

# ELTE LAW JOURNAL

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**CROSS-BORDER SUCCESSION  
AND FAMILY LAW  
– THE GOINEUPLUS PAPERS**

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# **Prelude to the GoInEUPlus Papers: The Hungarian Perspective on the EU Succession Regulation – Prognoses and the Very First Experiences**

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## **I Two International Research and Training Projects on the EU Succession Regulation**

This issue of the ELTE Law Journal contains four additional papers on the Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (hereinafter referred to as Regulation or Succession Regulation) from the perspective of Hungarian academics and practitioners.

These papers were drafted within the frame of two connecting international research and training projects co-funded by the EC DG Justice and Consumers, Justice Programme: ‘Governing Inheritance Statutes after the Entry into Force of EU Succession Regulation’ (GoInEU, 2017–2019)<sup>1</sup> and ‘Integration, Migration, Transnational Relationships. Governing Inheritance Statutes after the Entry into Force of EU Succession Regulations’ (GoInEUPlus, 2018–2020).<sup>2</sup> The papers published in this issue are the deliverables of the latter.

The General Objective of the projects was and is to contribute to the correct and coherent application of the Succession Regulation through analytical and capacity building activities

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<sup>1</sup> See the website of the project: <<https://eventi.nservizi.it/evento.asp?evID=192>> accessed 10 February 2020.

<sup>2</sup> See the website of the project: <<https://eventi.nservizi.it/evento.asp?evID=225&IDm=&Ing=2>> accessed 10 February 2020.



targeting legal practitioners. Partners in the actions are the University of Florence (coordinator), the Italian Foundation of Notaries, the Italian Association of Family Lawyers (AMI), *le Centre national de la recherche scientifique* (CNRS, France), the Universities of ELTE Budapest, Valencia, and Coimbra (in GoInEUPlus, also the De Gasperi Foundation).

The Law Faculty of Eötvös Loránd University (ELTE) participated and participates in the projects with three researchers, Ádám Fuglinszky, Orsolya Szeibert and Balázs Tókey. Laura de Negri joined the team when GoInEUPlus started. The Hungarian chapter organised an international conference and seminar in April 2019 having the title 'Diversity in Unity: The Succession Regulation in Hungary and Beyond'. More than 250 practitioners (notaries, judges, attorneys) and academics attended.<sup>3</sup> The next seminar is going to be held in 2020, with the title: 'International Succession Law and Matrimonial Property Law – Interrelations'.

When the cooperation started, the Hungarian project team contacted the Hungarian Chamber of Civil Law Notaries in order to map the status quo when the Regulation entered into force and also the forecasts regarding the application of the Regulation with special regard to the challenges and difficulties. The experiences and rough findings of these meeting (in January 2018) and of some other pieces of information acquired during the projects are the subject of this introductory essay. The project team opted for this method (interviewing the Notaries' Chamber<sup>4</sup>) in particular, because when the projects started, only two years had passed since the Regulation's entry into force; there were no published judgments on its application in Hungary. As such, the only chance to get access to some experience from the practice was (and mostly still is) to collect unpublished cross-border cases from the notaries who have (exclusive) authority to proceed with the probate procedure in Hungary. The goal was to set the scene and the framework (regarding Hungary) within which the actions of the projects were to be taken.

## II The Succession Regulation and Its Relevance in Hungary

The Succession Regulation is an important step in the creation of the General Part of Private International Law in the European Union, by the harmonisation and unification of private international law in matters of succession.<sup>5</sup> The aim of the Regulation is 'to make life easier for citizens by laying down common rules enabling the competent authority and law applicable to the body of assets making up a succession, wherever they may be, to be easily identified.'<sup>6</sup>

<sup>3</sup> See the website of the conference with the slides, cases and hypotheticals solved and with the video recordings of the presentations with English subtitles: <<https://eventi.nservizi.it/evento.asp?evID=192&IDm=2285>> accessed 10 February 2020.

<sup>4</sup> Represented by Ádám Tóth (President of the Hungarian Chamber of Civil Law Notaries) and Tibor Szöcs (Director of the Hungarian Notaries' Academic Research Institute).

<sup>5</sup> Andreas Köhler, 'General Private International Law Institutes in the EU Succession Regulation – Some Remarks' (2016) 18 *Annals Fac. L.U. Zenica* 169.

<sup>6</sup> Richard Frimston, 'The European Union Succession Regulation No. 650/2012' (2013) 33 *Estates, Trusts & Pensions Journal* 104, citing the Commission in the European Judicial Network website.

The Regulation deals with several aspects and the following matters are the most important: jurisdiction (Chapter II),<sup>7</sup> choice of law (Chapter III),<sup>8</sup> recognition, enforceability and enforcement (Chapter IV), authentic instruments and court settlements (Chapter V) and the European Certificate of Succession (Chapter VI).

The relevance of the Regulation cannot be overestimated due to the relatively high proportion of cross-border successions in Hungary,<sup>9</sup> which can be traced back to several – at least four – reasons. First, there was an ‘in kind compensation’ in Romania in return for the expropriation and exploitation of property during the communist regime, right after the fall of the communist era, and therefore several Hungarian citizens regained and have property there for historical reasons.<sup>10</sup> Second, many Hungarians had settled in other EU Member States – in Austria in particular – as refugees after the Revolution in 1956 and moved home again after 1990,<sup>11</sup> but they still have significant property (*inter alia* real estate and bank accounts) in those countries whereto they had emigrated during or immediately after the revolution. Third, numerous retired people from some Western European Member States – from Germany and from the Netherlands in particular – live now in Hungary because they can afford a higher standard of living by spending their pension in Hungary instead of their home countries. Fourth, many skilled workers moved from Hungary to Western European Member States – with Germany in first place – where they live as migrant workers.

### III Experienced and Forecasted Challenges

#### 1 Non-harmonised Issues

The Regulation harmonises and basically unifies the rules on jurisdiction (and some other matters of the international civil procedural law) and on applicable law in matters of succession. However, there are several other questions, which could come up in connection with cross-border successions.

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<sup>7</sup> The Member State in which the deceased had his habitual residence at the time of death shall have jurisdiction according to Article 4.

<sup>8</sup> As a general rule the law applicable to the succession shall be the law of the State in which the deceased had his habitual residence at the time of death according to Article 21. However, the deceased can choose the law of the State whose nationality he or she possesses at the time of making the choice or at the time of death according to Article 22. The application of *renvoi* is restricted.

<sup>9</sup> 2-4% of the probates are cross-border succession cases (estimation by the Hungarian Chamber of Civil Law Notaries).

<sup>10</sup> Transylvania was part of Hungary until the Treaty of Trianon in 1920 and a significant Hungarian minority has been living in Romania since then. However, the migration of this minority to Hungary is remarkable – in particular from the '90s – and this also increases the number of cross-border successions.

<sup>11</sup> The reason of the return of the '56-refugees and emigrants to Hungary was the regime change and the democratization of the country at the end of the '80s and in the beginning of the '90s.

### a) *Lack of tax law harmonisation*

The first problem is that the taxation issues are not harmonized, which makes asset planning rather difficult, since the differences between taxation rules can and do influence the choice of law. However, the European Union has no competence to harmonise taxation.

### b) *Lack of uniform registration (supranational register) of probate procedures*

Second there is no (uniform) notification system or register of probates (registration book) covering (all Member States of) the whole European Union,<sup>12</sup> though it would be necessary to find an effective method or solution to avoid or at least to handle parallel (probate) procedures. In order to apply *Article 17* on *lis pendens* cases<sup>13</sup> the competent authorities, courts and notaries should be notified of probate procedures and other processes in connection with the same succession case already commenced in another Member State, but in fact such notification rarely – if ever – happens. Notaries and courts therefore basically do not have the chance to be informed on parallel procedures. According to a real-life example explained by the Chamber of Civil Law Notaries,<sup>14</sup> a French citizen, who lived in Budapest for 15 years and had a Hungarian girlfriend, passed away in Hungary. His sister, who lives in Paris, made a statement on some aspects of the succession after the death of his brother (that one died in Hungary) before a French court. It is highly likely that the competent Hungarian notary who is in charge of the probate procedure in the same succession case will not be informed on the procedure already running in France. It is also possible that the Hungarian notary does receive a notice but too late, just after the release of the estate or the European Certificate of Succession being issued.

### c) *Probate procedures commenced in third countries*

It is even more problematic if the probate procedure has already commenced in a third country and not in a Member State. Since *Article 17* applies only to ‘proceedings involving the same cause of action and between the same parties in the courts of different *Member States*’, it will not be the Regulation but the autonomous private international law rules of the Member State that shall apply in such cases, whether or not the judgment of the court of a third country can be recognized and enforced in the Member State and therefore whether or not a probate procedure in this third country qualifies as *lis pendens* in Hungary. Section 69 Paras 1 and 4 of Act XXVIII of 2017 on Private International Law apply in this respect, according to which if a procedure launched previously is in progress before a foreign court, concerning the same

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<sup>12</sup> However, there is a network, the so-called ‘European Network of Registers of Wills Association’ and the aim of this project is ‘to develop and implement effective interconnection of European registers of wills’. The majority of the member states take part in this programme. <<http://www.arert.eu/?lang=en>> accessed 10 February 2020.

<sup>13</sup> According to *Article 17* (1) of the Regulation where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.

<sup>14</sup> Given by Ádám Tóth (President of the Hungarian Chamber of Civil Law Notaries).

right arising from the same factual basis, the Hungarian court may, either *ex officio* or upon request, suspend the procedure, provided that the recognition of the foreign court's decision is not excluded in Hungary. The Hungarian court shall terminate the procedure if the foreign court rendered a decision on the merits of the case and the decision can be recognised in Hungary. Thus, the Hungarian court has to check the preconditions of recognition of a foreign judgment. According to Section 109 Para 1 lit. a) 'A decision of a foreign court shall be recognised if the jurisdiction of the proceeding foreign court is well-founded in accordance with this Act.' This is not the case, for example, if Hungarian courts have exclusive jurisdiction (Section 88), but the court (or notary) in the third country takes nevertheless actions and *horribile dictu* passes a judgment.

The Hungarian legislator also recognised that the national rules on jurisdiction and applicable law can apply in cross border succession cases besides the Regulation, for example if the probate procedure commenced in a third country and the beneficiary of the estate wishes to enforce any claim regarding the inheritance in this procedure. This situation is not covered by the Regulation, though the beneficiary may need proof that he or she is entitled to claim the assets. Therefore the amendment of the Act XXXVIII of 2010 on Probate Proceedings<sup>15</sup> in 2018 introduced the so-called 'certificate of inheritance for the enforcement of claims in third countries' (which is not to be confused with either the domestic certificate of inheritance or with the European Certificate of Succession). According to Section 102/D of the amended Act, at the request of any beneficiary of the estate, the notary shall issue a certificate of inheritance, indicating the succession regime applicable under Hungarian law, if the deceased holds Hungarian citizenship and all his/her estate is situated in a third country and, pursuant to the Regulation, no Member State has jurisdiction. Thus, the sole function of this certificate of inheritance is the enforcement of a claim by the beneficiary of the estate in a third country.<sup>16</sup>

#### d) *The undefined magic-word: habitual residence*

As Recital No. 23 emphasises:

In view of the increasing mobility of citizens and in order to ensure the proper administration of justice within the Union and to ensure that a genuine connecting factor exists between the succession and the Member State in which jurisdiction is exercised, this Regulation should provide that the general connecting factor for the purposes of determining both jurisdiction and the applicable law should be the habitual residence of the deceased at the time of death.

The content and the application of the general term 'habitual residence' is therefore crucial, since the autonomous and uniform application of the Regulation depends predominantly on how courts, notaries, etc. in the Member States interpret this term.

<sup>15</sup> We used the English translation of the Act No. XXXVIII of 2010 on Probate Proceedings by CompLex DVD Jogtár.

<sup>16</sup> See Tibor Szöcs, 'Az európai öröklési rendelet hazai alkalmazását érintő legújabb rendelkezések' (2019) (1) Európai Jog 9–10.

The meaning and interpretation of the legal term ‘habitual residence’ was and is expected to be problematic from the practitioners’ point of view, since the Regulation does not contain a definition for it. The scholarly writings confirm this prognosis:

Some commentators have found the proposed connecting factor of habitual residence unsatisfactory since it is a term that is to have a uniform meaning throughout the European Union and subject to interpretation by the Court of Justice of the European Union (EUCJ), and yet it is not currently one of the terms clearly defined in Art. 3 of the draft Regulation. It may, therefore, in practice, have a different interpretation placed on it by the courts in different Member States.<sup>17</sup>

Furthermore, the Court of Justice of the European Union has not yet decided any case in connection with the meaning of habitual residence concerning the Regulation. Although there are other regulations containing a definition of habitual residence, it is a huge question whether the definition of habitual residence in one Regulation can be taken into consideration in the course of the application of another Regulation.<sup>18</sup> For example, Article 19 of the Rome I Regulation<sup>19</sup> and Article 23 of the Rome II Regulation<sup>20</sup> provide that the habitual residence of a natural person acting in the course of his business activity shall be his principal place of business.<sup>21</sup> These definitions however cannot be applied for the interpretation of the Regulation due to the different focuses of the respective regulations. Recitals 23<sup>22</sup> and 24<sup>23</sup>

<sup>17</sup> Frimston (n 6) 110.

<sup>18</sup> The legal literature had already discussed it widely before the Succession Regulation. The definition of habitual residence can be analysed in connection with the Succession Regulation – see among others Lurger Brigitta, ‘A szokásos tartózkodási hely’ in *Tanulmányok az Európai Öröklési Rendelet témaköréből. Európa a közjegyzőkért, a közjegyzők Európáért* (az Europe for Notaries – Notaries for Europe. Training 2015–2017 fordítása) MOKK 10–12.

<sup>19</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

<sup>20</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

<sup>21</sup> Páli Fatime Lejla, ‘Joghatóság, alkalmazandó jog az Európai öröklési rendelet kapcsán’ (2017) (6) *Közjegyzők Közlönye* 49–51.

<sup>22</sup> ‘In order to determine the habitual residence, the authority dealing with the succession should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased’s presence in the State concerned and the conditions and reasons for that presence. The habitual residence thus determined should reveal a close and stable connection with the State concerned, taking into account the specific aims of this Regulation.’

<sup>23</sup> ‘In certain cases, determining the deceased’s habitual residence may prove complex. Such a case may arise, in particular, where the deceased for professional or economic reasons had gone to live abroad to work there, sometimes for a long time, but had maintained a close and stable connection with his State of origin. In such a case, the deceased could, depending on the circumstances of the case, be considered still to have his habitual residence in his State of origin in which the centre of interests of his family and his social life was located. Other complex cases may arise where the deceased lived in several States alternately or travelled from one State to another without settling permanently in any of them. If the deceased was a national of one of those States or had all his main assets in one of those States, his nationality or the location of those assets could be a special factor in the overall assessment of all the factual circumstances.’

reveal some aspects to be taken into account in identifying the habitual residence. The Regulations on the field of family law, just like the Brussels IIA Regulation<sup>24</sup> and the Rome III Regulation<sup>25</sup> do not include any definition of habitual residence; however, the parents', the spouses' and the child's habitual residence have already been interpreted and applied in the CJEU's judiciary. The majority of these judgments have dealt with the habitual residence of the child, and the determination of an adult's habitual residence cannot be in all cases the same as identifying the child's habitual residence. It has the consequence that we are no closer to the meaning of the habitual residence under the aegis of the Succession Regulation.

Let's see the following example to highlight the uncertainties referred to above: the deceased (a Hungarian citizen) worked in Vienna on four working days of the week, thus from Monday to Thursday (and he lived there with his girlfriend and their common child in a flat in Vienna) and, with the approval of his employer, he worked from his home-office in Győr (Hungary) on Fridays, where he spent the weekends with his family (wife and two children). The majority of the deceased's real properties are located in Vienna. In such cases, it seems to be unclear whether Vienna or Győr was the habitual residence of the deceased. Recitals No. 23 and 24 highlight some circumstances that should be considered (e.g. the centre of interests of family and social life or the location of the assets), but the relationship of these factors to each other is unclear, i.e. whether they have equal importance or one is more significant than another. How to weigh up those circumstances and how to evaluate the big picture if some factors (e.g. family relationship) appear in several Member States even more puzzling. As far as this hypothetical case is concerned, the habitual residence of the deceased can't be unambiguously determined. Given that the assets are mainly located in Vienna, and according to Recital No. 24, this should be taken into account as a special factor; moreover, since the deceased's family connections were 'shared' as well, *prima facie* Vienna seems to be the last habitual residence, because, besides the location of the valuable assets, a significant part of his family and social life also connected him to Vienna, where he spent more time than in Hungary. At the same time, it can be reasoned that the deceased had the main point of his family life in Hungary, notwithstanding the fact that he had a child in Austria too, because he went to Austria originally 'for professional or economic reasons', and – in line with the first variation of Recital No. 24 – had still maintained a close and stable connection with his State of origin, and therefore he is to be considered 'still to have his habitual residence in his State of origin in which the centre of interests of his family and his social life was located'. (Another factor to be taken into account in favour of Hungary is the deceased's Hungarian citizenship.)

Another real case<sup>26</sup> confirms that the interpretation of habitual residence will probably not be uniform in different Member States: an Austrian citizen had lived for a long time in

<sup>24</sup> Regulation (EC) No 2201/2003 – jurisdiction, recognition and enforcement of matrimonial and parental judgments.

<sup>25</sup> Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

<sup>26</sup> Mentioned by Ádám Tóth (President of the Hungarian Chamber of Civil Law Notaries).

Hungary, but the Austrian authorities found that her habitual residence was (in) Austria (and not in Hungary) because her closest relative lived in Austria.

It is also a crucial issue whether the deceased could have two habitual residences at the same time (cf. in the first *Győr–Vienna* case mentioned above). It has continuously been a problem in connection with the application of the majority of the Regulations as people are much more mobile and have special living circumstances. The original idea of the concept of habitual residence was simple and had the aim that one person can have only one habitual residence, as this corresponds to the structure and aim of determining jurisdiction and the applicable law. Although the CJEU has already faced challenges in the course of the application of the different Regulations, especially when applying the Brussels IIA Regulation in the issues of parental responsibilities for the habitual residence of the child, it has insisted so far on the original goal and determined only one habitual residence for one person.<sup>27</sup>

## 2 Lack of Access to Information Needed to Proceed with the Probate Procedure

According to the representatives of the Hungarian Chamber of Civil Law Notaries, the most serious practical problem that the Hungarian notaries face (related to cross-border succession cases) is that they cannot get access to the substantive information needed to proceed with the probate procedure, first and foremost which assets (located abroad) belong to the estate. The two typical examples are bank accounts and the content of safe deposit boxes. The Regulation does not seem to offer them any useful and effective tools for this purpose either.

The Hungarian (substantive) succession law is based on the principle of *ipso iure* succession. It means that the estate devolves upon an heir in its entirety immediately by and after the death of the deceased without any action by the heir.<sup>28</sup> However, the probate procedure follows the so-called additional model:<sup>29</sup> the notary issues a ‘decree of release’ which lists all the assets and debts of the deceased and testifies authentically the facts of and rights related to the particular succession (what is the content of the estate, which assets does it consist of, who are the heirs, etc.). For example, the heir can register his or her ownership of real estate into the land register only by presenting the decree of release, which proves that the particular asset was devolved upon him or her after (and with) the death of the deceased. Therefore, in order to issue the decree of release, the notary must know exactly which particular assets belong to the estate. If the notary cannot identify the assets, several difficulties arise. For example, the heirs cannot enter into a settlement within the probate

<sup>27</sup> See primarily Case C-435/06, C, ECLI:EU:C:2007:714, Case C-523/07, A, ECLI:EU:C:2009:225; Case C-497/10 PPU, *Mercredi*, ECLI:EU:C:2010:829, Case C-111/17 PPU, OL, ECLI:EU:C:2017:436, Case C-512/17, HR, ECLI:EU:C:2018:513, Case C-393/18 PPU, UD, ECLI:EU:C:2018:835.

<sup>28</sup> Vékás Lajos, *Öröklési jog* (8th edn, Eötvös József Könyvkiadó 2014, Budapest) 14, 147–149.

<sup>29</sup> *Ibid.*

procedure on the distribution of the particular assets among themselves; moreover, the basis of the compulsory share<sup>30</sup> cannot be calculated, either.

Foreign banks generally do not provide information to Hungarian (or any foreign) notaries if they receive a direct request with reference to bank secrecy (frequently provided for in their general terms and conditions). The Hungarian notaries therefore try to get access to the information needed by addressing an indirect request, i.e. they do not contact the financial institutions directly, but the court (competent for probate procedures in the respective country; in Austria for example the Probate Court – *Nachlassgericht*) and this court requests the necessary information from the bank and then forwards the data to the Hungarian notary. This legal aid is based on the Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters. Though this *modus vivendi* seems to work on both sides, for example with Austria, but less so with some other Member States. According to the Notaries Chamber's experience, the foreign banks argue – if they receive a request from a Hungarian notary – that they cannot open the safe deposit box and look inside without the client's permission, again due to their general terms and conditions.

Some Hungarian notaries follow the innovative solution proposed by the Notaries Chamber based on Article 63 (2) c) of the Regulation, according to which it is possible to issue the European Certificate of Succession to demonstrate 'the powers of the person mentioned in the Certificate to execute the will or administer the estate.' Thus, if the notary designates one of the heirs as the executor of the will and issues this type of certificate then the designated heir, in his or her capacity as the administrator of the estate, can request the information needed, since he or she can prove his or her authorisation. However – as Section 43/B Paras 1–2 of Act No. XXXVIII of 2010 on Probate Proceedings provides for – the issue of this kind of European certificate of succession must be preceded by a specific decree issued by the notary, in which he entitles one or more parties involved in the probate procedure to gather information, data, documents and deeds on the assets located abroad. If more parties are authorised in this decree to do so, they can only act jointly (together). Though it is not required that all parties involved in the probate procedure agree upon which of them is entitled to gather information on the assets abroad, it is much easier if there is a consensus on that point and the parties involved notify the notary on which of them is willing and ready to discover and locate the assets abroad and to report on the result. If there is no such agreement among the parties, the notary can still make use of the opportunity of simultaneous authorisation of several parties, but in this case – as seen above – they can act only jointly (together). Moreover, the European Certificate of Succession based on Article 63 (2) c) of the

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<sup>30</sup> See Section 7:75 of Act No. V of 2013 on the Civil Code. In the legal literature cf. Hella Molnár, 'The Position of the Surviving Spouse in the Hungarian Law of Succession' in (2014) (2) ELTE Law Journal 103. 'The deceased's descendants, spouse, registered partner and the deceased's parents are entitled to a compulsory share if, at the time of the opening of succession, they are an intestate heir of the deceased or they would be an heir in the absence of testamentary disposition.'



Regulation must also be issued accordingly, i.e. it must be specified that the authorised parties can only act jointly. This can be difficult if there are hostilities between the parties.

The Hungarian legislator was made aware of the problem that Hungarian notaries cannot obtain all the information they need on the assets located abroad. Act No. XXXVIII of 2010 on Probate Proceedings was therefore amended twice in this respect, first in 2015 and then in 2018. After the first amendment, Sections 43/A and 43/B prescribed that assets located abroad shall be included in the estate inventory if the beneficiary of the estate has verified their existence and the fact that they form part of the estate. The notary could issue a special probate procedural certificate upon the reasoned request of the beneficiary of the estate and enable him or her to obtain information on the assets located abroad with it. However, foreign banks did not accept this particular certificate instead of the European Certificate of Succession. The act was therefore amended again, in 2018, and the rules on the probate certificate were repealed. According to the latest version of the act, the beneficiary of the estate shall provide information on the assets located abroad in the first place, but the notary may also take action *ex officio* for obtaining documentary evidence to verify the existence of foreign assets and that they form part of the estate. In our opinion, this is rather a formal and not a substantial solution of the problem concerned, because – as seen above – neither the beneficiaries nor the notaries have any effective means of obtaining all the necessary information on foreign assets in all Member States.<sup>31</sup>

### 3 Adaptation Proceedings

If the legal system of a Member State does not know a right *in rem* which is created or transferred to a beneficiary by succession under the applicable law ‘that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right *in rem* under the law of that State, taking into account the aims and the interests pursued by the specific right *in rem* and the effects attached to it’ according to Article 31 of the Regulation. However, the Regulation does not provide for the rules of the adaptation proceedings itself. It is stated in Recital No. 17 only that the ‘adaptation of unknown rights *in rem* as explicitly provided for by this Regulation should not preclude other forms of adaptation in the context of the application of this Regulation.’

The Hungarian legislator enacted the rules of adaptation proceedings into the Act LXXI of 2015 on Adaption Proceedings of Article 31 of Regulation (EU) No 650/2012 of the European Parliament and of the Council. According to Section 3 Para 3 of this act The Central District Court of Buda (i.e. one of the district courts in Budapest) has the exclusive competence in the first instance to decide on the adaptation of those particular foreign legal institutions that do not exist in Hungarian law.

However, the Chamber of Notaries is convinced that the adaptation of several foreign rights, rules, terms and institutions is going to be very difficult if not impossible. The so-called

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<sup>31</sup> See Szócs (n 16) 1–5.

*Dauertestamentsvollstreckung* (long-term will-executorship) under German law<sup>32</sup> can serve as an example (this states that if the only heir of the deceased is his six-year-old child, then the deceased can designate someone as a long-term executor of the wills, similar to a trustee). *Dauertestamentsvollstreckung* does not exist under Hungarian law. Another example is the notaries' right to act as estate-trustees (*Verlassenschaftskurator*) in Austria. The Hungarian notaries are not allowed to do so. This difference follows also from the diverging traditions of substantive succession laws in the two countries. While in Hungary the succession occurs *ipso iure*, i.e. when the bequeather dies, in Austria the estate becomes *hereditas iacens* first and has legal personality; and the heirs acquire ownership on the estate only by the decree of the probate court.<sup>33</sup>

To sum up, it is questionable whether these rights or legal institutions could be registered into the Hungarian land register and, if yes, under which legal title. For example, in the case of long-term will-executorship, there are several possible solutions: this could be converted either into 'prohibition of alienation and encumbrance'<sup>34</sup> or to a title based on 'fiduciary asset management contract'.<sup>35</sup>

<sup>32</sup> See Section 2209 of the German Civil Code. 'According to this provision, the deceased may entrust an executor with the administration of the estate without assigning to him any tasks other than those of the administration; he may also direct that the executor is to continue the administration after the completion of any other tasks assigned to him.' <[https://www.gesetze-im-internet.de/englisch\\_bgb/](https://www.gesetze-im-internet.de/englisch_bgb/)> accessed 12 February 2020.

<sup>33</sup> Cf. Section 546-547 ABGB: 'Verlassenschaft als juristische Person § 546. Mit dem Tod setzt die Verlassenschaft als juristische Person die Rechtsposition des Verstorbenen fort.'

'Gesamtrechtsnachfolge § 547. Mit der Einantwortung folgt der Erbe der Rechtsposition der Verlassenschaft nach; dasselbe gilt mit Übergabebeschluss für die Aneignung durch den Bund.'

See also 'Einantwortungsprinzip § 797. (1) Niemand darf eine Erbschaft eigenmächtig in Besitz nehmen. Der Erwerb einer Erbschaft erfolgt in der Regel nach Durchführung des Verlassenschaftsverfahrens durch die Einantwortung der Verlassenschaft, das ist die Übergabe in den rechtlichen Besitz der Erben.'

<sup>34</sup> Cf. Sections 5:31–5:34 of the Hungarian Civil Code. For the essence see: 'Section 5:31 [Establishing the prohibition of alienation and encumbrance]

(1) For the purpose of securing a right regarding the object of ownership, the owner may establish a prohibition of alienation and encumbrance or a prohibition of alienation regarding the object of the ownership, effective against third parties. With regard to real estate, the real estate register shall also indicate the right that is secured by the prohibition.

(2) The prohibition of alienation and encumbrance and the prohibition of alienation shall be terminated upon the termination of the right the prohibition intended to secure.'

<sup>35</sup> Cf. Sections 6:310–6:330 of the Hungarian Civil Code. According to Section 6:310 Para 1: 'Under a fiduciary asset management contract, the trustee shall manage on his own behalf and for the benefit of the beneficiary the things transferred to his ownership, as well as the rights and obligations transferred to him by the settlor (hereinafter "trust property"), and the settlor shall pay the fee.' On the registration of the trustees' property right see Section 17 Para 1 No. 28 and Section 38 of the Act No. CXLI of 1997 on the Register of Immovables.

## IV Some Closing Remarks

The Regulation is – no doubt – an important milestone in the harmonisation of European law. However, the first impressions and experiences of the notarial practice direct one's attention to the ambiguities and lacunae (unharmonised issues, undefined terms such as habitual residence, coexistence of the Regulation and of the national rules on applicable law and jurisdiction if, for example, probate procedures in third countries are involved) inasmuch as to the factual and practical difficulties of the application (access to information on assets located in another Member State). The former challenge could be met in the first place by the Court of Justice of the European Union; its judgments are going to be an important contribution to the autonomous and uniform application of the Regulation. It can be overlooked that the legislators of the Member States are also responsible for the obstacle-free and smooth application of the Regulation, since several more or less technical norms shall be enacted to serve this purpose, despite the direct effect of the Regulation. Without these additional rules, harmonization – which is the aim of the Regulation – can easily fail.

Moreover, it remains to be seen whether the harmonisation of jurisdiction and applicable law will have an impact on substantive succession law and if it does then to what extent. The notaries and courts will apply foreign law more often because of the new jurisdiction rules, and therefore information on foreign (succession) laws is expected to become more widespread and to become part of the everyday (in Hungary: mainly notarial) practice. National and international knowledge bases will likely be developed. This transparency of the various succession law regimes, the awareness of their similarities and differences will very probably influence the choice of law and facilitate choosing the applicable law in general. At the end of the day, it cannot be excluded that the wheels of the European legal approximation turn to (some) harmonisation of the substantive succession law, too. This could be seen as salutary according to scholarly writings and maybe the difficulties on this field are not as serious as they seem to be.<sup>36</sup>

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<sup>36</sup> Reinhard Zimmermann, 'Kulturelle Prägung des Erbrechts?' (2016) 71 (7) *JuristenZeitung* (JZ) 321–332.

# Behind the European Succession Regulation: Differences in the Substantive Law of Succession of Member States\*\*

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## I Introduction: Regulation of the European Union in the Field of International Private Law

The Treaty of Amsterdam,<sup>1</sup> which entered into force on 1 May 1999, amended the statutes of the European Union in a way that international private law and the international procedural law of the Member States may be unified by regulations in the fields listed in Art. 81 of the Treaty on the Functioning of the European Union (TEU). The results achieved by now in this field – despite their weak points – must be considered as logical steps in the process of the unification.<sup>2</sup> The unification of rules on jurisdiction, recognition and enforcement, as well as those of on conflict-of-laws is a significantly easier task than the harmonisation of the substantive rules. Concerning the latter, important and hopeful first steps have been made, for example the directives<sup>3</sup> formed in the field of consumer protection or the model rules<sup>4</sup> of the PECL, but we cannot talk about a breakthrough even in the field of the seemingly simplest

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<sup>1</sup> HL C 340, 1997.11.10.

<sup>2</sup> To this significant process see in the Hungarian legal literature: Császár Máttyás, 'Az EU nemzetközi magánjogi forrásainak hatása a nemzetközi magánjog általános részére' (2013) 60 (11) Magyar Jog 669–679; Vékás Lajos, 'Európai uniós és tagállami nemzetközi magánjog' (2017) 64 (10) Magyar Jog 589–601; Concerning codificational and technical problematics, see: Somssich Réka, 'Az uniós tagállamok szabályozástechnikai megoldásai a nemzeti jog, valamint az uniós jog viszonyának rendezésére a nemzetközi magánjog területén' in Berke Barna, Nemessányi Zoltán (eds), *Az új nemzetközi magánjogi törvény alapjai* (HVG-ORAC 2016, Budapest) 44–59.

<sup>3</sup> As such, we can mention the directives targeting the unification of the central institutions in contract law: Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts and the Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

<sup>4</sup> *Principles of European Contract Law*, Parts I and II, edited by Ole Lando and Hugh Beale; Part III, edited by Ole Lando, Eric Clive, André Prüm and Reinhard Zimmermann (The Hague, London, New York, 2000, 2003).

contract law harmonisation.<sup>5</sup> Conversely, the creation of regulations in the field of international private law brought spectacular results within the short period of one and a half decades. No less than ten regulations have been created, which form the common law of the European Union over a broad area by answering questions on international jurisdiction, recognition and enforcement; furthermore, they unify the rules of conflict-of-laws to determine the applicable law in international issues. It comes with the desirable consequence that, in several fields – the rules on jurisdiction, recognition and enforcement as well as the rules on conflict-of-laws – international private law rules became unified in all Member States. Consequently, in the same matters of fact, the courts (arbitration courts and other jurisdictional organs) of all Member States will apply the same rules of international conflict-of-laws norms and, accordingly, the same substantive law. The determination of the applicable substantive law therefore does not depend on which state's forum the case will be brought before, or which state's organ will proceed in the case.

## II About the Succession Regulation

To these regulations belongs Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (hereinafter Succession Regulation or Regulation).<sup>6</sup> This Regulation shall be applied to the succession of persons who died on or after 17 August 2015. Before the succession regulation entered into force, the conflict-of-laws rules of the Member States applied *different connecting factors* for the determination of the applicable law. In some legal systems (such as the Hungarian),<sup>7</sup> the last citizenship of the deceased, in others the last residence, while again in others the last habitual residence was the basis for determining the applicable law.<sup>8</sup>

Similarly to other EU regulations, the conflict-of-laws norms of the Succession Regulation have a *loi uniforme* character. This means that the courts apply, through the Regulation, the

<sup>5</sup> As a theoretical preparation of the unification of the European contract law, we can consider the monumental and – because of its method – innovative work edited by Nils Jansen and Reinhard Zimmermann, *Commentaries on European Contract Laws* (more than 2000 pages) (Oxford University Press 2018).

<sup>6</sup> Regarding the succession regulation, see Anatol Dutta, Sebastian Herrler (Hrsg.), *Die Europäische Erbrechtsverordnung* (C. H. Beck 2014, München); Astrid Deixler-Hübner, Martin Schauer (Hrsg.): *Kommentar zur EU-Erbrechtsverordnung (EuErbVO)* (Nomos 2015, Baden-Baden); Vékás Lajos, 'Objektive Anknüpfung des Erbstatuts' in Gerle Reichelt, Walter H. Rechberger (Hrsg.), *Europäisches Erbrecht* (Jan Sramek Verlag 2011, Wien) 41–56; Mádl Ferenc, Vékás Lajos, *Nemzetközi magánjog és nemzetközi kapcsolatok joga* (ELTE Eötvös Kiadó 2018, Budapest) 500–505.

<sup>7</sup> Act No. 13. from 1979. 36. §, 11. §.

<sup>8</sup> See the summary in the study of the Max Planck Institute in Hamburg: (2010) 74 RabelsZ 522, 125–126. margin numbers.

same substantive law, *whether the applicable rule is that of a Member State or not*. The basic idea of international private law is that the applicable law cannot depend on the proceeding forum. This principle requires that every forum of all Member States apply the norms determined by the Regulation, even if the applicable law is that of a State where the Regulation is not applicable or even that of a non-Member State. In this way a so-called ‘double channelled application process,’ the application of different conflict-of-laws rules for cases within and outside the European Union, can be avoided. It would lead in the given case to the application of different substantive laws and unnecessary difficulties. However, there is generally no reason that would make different conflict-of-laws rules necessary in internal EU and external cases. In extreme cases, the court of a Member State can deflect an unacceptable result by using the *ordre public* clause.

The Succession Regulation accepts the principle of the *unity of the estate*. It means that it makes no difference between movable and immovable assets and therefore the issue of the estate is subordinated to one single state’s law. With this solution, the Regulation intends to avoid complications which arising from the division of the estate. In cases when the assets are located in several states, these problems would increase the costs and significantly hinder the testator in planning the issue of succession. As one of the Member States where the Succession Regulation is applicable, the earlier *French succession law* followed the principle of dividing the estate: the law of the location of the subject (*lex rei sitae*) was applicable to the immovable assets, and the deceased’s personal law to the movable assets.<sup>9</sup> [Note: *Denmark* (using the opportunity assured by Articles 1. and 2. of the Protocol No 22. attached to Article 81 of the TEU) ruled out its participation in the unification process, which is based on Article 81 of the TEU. Consequently, the succession regulation is not applied in Denmark. The *United Kingdom* and *Ireland* did not use their *opt-in* possibility in Articles 1–3 of Protocol No. 21 attached to Article 81 of the TEU. Accordingly, the succession regulation is not applicable in these states either.]

The objective connecting factor of the Succession Regulation is the *habitual residence* of the deceased at the time of the deceased’s death. There is an *escape clause*, which helps the reasonable solution of extraordinary situations. When the overall assessment of all the factual circumstances of the case indicates that the deceased was manifestly more closely connected with another law (typically to the law of the state of his/her citizenship), the latter law has to be applied. The testator can provide that the issue of his/her estate has to be determined by the law of the state of his/her nationality at the time of making the choice or at the time of death. This *restricted possibility of choice of law* wants to ensure that he/she can order the estate under whichever state’s law was the familiar, economic and cultural centre of his/her life.

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<sup>9</sup> See *ibid.*

### III The Differences in Substantive Succession Rules

1. The differences in substantive succession law are found in the background of the unification of the European conflict-of-laws rules. The aim of the Succession Regulation is – above the differences in substantive laws – creating unity by harmonising international private law rules and by ensuring the *international harmony of decision-making*.

In the legal literature, the perception is considerably prevalent that traditions play a more significant role in the differences between national succession laws than regarding contractual laws. This is presumably the truth, even if we can discover many differences in succession laws that have no deep roots and for which substantial reasons cannot be found.

*Comparative law* implies the possibility of closing legal solutions concerning the order of succession. The observation of foreign laws was already a common method in the era of codifications since the end of the 19th century. For example, Béni Grosschmid took the solutions of foreign legal systems into account in almost all the problems he discussed in his study evaluating the justification of the draft act on the intestate succession *ex privata diligentia*.<sup>10</sup> The utilisation of the results of comparative law is even more unavoidable in the process of preparing national legislation nowadays. As an example, we can refer to the preparatory work on the fourth book, on succession, of the *Dutch Burgerlijk Wetboek* of 2003, during which the solutions of almost every European codification – among these the first Hungarian Civil Code – were considered.<sup>11</sup> Of course, this method of legislation does not result directly in the unification of legal solutions.

2. In the following we are going to reflect on two possible *differences in the general part* of succession law (section IV). After this we will discuss in detail the significant differences in the intestate succession rules of some legal systems (section V). Despite the practical importance of the question we are not discussing the substantive requirements of the testament. This topic is simply passed by, because the Succession Regulation – in accordance with the Hague Convention<sup>12</sup> of 1961 and the principle of *favor testamenti* – aims that the validity of a written testament shall be saved if possible. This is served by that rule of the Regulation which prescribes that the testament is formally valid if it fulfils the requirements of the law where it was made, of the testator's personal law or the law of his/her residential state or the law of the state of his/her habitual residence. Furthermore, a clause about an immovable is valid if the formal requirements of the state's law where the immovable is located were fulfilled. In the last part of our study we shall deal with the problems that derive from

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<sup>10</sup> See the study which was first published in the Magyar Igazságügy in years 1885 and 1886 Zsögöd Benő, *Magánjogi tanulmányok* 2. vol. (Poltzer 1901, Budapest) 63–257.

<sup>11</sup> See the study by Wilbert D. Kolkman in Kenneth G. C. Reid, Marius J. de Waal, Reinhard Zimmermann (eds): *Intestate Succession* (Oxford University Press 2015) 229, 236; For the new Dutch succession law see Csizmazia Norbert, 'Az új holland öröklési jog' (2003) 5 (2) Polgári jogi kodifikáció 30–38.

<sup>12</sup> Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions. Entered into force on 1 May 1964.

different interpretations of the compulsory share of inheritance. The Succession Regulation extends the applicable law to the compulsory share.

## IV Differences in the General Part

First of all, we present two possible problems in the *general part*, therefore we are going to answer the questions which can occur in intestate and testate succession, as well as regarding compulsory shares.

1. There are differences in legal systems as to whether they prescribe a requirement of some legal action to bring about succession. The majority of modern legal systems do not contain such a requirement, which means that without any specific legal action the succession comes about by the force of law at the moment of the death of the deceased: the principle of *ipso iure* succession.<sup>13</sup> This also means that the deceased's assets do not become derelict; there is no estate without a claimant. On the other hand, there are some legal systems today that prescribe a requirement for some legal action to bring about succession. These systems – on the contrary to *ipso iure* systems – are called *aditionalis* succession systems. Such are, for example, the Austrian and Italian succession laws. According to Austrian law – with specific exceptions – the heir does not immediately become the owner of the estate that passes to him, but the law on succession requires a non-contentious procedure and the successor's declaration (*Einantwortung*) to acquire the estate. According to the Italian law, legal succession comes about only due to the so called *accettazione*.<sup>14</sup>

2. The second problem is another difference in the regulation of renunciation contracts concluded with the testator. The ABGB and the BGB, as well as the majority of the legal systems following the German succession law tradition (e.g. Hungarian law) as well as the Nordic legal systems are familiar with the legal institution of renunciation (*Erbverzicht*).<sup>15</sup> On the contrary, renunciation contracts are null and void in some Romance legal systems (Spanish, Catalanian, Portuguese) without exception, while in others (French, Belgian, Italian) with specific exceptions. Art. 25 of the Succession Regulation seeks to solve this question. However, not even the unified conflict-of-laws rules are capable on their own to balance all the problems which originate from the different basic understandings, for example in the event of a change of statutes due to a change in the deceased testator's habitual country of residence.<sup>16</sup>

<sup>13</sup> See for example: HCC 7:87. §, BGB 1942. §.

<sup>14</sup> ABGB 797. §, 819. §; Codice civile Article 459., Articles 470–476.

<sup>15</sup> BGB 2346. § – 2352. §; ABGB 551. §; HCC 7:7. § – 7:9. §.

<sup>16</sup> Regarding this problem, see Sebastian Seeger: *Erbverzichte im neuen europäischen Kollisionsrecht* (Mohr Siebeck 2018, Tübingen).



## V Notable Differences of Intestate Succession in the Legal Systems of the European Union

1. We can conclude that the rules of intestate succession define the issue of the estate in every legal system on an *auxiliary basis*. These rules are applicable only in the absence of a valid testament, in the event of the debarment of the designated heir in the absence of an alternate heir or if the testament does not contain dispositions on the whole estate. This auxiliary role was made possible by the evolution of law: the succession laws of the modern era – almost without exception<sup>17</sup> – gave up<sup>18</sup> the Roman legal principle which excludes the parallel application of testate and intestate succession: *nemo pro parte testatus pro parte intestatus decedere potest*.<sup>19</sup>

This logical sequence is not reflected by practice, because in most European states – for multiple reasons – the testation rate is far from 50%,<sup>20</sup> and the majority of successions are intestate.

2. Among the intestate succession rules of the legal systems, we can nowadays find *several differences*. This might be considered surprising from many aspects.

a) First of all, the meaningful differences that show up in the details are hard to explain, because the *motives* behind intestate succession are common. At least it is true concerning the close relatives and the spouse. In the background of the intestate succession of every legal system there is one requirement that is always emphasised, namely that the law should determine the order of heirs in the way that the deceased would have ordered it, if he had made a will, which means, that the law should formulate the presumed intention of the deceased. It is said that it is even more correct, if the rules of the intestate succession are formulated in the way in which the deceased would have disposed – in accordance with the expectations of society. Such a requirement of society is family solidarity or care for family members.<sup>21</sup> These requirements are formulated somewhat generally and therefore they are unclear, if we consider the individual aspects of the deceased and the diversity of the amount and composition of the estate, although they do explain the essence. The canon of the law can hardly be more delicate than the mentioned aspect, and all closer and individualised considerations can be formulated by the will of the testator.

b) The national succession law rules have been approaching each other on many issues because of the social changes over the last 70 years. These changes are directly and specifically

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<sup>17</sup> According to the handbook edited by Reid, de Waal, Zimmermann (n 11) 445: in Europe this principle lives only in Catalonia's and San Marino's succession order.

<sup>18</sup> In the Hungarian succession law this principle was given up in 1715. See the study by Vékás Lajos in Reid, de Waal, Zimmermann (n 11) 274.

<sup>19</sup> Justinianian Institutions 2,14. For a rare exception of the principle, see Földi András, Hamza Gábor, *A római jog története és intézkedései* (21st edn, OFI 2016, Budapest) 608.

<sup>20</sup> See in the handbook by Reid, de Waal, Zimmermann (n 11) as a summary, 444. For the estimated Hungarian data see the study by Vékás (n 18) 275.

<sup>21</sup> See Reid, de Waal, Zimmermann (n 11) 445ff.

in connection with *social developments*, as for example the changed role of women in society, as well as their emancipation, and perhaps they are connected with the increased life expectancy.<sup>22</sup> As a general tendency, we can consider the strengthening of the legal status of the surviving spouse in intestate succession.<sup>23</sup>

In more recent times, the rules of succession have to fulfil several *constitutional and human rights requirements*,<sup>24</sup> which are bringing the order of intestate succession even closer together in the legal systems. From the middle of the 20th century, we can treat the equality of the spouses as one such requirement concerning intestate succession. Besides these, the European succession laws have come closer to each other, for example due to the fact that, in every legal system of the European Union, the full successor status of an adopted child as an intestate successor has been accepted.<sup>25</sup>

Even later, it took quite a lot of time to accept the equal position of a child born outside marriage, especially regarding the succession of the estate of the biological father.<sup>26</sup> In Hungarian law, the legal acceptance of equal succession rights for children born in marriage and outside marriage was implemented relatively early, in 1946.<sup>27</sup> This is impressive, because it happened much later in legal systems with a significant democratic history. In French law, for example, the rules causing a negative discrimination of any child born outside marriage only started to change in 1972, and the discrimination disappeared entirely in the first years of the 21st century.<sup>28</sup> In German law, the Weimar Constitution gave equality to children born outside marriage in 1919. However, the practical consequences of this constitutional principle were not included in the succession law rules. So – based on the constitutional thesis of the Grundgesetz of 1949 and the strong requirements of the sentence of the German Constitutional Court – an act (*Nichtehelichengesetz*) was passed in 1969, which basically (but yet not perfectly) assured the same successor status for the child born outside marriage.<sup>29</sup> Finally, we should mention that legal systems approach each other because, most recently, more and more legal systems are recognizing the same-sex partner's intestate succession rights as those of a spouse<sup>30</sup> or registered partner.<sup>31</sup>

<sup>22</sup> For all of these as a summary, see Reid, de Waal, Zimmermann (n 11) 511ff.

<sup>23</sup> 489ff.

<sup>24</sup> *Ibid.*, 448.

<sup>25</sup> Regarding the Hungarian evolution of law, see the study by Vékás (n 18) 279ff; for the French law see the study by Cécil Pérès in Reid, de Waal, Zimmermann (n 11) 40; regarding the German law see the study by Reinhard Zimmermann in Reid, de Waal, Zimmermann (n 11) 202ff.

<sup>26</sup> On the discrimination of children born out of marriage, which lasted for centuries, see Reid, de Waal, Zimmermann (n 11) 197, 481ff, and the quoted literature.

<sup>27</sup> Act No. XXXIX. from 1946. 1. §. On the gradual acceptance of equality in the practice of the Curia see Vékás (n 18) 278ff.

<sup>28</sup> See the study by Pérès (n 25) 37, 44.

<sup>29</sup> See the study by Zimmermann (n 25) 197ff.

<sup>30</sup> For the French law, see the study by Pérès (n 25) 49.

<sup>31</sup> For the Hungarian law, see the study by Vékás (n 18) 289; on the German law, see the study by Zimmermann (n 25) 219.

c) In the following, we will discuss the differences in the intestate succession rules of *European* legal systems (and among these, first of all, the states where the Succession Regulation is applicable). We will proceed in this way because of the limits to our knowledge and the framework; however, according to the Succession Regulation (due to its demand for universal application) the application of rules outside Europe is possible if the deceased's last habitual residence or – in the case of a choice of law – his/her citizenship connects the inheritance case to a legal system outside Europe.

3. The *descendants* forego the ascendants and the collateral relatives in every European legal system, and the sequence of succession among the ascendants is based on the same principle in the European legal systems. The European laws, almost without exception, distribute the estate *per stirpes*. It means that the share of a child who died before the deceased or is debarred from succession for other reasons will be inherited by his/her children or further descendants and not his/her siblings.<sup>32</sup> As a consequence, the deceased's closer and further descendants can inherit at the same time. The justification for the legal systems' substantively similar legal solutions as well as the legal literature gives different explanations.<sup>33</sup> However, the essential reason is obvious. By distributing the estate *per stirpes* among descendants, we can avoid the unfair consequences of those situations when the child of the deceased who has children dies before the deceased himself. Without distributing the estate *per stirpes*, the children (perhaps further descendants) of the child of the deceased who dies before the deceased would not receive a share of the estate, and they would be discriminated against, compared to the family of the deceased's other children.<sup>34</sup>

At first sight, succession *per stirpes* might seem unfair if the children who are debarred from succession have children of their own in a different number (these are the grandchildren of the deceased).<sup>35</sup> In these cases, the grandchildren receive the share of their parent who is debarred from succession, and their shares can be different depending on the number of their siblings. This problem is attempted to be solved by one of the regulations of the Scottish succession law, which follows the 'next-of-kin system' (also applied in some states of the USA). It makes an exception from the principle of succession *per stirpes*, and it prescribes an equal share for all grandchildren in those cases when the estate is inherited only by grandchildren, who come from different children.<sup>36</sup> The fairness of this system is questionable, because it makes the shares of the grandchildren depend on whether the grandchild's uncle or aunt or

<sup>32</sup> See for example the Hungarian HCC 7:55. § (3) sec., German BGB 1924. § (3) sec.

<sup>33</sup> See Reid, de Waal, Zimmermann (n 11) 462ff; for the historical background, which leads back to Justinian's Novels, see *ibid*, 453ff; in detail the study by Thomas Rüfner in Reid, de Waal, Zimmermann (n 11) 26ff.

<sup>34</sup> The same Reid, de Waal, Zimmermann (n 11) 466.

<sup>35</sup> The equal inheritance of the grandchildren to protect families with more children was suggested by Gustav Boehmer, *Vorschläge zur Neuordnung der gesetzlichen Erbfolge (BGB §§ 1924–1936)* (de Gruyter 1938, Berlin) 76ff. The prevailing point of view in the literature of the European states maintains succession *per stirpes* in this case too.

<sup>36</sup> Succession (Scotland) Act 1964 section 6(a). See the study by Kenneth G. C. Reid in Reid, de Waal, Zimmermann (n 11) 389. A similar suggestion occurred during the preparation works of the Dutch Burgerlijk Wetboek, but this was rejected; see the study by Kolkman (n 11) 234.

a person who belongs to another branch of the ascendants was debarred from succession or not before the death of the deceased.<sup>37</sup>

4. The succession laws of the member states of the European Union are different in the definition of the status of the *surviving spouse*.<sup>38</sup>

a) As we mentioned [up in section 2 b)] the strengthening of the surviving spouse's *successor position* is outlined in the latest legal evolution. From a historical perspective, there were fundamental changes in this field over the last two centuries. While according to the original version of the *Code civil* – similarly to the principles laid down in Justinian's Novels<sup>39</sup> – the surviving spouse, alongside blood relatives, did not inherit,<sup>40</sup> but only a hundred years later the German BGB gave a quarter to the surviving spouse, even alongside the children<sup>41</sup> and in the 20th century (e.g. in Italy in 1975) similar changes were made in most European legal systems. The reforms concerning the surviving spouse's successor status took place at the beginning of the 21st century in the French (2001, 2006), Dutch (2003), Hungarian (2013) and English (2014) law.

All these changes mean that by now the surviving spouse has come to a very beneficial successor status in the European legal systems.<sup>42</sup> Perhaps the most favourable status is granted by the Dutch Burgerlijk Wetboek and the northern legal systems. In these legal systems, the surviving spouse inherits everything and the common descendants of the deceased are residual 'subsequent heirs'; they will inherit only after the death of the spouse.<sup>43</sup> The surviving spouse has the worst status in Spanish law: in the *'three-line system'*<sup>44</sup>, the surviving spouse theoretically has to share even with the farthest ascendant, and gets usufruct on only the half of the assets.<sup>45</sup> If we assess the successor status of the surviving spouse, the rules of the matrimonial property regime have to be taken into consideration, as well as other rights of the surviving spouse.<sup>46</sup>

In the details there are still *differences*. These divergences – among other reasons – can be attributed to the differences between the rules of the matrimonial property regimes.<sup>47</sup>

<sup>37</sup> Reid himself thinks that this rule is difficult to prove: *ibid*, 390.

<sup>38</sup> On these problematics, see Weiss Emilia, *A túléelő házastárs öröklési jogi jogállása történeti kialakulásában és fejlődési tendenciáiban* (Akadémiai Kiadó 1984, Budapest) 309; Reinhard Zimmermann, 'Das Ehegattenerbrecht in historisch-vergleichender Perspektive' (2016) 80 (1) *RabelsZ* 39–92.

<sup>39</sup> See Földi, Hamza (n 19) 626; Rűfner (n 33) 28.

<sup>40</sup> This inimical situation was later lightened by the rules of the matrimonial property regime and other possibilities. See the study by Pères (n 25) 46.

<sup>41</sup> BGB 1931. §, see the study of Zimmermann (n 25) 211ff.

<sup>42</sup> As causes of these improvements see Reid, de Waal, Zimmermann (n 11) 490ff.

<sup>43</sup> See the study of M. Scherpe in Reid, de Waal, Zimmermann (n 11) 317ff, and the study of Kolkman (n 11) 242ff.

<sup>44</sup> See up in section 4.c).

<sup>45</sup> Spanish Civil code, Articles 935–944.

<sup>46</sup> See the study of Sergio Cámara Lapuente in Reid, de Waal, Zimmermann (n 11) 106ff.

<sup>47</sup> See Reid, de Waal, Zimmermann (n 11) 494ff. For Hungarian law see the study of Vékás (n 18) 284ff.

b) In the case of succession *alongside the descendants*, the *succession of usufruct*, which was earlier considered the main rule, was gradually forced back. Behind this development, we can find the financial, demographical and family-sociological changes of the 20th century. The inheritance of usufruct was formed under those circumstances when the essential inherited assets (in the first place, the lucrative *immovable assets*) were profitable stocks and not articles for personal use. Under these circumstances, the usufruct assured the livelihood of the spouse, without risking the future enjoyment of the estate by the other heirs after the expiration of the usufruct.

In the meantime the nature of the assets has significantly transformed. Nowadays most movable assets that can be inherited are relatively exhaustible; they are subject instead to consumption and depreciate quickly. In connection with the usufruct on some assets (copyright, patent and other rights, business shares, stocks, cash etc.) the interests of the spouse and the other heirs are often in sharp conflict. The increased life expectancy has extended the conflicts between the spouse who is the beneficiary of usufruct and the other heirs, especially in those not so rare cases when the other heirs come from the deceased's earlier marriage, and they are often just a bit younger or even older than the spouse.

Because of all of these, according to more and more European laws, the surviving spouse inherits a *share of the estate*. The Italian law<sup>48</sup> – starting the reform in 1975 – and from 2013 the Hungarian law<sup>49</sup> belong to these legal systems as well. According to the reformed (2001, 2006) *Code civil* the widow can choose between a share of the estate (one-quarter) and the usufruct of the whole estate.<sup>50</sup> The Belgian<sup>51</sup> and the Spanish<sup>52</sup> Civil Codes still assure usufruct. The share inherited by the surviving spouse is typically defined as a certain proportion.<sup>53</sup> This can be one-quarter of the estate,<sup>54</sup> one-third,<sup>55</sup> a half<sup>56</sup> or a child's-share (whether defining the minimum share<sup>57</sup> or not).<sup>58</sup>

c) More legal systems intend to assure the *family house* used before the death of the testator and *the habitual circumstances* for the surviving spouse even alongside the descendants. Austrian law makes it possible for the surviving spouse, by a legacy, to use the house occupied together with the deceased, as well as the use of the usual furniture and appliances are

<sup>48</sup> Codice civile Article 581.; see the study by Alexandra Braun in Reid, de Waal, Zimmermann (n 11) 84.

<sup>49</sup> HCC 7:58. § (1), b); see the study by Vékás (n 18) 284ff; Vékás Lajos in Vékás Lajos, Gárdos Péter (szerk.), *Kommentár a Polgári Törvénykönyvhöz*, 2. kötet. (2nd edn, Wolters Kluwer 2018, Budapest) 2614ff.

<sup>50</sup> Article 757.; see the study by Pérès (n 25) 46.

<sup>51</sup> Article 745.;

<sup>52</sup> Article 834.; see the study by Lapuente (n 46) 107.

<sup>53</sup> Determining the share of the surviving spouse in English law is more complicated. See the study by Roger Kerridge in Reid, de Waal, Zimmermann (n 11) 343ff.

<sup>54</sup> For example, Code civil Article 757.; BGB 1931. §.

<sup>55</sup> For example, ABGB 757. §; Codice civile Article 581. in the case of sharing with more than one child.

<sup>56</sup> For example, Codice civile Article 581. in the case of sharing with one child.

<sup>57</sup> For example, Polish Civil Code Article 931.

<sup>58</sup> For example, Hungarian Civil Code 7:58. § (1) b).

necessary to maintain their former standard of living.<sup>59</sup> Hungarian law makes this possible by usufruct.<sup>60</sup> The widow, upon his/her intestate share, receives the legacy or the usufruct. The *Code civil*<sup>61</sup> and the Italian jurisdiction<sup>62</sup> assure the surviving spouse's usufruct of the house used together with the deceased, as well as the associated furniture etc., but the value of these are deducted from his/her other share. By no means all European laws go so far in ensuring that the surviving spouse can maintain their earlier life conditions.<sup>63</sup>

d) There are differences in the laws of the EU member states concerning the definition of the successor status of the surviving spouse in *absence of descendants*. There are nowadays legal systems where, in the absence of descendants, the whole estate is inherited by the widow. This is the situation, for example, in English<sup>64</sup> and Danish law<sup>65</sup> and – with exception of the ancestral assets – the Hungarian Civil Code<sup>66</sup> of 1959 had the same regulations. According to other succession laws (for example the *Code civil*,<sup>67</sup> the Polish Civil Code<sup>68</sup> and Norwegian law<sup>69</sup>), the surviving spouse halves the estate with the parents. With the exception of the house used together with the deceased, as well as the usual furniture and appliances, this system was introduced in the Hungarian Civil Code of 2013 (HCC), too.<sup>70</sup>

The widow receives two-thirds of the estate according to the Austrian ABGB while, according to the BGB, he/she is entitled to one half in the event of sharing with the deceased's parents, grandparents and their descendants.<sup>71</sup> The Italian *Codice civile* also gives two-thirds to the surviving spouse, in the event of sharing with ascendants or siblings.<sup>72</sup> Spanish law, as we have mentioned, gives only a usufruct to the widow/widower and only on the half of the estate, in a given case, even when he/she shares with further ascendants.<sup>73</sup>

5. As much the European legal systems can be considered uniform in the intestate succession of descendants (see section 3 above) we can find as many differences in the *intestate succession of ascendants and collateral relatives*. There is unity in only one question: according to every European succession law, the *ascendants and the collateral relatives* may only become intestate successors in the absence (when there are no descendants or they are debarred from

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<sup>59</sup> ABGB 758. §.

<sup>60</sup> HCC 7:58. § (1) a).

<sup>61</sup> Code civil Articles 764–766.

<sup>62</sup> Cass UU, no 4847, 2013.

<sup>63</sup> See Reid, de Waal, Zimmermann (n 11) 491; 501ff.

<sup>64</sup> See the study by Kerridge (n 53) 340.

<sup>65</sup> See the study by Scherpe (n 43) 314.

<sup>66</sup> 607. § (4).

<sup>67</sup> Article 757-1.

<sup>68</sup> Article 933.

<sup>69</sup> See the study by Scherpe (n 43) 314.

<sup>70</sup> 7:60. §.

<sup>71</sup> ABGB Article 757., BGB 1931. Article (1).

<sup>72</sup> Article 582.

<sup>73</sup> Spanish *Code civil* Articles 935–944., see the study by Lapuente (n 46) 106ff.

succession) of descendants.<sup>74</sup> By a common perception and according to the studies of the summary handbook cited before, the rules of intestate succession concerning ascendants and the collateral relatives basically can be categorised into *three main systems* in civil law jurisdictions.<sup>75</sup>

a) We can call the first the parentelic succession system, which was formed in the *Erbfolgepatentgesetz* in 1786, and later in *ABGB*.<sup>76</sup> In *parentelic* systems – such as the Hungarian succession system<sup>77</sup> – the ascendants and the collateral relatives form a class of heirs according to levels of ascendants (class of parents, grandparents etc.). The heirs of the class that is closer to the deceased inherit before those in further classes and collateral relatives will become heirs only if their own ascendant is debarred from succession. For example, the sibling of the deceased will inherit only if his/her father or mother is debarred from succession but, in this case, the sibling inherits before the surviving grandparent. This sequence is supplemented by the mutual claim for the maintenance and the compulsory share between the parent and the child. All these are reflecting and representing the strong relationship between the parents and the children. In the grandparent's class and in the even further ascendants' class of heirs – whose members inherit only in exceptional situations – the principle of the parentelic succession can only be explained by the logics of the system. Deeper argumentations are not available.<sup>78</sup> The deceased may only express his/her closer emotional relationship with one of the grandparents or uncle/aunt if he/she left a testament to this end.

b) The second one consists of those succession systems that are based on the *Code civil*. According to the *Code civil*, and in those succession systems following this one,<sup>79</sup> the parents and the sibling may become intestate successors at the same time and any debarred sibling is substituted by his/her descendants (the deceased's nephew or niece). The parents each inherit one quarter of the estate, and the siblings share the other half of the assets and, similarly, they inherit the share of the debarred parent. The further ascendants (grandparents etc.) comprise the third class of heirs, and they inherit before the further collateral relatives who make up the fourth class of the heirs (uncles, aunts, cousins, etc.).<sup>80</sup>

<sup>74</sup> Reid, de Waal, Zimmermann (n 11) 468.

<sup>75</sup> See Helmut Coing, *Europäisches Privatrecht*, vol. I. (C. H. Beck 1985, München) 604ff; Heinz Neumayer, 'Intestate Succession' in *International Encyclopedia of Comparative Law*, vol. 5, ch. 3 (2002), 4–58. margin numbers; Dieter Heinrich, Dieter Schwab (Hrsg.), *Familienerbrecht und Testierfreiheit im europäischen Vergleich* (Gieseking 2001, Bielefeld); Reid, de Waal, Zimmermann (n 11) 458ff.

<sup>76</sup> German, Swiss, Hungarian, Greek, Polish law, Dutch law from 2003.

<sup>77</sup> HCC 7:63. § – 7:66. §. The ancient example of the parental system is the Austrian ABGB, which was followed by the German BGB, the Polish Civil Code and many other laws.

<sup>78</sup> See Reid, de Waal, Zimmermann (n 11) 474ff.

<sup>79</sup> The Belgian Code civil, the Luxemburgish law, the Dutch law from 1838 and in its main part the Dutch law from 2003 (*Burgerlijk Wetboek*), the Romanian civil code from 1864, the Italian Codice civile from 1865 and from 1942. To this system can be listed the succession law of the new Romanian Civil Code, which entered into force in October 2011 (*Codul civil*). On this see Veress Emőd, Székely János, 'Törvényes öröklés a román öröklési jog rendszerében' (2018) (4) *Közjegyzők Közlönye* 23–45. It should be noted that, outside Europe this succession system was accepted by both of Québec's codifications (1866, 1994).

<sup>80</sup> See the study by Pérès (n 25) 40ff.

c) The third, so called *three-line system*, is followed by the Spanish Civil Code from 1889 and the Catalanian and Portuguese codes.<sup>81</sup> In this system, the collateral relatives do not inherit at the same time as the ascendants, but they form a separate class of heirs and, according to this system, the collateral relatives inherit only after all of the ascendants who are entitled to inherit. This means, for example, that the deceased's grandparents (theoretically even further ascendants, too) inherit before the deceased's siblings.<sup>82</sup>

6. Within the three basic succession systems there are *further differences*, too, in the order of succession of ascendants and collateral relatives. These small differences are often not separated from each other according to the basic systems because they cross over that classification.

a) The European succession laws differ according to the furthest ascendants who are entitled to inherit.<sup>83</sup> The Hungarian Civil Code, for example, does not limit the intestate succession of the ascendants but, concerning the collateral relatives, the intestate succession is closed by the descendants of great-grandparents.<sup>84</sup> With this solution, the Hungarian law (similarly to some other laws e.g. the Austrian<sup>85</sup> and the Polish<sup>86</sup> law) is placed in the middle between those legal systems that are not familiar with any limits<sup>87</sup> and those which make strict barriers,<sup>88</sup> even though it is closer to those mentioned before.

b) The Hungarian *lineal inheritance (droit de retour)* is a unique institution in today's European succession laws.<sup>89</sup> The Hungarian Civil Code of 2013 has kept the system of lineal inheritance and this decision was supported by remarkable arguments.<sup>90</sup> In the absence of descendants according to lineal inheritance, an asset that was inherited by or donated to the deceased by one of the parents (or in defined cases from collateral relatives) goes back to the branch where it came from. Those who inherit according to lineal inheritance must prove that the acquisition was free-of-charge.<sup>91</sup>

c) The institution known in French as *la fente successorale* is a unique solution concerning the succession of the ascendants. According to these rules, half of the share due to a parent without descendants who is debarred from succession will be inherited by the other parent; the other half will be inherited by the closest ascendant of the debarred parent (in typical case

<sup>81</sup> Catalan law 1960, 1987, 1991, 2008), Portuguese law (1867, 1966). It should be noted that outside Europe this succession system was accepted by all Latin American codifications.

<sup>82</sup> See the study by Lapuente (n 46) 105ff, 111ff.

<sup>83</sup> On this, see Reid, de Waal, Zimmermann (n 11) 475ff.

<sup>84</sup> HCC 7:66. §.

<sup>85</sup> ABGB 735. § – 741. §, see the study by Christiane Wendehorst in Reid, de Waal, Zimmermann (n 11) 174.

<sup>86</sup> See the study by Frederyk Zoll in Reid, de Waal, Zimmermann (n 11) 302.

<sup>87</sup> For example, the German BGB 1929. §, see the study by Zimmermann (n 25) 197; Scottish law, see the study by Reid (n 36) 389ff.

<sup>88</sup> For example, English law, see the study by Kerridge (n 53) 327ff; further the Nordic laws, see the study by Jens M. Scherpe (n 43) 310ff.

<sup>89</sup> See Reid, de Waal, Zimmermann (n 11) 472.

<sup>90</sup> See Vékás Lajos (n 49) 2624ff.

<sup>91</sup> HCC 7:67. § – 7:71. §.



the deceased's grandparent in the same line). The surviving parent will inherit the whole share of the debarred parent, if this parent has no ascendants.<sup>92</sup> However, the parent is closer to the family of the deceased than the grandparent who is on the other line of ascendants, or even another further ascendant.<sup>93</sup> Considering the historical root of *la fente successorale* is a residue of the *paterna paternis materna maternis* principle and of the tradition of protecting the family property, which does not really fit together with modern succession laws. Nowadays it is family solidarity that is leading the order of intestate succession and not the intention of keeping the family property together. It is a great difference compared to lineal inheritance, that behind the institution of *la fente successorale* it can be only presumed that the asset derives from the ascendants, while it must be proved in the case of lineal inheritance.

7. There are significant differences in the European succession laws concerning the intestate successor position of the *state*, or perhaps the federal state (Germany<sup>94</sup>) or the municipality (Poland<sup>95</sup>).<sup>96</sup> In this field, the first dividing line between the legal systems is whether the state acquires the assets by virtue of succession. There are some European legal systems (for example France, Austria and the Netherlands),<sup>97</sup> where the state's acquisition of derelict assets is based on *sovereignty (iure imperii)* and not on succession upon the death of the owner. Article 33 of the succession regulation prescribes that such a Member State (in the absence of any other heirs) independently from the applicable law, can acquire those assets that are *located on its territory* but the state shall assure the satisfaction of the claims of creditors.

The differences between the laws that accept the legal succession of the state *by virtue of succession (iure successionis)* comprise after which ascendants or collateral relatives the state will be the intestate heir. In those legal systems where are no barriers to considering the level of ascendants and collateral relatives (German law) or ascendants (Hungarian law) in intestate succession, the state inherits only in the absence of all other heirs, perhaps as a necessary intestate heir, who cannot refuse the estate.<sup>98</sup> In other legal systems (for example in Italy), the intestate succession right of the ascendants and the collateral relatives is limited to a definite level and these laws determine the state as an intestate heir.<sup>99</sup>

<sup>92</sup> *Code civil* 747–749. Article; see – for the historical base of the institution as well – the study by Pèrès (n 25) 40ff.

The Dutch and Italian laws, which follow the succession order of the *Code civil*, did not implement this institution.

<sup>93</sup> The same Reid, de Waal, Zimmermann (n 11) 472.

<sup>94</sup> See the study by Zimmermann (n 25) 192ff.

<sup>95</sup> See the study by Zoll (n 86) 302.

<sup>96</sup> See Neumayer (n 75) 165–177 margin numbers. For the problematics of unlimited family succession and the solidarity of the community see Reid, de Waal, Zimmermann (n 11) 480ff.

<sup>97</sup> *Code civil* Article 724., Article 811., see the study by Pèrès (n 25) 45; ABGB 760. §, see the study by Wendehorst (n 85) 170; Dutch Burgerlijk Wetboek Article 4:189, see the study by Kolkman (n 11) 231.

<sup>98</sup> BGB 1936. §; HCC 7:74. §.

<sup>99</sup> Codice civile Article 586., see the study by Braun (n 48) 87ff.

## VI Significant Differences between the Legal Systems of the European Union Considering the Rules of the Compulsory Share

1. The institution of the compulsory share was formed by the European private law as an instrument to release the conflict between the idea of the freedom of *testamentary disposition and the care of the family and solidarity* or keeping the property in the family. By assuring the claim for the compulsory share, the legislator intends to give a particular share of the assets (mostly the value of these in money instead) to the closest relatives and the spouse of the deceased, against the expressed will of the testator in the testament. The compulsory share is therefore the minimum share of the estate which the closest relatives and the spouse of the deceased shall receive *ex lege*.

Except for *English* succession law, which limits the freedom of testamentary disposition only exceptionally and therefore does not know the institution of the compulsory share according to our civil law concept, and it only assures a claim for adequate maintenance and support for specific people against the heirs,<sup>100</sup> debates concerning the compulsory share always flare up. In the civil law systems that are treated as models, theoretical and philosophical questions occur from time to time. This is comprehensible because, behind the idea of this question, there are significant contradictions. The question comes up again and again: does the legislator have the moral basis to ensure, for one part of the deceased's assets, who shall be the owner, among specific close relatives and for the spouse against the deceased's explicit will, only considering the family relationship? The valid arguments for and against this institution, are being searched for; moreover, the constitutional and human rights related ramifications are nowadays being examined.

In France in the last third of the 19th century, there was an intensive political dispute, and the standard opinion of the institution of the compulsory share, which is accepted by the *Code civil*, was questioned for financial and social reasons. To understand this dispute, it has to be taken into consideration that the original rules of the *Code civil* kept a defined amount of the deceased's assets (*réserve*) for those entitled to a compulsory share (*héritiers réservataires*) and it did not define it as an obligatory claim against the successors, but as a real share of the estate. This type of the compulsory share was considered as a harmful restriction of the owner's disposal rights and as one side of the deformation of the social structure in the dispute.<sup>101</sup> The modification of the *Code civil* in 2006 made significant changes concerning the nature of the compulsory share claim, but the basic idea of this institution remained.<sup>102</sup>

<sup>100</sup> First the Inheritance (Family Provision) Act of 1938, then the Inheritance (Provision for Family and Dependents) Act of 1975, which is still applied.

<sup>101</sup> See Pierre Guillaume Frédéric Le Play, *La réforme sociale en France, déduite de l'observation comparée des peuples européens* (1864 Paris); Charles Brocher, *Étude historique et philosophique sur la légitime et les réserves en matière de succession héréditaire* (1868 Paris); Gustave Boissonnade, *Histoire de la réserve héréditaire et de son influence morale et économique* (1873 Paris).

<sup>102</sup> Philippe Malaurie, Laurent Aynès, *Les successions, les libéralités* (Defrénois 2006, Paris); Alain Delfosse, Jean-François Peniguel, *La réforme des successions et des libéralités* (LexisNexis 2006, Paris).

One of the important legal disputes during the preparation works of the German BGB concerned the compulsory share. Rejecting the arguments which maximally preferred the freedom of testamentary disposal, the majority opinion accepted the institution of compulsory share.<sup>103</sup> The original rules in BGB (§§ 2303–2338) have essentially remained the same until nowadays despite the later disputes and a few modifications.<sup>104</sup> It has to be mentioned that the German Constitutional Court – in one of its decisions of 2005 – not only did not consider the specific compulsory share guaranteed to a child as unconstitutional, noting that it does not harm constitutional regulations which are defending the right to property and succession, but it declared the assurance of the compulsory share to be protected based on these rules.<sup>105</sup>

Similar conceptual issues came up during the preparation works on the Hungarian Civil Code<sup>106</sup> and the Austrian legal reform in 2015.<sup>107</sup>

2. Despite the conceptual disputes, the decisive majority of the legal systems where the succession regulation is applicable *know and apply* the institution of the compulsory share, because their starting point is that the social changes did not make this instrument of familial solidarity unnecessary. This is also true for those legal systems that apply other legal tools to provide support inside the family where there is a death. In summary, the European legal systems do not differ concerning the conceptual approach of the compulsory share but in the details of its regulation.

There are differences concerning the *persons who are entitled* to compulsory share. The descendants and the surviving spouse usually belong to this group of persons, and their mutual relationship is formed according to the rules of intestate succession. An increasing number of European legal systems (but not every one) treat a registered partner the same way as the spouse concerning the rules of compulsory share. The picture is more diverse concerning the parents. For example, according to the HCC (similarly to the BGB), the parents of the deceased are entitled to compulsory share, if they have been excluded from succession by disposition mortis causa.<sup>108</sup> On the other hand, the new Austrian law, with the modification of ABGB § 762, eliminated the parent's right to compulsory share. There are differences between the amount of the compulsory share as well: in general half or one third of the intestate share forms the quota for the compulsory share. Besides these, the legal systems'

<sup>103</sup> See Hans-Georg Mertens, *Die Entstehung der Vorschriften des BGB über die gesetzliche Erbfolge und das Pflichtteilsrecht* (de Gruyter 1970, Berlin) 81–112.

<sup>104</sup> *Gleichberechtigungsgesetz* of 1957, *Nichtehelichengesetz* of 1969, *Gesetz zur Änderung des Erb- und Verjährungsrechts*, BGBl I 2009, 3142–3144.

<sup>105</sup> Grundgesetz Article 14. (1); BVerfG von 19 April 2005, BVerfGE 112, 332–363.

<sup>106</sup> See Weiss Emilia, 'Néhány gondolat a törvényes öröklés és a kötelesrész szabályainak reformjához' in *Liber Amicorum, Studia. L. Vékás dedicata* (ELTE ÁJK, Polgári Jogi Tanszék 1999, Budapest) 289–307; Csehi Zoltán, 'Észrevételek és javaslatok az új Polgári Törvénykönyv tervezetének kötelesrészi szabályaihoz' (2007) (7–8) *Közjegyzők Közlönye* 16–22; Vékás (n 49) 2639ff.

<sup>107</sup> Lásd Rudolf Welser, *Die Reform des österreichischen Erbrechts* (Manz 2009, Wien) 13ff, 73ff, 95ff; The reform was made in the *Erbrechtsänderungsgesetz* of 2015 (BGBl I no 87/2015), which entered into force on 1 January 2017.

<sup>108</sup> HCC 7:75. §; BGB 2303. § (2).

different regulations concerning the determination of the relationship between the compulsory share and the *foundation*, or the compulsory share and the *contract of inheritance* can result significant differences.

## VII Summary

As we presented above, there are still many differences today in the substantive succession law of those European legal systems where the succession regulation is applicable – despite a spontaneous harmonisation – and these differences can have a significant impact on the issue of the estate, the determination of heirs and many other questions which have to be decided in many cases. According to this, it is very important that the Succession Regulation – above the differences in substantive law – has made unity, unifying the rules in the majority of the European states on jurisdiction, applicable law, recognition and enforcement of decisions and the acceptance and enforcement of authentic instruments in matters of succession and has introduced the European Certificate of Succession.



## **Questions on the Cultural Cohesion (Embeddedness) of Succession Law – the Hungarian Example\*\***

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According to the traditional theory, succession law is strongly influenced by cultural factors. However, this widely held view is challenged today. Our aim is to give an explanation of how culture and political factors influence succession law with the help of experience from the recodification of succession law in Hungary. We think that lawyers overvalue the role of culture (traditions) in succession law; however, the political views of the governments can influence the regulation of succession what can make a future harmonization of succession law in the European Union less likely.

### **I Introduction**

It is a popular view that succession traditions and succession law are strongly influenced by cultural circumstances.<sup>1</sup> According to this aspect, succession law is similar to family law and this fact explains ‘why most publications on the law of succession aimed at an international audience are only meant to give information on one or more particular systems of succession law, without offering a comparative legal analysis. A comparison of succession laws is quite often seen as not fruitful in the light of the differing underlying social, cultural, economic and religious aspects; it is considered to be a senseless exercise.’<sup>2</sup> These circumstances are seen to

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<sup>1</sup> E.g. Tünde Mikes and Tomas de Montagut, ‘Family Succession Wars: Succession Norms and Practices in Medieval and Modern Catalonia’ in Maria Gigliola di Renzo Villata (ed): *Succession Law, Practice and Society in Europe across the Centuries* (Springer 2018, Cham, Switzerland) 21.

<sup>2</sup> Sjeff van Erp, ‘New Developments in Succession Law’ (2007) 11 (December) *Electronic Journal of Comparative Law* <<http://www.ejcl.org/113/article113-5.pdf>> accessed 10 December 2019, 1–2.

be why ‘succession law does not develop by rapid and radical changes, as for example, does contract law.’<sup>3</sup>

These articles do not explain what they mean under the terms culture and traditions. Of course, we do not try to give clear definitions for these expressions because it is impossible in the frame of a short paper. However, we guess that we should understand under these expressions in connection with succession and succession law that people have a common knowledge of succession rules in different societies and they accept these rules; they think these rules are correct – and they do not want these rules to be changed.<sup>4</sup>

However, this widely-held view is challenged today – especially by Reinhard Zimmermann, who expresses his doubts about the idea that the differences in the succession rules of some legal systems are based on cultural diversity.<sup>5</sup> Our aim is to give another explanation of how culture and political factors influence succession law with help of the experience of the recodification of succession law in Hungary. The importance of this question is clear: if there are significant culture-based differences between the succession rules of the member states of the European Union then the success of a future harmonisation of succession law is rather doubtful. However, if these cultural differences are not real, a future harmonisation is possible.

## II The Most Important Difficulty in the Evaluation of Cultural Factors on Succession Law

Before the detailed presentation of the above-mentioned main theories on the connection between culture and succession law, we would like to draw attention to one important deficiency which hinders us from finding the correct answer in this debate, namely that it is unknown why succession traditions are different in some legal systems. The best example is, on the one hand, the prevalence of intestacy and, on the other hand, the testation rate.

The prevalence of intestacy is quite varied around the world. For example, in France ‘fewer than 10 per cent of estates are transferred by will and, according to an opinion poll, only 3 per cent of French adults have ever envisaged disinheriting a member of their family.’<sup>6</sup> In Italy, scholars ‘have been speaking of a ‘crisis of the will’ since the 1970s. [...] This trend is confirmed by more recent figures, which reveal that in 2009 only about 16 per cent of all declared estates were distributed on the basis of a will.’<sup>7</sup>

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<sup>3</sup> Urve Liin, ‘Laws of Succession in Europe and Estonia: How We Got to Where We Are and Where We Should Be Heading’ (2001) 6 *Juridica International* <[https://www.juridicainternational.eu/public/pdf/ji\\_2001\\_1\\_114.pdf](https://www.juridicainternational.eu/public/pdf/ji_2001_1_114.pdf)> accessed 8 November 2019, 114.

<sup>4</sup> This interpretation – that people are fond of the habitual rules in the field of succession law – is popular in Hungary as well. See Weiss Emilia, *A túlélő házastárs öröklési jogi jogállása történeti kialakulásában és fejlődési tendenciáiban* (Akadémiai Kiadó 1984, Budapest) 33.

<sup>5</sup> Reinhard Zimmermann, ‘Kulturelle Prägung des Erbrechts?’ (2016) 71 (7, April) *JuristenZeitung* (JZ) 331.

<sup>6</sup> Cécile Pères, ‘Intestate Succession in France’ in Kenneth G. C. Reid, Marius J. de Waal and Reinhard Zimmermann, *Intestate Succession – Comparative Succession Law*, Volume II (Oxford University Press 2015, Oxford) 34.

<sup>7</sup> Alexandra Braun, ‘Intestate Succession in Italy’ in Reid, de Waal, Zimmermann (n 6) 68.

In other countries, testate succession is somewhat more popular (e.g. ‘between 25 and 35 per cent of the German population die testate’<sup>8</sup> or Hungary where ‘around 30 per cent of probates involve testamentary dispositions’).<sup>9</sup> Moreover, testate succession is as common as intestate succession or even more popular in some legal systems. For example, according to a study from 2013, around half of the 19,103 Dutch respondents were found to have made wills.<sup>10</sup> Similarly, ‘although conclusive data are lacking, studies suggest that fewer than half of all successions in Spain are intestate,’<sup>11</sup> and ‘contrary to what seems generally to be assumed, the vast majority of those who, in England and Wales, die leaving property of any significant value choose to make wills. Intestacy, for those who have property of value, is very unusual.’<sup>12</sup>

We can find this mixed picture of the prevalence of intestacy not just in Europe, but all around the world.<sup>13</sup> For example, on the one hand, ‘testacy rates are quite low in Latin America’, however Cuba is a notable exception;<sup>14</sup> on the other hand, in Australia and New Zealand, ‘most recent studies suggest a [testation] rate of 54 to 55 per cent for adults over the age of 18. This may be increasing.’<sup>15</sup>

Despite all the data mentioned above, it is not known why the prevalence of testate succession differs around the world.<sup>16</sup> It is not known either why people write or do not write a testament examining just one country. Ronald J. Scalise Jr. writes the following about this question regarding the law of the United States where the rate of intestate succession is around 60 per cent:

The exact reason for the prevalence of intestacy is uncertain. Some may feel they have too few assets to need the services of an estate planner. Others may believe the laws of intestate succession appropriately distribute their estate. Still others, no doubt, are hesitant to draft wills out of a reluctance to contemplate their own mortality. Whatever the reason, the prevalence of intestacy is clear, and only a detailed examination of the application and history of the rules of intestate succession can shed light over the wisdom of its broadly applicable principles.<sup>17</sup>

<sup>8</sup> Reinhard Zimmermann, ‘Intestate Succession in Germany’ in Reid, de Waal, Zimmermann (n 6) 182.

<sup>9</sup> Lajos Vékás, ‘Intestate Succession in Hungary’ in Reid, de Waal, Zimmermann (n 6) 275. We have to mention that according to surveys made at the beginning of the twentieth century because of the preparation of a civil code the testation rate was about 10 percent in Hungary. See Tárkány Szűcs Ernő, *Magyar jogi népszokások* (Gondolat 1981, Budapest) 728–729.

<sup>10</sup> Wilbert D. Kolkman, ‘Intestate Succession in the Netherlands’ in Reid, de Waal, Zimmermann (n 6) 225.

<sup>11</sup> Sergio Cámara Lapuente, ‘Intestate Succession in Spain’ in Reid, de Waal, Zimmermann (n 6) 97.

<sup>12</sup> Roger Kerridge, ‘Intestate Succession in England and Wales’ in Reid, de Waal, Zimmermann (n 6) 97.

<sup>13</sup> Kenneth G. C. Reid, Marius J. de Waal and Reinhard Zimmermann, ‘Intestate Succession in Historical and Comparative Perspective’ in Reid, de Waal, Zimmermann (n 6) 444.

<sup>14</sup> Jan Peter Schmidt, ‘Intestate Succession in Latin America’ in Reid, de Waal, Zimmermann (n 6) 122.

<sup>15</sup> Nicola Peart and Prue Vines, ‘Intestate Succession in Australia and New Zealand’ in Reid, de Waal, Zimmermann (n 6) 349.

<sup>16</sup> Reid, de Waal, Zimmermann (n 13) 445.

<sup>17</sup> Ronald J Scalise Jr, ‘Intestate Succession in the United States of America’ in Reid, de Waal, Zimmermann (n 6) 403.



Of course, Ronald J. Scalise Jr. writes just about the law of the United States, but his thoughts could be true for many other countries.<sup>18</sup>

We think that without answering this fundamental question we cannot close the debate on the connection between culture and succession law. We thus hope that several legal and sociological studies will soon deal with this problem, which could help us to answer the question whether and why people write or do not write a will.

### **III Theories of the Cultural Influence in Succession Law**

As we mentioned above, according to the traditional theory, succession law is strongly influenced by cultural factors. The main argument that supports this concept is the tight connection between family and succession, as well as between family law and succession law.<sup>19</sup> This theory is usually, accepted as an axiom, which does not need any explanation: succession law is based on family relationships regulated by family law and the concept of family and family law is influenced by cultural factors, and so succession law must be influenced by them, too.

However, Reinhard Zimmermann calls this theory, that cultural impacts would be that important around succession law and these factors would be a real impediment in front of the sense of comparative succession law and the harmonisation of succession law in the European Union, into question. He collects several arguments in favour of his concept. We will summarise the most important ones in the following paragraphs.

First, he shows that there are important differences between the succession regulations of similar legal systems – legal systems from the same legal culture – and there are important similarities between the succession regulations of different legal systems – legal systems from distinct legal cultures. However, if we accepted the theory of the important role of cultural factors in succession law, it would mean that legal systems that are part of the same legal culture should have similar succession regulations and legal systems that are part of distinct legal cultures should have different succession regulation into question. Zimmermann gives examples of the handwritten or holographic will: the legal systems of Latin America belong to the same legal culture – these are part of the civil law systems with similar legal traditions – but, on the one hand, the handwritten or holographic will is an orderly form of the testaments in Paraguay, Panama and Peru; on the other hand, handwritten or holographic wills are not acknowledged by the Uruguayan, Columbian and Bolivian law.<sup>20</sup> It is also interesting to notice the differences and similarities between the structure of intestate succession in some legal systems. There are three different models: the ‘French’ system (e.g. France and Italy), the ‘three-line system’ (e.g. Spain and Latin America) and the parentelic

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<sup>18</sup> Reid, de Waal, Zimmermann (n 13) 445.

<sup>19</sup> E.g. van Erp (n 2) 1, and Liin (n 3) 117.

<sup>20</sup> Zimmermann (n 5) 323–324.

system (e.g. Germany and Switzerland). On the one hand, it is true that legal systems with a similar legal culture often follows the same intestate succession model (e.g. Spain and Latin American countries belong to the three-line system); on the other hand, it is also common that legal systems with different legal cultures follows the same intestate succession model (e.g. Germany as a civil law country follows the parentelic system, which is accepted by several common law legal systems, see England and several states in the United States of America).<sup>21</sup> Moreover, it has also happened in the recent history that a legal system changed the intestate succession model as a result of the recodification of succession law. This happened in the Netherlands in 2003: the Dutch Civil Code of 1838 followed the French Civil Code and its intestate succession norms were close to the French model. However, the new Dutch Civil Code of 2003 contains an almost pure parentelic model.<sup>22</sup> Seeing these examples, we can easily notice that fundamental succession norms could be different in similar legal systems and could be similar in different legal systems.

As a second argument Zimmermann refers to the historical examples of (re)codifications. For example, there was intense debate during the drawing up of the succession law norms in the German Civil Code (*Bürgerliches Gesetzbuch, BGB*) at the end of the 19th century over whether the model of handwritten or holographic will should be acknowledged, because this testament form derived from French law and it was only known in that part of Germany that was influenced by French law. It is not a surprise that lawyers argued against the handwritten or holographic will by referring to cultural values. At last the concept of handwritten or holographic will was incorporated by the legislator and, despite the heated historical debate, this testament form is totally accepted in Germany and practically no-one knows that handwritten or holographic wills have been imported from France.<sup>23</sup>

Finally, we emphasise that modern trends in the development of succession law in Europe and in other parts of the world are quite similar as well. We should first mention that we notice the liberalisation of the formal rules of testaments. Second, the circle of relatives who are potential heirs is narrowing. The third trend is the elimination of the discriminative rules against extra-marital and adopted children. Last but not least, we shall mention the strengthening of the position of the surviving spouse.<sup>24</sup> Seeing these trends, we shall ask: why would comparative succession law and the harmonisation of succession law in the European Union be pointless?

If we consider all of these arguments, we have to admit that the role of cultural factors in succession law is not evident. This conclusion seems to be weak but, as we mentioned before, without the examination of some fundamental questions on the differences of succession traditions between different societies, we cannot evaluate the importance of cultural factors to succession law. It means that we shall not automatically accept these statements, that culture and traditions have a significant influence on succession law, and we need to perform wide quantitative research in this field before trying to answer this question.

<sup>21</sup> Reid, de Waal, Zimmermann (n 13) 458–461.

<sup>22</sup> Kolkman (n 10) 228–229, and Reid, de Waal, Zimmermann (n 13) 459.

<sup>23</sup> Zimmermann (n 5) 324.

<sup>24</sup> Zimmermann (n 5) 326–327.

## IV The Hungarian Example

As we presented above, the popular view that there is a tight connection between culture and succession law is strongly questioned, especially by Reinhard Zimmermann. Reading his convincing arguments, we could think that there are no serious impediments in the way of a future harmonisation of succession law in the European Union. However, we must not forget that there could be other factors than culture that could negatively influence legal harmonization. The experience of the recodification of succession law in Hungary gives us good examples for these possible impediments.

The Hungarian civil law was recodified at the beginning of the 21st century. The new Hungarian Civil Code of 2013 (NHCC) entered into force on 15 March 2014. The Codification Committee of the NHCC followed the principle of ‘minimalist’ recodification: only those norms that had been questioned before, especially by the jurisprudence, were suggested as those to be changed.

First we would like to show that the importance of cultural factors in succession law was clearly accepted by the Hungarian legislators. For example, this was the main reason for the preservation of ‘lineal inheritance or succession’ ‘which, substantively, means that certain properties are returned to the deceased’s family if the deceased leaves no children or descendants, instead of going to the spouse.’<sup>25</sup> As Lajos Vékás, the chairman of the Codification Committee of the NHCC explains, the ‘reason for its retention was that the evidence from both notarial and judicial practice indicated that this corresponded with the wishes of the general population.’<sup>26</sup> However, the need for this institution significantly decreased in the NHCC, which identifies the parents and the surviving spouse as the intestate heirs in the absence of descendants – the former Hungarian Civil Code of 1959 (FHCC) identified just the surviving spouse as the only intestate heir in this situation. According to the new rules, in the absence of descendants, the parents inherit together with the surviving spouse as intestate heirs and ‘lineal inheritance’ only complete the rights of the parents. In contrast, ‘lineal inheritance’ was the only way for the parents to inherit after the deceased in the absence of descendants in the frame of the FHCC. It means that, because of the belief in the rule of culture in succession law, such a legal institution, which was not really needed after the amendment of other succession rules, was preserved.

We can see the same belief regarding compulsory share: the Codification Committee of the NHCC did not want to change its main rules. It ‘has become an integral part of the Hungarian private law culture; this cultural tradition practically survived the modifications of the Civil Code [FHCC].’<sup>27</sup> However, the extent of the compulsory share – from half to one third of the share the persons entitled to a compulsory share would receive as intestate heirs – was

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<sup>25</sup> Hella Molnár, ‘The Position of the Surviving Spouse in the Hungarian Law of Succession’ (2014) (2) ELTE Law Journal 96.

<sup>26</sup> Vékás (n 9) 283.

<sup>27</sup> Molnár (n 25) 102.

modified in the final version of NHCC because of an accepted amending proposal from a member of parliament. Some lawyers protested at this solution – the justification for the amending proposal was unknown – but there was no other reaction; the media did not pay any attention.

We think that these two cases show that, if cultural factors in succession law are overestimated, the belief in these factors is still strong among lawyers. And their beliefs highly influence the legal harmonisation processes in the European Union.

Our second example for the possible impediments are political factors, which are presented by the discussion of the legal position of cohabitants as intestate heirs<sup>28</sup> in Hungary. Cohabitation is increasingly common in Hungary: according to last census (2011), more than 910,000 Hungarians live in cohabitation. This number was about 250,000 in 1990.<sup>29</sup> However, cohabitants were not intestate heirs according to the FHCC and the Codification Committee wanted to amend this rule because of these changes in Hungarian society. According to its proposal, 'a surviving extra-marital partner would have inherited a lifelong right to use the residential apartment and the related personal chattels jointly used with the deceased. The condition was that the partners shall have cohabitated for at least ten years, including the time of the deceased's death. However, this proposal was eventually not incorporated into the CC of 2013 [NHCC]';<sup>30</sup> The explanation is that the original proposal was clearly supported by the former socialist-liberal government – the earlier draft version of the NHCC from 2009, which did not enter into force, finally incorporated this proposal – but after the 2010 elections the new conservative government did not support the addition of cohabitants to the circle of intestate heirs because of their rigid concept of family: it shall be based on the marriage between a woman and a man. We therefore must not forget that not only cultural factors could impede the harmonisation of succession law in European Union; there are other ones as well. in the first place political factors.

Finally, we would like to emphasise another interesting phenomenon in connection with the recodification of succession law in Hungary. The NHCC does not follow some of the international trends mentioned before. On the one hand, the 'NHCC introduces one more Parental with the great-grandparents of the deceased and their descendants'<sup>31</sup> – according to the FHCC, the descendants of the great-grandparents of the deceased could not be intestate heirs. It means that the circle of relatives who are potential heirs has widened. On the other hand, the position of the surviving spouse has weakened. As we mentioned before, she or he is not the only heir in the absence of descendants – as was the case under the FHCC – but must share the estate with the parents of the deceased.

<sup>28</sup> The development of succession regulation on the acceptance of cohabitants as intestate heirs is rather controversial regarding European countries. See Reid, de Waal, Zimmermann (n 13) 504–508.

<sup>29</sup> See <<https://www.demografia.hu/hu/tudastar/fogalomtar/67-elettarsi-kapcsolat>> accessed 8 October 2019.

<sup>30</sup> Vékás (n 9) 288–289.

<sup>31</sup> Molnár (n 25) 96.

## V Conclusions

First, we shall repeat that we will not understand the role of culture in succession law if we do not know why succession traditions are different in some legal systems and what are the reasons for the customs about succession by examining just one country, for example why people write or do not write a testament. We cannot close the debate on the connection between culture and succession law without legal and sociological studies dealing with this issue.

Second, we shall make a distinction if we speak about culture: we can speak about the culture of the population in a country and we can speak about legal culture or the culture of the lawyers in a country. All the examples mentioned above show that culture in the second meaning has a much more important role in succession law than in the first one. It means that the population of the European Union could accept a new harmonised succession law quite easily but the harmonising process would be very difficult because the lawyers working on it would try to protect the values of their own national succession law as part of their legal culture.

Third, we must not forget that several questions in succession law are not purely professional-legal questions but political-ideological questions as well (e.g. the acceptance of cohabitants or same-sex partners as intestate heirs). It means that the different political values and views of the governments of the day could do more to hinder the harmonisation of succession law in the European Union than the differences of legal cultures between the member states.

# The European Succession Regulation from the Perspective of the First Three Years of Its Application\*\*

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## I A Selection of Practical Problems

For the fourth year now, the European Succession Regulation<sup>1</sup> (hereafter the ESR) has been applied, which has provided novel solutions from several points of view in inheritance cases containing foreign elements, and at the same time requires a different mind-set from practising lawyers dealing with succession.

One such novel solution is the application of the principle of *unity of succession* in the area of jurisdiction. Although the former Hungarian autonomous private international law was based on this principle in the field of conflict-of-laws regulation of succession,<sup>2</sup> the principle of unity of succession in the area of jurisdiction had little opportunity to prevail. This was because our former jurisdictional rules had already excluded domestic jurisdiction over foreign immovable estate and also for the foreign property of those deceased with foreign citizenship.<sup>3</sup> In practice, however, even in respect of the foreign movable estate of the deceased of Hungarian citizenship, conducting the succession proceedings was carried out in Hungary relatively rarely, given the fact that there was only a limited scope for recognition of the Hungarian decree on transferring the estate. In contrast to that, the ESR treats the estate as a single asset in terms of jurisdiction, irrespective of the location and legal nature of each of its assets. Thus, if domestic jurisdiction exists over the estate, it will, as a rule, cover the entire estate, including the foreign immovable estate, which was previously unimaginable.

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<sup>1</sup> Regulation (EU) No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (OJ L 201., 27.7.2012, 107).

<sup>2</sup> See the text of Section 36 (1) of Law-decree No. 13 of 1979 on Private International Law (old PIL) in effect before 17 August 2015.

<sup>3</sup> See Section 62/C. a)–b) of old PIL.

This has created a completely new challenge in the legal settlement of inheritance cases: the problem of ‘involving’ the estate assets located abroad in the domestic succession proceedings (see below, Chapter V).

The practice has also been obliged to get used to the *universal scope* of the new international succession regulation. In our earlier international inheritance law, there also used to be international rules of jurisdiction and conflict-of-laws norms. However, although they were given priority over the rules of the international private law code, they did not entirely supersede it. A significant part of our bilateral treaties on legal assistance in civil matters contains conflict-of-laws and jurisdictional norms for inheritance relationships; however, their personal and material scope is limited to the estate of the deceased of the nationality of the contracting states and to the estate of such deceased persons in the two contracting states; in other cases, the rules of the international private law code prevailed. Compared to that, the ESR has brought into the legislative framework governing succession matters the phenomenon that Professor Lajos Vékás referred to as ‘the twilight of conflict of laws of the Member States’<sup>4</sup>. The Regulation regulates both the issues of jurisdiction and applicable law universally; that is, the scope of this regime also extends to those inheritance cases where the facts are only linked to a third state and not to another EU member state.<sup>5</sup> As far as conflict-of-laws rules are concerned, the ‘Rome-type’ regulations that were drafted years ago also provide universal regulation.<sup>6</sup> However the universal regulation of jurisdiction, i.e. to cover the situations related to third countries by supplementary jurisdictional rules, is a relatively new phenomenon in the EU legislative process itself.<sup>7</sup>

In many ways, the regulation of *temporal scope* is also a novum. A typical regulatory solution to EU acts concerning jurisdiction and recognition is that the temporal scope of the jurisdictional regime laid down therein covers proceedings starting after the application of the given regulation begins. The ESR however, focusing on the date of the substantive legal relationship to be considered, pursues the solution that the entire regulatory regime of the Regulation, including the jurisdictional rules, extends to succession matters of those deceased who have died after the application<sup>8</sup> of the Regulation began. The consequence of this is that,

<sup>4</sup> Vékás Lajos, ‘A tagállami kollíziós nemzetközi magánjog alkonya Európában’ [The twilight of the national conflict of laws in Europe] in Raffai Katalin (ed), *A nemzetközi gazdasági kapcsolatok a XXI. században. Ünnepi tanulmánykötet a nyolcvanéves Bánrévy Gábor tiszteletére* (Pázmány Press 2011, Budapest) 129.

<sup>5</sup> The system of rules of the ESR answers e.g. the question whether it is possible to carry out domestic succession proceedings for the estate of a deceased person of Swiss citizenship; or which law is applicable to the deceased’s domestic estate who was an Irish citizen living in Ireland (also considered a ‘third state’).

<sup>6</sup> See Art. 2 of the Regulation (EC) No 593/2008 on the law applicable to contractual obligation (hereinafter Rome I Regulation); Art 3 of the Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (hereinafter Rome II Regulation); and Art. 4 of the Regulation (EU) No 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (hereinafter: Rome III Regulation).

<sup>7</sup> Before the ESR jurisdictional regulation of universal scope only existed on matters concerning family law maintenance obligations; see Art. 6–7 of the Regulation (EC) No. 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

<sup>8</sup> 17 August, 2015.

in succession cases, the period of time in which the conflict-of-law rules, as well as the jurisdiction norms of the previous legislation, ‘coexist’ with the rules laid down in the EU Regulation is relatively long. Although in decreasing numbers, there are still succession cases arising that are only to start now for the deceased who died before 17 August 2015. As regards such succession proceedings, Member States have continued to have their own legislation on jurisdiction. This explains why our new Act on International Private Law (PIL Act) adopted in 2017<sup>9</sup> explicitly upheld the jurisdictional rules for succession proceedings.<sup>10</sup> Considering the fact that even today, in practice, succession cases do arise from time to time in which settlements must be made decades after the death of the deceased, we can expect that our jurisdictional rules in the PIL Act will also be needed in the long term, even if they are obviously losing their practical significance.

Today, in view of the limited time-frame, I would like to deal with certain specific issues related to some of the regulatory core points of the ESR. These are admittedly the result of subjective selection, namely some issues that have been raised on a number of occasions during the four years of application of the Regulation and where, in my opinion, EU legislation leaves something to be desired, and can be considered less successful. Three of these issues tackle conflict of laws and one of them relates to international succession proceedings.

## **II The Uncertainty of Determining the Law Applicable to the Admissibility of Joint Wills**

It is well-known that the European legal systems have a markedly differing attitude to the institution of a joint will. Certain legal systems categorically prohibit the making of a joint will;<sup>11</sup> in contrast to this, in other countries, the joint will is a widespread means of estate planning; this is the situation in Germany in particular. German spouses very often use the type of testament referred to as the ‘Berliner Testament’ in commentaries and other legal literature sources;<sup>12</sup> in which the testifying spouses can mutually appoint each other as sole heir and also decide the order of succession to the estate of the surviving spouse. It was possible to meet such joint wills of German spouses in the Hungarian practice of succession proceedings relatively often, already years before the application of the ESR. It is also permitted to make a joint will under the Nordic legal systems, where the circle of persons who can declare their will in the same document is not even limited to spouses (or registered partners).

<sup>9</sup> Act XXVIII of 2017 on Private International Law (PIL Act)

<sup>10</sup> See Section 88 *b*), Section 89 *b*), and Section 98 of the PIL Act. In effect, these provisions took over the jurisdictional rules (in force before 17 August 2015) of the old PIL without any changes as to content.

<sup>11</sup> As, for example French law (Art. 968 of the Code civil), Italian law (Art. 589 of the Codice civile), Romanian law (Art. 1036 of the Noul cod civil), and Greek law (Civil Code of 1940. Art. 1717).

<sup>12</sup> Karlheinz Muscheler, *Erbrecht* Band I (Mohr Siebeck Verlag 2010, Tübingen) 1065; Dieter Leipold, *Erbrecht* (19. Auflage, Mohr Siebeck Verlag 2012, Tübingen) 174; Dietmar Weidlich in *Palandt Bürgerliches Gesetzbuch (Kommentar)* (75. Auflage, C. H. Beck Verlag 2016, München) § 2269, Rz. 1.



Regrettably, the ESR has undermined this legal institution, since the law applicable to the admissibility of joint wills cannot be established with sufficient certainty under the conflict-of-laws rules laid down in the Regulation.

## 1 Conceptual Incoherence in the Definitions of the ESR Regarding the Joint Will

The legal term ‘joint will’ is only mentioned in two places in the definitions of Article 3, but none of the conflict-of-laws rules explicitly provides for this type of will. In the early stages of the drafting of the Regulation, there was a text version<sup>13</sup> that would have provided specific conflict-of-laws rules for joint wills by appropriately applying the conflict-of-laws rules of agreement as to succession regarding the succession of several persons. This rule disappeared from the draft at a later stage of preparation for reasons that cannot be discovered. This is presumably due only to a technical-editorial mistake, as there were no longer any serious opponents from the Member States regarding conflict-of-laws rules on joint wills.

However, uncertainty remains as to which rule; Article 25 (concerning the agreements as to succession) or Article 24 (concerning the disposition of property upon death ‘other than an agreement as to succession’) applies to joint wills. The clarity on this issue is not exactly facilitated by the definitions in Article 3 of the Regulation, either.

The starting point is, in principle, the definition in Article 3 (1) *d*), which distinguishes three categories of disposition of property upon death, namely wills, joint wills and agreements as to succession. It can already be seen from this that the Regulation treats joint wills as a self-contained *sui generis* type of disposition of property upon death in its autonomous system of terms.

Article 3 *c*) contains a definition of the ‘joint will’, despite the fact that the joint will is not mentioned elsewhere in the rules of the Regulation. Accordingly, a joint will is ‘a will drawn up in one instrument by two or more persons’. However, the definition of *b*) of the ‘agreement as to succession’ makes the classification of joint wills completely uncertain. According to the latter provision, an agreement as to succession within the scope of the Regulation ‘means an agreement, *including an agreement resulting from mutual wills*, which [...] creates, modifies or terminates rights to the future estate or estates of one or more persons party to the agreement’.

This definition under *b*) is quite confusing since it makes the boundary between joint wills and agreement as to succession pliable within the scope of the Regulation. That is, it leads us to the conclusion that at least certain types of joint wills may even be considered agreements as to succession within its scope; namely, the cases of joint wills in which the testators have made mutually beneficial provisions for each other. The dilemma can also be

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<sup>13</sup> See Art. 18 of the working paper of the Council’s working committee (Committee on Civil Law Matters) 6198/10 (JUSTCIV 26, CODEC 95).

described as whether the definition in Article 3 c) of the ESR encompasses agreements as to succession, in particular the wording of the phrase ‘including an agreement resulting from mutual wills’ contained therein; and also the wills made by two persons in the same instrument in which the benefits are mutual.

## 2 Attempts to Find the Solution – Is Article 24 or Article 25 Applicable?

This is the decision for which the ESR text does not provide further guidance. It is therefore uncertain whether the disposition of property upon death on mutual benefits contained in the same instrument may be classified as an ‘agreement as to succession’ and thus whether the law governing the admissibility of such a disposition of property upon death is governed by the conflict-of-laws rule under Article 25 (agreement as to succession) or Article 24 (‘a disposition of property upon death other than an agreement as to succession’). That is, the two conflict-of-laws rules may lead to a very different result, as illustrated by the following example:

The testators are siblings. One of them lives in Finland and is a Finnish-Hungarian dual citizen. The habitual residence of the other sibling is in Hungary and he is a Hungarian citizen. The siblings mutually appoint each other as sole heirs; their dispositions of property upon death are made in a joint will. (Note: It is not only spouses for whom Finnish law allows to make a joint will.) The question arises as to whether the joint will of the siblings in question is allowed.

a) If we assume that this joint will with the testators mutually appointing each other as sole heir *can be classified as an agreement as to succession* in the system of the ESR, the law applicable to the issue of admissibility must be determined on the basis of Article 25, subsection (2) regarding the agreement for the succession of several persons. In this case, the cumulative assessment rule applies: the agreement as to succession of several persons is only permitted if the legal conditions thereof are in accordance with the hypothetical succession law<sup>14</sup> of both parties (at the time of the disposition of property upon death). In this example, the joint will of the siblings would only be permissible if it were allowed by both Finnish law and Hungarian law. Although the Finnish law is in line with the joint will of the siblings, it can get stuck in the prohibition under Hungarian law as provided for by Section 7:23 (1) of the Civil Code.

At the same time, Article 25 (3) provides for the freedom of choice of law as to the admissibility (and substantive validity) of the agreement as to succession. The national law of any one of the persons whose estate is involved can be chosen; thus, in the case of an agreement as to succession containing a mutual appointment of each other as sole heirs, the law of the nationality of any of the contracting parties may be chosen. If we also apply this provision to the question of the admissibility of a joint will, then the siblings concerned may place the issue of the admissibility of their joint will under the control of a single law instead

<sup>14</sup> See Chapter III of the present study on what is called ‘*hypothetical succession law*’.

of a cumulative examination: they may choose Finnish law; their joint will would have to be considered admissible by their choice of law.

Thus, the classification of the joint will as an agreement as to succession and the application of the conflict-of-laws rule of Article 25 would have the above-mentioned result.

b) If, on the other hand, we assume that a joint will cannot be regarded as an ‘an agreement as to succession’ and only the conflict-of-laws rule under Article 24 is applicable to it, the determination of the law applicable to the admissibility of joint wills becomes much more uncertain. The conflict-of-laws rule in Article 24 merely stipulates that the ‘disposition of property upon death other than an agreement as to succession’ is governed by the hypothetical succession law of the person making the disposition (at the time the disposition is made). However, this conflict-of-laws rule does not unequivocally cover situations where the disposition of property upon death involves the dispositions of several persons. It does not answer whether, in such a case, the rule of cumulative assessment is applicable [as foreseen in Article 25 (2)], or whether the admissibility of the same will is to be examined separately for each testator. The latter solution, however, may lead to situations called ‘limping legal relationships’ (*hinkende Rechtsverhältnisse*) where the dispositions of one of the parties in the same document are valid and those of the other party are not. If, in the example of the above-mentioned Finnish-Hungarian siblings, the admissibility of the joint will were to be examined separately for the two testators, it would have the consequence that a joint will would be permitted for the sibling living in Finland, so his disposition (if he were to die earlier) would be able to produce legal effects. In contrast to this, that of his sibling living in Hungary would not, as Hungarian law [being the hypothetical succession law of this sibling under Article 24 (1)] does not allow siblings to draw up joint wills.

### 3 Standpoints in Legal Literature

There is a marked contradiction in foreign legal literature on whether joint wills can be considered as agreements as to succession for the purposes of the Regulation, i.e. whether they are subject to the conflict-of-laws rule under Article 24 or Article 25. There is a consensus on whether simultaneous joint wills (in which the testators’ dispositions of property upon death are completely independent of each other in content and are linked only by being drawn up in the same instrument) cannot in any way be regarded as agreements as to succession; these are governed by the conflict-of-laws rule of Article 24. The debate is on the assessment of joint wills with mutual provisions.

One part of the standpoints<sup>15</sup> represents the ‘*agreement as to succession*’ approach, according to which the types of joint wills that contain mutual or reciprocal provisions are covered by the extended concept of an agreement as to succession under Article 3 (1) b).

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<sup>15</sup> This standpoint is represented by Andrea Bonomi, Azadi Öztürk, ‘Das Statut der Verfügung von Todes wegen (Art. 24 ff. EuErbVO)’ in Anatol Dutta, Sebastian Herrler (Hrsg.), *Die europäische Erbrechtsverordnung. Tagungsband zum wissenschaftlichen Symposium anlässlich des 20-jährigen Bestehens des Deutschen Notarinstituts*

Once this concept encompasses the two testators' wills in separate documents drawn up on the basis of a reciprocal and mutual disposition (for example, mutual wills under English law), it is difficult to see why the dispositions of the same content of two persons should not fall under the concept of an agreement as to succession if they are included in the same instrument.<sup>16</sup> This position regards the formation of the *agreement* between the persons declaring the disposition of property upon death and the resulting binding force thereof (*Bindungswirkung*) as the decisive factor in the concept of the agreement as to succession. If a joint will is binding on the testators (that is, none of the parties can unilaterally revoke or modify its will) then it shall be considered an agreement as to succession for the purposes of the application of the Regulation and therefore fall under Article 25; however, joint wills not having such binding force are governed by Article 24.

Some of the authors who represent this position also raised practical aspects for the applicability of Article 25: Article 25 (2) explicitly provides for a type of agreement as to succession which includes the will of several persons ('agreement as to succession regarding the succession of several persons'), with this provision being more appropriate in terms of content and structure for the conflict of laws handling of joint wills than Article 24, drawn up for the sole purpose of one person's disposition of his property upon death.<sup>17</sup> The truth of this argument is also accepted by authors who otherwise object to the applicability of Article 25 to joint wills.<sup>18</sup> Since Article 3 of the Regulation defines the agreement as to succession in substantive terms [agreement between the parties, point *b*)], while the joint will is defined purely on the basis of formal criteria ['one instrument by two or more parties' *c*)]; all cases of joint wills where dispositions are binding on the parties are excluded from the

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*am 11. Oktober 2013 in Würzburg* (C. H. Beck Verlag 2014, München) 47–69; Christoph Döbereiner, 'Das internationale Erbrecht nach der EU-Erbrechtsverordnung' (Teil II.) (2013) (5) MittBayNot 358; Kurt Lechner, 'Erbverträge und gemeinschaftliche Testamente in der neuen EU-Erbrechtsverordnung' (2013) (1–2) NJW 27; Christian Hertel, 'Verordnung (EU) Nr. 650/2012 des Europäischen Parlaments und des Rates vom 4. Juli 2012 über die Zuständigkeit, das anzuwendende Recht, die Anerkennung und Vollstreckung von Entscheidungen und die Annahme und Vollstreckung öffentlicher Urkunden in Erbsachen sowie zur Einführung eines Europäischen Nachlasszeugnisses' in Thomas Rauscher (Hrsg.), *Europäisches Zivilprozeß- und Kollisionsrecht. Kommentar* Band V. (4. Auflage, Otto Schmidt Verlag 2016, Köln) Art. 24 Rz. 6, Art. 25 Rz. 7.; Anatol Dutta, 'Die europäische Erbrechtsverordnung vor ihrem Anwendungsbeginn: Zehn ausgewählte Streitstandsminiaturen' (2005) (1) IPrax 32 (35); Frank Bauer in Anatol Dutta, Johannes Weber (Hrsg.), *Internationales Erbrecht. EuErbVO, Erbrechtliche Staatsverträge, EGBGB, IntErbRVG, IntErbStR, IntSchenkungsR. (Beck'sche Kurz-Kommentare)*. (C. H. Beck Verlag 2016, München) Art. 25. Rz. 3; Juliana Rodríguez Rodrigo in Alfonso-Luis Caravaca, Angelo Davi, Heinz-Peter Mansel (eds), *The EU Succession Regulation. A Commentary* (Cambridge University Press 2016, Cambridge) Article 24, 371.

<sup>16</sup> Döbereiner (n 15) 438; Lechner (n 15) 27.

<sup>17</sup> Hertel (n 15) Art. 25 Rz. 7.

<sup>18</sup> E.g. Katharina Hilbig-Lugani, 'Das gemeinschaftliche Testament im deutsch-französischen Rechtsverkehr – Ein Stiefkind der Erbrechtsverordnung' (2014) (6) IPRax 480; Markus Buschbaum, 'Grenzüberschreitendes Erbrecht Gestaltungsmöglichkeiten nach der Europäischen Erbrechtsverordnung (Fallbeispiele nach der ZEV-Jahresarbeitsstagung am 24. Oktober 2015 in München und 23. Januar 2016 in Berlin)' Fn. 9. <<https://www.stbk-koeln.de/service-fuer-mitglieder/seminare-und-sonstige-veranstaltungen/download-vortraege/grenzueberschreitendes-erbrecht-erbschaftsteuerrecht.html>> accessed 2 May 2019.

definition under point *c*) and placed under the definition of an agreement as to succession under *b*).<sup>19</sup>

Other views, however, categorically reject any extension of Article 25 to joint wills. This ‘will approach’<sup>20</sup> starts from the grammatical interpretation of the ESR, emphasising that Article 3 (1) *d*) distinguishes joint wills and agreements as to succession conceptually. Representatives of this position consider it unjustified to make a distinction between the various forms of joint wills on the basis of binding force. That is, the question of whether there is binding force for the joint will, or whether the dispositions contained therein can be regarded as reciprocal can only be answered on the basis of a particular legal system. The standpoints following the ‘agreement as to succession’ approach, by including the types of joint wills to which binding force is attached and which contain reciprocal provisions in the concept of agreement as to succession, already start from the concept and rules of a given law of succession (e.g. German law), although the law applicable to the legal effects of joint wills and their interpretation can only be determined after finding the appropriate conflict-of-laws rule. Consequently, according to this criticism, the ‘agreement as to succession’ approach creates a kind of ‘vicious circle’, thus becoming inapplicable. According to the authors of the ‘will’ approach, in all events joint wills are in any case covered by Article 24; they are not covered by the wording of Article 3 (1) *b*): ‘including the agreement based on mutual wills’. The latter reference should be interpreted narrowly, covering only contractual agreements (in the form of wills) in which the parties commit themselves to refuse to revoke it (‘not to revoke’).

## 4 Summary

The legal institution of the joint will, from the conflict-of-laws regulation point of view, has somehow ‘fallen between two stools’ during the drafting of the ESR. The uncertainty in the regulation outlined above has unfortunately undermined a ‘well-established’ estate planning tool widely used in many Member States. It is no mere chance that, in the years since the adoption of the Regulation, legal advice, especially in Germany, for spouses who may have a potential foreign element arising in their lives, due to the uncertainties in determining the applicable law, has warned against making a joint will, recommending instead they form of an agreement as to succession, which, at least under German law, is usually suitable for the same effects.

<sup>19</sup> Claudia Rudolf, Brigitta Zöchling-Jud, Gabriel Kögler in Walter Rechberger, Brigitta Zöchling-Jud (Hrsg.), *Die EU-Erbrechtsverordnung in Österreich* (Verlag Österreich 2015, Wien) 157.

<sup>20</sup> This standpoint is represented by Rembert Süß, ‘Nachlassbezogene Verfügungen’ in Rembert Süß (Hrsg.), *Erbrecht in Europa* (3. Auflage, Zerb Verlag 2015, Würzburg) Rz. 49ff; Ulrich Simon, Markus Buschbaum, ‘Die neue EU-Erbrechtsverordnung’ (2012) (33) NJW 2393 (2396); Carl Friedrich Nordmeier, ‘Neues Kollisionsrecht für gemeinschaftliche Testamente’ (2012) (9) ZEV 513; Daniel Schaal, ‘Aktuelles im IPR/aus dem Ausland’ (2013) (1) BWNotZ 29 (30); Stefan Stade, ‘Die EU-Erbrechtsverordnung aus französischer Sicht’ (2015) (3) Zerb 69 (74).

### III The Scope of the Law Governing the Substantive Validity of Wills

As I have mentioned above, the ESR, along with the general conflict of laws rule of inheritance (*lex successionis*) lays down specific rules on the law governing the admissibility and substantive validity of disposition of property upon death in Articles 24–25. The latter legal issues are subject to a special Private International Law rule, the law of the ‘establishing of the last will’ (called the *Errichtungsstatut*). The law applicable to these legal issues is what is called the *hypothetical succession law* of the deceased at the time of making the will. The latter, the law which ‘under this Regulation, would have been applicable to the succession of the person who made the disposition if he had died on the day on which the disposition was made’ is nothing else than the law of the habitual residence of the person at the time of making the disposition<sup>21</sup> (unless he has specified the law of the country of his nationality to be applied). The purpose of this regulatory solution is to ensure that the change of the applicable law after the disposition due to the change of the testator’s habitual residence (*Statutenwechsel*) does not affect the validity of the disposition already made.

It arises as a fundamental question concerning the application of Articles 24 and 25: exactly which inheritance legal issues fall within the scope of the special rules laid down in these articles; what can be considered as a *matter of ‘substantive validity’* in the system of the Regulation? In other words, how can we distinguish between the scope of the special rule concerning the ‘establishing of the last will’ and the scope of the general conflict-of-laws rules in Articles 24–25?

The answer seems to be simple: Article 26 lists the legal issues that are considered to be those concerning the substantive validity of the disposition of property upon death; the article identifies five such legal issues.<sup>22</sup> At first sight, any other legal issue related to the disposition of property upon death is normally governed by the law that usually governs inheritance, unless it is a formal validity question according to Article 27.

However, the question arises as to which law governs the validity of *certain, particular testamentary dispositions* contained in the last will. This issue is particularly sensitive to the kind of testamentary dispositions which are not considered valid by all legal systems, or which are subject to distinctly different terms of validity under certain legal systems. This is the case for example with the question of the validity of the appointment of a subsequent heir (*Nacherbe, fideikommissarische Substitution*). For example, the latter is allowed more widely by Austrian and German law than by Section 7:28 of the Hungarian Civil Code. It is not at all irrelevant whether the validity of the appointment of a subsequent heir is governed by the

<sup>21</sup> See recital (51) of the ESR.

<sup>22</sup> Namely, the issues of the capacity to make a disposition of property upon death, of the ‘incompatible’ benefits (i.e. the legal issues of whether the person making the disposition can dispose validly in favour of particular persons taking part in the making of the disposition as witnesses or in another capacity, and if yes, on what conditions can such persons receive such succession property), of the admissibility of representation for the purposes of making a disposition of property upon death, of the interpretation of the disposition, and questions relating to defects in consent of the person making the disposition.

general conflict of law rule based on the habitual residence of the deceased at the time of death [Article 21 (1)] or by the special rule concerning the establishment of a disposition upon death based on the habitual residence at the time of making the disposition [Article 24 (1)]. This is also illustrated by the following example:

The deceased was a German citizen who, in December 2015, when he was habitually resident in his country of origin, made a public will before a German notary. He appointed his sibling as his sole heir therein, with the stipulation that after the sibling's death, the inheritance should be transferred to a particular Catholic parish. Later, the testator settled in Hungary at the beginning of 2017, where he bought a family house and had his habitual residence there until his death. The question is: which law governs the substantive validity of the subsequent heirship appointed in the will?

If we accept the approach that the validity of particular testamentary dispositions should also be classified as a matter of 'substantive validity', then the validity of the subsequent heirship in question is governed by the special rule concerning the establishment of a disposition upon death, referred to in Article 24 (1). In this case, the deceased's appointment of a subsequent heir will be considered as a valid testamentary disposition, since the heir was habitually resident in Germany at the time of making the disposition; therefore, the hypothetical succession law under Article 24 (1) is German law. The appointment of the subsequent heir in question was in accordance with the provisions of German law.<sup>23</sup>

On the other hand, if we assume that the substantive validity of the particular testamentary dispositions, since they are not specified among legal issues falling within the scope of substantive validity by Article 26 of the ESR, falls within the scope of the general conflict-of-laws (*lex successionis*) rule then the validity of the appointment of the subsequent heir in question (similarly to most of the inheritance legal issues arising in succession cases) must be assessed in accordance with the law of the habitual residence of the deceased at the time of his death, i.e. Hungarian law in the present case. This then would lead to the invalidity of the appointment of the subsequent heir, as the appointment of a subsequent heir under the conditions mentioned in the example does not comply with the requirements of Section 7:28 of the Hungarian Civil Code.

So we could ask the question in the following way: when Article 26 of the ESR enumerates five types of legal issues, which are considered to be matters of 'substantive validity' in the context of disposition of property upon death, are these *of an exhaustive or merely exemplary nature*?

In the legal literature related to the regulation, contradictory positions have also emerged on this issue.

Some authors<sup>24</sup> are of the opinion that Article 26 contains an exhaustive list and that all other legal issues related to disposition of property upon death (with the exception of formal

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<sup>23</sup> On the basis of BGB Section 2100.

<sup>24</sup> Constanze Fischer-Czermak in Astrid Deixner-Hübner, Martin Schauer (Hrsg.), *EuErbVO. Kommentar zur EU-Erbrechtsverordnung* (Manz'sche Verlags- und Universitätsbuchhandlung 2015, Wien) Art. 26. Rz. 1.

validity questions within the scope of Article 27) are governed by the general conflict-of-laws rule, including the validity of particular testamentary dispositions encompassed in the disposition of property upon death. This view seems undoubtedly to be supported by the grammatical interpretation of the Regulation, since Article 26, unlike Article 23 (2), which defines the scope of the general conflict-of-laws rule, does not use the term 'in particular' to enumerate legal issues related to the scope of validity.

The vast majority of legal literary views,<sup>25</sup> however, take the view that, despite the literal wording of the Regulation, the list in Article 26 cannot be regarded as exhaustive; in addition to the five types of law referred to there, there are issues that can be classified as 'substantive validity' ones and are therefore subject to the law of habitual residence at the time of making the disposition. That is, the opposite solution, as these authors believe, would clearly *undermine the security of estate planning*, as it would result in the disposition of property upon death made validly at a given point in time, at the time of the establishing the last will, becoming invalid due to the change of the applicable law (because of the subsequent change of the testator's habitual residence). The explicitly stated fundamental objective of the Regulation, mentioned in several places in the Preamble,<sup>26</sup> is the legal certainty of estate planning. Thus, the majority position would, in essence, disregard the grammatical interpretation of the Regulation, bearing in mind a *superior maxima, the legal certainty of estate planning*. They would put the validity of certain testamentary dispositions that may be included in the disposition of property upon death under the scope of the law referred to by Articles 24–25, since this is the law that the testator may be expected to respect and take into account at the time of making the disposition.

There is no doubt that the distinction between the scope of the two conflicting statutes, the general conflict-of-laws rule (*lex successionis*) and the 'disposition of property upon death' rule as a special of conflict-of-laws rule has been less successful in the final text of the Regulation. This can be attributed to the fact that the issue of the law applicable to the substantive validity of the disposition of property upon death itself came to the fore at a relatively late stage of the drafting and, as a result, the solution to the question is not yet sufficiently mature.

<sup>25</sup> See in particular Bonomi, Öztürk (n 15) Rz. 45–50; Bauer (n 15) Art. 26. Rz. 2.; Süß (n 20) Rz. 6.; Hertel (n 15) Art. 26 Rz. 3.; Celia M. Caamiña Domínguez in Caravaca, Davi, Mansel (n 15) Art. 26 p. 395; Ulrich Pesendorfer in Alfred Burgstaller, Matthias Neumayr, Andreas Geroldinger, Gerhard Schmaranzer (Hrsg.), *Die EU-Erbrechtsverordnung* (LexisNexis 2016, Wien) Art. 26 Rz. 15.

<sup>26</sup> See recital (7) of ESR according to which 'in the European area of justice, citizens must be able to *organise their succession in advance*', and recital (37) according to which 'in order to allow citizens to avail themselves, with all legal certainty, of the benefits offered by the internal market, this Regulation should enable them to *know in advance* which law will apply to their succession.' The same is emphasized in the reasoning of the original proposal drafted by the European Commission (14722/09 JUSTCIV 210 CODEC 1209; see point 1.2 of the Explanatory Memorandum of the proposal).



## IV Renvoi in the Rules of the Regulation

The third issue I will address in this study still belongs to the subject of conflict-of-laws rule; this is the problem of renvoi (reference). As is well known, the Rome-type regulations consolidating conflict of laws exclude renvoi in its entirety.<sup>27</sup> This concept was followed by the original draft of the ESR.<sup>28</sup> Accordingly, the law referred to by the conflict-of-laws rules under the Regulation would have been ‘the rules of law in force in that State *other than its rules of private international law*’, that is to say, the substantive rules of the legal system in question. However, this changed during the drafting of this Regulation. The majority of the Member States supported the view that, in some respects, it is justifiable to take account of the outcome of the reference to the conflict-of-laws rules of the referred third-country legal system. The outcome of the final compromise on the issue is shown in Article 34 of the adopted text, according to which the reference to the conflict-of-laws rules of the referred third State has to be taken into consideration insofar as it refers to either a law of a Member State or the law of another third State which accepts this reference. (i.e. ‘which would apply its own law’).

The main argument of the Member States supporting the renvoi to be taken into consideration was that the circumstance that the rules of jurisdiction of the (intended) Regulation would have universal effect must be taken into account; the uniform rules of jurisdiction (including supplementary jurisdictional rules) also cover factual situations when the habitual residence of the deceased was in a third State. In such cases, however, the coincidence of jurisdiction and applicable law as a goal<sup>29</sup> becomes disintegrated.<sup>30</sup> In the view of the Member States with a majority support, this may be helped by requiring the renvoi to be taken into account in cases where the third-country conflict-of-laws rule refers back to the national law of a Member State. This is because considering this reference where appropriate may also result in the Member State forum dealing with the succession case being able to apply its own law.

The regulation has not come out the best. In my opinion, the main disability is that it did not take into account the fact that a significant part of the world’s legal systems observes the principle of the scission system of inheritance in the field of conflict-of-laws rules of succession. This, in effect includes the entire common law world. The common practice of Anglo-Saxon legal systems is to apply different laws to succession in respect of movable and immovable property: while the succession to movable property is to be governed by the law of the deceased’s domicile, the succession to immovable property by the law of the country where the estate is situated (*lex rei sitae*).

<sup>27</sup> See Article 20 of Rome I Regulation, Article 24 of Rome II Regulation and Article 11 of Rome III Regulation.

<sup>28</sup> See Article 26 of the original proposal drafted by the European Commission (14722/09 JUSTCIV 210 CODEC 1209).

<sup>29</sup> See recital (27) of ESR.

<sup>30</sup> Thus, for example, if a Hungarian citizen had his habitual residence in the USA but he also left some domestic estate then, under the subsidiary jurisdiction rules, the succession proceedings may be carried out in Hungary as well. However, the applicable law (if renvoi is not taken into account) would be the law of the third country, the country of the habitual residence (i.e. the law of one of the states of the USA).

The provision in the final text, which requires taking the reference back to the law of a Member State into account (but not necessarily the law of the forum!) has had the effect of returning ‘through the back door’ the scission system of inheritance to the conflict-of-laws rules of the Regulation. That is so since, if the conflict-of-laws rules of the referred third-country law in question, following this principle, renders a different connecting rule to govern the inheritance of movable and immovable property, the reference to the law of the Member State will in many cases be only partial.

Such cases occur daily in domestic practice.<sup>31</sup> For example, if the deceased was a British citizen, who had always lived in England (his habitual residence and domicile were there), left estate assets of different legal natures in Hungary, e.g. a flat purchased for investment purposes, as well as domestic bank accounts, the law applicable to each asset will be different. The Hungarian notary who has jurisdiction (limited to domestic inheritance) under Article 10 (2) of the ESR, has to apply partly English law (in respect of movable property) and partly Hungarian law (in respect of immovable property); due to the partial reference by the common law conflict-of-laws rules.

There is hardly any need for further explanation that such a result is not in line with the stated goal. The fact that Article 34 of the Regulation, under pressure from the Member States, provides for taking renvoi into account under certain conditions, would have had the practical consequence of the acting forum being allowed to apply its own law; moreover, with some luck, being able to avoid the application of foreign inheritance law. Far from that being realised, it has even brought new problems in the event of partial reference. That is because, in such cases, the acting authority (notary, court) should in principle *treat the estate as two (or more) legally separate part-estates*, the inheritance of which will be governed by completely different substantive succession regimes. What may be different in terms of the two asset parts, for example are:

- eligibility for the compulsory share (its conditions, scope of eligible persons, extent of the compulsory share);
- the legal order of transferring two part-estates (e.g. *ipso iure* inheritance for one, while the other one takes on ‘inactive status’ (*hereditas iacens*) for the time being, until acceptance or transferring);
- rules of waiver (deadline, method, etc.);
- the extent and rules of liability for the debts under the succession;
- conditions of sharing-out; etc.

In such cases, taking renvoi into account, far from making it easier, makes it even more difficult and very complicated to settle the succession case.

All in all, this, not the best-thought-out regulation for taking renvoi into account, has essentially sacrificed the principle of unity of succession and has brought with it many problems that are difficult to handle in practice.

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<sup>31</sup> As it occurred in the jurisprudence before the ESR, during the application of the second sentence (which provides for the reference back to be taken into consideration) of Section 4 of the old PIL.

In the course of a future comprehensive review of the ESR, consideration should be given to rethinking the regulation of renvoi and finding a solution that is better suited to the specificities of inheritance relationships. The Spanish (pre-ESR) judicial practice can be worth paying attention to;<sup>32</sup> this allowed the reference to Spanish law to be taken into account only on condition that it would not disrupt the unity of law applicable to succession covering the whole estate.<sup>33</sup>

## V Procedural Issues

Among the issues of international succession procedures, the Regulation regulates jurisdiction, the free circulation of decisions and authentic instruments among Member States, and the procedural core points of a brand new institution, the European Certificate of Succession (hereinafter: ECS). However, in the following I would like to briefly mention another segment of succession procedures, namely the difficulties of international cooperation in *obtaining information on succession matters*. Its institutional system is rather disordered; the ESR has also failed to regulate it properly.

For us, one of the central problems of obtaining cross-border information in inheritance matters is obtaining information about *foreign inheritance assets*. It is a relatively recent problem: as we have already mentioned in the introduction, the fact that the legal fate of the inheritance assets located in a foreign country is also to be settled in domestic proceedings is now a daily practice within the scope of the new jurisdictional rules of the ESR. In the period prior to the Regulation, however, the Hungarian notary only rarely had to confront the problem of foreign estate property.

The existence of foreign assets in the succession case is a *multi-layered, complex problem* in itself. Obtaining information about the existence of the property itself and the fact that it forms part of the estate is only one aspect of this. However, there are additional difficulties, for example determining the value of the foreign asset (e.g. in the case of a foreign immovable property); it is also necessary to clarify the precise requirements of the manner in which the asset in question is to be properly marked in the decree transferring the estate (or in the ECS issued) in such a way that it is accepted abroad, in particular so that its recording in a foreign public register should not be a problem for the heir.

<sup>32</sup> See decision STS 6401/1996 of 15 November, 1996 of the Tribunal Supremo (ECLI: ES:TS:1996:6401). The same court ruled similarly in its decision STS 3532/1999 of May 21, 1999 (ECLI: ES:TS:1999:3532), and in its decision STS 6053/2002 of September 23, 2002 (ECLI: ES:TS:2002:6053).

<sup>33</sup> Pursuant to Subsection 2 of Article 12 of the Spanish *Código civil* the reference under the conflict-of-laws rules shall be interpreted solely as the reference of the substantive legal norms of the referred legal system; however the reference back to Spanish law shall be taken into consideration. At the same time, pursuant to Subsection 8 of Article 9 of the *Código civil* the domestic law of the deceased [was, before the ESR] applicable, 'regardless of the nature of the estate property and the state where it is located' (*cualesquiera que sean la naturaleza de los bienes y el país donde se encuentren*). According to the standpoint of the Spanish courts this 'universal nature' (*carácter universalista*) of the applicable inheritance should prevail over the rule providing for the reference to Spanish law.

The domestic procedural regulation primarily places on the persons interested in the inheritance the burden of proof of the existence of the foreign property assets and the fact of their forming a part of the estate; but leaves open the possibility for the acting notary to take steps to clarify this.<sup>34</sup> In particular, the neuralgic point is the question of obtaining information on foreign succession assets for which there is a *duty of confidentiality*, such as obtaining data relating to a foreign bank account or other assets held with a foreign financial institution. For the disclosure of information about such property, the person interested in the inheritance will usually turn to a foreign financial institution in the course of the succession proceedings to no avail. Since he is not able to provide authentic proof of his legal status as an heir at this stage of the proceedings, the foreign financial institution will generally reject the disclosure of data covered by bank secrecy (existence of the account, its balance at the deceased's death and at the time of submitting the application). In the established practice, therefore, in many cases, the acting notary submits a request abroad to obtain data related to the account during the succession proceedings; in many cases, however, granting a request for information made directly by a notary to a foreign financial institution is also refused on the grounds that it can only provide information to its own domestic courts or authorities. Thus, according to the experience gained so far, obtaining data by a civil law notary is only possible indirectly, i.e. by means of a *request for international legal assistance* when the notary requests the *competent court* of the Member State where the account-keeping financial institution (or branch) operates, to provide the information on the account for the purposes of the pending succession case. In many cases, the practice of making such a request for international legal assistance is based on the European Taking Evidence Regulation.<sup>35</sup> Nothing in this Regulation precludes its applicability in non-litigious proceedings or in succession matters; however, the experience of using it in the succession proceedings is still rather mixed; not to mention the time-consuming nature of obtaining information in such an indirect way.<sup>36</sup>

A reassuring solution to obtaining information on the deceased's bank accounts left in another Member State would, in my opinion, be the (partial) *harmonization of the rules of the Member States on bank secrecy*, and that there would generally be a possibility for the Member State body (succession courts, notaries) having jurisdiction over the succession case to obtain information on the deceased's bank accounts in another Member State's financial institution in the same way, indirectly, as on domestic accounts.

There are also other aspects of obtaining information from abroad in succession proceedings, which I mention only in an indicative manner:

<sup>34</sup> See Section 43/A of Act XXXVIII of 2010 on succession proceedings (Hetv.).

<sup>35</sup> Council Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

<sup>36</sup> On this topic, see for more detail Szócs Tibor, 'Az európai öröklési rendelet hazai alkalmazását érintő legújabb rendelkezések – A hagyatéki eljárási törvény egyes nemzetközi vonatkozású rendelkezései módosításának háttéréhez' [The most recent provisions related to the domestic application of the European Succession Regulation – For the background of the amendment of particular provisions with an international dimension of the Act on succession proceedings] (2019) (1) Európai Jog 3–4.

- In many cases, it is necessary to obtain information on *the existence of the disposition of property upon death* and obtain the disposition itself. There are already aspirations among European states to create some forms of interoperability of the registers of wills. Such an initiative is the European Network of Registers of Wills Association (ARERT);<sup>37</sup> certain states that have particularly close relations with each other (France and the Benelux countries) have already interconnected their national registers of wills electronically. However, despite these initiatives, it is still not self-evident that a Member State's notary (or succession court) can obtain data directly from the register of wills of any other Member State.
- It is not uncommon for a notary to have to obtain information about *the existence of unknown heirs and their data* in another Member State. Although a public notice issued for the unknown heirs to come forward is published electronically,<sup>38</sup> there is little likelihood that the deceased's relatives, possibly living abroad and entitled to the succession or a compulsory share, could be informed of the succession proceedings in this way. This is especially the case if the deceased had his habitual residence in Hungary, but was a foreign national and had spent most of his life abroad (e.g. a German, Dutch or Finnish deceased person who had settled as a pensioner in Hungary), since in such cases there is reason to assume that the relatives entitled to succession have remained in their country of origin. At the same time, there is no international cooperation mechanism between Member States under which the cooperation of the judicial authorities of the Member State of the likely residence of the potential heirs (i.e. the Member State of origin of the deceased) could be requested in having the public notice published there.
- Articles 17–18 of the ESR lay down procedural rules on *lis alibi pendens* and related actions; however, there is a lack of an effective and reliable mechanism for allowing the authorities of the Member States to obtain information in a fast and easy way on *succession proceedings related to the same deceased that have possibly started in another Member State*. The elimination of parallel proceedings is essential in order to prevent several decisions (or European Certificates of Succession) certifying succession rights to the same estate of the same deceased and issued in different Member States from getting into cross-border circulation. Within the scope of this regulation, given the relatively pliable nature of the habitual residence as the main grounds for jurisdiction, there is a greater risk that the authorities of two Member States will reach a different conclusion as to the whereabouts of the habitual residence of the deceased.

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<sup>37</sup> *Association du Réseau Européen des Registres Testamentaires / The European Network of Registers of Wills Association* ([www.arert.eu](http://www.arert.eu)).

<sup>38</sup> See Hetv., Section 59.

## VI Summary

This brief study may be outlining a darker picture of the first experience of the application of the ESR in practice than reality would suggest. However, I deliberately wanted to highlight some of the core points in which I believe the EU regulation has been unfortunate. There is plenty of room for the Court of Justice of the European Union to find a solution to the aforementioned neuralgic issues in a preliminary ruling procedure. At the same time, the future comprehensive review of the Regulation<sup>39</sup> will also provide an opportunity to develop more mature solutions for some regulatory core points.

Overall, in my opinion, it can be considered a success in itself that, in circumstances where there are considerable differences between the inheritance law of the Member States, and perhaps even more so in their systems of succession proceedings, EU legislation has succeeded in creating a single system of the conflict-of-laws in the field of inheritance covering (nearly) all the Member States.

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<sup>39</sup> This will be due in 2025; see Article 82 of the ESR.



# Child Marriage in Hungary with Regard to the European Context and the Requirements of the CRC\*\*

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## I Introduction

The aim of the paper is to provide an overview of the regulation of child marriage in Hungary, also with regard to its legal historical context. In Hungary, the marriage of underage persons does not occur very often, which may lead one to question the importance of this issue at all. As only few Hungarian children marry, either with another child over 16 or with an adult, the justification of the legal and social phenomenon of child marriage has only been queried recently. The doubts about child marriage and the adequacy of its legal consequences, among others the fact that a married child over 16 becomes of legal age, has become apparent from the perspective of children's rights, which seem to have been strengthened in the course of the last decade. The sweep of children's rights, which is a remarkable but in practice not too rapid movement, is why I think that it is inevitably necessary to reveal some documentary cornerstones of children's rights in the international and European context, and especially some main requirements of the UN Convention on the Rights of the Child (CRC). I shed light on some statistical data concerning child marriage with the aim of providing a deeper perspective of child marriage and give some examples of pertinent regulations in some European countries, which may prove that the issue of child marriage is not 'settled' and constant but it is changing slowly. If it is admitted that to let children marry does not serve their real interests (as, among others, this is not a suitable way of providing them a higher standard of living), it can be easier to overcome some romantic beliefs about underage persons' serious legal commitment. In the summary of the paper, I mention the fact that the CRC uses the standard of 'evolving capacities of the child' but it cannot be recited in a way that would be detrimental for the child.

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## II Statistical Background – the Current State of the Problem also in Hungary

Child marriage, also referred to as early marriage, is any marriage where at least one of the parties is under 18 years of age.<sup>1</sup> According to the data 12 million girls are married before the age of 18 each year which means 23 girls every minute.<sup>2</sup> (When child marriage is discussed not only formal marriage but also informal marriage is taken into consideration. However, I focus primarily on formal marriage, as formal marriage and informal marriage – cohabitation – can be distinguished in the European countries better than in other, non-European legal systems.) The numbers and data are mind-bending, as 1 in 5 girls in the world are said to be married before 18 and over 650 million women alive today were married as children.<sup>3</sup> The problem is a global one, as child marriage occurs all over the world even if it happens more often in some regions such as North Africa, South Asia and the Middle East.

In Hungary, child marriage is not such a huge and complex problem as in the above-mentioned regions, but it clearly occurs in Hungary as well and it is contrary to the requirements of the UN Convention on the Rights of the Child (CRC) of 1989. The incidence of married girls aged 15–17 was 0.24 % of all girls between 15 and 17 in 2016, according to the data of the Hungarian Central Statistical Office.<sup>4</sup> It seems to show a downward trend, as this rate was 0.31 % in 2010.<sup>5</sup> I have to add that children above 16 may only enter into a valid marriage if it is authorised by the guardianship authority. We have no data on the rate of cohabitants among children, which fact cannot be detached from the fact that the age when anybody may cohabit with another person in a legally recognisable way is not defined in the Hungarian Civil Code (HCC), namely Act V of 2013.<sup>6</sup> The topicality of this issue is confirmed by the latest concluding observations of the Committee on the Rights of the Child. The concluding observations on the sixth periodic report on Hungary, which were adopted by the Committee at its eighty-third session (20 January – 7 February 2020), urged that the Hungarian Civil Code should be amended ‘to eliminate any exception to the minimum age of marriage of 18 years for girls and boys.’<sup>7</sup>

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<sup>1</sup> Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices, UN Committee on the Elimination of Discrimination against Women and Convention on the Rights of the Child, 2014.

<sup>2</sup> Source of the data is UNICEF. These are published by a partnership, Girls Not Brides. <<https://www.girlsnotbrides.org/about-child-marriage>> accessed 27 March 2019.

<sup>3</sup> See <<https://www.girlsnotbrides.org/about-child-marriage>> accessed 27 March 2019.

<sup>4</sup> 0.24% on 1 January 2016; <[http://www.ksh.hu/sdg/cel\\_05.html?lang=hu](http://www.ksh.hu/sdg/cel_05.html?lang=hu)> accessed 16 February 2020.

<sup>5</sup> 0.31% on 1 January 2010, 0.28 % on 1st January 2011 and 0.26% on 1st January 2015; <[http://www.ksh.hu/sdg/cel\\_05.html?lang=hu](http://www.ksh.hu/sdg/cel_05.html?lang=hu)> accessed 16 February 2020.

<sup>6</sup> The definition of cohabitation is contained in Art 6:514(1) of HCC.

<sup>7</sup> See <[https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/HUN/CRC\\_C\\_HUN\\_CO\\_6\\_41507\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/HUN/CRC_C_HUN_CO_6_41507_E.pdf)> accessed 16 February 2020.

### III Child Marriage Internationally and in the European Context – Facts and Documents on Human Rights

Child marriage affects all children regardless of gender but boys are affected to a lesser degree than girls.<sup>8</sup> The main causes of child marriage are gender inequality, tradition, poverty and insecurity. Poor families think that they can secure their children's future with marriage and also marriage will bring safety into the life of their child, as she will be saved from the risk of harassment and physical or sexual assault.<sup>9</sup> Child marriage's impacts are tremendous. Married children regularly finish their education, as these girls are expected to be mothers and wives although they are not mature enough to perform these roles. Their health is endangered among others by the early pregnancy and its consequences and most of them face a high risk of remaining poor.<sup>10</sup>

Although in Europe we do not face child marriage as often as in some other regions of the world, the national legislations typically let children – even if not very young children – to marry. The problem of child marriage has come into the foreground in Europe for two reasons, namely the rise in the standards of children's rights' and the fact that the European population has been changing and the proportion of the population among the members of which child marriage happens has been growing.<sup>11</sup>

When studying the human rights' conventions, both on the international and European level, the fact has to be borne in mind that a child marriage is often at the same time a forced marriage, as children do not enter into it freely. The CRC declares clearly that, for the purposes of this convention, a child means every human being below the age of eighteen years.<sup>12</sup> Although the second part of this sentence allows that the child may attain majority earlier under the law applicable to the child, Article 3 has to be emphasised, according to which in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. From the children's rights' perspective child marriage primarily cannot be in the child's best interests.

According to Art 16 of the UN Convention on Human Rights (1948), men and women of full age have the right to marry and to found a family and marriage shall be entered into only with the free and full consent of the intending spouses. The UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962) urged that no marriage should be legally entered into by any person under this age. The requirement of marrying at a 'marriageable age' and the prohibition of forced marriage – no marriage shall be entered into without the free and full consent of the intending spouses – is repeated in Art 23 of the International Covenant on Civil and Political Rights (1967) and partly also in Art 10 of

<sup>8</sup> See <<https://data.unicef.org/topic/child-protection/child-marriage>> accessed 27 March 2019.

<sup>9</sup> See <<https://www.girlsnotbrides.org/why-does-it-happen>> accessed 27 March 2019.

<sup>10</sup> See <<https://www.girlsnotbrides.org/what-is-the-impact>> accessed 27 March 2019.

<sup>11</sup> See <<https://www.pewforum.org/2017/11/29/europes-growing-muslim-population>> accessed 27 March 2019.

<sup>12</sup> Article 1 of CRC.

the International Covenant on Economic, Social and Cultural Rights (1967). Although child marriage is a problem of childhood, the UN Convention on the Elimination of All Forms of Discrimination against Women has to be mentioned, as it not only requires the free and full consent of the intended spouses but Art 16 also declares that the betrothal and marriage of a child shall have no legal effect. Besides, all necessary action shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official register compulsory, according to this Convention. The general comment No. 18 of the Committee on the Rights of the Child on harmful practices is clear, as it states that child marriage is considered to be a form of forced marriage.

The undesirability of child marriage (and forced marriage) shows up not only internationally but also on the European level, and the steps towards the direct prohibition of child marriage have been strengthened recently. Art 12 of the European Convention on Human Rights is in harmony with the international human rights' requirement of entering into marriage only at a marriageable age. The Parliamentary Assembly of the Council of Europe adopted a recommendation on forced marriages and child marriages in 2005 (Recommendation 1723). It recommended, *inter alia*, that the member states should be encouraged to inform pupils concerning their right to have their own decisions whether to marry, and should help the victims of forced marriage, punish the persons who participate voluntarily in a forced marriage or child marriage and to terminate child betrothals. In June 2018, the Parliamentary Assembly adopted a resolution on forced marriage in Europe (Resolution 2233). It recited that every day 39,000 young girls are married before reaching the age of majority and more than one third of them are younger than 15. The resolution repeats the risks that children face when marrying before their majority age and underlines that a child marriage is a forced marriage as 'a child cannot be considered to have expressed full, free and informed consent to a marriage'. It requires that forcing someone to marry should be criminalised; child marriage should be prohibited without exception. It adds that the differences between girls and boys in terms of the minimum age of marriage should be abolished and also civil law measures should be adopted against forced marriage. The Parliamentary Assembly welcomed the UN's Sustainable Development Goals, as they intend to eliminate forced marriages by 2030. (The 2030 Agenda for Sustainable Development and its 17 Sustainable Development Goals<sup>13</sup> was adopted in 2015 by 193 countries.) The European Parliament also raised its voice against child marriage, stating that the child marriage rate was declining but 'still too many' child marriages happen.<sup>14</sup>

<sup>13</sup> See <<https://www.un.org/sustainabledevelopment/development-agenda>> accessed 27 March 2019.

<sup>14</sup> See <[http://www.europarl.europa.eu/RegData/etudes/ATAG/2018/623526/EPRS\\_ATA\(2018\)623526\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2018/623526/EPRS_ATA(2018)623526_EN.pdf)> accessed 27 March 2019.

## IV Child Marriage in Europe – Some Examples

In Europe, the marriageable age is 18 almost without exception as a main rule, but in several countries a minor over the age of typically 16 may enter into a marriage. This is the case e.g. in Bulgaria, where persons at the age of 16 may marry with court permission,<sup>15</sup> in Poland, where the guardianship court may permit a woman who has reached the age of 16 to marry,<sup>16</sup> in Portugal, where the legal representative may authorise a person over 16 but below 18 to marry<sup>17</sup> and in Romania, where the approval of the parents or legal guardians and that of the family court is needed for the marriage of minors.<sup>18</sup> In Slovenia not 16 but 15 is the lowest age for a valid marriage, as they can marry if they receive permission from the local social services office,<sup>19</sup> and in Spain the possibility of 14–15-year-old children to enter into marriage was abolished only in 2015 and now the age limit is 16.<sup>20</sup>

There are, however, some European countries where it is impossible to enter into a marriage under the age of 18. These developments happened recently, just as the consequences of having to face child marriages among minor migrants. In Sweden, in the Netherlands and in Denmark marriage under the age of 18 came to be prohibited in the last years (in Sweden already in 2014, in the Netherlands in 2016 and in Denmark in 2017).<sup>21</sup> In Germany, the growing presence of married migrant girls resulted in the adoption of an Act to Combat Child Marriages, which entered into force in July 2017.<sup>22</sup> The aim of this Act was to prohibit all marriage under the age of 18 and eliminate all exceptions under that age, but it tended to reach the intended spouses under foreign applicable law when they enter into marriage in Germany. The German legislation created complex rules with an impact not only on national family and marital law but also on private international law.<sup>23</sup>

## V Child Marriage in Hungary – Historical Embeddedness and Current Regulation

In Hungary the HCC replaced the earlier Civil Code of 1959 and also the independent Family Act of 1952 and entered into force in March 2014. According to the family law rules of HCC a man and a woman of full age can enter into a marriage. However, if a minor enters into marriage

<sup>15</sup> Dimitar Topuzov, 'Developments in Family Law – Year by Year, Bulgaria' in Orsolya Szeibert (ed), *Developments in Family Law. Year by Year 1* (ELTE Eötvös Kiadó 2018, Budapest) 30.

<sup>16</sup> Piotr Fiedorczyk, 'Developments in Family Law – Year by Year, Poland' in Szeibert (n 15) 117.

<sup>17</sup> Rute Teixeira Pedro, 'Developments in Family Law – Year by Year, Portugal' in Szeibert (n 15) 134.

<sup>18</sup> Marius Floare, 'Developments in Family Law – Year by Year, Romania' in Szeibert (n 15) 149.

<sup>19</sup> Suzana Kraljić, 'Developments in Family Law – Year by Year, Slovenia' in Szeibert (n 15) 169.

<sup>20</sup> Jordi Ribot, 'Developments in Family Law – Year by Year, in Szeibert (n 15) 183.

<sup>21</sup> Marc-Philippe Weller, Chris Thomale, Ioana Hategan, Jan Lukas Werner, 'Das Gesetz zur Bekämpfung von Kinderehen – eine kritische Würdigung' (2018) 65 (17) FamRZ 1291–1292.

<sup>22</sup> Nina Dethloff, 'Child Brides on the Move: Legal Responses to Culture Clashes' (2018) 32 (3) IJLPF 302.

<sup>23</sup> Dieter Schwab, 'Die verbotene Kinderehe' (2017) 64 (17) FamRZ 1369–1370.

in the absence of the prior permission of the guardianship authority then this marriage is invalid [Art 4:9(1) HCC]. Although Hungarian family law distinguishes between non-existent marriage and invalid marriage, the marriage of a minor without the permission of the guardianship authority shall not result in the same more serious legal consequence as non-existence but only invalidity. The guardianship authority may grant permission for a minor over the age of sixteen if this minor has limited capacity. The guardianship authority shall decide to grant or reject the application after hearing the parent or the guardian. Those parents who may not exercise their custody rights even in substantial matters affecting the future of the child, or whose whereabouts are unknown or who cannot be heard due to other irremovable obstacles need not be heard [Art 4:9(3) HCC]. A marriage concluded in the absence of the guardianship authority's permission or before one of the spouses reaches the age of sixteen shall become valid retroactively to the date of its conclusion, after six months of the spouse reaching majority if the spouse concerned does not challenge the validity of the marriage within this term of preclusion, or the court, at the spouse's request, terminates the action brought on this ground earlier by another person entitled to do so.

Government Decree No 149/1997 (IX. 10.) on the guardianship authorities and child protection procedures contains the detailed rules on the permission of the guardianship authority concerning the marriage of a minor over 16.<sup>24</sup> The request for permission has to be submitted by the minor over 16 and he or she has to attach the doctor's certificate that the child is physically and mentally mature enough to enter into marriage and the certificate or statement of both intended spouses concerning their income, as the guardianship authority's task is to convince the court that the costs of living of the intended spouse under 18 and his or her child or the child which is to be born before the intended spouse reaches his or her majority are covered. According to the Decree, the minor has to attend counselling by the family protection service and has to attach the certificate of attendance. The public guardianship authority has to hear the intended spouses and the minor's legal representative and has to make a report about the future living circumstances of the minor. The guardianship authority shall hear the intended spouses on the arguments in favour of permission, and, according to Art 36 of the Decree, the guardianship authority permits the marriage of the minor if it is in the child's interest and the request for permission was submitted upon the free will of the minor without their being influenced.

The HCC contains almost identical rules to those of the Family Act of 1952 (Act No IV of 1952) concerning the minor's marriage. I would emphasise that, although the Family Law Book (Fourth Book) of the effective HCC always uses the word 'child' for people under 18, its Book on the Individual as Subject of Law (Second Book) never say a word about children, as it uses the term 'minor' in harmony with the traditional civil law rules. At the very end of the 20th century, when the recodification of the Civil Code began (actually in 1998) the children's rights' issues were not in the foreground and it can explain why the rules concerning

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<sup>24</sup> Articles 34–36 of Government Decree No 149/1997 on the guardianship authorities and child protection procedures.

the minor's marriage were seen to be stable. The rules that were in force at the end of the 20th century concerning a child's marriage in Hungary were in harmony with the European trends regarding minors' marriage options.

In the 19th century, children over 12 could enter into marriage in Hungary; if they married they reached their full capacity to act, as this was an immediate consequence of the marriage. In 1894, the Hungarian Marriage Act distinguished between mature and immature persons and declared 16 years for women and 18 years for men as the lower limits for marriage. However, a dispensation could be given for a minor over 12, regardless of it being for a girl or a boy. It changed in 1953 when the unified age limit of majority became 18 but a child could enter into a marriage with ministerial permission over 12 also at that time. Act I. of 1974, within the framework of the first comprehensive reform of the Family Act, lifted the age limit for marriage but applied a difference upon the basis of sexes. Men could marry from the age of 18 and women could marry from the age of 16. The age limit of marriage with permission was 2 years lower for both, which meant that men could marry with permission from the age of 16, while women from 14. Act IV of 1986, the second comprehensive reform of the Family Act, unified the marriageable age and lifted it to 18 for both men and women while it maintained the possibility of entering into marriage over the age of 16 with permission.<sup>25</sup>

The recodification of civil law, which affected family law and marital law in their entirety, would have given a chance to re-evaluate marriage involving the minors but it did not happen at all. At that time, the very end of the 20th century and the very beginning of the 21st century, the norms of children's rights were not really strong and the Hungarian recodification of civil law followed the aim of maintaining the then effective provisions if possible. Even the thought of modifying the minor's marriage or rather child marriage did not emerge. It was not debated whether a minor – a child – is mature enough to enter into a marriage; even the need to maintain of the then effective rules was accepted. Although the experts taking part in the recodification process recognised that the marriageable age had earlier been one of the most debated issues, they concluded that the requirements of marrying as a minor were well established and applied in the practice of the guardianship authority.<sup>26</sup> Some years later the thought that the issue of marriageable age does not require any modification was reinforced.<sup>27</sup>

<sup>25</sup> Sipócz László, *A gyámsági törvény magyarázattal (Act on guardianship with explanations)* (1882, Budapest), 10–13; Nizsalovszky Endre, *Magyar családi jog (Hungarian Family Law)* (1949, Budapest) 19. Short summary in Hungarian: Szeibert Orsolya, 'Gyermektartás és szülőtartás – változások a gyermeki jogállás és a szülői kötelezettségek alakulásának tükrében (Child maintenance and maintenance for parents – changes in the mirror of the shaping of child's status and parental obligations)' in Szeibert Orsolya (ed), *Család és családtagok. Jogági tükröződések (Family and family members. Reflection in branches of law)* (ELTE Eötvös Kiadó 2018, Budapest) 39–40.

<sup>26</sup> Weiss Emilia, 'A készülő Polgári Törvénykönyv családjogi könyvének a Kodifikációs Szerkesztőbizottság által elfogadott koncepciója (The Concept of the Family Law Book of Civil Code under reconstruction being adopted by the Codification Organising Committee)' (2001) (4–5) *Polgári Jogi Kodifikáció (Civil Law Codification)* 22–23.

<sup>27</sup> Weiss Emilia, 'Néhány kérdés a készülő Polgári Törvénykönyv családjogi könyve koncepciója köréből (Some issues concerning the concept of the Family Law Book of the Civil Code under elaboration)' in Gyekiczky Tamás (ed), *Ami a múltból elkísér. A családjogi törvény ötven éve (What escorts us from the past. Fifty years of Family Act)* (Gondolat–Infonia 2005, Debrecen) 24–25. And also in 2013, Weiss Emilia, 'A Ptk. Családjogi Könyvéről (About the Family Law Book of Civil Code)' (2013) (9) *Jogtudományi Közlöny (Gazette of Legal Jurisprudence)* 406–407.

The fact that a child can marry at the age of 16 with the permission of the guardianship authority was not questioned, even though the studies analysing and explaining the codification underlined the importance of the child's interests and the aim to protect the child's rights and interests in harmony with the CRC.<sup>28</sup>

## VI Conclusion – the Child's Evolving Capacities and Free Consent

Although the general comment No. 18 of the Committee on the Rights of the Child on harmful practices would prohibit child marriage, it adds the following:

as a matter of respecting the child's evolving capacities and autonomy in making decisions that affect her or his life, a marriage of a mature, capable child below 18 years of age may be allowed in exceptional circumstances, provided that the child is at least 16 years of age and that such decisions are made by a judge based on legitimate exceptional grounds defined by law and on the evidence of maturity, without deference to culture and tradition.

On the other hand, it is tradition and multiculturalism in connection with a lot of issues that can be mentioned as well.<sup>29</sup>

The prohibition of child marriage has the aim of protecting children as it has to be assumed that they cannot have free consent just because of being underage. The CRC does not work with ages, except for the age of 18, but uses the model of evolving capacities, which have to be analysed for each child according to the special circumstances of the case. That is what the above-mentioned option of the general comment emphasises – it is not the child's age alone that has to be taken into attention in the case of an underage marriage and tradition or religion should not be a decisive factor. However, it does not seem to be easy to determine whether a child between 16 and 18 has clearly free consent to marry. In my concluding words, I would refer (again) to the main targets of goal 5, namely to 'achieve gender equality and empower all women and girls' of the UN's Sustainable Development Goals, and especially 5.3, as to eliminate all harmful practices, such as child, early and forced marriage.

In sum, child marriage is a violation of human rights according to UNICEF.<sup>30</sup> Both the words 'child' and 'marriage' cause positive feelings; however, marriage is an institution for adults and not for children. That is why the term 'child marriage' is held to be inappropriate.<sup>31</sup>

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<sup>28</sup> This child-focused attitude is shown in the codification studies of Emilia Weiss. These studies are included in Szeibert Orsolya (ed), *Weiss Emilia családjogi és öröklési jogi kodifikációs tanulmányai (Codification studies of Emilia Weiss in the field of family law and succession law)* (ELTE Eötvös Kiadó 2017, Budapest) 403.

<sup>29</sup> Dethloff (n 22) 302. The cautiousness concerning the role of the state when children's rights are at stake is underlined from the perspective of Muslim jurisdictions – see Dörthe Engelcke and Nadjma Yassari, 'Child law in Muslim jurisdictions: The role of the state in establishing filiation (nasab) and protecting parentless children' (2019) 34 (3) *Journal of Law and Religion* 332–335; doi:10.1017/jlr.2019.40.

<sup>30</sup> See <<https://data.unicef.org/topic/child-protection/child-marriage>> accessed 27 March 2019.

<sup>31</sup> Arthur van Coller, 'Child Marriage – Acceptance by Association' (2017) 31 (3) *IJLPF* 363.

It is rooted in traditions and its right to existence often goes unquestioned – just as happened and still happens in Hungary, as the Decree declares it is permitted if it serves the child's interest. How can marriage serve the child's interest at all? A child needs protection, which has to be provided by the parents, relatives, society and the state and there is no need for a spouse at a child's age to give that protection. It is not primarily the European continent where child marriage occurs too often, but allowing children to marry transmits a message to society. The study provides an overview of the Hungarian rules on child marriage and an introduction to the international and European context of child marriage, with special regard to the latest developments and requirements.





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# Articles

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## Migration Related Issues Regarding Brexit: From Free Movement to Asylum and Illegal Migration

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The campaign preceding the referendum on the withdrawal of the United Kingdom from the European Union focused, among other issues, on the UK taking back control over immigration. Nevertheless, the incorrect use of terminology regarding immigration, instead of free movement of persons, could result in confusion as regards the extent to which the UK is bound by EU migration *acquis*. This article therefore intends to clearly distinguish the debate, on the one hand, on the retention of rights related to free movement and, on the other hand, the issues related to migration and asylum.

A unique aspect of this article is that it not only discusses the legal implications, but also focuses on the practical implementations and the related concerns, as the complications of the Brexit negotiations could even be exceeded by the challenges of the practical implementation of the required actions, both by the UK and the 27 EU Member States. The article therefore also draws attention to the risks posed by inadequate actions. Nevertheless, the future relationship between the EU and the UK is also discussed, both as regards the future legal migration of the citizens of the two parties, as well as possible close cooperation regarding asylum and illegal migration.

### I Introduction

Taking back control, including on migration, was one of the driving mantras leading to the majority voting for Brexit in the referendum in 2016. Nevertheless, academics state that ‘the perception that the UK has little control over immigration because of its EU membership is erroneous.’<sup>1</sup> This study intends to examine different areas of asylum and migration, partly

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<sup>1</sup> Natascha Zaun, ‘Taking back control? The impact of Brexit on the immigration of third country nationals and asylum seekers’ <<https://blogs.lse.ac.uk/brexit/2018/05/11/taking-back-control-the-impact-of-brexit-on-the-immigration-of-third-country-nationals-and-asylum-seekers/>> accessed 6 June 2019.

in order to see which perception is closer to reality; furthermore it also wishes to identify questions that could be negotiated and settled as part of the future relationship in the discussed policy areas.

The starting point should definitely be Protocol No. 21 of TFEU that clearly states that ‘the United Kingdom and Ireland shall not take part in the adoption by the Council of proposed measures pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union.’ Only three Member States, i.e. the UK, Ireland and Denmark, enjoy such an opt-out situation as regards harmonisation in the Area of Freedom, Security and Justice, yet the UK and Ireland have the right to opt in, either at the early phase of negotiations, resulting in the fact that their vote counts at the time of adoption and can therefore influence the outcome of a vote. Even if they do not opt in pre-adoption, the UK and Ireland still can decide to opt in any time after the adoption of a specific legal act in the Area of Freedom, Security and Justice.

The Area of Freedom, Security and Justice covers a number of policy areas in justice and home affairs. Even the list of migration-related issues could extend from border management, visa policy, legal migration and illegal migration to asylum issues. Although such policy areas were not among those most debated during the Brexit negotiations, it is worth examining the relevant EU *acquis* from a Brexit perspective, as a semantic shift from EU citizens to immigrants could be observed in the UK, resulting in the terminology of free movement of persons and that of immigration of third-country nationals being muddled. This article intends to focus on the issues of asylum and illegal migration as those policy areas have recently been the main focus of the EU.<sup>2</sup>

However, it would be a mistake not to deal with citizens’ rights, as the Brexit negotiations have definitely put this policy area in the centre of tensions, as the protection of the acquired rights of both EU citizens in the UK and UK citizens in the EU27 turned out to be a key concern for both parties.<sup>3</sup> It actually also touches upon the policy area of legal migration, as British citizens become third-country nationals as a result of withdrawal and therefore their long-term stay will fall under the regulatory area of legal migration.

All in all, the article ends up pointing out, through the examination of migration related issues, why the following statement of MEP Ellie Chowns is a very vivid description of Brexit: ‘It’s a complex dish that’s never been cooked before, has no recipe, two chefs in different kitchens, it’ll cost us a fortune and it risks giving us all indigestion for many years to come.’<sup>4</sup>

<sup>2</sup> See especially European Council Conclusions in June 2018 and December 2018, as well as the Statement on the situation at the EU’s external borders adopted by the EU Ministers of Home Affairs on 4 March 2020.

<sup>3</sup> See for in-depth background Éva Geller-Lukács, ‘Brexit – a Point of Departure for the Future in the Field of the Free Movement of Persons’ (2016) (1) ELTE Law Journal 141–162; <<http://eltelawjournal.hu/brexit-point-departure-future-field-free-movement-persons/>> accessed 6 June 2019.

<sup>4</sup> European Parliament, plenary debate on Implementing and monitoring the provisions on citizens’ rights in the Withdrawal Agreement, 14 January 2020 <[https://www.europarl.europa.eu/doceo/document/CRE-9-2020-01-14-ITM-003\\_EN.html](https://www.europarl.europa.eu/doceo/document/CRE-9-2020-01-14-ITM-003_EN.html)> accessed 19 January 2020.

## II Residence Rights: Immigration-Related Questions of Free Movement Issues

### 1 Retention of Residence Rights according to the Withdrawal Agreement

The UK's decision to withdraw from the European Union has generated many questions on the legal status of UK nationals living in an EU27 Member State and EU citizens living in the UK. Brexit has raised a number of concerns and resulted in diverging suggestions by politicians and NGOs as well as academics for ensuring that all EU citizens who have exercised their free movement rights will be able to retain their residence and equal treatment rights.<sup>5</sup>

On 8 December 2017 a joint report stated that an agreement has been reached in principle across, among others, the area of protecting the rights of Union citizens in the UK and UK citizens in the Union and declared the following: 'The overall objective of the Withdrawal Agreement with respect to citizens' rights is to provide reciprocal protection for Union and UK citizens, to enable the effective exercise of rights derived from Union law and based on past life choices, where those citizens have exercised free movement rights by the specified date.'<sup>6</sup> In November 2018, the European Union and the United Kingdom endorsed, at leaders' level, the Withdrawal Agreement that would ensure an orderly UK withdrawal from the EU on 30 March 2019, as well as a political declaration<sup>7</sup> setting out the main parameters of the future EU–UK relationship.<sup>8</sup>

Once the discussions aimed at bridging the gap between the UK and the EU positions had been stepped up, a revised Withdrawal Agreement was reached and immediately endorsed by the European Council on 17 October 2019, and in the meanwhile the Political Declaration on the framework for the future relationship was also revised. Nevertheless, the new agreement did not affect the provisions regarding citizens' rights and the revised political declaration did not modify Section IX on Mobility. On 13 December 2019, the European Council in its Conclusions reiterated its commitment to an orderly withdrawal on the basis of the Withdrawal Agreement, which was then signed by the two parties on 24 January and entered into force upon the UK's exit from the EU, on 31 January 2020 at midnight (CET).

The WA is an extensive legal document aiming, among other things, to preserve the rights of UK nationals living in the EU27 and EU citizens living in the UK. Importantly, the

<sup>5</sup> See Anne van der Mei, 'Brexit and citizenship I: retention of EU citizenship' <<https://www.maastrichtuniversity.nl/blog/2018/10/brexit-and-citizenship-i-retention-eu-citizenship>> accessed 6 June 2019.

<sup>6</sup> Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union, Para 6, <[https://ec.europa.eu/commission/sites/beta-political/files/joint\\_report.pdf](https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf)> accessed 6 June 2019.

<sup>7</sup> See <<https://www.consilium.europa.eu/media/37059/20181121-cover-political-declaration.pdf>> accessed 9 January 2020.

<sup>8</sup> Whereas the withdrawal agreement, if ratified, would be a legally binding treaty, the political declaration is a legally non-binding document; however, despite their different legal nature, they are considered as a package for the purpose of the approval process in both the EU and the UK.

agreement establishes a transition period until the end of 2020, extendable once with a maximum of two years, to help businesses and citizens to adapt to the new circumstances, and the EU and UK to negotiate their future partnership agreements. During this time, the UK applies the *acquis* and is treated as a Member State, but is not be able to participate in EU decision-making or be represented in EU institutions. It also means that the Free Movement Directive (2004/38/EC)<sup>9</sup> continues to apply in this extended period.

Part Two of the agreement sets out in legal terms provisions safeguarding most of the essential guarantees of EU free movement law for those who made use of it, both UK citizens in the EU27 and EU27 citizens in the UK. A stated priority for the EU and the UK, this part was completely agreed by negotiators in March 2018. In particular, the WA defines the categories of persons within its scope and contains provisions on residence and related rights, coordination of social security, equal treatment and non-discrimination. Undoubtedly, the most important result of the provisions is that the persons covered enjoy the rights set out in Part Two for their lifetime, unless they cease to meet the conditions therein.

Article 13(1) of the WA expressly states that ‘Union citizens and United Kingdom nationals shall have the right to reside in the host State under the limitations and conditions as set out in Articles 21, 45 or 49 TFEU and in Article 6(1), points (a), (b) or (c) of Article 7(1), Article 7(3), Article 14, Article 16(1) or Article 17(1) of Directive 2004/38/EC.’ It therefore provides the enforcement of the principle of acquired rights in this policy area, yet it does not deny that conditions and limitations can also be applied; nevertheless, the agreement also gives a closed list of them in order to avoid arbitrary application in this regard.

The personal scope of the agreement set out in Article 10 enumerates the categories of persons who are covered by the WA and enjoy this continued preferential residence right. Such categories are: (a)–(b) Union citizens or UK citizens who exercised their right to reside in the territory of the other party in accordance with Union law before the end of the transition period and continue to reside there thereafter; and (c)–(d) Union citizens or UK citizens who exercised their right as frontier workers in the territory of the other party in accordance with Union law before the end of the transition period and continue to do so thereafter.

Apart from the citizens of the EU and the UK covered by points (a)–(d), points (e) and (f) also recognise the acquired rights of certain family members, regardless of their citizenship. Family members, nevertheless, have to fulfil one of many conditions, yet the lengthy legal list of conditions leads to the conclusion that family members also have residence rights if they were already granted rights under EU law before the transition period (e.g. spouses, parents, children, grandchildren and grandparents) or who will be able to join the EU/UK national in the host state if they are living in a different country, but are already considered a family member by the end of the transition period.

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<sup>9</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77.

The WA also covers future children, wherever they are born or legally adopted. The right to join the EU or UK citizen after the transition period for already existing family members and future children is a declaration of the principle consistently confirmed by the CJEU that the residence right of family members is derived from, and is dependent upon, but also implied in the residence right, of the EU national practicing their free movement right. However, citizens' groups and the European Parliament<sup>10</sup> have underlined the WA failed to protect certain family reunification rights, especially those recognised by EU case law.

Based on the *Surinder Singh* case<sup>11</sup> a non-EU family member of an EU citizen moving to another Member State then returning to that citizen's home Member State must enjoy at least the same rights as would be granted to him or her under EU law if his or her spouse entered and resided in the territory of another Member State. The CJEU clarified that

when a Community national who has availed himself or herself of those rights returns to his or her country of origin, his or her spouse must enjoy at least the same rights of entry and residence as would be granted to him or her under Community law if his or her spouse chose to enter and reside in another Member State.<sup>12</sup>

Although such cases of returning mobile EU citizens are not regulated by the Free Movement Directive, the family reunification rights ensured in the Directive should still be applied to the returners according to the present EU acquis; this principle has been stipulated by the CJEU in the *O and B* case,<sup>13</sup> as well.<sup>14</sup>

Similarly, the agreement seems to fail to recognise the outcome of the *Zambrano* judgement<sup>15</sup> declaring the residence right of non-EU carers for minors who have not left their Member State of birth.<sup>16</sup> In this case it was not Directive 2004/38/EC, but Article 20 of TFEU that was interpreted by the CJEU as meaning that it precludes a Member State from refusing a third country national, upon whom his minor children who are European Union citizens are dependent, a right of residence in the Member State of residence and nationality of those

<sup>10</sup> European Parliamentary Research Service, 'Brexit: Understanding the withdrawal agreement and political declaration' European Parliament Brief, March 2019. <[http://www.europarl.europa.eu/RegData/etudes/BRIE/2019/635595/EPRS\\_BRI\(2019\)635595\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2019/635595/EPRS_BRI(2019)635595_EN.pdf)> accessed 6 June 2019, 3.

<sup>11</sup> Case C-370/90 *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department* [1992] ECR I-04265. See for more, Gellérné Lukács Éva, *Munkavállalás az Európai Unióban, (Employment in the EU)* (KJK Kerszöv 2004, Budapest).

<sup>12</sup> *Surinder Singh* case, Judgment of the Court, para 23.

<sup>13</sup> Case C-456/12 *O. v Minister voor Immigratie, Integratie en Asiel, and Minister voor Immigratie, Integratie en Asiel v B.*, [2014], ECLI:EU:C:2014:135.

<sup>14</sup> See Laura Gyeney, 'Same sex couples' right to free movement in light of Member States' national identities, The legal analysis of the Coman case' *Iustum Aequum Salutare* XIV. 2018. 2. <[http://ias.jak.ppke.hu/hir/ias/20182sz/11\\_GyeneyL\\_IAS\\_2018\\_2.pdf](http://ias.jak.ppke.hu/hir/ias/20182sz/11_GyeneyL_IAS_2018_2.pdf)> accessed 6 June 2019.

<sup>15</sup> Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011] ECR I-01177.

<sup>16</sup> See Ágnes Tóttós, 'Az Európai Bíróság legújabb ítélezési gyakorlatának hatása az idegenrendészeti jogalkalmazásra (The impact of recent case law of the European Court of Justice on the application of alien law)' in Pécsi Határőr Tudományos Közlemények XII. (2011, Pécs) 307–321.



children, and from refusing to grant a work permit to that third country national, insofar as such decisions deprive those children of the genuine enjoyment of the substance of the rights attached to the status of a European Union citizen.

As for family members who are not yet in the life of mobile EU nationals or UK citizens, but will be, only children born to, or legally adopted by, persons referred to in points (a) to (d) after the end of the transition period are covered by the agreement. It therefore does not extend the preferential rules to future spouses and their relatives. It is however not surprising, given the fact that, on the one hand, the letter David Cameron wrote to the President of the European Council on 10 November 2015,<sup>17</sup> describing the UK's concerns regarding EU membership, specifically contained reference to marriages of convenience,<sup>18</sup> and on the other hand, the British legal provisions on family reunification with a third-country national follows a restrictive approach.<sup>19</sup>

As regards administrative measures, the UK and the EU Member States can choose between two systems, either requiring that Union citizens or UK nationals, their respective family members and other persons who reside in their territory to apply for a new residence status which confers the rights [Article 18(1)], or allowing that those eligible for residence rights receive, in accordance with the conditions set out in Directive 2004/38/EC, a residence document that includes a statement that it has been issued in accordance with this Agreement [Article 18(4)]. According to the European Parliamentary Research Service it means that

the UK and the EU Member States can choose between a constitutive system (persons will be required to apply for a new residence status to attest to their rights under the withdrawal agreement) and declaratory system (those complying with the conditions automatically become beneficiaries of the withdrawal agreement).<sup>20</sup>

Nevertheless, since creating a new residence status in line with Article 18(1) does not necessarily constitute residence and treatment rights equal to those that have already been granted by the free movement *acquis*, it could be closer to the spirit of the agreement to distinguish the two solutions based on whether they provide direct effect to the WA or not.

In any case, persons entitled to the rights under the citizens' chapter have the right to request from the host state a document, which may be digital, attesting that the person is

<sup>17</sup> Letter by David Cameron on a new settlement for the United Kingdom in a reformed European Union, <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/475679/Donald\\_Tusk\\_letter.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/475679/Donald_Tusk_letter.pdf)> accessed 6 June 2019.

<sup>18</sup> See Éva Gellér-Lukács, Ágnes Töttös, and Sándor Illés, 'Free movement of people and the Brexit' in Hungarian Geographical Bulletin (2017) <<https://doi.org/10.15201/hungeobull.65.4.9>> accessed 6 June 2019. Gellérné Lukács Éva, 'Brexit – a Point of Departure for the Future in the Field of the Free Movement of Persons' (2016) (1) ELTE Law Journal 141–162.

<sup>19</sup> See report of the UK National Contact Point of the European Migration Network on 'Family reunification of Third Country Nationals in the European Union National' Contribution from the United Kingdom, Home Office Science, March 2017 <[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/28a\\_uk\\_family\\_reunification\\_final\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/28a_uk_family_reunification_final_en.pdf)> accessed 6 June 2019.

<sup>20</sup> European Parliamentary Research Service Brief, 3–4.

covered by the WA. EU law safeguards apply to any host state decision against the restriction of the residence rights of the persons covered. The host State may therefore not impose any limitations and conditions other than set out in the WA; furthermore, there shall be no discretion in applying the limitations and conditions, other than in favour of the person concerned.

According to Article 18(1) Member States may require to apply for a new residence status to attest to their rights under the withdrawal agreement. The WA also sets out the legal conditions of such national regimes in order to avoid them becoming restrictive. The Agreement specifically states that the sole purpose of such a procedure should be that of verification. The administrative procedures should be smooth, transparent and simple.

## 2 Retention of Residence Rights in the UK

The Home Office published the details of the EU Settlement Scheme (EUSS) in a Statement of Intent on 21 June 2018,<sup>21</sup> and has opened the scheme on a live trial basis, with the following guiding principle: ‘A principle of evidential flexibility will apply, enabling caseworkers to exercise discretion in favour of the applicant where appropriate, to minimise administrative burdens.’<sup>22</sup> The public beta test phase of the EUSS was launched on 21 January 2019 and the scheme was fully launched on 30 March 2019. As of 29 February 2020, overall, the total number of applications received up to 29 February 2020 was more than 3.3 million (3,343,700), while the total number of applications was almost 3 million (2,998,300). Of these, 58% were granted settled status and 41% were granted pre-settled status. Of the remaining applications, 19,100 received a withdrawn or void outcome, 6,800 were invalid and 300 were refused.<sup>23</sup>

As a result of a successful application<sup>24</sup> in the EUSS,<sup>25</sup> one is given either settled status or pre-settled status. Applicants are not asked to choose which they are applying for; the granted status depends on how long the applicant has been living in the UK when they apply. Settled status is granted if the applicant who started living in the UK by 31 December 2020 has lived in the UK for a continuous 5-year period.<sup>26</sup> If the applicant does not have 5 years’ continuous residence when applying, they will usually get pre-settled status. Even though the WA would allow the extension of the transition period for a maximum of two years, the European Union

<sup>21</sup> UK Home Office, ‘EU Settlement Scheme: Statement of Intent’ 21 June 2018, <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/718237/EU\\_Settlement\\_Scheme\\_SOI\\_June\\_2018.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/718237/EU_Settlement_Scheme_SOI_June_2018.pdf)> accessed 6 June 2019.

<sup>22</sup> Statement of Intent on the EU Settlement Scheme, para 1.15.

<sup>23</sup> EU Settlement Scheme Statistics February 2020 Experimental Statistics, 19 March 2020. <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/873588/eu-settlement-scheme-statistics-february-2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/873588/eu-settlement-scheme-statistics-february-2020.pdf)> accessed 26 March 2020.

<sup>24</sup> Exceptions include those who have indefinite leave to remain, which is usually verified by a stamp in the passport or a letter from the Home Office stating this, as well as frontier workers.

<sup>25</sup> See <<https://www.gov.uk/settled-status-eu-citizens-families>> accessed 26 March 2020.

<sup>26</sup> Five years’ continuous residence means that for 5 years in a row the applicant has been in the UK for at least 6 months in any 12-month period. The rules also include a number of justified exceptions.

(Withdrawal Agreement) Act 2020<sup>27</sup> [Section 33] rules out extending the transition period, even if a free trade deal with the EU has not been agreed.

Both pre-settled and settled status provide the right to work in the UK, use the National Health Service (NHS), enrol in education or continue studying, access public funds such as benefits and pensions if they are eligible for them, and travel in and out of the UK. However, pre-settled status only provides a right to stay in the UK for a further 5 years from the date it is granted, but they can apply to change this to settled status once they have 5 years' continuous residence. Once the applicant received settled status, they can stay in the UK for an indefinite period and will also be able to apply for British citizenship.

Apart from concerns regarding the proper technical function of the newly created EUSS or the possible bureaucratic burden it may mean for applicants to prove the length of their stay in the territory of the UK, one of the major concerns is related to the solely digital nature of certifying the new status as the UK does not issue a physical document under the system, and so the status is only registered and certified digitally. Some of the citizens concerned are afraid that, in the case of a solely digital registration, they will be at a disadvantage compared to third-country nationals with documentary status (e.g. when it comes to renting a flat, opening a bank account or getting access to health care);<sup>28</sup> furthermore, online systems can be temporarily offline or can be hacked.<sup>29</sup> Nevertheless, requesting the UK to issue a residence document would have required reopening this part of the Withdrawal Agreement, the scenario of which was continuously rejected by the Commission as it may have generated further requests for modification from the British side.

The second major concern of EU citizens living in the UK is whether they will be given the right status, so whether the British authorities will properly assess the duration of their stay in the UK. The media reported stories of people who were given pre-settled status when they had been living in the UK for far longer than 5 years as well as of a sharp rise in the proportion of EU citizens not considered eligible for settled status, which has caused alarm among campaign groups.<sup>30</sup> The organisation 'the3million' also expressed its concerns about EU citizens possibly being granted the wrong status, that is pre-settled instead of a settled status, as all holders of pre-settled status face an individual hard deadline when their status expires: if they do not apply for settled status before that expiry date, they lose all their rights in the UK.<sup>31</sup>

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<sup>27</sup> See <<http://www.legislation.gov.uk/ukpga/2020/1/contents/enacted>> accessed 26 March 2020.

<sup>28</sup> Access of third-country nationals to health care is a core issue not only in the UK. See for more Éva Geller-Lukács, Laura Gyeney, Gábor Kovács, and Sándor Illés, 'Third-country nationals in the Hungarian public health care sector' (2015) (1) *New Medicine* 29–36.

<sup>29</sup> See <[http://static.wixstatic.com/ugd/0d3854\\_c5075db192444f74a6543588134a2731.pdf](http://static.wixstatic.com/ugd/0d3854_c5075db192444f74a6543588134a2731.pdf)> accessed 8 January 2020.

<sup>30</sup> Rise in EU citizens not getting UK settled status causes alarm, *The Guardian*, 30 August 2019. <<https://www.theguardian.com/politics/2019/aug/30/eu-citizens-uk-settled-status-alarm>> accessed 8 January 2020.

<sup>31</sup> The3million: European Union (Withdrawal Agreement) Bill, A briefing on Pre-Settled Status under the EU Settlement Scheme, January 2020 <[http://0d385427-9722-4ee6-86fe-3905bdbf5e6e.usrfiles.com/ugd/0d3854\\_be6c47d83faa483a841dae953e2bede6.pdf](http://0d385427-9722-4ee6-86fe-3905bdbf5e6e.usrfiles.com/ugd/0d3854_be6c47d83faa483a841dae953e2bede6.pdf)> accessed 8 January 2020.

A third concern is whether the news on the required procedure of application will reach all the EU citizens and their family members in time so that they will not miss the application deadline of 30 June 2021. Some assume that hundreds of thousands of EU citizens who are currently living lawfully in the UK – many of them vulnerable and long-term residents – will not be able to apply on time, with serious consequences.<sup>32</sup> A study<sup>33</sup> has also examined which EU citizens are at risk of failing to secure their rights after Brexit, which also pointed out that one challenge facing any large-scale government programme is coverage. The study identifies four groups of characteristics that may decrease the chance of people applying in due time: people who may not be aware that they can and need to apply; people who are already vulnerable or have reduced autonomy for some reason; people with difficulties accessing or using the application; and people who could have difficulty demonstrating that they have been living in the UK.

If a significant number of eligible people do not apply, enforcing a strict deadline would increase the illegally resident EU-national population in the UK. As a result, perhaps one of the most important unresolved policy questions affecting the completeness of the settled status process is what contingency plans will be in place for people who do not apply by the deadline.<sup>34</sup>

Even though the proposed amendments to the European Union (Withdrawal Agreement) Bill 2020 for an automatic guarantee, a registration scheme and the provision of a physical documented proof of that status were unsuccessful,<sup>35</sup> the Independent Monitoring Authority for the Citizens' Rights Agreements (IMA) was established [Section 15] as required by the WA and a schedule to the act contains provisions relating to its constitution and functions. Complaints can be submitted to this body by EU27 citizens about their treatment, and it can launch inquiries or court proceedings as a follow-up. Nevertheless, according to Steve Peers it might be questioned whether the body is really independent, given the influence which the act gives the Home Secretary over appointments to it.<sup>36</sup>

On 15 January 2020, the European Parliament also adopted a resolution on implementing and monitoring the provisions on citizens' rights in the Withdrawal Agreement<sup>37</sup> noting all the concerns that have so far been identified and reiterating its commitment to monitoring closely how the EU27 and the UK implement Part Two of the Withdrawal Agreement. When

<sup>32</sup> See <<https://us13.campaign-archive.com/?u=9c20dec826b5110f3a7f5e9bc&id=f4c85ae13e>> accessed 8 January 2020.

<sup>33</sup> 'Unsettled Status? Which EU Citizens are at Risk of Failing to Secure their Rights after Brexit?' The Migration Observatory, 12 April 2018, <<https://migrationobservatory.ox.ac.uk/resources/reports/unsettled-status-which-eu-citizens-are-at-risk-of-failing-to-secure-their-rights-after-brexite/>> accessed 8 January 2020.

<sup>34</sup> Ibid.

<sup>35</sup> Amendments 5, 6 and NC5 to the European Union (Withdrawal Agreement) Bill.

<sup>36</sup> Steve Peers, 'The Withdrawal Agreement Implementation Bill' EU Law Analysis blog post, 22 October 2019. <<http://eulawanalysis.blogspot.com/2019/10/the-withdrawal-agreement-implementation.html>> accessed 9 January 2020.

<sup>37</sup> See <[https://www.europarl.europa.eu/doceo/document/B-9-2020-0031\\_EN.html](https://www.europarl.europa.eu/doceo/document/B-9-2020-0031_EN.html)> accessed 19 January 2020.

debating this subject, certain members of the EP practically blackmailed the UK that unless the citizens' rights will be properly ensured in line with the WA, they would not agree to the trade deal that is to be negotiated by the end of the transition period.<sup>38</sup>

### 3 Retention of Residence Rights in the EU27

The Brexit preparedness website of the European Commission contains specific information on measures by the 27 EU Member States ensuring the residence rights of UK nationals who are legally residing in a Member State.<sup>39</sup> Strangely, as of late March 2020 it still does not contain information on the Member States' choice on whether they apply Article 18(1) or Article 18(4) of the WA, but only on what happens in the event of a no deal scenario. Nevertheless, the website also contains an overview table<sup>40</sup> regarding the residence rights of UK nationals in EU27 Member States in a no deal scenario that – contrary to its introductory notes – also states plans and provisions applicable in case of Brexit with an agreement, and the website also lists all the links to the national websites that also contain information as regards the implementation of the WA. Planned preparatory measures in the Member States, especially as regards the national approach chosen for offering a continued right to stay, the administrative measures foreseen and the planned communication methods, as well as the timing of actions, can therefore be found from these sources, yet the pieces of information are scattered and can be misleading as they do not properly distinguish between a no deal scenario and Brexit based on the WA.

It can be nevertheless be concluded that many of the Member States plan to exchange the existing free movement documents to residence permits in line with Article 18(1) of the WA, yet even Article 18(4) provides that those eligible for residence rights have the right to receive a residence document that includes a statement that it has been issued in accordance with the Agreement. Furthermore, Article 26 of the WA provides that the state of work may require UK national frontier workers to apply for a document certifying their rights. In order to follow a common approach, a Commission implementing decision<sup>41</sup> set out provisions on documents to be issued by Member States pursuant to the WA. Council Regulation (EC) No 1030/2002<sup>42</sup> lays down a uniform format for residence permits for third-country nationals containing all

<sup>38</sup> See <[https://www.europarl.europa.eu/doceo/document/CRE-9-2020-01-14-ITM-003\\_EN.html](https://www.europarl.europa.eu/doceo/document/CRE-9-2020-01-14-ITM-003_EN.html)> accessed 19 January 2020.

<sup>39</sup> See <[https://ec.europa.eu/info/brexit/brexit-preparedness/citizens-rights\\_en](https://ec.europa.eu/info/brexit/brexit-preparedness/citizens-rights_en)> accessed 26 March 2020.

<sup>40</sup> See <[https://ec.europa.eu/info/files/overview-table-residence-rights-uk-nationals-eu27-member-states\\_en](https://ec.europa.eu/info/files/overview-table-residence-rights-uk-nationals-eu27-member-states_en)> accessed 26 March 2020.

<sup>41</sup> Commission Implementing Decision of 21.2.2020 on documents to be issued by Member States pursuant to Article 18(1) and (4) and Article 26 of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, C(2020) 1114 final.

<sup>42</sup> Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals [2002] OJ L 157/1.

the necessary information and meeting very high technical standards, therefore, that format should also be used for residence documents to be issued in line with the WA.

This implies that a certain transitory or grace period is foreseen by Member States to carry out the required administrative procedures. While certain Member States (Luxembourg, Croatia, France, Slovenia, Sweden and the Netherlands) aim at a relatively shorter transition period depending on the final date of withdrawal, Hungary, on the other hand, decided to set the end three years after the withdrawal date. The main justification behind the Hungarian decision is not necessarily the increased workflow, but instead a substantive one, as Hungary aims to directly exchange the free movement documents to national long-term residence permits once the length of stay of a UK citizen or family member in Hungary reaches a continuous three years.

This Hungarian approach also leads us to another major question, as Regulation 1030/2002 only sets out provisions regarding the format of the document, but Member States simply stating that they aim to issue this type of document does not give a hint of what conditions will be required or what rights will be provided for those exchanging their status for the specific national one. Based on the WA, Member States shall ensure that UK citizens and their family members will continue to enjoy, among others, residence and employment rights.

One condition that Member States are expected to check with regard to all applications is whether the applicant is a threat to public policy, public security or national security.<sup>43</sup> Second, there is usually a requirement of a certain length of continuous residence set out not only by the EU Long-Term Residence Directive,<sup>44</sup> but also by national schemes that could be applied parallel to the EU long-term regime. Member States may lift the national requirement (this is not an option in the case of the EU Long-Term Residence Directive) as UK citizens and their family members already enjoy the rights that such permanent residence permits usually grant for third-country nationals. On the other hand, when exchanging the previous document to a permit issued in the common format of Regulation 1030/2002, Member States might still insist on verifying the required length of residence in order to avoid temporarily staying UK citizens, such as students, acquiring a life-long residence right without the actual intention to stay in the particular Member State permanently. This would be a similar option to the one chosen by the UK by distinguishing between pre-settled and settled status.

As for administrative issues, with respect to lengthy transition periods, it needs to be ensured that, apart from the issuing Member State, all other Member States recognise those documents that serve as temporary residence documents during the transition period also as residence permits verifying residence rights in the Schengen area when crossing external borders. These documents could be those issued previously in line with Directive 2004/38/EC but still declared valid during the transition, or new documents, even if they do not hold many

<sup>43</sup> See Tóttós Ágnes, 'A közrendre, közbiztonságra veszélyesség uniós szabályozása a legális migráció területén (EU law on threats to public order and public security in the area of legal migration)' in Pécsi Határőr Tudományos Közlemények XIII. (2012, Pécs) 285–297.

<sup>44</sup> The EU Long-Term Residence Directive requires five years of continuous residence.

security elements. Regardless of the wide ranging variations Member States may choose, such documents need to be notified in line with Article 39(1)(a) of the Schengen Borders Code.<sup>45</sup>

## 4 Future Relationship

Free movement ends at the end of the transition period; therefore, unless the transition period is extended or the UK and EU decide to sign a separate treaty as part of the future relationship extending free movement in the future, much stricter immigration rules will apply to those intending to gain new residence rights in the territory of the other party. Therefore, national and EU rules need to be examined in order to see what happens when a national from the other party intends to gain a new entry and residence right after the withdrawal.

Based on primary law [Article 79 (1)–(2) of TFEU] several sectoral Directives have been adopted so far to harmonise the rules of entry and stay of third-country nationals aiming to reside for purposes such as family reunification,<sup>46</sup> long-term residence,<sup>47</sup> studies, research,<sup>48</sup> traineeship,<sup>49</sup> seasonal work,<sup>50</sup> highly-skilled work<sup>51</sup> or being intra-corporate transferees.<sup>52</sup> Nevertheless, on the one hand, Member States are provided with a degree of flexibility as a result of the several optional clauses in the Directive, and on the other hand, Member States' national competence is preserved where the purposes of stay are not harmonised at EU level. Furthermore, a major national competence is guaranteed by primary law, as TFEU 79(5) sets out the following: 'This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory

<sup>45</sup> Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77, 23.3.2016.

<sup>46</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12.

<sup>47</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2004] OJ L 16/44, amended by Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection [2011] OJ L 132/1.

<sup>48</sup> Researchers' status has been dealt with under EU legislation since 2005. Illés, Sándor, Gellérné, Lukács Éva, 'Towards researcher mobility' (2007) (Special issue) *Európai Tükör* 139–155.

<sup>49</sup> Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing [2016] OJ L 132/21.

<sup>50</sup> Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L 94/37. See Ágnes Tóttós, 'The Past, the Present and the Future of the Seasonal Workers Directive' (2014) (1) *Pécs Journal of International and European Law* 45–60.

<sup>51</sup> Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L 155/17.

<sup>52</sup> Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer [2014] OJ L 157/1. See Ágnes Tóttós, 'Negotiations in the Council' in Paul E. Minderhoud, Tesselkje de Lange (eds), *The Intra Corporate Transferee Directive. Central Themes, Problem Issues and Implementation in Selected Member States* (Wolf Legal Publishers 2018, Oisterwijk) 5–17.

in order to seek work, whether employed or self-employed.' Consequently, the actual management, especially that of labour migration, is primarily in the hands of individual Member States, and therefore UK citizens will have to face 27 diverging systems when trying to figure out the future rules should no preferential immigration system be set up between the UK and the EU for newly arriving citizens of the other party.<sup>53</sup>

As regards the British plans, the UK already made it clear in July 2018 that it would design a system that works for all parts of the UK and that UK would welcome workers because 'This will be crucial to supporting its public services, as well as enhancing the UK's attractiveness for research, development and innovation.'<sup>54</sup> In its paper in December 2018<sup>55</sup> the UK confirmed its intention to base its future immigration system on skills. In December 2019, Prime Minister Boris Johnson told Sky<sup>56</sup> that the UK intends to use an Australian style points based system in which there would be three categories of visas in the future – one for highly skilled that is 'exceptional talents'; one for skilled workers with job offers in sectors including the NHS; and a time-limited visa for lower-skilled migrants who will 'come to do particular jobs and stay for a while.'

Presently non-EEA citizens wanting to move to the UK to work or study need to apply for one of a number of visas that range from Tier 1, preserved for investors and 'exceptional talent', to Tier 5 visas for short-term voluntary and educational programmes. The two most common are the Tier 2 skilled worker visas and Tier 4 student visas. Some of these visas allow people to apply to bring dependants, such as children and partners. Visas work on a points-based system, in which people get more points for higher salaries or if their job is on the list of shortage occupations, and most visas come with other conditions, including knowledge of English, the need for a sponsor and agreeing not to claim benefits for a period of time. The criteria have become tougher in recent years: for example, for a Tier 2 'experienced skilled worker' visa, people now need to be paid at least £30,000 to apply, up almost £10,000 from 2011.<sup>57</sup>

The Migration Advisory Committee (MAC) published its report on salary thresholds and points-based systems on 28 January 2020,<sup>58</sup> then a policy paper on the UK's points-based

<sup>53</sup> On 29 March 2019 the outcome of the Fitness Check on the EU Legislation on Legal Migration was adopted, the relevant documents are available here: <[https://ec.europa.eu/home-affairs/what-we-do/policies/legal-migration/fitness-check\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/legal-migration/fitness-check_en)> accessed 9 January 2020.

<sup>54</sup> UK Government, 'Political declaration on the future relationship between the United Kingdom and the European Union' July 2018, <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/786626/The\\_Future\\_Relationship\\_between\\_the\\_United\\_Kingdom\\_and\\_the\\_European\\_Union\\_120319.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/786626/The_Future_Relationship_between_the_United_Kingdom_and_the_European_Union_120319.pdf)> accessed 6 June 2019, para 74–75.

<sup>55</sup> UK Government, 'The UK's future skills-based immigration system' December 2018, <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/766465/The-UKs-future-skills-based-immigration-system-print-ready.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766465/The-UKs-future-skills-based-immigration-system-print-ready.pdf)> accessed 6 June 2019.

<sup>56</sup> Sophy Ridge on Sunday, interview with Boris Johnson, 8 December 2019, <<https://www.skygroup.sky/corporate/media-centre/articles/en-gb/Sophy-Ridge-on-Sunday-Boris-Johnson>> accessed 8 January 2020.

<sup>57</sup> 'UK immigration: No preference for EU workers after Brexit, cabinet agrees' 25 September 2018, <<https://www.bbc.com/news/uk-politics-45634901>> accessed 6 June 2019.

<sup>58</sup> See <<https://www.gov.uk/government/publications/migration-advisory-committee-mac-report-points-based-system-and-salary-thresholds>> accessed 26 March 2020.



immigration system<sup>59</sup> was presented on 19 February 2020. A number of MAC's recommendations were accepted, including to lower the general salary threshold to £25,600, while under the points-based system for skilled workers, applicants will be able to 'trade' characteristics such as their specific job offer and qualifications against a lower salary. There will continue to be different arrangements for a small number of occupations where the salary threshold will be based on published pay scales, and the UK intends to set the requirements for new entrants 30% lower than the rate for experienced workers in any occupation. On 5 March 2020 the UK Government presented the Immigration and Social Security Co-ordination (EU Withdrawal) Bill<sup>60</sup> paving the way for ending free movement system with the EU, strengthening border security, and laying the foundation for a new UK points-based immigration system.

In an Annex to Council decision authorising the opening of negotiations with the UK for a new partnership agreement the EU dedicates a complete chapter to mobility (Chapter 9), although the aim of setting out a close relationship as regards legal migration between the departed parties cannot be found in the document. Instead, the EU's negotiation mandate only talks about envisaged partnership that should aim at setting out conditions for entry and stay for purposes such as research, study, training and youth exchanges.<sup>61</sup> Nevertheless, the UK's approach to negotiations contains no foreseen partnership regarding legal migration.<sup>62</sup>

### III Issues of Illegal Migration and Asylum

#### 1 The Return of Illegally Staying Migrants

At the end of 2010, the common rules on return were set out by the so-called Return Directive (Directive 2009/52/EC),<sup>63</sup> which provides for clear, transparent and fair common rules for the return and removal of irregularly staying migrants, the use of coercive measures, detention and re-entry, while fully respecting the human rights and fundamental freedoms of the persons concerned. On 12 September 2018 the Commission proposed the recast<sup>64</sup> of this Directive as a part of a package of measures following up the European Council of 28 June 2018 that underlined the need to step up the effective return of irregular migrants significantly,

<sup>59</sup> See <<https://www.gov.uk/government/publications/the-uks-points-based-immigration-system-policy-statement/the-uks-points-based-immigration-system-policy-statement>> accessed 26 March 2020.

<sup>60</sup> See <<https://www.gov.uk/government/publications/immigration-bill-2020-overarching-documents>> accessed 26 March 2020.

<sup>61</sup> *Ibid*, para 57.

<sup>62</sup> See <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/868874/The\\_Future\\_Relationship\\_with\\_the\\_EU.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/868874/The_Future_Relationship_with_the_EU.pdf)> accessed 26 March 2020.

<sup>63</sup> Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [2009] OJ L 168/24.

<sup>64</sup> Commission, 'Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast) A contribution from the European Commission to the Leaders' meeting in Salzburg on 19–20 September 2018' COM (2018) 634 final.

and welcomed the intention of the Commission to make legislative proposals for a more effective and coherent European return policy.

Nevertheless, the UK is not bound by the present Return Directive either, as a result of its opt-out. The United Kingdom did not opt into the previous version of the Directive, adopted in 2008, on the basis that it did not deliver the strong returns regime required by the UK and made the process overly bureaucratic according to its official position.<sup>65</sup> The UK believes this continues to be the case though it recognises that the recast seeks to establish clearer returns procedures and includes a number of additional provisions to those set out in the previous version of the Directive. Nevertheless, in its justification not to opt in, it is stated that UK return procedures have continued to be a success in comparison to those of other EU Member States, with strong relationships with third countries and new initiatives such as biometric returns.

One of the reasons for the low rate of effective return among migrants who have been ordered to leave the EU is the lack of cooperation from some third countries in identifying and readmitting their nationals. This is why the EU cooperates very actively with the home countries of irregular migrants, in particular through so-called readmission agreements. The 4 December 2018 Communication of the Commission on the 'Progress under the European Agenda on Migration'<sup>66</sup> acknowledged that the EU's return policy would not be effective without operational cooperation with third countries and 'although readmission is a sensitive political topic in many countries of origin, a cooperative approach has helped operationalise third countries' obligations on readmission.'<sup>67</sup> In line with this cooperative approach, the EU has been negotiating formal readmission agreements as well as less formal operational arrangements with the more reluctant third countries. As a result of these efforts, the EU presently has 17 readmission agreements<sup>68</sup> and 6 operational arrangements.<sup>69</sup>

The LIBE Committee of the European Parliament had a brief study prepared on 'The implications of the UK's withdrawal from the EU on readmission cooperation'<sup>70</sup> that examines the consequences of the UK's decision to withdraw from the European Union (EU) on the EU's readmission policy, as well as the framework for relevant future cooperation between the UK and the EU in this area. The study concludes that while the UK's withdrawal will have a limited effect on the EU as regards readmission, the implications for the UK of its withdrawal from

<sup>65</sup> Caroline Nokes (UK Minister of State for Immigration), 'Written statement on the European Union JHA Opt-In Decision: Proposal to Recast the Returns Directive' HCWS1290, 31 January 2019, <<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2019-01-31/HCWS1290>> accessed 6 June 2019.

<sup>66</sup> Commission, 'Communication to the European Parliament, the European Council and the Council, Managing migration in all aspect: Progress under the European Agenda on Migration' COM(2018) 798 final.

<sup>67</sup> Ibid, 9.

<sup>68</sup> Hong Kong, Macao, Sri Lanka, Albania, Russia, Ukraine, FYROM, Bosnia and Herzegovina, Montenegro, Serbia, Moldova, Pakistan, Georgia, Armenia, Azerbaijan, Turkey, Cape Verde.

<sup>69</sup> Afghanistan, Guinea, Bangladesh, Ethiopia, The Gambia, Côte d'Ivoire.

<sup>70</sup> European Parliament Policy Department for Citizens' Rights and Constitutional Affairs, 'Briefing on the implications of the UK's withdrawal from the EU on readmission cooperation' <[http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/596843/IPOL\\_BRI\(2018\)596843\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/596843/IPOL_BRI(2018)596843_EN.pdf)> accessed 6 June 2019.

the EU are far greater, as EU readmission agreements and mixed agreements containing readmission clauses will cease to apply to the UK following its withdrawal.

This implies that the UK not only needs to negotiate its own readmission agreements with the relevant third countries, but the geographical proximity and migration patterns will necessitate continuing cooperation between the EU and UK on readmission. It also suggests that a readmission clause pertaining to the readmission of their own nationals should be included in the future EU–UK relationship agreement alongside an EU–UK readmission agreement covering third country nationals and stateless persons.

## 2 Asylum Policy

UK is signatory to the 1951 Geneva Convention on the Status of Refugees<sup>71</sup> and the 1967 Protocol,<sup>72</sup> and has ratified both. The Maastricht Treaty had made asylum an EU matter, albeit within the framework of intergovernmental cooperation, yet under the Treaty of Amsterdam, asylum became an area of supranational EU competence, thereby establishing the foundations for a Common European Asylum System (hereinafter also referred to as CEAS).

The CEAS is a legislative framework established by the EU. Based on “accordance” with the Convention relating to the Status of Refugees (Refugee Convention) as amended by its 1967 Protocol, the CEAS regulates and sets common standards in the field of international protection with a view to developing common concepts and criteria, and harmonising the interpretation and application of asylum law among EU Member States.<sup>73</sup>

The first phase of the CEAS included secondary legislation enacted between 2000 and 2005 based on defining common minimum standards to which Member States were to adhere in connection with the reception of asylum-seekers (Reception Conditions Directive);<sup>74</sup> qualification for international protection and the content of the protection granted (Qualifications Directive);<sup>75</sup> and procedures for granting and withdrawing refugee status (Asylum Procedures Directive).<sup>76</sup>

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<sup>71</sup> Convention relating to the Status of Refugees, opened for signature on 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

<sup>72</sup> Protocol relating to the Status of Refugees, opened for signature on 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

<sup>73</sup> European Asylum Support Office, ‘An Introduction to the Common European Asylum System for Courts and Tribunals, A Judicial Analysis’ August 2016, <[https://www.easo.europa.eu/sites/default/files/public/BZ0216138\\_ENN.PDF](https://www.easo.europa.eu/sites/default/files/public/BZ0216138_ENN.PDF)> accessed 6 June 2019, 13.

<sup>74</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L 31/18.

<sup>75</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L 304/12.

<sup>76</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L 326/13.

The issue of secondary movement was first addressed in legislative form by the 1990 Dublin Convention, which set criteria for determining the State responsible for examining asylum applications lodged in one of the Member States of the European Communities. The Dublin system presupposed a similar treatment of asylum applicants and refugees in Member States. Such harmonisation of Member States' asylum law was first pursued through intergovernmental cooperation under the 1992 Maastricht Treaty (Title VI on cooperation in the field of Justice and Home Affairs).<sup>77</sup>

Nevertheless, the first phase of CEAS also reformed the Dublin Convention, resulting in the so-called Dublin II Regulation;<sup>78</sup> furthermore, legislation was also adopted that established the Eurodac database for storing and comparing fingerprint data in order to provide a successful implementation of the Dublin system.<sup>79</sup>

However, the Hague Programme<sup>80</sup> in 2004 already declared that the first phase of the CEAS should be quickly followed by a second phase of development, with a change of emphasis from minimum standards to a common asylum procedure on the basis of a uniform protection status. Consequently, the recast of all the elements of the CEAS was negotiated and adopted by 2013. Nevertheless, when it comes to EU asylum policies, the UK currently combines the best of both worlds. On the one hand, it has not opted into most of the second phase reforms. While the UK had opted into the first round of legislation (2000-2005), it decided to not opt into the recast of these directives (2008–2013),<sup>81</sup> in order to maintain its national rules the UK chose not to participate in the corresponding second phase CEAS instruments due to concerns over the limits they would place on its national system. As a result, the UK remained bound by the directives adopted as part of the first phase of the CEAS, as these directives established minimum standards and allowed Member States a large degree of flexibility in implementation. EU asylum harmonisation had indeed entailed liberalisations against the will of some Member States, and the UK made use of its right to opt out, in part to protect restrictive practices, such as 'detained fast track', which would not have been in line with the EU's policies.

<sup>77</sup> European Asylum Support Office, 'An Introduction to the Common European Asylum System for Courts and Tribunals, A Judicial Analysis' August 2016, <<https://www.easo.europa.eu/sites/default/files/public/BZ0216138ENN.PDF>> accessed 6 June 2019, 13.

<sup>78</sup> Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 50/1.

<sup>79</sup> Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention [2000] OJ L 316/1.

<sup>80</sup> European Council, 'The Hague Programme: Strengthening Freedom, Security and Justice in the European Union' 13 December 2004 [2005] OJ C 53/1.

<sup>81</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L 337/9.

On the other hand, the UK opted into the recast Dublin Regulation (Dublin III).<sup>82</sup> It was an essential interest of the UK to cooperate with the Member States regarding the fight against illegal secondary movements and the phenomenon of asylum shopping. The UK has therefore participated in the Dublin system since it was inaugurated as a Convention in 1990. The most recent iteration of the agreement, Dublin III, decides which nation is responsible for processing asylum claims, which is usually the first country of entry in the EU. With asylum-seekers usually coming from the Middle East and Africa, being geographically located in the North-West of the EU entailed a very favourable position for the UK under the Dublin Regulation. Unless an asylum-seeker has close family in the UK or a visa from the UK, the UK is not in charge of processing an application.

It is, of course, difficult to predict what the exact implications of leaving the Common European Asylum System will be for the UK. Even when the UK has left the EU, it will still ‘benefit’ from restrictive border policies, such as the EU–Turkey deal,<sup>83</sup> the closure of the Balkan route and Frontex operations aimed at deterring irregular migrants and asylum-seekers. However, leaving the Dublin Regulation might imply that the UK is less able to control the immigration of third-country nationals, particularly asylum-seekers; therefore leaving Dublin leaves the UK in a position of weakness vis-à-vis its European partners.

While the role of the Dublin Regulation as an effective instrument for controlling the immigration of third country nationals has often been questioned, given the wave-throughs from border countries, policy-makers from North-Western EU Member States, including the UK, have always wanted to keep it. They usually highlight two reasons for doing so. First, they felt that Dublin sent a signal to asylum-seekers that they would not be able to choose where to apply for asylum. Second, policy-makers argued that Dublin would also send a signal to voters that governments are in control of migration.<sup>84</sup>

### 3 Implications of the UK Leaving the Common European Asylum System

‘Overall, the international asylum law rules are fragmented in various ways: the UN Refugee Convention only applies to certain issues, and has no enforcement mechanism; the ECHR case law is ad hoc and indirect; and while the EU asylum laws are potentially more coherent

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Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L 180/60.

Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L 180/96.

<sup>82</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L 180/31.

<sup>83</sup> EU–Turkey statement, 18 March 2016, <<https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>> accessed 6 June 2019.

<sup>84</sup> Zaun (n 1).

than the other two sources, only some of those EU laws apply to the UK.<sup>85</sup> Even if the UK has a selective relationship regarding CEAS, leaving the EU could still have significant implications for British asylum policy, as was also extensively examined by the European Union Committee of the House of Lords.<sup>86</sup> The Committee's report identified two main areas where concerns arise: one related to the UK's departure from the Dublin system, the other one is the potential impact of Brexit on the UK's bilateral relationships, especially as regards effective cooperation with French and Belgian border agencies.

As regards the UK's participation in the Dublin system, the figures<sup>87</sup> show that a larger number of Dublin transfers to the UK were under Articles 8 and 9 of the Regulation: under certain conditions, the applications of some of those in EU countries, whose relatives are already in the UK, should be dealt with by the UK. In contrast, a larger number of transfers out were under Article 13, which mandates that asylum seekers who move on after being registered in a country of first arrival can be returned to that country. The Committee's report points out the negative consequences regarding both directions of Dublin transfers:

UK withdrawal from the Dublin System after Brexit would result in the loss of a safe, legal route for the reunification of separated refugee families in Europe. Vulnerable unaccompanied children would find their family reunion rights curtailed, as Dublin offers them the chance to be reunited with a broader range of family members than under current UK Immigration Rules. [...] After Brexit, the UK is also likely to find it more difficult to enforce the principle that people in need of protection should claim asylum in the first safe country that they reach. Without access to the Eurodac database, it is unclear how the UK would be able to identify asylum applicants who have already been registered in another European country. And a new returns agreement (or agreements) would be needed for the UK to be able to send asylum seekers back to their first point of entry to the EU.<sup>88</sup>

In a reference for preliminary ruling,<sup>89</sup> even the potential impact of Brexit on the present implementation of the provisions of the Dublin III Regulation before the withdrawal was examined. S.A. and M.A. challenged the transfer decision before the International Protection Appeals Tribunal of Ireland, primarily on the basis of Article 17 of the Dublin III Regulation and on grounds relating to the withdrawal of the UK from the EU. By way of derogation from Article 3(1), Article 17(1) of that regulation provides that each Member State may decide to

<sup>85</sup> Steve Peers, 'Manufacturing Discontent: Q and A on the legal issues of asylum-seekers crossing the Channel' 3 January 2019, <[https://eulawanalysis.blogspot.com/2019/01/manufacturing-discontent-q-and-on-legal.html?fbclid=IwAR2l5ryxUE7G15RrbZRFERqqEXotSY\\_FQ—m5mZrmL1KyyJFrkzkDoOAUs0](https://eulawanalysis.blogspot.com/2019/01/manufacturing-discontent-q-and-on-legal.html?fbclid=IwAR2l5ryxUE7G15RrbZRFERqqEXotSY_FQ—m5mZrmL1KyyJFrkzkDoOAUs0)> accessed 6 June 2019.

<sup>86</sup> 'Brexit: refugee protection and asylum policy' House of Lords European Union Committee, 48th Report of Session 2017–19, 11 October 2019, <<https://publications.parliament.uk/pa/ld201719/ldselect/lddeucom/428/428.pdf>> accessed 19 January 2020.

<sup>87</sup> Transfers in to the UK: 131 in 2015, 558 in 2016, and 461 in 2017. Transfers out of the UK: 510 in 2015, 362 in 2016, and 314 in 2017, <<https://www.migrationwatchuk.org/briefing-paper/444>> accessed 6 June 2019.

<sup>88</sup> 'Brexit: refugee protection and asylum policy' House of Lords European Union Committee Report, 3.

<sup>89</sup> Case C-661/17 *M.A. and Others v The International Protection Appeals Tribunal and Others* [2019] ECLI:EU:C:2019:53.

examine an application for international protection lodged with it by a third-country national or a stateless person, even if that examination is not its responsibility under the so-called Dublin criteria. In its judgement,<sup>90</sup> the CJEU finds it clear from the wording of Article 17(1) of the Dublin III Regulation that that provision is optional in so far it leaves it to the discretion of each Member State to decide to examine an application for international protection. It therefore implies that, regardless of a fear that might exist in certain applicants that their rights may be in danger because of being transferred to the UK that is in the process of withdrawal from the EU, no Member State could be forced to apply the discretionary clause as it is the exclusive right of the Member State. We could also add to the reasoning of the Court that such fears are not necessarily justified by the withdrawal of the UK, as we could see that the UK is already bound by a lower level of guarantees under EU law.

#### 4 Future Relationship

‘Irregular migrants and asylum-seekers will encounter a lot of practical and legal barriers when trying to enter the UK. Some of the practical obstacles – such as geographic location – will obviously remain, but some of the legal obstacles, especially those resulting from the Dublin Regulation, will disappear, and potentially make the UK less able to control the migration of third-country nationals.’<sup>91</sup> Nevertheless, at least in the short term, Brexit has an impact on illegal movements, as border officials had noticed a clear trend during interviews with recently-arrived asylum seekers and migrants, who said smugglers had warned them that the window of opportunity to cross into Britain would close after Brexit.<sup>92</sup> In the future, the UK will not only have to put much diplomatic effort into negotiating readmission agreements with third countries, but it may also wish to include the issue of return and readmission in the area of its future relationship with the EU. The European Parliament also recommended<sup>93</sup> that it would be beneficial for the EU to include a readmission clause in the future relationship agreement alongside the negotiation of an EU-UK readmission agreement, which would extend not only to own nationals, but to third-country nationals as well.

In its paper on several areas of the future relationship<sup>94</sup> the UK dedicated a separate subsection to issues of asylum and illegal migration (2.5.1), while stating that ‘it is vital that the UK and the EU establish a new, strategic relationship to address the global challenges of asylum and illegal migration.’ The UK also proposed a ‘comprehensive, “whole of route” approach that includes interventions at every stage of the migrant journey and to ensure that no new incentives are created to make dangerous journeys to Europe.’ According to the British

<sup>90</sup> M.A. Judgement, paras 53–61.

<sup>91</sup> Zaun (n 1).

<sup>92</sup> ‘Brexit fears are driving migrants to make dangerous journeys to Britain before its borders ‘close’ Newsweek, 2 January 2020, <<https://www.newsweek.com/brexit-fears-driving-surge-migration-britain-english-channel-1480061>> accessed 9 January 2020.

<sup>93</sup> European Parliamentary Research Service Brief, 3.

<sup>94</sup> UK Government (n 54) paras 74–75.

paper, it should, *inter alia*, cover ongoing operational cooperation, for example working with Frontex to strengthen the EU's external border, and Europol to combat organised immigration crime; a new legal framework to return illegal migrants and asylum-seekers to a country they have travelled through or have a connection with, based on a clear legal structure, facilitated by access to Eurodac or an equivalent system; new arrangements that enable unaccompanied asylum-seeking children in the EU to join close family members in the UK, where it is in their best interests and vice versa; a continued strategic partnership to address the drivers of illegal migration by investing and building cooperation in source and transit countries; and continued UK participation in international dialogues with European and African partners.

It therefore seems that the UK wishes to maintain active cooperation with the EU, and even more so wishes to somehow be a part of the implementation of certain elements of the EU *acquis*. This was also confirmed in July 2018 by the Political Declaration on the future relationship, which states that

The Parties will cooperate to tackle illegal migration, including its drivers and its consequences, whilst recognising the need to protect the most vulnerable. This cooperation will cover: *a*) operational cooperation with Europol to combat organised immigration crime; *b*) working with the European Border and Coastguard Agency to strengthen the Union's external border; and *c*) dialogue on shared objectives and cooperation, including in third countries and international fora, to tackle illegal migration upstream.<sup>95</sup>

The House of Lords European Union Committee in its report in November 2019 was also of the opinion that 'it is vital that refugees and asylum seekers are considered in any agreement on the future UK–EU relationship' and highlighted that this 'asylum cooperation should take the Dublin System as its starting point and would ideally be based on continued UK access to the Eurodac database.'<sup>96</sup> However, as regards the involvement of the UK in the implementation of the Dublin system and Eurodac, I see two major obstacles. First of all, the Dublin system and access to Eurodac is only provided to non-EU states that are Schengen associate states, but not to other third countries. Second, the modification of the Dublin system,<sup>97</sup> as one of the key elements of a wider asylum reform package, is presently being negotiated, although unsuccessfully.<sup>98</sup>

The UK Government, exactly because of the most debated element, the relocation system, has decided not to opt in to the EU proposal for the Dublin IV Regulation as 'the proposed Dublin IV Regulation binds Member States to participate in a quota-based distribution

<sup>95</sup> UK Government (n 54) para 114.

<sup>96</sup> 'Brexit: refugee protection and asylum policy' House of Lords European Union Committee Report, 4.

<sup>97</sup> Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)' COM (2016) 0270 final.

<sup>98</sup> See Ágnes Tóttós, 'How to Interpret the European Migration Crisis Response with the Help of Science' in Zoltán Hautzinger (ed), *Dynamics and Social Impact of Migration* (Dialóg Campus 2019, Budapest) 69–81.



scheme.<sup>99</sup> The House of Lord European Union Committee nevertheless suggests that the UK Government should reconsider participating in a responsibility sharing mechanism for asylum seekers, yet even this recommendation makes it conditional on the system operating on a voluntary basis.<sup>100</sup>

However, there is one particular issue in which the UK aims to negotiate with the EU as part of the future relationship. Section 17 (Family unity for those seeking asylum or other protection in Europe) of the European Union (Withdrawal) Act adopted in 2018 set out the obligation for the minister to negotiate an agreement with the EU under which, after Brexit, an unaccompanied child who has made an application for international protection to a member State may, if it is in the child's best interests, come to the UK to join a relative who is a lawful resident of the UK, or has made a protection claim which has not been decided, and an unaccompanied child in the UK, who has made a protection claim, may go to a Member State to join a relative there, in equivalent circumstances.<sup>101</sup> Nevertheless, the new European Union (Withdrawal Agreement) Act 2020 removes the obligation to agree a deal and only requires a government minister to make a statement setting out policy on the subject within two months.<sup>102</sup>

In line with the UK's situation described above, the negotiation mandate of the UK sets out its interest regarding two issues related to future relationship with the EU in the area of asylum and illegal Migration. First, the UK makes a specific commitment to seek to negotiate a reciprocal agreement for family reunion of unaccompanied children seeking asylum in either the EU or the UK, with specified family members in the UK or the EU, where this is in the child's best interests [Section 54]. Second, the UK indicates its openness to an agreement regulating asylum and migrant returns between the UK and the EU, or alternatively with individual Member States, underpinned by data sharing, to help counter illegal migration and deter misuse of our asylum systems [Section 55].

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<sup>99</sup> Robert Goodwill (UK Minister of State for Immigration), 'Written statement on European Union opt in decision: Dublin IV Regulation' HCWS370, 16 December 2016, <<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2016-12-16/HCWS370/>> accessed 6 June 2019.

<sup>100</sup> 'Brexit: refugee protection and asylum policy' House of Lords European Union Committee Report, 4.

<sup>101</sup> European Union (Withdrawal) Act 2018, Section 17 <<http://www.legislation.gov.uk/ukpga/2018/16/section/17/enacted>> accessed 9 January 2020.

<sup>102</sup> European Union (Withdrawal Agreement) Bill, Part 4 Section 37, <<https://publications.parliament.uk/pa/bills/cbill/58-01/0001/20001.pdf>> accessed 9 January 2020.

## IV Conclusions

After a detailed examination of the extent to which EU *acquis* on asylum and migration applies to the UK, it is easy to agree with the following statement of Professor Peers:

While some in the 2016 referendum campaign falsely claimed or implied that the UK has no control over its borders as an EU Member State, in fact the UK has an opt out from the EU's Schengen system of (in principle) open internal borders, as well as an opt out on EU law on asylum, immigration and criminal law. In practice, the UK only opted in to some EU asylum laws: all of the first phase laws, but only some of the second phase laws (Dublin, Eurodac and the asylum agency).<sup>103</sup>

On the other hand, as the mobility of EU citizens does not belong to the EU policy on Justice and Home Affairs, but instead is a key component of the internal market, where the UK does not presently enjoy opt-out rights, the control the UK actually wished to take back was not in the realm of immigration. It was in the field of free movement of persons, a cornerstone of the EU, and as a result the UK is even in the process of giving up on its membership. Nevertheless, only 'new immigration' could be covered by a more restrictive policy by the EU, while EU citizens already in the territory of the UK and their family members have acquired extensive residence and equal treatment rights that need to be preserved.

Consequently, extensive tasks arise on both sides of the English Channel as regards protection of citizens' rights: designing, legislating, administering communicating and enforcing. A number of concerns regarding the UK's Settlement Scheme have already arisen, such as the lack of physical document attesting the status, the ambiguity of proper assessment of the length of stay, and whether the procedure is properly available for all EU citizens and family members, especially the most vulnerable ones, and consequently, how harsh consequences would those not applying in due time need to face.

While it is true that about half of the EU27 Member States also opted for requiring the change of status to a national one similarly to the UK, their aim is supposedly to be able to issue a document with biometric data used for third-country nationals in the EU, thus safeguarding the effective retention of rights in line with the WA.

Apart from ensuring the future enjoyment of acquired rights and designing and implementing its national system accordingly, the UK and the EU27 should also start envisioning the elements of a future relationship in the area of migration and asylum. The UK and the EU will not stop facing common challenges in this regard, and the lack of European solutions will inevitably affect the situation of the UK. Therefore, the area of fighting illegal migration and the abuse of asylum systems while protecting the most vulnerable ones could be a policy area where close cooperation would have major significance for both the EU and the UK.

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<sup>103</sup> Peers (n 85).

Nevertheless, a divorce is a major change in any partnership, regardless of the parties' good intentions, as Commission President Ursula von der Leyen also expressed it:

The bonds between us will still be unbreakable. We will still contribute to each other's societies, like so many Brits have done in the EU, and as so many EU citizens do here every day in the UK. [...] But the truth is that our partnership cannot and will not be the same as before. And it cannot and will not be as close as before – because with every choice comes a consequence. With every decision comes a trade-off.<sup>104</sup>

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<sup>104</sup> Speech by President von der Leyen at the London School of Economics on 'Old friends, new beginnings: building another future for the EU-UK partnership' 8 January 2020, <[https://ec.europa.eu/commission/presscorner/detail/en/speech\\_20\\_3](https://ec.europa.eu/commission/presscorner/detail/en/speech_20_3)> accessed 8 January 2020.

# **Brexit and Security: What about Data Protection and Strategic Intelligence Information Sharing after the UK's Departure?**

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## **I Introduction**

As the EU Commissioner for Security Union, Julian King, remarked in June 2018,<sup>1</sup> maintaining the closest – and as efficient as possible – police and security cooperation after Brexit is undoubtedly a key interest of both the European Union (EU) and the United Kingdom (UK), with a view to safeguarding the security of UK and EU citizens in a world constantly threatened by international terrorism.<sup>2</sup> Latest events have demonstrated that negotiations in the field of security cover one of the ‘hottest’ areas in the Brexit process.<sup>3</sup> As known, a treaty between the EU and the UK on security matters may represent the future scenario, but its concrete framing is not free from doubts, uncertainties and debatable issues that are being discussed at the political and institutional level.

As early as in December 2016, the European Union Committee of the UK House of Lords published a report<sup>4</sup> in which it already pointed out the outstanding areas for future security cooperation between the UK government and the EU at the end of the UK's exit process. Such key issues are agencies and mechanisms to share crucial intelligence and information on criminal activities (such as Europol and Eurojust); data sharing systems for law enforcement purposes (the main reference here is to the second Generation Schengen Information System, Passenger

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<sup>1</sup> House of Lords, Select Committee on the European Union, Home Affairs Sub-committee, ‘Corrected Oral Evidence: Brexit: the proposed EU-UK security treaty’ 14 June 2018, <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-home-affairs-subcommittee/brexit-the-proposed-ukeu-security-treaty/oral/85932.html>> accessed 24 March 2019, Q 115 (Sir Julian King).

<sup>2</sup> For an updated view on terrorism and the state of the art on the struggle against it, Fionnuala Ní Aoláin, Colm Campbell, ‘Managing Terrorism’ (2018) (9) *Journal of National Security Law & Policy* 365.

<sup>3</sup> As demonstrated by the number of public consultations held on the Brexit phenomenon. See for an overview The Consultation Institute, ‘Is Brexit Changing the Practice of Public Consultations?’ October 2017, <<https://www.consultationinstitute.org/brexit-changing-practice-public-consultations/>> accessed 24 March 2019.

<sup>4</sup> House of Lords, European Union Committee, ‘Brexit: the proposed UK-EU security treaty’ July 2018, <<https://www.parliament.uk/uk-eu-proposed-security-treaty/>> accessed 24 March 2019.

Name Records and the Prüm database); and criminal justice tools (the European Arrest Warrant is certainly the major one, but others can be mentioned, such as the European Investigation Order).

This paper focuses on the first mentioned area and, specifically, on the sharing of intelligence information and how it might be dealt with after Brexit. To this aim, this research is divided as follows.

Section II engages in the examination of the state of the art with regard to the UK's role in security cooperation. The aim of this Section is to provide the reader with a clear idea of how crucial the issue is and how decisive the UK's involvement proved to be over the years. In doing so, particular attention is paid to activities pertaining to the Europol area.

Section III focuses on feasible patterns of cooperation in the Europol initiative after the final exit deal. It considers potentially applicable schemes of Europol-third country partnerships with a view to a critical assessment of whether (or not) they could suit the UK's position after Brexit. In doing so, a number of factors are taken into account, such as the fact that the UK is a major contributor of data to Europol; the accountability of Europol to the Court of Justice of the EU (ECJ); the need to take EU legislation and case law on data protection and budgetary issues into account.

Section IV hence assesses what is concretely being done. As is generally known, the UK government proposed to negotiate a treaty with the EU, aimed at providing a legal basis for future security cooperation. The way in which security issues may be influenced by the general Withdrawal Agreement, still at the draft stage, is considered as well.

Finally, some concluding remarks take stock of the findings that emerged in Sections I, II and III and consider them in light of concrete potential effects in the future. The claim of this paper is that the framing of mechanisms aimed at accessing and sharing security information through participation to agencies such as Europol should be prioritised even over other – undoubtedly vital – areas of security cooperation. This need appears to be shared also by the UK political environment. Hence, is the negotiation of an 'omnibus' treaty the best solution possible to serve such an aim? Would there be more efficient – and equally feasible – ways to ensure the maintenance of the UK's role in intelligence sharing in the aftermath of its exit from the EU? Such questions are discussed in this research, which tries to answer them and highlights some points that cannot be set aside if the UK wishes to avoid a decrease in its own and the EU's level of security after its departure.

## **II The UK and Security Cooperation: The State of the Art**

The main EU tool aimed at protecting security by countering trans-border criminal activities is cooperation in the area of Justice and Home Affairs (JHA). Cooperation on such issues has existed since 1975, when member states established an intergovernmental committee aimed

at coordinating counter-terrorism policies after the attacks perpetrated by terrorist organisations during the Olympic Games held in Munich in 1972.<sup>5</sup>

In 1993, what used to be a mere working group established by interior ministers of the member states<sup>6</sup> was institutionalised through the Treaty of Maastricht, bringing Justice and Home Affairs Cooperation within the Third Pillar.<sup>7</sup> Further developments can be traced to the entry into force of the Treaty of Amsterdam that, in 1999, renamed the Third Pillar ‘Police and Judicial Cooperation in Criminal Matters’ and shifted issues such as immigration, border control and asylum to the First Pillar. As is widely known, the Treaty of Lisbon, which entered into force in 2009, abolished the previously existing pillar structure and substantively restructured the EU Treaties, now existing in their consolidated version.<sup>8</sup> The main innovation that the Lisbon Treaty brought with regard to JHA cooperation is that many of its areas are now addressed through the ordinary legislative procedure with the qualified majority voting of the Council and full co-legislative role of the European Parliament (EP). It has not been always like that, since, before 2009, such issues were dealt with through a procedure in which the EP had only a consultative role and member states could exercise a veto on such matters. Even more importantly, the Treaty of Lisbon subjected JHA matters to the judicial review of the ECJ. This was not possible before, since they used to escape the review of the ECJ as well as the Commission’s powers – meaning that the Commission had no way of triggering an infringement procedure if member states failed to comply with such measures. Notably, ‘Europol’s structure, operation, field of action and tasks’ are among the JHA matters that the Treaty of Lisbon subjected to the ordinary legislative procedure.<sup>9</sup>

Since this paper focuses on the UK, some remarks on such country’s stance with regard to JHA are essential. Together with Ireland, the UK decided that its participation to JHA measures should not be automatic. To this aim, it negotiated Protocol 21 to the Lisbon Treaty.<sup>10</sup> Protocol 21 is defined as an ‘opt-in’ instrument. Pursuant to it, the UK can choose on a case-by-case basis whether it wants to participate in the adoption and application of any proposed JHA measures. This decision is not a prerogative of the government, since procedures ensuring parliamentary scrutiny are envisaged. The UK government traditionally took a positive stance towards JHA cooperation,<sup>11</sup> recognising it as a key initiative to enhance

<sup>5</sup> See Steve Peers, ‘The rise and fall of EU justice and home affairs law’ in Maria Fletcher, Ester Herlin-Karnell, Claudio Matera (eds), *The European Union as an Area of Freedom, Security and Justice* (Routledge 2016) 11.

<sup>6</sup> It had been named ‘Trevi’, standing for *Terrorisme, Radicalisme, Extremisme et Violence Internationale*. See August Reinisch, ‘The Action of the European Union to Combat International Terrorism’ in Andrea Bianchi (ed), *Enforcing International Law Norms Against Terrorism* (Hart Publishing 2004) 119, 122.

<sup>7</sup> Paul Craig, ‘Development of the EU’ in C Barnard, S Peers (eds), *European Union Law* (2nd edn, OUP 2017, Oxford) 9, 12.

<sup>8</sup> See David Phinnemore, *The Treaty of Lisbon: Origins and Negotiations* (MacMillan 2013).

<sup>9</sup> See art 88 TFEU.

<sup>10</sup> Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice [2016] OJ C 202/2016, 295.

<sup>11</sup> UK Government, ‘Report to Parliament on the Application of Protocols 19 and 21 to the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) (‘the Treaties’) in Relation to EU Justice

security and tackle issues such as immigration and cross-border crimes. This is demonstrated by the high number of opt-in decisions in JHA initiatives taken by the UK in recent years. Nonetheless, in July 2013, the UK government decided to opt out from all measures connected to this field adopted before the Lisbon Treaty<sup>12</sup> and simultaneously re-join 35 of them, accepting both the enforcement powers of the European Commission and the jurisdiction of the ECJ on their implementation.<sup>13</sup>

## 1 EU–UK Cooperation in Security Matters Nowadays: A General Overview

Focusing on the tools and mechanisms related to cooperation in the area of security to which the UK currently takes part, the following can be considered as the most important ones: the EAW;<sup>14</sup> Europol and Eurojust; the Schengen Information System; the European Criminal Record Information System; the Prüm system; and the legal instruments aimed at the transfer and management of Passenger Name Record (PNR) data, both with regard to the EU scheme – i.e. Directive 2016/681<sup>15</sup> – and agreements with third countries.<sup>16</sup>

As stated before, the UK decision to join such measures and initiatives, although it had the chance to avoid involvement in them – by way of Protocol 21<sup>17</sup> – was based on a positive evaluation of their beneficial effect on the UK itself. Additionally, there is clear evidence<sup>18</sup> that benefits are mutual: other EU countries derive significant advantages from the UK's participation in police and security cooperation. These are all factors that deserve to be taken into account in assessing the effects of the UK's departure on the 'security rate' of the European area. Moreover, this evidently shows that cooperation between the EU and the UK on these matters should be perpetuated and, if possible, kept to the same level as nowadays. And

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and Home Affairs (JHA) Matters (1 December 2009 – 30 November 2010)' January 2011, <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/228737/8000.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228737/8000.pdf)> accessed 24 March 2019.

<sup>12</sup> Protocol (No 36) on transitional provisions [2008] OJ L115/322.

<sup>13</sup> House of Lords, European Union Committee, 'EU Police and Criminal Justice Measures: The UK's 2014 Opt-Out Decision' 23 April 2013, <<https://www.parliament.uk/documents/the-uks-2014-opt-out-decision1.pdf>> accessed 24 March 2019.

<sup>14</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision [2002] OJ L 190/2002, 1.

<sup>15</sup> Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime [2016] OJ L 119/132.

<sup>16</sup> For example, PNR agreements with the United States. For an overview of PNR agreements with third country, Arianna Vendaschi, Gabriele Marino Noberasco, 'From DRD to PNR: Looking for a New Balance between Privacy and Security' in David Cole, Federico Fabbrini, Stephen Schulhofer (eds), *Surveillance, Privacy and Trans-Atlantic Relations* (Hart Publishing 2017) 67.

<sup>17</sup> See above, para I.

<sup>18</sup> House of Lords, European Union Committee 'Brexit: future UK-EU security and police cooperation' December 2016, <<https://publications.parliament.uk/pa/ld201617/ldselect/lducom/77/77.pdf>> accessed 24 March 2019.

indeed, in September 2017, the UK Prime Minister, Theresa May, suggested the possibility of a ‘transition period,’<sup>19</sup> immediately after exit, in which all security measures entered into by the UK would not cease to apply. Although the Withdrawal Agreement<sup>20</sup> takes this view into consideration and provides for a transition period, its concrete framing looks more like a situation in which the UK would retain burdens associated with being part of these measures without enjoying privileges deriving from them. Such circumstance will be better explained further in this analysis.

Before focusing on the UK’s role within Europol, it is worth setting the general context of the UK’s involvement in EU security policies. This is instrumental in understanding the added value of having the UK as a contributor to the above-listed measures regarding security cooperation. In oral evidence held before the UK House of Lords, a number of experts shed light on the importance of the UK’s role in security and police cooperation in each of these areas. Their findings, synthesising why the UK’s withdrawal would result in a significant loss for the EU’s security framework, can be divided into two main groups.

First, from a general perspective, such reports revealed that some of the measures adopted within the security cooperation framework were strongly influenced by the UK approach, which played an outstanding role in shaping them. A clear example is the PNR Directive,<sup>21</sup> which was adopted in 2016. In such context, the rapporteur was Lord Kirkhope of Harrogate – who is a former MEP for Yorkshire and the Humber – and the UK was a great source of inspiration for the framing of the EU PNR system. As a matter of fact, in 2011, i.e. when the Commission issued its draft proposal for the directive, the UK was the only EU country having its own national system for the collection and analysis of PNR data. It is not difficult to understand that, as soon as the UK is out of the EU, it will no longer be able to exercise such influence in debating forthcoming measures and set strategic objectives to be pursued through EU legislation and policies regarding security matters.

Second, the UK has great expertise in discovering threats to security – not comparable to that of other EU member states – and is undoubtedly in a privileged position, being part of the powerful ‘Five Eyes’ network.<sup>22</sup> In other words, due to its participation in such a well-known intelligence-sharing alliance with Australia, Canada, New Zealand and the US, it has access to information that other EU countries are not able to retrieve by relying only on their own capacities and sources. And, indeed, the director of the Government Communication

<sup>19</sup> Rt Hon Theresa May MP, speech on ‘A new era of cooperation and partnership between the UK and the EU’ September 2017, <<https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu>> accessed 24 March 2019.

<sup>20</sup> On the Withdrawal agreement and how it will be dealt with by UK domestic law, Marta Simoncini, ‘Part I: The Uncertain Application of the EU Withdrawal Act 2018: From the Great Repeal to the Contingency Plan?’ IACL-AIDC Blog, 6 August 2018, <<https://blog-iacl-aidc.org/blog/2018/8/6/part-i-the-uncertain-application-of-the-eu-withdrawal-act-2018-from-the-great-repeal-to-the-contingency-plan>> accessed 24 March 2019.

<sup>21</sup> See n 15.

<sup>22</sup> David Jenkins, ‘The handling and disclosure of sensitive intelligence’ in Genevieve Lennon, Clive Walker (eds), *Routledge Handbook of Law and Terrorism* (Routledge 2015) 266.



Headquarters (GCHQ, i.e. one of the main British intelligence agencies),<sup>23</sup> Jeremy Fleming, has recently remarked that, only in the last year, the UK supplied essential information to disrupt terrorist attacks that would have otherwise taken place in Europe.<sup>24</sup>

## 2 Focus on Europol Activities

From the findings presented above, it is very clear that the UK's core contribution to the field of security – and so, in parallel, major losses that would derive from its exit from the EU – is linked to intelligence information sharing. As a matter of fact, British advanced intelligence expertise and privileged relations – thanks to its affiliation to the Five Eyes network – provide major support to prevention activities carried out by EU agencies tasked with fighting transnational crime and safeguarding EU citizens' security.

At the EU level, the most important body in charge of supporting and coordinating intelligence gathering and sharing among EU member states is Europol. This agency allows information exchange through a very sophisticated and secure platform (called SIENA and working as a messaging facility) and it performs intelligence and forensic analyses. The main database on which such information is located is called the Europol Information System (EIS). Over recent years, Europol's activities have increasingly been relying on cyber-intelligence.<sup>25</sup> The crime areas on which it focuses are multiple: from terrorism to piracy, to money laundering and many other criminal activities that may need transnational cooperation if they are to be combated.

Europol is headquartered in The Hague and was established in 1995 with the signing of the Europol Convention in Brussels. The Convention came into force in 1998, after ratification by all the EU member states. Europol became an EU agency only in 2009, when Council Decision 2009/371/JHA<sup>26</sup> replaced the 1995 Convention. This Decision was then superseded by a new Europol Regulation, entered into force in May 2017.<sup>27</sup>

Although the UK had opted out from Europol in 2013 – as a consequence of the 'block' opt-out from pre-Lisbon JHA measures – it re-joined it immediately after, in December 2014.<sup>28</sup> In 2016, the British government also decided to opt in to the new Europol Regulation, mentioned above.

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<sup>23</sup> British intelligence is organized as follows. There are three main intelligence agencies: the Secret Intelligence Service (MI6); the Security Service (MI5); the Government Communication Headquarters.

<sup>24</sup> Ewen McAskill, Daniel Boffey, 'Brexit row: GCHQ chief stresses UK's role in foiling European terror plots' *The Guardian*, London, 19 June 2018, <<https://www.theguardian.com/politics/2018/jun/19/barnier-uk-will-lose-access-to-eu-security-databases-after-brexit>> accessed 24 March 2019.

<sup>25</sup> For a short overview, Chiara Graziani, 'EU-UK Intelligence Information Sharing after Brexit' DCU Brexit Institute Blog, 15 May 2018, <[http://dcubrexitinstitute.eu/2018/05/uk\\_eu\\_intelligence\\_information\\_sharing\\_after\\_brexit/](http://dcubrexitinstitute.eu/2018/05/uk_eu_intelligence_information_sharing_after_brexit/)> accessed 24 March 2019.

<sup>26</sup> Council Decision of 6 April 2009 establishing the European Police Office (Europol) [2009] OJ L 121/2009, 37.

<sup>27</sup> Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA [2016] OJ L 135/2016, 53.

<sup>28</sup> The opt-out and subsequent re-joining were organized in such a way that no operational gap was left. Hence, there was no time in which the UK was outside the 35 measures it decided to re-join.

The latest available data on the UK's contribution to Europol policies, projects and operations was disclosed by the UK National Crime Agency in written evidence given to the UK Parliament in February 2018.<sup>29</sup> This data displays that in 2016 the UK was the second highest contributor overall (Germany being the first) and the highest contributor in some specific projects.<sup>30</sup> Furthermore, Europol operational projects are very often led by the UK itself.

### **III Existing Models of Cooperation Between Europol and Non-EU Partners**

After Brexit, the UK will become a fully-fledged non-EU country and so it will fall within the category of 'third countries.' According to the Europol Regulation,<sup>31</sup> only EU member states can be entitled to membership of that agency and, consequently, enjoy the privileges stemming thereof. Nevertheless, the Regulation provides for two modalities aimed at building relationships between Europol and third countries. The choice depends on the relationship that Europol has with the third country at issue.<sup>32</sup> These two forms of partnership are strategic agreements and operational agreements. Indeed, a third option does exist. It is a unique arrangement that Europol negotiated with Denmark, for reasons that will be clarified later.

It is now necessary to focus on how these two categories of agreements – plus the 'hybrid' model represented by Europol-Denmark relationship – work. This analysis is essential in order to assess whether they could be applied to the UK after Brexit to maintain efficient and feasible cooperation with the ultimate aim of ensuring security.

#### **1 The 'Third Country' Model: Strategic Agreements and Operational Agreements**

The two above-mentioned forms of partnership represent two different schemes and, although they may appear very similar, they differ as to the kind of the information that can be accessed pursuant to each of the two categories. They can be described as follows.

The conclusion of strategic agreements is the most basic form of cooperation. It allows the exchange, between Europol and the third country at issue, of general intelligence information. It could be information of a strategic or technical nature. Europol has strategic agreements in place with China, Israel, Russia, Turkey and the United Arab Emirates.

<sup>29</sup> Written evidence submitted by the National Crime Agency to the UK Parliament (PSC0009) (2018) <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/home-office-delivery-of-brexit-policing-and-security-cooperation/written/78338.pdf>> accessed 24 March 2019.

<sup>30</sup> I.e. Europol SOC Analysis Project, Firearms, CSEA, Money Laundering, Cyber and Modern Slavery.

<sup>31</sup> See n 26.

<sup>32</sup> See extensively Mirja Gutheil et al, 'The EU-UK relationship beyond Brexit: options for Police Cooperation and Judicial Cooperation in Criminal Matters' Study for the LIBE Committee, 17 July 2018, <[http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL\\_STU\(2018\)604975](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2018)604975)> accessed 24 March 2019.

The latter approach, consisting of operational agreements between Europol and third countries, is more extensive. It allows the exchange of information to the same extent as strategic agreements do, but also personal data is included among the information that can be shared. Moreover, Europol's operational partners can access most Europol services, such as SIENA, and they can also have liaison officers at the Europol headquarters. Operational agreements in place between Europol and third countries include those with Australia, Canada and the US. According to Article 25 of Regulation 2016/794 – reforming provisions on Europol's activities, structure and governance –, operational agreements can only be concluded when one of the following circumstances is met. The first scenario that makes operation agreements possible is that the European Commission adopted a so-called adequacy decision,<sup>33</sup> finding that the third country guarantees an 'adequate level' of data protection. Alternatively, such deals are possible if the third country concluded an international agreement on the basis of Article 218 TFEU<sup>34</sup> 'adducing adequate safeguards with respect to the protection of privacy and fundamental rights and freedoms of individuals.' Article 25 also states that existing operational agreements, concluded pursuant to the previous framework – represented by the 2009 Decision – and before the entry into force of Regulation 2016/794 continue to be valid. Notably, all of the agreements between Europol and its operational partners – being at present more than 20 – have been signed according to the 2009 rules. Therefore, the provisions that entered into force in May 2017 have not yet been applied to conclude these kinds of deals.

## 2 'Tailor-Made' Cooperation: The 'Hybrid' Model and the Danish Example

The two patterns for Europol-third country cooperation addressed in the previous point represent the so-called third country model, which can be articulated in the two alternative schemes of strategic agreements and operational agreements. Nonetheless, over the years, Europol also set what can be defined as a 'tailor-made' model of cooperation. Indeed, this exceptional event happened only once and in a very peculiar circumstance, not being the country at issue – i.e. Denmark – a fully-fledged third country. This apparently odd situation needs further explanation.

As known, Denmark is a member state of the EU. Nonetheless, its relationship with the JHA area has never been smooth from the beginning for several reasons. With the Edinburgh Agreement of December 1992, Denmark announced four opt-outs with regard to measures

<sup>33</sup> Pursuant to art 36, Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA [2016] OJ L 119/2016, 89.

<sup>34</sup> Regulating the conclusion of international agreements between the EU and third countries and giving the European Parliament a 'veto power' as to the entry into force of the agreement. See Nadine Zipperle, *EU International Agreements: An Analysis of Direct Effects and Judicial Review Pre- and Post-Lisbon* (Springer 2018).

introduced by the Treaty of Maastricht. It opted out of monetary union; EU defence policy; EU citizenship; and JHA cooperation. Nonetheless, Denmark was part of Europol for as long as it operated under Council Decision 2009/371/JHA, to which it had decided to opt in. However, after the Lisbon Treaty entered into force, Denmark negotiated Protocol No 22, which represents a particularly strong form of opt-out, which can be defined as an ‘all-or-nothing’ approach.<sup>35</sup> According to Protocol No 22, Denmark does not take part in the adoption of any post-Lisbon measures in the area of freedom, security and justice, unless it notifies other member states that it wishes not to avail itself of the Protocol (thus accepting the whole *acquis* of measures in this area). Since such an option had not been exercised when the new Europol Regulation – repealing the 2009 Council Decision – was proposed, it became evident that Denmark could no longer enjoy Europol membership, at least if it maintained the existing opt-outs. Thus, in 2015, a national referendum was held in Denmark. Specifically, people were asked whether they intended to keep the Danish opt-outs as they were, or they preferred to convert such an inflexible clause to a case-by-case scheme, substantively similar to the one adopted by the UK. Had people chosen the second option – i.e. a ‘flexible’ opt-out regime – the Danish government could have decided on a case-by-case basis whether Denmark should participate in each proposed measure. However, Danish voters determined that existing opt-outs should not be changed. At the same time, they rejected participation in the new Europol regulation. Consequently, Denmark could no longer be a member of Europol, having deliberately dismissed any possibility for its membership.

That decision by the people of Denmark put the Danish government in a quite awkward situation. On the one hand, the popular referendum was a legally binding one and its results could not be overcome nor disregarded by the government; on the other hand, being cut off from Europol represented an undeniable disadvantage for Denmark’s security.<sup>36</sup> It should also be borne in mind that in 2015 Denmark had been especially affected by the threat of terrorism due to February 2015’s attacks in Copenhagen.<sup>37</sup> Hence, Danish authorities immediately sought an agreement with Europol. The deal was concluded in a very short timeframe.<sup>38</sup> The Europol Management Board authorised negotiations on 17 February 2017 and the agreement was signed on 29 April 2017.<sup>39</sup>

Actually, the agreement concluded between Europol and Denmark is peculiar and may resemble full membership to some extent, but it is not free from conditional clauses. For

<sup>35</sup> On the Danish opt-out, Rebecca Adler-Nissen, ‘Justice and Home Affairs: Denmark as an Active Differential European’ in Lee Miles, A Wivel, *Denmark and the European Union* (Routledge 2013) 47.

<sup>36</sup> As underlined by the representative of the Danish Ministry of Justice. Søren Pape Poulsen, ‘Møde Nr. 26. Om Konsekvenser Af Danmarks Udtrædelse Af Europol’ (2016).

<sup>37</sup> See generally on the 2015 attacks and reactions by democracies, Edward M. Iacobucci, Stephen J. Toope, *After the Paris Attacks: Responses in Canada, Europe, and around the Globe* (University of Toronto Press 2015, Toronto).

<sup>38</sup> As referred by Rob Wainwright, the then-Europol director, in an oral evidence before the UK Parliament.

<sup>39</sup> Agreement on Operational and Strategic Cooperation between the Kingdom of Denmark and Europe, <<https://www.europol.europa.eu/publications-documents/agreement-operational-and-strategic-cooperation-between-kingdom-of-denmark-and-europol>> accessed 24 March 2019.

example, Denmark has to continue its membership in the EU and in Schengen. Moreover, in order to maintain the agreement in place, Denmark is bound to keep accepting the ECJ's jurisdiction and the competence of the European Data Protection Supervisor (EDPS). It has to ensure continued implementation of the Directive on cooperation in police matters<sup>40</sup> as well. Any failure to perform any of these obligations shall result in the termination of Denmark-Europol deal as currently framed.

As to advantages that the agreement between Europol and Denmark carries with it, they can be summarised as follows. First, Danish officers have the chance to access Europol data through a 24-hour 'contact point'. The exchange of information shall take place 'without delay'. Second, Denmark may be invited to Europol Management Board meeting. Nonetheless, it cannot be provided with a right to vote. Third, Denmark has the power to assign up to eight Danish-speaking staff to handle Danish requests. Fourth, is able to input and to retrieve data from Danish authorities in the Europol processing systems.

### 3 The Applicability of Existing Patterns to the UK after Brexit

The Section above disclosed the ways available to Europol in order to manage its relationships with third countries when cooperation is considered reciprocally vital. Yet are these schemes applicable to the UK, once it will be out of the EU? And to what extent are they suitable to meet the UK's and EU's need for security in a world at struggle with terrorism, but also with other very serious crimes? The answer to the first question is quite predictable if one refers to the third country model. Since the UK will become a fully-fledged third country, from a legal point of view there is no reason why the two mentioned patterns – strategic and operational agreements – could not be applied to it, as long as consensus is reached between the British authorities and the Europol Management Board. Nevertheless, as to the feasibility of a model similar to the one in place between Denmark and Europol, the following analysis shows how some difficulties may arise, although it would not be impossible to negotiate such a kind of deal. Answering the second question – i.e. the effectiveness of such a solution in terms of ensuring security – is a much more challenging task. To try to give an answer, two separate scenarios have to be considered. The first consists of assessing what would happen if the UK negotiated an agreement according to the 'third country model'. The second evaluates how a deal similar to the one between Denmark and Europol would work, should the UK and Europol decide to engage in the negotiation of a similar tool.

Focusing on the 'third country model' – i.e. strategic or operational agreements –, there are a number of aspects showing that such cooperation would not be sufficient to keep (at least the essence of) existing standards of interaction between the UK and Europol. This proves true even if one takes into consideration that the most likely case would be the conclusion of an operational agreement, which is a stronger and more extensive form of

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<sup>40</sup> See Deirdre Curtin, 'Brexit and the EU Area of Freedom, Security and Justice: Bespoke Bits and Pieces' in Federico Fabbrini (ed), *The Law and Politics of Brexit* (OUP 2017, Oxford) 183, 190.

cooperation compared to strategic agreements. The inability of operational agreements to ensure an adequate level of UK contribution to Europol is for a variety of reasons. First, although third countries engaged in operational agreements do have a certain extent of access to Europol information, this is not full access. Third countries can only channel information and interrogate databases. Such limited access results in a delay in receiving information. Second, no third country can lead an operational project, although it has been showed how crucial the UK's role is in coordinating such initiatives. Third, in spite of having some form of access to information, third countries are never allowed to sit on the Europol Management Board. Hence, the UK would be deprived of the possibility to contribute to setting strategic objectives and priorities to be reached through Europol. It could not retain its right to vote either. Fourth, keeping the UK out of the operational and management activities of Europol would mean a decrease in the financial resources of the agency, since the UK's contribution would be less significant.

In sum, considering the UK as any other third country – Australia, the US and many others – engaged in an operational partnership with Europol would result in a sharp decrease of security for the whole European area.<sup>41</sup>

So, what about negotiating a 'tailor-made' agreement, as Denmark did? The legal feasibility of an identical deal deserves more discussion than that necessary in relation to operational agreements. As a matter of fact, such a kind of 'bespoke' agreement with Denmark was deemed possible, since Denmark was 'not leaving the EU'<sup>42</sup> and was subject to a number of conditional clauses, to which Denmark consented, such as the jurisdiction of the ECJ. Within the Brexit negotiation process, the role of the ECJ is a very contested issue.<sup>43</sup> The most controversial point in this regard is that the ECJ is entitled to rule on any dispute between Europol and its members.<sup>44</sup> If the UK is freed of the ECJ's review powers, the Court would lose any chance to review such cases. It is quite unlikely that the Luxembourg court would be ready to accept such a diminishment of its jurisdictional reach. In addition, since the agreement would have to be preceded by an adequacy decision, this means that the UK should keep respecting the core of EU data protection law at least, as interpreted by the ECJ's recent decisions.<sup>45</sup> Moreover,

<sup>41</sup> Chloé Brière, 'Cooperation of Europol and Eurojust with external partners in the fight against crime: what are the challenges ahead?' DCU Brexit Institute Working Paper no 1/2018.

<sup>42</sup> Wainwright (n 38).

<sup>43</sup> See on this issues Steve Peers, 'Dispute settlement and the ECJ in the draft Withdrawal Agreement' EU Law Analysis, 9 March 2018, <<http://eulawanalysis.blogspot.com/2018/03/dispute-settlement-and-ecj-in-draft.html>> accessed 24 March 2019. Rt Hon Theresa May MP, 'Speech at Munich Security Conference' 17 February 2018, <<https://www.gov.uk/government/speeches/pm-speech-at-munich-security-conference-17-february-2018>> accessed 24 March 2019.

<sup>44</sup> Art 49, Regulation (EU) 2016/794 (n 27).

<sup>45</sup> See the following landmark decisions on data protection and exchange: Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others* [2014] ECR I-238; Case C-362/14 *Maximillian Schrems v Data Protection Commissioner* [2016] 2 CMLR 2; Joined Cases C-203/15 and C-698/15 *Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others* ECLI:EU:C:2016:970; Opinion 1/15 ECLI:EU:C:2017:592

even the Danish model would allow the UK to have direct access to databases, although mechanisms are set to ensure that information is transmitted without delay. Additionally, and more importantly, no right to vote would be afforded to the UK representatives, in the same way as if an operational agreement were stipulated.

In spite of such weaknesses and practical issues, some scholars<sup>46</sup> argued that a ‘Danish style’ agreement may represent at least a benchmark for the path to be followed by the UK.

Before trying to give some insight into patterns of future cooperation, it is worth providing an overview of what the UK government is concretely doing and how it is planning to cope with post-Brexit security issues.

#### **IV The UK Government’s Solution: An EU–UK Security Treaty?**

On 2 August 2018, the EU Commission’s Chief Negotiator for Brexit, Michel Barnier, stated: ‘[o]n security, the EU wants very close cooperation to protect our citizens and democratic societies. We should organise effective exchanges of intelligence and information and make sure our law enforcement bodies work together’.<sup>47</sup> Some months before, in January 2018, the Commission had listed ‘the security interest of the EU27’, ‘fundamental rights’ and ‘the equivalence of data protection standards’ among the factors that determine EU cooperation with third countries<sup>48</sup> and the European Council reaffirmed them as outstanding points to be considered in the March 2018 guidelines on future relations after Brexit.<sup>49</sup> Therefore, the EU is particularly adamant about maintaining the closest possible relationship with the UK on security issues and of ‘effective exchanges of data with Europol’.

The British government’s approach is not far from this view. In September 2017, the UK government published a ‘Future Partnership Paper’, in which it explicitly claimed the need to react with arrangements going ‘beyond the existing, often *ad hoc* arrangements for EU third country relationships’.<sup>50</sup> The most recent stance of the UK government is represented by negotiating a security treaty, giving the legal basis for continuing judicial and police cooperation in criminal matters, as announced by Theresa May in Florence in September 2017. The next Section explores such a prospective agreement, its features and legal issues.

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<sup>46</sup> Curtin (n 40) 192.

<sup>47</sup> ‘An ambitious partnership with the UK after Brexit’ 2 August 2018, <[https://ec.europa.eu/commission/news/ambitious-partnership-uk-after-brexit-2018-aug-02\\_en](https://ec.europa.eu/commission/news/ambitious-partnership-uk-after-brexit-2018-aug-02_en)> accessed 24 March 2019.

<sup>48</sup> European Commission, ‘Police and judicial cooperation in criminal matters’ 29 January 2018, <[https://ec.europa.eu/commission/sites/beta-political/files/police\\_judicial\\_cooperation\\_in\\_criminal\\_matters\\_0.pdf](https://ec.europa.eu/commission/sites/beta-political/files/police_judicial_cooperation_in_criminal_matters_0.pdf)> accessed 24 March 2019.

<sup>49</sup> European Council, *European Council (Art. 50) (23 March 2018) – Guidelines* <<https://www.consilium.europa.eu/media/33458/23-euco-art50-guidelines.pdf>> accessed 24 March 2019.

<sup>50</sup> Rt Hon Theresa May MP, speech on ‘A new era of cooperation and partnership between the UK and the EU’ 22 September 2017, <<https://www.gov.uk/government/speeches/pms-florence-speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu>> accessed 24 March 2019.

## 1 Current Status of Negotiations and Legal Issues

When Theresa May first announced the intention to deal with post-Brexit security issues through a specific agreement, Theresa May remarked that it would respect ‘our shared principles, including high standards of data protection and human rights.’<sup>51</sup>

What the government envisages would be a comprehensive treaty on security between the UK and the EU, to be concluded within the second part of the Brexit negotiations. The main purpose of such a treaty would be to provide a ‘legal basis’ for cooperation. The UK government stated that the security treaty would respect both the decision-making authority of the EU and the sovereignty of the UK. According to the executive, forthcoming cooperation has to be based on three ‘pillars’, i.e. internal security, external security, and other forms of wider cooperation. The agreement should reflect the UK’s new status as a third country and, at the same time, minimise the loss of mutual capability and consequential decrease in citizens’ security. The treaty would replicate current arrangements on the following matters: the European Arrest Warrant, some access to the Schengen Information System and participation – it is not stated precisely under which form and conditions – in Europol, Eurojust and the PNR Directive.

There are a number of legal issues connected with stipulating an *omnibus* treaty on security between the UK and the EU. However, this paper focuses on four of them: the jurisdiction of the European Court of Justice; governmental accountability in stipulating it and transparency towards public opinion; the level of specificity and precision that might be reached through it; and mechanisms to deal with future measures. Each of these matters deserves separate analysis.

First, the jurisdiction of the ECJ has been a controversial point in Brexit discussions since the beginning. In January 2017 Theresa May, in announcing a ‘hard’ Brexit, seemed very convinced of the need to end the Luxembourg Court’s jurisdiction over the UK, saying that ‘laws will be interpreted by judges not in Luxembourg, but in courts across this country.’<sup>52</sup> This stance was mitigated in February 2018,<sup>53</sup> when the Prime Minister left some room for the ECJ’s case law, saying the UK would respect the ‘remit’ of the Court in its participating to EU agencies (among which Europol is included). Nonetheless, the approach of the government still casts doubt on the UK’s willingness to accept the ECJ as a dispute resolution mechanism in potential issues arising from the interpretation and application of the new security treaty – a role that the Court of Luxembourg would definitely claim. And, in any case, the treaty would be negotiated by the UK and the EU pursuant to Article 218 TFEU, which sets the procedure for the conclusion of international agreements between the EU and any third country.

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<sup>51</sup> Ibid.

<sup>52</sup> Rt Hon Theresa May MP, speech on ‘The Government’s negotiating objectives for exiting the EU’ 17 January 2017, <<https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>> accessed 24 March 2019.

<sup>53</sup> Rt Hon Theresa May MP, ‘Speech at Munich Security Conference’ (n 43).



According to this provision, the ECJ can be called to rule on the compatibility of the envisaged agreement with EU law and, in the event of a negative opinion, the draft text cannot enter into force in its current form. Hence, it is likely that the ECJ will exercise its jurisdiction in some way, at least ‘through the backdoor’.

Second, some experts<sup>54</sup> questioned the extent of governmental accountability on the issue. According to this view, the fact that negotiations of this kind of measure is usually not submitted to the public opinion – for example, through public consultation or referendum – would undoubtedly damage the transparency of the government’s action in a very high number of fields, given the *omnibus* nature of the future treaty.

Third, it seems very complicated to encapsulate all issues connected to security in a single legal instrument. This is likely to require a very long negotiation phase and a wide range of expertise, given the extensiveness of the security cooperation field. In other words, negotiating on Europol is different and requires dissimilar steps, skills and procedures than negotiating on PNR, for example, and other matters. Therefore, this treaty runs the risk of needing too long a time to be arranged or, alternatively, being rushed into the necessary steps for its conclusion without a proper and in-depth examination of the miscellaneous issues that it is expected to include.

Fourth, the treaty would cover measures in the security area in place until the moment it enters into force. What about the future? Of course, the EU institutions will continue working on security cooperation in the future. Consequently, new tools will be in place as well as others amending or replacing the existing ones. This aspect should be very well regulated in the treaty, in order to avoid a gap or a lack of updates in the UK–EU cooperation policy.

## 2 The Influence of the Withdrawal Agreement

As declared at the beginning, the Withdrawal Agreement does have some influence on the post-Brexit management of security cooperation with the EU, specifically with regard to Europol. The Withdrawal Agreement will be the legal tool through which, pursuant to Article 50 TEU, consensus reached on exit conditions will be consecrated.

The Withdrawal Agreement provides for a ‘transition period’. In this time, the UK will remain subject to EU law, including participation in justice and home affairs – limited to the existing opt-ins. Nonetheless, such participation will not be full and the regulation of the relationship with Europol clearly demonstrates this. As a matter of fact, the UK will be allowed to continue cooperation with Europol, but it will not be permitted to participate in the governance of the agency and to setting its strategic objectives. This appears to be nothing but a ‘diminished’ form of membership, based on the very models addressed above, i.e. the third-country pattern (specifically, in the form of an operational agreement).

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<sup>54</sup> House of Lords, Select Committee on the European Union, Home Affairs Sub-committee, ‘Uncorrected Oral Evidence: Brexit: the proposed UK-EU security treaty’ 25 April 2018, <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-home-affairs-subcommittee/brexit-the-proposed-ukeu-security-treaty/oral/82776.html>> accessed 24 March 2019.

That clause – currently represented by Article 122 of the exit deal’s text – poses two main problems. First of all, after a transitional period following this framework, it could be more complex to regain a status as close as possible to ‘full’ membership. Second, even if a more extensive deal is achieved in the future, there would still be a ‘gap’ in cooperation, represented by that period of ‘diminished’ membership. Actually, the rationale behind the transition period could be the need to take time and give political actors on the scene the necessary timeframe to negotiate the acceptable conditions of such a unique relationship. This is undoubtedly a necessary and desirable step. Nonetheless, the transition period will undoubtedly create a gap in intelligence-sharing, with many consequences in terms of security. Even if just for a short period, restricted participation by the UK – i.e. such a key contributor – could cause major drawbacks, should security threats emerge during that phase.

## V Conclusion

This paper has explored the key role that the UK has played, since its initial opt-in in Europol, in the exchange and management of intelligence information at the EU level, due to both its privileged position in the ‘Five Eyes’ network and its enhanced intelligence expertise.

This research also showed that Europol cooperation is probably the most efficient tool, nowadays, for the exchange of strategic information in the European area. The – nearly obvious – consequence is that excluding the UK from Europol would put the EU – both as an institution and with regard to its member states – in an extremely worrying situation. As a consequence, careful and efficient planning of Europol–UK relations should be regarded as a priority over the next months.

The analysis of potential forms of cooperation between Europol and third countries revealed that – as argued by many experts in the field – none of them would be entirely appropriate to meet the current needs in relation to the UK situation after Brexit. In parallel, the examination of the Danish model clarified that, although it is commonly considered as a peculiar form of participation that is not far from membership, its concrete features demonstrate that this model is still far from resembling the relationship existing among Europol members and the agency itself. Moreover, the Danish model seems far from achievable by a state that, in the future, will no longer be within the EU. As underlined above, it was considered possible in relation to Denmark for the very reason that such country, notwithstanding its complicated history of opt-outs, is still an EU member. Instead, the situation with regard to the UK is quite tricky. On the one side, a higher level of interaction than the one reached by Denmark would be required. On the other side, there are legal constraints – first and foremost the fact that, unlike Denmark, the UK will leave the EU – making even reaching a Denmark-style agreement quite problematic.

Two possible solutions could be conceived for addressing this complicated situation. Both of them are not straightforward nor easy to negotiate from a legal and strategic point of view. The first would be an amendment to the provision in Europol’s existing regulations allowing

only EU member states to be full members in order to open the door to former EU member states as well. This option, albeit conceivable in theory, is very difficult to achieve in practice. As a matter of fact, a fully-fledged amendment to an act of EU secondary law would be needed, according to all the procedural steps to be followed. This would mean a long process and it would be unlikely to find easy consensus on the issue among the bodies involved in EU legislation making. The second alternative would be a bespoke agreement, similar to that with Denmark but with more extensive clauses – allowing, for example, the UK to participate in the Europol Management Board and the right to vote. Difficulties due to the UK's ceased membership of the EU could be overcome in light of the fact that the UK *was* such. In other words, the speciality of clauses contained in such a hypothetical agreement – i.e. giving the UK the right to vote – could be justified by mutual trust based on relationships when the UK was still an EU member state and, hence, a full Europol member. This second option could be the most feasible one and could also be reconciled with the UK solution consisting of signing a security treaty, since such 'bespoke' agreement could be a part of that deal.

From a general perspective, what should be taken into account by both EU and UK bodies in framing their future security cooperation, is protecting the safety of EU and UK citizens by respecting their individual rights. The former can be accomplished through framing efficient intelligence exchange mechanisms; the latter can only be ensured if, in arranging feasible and well-functioning tools to maintain security cooperation, issues such as data protection standards and fair data processing are considered as guiding principles. Therefore, this paper also demonstrated that even an apparently technical issue, i.e. intelligence exchange through highly specialised agencies as Europol, is indeed a manifestation of the intrinsic tension between rights and security that the fight against terrorism carries with it.

# The Freedom to Discuss Public Affairs and the Protection of Personality Rights in the Hungarian Legal System

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## I Introduction

For many years, the limitation of the protection of the personality rights of public figures in Hungary was not based on statutory provisions. The point of departure for distinguishing between the personality rights of public figures and those of ordinary citizens was Decision 36/1994. (VI. 24.) AB of the Constitutional Court of the Republic of Hungary, which laid down certain fundamental principles. The Constitutional Court identified two outstanding constitutional interests, the possibility to criticise the activities of bodies and persons fulfilling state and local government tasks in public and the ability of citizens to participate in political and social processes without uncertainty, compromise or fear. As such, while the constitutionality of protecting the honour and reputation of individuals in the public sphere by means of criminal law may not be excluded, the freedom of speech pertaining to such persons may only be limited to a rather narrow extent in comparison to speech concerning private persons, and then only in order to protect persons exercising state powers. Furthermore, the Constitutional Court laid down certain ‘constitutionality requirements’ as to the applicability of libel and defamation in criminal law:

An expression of a value judgement capable of offending the honour of an authority, an official or a politician acting in public, and expressed with regard to his or her public capacity is not punishable under the Constitution; and an expression directly referring to such a fact is only punishable if the person who states a fact or spreads a rumour capable of offending one’s honour, or uses an expression directly referring to such a fact, knew the essence of his or her statement to be false, did not know of its falsehood because of his or her failure to pay attention or exercise the caution reasonably expected of him/her pursuant to the rules applicable to his or her profession or occupation, taking the subject matter, the medium and the addressee of the expression in question into account.<sup>1</sup>

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<sup>1</sup> Decision 36/1994. (VI. 24.) AB of the Constitutional Court of the Republic of Hungary, operative part.

This test establishing the liability of the perpetrator for deliberate lies or in the event of negligence is rather similar – but not identical to – the *Sullivan* rule developed by the US Supreme Court in 1964 in the *New York Times v Sullivan* case.<sup>2</sup> The codification of the Civil Code and its taking effect in 2014 was a major milestone on the road to limiting the protection of the reputation and honour of public figures under civil law, as a result of which the legislator adopted statutory provisions on the limitation of the protection of personality rights of public figures and for the freedom of public affairs to be taken into account in private law disputes (Section 2:44). The following parts will provide an overview of the jurisprudence of the Constitutional Court and high courts in relation to the Civil Code, focusing exclusively on the weightiest questions of detail.

## II The ‘Public Affairs General Clause’ in the Civil Code and its Initial Constitutional Interpretation

The original draft of the Civil Code submitted to the National Assembly also contained a general clause on the limited protection of the personality rights of public figures. However, the text finally adopted and promulgated, which differs from the proposal in several aspects, read as follows:

Section 2:44 [*Protection of the personality rights of public figures*]

The exercise of the fundamental rights ensuring a free discussion of public affairs in the legitimate interest of the public may limit the protection of the personality rights of public figures to an extent that is necessary and proportionate and is without prejudice to human dignity.

The adopted text, in conformity with the original proposal, leaves broad latitude for the courts as entities applying the law, but it raises several awkward issues. The question arises of exactly which personality rights are affected by the rule; in practice, beyond the protection of reputation and honour, these may include the protection of the right to private life, image, sound recording, and possibly private secret and personal data as independent personality rights and therefore, in certain cases, these rights of public figures may be enforced only to a limited degree.

The Commissioner for Fundamental Rights contested the wording ‘legitimate public interest’, stipulated as one of the preconditions for reducing the protection of personality rights, prior to the entry into force of the provision via a motion to the Constitutional Court. However, following this, the Constitutional Court deleted the text concerned in decision 7/2014. (III. 7.) AB. The decision stated that the protection of human dignity may constitute a limitation to the freedom of speech; nevertheless, no violation of human dignity ‘can justify the restriction of the freedom of speech. If it could, the very content of the freedom of speech

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<sup>2</sup> *New York Times v Sullivan* 376 US 254 (1964).

would become void. [...] The right to the protection of human dignity is unrestrictable, but only as a legal determinant of human status.<sup>3</sup>

The constitutional problem and the quite narrow latitude available to the Constitutional Court can easily be identified. Both the Fundamental Law and the Civil Code expressly protect human dignity, the former also declaring its inviolability, which does not mean unrestrictability at the same time.<sup>4</sup> The freedom of speech, similarly to human dignity, is a constitutional right,<sup>5</sup> albeit not an unrestrictable one, although its restriction is admissible only within a limited scope, similarly to all other fundamental rights.<sup>6</sup> The constitutional collision of human dignity and freedom of speech is, in itself, not an insoluble issue when applying the law. Neither can this collision be considered a recent problem.

However, Section 2:44 of the Civil Code seeks to provide extra protection for the freedom of speech (by ensuring a wider freedom for discussing public affairs), *inter alia*, by prohibiting the publication of opinions violating human dignity, as one of the objective limitations to a wider protection. Accordingly, if we assume that the latter provision does not render exercising the freedom of speech impossible (since any injurious opinion may necessarily violate human dignity at the same time, so it could be sanctioned), then a constitutional interpretation, which can provide guidance for those applying the law in terms of the application of the examined provision, must be assigned to the protection of human dignity.<sup>7</sup>

The Constitutional Court chose that solution and expressly drew the attention of the courts to their responsibility to interpret it in a manner which complies with the constitution.<sup>8</sup> The decision makes it clear that ‘the unrestrictable aspect of human dignity constitutes the absolute limit of the freedom of speech only with respect to that extremely narrow range of expressions of speech which deny the very foundations of the human status.’<sup>9</sup> As a general rule, opinions and value judgements cannot be grounds for either criminal or civil law prosecution; in this respect, the decision of 2014 referred to one of the most important elements of Decision 36/1994. (VI. 24.) AB, namely the total impunity of opinions. However, in contrast to the decision of 1994, in 2014 the Constitutional Court did not consider value judgements to be constitutionally protected all the time; ensuring that the freedom of debating public affairs in public:

<sup>3</sup> Decision 7/2014. (III. 7.) AB of the Constitutional Court of the Republic of Hungary, ABH 1994, 219–237, Statement of Reasons, [43].

<sup>4</sup> Article II of the Fundamental Law.

<sup>5</sup> Article IX of the Fundamental Law.

<sup>6</sup> Article I(3) of the Fundamental Law.

<sup>7</sup> See Koltay András, ‘Az „általános személyiségi jog” azonosítása felé. Alkotmányjogi, magánjogi és büntetőjogi vizsgálódás’ in Koltay András, Török Bernát (eds), *Sajtószabadság és médiajog a 21. század elején* 4. (Wolters Kluwer 2017, Budapest).

<sup>8</sup> Decision 7/2014. (III. 7.) AB of the Constitutional Court of the Republic of Hungary, ABH 1994, 219, Statement of Reasons, [60].

<sup>9</sup> *Ibid* [61].

[...] does not result in the protection of human dignity, privacy and good reputation of the parties concerned [...] becoming void. The persons exercising state powers and politicians acting in public are entitled to the protection of their personality rights if the given value judgement relating to their person does not concern their public affairs-related activity, within the scope of a discussion of public affairs, but their private or family life. Hence, civil law prosecution might be justified in that narrow context when the expressed opinion, being a total, explicit and severely disparaging negation of the human status of the person concerned, does not violate the personality rights named under Section 2:43 of the new Civil Code, but the unrestrictable aspect of human dignity specified under Section 2:42. Taking into account the arguments expressed above, even public figures can demand legal protection against false statements of fact.<sup>10</sup>

The decision highlights certain persons exercising state powers, such as judges, who, due to their special position, in line with the case law of the European Court of Human Rights (ECtHR), can be granted extra protection in terms of their personality rights as compared to other public figures, although this is still below the level of general personality rights protection.<sup>11</sup> In this way, the body also responds to the question of the constitutional interpretation of Article IX(4) of the Fundamental Law, according to which ‘the exercise of the freedom of expression may not aim to violate the human dignity of others’. Based on the interpretation of the Constitutional Court summarised above, this constitutional provision cannot be considered an absolute limit on the freedom of speech.

A notable merit of the decision is that it tried to provide an independent interpretation of the personality right of human dignity, which so far has only been used in the application of the law in a very fragmentary manner. In this respect, the following conclusions can be drawn from the decision of the Constitutional Court: (1) opinions and value judgements concerning public affairs and public figures are to be granted special protection; (2) however, this shall not include value judgements concerning the private or family life of public figures (if those are not related to public affairs); (3) furthermore, the protection does not include those opinions which represent an obvious and seriously disparaging negation of the human status of the concerned person (i.e. opinions which question or doubt that the person concerned is a human being, or disparages or reviles the person concerned in their human quality, and not in relation to public affairs). In the latter case, it is not the right to honour as per Section 2:45 of the Civil Code that is violated (the protection granted for opinions relating to public affairs under Section 2:44 may also totally exclude the possibility of violating this right to honour with regard to outstanding public figures, such as politicians and persons exercising state powers) but the right to human dignity [Section 2:42(2) of the Civil Code]. In other words, based on the decision of the Constitutional Court – contrary to the former approach of civil law courts – human dignity has a unique and independently applicable content above and beyond the right to honour and good reputation. At the same time, this means supplementing and rejecting the stipulations of the decision of 1994, as far as the comprehensive and total protection and unrestrictability of opinions are concerned.

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<sup>10</sup> Ibid [62].

<sup>11</sup> Ibid [61].

Regarding statements of fact, the decision stipulated that ‘demonstrably false facts in themselves are not protected by the constitution,’<sup>12</sup> thereby hinting that in certain cases, even false statements of facts can receive protection under freedom of speech. Later, the decision establishes that ‘even for those facts having no constitutional value which later turn out to be false, it is justified to take into account the interest of ensuring as free conditions for discussion of public affairs as possible when determining the extent of imputability (attribution of liability) and the possible penalties in the course of the legal proceedings.’<sup>13</sup>

In connection with the ‘necessary and proportionate extent,’ the decision established that the ‘restricted nature of the protection of the personality rights of persons exercising state powers and public figure politicians is deemed “necessary and proportionate” over a much wider scope than for anyone else.’<sup>14</sup> However, this condition, which is specified in the Civil Code, is not unconstitutional since ‘although it is linked to general terms used not in private law but in constitutional law, it nevertheless ensures the necessary and sufficient latitude for the application of the law to specify the tests used for the limits of the expression of political opinion.’<sup>15</sup> The decision categorises different groups of persons concerned and sets the level of protection afforded to criticism of each group, which comprise (1) public figures involved in public affairs, consciously undertaking public life, including persons exercising state powers and politicians with public standing; (2) ‘non-ex officio’ public figures involved in public affairs; and (3) persons exercising state powers who are not able to protect themselves publicly due to the nature of their service, such as judges. As we go down this list, the level of protection afforded to personality rights increases, whereas the extent of protection given to freedom of speech decreases.<sup>16</sup>

The expression ‘legitimate public interest’ would seem to be an unnecessary restriction of the freedom of speech and freedom of the press:

As far as the discussion of public affairs is concerned, the restriction of the protection of the personality rights of public figures for the purpose of guaranteeing freedom of opinion is a constitutional interest and requirement in all cases. Hence, there is no need to justify the existence of a ‘public interest,’ which may not be specified more precisely, not to mention the justification of the ‘legitimate nature’ of this public interest. [...] This condition of the new Civil Code would narrow the scope of free expression of opinion to an unjustified extent since, in addition to the ever-present social interest in the discussion of public affairs, it would only allow a wider criticism of public figures if further public interest could be ascertained.<sup>17</sup>

The decision highlights the necessity to assess three important questions of detail, of which we will make an overview, drawing on a body of jurisprudence that has been growing since

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<sup>12</sup> Ibid [49].

<sup>13</sup> Ibid [50].

<sup>14</sup> Ibid [57].

<sup>15</sup> Ibid [56].

<sup>16</sup> Ibid [57] and [58].

<sup>17</sup> Ibid [65].



2014. The first question is whether identifying someone's status as a public figure is the most suitable point of departure when establishing the scope of the protection of their personality rights, or it could be more important to establish whether the matter in hand is of a 'public' nature (Chapter III, *infra*). The second question is how to differentiate between statements of fact and statements of opinion when the distinction is not clear (Chapter IV, *infra*). The third question is how much narrower the scope should be if we think that the special rule is to be applied to an expression, i.e. as the scope in which the protection of personality rights needs to be applied becomes narrower: at what point is the limit of tolerance of those concerned in such cases (Point V, below)?

### III Public Affairs and/or Public Figures?

The operative part of Decision 36/1994. (VI. 24.) AB refers to authorities, officials and politicians acting in public. However, the justification for the decision also mentions public figures, entrusting the courts to define the scope of this latter category. Decision 57/2001. (XII. 5.) AB – describing the ECtHR case law on this issue – also refers to the category of 'persons acting in public'. It is not primarily a lower level of protection of the reputation of public figures that the ECtHR prescribes but rather the broadest protection of debates on public issues, i.e. the decisive factor is not the status of the person who is the subject of an allegation, but the extent to which the debate serves the public interest. Naturally, the ECtHR soon extended the principle of permitting higher levels of criticism of politicians to all authorities.

In *Thorgeirson v Iceland*,<sup>18</sup> the complainant, an Icelandic journalist, turned to Strasbourg because, after publishing several articles on the brutal practices of the Reykjavík police – without mentioning the names of any actual policemen – he had been sentenced for defamation. In its reasoning in favour of the complainant, the Court stated that the statements made in all cases of relevance to public debate are to be awarded special protection, rather than just 'political cases'. This principle has since become generally accepted. In *Nilsen and Johnsen v Norway*,<sup>19</sup> the complainants were two police officers who had criticised a university professor acting as the chairman of a committee investigating police brutality, and who had voiced offensive statements about him after he had sharply criticised the actions of the Police several times. The Norwegian court sentenced the police officers to a fine: According to the ECHR, however, public and at times heated replies to public criticism may be legitimate, and in the circumstances, both the two complainants and the professor qualified as public figures. The sharp criticism formulated by the police officers had not transgressed the limits of freedom of speech. In *Bladet Tromsø and Stensaas v Norway*,<sup>20</sup> statements on the cruel

<sup>18</sup> *Thorgeirson v Iceland*, no. 47/1991/299/370, 28 May 1992.

<sup>19</sup> *Nilsen and Johnsen v Norway*, no. 23118/93, 27 February 2001.

<sup>20</sup> *Bladet Tromsø and Stensaas v Norway*, no. 21980/93, 20 May 1999.

practices of seal hunters and the violation of fishing rules qualified as pertaining to issues of public interest, so the mandatory threshold of the tolerance of individuals concerned in the case was raised. In *Bergens Tidende v Norway*,<sup>21</sup> the ECtHR ruled that statements on the inappropriate treatment methods of a plastic surgeon were in the public interest.

The ECtHR case law seems reasonable, in that it is not the status of public figures – meaning the personal scope – that should be defined clearly and in advance in order to decide these legal disputes. The exact personal scope is impossible to define exhaustively; its boundaries are uncertain, it is in a permanent state of flux and depends on the context. A further important consideration is that, except when they are acting in public and engaged in debates on public affairs, the personality rights of public figures are also granted full protection. As such, even in indisputable cases – with regard to a political figure – it is not clear which test must be applied and when, because it has to be decided on a case-by-case basis whether the debated affair qualifies as a ‘public affair’ or not. Defining the situations in which reduced protection is to be granted to personality rights is a more reasonable approach than drawing up a list of the persons concerned. In other words, the fact of appearing publicly (‘public matter’) is of primary importance, not the public figure (the person) him- or herself. The scope of activities and information about public figures, persons exercising state powers and persons carrying out public functions that may be disclosed to the public may be defined. The protection of the personality rights of such persons may be limited occasionally, even beyond the scope of carrying out their public functions and public appearances. For example, the family life of a Member of Parliament may be regarded as information of public interest if it may influence the decisions of voters.

On the question of public affairs and public figures, the jurisprudence of the Constitutional Court in recent years and the ensuing case law have produced some important positions, which predominantly confirm the interpretation according to which the primary consideration when defining the reduced protection of personality rights is that the affair affected by the expression of opinion is deemed a ‘public affair’. However, the practice is not free from contradictions, which may introduce an element of uncertainty.

Decision 7/2014. (III. 7.) AB stipulates the primacy of identifying public affairs; nevertheless, it also indicates that the status of the public figure is also important, though it is secondary to ascertaining whether an affair is public in nature when establishing the scope of the protection of personality rights. Public affairs have an impact on the enforcement of the personality rights of those concerned, and if, in addition to that, the actors also qualify as public figures, their rights might be reduced even further; the scope of this limitation depends on the nature of their status as public figures (from politicians to celebrities).<sup>22</sup>

<sup>21</sup> *Bergens Tidende v Norway*, no. 26132/95, 2 May 2000.

<sup>22</sup> As for the attempt to identify the category of public affairs on the basis of Hungarian constitutional practice, see Bernát Török, *Szabadon szólni, demokráciában* (HVG-ORAC 2018, Budapest) 49–82.

The judiciary must take into account first and foremost the fact that, since it is public affairs themselves and not the public figures that can be found in the focus of the freedom of political speech, all speeches related to public affairs are under extra protection, which restricts the protection of the personality rights of those affected by them. It means that the restricted character of the protection of personality rights applies not only to those who are professionally engaged in appearing in public, as debating public matters can affect a wider scope of individuals in the framework of a concrete debate in a society. However, the status of the person affected by the speech must also be taken into account: in the case of persons exercising state powers and politicians acting in public, the restricted nature of the protection of their personality rights is considered 'necessary and proportionate' to a wider extent than with regard to any other person.<sup>23</sup>

This approach is confirmed in Decision 14/2017. (VI. 30.) AB: '[t]aking all these into account [...] the activity which is the basis of the labour dispute, i.e. the content of the Internet portal and the texts published there, is predominantly of a professional nature and does not show any link to public affairs, which would render this activity clearly as one that belongs to the freedom of discussing public affairs.'<sup>24</sup> This aspect is reflected in a similar way in regular judicial practice: '[w]hen deciding whether the person concerned has the obligation to tolerate the opinion and/or criticism, in the first place it has to be established whether the contested expression was related to a debate of public affairs.'<sup>25</sup> Important additional information on the concept of 'public affair' is provided by the statement of reasons in Decision 3030/2019. (II. 13.) AB. In the criminal proceedings relating to the main case, the accused person repeated and indeed extended his opinion on the complainant before the court, expressing new, strongly critical value judgements ('heap of shit', 'shame, blight on civilisation', 'public ghoul'). In the main case, he was sentenced for defamation, but in the new case launched due to the publication by the accused of the expressions he used at the trial – on his own social media surfaces – he was acquitted by the Court. The Constitutional Court rejected the relating constitutional complaint on the grounds that information on criminal proceedings qualifies as a public affair:

Based on the constitutional criteria drawn up, the Constitutional Court takes the position that the public nature of the debate can be established because the accused provides information on criminal proceedings that makes the public aware of the criminal law boundaries of the judgments of a television presenter due to his personal and professional conduct during his interviews. The status of the complainant as a public figure may not be disputed, since he makes his living as a television journalist. Compared to the previous case, in which the accused was found guilty of defamation, the current situation is different in terms of the purpose of the speech and the absence of the self-serving nature of it, compared to the previous, protected expression of opinion.<sup>26</sup>

<sup>23</sup> Decision 7/2014. (III. 7.) AB of the Constitutional Court of the Republic of Hungary, ABH 1994, 219, Statement of Reasons, [57].

<sup>24</sup> Decision 14/2017. (VI. 30.) AB of the Constitutional Court of the Republic of Hungary, ABH 2017, 952, Statement of Reasons, [40].

<sup>25</sup> BDT 2017. 3776.

<sup>26</sup> Decision 3030/2019. (II. 13.) AB of the Constitutional Court of the Republic of Hungary, Statement of Reasons, [38].

At this point, it is worth making a short detour and discussing issues of the protection of an individual's image, which also is also illuminating in respect of judging the protection of good reputation and honour, as well as for the interpretation of Section 2:44. Pursuant to Section 2:48 of the Civil Code, '(1) Recording a person's image or voice and using such a recording shall require the consent of the person concerned. (2) The consent of the person concerned shall not be required for recording his image or voice and for the use of such a recording if the recording was made of a crowd or of an appearance in public life.' From the text, it seems that it is not the identification of public affairs but public figures, more precisely acting in public life, that is the only important consideration and, outside the context of a public appearance, it is not possible to apply a reduced protection of the personality rights and here the application of Section 2:44 might be of some assistance. In contrast, the practice of the Constitutional Court in the 'images of policemen' cases<sup>27</sup> disregarded Section 2:44 when concluding that the freedom of speech and the right to information also provide guidance in the interpretation of Section 2:48. Therefore, images of policemen may be published freely, '[an] image taken in a public area and showing the subject in a non-offending and objective manner may generally be published without consent, if it relates to a news report of high interest to the public and forms part of free information provision on current affairs.'<sup>28</sup>

The Curia, after lengthy deliberations, finally accepted this approach: '[if] the person exercising state powers acts in the course of events influencing the public sphere, the exercise of his personality rights relating to his image and their restrictability might be subjected to rules that are different from those pertaining to the general protection of the personality rights of private persons solely participating in public events.'<sup>29</sup> Hence, although the policeman taking action is not yet a public figure, however, his activity is related to public affairs – and there is a strong assumption that the policeman discharges his tasks as the representative of public authority – the interpretation of the Civil Code must then take constitutional criteria into account, which is a step towards recognising the horizontal scope of fundamental rights.<sup>30</sup> In individual cases, the consideration given to this criterion by the Constitutional Court and the Curia is not completely uniform, as shown by more recent Constitutional Court decisions handed down after specific constitutional complaints, which repeatedly confirm the significance of taking the aspect of public interest into account.<sup>31</sup>

<sup>27</sup> Szeghalmi Veronika, Papp János Tamás, 'A rendőr képmásának védelme – a vita jelenlegi állása' (2015) 11 (4) *Iustum Aequum Salutare* 95–110.

<sup>28</sup> Decision 28/2014. (IX. 29.) AB of the Constitutional Court of the Republic of Hungary, ABH 2014, 1288, Statement of Reasons, [44].

<sup>29</sup> BKMPJE Decision 1/2015, item IV.3.

<sup>30</sup> Gárdos-Orosz Fruzsina, *Alkotmányos polgári jog? Az alapvető jogok alkalmazása a magánjogi jogvitákban* (Dialog Campus 2011, Budapest–Pécs); Gárdos-Orosz Fruzsina, Bedő Renáta, 'Az alapvető jogok érvényesítése a magánjogi jogviták során – az újabb alkotmánybírószági gyakorlat (2014–2018)' (2018) (1) *Alkotmánybírószági Szemle*.

<sup>31</sup> Decisions 16/2016. (X. 20.) AB of the Constitutional Court of the Republic of Hungary, ABH 2016, 356; 17/2016. (X. 20.) AB of the Constitutional Court of the Republic of Hungary, ABH 2016, 370; 3/2017. (II. 25.) AB of the Constitutional Court of the Republic of Hungary, ABH 2017, 190.

In the meantime, the case law of regular courts in relation to the protection of one's image has applied this principle appropriately in several different situations and restricted the exercise of the right to one's image accordingly:

If somebody accompanying a public figure participates in an event that is financed from public funds, he might expect the media to report on that, even using his image.<sup>32</sup>

I. If the representatives of the press are not granted access to an event with limited access to the press and the related prohibition is communicated by the designated person representing the press department of the public authority in the lobby of the building, the press reporting on this by publishing audio and video recordings shall not be obliged to pixelate the face of the civil servant speaking on behalf of the public authority.

II. The pixilation of the face may essentially impact on the credibility of the news report worthy of public attention of the event, therefore it would disproportionately restrict information on current events and the freedom of the press.

III. The civil servant performing communication-related tasks shall be obliged to tolerate the publication of his image and recorded voice with respect to an event worthy of public attention in order to ensure the freedom of discussing public affairs. The fundamental right of the press to the freedom of expression may restrict – to the necessary and proportionate degree – the personality rights of the representative of the public authority to his image and recorded voice.<sup>33</sup>

At the same time, the public sphere and the interests of the media may not restrict the enforcement of personality rights disproportionately. Recordings made with hidden cameras may be legitimate only in exceptionally justified cases, and public figures may be subjects of recordings only 'in situations that are of high interest to the public.'

I. The information obligation of the press does not give rise to excess rights; linear media services are obliged to conform to legislative provisions in the course of meeting this obligation and, as a main rule, their activities may not infringe upon others' personality rights. In the case of a video or audio recording made of a public figure without his consent in a public place, the collision between the freedom of opinion and the protection of personality rights needs to be resolved by weighing up interests, even if the statement or publication otherwise contributes to informing the public of an affair which is of high interest to them.

II. The usage of a recording made with a hidden camera violates the right of the public figure to his image and recorded voice if the statements recorded do not contribute to the debate of the affair of high interest to the public, or if they are not informative in a way that would stimulate this debate.<sup>34</sup>

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<sup>32</sup> BH 2017. 86.

<sup>33</sup> IH 2018. 52.

<sup>34</sup> BDT 2017. 3760.

I. The publication of a recording made of a public figure may restrict the right of the public figure to his image protected by law only to the degree necessary and proportionate in order to debate public affairs.

II. An image of a public figure taken in a situation which is not of interest to the public may only be published with the consent of the person concerned. In the absence of such consent, the image taken of him and published violates the right of the person concerned to his image, in the protection of which the injured person may file a lawsuit to enforce this right expressly.<sup>35</sup>

Similarly to the protection of an individual's image, the protection of private life as a personality right newly specified in the Civil Code [Section 2:43.b)] is also to be interpreted through the interest linked to the public debate of public affairs.

I. The right of politicians acting in public to a private life may also be restricted on the grounds of a legitimate public interest and only if the interference is related to the public activities, ideas spread, acts and statements of the person concerned who has an impact on public life.

II. The rebuttal of a statement made in relation to an insignificant element of a public event of high interest to the public does not constitute adequate grounds for the press to publish an event of the most intimate private sphere of the public figure, an artificial intrusion into the private sphere: Exercising the freedom of the press in such a manner is not proportionate to the violation of the personality rights of the public figure concerned in terms of privacy.<sup>36</sup>

So far, a more or less harmonious picture has emerged, which provides adequate grounds for making proper judgments in issues relating to public affairs and public figures and which will also spare the interpreter of an issue the obligation to define or make a list of public figures. In this context, the Civil Code is more of a pretext than the real reason for the developments in recent years; the introduction of a constitutional complaint in 2012 is of higher significance in this respect than the new provisions of the Civil Code. Similarly, an image taken of a political figure in the courtroom as an accused person, even if he was acquitted in subsequent proceedings, may be of high interest to the public and is related to the status of the accused as a public figure. The media may objectively – visually – also report on the state of play of criminal proceedings, providing the news coverage reflects the current state of play of the given proceedings and respects the assumption of innocence as a fundamental constitutional principle.<sup>37</sup> If the image shown in the news report does not depict the complainant in a humiliating situation, which would violate an essential aspect of their human dignity, its publication shall not be considered an abuse of the freedom of the press.<sup>38</sup>

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<sup>35</sup> BDT 2017. 3693.

<sup>36</sup> BDT 2018. 3847.

<sup>37</sup> Decision 3313/2017. (XI. 30.) AB of the Constitutional Court of the Republic of Hungary, ABH 2017, 1877, Statement of Reasons, [56].

<sup>38</sup> Decision 3348/2018. (XI. 12.) AB of the Constitutional Court of the Republic of Hungary, Statement of Reasons, [37] and [38].

However, as two decisions make clear, the case law of the Constitutional Court is not free from contradictions. In the case preceding Decision 1/2015. (I. 16.) AB, the contested opinions were expressed in a private debate, i.e. the test applicable to discussing public affairs did not have to be applied in this case. This is one more reason that it is disturbing to see that the Constitutional Court did not examine the context of the contested opinion in the first place but the status of the injured person. With respect to the injured party working as a lawyer, the Constitutional Court concluded that '[the] person acting as a lawyer may not be considered as a person exercising state powers only due to his status as a lawyer, neither does he qualify as a public figure politician.'<sup>39</sup> Indirectly, it follows that the Constitutional Court had returned to the more narrow definition of a public figure included in Decision 36/1994. (VI. 24.) AB, though it is not primarily the status of the person but the nature of the affair that needs to be examined in order to see whether or not the contested opinion is related to a 'public affair' – as the concurring opinion of Péter Paczolay pointed out.

The statement of reasons of Decision 3145/2018. (V. 7.) AB to some extent mixes up the relationship and sequence of considerations relating to public affairs and the public figure. On the one hand, the decision – in line with Decision 7/2014. (III. 7.) AB – stipulates that:

[41] [...] when qualifying a public statement, the point of departure shall typically not be the persons concerned, but it needs to be examined whether the statement is related to the debate of public affairs and issues of public interest. Essentially, this circumstance, i.e. debating public affairs – to the extent of the specific debate – is the consideration which typically determines how the persons concerned are to be classified. Therefore, the status of a public figure is linked to the fact of acting in the public sphere, which goes together with the debate of public affairs, which always needs to be evaluated in a specific situation and based on the criteria laid down in Decision 13/2014. (IV. 18.) AB. [42] The Constitutional Court therefore underlines that, in democratic decision-making processes, public debates of public affairs are indispensable and so are the surfacing of diverging positions, and discussing them driven by the values of a pluralist democracy. This is valid even if the debate concerned is a heated one and the persons concerned in the debate are exposed to sharp attacks, criticism or judgement. Therefore, the essential feature of the status of a public figure emerging from one's acting in the public sphere is that, depending on the specific situation, it covers all and every person who appears in a public debate of public affairs as a person shaping opinions. Taking these considerations into account, the Constitutional Court underlined that the protection of the freedom of opinion in the context of the debate of public affairs does not focus primarily on the status of the persons concerned, but on whether the speaker expressed his views on a social or political issue [Decision 7/2014. (III. 7.) AB, Statement of Reasons, Paragraph 47].<sup>40</sup>

<sup>39</sup> Decision 1/2015. (I. 16.) AB of the Constitutional Court of the Republic of Hungary, ABH 2015, 3, Statement of Reasons, [39].

<sup>40</sup> Decision 3145/2018. (V. 7.) AB of the Constitutional Court of the Republic of Hungary, ABH 2018, 745, Statement of Reasons, [41] and [42].

According to the logic of previous decisions, the body should have analysed the individual's 'public figure status,' not as a necessary precondition for restricting the scope of the protection of personality rights, but – taking this restriction as a given, due to the public affairs being discussed – as a circumstance with a bearing on the degree of the restriction of this protection. However, the statement of reasons identified public figure status as an equally necessary precondition, in addition to public affairs being discussed. What follows from this is that it is not sufficient for a media report or expression of opinion to concern a public affair: to reduce the scope of the protection of their personality rights, it is also necessary for the persons concerned to qualify as public figures.

[44] 2.2. If the public speech affects the freedom of debating public affairs, it is necessary to further examine whether or not the person affected by the speech is a public figure in the given situation and only after this examination can the constitutional test be applied. The fact that a public speech is related to public affairs per se shall not automatically lead to a reduced protection of the personality rights of the persons concerned. Establishing the public figure's status is always up to a case-by-case evaluation. [...]

[48] However, the subject-matter of the speech (public affair) is not the only criterion when judging the status of those affected by the public statement or speech. It is also indispensable to examine whether the person concerned decided in a voluntary manner to become someone who has an influence on public affairs. The enforcement of the right to free expression may exclusively be justified in cases in which participants became more active shapers of public affairs based on their own decisions, and thereby undertaking their exposure to evaluations and judgements in front of the public eye in the community concerned. Therefore, they are obliged to have an increased threshold of tolerance in respect of speeches and opinions in the context of the debate of public affairs that concern them, or classify them or might be offensive towards them. [...]

[50] The due consideration of the above criteria is indispensable in deciding the extent to which the debate of public affairs determines the personal status of those participating in this public debate on public affairs. The Constitutional Court therefore underlines that, when establishing public figure status, the status of the person concerned is not of decisive importance. What is of decisive importance is whether those participating in the public debate of public affairs have become shapers of public life, making regular or occasional public appearances based on their own decisions.<sup>41</sup>

The statement of reasons, beyond making an erroneous judgment regarding the relationship between a public affair and public figure criteria, identifies with the approach taken by the Curia in the cases concerning the images of policemen, according to which 'based on the definition of jurisprudence and legal literature, appearance, more specifically public appearance, shall be any political, social or artistic activity based on the voluntary decision and autonomous decision of the individual for a specific purpose, wishing to influence the life of the local community or society, in a narrower or broader sense.'<sup>42</sup> In the decisions taken in the

<sup>41</sup> Ibid [44], [48] and [50].

<sup>42</sup> BKMPJE Decision 1/2012, item III.



cases concerning the images of policemen, the Constitutional Court avoided, finally, rebutting the necessarily voluntary nature of appearance in public, and did not consider the reduced right of policemen to the protection of their images as justified pursuant to Section 2:48(2) of the Civil Code describing an appearance in public life, but it based these decisions on the constitutional consideration of public interest. This does not mean that this approach, according to which appearance in public is always based on a voluntary decision, is right; this approach is overly restrictive as is clearly justified in the concurring opinion of Judge Schanda, who refers to an illuminating example from the case law of the European Court of Human Rights as an illustration.

[103] Therefore, when deciding whether the expression of an opinion belongs to the sphere of discussing public affairs, i.e. it is to be granted increased constitutional protection, it is important to judge what role the consideration of public appearance plays. The statement of reasons of the current decision at some points refers to the fact that, in order to provide strong protection to the freedom of speech, following the decision on whether a statement belongs to the category of public affairs, we also need to decide whether the person concerned was a ‘public figure’ voluntarily affected by the statement. However, this logic of the constitutional law evaluation would not be in line with either domestic jurisprudence or the interpretation provided by the ECtHR.

[104] The status of public figure is one of the criteria within the constitutional law evaluation of whether the speech concerned belongs to the sphere of the debate of public affairs. This evaluation is based on various considerations, as shown by Decision 13/2014. (IV. 18.) AB (Statement of Reasons, [39]). The complexity of the test elaborated there in detail – which in reality is an appeal to give due consideration to all the factors of the individual case – very well illustrates that whether a statement qualifies as a public affair depends much more on individual social circumstances than on normative definitions. The basic theory mentioned earlier, namely that the question focuses on the nature of public affairs rather than the status of those concerned, shows that the public figure (and exercising state powers) qualification is one of the important but not, by itself, decisive elements of this categorisation. [...]

[105] The logic of the evaluation is relevant. According to the statement of reasons of the decision, after the categorisation, the public figure status needs to be decided upon in the subsequent process, because the enforcement of free expression may be justified “exclusively in those instances in which participants became active influencers of public affairs based on their own decisions, thereby undertaking their exposure to evaluations and judgements in front of the public eye in the community concerned.” (Statement of Reasons [48]). This, however, is not so. It has already been confirmed by domestic case law that the increased protection of the freedom of speech is applicable to a broader spectrum than ‘official public figures’ only [see Decision 7/2014. (III. 7.) AB]. The guidance of the Strasbourg case law sheds light upon the fact that, in certain cases, specific standards may be applied without having to identify any condition or circumstance which would render those concerned at least an ad hoc voluntary public figure: The Norwegian seal hunters in the case previously referred to did not have the faintest intention of voluntarily making a public appearance or becoming affected in a public debate; nevertheless, the protection of their personality rights in the legitimate social debate on the cruelty of seal hunting became more restricted [ECtHR,

Bladet Tromsø and Stensaas v Norway (21980/93), 20 May 1999]. Whether the protection of personality rights may be restricted to a varying degree depending on those concerned is a different question but this is already the question regarding tests within the realm of the debate of public affairs and it is not an evaluation to delineate area of the freedom of speech that is to be granted increased protection.

[106] In summary, those applying the law need to take a decision based on all the circumstances of the given case – including those concerned, if they exercise public authority or have (official or ad hoc) public figure status – whether the expression of opinion to be judged falls under the category of public debate of public affairs or not. If the answer to this question is yes, the constitutional considerations of the freedom of speech will be amplified and the protection of the personality rights of those affected by the expression of opinion will by all means – i.e. irrespective of factors referring to the voluntary appearance in public – be more restricted. In the case of politicians who appear in public or media personalities permanently seeking the limelight, it will of course be of a much greater extent than for the seal hunters, but this is already the question of fine-tuned tests within the realm of the debate of public affairs and not an issue of the initial categorisation.<sup>43</sup>

The concurring opinion, as opposed to the opinion adopted by the majority, is so far fully aligned with the jurisprudence of the Constitutional Court. Placing primary emphasis on the ‘public affair’ category, accompanied by the ‘public figure’ as the secondary consideration, ensures the proper balance of the freedom of speech and the enforcement of personality rights. However, giving the same priority to both and thus making them the conjunctive condition for the restricted protection of personality rights would bring about an unjustified restriction of open public debates. It would not result in a stronger protection of the rights of public figures, who would enjoy the level of protection granted to private persons; furthermore, debates of public affairs in which non-public figures participate would be less protected. This is an unwelcome development, and contradicts the principles that are derived from the case law of the Constitutional Court.

## **IV The Distinction Between Statements of Fact and Statements of Opinion**

Pursuant to Decision 36/1994. (VI. 24.) AB, when judging statements liable to damage one’s good reputation and honour, a distinction needs to be made between statements of fact and statements of opinion. This distinction is in turn based on further criteria. It is already enshrined in the Civil Code thus, pursuant to Section 2:45, that violation of good reputation means in particular misrepresenting or reporting untrue facts concerning and offending another person or misrepresenting true facts. Decision 7/2014. (III. 7.) AB also stipulates that the freedom of untrue facts and extreme opinions and their restrictability is to be established through the application of different constitutional tests.

<sup>43</sup> Decision 3145/2018. (V. 7.) AB of the Constitutional Court of the Republic of Hungary, ABH 2018, 745, [103]–[106] (Judge Schanda).

According to the Constitutional Court's decisions on statements of fact, a distinction must be made between true statements of fact (that have been proved before the court) and untrue (unproven) statements of fact. A further distinction may be drawn up in the context of untrue statements of fact due to the different evaluation of intentional statements or statements where the speaker failed to exercise the caution reasonably expected of him pursuant to the rules applicable to his profession or occupation, and statements made while observing the rules of his profession. Although the decisions of the Constitutional Court did not prescribe making such distinctions, the jurisprudence does draw a distinction between opinions based on facts and opinions, which, due to their character, lack such grounds (such as opinions generated by passion, reflecting emotions or containing an individual subjective value judgement). If, in the case of the former, the reality of the facts, which serve as the grounds for the opinion, is proved before the courts then the person expressing the opinion shall not be prosecuted, no matter how extreme or offensive his or her opinion is. On the other hand, opinions that have no factual grounds will remain restrictable if they are unduly offensive, insulting and humiliating (disparaging) as described by the judicial terminology.

Decision 13/2014. (IV. 18.) AB established criteria with a general scope and beyond the boundaries of criminal law, based on which the courts must take into account the following when differentiating between statements of fact and statements of opinion in cases of defamation:

[The] proceeding courts need to respond to the question of whether publicism (topical editorials) qualifies as a statement of fact or as a value judgement. In the course of this, attention must be paid to the fact that the full meaning of the incriminating sentence is available only in the context of a full text, the objective of which was to criticise the asset management practices of the municipality, i.e. the writing criticised the asset and financial management of the city with irony and exaggeration as [rhetorical] devices. Furthermore, it is necessary to evaluate the opinion context of the essay, which drew public attention to material inequalities and wasteful budgetary management experienced within the local community. On the basis of this, the question can be decided as to whether the essay contains any specific element at all, the truthfulness of which may be verified, or whether the writing is a value judgement expressing criticism, the opportunity and fact of which is protected, irrespective of its content.<sup>44</sup>

The above set of criteria is also applicable in private law disputes. Even with all the above taken into account, making a distinction between statements of fact and statements of opinion is a daunting task in specific cases. Such a task faced the Constitutional Court in respect of a debate between two historians.<sup>45</sup> The defendant in the main proceedings said, of the complainant, that what he said is 'extreme right-wing political provocation, which [...] would be punishable with lawful tools, because it relativises the Holocaust, and it is on the verge of

<sup>44</sup> Decision 13/2014. (IV. 18.) AB of the Constitutional Court of the Republic of Hungary, ABH 2014, 286, Statement of Reasons, [49].

<sup>45</sup> Decision 3001/2018. (I. 10.) AB of the Constitutional Court of the Republic of Hungary, ABH 2018, 14.

Holocaust denial. The complainant has ‘two fundamental objectives in mind: [...] they are related to the new ideological considerations of the new institution; the new authoritarian regime needs to whitewash its predecessor, the Horthy regime. It is absolutely obvious that this is what the issue is about and it tries to whitewash even Horthy himself from the crime of genocide, but it is an impossible endeavour’. The defendant, referring to the complainant, claimed that ‘only people who are professionally, morally and politically open to the extreme right, and ideologically think in terms of the restoration of the Horthy regime may be appointed as directors of such government institutes’. The above utterances are half-way between statements of facts and statements of opinions, and the Constitutional Court itself was divided on the issue of how to classify them. However, the majority regarded them as statement of facts, because:

the Constitutional Court took into account the context and purpose of the sentences at issue in the statement of the defendant, as well as the context and purpose of the statements in their entirety. Based on these criteria, it may be established that the defendant criticised and amplified the position of the complainant as expressed in the interview in a way that draws attention to it, using generalisation and exaggeration as legitimate tools, occasionally in an agitated tone; it questioned its scientific foundations and, drawing conclusions from the aforementioned, questioned in general the aptitude of the complainant to work as the institute’s director and criticised the ideological bias of the historical research institute established by the government.<sup>46</sup>

The element of criticism, with the nature of a judgement, made the statement an opinion according to the majority of the Constitutional Court and, as such, a less stringent test had to be applied to it and so the constitutional complaint was rejected by the body. The opinion-like character of the statement in respect of relativising the Holocaust, which qualifies as a crime, may be disputed, as five Constitutional Court judges did dispute it. However, even in this case, its qualification as an opinion is acceptable, taking the formulation and the opinion-character of the statement into account.

In order to further illustrate the difficulties posed by differentiating between statements of fact and statements of opinion, it is worth making a short detour to examine the case law of courts and the Constitutional Court in respect of the Act on Electoral Procedure, which is linked in an interesting way to the constitutional interpretation emerging in respect of the Civil Code.

In Decision 31/2014. (X. 9.) AB, the Court used its own case law as a basis with regard to the protection of personality rights of public figures as a given; in the present case, it primarily referred to Decision 7/2014. (III. 7.) AB: ‘In an election campaign, the freedom of expression and its restrictions need to be interpreted and judged in the personal relationship of public figures.’<sup>47</sup> This justification is disputable, at least. The section of the Act on Electoral Procedure concerned prescribes exercising of rights ‘in good faith in accordance with their

<sup>46</sup> Ibid Statement of Reasons, [36].

<sup>47</sup> Decision 31/2014. (X. 9.) AB of the Constitutional Court of the Republic of Hungary, ABH 2014, 1376, Statement of Reasons, [28].

purpose,<sup>48</sup> i.e. in the cases discussed, its test must be found (when is it possible to make an untrue statement in good faith, is it possible in theory to publish extreme and offensive opinions in good faith and within the limits of the purposeful exercise of rights during an election campaign period). The personality right tests invoked in the cases (protection of good reputation and honour in private law and defamation and libel in criminal law) are related to the application of other facts; therefore, at first sight, it is not absolutely clear whether they may be applicable in the context of the Act on Electoral Procedure. However, it is logical to some extent that the Curia, as well as the Constitutional Court, drew upon these tests, given the civil analogies in the statement of facts; for example, those tests related to which public figures are affected, to the necessary distinction between statements of fact and opinion and to the debate or discussion of public affairs. In the specific case, the Constitutional Court essentially overruled the court of appeal:

The judicial decision did not take into account that the complainant made a statement expressing his opinion. The distinction between a value judgement and a statement of fact may also have constitutional relevance. [...] Therefore, the freedom of expression is given increased protection in relation to value judgements which surface in a collision between opinions on public affairs, even if they are perhaps exaggerated and heightened.<sup>49</sup>

Overruling without giving an actual statement of reasons is problematic. The Constitutional Court should have defined the constitutional criteria for the distinction between a statement of fact and a statement of opinion; what the court may consider a fact and what it may regard as an opinion? In addition, the range of choices available is not merely limited to one between facts and opinions and therefore a more differentiated approach is necessary: statements of fact need to be distinguished from one another (they may be true or untrue), while opinions may have a factual ground that may be examined (the factual ground of which may be true or untrue) or be fully subjective opinions and value judgements that have no factual basis.

The complainant in Decision 5/2015. (II. 25.) AB called himself the only left-wing candidate on 1 February 2015 at the demonstration in Kossuth tér in Budapest. He stated: 'Fidesz has 11 candidates wearing 11 different shirts. The Fidesz team has fake candidates, dividing the voters of the opposition and adventurers who are in preparation. [...] On 22 February, I will defeat the Fidesz candidates in Veszprém.' The constitutional background to the decision in this case was again Decisions 36/1994. (VI. 24.) AB and 7/2014. (III. 7.) AB, relating to the protection of the reputation and honour of public figures. Again, in terms of classifying the statements as facts or opinion, the Constitutional Court came to a different conclusion to the court: '[The] decision taken by the judge in the current case seized on the direct content of the statement and stuck to it, ignoring the fact that the complainant expressed his ideas as his opinion.'<sup>50</sup>

<sup>48</sup> Act XXXVI of 2013 on Electoral Procedure, s 2(1)e).

<sup>49</sup> Ibid [29] and [30].

<sup>50</sup> Decision 5/2015. (II. 25.) AB of the Constitutional Court of the Republic of Hungary, ABH 2015, 136, Statement of Reasons, [27].

No substantive reasoning was attached to the decision of the Constitutional Court. It may be assumed that the Constitutional Court was right in deciding that the speech in question was an opinion, but they should have given arguments in favour of this position. True, if we take the expressed statement word for word, it included untruths, but this strict interpretation may also be misleading. It was obvious that the words must not be interpreted in their strict sense. The same would seem to apply to this case, because it is obvious that one party cannot have 11 different candidates in the same constituency competing with one another.

A nominating organisation in another case shared a video on its social media site on 29 March 2015, according to which one of the rival candidates running in the by-election for a seat in the National Assembly, who was a member of the supervisory board of MAL Zrt. at the time when the red sludge disaster occurred, might be liable for the accident. According to the video, 'P.F. was sitting among the management of the company'; furthermore, 'P.F. would have been responsible for preventing the disaster, but he did not do anything.' The Curia deemed these words as a misrepresentation of facts, and elaborated in detail, with legal references, that a member of the supervisory board may not be considered as a 'manager' of the given company. Decision 9/2015. (IV. 23.) AB rejected this, and judged the statements in the video to be an opinion:

Taking into account the circumstances, subject matter and purpose of the specific statement, the Constitutional Court established that the video shared in the election campaign, and the statements it contains clearly belong to the sphere of the free discussion of public affairs, which is to be granted increased protection in order to ensure the freedom of expression. Therefore, this means that the Curia, when taking its decision, did not take into account the fact that the local organisation of the nominating organisation represented by the applicant shared this video as a political opinion in the course of an election campaign.<sup>51</sup>

The claims relating to Decision 5/2015. (II. 25.) AB are also valid here. It is not only the constitutional criteria applied to the statement of fact and opinion that are not identified in the decision, but it is also not clear why the Constitutional Court considered the statement in question as an opinion (which I think is erroneous). Undoubtedly, in certain cases, the differentiation between statements of fact and of opinion is difficult and presupposes a necessarily subjective decision, but the Constitutional Court, in its decision, should have provided an explanation of why it provided an interpretation that is different from that of the Curia; all the more so because in this decision, it had made genuine efforts to provide reasons for the claims being interpreted as a statement of facts.

Decision 3107/2018. (IV. 9.) AB was handed down in respect of a leaflet featuring the following claim: 'T.B., your MP, has uttered the name of Fót [one of the towns in his constituency] in the Parliament once since 2014.' The Constitutional Court had the following to say on whether the statement was regarded as a fact or an opinion:

<sup>51</sup> Decision 9/2015. (IV. 23.) AB of the Constitutional Court of the Republic of Hungary, ABH 2015, 552, Statement of Reasons, [43].

[26] [...] The Constitutional Court has consistently considered an election campaign as a situation in which arguments for a free debate of public affairs are the strongest, and where opinions on political programmes and the suitability of candidates may be expressed even in an exaggerated and agitated manner, taking account of the fact that, during this period of time, there are also ample opportunities to express rebuttals or counter-opinions. [...]

[28] 3.2. Confirming all this, the Constitutional Court emphasises that in political debates, which are especially heated during the time of the election campaign, statements of fact may not be defined by automatically applying the provability test in the ordinary sense of the word, i.e. it may not be restricted only to evaluating the verbatim content of the statement examined. To establish the legal liability of those participating in an intensive debate on public affairs, it is not sufficient to show that certain elements of the examined statement may be rebutted objectively. The statement at issue has to be evaluated in the special situation of the election campaign and in the light of its real message for the addressees of the campaign slogans, the message for voters. The approach taken by this evaluation is determined by the fact that, in a democratic debate on public affairs, those who are concerned with the debate are citizens interpreting political events in their own context, who are aware of the specific features of opinions expressed by political parties, especially aware of the special features of campaigning, which are to attract attention and which have a tendency to exaggerate. [...]

[29] When deciding whether or not a statement is a fact from the constitutional law perspective, all this needs to be taken into account. If taking into account the debate on public affairs, and especially the specific features of the campaign then it is reasonable to attribute a meaning to the statement according to which the voters will interpret this statement as a political opinion of the past or future policy of the party concerned, or the aptitude of the candidate, and not take it word for word, this, then, has to be the point of departure in order to ensure the freedom of the most intensive sphere of a public debate. This evaluation, therefore, clearly goes beyond an examination of the elements of the statement and applying the provability test, and requires the evaluation of all the conditions relating to the case. If the statements expressed concern different public figures and relate to their political activities, programme or credibility and suitability, it may be assumed that voters will deem these statements to be opinions, even if these statements were formulated in the indicative mood. The exaggerated and shocking formulation of criticism might also be granted protection, even if the exaggeration might affect a fact as well. In doubtful situations, the evaluation may rely on the fact that there is ample opportunity in the campaign to rebut certain details or elements factually.<sup>52</sup>

It is clear that, in individual cases, the freedom of debating public affairs and the differentiation between statements of fact and statements of opinion require a flexible decision, which takes into account the general state of public speech and the context of the statement. In the long run, in election-related questions, it may be worth contemplating whether, in the context of the Act on Electoral Procedure, the analogy of the generally valid rules of personality rights

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<sup>52</sup> Decision 3107/2018. (IV. 9.) AB of the Constitutional Court of the Republic of Hungary, Statement of Reasons, [26] and [28]–[29].

protection is justifiable and applicable to the debate of public affairs, or, due to the character of an election (referendum) procedure, it is possible to identify specificities which justify a derogation from them. This is not an easy task, because applying the analogy seems natural, as in both cases public figures and public affairs are concerned; what is more, public affairs, which are the most likely to give rise to vigorous views, are the subject of a running debate in an election campaign, in which the parties state facts and formulate opinions. Even on this basis, in theory, it is possible to interpret the tests of good faith and exercising rights in accordance with their purpose as prescribed by the Act on Electoral Procedure in a way that is compatible with, but not fully identical to, the constitutional expectations relating to rules on the protection of the personality rights enshrined in the Civil Code and Criminal Code. One example of a possible derogation could be that even if due care is given [see Decisions 36/1994. (VI. 24.) AB and 7/2014. (III. 7.) AB], arguments against the protection of stating untrue facts may be raised in the context of the election process because, although they do not result in the violation of personality rights, they may mislead voters.

## **V The Threshold of Tolerance with Regard to Personality Rights for Persons Involved in the Discussion of Public Affairs**

The enforcement of the rules on the protection of personality rights in debates of public affairs and the higher threshold of tolerance for public figures and those concerned in public affairs was first defined in Decision 36/1994. (VI. 24.) AB. Twenty years later, it was made more precise when amended by Decision 7/2014. (III. 7.) AB, although regular courts did not apply or only partially applied the decision of 1994.<sup>53</sup> Decision 13/2014. (IV. 18.) AB partially reinforced the argument formulated in 1994 for criminal law but, remarkably, it was applied to the part of the test related to untrue facts:

[the] freedom of expression relating to public affairs fully protects facts that are proved true, while it protects the act of stating or spreading false facts only if the person spreading the rumour was not aware of the falsehood and did not fail to apply the circumspection required by their profession, either. These statements of facts, capable of slander, constitute the criminal offence of defamation and hence are subject to punishment.<sup>54</sup>

Concerning the freedom of value judgements, however, the Constitutional Court did not refer to its decision of 1994 (intending to provide unlimited constitutional protection to value judgements) but, in a previous paragraph of the Statement of Reasons, it quoted its Decision 7/2014. (III. 7.) AB, which is more restrictive in terms of the freedom of speech, but more lenient in terms of the protection of the personality rights:

<sup>53</sup> See Koltay András, 'A közéleti szereplők hírnév- és becsületvédelmének kérdései Európában, különös tekintettel a magyar jogrendszerre' in Koltay, Török (n 7).

<sup>54</sup> Decision 13/2014. (IV. 18.) AB of the Constitutional Court of the Republic of Hungary, ABH 2014, 286, Statement of Reasons, [41].



[the] freedom of opinion no longer provides protection for self-serving statements, which are outside the scope of the debate of public affairs, thus are related to private or family life, and aim solely at humiliation or the use of insulting or offensive expressions, or the violation of other rights. [...] Besides, it does not protect the opinion expressed in the public debate if the statements formulated violate the unrestrictable essence of human dignity; as such, they are the embodiment of an obvious and grave defamation of the human status.<sup>55</sup>

Decision 3328/2017. (XII. 8.) AB modified the test applied in 1994 on an important point. The Statement of Reasons concluded that, since defamation as a criminal act can only be committed deliberately, one of the elements of the test established in Decision 36/1994. (VI. 24.) AB may no longer be maintained, namely the one according to which the person who 'did not know of its falsehood [statement of fact offending one's honour] because of his failure to pay attention or exercise the caution reasonably expected of him pursuant to the rules applicable to his profession or occupation, taking into account the subject matter, the medium and the addressee of the expression in question'

The Constitutional Court attributed special significance to the fact that the legislator does not deem the defamation caused by negligence punishable as a criminal act in the effective Criminal Code. Based on this, and taking the facts in the Statement of Reasons in Constitutional Court Decision [34/2004. (IX. 28.)] into account, it concluded that the constitutional expectation concerning defamation caused by negligence can no longer be maintained.<sup>56</sup>

This Decision 34/2004. (IX. 28.) AB, does indeed contain argumentation linked to the above. However, I am of the opinion that neither there, nor in Decision 3328/2017. (XII. 8.) AB is the point of departure appropriate: The decision of 1994 did not wish to introduce defamation caused by negligence; it only provided grounds for exemption with respect to the conduct in question in order to explore the reality of the given statement. As the decision of 2004 rightly concludes: 'The criminal act of defamation stipulated in Section 179 of the [old] Criminal Code may exclusively be committed deliberately and, in order to establish the deliberate nature of the act, it is necessary for the perpetrator to be aware of the fact that the statement of fact is capable of offending one's honour.' Therefore, 'deliberate nature' here only refers to the publication of offensive statements and not to the fact that only deliberate lies may be offensive. The perpetrator needs to be aware of the fact that his statement is capable of negatively impacting on the social reputation and perception of the person targeted. This is also possible by making true statements, which the court might allow to be proved (Section 229 of the Criminal Code). If the court does not permit evidence to be provided, an otherwise true statement might also be defamatory. It is enough if the person who did not proceed with due care and diligence when establishing the truth of the statement knows that his statement might have negative consequences for the person concerned, thus his conduct will be regarded

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<sup>55</sup> Decision 7/2014. (III. 7.) AB of the Constitutional Court of the Republic of Hungary, ABH 2014, 209, Statement of Reasons, [40].

<sup>56</sup> Decision 3328/2017. (XII. 8.) AB of the Constitutional Court of the Republic of Hungary, ABH 2017, 1942, Statement of Reasons, [63].

as deliberate. The crime of defamation may be committed with a potential intention.<sup>57</sup> As a result, the reasoning of Decision 3328/2017. (XII. 8.) AB is unsound on this point, and it is also questionable whether, in cases relevant to criminal law, a new test will be applied by the Constitutional Court in the future.<sup>58</sup> A positive answer to this would entail a significant broadening of the scope of the freedom of speech as, in debates of public affairs in the future, only deliberately untrue statements (wilful, intentional lies) would be criminally punishable as defamation (though even in this case, the burden of proof would still lie with the speaker).

The interpretation of the right to honour and the freedom of opinions in the debate of public affairs is a question of fundamental importance. The Constitutional Court decision of 2014 introduced an interpretation that weighs up the options appropriately, and also provides room for free speech and the protection of personality rights, which will also be reflected in decisions handed down subsequently. Decision 3145/2018. (V. 7.) AB stipulated the following with respect to a legal dispute between two figures in the tabloid press:

The courts acting in the case launched by the complainant examined the statements in the lawsuit – as they were explicitly referred to by the court of second instance in its judgment – taking into account the constitutional content of Article IX(1) of the Fundamental Law. Pursuant to this, they formulated their uniform position, according to which the use of the term ‘psychopath’ in the case is not a suitable ground for establishing the infringement of rights, neither on the basis of its content, nor on the basis of the way in which it was formulated. In this context, the courts attributed decisive importance to the fact that the defendant did not use the term at issue in a medical sense. The court of second instance also referred to how, in everyday language, it is customary to use this expression to describe somebody who does not act in a way liked by or expected by the other party. Consequently, from the notes in the lawsuit, it does not follow that, according to the defendant, the complainant suffers from the disease referred to. The defendant formulated the contested statements as the subjective evaluation of the complainant’s conduct towards him. According to the position taken by the courts, the formulation ‘under obscure circumstances’ can also be clearly identified as an expression of opinion, which was a way in which the defendant reacted to the conduct of the complainant toward him.<sup>59</sup>

The Constitutional Court laid down in its Decision 3263/2018. (VII. 20.) AB a similar interpretation of the right to honour in light of the free debate of public affairs, coming to the conclusion that the right to honour does not really provide any protection in a debate of public affairs, and only statements that go beyond the damage to one’s honour and which offend the unrestrictable aspect of human dignity may be sanctioned:

<sup>57</sup> Szomora Zsolt, ‘Rágalmazás’ in Karsai Krisztina (ed), *Kommentár a Büntető törvénykönyvhöz* (CompLex 2013, Budapest) 475.

<sup>58</sup> Balogh Éva, ‘Alkotmánybíróság útvesztőben’ (2018) 22 (2–3) *Fundamentum* 82–83.

<sup>59</sup> Decision 3145/2018. (V. 7.) AB of the Constitutional Court of the Republic of Hungary, ABH 2018, 745, Statement of Reasons, [81].

[40] When interpreting the boundaries of the freedom of speech enshrined in Article IX para (1) of the Fundamental Law – with special regard to its restriction by criminal law –, [...] the Constitutional Court established a more stringent test than ‘the offence of honour’. According to the interpretation based on previous case law, and developing that further pursuant to the Fundamental Law, in the debate of public affairs, a criticism or value judgement relating to the person exercising state powers or a politician who is a public figure may not serve as grounds for criminal liability as the main rule. Only statements that collide with the unrestrictable aspect of human dignity, i.e. offending the legally expressed essence of one’s status as a human being, violate the constitutional right of free expression.

[41] The Constitutional Court emphasises that this restriction of the freedom of speech does not limit the disparaging or abusive nature of expressing an opinion per se, but it protects the essence of human dignity, which defines the essence of a human being. This unrestrictable domain of human dignity is not damaged by disparaging certain partial rights derived from human dignity (e.g. honour, good reputation) intensively and in a qualified manner, but if stating an opinion which ab ovo is aimed at violating this sphere protected in a special manner. Such a violation of rights could be, on the one hand, if the speaker negates or challenges the human status of those concerned or the requirement to treat them as human beings; on the other hand, if it intrudes into the innermost realm of human nature, attacking in a self-serving manner features that constitute the essence of one’s personality and identity. As opposed to the subjective category of the ‘sense of honour’, this violation provides an objective ground, which the courts may invoke when assessing defamation from the perspective of criminal law.<sup>60</sup>

BDT 2018. 3808. follows an important supplementary interpretation, according to which a more lenient judgment should be handed down in terms of the statement of untrue facts if the organisation concerned in the public affair (in this case the National Tax and Customs Authority) does not provide adequate information to the representatives of the media. In this case, ‘speculation’, which might contain untrue statements that cannot be proved, might be lawful if its publication is not abusive: ‘If, in public affairs of high interest to the public, the proprietors of information withhold information of high interest, the press, in addition to describing the facts and information serving as the basis of their conclusion, may also publish data in the form of speculation: these are protected by the freedom of expression on condition that they are not based on falsifying the facts.’<sup>61</sup>

It is also worth referring to a decision that relates to the constitutional interpretation of the Act on Electoral Procedure. In the case on which Decision 3122/2014. (IV. 24.) AB is based, a media service provider refused to broadcast a political promotional film by the applicant. The film ‘depicts a man disguised as a monkey dressed up in a military uniform, who is lip-synching to the voices of former Hungarian prime ministers.’<sup>62</sup> According to the

<sup>60</sup> Decision 3263/2018. (VII. 20.) AB of the Constitutional Court of the Republic of Hungary, ABH 2018, 1417, Statement of Reasons, [40] and [41].

<sup>61</sup> BDT 2018. 3808.

<sup>62</sup> Decision 3122/2014. (IV. 24.) AB of the Constitutional Court of the Republic of Hungary, ABH 2014, 610, Statement of Reasons, [2].

position taken by the Curia, ‘identifying somebody with an animal at any time qualifies as dehumanising the person concerned and this in a given case may be capable of violating human dignity.’<sup>63</sup> The position of the Curia is not sufficiently detailed; for example, the statement of reasons does not elaborate on the question of the extent to which satire and parody enjoy the protection of the freedom of speech. The conclusion that the phenomenon of public figures metaphorically ‘dressing up as animals’ may be interpreted as ‘identification with an animal’, the assessment of which concerns the very essence of the case, is dubious and so a more detailed elaboration would have been justified. The Constitutional Court, in agreement with the Curia, claimed that:

[the] scope of the freedom of expression protected by the Fundamental Law is broader with regard to opinions concerning exercising state powers and politicians acting in public but, even in their case, human dignity has an essential, untouchable core, which those formulating potential criticism are also obliged to respect. In the present election-related case, the depiction of those concerned as animals in a disparaging manner violates this essential content and thereby violates Article II and Article IX(4) of the Fundamental Law.<sup>64</sup>

It may be contested that the depiction in this case violated human dignity. In the period of election campaigns, public figures need to tolerate harsh, sometimes extreme criticism. It is common sense that nobody would think that the filmmakers do not consider the public figures of outstanding importance concerned in this case as homo sapiens, and so the film, though it did depict public figures as animals, due to its characteristics as a parody, could not have met the condition of ‘the total, obvious and severely disparaging negation of the human status of the person concerned.’<sup>65</sup>

## **VI Dissemination – the Obligations of the Media in Respect of Reporting Different Positions in Public Debate**

The matter of dissemination is one of the most sensitive issues connected to the rules on the protection of reputation and honour. Dissemination means the act of relaying information received from others. Under both the Civil Code and the Criminal Code, dissemination is regarded as if the person who merely relayed the information made the false statement himself. According to Position No. 14 of the Civil Law Department of the Supreme Court on press correction – the validity of which may be extended to other means of protecting reputation – ‘the correction of false statements is necessary, even if the communication originates from other sources. For this reason, the law allows for press corrections in the event

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<sup>63</sup> Ibid [3].

<sup>64</sup> Ibid [17].

<sup>65</sup> Decision 7/2014. (III. 7.) AB of the Constitutional Court of the Republic of Hungary, ABH 2014, 238, Statement of Reasons, [62].

of both making statements based on their own experiences and of relaying or communicating, i.e. disseminating, information received from others.’

The interest of publishing reports on public affairs and public events might collide with the interest of publishing true statements. The media, due to their character and the pace of publication, in numerous cases, do not have or have only a limited opportunity to check whether information complies with reality. In policy questions, they cannot decide in favour of any of the opposing positions, nor do they always have the opportunity to listen to the other party (although there is a fundamental ethical requirement for the media to make efforts to do so). Therefore, it is necessary to define the sources of information for which the media are automatically exempted from the obligation to check the content for reality (official communications, for example), and those that bring about some additional obligation (such as a procedure in good faith), as well as those where due diligence or increased diligence is expected in the course of publication.

Before the Civil Code was adopted, the case law of Hungarian courts had already shifted to a more lenient approach toward dissemination, with exemption from liability for persons disseminating information. In certain cases, and if using certain journalists’ sources, it may be acceptable if the media provider merely publishes a statement as is. According to case EBH 2001. 407., such sources include the National Assembly, local governments and various national and local public administration bodies. ‘Press members [...] reporting on proceedings falling within the competence (of these) or on motions or proposals filed during such proceedings are not required to have evidence for the truthfulness of their statements.’ Similarly, the media may not be required ‘to verify the statements made in a press conference by a police officer’ (BH 2002. 51.). By way of extending the application of this principle, the act of relaying information received from a press officer of the court may not serve as grounds for any claim for the infringement of personality rights (BH 2003. 357.). Similarly, ‘press correction may not be sought if the press publishes correct information about a fact established in a criminal, civil or public administrative action before the completion of the proceedings’ (BH 2004. 273.), even if the information subsequently turns out to be false in the course of the proceedings. For example, journalists who practically called a victim of a crime a psychopath on the basis of a defective expert opinion prepared during the police investigation were found not guilty of the crime of libel under case EBH 2005. 1289. A Supreme Court decision has also been made concerning the interpretation of the notion of dissemination in the context of on-line communication. If the on-line content provider publishes the news on a public website of a weekly paper run by it in a way that is accessible to anybody, the person who releases this information to others does not meet the statutory conditions of dissemination (BDT 2012. 2742.). In contrast, according to BH 2013. 266. ‘relaying the infringing article by e-mail shall qualify as dissemination.’

It was rather late, at the end of 2017 that the Constitutional Court first dealt with the question of dissemination in its Decision 34/2017. (XII. 11.) AB. In its first decision, it laid down a rule on interpretation – as a constitutional requirement – that extends the scope of exemption of the media from liability with regard to dissemination. The exemptions granted

include not only official communications by various organisations exercising executive power and other state organisations but press conferences of public figures in general.

The Constitutional Court establishes: It is a constitutional requirement stemming from Article IX(2) of the Fundamental Law and the freedom of the press enshrined therein that media content providers' activity, when reporting on the statements made at the press conferences of public figures in the debate of public affairs, in a way that is true to reality, without any interpretation and assessment and clearly indicating the sources of information and providing space for the rebuttal of the person affected by the statements of facts which might potentially offend his good reputation (or offering the opportunity for a response) shall not qualify as dissemination that is sanctioned by civil law as the violation of personality rights.<sup>66</sup>

The constitutional interpretation has also been followed in the case law of this area and indeed the practices of courts have further extended its scope. According to the decision of the Court of Appeal in Pécs, BDT 2018. 3835., the full and true to reality reporting of any statements made by public figures – i.e. not only statements made at a press conference – provides grounds for exemption from liability, even if the reporting published contains a statement of untrue facts: 'The media shall not be liable to prove truthfulness, if it reports the statement of a public figure in its entirety and true to the original. The substantive content of the statement in such a case shall be the opinion of the speaker itself, which may also include statements of facts evaluated by the speaker.'<sup>67</sup>

A second Constitutional Court decision on this matter, 3002/2018. (I. 10.) AB, handed down not long after this one, however, immediately narrowed the scope of the above constitutional requirement. In a way that is somewhat difficult to interpret, it established that the media shall be exempted from liability for an untrue statement they have disseminated only on condition that the media content includes exclusively the statements of those participating in the debate of the public affair, and nothing else beyond that. This is not too realistic and *ab ovo* excludes the possibility of an exemption of any article or news report prepared by the media themselves, beyond noting down and publishing the statements made by others. At the same time, the Constitutional Court does not limit the theoretical possibility of exemption from liability in terms of publishing facts stated at a press conference, thus such a publication – in line with the decision of the Pécs Court of Appeal – may include any statement concerning a public affair on condition that it does indeed contain only the statements of those concerned.

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<sup>66</sup> Decision 34/2017. (XII. 11.) AB of the Constitutional Court of the Republic of Hungary, ABH 2017, 2065, operative part.

<sup>67</sup> BDT 2018. 3835.

In the interpretation of the Constitutional Court – taking the constitutional requirement established in Decision 34/2017. (XII. 11.) AB into account – press coverage is outside the interpretation scope of dissemination if the media content focuses only on the up-to-date and credible statements of the persons participating in the debate on the public affair. In the given case, the press coverage did not focus on the statement of the first defendant but the description of information related to the events, which is contradictory. Consequently, in the given case, the press coverage examined qualifies as dissemination.<sup>68</sup>

The *Magyar Jelti Zrt. v Hungary* case<sup>69</sup> was launched following the latter decision of the Constitutional Court. The applicant made a complaint before the ECtHR, claiming that the Hungarian authorities had violated his right to the freedom of speech. The case is particularly interesting in that the dissemination was committed by embedding a link into the article; as such, the case was also about the legal judgment of a new form of communication made possible by Internet-based communication: Is it possible for the mere publication of a link to be infringing if the link leads to text or a video containing infringing, untrue statements?

According to the judgment of the ECtHR, if the journalist and/or the media content made by him did not express his agreement with the infringing content, and if he proceeded in good faith with due diligence, respecting the ethical rules of journalism or professional ethics, posting the link in itself does not amount to defamation. In addition, the context of the infringing content needs to be considered, namely what was the legal case regarding which it was posted for the public and who is affected; clearly the threshold of tolerance of outstanding public figures (in this case a parliamentary party) is also higher in such cases.<sup>70</sup>

## **VII Legislative Changes in the Summer of 2018: The Amendment of the Fundamental Law and the Civil Code, and the New Law on the Protection of Private Life**

The summer of 2018 saw several important legislative amendments, which have fundamentally affected the freedom of debate in public affairs and the enforcement of personality rights in private law. In the seventh amendment of the Fundamental Law, Article VI(1) was supplemented with the following text: ‘Exercising the right to freedom of expression and assembly shall not impair the private and family life and home of others.’ If the category of private life is interpreted by the Constitutional Court in line with Article 8 of the European Convention of Human Rights then that may include the right to good reputation and honour.

Act LIII of 2018 on the Protection of Private Life uses this as its point of departure (which, however, logically may not tie the hands of the Constitutional Court when interpreting the provisions of the Fundamental Law in the future). According to Section 8(1) of the Act,

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<sup>68</sup> Decision 3002/2018. (I. 10.) AB of the Constitutional Court of the Republic of Hungary, ABH 2018, 26, Statement of Reasons, [77].

<sup>69</sup> *Magyar Jelti Zrt. v Hungary*, no. 11257/16, 4 December 2018.

<sup>70</sup> *Ibid* [77]–[82].

‘the purpose of the right to respecting private life is especially the right to a name, the protection of personal data, private secrets, image and sound recording, honour and good reputation.’ Section 7(2), however, stipulates that ‘[the] private and family life, as well as the home of a public figure, shall be granted the same protections as those of a person who does not qualify as a public figure.’ Reading the two provisions concurrently, we may also conclude that the right to good reputation and honour, as well as the right to one’s image and one’s recorded sound, are part of the right to private life, and the scope of these rights of public figures are exactly the same as the scope of the rights of private individuals. However, this interpretation is not acceptable, because, on the one hand, in terms of the enforcement of these rights, the most relevant category is not that of the public figure but the public affair while, on the other hand, the same act amended Section 2:44 of the Civil Code, which stipulates the restriction of personality rights in the context of the discussion of public affairs. Nevertheless, the new act does not create a new statement of fact, which may have an impact on the tests of the freedom of speech in the debates of public affairs, and so it remains possible to establish a violation of ‘good reputation’ or ‘private life’ on the basis of the Civil Code and the case law of the Constitutional Court and other courts based on it. Instead, the act defines individual facts amounting to the violation of the right to family life, home and respecting and maintaining contacts.

According to the provisions of the Civil Code, which took effect in August 2018:

Section 2:44 [Protection of the personality rights of public figures]

- (1) The exercise of fundamental rights ensuring a free discussion of public affairs may limit the personality rights of public figures to an extent that is necessary and proportionate and is without prejudice to human dignity; however, it shall not violate their private and family life and home.
- (2) Public figures shall be entitled to the same protection as non-public figures with regard to communications or conduct falling outside the scope of free discussion of public affairs.
- (3) Activities and data in relation to the private or family life of public figures shall not qualify as public affairs.

The new text inserted into Paragraph (1) (‘however, it shall not violate their private and family life and home’) makes it likely that the text of the Civil Code will lend itself to a more restrictive interpretation of the concept of private life, as it does not include the right to good reputation and honour. From the whole of Paragraph (1), it still emerges that, in debates of public affairs, the protection of the right to good reputation, honour, image and recorded sound is restricted and opinions published in these debates and negatively influencing these rights are not infringing per se due to their character, but instead they are to be judged by earlier case law applying the Civil Code and the constitutional interpretation of the freedom of speech. Essentially, the new Paragraph (2) codified part of what is in decision 7/2014. (III. 7.) AB, providing the same degree of protection to public figures as for non-public figures in terms of statements falling outside the debate of public affairs. With regard to the new Paragraph (3), it is extremely important that it should be interpreted by courts in light of the freedom of speech enshrined in Article IX of the Fundamental Law: The private life of a public figure



may also be of high interest to the public if it is related to his public activities or has any bearing on any public affair.

Act LIII of 2018 seems, then, to be a strange piece of legislation, because for the most part it repeats certain provisions of the Fundamental Law, the Civil Code and Act CXII of 2011 on informational self-determination and the freedom of information with some additional content and imposing the sanctions enshrined in the Civil Code in the event of infringements. Its interpretation and identifying its autonomous normative content will be the responsibility of courts and the Constitutional Court.

## **VIII Closing Remarks**

The interpretation of personality rights and the relevant provisions of the Civil Code have gained momentum as a result of the decisions adopted by the Constitutional Court and regular courts in recent years related to the freedom of speech, specifically in discussions of public affairs. It would not be an exaggeration to claim that the number of important decisions taken during this period exceeded those made between 1994 and 2014, a span of twenty years. The significant number of constitutional complaints raised indicates a similar intensity in the near future, which one hopes will lead to the cementing of constitutional principles and the resolution of contradictions in their application. Discussions of public affairs continue to enjoy a broad degree of freedom, and the case law under the aegis of the Civil Code has been extremely helpful in defining the scope of this freedom. With regard to questions of detail, no long-term conclusions may be drawn, due to the rapid changes in this area and legislative efforts as recently as the summer of 2018, but the main criteria needed to strike a balance between the protection of personality rights, and the freedom of the debate of public affairs have already been identified, and the principles applicable to decisions made in individual cases are available in a solid and mature form with a sufficient degree of detail. The category of public affairs is to be interpreted broadly, whereby the public figure is an important category, but it is of secondary importance compared to the category of public affairs, and where the differentiation between statements of fact and statements of opinion is to be treated in a flexible way, and the threshold of tolerance of those concerned is clear from the case law of the Constitutional Court. These are praiseworthy successes in the less than three decades of history of the freedom of speech in Hungary.

# Corporate Governance in Venture Capital Contracts: A German–Hungarian Comparative Law Study

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## I Introduction, Methodology

### 1 Introduction

‘At the moment, Europe has huge reservoirs of scientific talent, but a very poor record at creating start-ups. The question many investors ask is: where is the European Google?’<sup>1</sup>

The basis of a successful company is a good idea. However, a good idea is not enough for success because it is necessary to finance the prototype, the marketing, the salary of the employees, the machinery, etc. It is very rare for the inventor to have enough resources to finance all expenses; as a result, funding usually involves external resources. Bank finance always provides a possibility in order to satisfy these financing needs, providing the company has enough assets as security for the bank loan. At the same time, we shall not forget that even if companies in their early phases do not have such assets which would provide proper securities for banks; on the other hand, the bank loans are expensive money. Unlike bank loans, investors provide equity, which does not have to be given back, although the investor will be a shareholder in the company. Equity transactions are good for the company, since it can use the investor’s money as a capital increase, and equity transactions are also good for investors, assuming the company becomes successful and the investor can sell his share at a higher price than his original investment.<sup>2</sup>

In the different phases of company development, the typical investors are always different entities. In the beginning, the company is financed by the founders and the so-called FFE, namely friends, family and fools. In the very early phase, corporate finance is so risky that there is no person who would take such risk other than the closest friends of the founders, their families or ‘foolish’ people. In the later phases, the risk is lower and there are some natural

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<sup>1</sup> David McWilliams, ‘Ireland Inc. Gets Innovated’ Sunday Business Post On-line; in Start Up Nation (Dan Senor, Saul Singer, Twelve, 2011) 208.

<sup>2</sup> Azin Sharifzadeh, *Venture Capital and Corporate Governance, Inaugural-Dissertation zur Erlangung des Doktor grades des Fachbereichs Wirtschaftswissenschaften der Johann Wolfgang Goethe-Universität Frankfurt am Main*, (LLM thesis, University of Augsburg 2010) 81–83.

persons, named business angels, who believe in the project and finance the company for a short time. When the company is more advanced and it already has sales channels, permanent buyers, a complete prototype, etc., then other investors tend to appear, such as the venture capital investors (VC) and private equity funds (PE). Finally, the company may become strong enough to be financed from the capital market as a listed company.<sup>3</sup>

Obviously, these phases are only the typical, average development phases of a successful company's life cycle but it can probably be accepted as a general experience. The different types of investors, in the different phases of company development are illustrated in *Figure 1* below.<sup>4</sup>

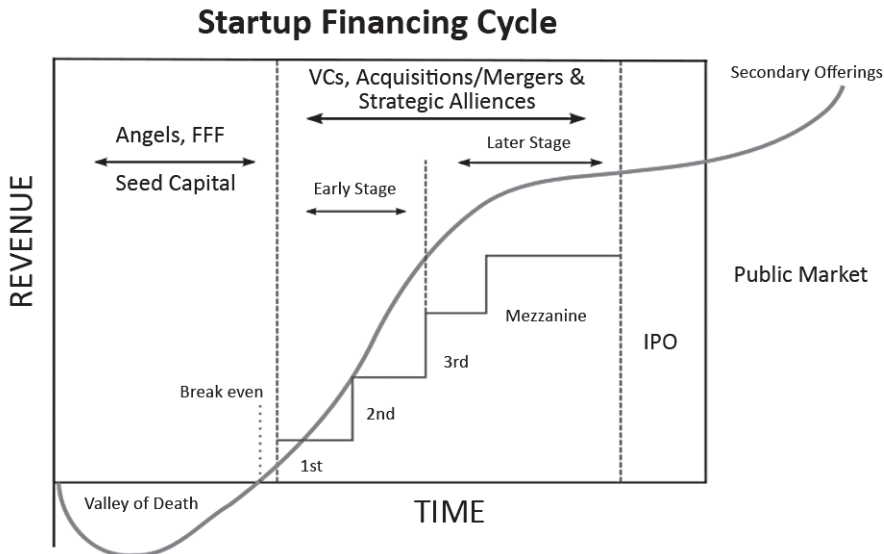


Figure 1: Corporate finance in the different phases of the company development

## 2 Methodology

In this study, we analyse three German and three Hungarian investment contracts and present the corporate governance of the target company after the first venture capital investor has invested in the target company.

In this study, we seek for the person who really manages the target company. In other words, we are looking for the person who is responsible for the decisions.

<sup>3</sup> Eli Talmor, Florin Vasvari, *International Private Equity* (John Wiley & Sons 2011, Hoboken, New Jersey) 365.

<sup>4</sup> Unknown writer, sources: <[http://www.netvalley.com/silicon\\_valley\\_history.html](http://www.netvalley.com/silicon_valley_history.html)> accessed 24 August 2019.

In this study, the company that receives the investment amount will be named the target company, and the investor is always deemed to be a VC fund. The legal forms of the target company were always GmbH in the German contracts and Kft. in the Hungarian contracts. The members of the GmbH will be named shareholders in this study, because the German contracts also used this expression. The Hungarian Kft. has members; therefore we use this expression for the owners of the target company, although it is not a partnership. Many times, when we discuss general problems, we do not differentiate members and shareholders, and use the 'shareholders' expression, since there is no relevant difference between these expressions regarding our study, and it will be easier to understand our statements.

The first shareholders or members of the target company are named founders. We have to note that there is no big difference between VC and PE investors' investment practices in Hungary, so usually, the VC and PE funds use the same terms and conditions but we follow the international trends and this study is based on the practice of VC funds.<sup>5</sup>

In this study, we analyse the Hungarian and German investment laws and practice. Our research method was empirical; we analyse six investment contracts. Three Hungarian contracts were chosen from my own ten-year long investment attorney practice, while three German contracts were chosen from a remarkable German investment law firm's practice, where I worked as an observer researcher.

Our working method had two parts. The Hungarian contracts were selected from the investment contracts available at our own practice, and chose the three most typical risk capital investment contracts. The most typical contracts should be considered that contracts in which the most frequently contained the most atypical investment contractual elements. Atypical contractual elements are those terms and conditions that are not in the Hungarian Civil Code or not otherwise used in daily commercial law practice. This is what Patton calls 'purposeful sampling'.<sup>6</sup> On the other hand, the German contracts were examined based on the contracts, given to us by our German colleagues. We asked them to give us the three most typical risk capital investment contracts from their own practice. The method, when the researcher asks other experts to give research material for their study Webley names 'snowball sampling techniques'.<sup>7</sup>

We have to emphasise that our research is qualitative research; the sampling and our conclusions are not necessarily representative or objective. Of course, it is not possible to conduct quantitative research into contractual practice as there is no researcher who could read every investment relevant contract. As was stated by Corbin and Strauss, 'Nowadays, however, we all know that in qualitative research, objectivity is only a myth'.<sup>8</sup> Our only purpose with this study is to describe the investment contracts which appeared during our research and give a broad picture of the corporate governance system in these contracts.

<sup>5</sup> Timothy Spangler, *The law of private investment funds* (3rd edn, Oxford University Press 2018) 1–27.

<sup>6</sup> Michael Quinn Patton, *Qualitative Research and Evaluation Methods* (3rd edn, Sage Publications 2002, London) 45.

<sup>7</sup> Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane, Herbert Kritzer (eds), *Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 7.

<sup>8</sup> Juliet Corbin, Anselm Strauss, *A kvalitatív kutatás alapjai* (L'Harmattan 2015, Budapest) 71.

Our research is based on inductive method, using comparative legal analysis techniques. We explain the most significant statutory laws from both legal systems and also draw some conclusions.

First of all, we introduce the mandatory law relating to the general corporate governance of the target companies in the examined agreements; later, the corporate bodies are presented in detail and finally we will draw some conclusions.

## II Corporate Governance in the Examined Contracts

First of all, we have to clarify what the definition of the corporate governance is.

We accept Richard Smaldon's definition:

corporate governance is the system by which business corporations are directed and controlled. The corporate governance structure specifies the distribution of rights and responsibilities among different participants in the corporation, such as the board, managers, shareholders and other stakeholders, and spells out the rules and procedures for making decisions on corporate affairs. By doing this, it also provides the structure through which the company objectives are set, and the means of obtaining those objectives and monitoring performance.<sup>9</sup>

Moreover, it is also necessary to explain contractual corporate governance. Richard Smerdon defines the contractual corporate governance as follows: 'Contractual corporate governance refers to the ways and means by which individual companies can deviate from their national corporate governance standards by increasing (or reducing) the level of protection they offer to their shareholders and other stakeholders.'<sup>10</sup> In view of such a definition, we shall only focus on the question of the difference between the statutory law and the applied corporate governance in the examined contracts.

First of all, we introduce the structure of German and Hungarian VC contracts and later we explain how the corporate bodies were working and what power the different corporate bodies had.

### 1 Corporate Governance in the German Agreements

Each German investment contracts consisted of three main different types of agreement.

The first agreement is an investment agreement, which regulates the investment procedure, the amount of the investment, the tranches and KPIs.<sup>11</sup> The second is a shareholders' agreement which sets out the internal rules of the company's operations and the

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<sup>9</sup> Richard Smerdon, *A practical Guide to Corporate Governance* (Sweet & Maxwell 2007, London) 3.

<sup>10</sup> *Ibid.*

<sup>11</sup> Key Performance Indicator, i.e. the conditions, the target company should fulfil to receive the investment funds, or any part thereof.

other rights and obligations between the parties. These two are considered to be trade secret and it is not required to publish their content according to the applicable law. The third agreement is the articles of association, which is a mandatory regulated document mandatory law and qualifies as public data because it is registered in the commercial register. Besides these agreements, there were many other documents in the transactions, for instance power of attorney mandates, business plans, IP agreements and a list of shareholders, etc.

The shareholders' agreement always had two parts in the examined contracts, the corporate governance and the special rights of the investor. Therefore, in the following, we focus on the rules of the shareholders' agreement.

In each contract, there were three main corporate decision-makers:

- a) Shareholders' meetings, as the supreme body of the target company.
- b) Board: Each contract referred to a so-called 'other corporate body', namely the advisory board. This body makes decisions on issues that are usually within the duties of senior management's (derogating from managing directors' competencies).<sup>12</sup>
- c) CEO: None of the shareholders' agreements has any rules for the managing director of the company (CEO), but it was regulated in the articles of association and in mandatory law. As we will see, the managing director has a general power to manage the company, except regarding the powers delegated to other corporate bodies. In fact, the shareholders' contracts all concerned the reduction of the managing director's power and enhancing the power of the general meeting and board.<sup>13</sup>

Finally, it is noted that none of the contracts has any rules for the supervisory board nor the auditor.

## 2 Corporate Governance in the Hungarian Agreements

Unlike the structure of German VC contracts, there were only two main agreements in one investment transaction in the examined Hungarian transactions: the investment agreement and the articles of association. The first one contained the investment structure, tranches, KPIs and the internal relationships regarding the company's operations and the other rights and obligations between the parties. This document was considered trade secret. The articles of association contained the rules which governed the organization and operations of the target company and which were regulated by the mandatory Hungarian corporate law. The articles of association are public data; thus it must be published upon being registering in the company register. Both of these contracts have detailed rules regarding corporate governance.

<sup>12</sup> Peter Cowley, *The Invested Investor* (Invested Investor Limited 2018) 124–130.

<sup>13</sup> Sec. 6 GmbH Act. See more: Frank Dornseifer (ed), *Corporate Business Forms in Europe* (Seiller, European Law Publisher GmbH 2005, München, 103–186 by Frank Dornseifer) 154–160.

We found the following corporate governance systems in the examined Hungarian contracts:

- a) Members' meeting: The main body of the target company was the members' meeting in each contract.
- b) Board: There was only one Hungarian contract in which an 'other corporate body' was established, named as an advisory board. In this contract, there was neither a supervisory board nor an auditor.
- c) CEO: Some of the duties and responsibilities of the managing director were regulated in the articles of association but, in a similar way to the German agreements, most rules were in the mandatory corporate law.
- d) Supervisory board and auditor: In other two Hungarian contracts, where there was no board, operated a supervisory board and auditor.

Now, let us see what power these corporate bodies have and how the different corporate bodies can work together.

### III Supreme Body of Target Companies

#### 1 Shareholders' Meeting in a GmbH

The shareholders' meeting is the ultimate decision-making body of a GmbH in German law. The shareholders usually exercise their rights at the shareholders' meeting. According to the GmbH Act (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung*; GmbH Act), there are two types of shareholders' resolutions:

- a) The exclusive competences of the shareholders' meeting.

The powers that are regulated in the mandatory law have to be listed here which and the shareholders cannot diverge from the law (*ius cogens*). Such powers are, for instance, amending the articles of association;<sup>14</sup> calling in additional contributions;<sup>15</sup> dissolving the company and appointing and recalling the liquidators;<sup>16</sup> and making resolutions regarding measures pursuant to the Transformation Act such as mergers, spin-offs, and changes of legal form.<sup>17</sup>

- b) The issues that are generally decided by the management of the company, unless the articles of association of the company provided otherwise.

These issues are not listed in the mandatory law, therefore they belong within the management's competence but, if the shareholders provided otherwise in the articles of association, they can reduce the power of the management and enhance the power of the shareholders' meeting.

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<sup>14</sup> GmbH Act, s 53–58.

<sup>15</sup> GmbH Act, s 26.

<sup>16</sup> GmbH Act, s 60, 66.

<sup>17</sup> Transformation Act s 13, 50, 125, 193, 226.

Moreover, the shareholders' meeting can also reduce the power of the management in other ways, as follows:

- a) the shareholders' meeting has the right to instruct the management of the company by its singular resolution, and
- b) the shareholders' meeting may set up other corporate bodies and appoint and dismiss the members of these boards.<sup>18</sup> As we mentioned above, in each examined German agreement, the shareholders used this right and set up advisory boards.

In the examined German contracts, the competence of the shareholders' meeting is recorded in the shareholders' agreement and the articles of association. The decision-making system consists of the following rules:

- a) General rules: The shareholders' meeting shall have a quorum when the members entitled to vote and representing more than a half of the votes to be cast are present. Unless the mandatory law, the articles of association or the investment agreement provide for a higher majority, all shareholders' resolutions are taken by a simple majority (i.e. more than 50%) of the votes.
- b) Veto right: it is not possible to make any resolution in the shareholders' meeting without the consent of the investor. Therefore, the investor alone cannot decide a matter in the competence of the shareholders' meeting, but it can prevent any decision ('destructive veto').<sup>19</sup>

All of the examined German contracts contain a very particular and exhaustive list of topics for the shareholders' meeting. The issues on this list may be decided by the shareholders' meeting with the exclusive destructive veto right of the investor.

Without listing all individual powers of the shareholders' meeting set out in the contracts, the following main groups are highlighted concerning the power of the shareholders' meeting:

- a) The exclusive competences of the shareholders' meeting, mentioned above.
- b) Every decision related to the structure of the management: determining the number of the managing directors; concluding, amending and terminating the managing director's service agreement, granting sole and joint power of representation to the managing directors, deciding on the remuneration of the managing board; etc.
- c) Share-related decisions: approval of the allocation of shares or parts of shares in the company, including any transfer, pledge or other encumbrance, implementation and termination of a trust relationship; resolutions regarding and in connection with the redemption of shares in the company; etc.
- d) Establishment of another corporate body: supervisory board, auditor, advisory board and any other corporate body.
- e) Approval of certain transactions. This group divides into two further subgroups:

<sup>18</sup> Gerhard Wirth, Michael Arnold, Ralf Morshäuser, Mark Greene, *Corporate law in Germany* (2nd edn, C. H. Beck 2010, München) 31–32.

<sup>19</sup> See more on the destructive veto right: Sharifzadeh (n 2) 57–58; and Neil J. Beaton, *Valuing Early Stage, Venture-Backed Companies* (John Wiley & Sons 2010, Hoboken, New Jersey) 27; and Dick Costolo, Brad Feld, Jason Mendelson, *Venture Deals: Be Smarter Than Your Lawyer and Venture Capitalist* (2nd edn, John Wiley & Sons 2012, Hoboken, New Jersey) 63–73., and Keith A. Allman, *Impact Investment: A Practical Guide to Investment Process and Social Impact Analysis* (John Wiley & Sons 2015, Hoboken, New Jersey) 171–175.



- the legal form of contracts: any contract related to real estate (sale, lease, etc.); loan, factoring, etc.;
- the value of the transaction: by using an exact, maximum value of the transaction, or transfer of a significant part of the company assets.

At this point, we should note that the German Federal Supreme Court clarified the competence of the management in the *Holz Müller* case relating to the transfer of assets. Although it concerned a listed company, we nevertheless highlight the main points of the case regarding the content of investment contracts and the will of the parties to such contracts. The court decided that the management board was not entitled to transfer the assets to the subsidiary without the approval of the shareholders' meeting, as this measure:

- touched upon the core of the company's operation;
- related to the most valuable part of the company; and
- entirely changed the corporate structure.

In the first case, in 1982, the disposal of a business which amounted to 80% of the company's assets, but later in two other decisions, the Courts clarified the first decision: in relation to company restructuring matters, the unwritten authority of the general meeting exists only in relation to measures which:

- result in substantive changes to the articles of association and therefore affect the fundamental authority of the supreme body,
- have a significant economic effect.<sup>20</sup>

In the contracts examined here, we found that the parties to the investment contract diverged from the German mandatory law and, in a similar way to the *Holz Müller* decisions, defined a significant asset transfer, whether relating to the deal size, or the types of asset deals, and the significant asset deals drew upon the discretion of the shareholders' meeting. Although we do not assume that the parties agreed on the above rules because of the *Holz Müller* cases, these rules are however deemed to be representative of the international trend of VC investment contracts.<sup>21</sup>

As a summary, we can record that the role of the shareholders' meeting in the corporate governance is the strategic direction of the company; it decides on major transactions, the designation of the management organisation and the appointment of the members of the management.<sup>22</sup>

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<sup>20</sup> BGH 25.02.1982, Az.: II ZR 102/81 in M. J. Thomas Möllers, *German and European company law* (university notes, University of Augsburg 2017) 15.

<sup>21</sup> Orrick, Herrington & Sutcliffe LLP (Markus Piontek, Vanessa Sousa Höhl, Johannes Rüberg, John Harrison Barbara Hasse, Lars Wöhning, Justine Koston), *Orrick's Guide to Venture Capital Deals in Germany* (Orrick, Herrington & Sutcliffe LLP, January 2018) 54.

<sup>22</sup> See more about the role of the shareholders: Ken Rushton, *The business case for corporate governance* (Cambridge University Press 2008, Cambridge) 81–99.

## 2 Members' Meeting in a Kft.

The legal structure of a Hungarian Kft. is very similar to that of a German GmbH. Although the Kft. has its own legal personality and its members' liability is limited, the liability of members to the company extends only to the provision of their initial contributions, and to other contributions set out in the memorandum of association,<sup>23</sup> but the members do not have securities regarding their legal relationship to the company.<sup>24</sup> The membership of the Kft. is named 'üzletrész', which means all rights and obligations arising in connection with the capital contribution of the members. *Üzletrész* shall come to existence upon the company's registration.<sup>25</sup> (The *üzletrész* is generally translated as business share or quota, but in the following we use 'share', whilst the owner of the share is a 'member'.)

The most important rules of the Kft. are regulated by the Hungarian Civil Code. Regarding the Hungarian Civil Code, the main decision-making body of the Kft. is the members' meeting. There is no comprehensive list in the mandatory law of the competences of the member's meeting, although some questions can only be decided by it. Such issues are, for instance, the appointment and dismissal of the managing director, the auditor and the members of the supervisory board, increasing and reducing the capital.<sup>26</sup> Other questions fall into the scope of the member's meeting, except if otherwise provided in the articles of association of the company. Those that are not named in the mandatory law or in the articles of association of the company as within the power of the member's meeting or another corporate body fall into the competence of the management.

In the examined Hungarian contracts, the supreme body of the company has very similar competence and process as in the German contracts:

- a) The member's meeting is quorate when the members entitled to vote and representing more than a half of the votes to be cast are present. If there is no quorum at the members' meeting, the reconvened members' meeting shall have a quorum for the issues of the original agenda irrespective of the voting rights or investor being represented. In one of the examined contracts, the reconvened members' meeting is also void if the investor is not represented. In this case, the second reconvened members' meeting will only have a quorum irrespective of the investor being represented.
- b) Unless the mandatory law, the articles of association or the investment agreement provides for a higher majority, all shareholders' resolutions are taken by a simple majority (i.e. more than 50%) provided the investor supports the decision (destructive veto).

All the examined Hungarian contracts contain a very particular and exhaustive list of topics for the member's meeting. This list is very similar, and the structure of the issues is the

<sup>23</sup> 2013. évi V. törvény a Polgári Törvénykönyvről (Act V of 2013 on the Hungarian Civil Code) 3:159.

<sup>24</sup> Kisfaludi András, Szabó Marianna (eds), *A Gazdasági Társaságok Nagy Kézikönyve* (Complex 2008, Budapest) 875; Pintér Attila, 'Az üzletrész-átruházási szerződésről' (2016) 24 (5) *Gazdaság és Jog* 11–15.

<sup>25</sup> Hungarian Civil Code (n 23) book 3:164. (1).

<sup>26</sup> Osztoivits András (ed), *A Polgári Törvénykönyvről szóló 2013. évi V. törvény és a kapcsolódó jogszabályok nagykommentárja*, I. kötet (Opten Informatikai Kft. 2014, Budapest) 668, (by Pázmándi Kinga).

same in each German and Hungarian contract, therefore we do not repeat the topics mentioned above.

## IV Management

### 1 German Structure

To understand the German GmbH management structure, we first examine the main mandatory corporate rules.

The GmbH has two compulsory corporate bodies: the shareholders' meeting and the managing director. One or more managing directors have to be appointed in each GmbH, according to the GmbH Act.<sup>27</sup> The managing director represents the company in legal transactions and performs the management. The law allows management by shareholder or third-party managing directors.<sup>28</sup> The managing director has the right to represent and act on behalf of the company in all legal transactions in and out of court. The scope of his/her authority is unlimited and cannot be limited in relation to third parties.<sup>29</sup> Unless the articles of association provide otherwise, the managing director is only jointly authorised to represent the company.<sup>30</sup> Nevertheless, the articles of association may allow the managing director to have authority to represent the company alone, or together with another managing director or a so-called procurator officer.

The managing director has a large scope of duties. Generally, the main duty of the managing director is to conduct the company's affairs with the due care of a prudent businessman.<sup>31</sup> Some particular duties of a managing director, named in the German mandatory law, are:

- a) to ensure that the accounts are kept properly, and balance sheets are drawn up properly;<sup>32</sup>
- b) to submit tax returns in the name of the company;<sup>33</sup>
- c) that the shareholders' meeting is convened by the managing director;<sup>34</sup>
- d) to file the necessary applications with the commercial register;<sup>35</sup>
- e) if the company becomes insolvent or over-indebted, the managing director applies for insolvency proceedings to be opened.<sup>36</sup>

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<sup>27</sup> GmbH Act s 6 para (1).

<sup>28</sup> GmbH Act s 6 para (3).

<sup>29</sup> GmbH Act s 37 para (2).

<sup>30</sup> GmbH Act s 35 para (2).

<sup>31</sup> GmbH Act s 43 para (1).

<sup>32</sup> GmbH Act s 41, 42.

<sup>33</sup> The Fiscal Code of Germany, s 34.

<sup>34</sup> GmbH Act s 49 p (1).

<sup>35</sup> GmbH Act s 78.

<sup>36</sup> German Insolvency Statute s 15a. p (1).

Unless otherwise provided for in the articles of association, the managing director is appointed and recalled by the shareholders meeting. The resolution on such an appointment must be passed by the majority of the shareholders.<sup>37</sup>

Further corporate bodies are optional, and should be stipulated in the articles of association of the company.<sup>38</sup> The name of these bodies can be very different: advisory board ('Beirat'), administrative board ('Verwaltungsrat') or shareholders' committee ('Gesellschafterausschuss'); but there is no mandatory law for these bodies.<sup>39</sup>

In some cases, the parties of the investment contract cannot diverge from the German mandatory law (*ius cogens*), whilst in other questions, they can regulate their own legal relationships (*ius disponendi*). For instance, it has to be at least one managing director in a GmbH, but some duties of the managing director are dispositive rules. Using the opportunity of *ius disponendi*, the parties agree on setting up a corporate body in every examined contract, which is not regulated by the mandatory law, and is named an advisory board ('Beirat'). In the following, let us see how the examined German contracts regulated the power of the advisory board.

In each transaction, the advisory board is established under the articles of association. The advisory board consists of 3, 4 and 6<sup>40</sup> members in the three examined contracts. In one of the contracts, the members of the advisory board were separately delegated by two investors (2 members) and one member was jointly delegated by the founders. In the other two contracts, the members of the advisory board were appointed by the shareholders' meeting. The resolution on such an appointment shall be passed by the majority of the shareholders. We have to note that although the founders pass resolutions by a majority of votes, as we mentioned above, the investor may block the resolution passed by using its destructive veto right, so in fact the members of the advisory board are 'nominated' by the founders and 'appointed' by the investors. The logic of this system is that the stakeholders (founders, investors) have to agree on the members of the advisory board since this corporate body has a large scope of very important topics with regard to corporate governance.

The list of these topics is very long; the parties listed the competence of the advisory board in detail, in each contract. Without listing all the powers of the advisory board individually, the following main groups are emphasised:

- a) CEO: In one contract, the managing director is not appointed by the shareholders' meeting, but by the advisory board. In this contract, the advisory board stipulated the number of directors and their duties as well.
- b) Management body: In two contracts, the advisory board has the right to establish the rules of procedure for the management whilst in the third contract the shareholders' meeting

<sup>37</sup> Wirth et al. (n 18) 38–48.

<sup>38</sup> Karel Van Hulle, Harald Gesell (eds), *European corporate law* (Nomos 2006, München) 157.

<sup>39</sup> Wirth et al (n 18) 50.

<sup>40</sup> In this contract, there were several investors in the transaction and the company was also in its later phase; probably that was the reason for the high number of members.

shall have such a right. In one contract, the advisory board may decide on the remuneration of the managing director.

*c)* Financial statements: In each contract, the managing director makes and the advisory board comments on the financial statements (balance sheet, profit and loss account, financial plan, investment plan), which are accepted by the shareholders' meeting.

*d)* Certain contracts: As we detailed above, the most important contracts are approved by the shareholders' meeting. Other contracts are approved by the advisory board, unless the contracts were less significant or connected to the usual daily business which belongs to the duties of the managing director. In this group, the contracts are categorised based on their subject (e.g. real estate, loan or other financing contract, security contracts, investment transactions, etc.), or because of their value.

*e)* Employment relationships: conclusion, amendment and termination of key employment contracts; implementation of an employee incentive plan; conclusion, amendment and termination of a collective agreement.

*f)* Subsidiary company: Setting up or acquisition of a share in another company and decision-making related to subsidiaries.

The advisory board could bring any decisions by passing a resolution, except those decisions delegated to the power of the shareholders' meeting. In the company where the advisory board consists of three members and two members are delegated by the investors, the advisory board shall pass resolutions by a simple majority of votes. In the other two companies, where the majority of the members of the advisory board are delegated by the founders, the advisory board passed resolutions by a simple majority of votes, including the votes to be cast by a member with special rights. This member was delegated to the advisory board directly by the investor.

The managing director shall execute the resolution of the advisory board, but the advisory board cannot make decisions that are against the law, the articles of association and the resolutions of the shareholders' meeting.

## 2 Hungarian Structure

First, let us review the Hungarian mandatory corporate law.

The management of a Kft. is provided for by one or more managing directors.<sup>41</sup> The managing director can be a natural person or a legal person, but if the executive officer is a legal person then it shall designate a natural person to discharge the functions of the executive officer in its name and on its behalf.<sup>42</sup> The managing director manages the operations of the Kft. independently, based on the primacy of the Kft's interests. In this capacity, the managing director discharges his or her duties in due compliance with the relevant legislation, the articles of association and the resolutions of the company's supreme body (members'

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<sup>41</sup> Hungarian Civil Code book 3 s 196 p (1).

<sup>42</sup> Hungarian Civil Code book 3 s 22 (2).

meeting). The managing director may not be instructed by the members of the Kft. and he may not be deprived of his powers by the members' meeting.<sup>43</sup> Otherwise, the members' meeting may decide to amend the articles of association of the company and make a decision on changing the duties of the managing director; it can increase or decrease his or her duties.<sup>44</sup>

The general rule of civil law is the decisions that are related to the governance of the company and are beyond the competence of the members shall be adopted by one or more managing directors.<sup>45</sup> The Hungarian Civil Code lists some special rules, which belong to the managing director's duties, unless the mandatory law or articles of association of the company otherwise provide for instance: requesting the registration of the company into the company register, representation of the company, convening the members' meeting, etc. The managing director is responsible for every decision which is not included in the issues of the members' meeting or another corporate body, which are based on the articles of association of the company.<sup>46</sup>

According to the decision of the Hungarian supreme court (Curia of Hungary, 'Kúria'), it is allowed that the structure of a kft.'s management is regulated in the articles of the association differently from the mandatory law and more than one managing director is elected to a management board of the company that can make a decision as a corporate body. Notwithstanding, this structure may not change the representation of the company.<sup>47</sup>

In the examined Hungarian investment contracts, I found two different structures for the board of the target company.

One of the examined Hungarian contracts had a management structure of a board, without a supervisory board. Two of the examined contracts have a management structure without a board but with a supervisory board.<sup>48</sup> The decision-making system in these target companies is presented as follows:

a) The target company in which a board has been set up operated very similarly to the German target companies. In this structure, the members' meeting passed resolutions in the most important but few in number of strategic questions; the board made decisions on the daily operation of the target company and managing director executed these decisions. In this structure, the member's meeting was rarely convened, usually only once a year, but the board had meetings very often, even more than two or three times a month. The main powers of the board are not significantly different from the German structure, focused on personal

<sup>43</sup> Hungarian Civil Code book 3 s 21. p (2) and book 3 s 112. p (2).

<sup>44</sup> Petrik Ferenc (ed), *Polgári jog, jogi személy* (HVG-ORAC 2014, Budapest) 161.

<sup>45</sup> Hungarian Civil Code book 3 s 4. p (2)–(3), book 3 s 21. p (2)

<sup>46</sup> Barta Judit, Harsányi Gyöngyi, Majoros Tünde, Ujváriné Antal Edit, *Gazdasági Társaságok a Polgári Törvénykönyvben* (Patrocinium 2016, Budapest) 89.

<sup>47</sup> BDT 2015. 3272.

<sup>48</sup> See more about the participation of the investors in the management of the target company in Hungary: Karsai Judit, *A kockázati tőkére befektetőknek és vállalkozóknak* (Magyar Befektetési és Vagyonkezelő Rt. 1998, Budapest) 64–72.

questions (elect and dismiss the CEO, or other key employees), the operation of the target company's bodies, approval of some financial statements, decision on employee matters, and issues regarding the subsidiaries.

b) In two other contracts, in which a board had not been set up but a supervisory board was established, the competence of the members' meeting is very wide; the members' meeting may pass a resolution on every strategic question and the most important operating questions:

- any question that is delegated to the competence of the supreme body of the company by the mandatory law (e.g. amendment of the articles of association, appointment of the managing director, capital increase or decrease, etc.)
- the management structure of the company (e.g. setting up a new corporate body, remuneration of the managing director and key employees, etc.)
- any change of the ownership structure of the company
- the approval of high value or significant contracts.

In this structure, the managing director only executes the decision of the members' meeting. The managing director can only decide on some questions that are not included in the scope of the members' meeting.

Otherwise, the management's area of control is very wide; the members of the companies elected an auditor and set up a supervisory board in both contracts.

The permanent auditor is always an independent person who inspects the books of the company and his or her report shall be published. The permanent auditor, who is appointed by the supreme body, shall be responsible for carrying out the audits of accounting documents in accordance with the relevant regulations, and shall provide an independent audit report to determine whether the annual accounts of the business association are in conformity with the legal requirements, and whether they provide a true and fair view of the company's assets and liabilities, financial position and profit or loss.<sup>49</sup>

Members of the Kft. may provide, in the articles of association, for the establishment of a supervisory board. The supervisory board's task is the supervision of the management in order to protect the interests of the Kft. Regarding the statutory law, the members of the supervisory board shall be independent of the management of the legal person, and shall not be bound by any instruction in performing their duties.<sup>50</sup> Nevertheless, it is not prohibited for a member of the permanent supervisory board to be a member of the target company, or his/her representative.

The members of the examined target companies set up a supervisory board at the request of the investor and one member of the supervisory board is always the deputy of the investor. The investor required the establishment of the supervisory board since, in this structure, the members' meeting may decide on almost every issue of corporate governance, provided the investor supports the resolution, but the investor is not an active player in the daily business of the company, therefore he or she needs information related to the operation of the

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<sup>49</sup> Hungarian Civil Code book 3 p 129 s (1).

<sup>50</sup> Hungarian Civil Code book 3 p 26 s (1).

company. The supervisory board continually supervised the management of the company; it had up-to-date information about the problems with the business of the company or the success of the managing director. The member of the supervisory board delegated by the investor informed the investor about these problems or good news. According to the examined contracts, the investor had the right to know about these problems and had the power to make effective decisions at the members' meeting to deal with such issues.

We have to emphasise that, the member of the supervisory board who was delegated by the investor was not independent; he or she had some legal relationship with the investor and the investor had the right (directly or indirectly) to instruct their deputy supervisory board member. Moreover, the parties accepted in the investment contract that the investor member of the supervisory board could first of all or more particularly inform the investor on the affairs of the target company. Because of their legal relationship, this member supervises the management of the company in favour of the investor, but not in favour of the company or every member of the company. Although we do not know a mandatory law that prohibits this structure, corporate governance can however be deformed by the non-independent supervisory board member.<sup>51</sup>

## V Governance and Management

According to Tricker, a distinction must be made between governance and management: the management runs the business; the board ensures that it is being well run and run in the right direction.<sup>52</sup> In the following, we summarize the theory of the actors regarding the examined transactions and their roles in corporate governance; later we present the management structure in the target companies.

### a) Executive director

The executive director is the executive manager of the company who is engaged in the daily management of the company. The chief executive officer is often known as the managing director. The executive manager is usually a member of the management board.<sup>53</sup>

### b) Non-executive director

A non-executive manager is the member of the board who does not hold any executive management position in the company.<sup>54</sup> The 2003 Higgs Review stated that

<sup>51</sup> See more about the independent manager: Lawrence A. Cunningham, 'Rediscovering Board Expertise, Legal Implications of the Empirical Literature' in F. Scott Kieff, Troy A. Paredes (eds), *Perspectives on Corporate Governance* (Cambridge University Press 2010) 62–95.

<sup>52</sup> Bob Tricker, *Corporate Governance, principles, policies, and practices* (Oxford University Press 2009, Oxford) 35.

<sup>53</sup> Tricker (n 52) 50.

<sup>54</sup> Tricker (n 52) 50.



The role of the non-executive director is frequently described as having two principal components: monitoring executive activity and contributing to the development of strategy. (...) However, as the non-executive directors do not report to the chief executive and are not involved in the day-to-day running of the business, they can bring fresh perspective and contribute more objectively in supporting, as well as constructively challenging and monitoring, the management team. (...) The role of the non-executive director is therefore both to support executives in their leadership of the business and to monitor and supervise their conduct.<sup>55</sup>

Tricker makes a difference between an independent and a connected non-executive director. The independent non-executive director is a director with no affiliation or other relationship with the company, except the directorship, that could affect, or be seen to affect, the exercise of objective, independent judgement. The connected non-executive director is a director who is not a member of the management but does have some relationship with the company and can affect the management. Such a connected non-executive director is a nominee director, who has been nominated to the board by the majority of shareholders.<sup>56</sup>

In the EU law, a 2005 Commission Recommendation on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board stated that: 'a director should be considered to be independent only if he is free of any business, family or other relationship, with the company, its controlling shareholder or the management of either, that creates a conflict of interest such as to impair his judgement'.<sup>57</sup> Annex II of the Recommendation clarified that it is not possible to give a comprehensive list of all threats to the directors' independence but it gave some criteria related to the independence of the directors. Some of them:

- not to be an executive or managing director of the company or an associated company, and not having been in such a position for the previous five years;
- not to be an employee of the company or an associated company, and not having been in such a position for the previous three years;
- not to receive, or have received, significant additional remuneration from the company or an associated company apart from a fee received as non-executive or supervisory director;
- not to be or to represent in any way the controlling shareholder(s);
- not to have, or have had within the last year, a significant business relationship with the company or an associated company, either directly or as a partner, shareholder, director or senior employee of a body having such a relationship;
- not to be, or have been within the last three years, partner or employee of the present or former external auditor of the company or an associated company;

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<sup>55</sup> Derek Higgs, 'Review of the role and effectiveness of non-executive directors' 2003, 27–28. <<http://webarchive.nationalarchives.gov.uk/20070603185143/http://www.dti.gov.uk/bbf/corp-governance/higgs-tyson/page23342.html>> accessed 18 August 2018.

<sup>56</sup> Tricker (n 52) 50–53.

<sup>57</sup> Commission recommendation of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board (Text with EEA relevance) (2005/162/EC) s 13.1.

– not to be executive or managing director in another company in which an executive or managing director of the company is non-executive or supervisory director, and not to have other significant links with executive directors of the company through involvement in other companies or bodies.

c) Chairman

According to Smerdon: ‘there should be a clear division of responsibilities at the head of the company between the running of the board and the executive responsibility for the running of the company’s business.’<sup>58</sup> The reason for this separation is to avoid the potential for abuse if power is concentrated in a single person and enable the chief executive to concentrate on managing the business whilst the chairman handles the running of the board and relations with shareholders and other non-contractual stakeholders such as the government, the regulators and the media.<sup>59</sup>

According to the 2003 Higgs Review, the most important responsibilities of the chairman are to:

- run the board and set its agenda;
- ensure that the members of the board receive accurate, timely and clear information, particularly about the company’s performance, to enable the board to take sound decisions, monitor effectively and provide advice to promote the success of the company;
- ensure effective communication with shareholders and ensure that the members of the board develop an understanding of the views of major investors;
- manage the board to ensure that sufficient time is allowed for discussion of complex or contentious issues, with appropriate arrangement for informal meetings beforehand to enable thorough preparation for the board discussion.<sup>60</sup>

Tricker makes a difference between four groups of the board structure: a board only with executive directors, a board with a majority of executive directors, a board with a majority of non-executive directors and the board only with non-executive directors. In the all-executive director board, the top managers are also the directors, whilst the all non-executive director board is entirely composed of non-executive directors. Logically, the board composed with the majority of the executive directors is the majority executive director board, and the board with the majority of the non-executive directors is the majority non-executive director board.<sup>61</sup>

Now, regarding Tricker’s grouping, we classify the examined corporate governance structures.

An advisory board was established in four of the examined contracts and in parallel, a supervisory board does not operate in these companies. In two other (Hungarian) contracts, although there was supervisory board and an auditor and advisory board was not established.

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<sup>58</sup> Smerdon (n 9) 179.

<sup>59</sup> Tricker (n 52) 58.

<sup>60</sup> Higgs (n 55) 99.

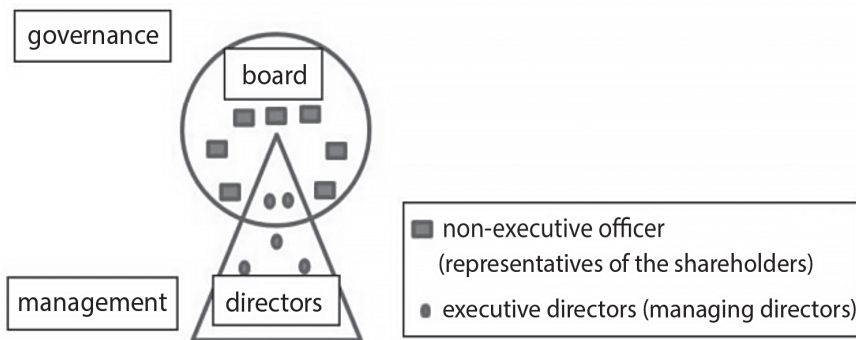
<sup>61</sup> Tricker (n 52) 61–67.

The governance structure, where there was an advisory board, is the following.

a) Majority non-executive director board

In two German and one Hungarian contracts, the board structure is the same: the members of the advisory board were composed of, on the one hand, the representative of the investors and founders and, on the other hand, of the managing directors. The representatives of the shareholders were directly delegated to the advisory board by the shareholders or by a resolution of the shareholders' meeting and they were the non-executive managers of the company. The members of the advisory board, delegated by the shareholders or the founders, were non-independent non-executive directors of the company. The managing directors, who were the executive directors of the company, had the same rights in the board as the non-executive directors but they were always in a minority. The chairman of the advisory board was delegated by an investor in the Hungarian contract and elected by the members of the advisory board in the German contracts. There was only one contract where the chairman was also the managing director.<sup>62</sup>

The majority non-executive director board is showed in *Figure 2* below:<sup>63</sup>



*Figure 2:* Majority non-executive director board

b) All non-executive director board

There was only one German contract where the managing director was not a member of the advisory board. The members of the advisory board are composed of the representatives of the investors and founders. The representatives of the shareholders are directly delegated to the advisory board by the shareholders (not independent non-executive directors) and the chairman was elected by the members of the advisory board.

The all non-executive director board is showed by the *Figure 3*.<sup>64</sup>

<sup>62</sup> See more about the busy director: Darina Feicha, *Board Structure and Auditor-Client Negotiations*, (Inauguraldissertation zur Erlangung des akademischen Grades eines Doktors der Wirtschaftswissenschaften der Universität Mannheim 2015) 52–55.

<sup>63</sup> Based on: Tricker (n 52) 36 and 62.

<sup>64</sup> Based on: Tricker (n 52) 36 and 64.

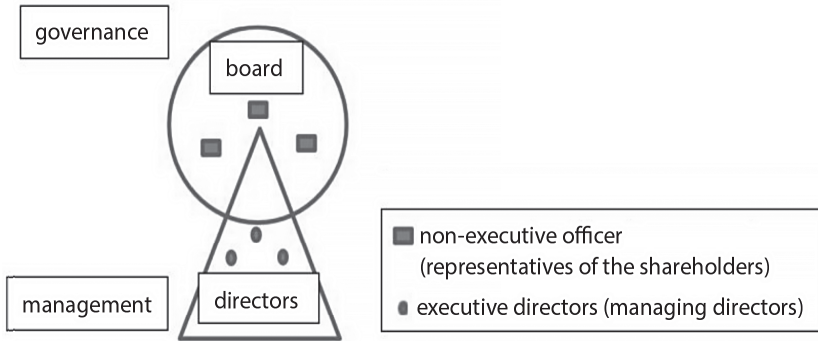


Figure 3: All non-executive director board

We had only two Hungarian contracts where there was no advisory board but there was a supervisory board and an auditor. This system is often named two-tier or supervisory board architecture (see Figure 4), but we have to emphasize again that, in these contracts, the supervisory board does not have the right to decide on any issues.<sup>65</sup>

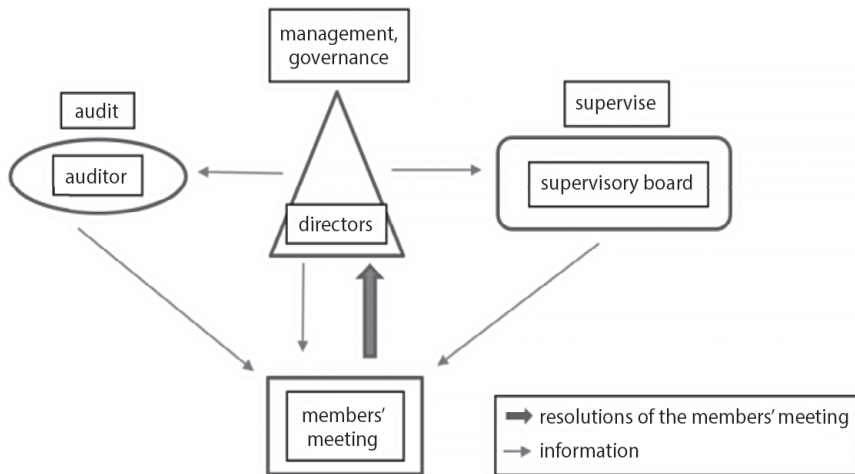


Figure 4: Two-tier system

In this system, the supervisory board only supervises the management of the company. Nevertheless, the supervisory board is obliged to supervise the management and company's economic status in order to report to the members' meeting. The necessary decisions are made upon this information by the members' meeting.<sup>66</sup> The members of the supervisory

<sup>65</sup> Tricker (n 52) 64; and Jean J. du Plessis, Bernhard Großfeld, Claus Lutterman, Ingo Saenger, Otto Sandrock, Matthias Casper, *German Corporate Governance in International and European Context* (3rd edn, Springer 2017) 8–13.

<sup>66</sup> Kecskés András, *Felelős társaságirányítás (corporate governance)* (HVG-ORAC 2011, Budapest) 263–311.

board were always delegated by the investor and the founders (non-independent member) and the supervisory board decided by a simple majority of votes, including the votes cast by a member delegated by the investor.

In this structure, the members always appointed an auditor by passing a resolution at the members' meeting with a simple majority of votes including the votes cast by the investor.

## **VI Final Remarks**

### **1 Summary of the Corporate Governance in the Examined Investment Contracts**

Finally, we examine the power relations in the target company, and it is time to draw conclusions and pinpoint the person who really manages the target company.

We have to identify the actors in corporate governance and characterise their roles. In this context, we can set up three groups regarding the roles of the shareholders' and members' meetings, the advisory board, the managing directors, the supervisory board and the auditor.

I found that, from this aspect we can group the examined contracts and make three different groups regarding the strength of the management or the main body of the target company.

#### *a) Strong members' meeting*

In the first group, there are two Hungarian contracts in which there was no advisory board but there was a supervisory board and an auditor. In this structure, the members' meeting was convened very often since the members of the company constituted articles of association that diverged from the main rules of the Hungarian Civil Code and there are many additional powers in favour of the members' meeting. Usually, these powers are the competence of the managing director; therefore the articles of association deprived the management of power. Any other power shall not fall within the scope of duties of the managing director.

In this structure, there was a supervisory board and an auditor but they both only supervised the operation of the managing director and made reports to the members' meeting. The necessary decision, based on this report, was made by the members' meeting. See *Figure 5* with the sign 'Box a)'.

#### *b) Balanced corporate governance*

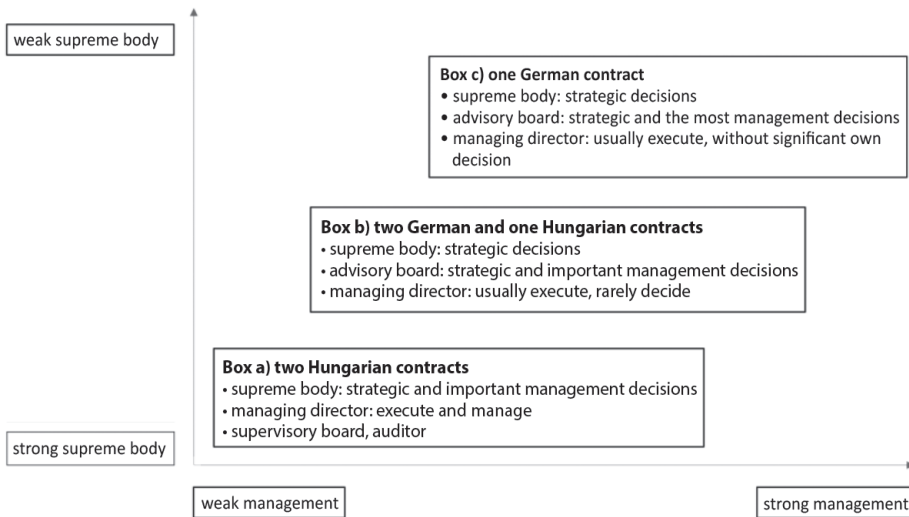
The third Hungarian contract and two German contracts are in this group. In these contracts, a corporate governance system was constructed in which there was a relatively strong shareholders' or members' meeting but the majority of the management tasks fell within the competence of the advisory board. The advisory board was convened very often and the company was actually managed by the advisory board. Furthermore, the main issues of the corporate governance were shared between the advisory board and managing director, whilst the managing director not only made decisions but he or she executed the resolutions

of the shareholders' and members' meeting and of the advisory board, too. See *Figure 5* below with the sign 'Box b)'

c) Strong management

Finally, in the third group there is only one German contract. The corporate governance structure was very similar to group *b*) but here the advisory board was stronger than mentioned above, since it could make resolutions in more issues related to corporate governance, including the appointment of the managing director. Mainly this latter power explains why we classify this corporate governance in another group, because the advisory board was able to actually manage the company, and if the members of the advisory board were not satisfied with the execution of their resolution then they could dismiss the managing director and appointed another one. See *Figure 5* below with the sign 'Box c)'

The three groups related to corporate governance are illustrated in *Figure 5*. The vertical axis shows how strong the main body is and the horizontal axis shows the strength of the management. Of course, this is only a screenshot of a company's corporate governance and it must always be borne in mind that the members were able to change the power of each corporate body at any time by modifying the articles of association.<sup>67</sup>



*Figure 5:* Corporate governance in the examined contracts

<sup>67</sup> See more the relationships of the corporate bodies: Hossam Zeitoun, *Corporate Governance Modes, Stakeholder Relations, and Organizational Value Creation* (PhD diss. 2011, Zurich) 2–19, 61–79.

## 2 Conclusions

As a summary, regarding *Figure 5* above, we can conclude that the parties strongly applied their freedom to derogate from the statutory law. The main purpose of the divergence was to protect the investor and therefore the parties amended the rights of the supreme body and the management. Those parties changed their form of corporate governance. Nevertheless, our experience is that there is no significant difference between the German and the Hungarian investment contracts where the parties constructed an advisory board. In the case of the Hungarian contracts in which no advisory board was established but there was a supervisory board and an auditor, we found a different corporate governance system but we can state that this solution is also effectively able to protect the investors' interest by applying another legal way.

So, who manages the target company? We found that, the investor has a strong influence on the management of the target company. It can be a direct influence when the investor exercises his or her voting right in the main body of the target company, as we saw in the cases of two Hungarian contracts, or it can be indirect when the investor's delegated person exercises the will of the investor in the board of the target company as we saw in the cases of all the target companies where a board had been established. Anyway, we can conclude that, after the first VC investment, the target company's corporate governance was changed, and the investor has the right to manage the decisions of the target company.

Although we analysed in detail the corporate governance system but have not examined the strength of the investor's voting rights in either the main body or in the board of the target company. As such, we have to emphasise that although we stated that the investor can manage the target company, we did not state that the investor manages the target company alone in any and all cases. The strength of the investor's rights in the target company is another topic which requires further research and another study. The writer of these lines hopes the reader will read our next study on investors' rights with interest.

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