



ELTE | LAW

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BUDAPESTINENSIS DE ROLANDO
EÖTVÖS NOMINATAE
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Varga, István*

Preface to the Issue of the *Annales*

Conducting research and publishing in foreign languages are an asset that ELTE Faculty of Law has always endorsed and took great pride in. Publications in foreign languages, being an indispensable means of the Faculty's participation in the international academic discourse, have always been a matter of high priority for the Faculty of Law of ELTE and have taken shape in the two main pillars of foreign language periodicals: the *Annales* and – later on – the *ELTE Law Journal*.

The Faculty's oldest, annual foreign language journal, the *Annales*, which predominantly contains English and German language contributions from the Faculty's professors and lecturers, has been published for over six decades now, ever since 1959. The volumes not only provide an internationally accessible forum for ELTE's professors, but also for guest professors and authors, thereby functioning as a channel enabling the flow and exchange of information, knowledge and scientific results, studies, articles and publications on lectures and international conferences held at the Faculty, embracing substantially every aspect of legal and political science. It is my great pleasure to recommend this anniversary edition with my compliments, trusting that the invaluable tradition of writing and publishing in foreign languages will continue and further proliferate in the upcoming volumes of the *Annales*, stemming from within the walls of ELTE Faculty of Law and from other scientific fora, where researchers feel spiritual affinity for our Faculty.

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Rennert, Klaus*

Klägerrechte und Entscheidungsmöglichkeiten nach der neuen ungarischen Verwaltungs- gerichtsordnung**

ABSTRACT

Until 2013, administrative court procedures in Hungary were regulated in a section of the Code of Civil Procedure and were thus a special type of civil procedure. Since then, Hungary has been taking steps to make administrative proceedings independent, both in terms of the court organisation and procedural law. The legislation in this regard has been and continues to be subject to intensive academic monitoring, also by foreign observers. This article by the president of the highest German administrative court analyses central aspects of the new Hungarian Act on Administrative Court Procedure from a comparative law perspective.

KEYWORDS: judicial protection against administration, types of actions, enforcement of administrative court judgments, margin of appreciation, principles of evidence proceedings

I. VORBEMERKUNG

Wer als Ausländer zu einem Gesetzgebungswerk Stellung nehmen soll, steht immer im Verdacht der Besserwisserei. Das würde erhärtet, nähme er sein eigenes Recht zum Maßstab und begnüge er sich damit, Differenzen aufzuzeigen – womöglich in solchen Differenzen ein Zurückbleiben des fremden Rechts hinter einem vermeintlichen Standard zu sehen, den das eigene Recht setzt. Eine solche Haltung wäre nicht nur verfehlt; sie vergäbe auch eine Chance.

Natürlich beruht eine Stellungnahme zu einem fremden Gesetz auf einem Vergleich mit dem eigenen Recht. Aber das ist kein Messen, sondern ein Vergleichen – ein Vergleichen, welches in beide Richtungen lernbereit ist. In diesem Sinne handelt es sich

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** Referat anlässlich der Arbeitstagung der obersten Verwaltungsgerichte Ungarns und Deutschlands (Budapest, 11. Oktober 2018.).

um Rechtsvergleichung, die beide Seiten in Dialog bringt und für beide Seiten Chancen birgt. Solche Rechtsvergleichung ist im heutigen Europa unverzichtbar.

Eine Inkongruenz besteht gleichwohl. Sie geht aber zu Lasten des Autors: Sein eigenes Recht kennt er vergleichsweise gut, das fremde Gesetz hingegen vergleichsweise schlecht. Das birgt die Gefahr von Missverständnissen und Fehlurteilen. Will man auf den Vergleich nicht von vornherein verzichten, muss dieses Risiko eingegangen werden. Ich bitte insofern von vornherein um Nachsicht.

II. MASSSTÄBE

Ein Vergleich braucht Vergleichskriterien. Diese sind unvermeidlich subjektiv. Sie entstammen der Problemwahrnehmung des Autors, hier also der deutschen prozessrechtlichen Diskussion. Diese kreist derzeit um zwei zentrale Fragen.

Zum einen geht es um die Funktion der Verwaltungsgerichtsbarkeit. In Deutschland dient sie vornehmlich dem subjektiven Rechtsschutz, also dem Schutz der Rechte – im Kern der Grundrechte – des Bürgers gegenüber dem Staat. Diese Funktion ist verfassungsrechtlich verbürgt und damit unverfügbar. Daneben trat und tritt jedoch eine andere Funktion, die regelmäßig als objektive bezeichnet wird und die ich die aufsichtliche Funktion der Verwaltungsgerichtsbarkeit nennen möchte. Wie die Verfassungsgerichte die Verfassungsmäßigkeit der Gesetzgebung überwachen, so sollen die Verwaltungsgerichte die Gesetzmäßigkeit der Verwaltung kontrollieren. Das löst sich von subjektiven Bürgerrechten und überprüft die objektive Rechtmäßigkeit des Verwaltungshandelns in jedweder Hinsicht. Insofern stellen sich vornehmlich zwei Fragen: Wer darf eine derartige Überprüfung veranlassen? Und: Kann der kontradiktorische Prozess das überhaupt leisten? Oder anders gewendet: Wie muss der Verwaltungsprozess konzipiert sein, um diese Funktion wahrnehmen, die damit verbundenen Erwartungen erfüllen zu können?

Daneben tritt in jüngerer Zeit eine andere zentrale Frage wieder in den Fokus, die die Institution der Verwaltungsgerichtsbarkeit eigentlich von Anbeginn an begleitet hat: ihr Verhältnis zur öffentlichen Verwaltung, zur Exekutive. Inwieweit darf das Gericht das Verwaltungshandeln überprüfen? Welche Entscheidungen darf das Gericht fällen? Und wie können die gerichtlichen Entscheidungen umgesetzt werden? In Deutschland kommt den Verwaltungsgerichten eine sehr weitreichende Kontrollkompetenz zu; sie dürfen fehlerhafte Verwaltungsentscheidungen nicht nur aufheben oder für unwirksam erklären, sondern die Verwaltung auch zu bestimmtem Handeln verpflichten; und die Vollstreckungsfrage stellt sich im Grunde nicht, weil die Verwaltung zur freiwilligen Umsetzung im Allgemeinen bereit ist. Aber zum einen gerät diese Bereitschaft der Exekutive zu freiwilligem Gehorsam jüngst ins Gerede. Und zum anderen fragt sich, ob all dies auch für die aufsichtliche Funktion der Verwaltungsgerichtsbarkeit gilt.

All dies sind in Deutschland bislang offene Fragen. Welche Stellung bezieht die neue ungarische Verwaltungsgerichtsordnung dazu?

III. VERBINDUNG VERSCHIEDENER FUNKTIONEN

Die ungVwGO verfolgt einen integrativen Ansatz: Sie unterscheidet nicht zwischen verschiedenen Verfahrensarten, die sie bestimmten Streitgegenständen oder bestimmten Gruppen von Klägern / Antragstellern zuordnet, sondern stellt eine einzige Verfahrensart zur Verfügung. Natürlich trägt sie bestimmten Besonderheiten von Streitgegenständen oder Klägern usw. durchaus Rechnung, nur geschieht dies durch Variationen innerhalb der einheitlichen Verfahrensart. Unbenommen bleibt, dass für Eil-, Zwischen- und Nebenverfahren besondere Regeln gelten; das ist selbstverständlich und ändert am Grundsatz nichts. Ebenso wenig ändert, dass die ungVwGO im Fünften Teil (§§ 124–154) Sondervorschriften für vereinfachte Verfahren, für Unterlassungs- oder Zahlungsprozesse, für bestimmte Aufsichtsverfahren über Selbstverwaltungskörperschaften und Gemeinden sowie für die Wiederaufnahme, die Urteilstvollstreckung und für Kompetenzstreitigkeiten vorsieht.

Die *Aufgabe der Verwaltungsgerichte* wird im Gesetz dahin umschrieben, wirkamen Rechtsschutz zu bieten (§ 2 Abs. 1). Das greift die Vorgabe des ungarischen Grundgesetzes auf (Art. 28 Abs. 7 ungGG) und rückt den subjektiven Rechtsschutz in den Vordergrund. Das ungarische Grundgesetz sieht aber ebenso vor, dass Gerichte „über die Gesetzlichkeit von Verwaltungsbeschlüssen“ entscheiden (Art. 25 Abs. 2 lit. b ungGG). Der ungVwGO ist dementsprechend eine Präambel vorgeschaltet, die neben den subjektiven Rechtsschutz gleichrangig die Gewährleistung der Gesetzmäßigkeit der Verwaltung stellt. Tatsächlich kommen als Kläger nicht nur natürliche und juristische Personen in Betracht, deren „Recht oder berechtigtes Interesse“ unmittelbar betroffen ist,¹ sondern auch anerkannte Verbände sowie Aufsichtsbehörden und die Staatsanwaltschaft (§ 17). Auch solche institutionellen Kläger müssen in der Klageschrift „die durch die Verwaltungstätigkeit verursachte Rechtsverletzung“ darlegen (§ 37 Abs. 1 lit. f). Subjektiver Rechtsschutz und objektive Verwaltungskontrolle stehen insofern gleichrangig nebeneinander. Der Bürgerbeauftragte ist nicht (mehr?) klageberechtigt;² eine Popularklage gibt es nicht.

Gegenstand von Verwaltungsstreitsachen kann ein breites Spektrum des Verwaltungshandelns sein. Zwar besteht insofern keine Generalklausel, und bestimmte Hoheitsakte werden justizfrei gestellt (Auswärtiges sowie Militärisches, irritierenderweise

¹ Damit wurde die vorherige Beschränkung auf solche Kläger, die bereits im vorangegangenen Verwaltungsverfahren formell beteiligt waren [vgl. K. Rozsnyai, Änderungen im System des Verwaltungsrechtsschutzes in Ungarn, (2013) (9) *Die Öffentliche Verwaltung*, 335–342, 338], aufgegeben.

² Vgl. aber § 141 Abs. 1 betr. Normenkontrollverfahren zu Gemeindefestsetzungen.

auch fremdenpolizeiliche Maßnahmen; § 4 Abs. 4, vgl. § 50 Abs. 6). Ansonsten aber sind nicht nur Verwaltungsakte, sondern auch Realakte (einschließlich deren Unterlassung) klagbar, ebenso wie administrative Rechtsnormen (sofern sie „*self executing*“ sind, sonst nur inzident, § 4 Abs. 5)³ sowie dienstrechtliche Maßnahmen und Verwaltungsvertragsverhältnisse (§ 4 Abs. 1-3). Probleme dürfte die Vorschrift bereiten, dass nur Verwaltungshandlungen klagbar sind, „die auf die Änderung der Rechtslage von [...] Rechtssubjekten gerichtet sind“ (§ 4 Abs. 2). Diese Finalität passt bei „Einzelentscheidungen“ und zumeist auch bei Rechtsnormen, wird aber auch bei sonstigen „behördlichen Maßnahmen“ vorausgesetzt (§ 4 Abs. 3 lit. b ungVwGO), was bei Realakten problematisch erscheint.⁴ Vor allem aber bewegt sich die Vorschrift ganz im Umfeld des subjektiven Rechtsschutzes, ist aber der aufsichtlichen Funktion der gerichtlichen Verwaltungskontrolle inkommensurabel. Auch diese auf die Wahrung individueller Bürgerrechte zu beschränken, dürfte nicht beabsichtigt sein und wäre jedenfalls im europäischen Umweltrecht wohl unzulässig.⁵

Der ungarische Verwaltungsprozess steht unter Geltung des *Beibringungsgrundsatzes* (§ 3 Abs. 3, § 37 Abs. 1 lit. f). Ausnahmen gelten nur in Ansehung schwerer Fehler, die zur Nichtigkeit des Verwaltungshandelns führen können, sowie bei besonderer gesetzlicher Bestimmung (§ 2 Abs. 5, § 85 Abs. 3). Nicht ganz deutlich ist, ob sich die Darlegungspflicht des Klägers nur auf Tatsachen oder auch auf Rechtsgründe bezieht, auf die er seine Behauptung, das Verwaltungshandeln sei rechtswidrig, stützen möchte (vgl. § 37 Abs. 1 lit. f sowie § 48 Abs. 1 lit. k); doch stehe das einmal dahin.⁶ Das Regime des Beibringungsgrundsatzes dürfte sich dem Umstand verdanken, dass sich der Verwaltungsprozess in Ungarn erst in jüngerer Zeit aus dem Zivilprozess emanzipiert; dieser Vorgang ist noch nicht abgeschlossen. Ihn beizubehalten, mag für institutionelle Kläger im Rahmen der aufsichtlichen Funktion der Gerichte angemessen erscheinen; diese besitzen selbst Mittel und Wege, sich die nötigen Informationen zu beschaffen, und der Verwaltungsprozess darf durch eine Ubiquität der rechtlichen und tatsächlichen Prüfungspunkte nicht überfordert werden, was bei einer unbeschränkten objektiven Kontrolle drohen würde. Individualkläger aber sind gegenüber der Behörde strukturell im Nachteil. Das wird noch dadurch verstärkt, dass auch das Recht auf Akteneinsicht den Regeln des Zivilprozesses folgen soll (§ 36 Abs. 1 lit. i). Jedenfalls

³ Zur Normenkontrolle betr. Gemeindegesetzungen vgl. §§ 139 ff., einschließlich eines Zwischenverfahrens zur konkreten Normenkontrolle bei der Kurie, § 144.

⁴ Allerdings sind (vorbeugende) Unterlassungsklagen vorgesehen (§ 8 Abs. 3 lit. h ungVwGO), die sich wohl nicht nur gegen drohende Verwaltungsakte, sondern auch gegen Realakte richten können (vgl. § 38 Abs. 1 lit. c ungVwGO).

⁵ Vgl. EuGH, Urteil vom 11.05.2011, Trianel – C-115/09 – Slg. 2011, I-3673.

⁶ Ein Zwischenverfahren der konkreten Normenkontrolle durch das Verfassungsgericht oder der Vorabentscheidung durch den Europäischen Gerichtshof kann das Gericht auch von Amts wegen einleiten (§ 34); trotz der insofern undeutlichen Formulierung dürften nur Zwischenverfahren und nicht auch eigenständige Verfahren gemeint sein.

in Ansehung subjektiver Rechte empfiehlt sich daher, sich von zivilprozessualen Reminiscenzen zu lösen. Eine amtswegige Sachaufklärung nützt auch der Verwaltung selbst, schon weil die gerichtliche Entscheidung dann ein höheres Maß an Richtigkeit und Verlässlichkeit aufweist – und damit als potenzielles Vorbild für Parallel- und Folgefälle taugt.

Ebenfalls eher zur aufsichtlichen denn zur Rechtsschutzfunktion der Gerichtsbarkeit passt die vergleichsweise zurückhaltende *Kontrolldichte*. Selbstverständlich beschränkt sich die Beurteilung durch das Gericht auf die Rechtmäßigkeit des Verwaltungshandelns und erstreckt sich nicht auf dessen Zweckmäßigkeit (§ 85 Abs. 1). Auch das Verwaltungsermessen ist aber rechtlich gebunden; Ermessensfehler sind Rechtsfehler. Das Gesetz sieht insofern lediglich eine Überprüfung dahin vor, ob das Ermessen überhaupt ausgeübt wurde und ob die angestellten Erwägungen in der gegebenen formellen Begründung mitgeteilt wurden (§ 85 Abs. 5). Man vermisst die zusätzliche Prüfung, ob diese Erwägungen rechtlich in der Sache auch tragfähig sind (oder ob die Verwaltungsentscheidung materiell „begründbar“ ist). Diese Zurückhaltung mag der aufsichtlichen Kontrollfunktion des Gerichts genügen; für einen effektiven Rechtsschutz geht sie wohl zu weit. Gerade in die Grundrechtssphäre von Individualklägern darf die Verwaltung nur verhältnismäßig eingreifen; das stellt gerade an die Ermessensausübung erhöhte Anforderungen.

Es ist aber damit zu rechnen, dass sich die künftige Judikatur der ungarischen Verwaltungsgerichte dieser Frage annehmen wird. Gerade der Grundsatz der Verhältnismäßigkeit etabliert sich mehr und mehr zum gemeinsamen europäischen Grundrechtsbestand. Dabei ist er längst nicht ausjudiziert. So gibt es Stimmen, denen zufolge Deutschland die Intensität der gerichtlichen Verwaltungskontrolle insofern etwas übertreibt. Vermutlich wird man sich in irgendeiner Mitte treffen.

IV. KLAGEARTEN UND GERICHTLICHE ENTSCHEIDUNG

Das System der Klagearten und Entscheidungsmöglichkeiten in der ungarischen Verwaltungsgerichtsordnung erschließt sich nicht auf den ersten Blick. Die ungVwGO kennt zwar ebenfalls die Feststellungsklage, die Leistungsklage sowie die Gestaltungsklage (§ 38 Abs. 1). Keine Fragen werfen Leistungsklagen auf Erfüllung eines Verwaltungsvertrages sowie auf Schadensersatz aus Vertrag oder aus einem Dienstverhältnis auf (§ 38 Abs. 1 lit. d und e, §§ 130 ff.); hier herrscht ersichtlich große Nähe zum Zivilprozess. Ausgeklammert sei auch die Leistungsklage auf Unterlassung drohenden schlichten Verwaltungshandelns (§ 38 Abs. 1 lit. c). Steht aber förmliches Verwaltungshandeln in Rede, so unterlegt der deutsche Beobachter dem Prozessrecht automatisch die materiell-rechtliche Lehre vom fehlerhaften Staatsakt: Fehlerhafte Normen sind nichtig, fehlerhafte Einzelakte (Verwaltungsakte) sind im Regelfalle wirksam, aber

aufhebbar. Darauf reagiert das Prozessrecht mit der Klage auf Feststellung der Nichtigkeit oder auf Kassation, bei „lässlichen“ (behebbar) Fehlern auf Unanwendbarkeit oder Unvollziehbarkeit bis zur Fehlerheilung. Unterlässt die Verwaltung hingegen einen Hoheitsakt, auf den ein Anspruch besteht, so steht die Leistungsklage auf Normerlass oder die Verpflichtungsklage auf Erlass des Verwaltungsakts bereit. Es sei versuchs- und ausnahmsweise einmal gestattet, das ungarische Prozessrecht über diesen deutschen Leisten zu schlagen. Dann zeigen sich Übereinstimmungen, aber auch einige Besonderheiten.

Der betroffene Individualkläger kann eine Abwehrklage gegen eine ihn belastende Hoheitsmaßnahme erheben. Das Gesetz unterscheidet insofern nicht zwischen Einzelakt und Norm. Die Abwehrklage hat, wenn das Gesetz es bestimmt, aufschiebende Wirkung, andernfalls kann das Gericht dies anordnen (§§ 50 ff.). Erweist sich die Klage als begründet, so wird die Hoheitsmaßnahme (*ex tunc*) „vernichtet“ oder, wenn Gründe des öffentlichen Interesses oder Drittinteressen dies gebieten, (*ex nunc*) „außer Kraft gesetzt“ (§ 92); „bei Bedarf“ wird die Behörde zur Durchführung eines neuen Verfahrens verpflichtet (§ 89 Abs. 1 lit. b), wofür das Gericht einen „Leitfaden“ geben kann, der die Behörde bindet (§ 86 Abs. 4, § 97 Abs. 4). All dies gilt freilich nur, wenn die Hoheitsmaßnahme an einem besonders schweren Fehler leidet (§ 92 Abs. 1 lit. a–c; hierher rechnet auch die Angabe einer falschen Ermächtigungsgrundlage) oder die Verwaltungshandlung nicht geändert werden kann (§ 92 Abs. 1 lit. d; dazu sogleich). Die Normenkontrolle gemeindlicher Satzungen führt immer zur rückwirkenden „Vernichtung“ (§ 146). Die Beseitigung eines Verwaltungsakts wirkt nur *inter partes* (§ 96), die einer Satzung *inter omnes* (§ 146 Abs. 5, vgl. § 147).

Die Ausnahme, dass die Verwaltungshandlung nicht geändert werden kann, zielt auf eine Änderung durch das Gericht selbst. Hierin unterscheidet sich das ungarische vom deutschen Recht: Wenn „die Eigenart des Falles es zulässt“ und die Sache spruchreif ist, kann das Gericht einen rechtswidrigen Verwaltungsakt selbst ändern. Das gilt auch und erst recht, wenn das Gericht die Sache schon einmal an die Verwaltung zurückgegeben hatte und die Behörde den vom Gericht mitgegebenen „Leitfaden“ ignoriert (§ 90 Abs. 1 und 2).⁷ Freilich ist die Änderungsbefugnis des Gerichts recht schmal. Sie besteht nicht bei Billigkeits- oder Ermessensakten, auch nicht bei haushaltswirksamen Entscheidungen, und generell nicht bei administrativen Rechtsnormen (§ 90 Abs. 3, § 4 Abs. 3 lit. c); dann bewendet es bei „Vernichtung“ oder „Außerkraftsetzung“. Auch in den verbleibenden Fällen muss sich die Änderung im Rahmen des Klageantrags halten (§ 85 Abs. 1). Dem Kläger darf daher nur ein „Minus“ zugesprochen werden, aber kein „Aliud“. Die Änderungsbefugnis läuft daher bei Anfechtungsklagen

⁷ Wird das Gericht auf diese Weise erneut mit der Sache befasst, so sind die im ersten Prozess beteiligten Richter ausgeschlossen (§ 10 Abs. 1 lit. h).

auf eine Teilstattgabe hinaus. Der Hauptanwendungsfall dürfte die gerichtliche Herabsetzung einer durch Bescheid festgesetzten Abgabe sein (vgl. § 91).

Gravierender ist der Unterschied bei Verpflichtungsklagen, auch bei Drittanfechtungsklagen. Überall stehen Verwaltungsgerichte vor dem Problem, ihre Leistungsurteile bei der Verwaltung durchzusetzen. Das Problem wird in solchen Ländern vermieden, die den Gerichten lediglich eine Kassationsbefugnis zuerkennen; doch wäre dies mit dem Gebot, effektiven Rechtsschutz zu gewähren, schwerlich vereinbar. Weder Ungarn noch Deutschland gehören deshalb zu diesen Ländern. Deutschland kennt vielmehr die Verpflichtungsklage bei gebundener und die Bescheidungsklage bei Ermessensverwaltung. Ungarn ist rigider: Hier ist das Gericht, wie gezeigt, bei gebundener Verwaltung in bestimmten Fällen befugt, den begehrten Bescheid an Stelle der Behörde selbst zu erlassen (§ 90 Abs. 1). Andernfalls verpflichtet es die Behörde zur Durchführung eines neuen Verwaltungsverfahrens unter Vorgabe eines bindenden „Leitfadens“ (§ 89 Abs. 1 lit. b, § 86 Abs. 4, § 97 Abs. 4). Wiederholt die Behörde den Fehler, kommt wiederum ein ersetzender Bescheid des Gerichts in Betracht (§ 90 Abs. 2). Bleibt die Behörde hingegen untätig oder ist die Bescheidersetzung aus den bereits erwähnten Gründen unzulässig, dann verbleibt nur die Erzwingung im Rahmen der Urteilsvollstreckung. Hier sieht das ungarische Recht erhebliche Geldbußen (Zwangsgelder) vor, die nicht nur gegen die Behörde, sondern auch gegen deren Leiter persönlich festgesetzt werden können (§ 152); das Gericht kann auch in die behördliche Kompetenzordnung eingreifen und eine andere Verwaltungsstelle für zuständig erklären (§ 153).

Die gerichtliche Änderung einer Verwaltungsentscheidung stößt in Deutschland sogleich auf Einwände unter dem Gesichtspunkt der Gewaltenteilung. Freilich ist zu konstatieren, dass auch andere Länder den Gerichten diese Befugnis verleihen, weil sie die Vollziehung gerichtlicher Erkenntnisse effektiver gestaltet (so etwa die Schweiz und Österreich). Ungarn hat diesen Schritt erst mit der Verwaltungsgerichtsordnung von 2017 unternommen. Es kannte zwar die gerichtliche Änderung von Verwaltungsmaßnahmen schon zuvor, jedoch eng beschränkt auf Gegenstände des Statusrechts von Personen (Anerkennung als Staatenloser oder Flüchtling), des Steuer- und Sozialrechts sowie solcher personenstands- und registerrechtlicher Sachen, die in Deutschland als Angelegenheiten der Freiwilligen Gerichtsbarkeit zusammengefasst werden.⁸ Jetzt wurde es verallgemeinert.

⁸ Rozsnyai, Änderungen im System..., 339–340.; I. Vadál, J. Zeller, Die Verwaltungsgerichtsbarkeit in Ungarn, (2015) 61 (3) *Osteuropa – Fragen zur Rechtsentwicklung in Mittel- und Osteuropa*, 298–305, 304, <https://doi.org/10.5771/0030-6444-2015-3-298>

V. SCHLUSSBEMERKUNG

Bis zum Erlass des neuen ungarischen Grundgesetzes vom 25. April 2011 war der Verwaltungsprozess in einem Abschnitt der Zivilprozessordnung geregelt und damit ein Sonderfall des Zivilprozesses. Seither betreibt Ungarn die Verselbständigung der Verwaltungsgerichtsbarkeit, zunächst durch das Gesetz Nr. CLXI von 2011, das am 1. März 2013 in Kraft trat und insb. die Einrichtung besonderer Arbeits- und Verwaltungsgerichte auf der unteren Stufe und eine relative Verselbständigung verwaltungsrechtlicher Spruchkörper in der Mittel- und Oberinstanz brachte,⁹ sodann durch das Gesetz Nr. I von 2017 über die Verwaltungsgerichtsordnung, das am 1. März 2017 verkündet wurde. Derzeit werden weitere Reformschritte zur Gerichtsverfassung erwogen, durch welche auch in der Mittel- und Oberinstanz selbständige Verwaltungsgerichte errichtet werden sollen. Damit kann der Sachverstand, den die Richter in den verselbständigten Spruchkörpern schon bislang sammeln konnten, im Sinne einer weiteren Spezialisierung gefestigt und vertieft werden. Die neue Verwaltungsgerichtsordnung gibt ihnen hierzu ein gut geeignetes Verfahrensrecht an die Hand.

⁹ Dazu insb. Rozsnyai, *Änderungen im System...*, 335 ff.

Kovács, András György*

The Curia's tasks in the Code of Administrative Court Procedure**

ABSTRACT

Act I of 2017 on the Code of Administrative Court Procedure (hereinafter referred to as: Kp.), to be entered into force on 1 January 2018, brings about fundamental changes in the system and scope of administrative justice. My lecture focuses on the modified role of the Curia as the country's supreme administrative court. The Curia has been given more significant tasks as a result of the extension of the administrative courts' competences and the Curia's strengthened position within the system of administrative justice. My basic premise is that the Curia, as a judicial forum responsible for the harmonisation of the administrative courts' caselaw and as a court of second instance, has an overweight role in the system of administrative justice, which is contrary to the rationale behind the Kp.'s regulatory framework.

KEYWORDS: Supreme Court, Curia, scope of administrative justice, administrative court procedure, administrative procedure, court case law, judicial forum, system of appeals, full review

I. THE GENERAL REASONS BEHIND THE INCREASED ROLE OF THE CURIA AS THE SUPREME ADMINISTRATIVE COURT

Several factors explain the fundamental changes in the characteristics and scope of administrative justice. The key ones are the following: a significant extension of the Kp.'s material scope in comparison with Chapter XX of the Code of Civil Procedure, an important increase in the administrative courts' procedural and decisionmaking competences and the possibility of a broader interpretation of the Kp.'s abstract

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definitions. These reasons together result in the emergence of a need for the further development of procedural and substantive administrative law.

The Kp.'s material scope has been fundamentally changed, since it now extends to administrative acts and the omission of such acts, as opposed to the previous regulation according to which administrative decisions could be challenged before court. By virtue of the new rules, individual decisions (except for supplementary ones, the ones related to the Government's activities and the ones delivered in a management and leadership relationship), administrative measures, administrative contracts and provisions of general effect (communications, resolutions, recommendations, regulations, etc.) – not falling under the scope of the Act on Legislation – to be applied in an individual case may be subject to judicial review. Legal disputes related to civil service and, in certain cases defined by law, legal disputes related to a public law issue that does not qualify as an administrative dispute are to be dealt with by the administrative courts as well. In addition, administrative courts will, in principle, overturn the unlawful administrative acts and condemn the administrative authority that had rendered or carried them out, or establish the authority's violation of law instead of the application of the earlier general rules on quashing the impugned administrative decisions and ordering the competent authorities to reopen their proceedings. They will be able to establish the unlawful omission of an authority in a larger variety of cases and will be given stronger powers concerning the enforcement of their judgments.¹

In many cases, the Kp.'s provisions leave it to the courts' practice to "determine the details" of their application and provide highly abstract definitions, which give the possibility of a broader judicial interpretation.² For instance, section 20(6) of the Kp. stipulates that the court may, on request or *ex officio* bring any person into the action whose rights or lawful interests are affected by the judgment to be passed therein as a person concerned, if the court deems that their involvement is necessary in order to resolve the legal dispute. It is not regulated, for example, whether the guidelines to be given by the court for the administrative authority's reopened proceedings should be included in the operative part or, in conformity with the earlier judicial practice, in the reasoning part of the court's decision,³ and, in general, it introduces a novel set of definitions (administrative acts, nonexistent acts, etc.) that are to be interpreted

¹ The introduction of the legal instrument of immediate legal protection will also result in an important expansion of competences.

² F. Rozsnyai, K., The emancipation of the law of administrative court procedure: the Code of Administrative Court Procedure (A közigazgatási perjog emancipációja: a közigazgatási perrendtartás), (2017) (5) *Jogtudományi Közlöny*, (235–242) 239.

³ Section 86(4) of the CAL regards the guidelines as part of the court's judgment; hence, it may be concluded that they should be included in the operative part. On the other hand, other provisions – such as on the availability of the operative part one day after the judgement's delivery and prior to the latter's being put in writing – may have the effect of creating a different judicial practice.

and developed by the jurisprudence.⁴ As an example, the provision according to which, in the event of establishing a legal injury, the court shall *ex officio* oblige the administrative authority to eliminate the consequences of the activity that injure the plaintiff's rights [section 89(3) of the Kp.] gives an abstract mandate to the courts to act *ex officio*, which will substantially alter the strict interpretation-based approach of judges. These changes fit into the latest international trends which originate from legal uncertainty due to a multilayered (national, European Union and international) legislation and are generally accepted by the jurisprudence of the European Court of Justice and the European Court of Human Rights. According to these trends, the need for a consistent caselaw prevails over the courts' strict legislation-based interpretation.⁵ The higher the court, the more lenient judicial interpretation becomes. The Curia will rightly continue to strive for a legislation-based interpretation, but it will not be as "efficient" as in the past; however, it will certainly not be as lenient as the caselaw of the relevant international judicial forums. The Curia's competences will, therefore, increase, not only because of the Kp.'s broader material scope, but also due to a less stringent judicial interpretation.

In the long term, the Curia's role will continue to be strengthened as a result of the Kp.'s effect of forcing the legal environment's further development. Although the legislator's intention was to adopt the Kp. and Act CL of 2016 on the Code of General Administrative Procedure (hereinafter referred to as: Ákr.) as parts of an integrated legal framework, it can be stated that the Ákr.'s provisions on the rights of the parties to administrative proceedings constitute a major setback in comparison with the rules of the previous piece of legislation, namely Act no. CXL of 2004 on the General Rules of Administrative Proceedings and Services (hereinafter referred to as: Ket.)⁶ and that the legislator was not able to include the Kp. and the Ákr. into a well-integrated system. The Ákr.'s material scope is narrower than that of the CAL or of the ÁKR.S,⁷ which implies that administrative acts other than administrative decisions, such as other individual decisions and administrative measures, will continue to lack a general procedural framework on the basis of which they could

⁴ It is one of the most important tasks of administrative justice, K. F. Rozsnyai, *Administrative justice in Procrustes' bed (Közigazgatási bíráskodás Prokrusztész-ágyban)*, (Budapest, Eötvös Kiadó, 2010) 13–17.

⁵ See this issue from a linguistic approach in R. Somssich, *The different language versions of the concepts of European community law, with particular regard to European private law (Az európai közösségi jog fogalmainak nyelvi megjelenítése különös tekintettel az európai magánjogra)*, PhD thesis, (Budapest, 2007) 182–193.

⁶ É. Szalai, *The legal standing of the client in the Ákr. (Az ügyfél-jogállása az Ákr.-ben)*, lecture in Jubilatory conferences on the occasion of the 350th anniversary of the foundation of the Faculty of Law of ELTE University, Our new procedural codes II: the Act on the General Rules of Administrative Proceedings and the Code of Administrative Litigation (*Új eljárásjogi kódexeink II.: az általános közigazgatási rendtartás és a közigazgatási perrendtartás*), conference, 5 May 2017, ELTE University, Faculty of Law, Conference Room.

⁷ Tax matters, asylum, alien policing and competition cases are not covered by the Ákr.'s material scope.

appropriately be subjected to judicial review. If the Ákr. were adopted in order to create a general procedural framework for administrative acts then some of the Ákr.'s newly introduced concepts – such as the term definitiveness instead of the principle of administrative *res judicata* – would have truly made sense and they would have helped administrative judges in reviewing the lawfulness of administrative acts other than administrative decisions. As regards the latter category of administrative acts, the principle of *res judicata* makes no sense; on the other hand, their definitiveness is an essential element for the administrative courts to being able to carry out their judicial review.⁸ All the above limit the Kp.'s impact, since the judicial review of administrative acts other than administrative decisions cannot be undertaken in an efficient manner. Nonetheless, administrative judges are, in the long term, expected to shape the aforementioned procedural framework, which will then strengthen the role of administrative justice.

The Ákr.'s and the Kp.'s other main objectives were to introduce a singleinstance administrative procedure and to make administrative litigation a fundamental means of legal remedy.⁹ The Ákr.'s objectives could be achieved only partially, as tax matters (that represent one third of all administrative court procedures) and the administrative disputes referred to in section 116(2) a) of the Ákr. (first instance decisions rendered by a district office or a body of a municipal government other than the council of representatives) continue to be dealt with in a twoinstance administrative procedure. With regard to the recent centralisation of public administration, which resulted in the district offices becoming generally competent firstinstance administrative bodies and to the continued existence of a twoinstance administrative procedure concerning decisions delivered by a body of a municipal government, it can be established that the Ákr. failed to comply fully with the Kp.'s new system. However, it is important to stress that full achievement of the above objectives would have entailed a significant change to the structure and personnel of the system of administrative justice, the lack of which can be deemed a positive result of the process of legislation. This means that the majority of administrative cases will continue to be heard by a single judge and not by a threemember judicial panel,¹⁰ which removes the risk of the judiciary's dilution

⁸ The term *Bestandskraft* (definitiveness) is used by the German Code of Administrative Procedure [*Verwaltungsverfahrensgesetz* (VwVfG)] not for administrative decisions (*Entscheidung*), but for administrative acts (*Verwaltungsakt*) in a generalised manner (section 43 of the VwVfG). It is evident that only definitive administrative acts may be subjected to judicial review.

⁹ There are other connecting points as well, see in K. F. Rozsnyai: Connecting points between the law of administrative litigation and the law of administrative proceedings (A közigazgatási perjog és a közigazgatási eljárásjog kapcsolódási pontjai), (2015) 1 (2) *Fontes Iuris*, 15–21.

¹⁰ Administrative disputes preceded by a twoinstance administrative procedure are to be dealt with by a single judge. See section 8(3) a) of the Kp.

and ensures the continuous and organic development of administrative judges and the system of administrative justice.¹¹

In addition, the Kp. will generate the development of substantive administrative law; for instance, the legislator will not be able to avoid the unambiguous qualification of administrative contracts, hence it can be stated that, in the long run, the spectacular development of substantive and procedural administrative law, as well as a growth of the role of administrative litigation, are expected.

The Kp. has therefore singlehandedly launched a revolutionary reform which effects the entire field of administrative law and which will be implemented by administrative judges under the guidance of the Curia as the country's supreme administrative court. The role of the Curia in the development of Hungarian administrative law and in the promotion of a culture of legality in respect of the functioning of the Hungarian State will be similar to that of the European Court of Justice in the development of European Union law and in enhancing European integration.

II. THE CURIA AS A JUDICIAL FORUM RESPONSIBLE FOR THE HARMONISATION OF THE ADMINISTRATIVE COURTS' CASELAW

Turning now to the Curia's role in the system of administrative justice, it should first be pointed out that, in the past, the Curia had not been entitled to exercise full supervisory power over the traditional, narrow-scope judicial review of administrative decisions. Through judicial review procedures, the Curia could examine only the legality of lower instance judgments dealing with administrative decisions and not with administrative orders; moreover, petitions for judicial review could not be submitted to the Curia in certain types of cases (*e.g.* asylum cases). On the other hand, petitions for judicial review had been lodged as a kind of "appeal" and their annual number had amounted to about 2,000,¹² in addition, a majority of them had raised

¹¹ If the adjudication of cases by three-member judicial panels became the rule, then it would have resulted in the recruitment of additional judges coming mainly from the public administration, thus with different socialisation background and law enforcement experiences, and their number would have been twice as many as the number of administrative judges currently in office at first instance, which would have brought fundamental changes to the judiciary's organisational culture and would have quickly marginalised the traditional judicial approach that is based on the judges' professional autonomy.

¹² According to the statistical report of the National Office for the Judiciary, in the year 2016, the Curia heard 1,699 petitions for judicial review in the field of administrative law, while it dealt with 882 such petitions in the field of labour law (including civil service disputes and certain types of administrative lawsuits, such as social security cases). <http://birosag.hu/kozerdeku-informaciok/statisztikai-adatok/2016-evkonyvek> (Last accessed: 19 June 2017).

no serious legal issues, but they had taken away valuable resources from the Curia's more complex tasks, in particular regarding the harmonisation of the courts' caselaw. Making matters worse, administrative orders and asylum cases had to be dealt with by twenty different courts in a single instance judicial procedure; as such, there had been no higher instance court that could have taken over, at least informally, the Curia's harmonisation role in such cases. In those circumstances, the Curia's strategic objective in respect of administrative cases could be none other than to have direct control over all types of cases through their individual adjudication and to have a continuously decreasing number of individual cases (a total of approximately 7,000 cases¹³ had been brought yearly to the Curia, this number is roughly the equivalent of the regional appellate courts' combined annual workload). With regard to the country's size and in comparison with the regional appellate courts' workload, the Curia's aim was therefore to make the number of its incoming cases decrease to about 2,000.¹⁴ The reason behind such aim was to alleviate the Curia's caseload in order to enable it to perform its main task better, namely the harmonisation of the courts' caselaw via the adjudication of individual cases.

This shift in the supreme judicial forum's functions has been apparent in the past couple of decades, when the reestablishment of the regional appellate courts resulted in a significant decrease of the Supreme Court's powers as a second instance appellate court (the Supreme Court's such powers remained unaffected only in the field of criminal law and only with regard to certain procedural orders).¹⁵ As a result of the entry into force of the Fundamental Law of Hungary, the Curia has been given the task of analysing the courts' jurisprudence as well.¹⁶ Such analyses are to be carried out by jurisprudence analysing working groups that publish the results of their findings in the form of summary reports, which qualify as "soft" means for orienting the courts. Uniformity decisions – with a strengthened role despite international criticism¹⁷ –, as well as decisions and rulings of theoretical importance remained applicable for the purpose of harmonising the courts' case-law. The most efficient means of harmonisation, however, continues to be the adjudication of individual

¹³ In 2016, a total of 7,326 petitions for judicial review was lodged with the Curia. Source: see the previous footnote.

¹⁴ See the lecture of Péter Darák, President of the Curia delivered on the occasion of a series of talks entitled "Legal system from within", held by the Institute for Legal Studies of the Centre for Social Sciences of the Hungarian Academy of Sciences on 6 November 2014, from 10:11, <https://www.youtube.com/watch?v=62-yb4h4Zg4> (Last accessed: 31. December 2018).

¹⁵ According to the explanatory notes attached to Act no. LXIX of 1997 on the establishment of the regional appellate courts, the setting up of the regional appellate courts as appellate courts enables the Supreme Court – as a result of a decrease in its caseload – to fully comply with its constitutional duties in the field of the harmonisation of the courts' case-law.

¹⁶ Section 24, subsection (1), point d) of Act no. CLXI of 2011 on the Organisation and Administration of the Courts of Hungary.

¹⁷ Opinion no. CDL-AD (2007) 003 of the Venice Commission of the Council of Europe.

cases by the Curia to guide the courts' jurisprudence. With regard to the above, the Curia set up three jurisprudenceanalysing working groups to justify the adoption of a code of administrative litigation and to determine the latter's regulatory principles.¹⁸ Each working group concluded that petitions for judicial review should be allowed to be submitted in a broader range of situations; the Curia, on the other hand, should be allowed to apply an admission policy to admit the cases that could be of relevance in respect of the harmonisation of the courts' caselaw.

The Kp. sought to achieve both objectives by extending – in cases where no appeal can be lodged with the Curia – the possibility of submitting a petition for judicial review in all types of administrative lawsuits and by introducing a filtering mechanism to help the Curia to concentrate its resources on dealing with cases that are of higher importance concerning the Curia's harmonisation role.

As regards the first issue, administrative orders can now be reviewed by the courts through a simplified administrative lawsuit, and it can be noted that the Kp. truly seeks to empower the Curia to hear all types of administrative matters. The new regulation can be, nonetheless, criticised, because it maintains a number of special procedural regimes which hinder the implementation of the Kp.'s universal approach. Despite the fact that the Curia's jurisprudenceanalysing working group on the courts' caselaw related to asylum cases had clearly indicated that a higher instance judicial forum should be created in order to resolve the differences in the jurisprudence of the various administrative courts in asylum matters, the legislator had not taken the working group's findings into due account during the adoption of the Kp. and of the other pieces of legislation related thereto.¹⁹ The working group found that, similarly to the previous regulation, either a court should be given exclusive territorial competence to deal with asylum and even alien policing cases or, if there would be more than one court to hear such cases, a higher instance judicial body should be set up so as to harmonise the lower instance courts' necessarily diverging caselaw. The above findings had been completely disregarded by the legislator, as a result of which the Kp. does not entitle the Curia to decide on the admissibility of a petition for judicial review related to an asylum case with the aim of harmonising the courts' caselaw.²⁰

Due to the Kp.'s extended material scope, an increase in the Curia's powers in respect of judicial review proceedings and the introduction of a filtering mechanism at

¹⁸ Published on the Curia's website on 21 February 2013, 17 February 2014 and 24 November 2015.

¹⁹ Summary report of the jurisprudenceanalysing working group on the courts' caselaw related to asylum cases (20 October 2014), page 90, published on the Curia's website.

²⁰ The maintenance of the previous situation cannot be justified by any professional reason, while the proposed regime could have been able to efficiently remedy the anomalies in the courts' diverging caselaw, complained by the Immigration and Asylum Office, without further delaying the conclusion of the relevant disputes in 99.9 percent of the cases.

the level of the Curia, the latter is able to review almost the full range of administrative decisions and administrative court decisions and to concentrate on legal disputes that are of importance with regard to its harmonisation role.

III. THE CURIA AS A COURT OF SECOND INSTANCE

Having regard to the above, the question arises as to why the new rules according to which the Curia had become an appellate court before which the decisions of the Metropolitan High Court, acting as a first instance administrative court, delivered in highly important and rather complex cases can be brought have been adopted contrary to the aforementioned efforts. The cases which are to be dealt with by the Metropolitan High Court are mainly related to the regulatory decisions of the administrative authorities and are of considerable economic importance, but they also include some fundamental rightsbased disputes, such as the following: the judicial review of the decisions of the Equal Treatment Authority and the National Authority for Data Protection and Freedom of Information, as well as decisions touching upon the freedom of assembly and access to classified information.

According to the legislator's initial concept, first instance judgments related to regulatory decisions with economic importance could have been appealed and the appellate court, after carrying out an admissibility check (similar to the filtering mechanism introduced for judicial review procedures), would also have been entitled to modify the impugned judgments; all that instead of allowing the submission of petitions for judicial review as a result of which the judicial review court would have been authorised only to quash the impugned judgments.²¹ The concept was in line with the Kp.'s fundamental purpose, *i.e.* to create a procedural code which promotes the quick conclusion of cases. This would have been particularly important in respect of regulatory decisions which are of *ex ante* nature, based on a complex background and usually valid for a 2-3 yearlong regulatory cycle; therefore, their *ex tunc* quashing by the supreme judicial forum, for example due to a need for minor corrections, in the framework of a judicial review procedure, would have been mostly nonsensical and incomprehensible.²²

²¹ http://www.drhosszu.hu/admin/feltolt/ozigazgatasi_perrendtartas_2016_04_13_p.pdf (Last accessed: 31 December 2018).

²² See in detail in A. Gy. Kovács, *Market regulation and means of legal remedy – the courts' caselaw related to regulatory decisions with particular regard to the field of electronic communications (Piacszabályozás és jogorvoslat – a piacsabályozói döntések bírói gyakorlata, különös tekintettel az elektronikus hírközlésre)*, (HVG-Orac, Budapest, 2012) 325.

In April 2016, a modified bill was presented²³ which, as a general rule, excluded the possibility of submitting petitions for judicial review in administrative lawsuits, hence, 80 percent of such lawsuits would have been finally disposed of by a planned Administrative High Court which would have functioned as an appellate court. Under this regime, only the regulatory as well as public procurement, competition law and certain fundamental rights-related decisions of the Administrative High Court, acting as a court of first instance, could have been appealed to the Curia. In the latter types of cases, there were, however, no professional reasons for maintaining the appellate system. Regulatory cases have been traditionally dealt with in a singleinstance administrative procedure because of their complexity and the shortage of experts capable of handling them, in particular in a medium-sized country like Hungary. In the absence of a sufficient number of appropriately trained experts, legal practitioners and judges, it would have been quite difficult to establish a twoinstance administrative procedure or a singleinstance administrative procedure combined with a twolevel judicial system.²⁴ In such a setting, the Curia would have been unable to exercise its harmonisation role, originating from the Fundamental Law of Hungary, regarding the review of administrative decisions, which would have resulted in an unconstitutional legal regime; on the other hand, if the Administrative High Court would have been given that role, the Curia's functioning as an appellate court would then have become completely meaningless. This was particularly true since the Constitutional Court's control, through the mechanism of genuine constitutional complaints, over the legality of the Administrative High Court's proceedings would have been a sufficient guarantee. There would have been no need for additional safeguards, as there would have been not enough judges, at a systemic level, to assess the relevant substantive administrative law issues in a twolevel judicial system in an appropriate manner. All that raised the possibility that the Curia would have shortly fallen out of the system of administrative justice as a result of the exclusion of appellate procedures by an act of law adopted by a simple majority and it would have been replaced by the Administrative High Court, operating outside the ordinary court system with newly recruited judges.²⁵

²³ http://www.drhosszu.hu/admin/feltolt/ozigazgatasi_perrendtartas_2016_04_13_p.pdf (Last accessed: 31 December 2018).

²⁴ Numerous critical remarks alleging a lack of experts have been made in a recurring manner as regards the adjudication of such regulatory cases which may currently be dealt with by three different judicial instances. See among others the polemical articles of András Tóth, András Kovács and Szabolcs Koppányi published in 2006 and 2007 in the periodical entitled *Infocommunications and Law (Infokommunikáció és Jog)*.

²⁵ See: Bill on the modification of certain acts of law due to the renewal of the system of administrative justice, <https://d2gvief1bctb7.cloudfront.net/wp-content/uploads/sites/7/2016/08/normaszoveg.pdf> (Last accessed: 22 June 2017); K. F. Rozsnyai: A separate procedural code and separate courts in the system of administrative justice (Perjogi önállóság és különbíróági jelleg a közigazgatási bírósághoz), (2016) (4) *Public Law Review*, 7–8.

Finally, the legislator decided, in view of constitutional concerns as well, to withdraw the draft provisions which would have excluded the possibility of lodging a petition for judicial review; however, it decided to introduce a traditional system of appeals, which entailed the rejection of the initial concept of the quick conclusion of cases and of decreasing the level of the courts. It, nonetheless, became obvious for those who have followed the process of legislation that if the Administrative High Court were set up by the modification of the relevant cardinal acts of law (to be adopted by a two-thirds majority) then the Curia's "removal" from the system of administrative justice can easily be carried out by the adoption of a piece of legislation requiring only a simple majority vote of the members of the Parliament. Having regard to the legislator's initial concept, this solution is professionally justified, because the Curia's remedy proceedings would be unnecessary in such a model provided that the Administrative High Court would also take over the Curia's harmonisation role in the system of administrative justice.²⁶ Ultimately, the establishment of the Administrative High Court failed due to a lack of majority support among MPs', while the traditional system of appeals continued to be applicable and the Curia became the "successor" of the Administrative High Court, which resulted in the introduction of a redundant level of jurisdiction and an increase in the duration of proceedings in respect of cases of high complexity and priority. Thus, the Curia became a second instance administrative court, but it also remained responsible for harmonising the administrative courts' jurisprudence.

Consequently, the Curia was given an excessive role within the system of administrative justice, in which complex regulatory cases are heard in a twoinstance court procedure (despite a shortage of legal expertise in such cases), while traditional and mainly less complex cases are dealt with in a singleinstance court procedure. We should not forget that, if we take the Ákr.'s main rule into due consideration, both traditional and regulatory cases should be, in principle, heard in a singleinstance administrative procedure. Contrary to that rule and in an illogical manner, regulatory

²⁶ The unconstitutionality of such a model could have been raised, but the Constitutional Court's proceedings could have been initiated only by the President of the Curia or the Prosecutor General (no constitutional complaint could have been submitted in that regard), and the big question is whether the Constitutional Court would have shared the aforementioned concerns. The complexity of the issue is well shown by the fact that the Kp. has also been examined by the Constitutional Court, the latter rendered a rather contradictory decision which sought, in an inappropriate way, to prevent the promotion of the Metropolitan High Court to the position of an administrative high court within the judicial system and which reflected an approval of the legislator's aforementioned initial concept and a dismissal of any other solutions (namely the establishment of an administrative high court within the existing system of justice). See Constitutional Court decision no. 1/2017 (of 17 January 2017).

cases – in which there would be a need for the concentration of expertise – are dealt with in a twoinstance administrative court procedure.²⁷

IV. CONCLUSION

With regard to the above, I am of the opinion that it would be necessary to introduce the newly proposed appellate system only in respect of the Curia instead of the currently applicable system of appeals²⁸ with the aim of ensuring the harmonisation of the courts' caselaw and to exclude the possibility of such appeals contrary to the Kp.'s internal logic. In this way, the Curia could efficiently fulfil its supervisory role and become a true guardian of the administrative courts' harmonised caselaw.

²⁷ The focus here is rather on administrative regulatory issues, and the analysis has disregarded the cases in which, as a result of the modification of the CAL's material scope, there is a twoinstance procedure due to a lack of the administrative authority's formal decision. This, however, does not alter the substantive findings.

²⁸ The current system of appeals may and should be maintained in cases in which the administrative authorities had not delivered any individual administrative decision prior to the commencement of the administrative lawsuit.

Wiebe, Andreas*

Verbandsklagen und Wettbewerbsrecht – Sammelklage „österreichischer Prägung“ und Gewinnabschöpfungsanspruch § 10 d UWG

ABSTRACT

The compensation for small damages still poses considerable problems in terms of procedural instruments in European countries. While no collective claims comparable to the U.S. class action exist two examples to cope with the market failures in this area are elaborated in this article. The collective claim “Austrian way” has been developed by practice and is discussed in more detail and compared to the class action. It includes several advantages. The legislator, however, could not be convinced to enact this model into law.

Germany introduced a collective claim to absorb damages from unfair commercial practices in 2010 into the Statute Against Unfair Competition (UWG). It was brought forward mostly by consumer associations but is fraught with several shortcomings in its design which severely limited its practical effectiveness. Nevertheless, both models may form interesting alternatives to an introduction of a model of class action that is increasingly discussed on a European level to cope with the “rational disinterest” of consumers to claim damages.

KEYWORDS: Collective claim “Austrian way”, profit absorption in German unfair competition law, small and distributed damages, comparison to U.S. class action, consumer protection

I. SAMMELKLAGE „ÖSTERREICHISCHER PRÄGUNG“

1. Entwicklung

Wer einmal einige Zeit in Österreich verbracht hat, weiss, was eine „österreichische Lösung“ ist. Eine solche österreichische Lösung findet sich auch im Wettbewerbsrecht

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und heißt dort „österreichische Prägung“, nämlich „Sammelklage österreichischer Prägung“. Sie ist eine interessante Erscheinung, die zeigt, dass einerseits ein Bedürfnis für eine Sammelklage im Lauterkeitsrecht besteht, andererseits der Gesetzgeber diesem Bedürfnis nicht gerecht wird und daher die Judikatur in die Bresche springen muss.

Das jüngste Beispiel betrifft den leidlichen VW-Skandal. Der VKI (Verein für Konsumenteninformation) prüft eine Sammelklage gegen VW wegen der manipulierten Abgaswerte. Anknüpfungspunkt ist eine „Irreführung“ durch falsche Emissionswerte in Fernsehspots und Broschüren. Aus diesem Grund hat der VKI eine Sammelaktion ins Leben gerufen: Autohalter, die vermuten, betroffen zu sein, können sich mittels einem online-Formular auf der Website des VKI mit ihren Daten eintragen und erfassen lassen, um sowohl technische als auch rechtliche Updates zu den Fällen zu erhalten, und für den Fall, dass geklagt wird, rechtlich vertreten zu werden. Im nächsten Schritt wollen die EU-Verbraucherschutzorganisationen dann vereint als eine Partei gegenüber VW auftreten und für Schadenersatz eintreten. „Es kann nicht sein, dass amerikanische Bürger hier [hinsichtlich Schadenersatzanspruch] bevorzugt behandelt werden“, sagte Peter Kolba, Vertreter des VKI.

Was steckt dahinter? Ende der Neunziger erkrankten hunderte österreichische Touristen in einem Clubhotel. Doch ein echtes, auf Leistung gerichtetes kollektives Rechtsschutzinstrument fehlte. Das rief den Verein für Konsumenteninformation (VKI) auf den Plan. Er ließ sich die Ansprüche aller Urlauber, die das wollten, abtreten, machte sie in einer Klage gegen die Hotelbetreiber gebündelt geltend und schaffte es, Prozessfinanzierer ins Boot zu holen, die bei Unterliegen des Klägers die Verfahrenskosten schultern würden. Die „Sammelklage österreichischer Prägung“ war geboren. Mehr als 15 Jahre nach dem Reiseschadensfall hat sich im Rechtsbestand der Alpenrepublik nichts geändert.

2. Ausgestaltung und Zulässigkeit

Nun kennt auch das österreichische Recht die Verbandsklage, die im KSchG und im UWG geregelt ist und dem Verband die Möglichkeit gibt, gegen unlautere Werbung oder die Verwendung unfairer Vertragsklauseln auf Unterlassung zu klagen.¹ Daneben gibt es die Verbands-Musterklage, die bereits ein Vorläufer der Sammelklage österreichischer Prägung ist. Danach wird ein Anspruch an den Verband abgetreten, der diesen dann einklagt. Unabhängig vom Streitwert kann der OGH angerufen werden, und dessen Entscheidung entfaltet dann zumindest *de facto* eine Bindungswirkung gegenüber

¹ Vgl. den Überblick bei B. Pirker-Hörmann, P. Kolba, Österreich: Von der Verbandsklage zur Sammelklage, in *Internationales Symposium „Verbraucherpolitik: Kollektive Rechtsdurchsetzung – Chancen und Risiken“ AG 4 – Europäische Perspektiven zur Durchsetzung von Verbraucherrechten*, https://verbraucherrecht.at/system/files/typo3/Kolba_Pirker_Bamberg.pdf (Last accessed: 31 December 2018).

allen gleichgelagerten Fällen. Der Nachteil hier ist, dass in jeden einzelnen Fall eine Klage angestrengt werden muss.

Daraus entstand die Idee, die Ansprüche zu bündeln. Bei der Sammelklage „österreichischer Prägung“ werden die Ansprüche im Wege der Inkassozession an einen Verband abgetreten, der diese dann einklagt.² Die Sammelklage kann von jedermann erhoben werden, in der Praxis tritt aber vor allem der VKI als Kläger auf.³

Es gibt eine Reihe von Unterschieden zur class action. Es tritt nur der Zessionar als Kläger auf, nicht die Gruppe von Betroffenen. Die Wirkung des Urteils trifft nur die Anspruchsinhaber, die ihre Ansprüche abgetreten haben. Es gilt das opt-in-Prinzip.

Kennzeichnend ist auch die Einschaltung von Prozessfinanzierern. Diese erhalten im Erfolgsfall eine Beteiligung und müssen bei Verlust des Prozesses die gesamten Prozesskosten tragen.⁴ Allerdings enthält § 879 Abs. 2 Zi. 2 ABGB das Verbot, sich einen bestimmten Teil des Betrags versprechend zu lassen, der der Partei zu erkannt wird. Dies entspricht dem Verbot eines Erfolgshonorars, das auf die erstrittene Summe im Unterschied zum Streitwert bezogen ist. Nun gilt dies Verbot für „Rechtsfreunde“, was sich vor allem auf Rechtsanwälte, Steuerberater und Wirtschaftsprüfer bezieht. Die überwiegende Meinung sieht auch Prozessfinanzierer in der gleichen Situation, weil sie auch besser den Prozessausgang abschätzen und Einfluss auf die Prozessführung nehmen können, so dass entsprechende Vereinbarungen über die Prozessfinanzierung unwirksam wären.⁵ Das soll allerdings anders sein, wenn sich der Finanzierung auf die reine Finanzierungsfunktion beschränkt. Jedenfalls wird die Prozessfinanzierung überwiegend als positiv für die Herstellung von Waffengleichheit angesehen. Für den Beklagten kann etwa die Einbringung der Prozesskosten erleichtert werden.⁶

Sucht man nun nach gesetzlichen Grundlagen, so stößt man auf § 227 öZPO, nämlich die objektive Klagenhäufung. Danach können mehrere Ansprüche gegen denselben Beklagten in einer Klage geltend gemacht werden, vorausgesetzt das gleiche Gericht ist zuständig und die gleiche Verfahrensart einschlägig. Ein Teil der Lehre will

² Vgl. den Überblick bei G. Huber, C. Grabmair, Sammelklagen auch in Österreich?, (2010) (2) *PHi*, 42. ff.; A. Klauser, Von der „Sammelklage nach österreichischem Recht“ zur echten Gruppenklage, (2005) (10) *ecolex*, 744.; G. E. Kodek, Die „Sammelklage nach österreichischem Recht“, (2004) (8) *ÖBA*, 615.; Pirker-Hörmann, Kolba, Österreich: Von der Verbandsklage zur Sammelklage, 5 ff.; W. H. Rechberger, Prozessrechtliche Aspekte von Kumul- und Großschäden, (2003) (1–2) *VR*, 15.

³ Der VKI ist zwar privatrechtlich organisiert, Mitglieder sind aber die Sozialpartner sowie das Konsumentenschutzministerium, Verbandsklagen finden nur im Auftrag und auf Finanzierung durch das Ministerium bzw. von Arbeiterkammern statt; daher wird die Verbandsklage letztlich auch als staatliche Rechtsdurchsetzung bewertet, vgl. P. Kolba, U. Docekal, M. Nuncic, *Sammelklagen in Österreich. Praktische Erfahrungen – Ökonomische Analyse – Meinungsumfrage*, https://verbraucherrecht.at/system/files/typo3/VKI_Studie_Sammelklage.pdf (Last accessed: 31 December 2018) 15. f., 215.

⁴ A. Klauser, „Sammelklage“ und Prozessfinanzierung gegen Erfolgsbeteiligung auf dem Prüfstand, (2002) (11) *ecolex*, 805.

⁵ Vgl. Huber, Grabmair, Sammelklagen auch in Österreich?, 42., 45.

⁶ Vgl. a.a.O.

zusätzlich die Voraussetzungen der Streitgenossenschaft anwenden (§ 11 Zi. 2 öZPO), um deren Umgehung zu vermeiden.⁷ Danach muss es sich auch um gleichartige und auf im wesentlichen gleichartigem rechtlichen Grund beruhende Ansprüche handeln. Damit will man auch vermeiden, dass unterschiedliche Beweisverfahren notwendig würden.

Der OGH hat die Zulässigkeit der Sammelklage „österreichischer Prägung“ anerkannt und hinsichtlich der Zulässigkeitsvoraussetzungen eine vermittelnde Linie vertreten.⁸ Danach muss zwar nicht die Identität des rechtserzeugenden Sachverhalts gegeben ist, wohl aber „ein im Wesentlichen gleichartiger Anspruchsgrund (maßgebliche gemeinsame Grundlage) vorliegen. Darüber hinaus müssen im Wesentlichen gleiche Fragen tatsächlicher oder rechtlicher Natur, die die Hauptfrage oder eine ganz maßgebliche Vorfrage aller Ansprüche betreffen, zu beurteilen sein“.

In dem einschlägigen Verfahren ging es um gesetzwidrige Zinsanpassungsklauseln von Banken. Es lagen unterschiedliche Kreditverträge vor, die bei unterschiedlichen Filialen geschlossen waren, so dass eine Streitgenossenschaft wohl nicht vorlag. Der OGH bejahte jedoch die Zulässigkeit einer Sammelklage, da bei der Geltendmachung von Rückforderungsansprüchen wegen zuviel gezahlter Zinsen durch mehrere Kreditnehmer ein „im Wesentlichen gleichartiger Anspruchsgrund geltend gemacht werde, nämlich Bereicherungs- und/oder Schadensersatzansprüche aufgrund unwirksamer Zinsanpassungsklauseln eines bestimmten Kreditinstituts“. Zudem mussten gleiche Fragen tatsächlicher oder rechtlicher Natur gelöst werden, was sich darauf bezog, dass die Bank die Verjährung der Zinsansprüche eingewendet hatte.

3. Beispiel Nazar/Brech-Durchfall

Nun bringt das Modell dieser Sammelklage auch einige Nachteile mit sich. Zum einen ist es bei weiterer Verbreitung fraglich, ob die Verbände die Vielzahl von Klagen stemmen können. Zum anderen ergeben sich Probleme bei der grenzüberschreitenden Geltendmachung von Ansprüchen. Dies wurde deutlich im Fall Nazar. Dabei ging es um folgenden Sachverhalt.

Im Sommer 2004 erkrankten Pauschalreisende in einem türkischen All-Inclusive-Club Reisende an zum Teil schwerem Brech-Durchfall. Ein Privatgutachten eines medizinischen Sachverständigen legte nahe, dass verdorbenes Essen oder verunreinigte Getränke die Hauptursache für die Explosiv-Epidemie waren; bei einigen Erkrankten wurden sogar

⁷ R. Madl, *Ausgewählte Rechtsfragen zur Rückforderung zuviel bezahlter Zinsen bei mangelnder Bestimmtheit einer Zinsanpassungsklausel*, (2003) (10) *ÖBA*, 722.; a.A. U. Frauenberger-Pfeiler, *Zur Zuständigkeit für Sammelklagen*, (2009) (12) *ecolex*, 1041.

⁸ OGH, 4 Ob 116/05 w, 12.7.2005. Vgl. auch S. Kalss, *Massenverfahren im Kapitalmarktrecht*, (2005) (5) *ÖBA*, 322.

Salmonellen als Erreger diagnostiziert. Der VKI ließ sich die Schadenersatzansprüche von 37 geschädigten Verbrauchern (von insgesamt 60 Betroffenen) abtreten und machte deren Ansprüche gesammelt mit zwei Sammelklagen nach österreichischem Recht geltend, und zwar gegen den österreichischen Reiseveranstalter und gegen sein Schweizer Tochterunternehmen. Der Gesamtschaden betrug etwa 54,000 €.

Problematisch war in diesem Fall der grenzüberschreitende Aspekt. 15 Geschädigte aus Vorarlberg hatten bei der Schweizer Tochtergesellschaft des Reiseveranstalters gebucht. Daher war für diese Geschädigten die Klage gegen ein ausländisches Unternehmen zu richten. Der OGH stellte fest, dass sich der VKI nicht auf den Verbrauchergerichtsstand des Art 14 LGVÜ berufen könne, weil es sich um abgetretene Forderungen handelte, die der VKI in seinem Namen einklagte.⁹ Der OGH berief sich hier auf eine Entscheidung des EuGH, die in solchen Fällen festgestellt hatte, dass der Verbrauchergerichtsstand nach Art 15 EuGVVO bzw. nach Art 13ff LGVÜ durch die Abtretung an den VKI verloren gehe.¹⁰ Dadurch wurde allerdings die Abtretung an den VKI mit einem kommerziellen Inkassobüro (Shearson/Hutton-Entscheidung) gleichgestellt. Erst der Abschluss einer Gerichtsstandsvereinbarung mit der Schweizer Beklagten konnte die Zuständigkeit begründen. Im Ergebnis wurden dann durch Entscheidung des BGHS Wien fast 100% der Forderungen gewährt. In einem parallel durchgeführten Individualprozess lagen die Prozesskosten um mindestens das Dreifache höher.

4. Bewertung durch VKI

Der VKI selbst beurteilt die Möglichkeiten der Sammelklage positiv.¹¹ Zu den Vorteilen gehören:

1. Die Sammelklage dient der Prozessökonomie bei Massenschäden. Ein Richter entscheidet, er hört ein und denselben Sachverständigen und es gibt ein Urteil und nicht mehrere u.U. gegenläufige Entscheidungen, was zur Rechtssicherheit beiträgt.

2. Die Sammelklage verhindert, dass die Ansprüche der Geschädigten verjähren können, wie es bei einem Musterprozess der Fall sein kann.

3. Die Sammelklage führt zu einem hohen Streitwert, was die Anwaltskosten reduziert.

4. Die Sammelklage macht Einzelansprüche unter 50,000 Euro durch Zusammenrechnung der Streitwerte durch Prozesskostenfinanzierer finanzierbar. Das führt dazu, dass sich Geschädigte ohne Kostenrisiko an der Klage beteiligen können.

⁹ Beschluss vom 4.3.2005 zu 9 Nc 4/05w.

¹⁰ EuGH 19.1.1993, C-89/91, Shearson Hutton/TVB und Rs C – 167/00 VKI/Henkel.

¹¹ Pirker-Hörmann, Kolba, Österreich: Von der Verbandsklage zur Sammelklage, 8 ff. Vgl. auch die Auswertung von 30 Fällen in Kolba, Docekal, Nuncic, *Sammelklagen in Österreich*, 8. ff.

5. Die Sammelklage fördert den Abschluss eines Vergleichs.

Eine Studie des VKI zeigt aber auch Defizite auf:

1. Viele Verbraucher sehen die Notwendigkeit, Ihre Ansprüche an den Sammelkläger abzutreten als Hindernis.

2. Der Sammelkläger ist der primäre Schuldner der Prozesskosten, was zu hohen Risiken führen kann.

3. Die Organisationskosten einer Sammelklage sind erheblich.

4. Mangels ausdrücklicher gesetzlicher Regelung drohen aufwendige Zwischenstreitigkeiten über die Zulässigkeit der Klage.

5. Bei grenzüberschreitenden Rechtsstreitigkeiten nimmt die Abtretung der Ansprüche auf Verbraucherseite die Möglichkeit, sich auf den Verbrauchergerichtsstand der Art. 15 ff EuGVVO zu berufen.¹²

Insgesamt werden danach die Chancen deutlich erhöht, dass es im Verfahren zu einem für den Verbraucher günstigen Vergleich kommt und die Gerichte entlastet werden. Allerdings. Besteht auch ein gewisses Risiko, da der Verband primärer Schuldner des Kostenersatzes ist und muss versuchen, sich gegen das Risiko einer Insolvenz des Prozesskostenfinanzierers abzusichern. Daher befürwortet der VKI die Einführung einer echten Gruppenklage.

5. Legislаторische Bemühungen

Auch wenn ein permanentes Durchlavieren durchaus seinen Charme haben kann, so erging doch 2004 der Auftrag an die zuständige Ministerin durch das Parlament, für eine gesetzliche Grundlage zu sorgen. Der Ministerialentwurf für eine Zivilverfahrens-Novelle für Gruppenverfahren lag seit 2007 vor.¹³

Voraussetzung für das Einreichen einer Gruppenklage soll danach sein, dass mehrere Personen eine große Anzahl von Ansprüchen geltend machen, die gegen dieselben Personen gerichtet ist und die gleiche Tat- und Rechtsfragen aufwerfen.¹⁴ Außerdem muss die gemeinsame Behandlung aller Voraussicht nach einfacher und billiger sein als die Durchführung entsprechender Einzelverfahren. Wird die Klage vom zuständigen Gericht erster Instanz für zulässig erklärt, muss sie öffentlich bekannt gemacht werden. 90 Tage nach Bekanntmachung ergeht dann die Entscheidung über die Durchführung. Eine Abtretung der Ansprüche ist nicht erforderlich, ein Beitritt ist bis zu sechs Monaten möglich, ein Austritt bis zum Schluss der mündlichen Verhandlung.

¹² Kolba, Docekal, Nuncic, *Sammelklagen in Österreich*, 15. f.

¹³ Vgl. dazu Nowak, *Das Gruppenverfahren nach dem Ministerialentwurf der Zivilverfahrens-Novelle 2007*, 2012.

¹⁴ Vgl. Kloiber, Reiter, Haller, *Ein Überblick über den Ministerialentwurf einer Zivilverfahrens-Novelle 2007*, (2007) 334 (10) *Zak*, 183.; Huber, Grabmair, *Sammelklagen auch in Österreich?*, 42., 46. f.

Ein Gruppenvertreter ist danach Ansprechpartner für den Prozessvertreter und soll die Interessen der Gruppenkläger vertreten und die prozessualen Rechte und Pflichten der Gruppenkläger wahrnehmen. Er muss nicht aus dem Kreis der Kläger kommen.

Das Gruppenverfahren dient nur der Klärung der Tat- und Rechtsfragen und endet mit einem entsprechenden Urteil. Die Ansprüche selbst müssen dann durch die Kläger jeweils in Einzelverfahren binnen drei Monaten nach Veröffentlichung der Beendigung des Gruppenverfahrens geltend gemacht werden.

Zu einer Verabschiedung ist es bisher wegen Meinungsverschiedenheiten zwischen Justiz- und Verbraucherschutzministerium nicht gekommen. Einer der Streitpunkte ist die Mindestanzahl der Kläger, die mit 100 angesetzt ist sowie die Höhe des Mindeststreitwerts. Trotzdem betonen alle Beteiligten, dass die Gruppenklage kommen werde.

6. Fazit

Der VKI hat interessanterweise auch eine Umfrage unter Verbrauchern sowie den Teilnehmern von Sammelklagen durchgeführt.¹⁵ Sie zeigte, dass mit ihnen die Erwartung verbunden ist, leichter, schneller und mit weniger Risiko zu seinem Recht zu kommen. Es ergab sich auch, dass mehr Verbraucher klagen würden, wenn sie dies gemeinsam mit anderen Verbrauchern tun könnten. Was die Verbraucher von Klagen abhält, ist vor allem der Aufwand für den Einzelnen und das Prozesskostenrisiko. Dadurch wird ein Ungleichgewicht zugunsten der Unternehmen geschaffen. Dieses kann durch Sammelklagen abgebaut werden. Die Teilnehmer an einer Sammelklage beurteilten diese sehr positiv hinsichtlich Vorbereitung, Durchführung und Betreuung. Auch ergibt sich aus der Umfrage, dass grenzüberschreitender Verbraucherschutz für die Verbraucher immer noch kaum existent ist.

Insgesamt kann man feststellen, dass die Sammelklage gerade bei kleineren Schäden ein Fortschritt gegenüber Individualklagen darstellt, aber gegenüber einer „echten“ Sammelklage immer noch relevante Nachteile hat. Dazu gehört das Opt-in-Prinzip, dass wohl zu hohen Transaktionskosten führt, gerade wenn die individuellen Schäden gering sind. Demgegenüber ist aus ökonomischer Sicht bei einem Opt-Out-Prinzip die „Divide et Impera“ – Strategie möglich, bei welcher der Beschuldigte einigen Geschädigten eine außergerichtliche Einigung anbietet, um die Anzahl der an einer möglichen Kollektivaktion Teilnehmenden hinreichend klein zu halten. Der daraus entstehende Wettbewerb um den Vergleich ermöglicht es dem Schädiger, die Gesamtkompensation geringer zu halten. Daher wäre eine optimale Internalisierung der Kosten wohl bei einer verpflichtenden Zugehörigkeit zur „Class“ gegeben.¹⁶

¹⁵ Kolba, Docekal, Nuncic, *Sammelklagen in Österreich*, 277. ff.

¹⁶ Kolba, Docekal, Nuncic, *Sammelklagen in Österreich*, 17.

II. GEWINNABSCHÖPFUNG NACH § 10 dUWG

Zu den in Österreich gemachten Erfahrungen gehört auch, dass für Streu- und Bagatellschäden ein wirksames Mittel der Generalprävention fehlt. Unternehmer können damit rechnen, die Gewinne aus Verstößen behalten zu können, da es an effektiven Möglichkeiten der Gewinnabschöpfung fehlt. Daher ist im zweiten Teil ein Blick auf § 10 des deutschen UWG interessant, der genau diese Möglichkeit der Gewinnabschöpfung geschaffen hat. Dabei handelt es sich sozusagen um eine Weiterentwicklung der Möglichkeit der Sammelklage.

1. Zweck der Norm und zugrundeliegendes Problem

Gerade im Wettbewerbsrecht wurden Durchsetzungsdefizite bei den sog. Streuschäden stark wahrgenommen. Ein Rechtsdurchsetzungsdefizit ergibt sich in derartigen Fällen daraus, dass die Betroffenen grundsätzlich von einer Durchsetzung der ihnen zustehenden Rechte und Ansprüche aus verschiedenen Gründen absehen. Unterlassungsansprüche sind häufig wenig wirksam, wenn Unternehmen ihre Werbung nur geringfügig abändern oder abgemahnte Firmen schon an der einmaligen Werbeaktion erheblich profitiert haben. Zusätzlich bestand das Problem, dass Verbraucher nach deutschem UWG kein eigenes Klagerecht haben, also auch Schadensersatzansprüche nicht selbst einklagen können.¹⁷ Dieses ist immer wieder rechtspolitisch diskutiert worden, man hat aber wegen der Befürchtung einer angeblichen Überlastung der Gerichte und den sonstigen zivilrechtlichen Klagemöglichkeiten bis heute davon abgesehen. Auch Schadensersatzklagen von Mitbewerbern sind aber problematisch, da in solchen Fällen entweder kein Schaden entstanden ist oder entsprechende Ansprüche nicht durchsetzbar sind, weshalb der Zuwiderhandelnde den rechtswidrig erzielten Gewinn behalten kann.

Der Gesetzgeber hat bei der Novelle 2004 § 10 dUWG eingeführt, wonach durch Verbände ein Gewinnabschöpfungsanspruch geltend gemacht werden kann. Dieser dient nicht so sehr dem Interessenausgleich zwischen Verletzer und Verbraucher, sondern der zivilrechtlichen Prävention von schwerwiegenden Wettbewerbsverstößen, die vorsätzlich begangen wurden und sich gegen eine Vielzahl von Abnehmern richten. Die Vorschrift hat insoweit generalpräventiven Charakter.¹⁸ Sie hat Bedeutung auch und gerade für die Fälle, in denen der Verletzer noch keine strafbewehrte Unterlassungsverpflichtung eingegangen ist und demgemäß bei Zuwiderhandlungen keine

¹⁷ C. Alexander, Nutzen und Zukunft der Gewinnabschöpfung in der Diskussion, (2012) *WRP*, 1190–1197. Vgl. auch BGH 1974 – Prüfzeichen.

¹⁸ Zu deren Zulässigkeit im Rahmen der zivilrechtlichen Systematik vgl. von Braunmühl, in K.-H. Fezer, W. Büscher, E. I. Obergfell, *UWG. Kommentar zum Gesetz gegen den unlauteren Wettbewerb*, 3. Aufl. (Verlag C.H. Beck, München, 2016) § 10 Rn. 114. ff.

Vertragsstrafe (§§ 339 ff BGB) zu befürchten hat. Ebenso wie die Vertragsstrafe stellt auch § 10 nach wohl h.M. keine „verkappte Strafvorschrift“ dar.¹⁹ Die Vorschrift erschöpft sich in der wirtschaftlichen Neutralisierung von schwerwiegenden Wettbewerbsverstößen und bleibt insoweit hinter einer Vertragsstrafe zurück.

Der Gewinnherausgabeanspruch gem. § 10 UWG hat vor allem die Funktion, das bereits beschriebene Marktversagen zu korrigieren. Trotz bestehender zivilrechtlicher Ansprüche bemerken Abnehmer oft gar nicht, dass sie übervorteilt worden sind, oder sie vermeiden die Kosten und Mühen einer Durchsetzung ihrer Ansprüche („rationales Desinteresse“). Die bestehenden Verbandsklagemöglichkeiten beschränken sich auf Unterlassungsansprüche. Dem Verletzer verbleibt daher in der Regel der auf unlautere Weise erzielte Gewinn.

Der Gewinnabschöpfungsanspruch ist die erste Verbandsklage im deutschen Recht, die sich nicht mehr auf den negatorischen Rechtsschutz beschränkt, sondern auf einen Leistungsanspruch richtet. Er hat keine unmittelbare Entsprechung in anderen Rechtssystemen im internationalen Vergleich.

2. Eckpunkte der Norm

Der Gewinnherausgabeanspruch gem. § 10 UWG ist seiner Rechtsnatur nach weder ein Schadensersatzanspruch noch ein Bereicherungsanspruch, sondern ein Anspruch eigener Art („sui generis“).²⁰ Am ehesten ist der Gewinnherausgabeanspruch noch mit dem Herausgabeanspruch aus § 852 BGB vergleichbar, der ebenfalls im Tatbestand eine unerlaubte Handlung voraussetzt, in der Rechtsfolge aber auf Herausgabe des auf Kosten des Verletzten Erlangten gerichtet ist. Er beruht auf dem Gedanken des „Fruchtziehungsverbotes“.²¹

a) Tatbestandsvoraussetzungen

Es muss zunächst eine unlautere geschäftliche Handlung nach 3 oder § 7 UWG vorliegen. Diese muss vorsätzlich begangen worden sein. Vorsätzlich handelt dabei bereits,

¹⁹ H. Köhler, J. Bornkamm, *UWG. Gesetz gegen den unlauteren Wettbewerb*, 34. Aufl. (Verlag C.H. Beck, München, 2016) § 10 Rn. 3.; Lettl, *UWG*, Rn 672., 283; a.A. aber R. Sack, Der Gewinnabschöpfungsanspruch von Verbänden in der geplanten UWG – Novelle, (2003) *WRP*, (549–558) 552.; S. Engels, T. H. Salomon, Vom Lauterkeitsrecht zum Verbraucherschutz: UWG-Reform 2003, (2004) *WRP*, (32–44) 42.; S. Wimmer-Leonhardt, UWG-Reform und Gewinnabschöpfungsanspruch oder „Die Wiederkehr der Drachen“, (2004) (12) *GRUR*, 16. ff.

²⁰ Vgl. Köhler, Bornkamm, *UWG*, § 10 Rn. 5; Goldmann, in H. Harte-Bavendamm, F. Henning-Bodewig, *UWG, Gesetz gegen den unlauteren Wettbewerb*, 4. Aufl. (C.H. Beck, München, 2016) § 10 Rn. 20.; F. Henning-Bodewig, Die Gewinnabschöpfung nach § 10 UWG – ein Flop?, (2015) 117 (8) *GRUR*, (731–739) 733.

²¹ von Braunmühl, in Fezer, Büscher, Obergfell, *UWG*, § 10 Rn. 3.

wer eine von der eigenen Einschätzung abweichende rechtliche Beurteilung in Betracht zieht, gleichwohl jedoch die fragliche geschäftliche Handlung vornimmt.

Herauszugeben ist nur der Gewinn, der zu Lasten einer Vielzahl von Abnehmern erzielt worden ist, nicht dagegen zu Lasten von Lieferanten und Mitbewerbern. Im Einzelnen ist hier vieles umstritten.²² So ist etwa streitig, ob dem Gewinn unmittelbar ein Vermögensnachteil der Abnehmer gegenüber stehen muss.²³ „Zu Lasten“ der Abnehmer ist der Gewinn etwa nach Ansicht von *Köhler* nur dann erzielt, wenn den Abnehmern auf Grund des Geschäfts, das für den Verletzer einen Gewinn abwerfe, an sich bürgerlich-rechtliche Rechte oder Ansprüche zur Sicherung ihrer Vermögensinteressen gegen den Verletzer zustünden. Eine nur mittelbare Benachteiligung der Abnehmer, wie etwa bei Kartellverstößen auf einer vorgelagerten Marktstufe, reiche dementsprechend nicht aus.²⁴ Teilweise wird vertreten, das Merkmal sei bereits dann erfüllt, wenn durch den Lauterkeitsverstoß die Abnehmerinteressen verletzt wurden.²⁵ Andere halten eine wirtschaftliche Schlechterstellung der Abnehmer für erforderlich, die aber schon im Abschluss des ungewollten Vertrags liegen könne.²⁶

Eine Vielzahl an Abnehmern soll jedenfalls dann vorliegen, wenn der Verstoß seiner Art nach Breitenwirkung besitzt.²⁷ Die untere Grenze wird bei drei Abnehmern gesehen.²⁸ Ausgeschlossen sind aber nach allen Ansichten solche Wettbewerbsverstöße, die gegenüber einem einzelnen Abnehmer begangen wurden.

b) Rechtsfolgen

Eines der wesentlichen Merkmale des Anspruchs aus § 10 Abs. 1 UWG ist, dass er auf Herausgabe des (verbliebenen) Gewinns an den Bundeshaushalt geht. Wegen des generalpräventiven Charakters ist es letztlich egal, wem der abgeschöpfte Gewinn zufließt.

²² Vgl. OLG Frankfurt a. M., GRUR-RR 2010, 482 – heute gratis.

²³ Köhler, Bornkamm, *UWG*, § 10 Rn. 9 mit Verweis auf BGH GRUR 2008, 818 Rn. 135 – Strafbare Werbung im Versandhandel; A. Ohly, O. Sosnitza, *UWG, Gesetz gegen den unlauteren Wettbewerb*, 7. Aufl. (C.H. Beck, München, 2016) § 10 Rn. 8 f.; G. Pokrant, Zum Verhältnis von Gewinnabschöpfung gemäß § 10 und Schadensersatz nach § 9 UWG, in H.-J. Ahrens, J. Bornkamm, H. P. Kunz-Hallstein (Hrsg.), *Festschrift für Eike Ulimann, (juris GmbH, Saarbrücken, 2006, 813–824) 816*.

²⁴ Goldmann, in Harte, Henning, *UWG*, § 10 Rn. 101; H. W. Micklitz, in *MüKoUWG* § 10 Rn. 121. Im Falle einer Lieferkette kann der Anspruch aus § 10 UWG nur in Bezug auf das jeweilige Vertragsverhältnis (Hersteller/Händler; Händler/Verbraucher) geltend gemacht werden, vgl. BGH WRP 2008, 1071 Rn. 135.

²⁵ Vgl. O. Gärtner, Der Gewinnabschöpfungsanspruch gemäß § 10 UWG – Leitfaden für eine effektive Anwendung in der Praxis, (2008) *GRUR Int*, 817., 820. f.

²⁶ Vgl. OLG Stuttgart, (2007) *GRUR*, 435., 437.; Ohly, Sosnitza, *UWG*, § 10 Rn. 8 f.

²⁷ Vgl. OLG Frankfurt, (2009) *GRUR-RR*, 265., 267. Nach Begr RegE UWG 2004 zu § 10 Abs 1, BT-Drs 15/1487 S. 24 muss es sich um einen „größeren Personenkreis“ handeln.

²⁸ BGH NJW 2002, 138., 139; Köhler, Bornkamm, *UWG*, § 10 Rn. 12; von Braunmühl, in Fezer, Büscher, Obergfell, *UWG*, § 10 Rn. 210.; Enger H. W. Micklitz, A. Stadler, *Unrechtsgewinnabschöpfung*, (Nomos, 2003), 2002, die diese Grenze bei 15–30 Personen ansetzen; Goldmann, in Harte, Henning, *UWG*, § 10 Rn. 99: 50 Personen als Regelfall.

Man wollte diesen aber auch nicht bei klagenden Verband belassen, um die Gefahr einer missbräuchlichen Geltendmachung des Anspruchs zum Zweck der bloßen Einnahmenerzielung zu vermeiden. Andere Modelle, zB Abführung an eine Stiftung, wurden im Gesetzgebungsverfahren erwogen, aber verworfen.²⁹

Der Anspruch aus § 10 wird in der Regel mit der Leistungsklage durchgesetzt. Der Kläger kann die Feststellungsklage mit einer Auskunftsklage verknüpfen. In der Regel wird der Anspruchsberechtigte den Anspruch nicht beziffern können, da er die Betriebsinterna des Zuwiderhandelnden nicht kennt. Ihm steht aber nach allgemeinen Grundsätzen ein Auskunfts- und Rechnungslegungsanspruch zu. Der Anspruchsberechtigte kann daher im Wege der Stufenklage gem. § 254 ZPO auf Auskunft oder Rechnungslegung und Leistung klagen.

Leistungen, die der Schuldner bereits an Dritte oder den Staat getätigt hat, können nach § 10 Abs. 2 S. 1 UW abgezogen werden. Außerdem kann der Verband seine eigenen Aufwendungen erstattet verlangen, soweit diese durch den abgeführten Gewinn abgedeckt sind (§ 10 Abs. 4 S. 3 UWG).

3. Erfahrungen und praktische Wirksamkeit

a) Rechtsprechungspraxis

Der Verbraucherzentrale Bundesverband e. V. hat den Gewinnabschöpfungsanspruch bis Ende 2013 insgesamt 24-mal geltend gemacht.³⁰ Die bisher ergangenen Entscheidungen bewegen sich im einstelligen Bereich. Sie spiegeln zugleich die inhaltlich kritischen Elemente des Anspruchs wider.

Dies betrifft zum einen den notwendigen Vorsatz. In einer Entscheidung des OLG Frankfurt ging es um das Anbieten von Grafiken zum Download im Internet bzw. den Zugang zu 2000 Gedichten, wobei die Entgeltlichkeit des Angebots verschleiert wurde.³¹ Das OLG bejahte einen Verstoß gegen die PAngV iVm § 4 Nr. 11 UWG a.F. sowie eine irreführende Werbung nach den §§ 3, 5 UWG. Der Vorsatz sei gegeben, da die Beklagte zumindest billigend in Kauf genommen habe, dass ihr Verhalten die Abnehmer täuschen könnte: „Es gibt keinen Anhaltspunkt für die Annahme, dass die Beklagte zu 1 ein auf Täuschung und wirtschaftliche Schädigung von Verbrauchern angelegtes Verhalten für rechtlich zulässig gehalten haben könnte“.

Beliebter Gegenstand solcher Verfahren ist das Werben mit einem überholten und deshalb irreführenden Testergebnis. Das OLG Stuttgart bejahte in einem solchen Fall den Vorsatz, „da dieser schon gegeben sei, wer sein wettbewerbsrelevantes Verhalten

²⁹ Vgl. Begr. RegE UWG 2004 zu § 10 Abs 4, BT-Drs 15/1487 S 25.

³⁰ Vgl. von Braunmühl, in Fezer, Büscher, Obergfell, *UWG*, § 10 Rn. 158.

³¹ OLG Frankfurt, (2009) *GRUR-RR*, 265. – Abo-Fallen.

fortsetzt, obgleich er sich auf Grund der ihm bekannten Tatsachen nicht der Einsicht verschließen kann, dass dieses unlauter ist“.³² Bei einem sechs Jahre alten Testergebnis hätte sich der Verdacht der Überholtheit aufdrängen müssen und spätestens nach Abmahnung hätte man die Tatsachen überprüfen müssen.

In einer weiteren Entscheidung nahm das OLG Frankfurt Vorsatz auch dann an, wenn der vom Beklagten beauftragte Rechtsanwalt nach Abmahnung die Zulässigkeit bejaht.³³ Spätestens nach Abmahnung handele derjenige, der es auf einen Wettbewerbsverstoß ankommen lasse, vorsätzlich.

Das OLG Schleswig relativiert dies in einer neueren Entscheidung zur Verwendung unwirksamer AGB.³⁴ Dabei ging es um die Forderung einer Nichtnutzungsgebühr durch einen Mobilfunkanbieter. Das Gericht gesteht zu, dass eine Abmahnung auch unberechtigt sein könne. Wenn der Klauselverwender in derartigen Fällen bei ebenfalls sorgfältiger Prüfung und unter Berücksichtigung der Argumentation der abmahnenden Institution zu dem Ergebnis komme, dass die Klausel wirksam sei, könne er sie während des laufenden Abmahnverfahrens und eines anschließenden Rechtsstreits weiter verwenden, ohne das zusätzliche Risiko der Gewinnabschöpfung zu tragen. Die vorliegende Klausel, mit der eine zusätzliche Gebühr ohne Gegenleistung gefordert werde, sei aber evident unwirksam, was sich dem Beklagten auch aufdrängen musste.³⁵

Hinsichtlich des zweiten kritischen Merkmals des abzuschöpfenden Gewinns handelte es sich hier um einen typischen Streuschaden. Die Beklagte hatte die entsprechenden „Nichtnutzungsgebühren“ in Höhe von € 4,95 über ein Jahr von den Kunden vereinbart. Damit war für das Gericht jedenfalls die Grundlage für einen Auskunftsanspruch gegeben. Die Beklagte musste dann Auskunft über die Einnahmen und Ausgaben geben, so dass der Verband in der Lage war, den Gewinn zu berechnen und dessen Herausgabe zu fordern. Das Gericht lehnte die Aufnahme eines Wirtschaftsprüfervorbehalts ab.

Nach Ansicht des OLG Stuttgart bedürfe es nicht des Nachweises eines Schadens der Kunden iSv § 249 BGB, weil im Gesetzgebungsverfahren die Wörter „auf Kosten“ durch die Wörter „zu Lasten“ ersetzt worden seien, um sicherzustellen, dass es für den Gewinnabführungsanspruch keines den Unternehmergewinn kongruenten Schaden der

³² OLG Stuttgart, (2007) *GRUR*, 435. – Veralteter Matratzentest.

³³ OLG Frankfurt a. M., (2010) *GRUR-RR*, 482. – heute gratis.

³⁴ OLG Schleswig, Urt. v. 19.03.2015 – 2 U 6/14.

³⁵ OLG Schleswig, Urt. v. 19.03.2015 – 2 U 6/14, Rz. 107: „Wenn die Beklagte sich darauf beruft, dass sie die betroffene Klausel durch ihre Konzernrechtsabteilung habe prüfen lassen, spricht dies jedenfalls nicht gegen ihren Vorsatz, sondern eindeutig dafür. Dass die formulärmäßige Erhebung einer zusätzlichen Gebühr für die Nichtinanspruchnahme einer Leistung gegen grundlegende zivilrechtliche Prinzipien verstößt, kann keinem Juristen entgangen sein.“ Vgl. auch OLG Schleswig, (2013) *MMR*, 579., wonach man bei einem Großunternehmen mit Milliardenumsatz davon auszugehen habe, dass die Rechtsabteilung die einschlägige Rechtsprechung beobachtet und für die eigenen Handlungsweisen auswertet.

Abnehmer bedürfe.³⁶ Nach Ansicht des LG München I soll ein Gewinn bereits dann angenommen werden, wenn ein Beitrag zur Deckung der Fixkosten (Kostendeckungsbeitrag) erzielt wurde.³⁷ Kein Gewinn liege dagegen bei sonstigen wirtschaftlichen Vorteilen (Verbesserung der Marktposition) vor. Bietet ein Unternehmer im Wettbewerb dagegen Produkte bzw. Dienstleistungen derart unter Wert an, dass dies nicht einmal für die Deckung der eigenen Fixkosten ausreicht, erzielt er keinen abschöpfbaren Gewinn. Ferner verlangt § 10 UWG, dass der erzielte Gewinn unmittelbar auf dem Wettbewerbsverstoß beruht. Das bloße „Anlocken“ von Kunden mit dem Ziel, weitere Umsätze – unabhängig von den konkret beworbenen Waren oder Dienstleistungen – zu generieren, ist kein solcher Gewinn. Damit sind die Grenzen des Anspruchs nach § 10 UWG aufgezeigt.

b) Rechtspolitische Diskussion

Von Seiten der Verbraucherverbände wurde bereits früh eingewandt, der Gewinnabschöpfungsanspruch sei an derart enge Voraussetzungen gebunden, dass er in der Praxis kaum Wirkung zeigen werde.³⁸ Leider hat sich diese Einschätzung bestätigt. Die Regelung leidet an vielen Konstruktionsfehlern, so dass sich die damit verbundenen Hoffnungen bisher nicht erfüllt haben. Die zumeist von Verbraucherorganisationen bzw. vom Dachverband der Verbraucherverbände auf der Grundlage von § 10 UWG bislang erhobenen Klagen dürften sich im zweistelligen Bereich bewegen. Nach Alexander gibt es zu der Vorschrift mehr wissenschaftliche Abhandlungen als Gerichtsentscheidungen. Hauptprobleme sind fehlende Anreize durch die Pflicht zum Abführen an den Bundeshaushalt sowie der Nachweis vorsätzlichen Verletzerhandelns.

Diese Meinung wird auch von Teilen der Literatur geteilt.³⁹ Fezer etwa sieht die Hauptursache des Gesetzesversagens in der Vermischung verschiedener dogmatischer Kategorien, nämlich der (deliktischen) Schadensersatzhaftung und der Haftung wegen ungerechtfertigter Bereicherung.⁴⁰ Trotzdem hält ein großer Teil der Literatur den Grundgedanken im Sinne der Stärkung des Verbraucherschutzes und Entgegenwirken eines Marktversagens nach wie vor für richtig.⁴¹ Umstritten ist, ob sich bereits aus Art. 13 UGP-RL eine Pflicht zur effizienteren Ausgestaltung des Anspruchs ergibt.⁴²

³⁶ OLG Stuttgart, (2007) *GRUR*, 435. – Veralteter Matratzentest.

³⁷ LG München I, Urteil vom 17.9.2014 – 37 O 16359/13.

³⁸ Stellungnahme der Verbraucherzentrale Bundesverband e. V. zum Regierungsentwurf eines Gesetzes gegen den unlauteren Wettbewerb vom 7. Mai 2003.

³⁹ Goldmann, in Harte, Henning, *UWG*, § 10 Rn. 5 ist § 10 UWG: praktisch „totes Recht“.

⁴⁰ K.-H. Fezer, *Zweckgebundene Verwendung von Unrechtserlösen und Kartellbußen zur Finanzierung der Verbraucherarbeit*, abrufbar unter <https://kops.uni-konstanz.de/bitstream/handle/123456789/23103/zweckgebundene%20Verwendung%20von%20unrechtserl%C3%B6sen.pdf?sequence=2> (Last accessed: 31 December 2018) 25., 30.

⁴¹ Henning-Bodewig, Die Gewinnabschöpfung nach § 10 UWG – ein Flop?, 731.

⁴² Danach müssen die Sanktionen „wirksam, verhältnismäßig und abschreckend“ sein; vgl. dazu von Braummühl, in Fezer, Büscher, Obergfell, *UWG*, § 10 Rn. 159 ff.

In der Literatur wird deshalb auch immer wieder angeregt, den Tatbestand auf grobe Fahrlässigkeit zu erweitern, eine Kausalitätsvermutung beim Gewinn einzuführen und die eingezogenen Beträge den Klägern zugutekommen zu lassen. Fezer schlägt vor, die Abschöpfung rechtswidrig erlangter Erlöse als Geltendmachung eines „Verbraucherkollektivschadens“ aus den abzuschöpfenden Unrechtserlösen und Verbraucheranteilen an Kartellbußen ein zweckgebundenes Sondervermögen des Bundes zur Finanzierung der Verbraucherarbeit einzurichten und damit die Arbeit der Verbraucherschutzorganisationen zu verbessern.⁴³ Auf das Erfordernis eines Verschuldens soll entweder komplett verzichtet oder eine Beweislastumkehr festgeschrieben werden, die dem Verletzer bei nicht schuldhaftem Verhalten eine Entlastungsmöglichkeit eröffnet.⁴⁴ Eine Gewinnerzielung zu Lasten einer Vielzahl von Abnehmern ist nicht mehr vorgesehen. Herauszugeben ist der durch einen Verstoß gegen § 3 oder § 7 UWG erzielte rechtswidrige Erlös, dessen Höhe gemäß § 287 ZPO zu schätzen sei.⁴⁵ Damit würden den teils unüberwindbaren Beweisschwierigkeiten Rechnung getragen.

Eine solche Ausgestaltung hätte den zusätzlichen Vorteil, dass die Verbraucherverbände, die wohl am ehesten auf der Grundlage von § 10 UWG tätig werden, auch bei umstrittenen Fallgestaltungen und schwieriger rechtlicher Bewertung genügend Ressourcen für kostspieligere Gerichtsverfahren hätten.⁴⁶ Weiter sollen flankierend weitere zivilprozessuale Maßnahmen eingeführt werden, etwa Musterfeststellungsklage und Gruppenklage. Kurzfristig könnte Abhilfe schon durch eine relativ kleine Änderung geschaffen werden, nämlich Zuführung des eingezogenen Unrechtsgewinns an die Verbände zur zweckgebundenen Verwendung, damit § 10 UWG an Effizienz gewinnen kann.⁴⁷

Schließlich wird der bisherige Mißerfolg der Regelung auch zum Anlass genommen, die Diskussion über individuelle Ansprüche der Verbraucher im UWG wieder aufzunehmen, die schon seit den Siebzigerjahren immer wieder geführt wird.⁴⁸ Die gegen eine solche Klageberechtigung angeführten Gründe sind letztlich nicht stichhaltig.

⁴³ Fezer, *Zweckgebundene Verwendung...*, 25., 30. Vgl. auch Alexander, Nutzen und Zukunft der Gewinnabschöpfung in der Diskussion, 1190.

⁴⁴ Gegen Verzicht auf Verschulden Alexander, Nutzen und Zukunft der Gewinnabschöpfung in der Diskussion, 1190.

⁴⁵ Vgl. auch A. van Raay, *Gewinnabschöpfung als Präventionsinstrument im Lauterkeitsrecht*, Diss., (KIT Scientific Publishing, 2012) abrufbar unter <http://www.ksp.kit.edu/9783866448117> (Last accessed: 31 December 2018). Nach von Braunmühl, in Fezer, Büscher, Obergfell, *UWG*, § 10 Rn. 329, ist die Schätzung schon *de lege lata* möglich.

⁴⁶ Henning-Bodewig, Die Gewinnabschöpfung nach § 10 UWG – ein Flop?, 731.

⁴⁷ A.a.O.

⁴⁸ Henning-Bodewig, Die Gewinnabschöpfung nach § 10 UWG – ein Flop?, 731.; R. Sack, BB 2003, 1073, 1080 f.

4. Fazit

Der Gewinnabschöpfungsanspruch betritt Neuland, scheint aber gerade bei kleinteiligen Streuschäden ein adäquates Mittel zur Herstellung von Parität und zur Überwindung des „rationalen Desinteresses“ der betroffenen Verbraucher. Auch aufgrund der Verwässerung im Gesetzgebungsverfahren leidet er an einer Reihe von Konstruktionsfehlern. Die Rechtsprechung bemüht sich zunehmend, im Rahmen des Möglichen diese auszugleichen. Daher erscheint die vorherrschende grundsätzlich negative Bewertung des Anspruchs nicht gerechtfertigt. Allerdings sollte der Gesetzgeber im Lichte der praktischen Erfahrungen nachsteuern.⁴⁹ Diese betrifft vor allem drei Punkte: Entschärfung des Vorsatzerfordernisses, Beweiserleichterungen beim Gewinnnachweis, Verwendung der eingezogenen Gewinne für Verbraucherschutzorganisationen oder Verbraucherschutzzwecke.

Bedenken hinsichtlich eines Missbrauchs, etwa durch „Gewinnabschöpfungsvereine“, kann man relativ schnell entkräften.⁵⁰ Hier kann man zunächst verweisen auf die besonderen Anforderungen an die anspruchsberechtigten Einrichtungen gemäß § 8 Abs. 3 Nr. 2 und Nr. 3 UWG. Weiterhin ist eine missbräuchliche Geltendmachung nach § 8 Abs. 4 UWG unzulässig, was auch gegenüber einem Abschöpfungsanspruch Sperrwirkung entfaltet. Schließlich gelten auch die allgemeinen Grundsätze der §§ 226, 242 BGB. Darüber hinaus könnte man eine zweckgebundene Verwendung vorschreiben, die durch spezielle Kontrollrechte des Bundesamtes für Justiz abgesichert werden könnte. Zu diskutieren wäre dann, inwieweit eine Begrenzung auf Härtefälle erfolgen sollte, wie es mit dem Merkmal des Vorsatzes beabsichtigt war.⁵¹ Da subjektive Elemente im UWG keine Rolle spielen, ist dieses Element zumindest systemfremd.

III. RESUME

Das ohne Zweifel bestehende Marktversagen bei der Geltendmachung von Schäden im UWG und auch in anderen Bereichen kann durch kollektive Instrumente ausgeglichen werden. Die Sammelklage und der Gewinnabschöpfungsanspruch sind dabei zwei unterschiedliche Instrumente, deren grundsätzliche Eignung zur Herstellung eines Gleichgewichts der Kräfte anzuerkennen ist. Dabei können sich beide ergänzen, wobei der Gewinnabschöpfungsanspruch für Streuschäden mit geringem Schaden besonders geeignet ist, während der Sammelklage für größere, eher bezifferbare Schäden

⁴⁹ Vgl. auch Bundesrat, Stellungnahme zum RegE UWG-Reform 2015, BR-Drs. 26/15, S. 4

⁵⁰ Vgl. zum Folgenden Alexander, Nutzen und Zukunft der Gewinnabschöpfung in der Diskussion, 1190. ff. Vgl. auch von Braunnühl, in Fezer, Büscher, Obergfell, *UWG*, § 10 Rn. 110. Kritisch zu Kollektivklagen Stellungnahme der GRUR, (2010) *GRUR*, 120 f.

⁵¹ Vgl. von Braunnühl, in Fezer, Büscher, Obergfell, *UWG*, § 10 Rn. 170.

mit Breitenwirkung nützlich sein kann. Die existierenden Formen haben noch großes Verbesserungspotenzial, wie die dargestellten Reformüberlegungen deutlich machen.

Wegen der verschiedenen mit einer Class Action amerikanischen Stils verbundenen Probleme (Ermittlung der Schadenshöhe und individuellen Anteile, *punitive damages*)⁵² mag ein Opt-in Prinzip bei der Gruppenklage sinnvoller sein,⁵³ wirft aber die bereits angesprochenen strategischen Probleme auf, die eher in Richtung auf ein Opt-Out-Prinzip weisen. Als „Unterfütterung“ sollten auch für das deutsche UWG individuelle Ansprüche der Verbraucher auf Schadensersatz endlich anerkannt werden.⁵⁴ Der Gewinnabschöpfungsanspruch bedarf noch erleichterter Durchsetzungsmöglichkeiten sowie veränderter Anreize bei der Zuordnung abgeschöpfter Gewinne.

Insgesamt erscheinen effektiver und abgestuft ausgestaltete Gruppenklagen und Verbandsleistungsklagen⁵⁵ aber als notwendige Ergänzungen zu den bereits vorhandenen Instrumenten der kollektiven Unterlassungsklagen, da sie sowohl der Notwendigkeit einer Generalprävention als auch dem Gesichtspunkt der „Unrechts-gewinnabschöpfung“ Rechnung tragen.⁵⁶ Die dadurch entstehende Bandbreite von „public“ und „private enforcement“ kann dazu dienen, die im Verbrauchergeschäft entstandenen Ungleichgewichte auszugleichen und die Funktion von Schadensersatzansprüchen in diesem Bereich wiederherzustellen.

⁵² Vgl. von Braunmühl, in Fezer, Büscher, Obergfell, *UWG*, § 10 Rn. 46.

⁵³ Vgl. auch Empfehlung der Kommission v. 11.6.2013, ABl. L 201 v. 26.7.2013, 60 („Gemeinsame Grundsätze für kollektive Unterlassungs- und Schadensersatzverfahren bei Verletzung von durch Unionsrecht garantierten Rechten“).

⁵⁴ Dazu Henning-Bodewig, Die Gewinnabschöpfung nach § 10 UWG – ein Flop?, 731–739.

⁵⁵ Vgl., wo eine Untergrenze von € 500 für Gruppenklagen diskutiert aber letztlich abgelehnt wird, da sich der Markt hier selbst reguliere.

⁵⁶ Vgl. bereits die Gutachten von A. Stadler, Bündelung von Verbraucherinteressen im Zivilprozess, in T. Brönneke (Hrsg.), *Kollektiver Rechtsschutz im Zivilprozess*, (Nomos, 2001) 1, 3 ff.; *dies.*, Verbandsklagen auf Schadensersatz bzw. Gewinnabschöpfung, Gutachten im Auftrag des Verbraucherzentrale Bundesverband e. V. (vzbv), 2002, S. 4 ff.; sowie Micklitz, Stadler, *Unrechts-gewinnabschöpfung*, 25. ff.

Bak, Klára*

Agricultural Cooperatives as a Determining Form of Agricultural Enterprise

ABSTRACT

Cooperatives are widespread in agriculture and in certain branches of agriculture cooperatives are popular. Agricultural cooperative is considered to be a crucial and globally efficient business model in agriculture and agri-food industry, as well as in rural development in the 21st century. As a type of cooperative, it has special features and operates according to particular principles. Agricultural cooperatives provide significant economic achievements and besides economic advantages, they may also offer several further benefits of different nature to their members. The regulation of the countries concerning agricultural cooperatives have smaller – bigger differences. Some law systems like the Hungarian determine special provisions for agricultural cooperatives. In Hungary the Act X of 2006 on ‘cooperatives’ involves specific rules for agricultural cooperative under the title ‘Agro-economic cooperative’.

KEYWORDS: agricultural cooperative, complex goals, economic achievements, social advantages, special provisions, Act X of 2006 on cooperatives, agro-economic cooperative

I. INTRODUCTION

International documents and documents published by certain institutions of the European Union have the same point of view, according to which cooperatives are considered to be a crucial and irreplaceable organisation of agriculture and the agri-food industry, as well as of rural development in the 21st century.¹ One of the reasons for this lies in the fact that the cooperative form, which is traditionally an institution involving

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¹ See e.g.: Food and Agricultural Organization of the United Nations (hereinafter: FAO): Agricultural Cooperatives – Key to Feeding the World, 2012 World Food Day, Celebration Report, <http://www.fao.org/docrep/017/i3191e/i3191e00.pdf> (Last accessed: 31 December 2018); Concerning Europe, a document with a similar content is e.g.: European Economic and Social Committee: *Cooperatives and agri-food development*, EESC Opinion, 11th July 2012, Brussels, NAT/541.

small and medium market participants,² may align its function to the contemporary demands being placed on agriculture, food production and food processing, as well as on rural development in an efficient and flexible way.³ One of these demands involves the ensuring agricultural sustainability.⁴ It includes especially promoting a food supply of an appropriate quantity and quality, besides preserving the ecosystems along with their recovery; increasing food security; setting up proper farming conditions for rural small-scale producers providing the opportunity for farmers to acquire innovative and developed technologies and increasing their competitive skills as well as promoting employment in the rural areas.⁵

² See the history of cooperatives: Kuncz Ö., A Rochdale-i elvek és a szövetkezet jogi fogalmának körülírása, in *Küzdelem a gazdasági jogért*, Vol. II. (Királyi Magyar Egyetemi Nyomda, Budapest, 1941) 414–415, 442.; Czettel J. and Ihrig K., *Szövetkezeti ismeretek*, (Patria Irodalmi Vállalat és Nyomdai Részvénytársaság, Budapest, 1926) especially 6.; Réti M., *Szövetkezeti jog*, Egyetemi jegyzet, (ELTE Eötvös Kiadó, Budapest, 2010) 22–39.; Réti M., Az európai szövetkezeti szabályozás fejlődéstörténetéről, (2012) 33 (1–2) *Szövetkezés*, 9–33. The essay is available in on the homepage of the Research Institute for Cooperatives: <http://www.szovetkezetikutato.hu/kozlesre.php> (Last accessed: 31 December 2018); Domé Györgyné and Réti M., *Szövetkezeti jog*, (ELTE ÁJK, Budapest, 1999); J. Birchall, *Rediscovering the cooperative advantage, Poverty reduction through self-help*, (Cooperative Branch, International Labour Office, Genf, 2003) especially 5–6.; Prugberger T., Az európai szövetkezetekről szóló rendelet a magyar szabályozás és a nyugat-európai szövetkezeti jogi szabályozás tükrében, (2003) (11) *Jogtudományi Közlemény*, 460–470.

³ See e.g.: E. McInerney (FAO Officer), *Cooperatives key to achieving sustainable agricultural development*, <http://www.un.org/esa/socdev/documents/2014/coopsegm/McInerney.pdf> (Last accessed: 31 December 2018); B. Manzano Lepe, *The Role of Agriculture Cooperatives and Farmer Organizations on the Sustainable Agricultural Practices Adoption in Uganda*, (Universiteit Gent, Gent, 2016), https://lib.ugent.be/fulltxt/RUG01/002/305/220/RUG01-002305220_2016_0001_AC.pdf (Last accessed: 31 December 2018); P. Burjorjee, Y. Nelis and B. Roth, *Land cooperatives as a model for sustainable agriculture: A case study in Germany*, (Blekinge Institute of Technology, Karlskrona, 2017), <http://www.diva-portal.org/smash/get/diva2:1111078/FULLTEXT02> (Last accessed: 31 December 2018).

⁴ See the interpretation of the definition of sustainable agriculture: Valkó G., *A fenntartható mezőgazdaság indikátorrendszerének kialakítása az Európai Unió tagországaira vonatkozóan*, (Központi Statisztikai Hivatal, Budapest, 2017) 46–48.

⁵ See: General Assembly of the United Nations (hereinafter: UN), *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, 21th October 2015, <https://sustainabledevelopment.un.org/post2015/transformingourworld> (Last accessed: 31 December 2018); UN, *Agenda 21, Chapter 14, Promoting Sustainable Agriculture And Rural Development*, United Nations Conference on Environment & Development, Rio de Janeiro, Brazil, 3 to 14 June 1992, <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf> (Last accessed: 31 December 2018). The rules of the second pillar of Common Agricultural Policy, the so-called rural development policy harmonise with the point of view of the relating international documents. The Regulation (EU) No 1305/2013 of the European Parliament and of the Council of 17 December 2013 on ‘support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) No 1698/2005’ provides the guiding rules. It is worth mentioning Section (4) of the Preamble of the Regulation which contains the following: ‘(4) To ensure the sustainable development of rural areas, it is necessary to focus on a limited number of core priorities relating to knowledge transfer and innovation in agriculture, forestry and rural areas, to farm viability, to the competitiveness of all types of agriculture in all regions and promoting innovative farm technologies and the sustainable management of forests, to the organisation of the food chain, including the processing and marketing of agricultural

This essay introduces some data in connection with agricultural cooperatives in order to give a clear picture about the importance of this form of entrepreneurship in agriculture and to demonstrate their role in the agricultural sector. Moreover, the analysis shows the operative features and regulatory characteristics of agricultural cooperatives which, on one hand make this entrepreneurship unique and, on the other hand, guarantee their success.

II. THE ECONOMIC RESULTS OF AGRICULTURAL COOPERATIVES

the role of cooperatives in agriculture is important, their results are outstanding. According to the data issued in 2016 by the International Cooperative Alliance and the European Research Institute on Cooperative and Social Enterprises, *from the aspect of turnover, 32% of the top 300 cooperatives worldwide are in the fields of agriculture and food industry.*⁶ In our opinion, this proportion is extremely high and demonstrates that cooperatives seem to be globally efficient in agriculture and the food industry.

Considering the European region, the data concerning this topic issued by the Cooperatives Europe with its headquarters in Brussels⁷ and the General Committee for Agricultural Cooperation in the European Union⁸ (shortly, hereinafter: COGECA) should be highlighted. According to the research by Cooperatives Europe in 2015, more than 50,000 cooperatives operate in agriculture, which have more than 9.5 million

products, to animal welfare, to risk management in agriculture, restoring, preserving and enhancing ecosystems that are related to agriculture and forestry, to the promotion of resource efficiency and the shift towards a low carbon economy in the agricultural, food and forestry sectors, and to promoting social inclusion, poverty reduction in and the economic development of rural areas.' <http://eur-lex.europa.eu/legal-content/HU/TXT/HTML/?uri=CELEX:32013R1305&from=HU> (Last accessed: 31 December 2018). See the Common Agricultural Policy of EU: Halmi, P., *Közös agrárpolitika*, in Kende T. and Szűcs T., *Az Európai Unió politikái*, (Osiris, Budapest, 2001); Réti M., *Az agrárpiac szervezésének, szabályozásának jogi eszközei az Európai Unióban*, in Domé Gy., Vass J., Hársfalvi R., Kurucz M., Réti M. and Vass J., *Agrárjog*, (ELTE ÁJK, Budapest, 1999) 194–234.; M. Réti and K. Bak, *The Common Agricultural Policy with and without the United Kingdom – CAP Brexit*, (2016) (1) *Elte Law Journal*, 163–182.

⁶ International Cooperative Alliance, European Research Institute on Cooperatives and Social Enterprises, *World Co-operative Monitor, Exploring the Co-operative Economy*, 2016 Report, http://old.ica.coop/sites/default/files/WCM_2016.pdf?_ga=1.211645532.853113102.1428575261 (Last accessed: 31 December 2018) 7.

⁷ The organization represents cooperatives and protects their interests in Europe. It has 141 million individual members, who are owners of 176,000 cooperative enterprises. The homepage of the organization: <https://coopseurope.coop/about-us> (Last accessed: 31 December 2018).

⁸ According to data published by the organization, it represents 22,000 agricultural cooperatives in Europe. The homepage of the organization: <http://www.copa-cogeca.be/Menu.aspx> (last accessed: 31 December 2018).

members.⁹ Concerning the survey issued in 2010 by COGECA the market shares of agricultural cooperatives in the European Union was approximately 60% from the aspect of processing and marketing agricultural products and 50% concerning supply.¹⁰ The third most important document was also issued by COGECA with the title of ‘Development of Agricultural Cooperatives in the EU 2014’¹¹ in 2015. Besides other data, this document includes the number and the definition of agricultural cooperatives operating in Europe and the number of their members, as well as the trends reflected by the statistics presented in the surveys regarding previous data. One of the values of this document is that it conveys independent data concerning certain European countries. Among the data in this document are the results of the turnover of the agricultural cooperatives which belong to the top 100 according to their economic achievements for 2011–2013. As the data show, the top 100 European agricultural cooperatives altogether had a turnover of EUR 187,846 million in 2011, while it was EUR 223,358 million in 2013.¹² Another valuable finding on the basis of this survey is that 50% of French farmers are members of a CUMA (*Coopératives d’Utilisation du Matériel Agricole*) which is a special type of cooperative in France.¹³ Denmark is also worth mentioning in the European context. In Denmark, 28 cooperatives operate with 45,710 members in agriculture according to the data in 2015.¹⁴ By considering the two figures regarding the Danish agricultural cooperative system we may come to the conclusion that cooperatives in Denmark are organised with the participation of more members. Most entrepreneurs in agriculture are cooperatives.¹⁵ Denmark is also worth mentioning from the aspect that cooperatives seem to have been an extremely successful and efficient organisational framework regarding certain strategic branches of agriculture, such as the dairy industry, since the first third of the 20th century.¹⁶

⁹ Cooperatives Europe, *The Power of Cooperation – Cooperatives Europe key figures*, (Cooperatives Europe, Brussels, 2015), <https://coopseurope.coop/sites/default/files/The%20power%20of%20Cooperation%20-%20Cooperatives%20Europe%20key%20statistics%202015.pdf> (Last accessed: 31 December 2018) 19.

¹⁰ COGECA, *Agricultural Cooperatives in Europe*, (Brussels, 15th September 2010), <https://www.agro-alimentarias.coop/ficheros/doc/03020.pdf> (Last accessed: 31 December 2018) 18.

¹¹ COGECA, *Development of Agricultural Cooperatives in the EU 2014*, (Brussels, 5th February 2015). http://agricultura.gencat.cat/web/.content/de_departament/de02_estadistiques_observatoris/27_butlletins/02_butlletins_nd/documents_nd/fitxers_estatics_nd/2015/0165_2015_IA_Cooperatives_Cooperatives-UE.pdf (Last accessed: 31 December 2018).

¹² See the data: COGECA, *Development of Agricultural Cooperatives in the EU 2014*, 24–27.

¹³ Filippi, M., *Support for Farmers’ Cooperatives; Country Report France.*, Wageningen: Wageningen UR., 2002, <https://edepot.wur.nl/244795> (Last accessed: 31 December 2018) 15.

¹⁴ Cooperatives Europe, *The Power of Cooperation – Cooperatives Europe key figure*, 56.

¹⁵ Danish Agriculture and Food Council, *Facts and Figures – Denmark – A Food and Farming Country*, (September 2016), <https://agricultureandfood.dk/~media/lf/tal-og-analyser/fakta-om-erhvervet/facts-and-figures/facts-and-figures-2016/facts-and-figures-rev2.pdf> (Last accessed: 31 December 2018).

¹⁶ Dairy cooperatives have a long history in Denmark. In the middle of the 1930’s, 92% of milk producers were organized in cooperatives, producing 84% of dairy products, 90% of export-butter and 87% of

FAO data can be highlighted concerning regions beyond Europe. According to it, cooperatives produce 37.2% of GDP in agriculture in Brazil.¹⁷ Considering the current data, 12 million farmers provide dairy cooperatives with 16.5 million litres of milk on a daily basis in India.¹⁸ In Armenia, there is a labour shortage in agriculture. Data from 2011 record that 118 cooperatives out of all 239 registered in the country operate in farming and/or food production.¹⁹

We may come to two significant conclusions from the above data. We can see that a great number of cooperatives nowadays operate in the field of agriculture worldwide. *Cooperatives are widespread in agriculture and in certain branches of agriculture cooperatives are popular.*²⁰ It is also important to conclude that *cooperatives may be considered to be successful and efficient, concerning the findings of the surveys. Cooperatives are able to provide significant economic achievements for their members.*²¹

III. THE FEATURES OF AGRICULTURAL COOPERATIVES

the success of agricultural cooperatives supported by the previously shown economic data may be concluded from the fact that *agricultural cooperatives as a type of cooperatives have a unique legal nature and special operating features and principles. These operating features and principles characterise cooperatives in general.* As cooperative traditions date back to the 19th century, these operating principles have been tried, justified by

meats were related to cooperatives. See the data: Habsburg E., *A magyar tanyavilág*, (Szent-István Társulat, Budapest, 1938) 207.

¹⁷ FAO, *Agricultural cooperatives are key to reducing hunger and poverty*, <http://www.fao.org/news/story/en/item/93816/icode/> (Last accessed: 31 December 2018).

¹⁸ See the data: <http://www.amul.com/m/about-us> (Last accessed: 31 December 2018).

¹⁹ S. Movsisyan, *The Role of Cooperatives in the development of Agriculture in Armenia, Asian Countries & EU (Worldwide case studies)*, (Research Paper, Institute for Cultural Diplomacy, Berlin, 2013).

²⁰ It is worth highlighting that cooperation has a long tradition in agriculture. In this field the appearance of cooperatives dates back to ancient times and the Middle Ages, when the everyday life and farming required mutual collaboration. However, it is important that cooperatives operating against natural disasters developed self-organizationally beside cooperatives mentioned above, e.g. cooperatives for afforestation against rock-falls. From a historical aspect, it is relevant to mentioning that a conscious cooperation wave took place in the rural areas of Europe as well as in the USA. We highlight from the analyses of the history of agricultural cooperatives: Czettler and Ihrig, *Szövetkezeti ismeretek; Réti, Az európai szövetkezeti szabályozás fejlődéstörténetéről*, 11–17.; J. Birchall, *The international co-operative movement*, (Manchester University Press, Manchester and New York, 1997). See the relating data concerning the USA: J. Birchall and L. Hammond Ketilson, *Resilience of the Cooperative Business Model in Times of Crisis*, (International Labour Organization, Geneva, 2009), https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/documents/publication/wcms_108416.pdf (Last accessed: 31 December 2018) 5.

²¹ A similar conclusion can be found in: Szeremley B., *Exportorientált értékesítő szövetkezetek létesítése az élelmiszer-gazdaságban*, (1994) 15 (1–2) *Szövetkezés*, 41.

practice and are of long standing.²² These operating features ensure a kind of balance for the cooperative members and they also mean a long-term operating opportunity at the same time.

It is important to highlight the special operation of cooperatives, which is member-centred. All of the cooperative members have the opportunity to take advantage of the cooperative for their own individual purposes. Another important feature of cooperative is that *the members are obliged to contribute personally to the operation of the cooperative.* The main role of the members is to participate in an active way. *The members of a cooperative primarily benefit from the profit of a cooperative according to the proportion of their personal contribution.*²³

Furthermore, it is also an important feature that *the members of cooperatives, who are the owners and the users of the cooperative at the same time, mutually collaborate with each other* with special concern for harmonising their activities. It is clear from the nature of the cooperative form that *the members of an agricultural cooperative may benefit due to its size and the relations in the commercial market.* This advantage may be realized in the case of an agricultural cooperative by the fact that the members of the cooperative, i. e. the farmers, may be in a better position to make a bargain in the market than individually. In the agriculture another advantage, which also traces back the economies of scale of cooperatives, is that cooperatives may be able to operate more cost-effectively than the member individually.²⁴ Cooperatives have open membership. It means that the number of cooperative members is not limited so they can have a lot of members. The members can be stronger in the market together than alone. A cost-effective operation is ensured for the cooperative also by the fact that *it does not need a mediator in the process of the activity in the market,* because the members, who are the users and the owners at the cooperative at the same time, deal with traditional mediatory tasks, too.²⁵ An additional economic advantage of agricultural cooperatives

²² The International Cooperative Alliance has defined the international cooperative principles as guidelines since the first third of the 20th century. These principles signify the unique operating principles of cooperatives. According to the organization, 'real' cooperatives function along these principles. Those currently in force were accepted in September 1995, their last revision happened at the global congress in Turkey in 2015. The international cooperative principles in force are: 'Voluntary and open membership', 'Democratic member control', 'Member's Economic Participation', 'Autonomy and Independence', 'Education, Training and Information', 'Cooperation among cooperatives', 'Concern for Community'.

²³ See: Réti, *Szövetkezeti jog*, 31–32.

²⁴ See: G. L. H. Svendsen and G. T. Svendsen, Measuring Social Capital: The Danish Co-operative Dairy Movement, (2000) 40 (1) *Sociologia Ruralis*, (72–86) 72–73., https://www.researchgate.net/publication/227698290_Measuring_Social_Capital_The_Danish_Co-Operative_Dairy_Movement (Last accessed: 31 December 2018) <https://doi.org/10.1111/1467-9523.00132>

²⁵ Réti, *Szövetkezeti jog*, especially 31–32.

is that it may be able to regulate the prices at the market if the particular cooperative is considered as a significant participant at the competitive market.²⁶

In this context, it is worth mentioning that, since the end of the 19th century *the agricultural, food industrial and consumer cooperatives* have been rationalizing their activity in order to achieve a more effective and fruitful operation so that cooperative network, as well as cooperative systems coordinated by cooperative centres could be established. Concerning their rural cooperatives, these centres take an extremely useful coordinating and logistic function²⁷ and are able to hold the agricultural, purchasing and consumer cooperatives together in the countryside. These kinds of centres were established in such countries as Germany and Denmark²⁸ at the beginning of the 20th century, but we may not forget about the so called ‘Hangya’ cooperative centre in Hungary.

Referring to the issue above, it is necessary to draw attention to another essential factor, that besides cooperatives organised for farming the same crops, several other types of cooperatives are present in the agricultural and food industries. As we have explained before concerning the manufacture of food products it as advantageous for the members to get the essential ingredients and devices for farming, to use the agricultural machines and to make process together. As we have also highlighted, the common cultivation and marketing ensure a more beneficial and cost-efficient marketing position for selling the products. In such way the purchasing cooperatives, sales cooperatives, cooperatives for controlling animals, dairy cooperatives, machine cooperatives as well as the consumer cooperatives, which take a role in distributing products to the consumers, have been present for a long time. Recently, a new type of cooperative, so-called agricultural marketing cooperatives have appeared. These cooperatives provide marketing activities to be more successful in the market.

We also have to point out that, besides economic advantages, agricultural cooperatives may offer several further benefits of different nature to their members. These advantages trace back to the complex goals of the cooperative. Another unique feature of a cooperative is that it tends to provide its members with cultural, educational, and social advantages, too. *They may seem be the appropriate organisational frame to supply opportunities for education, training and further studies which may improve the member's professional, theoretical and practical knowledge as well as support their promotion because cooperatives exist and operate member-centred.* ‘Hangya’ system from

²⁶ The Hungarian ‘Hangya’ cooperative model which was established at the end of the 19th and operated until the end of the Second World War serves as an example. One of its goals was to regulate the market price in the countryside. See: Termelő-Értékesítő és Fogyasztási Szövetkezet, A Magyar Gazdaszövetség Szövetkezeti Központja, *A „Hangya” Termelő-Értékesítő és Fogyasztási Szövetkezet, a Magyar Gazdaszövetség Szövetkezeti Központja Első 25 éve*, (Hangya Házinyomda, Budapest, 1923) 23.

²⁷ Habsburg, *A magyar tanyavilág*, 51., fn. 16.

²⁸ Ibid.

the beginning of the 20th century may serve a good example for it, because its activity in the countryside was significant in the field of education for the members. ‘Hangya’ network published e.g. a nationally widespread quality paper to inform the Hungarian farmers about the latest Western-European agricultural procedures.²⁹

In connection with agricultural cooperatives, it is important to mention that they are able to *take a significant role in employment of the rural people by ensuring an opportunity to stay in the countryside.*

Last but not least, it is also a feature of agricultural cooperatives that, in general, they *pay particular attention to the criteria of environment conservation, health care and innovative solutions.* The professional analysis matches the practical experience from the aspect that agricultural cooperatives are pioneers in bio farming and they serve as a good example of how to apply environmentally friendly farming methods.

IV. THE REGULATION OF AGRICULTURAL COOPERATIVES

1. Regulatory models in general

In the context of the analysing of regulations concerning cooperatives, we may lay down that the regulatory solutions of certain countries have smaller – bigger differences. Naturally, these differences may be originated in their specific law systems, societies, and economies.

Nowadays several countries lay out sui generis acts concerning the cooperative form, regardless of their specific economic activity. It means that the cooperative law material generally deals with the rules of establishment, operation and cessation of cooperatives concerning all or almost all the cooperative types independently from the goal and function of the cooperative. The German,³⁰ Austrian,³¹ Finnish³² cooperative laws may serve as good examples of this regulatory method. Furthermore,

²⁹ Ibid.

³⁰ „Gesetz betreffend die Erwerbs- und Wirtschaftsgenossenschaften”; The date of entry into force of the German Act on cooperatives: 1st May 1889. The Act is available on the internet in German: <https://www.gesetze-im-internet.de/geng/BJNR000550889.html> (Last accessed: 31 December 2018).

³¹ „Gesetz vom 9. April 1873, über Erwerbs- und Wirthschaftsgenossenschaften”; The Austrian Act is available on the internet in German: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001680> (Last accessed: 31 December 2018).

³² The new cooperative Act, namely the Act on cooperatives Nr. 421/2013 (*Osuuskuntalaki*) entered into force in Finland in 1st January 2014. The Act is available on the internet in Finnish: <https://www.finlex.fi/fi/laki/alkup/2013/20130421> (Last accessed: 31 December 2018).

the Portuguese³³ regulation follows their regulatory approach, too. However, several law systems determine special provisions for certain cooperative types, such as agricultural cooperatives. The French and Hungarian³⁴ cooperative law may fall under the last group.

2. Portuguese Cooperative Regulation

It is worth highlighting the Portuguese act on cooperatives (Lei n.º 119/2015, de 31 de Agosto *Código Cooperativo*) because it should be considered as a pattern for the Hungarian lawmaker from some aspects. On one hand, the Portuguese Act on cooperatives may be suggested to be followed because Article 4 of the act enumerates the branches of the cooperative sector. According to the act, the cooperative sector consists of 12 different branches. The Article 4, Section 1, point c) denominates ‘agriculture’ (*Agrícola*). It clearly turns out from the act that, actually, cooperatives appear an amazingly wide scale in the economy.

Last but not least, concerning Portuguese cooperative law, we shall refer to the fact that the Portuguese regulations ensures a constitutional basis for cooperatives.³⁵ Article 61 of the Constitution of the Portuguese Republic (*Constituição República Portuguesa*) lays down the opportunity to found cooperatives for all. Besides the opportunity for establishing cooperatives, the constitution, namely Article 85, Section (2), also declares that the state may ensure fiscal and financial benefits as well as technical support for cooperatives. Hence, the operation of this entrepreneurship is supported by the Portuguese law at the level of the constitution.³⁶ Regarding cooperatives, another particularly valuable element of the Portuguese constitution is that it guarantees to establish cooperative schools as part of the educational system.³⁷ Taking the Portuguese regulation into account as a model, it may be worth being considered by the Hungarian lawmaker to ensure a constitutional basis for the cooperative sector.

³³ Lei n.º 119/2015, de 31 de Agosto *Código Cooperativo*. The Portuguese Act is available on the internet in Portuguese: <https://dre.pt/dre/legislacao-consolidada/lei/2015-70147380> (Last accessed: 31 December 2018).

³⁴ Act X of 2006 on cooperatives ‘II. Special Types of Cooperatives’, ‘2. School cooperatives’, ‘3. Social cooperatives’. The Act is available on the internet: https://net.jogtar.hu/jogszabaly?docid=A0600010_TV (Last accessed: 31 December 2018).

³⁵ See a valuable work on the analysis of the constitutional basis of cooperatives: Réti M., A szövetkezeti forma jelentőségéről az uniós jogban, aktuális nemzetközi tendenciáiról, alkotmányjogi alapok az európai jogrendszerek szövetkezeti jogában, in *Ünnepi tanulmányok Prugberger Tamás professor emeritus 80. születésnapjára, Miskolci Jogi Szemle*, (2017) Special Volume 12 (2) 479–492.

³⁶ Trócsányi L. and Badó A. (szerk.), *Nemzeti alkotmányok az Európai Unióban*, (KJK-KERSZÖV Jogi és Üzleti Kiadó Kft., Budapest, 2005). The Portuguese Constitution is available in Portuguese language: <http://www.parlamento.pt/Legislacao/Paginas/ConstituicaoRepublicaPortuguesa.aspx> (Last accessed: 31 December 2018).

³⁷ Portuguese Constitution Article 43, Section (3).

3. French Cooperative Regulation; Definition in the French Act on Cooperatives

The regulatory method of the French law concerning agricultural cooperatives may be considered as a pattern, because it determines cooperative by establishing their economic benefits mentioned above as a starting point in its definition.

In France, agriculture is considered as a particular branch of the economy in which the role of agricultural cooperatives is significant – as the previous results of cooperatives have already shown it. In light of these, the Act of 10 September 1947 on ‘cooperatives’³⁸ essentially reflects the typical economic features of cooperatives. The French cooperative act defines cooperative as:

companies, the primary purposes of which are: 1. To reduce, for the benefit of their members and through the joint effort of said members, the cost price and, where applicable, the sale price of certain products or certain services, by performing the functions of the entrepreneurs or intermediaries whose remuneration would increase said cost price; 2. To improve the merchantable quality of the products supplied to their members or of those products produced by said members and delivered to consumers; 3. And, in general, to contribute to the satisfaction of their members’ needs, the promotion of their members’ economic and social activities and the training of their members. Cooperatives may be active in all areas of human activity.³⁹

The definition of the French cooperative act clearly reflects the already mentioned characteristics of cooperatives. The definition includes that cooperatives provide the economic interest of the members along with giving a chance for their own development and training. It is also worth highlighting from the elements of the definition that cooperatives play a significant role in all branches of human activity, and they are able to provide these activities. The French regulation harmonizes with the Portuguese law in its regulatory point of view because it also lays down that cooperatives do a variegation of activities.

In connection with French cooperative law it shall be pointed out that regulation has been introduced gradually. Besides the Act of 10th September 1947 on ‘cooperatives’, which includes the general rules concerning legal relationships of cooperatives, an individual act was made for agricultural cooperatives. The Act of 17th June 1972 on agricultural production cooperatives includes the special rules concerning

³⁸ „Loi n° 47-1775 du 10 septembre 1947 portant statut de la coopération”, the Act was published in the *Official Gazette* of 11th September, 1947. The Act on Cooperative is available on the internet: <http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000684004> (Last accessed: 31 December 2018).

³⁹ See in English: http://www.juricoop.coop/juricoop/iso_album/loi_10_09_1947-version_anglaise.pdf (Last accessed: 31 December 2018).

this cooperative type. Regarding its regulation, it is worth highlighting that if the content of the rules of this branch does not match the content of the provisions included in the general cooperative law, the rules of the special law shall be applied to agricultural cooperatives.⁴⁰

4. The Current Hungarian Regulation of Agricultural Cooperatives

a) The Structure of the Regulation on Agricultural Cooperatives

Similarly, to the French regulation, the Hungarian regulation relating to agricultural cooperatives has also been introduced gradually. The Act X of 2006 on 'cooperatives'⁴¹ established special rules concerning agricultural cooperatives under the title 'Agro-economic cooperative' since which came the introduction of Act V of 2013 on the 'Civil Code' (hereinafter: CC).

The rules the Third Book, namely 'Legal Persons'; specifically sections 3:325–3:367, establish the general rules relating to cooperatives. In addition to it, Act X of 2006 on 'cooperatives'⁴² (hereinafter: Coop Act) includes general rules concerning cooperatives in Chapter I under the title 'Provisions related to Civil Code'. More specific rules for agricultural cooperatives are involved in Point 4 of Chapter II under the title 'Agro-Economic Cooperative'.

b) The Definition of Agro-Economic Cooperative

The current definition of agro-economic cooperative originates in Section 3:325. of the Civil Code. Based on and matching it at the same time, the Coop Act thus defines an agro-economic cooperative:

§ 22 (1) An agro-economic cooperative is a cooperative operating in the agricultural, forestry and food sectors, providing support services and engaged in main activities, such as:

a) services and activities designed to enhance the operations of its members relating to their primary agricultural production and farming, and to placing their products on the market, including:

⁴⁰ See the regulation of French agricultural cooperatives: Prugberger T., A kereskedelmi szövetkezetek szerepe a közép-kelet-európai térségben, (1994) 14 (1–2) *Szövetkezés*, (21–39) 30–31. fn. 29.; see the history and operation of French agricultural cooperatives: Dávid Cs., *Szövetkezés a francia élelmiszer-gazdaságban*, (1998) 19 (1) *Szövetkezés*, 120–136.

⁴¹ It was modified by the Act CCLII of 2013, § 181, Subsection (1).

⁴² We note that the comprehensive amendment of Act X of 2006 on cooperatives has brought significant changes in the regulation. The Act was modified by Section 18(11) of Act CCLII of 2013 on the amendment of certain acts.

- aa) the joint purchasing of materials and equipment for production, and making arrangements for the joint commercialization of production,
- ab) storage and processing of production,
- ac) mechanized services provided for production, and for processing;
- b) farming and agricultural production using the agricultural and forestry land of its members and others.

The definition of the Coop Act is worth mentioning from both its theoretical and practical aspects because the concept represents the activities carried out in agriculture, silviculture and in another independent branch, namely food industry, which is strongly linked with agriculture. In brief, it means that the definition of agro-economic cooperative was elaborated focusing on the Hungarian agriculture as a whole. The main activities carried out by agro-economic cooperatives may be divided into two big groups, on one hand, providing certain services and carrying out certain activities which support the member's economies belong to one of these main activities and, on the other hand, the other main activity belongs to production.

According to the first case, the agro-economic cooperative provides its members with some kind of services, or it carries out certain sub-activities in connection with agriculture, such as purchasing ingredients, processing products or storage. In this case, the supplementary role of cooperatives concerning their members' business activity stands out. In this field, the exact purpose of the cooperative is to carry out activities which can hardly or not at all be achieved by the members on their own. Moreover, in order to promote efficiency, it shall present itself in a supplementary way in the economy of the cooperative members. The Coop Act Section 22(4) establishes correctly that this agro-economic cooperative subtype *'shall not seek to make a profit in their contracts concluded with their members.*

The other subtype is represented by the agro-economic cooperative, which carries out productive activity. These agro-economic cooperatives carry out productive activities by making use of the land of their members or a third person.

c) The Special Rules concerning Agro-economic Cooperatives

Regarding agricultural cooperative, Section 4 of the Coop Act establishes special rules for a unique legal institution, an operating fund, as well as for the exclusion of a member.

Concerning the rules of operational funds, Section 22(3) of the Coop Act includes the following: 'The statutes of an agro-economic cooperative shall provide for the setting up of an operational fund for starting up operations and shall lay down the rules for the appropriation of the operational fund.' According to the law it means that agricultural cooperatives shall establish an operative fund and its subregulation in its statutes. The goal of this provision may refer to the fact that an agricultural cooperative shall possess a certain amount of fortune to be able to ensure the stability of

its operation. However, the lack of the regulation concerning the goal, the legal nature and title of use of operative fund may cause some difficulties from the aspect of the application of the law.

Concerning the exclusion of a member, the Coop Act establishes the following special rules of agricultural cooperatives:

§ 24 (1) Serious harm to the interest of an agro-economic cooperative shall include the case where any action or negligence of a member, serving grounds for bringing action for the exclusion of such member, prevents or poses a serious threat to prevent the agro-economic cooperative to access assistance co-financed by the European Union or the central budget. (2) Where the exclusion of a member is initiated under Subsection (1), the court shall rule on the suspension of membership rights of such member in priority proceedings.

V. SUMMARY

This analysis points out the significant role of agricultural cooperatives for small and medium producers due to their unique features. We also found it important to represent that rules on agricultural cooperatives match their geographical, social and economic conditions. We wish that this work may support the further development of Hungarian cooperative law concerning agricultural cooperatives.

Darák, Péter*

Should Tax Law Be Interpreted? Is It Right to Interpret Tax Law?

ABSTRACT

The absurdity of law interpretation is even stronger in public law, especially in tax law. It is not right to interpret tax law, because it is dangerous. It is wrong to interpret tax law, because it is impossible to predict how the written text of the law will be interpreted later. Interpretation excludes voluntary compliance with tax law because the taxpayer does not know what the interpreted content of the law is, and it is unfair to impose sanctions for non-compliance with a law if its meaning is only determined later.

However there is a need of interpretation, which became more difficult with constitutionalisation, europeanisation of law and increasing relevance of fundamental rights. Lawyers have to fight with lack of theoretical structures, methodological uncertainty, and are faced with different tax professionals with opposing and competing interests. We have to point out the dominant position of the tax authority, absence of genuine methodological debates, bad traditions. The author gives practical examples, how jurisprudence can solve these dilemma.

KEYWORDS: *praeter legem* and *contra legem* law developing interpretation, reverse hierarchy of legal norms, retrospective tax inspection, discrimination, reliable ('well-behaved') taxpayers, content overrules form, unlawful exercise of taxpayer's rights

I. INTRODUCTION

It is not right to interpret tax law, because it is dangerous. It is wrong to interpret tax law, because it is impossible to predict how the written text of the law will be interpreted later. Interpretation excludes voluntary compliance with tax law because the taxpayer does not know what the interpreted content of the law is, and it is unfair to impose sanctions for non-compliance with a law if its meaning is only determined later.

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II. WHAT MAKES OUR JOB DIFFICULT?

In seeking to answer the question of whether we should or should not interpret tax law, reality cannot be ignored. And the reality is that in Hungary no legal norm can be applied without interpretation. Hence, the answer to the above question is yes: we should interpret tax law, even if interpretation is wrong in principle, as it makes compliance with the law more difficult. In examining the reasons that make it difficult for us to determine the genuine content of tax law, the following factors can be specified.

1. Constitutionalisation, increasing relevance of fundamental rights

Tax law, similarly to other specialised fields of law, is becoming increasingly influenced by constitutional law, and a fundamental rights-based approach is becoming increasingly prevalent in the field of tax law. I would like to mention two examples. First, which tax lawyer would think that tax law sanctions need to be compared with criminal law sanctions so that the proportionate tax law sanction can be determined? Well, as the most recent international practice demonstrates, the *ne bis in idem* principle must be interpreted, by taking several fields of law into consideration; that is, it is not sufficient to apply tax law provisions and sanctions by themselves: in applying the *ne bis in idem* principle: due regard must be paid to other sanctions already imposed – for example, for criminal or administrative offences.

The prohibition of double sanctioning applies where three conditions are met: the facts, the violator and the protected legal interest are the same. According to the most recent case law of the Court of Justice of the European Union, this principle – which is acknowledged by both the EU Charter of Fundamental Rights and the European Convention on Human Rights – may be limited for the purpose of protecting the financial interests and financial markets of the EU but only to the extent necessary to achieve those objectives. In its judgments delivered in cases C-524/15 and C-537/16, the Court has concluded that a possible duplication of criminal proceedings and penalties and of administrative proceedings and penalties of a criminal nature against the same person concerning the same facts is not inconceivable. Such limitations of the *ne bis in idem* principle do, however, require justification in conformity with the requirements of EU law; that is, the limitations must pursue an objective of general interest acknowledged by the Union, must contain clear and precise rules, and must provide for rules making it possible to ensure that the severity of all the penalties imposed is limited to what is strictly necessary in light of the seriousness of the offences committed.¹

¹ Source: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-03/cp180034en.pdf> (Last accessed: 31 December 2018).

The other principle which became embedded in tax law due to the impact of constitutional law and which appears, as will be presented below, in several provisions of the new Act on the Rules of Taxation (hereinafter: 'ART') and in the Act on Tax Administration Procedure (hereinafter: 'ATAP'), is the principle of equal treatment. The consistent application of the principle of equal treatment results in multipolar legal relationships under tax law. As German tax law practice demonstrates, there may arise so-called competing actions; namely, where the tax authority remits the tax debt of a business company or decides not to impose a fine on the company, a competitor may file a lawsuit against the decision alleging that the tax authority has thereby granted an unauthorized competitive advantage for the company that failed to pay its tax debt.

2. Europeanisation

The next factor is Europeanisation. We clearly see that, in these days, Hungarian tax law, in respect of certain tax types, cannot be interpreted without a sound knowledge of EU law. We may mention the value-added tax (VAT) Directive, since, in the related cases, we must determine the contents of a service and must determine which services are only ancillary to the principal service in the light of the case law developed under the Directives. Without being familiar with the respective EU Regulations, we are unable to determine even the tariff heading under which a given commodity falls.

3. Lack of theoretical structures

Another factor that makes our job difficult is that tax law is primarily practice-oriented, a finance and accountancy-related discipline, in which area law keeps playing catch-up with practice. It is sufficient to recall how tax law endeavours to react continuously to the ever-changing methods of tax planning, or to point out the impossibility of placing the OECD Model Convention in the hierarchy of legal sources, of determining its legal nature, and of resolving the problem of retroactive application of the related Commentaries.²

² According to the Protocol to the Agreement between the Federal Republic Of Germany And the Republic Of Hungary for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital, signed on 28 February 2011 in Budapest, Articles 5 and 7 of the Agreement shall be applied and explained, and especially any dispute shall be resolved subject to the Commentaries on Articles 5 and 7 of the OECD Model Convention in force. In case of any future revision of the Commentaries by OECD, Articles 5 and 7 of this Agreement shall be explained in light of the revised Commentaries, that is, according to the updated version, provided that they are in accordance with the text of the Agreement.

4. Methodological uncertainty

Tax law also suffers from methodological uncertainty. This uncertainty results, on the one hand, from the fact that classic public-law doctrines need to be applied to a specific field of law while due regard is to be paid, in the interpretation of tax law, to very important public finance interests. On the other hand, the precise delineation of the boundaries between criminal law and tax administration also poses a problem, and the practice that has evolved in the past years awaits important discoveries in this respect.

5. Two professions with opposing and competing interests

In interpreting tax law, our job is made more difficult by the fact that two professions face each other: tax advisors and tax inspectors interpret tax law along lines that reflect clearly understandable interests. Of course, those lines are very different.

6. Dominant position of the tax authority; absence of genuine methodological debates; bad traditions

The possibility of tax law interpretation is also distorted by the dominant position of the tax authority in tax administration proceedings. Another distorting effect is the absence of genuine and meaningful debates among legal scholars about the methodology of tax law; our bad tax law traditions – including traditional Hungarian resistance to paying taxes in the fashion of the ‘Kuruc’ (17th century anti-Habsburg) rebellion – are also distorting factors. Hungarian tax morals can be described as typically Eastern European.

III. DOES JURISPRUDENCE OFFER ANY HELP?

Does jurisprudence offer any help in the correct interpretation of tax law? Well, we must start from the actual situation and must state that no one may question the binding force of valid laws. The content of such laws, however, must be established by analysing them, and the content thus established will then become binding. The question is, who is entitled to give an authentic interpretation of the laws? There can be no doubt that only a judge may determine a legal dispute, based on the interpreted, specific content of the applicable law. As to the methods of law interpretation, jurisprudence obviously enjoys much greater leeway, for example in determining the objectives of the law and the interests sought to be protected by the law, and in compiling the list of values and principles which support the interpretation of tax law.

IV. METHODS OF DETERMINING THE APPLICABLE LAW

Among the methods of interpretation, we can find the classic methods defined by Friedrich Carl von Savigny: grammatical, systematic, historical and teleological. In our modern world, however, interpretation in conformity with the constitutional standards, EU law, and international law is also indispensable. Moreover, in a world of global tax competition, the method of comparative law cannot be ignored, either. I am sure that no one would take the risk of accepting an interpretation that is regarded in other parts of the world as ridiculous. Therefore, the use of comparative method is becoming increasingly prevalent.

Another question is the extent to which the interpretation of tax law is suitable for developing the law. Legal theory makes a distinction between *praeter legem* and *contra legem* law-developing interpretations. It must be noted that, under Hungarian tax law practice, the borderline between these two methods is almost entirely unclear and, in view of the Hungarian Constitutional Court's recent decisions, it can be stated that this body limits the leeway allowed for law developing interpretation to an even greater extent than what is common under international trends.

The conflict-of-law rules and the principles under which the interpretation of tax law could be carried out are not always applicable. In this respect I wish to mention two examples. To tax lawyers, the reverse hierarchy of legal norms is a familiar concept, the essence of which is that the lowest ranking norm is the one applicable, because the lowest ranking norm, guideline or National Tax and Customs Administration (NTCA) opinion is the most detailed and the most understandable for taxpayers. The other example is related to the question of valid and binding legal norms. Namely, tax law contradicts the general rule that only legal norms in force may be applied because, in conducting a retrospective tax inspection with regard to the preceding five years, the tax authority must apply tax law provisions already repealed by the legislature but in force at the material time. In determining the applicable law, careful consideration and the use of the methods of logical argumentation are indispensable.

V. OTHER FACTORS HAVING AN IMPACT

Other factors also have an impact on tax law. Such factors include, among others, circumstances that in practice function as preliminary restrictions; such a restriction occurs, for example, upon an advance tax ruling, which is a special procedural law institution allowing the tax authority to determine in advance the tax liability of a given transaction.

The protection of a legitimate expectation or the principle of equal treatment may also have an impact on a given tax liability.

These days, empirical legal studies pay increased attention to the cognitive and decision-making processes, therefore the vast amount of American empirical literature

that deals with the distortive effects of those processes cannot be ignored in the interpretation of tax law, either. The traditional approach of Hungarian legal theory emphasises the importance of enforcing the principles of material justice, legal certainty, and effectiveness in the interpretation of tax law.

VI. WHERE DO WE EXPECT FURTHER HELP FROM JURISPRUDENCE?

Where do we expect further help from the jurisprudence with the interpretation of tax law? We have no reliable methods to ensure the compatibility of contradicting values, and we cannot precisely reflect in the interpretation of tax law the application of tax rules, which application is constantly adjusted to changing life circumstances. Tax law interpretation and jurisprudence are powerless *vis-à-vis* value changes, too.

In searching positive law for methodological rules orienting us in the interpretation of tax law, the inventory that can be made is rather deficient. Positive law, naturally, specifies the objective of the law and sets forth the obligation of exercising the rights in conformity with the purpose of authorisation – which rule refers back to the legislature’s will as an aspect to be taken into consideration in interpreting the law – but, in addition to these rules, only the prohibition of discrimination appears in various respects in the texts of the tax laws, and the taxpayer’s ‘good behaviour’ may have an impact on tax cases. At this point, I would like to raise some concerns: Is granting certain statutory benefits to reliable (‘well-behaved’) taxpayers compatible with the prohibition of discrimination? When the tax authority applies the principle of actual content, namely, the economic outcome of the transaction; that is, when content overrules form, what are the limits of the authority’s scope of action? From the existing practice, instances can be recalled when the tax authority treated independent contractor agreements as employment contracts, and this practice was accepted by the courts, too. Moreover, the tax authority treated lease-purchase agreements with so-called ‘head-weighted’ payment structure (where at least 70 percent of the purchase value is paid at the beginning of the lease period) as purchase agreements, and reclassified onerous contracts as gratuitous contracts, and vice versa. As such, the question arises: Where are the doctrinal limits of classifying contracts according to their genuine content? For the tax authority, a similarly fundamental issue is the principle of equitable procedure – what can be the consequences of such a procedure?

VII. EXAMPLES FROM THE CURIA’S TAX JURISPRUDENCE

Let me give a few examples as an illustration. In a case related to the lawful exercise of rights, company employees who were authorised to accept official documents ‘hid’ in

the company's office building from the tax authority employee who was empowered by the law to serve official documents in person. In its judgment, the Curia found that the company's conduct amounted to abusive exercise of rights. The Curia went against the grammatical interpretation of the positive law when it concluded that although the decision had not been actually served it should be regarded as having been duly served.³

The other example concerns equitable procedure. What requirements are to be met by the tax authority under the principle of equitable procedure? In a recent judgment, the Curia found that if a tax authority decision is taken more than one year after the expiration of the statutory time limit, no sanction can be imposed on the taxpayer.⁴ A similar legal consequence is prescribed in the new ART, namely where a taxpayer acts in compliance with the information provided on the website of the NTCA and the information later proves to be erroneous, no sanction can be imposed on the taxpayer.⁵

VIII. METHODOLOGICAL DEBATES

What methodological debates do the above questions of law interpretation generate? In establishing the economic content of a transaction, the dilemma is that business transactions are not one-way transactions. Taxpayers, even those entering into a transaction for tax evasion purposes, pay attention to ensuring that their transactions have multiple/various contents and can be approached from various directions. Can it be stated in such cases that the transaction was aimed at, exclusively or primarily, tax evasion? If the affirmative, on the basis of what facts? Can, in such cases, the method of typification of contracts be applied? How should the private law and contract law-related open concepts that arise in connection with this issue be treated?

As to the taxpayer's obligation to exercise their rights lawfully and in good faith, we have no guidance as to whether it is an objective or a subjective requirement and whether the lawfulness of the exercise of a right is to be inferred from objective circumstances, or can/should circumstances related to the state of mind also be taken into account? What facts may give rise to a finding of unlawful exercise of such rights?

³ Decision of the Curia No. Kfv. I. 35.008/2017/6, Reasoning Part [36]: 'In the course of personal delivery of a document issued by the tax authority, the denial of receipt can be effected not only by an express declaration but also by implicit conduct depending on the assessment of the circumstances of delivery.'

⁴ Judgment of the Curia No. Kfv. I. 35.080/2017/6, Reasoning Part [31]: 'Considering the above, the Curia examined in the given case to which extent the exceed of the deadline by 528 and, respectively, 538 days – which was also acknowledged by the defendant – influenced the plaintiff in performing its obligation of proof and, consequently, the establishment of the unlawful exercise of the right to VAT refund.'

⁵ Section 247, subsection 1 of Act CL of 2017: No sanction may be imposed on the taxpayer if it has proceeded in accordance with any information material published by the tax authority on its website, on the specific surface created for this purpose.

Tax law uses many generic and uncertain legal concepts, such as ‘costs of living’ or ‘credible evidence’. The meaning of these concepts is rather ambiguous if we focus only on the text of the laws. And, finally, the biggest question for law application is the extent to which the deficiencies and loopholes of tax legislation can be eliminated and filled. Practice has given controversial answers to this question. Is it allowed to establish content that is contrary to the grammatical meaning? I have mentioned the example related to the service of a decision, where the Curia accepted a content contrary to the grammatical meaning. I could, however, mention other cases, in which the Curia did not resort to such practice, or resorted to such practice but, in ensuing proceedings, the Constitutional Court established that, in applying the law, the Curia had exceeded its powers. To what extent may the courts interpreting tax law develop law? This question is not answered, and in general, it cannot be answered. Can the extent of law-developing interpretation depend on whether the interpretation is in favour of or against the taxpayer?

Well, these methodological debates continue to exist in the new legal environment, too: a careful reading of the new Act on Tax Administration Procedure and of the new Act on the Rules of Taxation reveals no substantial changes.

IX. CONCLUSIONS: CONTINUITY AND OPENNESS IN THE INTERPRETATION OF THE LAW

As a conclusion, I wish to emphasise the following: if we wish to make progress in the interpretation of the law in an acceptable manner, two requirements must be fulfilled simultaneously: one is continuity, the other is openness. The tension between continuity and openness may be reduced by the consistent enforcement of the following aspects. We should foster the special features of our national legal system, should reinforce the tendencies developed in Hungarian tax law, give effect to general principles of legal theory, and should endeavour to make judicial law development and its traditions more accepted and welcomed. Naturally, tax law depends on the economic situation. Therefore, no acceptable tax law interpretation is possible without balanced economic development and reasonable legislation. In a different context, a similar conclusion was reached by T. S. Eliot, who summarised the artistic combination of these two aspects as follows:

It is not enough to understand what we ought to be unless we know what we are, and we do not understand what we are unless we know what we ought to be. The two forms of self-consciousness, knowing what we are and what we ought to be, must go together.⁶

⁶ T. S. Eliot, *Religion and Literature*, in *Essays Ancient and Modern*, (Harcourt, Brace and Company, New York, 1936) 92–115.

Fazekas, János*

The Regulation of Competence in the Act on Public Administrative Proceedings

ABSTRACT

The paper examines regulation on competence in the Act on Public Administrative Proceedings (Ákr.) in Hungary. Regulation on competence is a basic guarantee of constitutionality and rule of law regarding administrative procedures, since public authority can only be carried out by bodies that have democratic legitimacy. However, the Ákr. does not cover several issues that are fundamentally relevant to this subject, e.g. delegation of competence and second instance authority. The hypothesis of the research is that the main reason for that is the intent of broadening the government's policy-making and organisational powers. In addition, the paper examines whether these intentions and the Ákr. are consistent with the above-mentioned constitutional requirements.

KEYWORDS: administrative law, administrative procedural law, rule of law, competence, Act on Public Administrative Proceedings (Ákr.), Hungary

I. INTRODUCTION – THE IMPORTANCE OF REGULATION ON COMPETENCE IN ADMINISTRATIVE PROCEDURAL LAW

Regulation on competence is a key question in administrative proceedings' law. It has been regulated also in the Act CXL of 2004 on the General Rules of Administrative Proceedings and Services (hereinafter: Ket., the former General Code) and Act CL of 2016 on General Public Administrative Proceedings (hereinafter: Ákr. which came into force on 1st January 2018). Regulation of competence is a basic guarantee of constitutionality and rule of law regarding administrative procedures, because public authority can only be carried out by bodies that have democratic legitimacy. It means delegation which comes from the sovereign people. This legitimacy provides transparency, accountability and predictability regarding individual cases of clients who are independent of public administration. It is therefore essential that a public statutory norm which is available to everyone shall regulate which body performs

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public authority in a concrete case (at first and second instance, if there is second instance) and how it shall do it.¹

The main purpose of Ákr. is to provide a normative minimum standard through regulating only the questions which affect every type of individual cases; In other words, to strengthen the general nature of the Ákr.² This may also be related to the fact that, although the extent of the regulation of competence has not changed significantly, the Ákr. does not cover several issues that are fundamentally relevant to this subject. As such, it does not regulate jurisdiction, delegation of competence, primacy of court, authorities acting in local government affairs, possible types of quasi-authorities and second instance authority. In addition to considerations regarding the parsimony of regulation, another consideration may arise, namely the intent of broadening the government's policy-making and organisational powers.³

In my paper, I try to justify this hypothesis, basically relying on the normative text and its antecedents. In doing so, I also examine whether these intentions and the new Act are consistent with the above-mentioned constitutional requirements.

II. THE LACK OF REGULATION OF JURISDICTION

Jurisdiction means the international division of labour between administrative authorities. In other words, in cases that contain international features, which state's authority shall act. The Ákr. does not regulate this question at all (it is not mentioned in the normative text), according to the Official Explanation, which explains that its practice has not developed and it does not arise in the overwhelming majority of cases and consequently cannot be regarded as a general rule.⁴ However, this is a misunderstanding: the general nature of a rule is not a quantitative but a qualitative issue. It does not depend on whether the legal institution is often applied, but whether the necessity of its application in all types of cases may in principle be raised. An international element (for example, a resident or established resident of a foreign country) can in practice exist in all types of cases. From another point of view, it is also true that there are legal institutions (for instance, an interpreter) which are not so often

¹ Decision of the Constitutional Court No. 38/1993. (VI. 11.), ABH 1993, 256., 262., Rozsnyai K., A közigazgatás fogalma, in Fazekas M. (szerk.), *Közigazgatási jog. Általános rész I.*, (ELTE Eötvös Kiadó, Budapest, 2015²) 22–23.; J. H. Jans, R. de Lange, S. Prechal and R. J. G. M. Widdershoven, *Europeanisation of Public Law*, (Europa Law Publishing, Groningen, 2007) 23–29.

² Official Explanation of the Ákr. General Part.

³ The Official Explanation of Section 9 of the Ákr. refers to 'possible further legal and organisational development' as the background to the general concept of administrative authority. See also: Hajas B., *Az Ákr. hatálya*, (2017) 19 (4) *Jegyző és Közigazgatás*, 7–12., <https://jegyzo.hu/az-akr-hatalya/> (Last accessed: 31 December 2018).

⁴ Official Explanation of Section 17 of Ákr.

applied, but they are regulated in the Ákr. Moreover, the Official Explanation itself highlights the fact that an administrative appeal, which is a typical general institution of administrative procedural law, can be submitted in few cases so it is not a general type of remedy anymore.⁵ However, this did not cause the legislator to leave the rules on appeal out of the Code, since it is rare, therefore, does not require general regulation, but has transformed the content of the regulation.⁶

Therefore, the fact that Ákr. does not regulate the issue of jurisdiction does not mean that there is no need for regulation, given the general nature of the legal institution. The change is ‘just’ that the general rules are neither in the Ákr. nor in other Code-like statute. Nonetheless, there are sources of law that can be called upon when an international element arises in an individual case. Thus, if the administrative case contains some civil law element (e.g. regarding guardianship, parental custody or international investment), then Act XXVIII of 2017 on Private International Law (hereinafter: Nmjt.v.) shall be applied.⁷ In other cases, sectoral legislation, international law or European Union law may be applicable.⁸

III. THE DEFINITION OF COMPETENCE AND THE CONCEPT OF AUTHORITY

Regarding the principle of rule of law, the Ákr. sets the same requirements against sectoral regulation of competence as the Ket. used to: competence must be regulated by statutory law.⁹ What is new is a distinction between authorisation and designation to exercise competence. The former may be made by a parliamentary act, a government decree or a local governmental decree, the latter by any statutory law.¹⁰ Authorisation applies to – according to the Official Explanation of Section 9 – administrative bodies established specifically for the exercise of official authority. On the other hand, designation refers to quasi-authorities: organisations or persons other than public authorities, but may exceptionally provide administrative powers, e.g. to public corporations or individuals. Nevertheless, this distinction does not seem very well-grounded in the light of theory and sectoral regulations.

⁵ Official Explanation of Ákr.

⁶ Official Explanation of Ákr., Szalai É., Az Ákr. jogorvoslati rendszerének jellemzői, in Fazekas M. (szerk.), *Közigazgatási jog. Általános rész III.* (ELTE Eötvös Kiadó, Budapest, 2017²) 275–278.

⁷ Nmjt.v. 3. § a) pont.

⁸ See e.g. Act XXXI of 1997 on the Protection of Children and Guardianship Administration (Gyvt.) Section 4 Paragraph (3) and Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

⁹ Ákr. Section 2 Paragraph (1). See also footnote 1.

¹⁰ Ákr. Section 9.

Regarding the concept of the administrative authority¹¹ it is a conspicuous change that the Ákr. does not even outline the types of bodies authorised for the exercise of official authority (state administration bodies, local government bodies and quasi-authorities) in an exemplary manner. The reason for this is that – according to the Official Explanation – it is not a matter of procedural law, but a matter of substantive or organisational law, and the legislator wants to respect the subsequent development of the organisation and the organisational power of the Government.¹² This generic clause-type, much more flexible definition is in line with the principle of legal certainty, and who acts as an administrative authority in an individual case is indeed a matter of organisational law. The question may be whether this much more flexible regulatory technique means a change of attitude: is there a governmental intention to transfer more administrative authority powers to quasi authorities? This, in itself, would be not unconstitutional, but it can only be constitutional with the right guarantees.¹³ Such a guarantee is primarily to ensure democratic legitimacy and adequate remedies. Moreover, such a guarantee was a provision of the Ket. which stated that if a public authority competence was transferred to a quasi-authority, the sectoral law had to define the cases in which the Ket. was to apply.¹⁴ The Ákr. contains no such provision, so the system of guarantees is less stringent than the system of the Ket., although it contains the essential safeguards.

However, the Ákr. does not regulate generally which body is the second instance authority that has jurisdiction over appeals. According to the Official Explanation of the Ákr.¹⁵ it is an organisational matter, not a procedural one, which is correct. Nevertheless, the Ket. itself did not confer competences to bodies but adjusted general principles regarding the regulation of competences. These principles were as follows: (1) the authority of first and second instance must be designated to a body by law, (2) the second instance authority is, in principle, the supervisory body of the first instance authority, (3) the first and the second instance authority cannot be the same body, (4) the second instance authority cannot give a direct order to the first instance authority regarding the individual case.¹⁶

These principles meant constraints on sectoral legislation and individual adjudication processes in order to enforce the constitutional right to legal remedy. Of course, they can be derived from rule of law and the right to legal remedy. Furthermore,

¹¹ See further: Á. Várad, The Concept of “Authority” and Procedural Principles in the Administrative Procedural Law of the European Union, (2015) 56 (1) *Acta Juridica Hungarica*, 72–85. <https://doi.org/10.1556/026.2015.56.1.7>

¹² See footnote 3.

¹³ See e.g. Decision of the Constitutional Court No. 478/B/1996. See detailed: Hajas, Az Ákr. hatálya; Barabás G. and Kovács A. Gy., A törvény hatálya, in Barabás G., Baranyi B. and Kovács A. Gy. (szerk.), *Nagykommentár a közigazgatási eljárási törvényhez*, (CompLex Kiadó, Budapest, 2013) 70–74.

¹⁴ Ket. Section 12. Paragraph (4). The Official Explanation of the Ket. mentioned legal certainty as a justification to this provision.

¹⁵ Official Explanation of Section 9 of Ákr.

¹⁶ Ket. Section 106.

in the remedy system of the Ákr., appeal is a secondary remedy, as opposed to judicial review, and therefore the absence of such rules cannot cause such a problem. However, it must be borne in mind that a considerable part of the adjudicative competences has been transferred to district and Budapest district offices in recent years and there are still appeals in these cases.¹⁷ On the other hand, if we examine the Ákr. alone, it must be stated that the level of the safeguards has weakened due to the disappearance of these fundamental principles from the Code.¹⁸ This can be of particular importance when an administrative authority or court or the legislator needs a guideline. So far Ket. showed a relatively straightforward course in these constitutionally sensitive issues, even if sectoral laws could differ from it, e.g. from the abovementioned principle no 2.; see the so-called horizontal remedy.¹⁹

IV. GENERAL PRINCIPLES OF REGULATION ON COMPETENCE

A ban on the abolition of powers is a classic principle, which is an important aspect of rule of law: the client has the right to have an authority designated by law in his/her individual case. This principle has been stipulated by both Ket. and the Ákr.²⁰

There is, however, no rule for the delegation of powers, contrary to Ket.²¹ According to the Official Explanation of the Ákr., there is no need to explicitly prohibit it, as the exercise of the powers designated by the law is not an option but an obligation for the authority, derived from the principle of rule of law. I can agree with that but the concern is the same: in such a regulatory environment, the outcome of a controversial situation depends solely on sectoral regulation or the authority or court acting in the concrete case. The outcome has been up to these factors so far, but it is a fact that the guarantee level of general regulation has become lower.

The primacy of the court is also a classic principle, which can be traced back to the principle of the separation of powers. This principle means that if the administrative court decides on the essence of the case or identifies its lack of competence, this decision

¹⁷ Ákr. Section 116. Paragraph (2). See also: Horváth M. T. and Józsa Z., *Az államigazgatás helyi és területi szervei: koncentráció és koncentrátum*, in *A magyar jogrendszer állapota*, (MTA Társadalomtudományi Kutatóközpont Jogtudományi Intézet, Budapest, 2016) 564–582.

¹⁸ Szalai, *Az Ákr. jogorvoslati rendszerének jellemzői*.

¹⁹ See e.g. Government Decree No 410/2007. (XII. 29.) on traffic violations, which states that the Head of Police of Vas County or Szabolcs-Szatmár-Bereg County acts on first instance in these cases, while the Head of Police in Budapest Capital acts on second instance, which is a body at the same level of organisation as the first instance authority. See further: Barabás G., Fazekas J. and Kovács A. Gy., *Joghatóság, hatáskör, illetékesség*, in Barabás G., Baranyi B. and Kovács A. Gy. (szerk.), *Nagy-kommentár a közigazgatási eljárás törvényhez*, (CompLex Kiadó, Budapest, 2013) 134.

²⁰ Ákr. 9. §. See also: Barabás, Fazekas and Kovács, *Joghatóság, hatáskör, illetékesség*. 138–139.

²¹ Ket. Section 19. Paragraph (3). See further: Barabás, Fazekas and Kovács, *Joghatóság, hatáskör, illetékesség*. 135–138.

is binding on everyone (*res iudicata*).²² The Ákr. – contrary to Ket. – does not expressly state this, which is well-founded, because it can be deduced from the principle of legality and separation of powers. Nonetheless, there are legal provisions from which the primacy of the court can be derived.²³

V. OTHER REGULATORY ISSUES

Hereinafter, I refer to legal institutions that do not directly relate to the concepts and principles discussed previously, but are act as a guarantee.

The rules of the Ákr. on illegal silence of the authority²⁴ are considerably shorter than those in Ket.²⁵ For example, such powers as the initiation of disciplinary proceedings or the special provisions on local authority cases have been omitted. In essence, the Ákr. only states that the supervisory body or the administrative court is authorised to act in the case of the illegals silence. In my view, this does not necessarily imply any safeguard problems.

Regarding the situation of regulation on conflict of competence: the Ákr. transfers the competence of making a decision on that matter to the administrative court. Ket. consisted of the same regulation²⁶ with an exception. While Ket. expressly transferred the competence to the Municipal Administrative and Labour Court, the Ákr. only generally refers to the administrative court, so it is clear from the Kp. that the Municipal Court of Budapest will act in that case.²⁷

The regulation of provisional measures is more problematic. This dogmatic category covers a constitutionally sensitive phenomenon, when an administrative authority in a case of emergency (e.g. a life-threatening situation or severe risk of injury) acts without competence or jurisdiction. Doing so, it essentially violates one of the basic principle of rule of law and prohibition of abolition of powers. However, administrative law acknowledges the justification of provisional measure and tries to adjust its constraints by regulating it. The regulation in the Ákr. does not, in substance, differ from the provisions in Ket.,²⁸ however, its taxonomic location is problematic. In the Ákr. these provisions are in Chapter VIII ‘Specific Rules in Relation to Certain Regulatory Actions’ together with protective measures, sequestration and seizure.

²² Barabás, Fazekas and Kovács, *Joghatóság, hatáskör, illetékesség*. 139.

²³ Act CLXI of 2011 on the Organization and Administration of the Courts Section 2. Paragraph (1), Act I of 2017 on the Code of Administrative Litigation (hereinafter: Kp.) Section 96–97.

²⁴ Ákr. Section 15. Paragraph (2).

²⁵ Ket. Section 20.

²⁶ Ket. Section 24. Paragraph (1), Ákr. Section 18. Paragraph (3).

²⁷ Kp. Section 12. Paragraph (3) and Section 13. Paragraph (11).

²⁸ Ket. Section 22. Paragraph (3)–(5) and Ákr. Section 106.

The Ákr. handles the concept of authority measure in a dogmatically erroneous way, since the legal institutions mentioned in Chapter VIII may be formal decisions; nevertheless, an authority measure is a non-formal decision of the authorities, but is usually an oral, unformed act.²⁹ The provisional measure may also be a formal decision, since the authority may adopt it on the essence of a case.³⁰

VI. CONCLUSIONS

In sum, it can be stated that the Ákr. provides a much wider administrative policy gap and organisational power for the government and the legislator than before. This is the most striking in its designation of the second instance authority, considering also the fact that the weight of the appeal has probably not diminished to such an extent in the new regulatory environment as intended by the original government motivations. Anyway, loosening the boundaries of the forum system is definitely a step towards increasing organisational power.

Another direction of change is the rules of the Ákr. on weakening guarantees of predictability, accountability and thus the rule of law, but they can also be used to increase public policy manoeuvre, namely the rules on quasi authorities, delegation of jurisdiction and primacy of the court. It should be emphasised again that this does not mean that these rules have disappeared from Hungarian administrative procedural law; as I have referred to, they can be deduced from general principles or from specific provisions in other laws. Regarding guarantees, a more abstract, shorter regulation can be a problem if a civil servant or judge does not or does not want to derive the safeguards of rule of law and constitutional rights from these rules and from other available sources such as sectoral regulation, EU and international law, judicial practice or professional competence. This kind of more abstract regulation is therefore more appropriate in hierarchical matters (e.g. in head of authority – civil servant relationships), where there is much less need for fundamental rights protection, because client, for example, is more vulnerable than a civil servant. On the other hand, in administrative proceedings where the opposite is true, it is less reassuring, since we need to protect clients who lack public authority and state resources from the possible arbitrariness of state.

²⁹ See Official Explanation on Chapter VIII and Fazekas M., *A hatósági aktusok*, in Fazekas M. (szerk.), *Közigazgatási jog. Általános rész III.* (ELTE Eötvös Kiadó, Budapest, 2017²) 99–100.

³⁰ According to some opinions, provisional measures can be both formal and oral acts, see: Barabás, Fazekas and Kovács, *Joghatóság, hatáskör, illetékesség*, in Barabás G., Baranyi B. and Kovács A. Gy. (szerk.), *Nagykommentár a közigazgatási eljárási törvényhez*, (CompLex Kiadó, Budapest, 2013) 178–179.

Kecső, Gábor*

Bailout of Local Governments and the Introduction of Active Control in Hungary After 2010

ABSTRACT

Comprehensive legal reform in Hungary affecting the regulation on the whole fiscal sector was made after the general parliamentary election of 2010. It covered the renewal of the rules on local governments too. Regarding local public finance two changes are of paramount importance from the aspect of budget sustainability: 1) passive control was replaced by active control in confining local borrowing; 2) local governments were bailed out by the central government. These changes allowed Hungarian local governments a new beginning in the management of their functions, however, massive centralisation of public services was implemented. These parallel processes transformed the substance of localism in Hungary; meanwhile, the framework of local governments has remained stood constant since the transition.

KEYWORDS: Hungarian local finance, confining local borrowing, hard and soft budget constraint, bailout of local governments

I. SETTING OUT THE PROBLEM

It is said that the economic crisis arrived in Hungary in late 2008, where ongoing budgetary crisis management dominated the fiscal policy. The consequence of this coincidence was that conflicting fiscal policies should have been undertaken by the government.¹ Expansionary and contractionary fiscal policy cannot be made successfully at the same time in a small open economy such as the Hungarian one. Under these circumstances, the public-debt-to-GDP ratio just exceeded 80% in 2010 and in 2011, being a historical peak in the 21st century up to now.² Debt service was at critical level for the central government and challenged Hungary's debt tolerance

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¹ Neményi, J., A monetáris politika szerepe Magyarországon a pénzügyi válság kezelésében, (2009) 56 (5) *Közgazdasági Szemle*, (393–421) 401–405.

² Hungarian Central Statistical Office, http://www.ksh.hu/docs/hun/xstadat/xstadat_eves/i_int040.html (Last accessed: 01 May 2017).

ability.³ Many local governments were imprudent, because their revenue (or current) budgets were unbalanced due to insufficient intergovernmental grants and because their Swiss franc debt service rose greatly due to the weakening of the Hungarian forint.⁴

The general parliamentary election of 2010 brought about big changes in Hungarian politics. The former opposition parties (FIDESZ and KDNP) won more than two-third of the seats in the Parliament, after which Parliament, as the constitutional and legislative power, reformed the legal system affecting the whole fiscal sector. First and foremost a new constitution of Hungary called the Fundamental Law was promulgated. Furthermore, many important new acts were enacted. Two of them have to be noted in the light of the topic: 1) Act CLXXIX of 2011 on Hungarian Local Governments No. (hereinafter referred to as: LGA 2011); 2) Act CXCV of 2011 on the Economic Stability of Hungary (hereinafter referred to as: ESHA).

In sum, the renewal of the law covered the rules on local public finance, out of which this paper aims to highlight the bailout process and the changes in local borrowing limits. These two are inseparable in terms of their history and effect. In the first place I start my thoughts with a summary of theories on confining local borrowing and I summarise the history of the relevant Hungarian legal provisions. Then I come to my core points.

II. MAIN MODELS OF CONFINING LOCAL BORROWING

Local borrowing can be confined according to five main theoretical models, based on international comparison.⁵ These are the following: 1) market discipline model;

³ It refers to manageable sum of public debt where default is unlikely. See in more details: C. Reinhart, K. Rogoff and M. Savastano, *Debt Intolerance*, National Bureau of Economic Research, WP 9908 2003 (National Bureau of Economic Research, Cambridge, 2003) 3–8.

⁴ Vigvári A., *Pénzügyi kockázatok az önkormányzati rendszerben*, (Állami Számvevőszék Kutató Intézete, Budapest, 2009) 6–8.; L. Domokos, Operating Risks and the Increasing Indebtedness of Hungarian Local Governments. Audit experiences of the State Audit Office of Hungary, (2012) (2) *Public Finance Quarterly*, 155–163.

⁵ T. Ter-Minassian, and J. Craig, Control of Subnational Government, in T. Ter-Minassian (ed.), *Fiscal Federalism in Theory and Practice*, (IMF, Washington D.C., 1997) 156–172.; B. Dafflon, The requirement of a balanced budget and borrowing limits in local public finance: setting out the problems, in B. Dafflon (ed.), *Local Public Finance in Europe – Balancing the Budget and Controlling Debt*, (Edward Elgar, Cheltenham, 2002) 1–14.; J. Rattso, Fiscal controls in Europe: a summary, in B. Dafflon (ed.), *Local Public Finance in Europe – Balancing the Budget and Controlling Debt*, (Edward Elgar, Cheltenham, 2002) 277–290.; P. Swianiewicz, The Theory of Local Borrowing and the West-European Experience, in P. Swianiewicz (ed.), *Local Government Borrowing: Risks and Rewards – A Report on Central and Eastern Europe*, (Open Society Institute, Budapest, 2004) 1–23.; P. Swianiewicz, Comparing International Experiences: Emerging Markets of Local Borrowing?, in P. Swianiewicz (ed.), *Local Government Borrowing: Risks and Rewards – A Report on Central and Eastern Europe*, (Open Society Institute, Budapest, 2004) 385–422.; P. S. Florestano, State Limitations on Local Fiscal Authority, in J. Rabin and D. Dodd (eds), *State and*

2) co-operative approach; 3) passive control; 4) active control; 5) direct democracy control. In practice, legislators can mix the models via general and special rules and no one can deny that each regime has its own characteristics. The content of these theoretical models can be summarised as follows.

The first model relies solely or primarily on market discipline. Local governments are free to take out a loan if creditors are willing to give a loan to them. The mechanisms of the financial market represent the limit in this model. The market discipline model has inherent malfunctions, since there are failures in the local debt market for many reasons. Soft budget constraint⁶ is an important example of the reasons. Therefore, the legislator has to apply other models to limit local borrowing. Nevertheless, other models do not replace the market mechanism, but complement it. Even so, local governments can take out a loan if creditors are willing to give a loan to them.

The second model is the co-operative approach. In this case, the representatives of central governments and each local government conclude a gentlemen's agreement on confining indebtedness. The agreement is the outcome of a negotiation process. The parties follow the agreement without legal obligation to do so. One example is the Australian Loan Council.⁷ In my view, this model suits the federal-member state relationship, because the number of member states is limited and the federal government treats member states as partners, especially because the sovereignty is shared with them. In contrast, the number of local governments is too high in most countries and central government is prone to treat local governments as handmaidens, not as partners.

The third model is the so-called rules-based approach or passive control. Limits, which are extra to the market mechanisms, are laid down in the laws and local governments follow the special rules as a norm without direct central control. For instance, this model has been applied in England since 2004.⁸ The norms are specified in the Prudential Code for Capital Finance in Local Authorities issued by the Chartered Institute of Public Finance and Accountancy.

Local Government Administration, (Marcel Dekker, New York, 1985, 103–119) 109–110.; J. de Torres, *Financing Local Government*, Studies in Business Economics 96. (National Industrial Conference Board, New York, 1967) 26–27.; G. Kecsó, The Impacts of Public Debt and Deficit Convergence Criteria on Local Indebtedness in Hungary, in A. Piekutowska and I. Wrońska (eds), *Ten Years of the Visegrad Group Member States in the European Union*, (Oficyna Wydawnicza Aspra, Warsaw, 2015) 59–70.

⁶ An organisation faces a hard budget constraint if it does not get outside support to cover its deficit and is obliged to reduce or cease its activity if the deficit persists. The soft budget constraint occurs if a supporting organisation is ready to cover all or part of the deficit. J. Kornai, E. Maskin and G. Roland, Understanding the Soft Budget Constraint, *Journal of Economic Literature*, (2003) 41 (4) 1095–1136., <https://doi.org/10.1257/002205103771799999>

⁷ R. Webb, The Australia Loan Council, (2001–2002) (43) *Department of the Parliamentary Library Research Note*, (1–2) 1.

⁸ Local Government Act 2003, Section 3 Para 5–7; Section 15 Para 1 and 2003 No. 3146 Local Government, England, the Local Authorities (Capital Finance and Accounting) (England), Regulations 2003 Section 2.

The fourth model is the administrative approach or active control. Limits are specified in the laws and central government approval of local borrowing is required. Local governments are obliged to ask central government's permission to conclude credit agreements or issue bonds. Active control means extra safeguards against excessive local indebtedness. This is the main advantage of this model, to my mind. The fear is that central government is prone to exercise this power on the basis of political discretion. This model was used in England, for instance, until 2004.

The last model is based on direct democracy instead of indirect democracy. Decisions on borrowing are up to the local voters. The ultimate reason of this model is that local residents have to finance the interest part and the capital part of the local debt through paying local taxes if there is hard budget constraint for local governments. This model is applied in some states within the USA.

Each of the theoretical models has advantages and disadvantages from certain points of view. Their proper application in practice requires conformity to country-specific circumstances. For example, direct democracy control prerequisites a traditional, well-functioning democracy in which voters are personally involved in the management of local public affairs. The precondition of the market discipline model, which is perfect competition, hardly ever exists fully in the local debt market. Active control represents strong borrowing confines on the one hand; on the other hand, it restricts the local decision-making autonomy to the highest degree. Consequently, there is no eternal ranking of the five models in theory, as far as I am concerned.

III. HISTORICAL REGIMES IN HUNGARY SINCE THE TRANSITION

Three different regimes have been applied in Hungary since the transition (1989–1990). These can be classified as belonging to the model of market discipline (1990–1995), passive control (1996–2011) and active control (from 2012).

The old Act on Hungarian Local Governments No. LXV of 1990 (hereinafter referred as LGA 1990) contained no special provisions on limiting local borrowing. Thus, the market reliance model was in effect, despite the fact that the Hungarian financial market started to evolve just before the transition. The reason for the application of this regime was that the reforming Parliament intended to contradict almost everything that was similar in logic to the previous system.⁹ The standard of local borrowing, however, stood low during this term and afterwards.

⁹ Kulcsár K., *Politikai rendszer és politikai kultúra*, in Glatz F. (szerk.), *A demokrácia intézményrendszere Magyarországon*, (MTA, Budapest, 1997, 11–31) 13.

Passive control was introduced by the so called Bokros package. Mr. Lajos Bokros served as Minister of Finance from 1995 to 1996. This package named after him contained some austerity measures as amendments to other acts. On top of that, it amended the LGA 1990 as follows: the upper ceiling of local liabilities, such as credits, loans, bonds and their interest, was their adjusted own revenues, defined as 70% of its own local revenues, deducted by liabilities matured within the fiscal year. Liquid loans were out of the scope of the limitation.¹⁰ The new regime became effective as of 1 January 1996.

Under the period of passive control, local debt increased swiftly. Its sum was 1255 billion HUF in 2010, twenty times more than the debt in 1995 (59.6 billion HUF).¹¹ That is why passive control was such a concern in Hungary. There were two elemental features behind this trend. First, smaller municipalities received disproportionate intergovernmental grants for their mandatory public services and their own fiscal capacity was too weak. Consequently, they financed their loss through loans and bonds. Second, counties and larger city municipalities contributed to the rise via issuing bonds denominated in Swiss franc in 2007 and in 2008. This extra risk made many local governments vulnerable. The budgetary and financial crisis could easily harm these municipalities through weakening the Hungarian forint.

No local governments can be liquidated, unlike private companies.¹² Minimal local public services have to be managed forever in the society and state in which we live. After 2010, the legislator made two basic changes regarding the topic of this paper. Central government bailed out local governments and active control of local borrowing was introduced in the ESHA in order to prevent excessive indebtedness in the future. The next two points are about these themes.

IV. BAILOUT OF HUNGARIAN LOCAL GOVERNMENTS BETWEEN 2011 AND 2014

The bailout process started at the end of 2011, where counties' credit liabilities were transferred to the central budget in their entirety. Most of the smaller municipalities received earmarked intergovernmental grants to redeem their loans in 2012. Other municipalities were bailed out in 2013 and 2014. Table 1 summarizes the four steps of the bailout. The outcome of this process was that local governments became almost totally free of debt and their revenue budget came prudent.

¹⁰ LGA 1990 Sec 88.

¹¹ Eurostat <http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do> (Last accessed: 01 May 2017).

¹² It is formulated by Kornai et. al. that "financial difficulties do not normally lead municipalities, towns and districts, let alone countries, to exit". Kornai, Maskin and Roland, *Understanding the Soft Budget Constraint*, 13.

Table 1. Bailout of local governments in Hungary 2011–2014¹³

	Sum of bailout (bill. HUF)	Local governments affected	Legal techniques used	Legal source
2011	196	All counties	Cent. gov. assumed local credit liabilities	Act on restructuring counties No. XLIV/2011.
2012	74	Almost all municipalities which have no more inhabitants than 5000	Cent. gov. gave earmarked grants to loc. gov. to redeem loans	Act on central budget 2012 No. XXVIII/2011.
2013	625.5	One part of municipalities which have more inhabitants than 5000	Cent. gov. assumed local credit liabilities according to the main rule	Act on central budget 2013 No. CCIV/2012.
2014	472	Remaining part of municipalities which have more inhabitants than 5000	Cent. gov. assumed local credit liabilities according to the main rule	Act on central budget 2014 No. CCXXX/2013.
Sum-total	1367.5			

According to the theory, bailout has a detrimental effect on the behaviour of the recipient organization if it can expect to be rescued from trouble by a supporting organization (moral hazard). In local finance, the recipient organisation is the particular local government; the supporting organisation is the higher level government (in Hungary the central government). Bailout – according to the theory – distorts the recipient's decisions on management, because it does not face the consequences of deficit spending.¹⁴

The soft balance constraint syndrome can be considered as an issue regarding Hungarian bailout at first glance. The reasoning could go that local governments will run their budget in a non-sustainable manner in the future, since they expect to be

¹³ Kecskó, *The Impacts of Public Debt and Deficit Convergence Criteria on Local Indebtedness in Hungary*, 68.

¹⁴ Kornai, Maskin and Roland, *Understanding the Soft Budget Constraint*, 4–15. 1.

bailed out by the central government again. The introduction of active control has an important role at this stage of the argumentation. Hungarian local governments are obliged to balance their revenue budgets¹⁵ according to the concept of the golden rule¹⁶ and central government's prior approval of local credit liabilities is required by the ESHA.¹⁷ Thus, even if local governments expect a repeated bailout in the long run, they are not able to conclude any valid credit contracts without central permission. The future behaviour of local governments does not depend on their own acts, but the central government's decision. To my mind, it draws the teeth of the soft budget constraint syndrome. This connecting link between the bailout and the active control makes the Hungarian case special.

V. ACTIVE CONTROL SINCE 2012

The rules on active control are laid down by the ESHA Sec 10–Sec 10/E. This regime has been amended many times since 2012. The provisions became even more elaborated and lengthy. The rules described are those in force on 1st August 2017.

The regime on limiting local borrowing consists of a general and a special set of rules. Both cover the credit liabilities that are defined by an exhaustive list.¹⁸ The most important ones are credit contracts, loan contracts, the issuance of bonds and promissory notes and financial lease contracts. Furthermore, both refer to guarantee contracts and contracts of suretyship.¹⁹

According to the general set of rules, the Hungarian Government's prior approval of local credit liabilities, guarantee contracts and contracts of suretyship is required to conclude valid agreements. There are four conditions to the approval of credit liabilities. 1) The credit liability does not risk the debt target envisaged in the act on central budget.²⁰ 2) The credit liability is for investment purpose attached to one or

¹⁵ LGA 2011 Sec 111 Para 4.

¹⁶ According to this concept, local governments are not allowed to take out a loan to finance current expenditures except short term loans, redeemed within a year. The short term loan in the current budget is for treasury purpose, namely for managing the temporal discrepancy between local revenues and expenditures. The outcome of the golden rule is that the current budget has to be balanced without long term loans. B. Dafflon, The requirement of a balanced budget and borrowing limits in local public finance..., 28–29. It shall be noted that according to the European Charter of Local Self-Government, for the purpose of borrowing for capital investment, local authorities shall have access to the national capital market within the limits of the law. European Charter of Local Self-Government, Article 9 Section 8.

¹⁷ The relevant rules are discussed in point V. of this paper.

¹⁸ ESHA Sec 3 Para 1.

¹⁹ It has to be noted that this paper does not henceforth deal with guarantee contracts and contracts of suretyship.

²⁰ This condition is in connection with the public debt brake rules in Fundamental Basic Law of Hungary. In essence, Parliament shall adopt the act on central budget, the consequence of which is

more mandatory local task and the maintenance of the new property is provided in the long run. 3) The debt-service-to-own-revenue ratio does not exceed 50%. 4) A minimum of one local tax out of four²¹ is imposed by the municipality.

According to the special set of rules, local governments can conclude credit liabilities without approval in two cases. 1) Those that mature within the fiscal year and 2) small amount credit liabilities that are defined precisely by the ESHA. Local governments shall comply with the 50% ratio in these two cases too. It has to be noted that the special set of rules belongs to the model of passive control, since there are rules that are extra to the market mechanisms, but no direct control of central government exists. As such, the Hungarian regime blends the models; however, active control prevails.

VI. CONCLUSION

Local public services have been centralized in Hungary after 2010. It is enough to emphasise that extensive and expensive services to the people were given to bodies of the central government. The most important examples are education and health care excluding primary health care. Bailout, active control and centralisation concern the substance of Hungarian localism. Under these circumstances, one can argue that local governments have less functional autonomy due to the centralization. One can argue that they have more financial autonomy, because they no longer have enormous debt service, even if active control was introduced. One can argue that less functional autonomy means more real autonomy, as local governments are prudent.

As far as I am concerned, uniform judgement is difficult to make, because the balance of the pros and cons of the changes depend on the starting financial position of local governments around 2010, and their starting position were diverse.²² Some of them were in trouble and had comprehensive functional autonomy only their accounts. Some of them were prudent and exercised comprehensive functional autonomy. Smaller municipalities with a lot of debt and with small tax capacity seem to be the winners in the reforms. Cities with affordable debt and high tax capacity lost more than they won. Without a doubt, the framework of local governments made by the reformers in 1989/90 is still massive, but their substance transformed.

that the public-debt-to-GDP ratio declines from fiscal year to fiscal year. The sum of the public debt for the end of the fiscal year is planned in the act on central budget. This is the debt target that has to be respected by local credit liabilities.

²¹ There are five local taxes in Hungary according to Act C of 1990 on Local Taxes. These are: building tax, plot tax, tourist tax, local business tax, and communal tax. The imposition of the latter one, however, does not fulfil the criteria of the ESHA rule. That is why the condition as to the approval is to impose at least one local tax out of four (not five).

²² Vígvári, *Pénzügyi kockázatok az önkormányzati rendszerben*, 10–28.

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Instead of Disciplinary Proceedings – The Legal Consequences of the Employee’s Wrongful Breach of Obligations

ABSTRACT

The purpose of this brief essay is to examine the opportunities available to the employer according to the legislation currently in force in the event an employee commits a wrongful breach of obligation. The employer has three options: warning, termination of the legal relationship, or disciplinary liability. The study aims to provide an overview of the previous regulation and the history of the legal instrument of disciplinary liability, the characteristics, advantages and disadvantages of the three options.

KEYWORDS: disciplinary liability, disciplinary proceedings, work discipline, wrongful breach of obligation, legal consequences, warning, Labour Code

I. INTRODUCTION

The expression “disciplinary” sounds slightly archaic among our current labour law technical terms. However, colleagues who are practicing lawyers and are active in labour law in addition to the theoretical tasks may experience that if the employee commits a breach or omission of obligation, the employers demands *disciplinary procedure* straight away. The purpose of this brief essay is to examine the opportunities available to the employer according to the legislation currently in force in the event an employee commits a wrongful breach of obligation, aiming to provide an overview of the previous regulation, and the history of the legal instrument of disciplinary liability.¹

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¹ The present study examines the legal instrument of disciplinary liability and the history thereof in the private law of labour law.

II. HOW CAN THE EMPLOYEE'S WRONGFUL BREACH OF OBLIGATION BE PREVENTED?

However, before assessing the adverse legal consequences in detail, it is inevitable to note what the employer can do to prevent the employee's wrongful breach of obligation. István Kertész – who provided the basic principle for the labour law specialists in respect of disciplinary liability issues – refers back to Gyula Eörsi in this regards as well, making a distinction between technical-organisational and social-psychological defence.² The first group includes – for instance – the various protective and alarm devices and security guards, while the second group includes – according to the wording used by Kertész – “influencing the creation of human determination of will”,³ for which there are two main methods, direct and the indirect legal regulation. Direct legal regulation shall mean when “the preventive instruments are determined by the law itself, without inserting any separate consideration”,⁴ examples of which may be the wage system and the bonus system. Meanwhile, the indirect legal instruments include – for example – exceptional instruments requiring consideration, such as recognition and rewards and their opposite, accountability.⁵ Therefore, if applying the same logic, it can be established that, in course of analysing the regulation of accountability, within the group of social-psychological defence, in the sub-group of indirect legal regulation, we study the cases of accountability.

III. WHAT DOES THE TERM “WORK DISCIPLINE” MEAN?

Before explaining the options, the employer has if the employee wrongfully breaches his/her obligations, it is worth touching upon the question of how work discipline can be defined. Probably the most apt interpretation of work discipline is included in the cited work of István Kertész, where it is defined as part of the moral and legal forms of consciousness established as the reflection of the social work organisation.⁶ However, the definition of Alekszandrov, who interpreted work discipline as the fulfilment of all of the obligations to be fulfilled by the employee based on the employment relationship should also be highlighted.⁷ What can be considered to be within the scope of work discipline

² Kertész I., *A fegyelmi felelősség alapkérdései a munkajogban (The fundamental issues of disciplinary liability in labour law)*, (Közgazdasági és Jogi Könyvkiadó, Budapest, 1964) 106.

³ Ibid. 106.

⁴ Ibid. 107.

⁵ Ibid.

⁶ Ibid. 14.

⁷ Alexandrov, N. G., *Szovjet munkajog (Soviet Labour Law)* (Budapest, 1953) 242, in Kertész, *A fegyelmi felelősség alapkérdései a munkajogban (The fundamental issues of disciplinary liability in labour law)* 19.

based on the current legislation in effect and the case-law? It is worth examining this question from the aspect of whether – for example – the employee is subject to restrictions and obligations in respect of his/her conduct beyond the working time. Pursuant Section 8(2) of Act I of 2012 on the Labour Code, workers may not engage in any conduct, even outside their working hours, that – stemming from the worker's job or position in the employer's hierarchy – directly and factually has the potential to damage the employer's reputation, legitimate economic interest or the intended purpose of the employment relationship. Nowadays, numerous examples of employees' conduct beyond working hours are provided by behaviour arising from the use of social media, in connection with which the provision of the Labour Code cited above, as well as the general standards of conduct shall be taken into consideration. It is not impossible that even a single expression of opinion made in the social media constitutes a wrongful breach of obligation by the employee and results in adverse legal consequences.⁸

IV. WHAT ADVERSE LEGAL CONSEQUENCES ARE TO BE EXPECTED?

In the event of any wrongful breach of obligation by the employee, the employer has three options: warning, termination of the legal relationship – or, according to the former terminology, disciplinary liability – and under the current legislation, the application of the legal consequences in accordance with Section 56 of the Labour Code. Let us examine the legal consequences mentioned!

A warning is the lightest sanction of wrongful breaches of obligation by the employee. There are no prerequisites for using it, and it follows from exercising the employer's rights that the employer is entitled to give warnings to the employee. According to László Román, a warning is merely an antecedent to punishment; is it essentially sanctioning the non-compliance of performance by creating the prospect of punishment.⁹ The warning includes the wrongful breach of obligation that gave rise to the warning, whether it is a written or verbal warning depending on the conduct or omission to be sanctioned, the consequences potential later breaches of obligations may have; moreover, a notification of the legal consequences shall not be forgotten either.¹⁰

⁸ A more elaborate study in this regard is included in Németh J., *A közösségi média használatára alapozott felmondások – megosztó gyakorlatok* (Terminations based on the use of social media – divisive practices), *HR & Munkajog (HR & Labour Law)*, (2013) 4 (6) 13–18.

⁹ Román L., *Munkajog. Elméleti alapvetés (Labour Law. Theoretical fundamentals)*, (Tankönyvkiadó, Budapest, 1989) 331–332.

¹⁰ According to Section 22(5) of the Labour Code, as regards the unilateral acts of employers the reasons must be provided in writing in cases specified by the Labour Code, and shall notify the employee of the means of enforcement of a claim, and also of the time limit available, if shorter than the term of limitation. In the event of failure to provide information as to the time limit, the claim may not be

In the case of verbal warning, the employer should bear in mind that the reason giving rise to the warning, as well as the fact of the verbal warning itself, may be difficult to prove later.

It may be established as a general rule that the warning causes no substantive disadvantage to the employee directly; however, different, exceptional cases are possible, when, for example, for example, the warning may be considered as a bonus decreasing factor, thus – although indirectly – it may cause material disadvantage. A warning policy used by the employer ensures fairness, consistency and predictability. The warning policy may regulate the principles of the warning policy of the employer, and may provide a non-exhaustive list of the conducts giving rise to a warning.

If the warning – as the lightest sanction – may be deemed as one of the extremes in the system of sanctions of the wrongful breaches of obligation by the employee, its opposite – that is, the sanction which may be deemed the most severe – is the termination of the legal relationship. The system of the termination of the legal relationship is regulated in detail by the Labour Code, and this study does not examine it or the related case-law. However, it shall be noted that, in the system of the termination of the legal relationship, termination with immediate effect is the most severe sanction, since in this case the legal relationship of the employee is terminated on the day termination is communicated, with immediate effect, without the employee receiving any financial allowances, since in this case the employee is entitled to neither a termination (exemption from work) period nor severance pay.

So far, two types of legal consequence, warning and the termination of the legal relationship have been discussed in this study. There is another option in addition to these two: the adverse legal consequence regulated in Section 56 of the Labour Code currently in effect, which is otherwise specified by former Labour Codes as disciplinary punishment. It is worth examining thoroughly how liability and the disciplinary right may be interpreted, as well as their history in the previous legislation. In the opinion of István Kertész, three common characteristics shall be taken into consideration in respect of all forms of liability: the subject of all types of liability is a conduct valued unfavourably by society; the end is prevention; while the mean is imposing the penalty (using Gyula Eörsi's expression, "adequate penalty").¹¹

According to Gusztáv Vincenti, the disciplinary right is the right of employer through which the it can force the employee to fulfil their obligations and may impose detrimental punishment on the employee for infringing them. The scope of the

enforced after a period of six months. According to Section 287(1) c) of the Labour Code, in the case of warnings, an action shall be brought within thirty days of the delivery of the warning. However, if the warning does not include a notification of legal remedy then the employee may turn to the court within six months.

¹¹ Kertész, *A fegyelmi felelősség alapkérdései a munkajogban (The fundamental issues of disciplinary liability in labour law)*, 120.

disciplinary right may differ depending on the penalty the employer imposes on the employee for each type of conduct, as well as whether exercising this right is subject to a specific procedure or not.¹² László Román improved the interpretation of the legal instrument of disciplinary liability significantly by analysing why disciplinary liability is a sanction procedure, and therefore a secondary (ancillary) legal relation, i.e. it is not a legal instrument in itself but it may also be interpreted as a separate legal relation, which is separate from the underlying legal relation, and is to be disconnected from it. Furthermore, it alters the roles, since the employer becomes the party exercising disciplinary rights, while the employee becomes the “suspect”.¹³

In terms of history, Vincenti recalls¹⁴ that, in the beginning of the 20th century, disciplinary infringements, punishments and procedure had been regulated accurately by the legislature for those cases where the service relationship of the employee – although not a public service relationship – affected public interest. In this regard, Vincenti mentions Act XVII of 1914 on the Rules of Railway Service, which regulated service infractions, as well as the punishments to be imposed, and the disciplinary procedure. According to Section 31 of this law, minor service infractions had been punishable by orderly punishment, while more severe service infractions had been punishable by disciplinary punishment. Orderly punishments comprised admonishment and a fine, which could not exceed 20% of the annual salary (income) of the employee. Disciplinary punishments included reprimand, as well as a fine, which could not exceed 5% of the annual salary (income) of the employee, transfer, extension – by six months to two years – of the waiting time before being entitled to promotion or an age supplement and, as the most severe punishment, dismissal from service. Act XIX of 1934 on the Rules of Service for the Staff of Hungarian Maritime Commercial Vessels also included extensive disciplinary regulation. It should be mentioned as point of interest and as testament to the way of thinking of the era that Section 95 of Act XII of 1922 amending Law XVII of 1884 on the Industry Act allowed the employer to use light corporal punishment on male apprentices below the age of sixteen, provided that it was unavoidable in order to uphold workplace discipline; however, the employer was not entitled to impose any penalty related to the apprentice’s accommodation.

After the Second World War but before the first Labour Code, the Council of Ministers Decree No. 34/1950. (I. 27.) on the Disciplinary Policy of State-owned Companies is worth mentioning.¹⁵ The policy specified the companies falling within

¹² Vincenti G., *A munka magánjogi szabályai (The private law rules of labour)*, (Grill Károly Könyvkiadó Vállalat, Budapest, 1942) 126.

¹³ Román, *Munkajog. Elméleti alapvetés (Labour Law. Theoretical fundamentals)*, 325–327.

¹⁴ Vincenti, *A munka magánjogi szabályai (The private law rules of labour)*, 127.

¹⁵ The analysis of the decree is available in Farkas J., *Munkajogunk fejlődése a felszabadulástól a Munka Törvénykönyvéig (The development of our labour law from the liberation until the Labour Code)* (Jogi- és Államigazgatási Könyv- és Folyóiratkiadó, Budapest, 1952) 85–89.

its scope in detail. Pursuant to Section 4 of the decree, ensuring work discipline was the obligation and point of honour of all workers. According to the regulation, a disciplinary offence was committed in three cases: first, in the event of a breach of work discipline, plan discipline or the violation of Socialist morals, therefore in particular if the worker committed any criminal offence or misdemeanour in connection with his/her work, if the worker damaged the people's assets wilfully or negligently (e.g. destroying or damaging furniture or accessories, documents, production equipment, stocks of goods or material, etc.), or if the worker tolerated such activity by employees under his/her management, if the worker wrongfully failed to fulfil his/her work obligation (e.g. unjustified absence, refused to work, etc.), if the worker wilfully worked improperly, or if the worker caused serious damage through negligence (e.g. wasting material or energy, high scrapping rate, etc.), if the worker failed to comply with duly issued instructions, breached or circumvented the provisions applicable to working time or wages (e.g. counterfeiting a clocking-in card, other wage fraud etc.), second, leading a scandalous or immoral lifestyle, or in the case of any conduct that made the worker unworthy of filling his/her job function (e.g. being drunk), and, third, in the event of any conduct which showed that the worker was against the state or social order of the people's democracy (e.g. speaking ill of the fundamental institutions of the People's Republic). Wilful or negligent participation in committing any of the disciplinary offences was also considered a disciplinary offence. The disciplinary punishments to be imposed were the following: verbal reprimand, written reprehension, fine, revocation of advantages, transfer, and termination with immediate effect. Except for the verbal reprimand and the termination with immediate effect, more than one disciplinary punishment could be imposed jointly. It is very important to mention that the decree included detailed and accurate regulation of the disciplinary procedure itself, i.e. the process of imposing disciplinary punishment in cases of disciplinary offence. As part of this, Section 15(2) of the decree stipulated that the defendant shall be interviewed before imposing the punishment, and the defendant shall be given an opportunity to present his/her defence. The employee could be suspended from his/her job during the procedure. Although the disciplinary procedure had two stages within the employer, since the decree allowed the disciplinary decision to be appealed; however, the appeal could be adjudicated by the conciliation committee. Nevertheless, legal recourse before the ordinary courts could not be sought against the disciplinary decision adopted based on the policy. However in the opinion of József Farkas, if the application of the disciplinary punishment was not in compliance with the policy then the case could be brought before the ordinary courts;¹⁶ his opinion is supported by the fact that Section 3 of the decree expressly stipulated that "the disciplinary decision made in accordance with the present policy" shall not be reviewed and modified by the ordinary court. If we

¹⁶ Ibid. 88.

know the principle of the Soviet labour law,¹⁷ then we understand why the institution of disciplinary liability had been regulated in such detail in 1950 in Hungary. Namely, in the Soviet Union, work discipline primarily had to be ensured by persuasion as the basic method; however, if this yielded no result, a rather detailed and thorough regulation was necessary. Hence, this is what the analysed decree already ensured in 1950, and our first Labour Code – i.e. Law-Decree 7 of 1957 on the Labour Code (hereinafter referred to as first Labour Code) – followed this path as well, and it already included the disciplinary rules in Chapter XI – Work Discipline upon its entry into effect.¹⁸ Similar to the decree analysed, upholding work discipline was the obligation of all workers under Section 110 of the first Labour Code as well. Similar to the decree, under the first Labour Code, the worker committed a disciplinary offence if he/she committed any criminal offence related to his/her work or committed any other serious criminal offence, in the case of any conduct which showed that the worker was against the state or social order of the people's democracy, if he/she breached work discipline, plan discipline or the rules of Socialist work ethics, if the worker led a scandalous or immoral lifestyle, or otherwise showed any conduct that made him/her unworthy of fulfilling his/her job function. This definition was amended on 1st January 1965 so that the disciplinary offences included the wrongful breach of obligation related to the employment, and conduct unworthy of employment as well.

No changes were made in respect of the disciplinary punishments either compared to the decree analysed since, under Section 113(2), disciplinary punishments were the following: verbal reprimand, written reprehension, fine, revocation of advantages, demotion and termination with immediate effect. Upon its entry into effect, the first Labour Code regulated the disciplinary procedure more laconically, and it included no provisions regarding the imposition of disciplinary punishments; however, as of 1st January 1965, under Section 112, the Council of Ministers had the power to establish the rules of disciplinary procedure.

Act II of 1967 on the Labour Code (hereinafter referred to as the second Labour Code), entering into effect on 1st January 1968, contained a similarly detailed regulation, i.e. the disciplinary punishments and the disciplinary procedure were specified. It shall be noted that, simultaneously with the entry into effect of the second Labour Code, Government Decree 34/1967. (X. 8.) on the implementation of Act II of 1967 on the Labour Code, which accordingly included provisions on disciplinary liability entered into effect. It shall be highlighted that the concept of disciplinary offence – unlike the decree and the wording used by the first Labour Code upon its entry into effect – was merely defined as the wrongful breach of an obligation related to the employment

¹⁷ Pasersztnyik, A. J., *A szovjet munkajog alapelvei (The principles of Soviet labour law)*, (Hírlap, Szaklap-és Könyvkiadó Rt., Budapest, 1949) 46.

¹⁸ As a general rule, the provisions analysed refer to the wording at the time of the entry into effect of both the first and the second Labour Code.

– this is essentially the wording in effect today. The reasoning of the act explains the lack of a subject matter-like list, stating that, considering the diversity and different severity of infringements, it is impossible to list them in such a manner or to specify the scope of serious infringements accurately.¹⁹ Disciplinary punishments could include reprimands, severe reprimands, reduction or revocation of specific advantages and allowances, reduction of the base wage and transfer, as well as termination, so the act – as explained in the reasoning as well – essentially continues to maintain the previous types of disciplinary punishment; however, it adds the reduction of the base wage to the types of punishment. It shall be highlighted that the Government Decree specified – for example – how the reduction or revocation of specific advantages and allowances could be interpreted. It shall be emphasised that the second Labour Code upholds the previous system, according to which disciplinary punishments may only be imposed in the course of a disciplinary procedure. At the same time, the act does not include the rules of imposing disciplinary punishments. However, the reasoning provided detailed guidelines in this regard, and it includes that, in order to allow the punishment imposed to have the appropriate educational effect, it was necessary that the party exercising the disciplinary right assessed all relevant circumstances of the case concerned before determining the extent of the punishment. In the course of the assessment, the impact of the given breach of obligation at the company shall be evaluated first of all since, if the breach of obligation had been serious, it affected the work discipline of the workers of the company more, and imposing a relatively lenient punishment would not deter them from similar breaches of obligation. In addition to serious breaches of obligation such as theft, fraud, a 4 or 5-day unjustified absence, considering the character of certain companies, certain breaches of obligation were considered as particularly serious breaches of obligation, for example, unjustified absence in the case of a bus driver. Similar examples were ticket fraud regarding public transportation, and taxi driver and restaurant servers demanding a tip in case. The reasoning also explains that the examination of the worker's previous behaviour before imposing the punishment was quite a significant circumstance as well. In the case of a frequently insubordinate worker, even smaller breaches of obligation had to be punished more severely, since the behaviour implied that the application of the more lenient punishment had not achieved the appropriate educational effect. On the contrary, excellent and permanently good work, exemplary behaviour, etc. were usually mitigating factors in favour of the worker in the event of first-time breaches of obligation. This had to be evaluated in favour of the worker more if the accountability procedure was the result of his/her negligent conduct, and less if the worker committed a wilful breach of obligation, thus his/her culpability was more serious. In course of evaluating the previous behaviour of the worker, it was advisable to evaluate the entire person and within that, assessing the behaviour shown

¹⁹ The detailed reasoning of Sections 55 and 56 of Act II of 1967 on the Labour Code.

primarily in the last one or two years was considered correct. Usually, the personal and family circumstances of the worker could be taken into consideration if the situation of the worker was actually significantly less favourable compared to the other employees, and if it was not precluded by the gravity of the case and the possible previous behaviour of the worker. As such, for example in a case of theft by a repeat offender, unjustified absences within short periods of time and their family and personal circumstances could only be evaluated in favour of the worker in exceptional cases. Those listed above include only those significant factors which should usually be taken into consideration in order to be able to impose the correct disciplinary punishment. Special circumstances other than those listed above, substantially affecting the assessment of the case, could arise as well. Therefore, if, for example, the worker caused damage after several hours of overtime work and if, after the breach of obligation, the worker dutifully mended matters for the sake of society or the company.²⁰

Summarising the legislation between the post-Second World War period and the change of the regime, it can be established that the institutional system of disciplinary liability was given an emphasised role; up until 1st January 1965, the conducts which could qualify as a disciplinary offence had been specified by the legislation specified in a subject matter-like manner, and the legislation included itemised lists of the disciplinary punishments, as well as specifying the disciplinary procedure itself, too. This was in compliance with the Soviet labour law approach that, if persuasion is not enough to uphold work discipline then detailed regulation is necessary. In addition, it shall be noted in connection with both the first and the second Labour Code, that – as István Kertész put it – comprehensive solutions with criminal law features were developed,²¹ considering that the legislation included provisions on the scope of the disciplinary punishment, suspension from enforcement, and exemption from disciplinary punishment.

Let us review what changes occurred in this regard after the change of the regime. Act XXII of 1992 on the Labour Code, i.e. the third Labour Code, entered into effect on 1st July 1992. Upon reading it, it is immediately noticeable that this Labour Code no longer uses the expression “disciplinary”, nor is it present in the law currently in force.²² The first lines of the general reasoning of the act promptly include that

[...] the management of human resources, the workforce, appears increasingly as a production factor, and as a result *the labour market is gradually becoming part of the economic market*, and starts to operate according to the principles and rules thereof [...]

²⁰ The detailed reasoning of Sections 55 and 56 of Act II of 1967 on the Labour Code.

²¹ Lehoczkyné Kollonay Cs. (szerk.), *A Magyar Munkajog II. (Hungarian Labour law II.)*, (Kulturtrade Kiadó, Budapest, 1949) 9.

²² In the reasoning attached to Chapter VIII of the third Labour Code, it was promptly established that the legal definition of disciplinary liability had ceased.

This change has to be acknowledged by the labour law legislation as well: the legislation logic applied so far has to be discontinued. The market-based legislation also causes the current legislation of administrative character to be replaced with a civil law-like legislation which conforms more with the particularities of the employment relationship. *The legal intervention by the state shall retreat strongly,* and the legal regulation mandatory to the subjects of the employment relationship shall be limited exclusively to determining the guarantee elements of the employment relationship, to specifying the so-called “minimum standards”. (Such are the rules applicable to working time and the maximum amount of overtime work, mandatory resting time, the liability of the employer and the employee, as well as prohibitions on termination). Any other issue related to the employment relationship shall be settled by the subject of the employment relationship – the employer and the employee – through an agreement. Therefore, in this changed situation, the state no longer regulates based on its proprietary function but based on its public order protection function.²³

If we analyse Section 109 of Act XXII of 1992, then the provisions of the general reasoning are verified as follows.

Thus, only one single section of the third Labour Code, Section 109, contained the provisions applicable to the employee’s wrongful breach of obligation arising from the employment, in the chapter titled “the rules of work”. Instead of disciplinary punishment, the term used is “adverse legal consequence”, and instead of the disciplinary procedure the Labour Code stipulates only procedural rules. It is also a stark change that the act did not specify the disciplinary punishments (adverse legal consequences) or the disciplinary procedure (disciplinary rules) itself; however, it referred the determination of both the punishments and the procedure to the collective agreement. In respect of the procedure, the only guarantee provided by the act was that it had to be ensured that the employee had opportunity to present his/her defence and he/she may employ a legal representative. In addition to the above, the third Labour Code also stipulated that no measure containing any adverse legal consequence in respect of the employee could be taken if one year had already elapsed from the wrongful breach of obligation being committed, as well as that measures containing adverse legal consequence could only be imposed in a written, justified resolution, which includes the notification related to legal remedies. In respect of the adverse legal consequences, the act stipulated as another guarantee provision that the adverse consequences related to employment and to be imposed shall not violate the personal rights and the human dignity of the employee, as well as that fines could not be imposed as an adverse legal consequence. The Labour Code did not include any provision at all concerning the scope and effect of the adverse legal consequence, exemption from the adverse legal consequence, the suspension of

²³ The general reasoning of Act XXII of 1992 on the Labour Code.

enforcement, or any provision applicable to the enforceability of the adverse legal consequence at the new employer in the case of termination of employment. Moreover, it follows from the above that, in addition to ensuring the guarantee provisions, the act entrusted the parties – or more accurately, the collective agreement – with establishing the adverse legal consequences and the procedure. It shall be emphasised that, considering the requirement of regulation in a collective agreement, the adverse legal consequence under Section 109 could be imposed by the employer exclusively if there was a collective agreement at the employer, and if the collective agreement regulated adverse legal consequences and procedural rules as well. This is reflected in court decision No. BH 1999, 275. as well, which states that if the employer intends to impose any other legal consequence in addition to the extraordinary termination against the employer who had wrongfully breached their obligation arising from the employment relationship, such consequences shall be regulated by the employer in the collective agreement, by determining the rules of the procedure. This provision is probably even more markedly reflected in court decision No. BH 1998, 197., which held that it followed from the provisions of the act that, even in the event of proven wrongful breach of obligation, no adverse consequences could be imposed on the employee unless the procedure for imposing them had been regulated by the collective agreement.

The court decision were useful in respect of the case-law concerning the provisions on adverse legal consequences as well; for example decision No. BH 1996, 668., which stated that, pursuant to the collective agreement, the employer may impose all adverse legal consequences against its employer who had committed a wrongful breach of obligation, as a result of which certain elements of the employment relationship may change: this however shall not be final compared to the employment contract concluded. In addition, according to decision No. EBH 2002, 691., in the case of a wrongful breach of obligation arising from the employment relationship, the collective agreement could stipulate legal consequences as a result of which certain elements of the employment relationship change; this however shall not be final compared to the employment contract concluded. Therefore, the legal consequences may amend certain elements of the employment relationship for an interim period, temporarily; that is, the adverse legal consequence cannot and could not in any way modify certain elements of the employment relationship permanently, since that would constitute and would have constituted a unilateral amendment of the employment contract. According to the established judicial practice, if the employer voluntarily established incentive pay for its employee, its the revocation however does not fall within the scope of the employer's unrestricted discretion, and the conditions for the revocation shall have a causal relationship with the employee's obligation arising from his/her employment, and shall also be adequately concrete.²⁴ In this regard, the question of whether, for

²⁴ Court decision No. BH 1997, 371.

example, the time period when the employee is exempt from his/her working obligation – for instance if the employee becomes unfit for work, is on sick leave or receives sick pay – should be calculated in the duration of the enforcement of the adverse legal consequence. Decision No. EBH 2001, 567. provides guidance in this regard, when it states that if the collective agreement did not regulate the enforcement of the adverse legal consequence imposed for a fixed-term – in the specific case, the reduction of the base wage by 20% for six months – then only that period may be taken into account in respect of the duration of the punishment, during which the adverse legal consequence could actually be imposed, and all those periods when the adverse legal consequence could not be enforced for objective reasons shall be disregarded during the term of the employment relationship.

Furthermore, labour law department opinion No. MK 122 shall be mentioned, according to which if the employee refuses to participate in any examination aimed at verifying whether the employee is under the influence of alcohol or whether the alcohol ban applicable to the employee is complied with, this refusal shall in itself be adequate to impose the adverse legal consequences. Any employee who refuses to participate in such an examination may be prohibited from work, and for this reason it is lawful to withdraw his/her wage for the duration of the prohibition. The employer shall notify the employee in writing of result of the examination carried out by the employer. If the employee does not accept the result, he employer shall bear the burden of proof.

What changes did the fourth Labour Code bring about in this regard? The fourth Labour Code is Act I of 2012 on the Labour Code, which entered into effect exactly twenty years after the entry into effect of the third, on 1st July 2012. According to the general reasoning of the act,²⁵ in case of the then-Labour Code – i.e. the third Labour Code – the intention of the legislature was to replace the labour law legislation which was based on state ownership and state control and which applied an administrative law approach with a labour law system which conforms with the conditions of the market economy. To this end, the legislature attempted to reduce state intervention and intended to provide significantly more opportunity for legislation – compared to the previous legislation – to have a private law approach. In this regard, the legislature wanted to give a substantial role to collective agreements as the crucial regulatory factors of the labour market. Section 109 of the third Labour Code complied with this intention, which – as shown above – allowed the use of adverse legal consequences in the event of the employee's wrongful breach of obligation, provided that it was regulated in the collective agreement. Nevertheless, it is a fact that, after the change of the regime, as a result of the privatisation of the state-owned large enterprises and the increased number of small and medium enterprises, the relevance of collective agreements remained relatively limited in shaping the Hungarian labour market.

²⁵ The general reasoning of Act I of 2012 on the Labour Code.

In respect of Section 109 of the third Labour Code this meant that the employers which had no collective agreement had no opportunity to apply Section 109. The legislature intended to change this system. As a result, according to the provisions of Section 56 of the fourth Labour Code, if the employer or the worker is not covered by a collective agreement, the employment contract may prescribe adverse legal consequences consistent with the gravity of the infringement. This is a rather significant change since, through this provision, the use of adverse legal consequences became available to essentially all employers, provided that the parties specify the adverse legal consequences in the employment contract. This is in compliance with the provisions of the reasoning of Section 56 of the fourth Labour Code, according to which the purpose is the more consistent enforcement of the contract principle. Another key change, compared not only to the third Labour Code but compared to the legislation of previous decades as well, is that it is not required to specify the procedural rules in the employment contract (collective agreement), so the employer may impose adverse legal consequences even without procedural rules, provided that the parties specify the adverse legal consequences in the employment contract (collective agreement). According to the reasoning attached to Section 56 of the Labour Code, the reason behind this is that if the act does not stipulate any specific procedural obligation for the employer, even in the case of termination with immediate effect on the grounds of the employee's wrongful breach of obligation, then conducting a preliminary procedure of such a character before the application of a comparatively much more lenient legal consequence is not justified. This legislative solution is divisive. On the one hand, it has the definite advantage that it is in line with the flexibility requirement. At the same time, it diminishes the safety principle protecting the employee, although – as Gábor Kártyás established – it is in the interest of the employer as well that any adverse legal consequence is imposed only after thorough examination, in a prudent procedure, which explores the opinion of the employee as well.²⁶

However, in respect of adverse legal consequences – unlike the third Labour Code, which did not allow the imposition of fines²⁷ – the fourth Labour Code stipulates that financial sanctions may be imposed; however, their total amount shall not exceed the employee's monthly base wage in effect at the time when the legal consequence is imposed.

In compliance with the judicial practice established during the third Labour Code,²⁸ the fourth Labour Code directly states that only such sanctions related to the

²⁶ Kártyás G., Mit érdemel az a bűnös? Fegyelmezési lehetőségek az új Mt. alapján (What should we do with the culprit? Disciplining opportunities according to the new Labour Code), (2013) 4 (7–8) *HR & Munkajog (HR & Labour Law)*, (29–33) 32.

²⁷ It shall be noted that although the third Labour Code did not allow the use of fines, the practice used fixed-term base wage reduction, an example for which may be decision No. EBH 2001, 567.

²⁸ Decisions Nos. EBH 2002, 691. and BH 1996, 668.

employment relationship which modify the terms and conditions of the employment relationship for a fixed term may be imposed; it also expressly stipulates that the legal consequence imposed shall be proportionate to the gravity of the breach of obligation. The provision that the sanction shall not violate the personal rights and the human dignity of the employee remained unchanged compared to the previous legislation. Although it followed from the principles and the case-law that the prohibition of double evaluation used to be applicable previously as well, the fourth Labour Code now directly stated that no adverse legal consequence shall be imposed for a breach of obligation which is also referred to by the employer as the reason for terminating the employment.

Section 56(4) includes that the measure imposing adverse legal consequences shall be put in writing, with reasons provided. However, Section 56 does not detail whether the employee may use a legal representative, for example, in course of the clarification of the subject matter. However, Section 21 shall be taken into account in this regard, which allows the employee to make legal statements through his/her authorised representative; accordingly, the Labour Code does ensure the opportunity to employ a legal representative, as the case may be. Compared to the third Labour Code, it is a new rule that under Section 55(2) of the fourth Labour Code, the employer is essentially entitled to suspend the employee; that is, the employer, if so required for investigating the circumstances of an employee's breach of obligations, may exempt the employee from the requirement of availability and from work duty for the period required for the inquiry, in any case for up to thirty days. In respect of the deadlines, the new legislation, i.e. Section 56(3), refers to Subsection 78(2), namely, the deadline to be applied in the event of termination with immediate effect.²⁹

It is inevitable to examine whether the court decisions (BH) and the decisions on principle (EBH) established during the term of the third Labour Code may be applied or not. It can be generally established that, by not requiring procedural rules, specifying the adverse legal consequences in the employment contract, allowing financial sanctions and determining their maximum amount, a new regulatory, and thereby a new legislative environment was created. At the same time some decisions, for examples No. BH 2001, 567. or No. BH 1997, 371., may undoubtedly continue to be applied. The precise comparison of the effective legislation and the decision intended to be used is definitely necessary in order to decide the matter.

In summary, it can be established that the rules of imposing adverse legal consequences in the case of the employee's wrongful breach of obligation have been

²⁹ According to Subsection (2) Section 78, the right of termination without notice may be exercised within a period of fifteen days of gaining knowledge of the grounds for it, in any case within not more than one year of the occurrence of such grounds, or in the event of a criminal offence up to the statute of limitation. If the right of termination without notice is exercised by a body, the date of gaining knowledge shall be the date when the body, acting as the body exercising employer's rights, is informed regarding the grounds for termination without notice.

changed substantially by the fourth Labour Code. It is an undeniable fact that the act intends to entrust the parties, i.e. the employer and the employee, with a much more active role in course of the conclusion or amendment of the employment contract, in order to enforce the contract principle included in the reasoning of the act more consistently as well. In course of the determination of the types of adverse legal consequences, it may provide help and ideas to the parties if they review the previous legislation, and become engrossed in the legislative practice. Theoretical legal experts, as well as practicing attorneys-at-law have an important role in raising awareness of the opportunities provided by the new legislation, and in the promotion thereof in the everyday legal practice. Last but not least, it shall be emphasised that the judicial practice will undoubtedly provide guidance for the interpretation of Section 56. However, this requires Section 56 to be present in the everyday legal practice, since only in this case will subject matters occur, which contribute to the establishment of the judicial practice providing guidance in respect of the issues under debate.

Réti, Mária*

The Legal Regulation of Land and Soil Protection – Complexity and the Main Characteristics of the Laws

ABSTRACT

The regulation of land protection is a fundamental regulatory field of Hungarian agricultural environmental law, and, with an extended interpretation, it is also the regulatory field of environmental law. Land appears as a significant regulatory object in the Hungarian land and agricultural law expressing the land's multifunctional character and its determining role in economic, social, environmental and cultural sustainability. The Hungarian land protection legislation is complex. The most important components of the Hungarian land protection legislation are the Fundamental Law of Hungary, the Act LIII of 1995 on the General Rules of Environmental Protection (hereinafter: Kvtv.) and the Act CXXIX of 2007 on the Protection of Agricultural Land (hereinafter: Tfv.). The Kvtv. involves several protective areas; it includes the fertility and structure of land, water and air balance, as well as the conservation of the biosphere. The Kvtv. enforces a regulatory content with an ecological aspect. The land protection in the Hungarian legislation appears as quantitative or qualitative protection. The quantitative protection of arable land means that the agricultural use shall not be wasteful. The qualitative protection is equivalent to the soil protection. According to the Tfv. the fertility of soil stands in the centre of the definition of soil protection. The obligation to utilise arable land as regulated in the Tfv. greatly supports the enforcement of protective rules, the protection of arable land and appropriate farming practice for it. The utilisation of arable land for other purposes may be temporary or permanent. The aim of the land protection law is to preserve the current rate of the arable land in Hungary.

KEYWORDS: land and soil protection, obligation to protect arable land, qualitative and quantitative protection, soil fertility, obligation of arable land utilisation, land user, agricultural land use and utilisation, temporary and supplementary utilisation, reuse of land, land protective procedure, land protection contribution and fine

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I. INTRODUCTION

Land and soil protection may be considered as a fundamental regulatory field of Hungarian agricultural environmental law, but, with an extended interpretation, it is also the regulatory field of environmental law. At the same time, the topic of land and soil protection is closely related to questions referring to property rights and the usage of land. In the land law¹ and agricultural law of European legal systems, land appears as a special regulatory object expressing the land's multifunctional character and its determining role in economic, social, environmental and cultural sustainability. Contemporary analysts who are experts on this topic emphasize the economic and ecological functions of land and they also point out its social importance.² Furthermore, the fact that the constitutions³ of certain European legal systems pay special attention to land also shows the complexity of the regulation of land protection. The Fundamental Law of Hungary⁴ declares the *erga omnes* obligation to protect arable land besides of other natural resources, as the obligation of the State and every person.⁵ Based on the findings of interdisciplinary research, this regulatory approach is absolutely correct and

¹ See the German regulation: *Gesetz über Maßnahmen zur Verbesserung der Agrarstruktur und zur Sicherung land- und forstwirtschaftlicher Betriebe (Grundstückverkehrsgesetz – GrdstVG)* vom 28. Juli 1961 (BGBl. I S. 1091) <https://www.gesetze-im-internet.de/grdstvg/BJNR010910961.html> (Last accessed: 31 December 2018). See for the regulation of the Austrian province Vorarlberg: *Landesrecht konsolidiert Vorarlberg: Gesamte Rechtsvorschrift für Gesetz über den Verkehr mit Grundstücken*, <http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=LrVbg&Gesetzesnummer=200005979> (Last accessed: 31 December 2018). See the Swiss regulation: *Bundesgesetz über das bauerliche Bodenrecht* vom 4. Oktober 1991 (hereinafter: BGBB), <https://www.admin.ch/opc/de/classified-compilation/19910253/index.html> (Last accessed: 31 December 2018). See the land law of some European law systems: Tanka E., *Magyar birtokpolitika az Európai Egyesült Államokban*, (Alterra Kiadó, Miskolc, 2004) 102–121.; Prugberger T., *A termőföldhasználat – hasznosítás és birtoklás, valamint a termőföldforgalom jogi szabályozásának kibátása a természet és környezetvédelemre*. http://www.vmtt.org.rs/mtn2014/049_080_Prugberger.pdf (Last accessed: 31 December 2018).

² E.g.: Fodor L., *Környezetjog*, (Debreceni Egyetemi Kiadó, Debrecen, 2015) 194.

³ As a glaring example see: Constitution of the Republic of Bulgaria Chapter one “Fundamental Principles” Article 21(2): “Land, as a chief national asset, shall enjoy particular protection on the part of the State and society.” See for it: <http://www.parliament.bg/en/const> (Last accessed: 31 December 2018); See in Hungarian: Szakály Zs. (transl.), *Nemzeti Alkotmányok az Európai Unióban*, (Wolters Kluwer, Budapest, 2016) 135. See moreover Portugal’s Constitution Section (1) Article 93. “d) To ensure the rational use and management of the soil and other natural resources and to maintain their regenerative capability.” https://www.constituteproject.org/constitution/Portugal_2005.pdf (Last accessed: 31 December 2018); See in Hungarian: Szakály, *Nemzeti Alkotmányok az Európai Unióban*, 776. See also: Constitution of the Republic of Slovenia Article 71. “(1) The law shall establish special conditions for land utilisation in order to ensure its proper use. (2) Special protection of agricultural land shall be provided by law.” <http://www.us-rs.si/media/constitution.pdf> (Last accessed: 31 December 2018). See for the Hungarian translation: Szakály, *Nemzeti Alkotmányok az Európai Unióban*, 986.

⁴ Fundamental Law of Hungary (25th April 2011); See for it: <https://net.jogtar.hu/jogszabaly?docid=A1100425.ATV> (Last accessed: 31 December 2018).

⁵ See as above Article P).

essential. Considering the current data, 80% of the territory of Hungary is arable land,⁶ the preservation of which is a key issue.⁷

Several documents⁸ published by international organizations also highlight the global importance of land protection. In the frame of the regulatory reform⁹ of the Common Agricultural Policy¹⁰ (hereinafter: CAP), which is one of the European Union's policies, "greening" is a glaring example for the tendency to regulate the protection of land.¹¹

II. ON THE REGULATORY SYSTEM AND THE MAIN FEATURES OF HUNGARIAN LAND PROTECTION

The Hungarian regulation of land protection depends on two main correlative acts. One of them is Act LIII of 1995 on the General Rules of Environmental Protection (hereinafter: Kvtv.) and the other is Act CXXIX of 2007 on the Protection of

⁶ See the current data: *Statistikai Tükör*, 3rd August 2017, 1., <https://www.ksh.hu/docs/hun/xftp/gyor/vet/vet1706.pdf> (Last accessed: 31 December 2018). "On 1st June, 2017 almost 80% of the country's area was covered by land of 7 million 371 thousand ha, which has slightly dropped compared to the previous year. Almost three-quarters of the land (5,4 million ha) is considered to be agricultural land, which is registered as field, kitchen-garden, vineyard, fruit garden and lawn." Current data for forests: "Forests [...] along with areas which serve the performance of silvicultural activity cover altogether 2 059,7 thousand ha; the proportion of national forestry is 20,8%." See it: Erdőtörvény, (2017) (12) *infojegyzet*, 1–4., http://www.parlament.hu/documents/10181/1202209/Infojegyzet_2017_12_erdotorveny.pdf/8dd07f2a-741c-4acb-992b-c3fad1128909 (Last accessed: 31 December 2018) 1. See the former data: Agrárgazdasági Kutató Intézet, A magyarországi birtokstruktúra, a birtokrendezési stratégia megalapozása, (2004) (6) *Agrárgazdasági Tanulmányok*, 42. "83% of the country's 9,3 million are in total land, 63% is cultivated land, most of which – almost the half of it – is used as fields. The rate of forestry is relatively low, 19% of the area is covered by forest and 1-tenth of it is registered as lawn." See data of the 1990s: Bakács T., *Magyar környezetjog*, (Springer Verlag, Budapest, 1992) 24–25.

⁷ Fodor L., Gondolatok a földvédelem agrárjogi és környezetjogi kapcsolódási pontjairól, in Csák Cs. (szerk.), *Ünnepi tanulmányok Prugberger Tamás professzor 70. születésnapjára*, (Novotni Kiadó, Miskolc, 2007) 108–117.

⁸ E.g. UN General Assembly A/RES/70/1 "Transforming our world: the 2030 Agenda for Sustainable Development" <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/291/89/PDF/N1529189.pdf?OpenElement> (Last accessed: 31 December 2018). We emphasize that sustainable agriculture besides stopping global famine and the requirement of food security exactly appears as a second aim from the 17 global overall aims defined by the United Nations: "End hunger, achieve food security and improved nutrition and promote sustainable agriculture". 33.

⁹ Halmai P., Közös agrárpolitika, in Kende T. and Szűcs T., *Az Európai Unió politikái*, (Osiris, Budapest, 2001); Halmai P., *Az Európai Unió agrárrendszere*, Harmadik átdolgozott, bővített kiadás, (Mezőgazda Kiadó, Budapest, 2007); T. Oppermann, *Europarecht*, (Verlag CH Beck, München, 1991) 475–503.

¹⁰ See for the regulatory regime of the Common Agricultural Policy: The Treaty on the Functioning of the European Union, Part III, Art. 38–44.

¹¹ Csák Cs., Cross compliance, avagy környezetvédelem a támogatás feltételeként, (2012) (2) *Publicationes Universitatis Miskolciensis Series Juridica et Politica*, 423–433.; M. Réti and K. Bak, The Common Agricultural Policy with and without the United Kingdom – CAP Brexit, (2016) (1) *ELTE Law Journal*, 163–182.

Agricultural Land (hereinafter: Tfv.). The Kvtv. includes frame-like regulatory provisions in respect of land protection. In addition, by establishing special requirements, other rules of law are connected to it.¹² The determining element of the special law material is the Tfv. The provisions of the Kvtv. and of the Tfv. comply with the provisions of the Fundamental Law, which is a determining factor for the regulatory system of Hungarian land protection. Act CXXII of 2013 on arable and forestry land trade (hereinafter: Földforgalmi tv.) and the Act CCXII of 2013 on laying down certain provisions and transition rules in connection with Act CXXII of 2013 concerning arable and forestry land trade (hereinafter: Fétv.) are also parts of the regulatory system.

From the main features of the Hungarian regulatory system of land protection, the regulatory approach of the Kvtv. needs to be pointed out because it takes the land as an environmental element, among other ones enforcing ecological aspects.¹³ The Tfv. takes the land as its regulatory object, which is also reflected in the title of the Act and it enforces the brief approach of the lawmaker.¹⁴ This Act covers both quantitative and qualitative protection (soil protection) of arable land, besides other regulatory fields. From the main characteristics of the Tfv., it is important to mention that the Act is strongly related to agriculture and farming. The rules of land protection are affected by the imperative to preserve and improve the fertility of the land.¹⁵

III. THE REGULATORY PILLARS AND THEIR CORRELATION REGARDING LAND PROTECTION

1. References in the Fundamental Law

Referring to the introduction, the Hungarian Fundamental Law gives key importance to this topic exactly and correctly as it is laid down in the Preamble of the Kvtv.¹⁶ Article P)

¹² We emphasise Act XLVIII of 1993 on Mining considering especially section 36(1): “The mining entrepreneur or the person who is allowed to conduct geological research is obliged to restore gradually the open area which has ceased to exist as a result of mining activity or geological research or it is significantly restricted. Moreover, they are obliged to make the area suitable for its reuset or to develop it, matching its natural environment (hereinafter: landscaping).” See special the rules in Act XVIII of 2004 on wine-growing and viticulture, as well as Act XXI of 1996 on territorial development and spatial planning.

¹³ It is worth mentioning that there is progress in the concept of the general regulation concerning land protection. See: Bakács, *Magyar környezetjog*, 27.

¹⁴ Contemporary analysts emphasize the same fact: e.g.: Fodor, *Környezetjog*, 196., fn. 2.

¹⁵ We need to note that the act clearly establishes in all of its provisions that the demand does not extend to the protection of any environmental element. We will return to this topic.

¹⁶ The Preamble of the GR Act clarifies the aim of the lawmaker and it clearly declares that the GR Act is established regarding the content of the Fundamental Law. The Preamble includes the aim system

Section (1) of the Fundamental Law¹⁷ lists arable land in first place in the rank of natural resources, considering it as one of the common heritages of the nation. According to the introduction, protecting and sustaining arable land as well as preserving it for future generations appear as a general obligation in the Fundamental Law. Considering the aims established in the Fundamental Law it is important to pay attention to the content of Article P), which expresses the importance of arable land in the Fundamental Law. According to section 2 of this Article, to achieve the aims established in the previous section, the limits and conditions for acquisition of ownership and for use of arable land shall be laid down in a cardinal Act.¹⁸

Concerning the Fundamental Law, Article XXI Section (1) shall also be mentioned according to which “Hungary shall acknowledge and endorse the right of everyone to a healthy environment.”¹⁹ The further sections of Article XXI are also important from the aspect of enforcement of general protective rules, such as land protection rules.²⁰ Article XXI (2) of the Fundamental Law establishes the obligation of

of the lawmaker matching the content of the Fundamental Law in the followings: “As natural heritage and environmental features are national assets, their preservation, conservation and improvement are fundamental aspects of the biosphere and the health and quality of life of humans and, furthermore, as there can be no harmony between the activities of man and nature without these, neglecting them would endanger the health of present generations, the existence of future generations and the survival of a number of species; the National Assembly, in accord with the provisions of the Fundamental Law, does enact the following law [...]”.

¹⁷ Art. P) “(1) Natural resources, in particular arable land, forests and the reserves of water, biodiversity, in particular native plant and animal species, as well as cultural assets form the common heritage of the nation; it shall be the obligation of the State and everyone to protect and maintain them, and to preserve them for future generations”.

¹⁸ Art. P) “(2) The limits and conditions for acquisition of ownership and for use of arable land and forests necessary for achieving the objectives referred to in Paragraph (1), as well as the rules concerning the organisation of integrated agricultural production and concerning family farms and other agricultural holdings shall be laid down in a cardinal Act.”

¹⁹ We need to note, that Article 70 of the Constitution of Croatia establishes a similar declaration with the following content: “[...] The state shall ensure conditions for a healthy environment. Everyone shall, within the scope of their powers and activities, accord particular attention to the protection of human health, nature and the human environment.” See in Hungarian: „[...] Az állam biztosítja az egészséges környezethez való jog megvalósításának feltételeit. Mindenki köteles a saját hatáskörének és tevékenységének keretében, különös figyelemmel lenni az emberi egészség, a természet és az emberi környezet védelmére.” Translator Jakó N., in Szakály, *Nemzeti Alkotmányok az Európai Unióban*, 433.

Furthermore, see the right to healthy environment: Constitution of the Republic of Slovenia Article 72 “(1) Everyone has the right in accordance with the law to a healthy living environment.” See the Hungarian translation: „(1) A törvénnyel összhangban mindenkinek joga van az egészséges környezethez.” Szakály, *Nemzeti Alkotmányok az Európai Unióban*, 986.

²⁰ Hungarian Fundamental Law Article XXI

“(1) Hungary shall recognise and give effect to the right of everyone to a healthy environment.

(2) Anyone who causes damage to the environment shall be obliged to restore it or to bear the costs of restoration, as provided for by an Act.

(3) The transport of pollutant waste into the territory of Hungary for the purpose of disposal shall be prohibited.”

the perpetrator to bear the costs of restoration and damage caused to the environment.²¹ Moreover, Section (3) describes the prohibition of importing pollutant waste in order to dispose it in Hungary. The content of Article XXI of the Fundamental Law harmonizes with the content of the Preamble of the Kvtv.; moreover, with the land protection provisions in it.²²

2. The main provisions concerning land protection and particular land protection-Rules in Act LIII of 1995 on the General Rules of Environmental Protection

The harmony between the Kvtv. and the Fundamental Law reflects the definition of sustainable development in the Kvtv.²³ The lawmaker considers sustainable development as a basic principle of a multi-pillar system, which is the system of social and economic relations and activities. This system shall continuously preserve natural assets, not only by concentrating on the present situation but considering future generations, too. In order to achieve the aim of preservation, this system shall use natural resources economically and reasonably. The aspect of being in favour of continuity can easily be perceived, because the system of sustainable development from an ecological point of view will improve the quality of life in long term and it will also guarantee the preservation of diversity.²⁴

The objective system of the Kvtv. establishes ensuring sustainable development and harmony in the relations of humans and society, as well as the high level and correlated protection of the environment as a whole and the protection of its elements and processes.²⁵ The objective system of the Kvtv. mentioned above, along with the definition of “environment” appearing in the “Definitions,” reflects the aspect expressed

²¹ We need to note that the Constitution of the Republic of Estonia enforces, in its Article 53, a similar regulatory aspect as the Hungarian Fundamental Law in the following way: “Everyone has a duty to preserve the human and natural environment and to compensate for harm that he or she has caused to the environment. The procedure for compensation is provided by law.” Translation in Hungarian: „Mindenki köteles megőrizni az emberi és természeti környezetet, és kártérítéssel tartozik az általa okozott környezeti károkozásért. A kártérítés eljárását törvény szabályozza.” Translator Jakó N., in Szakály, *Nemzeti Alkotmányok az Európai Unióban*, 301.

²² See: Kvtv. sections 14–17; we will return to this topic in more detailed.

²³ Kvtv. under the Title “Definition” “section 4(29) “sustainable development” means a system of social and economic conditions and activities that preserves the natural values for the current and future generations, uses natural resources economically and expediently and, in ecological terms, ensures the improvement of the quality of life and the preservation of diversity in the long run;”.

²⁴ See sustainable use of land: Olajos I., A fenntartható földhasználat határai – avagy dilemmák az energetikai növények természetességében, in Csák Cs. (szerk.), *Jogtudományi tanulmányok a fenntartható természeti erőforrások témakörében*, (Miskolci Egyetem, Miskolc, 2012) 142–150.

²⁵ Kvtv. section 1(1) “§ 1(1) The objective of this Act is to create a harmonious relationship between man and the environment, to facilitate the coordinated protection of the environment, its components and processes and to provide for the conditions of sustainable development.”

by the lawmaker in this topic;²⁶ namely that, according to the definition of the Kvtv., environment includes its elements, systems, processes and structures.²⁷ As it turns out from the regulatory content, which will be analysed later, the environmental element involves five sub-elements, which interact with one another, and their further components. According to the provision of the Kvtv., the environmental element may mean land, air, water and the biosphere, as well as the built (artificial) environment, along with its components, established by humans.

Regarding the objective of Kvtv., it is important for the lawmaker to ensure an appropriate frame along two principles, namely foresight and equitability in bearing the burden, in order to assert constitutional rights to a healthy environment. It also promotes high-level, harmonious protection, activities that support sustainability, and the processes, procedures, developments, acts, and mechanisms highlighted by the lawmaker.²⁸

Comparing the aforementioned general objectives of the Kvtv. to the equivalent provisions²⁹ of the Swiss Federal Environmental Act (814.01 Bundesgesetz über den Umweltschutz vom 7. Oktober 1983),³⁰ the similarity of the lawmaker's perception may be seen. The corresponding Swiss act regulates at an overall level, too. However, the

²⁶ Kvtv. section 4(1).

²⁷ Kvtv. section 4(2).

²⁸ Kvtv. section 1(2).

“(2) In accordance with the principles of foresight and equitable bearing of burdens, this Act creates an adequate framework for the assertion of constitutional rights to a healthy environment and promotes

- a) the reduction of the use, loading and pollution of the environment, the prevention of its impairment, and the repair and restoration of the damaged environment;
- b) the protection of human health and the improvement of the environmental conditions of the quality of life;
- c) the preservation and conservation of natural resources, and rational and efficient management that ensures the renewal of resources;
- d) the harmony of the other objectives of the state with the environmental protection requirements;
- e) international cooperation in environmental protection;
- f) initiatives taken by the public and public participation in activities aimed at protecting the environment, such as exploring and learning about the state of the environment and carrying out the tasks of government agencies and local governments related to the protection of the environment;
- g) the coordination of the functioning of the economy and social and economic development with environmental requirements;
- h) the establishment and development of institutions, the purpose of which is to protect the environment;
- i) the establishment and development of a public administration that serves to conserve and protect the environment.”

²⁹ „Umweltschutzgesetz Art. 1. Zweck 1. Dieses Gesetz soll Menschen, Tiere und Pflanzen, ihre Lebensgemeinschaften und Lebensräume gegen schädliche oder lästige Einwirkungen schützen sowie die natürlichen Lebensgrundlagen, insbesondere die biologische Vielfalt und die Fruchtbarkeit des Bodens, dauerhaft erhalten.“ “The objective of the Act is to protect humans, animals, plants, their community and territory from the harmful and burdensome effects as well as to sustain the life conditions, especially the biodiversity and *the fertility of soil*, in the long run.” Translator: Mária Réti.

³⁰ For short: Umweltschutzgesetz, USG, <https://www.admin.ch/opc/de/classified-compilation/19830267/index.html> (Last accessed: 31 December 2018).

protection of soil fertility clearly appears as the objective of the Hungarian Act. From the aspect of our topic, we should also mention that there is one single valid provision regulating the burden of soil in Switzerland.³¹

Referring to the provisions of the Kvtv., we should declare that the unified protection of environmental components³² is a basic issue defined by Kvtv.³³ According to the Act, each environmental component shall be protected in itself and as a part of all the environmental elements, as well as considering their interrelationship. The Act regulates utilisation and loading of environmental elements by considering their unified protection. Another particular feature of the protection of environmental elements involves their qualitative and quantitative protection as well the protection of the sets of environmental elements and the protection of proportion and processes within the environmental elements.³⁴ The lawmaker does not allocate priorities: Classification into “protected”, “more protected” and “the most protected” environmental elements does not exist. According to the related provisions of the Kvtv., in the event of the prevention, reduction or termination of utilising and loading of an environmental element, another environmental element cannot be damaged or polluted.³⁵

Besides clarifying the general principles relating to protection, the Kvtv. specifies particular provisions under the title “The Protection of Land” the most important of which are related to the extension³⁶ and content³⁷ of protection. Land protection includes the protection of the surface and subsurface layers of land; moreover, the conservation of the soil, rock formations and minerals, as well as the protection of their natural and transitional forms and processes. According to the provision of the Kvtv., land protection is complex, as it involves several protective areas; it includes the fertility and structure of land, water and air balance, as well as the conservation of the biosphere. Considering the rules of land protection in the Kvtv., the boundary of the Act regarding activities and disposing materials both on the surface and subsurface is also important. It means that only those activities may be done and only those materials may be disposed which do not pollute and damage

³¹ 814.12 Verordnung über Belastungen des Bodens (VBBo) vom 1. Juli 1998, <https://www.admin.ch/opc/de/classified-compilation/19981783/index.html> (Last accessed: 31 December 2018).

³² Kvtv. Chapter II under the title “Protection of Environmental Components and Factors that Endanger the Components” section 13.

³³ See the interaction of environmental elements and the rules for land and water protection: Kurucz M., *Föld- és vízvédelmi jog Agrárkörnyezeti alapok*, (ELTE Jogi Továbbképző Intézet, Budapest, 2002); see more: Horváth G., A környezetvédelem, a természetvédelem és az élőhelyvédelem viszonyrendszere a hazai jogi szabályozásban, (2013) 68 (7–8) *Jogtudományi Közlöny*, 355–367.

³⁴ Kvtv. section 13(2).

³⁵ Kvtv. section 13(3).

³⁶ Kvtv. section 14(1).

³⁷ Kvtv. section 14(2).

the quantity and quality as well as the processes of environmental elements both on the surface and subsurface.³⁸

In addition, concerning investments (construction and mining), the Kvtv. handles land protection with a correct legislative approach. The time-validity of the related obligation is particularly important from the aspect of land protection. According to the related provision, there are two correlating obligations in the case of an investment. The appropriate removal of the topsoil and its use as agricultural soil shall be ensured before the start of an investment.³⁹ After the end of the activities concerning the land utilisation, the user of the area shall take care of the scheduled restoration and arrangement, as well as the conditions of recycling. It is important that this obligation already burdens the user of the area in the course of using it if this obligation is stipulated in a legal regulation or in an official decision.⁴⁰ The regulatory content provides the aim of the fertility of land and the protection of agricultural soil. We may declare that the regulatory content is practical, and it obviously leads to the fulfilling the related provisions of the Fundamental Law at the same time. In addition, it satisfies the ambition laid down in the Preamble, which aims the harmonization with the Fundamental Law.

3. The main provisions of Act CXXIX 2007 on the Protection of Arable Land

a) The structure of the Tfv.

The Tfv. is built on five chapters. Chapter I establishes the “Introductory Provisions” which include those concerning the scope of the Act and definitions. Chapter II contains provisions regarding the exploitation, protection and assessment of land. Chapter III summarises the most important rules of qualitative protection under the title of “Soil protection”. Chapter IV includes provisions under the title “Cadastral Procedure of Fruit-Growing Region, the Announcement of Plantation and Planting of Fruits and the Cadastral Registry of Fruit Plantation”. Chapter V establishes the provisions of entry into force and the temporal issues, as well as the enabling provisions. We need to mention that the rate of land protection contribution is established in Appendix 1, while the fines for breaching land protection laws are established in Appendix 2 and the amount of soil protection fines is established in Appendix 3.

³⁸ Kvtv. section 15(1). It is worth noting the subsidiary rule of Section (2), according to which there is a separate legal regulation for the environmental conditions concerning depositing materials.

³⁹ Kvtv. section 16.

⁴⁰ Kvtv. section 17(3).

b) The Scope of the Tfv.

As clearly appears from the structural characterisation of the Tfv., it establishes provisions concerning the exploitation of arable land, land protection and the assessment of land and soil protection. The scope of the Act relates to arable land as a general rule and to property which is not assessed as arable land when the Act regulates this way. Regarding the urban lands that are in agri- or silvicultural use, it is an important rule that the provisions for arable land shall be applied as a main rule for them, too. The rules are established in relation to land protection and side-exploitation⁴¹ make an exception to the previous rule.⁴² The regulation relating to agricultural lands under nature conservation also refers to the extended scope of the Act.⁴³ Rules related to agricultural lands shall be applied to property registered as a garden-plot in the land registry if certain provisions are complied with.⁴⁴

The scope of the Act also considers its so-called “negative” scope. It means that the scope of the Tfv. does not include the establishment of a forest or its exploitation, its urban development as or as silviculture, as it is determined in the Act XXXVII of 2009 on the Forest and the Protection of Forests and Silviculture (hereinafter: Evt.).⁴⁵ There is another prominent rule, according to which the scope of the Tfv. does not include the protection of land as an environmental component. It is worth again drawing attention to the fact that the starting point of the regulatory perception of the Kvtv. and the Tfv. do not completely match. The Kvtv. enforces a regulatory content with an ecological aspect.⁴⁶ As an important rule, the Kvtv. involves in the expectation on the basis of which its rules shall be applied along with the soil protective provisions of other acts.⁴⁷

c) The double directions correlating with each other and the main definitions concerning agricultural land protection

The quantitative protection of arable land includes that a particular land shall be protected,⁴⁸ its territorial extent shall be properly preserved and the agricultural use shall not be wasteful. For instance, certain economic/farming objectives (investments) shall not overwrite the protection.

⁴¹ Tfv. section 5(4).

⁴² See the scope of the Tfv.: section 1(1)–(3).

⁴³ Tfv. section (5): “The provisions of this Act shall be applied to protected agricultural land unless otherwise required by the Act on nature protection.”

⁴⁴ Tfv. section 1(7).

⁴⁵ The rule established in the Tfv. section 1 (4a) helps the explanation in the following way: “The forest authority is entitled to determine and certify, which area is considered to be forest according to the forest act.”

⁴⁶ Cf. p 4.

⁴⁷ Tfv. section 1(6).

⁴⁸ Typical examples are the so-called “greenfield investments” which reduce obviously the amount of agricultural land.

We may talk about soil protection with regard to qualitative protection; otherwise, soil protection appears among the definitions of the Tfv. with the following content: “2(17). soil protection: protecting and improving arable land, as well as preventing it from physical, chemical and biological degradation; (...)” Referring to the introduction of this analysis, international organisations obviously point out the importance of taking acts against soil degradation. They also emphasise the significance of protection from other aspects.⁴⁹

The quantitative and qualitative protection of soil obviously correlate with each other.⁵⁰ The fertility of soil stands rightly in the centre of the definition of soil protection. If soil protection is not enforced appropriately by practice, it may logically result in the soil losing its nutrients. It means that the particular part of the land may cease to exist as fertile land.

According to the Tfv.’s main definitions, arable land means the part of the land which is located on the periphery of a settlement and is registered in the real estate register as a field, a vineyard, a fruit garden, a garden, a meadow, a pasture-ground (lawn), a reed-bed or as afforested land. There is one exception: if the part of the land is considered to be a forest according to the definition of the Evt. It defines soil as a conditionally renewable natural resource, which is the fundamental means of agricultural and sylvicultural production. Also, it is the live sphere of the Earth’s solid surface, the most important feature of which is fertility.

d) The obligation of arable land utilisation; the consequences of negligence

The obligation to utilise arable land as regulated in the Tfv. greatly supports the enforcement of protective rules, the protection of arable land and appropriate farming practice for it. The land user is obliged to use the land in two different ways depending on his choice. Either the land user shall be obliged to utilise the land for the appropriate agricultural production according to its registration in land estate registry or without agricultural production, the land user shall prevent weeds from establishing and spreading and observe the soil protective provisions.⁵¹ Regarding vineyards and fruit gardens, it is worth mentioning that the land user has no choice, because he/she

⁴⁹ UN: Transforming our world, point 33. *ibid.*, 39–41.

“33. We recognize that social and economic development depends on the sustainable management of our planet’s natural resources. We are therefore determined to conserve and sustainably use oceans and seas, freshwater resources, as well as forests, mountains and drylands and to protect biodiversity, ecosystems and wildlife. *We are also determined* [...] to tackle water scarcity and water pollution, *to strengthen cooperation on* desertification, dust storms, *land degradation* and drought and to promote resilience and disaster risk reduction.”

⁵⁰ Horváth G., Az agrár-környezetvédelmi jog földvédelmi részterületének „tárgyi és területi” hatálya, in Bobvos P. (ed.), *Reformator iuris cooperandi*, (Pólay Elemér Alapítvány, Szeged, 2009) 209–229.

⁵¹ Tfv. section 5(1); The act and the legal regulation for the implementation of the act may establish provisions which have another content as the main rule.

is obliged to use the land for production.⁵² The provisions of the Tfv. are regularly checked by the estate authority.⁵³ If the obligation of agricultural land utilisation is neglected, a land protection fine shall be paid according to the conditions established in the Tfv.⁵⁴ In connection with the obligation of agricultural land utilisation, garden-plots as well as the special rules applied to them should be highlighted. The relating provision of the Tfv. may be considered as a valuable regulatory component. According to it, uncultivated garden-plots may be assigned for social land programmes and for municipal public work programmes that include agricultural activity for one year.⁵⁵ In this case, the owners of the garden-plots may not claim compensation from the local government for the utilisation of the land as part of either programme.⁵⁶ The Földforgalmi tv.⁵⁷ and the Fétv.⁵⁸ both invoke compulsory land use in the event of failure of the obligation of land utilisation.

When analysing the institution of the obligation of land utilisation, the provisions relating to the conditions of acquisition of property established in the Földforgalmi tv. stand out. It means that, according to this act, as a main rule, upon acquiring arable land, the acquirer shall make a declaration on the use and utilisation of land as well as its utilisation for other purposes. The acquirer shall make the declaration with keeping the determined formalities. This declaration is one of the conditions of acquiring arable land. According to the Földforgalmi tv. the acquirer shall accept that he shall not give the use of the land over to anybody, he shall use the land himself, he meets the requirement of arable land utilisation and he will not utilise the arable land for other purposes (with some exceptions in the act) for five years following the date of acquiring the land. This declaration shall be made in the contract on the transfer of property or in a private document of full probative value as well as in a notarial deed.⁵⁹

As part of the regulatory material of the obligation of land utilisation the conversion of land in the real estate register should be mentioned. Independently from the land conversion, the classification of the arable remains the same and what is more its utilisation is unchanged. The alteration of registration may mean a different kind of farming, which may have serious effects on the environment. Considering the fact that the registration is bound to real estate registry, it shall reflect the alteration. Regarding

⁵² Tfv. section 5(2).

⁵³ Tfv. section 5(5).

⁵⁴ Tfv. section 5(6), see the land protection fine more exactly: Tfv. sections 24–25 and Appendix 2 for the rate of the fine.

⁵⁵ Tfv. section 5/A(1)–(7).

⁵⁶ Tfv. section 5/A(7).

⁵⁷ Földforgalmi tv. Chapter V. “The official control of the limit of acquisition and compulsory utilisation.”, exactly section 64–67.

⁵⁸ Fétv. “Chapter XII The rules of the official control of the limit of acquisition and of compulsory utilisation.”

⁵⁹ Földforgalmi tv. section 13(1).

the main rule, the conversion of land shall be declared to the real estate authority. The omission of this declaratory obligation will result in a land protection fine being levied.⁶⁰

e) The rules on utilisation for other purposes

The utilisation of arable land for other purposes may be temporary⁶¹ or permanent.⁶² The Tfv. obviously defines the cases of utilisation of arable land for other purposes, which may be – the temporary or permanent use of the arable land by which the arable land will be unusable, either temporarily or permanently, for agricultural purposes; – the authorisation of urban development; the use of large-scale afforestation, or manor afforestation, as well as the afforestation related to a road, railway or other technical establishments that are out of the scope of the Tfv.⁶³ As special rules have also been introduced for garden-plots.⁶⁴

As a main rule, arable land may be utilised for other purposes with the permission of the property authority.⁶⁵ The property authority will conduct a so-called land protective procedure.⁶⁶ The deadline of this procedure is 30 days it has to be completed within 30 days. A local inspection shall be held as both part of the land protective procedure and by the examination of land protective professional rules. It is an important rule, that according to the provisions of the Tfv., the utilisation of arable land for other purposes may result in a land protection contribution, which shall be paid only once.⁶⁷ The authorisation of the real estate authority is needed but this alone does not satisfy the conditions of a lawful procedure, because this does not release the inquirer from acquiring other necessary official permits. There is obviously a need for a protective rule according to Section 11 which states that “Agricultural land may be used for other purposes only in exceptional cases – primarily with regard to lower-quality agricultural land”.⁶⁸

⁶⁰ Tfv. § 3 We note that special rules are applicable to forests and vineyards. The provisions of the Etv. and Act XVIII of 2004 are of fundamental importance for them.

⁶¹ It is considered to be temporary utilisation of agricultural land for other purposes, when, on the area concerned, there is destruction of the unharvested crop, production losses, the necessary agricultural work has been prohibited, or the structure of the soil has become harmful. See: Tfv. section 14(1) We should mention that temporary utilisation for other purposes may be permitted for a maximum 5 years. Tfv. section 14(2).

⁶² Tfv. section 9(3).

⁶³ Tfv. section 9(1) points a)–c)

⁶⁴ See as special rule Tfv. section 5/A.

⁶⁵ Tfv. section 10(1), see the exceptions in section 10(2).

⁶⁶ Tfv. section 8/C.

⁶⁷ Tfv. sections 21–23, see Appendix 1 for the rate of the land protection contribution.

⁶⁸ See the rules for agricultural lands which have better quality than the average: Tfv. section 11(1)–(3).

If the arable land is re-classified as urban land, it means the permanent utilisation of arable land for other purposes.⁶⁹ The classification of arable land as urban land may be requested by the local government according to the Tfv. This is exclusively the local government's right.⁷⁰ With its request, the local government shall attach the documents regulated by the Tfv. to the inquiry. It is also an important rule that the local government shall declare that those parts areas specified in the request shall be utilised for the stated purpose within 4 years. The rule on paying the land protection contribution shall apply to the local government, too.⁷¹

Two supplementary rules should be highlighted in connection with utilisation for other purposes. One of them is called temporary utilisation. According to the provisions established in the Tfv., if the real estate authority has permitted the utilisation of agricultural land for other purposes, either the land user or the applicant is obliged to meet the requirements of its agricultural utilisation until the first use of land – e.g. until a certain investment actually starts. The other form of utilisation called supplementary utilisation, according which the land user shall regularly take care of the vegetation on the property which is not arable land if it does not prevent or limit the appropriate use of the property for other purposes.⁷²

The Tfv. includes also the applicant's obligation concerning the termination of utilisation for other purposes. As a main rule, the applicant – according to their own choice – shall make the whole area or at least half of the area suitable for agricultural or silvicultural use. This provision may also be applied to the applicant who is concerned about exceeding the four-year the suspension of utilisation for other purposes.⁷³ This is the rule on the reuse of land, on the basis of which the particular part of the land may be available for cultivation again.

f) The main rules of soil protection

As we have mentioned before, the Tfv. includes particular definitions concerning soil and soil protection. While the definition of soil concentrates on fertility, which is its most important feature, the complex definition of land protection focuses on the protection of the quality and fertility of agricultural land.⁷⁴ The introduction to the act refers to, the change in approach of the regulatory regime of the EU's Common Agricultural Policy; the greening process has affected soil conservation. Without

⁶⁹ If the recourse of arable land occurs for the purpose established in Tfv. section 15/B, (namely the arable land is necessary for as a production site, borrow pit or surface-mining activity), it is also considered to be utilisation of arable land for other purposes.

⁷⁰ Tfv. section 15(2).

⁷¹ Tfv. sections 21–23. §, furthermore Appendix 1 on the rate of the land protection contribution.

⁷² Tfv. section 5(3)–(4).

⁷³ Tfv. section 6(1).

⁷⁴ Tfv. section 2, points 16 and 17.

aiming at completeness, we need to highlight the set-aside systems, as well as land-use methods that favour of ecological farming which support has been significant. The territorial rules along with restrictions on animal density and silvicultural programmes have all assisted soil protection. Concerning “big steps” we need to point out the MacSherry Reform, the documentation of Agenda 2000, which clearly declared the multifunctional characteristic feature of agriculture by defining rural development as the second pillar of the system. Undoubtedly, the institute of modulation is extremely valuable regarding protective rules. As a result of the requirements, which concentrate on the environment and preserving it, environmental protection aspects are facilitated by financial support. The progress of greening as part of the Fischler Reform (2003) as well as the Regulation package from 2013 with special regard to the Regulation (EU) No 1306/2013 of the European Parliament and of the Council and its Annex II, the rules of Cross-compliance⁷⁵ may be considered to be a huge leap in this topic.⁷⁶

The Tfv. establishes the authorities responsible for soil protection. Here we highlight the Soil Conservation Information and Monitoring System, the task of which is to observe the alteration of soil and to classify it with special concern. It greatly serves the protective aims, because it is public and has a common interest.⁷⁷

Soil conservation authorities also have a key importance. The authorisation of the soil conservation authority is essential for certain activities and procedures such as soil improvement, also known as amelioration and landscaping with an agricultural purpose.⁷⁸ It is also a significant rule that a soil conservation plan is needed for official land protection procedures, which is determined in a special law.⁷⁹ According to the Tfv., a land conservation fine shall be paid if the land user violates the obligations concerning soil protection.⁸⁰

Soil protection is fundamentally the obligation of the land user⁸¹, who has wide range of duties. The land user must adjust to the ecological features of the agricultural area and align his soil-protective farming or other activity to it.⁸² If the area is exposed to damage from either water or wind erosion, the land user has practical obligations to prevent it according to the Tfv.⁸³ It is obvious that the obligation in connection with a field differs from the obligation on the area of a plantation or on a meadow or grazing-ground (lawn). The related obligations of the land user are practical, because it is clear

⁷⁵ See concretely: Regulation Article 93.

⁷⁶ See for the analysis of the process: footnotes 10 and 11.

⁷⁷ See for its function and goals: <http://portal.nebih.gov.hu/-/a-tim-azaz-a-talajvedelmi-informacios-es-monitoring-rendszer/> (Last accessed: 31 December 2018).

⁷⁸ Tfv. section 49(1).

⁷⁹ Tfv. section 50(2); See for the definition of soil conservation plan: Tfv. section 2, point 18.

⁸⁰ Tfv. section 56–57.

⁸¹ See for the definition of land user: Tfv. section 31(1) a).

⁸² Tfv. section 35.

⁸³ Tfv. section 36.

that, for specific field, plants that match its soil cover and can prevent erosion shall be planted. We need to mention that if erosion cannot be prevented by undertaking the related provisions of the Tfv., the land user will have further obligations. One of these obligations is that the registration of the arable land shall be altered.⁸⁴ On the basis of another practical rule, vegetation such as forest belts which ensure the protection of areas endangered by erosion shall be preserved.⁸⁵

The land user is also obliged to consider the needs of cultivated plants on acidic soil or soil that is susceptible to acidity. For example, the soil shall be improved or acidic fertiliser shall not be used on it.⁸⁶ There is a special rule for soil protection in the case of saline soil. It is logical, that the land shall be cultivated by the land user without degrading soil quality. The land user also has obligations regarding soil conservation, for example concerning the quality of irrigating water.⁸⁷ The provision of the Tfv. oblige the land user to take care of the preservation of the organic content by applying soil conservation methods; by applying rotation; by growing follow-up crops or intercrops; by making use of stubble field remains; by gaining organic materials and by preserving humous topsoil. It is a significant rule that the humous topsoil must not be removed, unless otherwise required by the Tfv. Developing a harmful abundance of groundwater or sub-surface water shall be prevented avoiding and remedying soil compaction. At the same time, the land user is obliged to protect the arable land from foreign materials that damage its quality. It is a general rule that nutrient management, which takes the nutrient supply of the soil while using the land and the growing plants' need for nutrients into account, and which is also environmentally friendly, shall be carried out. Soil protection is evidently essential in the case of investments carried out on arable land or that have an effect on it and are considered to be investments according to the Act on accounting. Investments and any other activities carried out on agricultural land and having an effect on it shall be planned as well as implemented so that the conditions of soil protective farming, especially the humous topsoil on both particular area and "nearby" arable land cannot be degenerated.

IV. CONCLUSION

Considering the analysed theme, as a final statement we would like to make the suggestion that the content on fundamental rules making up the Hungarian soil protection system could be simplified so that the practice could apply them more efficiently than the current one.

⁸⁴ Tfv. section 36(2).

⁸⁵ Tfv. section 36(3).

⁸⁶ Tfv. section 37.

⁸⁷ Tfv. section 38.

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The Transformation of the Hungarian Fiscal and Monetary Constitution

ABSTRACT

The new Hungarian constitution, the Fundamental Law of Hungary, passed on 25th April 2011, entered into force on 1st January 2012. The new constitution and the cardinal laws regulate the institutional basis of the fiscal and monetary system of the country and also sets forth the basic rules of the distribution of tax burden. The Fundamental Law caused momentous controversies in the political and in the academic sphere. The author takes a historical perspective with the purpose of showing the conditions under which the post socialist Hungary re-joined the market-oriented world in the era of globalization. The author also describes the core constitutional changes and provides arguments for their appropriate nature.

KEYWORDS: constitutional law, fiscal constitution, monetary law, tax law, fiscal sociology

I. INTRODUCTION

The new Hungarian constitution, the Fundamental Law of Hungary, passed on 25th April 2011 and went into force on 1st January 2012. The Fundamental Law is a so-called core constitution and it directs the National Assembly to pass cardinal laws on subjects specified in it; several aspects of public finances and the central bank are regulated by cardinal laws. The new constitution and the cardinal laws regulate the institutional basis of the fiscal and monetary system of the country and also the basic rules of the distribution of tax burden. The Fundamental Law caused momentous controversies in the political and in the academic sphere. Those scholars who criticised it questioned its necessity, professional correctness and legitimacy. A renowned scholar formed one of the main objections towards its fiscal rules as follows: “The elevation of topical economic or taxation policies of the present government to constitutional status,

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thereby making changes by future governments practically impossible”.¹ Legal scholars of this view expressed basically similar opinions,² and scholars of economics expressed similar views regarding the so called unorthodox fiscal and monetary policy pursued in the frame of the new constitutional system.³

The – previous – Constitution was neutral in terms of economic policy⁴ while the Fundamental Law is not. The changes at both constitutional and policy level were the results of a crisis situation before 2010.⁵

Bearing in mind the critics mentioned above, I describe the core changes and argue for their appropriateness. Almost a decade ago, I made proposals similar to those enacted in the FL.⁶ Although the Hungarian system of finances is far from perfect, the experience of the last decade shows that the changes have resulted in a positive outcome until this time.

¹ L. Sólyom, The Rise and Decline of Constitutional Culture in Hungary, in A. von Bogdandy and P. Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania*, (Bloomsbury Publishing, London, 2015, 5–32) 19. <https://doi.org/10.5040/9781474202176.ch-001> <https://doi.org/10.5040/9781474202176>

² E.g. Deák D., *Alkotmány és adójog*, (HVG-Orac, Budapest, 2016); A. Jakab and P. Sonnevend, Continuity with Deficiencies: The New Basic Law of Hungary, (2013) 9 (1) *European Constitutional Law Review*, (102–138) 121., <https://doi.org/10.1017/S1574019612001058>; M. Bánkuti, G. Halmai and K. L. Scheppele, From Separation of Powers to a Government without Checks: Hungary’s New and Old Constitution, in G. A. Tóth (ed.), *Constitution for a Disunited Nation: On Hungary’s 2011 Fundamental Law*, (CEU Press, Budapest and New York, 2012) (237–269) 240. (“the pension system, the family welfare support system, the basic rules of taxation all assigned to cardinal laws”).

³ E.g. Bod P. Á., A magyar pénzpolitika nemzetközi meghatározottságáról, (2011) 10 (1) *Hitelintézeti Szemle*, 1–13.

⁴ G. Brunner and L. Sólyom, *Constitutional Judiciary in a New Democracy – The Hungarian Constitutional Court*, (The University of Michigan Press, Ann Arbor, 2000) 294.; Sólyom L., *Az alkotmánybíráskodás kezdetei Magyarországon*. (Osiris, Budapest, 2001) 627–629. The Constitution included that the Hungarian economy is a market type economy [Preamble; § 9 (1)] and declared that private and public property are equal in terms of rights and protection [§ 9 (1)]; however, otherwise it was silent about economic policy. The Constitutional Court explained in its reasoning that the Constitution was neutral in terms of economic policy. [33/1993. (V. 28.) AB; The formula on economic neutrality was a frequently repeated statement of the Constitutional Court in its decisions.]

⁵ For more details e.g. Kolosi T. and Tóth I. Gy. (szerk.), *Társadalmi riport 2010 (Social Report 2010)*, (TÁRKI, Budapest, 2010).

⁶ Simon I., A közpénzügyek szabályozása az alkotmányban: tervezet, (2011) (16) *Pázmány Law Working Papers*, 1–41., <http://plwp.eu/evfolyamok/2011/122-2011-16> (Last accessed: 31 December 2018); Simon I., A közpénzügyek szabályozása az alkotmányban, in Drinóczi T. and Jakab A. (szerk.), *Alkotmányozás Magyarországon 2010–2011*, II. köt., (Pázmány Press, Budapest and Pécs, 2013) 361–417.

II. POWER BALANCES – PROPERTIES OF DIFFERENT AGES

1. Power balances from historical perspective

1. Human societies have organised themselves in different ways in different periods of time, in different locations and cultures. There have been differences among them in the size of population, geographical location, the economic and technical background and in the legal institutions that have determined how societies operated. These conditions and institutions have substantially influenced the possibilities of different societies.

2. The assumption followed in this study is that the power structure of a given society strongly determines its legal institutions. A century ago, Charles A. Beard concluded that “the social structure by which one type of legislation is secured and another prevented – that is, the constitution – a secondary or a derivative feature arising from the nature of economic groups seeking positive action.”⁷ His view is based on James Madison’s thoughts on conflicting economic interests.⁸ This inquiry does not follow the hypothesis – a kind of economic determinism – quoted just above; however, having analysed economic and financial affairs and their regulation for three decades one can derive the conclusion that economic and financial interest can at least not be neglected. My assumption is that, although economic interest has substantial influence on the legal institutions of a society, including its constitution, it is not the sole determinant factor on constitutional setting; depending on the given situation, among others, the culture, trust in the opposition parties, patriotism and even national sentiment can have a significant effect.

3. The Hungarian changes in 2010 and afterwards were responses to a complexity of challenges that could not have been answered via orthodox responses. That is why the decisions of the Government and Parliament have been perceived as unorthodox; the situation was unorthodox. If we recall some historical events – constitutional moments – we can realise that these situations and the outcomes were unorthodox.

4. The written formats of power balances, the roots of the modern constitutionalism can be found in the Middle Ages; e.g. the English Magna Carta from 1215 and the Hungarian *Aranybullá* (*Golden Bull*) from 1222. In substance, these documents were agreements between the king and the nobility containing the responsibilities and

⁷ E.g. C. A. Beard, *An Economic Interpretation of the Constitution of the United States*, (The Lawbook Exchange, New York, 1921) 13.

⁸ Beard, *An Economic Interpretation of the Constitution of the United States*, 14.; J. Madison, The Federalist No. 10, in A. Hamilton, J. Madison and J. Jay, *The Federalist Papers*, (Penguin Books, New York, 2003) 52.

competencies of the ruler and the rights of the nobility.⁹ Needless to say that, at that time, the Church was part of the power structure in Europe. In our days, the Magna Carta is a historical symbol of the rule of law; however, its significance at that time was much less since the ruler ignored his obligations.¹⁰

5. The next constitutional moment to be referred here is the liberal constitutional state, created mostly in the nineteenth-century, although earlier variants – such as in England – existed. The parliaments – and therefore the whole political system – of new bourgeois nation states were rather oligarchic since voting rights were allocated to a small fraction of society.¹¹ The Third Estate took over the power positions of the absolutistic nation state and its political purposes can be described in two key words: constitutionalism and parliamentarianism. The first excluded arbitrariness and, in substance, created the rule of law, while the second created a regime where the power is derived from and accountable to the electorate.¹²

From the perspective of finances, Professor Tibor Nagy showed that the one-time political class defined four areas of finances in the constitutions and kept them at the competence of the parliaments; taxation, public debt, budget and the oversight of its execution and the currency.¹³ Other constitutional safeguards were not necessary since the parliament was itself the institution that guaranteed the legality and proper operation of finances. From a taxation point of view, it is important that the principles of generality and equality of taxation were also introduced; first and foremost this meant the abolition of the tax privileges of the nobility.

2. Power balances from a historical perspective: the post-war period

1. After the Second World War, western societies created a system that integrated a substantial part of the population, and guaranteed the preconditions of a life that allowed people to live with dignity. That was the welfare state which, beside political rights, ensured social, cultural and economic rights, as was declared in different internationally accepted documents, such as the UN Covenant on Economic,

⁹ R. C. van Caenegem, *An Historical Introduction to Western Constitutional Law*, (Cambridge University Press, Cambridge, 1985) E-book 2012, <https://doi.org/10.1017/CBO9781139170871> (Last accessed: 31 December 2018); Mezey B., Alkotmány és képviselet a középkori Európában, in Mezey B. and Szenté Z. (szerk.), *Európai parlamentarizmus és alkotmánytörténet*, (Osiris Kiadó, Budapest, 2003, 19–177) 31.

¹⁰ J. Melton and R. Hazell, Magna Carta.... Holy Grail?, in R. Hazell and J. Melton (ed.), *Magna Carta and its Modern Legacy*, (Cambridge University Press, Cambridge, 2015, 3–20) 3. <https://doi.org/10.1017/CBO9781316285718.002>

¹¹ Caenegem, *An Historical Introduction to Western Constitutional Law*, 194–195.; Concha Gy., *Újkori alkotmányok*. I. kötet, (Eggenberger, Budapest, 1884).

¹² Caenegem, *An Historical Introduction to Western Constitutional Law*, 194.

¹³ Nagy T., A pénzügyi jog alkotmányos alapjai, (1963) 5 (2) *Acta Fac. Pol. Jur. Univ. Sci.*

Social and Cultural Rights.¹⁴ The basis of these constitutional systems was universal, equal and secret suffrage. This concept of voting right may be derived from the experiences of the wartime needs of these societies. As military service and taxation were universal in those societies, there was no reason to reject the right to take part in elections of those who took on the burdens.¹⁵ *The universal right to vote is a key point for understanding the political developments and policy formation in different countries, not only in the post-war period but also during the last decade, from the financial crisis, starting in 2007, onwards.*

2. The spirit of the age resulted in different principles, either directly in the constitutions or in the decisions of the constitutional courts. Examples: the German Basic Law states that Germany is a social state,¹⁶ the Spanish Constitution also declares that Spain is a social state and also that the tax system is based on progressive taxation,¹⁷ the Italian Constitution followed a similar path and includes the principle of progressive income taxation.¹⁸ From a taxation point of view, it was the age of the global income tax base and progressive taxation with a minimum tax-free threshold (subsistence minima). The German Constitutional Court derived the right to tax-exempt subsistence minima from the right to human dignity.¹⁹

Although, it was a golden age in the North Atlantic region and the Anglo-Saxon world, other parts of the world were less fortunate, – such as the (former) colonies or the so-called Soviet bloc. In the latter, the democratic political system was hollowed out, and elections were rendered meaningless due to the one-candidate system.²⁰

¹⁴ United Nations, *Universal Declaration of Human Rights*, (United Nations, UDHR, 1948) https://www.ohchr.org/en/udhr/documents/udhr_translations/eng.pdf (Last accessed: 31 December 2018); United Nations, *International Covenant on Economic, Social and Cultural Rights* (United Nations, New York, 1966) https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=en (Last accessed: 31 December 2018); United Nations: *International Covenant on Civil and Political Rights* (United Nations, New York, 1966) https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=en (Last accessed: 31 December 2018).

¹⁵ E. Huber, Evelyn: Introduction, in S. Leibfried et al. (eds), *The Oxford Handbook of Transformations of the State*, (Oxford University Press, Oxford, 2015, 1–41) 3.; C. Tilly, Reflections on the History of European State-Making, in C. Tilly (ed.), *The Formation of National States in Western Europe*, (Princeton University Press, Princeton, 1975, 3–83) 42.

¹⁶ German Basic Law Art 20(1).

¹⁷ Spanish Constitution 1978 Art 1(1) and Art 31(1). Moreover, the Spanish Constitution explicitly prohibits confiscation.

¹⁸ Italian Constitution 1947 Art 53.

¹⁹ E. Reimer, *German Income Tax – Outline and Reforms*, (Manuscript, 2001, 1–44) 7.; H. Kube, Financing the State – the Tax-funded State versus Multiple and Mixed Financing Strategies, in H. Pünder and C. Waldhoff (eds), *Debates in German Public Law*, (Hart Publishing, London, 2014, 131–158) 148.; J. English, The Impact of Human Rights on Domestic Substantive Taxation – the German Experience, in M. P. Maduro, and P. Pistone et al. (eds), *Human Rights and Taxation in Europe and the World*, (IBFD, Amsterdam, 2011, 285–302) 287.

²⁰ Dezső M. et al., *Alkotmánytan I*, (Osiris Kiadó, Budapest, 2007) 141.

3. As it is important for the interpretation of our age, a short reference to the post-war international world order has to be made. In essence it was a bipolar world order that was composed of – theoretically and according to the international legal documents – equal nation states²¹ surrounded by borders, and those borders entailed economic borders as well (e.g. customs, controlled capital movements). There were changes in that period, such as decolonisation and the development of regional integrations; however, these changes did not change the basic structure of the world order of nation states. It seems likely that the wave of decolonisation – the deconstruction of the European world empires – partly happened as an effect of a new international world power – the US – and because of the socialist alliance led by the Soviet Union. The US brought two important changes to the international world order: multilateralism and non-discrimination.²² The purpose of the latter was to dissolve the strength of the previous colonialist connections and decrease the advantages of the colonialist countries in the economic sphere; it was mainly directed against Britain. Multilateralism served the peaceful achievement of the political goals of the dominant powers, especially the United States.²³

4. International fiscal, monetary, financial and trade law served inter-national economic relations. The international monetary and financial relations were served primarily by the Bretton Woods institutions and the legal infrastructure of the trade relations were ensured by the GATT. The OECD gradually gained its position, especially in the fields of international taxation and foreign exchange liberalisation.

Although western societies integrated the substantial part of the population, at least in material terms, it happened partly on the basis of asymmetric economic relations with economically less developed countries; e.g. unbalanced international trade²⁴ and asymmetry in international tax²⁵ relations.

²¹ Charter of the United Nations Art 1(2). It was promulgated in Hungary by the Act I of 1956.

²² Rodrik D., *A globalizáció paradoxona – Demokrácia és a világgazdaság jövője (The Globalisation Paradox)*, (Corvina Kiadó, Budapest, 2014) 104–105. A special version of the non-discrimination principle is the principle of the most favoured nation treatment as it was formulated in international trade (customs) agreements.

²³ R. W. Stone, *Controlling Institutions*, (Cambridge University Press, Cambridge, 2011) 1–7.

²⁴ W. Milberg and D. Winkler, *Outsourcing Economics – Global Value Chains in Capitalist Development*, (Cambridge University Press, Cambridge, 2013), 285. <https://doi.org/10.1017/CBO9781139208772>

²⁵ E.g. J. Braun and M. Zagler, An Economic Perspective on Double Tax Treaties with(in) Developing Countries, (2014) 6 (3) *World Tax Journal*, 242–281. In the new BEPS context see: A. Christians, Taxing According to Value Creation. (2018) 90 (June 18) *Tax Notes International*, 1379–1383.

3. Contemporary power imbalances: the breakdown of the post-war international system and globalisation

a) The road to imbalances: emergence of the global order

1. The origin of the contemporary world order may be located in the crises of the developed countries in the seventies,²⁶ which was followed by a conservative twist in British (1979) and American (1981) politics and economic policy. The speed of changes was slightly accelerated by the collapse of the Soviet bloc. From the eighties, the developed countries and the businesses of these countries made intense efforts to abolish exchange controls and other obstacles to international investment and the provision of services internationally. The neoliberal free market ideology served as the conceptual basis of this move. It was promoted – mainly in the so-called developing world including the East-Central European countries – by the US via ideological channels (e.g. media, education) and via the creditor institutions (e.g. IMF).²⁷

2. The processes that led to the contemporary political and economic structures usually described by the keywords of privatisation, deregulation,²⁸ liberalisation²⁹ and globalisation. There have been two main lines of legal intrusion into the process of creating the global market. One of them is liberalisation – of customs, foreign exchange (mainly capital movements), provision of services – and re-regulation – mainly through professional standards – of the global market. The content of the different legal instruments follows economic interests and the consequences of them are usually clear for only a narrow circle of professionals.³⁰

3. The liberalisation of capital movements and the provision of services cleared the path to market integration globally and at the same time for the emergence of multinational corporations as they exist in our days.³¹ As Jean-Bernard Auby wrote, the most striking aspect of globalisation “is spatial dislocation: the deterritorialisation of

²⁶ E.g. Erdős P. and Molnár F.: *Infláció és válságok a hetvenes évek amerikai gazdaságában*, (Közgazdasági és Jogi Könyvkiadó, Budapest, 1982).

²⁷ J. D. Levy, S. Leibfried and F. Nullmeier, Changing Perspectives on the State, in S. Leibfried et al. (eds), *The Oxford Handbook of Transformations of the State*, (Oxford University Press, Oxford, 2015, 33–58) 40, <https://doi.org/10.1093/oxfordhb/9780199691586.013.2>; Stone, *Controlling Institutions*, 72–73.

²⁸ The deconstruction of market barriers such as price regulation, structural regulations of the market.

²⁹ Meaning the deconstruction of economic state barriers; for example foreign exchange regulations such as the *OECD Code of Liberalisation of Capital Movements* and the *OECD Code of Liberalisation of Current Invisible Operations*. <http://www.oecd.org/daf/inv/investment-policy/codes.htm> (Last accessed: 31 December 2018). The agreements managed in the WTO framework: GATS, TRIPS and also its elderly brother, the GATT. E.g. https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm (Last accessed: 31 December 2018).

³⁰ E.g. E. B. Kapstein, *Supervising International Banks: Origins and Implications of the Basle Accord*, (Princeton Univ Intl Economics, Princeton, New Jersey, 1991) (Essays in International Finance No. 185).

³¹ E.g. Simon I., A pénzügyi piac strukturális szabályozása. (2005) 1 (1) *JoGoK*, 10–23.

economic and social activities and mechanisms. What is at stake here is a rearrangement of territories, on the basis of a dislocation of certain activities.³² Today, transnational enterprise and the global market, together with the e-sphere, exist as a reality with interests partially different from the interests of the nation states, and of integrations such as the EU. The transnational corporation organises itself as a value chain in the global marketplace and locates its elements (subsidiaries, permanent establishments) according to its best interests, taking the legal (statutory, judicial etc.) environment into account.³³ One aspect of it is tax planning – including its unacceptable level: aggressive tax planning – the purpose of which is to reduce the amount of tax to be paid at group level. The other side of the coin is the tax competition among states offering a favourable fiscal environment in order to attract investment from multinational market players.³⁴ However, in the global market place, other forms of competition among states are present beside tax competition, which can be called regulatory competition with a more general expression. One of the examples is the area of financial regulation and supervision.³⁵ Generally speaking, the sides of the coin are regulatory competition on the states' side and regulatory arbitrage on the side of market participants. As was formulated by many scholars, businesses – or more generally the economy – seek to neutralise its environment and, with this, beside its environment, it also endangers itself.³⁶ The US subprime crisis – which broke out in 2007 – could serve as an example of how it gradually had arisen despite a regulatory and supervisory environment taken as top quality, based on global offshore fundraising and with unbelievable negative global impact.³⁷

b) An asymmetric relationship: Hungary in the global order

4. It is important to note how the countries of East-Central Europe, among them Hungary, integrated into the global economy, including Europe. Andreas Nölke and Aljan Vlieghe proposed to call the economic systems of these countries dependent market economies, pointing out that, according to their substantial features, these economies differ from the two traditional models; i.e. the liberal model represented

³² J.-B. Auby, *Globalisation, Law and the State*, (Bloomsbury Publishing, Oxford, 2017) 6–7.

³³ E.g. L. G. Baxter, Understanding the Global in Global Finance and Regulation, in R. P. Buckley et.al. (eds.), *Reconceptualising Global Finance and its Regulation*, (Cambridge University Press, Cambridge, 2016, 28–48) 44–45. <https://doi.org/10.1017/CBO9781316181553.003>

³⁴ E.g. W. Schön (ed.), *Tax Competition in Europe*, (IBFD Publications, Amsterdam, 2003).

³⁵ E.g. M. P. Malloy, Bumper Cars: Themes of Convergence in International Regulation, (1992) 60 *Fordham Law Review*, 1–22.

³⁶ Polányi K., *A nagy átalakulás – Korunk gazdasági és politikai gyökerei*, (*The Great Transformation*) (Napvilág Kiadó, Budapest, 2004) 311–313. Similarly e.g. Milberg and Winkler, *Outsourcing Economics...*, 284–285.; Rodrik, *A globalizáció paradoxona...* (*The Globalization Paradox*), 73.

³⁷ E.g. R. Murphy, *Tax Havens Creating Turmoil – Evidence submitted to the Treasury Committee of the House of Commons by the Tax Justice Network*, (Tax Justice Network International Secretariat, Chesham, 2008).

by the US and the coordinative model represented by Germany.³⁸ The main feature of dependent market economies is the dominant role of foreign ownership. Taking the example of Hungary, foreign-owned companies provided 50% – in terms of gross income and gross added value – of GDP between 2010 and 2015. In the energy industry their gross income proportion was 71.3% in 2010 and 55% in 2015. As employers, these companies employed 25% of the labour force in Hungary.³⁹ There are some consequences of this situation. For example, investment decisions are not made in Hungary but in the US and Western European headquarters of the corporations and the local firms are hierarchically controlled by and their managers report to their western headquarters. Moreover, the decisions on financing the locally owned businesses are also made abroad due to the high proportion of foreign ownership in the financial industry.⁴⁰

5. Beside the traditional obligations derived from international legal sources, two additional sets of rules of the global sphere have an impact on Hungary. One of them influences Hungary as a sovereign legislator; the other effects Hungary as a debtor market participant, which has to manage its public debt.

The first set of rules are those professional standards that gain dominance over the last thirty years in the regulation of business activities; for example the standards published by the Basel Committee. A substantial part of those rules under which the financial market and its participants operate are composed of “soft” global standards⁴¹ that become hard domestic laws directly or via the EU implementation process, as with the III. Basel Accord that was implemented into European law via the 575/2013/EU regulation and the 2013/36/EU directive. The content of these global standards are profoundly influenced by the dominant states, mainly, because of its weight, the US.⁴² The dominant market players also have substantial influence on decisions of this kind; this influence might have been stronger before the 2007/08 crisis than today.

The other set of rules are in connection with financing public debt; these rules delimit the possibilities of forming sovereign policy – fiscal, economic, social etc. As Stephen B. Kaplan wrote, the transformation of the method of financing public debt from bank loan to bond issues narrowed excessively indebted states’ room to manoeuvre

³⁸ A. Nölke and A. Vliegenthart, Enlarging the Varieties of Capitalism – The Emergence of Dependent Market Economies in East Central Europe, (2009) 61 (4) *World Politics*, 670–702. <https://doi.org/10.1017/S0043887109990098>

³⁹ These data were derived from the publication of the Central Statistical Office of Hungary, <http://www.ksh.hu/docs/hun/xftp/idoszaki/pdf/kulfleany15.pdf> (Last accessed: 31 December 2018).

⁴⁰ Nölke and Vliegenthart, Enlarging the Varieties of Capitalism..., 679–684.

⁴¹ E.g. C. Brummer, *Soft Law and the Global Financial System – Rule Making in the 21st Century*, (CUP, Cambridge, 2015). <https://doi.org/10.1017/CBO9781316423875>

⁴² Kapstein, *Supervising International Banks...* Kapstein described the process how the I. Basle Accord was accepted. It is in accordance Randall W. Stone’s referred statements.

in policy formation.⁴³ The market – creditors and credit rating agencies – influences the debtor states' policy formation via credit decisions and ratings. The next level of policy formation by creditors is the decisions of international financial institutions such as the IMF. States that have no access to market finance are funded by the international financial institutions, primarily by the IMF. The credit conditions applied by the IMF are based on Washington consensus-type policies; it is a neoliberal type policy framework.⁴⁴ The result of this is normally an austerity fiscal policy; and its components are privatisation, liberalisation and deregulation.⁴⁵

6. It is worth adding that, in Hungary, those channels referred above that promoted the neoliberal ideology – the international financial institutions and the media – operated efficiently.⁴⁶ The connotations of the key words – including privatisation, liberalisation and deregulation – are not, or at least not so positive in East-Central Europe as they were in the beginning of the nineties of the last century. One of the reasons is the asymmetric position of Hungary in the global sphere in economic terms. The origin of the so called unorthodox institutional and policy solutions pursued in Hungary can partly be located here.

c) **The renaissance of the nation state**

7. Since the outbreak of the global financial crisis some changes have occurred in the global power structure.

First, in the financial market – and also in the sphere of international taxation – a kind of global regulation via standard and model setting and governance via policy coordination has emerged during the last decades. These devices gained new structures and methods after the crisis, and narrowed the leeway of transnational corporations.

Second – to make concrete the first point above – the shift from G7 to G20 in global informal policy formation shows that some of the one-time developing countries

⁴³ S. B. Kaplan, *Globalization and Austerity Politics in Latin America*, (Cambridge University Press, Cambridge, 2013) 279. <https://doi.org/10.1017/CBO9781139086196>

⁴⁴ E.g. J. E. Stiglitz, Democratizing the International Monetary Fund and the World Bank: Governance and Accountability, (2003) 16 (1) *Governance: An International Journal of Policy, Administration, and Institutions*, (111–139) 122. <https://doi.org/10.1111/1468-0491.00207>

⁴⁵ See generally the analysis of the creditor debtor relationship in this context: Kaplan, *Globalization and Austerity Politics in Latin America*.

⁴⁶ Szalai E., *Gazdasági elit és társadalom a magyarországi újkapitalizmusban*, (Aula Kiadó, Budapest, 2001). (The author has been engaged in elite research for many decades. According to her in-depth interviews, the commercial TV channels were financed by economic interest groups and they bought the opportunity to be in the programmes in different ways. The interest of the dominant groups – the former socialist technocrats who transformed their political positions to ownership positions and the foreign investors – was to create a monopoly position for the neoliberal ideology – and inside this frame the unconditional promotion of globalisation. The core of these messages was the fetishism of international free market competition and their function was to hide how the real competition exists in the marketplace. Ibid. 223–224.)

have become players in the decision making process.⁴⁷ The weight of the G20 can be measured in the financial field on the basis of decisions, such as the establishment of the Financial Stability Board in 2009⁴⁸ or the launch of the Base Erosion and Profit Shifting project, the mandate for which was received by the OECD.⁴⁹ The BEPS and the Third Basel Accord serve as examples of the new legal devices that might narrow the room for arbitration by multinationals.

Third, the most remarkable change of the last decade is the growing emphasis of national interest in the democratic political systems of Europe and in the Americas. The following examples may show the strengths of the wind of change: the victory of Donald Trump in the US, Brexit, the results of the national elections in Poland, Czech Republic, Italy, Austria, Israel, Brazil, and Greece. The pioneer of this wave was the outcome of the elections in 2010 in Hungary.

In the next couple of years, it will become clear whether the renaissance of the nation states brings a new power balance among the different players in the global arena. Obviously, there are several significant reasons for the changes mentioned but the most decisive factor is democracy itself, the main element of which is the general voting right.⁵⁰ The core causal factor in the changes is that the political power of the western countries left the politically active classes of the societies alone. While western state powers were keen to giving a path for their business enterprises to secure places in the market and investment possibilities globally, and the corporations made substantial capital investments in less industrialized countries – meanwhile strengthening their own global competitors in the Far East (e.g. China) – they forgot their home societies. During the last decades, the inequalities have grown significantly in the OECD countries and the income of the middle class did not grow between 1988 and 2008.⁵¹

8. The question whether the renaissance of the nation state will solve those problems that revitalized some democracies cannot be answered yet. One of the problems that first and foremost should be solved is inequality and the distribution of wealth inside the societies and among societies. That state of inequality existing today even endangers the market itself as it narrows demand.

⁴⁷ G. Smith, *G7 to G8 to G20: Evolution in Global Governance*, (2011) (6) *CIGI G20 Papers*; C. Barry et al., *Making the G20 Summit Process Work: Some Proposals for Improving Effectiveness and Legitimacy*, (2010) (2) *CIGI G20 Papers*. More information at <http://www.g20.utoronto.ca/g20whatisit.html> (Last accessed: 31 December 2018).

⁴⁸ The *Charter of the Financial Stability Board* is available at: <http://www.fsb.org/wp-content/uploads/FSB-Charter-with-revised-Annex-FINAL.pdf> (Last accessed: 31 December 2018).

⁴⁹ *OECD/G20 Base Erosion and Profit Shifting Project: Executive Summaries – 2015 Final Reports*, (OECD, 2015), <http://www.oecd.org/ctp/beps-reports-2015-executive-summaries.pdf> (Last accessed: 31 December 2018) 5.

⁵⁰ Dani Rodrik shows the conflict between the “hyperglobalization” and the democracy under the title of the trilemma of globalisation. See Rodrik, *A globalizáció paradoxona... (The Globalization Paradox)*.

⁵¹ B. Milanovic, *Global Inequality*, (The Belknap Press, Cambridge, MA and London, 2016) 11., 19.

I think Dani Rodrik clearly sees the problem of our age when saying that the proper and sustainable level of globalisation was the one that existed after the second world war as opposed to the one that exists in our age and what he calls hyper-globalisation. The precondition of sustainable global cooperation is the nation state.⁵² It is built on democratic political process and it ensures the legal foundations of the market, including the judicial system. Another institution that carries all of the core functions of the state at least and operates in a transparent and accountable way, as well as granting the basic set of human rights, does not seem emerging on the earth.

9. It must be noted here in this context that Hungary is a member states of the EU, therefore I take the *acquis de l'Union* as the natural framework of the Hungarian constitutional law, as Hungary concluded it in the treaties. One must note that the debate on the constitutional identity of the member states reflects on the questions discussed here in this study.

III. FISCAL AND MONETARY RULES IN THE FUNDAMENTAL LAW OF HUNGARY

1. Finances in the Constitution and in the Fundamental Law – a summary

1. The Constitution that was in effect from 1949 until 31st December 2011 was reticent on financial affairs; its rules covered taxation, the budgetary power of the Parliament and the rules on the central bank and the State Audit Office. It has to be mentioned that the fiscal and monetary rules were enacted as amendments – with the exception of the budgetary competence of the Parliament – in 1989, just before the transition from the so called socialist system to a democratic political system and market economy in 1990. The Constitution was amended with a set of rules that narrowed the fiscal competence of the Constitutional Court with effect as of 20th November 2010. With the effect from 1st January 2011, the Constitution was amended with rules on the Financial Services Authority.⁵³ From this time onwards, the supervisory institution of the financial market gained constitutional status.

2. The Fundamental Law is structured into four parts. The first is a special preamble, a catalogue of values and titled as the “National Avowal”. The second part is titled as “Foundation” (Art A–T) that contains the basic constitutional principles. The third part of the FL which contains the basic rights and freedoms and also the basic

⁵² Rodrik, *A globalizáció paradoxona... (The Globalization Paradox)*, 294–296.

⁵³ The FSA was merged into the central bank in 2013.

obligations, titled “Freedoms and Responsibilities” (Art I–XXXI.). The fourth part regulates the state organization and titled “The State” (Art 1–54).

As mentioned above, the new Hungarian two-tier constitutional system requires qualified majority for the enactment of two types of laws; one of them is the Fundamental Law (passed by the two third majority of the representatives) and the other comprises the cardinal laws (enacted by the two third majority of the representatives present in the National Assembly). These legal sources provide a not negligible proportion of the body of legal norms governing fiscal and monetary law.

3. The Fundamental Law itself regulates a wide range of subjects that belong to the field of fiscal and monetary law.

A short overview of how these rules are structured in the FL is necessary, and some of the rules will be discussed in more detail below in this study. In the second part, the FL sets the basic principles on budgeting (Art N), on the basic relationship of the individual and the community (Art O), on public assets (Art P) and also on money, as Art K) states that the official currency of Hungary is the forint.

In its third part, the FL regulates the basic rules on taxation (Art XXX.), on the pension system (Art XIX.) and on the health care system (Art XXI.).

Part four – that regulates the state – prescribes that the National Assembly decides on the budget and its implementation (Art 1). It includes the competencies of the President of the Republic in connection with public finances (Art 3 and 9), and the status of the local municipalities in the framework of public finances (Art 32 and 34). This part includes a separate chapter titled “Public Finances” (Art 36–44). This chapter on public finances includes the basic rules on the budget, the public debt, the National Bank of Hungary, the State Audit Office, the Budgetary Council, the article in which the FL prescribes that the basic rules – beside the ones that are included in the FL – of taxation and the pension system have to be enacted in a cardinal law,⁵⁴ and also includes the rule according to which payment from public funds to a private party (i.e. mainly businesses) shall be made only if the latter is a transparent entity, meaning that its ownership structure and operation is transparent.

4. The restricted power of the Constitutional Court in the area of fiscal legislation has to be mentioned – which is not the innovation of the FL, as it was referred to above – since it belongs to the new constitutional setting. The essential purpose of these rules is to delimit the potential intervention of the Court into budget framing – an essential part of which is taxation – and the public debt reduction decisions of the Parliament. While the public (“general government”) debt exceeds 50% of the GDP, the Constitutional Court has powers to review laws on the central budget, the implementation of the central budget, central taxes and other fiscal levies, and on the legislation of conditions for local taxes for conformity with the Fundamental

⁵⁴ This cardinal law is Act CXCIV of 2011 on the Economic Stability of Hungary (Stability Act).

Law solely as pertaining to fundamental rights to life, human dignity, protection of personal data, freedom of thought, freedom of conscience and freedom of religion, or rights in connection with Hungarian citizenship, and annuls such laws only in the event of any infringement of these rights. However, the Court has the power to annul the fiscal laws mentioned if they were adopted or published by infringing the procedural rules of legislation laid down by the Fundamental Law [Art 36(4)–(5)].

In the following, some details on some areas of the new constitutional setting and the reasons for their formulation will be given.

2. The budget, the deficit and the public debt

1. Before we have a closer look on the institutional construction of budgetary affairs and disciplined budget management, it is reasonable to recall some interpretations of the public debt and also the figures of both the deficit and the public debt as they existed just before the endeavour to construct a new constitution.

2. As a renowned economist wrote some thirty years ago, public debt in its economic substance is similar to fever; it is a symptom that shows deeper problems of the economic structure of a given country, which structural problems are derivatives of deeper problems, namely the power and vested interest structures of the given society and economy.⁵⁵ The cure may be the modification of these power structures. Minor progress happened during the transition; however, the continuous deficit spending and the high degree of public debt was obvious in 2010.

The measure of the public debt, partly dependent on the informal economy; in this context tax avoidance and tax evasion, have an effect on the revenue side and corruption mainly affects the expenditure side. As an example, James S. Henry showed that the quantity of the capital that was siphoned off to offshore locations from Hungary during the last decades was substantial, even by international comparison.⁵⁶

3. Solving the public debt is also a question of redistributing burdens among recent taxpayers – for example, the free rider problem – and also redistributing burdens among generations.

4. The public debt can also be a question of sovereignty since, above a certain public debt to GDP ratio, financing the debt involves following policy measures, the basic conditions of which are determined by external sources; economically forceful countries seem exempt. In the EU context, these rules are defined as public law rules,

⁵⁵ Antal L., Gazdasági helyzetünk, fejlődési esélyeink és a tőkepiac fejlesztése, (1990) (2) *Bankszemle*, (1–8) 7.

⁵⁶ See J. S. Henry <http://globalhavenindustry.com/> (Last accessed: 31 December 2018) and also the graphics on *The Guardian* website http://image.guardian.co.uk/sys-images/Observer/Pix/pictures/2012/07/21/gu_wealth-offshore-01.jpg (Last accessed: 31 December 2018).

since these are institutionalised in the Maastricht Treaty and the Stability and Growth Pacts and later in the rules of budget planning.

The conflict between Hungary and the international creditor institutions – the so-called troika: the IMF, the ECB and the EU Commission – at the beginning of this decade can serve as an example of the sovereignty problem, which concerns policy formation. Beside the Hungarian example, the Greek financial crisis can also serve as an example of this problem. The two countries – Greece and Hungary – chose two different ways of crisis management, both of which are full of conflicts.

5. The proportion of public debt to GDP grew during the first decade of this century. During the period when – a short political comment is needed – the so called socialist-liberal coalition was in power between 2002 and 2010, the public debt relative to GDP increased by almost 30%. While the *public debt* was 84% in 1995, it was reduced to 51.4% by 2001 – the last whole year of the first Orbán government – and it increased to 77.2% in 2009, the last whole year of the socialist-liberal government. The peaks were in 2010 (79.7%) and 2011 (79.9%). Over a period of almost a decade – since 2010 – the public debt to GDP ratio was reduced by almost 10% to 70.845% at the end of 2018.⁵⁷ The priorities of public debt management, beside debt reduction, have been to increase the share of domestic household bondholders and to reduce the proportion of foreign currency-denominated debt, which was circa 50% in 2010 and 21% in March 2018.⁵⁸

The *deficit* scene is similar. From the accession to the EU in 2004, Hungary was under an excessive deficit procedure until 2013.⁵⁹ In proportion to the GDP, the deficit has been under 3% (one of the Maastricht criteria) since 2012. It was 2.2% in 2018.⁶⁰

6. Although the primary objective of the regulation of the budgetary affairs at constitutional level was the reduction of budget deficit and the public debt, other norms were also enacted in this field. Therefore, it is reasonable to draw up the basic constitutional framework of budgetary affairs in order to have a coherent picture of budgetary rules.

As a starting point the basic principle of budget management has to be quoted: “Hungary is committed to the principle of a balanced, transparent and sustainable management of the budget.”⁶¹ The quoted principle will be recalled below in the debt and deficit management context.

⁵⁷ https://www.ksh.hu/docs/hun/eurostat_tablak/tabl/tsdde410.html (Last accessed: 31 December 2018); <http://www.akk.hu/hu>; <http://www.mnb.hu/letoltes/koltsegvetesi-jelentes-2018-hun.PDF> (Last accessed: 31 December 2018).

⁵⁸ <http://www.akk.hu/hu> (Last accessed: 31 December 2018).

⁵⁹ Council Decision of 21 June 2013 abrogating Decision 2004/918/EC on the existence of an excessive deficit in Hungary. http://ec.europa.eu/economy_finance/economic_governance/sgp/pdf/30_edps/126-12_council/2013-06-21_hu_126-12_council_en.pdf (Last accessed: 31 December 2018).

⁶⁰ https://www.ksh.hu/docs/hun/eurostat_tablak/tabl/teina200.html (last accessed: 31.12.2018).

⁶¹ FL Art N) (1).

The FL keeps the budgetary competences of the National Assembly and orders that it has to pass a budget act and an act on its implementation for each year. The Government presents these bills – the budget and the one on its implementation – to the National Assembly within the time limit prescribed by the respective act. The FL orders that the bill on the central budget and the bill on the implementation of the central budget shall contain all state expenditures and revenues in an identical format and the bills must be transparent and reasonably detailed.⁶²

An automatic regulator is built into the Fundamental Law; if the Budget Act is not passed by the beginning of the fiscal year, the Government is entitled to collect taxes on the basis of the tax laws in effect and to spend, *pro rata temporis*, according to the Budget Act of the previous fiscal year.⁶³ As a potential solution for conflicts manifested in connection with the budget, the Fundamental Law gives the power to the President of the Republic to dissolve National Assembly – announcing the date of the new parliamentary elections at the same time – if the National Assembly does not pass the budget act by 31 March of the given fiscal year.⁶⁴

The Fundamental Law addresses the basic principles of budget execution, stating, that the Government is obliged to implement the central budget in a lawful and expedient manner, with efficient management of public funds and by ensuring transparency.⁶⁵

7. Public debt-brake rules are among the most important norms of public finances in the Fundamental Law. While the public debt is above 50% of the GDP ceiling, the National Assembly has to pass a budget that results in a decrease of the public debt ratio compared to the previous year. If the proportion is under 50%, the National Assembly shall be prohibited from passing a budget that result in the ceiling being breached. There is an escape clause in the Fundamental Law that allows it to ignore the debt-brake rule according to the conditions defined, namely a special legal order or a significant and lasting recession. The clause allows such deviation only as necessary in order to regain a balanced operation. The Stability Act defines the term significant and lasting recession as a decrease in real GDP, using any measure.⁶⁶ The guardian institution of the debt-brake rule is the three-member body, the Budgetary Council, without whose consent the Budget Act cannot be enacted; it has a veto power. One of its members is the Governor of the National Bank, another member is the President of the State Audit Office, and the third member is the Chairman of the Budgetary Council, nominated by the President of the Republic for six years.⁶⁷

⁶² FL Art 1 (2) c) and Art 36(1)–(2).

⁶³ FL Art 36(7).

⁶⁴ FL Art 3(3)–(4).

⁶⁵ FL Art 37(1).

⁶⁶ FL Art 36(6); Stability Act § 7.

⁶⁷ FL Art 44; Stability Act Ch 4 § 15–27 (§ 23–27 qualify as cardinal law).

8. Debt brake rules for the phase of the implementation of the budget are also defined at constitutional level. The FL orders that the government cannot take any considerations that would result in the growth of the public debt/GDP ratio compared to the previous year while it is above 50%. If the ratio is under 50%, this proportion will be an absolute ceiling, meaning that the Government is prohibited to take any consideration that results in exceeding the ceiling.⁶⁸ The Government, on the basis of the semi-annual data, reviews the situation of the economy and the budget and if necessary submits a budget modification bill to the National Assembly in order to ensure the proper operation of the debt-brake rule. The Budgetary Council's veto power applies in this case as well.⁶⁹

9. In order to control the public debt, the municipalities and publicly owned private entities whose debts are calculated in the public debt are only permitted to conclude any kind of business transaction (e.g. loan, lease, issuing securities) that raises public debt – as the main rule – with the prior consent of the Government (in the case of municipalities) or the Finance Minister (publicly owned entities). The Stability Act contains the detailed list of conditions that have to be met for gaining prior consent.

10. As to the deficit, the Stability Act prescribes that the yearly deficit of the public household (“general government” in ESA terms) cannot be higher than 3% of GDP.⁷⁰ Since the public debt – in the usual parliamentary process – is born through the yearly budget deficit, this rule is a very important means of controlling public debt.

11. The budgetary rules of the Fundamental Law explained above have two goals. One of them is to ensure the disciplined operation of public finances. The other is to keep as much fiscal sovereignty of the country as possible in a globalized economic system, as a member state of the European Union. The quite overt reason behind it is that the state has to fulfil its functions in a given society taking into due account its own social, economic and political conditions.

3. The national asset

1. By definition the property of the state and the municipal governments are considered national assets.⁷¹ Until 1989 there was not even an attempt to account for all assets of the state, and there are only estimates of their value at the time of transformation (1990); however these estimates, both in terms of methods and data, are rather imprecise. According to these estimates, the value of transferable property of the public

⁶⁸ FL Art 37(2)–(3).

⁶⁹ Stability Act § 5.

⁷⁰ Stability Act § 3/A(3).

⁷¹ FL Art 38(1).

household (general government) was 10-11 thousand billion Hungarian forints.⁷² The state-owned enterprises that were transferred to the State Property Agency – a public body responsible for privatisation – were valued at 1700 thousand billion Hungarian forints, and 2600 thousand billion forints together with the value of those land that were given to the ownership of municipalities. The tangible assets of state-owned enterprises were valued in 1968,⁷³ these valuations served as the basis when the state-owned enterprises were transformed into different company forms and also when the companies were sold. Privatisation started in a spontaneous way in 1989; the leadership of one-time state-owned enterprises managed to gain ownership control over the most valuable parts of the companies that were established via the transformation of state owned enterprises.⁷⁴ Privatisation as a regulated process started in 1990 and almost 90% of the one-time state owned enterprises were transferred to private ownership by 1996. The main form of creating private ownership was not privatisation; rather, it was the loss of assets, meaning that the assets simply disappeared. Fifty percent of the assets' value vanished in this way.⁷⁵ In 1995–1996, strategic industries – natural monopolies – were sold off, such as the oil and gas, telecommunications and electricity and the result was that, instead of Hungarian state monopolies, private monopolies or foreign state monopolies were created.⁷⁶ The banking sector was privatised between 1994 and 1997; the result was that two thirds – in terms of assets – of the sector was in foreign ownership in 2000.⁷⁷ It was 85% in 2008 and cc 45% in 2017.⁷⁸

2. Beside privatisation, the question of farmland attracts special interest in Hungary and also in the neighbouring countries. According to prevailing contemporary neoliberal economic thinking – backed by dominant interests in it – land is a form of

⁷² The official HUF/USD exchange rate published by the National Bank of Hungary was HUF 65.41 = USD 1 on 8th April 1990; the day of the second round of the first free parliamentary elections in Hungary. <https://www.mnb.hu/arfolyam-tablázat?deviza=rbCurrencyActual&devizaSelected=USD&datefrom=1990.04.08.&datetill=1990.04.15.&order=1> (Last accessed: 31 December 2018).

⁷³ Matolcsy Gy., *Lábadozásunk éve*, (Tulajdon Alapítvány Privatizációs Kutatóintézete, Budapest, 1991) 141.

⁷⁴ Báger G. and Kovács Á., *Privatizáció Magyarországon I*, (Állami Számvevőszék, Budapest, 2001) 101–103.; Matolcsy Gy., A privatizáció Magyarországon, in Báger G. and Kovács Á. (szerk.), *Privatizáció Magyarországon II. Háttér tanulmányok*, (Állami Számvevőszék, Budapest, 2004, 13–30) 14.

⁷⁵ Matolcsy Gy., A privatizáció Magyarországon, 24–25.; Tamás Erdei the former CEO of MKB Bank and the chairman of the Hungarian Bankers Association also estimated the loss at around 40–50%; see Báger and Kovács, *Privatizáció Magyarországon I*, 132. fn. 238.

⁷⁶ Matolcsy Gy., A privatizáció Magyarországon, 28.; Gidai E., Giday A. and László T., Néhány fontosabb ágazat (vállalat) privatizációja, in Báger G. and Kovács Á. (szerk.), *Privatizáció Magyarországon II. Háttér tanulmányok*, (Állami Számvevőszék, Budapest, 2004) 201–268.

⁷⁷ Várhegyi É., Külföldi tulajdon a magyar bankrendszerben, (2001) 48 (július–augusztus) *Közgazdasági Szemle*, (581–598) 583–584.

⁷⁸ *Raiffeisen CEE Banking Sector Report 2018*.

capital, as can be seen in EU law⁷⁹ and the OECD Code⁸⁰ referred to above. One of the purposes of these rules was to neutralise land as a political phenomenon. However, a substantial part of society in East-Central Europe think that the land of a country – beside its economic value – is not only a political phenomenon but it is also a part of the national identity. The recent majority of parliamentary representatives in Hungary are also of this view, as can be derived from the texts and spirit of the legislative acts of the last decade.⁸¹ This question is a major conflict factor in the relationships between the EU and several member states.⁸² The reasons are rational and simple: these member states are reluctant to sell off one of the bases of their existence; this is particularly true for the East-Central European countries. There are significant differences between member states in terms of the quantity of the domestic capital to be invested, in land prices and the ownership structures.

3. On the basis of previous experiences – briefly mentioned above – the FL includes the basic rules of national assets.

The concept and the functions of national asset are defined in the Fundamental Law and cardinal laws. At the level of the basic constitutional principles, Art P) constitutes that natural resources, particularly arable land, forests and water resources, as well as biological diversity, in particular native plant and animal species and cultural assets shall comprise the nation's common heritage; responsibility for protecting and preserving them for future generations lies with the State and every individual. Moreover, the FL states that the basic rules relating to them have to be regulated in cardinal laws.⁸³ Art 38 of the FL defines national assets as the property of the state and the municipalities and their function is to serve the public interest and satisfy public needs. In addition, it stipulates the basic rules of asset management.⁸⁴

⁷⁹ Council Directive of 24 June 1988 for the implementation of Article 67 of the Treaty (88/361/EEC).

⁸⁰ OECD Code of Liberalisation of Capital Movements 2018. Hungary has made reservation in respect of real estate operations. Annex B Reservations Hungary List B, B1, 66. <http://www.oecd.org/daf/inv/investment-policy/Code-capital-movements-EN.pdf> (Last accessed: 31 December 2018).

⁸¹ E.g. Act CXXII of 2013 on Transactions in Agricultural and Forestry Land and its official explanatory memorandum.

⁸² Financial services: Commission requests Bulgaria, Hungary, Latvia, Lithuania and Slovakia to comply with EU rules on the acquisition of agricultural land, Brussels, 26 May 2016. See also: Commission Interpretative Communication on the Acquisition of Farmland and European Union Law (2017/C 350/05).

⁸³ FL Art P) (1)–(2). Act CXCVI of 2011 on the National Asset define the national asset and regulates its management.

⁸⁴ FL Art 38.

4. Taxation

1. As mentioned at the beginning of this study, one of the core points of the critics against the new constitutional system was that certain tax policy elements were included in the Fundamental Law and in the Stability Act. These are the new rules of personal income taxation. My view is that these are one of the most important – adequate and appropriate – elements of the two-tier constitutional law and the tax system has made a small step toward tax justice, although it remained rather regressive due to the significant proportion of turnover taxes – e.g. VAT – in net wages.

Hungarian real wages did not improve between 1980 and 2009.⁸⁵ The yearly national average net wage was 6702 euro in Hungary, while the EU (28) average was 24,162 euro in 2015, the same data was 8630 euro, and 24700 euro in 2018.⁸⁶ The difference in the costs of living is far less significant than the wage gap when comparing EU countries. The data of the Central Statistical Office shows that the major part of the Hungarian population lives in households that have no savings of at least 70 thousand forints.⁸⁷ This proportion was 74% in 2010, 75% in 2011, 74.9% in 2012, 70.7% in 2014, 50.7% in 2015, 31.4% in 2016, and 33.2% in 2017.⁸⁸

A closer look at the wage structure at national level may add also important information. The national average net wage (5th decile in the gross wage statistics) was one and a half times more than the subsistence minima (HUF 75,024 in 2009 and 78,736 in 2010) in 2010; this figure was two and a half times more in the 7th decile, in the 8th decile the net wage was three times more than subsistence and in the 9th decile four times more than the subsistence. There was a very narrow scope for progressive taxation of labour income; and it is true for the present situation as well, in spite of the fact that the last couple of years brought an increase in wage levels.⁸⁹ The highest 10th decile was composed of cc 46,000 taxpayers and their monthly gross income was 1,5 million Hungarian forints, which was 780 thousand in net, after (progressive) tax

⁸⁵ Kovács I., A jövedelemeloszlás és jövedelemegyenlőtlenség a személyi jövedelemadó-bevallási adatok tükrében, (2011) 89 (3) *Statiztikai Szemle*, (294–312) 306–307.

⁸⁶ See for comparison: http://ec.europa.eu/eurostat/statistics-explained/index.php/Wages_and_labour_costs/hu; <http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do> (Last accessed: 31 December 2018).

⁸⁷ Cc 233 euro depending on the exchange rate. This figure was calculated at the 1/300 euro/forint rate.

⁸⁸ *Háztartások életszínvonala 2014*, (*Standard of living of households 2014*), (KSH, Budapest, 2015) 26., <https://www.ksh.hu/docs/hun/xftp/idoszaki/hazteletszin/hazteletszin14.pdf> (Last accessed: 31 December 2018); *Háztartások életszínvonala 2016*, (KSH, Budapest, 2017) 25., <https://www.ksh.hu/docs/hun/xftp/idoszaki/hazteletszin/hazteletszin16.pdf> (Last accessed: 31 December 2018); *Háztartások életszínvonala 2017*, (KSH, Budapest, 2017) 13., <https://www.ksh.hu/docs/hun/xftp/idoszaki/hazteletszin/hazteletszin17.pdf> (Last accessed: 31 December 2018).

⁸⁹ STATADAT: 2.1.35. *Az alkalmazásban állók havi bruttó átlagkeresete a nemzetgazdaságban (Employees' monthly gross wage) (2000–)*, http://www.ksh.hu/docs/hun/xstadat/xstadat_eves/i_qli012b.html (Last accessed: 31 December 2018).

and social security contributions. The effective personal income tax rate was 16,34% on the global tax base (basically wages) in 2010.⁹⁰

2. The Fundamental Law and the Stability Act give the constitutional basis of taxation. Art XXX of the FL reads as follows: “(1) Everyone shall contribute, according to their capabilities and participation in the economy, to financing the needs of the community. (2) For those raising children, the extent of their contribution to covering common needs shall be determined while taking the costs of child rearing into consideration.” The word “capabilities” above refers to the principle of ability to pay while the other principle – participation in the economy – is not yet clarified. The latter can serve as the constitutional basis for fiscal levies that are not closely connected to the ability to pay; such as environmental taxes. In addition to these rules, the Fundamental Law orders that the basic rules concerning the bearing of public burdens have to be laid down in a cardinal act – i.e. in the Stability Act – in order to make one’s contributions to common needs calculable.⁹¹

3. As to the distribution of tax burdens, the general rule for taxation in the Fundamental Law contains three principles. These three principles – as they were quoted above, the ability to pay, involvement in the economy and family (child) allowance – give the basic framework of tax burden distribution. The ability to pay principle is further delineated, relating to the labour income of natural persons and also for business income, in the Stability Act. As regards labour income, these rules are the mandatory flat tax, the 50% cap on the tax wedge – meaning, that the total amount of fiscal burdens on the employer and the employee on the gross salary must not exceed the net salary of the employee – and the family allowance. In respect of the latter, the Act says that an increasing amount per child has to be provided, depending on the number of children, in such a way that, from the number of three children, the amount of allowance per child has to be higher than for one child and for two children. There is also a guarantee rule: the amount of the allowance cannot be less than in the previous fiscal year.

As regards the taxation of business income, the Stability Act contains a flat tax rule for business income with suspensive effect until 1 January 2020.⁹²

Together with the changes in constitutional basis of the tax burden distribution, there was also a tax reform in Hungary; the tax policy was modified from 2010 onwards. The key concept was to decrease fiscal levies on labour and on business, as it has been thought that this increases the level of employment and supports economic growth and to keep the high level of consumption taxes and to temporarily (2010–2012) or for a longer run reallocate that tax burden from labour to certain industries (retail

⁹⁰ National Tax and Customs Authority, *Personal income tax statistics 2004–2010*, <https://nav.gov.hu/nav/archiv/szolgaltatasok/adostatsztika> (Last accessed: 31 December 2018).

⁹¹ FL Art 40.

⁹² The referred rules of the Stability Act on tax burden distribution are § 36–38.

trade, banking, telecommunication, energy) the revenue of which arises from domestic consumption and the extra profit realized in the previous decade stemmed more from location-specific than firm-specific rents.⁹³ The real result of the policy change has been a partial shift of the tax burden of the working middle class – whose wage income was depressed near to the subsistence minima as explained above – to other tax subjects. The lowest income earners did not gain on the abolition of the second tax bracket, the progressive rate of income tax. The abolition of the tax exempt threshold caused temporary difficulties; however, it was a stated policy goal that no one could be worse off as a result of the modification of income taxation. In the public sphere, a compensatory mechanism – i.e. a wage increase – was introduced and the government made real policy and legal efforts to motivate employers in the private sector to compensate the potential net income loss of wage earners by increasing wages.

Art O) of the FL has to be referred here: “Everyone shall bear responsibility for his or her own self, and shall contribute to the performance of state and community tasks according to his or her ability and faculty.” The quoted principle shows the basic concept on which the relationship between the individual and the public (the political community) is built. In the Hungarian tax system there is no tax exempt threshold. Needs that arise have to be financed via direct subsidies. The Constitutional Court decided in the same way two decades ago, explaining that the Constitution does not contain a prohibition of the taxation of minimum income.⁹⁴ The Government response to the critics was twofold: first, the rate of tax evasion is substantial around the minimum wage (which was around subsistence level); a high proportion of the labour force is employed on minimum wage and this amount is usually supplemented with non-taxed amounts. Moreover, it is a social habit that entrepreneurs include their income in their personal income tax return at minimum wage level. The second was that the necessary increase in wage levels would provide a more advantageous position for everyone and the reduction of the level of unemployment – that went from 11.7% in 2010 to 3.8% in 2018⁹⁵ – would have the same effect.

4. Beside the rules that establish certain limits on the distribution of the tax burden, the Fundamental Law includes other rules of taxation. The first to be mentioned is on the statutory basis of taxation; it is not new, but the way of regulation is new, at the second tier, i.e. the cardinal law level. Taxes – and other fiscal levies – must be based on a statute, which is, as a general rule, an act of the National Assembly; thus,

⁹³ See e.g. <https://www.internationaltaxreview.com/article/b1f9k22yr9xl5q/location-specific-advantages-india-and-china?supplementListId=90794> (Last accessed: 31 December 2018).

⁹⁴ Constitutional Court Decision 85/B/1996. See: I. Simon, Restricting the Legislative Power to Tax – National Report: Hungary, in Restricting the Legislative Power to Tax, IACL 17th Congress (General reporter: Henry Orderer), (2007) 15 (2) *Michigan State Journal of International Law*, (341–369) 347–348.

⁹⁵ https://www.ksh.hu/thm/2/indi2_3_2.html (Last accessed: 31 December 2018).

the taxing power is in essence one tier. It follows from the text of two articles of the Fundamental Law: Art XXX establishes taxation as a fundamental obligation and Art I (3) orders that, beside fundamental rights, fundamental obligations also must exclusively be regulated by Acts of National Assembly. There are minor exceptions – in terms of the volume of public revenues – such as local taxes. The Fundamental Law itself empowers the municipalities to decide on local taxes in the frame of an act of the National Assembly; it is Act C of 1990 on Local Taxes.

In addition to these rules, the Fundamental Law orders that the basic rules concerning the bearing of public burdens have to be laid down in a cardinal law – i.e. in the Stability Act – in order to make one's contributions to common needs calculable.⁹⁶

The Stability Act gives an open list of fiscal levies, – e.g. tax, duty on the acquisition of property, contribution – and classifies them into two groups on the basis of one criteria, whether they are paid in return for the services of the state or local municipalities provided in their capacity as public authorities – e.g. duty for court procedure, licence fee – or they are paid without any *quid pro quo*. This classification also carries an incomplete statutory definition of the concept of tax. The Stability Act specifies a narrow scope of delegated taxing power, mainly in the area of fees; for example, the Governor of the Central Bank is entitled to levy fees on the basis of an act of the National Assembly.

2. Beside the questions of taxing power, the rules on tax legislation (tax law making) are also defined at constitutional level. As to the (formal) limits of tax law-making power, the Stability Act contains the mandatory 30 day period between the promulgation day and the day any kind of tax statute – and its modifications or amendments – enter into force and on the prohibition of retroactive legislation, apart from those rules that are favourable to all taxpayers without discrimination.

5. The currency and the central bank

a) The currency

1. The Fundamental Law declares in its Article K) that the official currency of Hungary is the forint. The Act on the Hungarian National Bank authorises the Bank to issue banknotes and coins in the official currency of Hungary, and states that banknotes and coins issued by the Bank qualify as legal tender in Hungary.⁹⁷

Beside its symbolic meaning and practical importance – i.e. the forint fulfils the functions of money in Hungary – there is another important feature of the constitutional regulation of the currency: the replacement of currency with another

⁹⁶ FL Art 40.

⁹⁷ Act CXXXIX of 2013 on the National Bank of Hungary (MNB Act) § 4(2).

one requires the modification of the Fundamental Law. The practical importance of Art. K) will arise when the country joins the euro zone, and replaces forint with euro. It requires the modification of the Fundamental Law, therefore requires at least a two-third majority vote. As the exchange rate of replacement restructures the economic positions and redistributes wealth, the two third majority vote is an important safeguard in the decision making process. One can assume with good reason that the privatisation process verified the public choice theory; therefore control points like this are justified.

2. The forint is a freely convertible currency. Inside the EEA sphere, there are no limitations; however, in a wider context there are some barriers to capital movements. Hungary has made some reservations to the OECD Code of Liberalization of Capital Movements, for example for real estate operations.

The forint fulfils the three practical functions of a currency. First, it is mandatorily accepted for settling debts in market relations in Hungary, provided the parties did not stipulate other currency. However, there is one important limitation: salaries (wages) have to be paid in forint. Second, taxes and other fiscal levies have to be paid in forint; it is regulated by the Stability Act.⁹⁸ Third, as a main rule, financial reporting obligations have to be discharged in forint under the Accounting Act, although it is possible to opt out under the conditions specified in the Act. It must be added here that tax returns (personal and company) also have to be prepared in forint.

b) The central bank

3. The Fundamental Law⁹⁹ and the cardinal act on the Magyar Nemzeti Bank (National Bank of Hungary)¹⁰⁰ regulate the Bank. These rules meet the criteria of so called legal convergence, as the legislation is compatible with the Maastricht Treaty¹⁰¹ and Protocol No 4 on the Statute of the ESCB and the European Central Bank.

The Governor of the Bank has the right to issue decrees in the scope of the responsibilities of the Bank – defined in the cardinal MNB Act – which cannot be *contra legem*, meaning that, in the hierarchy of norms, they are at the same level as Government decrees.¹⁰²

4. The primary objective of the Bank is to achieve and maintain price stability.¹⁰³ The consumer price index has risen by under 3% since 2013; in 2018 it was 2.8%¹⁰⁴ and the medium-term target is 3%. The basic rate has been 0.9% since May 2016.

⁹⁸ Stability Act § 28(2).

⁹⁹ FL Art 41(1)–(5).

¹⁰⁰ According to § 184 of the MNB Act, those rules of the Act that regulate the status of the Bank, its primary objective and basic tasks qualify as cardinal law.

¹⁰¹ TFEU Art 131 (TEC Art 109).

¹⁰² FL Art 41(5).

¹⁰³ MNB Act § 3(1).

¹⁰⁴ https://www.ksh.hu/docs/hun/xstadat/xstadat_eves/i_qsf001.html (Last accessed: 31. December 2018).

Beside the inflation target, other objectives are defined thus: “Without prejudice to its primary objective, the MNB shall uphold to maintain the stability of the financial intermediary system, to increase its resilience and to ensure its sustainable contribution to economic growth, and shall support the economic policy of the Government using the means at its disposal.”¹⁰⁵ It is compatible with TFEU Art 127(1). The Bank has a complex target system; to ensure price stability (in itself a complex task); however, it has to be achieved while fulfilling its other mandates, which are to ensure the safe operation of the financial market in a way that serves the sustainable financing needs of the growing economy and to support the economic policy of the Government. In 2013, the mandate of the Bank was in substance doubled: it became the sole – macro and micro – supervisor of the financial markets.¹⁰⁶ Not just the text of the MNB Act was changed that year; but also the interpretation of the text or, in other words, the perception of what was then its new leadership of the monetary system and the economy was different – unorthodox, as it was labelled – compared to the previous one, and also the monetary policy options were evaluated differently. This means that, as long as price stability as the primary objective is not jeopardised, the Bank applies measures that support economic growth. Two measures that have been applied can be mentioned. One of them is the significant cut of the basic rate; the other is the so called Growth Credit Program. The latter provided a measurable quantity of cheap credit from its own resources to the SME sector, extended through the banking system.

5. The basic tasks of the Bank as defined in the MNB Act, are, among others, managing monetary policy, issuing money, managing foreign exchange and gold reserves, preserving the external stability of the country, implementing the exchange rate policy, overseeing the payment, the clearing, and the securities settlement systems, and macro prudential supervision. The exchange rate regime is decided by the Government with the consent of the Bank; the exchange rate policy is managed by the Government and the Bank as a matter of common interest among EU member states. The exchange rate regime and policy cannot compromise the primary objective of the Bank.

6. In the scope of its autonomy, the legislation defined the legal status of the Bank and the conditions of its personal, organisational, institutional (decision making) and financial autonomy. The Bank is a member of the European System of Central Banks (ESCB) and the European System of Financial Supervisors. The Bank and any of its decision-making officials or bodies are prohibited from seeking or taking any kind of instructions from the Government, EU institutions – excluding the ECB – and other organisational units, the governments of the member states or any other organisation

¹⁰⁵ MNB Act § 3(2).

¹⁰⁶ FL Art 41(2) [Fifth Amendment of the FL Art 5(1) with the effect of 1 October 2013].

or political party.¹⁰⁷ The Governor and the – at least two and at most three – Deputy Governors of the Bank are appointed by the President of the Republic on the proposal of the Prime Minister for six years.¹⁰⁸ The Governor can serve a maximum of two six-year terms. The Governor and the Deputy Governors are members of the – at least five, at most nine-member – Monetary Council, which is the supreme decision-making body of the Bank in the scope of its basic tasks. Other members of the Council are elected by the National Assembly for six years, and they are employed by the Bank during their term of office.¹⁰⁹ The financial autonomy of the Bank is ensured by way of loss compensation from the central budget.

The Governor of the Bank has to prepare a yearly written report to the National Assembly and has to be present for a parliamentary hearing.¹¹⁰ The report to Parliament is public, available on the homepage of the Bank. The MNB Act obliges the Bank to prepare and publish a quarterly report on monetary trends – titled an inflation report – and other important developments. The Bank publishes the shortened minutes of the meetings of the Monetary Council that decide on the basic rate.

IV. SUMMARY AND CONCLUSIONS

1. After the free election in 1990, Hungarian society rejoined the historical path from which it was deviated. In sum it is a democratic political system, governed by the rules of the law enacted by the National Assembly and other bodies competent to issue legal norms and the economic base of the system is a market type economy.

2. The new two-tier constitutional system is not neutral in terms of fiscal and monetary policy. On the monetary side, there has not been any change since the Hungarian law embodied the currency school concept – the primary target of the (autonomous) central bank is price stability – as defined in the cardinal MNB Act in accordance with the EU law. The rule on the currency also has to be referred to in this context since it is a real novation at constitutional level.

On the fiscal side, significant changes took place. The most important among them are the rules on the deficit ceiling, the public debt-break rules, the rules on the national assets and the rules on tax burden distribution. The first two serve disciplined budget management and also the maintenance of sovereignty in terms of policy decisions. The rules on tax burden distribution – flat tax on wages, tax wedge rule, family allowance – has served to liberate the wage-earning middle class, especially those with three or more children. From the date of the first tax reform, in 1988 onwards, a

¹⁰⁷ MNB Act § 1(2).

¹⁰⁸ FL Art 41(3); MNB Act § 10–11.

¹⁰⁹ MNB Act § 9(4).

¹¹⁰ FL Art 41(4).

significant proportion of the tax burden was allocated to wage earners, i.e. progressive personal income tax, social security contributions, consumption taxes (e.g. VAT, excise duty); the new rules simply limit the taxing power's access to taxing wages above a certain level.

3. The new constitutional setting has restructured competencies among the different public actors. The modification of those rules that are included in the FL and in the cardinal laws require qualified majority voting. The FL requires a 2/3 majority vote of the total number of representatives, while the enactment and modification of cardinal laws require a 2/3 majority vote of the representatives present. It means a shift in competences of the simple majority of the National Assembly to the qualified majority. This constitutional construction means that the state – i.e. the National Assembly, by simple majority voting – has limited decision making competence on issues that are vital for the existence of the political community; i.e. the nation.

Another part of restructuring competences is the veto power of the Budgetary Council, that delimits the decision making power of the National Assembly. As referred to, the limitation of Constitutional Court competencies in fiscal matters theoretically widens the National Assembly's room to manoeuvre.

4. Hungary is a member state of the EU and part of the globalised world; however, its accession resulted in an asymmetric position, partly because of the economic backwardness¹¹¹ of the country, and the economy of Hungary can hence be named a dependent market economy. The domestic constitutional and policy changes in Hungary after 2010 caused direct extraterritorial effects since, due to the special dependent structure of the economy; state intervention inevitably wounds foreign interests.¹¹²

¹¹¹ E.g. A. Gerschenkron, *Gazdasági elmaradottság történelmi távlatból*, (Gondolat, Budapest, 1984).

¹¹² Auby, *Globalisation, Law and the State*, 17.; S. Battini, *The Globalization of Public Law*, (2006) 18 (1) *European Review of Public Law*, (131), 7., <https://ssrn.com/abstract=895263> (Last accessed: 31 December 2018).

Sipos, Attila*

The Legal Status and Use of National Airspace

ABSTRACT

“Every State has complete and exclusive sovereignty over the airspace above its territory.” Therefore, as a main rule the national airspace is closed, that is, the aircraft of another state may enter there only in possession of adequate permissions and by adherence to air navigation procedures. The national airspace is a real treasure. A treasure, which needs constant utilization, care and protection, just like croplands. If the foreign aircraft does not follow the rules, it may expect military intervention (interception). If the foreign aircraft follows the rules, it shall be authorised to use the national airspace and is obligated to pay due charge for the air navigation service. The airspace is most intensively used by international scheduled and non-scheduled air carriers, which are governed by the same rules, however, the operation of scheduled commercial flights requires the existence of further licences and traffic rights.

When we behold the skies, we do not think or see that in fact we are looking at the secluded world of intersected, thematically delimited airspaces allocated into provinces. Which implies that the national airspace can be divided into controlled and uncontrolled airspaces with different sectors; they can also be restricted, temporarily restricted, dangerous and prohibited airspaces; furthermore, the airspace can be extended by the Air Defence Identification Zone (ADIZ). The airspace above high seas is international, where, just as in outer space, state sovereignty is not applicable, thus, the national airspace needs to be separated from international airspace horizontally and from outer space vertically.

The above issues will be discussed in detail from a legal point of view. Essentially, the following paper introduces the concept of the national airspace as well as the rights and obligations of the users of the airspace.

KEYWORDS: sovereign airspace, boundaries of airspace, controlled and uncontrolled airspace, restriction of airspace, ADIZ zone in airspace, interception in airspace

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I. THE AIRSPACE OF THE SOVEREIGN STATE

The territory of a State has extraordinary significance since, in the airspace above the territory, the supreme power of the sovereign state prevails. Sovereignty has a central role in international law and also in international civil aviation. Pursuant to the provision of the Chicago Convention on International Civil Aviation (1944),¹ the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State (Article 2). Thus, the territory of the State encompasses: the mainland and territorial waters,² while the national airspace consists of the territory above the mainland and territorial waters. The quasi territory of the State, from the viewpoint of jurisdiction, also includes embassy or consulate buildings, offices, diplomatic cars, the board of a ship, an aircraft or spacecraft and space stations.

Seventy-one per cent of the surface of the Earth is covered by oceans and seas, chiefly by the high seas. From the viewpoint of air law, we need to differentiate territorial waters from the high seas, because the airspace above the coastal sea qualifies as *national*, thus, the coastal state is due complete and exclusive sovereignty in the airspace above its territorial waters, whereas the airspace above the high seas qualifies as *international*, therefore, above such territories, no sovereign rights prevail. Almost the whole of the mainland, constituting 29 per cent of the surface of the Earth is subject to state sovereignty. The sovereign state has complete and exclusive power in the national airspace above its territory up to the boundary of outer space.

Sovereignty is a political, legal and historic category. Sovereignty proceeds from the concept of the State; it is an exclusive attribute of the State. In other words, the State and solely the State is sovereign, thus, all States are sovereign, and their sovereignties are equal. The State is an entity which encompasses the community of people led by a government exercising actual power on a specific territory in international relations. Sovereignty consists of two inextricable notions forming a unity:

– internal side: *territorial supreme power* implies the actual supreme power exercised in its own territory by the State, the exercise of exclusive control, the opportunity to create a constitution and other statutes, as well as their enforcement by the executive power. Only States may avail of supreme power, i.e., the monopoly of legitimate violence; and

¹ The Convention on International Civil Aviation is one of the masterpieces of international law-making, consisting of 4 major parts [Air Navigation, The International Civil Aviation Organization (ICAO), International Air Transport and Final Provisions], and within these it contains 22 Chapters and 96 Articles. The Convention and its 19 Annexes exceed a total of 4,000 pages. The contracting States adopted and signed the Chicago Convention on 7 December 1944, thereby, the International Civil Aviation Organization (ICAO) was established. ICAO Doc. 7300 the Chicago Convention.

² Including the national rivers and lakes, the international rivers, in the case of seas: the coastal sea, furthermore, the archipelago and certain straits.

– external side: *international independence*, which prevails among the given sovereign state and the international community. In this system of equal international relations, the independent State intervenes autonomously.³

Independence in international relations entails the exercise of actual territorial and personal jurisdiction in the internal life of the sovereign State. The two concepts supplement each other to form an entirety, since the State, in the absence of independence in international relations, in its internal life may neither exercise actual territorial or personal jurisdiction, nor can it proceed autonomously in international relations.⁴ Sovereign States are equal and, according to the tenet of canon law, equals do not have authority over one another (*par in parem non habet imperium*). A State may only be obligated due to its consent, which may be granted in treaty-law or customary international law.⁵

1. The national airspace of the sovereign State

The first and simultaneously the most important article of the Chicago Convention (hereinafter: Convention) provides that the contracting States recognise that every State has *complete and exclusive sovereignty* over the airspace above its territory (Article 1). Since the airspace always shares the legal destiny of the territory beneath, we need to distinguish between:

- *national airspace* above the territory of the State subject to the complete and exclusive sovereignty of the State; and
- *international airspace* not located above the territory of a State, thus it is beyond the boundaries of State sovereignty.

Completeness and exclusivity imply that the airspace of the sovereign State is, in legal terms (*de jure*), regarded as a detached territory, where the aircraft of other countries may not enter arbitrarily. The sovereign State may neither be constrained from outside, nor may its territory be occupied. According to the tenet pronounced in the case *Island of Palmas case* (1928): “Sovereignty in the relations among States denotes

³ Valki L., Az állam szuverenitása, (The Sovereignty of the State), in Kende T., Nagy B., Sonnevend P. and Valki L. (eds), *Nemzetközi jog, (International Law)*, (Wolters Kluwer, Budapest, 2018) 94–98.

⁴ International law takes only one circumstance into consideration, namely, whether a State proceeds autonomously in its international relations or it does not. No forum exists in the world which could examine whether a State is or is not actually sovereign. The United Nations may not play such a role either. Each State makes a decision by virtue of itself whether it intends to enter into relations with a formation declaring itself a sovereign State. Valki L., Az Európai Unióhoz csatlakozó Magyarország szuverenitása, (The Sovereignty of Hungary Acceding to the European Union), (1999) 44 (8) *Magyar Tudomány*, 1000–1007.

⁵ Nagy B., *Az abszolútum vágyáról és a tünékeny szuverenitásról, (On the Desire for the Absolute and the Transitoriness of Sovereignty)*, (Budapest, 1996) 18.

independence. Independence with respect to a part of the Globe is the right to exercise therein, with the exclusion of any other State, the functions of a State.⁶ However, the sovereignty of the sovereign State proceeding as an autonomous and independent legal entity in international relations may not be considered absolute, since the States, by entering into international obligations, may be restricted in their authorisation. Thus, in the event of fulfilling the conditions and obligations assumed under international treaties, it is practicable for the States to open their national airspace above their territories and to permit the entrance of the aircraft of other States with the application of the basic principles of mutuality and reciprocity.

In the most important provision of the Convention, the lawmaker recognises the complete and exclusive sovereignty in their airspace for all States, not only for the contracting States. The difference between “State” and “contracting State” has faded by our days, since almost all – specifically 192 – States are members of the ICAO.⁷ In the beginning, however, the distinction had great significance. Namely, in 1947, the ICAO had merely 26 Member States; nowadays, when the lawmaker mentions the rights and obligations of the “States”, it has in mind every sovereign State all over the world (disregarding membership).

Nevertheless, it is possible to fly into or overflying the national airspace despite its closure and to land in the territory of the sovereign State. In that case, the aircraft of the other State needs to comply with the conditions assumed under the Convention for *non-scheduled flights* while, in the case of (commercial) *scheduled flights*, besides compliance with the conditions under the Convention, the permission or authorisation of the foreign State also needs to be obtained (Articles 4–5).

2. The horizontal boundary of national airspace

Since the legal status of the airspace above the territory of the State is determined by the legal status of the territory beneath, the airspace above the mainland of the State, or, in the case of countries with coasts, the airspace above “adjacent territorial waters” constitutes the territory of the State.⁸ Horizontally, state sovereignty extends to the boundary of the mainland, but if the country possesses seas, it extends to the boundary of territorial seas.

⁶ *Island of Palmas case. Reports of International Arbitral Awards RSA*, Vol. II., 4 April 1928. 838.

⁷ The 191st Member State acceding to the ICAO was South-Sudan on 11 October 2011, which had become independent on 9 July 2011. The fourth smallest State of the world, Tuvalu (Polynesia) situated on 26 sq.km joined the membership on 18 November 2017 as the 192nd Member State of the ICAO.

⁸ The logic of air law considerably resembles that of maritime regulations. From the outset, we may assert that similarly, to the principle of Roman law “the thing built on the land goes with the land” (*aedificium solo cedit*), the legal status of the airspace is therefore determined by the status of the territory beneath. Kovács P., *Nemzetközi közjog, (International Public Law)*, (Osiris, Budapest, 2016) Point 1378.

Territorial seas and *internal waters* (national waters) constitute parts of the territory of the State. The water, the depth (seabed) and the airspace of these territories are subject to the sovereignty of the State, i.e., they qualify as state territories. Pursuant to the UN Convention on the Law of the Sea (UNCLOS),⁹ territorial seas reach out to at most 12 nautical miles¹⁰ from the coast. In the national airspace above territorial seas, aircraft are not authorised to pass peacefully, that is, they may not fly freely in that airspace without special permission. Innocent (peaceful) passage is an institution of maritime law, which is due to commercial and warships on territorial seas.¹¹

The boundaries of jurisdictional waters and the airspace above can be demarcated by the precise determination of the baseline of the territorial sea. Due to the unique location of islands, the precise demarcation of 12 nautical miles is sometimes problematic in practice.¹² Aircraft pilots need to take the 12 nautical miles seriously since the right of States to defend their territory prevails entirely in this respect. With regard to the fact that this part is the closest to the mainland, in the event of minor carelessness or a wilful act, a controversial incident or conflict related to the defence of the territory may develop.¹³

High seas (international waters) do not constitute part of the territory of the State. High seas constitute areas to be freely used by all for peaceful purposes (*res communis omnium usus*); they may not be appropriated or occupied, therefore no State may extend its territorial jurisdiction thereto. The legal status of the high seas in this context is identical to that of, outer space. The high seas are open to all States, whether coastal or landlocked. This entails, inter alia, both for coastal States and landlocked States:

- a) freedom of navigation;
- b) freedom of fishing;
- c) freedom to lay submarine cables and pipelines;

⁹ The codification of the entirety of maritime law ensued in Geneva between 1958 and 1982 under the auspices of the UN. The codification of maritime law encompassed its entirety and so, the destiny of the high seas was settled. In 1982 at the Conference of the UN on the Law of the Sea held in Montego Bay (Jamaica), the States adopted the Convention on the Law of the Sea, which contained the comprehensive regulation of maritime law and took effect on 16 November 1994.

¹⁰ One nautical mile is 1,852.2 metres long, that is, 12 nautical miles equal 22.2 kilometres.

¹¹ The passage of ships is considered peaceful as long as the security and the order of the coastal State is not disturbed, and it is in accordance with the basic principles of international law. On the contrary, the passage is not peaceful if, during the passage, fighter planes take off from and land on an aircraft carrier.

¹² Geneva Convention of 29 April 1958 on the Territorial Sea and the Contiguous Zone (1958) – Limits of Territorial Sea. Articles 3–4, Section II.

¹³ For example, a Soviet MIG–19 fighter plane unlawfully shot down an American reconnaissance aircraft, a Boeing RB–47H Stratojet completing a routine flight over international waters in international airspace flying at a distance of 50 miles from the Soviet coast on 1 July 1960, since they believed the scouting plane “was staying close”. *National Museum of US Air Force: RB–47H Stratojet Shot Down* (posted 2006), <https://www.nationalmuseum.af.mil/Visit/Museum-Exhibits/Fact-Sheets/Display/Article/197621/rb-47h-shot-down/> (Last accessed: 31 December 2018).

d) freedom to construct artificial islands and other installations permitted under international law;

e) freedom of scientific research;

f) freedom of overflight above the high seas.¹⁴

Pursuant to the Convention on the Law of the Sea, the high seas include neither the adjacent waters measured from the end of territorial waters with a width of 12 nautical miles, nor the exclusive economic zone of a range of 176 nautical miles.¹⁵ These zones are not considered national territories, but the coastal States may exercise enforcement rights and pursue economic activities in these zones within a regulated framework. Consequently, the high seas stretch beyond 200 nautical miles measured from the coast. From the viewpoint of air law, however, the territory beyond the territorial sea regarded as state territory qualifies as high seas since it is entirely free to fly over, and manoeuvre in the adjacent area and the exclusive economic zone.

It is the elementary interest of each country that international connections are secured above the high seas in the international airspace. During their flight, the civil or state aircraft operating above the high seas may not breach the territorial sovereignty of other States by any chance. Namely, the countries with territorial seas are not deprived of their defence weapons; they are entitled to use them.

On 1 April 2001, a Lockheed EP-3E (Aries II) electronic scouting plane from the American Navy collided with a Shenyang J-8II interceptor made in China, as a consequence of which the Chinese aircraft fell into the sea and the pilot lost his life. The grave accident could ensue because the Chinese pilot of the fighter plane approached the scouting plane dangerously with a peculiarly construed interception, by “chasing away” in a so-called “Top Gun style” (within 3 metres, even showing his e-mail address on a piece of paper). The unarmed scouting plane, which was hard to manoeuvre, became caught with the fighter plane of the Chinese pilot, which crashed, whereas the four-engined American military airplane made a forced emergency landing at a military airfield on Chinese Hainan Island. The case occurred to the south of Hainan Island, at 65 nautical miles measured from the coastline, in international airspace.¹⁶

The Chinese government in its diplomatic memorandum made immediate reference to an intrusion into the Chinese airspace without permission. It found two legal grounds for the allegation that the territorial sovereignty of China had been violated by the American military plane.

¹⁴ *The Law of the Sea Convention* (1982), Chapter VII. High Seas. Part I. Article 87.

¹⁵ *Ibid.* “the coastal State shall make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles from the baselines, from which the breadth of the territorial sea is measured.” Article 82.

¹⁶ *CRS Report for Congress, China–US Aircraft Collision Incident of April 2001: Assessments and Policy Implications*, Order Code RL30946, 10 October 2001. 1–21.

– In its justification the Chinese government stated that it recognises Spratly and Paracel Islands in the South China Sea as its own territory; therefore, the boundary 12 nautical miles away needs to be measured from these islands, and so the American military plane had breached Chinese national airspace.

However, the legal fate of the above-mentioned islands is dubious, since the right of control over the mostly uninhabited islands with exploitable mineral resources and an abundant stock of fish had been disputed for a long time by several states in the region (Taiwan, Vietnam, the Philippines and Malaysia). Therefore, China could not enforce its territorial sovereignty officially.¹⁷

– Furthermore, in its justification, the Chinese government also highlighted that its right of control over its national airspace extends to the boundary of the exclusive economic zone ranging 200 nautical miles measured from the mainland, which is recognised as the maritime territory of the State under the UN Convention of the Law of the Sea (1982).

However, the Chinese government had not declared the unilateral establishment of its air defence identification zone before the incident; this was absent until 2013. Thus, in the absence of the Chinese ADIZ zone, the Convention on the Law of the Sea had to be interpreted, according to which, in the exclusive economic zone, the coastal State is authorised for the exploitation of the natural wealth of the seabed and for the right to fish there, but not for the domination of the airspace. This zone, with a width of 200 nautical miles, consists of the territorial sea of 12 nautical miles qualifying as State territory and 188 miles of sea not qualifying as State territory, over which, since its airspace is international, all parties can freely pass. It is notable that the US, although it is one of the greatest maritime powers, is not a party to the Convention on the Law of the Sea. It merely undertook the obligation to observe its prescriptions while adapting to international customary law.¹⁸

¹⁷ On 26 May 2015, the Chinese government issued its strategic White Book, in which it stated that it prioritised defence on the high seas instead of territorial seas. In this material, China emphasised that “from the viewpoint of sovereignty Chinese developments and constructions on its islands do not differ from the constructions in the internal areas of the country”; furthermore, it pointed out that “interference with affairs related to the southern seas by external parties qualifies as being provocative”. The fate of the islands is a source of grave tension in the region; in addition, China commenced large-scale construction and the establishment of a new airfield on the disputed Spratly Islands. In May 2015, the patrol flight of the American navy with a CNN crew on board flew over the construction, while the Chinese party several times demanded the airplane “injuring” the airspace to leave. Zord G. L., A nyílt tengeren is tényező lett Kína, (China Has Become a Factor Also on the High Seas), (2015) (122) *Magyar Nemzet*, 16.; China’s Military Strategy. Xinhua, 26 May 2015, www.china.org.cn/china/2015-05/26/content_35661433 (Last accessed: 31 December 2018).

¹⁸ J. L. Malone, The United States and the Law of the Sea after UNCLOS III, (1983) 46 (2) *Law and Contemporary Problems*, 29–36. <https://doi.org/10.2307/1191507>

After landing, the American airplane was “tampered with”, to use the words of President George W. Bush.¹⁹ The Chinese did so despite the rule that they were not authorised to enter the American military aircraft, because during peacetime its interior is regarded as flying State territory, hence it is subject to American jurisdiction. However, the basic rules of international law do not always have adherents. Therefore, despite no training on what to do in such an eventuality, the 23 crew members attempted to destroy or disable everything of military value during the forced landing, so that they did not fall into unauthorised hands. The airplane was inspected with meticulous care by the Chinese, who later returned the military plane with some parts missing, thereby breaching international law. The detained crew, in compliance with the prescriptions of international law, was released.

3. The vertical boundary of national airspace

The “theoretical” demarcation of the geographical boundary between the national airspace and outer space has significance. In legal terms this boundary demarcates the vertical range of the sovereign power of the State. Thus, the national airspace is not infinite; the point where it ends is the beginning of outer space. However, the legal fate of the two spaces differs. While national airspace is under the jurisdiction of the State, outer space can freely be utilised by all; here state sovereignty does not prevail. Consequently, each member of the international community may equally use outer space for peaceful purposes, whereas no State may demand the occupation or possession of such a territory or region. Therefore, from a legal point of view, it is essential where the jurisdictional boundary between the national airspace and outer space is established.

The demarcation has special literature as large as a library. Gyula Gál (1926–2012) space lawyer, makes 49 recommendations for demarcation in his book published in 1969,²⁰ some of which are noteworthy in this respect. According to the *theory of gravity*, the upper limit of the sovereign power of the State can be delineated at the altitude from where objects launched from the Earth still drop back. According to the *atmosphere theory*, the outer space begins where the mass of air surrounding the Earth ends, whereas the *aerodynamic concept* claims the outer space begins where the machine’s lift is not sufficient to hold the aircraft in the air. The *biological theory* holds that the airspace ranges to the point where man is capable of sojourning in the air without the help of technical devices, whereas the *rotational theory* maintains that the airspace ranges to the point where gravitation and centrifugal forces counter-balance each other. According to the *theory of the security of the state*, the boundary needs to be

¹⁹ M. Kukis and K. Arms, Bush to China: Return Plane, Crew, (2 April 2001) *United Press International*.

²⁰ G. Gál, *Space Law*, (Oceana Publication, Leiden and Budapest, 1969) 59–116.

established where the defence and security of the nation can still be guaranteed in the airspace by the State. It is likely that the *functionalist theory* is the most welcomed, and practice is increasingly following this. The adherents of the functionalist demarcation do not accept that the State has the power to determine the upper limit of its airspace unilaterally,²¹ because they believe that the boundary cannot be calculated in altitude, but the demarcation derives from the character of the activity; that is, outer space begins at the point where orbiting movement takes place. Accordingly, aviation in the airspace becomes outer space activity when the objective is to place a given object (device) in orbit or its orbit injection beyond, the movement of the object there or its deorbiting, furthermore, the landing, staying of the object on alien planets or its return from there.

Andrew G. Haley (1904–1966), an American lawyer and outer space specialist, deserves credit for the most widespread theory on the vertical demarcation of the boundary between national airspace and the outer space. It was he who delineated the boundary of jurisdiction at an altitude of 83 km (275,000 feet), which he designated as “the Kármán primary jurisdictional line”. Namely, Theodore von Kármán,²² a Hungarian scientist, had calculated the altitude at which the aircraft needs to fly more speedily than the cosmic speed to be held at the given altitude by aerodynamic lift.²³ According to von Kármán, the jurisdictional boundary between aerodynamics and astronautics stretches at an altitude between 80 and 100 km depending on the varying natural and atmospheric conditions; nevertheless, he wisely added: “I am convinced that this tough legal issue will not be solved during my lifetime”. The problem of demarcation, still open today, needs to be resolved unambiguously sooner or later by mankind, while increasingly higher degrees of technical development are being achieved.

Today, some outer space powers generally demarcate the boundary between 100 and 110 km unilaterally. On 14 April 1983, the Soviets recommended, in a memorandum addressed to the UN, establishing the boundary between national

²¹ N. Q. Dinh, *Droit International Public*, (Pellet, Paris, 1999) 359.

²² Theodore von Kármán (1881–1963) was a mechanical engineer, physicist and a scientist of applied mathematics. He was called the “patron saint” of the US Air Force (USAF). He is the father of supersonic aviation and a pioneer of missile technology and hypersonic astronautics. Via the construction of wind-tunnels he discovered the significance of streamlining and revealed the regularities of special forces, eddies and currents (see, the Kármán’s vortex), which affect airplanes and other aerial moving objects. E. Lee, *The Wind and Beyond: Theodore von Karman, Pioneer in Aviation and Pathfinder in Space*, (Little, Brown and Company, Boston and Toronto, 1967).

²³ The spatial range of the Kármán-line is determined via the connection between altitude and speed. The higher the aircraft flies (feet $\times 10^3$), the higher its speed needs to be to stay aloft (feet $\times 10^3$ /sec.), since the lift decreases due to the increasingly thinner air. At a certain physical point, that is, at an altitude of about 92 km, but essentially anywhere in the range between 80 and 100 km, lift suddenly ceases to exist and the aircraft is unable to stay in the air any longer. Obviously, this is merely a theoretical approach, since modern airplanes flying at a cruising altitude of an average of 11 km are incapable of reaching this boundary or the necessary speed. Sipos A., *A Nemzetközi Polgári Repülés Joga, (The Law of International Civil Aviation)*, (ELTE Eötvös Kiadó, Budapest, 2018) 59.

airspace and outer space at an altitude not exceeding 110 km above sea level under an agreement among the States.²⁴ The Australian government established this boundary at an altitude of 100 km above sea level under national law regulating space activity.²⁵ Although several developed States successfully pursuing space activity have national law pertaining to space research, it was only the Australians that declared how high their national airspace ranges vertically. At the same time, we need to note and emphasise that international treaties adopted by the international community do not contain universal rules or provisions to separate national airspace from outer space vertically.²⁶

II. INTERNATIONAL AIRSPACE

In the international airspace, state sovereignty does not prevail, this airspace is not subject to the chain of state sovereignties. Above the high seas and the South Pole (the Antarctica)²⁷ international airspace stretches. Its legal status is identical to that of outer space, since above both territories the airspace can be used by all, therefore, by staying in the international airspace above the high seas and the South Pole, “we are in outer space,” emphatically and solely with respect to their legal status and free use.

In consideration of the fact that the high seas are not subject to the territorial sovereignty of the States, and as a consequence, the airspace above them is international, the question arises as to who supervises order in the largest freely utilisable airspace in the world. In the international airspace above the high seas, the aviation rules formulated by the ICAO have to be complied with according to the Annexes to the Convention,²⁸ since, over the high seas, the rules in force shall be those established from time to time under the Convention (Article 12). During operation the old basic Roman principle should prevail: use your property in such a way that you do not injure other people’s property (*sic utere tuo ut alienum non laedas*).

²⁴ *UN Chronicle*, 21 (4), 1984. 37.

²⁵ *Australian Space Activities Act of 1998*, Section 8.

²⁶ We need to mention the official standpoint of the International Aeronautic Federation (FAI) as an example. The more than 100 Member States of the Federation have adopted the boundary of 100 km in the area of sports flights, but this in itself does not imply an internationally acknowledged prescription or obligation. *FAI Sporting Code. General Section. Classes and Definitions*. January 2017. 2–3.

²⁷ The South Pole (Antarctica) is an extraordinarily important area from strategic, economic and scientific points of view. The international legal relations of the sole perpetually uninhabited continent of the Earth covered by ice are regulated under the Antarctica Treaty (1959). Under the Treaty, which is essentially an international agreement establishing the status of the continent under public law, only 7 States of the parties to the Treaty renounced demands for national ownership provisionally. Sipos A., Az emberiség hódítása a világűrben, (The Conquest of Outer Space by Mankind), in Frey S. (ed.), *Űrtan Évkönyv 68, (Space Studies Almanac 68)*, (Magyar Asztronautikai Társaság, Budapest, 2017) 78–79.

²⁸ Annex 2 on Rules of the Air; Annex 6 on Operations of Aircraft; Annex 11 on Air Traffic Services and Annex 12 on Search and Rescue contain standards and rules for flight above the high seas.

At the same time, the ICAO does not have authorisation for enforcement; therefore, the observance of aviation rules prescribed by the ICAO with respect to aircraft flying over the high seas shall be required by the country where the aircraft was registered. Air navigation control and information services, as well as search and rescue operations, have to be discharged by the States with coast on the basis of the mandate granted by the ICAO Council. However, this does not mean that, in the air traffic zones above the high seas, the sovereignty of these States predominates. Over the high seas the rules of air traffic, safety, security, search and rescue are stipulated by international treaties concluded by the States.

III. CONTROLLED AND UNCONTROLLED NATIONAL AIRSPACES

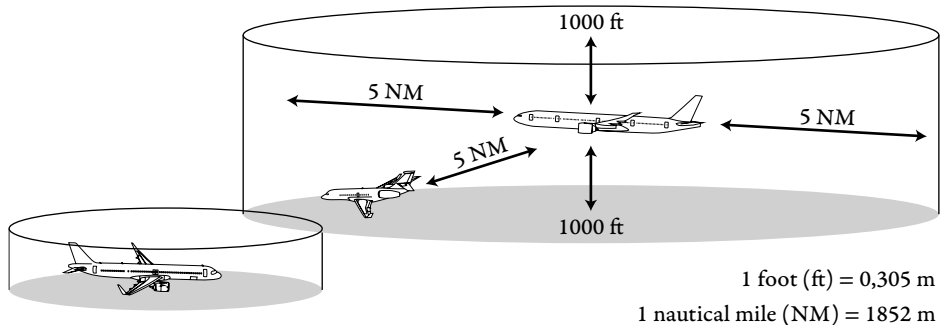
The airspace used in air transport can be uniformly divided into *controlled* and *uncontrolled* airspaces. Uncontrolled airspace means the whole airspace of air traffic which is beyond controlled airspace. If possible, exclusively wide-bodied aircraft engaged in international commerce travel in controlled airspace, whereas narrow-bodied aircraft and private airplanes, (we may think mainly of balloons, gliders and one- or two-engined aircraft) fly in uncontrolled airspace. The two different types of airspace are entirely dissimilar in their operation. In controlled airspace, an air navigation service operates, which, by giving guidance to traffic participating in the airspace, guarantees safe separation and operation. For that purpose, it is obligatory to use bilateral radio communication and the on-board signalling device. In uncontrolled airspace, however, no air navigation service operates, merely an aviation information service. Proceeding from this, the aviation information service is not responsible for separation in uncontrolled airspace but, by utilising its assistance and information, all pilots flying an aircraft travel while relying on their own responsibility and secure separation from the relevant traffic. In this airspace, bilateral radio connection and the use of signalling devices is not obligatory. Without the use of these, aviation can be standard, but their use in the interest of the maintenance of flight safety is of high importance.

Controlled airspaces are demarcated along busier airports and air routes. In these airspaces various air navigation services discharge their tasks 24 hours a day, that is, in controlled airspaces traffic is under the supervision of air navigation service. The basis of safe air traffic accomplished in controlled airspaces consists in the separation rules applied by the air navigation services. The objective of separation is the prevention of collision between airborne or taxiing aircraft and obstacles on the surface. In other words, what guarantees the achievement of this objective is the production or maintenance of clearance (separation based on time or distance) between two or more air vehicles. The most important main rule of the task of navigation control is that

by the time one (any) of the applied forms of separation is harmed, another form of separation needs to be “produced”.

Separation may be on the one hand, geographical (two aircraft travel far from each other geographically, one for example in the airspace of Moscow, the other one above Budapest), on the other hand, vertical or horizontal.

Figure 1. The separation of aircraft in controlled airspace



The basis of *vertical separation* is the determination of the required vertical distance between two aircraft so that they carry out safe flights. This is rendered by the vertical separation minimum (VSM), which compared to a definite reference basis (according to the measurement of the pressure altitude) is a nominal 1,000 feet (304.8 metres) under an 8.8 km level of flight and 2,000 feet (609.6 metres) at and above an 8.8 km level of flight. As a result of the development of technical conditions (the intense improvement of the precision of altitude measurement devices and their on-board application), as well as the rapid growth of the volume of air transport, the reduced vertical separation minimum (RVSM) was introduced, according to which, by the determination of 6 new altitudes, a further increase in airspace capacity of 20 per cent was attainable. Aircraft with suitable autopilot systems and altitude measurement devices, as well as appropriate authority certificates, may travel in higher airspaces between flight levels of 29,000 feet (8.8 km) and 41,000 feet (12.5 km) with a vertical separation of 1,000 feet (304.8 metres), which enhances the intensity of the flow of air traffic. The determined, obligatorily supervised flight altitudes permitted for aircraft are mandatory altitude levels, reference values provided to pilots, which have a certain degree of tolerance (e.g., in the case of VSM 300 feet (± 91 metres), while in the case of RVSM 200 feet (± 61 metres) diversion is permitted for aircraft as altitude tolerance limits.).

In the case of *horizontal separation*, we distinguish lateral, longitudinal and radar-based separations, for the implementation of which navigation services take distance, time and vector coordinates into consideration. Turbulence separation implies

a peculiar category of separation, which determines certain separation minimums on the basis of the turbulence created by aircraft.

1. Restriction of national airspace

Each contracting State may, for reasons of military necessity or public safety, *restrict* or *prohibit* uniformly the aircraft of other States from flying over certain areas of its territory provided that no distinction in this respect is made between the aircraft of the State whose territory is involved, engaged in international scheduled airline services and the aircraft of the other contracting States likewise engaged [Article 9. *a*)]. It is an assignment of the State to designate the airspace for the purpose of air transport. National airspace means the airspace designated for air transport over the territory demarcated by the state border. This is divided into airspace for air transport with determined range and into special airspace, which can be restricted or temporarily restricted, dangerous and prohibited airspaces.

– Flight in the *restricted airspace* may be carried out only with the permission of the aviation authority, with the exception of special aerial search and rescue flights, ambulance flights, and flights directed at policing or prosecution as well as real air defence flights. Such restricted airspaces may be determined with regard to environmental protection and nature conservation in the interest of protected and specially protected species of birds and of birds with significance for the community.

– Flight in the *temporarily restricted airspace* is very hazardous, because therein military (state) aircraft are engaged in activities which may pose a threat to aircraft not engaged in the activity. Therefore, during the announced operation hours, flight into such airspace is admissible solely with the permission of the concerned services.

– Flight in *dangerous airspace* (above artillery and infantry shooting ranges) implies great risk, because activities posing a concrete threat to aircraft take place. During the announced operating hours, flights by aircraft engaged in the activity carried out in the dangerous airspace are admissible according to the rules stipulated under statute with the permission of the service concerned. During that time, other flights may not be carried out in or through the dangerous airspace.

– In *prohibited airspace* the activity of air transport is prohibited. These are generally designated above nuclear power plants, special objects, industrial facilities and research centres. Descriptions of such prohibited areas in the territory of a contracting State, as well as any subsequent alterations to them, shall be communicated as soon as possible to other contracting States and to the ICAO [Article 9. *a*)].

The restriction or prohibition of aviation in the national airspace pertains to the aircraft of all States. The restriction of aviation may not target or discriminate against the aircraft of another State, thus, the parties may not distinguish between their own

aircraft engaged in international services and the aircraft of other contracting States likewise engaged. For example, they may not close down part of the airspace for the mere purpose of coercing an aircraft to spend a longer time in the airspace of the given State and thereby pay a higher charge for route use.²⁹ It is not admissible either that, in the actually lawfully closed down airspace, the aircraft of the cordial state receives privileges, thus, in an unauthorised manner, although in possession of a permit, it flies in a closed airspace, thereby, as opposed to the aircraft of other States, it travels on a shorter route more rapidly and economically.

Each contracting State also reserves the right, in exceptional circumstances or during a period of emergency, or in the interest of public safety, and with immediate effect, to *restrict* or *prohibit* temporarily flying over the whole or any part of its territory (territorial waters) on condition that such a restriction or prohibition shall be applicable without distinction of nationality to aircraft of all other States [Article 9. *b*]).

A relevant example was the activity of Eyjafjallajökull, an Icelandic volcano, which created an exceptional circumstance in civil aviation in April 2010. As a consequence of the eruption, due to the volcanic ash reaching a large part of Europe, the majority of European countries prohibited traffic in their national airspace with immediate effect with a view to the maintenance of safety. The cause of the prohibition was that the smooth volcanic ash contains tiny glass granules, which rapidly erode and block the driving mechanism and other important devices of the aircraft. During the embargo of six days the flights of at least 10 million people were frustrated and more than 100,000 flights were cancelled.³⁰

In a temporarily restricted airspace, for example, for the purpose of securing military drilling flights, the airspace is closed down only up to a definite altitude, but over this airspace civil aircraft may travel freely. However, some airlines, according to their internal operation rules, do not fly above such airspaces; they opt for longer routes instead, because they do not wish to expose their passengers to higher risk.

The airplane with flight number 17 and registration number 9M-RMD of Malaysian Airlines (MH) on its route from Amsterdam (AMS) to Kuala Lumpur (KUL) crashed due to a missile hit above Ukraine, 50 km from the Russian border on 17 July 2014. All 298 persons on board the airplane lost their lives. The perpetrators, who used an anti-aircraft missile against a civil flight, broke the most important basic

²⁹ Air navigation charges have to be paid by all the operators of the aircraft who utilise the services of the air navigation organisation operating in the given airspace. The three groups of charges generated by air navigation services are route use, terminal navigation and communication charges. The charge of route use equals the multiplication of the mass factor of the airplane, the distance factor and the unit charge. Essentially, the further the aircraft travels in the national airspace, the more the body of the aircraft maximally weighs multiplied by the unit charge, the more is paid for the service. EUROCONTROL Central Route Charges Office (CRCO).

³⁰ G. Bisignani, The Eruption of Eyjafjallajökull Was a Wake-up Call for Change, (1 June 2010) *Airlines International, LATA Magazine*.

norms of international law. The aircraft was flying over restricted airspace at an altitude of 10 km. In the spring of 2014, the ICAO, in a letter sent to Member States and the United States Federal Aviation Administration (FAA), had drawn attention to the fact that a specific Eastern part of Ukrainian airspace, due to the evolving conflict, was not safe.³¹ As a consequence, the airlines of several countries avoided that airspace for reasons of safety. However, not all airlines followed through, because they wished to take advantage of the shorter route and the airspace at that altitude was still open. The representatives of Malaysia, Australia and the European countries at the 39th Assembly of the ICAO (2016) jointly initiated the formation of a system supporting the avoidance of conflict-burdened zones, in which the operators and the air navigation service providers can share their experiences of implemented flights in due time with pilots and other participants travelling in the given region.³²

2. The interception of a civil aircraft in the national airspace

Each contracting State, under such regulations as it may prescribe, may require any aircraft entering the areas to effect a landing as soon as practicable thereafter at some designated airport within its territory [Article 9. c)]. In the national airspace above the country in the interest of public order, public safety and the defence of the security of the nation, any aircraft may be held up and in certain cases may be summoned to land for the purpose of identification. If the pilot of the aircraft fails to identify themselves, they may be intercepted for that purpose. After identification, the pilot may continue their journey or may be requested to leave the airspace or to land at a specified airport for further examination. The pilot may be forced to land only in an exceptional case, because it is a main rule that civil aircraft may be intercepted only at the very worst. The aircraft concerned has to follow the warning or signal for landing without delay. The pilot of the aircraft breaching the rules has international liability, and in a severe case may expect sanctions under criminal law. Nevertheless, the use of weapons must be avoided against the civil aircraft in-flight not obeying the warning. Likewise, the application of tracer bullets shots for the purpose of calling attention should also be avoided, since it may jeopardise the safety of the persons on board or of the aircraft. The commander of the intercepted civil aircraft is obliged to implement the instructions of the proceeding military organisation and the pilot of the state aircraft related to identification, hold-up or landing. The necessary instructions and measures for the civil aircraft need to be issued primarily via the air navigation units concerned. Beyond this, the commander of the intercepted civil aircraft is obliged to attempt to engage in wireless connection with

³¹ FAA NOTAM – *Airspace Special Notice Ukraine*, FDC 4/7667 (A0012/14), 23 April 2014.

³² ICAO Assembly, 39th Session Working Paper, A39-WP/108TE/32, 19/8/2016.

the intercepting state aircraft or with the concerned unit directing the interception via a general call on the emergency frequency at 121.500 MHz.³³

If the air navigation service discovers that the aircraft is flying in the serviced airspace by breaching the rules, the civil and military air traffic controllers in cooperation intervene and enforce coercive measures. The air navigation service establishes a connection at the available frequencies. The pilot of the intercepting military airplane communicates the measures to be enforced to the pilot of the intercepted aircraft. The other fighter plane performing covering flies behind the intercepted aircraft, since the pilot needs to react immediately to the contingent activity of attack or escape by the intercepted plane. In this way, it covers the safe implementation of the interception and the leading airplane performing the identification. The distance between the leading airplane and the intercepted aircraft is 300 metres. In this first phase, the leading fighter plane approaches the intercepted plane so that its pilot may clearly see the closing up fighter plane, generally on the left, somewhat above at a distance of 300 metres sideways.

Each contracting State is obliged, in compliance with international law and ICAO standards to elaborate the detailed measures and procedures for the implementation of interception in its national airspace. These rules have to be unified at an international level so that interception may take place anywhere in the world (and it occurs quite frequently); it also has to be controlled by civil and military parties in a harmonised and foreseeably safe manner.

3. Communication in the airspaces

In international aviation, during air navigation control verbal communication takes place “in the world-language of aviation”, in English all over the world. When, at the dawn of aviation, a choice needed to be made, the English language was predominant, since English-speakers were the most common in the civil aviation industry (obviously it was impossible on a flight from Amsterdam (AMS) to Jakarta (CGK) to speak to every air navigation controller in their own language). In the 1950s, English became entirely accepted internationally in spite of the fact that this practice has not been regulated officially under an international treaty until this day. Moreover, the official languages of the United Nations and the ICAO itself, as a specialised agency of the UN, are English, French, Spanish, Russian, Arabic and Chinese.³⁴ This means that all of them are the official languages of civil aviation, but they were not adopted at

³³ The Commission Implementing Regulations (EU) No 923/2012 – laying down the common rules of the air and operational provisions regarding services and procedures in air navigation. L 281/1, 13.10.2012.

³⁴ The original Chicago Convention was drawn up in English. At the same time, the equally authentic versions in English, French and Spanish were opened for signature in Washington D.C. Chicago Convention, Chapter XXII, Signature of Convention.

the same time,³⁵ and, as safety is the most important priority, the requirement of the communication of information in one language has predominated, so the English language has become prevalent. As of today, owing to local dialects, multiplicities of versions of English are differentiated, which entails further risks.³⁶ Therefore, all pilots and air traffic controllers need to have basic English communicational skills and they need to be familiar with the professional vocabulary of aviation, both in their own language and in English.

The pilots of aircraft, and the ground staff use a peculiar language of aviation, the English “phony”, that is, the uniform English aviation language for communication during the implementation of the flight. The phony is vital in aviation. The introduction of phony was necessary because the standard expressions are short, which is required with respect to increasing traffic, in addition, the well-formulated messages present the information more precisely with the aim of excluding misunderstandings. Standard expressions reduce the risk of mixing up words with a similar pronunciation. The English phony is a descriptive language containing special expressions and formulation rules. The requirements are strict, because a considerable proportion of flying accidents proceed from the errors of the crew on board. Numerous incidents may be traced back unambiguously to their insufficient command of English. Therefore, while speaking on the wireless, if proper names, abbreviations or acronyms (registration sign, the ICAO-code of an airport, route points, the code for radio stations) with dubious spelling need to be spelt, communication has to take place according to the ICAO “alphabet.” It is very important to use the phony correctly, since the communicated information and instructions greatly contribute to the safe operation and efficient control of the aircraft.³⁷

³⁵ ICAO Doc 8876 International Conference on the Authentic Trilingual Text of the Convention on International Civil Aviation (1944); Protocol on the Authentic Trilingual text of the Convention on International Civil Aviation. Buenos Aires, September 1968; ICAO Doc 9208 Protocol Relating to an Amendment to the Convention on International Civil Aviation (Final Clause Russian Text); ICAO Doc 9664 Protocol Relating to an Amendment to the Convention on International Civil Aviation (Final Clause Arabic Text); ICAO Doc 9722 Protocol Relating to an Amendment to the Convention on International Civil Aviation (Final Clause Chinese Text).

³⁶ A. C. Boschen and R. K. Jones, Aviation Language Problem: Improving Pilot-Controller Communication. *Proceedings of 2004 international professional communication conference*, 29 September–October 2004, Minneapolis, USA. Piscataway: IEEE Press, (2004) 291–299., www.ieeexplore.ieee.org/abstract/document/1375313 (Last accessed: 31 December 2018).

³⁷ It is a matter of curiosity that originally for the communication of the letter F, the word Fox was used, while for the letter Q, the word Queen was used. However, at the initiation of the British government this rule was changed, because the expressions were rightfully considered to be offensive for the British Queen. Barati E., *A rádió-távbeszélő kifejezések szerepe a repülésbiztonságban, (The Role of Radio-Telecommunication Expressions in Flight Safety)*, Thesis. (The University of Nyíregyháza, Nyíregyháza, 2016) 16–21.

Table 1. The ICAO Phonetic Alphabet table

A – Alfa	N – November
B – Bravo	O – Oscar
C – Charlie	P – Papa
D – Delta	Q – Quebec
E – Echo	R – Romeo
F – Foxtrot	S – Sierra
G – Golf	T – Tango
H – Hotel	U – Uniform
I – India	V – Victor
J – Juliett	W – Whiskey
K – Kilo	X – X-ray
L – Lima	Y – Yankee
M – Mike	Z – Zulu

If the intercepted civil aircraft must land, the appointed airport needs to be suitable for the safe landing of the given type of aircraft. In the interest of the elimination or reduction of the dangers of interception, coordinated action between the pilots and the ground controlling units is necessary, furthermore, during the proceedings *vis-à-vis* the aircraft using the airspace illegally, the cooperation of civil air navigation and military services needs to be secured by all means.³⁸

In 1961 the Algerian war fought, for its independence from France, was approaching its end. The French established an identification and defence zone of 60 km measured from the Algerian coast and unilaterally declared that flying in the determined airspace was prohibited. On 9 February 1961, an IL-18 with the President (head of state) of the Soviet Union on board, on his way to Morocco, flew into the airspace unilaterally prohibited by the French. Immediately three Vautour fighter planes made in France flew onto the intercepted flight and established radio connection by signalling twice on the emergency frequency. In the meantime, one of the fighter planes shot tracer bullets in front of the civil airplane, thereby coercing it to leave the prohibited zone without delay.

In connection with the case, we may set forth as a fact that the Soviet airplane was flying above the high seas. All States are authorised to fly freely over the high seas, and this right may not be restricted by the States. The Convention stipulates that such prohibited areas shall be of reasonable extent and location so as not to interfere unnecessarily with air navigation [Article 9. *a*)]. The French made a mistake, not by

³⁸ In compliance with the international standard determined under Annex 2 to the Chicago Convention on Rules of the Air, the Member States need to elaborate in detail and implement the proceedings in their national law.

driving the airplane out from the prohibited zone designated by them unilaterally over the high seas, because thereby they protected the airplane, but they breached the law by interpreting the rules of interception peculiarly. As the Soviet leadership formulated to the French government in their letter of protest: “How long has it been customary law that the identification of the aircraft is paralleled by opening a broadside?”³⁹

IV. EXTENSION OF THE BOUNDARY OF THE NATIONAL AIRSPACE FOR THE PURPOSE OF IDENTIFICATION

It is reasonable to raise the issue of how coastal States can defend themselves *vis-à-vis* attacks approaching from the high seas. The latest versions of passenger or cargo airplanes with an average speed of 900 km/hour fly over the territorial waters with a width of 12 nautical miles in just 90 seconds. Obviously, in such cases there is insufficient time for actual and effective defence. Therefore, in the interest of the greatest defence of national airspaces, coastal States apply peculiar policing rights to flights in the international airspace.

Being the first as such in the world, the United States near the coasts of Alaska established its Air Defence Identification Zone (hereinafter: ADIZ zone) (with an extension of 380 nautical miles) after World War Two for reasons of national security with reference to the natural right of individual or collective self-defence.⁴⁰ The ADIZ is essentially a transitional zone, an extension of the boundary of the national airspace unilaterally by the State⁴¹ to 200 nautical miles measured from the coast, which is an intermediary institution on the boundary of the international and national airspace not prohibited by international law. The ADIZ zone is demarcated primarily on territories, where the extended water surface stretches close to the coast of the sovereign State. At the same time, it is necessary to emphasise that the State does not intervene in the airspace above the high seas concerned with a claim for sovereignty; it merely demands the right of observation and identification.⁴² The exercise of the particular right of control in ADIZ zones, beyond the aspects of national defence, increases the transparency of the airspace, thereby decreasing the possibility of collision in the air. Furthermore, it may support search and rescue, while it renders air traffic in the airspace

³⁹ Plane Attack Shocks Moscow, (10 February 1961) *Miami News*, 1.; French Try to Shoot the Red Angel, (11 February 1961) *Miami News*, 1.

⁴⁰ United Nations Charter, Article 51.

⁴¹ In its general character the unilateral legal act by the State is a declaration of intent, which aims to give rise to legal effect on an international basis. The legal binding force of the unilateral act is based on the principle of good faith and the according purpose of the State prescribing it, as long as it is issued clearly and intelligibly.

⁴² R. J. Butler, *Sovereignty and Protective Zones in Space and Appropriate Command and Control of Assets*, Research Report, AU/ACSC/034/2001-04, 2001. 15. <https://doi.org/10.21236/ADA407102>

of the high seas strategically more predictable and foreseeable. No international convention has been drafted for the air defence identification zones. Thus, the pertinent rules are unilaterally established by the States with adherence to the relevant domestic and international norms.

At the same time the question arises: to what extent is the identification zone of national air defence established by the unilateral act of the nation compliant with international law and lawful as to free flight over the high seas? The international legal basis of the extension is that the State, on the grounds of aviation security and self-defence, is authorised to prescribe obligations unilaterally *vis-à-vis* the aircraft entering its national airspace. This requirement prescribes the obligation of identification for the pilot of the aircraft upon entering the ADIZ zone. At the same time, the extension does not have a legal basis if the pilot of the aircraft does not intend to fly into the national airspace, fly over the territory of the State or land on it. In this case, the pilot is not obliged to follow the rules, since only those, who intend to fly into the national airspace need to observe them.⁴³

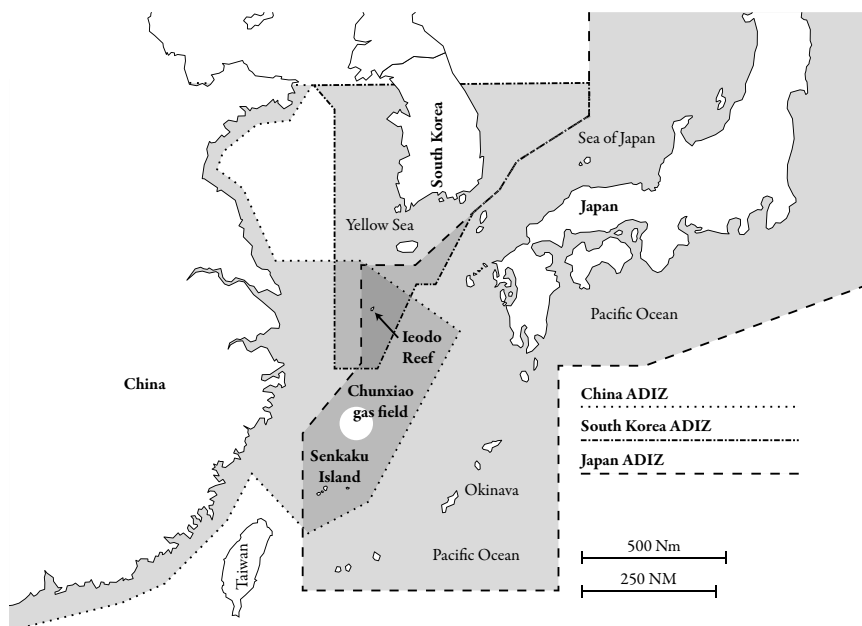
The legitimacy of ADIZ identification zones was particularly justified by the tragic terrorist attacks of 11 September 2001 carried out by civil airplanes against the United States. The flights operated in domestic traffic, in the national airspace and did not arrive from the high seas. Nevertheless, because of the method of commission, the tragic event had direct effect on the process of the world-scale formation of ADIZ zones. As a consequence of the terrorist attack committed in times of peace, causing the death of 2,977 and later of even more innocent people, the United States prescribe far stricter identification rules than the above for all aircraft entering and flying in its ADIZ zone. In the zone of 200 miles measured from the coastline of the United States (which ranges to 400 miles off the coast of California) only and exclusively those civil aircraft which have identified themselves according to the rule irrespective of whether their destination (the location of the agreed stopping place or the place of destination) is in the territory of the United States or in another country may fly.

According to different requirements, guided by national interests, an increasing number of countries have established their own air defence identification zones.⁴⁴ As the map illustrates, the Chinese and Japanese ADIZ zones above the Senkaku Islands and the Chunxiao Gas Field, supplemented by the ADIZ zone of South-Korea at the Jeodo bottom-rock overlap one another. This division can be traced back unequivocally to the territorial conflicts in the region between the countries.

⁴³ M. N. Schmitt, Air Law and Military Operations, in T. D. Gill and D. Fleck (eds), *The Handbook on the International Law of Military Operations*, (Oxford University Press, New York, 2010) 307.

⁴⁴ ADIZ (Air Defence Identification Zone) zones have been demarcated among others by China, Taiwan, Russia, Canada, India, Pakistan, Japan, Vietnam, South Korea, North Korea, Sweden, Norway and Great Britain.

Figure 2. The ADIZ zones of China, South-Korea and Japan



V. NON-SCHEDULED AND SCHEDULED FLIGHTS IN NATIONAL AIRSPACE

The international character of aviation proceeds from its nature of traversing borders. From the title of the Convention, that is, Convention on International Civil Aviation, we may basically infer *rubro ad nigrum*.⁴⁵ The title positively mediates to the applicator of the law, even if it is not explicitly highlighted in the text, that the rules of the Convention are to be applied with respect to international civil flights, not domestic civil flights. Pursuant to the Convention, the flight is international if the aircraft passes through the airspace of more than one sovereign State [Article 96. b)]. The separation of international and domestic flights does not have special significance from the viewpoint of performing the flights. Namely, the ICAO members' legal relations implies the obligation of the Member States to transplant the prescribed international Standards and Recommended Practices (so-called SARPs) into their national rules. In these terms,

⁴⁵ *Rubro ad nigrum*, that is, from the red to the black; which implies that the meaning of the text of the law is elucidated and explicated by the title of a statute. In the Middle Ages, glossators wrote the titles of the chapters of statutes in red, while the content was in black. Bánk J. (szerk.), *3500 latin bölcsesség, (3500 Latin Wisdoms)*, (Szent Gellért, Budapest, 1993) 10.

the major players of the industry (airlines, airports, air traffic service providers, ground handling companies etc.) must apply the international requirements upon carrying out domestic civil flights as well. The essence of the separation is that, in the event of incidents, disputes or inspections related to domestic civil flights, the Convention does not have legal force; any reference thereto is inadmissible. At the same time, if international and domestic flights occur in the same airspace, there may be an incident when a domestic and an international flight are implicated in conflict. The examination has to ensue within the purview of the Convention with respect to the fact that one of the parties was making an international flight.

As a main rule, the Convention does not apply to unbound (free) flights carried out unilaterally between countries. Air traffic is always delimited by the sovereign airspace of the other country; that is, if an aircraft leaves the airspace of its homeland (A) and flies into the airspace of country (B), the aircraft will be governed by the sovereign power of country (B). If an air carrier flies into the national airspace of another State during a *non-scheduled flight*, it needs a flight plan and authorisation from the air traffic management (ATM) in all cases. If the air carrier intends to operate an international *scheduled air service* continually with regular traffic to another country for commercial purposes,⁴⁶ further permissions, bilateral or multilateral air services agreements (ASA) between the concerned States are to be obtained mandatorily. Each aircraft, irrespective of the character of its operation (non-scheduled or scheduled flight), is obliged to observe consistently and implement the Rules of the Air in foreign airspaces.

1. Non-scheduled flights

Each contracting State agrees that all aircraft of other contracting States that are *not engaged in scheduled* international air services has the right, subject to the observance of the terms of the Convention,

- to make flights into; or
- to fly in transit non-stop above the territory of; or
- to make stops for non-traffic purposes in the contracting States.

The exercise of these rights *does not necessitate obtaining prior permission*, but it is subject to the right of the State flown over to require landing (Article 5).

Due to the fact of accession to the Convention, these rights of flying may be exercised by all aircraft not engaged in scheduled operation. The ICAO Council has not defined the concept of non-scheduled flight, thereby entrusting its definition

⁴⁶ Air service means any scheduled air service performed by aircraft for the public transport of passengers, mail or cargo [Article 96. a)]. The air carrier operates for commercial purposes, if the flight is carried out in return for remuneration or hire for the public transport of passengers, cargo or mail.

to national law. In practice, non-scheduled aircraft generally operate for private, business, commercial (tourist flights) or other purposes (e.g., aid shipment). The rule of the Convention, according to which “making stops for non-traffic purposes in the contracting States” is to be interpreted broadly, because these flights may also be engaged in such activity, although not regularly, according to a schedule. The most established form of non-scheduled flights are charter flights. The operator of the charter flight travels without a prior publicised schedule, not under the auspices of interstate agreements and it determines the charges for its services freely. Such aircraft, if engaged in the carriage of passengers, cargo, or mail for remuneration or hire on other than scheduled international air services, shall also, have the privilege of taking on or discharging passengers, cargo, or mail, subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable. (Article 5).

While *non-scheduled* operation does not require carriers to obtain state permission in advance, *scheduled* operators are obliged to obtain special permits or authorisation granted under bilateral air services agreements concluded between the parties concerned for commercial activity between two Member States. It follows in an advantageous situation for non-scheduled operators managed flexibly to the detriment of scheduled operators; therefore, the lawmaker has restricted the sphere of action of non-scheduled flights. Any contracting State may request the cancellation of non-scheduled flights, if it deems that these detrimentally affect the interests of scheduled flights operated in the territories where the Convention is applicable. Each contracting State may demand full scope of information about the character and range of the implemented methods of transporting.

Undoubtedly, non-scheduled aircraft may operate more freely. However, this does not imply literally that they may fly in the sovereign airspace of a State in the absence of all permissions, without adherence to basic requirements in the sovereign airspace of a specific State:

1. Although non-scheduled flights are authorised to make flights into the territory of a contracting State; or to fly in transit non-stop over its territory; or to make stops for non-traffic purposes on route to their destination without prior permission, they may exercise these rights exclusively with respect to the Rules of the Air (Annex 2) and with the observance of the conditions of the Convention (Article 5). Pursuant to the Convention, the activity of the carrier upon “a stop for non-traffic purposes” implies a landing for any purpose other than taking on or discharging passengers, cargo or mail [Article 96. d)].

2. The conditions in accordance with the international rules of the ICAO are regulated by the State on a national level, which demands adherence to these rules and procedures by the user of its airspace. In practice, the pilot or operator of the non-scheduled flight announces the fact of flying in advance and submits a flight plan with

a view to its implementation, in which the pilot informs the States over the territory of which the aircraft will traverse at a pre-determined speed (keeping to the speed is one of the guarantees of safe separation from other aircraft on the same route and of the precise arrival of the crew at a busy destination according to the predetermined landing slot). As long as the aircraft does not possess a valid flight plan, it may not enter the airspace of the other country. Alternatively, if it does possess a flight plan, but the pilot of the airplane does not observe it in the airspace of the sovereign State, the State over the territory of which the aircraft passes may demand that it lands and take measures *vis-à-vis* the pilot of the non-scheduled flight.

3. The contracting States may not only coerce the airplane to land, but they may also reserve the right, for reasons of flight safety, to require the aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facilities to follow prescribed routes, or to obtain special permission for such flights (Article 5).

Each contracting State undertakes to adopt measures to ensure that every aircraft flying over or manoeuvring within its territory and that every aircraft carrying its nationality mark, wherever such registered aircraft may be, shall comply with the rules and regulations relating to the flight and manoeuvre of aircraft. Each contracting State undertakes to ensure the prosecution of all persons violating the applicable regulations (Article 12).

2. Flight without prior permission in the national airspace

Safeguarding, reconnaissance and active defence of their airspace are primary tasks for all States, since a strike of a contingent enemy may most of all be expected through the airspace. The long-range airspace-detecting devices and satellites monitoring all events to the most minute details work in a concentrated system and they provide data for the centre, on the basis of which the changes in the airspace can be tracked precisely and the necessary measures may be issued promptly for implementation. The States defend their national airspaces 24 hours a day. In the event of unauthorised access to the airspace, the air defence may detain (intercept) any aircraft for the purpose of identification and may demand that it lands. If the aircraft does not obey the demand, coercive measures may be applied.

An eloquent example for this was the strange incident that happened early in the morning of 28 May 1987. The 19-year-old Mathias Rust from West Germany managed to fly on private airplane into the depths of one of the most defended Soviet airspaces and, as the climax of the journey, he landed in Red Square in Moscow. Although the air defence had been alerted twice; what is more, intercepting fighter planes had also ascended to approach the conspicuous target, Soviet air defence failed to apply tactical instruments due to its inadmissible carelessness and irresoluteness, as the report of the investigating

committee established. Matthias Rust flew into the sovereign airspace of another State without permission, wilfully and systematically violating the international navigational and flight safety prescriptions. The charges against him were, violation of the frontier, unlawful inflight, the violation of international navigation rules and related to his acts in Red Square, malicious hooliganism, mala fide ruffianism and the grave violation of public order. Rust was sentenced to 4 years' imprisonment by the Soviet Supreme Court. At any rate, Mathias Rust would have had the right to fly into the territory of a contracting State if he had complied with the conditions of the Convention. However, he did not observe these conditions, because he did not have a flight plan for the controlled Soviet airspace; furthermore, he switched off his radio after take-off, while the Finnish air navigation controller was trying to warn him on all available frequencies that he had committed a navigational error and was flying in the wrong direction. He had designated the Bromma Stockholm Airport (BMA) as a place of landing, whereas he was not heading in that direction. He broke all the possible rules. What is more, when the Soviet fighter planes spotted his plane, he started flying in circles, maliciously pretending that he had become lost.

The Chicago Convention formulates lucidly: Each contracting State agrees not to use civil aviation for any purpose inconsistent with the aims of the Convention (Article 4). Besides the continual observance of State sovereignty, the parties are obligated to cooperate. The rules of aviation shall be applied to the aircraft of all contracting States without distinction as to nationality and shall be complied with by such aircraft engaged in international air navigation upon admission to or departure from the territory of, or to the operation and navigation of such aircraft while within the territory of a contracting State (Article 11).

Beyond the framework laws and under Annex 2 to the Convention on the Rules of the Air (similarly to the rules of the Highway Code related to traffic on roads), the ICAO defines the standard procedure of international civil aviation as a mandatory procedure. Annex 2 contains the Rules of General, that is, Visual Flight (VFR) and of Instrument Flight (IFR).⁴⁷ Each of these rules is a standard, so their observance by the Member States is mandatory. On that basis, the pilot needs to submit a flight plan before take-off to cross the State border and needs to request prior permission actually to ascend. During the whole time of flying, the pilot has to be in radio contact with the air navigation control service concerned and, as a main rule, he needs to take off from and land at the airports requested and designated in advance. The pilot also needs to be in possession of meteorological data and information in order to carry out the flight safely.

⁴⁷ In visual flight, it is the responsibility of the pilot to separate from other aircraft since orientation is dependent on the visual skills of the pilot. During instrument flight, the pilot follows the designated route on the basis of the navigation instruments of the aircraft: 99 per cent of commercial civil flights are carried out according to the latter.

The pilot in command has to fulfil the above-mentioned obligations before the commencement of the flight. Preceding the flight, he checks whether the aircraft is capable of the safe implementation of the task. Beyond this, he needs to familiarise himself with all the information at his disposal concerning the planned flight, he needs to study the available meteorological reports and forecasts. Furthermore, the pilot in command needs to determine the fuel demand and devise a suitable plan for if the flight cannot be implemented according to the original plan.

It is always the pilot in command who is responsible for operations, according to the Rules of the Air; furthermore, he is obliged to make decisions on issues concerning the operation of the aircraft under his command. For flying in the *controlled airspace* subject to the surveillance of the air navigation control, the fulfilment of two basic requirements is necessary:

1. Due to flight safety and crossing the State border, it is pre-eminently significant from the viewpoint of air traffic management that, at least 30 minutes before take-off, a *flight plan* (FLP) shall be submitted by the operator of the aircraft to the air navigation service provider. The utilisation of the airspace for air traffic is based on a valid flight plan submitted to and acknowledged by the air navigation service provider, without which no flight is admissible. The flight plan contains all the data prescribed for air navigation control; it also contains data for a case of emergency necessary for the search and rescue of the aircraft in trouble, such as the brake release time, the time of arrival of the airplane, the designated airport and the secondary (alternate) airport in the event of an unforeseen problem. The flight plan has to be placed at the disposal of the air navigation control before the take-off of the aircraft. The air traffic controller enters the data in the flight plan into the system of air navigation control so that, at the time of take-off, the necessary information should be available for, or it may be issued (e.g., in the form of permission) to, the crew of the aircraft. The movement of the aircraft is tracked on the secondary radar equipment.

2. The other basic requirement is that a *transponder* shall be available on board an aircraft, which sends automatic replies to the secondary radar on the ground that continuously relays questioning impulses. In this system, the radio signal relayed from the radar station on the ground initiates the radiation of the radio signal of the other station on board the aircraft, then it receives the arriving replies and forwards them to the processing unit. Due to its use, the data of the specific aircraft appear on the screen of the radar, so the air traffic controllers can see the line signal of the aircraft, its exact position, speed, altitude and the tendencies in movement. The air navigation control carries out its work on the basis of continuously updated databases and real-time positioning data. In addition, by the comparison of the routes and data of airplanes, it can carry out, for example, conflict research.

Basically, from these two significant data stores and on the basis of the information yielded by them, the air traffic controllers can safely control the flow of air traffic within their area of competence by giving permissions and concrete instructions.

VI. SCHEDULED FLIGHTS

Upon the conclusion of the Chicago Convention concerning the issues of aviation, the interests of the Great Powers differed according to their positions and their losses in World War Two. With respect to the fact that, in the territory of the United States of America, no battles were fought in the physical sense, the approximately 20,000 military airplanes (mainly Douglas Dakota C-47 and Skymaster C-54 designed to carry troops, cargo and casualties) manufactured for the allied powers under relatively “peaceful” circumstances could be technically converted by the United States to line up for civil aviation. As a consequence, the United States advocated the freedom of the air and its complete liberalisation. In contrast, Great Britain, having suffered huge losses and in possession of few usable airplanes, among them mainly bombers, urged the establishment of a system in which competition was heavily restricted. Accordingly, the Member States themselves, as well as an international organisation congregating airlines instead of the States, would have made decisions on commercial issues (tariffs, flight frequencies and capacity) and on the allocation of air routes.

As a result of negotiations, the British principle professing the freedom of the States to make decisions gained the upper hand. This has determined the system of permissions and authorisations necessary for the operation of scheduled flights set forth under bilateral or multilateral air services agreements up to this day. In this system, no scheduled international air service may be operated over or into the territory of a contracting State, except with the *special permission* or *other authorization* of that State, and in accordance with the terms of such permission or authorization (Article 6). In other words, in the national airspaces of the Member States, the scheduled airlines of other States may carry out air services with commercial purposes exclusively on the basis of bilateral and multilateral agreements concluded by the States.

The ICAO Council defined the scheduled international air service at the request of the Member States. According to the ICAO, a scheduled international air service is a series of flights described by all the following characteristics:

- it passes through the airspace over the territory of more than one State; and
- it is performed by aircraft for the transport of passengers, mail or cargo for remuneration in such a manner that
 - each flight is open to be used by the members of the public, and
 - it is operated so as to serve traffic between the same two or more points, either according to a publicised timetable or with flights so regular or frequent that they constitute a recognisably systematic series.⁴⁸

The rules of international law pertaining to aviation must be construed as a uniform system, which guarantees framework regulation. The Convention regulates

⁴⁸ ICAO Doc 7278 – C/841 *Definition of Scheduled International Air Service* (1952).

the international dimension of civil aviation and establishes minimum requirements concerning flight safety, aviation security and technology in the relations between Member States. Simultaneously, it entrusts States to regulate further, mainly commercial issues under air services agreements. The conclusion of interstate air services agreements became the prerequisite of the launch of air traffic carried out by commercial scheduled flights via registered and designated air carriers between two States. Under these circumstances, a scheduled flight is subject to the same conditions as a non-scheduled flight, so both need to avail of flight plans and transponders on board the aircraft, but the operation of scheduled flights, because of their commercial character, requires prior permission at governmental level. This permission is designated as an Air Services Agreement. The system of bilateral or multilateral air services agreements is the outcome of a historical situation and a compromise,⁴⁹ which has basically determined the activity of air transporting among countries, that is, international civil aviation up to this day.

1. Freedoms of the air

In air services agreements, the parties designate the operating airlines and determine the destinations, the capacity and the frequency of flights and they mutually guarantee the most important right of access to the market: traffic rights. Traffic rights are the privileges granted in scheduled international air transport, on the basis of which it is up to the decisions of Member States which airlines, with what *route rights*⁵⁰ and *freedoms of the air* they permit to fly into their national airspace and to land at their airports for the purpose of carrying out commercial activities (that is, the forwarding of passengers, baggage, mail or cargo for remuneration).

– The *route rights* consist of the right of access to markets, in possession of which the operators of the aircraft may fly to endorsed geographical points. This right is manifest in the determined geographical specification of the route(s) or in the combination of geographical specifications, according to which the operators carry out activities of air services and land at designated points of the routes determined in the flight plan.

– The *freedoms of the air (traffic rights)* consist of the right of access to markets, according to which the parties to air services agreements determine the traffic rights to be exercised by their airlines and registered aircraft during scheduled flight in and above their territories.

The two rights are to be construed as closely interwoven; one of them determines the routes, i.e., between which cities the traffic can be launched, while the other right determines the commercial content of the route (whether the flight may be continued,

⁴⁹ B. Cheng, *The Law of International Air Transport*, (Oceana Publications, London, 1962) 7–9.

⁵⁰ ICAO Doc 9626 *Manual on the Regulation of International Air Transport*. Chapter 4.1, 2006.

whether the aircraft may forward between two other countries or within the given country). The airlines publicise the route rights they exercise in timetables, whereas traffic rights are contained under the annexes to the air services agreements.

The Chicago Convention does not provide for the traffic rights of scheduled flights; they are contained by two supplementary agreements (1944), which qualify as sources of law of the Chicago system:

- the “Two Freedoms” Agreement: the International Air Services Transit Agreement;
- the “Five Freedoms” Agreement: the International Air Transport Agreement.⁵¹

a) Transit rights (1–2)

Pursuant to the International Air Services Transit Agreement, the contracting States guarantee for other Member States the two transit rights, also referred to as technical rights, with respect to *scheduled international flights*:

1. Privilege for the airline of the home country [A] to fly into the airspace of another country [B] or [C], or fly over without landing;
2. Privilege for the airline of the home country [A] to land for non-traffic purposes, for technical or safety reasons (i.e. emergency, technical failure, bad weather conditions, fuel intake, unruly passenger, terrorist attack etc.), while flying in the airspace of another country.

No prior authorisation for carrying out such a landing manoeuvre is necessary, since the Member States are obliged to manifest flexibility in such strained situations, to provide assistance for the landing aircraft and to give permission to interrupt the flight. If the scheduled flight engaged in commercial activity (e.g., carrying tourists) during its journey is obliged to land for problems endangering flight safety, it may not carry out commercial activity (may not take on passengers or baggage for remuneration) on the spot (other than the destination).

b) Traffic rights (3–9)

Pursuant to the International Air Transport Agreement, the parties to the Convention guarantee traffic rights (3–4–5) beyond transit rights for other Member States with respect to *scheduled international flights*:

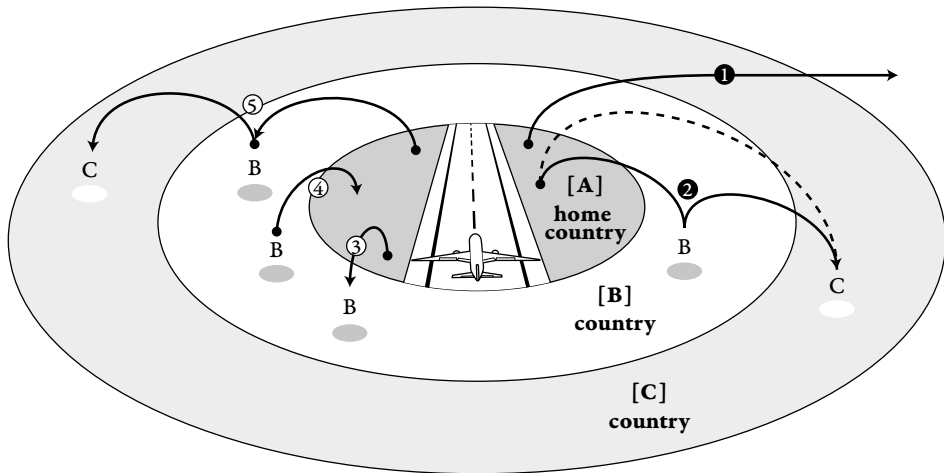
3. Privilege for the air carrier of the home country [A] to operate to the airport of the contracting partner State [B] for commercial purposes.

⁵¹ The ICAO shall also carry out the functions placed upon it by the International Air Services Transit Agreement and by the International Air Transport Agreement drawn up at Chicago on December 7, 1944, in accordance with the terms and conditions set forth therein [Article 66. a)]. The International Air Services Transit Agreement (IASTA) has been ratified by 133 countries (ICAO Doc 7500). The International Air Transport Agreement has been ratified by only 11 States, https://www.icao.int/secretariat/legal/List%20of%20Parties/Transport_EN.pdf (Last accessed: 31 December 2018).

4. Privilege for the air carrier of the home country [A] to operate from the contracting partner State [B] to the airport of the home country [A] for commercial purposes.

5. Privilege for the air carrier of the home country [A] to operate for commercial purposes on the route between country [B] and a third country [C] so that the departure or the destination of the operation are on the airport of the home country [A].

Figure 3. Transit rights (1–2) and Commercial traffic rights (3–5)



The fifth (just as the sixth and seventh) right may be exercised with the approval of the third country. In air services agreements, the contracting States made use of further combinations of the rights described above; thus, with respect to *scheduled international flights*, traffic rights 6 and 7 were established. These rights are not stipulated under the agreements, they are not legally regulated, but have evolved in commercial practice. Right 6 is in fact the combination of rights 3 and 4. The cabotage rights of 8 and 9 originate in maritime law and have evolved over several centuries of commercial practice.⁵²

6. Privilege for the airline of the home country [A] to operate for commercial purposes in two phases between two other countries [B] and [C] and use the airport of the home country [A] as a point of transfer.

⁵² Traffic rights 8th and 9th as cabotage are maritime legal institutions; the freedoms derive from maritime law. Cabotage in maritime law was permitted by a coastal State for another State to carry out commercial activity between its two internal points on the basis of mutuality.

7. Privilege for the airline of the home country [A] to operate for commercial purposes between two other countries [B] and [C] without using the airport of the home country [A].

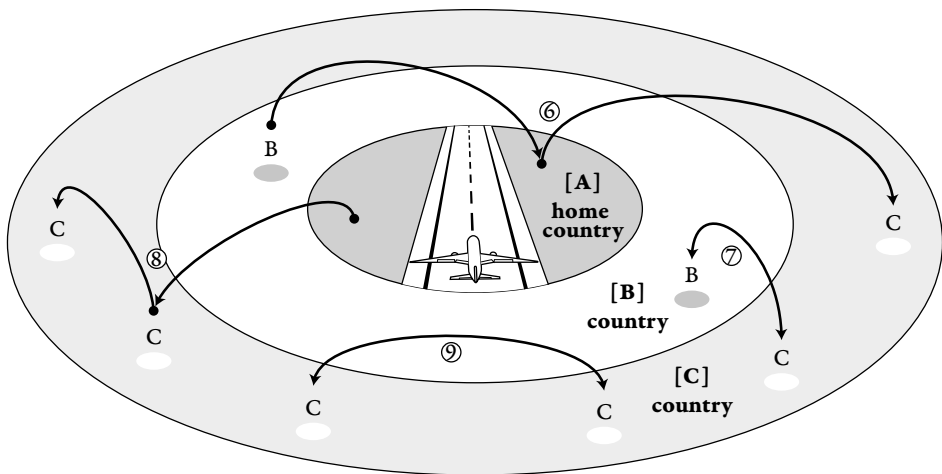
8. Privilege for the airline of the home country [A] to operate for commercial purposes between internal points of country [C] (or country [B]), so that the departure and the destination of the route is the airport of the home country [A] (consecutive *cabotage*).

For example, London [A] – Beijing [C] – Shanghai [C]; or London [A] – Moscow [B] – Vladivostok [B].

9. Privilege for the airline of the home country [A] to operate for commercial purposes among the internal points of country [C] (or country [B]) without the use of the airport of the home country [A] carrying out sheer domestic air traffic (stand-alone *cabotage*).

For example, Beijing [C] – Shanghai [C]; or Moscow [B] – Vladivostok [B].

Figure 4. Commercial traffic rights (6–9)



Under the bilateral air services agreements, in the beginning the governments agreed on the conditions of scheduled air traffic with a view to the enhanced protection of their domestic, primarily national airlines; later, they concluded agreements via which they somewhat cleared the way for market relations, and finally, the more widespread Open Skies Agreements have gained ground. In these bi- or multilateral agreements, the contracting parties have opened up their markets mutually, therefore, their airlines may exercise the majority of traffic rights freely without the limitation of capacity and frequency. The States apply multiple airline designations and the determination of the

tariff is free. The Open Skies Agreements presume the multiple or unlimited designation for air carriers as a basic condition, and the number of landing points connected to the network of flights is not restricted. Nevertheless, the Open Skies Agreements do not provide that the national airspace may be fully utilised for commercial activity by each State, because, under these agreements, although the air carrier of the contracting State can operate scheduled flights according to liberalised conditions, they are however in a limited manner, since the access to traffic rights deriving from freedoms of the air 7–9 is not guaranteed and bound to further permissions. The difference between scheduled and non-scheduled flights in the liberalised internal markets have lost its significance. One relevant example is the single market of the European Union, since the national airspaces of the Member States are open for all community carriers⁵³ without any limitations.

VII. SUMMARY

From the outset, the opening of national airspaces had for long been a cherished plan, analogically to the principle of the freedom of the high seas (*mare liberum*). Before World War One Paul Fauchille (1858–1926) applied the concept to the Aerial Ocean, and thence, he elaborated the legal principle of the freedom of the air (*l'air est libre*), according to which the airspace used to be open for all aircraft of all nations, with the limitation that the States could take restrictive steps in the interest of the security of their territories. This theory had had an extraordinarily large role in the initial elaboration of the system of air law but, after World War, it unambiguously failed. At that time, it became obvious for the States that the acquisition of the domination of the air (and later outer space) would be crucial for victory in international conflicts. For this reason, national airspace has been controlled in its entirety by the State and cannot be open for other States in the absence of relevant agreements. Beyond doubt, national airspace is an asset; it has the same value as land. States in this regard protect their airspaces and not only for the purpose of defence or their national security, but also for economic reasons. This kind of protectionist behaviour proceeds from the national defence policy and economic interests all over the world. The protection of the markets is guaranteed under air services agreements, which have entirely determined the development of international civil aviation until this day. For this reason, the overall control of national airspaces has been and will be paramount in all respects and terms.

⁵³ The community carrier is an airline with air traffic rights in the Member States of the European Union, which is in the substantial ownership (50%+1) of EU States and/or the citizens of the Member States and is under effective control.

