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Contact • eltelawjournal@ajk.elte.hu
Eötvös Loránd University, Faculty of Law • 1053 Budapest, Egyetem tér 1–3, Hungary
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Peter-Tobias Stoll*

The Protection of Intra-EU Investments: Putting the EU's Rule of Law to the Test

Abstract

With the 2018 *Achmea* ruling, the European Court of Justice declared investment arbitration in the intra-EU setting to be inadmissible. As a result, the Member States have cancelled more than 190 bilateral investment protection treaties between themselves. Critics fear a high level of legal uncertainty for intra-EU investments. The EU Commission, on the other hand, believes that the existing law of the internal market provides 'adequate and effective protection' for such investments without further ado. Both sides invoke the rule of law. After an overview of the developments, individual elements of the protection of investments within the EU, namely the rights of investors, the balance between them and public interests, the legal means available and the question of compensation, are analysed comparatively. In the end, it emerges that both positions can lay claim to different elements of the rule of law. The rule of law does not require maintaining investment protection with bilateral treaties and investor-state arbitration. However, it is questionable whether the existing law in the internal market does adequately protect investments in the European Union. With the abolition of traditional international investment protection, the European Union faces major challenges with regard to the further improvement of the rule of law, the importance of which goes far beyond the issue of investment protection.

Keywords: Investment law, intra-EU investments, EU Charter of Fundamental Rights, ECHR, *Achmea* ruling of the CJEU

* Peter-Tobias Stoll (Prof. Dr. iur. Dr. h.c.) holds a Chair for Public Law and International Law at the Faculty of Law of the Georg-August-Universität Göttingen and is a Director of the Institute for International and European Law, where he heads the Department for International Economic and Environmental Law (e-mail: Peter-Tobias.Stoll@jura.uni-goettingen.de). The article is based on a presentation given in Budapest on occasion of being awarded the title of a *doctor honoris causa* of the Eötvös Loránd University of Budapest on 12 May 2023.

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I Introduction

In 2018, the European Court of Justice (CJEU) ruled in *Achmea* that the investor-State dispute settlement (ISDS) system is incompatible with the autonomy of the European legal system.[1] Afterwards, Member States have cancelled more than 190 bilateral investment protection agreements between themselves.[2] As a result, the application of international investment law (IIL) to investments made by investors from the European Union (EU) within the European Union territory has come to an end. These developments have been sharply criticised. It is feared that this will significantly jeopardise the investment climate in the European Union. The European Commission (Commission), on the other hand, believes that the application of international investment law manifestly contradicts key principles of the rule of law and that 'adequate and effective'[3] protection of such investments is essentially guaranteed by existing EU law.[4] Both positions invoke the rule of law as justification.[5] As will be explained below, they are, however, invoking different aspects of the rule of law.[6] For a closer look, it is necessary to consider the various sub-elements of investment protection. These include the rights of investors, the balancing of these rights against public interests, the available remedies and the availability of effective compensation. The overall view will show that adequate protection of investments does not necessarily require the applicability of international investment protection law and its standards. On the other hand, it is equally doubtful that existing European Union law is sufficient in itself to ensure such adequate protection.[7] Adequate protection for investments within the European Union must take into account the various elements and aspects of the rule of law as they are put forward in the discussion. This is a task for the European Union, the significance of which goes far beyond the question of investment protection.

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1 Case C-284/16 *Slovak Republic v Achmea BV,* EU:C:2017:699.

2 See, for example: *Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union* [2020] OJ L/1 169.

3 European Commission, 'Protection of Intra-EU investment' COM (2018) 547 final, p. 26.

4 Keynote speech by Commissioner McGuinness at the forum on protecting and facilitating investment in the single market, Brussels, 28 June 2022, <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_4182> accessed 15 December 2023, '[…] the evidence we gathered does not suggest […] to warrant specific legal action at EU level'.

5 See Dimitry Vladimirovich Kochenov, Nikos Lavranos, 'Achmea versus the Rule of Law: CJEU's Dogmatic Dismissal of Investors' Rights in Backsliding Member States of the European Union' (2022) 14 Hague Journal on the Rule of Law 195–219, DOI: https://doi.org/10.1007/s40803-021-00153-7, 199: 'Implications of the case in the context of the rule of law are truly dramatic: deterioration of the rule of law in some Member States, which the EU does not have the tools to effectively counter, when combined with the outlawing of the BITs results in a simple cancellation of the whole idea of judicial protection in the places where it is needed the most'.

6 See Peter-Tobias Stoll, 'International Investment Law and the Rule of Law' (2018) 9 (1) Goettingen Journal of International Law, Special Ed. Holterhus, 267–292.

7 See Ecorys and Deloitte, *Impact assessment study on investment protection and facilitation in the EU* (European Commission 2022) <https://ec.europa.eu/finance/docs/policy/210101-study-investment-protection-facilitation_en.pdf> accessed 15 December 2023.

II International Investment Law and the Termination of its Application in the EU

The rule of law, or a perceived lack of it, has driven the development of international investment law from the very beginning, in the 1950s and 1960s. In order to provide for legal security, international standards of protection and ISDS have been established to take the sensitive issues of the treatment of foreign investors out of a possibly highly politicised national context in a state hosting the foreign investment. In these early stages of emergence, international investment law was understood as an economic policy tool to attract foreign investments.[8] In the emerging system of IIL and, as a stereotype, arbitrators, law firms, investors and a part of academia understand the rule of law to be about protecting the rights of investors against undue interference including significant compensation to be awarded swiftly by way of international arbitration producing effectively enforceable awards (titles).

Now, with countries being confronted at home with a system of investment protection that they had propagated, as to fix rule of law deficits abroad, harsh criticism of the system ensued. Legislators, governments, courts and the general public, often taking note of the system for the first time, were alarmed about three arbitrators chosen by the parties to discuss the merits of a seemingly domestic legislative and administrative action, in an international procedure. They were also alarmed about the amount of compensation awarded by those three arbitrators, and their exorbitant fees. Also, they worried about their own enterprises, which, when facing the same measures, had to rely on national rules and remedies. Last but not least, they worried about their legislators and governments being discouraged from adopting important regulations. In one way or the other, this criticism involves legitimacy, due process and non-discrimination and thus can be said to be well founded in the rule of law discourse as well.[9] In 2018, the Court of Justice of the European Union held that investment arbitration between an EU investor and an EU Member State is inadmissible under the European Union legal order.[10] Many rightly saw this as the end of the use of international investment law in the intra-EU setting. Looked upon more closely, it becomes apparent that the Court's ruling is probably only the tipping point in a larger process of pushing back the application of international investment law within the EU, for reasons which go far beyond the admissibility of investment arbitration.

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[8] For more information on historical origins of International Investment Law: Andrew Newcombe & Lluis Paradell, *Law and Practice of Investment Treaties: Standards and Treatment* (Kluwer Law International BV 2009, Alphen aan den Rijn) 3–18.

[9] See Peter-Tobias Stoll, Till Patrik Holterhus and Henner Gött, *Investitionsschutz und Verfassung. Völkerrechtliche Investitionsschutzverträge aus der Perspektive des deutschen und europäischen Verfassungsrechts* (Mohr Siebeck 2017, Tübingen) 7 et seq.; Peter-Tobias Stoll and Till Patrik Holterhus, 'The "Generalization" of International Investment Law in Constitutional Perspective' in Steffen Hindelang and Markus Krajewski (eds), *Shifting Paradigms in International Investment Law* (OUP 2016, Oxford) 339–356. DOI: https://doi.org/10.1093/acprof:oso/9780198738428.003.0015

[10] Case C-284/16 *Slovak Repbulic v Achmea BV,* EU:C:2017:699 paras 55, 56.

Within the European Union and its Member States the criticism outlined above has resulted in various activities. The Commission had taken steps to persuade Member States to end bilateral investment agreements between themselves.[11] With the early exception of Ireland, Finland, Austria and Sweden, Member States terminated their agreements by agreement of May 5, 2020 – the non-complying States soon followed, putting an end to some 190 agreements.[12]

III Investors' Rights and Property

With these developments, IIL, an international law instrument specifically designed to address the protections of investors and their investments, has ceased to apply. Such protection now relies on the more general rules applicable in the EU, the Union's rulebook itself, as well as the European Convention on Human Rights (ECHR), which is closely tied to the law of Member States, altogether often referred to as 'EU law' in a more general understanding. At first glance, this EU law may appear to be unprepared to fill the gap, as EU treaties scarcely refer to investors or investments explicitly or indeed even implicitly.[13] However, this hardly means that the drafters of the treaties have neglected this economic activity and the legal structures needed for it to unfold. On the contrary – from the early days of the EEC, European integration was about a common market including all economic factors and all related activities. This integration was spearheaded by the introduction of four fundamental freedoms of the EU's single market, which cover the freedom of establishment, the free movement of capital, and the additional rights to the free movement of goods, persons and the free provision of services.[14] In so far as we see investment as an activity including establishment, operations and exiting, EU law is likely to be more encompassing than IIL, as the latter only refers to some of these activities, such as activities in the pre-investment phase, capital transfers and payments and more indirectly covers others by way of the standard of fair and equitable treatment and non-discrimination.[15]

However, investing and operating an investment is not only an ongoing activity, but also entails assets. Originally drawing from the customary international rules on the minimum protection of foreigners and their belongings and on the conditions for expropriation and

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[11] E.g. European Commission, Communication from the Commission to the European Parliament and the Council, 'Protection of Intra-EU investment' COM(2018) 547 final, 2, 3.

[12] *Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union* [2020] OJ L 169/1.

[13] With rare exceptions like Art. 206 of the Treaty on the Functioning of the European Union (TFEU) on a common policy regarding foreign direct investment.

[14] Which were first established in the 'Treaty establishing the European Economic Community' [1957] and still in force today in Art. 28 TFEU et seqq.

[15] Dominik Moskvan, *Protection of Foreign Investments in an Intra-EU Context: Not One BIT?* (Edward Elgar 2022, Cheltenham) 23. DOI: https://doi.org/10.4337/9781800880382

compensation, international investment law is particularly strong in defining a protection of property rights on investments.

However, in the EU and the legal order of the Member States, property is protected as well.[16] This is explicitly stated in Article 1 of the 1952 Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 1 First Protocol ECHR). The fundamental rights under the Convention forms part of the constitutional traditions common to the Member States and this way constitute general principles of the Union's law according to Article 6(3) of the Treaty on European Union (TEU). This is good law ever since the *Hauer*[17] case of the CJEU. Moreover, today, Article 17(1) of the EU Charter of Fundamental Rights (CFR) contains a right to property, which applies to the EU and Member States, when implementing EU law. Under Article 52(3) of the Charter, the meaning and scope of this right shall be the same as the one laid down in the Convention. These European standards inform the respective rights enshrined in the law of Member States, which might come into play as well.

When looking closer, some significant differences must be noted in comparative view:[18] In detail, the notion of expropriation is more expansive in IIL, as it is more receptive to cover *de facto* or indirect expropriations, while EU law can be understood to draw a more explicit line between the taking of property and the regulation of its use.[19] Also, EU law protection of property is a composite structure built on the aforementioned components, which might be difficult to navigate sometimes. Moreover, some of those components as well as rules have not been applied or adjudicated upon very frequently. Seen from some more distance, it can be concluded that an investor's right to the investment as the core concern of IIL is taken care of under EU law as well. It may also be observed that the EU's economic integration and liberalisation dimensions are much more strongly developed, whereas the protection of assets and property have not enjoyed the same priority for many years, possibly due to the existence of IIL.

IV Proper Balancing of Investor's Rights and Public Interest / Right to Regulate

Rights and freedoms can hardly be guaranteed without limits. Their justification and disciplines for related measures are key concerns of IIL as well as of EU law in general. They are reflected in mechanisms that provide for a proper balance of individual rights

16 Ibid 118 et seq.

17 Case 44/79 *Liselotte Hauer v Land Rheinland-Pfalz,* EU:C:1979:290.

18 See generally: Moskvan (n 15).

19 See Agata Daszko, 'Humanising European Investors: BITs Are Dead, Long Live the ECHR? A Look to RWE v. The Netherlands' (2023) European Yearbook of International Economic Law (forthcoming). DOI: https://doi.org/10.1007/8165_2023_103

and public interests and the right to regulate.[20] More generally, they relate to the questions of the exercise of public authority, which is a key aspect of the rule of law. International investment law has come a long way and achieved an elaborate set of principles and rules to spell out the essentials of legitimacy of regulation and measures in public interest and to determine to what extent individual rights may be legitimately limited with or even without compensation. The issues of police powers *vis-à-vis* expropriation and legitimate expectations *vis-à-vis* the standard of fair and equitable treatment[21] are key in this regard.

In a long line of adjudication, the CJEU too has dealt with quite a number of such public policy objectives.[22] This includes the protection of the environment, of consumers and workers, the planning of land uses and the proper allocation of agricultural lands. Further examples are the proper functioning of the tax system and the protection of creditors and minority shareholders on the financial markets. Of course, the list of legitimate public purposes and policy objectives can hardly be said to be exhaustive. It is a legitimate right and even the task of Member States as well as the EU to define public purposes as they may deem appropriate in order to fulfil their tasks.

Nevertheless, this discretion of legislators, regulators and administrators comes along with a number of disciplines and restrictions. First of all, the requirement of justification must be mentioned, which can be considered a precondition of any rational public governance in a constitutional system. Second, the principle of non-discrimination plays a fundamental role in this regard.

These two basic requirements and disciplines form the basis, on which the so-called general principles of Union law operate. These, in turn, are the principles of proportionality, legal certainty and legitimate expectations. Proportionality can be understood to mean that the measure is suitable to achieve the intended objectives and does not exceed what is necessary to attain those objectives. Furthermore, and as is well known, proportionality entails also that no other less restrictive measure is available.[23]

The principle of legal certainty implies that rules should be clear, precise and predictable, something which would equally apply to standards and administrative decisions. In European case law, it has been highlighted that this legal certainty is particularly required where private individuals or undertakings may be affected.[24]

The principle of legal legitimate expectations entails that expectations of the addressees of the measure are duly taken into account, where they are legitimate and the addressees

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20 See Stoll, Holterhus, Gött (n 9) 24 et seq., 106 et seq.

21 Moskvan (n 15) 63 et seq.

22 For example: Joined Cases C-52/16 and C-113/16 *SEGRO,* EU:C:2018:157; Case C-349/07 *Sopropé,* EU:C:2008:746; Case C-230/18 *PI v. Landespolizeidirektion Tirol,* EU:C:2019:383; Case C-235/17, *Commission v. Hungary (Usufruct Over Agricultural Land),* EU:C:2019:432.

23 E.g, Joined Cases C-52/16 and C-113/16 *SEGRO,* EU:C:2018:157, para 76. See also Case C-577/10 *Commission v Belgium,* EU:C:2012:814 para 44.

24 E.g. Joined Cases C798/18 and C799/18, *Anie and Others,* EU:C:2021:280, para 41. See also Case C-322/16 *Global Starnet,* EU:C:2017:985, para 46.

are prudent.[25] The principle can be also said to require in general that new rules should be accompanied by adaptations for affected individuals or undertakings that have had such legitimate expectations.

Altogether, these well developed and structured disciplines on measures which affect the rights of investors may be said to balance individual rights and public interest appropriately. These disciplines are firmly and clearly set out in EU law and affirmed and developed by a large body of jurisprudence of the CJEU. While a concise comparison cannot be offered in the confines of this paper, it can be concluded that international investment law and EU law have much in common at this point and that EU law appears to be at least as appropriate, if not even more elaborate, in view of enabling and disciplining measures in the public interest.

V Effective Remedy: Access to Justice and Enforcement

Another important dimension of the protection of investors and investments concerns the availability of an effective remedy. Indeed, it is one of the essential elements of the rule of law that an individual right, such as the rights of investors, can be effectively enforced.[26] An effective remedy includes procedural elements such as access to justice, effective enforcement of decisions and, in substantive dimensions, may entail compensation, as will be discussed below.

Effective remedies are of critical importance in the case of foreign investments and their promotion. Doubts about the effectivity of legal systems and courts in host States are the *raison d'être* of international investment law and, more particularly, its investor-State dispute settlement regime. Arbitration and the facilitated enforcement of awards are key components of a remedy, which, in terms of effectivity, is unparalleled.

Now that this option is not available any more for investment undertaken within the EU, EU investors will have to turn to the general system of adjudication and enforcement. Both, Articles 13 and 6 ECHR as well as Article 47 CFR and EU law, as for instance Article 19(1) subparagraph 2 TEU contain an individual right to an effective remedy.

While, by and large, these rights are complied with, defending investor's rights in the EU and Member States may be burdensome. The applicable law may vary and, accordingly, different courts may come into play. Thus, not only the courts of Member States may get involved but the CJEU or the ECHR may also be charged with the matter, depending on the circumstances of the case. Procedures may be complex, diverse and sometimes lengthy and inefficient. There is little doubt that pursuing investor's rights in ordinary courts is a lot more burdensome and time consuming that investor-State arbitration.

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[25] Developed by the CJEU in Case 111/63 *Lemmerz-Werke,* EU:C:1965:76 as a 'constitutional' principle.

[26] See for more detail: Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (CUP 2016, Cambridge) 282–338. DOI: https://doi.org/10.1017/CBO9781316687123.012

Protecting investments within the EU in the absence of IIL is in urgent need of taking a large array of measures to facilitate, accelerate and streamline the procedures at hand, to better equip courts and to train judges. In some instances, this might require taking bold and effective measures against a few Member States, whose judicial systems suffer from long-standing and systemic failures, which have been ignored far too long. Obviously, protection of investors rights through ordinary courts would lag behind arbitral procedures, even where all these improvements are implemented, as court proceedings take their time and might possibly include an appeal or a constitutional complaint. Some observers will see this as confirmation of their assessment that the elimination of the applicability of international investment law has resulted in a loss of the rule of law. This might already be doubted because it largely fails to take into account the potential benefits of having a right to appeal or other means to bring the matter to another court for more accurate assessment. However, more importantly, it reflects an understanding of the rule of law that is focused on the effectivity of the protection of investors rights. Such a view fails to properly take into account that investor-State arbitration comes along with drawbacks, which are equally related to the rule of law, if seen in a more comprehensive context. At the very least, these drawbacks concern the autonomy of the EU legal order,[27] as relied on by the CJEU in *Achmea*, a reasoning which has been rightly questioned by quite a number of voices. More serious is the fact that IIL and treaty-based investment arbitration is only available for those investors who can rely on an international investment agreement, such as a BIT. The system thus discriminates against those who do not enjoy this privilege, as their home Member State did not conclude such an agreement, let alone domestic investors, who fail to enjoy this privilege already because of the fact that IIL in its entirety is about foreign investors only.[28] Also, general courts equipped with judges might be considered more suitable to hear investment disputes as these disputes concern the proper and legitimate exercise of public authority.[29] It shall be noted that, for these reasons, investor-State arbitration has rarely been permitted in a purely national context and that it has been the subject of agreements only in a number of selected cases.[30] In short, the legitimacy of the adjudicating body is at stake here and a court with judges nominated by way of a procedure, which vests them with legitimacy, seems to be more suitable for adjudicating cases, where the exercise of public authority is at stake.[31]

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27 For more detail on the Autonomy EU Law in ISDS see: Trajan Shipley, 'The Principle of Autonomy of EU Law in the Context of Investor-State Dispute Settlement: A Public Policy Norm?' [2023] European Yearbook of International Economic Law 239–246, DOI: https://doi.org/10.1007/978-3-031-41996-6_10

28 Stoll (n 6) 287 et seq.; Stoll, Holterhus, Gött (n 9) 132 et seq.

29 Stoll (n 6) 286.

30 Stoll, Holterhus (n 9) 342.

31 Stoll, Holterhus and Gött (n 9) 239 et seq.

VI Effective Remedy: Compensation

One of the most relevant and controversial issues about the protection of intra-EU investments after *Achmea* concerns the issue of compensation. International investment law has a reputation for providing for compensation easily and in considerable amounts. Some see this as a welcome achievement, others harshly criticise it. Both sides vehemently rely on the rule of law for their arguments. Looking closer, it becomes clear that the compensation issue is about more than the money involved. Compensation may be provided for under different sets of rules and depend on steps taken beforehand, such as exhaustion of other remedies in the EU context, or contributory fault in IIL. Different methods of calculation also have to be taken into account.[32]

1 Compensation for Expropriation

In view of the protection of investors, compensation may come into play in different ways. First, compensation may be afforded in the context of an expropriation. International investment law builds on customary international law standards at this point, which envisage that prompt, adequate and effective compensation be afforded in case of an expropriation.[33] Bilateral investment treaties as well as arbitral awards have specified this standard by including indirect expropriations, clarifying that compensation is also due for measures which result in deprivation of the investors of their ability to manage, use or control their property, without the direct transfer of the legal title to the State, and by adding details about methods of the calculation of the amounts due.

As far as the law in the EU is concerned, expropriation is addressed by the laws of Member States, which do differ to some degree. Under the ECHR and according to the Court's jurisprudence on the right to property under Article 1 of Protocol 1 ECHR, compensation and its amount is subject to a balancing between the individual right and the public policy purpose underlying the expropriation and might in exceptional circumstances be even denied completely.[34] As far as EU law is concerned, Article 17(1) of the CFR states, that '(n)o one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss'.

It is not the place here to delve into the details of those different concepts. However, it becomes clear already that international investment tends to be more extensive in taking

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[32] See generally: Moskvan (n 15) 135 et seq.

[33] First established as 'Hull rule'; see e.g. Markus Krajewski, *Wirtschaftsvölkerrecht* (5th edn, C.F. Müller 2021, Heidelberg) 189.

[34] ECHR 'Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights – Protection of property' (31 August 2023) <https://ks.echr.coe.int/documents/d/echr-ks/guide_art_1_protocol_1_eng> accessed 15 December 2023, 37 para 182 et seq.; see also Daszko (n 19).

indirect expropriations into account as compared to the law within the EU, which would consider many such measures as 'control of use' or regulation. EU law also puts more emphasis on the public purpose as a limit or a balancing factor.

2 Compensation as a Remedy for Unlawful Interference

Aside from the context of an expropriation, compensation may also be awarded as a remedy for the violation of the rights of investors in the course of the exercise of public authority. IIL may deal with it by way of a more extensive understanding of expropriation, which covers indirect expropriations as well as by separate standards, chiefly the standard of fair and equitable treatment. In EU law, where expropriation is often defined more narrowly, compensation will be afforded under the rules of State or EU liability – a very complex issue.[35] As is observed frequently, the EU's own liability is fairly limited by requiring that a breach of an EU rule has taken place, which is sufficiently serious and that a direct causal link exists between the breach and the harm suffered.

As far as it is applicable, Article 41(3) CFR envisages, that '(E)very person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States'. At first glance, this provision appears quite promising to those who have experienced losses due to some EU-related measures. However, the relevant case law of the CJEU points to a number of conditions that need to be fulfilled.[36] In addition to a breach of a rule of law, which confers rights to the individual at hand, such breach must be sufficiently serious and a direct causal link is required between the breach and the harm suffered.

Most observers agree that these conditions and their application by the CJEU are fairly restrictive.

As far as the ECHR is concerned, a violation of rights under the Convention might entail a just satisfaction to be afforded by the Court under Article 41 ECHR, which, however, will probably lag far behind the amounts to be expected as compensation in IIL.

3 The Relationship between Primary and Secondary Remedies

Compensation in the course of state liability has sometimes and rightly been labelled as a 'secondary' remedy, whereas challenging the respective measure at hand in court can be considered a 'primary' remedy.[37] The interrelationship between the two is crucial and

[35] See Andreas Biondi and Martin Farley, *The Right to Damages in European Law* (Kluwer 2009, Alphen aan Rijn).

[36] In accordance with Art. 52(2) CFR, the CJEU refers to Art. 340 para 2 TFEU and Art. 41(3) CFR simultaneously and therefore applies equivalent conditions. See e.g., Case C-45/15 P *Safa Nicu Sepahan,* EU:C:2017:402, paras 64, 73, 84 and 91.

[37] Anne van Aaken, 'Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View' in Stephan W. Schill (ed), *International Investment Law and*

complex. In international investment law, it is somehow reflected by the requirement of the exhaustion of local remedies, which, however, may and is often waived. This requirement is seen as a device to safeguard the sovereignty of the State hosting the investment. In EU law, the requirement to challenge a measure before asking for compensation is more straightforward and has other connotations: it is driven by the desire to see the exercise of public authority being put to the test of legality in the public interest. This is sometimes framed as a principle of 'no acquiesce and liquidate'.[38]

4 The Calculation of Compensation

A striking difference between international investment law and the law and practice applicable in the EU, which cannot be overlooked and is often emphasised in practice, lies in the amount of compensation. The compensation awarded by arbitral tribunals on the basis of international investment law in the case of expropriations or a violation of other standards often amounts to large sums and plays a central role in criticising this law and its application. However, the practice of compensation under the law otherwise applicable in the EU is also criticised. The amounts are often much lower and are felt to be insufficient.

The differences result from the use of different rules and methods of calculation. Under IIL, the compensation is based on the potential value that the affected investment would have according to the reasonable expectations and business plans of the investor. On this basis and in most cases, the compensation is calculated according to the discounted cash flow method. The manifold standards and laws applicable in the EU in the absence of international investment law imply various different rules, methods and practices in view of compensation. Often, the cost incurred by an investor plays a crucial role and balancing may take place in considering the public interest, which has motivated the restrictions at hand. The many details of the calculation applied and the obvious differences certainly merit a closer look. Here, it is sufficient to note that all these rules, methods and practices are unlikely to match the amounts provided for under IIL and often lack transparency and legal certainty.

As has been observed frequently, there is ample room for improvement at this point.

However, beyond the obvious need for reform as such, the more general question arises as to what level of compensation should be considered appropriate.

EU legislation and the European Parliament (EP) have voiced criticism in view of the compensation afforded to investors under IIL. For instance, recital (4) of Regulation 912/2014 on managing financial responsibility linked to investor-to-state dispute settlement states

Comparative Public Law (OUP 2010, online edn, Oxford Academic, 1 Jan. 2011) DOI: https://doi.org/10.1093/acprof:oso/9780199589104.003.0023

[38] See Attila Vincze, 'Dulde und liquidiere im Unionsrecht? – Zu den möglichen Folgen der Europarechtswidrigkeit und ihrem Verhältnis zueinander' (2023) 58 (1) Europarecht (EuR) 84–100, DOI: https://doi.org/10.5771/0531-2485-2023-1-84, 91 et seq.; see also for a fundamental decision of the German Constitutional Court on this principle: BVerfGE 58, 300 – Nassauskiesung.

that 'Union agreements should afford foreign investors the same high level of protection as Union law and the general principles common to the laws of the Member States grant to investors from within the Union, but not a higher level of protection'.[39]

In its recent resolution on the future of EU international investment policy, the EP has voiced concerns about the discounted cash flow method to calculate compensation under IIL. In the resolution, the EP 'invite(s) the Commission to assess in depth and provide for corrective and transparency oriented rules and safeguards in relation to the provisions governing compensation in EU IIAs', 'call(s) for compensation to be capped at the level of sunk costs, reflecting the amount of eligible expenditure actually incurred by the investors' and 'underline(s) that balancing approaches should, as appropriate, determine compensation awards below this cap'.[40] While certainly the resolution addresses the international dimension, it must also be well understood to reflect the positions of the EP in view of the protection of investments taking place within the EU.

VII The Rule of Law as a More Encompassing Concept and the Way Forward

The discussion on the protection of intra-EU investments after *Achmea* often started out from the perspective of international investment law and practice with all related expectations. This has been helpful to fully appreciate the challenges ahead. The discussion has highlighted the need of investors for effective protection of their rights, which is ultimately an imperative of the rule of law. However, the rule of law is more encompassing than a narrow focus on the effectivity of the protection of individual rights of investors, as some would suggest. Next to this aspect, non-discrimination, the legitimacy of adjudicative bodies and the need to require the challenging of measures first, in front of courts in aid of the general interest, before asking for compensation have to be taken into account as well. This is why IIL, as it stands, can hardly serve as the only orientation to determine the adequate level of protection.

There is no comfortable trade-off between these different elements of the rule of law. Neither can the effectiveness of the protection of investor's rights be an excuse to allow for far-reaching discrimination and adjudication outside legitimate courts, nor can the latter two justify the weakening of investor's rights. Instead, the protection of rights, non-discrimination and legitimacy of adjudicators have to be improved and maintained in parallel.

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[39] Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party [2014] OJ L 257/121.

[40] European Parliament resolution of 23 June 2022 on the future of EU international investment policy (2021/2176(INI)), [2023] OJ C 32/96, para 34.

Here, a number of activities and measures will be helpful. Several cases can be expected to be brought and might allow for building up a more detailed and coherent jurisprudence on the matter. Proper resourcing of courts by the EU and Member States and adequate training of judges will be essential in this regard. Likewise, the legal profession will develop the skills and capacities to support clients in this new legal setting. Academia has a role to play too in reflecting, assessing, guiding and discussing the developments and in teaching and training. Given the uncertainties at hand, the number of policy questions involved and the need for more guidance and the relevance of the issue for individual rights in the system of European multilevel governance, legislative action might become an option, too, a consideration which should not be dismissed outright without further ado.

Altogether, the challenge ahead might appear to be overly ambitious. Indeed, with *Achmea* and the ensuing developments, the EU has left the comfort zone that IIL provides. However, every effort is worth the task, as it is about more than just the protection of investments. Improving investment protection under general rules and by ordinary courts will consequentially benefit more generally the rule of law and its implementation in the EU and this way significantly fulfil in a wider sense its mission to constitute an area of freedom, security and justice as envisaged by Article 3(2) TEU and 67 TFEU.

VIII Conclusion

International investment protection is an elegant and convenient solution to fulfil investors' expectations of legal protection. It does not force states to move out of their comfort zone and improve their rule of law. It does not require the potential host state to guarantee legal protection and the rule of law in its system. Instead, disputes are shifted to the outside and to international arbitration tribunals. An internal market cannot afford this convenience in the long term. It essentially rests on law and the rule of law. It must not allow discrimination and must rely on a high degree of effectiveness and legitimisation of sovereign power and its judicial review and encourage investors to seek legal protection in the general interest and require them to accept losses for justified public purposes. Referring European investors to existing European law and hoping for clarification of individual issues by the European courts is unlikely to be sufficient. Apart from some possibly necessary legislative measures, the far more difficult task is likely to lie in improving the rule of law as a whole. This is, of course, a task that has not only become necessary with regard to investment protection, but is also a high priority for the further development of the European Union in its entirety.

Péter Budai*

Guy Fiti Sinclair's Approach and its Application to EU Law: the Development of the Rule of Law as a Case Study

Abstract

As theories on the development of the European Union do not give sufficient emphasis to aspects of EU law, it may be necessary to complement their application with other integration theories. To this end, the article intends to provide an analytical framework by relying on the field of the law of intergovernmental organisations. Guy Fiti Sinclair's approach provides a framework to understand the expansion of powers in the case of intergovernmental organisations, an area not sufficiently explored concerning matters of EU law. The article examines the development of the rule of law based on the analytical framework. In addition to the introduction of the early context of the rule of law as well as the trends in the development of the rule of law in particular intergovernmental organisations, it also examines the position of the European Commission, the European Parliament and the Court of Justice of the European Union and the understanding of the rule of law within the academic sphere of the 2010s. The article focuses on the ASJP case, which, due to its innovative nature, has significantly impacted the development of the interpretation of the rule of law within EU law. The article, therefore, aims to give a perspective to understand the development of the rule of law, relying on this analytical framework.

Keywords: EU law, rule of law, Court of Justice of the European Union, European Commission, European Parliament, Article 7, law of intergovernmental organisations

* Péter Budai, LL.M. College of Europe (Bruges) is Ph.D. student at ELTE Eötvös Loránd University, Faculty of Law, Doctoral School of Law (e-mail: peter.budai101100@gmail.com).

I Introduction

A legitimate criticism of the development of European integration is that the theories describing this phenomenon focus on the political and economic aspects of this process but fail to explain the expansion of powers and the development of European Union (EU) law in this regard.[1] This seems quite a missed opportunity because EU law serves as an engine for the development of the Union. To better understand the expansion of powers of the Union, it may be necessary to borrow a theoretical approach from the field of public international law, more specifically from the law of intergovernmental organisations. Guy Fiti Sinclair's analytical framework relies on a sociological-historical approach. It not only underlines the importance of the content of the instruments issued by the international organs and the decisions of international courts but also highlights specific international trends and the activity of international organs as well as their leaders' approach which are relevant for understanding the expansion of powers of intergovernmental organisations. Based on this, Sinclair relies on so-called constitutional growth, which stresses the change in the interpretation of the provisions of the founding treaties.

This paper aims to give a case study to understand the application of such an analytical framework. In this regard, the paper shows how the rule of law (hereinafter 'RoL') emerged in Community law and later in EU law and how its evolution can be observed up to the decision on the Portuguese judges' case, the so-called ASJP case. The case marked a turning-point, as the Court of Justice of the European Union (Court of Justice or CJEU) based its core reasoning on the RoL as a value and linked it to the question of the independence of the judiciary of a Member State. First, the paper introduces Sinclair's approach and applicability to the European Union (Chapter 2). Other components must then be highlighted in the process, relying on Sinclair's approach and presenting its developmental arc. Chapter 3 outlines the historical context of the RoL, which encompasses the dimension of EU law and specific international trends. As the framework emphasises the positions of organs of international organisations and the academic community, it is essential to describe their role in the process in Chapter 4 and Chapter 5 respectively. Chapter 6 examines the case study, the ASJP case, its context, the content and the outcome.

The study follows a coherent path regarding its sources: it uses historical and jurisprudential works and studies with relevant EU legal sources and case law. Importantly, however, the scope of the study does not allow for a thorough analysis of all cases. As such, the aim is not to give a detailed picture of the development of the RoL but to provide an analytical framework to understand better how an expansion of powers occurs in the Union.

[1] Morten Rasmussen, 'Towards a Legal History of European Law' (2021) 6 (2) European Papers 927–928.

II The Applicability of Guy Fiti Sinclair's Approach to the European Union

1 Sinclair's Analytical Framework

The law of intergovernmental organisations examines their legal relations, structure and functions. However, only a few works studied the expansion of powers of intergovernmental organisations. In 'To Reform the World – International Organizations and the Making of Modern States', Guy Fiti Sinclair examined the expansion of powers of some intergovernmental organisations, such as the activity of the International Labour Organisation (ILO) concerning social and economic reforms, the peacekeeping missions of the United Nations and the matter of development of the World Bank, as well as their related implications, in more depth. He stresses that the expansion of powers is not a zero-sum game but rather a process based on active and changing discourse and practices of these organisations, considering the historical context and the broader social, cultural and political dimensions.[2]

First, Sinclair defines state formation as a cultural process. Instead of defining the state as a distinct, fixed and unitary entity, the author underlines that contemporary states consist of repeated practices and representations that form the state.[3] States are constantly being constructed within an ongoing disorderly process of social interaction. The states acquire new powers in this process. However, this process is not linear, and includes contradictory and complementary elements, and intergovernmental organisations play an essential role in such a development.[4]

Second, Sinclair argues that there are intergovernmental organisations that expand their powers beyond the limits set by their Member States. For this, the author refers to so-called constitutional growth, which originates from Jellinek's constitutional transformation. As Jellinek explains, the texts of the constitution do not change, but the meaning of the provisions does. Relying on this concept, Sinclair explains that the intention of intergovernmental organisations to expand their powers does not appear at the time of their creation. Later, however, they demand new powers through their established practices and the reinterpretation of existing rules. During this process, there are no textual changes in the founding treaty. This can lead to an expansion of powers.[5] This needs the support of the most significant powers within these organisations and the acceptance of the smaller states.[6]

Third, the organs of intergovernmental organisations concerned play an active role in the process, relying on their innovative leadership and technical expertise. For instance,

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[2] Guy Fiti Sinclair, *To Reform the World – International Organizations and the Making of Modern States* (Oxford University Press 2017, Oxford) 5, 8–9, 18, DOI: https://doi.org/10.1093/acprof:oso/9780198757962.001.0001

[3] Ibid, 14.

[4] Ibid, 2, 14–15, 30.

[5] Ibid, 5, 9, 18.

[6] Ibid, 9, 18, 276–287, 291–292.

Sinclair stresses the significance of Albert Thomas, the first Director of the International Labour Office, the permanent secretariat of the ILO. Thomas was dedicated to establishing authority for the organisation. He (and his colleagues) stressed the importance of the ILO gaining a more serious role, a mission of social transformation.[7] In the case of the UN, Dag Hammarskjöld played an exceptional role in introducing modernisation and state-building techniques. In his reports, he emphasised social justice and equality of political and economic rights among nations, equal rights for individuals, and greater social justice within the nations.[8] With regard to the case of the World Bank, then President of the World Bank George Woods and then President George McNamara supported the idea that the organisation should turn to issues of development.[9] In all cases, a comprehensive technical expertise was established within the organisations concerned.

Fourth, this process has its specific attributes. Sinclair does not see the law as a uniform construction but as constantly formed through sociological interaction. Hence, law has a multi-faceted and contradictory nature, which could generate more and more identities and meanings.[10] Furthermore, the author also refers to the multifunctionality of law. On one hand, it has the aspect of being used as a tool for political pressure. On the other hand, intergovernmental organisations rely on moral principles and goals that come from certain (international) trends. These trends appear in internal documents, opinions and recommendations; therefore, they are termed soft law. Later, this could be formulated in 'harder' legal norms.[11] Ultimately, this body of law imposes obligations on the Member States, a process that also affects their competences. In this regard, Sinclair stresses the importance of judicial opinions and academic research that supports the legal discourse.[12]

Finally, international courts have a legitimising role in the expansion of powers. International courts tend to decide on the internal matters of an intergovernmental organisation. In the case studies concerning the ILO and the UN peacekeeping mission, the Permanent Court of International Justice (hereinafter the 'PCIJ') and the International Court of Justice (hereinafter the 'ICJ') examined competence issues and legitimised those developments. The PCIJ, in its advisory opinion, accepted the ILO's competence to regulate the conditions of agricultural workers and stated that the text was not ambiguous as the competence of the ILO covered this matter. In its second advisory opinion, however, the PCIJ denied the ILO had competence in proposals for the organisation and development of the means of production. The PCIJ also stressed that 'the improvement of the conditions of the workers may increase the amount of the production'. In some cases, therefore, the ILO

7 Ibid, 46–48.
8 Ibid, 166–169.
9 Ibid, 237–245.
10 Ibid, 503.
11 Ibid, 3.
12 Ibid, 291–292.

has competence if it is incidental to performing its function under its Constitution.[13] In the case of the UN peacekeeping operations, the ICJ dealt with the expenses regarding the UN Operation in Congo and the UN Emergency Force. The ICJ examined Articles 24 and 48 of the UN Charter on the competences of the UN Security Council, and found that it has primary but not exclusive responsibility concerning international peace and security. Based on the reasoning of Article 11(2) of the UN Charter, 'any such question on which action is necessary shall be referred to the Security Council by the General Assembly' but this did not rule out the role of the UNGA in peacekeeping.[14]

2 The Applicability of the Analytical Framework for the Union

The question arises of whether this theoretical approach is appropriate to examine the European Union. Although it is widely recognised that the EU is an entity beyond the concept of an intergovernmental organisation, it still has some features of such an organisation. In addition, the following aspects should be taken into account:

First, the founding treaties of the Union are similar to the founding treaties of an intergovernmental organisation. The Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU) and the predecessor treaties are also international treaties.[15] They contain the objectives, tasks, the list of organs, the intention to establish a permanent infrastructure and the declaration that the Union has a legal personality.[16] However, from quite early on, the founding treaties required special attention, as the Union has its institutions and constitutes a new legal order of international law. In this regard, the Member States limited their sovereign rights, which not only comprise the Member States but also their nationals.[17] In addition, the text of the founding treaties remains obscure and vague and contains little substance. Therefore, much depends on the interpretation of the text. Moorhead calls this the fuzziness of EU law, for which the understanding of values, objectives and interests is needed for the correct interpretation.[18] Unsurprisingly, this is in line with the case-law of the Court of Justice, which characterised one of the founding treaties (the Treaty on the European Economic Community, EEC

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13 *Competence of the International Labour Organisation in Regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture* (Advisory Opinion) PCIJ Series B No 2 (12 August 1922), 15–17.

14 *Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter), Advisory Opinion,* [1962] ICJ Rep 151, 159–160, 163–164.

15 Preamble and Article 1 TEU, Preamble and Article 1 TFEU.

16 Article 47 TEU.

17 Case C-26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration,* EU:C:1963:1; Opinion 2/13 Accession of the European Union to the ECHR, EU:C:2014:2454, para 157.

18 Timothy Moorhead, *The Legal Order of the European Union – The Institutional Role of the Court of Justice* (Routledge 2014, Abingdon) 43–44, DOI: https://doi.org/10.4324/9780203720547

Treaty) as the constitutional charter of the Union.[19] However, the Member States refused to repeat this in the case of the TEU and TFEU,[20] and the Court emphasised the constitutional features of the Union in its later case-law.[21] A difference between the founding treaties of intergovernmental organisations and the EU Treaties is that the texts of the latter sometimes change. However, in many cases, these changes are merely codifications of the existing development of EU law.[22]

Second, the competences of the Union also expand. Although the EU Treaties contain the principle of conferral mentioned directly or indirectly several times, a catalogue of competences and additional principles, such as the principles of subsidiarity and proportionality, this tendency remains unchanged.[23] An expansion of powers (or relying on a more critical terminology, competence creep) occurs, not just in the form of indirect legislation but in many other forms. Although it is an uncontrolled phenomenon and has worrying tendencies, this exists.[24]

Third, the institutions of the Union (very similar to the organs of the intergovernmental organisations concerned) rely on and promote such an expansion of powers. One of the most critical actors in this process is the European Commission (Commission). From very early on, the Commission has had considerable executive powers and an essential role in the legislation, representing the supranational approach within the institutional framework. In this sense, the leadership of the Commission also had this mindset from early on, which contributed to the development of the Union.[25] In addition, since the entry into force of the EEC Treaty, the Commission contributed to establishing a dedicated technical expertise for itself. It is not just based on legal knowledge but also covers various scientific fields that connect to policy and law-making for the Union.[26] A similar supranational actor is the

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19 Case C-294/83, *Parti écologieste „Les Verts" v European Parliament,* EU:C:1986:166, para 23.

20 Conclusions of the Brussels European Council, (21 and 22 June 2007) 11177/1/07 REV 1, para. 3., Annex 1, paras 1–3.

21 Opinion 2/13, paras 158, 163, 165.

22 Theodore Konstadinides, 'EU Foreign Policy under the Doctrine of Implied Powers: Codification Drawbacks and Constitutional Limitations' (2014) 39 (4) European Law Review 515.

23 Marcus Klamert, *The Principle of Loyalty in EU Law* (4th edn, Oxford University Press 2014, Oxford) 143, DOI: https://doi.org/10.1093/acprof:oso/9780199683123.003.0007; Marc A. Pollack, 'Creeping Competence: The Expanding Agenda of the European Community' (2008) 14 (2) Journal of Public Law 95, DOI: https://doi.org/10.1017/S0143814X00007418

24 Sacha Garben, 'Competence Creep Revisited' (2017) 57 (2) Journal of Common Market Studies 207–209, 221–222, DOI: https://doi.org/10.1111/jcms.12643

25 Wilfried Loth, 'Walter Hallstein, a committed European' in *The European Commission, 1958–1972, History and memories of an institution,* European Union (2014) 84, <https://op.europa.eu/en/publication-detail/-/publication/ebec8b45-1aab-4d57-887f-0da73489b19e> accessed 15 December 2023 Belgium; Henriette Müller, 'Setting Europe's agenda: the Commission presidents and political leadership' (2017) 39 (2) Journal of European Integration 133, DOI: https://doi.org/10.1080/07036337.2016.1277712

26 Hans von der Groeben: 'Walter Hallstein as President of the Commission' in Wilfried Loth, William Wallace and Wolfgang Wessels: *Walter Hallstein – The Forgotten European?* (Macmillan Press Ltd. 1998, London) 97–98, DOI : https://doi.org/10.1007/978-1-349-26693-7_7

European Parliament (EP). From the beginning of the European Economic Community, the EP intended to gain more powers, including political control concerning other institutions of the integration, namely the Commission and the Council.[27] However, the Parliamentary Assembly needed to deepen its knowledge of the various policy areas of the Union. Consequently, the different committees and political groups also sought to maintain connections with experts, which helped the committees to become fora for communicating interests within the EP.[28] At the time of the EEC, these committees with sectoral competence (for transport, energy policy, trade policy and agriculture) were active.[29] In line with this development, especially from the beginning of direct elections, the representatives of the EP started to focus more on policy areas and become active in different proposals or setting a policy item on the political agenda.[30]

Fourth, the Court of Justice of the European Union has a legitimising role, but is also an institutional actor. Regarding the legitimising role, the Court of Justice acquired an interpretative monopoly of EU law.[31] Because of the fuzziness of the text of the founding treaties, the Court of Justice must rely on the principles, interests, objectives and values of the Union to fill the gaps and lacunae of EU law.[32] This gives a significantly important role to the Court of Justice and opportunities to legitimise the expansion of powers. The attitude of the Court is also in line with its role in EU law. The Court of Justice is generally highly bureaucratised, comprising divisions undertaking legal or linguistic tasks. In this regard, the judges have a wide range of powers to enact strong leadership. This guarantees the consistency of rulings and the uniformity of its judgments. In addition, unlike judges of international courts and tribunals, there are no individual and dissenting opinions from judges concerning the different judgments. This consistency of the Court remained even

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27 Rapport sur les compétences et les pouvoirs du Parlement européen, Rapporteur: M. Hans Furler, 14 Juin 1963, <http://aei.pitt.edu/13815/1/doc.31.PDF> accessed 15 December 2023; Eric Stein, 'The European Parliamentary Assembly: Techniques of Emerging "Political Control",' (1959) 13 (2) International Organization 240–241, DOI: https://doi.org/10.1017/S0020818300000060

28 Ibid, 242; David A. Alexander, 'Expertise, turnover and refreshment within the committees of the European Parliament: as much like Sisyphus pushing the boulder up the mountain as we may think?' (2022) 44 (7) Journal of European Integration 899–917; Christine Neuholdt: 'The "Legislative Backbone" keeping the Institution upright? The Role of European Parliament Committees in the EU Policy-Making Process' (2001) 5 (10) European Integration online Papers 21, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=302785> accessed 15 December 2023.

29 Antoine Vauchez, 'Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity' LSE, Law, Society and Economy Working Papers 19/2013, 26–27, DOI: https://doi.org/10.2139/ssrn.2264795

30 Jan-Henrik Meyer, 'Green Activism. The European Parliament's Environmental Committee promoting a European Environmental Policy in the 1970s' (2010) 17 (1) Jahrbuch der Europäischen Integration Institut für Europäische Politik 73–77, DOI: https://doi.org/10.5771/0947-9511-2011-1-73

31 Gareth Davies, 'Does the Court of Justice own the Treaties? Interpretative pluralism as a solution to over-constitutionalization' (2018) 24 (6) European Law Journal 360–361, DOI: https://doi.org/10.1111/eulj.12298

32 Pierre Pescatore, 'Les objectifs de la Communauté européenne comme principes d'interpretation dans la jurisprudence de la Cour de Justice' in *Miscellanea Ganshof van der Meersch Bruyland* (1972, Brussels) 328.

after the enlargements.[33] In this regard, the judges have considerable importance in the life of the institution. From the 1960s, pro-European jurists became judges who intended to give the Court more weight within the institutional framework and Community / EU law. From early on, the judges relied on arguments that pro-European jurists used in academic circles and usually tested them in academic conferences.[34]

Finally, it is important to highlight a solid academic community related to EU law, which has certain features. An academic specialising in EU law writes articles and lectures on EU legal matters and researches a specific topic. They point out the context, correlation and controversies and stress further questions related to EU law. These actions together form a community around the research of EU law in academia. Unsurprisingly, legal experts and practitioners pay attention to lectures and articles. Their significance is especially relevant for Advocate-Generals, who do not just point out previous case-law concerning the legal debate at hand but also refer to the political and legal context, which includes the relevant academic debate to highlight the different angles of the problem.[35] In addition, the academia has connections with the practitioners as well. Practitioners go to conferences to give a detailed snapshot of some legal issues. They interact with the academia during the conferences and in different legal journals.[36]

Considering these points, it is not enough to verify the applicability of Sinclair's analytical framework at an abstract level. A case study should therefore, be used to support such an approach to understand the expansion of powers within the Union in its systematic and dynamic aspects.

III The Rule of Law as an Increasing Trend

1 The Development of the RoL in the Union Founding Treaties

There are different approaches to the occurrence of the RoL at the level of founding treaties. According to Kecsmár and Hertog, the Single European Act introduced the RoL.[37] Pech,

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[33] Arjen Boin, Susanne K. Schmidt, 'The European Court of Justice: Guardian of European Integration' <https://link.springer.com/chapter/10.1007/978-3-030-51701-4_6#Sec2> accessed 15 December 2023.

[34] Vauchez (n 29) 28.

[35] Michal Bobek, 'A Fourth in the Court: Why are there Advocates-General in the Court of Justice?' (2012) 14 Cambridge Yearbook of European Legal Studies 529–561.

[36] Päivi Leino-Sandberg, 'Enchantment and critical distance in EU legal scholarship: what role for institutional lawyers?' (2022) 1 (2) European Law Open 246, DOI: https://doi.org/10.1017/elo.2022.17

[37] Krisztián Kecsmár, 'A jogállamiság fogalma az Európai Unió Bíróságának ítélkezési gyakorlatában, avagy a jog került a politika vagy a politika a jog csapdájába?' (2020) 23 (2) Európai Tükör 32–33, DOI: https://doi.org/10.32559/et.2020.2.2; Leonhard den Hertog, 'The Rule of Law in the EU: Understandings, Development and Challenges' (2012) 53 (3) Acta Juridica Hungarica 207–208, DOI: https://doi.org/10.1556/AJur.53.2012.3.3

conversely, identifies the RoL without its explicit identification in EU law. The lack of reference to the RoL can be traced back to the fact that representatives of the government of the United Kingdom (therefore representatives of common law) were not invited to the negotiations, neither in the case of the European Coal and Steel Community (ECSC) nor that of the EEC. In addition, translations of the RoL were less common at that time.[38] What is certain that the Court of Justice underlined in the Les Verts case that 'the European Economic Community is a community based on the RoL'.[39] In this regard, the Court of Justice used the tools of teleological interpretation to point out that the Union is not just any legal order but has a constitutional nature. The Court also underpinned the importance of certain aspects of the principle (such as legality, legal certainty, effective judicial protection, and the right to be heard) with its case law and its link to substantive fundamental rights issues.[40] Regardless of which approach may be correct, it is safe to say that the appearance of RoL was sporadic in the development of EU law and was not given much emphasis in those years.

Soon after, RoL appeared to acquire more critical roles. The Copenhagen Criteria included political, economic and legal requirements in the context of enlargement. The political branch covered the stability of institutions, guaranteeing inter alia the RoL.[41] The concept of the RoL has not only appeared in the enlargement policy but has also occurred in the founding treaties. In addition to the reference to the RoL in the preamble of the Single European Act,[42] the Maastricht and post-Maastricht reforms introduced some relevant provisions to the treaties, including the recognition of the rule of law as one of the founding principles of the Union, and the introduction of the predecessor of the Article 7 TEU procedure, although with no actual practice.[43]

With the Lisbon reforms, two significant changes occurred with the concept of RoL at the level of the founding treaties. First, the RoL appeared in more provisions. First, RoL appeared in more provisions at the level of the founding treaties, including among the objectives, the list of missions of the institutional framework, the Article 7 TEU procedure, the articles of the common foreign and security policy and the Charter of Fundamental Rights of the European Union (Charter).[44] Second, RoL is not mentioned as a principle but a value of the Union, on which the Union is founded and which is common to the Member States.[45]

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38 Laurent Pech, 'The Rule of Law' in Paul Craig, Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021, Oxford) 309–310, DOI: https://doi.org/10.1093/oso/9780192846556.003.0010

39 *Les Verts*, para 23.

40 Nóra Chronowski, 'Jogállamiság – Gondolatok a magyar és az európai uniós jogfejlődésről' (2016) (4) Pro Publico Bono – Magyar Közigazgatás 37–38.

41 European Council Conclusions Copenhagen [1993] SN 180/1/93 REV 1.

42 Single European Act [1987] OJ L 169, 29.6.1987, 1–28.

43 Kecsmár (n 37) 32–34.

44 Articles 3(1), 13(1), 7, 21 TEU, Preamble, *Charter of Fundamental Rights of the European Union* [2007] OJ C 326, 26.10.2012, 391–407.

45 Article 2 TEU.

However, neither the values of the Union nor the RoL were defined in the founding treaties. These provisions do not help to understand the content of the RoL or its precise role as a value of the Union. First, there were critical assumptions on the nature of the values of the Union. Itzcovich stressed that courts enforce laws, not values. Furthermore, Kochenov argued that values are, in fact, legal principles. Some approaches also stressed values as a standalone category. Not even the Court of Justice could give a clear view of the nature of Union values.[46] In its case law, the Court referred to the values common to the Member States and the principles set out in Article 2 TEU, which define the identity of the Union.[47]

This is reminiscent of the fuzzy nature of the EU Treaties, underlined by Moorlock and Sinclair's approach to the nature of the founding treaties. These provisions highlight an increasing need for the Union to say something about the RoL. This growing demand has been exacerbated by the emergence of rule of law deficiencies within Member States, which have been seen as an EU-wide problem.[48] Consequently, the founding treaties are suitable for an expansion of powers of the Union regarding the concept of the RoL.

2 Trends for the Rule of Law in Intergovernmental Organisations

As the RoL is not an EU-specific matter but an international phenomenon and the deficiencies in its RoL can have a far-reaching impact in other fora, intergovernmental organisations and international courts expressed their increasing need to prepare their different (soft law) instruments. Since 2005, there has been considerable interest in the RoL within the UN. In that year, divisions focusing on the RoL were established to ensure the concept would be taken into account in relation to the organisation and international relations.[49] In 2004, Kofi Annan issued a report entitled The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies highlighting the RoL as a key concept in these societies and initiating its relevance within the UN.[50] In this regard, a significant supporter of the RoL, an EU Member State, Austria, introduced the Rule of Law Initiative. Then, Austrian Foreign Minister Benita Ferrero-Waldner emphasised in her address to

[46] Dimitry Kochenov, 'The Aquis and Its Principles: The Enforcement of the 'Law' vs. the Enforcement of 'Values' in the EU', in András Jakab, Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States's Compliance* (2017 OUP) 9–10, DOI: https://doi.org/10.1093/acprof:oso/9780198746560.003.0002

[47] Case C-156/21 *Hungary v European Parliament and Council,* EU:C:2022:97, para 157.

[48] Inês Pereira de Sousa, 'The Rule of Law Crisis in the European Union: From Portugal to Poland (and Beyond)' (2020) 114 Teisé 145, DOI: https://doi.org/10.15388/Teise.2020.114.10

[49] Andreas Kumin, 'Global Activities and Current Initiatives in the Union to Strengthen the Rule of Law – A State of Play' in Werner Schroeder (eds), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation* (Hart Publishing 2016) 208–211, DOI: https://doi.org/10.5040/9781474202534.ch-012

[50] The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies, Report of the Secretary-General, Doc [2004] S/2004/616.

Secretary-General Kofi Annan that strengthening the RoL is a priority for the UN.[51] First, the Initiative introduced a series of panel discussions that focused on the increased role of the Security Council in the international world order and focused on its connection with the RoL.[52] At the end of discussions, Austrian State Secretary Hans Winkler and the Rapporteur Simon Chesterman at the UN Headquarters in New York introduced the Final Report and Recommendations on the topic.[53] The so-called Rule of Law group within the UN, headed by Austria, also initiated bringing The Rule of Law at the National and International Levels Agenda Item to the UN General Assembly.[54] Furthermore, the Rule of Law Unit was created to assist national efforts to re-establish the RoL in conflict or post-conflict societies. Later, a Declaration on the Rule of Law at the National and International Levels was adopted in 2012, underlining that human rights and democracy are interlinked and mutually reinforcing with the RoL.[55]

A similar pattern has been present in other intergovernmental organisations. Within the aegis of the Council of Europe, the Venice Commission considered the various traditions of the RoL. In its Report on the Rule of Law, using a comprehensive approach, focused on identifying the essential elements of the concept.[56] Regarding the Organization for Security and Co-operation in Europe (OSCE), the Helsinki Ministerial Council Decision No. 7/08 encouraged the strengthening of the RoL, especially in the areas of the independence of the judiciary, effective administration of justice, right to a fair trial, access to a court, accountability of state institutions and officials and respect of RoL in the public administration.[57] In the case of the World Bank, internal instruments underlined the importance of the RoL from an economic perspective. The Bank's internal think-tank (Legal Institutions of the Market Economy) proposed 'reforming laws' and 'reforming institutions' to promote the RoL. Reforming laws include drafting substantive laws for property, contract, company, bankruptcy and competition, while reforming institutions cover courts, legislative bodies, property registries, ombudsmen, law schools and judicial training centres, bar

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[51] Statement by H.E. Dr. Benita Ferrero-Waldner, Federal Minister for Foreign Affairs of the Republic of Austria, at the 59th Session of the UN General Assembly, 23 September 2004, 6.

[52] Konrad G. Bühler, 'The Austrian Rule of Law Initiative 2004–2008 – The Panel Series, the Advisory Group and the Final Report on the UN Security Council and the Rule of Law' [2008] Max Planck Yearbook of United Nations Law, DOI: https://doi.org/10.1163/18757413-90000030a

[53] The UN Security Council and the Rule of Law – The Role of the Security Council in Strengthening a Rules-based International System, Final Report and Recommendations from the Austrian Initiative 2004–2008, <https://www.iilj.org/wp-content/uploads/2017/08/unsc_and_the_rule_of_law.pdf> accessed 15 December 2023.

[54] Bühler (n 52) 414–416.

[55] In Larger Freedom: Towards Development, Security and Human Rights for All — Report of the Secretary-General, 59th sess, Agenda Items 45 and 55, UN Doc A/59/2005 (21 March 2005), para 137; Bühler (n 52) 417.

[56] Report on the Rule of Law, Adopted by the Venice Commission, 25–26 March 2011, <https://rm.coe.int/1680700a61> accessed 15 December 2023.

[57] Decision No. 7/08 on further strengthening the rule of law in the OSCE area, <https://www.osce.org/mc/35494> accessed 15 December 2023.

associations and enforcement agencies.[58] In its annual review report on the initiative of legal and judicial reforms in 2004, it stressed that the development experience showed that the RoL promotes effective and sustainable economic development and good governance. Since 2013, the World Bank has considered the RoL as a Worldwide Governance Indicator, which considers the extent to which individuals have confidence in and abide by the rules of society, including the courts and the law.[59]

The activity and case-law of the European Court of Human Rights (hereinafter 'ECtHR') and the Inter-American Court of Human Rights (hereinafter 'IACtHR') are significant in tackling this trend. These international courts have influenced the structure and powers of the judicial systems of their Member States. In their rulings, they interpreted specific provisions of the American Convention on Human Rights and the European Convention on Human Rights (hereinafter 'ECHR').[60] It was necessary because although several human rights aspects had already been raised about the judicial systems of their member states, neither convention contained detailed rules on this matter. Both the IACtHR and ECtHR have sought to interpret the provisions on effective judicial protection in certain cases. This development of the case law covered the issues of judicial remedies, the right to fair trial, the exercise of judicial functions, the enforcement of judgments and access to courts.[61]

In this regard, it should be stressed that the Council of Europe and, specifically, the ECHR have received particular attention from the Union. Article 6(2) TEU requires the Union to accede to the ECHR.[62] In addition, the Charter also pays special attention to the fundamental rights listed in the ECHR. This process is of great interest in the EU legal literature, as is the Court of Justice's consideration of the case law of the ECtHR regarding the interpretation of the provisions of the ECHR.[63]

IV The Rule of Law within the Institutions of the Union

The question arises of whether EU institutions can be compared to the international organs of the intergovernmental organisations examined by Sinclair. As he underlined, the activities of the international organs stimulated the development of certain concepts on which the intergovernmental organisations relied on later in their instruments. If we

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58 Gordon Barron, 'The World Bank & Rule of Law Reforms', Development DESTIN Studies Institute, LSE Working Papers, no. 05-70, <https://www.files.ethz.ch/isn/137920/WP70.pdf> accessed 15 December 2023.

59 See World Bank, 'Rule of law' indicator <https://www.worldbank.org/content/dam/sites/govindicators/doc/rl.pdf> accessed 15 December 2023.

60 David Kosar, Lucas Lixinski, 'Domestic Judicial Design by International Human Rights Courts' (2015) 109 (4) The American Journal of International Law 713–715, DOI: https://doi.org/10.5305/amerjintelaw.109.4.0713

61 Ibid, 748–755.

62 Article 6(2) TEU, Preamble, *Charter of Fundamental Rights of the European Union.*

63 Sejla Imamovic, 'The Court of Justice of the EU as a Human Rights Adjudicator in the Area of Freedom, Security and Justice' Jean Monnet Working Papers 5/2017, 5–6.

apply Sinclair's analytical framework to the development of the RoL, some EU institutions concerned should be closely examined.

1 The European Commission

Since 2012, the Commission has applied a comprehensive approach to the RoL as a result of the upcoming RoL concerns in some Member States. In 2012 and 2013, former President of the Commission José Manuel Barroso stressed in his State of the Union speeches, referring to the upcoming concerns about Hungary and Romania, that a political union includes respect of the RoL.[64] He emphasised that this is the backbone of democracy in the Member States.[65] In addition, the Commission intended to put itself into a central position by introducing a general framework 'based on the principle of equality between member states, activated only in situations where there is a serious, systemic risk to the RoL, and triggered by pre-defined benchmarks'.[66] The approach was reiterated by former Vice President of the Commission, Viviane Reding, who stressed that there was a crisis of the RoL in the Union.[67] Later, commissioners also stressed the importance of the protection of the RoL. For instance, Jourová underlined the link between the RoL and EU subsidies.[68] Later, in 2018, the connection between the RoL and the protection of the financial interests of the Union was also pointed out.[69]

The Commission has also sought to define the RoL in its various instruments. According to the Commission, RoL is a constitutional principle with formal and substantive components that should be consistent with the case law of the Court and ECtHR.[70] The position of the institution is that the term includes the principle of legality, legal certainty, prohibiting the arbitrary exercise of executive power, effective judicial protection by independent and impartial courts, effective judicial review, including respect for fundamental rights, equality before the law and separation of powers. Such an approach is intended to be as detailed as

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64 José Manuel Barroso, José Manuel Durão Barroso President of the European Commission State of the Union 2012; José Manuel Barroso, José Manuel Durão Barroso President of the European Commission State of the Union 2013 Address Plenary session of the European Parliament/Strasbourg, 11 September 2013.

65 European Commission, Communication to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law (2014) COM (2014) 158 final.

66 Ibid.

67 Viviane Reding, *The EU and the Rule of Law – What next? SPEECH/13/677,* Centre for European Policy Studies/Brussels, 2013, available at: <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_677> accessed 15 December 2023.

68 Daniel Matousova, Friedrich Naumann, 'Tying EU Subsidies to Rule of Law?' 4liberty.eu <https://4liberty.eu/tying-eu-subsidies-to-rule-of-law/> accessed 15 December 2023.

69 Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States COM (2018) 324 final.

70 European Commission (n 65); European Commission, Annexes to the Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law COM (2014) 158 final, Annexes 1-2.

possible. This also appeared in the communication of the Commission, which emphasised not just the principles mentioned above but also stressed it would take the institutional practice and the jurisprudence of the Council of Europe into account.[71] The Commission also applies the same comprehensive approach in its Rule of Law Reports, stressing four key areas of the RoL: the justice system, the anti-corruption framework, media pluralism and freedom and other institutional issues related to checks and balances. This underlines the Commission's similarity to the intergovernmental organisations Sinclair examined.

Furthermore, the Commission also intended to invent instruments to tackle the concept of RoL. These focused on either the prevention of any deficiency of the RoL, or the sanctioning of the Member State concerned. In general, the Commission did not have a specific legal basis for protecting the RoL. However, in many cases, the institution relied on other legal bases indirectly, or underlined that the Commission introduced the instrument at the request of the European Parliament and the Council. In addition, the Commission also expressed that RoL-related instruments already exist under the aegis of different intergovernmental organisations, such as the UN or the Council of Europe. First, the Commission created a new mechanism to address threats to the RoL in a given Member State before the procedure under Article 7 TEU is activated. To this end, it has developed the so-called 2014 Rule of Law Framework.[72] According to the Commission, it established a three-stage process, which it activates in cases where there is a clear systemic threat to the RoL but does not meet the criteria for activating the Article 7 TEU procedure.[73] Second, the framework for the coordination and surveillance of economic and social policies, the so-called European Semester, also goes beyond simple economic policy matters and focuses on the fight against corruption and specific issues of the justice system of the Member States. In this regard, the Commission proposes country-specific recommendations for adoption by the Council. Although these are soft law documents within EU law, their role in creating new competences for the Union is evident.[74] Garben even considers this a form of competence creep.[75] Third, since 2020, the Commission has even provided recommendations to the Member States on its RoL, for which the institution also examines whether the Member State has addressed the problems identified in the recommendations from previous years.[76] Finally, one of the recent inventions is the so-called rule of law conditionality regulation,

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71 European Commission, Communication from the Commission to the European Council, the Council, the European Social Committee and the Committee of the Regions – Strengthening the rule of law within the Union COM (2019) 163 final; Justyna Maliszewska-Nienartowicz and Marcin Kleinowski, 'What Rule of Law for the European Union? – Tracing the approaches of the EU Institutions' (2021) 50 Polish Political Science Yearbook 2–4, 9, DOI: https://doi.org/10.15804/ppsy202155

72 European Commission (n 65).

73 Ibid.

74 Ibid.

75 Garben (n 24) 212.

76 See more: <https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2023-rule-law-report_en> accessed 15 December 2023.

which underlines the protection of the financial interests of the Union and the RoL. The instrument enables the Council, at the request of the Commission, to sanction Member States if a breach of the RoL in a Member State 'affect[s] or seriously risk[s] affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way'.[77]

Sinclair highlighted that this trend has similarities to the case of the ILO. As Sinclair puts it, the ILO and especially its organ, the International Labour Office, 'was animated by a powerful sense of its unique mission and mandate to effect social reform through law'. The Office started to expand beyond the founder's expectations since its establishment. Albert Thomas, the first Director of the International Labour Office of the ILO, played a significant role in this process. He was dedicated to establishing authority for the organisation. He (and his colleagues) stressed the importance that the ILO should take on a more serious role, a mission of social transformation.[78] Thomas and other officials from the ILO were similarly active in expanding the powers of ILO to economic-related issues by relying on the written competences of the ILO regarding working conditions.[79] This trend had its context as well. The ILO's vision was to become a *'living organisation'* that tends to rely on social legislation and reform based on the ILO's liberal objectives. In this regard, Thomas stressed that the articles of the ILO were not simple provisions but *'a faith if not a doctrine'* that encouraged the ILO to engage actively and receive more and more powers.[80]

2 The European Parliament

In line with the Commission's active role in the development of the RoL, the EP has also played an active supporting role in the process within the EU institutional framework. First, the EP had a considerable role as a co-legislator. Its role is mirrored in the rule of law conditionality regulation, which even includes a definition of the RoL,[81] also covering matters related to the independence of the judiciary.[82] Second, from a more political perspective, the EP had an initiating role in maintaining the issue of the RoL on the political agenda at the European level. Since 2012, the EP has stressed that Member States should be assessed regularly on their continued respect for the Union's values and their compliance with the requirements of democracy and the RoL.[83] In addition, in 2016, the EP adopted

77 Article 4, Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L433I/1.

78 See a series of statements from Albert Thomas: Ibid, 46–48.

79 Ibid, 90–96.

80 Sinclair (n 2) 47.

81 Maliszewska-Nienartowicz, Kleinowski (n 71) 10.

82 Article 2 a) Regulation (EU, Euratom) 2020/2092.

83 For instance, European Parliament resolution of 12 December 2012 on the situation of fundamental rights in the European Union (2010–2011) 2011/2069(INI), 12 December 2012, 3–5; Report on the situation of fundamental rights: standards and practices in Hungary, 2012/2130(INI), 16 February 2012, E.

the so-called 'in't Veld Report' to introduce a comprehensive 'Union Pact for democracy, the rule of law and fundamental rights'. The resolution gave the Commission a free rein to develop a proposal for a comprehensive mechanism to monitor democracy, RoL and fundamental rights in the Union.[84] In addition, the EP also adopted several resolutions, and its Committee on Civil Liberties, Justice and Home Affairs adopted reports and organised on-the-spot country checks.[85]

Finally, as a more significant demonstration of power, the EP adopted the Sargentini report on Hungary, which triggered the Article 7(1) TEU procedure to determine the existence of a clear and serious breach of EU fundamental values in Hungary.[86] In this regard, RoL-oriented topics later remained on the political agenda of the EP, especially in the cases of Poland and Hungary. In this context, the EP urged the Commission and the Council to continue to ensure that the RoL is respected in the Member States and in the Union.[87]

3 The Court of Justice

Sinclair underlines that international courts legitimise the expansion of powers for the intergovernmental organisations concerned. However, the Court of Justice is also part of the same institutional framework as other institutions, and it is known for its activism in developing EU law. This activist role does not change this role of the Court but gives an additional aspect that should be highlighted to understand the complexity of the process. The question therefore, arises of whether the judges interpreted the RoL in their statements or writings. The short answer is maybe 'not so much' and only some writings can be examined. First, regarding the early case law, it is safe to say that elements of the RoL appeared sporadically to comment on the RoL as a whole. This includes the recognition of effective judicial protection as a fundamental right and its legal development by the Court relying on the Charter. Second, the Les Verts case introduced different questions for the prominent representatives of the European elites, such as the possibility to challenge the decisions of the institutions and the constitutional character of the founding Treaties. However, the

[84] European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights [2018] OJ C215/162, 1.

[85] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on 2020 Rule of Law Report – The rule of law situation in the European Union COM (2020) 580 final, 24.

[86] European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded [2019] OJ C433/66.

[87] For instance, European Parliament resolution of 1 June 2023 on the breaches of the Rule of Law and fundamental rights in Hungary and frozen EU funds 2023/2691(RSP).

RoL did not have priority at that time.[88] Third, RoL first appeared as a principle and then as a value of the Union. As these were protected under the Article 7 TEU procedure, during which the Court of Justice did not have much of a role because of the political nature of the procedure, this explains why they did not pay attention to this issue for a long time.[89]

However, the RoL had appeared for the judges of the Court regarding judicial independence even before the ASJP case.[90] Quite early on, Lenaerts had been seeking to analyse the RoL in relation to the judiciary as a whole. In his view, the Community courts and Member State courts together play an essential role tin upholding the RoL in Community law. The focus of his analysis was then much more on proceedings before the Court of Justice. He considered the RoL as a tool for the Court of Justice, which heled to strike a balance 'among the different interests in a multi-layered system of governance'. To achieve this, a formalistic understanding of the RoL is not enough. In that regard, it is the task of the Court to fill the constitutional lacunae.[91] Lenaerts emphasised that judicial protection had a significant role in this but was silent on other aspects of the RoL. Even then, he stressed that national courts had an obligation to ensure that Community law was effective, which he defined as a systemic safeguard.

Finally, Article 19 TEU should be mentioned here. During the negotiations on the text of the article, the members of the Discussion Circle, who were also judges in the Court of Justice, did not pay much attention to the second subparagraph of Article 19(1) TEU.[92] The provision was considered a codification of existing rights and obligations. However, later, Lenaerts underlined that the provisions could have far-reaching consequences, as national courts could be forced to introduce new remedies guaranteeing individuals, in all cases, the possibility of challenging EU acts and obtaining preliminary rulings. He pointed out that Article 19 TEU gives the Court of Justice a constitutional mandate to carry out a comparative study of the relevant legislation of the Member States. In addition, Article 19 TEU serves to uphold the RoL within the Union.[93] However, the author also stated that

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88 Anne Boerger, Bill Davies, 'Imagining the Course of European Law? Parti écologiste 'Les Verts' v Parliaments as a Constitutional Milestone in EU Law' in Fernanda Nicola, Bill Davies (eds), *EU Law Stories – Contextual and Critical Histories of European Jurisprudence* (CUP 2017) 83–102, DOI: https://doi.org/10.1017/9781316340479.005

89 Paul van Elsuwege, Femke Gremmelprez, 'Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice' (2020) 16 (1) European Constitutional Law Review 8–10, DOI: https://doi.org/10.1017/S1574019620000085

90 Michal Ovádek, 'The making of landmark rulings in the European Union: the case of national judicial independence' (2023) 30 (6) Journal of European Public Policy 9, DOI: https://doi.org/10.1080/13501763.2022.2066156

91 Koen Lenaerts, 'How the ECJ Thinks: A Study on Judicial Legitimacy' (2013) 36 (5) Fordham International Law Journal 1304, 1307.

92 Second subparagraph of Article 19(1) TEU; Final Report of the Discussion Circle on the Court of Justice (2003) 636/03, para 18.

93 Koen Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union' (2007) 44 (6) Common Market Law Review 1626, 1629, 1645, DOI: https://doi.org/10.54648/cola2007138

this provision has an 'interpretative fissure' which must be filled in the future.[94] These approaches were more detailed in the author's work after the ASJP case.[95]

V The Concept of the Rule of Law according to the Academics

Sinclair's analytical approach stresses that in the case of the ILO, the UN and the World Bank, expertise tends to rely on the scientific development, results of management and economics. Regarding the development of the European Union, in some cases, the same issue can be observed in the legal scholarly dimension. Schepel and Wesseling underline that European integration is largely driven by legal interpretation and not just by political decisions. It is not surprising because European integration is a project of integration through law. In this process, the legal community plays a vital role in the development of EU law. Academic journals and established transnational associations. as well as the arguments from the academics, contributed to the history of European law.[96] Among others, there are examples of this in the case of direct effect or the supremacy of EU law.[97] In this regard, academics often identified certain problems of law. Sticking to the example from the early development of law, this happened in the case of the correlation of uniform implementation of law and primacy. A similar pattern can be observed regarding the development of the RoL consisting of two components. First, the authors identified concerns of RoL, and second, they gave proposals to solve the concerns of the RoL.

1 Rule of Law as a Concern in EU law

Without conducting serious research, an increased interest in the RoL arose among jurists and publications. On the one hand, this can be seen in the increasing number of publications on the subject between 2012 and 2018. It became an increasingly popular topic in some academic journals and volumes. For instance, in the case of the Common Market Law Review, there was only one article concerning the RoL in 2012 and 2014. However, between 2016 and 2018, there were only a few editorial comments did not mention the RoL and the EU together. Furthermore, in 2017, there was one article highlighting the RoL in relation

[94] Koen Lenaerts, José A. Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' EUI Working Papers 9/2013/, 47.

[95] See Koen Lenaerts, 'New Horizons of the Rule of Law Within the EU' (2020) 21 (1) German Law Journal 29–34, DOI: https://doi.org/10.1017/glj.2019.91

[96] Harm Schepel, Rein Wesseling, 'The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe' (1997) 3 (2) European Law Journal 165–188, DOI: https://doi.org/10.1111/1468-0386.00025

[97] Karen J. Alter, 'Jurist Advocacy Movements in Europe: The Role of Euro-Law Associations in European Integration (1953–1975)' in Karen J. Alter, *The European Court's Political Power – Selected Essays* (Oxford University Press 2009, Oxford) 61–89, DOI: https://doi.org/10.1093/oso/9780199558353.003.0004

to the Rosneft case, while there were several articles on the RoL in 2018.[98] On the other hand, some journals, including *Europarecht*, *Cahiers de Droit Européen* or the European Constitutional Law Review rarely dealt with the issue between 2012 and 2018.[99] On the other hand, it is also true that several volumes of studies have been published in the period focusing on the examination of the RoL in the EU, either at the supranational or national level.[100]

2 Proposals concerning the Rule of Law

Not just the increasing popularity but also certain topics can be distinguished. Regarding the first branch of topics, a variety of publications focused on criticising the EU for the lack of action regarding possible RoL concerns and not providing sufficient protection for the value.[101] In addition, many of these authors explicitly took the view that the Article 7 TEU procedure was not sufficiently effective. There were also early references to the need to give the RoL a more significant role in developing EU law. Considering the second branch, some authors gave *de lege ferenda* proposals to address the issue. These proposals were based on the presumption that the Member States do not have the will to modify the founding treaties, for instance to modify the Article 7 TEU procedure to make it more effective under the changed landscape. One of these is the so-called reverse Solange, whereby, outside the scope of the Charter, Member States retain autonomy in protecting fundamental rights as long as they are presumed to safeguard their substance. If this presumption were to be rebutted, EU citizenship would come to the fore, allowing EU citizens to seek redress before national courts and the Court of Justice.[102] A further proposal was to establish systemic infringement proceedings. The idea behind this was that if a Member State posed a systemic threat to the fundamental values of the Treaties, the Commission should be able to initiate infringement proceedings either based on Article 2 TEU or based on the obligation of sincere cooperation

[98] See: Common Market Law Review <https://kluwerlawonline.com/Journals/Common+Market+Law+Review/2> accessed 15 December 2023.

[99] See Europarecht, <https://www.nomos-elibrary.de/zeitschrift/0531-2485>; see Constitutional Law Review: <https://www.cambridge.org/core/journals/european-constitutional-law-review/all-issues>; see Cahiers de Droit Européen: <https://www.jurisquare.be/fr/journal/cahdroiteur/index.html> accessed 15 December 2023.

[100] To give some examples: Flora A.N.J. Goudappel, Ernst M.H. Hirsch Ballin (eds), *Democracy and rule of Law in the European Union – Essays in Honour of Jaap W. de Zwaan* (Asser Press 2016); András Jakab, Dimitry Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford University Press 2017, Oxford), DOI: https://doi.org/10.1093/acprof:oso/9780198746560.001.0001

[101] Dimitry Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?' [2015] Yearbook of European Law 16–18, DOI: https://doi.org/10.1093/yel/yev009; Christophe Hillion, 'Overseeing the Rule of Law in the EU' in Carlos Closa, Dimitry Kochenov: *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016) 81, DOI: https://doi.org/10.1093/yel/yev009

[102] Carlino Antpöhler, Johanna Dickschen, Simon Hentrei, Matthias Kottmann, Maja Smrkolj, Armin von Bogdandy, 'Reverse Solange – Protecting the essence of fundamental rights against EU Member States' (2012) 49 (2) Common Market Law Review 489–519, DOI: https://doi.org/10.54648/cola2012018

set out in Article 4(3) TEU.[103] It should be noted that later infringement proceedings concerning Article 19 TEU are considered as systemic infringement procedures, which are treated as graver breaches of EU law. It was also suggested that a so-called Copenhagen Committee / Commission should be set up to keep under review the compliance of Member States with the Copenhagen Criteria after they became members of the Union.[104] Proposals were also made to place greater emphasis on the protection provided by the Charter.[105] What is certain is that they signalled RoL concerns to the EU institutions. In addition, some of these proposals ultimately looked to the Commission or the Court of Justice for a solution.

Finally, the extensive reading of Article 51 of the Charter should be mentioned here. As von Danwitz underlined, if Article 51 on the scope of the Charter were to be interpreted as giving the Court of Justice of the European Union the power to interpret the Charter rights in a way that would ensure that the CJEU upholds the RoL within the Member States, it would raise several questions. First, it would run counter to the structure of the Charter and to the meaning of its provisions, as it would disrupt the basis for the scope of application of the Charter's provisions. In addition, it would be problematic because it would be an exercise by the CJEU of the exclusive jurisdiction of the national constitutional courts, which would upset the already delicate balance between them. The author also stressed that the Court seemed to refuse to apply such an extensive reading to the application of the Charter.[106]

With regard to the legal discourse of protection of the RoL within the Union, Komanovics summarised how the critiques of the legal profession ensure that the legal nature of the procedures is maintained and remains at the forefront, as opposed to simple political debates. However, it is true that the critics take the political aspects into account in order to initiate some sort of process.[107]

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[103] Kim Lane Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Action' in Closa, Kochenov (n 101) 105–132, DOI: https://doi.org/10.1017/CBO9781316258774.007; András Jakab, 'The EU Charter of Fundamental Rights as the Most Promising Way of Enforcing the Rule of Law against EU Member States' in Closa, Kochenov (n 101) 187–205, DOI: https://doi.org/10.1017/CBO9781316258774.011

[104] Jan-Werner Müller, 'Protecting the Rule of Law (and Democracy!) in the EU' in Closa, Kochenov (n 101) 206–224, DOI: https://doi.org/10.1017/CBO9781316258774.012; Claudio Franzius, The Sense and Nonsense of a Copenhagen Commission, <https://verfassungsblog.de/the-sense-and-nonsense-of-a-copenhagen-commission/> accessed 15 December 2023.

[105] Gabriel N. Toggenburg, Jonas Grimheden, 'The Rule of Law and the Role of Fundamental Rights – Seven Practical Pointers' in Closa, Kochenov (n 101) 147–171, DOI: https://doi.org/10.1017/CBO9781316258774.009

[106] Thomas von Danwitz, 'The Rule of Law in the Recent Jurisprudence of the ECJ' (2014) 37 (5) Fordham International Law Journal 1337–1338.

[107] Adrienne Komanovics, 'Hungary and the Luxembourg Court: The CJEU's Role in the Rule of Law Battlefield' (2022) 6 EU and Comparative Law Issues and Challenges Series 145, DOI: https://doi.org/10.25234/eclic/22413

VI The Legitimising Role of the Court of Justice of the European Union

In Sinclair's examples, namely the case of the ILO and the UN peacekeeping missions, both the PCIJ and the ICJ examined possible expansion of powers. However, the European Union, more specifically its legal order and institutional framework, represents a different regime. Hence, the Court of Justice has different tools to play this role in the legitimising process. In this regard, the Court of Justice relies on specific procedures, such as preliminary proceedings, annulment procedure and infringement procedure. These procedures provide more channels for the Court to examine competence questions. The question of RoL is no exception from this.

1 The ASJP Case

a) **Background to the case**

The legal literature has a consensus that the ASJP case changed the interpretation of the RoL in the EU legal order regarding its connection with the judiciary. However, this was not the first opportunity for the Court to decide in such a case.

A provision of the Fundamental Law of Hungary allowed all judges, except the President of the *Kúria*, to remain in service until the general retirement age. However, a transitional provision of the Fundamental Law would have introduced that if a judge had reached retirement age before 1 January 2012, his or her service would have ended on 30 June 2012. On this basis, the age of 62 would have applied to the office of a judge.[108] It should be noted that, on 16 July 2012, the Constitutional Court declared these provisions unconstitutional,[109] a decision welcomed by the Commission.[110] Nevertheless, the Commission launched infringement proceedings. It argued that the contested provisions were contrary to the provisions of Directive 2000/78/EC (Equality Framework Directive), as discrimination on the grounds of age cannot be justified, or at least is neither appropriate nor necessary.[111] With regard to the case, Advocate General Kokott pointed out inter alia that the sudden retirement of judges raises doubts about the independence of the courts and thus about the quality of justice. Kokott also underlined the case law of the Court of Justice, which suggests that courts must be independent, particularly during preliminary references. The AG emphasised that the case involved the external aspect of judicial independence, whereby the judiciary is protected from any external interference or pressure which might jeopardise

[108] Vincze Attila, 'Az Európai Unió Bírósága a bírói nyugdíjazásról – A diszkrimináció tilalma és a bírói függetlenség' (2012) 3 (4) Jogesetek Magyarázatai 65–66.

[109] 33/2012. (VII. 17.) AB of the Constitutional Court of Hungary ABH, 16 July 2011.

[110] Viviane Reding's tweet, 2012.07.16., <https://twitter.com/vivianeredingeu/status/224894097805160448> accessed 15 December 2023.

[111] Case C-286/12 *European Commission v Hungary,* EU:C:2012:687 paras 24 and 26–31.

the judges' judgments.[112] The AG also pointed out that any misunderstanding about the external influence of the courts needs to be avoided. However, the AG neither stressed this point and argument in more detail in the opinion later, nor mentioned the matter of RoL. Finally, the Court did not stress the matter of judicial independence. Instead, it based its reasoning only on age discrimination.

***b)* The context of the case**

In contrast, the so-called ASJP case took a different approach, taking into account the emerging trend of the RoL, and thus commencing the legitimisation process of the expansion of power of the Union. In 2011, Portugal started implementing austerity measures to comply with some of the commitments made in the May 2011 Memorandum of Understanding and its subsequent amendments with the Commission to obtain financial assistance for Portugal under the European Financial Stabilisation Mechanism. A number of these measures were referred to the Portuguese Constitutional Court, which itself ruled them unconstitutional, including, for example, the reduction of public servants' salaries. Although certain national courts explicitly suggested that the Court's interpretation should be sought on aspects of fundamental rights protection, the Court of Justice repeatedly refused, claiming that it had no jurisdiction.

However, in this particular case, the Portuguese legislation reduced the salaries of judges holding public office or working in the public service in Law No 75/2014, putting in place the mechanisms for the temporary reduction of remuneration and the conditions governing their reversibility. It included the Court of Auditors as well, from October 2014 until 1 January 2016. The Associação Sindical dos Juízes Portugueses, the Portuguese association representing the interests of Portuguese judges, brought proceedings before the Portuguese Supreme Administrative Court, arguing that the measures infringed the independence of judges. Interestingly, the Supreme Administrative Court referred to EU law, as it stated that the interim measures on salaries were also based on EU law obligations. However, taking a closer look, it is not that surprising: from the earlier case law the Constitutional Court had considered it constitutional. As such, the association probably decided to follow a different approach in that regard.[113] The Supreme Administrative Court stressed, however, that judicial protection must be guaranteed primarily to the court of the Member States based on the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, and that the independence of the courts depends on the remuneration of judges. In this regard, it stressed that *'the independence of judicial bodies depends on the guarantees that attach to their members' status, including in terms of remuneration'*.[114] The Supreme Administrative Court asked the Court of Justice whether the Member States may apply measures for a general

[112] Case C-286/12 *European Commission v Hungary,* EU:C:2012:602, Opinion of AG Kokott paras 54–56.

[113] Matteo Bonelli, Monica Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary' (2018) 14 (3) European Constitutional Law Review 626, DOI: https://doi.org/10.1017/S1574019618000330

[114] Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas,* EU:C:2018:117, para 17.

reduction of salaries in the civil service to members of the judiciary if those measures were linked to obligations to reduce excessive public deficits and to the EU financial assistance programme.

***c)* The decision of the Court and its relevance to the expansion of power**

First, the Court echoed the argument of the Supreme Court. It underlined that the scope of Article 19(1) TEU is broader than that of Article 51 of the Charter. The Court of Justice underlines that this principle follows both from the constitutional traditions of the Member States and from the provisions of the ECHR.[115] However, this separation means that there are cases where the Member States must ensure effective judicial protection, even if the Charter does not otherwise provide such protection at the level of fundamental rights.[116] This underlined that article 19 TEU provides broader obligations than the Charter in this regard.

However, the Court of Justice went further in analysing the situation. It also made findings about Article 2 TEU. It stressed that the RoL is a value common to the Member States, which are societies based on justice, and in that regard, the Union is also a legal union.[117] The Court of Justice underlined that Article 19 TEU gives some sort of manifestation to the RoL as a value enshrined in Article 2 TEU, in which the case the possibility of judicial review is granted not only to the Court of Justice but also to the courts of the Member States as well.[118] The Court of Justice linked this to the duty of loyal cooperation, which, read in conjunction with the second subparagraph of Article 19(1) TEU, ensures that the Member States provide the legal remedies necessary to ensure effective judicial protection.[119] This is another turn of the previous approach of the Court of Justice and the academia. Article 2 TEU was now used in a very strict argument for the first time, and a value was linked to a newly introduced (and seemingly forsaken) provision of the founding Treaties.

The Court further stated that this requirement is essential for the proper functioning of the system of judicial cooperation between the courts of the Member States and the Court of Justice. In essence, the European judicial system ensures respect for the law within the Union.[120] According to the Court, this is guaranteed by Article 19 TEU, from which the obligation is to ensure effective judicial protection. In that regard, the Court of Justice held that, since questions relating to the Union's resources and financial resources may affect the application and interpretation of Union law, national courts must ensure that, in their examination of the question, they comply with the requirements of effective judicial protection.[121] In this respect, Article 47 of the Charter is fundamental to the independence

[115] *Associação Sindical dos Juízes Portugueses v Tribunal de Contas,* paras 29, 31 and 35.
[116] Bonelli, Claes (n 113) 631.
[117] *Associação Sindical dos Juízes Portugueses v Tribunal de Contas,* paras 30–31.
[118] Ibid, para 32.
[119] Ibid, para 34.
[120] Ibid, paras 32–33.
[121] Ibid, paras 39–41.

of the judiciary. With this argument, the Court gave the link between the two aspects: the structural and fundamental right perspectives of the judiciary in EU law.[122] Here, the Court, similarly to Advocate General Kokott's opinion, referred to the external independence of the judiciary and emphasised that they must protect any external interference that might jeopardise the independence of the decision-making and the decision itself.

It is clear that although the Court of Justice had relied on previous decisions to derive its reasoning, it based its decision on EU values, namely the RoL. It inferred from this that Article 19 TEU guarantees the value of the RoL, which can be linked to the principle of effective judicial protection under Article 47 of the Charter. The exercise of this fundamental right is a guarantee of the independence of the judiciary. Menzione submits that it is not necessary to apply a teleological interpretation of the law to deduce that reasoning since that is what the textual interpretation leads to.[123] On the other hand, the academia could not identify such an interpretation before, not regarding the nature of EU values, nor regarding the exact content of the second subparagraph of Article 19(1) TEU and its reference to Article 2 TEU, therefore referring to a meta-teleological interpretation, in which competing principles and values are interpreted.

What is more interesting is that this resulted in the legitimisation of a power expansion by the Union. The Court interpreted EU law concerning the relation of the remuneration of judges, as this affects the obligation of the Member States under Article 19 TEU(1) to provide sufficient remedies to ensure effective legal protection in the fields covered by Union law. The Court of Justice highlighted a new aspect of the application of Union law, but an interesting one: this is an aspect of the RoL. Consequently, this represents a legitimisation of an expansion of power concerning the RoL, representing the Court's view on the matter. In this respect, Bonnelli and Claes stress that it has become a priority for the Court of Justice to make the Member States understand that their judicial system is not entirely a national competence, as they have obligations to ensure the proper enforcement of EU law.[124] Some judges have made it very clear in their speeches that they consider the judicial independence and the RoL of paramount importance,[125] although such an interpretation is in line with von

[122] Ibid, paras 42–44.

[123] Serena Menzione, 'Case Note: Anything New under the Sun? An Exercise in Defence of the Reasoning of the CJEU in the ASJP Case' (2019) (2) Review of European Administrative Law 231, DOI: https://doi.org/10.2139/ssrn.3470622

[124] Bonelli, Claes (n 113) 623.

[125] See inter alia Edric Porter, Swedish EU judge Nils Wahl: 'The EU will collapse' 2021, DealMakerz <https://dealmakerz.co.uk/swedish-eu-judge-nils-wahl-the-eu-will-collapse/> accessed 15 December 2023; Ineta Ziemele, 'Speech by the President Ineta Ziemele at the 7th International Scientific Conference of the University of Latvia Faculty of Law' 2019, <https://www.satv.tiesa.gov.lv/en/runas-un-raksti/the-rule-of-law-of-today-serving-the-european-citizen/> accessed 15 December 2023; Lars Bay Larsen, 'Rule of Law and Independence of National Judges', Member States' National Identity, Primacy of European Union Law, Rule of Law And Independence of National Judges 2022, <https://cortecostituzionale.it/jsp/consulta/convegni/5_sett_2022/Giornata-Studio-BayLarsen.pdf> accessed 15 December 2023, 6.

Danwitz's argument about Article 51 of the Charter. The expanded scope of Article 19 TEU holds the same issue as the author highlighted, namely the conflicting power with national constitutional courts. However, this process did not end here.

2 Furthering the Legitimisation Process of the Court of Justice

Shortly after the decision, the Commission sent Poland a formal notice to initiate infringement proceedings. The case concerned an infringement of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, as Poland had reduced the retirement age of judges of the Supreme Court.[126] The Commission thus gave the Court of Justice a further opportunity to clarify its reasoning. This move was underpinned by the fact that the EP supported the Commission with its resolution regarding initiating the Article 7 TEU procedure against Poland. The biggest Member States also supported the Commission triggering the process.[127] In C-619/18, the Court of Justice clarified the relationship between Article 7 TEU and the infringement proceedings that can be brought under Article 258 TFEU, and also further elaborated on the relationship between Article 19 TEU and Article 47 of the Charter. In addition, it confirmed that the RoL enshrined in Article 2 TEU is precisely spelled out in Article 19 TEU.[128] Further infringement proceedings addressed the concerns regarding the Polish judiciary, during which the Court of Justice further highlighted other details of the concept. It can be stated that these proceedings can be very similar to the proposals of the academia regarding systemic infringement proceedings.[129]

VII Conclusion

From the above, it seems reasonable that Sinclair's analytical framework can be used to understand the development of the RoL within the Union as an expansion of power.

First, the content and precise nature of the values enshrined in Article 12 and Article 19 TEU cannot be understood by relying on the text of the founding treaties only. At the time of the drafting, neither the authors from the academic sphere nor other actors reflected on their context as in the ASJP case. Consequently, the wording of the provisions in question was intact but the meaning changed. The nature of these provisions is in line with Sinclair's standpoint on constitutional growth, that the provisions of the text remain unchanged, but the interpretation of the text could differ.

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126 Case C-619/18 *European Commission v Poland,* EU:C:2019:531.

127 Ovádek (n 90) 18.

128 *European Commission v Poland,* paras 42 and 47.

129 Matteo Bonelli, 'Infringement Action 2.0: How to Protect EU Values before the Court of Justice' (2022) 18 (1) European Constitutional Law Review 30–58, DOI: https://doi.org/10.1017/S1574019622000049

Second, there has been an increasing tendency toward the development of the RoL. It was, in fact, a phenomenon that other intergovernmental organisations, such as the UN, the OSCE, the World Bank and the Council of Europe, as well as other international human rights courts, especially regarding the case-law concerning the judicial systems of their Member States rely on the RoL. The EU and its institutions also relied on the trends of these organisations.

Third, EU institutions, particularly the Commission, the EP, and even the Court of Justice, have sought to address the RoL in some way early on. It is also apparent that the institutions concerned have taken a more assertive position on the RoL. From the side of the Commission, a proliferation of the RoL occurred and developed. From the side of the EP, the institution became increasingly active in maintaining the issue on the political agenda and inviting the Commission, the Council and the Member States to ensure the proper implementation of the RoL within the Union. Regarding the side of the Court of Justice, Lenaerts' approach appeared in the later judgments of the Court of Justice. These issues are similar to the international organs Sinclair examined, as they also promoted the development of the expansion of the specific powers of intergovernmental organisations.

Fourth, it is also important to point out that the academic world has sought to emphasise the deficiency of the RoL as a phenomenon. The analysis shows that it became increasingly popular during the period in question. In addition, the criticisms of the Union and the proposals represented pressure for the Union. Furthermore, some proposals, such as systemic infringement procedures, have been put into practice in some form.

Finally, the Court of Justice, similar to the international courts in Sinclair's analytical framework, legitimised the development of the RoL. Relying on Article 2 and Article 19 TEU, the RoL was introduced, and the Court of Justice identified the role of Union values. The approach of the Court highlighted the development of EU law and an expansion of power.

Consequently, Sinclair's analytical framework can be helpful in understanding the development of Union law and the expansion of European Union's powers.

Gergely Gosztonyi* – Ewa Galewska** – Andrej Školkay***

Challenges of Monitoring Obligations in the European Union's Digital Services Act

Abstract

The article argues that the Digital Services Act, as part of the EU's broader attempt to regulate intermediary services providers in a constantly growing and challenging technological, social and political environment, does not provide a final and comprehensive solution to the issue. The Digital Services Act appears inconsistent with the previous case law of European supranational judiciary forums regarding the prohibition of general monitoring by intermediary services providers. In fact, it provides the Member States with vaguely worded regulatory exceptions in the event of a ban on general monitoring. However, the Digital Services Act can be seen as a legitimate and necessary attempt to enforce the regulation at the European level through Member States while at the same time giving a unique regulatory position in specific cases to the European Commission or pan-European legal bodies in general. Finally, the Digital Services Act also turns initial enforced self-regulatory attempts to regulate social harms, possibly caused by intermediary services providers, into co-regulation.

Keywords: digital services, Digital Services Act, DSA, monitoring obligations, providers of intermediary services, PIS, E-commerce Directive, ECD

* Gergely Gosztonyi (PhD, Dr. habil) is an Associate Professor at Eötvös Loránd University (ELTE), Faculty of Law, Budapest, Hungary (e-mail: gosztonyi@ajk.elte.hu). His research was supported by the János Bolyai Research Scholarship of the Hungarian Academy of Sciences.

** Ewa Galewska (PhD, Dr. habil) is a Professor at University of Wrocław, Faculty of Law, Administration and Economics, Wrocław, Poland (e-mail: ewa.galewska@uwr.edu.pl).

*** Andrej Školkay (PhD, Dr. habil) is a Professor at School of Communication and Media, Bratislava, Slovakia (e-mail: askolkay@gmail.com).

I Introduction

In this article, we discuss selected aspects of critical issues and related developments of platforms' general monitoring obligations within the European Union (EU) law and the relevant case law. The idea of this article is not to assess whether measures that lead to general monitoring obligations would be appropriate in the digital EU, for instance, from the perspective of the human rights system. It aims to emphasise that the well-established regime of liability for illegal online content and measures developed and promoted by the EC are inconsistent. It is therefore time to say that a revolution in the field of liability is already happening but also requires a revision of the old regime, and the EU cannot avoid facing this problem.

It should be mentioned first that the Digital Services Act (DSA[1]) uses the term *provider of intermediary services* (PIS) rather than more popular (but arguably less precise as well as more diverse) terms such as *social media* or *online platform* or even the previously used (and sometimes still used) term, *Internet Service Providers* (ISPs). It should also be noted that another term, *information society services,* is also used, namely in the E-commerce Directive (ECD[2]). In short, *intermediary service* means one of the selected and enumerated 'information society services' (see DSA Article 3(g)).

As the core regulation before the DSA was the ECD, we first tackle its regulatory approach in the article. In the last more than twenty years, it turned out that the wording of the directive was not precise enough; international courts, such as the Court of Justice of the European Union (CJEU), tackled the most controversial regulatory issues and helped the legal developments in this area.

We also discuss how monitoring obligations, as a very specific and arguably key aspect of Digital Services regulation, has evolved in the DSA. We emphasise that the established regime of PIS' liability for illegal content online and measures developed and promoted by the European Commission (EC) is inconsistent. It is therefore time to say that a revolution in the field of PIS' liability is already happening but also requires a revision of the old regime, and the EU must tackle this challenge. This overview is, therefore, rather selective. We start with the fundamental idea – the prohibition of general monitoring – then we move our discussion toward the case law of general monitoring in the practice of the CJEU. Next there is a discussion of general monitoring in the EU legislation after the ECD and finally we show how a ban on general monitoring in the DSA is defined and discuss two general exceptions. Furthermore, we discuss some potentially controversial conditions for these exceptions from the ban on general monitoring. We conclude by pointing out a certain

[1] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1.

[2] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [2000] OJ L178/1.

remaining inconsistency concerning monitoring obligations in the Digital Services Package, specifically in the DSA.

II Prohibition of General Monitoring in the EU

When the Television Without Frontiers Directive (TWFD) was amended in 1997, it was suggested that the new audiovisual regulation should also cover the Internet, but this proposal failed in the European Parliament (EP).[3] As a result, a formal distinction has emerged between traditional media services, where the provider determines the time at which content can be consumed *(push),* and Internet-based services, for which the consumer can choose when *(pull).* This gave rise to the concept of *information society services,* which has become one of the key concepts since the adoption of the ECD in 2000. Information society services 'span a wide range of economic activities which take place on-line' (ECD Recital 2). However, it is evident throughout the careful wording of the directive that it was 'reflecting the policy consensus that the internet should not be brought under existing media regulatory regimes',[4] thus forming a kind of transition between the early Internet legal vacuum and traditional state regulation.[5] For example, in the period between when the Digital Services Package and ECD were adopted, the revised Audiovisual Media Services Directive (AVMSD) was enacted in 2018; it imposed more obligations on video-sharing platforms as a specific PIS. Video-sharing platforms were tasked to take appropriate and proportionate measures, preferably through co-regulation, to protect the public from illegal content (terrorist content, child sexual abuse material, racism and xenophobia or other hate speech) and minors from harmful content.

The EU has developed a system for liability for content posted on the internet that differs from the US CDA230 immunity rules.[6] The central element is Section 4 of the ECD, entitled 'Liability of intermediary service providers'. Of the three sets of rules, the first two ('mere conduit' and 'caching') give PISs immunity from liability similar as under the US regime. More interesting, however, is the issue of the liability of hosting providers, for which rules have been included in Article 14 of the ECD. The (relative) novelty of the

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3 Perry Keller, 'The New Television without Frontiers Directive' in Eric M. Barendt (ed), *Yearbook of Media and Entertainment Law. Volume III: 1997/98* (Clarendon Press, 1998, Oxford) 188, DOI: https://doi.org/10.1093/oso/9780198265979.003.0007

4 Perry Keller, *European and International Media Law: Liberal Democracy, Trade and the New Media* (Oxford University Press 2011, Oxford) 125, DOI: https://doi.org/10.1093/acprof:oso/9780198268550.003.0015

5 Gergely Gosztonyi, 'Aspects of the History of Internet Regulation from Web 1.0 to Web 2.0' (2022) 12 (1) Journal on European History of Law 168–173.

6 Anu Bradford, *Digital Empires. The Global Battle to Regulate Technology* (Oxford University Press 2003, Oxford) DOI: https://doi.org/10.1093/oso/9780197649268.001.0001

European system is the commonly used *notice and take-down system* (NTDS[7]), which has introduced a multi-step procedural system: the intermediary service provider must have specific knowledge of content that is manifestly illegal and must take steps to remove it expeditiously. In contrast to the US legislation, the EU has opted for a different model (also known as the *safe harbour model*[8]), which focuses on a non-automatic exemption.

In addition to the NTDS, the provisions of Article 15 of the ECD should be highlighted[9] that the Member States shall not impose a general obligation on service providers[10] to A) monitor the information which they transmit or store or B) actively seek facts or circumstances indicating illegal activity (no general obligation to monitor).[11] This rule, therefore, does not oblige service providers, and therefore nor social media, to monitor continuously the content posted on their sites.[12] It should be remembered, however, that the directive was created in 2000 and that, in the 2020s, more and more Member States have considered changing this rule. In 2015, however, the Manila Principles on Intermediary Liability, issued by NGOs, reaffirms in its principle I(d) the maintenance of the general ban on monitoring. As Senftleben and Angelopoulos stated, 'The saga of the general monitoring prohibition has indeed proven Odyssean'.[13]

III General Monitoring in the Practice of the CJEU

It is worth observing how the CJEU has tackled this issue in the meantime and helped to fill the gaps in the legislation with robust legal development work. The 'most important cases' list starts with the French cosmetics company L'Oréal, which reported to the online marketplace eBay that counterfeit versions of its products have been sold under the L'Oréal

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7 Alexandre de Streel and others, *Online Platforms' Moderation of Illegal Content Online* (European Parliament 2020, Brussels) 10.

8 Tambiama Madiega, *Reform of the EU liability regime for online intermediaries: background on the forthcoming Digital Services Act* (European Parliamentary Research Service 2020, Brussels) 1–2.

9 Jan Oster, *European and International Media Law* (Cambridge University Press 2017, Cambridge) 234–236.

10 Aleksandra Kuczerawy, *Intermediary Liability and Freedom of Expression in the EU: from Concepts to Safeguards* (Intersentia 2018, Brussels) 63.

11 It is important to note, though, that the Article 'shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information' ECD Article 14(3).

12 Joris van Hoboken and others, *Hosting intermediary services and illegal content online. An analysis of the scope of article 14 ECD in light of developments in the online service landscape: final report* (European Commission 2018, Luxembourg) 45–47.

13 Martin Senftleben, Christina Angelopoulos, *The Odyssey of the Prohibition on General Monitoring Obligations on the Way to the Digital Services Act: Between Article 15 of the E-Commerce Directive and Article 17 of the Directive on Copyright in the Digital Single Market* (University of Amsterdam – University of Cambridge 2020, Amsterdam – Cambridge) 7.

brand name on several occasions. The marketplace prohibits the sale of counterfeit goods in contracts signed by its users. As a result, the cosmetics company has held eBay (and in particular, its European operating subsidiary eBay.co.uk) liable. At the same time, it has also sued Google, which, after searching for the name of the cosmetic products, also displayed ads for those counterfeit products on eBay that were promoted for sale. In the case, Judge Arnold, sitting in the United Kingdom, raised several options that eBay could choose to filter out or minimise problems without generally monitoring the uploaded content.[14] The English court eventually referred the matter to the CJEU, the decision of which led many (such as Christine Riefa[15]) to conclude that operators should have a general obligation to monitor. However, in 2011 the CJEU did not take such a view in the formal documents in the case.[16]

A couple of years later, in 2016, in *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH*, Tobias Mc Fadden ran a shop in Germany selling light and sound equipment and also offered his customers free access to a wifi network, which was not password protected. In its judgment, the CJEU stated that, although it is for the national court to administer justice under federal and EU law, of the three technical solutions hypothetically proposed by the national court (withdrawal of the service, password protection or a general obligation to monitor traffic[17]), only password protection could pass the test of legality.[18]

In the 2019 case of *Eva Glawischnig-Piesczek v Facebook Ireland Limited,* the CJEU had to rule directly on Article 15 of ECD, unlike in previous instances where the general prohibition of monitoring was only raised as a sub-issue. Whereas previously, in the above points and the two SABAM cases,[19] the CJEU had also concluded that general monitoring was not an expectation for service providers, here there was a slight change of direction.[20] A defamatory text about the Austrian MEP Eva Glawischnig-Piesczek was published with a photo of her on Facebook. The person concerned not only asked the service to remove the content in question but also to remove all similar content (with the same content). The national court ordered the service provider to do the same. However, this can only

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[14] *L'Oréal SA v eBay International AG* [2009] RPC 21, [2009] ETMR 53, [2009] EWHC 1094 (Ch), para 277.

[15] Christine Riefa, 'The end of Internet Service Provider's liability as we know it – Uncovering the consumer interest in CJEU Case C-324/09 (L'Oréal/eBay)' (2012) 1 (2) Journal of European Consumer and Market Law 104–111 DOI: https://doi.org/10.1007/s13590-012-0006-x

[16] Case C-324/09 *L'Oréal SA and others v eBay International AG and others,* ECLI:EU:C:2011:474.

[17] Case C-484/14 *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH,* ECLI:EU:C:2016:689, para 87.

[18] Gergely Gosztonyi, 'The contribution of the Court of Justice of the European Union to a better understanding the liability and monitoring issues regarding intermediary service providers' (2020) 59 (1) Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae – Sectio Iuridica 142, DOI: https://doi.org/10.56749/annales.elteajk.2020.lix.7.133

[19] Case C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM),* ECLI:EU:C:2011:771; Case C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV,* ECLI:EU:C:2012:85.

[20] Miriam Buiten, 'The Digital Services Act: From Intermediary Liability to Platform Regulation' (2021) 12 (5) Journal of Intellectual Property, Information Technology and E-Commerce Law 370, DOI: https://doi.org/10.2139/ssrn.3876328

be done if the service provider continuously monitors the content uploaded to it, so the national court referred the matter to the CJEU.[21] It held that the Member States have the possibility not only to require that the content in question be removed but also to impose such requirements on any similar content that may be shared *(notice-and-stay down).*[22] In this case, the court held that automated methods[23] could adequately address the issues raised: this is not general monitoring but only specific monitoring, according to the CJEU.[24] However, it should be stressed that the CJEU did not find[25] a clear dividing line between prohibited general monitoring and ad hoc monitoring measures.[26]

Overall, it seems that, in the time between the L'Oréal case in 2011 and the *Eva Glawischnig-Piesczek* case in 2019, the CJEU has made a minor change of direction, and although it referred to case-by-case monitoring, it seems to have shifted towards adopting general monitoring when analysing the case.[27] As Gyetván summarised, 'the arguments put forward in the judgments as a whole paint a rather worrying picture as regards the interpretation and enforcement of the prohibition of general monitoring'.[28]

IV General Monitoring in the EU Legislation after the ECD

In general, EU institutions increasingly perceived PISs as active internet guardians, the role of which is to detect and remove illegal content posted online.[29] The opinion that

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[21] João Pedro Quintais, Sebastian Felix Schwemer, 'The Interplay between the Digital Services Act and Sector Regulation: How Special Is Copyright?' (2022) 13 (2) European Journal of Risk Regulation 199, DOI: https://doi.org/10.1017/err.2022.1

[22] Case C-18/18 *Eva Glawischnig-Piesczek v Facebook Ireland Limited,* ECLI:EU:C:2019:821, para 36.

[23] Herbert Zech, 'General and specific monitoring obligations in the Digital Services Act' (2021) VerfBlog, <https://verfassungsblog.de/power-dsa-dma-07> accessed 15 December 2023, DOI: https://doi.org/10.17176/20210902-113002-0

[24] *Eva Glawischnig-Piesczek,* para 34.

[25] Alexandre de Streel, Miriam Buiten, Martin Peitz, *Liability of online hosting platforms: should exceptionalism end?* (Centre on Regulation in Europe 2018, Brussels) 20.

[26] Golunova also points out about the worrying aspect of CJEU's 'uncharacteristic ignorance of fundamental rights concerns'. Valentina Golunova, 'In Tech we Trust? Fixing the Evolutionary Interpretation by the Court of Justice of the Prohibition of General Monitoring in the Era of Automated Content Moderation' in Evangelia Psychogiopoulou, Susana de la Sierra (eds), *Digital Media Governance and Supranational Courts: Selected Issues and Insights from the European Judiciary* (Edward Elgar Publishing 2022, Cheltenham) 62.

[27] It should be noted though that Recital 30 of the DSA upholds this distinction between general monitoring obligations and monitoring obligations in specific cases.

[28] Dorina Gyetván, 'Az általános nyomon követési kötelezettség mint a közvetítő szolgáltatók felelősségének jövője? [A general monitoring obligation as the future of intermediary service providers' liability?]' in Marianna Fazekas (ed), *Jogi Tanulmányok 2021* (Eötvös Loránd Tudományegyetem Állam- és Jogtudományi Kar, Állam- és Jogtudományi Doktori Iskola 2021, Budapest) 311.

[29] E.g. Proposal for a regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online, COM (2018) 640 final.

PISs should fulfil their role more actively is expressed in many EU acts and documents encouraging them to adopt effective proactive measures[30] that include automated means (e.g. filtering technologies).[31] EU institutions refer directly to automatic detection and filtering as measures that PISs may apply,[32] and underline the importance and encourage the development thereof.[33] At the same time, the EU legislators are obviously aware that the borderline between activities encouraging the application of automatic detection and filtering technologies as an instrument to tackle illegal content more actively and the prohibition of monitoring is very vague.[34] This is probably why the reference to Article 15 of the ECD is made very often to emphasise that instruments promoted by the EU within the field of tackling illegal content online cannot lead to general monitoring obligations.[35] On the other hand, it is difficult to identify instruments that PISs could apply to fulfil their obligations imposed upon them in the EU law without engaging in constant monitoring of online content, even if one bears in mind that the EC strongly underlines the voluntary nature of the proactive measures they implement.[36]

Two acts – the Copyright Directive (CDSMD)[37] and Regulation on Terrorist Content (TERREG)[38] – constitute examples of a struggle to reflect new expectations of the PISs in tackling illegal content online on the one hand and the prohibition of Article 15 of the ECD on the other. The legislative procedures thereof lead to the conclusion that the EC presents a relatively liberal attitude towards the prohibition of general monitoring obligations and a very flexible interpretation of its boundaries. On the other hand, the EP and the Council

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30 Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Tackling Illegal Content Online Towards an enhanced responsibility of online platforms, COM (2017) 555 final, 3.3.1.

31 Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online [2018] OJ L63/50.

32 Recommendation of the European Parliament and of the Council of 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry [2006] OJ L378/72.

33 COM (2017)/ 555 final.

34 Martin Husovec, 'Rising Above Liability: The Digital Services Act as a Blueprint for the Second Generation of Global Internet Rules' (2024) 38 (3) Berkeley Technology Law Journal 883–920, DOI: https://doi.org/10.2139/ssrn.4598426

35 E.g. Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA [2017] OJ L 88/6.

36 Commission Recommendation (EU) 2018/334, 24.

37 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92; Joao Pedro Quintais, Christian Katzenbach, Sebastian Felix Schwemer et al., 'Copyright Content Moderation in the European Union: State of the Art, Ways Forward and Policy Recommendations' (2024) 55 (1) International Review of Intellectual Property and Competition Law 157–177, DOI: https://doi.org/10.1007/s40319-023-01409-5

38 Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online [2021] OJ L172/79.

make efforts to place the EC's proposals within the structure of the online liability regime constituted in the provisions of the ECD.

The EC's proposal of CDSMD[39] in its Article 13 required information society service providers whose services consist of the storage and provision to the public of access to large amounts of works or other subject matter uploaded by their users to put in place measures to ensure the functioning of agreements concluded with rightsholders for the use of their works or other subject-matter, or to prevent the availability on their services of works or other subject-matter identified by rightsholders. Among these measures, the EC listed effective content recognition technologies, which triggered wide criticism in the legal literature. Many authors argued that there would be general monitoring obligations imposed upon PISs. Christina Angelopoluos emphasised that the obligation to apply technologies of this kind would require precise general monitoring: after all, how can infringing content be *effectively recognised* on a platform using a technological tool without the oversight of the totality of the content on that platform?[40] To *recognise* unwanted content within a collection of content, one must logically examine each piece of content in that collection. Also, Frosio rightly observed that, by promoting automatic infringement assessment systems, the EC, in fact, would force PISs to develop and deploy filtering systems, therefore de facto monitor their networks and thus contradicting Article 15 of the ECD.[41] Stalla-Bourdillon and others argued that requiring PISs to use automated means, such as Content ID-type technologies, to detect systemically unlawful content, in fact, forces them to monitor all the data of each of their users actively and thereby amounts to a general monitoring obligation.[42]

Since the EC's proposal raised serious concern over its conformity with online liability regime,[43] the notion of content recognition technologies was removed during the legislative procedure.[44] The adopted Article 17 of the CDSMD provides new obligations for information society service providers, among which two are particularly interesting from the perspective of general monitoring. Firstly, PISs should obtain authorisation from the rightsholders, for instance, by concluding a licensing agreement, to communicate or make available to the

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[39] Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM (2016) 593 final.

[40] Christina Angelopoulos, *On Online Platforms and the Commission's New Proposal for a Directive on Copyright in the Digital Single Market* (University of Cambridge 2017, Cambridge) DOI: https://doi.org/10.2139/ssrn.2947800

[41] Giancarlo Frosio, 'To To Filter or Not to Filter? That is the Question in EU Copyright Reform' (2018) 36 (2) Cardozo Arts & Entertainment Law Journal 101–138.

[42] Sophie Stalla-Bourdillonand and others, 'Open Letter to the European Commission – On the Importance of Preserving the Consistency and Integrity of the EU Acquis Relating to Content Monitoring within the Information Society' (2016) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2850483> accessed 15 December 2023.

[43] Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market – Orientation debate on Articles 11 and 13, 2016/0280 (COD).

[44] Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market – Consolidated Presidency compromise proposal, 2016/0280 (COD).

public works or other subject matter (Article 17(1)). Secondly, if no authorisation is granted, information society service providers have to ensure the unavailability of specific works and other subject matter for which the rightsholders have provided relevant and necessary information (Article 17(4)(b)) and, in any event, shall act expeditiously, upon receiving a sufficiently substantiated notice from the rightsholders, to disable access to or to remove from their websites the notified works or other subject matter and make best efforts to prevent their future uploads in accordance with point (b) (Article 17(4)(c)).

Removing infamous *content recognition technologies* did not erase doubts regarding Article 17 of the CDSMD's compliance with a general monitoring obligation prohibition.[45] The problem is that its provisions, in fact, force information society service providers to verify all the content on the platform to determine if authorisation is required.[46] Gerald Spindler argues in this respect that, as a result, PISs must check the legality of the content itself and explicitly cannot rely on specific details provided by others.[47] This, without doubt, leads to the infringement of prohibition from Article 15 ECD. Also, provisions in Article 17(4)(b) and (c) of the CDSMD seem doubtful in the light of general monitoring, especially the first one that requires PISs to apply measures to avoid the availability on their services of unauthorised works and other subject matter. There are voices in the literature stating that Article 17(4)(b) of the CDSMD respects that there is no proactive obligation of providers to monitor their platforms, because the wording of Recital 66 CDSMD indicates that a PIS must fulfil its obligations from Article 17(4)(b) only on the basis on information provided by the rightsholder. In other words, the rightsholder's specific activity triggers a specific monitoring obligation of the PIS. It is worth noting, however, that the legislator does not indicate in the CDSMD what measures PISs should apply to fulfil their obligations. The provisions in question merely indicate that PISs should act under high industry standards of professional diligence. Moreover, the EC emphasises that information society service providers may implement here any relevant solutions, and it clearly refers to a free choice of available technology that allows the detection of unauthorised content, such as content recognition technology.[48] As a result, there is an increase in applications by some information

[45] Folkert Wilman, 'Two emerging principles of EU internet law: A comparative analysis of the prohibitions of general data retention and general monitoring obligations' (2022) 46 (1) Computer Law & Security Review DOI: https://doi.org/10.1016/j.clsr.2022.105728

[46] Eduardo Celeste and others, 'Shaping Standards from Below: Insights from Civil Society' in Eduardo Celeste and others (eds), *The Content Governance Dilemma. Information Technology and Global Governance* (Palgrave Macmillan 2023, Cham) 74, DOI: https://doi.org/10.1007/978-3-031-32924-1_4

[47] Gerald Spindler, 'The Liability system of Art. 17 DSMD and national implementation Contravening prohibition of general monitoring duties?' (2019) 10 (3) Journal of Intellectual Property, Information Technology and E-Commerce Law 344–374.

[48] Commission, Communication from the Commission to the European Parliament and the Council. Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market, COM (2021) 288 final.

society service providers of automated filtering tools.[49] Also, from the perspective of legal doctrine, this is a logical consequence of Article 17 of the DSDM. Montagnani and Trapova raised concerns that it is highly likely that whenever licensing agreements from Article 17 are not feasible, to avoid direct liability for violation of the right of communication to the public, information society service providers will resort to monitoring mechanisms.[50]

In its TERREG proposal, the EC presented the opinion that measures adopted based on provisions thereof may exceptionally derogate from the prohibition of imposing a general monitoring obligation. By stating this directly, the EC slightly opened the gate to instruments that can amount to general monitoring. Following this path, the EC imposed upon every PIS an obligation to detect terrorist content online actively, using proactive measures including automated means. During the legislation procedure, the EP noticed that the TERREG proposal would lead to infringement of the ECD.[51] The notion of proactive measures was therefore replaced by specific measures that include appropriate technical and operational measures or capabilities, such as proper staffing or technical means to identify and expeditiously remove or disable access to terrorist content (Article 5(2)(a)). Technical means of identifying terrorist content are interesting because they can also include filtering technologies. It leads to the conclusion that the EP simply replaced proactive measures constantly promoted by the EC with a different vocabulary.

Contrary to the EC's proposal, the provisions of TERREG are based on the dependence between the requirement to apply special measures to identify terroristic content and preceding decisions taken by competent state authorities. The EU legislator considers decisions from Article 5 TERREG to be special measures permitted in light of Article 14(3) of the ECD. It is doubtful, however, that the mere fact that obligations from Article 5 are connected with a decision of state authority would be sufficient here, even if it is addressed to certain PISs and concerns only a specific period of time. Despite such restrictions, this still may lead to general monitoring obligations. If they were to fulfil the requirements of Articles 14(3) and 15 of ECD, decisions from Article 5 of TERREG should be applicable in a specific case (to specific content) and be limited in time. This means they should indicate the duration of monitoring and information relating to the nature of the infringements in question, their author and their subject. Those elements are all linked with each other.[52] Decisions from Article 5 of TERREG do not fulfil these requirements due to their too general nature, which forces PISs to analyse various postings by their users to identify

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[49] Jasmin Brieske, Alexander Peukert, *Coming into Force, not Coming into Effect? The Impact of the German Implementation of Art. 17 CDSM Directive on Selected Online Platforms* (University of Glasgow 2022, Glasgow) DOI: https://doi.org/10.2139/ssrn.4016185

[50] Maria Lillà Montagnani, Alina Trapova, 'New Obligations for Internet Intermediaries in the Digital Single Market – Safe Harbors in Turmoil?' (2019) 22 (7) Journal of Internet Law 3–19 DOI: https://doi.org/10.2139/ssrn.3361073

[51] COM (2018) 640 final.

[52] *Eva Glawischnig-Piesczek,* paras 44–47; 49–50.

terrorist content. Moreover, such analysis also requires an assessment of a content's nature, wording and context (TERREG Article 1(3)); this, in turn, contradicts the CJEU's opinion.

In the next section, we will point to how the above-discussed attempts, on the one hand, avoid general monitoring obligations and, on the other, follow a more practical need to find a pragmatic and functional system of redress and protection of rights, as has been reflected or mirrored in the final version of DSA.

V Debates on General Monitoring on the Path to the DSA-DMA

Because the European Union adopted the new and long-awaited digital services legislation in the summer and autumn of 2022, we discuss this final shape as an example of the final design of general monitoring obligations within the DSA. Digital Services regulation includes both DSA and Digital Markets Act (DMA).[53] We focus here on the DSA as a regulation primarily concerned with the liability of PISs for illegal content, online disinformation or other societal risks, transparency and consumer protection. In contrast, DMA primarily targets the lack of competition in digital markets.[54] The DMA covers gatekeeper online platforms (platforms with a dominant online position that makes it hard for consumers to avoid). However, some gatekeeper online platforms are also covered in the DSA (but from a different perspective). Therefore, the DMA is still occasionally cited.

It may be helpful to recapitulate the critical issues of the debate that led to the final version of the DSA, especially, but not exclusively, regarding general monitoring obligations by PISs. This debate concerned the following issues, to which we also provided selected responses and highlighted the still unresolved issue of inconsistency in monitoring obligations. To recapitulate, the critical points in the professional debate on content monitoring obligations for online social content concerned the following topics:

a) There was discussion of the immediate impact on free expression rights – it tilted the balance of the intermediary liability rules toward greater restriction of speech.[55] Therefore, for example, the European Media Association suggested[56] that the correct approach would be to limit the prohibition to targeting minors or based on sensitive data on very large online platforms (VLOP). This is partially the case for the DSA, when all PISs have rather specific obligations in protecting minors (DSA Article 28, 34(d), 35(j), 44(j)). At the same

[53] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/1.

[54] Zsolt Ződi, *Platformjog [Platform law]* (Ludovika Egyetemi Kiadó 2023, Budapest).

[55] Jack M. Balkin, 'Free Speech is a Triangle' (2018) 118 (7) Columbia Law Review 2011–2055, 2029.

[56] European Media Association, 'Joint final recommendations by European Media Associations for the concluding stage of the Digital Services Act trialogue negotiations in relation to online advertising rules' (2021) <https://www.ebu.ch/files/live/sites/ebu/files/News/Position_Papers/open/2022/210422%20Media%20Coalition%20DSA%20final%20recommendations.pdf> accessed 15 December 2023.

time, the VLOPs and the Very Large Online Search Engines (VLOSE) have specific duties (DSA Section 5), some of which are directly or indirectly related to monitoring obligations.

b) There was a worry about the move towards privatised enforcement through algorithmic artificial intelligence (AI) without transparency and the appropriate safeguards for speakers and the general public.[57] However, opponents argued that the different types of notice and action mechanisms used to regulate online content differ in their impacts. If the requirements are adequately defined and followed, they can act as essential safeguards. Their actual effect, however, may vary tremendously, depending on the form they take and accompanying restrictions – preferably administered by courts.[58] This is indeed the case – the CJEU has been assigned a specific role regarding relevant decisions by the EC.

c) There was a concern by the broadly discussed issue of the over-removal of lawful content *(false positives)* or an under-removal of illicit content *(false negatives).*[59] However, according to some authors, this is already a reality within the unregulated power of the platforms.[60] De Gregorio suggested two solutions to this issue: A) the insertion of new procedural rights in the online environment, including the obligation to explain the reasons behind platforms' decisions, and B) the second solution will question the doctrine of horizontal effect to establish a mechanism to enforce constitutional rights *vis-à-vis* online platforms that operate in a global framework.[61] The DSA requests that 'the providers concerned should, for example, take reasonable measures to ensure that, where automated tools are used to conduct such activities, the relevant technology is sufficiently reliable to limit, to the maximum extent possible, the rate of errors' (DSA Recital 26).

d) There was an occasional objection that such a regulation may hinder innovation and competition by increasing the costs of operating an online platform.[62] This is true for smaller platforms, but simultaneously, the VLOPs and the VLOSEs create forms of oligopolies that hinder competition.

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[57] Michal Lavi, 'Do Platforms Kill?' (2020) 43 (2) *Harvard Journal of Law and Public Policy,* 477; Giancarlo Frosio, 'From Horizontal to Vertical: An Intermediary Liability Earthquake in Europe' (2017) 12 (7) Journal of Intellectual Property & Practice 565–575 DOI: https://doi.org/10.1093/jiplp/jpx061

[58] Aleksandra Kuczerawy, 'From 'Notice and Take Down' to 'Notice and Stay Down': Risks and Safeguards for Freedom of Expression' in Giancarlo Frosio (ed), *The Oxford Handbook of Intermediary Liability Online* (Oxford University Press 2019, Oxford) DOI: https://doi.org/10.1093/oxfordhb/9780198837138.013.27

[59] Daphne Keller, *Empirical Evidence of "Over-Removal" by Internet Companies under intermediary liability laws* (Stanford Law School 2020, Stanford).

[60] Katrina Geddes, 'Meet Your New Overlords: How Digital Platforms Develop and Sustain Technofeudalism' (2020) 43 (4) Columbia Journal of Law and the Arts 455–485.

[61] Giovanni De Gregorio, 'From Constitutional Freedoms to the Power of the Platforms: Protecting Fundamental Rights Online in the Algorithmic Society' (2018) 11 (2) European Journal of Legal Studies 65–103.

[62] Stefan Grundmann, Philipp Hacker, 'Digital Technology as a Challenge to European Contract Law – From the Existing to the Future Architecture' (2017) 13 (3) European Review of Contract Law 255–293, DOI: https://doi.org/10.1515/ercl-2017-0012; Elvira Caterina Parisi, Francesco Parisi, 'Rethinking Remedies for the Attention Economy' (2023) 31 (1) The Economics and Regulation of Digital Markets, DOI: https://doi.org/10.1108/S0193-589520240000031004

A general overview of a global debate on the regulation of the PISs was given by Školkay.[63] He showed that there were available ideas on regulating PISs, specifically the VLOPs. These measures included soft regulation, hard law and financial, technological and other direct and indirect regulatory mechanisms. In the end, within the EU, the solution was found in a rather detailed and extensive hard law regulation – the Digital Services Package. However, arguably, some other aspects included in that Package lead this regulation to having a hybrid status (e.g. some forms of co-regulation are included).

VI General Monitoring Obligations in the DSA – A Cornerstone of EU Digital Services Regulation

Article 8 of the DSA (No general monitoring or active fact-finding obligations) – based on a 2021 study, which drafted six policy options for an efficient EU liability system[64] – states that PISs are exempted from general monitoring obligations; however, there are two specific cases apart from this available exemption when monitoring can be required – either by national authorities[65] or in particular cases. For the former situation, on the one hand, there are checks provided by the EU legislation (including the DSA) – as specified by the CJEU. 'The applicable Union legislation' is first mentioned only in general terms and only later the more specific relevant and related EU legislation (TERREG, Regulation (EU) 2019/1020[66] and Regulation (EU) 2017/2394[67]) are mentioned.

On the other hand, national authorities are defined quite broadly – they may include 'national judicial or administrative authorities, including law enforcement authorities' (DSA Recital 31). Again, a balance seemed to be sought in the sense that there is actually no general monitoring possible by national authorities. Still, instead, case-by-case intervention is possible. National authorities 'may order providers of intermediary services to act against one or more specific items of illegal content or to provide certain specific information' (DSA Recital 31). Specific cases include content considered illegal in the offline world (which is

63 Andrej Školkay, 'An Exploratory Study of Global and Local Discourses on Social Media Regulation' (2020) 10 (1) Global Media Journal (German Edition) 1–51, DOI: https://doi.org/10.22032/dbt.44942

64 Andrea Bertolini, Francesca Episcopo, Nicoleta-Angela Cherciu, *Liability of online platforms* (European Parliamentary Research Service 2021, Brussels).

65 An example could be the KEHTA system (Központi elektronikus hozzáférhetetlenné tételi határozatok adatbázisa, Central database of electronic inaccessibility decisions) operated by the Hungarian National Media and Infommunications Authority. See: <https://adatkapu.nmhh.hu>.

66 Regulation (EU) 2019/1020 of the European Parliament and of the Council of 20 June 2019 on market surveillance and compliance of products and amending Directive 2004/42/EC and Regulations (EC) No 765/2008 and (EU) No 305/2011 [2019] OJ L169/1.

67 Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004, [2017] OJ L345/1.

also the general philosophy of this regulation). This questions the legal philosophy that initially, as discussed earlier, tried to treat online regulation as fundamentally different from the offline world (yet, in hindsight, slowly moving away from non-regulation to soft regulation and co-regulation as well as hard regulation).[68]

The territorial scope of monitoring is probably the most challenging issue. There is a clear general rule (DSA Recital 36) that 'the effect of the order should, in principle, be limited to the territory of the issuing Member States'. There are again two exceptions to this general rule: A) 'unless the illegality of the content derives directly from Union law' (for example, this can be related to copyright or terrorist content); and B) if 'the issuing authority considers that the rights at stake require a broader territorial scope'. The latter definition is clearly too broad, as it allows any intervention abroad, as the regulation 'does not provide the legal basis for issuing such orders, nor does it regulate their territorial scope or cross-border enforcement' (DSA Recital 31). This questions the actual effectiveness of the DSA in such cases, which is ultimately limited to national law, which is determined by international agreements.

Nevertheless, again, there is a strong right given to the national authorities: 'The obligation for the orders to contain a statement of reasons explaining why the information is illegal content may be adapted where necessary under the applicable national criminal procedural laws' (DSA Recital 34). Even more strongly, 'Therefore, where those laws in the context of criminal or civil proceedings provide for conditions that are additional to or incompatible with the conditions provided, (…) they might not apply or might be adapted' (DSA Recital 34). This may allow another free space for legal interpretation. Indeed, national authorities (or, in effect, Member States) should not be affected by the possibility 'to require a provider of intermediary services to prevent an infringement' concerning illegal content (DSA Recital 34).

An exciting and vital aspect tackles language issues when issuing and communicating orders. The DSA (Recital 35) suggests that: 'the transmission of the order should be accompanied by a translation of at least the elements of the order which are set out in this Regulation' if there is no previous agreement on the use of language and if the language used by the provider of intermediary services is different from the EU official languages. This may concern Chinese or Russian PISs as well.[69]

VII Conclusion

The prohibition of general monitoring has been kept in the final DSA regulation. However, monitoring obligations have been impacted by a need to produce regulations that satisfy

[68] Petra Lea Láncos, *The Many Facets of EU Soft Law* (Pázmány Press 2022, Budapest). DOI: https://doi.org/10.4337/9781802208917

[69] Gergely Gosztonyi, 'Special models of internet and content regulation in China and Russia' (2021) 9 (2) ELTE Law Journal 87–99, DOI: https://doi.org/10.54148/ELTELJ.2021.2.87

all key players. This, by necessity, a typical EU approach, included many internal checks and balances, including some vague wordings, within the DSA concerning monitoring options. Moreover, not surprisingly, monitoring as specified in the DSA seems to be heavily influenced by previous legal discussions, case law and experiences with soft law.

As a result, one must be very careful when thinking about the DSA. As mentioned, there is a general exemption from monitoring obligations. This is highlighted by the wording 'neither *de iure* nor *de facto*'. This is quite strong wording, providing further guarantees against national security and intelligence agencies' illegal or special monitoring. The text of the DSA allows a lot of interventions and creative interpretation by national authorities – especially if relevant national legislation to which the DSA is referring is somewhat vague or when national authorities are less liberally-minded.[70]

Moreover, the EU's regulatory approach[71] may lead to doubts that it applies *contra lege* interpretation of the prohibition of monitoring, which also opposes the case law of CJEU. The EU regulatory solution created a situation in which, in the light of binding provisions in Article 15 of the ECD, PISs are obliged to tackle illegal content actively. The EC imposed these obligations in legal acts and using legally non-binding documents (self-regulatory or co-regulatory guidelines).

Although the EU regulation underlines the importance of the prohibition of imposing general monitoring obligations upon PISs, at the same time, it fundamentally undermines this very principle. The EC's regulatory initiatives are in effect, leading to a situation that is inconsistent with the established liability regime. Although the DSA pretends that obligations that amount, for instance, to applying filtering technologies do not infringe the prohibition from Article 15 of ECD, even the nature of such measures brings doubts about their consistency with the current liability regime. One may get the impression that the DSA expects that PISs will apply filtering technologies to detect illegal content online in general, acting voluntarily but at the same time construing legal obligations in a way that leaves them with no choice and merely forces them to monitor all content coming from various users, thereby infringing the law.

However, one should admit that PISs, at least the VLOPs and the VLOSEs, already use filtering technologies to detect illegal content online, but the question is whether this should be treated as a justification for an ever-spreading inconsistency in the EU's regulatory approach. For many years, the position of PISs was built on a well-established liability regime based on their reaction to illegal content online.

Despite the new DSA provisions, we should not forget that 'even if providers were to make an effort to properly evaluate all proactively discovered content before taking action on it, they would still face incredible difficulties due to inconsistent speech laws around the

[70] Ondřej Moravec and others, 'Digital Services Act Proposal (Social Media Regulation)' (2021) 14 (2–3) Studia Politica Slovaca 166–185, DOI: https://doi.org/10.31577/SPS.2021-3.5

[71] Anupam Chander, 'When the Digital Services Act Goes Global' (2023) 38 (4) Berkeley Technology Law Journal, DOI: https://doi.org/10.15779/Z38RX93F48

globe'.[72] In a few years, the EU legislation has moved to proactive detection and removing such illegal and also charmful content. Based on co-regulatory measures, the current DSA considers tackling 'the possible negative impacts of systemic risks on society and democracy,[73] such as disinformation or manipulative and abusive activities' (DSA Recital 104).[74]

So now the question is which regime is to follow in the coming years for online PIS liability?

[72] Golunova (n 26) 56.

[73] János Tamás Papp, *A közösségi média szabályozása a demokratikus nyilvánosság védelmében [Social media regulation to protect the democratic public]* (Wolters Kluwer 2022, Budapest).

[74] It should be noted that DMA that is not discussed in detail here, even strengthened traceability and checks on traders to ensure products and services are safe. This includes steps to perform random checks on whether illegal content resurfaces among its marketed goods.

Orsolya Szeibert*

Parental Agreements on Children's Parental Custody, Contact and Child Maintenance – High Requirements and Strict Standards versus the Child's Interests

Abstract

The aim of the paper is to analyse the Hungarian family law rules regarding parental agreements on children's parental custody, contact and child maintenance, including their high legal and judicial requirements and strict standards. Parents are regularly supported to agree on issues concerning their children in cases when they no longer live together, as this corresponds to the principle of autonomy. However, they must enter into agreements that meet the requirements of the child's best interests regardless of whether they lived in marriage or de facto cohabitation. The agreements must serve the interests of the partners and those of the child but not only at the time of concluding the agreement but also later. The question emerges of how either partner may request the agreement to be modified if the parents cannot agree new terms. Several aspects of the regulation, such as the judiciary, need to be considered and envisaged to evaluate the legal environment of parental agreements. This investigation is validated by the fact that it is not only the parents' but also the state's task to support the conclusion of agreements that protect the parties and their child's interests and, if necessary, make the amendment of agreements possible.

Keywords: parental agreements, divorce, parental custody, child maintenance, contact, judicial amendment, child's interests, judiciary

* Orsolya Szeibert is professor and head of department at ELTE Eötvös Loránd University, Faculty of Law, Department of Civil Law (e-mail: szeibert@ajk.elte.hu).

I Introduction

The analysis of the regulatory environment and the judiciary concerning parental agreements on children's parental custody, contact and child maintenance requires the several issues to be considered, also on a wider horizon. The Hungarian Civil Code (HCC), Act V of 2013, entered into force in March 2014. It is worth comparing the earlier family law rules, Act IV of 1952 on marriage, family and guardianship (Family Act) with the new ones to ascertain whether the effective rules have kept up with modern family law trends and have reflected the challenges of nowadays, especially in the field of parental custody and parental agreements regarding the child. The main issues to be envisaged are the differences between the parental agreements between spouses or former spouses and de facto cohabitants and other partners, if there are any, and, in addition, the possible content of parental agreements concerning the child's parental custody, contact and child maintenance. An issue is supporting parents to reach a proper agreement, the opportunity to access alternative dispute resolution during this process and availing of the court's competence to scrutinise parents' agreements, such as the possible judicial modification of them if the parties cannot agree on their amendment and safeguarding the child's interests and rights. The aim is to examine the judiciary as well. The final question to be answered is whether and how the child's interests prevail in the envisaged field. These issues reflected in the mirror of the Hungarian judiciary and literature. It is the topic of a further contribution to analyse what kind of solutions might be also in the context of European and international trends in the field of judiciary, special court structures (family law courts), alternative dispute resolution and some supportive methods.

II Difference between the Parental Agreements between Spouses and those of Other Partners in Case of Living Separately from Each Other

At the time of its enactment, the Family Act already made no distinction between parental agreements according to whether the parents lived in marriage or de facto cohabitation.[1] As parental custody was the consequence of filiation and maternal and paternal status, the agreements of parents' living separately could not differ based on the type of their partnership or even the lack of a marriage or de facto cohabitation. Although a legal difference existed as a consequence of that, only a marriage had to be terminated formally.

[1] It was obvious in the late 1940s and early 1950s that no difference can be made between children born in marriage and born out of wedlock. See in English Emilia Weiss, Orsolya Szeibert, 'National Report on Parental Responsibilities (Hungary)' in Katharina Boele-Woelki, Bente Braat, Ian Curry-Sumner (eds), *European Family Law in Action. Volume III Parental Responsibilities* (Intersentia 2005, Antwerp-Oxford, built into the volume according to the scientific questionnaire) 89–90.

The Family Act regulated divorce and later divorce by mutual consent, including the rules on the agreement on the accessory issues.[2] Besides, the Family Act contained provisions on the forms of exercising parental custody with regard to parents living separately. In the case of divorcing parents, both sets of rules had to be read together but, in the case of de facto cohabitation, only the rules on the forms of exercising parental custody had to be applied.

This difference has been maintained in the Fourth Book, on Family Law, of the Hungarian Civil Code. If parents terminate their marriage, they must follow the rules on divorce and those on parental custody, too. De facto cohabitation is regulated in the HCC but the general rules regarding the definition of an existing cohabitation and its property relations are contained in the Sixth Book, in the Book on Obligations and only some family law consequences are in the Book on Family Law. As parental custody is based upon maternal and paternal status, provisions on parental custody, its exercise and arrangement have to be applied to parents in general. The possible content of the parental agreements concerning children in the case of divorce can be read from both sets of rules together. However, it is a debatable question that if the parents are not married the conditions set out with regard to divorce (e.g. that parents do not have to agree on contact between the child and the separately living parent if those parents agree on joint parental custody, discussed below in detail) must be applied in their case as well.

III Divorce in Hungarian Family Law with Special Regard to Divorce by Mutual Consent

1 Regulation of Divorce by Mutual Consent until 2014

Divorce by mutual consent was introduced into the Hungarian family law in 1974. Act I of 1974 modified the then effective Family Act, Act IV of 1952 on marriage, family and guardianship. The 1974 Act stated that the only ground for divorce is the complete and irretrievable breakdown of married life and made it possible to divorce by the common consent of the spouses. The common consent of the spouses required the consent concerning the accessory issues enumerated in the Act, which indicate that the marriage had broken down completely and irretrievably.[3] The consent on the divorce and on the accessory issues did not create a presumption of an irretrievable breakdown but the court did not have to investigate the reasons giving rise to the divorce. The spouses had to present their agreement on the custody and the maintenance of any child, the non-custodial parent's right of contact with their child,

[2] See in English Emilia Weiss, Orsolya Szeibert, 'National Report on Grounds for divorce and maintenance between former spouses (Hungary)' in Katharina Boele-Woelki, Bente Braat, Ian Sumner (eds), *European Family Law in Action. Volume I Grounds for Divorce* (Intersentia 2003, Antwerp–Oxford, built into the volume according to the scientific questionnaire) 50.

[3] Weiss, Szeibert (n 2) 54.

if the claimant so requested, spousal maintenance, the right to use the matrimonial home after divorce and the distribution of common property, excluding immovable property. This agreement had to be judicially settled during the proceeding before the court.

2 Regulation of Divorce by Mutual Consent since 2014 – Unchanged Rules

The new Hungarian Civil Code, Act V of 2013 entered into force on 15 March 2014, and it contains family law rules in its Fourth Book. The main content of family law therein, such as the earlier structure of family law have been preserved. The rules on divorce were also maintained with some slight changes. Divorce remained a judicial process, as no administrative procedure for the termination of marriage has been enacted. Irretrievable breakdown has remained the sole ground for divorce, and mutual consent has not become an automatic ground for divorce, as divorce by mutual consent has maintained being embedded in irretrievability. If the spouses both agree on divorce and on all accessory issues, their request for divorce is not the result of undue influence and they declare it as their final decision, the court does not investigate the reasons giving rise to the divorce.[4]

The main and high requirements concerning mutual consent have not changed, as the spouses have to agree on all accessory issues to be divorced by mutual consent.[5] The circle of the accessory issues has however changed. While spouses earlier had to distribute their property, with the exception of the termination of joint ownership of the immoveable property, the distribution of their joint property does no longer belong to the accessory issues that spouses have to agree as the property relations of the spouses have become complicated and all-encompassing. Nevertheless, they have to agree on the use of the matrimonial home and spousal maintenance, if claimed. It has remained unchanged that the spouses have to agree on all issues concerning their minor child.[6]

IV Agreement on Parental Custody, Contact with the Parent Living Separately and Child Maintenance – Complexity of the Rules with Regard to Recent Changes

The structure of parental custody of divorced parents has changed in the HCC and its consequences have been drawn in its text with regard to the accessory issues in the case of divorce. The possibility of joint parental custody by parents living apart has been

4 See in English Orsolya Szeibert, 'Family Law' in Attila Harmathy (ed), *Introduction to Hungarian Law* (Wolters Kluwer 2019, Alphen aan den Rijn, 219–229) 220–221. In Hungarian see Emilia Weiss, 'A Ptk. Családjogi Könyvéről' (2013) (9) Jogtudományi Közlöny 405–414.

5 Pál Szilvia, 'Tényállások a házassági bontóperben: a sehova kapuja?' (2016) (1) Családi Jog 17–23.

6 Art 4:21(3) HCC.

maintained. In case of divorce, parents can agree on joint parental custody, but also on the division on rights and obligations belonging to custody and their sole custody as well.[7] In the case of an agreement on joint parental custody, the HCC does not require the agreement on contact with the child[8] but required the agreement of the child's residence. In the case of sole custody, it was clear that the child resides with the parent exercising sole custody, even if both parents must decide together on the most important issues[9] affecting the child's life.

The will of the legislator was obviously to promote joint parental custody by parents[10] even if living apart from each other. The slogan of the recodification of family law was 'gradual progress,' covering the idea that rules should only be changed if it necessary.[11] In the spirit of the gradual progress, the only possibility of exercising joint parental custody was if the parents agreed on that and it was not provided that the parents could agree on the child's alternating residence. However, parents were not forbidden to agree on their child's alternative residence either. The HCC did not require the parents to agree on contact with the child if they agreed on joint parental custody. It was unambiguous that the parents had to agree on child maintenance, even in cases of joint parental custody.

In January 2022, new rules passed in 2021 entered into force concerning parental custody of divorced parents.[12] Although the most important change has affected the court's competence on ordering joint parental custody and even alternating residence,[13] a slight modification was introduced concerning the parents' agreements. According to the newly introduced rules, parents can exercise joint parental custody while providing alternating residence for the same periods of time for the child and, in this case, they are entitled and obliged to take care of the child in turn.[14] No further regulation is provided for this case.

No exact normative guidance is provided for the parents agreeing on joint parental custody or alternating residence. In the case of joint parental custody, it is held that parents have to decide on all issues concerning the child, as opposed to when one parent exercises sole custody and they have to decide together on only the most important issues affecting the child's life. According to the HCC, the parents have to provide a balanced lifestyle for

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7 Arts 4:164(1) and 4:165(1) HCC.

8 Art 4:21(4) HCC.

9 These are the determining and changing the name of the minor child, determining his place of residence if other than his place of domicile shared with the parent or his place of residence abroad for an extended period of time or for the purpose of settlement, changing the nationality of the child and choosing the school and career path of the child shall be considered to be substantial matters affecting the future of the child according to Art 4:175(2) HCC.

10 Emilia Weiss, 'A készülő Polgári Törvénykönyv családjogi Könyvének a Kodifikációs Szerkesztőbizottság által elfogadott koncepciója' (2001) (4–5) Polgári Jogi Kodifikáció 21–40, 31.

11 The introduction of the phrase 'gradual progress' was used by happened in the peridical 'Family Law'. András Kőrös, 'Fontolva haladás – az új Ptk. Családjogi Könyve. I. Rész: A élettársi jogviszony szabályozásának szakértői javaslata' (2005) (2) Családi Jog 1–10, 1.

12 Act No CXXII of 2021.

13 Art 4:167(1) and Art 4:167/A. HCC.

14 Art 4:164(1) HCC.

their child and both of them have the right to act alone in the interest of the child, subject to notifying the other parent without delay.[15] As joint parental custody means the 'legal' joint custody and not the 'residential' or 'physical' one, the child lives lifestyle-wise with one parent. However, contact between the child and the parent living separately has remained a completely unresolved issue.

The 'original' idea was that joint parental custody presupposes the parents' total cooperation, which is why the HCC restricted joint parental custody to when the parents agree on that.[16] The above-mentioned rule according to which it is not mandatory for the divorcing parents to agree on contact was in harmony with the theoretical idea that there is no need to agree on contact if parents are fully willing to cooperate. In the case of divorce, child maintenance was an accessory issue even when the HCC entered into force, and it was meaningful, as mere joint parental custody – without alternating residence – means that the child lives with one of the parents.

The circle of accessory issues and the relevant provisions in the case of divorce by mutual consent remained unchanged even after the modification of the parental custody rules in 2021. If the rules on accessory issues in the event of divorce and the new opportunity that articulates the agreement of alternating residence of the child are projected onto each other, a lot of normative gaps can be recognised. It is obvious from the regulation of alternating residence that it is a 'subcategory' of joint parental custody which can be either 'joint parental custody without alternating residence' as a mere legal togetherness of the parents or a 'joint parental custody with alternating residence' when the parents are entitled and obliged to take care of the child in turn for the same periods of time. The phrase 'alternating residence' or a similar wording is not found in the HCC.

The normative gaps mentioned are obviously recognised if we have a look at the rules whereby the court may order joint parental custody with or without alternating residence at the request of either parent. The court may order the joint parental custody if it is in the child's interest, and it has to decide on contact, child maintenance and the child's residence, too.[17] The court may order that the parents shall be entitled and obliged to take care of the child in turn for the same periods of time with attention to the child's interest. In this case, the court decides on the periods of time, the maintenance of the child (if there is such a need) and on the method of handing over and receiving the child covering the period of school breaks and holidays as well.[18] If it is held by the legislator that the court has to arrange ancillary issues together with the ordering of joint parental custody and alternating residence, it seems logical to suppose that these are significant issues even if the spouses

[15] Art 4:164(2)–(3) HCC.
[16] Weiss (n 10) 31.
[17] Arts 4:167(1) and 4:167/A(1) HCC.
[18] Art 4:167/A(1)–(2).

agree on either joint parental custody or alternating residence.[19] Even if it is assumed that the parents are willing to cooperate in exercising joint parental custody, it is essential to agree on the important issues even if the legal rules do not demand it.

An amendment in 2023[20] confirms the thoughts described above. In 2014, the HCC contained the rule that if the parents could no longer cooperate in exercising joint parental custody, the court shall terminate it at the request of either parent. This rule was maintained even in 2022. The essence of this judicial competence was in accordance with the perception that joint parental custody presupposed the parents' full cooperation. The court did not have any power of discretion as, in the absence of parental cooperation, it had to terminate the joint parental custody. The new rule, which entered into force in October 2023, has provided discretionary power to the court to terminate the joint parental custody if one parent requests it before the court. The reasoning of the amendment is to ensure that if the court orders joint parental custody at the request of either parent, neither parent may 'abuse' the rule. The essence of the 'abuse' seemed to be that the court had to terminate joint parental custody if one parent proved that they could not cooperate with the other. However, there is no difference between the case when the court ordered joint parental custody, or the parents agreed on that. If they cannot cooperate and one of them turns to the court, it may reject the petition on the termination of joint parental custody.

The rules regarding the accessory issues in the case of divorce by mutual consent require the parents' agreement on maintenance irrespective of how they wish to exercise parental custody. New provisions have been built into the regulations on parental custody. Although these concern the judicial decision on joint parental custody and alternating residence,[21] the consideration of the legislator may be a guidance for the case of the parental agreements. According to these rules, if the court orders joint parental custody at either spouse's request, it has to decide on maintenance and also, if the child's alternating residence is ordered, the court decides about child maintenance if needed.

V Mediation as a Form of Support in the Civil Code

Mediation was not built into the divorce proceeding in the context of the Family Act. Act LV of 2002 on mediation – on mediation generally – entered into force in 2003. At that time, so-called 'divorce mediation' existed in Hungary, but it was not widely well-known and available.

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[19] See on thoughts on the possibilites of joint parental custody and alternating residence, Orsolya Szeibert, 'Új mérföldkő a hazai családjogi szabályozásban: a bíróság által elrendelhető közös szülői felügyelet és váltott gondoskodás' (2022) (3) Családi Jog 10–15; Károly László Simon, 'A közös szülői felügyelet bírósági elrendelésének mérlegelési szempontjai a hazai szabályozás tükrében' (2022) (4) Családi Jog 1–10.

[20] Act No XXXI of 2023.

[21] Art 4:167/A HCC.

A novelty is that mediation is mentioned in the frames of rules on divorce.[22] According to the HCC, spouses can use a mediation procedure to resolve their relationship and the disputed issues related to the divorce based on agreement, either by their own decision or at the initiative of the court before or during the divorce proceedings.[23] The agreement reached because of the mediation process can be included in a lawsuit settlement. This rule does not mean that the mediation process is built into the divorce proceedings, even if the court 'initiates' it. The court may only suggest that the spouses turn to a mediator, but it is not mandatory for them.

VI Requirements for the Accessory Issues in the Case of Divorce and their Scrutiny by the Court

The requirements concerning the existence of the consent on accessory issues and their appropriateness were also high in the Family Act.[24] The divorce court could not deliver a partial judgment, so the spouses had to agree entirely on all accessory issues and if one accessory issue was omitted then divorce by mutual consent was impossible. It was therefore clearly expected that the spouses must agree on the above-mentioned issues if they wished to divorce by mutual consent. The requirements concerning the agreement were high, as the court had to remind the spouses that they should not enter into ill-considered agreements merely to obtain a divorce soon.[25] The spouses had to be warned that the agreement would be binding on them, and they could ask for its amendment later if there were special circumstances or when it was in the interest of minor children to do so and then only within two years of the divorce decree.

The agreement on the accessory issues had to be scrutinised and approved by the court. Theoretically, the court had to investigate whether the agreement was in the interests of the minor children and whether it was detrimental to the interests of one of the spouses. Although it was obligatory for the court, experiences indicate the court did not scrutinise them very closely or in detail.

In the HCC, the requirements of consenting to the accessory issues in the case of divorce have remained high and there are gaps concerning the regulation of the exact legal details when the parents agree on joint parental custody and alternating residence, as has been mentioned above. There are several conditions for requesting the amendment of either part of the agreement later on, which is why parents are required to pay great attention to the accessory issues and consider them thoroughly before divorce.

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[22] András Kőrös, 'Fontolva haladás – az új Ptk. Családjogi Könyve. 2. Rész: A házasság megszűnésének szabályai' (2005) (3) Családi Jog 12–19, 18–19.

[23] Art 4:22 HCC.

[24] Ottó Csiky, 'A házasság megszűnése' in András Kőrös (ed), *A családjog kézikönyve 2007.* I. (HVG-ORAC 2007, Budapest, 60–91) 80–83.

[25] Csiky (n 24) 83.

The requirement that the court theoretically has to scrutinise the spouses' agreements has not changed. However, according to the experiences, how deep it investigates whether the agreements meet the affected child's interests and the spouses' interests, or it really investigates it at all depends on the court. The judicial attitude seems to have much to do with the trust of the reasonableness and amicability of the parents and their relationship. To date, no empirical research has actually been conducted on the judicial scrutiny of the spouses' agreements.

VII The Amendment of the Spousal Arrangements Affecting the Former Spouses' Minor Child

1 *Clausula Rebus Sic Stantibus* concerning the Agreements Affecting the Child in the Event of Divorce in the Effective Family Law Rules

The reminder to the spouses that it will be complicated to amend their agreements after the court has incorporated them into a judgment rests on real foundations. In each case when either former spouse wishes to request for the modification of the agreement, his or her petition has to meet the requirements of the *clausula rebus sic stantibus.* The court strictly judges whether the claim is an adequate one. The requirements of amendment of agreements regarding the minor child are only slightly differ from each other.

The court may be requested to modify the exercise of parental custody if the circumstances under which the parents' agreement (or the court's decision) was based subsequently changed significantly, and consequently, the modification serves the interest of the child.[26] The legal rule adds that the parent who was at fault in causing changes in the circumstances, in particular by unlawfully taking or retaining the child, may not rely on the interests of the child with regard to the changes in the circumstances. As mentioned above, if the parents are unable to cooperate any longer in exercising joint parental custody, the court may terminate joint parental custody at the request of either parent.[27] There is no such definite requirement in the HCC concerning the amendment of the agreement on contact but the Hungarian Curia declared that the rules on the amendment of the agreement/decision on parental custody have to be applied analogously to the modification of agreement/decision on contact (as detailed below).

There is no special rule on the modification of the agreement or judicial decision on child maintenance but the general rule on modifying the level of maintenance has to be applied to child maintenance as well. This general rule[28] concerning the modification of the level of maintenance distinguishes between the requirements for modification depending

[26] Art 4:170(1) HCC.
[27] Art 4:170(2) HCC.
[28] Art 4:210(1) HCC.

on whether the previous one was based on an agreement between the parties or a court decision. If either parent wishes to ask for the modification of the level of child maintenance, it is possible if any of the circumstances that served as basis for determining maintenance based on the court judgment has changed in such a way that the unchanged provision of maintenance would violate a substantive legal interest of either party. If the parents agreed on child maintenance, the modification of the level of maintenance may be requested if any of the circumstances that served as a basis for determining maintenance based on the agreement has changed in such a way that the unchanged provision of maintenance would violate a substantive legal interest of either party, but the parent who had to expect the possibility of a change in the circumstances at the time when the agreement was concluded or who is at fault regarding the change in the circumstances may not apply for the modification of the maintenance based on an agreement. The possibility of requesting the modification of an agreement on child maintenance has been made deliberately[29] harder.

2 The Justification for the Rigid Requirements during the Codification of the Hungarian Civil Code

The codification process of the HCC lasted for approximately fifteen years, from 1998 until 2013. The draft of the family law rules was elaborated in the very early 2000s and the first draft of the normative text became ready in 2005 and 2006.

a) **Family law as an independent legal branch and rules for the judicial amendment of the agreements concerning the child in the Family Act**

The Family Act was an independent legal act for 60 years. Therefore, even if connections were assumed and maintained between the Family Act and the then effective Civil Code (Act IV of 1959) – especially in the field of matrimonial property law –, the rules of the Civil Code of 1959 were not applied to the family law relationships regarding child maintenance, parental custody and contact. The Family Act included some rules on the amendment of the parents' agreements. It was held in connection with the parents' agreements on rendering their relationship in the ancillary issues that the court had to inform the parents, and it could approve the spouses' agreements concerning their minor child if it met the child's interests. The Family Act prescribed that, within two years of the approval of the agreement, the court could only request a change to the agreement governing the long-term legal relationship between the parties if it served the interests of the spouses' minor child, or if, due a change in circumstances, the agreement seriously harms the interests of one of the parties.[30]

[29] András Kőrös, 'Fontolva haladás – az új Ptk. Családjogi Könyve. 8. Rész: A rokontartás' (2007) (1) Családi Jog 1–10, 9–10.

[30] Art 18(3) Family Act.

When the recodification process of the Civil Code began, it was disputed whether the family law rules should be incorporated into the Civil Code and at last it was decided that it should be so.[31] The first draft mirrors the wish of the drafters to find the connecting points between the general contract law rules and family law agreements.

b) Clausula rebus sic stantibus principle in modifying the parents' agreements

The draft aimed to maintain the rule that such an agreement should only be changed in very justified cases but did not hold it important to include a general rule in this regard as the law was drafted to contain provisions among the specific rules that the agreement on custody and contact could only be changed if it served the interest of the minor child of the parents.[32]

According to the draft text, two conjunctive requirements were planned to be included in the regulation concerning the possible modification of the exercise of parental custody, firstly that the circumstances upon which the parents' agreement (or the court's decision) was based subsequently changed significantly, and consequently, the modification serves the interest of the child.[33] As such, the earlier provision was upheld. However, it changed the requirements of the judicial modification of the agreement on child maintenance. The reasoning of the draft articulated that the extra requirement in the case of an agreement, according to which the parent who had to expect the possibility of a change in the circumstances at the time when the agreement was concluded or who is at fault regarding the change in the circumstances may not apply for the modification of the maintenance that is based on agreement, had to be included in the model of judicial modification of the contract in the Book on Obligations.[34] Although the agreement on the exercise of parental custody and contact was discussed as an 'agreement' and exactly a 'contract', the agreement on child maintenance seemed to be held as a 'contract' or at least an 'agreement' that operates as a 'contract'. It has not been discussed in the Hungarian legal literature whether such an agreement was a contract but, as the family law rules were incorporated into the Civil Code, this issue might understandably emerge.

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31 András Kőrös, 'A Ptk. és a családjog kapcsolata – a gyakorló jogász szemével' (1999) (1) Polgári Jogi Kodifikáció 3–9, 5, 8; Emilia Weiss, 'Az új Polgári Törvénykönyv és a családjogi viszonyok szabályozása' (2000) (2) Polgári Jogi Kodifikáció 4–13, 12–13.

32 Kőrös, A házasság megszűnésének szabályai (n 22).

33 Art 72/A(2) Family Act. András Kőrös, 'Fontolva haladás – az új Ptk. Családjogi Könyve. 7. Rész: A szülői felügyelet III. fejezet' (2006) (4) Családi Jog 1–9, 5.

34 Kőrös, A rokontartás (n 29) 9–10.

VIII The Amendment of the Agreements regarding Children in the Judiciary in Recent Years

1 Parental Custody

It had been crystallised in the judiciary that a request of either parent to amend the decision (either based on the parental agreement or a judicial arrangement) on parental custody could be found justified under the Family Act if there had been a substantial and significant change in the previous circumstances affecting the exercising of parental custody.[35] If the change in circumstances had taken place, an additional essential requirement was that the change was in the interest of the child. It was uniformly followed that the fundamental change of the circumstances had to be examined from the point of view of the child's interest and a defining aspect was the requirement of legal stability regarding the child's residence with either parent, if it was not the result of abuse.

The commentary literature has repeated these phrases word by word, insisting that both conditions, namely the significant change of the circumstances and that the amendment serves the child's interest, must prevail.[36] It was actually in line with the idea developed during the codification that the thorough justification of the amendment should be maintained.[37]

In a recent case[38] adjudged by the Hungarian Curia (Hungarian Supreme Court) one parent of a child over the age of 14 initiated a lawsuit for the amendment of the parental custody. The child had a wish, consistently expressed before the courts, to live with the other parent, who initiated the proceedings. While the court of first instance had the opinion that no real change in circumstances happened in this case, the court of second instance did not agree with this conclusion, as they held that the fact in itself that the child would have liked to live in a different environment must have been regarded as a significant change in circumstances and, as the child was over 14, the proceeding court had the task of considering whether the child's choice endangered his development.[39] The Hungarian Curia repeated the legal rule consisting of two conjunctive conditions as a basis of its own reasoning and summarised that the courts that acted on the first and second instances differed on whether the child's longing for the former environment could be evaluated as a change in circumstances that established the amendment of the earlier decision.[40]

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35 Edit Bencze, 'A szülői felügyelet és a gyermekvédelmi gondoskodás' in András Kőrös (ed), *A családjog kézikönyve 2007.* II. (HVG-ORAC 2007, Budapest, 625–801) 671–673.

36 Katalin Makai, 'A szülői felügyelet' in András Kőrös (ed), *Polgári Jog. Családjog* (HVG-ORAC 2013, Budapest 233–299) 266. This is held later, see Katalin Makai, 'A szülői felügyelet' in András Kőrös (ed), *Polgári Jog. Családjog* (HVG-ORAC 2018, Budapest, 291–368) 328.

37 András Kőrös, Katalin Makai, Orsolya Szeibert, 'Negyedik Könyv' in Lajos Vékás, Péter Gárdos (eds), *A Polgári Törvénykönyv magyarázatokkal* (Complex 2013, Budapest, 237–360) 334.

38 Decision of Hungarian Curia Kúria Pfv.I.20.052/2023/5. BH 2023.9.212.

39 Decision of Hungarian Curia Kúria Pfv.I.20.052/2023/5 [32].

40 Decision of Hungarian Curia Kúria Pfv.I.20.052/2023/5. [38]-[39].

2 Child Maintenance

The earlier case was based upon a former judicial decision, but the Hungarian Curia's interpretation of the rule concerned did not depend on whether the former method of exercising the parental custody had been based upon an agreement or a judgment. In child maintenance cases, mentioned above, the requirements of an amendment of the level of maintenance are even higher if it is based upon a parental agreement. The conjunctive conditions are interpreted very strictly, as the Hungarian Curia reinforced in a recent judgement[41] that that the change of the former circumstances has to be objective, with the consequence of a serious legal injury to the interested party.[42] The mentioned novelty of the maintenance rules, namely that the parent who had to expect the possibility of a change in the circumstances at the time when the agreement was concluded or who is at fault regarding the change in the circumstances may not apply for the modification of maintenance that is based on an agreement.

The commentary literature confirmed that the aim of the new provision was to introduce more rigid regulation[43] in order to bring it, as a permanent legal relationship, closer to the conditions for modification of a judicial contract.[44] It has been since the new rules entered into force that the parents' agreement, or any agreement between a claimant and the obligor in the family maintenance context, is a contract in the legal sense. The Hungarian Curia implemented these strict requirements into practice, underlining that if the parents definitely and clearly articulated their will in the agreement with regard to several aspects of the maintenance, including the time period of the maintenance obligation, this 'contractual will' cannot be ignored.[45] In its reasoning, the Hungarian Curia added that the legislator drew the conclusions of the fact that the family law rules had been integrated into the Civil Code and gave priority to achieving the right to self-determination.[46] Although the contractual character was originally model for the spouses' agreements regarding the use of the common dwelling and the determination of the property relations for the future, the Hungarian Curia refers in its reasoning to the arrangement of exercising parental custody as well as an example of the agreement ensuring the partner's autonomy. The reasoning declares that the contractual arrangement means that the general rules of obligations have to be applied to these agreements with certain legally determined exceptions.[47] The expectation that parents have to behave responsibly also plays a role here.

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41 Decision of Hungarian Curia Kúria Pfv.II.21.474/2019/8. BH 2020.11.330.

42 Decision of Hungarian Curia Kúria Pfv.II.21.474/2019/8. [50].

43 Kőrös, Makai, Szeibert (n 37) 349.

44 Orsolya Szeibert, 'A rokontartás' in András Kőrös (ed), *Polgári Jog. Családjog* (HVG-ORAC 2013, Budapest 300–333) 317. This is held later, see Orsolya Szeibert, 'A rokontartás' in András Kőrös (ed), *Polgári Jog. Családjog* (HVG-ORAC 2018, Budapest, 370–423) 390–393.

45 Decision of Hungarian Curia Kúria Pfv.II.20.804/2018/12. BH 2019.7.204

46 Decision of Hungarian Curia Kúria Pfv.II.20.804/2018/12. [31].

47 Decision of Hungarian Curia Kúria Pfv.II.20.804/2018/12. [31].

3 Contact between the Child and the Parent Living Separately

Although the Family Act prescribed requirements for the amendment of agreements concerning parental custody and child maintenance, it did not regulate it[48] regarding contact, presumably because the arrangement of contact cannot be like a contract. The commentary literature did not say a word about the need to apply a similarly strong set of conditions.[49]

However, the Hungarian Curia has introduced them. In a case,[50] the divorcing spouses had agreed on the exercising of parental custody, child maintenance and contact before the proceeding court. As it turned out later, the contact between the children and the separately living parents was fraught with problems from the beginning. The other parent requested the rearrangement of the agreement on contact from the court and ordering a controlled contact. Although the court of first instance rejected the petition, the court of second instance considered the concerned child's interests crucial, deemed the further deterioration of the contact as a change of circumstances and held it decisive that the earlier arranged contact could not function.[51] The Hungarian Curia agreed with the reasoning of the court of first instance. The court articulated that, in the absence of a special legal provision, the legal rule concerning the rearrangement of parental custody had to be applied to the rearrangement of contact, which meant that both conjunctive conditions had to be applied.[52] The court of second instance argued that the lack of well-functioning contact injured the child's interests and achieved the change of circumstances in itself.[53] The Hungarian Curia stated in its reasoning that the Book of Family Law provided wide autonomy to the parents to arrange their family relationships in a contract[54] and it was their responsibility that the interests of their child were taken properly into account.

IX Conclusions regarding the Child's Interests

Some issues emerged at the beginning of the codification in connection with incorporation of family law rules into the Civil Code. Although all aspects of family law were reconsidered and discussed during the codification, the issue of how to rearrange or amend the parents' agreements regarding children did not attract huge attention. It is understandable, as theoretical and complex issues and drafts were continuously debated for years. However, we can recognise that these opportunities, or the lack of them, play an enormous role in

48 Kőrös, Makai, Szeibert (n 37) 338–339.
49 Makai, 'A szülői felügyelet' (n 36) 280–285. This is held later, see Makai, 'A szülői felügyelet' (n 36) 348–354.
50 Decision of Hungarian Curia Kúria Pfv.II.20.913/2017. BH 2018.4.115.
51 Decision of Hungarian Curia Kúria Pfv.II.20.913/2017. [31]–[32].
52 Decision of Hungarian Curia Kúria Pfv.II.20.913/2017. [28].
53 Decision of Hungarian Curia Kúria Pfv.II.20.913/2017. [32].
54 Decision of Hungarian Curia Kúria Pfv.II.20.913/2017. [35].

everyday life. The Hungarian Curia took steps to approach the judgment of these cases to the contractual situations and the role of the parents' exercising self-determination and autonomy to that of contractual partners.

It is worth envisaging whether it is legally provided that the child's interests must be taken into account. The answer is, of course, yes.

According to a family law principle in family legal relationships, the interests and rights of the child shall be granted increased protection.[55] This is confirmed in the provisions on the judicial dissolution of marriage. The HCC declares that, upon the dissolution of marriage, the interests of the common child shall be considered and that, when agreeing on the exercise of parental custody, contact arrangements between parent and child and child maintenance, the interests of the child shall prevail. It is required from the parents that they shall exercise parental custody with a view to ensuring the child's appropriate physical, mental and moral development and inform the child of any decisions affecting them.[56] Theoretically, the family law rules provide that the child's interests are considered both in the divorce proceedings and when agreeing on the accessory issues affecting the child. It is a further issue how the realisation of the interests of the concerned child is guaranteed. This question deserves to be said more because the parents' autonomy is protected, there is no built-in mediation, and the court does not always examine the parents' agreement in depth.

Furthermore, the strict insistence on the conjunctive conditions being realised inevitably results in putting the child's interests in the background, especially if the child's interests cannot be considered as a change of circumstances. A reasoning was articulated during the codification and also in the judiciary when applying the family law rules that it has to be avoided that the parents act to each other's disadvantages. It is an aim worth being supported but it cannot be disadvantageous for the child.

A challenge is the application of the substantive law rules on parental custody, as recent modifications have raised some questions on their proper application and no crystallised judiciary has been shaped yet. A further challenge that has become permanent is that circumstances are in constant change. Children are developing; their capacities are evolving and their families including their parents are exposed to changes. Even if it is not possible and desirable to follow up the changes in a daily basis, opportunity must be provided for the follow up of the mutating living conditions.[57] It is a challenge for practising lawyers and legislator.

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[55] Art 4:2 HCC.

[56] It is a principle of the Fourth Book of the HCC, Art 4:147(1) HCC.

[57] See Ingeborg Schwenzer, Mariel Dimsey, *Model Family Code from a Global Perspective* (Intersentia 2006, Antwerpen – Oxford) 147–148.

Balázs Arató*

Special Legal Relationships and Liability Issues in Relation to Evidence Handed over to A Forensic Expert by a Civil Court

Abstract

The paper takes a recent case as a starting point to examine how the disappearance of the object of examination from a forensic expert appointed by the trial court should be assessed in the light of civil law, civil procedure and constitutional law. The analysis will focus on the specific legal relationships and liabilities associated with the appointment of an expert. The theoretical conclusions on these issues are the starting point for the fundamental question, of constitutional importance, of whether a judgment can be based on an expert's opinion that was drawn up without the expert having returned the object of the examination although he should have done so. The study also attempts to answer this question.

Keywords: expert appointed by the court, object of examination, custodial liability, rule of law, evidentiary procedure, fair trial

I The Topicality of the Issue

The present study and the theoretical conclusions it contains derive their topicality from a recent case concerning the invalidity of a will before the Metropolitan Court of Budapest, which was also tried before the Curia.[1] In this case, the court-appointed forensic chemist took the will (the only original example) from the court's safe for examination, and later reported that the will had been stolen from him by an unknown person and therefore could not be returned. The forensic expert, in his opinion presented in these circumstances, claimed that the will was forged because the printed text was put on paper after the testator's

* Balázs Arató (PhD, Dr. habil.) is associate professor at Károli Gáspár University of the Reformed Church in Hungary, Department of Commercial Law/Department of Civil Law (e-mail: arato.balazs@kre.hu).

1 See the judgment No.21.P.25.192/2014/180-II (corrected by the order No.181) of the Metropolitan Court of Budapest dated 1st of September 2020, and the judgment No.Pfv.II.21.494/2021/7 of the Curia 18th of May 2022.

name had been written. The trial courts based their judgments on this expert opinion and, with the exception of the court of appeal, declared the will invalid. In the light of the above, it is useful to examine the nature of the legal relationships between the parties involved when an object or evidence is deposited to the court in connection with litigation or when the same object or evidence is handed over by the court to a forensic expert for examination. A further relevant issue is the question of who should be subject to what legal consequences if the object or evidence is not returned by the forensic expert. The focus of this study is primarily civil law, but it cannot ignore a broader analysis, as the legal consequences of the facts are at least cross-jurisdictional.

II Special Legal Relationships

Following the chronological order of the events that are legally relevant and can be legally grasped, we can arrive, step by step, at the question of the nature of the legal relationship between the parties and the court when the former entrust to the latter, for the purpose of settling their dispute, the object that is at the centre of the litigation, in this case the will. A detailed examination of the antecedents of the legal relationship and then of its content will lead to an answer to the question.

III Legal Relationship with a Notary

As a starting point, let us assume that, as is typical, the will is made available to the probate registrar or directly to the notary who is conducting the probate proceedings by the party interested in the validity of the will, and that the notary hands the document to the court after becoming aware that the party interested in the annulment of the will has filed an action for a declaration that the will is invalid. In addition, it is often the case that the will is found in the deceased's home or is made available to the authorities by the person entrusted by the testator with the safekeeping of the will (for example, a witness). The first event in all such cases is therefore when the will comes into the possession of the notary for the purposes of the probate proceedings, so that the legal relationship which arises from it should first be analysed in detail and then correctly assessed. Assuming that the person who handed over the will to the notary had a valid title to possession of the will, I will analyse only the legal relationship between him and the notary. The keeper of the will makes the document available to the notary to give effect to the testator's wishes, in other words, to enable the notary to transfer the estate to the heirs in accordance with the will. Starting from the legal status of the notary and taking account of their obligations in relation to the will, we can arrive at a conclusion as to what will be the legal title to the possession of the will by the notary. In a peculiar way, Act C of 2012 on the Criminal Code (hereinafter

the Btk.) provides the answer to the question of the legal status of notaries. Article 459(1)(11)(g) of the Btk. defines a notary as an official person. This means that they perform a public task, has special powers to do so and is subject to enhanced protection. It does not follow, of course, that notaries cannot be subject to civil law relationships in the course of or in connection with the performance of their public duties. In my view, one of these civil law relationships is where the keeper of the will delivers the document to the notary in order to enable the transfer of the estate in accordance with the testator's wishes to be carried out as a public task. For the purposes of the civil law classification of this relationship, the question of whether it is a pecuniary or non-pecuniary one must be of particular importance.

The holder of a will is obliged to hand over the document he or she has kept to a notary, since he or she has undertaken to give effect to the testator's will, but receives no consideration for doing so. The holder's action is clearly in the interests of the testator and of the persons named as heirs in the will. The notary's duty is to receive and preserve the will, to examine its form and content and then to transfer the estate on the basis of a valid and effective will, which is free from any defects. The notary is remunerated for this, but not by the person who hands over the will, but by the parties interested in the succession. Despite its special features, the legal relationship bears, at least incidentally, the characteristics of a deposit. As we have seen, in addition to the receipt and safekeeping of the will, the notary also has other obligations in relation to the document, but it is the deposit itself that serves to fulfil these duties.[2] In summary, it can be said that a notary in a public capacity obtains, by means of a deposit, the possession of the document which, if suitable, will serve as the basis for the transfer of the estate, meaning that the deposit is ancillary to the main service provided by the notary in his capacity.

IV Relationship with the Court

In the event of a lawsuit being brought in the course of the probate proceedings to establish the invalidity of the will, the notary, as the depositary, will deposit the will with the court for the purpose of the lawsuit, and therefore acts as a depositor in this relationship (towards the court). In my view, however, it would be too restrictive to consider only the notary as the depositor in the context of the document being brought before the court. The transfer of the will to the court is in the legal interest of both the contesting party and the beneficiary, since both of them wish to have the dispute settled and, by becoming parties to the action, they themselves trigger the notary's action which brings the will into the possession of the court. In this sense, therefore, the parties themselves are present from the outset in the legal

[2] Compare: Vékás Lajos, Gárdos Péter (eds), *Kommentár a Polgári Törvénykönyvhöz* (second, revised edition, Wolters Kluwer Kft. 2018, Budapest), see the explanation of Section 6:360 of the Civil Code (Ptk.) by Gárdos Péter, according to which, „a letétnek lehet a szűken vett őrzésen túlmutató célja is: szolgálhatja egy jogügylet megvalósítását, vagy lehet biztosíték is". Translated into English: The deposit may have a purpose beyond custody in the narrow sense: it may serve to enforce a legal transaction, or it may be a security.

relationship between the notary and the court, at least as underlying depositors. It could even be said that when the will is handed over to the court, the obligation becomes multi-subject on the eligible side and a kind of joint and several relationship of the depositors is established.

It is typical that irreplaceable objects and documents of greater ideological or material value (such as wills) are placed in the court's vault. This also underlines the depositary nature of the legal relationship, since it shows that the court has a more stringent duty of custody than usual. This is fully consistent with the fact that the depositor's main obligation is to preserve and return the deposited property. The court's primary task is, of course, to adjudicate on the suit, the resulting deposit contract being ancillary to this.

V Legal Relationship with the Forensic Expert

In actions for a declaration of invalidity of a will, it is common for the plaintiff to allege a ground for invalidity which requires a special expert, a document examination. In the light of the case law, most of the time the competence of a writing and document expert is required, but more recently, as the facts of the case show, there have also been examples of the involvement of a trace or chemistry expert. The question arises, therefore, as to the nature of the legal relationship between the court that holds the document in deposit for the purposes of the proceedings and the forensic expert appointed by the court, and whether there is any civil law relationship between the parties interested in providing evidence and the expert. Pursuant to Section 3(1) of Act XXIX of 2016 on Forensic Experts (hereinafter Act on Experts), the duty of a forensic expert is to assist in establishing the facts of the case by providing an expert opinion. Acting on the basis of an assignment from an authority or a mandate, a forensic expert is obliged to comply with the requirements of independence and impartiality when deciding specialist question and to formulate his/her expert opinion on the basis of the results of scientific and technical progress. On the basis of this legislation, the initial stage of the expert's activity in a specific case is the appointment as an official act or the mandate as a civil act, and the result is the expert opinion. This reveals a rather mixed and complex legal relationship. Given that Act V of 2013 on the Civil Code (Civil Code or Ptk.) considers the research contract as a sub-type of the contract to produce a work, on the basis that the product is the research report, it is perhaps not a mistake to measure the expert's work by the same yardstick.[3] Despite the fact that the law itself uses the word 'mandate' (which in Hungarian

[3] See in this context: Vékás, Gárdos (n 2), see the explanation of Section 6:253 of the Civil Code (Ptk.) by Gárdos Péter, according to which „a szerződés alapján a kutató köteles a kutatás jellegéhez kapcsolódó szellemi alkotást, például kutatási jelentést, más hasonló művet elkészíteni, az ilyen műre vonatkozó, a megengedett legszélesebb terjedelmű felhasználási jogot köteles a megrendelőnek átengedni". Translated into English: Under the contract, the researcher is obliged to produce an intellectual work related to the nature of the research, such as a research report or other similar work, and to assign to the client the right to use such work to the fullest extent permissible.

refers to an agency contract), it is not (completely) correct even in the case of a private expert, as in such a case we also expect the expert to provide a product, an expert opinion. Of course, the expert is also subject to the duty of care that is typical of a mandate (agency contract), but the whole of his or her task is still predominantly producing a work.

Having explored the legal content of the expert's (co-)operation, it is useful to examine who are the 'clients' of the contract to produce a work with the expert. According to the Ptk., this is the person who is obliged to accept the contractor's work and pay the contractor's fee. In the case of a private expert, no dilemma arises, so I will now examine the subjects of the contract in relation to the expert acting on the basis of a court appointment.

It seems appropriate to approach the question from the point of view of who is entitled to claim in the event of defective performance by the expert. In the light of the case-law, there are several forms of expert malpractice. Examples include when the expert goes beyond his or her scope of competence, is biased, takes a position on a point of law, gives a false opinion or his or her opinion is otherwise questionable.[4] The court takes the expert's opinion as a contractor's work from the expert, but does so also on behalf of the parties. According to the rules of evidence governing Hungarian procedural law, the party who has an interest in having the court accept the facts as true must prove the facts relevant to the case. If special expertise is necessary to establish such a fact, the party who has an interest in providing evidence must request the appointment of a forensic expert, otherwise he or she will suffer the legal consequences of the lack of evidence.[5] This does not mean, however, that the client of the contract to produce a work with the expert is exclusively that party. This is because the other party also has an interest in the expert's opinion justifying his or her position in the litigation; in other words, he or she expects the expert to provide a product with such content and in this sense is himself or herself also a client. So, on the client side, we see the court and the litigants, who are all entitled to assert claims against the expert based on defective performance, and do so, each according to their own specific criteria. The motivation of the parties in this respect does not require any particular explanation, but it is worth examining whether there is a case where the court does not act as a kind of mediator in enforcing the claim of one of the parties against the expert for defective performance, but itself acts as a 'complaining' client, for example by excluding the expert's opinion from evidence *ex officio*. The domestic procedural rules undoubtedly grant the court such a power, just think of Section 316 of Act CXXX of 2016 on the Code of Civil Procedure (Pp.), which deprives the expert opinion of its admissibility as evidence in the cases listed there.

At the same time, it can also be noted that the principle of the binding nature of the motion applies in the context of the expert opinion, which means that the court – except in the cases provided for in Section 316 of the Pp. – mostly forwards to the expert the concerns

4 See in detail Section 316 of the Pp.

5 See in this context in detail Section 265 of the Pp.

of the parties, at least those that the court itself agrees with.[6] Irrespective of this, it can be concluded from the scope of those entitled to raise qualitative objections that, in civil law terms, the contracting parties and the court are the clients of the contract to produce a work with the expert. Although the contract to produce a work is dominant, it is not the only legal relationship of a civil law nature that is established between the same actors. It is not uncommon for the expert to be forced to take the object held by the court temporarily in order to carry out the necessary examination for the preparation of the expert opinion. This will almost certainly be necessary in the case of expert examinations of wills or deeds, since these examinations are typically carried out with technical devices and equipment that cannot be transported to the site or can only be transported with considerable difficulty. The expert will take possession of the object of examination held in custody by the court for the purpose of fulfilling his/her main obligation as a contractor and will be obliged to return it at a later date, after the expert examination has been carried out. The special circumstances of the case therefore require that the object of the examination held in deposit by the court is temporarily removed from the depositary's possession, meaning that, in essence, the same sub-deposit as above is made, with the difference that the expert will not only be bound by the obligations arising from the deposit contract, but will also have to perform the contract to produce a work, and it is precisely for the latter purpose that they become a depositary. The legal framework of the expert's activity involving the examination of an object is therefore a contract to produce a work with deposit elements.[7] In my view, the depositors are those who are the clients of the contract to produce a work, namely the court and the litigants.

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[6] Compare this with Section 315 (1) of the Pp., according to which „ha a kirendelt szakértő szakvéleménye aggályos és az aggályosság a szakértő által adott felvilágosítás ellenére sem volt kiküszöbölhető, a bíróság indítványra új szakértőt rendel ki.". Translated into English: If the opinion of an officially appointed expert is inconclusive and the inconclusiveness could not be addressed despite the clarifications provided by the expert, the court shall, upon a motion, officially appoint a new expert. According to the wording of the law, this could be continued indefinitely by appointing another expert, but judicial practice has prevented this by stating that if the concerns of the expert opinion cannot be resolved by the appointment of a new expert or if the party does not request the appointment of a new expert, „a bíróságnak mellőznie kell a szakértői véleményt, és a szakkérdést, mint bizonyítatlant a bizonyításra kötelezett fél terhére kell értékelnie". Translated into English: the court shall disregard the expert's opinion and consider that the specialist question has remained unproven, with the disadvantages of this being suffered by the person who would have been obliged to provide evidence. See in this respect and in detail: *Igazságügyi szakértőkkel kapcsolatos szabályozás és feladatok, lehetséges eszközök az eljárás gyorsítása érdekében; bírósági általános igazgatási szekció* <https://birosag.hu/sites/default/files/2018-08/24_dok.pdf> accessed 15 December 2023.

[7] Case law confirms this. See, for example, the decision BH 2001. 424., where the acceptance of a car for repair creates a contract to produce a work which includes a deposit element. On this basis, and applying some analogy, the above proposition is, in my view, justified.

VI Civil Law Aspects of the Loss of the Will by the Expert, Liability Issues

Having considered which civil law relationships arise between whom in the context of an action for a declaration of the invalidity of a will, it is useful to examine from the same perspective the case where the expert appointed by the court does not return the will and gives their expert opinion in such circumstances. It is noted above that the expert will be subject to a (sub)deposit contract upon taking possession of the object of the examination. Consequently, the expert is not only obliged to carry out the examination under the contract to produce a work, but also to keep, preserve and return the will. The nature and extent of the depositary's duty of safekeeping has been clearly established by jurisprudence and consistent case-law.

> Generally speaking, the depositor's conduct and actions should be aimed at ensuring that the depositor receives the property intact at the expiry of the deposit. Custody therefore means, on the one hand, preserving the physical condition of the deposited object and, on the other hand, maintaining the ownership of the deposited object. The exact content of the custody obligation is determined firstly by the characteristics and needs of the deposited object and secondly by the circumstances of the deposit. At the same time, however, the duty of safekeeping does not typically require active conduct, but it is sufficient to keep the object in appropriate conditions and to protect it from loss, damage or destruction.[8]

This gives rise to a strict custodial liability, meaning a liability based on an objective basis, since the Civil Code (Ptk.) defines both the obligation to preserve and the obligation to return as the conceptual elements of a deposit.[9] It can also be said that the obligation to keep is in the service of the obligation to return, meaning that it (the duty of safekeeping) must be measured against a very strict yardstick.

In the light of judicial practice and jurisprudence, it can also be said that the depositary is under a continuous duty of safekeeping, 'and that there is therefore a clear prohibition on any conduct that is not in accordance with the duty of safekeeping; in other words, which jeopardises the return of the depositor's property in its original state'.[10] Therefore, even if it is proved that the will was stolen from them, the expert has breached their contract by not ensuring the continued safekeeping of the object of the examination. In this sense, therefore, the theft does not constitute *force majeure* such as to give rise to the expert's exemption, in the light of the objective basis of liability for custody. The expert was holding

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[8] See in this context: Vékás, Gárdos (n 2), see the explanation of the Article 6:360 of the Civil Code (Ptk.) on 141. Translation by the author.

[9] For the meaning of custodial liability and its roots in Roman law, see Max Kaser, Rolf Knütel, Sebastian Lohsse, *Römisches Privatrecht* (22nd edition, CH Beck 2021) 271–277.

[10] Vékás, Gárdos (n 2), see the explanation to Article 3:361. of the Civil Code (Ptk.) by Gárdos Péter.

the object as a sub-depositary, so the question is whether they alone are responsible for its loss. As I have shown above, the will was also held by the court as a depositary and was deposited by it to the appointed expert. A closer look at this legal relationship reveals that the expert is in fact a vicarious agent, and therefore Section 6:148 of the Civil Code (Ptk.) applies. Provided that the court has lawfully used a vicarious agent, it is liable for their conduct as if it had acted itself. The question arises as to how, in the circumstances of a case, the question of the lawful or unlawful use of a vicarious agent is to be assessed. In my opinion, if in a case leading to the disappearance of the will (which is suspicious in itself), it can be proven that the guarantees of the rule of law were not applied around the appointment of the expert (for example, because the court appointed an expert named by one of the parties or did not ensure the presence of an official witness or the parties at the expert examination), then the unlawful involvement of the vicarious agent arises, which in turn gives rise to unlimited liability of the court for damages under Section 6:148(2) of the Ptk.[11] If there are no such circumstances, the court is liable according to the rules on the lawful use of a vicarious agent. In my opinion, there is no obstacle to a party bringing an action directly against the expert for the loss of the object of the examination, and the action may be brought not only on the basis of tort but also for breach of contract, since – as the above conclusion shows – the parties to the action are on the client and depositor side, also subject to the contract to produce a work with deposit elements, which is the framework of the expert's activities.

This is reinforced by the fact that the expert's fees are also advanced by one of the parties and are also borne by one of the parties, depending on the outcome of the proceedings.

However, the disappearance of the will is not only of importance for potential claims for damages and the subjects and extent of liability for damages, but also raises much more important issues for the rule of law, given the role of the will and the expert opinion in the litigation. The courts in the case that gave the actuality of the present study did not perceive any concerns and accepted the expert opinion as a basis for their judgment. They did so despite the fact that all the other evidence in the case (expert opinions on handwriting and documents, medical reports) confirmed that the will had been properly drawn up. I consider it a serious shortcoming that there is no specific provision in our current law requiring the forensic expert *expressis verbis* to return the object they have taken over for examination. However, the legislator is excused by the fact that the obligation to return is an obvious and self-evident requirement, and the case at hand is unprecedented, so

[11] In the context of the liability of judges and courts, including its historical context, see in detail: Schlachta Boglárka Lilla, 'A bírák és bírósági hivatalnokok felelősségéről szóló 1871. évi VIII. tc. képviselőházi vitája' in Miskolczi-Bodnár Péter (ed), *Jog és Állam* No. 42. (XXIII. National Conference of Doctoral Candidates in Law, KRE ÁJK 2022, Budapest) 207–215; Schlachta Boglárka Lilla, 'A bírói hivatás polgári kori történetének archivált forrásai és annotált bibliográfiája' in Miskolczi-Bodnár Péter (ed), *Jog és Állam* No. 29. (XXI. National Conference of Doctoral Candidates in Law, KRE ÁJK 2021, Budapest) 101–113; and Schlachta Boglárka Lilla, 'Szemelvények a Budapesti Ítélőtábla fegyelmi ügyeiből (1938–1944)' (2022) 20 (3) Jogtörténeti Szemle 46–54, DOI: https://doi.org/10.55051/JTSZ2022-3p46

there was probably no need for specific rules in this respect. The legal assessment of an expert opinion submitted without the return of the object of the examination can therefore only be approached by applying the auxiliary rules offered by the legal system. This is precisely the aim of the above civil law approach, which, in my view, leads to the following conclusions, which are also civil law in nature at this stage. The legal framework for the expert's operation involving the examination of an object is a contract to produce a work with deposit elements. Under the underlying deposit contract, the main obligation of the depositary, and hence the conceptual element of the deposit, is the safekeeping and return of the object. The forensic expert in the case did not comply with these requirements. The contract of deposit and the contract to produce a work form an indissoluble contractual unit, the consequence of which is that the breach of the main obligations arising from the contract of deposit becomes an irreparable legal defect in the product of the contract to produce the work. Since all this takes place within the judicial system, in the proceedings of the court exercising public authority, the court as the client has a duty of enforcement of the resulting claims against the expert as the contractor. The enforceable claims are of the nature of a warranty for material defects. According Section 6:159 of the Ptk., the repair, replacement and proportional reduction of the consideration (expert's fee) are out of the question, since the will cannot be replaced, and the reduction of the fee would also be inappropriate to remedy the problem. This leaves the right to cancel the contract as remedy for breach of warranty for material defects. The fact that the expert is unable to return the will is of course an obstacle to restoring the original situation, so it is perhaps more appropriate to assume the cancellation of the contract with immediate effect required from the court under Section 6:140(1) of the Ptk., second phrase, as a termination. In any case, it can be said that the exercise of this remedy by the court for breach of warranty for material defects can be combined with legal consequences, which already provide a solution even to the anomaly created by the disappearance of the will.

VII Procedural Conclusions from the Civil Law Approach

It has been established above that the disappearance of the will, namely the fact that the expert, although they would be obliged to do so, is unable to return the document, leads to a performance of the contract by the expert which is suffering from an irreparable legal defect. But what exactly is this legal error in the language of civil procedure and why is it irremediable? In recent years, there have evolved a number of requirements for expert opinions. Most of these are implicitly included in the Pp. since, by attaching a legal consequence to the vague, contradictory or questionable nature of the expert opinion, it practically formulates the expectation that the expert opinion must be clear, uncontradicted and conclusive. In addition, reference should be made to the provisions of the Act on Experts, which are also relevant in this respect, as they set clear formal and substantive requirements

for the expert opinion.[12] However, the fact that the expert would be obliged to return the object of examination is not explicitly stated in any of the laws, but this requirement can only be derived indirectly from the provisions of the Act on Experts, according to which prior approval is required for the performance of an examination that entails the alteration or destruction of the object, meaning that, in principle, the examination cannot entail the alteration or destruction of the object, but the expert must return it in an undamaged state. However, in the case under study, the will disappeared from the expert's possession, yet the courts did not attach any significance to this fact, but based their judgment on the expert's opinion, thus recognising the expert's performance as in conformity with the contract, despite the fact that he did not return the will. The requirement for an expert opinion to be conclusive is constantly evolving in case law and jurisprudence. There is no example in the case law similar to the case at issue in the present study, and thus no decision of the higher courts that provides guidance on what a court wherein such a case arises should do. Consequently, in addition to the civil law conclusion above, we must apply the requirements hitherto established for an expert opinion in the light of the principles guaranteeing the rule of law in order to see what irreparable defect is involved in an expert opinion in connection with which the expert does not return the object of the examination. In my opinion, the loss of the examination object by the expert precludes repeatability (reproducibility and controllability), so the opinion cannot be credible (reliability); not only because the expert can only prove beyond reasonable doubt what they wrote in their opinion by the object of the examination; in other words, the fact that the latter cannot be found deprives the expert opinion of its essential support, thus reducing the expert's findings to mere statements. In my view, in order for an expert opinion to be considered credible under the rule of law, there must always be an objective, theoretical possibility of cross-checking. If, by its very nature, an expert examination entails the destruction (or alteration) of the object, particularly strict procedural guarantees must compensate for the resulting disadvantages. Mónika Nogel, a prominent researcher on the subject, explains,

> There are legal and professional rules on the handling of examination material. Legal requirements can be broadly divided into two groups. The first group includes requirements relating to the documentation of the origin of the examination material (e.g. inspection, search, seizure). These include rules for the proper handling of examination material to prevent loss and avoid mix-ups, requirements for documenting the handover to an expert, etc. These rules are also one of the safeguards to ensure that the expert opinion is reliable: if the expert bases their opinion on examination material of uncertain origin or obtained or handled in an unverifiable manner, the opinion cannot be considered reliable even if its content is correct. Proper documentation of relevant baseline data is essential for the examination, and the objectivity and proper documentation of the examination

[12] See in detail Articles 47–48 of the Act on Experts.

> is demonstrated by the fact that the given baseline data are processed and evaluated in the same way by experts with the appropriate skills. I think it is important to add to the above that, according to judicial practice, the traceability and verifiability on the part of the court and the parties is also an important requirement of the conclusiveness, because if the veracity of the data cannot be checked in any way, the expert opinion cannot be reliable and cannot be conclusive. Nor can an opinion be conclusive if its findings cannot be verified by the interested parties...[13]

This is also in line with the position of Árpád Erdei, according to whom 'an expert opinion must be factual, realistic, up-to-date, scientifically sound, reliable, in conformity with the results of science and the so-called natural rules of the profession, and verifiable (controllable)'.[14] The proliferation of the same views in the judiciary is best reflected in the summary opinion of the Curia's Case Law Analysis Group, 'Expert Evidence in Judicial Proceedings', issued in Budapest on 19 December 2014, which sets out the requirement of reliability and verifiability (controllability) of expert opinions.[15] Accordingly, if the veracity of the data cannot be checked in any way, the expert opinion cannot be reliable and cannot be conclusive.[16] The serious legal defect in the expert's performance, being the fact that the expert did not return the object of the examination, therefore results in the irreparable inconclusiveness of the expert opinion due to its uncontrollability, in the sense of civil procedure, meaning that such an expert opinion must be excluded from the scope of evidence. In the light of the above, it can be concluded that, in the case at hand, the courts made a fatal mistake from the point of view of the rule of law when they accepted the expert opinion as the basis for their judgment without criticism in the absence of the object of the examination. The final lesson of the contract law approach 'combined' with civil procedural law considerations is that, in the case at hand, there was a defective performance and the product is unsuitable for its intended use due to the legal defect, in that it is not an expert opinion but merely an argumentum ***ad hominem,*** an empty, personal slander that violates the authority of the administration of justice under the rule of law. With the

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[13] Nogel Mónika, *Az igazságügyi szakértői vélemények hitelt érdemlősége a büntetőeljárásban* (PhD thesis, 2018 Pécs) 245–246; see also in detail: Nogel Mónika, *A szakértői bizonyítás aktuális kérdései. Kézikönyv a szakértői tevékenységről és a szakvéleményről szakértőknek és jogászoknak* (HVG-ORAC 2020, Budapest). Translation by the author.

[14] See in detail: Erdei Árpád, *Tény és jog a szakvéleményben* (KJK 1987, Budapest).

[15] The present study focuses on the proceedings of ordinary courts, but the findings also apply, of course, to all official and arbitral proceedings in which an expert can be appointed. On the rules and specificities of arbitration, see for example: Boóc Ádám, *A választottbírósági ítéletek érvénytelenítése: Jogösszehasonlító elemzés és az új magyar szabályozás bemutatása* (Patrocinium 2018, Budapest) 272; and Boóc Ádám, 'Észrevételek a kereskedelmi választottbírósági ítéletek érvénytelenítéséről a közrendbe ütközés okán a magyar jogban' (2020) 75 (4) Jogtudományi Közlöny 165–173.

[16] See in detail: see page 162 of the summary opinion of the Curia's Case Law Analysis Group, 'A szakértői bizonyítás a bírósági eljárásban', dated on 19 December 2014, Budapest, under the subheading 'A követhetőség és az ellenőrizhetőség követelménye'.

above reasoning, I of course do not contest the court's right to discretion and evaluation of evidence, but I am arguing that an expert opinion without the object of examination cannot be evidence at all.

The German Federal Administrative Court recently handed down a landmark decision on this issue. It has ruled with general validity that an expert opinion that is in practice limited to a statement but does not contain either the facts on which the finding is based or the means of ascertaining those facts in a verifiable manner is materially defective and cannot be taken into account as evidence.[17]

VIII Constitutional and Human Rights Considerations

The same result is obtained if the problem of a lost will is approached from a constitutional law perspective. In civil proceedings under the rule of law, a party interested in overturning an expert opinion may rely on a number of procedural means, but it is no exaggeration to say that all of these are effectively undermined by the absence of the object of the examination, since it becomes objectively impossible to check the veracity of the opinion and to prove against it. The starting point for the fundamental rights approach is Article XXVIII(1) of the Fundamental Law, which states that 'everyone shall have the right to have any indictment brought against him or her, or his or her rights and obligations in any court action, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by an Act'. The right to a fair trial is the procedural, process-specific expression of the rule of law, a general expectation the precise content of which has been elaborated in recent decades by the European Court of Human Rights (ECtHR) and constitutional courts under the rule of law. As a consequence, the right to a fair trial includes a number of sub-rights or sub-requirements, but it is impossible to list them exhaustively, since both in the literature and in the practice of law, more and more new expectations are constantly being formulated, mostly in the context of specific violations of rights in individual cases. The right to a fair trial is thus also a constantly evolving and expanding abstract requirement for judicial and administrative procedures under the rule of law, which should, however, be directly enforced not only by the ECHR and the constitutional courts, but also by the constitutional institutions operating at lower levels, since the guarantee of fundamental rights – including the fairness of proceedings – cannot be independent of the adjudication of cases on the basis of specific law. The sub-justification of the right to a fair trial, which must be highlighted in the first place for the purposes of the case under examination, is the principle of equality of arms, and as part of this the possibility

[17] See in detail the decision GZ Ra 2016/19/0350 of the German Federal Administrative Court of 22 March 2017, in which the court clearly states the requirement of verifiability of the expert opinion, and also states that if a court or authority relies on an unverifiable expert opinion, this constitutes a serious omission in the investigation of the facts.

of proof and counter-proof. The right to an adversarial process is also worth mentioning. The requirement of equality of arms is essentially a fair balance between the parties, according to the case-law of the ECHR and the Constitutional Court of Hungary, and the right to an adversarial process requires that each party be given a reasonable opportunity to present its case and evidence. In the case at hand, it became objectively impossible for the party interested in overturning the expert's opinion to provide any counter-evidence to the expert's allegations, as the only possible starting point would have been the original will, which was not available because the expert did not return it. I am convinced that, in a fair procedure, only an expert opinion that is the result of a transparent, traceable and verifiable expert examination can be evidence. An essential condition for the fair acquisition of an expert opinion as evidence and a minimum requirement for the fairness of the expert procedure is that the forensic expert must return the object of the examination entrusted to them in the same condition as when they received it. Civil proceedings in which the expert is not required to do so cannot be fair. In my view, therefore, by basing their judgement without criticism of the opinion of the expert who did not return the object of the examination, the courts took a position that was blatantly contrary to the Fundamental Law.

As far as I know, there has never been a case like this before the European Court of Human Rights, as the disappearance of evidence, especially from a member of the judiciary, is an unprecedented event. However, looking at the case law in Strasbourg, it can be said that, like the constitutional courts, the ECHR treats the assessment of evidence as essentially a matter for national courts. At the same time, there has been a shift in the practice of the ECHR towards the guarantees of Article 6(1) of the Convention on the procedural treatment of evidence, in that if a piece of evidence is not obtained in the context of a fair trial, it cannot be considered as evidence. Indeed, the ECHR has ruled that the whole procedure, including the way in which the admissibility of evidence is decided, must be fair.[18] In my view, this kind of distinction, which I believe to be correct, is not yet, or only to a limited extent, characteristic of constitutional courts.

IX A Right *in Rem* Approach

Just in case the above multi-pronged reasoning would not be sufficiently convincing, it is also useful to substantiate briefly, with arguments from a right *in rem* perspective, why the trial courts should have excluded the expert opinion without the object of examination from the scope of evidence. The starting point for answering the question from such a perspective is to explore the nature of the relationship *in rem* between the opinion and the object of examination.

[18] See for example the cases *Blucher v Czech Republic,* no. 58580/00, §52, ECHR 11 January 2005 and *Dombo Beheer B.V. v Netherlands,* no. 14448/88, § 32–34, ECHR 27. October 1993.

The object of examination and the expert opinion form an inseparable ideological unit of things and, in my view, are bound together by a kind of abstract accessory relationship. An expert opinion, as a main thing, is not fit for its intended use without the object of examination as an accessory (subordinate thing), in that it is not an expert opinion and cannot therefore be used as a basis for judgment.

X *De Lege Ferenda*

The above raises the question as to how the court of first instance should have proceeded when the expert declared that he was unable to return the will entrusted to him. In my view, the legal institution of mistrial, as it is known in Anglo-Saxon law – primarily in criminal cases – can serve as a starting point and also as a solution to consider.[19] Of course, we cannot turn a blind eye to the differences between legal systems, so I am not advocating the adoption of the legal instrument without change, but the introduction of something similar in domestic law. Before elaborating on this, however, it is useful to examine what the trial judge should have done on the basis of the domestic legislation in force when the serious anomaly was detected, since borrowing legal institutions from foreign legal systems in order to keep the trial within the lawful framework is avoidable. It is undoubtedly an unprecedented and extraordinary event when the only evidence available in the course of a judicial procedure disappears, moreover from a public servant of justice. From this point onwards, not least because of the fundamental rights implications detailed above, the dispute goes beyond the scope of the individual case and the rule of law inevitably becomes a party to it. The response (and speed of response) of the actors of justice will determine whether Pandora's box opens or whether the rule of law is activated and its immune system is able to stop the killer disease attacking the cells in a timely manner. If, on one occasion only, a judicial verdict may be based on an expert's opinion that was drawn up without the expert having returned the object of the examination, although they should have done so, then anyone can be convicted on any trumped-up indictment, and all that is needed is an expert who, by their unverifiable and unsubstantiated statements, justifies the accusation. It hardly needs to be said that this is an evocation of dark historical times and unthinkable under the rule of law. It is precisely for this reason that the courts should have taken this long-term consequence into account when taking their position, which should have been nothing other than the immediate and unhesitating exclusion of the expert opinion from the evidence.

[19] See, for example, Article 62 of Chapter 15A of the North Carolina Code of Criminal Procedure on mistrial. This provides that a judge shall declare a mistrial, either on their own motion or upon request, if it becomes impossible to conduct the trial in accordance with law. US jurisprudence has extended the scope of the mistrial, which is usually also held when there is a serious procedural irregularity or misconduct in relation to an evidentiary matter. The legal consequence of a mistrial is to declare the proceedings null and void and to terminate them, and then to conduct them again legally, starting from the beginning.

Returning to the institution of the mistrial, which is now known in Anglo-Saxon law and can be regarded as a striking manifestation of the self-defence mechanism of the rule of law, it can be stated that it would not be incompatible with our domestic law to empower (and at the same time oblige) the judge in a trial to declare a so-called 'mistrial' in the event of certain conditions being met, but especially in the event of the rule of law being threatened. In this case, the judge could be entitled to ask for a binding and non-appealable preliminary guidance of a special panel on the procedure to be followed, as a further development of the Anglo-Saxon legal institution. Since there is a fundamental interest in reaching a final decision on a matter of major importance for the rule of law as soon as possible, the panel to be mandatorily involved by the court in such a case could consist of delegates from the Curia, the Constitutional Court and the Prosecutor General's Office. The participation of the Curia and the Constitutional Court does not require any particular explanation, while the involvement of the Prosecutor General's Office is justified by the already existing *amicus curiae* power of the body.[20]

XI Summary

In the light of the above, and in accordance with the requirements of the rule of law and fair trial, the following conclusions can be drawn. If the expert does not return the object of the examination, although they would be obliged to do so, they cannot present their expert opinion, since they cannot perform in conformity with the contract, the expert opinion will not be fit for its intended use, meaning that it cannot be used as a basis for a judgment. If the expert nevertheless submits their opinion, the court hearing the case must immediately make it clear that the expert's opinion is excluded from evidence and must confirm this in its judgment. Since an unverifiable (uncontrollable) expert opinion cannot be evidence under the rule of law, the burden of the lack of evidence in such a case falls on the party who had an evidentiary interest in the expert's proceedings. The expert's liability for damages is twofold. In view of their strict liability of custody, the expert is liable to the owner (and depositor) of the object of the examination as a thing of pecuniary value for the loss, and, if they nevertheless submit their expert opinion and in it confirms the position of the party requesting the appointment of the expert, they are also liable to this party as the victim of the lack of evidence for which the expert is responsible.

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[20] In relation to the power of the Prosecutor General's Office as *amicus curiae*, see in detail Article 11(2)(j) of Act CLXIII of 2011 on the Prosecution Service, according to which the Prosecutor General may, in proceedings before the Curia, express their professional opinion on a question of law, representing the public interest, on their own initiative or at the request of any party, in order to unify the case law of the courts, even if the prosecutor does not participate in the proceedings. The Prosecutor General is obliged to express their professional opinion at the request of the Curia. The opinion of the Attorney General, which is not binding for the Curia, shall be communicated to the parties of the proceedings. See also: Aleku Mónika, *Közérdekvédelem az igazságszolgáltatásban. Az ügyész polgári jogi, polgári eljárásjogi és egyéb garanciális funkciója* (PhD thesis, 2022, Budapest) 237–246.

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