nutartis administracinėje byloje S. T. V. Lietuvos valstybė, byla Nr. AS444-199/2008, reported by Valutyté (n 29) 288-289.

69 (LT) Lietuvos vyriausiojo administracinio teismo, 10/04/2008, nutartis administracinėje byloje Nr. P444-129/2008, reported by Valutyté (n 29) 288–289.

70 (LT) Lietuvos apeliacinis teismas, 23/06/2014, Byla 2A-871/2014.

71 (LT) Vilniaus apygardos teismas, 21/01/2015, Byla 2A-1116-392/2015.

72 (LU) Cour d'appel de Luxembourg, jugement, 13/01/2010, reported by Georges Ravarani, 'Rapport luxembourgois', in Coutron (n 10) 328–333.

73 (CJUE) Case C–29/10 *Koelzsch* EU:C:2011:151 [2011] ECR I-01595.

bk) Netherlands

In its judgment delivered on 15 February 2011, the *Gerechtshof 's-Gravenhage* (District Court, The Hague) refused compensation for breach of EU law by the national court, relying on national procedural rules which prohibited the allocation of damages.[74] The *Gerechtshof's-Gravenhage* pointed out, that the claimant had already received damages following an administrative procedure. Therefore, as a civil court, it did not have the competence to decide again on the damages claim.

In a decision handed down on 5 May 2010, the *Rechtbank's-Gravenhage* dismissed the damages claim on the grounds that the claimant had not exhausted all remedies, an appeal in cassation being still available for him.[75]

bl) Poland

In a judgment rendered on 26 June 2014, the *Naczelny Sąd Administracyjny* (Supreme Administrative Court) pointed out that a judgment delivered by a supreme court can only be declared unlawful[76] if its unlawfulness results from a gross violation of EU law.[77] Applying this principle to the case at hand, it dismissed the motion of the claimant brought against its own previous judgment. In the first place, the *Naczelny Sąd Administracyjny* emphasised that under Polish administrative procedural law, unlawfulness has a strict meaning. A gross violation of the rules of law means that the breach is obvious and indisputable, since it clearly departs from a given rule, and, therefore, can be described as extraordinary. The court alluded directly to CJUE judgments in *Köbler* and in Traghetti del Mediterraneo. In the second place, the *Naczelny Sąd Administracyjny* pointed out that an action to declare a final judgment unlawful cannot substitute, supplement or be filed before an appeal in cassation. Therefore, if the claimant himself had not invoked the violation of EU law in the appeal proceedings before the Supreme Court, it was not possible to claim a violation of EU law in an action to declare unlawful a final and legally binding judgment either.

Several other judgments have also been rendered on the ground of the same provision in the Polish administrative procedural code.[78] In a judgment delivered on 11 June 2014, the

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74 (NL) Gerechtshof 's-Gravenhage, Uitspraak, 15/02/2011, ECLI:NL:GHSGR:2011:BP6841, reported by Tony P. Marguery and Herman J. van Harten, 'Rapport néerlandais' in Coutron (n 10) 352, n 70.

75 (NL) Rechtbank 's-Gravenhage, Uitspraak, 05/03/2010, ECLI:NL:RBSGR:2010:BL6948, reported by Marguery and van Harten (n 74) 352, n 69.

76 According to the Polish Civil Code, if the damage has been inflicted by issuing a final court ruling or a final decision, its redress may be demanded after it has been acknowledged in an appropriate proceeding that the ruling or decision contradicts the law. The declaration of unlawfulness as a sui generis procedure is one possible way to establish such a violation of law. Hence, the declaration of unlawfulness of a final judgment is a procedural element of an action for damages for breach of law by Polish courts. Therefore, with regard to the strong connection between the action for liability and this special remedy, the relevant case-law is presented in this section.

77 (PL) Naczelny Sąd Administracyjny, Wyrok, 26/06/2014, I FNP 5/14, reported in database JuriFast.

78 (PL) Prawo o postępowaniu przed sądami administracyjnymi (n 29), art. 285a, § 3. See also Przemysław Mikłaszewicz, 'Rapport polonais,' in Coutron (n 10) 382 and Naczelny Sąd Administracyjny, Wyrok, 28/02/2013, I FNP 10/12.

Naczelny Sąd Administracyjny held that the refusal by the same court to make a preliminary reference in the previous proceedings had not breached any EU rule, as the interpretation of the EU norm was not ambiguous.[79] The *Naczelny Sąd Administracyjny* pointed out that the national courts of last instance enjoy certain discretion on whether to make a request or not. Especially, if the interpretation of the EU rule is not doubtful, the court does not have to make a referral, even if one of the parties proposes such a submission. Accepting a contrary position would mean to deny the possibility of the national courts to adjudicate on EU law matters.

Furtermore, in a judgment pronounced on 26 August 2011, the *Naczelny Sąd Administracyjny* dismissed the claim as it found that the interpretation of the EU provision in the contested final decision had been correct.[80] In a series of judgments rendered on 21 December 2010, the *Naczelny Sąd Administracyjny* reiterated that the interpretation and the application of Polish procedural rules come under the scope of the national procedural autonomy, and, consequently, dismissed the claims.[81]

As for civil cases, in a judgment handed down on 8 December 2009, the *Sąd Najwyższy* (Supreme Court) declared the contested final judgment unlawful.[82] The *Sąd Najwyższy* arrived at this conclusion as the inconsistency of the final judgment with the EU law became clear following the CJUE judgment on the same matter of law. Moreover, a judgment by the *Sąd Najwyższy* from 12 October 2006 seems to suggest that the flagrant violation of the obligation to submit a preliminary reference to the CJUE may in itself suffice to declare a final civil judgment unlawful.[83]

bm) Portugal

In a judgment handed down on 3 December 2009, the *Supremo Tribunal de Justiça* (Supreme Court) dismissed on appeal a liability claim brought against the state for breach of the EU law by its own decision.[84] The *Supremo Tribunal de Justiça* argued that since at the time of the facts the national law on judicial liability[85] had not yet been in force, there was no rule in Portuguese law under which the state could be held liable for breach of law by the judiciary.

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79 (PL) Naczelny Sąd Administracyjny, Wyrok, 11/06/2014, I GNP 2/14, reported in Reflets n° 3/2014, 38.

80 (PL) Naczelny Sąd Administracyjny, Wyrok, 26/08/2011, I GNP 1/11, reported by Mikłaszewicz (n 78) 381, n 107.

81 (PL) Naczelny Sąd Administracyjny, Postanowienie, 21/12/2010, I FNP 1/10, I FNP 5/10 and I FNP 8/10, reported by Mikłaszewicz (n 78) 382, n 109.

82 (PL) Sąd Najwyższy, Wyrok, 08/12/2009, I BU 6/09, reported by Mikłaszewicz (n 78) 380–381. The judgment was based on the Civil Code. In terms of this provision, and contrary to the rules in administrative law, the breach of both Polish and EU law can serve as a legal basis to an action to declare unlawful a final judgment. On the other hand, an action to declare unlawful a final judgment cannot be initiated against the judgments of the *Sąd Najwyższy*. These latter points can be contested directly in a liability claim. See Kodeks cywilny (n 29) art. 417-1, § 2.

83 (PL) Sąd Najwyższy, Wyrok, 12/10/ 2006, I CNP 41/06, reported by Mikłaszewicz (n 78) 381, n 102.

84 (PT) Supremo Tribunal de Justiça, Acórdão, 03/12/2009, Revista n.º 9180/07.3TBBRG.G1.S1, available at Network of the presidents of the surpreme judicial courts of the European Union, reported by José Narciso da Cunha Rodríguez and Helena Maria de Jesus Patricio, 'Rapport portugais' in Coutron (n 10) 400–404.

85 (PT) Lei n.º 67/2007 (n 31). See also da Cunha Rodríguez and Jesus Patricio (n 84) 398, n 21.

This decision meant to overturn the judgment of the *Tribunal da Relação de Guimarães* (Court of Second Instance of Guimarães), which, in the same case, ordered the Portuguese State to pay compensation.

In the above mentioned judgment of 23 Avril 2009, the *Tribunal da Relação de Guimarães* found the liability claim well founded on the basis of the CJUE case-law on state liability, and, therefore, ordered the state to pay compensation. The *Tribunal da Relação de Guimarães* argued that the state can be held liable for the breach of EU law by its courts even in the absence of national law on judicial liability.[86]

In a judgment delivered on 9 July 2015, the *Tribunal Constitucional* examined the constitutionality of the criteria requiring the prior reversal of the contested judgment as a condition for liability.[87] Even though the dispute was not related to EU law, it hence appears that the *Tribunal Constitucional* approved this restrictive condition being set aside for claims arising from violation of EU law by Portuguese courts. First, the *Tribunal Constitucional* stated that the Constitution only provides a general framework for liability claims and therefore, the legislator has the right to establish specific rules concerning the exercise of this right. However, these rules cannot arbitrarily and unreasonably restrict the right to compensation. The court then pointed to the conflict between judicial liability and the principles of legal certainty and res judicata. In this regard, it raised the question of which court has the final word on an already decided matter. At this point, the *Tribunal Constitucional* made reference to the CJUE's case-law and arguments in the judgments in *Köbler* and Traghetti del Mediterraneo. According to the *Tribunal Constitucional,* recognising judicial liability for breaches of EU law is justified because the parties do not have direct access to the CJUE and they cannot enforce a preliminary reference being made before the CJUE. Therefore, Member State liability is important to provide effective judicial protection where violation of EU has occurred. However, as for domestic matters, the criterion of prior reversal of the contested judgment is not contrary to the constitutional right to compensation. The restriction that it implies does not restrict the essential content of this right and the restriction is not arbitrary, either.

bn) Slovakia

Even if there is no judgment on the case, it is noteworthy that in a request for preliminary ruling dated 12 March 2015,[88] the Okresný súd Prešov (District Court, Prešov) raised the question whether Slovakian rules concerning judicial liability, especially those with regard to the duty of mitigation, are in conformity with EU requirements.[89] In particular, the court asked whether liability might arise before the claimant had used all legal remedies available in the legal order of the Member State, such as requiring an account for unjust enrichment in proceedings for the enforcement of an award.

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86 (PT) Tribunal da Relacao de Guimaraes, Acórdão, 23/04/2009, 9180/07.3TBBRG.G1.

87 (PT) Tribunal Constitucional, Acórdão, 09/07/2015, n.º363/2015.

88 (SL) Okresný súd Prešov, Uznesenie, 12/03/2015, 7C 6/2010-316.

89 (CJUE) *Tomášová* (n 17)

bo) Sweden

In its decision of 6 June 2009, the *Justitiekanslern* (Office of the Chancellor of Justice) awarded compensation for damages suffered by the claimant due to judicial decisions contrary to EU law.[90] The unlawful judicial act consisted in the decision by the *Regeringsrätten* (Supreme Administrative Court), to declare inadmissible the appeal of the claimant against the judgment of the *Kammarrätten i Göteborg* (Administrative Court of Appeal, Göteborg). In fact, the *Kammarrätten* had dismissed the motion of the claimant to revise the original tax decision in its case on the basis of the EU law. Examining the liability claim lodged before it, the *Justitiekanslern* found that the erroneous interpretation of the EU law in the main, primary proceedings cannot be considered sufficiently serious. It pointed out that the appeal court had analysed in detail the available CJUE case-law and that the erroneous interpretation attributed to the directive was excusable. However, the violation of law by the *Regeringsrätten,* consisting of declaring the appeal against the above appeal court judgment inadmissible, was a sufficiently serious breach to give rise to compensation. The *Justitiekanslern* stressed that, at that time, the *Regeringsrätten* already had information about the CJUE judgment concerning the relevant question of law. Therefore, in the light of this new CJUE jurisprudence, the appeal should have been declared admissible. By declaring the appeal inadmissible, the *Regeringsrätten* committed a sufficiently serious breach of the EU law, and the claimant was therefore entitled to compensation.

bp) United Kingdom

In its judgment of 12 May 2010, handed down as an appeal court in a state liability action, the *Court of Appeal* found the contested judgment contrary to EU law.[91] However, the breach was not sufficiently serious to engage liability on the basis of the principles set out in *Köbler*. The *Court of Appeal* stated that the violation of EU law had indeed taken place, as both the EU directive, and the Treaty provision on the obligation to ask preliminary ruling had been breached. As for the gravity of the violation, the *Court of Appeal* found the contested judgment consistent with other judgments made by other Member States' courts in similar cases at that time. Furthermore, even though the Commission had been notified on the national law before it came into force, it was not the subject of a complaint at that time. Bearing in mind all of these factors, the *Court of Appeal* ruled that the failure to submit a request for a preliminary ruling to the CJUE was an excusable error.

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90 (SE) Justitiekanslern, beslut, 06/04/2009 (n 23).

91 (UK) Court of Appeal (England), Civil Division, judgment, 12/05/2010, Cooper / Her Majesty's Attorney General, [2010] EWCA Civ 464, reported by Lock (n 15) 1682, n 39 and in Reflets nº 2012/3, 21.

III Conclusion

Two main conclusions can be drawn from the national case-law on *Köbler* claims. On the one hand, several Member States have actually implemented the *Köbler* liability in their legal framework, despite limitations in the domestic statutory provisions. Even though legal provisions have not been changed in most of these states, some courts have adjudicated liability claims directly on the basis of the *Köbler* judgment. On the other hand, even in these Member States, compensation has been allocated only in the rarest of circumstances. Both these statements need to be elaborated.

1 The Impact of the Köbler Liability

Therefore, contrary to what might have been previously expected, the *Köbler* doctrine appears to have found a certain acceptance in several national regimes. The above analysis shows that thirteen Member States have accepted, at least theoretically, to hold the state liable for breaches of EU law by national supreme courts (Austria, Belgium, Bulgaria, Finland, France, Germany, Italy, Lithuania, the Netherlands, Poland, Portugal, Sweden, and the UK).[92]

Furthermore, even though there is no reported judgment on a *Köbler* claim from the Czech Republic, it follows from a judgment rendered on a liability claim against the state on the basis of a breach by an administrative authority[93] that, in theory, the principle of state liability on the basis of EU law is recognised in the Czech Republic as well. Moreover, the requests for preliminary ruling by the Luxembourgish and Slovakian courts suggest that these courts are inclined to accept state liability.

In most Member States, the implementation of the *Köbler* doctrine resulted in the duplication of liability regimes. It means that the conditions of state liability for judicial acts appear be less strict with regard to damages caused by violation of EU law rather than violation of national law. In most Member States, this is the result of the fact that national courts had to set aside their domestic rules on liability for judicial activity to be able to establish the liability of the state for breach of EU law by the national supreme courts.[94] This is the case in Austria, Bulgaria, Finland, France, Germany, Lithuania, the Netherlands, Portugal, and the UK. The exception is Belgium, where the jurisprudential changes have general application.

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[92] However, the position of Spanish courts is not unanimous in this regard.

[93] (CZ) Nejvyšší soud České republiky rozsudek ze dne 20/08/2012, n°28 Cdo 2927/2010, ECLI:CZ:NS:-2012:28.CDO.2927.2010.1, reported by David Petrlík, 'Rapport tchèque' in Coutron (n 10) 427–429, n 75 and in Reflets n° 3/2012, 18–19.

[94] It has been the case in Austria (exclusion of liability of supreme courts'), Belgium (condition of the prior reversal of the contested judgment), Bulgaria (exclusion of liability), the Czech Republic (condition of the prior reversal of the contested judgment), Finland (condition of the prior reversal of the contested judgment or conviction or condemnation for damages of the judge), France (no liability for final judgments), Germany (liability for judicial errors only for criminal offences), Italy (unquestionable nature of final judgments), the Netherlands (exclusion of liability for judicial activity), and the UK (absolute immunity of courts) as well.

The duplication of liability regimes is due to legislative amendments in two Member States. In Italy, recent amendments allow the possibility to make the state liable for judicial breaches on wider grounds than previously foreseen, and provide an explicit ground for liability in the case of manifest infringement of EU law. In Poland, holding the supreme courts liable is possible on wider grounds with regard to EU law infringements than national breaches.

In Sweden, because an informal way to receive damages before the *Justitienaslern* had already existed,[95] it was possible to apply the *Köbler* doctrine under this procedure without any legislative amendment or judicial intervention.

On the other side, even though there has not yet been an available judgment on a *Köbler* claim from Denmark and Latvia, the application of the doctrine should not, in principle, have major difficulties in this two Member States. In Denmark, similarly to Spain, liability of the state for judicial acts had already been recognised under the general regime of liability even before *Köbler*. The conditions set by Danish law do not seem to be more restrictive than those established by the CJUE. Similarly, national provisions do not appear to exclude the theoretical possibility to hold the supreme courts liable for breach of EU law in Latvia.

There are, however, Member States which have still refused to adapt their liability regime to the requirements of the *Köbler* and Traghetti del Mediterraneo case-law. The available case-laws show such reticence especially from the Hungarian Supreme Court, which has repeatedly held that it cannot reassess in a liability claim a final legal judgment that has already gained res judicata.

As for other not-yet-mentioned Member States, in the absence of available case-law, there is no possibility to evaluate their position in this regard.

Another issue is the condition in national laws regarding the gravity of the breach, which appears to jeopardise the allocation of damages for EU law violations in several Member States in practice. However, the incompatibility of this condition with the ECJ's case-law is not obvious for two reasons. First, as far as these requirements apply without distinction to national and EU law violations, the principle of equivalence is well observed. Second, the CJUE itself set very strict conditions for liability in *Köbler*. As such, it is not obvious whether the strict, albeit subjective conditions for liability under the Spanish,[96] Slovenian[97] and Polish[98] regimes, for example, even if they may be contrary to the effectiveness principle, are in fact incompatible with the *Köbler* conditions.

The position of legal doctrine is not unanimous in this regard either. According to Scherr, 'the highly restrictive approach to the concept of state liability for judicial breaches, which appears to be the only commonality between all the national legal concepts of state liability

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[95] (SE) Lag (1975:1339*) om justitiekanslerns tillsyn* (Act on the Chancellor of Justice's supervision); *Förordning (1995:1301) om handläggning av skadeståndsanspråk mot staten* (Regulation on the processing of claims against the state).

[96] See in this regard Daniel Sarmiento, 'Rapport espagnol' in Coutron (n 10) 179.

[97] Trstenjak and Plaustajner (n 32) 472–473.

[98] Mikłaszewicz (n 78) 383–384.

for judicial breaches in the European Union Member States, is mirrored at European Union level in an equally restrictive system of Member State liability *à la Köbler*'.[99]

2 The Role of the Köbler Liability

As experience shows, even in Member States where *Köbler* liability is accepted theoretically, it is not a frequently used method to make good of damages caused to individuals by a final judgment of a national supreme court. Moreover, even on the rare occasions when it has been relied on, compensation has almost never been awarded. Therefore, *Köbler* liability appears not to be an effective remedy for infringed individual rights.[100]

Nevertheless, it serves as an incentive for Member State courts to fulfil their obligations in applying EU law and, therefore, it can prevent the occurrence of damage. Hence, as a preventive or deterrent tool, it may contribute to the effective application of EU law.[101] In this regard, it is certainly true that the *Köbler* judgment has made its impact on national regimes, and has in general contributed to raising the level of protection of individual rights. This follows from the adaptation of domestic liability regimes to the *Köbler* principle.

[99] Scherr, Comparative aspects (n 8) 585. See also Beutler (n 6); Nassimpian (n 11) 824.

[100] Beutler (n 6) 790; Nassimpian (n 11) 834; Lock (n 15) 1685.

[101] In this regard, the literature has already pointed out that the state liability concept is not coherent enough, and it should be determined whether its primary function is to remedy infringed rights or to deter non-compliant supreme courts. See, in this regard Dorota Leczykiewicz, 'Enforcement or Compensation? Damages Actions in EU Law after the Draft Common Frame of Reference' 59 *Legal Research Paper Series* (University of Oxford, 2012) 1–3, 17; Lock (n 15), 1676, 1700, 1701; Rodríguez (n 7) 611, 614–615.

Viola Vincze*

Taming the Untameable: The Role of Military Necessity in Constraining Violence

I Introduction

1 Introductory Thoughts

According to Cicero's 2000-year-old maxim,[1] *'Silent enim leges inter arma,'* laws are silent among arms. Nonetheless, looking back at the course of history and luckily for us, this maxim proved to be false. Laws, especially the laws of war, are far from being silent. Law not only makes itself heard (loud and clear), but it seems to speak multiple languages, and instead of whether it is applicable in wartime or not, it is the question of which set of rules apply to wars that should be asked.

Although the Law of Armed Conflict (LOAC) has gone through an organic development in the past millennia, with military thinkers and lawmakers developing and shaping its content, its relevance (and sometimes existence) needed to be justified again and again. The principle of Military Necessity is one of the cornerstones of LOAC. Nevertheless, it is more than that. It indicates the recognition of the need for rules in times of armed conflict, which protect those willingly or unwillingly exposed to the adverse effects of hostilities, and it is also proof of the ability of humankind to constraint itself and surrender short-term (military) advantages in order to secure the possibility and conditions of stability and peace in the end.

The conception of Military Necessity may have ancient roots but it is not in any sense obsolete at the dawn of the twenty-first century. The 9/11 attacks and subsequent events (invasion of Afghanistan (2001) and Iraq (2003), the declaration of the 'War on Terror') and the recent military intervention in Crimea (2014-present) by Russia and the resulting clashes) all underline the demand for universally applicable (and applied) rules and principles to ensure the viability of a civilised and liveable future.[2] In the light of the ongoing conflicts in the

* Viola Vincze (LL.M.) is legal advisor at the Ministry of Defense, Legal Department and a Ph.D. Candidate at ELTE Law School. The views and opinions expressed in this article are those of the authors.

[1] Marcus Tullius Cicero's speech in defence of Titus Annius Milo in April 52 B.C. (Pro Milone) <http://sabidius.blogspot.hu/2012/08/cicero-pro-milone.html> accessed 25 April 2017.

[2] The former Deputy Supreme Allied Commander Europe has recently depicted a chilling fictional account of a fully-fledged war started by Russia. General Sir Richard Shirreff, *War with Russia* (Coronet 2016).

Middle East, in Ukraine and in Africa, an assessment of the applicable principles is topical and relevant since there is a large amount of media coverage of the apparent breaches of the applicable law (e.g. bombing hospitals or places of worship). Operational principles, such as the principle of Military Necessity, are vital to facilitate and ensure that the law is observed and the conduct of hostilities involves the least possible injury and damage – only those actions which are inherently militarily necessary in order to subdue the enemy forces should be carried out.

The principle of Military Necessity cannot be sacrificed in order to gain (national) security or certain military advantages. On the one hand, it is not only a moral imperative to alleviate the injuries and damage inherent to conflicts, it is also a principle of humanitarian law deeply embedded in both written and customary norms. On the other hand, notwithstanding the official or unofficial propaganda, national security and the much-sought military advantage cannot be but illusory and short-lived if achieved at the expense of the foundational principles. The international community should therefore keep the operational principles of LOAC in the highest regard, as undermining them would possibly mark the beginning of an era where democratic values, the rule of law and universally recognised principles are not respected and military decisions are made arbitrarily, based on ill-perceived advantages to gain.

Complementing this picture with the recent developments in technology and weaponry, as well as the appearance of cyber space as a new domain of warfare,[3] further complicates the applicability of LOAC.

This essay gives an account of the development and content of the principle of Military Necessity and argues that compliance with it is more important than ever if the international order is to be maintained as we know it today.

2 The General Principles of Law of Armed Conflict

The most important purposes of LOAC are to regulate the conduct of hostilities and to protect the victims of armed conflicts. In the light of the ongoing conflicts in the Middle East and in Africa, the assessment of the principles applicable to these conflicts is topical, relevant and underlined by a large number of apparent breaches of the applicable law (e.g. bombing hospitals or places of worship). In the event of international armed conflicts (IAC), armed forces are obliged to apply the basic principles of LOAC, which are vital in order to ensure that the conduct of hostilities involves the least possible injury and damage – only those actions which are (inherently) militarily necessary in order to subdue the enemy forces should be taken.

[3] In February 2017 the NATO Cooperative Cyber Defence Centre of Excellence has released the Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations, a comprehensive analysis of how existing rules of International Law applies to cyber operations. <https://ccdcoe.org/tallinn-manual-20-international-law-applicable-cyber-operations-be-launched.html> accessed 26 April 2017.

The main sources of LOAC are conventional treaty law and rules of customary law. The latter are generally accepted as carriers of *opinio juris* and manifested in widespread state practice;[4] however, some of them are subject to debate among legal experts and not crystallised yet as universally accepted customary rules. The rules of customary law and general or specific treaty law provisions often happen to overlap – further strengthening 'the moral claim of the international community for their observance'.[5]

The body of customary LOAC has integrated the 'cardinal principles' of distinction and prohibition of unnecessary suffering,[6] as well as the principle of proportionality and the principle of military necessity and humanity as standards guiding and governing the conduct of hostilities. According to para 79 of the ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons *(Nuclear Weapons),* the fundamental rules (distinction and prohibition of unnecessary suffering) 'are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law'.

Similarly to customary rules, there is no general agreement regarding the principles applicable in IAC. As of today, no exhaustive list of principles has been agreed upon and sources refer to different combination. Many contemporary writers suggest, for example, that humanity and precaution shall be considered as emerging principles, as opposed to those who regard them as already existing ones.[7] The task of considering and 'measuring' state practice and *opinio juris* is performed by scholars, lawyers and military experts and therefore it is always somewhat subjective reflecting the views and judgment of the evaluator. Consequently, the analysis of the usage and the psychological aspect attached to it always calls for a critical assessment.[8]

The customary principles of LOAC are important, not only because they facilitate the interpretation of the applicable law but also because they guide drafters and policy makers in

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[4] According to the *North Sea Continental Shelf, Judgment* [1969] ICJ Reports 3, '…in order to achieve this *[opinio juris]* result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis.* The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even habitua1 character of the acts is not in itself enough.' 44.

[5] Theodor Meron, 'The Geneva Conventions as Customary Law' (1987) 81 American Journal of International Law 348, 350.

[6] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Reports 226, para 78.

[7] Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (2nd edn, Cambridge University Press 2016) 308.

[8] According to Luban, '[…] no way exists to tell if a rule has attained customary status' and '[…] customary international law exists (or not) in the pronouncements of experts reading the tea leaves of diplomatic practice.' David Luban, 'Military Necessity and the Cultures of Military Law' (2013) 26 Leiden Journal of International Law 315, 325.

the course of legislation and the application of law. They are the legal and moral foundation of LOAC, universal values against which military conduct is measured.[9]

According to Green, in the conduct of hostilities adversaries should be guided by three long-standing principles of armed conflicts: necessity, humanity and chivalry.[10] Dinstein on the other hand (following the reasoning of the ICJ in *Nuclear Weapons*[11]) distinguishes between cardinal principles (distinction and the prohibition of unnecessary suffering) and driving forces (military necessity and humanitarian considerations) 'energizing the motion of LOIAC' and examines the Martens Clause in the context of the cardinal principles.[12] Similarly, Solis' core concepts include distinction, military necessity, unnecessary suffering, and proportionality.[13]

The development of these principles and humanitarian rules unquestionably supported the improvement of the conditions of IACs.

In the system of core concepts, military necessity and humanity can be regarded as the fundamental principles and inspirations of LOAC, together offering a golden path that serves as the ultimate limit and restraint on the battlefield in the course of gaining military advantage. Nonetheless, military necessity shall be analysed in a wider context, including the relevant military issues of IACs (e.g. tactical advantage or anticipated collateral damage), normative control, and the ethical implications, decision-making context, intended political strategy and public opinion.

3 The Concept of Military Necessity

Military necessity is the concept of legally using only that kind and degree of force that is required to overpower the enemy. At the heart of the concept lies the criterion that no defence shall be provided in the event of unlawful actions; on the contrary: a balanced principle of military necessity fosters gaining military advantage while also manifesting the humanitarian requirements of law. This author shares Luban's opinion that the licensing function of LOAC is not as fundamental as the constraining function.[14] The US Department of Defense Law of War Manual (US DoD Manual) also underlines the prohibitive nature of the law of war, meaning that it forbids rather than authorises actions.[15]

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[9] When no specific rule applies, the principles of the law of war 'provide a general guide for conduct during war'. United States Department of Defense Law of War Manual (12 June 2015) 51. <http://archive.defense.gov/pubs/law-of-war-manual-june-2015.pdf> accessed 5 February 2017.

[10] L. C. Green, *The Contemporary Law of Armed Conflicts* (3rd edn, Manchester University Press 2008) 151.

[11] *Nuclear Weapons* (n 6) para 78.

[12] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflicts* (3rd edn, Cambridge University Press 2016) 8.

[13] Solis (n 7) 269.

[14] Luban (n 8) 320.

[15] US Department of Defense (DoD) Law of War Manual (12 June 2015) 13. <http://archive.defense.gov/pubs/law-of-war-manual-june-2015.pdf> accessed 5 February 2017.

The precise content and practical feasibility of military necessity can be blurred nonetheless, as it can convey different implications. Traditionally, one concept indicates using the notion in exceptional circumstances (in connection with lawful acts); another implies the justification of acts which are otherwise considered unlawful. By now the latter interpretation has lost its footing. Today lawmakers, scholars and military experts generally agree that lawful acts will become unlawful when they are devoid of the requirement of military necessity.[16] Military necessity shall not be confused with military convenience either;[17] it can never allow for illegal acts and atrocities committed in bad faith and not connected to specific military objectives.

In the conduct of hostilities, the fundamental objective is to accomplish certain political and military purposes. This concept supports the defeat of the adversary's military forces but it does not necessitate full obliteration. Military necessity determines the available room for manoeuvre and at the same time also limits it. The conduct of hostilities is required to meet the legality criteria at all times and it can be regarded as legal only to the extent that military necessity justifies it. When hostile acts overstretch the requirement of military necessity, they become war crimes according to the Rome Statute of the International Criminal Court (ICC).[18]

Scholars and military thinkers have long been divided over military necessity, with military lawyers supporting the application of the LOAC and Rules of Engagement with minimal restraints posed by considerations of human rights and humanitarian concerns. On the other hand, academics supporting extensive humanitarian considerations promote more stringent limitations regarding the conduct of hostilities and stringent application of human rights in the course of armed conflicts.[19]

Scholarly opinion is of great importance in interpreting law but military actions, tactics and strategies eventually stem from and are inseparable from political decision-making, representing the people as the ultimate source of political power.[20] The great orchestra of warfare therefore involves the armed forces, political decision makers (governments) with a complex system of interests, the voters and the general public, whose views on armed conflict are influenced not only by political rhetoric, but also by constant media coverage of armed conflicts.

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16 'The law of war has been developed with special consideration of the circumstances of war and the challenges inherent in its regulation by law. Thus […] the exigencies of armed conflict cannot justify violating the law of war.' US DoD Manual (n 15) 9.

17 W. Hays Parks, 'Special Forces' Wear of Non-Standard Uniforms' (2003) 4 Chicago Law Journal 493, 543.

18 Article 8 2. (b).

19 As Luban puts it rather diplomatically, '[…] those who see peace as the normal condition of human life will regard respect for peacetime human rights as a baseline, and the normative requirements in war as an aberration. And, of course, vice-versa: those who regard war as regrettable but not aberrational will grant equal normative rank to the laws of war, and won't be inclined to interpret them through human rights thinking. Precisely because the arguments about the natural baseline of human existence are impossible to resolve, this clash of normative commitments will be as well.' David Luban, 'Human Rights Thinking and the Laws of War' (2015) 19. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2589082> accessed 6 February 2017.

20 For more on the role of public opinion see Luban (n 8) and James Gow, *War and War Crimes* (Hurst and Company 2013, London).

II The Short History of the Concept

In accordance with the previously said, there had been two blocs regarding the interpretation of the principle. According to a German minority faction,[21] military necessity can override the application of positive law and it can serve as a justification for the breach of the law of war. In the reading of the majority concept, however, the circumstances in which military necessity occurs are governed by the rules of LOAC and therefore military necessity cannot justify acts that are non-compliant with the positive rules of LOAC.

The origin of the debate in the modern era goes back to the eighteenth century. In 1795 France signed the Treaty of Basel with Prussia,[22] inspiring Immanuel Kant to write his pamphlet *Perpetual Peace* (1795), in which he collected the concepts providing the prerequisites for any lasting peace among states. Kant believed that permanent peace cannot be achieved following the complete destruction of the adversary ('war of extermination') and 'the use of all means leading to it,' and therefore these shall be forbidden (Preliminary Article 6).[23]

A whole different concept (the late eighteenth century Prussian tradition of *Kriegsräson*)[24] is represented by Carl von Clausewitz, one of the most convincing nineteenth century proponents of considering warfare as a political instrument. In *On War* (1832) he regards war as merely 'the continuation of policy by other means,'[25] in other words an extended hand of policy makers. It presupposes an established political end, in the attainment of which war plays the role of means. Military conduct therefore cannot be viewed in isolation; it is always intertwined with and determined by the underlying political objectives. The means have to match the purpose, i.e. the degree of force used has to be adjusted to the political purpose anticipated. As to the conduct of warfare, Clausewitz is clear that the aim of warfare is to destroy the enemy forces; that is 'they must be put in such a condition that they can no longer carry on the fight'.[26]

In Clausewitz's reading, humanitarian concerns are entirely subjugated to gaining victory over the enemy forces:

> Attached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it. Force […] is thus the means of war; to impose our will on the enemy is its object.[27]

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21 Solis (n 7) 285.

22 At the starting point of the War of the First Coalition (1792–1797), France declared war on Austria in April 1792 and other states had joined the conflict on the Austrian side (England, Prussia, the Netherlands, Spain and Russia). According to the Treaty of Basel, France and Prussia were pledged to neutrality and Prussia recognized the French occupation of the left bank of Rhine.

23 Immanuel Kant, *Perpetual Peace* (first published 1795, Filiquarian Publishing 2007) 10–11.

24 For more on *Kriegsräson* see Solis (n 7).

25 Carl von Clausewitz, *On War* (first published 1832, Princeton University Press 1989) 7.

26 Ibid 90.

27 Ibid 75.

In Horton's analysis, 'clausewitzian military necessity – *Kriegsräson*[28] – will justify any militarily expedient measure, including a contravention of otherwise defined laws of armed conflict'.[29]

Thirty years following the completion of *On War*, on the other coast of the Atlantic Ocean, the United States descended into war.[30] The calamities and atrocities committed in the course of the conflict facilitated a General Order regulating the conduct of hostilities. The 1863 Lieber Code[31] promulgated by President Lincoln is one of the cornerstones of the development of the concept of military necessity. Its proponents wanted to provide soldiers with a military code of conduct in order to prevent atrocities and abuses during the conflict and humanize the conduct of hostilities as much as circumstances allowed.[32]

According to Article 14 of the Lieber Code, military necessity 'consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war'. The document admits the destruction not only of enemy combatants, but also of those whose destruction is unavoidable in the course of war.[33] Article 16 (resonating Kant to a certain extent) states that

> military necessary does not admit of cruelty – that is, the infliction of suffering for the sake of suffering or for revenge, […] and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.[34]

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28 According to Horton, 'Prussia, and then Germany, embraced an unrestrained Clausewitzian view of the doctrine, as exemplified in the maxims *"Kriegsräson geht vor Kriegsmanier"* (Kriegsräson takes precedence before the laws of war) and *"Not kennt kein Gebot"* ("Necessity knows of no legal limitation")'. Scott Horton, 'Kriegsräson or Military Necessity? The Bush Administration's Wilhelmine Attitude towards the Conduct of War' (2006) 30 Fordham International Law Journal 576, 585.

29 Ibid 580.

30 American Civil War 1861–1865.

31 Instruction for the Government of Armies of the United States in the Field promulgated as General Orders No. 100 by President Lincoln, 24 April 1863 in Yale Law School, The Avalon Project http://avalon.law.yale.edu/19th_century/lieber.asp.

32 For more on the Lieber Code see Burrus M. Carnahan, 'Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity' (1998) 92 American Journal of International Law 213–231; Michael A. Newton, 'Modern Military Necessity: The Role and Relevance of Military Lawyers' (2007) 12 Roger Williams University Law Review 877–903.

33 Article 15 of the Lieber Code.

34 According to Article 15, 'military necessity admits of all direct destruction of life or limb of 'armed' enemies, and of other persons whose destruction is incidentally 'unavoidable' in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God'.

The Lieber Code has strongly influenced the treaties that followed. One of the most important among them was the St Petersburg Declaration,[35] which was conducted with the aim of prohibiting the use of certain weapons[36] in times of armed conflicts. The Declaration states that, for the purpose of weakening the military forces of the enemy, it is sufficient to disable the greatest possible number of men and that this purpose would be exceeded by employing arms which 'uselessly aggravate the suffering of disabled men, or render their death inevitable'; as such, it would be contrary to the laws of humanity. The parties also vowed to reconcile the necessities of war with the laws of humanity, underlining the link between the two, which is considered one of the most important achievements of the Declaration.

III Military Necessity and the Body of Modern LOAC

1 Early Development

The War of Italian Unification (especially the battle of Solferino)[37] and the American Civil War had turned public attention to the tragedies of conflicts and initiatives started to lessen the suffering by codifying the (customary) laws of war. In 1874, a conference took place in Brussels with the participation of the European states and Russia in order to draft an agreement (Brussels Declaration) on this matter. Even though the Declaration was not agreed upon in the end, it served as an important precursor for the Hague Conventions adopted in 1899 and 1907, which were regarded as declaratory of the laws and customs governing armed conflicts.

The 1899 First Hague Peace Conference convened with the purpose *inter alia* of reviewing the 1874 Brussels Declaration. As a result, Hague Convention II on land warfare[38] was adopted. In its preamble, the High Contracting Parties declared that the provisions of the Convention, 'the wording of which has been inspired by the desire to diminish the evils of war so far as military necessities permit',[39] shall serve as general rules of conduct for the belligerents taking part in the hostilities. Eight years later (in the Second Hague Peace Conference) states adopted Hague Convention IV.[40] The adoption of Hague Convention IV

[35] *St Petersburg Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles* (signed and entered into force 11 December 1868).

[36] Any projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances.

[37] 24 June 1859.

[38] *Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, adopted 29 July 1899 (entered into force 4 September 1900).

[39] Preamble.

[40] *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, adopted 18 October 1907 (entered into force 26 January 1910).

took place after a thorough review of the 1899 Hague Convention II[41] and the document repeated that the wording of the provisions 'has been inspired by the desire to diminish the evils of war, as far as military requirements permit.'[42] Hague Convention II and IV are still in force[43] and Green underlines the fact that the rules embodied in these documents have been adopted and adjusted to military requirements ('in the light of military needs'); therefore 'the mere plea of military necessity, *raison de guerre* or *Kriegsräson* is not sufficient to evade compliance with the laws of war.'[44]

During World War I and World War II, the military maxim of *Kriegsräson* served as a legal justification for political and military decision makers.[45] Criminal conduct was held to be acceptable in the event of necessity, indicating that exceptional circumstances might exist in which military commanders can be allowed to resort to unlawful military conduct in order to achieve certain military advantage. *Kriegsräson* however is not a synonym for military necessity, although there were attempts to interpret it as such, and to blur the difference between the generally accepted 'mainstream' concept and the minority theory of *Kriegsräson*.

2 A Maturing Concept (the Death of *Kriegsräson*)

The judgment of the Nuremberg Military Tribunal in the *Hostage Case*[46] provides further important references to the development of the concept. In the case, the United States prosecuted German military commanders charging the defendants with 'unlawfully, wilfully and knowingly committing war crimes and crimes against humanity'. The basis of the indictment was Control Council Law No. 10 (20 December 1945) whose Article 11 defines

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41 For those countries which ratified the 1907 Hague Convention IV too, this substituted Convention II, though the 1899 document remained in force for those state parties which have not signed the 1907 Hague Convention IV.

42 Preamble.

43 Articles 22 and 23 of Convention II and IV limit the belligerents' right to adopt means of injuring the enemy and forbade certain means of injuring the enemy during the hostilities.

44 Leslie C. Green, *The Contemporary Law of Armed Conflict* (3rd edn, Juris Publishing, Manchester University Press 2008) 147.

45 The speech of Chancellor von Bethmann-Hollweg of 4 August 1914 in the Reichstag: 'Gentlemen, we are now in a state of necessity, and necessity knows no law! Our troops have occupied Luxemburg, and perhaps are already on Belgian soil. Gentlemen, that is contrary to the dictates of international law. It is true that the French Government has declared at Brussels that France is willing to respect the neutrality of Belgium as long as her opponent respects it. We knew, however, that France stood ready for the invasion. France could wait, but we could not wait. A French movement upon our flank upon the lower Rhine might have been disastrous. So we were compelled to override the just protest of the Luxemburg and Belgian Governments. The wrong – I speak openly – that we are committing we will endeavor to make good as soon as our military goal has been reached. Anybody who is threatened, as we are threatened, and is fighting for his highest possessions can have only one thought – how he is to hack his way through *(wie er sich durchhaut)!*' James Brown Scott, 'Editorial comments – Germany and the neutrality of Belgium' (1914) 8 American Journal of International Law 877, 880.

46 *Hostage Case, United States v List* (Trial Judgment) (Nuremberg Military Tribunal, Trial Chamber, Case No 7, 19 February 1948) 8 LRTWC 34 in Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Volume XI/2.

war crimes and crimes against humanity. The defendants were indicted *inter alia* for 'participating in a deliberate scheme of terrorism and intimidation […] unjustified by military necessity.'[47] The fact that the Tribunal was set up by the Allies and the applicable law had been enacted after committing the crimes (strictly speaking in breach of the *nullum crimen sine lege* principle) is still a source of debate among scholars,[48] although it is clearly stated in the judgment that the acts committed by the defendants violated 'international conventions, the Hague Regulations, 1907, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations'[49] and that Article 11 of Control Council Law No. 10 only recognised and defined already existing international law.[50]

The defendants invoked the concept of military necessity in order to justify killing and destruction; however, the judgment refused to admit necessity as a ground for defence and stated that the extent of practice exceeded 'the most elementary notions of humanity and justice'[51] and concluded that the defendants confused the notion of military necessity with 'convenience and strategical interests'. Military necessity cannot be invoked when violation of positive rules occurs[52] and accordingly, the judges found that the notion of military necessity could only be used in relation to lawful acts (as belligerents are subject to the laws of war). The judges opined the theory of *Kriegsräson* had superseded the rules embedded in international law.[53] Destruction cannot be an end in itself; there has to be some connection with defeating hostile forces. The judgment allows military forces 'to apply any amount and kind of force' but only with the least possible destruction.[54]

To complement the conclusion regarding military necessity, another concept emerged as a result of the trial, the so-called Rendulic Rule, according to which situations, circumstances and evidence have to be judged as they appeared to the defendant at the time (the question being whether the defendant could 'honestly conclude that urgent military necessity warranted the decision made'[55]).

3 The Geneva Conventions and Additional Protocol I

The horrors of World War II gave an impetus for the review and reconfirmation of the protection accorded by LOAC to persons not taking direct part in hostilities.

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47 *Hostage Case* (n 46) 1230.

48 For more on the debate see James Gow, *War and War Crimes* (Hurst and Company 2013, London).

49 *Hostage Case* (n 46) 1234.

50 *Hostage Case* (n 46) 1234.

51 *Hostage Case* (n 46) 1252.

52 *Hostage Case* (n 46) 1252-1253, 1256.

53 *Hostage Case* (n 46) 1272.

54 'Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money. […] It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of war'. *Hostage Case* (n 46) 1253.

55 *Hostage Case* (n 46) 1297.

The Geneva Conventions of 1949[56] hardly contain any reference to the principle of military necessity, because the rules regarding the conduct of hostilities were considered part of customary LOAC, and therefore the Conventions have not encompassed these (apart from a few references)[57]. Solis points out however that military necessity being 'uncodified customary law' does not make the concept less enforceable.[58] Following World War II, military lawyers and academics generally agreed that the minority *Kriegsräson* interpretation had no place in rebuilding Europe. According to Horton, 'one of the animating purposes of the 1949 reinstatement of the Geneva Conventions was to put the last nails in the coffin of the doctrine of *Kriegsräson*'.[59] The Commentary of Protocol I Additional to the Geneva Conventions (Additional Protocol I) also confirms that the concept of *Kriegsräson* is discredited and 'totally incompatible with the wording of Article 35, paragraph 1, and with the very existence of the Protocol'.[60]

There have been many conflicts in the post-World War II era (most notably the Vietnam War) which propelled new developments in international warfare. The changing conditions and political environment made it necessary to clarify and amend LOAC again. As a result, Protocol I[61] and II[62] Additional to the Geneva Conventions have been adopted in 1977, supplementing rather than replacing the Geneva Conventions.[63] Originally, the 'Hague Law' (Hague Conventions and Declarations) regulated the rules and customs regarding the conduct of hostilities and the Geneva Law (Geneva Conventions) concerned the protection of the civilian victims of warfare and combatants *hors de combat.* There have been many overlaps between Hague Law and Geneva Law throughout the development of LOAC, from the late nineteenth century on, and with the adoption of the Geneva Conventions of 1949 and the Additional Protocols in 1977, these branches have inseparably melded.[64] Additional Protocol

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56 *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, adopted 12 August 1949 (entered into force 21 October 1950); *Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, adopted 12 August 1949 (entered into force 21 October 1950); *Geneva Convention (III) relative to the Treatment of Prisoners of War*, adopted 12 August 1949 (entered into force 21 October 1950); *Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War*, adopted 12 August 1949 (entered into force 21 October 1950).

57 Geneva Convention (IV) contains references to military necessity in Articles 49, 53, 55, 108, 143, 147.

58 Solis (n 7) 278.

59 Horton (n 28) 589.

60 *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949,* 17 October 1987, para 1386.

61 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I),* adopted 8 June 1977 (entered into force 7 December 1978).

62 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II),* adopted 8 June 1977 (entered into force 7 December 1978).

63 Adam Roberts, Richard Guelff (eds), *Documents on the Laws of War* (3rd edn, Oxford University Press 2009) 419.

64 It is important to note that the provisions of the 1977 Protocol I Additional to the Geneva Conventions shall apply 'to all cases of declared war or of any other armed conflict' between parties to the Protocol and even when one of the parties to a conflict is not a party to Additional Protocol I, those parties who are will remain bound by it in their relations (Common Article 2).

I embodies rules relating to the treatment and protection of the civilian population, as well as the wounded, sick and shipwrecked, combatant and prisoner of war status, and more importantly from the military necessity point of view, it also addresses the methods and means of warfare.

The Geneva Conventions and the Additional Protocols are the most important sources of the LOAC regarding the conduct of hostilities and, although they do not include any explicit provision on the principle of military necessity as such, many direct and indirect references can be found in the texts. Among the Basic rules regarding the methods and means of warfare,[65] Additional Protocol I limits the parties to any armed conflict in arbitrarily employing any means or methods of warfare irrespective of the injury and damage they would cause.[66] This provision can be regarded as the most straightforward translation of military necessity that can be found in the Protocol.[67] The feasible precautionary measures in the choice of means and methods of attack, as well as advance warning of attacks unless circumstances do not permit are both admissions of situations where military necessity can override the main rules.[68] Considerations of military necessity can be found behind provisions dealing with the protection of the civilian population and objects too. In the first case, protection will cease at such a time as civilians take a direct part in hostilities[69] and even deadly force can be used against them. In the latter case, military objectives are limited to those objects, which make an effective contribution to military action (in case of doubt, it must be assumed that they do not).[70] In this case, the balance between military necessity and humanitarian considerations has been tipped towards the latter in order to prevent unnecessary destruction. Additional Protocol I also includes special provisions in order to protect works and installations containing dangerous forces.[71] This special protection against attacks however also cease to exist in the event of an overriding military necessity i.e. where these dams, dykes, nuclear electrical generating stations (and other military objectives located at or in the vicinity of these works and installations) are used 'in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support.'[72]

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65 Article 35 1.

66 According to Article 35 1. 'in any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.'

67 Articles 54, 62, 67 and 71 also contain references to military necessity.

68 Article 57 2–3.

69 Article 51 3.

70 Article 52 2–3.

71 Article 56.

72 Article 56 2.

4 Military Necessity in the Reading of International Court of Justice (Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons)

On the request of the General Assembly of the United Nations,[73] the International Court of Justice (ICJ) handed down in 1996 the *Nuclear Weapons* Advisory Opinion.[74] The question the ICJ had to answer was whether the threat or use of nuclear weapons was in any circumstance permitted under international law. Decided by the casting vote of the President of the Court, the Court failed to give an unambiguous answer to a clear question, stating that

> It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.[75]

With its subject being so closely linked to military necessity, the otherwise extensive document is remarkably ignorant of the notion. It refers to military necessity only in the context of environment protection[76] but it does not analyse it in connection with the threat or use of nuclear weapons.

This has been a vastly debated opinion.[77] The notion of military necessity is disregarded throughout the text[78] even though the judges refer to a situation threatening a nation as a whole (as opposed to, for example, the population of a city or a region), and the Court draws up a potential constellation of the most extreme circumstances for testing the possibility of the threat or use of nuclear weapons. Initiating and conducting hostilities in such an event

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73 Resolution A/RES/49/75 K, adopted by the General Assembly on 15 December 1994 (Request for an advisory opinion from the International Court of Justice on the legality of the threat or use of nuclear weapons.)

74 *Nuclear Weapons* (n 6).

75 *Nuclear Weapons* (n 6) para 105.

76 '30. States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality'.

77 Dinstein (n 12) 96, Solis (n 7) 289; Michael N. Schmitt, 'The International Court of Justice and the Use of Nuclear Weapons' [1998] Spring NWC Review 1–21, <https://www.hsdl.org/?view&did=444281> accessed 24 April 2017; Louis Maresca, 'Nuclear weapons: 20 years since the ICJ advisory opinion and still difficult to reconcile with international humanitarian law' 8 July 2016, <http://blogs.icrc.org/law-and-policy/2016/07/08/nuclear-weapons-20-years-icj-opinion/ accessed> 25 April 2017.

78 Judge Higgins admits that the question of military necessity remains unanswered. According to her, 'if the suffering is of the sort traditionally associated with the use of nuclear weapons [...] then only the most extreme circumstances [...] could conceivably "balance" the equation between necessity and humanity'. *Nuclear Weapons* (n 6) para 18 (Dissenting Opinion of Judge Higgins).

should have invoked the thorough assessment of the basic principles of both *jus ad bellum* and *jus in bello*.

Regarding the prerequisites of the recourse to self-defence, the Court found that 'the submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law'.[79] However, military necessity as a core principle of LOAC is fundamentally a notion of *jus in bello* and it should not be confused with the notion of necessity in self-defence (in the context of *jus ad bellum*). The lawfulness of self-defence depends on whether the measures taken were necessary and proportionate to the attack.[80] Necessity in this case refers to actions necessary to deter an attack; the threat must be imminent with no available peaceful alternatives. Unfortunately, the Court has not used the above considerations unambiguously. The Advisory Opinion does not contain any clear reference to military necessity (as understood by *jus in bello*) but points out that 'the overriding consideration of humanity'[81] lies at the very heart of the principles of LOAC (which is understood by many as the counterbalance of military necessity).

Advisory Opinions are not binding legal instruments, although they possess a persuasive power and are regarded influential statements regarding relevant legal questions.[82] The opinion is indeed unique and tentative with a surprising finding of *non liquet;* one should remember however that this opinion had been delivered in 1996, only a few years after the Cold War ended, in an era which was still characterised by exploratory talks and rapprochement, and the overwhelming political sensitivity can be one of the reasons for the Court being unable to reach an agreement.

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[79] '41. The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law. As the Court stated in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America):* there is a "specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law" (ICJ Reports 1986, 94, para. 176). This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed.'

[80] The right of self-defence has fostered the so-called Webster formula following the Caroline incident in 1837 involving the destruction of the small steamer *Caroline* by British forces, which later spiraled into a diplomatic crisis between the British and the Americans. According to the Webster formula, the necessity of self-defence is 'instant, overwhelming, leaving no choice of means, and no moment of deliberation.' British-American Diplomacy, The Caroline Case in Yale Law School, The Avalon Project <http://avalon.law.yale.edu/19th_century/br-1842d.asp> accessed 24 April 2017.

[81] *Nuclear Weapons* (n 6) para 95.

[82] 'Contrary to judgments, and except in rare cases where it is stipulated beforehand that they shall have binding effect (for example, as in the Convention on the Privileges and Immunities of the United Nations, in the Convention on the Privileges and Immunities of the specialized agencies of the United Nations, and the Headquarters Agreement between the United Nations and the United States of America), the Court's advisory opinions have no binding effect. […] Although without binding effect, the advisory opinions of the Court nevertheless carry great legal weight and moral authority. They are often an instrument of preventive diplomacy and have peace-keeping virtues. Advisory opinions also, in their way, contribute to the elucidation and development of international law and thereby to the strengthening of peaceful relations between States.' Advisory Jurisdiction ICJ website http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=2 accessed 25 April 2017.

5 Recent Progress

The Rome Statute[83] was adopted just two years following *Nuclear Weapons*. It encompasses provisions on war crimes with direct reference to military necessity; the notion is used as justification in cases of destruction and appropriation of properties and the Statute renders its infringement prosecutable.[84] Its provisions are closely related to some of the articles of Additional Protocol I on civilian objects (Chapter III).[85]

The 2005 UK Joint Service Manual of the Law of Armed Conflict (UK Joint Service Manual) points out that LOAC was composed with the concept of military necessity in mind and therefore it is not available as a defence for those accused of war crimes 'unless express allowance is made for military necessity within the provision allegedly breached'.[86] This can be said to be aligned with the above provisions of the Rome Statute.

Among the recent developments, the 2009 ICRC Guidance on the Notion of Direct Participation in Hostilities (Interpretive Guidance)[87] sparked debate among scholars and military experts[88] regarding the loss of civilian status and the constitutive elements of direct participation in hostilities. According to the Interpretive Guidance, the key objectives of LOAC are the protection of the victims of armed conflicts and the regulation of the conduct of hostilities 'based on a balance between military necessity and humanity'. The Interpretive Guidance confirms the restrictive function of military necessity regarding the use of force in direct attacks. The force permitted by LOAC shall not exceed that considered necessary to achieve a specific military purpose.[89] The decision on the kind and degree of force that can

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83 *Rome Statute of the International Criminal Court*, adopted 17 July 1998 (entered into force 1 July 2002).

84 Article 8 (2) (a) (iv): For the purpose of this Statute, 'war crimes' means: (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; Article 8 (2) (b) (xiii): For the purpose of this Statute, 'war crimes' means: (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war.

85 Article 52 (1), Article 54 (2) and (4), as well as Article 56 (1) of Additional Protocol I.

86 *The UK Joint Service Manual of the Law of Armed Conflict,* Joint Service Publication 383, 2004, Edition 16.44. <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf> accessed 6 February 2017.

87 Nils Melzer, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (2009) ICRC <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> accessed 6 February 2017.

88 Dinstein (n 12) 175, Dapo Akande, 'Clearing the Fog of War? The ICRC's Interpretive Guidance on Direct Participation in Hostilities' 4 June 2009, <https://www.ejiltalk.org/clearing-the-fog-of-war-the-icrcs-interpretive-guidance-on-direct-participation-in-hostilities/> accessed 25 April 2017; Ryan Goodman, 'The Detention of Civilians in Armed Conflict' (2009) 103 AJIL 48, 51. Michael N. Schmitt: 'Deconstructing Direct Participation in Hostilities: the Constitutive Elements' (2010) 42 International Law and Politics 697, 698; Bill Boothby, ' "And For Such Time As", the Time Dimension to Direct Participation in Hostilities' (2010) 42 International Law and Politics 741, 743.

89 '[…] the principles of military necessity and of humanity reduce the sum total of permissible military action from that which international humanitarian law does not expressly prohibit to that which is actually necessary

be regarded as necessary in an attack involves a complex assessment based on a wide variety of operational and contextual circumstances. Although the above findings are sound, others are strongly questionable. Instead of 'classic large-scale confrontations' the Interpretive Guidance ties the restraining function to forces operating 'against selected individuals in situations comparable to peacetime policing'.[90] Even more remarkable and counterintuitive to a realistic assessment of the conduct of warfare is the recommendation to refrain from killing enemy combatants or giving them 'an opportunity to surrender where there manifestly is no necessity for the use of lethal force'.[91] There is no supporting evidence in the conduct of hostilities that the majority of states would regard it as a customary rule of LOAC.

It is this author's belief that even though understanding the general principle behind such a recommendation, one can never lose sight of the fact that violence, destruction and killing are inherent characteristics of warfare. Naive restrictions would not only impose unrealistic expectations on combatants but they would also make it almost impossible for LOAC to fulfil its purpose of effectively limiting the adverse effects of armed conflicts. Furthermore, the preliminary analysis of military necessity is indispensable prior to an attack, but overregulation of conduct with regard to individual combatants would without doubt make it impossible to monitor and control adherence and would eventually lead to possible breaches.

Disputing the approach recommended by the 2009 Interpretive Guidance does not mean that humanitarian considerations should be overshadowed. Military necessity and humanitarian considerations are not distinct concepts, but the manifestation of balancing viewpoints: those participating in armed conflict would like to gain the best possible military advantage with the least casualties, injuries and damages suffered. Therefore, an acceptable common ground is necessary in order to ensure the effectiveness of both approaches.

Compared to the ICRC approach, the wording of the 2015 US DoD Manual offers a more balanced perspective, carrying the possibility of resorting to non-lethal means without overregulating the required military conduct when it states that 'military necessity may justify not only violence and destruction, but also alternative means of subduing the enemy. For example, military necessity may justify the capture of enemy persons, or non-forcible measures such as propaganda and intelligence-gathering'.[92] In line with the 2009 Interpretive Guidance, Reeves and Thurnher[93] note through illustrative examples[94] that legal and public

for the accomplishment of a legitimate military purpose in the prevailing circumstances'. Interpretive Guidance (n 87) 79.

90 Ibid 80.

91 Ibid 82.

92 US DoD Manual (n 9) 53.

93 Shane R. Reeves, Jeffrey S. Thurnher, 'Are We Reaching A Tipping Point? How Contemporary Challenges Are Affecting the Military Necessity – Humanity Balance' (2013) Harvard Law School National Security Journal <http://harvardnsj.org/wp-content/uploads/2013/06/HNSJ-Necessity-Humanity-Balance_PDF-format1.pdf> accessed 6 February 2017.

94 (1) Attempt to capture enemy combatants before employing deadly force, (2) autonomous weapons systems to be pre-emptively banned, (3) using lethal kinetic response in the cyber context.

discourse points towards a 'potential tipping point that could upend the historical framework by disproportionately favouring humanitarian consideration.'[95]

IV Definition and Application of Military Necessity

1 The Definition and Elements of Military Necessity

There are many existing definitions of military necessity crafted by academics[96] or found in available military manuals.[97] Among the manuals, one of the most detailed and comprehensive concepts can be found in the UK Joint Service Manual, according to which

> military necessity permits a state […] engaged in an armed conflict to use only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.[98]

As follows from the definition, the circumstances and limits of a certain military situation and considerations of LOAC shall be taken into account when planning military engagement. The notion reconfirms that military necessity cannot provide a defence for unlawful actions ('not otherwise prohibited').

The UK Joint Service Manual also establishes the basic elements of military necessity,[99] which can be split up into four cumulatively applicable features:

(1) use of controlled force,

(2) necessity cannot excuse a departure from the law of armed conflict,[100]

(3) use of force not otherwise prohibited is legitimate if it is also necessary to achieve, as quickly as possible, the complete or partial submission of the enemy, and

(4) the use of force which is not necessary is unlawful. [101]

Based on these elements, military necessity shall be assessed on a case-by-case basis,

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95 Ibid 3.

96 Solis (n 7) 278; Dinstein (n 12) 8.

97 For examples see the US DoD Manual (n 9) 52; Canadian Forces Joint Publication CFJP 01 Canadian Military Doctrine (April 2009) <http://publications.gc.ca/collections/collection_2010/forces/D2-252-2009-eng.pdf> 2–15; Manuel du droit des conflits armés Édition 2012 Ministère de la Défense <http://www.cicde.defense.gouv.fr/IMG/pdf/20130226_np_cicde_manuel-dca.pdf> 10.

98 UK Joint Service Manual (n 86) para 2.2.

99 UK Joint Service Manual (n 86) para 2.2.1.

100 'Not otherwise prohibited by the law of armed conflict'.

101 Hayashi split up the requirements of exceptional military necessity into the following four elements:
1) the measure was taken primarily for some specific military purpose;
2) the measure was required for the attainment of the military purpose;
3) the military purpose for which the measure was taken was in conformity with international humanitarian law; and

taking into account and balancing between the achievable military advantage and the anticipated destruction it may involve.

2 The Notion of Military Advantage

Force shall be used to achieve the intended military objectives and generally, the defeat of the enemy forces, but the degree and duration cannot overreach what is necessary, taking into account that enemy forces do differ in terms of their preparedness, size, available arms, etc., which will require parties to adjust their efforts to the circumstances.

It is normally suggested to interpret military necessity in the circumstances prevailing at the time. This however cannot entail a narrow reading (as suggested by the 2009 ICRC Interpretive Guidance) according to which the aim is to injure and capture the enemy combatants rather than making them targets of the attacks (with the possibility of killing them) and today no provisions exist in the body of LOAC to suggest otherwise.[102] Rather, military commanders shall make their decisions in good faith and based on all available information. Military necessity analysis shall be carried out on a case-by-case basis and it shall cover, *inter alia,* the nature of the target and the reason for targeting it, the possible estimation of collateral damage (civilians and civilian objects) and the means and methods intended to be used. Any analysis has to be extended to include the assessment of other possible targets and weapons, which may be more feasible bearing in mind the obligation to mitigate casualties and destruction.

In a wider context, the proportionality of the planned actions shall (also) be considered before permitting and beginning the operations.[103] The principle of proportionality require military commanders to ensure that the injury, damage and losses resulting from a military action are not excessive compared to the expected direct military advantage.[104] Military advantage therefore has a strong connection to military necessity, as it has to ensue directly from the military conduct (adhering to the principle of military necessity).

According to the 2013 US Joint Targeting document (US Joint Targeting),[105] military advantage 'refers to the advantage anticipated from an attack when considered as a whole, and

4) the measure itself was otherwise in conformity with international humanitarian law.
Nobuo Hayashi, 'Requirements of Military Necessity in International Humanitarian Law and International Criminal Law' (2010) 28 Boston University International Law Journal 39, 62.

102 For more see the 2009 ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities (n 87).

103 According to Mayorga, '… military necessity permits belligerents to use lethal force and attack lawful targets, including members of armed groups, so long the principles of distinction, proportionality, and precaution are observed'. Ofilio Mayorga, 'Arbitrating War: Military Necessity as a Defense to the Breach of Investment Treaty Obligations' (2013) Policy Brief, Program on Humanitarian Policy and Conflict Research, Harvard University, 4. <http://www.hpcrresearch.org/sites/default/files/publications/081213%20ARBITRATING%20WAR%20(final).pdf> accessed 6 February 2017.

104 Article 51. 5 (b) of Additional Protocol I.

105 Joint Targeting, Joint Publication 3-60 (31 January 2013) A-4 <http://www.bits.de/NRANEU/others/jp-doctrine/jp3-60(13).pdf> accessed 6 February 2017.

not only from its isolated or particular parts'. The United States' interpretation of the 'definite military advantage' seems much wider than what can be derived from the wording of Additional Protocol I. As stated by the US Joint Targeting,[106] military commanders may meet the criterion of definite military advantage in the event of seizing or destroying 'objects with a common purpose in order to deny their use to the enemy'.[107] Additional Protocol I on the other hand is more restrictive, limiting the possible objects of attacks to those which (based on a specific attribute) further military action. [108]

The definite military advantage has been translated into the language of the Rome Statue (and its Elements of Crimes) in a slightly different manner: when assessing proportionality, the incidental loss of life, injury or damage has to be measured against the 'concrete and direct overall military advantage anticipated'.[109] According to the Elements of Crimes, 'concrete and direct overall military advantage' indicates a military advantage that is foreseeable by the perpetrator at the time of the attack.[110]

3 Military Necessity and Legality

Military necessity and legality are inherently linked. As already said, military necessity cannot be invoked to justify departure from LOAC. This is reflected in the judgment of the Nuremberg Military Tribunal in the *Hostage Case* and found in Downey's definition from the early fifties, according to which military necessity is

> an urgent need, admitting of no delay, for the taking by a commander of measures, which are indispensable for forcing as quickly as possible the complete surrender of the enemy by means of regulated violence, and which are not forbidden by the laws and customs of war.[111]

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106 Ibid A-3.

107 For more on targeting see Marco Roscini, 'Targeting and Contemporary Aerial Bombardment' (2005) 54 International and Comparative Law Quarterly 411–444.

108 According to Article 52 2. of Additional Protocol I, 'attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.'

109 Article 8 (2) (b) iv.

110 The Elements of Crimes goes on by stating that 'such advantage may or may not be temporally or geographically related to the object of the attack. The fact that this crime admits the possibility of lawful incidental injury and collateral damage does not in any way justify any violation of the law applicable in armed conflict. It does not address justifications for war or other rules related to jus ad bellum. It reflects the proportionality requirement inherent in determining the legality of any military activity undertaken in the context of an armed conflict'. *Elements of Crimes,* International Criminal Court (ICC), 2011, 19.

111 William G Downey, 'The Law of War and Military Necessity' (1953) 47 American Journal of International Law 251, 254.

His definition bears a strong resemblance to the one found in the Lieber Code[112] in the sense that both refer to indispensable measures, which is missing from the definition of the UK Joint Service Manual. The UK Joint Service Manual and the US DoD Manual both confirm the legality criterion, stating that 'armed conflict must be carried on within the limits of international law, including the restraints inherent in the concept of necessity'[113] and 'military necessity does not justify actions that are prohibited by the law of war'.[114]

What is also common is that all these definitions indicate humanitarian considerations, whether directly or indirectly. (In the UK Joint Service Manual, it is the reference to the minimum expenditure of life or the requirement of achieving the objective as soon as possible.) These criteria limit the way military necessity works and compel military commanders to balance military necessity with humanitarian considerations.

Military objectives and actions not justified by military necessity are not accepted by LOAC. The concept acknowledges however the actuality of circumstances which can tolerate certain amount of flexibility if there are admissible military reasons. LOAC cannot fulfil its purpose if it does not correspond to the realities of the front line and if it cannot ensure that situations and scenarios not foreseen at the time of adopting its relevant documents can still be covered by the rules and principles contained in them. Regarding the application of the principle, the US DoD Manual highlights the importance of the following:

> (1) permitting consideration of the broader imperatives of winning the war as quickly and efficiently as possible; (2) recognizing that certain types of actions are, as a general matter, inherently militarily necessary; and (3) recognizing that persons must assess the military necessity of an action in good faith based on the information available to them at the relevant time and that they cannot be judged based on information that subsequently comes to light.[115]

The last requirement can be regarded as one of the modern translations of the Rendulic Rule.

V Balancing Military Necessity and Humanitarian Considerations

1 The Complementarity of Requirements

In the course of warfare, all parties have a vested interest in suffering the fewest deaths and injuries and least damage when being exposed to the adverse effects of hostilities. This demanded from the beginning the existence of uniform norms equally applicable to every

[112] According to Article 14, military necessity 'consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.'

[113] UK Joint Service Manual (n 86) para 2.3.

[114] US DoD Manual (n 9) 53.

[115] US DoD Manual (n 9) 56.

party's conduct *(jus in bello).* To this end, the protection of the victims of armed conflict and the effective regulation of the conduct of hostilities as the most important objectives of LOAC shall be based on a delicate balance between military and humanitarian considerations. Humanitarian considerations and the principle of humanity are often used interchangeably, but both imply respect for human life, physical security, dignity and human rights, as well as compassion; although no universal definition exists (the meaning of '(not) humane' is far from being clear).[116]

Military necessity and humanitarian considerations are not competing, distinct rules; they complement and strengthen each other.[117] Together with the principle of distinction and the prohibition of unnecessary suffering they are considered to be elements of the principle of proportionality. As principles, they support the interpretation of positive rules and serve as guidance when no specific rule exists to regulate certain circumstances. They form an essential and autonomous part of LOAC in their own right and shall always be observed concurrently.

A notable manifestation of the principle of humanity can be found in the already mentioned 1996 *Nuclear Weapons* Advisory Opinion. According to para 25, 'the protection of the International Covenant on Civil and Political Rights[118] does not cease in times of war' (except in times of national emergency when certain provisions may be derogated from).[119] Considering whether a particular loss of life is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant can only be decided by reference to the Law of Armed Conflict (as *lex specialis*) and not deduced from the terms of the Covenant. The jurisdiction clause[120] of the Covenant states that parties 'undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction' the rights recognised in the Covenant.

The UK Joint Service Manual also includes humanitarian considerations when stating that 'humanity forbids the infliction of suffering, injury, or destruction not actually necessary for the accomplishment of legitimate military purposes'[121] and the 2015 US DoD Manual's definition of humanity is very similar: 'the principle that forbids the infliction of suffering, injury, or destruction unnecessary to accomplish a legitimate military purpose.'[122]

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116 For more on the principle of humanity see Michael N. Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (2010) 50 Virginia Journal of International Law 795–839; Nils Melzer, 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' (2010) 42 International Law and Politics 831–916; Larry May, 'Humanity, Necessity, and the Rights of Soldiers' <https://www.law.upenn.edu/live/files/3026-larry-mayhumanity-necessity-and-the-rights-of> accessed 6 February 2017.

117 'The principles of necessity and humanity are complementary, seeking to adjust the means essential to realise the purpose of the conflict with the minimisation of human suffering and physical destruction.' Green (n 10) 151.

118 *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

119 Article 4.

120 Article 2 1.

121 UK Joint Service Manual (n 86) para 2.4.

122 US DoD Manual (n 9) 58.

We can conclude that military necessity is a concept inherently saturated with humanitarian concerns. Combatants are simultaneously trained military professionals and moral beings, who cannot and must not put aside respect for human life (and human rights) in the conduct on hostilities although some experts question their applicability in armed conflicts.[123] The question arises of what happens if the balance is compromised by disproportionately favouring any of these 'meta-principles'.[124]

Military necessity seems to have been used for justifying obtrusive deviations from the application of the rules of LOAC. Giving space to the superseded concept of *Kriegsräson* (where military necessity overrides humanitarian considerations) could ultimately lead to lawless societies, where adversaries would eventually stray from observing positive law upon experiencing that opponents are invoking the notion of military necessity justifying unlawful acts which would clearly threaten not only the observance of positive law but the generally rule of law, too.

Conflicts and violence are inherent to human nature and stem from the most basic instinct of survival. It was recognised long ago however that unconstrained aggression may be a double edged sword. It may allow a party to reach its (military) objectives, but it might also drive the adversary to resort to a degree of force it would not use otherwise to overpower the enemy forces. The ultimate goal of LOAC is to protect adversaries and victims participating in or exposed to armed conflicts and it performs this function by regulating and limiting the means and methods to be employed. It is undeniable that, by curbing the possible ways of military engagement as a result of the development of LOAC, warfare became more civilized than before although it is important to understand that warfare has never been and will never be humane as it goes against the very nature of armed conflict. One can only infer more humane means and methods than others.

2 The Importance of Finding the Right Balance

Military necessity and humanitarian considerations function as each other's checks and balances.[125] Complete realisation of either of these perspectives would wipe out the application of the other. As opposed to wanton destruction, applying human rights in their entirety would manifest a paradox of armed conflict without violence.

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123 According to Luban, military lawyers 'see little conceptual or historical connection between human rights law and LOAC'. Luban (n 8) 328.

124 For more on the balance between the principles see Shane R. Reeves, David Lai, 'A Broad Overview of the Law of Armed Conflict in the Age of Terror' in Lynne Zusman (ed), *The Fundamentals of Counterterrorism Law* (ABA Book Publishing 2014).

125 '[…] military necessity exists in equipoise with the principle of humanity, which seeks to limit the suffering and destruction incident to warfare. This symbiotic relationship determines in which direction, and at what speed, International Humanitarian Law evolves'. Michael N. Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (2010) 50 Virginia Journal of International Law 795, 796.

The Martens Clause of Additional Protocol I demonstrates both the significance attributed to the principle of humanity and the elusive nature of the concept.[126] Even though the Martens Clause underlines the requirement that parties to an armed conflict shall not fight without certain limitations imposed on them, Additional Protocol I does not clarify the notions of 'principles of humanity' and 'dictates of public conscience' which therefore can be subject to endless arguments. According to Cassese, 'the clause essentially served as a diplomatic ploy'[127] and was 'part of a diplomatic manoeuvring to overcome political difficulties'.[128]

The ambitious but undefined concepts of humanity and public consciousness cannot prevent the prevalence of the idea that acts not expressly prohibited are actually permissible[129] which goes against the core idea of humanity and implies an unjustifiably wide interpretation. Although these notions were considered in many decisions, it is very unlikely that any court would choose to base its decision solely on these elusive arguments.[130]

When assessing the required balance between military necessity and humanity, a holistic approach shall be applied.[131] Humanity shall be regarded as *lex generalis,* a notion to be respected both in times of peace and warfare. However, in times of IAC, a wider room for consideration should be ensured for military commanders, implying that military objectives shall allow acts which might not be or are not tolerated by (human rights) law in peace time.[132] To provide the greatest achievable protection, those human rights treaty provisions that are not addressed by LOAC will continue to rule during hostilities.

The minimum standards set by humanitarian considerations cannot be relieved by exhaustive positive law[133] since law cannot fully cover all aspects of warfare. As Piancastelli puts it, 'insisting on the ideal of a rule of law to limit discretion and to tame the exception is

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126 The general provisions of Additional Protocol I lay down the principles and the scope of application. The contemporary definition of the Martens clause [Article 1 (2) of Additional Protocol I] extends the protection provided by the Protocol and any other international agreement when it concludes that 'in cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience'.

127 Antonio Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?' (2000) 11 European Journal of International Law 187, 198.

128 Ibid 216.

129 Schmitt (n 116) 800.

130 It has to be noted though that the ICJ referred to the Martens Clause as 'an effective means of addressing the rapid evolution of military technology'. *Nuclear Weapons* (n 6) para 78.

131 For more on the balance between military necessity and humanity see Shane R. Reeves and Robert E. Barnsby, 'The New Griffin of War: Hybrid International Armed Conflicts' (2013) 34 Harvard International Review 16–18.

132 Dinstein also underlines that LOAC norms as *lex specialis* will prevail over the *lex generalis* of human rights in times of armed conflict. Dinstein (n 12) 32.

133 According to Piancastelli, 'if law cannot regulate life without exception, it cannot restrain warfare without concurrently enabling it'. Luis Paolo Bogliolo Piancastelli de Siqueira, 'Rethinking Military Necessity in the Law of Armed Conflict' (2012) 19. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2201129&download=yes> accessed 6 February 2017.

inadequate, as it does not satisfactorily capture the way the exception works within the international legal regime'.[134]

Although the majority of the roles law-makers and military personnel play are linked to regulating and applying military necessity and humanity, Schmitt also underlines the role of international tribunals (ICTY) and NGOs (e.g. Amnesty International, Human Rights Watch, Goldstone Report) in influencing the balance between necessity and humanity.[135]

VI Future Challenges

LOAC has to be functional but also humane enough to fulfil its declared purposes. Only an operational concept of military necessity can ensure the legality of military conduct and decision-making. Recent state practice shows that even when a state is generally following the Geneva Conventions, precedents of unlawful conduct still exist. In a world of insecurity and unpredictability propelled by rapid political and technological changes, law represents the desired safety, stability, and predictability. Nevertheless, in times of crisis and political pressure, human rights and basic values may tremble.

There is a growing trend of disregard towards and misinterpretation of LOAC, which can undermine its authority and credibility in the long run. It is crucial to recognize and acknowledge the role of law in creating values. When the law can no longer perform this function (effectively), its review is necessary, because regulations, mechanisms and institutions must always correspond to the actualities, bearing in mind the possible circumstances that have not yet occurred.

Historically, LOAC has been hardwired to cover the conduct of states in the course of conventional warfare. The changing nature of the conduct of hostilities and the new challenges posed by the advent of asymmetric warfare and new weapon systems that are being developed, *inter alia,* require LOAC to adjust and evolve. Asymmetric warfare surfaced as a new type of conflict based on armed forces (of states and non-state actors) with significant difference in their size, military equipment, preparedness and capabilities. It is becoming increasingly rare to come across 'pure' conventional warfare between state parties; states (both policy makers and military personnel) therefore need to be prepared for the new challenges posed by the new methods of warfare. Terrorists often claim *extra legem* legitimacy in order to justify their obviously illegal violence and gain advantage from the fact that states respect and adhere to the obligations derived from LOAC, although the number of recent counter-examples is steadily growing. According to Van Bergen and Gittings, 'the [Bush] Administration always insists that it is following Geneva, except to the extent that "military

134 Ibid 18.
135 Schmitt (n 116).

necessity" requires otherwise'.[136] It seems that although the notion of *Kriegsräson* had been transcended for some time now, some state actors still believe that the crimes committed by terrorists may in certain cases justify reactions not in line with the requirements of LOAC.[137] Developing more effective weapons has always been an integral part of warfare. The research and progress in using drones, autonomous weapons systems, cyber abilities or nano-technology has exponentially accelerated in the past decade, further deepening the gap between the law adopted and the recent developments.

The ultimate purpose of LOAC is to limit the adverse effects of armed conflicts but it cannot deliver when new developments and phenomena are ignored. Military necessity is essential as a restricting factor in the conduct of hostilities, in resorting to certain means and methods of warfare. LOAC has to ensure the operability of its rules and principles by guiding the changes in a safe(r) direction by the thorough review and possible amendment of the existing framework in order to be able to regulate the realities rather than just trying to catch up with history.

136 Jennifer Van Bergen, Charles B. Gittings Jr, 'Bush War: Military Necessity or War Crimes?' (2003) <http://www3.alternet.org/story/16396/bush_war%3A_military_necessity_or_war_crimes> accessed 6 February 2017.

137 Reeves, Lai (n 124) 141.

Notes

Jaap W. de Zwaan*

The Future of the European Union Cooperation**

EU Cooperation as a Process, the Relevance of the Rule of Law and Suggestions for the Future

I Introduction

The reason for my attendance here today is connected to the fact that President János Áder has awarded me a Hungarian decoration, the 'Knight's Cross of the Hungarian Order of Merit'.

His Excellency the Minister of Justice, László Trócsányi, was the one who proposed me for the decoration 'in recognition of my work in the field of European Union law and international relations'. I really am proud and honoured by that initiative.

In order to introduce myself: I am a lawyer, I studied law at Leyden University. Thereafter I was granted an LLM degree at the College of Europe, the prestigious institute for European Studies in Bruges, Belgium. I received my doctor's degree from Groningen University.

I started my professional career as a member of the Bar of The Hague. After a period of six years I entered the Netherlands Foreign Office. I worked for a period of more than 18 years in the EU domain, in The Hague as well as in Brussels: with the Policy Department of European Integration, the Department of the Legal Advisor and the Netherlands' Permanent Representation in Brussels. In fact I served twice at the Department of the Legal Advisor in The Hague. I was also posted twice at our Permanent Representation in Brussels as legal advisor, respectively as legal adviser and coordinator for justice and home affairs.

After my period in the diplomatic service, in 1998 I was appointed full time Professor of the Law of the European Union at the Law School of the Erasmus University Rotterdam. During my stay at the university I served the faculty also as International Dean and as Dean.

Furthermore I was Director of the Netherlands Institute of International Relations 'Clingendael', in The Hague, for nearly six years.

* Prof. Dr. Jaap W. de Zwaan, em. Professor of the Law of the European Union, Erasmus University Rotterdam and former Professor of European Integration, The Hague University of Applied Sciences, The Netherlands; e-mail: dezwaan@law.eur.nl.

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Finally, after being retired as European Law Professor in Rotterdam, I have been active as Professor of European Integration at an institute of higher education in The Hague, the The Hague University of Applied Sciences.

I have become Interested in what was then called 'Eastern Europe' very early, in fact when I was a student at Leyden University. At that time in Europe, we experienced the impact of the Cold War and the division of Europe between 'East' and 'West', as a consequence of the Iron Curtain put in place at the end of the Second World War. I really was excited when that curtain was lifted and the division of Europe was over, after the fall of the Berlin Wall on 9 November 1989.

By the way, Eötvös Loránd University (ELTE) is a university which I know rather well. During my service at Erasmus University Rotterdam I introduced – at the time in my capacity of International Dean – the Law School of ELTE into our Rotterdam Law Network (RLN), a university network for the exchange of students and lecturers and for the development of common projects. In fact, the last time I visited your University and Law School was in April 2015, when the coordination meeting of our network, chaired by me, took place here in this very room!

Finally, as we all know Hungary has been a Member State of the European Union (EU) since May 2004. Your membership followed a period of negotiations on how to connect Hungary to the European Union and its policies. The accession was the direct result of a decision taken by yourselves; it was the choice of the Hungarian people. A referendum on joining the European Union was held in Hungary on 12 April 2003. The proposal was approved by 83.8% of voters, with a voter turnout of 45.6%.

All 'old' Member States welcomed your accession wholeheartedly at the time.

II European Union Cooperation

1 Objectives

The main objective of EU cooperation has been the establishment of the internal market, mentioned in Article 26(2) of the Treaty on the Functioning of the EU and representing an economic area without internal frontiers, covering free movement of goods, persons, services and capital, and characterised by equal chances for competition.

Over the years we also have developed related domains of policy, such as environment, research, social and regional policy.[1]

Since the Treaty of Maastricht, entered into force in November 1993, Justice and Home Affairs (covering matters of substance such as asylum and immigration, as well as criminal law

[1] See for the complete list of EU policies: Part Three of the *Treaty on the Functioning of the European Union* (TFEU): OJ C 326, 26.10.2012, 47–199.

and police cooperation)[2] and the Common Foreign and Security Policy[3] became new domains of cooperation. At the same time, the EMU, the Economic and Monetary Union, was also added to the list of EU policies.[4] Having said that, while the EMU may be considered a Monetary Union, it is not a properly speaking Economic Union, because of the lack of coordination of our national economic policies until now.

I realise that these new domains of cooperation all concern highly politically sensitive matters, touching as-it-were upon the roots of national societies. However, not all these areas belong to the exclusive domain of the European Union and its institutions. Member States keep being involved in the development of the new policies, in their capacity of members of the Council. Furthermore, Member States still hold their own responsibilities in the respective areas.

Having said that, is there an alternative in our world of today to dealing with such 'global' issues together, so commonly? To put it differently: should we prefer to keep full sovereignty in these areas, so to deal with them purely in the national domain? What would be the consequence? A country in splendid isolation, I am afraid. In my mind that is not an ideal scenario.

So, basically the Union is focusing on areas having a cross boundary character, therefore issues which individual states are no longer able to handle effectively on their own. Changes and amendments to the existing infrastructure are to be decided by the Member States collectively. This is because it is the Member States who are – as the Germans say – *'die Herren der Verträge'*.[5]

2 Achievements

Looking back to the start of our European cooperation – my country, the Netherlands, was one of the founding fathers – and, taking into account the achievements during the period of your EU membership, we can only conclude that great results have been achieved.

We have secured peace and stability in our part of the continent, of course also thanks to the efforts made by NATO and the context of the end of the Cold War. We also have secured more prosperity.

In the context of your accession, you were able to profit from financial support, transferred by the European Union, to help your country to overcome the situation of backwardness in a variety of economic sectors. In that respect your country has made good progress over the years. That said, it may be that we have not been able to overcome all differences between old and new Member States, for example with regard to economic development, investments, employment and salaries. In that respect, work nevertheless remains to be done.

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2 Part Three, Title V, TFEU.

3 Title V of the Treaty on European Union (TEU: OJ C 326, 26.10.2012, 13-45) as well as Article 205 TFEU.

4 Part Three, Title VIII, TFEU.

5 See for the treaty amendment procedure: Article 48 TEU.

III European Union and the Rule of Law

Over the last years, discussions have started, initiated *inter alia* by the European Commission in Brussels, about the respect in your country of fundamental principles which we all share.

Furthermore, your country has shown reluctance as to the way the EU exercises its competences and responsibilities in certain policy areas.

1 Fundamental Values and Principles

The discussions about the respect of fundamental principles concern – or did concern – sectors such as:

– the Media (the establishment of a Media Council);
– the Judiciary (the discussions were about an age limit for judges and the composition of the Constitutional Court);
– Education (the Higher Education law);[6]
– the functioning of NGOs (the Act on foreign funded non-governmental organisations).[7]

Basically, these discussions concern institutions and organs playing an essential role in our today's societies and, broadly speaking, the public domain. The discussions touch upon the independence of these institutions and organs and, for that reason, are of major interest for the functioning of the rule of law.

Of course, partners – in this case, Member States of the EU – can disagree about the significance and interpretation of individual human rights and fundamental freedoms. To that extent, fortunately, in all cases mentioned, dialogues have started to overcome the differences of opinion.[8] A number of issues have already been settled.

Be that as it may, the European Union is – as are its individual Member States – a so-called 'community of law'. The Union issues decisions which are not only binding for the Member States themselves, but also for companies and, in certain circumstances, for the citizens. That principle has been confirmed over and over in the doctrine of the Court of Justice in Luxembourg.[9]

Therefore, in order to maintain a stable society, a number of minimum conditions have to be met. These minimum conditions, in fact corresponding with the minimum require-

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[6] See for some recent developments: http://europa.eu/rapid/press-release_MEMO-17-3494_en.htm.

[7] See for some recent developments: http://europa.eu/rapid/press-release_IP-17-3663_en.htm.

[8] See for the approach proposed by the European Commission for such discussions: Communication 'A new EU framework to strengthen the Rule of Law, COM(2014)158 final of 11 March 2014, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0158&from=EN.

[9] Long before the principle of the rule of law was explicitly referred to in the EU Treaties (see for the last version: Article 2 TEU), the Court of Justice in its judgment of 1986 'Les Verts' had emphasized that the EU is 'based on the rule of law inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic Constitutional Charter, the Treaty': Case 294/83, *'Les Verts' versus European Parliament,* [1986] ECR 01339, para 23. See also Thomas von Danwitz, 'The Rule of Law in the Recent Jurisprudence of the ECJ' (2014) 37 (5) Fordham International Law Journal 1311–1346.

ments for membership of the EU, are embedded in Article 2 of the Treaty on European Union, which states 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'. It is added 'These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'.

In a way, nothing particular. Essentially such principles appear in the texts of all our constitutions, yours as well as the one of my country.

In the EU context furthermore, the procedure of Article 7 of the Treaty on European Union has been established to control the respect of those minimum requirements by the Member States.

Moreover, the Charter of Fundamental Rights of the European Union[10] embodies a series of fundamental freedoms and principles, the origins of which are to be found respectively in the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Social Charter, and European Union law as interpreted by the Court of Justice.

Understand me correctly; we have to survey the respect of our fundamental common values and principles everywhere in the Union, in all the Member States. So in this country, but also for example in my own country, the Netherlands.

And, I repeat, the fact that there do exist differences of opinion about the interpretation of the norms and values mentioned should not be considered as abnormal. Each individual Member State has its own history, culture and political background. The Union has to respect the national identities of all Member States.[11] Moreover, according to a well-known slogan we are in Europe 'united in diversity'.[12] In the end it is up to the 'highest' judge, whether it is the Court in Luxembourg or the one in Strasbourg, to provide a uniform interpretation.

Therefore, for the moment, it is best to have such differences of opinion discussed in the framework of the EU institutions in Brussels, in order to find satisfactory common solutions.

2 Exercise by the EU of its Competences

Furthermore, as I said earlier, your country from time to time manifests a reserved attitude with regard to the way the European Union exercises its competences.

In the Spring of this year, for example, a *'Stop Brussels' campaign* took place, in the context of which a series of questions about six specific issues were submitted to the citizens. All six issues were directly connected to a presumed behaviour of the EU in the policy domains

10 OJ C 326, 26.10.2012, 391–407.

11 Article 4(2) TEU.

12 See for example the reference to that motto of the Union in Article I-8 of the Treaty establishing a Constitution for Europe, signed on 29 October 2004 and published in OJ C 310, 16.12.2004, which treaty, though, never entered into force.

concerned. Because of the suggested linkages, the European Commission took a position. In its reaction, the Commission considered most of the questions 'factually incorrect' or even 'misleading'.[13] Now, apparently a second consultation has started recently, or will start soon, about a so-called *Soros Migration Plan,* in which context reference is made – again, and at first sight wrongly – to an assumed close cooperation with the EU institutions.[14]

More importantly, all this sounds as if 'Brussels' and its institutions represent a framework of governance, completely separate from the capitals. That is not so. The European Union is an organisation, a mechanism, to implement the objectives and ideas discussed between and decided upon by the Member States themselves. The institutions, the Commission being one of them, assist in that process, each of them exercising its own role and responsibilities. Brussels is therefore 'us' and not 'they' or 'them'.

Your country also takes opposite positions – compared to many other Member States – especially in the area of *asylum and migration.*

For example your country has refused to implement a *Council decision of 22 September 2015* regarding the relocation of migrants coming from Africa, the Middle East and Asia, the majority of them looking for asylum in Europe.[15] That decision was adopted when the migration crisis was at its height.

Now, indeed, the relocation of migrants concerns a new and extremely complex problem for the EU, of a very specific nature also, not to be compared with technical harmonisation measures regarding the completion of the internal market.

Nonetheless, it is a subject matter essentially related to the working of the principle of free movement of persons, one of the fundamental freedoms of the internal market. In fact, asylum and immigration reflect the external dimension of free movement of persons, in the same way as exports of goods to and imports of goods from third counties reflect the external dimension of free movement of goods. The last mentioned 'trade' movements have given rise to the establishment of our common commercial policy.

In essence, the decision of the Council of 22 September 2015 intended to overcome a serious but common problem, in a period where the situation on the ground was extremely urgent. In a way, solidarity was at stake.

Now, your country, together with the Slovak Republic, appealed against that Council decision. You were fully entitled to do that, because, as we discussed earlier, we live in a society governed by the rule of law. Nonetheless, in its judgment of 6 September 2017, the Court of Justice dismissed your appeal and the grounds contained therein.[16]

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[13] https://ec.europa.eu/commission/publications/stop-brussels-european-commission-responds-hungarian-national-consultation_en.

[14] http://abouthungary.hu/news-in-brief/national-consultation-on-the-soros-plan/.

[15] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ 2015 L 248, 80.

[16] Judgment in Joined Cases C-643/15 and C-647/15, *Slovakia and Hungary versus Council,* ECLI:EU:C:2017:631.

The Court had to interpret Article 78, third paragraph, of the Treaty on the functioning of the European Union, the text of which states the following:

> In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

In its judgment of 6 September 2017 the Court ruled that:

> Article 78(3) TFEU enables the EU institutions to adopt all the provisional measures necessary to respond effectively and swiftly to an emergency situation characterised by a sudden inflow of displaced persons. Those measures may also derogate from legislative acts, provided, in particular, that their material and temporal scope is circumscribed and that they have neither the object nor the effect of replacing or permanently amending legislative acts.

The Court came to the conclusion that those conditions were met in the present case.

It seems to me that that outcome is a correct and reasonable one. Having said that, the judgment also shows that the Court basically gave a policy decision, including criteria to be fulfilled, rather than a detailed analysis of the characteristics of the 'provisional measures' that Article 78(3) allows the Council to adopt. The Court in fact promotes the principle that EU polices, in order to be successful, must be 'effective'.

IV Global Threats and Challenges

Now, let's take a look in the future, our common future.

In the course of time we have experienced a multitude of global problems and obstacles; external ones and internal ones.[17]

(From a Dutch perspective) the main external challenges are related to:

– The tensions between Russia and Ukraine;
– The unrest and conflicts at all our other external borders, whether it is in the Middle East or in Central and Northern Africa;
– Migration, the influx in Europe of migrants – coming from Africa, the Middle East and Asia – looking for protection in our safe European environment; and
– Threats of terrorism.

[17] See for this discussion also: Jaap W. de Zwaan, *Stability and Differentiation in the European Union, Search for a Balance* (Eleven International Publishing 2017, The Hague) and Jaap W. de Zwaan, Flexibility, Differentiation and Simplification in the European Union: Remedies for the Future? in Jaap de Zwaan, Martijn Lak, Abiola Makinwa, Piet Willems (eds), *Governance and Security Issues of the European Union, Challenges ahead* (Asser Press/Springer 2016) 331–353.

The main internal challenges concern:
– The left-overs of the economic crisis (because the crisis is not yet over);
– The impact migration has on all our national societies;
– Euroscepticism, also in this country;
– And, of course, 'Brexit'.

V European Union as Framework for Cooperation

It seems to me that the problems mentioned are common problems, best to be dealt with commonly. And, it is my conviction, the European Union is the best framework available for cooperation on how to solve these problems.

Because the European Union, although certainly not perfect, is:
– A stable organisation;
– Transparent in its working;
– Efficient; and
– Democratic, in view of the position the European Parliament has acquired as EU co-legislator and part of the EU budget authority.[18] Democratic also because of the involvement of national parliaments in the preliminary stage of EU decision making, when proposals of the Commission can be tested and assessed by them in the context of the subsidiarity and proportionality principles.[19]

Again, certainly the EU system is not perfect. What we have tried to achieve is to accommodate wishes and demands of Member States in such a way that a useful and efficient organisation has come into being. Don't forget in this respect that the construction is the result of essentially *voluntary* acts of the Member States – an application of accession being an example – and *voluntary* cooperation undertaken by all Member States collectively, in the context of the implementation of the EU objectives. Nobody forces a state to become a Member State of the EU. And, nobody imposes its will on other members. Article 50 of the Treaty on European Union even allows a Member State to withdraw from the Union.[20]

On the other hand, in order to allow the EU to fully implement its treaty objectives once they have been established by the Member States, variants of *majority voting* necessarily have to be applied in the decision-making process of the Council. The alternative being that all Member States would possess a veto right in each individual case. Such a situation would be a recipe for failure.

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[18] See the Articles 294 (ordinary legislative procedure) and 314 (procedure for the establishment of the annual budget) TFEU.

[19] See the Protocols no. 1 (on the role of National Parliaments in the European Union) and 2 (on the application of the principles of subsidiarity and proportionality), annexed to the Treaties: OJ C 326, 26.10.2012, 203–209.

[20] The reference here is obviously to the notification of the United Kingdom of 29 March 2017 to withdraw from the European Union.

Anyway, majority voting in the Council[21] should not be a problem in a context wherein:
– the European Commission – in its capacity of 'caretaker' of the general interest of the EU –[22] exercises a right of initiative;
– the European Parliament possesses co-legislative powers; and
– the Court of Justice controls the legality of the acts of the EU institutions and bodies.[23]

That said, majority voting is an ultimate remedy only rarely practised in the Brussels negotiation rooms. In the overwhelming majority of cases consensus is looked for during the negotiations, and also reached by making compromises. To that principle, the relocation decision of the Council of 22 September 2015, earlier referred to, is obviously an exception. However, in that case the urgent and humanitarian situation on the ground had to be taken into account.[24]

VI Possible Solutions

The question arises how the EU and its Member States should solve the global problems mentioned earlier.

Certainly, it would be best to maintain the working of the principles of *'unity'* and *'uniformity'* in future, meaning that all Member States cooperate in given policy domains in the same, identical, manner as well as at the same moment.[25]

That, indeed, would be the best way to ensure the consistency and stability of the overall EU cooperation. However, it is not very probable that such a scenario will work in future.

This is because, gradually and over the years, the group of Member States has become more and more heterogeneous. Differences of opinion have also appeared between the leaders of the Member States on how to deal with the problems concerned and, more generally, how to move forward with the European Union.

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21 See for the principle and the modalities of qualified majority voting: Article 16(3) and (4) TEU.

22 See for this capacity the reference to the promotion of 'the general interest of the Union' in Article 17(1) TEU.

23 See the description of the responsibilities of the Court in the second sentence of Article 19(1) TEU. See also Article 263 TFEU.

24 The Council decision of 23 October 2017 concerning the so-called posting of workers directive could be considered as a next example. However, in this case one should realize that the vote reflects only a provisional decision of the Council, to be submitted to the European Parliament for negotiations in the framework of the ordinary legislative procedure, referred to in Article 294 TFEU and mentioned earlier.

25 See Jean-Claude Piris, 'The acceleration of differentiated integration and enhanced cooperation' Fondation Robert Schuman/European Issues no. 328 of 13 October 2014, 1–5, where it is stated on p. 1: 'Respect for the unity dogma (…) was justified by the necessity to build a common market. A common playing field had to be established, the same rules had to apply, they had to be interpreted in the same way by all, an independent arbitrator had to check their implementation and their infringement had to be subject to sanctions by a judge.' Furthermore, the principle of uniform interpretation is embedded in the several elements of Article 234 TFEU. The importance of that principle is also expressed in the case law of the Court of Justice, such as the judgment of 18 October 2007 in the Case C-195/06, KommAustria/ÖRF, ECLI:EU:C:2007:613, notably paragraph 24.

Since the strict maintenance of the principles of unity and uniformity therefore cannot be considered a realistic perspective anymore, we have to reflect on alternative models, enabling:

– Those who want to go forward to do that; and
– Those who do not want to participate in new stages of the cooperation process to be left out of these new developments, at least for the moment. They should not be forced to join; however, they are free to do that at a later stage, once they are ready.

The result of such a new approach is that, in the end, nobody will be excluded.

As new instruments, to achieve such a new approach, I propose two mechanisms:

– Simplification of the application of the principle of enhanced cooperation, the principle allowing Member States to cooperate in smaller circles;

and, connected to that proposal,

– Simplification of the ordinary treaty amendment procedure.

1 Simplification of Enhanced Cooperation

With regard to the idea of simplifying the application of the principle of enhanced cooperation,[26] I refer to Article 20 of the Treaty on European Union.[27]

At the moment, at least 9 Member States are required to launch an initiative regarding enhanced cooperation. Furthermore, such a launch has to be supported by a proposal of the Commission and requires the approval of the Council by qualified majority.

In my opinion, that procedure has become too complicated and should be simplified. The general 'approach', of how to apply the principle of enhanced cooperation, also has to be amended.

Instead therefore, my proposal is to enable a vast majority of Member States – say, *three quarters of the number of Member States,* so in the present state of play 21 out of the 28 existing Member States – to make such a new step without other conditions needing to be fulfilled, except of a formal 'confirmation' by the Commission. And, again, the others can join later, once they so wish.

2 Simplification of Treaty Amendment procedure

Next, simplification of the ordinary treaty amendment procedure, in my mind, is also greatly needed.[28] In this case I refer to paragraphs 1 to 5 of Article 48 of the Treaty on European Union.

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[26] See for this discussion also: De Zwaan, *Stability and Differentiation in the European Union, Search for a Balance* (n 17) 16–19, and de Zwaan, 'Flexibility, Differentiation and Simplification in the European Union: Remedies for the Future?' (n 17) 338–341.

[27] See for the rules how to apply enhanced cooperation: Articles 326–334 TFEU.

[28] See for this discussion also: De Zwaan, *Stability and Differentiation in the European Union, Search for a Balance* (n 17) 27–31, and de Zwaan, 'Flexibility, Differentiation and Simplification in the European Union: Remedies for the Future?' (n 17) 349–351.

At this moment in time, to have treaty amendments adopted and entering into force, consensus between all Member States is required, in the process of negotiations and signature of the texts concerned, in the approval of the amendments at national level and in the deposit of the respective acts of ratification.

In this case as well, my proposal is to allow a vast majority of *three quarters of the number of Member States* to agree on such amendments and have them applied, in the first instance of course – only – in their mutual relations. And, again, the Member States not participating in these new developments can always follow later, once they are ready to do so.

In this way, with regard to the future development of the EU integration process, a differentiated approach – initiated by a vast majority of Member States as 'front runner' groups – should be acceptable as long as none of the other partners will be excluded from such developments.

Apart from that, all partners – none excluded – will participate in the cooperation regarding a solid substantive acquis at *minimum* level comprising the internal market cooperation 'plus' domains such as trade policy, environment and – in my mind also – asylum and immigration.

As a result, we would have created a solid basis for future EU cooperation, in the context of which all Member States do cooperate intensively whereas, on top of that, facilities do exist for cooperation in specific areas between smaller groups of Member States.

VII Proposals of the European Commission

1 Juncker's White Paper

On 1 March 2017, Commission President Juncker submitted his White Paper of the Future of Europe.[29] In it, Juncker presents reflections and scenarios for the European Union of 27 Member States by 2025.[30]

More particularly the Commission proposes five scenarios:

– Carrying on;
– Nothing but the single market;
– Those who want to do more;
– Doing less more efficiently;
– Doing much more together.

If you ask me, the five scenarios proposed by Juncker are rather arbitrary ones. In fact, applying his own way of thinking, many more could be thought of.

[29] https://ec.europa.eu/commission/sites/beta-political/files/white_paper_on_the_future_of_europe_en.pdf.

[30] See for this discussion also: De Zwaan, *Stability and Differentiation in the European Union, Search for a Balance* (n 17) 25–27.

Other comments can also be made:

Scenario 1: Carrying on
This scenario implies that life continues by applying the instruments and procedures already available at present. In short, the reference is to 'muddling through'. That, however, cannot be a solution; practice shows this on a daily basis. On the contrary, choices have to be made, such as whether we want 'more' or 'less' Europe. And, if a preference is manifested in favour of more Europe, the question arises of how to organise such additional responsibilities for the Union.

Scenario 2: Nothing but the single market
This scenario is hardly ambitious. In fact, it shows the way to a future based on (much) less substance of cooperation compared to what has been achieved today. Thus, it is not a very attractive scenario either.

Scenario 3: Those who want to do more
The reference here is to a multi-speed Europe, enabling those Member States who want to proceed to do so in smaller groups. Such a result indeed resembles the proposals I presented a while ago. However, whereas the Commission scenario refers to concrete policy domains, the proposals I am in favour of promote a more *global* approach, enabling Member States to choose targets and objectives deemed necessary at a certain moment, in view of the political circumstances at that particular moment.

Scenario 4: Doing less more efficiently
Certainly, 'efficiency' should be always welcomed. However, focusing on fewer targets and objectives compared to the situation as it is today demonstrates a model of low ambition.

Scenario 5: Doing much more together
This model certainly looks interesting. However, in view of the fact that this option presupposes, according to Juncker's White Paper, collective action of all Member States as a point of departure for decision-making in the future stages of EU cooperation, the model does not seem very realistic.

All in all, Juncker's proposals focus on a selection of specific policy matters. To that extent, the proposals of the White Paper are rather static.

On the contrary, the inherent characteristic of the proposals I am in favour of is that EU cooperation is a gradual process, illustrated by a 'step by step' approach. Therefore, my idea is that we rather need a flexible but *structural* model to be applied when considered necessary in the political circumstances at hand. In short, we need to provide for an adequate procedure to manage 'the process'. In doing so, my idea – as recalled earlier – is to allow a majority of three quarters of the number of Member States taking the lead in the further stages of EU cooperation, whereas the other Member States may follow once they are willing and prepared to do so. In so doing, EU cooperation is open to all.

2 Juncker's State of the Union Address

Now, by way of follow-up of his White Paper, Commission President Jean-Claude Juncker delivered on 13 September 2017 his State of the Union Address before the European Parliament.[31]

Referring to the present political 'momentum' – at that moment he referred to the election of Macron in France; since then we also can hint at the re-election of Chancellor Merkel in Germany – the President proposed a number of initiatives and ideas, such as to:

– finally open the Schengen cooperation to Bulgaria and Romania;
– encourage Member States which so far didn't do so (such as Hungary) to join the euro once they fulfil all conditions;
– maintain a credible enlargement perspective for the Western Balkans;
– rule out EU membership for Turkey for the foreseeable future;
– nominate a European Minister of Economy and Finance;
– make the EU stronger in fighting terrorism;
– make the EU a stronger global actor in the domains of foreign policy and defence; and, last but not least,
– merge the roles of President of the European Commission and the one of President of the European Council, that 'single' President to be elected after a Europe-wide election campaign.

Now, certainly, one can criticise the proposals or like them. I should say that Juncker at least has presented a vision. Moreover, what else could one have expected from a personality representing the *general interest* of the Union?

So, the least one can say is that Juncker has put forward ideas and proposals worth being discussed, not only at the level of the institutions in Brussels, but also in the Member States.

What is surprising, though, is that Juncker, in his September address, hardly refers any more to the principle of 'differentiation', the framework of cooperation in smaller circles, which in fact was a fundamental element of his 'Future of Europe' White Paper of March this year, discussed earlier.

Understandably it is the desire of the President of the European Commission to keep the group of Member States together, and to maintain unity as a principle of EU cooperation. However, it seems to me that, once it will appear during the forthcoming negotiations at the highest political level that, indeed, several heads of state or government reject Juncker's proposals, the idea of differentiated cooperation should be reintroduced in the debate.

Therefore, let's be grateful to Jean Claude Juncker for having launched his proposals which, if accepted at least by a large majority – three quarters? – of Member States, could bring the European Union further and enable the Union to become a real global player.

[31] http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm.

VIII The Position of Hungary in the Debate

What now is the position of Hungary in this debate?

I should advise to count your blessings; at present we live in a stable continent and environment, whereas our continent is faced with a multitude of problems which individual countries cannot handle alone any longer.

In that respect, we must recognise that sovereignty these days is a highly relative concept. It is clear that in our complicated world, with so many international organisations being active and international rules and agreements in force, our economies and societies already are intensively interconnected. The United Kingdom will notice that, once that country has left the European Union.

We are therefore completely dependent on good international partnerships and solid frameworks for international cooperation. We have to join forces! Moreover, we should not forget that EU cooperation is a peace process and, in view of the way it operates, also a constructive and positive process. We therefore have to maintain – and to protect – the stability of that construction.

Last but not least, in order to stimulate the future development of our integration process, a differentiated approach – initiated and supported by a vast majority of Member States as 'fore runner' groups – should be acceptable as long as the other partners will not be excluded from participating in such developments, when they so wish.

IX Final Remarks

All this leads me to five final remarks:

1. Differences of opinion – for example with regard to the interpretation of our common values and standards – have to be discussed. The reference here is to the discussions taking place between the Hungarian Government and the European Commission regarding a number of files.

2. Common global problems – such as the tensions at our external borders, migration and terrorism – have to be dealt with in common.

3. 'Brussels' is 'US' and not 'THEY' or 'THEM'. In other words, Brussels is not a separate organisation. The European Union has been founded by the Member States themselves, for their own benefit. It is also the Member States who determine the objectives of the organisation, as well as how to implement these objectives.

4. The European Union, having institutions and organs plus efficient and democratic decision making procedures at its disposal, provides an adequate framework for our future cooperation; and

5. Further improvements to the infrastructures of the European Union – which are certainly necessary – have to be discussed and decided upon in common.

János Martonyi*

Multilateralism and Regionalism in International Trade Law

International trade has been tested by a growing number of economic, political, ideological, institutional and legal challenges. On the one hand, the future of the global trading system depends largely upon the development of all these 'external', uncertain and unpredictable risks and opportunities of various natures. On the other hand, or conversely, international trade and the functioning of the global trading system is one of the major factors that have a significant impact upon the shaping of the present and future world order.

Trade has always been the generating force of economic growth, employment, prosperity and progress of humanity. The forms, the objects, the technics and the rules have been changing all through history. These transformations are rapidly accelerating, but the substance and the function of exchanging the products of human activities at the local, regional and global level have remained essentially the same: creating wealth and promoting welfare. What used to be limited to the exchange and physical movement of goods has been extended to services of all kinds and now more and more engulfs the flow of data.

The fundamental shift in the relation between trade in goods, trade in services and the flow of data due to the breath-taking development of technology, the new phenomenon of 'deep-tech' and all that it entails, creates the impression that trade is losing its importance and the main transformation is taking shape outside of trade in a traditional sense. However, deep-tech does not diminish the role of trade in the widest sense, i.e. exchanging everything that is created physically or intellectually by humans, including algorithms for robotisation, automation or ultimately artificial intelligence.

It is true that the volume of goods moved around the world (in particular goods carried by sea) is not increasing (indeed it is on the wane, not only relative to trade in services, but also to global economic growth), but at the same time supply chains become even more complex, increasingly relying on new technologies substituting data for components. All in all, the ancient devise *'navigare necesse est'* is still valid, indeed, in a more abstract sense, it is more relevant than ever.

Because of the deep-rooted and sweeping transformation in the nature, structure and forms of international trade, both macroeconomic theory and political doctrine are becoming

* János Martonyi is Professor emeritus at the Faculty of Law of the University of Szeged and former Minister of Foreign Affairs.

fundamentally divided on a long range of issues previously considered as simple evidences based on conventional wisdom.

Are bilateral trade balances still (or again) relevant or in a multilateral world may bilateral imbalances in the economic system be considered irrelevant? What are the main causes of perennial bilateral deficits? Are there general macroeconomic reasons behind these imbalances, such as excessive spending and saving on the other side? Or it is the 'manipulated' value of some countries' currency, or the unfair rules established by multilateral or by regional agreements or, indeed, their persistent violations that are to be primarily blamed for all these disequilibria and controversies. Conflicting economic theories, diverse and opposing ideas and arguments are swirling around in academic, as well as in public discourse and make – directly and immediately – their way to heated political debates. Correlation is confused with causation and vice versa. Political ideologies step in and make a once scholarly and intellectually attractive but, in broader political debates somewhat neglected subject, the area of the fiercest debates a battlefield of ideological and political clashes. TTIP, TPP, NAFTA are only some of the cases in point. The war is therefore economic, political and cultural alike and the conflicts between national interests are compounded by deep ideological divides instrumentalised by political movements for their own political purposes. The conflict between the regulatory autonomy or sovereignty of states and the beyond the boarder regulatory efforts of the new generation free trade agreements also reflect, in the most spectacular manner, the deepening ideological divide which is ultimately rooted in the diametrically opposing views relating to the tackling of globalisation and the visions on global governance.

The internal conflicts and challenges of the world trading system are aggravated by the geopolitical challenges, the tectonic shifts and rumbles all around the world. The 'great shift' in the economic and geopolitical power structure of the world, the absence of a single dominant power or hegemon, the growing fragmentation of the economic, geopolitical and cultural world order, the rise of a multi-actor, multi-stakeholder world, the re-emerging spheres of influence, the growing antagonisms and all the risks and threats entailed by them supply the basic framework and background for an international trading system fighting for its survival and for the saving of its tremendous achievements of the last 70 years.

The role of legal scholarship in this situation, characterised also by excessive rhetoric, should be – first of all – to calm down the excitement, *'calmer les esprits'* and to take an objective, reasonable and balanced approach, distancing itself from ideological motives and sentiments.[1] At the same time, thorough analysis must be conducted, based upon reliable research and data, in order to lay down the groundwork for future rule-making on a local, national and regional as well as on a global level.

The global trading system as established and developed by international trade law stands on two – interconnected – pillars. The first is the international – multilateral and regional

[1] János Martonyi, Transatlantic Trade and Investment Partnership Negotiations and its Consequences for the European Union, XXVII. FIDE Congress, Budapest, 2016.

(bilateral) – rule making; the second is the adjudication of disputes on the basis of all these regulatory instruments.

As it is well known, the multilateral trade regulation came to a standstill around 20 years ago and since then seems to be in a frozen state. Minor achievements have been made, such as the Trade Facilitation Agreement (Bali, 2013) or the Information Technology Agreement (extended in Nairobi, 2015; this being the first major tariff-cutting deal on an MFN basis since 1996), but most of the original aspirations of the Doha Round have simply failed and are not to be expected to materialize even at a longer term.

The substantial increase in the number of participants in the global game, the changes in their economic weight and political clout, and the absence of timely adaptation to them, certainly contributed to the deadlock in the multilateral rule-making. Another reason is the over-stretching of the scope or coverage of the regulations. The existing structure could no longer carry the multiplied weight of increasingly targeted areas of law-making. On a more general level and in a deeper context, the freezing of the multilateral regulatory process also reflects the overall gridlock in the functioning of the global institutions or global governance.

The realistic objective that can now be set for the future development of the multilateral regulation of world trade is, first and foremost, the preserving and maintaining of the present system with all the substantial achievements. At the same time the 'global acquis' of the regulatory system should and can be improved, developed and aligned with new demands and realities in some specific, limited areas, as this has been the case in recent years. Save what we have, maintain it in workable shape and 'keep the powder dry' for the future; these can be the basic aspirations for the multilateral (global) rule-making in the present situation. At the same time, developments on other levels of regulation will further unfold, and are, in many fields, equally or even more suited to tackle the issues of international trade which itself – as we have seen – happens to be in deep and accelerating transformation. And it is not only trade in the widest and more abstract sense that is rapidly changing, but also the social, political and economic demands and expectations are intensifying and have an even stronger impact upon all kinds of rule-making.

While the multilateral trade regulation seems to have reached its limits, that also appears to be in line with the apparent – structural or conjectural? – slowdown of globalisation, the other pillar of the world trading system is still in fairly good shape and functions satisfactorily. The dispute settlement system of the WTO is often referred to as the 'bright spot' of the international trading system[2] handling a growing number of complex and serious disputes between various members of WTO with a very high ratio (90%) of compliance. Because of the freezing of the rule-making branch of the system and the unfulfilled needs for adjustment and development of the rules, the dispute resolution mechanism is obliged, in a way, to take over some of the tasks of regulation and has to resolve issues that should normally be tackled

[2] 'the Dispute Settlement System (DSS) of the WTO continues to be considered a success story, and rightly so', Giorgio Sacerdoti, *The Future of the WTO Dispute Settlement System: Consolidating a Success Story in Future of the Global Trade Order* (European University Institute and IMD 2016) 46.

by the organic development of the legislative process. The DSS of the WTO has therefore become the 'victim of its own success'; it is flooded by disputes, in growing number and complexity, and the system is increasingly overloaded. Non-trade issues are on the rise, panels and the Appellate Body are confronted with the need to balance between disgeneric values which make their task sometimes close to impossible. At the same time, it is mistaken to believe that the DSS, that is the judicial function, can take over not only part of the legislative function, but also the 'whole pain of the world' from environment protection to labour law, from SPS to social welfare or from data protection to human rights. The result is the increasing length of the procedures and also the decrease in prompt compliance.[3]

Despite these and other challenges, the multilateral DSS remains to be the most successful area of the world trading system. It is not perfect, but it is fair and efficient. This is the reason why the multilateral dispute settlement seems to be winning the 'competition' with the dispute settlement mechanisms of the regional trade agreements. While there is an ongoing academic discussion on the relationship and the possible jurisdictional conflict between the two mechanisms, the fact is that the 'vast majority of RTA – DSMs have not been used at all', and even the 'FTA partners continue to use the WTO dispute settlement mechanism to resolve disputes between them.'[4] One of the reasons for this preference for the WTO mechanism is no doubt its more legalistic character, both in a substantive and in a procedural sense. The level of commitments, of course, differs as RTAs essentially aim to establish free trade with rights and obligations going well beyond the multilateral framework. At the same time the RTA – DSMs represent a wide range of models, from the pure political-diplomatic consultation to quasi-juridical and juridical systems or even a supranational model with direct effect of the decision adjudicating the dispute.[5]

The bright spot of the international trading system is, however, exposed not only to legal or procedural risks, but also to threats of general and fundamental nature. The dark clouds that seem to be assembling on the horizon of the multilateral trading system, the general political and economic background have a negative impact upon the judicial function as well. If this function is severely damaged, the overall system might receive a mortal blow. This is why all efforts must be developed in order to improve the dispute settlement system itself, adapting it to the new challenges, as well as to the political and economic realities.

Procedural improvements of the dispute settlement mechanism are needed and would, undoubtedly, be helpful. Whatever all these corrections will be, it must be clear, however, that the judicial function cannot, by itself, save and secure the future of the multilateral trading system. The dispute settlement mechanism will be unable to fulfil its function appropriately without a solid legislative background, a basis of rules that are not frozen, but evolve, adapt

[3] Giorgio Sacerdoti (n 2) 47–49.

[4] Claude Chase, Alan Yaovich, Jo-Ann Crawford, Pamela Ugaz, Mapping up dispute settlement mechanism in regional trade agreements – innovative or variations on a theme? In Rohini Acharya (ed), *Regional Trade Agreements in the Multilateral Trading System* (Cambridge Univ. Press 2016) 610.

[5] On the models of RTA-DSMs, Chase, Yanovich, Crawford, Ugaz (n 4) 618–621.

and develop according to the changes of the economic and political environment. The legislative and judicial function cannot be separated and are ultimately not only interlinked but also interdependent; one cannot live without the other. The ambitions for the revival of the rule-making are still there and in the light of several statements it seems, this time again, that hope is the last thing to die.

It cannot be contested that one of the main reasons for the rapid growth of RTAs has been the deadlock in the multilateral rule-making of WTO. At the same time, the differentiation of the multilateral system started well before the slowdown or the standstill in multilateral rule-making. It started with the birth of the system by including Article XXIV in the GATT, 1947. Exceptions from and derogations to the principle of equal treatment as implemented by MFN treatment widened both in law and in practice and, at the time the WTO was established, what used to be the general rule with limited exceptions became in reality the exception.[6]

This tendency was substantially accelerated by the special bilateral or regional (plurilateral) agreements based upon Article XXIV of GATT, Article V of the General Agreement on Trade in Service (GATS) or paragraph 2c of the Enabling Clause. While the cornerstone of the multilateral system was the fundamental principle of equal treatment and the objective was to achieve progressive multilateral liberalisation, not to establish free trade, the RTAs' purpose has been precisely the opposite. The objective here has been to establish special regimes, in most cases, free trade between the parties. These agreements are by nature discriminatory, granting special rights and benefits to their parties and, by the same token, depriving the non-parties of the same rights and benefits.

By the end of 2016 the total number of the RTAs in force and notified to the WTO under the Transparency Mechanism of RTAs was 271.[7] (In case agreements for goods and for services are counted separately the number of RTAs in force and notified was 461, while the overall number concluded and notified was 629. An unknown number of RTSs have not been notified and therefore do not appear in the WTO Transparency Mechanism.) 20% of all RTAs in force are European, 17% are in East Asia, 12% in South-America and 9% in the CIS region. The European Union has by far the highest number of RTAs and the number of its RTAs in line with its growing global outreach is and will be further increasing. The United States (20) and China (14) follow the EU from a significant distance. The difference between the US and the Chinese number will soon be reduced and probably reversed due to the US step back from TPP (and perhaps other decisions to follow) and also as a result of the Chinese expansion, not only by filling the Asian vacuum created by the US, but also as part of a global geopolitical and economic ambition. The new bilateral or 'transactional' approach taken by the US and a more active Chinese trade policy, driven by a growing assertiveness and a global vision and aspiration, might reverse not only the relationship between the number of RTAs, but also affect the geopolitical and economic power balance between the two superpowers.

[6] János Martonyi, 'The Decline of Equal Treatment in World Economy, Foreign Trade' (2015) 1 Legal Studies.
[7] Recent Developments in Regional Trade Agreements, INT/SUB/RTA/153, July-December 2016.

(Conclusions, however, should not be hastily drawn, given the complexity of the various factors and the uncertainty of developments. One, often somewhat disregarded, factor is the overwhelming advantage of the United States in the field of 'soft power').

The RTAs' growth has not been limited to their number but extended also their coverage as their scope has become more and more comprehensive, including provisions on intellectual property, competition, government procurement and investment and also regulations on the protection of human and animal health, environment, labour, social welfare and human rights. Because of the overstretching of their coverage, the RTAs' world has been encountered by very similar challenges to those previously met by the multilateral regulation. The consequences of the extension of the regulated areas are, however, very much different in the multilateral rule-making and in the RTAs. Since RTAs are essentially free trade agreements, their regulations go much further 'beyond the border' and interfere much deeper with the national regulatory autonomy of the parties. Here is where serious political conflicts enter and turn into ideological clashes between the two sides of the deepening divide, increasingly instrumentalised for political purposes. This is the ideal terrain where 'globalists' and 'sovereigntists' can display and advocate their emotionally laden ideological and political prejudices, and can therefore jeopardise the efforts aiming at the promotion of more free, more fair and more rule-based trade; rules that also have the basic function protect and to safeguard the interests of the smaller and the weaker.

One way of easing the tension created by the conflicting world visions could be to exercise more restraint in the widening of the scope of the agreements, the original function of which happened to be the promotion of free and fair trade. Political controversies are, in any case, hard to be avoided, given not only the opposing ideological convictions, but also the underlying material, indeed, economic interests. It is also to be noted that quite frequently the same political and societal movements that demand respect for the regulatory sovereignty of nations strongly request the validation of social, labour and human rights for other countries, hence the inclusion of such provisions in the agreements.

Out of the four drivers behind the establishment and shaping of RTAs – geographic proximity, economic policies, supply chains and geopolitics – the third and fourth factors have steadily been gaining importance for at least a decade. At the time of the beginning of the RTAs' history, it was clearly the geographic factor which was the most visible: free trade areas or customs unions were essentially developed between or among neighbouring countries. Economic and social philosophy determining the political, social order, as well as the economic and trade policies of the potential partners of an RTA also used to play a decisive role, as free trade was (an still is) unimaginable without a certain level of market economy and, accordingly, WTO membership. At the same time, RTAs progressively establishing free trade increasingly have come into being between not only geographically remote countries, but also parties whose economic, social and political orders show significant discrepancies. ASEAN was the first, but not the last evident example for this, where the 'ideological diversity' is compounded by the huge differences in the level of economic development (Laos and Singapore). Now new RTAs have been concluded or are being negotiated between parties

separated both by geographic distance and political philosophy (e.g. EU-Vietnam, China and Chile or Switzerland etc.).

Both the regional and the global economy are now based on supply chains that are now the major factors also in the establishment of RTAs. On the other hand, RTAs themselves buoy up supply chains by stimulating and facilitating the free movement of goods and services becoming part of the supply as well as value chains. (We will hopefully be able to avoid the catastrophic consequences of a situation where a long-standing and well-functioning free trading regime, indeed a single market, ceases to exist, thereby disrupting innumerable vital supply chains developed over several decades between the EU and the United Kingdom).[8]

In line with the general geopolitical developments, in particular the exacerbation of power struggles and confrontations of economic interests, the geopolitical factors also have a significant impact upon the establishment of RTAs. The best and most well-known example is the TPP where the original geopolitical objectives of the United States were evident: create an economic area, develop closer ties with all the other 11 Asian, North and Latin-American nations, and exclude the great geopolitical rival, China. The withdrawal of the US will also have geopolitical consequences, precisely the opposite of what was the original purpose. China will likely take the place of the US and that will not only shift most of the economic benefits to the Middle Empire, but it will re-enforce the Chinese geopolitical position and power in and well beyond the Asian region. (Whether the economic withdrawal can be offset by increasing military capabilities and power is an open – and somewhat ominous – question).

There is an older and, for us, closer demonstration of the sometimes preponderant role of geopolitics in creating RTAs. It is the European integration process, where the original purpose was preponderantly political. It was only after the treaty on the European Defence Community was voted down by the French National Assembly in 1954 that the idea of progressively creating an economic integration and thereby laying down the economic basis for an ultimate political union of Europe *('finalité politique')* was put on the table by ingenious 'technocrats' like Jean Monnet, inventing also the great technique of the *'méthode communautaire'* that has been the key driver of the organic and incremental development of the European construction, at least for half a century. It is another question that the 'technocratic' approach has now been exhausted, in part because of its excessive overreach creating thereby problems that it could not resolve. (Again, the 'victim of its own success' syndrome). Now it is high time to revert to the origins and to the somewhat forgotten principle of the *'finalité politique,'* adapted to the new situation in the world, primarily in the external relations of Europe.

Whatever the key drivers of the RTAs are, they show a very high level of diversity, not only because of the differing factors and purposes behind them, but also due to the very different historic, economic and political situations in which they come into being. They are diverse

[8] János Martonyi, 'Brexit. Brexit?' (2016) 1 ELTE Law Journal.

in their coverage, structure, legal techniques, substantive provisions, rights, obligations and dispute settlement mechanisms; hence they are not easy to be classified in various groups or models. This reflects the growing differentiation of the overall trading system, starting originally within the multilateral framework, and later continued and deepened by the spreading of all sorts of bilateral, regional, plurilateral free trade agreements (as well as customs unions). Behind this overwhelming trend of differentiation and fragmentation, however, there are apparent commonalities, principles and general features that may represent the groundwork for a future reunification of the international trade rules. (We should not forget that the historic and legal background for the establishment of GATT was the sophisticated network of bilateral trade agreements based upon the MFN treatment that was ingeniously multilateralised in the new situation after the Second World War.)

All these developments taking place in the international trading system reflect and demonstrate the general economic and geopolitical trends. Globalisation slows down but goes on; regionalization and localisation are on the rise, but are intertwined with universal and common elements.

Geopolitical power and responsibility progressively devolve to regional levels; the diffusion of power decentralises governance and rule-making, but global risks and opportunities demand common action and universal (multilateral) rule-making.

These two competing and at the same time complementary tendencies are present not only in geopolitics, in the global economy and in the international trading system, but also in what is called 'soft power' or, indeed, culture in the widest possible sense. Since most of our attention is focused upon the economic and geopolitical (including military might) parts of the equation, we tend to belittle culture as the ultimate mover of all the other areas. 'It is culture that matters', it is culture that essentially creates and forms economy, politics and all the other areas of human and social activities.

Rule-making is part of culture and as such does not only reflect, but also develops and shapes geopolitics as well as the economy. If this is true, then we cannot only describe and analyse what is going on and why, but we also have the possibility, the capability and the responsibility – by local, national, regional and universal rule-making – to influence, to shape and to improve the world's security, stability and prosperity.

Rules are becoming more universal and fragmented at the same time; the world which was supposed to be flat is more and more divided, and power is more devolved. The economy and trade are inherently interdependent and multilateral, but regional and bilateral endeavours increasingly pervade the whole system. Culture is diverse, collective identities differ (dialogue, not clash!), but it cannot dispense with some universal values that many believe, are of absolute nature. In this complex, tumultuous competition, trade – free, fair and rule-based trade with a strong multilateral dimension – has a vital role to play.

Rainer Pitschas*

Self-Governing Health Care in Germany at the Frontiers of Parliamentary Law**

The Self-Governing German Health Care System and the Federal Joint Committee as an Independent Decision–Making Body of Joint Self Government

I Insurance in Germany

1 The Public and Private Health Care System according to the Law

Illness is one of the risks in our life which most people cannot finance themselves. In Germany, therefore, there exists a provision against illness through statutory health insurance on the one side and by private health insurance on the other side. Almost 86 % of inhabitants are members of the statutory health insurance to which they pay their contributions. They are secured by the compulsory public health insurance funds. The state provides a special allowance *(Beihilfe)* for public servants as a supplement to their income.[1]

According to the Constitution for the Federal Republic of Germany, everybody has the right to life and physical integrity. This does not only include the right not to be harmed by the state but also the right to support and protection; so the state is obliged to ensure a functioning health care system as well. The competencies for regulating health care matters in Germany are founded in Art. 74 § 1 No. 19 and 19a of the Constitution.[2] It contains all the issues of concurrent legislation, as an exception to the rule in federal states that the single state usually has legislative competence. The consequence is that if the federal government legislates on one of these matters, the states generally can no longer legislate on that matter (see Art. 72 of the Constitution). It is, however, for Germany, remarkable that there is no

* Prof. Dr. iur. habil. Dr. h.c. mult. Rainer Pitschas, German University of Administrative Sciences Speyer.

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1 See generally Raimund Waltermann, *Sozialrecht* (12th edn, C. F. Müller 2016, Heidelberg) para 8.

2 *Grundgesetz für die Bundesrepublik Deutschland* vom 23. Mai 1949, Bundesgesetzblatt 1.

global competency for the Federal Government in the area of health care except particularly expressed single competencies.[3]

Against this background, Germany's health care system is the oldest in Europe. It started with Otto von Bismarck's social legislation. This law included the Health Insurance Bill of 1883, the Accident Insurance Bill of 1884 and the Old-Age and Disability Bill of 1889. Initially, the insurance only covered low-income people and government workers, but step for step it would expand to cover the entire population. In contrast to that, the members of a private insurance scheme have earnings above a certain limit even today. Nearly all of the German population is eligible to join a private insurance scheme–. Generally, the private system gives good protection with affordable premiums for young people, allowing doctors to charge firefees and for wider services. However, private insurance charges each family member adult patient premiums and raises the premiums for older patients. Health policy in Germany is therefore currently debating the question of modernising the law and reality of the whole insurance system by introducing unique health insurance for all citizens, like for those in The Netherlands.[4]

2 Statutory Health Care as a Pillar within the Social Insurance System

All in all and from an institutional perspective, health insurance is part of a greater Social Insurance System, also embracing accident insurance, nursing care insurance and pension insurance for all. Part of social insurance is also unemployment insurance, even though the insurance belongs under the statutory labor promotion law.[5]

3 Social Insurance System as a Part of Social Provision in the Modern Social State

In its extent, the social insurance system itself is part of the *Social Prevention System*.[6] The state founded this system to become a modern social state in Europe. The system also includes *Social Welfare* and those social provisions by the state which people receive, for example, in the event of falling a victim of crime.

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[3] See Rainer Pitschas, 'Krankenhausstrukturen – Erschöpfter Föderalstaat?' (2016) 34 Vierteljahresschrift für Sozialrecht 343–354, 349 ff.

[4] See for example Friedrich Breyer, 'Pflege und Gesundheit' in Peter Masuch, Wolfgang Spellbrink, Ulrich Becker, Stephan Leibfried (eds), *Grundlagen und Herausforderungen des Sozialstaats – Denkschrift 60 Jahre Bundessozialgericht,* Band 1 – Eigenheiten und Zukunft von Sozialpolitik und Sozialrecht (Erich Schmidt 2014, Berlin) 729–749.

[5] Waltermann (n 1) 35–39, 190–192.

[6] See generally Rainer Pitschas, 'Soziale Sicherheit durch Vorsorge-Sicherheit als Verfassungsprinzip des Sozialstaats' und das Vorsorgeverhältnis als rechtliches Gehäuse ihrer Vorsorgestandards' in Ulrich Becker (ed), *Rechtsdogmatik und Rechtsvergleich im Sozialrecht I* (Nomos 2010, Baden-Baden) 63–106.

II Statutory Health Insurance as a Self-governing System

1 Regulation of the Health Care System by Parliamentary Public Law

Statutory Health Insurance is actually performed by more than thirty *health care funds.* The work of these funds is directed by the regulation of parliamentary public law at the federal level. The Ministry of Health regulates at the federal level, whereas the Ministries of Labour and Social Affairs regulate at the state level. The tasks of the Ministry of Health are to create bills, regulations and administrative provisions.

Another very important aspect is the maintenance of an *effective* statutory health insurance scheme, which includes economic aspects as well as strengthening the rights of patients. Furthermore, the Ministries of Health on both levels are responsible for prevention, health protection, disease control and bio-medicine. Apart from that, they set the framework for the production of pharmaceuticals and medical products.

In the first line it is the Federal Government which thus specifies the legal framework for the statutory health insurance system. The health care fund's benefits are provided according to that legal framework. More than that, all the health care funds, as well as all the other institutions within the circle of health care provision, are bounded, unlike private health insurance, to the principles of *solidarity* and social *equalisation.*

2 Self-Government within the Scope of Statutory Health Insurance by Health Funds

However, the insurance providers are independent and self-governing institutions. That means they have the power to bargain with hospital or medical associations and with physicians and dentists, because the providers of health care services and purchasers are completely separated.

'Self-Government' for them means within the scope of statuary health care insurance system to exercise their duties in an independent manor and without orders from Government. The insurance funds are thus a species of non-governmental organisations, working in their own responsibility and jurisdiction like autonomous entities. They have to consider the principles of solidarity and social equalization, as well as the rights of patients who are members of a sickness fund, but they do their business under the statutory *supervision* of the Federal Ministry of Health and/or the State Government.[7]

As already mentioned, more than thirty different self-governed public sickness funds exist in Germany. All of them compete with each other. The members of each fund have to pay a contribution of 14.6 % of their monthly income and – as an additional contribution –

[7] See, for example Rainer Pitschas, 'Abgrenzung der Aufsichtszuständigkeiten in der gesetzlichen Krankenversicherung gem. Art. 87 Abs. 2 S. 2 GG' (2016) 25 Neue Zeitschrift für Sozialrecht 321– 28, 322–323.

0.9 % on average as a supplement. There is a ceiling by law, but in some funds it is possible to have to pay some further contributions on top.

Through so-called 'social elections' the members of a sickness fund can elect their representatives, who will choose the executive board of the Fund. However, this form of representing the interests of patients is ineffective.

3 Autonomous 'Umbrella-Organisations' for a Self-governing German Health Care System

On the top of the health insurance funds, we also find furthermore autonomous organisations as public legal entities consisting of the health policy of funds in this sector. In addition to this construction, there are also the National Associations of Physicians and Dentists as well as the German Hospital Federation. They work together in the German *Central Federal Association of Health Insurance Funds.* Its main goal is to ensure, by distributing the premiums, the principal that every citizen receives the necessary health care services independent of his income. That is the consequence of the principle of solidarity and the welfare state.

Another important aspect is that health care services have to be carried out according to the human dignity and the free will of the patient. The Central Federal Association of Health Insurance Funds is in that way something like an 'Umbrella Organisation' for health care provision in Germany.

4 The Central Health Care Fund

Since January 1st 2009, this complimentary *Central Health Care Fund* which is collecting all the contributions from the sickness funds' members has continued to exist.[8] The contribution rates of the insured persons go directly to the Central Fund and the Federal Government grants up to 14 billion Euros each year to cover the remaining expenditures by the health care funds. The allocated rate, which is paid back to the insurance providers out of the fund for each insured person, depends on their age, sex, and possible health risks. In the event that the insurance providers cannot cover their costs using this allocated rate, they can charge an additional input from their members (2016: up to 0.9 % extra contribution per month).

5 Regulatory Decision-making by Settlement of Guidelines

The *Statutory Health Insurance Funds* and especially the *Central Federal Association of Health Insurance Funds* take part in the regulatory decision-making by self-governed settlement of guidelines in so-called *norm-replacing treaties:* At least two different

[8] Arndt Schmehl, 'Gesundheitsfonds, Finanz- und Risikoausgleiche' in Helge Sodan (ed), *Handbuch des Krankenversicherungsrechts* (CH Beck 2010, München) para 39 C.

associations enter in to an agreement on the details of health care and this contract has a regulatory effect; it works like a public law norm.[9]

III The Federal Joint Committee as an Independent Autonomous Body of Joint Self-Government within the Health Care System

1 The Federal Joint Committee: What It Is and What It Does

The *Federal Joint Committee* is a public legal entity comprising the leading umbrella organisations of the self-governing German health care system described earlier, The National Association of Statutory Health Insurance on the side of physicians and dentists, the German Hospital Federation and the Central Federal Association of Health Insurance Funds form the Committee.[10] In addition to these four pillar organisations, patient representatives also participate in all the sessions of the Committee. They are entitled to put topics on the agenda, but not to vote. Other participants in discussions of the Joint Committee are the federal counties, although they are not allowed by the law to do so[11], and private health care insurance provides, for example. However, they are also not entitled to put topics on the agenda.

The *Joint Committee* has an interesting history of development. It was established on 1st January 2004. As a result of the health care modernisation act, it took over the mandates of its predecessor organisations. As such, it is an outstanding example of the increasing centralization of self-government in the social sector and of loosening its own roots. However, following same path, the *Committee (Gemeinsamer Bundesausschuss / G-BA)* became the highest decision-making body of the joint self-government of physicians, dentists, hospitals and health insurance funds in Germany: The Committee issues directives for the benefit-catalogue of the statutory funds in Germany for more than 70 million insured persons and specifies which services in medical care have to be reimbursed by the funds *(Gesetzliche Krankenversicherung / GKV)* from the central health care fund.

In addition to that, the G-BA specifies measures (public law norms instead of parliamentary law and settlement of guidelines by contract) for quality assurance as well as in in-patient and out-patient areas of the health care system. So what is the G-BA really? And what it its function at the core of health governance?

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[9] See generally Peter Axer, *Normsetzung der Exekutive in der Sozialversicherung* (Mohr-Siebeck 2000, Tübingen) 52–95.

[10] See generally § 91 Abs. 1 Satz 1 German Social Code, Book 5 (SGB V) from 2017.

[11] See Winfried Kluth, *Der Gemeinsame Bundesausschuss (G-BA) nach § 91 SGB V aus der Perspektive des Verfassungsrechts: Aufgaben, Funktionen und Legitimation* (Duncker & Humblot 2015, Berlin) 96–98.

2 The Federal Joint Committee as an Unspecified Public Legal Entity

From the standpoint of modern administrative law, the *Federal Joint Committee* is a public legal entity comprising the four leading umbrella organisations of the self-governing health care system.[12] As mentioned the Committee was established on 1 January 2004 as a result of the health care modernisation act. It took over the mandates of the predecessor organisations and began its third term of office on 1 July 2008; the fourth term started on 1 July 2012.

The Committee is the highest decision-making body of the joint self-government of physicians, dentists, hospitals and health insurance funds in Germany. It issues directives for the benefit catalogue of the statutory health insurance funds and specifies which services and medical care have to be reimbursed by the Central Health Care Fund.

As with many organisations in the field of social insurance, the Committee works under the statutory supervision of the Federal Ministry of Health. It is a legal supervision. Resolutions and directives passed by the G-BA are audited by the Federal Ministry in accordance with the requirements set forth in the law and then published in the Federal Gazette, if no objections are found. However, the latest amendment of the social law code has brought intensified functional supervision concerning the financing data of the Committee and its budget – a new effort to control the decisions of the Committee by strengthening financial oversight.[13]

3 Structure, Members and Patient Involvement

a) In accordance with the requirements set forth in the German social code, book five (SGB V), the Resolutions Committees of the Federal Joint Committee (= Plenum) comprises 13 members:

– One impartial chair – at the same time Chairman of the Committee – and two impartial members (the impartials)
– Five members appointed by the Central Federal Association of Health Insurance Funds
– Two members appointed by the German Hospital Federation (GKG)
– Two members appointed by the National Association of Statutory Health Insurance Physicians (KBV)
– One member appointed by the National Association of Statutory Health Insurance Dentists (KZBV)

The term of office of each plenum member is six years. Myself, I am the Deputy of the Impartial Chair.

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[12] Reimund Schmidt, De Caluwe, 'Kommentierung zu § 91 SGB V' in Ulrich Becker, Thorsten Kingreen (eds), *SGB V – gesetzliche Krankenversicherung. Kommentar* (4th edn, CH Beck 2014, Berlin) para 91 n. 10.

[13] Rainer Pitschas, 'Auswirkungen des Selbstverwaltungsstärkungsgesetzes auf den Gemeinsamen Bundesausschuss (G-BA)' (2017) 69 (4) Kranken- und Pflegeversicherung (be published).

The members appointed by the pillar organisations to the G-BA, as well as the proxies, work in an honorary capacity.

The impartial chair represents the G-BA judicially and extra-judicially, shares supplementary sessions and works with the other impartial members to prepare the sessions. Along with the management board, the chair is also responsible for ensuring the budget and staffing plan of G-BA.

In addition to their responsibilities in the plenum, the three impartial chairs are directing the sub-committees of the G-BA. Based on proposals submitted by the impartials, the plenum appoints the chairs and proxies for each subcommittee. Each impartial has a primary and secondary deputy to fulfill his or her responsibilities and exercise his or her rights if the impartial is prevented from doing so.

b) In accordance with the regulations set forth in the German Social Code (Book 5, SGB V), leading nationwide advocacy groups that represent patient interests or facilitate self-help for people in Germany who are chronically ill or have disabilities are entitled to take part in discussions and submit petitions, but not to vote.

The following patient groups and self-help-organizations are currently entitled to appoint patient representatives:

– The German Council of People with disabilities
– The Federal Syndicate of Patient Interest Groups
– The German Syndicate of Self-Help Groups
– The Federation of German Consumer Organisations.

These groups and the people they represent reflect the diversity of patient interests and self-governed organisations in Germany. Upon request, the Federal Ministry of Health can recognise additional organizations that are not members of the federations mentioned above as leading nationwide advocacy groups.

c) The plenum of the G-BA appoints *Sub-Committees* to prepare decisions and resolutions. These Sub-Committees consist of one impartial chair, six representatives from the umbrella organisations of the statutory health insurance providers and a total of 6 representatives from the umbrella organisation of care-providers (the German Hospital Federation and the National Associations of Statutory Health Insurance Physicians and Dentists). The German Hospital Federation and the National Associations of Statutory Health Insurance, Physicians and Dentists appoint two Representatives each, unless the plenum determines a different structure based on the tasks of that Sub-Committee.

Patient Representatives are also present at Sub-Committee meeting and take part in the discussions. Representatives from other organisations and federations are involved as required and experts brought in as needed. Unlike the plenum, Sub-Committees meet only in closed sessions. They draft the results of their discussions as recommended resolutions for the plenum. But I suppose, the in-transparent way of decision-finding is not to justify.

IV Legal Mandate, Procedures

a) The *legal basis* for the work of the *Joint Committee* is, as mentioned, the German social code, Book 5 (SGB V).[14] Herein lawmakers have specified the mandates and responsibilities of the G-BA, the appointment of its members, patient involvement, the inclusion of third parties and the general framework of the structures and procedures of the Committee. In its bylaws and rules of procedures – both of which must be approved of the Federal Ministry of Health – the Committee defines the details of this statutory regulations.

Although the legislator provides the framework, it is the duty of the self-government to fill out this framework and to ensure that the legal instructions are practically implemented in every days work. The legal basis for this can be found although in the Social Code Book 5 (§ 92).

b) The directives in this way concluded by the Committee have the character of sublegal norms. In other words, they apply to the statutory health insurance funds and to persons insured by these funds. At the same time, patients, responsible physicians and other service-providers are also bound as parties. In that manner, non-legislative norms are binding upon all stakeholders in the statutory health insurance system. In accordance with the requirements in the SGB V, all resolutions and directives passed by the Federal Joint Committee are audited by the Federal Ministry of Health and then published in the Federal Gazette if no objections are found.

So what is the result? The Federal Joint Committee is of course not a subordinate agency of the Federal Ministry of Health; it is a discrete public legal entity. However, it creates its own health policy in Germany by the settlement of law – perhaps in contrast to the parliamentary order.[15]

V Autonomous Joint Self-Government: Asking after the Rule of Law and the Problem of Democratic Legitimation

Let me sum up. Co-Operatism and Self-Government are fundamental organisational principles for the construction and successful work of the Public Health Service in Germany. However, to navigate a compromise between several pressure groups on difficult questions about the distribution of financial and other resources of health care for everybody, as well as to guarantee its effectiveness and efficiency is a very complicated and extreme point of controversy. To resolve these questions is the main task of the joint self-government of physicians, dentists, hospitals and health insurance funds.

[14] Consider Kluth (n 11) 11–27, 39–60, 90–104.
[15] Compare Kluth (n 11) 90–104.

With regard to this problem, the actual construction of the Federal Joint Committee ensures, on the one side and without any doubt, 'social peace' in Germany by granting a minimum of financial resourcing for providing health care. However, on the other side there is a wide range of factors which cry for the situation to change. By reflecting the needs for the developing structures of self-government, we have to take particular notice of:

– increasing centralisation of decision-making bodies in statuary healthcare
– ongoing professional guidance by specialised institutes (in Germany: Institute for Quality and Efficiency in Health Care)
– increasing participation of counties in decision-making and the problem of outsiders
– the common good versus competitive health care
– settlement of norms in public law by the Federal Joint Committee and the influence of supervision in relation with the role of parliament and the rule of law.

These and other observations form a challenge to reflect the principles of 'corporatism' and 'self-government'.[16] That means, for example, discussing both boundaries and public law at its boundaries with regard to the function and role of professional corporations in joint self-government for providing health care. Among those questions, the boundary between law and politics, viewed from a public law perspective, and also the scope of settling public law norms by self-government seem to be of particular interest.

VI Summary

Health care in Germany by statutory health insurance funds within a self-governing health care system is far from perfect, as we learn from the example of the *Federal Joint Committee,* the highest self-governing and independent decision-making body of joint self-government. It is a real 'bureaucratic monster'. The construction of autonomous service provision as a self-governing system was once thought of as a step into flexibility of decision making during the day-today-business. Nevertheless, the settlement of exigent public law norms by self-governed entities and the way of decision-making by integrating 'outsiders' has driven the whole statutory health insurance constellation into a vicious circle of unstable contribution rates as a consequence of competition, into a movement away from the principle of solidarity and to changing ways of financing statutory health insurance. In my opinion we need a new construction for representing patients' interests in health care and to take responsibility for it – but not under an institution like the G-BA.

[16] For the discussion of these topics see Rainer Pitschas, 'Dezentrale Regulierung des deutschen Gesundheitswesens. Der "Gemeinsame Bundesausschuss (G-BA)" als rechtsetzende Regulierungsagentur' in Korea Public Land Law Association (ed), *Verwaltungsrechtssystem und Verwaltungswissenschaft. Essays in Honour of Prof. Dr. Hae-Ryoung Kim* (Hanyang University 2016, Korea/Seoul) 467–481.

Patrizia Magarò*

Schools and Universities in the Italian Multi-level Governance System**

I Education and Decentralisation

This study intends to provide some reflections on the public education service – provided by schools and universities – which has been heavily affected by the cuts made in recent years, relegating Italy to the lowest positions among the member States of OECD and the European Union, with regard to the percentage of public spending on education.[1] In the past twenty years, the continuous decline in investment in this field has significantly aggravated the various problems affecting education in Italy.

The critical aspects discussed here are linked only in part to the effects of the economic crisis and the national policies implemented over the last decade to contain public deficits; they are also related to some unresolved knots of Italian regionalism and complex dynamic of territorial decentralisation.

The problems of this public service are also due to the fact – as we will demonstrate in the following pages – that education is delivered through a 'widespread' decision making-process, involving many institutional bodies other than the State, in a 'galaxy' of responsibilities and competences, without the necessary coordination; this has a negative impact on the operation of the school system, weakening its effectiveness and slowing down its overall development.

As we will see, education has lost its original 'national' connotation, by increasingly assuming more, over the last two decades, a 'decentralised' character and a 'multilevel' articulation, as the result of the growing involvement of the territorial authorities in this sector, as well as of the educational institutions. Nevertheless, this process has been achieved in

* Prof. Dr. Patrizia Magarò, Università degli Studi di Genova, Dipartimento de Giurisprudenza.

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1 See OECD, *Education at a Glance 2016: OECD Indicators* (OECD Publishing 2016, Paris) 222, DOI: http://dx.doi.org/10.1787/eag-2016-en. See also Eurostat press release, 22 March 2016, http://ec.europa.eu/eurostat/documents/2995521/7214399/2-22032016-BP-EN.pdf/596b9daa-b9d6-415d-b85a-b41174488728.

a fragmented and haphazard regulatory framework, through reforms often lacking in coherence and overall strategic vision.

Education is configured by the 1948 Italian Constitution as a 'public service'[2]: it sets out the State's duty both to 'lay down general rules for the education' and to provide this service to citizens, through the establishment of 'State schools of all branches and grades'.[3]

Cultural promotion is carried out by guaranteeing freedom of teaching, free access to school education without discrimination, free compulsory education[4] and recognising the right of pupils lacking financial resources to receive education.

There is no State monopoly on education, as the right of private individuals or organisations to create school institutions (and to obtain parity recognition, according to the law requirements) is guaranteed.[5]

However, it is up to the State to define the content of education and the outline of the complex organization specifically aimed at providing this service to citizens.

The Italian educational system continued to be characterised by an accentuated national centralisation until almost the end of the 1990s.

Traditional Italian local authorities – municipalities and provinces – already existing in the old Kingdom of Italy, continued to assume, in the new republican legal order, instrumental administrative competences in education-related matters (it was up to them to bear the costs of maintaining buildings and operating schools).

Leaving aside, for the moment, the question of universities – to which we will devote some reflections later – and focusing on school education, it is worth mentioning that this public service should have been run within a deeply changed territorial organisational system, based on promoting autonomy and decentralisation (according to article 5 of the Constitution) and on the presence of a new, important level of government, in addition to the traditional local authorities.

The 1948 Italian Constitution, with an innovative solution in the comparative panorama after the second world war, provided in fact for the creation of an intermediate territorial authority, the 'region', which was conferred with legislative power but only in some matters

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2 See Carlo Marzuoli, 'Istruzione: libertà e servizio pubblico' in Carlo Mazzuoli (ed), *Istruzione e servizio pubblico* (Il Mulino 2003, Bologna) 11.

3 See article 33, paragraph two, of the Italian Constitution.

4 Education is compulsory for ten years. After the eight-year first cycle of education, the final two years of compulsory education can be undertaken at a State upper secondary school or in a three or four-years vocational education and training course, under the specific competence of regions.

5 This study does not cover the aspects related to private education; we limit ourselves to observe that, according to art. 33, paragraphs three and four, of the Constitution, 'entities and private persons have the right to establish schools and institutions of education, at no cost to the State. The law, when setting out the rights and obligations for the non-state schools which request parity, shall ensure that these schools enjoy full liberty and offer their pupils an education and qualifications of the same standards as those afforded to pupils in state schools'. These *'scuole paritarie'* can issue certifications with the same legal value as those of State schools; they can receive funding from the State as well as from regions and other territorial authorities.

strictly listed and in accordance with the fundamental principles laid down in state legislation (in line with the logic of the so-called 'shared' legislative power).[6]

Regions were not established operationally until 1970 (with a delay of more than twenty years after the entry into force of the Constitution), and in the first phase of their activity they did not contribute to the public education system to a significant degree. For this reason, the traditional vision, of education as a primary state function and configuring the school system as an essential part of the central and peripheral national administration, seemed to be confirmed.

A significant turnaround took place in the second half of the 1990s, in a context marked by profound political and institutional changes, when a period of wide reforms of the State administration began, giving concrete effect to the principles of autonomy and decentralisation, formally enshrined in the Constitution but in practice not yet fully implemented.

Between 1997 and 1998, through several legislative reforms but without modifying the Constitution, the implementation of a kind of 'administrative federalism' started, with the transfer of administrative functions from the State to regions and local authorities.

Going beyond the idea that the State should be considered the only authority with competences in the educational public sector, the existence of a 'polycentric' system started to become clear; territorial authorities are now asked to assume responsibilities of public relevance and general interest, on the basis of the subsidiarity principle.

The administrative powers of local authorities have progressively been extended. Municipalities and provinces continue to provide construction, operating utilities and maintenance of buildings, but the implementing rules of the 'administrative federalism' have assigned them additional competences, previously carried out by the State, in the field of education.[7]

Provinces (in relation to secondary education) and municipalities (for the other grades)[8] have assumed several tasks concerning opening, merging and closing schools, according to the programming tools. They have to develop organisational plans for the network of educational institutions, oversee school bodies in their territory, and suspend classes in serious and urgent cases. Furthermore, local authorities, also in agreement with school administrations, launch initiatives related to adult education and provide educational and

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[6] In this study we are taking into account only ordinary regions, but it should be remembered that there are five regions in Italy with a special form of autonomy, whose competencies have been regulated through constitutional laws. With regards to education, different powers have been foreseen in the statutes of special autonomous regions, which were created in the period between 1946 and 1950 (Sicily, Sardinia, Aosta Valley, Trentino Alto-Adige) and, in 1963, Friuli Venezia Giulia. Sicily and the provinces of Trent and Bolzano have been granted a large autonomy concerning primary schools, whereas Aosta Valley and the two provinces of Trentino Alto-Adige have also competences in the field of language teaching, related to the curriculum as well.

[7] See in particular the Legislative Decree no. 11 of 1998, *'Conferimento di funzioni e compiti amministrativi dello Stato e agli enti locali, in attuazione del capo I della legge 15 marzo 1997, n. 59'.*

[8] See Law n. 23 of 1996, *'Norme per l'edilizia scolastica'.*

professional guidance services as well as organisational support services (transport, school canteen), paying particular attention to students with disabilities and developing measures to preventing pupils from leaving the school system early and promoting health education.

Regions have been mainly endowed with administrative functions concerning the planning of integrated vocational education and training, as well as of educational networks (within the limits of the available human and financial resources), on the basis of provincial plans and of local authority proposals. Moreover, it is up to the regions to plan school building interventions, to fix the school calendar and to grant contributions (which may be added to those set out at national level) to private schools.

The state has residual functions related to specifying the criteria and parameters for the organisation of the educational system, to evaluating it and to setting and allocating the financial resources charged to the national budget and to the recruiting and assigning staff. The state has competences in supporting school activities and with regard to relations with regional administrations, local authorities, universities and training agencies.

The public service of education must therefore be provided through a coordinated exercise of functions by all territorial authorities of the Republic (regions, municipalities and provinces, together with metropolitan cities, as we will see later), in a system which has found a new constitutional enshrinement, by means of the major revision of 2001.

II Challenges in Territorial Governance of Education

Another period of Italian regionalism started with the entry into force of constitutional law no. 3 of 2001, which amended the entire Title V of the second part of the Constitution, devoted to the territorial organisation of the Republic.

Metropolitan cities have been introduced by the Constitution (even if they were operationally established only in 2015). Following federalist suggestions, a new articulation of powers regarding the different territorial levels of government was created.

With regard to the legislative function, the new article 117 of the Constitution expressly mentions the matters of 'exclusive' competence of the State and, in a subsequent list, which regions – as in the past – can legislate, in accordance with the general rules laid down in national laws. A residual legislative power is reserved for regions (and State intervention is formally precluded).

Compared with the previous constitutional framework, the reform introduced some significant innovations concerning education, and the regional role has been extended in this field; however, 'education' is a matter which needs to be considered while taking different types of competences into account.

The state has exclusive legislative power only in some aspects of education; other aspects fall into 'concurring' legislation (namely the state lays down fundamental principles and regions draft and implement detailed plans based on them); moreover, further aspects fall under the residual – and exclusive – competence of regions.

However, it should be noted that regions have not really been able to build a territorial education system after the reform; in the past few years some tendencies that can be seen as contrary to the spirit of the reform have emerged and grown, pushing towards what has been described as a 'comeback of centralisation'[9], and which have partly called into question the new distribution of responsibilities among the state, regions and local authorities.

First, it should be noted that a critical aspect of education in Italy continues to be represented by overregulation, which has built up over the years and is very complex, patchy and haphazard.

The overabundance of national rules almost never express a long-term strategic vision on education and they are often drafted without adequate cooperation with all territorial authorities and full respect for their autonomy, thus allowing the central government to maintain a strong role in educational processes.

Moreover, the complexity of the new distribution of powers has soon revealed the difficulty of a precise delimitation of the field of intervention reserved for the state and regions. This has contributed to increase the already high level of litigation before the Constitutional Court, which had to bring the fragmented competences on education into a framework characterised by 'a complex intertwining in the same matter of general rules, fundamental principles, regional laws and administrative acts'.[10] However, the constitutional jurisprudence did not really slow down the state's tendency to undermine competences from progressively passing to the regions.

The main reason for there having been so many disputes between the two institutional levels is the persistent absence of an effective forum for consultation and composition by the various interests involved. A constructive relationship between state and regions cannot be considered in the current Italian Parliament, despite many efforts made, in 2006 and 2016, to amend the Constitution. The Senate is still waiting to be transformed definitively into a real chamber with territorial representation, overcoming the Italian atypical equal bicameralism.

An interesting possibility introduced in the Constitution in 2001 has not even been applied so far.

Art. 116 makes it possible for the 15 ordinary regions to have 'additional forms and special conditions of autonomy' concerning some matters, amongst which is education. This mechanism, which could open up the Italian constitutional system to a more 'asymmetric regionalism', following the Spanish model, is now claimed by Lombardia and Veneto, which are organising a consultative referendum to start this procedure.

Another important problem is the key importance of the financial aspect in the concrete provision of the education service.

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9 A. M. Sandulli, *Il Sistema nazionale di istruzione* (Il Mulino 2003, Bologna) 89. See also Erik Longo, 'Fine di una materia. Spunti ricostruttivi e note critiche sul fragile decentramento dell'istruzione' [2015] ISSiRFA <http://www.issirfa.cnr.it/erik-longo-fine-di-una-materia-spunti-ricostruttivi-e-note-critiche-sul-fragile-decentramento-dell-istruzione-maggio-2015.html>, accessed 18 July 2017.

10 See *Corte costituzionale* (Italian Constitutional Court), Decision no. 13 of 2004.

The implementation of the 2001 reform should have also constitutionally covered so-called 'fiscal federalism', which was intended to reshape the financial relations between the state and territorial authorities, by giving greater revenue and spending autonomy to municipalities, provinces, metropolitan cities and regions.

However, the new dynamic of fiscal federalism only started in earnest in 2009.

The implementation of this still ongoing process has been affected by the worsening of the economy. The many regional and local finance reform rules have been repeatedly amended, not in order to improve the system's functionality, but just for fiscal consolidation. This issue has introduced some substantial elements of 'centralisation' related to the control of revenue and spending decisions of autonomous territories.

A complex financial equalisation system is now being completed – the conclusion of this process is planned for 2021 – but it is clear that it has so far been unable to guarantee adequate financial resources, to fully cover the costs of their fundamental functions, to all territorial authorities.

Local authorities play a strategic role in the provision of education services, but there is a growing number of municipalities which have been forced to reduce services significantly (or to increase prices considerably) for young children, foreign pupils and students with disabilities or to cut back school canteen services, the provision of free schoolbooks, etc.

Social and territorial inequalities have increased. What is particularly marked is the disadvantage of the southern regions and the islands, where there is the highest concentration of families suffering social exclusion and the child poverty rate is much higher than in the rest of the country. Efforts for the cultural and social integration of students without Italian citizenship have also been inadequate so far.

Nevertheless, it should be remembered that the efficiency and cost-effectiveness of public services do not seem to be helped by the problem of Italian municipal fragmentation. There are 8,048 municipalities or communes in Italy and are typically small in size; smaller communes in particular find it difficult to plan and manage their fundamental functions.

Inter-communal coordination and cooperation are still feeble and informal; this is due to the strong localism, the weak role played by regions and a constantly evolving process of reorganising the tasks of local authorities.

In recent years, national laws actually intervened several times in order to regulate local government competencies, not only due to economic emergency but also to reduce the 'costs of politics' (politicians).

The most recent reform of local authorities, for instance, is considered by many as an expression of a 'recentralising' logic. In 2014, ten metropolitan cities, with planning and territorial management functions, were introduced by a national law in the ordinary regions[11] (which replaced an equal number of provinces the following year). The remaining provinces

[11] See Law no. 56 of 2014, *'Disposizioni sulle città metropolitane, sulle province, sulle unioni e fusioni di comuni.'* Four other metropolitan cities have subsequently been created in the regions by a special statute, which are not covered in this study.

have been transformed into second-tier 'large area' territorial authorities, with 'fundamental functions' in some specific fields; their organisation was expressly given as 'transitional', while waiting for constitutional reform in order to decide their concrete future. Regions have been called to reorganize the 'non-fundamental' functions of provinces through specific laws.

The Italian Court of Auditors has recently observed that provinces live today in 'an objective condition of uncertainty which affect their constitutional prerogatives';[12] due to the reorganisation of the local government system taking place in a climate of great vagueness about the fate of provinces. While awaiting their definitive abolition, foreseen in the constitutional revision bill of April 2016, the government's plans were rejected by the people in a referendum.

Unlike the 2001 constitutional law – marked by a strong 'federalist' impetus – the constitutional reform rejected by the referendum on 4th December 2016[13] was approved in a context of deep crisis and delegitimisation of territorial authorities, after numerous judicial investigations concerning cases of corruption and waste of resources, which occurred at all peripheral levels of government (but especially concerning regions).

Provinces were abolished *tout court,* without reconfiguring the system of local authorities (despite the many problems of the new recently created metropolitan cities) and the regional system appeared generally weakened.

In short, the declared intention of opening a new virtuous phase of Italian regionalism was disavowed by a logic of substantial (re)centralisation.

In such a chaotic context, it is not always possible to identify exactly the responsibilities of regional and local authorities, and so sometimes administrative courts have had to intervene.

Sound forms of inter-institutional collaboration would be very opportune, for instance in school buildings, the multilevel governance of which involves State, regions and local authorities.

This issue has unfortunately now assumed the characteristic of a real 'national emergency'. Recent surveys have highlighted that 65% of schools were been built before the entry into force of the anti-seismic legislation of 1974. More than half are in seismic areas, often without having the necessary technical certifications.[14] Attention should be drawn to the fact that

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[12] Corte dei Conti, Sezione delle Autonomie, 'Audizione sulla finanza delle Province e delle Città metropolitane presso la Commissione Parlamentare per l'attuazione del federalismo fiscale, 23/2/2017, 4' <http://www.corteconti.it/export/sites/portalecdc/_documenti/controllo/sez_autonomie/2017/audizione_finanza_province_citta_metropolitane.pdf>, accessed 18 July 2017.

[13] In April 2016, Italian Parliament approved a Constitutional Law concerning 'Provisions for overcoming equal bicameralism, reducing the number of Members of Parliament, limiting the operating costs of the institutions, the suppression of the CNEL and the revision of Title V of Part II of the Constitution', available at: http://www.gazzettaufficiale.it/eli/id/2016/04/15/16A03075/sg. A constitutional referendum was held on 4th December 2016 and 59.11% of voters rejected this reform.

[14] See Legambiente, 'Ecosistema Scuola. XVII Rapporto di Legambiente sulla qualità dell'edilizia scolastica, delle strutture e dei servizi' [2016], 15, <https://www.legambiente.it/sites/default/files/docs/ecosistema_scuola_2016_xvii_rapporto.pdf>, accessed 18 July 2017.

Italy is one of the most endangered Mediterranean countries, due to the frequency of earthquakes and to the intensity that some of them have achieved.

With regard to school buildings, the executive powers and responsibilities shared by the various territorial authorities require a strategic planning approach and effective coordination, which should avoid overlapping tasks and allow timely building maintenance (over the last three years, 117 schools have collapsed).

III Centralism and Autonomy in Higher Education

A worrying aspect of the (failed) constitutional reform of 2016 concerned the autonomy of the universities, a subject that deserves to be mentioned briefly.

In order to understand the scope of innovations the reform was seeking to introduce, it is worth remembering, first of all, that in 1946 little attention was paid in the Constituent Assembly to the autonomy of school administrations and universities, even though this latter is enshrined in art. 33, which guarantees the freedom of the arts and sciences – which may be freely taught – and states that 'higher education institutions, universities and academies have the right to establish their own regulations, within the limits laid down by the law of the State'.

It was not until late 1980s that a process began, rich in significant innovations but also in contradictory elements, that placed the debate on university autonomy and its multifaceted contents at the centre of attention.

Full self-government for universities was finally implemented under Law no. 168 of 1989, which laid down the fundamental principles regarding academic autonomy and reorganised ministerial functions in the field of higher education and scientific research, through the creation of the Ministry of Education, University, Scientific and Technological Research (MIUR), a department whose structure and denominations has undergone several variations, also related to the changing political situation).

This law defined the relations between universities and the new Minister quite clearly. The Minister has been assigned a function of promoting research, planning university development and devising the general strategic guidelines of the system, defining resource allocation criteria, coordinating academic education and Italian research with the European and international projects; it was also up to the Minister to exercise some control over the main acts adopted by universities.

The reform of 1989 stated that university autonomy has a didactic, scientific, organisational, financial and accounting nature, adding that the academic institutions 'establish their autonomous system with their own statutes and regulations'.

However, the discipline of fields, particularly relevant for the life of academic institutions, was later established by the State, both through numerous laws (as permitted by the Constitution) and a heavy, continuous flow of regulations which have made the normative

reference framework progressively more disorganised, fragmentary and heterogeneous, also reproducing the old ministerial centralization prior to the 1989 reform.[15]

The strict state control on universities, even today (e.g. with reference to the didactic system, study qualifications, definition of the fields of teaching and research, academic tenure, etc.) appears partly contrary to the autonomist choice made in 1989.

The Conference of Italian University Rectors has long brought some issues deemed urgent to Government's attention, requesting the adoption of appropriate measures.

The financial autonomy of universities is considered particularly problematic, as it is constantly limited by national public finance decisions. The simplification of administrative procedures in strategic areas such as planning the curriculum, the research evaluation system and accounting appears to be essential, in order to sustain efforts for innovation and change in universities.

The choice, contained in the 2016 constitutional reform, to reserve legislative competence on 'university education' as well as on 'strategic planning of scientific and technological research' exclusively to the state also raised concerns.

Many people were of the opinion that this new feature would have placed a heavy burden on university autonomy, by putting this latter 'to the service of the changing and contingent future Governments' willingness'.[16] Such a fear appeared even more well-founded, in view of some questionable decisions taken in the same period by the Italian government, in the field of university teaching staff recruitment (then considered by the Council of State as seriously undermining the university autonomy).

The people's rejection of the constitutional revision law has prevented, *inter alia,* a virtuous circle, begun after 2001, which – albeit slowly – has progressively led to a greater interaction between universities and territorial context of reference, precisely in the field of scientific research and technological innovation, from being broken. The 2001 reform of Title V of the second part of the Constitution had in fact strengthened this relationship, trying to include universities in the 'regional' education system as well.

In this respect, it should be noted that there were only 26 Italian universities in the early 1900s, while today they are 97 (including online ones, whose relationship with their seat seems weak and fluid), a number corresponding to almost one academic institution per province. Despite universities becoming increasingly widespread, their relationship with territorial authorities has never been historically characterised by intense and institutionalised forms of cooperation such as those existing in other European countries with strong political decentralisation.

Until 2001, there was no trace in the Constitution of regional legislative competencies in the field of higher education; administrative responsibilities for educational assistance have

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[15] Giliberto Capano, Marino Regini, *Come cambia la governance. Università italiane ed europee a confronto* (Fondazione CRUI 2015, Roma) 9–10.

[16] Umberto Izzo, 'L'autonomia dell'Università al tempo della riforma costituzionale' [2016], <https://www.roars.it/online/lautonomia-delluniversita-al-tempo-della-riforma-costituzionale/>, accessed 18 July 2017.

however allowed regions to provide, alongside the state, public education services, in terms of guaranteeing the right to study.

Over the years, regions have thus developed disciplines concerning the right to university studies; they have urged Parliament to adopt framework legislation to lay down some fundamental principles ensuring uniform treatment to students all over the country, regardless of the location of the specific university attended.

The state has the task of exercising the functions of directing, coordinating and programming measures concerning the right to university studies, while regions 'activate interventions aimed at removing economic and social barriers' to manifest this right (e.g. through canteen, housing, transport services or scholarships, healthcare, career counselling, etc.).

In 2001, Parliament decided not to explicitly mention universities among the areas of shared competence, listed in art. 117 Const., referring, however, to 'scientific and technological research and support for innovation in sectors of production'. This was a significant innovation, the implementation of which first advanced with difficulties both at national and regional level, but it has assumed a more concrete appearance and an important role over time.

As there is a very strict link between high level teaching and research activities, the inclusion of scientific and technological research in the shared legislation has had positive effects in the same field of higher education, as regions have tried, through the research discipline, to extend their engagement to the development of aspects closely related to the life of universities.

Cooperation between universities and regions has then received significant impetus from specific framework agreements (especially in 2005 and 2012), jointly signed by the Conference of Rectors of the Italian Universities and the Conference of Presidents of Regions and Autonomous Provinces. In these documents, attention has been drawn to the need to stimulate the synergy between the two 'systems of autonomy', to improve the efficiency and quality of academic education and research, by fully integrating higher education into a regional programming strategy.

Particularly important is the support that regions can offer to internationalisation in the field of training, research and culture, an indispensable process for developing cooperation networks across territories, universities and Italian and European enterprises through joint actions and the implementation of specific projects.

To make sure that this commitment could be profitable, regional authorities are required to assume an effective coordinating role between universities and local SMEs, stimulating, with appropriate economic incentives and the necessary planning, a simultaneous and positive growth of both systems.

In defining the programming framework for supporting the cultural, economic and social development of their respective territories, most regions have approved, in recent years, special laws to promote scientific research, enhance interaction between universities and regional production systems and supporting higher education, technology transfer and innovation.

Such synergy is today indispensable to increase the attractiveness of university systems and regional territories – as is the case with other foreign countries – and to carry out joint initiatives enabling access to European funding, encouraging the employment of graduates, strengthening the relationships between the scientific and productive world and supporting territorial economic development.

The statutes of Italian universities have been greatly modified in recent years, to adapt their organisation and academic governance to the principles and guiding criteria laid down by a 2010 reform law. This new phase also offered the opportunity to reinforce their links with their territories and there are many who believe that a dynamic of 'regionalisation of universities' has started, by means of the different rules at peripheral level.[17]

The constitutional reform, finally rejected by the people, could have called into question this virtuous process, prefiguring further constraints (in addition to those closely related to the need for national coordination) on the ability of universities to develop autonomously innovative processes and good administrative practices.

It should not be disregarded that universities have progressively expanded and consolidated links with territorial autonomies, but they still live their everyday life in a system of relationships, in which the role of the state remains largely dominant, without there being any signs of its possible downsizing in the near future.

As we have already seen with regard to schools, universities in Italy are a key driver of socio-economic growth too but, compared to what happens in other European countries, there is a tendency to 'centralise' decision-making process as if such institutions should still be considered as peripheral articulations of the state, destined to guarantee a generic right to higher education, in a homogeneous manner across the whole nation.

A distribution of competences aimed at enhancing the peripheral level has not generated, in other national systems characterised by strong administrative and political decentralisation, a push to the 'fragmentation' of education into a multiplicity of local subsystems. The culture of autonomy seems instead to have impelled the positive development of coordinating forms, both vertical (between the national and peripheral level) and horizontal (between local authorities and universities).

The development lines of the regional and local system in Italy have unfortunately never been detailed so far in the light of a project shared by all political forces; for this reason, decentralisation has not grown on a basis of incremental dynamics, as with almost all European countries, but has followed a winding path. Any recognition of progressive and significant degrees of autonomy to regional and local authorities has always been followed by phases of different intensity, during which an attempt to reverse the process was made or a substantial recentralisation of competences was achieved.

[17] See for example Enrico Carloni, 'Il rapporto tra le Università e il territorio alla luce dei nuovi statuti di autonomia' [2012] Istituzioni del Federalismo 311–335, 312.

The building of a sound 'system of autonomies' would primarily require state willingness to reform itself, transforming its own mechanisms and apparatus but, above all, it calls for fully sharing the idea that decentralisation should not be a mere 'bureaucratic' transfer of competences between institutions. This is particularly true in the field of higher education, to which we have devoted our critical attention in these pages.

Case Note

Florian Heindler*

The Austrian Public Policy Clause and Islamic Family Law

I Introduction

Austrian courts, in accordance with the private international law rules applicable in Austria, may be required to apply a law based on the authority of religious sources such as the *Quran* and the *sunna*. Likewise, decisions adopted in jurisdictions designated as Islamic can be recognised by Austrian courts in accordance with the rules of recognition and enforcement. Two cases, one on the application of Saudi-Arabian law in Austria, and one on the recognition of an Iranian decision, were decided by the Austrian Supreme Court in 2011.

In both cases, national private international law rules have been applicable. The case-notes therefore, focus on the Austrian public policy clause. However, public policy clauses can be also found in EU legal instruments such as the Rome III Regulation (Art 12) and the EU Regulation No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations – (Art 24 lit a). None of the EU legal instruments was applicable in the current case. In the consideration of religious sources, similar questions arise as with regard to the invocation of the national public order clause. However, the reflections made below on the Austrian public order clause may only be transposed with great care, considering the difficult nature and context of the public order clauses in EU legal instruments.

Austrian conflicts law, as it is generally constituted, may refer to legislation influenced by Islam and governs the recognition of a decision adopted in a jurisdiction shaped by Islamic authority. It does, however, neither prescribe specific rules for legislation influenced by Islam or for the recognition of decisions adopted in a jurisdiction shaped by Islamic authority, nor outlaw the application or bar recognition. This approach is concise for many reasons. In particular, the variety of situations does not allow a one-size-fits-all approach to legislations influenced by Islam, but requires the flexibility that can be availed of in a balanced private international law system. Hence, if Austrian courts would be forced to ignore any family law decision adopted in a jurisdiction designated Islamic, then women, in a number of instances

* Florian Heindler (PhD) is assistant professor at Sigmund Freud University Vienna, Faculty of Law (e-mail: florian.heindler@jus.sfu.ac.at). A special thank you goes to Bea Verschraegen for sharing and discussing ideas.

could lose ancillary entitlements to relief and child custody, for example,[1] not to mention the problem of limping marriages, i.e. marriages being recognized in some but not in all jurisdictions.

The law of many jurisdictions is based on the authority of religious sources such as the *Quran* and the *sunna.* However, the different jurisdictions offer a variety of legal rules. Although a number of jurisdictions refer to the abovementioned sources, the different interpretations and the variety of additional rules are part of each jurisdiction. References by the Austrian Private International Law Act ('autIPRG') ought to be understood as references to the law of a particular state. Therefore, for a jurisdiction designated Islamic, it has to be established how the sources are interpreted in the particular state and whether complementary rules are applied.[2]

The application of a so-called Islamic law, i.e. law based on the authority of religious sources such as the *Quran* and the *sunna,* by an Austrian court, could easily attract the attention of a larger public, including politicians and the mass media. In Austria, this is due to a suspicious attitude towards Muslims currently prevailing among large parts of the Austrian population. The foremost reason beyond this suspicion is the steadily growing size of the Muslim population in Austria. Other fears may derive from terrorist attacks committed by Muslims who refer to their religious ambitions. In recent years, especially the activities of the so-called Islamic state and the large number of refugees who have arrived in Austria are deemed to have led to a growing mistrust towards Muslims, including hostility towards Muslim customs[3] and legal traditions.

This general tendency also affects the legislator,[4] legal discussions, and courts. In the US, federal states started to ban Islamic law, even when it would have been applicable in accordance with choice of law rules.[5] On some occasions, this even goes further, and they promote attempts to restrict the application of foreign laws in general.[6] Austrian private international law, in contrast, remains neutral and open to the application of foreign law and the recognition of foreign decisions, including legislation referring to the *Quran* and the *sunna* and decisions in respective jurisdictions. Discussions, therefore, focus on the range of

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1 See Ilias Bantekas, 'Transnational Talaq (Divorce) in English Courts: Law Meets Culture' (2009) 9 (2) Journal of Islamic State Practice in International Law 40–60, 45–46.

2 See Andrea Büchler, *Islamic Law in Europe? Legal Pluralism and its Limits in European Family Laws* (Routledge 2016, Oxon – New York) 10.

3 In 2015, the Austrian supermarket chain Spar withdrew halal meat from the range of its products after massive protests about their offering.

4 Austria e.g. has enacted an Anti-veiling Act *(Anti-Gesichtsverhüllungsgesetz)* that entered into force on 1 October 2017.

5 See Bryan Turner, James Richardson, 'America. Islam and the Problems of Liberal Democracy' in Maurits Berger (ed), *Applying Shari'a in the West – Facts, Fears and the Future of Islamic Rules on Family Relations in the West* (Leiden University Press 2013, Leiden, 47–64) 52–54, 56–57.

6 See e.g. State of Arkansas House Bill 1471 'An act to protect the rights and privileges granted under the United States Constitution and the Arkansas Constitution; to declare American Laws for American Courts; and for other purposes' (2015). Similar provisions have been enacted in a number of other US states.

application for the public policy clause. As such Austrian courts are also straddling between suspicion of laws designated as *sharia* law and the belief in the basic equality of legal orders supporting judicial harmony. Whereas the public policy clause is easily invoked in order to avoid the application of law designated as *sharia* law, the original intent was to award only a limited role to the public policy clause, merely focusing on the effects of the application of foreign law or on the effects of the recognition of a foreign judgment. The decisions illustrate the variety of treating law designated as *sharia* law in family matters by Austrian courts.

II Post-marital Maintenance

1 Facts of the Case

The Austrian Supreme Court decision dated 28 February 2011,[7] concerned an action for spousal and post-marital maintenance. The action was brought by the wife of a couple married in Medina, Saudi Arabia, in 1983. At the time of the marriage, both spouses were Saudi Arabian citizens. The permanent residence of the wife before as well as after the marriage was in Austria, whereas the husband moved to Austria after the marriage. In 2003, the wife acquired Austrian citizenship, whereas the husband remained a citizen of Saudi Arabia. The marriage ended in divorce in 2007.

The Austrian courts dealing with the case first had to determine the applicable law in accordance with Austrian private international law rules. The Hague Protocol on the Law Applicable to Maintenance Obligations was not yet applicable, since the procedure had already started before its entry into force in Austria.[8] The Austrian Supreme Court distinguished between spousal and post-marital maintenance, since the calculation of spousal maintenance remained uncontested in the revision. In order to determine the law applicable to post-marital maintenance, the Austrian Supreme Court rightfully applied § 20 s 1 and § 18 s 1 no 1 autIPRG. In accordance with § 20 s 1 autIPRG, 'the prerequisites and effects of a divorce shall be judged according to the law governing the personal legal effects of the marriage at the time of the divorce'. It is stated in § 18 s 1 no 1 autIPRG that these effects shall be judged 'according to the personal status law which the spouses have in common, and, in its absence, according to the last common personal status law of the spouses, provided one of the spouses has retained it'.[9] Austrian private international law rules referred in the given case to the law of Saudi Arabia. References in the Austrian Private International Law Act, in

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7 Austrian Supreme Court ('OGH') 9 Ob 34/10f.

8 See Council Regulation (EC) 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L 7/1, art 75. For details see OGH 7 Ob 116/12b; OGH 10 Ob 35/12p; OGH 5 Ob 152/15m; Brigitta Lurger, Martina Melcher, *Handbuch Internationales Privatrecht* (Verlag Österreich 2017, Vienna) para 2/200–2/205.

9 Translations by Edith Palmer, 'The Austrian Codification of Conflicts Law' (1980) 2 (28) The American Journal of Comparative Law 197–234, 226–227.

accordance with § 5 s 1 autIPRG, include the conflicts rules of a foreign legal order. Saudi Arabian conflicts law however accepted the reference.[10]

Nonetheless, Austrian courts are entitled to apply Austrian law as the *lex fori,* if and only if (1) 'despite intensive efforts the foreign law cannot be ascertained within a reasonable time',[11] or (2) the application of foreign law 'would lead to a result irreconcilable with the basic tenets of the Austrian legal order'.[12]

In the present case, the first instance court with regard to spousal maintenance applied Austrian law referring to § 4 s 2 autIPRG. In relation to post-marital maintenance, the first instance court again applied Austrian law but referred to the public policy clause, stating that the rules on post-marital maintenance applicable in Saudi Arabia are contrary to the basic tenets of the Austrian legal order. The second instance court confirmed this decision and made it explicit that a three-month limitation of post-marital maintenance, as provided by Saudi Arabian law, is irreconcilable with the basic tenets of the Austrian maintenance law. Applying Austrian maintenance law in accordance with § 6 autIPRG, the second instance court awarded maintenance on grounds of equity and fairness, e.g. in consideration of the spouses' financial abilities, in accordance with § 68 Austrian Marriage Act. This provision applies if no fault by the spouses has been established

This decision was amended by the Austrian Supreme Court with regard to post-marital maintenance. It first established, with reference to an expert opinion, that applicable Saudi Arabian law provides for maintenance only during a waiting period, which is up to three months after divorce.[13]

2 The Application of the Public Policy Clause

The Austrian Supreme Court emphasised that the public policy clause must be regarded as an exception, being in conflict with the system of private international law, particularly regarding the acceptance of the principle of equality of legal systems.[14] In this regard, the Austrian Supreme Court confirmed that the public policy clause must be applied cautiously.[15]

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[10] See with further references Marco Nademleinsky, 'Unterhaltsbefristung der Scharia verstößt nicht gegen inländischen ordre public' [2011] Zeitschrift für Familien- und Erbrecht 103–104, 104.

[11] § 4 s 2 autIPRG, translation by Palmer (n 9) 223.

[12] § 6 autIPRG, translation ibid.

[13] This result is in line with reports of many observers. See e.g. Lena-Maria Möller, 'No Fear of Talaq: A Reconsideration of Muslim Divorce Laws in Light of the Rome III Regulation' (2014) 10 (3) Journal of Private International Law 461–487, 472.

[14] For Austria see Fritz Schwind, *Internationales Privatrecht* (Manz 1990, Vienna) para 15; Bea Verschraegen, 'Internationales Privatrecht' in Peter Rummel (ed), *ABGB – Kommentar zum Allgemeinen bürgerlichen Gesetzbuch* (3rd edn, Manz 2004, Vienna) § 6 autIPRG para 1; Marco Nademleinsky, Matthias Neumayr, *Internationales Familienrecht* (2nd edn, Facultas 2017, Vienna) para 01.25.

[15] See also 6 Ob 242/98a; OGH 3 Ob 221/04b; OGH 9 Ob 70/10z; OGH 7 Ob 200/10b; Alfred Duchek, Fritz Schwind, *Internationales Privatrecht* (Manz 1979, Vienna) § 6 para 2; Nademleinsky, Neumayr (n 14) para 01.23; Schwind (n 14) para 155–156; Bea Verschraegen, *Internationales Privatrecht* (Manz 2012, Vienna) para 1310.

It interpreted § 6 autIPRG as requiring an analysis of the effects of the application of Saudi Arabian law with regard to the particular circumstances of the case. In the given case, divorce was observed to be confirmed based on mutual fault for the break-up of the marriage. Maintenance after break-up of the marriage due to mutual fault is awarded under Austrian law in accordance with the principle of equity and fairness. Limitations subject to a number of considerations may be set by the court, applying Austrian law as well. In this regard, the Austrian Supreme Court did not accept the decisions of the lower instance courts, which stated that the three-month limitation of the post-marital maintenance in this particular case was irreconcilable with the basic tenets of the Austrian legal order. Similarly, *Stone* already observed in the 1980's that, for legal regimes, which favour the destruction in law of marriages which have irretrievably broken down in fact and enable a divorce to be obtained with little difficulty, 'neither the grounds on nor the procedure by which a foreign divorce is obtained should be relevant to its recognition in England.'[16]

The Austrian Supreme Court rightfully observed that the result of the application of the foreign law regarding the particular case, and not the foreign law as it is generally constituted, must be considered.[17] This interpretation of § 6 autIPRG is consistent with the prevailing Austrian doctrine[18] and a number of decisions by the Austrian Supreme Court in family law and other areas of the law.[19] However, in the given case, *Fucik* rightfully mentioned that the suspicion of law designated as *sharia* law resulted in public attention regarding the case and not the restriction of maintenance as such, and he added that other legal orders, e.g. Swedish law, although they would have denied any right to post-marital maintenance if it would have been applicable to the given case, would not have been tested against the public policy clause.[20]

The present case, however, illustrates the disadvantage of the reference in § 20 s 1 and § 18 s 1 no 1 autIPRG to maintenance obligations. Clearly, Saudi Arabian law does not have a close connection with the legal relationship and obligation that was the subject of the claim. Today, Art 3 of the Hague Protocol on the Law Applicable to Maintenance Obligations would refer to the 'law of the State of the habitual residence of the creditor' and Austrian law would therefore apply.[21]

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16 PA Stone, 'The Recognition in England of Talaq Divorces' (1985) 14 (4) Anglo-American Law Review 363–378, 371.

17 See also Christian von Bar, Peter Mankowski, *Internationales Privatrecht I. Allgemeine Lehren* (Beck 2003, Munich) § 7 para 265–277; Verschraegen, *Internationales Privatrecht* (n 15) para 1314.

18 See Michael Schwimann, *Internationales Privatrecht* (3rd edn, Manz 2001, Vienna) 44–45; Verschraegen in Rummel (n 14) § 6 para 3; Barbara Egglmeier-Schmolke, *Internationales Privatrecht* (2nd edn, NWV 2016, Vienna–Graz) 42–43.

19 OGH 4 Ob 199/00v; OGH 5 Ob 131/02d; OGH 3 Ob 242/05t; OGH 9 Ob 70/10z.

20 Robert Fucik, Scharia und ordre public [2011] Interdisziplinäre Zeitschrift für Familienrecht, 180–181, 181.

21 See Willibald Posch, 'Die Anwendung des islamischen Rechts in Österreich heute – und morgen?' [2012] Zeitschrift für Rechtsvergleichung 71–80, 76; Harun Pacic, 'Islamisches und islamisch geprägtes Recht in Österreich' [2013] Zivilrecht aktuell, 111–114, 112–113.

III Divorce

1 Facts of the Case

The Austrian Supreme Court decision dated 13 October 2011[22] concerned an application for divorce. The application was brought on 12 September 2007 by the wife of an Iranian couple living in Austria. The husband, who had Iranian-Austrian dual citizenship, opposed that application, contending that they had been divorced in Iran. The application for divorce was brought in Teheran by the husband earlier in 2007. The Iranian first instance court decided in favour of the application by a judgment issued on 20 October 2007. This decision was appealed by the wife and confirmed by the Iranian second instance court on 22 January 2008. This decision was again appealed by the wife and on 30 August 2008 the Iranian Supreme Court finally rejected the appeal. On 8 March 2009, the Iranian family court issued the respective official divorce acknowledgement.

In the meanwhile, the Austrian courts continued the divorce proceedings in Austria. The first instance court decided on 31 May 2010 that the marriage was divorced in Iran and accordingly dismissed the application brought in Austria. The dismissal of the Austrian application was based on the recognition of the Iranian court decision. The second instance court confirmed this decision and declared that the Iranian decision must be recognised in accordance with § 97–99 Austrian Non-Contentious Proceedings Act (*Außerstreitgesetz,* 'autAußStrG').[23] § 97 s 1 autAußStrG allows the recognition of foreign divorce judgements if they are final and if there is no reason to reject recognition. Possible reasons for rejection are indicated in § 97 s 2 autAußStrG. In accordance with § 97 s 2 no 1 autAußStrG, recognition must be rejected if the foreign judgment is manifestly irreconcilable with the basic tenets of the Austrian legal order. More specifically, § 97 s 2 no 2 autAußStrG bars recognition if the proceedings infringed the right to a fair hearing of one spouse, unless the spouse was evidently in agreement with the decision. Finally, § 97 s 2 no 4 autAußStrG bars recognition if, by hypothetical application of Austrian law on international jurisdiction, the foreign court would have lacked jurisdiction.[24]

The Austrian Supreme Court lifted the decisions of the first and second instance court, with reference to § 97 s 2 no 1 autAußStrG and stating that the Iranian judgement was irreconcilable with the basic tenets of the Austrian legal order. It thus refused to recognize the foreign divorce judgment. The application for divorce brought subsequently by the wife in Austria was admissible.

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[22] OGH 6 Ob 69/11g.

[23] See for the legislative history Marco Nademleinsky, 'Die Anwendung von Anerkennungsregeln auf familienrechtliche Entscheidungen' [2016] Österreichische Juristenzeitung 1063–1070, 1065–1066. Brussels IIbis does not apply to divorces obtained outside the EU.

[24] See OGH 1 Ob 21/17w; Thomas Garber, 'Zur Reichweite der österreichischen Jurisdiktionsformel' [2017] Zeitschrift für Familien- und Erbrecht 233–237, 235–236.

2 Recognition of a Talaq

A *talaq* can be subject to recognition in Austria. However, Austrian courts can only consider a *talaq* to be a decision in the meaning of § 97 autAußStrG if a foreign authority has to some extent participated in the proceedings; hence a contribution of the foreign authority with formal constitutive effect on the *talaq* is not required.[25] Therefore, the *talaq,* as it is constituted in many jurisdictions, where it has lost some of its unilateral character, can be regarded as a decision in the meaning of § 97 autAußStrG. Separate proceedings for recognition are no longer required in accordance with the introduction of the new Austrian Non-Contentious Proceedings Act in 2003.

In Austria, the recognition of a *talaq* and the applicable law on divorce are fully separate matters. Thus, irrespective of whether the Iranian court applies the same substantive law as the Austrian court, Austrian courts may recognise that a marriage is divorced. If an Austrian court is dealing with a divorce application, it must assess whether the marriage has already ended in divorce, e.g. by a final foreign *talaq.* Upon recognition of a foreign *talaq,* the later divorce application in Austria would be inadmissible.

In the present case, it has been assumed by the Austrian Supreme Court that the husband used his entitlement under Iranian law to repudiate his wife without requiring her consent. It was found that the husband under Iranian law was entitled to declare repudiation, whenever he wanted to, by spelling out the necessary phrase in front of two just men. The disagreement of the wife regarding the divorce was inferred from the fact that the wife brought a divorce claim in Austria.[26] However, the proceedings that actually took place in Iran are not described accurately by referring to repudiation. The facts of the case, moreover, include that the husband brought a claim to the Teheran court, which was forwarded to an arbitrator, who tried to reconcile the spouses and save the marriage. It was established that the spouses nominated representatives to participate in the reconciliation procedure but the arbitrator finally failed to reconcile the marriage.

a) References to prior decisions on talaq

The question whether a *talaq* is irreconcilable with the basic tenets of the Austrian legal order has been considered by the legal doctrine in Austria,[27] in many other European jurisdictions,

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25 OGH 6 Ob 189/06x; OGH 1 Ob 138/09i; OGH 6 Ob 69/11g.

26 On the contrary, Bea Verschraegen, 'Scheidung nach iranischem Familienrecht' [2012] Österreichische Juristenzeitung 260–263, 262 observed that the Austrian divorce claim illustrated consent of the wife, except for the financial consequences of the divorce. See also for this opinion Lydia Fuchs, '§ 100 autAußStrG' in Edwin Gitschthaler, Johann Höllwerth (eds), *Kommentar zum Außerstreitgesetz* (Manz 2013, Vienna) para 19.

27 See for instance Schwind (n 14) para 156–157; Willibald Posch, '"Islamisierung" des Rechts?' [2007] Zeitschrift für Rechtsvergleichung 124–133; Bea Verschraegen, 'Ordre public in einer Gesellschaft kultureller Vielfalt aus der Perspektive des Zivilrechts' [2012] Richterzeitung 216–227, 218; Posch 'Die Anwendung des islamischen Rechts in Österreich heute – und morgen?' (n 21) 71; Wolfgang Wieshaider, 'Religious Rules Under Austrian State Law' in Rossella Bottoni, Rinaldo Cristofori, Silvio Ferrari (eds), *Religious Rules, State Law, and Normative Pluralism*

and was tackled in discussions on the EU legal instruments as well.[28] In Austria, the recognition of a *talaq* had already been subject to decisions of the Austrian Supreme Court as well as prior decisions of the Austrian Ministry of Justice, which was competent to recognise foreign divorce judgments until 2001.[29] The Austrian Ministry of Justice determined that a divorce effectuated by the husband's unilateral declaration is contrary to Austrian public policy, unless (1) there was consent from the wife,[30] or (2) the same legal conditions for the spouses to declare the divorce unilaterally would apply.[31] Thereafter, the Austrian Supreme Court issued three decisions. In a decision dated 31 August 2006,[32] the Austrian Supreme Court held that 'repudiation in accordance with Islamic law *(talaq)* is contrary to national public policy'. In a decision dated 28 June 2007,[33] the Austrian Supreme Court dismissed the applications of both spouses, who requested the recognition of an Egyptian *talaq,* stating that foreign decisions which violate Austrian public policy cannot be recognised based on consent to it by the parties.[34] This decision can be brought in line with the prior statement of the Austrian Ministry of Justice and the prevailing doctrine, both stipulating that, upon the consent of the wife, a unilateral declaration of divorce is feasible, but only by referring to the fact that, in the given case, the wife did not know about the divorce in Egypt and only found out about it later. As such, Austrian courts may even require consent in advance, which typically would not be formally documented. It can furthermore be added, that in both cases decided by the Austrian Supreme Court, the spouses were Austrian citizens, and thus there was greater margin of discretion to refer to Austrian public policy. In a decision dated 7 February 2008,[35] the Austrian Supreme Court confirmed that a *talaq* (in this case, Pakistani) is contrary to Austrian public policy. In this case, the wife was still a citizen of Pakistan. Regardless of her

– *A Comparative Overview* (Springer 2016, Switzerland, 77–90) 83–84; Nademleinsky, 'Die Anwendung von Anerkennungsregeln auf familienrechtliche Entscheidungen' (n 23) 1066–1068.

28 The literature on the issue is innumerable. See for instance Zoé Papassiopi-Passia, 'The Applicable Law on Divorce and the "Ordre Public" Reservation in Greek Conflict of Laws' (2000) 60 (4) Louisiana Law Review 1227–1239; Thomas Rauscher, 'Talaq und deutscher ordre public' [2000] IPRax 391–394; Marie-Elodie Ancel, 'Islamic Repudiations before the French Cour de cassation' in Petar Šarčević, Paul Volken, Andrea Bonomi (eds), *Yearbook of Private International Law,* Vol VII (Sellier 2006, Munich, 261–268); Möller (n 13) 461; Susanne Gössl, '"Annerkennung" ausländischer Ehescheidungen und der EuGH – Lost in Translation?!' [2016] StAZ Das Standesamt 232–235; Roberto Mazzola, 'Modifications et Contradictions de la Réalité Socioreligieuse en Italie. Profiles Juridiques et Sociales' in Bottoni, Cristofori, Ferrari (n 27) 229–249, 237–238.

29 See Nademleinsky, 'Die Anwendung von Anerkennungsregeln auf familienrechtliche Entscheidungen' (n 23) 1065.

30 Recognition in all situations in which the wife had consented was also deemed admissible in France. For references see Susan Rutten, 'Recognition of Divorce by Repudiation (talaq) in France, Germany and the Netherlands' (2004) 11 (3) Maastricht Journal of European and Comparative Law 263–285, 272.

31 Austrian Ministry of Justice 251.273/1-I.9/1998 = Zeitschrift für Rechtsvergleichung [1999] 193.

32 OGH 6 Ob 189/06x.

33 OGH 3 Ob 130/07z.

34 See for this approach also Regional Court of Salzburg 21 R 430/14b = Ehe- und familienrechtliche Entscheidungen LII 147.874; Regional Court of Linz 15 R 81/14h = Ehe- und familienrechtliche Entscheidungen LI 144.428.

35 OGH 7 Ob 10/08h.

foreign citizenship, the court aligned to the prior issued judgements and emphasised that even if the wife had agreed to the divorce in the recognition proceedings, an agreement which would have been achieved after the *talaq,* i.e. subsequent approval of the *talaq* by the wife, would not have made it possible to recognise the divorce in Austria.

In all three abovementioned cases, the *talaq* was initiated and completed without notifying the wife. In contrast, in the present case on the recognition of an Iranian judgment, a procedure attempting to reconcile the marriage preceded the divorce, and the wife used the possibility of appealing the decision. Nevertheless, the Austrian Supreme Court applied the same two-step mode of reasoning as in the prior cases concerning a *talaq,* which were achieved without notice to the wife. First, it concluded that the proceedings qualify as unilateral expulsion. Second, it stated that the decision is contrary to the Austrian public policy clause in family law and cannot be subject to recognition under § 97 autAußStrG. The Austrian administrative courts apply the two-step mode exemplified by the Austrian Supreme Court as well.[36] This two-step approach, however, ignores the developments and actual legislation and practice in Iran. Contrary to the simplistic method of the Austrian Supreme Court, with regard to jurisdictions designated Islamic, constant awareness of developments is crucial.[37]

b) Abstract or case-based analysis of the foreign decision

It can be criticized that the Austrian Supreme Court did not accurately distinguish between the result of the recognition of the foreign decision regarding the particular case and the observation of the foreign law as it is generally constituted. The two-step approach used by the Austrian Supreme Court primarily consists of an abstract assessment of the foreign law as it is generally constituted.[38] In addition, it must be emphasised that, in recognition cases, it is the effect of recognition that should be taken into consideration rather than the way a decision has been achieved.[39] In order to invoke the Austrian public policy clause in accordance with § 97 s 2 no 1 autAußStrG, the foreign decision must be manifestly irreconcilable with the basic tenets of the Austrian legal order. As such, the wording of § 97 s 2 no 1 autAußStrG also underlines the focus on the judgment instead of putting the emphasis on the procedure.[40] This rule, however, is accompanied by § 97 s 2 no 2 autAußStrG, which, in contrast, would bar recognition if the proceedings have infringed the right to a fair hearing of one spouse, unless the spouse was evidently in agreement with the decision. However, the Austrian Supreme Court only referred to § 97 s 2 no 1 autAußStrG. The present case, actually

36 Bundesverwaltungsgericht W161 2136831-1.

37 See Rutten (n 30) 269; Nademleinsky, Neumayr (n 14) para 05.146 criticising the method of the Austrian Supreme Court.

38 This is also observed by Susanne Gössl, 'The public policy exception in the European civil justice system' [2016] The European Legal Forum 85–92, 91.

39 OGH 3 Ob 221/04b.

40 Fuchs (n 26) para 18. The same approach can be observed in English case law, focusing on whether the *talaq* is effective in the country obtained [Bantekas (n 1) 43].

was not suitable to apply § 97 s 2 no 2 autAußStrG, since the wife could even use an entitlement to file an appeal against the *talaq*. However, this ground could be more appropriate in other *talaq* cases, in which a husband in an Islamic couple living in Austria travels abroad in order to receive a *talaq* and seeks recognition in Austria.

Austrian doctrine rightfully distinguishes between a situation in which Austrian courts would have to apply foreign divorce law and recognition of a foreign divorce decision, and stresses that, when applying the public policy clause in recognition cases, the courts must be even more cautious.[41] When (not) recognising the *talaq,* the Austrian Supreme Court was particularly concerned that the husband used his entitlement under Iranian law to repudiate his wife without requiring her consent. Focusing on the effect of recognition, one cannot ignore the fact that divorce without the consent of one of the spouses is attainable under Austrian law as well.[42] And, as it has been observed, this is similarly possible in many other European jurisdictions as well, with little difficulty.[43] It is therefore not surprising that doctrine is hesitant to apply the public policy clause and deny recognition as a rule, even in cases of unilateral expulsion.[44] To the contrary, legal regimes that allow divorce in an uncomplicated manner have a reason to refuse to recognise a divorce only in the most exceptional cases.[45] Moreover, German courts assess whether, under German law, divorce would have been feasible for the husband.[46] In these cases in particular, notwithstanding whether discriminatory access to divorce would have been established by foreign law, German courts tend to recognise the foreign decision.[47] This approach is in compliance with the principle that it is not the foreign law as it is generally constituted which must be assessed,[48] but whether it is manifestly irreconcilable with the basic tenets of the Austrian legal order where the focus must be made.

This should not mean ignoring the fact that the possibility for a husband to repudiate his wife unilaterally provides men with a perception of cultural and legal superiority over women.[49] The undesirable dynamics, resulting from the provision of the unequal distribution of the entitlement to initiate divorce proceedings, should be addressed by conflict rules. In this regard, the Rome III and the Brussels II bis Regulation largely confer Muslim women living

41 Nademleinsky, Neumayr (n 14) paras 01.29, 05.125; Schwind (n 14) para 159; Verschraegen, 'Scheidung nach iranischem Familienrecht' (n 26) 262–263; Egglmeier-Schmolke (n 17) 43.

42 § 55 Austrian Marriage Act.

43 See already Stone (n 16) 371.

44 Rauscher (n 28) 391-392; von Bar, Mankowski (n 17) § 7 para 281; Verschraegen in Rummel (n 14) § 20 para 13; for a dissenting opinion see Fuchs (n 26) para 19 and Martin Weber, 'Die Brüssel IIa-Verordnung' in Peter Mayr (ed), *Handbuch des europäischen Zivilverfahrensrechts* (Manz 2017, Vienna) para 4.247.

45 See Stone (n 16) 370.

46 German Supreme Court XII ZR 225/01 para 44; Higher Regional Court of Zweibrücken 2 UF 80/00; Higher Regional Court of Frankfurt 5 WF 66/09 para 21.

47 Higher Regional Court of Munich 2 UF 1696/86.

48 See Marco Nademleinsky, 'Wieder keine Anerkennung der talaq-Scheidung' [2012] Zeitschrift für Familien- und Erbrecht 134–135, 135.

49 See Bantekas (n 1) 43.

in Austria with the possibility to initiate divorce proceedings before Austrian courts applying Austrian law.[50] This clearly causes a highly deserved insecurity to some men's perception of cultural and legal superiority over women and thus addresses the undesirable dynamics resulting from the provision of the unequal distribution of the entitlement to initiate divorce proceedings.

c) The Iranian proceedings in the present case

The assumption that a *talaq* would in any case be manifestly irreconcilable with the basic tenets of the Austrian legal order cannot be derived from § 97 s 2 no 2 autIPRG. A more comprehensive approach towards foreign law, which irritates such a one-sided negative appraisal of *talaq*, at least in Iran, must be applied.[51] In the present case, the Iranian court decreed binding conditions on the husband and referred to provisions in the marriage contract. Iranian family law, that is to say, considers marriage as being a contract, which also enjoys a certain degree of party autonomy.[52] This flexibility could have been used, for instance, to nominate the wife as representative and thus make it possible for her to initiate a *talaq* as well.[53] In addition, in the present case, the spouses had been ordered to undergo reconciliation proceedings.

d) The Austrian nexus of the case

In the present case, little attention was given to the Austrian nexus of the case. The Austrian Supreme Court declared the fact that the spouses have their common and habitual place of residence in Austria as sufficient to create a domestic nexus for the application of the Austrian public policy clause. Undoubtedly, the domicile of the spouses constitutes a strong nexus. Domestic nexus, however, is a flexible instrument for the application of the Austrian public policy clause, particularly if the couple has been married for only a short period before the divorce or regularly changes its domicile where the duration of its stay in Austria should be considered.[54]

Proximity is an important factor to be observed in order to avoid a wife from being unfairly deprived of her opportunity to obtain financial or proprietary relief. Especially English

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[50] For the scope of application of the Iranian-Austrian Friendship Treaty see Nademleinsky, Neumayr (n 14) paras 05.94–05.96.

[51] See Verschraegen, 'Scheidung nach iranischem Familienrecht' (n 26) 262; Pacic (n 21) 112.

[52] See also German Supreme Court XII ZR 225/01 para 41.

[53] See Möller (n 13) 471. In addition, women may apply for divorce by means of a judicial decree. Dissolution of marriage may also be permissible through a judicial rescission of the marriage contract. The conditions for a woman to apply for divorce significantly vary in different jurisdictions (for an overview see Javaid Rehman, 'The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq' (2007) 21 International Journal of Law, Policy and the Family 108–127, 118–119). However, in conclusion, equal access to divorce is achieved by neither of the possible forms.

[54] Verschraegen, 'Scheidung nach iranischem Familienrecht' (n 26) 262; Fuchs (n 26) para 18; for general consideration see Nademleinsky, Neumayr (n 14) para 01.25. For Germany, see Rutten (n 30) 278.

courts refer strongly to proximity, in particular to the domicile of the spouses, and may refuse recognition of the divorce through the application of English public policy.[55] A divorce which has been obtained and is effective in a country in which neither of the spouses is habitually resident is a sensitive issue, because it could have been achieved by way of *forum* shopping or *forum* tourism. This can be best avoided by (1) using a flexible notion of the concept of domestic nexus, (2) applying § 97 s 2 no 2 autAußStrG, requiring a fair hearing for both spouses, and (3) limiting the scope of recognition of a divorce decision to the status issues.[56]

If proximity is affirmative, it becomes easier to invoke public policy concerns. However, this is a two-sided approach. Likewise, women shifting their domicile to Austria, in order to access Austrian divorce rules, cannot easily invoke Austrian public policy in consideration of a divorce pronounced in the country of the couple's former usual residence. Thus, the Austrian courts must also consider the duration of stay in Austria when invoking the Austrian public order clause, e.g. in relation to recognition of a foreign decision.

e) Limited scope of § 97 autAußStrG

Courts have to be sensitive when *forum* shopping or *forum* tourism by Muslim husbands could deprive the wife of her financial or proprietary relief. After a divorce, measures need to be taken in relation to finances, which are linked to the divorce itself. Divorce and financial arrangements are usually intertwined. Nevertheless, conflict of law rules may refer the questions of divorce and financial arrangements, such as compensation and alimony, to separate recognition regimes. So does § 97 autAußStrG, which does not apply to decisions on the separation of property, maintenance and other financial or proprietary entitlements, even if these are linked to the divorce itself.[57] Accordingly, Austrian law even provides for recognition of a foreign *talaq* in parts, if financial or proprietary questions are part of the foreign decision.[58]

Although this may result in limping decisions, there are good reasons to apply separate recognition regimes especially with regard to *talaq*.[59] Since the foreign *talaq* and its recognition in Austria would not determine property, maintenance, and other financial or proprietary entitlements, the main incentive to invoke the Austrian public policy clause can be eliminated and likewise the main incentives for a husband travelling to get divorced abroad should not apply.

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[55] Alex Mills, 'The Dimensions of Public Policy in Private International Law' (2008) 4 (2) Journal of Private International Law 201–236, 226.

[56] See text to n 57.

[57] Fuchs (n 26) para 10.

[58] OGH 6 Ob 62/03s; OGH 7 Ob 199/06z; Regional Court of Wels 21 R 40/11y = Ehe- und familienrechtliche Entscheidungen XLVIII 133.183. Similarly for France and the Netherlands, see Rutten (n 30) 283–284.

[59] See for a similar approach Rutten (n 30) 283.

3 Special Issues of Concern?

Notwithstanding the general suitability of the solutions provided by § 97 autAußStrG with regard to the recognition of foreign *talaq,* several issues raise concerns and require separate assessment.

Reportedly, in a larger number of cases, young Muslim women marry abroad and face a *talaq* also pronounced abroad,[60] although the Muslim couple permanently resides in Austria. Such conflict rules, that one spouse is able to escape binding national rules in order to deprive his wife of her legal rights and entitlements and thus uses transnational mobility to circumvent the closest connected law, should be avoided. These issues are addressed by § 97 autAußStrG, which offers three barriers to *forum* shopping in international family law. First, under § 97 autAußStrG only the status issue are recognised and financial or proprietary entitlements are left aside; second, § 97 s 2 no 2 autAußStrG bars recognition if the wife has no opportunity to be heard in the proceedings, and third, § 97 s 2 no 4 autAußStrG bars recognition if by hypothetical application of Austrian law relating to jurisdiction, the foreign court would have lacked jurisdiction.

Another issue giving rise to concerns is that, reportedly, some jurisdictions, which refer to the religious sources of the *Quran* and *sunna,* allow unilateral divorce pronounced via electronic communication, such as e-mails, over the telephone or by text messages sent from mobile devices.[61] Notwithstanding such divorces being permissible under the applicable legal order, they would in most cases lack the involvement of a state institution and, thus cannot be regarded as a decision in the meaning of § 97 autAußStrG. Only situations in which foreign state institutions register a unilateral divorce pronounced via electronic communication could this be a decision which leads to recognition in Austria. § 97 s 2 no 2 autAußStrG bars recognition if the wife has no opportunity to be heard in the proceedings, which would certainly be the case with regard to any *talaq* pronounced via e-mail, over the telephone or by text message. Hence, even these cases do not require invoking the public policy clause.

IV Conclusion

The Austrian public policy clause requires an examination of the circumstances of each particular case. It provides sufficient means to avoid strikingly unjust results and circumvention of the law, be it in cases applying family law designated as Islamic law or recognition of a foreign *talaq,* for example. In contrast, measures barring the recognition of decisions issued by a court in a state applying a law designated Islamic or outlawing the application of any law designated Islamic *per se* is neither necessary nor reasonable.

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60 See for instance Bantekas (n 1) 43.

61 See Nehaluddin Ahmad, 'A Critical Appraisal of "Triple Divorce" in Islamic Law' (2009) 23 International Journal of Law, Policy and the Family 53–61, 56.

In particular, the recognition of a foreign decision regarding simply the existence and continuation of a marriage is suitable of underlining that the public policy clause focuses on the effects of the recognition of a foreign decision. Whether the fact that a marriage shall be divorced is contrary to the basic tenets of the Austrian legal order cannot usually be subject to the application of a public policy clause.

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