



ELTE | LAW

ANNALES

UNIVERSITATIS SCIENTIARUM
BUDAPESTINENSIS DE ROLANDO
EÖTVÖS NOMINATAE
SECTIO IURIDICA

2019

BUDAPEST



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SECTIO IURIDICA

TOMUS LVIII.



ELTE | LAW



Budapest, 2019

Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae
Established in 1959

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DOI: 10.56749/annales.elteajk.2019.lviii

ISSN 0524-899X (Print)

ISSN 2939-6263 (Online)



EÖTVÖS LORÁND
UNIVERSITY | BUDAPEST

Editorial work: Eötvös University Press

H-1088 Budapest, Múzeum krt. 4.

Executive Publisher: the Executive Director of Eötvös University Press

Layout: Andrea Balázs

Cover: Ildikó Kmotrik

Printed by: Multiszolg Ltd

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Lakatos, István*

The Historical Legacy of the United Nations Commission on Human Rights**

ABSTRACT

The article provides an overview of the work of the UN Commission on Human Rights, the first intergovernmental human rights body of the United Nations. The author aims to introduce the most important characteristics of the CHR in a way that avoids the trap of overemphasising the critical remarks formulated during the last few years of the most important human rights body in the world. The contribution of the CHR to the international standards-setting activities of the international community in the field of the promotion and protection of human rights and fundamental freedoms was significant, which was duly highlighted in this paper in order to have a balanced portrait of this important body.

KEYWORDS: Commission on Human Rights, Human Rights Council, special procedures, human rights standard-setting

Most of the people in this room work for government or seek to affect the actions of government. That is politics. For some to accuse others of being political is a bit like fish criticising each other for being wet.

Sergio Viera de Mello

former UN High Commissioner for Human Rights¹

* Lakatos, István, career diplomat, former human rights ambassador of the Ministry of Foreign Affairs and Trade of Hungary, currently the senior adviser of the Ministry of Justice, Human and Minority Rights of Montenegro.

** The opinions expressed herein are strictly personal and do not necessarily reflect the position of the Hungarian MFAT.

¹ M. Ignatieff, Rights inflation and role conflict in the Office of the High Commissioner for Human Rights, in F. D. Gaer and C. L. Broecker (eds), *The United Nations High Commissioner for Human Rights: Conscience of the World* (Martinus Nijhoff Publishers, Leiden and Boston, 2014).

I. INTRODUCTION

Very few international bodies or institutions received the amount of criticism as the Commission on Human Rights (CHR) did during its last period of work. These heavy criticisms annulled the enormous results achieved by the CHR since 1946 particularly during the not entirely human-rights-friendly conditions of the Cold War. This article intends to provide a fair and balanced portrait of the first universal human rights body of the world by explaining the reasons that led to its replacement by the Human Rights Council (HRC) in 2006.

II. THE ESTABLISHMENT OF THE UNITED NATIONS COMMISSION ON HUMAN RIGHTS

Most critics tend to forget that the CHR existed for 60 years and, for that time, did the most to advance the international human rights agenda, despite the constraints of the Cold War period. It is not surprising therefore that, in 1945,² then US Secretary of State Edward Stettinius considered the establishment of the CHR as a step which might have become “one of the most important and significant achievements of the San Francisco Conference”.³ This short essay intends to do justice in that context, by highlighting the achievements of the CHR, in addition to its obvious flaws regarding its functioning.

In line with Article 68 of the UN Charter,⁴ The Economic and Social Council (ECOSOC) appointed a preparatory committee consisting of nine highly qualified and experienced individuals, chaired by Eleanor Roosevelt, former First Lady and well-known human rights activist.⁵ Roosevelt chaired the CHR for the first six years as the US representative.⁶ Another important member of the preparatory committee was René Cassin, the French jurist who was one of the main authors of the Universal Declaration of Human Rights (UDHR). He also proposed the creation of the position of an

² The 1945 San Francisco Conference: <https://www.un.org/en/sections/history-united-nations-charter/1945-san-francisco-conference/index.html> (Last accessed: 31 July 2019).

³ P. G. Lauren, “To preserve and build on its achievements and to redress its shortcomings”: The journey from the Commission on Human Rights to the Human Rights Council, (2007) 29 (2) *Human Rights Quarterly*, 310. <https://doi.org/10.1353/hrq.2007.0020>

⁴ Article 68 of the UN Charter: “The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions.”

⁵ Lauren, “To preserve and build on its achievements and to redress its shortcomings”..., 310.

⁶ K. Boyle, *The United Nations Human Rights Council: Origins, antecedents, and prospects*, in K. Boyle (ed.), *New Institutions for Human Rights Protection*, (Oxford University Press, Oxford, 2009) 22. <https://doi.org/10.1093/acprof:oso/9780199570546.003.0002>

attorney general for human rights,⁷ which could have been the predecessor of the present position of the UN High Commissioner for Human Rights. At that time, however, the international community was not prepared for that innovation. Taking into account the antagonism existing between the international promotion and protection of human rights – in line with Article 1(3) of the Charter⁸ – and the importance of national sovereignty – contained in Article 2(7) of the UN Charter⁹ – the preparatory committee suggested that the CHR would be composed of individual experts and not government representatives.¹⁰ Not surprisingly, this recommendation was not accepted by states. The CHR was created as an intergovernmental body, established by ECOSOC Resolution 5(I), adopted on 16 February 1946.¹¹ The resistance of certain key players concerning a body with independent experts was “understandable” in light of the totalitarian system of the Soviet Union, the racism problem in the USA and the Colonies question affecting the UK.¹² As a consequence of these political considerations, the CHR was not given any investigative power nor, at the beginning, even the capacity to receive or examine communications from individuals. It changed, at least partly, in 1947, when ECOSOC recognised its authority to receive communications. However, Resolution 75 (V) underlined that the CHR had “no power to take any action in regard to any complaints concerning human rights”.¹³

To make an objective assessment of the overall performance of the CHR, it should be noted that before 1945 human rights – except for labour and minority rights – were not considered as a “legitimate matter of international legal concern”.¹⁴ However, the horrors of WWII and the Holocaust made it very clear that the policy of absolute sovereignty could not be continued and the cause of human rights could not

⁷ J.-P. Thérien and P. Joly, “All Human Rights for All”: The United Nations and Human Rights in the Post-Cold War Era, (2014) 36 (2) *Human Rights Quarterly*, 389. <https://doi.org/10.1353/hrq.2014.0018>

⁸ Article 1(3) of the UN Charter: “The Purposes of the United Nations are: [...] 3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”

⁹ Article 2(7) of the UN Charter: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”

¹⁰ Lauren, “To preserve and build on its achievements and to redress its shortcomings”..., 314.

¹¹ L. S. Sunga, What effect if any will the UN Human Rights Council have on Special Procedures?, in G. Alfredsson, J. Grimheden, B. G. Ramcharan and A. de Zayas (eds), *Essays in Honour of Jakob Th. Möller. International Human Rights Monitoring Mechanisms*, (Martinus Nijhoff Publishers, Leiden and Boston, 2009) 170.

¹² D. P. Forsythe and B. Park, The changing of the guard: From the UN Human Rights Commission to the Council, (2008) 29 (1–5) *Human Rights Law Journal*, 3.

¹³ Sunga, What effect if any will the UN Human Rights Council have on Special Procedures?, 170–171.

¹⁴ *Ibid.* 170.

remain the exclusive subject of domestic political considerations. The fact that many states did not possess a modern human rights approach and lacked natural law traditions often resulted in the conclusion that human rights were tools in the hands of Western imperialism.¹⁵ This cautious and inconsistent approach by member states towards human rights had consequences: all seven provisions of the Charter with references to human rights were general and more promotion than protection-oriented. Key sections of the UN Charter, such as Chapters VI and VII, were completely silent on human rights.¹⁶

Finally, ECOSOC set up the CHR in 1946, under its supervision. With 18 member states, it was the first universal intergovernmental human rights body. In parallel with the enlargement of UN membership, the size of the CHR increased to 21 members by 1962, 32 by 1967, and 43 by 1980. It reached its final scale (53) in 1992.¹⁷ However, the size of the secretariat did not follow these developments and the originally established length of the annual session (six weeks) did not change either.¹⁸

III. THE FIRST TWO DECADES OF STANDARDS-SETTING

The first 20 years of the CHR, between 1947 and 1967, were dominated by Western states and their allies. There were no sub-Saharan African states in the CHR until 1964.¹⁹ During this period, the CHR focused on standards-setting rather than supervising the human rights policy of individual states. Its first and most significant task was to draft an International Bill of Rights, which was to have three components: the declaration of rights, the preparation of a binding convention, and the establishment of specific implementation and enforcement mechanisms.²⁰ This plan was blocked as a result of international disputes over the “role of international bodies in implementation”.²¹ In just two years, the CHR produced the most important contribution to the development of the international promotion and protection of human rights, namely the drafting of the UDHR, which finally became the first pillar of the International Bill of Rights as a non-binding document, declaring the human rights to be recognised at that time by the

¹⁵ R. Freedman, *The United Nations Human Rights Council – A Critique and Early Assessment*, (Routledge, Abingdon, 2013) 10. <https://doi.org/10.4324/9780203074732>

¹⁶ N. Schrijver, The UN Human Rights Council: A new “society of the committed” or just old wine in new bottles?, in T. Skouteris and A. Vermeer-Künzli (eds), *The Protection of the Individual in International Law. Essays in Honor of John Dugard*. (Cambridge University Press, Cambridge, UK and NY, USA, 2007) 82.

¹⁷ *Ibid.* 84.

¹⁸ Freedman, *The United Nations Human Rights Council...*, 15.

¹⁹ Boyle, *The United Nations Human Rights Council...*, 22.

²⁰ Lauren, “To preserve and build on its achievements and to redress its shortcomings”..., 315–316.

²¹ J. A. Mertus, *The United Nations and Human Rights. A Guide for a New Era*, 2nd ed. (Routledge, Abingdon, 2009) 52. <https://doi.org/10.4324/9780203878019>

international community. It was remarkable that the drafters of the UDHR managed to put together a text that was adopted on 10 December 1948 by 48 votes in favour, with 8 abstentions. The absence of “no” votes signalled the strong international consensus behind the Declaration.

The first legally binding human rights treaty, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) – also drafted by the CHR – was adopted by the United Nations General Assembly (UNGA) in 1965.²² This was followed a year later by the adoption of two important human rights treaties: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).²³ Originally, the UNGA directed the CHR to draft a single document containing civil, political, economic, social and cultural rights. However, in 1951, after receiving the CHR report containing 73 draft articles, ECOSOC suggested that the UNGA reconsider its decision regarding a single human rights treaty. The UNGA was seriously divided on this issue. A decision was finally adopted, by 29 to 25, with 4 abstentions, to separate civil and political rights from economic, social and cultural rights.²⁴ The reason behind this compromise solution was that certain states were arguing for the primacy of civil and political rights, while others were in favour of the primacy of economic, social, and cultural rights. The resulting two treaties made it possible to join only one of them.²⁵ During this period, referred to by certain experts as the “era of inaction” because of the lack of power to take action regarding individual complaints, the CHR considered itself more a technical than a political body.²⁶ Three other legally binding treaties drafted by the CHR should also be mentioned: the International Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment [commonly known as the United Nations Convention against Torture (UNCAT)] (1984), the Convention on the Rights of the Child (CRC) (1989), and the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (1990). It should be noted that the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was negotiated and drafted outside the CHR.²⁷

²² Ibid. 319.

²³ Although ECOSOC already submitted the two drafts to the UNGA in 1954, they were not adopted till 1966.

²⁴ D. Shelton, Standard-setting by the United Nations Commission on Human Rights. An overview from its inception in 1947 until the creation of the Human Rights Council in 2006, (2008) 29 (1–5) *Human Rights Law Journal*, 18.

²⁵ Mertus, *The United Nations and Human Rights...*, 52.

²⁶ J. Gutter, Special Procedures and the Human Rights Council: Achievements and Challenges Ahead, (2007) 7 (1) *Human Rights Law Review*, 96. <https://doi.org/10.1093/hrlr/ngl029>

²⁷ Forsythe and Park, *The changing of the guard...*, 5.

The high expectations of the CHR were well marked by the fact that, between 1947 and 1957, it received nearly 65,000 individual petitions. Later, this number increased, and sometimes even reached 20,000 annually.²⁸ Petitioners asked for help against the human rights violations of their governments and they wanted the human rights paragraphs of the Charter to be applied to them.²⁹ Most members of the CHR were concerned about possible public criticism by their own nationals in front of the eyes of the international community and instructed their delegations to declare that the CHR had no power to take any action regarding these complaints.³⁰

IV. COUNTRY SITUATIONS AND THEMATIC SPECIAL PROCEDURES

The establishment of the Special Committee on the Policies of Apartheid by the UNGA in 1961 served as an important inspiration for the CHR, as this Committee was entitled to review communications too.³¹ ECOSOC Resolution 1235 (XLII) of 6 June 1967 followed this model, by authorising the CHR and the Sub-Commission on the Prevention of Discrimination and Protection of Human Rights “to examine information relevant to gross violations of human rights and fundamental freedoms, as exemplified by the policy of apartheid as practiced in the Republic of South Africa and in the territory of South West Africa [...]”³² There were debates among member states whether this reference intended to “limit the procedure to human rights abuses in South Africa or whether this was merely an illustration of a situation where the Commission should act”.³³ The efforts by those states that wanted to “restrict the reach of the 1235 procedure” failed, making it possible to apply it to any human rights violations.³⁴ This expanded CHR mandate was used shortly after its adoption by Arab states to condemn Israel for

²⁸ Buergenthal T., *Nemzetközi emberi jogok, (International Human Rights)*, (Helikon Kiadó, Budapest, 2001) 78.

²⁹ Lauren, “To preserve and build on its achievements and to redress its shortcomings”..., 314–315.

³⁰ Ibid. 315.

³¹ Sunga, What effect if any will the UN Human Rights Council have on Special Procedures?, 171.

³² ECOSOC Resolution 1235 (XLII). Question of the violation of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of apartheid, in all countries, with particular reference to colonial and other dependent countries and territories. Adopted by ECOSOC on 6 June 1967. <https://biblioteca.iidh-jurisprudencia.ac.cr/index.php/in-english/universal-system-of-human-rights/procedural-norms/ecosoc-1/2168-resolution-1235-xlii-by-the-economic-and-social-council-1967/file> (Last accessed: 31 July 2019).

³³ F. Cowell, The evolution and design of powers at the UN Commission on Human Rights: The complex legacy of anti-apartheid activism, (2019) 19 (1) *Acta Universitatis Carolinae Studia Territorialia*, 67–77. <https://doi.org/10.14712/23363231.2019.17>

³⁴ Mertus, *The United Nations and Human Rights...*, 54.

the occupation of certain Arab territories during the Six Days War.³⁵ Resolution 1235 was also used in October 1967 to discuss the situations in Greece and Haiti.³⁶ One of the main significances of Resolution 1235 was that the CHR could hold an annual debate on human rights violations occurring in any member state, and thereby paving the way for the creation of country-specific Special Rapporteurs.³⁷ In 1967, the CHR decided to establish an ad hoc Working Group on South Africa with a mandate to investigate and report back on human rights violations occurring in the country.³⁸

The next important step happened in 1970 when ECOSOC passed Resolution 1503 (XLVIII),³⁹ authorising the Sub-Commission to appoint a working group to investigate communications regarding specific allegations of human rights violations. An important feature of the procedure was its strict confidentiality until the investigations had been completed. The CHR could then publicise the findings if it decided to take action under the 1235 procedure.⁴⁰ This resolution, together with ECOSOC Resolution 1235, allowed the CHR to go further than simply human rights standards-setting. It contributed to it becoming the leading world forum concerning urgent human rights issues.⁴¹

The first individual country-specific Special Rapporteur was appointed in 1979, regarding the human rights situation in Chile “after Pinochet overthrew the democratically elected Allende government in 1974”.⁴² This was followed by subsequent appointments in the early 80s related to the human rights situations in El Salvador, Equatorial Guinea, Bolivia and Guatemala, and in 1984 regarding Afghanistan and Iran.⁴³

The first thematic mandate was the Working Group on Enforced or Involuntary Disappearances, established by CHR Resolution 20 of 29 February 1980.⁴⁴ Although it was originally a response to the situation in Argentina, an issue-oriented approach offered a less confrontational way of addressing the problem.⁴⁵ The first individual thematic mandate was on extrajudicial, summary or arbitrary executions (1982)

³⁵ R. Wheeler, The United Nation Commission on Human Rights, 1982–1997: A study of “targeted” resolutions, (1999) 32 (1) *Canadian Journal of Political Science*, 75–76. <https://doi.org/10.1017/S0008423900010106>

³⁶ Cowell, *The evolution and design of powers at the UN Commission on Human Rights...*, 67–77.

³⁷ S. P. Subedi, Protection of Human Rights through the mechanism of UN Special Rapporteurs, (2011) 33 (1) *Human Rights Quarterly*, 206. <https://doi.org/10.1353/hrq.2011.0011>

³⁸ Boyle, *The United Nations Human Rights Council...*, 25.

³⁹ ECOSOC Resolution 1503 (XLVIII) on Procedure for dealing with communications relating to violations of human rights and fundamental freedoms, <http://hrlibrary.umn.edu/procedures/1503.html> (Last accessed: 31 July 2019).

⁴⁰ Wheeler, *The United Nation Commission on Human Rights...*, 75–76.

⁴¹ Sunga, What effect if any will the UN Human Rights Council have on Special Procedures?, 172.

⁴² Subedi, Protection of Human Rights through the mechanism of UN Special Rapporteurs, 207.

⁴³ *Ibid.*

⁴⁴ C. Tomuschat, Origins and history of UN special procedures. An overview from their inception to June 2007, (2007) 29 (1–5) *Human Rights Law Journal*, 28.

⁴⁵ Gutter, Special Procedures and the Human Rights Council..., 98.

followed by the appointment of a Special Rapporteur on Torture (1985).⁴⁶ This second mandate covered all states, irrespective of the ratification of the ICCPR or UNCAT.

By the end of the CHR's mandate (June 2006), there were 28 thematic⁴⁷ and 13 country-specific mandates.⁴⁸ (This number was even higher in 1998 when there were 53 mandates, but a few country-specific mandates were terminated and a few thematic ones combined by 2006.⁴⁹) This significant and rapid increase in the number of special procedures was mainly the result of the very flexible nature of this institution, and its ability to address new challenges within a short period, unlike the treaty-based system.⁵⁰ However, this flexibility also came together in an ad hoc manner. They were created by resolutions adopted by the majority of the CHR. These resolutions were usually drafted in vague terms, so the mandate holders had the relative freedom to determine their own working methods.⁵¹ Until the 90s, most of the special procedures focused on civil and political rights. However, by 2006, numerous mechanisms and mandates were dealing with economic and social rights, including the right to adequate housing, the right to food, the right to education, the question of human rights and extreme poverty and the right to health, just to name a few.⁵²

The World Conference on Human Rights, which took place in 1993 in Vienna, had an important effect on the special procedures system in two ways. It was the first occasion on which the various mandate holders convened to discuss matters of common interest and it was the World Conference that decided to create the post of the High Commissioner for Human Rights and thereby transforming the UN Centre for Human

⁴⁶ Tomuschat, *Origins and history of UN special procedures...*, 28.

⁴⁷ Enforced or involuntary disappearances (established in 1980), extrajudicial, summary or arbitrary executions (1982), torture (1985), freedom of religion or belief (1986), sale of children, child prostitution and child pornography (1990), arbitrary detention (1991), freedom of opinion and expression (1993), racism, racial discrimination (1993), independence of judges and lawyers (1994), violence against women (1994), toxic waste (1995), right to education (1998), extreme poverty (1998), migrants (1999), right to food (2000), adequate housing (2000), human rights defenders (2000), economic reform policies and foreign debt (2000), indigenous people (2001), people of African descent (2002), physical and mental health (2002), internally displaced persons (2004), trafficking in persons (2004), mercenaries (2005), minority issues (2005), international solidarity (2005), countering terrorism (2005) and transnational corporations (2005).

⁴⁸ Myanmar (in operation since 1992), Cambodia (1993), Palestinian Occupied Territories (1993), Somalia (1993), Haiti (1995), Cuba (2002), Liberia (2003), Belarus (2004), Burundi (2004), DPRK (2004), Democratic Republic of the Congo (2004), Sudan (2005) and Uzbekistan (2005).

⁴⁹ Sunga, *What effect if any will the UN Human Rights Council have on Special Procedures?*, 173.

⁵⁰ Subedi, *Protection of Human Rights through the mechanism of UN Special Rapporteurs*, 225.

⁵¹ E. Domínguez-Redondo, *The history of the Special Procedures, A 'learning-by-doing' approach to human rights implementation*, in A. Nolan, R. Freedman and T. Murphy (eds), *The United Nations Special Procedures System*, (Brill Nijhoff, Leiden, 2017) 36.

⁵² Sunga, *What effect if any will the UN Human Rights Council have on Special Procedures?*, 173.

Rights into the Office of the High Commissioner for Human Rights (OHCHR), providing the secretarial background of special procedures.⁵³

Unfortunately, cooperation with mandate holders, especially with country-specific ones, was not always easy. For example, Cuba, Belarus and Sudan refused to cooperate with the Special Rapporteur entrusted with examining the human rights situation in their given country. They did not allow Special Rapporteurs to enter their country, so they had to collect information outside it.⁵⁴

V. ASSESSMENT OF THE WORK OF THE COMMISSION ON HUMAN RIGHTS

The CHR had a relatively weak mandate, reflecting the political considerations of UN member states. It was known by certain experts as a “moral talk-shop”.⁵⁵ During the first period of the CHR (1947–1967), the body was dominated by Western states and its focus was standards-setting. During this period, not one Chair of the CHR came from the Eastern Bloc and the participation of African countries was minimal.⁵⁶ Its supervising role began to be established during the second period (1967–1979), with the adoption of ECOSOC Resolutions 1235 and 1503. During the following cycle between 1979 and 1991, CHR members tried to enhance its policy supervising functions, despite the political limitations of the Cold War. The first part of the post-Cold-War period was marked by the dominance of nearly consensus-like resolutions, while in its last years, between 2001 and 2006, inter-regional clashes strengthened, leading to the replacement of the CHR with the HRC.⁵⁷

Jack Donnelly, in his study on the period between 1955 and 1985, indicated that almost 30% of the CHR’s meeting time was devoted to civil and political rights while social and cultural rights were only discussed in 5.5% of the meeting time. However, these figures look a bit different if we take into consideration that almost half of the 30% devoted to discussing civil and political rights was related to the question of racial discrimination, the number one priority for the Third World in this period, besides the issue of the right to self-determination (10%).⁵⁸

Economic and social rights only started to be discussed after 1965, and even if we accept the argument that they can be implemented gradually, this does not explain

⁵³ Gutter, *Special Procedures and the Human Rights Council...*, 99–100.

⁵⁴ Tomuschat, *Origins and history of UN special procedures...*, 29.

⁵⁵ Forsythe and Park, *The changing of the guard...*, 4.

⁵⁶ Boyle, *The United Nations Human Rights Council...*, 26.

⁵⁷ Forsythe and Park, *The changing of the guard...*, 4.

⁵⁸ J. Donnelly, *Human Rights at the United Nation 1955–85. The question of bias*, (1988) 32 (3) *International Studies Quarterly*, 279. <https://doi.org/10.2307/2600444>

their very low share of the CHR agenda. Donnelly was of the view that it was partly because developing countries also had a lot to hide regarding their performance on economic and social rights, as not all the problems could be explained exclusively by external factors.⁵⁹

Donnelly was perfectly right in highlighting that while there were serious human rights violations committed by Israel, they were certainly not the worst and there were several counties in Africa, Asia, and Latin America – not to mention the members of the Soviet Bloc – with similar human rights problems, which were never named by any CHR resolution. The most visible bias regarding country situations was that only three states, namely South Africa, Israel and Chile, received a separate agenda item both in the CHR and in the UNGA Third Committee.^{60,61}

According to Donnelly's survey, Africa was almost completely absent from critical comments during this period. Asia and the Middle East were covered slightly better, with the situation in Afghanistan, Iran, Kampuchea and East Timor all discussed. However, the human rights situations in Vietnam, North and South Korea, and the Philippines are certainly missing from the list of issues which should have been discussed by the CHR. Donnelly was of the view that probably, Latin America received the most balanced treatment among all the regions, with resolutions on Bolivia, El Salvador, Guatemala and Nicaragua. However, the absence of Argentina, Cuba and Uruguay from this list is striking.⁶²

Frederick Cowell eloquently demonstrated the important role the campaign against apartheid played in the institutional changes, empowering the body to investigate human rights violations in different countries.⁶³ Important work by Ron Wheeler on the targeted resolutions of the CHR shows that, before 1982, specific country situations could not be discussed publicly before the confidential procedures had been completed.⁶⁴ During the 16-year period (1982–1997) he examined, the CHR considered 1216 draft resolutions. Of these 1196 were passed, 3 failed and, in the case of 17, the CHR voted either to take “no action” or decided to suspend the debate. Of the resolutions, 68% were thematic, not addressing any special human rights violation in a given country. During the period examined, 391 draft resolutions focused on the human rights violations committed by specific actors. The number of targeted resolutions gradually increased from 1982 to 1997. There were only three country-specific drafts which were not adopted during the examined period (USA, China, and

⁵⁹ Ibid. 281.

⁶⁰ Ibid. 290–292.

⁶¹ One of six main committees at the UNGA, it deals with human rights, humanitarian affairs and social matters.

⁶² Donnelly, *Human Rights at the United Nation 1955–85...*, 293.

⁶³ Cowell, *The evolution and design of powers at the UN Commission on Human Rights...*, 69.

⁶⁴ Wheeler, *The United Nation Commission on Human Rights...*, 75–76.

Nigeria in 1995).⁶⁵ It is clear from the list of adopted targeted resolutions, that they were focusing on a few “regional outcasts”, such as South Africa and Israel, and other unpopular regimes, for example Guatemala, Iran and Iraq.

Wheeler manifested the regional imbalances regarding targeted countries during the period between 1982 and 1997 when 294 resolutions, representing 76% of the total, named African, Asian and Latin American states. This was not surprising, since the most serious human rights violations occurred in these three regions and the resolutions focused on civil and political rights, which were lacking in many Third World countries. Without the extreme number of resolutions addressing the human rights situation of Israel and South Africa, the percentage for Asia would drop to 20% from 44%, and in the case of Africa, it would be 17% instead of 35%.⁶⁶ It is interesting to note that no African members of the CHR – except for targeted countries – voted against resolutions (66 altogether) adopted regarding the human rights situation of other African states (Equatorial Guinea, Western Sahara, Rwanda, Nigeria, Burundi and Angola). This was the result of the very soft and moderate language of these initiatives, aimed at obtaining the support of African states.

Between 1982 and 1997, 63 CHR resolutions addressed the human rights situation in 7 Latin American countries (Bolivia, Chile, Cuba, El Salvador, Guatemala, Haiti and Paraguay). Most of the resolutions were co-sponsored or sometimes even drafted by Latin American states but, as was the case with the other regions, major players such as Mexico and Brazil were never mentioned in these drafts.⁶⁷

If we do not count the resolutions adopted on Israel, the CHR rarely targeted west Asian states. Only 10 resolutions were adopted during the examined period, 9 of which were on Iraq, the tenth on Cyprus (which belongs to the Asian Group within the UN system). From South and East Asia, just a few states were named by CHR resolutions: Sri Lanka, Afghanistan, Iran, Vietnam, Cambodia, Myanmar and Indonesia.⁶⁸

Wheeler’s survey indicates that no resolution was adopted regarding the human rights situation in Western European states. The exceptional case was when Portugal was held partly responsible for the human rights violations occurring in East Timor and there were also a few resolutions condemning certain Western states for aiding South Africa. The situation in Northern Ireland was discussed, for example, but it never became subject to a resolution. The USA was targeted on five occasions, mostly implicitly, for instance regarding its strategic cooperation with Israel and its military actions in Panama or Grenada. Two resolutions accused the USA of racism and other

⁶⁵ Ibid. 78–81.

⁶⁶ Ibid. 86–88.

⁶⁷ Ibid. 88–89.

⁶⁸ Ibid. 89.

systematic human rights violations. The first was not adopted, as a no-action motion was initiated, while the second was defeated by a large margin.⁶⁹

From Eastern Europe, the first country named by a CHR resolution was Poland in 1982 and 1983, because of the implementation of martial law measures, followed by Albania in seven resolutions between 1988 and 1994. Romania was the subject of five resolutions between 1989 and 1993, and then it was the former Yugoslavia, which had a permanent place on the CHR's agenda with ten resolutions passed on it between 1993 and 1997. The Soviet Union was condemned by several resolutions because it intervened in Afghanistan and there were several attempts to condemn Soviet policy in Chechnya, but there was finally not one resolution adopted on that issue.⁷⁰

Altogether 37 states (including Croatia and Bosnia-Herzegovina, separately) were targeted by the CHR during this period, which indicated a substantial improvement compared to the previous period, when only Israel and South Africa were highlighted.⁷¹

In their research, James H. Lebovic and Erik Voeten found that, in the post-Cold War era, the Commission's targeting and punishment of countries "was based less on partisan ties, power politics, and the privileges of membership, and more on those countries' actual human rights violations, treaty commitments, and active participation in cooperative endeavours such as peacekeeping operations".⁷²

Steven Seligman examined the post-Cold War period of the CHR and the first few years of the HRC, regarding country-specific resolutions. Based on the examination of the 330 resolutions regarding 34 different states adopted by the CHR between 1992 and 2005, he found that democratic states were more likely to support resolutions targeting states other than Israel. He also concluded that Western democracies were more willing to support targeted resolution than non-Western democracies. Not surprisingly non-democratic states were the least supportive of country-specific resolutions. However, Seligman also found that, contrary to expectations, democracies were not more supportive than non-democracies of resolutions condemning Israel.⁷³ He concluded that the CHR was used by many states to protect friends and criticise enemies and, in this context, the resolutions regarding Israel were usually drafted in a "one-sided manner", while concerning other states such as Sudan, they "were designed to minimise criticism".⁷⁴ The disproportionate focus of the CHR was underlined by the fact that, during the examined period, 24% of the country-specific resolutions targeted Israel.

⁶⁹ Ibid. 90–91.

⁷⁰ Wheeler, *The United Nation Commission on Human Rights...*, 91–92.

⁷¹ Ibid. 98.

⁷² J.H. Lebovic and E. Voeten, *The Politics of shame: The condemnation of country Human Rights Practices in the UNCHR*, (2006) 50 (4) *International Studies Quarterly*, 861. <https://doi.org/10.1111/j.1468-2478.2006.00429.x>

⁷³ S. Seligman, *Politics and principle at the UN Human Rights Commission and Council (1992–2008)*, (2011) 17 (4) *Israel Affairs*, 538. <https://doi.org/10.1080/13537121.2011.603519>

⁷⁴ Ibid. 538.

VI. MAIN FACTORS LEADING TO THE REPLACEMENT OF THE COMMISSION ON HUMAN RIGHTS

Before starting to address the most important elements contributing to the discreditation of the CHR, it should be noted that the CHR did more than any UN body to involve representatives of civil society in international human rights diplomacy.⁷⁵ This transparency continued with the HRC, too. Despite all these achievements during the last years of its existence, the CHR became the target of severe criticism from different circles. The first sign, the one that made the problem visible for the outside world too,⁷⁶ was the 2004 report of the UN Secretary-General's High-level Panel on Threats, Challenges and Change, entitled *A more secure world: our shared responsibility*,⁷⁷ and Kofi Annan's response to it, entitled *In larger freedom: towards development, security and human rights for all* (2005).⁷⁸

However, the process which led to the replacement of the CHR by the HRC had started several years earlier. An important moment was in May 2001, when the USA lost its seat on the CHR for the first time in history. That year, there were four contenders for the three seats available for Western European and Others Group (WEOG), three European candidates and the USA, with the majority of the developing world supporting the Europeans. In 2003, when the USA was again elected to the CHR, Washington intensified its fight against the practice of electing countries with a deplorable human rights record. That year the Libyan ambassador was elected as Chair of the CHR despite the protest from Washington, which lost the vote on the issue.⁷⁹

The political vacuum created as a result of the end of the Cold War had been filled by regional confrontations instead of the East-West divide. The growing CHR membership was followed by an expanding agenda, containing more and more country-specific resolutions contributing to the so-called politicisation of the CHR. As a result, it was increasingly accused of applying double standards in the course of reviewing the human rights record of UN member states.⁸⁰ The main human rights body of the UN

⁷⁵ Lauren, "To preserve and build on its achievements and to redress its shortcomings"..., 324.

⁷⁶ P. Scannella and P. Splinter, The United Nations Human Rights Council: A promise to be fulfilled, (2007) 7 (1) *Human Rights Law Review*, 42. <https://doi.org/10.1093/hrlr/ngl036>

⁷⁷ The Secretary-General's High-level Panel Report on Threats, Challenges and Change, *A more secure world: our shared responsibility*, <https://www.un.org/ruleoflaw/blog/document/the-secretary-generals-high-level-panel-report-on-threats-challenges-and-change-a-more-secure-report-our-shared-responsibility/> (Last accessed: 31 July 2019).

⁷⁸ *In larger freedom: towards development, security and human rights for all: Report of the Secretary-General*, <https://www.un.org/ruleoflaw/blog/document/in-larger-freedom-towards-development-security-and-human-rights-for-all-report-of-the-secretary-general/> (Last accessed: 31 July 2019).

⁷⁹ Boyle, *The United Nations Human Rights Council*..., 27.

⁸⁰ M. Spohr, United Nations Human Rights Council. Between institution-building phase and review of status, in A. Von Bogdandy and R. Wolfrum (eds), *Max Planck Yearbook of United Nations Law*, Vol. 14., (Brill, Leiden, 2010) 173. <https://doi.org/10.1163/18757413-90000052>

devoted more and more time to procedural debates and the practice of the so-called no-action motions, by which procedural motion powerful member states, such as China, blocked the CHR from taking action on certain country-specific resolutions. There were several attempts to reform the body substantially but, finally, only limited reforms took place, affecting the agenda and the working methods. The “institutional jacket” of the CHR, as a result of being the functional committee of ECOSOC, the limited working time, and the facilities allocated to it were not addressed.⁸¹

Despite the unique privileges enjoyed by NGOs in the CHR, civil society increasingly criticised the Commission for not addressing important human rights issues as a result of applying double standards. Many states were also critical of the fact that the human rights problems involving the five permanent members of the UN Security Council (the P5 countries), such as the situation in Tibet (China), Chechnya (Russia), and Guantanamo Bay (USA) were never on the CHR’s agenda. Kofi Annan described this situation as a “credibility deficit”.⁸²

This credibility deficit was also because many states with deplorable human rights records were mainly motivated to join the CHR to protect themselves against international criticism and to criticise their political enemies. Given the loose membership criteria, it was relatively easy to secure 28 votes within ECOSOC.⁸³

Kofi Annan explicitly stated that politicisation and selectivity had undermined the credibility of the CHR and had had a negative effect on the reputation of the UN as well. Consequently, he suggested the establishment of a new institution, the HRC.⁸⁴

As a result, the international community began to prepare to replace the CHR with a new institution, to extend the working time, enhance the quality of membership, make it easier to address crises outside the main sessions, and upgrade the status of the institution.⁸⁵ The international community intended for the HRC to overcome the selectivity, politicisation and practice of double standards of the CHR.⁸⁶ The political decision to replace the CHR with the HRC was taken in September 2005 at the World Summit.⁸⁷

⁸¹ Schrijver, *The UN Human Rights Council...*, 84.

⁸² Y. Terlingen, *The Human Rights Council: a new era in UN human rights work?*, (2007) 21 (2) *Ethics and International Affairs*, 169. <https://doi.org/10.1111/j.1747-7093.2007.00068.x>

⁸³ M. Davies, *Rhetorical Inaction? Compliance and the Human Rights Council of the United Nations*, (2010) (35) *Alternatives*, 452. <https://doi.org/10.1177/030437541003500406>

⁸⁴ L. Rahmani-Ocora, *Giving the Emperor real clothes: The UN Human Rights Council*, (2006) (12) *Global Governance*, 15. <https://doi.org/10.1163/19426720-01201003>

⁸⁵ *Ibid.* 16.

⁸⁶ L. K. Landolt, and B. Woo, *NGOs invite attention: From the United Nations Commission on Human Rights to the Human Rights Council*, (2017) 16 (4) *Journal of Human Rights*, 407. <https://doi.org/10.1080/14754835.2016.1153411>

⁸⁷ N. Ghanea, I. *From UN Commission on Human Rights to the UN Human Rights Council: one step forward or two steps sideways?*, (2006) 55 (3) *International and Comparative Law Quarterly*, 697. <https://doi.org/10.1093/iclq/lei112>

VII. CONCLUSION

The six decades of the CHR cannot be assessed based on the criticisms formulated during the last few years of the most important human rights body in the world. The contribution of the CHR to the international standards-setting activities of the international community in the field of the promotion and protection of human rights and fundamental freedoms was enormous. Such a contribution cannot be negated by criticisms related to politicisation or double standards. These are unfortunate but normal signs of an intergovernmental body, influenced by the political aspirations and agendas of the member states. The CHR did what it could within the confines of Cold War realities, which were replaced by the North-South confrontation in the 90s. Despite these political hurdles, the CHR managed to establish a sophisticated system of special procedures, covering a wide range of thematic issues and numerous country situations. This database, however, is not used enough. This is one of the areas where the international community could do much more in the interests of more effective prevention or management of human rights crises. The Country offices of the OHCHR should have a pivotal role in this context.

A political body like the CHR cannot do more than it is allowed to do by member states and cannot be blamed for being political. The international community decided to replace the CHR with another organ, as many member states thought that a new institutional framework could cure its political deficiencies. It was not surprising therefore that the new body of almost the same size, with the same players and similar political conditions, could not bring about a breakthrough in the international fight against human rights violations.

Pap, Dániel*

The Walking Dead: Should Awards that Have Been Annulled at the Seat Nevertheless be Enforced by Courts in Other Jurisdictions?

ABSTRACT

The question of whether an arbitral award can be enforced after it has been annulled at the seat of the arbitration divides domestic legal orders, academics, and practitioners alike. French jurisprudence – which is one of the most permissive in that it rests on the premise that the law of the seat of arbitration is not the ultimate regulator of the validity of an arbitral award – has been at the centre of the debate for many years. With the 2019 decision of *the Cour d'appel de Paris* enforcing an arbitral award that was annulled in Egypt although not only the parties but also the *lex arbitri* and the *lex contractus* were Egyptian, it is time to revisit the debate and examine why the arguments levelled against the French approach are unconvincing. In this context, the article will analyse the main lines of thought against the enforcement of annulled arbitral awards and will argue that – except for internationally recognised standard annulments – annulled awards can and should be enforced under the New York Convention.

KEYWORDS: arbitration, enforcement, recognition, arbitral award, New York Convention, annulment, set aside, France

I. INTRODUCTION

By virtue of continuous development in the field of international arbitration,¹ one might argue that a certain universal body of transnational arbitration law has emerged that

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¹ See as an example of development: the adoption of UNCITRAL Model Law by more and more countries: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status (Last accessed: 31 July 2019); international treaties governing enforcement and recognition of awards: Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the New York Convention), 330 U.N.T.S. 38 (1959); the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention); the European Convention on International Commercial Arbitration of 1961 done at Geneva, April 21, 1961; and the widespread application of general principles of international law as enshrined in Article 38 of Statute of the International Court of Justice.

governs international arbitration in the same way, right around the globe. The reality, however, is more nuanced. Even among jurisdictions that are commonly referred to as “pro-arbitration”, divergence persists. A typical example of such divergence concerns the enforcement of awards annulled at the seat.

The debate surrounding this subject is an old one.² Nevertheless, no uniformly accepted solution exists, and harmonisation is yet to take place. The two main lines of thought on the matter can be boiled down to the following questions: (i) whether the seat of the arbitration is the mainstay that inseparably connects the arbitration to the legal order of the seat, thereby raising ordinary courts at the seat to the rank of final guardians; or (ii) whether the seat is nothing more than a place of convenience for the parties and, consequently, the courts at the seat should be given no special weight.

In this essay, I undertake to argue that – except for internationally recognised standard annulments – annulled awards can and should be enforced under the New York Convention. I will first present the approach taken by France, the jurisdiction that is leading the way when it comes to the enforcement of arbitral awards annulled at the seat. The French courts’ interpretation will then serve as a basis for the second part of the discussion, on arguments against enforcement and why they hold no merit. Finally, I will provide my conclusion by arguing that local standard annulments should be disregarded for the sake of uniformity.

II. THE FRENCH WAY

It is irrefutable that France is one of the most influential jurisdictions on international arbitration. This is even more so when it comes to the topic of this essay, as French jurisprudence has become the poster child for the pro-enforcement approach. This is because the line of decisions rendered by French courts – beginning in 1984 with *Nolsolor*³ followed up by *Hilmarton*⁴ and *Putrabali*⁵ – gave life to issues surrounding the present topic that had only existed before as fiction in the minds of legal scholars.

² J. Paulsson, *Delocalisation of International Commercial Arbitration: When and Where It Matters*, (1983) 32 (1) *International and Comparative Law Quarterly*, 53–60. <https://doi.org/10.1093/iclqaj/32.1.53>; J. Paulsson, *Enforcing Arbitral Awards Notwithstanding Local Standard Annulments*, (1998) 6 (2) *Asia Pacific Law Review*, 1–28. <https://doi.org/10.1080/18758444.1998.11788058>; A. J. van den Berg, *Enforcement of Annulled Awards?* (1998) 9 (2) *The ICC International Court of Arbitration Bulletin*, 15–21.

³ Note, B. Dutoit, 1985 Rev. Crit. DIP 551 (1985).

⁴ E. Gaillard, *The Enforcement of Awards Set Aside in the Country of Origin*, (1999) 14 (1) *ICSID Review – Foreign Investment Law Journal*, 22–24. <https://doi.org/10.1093/icsidreview/14.1.16>

⁵ Cour de cassation, civile, Chambre civile 1, 29 juin 2007, 05-18.053.

As these decisions have been analysed at length by many commentators,⁶ here I will only summarise the compounded findings of these cases.

The line of argumentation put forward by French jurisprudence in these cases is a combination of the interpretation of Article V(1)(e) and Article VII of the New York Convention and the relevant provisions of the French Civil Procedure Code. In *Norsolor*, the French courts established that there is an interplay between Article V(1)(e) and Article VII of the New York Convention. This allows for the application of the more favourable law in the case of the enforcement of an annulled award. In turn, this leads to the applicable French law as the more favourable law. According to the applicable French rules, the French court may not refuse enforcement of an arbitral award except in limited cases under Article 1502 (now Article 1520) of the Civil Procedure Code. These, however, do not encompass the annulment (or setting aside) of an award at the seat of arbitration as a barrier for enforcement. As such, the domestic review of the arbitral award for which enforcement is sought is based only on the applicable criteria of French law.

The conditions for enforcement of an annulled award were further crystallised in *Hilmarton*. In that case, the award – notwithstanding its annulment in Switzerland – was enforced by the *Tribunal de grande instance* in France. In the aftermath of the French decision on enforcement, a second arbitral award was rendered between the same parties on the same issue in Switzerland. The award creditor sought to enforce the second arbitral award in France. The French courts were faced with the dilemma of how to reconcile three decisions living simultaneously in their legal system: (i) the court decision at the seat of arbitration, setting aside the first award; (ii) the first award enforced in France; and (iii) the second award for which enforcement was sought. After multiple rounds of remittals, the *Cour de cassation* answered the dilemma. Relying on the principle of *res iudicata*, it held that no subsequent arbitral award between the same parties on the same subject matter could be enforced in France.⁷ Consequently, only the first award could “survive”.

In *Putrabali*, the French courts reaffirmed the principles laid down in *Norsolor* and *Hilmarton*. The courts additionally held that an international arbitral award is independent of the national legal order of the seat and that the award’s validity was

⁶ E. Gaillard, L'exécution des sentences annulées dans leur pays d'origine, (1998) 125 *Journal du Droit International*, 645.; C. Jarroson, Note – Cour de cassation (1re Ch. civ.) 23 mars 1994 – Société Hilmarton v. société OTV, (1994) *Revue de l'Arbitrage*, 329–336.; P. Mayer, Revisiting Hilmarton and Chromalloy, in A. J. van den Berg (ed.), *International Arbitration and National Courts: The Never Ending Story* (Kluwer Law International, 2001) 165–176.; P. Pinsolle, The status of vacated awards in France: the Cour de Cassation decision in Putrabali, (2008) 24 (2) *Arbitration International*, 277–295. <https://doi.org/10.1093/arbitration/24.2.277>

⁷ P. Fouchard, La portée internationale de l'annulation de la sentence arbitrale dans le pays d'origine, (1997) (1) *Rev. Arb.*, 329.

to be ascertained by the laws of the country where enforcement is sought.⁸ The courts further clarified the distinction between international arbitral awards and domestic awards in France.

More recently, in 2019, the Paris Court of Appeal decided to enforce an arbitral award that was annulled in Egypt. The particularity of this decision lies in the fact that both parties were Egyptian and the suit concerned a contract with the place of performance in Egypt and where the applicable substantive law was also Egyptian.⁹ In this case, the Paris Court of Appeal progressed previous case law by clarifying that an award is to be considered foreign if it was rendered outside of France, irrespective of whether it can be regarded as international or domestic in nature. Therefore, under French law, an arbitral award can be international, foreign or domestic. Under the new case law, it seems that foreign awards are afforded the same treatment as international awards.

In conclusion, the doctrine of enforcing annulled arbitral awards in France is quite fleshed out: annulment at the seat does not itself constitute grounds for non-enforcement of the award in France. The French courts will analyse the award based on the applicable criteria of French law and decide upon its enforcement under the same rules. Nevertheless, many questions have been raised by opponents of the pro-enforcement approach, which need to be addressed.

III. ARGUMENTS FOR AND AGAINST THE ENFORCEMENT OF ANNULLED AWARDS

In this section, I will analyse some of the most pertinent arguments opposing the idea of enforcing annulled awards and show that none of these arguments is sufficient to conclude that awards annulled at the seat cannot be enforced.

1. The New York Convention prohibits enforcement of awards annulled at the seat

The first argument appears to support an interpretation of Article V(1)(e) of the New York Convention,¹⁰ according to which the enforcement of awards that were annulled at the seat is prohibited. The argument is based on the idea that Article V(1)(e) is to be read as placing an obligation without any discretion on domestic courts to refuse

⁸ Cour de cassation, civile, Chambre civile 1, 29 juin 2007, 05-18.053.

⁹ *Cour d'appel de Paris, Société Egyptian General Petroleum Corporation v. Société National Gas Company (NATGAS)* / 17/19850, 21 May 2019.

¹⁰ Article V(1)(e) of the New York Convention reads in relevant part: "recognition and enforcement of the award may be refused [...] only if [...] the award [...] has been set aside or suspended by a competent authority of the country in which [...] the award was made".

enforcement should any of the scenarios encompassed by Article V come into play. This idea has been refuted by most eminent authors¹¹ and domestic courts alike.¹²

By applying the general rules of treaty interpretation,¹³ we may arrive at the conclusion that enforcement is not prohibited by the New York Convention. First, the use of the modal verb “may” in the first sentence of Article V(1) is a tell-tale sign of the drafter’s intention to allow for judicial discretion. This is also supported by the wording of the equally authentic texts of all other language versions of the New York Convention, bar the French text. Nevertheless, even the French text is not in explicit contradiction to this interpretation.¹⁴ Second, as to the object and purpose of the New York Convention, domestic court interpretation is consistent – the goal of Article V(1)(e) was to move away from the “double exequatur” system of the 1927 Geneva Convention.¹⁵ Therefore, if we accept the premise that Article V(1) is to be interpreted as a non-discretionary obligation, there is a dissonance between the actual text and the drafters’ intention, since this interpretation would entail the same double exequatur mechanism that the drafters wished to avoid.¹⁶ Consequently, as both the textual interpretation and the analysis based on the object and purpose support the approach proposed by French courts, the argument that the New York Convention prohibits enforcement holds no ground.

2. An award annulled at the seat is “dead”

Another argument put forward by some eminent practitioners is that an award has no continued existence once it is annulled at the seat.¹⁷ This idea proclaims that the binding nature of an arbitral award derives from the national legal system of the seat of the arbitration. Hence, the courts at the seat have exclusive competence to decide upon the validity of an arbitral award. The idea also received more traction after the

¹¹ Paulsson, *Enforcing Arbitral Awards...*, 6–11.

¹² High Court of England, judgment of 20 January 1997, per Longmore J (unreported); G. R. Delaume, *Enforcement Against a Foreign State of an Arbitral Award Annulled in the Foreign State*, (1997) (2) *Revue du droit des affaires internationales*, 253–254.

¹³ Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, 331, Article 31.

¹⁴ J. Paulsson, *May or Must Under the New York Convention: An Exercise in Syntax and Linguistics*, (1998) 14 (2) *Arbitration International*, 229. <https://doi.org/10.1093/arbitration/14.2.227>

¹⁵ Paulsson, *Enforcing Arbitral Awards...*, 7–9.

¹⁶ See, *German (F.R.) party v. Dutch party*, President of Rechtbank, The Hague, Netherlands, 26 April 1973, *Yearbook Commercial Arbitration 1979* – at 305–306 (stating that “[a]n important improvement of the New York Convention for the Execution of Foreign Arbitral Awards of 1927 is the fact that the double exequatur leave for enforcement is abolished”); *Joseph Müller AG v. Bergesen und Obergericht (II. Zivilkammer) des Kantons Zürich*, Court of First Instance, Switzerland, 26 February 1982 (holding that “the aim of the New York Convention is to avoid the double exequatur”).

¹⁷ van den Berg, *Enforcement of Annulled Awards?*

oft-cited U.S. Appellate court decision in *TermoRio SA v. Electranta SP*.¹⁸ In that case, the U.S. Appellate court refused to enforce an arbitral award that was annulled at the seat of arbitration. The court relied on the argument that an award does not exist to be enforced once it has been annulled at the seat.¹⁹ According to the U.S. Appellate court, this approach is also in line with the spirit of the New York Convention.²⁰

This argument is, however, refutable when we take a closer look at from where the power of the arbitrators to decide upon the issue derives. As opposed to ordinary courts – whose power to decide disputes are conferred upon them by State legislation – arbitration is a creature of consent. It is based on an agreement between private individuals who, in most scenarios, select a seat based on convenience and logistics and not to root their dispute immutably to one jurisdiction. International arbitration therefore cannot be regarded as a manifestation of the power of the state. In fact, one of the most glaring elements that defines arbitration compared to ordinary courts is the lack of state control over the arbitral process.²¹ As such, it is unconvincing that domestic courts at the seat of arbitration would have the power to extinguish arbitral awards with an *erga omnes* effect towards other States based on this idea.

Furthermore, the idea of “Ex Nihilo Nihil Fit” (nothing comes from nothing) simply does not line up with the text of the New York Convention.²² Both Article V(1) and Article VII of the New York Convention stipulate the possibility of the recognition of an arbitral award despite its annulment. Consequently, any idea claiming that an award is extinguished would render the text in Article V(1) and Article VII of the New York Convention obsolete, in that there would be no award left to be recognised.²³

Hence, if we accept that international arbitration is not tied to one legal system and that the New York Convention allows for the enforcement and recognition of awards annulled at the seat, an award cannot be extinguished via annulment at the seat.

3. Uniformity must be maintained

The idea here is that the enforcement of annulled awards gives rise to inconsistencies in the system. The *Hilmarton* decision is usually singled out as the main perpetrator of this. In *Hilmarton*, as discussed above, there was a point in time when two arbitral awards with a party- and issue identity existed simultaneously in the French legal

¹⁸ *TermoRio SA v. Electranta SP*, 487 F.3d 928 (D.C. Cir. 2007).

¹⁹ *Ibid.* 936.

²⁰ *Ibid.* 937.

²¹ P. Lalive, *Les régies de conflit de lois appliquées au fond du litige par arbitre international siegeant en Suisse*, (1976) (3) *Revue de l'arbitrage*, 155.

²² G. Born, *International Commercial Arbitration*, 3rd ed., (Wolters Kluwer, 2021) 3991–3992.

²³ *Ibid.*

system. Commentators were swift to point out the absurdity of such a result.²⁴ They claimed *Hilmarton* to be a warning sign for things to come should the French approach gain more popularity.

Despite the pertinence of this argument, history has not proved that such fears are valid. Even so, the inconsistency produced by *Hilmarton* was ultimately resolved by the *Cour de cassation*.²⁵ It is to be noted that situations similar to those in *Hilmarton* arise only sporadically. As Professor Paulsson puts it “[Hilmarton] is a two-headed white rhinoceros which might give us a thrill in the cinema but does not really endanger our daily walk to work”.²⁶ This is because awards are rarely annulled, since the grounds for annulment in UNCITRAL Model Law countries²⁷ are very limited. Moreover, the court of enforcement will usually come to the same conclusion on annulment as the seat, since the grounds for annulment will in most instances be the same in the jurisdiction of enforcement.

In any event, the benefits of the pro-enforcement approach, i.e. respecting the principle of party autonomy to the fullest extent and refraining from the encroachment of state sovereignty, far outweigh the issues caused by the possibilities of occasional and temporary inconsistencies in the system.

IV. POTENTIAL SOLUTIONS

The above-raised issues may be resolved at the international treaty level or the local domestic level. This entails either (i) the revision of the relevant articles of the New York Convention so that it leaves no debate on interpretation, or (ii) to maintain the *status quo* and trust State courts to develop an approach organically, that inches closer to uniform as time passes by.

1. Revision of the New York Convention

Some authors have argued that the New York Convention is ripe for revision due to the systematic inconsistencies that have arisen in practice.²⁸ Although hypothetically this could be the fastest way to resolve the issue, in practice this seems unlikely to occur,

²⁴ B. Laurent et al., Fabre, 1995 Bull. ASA, 118.

²⁵ Fouchard, La portée internationale de l'annulation de la sentence arbitrale dans le pays d'origine, 329.

²⁶ Paulsson, Enforcing Arbitral Awards..., 14.

²⁷ Legislation based on the Model Law has been adopted in 85 States in a total of 118 jurisdictions see: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status (Last accessed: 31 July 2019).

²⁸ Hamid G. Gharavi, Enforcing Set Aside Arbitral Awards: France's Controversial Steps beyond the New York Convention, (1996) 93 (6) *Transnat'l L. & Pol'y*, 93–108.

since amending the New York Convention would require all contracting parties to the New York Convention to agree on the amendment without reservations. In today's world, this is close to impossible, therefore we may rule out this solution.

2. Organic adoption of uniform standards by national courts

A more likely scenario is that national courts adopt a congruent solution that rises to the level of uniformity which can settle the issue. The only question is what solution they should adopt.

In my view, the approach heralded by Professor Paulsson is to be welcomed. This is to disregard annulment at the seat that was based on "local standard annulment" and instead only refuse enforcement if it is an "international standard annulment".²⁹ International standard annulment could be anything that falls within the scope of the first four paragraphs of Article V(1) of the New York Convention. *Au contraire*, local standard annulment is anything that is specific to the national legal system of the seat but does not meet the conditions laid down in the first four paragraphs of Article V(1) of the New York Convention.

With the adoption of the UNCITRAL Model Law by more and more States, this uniformity is already taking place. The approach elucidated by Professor Paulsson that is international standard annulment, has also been somewhat adopted in the 1961 European Convention of International Commercial Arbitration. In Article IX of the European Convention, the grounds for refusal of recognition or enforcement are limited to those set out in the first four paragraphs of the New York Convention; in essence, to international standard annulment grounds. Thus, a viable alternative to the total restriction of enforcing annulled awards exists. It offers a way to harmonise the process while simultaneously preserving the transnational character of international arbitration and state sovereignty.

V. Conclusion

At the heart of the question lies a policy issue that needs to be decided by States: upon what should a decision on enforcement or non-enforcement of an award be predicated? Should it be the arbitral award or a judicial decision by a national court at the seat of arbitration?

If the answer to the question is the latter, in my view, that would render the arbitral process no more than a mere spectacle. The award would always need to be

²⁹ Paulsson, *Enforcing Arbitral Awards...*, 23–28.

confirmed by a national court at the seat of arbitration to furnish it with any practical effect. This would amount to granting that court a transnational global effect – extra-territorial jurisdiction. Furthermore, this approach would be a step back to the double exequatur system of the Geneva Convention – an outcome that was to be avoided by the authors of the New York Convention.

By taking the approach argued in this essay, the arbitral award would have to be looked at by the national courts who have the most “skin in the game”: the jurisdiction where enforcement is carried out. It seems counterintuitive to afford more power to the decision of a court that has no interest in the enforcement being carried out rather than the court that permits seizure and sale of assets on their territory. On the one hand, the New York Convention is most certainly not a barrier to this line of thought. On the other hand, it is true that inconsistencies might arise by taking this approach; however, they are rare and methods to deal with such anomalies already exist as showcased in *Hilmarton*. If one is a true proponent of international arbitration on a global scale, the approach to be taken, in my view, is to allow the enforcement of arbitral awards annulled under local standards at the seat.

Mészáros, Árpád*

National Approaches by EU Member States to Concluding Bilateral Social Security Agreements with Third Countries: Hungarian Experiences

ABSTRACT

In this study we are looking for the answer to the question of what kind of Hungarian specific aspects can be identified and what national interests and circumstances determine the Hungarian legislation, when concluding bilateral agreements on social security coordination. Not only EU membership itself, but the preparation for it had an important impact on the Hungarian regulatory goals, the applied tools and the formation of the room to manoeuvre in this field. We can conclude that EU principles essentially define the rules and tools of modern Hungarian bilateral agreements.

The fast development of the EU legislation in the field of social security also soundly defines the national room for manoeuvre when concluding agreements at bilateral level with third countries. Taking the *Gottardo* case into consideration in particular, we can see that there is a very clear EU impact on those rules. We analysed several specific issues that are relevant in modern Hungarian agreements in respect of the EU law impact:

- the scope of the agreements (material, personal);
- the applicable legislative rules and some specific benefits under the scope of the agreements;
- the principles in the agreements and the assimilation of facts especially.

In conclusion it is clear that Hungary has an effective bilateral system of tools that protect the rights of those affected by mobility. This is a stable set of tools and altogether a system that can operate for many decades. However, it is also clear that it worth building on, and on this basis to develop the system of agreements further.

KEYWORDS: bilateral social security agreements, protection of social security rights, EU and agreement principles, *Gottardo* case, applicable legislation

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I. INTRODUCTION

There are many different approaches for securing the rights of citizens and aiming at avoiding conflicts of law in the field of social security. It is not surprising when a person is obliged to accept that his or her situation is not only covered by the national rules of his or her country, but also the rules of another country. Having said that, it creates a lot of challenges that need to be faced.

For a country that is a Member State of the European Union, or at least a member of the Council of Europe, providing protection in respect of social security rights outside of its own territory is a much more complex challenge. In these organisations, membership not only entails providing rights for the members but these countries also need to accept the obligations arising from supranational law,¹ or the relevant international law² in respect of the basic principles and rules in the field of social security.

In 2018, a special volume of the *European Journal of Social Security* was devoted to reporting several very important contributions by experts from legal practice and science under the umbrella of a conference to explore the external dimensions of social security coordination.³

In this article, inspired by this volume and especially by the contributions related to national approaches of EU Member States in concluding bilateral social security,⁴ I would like to present the Hungarian approach and practical experiences in this respect.

II. THE EUROPEAN LEGISLATIVE ENVIROMENT

In EU law, as a result of a complex development process the so-called social security coordination rules⁵ provide the highest possible level of protection for the practical

¹ Although in principle bilateral agreements do not have to be literally in conformity with the overriding Treaty provisions on the free movement of workers' EU social security, there are nevertheless some very important fields where it is not appropriate not to take into consideration some relevant principles arising from EU law. For this, see the EU social security coordination rules.

² European Social Charter of the Council of Europe, <https://www.coe.int/web/european-social-charter/home> (Last accessed: 31 July 2019).

³ (2018) 20 (2) *European Journal of Social Security*, 1–216.

⁴ See especially: F. Pennings, National approaches of EU Member States in concluding bilateral social security agreements with third countries: The case of the Netherlands, (2018) 20 (2) *European Journal of Social Security*, 162–172. <https://doi.org/10.1177/1388262718771787>; B. Spiegel, National approaches of EU Member States in concluding bilateral social security agreements with third countries: The case of Austria, (2018) 20 (2) *European Journal of Social Security*, 148–161. <https://doi.org/10.1177/1388262718780747>; G. Strban, Member States' approaches to bilateral social security agreements, (2018) 20 (2) *European Journal of Social Security*, 129–147. <https://doi.org/10.1177/1388262718771789>

⁵ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004, Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (Text with relevance for the EEA and for Switzerland).

implementation of the four fundamental freedoms, in particular the free movement of workers, and then persons in general.⁶ As a cornerstone of EU law, it is essential that, in addition to enshrining and protecting freedom of movement, the Treaty on the Functioning of the European Union (hereinafter TFEU) specifically provides for the protection of the social security rights of workers under Article 45 TFEU.

At the same time, even the EU itself has not created a substantive EU law that applies uniformly to EU citizens, providing the same level of benefits and eligibility rules in all countries.

As far as adequate protection is concerned in the EU, the development of a system of rules for the coordination of national legal systems and their conflict-free cooperation was already established in 1958.⁷ Its dynamic and continuous development since then has been decisive for the development of EU citizens' rights today.

The EU does not provide exclusively EU-level social security benefits, but the coordination rules of the EU guarantee that the persons concerned enjoy equal treatment and full protection throughout the Union in the application of all relevant national legislation as regards the principles of portability of benefits and aggregation and preservation of acquired rights. It has now become clear that it is particularly important for national legislators to pay attention to the implementation of Articles 18 and 45 of the TFEU. That is to say, respect for the principle of equal treatment and the fact that the obligation to prohibit discrimination against workers can only be waived if very strict conditions for dismissal are met are the cornerstones of all social security legislation.⁸ These are guaranteed to citizens by EU law for all social security risks.⁹

Having said that, it is also true that even EU Member States have much more freedom and more control over where, when and how to accept international obligations when creating bilateral social security agreements with third countries. Traditionally, it seemed undisputable that States are free to conclude bilateral agreements in any way they find appropriate. Their freedom in this process is not controlled by others, just the contracting states, and the courts the contracting states are empowering in this respect, even if those are national courts or some kind of board of arbitration.

⁶ Gellérmé Lukács É. and Gyulavári T., Szociálpolitika és foglalkoztatás, (2009) (különszám) *Európai Tükör*, 199.

⁷ Regulations (EEC) No 3 and No 4 from 1958 were replaced by Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community for EEA/EU nationals and by Regulation (EEC) No 574/72 implementing the Regulation (EEC) No 1408/71. Then, with effect from 1 May 2010, Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 on its implementation replaced the previous rules.

⁸ Case C-55/00, *Gottardo* (European Court of Justice of 15 January 2002) point 35.

⁹ A.-P. van der Mei, P. Melin, Z. Vankova and H. Verschuere, The external dimension of EU social security coordination, (2018) 20 (2) *European Journal of Social Security*, (81–85) 81. <https://doi.org/10.1177/1388262718771734>

As a starting point, it seems to be a simple case; however, the reality turns out to be more complex.

In respect of every bilateral relationship involving EU Member States, it needs to be taken into consideration that although sovereign nations, at the same time our countries are members of the European Union, which not only in principle but also in practice seriously affects our bilateral relationships with non-EU Members.

EU law can be interpreted as binding law primarily in relation to the law of the Member States of the European Union and their territories. However, there are cases where not only the territory of the Union is affected by existing Union law. It might happen that it is necessary to be considered the applicable law, when the person concerned is not and never has been living in a Member State (e.g. in some special cases of export of pensions). It might also happen that the direct effect of some legal instruments goes beyond the internal rules of the Member States.

One of the aims of this article is to explore and highlight a distinct part of these kinds of cases and their impact on the national room to manoeuvre in the field of social security agreements.

EU Member States, and thus Hungary, provide and develop the network of social security protection established jointly with non-EU member states and third countries primarily through bilateral agreements. Today, this area of law is also significantly influenced by the development of EU law.

Therefore, in order to get a complete picture and fully understand this complex issue, it is worth examining exactly how EU law affects the bilateral social security relations of the European Union member states, and thus Hungary, in this area of traditionally exclusive national competence.

This article also aims to analyse the bilateral agreements on social security concluded by Hungary in the light of the relevant international and especially the supranational rules (EU rules).¹⁰

III. WHY IS IT IMPORTANT TO CONCLUDE SOCIAL SECURITY AGREEMENTS?

To answer why it is necessary for an EU Member State to conclude bilateral agreements, we need to take into account the following. Cooperation and association agreements, in the field of social security, have been concluded by the EU itself with a number of partners to date. However, their success in practice is more than questionable;¹¹ even if

¹⁰ See especially the Regulation EC No 883/2004.

¹¹ For a systematic review of this, see K. Eisele, Social security coordination in Association Agreements: Is a common EU approach with third countries in sight?, (2018) 20 (2) *European Journal of Social Security*, 116–122. <https://doi.org/10.1177/1388262718771785>. After acknowledging the initial

more or less successful, they are in no way a real substitute for the conclusion of bilateral agreements. The failure of these agreements also provides us with an opportunity to see that some key specific and sensitive topics can help to identify the theoretical and practical implications of EU law on national contracting.

One of the most striking effects of EU law on bilateral conventions is the case law arising from Member States' obligations, which points to the limits of regulatory freedom, and in particular the judgment in Case C-55/00, *Gottardo* (European Court of Justice of 15 January 2002). This judgment shed light on the extent to which Member States' contracting practices cannot be independent of EU law obligations. In 2012, József Hajdú reviewed the situation of Hungary's bilateral agreements in connection with the interpretation of this specific case.

Based on his systematization, of the concluded agreements, it is obvious that Hungary has a comprehensive circle of agreements. According to him, the Hungarian agreements can be typified in many ways. The developments of the agreements can be identified from a period to a period on the basis of historical, political and economic reasons. We can take several tipifying principles into account, namely the circle of states with those the first agreements were concluded (Member States of the Council for Mutual Economic – COMECON) and the reasons, to review those after 1990, the preparations for the EU accession, or the membership position in the EU after 2004, the review of the legislation in respect of the rights of persons with Hungarian origins living in the neighbouring countries as minorities and so on.)

Of course the aim is not to analyse in depth the structure of each of the Hungarian bilateral agreements and make a systematically widespread examination of the different rules of those in respect of the rules of Regulation 883/2004. The aim of this paper is to highlight the trends and turning points of the development of the legal provisions of this specific field.

There are several so-called social security agreements. Several new instruments,¹² and also the process of renewing some earlier instruments fell into the period of the accession and the early years of Hungary's EU membership, and most of our legislative experiences in this field are based on this period. Taking this into consideration, the present examinations aim to put an emphasis on the EU legislation inputs and interactions between social security-related EU and bilateral level norms.

success of the agreements, the author points out that, according to their very nature, they seek to address the acquisition of rights by third-country nationals staying (working) in the EU, in particular the preservation of these rights. However, the recent EU-advocated revision or drafting aimed at protecting the rights of EU citizens in a third country no longer encounters particularly strong support from relevant partners (e.g., even in the case of Turkey).

¹² Hungary has a long tradition of concluding bilateral social security agreements with third countries. Although today agreements with several European and overseas countries are in force or have at least been signed, (at about 20) the total number of agreements signed at one time is much higher.

There is not a single static driver behind social security agreements; the motives of the states are naturally different, and are changing constantly. From time to time, the emphasis shifts according to the new challenges that states face. Nevertheless, it is not a mistake to identify some leading factors that need to be considered as serious or basic drivers, including the number of people immigrating from or emigrating to a specific country, and the economic relationships and special needs of specific partner countries.

With respect of the Hungarian development process of the social security legislation in the field of international relationships, not taking the traditional historical roots from before the second world war into consideration, we can speak of a mainly-three step process.

As a first step, the COMECON countries, at the end of the 1950s and the beginning of the 1960s, established a system of a bilateral social security agreement net between each others. The main motivation behind these agreements could be defined as purely political, namely to strengthen the association between the socialist countries; nevertheless, though it did not occur often, where there were some movements between countries, those agreements provided a special kind of protection for the persons concerned.

Second, upon opening in a way to the Western European countries, especially in respect of benefits in kind, new kind of agreements were introduced in the 70s and 80s.¹³ These could have real effect only in respect of short-term stays in other countries in emergency health situations.

The third period started after the dissolution of the Soviet bloc, when the central and eastern European countries joined the Council of Europe, and established open economies. Progress was not very strong to begin with and stalled for a decade, but the opportunities of joining to the EU provided a strong impetus to renew the system of Hungarian bilateral social security agreements around 2000. It was at this point that we could talk in real terms of defining the rights of citizens, and European principles for providing protection for those attracted by the free movement opportunities, namely some kind of “European-like benefits”.

The first of the new kind of agreements (before EU accession) could be called European-type agreements, and the processes of negotiating them had two aims, first, to establish modern relationships and real, living coordination mechanisms with our

¹³ E.g., the Finnish and British health agreements, see:

1) a Magyar Népköztársaság Kormánya és a Finn Köztársaság Kormánya között Budapesten, az 1978. évi június hó 27. napján aláírt, az egészségügy, az orvostudomány és a társadalombiztosítás területén történő együttműködésről szóló Egyezmény kihirdetéséről szóló 15/1979. (IV. 15.) MT rendelet;
2) a Magyar Népköztársaság Kormánya és Nagy-Britannia és Észak-Írország Egyesült Királysága Kormánya között Budapesten, az 1978. évi november hó 1. napján aláírt, az orvostudományi és az egészségügyi együttműködésről szóló egyezmény kihirdetéséről szóló 21/1979. (VI. 26.) MT rendelet.

neighbour countries, our European partners¹⁴ based on the principle of insurance (protection of acquired rights; social security services are provided by the competent state based on acquired rights in its social security system); second, to prepare the country for the challenges of social security coordination in the EU well in advance of accession. This specifically meant adopting and using the coordination rules and mechanisms of the EU at bilateral level with both EU members and third countries alike.

After renewing relations with our neighbours, exchanging the former socialist-type agreements with Council of Europe and the European Union principle-based modern agreements, and gaining a lot of experience, as a Member State of the EU, the world definitively opened for Hungary. Several overseas countries became interested in establishing legally formed cooperation mechanisms, and concluding agreements as legal instruments in the field of social security with Hungary. This second group of agreements could be classified broadly as overseas-type agreements.

Modern agreements (being in the third group) need to be analysed in greater depth in order to understand the effects of EU law on Hungarian agreements. In this respect, we do not present a full picture here of all of the legal instruments (those that are more interesting from a historical point of view, and not from the perspective of our present goal), but it is a very complex picture in itself to compare the development of these modern agreements with the evolution of EU law.

To understand the impacts, we need to take into consideration the process of the evolution of the direct impact of EU legislation on the bilateral agreements of the Member States.

IV. THE EVOLUTION OF THE DIRECT IMPACT OF EU LEGISLATION

For this reason, the case-law decisions of the Court of Justice of the European Union are worth examining, as the most significant indicator of the development of EU law. Starting from identifying the importance of case law, we need to take into consideration the relationship between EU secondary law, in particular Community regulations and bilateral agreements. On this basis, we can conclude that this is a very complex issue. It cannot be stated that Community law always takes precedence in the event of a conflict of norms, even if the agreement concluded is, as a general rule, subject to that primacy.

Clearly, with regard to issues of conflict between bilateral agreements and Community law, the Court first examined the agreements concluded between the

¹⁴ The only exception was the case of Canada, with whom a so-called overseas type agreement was concluded in 2003 (Act 49 of 2003) (hereinafter, when citing a Hungarian social security agreement I refer it by the name of the country and citing the Hungarian Act that promulgated it [e.g. the Canadian agreement (Act IL of 2003)].

Member States before their accession (intra-EU relations). Here we can see a well-outlined development curve, with the broadening interpretation of citizens' rights in the *Wader, Rönfeldt and Kaske* cases, which are consumer-friendly decisions, then in the cases of *Thévenon and Rodriguez*, which further clarified the earlier broadly defined rights (namely, by narrowing them).¹⁵

In essence, no social security agreement concluded by a Member State with a non-member country was examined by the Court until the *Grana Novoa* case (1992¹⁶). Even so, its decision did not affect the Member States' full freedom of interpretation in respect of the rules of the agreement with the third country, nor did it identify a restriction justified by Community law.

The *Gottardo* judgment¹⁷ fundamentally changed this situation in 2000. Although it was decisive and clear that Member States should treat nationals of other Member States in the same way as their own nationals when applying their bilateral conventions, a case from 2018¹⁸ (*EU* case) before the Court showed that, more than a decade and a half after the former decision, it was far from clear that the Member States' authorities have a general obligation¹⁹ to apply the *Gottardo* rule, treating nationals of other Member States in the same way as their own nationals.

Taking the *Gottardo* case into consideration as well, we can identify which provisions of bilateral agreements are primarily affected by the judgment, and through it by EU legislation, either directly or only indirectly. When trying to establish those principles and rules of the EU – and also appearing in the bilateral conventions – that are fundamentally affected, it is worth paying particular attention to the following issues:

1. personal scope; the separation of open and closed personal scope social security agreements and the relationship of personal scope to the principle of equal treatment, which also show the extent to which the application of the *Gottardo* clause²⁰ is mandatory and where it makes sense at all;
2. to regulate the assimilation of facts, which typically results from the development of EU law;
3. the limits of equal treatment, (issues of exemption, objective justification);
4. institutional cooperation with a third country, its openness to cooperate.

¹⁵ Relevant ECJ Cases: *Walder* Case C-82/72, ECLI:EU:C:1973:62; *Rönfeldt* Case C-227/89, ECLI:EU:C:1991:52; *Kaske* Case C-277/99, ECLI:EU:C:2002:74; *Thévenon* case C-475/93, ECLI:EU:C:1995:371; and *Rodriguez* Case C-113/96, ECLI:EU:C:1998:203.

¹⁶ *Grana Novoa* Case C-23/92, ECLI:EU:C:1993:339.

¹⁷ See the *Gottardo* case cited above.

¹⁸ *EU* case C-801/18, ECLI:EU:C:2019:684.

¹⁹ Taking into consideration the *Gottardo* judgment and, more broadly, the consequences of case law decisions, we can point out that the EU institutions, in particular the Commission, quickly identified the significance of the *Gottardo* judgment and encouraged the Member States to apply the principle fully (not only in respect of pensions, but in a much broader context of social security benefits).

²⁰ See later in VI.2. first paragraph.

From this perspective, the following issues are worth taking into account in the modern Hungarian agreements:

- the scope of the agreements (material, personal),
- applicable legislation,
- principles in the agreements,
- assimilation of facts,
- institutional cooperation especially in specific cases (data protection issues, *Gottardo* clause, interpretation).

Taking into consideration this framework of the necessary (required) minimum progress of the Hungarian agreements in the last two decades, we can see the following general characteristics in them.

V. THE SPECIFIC CHARACTERISTICS AND THE DEVELOPMENT OF HUNGARIAN BILATERAL AGREEMENTS

1. The scope of Hungary's bilateral agreements

According to the general characteristics of Hungarian agreements, we can distinguish two groups, territorial and insurance-based agreements. Being part of the first group, the social policy agreements with Poland, Bulgaria for example basically belong(ed) to the group of territorial agreements, the essence of which is that, as a general rule, the country in whose territory the person concerned resides provides the benefits at his own expense.

Before the accession to the EU the most important goal was to be prepared for it, and be prepared in practice for the obligations arising from the obligatory introduction of the EU level social security coordination system. This meant that the Hungarian negotiating positions, especially with EU Member States or accessing countries, were determined by the direct objective of approaching the bilateral rules to the EU legislation as closely as possible. Of course, it did not mean that the EU regulations as whole could be introduced, but the intention was very clear; to conclude agreements as broad in their scope as possible and create insurance-based agreements.

Following the accession to the European Union, other driving principles on the Hungarian side have further nuanced Hungarian interests. Thus, in particular, the replacement of the old territorial agreements, the renewal of existing relations with neighbouring countries, and the settlement of the situation of the Hungarian minority living outside the borders of Hungary as advantageously as possible were very important. However, it can be stated in general that, in the first decade of the third millennium, the Hungarian side aimed not only to regulate the rights of workers and their family members moving from one country to the other in order to have employment there, but

even more broadly, in respect of as many (pensioner, students, etc.) persons as possible. As such, we can say that, during this period (namely the pre-accession period, and the early years in the EU), the EU and bilateral regulatory trends, although not identical, were definitely pointing in the same direction.

That it was to be changed was made very obvious when Hungary, as an EU Member State, became a possible important regional partner for some important big countries that were more or less only economically interested in our Central European area (USA, Japan, India, South Korea). This not only meant stepping back to the protection of the interest of workers only as a first target, but it also meant reducing the targeted social security benefits (and the national legislation) under the scope of the agreements. This was especially visible in respect of benefits in kind, as we will see at a later stage of our analysis.

An attempt can be made to group the Hungarian bilateral instruments on the basis of who is covered by the personal scope of the agreement. Socialist conventions basically cover the citizens of the contracting parties.²¹

With regard to modern agreements, the scope of the agreement is extended by Hungary to all persons entitled to benefits under Hungarian law (insured persons, persons entitled to cash benefits and, in some cases, persons entitled to health care in kind). In the case of these agreements, it is not the Hungarian citizenship that is decisive, but the scope of the Hungarian social security legislation applied.²² This principle is essential, because all our agreements seek to ensure equal treatment of all those subject to Hungarian law.

2. Specific questions of the applicable legislation rules in the agreements

In the modern Hungarian agreements, the second part regulates the clear definition of the applicable law in the case of employment or residence in the territory of another country. As a general rule, the employed person is subject to the legislation of the place of employment, with precisely defined exceptions.²³

Among the rules of applicable law relating to employment in the territory of another country, the agreements state, as a general rule and in accordance with

²¹ Thus, for example, entitlement to health care in kind does not have to be proved by a document certifying the existence of an insurance relationship, but simply by a passport proving the nationality of the other country, as is the case today, for example in respect of Ukraine.

²² In this respect, it could be defined as “open” personal scope agreements as was introduced by Spiegel according to the Austrian legislation: Spiegel, *National approaches of EU Member States...*, 152.

²³ See for example the German–Hungarian social security agreement (Act XXX of 2000) as a very EU characteristic example (Article 11), or the USA agreement (Act XXIX of 2015) where the detailed applicable legislation issues were definitely in the focus because of their economic importance (Article 5).

European standards and the principle of equal treatment, that the employee's insurance obligation is governed by the law of the Contracting State where the person concerned is gainfully employed.

In contrast with the clear but very short general rules, the exception rules are visibly longer in the agreements. Exceptions to the general rule are, *inter alia*, persons employed in the public services but fulfilling their work obligations in the territory of the other Contracting Party, workers posted by the employer to the territory of the other country (self-employed persons also in most cases), or persons employed in international transport. The agreements generally provide for the possibility for the national competent authorities to grant certain further exceptions to the rules of the agreements in respect of certain persons, subject to the application of the law of one of the Contracting States. In the case of countries that are relatively far from Hungary, from an economic point of view, these exception rules are of fundamental importance. These "economy-led" agreements very clearly try to handle a sometimes stronger, sometimes less pronounced, but nevertheless important economic issue, namely defining the special cases where it is possible not to apply the general rule when determining the applicable law.

The bilateral agreements, in line with modern international forms of employment and investment relations accepted in Europe,²⁴ allow the insured person to be posted to the territory of the other Contracting Party for a longer period (from 12 to 60 months, but usually the latter) For that period, the employed/self-employed person remains under the legislation of the sending State.

This also means that the posted person retains his/her insurance relationship in the sending State (fulfilling his/her social security obligations, in particular the payment of contributions). This is in stark contrast to the EU approach, which applies a much stricter rule in relations between EU Member States. However, we need to emphasise that this approach has a significant impact on economic investment and major industrial and industrial developments. There can be several understandable reasons for granting an exception.²⁵

However, these exemptions are always well-defined exceptions to the *lex loci laboris* principle in the agreements. To apply them in a proper way requires close cooperation with the authorities of the host country.

The in-depth regulation of this right will continue to be important in the future in the agreements, even though the EU Member State approach to regulating postings

²⁴ 12 months under the scope of the regulation 1408/71 EEC, 24 months under the scope of Regulation 883/2004 EC.

²⁵ It is sometimes difficult, for example, to find a professional who undertakes to work abroad in a senior or middle management position, or in highly specialised work processes of special importance to the activities of a given company or group of companies, by falling out of the scope of its country's social security legislation and having his or her employment contract still with the company in the sending country.

will have to take into account the growing restrictions on national freedom, taking into its obligations as a Member State of the Union into consideration.²⁶

One of the important limits is the case of EU law primacy. With regard to the legal status of posting involving several EU Member States, it is no longer disputed that, if this condition is met, the applicable legislation shall no longer be governed by the rules of the bilateral agreement, but by EU coordination regulations. The trends of curtailing the limitless freedom of Member States and the need to develop the protection of the rights of workers was very visible in the last decade. The EU itself has taken very important steps to improve its own position and tools further, to help the Member States in their cross-border disputes and difficulties of cooperation regarding their labour markets. For this, we can recall the example of the establishment of the European Labour Authority.²⁷

At the same time, even if an agreement is concluded for the purpose of economic importance alone (it is clearly targeted, for example, in the cases when China starts negotiations), in addition to the positive economic effects, the persons covered by the agreement, who could be many more than the posted workers, may benefit from the existence and application of the agreements when those agreements can cover at least some basic benefits. If it could be achieved by concluding an agreement to cover at least the long-term benefits (for examples pensions), it is worth concluding an agreement.²⁸

On the Hungarian side, special questions of interpretation regarding the rules of posting usually arise with those overseas countries that can show the limits of the possible impacts of the EU legislation principle.

Where there are already explicit economic reasons behind the agreement, the rules of applicable law are very often decisive, when deciding whether to conclude an agreement or not, especially when the Hungarian law giving a unilateral provision that is opposite to the more flexible rules in the agreements on posting creates a much less flexible framework for investor companies. The Hungarian law allows for a maximum

²⁶ The rule is not unilateral; not only the person sent to Hungary, but also the person sent from Hungary is exempted from the application of the law of the host country, but there is a clear limit for the application of the agreement when the EU law prevails, because the conditions are fulfilled (for example the person from a third country pursues its activity in two Member states during the time of being posted to Hungary).

²⁷ The social security coordination mechanisms have direct cooperation with the European Labour Authority (ELA) when the ELA signals the social security posting issues for further management to the relevant EU institution, namely the Administrative Committee functioning under the scope of the 883/2004 Regulation: for further in depth analysis of the ELA see É. Gellérné Lukács, European Labour Authority: The guardian of posting within the EU?, (2018) 5 (1) *Magyar Munkajog/Hungarian Labour Law*, 1–21.

²⁸ See the South Korean agreement (Act LXXIX of 2006).

of two years,²⁹ whereas, as we mentioned earlier, especially with overseas states, this is usually extended by agreements for a much longer period (5 years).

Several specific issues could arise during negotiations. For some concrete example let us see some issues from practice.

The legal situation of a person already on secondment who is further posted from a third country to the territory of one of the Contracting States may be a sensitive issue. That is, for example, by terminating the posting of a Japanese worker in Ukraine for 3 years on 30th June, is it possible for the person to move into Hungary under the scope of the Japanese agreement for the period of the maximum 5 years specified in the agreement and start to work there on 1st July of the same year? Technically, it is a fact that the person concerned physically moves only between Ukraine and Hungary. Even though the answer is yes, because it is irrelevant under the scope of the Japanese–Hungarian agreement where the person physically comes from, Hungarian law does not preclude it. From the perspective of the agreement, the posting of this person starts on 1st July, regardless of what happened earlier. Therefore, Hungarian law does not pose an obstacle. This is of course not the case under the scope of the EU law.

Another question is whether you can send another posted worker from the company to the same position, replacing the former posted worker. It essentially means a continuous posting (replacement posting). The answer is that the agreement does not exclude it, and so it is not excluded by Hungarian law, when at the same time it is an essential issue in the EU that replacement posting shall be avoided and forbidden.

Can the receiving company (the company of the place of secondment) conclude a second employment contract with the posted worker, and could the person generally be excluded from the Hungarian insurance system? The answer is that there is a clear possibility for it, if this is expressly permitted and regulated by the agreement.³⁰ This is also not a welcome approach according to the EU law.

These practical issues can be satisfactorily resolved bilaterally in terms of a common interpretation, although they do require careful consideration in formulating

²⁹ See Section 17(2) of Act CXXXII of 2019 on the Eligibility for Social Security Benefits and the Funding for these Services, which regulates the legal relationships those are not covered by the insurance under the scope of the Act (i.e. posting, secondment or temporary staff for a maximum two years in respect of a foreign worker).

³⁰ For this a very good analogical example introduced by Spiegel was the Canadian posting rules interpretation where, in the cases of the new labour contracts within the same group of undertakings, when the person is sent from a mother company to the daughter company in another country, the new labour contract in this daughter company shall not change the legal status of the original posting. See Spiegel, *National approaches of EU Member States...*, 156. It was almost the Hungarian case in respect of the USA, and therefore there was a clear need to include a special rule in the agreement as Article 5 paragraph 2 handling the posting between the mother and daughter company. On the contrary, Regulation 883/2004 EC excludes the conclusion of a new labour law contract in the country of activity, or using another text to cover such cases with a new labour law contract under the posting provision.

common provisions to ensure the two authorities and institutions applying the agreement really mean the same thing.

However, the limits can be very visible if the EU rules should be taken into consideration. It is all the more surprising for partners if these rules above are interpreted quite differently because of the involvement of a third country which is another EU Member State (for example working in Hungary but living in Slovakia). In this case, it is no longer the bilateral rules that apply, but the EU posting rules. On the basis of these, replacement posting is prohibited. Forwarding from one state to another can only be interpreted as a posting if the permitted time abroad is not exceeded; that is, the EU limit of 24 months in total applies immediately. Furthermore, it is not possible to conclude an employment contract with the employer at the place of posting, subject to the provisions of the Community Regulation.³¹

It is obvious that this part of the agreements is not only very essential, but at the same time a very sensitive issue to conclude as an EU Member State with third country partners.

3. Principles in the agreements

The Hungarian regulatory principles are clearly intended to ensure that the agreements grant the closest possible alignment with the European Union coordination principles, especially the following:

- the right of persons subject to the law of both Contracting Parties to equal treatment and equal treatment of the facts;
- the maintenance of rights already acquired under the law of both Contracting Parties;
- access to benefits outside Hungary and the country providing the benefits, i.e. anywhere in the world (export principle);
- a clear definition of the applicable law shall ensure, on the basis of coordination rules, the elimination of double insurance – and the associated double payment of contributions – and, as far as possible, the exclusion from insurance schemes (conflict of law);
- the aggregation of periods of entitlement already acquired under the law of both Contracting Parties;
- the application of the reimbursement (accounting) principle; that is to say, benefits and, in particular, their financing are, in principle, the responsibility of the institution whose law is applicable, namely the obligation of the so-called competent institutions;

³¹ A new labour law contract excludes posting under Article 12(1) of Regulation 883/2004/EC.

– a proportionate burden on the social security systems of the Contracting Parties and the provision of adequate administrative systems for smooth implementation.³²

In its bilateral agreements, Hungary aims to lay down the principle of equal treatment, rules on the transfer of benefits abroad, the avoidance of overlapping benefits and assimilation of the facts.

The purpose of these provisions is to ensure that beneficiaries are treated with the same rights and obligations as regards their benefits when applying the social security legislation of the two countries. Thus, for example, conventions guarantee the security of the transfer of benefits abroad: benefits are paid to persons in the territory of the other Contracting State in the same way as to persons in the territory of the State of payment and they may not be reduced, suspended or refused on the grounds that the insured person is in the territory of the other country when providing the benefit.

As it is the case in several EU Member State (for example, Austria³³) we see an important difference between equal treatment under EU law and under the bilateral agreements concluded by Hungary. It is that the provisions under the bilateral agreements rule only against direct discrimination, while it is a well-known obligation in the EU to avoid even indirect discrimination. The bilateral agreements are not so deeply sophisticated. The reason behind it is almost the same as, for example, in the case of Austria,³⁴ namely the Hungarian social security scheme is not a nationality-based but an insurance-based system. Being so, it is quite clear that, on the basis of nationality, discrimination is not real threat for migrant workers.

The principle of assimilation of facts is a very widely used rule in agreements involving Hungary and is defined in the EU legislation.³⁵ It is connected to the principle of equal treatment, according to the juridical development work of the Court of Justice.³⁶ We can often find this basic rule of principle in the Hungarian agreements after the accession of Hungary to the EU.³⁷

³² Pauline Melin defines five driving principles in respect of EU coordination: conflicts of law, equal treatments, aggregation of periods of insurance or employment, export of benefits and administrative cooperation. P. Melin, *The External Dimension of EU Social Security Coordination – Towards a Common EU Approach*, (Brill–Nijhoff, Leiden–Boston, 2019) 302. <https://doi.org/10.1163/9789004415331> However, I felt it important to give those guiding principles in a little broader context.

³³ Spiegel, National approaches of EU Member States..., 153.

³⁴ Ibid.

³⁵ Under Article 5 of the Regulation 883/2004 EC this principle could be found as an explicit rule of the principle of assimilation of facts.

³⁶ Spiegel mentions the good example of *Carlos Mora Romero v Landesversicherungsanstalt Rheinprovinz* Case (Case C-131/96, ECLI:EU:C:1997:31). In its judgement the Court decided that German legislation under which an orphan's pension is prolonged by the duration of military service in Germany has also to be extended by a military service in another Member State. See Spiegel, National approaches of EU Member States..., 154. fn. 31.

³⁷ For example see the serbian agreement (CCXXXIV of 2013) Article 6.

Respecting the export of benefits principle at the same time, and taking into consideration the possible restrictions according to EU legislation, it is a valid question whether there is not a possible practical reason for narrowing the material scope of the agreements. Definitely, with regard to special non-contributory benefits, family benefits and unemployment benefits, it is understandable (not only from the Hungarian but from the partner point of view) that the negotiating parties are not ready to include these kinds of benefits. The acceptable hesitation is understandable, taking into consideration the fears within the EU those leading to the Brexit for example in respect of family benefits export cases.³⁸

Hungarian agreements exclude general social assistance (means tested benefits of a social nature) from the scope of the export of benefits principle. The general rule is that they are not to be exported. The objective reasoning for this, accepted by the Council of Europe approach too, is that the income status of a person living or staying in the territory of another state cannot be precisely determined or controlled by the state providing the benefits.

There is a limited number of agreements that go further in respect of the material scope of insurance-based long-term cash benefits, namely pensions. Moreover, the export clause in pension agreements has no real impact on Hungarian bilateral agreements. The Hungarian system – because of its open, insurance-based approach, necessarily provides for all entitled persons to move and receive their benefits abroad.³⁹

Considering short-term cash benefits, especially in respect of sickness insurance (sickness, maternity) the real intention, to coordinate them under the scope of the agreement, has been even more limited. We can only see it between EU Member States and countries seeking accession to the EU. In those cases, the real driving force is their intention to prepare for the EU coordination rules, otherwise they are not very keen to even consider the opportunity to involve such rules among the negotiated measures.

³⁸ The decisions adopted by the European Council on 18–19 February 2016 entitled “Re-regulating the situation of the United Kingdom in the European Union” were clearly intended to retain the United Kingdom in the EU addressing the direct causes of the planned Brexit referendum. One of the political starting point of the Brexit referendum was in part the issue of social dumping. For example the obligation of sending abroad the full british family benefits even when the child was not staying together with the parent working in the UK, but in his or her home-country with the other parent. The Council tried to address definitely this issue. See Official Journal of the European Union C1-69/1, 23.2.2016.

³⁹ Thus, the national rules in Hungary fulfill the obligations based on the European Convention on Human Rights (see: ECHR, Case 10441/06, of 7.11.2013, *Pichkur against the Ukraine*) and in most cases there is not a real need from the Hungarian point of view to have bilateral agreements to provide the option to export pensions. However, as a basic principle in the COE model, and the EU legislation is always laid down in the Hungarian agreement, and it is very important to see, that this principle could have a very important added value when the other Contracting State depends only on its own national legislation and forbids the export of pensions (which was the case for example in the agreement with Russia).

4. Some specific benefits under the scope of the agreements

In the Hungarian agreements with European countries, in line with the practice of geographically close countries, a quite similar wording has been developed with partners to help address the risks associated with working in the other country on a comprehensive basis. Hence, in many cases, the scope of the agreements extends to the coordination of rules on benefits and entitlements in relation to accidents at work and occupational diseases as well.⁴⁰

The presence of rules for coordinating unemployment benefits is a complex issue; the opportunity for including them is much narrower. In Hungary, a significant proportion of foreigners can only be employed with a work permit, and this is also true for most partner countries – in contrast to EU law – therefore, in principle, it is only possible to mutually recognise insurance periods in an international agreement, but not to coordinate access to the benefits. Under Hungarian law, if employment is terminated, the permit is revoked by the employment authority. In this case, the foreign citizen therefore does not have the necessary conditions to establish an employment relationship in the same way as a person who is registered as resident in Hungary, and he therefore cannot be considered unemployed or receive unemployment benefits under the scope of the Hungarian law. Although it would in principle be possible to recognise the fact and duration of work performed in another country, in most cases the national rules on unemployment benefits are not coordinated, not even in this area. This is because national efforts are aimed at and enable the return of workers to the national labour market, and in most cases the partners do not see this as the goal of social security-type coordination. This is especially true for agreements adopted in the current decade, although there is an exception to this, because in 2013 there was an agreement that included such a provision, namely the Serbian social security agreement.⁴¹

In respect of granting of sickness benefits in kind to persons residing or staying outside the competent State, it is only provided by some agreements and only concluded with European states, exactly as happened in the case of Austria.⁴² An important area in the field of cooperation between European countries is the benefits provided in the event of a temporary change in the state of health of persons. A situation like this significantly affects earning capacity and the ability to take care of oneself, and therefore

⁴⁰ See the following social security agreements of Hungary: the Austrian agreement (Act CXXXIII of 2000) Articles 16–18; German agreement (see above) Articles 20–24; Romanian agreement (Act II of 2006) Articles 17–19; Croatian agreement (Act CXXV of 2005) Articles 26–29; Bulgarian agreement (Act I of 2006) Articles 16–17; agreement with Montenegro (Act LXXII of 2008) Articles 25–26; agreement with Bosnia and Herzegovina (Act II of 2009) Articles 23–24; Serbian agreement (see above) Articles 29–30; Albanian agreement (Act XVIII of 2015) Articles 20–23; North Macedonian agreement (Act XXIII of 2015) Articles 18–21; Turkish agreement (Act XXX of 2015) Articles 20–22.

⁴¹ See the Serbian agreement (see above) Article 31.

⁴² See Spiegel, National approaches of EU Member States..., 157.

what kind of range of benefits in kind and in cash related to illness and maternity will be provided for them when working or living abroad is an essential question for migrants. This is absolutely in line with the EU principles of free movement.

Having said that, an examination of the coordination rules of this benefit can always be useful, because it highlights the potential and the natural limitations of EU law and practice having *effect on* bilateral agreements.

Clearly, one of the most important questions when drafting the agreements based on the European Union legal background is the opportunity to incorporate the rules concerning benefits in kind into the sphere of the accepted material scope. This is not an easy target to achieve, first because they are not the generally accepted type of benefits, namely not cash benefits. Instead, they are service in nature. The services are provided by the national health care system, in a country where the person stays only for temporarily without changing its original insurance status. However not this system is responsible for the final financing of the health-care treatment. (Staying for a holiday in another country somebody does not change his/her social security health insurance, but if there is an agreement between the two respective countries anybody would like to have an opportunity to receive the necessary health treatment during his/her stay in the other country on behalf of his/her insurance system, without paying for it directly to the health care provider). The inclusion of this benefit is especially sensitive in the case of countries outside of Europe. Second, it is one of the most sensitive questions in practice and it is not rare that disputes arise between the institutions, even when the favourable political will is strong between the contracting states.⁴³ These leads to the obvious conclusion that to include these kind of benefits into the agreements tends to be extraordinary rather than ordinary practice (EU Member State status or expected accession can be a real driving force in the political will).

For most countries, in addition to laying down the rules of applicable law, it is crucial to manage benefits for persons entitled to old-age and death (survivors') pension benefits. In general, the coordination of eligibility rules for cash benefits in the event of invalidity is a similar issue, and both European and non-European partners more or less want to deal with. With regard to these, the EU principles used as a starting point by the Hungarian side can be interpreted and accepted easily by its partners. These are important for almost all countries. Therefore when the possibility was examined within the EU, as early as 2010, of the possibility of unilateral EU action in relations between the European Union and third countries, even considering an EU level social

⁴³ See for example the conclusion made by Spiegel in his Article, stating: "If such disputes continue and cannot be solved in the sense that Austria and all other EU Member States interpret these provisions in the same way, a termination of the sickness rules of the agreements in relation to these contracting countries will have to be considered." Spiegel, National approaches of EU Member States..., 157.

security agreement, the proposal suggested in the EU's common reflection process was that the first common EU regulatory concept should be limited to these benefits only.⁴⁴

The Hungarian agreements contain these rules appropriately. Contrary to the first generation agreements concluded with Comecon countries in the 1950s and 1960s, when, for the person moving her or his residence from one country to the other, the competent state was changed, obliging pensions to be paid in the state where the person resided, in modern agreements the guiding principles are based on those of the CoE and especially on EU legislation.⁴⁵ In the field of pension insurance, the pension shall, as a general rule, be determined in accordance with the applicable legislation of the Contracting State concerned. The Hungarian agreements provide for the possibility of aggregating periods of entitlement in cases where a period of insurance completed in one of the Contracting States alone would not entitle the person concerned to a pension.⁴⁶ In these cases, the so-called "pro rata" principle, i.e. the pro rata pension calculation, applies. Both countries also take into account periods of insurance completed in the other country to determine the theoretical amount of pension, but only determine pensions in proportion to the period of insurance completed in their own country. This solution ensures that the burden is borne proportionately and that those concerned receive benefits in line with what they have established for themselves in the country's social security scheme.

It is an interesting experience that, instead of a common rule (one rule for both of the countries), overseas countries seek to lay down unilateral rules on entitlement to benefits and on the determination of benefits themselves. It is definitely not the common approach of the European countries in seeking simple coordination mechanisms as solutions.⁴⁷

After 2012, a new approach in Hungarian legislation introduced the replacement of the existing pension-like invalidity benefits with new rules. The national rules on benefits of persons with changed working capacity required new coordination rules in the agreements. In most cases under the legislation of the partners, the general benefits based on the risk of invalidity continued to be determined and paid under the pension insurance scheme.⁴⁸ This is not the case under the scope of the Hungarian legislation. In order to harmonise these standards with Hungarian rules, in accordance with EU principles, the agreements regulate the specific rights and procedures for determining

⁴⁴ B. Spiegel, *Analysis of Member States' Bilateral Agreements on social security with Third Countries, report ordered by the European Commission*, Contract ref. No. VC2010/0646, 2010. 23–24., <http://ec.europa.eu/social/BlobServlet?docId=6645&langId=en> (Last accessed: 31 July 2019).

⁴⁵ Not trying to introduce such a kind of complex system that is put down by relevant Regulation rules: Arts 44–60 in 883/2004, 987/2009 but respecting the rights of the persons concerned tries to find a simpler solution but based on the same principle.

⁴⁶ See for example the Croatian agreement Article 18 paragraph 1.

⁴⁷ See for example the Japanese agreement (Act CLII of 2013) Articles 14–17 for the Japanese rules, and 18–21 for the Hungarian rules.

⁴⁸ See for example the Serbian agreement Article 22.

the benefits of persons with changed working capacities (i.e. become disabled).⁴⁹ The coordination rules laid down in the agreements on benefits for disabled persons include solutions to national efforts that will make it possible to return workers to the national labour market, therefore the coordination rules in the agreements are primarily also to support these targets.

VI. OTHER SPECIFIC ISSUES OF THE EU LAW IMPACT ON THE BILATERAL AGREEMENTS

1. Data Protection

A characteristic example of the direct effect of EU law is the development of the data protection rules in bilateral agreements. In the last two decades, one of the most significant development of the articles of bilateral agreements has been the data protection provisions with a clearly growing number of direct rules (paragraphs or even article numbers).

The consideration of the EU data protection provisions after accession (first direct impact) was followed by the expansion and tightening of EU standards within the EU itself as a second impact.⁵⁰ Today, the national Hungarian law on the right to self-determination in information and freedom of information, which transposes EU standards, as a piece of detailed legislation, has a clear affect on agreements, requiring numerous rules in the agreements as well. This was an increased task in particular for negotiations concluded after the entry into force of the national legislation.⁵¹ However, we need to keep in mind the fact that these requirements are conducted from EU level GDPR legislation.⁵²

National data protection standards differ significantly between EU and non-EU countries, even in principle. In many cases, this can lead to serious conflicts of law in the implementation of the agreements, which can even be obstacles to institutional co-operation in achieving the objectives of the agreement.

⁴⁹ See for example Article 28 of the Serbian agreement.

⁵⁰ Regulation 2016/679 EC on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ 2016, L 119, 1) and especially Art. 44 et seq. of the General Data Protection Regulation, imposing the obligation on MS to also apply these rules in relationships with third countries, including those cases when there is a data exchange between a MS and a third country under the scope of a bilateral agreement.

⁵¹ Act CXII of 2011.

⁵² EU directive on data protection (GDPR) see above.

A very typical problem is, for example, that no data can be transferred or processed, or vice versa, for example, if the institution of the other party uses the data and information transferred within the framework of the agreement in order to enforce tax law interests. This question was particularly interesting, for example, due to differences in attitudes in the Hungarian–American context. In the United States, information provided under agreed information exchange provisions is generally confidential, but may be provided by the competent social security institutions to courts and other administrative bodies involved in the determination of taxes/contributions and benefits, the collection of taxes/contributions, and the payment of benefits. If, in a manner that does not infringe its own law, the US competent authority might release the information it has received from the Hungarian institution in the implementation of the agreement to the US tax authority, this type of non-conventional use will immediately conflict with the GDPR-based Hungarian legislation.

However, these two fundamentally different conceptual approaches create situations that seem insoluble in the event of a conflict between the national provisions. This can force the authorities to choose between the provisions of national legislations and international agreements. It can involve the question of what to do if the reporting authority or institution obviously asks for information other than what is allowed to be provided according to the Hungarian laws, and is in line with the principles of the agreement. That is, it is visible, directly or indirectly, from the request that the purpose of the data processing is not expected to be related strictly to the implementation of the social security agreement. As such, although it is formally lawfully requested under the scope of the agreement, in practice it is visible or at least unavoidable that the institution will handle and even forward it to an unauthorised body, which is illegal according to Hungarian (and EU) law.

If these issues are not properly regulated in the agreement, violations cannot be prevented or properly repaired. That is why, for objective reasons and based on the obligations of EU Member States as contracting states, we cannot be too flexible in this regard. And it is true, even at the cost of ultimately not concluding the agreement, no matter how beneficial it may be to settle relations otherwise. Whether, in the end, the non-conclusion of the convention is more detrimental than the potential data protection risks or not, cannot be the subject of a political decision. In respect of these rules the room for manoeuvre is more limited than in the case of the possible range of benefits coordinated and provided under the scope of the agreement. In the case of the latter the freedom of the political will of the national decision makers is almost unlimited. In the former, it is not possible to make compromises without violating our own constitutional rights and EU obligations and so it is absolutely vital that these cooperation frameworks will be enshrined as precisely as possible in the agreements, that inaccuracy does not lead to difficult disputes at a later stage due to the improper handling of personal data.

This particular dilemma draws our attention to the limitations of fragmented international treaty solutions. At the same time, it must be seen that, for many non-European partners, it is difficult to interpret and accept a social security agreement with the level of data protection rules that Hungary, or even Austria and Germany apply in view of their EU obligations.

It is not easy to make partners to concede these rules only at the request of Hungary. However, if an overseas country negotiates not only with Hungary but also with other – large – European states, and already accepts these complex rules as a common basis for cooperating with an EU Member State (as Japan did in its negotiations with Germany, for example), for those relations it can be a great help to adopt the Hungarian proposals to introduce a detailed system of data protection rules in the agreement.

This can make us conclude that this can be further facilitated by a relatively standardised wording model used by all EU Member States, as indicated, for example, by the Austrian Chief Negotiator in relation to the Austrian conventions, especially in respect of specific rules on agreements, which are very strictly defined (impacted) by EU law.⁵³

At the same time, the example of data protection also points to the need to increase the role of the European Union in this area. At present, it may not be realistic for the European Union to formally conclude social security agreements on its own, even in the context of closer economic cooperation.

Although based on an assessment of the content of the cooperative frameworks, it is not completely ruled out in special cases: see Switzerland, Norway, Iceland and Liechtenstein, and for the future in the case of the United Kingdom, it is generally too futuristic to imagine a rapid growth of this kind of cooperation form, creating several new agreements.

However, it could be very useful if the EU could, in respect of some type of rules of the agreements such as data protection, establish a system of cooperation with major partners that can provide such a level of protection in general, not only for social security conventions but also much more broadly in the system of economic cooperation. This would significantly simplify the fulfillment of the current EU obligations, which are compartmentalised and often difficult for partners to interpret, resulting in a different wording in each agreement. If only a reference to such an EU agreement had been applicable in the agreements instead of introducing complicated rules from agreement to agreement, it would not only be much simpler, but would also ensure a much higher level of protection in respect of EU citizens rights.

This shows, by way of example, that EU strategies and action can indeed have a place and added value, while preserving the independence of national legislative activity concerning the external dimension of social security.

⁵³ See Spiegel, *National approaches of EU Member States...*, 159.

2. The direct impact of EU case law on agreements, in particular the *EU Gottardo* case law

As mentioned in part II, one of the most striking effects of EU law on bilateral agreements is the case law arising from Member States' obligations, because it clearly highlights the limits of Member States' regulatory freedom. In this respect, the so-called issue of the *Gottardo* clause⁵⁴ in Hungarian conventions is certainly remarkable. Although not an EU regulation, the rule on the enforcement of Hungary's EU obligations is usually contained in a direct provision in Hungarian bilateral agreements. According to it, Hungary directly expresses its commitment to treat all citizens of the European Union under the same conditions in all cases, regardless of whether they are citizens of Hungary or another European Union Member State. Contained in a separate article of the agreements as a so-called EU clause, albeit not always with the same wording, it clearly states in substance that the agreement does not affect the obligations arising from Hungary's membership of the European Union. If the partner deems it necessary due to the accession of the EU, it is advisable to make an EU reference in this regard as well.⁵⁵

With this unilateral declaration, by displaying it in the agreement, Hungary is formally fulfilling its accountable EU obligation. However, in practice, this is also a living obligation in those cases where this clause is not included in the text because the partner cannot accept this kind of restrictive provision in the agreement.⁵⁶ It is a real issue when the partner wishes to limit the personal scope of the agreement to the citizens of the contracting parties only (perhaps including the homeless, and refugees).

Not only can the principle-approach create havoc between contracting states. In respect of the implementation of this rule, it is clear that a unilateral commitment will only work if the competent institutions of the partner are prepared to provide administrative assistance to the EU Member State contracting party making the unilateral declaration in the agreement. Otherwise, from a practical point of view, the agreement can create a situation where direct discrimination could be demonstrated with regard to non-hungarian EU citizens. It does not mean, of course, that the partner should provide benefits under its legislation, but without its help even

⁵⁴ An important element of the European Court of Justice case law was the judgment in Case C-55/00, *Gottardo* (European Court of Justice of 15 January 2002) on which the so-called *Gottardo* clauses (EU clauses) in the agreements were introduced.

⁵⁵ See the Turkish agreement Article 46.

⁵⁶ Which is definitely the case in the latest agreement by Hungary, namely the Hungarian–Russian social security agreement in preparation. (An interesting question to be examined further could be the situation of a Russian citizen living in Russian-occupied Ukrainian territory in Crimea, or whether the EU could make a decision not to allow Member States to apply Russian agreements in respect of this territory. There could be a real threat in a similar situation for an Israeli citizen who is resident in the Golan, when there is an agreement between Israel and an EU MS.)

the EU Member States cannot decide upon and provide the proper benefits according to their legislation.

However, in the implementation of this rule, it is clear that unilateralism only works if the contracting partner is ready to provide administrative assistance to the contracting party making the unilateral declaration.

If a non-EU Member State's contracting partner is, in principle, prepared to conclude an agreement only in respect of nationals of the two countries and interprets it strictly in all cases, an EU Member State would not be able to conclude the agreement lawfully, (namely the third country's institutions not applying it in any way, not even helping to fulfill the obligations of the other country's partner institutions).

As stated in the *Gottardo* judgment, a Member State of the European Union may not discriminate against a person who acquires a right in an EU Member State (e.g. a national of another EU State who has completed a period of insurance). That is, a Member State cannot apply the agreement only to its own nationals and not applying to nationals of another EU state at the same time. However, in order for the agreement to be properly applied to nationals of another EU Member State, it is necessary to have the appropriate information, namely the rights and entitlements of the persons concerned acquired in the territory/under the law of the other Contracting Party need to be known in order to take them into account. It is therefore necessary for the competent institutions to obtain information and in some cases certificates, which requires at least the full cooperation of the administrative bodies of the other country, without which the EU Member State cannot fulfill its obligation to take due account in respect of the the acquired rights or the relevant facts in practice. In this way, the importance of this case is indisputable and highlights very specifically the direct effect of EU case-law in the process of concluding bilateral agreements.

This question highlights a very interesting question of principle. If it is known that a third country is not ready to cooperate with the Member State to help it fulfill its obligations, even if it happens indirectly (only seen in practice), or expressed it directly, even during the negotiations before concluding the agreement, what shall the Member State do in a situation like this? Is it possible that it is not allowed to conclude the agreement? Must it terminate the concluded agreement, because the partner's institutions are not able to fulfill their obligations in respect of the EU citizens? There is no clear answer to these questions and there are differing opinions in this respect.

Cortazar points out very precisely that EU Member States are faced with two options for dealing with an agreement with a reluctant third country, in order to meet the obligations that EU Member States must fulfill themselves through a ruling by the Court of Justice of the European Union. The first is to develop a reciprocity policy with non-EU partners at European level (in his case study, such an agreement with Morocco is therefore proposed). Or, in the second case (do nothing), the Member States of the

European Union knowingly infringe their obligations under EU law. That is, in essence, in his view, they could not have legally entered into an agreement.⁵⁷

However, Spiegel takes a different view.

Of course, EU Member States under EU law remain free to conclude bilateral agreements with third countries and can also choose the content of such agreements (provided they respect the principle of equal treatment of all EU citizens). The obligations stemming from the Gottardo judgement (see footnote 20) led only to a recommendation of the Administrative Commission (Recommendation No H1 concerning the Gottardo judgment, according to which the advantages enjoyed by a State's own nationals under a bilateral convention on social security with a non-member country must also be granted to workers who are nationals of other Member States (OJ 2013, C 279:13). Of course, if the contracting partner rejects an agreement based on such principles this should not hinder the Member State to conclude such an agreement as long as it can prove its attempts to include the principles developed by that judgement.⁵⁸

In this respect, a specific case by the Court of Justice has not yet been examined; the two practical approaches have not been ruled by it, and in any event it what position the Court of Justice will take in such a specific case will be an interesting question. In my view, however, Cortazar's position is closer to what we can predict as the Court's position, because it is more in line with the Court's approach to protecting the EU citizens in line with the principle of equal treatment.

3. Interpretation – using a common language

A third issue that warrants further investigation is consistent interpretation, the issue of comprehension of the texts of the agreements. In Europe, thanks to the creation of a common legal language for social security and its coordination by the Council of Europe and the European Union (both concepts and technical language), such difficulties of understanding are rare. In the preparation and implementation of agreements with non-European countries, it is a very serious challenge to identify whether the two parties really understand the same when interpreting a specific coordination rule, especially with regard to the proper implementation of the relevant national rules. This challenge will inevitably have to be faced by EU Member States negotiating with Japan, South Korea, or even Canada and Russia. In these cases, it

⁵⁷ C. G. de Cortázar Nebreda, El Acuerdo de Asociación de la UE y Marruecos y sus implicaciones en el ámbito de la protección social, In M. D. Ramírez Bendala (ed.), *Problemas Actuales De La Seguridad Social En Perspectiva* (Ediciones Laborum, 2019, 1–36) 24.

⁵⁸ Spiegel, National approaches of EU Member States..., fn. 60.

is advised to introduce the meaning of the principles and the terms of the EU legal language of coordination very precisely in order to have the same understanding by the parties.

VII. SUMMARY AND CONCLUSIONS

Looking for the answer to the question of what kind of Hungarian specific aspects can be identified and what national interests and circumstances determine the Hungarian legislation, we identified a complex picture regarding concluding bilateral agreements on social security coordination. We can state that not only EU membership itself, but the preparation for it had an important impact on the Hungarian regulatory goals, the applied tools and the formation of the room to manoeuvre in this field. We can conclude that EU principles essentially define the rules and tools of modern Hungarian bilateral agreements. And it is true, even though in specific cases when an EU MS concludes an agreement with an overseas country, the basic principles are to be found in the agreements. The development of the EU legislation in the field of social security also soundly defines the national room for manoeuvre when concluding agreements at bilateral level with third countries.

In order to understand the Hungarian possibilities and regulatory conditions, it was necessary to review the following issues in the first part of the study:

- European legislative environment;
- Why is it important to conclude social security agreements?;
- The evolution of the direct impact of EU legislation.

Taking the *Gottardo* case into consideration in particular, which gave us a very clear legal framework to establish the room to manoeuvre when concluding bilateral agreements, we can see that there is a very clear EU impact on those rules. The bilateral agreements were primarily affected by the judgment, and through it by the EU legislation. When we tried to identify those principles and rules of the EU appearing in the bilateral conventions that are fundamentally affected, it became clear that, in several aspects, we can highlight direct visible affects, especially in the fields of the scope of the agreements; how to regulate the assimilation of facts in them, the questions of equal treatment; institutional cooperation with the third country, the and other country's openness to cooperate.

From this perspective, we analysed several specific issues that are relevant in modern Hungarian agreements in respect of the EU law impact:

- the scope of the agreements, (material, personal);
- the applicable legislative rules and some specific benefits under the scope of the agreements;
- the principles in the agreements and the assimilation of facts especially.

A special analysis was introduced in respect of the difficulties of institutional cooperation, especially in specific cases (data protection issues, *Gottardo* clause, interpretation – common language) according to the impact of EU law on bilateral agreements.

Taking into consideration this framework of the necessary (required) minimum progress over the last two decades, we can see the following general characteristics of the development of Hungarian agreements.

Overall, there is a significantly recognisable system and are clearly identifiable principles in Hungarian agreements. This is a good way to create a safety net, even if that does not provide the level of protection provided by EU legislation.

For the questions

- a) does Hungary respond to the challenges of mobility with third countries; or
 - b) do the means used ensure effective action / response from a legal perspective; and
 - c) can we discover the elements of a structured system in the legal solutions used
- the answer is a resounding yes in all three cases.

Hungary has an effective system of tools that protect the rights of those affected by mobility. This is a stable set of tools and altogether a system that can operate for many decades.⁵⁹ However, it is also clear that it worth building on, and on this basis to develop the system of agreements further.

However, it is clear that, in the case of relations outside the European Economic Area, there are greater differences between the contracting parties' systems, which narrow the opportunities for cooperation. In Europe, EU law plays a leading and exemplary role in helping countries to conclude the widest possible conventions within Europe.

Outside Europe, however, there has been less room for manoeuvre in recent decades, driven by the economic interests of the partners rather than the highest level possible of protection of citizens' social security rights and advantages.

Moreover, this room has always been narrow due to the generally greater economic weight of the partners and their stronger bargaining power.

The contributions in the special volume of the European Journal of Social Security in 2018 highlighted the importance not only the issue itself, but the natural limits and at the same time the opportunities and merits of a possible European approach on the basis of EU-level cooperation.

I share this vision. More room for manoeuvre for the future can only be imagined if we at national level can sit down at the negotiating table in some form, acting on the experience gained from EU membership and supported and backed by

⁵⁹ So far, no modern agreement has been amended, although there are agreements in between them almost twenty years old.

EU recommendations, in order to give our citizens agreements even better serving their interests, as EU law does at EU level.

It is obvious that the conditions for this need to be created, but Hungary does not have to start out alone; it is worth thinking together with the other EU Member States and the European Commission in order to expand our room for manoeuvre together for future negotiations.

Kis, Réka*

The Law Applicable to Copyright Infringements under the Rome II Regulation: Challenges and Alternatives in the Digital Age

ABSTRACT

The conflict of laws rule stipulated in Article 8(1) of the Rome II Regulation designates the law applicable to non-contractual obligations arising from the infringement of a national intellectual property right according to the traditionally acknowledged *lex loci protectionis* principle. Furthermore, Article 8(3) of the Regulation excludes the right of the parties to designate the applicable law by their mutual agreement. The *lex loci protectionis* principle complies with the territorial nature of intellectual property rights, nevertheless, in the case of multi-state or ubiquitous infringements of copyright, it can lead to the simultaneous application of the laws of all the countries where the infringing act was committed. Theoretically, the number of different applicable laws can add up to 180-200, each of them granting a different scope of protection and differing enforcement measures. This approach, which has traditionally been referred to as the *mosaic approach*, entails a number of disadvantages, such as legal uncertainty or costly and burdensome proceedings. The last two decades have therefore marked an endeavour by specialists and different national or regional courts to find alternative solutions to the conflict rule based on the *lex loci protectionis* principle, at least with respect to the ubiquitous infringement of intellectual property rights. The aim of the present study is to summarise and analyse some of these alternative proposals and to examine how they could contribute – or whether they could contribute at all – to the possible amendment of Article 8 of the Rome II Regulation from the perspective of copyright.

KEYWORDS: Rome II Regulation, copyright, applicable law, ubiquitous infringements

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I. INTRODUCTION

In the Explanatory Memorandum of the Proposal¹ for the Rome II Regulation,² the Commission argued that the harmonisation of conflict rules of the Member States “is particularly suitable for settling cross-border disputes, as, by stating with reasonable certainty the law applicable to the obligation in question irrespective of the forum” and that “this proposal allows the parties to confine themselves to studying a single set of conflict rules, thus reducing the cost of litigation and boosting the foreseeability of solutions and certainty as to the law”.³ Furthermore, the “proposal for a Regulation would allow parties to determine the rule applicable to a given legal relationship in advance, and with reasonable certainty, especially as the proposed uniform rules will receive a uniform interpretation from the Court of Justice”.⁴

The main benefits of adopting the Rome II Regulation could thus be summarised in the following keywords: reasonable certainty, reduction of litigation costs, foreseeability and as a result, legal certainty. Nonetheless, the special conflict of laws rule laid down in Article 8 of the Regulation and applicable, among others,⁵ to multi-state or ubiquitous infringements of copyright, is criticised for disregarding these precise values.

The conflict of laws rule stipulated in Article 8(1) of the Regulation designates the law applicable to non-contractual obligations arising from the infringement of a national intellectual property right according to the traditionally acknowledged *lex loci protectionis* principle. In other words, the court shall apply “the law of the country for which protection is claimed”. Furthermore, Article 8(3) of the Regulation excludes

¹ Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-contractual Obligations (Rome II), COM(2003)427 final, 2003/0168 (COD), Brussels, 22.7.2003.

² Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

³ Proposal for Regulation [2003]: cited above, 5.

⁴ Proposal for Regulation [2003]: cited above, 6.

⁵ The conflict rules under Article 8 of the Rome II Regulation do not distinguish between the different types of intellectual property rights, such as copyright, neighbouring rights the *sui generis* right of databases and the different industrial property rights, but dictate a single set of conflict of laws rules for all of them. Nevertheless, the differences between the various intellectual property rights, such as those concerning their legal nature, process of creation, purpose and harmonisation level are not negligible. The fundamental differences between the *lato sensu* copyright and industrial property rights reside in the increased cultural role and automatic protection of the former, as opposed to the mostly commercial purpose of the latter and the registration requirements they need to undergo in order to be protected (except for the well-known trademarks and unregistered Community design, which are not subjected to registration requirements or industrial designs and models, which may be subject to copyright protection and thus, be protected automatically). As I consider that these differences require the separate study of copyright, taking into account its specific characteristics, the present paper deals only with the topic of copyright in the broadest sense, i.e. copyright and related rights.

the right of the parties to derogate from the law designated by the prior rule by their mutual agreement pursuant to Article 14.⁶

The *lex loci protectionis* principle complies with the territorial nature of intellectual property rights and emphasises the independence of the intellectual property rights legislation of each country. The law designated by the *lex loci principle* is usually the law of the country where the infringement was committed.⁷ Nevertheless, under this principle, in the case of multi-state or ubiquitous infringements of copyright, such as those committed on the internet, if the plaintiff claims the full compensation of the damage, the court has to apply the laws of all the countries where the infringing act was committed simultaneously.⁸ Theoretically, the number of different applicable laws can add up to 180-200, each of them granting a different scope of protection and enforcement measures.⁹ This approach has traditionally been referred to in the literature as the mosaic approach.

First and foremost, the mosaic approach makes the determination of the number of applicable laws and the identification of the laws themselves burdensome or, in extreme cases, even unfeasible.¹⁰ Second, “proceedings become more costly and

⁶ Paragraph (2) of Article 8 prescribes a special conflict rule for designating the law applicable to non-contractual obligations arising from the infringement of a unitary Community intellectual property right. As a unitary European copyright or related rights protection hasn't been developed yet, Article 8(2) is not relevant for the present paper.

⁷ See Proposal for Regulation [2003]: cited above, 20.

⁸ See E. Ulmer, *Intellectual Property Rights and the Conflict of Laws*, (Springer, The Netherlands, 1978) 13.; A. Peukert, Territoriality and Extraterritoriality in Intellectual Property Law, in G. Handl, J. Zekoll and P. Zumbansen (ed.), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Brill, 2012, Leiden, Boston, 189–228) 189. https://doi.org/10.1163/9789004227095_009; T. Kono and P. Jurčys, General Report, in T. Kono (ed.), *Intellectual Property and Private International Law. Comparative Perspectives* (Bloomsbury, Oxford and Portland, Oregon, 2012, 6–216) 17.; P. Goldstein and P. B. Hugenholtz, *International Copyright. Principles, Law, and Practice* (Oxford University Press, New York, 2013) 97.; R. Matulionytė, Enforcing Copyright Infringement Online: In Search of Balanced Private International Law Rules, (2015) 6 (2) *Journal of Intellectual Property Information Technology and Electronic Commerce Law*, (132–145) 138.; A. Kur and U. Maunsbach, Choice of Law and Intellectual Property, (2019) 6 (1) *Oslo Law Review*, (43–61) 47. <https://doi.org/10.18261/issn.2387-3299-2019-01-07>; H. Schack, The Law Applicable to Unregistered IP Rights After Rome II, (2009) (26) *Ritsumeikan Law Review*, (129–144) 134.; P. A. De Miguel Asensio, La legislación sobre derechos de autor y su ámbito de aplicación: perspectiva europea, (2015) *Anuario Dominicano de Propiedad Intelectual*, (117–154) 119.; B. Buchner, Article 8 Infringement of Intellectual Property Rights, in G.-P. Calliess (ed.), *The Rome Regulations: Commentary on the EC Regs on Conflict Laws* (Kluwer Law International, The Netherlands, 2011, 481–487) 484.; P. Torremans, Private International Law Issues on the Internet, in I. Stamatoudi (ed.), *New Developments in EU and International Copyright Laws* (Kluwer Law International, Alphen aan den Rijn, 2016, 379–396) 394.

⁹ The high number can be attained due to Article 3 of the Regulation, which lays down the principle of universal application and Article 25 of the Regulation that stipulates that “[w]here a State comprises several territorial units, each of which has its own rules of law in respect of non-contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation”. On this topic see Matulionytė, Enforcing Copyright Infringement Online..., 138.

¹⁰ See Kur and Maunsbach, Choice of Law and Intellectual Property, 55–56.

burdensome in proportion to the number of different laws that need to be applied¹¹. These consequences occur due to the numerous differences between the substantive copyright laws of the countries, which complicate the identification of the author or right holder, on the one hand, and the particular rights and their exceptions and limitations, on the other.¹²

Third, due to the territorial nature of copyright, the extent of the damages must be determined separately for each State, in accordance with the substantive law of that State. This process is both costly and time consuming, and – as Advocate General Cruz Villalón has pointed out in his Opinion concerning the interpretation of the rules of jurisdiction, and which opinion can be pertinently applied to the issue of applicable law, as well – an applicant will not be able to produce verifiable material which delimits precisely the damage sustained in a specific Member State. That factor would lead the court to order compensation which is lower than the damage actually sustained, or which is higher, thereby exceeding the scope of the territorial criterion.¹³ The situation of the infringer is not optimal either, as they must respect the substantive copyright law of each country in order to rule out the possibility of any infringement. Another option is to adapt their digital activity to the law of the country with the strictest liability regime, but in practice that would mean the extraterritorial application of the copyright law of the latter country.¹⁴

The last two decades have therefore marked an endeavour by specialists and different national or regional courts to find alternative solutions to the conflict rule based on the *lex loci protectionis* principle, at least with respect to ubiquitous infringement of intellectual property rights. The aim of the present study is to summarise and analyse the private international law solutions and to examine how they could contribute – or whether they could contribute at all – to the possible amendment of Article 8 of the Rome II Regulation from the perspective of copyright.

Before that, however, it is worth mentioning that each proposal restrains, to a greater or lesser extent, the strictly interpreted territoriality principle. In this regard, critics frequently refer to territoriality as the Achilles-heel of copyright.¹⁵ The authors of

¹¹ European Max Planck Group on Conflict of Laws in Intellectual Property, *Conflict of Laws in Intellectual Property: The CLIP Principles and Commentary* (Oxford University Press, Oxford, 2013) 3:603.C05.

¹² M. Trimble, The Multiplicity of Copyright Laws on the Internet, (2015) 25 (2) *Fordham Intellectual Property, Media and Entertainment Law Journal*, (339–405) 344–345.

¹³ C-441/13, Hejduk, EU:C:2014:2212, Opinion of AG Pedro Cruz Villalón, 42. See also S. Neumann, Ubiquitous and multistate cases, in P. Torremans (ed.), *Research Handbook on Cross-border Enforcement of Intellectual Property*, (Edward Elgar, Northampton, 2014, 497–525) 510. <https://doi.org/10.4337/9781781955802.00018>

¹⁴ Neumann, Ubiquitous and multistate cases, 511.

¹⁵ See for instance P. Torremans, Copyright Territoriality in a Borderless Online Environment, in J. Axhamn (ed.), *Copyright in a Borderless Online Environment* (Norstedts Juridik, Stockholm, 2012, 23–35) 24.; P. Hugenholtz, Harmonization or Unification of EU Copyright Law, in J. Axhamn

the soft law proposal known as the Conflict of Laws in Intellectual Property (hereinafter CLIP)¹⁶ note that the

fact that territoriality was taken for granted in previous times does not have to govern decisions that are made today and tomorrow. Considering that international intellectual property harmonisation has attained a fairly high level in the wake of TRIPS and the two WIPO Internet treaties, the argument that the territoriality principle is no longer as crucial as it was in the early stages of developing national intellectual property regimes gains plausibility.¹⁷

A number of alternative private international law or substantive law solutions have been proposed to replace, in whole or in part, the *lex loci protectionis* principle, at least regarding the law applicable to ubiquitous torts. Concerning their structure, they can be divided into three major groups.

The first group includes those conflict of laws rules which would replace or supplement the conflict rule based on the principle of *lex loci protectionis* with another conflict rule in order to reduce the number of applicable laws. The second group consists of specific rules which, in terms of their legal nature, can be classified as substantive legal norms, yet their main purpose is to reduce the number of applicable laws indicated by the conflict of laws rule. These substantive rules usually seek to define the concept of infringing act or damage in such a way that it can be linked to the territory of a single State. The third group consists of more complex conflict of laws rules. Their development has been motivated by the desire to overcome the disadvantages of the conflict of laws rules based on the principle of *lex loci protectionis* and the one-sidedness of the conflict of laws rules belonging to the previous two categories. They have in common that the law applicable to ubiquitous torts is usually determined by a conflict of laws rule comprising multiple factors, which aim at finding the law of the State most closely connected with the dispute.¹⁸ The next sections will summarise and structure the main proposals and will synthesise the main advantages and setbacks of each.

(ed.), *Copyright in a Borderless Online Environment* (Norstedts Juridik, Stockholm, 2012, 189–204) 194.; Kaskovits M., CDSM-napló – 2. rész: szöveg- és adatbányászat, *copy21.com*, <https://copy21.com/2019/05/cdsm-naplo-2-resz-szoveg-es-adatbanyaszat/> (Last accessed: 31 July 2019).

¹⁶ For more details about the CLIP proposal see *infra* Chapter IV.

¹⁷ European Max Planck Group on Conflict of Laws in Intellectual Property, *Conflict of Laws in Intellectual Property...*, 3:603.C07.

¹⁸ Except for the Transparency proposal, which instead of relying on multiple factors in order to find the closest connection with the dispute, determines the law applying to ubiquitous infringements according to a modified *market effect* doctrine. For details see *infra* Chapter IV.

II. SINGLE-LAW CONFLICT OF LAWS RULES

As has been mentioned above, the solutions comprised in the first category seek to elaborate conflict of laws rules that would manage to designate the single most suitable law or a small number of applicable laws for ubiquitous infringements. It seeks to replace or supplement the conflict rule based on the *lex loci protectionis* principle, at least with regard to ubiquitous infringements.

1. *Lex originis*

The first to be mentioned is probably the “oldest rival” of the *lex loci protectionis*, namely the conflict rule based on the *lex originis* principle. Under the *lex originis*, the court applies the law of the country of origin of the work, regardless of where the infringement and the damage have occurred. The *lex originis* principle is based on the universalist theory of copyright, which considers the different national copyrights to be a single, internationally recognised right. The main advantage of the rule based on *lex originis* is that the applicable law is fairly easy to identify and foreseeable for both the right holder and the potential infringer.¹⁹ According to Professor Boytha, the *lex loci originis* principle is perhaps dogmatically more consistent than the *lex loci protectionis* principle and it enhances the uniform results of the application of copyright law; nevertheless, it is difficult to apply in practice.²⁰ With regard to the period before the spread of the Internet, the professor argued that the Montevideo Convention, which enacted the *lex originis* principle, required national judges and foreign users to be familiar with the laws of all the member states of the Convention.²¹ Furthermore, in the event of litigation, the *lex fori* and the *lex originis* are very rarely the same,²² and this circumstance places an additional burden on judges, who will seldom apply the law they are most familiar with. However, the same hindrances have emerged in the case of the *lex protectionis* principle as well, due to the proliferation of the use of internet. In other words, a judge applying the *lex loci protectionis* principle in a case of ubiquitous infringement of copyright, might have to become familiar with the substantive laws of all the countries of the world.

There are however other arguments against the application of the *lex originis* principle. According to some commentators, it is incompatible with the principle of

¹⁹ See Neumann, Ubiquitous and multistate cases, 516.; Trimble, The Multiplicity of Copyright Laws on the Internet, 359.

²⁰ Boytha Gy., Viszonosság a nemzetközi szerzői jogban, (1967) 22 (9) *Jogtudományi Közlöny*, (538–549) 543.

²¹ Boytha Gy., Some Private International Law Aspects of the Protection of Authors’ Rights, (1988) (24) *Copyright*, (399–414) 406.

²² Boytha, Viszonosság a nemzetközi szerzői jogban, 543.

national treatment enshrined in Article 5 of the Berne Convention.²³ Others consider that, under the *lex originis* principle, the works originating from different countries would be subject to different laws on the territory of the same country²⁴ thus leading to discrimination between the rightholders. Consequently, nor does this principle provide users with greater predictability of the applicable law than the *lex loci protectionis* since, when commercial users want to use a number of different works, each of these works might be subject to a different national law, depending on its place of origin.²⁵ More importantly, the *lex originis* principle prevents the states from enforcing their own copyright policy on their own territory.²⁶

2. *Lex loci delicti*

Another alternative resulted from the attempt of adapting the *lex loci delicti* principle to ubiquitous infringement of copyright. As a rule, under the *lex loci delicti* principle, the law applicable to a non-contractual obligation arising out of a tort/delict is the law of the State in which the event giving rise to the damage occurred. However, it has been mentioned above and the CJEU has clarified it in its case law on the interpretation of the rules of jurisdiction, damage caused by multi-state or ubiquitous infringement of copyright cannot be attributed to the law of a single State. For instance, in the case of the distribution of a protected work on the Internet, the harmful event is present in all the states where the illegal uploading and downloading of the work takes place. Consequently, in order for the traditional *lex loci delicti* principle to be a genuinely suitable alternative to the *lex loci protectionis* principle, it must be accompanied by an additional condition, which restricts the harmful event to the territory of one country.

Such an alternative is proposed by the EU's so-called Satellite and Cable Directive²⁷ or the recently adopted Online Broadcasting and Retransmission Directive.²⁸ According to Article 1(2) point b) of the Satellite and Cable Directive, the "act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organization, the programme-

²³ See Matulionytė, Enforcing Copyright Infringement Online..., 138. See also Trimble, The Multiplicity of Copyright Laws on the Internet, 370.

²⁴ See Matulionytė, Enforcing Copyright Infringement Online..., 138.

²⁵ Ibid. 139.

²⁶ Ibid.

²⁷ Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

²⁸ Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC.

carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth”. The rule in Article 1(2) is therefore not a conflict of laws rule, but a substantive law rule, which nevertheless affects the determination of the applicable law. According to this substantive law rule, the law applicable under the *lex loci delicti* principle can only be the law of the State in which the broadcast signals are transmitted to the satellite and then to the uninterrupted chain of transmission to Earth. The Satellite and Cable Directive has therefore narrowed down the multi-state tort to the territory of a single state, more precisely to the place of origin of the act.

Furthermore, in accordance with Article 3(1) of the Online Broadcasting and Retransmission Directive, certain acts of communication to the public, reproduction and making available to the public of works or other protected subject matter in the course of the provision of an ancillary online service by or under the control and responsibility of a broadcasting organisation shall, for the purposes of exercising copyright and related rights relevant for those acts, be deemed to occur solely in the Member State in which the broadcasting organisation has its principal establishment.²⁹ The solution put forward by this Directive is therefore an even bolder one, as the act of communication, the act of making available to the public and the act of reproduction doesn't necessarily take place at the origin of the multinational act itself but, by means of a legal fiction, it is localised on the territory of the Member State in which the broadcaster has its principal place of business. The legitimacy of the legal fiction can be sustained by the plausible presumption that the broadcaster's primary place of business coincides with the place where the act originated or the decision giving rise to the act was taken. A similar solution can be found in Article 5(3) of the CDSM Directive. According to its provisions, the use of works and other subject matter for the sole purpose of illustration for teaching through secure electronic environments shall be deemed to occur solely in the Member State where the educational establishment is established.

The common feature of the three examples is that each Directive localises the act in the point of its actual or presumed origin. With regard to satellite broadcasting and internet activities, the literature refers to this place as *Handlungsort*.³⁰ In the event

²⁹ See also Tóth A.-K., *Az európai szerzői jogi harmonizáció és a territorialitás kérdése*, (2016) (11) *Iparjogvédelmi és Szerzői Jogi Szemle*, (9–43) 14. Regarding the conditions and limits of applying this legal fiction, see preambles (9)–(14) of the Directive.

³⁰ See M.-M. van Echoud, *Choice of Law in Copyright and Related Rights*, (Kluwer Law International, 2003), <https://www.ivir.nl/publicaties/download/970.pdf> (Last accessed: 31 July 2019) 217. Some commentators use the terms “place of origin”. (See for instance Neumann, *Ubiquitous and multistate cases*, 516.; European Max Planck Group on Conflict of Laws in Intellectual Property, *Conflict of Laws in Intellectual Property...*, 3:603.N07; Matulionytė, *Enforcing Copyright Infringement Online...*, 139.). However, due to the risk of confusion with the *lex originis* principle presented above, I chose not to use this term.

of damage inflicted by online activity, the *Handlungsort* frequently coincides with the offender's domicile or habitual residence if they are a natural person or the infringer's headquarters if it is a legal person.³¹

Defining the harmful act based on the *Handlungsort*-theory has the obvious advantage of making the applicable law foreseeable for the user and potential infringer, and thus facilitating the apprehension and adherence to the provisions of the substantive copyright law.³² Second, the *Handlungsort*-theory benefits the copyright holders as well, since the latter have the possibility to claim the whole damage under one single law.³³ Third, if the *Handlungsort* coincides with the habitual residence of the infringer, the court seized with the action will apply its own law, namely the law that the court is most familiar with.³⁴ In addition, this court is the court that, according to the EU rules on jurisdiction, has jurisdiction to award damages for the entire infringement. Finally, it should not be overlooked that the defendant's habitual residence is usually where they have assets, and thus it may be an attractive forum for the right holder to bring their claim,³⁵ as the enforcement of the judgment might become more successful.

Despite its many advantages, the *Handlungsort* theory has significant disadvantages, too. In particular, the literature on international copyright holds that this solution clearly favours the copyright users, i.e. infringers, as it allows them to relocate to so-called copyright "havens", which are countries with rather low-level copyright protection or in which judgments are difficult or even impossible to enforce.³⁶ On the other hand, indicating the actual origin of the infringing activity may also be difficult due to the rapid development of technology. Van Echoud noted, as early as in 2003, that anyone in the digital world could easily direct files on a server of a location of their choice,³⁷ thus manipulating the applicable law without any physical relocation. And determining the place of origin of an activity in the context of *peer-to-peer* exchanges is particularly elusive, if not downright meaningless.³⁸ Besides its unpredictability, it can

³¹ See Trimble, *The Multiplicity of Copyright Laws on the Internet*, 359.; van Echoud, *Choice of Law in Copyright and Related Rights*, 217.

³² See Trimble, *The Multiplicity of Copyright Laws on the Internet*, 361.; van Echoud, *Choice of Law in Copyright and Related Rights*, 217.; Neumann, *Ubiquitous and multistate cases*, 516.; Matulionytė, *Enforcing Copyright Infringement Online...*, 139.

³³ Matulionytė, *Enforcing Copyright Infringement Online...*, 139.

³⁴ See Trimble, *The Multiplicity of Copyright Laws on the Internet*, 362.

³⁵ See also van Echoud, *Choice of Law in Copyright and Related Rights*, 219.

³⁶ See also Trimble, *The Multiplicity of Copyright Laws on the Internet*, 360.; American Law Institute, *Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Dispute (with Comments and Reporters' Notes)*, (2008) Part 10, <https://www.wipo.int/edocs/lexdocs/laws/en/us/us218en-part10.pdf> (Last accessed: 31 July 2019) 4.; Neumann, *Ubiquitous and multistate cases*, 516.; Matulionytė, *Enforcing Copyright Infringement Online...*, 139.; van Echoud, *Choice of Law in Copyright and Related Rights*, 217.; European Max Planck Group on Conflict of Laws in Intellectual Property, *Conflict of Laws in Intellectual Property...*, 3:603.N07.

³⁷ van Echoud, *Choice of Law in Copyright and Related Rights*, 217.

³⁸ American Law Institute, *Intellectual Property...*, Part 10, 4.

also result in the application of a law that has nothing to do with the non-contractual obligation itself.³⁹ Therefore, a solution based on the *Handlungsort* theory provides a forum shopping possibility for the users and makes the applicable law unpredictable for the rightholder.

3. *Lex loci damni*

A similar alternative to the *lex loci delicti* rule and the substantive law rule focusing on the place of origin of the harmful act may be the conflict of laws rule focusing on the occurrence of the damage and its outcome. The equivalent of the prior solution would thus be the combination of the conflict of laws rule based on the *lex loci damni* principle and a substantive law rule defining the place where the damage occurred. Some commentators also refer to the place where the actual damage occurs as *Erfolgsort*.⁴⁰ This place is not equivalent to the domicile of the claimant, nor does it cover the place of indirect damages.⁴¹

It is worth mentioning the Opinion of Advocate General Niilo Jääskinen delivered in the *Pinckney* case. In *Pinckney*, the Court had, for the first time, an opportunity to rule on the conditions in which the courts of a Member State have jurisdiction *ratione loci* to determine a dispute arising from an alleged infringement of copyright via the internet on the basis of Article 5(3) of the Brussels I Regulation.⁴² The Advocate General advised the Court to depart from the doctrine established in the *eDate Advertising and Martinez* case and not apply the criterion of accessibility when interpreting the occurrence of damage, according to which the potential harm is considered to arise in all the places from which the website in question can be consulted.⁴³ Instead, he advised the Court to apply the “theory of focalisation”⁴⁴ and thus favour the courts of the state the activity was aimed at by the internet site in question.⁴⁵ The designation of this court would be justified by the fact that the damage corresponds to the failure to profit from the unauthorised broadcast of the works.⁴⁶ As it turned out, the Court did not accept Advocate General Jääskinen’s proposal. However, if we were to apply the proposal of the Advocate General as a conflict rule to establish the applicable law, the substantive rule supplementing the *lex loci damni* principle would stipulate that the place where the damage occurred is the State the activity was aimed at.

³⁹ Matulionytė, *Enforcing Copyright Infringement Online...*, 139.

⁴⁰ van Echoud, *Choice of Law in Copyright and Related Rights*, 217.

⁴¹ *Ibid.*

⁴² See C-170/12, *Pinckney*, EU:C:2013:400, Opinion of AG Niilo Jääskinen, 2.

⁴³ Opinion of AG Niilo Jääskinen, 68.

⁴⁴ *Ibid.* 64.

⁴⁵ *Ibid.* 71.

⁴⁶ *Ibid.* 64.

This solution would lead to a similar result as the conflict of laws rule based on the *market effect* theory. Two versions of this principle will be discussed below; one of them has been elaborated in the Transparency Proposal and the other one has taken the form of a *de minimis* rule in the CLIP. The aim of all three solutions is to replace the mosaic application of the set of laws designated by the *lex loci protectionis* with the law of only one or just a few countries, i.e. the law of the country or countries in which the harmful act produces its greatest effect or effects at all.

The constructions of the three solutions are obviously different, but even their criteria for designating the applicable law differ slightly. The solution derived from the Opinion of Advocate General Jääskinen may also be interpreted as meaning that one of the criteria for choosing the applicable law is the intention of the infringer that can be inferred from the characteristics of the harmful act. For instance, from the use of a certain country-code top-level domain and the language of that country, one can deduce that the act is targeted at that particular state. In contrast, under the Transparency proposal, the law applicable to a non-contractual obligation arising from a ubiquitous infringement of a copyright is the law of the place where the results of the exploitation of the copyright are or will be maximized.⁴⁷ In the process of selection, one must take into account the value of the damage and the amount of use of intellectual property rights, and this is only possible after the damage has occurred. One of the main differences between the two proposals resides therefore in the prevalence of the interests of one or the other party. While, according to the Advocate General's proposal, the infringer may, by his own actions, have some control over the determination of the applicable law, in the case of the Transparency proposal the solution is less foreseeable for them. From the perspective of the parties' interests, the latter solution can therefore be considered more neutral.

Advocate General Cruz Villalón proposes a similar solution to the general rule of the Transparency proposal in his Opinion delivered in the *Hejduk* case concerning the interpretation of the provisions of Article 5(3) of the Brussels I Regulation. According to the Advocate General, in cases where "delocalised" damage occurs on the internet and infringes copyright, "the best option is to exclude the possibility of suing in the courts of the State where the damage occurred and to limit jurisdiction, at least that based on Article 5(3) of the regulation, to that of the courts of the State where the event giving rise to the damage occurred".⁴⁸ However, the Advocate General did not elaborate on the criteria necessary to determine the place where the damage occurred, which is certainly unfortunate for the purposes of the present study.

The literature on copyright has developed yet another version of the theory based on the *Erfolgsort*. According to this version, the place where the damage occurs

⁴⁷ See Article 302(1) of the Transparency proposal.

⁴⁸ Opinion of AG Niilo Jääskinen, 45.

is the domicile or habitual residence of the copyright owner.⁴⁹ The starting point of this theory is the assumption that the damage resulting from the copyright infringement affects the person and the pocket of the author.⁵⁰ At the same time, habitual residence or domicile may serve as proxies to the consequences of the damage, to the extent that they are closely related to the location of the effects of the copyright infringement.⁵¹ This latter proposal clearly favours the interests of the rightholder.

Theoretically, the solutions focusing on the effects of the damage provide a greater degree of predictability for the parties than the solution based on the *lex loci protectionis* principle, since the former require the application of a single or a limited number of laws. This can particularly be noticed in cases where the *Erfolgsort* coincides with the domicile or residence of the rightholder. In practice, however, in many cases the courts might need to carry out a detailed factual analysis in order to be able to assess the impacts of the infringing act or to determine the targeted State, and these can only be done at the stage of examining the merits of the case, not the stage of designating the applicable law.⁵² Furthermore, the determination of the applicable law would not be straightforward either in cases where the applicable law does coincide with the residence of the rightholder, yet the infringement affects works with multiple authors or multiple rightholders.⁵³ Additionally, similarly to the *Handlungsort* theory, the conflict of laws rules based on the *Erfolgsort* theory would provide one of the parties with a forum shopping opportunity, but this time the advantaged party would be the rightholder.⁵⁴ Last but not least, the applicable law would rarely coincide with the law of the forum, which would place an additional burden on the courts.

III. SUBSTANTIVE LAW SOLUTIONS

I have mentioned above the substantive rules that also affect the determination of the applicable law. These rules can be divided into two categories. The first contains the norms that attempt to localise the harmful act or the place where the damage occurred. The second category includes the so-called *de minimis* rules, which establish stricter

⁴⁹ See Trimble, *The Multiplicity of Copyright Laws on the Internet*, 367. See also A. Kur, *Applicable Law: An Alternative Proposal for International Regulation – The Max Planck Project on International Jurisdiction and Choice of Law*, (2005) 30 (3) *Brooklyn Journal of International Law*, (951–981) 977–978.

⁵⁰ See Trimble, *The Multiplicity of Copyright Laws on the Internet*, 369., citing an opinion of Ginsburg from 1995.

⁵¹ See Trimble, *The Multiplicity of Copyright Laws on the Internet*, 369., citing an opinion of Guzman concerning the determination of jurisdiction of courts. See also A. T. Guzman, *Choice of Law: New Foundations*, (2002) (90) *The Georgetown Law Journal*, (883–940) 920.

⁵² See also Matulionytė, *Enforcing Copyright Infringement Online...*, 137.

⁵³ Trimble, *The Multiplicity of Copyright Laws on the Internet*, 368.

⁵⁴ For arguments sustaining this opinion and against it see van Eechoud, *Choice of Law in Copyright and Related Rights*, 218. and next. See also Trimble, *The Multiplicity of Copyright Laws on the Internet*, 360.

conditions for the definition of an infringement or damage. The difference between the two categories is not as clear as their name suggests, and there are a number of overlaps between them in terms of their effects, as revealed by the above analysis as well. The examination of the so-called “localisation” rules was the subject of the previous section and one version of the *de minimis* rule will be analysed in the following section.

IV. MULTI-FACTOR CONFLICT OF LAWS RULES

Over the last two decades, a number of more complex proposals addressing the private international law aspects of intellectual property rights have emerged. These seek to correct the deficiencies of conflict of laws rules based on the principle of *lex loci protectionis*, on the one hand, and to neutralise the one-sidedness of the solutions presented above, on the other. Some of the proposals are created by individual researchers⁵⁵ and others by specialised committees or research groups set up for this specific purpose. There are six renowned proposals in the copyright literature, which are increasingly referred to by the different international and national courts. These aim to help the work of courts and legislators in the form of soft law rules. Five of the six proposals have been finalised by the time of writing this study; the sixth proposal’s elaboration is still in progress. Chronologically, they are the following: the *Principles Governing Jurisdiction, Choice of Law, and Judgments In Transnational Disputes in Intellectual Property*, adopted by the American Law Institute in 2008 (hereinafter ALI), the *Transparency Proposal on Jurisdiction, Choice of Law, Recognition and Enforcement of Foreign Judgments in Intellectual Property*, elaborated in 2009 by three Japanese researchers, Ryu Kojima, Ryo Shimanami and Mari Nagata (hereinafter the Transparency), the *Principles by Korean Private International Law Association adopted in 2010* (hereinafter KOPIA), the *Joint Proposal by the Members of the Private International Law Association of Korea and Japanese Waseda University Global COE Project* (hereinafter the Joint JK), the *Conflict of laws in Intellectual Property adopted by the European Max Planck Group in 2011*, and finally the draft *Guidelines: Intellectual Property in Private International Law*,⁵⁶ a project of the International Law Association (hereinafter the ILA).

One common feature of all six proposals is that they all regulate the private international law aspects of intellectual property holistically. In other words, besides laying down the rules for determining the applicable law, they also provide rules for jurisdiction of the courts and the recognition and enforcement of judgments. And, in relation to the applicable law aspects, they deal with several issues concerning the private international law aspects of intellectual property, such as contracts, proprietary aspects,

⁵⁵ See for instance van Eechoud, *Choice of Law in Copyright and Related Rights*, 229.; Kur, *Applicable Law...*, 979–981.

⁵⁶ The present study was based on the draft adopted in 2018. See ILA, 8. and next.

transfer of intellectual property and infringements. Nevertheless, the present study reviews only three of these rules in a comparative analysis; the general rule, the special rule on ubiquitous torts and the provisions governing the freedom of choice of the parties. I believe that this brief comparative analysis provides an opportunity to become acquainted with these provisions, yet the proper assessment of them and the understanding of how these rules could contribute to amending Article 8 of the Rome II Regulation with respect to copyright would require a holistic and comparative analysis of the whole set of rules of the soft law proposals, along with a detailed analysis of the *lato sensu* private international law rules of intellectual property law adopted by the EU.

Another common feature of the proposals is the conservation of the principle of territoriality as a general rule, completed with a series of exceptions. The territorial nature, despite its numerous criticisms, remains one of the fundamental principles of international, EU and national intellectual property law. Moreover, it should not be overlooked that the vast majority of *de lege ferenda* proposals are more than reluctant to abolish territoriality.

1. The general rule

In the present study, the term “general rules” refers, in particular, to the conflict rule determining the law applicable to an obligation arising from an infringement of an intellectual property right, except for the ubiquitous infringement and the issue of secondary or ancillary liability.

The general rules of the KOPILA and ALI apply not only to infringements but to other aspects of intellectual property, too. Such other aspects include the creation of intellectual property, ownership issues, transferability and termination of the right. The other four proposals contain two separate provisions for tort and for other aspects of intellectual property.

The general rules of all the proposals, except the rule of the Transparency proposal, are based on the *lex loci protectionis* principle. Nevertheless, the structure and wording of these conflict rules differ to some extent. The authors of the CLIP remark in this regard that the

principle of *lex protectionis* is closely connected with the principle of territoriality. Although it is neither uncontested nor indispensable as a fundamental feature of intellectual property law, the principle of territoriality is basically acknowledged as an important means to safeguard the sovereignty of legislatures deciding on the specifics of intellectual property protection within the limits prescribed by international law. In that sense, the Principles remain committed to the territoriality principle.⁵⁷

⁵⁷ European Max Planck Group on Conflict of Laws in Intellectual Property, *Conflict of Laws in Intellectual Property...*, 3:603.C06.

Three of the five proposals based on the principle of *lex loci protectionis*, namely the ALI, Joint JK and KOPILA, distinguish between registered and unregistered intellectual property rights. Under Article 301 of the ALI, the law applicable to infringement of intellectual property rights and the remedies for their infringement is for registered rights, the law of each State of registration and for other intellectual property rights, the law of each State for which protection is sought. The wording of article 19 of the KOPILA is very similar to the wording of Article 301 of the ALI. Article 301 of the Joint JK clarifies the difference between the definitions given to the *lex loci protectionis* in the case of registered and unregistered rights. According to Article 301(2) of Joint JK, “*lex protectionis* is the law of the state for which protection is sought. In the case of a registered intellectual property right, this state is presumed to be the state in which that right is or will be registered [...]”.

The necessity and utility of distinguishing the two types of intellectual property rights has long been a concern of the intellectual property literature and opinions differ. The authors of the CLIP consider that the principle of *lex loci protectionis*, which applies to both categories, does not justify a terminological distinction. Given that, in the case of registered intellectual property rights the law of the State for which protection is sought usually coincides with the State of registration, the difference in terminology does not translate into one of substance. On the other hand, referring to the country of registration as opposed to that of protection obscures the fact that all intellectual property follows the same fundamental principles with regard to infringement.⁵⁸

Matulionytė adheres to a similar view. In her opinion, the advantage of clarifying the concept is counterbalanced by the fact that the coexistence of the two rules make the already complicated system even more complicated, and that the relationship between the two rules is not clear either. “[I]s it the same rule worded differently or are these two different rules with different content?” asks the author.⁵⁹

The authors of the Transparency proposal came up with a different solution instead of a vague definition of the *lex loci protectionis* principle. With regard to the creation, original owner, transferability and effects of intellectual property rights, the Transparency proposal identifies the law of the State providing the protection as the applicable law. According to Article 305, the existence, primary ownership, transferability and effects of intellectual property rights shall be governed by the law of the country that granted the intellectual property right. The authors of the proposal consider that this phrasing eliminates the difficulties of interpretation regarding the

⁵⁸ European Max Planck Group on Conflict of Laws in Intellectual Property, *Conflict of Laws in Intellectual Property...*, 3:601.N08–3:601.N10.

⁵⁹ R. Matulionytė, IP and Applicable Law in Recent International Proposals: Report for the International Law Association, (2012) (3) *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, (263–305) 266.

traditional wording, i.e. “the law of the State for which protection is claimed”, and it consolidates within a single rule two connecting factors that are unjustifiably separated in the ALI.⁶⁰

The authors of the ALI Principles argue that, in the case of unregistered rights, the usual point of attachment for determining infringement of these rights will be the countries where the rightholder’s market for the work has been affected,⁶¹ as the registration itself can obviously not be the relevant point of attachment. Furthermore, the formulation “each country for which protection is sought” is compatible with a market-oriented approach, as it corresponds to the markets that the plaintiff seeks to protect from infringements that are occurring there.⁶² Anette Kur suggests that the solution proposed by the ALI may be understood as limiting the applicable law in cases of unregistered intellectual property rights to the law of the states whose market has been or will be significantly impacted by the infringing act. Nevertheless, she finds no pertinent reason why this market impact rule is confined to unregistered intellectual property rights only, as the rule functions similarly for both registered and unregistered intellectual property rights.⁶³

It is also worth bearing in mind that, in an earlier draft of the ALI proposal, the general rule was not based on the *lex loci protectionis* principle but on the market impact rule. It was later replaced by the more traditional, territorial approach.⁶⁴ This fact therefore raises the question whether this comment remained in the commentary of the Principles only accidentally and not intentionally.

Based on the above it can be concluded that when the general rule is derived from the *lex loci protectionis* principle, it is necessarily justified to distinguish between registered and unregistered intellectual property rights. If both rules aim to designate the law of the same country and their existence is justified only by pedagogical considerations, I believe that the two rules would not simplify, but rather complicate the interpretation of the conflict rule.⁶⁵ I agree with Matulionytė that the term “for which protection is sought” is already implemented in some national statutes, clearly established in some states’ court practice and widely accepted in doctrine. Therefore, a new wording would obscure rather than clarify its meaning.⁶⁶

⁶⁰ R. Kojima, R. Shimanami and M. Nagata, Applicable Law to Exploitation of Intellectual Property Rights in the Transparency Proposal, in J. Basedow, T. Kono and A. Metzger (ed.), *Intellectual Property in the Global Arena. Jurisdiction, Applicable Law, and the Recognition of Judgments in Europe, Japan and the US*, (Mohr Siebeck, Tübingen, 2010, 179–228) 209.

⁶¹ See American Law Institute, *Intellectual Property...*, Part 8, 2.

⁶² See *ibid.* Part 8, 3.

⁶³ Kur, *Applicable Law...*, 969.

⁶⁴ Matulionytė, *IP and Applicable Law in Recent International Proposals...*, 266.

⁶⁵ See also Kur, *Applicable Law...*, 970.

⁶⁶ Matulionytė, *IP and Applicable Law in Recent International Proposals...*, 266.

Nevertheless, in the case of ubiquitous torts, the difference between the registered and unregistered intellectual property rights is more obvious. For the first category, due to the complexity of the registration process and the costly registration fees, it is reasonable to assume that most of the rightholders have carefully considered in which States to seek protection and, after the successful termination of the registration process, strictly account for their rights. Furthermore, countries keep track of the registered IP rights in publicly accessible registers, in this way providing information to users and potential infringers. As a result, potential infringers have the opportunity to discover the existence and content of the rights, the duration of protection and the identity of the rightholder. As such, it can be argued that registered intellectual property rights are usually exercised in a relatively controlled environment and there is a degree of awareness associated with their possible infringement.

In contrast, in the case of unregistered intellectual property rights, such control and such a degree of awareness cannot be reasonably assumed. Although most states provide an opportunity for registration for authors, performers and other rightholders, since registration is not a criterion for the existence of a right, it would be irrational to expect all rightholders to register their rights. It follows that it cannot be reasonably assumed that users are always informed and they always foresee the legal consequences of their actions, in particular if carried out in a digital context. Theoretically, under Article 8 of the Rome II Regulation, the number of laws applicable to a non-contractual obligation arising from the infringement of an unregistered intellectual property right on the internet could go as high as 180 or even 200. And this – as Kur and Maunsbach argue – is obviously no realistic prospect.⁶⁷

Consequently, the necessity to develop a conflict rule that reduces the number of applicable laws in the event of ubiquitous infringement is more evident in the case of unregistered intellectual property rights. For this reason, the enactment of different conflict of laws rules applicable to ubiquitous torts and freedom of choice of the parties for registered or unregistered rights – or, at the very least, the justification of the dismissal of such differentiation supported by thorough research – would be more than welcome. In this sense, I am convinced that, in the event of a future amendment of Article 8 of the Rome II Regulation, a comprehensive analysis of the two types of intellectual property rights, taking their legal nature, their creation, exercise, type and frequency of infringement into account, would be appropriate and even necessary.

With respect to the general rule, the Transparency proposal departs from the traditional conflict rule, and instead of the *lex loci protectionis* principle constructs its general rule on the so-called “market effect” doctrine.⁶⁸ More specifically, Article 301(1) of the Transparency proposal provides that “[t]he law applicable to an intellectual

⁶⁷ Kur and Maunsbach, *Choice of Law and Intellectual Property*, 56–57.

⁶⁸ See Kojima, Shimanami and Nagata, *Applicable Law to Exploitation of Intellectual Property Rights...*, 187.

property infringement shall be the law of the place where the results of the exploitation of intellectual property occur or are to occur”. According to the authors of the proposal, the term “result” refers to the “economic loss in the market”.⁶⁹ The concept itself should be defined solely by private international law rules; its meaning must not be affected by substantive law.⁷⁰ The connecting rule abandons strict territoriality, as it may occasionally require the extra-territorial application of the law.⁷¹

The most obvious advantage of the principle of market effect would become palpable in the event of ubiquitous infringement of copyright. That is, for example, in the event of an online copyright infringement, instead of approximately 180 national laws, only the law or laws⁷² of those States whose markets are affected by the results of the exploitation of the infringed copyright will be applied. Thus, the market effect doctrine requires the application of a considerably smaller number of national laws than the *lex loci protectionis* principle. In the case of the Transparency proposal, however, this advantage is less significant, as the proposal places ubiquitous torts under a special rule.⁷³ Nevertheless, the rule does not completely lose its relevance, since it reduces the number of applicable laws in the event of multi-state torts.

The commentary on the CLIP notes in this respect that the difference between the general rule of the Transparency Proposal and the *lex loci protectionis* rule “does not appear to be one of substance, as the term «results of exploitation» is effectively synonymous to «infringement», and hence points to the law of the country where protection is sought against an ongoing or threatening infringement”.⁷⁴ A similar conclusion can be deduced from the commentary of the Transparency Proposal, stating that the place of the infringement usually coincides with the place where the damage occurs and, as a result, it is all the same whether the connecting factor is based on the place where the result occurs or where the rights are exploited.⁷⁵ Another criticism of the market effect doctrine concerns the difficulty of determining the applicable law in cases of infringement of moral rights.⁷⁶

⁶⁹ See *ibid.*

⁷⁰ *Ibid.*

⁷¹ Matulionytė, IP and Applicable Law in Recent International Proposals..., 267.

⁷² Article 25(1) of the Rome II Regulation states that “[w]here a State comprises several territorial units, each of which has its own rules of law in respect of non-contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.”

⁷³ See Article 302 of the Transparency Proposal.

⁷⁴ European Max Planck Group on Conflict of Laws in Intellectual Property, *Conflict of Laws in Intellectual Property...*, 3:601.N11. For a similar opinion see C. Otero García-Castrillón, Choice of law in IP: Rounding off territoriality, in P. Torremans (ed.), *Research Handbook on Cross-border Enforcement of Intellectual Property*, (Edward Elgar, Cheltenham, UK and Northampton, MA, 2014, 421–468) 449. <https://doi.org/10.4337/9781781955802.00016>

⁷⁵ Kojima, Shimanami and Nagata, Applicable Law to Exploitation of Intellectual Property Rights..., 195.

⁷⁶ Otero García-Castrillón, Choice of law in IP..., 449. See also Kur, Applicable Law..., 971.

In terms of its effects, the market effect doctrine is similar to the so-called *de minimis* rule, which is regulated, among others, by the CLIP. As mentioned above, the *de minimis* rule is a substantive law rule that indirectly affects the private international law rules by reducing the number of applicable laws due to narrowing the definition of the infringement or damage. Out of the six proposals, the CLIP and the Joint JK contain such rules. Under Article 3:602(1) of the CLIP, a “court applying the law or the laws determined by Article 3:601 shall only find for infringement if (a) the defendant has acted to initiate or further the infringement in the State or the States for which protection is sought, or (b) the activity by which the right is claimed to be infringed has substantial effect within, or is directed to the State or the States for which protection is sought”. However, paragraph (2) of the same article states that “[t]he court may exceptionally derogate from that general rule when reasonable under the circumstances of the case”. Due to the unclear English translation of Article 305 of the JK proposal, one can only assume that the court may only apply the law determined on the basis of the *lex loci protectionis* principle if the conduct is directed against the State granting the protection and if a risk of indirect and subjective infringement occurs on the territory of that State. The *de minimis* rule is likely to apply only to secondary or intermediary liability.⁷⁷

It therefore follows from the combined application of the *lex loci protectionis* principle and the *de minimis* rule that the court must apply the law of the State or States for which protection is sought, provided that the infringing activity occurred on the territory of this state or the activity has produced a substantial effect on its market. Consequently, the *de minimis* rule of the CLIP, compared to the market effect doctrine of the Transparency Proposal, extends the list of applicable laws to the laws of the States where the infringing activity took place. At the same time, it reduces the number of States in which the results of the exploitation of intellectual property rights occurred to only the States in which the infringing activity has had a significant effect.

The *de minimis* rule first appeared in 2001 in a proposal of the Intellectual Property Organization concerning the use of trademarks in an online environment.⁷⁸ Subsequently, the rule was incorporated into their own case law by some national courts, such as the German Supreme Court in its *Hotel Maritime* judgment on trademarks and as the Canadian Supreme Court in its *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers* judgment related to copyright.⁷⁹ According to Otero García-Castrillón, the principle is also compatible

⁷⁷ Matulionytė, IP and Applicable Law in Recent International Proposals..., 284.

⁷⁸ See World Intellectual Property, *Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet*, (2001) https://www.wipo.int/edocs/pubdocs/en/wipo_pub_845.pdf (Last accessed: 31 July 2019) Article 2.

⁷⁹ *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, 2 SCR 427, 2004 SCC 45. For details see European Max Planck Group on Conflict of Laws in Intellectual Property, *Conflict of Laws in Intellectual Property...*, 3:602.N05.

with Article 8 of the Rome II Regulation, as, being a substantive law rule, it can be adopted at any time by the Member States⁸⁰ without violating the mandatory provisions of the Regulation.

Like the market effect rule of the Transparency proposal, the *de minimis* rule of the CLIP does not cover ubiquitous infringement either, but it only applies to multi-state infringements. Ubiquitous infringements are regulated by a special rule.⁸¹

The *de minimis* rule of the CLIP has attracted numerous criticisms in the literature,⁸² of which I will only mention two, since they highlight important considerations in the event of a future amendment of the Rome II Regulation. First, the concept of “substantial effect” is too abstract and too broad,⁸³ making it difficult to identify and select the effects that are relevant for the application of the rule. On the one hand, this feature confers judges with unusually broad freedom of decision, which is unfamiliar to continental law regimes. On the other hand, this broad and abstract concept is difficult to reconcile with the criterion of legal certainty promoted by the Rome II Regulation. Second, the exceptions to the *de minimis* rule are so generous that they question the usefulness and effectiveness of the rule itself.⁸⁴

Summarising the features of the general rules of the six proposals, it can be argued that none of the rules depart significantly or at all from the traditional *lex loci protectionis* principle. The market effect doctrine regulated by the Transparency proposal and the *de minimis* rule of the CLIP seem to be exceptions to this statement, but a more detailed analysis reveals that, in practice, they very rarely lead to different solutions. The innovation of the six proposals, however, lies in the creation of a special rule applicable to ubiquitous infringements, the analysis of which is the subject of the following section.

2. The special rule applicable to ubiquitous infringements

The rules regarding ubiquitous infringements in five of the six proposals consist of three elements: the principle of closest connection, the connecting factors that determine the law with the closest connection and an escape clause allowing the court to return to territoriality.⁸⁵

⁸⁰ Otero García-Castrillón, Choice of law in IP..., 450–451.

⁸¹ See Article 3:603 of CLIP.

⁸² For the detailed criticism see Otero García-Castrillón, Choice of law in IP..., 451–452.; Matulionytė, IP and Applicable Law in Recent International Proposals..., 285–286.

⁸³ Otero García-Castrillón, Choice of law in IP..., 451.

⁸⁴ Matulionytė, IP and Applicable Law in Recent International Proposals..., 285. For a different opinion see Otero García-Castrillón, Choice of law in IP..., 452.

⁸⁵ Matulionytė, IP and Applicable Law in Recent International Proposals..., 286.

The exception is represented by the Transparency Proposal, which created a connecting factor that is not based on the principle of the closest connection, but seeks to adapt the market effect doctrine established by the general rule to ubiquitous torts. Under Article 302(1) of the Transparency proposal, ubiquitous infringements of intellectual property shall be governed by the law of the place where the results of the exploitation of intellectual property are or will be maximised. Nevertheless, the escape clause is present in this proposal as well.⁸⁶ According to the authors of the Transparency proposal, the maximum results of the exploitation of rights should not be reduced to the value of the damages from a substantive law perspective, but the amount of exploitation, such as the large number of downloads in a certain jurisdiction, should be taken into account instead. Moreover, the maximum results of the exploitation should be assessed at the moment of filing the action.⁸⁷

The authors of the Transparency Proposal argue that the adapted market effect rule – as opposed to the close connection principle adopted by the ALI and CLIP proposals – is more impartial towards the parties and enhances the predictability of the determination of the applicable law. In other words, the connecting factors stipulated in the special rules of the ALI and the CLIP inevitably lead to the choice of applicable law detrimental to one or the other of the parties and deprives one or the other party of the foreseeability of the applicable law.⁸⁸

In the opinion of the authors of the ALI Principles, the multi-factor approach proposed by the ALI is an intermediate solution between the territoriality and the single-law approaches. This solution seeks

to gain the simplification advantages of the single-law approach by identifying the State(s) most closely connected to the controversy, but [it] also strive[s] to respect the sovereignty interests underlying the territoriality approach. Thus, while the court may choose a single (or reduced number of) applicable law(s), the parties may also demonstrate that for certain States where alleged infringements are occurring, local law would produce a significantly different outcome.⁸⁹

The five proposals based on the closest connection principle rely on multiple connecting factors to identify the applicable law or laws. But while the connecting factors enlisted in the special rules of the ALI, CLIP and ILA serve only as examples for determining the country most closely related to the dispute,⁹⁰ the situation of the Joint JK and

⁸⁶ See Article 302(2) of the Transparency Proposal.

⁸⁷ See Kojima, Shimanami and Nagata, *Applicable Law to Exploitation of Intellectual Property Rights...*, 200.

⁸⁸ See *ibid.* 209.

⁸⁹ American Law Institute, *Intellectual Property...*, Part 10, 4.

⁹⁰ ALI: “the law or laws [...] as evidenced, for example, by;”; CLIP: “the court shall take all the relevant factors into account, in particular the following”.

the KOPILA is not so clear,⁹¹ at least based on their English version.⁹² Furthermore, according to Article 21(3) of the KOPILA, if the State most closely connected with infringement cannot be determined with the above-mentioned rule, the State where the habitual residence⁹³ of the defendant is located is considered to be the State with the closest connection.

The connecting factors that determine the state with the closest or close connection with the dispute can be divided into three major categories. The first category contains the party-neutral connecting factors. These usually focus on the places of residence of the parties, the centre of the parties' relationship, the extent of their activities or investments and the targeted markets. The second category comprises the connecting factors that link the state with the close or closest connection to the infringer or the place of infringing act. These include the residence or principal place of business of the infringer and the location where the harmful activities were committed. The third category includes factors that focus on the rightholder. These consist of connecting factors focusing on the place of the damage and the place of the activities and investments of the right holder.

In summary, the ALI and ILA contain broader and more party-neutral connecting factors, while the connecting factors of the CLIP are narrower and seem to favour the infringer rather than the rightholder. The KOPILA and the Joint JK try to reach a compromise between the parties' interests: they take over the connecting factors of the special rule in the CLIP, but complement them with the law of the state where the main interests of the right holder are located.⁹⁴ The preference of the CLIP's authors for the connecting factors favouring the interests of the defendant can be justified by the need to compensate the plaintiff's privilege to bring suit under one applicable law.⁹⁵

Despite their similarities, there are a number of differences in content and wording between the special rules of the six proposals. One such difference refers to their mandatory or dispositive character: while the ALI,⁹⁶ CLIP⁹⁷ and ILA⁹⁸ permit

⁹¹ In the view of Matulionytė, the lists of connecting factors of the Joint JK and KOPILA seem to be exhaustive. Matulionytė, *IP and Applicable Law in Recent International Proposals...*, 286.

⁹² Joint JK: "the closest connection ought to be on the account of the following"; KOPILA: "the court shall consider the following factors".

⁹³ Article 2 paragraph 7 define the term "habitual residence".

⁹⁴ Matulionytė, *IP and Applicable Law in Recent International Proposals...*, 286.

⁹⁵ A. Metzger, *Applicable Law under the CLIP Principles: A Pragmatic Reevaluation of Territoriality*, in J. Basedow, T. Kono and A. Metzger (eds), *Intellectual Property in the Global Arena. Jurisdiction, Applicable Law, and the Recognition of Judgments in Europe, Japan and the US*, (Mohr Siebeck, Tübingen, 2010, 157–178) 176.

⁹⁶ "the court may choose to apply".

⁹⁷ "the court may apply".

⁹⁸ "it may be appropriate to apply".

the courts to deviate from the general rule in cases of ubiquitous torts, the Joint JK,⁹⁹ KOPILA¹⁰⁰ and Transparency¹⁰¹ proposals do not confer such discretion on the courts; the courts must apply the special rule to ubiquitous torts.

Another difference concerns the number of applicable laws. The special rules of the CLIP, Joint JK, Transparency and KOPILA seek to designate a single applicable law, usually the one most closely connected with the non-contractual obligation, while the ALI and ILA permit the application of more than one law. The difference is also reflected in the wording of the special rules: while the former, except for the Transparency proposal, are looking for the law with the closest connection with the non-contractual obligation, under Article 321(1) of ALI, “the court may choose to apply [...] the *law or laws* of the State or States with *close connections* to the dispute” and, according to Article 26(1) of ILA, “it may be appropriate to apply [...] *only the law or laws* of the State(s) having an *especially close connection* with the global infringement”.

The proposals also differ with regard to the type of infringements covered by the special rule. The strictest are the CLIP and ILA, which apply the special rule only to infringements that have been carried out through ubiquitous, or ubiquitous and multi-state media.¹⁰² The authors of the CLIP acknowledge that they have indeed adopted a rather conservative approach when creating the special rule deviating from the *lex protectionis* principle¹⁰³ and, due to its narrow scope, in practice the rule will be of primary relevance for claims under copyright.¹⁰⁴

Under the ALI and Transparency proposals, the special rule applies when the infringing act itself is ubiquitous.¹⁰⁵ In addition, the Joint JK and KOPILA also cover multistate infringements, insofar as infringement has occurred on the territory of unspecified or unidentifiable states.¹⁰⁶ It can be concluded from the phrasing of the last two rules that their application is not limited to online infringements.¹⁰⁷

With the exception of the ILA and the Transparency proposal, the special rules of the other four proposals also cover other aspects of intellectual property rights insofar

⁹⁹ “the court shall apply”.

¹⁰⁰ “the law [...] shall govern”.

¹⁰¹ “shall be governed”.

¹⁰² Article 3:603(1) of CLIP: “infringement carried out through ubiquitous media such as the Internet”. Article 25(1) of ILA: the “infringement in multiple states is pleaded in connection with the use of ubiquitous or multinational media”. See Matulionytė, IP and Applicable Law in Recent International Proposals..., 287.

¹⁰³ European Max Planck Group on Conflict of Laws in Intellectual Property, Conflict of Laws in Intellectual Property..., 3:603.C08.

¹⁰⁴ Ibid. 3:603.C09.

¹⁰⁵ “the alleged infringing activity is ubiquitous and the laws of multiple States are pleaded”.

¹⁰⁶ Joint JK: “an infringement that occurs or has occurred in unspecified and multiple states”. KOPILA: “an infringement of Intellectual Property Rights occurs or is likely to occur in multiple States which are unidentifiable or difficult to identify”.

¹⁰⁷ Matulionytė, IP and Applicable Law in Recent International Proposals..., 287.

as they arise in the form of preliminary questions.¹⁰⁸ The ALI is more permissive than the other three proposals, as the special rule stipulated in Article 321 can be applied to the issues of existence, validity, duration and attributes of intellectual property even if these issues do not appear in the form of preliminary questions, but have appeared, for instance, only parallelly with the infringement. The special rules of the ILA and the Transparency proposals do not mention the other aspects of intellectual property, even if they appeared as preliminary questions, therefore it can be assumed the special rules do not apply to ubiquitous infringements.¹⁰⁹

As I have mentioned before, all six proposals include an escape clause attached to the special rule on ubiquitous torts. The purpose of the escape clause is to permit the court to apply to the whole or part of the dispute, on the request of the parties or based on its own decision¹¹⁰ another law than the one designated by the special rule if, with respect to particular States covered by the action, the solution provided by any of those States' laws differs from that obtained under the law(s) chosen to apply to the case as a whole,¹¹¹ or when the rules applying in a State or States covered by the dispute differ from the law applicable to the dispute in aspects which are essential for the decision,¹¹² or the defendant's activities are legally allowed under the law of other State which is affected by the activities causing the infringement,¹¹³ or if the result of the application of the special rule is extremely unreasonable in relation to a specific country.¹¹⁴

The main advantages of the multi-factor connecting rule based on the close connection principle are its flexibility and its ability to adapt to the specifics of the individual case.¹¹⁵ The variety of the factors the courts have to or may take into account in the process of determining the applicable law alleviate the disadvantages of each single connecting factor.¹¹⁶ Moreover, Trimble believes that

the factors approach should be the champion of promoting the “right” copyright policies; by selecting particular factors for courts to weigh, the approach's designers steered the choice of applicable law toward the law of the country that in a given case has the prevailing interest in having its copyright law applied, or alternatively [...] the country whose interests would be more impaired if its law were not applied.¹¹⁷

¹⁰⁸ See art. 3:603(1) of CLIP, art. 306(3) of Joint JK, art. 22 of KOPILA.

¹⁰⁹ See also Kojima, Shimanami and Nagata, *Applicable Law to Exploitation of Intellectual Property Rights...*, 214.

¹¹⁰ See art. 302(2) of Transparency.

¹¹¹ See art. 321(2) of ALI and art. 25(3) of ILA. A similar solution is adopted in art. 306(4) of Joint JK.

¹¹² Art. 3:603(3) of CLIP.

¹¹³ Art. 21(4) of KOPILA.

¹¹⁴ Art. 302(2) of Transparency.

¹¹⁵ See Neumann, *Ubiquitous and multistate cases*, 516.

¹¹⁶ See Matulionytė, *IP and Applicable Law in Recent International Proposals...*, 289.

¹¹⁷ Trimble, *The Multiplicity of Copyright Laws on the Internet*, 378–379.

The downside of flexibility is the unpredictability of the law applicable to the particular case and consequently, the decline of legal certainty.¹¹⁸ This is most obvious in the case of the ILA and ALI proposals. The application of the special rule of both proposals is optional and, in the event of the application of the special rule, more than one law may be applied simultaneously. However, due to the escape clause and if certain conditions are fulfilled, the court may nevertheless derogate from the application of the special rule at the request of the parties. Consequently, in many cases, the parties would find it difficult or even impossible to predict how many and exactly which national laws would be applied to the dispute. This, in turn, would sabotage the legal certainty considered to be the cornerstone of the Rome II Regulation¹¹⁹ and would sometimes lead to even more unpredictable results than the solution provided for in Article 8 of the Regulation. Furthermore, both proposals provide an exceptionally wide margin of discretion for the judges, which is rather unusual for continental law systems.

In the case of the CLIP, Joint JK and KOPILA, the predictability of the applicable law increases with the reduction of the flexibility of the conflict rules. Nonetheless, I agree with Matulionytė, who argues that the increase of legal certainty in the latter is negligible as well. In this regard, courts in continental law systems may have trouble accepting such a flexible rule, as they would probably prefer a clear-cut rule combined with the closest connection rule as an escape clause.¹²⁰

According to the authors of the CLIP, when the applicable law is determined by a factor-based analysis rather than by a hard and fast rule, the result will inevitably be uncertain, resting to some extent on subjective evaluations by the courts.¹²¹ Therefore, a thorough analysis requires the analysis of the rules on jurisdiction, too.¹²² Consequently, for finding the best suited solution, not even the creation of the perfect conflict of laws rules would suffice, as the right balance can only be achieved with the appropriate rules on jurisdiction and rules on the enforcement of judgments.

In summary, the factor-based conflict rule emphasises, due to its flexibility, the fairness of the decision adopted in individual cases. Nevertheless, for the same reason, the outcome of the abstract process of the designation of the applicable law is rather unpredictable, undermining the requirement of legal certainty. By contrast, the outcome of applying the special rule of the Transparency proposal does indeed appear to be more foreseeable and more compatible with legal certainty, as it identifies only one applicable

¹¹⁸ See for instance Neumann, Ubiquitous and multistate cases, 516.; M. Trimble, Undetected Conflict-of-Laws Problems in Cross-Border Online Copyright Infringement Cases, (2016) (1) *North Carolina Journal of Law & Technology*, (119–159) 380.

¹¹⁹ For a similar opinion see Matulionytė, IP and Applicable Law in Recent International Proposals..., 289.

¹²⁰ Matulionytė, IP and Applicable Law in Recent International Proposals..., 289.

¹²¹ European Max Planck Group on Conflict of Laws in Intellectual Property, *Conflict of Laws in Intellectual Property...*, 3:603.C13.

¹²² *Ibid.* 3:603.C14.

law. However, in many cases it is very difficult or even impossible to identify the state where the results of exploiting the right are maximised.¹²³ Consider, for example, an English-language e-book distributed on a multilingual or English website. Given that the use of the English language is very widespread, almost ubiquitous, it would be unreasonable to assume that the distribution would only affect the market of the countries whose official language is English. Furthermore, the special rule also covers places where the maximum result of the exploitation of the right will occur in the future. According to Matulionytė, it would be very difficult for the courts to predict the future.¹²⁴ Last but not least, the dispute may be more closely related to another state than to the one where the results of the exploitation are maximised. The proposal does not offer a solution for this problem either.¹²⁵

3. The freedom of choice of the parties

The issue of the parties' freedom of choice divides the literature, although a growing number of opinions consider that the complete prohibition of the freedom of choice under the Rome II Regulation is unjustified. Most commentators believe that the partial introduction of the freedom of choice for intellectual property infringements associated with the appropriate corrections would help to eliminate the disadvantages of the mosaic-application of the different national laws pursuant to the *lex loci protectionis* principle.¹²⁶ In line with these views, each of the six soft law proposals regulates the parties' freedom of choice, even if the extent of their freedom varies greatly.

Except for the Transparency proposal, each one allows the parties to agree on the applicable law before or after the infringement has arisen. The Transparency proposal allows the parties to choose the applicable law only after the event giving rise to the damage occurred.¹²⁷ As regards the aspects of intellectual property rights and the dispute covered by the freedom of choice, the rules of the Joint JK contains the most permissive, while the CLIP and ILA consist the most stringent solutions.¹²⁸

Under Article 302 of the Joint JK, “[t]he parties may at any time designate a law that will govern all or part of their dispute. Nevertheless, where the agreement on applicable law is concerned with the matters of an intellectual property right as such,

¹²³ Matulionytė, IP and Applicable Law in Recent International Proposals..., 289.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ See for instance Kur, Applicable Law..., 975–976.; van Eechoud, *Choice of Law in Copyright and Related Rights*, 214.; U. Maunsbach, Copyright in a Borderless Online Environment – Comments from a Swedish Horizon, in J. Axham (ed.), *Copyright in a Borderless Online Environment*, (Wolters Kluwer, Vällingby, 2012, 47–61) 60–61.; Otero García-Castrillón, Choice of law in IP..., 449.

¹²⁷ See article 304(1) of Transparency.

¹²⁸ See Matulionytė, IP and Applicable Law in Recent International Proposals..., 280.

including its existence, validity, revocation and transferability, that agreement affects only the contracting parties”. Consequently, the agreement on the consequences of the infringement may be asserted against third parties, as long as their vested rights are not affected. Article 20 of the KOPILA contains similar provisions, except that the choice of law agreement shall be binding only on the parties with regard to the infringement as well.

Under Article 302(1) of the ALI proposal, the parties may agree at any time, including after a dispute has arisen, to designate the law that will govern all or part of their dispute. However, paragraph 2 does not allow for a choice of law with respect to the validity and maintenance of the registered intellectual property rights, the existence, attributes, transferability, and duration of rights and the formal requirements for recording assignments and licences. Article 302 lays down further rules on the legal capacity of the parties and the reasonableness of certain clauses included in standard form agreements.

With respect to non-contractual obligations, the CLIP and ILA allow the parties to agree only on the remedies for the infringement. The wording of the ILA is very concise and article 25(2) merely states that the law applicable to the remedies for the infringement may be chosen by the parties. The CLIP, on the other hand, contains detailed rules on the parties' freedom of choice and the structure of the provisions is similar to that of the general rule set out in Article 4 of the Rome II Regulation. Article 3:606(1) of CLIP provides that the parties may agree to submit the remedies claimed for the infringement to the law of their choice by an agreement entered into before or after the dispute has arisen. The second paragraph of the same article provides for an exception from the rule, pointing to the law governing the pre-existing relationship closely connected to the infringement, then it lays down two further exceptions to the former exception. The latter state that the law governing the pre-existing relationship closely connected to the infringement shall not apply if the parties have expressly excluded the application of it with regard to the remedies for infringement, or it is clear from all the circumstances of the case that the claim is more closely connected with another State.

An argument in favour of choice of law is, according to the CLIP's authors, “that the option to agree on one law for computing damages or determining other sanctions would improve foreseeability and thereby foster legal certainty in international relations, and that this would be particularly valuable when an infringement extends over a large number of States”.¹²⁹

The authors of the CLIP had also considered the possibility of extending the possibility of choice of law to other or all elements of an infringement, as other projects have done. In the end, it was concluded that extending the freedom of choice would entail a fundamental policy decision, as it would limit the cogent character of the *lex protectionis*

¹²⁹ European Max Planck Group on Conflict of Laws in Intellectual Property, *Conflict of Laws in Intellectual Property...*, 3:606.N14.

principle, thereby reducing the right of the public policy objectives on which the principle is based. And this was not in line with the more conservative views of the CLIP.¹³⁰

Kur and Maunsbach highlight two other notable arguments for defending the more conservative option of the CLIP. According to the authors, if the parties could derogate in all respects from the principle of *lex protectionis*, the scope of the right, including exceptions and limitations, would be at their disposal. In practice, this would undermine the mandatory nature of national legislation on the protection of intellectual property rights. The situation is, however different with regard to remedies, as their type and dimension are not essential elements of the basic claim to validity of the national rules. On the other hand, it is also worth bearing in mind that, in practice, a claim for reparation always involves an element of choice, since it is neither mandatory nor usual for the plaintiff to claim all available sanctions in a lawsuit. Plaintiffs usually select the remedies that they consider to be the most efficient and for which the requirements are least complicated to establish.¹³¹

Finally, an earlier opinion of Maunsbach is also worth mentioning. In that opinion, the author devotes a greater role to the parties' freedom of choice, noting that every proposal which deals with the complexity of the problems of intellectual property in the online space comes up with equally complicated solutions. In other words, the solutions themselves are often no less complicated than the problems themselves. Therefore, the author endeavours to find one simple rule, based on the parties' freedom of choice that can be applied in all situations instead of creating rules that provide detailed guidance for each situation. According to Maunsbach, this can be achieved by two factors: on the one hand, by further developing the case law on the rules of jurisdiction of the Brussels I Regulation, and on the other hand, by accepting that it is time to treat intellectual property rights similarly to all other property rights and to allow parties to agree on jurisdiction and applicable law in intellectual property disputes as well.¹³²

V. CONCLUSIONS

The analysis shows that the conflict of laws rules comprised in the first two categories and designed to replace or supplement the principle of *lex loci protectionis* with a simple conflict rule and/or a substantive law rule do reduce the number of applicable laws and thus, usually make the outcome of the dispute more predictable and ultimately less costly. Simplicity, however, often entails the problem of one-sidedness, as usually the

¹³⁰ See *ibid.* 3:606.N15–3:606.N16.

¹³¹ See Kur and Maunsbach, *Choice of Law and Intellectual Property*, 60.

¹³² Maunsbach, *Copyright in a Borderless Online Environment...*, 61.

interests of one of the parties are favoured and, additionally, in some cases the applicable law is difficult to determine.

The third category of alternative solutions, including multi-factor conflict rules, are characterised by a high degree of flexibility, which allows the courts to make fair and equitable decisions in individual cases. Nevertheless, the conflict rules are highly intricate. In many cases, the complexity of the rules makes the designation of the applicable law unpredictable to the parties and the outcome of the dispute unforeseeable, thus jeopardising legal certainty in the long run. To alleviate the disadvantages of the latter proposals, the authors of the proposals recommend aligning these conflict rules with the rules of jurisdiction and enforcement of judgments.

None of the above solutions seem to represent the perfect solution for the replacement of the *lex loci protectionis* principle adopted by Article 8 of the Rome II Regulation. Nevertheless, each proposal can be regarded as a small step in the pursuit of a well-functioning alternative or completion to the conflict rule currently in force, at least with respect to the ubiquitous infringement of copyright. Anyway, as has been shown above, an adequate solution could only be found after a comprehensive analysis of the *lato sensu* private international law rules on intellectual property adopted in the EU, including not only the infringement of intellectual property rights, but contracts, ownership, transferability and other relevant issues, and the rules on jurisdiction and enforcement of judgments as well.

Börzsönyi, Blanka*

Intellectual Property Considerations in M&A Due Diligence

ABSTRACT

Due diligence is of key importance in identifying, allocating and mitigating risk in M&A transactions. The review of intellectual property matters is an essential part of each due diligence exercise. The related evaluation encompasses the review of publicly available information, as well as the contractual relations of the target. Proprietorship, geographical spread, status and term of the protection of registered intellectual property is assessed for evaluating the target's technology. The manner how intellectual property was acquired, interdependence from seller is assessed, and inbound and outbound licenses must also be carefully reviewed, especially in light of the post-closing operational matters and possible integration of the target into the buyer group. Expert knowledge of transactional theory, intellectual property and contract law is necessary to identify, evaluate and mitigate risks stemming from intellectual property-related matters.

KEYWORDS: Legal due diligence, M&A, intellectual property, warranty, indemnity, due diligence stages, due diligence report

I. INTRODUCTION

From an abstract perspective, in the M&A context, certain transaction steps may be viewed as part of the parties' attempts to allocate risk. Due diligence ("DD"), as a transaction stage (ideally conducted pre-signing) is essential in identifying (and thus, allocating and addressing) matters that (may) pose any risk to the acquirer post-completion.

Intellectual property rights ("IP") are not equally material in respect of the operation of every company or in the context of each acquisition. Nevertheless, to avoid a lemon purchase, each transaction team must keep IP considerations in mind, and, where IP-infused industries and IP-focused acquisitions are concerned, IP matters must be of primary focus during the DD and drafting the transaction documents.

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This paper provides a practical, simplified overview – from an IP point of view – of the stages of M&A transactions, as well as the purpose, disciplines and process of DD exercises.

The plan of this summary is as follows. Part II summarises the stages of M&A transactions. Part III reviews the purpose, disciplines and typical course of legal DDs. Part IV focuses on the particularities of IP DD processes. Part V presents the main considerations and typical issues uncovered during the IP DD. Part VI recaps the essence concluded in Parts II to V.

II. STAGES OF AN M&A TRANSACTION

M&A literature identifies two-stage to ten-step classifications, most drawing the theoretical border lines between the preliminary, preparatory, merger/acquisition and post-merger/post-acquisition phases of transactions.

In general, typical M&A transactions encompass the following main stages and milestones:¹ (i) preliminary discussions; (ii) establishing non-disclosure arrangements; (iii) elaborating letters of intent or term sheets; (iv) drafting and negotiating the transaction documents; (v) signing the transaction documents; (vi) interim period between signing and the completion of the transaction;² (vii) completion of the transaction;³ and (viii) post-closing period.

Steps from (i) through (iv) serve as the preliminary, pre-signing phase of a transaction, focused on value exploration and feasibility assessment. Simply put, during such a “courtship phase” the management of the target becomes familiar with “the advantages of the proposed marriage” and how it is envisioned they will be brought about is discussed. The “marriage ceremony” closes the second phase of a deal, encompassing mainly legal steps, which is followed by the post-closing “honeymoon” phase, wherein real integration begins. Adjustment takes place after the “honeymoon” phase.⁴

¹ DLA Piper LLP (US), *Mergers and acquisitions: overview of a transaction*, Available at: <https://www.dlapiperaccelerate.com/knowledge/2017/mergers-and-acquisitions-overview-of-a-transaction.html> (Last accessed: 31 July 2019).

² The signing and exchange of the transaction documents and the completion of an acquisition may occur simultaneously or be split in time. In the former case, namely, when an interval between signing and closing is necessary, exchange is approached as a separate transaction stage and typically involves the parties making a commitment (the “engagement”) in the signed share sale and purchase agreement (“SPA”) to proceed with the transaction. [Thomson Reuters Practical Law Corporate, *Exchange and completion: share purchases*, <https://uk.practicallaw.thomsonreuters.com/7-107-376> (Last accessed: 31 July 2019)].

³ Closing (or completion) is practically the “marriage ceremony” of the deal, as a result of which the ownership over the target transfers to the buyer.

⁴ R. Calipha, S. Tarba and D. Brock, *Mergers and acquisitions: A review of phases, motives, and success factors* [quoting Vance, Fery, Odell, Marks and Loomba (1969)], in Cooper and Finkelstein (eds), *Advances in Mergers and Acquisitions*, (Emerald Group Publishing Limited, Bingley, 2010) 1–24. [https://doi.org/10.1108/S1479-361X\(2010\)0000009004](https://doi.org/10.1108/S1479-361X(2010)0000009004)

During the preliminary phase, it is vital for a purchaser that the target company (“Target”) is assessed from (*inter alia*) a legal, tax, operational and financial point of view, by conducting the respective DDs. DDs are performed by specialist professionals, ideally prior to the negotiation of the transaction documents and after the execution of non-disclosure agreements, term sheets and letters of intent.

III. DUE DILIGENCE PROCESS

1. Rationale

In M&A transactions, DD “refers primarily to an acquirer’s review of an acquisition candidate to make sure that its purchase would pose no unnecessary risks to the acquirer’s shareholders”.⁵ This process of verification, investigation or audit of a potential deal or investment opportunity is aimed at confirming all facts and financial information, and verifying anything else that was brought up during an M&A deal or investment process.⁶

The basic goal of a DD is to assess and identify the benefits and drawbacks of a contemplated transaction, taking into account the liabilities incurred in connection with it, by investigating all relevant aspects in the past, present and future of the target. DDs aim to reduce negotiation risk and deal risk by enabling the purchaser to verify whether the target is indeed the one that it intends to buy. In this regard, current and future sales and profits, assets, liabilities and matters against which protection should be sought are identified. Deal risk is reduced through adequate pre-completion and post-acquisition planning, one of the key elements of which are DDs.⁷

2. Disciplines

A diligent buyer may want to conduct DDs in various disciplines, usually encompassing (among others) financial, commercial and legal (these three widely treated as the “main” DD topics), human resources, management, pension, tax, environmental, IP, IT, technical, operational, property, and anti-trust assessments. The scope of the DDs actually conducted will be determined by the prospective purchaser.

⁵ L. A. Reed and C. M. Elson, *The art of M&A due diligence, navigating critical steps and uncovering crucial data*, 2nd ed. (McGraw-Hill Education, New York, 2010) 6.

⁶ Corporate Finance Institute, *What is Due Diligence?*, <https://corporatefinanceinstitute.com/resources/knowledge/deals/due-diligence-overview/> (Last accessed: 31 July 2019).

⁷ P. Howson, *The Essentials of M&A Due Diligence*, 1st ed. (Routledge, London, 2018) 6–7. <https://doi.org/10.4324/9781315107097-1>

It is general practice that the legal DD conducted in respect of the transaction also covers – the depth of assessment varying on a case-by-case basis – IP and IT matters. Legal DD never encompasses assessment from a technical perspective; therefore, if the IT systems applied by the Target or its business necessitates the operation of an elaborate and/or highly particular IT background, technical IT DD is necessary.

3. DD process

As a general rule, DD processes are driven by transactional lawyers (most commonly, corporate attorneys), as well as tax and financial specialists.⁸ Depending on the business of the target, subject-matter experts (“SME”) may also need to be involved.

Prior to the commencement of the DD, counsel should clear with the client, among others, (i) the DD budget; (ii) scope of review; (iii) the type of report that must be prepared; (iv) the applicable deadlines; (v) review and issue thresholds; and (vi) potential deal-breakers. Usually, either a counsel coordinating the legal DD team or a project manager coordinating the DD of the various SMEs serves as a contact point and distributes requests and information among the DD team and the sellers.⁹

The DD phase commences with the delivery of a list of enquiries, known as “information request list” or “initial request list”, referred in jargon as the “IRL”, which is usually drafted by the purchaser’s legal advisors (in the case of a buyer DD) (“IRL”). The IRL intends to address the most common issues that may arise in relation to the Target and its operation (including IP and IT matters), as well as the transaction itself, by requesting either the (i) the sellers’ confirmation as to the absence of certain issues (e.g. the absence of patent litigation related to the operation of the Target) and as to compliance with obligations binding the Target), or, if such may not be provided; (ii) disclosure of relevant documentation. Standard IRL requests related to the Target IP (defined below) are described in Part IV below.

Where disclosure is inconsistent, or otherwise contains gaps (e.g., pages are missing, the disclosed documents refer to relevant documents that have not been disclosed or the sellers provide neither confirmations nor documents in respect of the requests set out in the IRL), it is prudent for the purchaser’s counsel to submit further requests to the sellers for clarification and disclosure.

Apart from written information disclosed to the reviewing counsel, it is also common practice to ensure the SME’s access to the management of the Target by holding management calls (interviews), during which any matter uncovered by the DD may be further addressed.¹⁰

⁸ Thomson Reuters Practical Law Corporate & Securities, *Due Diligence for Private Mergers and Acquisitions*, <https://uk.practicallaw.thomsonreuters.com/8-381-0512?originationContext=knowHow&transitionType=KnowHowItem&contextData=%28sc.Default%29&comp=pluk> (Last accessed: 31 July 2019).

⁹ Ibid.

¹⁰ Ibid.

IV. IP DUE DILIGENCE¹¹

1. Objective

The primary objective of the buyer's IP counsel during the DD is to ascertain whether, with the effect of the acquisition, the Target will remain entitled to use all IP necessary for the conduct of its business (as carried out prior to the acquisition), as well as to develop its operation as planned and in line with the intentions of the buyer.¹² Further objectives of the buyer DD include the identification of IP-related (*i*) liabilities that may affect the deal (and IP asset) valuation; and (*ii*) obstacles that must be resolved and mitigated prior to closing.¹³

These goals are achieved through the review and evaluation of the documents and information outlined in sections IV.2. and IV.3. below, and the consequent drafting solutions applied in the transaction documents.

2. Preliminary IP considerations, information and document requests

IP SMEs involved in the DD should take various factors into account prior to drafting/commenting on the IRL and starting on the DD itself: the structure of the M&A transaction at hand (share or asset purchase, forward or reverse mergers),¹⁴ the identity of the acquirer, the industry and geographic scope of the operation of the Target and the presumed materiality of the Target IP, as well as any constraints (e.g., budget, expedited

¹¹ Note that information technology ("IT"), as well as data protection matters usually form an independent area of the DD processes. Therefore, this summary concentrates on "classical" IP DD matters and does not encompass IT and data protection considerations.

¹² C. Connolly, *Intellectual property: share purchases, how to deal with intellectual property rights on a share purchase or other acquisition*, <https://uk.practicallaw.thomsonreuters.com/Document/Ib55548a8e83211e398db8b09b4f043e0/View/FullText.html?listSource=Foldering&originationContext=MyResearchHistoryRecents&transitionType=MyResearchHistoryItem&contextData=%28soc.Search%29&VR=3.0&RS=cblt1.0&navId=BE477F2DE6E97F2072CCC2E3FBE34ECD&comp=pluk> (Last accessed: 31 July 2019).

¹³ D. Glazier and T. Rubin, *Intellectual Property: Stock Purchases and Mergers*, [https://uk.practicallaw.thomsonreuters.com/6-506-9152?originationContext=document&vr=3.0&rs=PLUK1.0&transitionType=DocumentItem&contextData=\(sc.Default\)#co_anchor_a988992](https://uk.practicallaw.thomsonreuters.com/6-506-9152?originationContext=document&vr=3.0&rs=PLUK1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_anchor_a988992) (Last accessed: 31 July 2019).

¹⁴ In mergers and stock purchases, the acquirer will acquire control over the IP rights owned by the Target either directly or indirectly. In asset purchases, the buyer will acquire only certain assets and liabilities. In the former case, particular consideration must be given by counsel whether the transaction itself will impair any target IP rights, trigger any change-of-control provisions or necessitate third-party consents or special measures to ensure the continuous right of usage of the target (or buyer). (See footnote 12.)

timeline).¹⁵ It should also be established whether the Target is an operating company that is a party to IP agreements.

The materiality of the IP may be assessed based on, among others, the current or future revenue generated by royalties or license fees payable or received regarding the licensing of the IP, as well as the lack of commercially available alternatives to the IP, and the applicable replacement cost.¹⁶

IP-related transactional DDs aim to encompass the broadest scope of IP owned and/or used, exploited or otherwise held for use by the Target (“Target IP”). *Per definitionem*, Target IP usually includes registered and unregistered IP rights (including, know-how, trademarks, patents, copyright, inventions, database rights and domain names).¹⁷

Upon the commencement of a DD process, it is standard for the legal counsel of the buyer to request:¹⁸

(i) a summary list of the Target IP, distinguishing between registered and unregistered IP, as well as IP in respect of which the application for registration is ongoing at the time of the request, together with (where relevant) copies of documents relating to such IP;

(ii) confirmation that the Target IP is valid and all registrable IP has been duly registered;

(iii) details of costs related to maintaining the registered Target IP (where relevant);

(iv) licences, collaboration agreements and consents granted in respect of the Target IP that forms the basis of the use by the Target of Target IP originally owned by third parties;

(v) details of any actual (i.e., ongoing) disputes, or threatening disputes (e.g., of which notice or a cease- and desist-letter has been served on the Target or on the sellers), especially of those concerning the ownership or validity of Target IP;

(vi) documentation related to any (known or suspected) infringement by the Target of third parties’ IP rights, or the confirmation that no such act has been committed by the Target and no such claim has been put forward;

(vii) details of shared IP rights, clearly specifying if an IP right is held jointly or is licensed from or to an entity in the sellers’ group;

¹⁵ Thomson Reuters Practical Law Intellectual Property & Technology, *IP Due Diligence Issues in M&A Transactions, Checklist*, (based on original materials by Elaine D. Ziff and Grace Del Val), www.uk.practicallaw.thomsonreuters.com (Last accessed: 31 July 2019).

¹⁶ *Ibid.*

¹⁷ McDermott Will & Emery, *The top five intellectual property traps in M&A transactions*, <https://www.lexology.com/library/detail.aspx?g=ea39b939-6d90-4536-984c-e9e1b4fccfd5> (Last accessed: 31 July 2019).

¹⁸ Thomson Reuters Practical Law Corporate, *Legal due diligence information request: long form: share purchases*, <https://uk.practicallaw.thomsonreuters.com/> (Last accessed: 31 July 2019).

(*viii*) details of whether any Target IP has been developed by the employees of the Target (or the seller group), or whether by independent contractors, as well as the relevant contracts on assignment of the Target IP rights to the Target.

3. Publicly available information

In addition (and prior) to the review of the documentation disclosed by the sellers, it is useful to gather information from public sources in relation to the Target's IP. This preliminary review should encompass checking the websites used by the Target (which may reveal the set of trademarks or other IP used by the Target) and publicly available IP databases (including especially certified registers (in Hungarian "közhitel nyilvántartások").

It is therefore standard for Hungarian IP counsel to check, in addition to the documents disclosed by the sellers:

(*i*) the online database (in Hungarian: "E-nyilvántartás adatbázis") of the Hungarian Intellectual Property Office (in Hungarian: "Szellemi Tulajdon Nemzeti Hivatala") ("HIPO")¹⁹ in respect of (*a*) applications submitted to and/or granted by the HIPO regarding industrial IP; and (*b*) usage rights granted in respect of orphan works (in Hungarian: "árva művek");²⁰

(*ii*) the online database²¹ of the Council of Internet Providers (in Hungarian: "Internet Szolgáltatók Tanácsa") ("ISZT") in respect of ".hu" top level domain names. The so-called "whois" record, retrievable from this page, reveals the person registering the domain name²² and the time of registration, as well as the name and contact details of the registrar. Data reflected in the ISZT database is updated based on the official databases maintained by the registrars;

(*iii*) the webpage through which the Target is available on the internet. In the majority of cases, the webpages reflect the trademarks and trade names used by the Target;

(*iv*) sample official documents (e.g., invoices, customer communications) issued by the Target, as part of its operations.

¹⁹ Accessible at the following webpage: www.sztnh.gov.hu (Last accessed: 31 July 2019).

²⁰ In addition, it is standard to consult the the online database (in Hungarian: "E-kutatás adatbázis") of the HIPO in respect of industrial properties. Data related to industrial IP registered or applied for in Hungary, or granted (and effective) internationally or at an EU level may be accessed in this database. Note that the "E-kutatás" database is not a certified register.

²¹ Accessible at the following webpage: www.domain.hu (Last accessed: 31 July 2019).

²² Note, however, that, for GDPR compliance, the name of natural persons is not reflected on the whois record. This could pose particular difficulties in an M&A transaction where the person registering the domain name is not an employee or official of the Target but a person belonging to the sellers' group.

When performing public searches, it is useful to keep in mind that there may exist entries standing in the name of a predecessor-in-title (or, more usually, the legal predecessor or previous corporate name of the target).²³

V. KEY IP CONSIDERATIONS

At a minimum, the assessment in point IV.3. above will provide information relating to the proprietorship, geographical spread and term of the Target's registered IP, and may serve as a basis for the evaluation of the Target's technology (through the value of the patents and published patent applications of the Target). Usually (but to be verified in each case, to the extent possible) seller/Target records of registered IP are accurate. As the buyer would acquire the Target itself under the SPA, generally no further steps would be required to ensure that the Target retains its ownership over that IP.²⁴

Unlike the assessment of registered IP, the identification and evaluation of unregistered IP rights could prove more difficult. This could pose particular difficulties in unregistered IP-infused industries, such as software production, publishing and fashion, as well as entertainment. Therefore, the due review of the Target's documentation will be key for establishing whether ownership exists and is defensible.

In each case, IP counsel should review the IP search reports against disclosure to verify the accuracy and completeness of the latter, and whether there are any gaps in the chain-of-title, or there remains any unreleased security or other issues in respect of the protection of the Target IP. In the event of any discrepancy between public sources and the information disclosed by the sellers, counsel should confirm the reason for such a discrepancy and double-check the accurate scope of IP that will be included in the transaction.²⁵

Counsel must also understand how the Target IP has been developed or acquired (e.g., whether the Target IP has been developed jointly with third parties, or by employees, consultants or other independent contractors of the Target, or, with funding or resources from any government entities or academic institutions) and review the underlying documentation. In the case of acquired IP, the assignment provisions of the relevant agreements must be double-checked to ensure that the transfer of ownership has been completed, without any additional conditions or obligations.²⁶

A core area of review is the IP licences concluded by the Company, whether inbound or outbound. As the form of licences varies, some may be easily identified (e.g., trademark licenses), while others may be less obvious (e.g., research and development,

²³ See footnote 12.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

consulting, manufacturing, supply or distribution agreements). Although disclosure in respect of in-licensed IP will mostly depend on the seller, IP counsel should normally try to identify the following in each case:²⁷

- (i) the role played by the Target (licensee-licensor, assignee- assignor);
- (ii) IP involved;
- (iii) exclusive or non-exclusive nature of grant;
- (iv) geographical scope of the licence and whether there are any restrictions on export;
- (v) term of the arrangement, remaining term of the protection of the underlying IP, any post-termination restrictions;
- (vi) grant-back, right of first refusal, right of first offer or option provisions;
- (vii) cases of termination, especially if a change-of-control clause will be applicable (in Hungarian: irányításváltozási klauzula) in relation to the contemplated acquisition; and
- (viii) royalties payable on the grant.

A material issue to analyse is how the licensing arrangements of the Target will be affected by the contemplated transaction (e.g., in the case of stock purchases and forward or reverse mergers change-of-control or anti-assignment provisions may be triggered).²⁸

The degree of IP and IT interdependence of the Target from seller group entities,²⁹ target group entities³⁰ and third persons³¹ must also be identified and assessed. Depending on the structure of the seller/target group and the business and role of the Target fulfilled in such set-up, interdependence could work both ways (i.e., the Target licenses IP to and/or from seller group entities). In general terms, if the DD identifies that there exists “shared” IP, in carve-outs, the parties must discuss and agree on the future ownership and use of such IP. The outcome of the negotiation and the terms of eventual licensing or assignment arrangements will depend on the bargaining position of the parties. In the case of shared IP:

(i) if, after the completion of the acquisition, the Target would not use IP licensed from seller group entities, the relevant licensing arrangements should be terminated (typically pre-closing);

(ii) if, after the completion of the acquisition the Target would not license IP to seller group entities, the relevant licensing arrangements should be terminated (typically pre-closing);

²⁷ See footnote 12.

²⁸ See footnote 13.

²⁹ That is, those entities that will not belong to the buyer’s group after the effective date of the acquisition (i.e. the entities retained by the sellers).

³⁰ That is, those entities that are being purchased within the framework of the transaction directly or indirectly (e.g., subsidiaries of the Target).

³¹ That is, partners that neither belong to the seller group, nor form part of the target group.

- (iii) if, after the completion of the acquisition, the Target would still be using:
- a) house marks (e.g., the name of the holding company is used by the Target as a product identifier or the Target carries out its business under a trading name that derives from the name of the holding), use could usually be permitted for a limited term;
 - b) trademarks of the seller group, if the goods of the seller group and that of the Target in respect of which the relevant mark is used, are (i) related, the conclusion of a licence arrangement would be necessary, or (ii) unrelated, the parties may find the conclusion of an assignment arrangement beneficial; or
 - c) other IP, the use of such IP should be ensured.³²

Finally, counsel should also gain a clear understanding of the practice of the Target concerning the protection of the Target IP (i.e., whether all Target IP rights are registered, all renewal and maintenance fees are paid when due, which IP right is set to expire in the near future) and obtain confirmation whether there are any ongoing, pending or threatening IP disputes, infringement, unfair competition, misappropriation, and other IP-related claims (e.g., reexamination, cancellation, opposition) involving the Target and the Target IP. In relation to disputes, their materiality, worst and best-case scenarios, alternatives, likelihood of settlement, the costs of dispute should be evaluated by counsel.³³

The issues identified during the DD review, together with their transactional evaluation and IP counsel's recommendation, are summarised in the due diligence report that will be provided to the client for review and consideration. The due diligence report usually has both the IRL and the list of additional questions and requests, together with the sellers' answers submitted in response, as annexes.

VI. CONCLUSION

IP counsel, as an SME, plays an important role throughout the transaction cycle, especially if the Target IP and/or the IP-related interdependence of the Target is material. This involvement should be optimised – on a case-by-case basis, taking into consideration the size and structure of the deal, as well as the materiality of the IP involved – from the perspective, and with the purpose of minimising the acquirer's risk against a lemon purchase.

³² See footnote 12.

³³ Ibid.

It has been demonstrated through the bitter examples of Volkswagen's Rolls-Royce acquisition,³⁴ Clorox's Pinesol purchase³⁵ and Symantex's Bindview acquisition³⁶ that IP due diligence must be taken seriously indeed, especially in cases where "trophy" IP is concerned. IP due diligence, therefore, is not a luxury but a necessity³⁷ and its findings must be evaluated carefully and form the basis of the transaction documents, that – where (and how most) cost-effective – will allocate risk³⁸ through representations, warranties, indemnities, covenants, condition precedents, earn-outs and completion deliverables provisions.

³⁴ M. Lieberstein and G. Peterson, Putting the diligence in intellectual property due diligence: cautionary tales of those who didn't, (2016) 25 (2) *Bright Ideas Newsletter*.

³⁵ R. Cruise, *The importance of due diligence in IP: Lessons from Volkswagen, Apple, Inc. and Clorox Company*, <https://www.pof.com.au/importance-due-diligence-ip-lessons-volkswagen-apple-inc-clorox-company/> (Last accessed: 31 July 2019).

³⁶ T. Lau, *Caveat Emptor: Lessons from Volkswagen's Lemon Purchase*, https://ecommons.udayton.edu/mgt_fac_pub (Last accessed: 31 July 2019).

³⁷ I. Cockburn, *IP Due Diligence – A Necessity, not a Luxury*, https://www.wipo.int/sme/en/documents/ip_due_diligence_fulltext.html (Last accessed: 31 July 2019).

³⁸ J. C. Coates IV, Allocating Risk through Contract, Evidence from M&A and Policy Implications, 09/2012 *Harvard Law School Discussion Paper No. 729*, http://www.law.harvard.edu/programs/olin_center/papers/pdf/Coates_729.pdf (Last accessed: 31 July 2019).

Sipos, Attila*

The Modernisation of Air Carrier Liability: Is the New Montreal Convention the Humble Successor to the Warsaw System?

ABSTRACT

For seventy years, the Convention on the Unification of Certain Rules Relating to International Carriage by Air, more commonly known as the Warsaw Convention (1929) was the most important treaty regulating the relations of private international air law, which was replaced by a new international treaty, the Montreal Convention (1999). Of the international treaties of private law drafted under the guidance of the International Civil Aviation Organization (ICAO), the Montreal Convention is at present the most important treaty of private international air law. Its peculiarity is hidden in its legal institutions, which support the universal predominance of the Montreal Convention. The lawmaker introduced legal institutions familiar from the Warsaw Convention and utterly new ones, all of which targeted its ratification by as many countries as possible so that private international legal unification in the area of air law can be accomplished in the broadest possible scope. The author unfolds the definitive features of the Warsaw Convention and the phases of its modernisation. His goal consists partly in the introduction of the unquestionably manifold ways the Montreal Convention drew upon the Warsaw Convention and its amendments, but he also emphasises that as a new, renascent international source of law it guarantees rights and creates obligations in conformity with the challenges of our days.

KEYWORDS: air carrier liability, limited liability, air ticket, modernization

I. INTRODUCTION

The principal objective of the rules of the private law of international civil aviation (treaties) is the realisation of the uniformity of law in the system of international relations, especially giving rise to rightful and equitable (*ex aequo et bono*) balance concerning the rights of the claimant.

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In the system of rules of liability for damages in international civil aviation, the rules of liability for damage caused to the *second party* (passengers or consignors) by air carriers are incorporated by the following sources of law:

- the universally recognised general legal principles of international law;
- multilateral international contracts [e.g., the Warsaw Convention (1929) and its amendments, the Montreal Convention (1999)];
- the decisions of international organisations;
- judicial decisions by the appliers of the law;
- agreements concluded between the state and the airline;
- agreements among the airlines; and
- so-called soft law provisions and agreements.

Besides international treaties, what have great significance upon the adjudication of damage caused to a second party include internationally recognised legal practice (cases constituting precedents), the resolutions of the International Air Transport Association (IATA)¹ and its agreements concluded with the member airlines and the professional requirements therein. Among legal sources, the universally recognised Warsaw Convention and the legal cases founded on its rules are prominent.

II. THE WARSAW CONVENTION (1929)

The first international commercial flight travelling between Paris and London took off with 12 paying passengers on board on 8 February 1919. The airplane, an F.60 Goliath was navigated by Henry Farman (1874–1958), a reputed aviator, pilot and airplane architect at that time. All of the passengers were soldiers, as non-military flying was still prohibited following the First World War.² After the transition to peacetime and the creation of civil airlines, the French government soon realised that regulation and the rules of liability for damages need to be formulated on an international level. Therefore, the French president, Raymond Poincaré (1860–1934) convened an

¹ The IATA was set up for the second time on 19 April 1945 during the International Air Transport Conference of international airlines held at Habana, Cuba (the former IATA had functioned between 1919–1945 with headquarters at The Hague). Initially, the IATA operated the uniform system of charges. In our days, the IATA deals with the standardisation of procedures and practices, the representation of member airlines and the comparison of tariffs and slot allocation. The headquarters of the organisation is in Montreal, whereas, the top management has its sessions in Geneva. Nowadays, more than 285 airlines representing 80% of the performers of global air traffic are members of the IATA. E. M. Gjemulla and L. Weber (eds): *International and EU Aviation Law: Selected Issues*, (The Netherlands Alphen aan den Rijn, 2011); L. Weber, *International Organizations*. (Kluwer Law International, 2011) Chapter 3, 112–128.

² K. DeMace, Farman F.60 Goliath – The Plane of the Week, *Theflightblog.com*, <https://aviationoiloutlet.com/blog/plane-week-farman-f-60-goliath-2/> (Last accessed: 31 July 2019).

International Conference on Private Air Law in 1925. At the conference held in Paris, the delegates of the invited countries set up the International Technical Committee of Experts in Air Law (CITEJA). At the outset, the objective of the Committee was the examination of the feasibility of the establishment of a uniform international regime of liability, whereas later it became the elaboration of the system and elements of an international treaty regulating liability for damages. The body at its first, then at its second session (1928) deliberated on the liability of air carriers, the system of jurisdiction and the issues of combined and successive carriage. At the third session of the CITEJA Committee, the draft of the treaty designed to be final was approved; therefore, the Committee made a recommendation for the convention of a new conference on international air law. On the basis of the recommendation, the second International Conference on Private Air Law was convened in Warsaw on 4–12 October 1929, at which 33 countries had delegates. The United States participated at the conference as an observer. The final recommendation put forward by the presidium was adopted by the parties as an international Convention on the Unification of Certain Rules Relating to International Carriage by Air, which later became familiar as the Warsaw Convention. The Convention was elaborated in French and it had a sole original copy; therefore, the Polish government, as the depository of the Convention, took steps so that the governments of the contracting parties received an authentic copy. The sole genuine version of the Warsaw Convention was lost during World War II, only the copies received by the representatives of the States that acceded to the Convention remained intact. Having been ratified by five acceding states, the Warsaw Convention took effect on 13 February 1933.

As air transport gained significance, it became increasingly problematic that the extent of compensation, mainly for personal injury, varied from state to state, and the legal grounds of liability had not been the same in different legal systems. Therefore, the Warsaw Convention focused on the uniform regulation of the liability of the air carrier for damages. For the compensation of pecuniary claims deriving from damage caused by the air carrier, the Convention gave rise to a system of rules of private law, which directly affected both natural and legal entities.³ A prominent merit of the Warsaw Convention consisted in its endeavour to resolve the contradictions between the Continental and the Anglo-Saxon legal systems.

It was primarily the legal experts of countries following the Continental legal system who drafted the Convention but, by working in an open-minded manner, they offered scope for the Anglo-Saxon case law as well. As a consequence, for the interpretation of the main rules and concepts of the Warsaw Convention and its successor, the Montreal Convention, internationally recognised Anglo-Saxon legal cases

³ J. E. Landry, Swift, Sure and Equitable Recovery. A Developing Concept in International Aviation Law, (1975) 47., *New York State Bar Journal*, 372–374.

as precedents and judicial practice have given guidance. The makers of the Warsaw Convention, drawing on the institutional system of maritime law, created one of the most significant international treaties of international law. The Warsaw Convention was ratified by 152 countries, thus, we can rightly state that the Convention achieved the goal set by its drafters since it:

- *unified* the specific statutes pertaining to international carriage by air;
- *limited* the liability of air carriers for damages; and
- *harmonised* the contents and the formal requirements of the documents of carriage.

The high number of acceding countries indicates that the Warsaw Convention has been the most widely recognised private international law treaty in the history of the regulation of aviation. The number of accessions will not increase, despite the fact that the Warsaw Convention is still in effect, since the Convention was completely replaced by the Montreal Convention, which in a way “superannuated” it. For countries which have acceded to the Montreal Convention, the Warsaw system of rules has been entirely invalidated. At the same time, in the case of countries which have not acceded to the Montreal Convention, but had ratified the Warsaw Convention and its amendments, the Warsaw regime remains guiding.

1. Limited liability

At the outset, in the Warsaw system, the lawmaker counter-balanced the rigorous liability of the air carrier for damages by limiting the amount of compensation to be paid in the event of accidents sustained by the passengers, thereby alleviating the situation of the air carrier. The limitation of the liability for damages as an institution had been adopted from maritime law. Its introduction was justified mainly by the financial protection of air carriers since, upon the occurrence of really grave accidents, they had become obliged to compensate for damage to such an extent that they could be entangled in financially difficult situations and in extreme cases in bankruptcy. One stakeholder group in the air transport industry, namely the airlines, had needed an adequate safeguard for their liability for damages, its protection by the regulator. Aviation is a capital-intensive, financially risky activity. Owing to the sharpening competition in the market, a great majority of the airlines had become financially vulnerable, and their profit-generating capacity in the passenger forwarding segment remained low.⁴ Although the states have,

⁴ The main activity of airlines is the carriage of passengers. In the passenger carriage segment, airlines make low margins due to fierce competition, the price of kerosene, tax burdens, and many other factors. In other areas, such as the consignment of cargo or charter activities, airlines realise far higher profits. In 2012 the IATA member airlines on average made profits of 2.56 USD per passenger on one-way flights. According to the report by IATA, between 2004 and 2011, airlines made profits of 4.1 per cent on average, which,

since then, tended to liberalise their domestic markets and withdraw from regulating the airlines, they are still interested in safeguarding, with the instruments of law, the stability of airlines, which has yielded measurable domestic economic benefits and served national interests in many respects. Such a regulatory instrument, creating an advantageous situation for the air carriers, was the comprehensive limitation of the liability of airlines for damages under an international treaty (the Warsaw Convention). The introduction of the limitation protected not only the air carriers but also facilitated the unification both of the assertion of the right to compensation and of the extent of payments, as well as the reduction of the number of frequently circumstantial and protracted lawsuits between the subjects of the legal relation of carriage.⁵ The limitation of the liability for damages also diminished the high financial risk deriving from the activity of carriage by air. This way financing insurance became cheaper and the financial consequences of causing damage became more predictable. These manifested themselves in decreasing operating costs and the falling price of air services. As a consequence of the limitation, before the commencement of the journey, the passenger or the consignor of cargo was obliged to take out insurance for a considerably higher amount than the limited amount of compensation to be paid by the airline.

With good reason, the question arises whether the passenger or the consignor of the cargo was aware of the circumstance that, in the event of an accident, the air carrier did not compensate for the whole value of damage, but only for its fraction. Pursuant to the Warsaw Convention, the answer is unequivocally yes. Namely, on the basis of the provision of the Convention, the airline, before the commencement of the flight, was obliged to warn each passenger of this condition indicated in the air ticket proving the contractual relationship. The air ticket needs to contain an unambiguous warning that the carriage may be covered by the Warsaw Convention, which in most cases limits the liability of carriers for death or personal injury and in respect of the loss of or damage to baggage [Article 3(1)c)].

However, in practice, the majority of passengers did not read the contractual conditions of the air ticket but this essentially did not affect the limited liability of the air carrier. If the air carrier met its obligation to communicate the information lawfully, it could maintain its advantageous situation deriving from the limitation. If the passenger did not read the warning publicised in the air ticket, this fact did

in comparison with the profitability of other industries, is extremely low. In view of the fact that, in the inventory of a larger airline, the total value of its modern airplanes in itself is several billion dollars, compared with the huge operational risk, this profit is not really prominent. This enormous capital would yield much higher profits, in another investment. At the same time, between 2015 and 2019, the IATA member airlines achieved quite high profits, of above 8.4 per cent. B. Pearce, Profitability and the Air Transport Value Chain, (2013) (10) *IATA Economics Briefing*, 18.; (2019) *IATA Annual Review*, 44.

⁵ H. Drion, *Limitation of Liabilities in International Air Law*, (Springer, Dordrecht, 1954) 36–41. <https://doi.org/10.1007/978-94-017-6127-7>

not have significance for the air carrier since, pursuant to the Roman legal maxim, ignorance of the law does not exempt anyone from bearing responsibility (*ignorantia iuris neminem excusat*). Although the lawmaker strictly demanded the communication of the information, it ignored passengers with sight defects, the illiterate, or those who do not understand the conditions of the contract in a foreign language.

2. The relevance of documentation

The documents of carriage (the passenger ticket and the air waybill upon the consignment of cargo) have probative force. In the absence of evidence to the contrary, the passenger ticket, as main evidence, shall constitute *prima facie* evidence⁶ of the conclusion and the conditions of the contract of carriage, consequently, of the route as agreed upon by the parties without any doubt whatsoever. The international character of the carriage may be established according to the exact route (the place of departure and the place of destination) accepted by the contracting parties [Article 1(2)], which is important, since the Warsaw Convention is applicable only and exclusively to cases of international carriage, not to domestic carriage.

The Warsaw Convention strictly demanded notification of the limited liability of the air carrier in the passenger ticket. The passenger needed to be aware of the fact of the limitation in time, so that they could take out supplementary insurance with more favourable conditions in order to gain greater protection. The absence, irregularity or loss of the passenger ticket in itself did not affect the existence or the validity of the contract of carriage [Article 3(2)], but it had an entirely detrimental legal consequence for the carrier. Namely, if, with the consent or awareness of the air carrier, the passenger embarked without a passenger ticket made out in advance, or, if the ticket did not include the general warning pertaining to the limitation of liability and an accident happened, the air carrier forfeited its right to determine the upper limit of the compensation and was liable for the damage caused *without limitation*. The air carrier could also lose the applicability of the limitation clause if, in the lawsuit, the passenger (or their relative in the case of their death) proved successfully that the aggrieved party could not avail themselves of the opportunity to purchase extra insurance because the air carrier had imparted the condition pertaining to the limitation illegibly or incomprehensibly.

⁶ A Latin expression meaning on its first encounter or at first sight. It is based on first impression; accepted as correct until proved otherwise.

In the *John Lisi versus Alitalia*,⁷ the plaintiff took recourse to the court with the claim that the airline paid total compensation for the damage instead of that of about 8,300 USD (it was the normative amount at that time) deriving from limited liability for the fatally injured passenger on board the airplane travelling from Rome (FCO) to New York (JFK), which crashed close to Shannon Airport. In the lawsuit, the plaintiff based his claim on the fact that the passenger ticket had been printed in point 4 print. Consequently, before the flight the passenger had been unable to read and construe the warning in the ticket appropriately, therefore, he had not been able to take prudent steps in order to supplement his insurance. The court sustained the action, and in its justification, it highlighted that by printing in Lilliputian letters the airline disguised the conditions of the flight, therefore, the air carrier had to compensate for the entire damage.

However, the *Lisi* case did not become a precedent to be followed by other judicial fora, it is rather an interesting example of the struggle for breaking through the limitation from the position of the plaintiff.

In *Chan Elisa versus Korean Air Lines*,⁸ the plaintiff took recourse to the court with the claim that, in the case of the passenger who was killed in the tragedy of Flight 007 of Korean Air Lines (KE), the airline should compensate the entire damage instead of the limited amount specified in the Warsaw Convention, which was raised to 75,000 USD under the Montreal Agreement, applicable in the event of death. While making out the passenger ticket, the airline used letters of size 8 instead of modern characters of size 10 prescribed under the Montreal Agreement (1966) concluded among the airlines. Thus, the passenger could not read clearly and interpret the warning; consequently, they did not take due steps to purchase supplementary insurance. Nevertheless, the court ruled that by the use of letters of size 8, the airline did not forfeit its advantage deriving from limited liability guaranteed under the Warsaw Convention and therefore dismissed the plaintiff's action. Although the reference to the size of the letters was unsuccessful, the plaintiff (a relative of the passenger), not long after the ruling, broke through the limitation of liability for damages in another way. Subsequently to the end of the Cold War, an international team of experts examined the flight recorder (black box) of the crashed aircraft, which revealed that the pilots had been unambiguously responsible for the occurrence of the tragedy. Consequently, Korean Air Lines was deprived of the protection of limited liability for damages guaranteed by the Warsaw Convention, therefore, it had to pay damages in full to the heirs of the victims.

Thenceforward, the crucial factor in judicial practice consisted not in the size of the letters, but a much more practical aspect: the delayed receipt of the passenger ticket (for example, the passenger received their passenger ticket while embarking,⁹

⁷ *John Lisi v. Alitalia*, US Court of Appeals Second Circuit, Nos. 91–95, Dock. 30543–30547, 1966. 510–514.

⁸ *Chan Elisa v. Korean Air Lines*, Supreme Court Reporter, 490 U.S. 122, 104 L. Ed. 2d 113, 1989.

⁹ *Warren v. Flying Tiger Line Inc.*, US Court of Appeals 9th Circuit, 352 F. 2d 494, 1965.

or they gained access to their ticket on board in their seat).¹⁰ In these cases it was unequivocal that the passenger could not read the warning, or if they did, they could do so in the moment preceding departure, therefore, they did not have time to take steps in the interest of the further reinforcement of their protection.

The majority of passengers do not deal with the contractual conditions of the passenger ticket; their attention is obviously focused on the times of departure and arrival. If any of the passengers did read the warning attentively, generally, they did not decide to turn to an insurance company in order to supplement the low amount determined for the occurrence of an accident under the contractual conditions. Therefore, the lawmaker provided the opportunity for the passenger before the commencement of the flight to purchase insurance entitling them to an amount of compensation deemed sufficient and favourable, or to agree on a higher limit of liability with the air carrier under a special contract [Article 22(1)] and, in the case of checked-in baggage of high value, a special declaration of interest in delivery at destination for a supplementary sum [Article 22(2)a)].

The Warsaw Convention, although it protected the limited liability of the airlines by all means, in certain cases provided scope for the forfeiture of the limitation. In the system of the Warsaw Convention, liability became unlimited, if pursuant to the provisions of the Convention, the intentional conduct of the airline as damaging party was established. For this, the claimant needed to prove that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent or recklessly (*luxuria*) to cause damage and with knowledge that damage would probably result (Article 25).

In the lawsuit *Marjorie Zicherman versus Korean Air Lines*,¹¹ the plaintiff took recourse to the court with the claim that, in the case of a passenger who died in the tragedy of Flight 007 of Korean Air Lines (KE) the airline should compensate for the entire damage instead of the limited amount specified in the Warsaw Convention and raised to 75,000 USD in the Montreal Agreement (1966) applicable in the case of death. The plaintiff submitted the claim with reference to the fact that the pilots, while proceeding in their duty, caused the tragedy via wilful misconduct and negligence, which was proved. Consequently, the limitation of the liability for damages was broken. The court established the liability of the airline and emphasised in its justification that, on the basis of international maritime law, the heirs may claim further pecuniary compensation as a consequence of the loss of life above the high seas. The court obliged the airline to pay the plaintiff (the relatives) compensation of 70,000 USD for the loss of companionship, 161,000 USD for the grief to be borne during their lives, 16,000 USD for the omitted support and inheritance and

¹⁰ *Mertens v. Flying Tiger Line Inc.*, US Court of Appeals 2nd Circuit, 341 F. 2d 851, 1965.

¹¹ *Marjorie Zicherman v. Korean Air Lines, Co. Ltd.*, Supreme Court reporter 510 U.S. 217, 133 L. Ed. 2d 590, 1996.

100,000 USD for the pain and suffering of the deceased during their fall. The Death on the High Seas Act (DOHSA) is integral to the domestic law of the United States and it is applicable solely if the jurisdiction of an American court has been appointed to adjudge the case. The main objective of the act adopted in 1920 by the Congress of the United States has been that, in accidents on the high seas and due to deaths therefrom, the heirs (child, wife, husband, parents or relatives) will receive compensation from the owner of the ship. The statute has also been applied to aviation accidents, but it pertains exclusively to commercial flights (neither to helicopters, state or military planes, nor to corporate or private airplanes). This rule has been applicable if the accident happened beyond 12 nautical miles off the coast of the United States.¹²

Since the air carriers paid unreasonably low compensation of a fixed amount for the loss of life, before the court, the relatives and heirs resorted to the only method of breaking through limited liability: pursuant to Article 25 of the Warsaw Convention, they endeavoured to prove the responsibility of the crew of the aircraft for the event. The array of solicitors saw evidence in all cases for the fact that the accident had ensued due to the wilful misconduct of the crew or the agent of the air carrier with malice aforethought, but mainly due to the deliberate negligence or recklessness (*luxuria*) of the commanding pilot proceeding in their scope of duties. They did so with consideration to demand the highest possible amount of compensation for their clients by the airlines. This is the origin of the saying that in aviation it is not the flight safety risk that is high, but the membership of the Bar Association.

III. MODERNISATION OF THE WARSAW CONVENTION

With the advance of time, the Warsaw Convention became obsolete, although the lawmaker amended it several times via further treaties and supplementary protocols. The continual revision of the Warsaw system of rules ensued primarily because of the reconsideration of liability limitations. The member states did not always keep up with inflation, furthermore, the economic differences and divergences of the standard of living among the countries made the amounts of compensation disproportionate. The saying: "The American passenger is the most expensive passenger" well illustrated the evolved situation. The rulings passed by the courts of the United States one after the other secured the highest pecuniary and non-pecuniary compensation for the claimants, which encompassed all the elements of the damage, such as suffering, the loss of support and inheritance, the grief and pain of the relatives, the loss of paternal care, child-rearing, the absence of the loved person and the loss of an affectionate life. Since the quality of

¹² *Death on the High Seas Act (DOHSA)*. *Code of Laws of the United States of America* 46 U.S.C. appx. (Articles 761–768).

life and the cost of living vary by country, this fact was considered by the courts upon the calculation of the amount of damages. For example, if a 45-year-old wage earner (in an administrative position) dying in an air accident leaves behind a wife and one child, their family would receive compensation of approx. 4.5 million USD in the United States. The amount of compensation under the same conditions in Canada would equal 1.7 million USD, in Great-Britain 1.2 million USD, in France 1.4 million USD, in Eastern Europe 450,000 USD, whereas in Asia it would be between 250,000 and 650,000 USD.¹³

Claimants therefore generally filed their claims in U.S. courts in the hope of the award of higher amounts of compensation due to the additional benefits deriving from the more effective protection of consumers. They did so even if the U.S. court did not have jurisdiction for the adjudication of the case, since the headquarters or the principal place of business of the air carrier was not registered in the territory of the U.S. or the place of destination (the last destination on the air ticket) was not in the U.S. In such cases the court rejected the action due to lack of jurisdiction, of competence.

In the case *Klos versus Polish Airline (LOT)*,¹⁴ the passenger purchased a return ticket for the route Warsaw (WAW) – New York (JFK) – Warsaw (WAW) in May 1987. The real objective of the flight was not sightseeing, because the passenger wished to start a new life in New York. The passenger bought the return passenger ticket sheerly with the intent to camouflage his plan. However, the Ilyushin Il–62M airplane on flight 5055 of the airline crashed shortly after take-off and all the persons on board lost their lives. The relatives (plaintiffs) referred the case to a U.S. court with reference to the fourth forum, since the ultimate end of the journey, the destination, was New York. Although in the case the first three fora secured the jurisdiction of a Polish court, the plaintiffs chose the American forum of jurisdiction. Nevertheless, the U.S. court established that it could not proceed in the case due to lack of jurisdiction, since the final destination of the journey was not New York, but Warsaw; therefore, it dismissed the action. Undoubtedly, the passenger ticket attests the real objective of the journey (the place of departure and the place of destination were both Warsaw, whereas the agreed stopping place was New York). The subjective goal of the passenger in the contractual relationship was not relevant, hence it was a non-considerable circumstance in the judgment of the case.

If the responsibility of the air carrier were proved, it was by all means liable to the upper limit of the amount of compensation determined under the Warsaw Convention. Although the limitation of the amount of compensation implied measurable advantage for the air carrier, the lawmaker nevertheless precluded the possibility that the air carrier in an extreme case could settle unilaterally at a lower value than the determined amount of liability, or, exempt itself from the obligation of compensation. All clauses with the

¹³ A. J. Harakas, *Aviation Issues in the US*, (McGill University, Lecture, October 2014) 7.

¹⁴ *Stefania Klos v. Polskie Linie Lotnicze*, No. 379, Docket 97–7073, US Court of Appeals, Second Circuit 1997.

objective of exonerating the air carrier or the determining a lower limit of liability than that prescribed under the Convention were null and void, but the nullity of any such clause did not entail the nullity of the other provisions of the contract.

The main objective of the amendments of the Warsaw Convention was to raise the limits of liability and the amount of compensation. The increases in themselves did not solve all problems but they supported the trend of the accession of as many countries as possible to the international treaties amending the Convention, and the accession of as many airlines as possible to the agreements on carriage by air. The most important objective further on remained the same: should the parties be entitled to compensation take action anywhere, the statutes to be applied in their cases and the judgments they are awarded need to be the same.

The modernisation of the Warsaw Convention ensued in several steps, of which the most important ones are the following:

- The Hague Protocol (1955);
- The Guadalajara Convention (1961);
- The Montreal Agreement (1966);
- The Guatemala City Protocol (1971);
- The Montreal Additional Protocols [No. 1, 2, 3, 4] (1975);
- The Japanese Initiative (1992);
- The IATA Inter-carrier Agreements (1995–1996);
- The Regulation of the Council of the European Union (1997).

1. The Hague Protocol (1955)¹⁵

The objective of the recommendation elaborated by the ICAO Legal Committee (LC) was that, rather than drafting a new convention, the content of the Warsaw Convention should be validated with the necessary amendments. The members of the committee focused on counterbalancing the excessive protection of the air carriers and supporting the less protected passengers resorting to the service. On this basis, the contracting parties doubled the upper limit of the amount of compensation to be paid in the event of the death or injury of a passenger, so it increased from 8,300 USD to 16,600 USD (this amount did not include the cost of legal proceedings). While the majority of the states ratified the protocol, the government of the United States, with reference to the excessively low limit, refused to accede. (This is interesting because, as a consequence, in the United States, as party to the Warsaw Convention, the upper limit of 8,300 USD remained authoritative until 1966).

¹⁵ Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, done at The Hague on 28 September 1955.

2. The Guadalajara Convention (1961)¹⁶

In the Guadalajara Convention, the States Parties extended the liability rules to relations where the client, in this case the passenger, does not establish a contractual relationship with the air carrier actually discharging the carriage (the airlines conclude so-called “code-share” agreements with one another; that is, the flight on a route determined by them is operated jointly). With this step, besides the contracting carrier, the actually operating carrier was also included in the scope of regulation.

3. The Montreal Agreement (1966)¹⁷

The Montreal Agreement is not an interstate international treaty, but an agreement concluded among the airlines. The agreement raised the amount of compensation for death or bodily injury to 75,000 USD¹⁸ in the case of flights departing from, arriving in or flying over the United States. The agreement was applicable in case of the death or bodily injury of a passenger, but it did not contain provisions concerning baggage and consigned cargo. The airlines which intended to operate in the United States needed to accede to the agreement in order to be granted permission to carry out commercial activity in the territory of the country. The United States could make the air carriers interested in cooperation and pressurise them commercially, since at that time 25 per cent of international passenger carriage in the world was implemented through the US, and, simultaneously, it had the largest number of domestic flights in the world.¹⁹ The air carriers in the Montreal Agreement also assumed the obligation to print passenger tickets (with the warning on limited liability therein) in Modern typeface letters, sized 10 (Article 2).

¹⁶ Convention Supplementary to the Warsaw Convention, for the unification of certain rules relating to international carriage by air performed by a person other than the contracting carrier. Signed at Guadalajara on 18 September 1961.

¹⁷ Montreal Intercarrier Agreement. Agreement relating to Liability Limitations of the Warsaw Convention and The Hague Protocol. 31 Fed. Reg. 7302, Civil Aeronautics Board Order No. E-28680 approving CAB 18900, 13 May 1966.

¹⁸ The amount of 75,000 USD contained all costs of the assertion of rights. If the claim was enforced before a court in a federal state in which the costs of legal proceedings were reimbursed separately, the upper limit of pecuniary liability was 58,000 USD, which did not include the costs of legal proceedings. The territorial and personal scopes of the Agreement were restricted to air carriers which operated carriage departing from, flying over or arriving in the territory of the United States. Montreal Intercarrier Agreement (CAB18900), 1966. I. (I).

¹⁹ A. T. Wells and B. D. Chadbourne, *Introduction to Aviation Management*, (Krieger Publishing Company, Malabar, 1992) 83.

4. The Guatemala City Protocol (1971)²⁰

As a principal objective, the states concerned made an attempt to review the Warsaw Convention, to raise the limits of liability and enhance the responsibility of the air carrier, but the Protocol never took effect. As it was ratified by merely 7 countries, it became a historical document.

5. The Montreal Additional Protocols [No. 1, 2, 3, 4] (1975)²¹

The states attending the Diplomatic Conference convened in Montreal set the objective of addressing the questions left open by the Guatemala City Protocol. The Warsaw Convention had determined the limits of liability in the currency of the French Gold Franc.²² After the Vietnam War, the United States and other countries devaluated their currency as a consequence. Therefore, the determination of some new stable measurement was necessary. The Special Drawing Rights (SDR)²³ was determined by the International Monetary Fund (IMF), an independent organisation belonging to the UN “family” and the transfer thereto was accepted by the parties. During the proceedings, the conversion of these amounts to the national currency was carried out by the court upon passing the judgment on the basis of the value of SDR prevalent in the given currency. Furthermore, the States Parties modernised and simplified the rules concerning the documentation of carriage, which resulted in serious changes, since the parties could accept lawfully the air waybill made out electronically. In addition, air cargo could depart even if its complete documentation had not been prepared. The

²⁰ ICAO Doc 8932 Guatemala City Protocol.

²¹ In Montreal the Additional Protocols Nos. 1–3. and a Protocol No. 4. were signed, which are jointly designated as the “Montreal Protocols.” The Additional Protocol No. 3. did not take effect. The Additional Montreal Protocols Nos. 1., 2., 3. and 4.; ICAO Doc 9148 Montreal Protocol No. 4. to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955. Montreal, 25 September 1975.

²² The sums mentioned in Francs shall be deemed to refer to a currency unit consisting of sixty-five and a half milligrams of gold of millesimal fineness nine hundred. These sums may be converted into national currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgement. Warsaw Convention, Article (22)5.

²³ The amounts manifest in SDR pertain to a unit determined by the International Monetary Fund. The determination of the SDR is effected so that the major international currencies used in international transactions are united in a currency basket. The SDR (the currency code of which according to the ISO–4217 standard is XDR) derives its value from a basket of five currencies: the Euro, the Japanese yen, the American Dollar, the British Pound Sterling and the Chinese renminbi (yuan). The weight of the given currency manifest in SDR is determined by the weight the given national currency carries in international transactions. *IMF Review of the Method of Valuation of the SDR. Executive Summary*, July 2015. 1–2.

lawmaker added to the limited liability of the air carrier for damage caused to the cargo that the upper limit of the liability for damage could not be surpassed, with the exception if a higher value had been stipulated in advance.

6. The Japanese Initiative (1992)²⁴

The initiative encompassed ten Japanese airlines, which incorporated a special provision into their conditions of carriage. For its legal grounds, they drew on the Warsaw Convention, which facilitated that the airlines and the passengers could agree on a higher limit of liability under a special contract [Article (22)1]. According to the conception of the Japanese airlines, in the event of an accident sustained by the passenger, the air carrier acceded to the initiative would be liable in a two-layered system:

- under the amount of 100,000 SDR, the air carrier cannot preclude or limit its liability, therefore, it shall be entirely liable for the damage;
- in the event of damage exceeding 100,000 SDR, the air carrier shall be liable for the amount of proven damage, if the air carrier cannot exonerate itself.

Via the initiative, the Japanese airlines made history, because their recommendation consisting of three paragraphs and barely half a page established the unlimited liability of the air carrier with respect to accidents sustained by the passenger. Although an upper limit was applied, its significance was that the air carrier could exonerate itself from liability only above that amount. It is incredible: what the states had not been able to agree on for 40 years, some airlines could resolve after seven years' negotiations. (Note: this two-layered system will appear later in the Montreal Convention.)

One of the largest catastrophes of the history of civil aviation underlay the commitment of the Japanese, which demonstrated in reality that the low level of the limits of liability for damage could not be tenable any longer. On 12 August 1985, the vertical stabilizer detached explosively due to a maintenance-repair fault from a Boeing 747–400 Jumbo Jet airplane 12 minutes after take-off on the Tokyo–Osaka 123 domestic flight operated by Japan Airlines (JL). The unnavigable plane crashed in the mountains. Of those on board, 520 lost their lives, while 2 persons survived the accident. Since the flight was domestic, the Warsaw Convention was inapplicable. Therefore, the payment of compensation was determined pursuant to the rules of national law. However, these amounts considerably exceeded the Warsaw limits, so it became unambiguous that, had this been an international flight, the relatives of the victims would have received much less compensation.

²⁴ Japan Airlines' Conditions of Carriage; "The Japanese Initiative", (1995) 11 (2) *Lloyd's Aviation Law*.

7. The IATA Intercarrier Agreements (1995–1996)²⁵

In June 1995, Washington D.C. accommodated the IATA international conference, where two agreements were drawn up (IIA/MIA) by the member airlines. The majority of air carriers adopted the two-layered Japanese Initiative (1992) guaranteeing higher liability limits and agreed that the Warsaw system inevitably needed a complete review besides the preservation of its basis. The review of the Warsaw system was necessitated by the rigorous liability rules and low limits, which were unfair towards the claimants.

8. The Regulation of the Council of the European Union (1997)

Although the law of the European Union does not constitute international law (therefore it is not part of the international treaties reforming the Warsaw system), we need to make mention thereof here, since the institutions of the European Union were among the pioneers in the modernisation process of the system of liability for damages governing air carriers. The European Union also deemed the value limits of the liability of air carriers to be low, so it urged the prescription of uniform liability rules within the Community. The legitimacy of regulation within the Union was justified, mainly because the Warsaw Convention contained rules exclusively concerning international air carriage, while in the internal market of the EU the lawmaker abolished the distinction between domestic and intra-EU carriage as of 1 April 1997 as part of the Third Package.²⁶ Consequently, in the inland market of the community, liability rules based on the same provisions were necessary. A further intent of the lawmakers of the European Union was to reinforce the protection of passengers involved in air accidents; therefore, an unlimited liability system in the event of the death or bodily injury of passengers was introduced.

As a result of law-making, the European Parliament and the Council of Europe adopted the Council Regulation No. 2027/97 on air carrier liability in the event of accidents,²⁷ which was amended under Regulation (EC) No. 889/2002 of the European Parliament and of the Council five years later.²⁸ This was necessary since, on 5 April 2001,

²⁵ The Intercarrier Agreement on Passenger Liability (IIA) and the Agreement on Measures to Implement the IATA Intercarrier Agreement (MIA) adopted at the 51st General Assembly of IATA organised in Kuala Lumpur in October 1995.

²⁶ Third Package (HL L 240.): Council Regulation (EEC) No. 2407/92 on licensing of air carriers; Council Regulation (EEC) No. 2408/92 on access for Community air carriers to intra-Community air routes; Council Regulation (EC) No. 2409/92 on fares and rates for air services.

²⁷ Council Regulation (EC) No. 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air (9 October 1997), HL L 285., 17 October 1997. 1.

²⁸ Council Regulation (EC) No. 889/2002 of 13 May 2002 amending Council Regulation (EC) No. 2027/97 on air carrier liability in the event of accidents HL L 140., 30 May 2002. 2.

the Council of the Europe had made a decision on the approval of the accession of the European Union to the Montreal Convention and on the harmonisation of its rules with the regulations of the EU.²⁹ According to the justification of the Council, the Community and its member states have parallel competence concerning the issues encompassed by the Montreal Convention; therefore, for the purpose of its uniform and comprehensive application, the simultaneous ratification of the Montreal Convention by the EU and its member states was necessary.

Council Regulation (EC) No. 2027/97/EC is to be applied in the event of the death or bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board an aircraft or in the course of any of the operations of embarking or disembarking (Article 1). Following the models of the Japanese Initiative and the IATA Air Carrier Agreements, the European Union, at the level of the member states, introduced the unlimited liability of Community air carriers for damages in the event of the death or bodily injury of passengers. The Community air carrier,³⁰ in the event of damages up to the sum of the equivalent of 128,821 SDR (about 155,000 EUR) may not challenge the claim for compensation, or exclude or limit its liability [Article 3(2)]. Up to this amount, the air carrier shall provide compensation in all cases. Above the amount of 128,821 SDR, the air carrier shall be liable for the damage caused, but may resort to defence against the claim (may be exonerated wholly or partly from its liability) if it can prove that the damage derived from the negligence of the injured or deceased passenger or the passenger contributed to the occurrence of the damage [Article 3(3)]. The burden of proof shall be borne by the Community air carrier; as a consequence, the passenger is granted a greater opportunity to enforce their claim for damages more successfully.

The “Warsaw system” outgrew itself. Due to increased traffic and the changed commercial circumstances, it no longer served the purpose for which it had been established. The modernisation of the Warsaw Convention had constantly been on the agenda and, as a consequence of the amendments and the accessions thereto in various numbers, it had become a rather complex and heterogeneous system of rules. It was not by chance that the international community coordinated by the organisation of the ICAO, as a result of the work and deliberation of 33 years, reached the ultimate and all-encompassing destination of the process: the Montreal Convention.³¹

²⁹ Council Decision 2001/539/EC of 5 April 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air.

³⁰ 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. Sipos A., *A nemzetközi polgári repülés joga*, (ELTE Eötvös Kiadó, Budapest, 2018) 132.

³¹ M. Milde, From Warsaw 1929 to Montreal 1999, *IASL/McGill Symposium* (UAE, Dubai, 13–14 December 2003); *ICAO Special Meeting on Limits for Passenger under the Warsaw Convention and The Hague Protocol*, (Montreal, 1–15 February 1966).

IV. THE MONTREAL CONVENTION (1999)³²

The Montreal Convention summarises the results of 70 years' law-making and retains certain provisions from the original text and the subsequent amendments of the Warsaw Convention, while it meets the most recent demands of regulation. The Montreal Convention is not a "successor" of the Warsaw regime, it follows, it is a new international treaty, which was designed to create complete uniformity in private law liability relations between the air carriers and their passengers, as well as between the air carriers and consignors. The establishment of such uniformity requires as many accessions by the states as possible. The Montreal Convention "predominates" over the outdated Warsaw system, replaces the Warsaw Convention and its amendments in all respects and prevails over any other rules which apply to international carriage by air (Article 55).

Nevertheless, the Warsaw Convention is still in effect; it was ratified by 152 states. At the same time, the Montreal Convention has been ratified by 135 states and a regional economic integration organisation, the European Union itself.³³ Therefore, there are still states, although in a diminishing number, where the Warsaw Convention and its amendments are still valid. This fact further complicates the adjudication of cases on the basis of the Warsaw system. The situation is aggravated by the fact that states have ratified different amendments of the Warsaw Convention, thus, it is very likely that the passengers on the same airplane are subject to different rules and different jurisdictions. In the case of one passenger the Montreal Convention is applicable, in the case of the other one the Warsaw Convention and its amendments apply, while the third passenger's situation is governed by national law, therefore, in the event of an accident, their claims for damages will be adjudged on the basis of different rules of liability. The strange situation may also emerge that, if the airline suffers a catastrophe, less compensation is due for the relatives of the deceased passenger than for a slightly injured person surviving the accident. The reason is that the heir of the deceased passenger is entitled to compensation on the basis of the Warsaw Convention and its amendments (its version amended by The Hague Protocol and the Montreal Agreement) and may in the first step claim compensation of at most 75,000 USD, whereas the passenger subject to the Montreal Convention may claim compensation with respect to the degree of the

³² ICAO Doc 9740; Convention for the Unification of Certain Rules for the International Carriage by Air. Montreal, 28 May 1999.

³³ The European Community as a regional economic integration organisation deposited the ratifying document with the Secretary General of the ICAO on 29 April 2004, as a consequence of which the Convention took effect for the EU afterwards on the 60th day, on 28 June 2004.; Council Decision 2001/539/ (EC) of 5 April 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention 1999). Official Journal L 194, 18/07/2001 38–38.

injury, of 128,821 SDR³⁴ (about 183,500 USD). If the injury is lighter, the demand of the claimant shall be fulfilled under this amount. If the injury is more severe, i.e., it exceeds the equivalent of 128,821 SDR and the air carrier cannot exonerate itself above this sum, it shall indemnify the complete proven damage to the passenger.

The different practice of the application of law under the Continental and the Anglo-Saxon (case law) legal regimes founded on each other permissively by the Warsaw regime gave rise to a special situation. The voluminous case-law practice under the Warsaw system became a knowledge base in the course of time, which the lawmaker saved for posterity with a unique legal technical solution: several legal institutions and concepts of the Warsaw Convention (limited liability, the accident, the exclusiveness of the Convention, the four jurisdictional forums, the limitation of lawsuits, the definitions of international carriage) were transplanted into the new Montreal Convention in some places with minor modifications, which did not affect their substance. Consequently, the legal cases in this scope will have further significance in the application of law; they provide guidance and shape the law. Therefore, the proceeding courts of the States acceded to the Montreal Convention may refer to and rely on former legal cases and legal practice constituting precedence on the basis of the Warsaw Convention and its additional protocols.

The Montreal Convention focuses closely on four major areas:

- the format of the documents of carriage and its display (Articles 3–11);
- the liability regime (objective liability) (Articles 17–18);
- the limitations of liability (unlimited liability for accident) (Articles 21–22);
- and
- jurisdictional forums [five forums (4+1)] (Article 33, Article 46).

The lawmaker opened a new chapter in the history of the liability of the air carrier for damages, since, in the event of an accident (bodily injury or death) sustained by the passenger, it obliged the air carrier to assume unlimited liability for damages, it simplified the documentation of carriage, facilitated the electronic issuance of the air ticket and the air waybill and, by the introduction of the fifth forum of jurisdiction, it extended the scope of optional proceeding courts for the plaintiffs; furthermore, it obliged the air carrier, if the national law so required, to make advance payments following an accident sustained by the passenger. The requirement of the purchase of

³⁴ The amount of 100,000 SDR per passenger determined in 1999 and all other amounts in Articles 21–23 of the Convention, for the purpose of the offset of the inflation, have been raised by the States Parties pursuant to the rule of Article 24 of the Montreal Convention. The upper limit in the case of passengers became 113,100 SDR in 2009, then 128,821 SDR in 2019. The limit, revised at five-year intervals did not change in 2014, then, in 2019 it was amended again and the raised amounts have been applied since 28 December 2019. *Revised Limits of Liability Under the Montreal Convention of 1999*, https://www.icao.int/secretariat/legal/Pages/2019_Revised_Limits_of_Liability_Under_the_Montreal_Convention_1999.aspx (Last accessed: 31 July 2019).

adequate insurance by the air carrier is also a new element in the Montreal Convention, just like the provision that the air carrier may enter a counterclaim against the claimant third party.

This way, the lawmaker resolved the sustained differences and the consequently deriving conflicts between the old and the new system by the establishment of an entirely new international treaty, i.e., the Montreal Convention (not by the amendment of the Warsaw Convention, although drawing upon it), which replaced all the former conventions, protocols and agreements in the relations among the contracting States. The comprehensive unification of law is unequivocally only a matter of time, and the Montreal Convention will predominate as being observed by the decisive majority of the international community.

V. CONCLUSION

Instead of a fragmented and complex “Warsaw system” consisting of six international treaties, the Montreal Convention offers the alternative of a uniform, homogenous system of rules. This reinforces the intention of the states and regional economic integration organisations to accede. Although there are still states which are parties solely to the Warsaw Convention (or not parties to both of them), it can be established that, as reflected by the ratifications to the new Montreal Convention hitherto, the lawmaker has successfully laid the foundation for the unification of the system of the liability of the air carrier for damages. International legal harmonisation can be realised only via the actual prevalence of the rules and procedures set forth under the nouveau Montreal Convention, since there are still numerous collisions deriving from diverse national regulations and conflicts arising during the adjudication of private legal disputes.

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How the European Court of Human Rights Contributed to Understanding Liability Issues of Internet Service Providers

ABSTRACT

Section 4 of the 2000 Directive on electronic commerce (ECD) established significant regulations concerning the liability of intermediary service providers regarding illegal content. However, in the past twenty years it has become apparent that its details are not adequately developed. The European Court of Human Rights (ECtHR), in accordance with the European Convention on Human Rights (ECHR), performs significant legislative action in this field. Its rulings touch upon the active or passive role of service providers, issues regarding the operation of the notice-and-takedown system, and the legal grounds of due notice. The present study examines the practices and role of the European Court of Human Rights, as this organisation has significantly contributed to the new set of proposals on digital regulation (to be introduced in 2020) moving in a direction more suitable to meet present-day demands concerning liability.

KEYWORDS: information society services, liability, six-part liability test, internet service providers, notice-and-takedown system, case law, Delfi AS, Magyar Tartalomszolgáltatók Egyesülete, Index.hu Zrt., Pihl, Tamiz, Magyar Jeti Zrt., Høiness

I. INTRODUCTION

Regarding one of the most important issues of internet regulations, namely who is liable for illegal content, the central element of the set of regulations developed by the European Union is Section 4 of the Directive on electronic commerce (ECD),¹ entitled

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¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ L 178, 17.7.2000 1–16.

“Liability of intermediary service providers”.² The set of regulations uses three different terms: “mere conduit”, “caching” and “hosting”. In the case of the first two, similarly to paragraph 230(c)(1) of the Communications Decency Act of the United States,³ providers are exempt from liability. In case of “hosting”, however, as expounded in Article 14, providers are not liable for the information stored on condition that (a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.⁴

This notice-and-takedown system (NTDS) is a relative⁵ novelty in the European set of regulations, implementing a multi-stage system of conditions and procedures. First, the intermediary service provider must have actual knowledge of illegal content and, second, they must take steps to remove that content within a certain amount of time. Based on this, we can establish the fact that the European Union, unlike the United States, has opted for a model (often called a ‘*safe harbour model*’),⁶ wherein exemption from liability is not automatic.⁷

Any measure taken must be in view of Article 10 of the ECHR, which states that “everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.” The article then proceeds to state that “[...] the exercise of these freedoms may be subject to [...] formalities, conditions, restrictions or penalties”, but these must pass a three-step test, which ensures that the actions taken are not arbitrary. Any interference must be “(a) suitable to achieve the legitimate aim pursued (suitability), (b) the least intrusive amongst those which might achieve the legitimate aim (necessity), and (c) strictly proportionate to the legitimate aim pursued (proportionality *stricto sensu*)”.⁸

² C. Wendehorst, Platform Intermediary Services and Duties under the E-Commerce Directive and the Consumer Rights Directive, (2016) 5 (1) *Journal of European Consumer and Market Law*, 30–33.

³ Communications Decency Act (CDA), Pub. L. No. 104-104 (Tit. V), 110 Stat. 133 (Feb. 8, 1996).

⁴ ECD, [14].

⁵ The procedure already appeared in 1998 in the DMCA (The Digital Millennium Copyright Act), Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998); however, only to be applied in copyright infringement issues. See: M. Peguera, The DMCA Safe Harbors and Their European Counterparts: A Comparative Analysis of Some Common Problems, (2009) 32 (4) *Columbia Journal of Law & the Arts*, 481–512.

⁶ M. Husovec, Holey Cap! CJEU Drills (Yet) Another Hole in the E-Commerce Directive’s Safe Harbors, (2017) 12 (2) *Journal of Intellectual Property Law & Practice*, 125. <https://doi.org/10.1093/jiplp/jpw203>

⁷ It is also important to note that, based on Section 4 Article 14(c), member states are entitled to implement their own regulations of removing content and restricting access.

⁸ J. Oster, *Media Freedom as a Fundamental Right*, (Cambridge University Press, Cambridge, 2015) 123–124. <https://doi.org/10.1017/CBO9781316162736>

It is safe to say that several professional disputes have taken place in the past twenty-one years about various issues (such as the question of “actual knowledge” on the part of the provider; what constitutes “illegal content”; how much is the “certain amount of time” within which a provider must act; whether the provider is passive or active; moreover, many have put forward the idea that various types of content would require various types of procedures).⁹ Still, the task of thorough interpretation of the set of regulations – without which it is impossible to ascertain whether any content has been removed legally or some type of censorship has taken place – was left to international courts.

II. THE EUROPEAN COURT OF HUMAN RIGHTS AND THE COURT OF JUSTICE OF THE EUROPEAN UNION

The two most important international courts regarding the ECD’s detailed regulations of service provider liability and the implementation of the ECHR are The European Court of Human Rights (ECtHR) in Strasbourg and the Court of Justice of the European Union (ECJ) in Luxembourg. The main difference between them is that “while the ECJ can be seen as an integrative agent, striving for further EU harmonization, the ECtHR’s mandate is that of providing a minimum human rights standards protection, beyond which wider scope is left for pluralism and national sovereignty within the EU”.¹⁰ In practice, this means that the ECJ acts as an intermediary in disputes between EU institutions, or between EU institutions and EU Member States, and also “ensures compliance with EU Treaty at the national level, and by the Treaty of Maastricht has the right to impose fines for legal entities and Member States that violated EU law”.¹¹ On the other hand, “an adverse ECtHR ruling will result in a »more gradual (and perhaps less politically costly) implementation« of the decision than in the case of an adverse ECJ ruling”.¹² These two courts take account of one another’s rulings where

⁹ Although the present study does not aim to examine the 2019 copyright directive, it is worth noting that its regulation of content removal is a unique phenomenon in the system. Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Text with EEA relevance.), PE/51/2019/REV/1, OJ L 130, 17.5.2019 92–125. See: F. Romero-Moreno, Notice and staydown and social media: amending Article 13 of the Proposed Directive on Copyright, (2019) 33 (2) *International Review of Law, Computers & Technology*, 187–210. <https://doi.org/10.1080/13600869.2018.1475906>

¹⁰ E. Imbarlina, The Roles and Relationship between the Two European Courts in Post-Lisbon EU Human Rights Protection, *Jurist*, (12 September 2013) <https://www.jurist.org/commentary/2013/09/elena-butti-lisbon-treaty> (Last accessed: 31 July 2019).

¹¹ S. Bardarova, Comparison Between the European Court of Justice and European Court of Human Rights, *SSRN Paper*, (18 June 2013) <https://doi.org/10.2139/ssrn.2281215>, <https://ssrn.com/abstract=2281215> (Last accessed: 31 July 2019).

¹² Imbarlina, The Roles and Relationship between the Two European Courts...

the infringement of human rights is involved. Which is indeed important, because, as Oreste Pollicino states: “The ECtHR and the ECJ have protected freedom of speech in a very different manner. Whereas the former does actually work as a constitutional court of fundamental rights, the latter has been more influenced by the original economic nature of the European Community”.¹³ These differences are apparent in the way these two courts handle issues of content regulation and moderation by platform providers.

III. MILESTONE LEGAL CASES BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

It is thus worth examining how the ECtHR approaches these questions, as it has, along with the ECJ, significantly contributed to the new set of proposals on digital regulation (to be introduced in 2020) moving in a direction more suitable for meeting present-day demands concerning liability.

1. *Delfi AS v. Estonia* (2015)¹⁴

The first milestone case was that of the Estonian online news portal Delfi, where it was possible for users to comment anonymously.¹⁵ Some of these comments proved to be disputed, offensive or even defamatory.¹⁶ The portal actually had an inbuilt content filter, which deleted comments when certain “blacklisted” expressions were used. The only other way, however, to delete a comment, was for other users to report the comment as inappropriate, and then wait for Delfi to take any measure they deemed fit. Delfi did indeed remove comments based on their own investigations, but quite rarely. In 2006 a particular article had twenty comments¹⁷ which were deemed threatening or offensive. After the comments had been reported, the portal deleted the content, but refused to pay the damages claimed. Following a long legal procedure,¹⁸ the case was submitted to

¹³ O. Pollicino, Judicial protection of fundamental rights in the transition from the world of atoms to the word of bits: the case of freedom of speech, (2019) 25 (2) *European Law Journal*, 168. <https://doi.org/10.1111/eulj.12311>

¹⁴ *Delfi AS v. Estonia*, App no. 64569/09 (ECtHR, 16 June 2015).

¹⁵ Deák I., Ki felel a kommentekért? A Delfi AS kontra Észtország ügy (Who is liable for comments? *Delfi AS v. Estonia*), (2015) 8 (3) *Közjogi Szemle*, 56–59.

¹⁶ E. Derieux, Responsabilité d’un portail d’actualités du fait de commentaires diffamatoires postés par des internautes, (2015) (118) *Revue Lamy droit de l’immatériel*, 26–29.

¹⁷ Out of the 185 posted on the article. – Author’s note.

¹⁸ Nádori P., *Delfi AS v. Észtország: strasbourgi döntés a névtelen kommentekért viselt szolgáltatói felelősségről* (*Delfi AS v. Estonia: Strasbourg’s decision on service provider liability for anonymous comments*), (2013) 10 (56) *Infokommunikáció és Jog*, 131–140.

the ECtHR, which had to establish whether platform providers are liable for content uploaded by third parties. The ECtHR ruled that Estonia did not violate Section 10 of the ECHR when the court established the liability of Delfi regarding the comments to their articles. Four aspects were considered by both the Chamber and the Grand Chamber:¹⁹

- the context of the comments;
- the measures applied by the applicant company in order to prevent or remove defamatory comments;
- the liability of the actual authors of the comments as an alternative to the applicant company's liability; and
- the consequences of the domestic proceedings for the applicant company.²⁰

The Court eventually ruled that the unlawful comments constituted hate speech, and did not require any linguistic or legal analysis.²¹ It is important to note that the Court agreed with the Estonian court that Delfi must be regarded as a publisher (that is, commercial entrepreneur), and its activities in publishing the comments are not merely of a technical, automatic and passive nature. The liability of the author of the original comment was not examined in this case, but it was established in the ruling that the complainant could have, on their own volition, sued either the internet provider or the (anonymous) author of the original comment. Section 109 of the ruling stated that “established law in the European Union and other countries envisaged the notice-and-take-down system as a legal and practical framework for Internet content hosting. This balance of responsibilities between users and hosts allowed platforms to identify and remove defamatory or other unlawful speech, whilst at the same time enabling robust discussion on controversial topics of public debate [...]”²² That is, “this system (i.e. NTDS)²³ can in the Court's view function in many cases as an appropriate tool for balancing the rights and interests of all those involved”.²⁴ So, to summarise, in 2015 the ECtHR ruled that if content placed on intermediary providers constitutes hate speech,

¹⁹ *Delfi AS v. Estonia*, App no. 64569/09 (ECtHR, 16 June 2015), [144]–[161].

²⁰ An interesting comparison can be made with criteria applied by the ECtHR in traditional media-related cases established in the *Axel Springer v. Germany* and the *Von Hannover v. Germany* cases: – Contribution to a debate of general interest; – How well known is the person concerned and what is the subject of the report; – Prior conduct of the person concerned; – Method of obtaining the information and its veracity; – Content, form and consequences of the publication; – Severity of the sanction imposed. *Axel Springer AG v. Germany*, App no. 39954/08 (ECtHR, 7 February 2012), [89]–[95]; *Von Hannover v. Germany* (No. 2) App nos. 40660/08 and 60641/08 (ECtHR, 7 February 2012), [108]–[113].

²¹ F. Krenc and S. van Drooghenroek, *Chronique de jurisprudence de la Cour européenne des droits de l'homme*, (2015) 39 (6625) *Journal des tribunaux*, 821.

²² *Delfi AS v. Estonia*, App no. 64569/09 (ECtHR, 16 June 2015), [109].

²³ Author's note.

²⁴ *Delfi AS v. Estonia*, App no. 64569/09 (ECtHR, 16 June 2015), [159]; See more: Seps T., No comment? Az internetes hozzászólásokért való jogi felelősség (No comment? Liability for online comments), (2015) 19 (4) *Fundamentum*, 108.

Member States may “impose liability on internet news portals [...] if they fail to take measures to remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties”.²⁵

The ruling was met with harsh criticism by judges András Sajó and Nona Tsotsoria in their joint dissenting opinion:

The consequences are easy to foresee. For the sake of preventing defamation of all kinds, and perhaps all “illegal” activities, all comments will have to be monitored from the moment they are posted. As a consequence, active intermediaries and blog operators will have considerable incentives to discontinue offering a comments feature, and the fear of liability may lead to additional self-censorship by operators. This is an invitation to self-censorship at its worst.²⁶

Neville Cox emphasised²⁷ that the ruling does not take national laws in force at the time into consideration, and does not wish (or fails to) provide a precedent for later cases.²⁸ Another criticism, expressed by Nádori, was that

the Grand Chamber considered the portal’s comment section dissociated not only from web hosting services, but also ‘other internet fora’. One wonders why, as the decision lacked any reasonable arguments. The Grand Chamber underlined that this case does not concern so-called social media sites, but it is not easy to determine what characteristics make an internet news portal differ from a social media site to such great extent in the relevant matter.²⁹

²⁵ *Delfi AS v. Estonia*, App no. 64569/09 (ECtHR, 16 June 2015), [159].

²⁶ *Ibid.*, Joint dissenting opinion of Judges Sajó and Tsotsoria, I. 17.

²⁷ N. Cox, *Delfi AS v Estonia: The Liability of Secondary Internet Publishers for Violation of Reputational Rights under the European Convention on Human Rights*, (2014) 77 (4) *The Modern Law Review*, 619–629. <https://doi.org/10.1111/1468-2230.12081>

²⁸ Roberto Spano’s counter-argument is that the ECtHR’s related judgments provide merely a starting point, with limited relevancy as precedent. R. Spano, *Intermediary Liability for Online User Comments under the European Convention on Human Rights*, (2017) 17 (4) *Human Rights Law Review*, 665–679. <https://doi.org/10.1093/hrlr/ngx001>

²⁹ Nádori P., *Úton a tömeges internetes szólás jogi megítélésének új megközelítése felé. A strasbourgi Nagykamara ítélete a Delfi-ügyben (On the way to a new approach to the legal assessment of mass online speech. The Strasbourg Grand Chamber’s ruling in the Delfi case)*, (2019) 8 (2) *In Medias Res*, 362.

2. *Magyar Tartalomszolgáltatók Egyesülete (MTE) and Index.hu Zrt. v. Hungary (2016)*³⁰

Roughly half a year later, in another milestone case, the ECtHR chose a slightly different approach.³¹ Certain comments on Index (then the market-leading Hungarian online news site) were offensive to the company of a third party (“Benkő-Sándor-sort-of sly, rubbish, mug company”). The third party criticised in the comments brought a civil action against MTE and Index.hu Zrt. When notified of the lawsuit, Index removed the comment in question. The Hungarian court ruled that Index has objective liability regarding unlawful comments by its readers. The ECtHR, however, later dismissed this notion, stating that “this amounts to requiring excessive and impracticable forethought capable of undermining freedom of the right to impart information on the Internet”.³² Moreover, in the Court’s view, Hungary violated Article 10 of the ECHR when determining the liability of Index regarding the comments written concerning their articles. Comparing this case to the case of *Delfi*, the ECtHR confirmed that online news portals are indeed liable for comments to their articles and content uploaded by third parties, but pointed out a significant difference between the two cases: while in the case of *Delfi* the content in question was undeniably unlawful and amounted to hate speech, in the case of Index the content was “only” offensive and vulgar. The ECtHR was of the opinion that, although the act of hate speech was not committed, the “criteria of liability”, as identified in the case of *Delfi* (the context of the comments, the measures applied by the applicant company in order to prevent or remove defamatory comments, the liability of the actual authors of the comments as an alternative to the intermediary’s liability, and the consequences of the domestic proceedings for the applicant company), were also relevant in this case.³³ In addition, the Court introduced two further aspects to be considered:

- the conduct of the injured party; and
- the consequences of the comments for the injured party.³⁴

³⁰ *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. v. Hungary*, App no. 22947/13 (ECtHR, 2 February 2016).

³¹ On detailed comparison of the two cases see: J. Sidlauskienė and V. Jurkevičius, *Website Operators’ Liability for Offensive Comments: A Comparative Analysis of Delfi as v. Estonia and MTE & Index v. Hungary*, (2017) 10 (2) *Baltic Journal of Law & Politics*, 46–75. <https://doi.org/10.1515/bjlp-2017-0012>; J. T. Papp, *Liability for Third-party comments before the European Court of Human Rights – Comparing the Estonian Delfi and the Hungarian Index-MTE decisions*, in M. Szabó, P. L. Lános and R. Varga (eds), *Hungarian Yearbook of International and European Law 2016*, (Eleven International Publishing, The Hague, 2017) 315–326. <https://doi.org/10.5553/HYIEL/266627012016004001019>

³² *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. v. Hungary*, App no. 22947/13 (ECtHR, 2 February 2016), [82].

³³ *Ibid.* [70].

³⁴ *Ibid.* [80]–[85].

Speaking of the behaviour of the injured party, the ECtHR disapproved of the fact that they “never requested the applicants to remove the comments but opted to seek justice directly in court”. Regarding the consequences of the comments, it was observed that domestic courts never examined this aspect of the case, but it is highly unlikely that these comments would have had any negative consequences on the injured company. With these six criteria – the previous four having been supplemented with the two new ones –, the ECtHR took a step towards deciding “whether today’s ECtHR case law formulates the universal criteria for internet news portal managers’ liability, or whether they are relative and should rather be applied *ad hoc* in each case”.³⁵ Although experts tend to disagree on the question, Tamás Szigeti and Éva Simon are of the opinion that this case “can be viewed as a correction on a “previous unlucky decision”³⁶ (that is, the *Delfi*-case).³⁷

3. *Pihl v. Sweden* (2017)³⁸

Unlike in the previous cases, this time the applicant was a private citizen, suing because his right to privacy and good reputation had been violated. Swedish authorities refused to confirm the liability of the operators of a blog where a blog entry and an anonymous comment appeared defaming Rolf Anders Daniel Pihl. The ECtHR utilized the aforementioned criteria as relevant precedents to this case. An intriguing element of the proceedings was that the Court attached “importance to the fact that the association is a small non-profit association, unknown to the wider public, and it was thus unlikely that it would attract a large number of comments or that the comment about the applicant would be widely read”.³⁹ Attila Tatár noted the different approaches to what seems to be one and the same aspect: “When determining the lack of liability, in the case of the MTE the Court in Strasbourg attributed little importance to the fact that one of the applicants was the owner of one of the leading news portals in Hungary, whereas in the case of *Pihl* it was expressly emphasized that the small blog was run by a non-profit association”.⁴⁰ In any case, the final ruling was that Sweden did not violate the ECHR.

³⁵ Sidlauskienė and Jurkevičius, *Website Operators’ Liability for Offensive Comments...* 49.

³⁶ Szigeti T. and Simon É., *A hozzászólás szabadsága: a közvetítő szolgáltatói felelősség aktuális kérdéseiről* (The freedom of commenting: On present-day issues of intermediary provider liability), (2016) 20 (2–4) *Fundamentum*, 113.

³⁷ Author’s note.

³⁸ *Pihl v. Sweden*, App no. 74742/14 (ECtHR, 9 March 2017).

³⁹ *Ibid.* [31].

⁴⁰ Tatár A., *A tárhelyszolgáltatók körében felmerülő felelősségi kérdésekről* (On liability issues for service providers), (2019) 16 (72) *Infokommunikáció és Jog*, 11.

4. *Tamiz v. United Kingdom* (2017)⁴¹

British politician Payam Tamiz was preparing for a local election when, at the end of April 2011, a blog entry concerning him and containing his photograph appeared on Blogger.com, a blog service run by Google. Several anonymous comments were posted in the comments section, many of which Mr. Tamiz found defamatory, therefore he used the “report abuse” function to complain. He also complained in writing, to which letter Google requested clarifications in writing. Google forwarded the letter of complaint after a few months had passed, in August 2011, to the author of the blog entry, who subsequently removed the post and the comments. Payam Tamiz, however, had already sued Google, requesting the national court to establish the company’s liability. The court characterised five of the comments as “mere vulgar abuse”, and three as “arguably defamatory”.⁴² Whether Google was to be regarded as provider or publisher, the court⁴³ concluded: “It is no doubt often true that the owner of a wall which has been festooned, overnight, with defamatory graffiti could acquire scaffolding and have it all deleted with whitewash. That is not necessarily to say, however, that the unfortunate owner must, unless and until this has been accomplished, be classified as a publisher.”⁴⁴ The national court’s opinion was that even if Google was to be regarded as a publisher, the company did indeed do everything in their power to have the impugned content removed. An important new element in the case was the fact that the court had examined⁴⁵ the complaint sent to Google, as “appropriate notice” is necessary for the provider to have “actual knowledge of illegality”.⁴⁶ The court concluded that “a report merely stating that the impugned content is defamatory is not precise and substantial enough, as it is not reasonable to expect internet providers to take every such claim for granted”.⁴⁷

Later, when heard by the ECtHR, Tamiz argued that “although Google Inc. had operated a “notice-and-take-down” process, it was inadequate in his case since four months elapsed between his “reporting abuse” and the content being removed”,⁴⁸ and that the comments were plainly defamatory, as they did not contribute to a debate of

⁴¹ *Tamiz v. United Kingdom*, App no. 3877/14 (ECtHR, 19 September 2017).

⁴² *Ibid.* [25].

⁴³ On the relevant jurisdiction in the United Kingdom see: D. McGoldrick, The Limits of Freedom of Expression on Facebook and Social Networking Sites: A UK Perspective, (2013) 13 (1) *Human Rights Law Review*, 125–151. <https://doi.org/10.1093/hrlr/ngt005>

⁴⁴ *Tamiz v. United Kingdom*, App no. 3877/14 (ECtHR, 19 September 2017), [29].

⁴⁵ *Tamiz v Google Inc Google UK Ltd*, [2013] EWCA Civ 68.

⁴⁶ See more: *Bunt v Tilley & Others*, [2006] EWHC 407 (QB); [2007] 1 WLR 1243; [2006] 3 All ER 336; [2006] EMLR 523; *Davison v Habeeb & Others*, [2011] EWHC 3031 (QB); *Kaschke v Gray & Hilton*, (No 2) [2010] EWHC 1907 (QB); *Jameel (Yousef) v Dow Jones & Co. Inc.*, [2005] EWCA Civ 75; [2005] QB 946; [2005] 2 WLR 1614; [2005] EMLR 353.

⁴⁷ Tatár, A tárhelyszolgáltatók körében felmerülő felelősségi kérdésekről, 9.

⁴⁸ *Tamiz v. United Kingdom*, App no. 3877/14 (ECtHR, 19 September 2017), [69].

public interest.⁴⁹ The ECtHR highlighted that the allegedly defamatory content “must attain a certain level of seriousness”⁵⁰ since “millions of Internet users post comments online every day and [...] the majority of comments are likely to be too trivial in character, and/or the extent of their publication is likely to be too limited, for them to cause any significant damage to another person’s reputation”. Moreover, Payam Tamiz, as a politician, would be expected to have a higher tolerance threshold than the average internet user.⁵¹ The ECtHR examined whether there was any evidence of a “real and substantial tort” and ruled that “a fair balance was struck” between “the right to private life and reputation and the right to freedom of expression”.⁵²

The ECtHR dismissed Tamiz’s argument that the *Delfi* criteria should be used in this case, on the grounds that *Delfi* is a “professionally managed Internet news portal run on a commercial basis which published news articles of its own and invited its readers to comment on them”,⁵³ whereas Google does not create content and has no editorial liability for blog entries published. Also, as demonstrated above, in the *Delfi* case the Grand Chamber expressed its opinion – albeit without solid evidence – that internet providers are different from “other Internet fora”, hence the *Delfi* case does not constitute a precedent to this particular case. As such, it is no wonder that eventually the ECtHR ruled that the United Kingdom did not violate the ECHR.

5. *Magyar Jeti Zrt. v Hungary* (2018)⁵⁴

A slightly different issue was in the focus in 2013 concerning a certain hyperlinked content. 444.hu, a news portal run by Magyar Jeti Zrt., published an article containing a link to a YouTube video where a gypsy leader stated that football fans singing racist songs were members of the right-wing political party Jobbik, (then⁵⁵) mostly known for its anti-gypsy activities. Jobbik sued both the gypsy leader and Magyar Jeti Zrt. for defamation. The Hungarian court ruled that the company was liable for publishing

⁴⁹ *Axel Springer AG v. Germany*, App no. 39954/08 (ECtHR, 7 February 2012), [90]; *Von Hannover v. Germany*, (No. 2) App nos. 40660/08 and 60641/08 (ECtHR, 7 February 2012), [109].

⁵⁰ *Tamiz v. United Kingdom*, App no. 3877/14 (ECtHR, 19 September 2017), [80].

⁵¹ See: Koltay A., A közügyek vitáinak szabadsága és a személyiségi jogok védelme (On the freedom to dispute public affairs and on defending privacy), (2019) (4) *Pázmány Law Working Papers*, https://plwp.eu/files/PLWP_2019_04_Koltay.pdf (Last accessed: 31 July 2019).

⁵² I. Milkaite, *Tamiz v. UK: Google’s blog-publishing service is not liable for offensive comments*, *Strasbourg Observers*, (23 November 2017) <https://strasbourgobservers.com/2017/11/23/tamiz-v-uk-googles-blog-publishing-service-is-not-liable-for-offensive-comments> (Last accessed: 31 July 2019).

⁵³ *Tamiz v. United Kingdom*, App no. 3877/14 (ECtHR, 19 September 2017), [85].

⁵⁴ *Magyar Jeti Zrt. v. Hungary*, App no. 11257/16 (ECtHR, 4 December 2018).

⁵⁵ Author’s note.

content containing false information. Years later, the ECtHR, contrary to the ruling of the national court,⁵⁶ confirmed that Article 10 of the ECHR on the right to freedom of expression was violated by holding the media company liable for content hyperlinked in its articles.⁵⁷ The ECtHR was of the opinion that hyperlinks serve as a kind of navigation tool; “they merely direct users to content available elsewhere on the Internet”, and that “the person referring to information through a hyperlink does not exercise control over the content to which the hyperlink enables access”.⁵⁸

In the ECtHR’s final comments a set of factors were introduced to be taken into consideration in future hyperlink-related law cases. These are the following:⁵⁹

- Did the journalist endorse the impugned content?
- Did the journalist repeat the impugned content (without endorsing it)?
- Did the journalist merely put a hyperlink to the impugned content (without endorsing or repeating it)?
- Did the journalist know or could reasonably have known that the impugned content was defamatory or otherwise unlawful?
- Did the journalist act in good faith, respect the ethics of journalism and perform the due diligence expected in responsible journalism?

The Court also noted that “objective liability [for hyperlinked content] could have negative consequences on the flow of information on the internet by impelling authors and publishers to refrain altogether from hyperlinking to material whose content they could not control. That could directly or indirectly have a chilling effect⁶⁰ on freedom of expression on the internet.”⁶¹

6. *Høiness v. Norway* (2019)⁶²

In the latest case pertaining to the issue, the ECtHR ruled that the ECHR was not violated when the national court did not find the provider of an online portal liable

⁵⁶ C. Vander Maelen, *Magyar Jéti Zrt v. Hungary: the Court provides legal certainty for journalists that use hyperlinks*, *Strasbourg Observers*, (18 January 2019) <https://strasbourgobservers.com/2019/01/18/magyar-jeti-zrt-v-hungary-the-court-provides-legal-certainty-for-journalists-that-use-hyperlinks> (Last accessed: 31 July 2019).

⁵⁷ H. Surrel, *Responsabilité d’un portail d’actualité en raison de l’affichage d’un hyperlien*: CEDH, 4 décembre 2018. *Magyar Jéti Zrt c/Hongrie*, (2019) (52) *La Semaine Juridique: Édition Générale*, 2376.

⁵⁸ *Magyar Jéti Zrt. v. Hungary*, App no. 11257/16 (ECtHR, 4 December 2018), [73]–[75].

⁵⁹ *Ibid.* [77].

⁶⁰ See: *Belpietro v. Italy*, App no 43612/10 (ECtHR, 24 September 2013), [61]; *Fatullayev v. Azerbaijan*, App no 40984/07 (ECtHR, 22 April 2010), [100]–[103].

⁶¹ *Magyar Jéti Zrt. v. Hungary*, App no. 11257/16 (ECtHR, 4 December 2018), [83].

⁶² *Høiness v. Norway*, App no. 43624/14 (ECtHR, 19 March 2019).

for certain vulgar comments posted on it. The applicant was a Norwegian citizen, Mona Hoiness, who claimed that three anonymous comments constituted sexual harassment against her. The portal, Hegnar Online removed, the content in question as soon as having been notified of it. Although the case before the ECtHR dealt with online content regulation, Article 8 of the ECHR was the focus of the proceedings, not Article 10.⁶³ In harmony with the national court, the ECtHR ruled that while the comments were vulgar, it was not necessary to examine in depth the nature of the impugned comments, as they [...] did not amount to hate speech or incitement to violence.⁶⁴ As previously, it was declared that a working NTDS is suitable for exemption from liability.

IV. CONCLUSION

As we could see, the practice of the ECtHR regarding issues on the liability of service providers covers a wide range. The ECtHR has made important clarifications regarding NTDS, which, as in the *Delfi* case, can be a suitable means for balancing the rights and interests of all parties concerned, and thus establishing exemption from liability. Also, the ECtHR has noticed that different types of content might require different approaches (especially content which amounts to hate speech), and seems to be willing to extend the framework of a unified system of regulation. Another important feature of ECtHR rulings was the consistent standpoint regarding the active versus passive roles of internet providers, namely that only providers of a neutral, passive nature may be exempt from liability.

Unlike the ECJ, the ECtHR puts great emphasis on consciously defining the criteria which may be of help to concerned parties, as well as to national law enforcers. The six-part liability test established by the ECtHR follows this route, clarifying the aspects to be examined in relation to the ECD and the ECHR. These are the following:

- the context of the comments;
- the measures applied by the applicant company in order to prevent or remove defamatory comments;
- the liability of the actual authors of the comments as an alternative to the applicant company's liability; and
- the consequences of the domestic proceedings for the applicant company;
- the conduct of the injured party; and
- the consequences of the comments for the injured party.

⁶³ C.E.D.H., 19 mars 2019. *Hoiness c. Norvège*, (2018–2019) (3) *Auteurs & media*, 380.

⁶⁴ *Hoiness v. Norway*, App no. 43624/14 (ECtHR, 19 March 2019), [69].

The rulings of the ECJ and the ECtHR differ on certain questions, which is not surprising, as the two courts focus on different aspects of the same issues. At the same time, the jurisprudence of these two international courts significantly contributes to national courts having well-grounded practical knowledge and precedents in questions of the liability of service providers and of the internet as a complex, ever-changing ecosystem.

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Treasure Trove in Roman Law and in its Subsequent Fate

ABSTRACT

In this study, some problems of regulation concerning treasure trove in Roman law, in mediaeval legal history, in modern age, and in contemporary legal systems are scrutinised. As for Roman law, e.g. the famous text by Paul (D. 41, 1, 31, 1, in which the original, classical, influential, but dogmatically strongly discussed definition of treasure can be found) and the relevant imperial constitutions [e.g. the constitution by Hadrian (cf. Vita Hadr. 18, 6 and Inst. 2, 1, 39)] are briefly analysed. Although later utterly new regimes were created concerning treasure trove, Hadrian's (and Justinian's) regime of treasure trove – as well as the famous definition by Paul – survives even in many contemporary codes of the civil law jurisdictions.

KEYWORDS: treasure, treasure trove, money, valuable movable, landowner, finder, media sententia, natural equity, Roman law tradition, “private law” and “public law” approach

I. ANTECEDENTS AND PURPOSES OF OUR RESEARCH

a) With regard to the numerous relevant sources of Roman law, treasure trove could be considered as an important legal problem in ancient Rome.

During the analysis of treasure trove patterns of Roman law, dogmatically as well as terminologically important questions appear, which have not been clarified even today. Just some examples need to be named here: Could only money or other movables of any value also be regarded as treasure in classical Roman law? Can treasure trove be regarded as an autonomous way of acquiring ownership in classical Roman law, or not? In addition, several important questions are to be studied, such as the different points of view of classical Roman jurists concerning the legal nature of treasure, the problems of treasure trove by a slave or a *filius familias*,¹ and the development of the treasure trove regime in the context of imperial constitutions.

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¹ Many debates arose regarding a *filius familias* (under the authority of his father) or a slave who found treasure in an immovable property – neither of whom was able to acquire ownership of them. In this

b) As for the Roman law literature, a number of studies have been published, on the one hand related to general issues (cf., for instance, Pampaloni,² Perozzi,³ Rotondi,⁴ Bonfante,⁵ Mayer-Maly,⁶ Marchi,⁷ and Knütel⁸) and, on the other, linked with certain details (see, for example, Appleton,⁹ Schulz,¹⁰ Lauria,¹¹ Nörr,¹² Scarcella,¹³ Busacca,¹⁴ and Klingenberg¹⁵) of treasure trove.

The most specialised analysis of treasure trove in Roman law could be found in the great monograph by a Spanish Romanist, Alfonso Agudo Ruiz, published in 2005.¹⁶

respect, the texts by Tryphoninus (D. 41, 1, 63) are relevant. Cf. F. Schulz, Fr. 63 D. 41, 1 (Zur Lehre vom Schatzerwerb), (1914) (35) SZ, 94 ff. <https://doi.org/10.7767/zrgra.1914.35.1.94>; A. Agudo Ruiz, *Régimen jurídico del tesoro en derecho romano*, (Madrid, 2005) 92 ff.

² M. Pampaloni, Il concetto giuridico del tesoro nel diritto romano e odierno, in *Per l'VIII centenario della Università di Bologna*, (Roma, 1888) 101 ff.

³ S. Perozzi, Contro l'istituto giuridico del tesoro, in *Monitore dei Tribunali*, 31, (Milano, 1890) 705 ff.

⁴ G. Rotondi, I ritrovamenti archeologici e il regime dell'acquisto del tesoro, *Rivista di diritto civile*, (1910) (2) 310 ff.

⁵ P. Bonfante, La vera data di un testo di Calpurnio Siculo e il concetto romano del tesoro, in *Mélanges P. F. Girard*, I, (Paris, 1912) 123 ff.; Idem, *Corso di diritto romano. La proprietà*, II/2, (Torino, 1968) 127 ff. (In our study, Bonfante's famous and even in the modern research relevant *Corso* will be cited.)

⁶ See, for instance, Th. Mayer-Maly, Der Schatzfund in Justinians Institutionen, in P. Stein and A. D. E. Lewis (eds), *Studies J. A. C. Thomas*, (London, 1983) 109 ff.; Idem, Thensaurus meus, in *Studia V. Pólay*, (Szeged, 1985) 283 ff.; Idem, Ducente fortuna, in *Studies A. A. Schiller*, (Leiden, 1986) 141 ff.

⁷ E. C. S. Marchi, A 'fanciulla d'Anzio' e o istituto do tesouro, (1997) (25) *Index*, 365 ff.

⁸ R. Knütel, Von schwimmenden Inseln, wandernden Bäumen, flüchtenden Tieren und verborgenen Schätzen. Zu den Grundlagen einzelner Tatbestände originären Eigentumserwerbs, in R. Zimmermann, R. Knütel and J. P. Meincke (Hrsg.), *Rechtsgeschichte und Privatrechtsdogmatik (Festschrift H. H. Seiler)*, (Heidelberg, 1999) 569 ff.; Cf. Idem, Arbres errants, îles flottantes, animaux fugitifs et trésors enfouis, *Revue historique de droit français et étranger*, (1998) 76 (2) 206 ff. (In our study, the author's German language work will be cited.)

⁹ Ch. Appleton, La trésor et la « iusta causa usucapionis », in *Studi P. Bonfante*, III, (Milano, 1930) 3 ff.

¹⁰ Schulz, Fr. 63 D. 41, 1, 94 ff.

¹¹ M. Lauria, Dal possessore del tesoro all'«inventor», (1955) (1) *Labeo*, 21 ff.

¹² D. Nörr, Ethik von Jurisprudenz in Sachen Schatzfund, (1972) (75) *BIDR*, 11 ff.

¹³ A. S. Scarcella, Una nuova concezione del tesoro alla luce del C.I. 10.15.1, (1989) (58) *Atti dell'Accademia Peloritana dei Pericolanti*, 188 ff.

¹⁴ C. Busacca, Qualche osservazione sulle innovazioni introdotte dai Divi Fratres nel regime giuridico del tesoro, in *Studi A. Falzea*, IV, (Milano, 1991) 133 ff.

¹⁵ G. Klingenberg, Der „Angeber“ beim Schatzfund, in *Gedächtnisschrift Th. Mayer-Maly*, (Wien, 2011) 237 ff. https://doi.org/10.1007/978-3-7091-0001-1_15

¹⁶ Agudo Ruiz, *Régimen jurídico del tesoro en derecho romano*. See the Spanish author's studies on this topic, too: Idem, La definición del tesoro en las fuentes jurídicas romanas, (2006) (4) *Revista electrónica del Departamento de Derecho de La Rioja*, 153 ff. <https://doi.org/10.18172/redur.3986>, <http://www.unirioja.es/dptos/dd/redur/numero4/agudo.pdf> (Last accessed: 31 July 2019); Idem, El concepto de tesoro en derecho romano, in *Scritti G. Franciosi*, I, (Napoli, 2007) 31 ff.; Idem, La adquisición del tesoro en época clásica en derecho romano, (2013) (11) *Revista electrónica del Departamento de Derecho de La Rioja*, 7 ff. <https://doi.org/10.18172/redur.4121>, <https://www.unirioja.es/dptos/dd/redur/numero11/agudo.pdf> (Last accessed: 31 July 2019). [Henceforth, the author's book (published in 2005) will be cited.] – From the Spanish bibliography of treasure trove see, in addition, G. R. de las Heras Sánchez, *Adquisición del tesoro en el Fuero de*

As for the Hungarian literature on this topic, Károly Visky's paper,¹⁷ the doctoral thesis by János Erdődy,¹⁸ and our works¹⁹ should be mentioned. (In these works, several treasure trove-related topics were examined in the context of Roman law, legal history, and modern legal systems.)

c) Utterly new regimes were created in the Middle Ages concerning treasure trove. Unlike classical and Justinianic Roman law – in which half of the treasure was given to the finder and half to the owner of the land. Regarding the sources of the legal history of the Mediaeval and modern age, treasure trove could be considered as an important legal problem then, too, and, in addition, it bears great importance in contemporary legal systems as well – with terminologically and dogmatically important questions in all periods of legal history. Therefore, as a kind of appendix to the research in Roman law, some different mediaeval and modern legal constructions of treasure trove need to be examined, too.

d) As for the structure of our study, as one of the main antecedents of the modern treasure trove systems, some aspects of the regulation of treasure trove in Roman law will be investigated first and foremost (II.). The subsequent fate of treasure trove systems will then be examined; in this regard, some different solutions in the Mediaeval, as well as in the modern age (III.), and in some modern legal systems (IV.) will be examined briefly. Finally, our most important conclusions will be summarised (V.).

II. A BRIEF HISTORY OF TREASURE TROVE IN ROMAN LAW

a) The Latin word “the[n]saurus” – originating from the Greek noun *thesauros*²⁰ – first appeared in non-legal writings in Rome. In several works from the time of the Republic, as well as of the Principate, the problem of treasure trove arose (see, for instance, the works by Plautus, Horatius, and Petronius).²¹

Cuenca: bases romanas y evolución posterior, in *Actas del II Congreso Internacional y V Iberoamericano de Derecho Romano. Los derechos reales*, (Madrid, 2001) 53 ff.; A. Ortega Carillo, El concepto romano de tesoro y el artículo 352 del Código civil, in *Estudios A. Calonge*, II, (Salamanca, 2002) 739 ff.

¹⁷ Visky K., Kincs és kincstalálás (Treasure and treasure trove), (1982) (37) *Jogtudományi Közlöny*, 125 ff.

¹⁸ J. Erdődy, *Radix omnium malorum?*, PhD thesis, (Budapest, 2012), <https://jak.ppke.hu/uploads/articles/12332/file/Erd%C5%91dy%20J%C3%A1nos%20PhD.pdf> (Last accessed: 31 July 2019), 159 ff. In addition, see Idem, Le sens de l'expression du trésor dans les sources romaines comme la base des réglementations contemporaines, (2014) 10 (2) *Iustum Aequum Salutare*, 134 ff.

¹⁹ Especially see Siklósi I., *A kincstalálás római jogi, jogtörténeti és modern jogi kérdésköre*, (*Treasure trove in Roman law, in legal history, and in modern legal systems*), (Budapest, 2016).

²⁰ See, for instance, W. H. Gross, in K. Ziegler, W. Sontheimer and H. Gärtner (Hrsg.), *Der kleine Pauly*, (München, 1979) s. v. thesaurus; H. G. Liddell and R. Scott, *A Greek-English lexicon*, (Oxford, 1940) s. v. *thesauros*.

²¹ See Bonfante, *Corso di diritto romano*, 132 ff.; Knütel, *Von schwimmenden Inseln...*, 574; Agudo Ruiz, *Régimen jurídico del tesoro en derecho romano*, 65 ff.

b) In the Roman legal texts, the word *thesaurus* appeared only later. Originally, the Roman jurists did not distinguish the proprietor of the land from the owner of the treasure. According to the oldest Roman law tradition, represented even by the *fundatores iuris civilis* (Brutus and Manilius) in preclassical Roman law, treasure – as an *accessio* of the land – belongs to its owner; therefore, the *usucapio* of a plot of land and the treasure ought to go together (cf. Paul. D. 41, 2, 3, 3).²²

c) The detailed rules of treasure trove were only elaborated by classical Roman jurists. In this regard, the famous text by Paul (D. 41, 1, 31, 1)²³ – in which the original, classical, influential, but dogmatically strongly discussed definition of treasure could be found – deserves an in-depth analysis.

According to Paul, “*thesaurus est vetus quaedam depositio pecuniae, cuius non exstat memoria, ut iam dominum non habeat*” (“Treasure is an ancient deposit of a valuable movable object, the memory of which is no longer sustained, so that it now has no owner any longer.”).

Concerning the term *depositio pecuniae*, we can emphasise that – in the light of other relevant sources (Paul. D. 47, 9, 4, 1; Paul. D. 50, 16, 5 pr.; Herm. eod. 222) – not only money, but generally further movables of great value could be regarded as treasure, even in classical Roman law. On the basis of several postclassical sources – which contain the words *monile* and *mobile* in the scope of defining “treasure” – it could theoretically be concluded that only money could be regarded as treasure in classical Roman law, though it seems more likely that the above-mentioned term *depositio pecuniae* referred to each and every movable object of value even back then.

²² “Brutus et Manilius putant eum, qui fundum longa possessione cepit, etiam thesaurum cepisse, quamvis nesciat in fundo esse [...]” From the virtually boundless literature of this text see e.g. F. C. von Savigny, *Das Recht des Besitzes. Eine civilistische Abhandlung*, (Giessen, 1837⁶) 260 ff.; Appleton, *La trésor et la « iusta causa usucapionis »*, 10 ff.; Lauria, *Dal possessore del tesoro all’‘inventor’*, 21 ff.; Th. Mayer-Maly, *Studien zur Frühgeschichte der „usucapio“ III*, (1962) (79) *SZ*, 104 ff. <https://doi.org/10.7767/zrgra.1962.79.1.86>; A. Metro, *L’obbligazione di ‘custodire’ nel diritto romano*, (Milano, 1966) 60 ff.; A. Watson, *The law of property in the later Roman Republic*, (Oxford, 1968) 55 ff.; Nörr, *Ethik von Jurisprudenz in Sachen Schatzfund*, 14.; R. Backhaus, „*Casus perplexus. Die Lösung in sich widersprüchlicher Rechtsfälle durch die klassische römische Jurisprudenz*“, (München, 1981) 146 ff.; Knütel, *Von schwimmenden Inseln...*, 571 ff.; Agudo Ruiz, *Régimen jurídico del tesoro en derecho romano*, passim; G. Krämer, *Das besitzlose Pfandrecht. Entwicklungen in der römischen Republik und im frühen Prinzipat*, (Köln, 2007) 167 ff.

²³ “*Thesaurus est vetus quaedam depositio pecuniae, cuius non exstat memoria, ut iam dominum non habeat: sic enim fit eius qui invenerit, quod non alterius sit. Alioquin si quis aliquid vel lucri causa vel metus vel custodiae conderit sub terra, non est thesaurus: cuius etiam furtum fit.*” Cf., for instance, F. Schulz, *Classical Roman law*, (Oxford, 1951) 362.; V. Arangio-Ruiz, *Istituzioni di diritto romano*, (Napoli, 1960¹⁴) 191.; Bonfante, *Corso di diritto romano*, 128 ff.; M. Kaser, *Das römische Privatrecht*, I, (München, 1971²) 426; Mayer-Maly, *Thesaurus meus*, 283 ff.; Marchi, A ‘fanciulla d’Anzio’ e o istituto do tesouro, 368 ff.; Knütel, *Von schwimmenden Inseln...*, 573; Agudo Ruiz, *Régimen jurídico del tesoro en derecho romano*, 31 ff.

As for the expression *iam dominum non habeat* mentioned in Paul's text: since treasure, (in principle) has or may have an owner, it cannot be regarded as *res nullius*. The other observation by Paulus – *cuius non exstat memoria* – can be considered as a dogmatically more relevant element, because the owner of treasure seems to be in a “memory hole”. As a result of practical considerations, treasure can be regarded as an object, the ownership of which cannot be ascertained conclusively.

d) Since treasure is not *res nullius* in a strict (technical) sense, the acquisition of its ownership cannot be regarded as *occupatio* – which is carried out as a result of *apprehensio* – but *inventio*. It is, however, questionable whether classical Roman jurists institutionalized an absolutely autonomous way of acquiring ownership, which is different from *occupatio*. In our opinion, treasure trove could be regarded as an autonomous way of acquiring ownership in Roman law; however, it is probable that this was so merely from Hadrian's time.

e) The *locus* of treasure trove is not disputed in Roman law literature, since classical, postclassical, and even Justinianic law focused only on treasures which had been found in an immovable – contrary to the mediaeval and modern jurisprudence, in which treasure trove in any movable property is also dealt with.

f) Especially on the basis of texts by the early classical jurists (for instance Labeo), but even by the later classical jurists, it can be observed that the word *thesaurus* was not only used in strict legal (technical) sense but also in a non-technical sense. In these fragments, *thesaurus*, of course, has nothing to do with treasure trove as one of the original ways of acquiring ownership (see, for instance, Pomp. D. 10, 4, 15; Ulp. D. 10, 2, 22 pr.; Lab. D. 34, 2, 39, 1; Pap. D. 41, 2, 44 pr.).

g) Considering the imperial constitutions related to treasure trove, the most famous and significant regulation was introduced by Hadrian. His constitution can be described as a *media sententia* compared to the different prior opinions by classical jurists. Hadrian's constitution, equally cited in the Institutes of Justinian (see below), is also known from an earlier, though not a legal source, *Historia Augusta (Vita Hadr. 18, 6)*.²⁴ With regard to treasure trove, Hadrian ruled that if anyone made a find on his own property, he might keep it; if on another's land, he should turn over half to that landowner; if on state land, he should share the treasure equally with the *fiscus*.

h) However, later – on the basis of the text by Callistratus (D. 49, 14, 3, 10) – the *divi fratres*: Marcus Aurelius and Lucius Verus modified Hadrian's concept. According to their constitution, if a treasure had been found “in locis fiscalibus vel publicis religiosive aut in monumentis” [“on land belonging to the Treasury, or in public or religious places, or in monuments” (*res extra commercium*)], half of it could

²⁴ “De thesauris ita cavit, ut, si quis in suo reperisset, ipse potiretur, si quis in alieno, dimidium domino daret, si quis in publico, cum fisco aequabiliter partiretur.” Cf. e.g. Bonfante, *Corso di diritto romano*, 131.; Knütel, *Von schwimmenden Inseln...*, 571.

be claimed by the Treasury. Such a treasure trove needed to be reported to the *fiscus* (cf. eod. 3, 11 and eod. 1 pr.). A regulatory attitude which implies a “public law-approach”.²⁵

i) The rather obscure constitution of Alexander Severus – which is often disregarded in Roman law literature – is only mentioned by *Historia Augusta (Vita Alex. 46, 2)*.²⁶ According to it, treasure – as a rule – belonged to the finder, but when the treasure was too precious, a part of it belonged to the imperial authorities. (“Treasure-trove he always gave to the finders, and if these were numerous he would include among them the officials of his various departments.”) Unfortunately, the background and the exact content of these rules are unknown, and we cannot come to any well-founded conclusions on the basis of such an uncertain source.

j) As for postclassical Roman law, the imperial constitutions concerning treasure trove are to be mentioned (cf. CTh. 10, 18 and C. 10, 15). In this respect, perhaps the most notable postclassical ruling related to treasure trove was created by the constitution of Leo and Zeno in 474 AD, which, on the one hand, reinstated the regime institutionalised by Hadrian and, on the other hand, established noteworthy and substantial new rules related to treasure trove, which often appear even in the modern era.²⁷

k) It is well-known that Hadrian’s regulations were implemented by Justinian, according to his *Institutes* (2, 1, 39).²⁸ It is worth mentioning that only Hadrian’s constitution was cited in Justinian’s *Institutes*, while the above-mentioned constitution by Leo and Zeno was disregarded in this law-book. According to Inst. 2, 1, 39, if anyone found treasure on his own land, the Emperor Hadrian, following natural equity, adjudged to him the ownership of it. Hadrian established the same rule when the

²⁵ Cf. Busacca, *Qualche osservazione sulle innovazioni introdotte dai Divi Fratres nel regime giuridico del tesoro*, 133 ff.; Agudo Ruiz, *Régimen jurídico del tesoro en derecho romano*, 95 ff.; Klingenberg, *Der „Angeber“ beim Schatzfund*, 242 f.

²⁶ “Thesaurus repperitos iis qui reppererant donavit et, si multi essent, addidit his eos quos in suis habebat officiis.” Cf. Bonfante, *Corso di diritto romano*, 135.; Busacca, *Qualche osservazione sulle innovazioni introdotte dai Divi Fratres nel regime giuridico del tesoro*, 154; Agudo Ruiz, *Régimen jurídico del tesoro en derecho romano*, 106 f., with summary of the relevant literature.

²⁷ Cf. Mayer-Maly, *Ducente fortuna*, 142.; Agudo Ruiz, *Régimen jurídico del tesoro en derecho romano*, 108 ff.; Klingenberg, *Der „Angeber“ beim Schatzfund*, 241.

²⁸ “Thesaurus, quos quis in suo loco invenerit, divus Hadrianus, naturalem aequitatem secutus, ei concessit qui invenerit. Idemque statuit, si quis in sacro aut in religioso loco fortuito casu invenerit. At si quis in alieno loco non data ad hoc opera sed fortuito invenerit, dimidium domino soli concessit. Et convenierit, si quis in Caesaris loco invenerit, dimidium inventoris, dimidium Caesaris esse statuit. Cui conveniens est et si quis in publico loco vel fiscali invenerit, dimidium ipsius esse, dimidium fisci vel civitatis.” Cf., for instance, Mayer-Maly, *Der Schatzfund in Justinians Institutionen*, 126 ff.; Agudo Ruiz, *Régimen jurídico del tesoro en derecho romano*, 85. – Another solution was in force in the Ostrogothic Kingdom at the same time. It can be assumed on the basis of a brief text by Cassiodorus (*Variae*, 6, 8, 6) that Theodoric the Great gave all treasure the aearium: “Depositivae quoque pecuniae, quae longa vetustate competentes dominos amiserunt, inquisitione tua nostris applicantur aeariis, ut qui sua cunctos patimur possidere, aliena nobis debeant libenter offerre.” Cf. Bonfante, *Corso di diritto romano*, 127.; Marchi, A ‘fanciulla d’Anzio’ e o istituto do tesouro, 369.; Knütel, *Von schwimmenden Inseln...*, 5738⁸; Agudo Ruiz, *Régimen jurídico del tesoro en derecho romano*, 37.

treasure was found by accident in a sacred or religious place. If the treasure was found in a land of another by accident, and without specially searching for it, Hadrian gave half to the finder, half to the owner of the land; and upon this principle, if the treasure was found in a land belonging to the Emperor, he decided that half should belong to the latter, and half to the finder. Consistently with this, if anyone found treasure on land belonging to the imperial treasury or in a public place, half belonged to the finder, and half to the treasury (*fiscus*) or the *civitas*. This text, being a legal source, is more accurate and precise than the above-mentioned text in *Historia Augusta*. Justinian also referred to *naturalis aequitas* (“natural equity”), which had not been mentioned in *Historia Augusta*, but which was referred to nonetheless in the text of Gratianus’, Valentinianus’, and Theodosius’ imperial constitution, published in 380 AD (cf. CTh. 10, 18, 2).

III. FROM THE HISTORY OF TREASURE TROVE IN THE MEDIAEVAL AND MODERN AGES

a) Compared to Roman law – especially to classical and Justinianic Roman law – utterly new regimes were created concerning treasure trove in the mediaeval period of legal history. Nevertheless, it is worth mentioning that Justinian’s ruling was sometimes equally in force. In this respect, the *constitutio* (*Regalia sunt hec*) of the Holy Roman Emperor, Frederick Barbarossa (1158) could be referred to, in which the solution by Justinian appeared; namely that half of the treasure belonged to the finder.²⁹ However, the Constitutions of Melfi by Frederick II (*Constitutiones Regni Siciliae*, 3, 35, in 1231) gave the whole treasure to the *fiscus*.³⁰ According to the famous law-book of Eike von Repgow, the Mirror of the Saxons (*Sachsenspiegel, Landrecht*, I, 35, 1), every treasure hidden in the ground belongs to the Emperor.³¹ However, according to the *Schwabenspiegel* (*Landrecht*, 347), a quarter of the treasure belonged to the finder.³²

In France, according to the *Établissements de Saint Louis* (I, 94), which consists of thirteenth-century French customary law, no one but the king could acquire treasure

²⁹ “[...] dimidium thesauri inventi in loco cesaris, non data opera, vel in loco religioso [...]” Cf. Th. Mayer-Maly, *Der Schatz im Acker*, in Idem, *Rechtsgeschichtliche Bibelkunde*, (Wien, Köln and Weimar, 2003) 48 f.

³⁰ “Scire enim debet unusquisque inventiones regni nostri, quarum dominus non apparuerit, ad fiscum specialiter pertinere.” Cf. Mayer-Maly, *Der Schatz im Acker*, 49. For the whole context see W. Stürner (Hrsg.), *Die Konstitutionen Friedrichs II. für das Königreich Sizilien*, (Hannover, 1996) 402.

³¹ “Al schat, under der erde begraven diepher den eyn pluch geit, horet zu der koninlichen gewalt.” Cf. e.g. K. Zeumer, *Der begrabene Schatz im Sachsenspiegel* I, 35, (1901) (22) *Mitteilungen des österreichischen Instituts für Geschichtsforschung*, 420 ff.

³² “[...] dem vinder sol daz vierteil werden.” Cf. e.g. Th. Mayer-Maly, *Komponenten der Regelung des Schatzfundes im Schwabenspiegel*, in D. Medicus, H.-J. Mertens, K. W. Nörr and W. Zöllner (Hrsg.), *Festschrift H. Lange*, (Stuttgart, Berlin and Köln, 1992) 185 ff.

consisting of gold, while silver treasures belonged to the barons, who had the so-called high justice in their lands (« Nus n'a fortune d'or, se il n'est rois. Celle d'argent est au seigneur qui a grant joutise an sa terre. »). Obviously, this rule is closely related to the French law principle “nulle terre sans seigneur”.³³ In the same work, the definition of treasure could be discovered as well: “Treasure is when it is buried under the ground, and the earth has been disturbed” (« Fortune est don terre est effondrée. »).³⁴

b) On the basis of the research by Coing,³⁵ it should be pointed out that not only in the medieval legal sources, but even in the modern age similar regulations can be found (see, for instance, the argumentation of King James VI in his famous work “The Trew Law of Free Monarchies” [1598]: “For if a hoord be found under the earth, because it is no more in the keeping or use of any person, it of the law pertains to the king.”³⁶), although Justinian’s treasure trove-related rules were also in force. In the works by Hugo Grotius,³⁷ Simon van Leeuwen,³⁸ and Arnoldus Vinnius³⁹ Justinian’s regime was introduced again. However, the rules stemming from the Mediaeval era – according to which any treasure found should belong to the emperor – were still in force and were termed as a “ius commune et quasi iuris gentium” by Grotius and van Leeuwen, as well. For instance, van Leeuwen pointed out that any concealed treasures which a person may have found upon or in his own ground, belonged to themselves, but if any such treasure was found in the land of another person, one half of it belonged to the owner of the premises, and the other half to the finder. In many countries, however, the treasure was to be appropriated by the government. As for Roman-Dutch Law, it can be regarded as uncertain, according to van Leeuwen’s opinion.⁴⁰

Concerning the French *droit coutumier* in the 17th century – on the basis of Jean Domat’s famous *Les loix civiles dans leur ordre naturel* – we can refer to the rule according to which one third of the treasure belonged to the finder, one third to the landowner, and one third to the baron (« Seigneur haut Justicier »). When the finder was the landowner himself, half belonged to them, and the other half to the baron.⁴¹

³³ See F. Bourjon, *Le droit commun de la France et la coutume de Paris*, I, (Paris, 1747). 126.: « il n’y a nulles terres [...] qui ne relèvent d’un Seigneur ».

³⁴ Cf. J.-Ph. Lévy and A. Castaldo, *Histoire du droit civil*, (Paris, 2002) 538. For the whole context, see P. Viollet, *Les Établissements de Saint Louis*, (Paris, 1883) 164.; *The Établissements de Saint Louis. Thirteenth-century law texts from Tours, Orléans, and Paris* (translated and with an introduction by F. R. P. Akehurst), (Philadelphia, 1996) 60 f.

³⁵ H. Coing, *Europäisches Privatrecht*, I, (München, 1985) 300.

³⁶ Cf. J. P. Sommerville (ed.), *King James VI and I. Political Writings*, (Cambridge, 1994) 74.

³⁷ De iure belli ac pacis, 2, 8, 7; cf. H. Grotius, *Inleiding tot de hollandsche rechtsgeleerdheid*, (Graven-Haghe, 1631) 18.

³⁸ S. van Leeuwen, *Het Rooms-Hollands-Regt*, (Amsterdam, 1708) 115.

³⁹ A. Vinnius, *Institutionum imperialium commentarius*, (Amsterdam, 1665⁴) 176.

⁴⁰ van Leeuwen, *Het Rooms-Hollands-Regt*, 115.

⁴¹ J. Domat, *Les loix civiles dans leur ordre naturel*, I, (Paris, 1745) 268.

In the rules concerning treasure trove of the *Codex Maximilianeus Bavaricus Civilis* (1756)⁴² and the *Allgemeines Landrecht für die Preußischen Staaten* (1794)⁴³ – which cannot be considered as civil codes in modern sense – reflects on the one hand Justinian's treasure trove system, and, in addition to all this, the influence of several mediaeval legal rules as well.

IV. TREASURE TROVE IN MODERN LEGAL SYSTEMS

a) Justinian's regime of treasure trove (as well as the famous definition by Paul) survives in many contemporary codes of the civil law jurisdictions.

In the modern French rules concerning treasure trove (see art. 716 of French *Code civil*⁴⁴), the subsequent fate of the Roman law tradition could clearly be pointed out. Although the French *Code civil* achieved a kind of a "symbiosis" between the earlier *droit écrit* and *droit coutumier*, the rules of the article related to treasure trove belong to the rules that prefer the Roman law solution to customary law. Regarding the new social order after the French Revolution, it is obvious that the solution of the earlier French customary law – according to which the one third of the treasure had belonged to the baron – was no longer allowed to be applied. Since the French *Code civil* had greatly affected many subsequent civil law codifications, the treasure trove system of Roman law has survived in all legal systems inspired by French legal tradition (see, *inter alia*, the

⁴² 2, 3, 4: "Gefundener Schätzenhalber, welche solange Zeit vergraben, eingemauert, oder sonst verborgen gewest, daß man den Eigenthümer nicht mehr davon weiß, wird das General-Mandat von Anno 1752 hiermit folgendermassen erneuert. Soll man den Schatz in deren Theile theilen, wovon dem Fisco zwey Drittel zugehen, der Überrest aber dem Erfinder, wenn er den Fund auf seinem Eigenthum thut, verbleibt. Falls aber derselbe in fremden geschiehet, so theilt der Erfinder sothanes Drittel mit dem Eigenthümer des Orts, ausser da der Schatz nicht von ungefehr gefunden, sondern ohne des Eigenthümers Wissen und Willen mit Fleiß darauf nachgesucht oder gegraben worden, welchenfalls das ganze Drittel dem Proprietario Loci allein zugehört. Gebraucht man sich aber etwan gar Aberglaubischer Dingen hierunter, so verfallt man dadurch nicht nur in malefizische Straf, sondern der Antheil, welchen man sonst dabey gehabt hätte, gehet verlohren, und kommt dem Fisco zu, jedoch ohne Präjuditz des Eigenthümers, wenn er bey der Sach unschuldig ist."

⁴³ 1, 9, 86: "Wer zur Nachsuchung von Schätzen vermeintlicher Zaubermittel, durch Geisterbannen, Citiren der Verstorbenen, oder anderer dergleichen Gaukeleyen, es sey aus Betrug oder Aberglauben, sich bedient; der verliert, außer der sonst schon verwirkten Strafe, sein Anrecht auf einen etwa zufälliger Weise wirklich gefundenen Schatz." Cf. Mayer-Maly, *Ducente fortuna*, 144.

⁴⁴ « La propriété d'un trésor appartient à celui qui le trouve dans son propre fonds; si le trésor est trouvé dans le fonds d'autrui, il appartient pour moitié à celui qui l'a découvert, et pour l'autre moitié au propriétaire du fonds. »

Chilean *Código civil* of 1855,⁴⁵ the Louisiana Civil Code of 1870,⁴⁶ the Spanish *Código civil* of 1889,⁴⁷ and the Québec Civil Code of 1994⁴⁸).

The Austrian *Allgemeines Bürgerliches Gesetzbuch* of 1811 maintained a solution until 1846, according to which one third of the treasure belonged to the treasury.⁴⁹ The Austrian system of treasure trove is now based to a considerable extent on the treasure trove system of Justinian's rules.⁵⁰

Since the German *Bürgerliches Gesetzbuch* of 1900 is a result of the research by Pandectist legal scholars, the liberal regime of treasure trove of Hadrian and Justinian entered the German Civil Code due to the respect for the Roman law tradition.⁵¹ (In this regard, Wieacker's opinion seems to be highly relevant: „[...] das Bürgerliche Gesetzbuch von 1896 ist das spätgeborene Kind der Pandektenwissenschaft und der nationaldemokratischen, insoweit vor allem vom Liberalismus angeführten Bewegung seit 1848“.⁵²) Since the BGB – besides the French *Code civil* – had an essential impact on many succeeding civil law codifications (see, inter alia, the Italian *Codice civile* of 1942, the Portuguese *Código civil* of 1966, and the Brazil *Código civil* of 2002), the Roman

⁴⁵ Art. 626: “El tesoro encontrado en terreno ajeno se dividirá por partes iguales entre el dueño del terreno y la persona que haya hecho el descubrimiento.”

⁴⁶ Art. 3420: “One who finds a treasure in a thing that belongs to him or to no one acquires ownership of the treasure. If the treasure is found in a thing belonging to another, half of the treasure belongs to the finder and half belongs to the owner of the thing in which it was found.”

⁴⁷ Art. 351: “El tesoro oculto pertenece al dueño del terreno en que se hallare. Sin embargo, cuando fuere hecho el descubrimiento en propiedad ajena, o del Estado, y por casualidad, la mitad se aplicará al descubridor.” Cf. J. M. Farré Alemán, *Código civil comentado y concordado*, (Barcelona, 2001) 421 ff.; A. Roma Valdés, *La ley y la realidad en la protección del patrimonio arqueológico español*, (2001) (48) *International Numismatic Council, Compte rendu*, 69 ff.

⁴⁸ Art. 938: “Le trésor appartient à celui qui le trouve dans son fonds; s'il est découvert dans le fonds d'autrui, il appartient pour moitié au propriétaire du fonds et pour l'autre moitié à celui qui l'a découvert, à moins que l'inventeur n'ait agi pour le compte du propriétaire.”

⁴⁹ Cf. U. Floßmann, *Österreichische Privatrechtsgeschichte*, (Wien, 2008⁶) 175.

⁵⁰ Cf. 399. §: „Von einem Schatz erhalten die Finder und der Eigentümer des Grundes je die Hälfte.“ See, for instance, G. Dembski, *Münzfunde und Münzsammlungen – die gesetzlichen Bestimmungen in Österreich*, (2001) (48) *International Numismatic Council, Compte rendu*, 66 ff.

⁵¹ 984. §: „Wird eine Sache, die so lange verborgen gelegen hat, dass der Eigentümer nicht mehr zu ermitteln ist (Schatz), entdeckt und infolge der Entdeckung in Besitz genommen, so wird das Eigentum zur Hälfte von dem Entdecker, zur Hälfte von dem Eigentümer der Sache erworben, in welcher der Schatz verborgen war.“ Cf. H. J. Wieling, *Sachenrecht*, (Berlin, Heidelberg and New York, 2007⁵) 160 ff.; M. K. Hermans, *Der Schatzfund. Eine Gegenüberstellung der Rechtsverhältnisse an einem Schatz im deutschen und niederländischen Recht unter Berücksichtigung öffentlich-rechtlicher Sonderbestimmungen*, (Münster, 2011) 10 ff.

⁵² F. Wieacker, *Das Sozialmodell der klassischen Privatrechtsgesetzbücher und die Entwicklung der modernen Gesellschaft*, in Idem, *Industriegesellschaft und Privatrechtsordnung*, (Frankfurt am Main, 1974) 15. Cf., in addition, 10: „Frucht der Pandektenwissenschaft“; p. 22: „spätgeborenes Kind des klassischen Liberalismus“. [Wieacker' study was published originally in 1953 (Juristische Studiengesellschaft Karlsruhe, Schriftenreihe, 3)]. – Cf., in addition, Idem, *Privatrechtsgeschichte der Neuzeit*, (Göttingen, 1967²) 478 f.

law regime of treasure trove has survived in these legal systems due to the French and the German legal tradition as well.⁵³

b) The Swiss *Zivilgesetzbuch* of 1907 had a great effect, for example, on the new Italian *Codice civile*, and on many more civil codes. Still, the approach of treasure trove in Swiss law – according to which the treasure belongs to the owner of the property in which a hidden treasure has been found, while the finder (contrary to the above-mentioned legal systems based on Roman law tradition) has only a claim for an equitable fee⁵⁴ – had no influence on any later codifications.

Compared to the majority of the legal systems based on the Roman law tradition, another solution is in force in Hungary, too. As for the treasure trove system of the Hungarian Civil Code of 1959, a socialist legal approach was institutionalised, according to which the treasure ought to be offered to the state. In contrast to this, the prior Hungarian private law gave one third of the treasure to the finder, one third to the owner of the property on which the hidden treasure had been found, and one third to the Treasury. According to Section 132 of the (old) Hungarian Civil Code of 1959, if a person finds a valuable object which has been hidden by unknown persons, or the ownership of which has otherwise been forgotten, he is obliged to offer it to the state. If the state does not claim the object, it shall become the property of the finder; otherwise the finder shall be entitled to a finder's fee proportionate to the value of the object found. However, if the object found is a relic of great value or historic importance, its ownership may be claimed by the state. The same rules are sustained nowadays, with regards to the relevant provisions of the new Hungarian Civil Code of 2013 [5:64. § (1)–(3)].

c) As for the common law jurisdictions, English law – which has developed separately to continental civil law practices – maintains its old legal tradition⁵⁵ concerning the rules of treasure trove as well. According to the old common law and the *Treasure Act* of 1996 – in accordance with the general principles of the English Law of Property as well – the treasure belongs to the Crown or to the franchisee, if there is one.⁵⁶

⁵³ See *Codice civile*, art. 932.; *Código civil port.*, art. 1324.; *Código civil bras.*, art. 607.

⁵⁴ *Schweizerisches Zivilgesetzbuch*, art. 723.

⁵⁵ Cf. H. Bracton, *De legibus et consuetudinibus Angliae* (ed. G. E. Woodbine), (New Haven, 1922) 338 ff.; W. Blackstone, *Commentaries on the laws of England*, 1, (Oxford, 1765) 285 f. Regarding the whole problem of treasure trove in English legal history see Ch. R. Beard, *The romance of treasure trove*, (London, 1933); G. F. Hill, *Treasure trove in law and practice from the earliest time to the present day*, (Oxford, 1936).

⁵⁶ *Treasure Act*, Section 4 (1). See, for example, R. Bland, The Development and Future of the Treasure Act and Portable Antiquities Scheme, in S. Thomas and P. G. Stone (eds), *Metal Detecting and Archaeology*, (Woodbridge, 2008) 63 ff.

The leitmotiv of Scottish law – which belongs to the mixed jurisdictions – happens to be the same. According to the principle “quod nullius est, fit domini regis”, treasure, as a kind of “bona vacantia”, belongs to the Crown.⁵⁷

The “treasure trove systems” of the United States⁵⁸ are quite heterogeneous. Since Louisiana and Puerto Rico belong to the so-called mixed legal systems, their rules considering treasure trove are based on Roman law. As for the case law of treasure trove, it is very divergent in the Member States of the USA. It is worth mentioning that the principle of equitable division can also be found in the legal literature. As for some treasures of great importance, federal acts ought to be applied (cf., for instance, the *Antiquities Act* of 1906, the *National Historic Preservation Act* of 1966, and the *Archaeological Resources Protection Act* of 1979).

V. CONCLUSIONS

The original concept by Hadrian related to treasure trove is currently amended with numerous “public law elements”,⁵⁹ even in those legal systems which are based on the Roman law tradition, since nowadays treasures of great archaeological and cultural importance would not be awarded exclusively to the finder or, for instance, the landowner. Hadrian’s regime is to be evaluated in its own time and context, that is in Roman law. An individualist and liberal approach is reflected in this regime on treasure trove. An exclusively “private law approach” seems to be unsustainable today, as the ruling of treasure trove deserves a complex approach according to which any treasure could be regarded as a national heritage or even a kind of “common heritage of mankind” (of course not in the “technical” sense of modern international law). The regulation of treasure trove has only to serve this fine purpose.

⁵⁷ Cf. J. Erskine, *An institute of the law of Scotland, in four books, in the order of Sir George Mackenzie’s institutions of that law*, I, (Edinburgh, 1824) 224.; A. Saville, The law and practice regarding coin finds. The treasure trove system in Scotland – an update, (2008) (55) *International Numismatic Council, Compte rendu*, 13.

⁵⁸ Cf. R. H. Helmholz, Equitable division and the law of finders, (1983) (52) *Fordham Law Review*, 313 ff. (first of all, on the development of case law of treasure trove); J. R. Richman and M. P. Forsyth (eds), *Legal perspectives on cultural resources*, (Walnut Creek et al., 2004) Especially see the studies of R. B. Cunningham (The twilight of treasure trove, 38 ff.) and L. Sebastian (Archaeology and the law, 4 ff.); J. M. Kleeberg, The law and practice regarding coin finds. Treasure trove law in the United States, (2006) (53) *International Numismatic Council, Compte rendu*, 13 ff.

⁵⁹ On the problem of the distinction between private law and public law see G. Hamza, Reflections on the Classification (divisio) into ‘Branches’ of Modern Legal Systems and Roman Law Traditions, in *Studii L. Labruna*, IV, (Napoli, 2007) 2449 ff. From the Hungarian literature, in addition, see: Menyhárd A., A polgári jog tudománya Magyarországon, (The science of private law in Hungary), in Jakab A. and Menyhárd A. (eds), *A jog tudománya*, (The science of law), (Budapest, 2015) 255., with further literature references.

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The Role of Central Agencies in the Field of Public Service Provision

ABSTRACT

The paper reviews the role of central agencies in the field of public service provision in Hungary after 2010. The main hypotheses on public service providing role and independence of agencies are (1) service providing is a relatively new type of task among Hungarian central agencies, (2) agencies with service providing tasks are not independent or only relatively independent: In order to justify these hypotheses the paper examines the concept, historical background, function and powers of independent (regulatory) agencies. Then the paper presents agencies' role in public service providing: institution maintenance, funding and cultural-ideological tasks. The research confirms hypothesis no. 1 partly: the service providing task is relatively new in Hungary, however, funding and political-ideological tasks have some precludes. Hypothesis no. 2 is confirmed partly, too: agencies and service providers are under severe governmental/ministerial control.

KEYWORDS: central agency, government, public service providing, independence

I. INTRODUCTION

The system of Hungarian central agencies has been transformed since the change of government in 2010. The sphere of non-governmental central bodies has been centralised and concentrated: the number of central agencies has decreased, and they have become more subordinate to the Government or the ministries. These tendencies have been connected to the overall centralisation of the Hungarian public administration, for example the centralisation of the central government and the decline of the importance of local governments within the Hungarian public administration.¹ As part of these

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¹ I. Hoffman, J. Fazekas, K. Rozsnyai, Concentrating or Centralising Public Services? The Changing Roles of the Hungarian Inter-Municipal Associations in the last Decades, (2016) 14 (3) *Lex Localis: Journal of Local Self-Government*, 451–471. [https://doi.org/10.4335/14.3.451-471\(2016\)](https://doi.org/10.4335/14.3.451-471(2016))

tendencies a lot of public tasks – including service providing tasks – have been transferred from local governments to central agencies (see detailed in Section III).

The paper reviews the role of (independent or autonomous) central agencies in the field of public service provision in Hungary after the governmental change in 2010. The method of the research is jurisprudential, therefore based on legal texts, statutory and other normative decisions and the relevant scientific literature. The main hypotheses on the public service-providing role and independence of agencies are as follows.

1. Service providing is a relatively new type of task among Hungarian central agencies.
2. Central agencies with service providing tasks are not independent or only relatively independent.

In order to justify these hypotheses, the paper examines the concept, historical background, function and powers of independent (regulatory) agencies. The paper then presents agencies' roles in public service-providing: institution maintenance, funding and cultural-ideological tasks. The research partly confirms hypothesis no. 1: the service-providing task is relatively new in Hungary, but funding tasks are traditional. Hypothesis no. 2 is confirmed: agencies and service providers are under strict governmental/ministerial control.

II. THE (INDEPENDENT) CENTRAL AGENCIES

1. The concept of regulatory authority

Regulatory authorities are usually central bodies in the system of public administration (in Europe at national and European Union level as well), but they can operate on a territorial level, too.² The essence of the regulatory activity is that the regulatory body constitutes general rules of conduct and norms, but it is not necessarily formally provided with legislative powers. Therefore, making and implementing laws are united in one hand. It can be carried out in three ways.

a) The requirements laid down in individual (adjudicative or administrative) decisions issued by the regulatory body, such as permits and sanctions, are followed as norms by market actors who are not directly involved in the given individual case as clients, but they are in a similar position. As a result, the individual decisions become uniform and take on a normative nature.

² A. Sajó, Independent Regulatory Authorities as Constitutional Actors: a Comparative Perspective, *Annales Universitatis Scientiarum Budapestinensis De Rolando Eötvös Nominatae Sectio Iuridica*, (2007) 5–51.; X. A. Yataganas, Delegation of Regulatory Authority in the European Union. The Relevance of the American Model of Independent Agencies, (2001) (3) *Jean Monnet Working Paper*.

b) The regulatory authority adopts several types of soft law instruments, such as policy, recommendations and codes. These are not official legislative acts, but they have nearly the same weight (for example, market actors follow them in the absence of detailed legal provisions).

c) Sometimes normative regulatory powers are vested in regulatory authorities so that they can adopt normative rules, for example decrees (the National Media and Infocommunications Authority and the Hungarian Energy and Public Utility Regulatory Authority).

The homeland of regulatory authorities is the United States of America. They emerged in Europe only after the Second World War and it was a long process because, among European public lawyers, rule-making and law enforcement are theoretically and practically separated spheres of law, while the integration of these two types of activity is the very essence of how regulatory authorities operate.³

Regulatory authorities usually operate in sectors in which technical norms change quickly, such as telecommunications, media and financial services. Because of the continuous sectoral transformation, the legislature is not able to fulfil one of its most important functions: market actors can anticipate the decision of the administrative authority in their individual case (accountability). In these sectors, regulation is often based on abstract concepts, so market actors cannot foresee the content of the administrative decision and its motives or the aspects of consideration. Accountability is usually provided by individual authoritative decisions: the client and market actors in a similar position examine the decision adopted in similar cases and try to draw conclusions (individual decisions have normative or quasi-normative nature). The above-mentioned soft law instruments have a similar function: they can orientate the performance of market actors in order to comply with mandatory legal rules.⁴

However, the performance of regulatory authorities is rather problematic regarding constitutional matters. Namely, regulatory authorities are not directly vested with normative regulatory powers by the Constitution, although, as we could see above, in practice, they carry out regulatory functions. Moreover, the decision-making process of regulatory bodies usually lacks the usual constitutional guarantees of the legislative process, namely transparency and accountability. Furthermore, establishing regulatory bodies is a strong challenge to the separation of powers, because of the merger

³ G. Majone, *The Rise of the Regulatory State In Europe*, in W. C. Müller, *The State in Western Europe: Retreat or Redefinition?* (Psychology Press, 1994) 80–81.; Sajó, *Independent Regulatory Authorities as Constitutional Actors: a Comparative Perspective*, 23–25.

⁴ Kovács A. Gy., *Mitől szabályozó egy hatóság?* in Valentiny P. and Kiss F. L. (szerk.): *Verseny és szabályozás 2008*, (MTA Közgazdaságtudományi Intézet, Budapest, 2009) 13–45.

of rule-making and law enforcement functions and because of their independence.⁵ This independence is another very sensitive characteristic of regulatory agencies.

2. The independence of regulatory authorities

Independence is a very controversial feature of regulatory authorities. In several sectors, such as media and telecommunications, it is prescribed by the law of the European Union to the Member States that they establish an independent regulatory authority (e.g. Audiovisual Media Services Directive: preamble paragraph 94 and Art. 30).

The reason for independence lies in the fact that these sectors have been liberalised in recent decades: a lot of private sector companies have become service providers while some public sector organisations have remained service providers, too. Nevertheless, the state, which is the owner or supervisor of these public sector organisations, is the main regulator of these sectors, too. As a result, the state's two functions (service provider and regulator) must be separated in organisational, personnel and budgetary ways in order to maintain fair competition. On the other hand, regulatory authorities must be separated from the supervised sector as well. The other justification of independence is the protection of certain fundamental rights, such as freedom of expression, and competition and the prohibition of discrimination.⁶

Independence has special legal guarantees in Hungary as follows.⁷

a) Autonomous bodies are created in an act of the National Assembly (or cardinal act), which cannot be modified by the Government.

b) They cannot be instructed, neither by the Government nor by the Minister or another state organ.

c) They submit a – usually annual – report to the National Assembly and shall inform the Government of their activities.

d) The main governance powers on their staff are usually performed by the President of the Republic or the Parliament or the Head of the body. The Head is often appointed by the President of the Republic or elected by the National Assembly. Besides, the PM sometimes has some powers in this field, for example to make a proposal on the appointment of the Head of the National Competition Authority. On the other hand, the senior officials and civil servants must comply with strict rules on conflict of

⁵ P. L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, (1984) 84 (3) *Columbia Law Review*, 573–669. <https://doi.org/10.2307/1122501>

⁶ Kovács, *Mitől szabályozó egy hatóság?*

⁷ J. Fazekas, *Central administration*, in A. Patyi, Á. Rixer and Gy. Koi (eds), *Hungarian Public Administration and Administrative Law*, (Schenk Verlag, Passau, 2014) 287–303. <https://doi.org/10.1556/204.2015.37.2.3>

interests. The salaries of the senior officials and civil servants are usually higher than those of the employees of other central bodies.

e) Autonomy in budgetary matters should also be mentioned. Autonomous bodies usually elaborate their own budget and therefore it is adopted as a part of the Central Budget Act of the National Assembly. In some cases, the budget is the subject of a separate act of Parliament (e.g. the budget of the media authority).

f) Because autonomous organs have no supervisory bodies, their decisions cannot be repealed or amended by administrative organs but only by courts, which can only review the legal aspects of their operations.

There are central agencies which are not independent from central administration, or their independence is only relative. The status of these bodies can be described by the concept of centralisation: a change that affects the decision-making, control, and instruction competences, partially or wholly transferring them to an upper level of the administrative hierarchy.⁸ Centralized agencies operate under strict administrative control of the government and they can be instructed and regulated by a ministry or the Government itself.

III. AGENCIES' ROLE IN PROVIDING PUBLIC SERVICES

Providing public services is not a traditional task for central agencies in Hungary, if we take the narrow definition of public services into account. Central agencies have carried out mainly administrative proceedings (adjudication) in the last decades and have directed subordinate territorial (deconcentrated) bodies.⁹ The weight of public service provision in the portfolio of central agencies began to increase after the elections and governmental change in 2010. The three public service-providing activities among agencies are maintaining institutions, funding and cultural-ideological tasks.

1. Institution maintenance

After 2010, the newly elected Hungarian government decided to reorganise the system of human public services. The main goal of the reform was to centralise the maintenance

⁸ M. Rosta, Schizophrenic Public Administration Reform in Hungary. Tension between Anti-NPM Systemic and Pro-NPM Organizational Reforms, (2015) 37 (2) *Society and Economy*, 183–206.; P. D. Hutchcroft, Centralization and Decentralization in Administration and Politics: Assessing Territorial Dimensions of Authority and Power, *Governance*, (2001) 14 (1) 23–53. <https://doi.org/10.1111/0952-1895.00150>; C. Pollitt and G. Bouckaert, *Public Management Reform: A Comparative Analysis. New Public Management, Governance and the Neo-Weberian State*, (Oxford University Press, Oxford, 2011).

⁹ Fazekas, Central administration, 299.; Hoffman I., A közszolgáltatások fogalma, in Fazekas M. (szerk.): *Közigazgatási jog. Általános rész II*, (ELTE Eötvös Kiadó, Budapest, 2017, 17–38) 19–20.

of public institutions in the fields of primary and secondary education, health care and social care. Before 2010, most of the institutions were maintained by local self-governments: for example, specific health care (such as inpatient care) was a compulsory task of the counties while primary care was under the scope of settlements. According to government statements, serious problems occurred before 2010 in these sectors. The local governments had insufficient budgetary resources to maintain their institutions effectively and transparently, therefore only the state administration could provide these public services at a uniform high quality. In the opinion of government decision-makers, only the control of central government could ensure equal opportunities in these sectors.

The Government established agency-type central bodies and their territorial units for the task of maintaining institutions (e.g. primary and secondary schools, hospitals, and nursing homes) in the aforementioned three fields:

a) health care: National Institute for Quality- and Organisational Development in Healthcare and Medicines, then after the reorganisation in 2015: National Health Care Service Centre;

b) primary and secondary education: Klebelsberg Institution Maintenance Centre;

c) social care: General Directorate of Social Affairs and Child Protection.

According to the statutes regulating the legal status and performance of these bodies, the typical maintenance tasks are as follows:

- establishing, reorganising and terminating service provider institutions;
- budgetary tasks, for example approving the annual budget and regulating the budgetary conditions of the institution;
- property management;
- regulating the legal status of the personnel of the institution;
- appointing and dismissing the senior officers of the institution;
- legal, professional and budgetary supervision of the institution.

In addition, these tasks are not entirely carried out by the agencies itself. As a higher level of centralisation, some of these tasks have been conferred on the Minister responsible for the sector (this has been the Minister of Human Capacities in all three sectors), most commonly establishing, reorganising and terminating service provider institutions, budgetary tasks and appointing and dismissing the senior officers of the institution. In these cases, the agency usually makes proposals to the Minister and draws up the decisions.

On the other hand, the General Directorate of Social Affairs and Child Protection and the Klebelsberg Institution Maintenance Centre (primary and secondary education) have territorial units in the counties (19) and the capital (Budapest). The Klebelsberg Institution Maintenance Centre has regional units, too. They contribute to performing the maintenance tasks (preparing decisions and making

proposals) or have competences of their own. For example, the competences of district units of the Klebelsberg Centre extend to primary schools, while secondary schools are under the jurisdiction of county units.

Another and very important side of centralisation is the organisational power¹⁰ of the Government and the Minister over the agencies. In accordance with the Fundamental Law, the Government may establish government agencies pursuant to provisions laid down by law (Art. 15). The origin of this power is the authorisation of the Parliament to the Government to implement its programme in certain sectors and in general. For this purpose, the Government must have an appropriate and well-constructed state administrative system.

The three agencies are categorised into the 'central office' body-type.¹¹ According to Section 72-73/B of Act XLIII of 2010 on Central State Administrative Bodies and the Status of Government Members and Ministers of State,¹² the Government and the Minister had certain organisational and control powers over central offices as follows:

a) The central offices are created by Government decrees.

b) Their main tasks and duties are regulated by Acts adopted by the National Assembly and by the abovementioned Government decrees as well. The organisational power of the Government prevails in how the bodies' tasks and competences are regulated. The Acts of Parliament do not designate state administrative organisations using their official names but only with their common nouns, designating the main tasks of the organisation. The Acts authorise the Government to designate the concrete organization or agency in decrees giving its proper name and detailed tasks. For example, Act CLIV of 1997 on Health Care stated that health care institutes were maintained by the entitled bodies so Government Decree 27/2015. (II. 25.) designated the National Health Care Service Centre as maintenance agency. This way of regulation provides the possibility of Government reorganization without an Act of Parliament.

c) The three central offices are under the direction of the Minister of Human Capacities, who appoints their heads, gives instructions and adopts the organisational and operational procedures of the agency. The appointment of the Head of the agency must be approved by the Permanent Secretary of the Prime Minister's Office (PMO).

d) The budgetary matters of the agencies are governed by the Minister of Human Capacities. The budgets are situated in the Ministry's chapter in the Act on the Central Budget of Hungary. As a result, the Minister performs the rights of the founder over these bodies and exercises financial control over their performance. The

¹⁰ E.-W. Böckenförde, *Die Organisationsgewalt im Bereich der Regierung. Eine Untersuchung zum Staatsrecht der Bundesrepublik Deutschland*, (Duncker & Humblot, Berlin, 1964); Fazekas, Central administration, 290–291.

¹¹ Fazekas, Central administration, 299.

¹² This Act has already been repealed. Now Section 36–38 of Act CXXV of 2018 on Government Administration regulates the legal status of central bodies without any important differences.

transformation of the role of the central administration can be observed in the change of the total expenditure of the budgetary chapter – in practice the sectors – directed by the Ministry of Human (formerly National) Capacities.

In sum, the maintenance agencies in these three sectors are rather tightly subordinated to the Government and directly to the Minister of Human Capacities. This influence expands to the territorial units; for example, the heads of the county and district units of the Klebelsberg Institution Maintenance Centre are appointed by the Head of the Centre but the approval of the Minister is also necessary [Section 6 of Government Decree 202/2012. (VII. 27.) on the Klebelsberg Institution Maintenance Centre]. Furthermore, the heads of the county units of the General Directorate of Social Affairs and Child Protection are appointed by the Minister [Section 2 of Government Decree 316/2012. (XI. 13.) on the General Directorate of Social Affairs and Child Protection]. Nevertheless, the PMO's Permanent Secretary's competence of approval may allow the central government (and the Prime Minister personally) predominant influence over senior personnel matters of the maintenance agencies.

2. Funding bodies

In the last decades since the regime change in 1989/90, several central agencies were established with funding tasks. This entails providing financial resources for several public purposes, such as managing scholarships, competitions and making decisions on tenders. These bodies are usually central offices like the Klebelsberg Centre: they are subordinate to a Ministry or the Government, therefore no serious amount of independence can be detected from the central government. The responsible Ministry or the Government regulates their budget, organisation, and operation, gives them direct instructions and exercises personnel competences e.g. appointment and dismissal of the Heads of these bodies (see maintenance agencies at the previous chapter).

The National Research, Development and Innovation Office (NRDIO) was established by Act LXXVI of 2014 on scientific research, development and innovation. The main aim of its establishment, according to the Act, was to create an institutional framework for the governmental coordination of the national research, development and innovation ecosystem. In order to fulfil this, the NRDIO gives advice on RDI policy for the Government and prepares the RDI strategy for the Government. Moreover, it handles the NRDI Fund and funds research projects based on applications by individual researchers and research groups. The NRDI is the successor of the OTKA (National Scientific Research Fund) Program which was established in 1986.

The Human Capacity Support Provider Body (HCSPB) is a central agency subordinate to the Ministry of Human Resources established in 2012 by Government Decree 178/2012. (VII. 26.). It provides grants to applicants for educational and social

purposes. In addition, it implements EU-funded (EFOP) projects in order to strengthen Hungarian communities, and NGOs in foreign countries, especially neighbouring countries, such as Romania and Slovakia.

The National Institute of Health Insurance Management (NIHIM) is a central agency which is also subordinate to the Ministry of Human Resources established in 2016 by Government Decree 378/2016. (XII. 2.). It manages the National Health Insurance Fund and is the successor of National Health Insurance Fund, which was established in 1993. The main task of the NIHIM is handling the Health Insurance Fund: it allocates its budget to channel state finances to service providers the health care sector. It also carries out procedures regarding social security assistance for pharmaceuticals and medical aids and the adoption of health technologies, and maintains a unified record of health insurance and the pharmaceuticals, medical aids and healthcare services receiving social security reimbursement.

3. Cultural-ideological tasks

The appearance of central agencies entitled with cultural-ideological tasks is a relatively new phenomenon in Hungarian public administration. These work in a field with a politically controversial perception among Hungarian society. The topics covered by the performance of these bodies can be historically contentious, for example the history of the Hungarian Regime Change in 1989/1990, the role of Hungary in the Second World War, Communism and Nazism in Hungary, and the Holocaust. Other topics are also very sensitive and have very strong actual political ties for example, the state of Hungarian minorities in neighbouring countries. Within this framework, they conduct research programmes, allocate grants, hold conferences and publish books and papers. Doing so, they often take a political stand regarding the abovementioned topics.

The first central organ with such tasks was the House of Terror, established in 1999 by the Government Resolution 1020/1999. (II. 24.). More were set up after 2010: the Research Institute and Archives for the History of the Hungarian Regime Change established by Government Decree 83/2013. (III. 21.), and the Research Institute for National Strategy established by Government Decree 346/2012 (XII. 21.). These agencies operate under ministerial control (except for the House of Terror the responsible minister is the Head of the Prime Minister's Office).

IV. CONCLUSIONS

The first question which must be answered is why central agencies carry out the abovementioned tasks in the field of public service provision? If we consider the general

characteristics of agencies, we can see that they are widely used in the non-ministerial sphere of the central administration. The main advantage of their existences is that they concentrate on a few specified tasks while the ministries can implement policies and higher rule-making.¹³ Furthermore, agencies may provide a much more flexible framework of human resource management as buffer organisations during personnel cutback campaigns, which are rather frequent in Hungary.¹⁴ In spite of their (respective) autonomy, agencies often carry out political tasks and frequently operate under tight governmental or ministerial control.¹⁵ Furthermore, an agency structure may favour public participation, and agencies are able to focus public attention on controversial issues thus enriching public debate.¹⁶ The latter function can be very important in politically sensitive sectors regarding the abovementioned cultural-ideological bodies.

To put it in a nutshell, hypothesis no. 1 is partly confirmed: public service provision tasks in the portfolio of central agencies is a mostly new phenomenon in Hungarian public administration. Central agencies usually carry out adjudicative competences (administrative proceedings). On the other hand, there are funding bodies which have historical roots.

Hypothesis no. 2. is partly confirmed as well: agencies entitled with service provider tasks operate under strict governmental or ministerial control (except House of Terror). The responsible minister or the Government exercises such executive competences such as directing and regulating them and budgetary control. Therefore, they can serve as political and ideological tools (symbols) in centralising public administration.

¹³ B. G. Peters, *The Politics of Bureaucracy. An Introduction to Comparative Public Administration*, (Routledge, London and New York, 2010) 129–130., 314–315.

¹⁴ Gy. Hajnal, Agencies and the Politics of Agencification in Hungary, (2011) 7 (4) *Transylvanian Review of Administrative Sciences*, (74–92) 77–78.

¹⁵ On politicization see Hajnal, Agencies and the Politics of Agencification in Hungary.

¹⁶ G. Majone, The regulatory state and its legitimacy problems, (1999) 22 (1) *West European Politics*, (1–24) 9. <https://doi.org/10.1080/01402389908425284>

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Judicial Review of Administrative Discretion in Competition Law: Comparative Analysis of the EU and the Hungarian Approach

ABSTRACT

In my paper I aim to observe how the margin of appreciation enjoyed by competition authorities in complex economic matters is treated by EU and Hungarian judicial review. Judicial control in this aspect is ambivalent because, while a certain degree of understanding economic principles, as well as the observation of procedural rights are required, courts carry out a legality review which is by definition deferential to administrative discretion. Therefore, I examine the extent of this marginal review in EU case law, with special regard to the so-called manifest error test, its elements and its limits. In addition, I also assess how the Hungarian approach is different concerning recent competition cases.

KEYWORDS: competition, administrative discretion, judicial review, antitrust, merger control, complex economic matters, manifest error of assessment

I. INTRODUCTION

It certainly is a compelling task for administrative authorities to bring legal proceedings in complex matters that call for a detailed investigation as well as an expertise of a scientific or technical nature. In these instances, public enforcement has to comply with a set of rules that, while granting a certain discretion to the administrative authorities, also demands that their decisions remain well-founded and well-reasoned within the meaning of economic terminology; a scientific background that only a handful of authorities will be expected to possess. As regards EU competition policy, an area which is strongly based upon enforcement by the European Commission (the ‘Commission’) and national competition authorities (‘NCAs’) alike, these requirements are well known. Parts of competition law cases are considered to heavily rely on economic appraisals,¹ which serve as a background to competition rules.

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¹ V. Tiili and J. Vanhamme, The Power of Appraisal (Pouvoir d’Appréciation) of the Commission of the European Communities Vis-a-vis the Powers of Judicial Review of the Communities’ Court of Justice and Court of First Instance, (1998) 22 (3) *Fordham International Law Journal*, 887.

It is far from being obvious, however, how an assessment of these matters made by competition authorities should be subject to judicial review of the merits. This is essentially a question of judicial interference in administrative procedure, which can be approached from two sides: one of institutional independence and one of fundamental rights, especially procedural fairness. It appears that EU courts, in deference to the Commission's margin of appreciation, outlined a standard of *marginal* review in the event of complex economic evaluations. However, in EU member states that are also bound by the rules of the European Convention of Human Rights ('ECHR'), *comprehensive* judicial review is a key requirement, derived from the right to a fair trial. Cases before the European Court of Human Rights ('ECtHR'), like *Menarini Diagnostics srl v Italy*,² state that the concept of 'full jurisdiction' must prevail in competition law procedures during the judicial phase.

As the approach of member states is a crucial element in competition law enforcement, it is an important task to examine how they can find a proper balance between the separation of powers reflected by the CJEU case-law and the theory of unlimited review arising from ECtHR judgments. In Hungary, a member state since May 1 2004, recent case law has referred to the extent of full judicial review and human rights requirements in competition cases. The aim of this article is to present the differences between the EU and the Hungarian perspective in light of the case law.

II. REVIEW OF COMPETITION LAW DECISIONS BEFORE THE EU COURTS

According to paragraph 1 of Article 263 the Treaty on the Functioning of the European Union ('TFEU'), the Court of Justice of the European Union ('CJEU') shall review the legality of acts of the Commission, among other EU institutions. From a legal point of view, this Article can be regarded as the fundamental legal basis for the establishment of judicial review in respect of the Commission's decisions rendered in competition cases as well. It should also be emphasised that, since 1989, the General Court ('GCEU') has been established to be the court of first instance in reviewing the Commission's decisions. This renders the CJEU a second instance forum that can only carry out an assessment on points of law and not the factual assessment.³

² Application no. 43509/08, *A. Menarini Diagnostics srl v Italy*, Judgment of 27 September 2011.

³ See Article 256(1) TFEU: 'The General Court shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles 263, 265, 268, 270 and 272, with the exception of those assigned to a specialised court set up under Article 257 and those reserved in the Statute for the Court of Justice. The Statute may provide for the General Court to have jurisdiction for other classes of action or proceeding. Decisions given by the General Court under this paragraph may be subject to a right of appeal to the Court of Justice on points of law only, under the conditions and within the limits laid down by the Statute.'

Regarding the object of the review, a distinction must be made between the review of the substantive legality of the case (in other words, the constituent elements of the alleged infringement) and the review of the fines imposed by the Commission, as different judicial standards are applicable to these. This distinction and the limits of judicial review are considered to originate from a separation of powers between EU institutions that serves as a guarantee of ‘the administrative body’s ability to act within the territory assigned to it by the Treaty and the legal framework’.⁴

1. Review of substantive legality

Judicial review of substantive legality entails a comprehensive⁵ examination of administrative decisions issued by the Commission. The courts’ review should be sufficiently deep and may not be prevented by the Commission’s discretion: the CJEU stated in its case law that ‘the General Court cannot use the Commission’s margin of discretion, by virtue of the role assigned to it in competition policy by the EU and FEU Treaties, as a basis for dispensing with the conduct of an in-depth review of the law and of the facts’.⁶ Comprehensive review therefore means that EU courts do not refrain from scrutinising the factual circumstances of the case. The GCEU applies a full review of the facts and their interpretation, examines whether the Commission’s assessment of the evidence is convincing, and, if the court’s assessment of the evidence does not support the Commission’s conclusion, the decision may be annulled.⁷ However, EU courts are not allowed to carry out a *de novo* review and substitute their own assessment of the facts for the Commission’s.⁸ This restriction is important because EU Courts cannot place themselves in the authority’s shoes and exercise its discretionary powers by carrying out the competition investigation in its stead.⁹

⁴ H. C. Laguna de Paz, Understanding the Limits of Judicial Review in European Competition Law, (2014) 2 (1) *Journal of Antitrust Enforcement*, 210. <https://doi.org/10.1093/jaenfo/jnt014>

⁵ See, for example., Case 42/84, *Remia BV and others v Commission*, [1985] ECR 02545, para 34: ‘[...] as a general rule the Court undertakes a comprehensive review of the question whether or not the conditions for the application of Article 85(1) are met [...]’.

⁶ See, for example, Case C-382/12 P, *MasterCard v Commission*, ECLI:EU:C:2014:2201, para 156.

⁷ F. Castillo de la Torre and E. Fournier, *Evidence, Proof and Judicial Review in EU Competition Law*, (Elgar Publishing, 2017) 268. <https://doi.org/10.4337/9781782548904>

⁸ M. Bernatt, Transatlantic Perspective on Judicial Deference in Administrative Law, (2015) 22 (2) *Columbia Journal of European Law*, 323. <https://doi.org/10.2139/ssrn.2648232>

⁹ Laguna de Paz, Understanding the Limits of Judicial Review in European Competition Law, 210.

2. Review of fines

In light of the above and as a general rule, the review of legality can only be aimed at the potential annulment of the Commission's decision but not its reformation.¹⁰ It must be noted, however, that Article 261 TFEU allows regulations to grant unlimited jurisdiction for EU Courts with regard to the penalties provided for in such regulations: '[r]egulations adopted jointly by the European Parliament and the Council, and by the Council, pursuant to the provisions of the Treaties, may give the Court of Justice of the European Union unlimited jurisdiction with regard to the penalties provided for in such regulations'.

In line with the permission granted by Article 261 TFEU, Article 31 of Council Regulation No. 1/2003 declares that

[t]he Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.' The CJEU confirmed this in *KME v Commission*, where it held that 'in addition to the review of legality, now provided for under Article 263 TFEU, a review with unlimited jurisdiction was envisaged in regard to the penalties laid down by regulations.'¹¹

This so-called 'unlimited review' serves as a transfer of power from the Commission to EU courts regarding the determination of the abovementioned sanctions, in the course of which the GCEU may have a wider freedom to decide, even considering new evidence.¹² This makes an unlimited review of the fines 'more than a simple review of legality'.¹³ Consequently, EU courts are entitled to carry out a *de novo* review in respect of the fining policy of the Commission.¹⁴

¹⁰ See Article 264 TFEU: 'If the action is well founded, the Court of Justice of the European Union shall declare the act concerned to be void. However, the Court shall, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive.'

¹¹ Case C-389/10 P, *KME Germany and others v Commission*, ECLI:EU:C:2011:816, para 120. See also Case C-603/13 P, *Galp Energia Espana and others v Commission*, ECLI:EU:C:2016:38, para 76.

¹² Castillo de la Torre and Fournier, *Evidence, Proof and Judicial Review in EU Competition Law*, 268–269.

¹³ See joined cases C-238-99 P, C-245/99 P, C-247/99 P; C250/99 P to C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij and Others v. Commission*, ECLI:EU:C:2002:582, para 692: '[...] More than a simple review of legality, which merely permits dismissal of the action for annulment or annulment of the contested measure, the unlimited jurisdiction conferred on the Community judicature authorises it to vary the contested measure, even without annulling it, by taking into account all of the factual circumstances, so as to amend, for example, the amount of the fine.'

¹⁴ Bernatt, *Transatlantic Perspective on Judicial Deference in Administrative Law*, 324.

3. Marginal review and its limits

Aside from comprehensive and unlimited review, there is a so-called limited or marginal review, which is applied by EU courts in the case of ‘complex economic matters’:

The Court observes that it follows from consistent case-law that, although as a general rule the Community Courts undertake a comprehensive review of the question as to whether or not the conditions for the application of the competition rules are met, their review of complex economic appraisals made by the Commission is necessarily limited to checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers.¹⁵

The need for such a special type of review was recognized early in the case law. Article 33(1) of the European Coal and Steel Community (‘ECSC’) Treaty of 1951 provided that the courts are allowed to carry out only a limited examination when it comes to the assessment made by the Commission of economic facts:

The Court of Justice shall have jurisdiction in actions brought by a Member State or by the Council to have decisions or recommendations of the High Authority declared void on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers. The Court of Justice may not, however, examine the evaluation of the situation resulting from economic facts or circumstances in the light of which the High Authority took its decisions or made its recommendations, save where the High Authority is alleged to have misused its powers or to have manifestly failed to observe the provisions of this Treaty or any rule of law relating to its application.

Later, the second half of the text that dealt with the evaluation of economic facts was left out of the Treaty of Rome of 1957 and of subsequent Treaties.¹⁶

Marginal review gained reception in competition cases when the CJEU held in *Consten and Grundig* that

the exercise of the Commission’s powers necessarily implies complex evaluations on economic matters. A judicial review of these evaluations must take account of their nature by confining itself to an examination of the relevance of the facts and of the legal

¹⁵ Case T-201/04, *Microsoft v Commission*, ECLI:EU:T:2007:289, para 87.

¹⁶ A. Kalintiri, What’s in a name? The marginal standard of review of “complex economic evaluations” in EU competition enforcement, (September 2016) *LSE Research Online*, http://eprints.lse.ac.uk/67727/1/KALINTIRI_The%20marginal%20standard%20.pdf (Last accessed: 31 July 2019) 5.

consequences which the Commission deduces therefrom. This review must in the first place be carried out in respect of the reasons given for the decisions which must set out the facts and considerations on which the said evaluations are based.¹⁷

The CJEU's above declaration was elaborated in connection with the question whether the exclusive agreement between undertakings Consten and Grundig can be individually exempted under Article 101(3) TFEU. Later, in *Remia*, the CJEU extended the principle of marginal review to Article 101(1) in a general manner when it had to decide whether the Commission's appraisal was lawful in determining that the duration of a non-compete clause was excessive. The Court emphasised that

[a]lthough as a general rule the Court undertakes a comprehensive review of the question whether or not the conditions for the application of Article 85(1) are met, it is clear that in determining the permissible duration of a non-competition clause incorporated in an agreement for the transfer of an undertaking the Commission has to appraise complex economic matters. The Court must therefore limit its review of such an appraisal to verifying whether the relevant procedural rules have been complied with, whether the statement of the reasons for the decision is adequate, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers.¹⁸

The term 'manifest error of assessment' or 'manifest error of appraisal', which is the part of the review that refers to the errors made in the intellectual process of the Commission's evaluation,¹⁹ appears to be an 'all-encompassing term' in EU competition law.²⁰ EU courts have considered the application of the manifest error test in various instances.²¹ Therefore, EU judicature has been criticised for applying marginal review, as a 'lighter' type of review, to cases where in fact a more investigative approach would have been required, such as in Article 102 TFEU (abuse of dominance) cases,²² or more

¹⁷ Joined cases C-56/64 and C-58/64, *Consten and Grundig v Commission*, ECLI:EU:C:1966:41, 347.

¹⁸ Case C-42/84, *Remia BV and others v Commission*, [1985] ECR 02545, para 34.

¹⁹ Kalintiri, *What's in a name?*, 11.

²⁰ A. Kalintiri, *Evidence Standards in EU Competition Enforcement: The EU Approach*, (Hart Publishing, 2019) 185. <https://doi.org/10.5040/9781509919697>

²¹ See, for example, D. M. B. Gerard, *Breaking the EU Antitrust Enforcement Deadlock: Re-Empowering the Courts?*, (2011) 35 (4) 472.: 'As noted, some have taken issue with the proliferation of references to the deferential review standard of the "manifest error of assessment". Originally introduced in relation to the review of complex economic reasonings, it can now be encountered, in various situations ranging from the definition of markets to the setting of fines, the assessment of companies' cooperation under the leniency notice, etc.' See also Kalintiri, *What's in a name?*, 6–7., for further examples from the case law.

²² Bernatt, *Transatlantic Perspective on Judicial Deference in Administrative Law*, 307.

generally, where the Commission's market definition has been disputed.²³ The concern in the abstract can be summed up as such 'that the General Court would be unwilling to scrutinise the Commission's assessments and, hence, that it would be too deferential toward the Commission'.²⁴

However, the notion of marginal review does not necessarily mean that EU courts (and especially, the GCEU) would shy away from an intensive review of complex economic assessments. In the *Tetra Laval/Sidel* merger, the GC had annulled the Commission's decision prohibiting the merger between Tetra Laval and Sidel. The Commission appealed against the judgment, contesting the GC's appraisal of the case on the grounds that the GC had applied a stricter review than a marginal review and went beyond its jurisdiction. Disagreeing with the Commission's arguments, the CJEU held that

[w]hilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.²⁵

The above paragraph in *Tetra Laval* is often evoked by commentators as evidence that EU courts indeed perform a marginal assessment that is deep enough to satisfy effective judicial review.²⁶

Nevertheless, it must be noted that the limit of the manifest error test (and thus, the scope of judicial scrutiny) is where the Commission's discretion begins. The Commission's determination of complex economic facts may not be reassessed by the GCEU, as it is not the GCEU but the Commission that is 'institutionally responsible for making those assessments'.²⁷ For example, the CJEU set aside the GCEU's judgment in the *Alrosa* case where it found that, by annulling the Commission's decision on commitments because less onerous alternatives were available, 'the General Court put forward its own assessment of complex economic circumstances and thus substituted

²³ M. Sousa Ferro, Judicial Review: Do European Courts Care about Market Definition?, (2015) 6 (6) *Journal of European Competition Law & Practice*, 400–410. <https://doi.org/10.1093/jeclap/lpu113>

²⁴ M. Van der Woude, Judicial Control in Complex Economic Matters, (2019) 10 (7) *Journal of European Competition Law & Practice*, 416. <https://doi.org/10.1093/jeclap/lpz037>

²⁵ Case C-12/03 P, *Commission v Tetra Laval*, ECLI:EU:C:2005:87, para 39.

²⁶ See, for example, M. Jaeger, The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?, (2011) 2 (4) *Journal of Competition Law & Practice*, 300–301. <https://doi.org/10.1093/jeclap/lpr049>

²⁷ Case C-67/13, *Groupement des Cartes Bancaires v Commission*, EU:C:2014:2204, para 46.

its own assessment for that of the Commission, thereby encroaching on the discretion enjoyed by the Commission instead of reviewing the lawfulness of its assessment'.²⁸ As far as the review of commitments is concerned, this approach was later mirrored by the GCEU in the *Morningstar* case, where it held that while

taking into account the discretion enjoyed by the Commission when assessing the appropriateness of the proposed commitments, the role of the Court is limited to establishing that the Commission has not committed a manifest error of assessment. More precisely, its role, in the context of that judicial review, is to determine whether a balance has been struck between the concerns raised by the Commission in its preliminary assessment and the commitments proposed by [Thomson Reuters], which must, once again, address those concerns in an adequate manner. Additionally, the review of the lawfulness of the decision making those commitments binding must be assessed in the light of the Commission's concerns and not of the demands put forward by competitors in relation to the content of those commitments. Consequently, the appropriate test to be applied in relation to the Commission's concerns, as expressed in its preliminary assessment, is to determine whether the commitments are sufficient to address adequately those concerns, which seek, in the present case, to make it easier for customers to switch provider.²⁹

4. The extent of judicial review and human rights

Against the backdrop offered by EU case law, there remains the question whether judicial deference in the case of limited review could be contrary to Article 6(1)³⁰ of the ECHR or Article 47(2)³¹ of the Charter of Fundamental Rights of the European Union ('Charter'). It goes without saying that there is a significant connection between the two provisions. Indeed, Article 52(3)³² of the Charter sets the ECHR's case law as

²⁸ Case C-441/07 P, *Commission v Alrosa*, ECLI:EU:C:2010:377, para 67.

²⁹ Case T-76/14, *Morningstar v Commission*, ECLI:EU:T:2016:481, paras 56–58.

³⁰ 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

³¹ 'Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.'

³² 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights

a minimum requirement for the interpretation of the Charter in terms of corresponding rights. However, as the EU itself is not a contracting party of the ECHR, there has been a longstanding question as to whether the review applied by EU courts corresponds to the lawful interpretation of Article 6(1) by the ECtHR.

Since *Menarini Diagnostics srl v Italy*,³³ competition law proceedings are regarded as falling under the criminal limb of Article 6(1) ECHR. However, in *Jussila v Finland*, the ECtHR made a distinction between hardcore and non-hardcore criminal proceedings, and it remains obvious that competition proceedings may fall into the latter group.³⁴ Consequentially, the case law places competition enforcement (along with other administrative procedures such as tax proceedings) between civil and hard-core criminal matters. Therefore, one may argue for the special treatment due for competition decisions during administrative review. In *Menarini*, the ECtHR ruled that the Italian judicial review system of administrative decisions was lawful because it guaranteed 'full jurisdiction' in facts and law.³⁵ It also stated that the Italian administrative courts' judicial review was not only a control of legality, since they were also entitled to verify if the competition authority had lawfully exercised its powers and if its decisions were proportionate, and they could also examine the authority's technical evaluations.³⁶

However, as Nazzini points out, the requirement of full jurisdiction refers entirely to the scope of judicial review, and it does not provide any information on the actual standard of review.³⁷ In other words, it is a completely different thing to examine the scope of the court's examination and the intensity or depth of it. The CJEU has made the same conflation of the two concepts in *KME Germany*, where it held that judicial deference towards the Commission's margin of appreciation was in compliance with the effective judicial protection requirement of Article 47(2) Charter of Fundamental Rights.³⁸

The ECtHR's case law has nevertheless permitted in numerous cases a wide degree of latitude towards administrative authorities in specialised areas of law,³⁹ such as

shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

³³ Application no. 43509/08, *A. Menarini Diagnostics srl v Italy*, Judgment of 27 September 2011, para 44.

³⁴ Application no. 73053/01, *Jussila v Finland*, Judgment of 23 November 2006, para 43.

³⁵ Application no. 43509/08, *A. Menarini Diagnostics srl v Italy*, Judgment of 27 September 2011, para 59.

³⁶ *Ibid.* para 64.

³⁷ R. Nazzini, *Judicial Review after KME: An Even Stronger Case for the Reform that Will Never Be*, (2015) 40 *European Law Review*, 498. Castillo de la Torre and Fournier, *supra* note 7, 295, also acknowledge that '[t]he exact extent of the review carried out by the competent court in *Menarini* is not very clear from the judgment', but they are of the view that 'it is similar to, if not more limited than, the review exercised by EU Courts.'

³⁸ Case C-389/10 P, *KME Germany and others v Commission*, ECLI:EU:C:2011:816, paras 118–138.

³⁹ Castillo de la Torre and Fournier, *Evidence, Proof and Judicial Review in EU Competition Law*, 292.

television broadcasting regulations,⁴⁰ environmental protection⁴¹ and town planning.⁴² Although these were essentially civil and not criminal cases (within the meaning of the ECtHR's case law), Nazzini suggests that the ECtHR's jurisprudence allows judicial deference when the following conditions are present:

- the subject-matter is such that it is appropriate to be decided by an administrative authority subject to deferential judicial review; and
- the administrative authority complies with the requirements of independence and impartiality despite its administrative nature.⁴³

Transposing these requirements into EU administration, the Commission cannot be regarded as an independent and impartial tribunal,⁴⁴ which means that judicial deference cannot be permitted. This raises concerns in ensuring effective judicial protection in both antitrust and merger control cases.⁴⁵ Without any clear solution in this aspect, some commentators advocate for the allocation of further guarantees in the procedure of the Commission.⁴⁶

III. THE STANDARD OF REVIEW IN HUNGARY

In Hungary, public competition enforcement is an interplay between the Hungarian Competition Authority ('GVH'), the parties, the lower courts and the Curia, which is the Hungarian Supreme Court, while carrying out an extraordinary revision.⁴⁷

⁴⁰ Applications nos. 32181/04 and 35122/05, *Sigma Radio Television Ltd. v Cyprus*, Judgment of 21 July 2011.

⁴¹ Application no. 33538/96, *Alatukkilä and others v Finland*, Judgment of 28 July 2005.

⁴² Application no. 19178/91, *Bryan v United Kingdom*, Judgment of 22 November 1995.

⁴³ Nazzini, Renato: Administrative Enforcement, Judicial Review and Effective Judicial Protection in EU Competition Law: A Comparative Contextual-Functionalist Perspective, (2016) (31) *King's College Dickson Poon School of Law, Legal Studies Research Paper Series*, 36.

⁴⁴ Kalintiri, *Evidence Standards in EU Competition Enforcement...*, 176.

⁴⁵ While merger control cases cannot be considered as criminal proceedings under the ECHR or the Charter of Fundamental Rights, judicial deference is still an important issue in them because of the multitude of complex economic evaluations in concentrations. (See Kalintiri, *Evidence Standards in EU Competition Enforcement...*, 180.)

⁴⁶ Cf. Castillo de la Torre and Fournier, *Evidence, Proof and Judicial Review in EU Competition Law*, 295.: 'After years of insistence that the case law of EU Courts should be put in line with what was perceived to be the line in Strasbourg, the wider impression now is that no relief will come from Strasbourg and the tendency is nowadays to invite the Court of Justice to 'raise' the standard of review beyond what the ECtHR requires. However, there are still authors not convinced that the standards applied by the EU Courts respect the case law of the ECtHR and the Menarini judgment, and some submit that the fairness of the system still depends on whether certain rights are in turn guaranteed at the administrative stage, since a more limited review by the General Court may be acceptable only to the extent that more guarantees are applied in that first stage.'

⁴⁷ See Section 7(2) of Act I of 2017 on the Code of Administrative Court Procedures ('Kp.').

Recently, there has been a minor change in the Hungarian legislation regarding administrative litigation. Until 1 January 2018, judicial review of administrative decisions was regulated by Chapter XX of the Old Code of Civil Procedure ('Ket.').⁴⁸ Since 1 January 2018, the Kp.⁴⁹ has been effective. According to it, the administrative courts at first instance shall examine the lawfulness of the administrative decisions within the limits of the claim,⁵⁰ and they 'shall evaluate the evidence separately and all of them together, comparing them to the facts established in the prior administrative procedure'.⁵¹ This was formerly regulated under Section 206(1) of the Ket.

However, there is a rule that curtails the discretion of Hungarian courts to adjudicate the cases in relation to the margin of discretion enjoyed by the authorities. According to Section 85(5) Kp.,

[i]n the scope of the lawfulness of administrative acts realised within discretionary powers the court shall also examine whether the administrative body exercised its competence within the frameworks of its authorisation for deliberation, whether the criteria of deliberation and their causal relation as to weighing the evidence can be ascertained from the document containing the administrative act.⁷

This was formerly regulated under Section 339/B of the Ket.

It can be seen from the above that Hungarian courts also carry out a review of legality in relation to administrative acts. However, this review is bound by a clause that seems similar to the marginal review performed by EU courts, which is essentially a test that examines on the merits whether the reasons behind the authority's discretionary act are clear and logical enough (i.e., causality can be established). It can also be noted as a similarity that, according to the current Hungarian rules, a decision by the GVH can only be annulled but not amended by the courts.⁵²

Nevertheless, in light of the below, Hungarian and EU competition law differ on what can be the object of a discretionary act or assessment. In Hungarian law, the 2/2015 (XI. 23.) KMK Opinion⁵³ on the judicial review of discretionary administrative decisions ('Opinion') was issued in 2015 in order to make a clear definition of what qualifies as a discretionary act. In this aspect, the Opinion distinguishes the assessment of the evidence from the assessment that is permitted by law for administrative bodies:

⁴⁸ Act no. III of 1952 on the Code of Civil Procedure.

⁴⁹ Ibid.

⁵⁰ See Section 85(1) Kp.

⁵¹ See Section 78(2) Kp.

⁵² See Section 90(1)b) Kp.

⁵³ 2/2015. (XI. 23.) KMK vélemény a mérlegelési jogkörben hozott közigazgatási határozatok felülvizsgálatáról. The text in Hungarian is available here: <https://kuria-birosag.hu/hu/kollvel/22015-xi23-kmk-velemenymerlegelési-jogkorben-hozott-kozigazgatasi-hatarozatok> (Last accessed: 31 July 2019).

‘[a] decision is considered to be realised within discretionary powers if the authority’s decision is based on a legal provision that only designates the limits of the decision. A decision is also realised within discretionary powers if the legal provision allowing for alternative decisions does not designate the conditions or aspects of the making of said decision.’⁵⁴ The Opinion specifically mentions the power of the GVH to impose fines on undertakings for competition infringements based on the assessment of certain aspects as an example of a discretionary power.⁵⁵

The above definition of discretionary act does not permit the inclusion of the assessment of the evidence or the facts. According to the Opinion,

[t]here have been judgments that considered the collection of evidence and their assessment a discretionary activity of the authority and carried out its review accordingly. Without a doubt, the assessment of evidence by the authority is a kind of ‘discretionary activity’, but this does not indicate a discretionary power from the point of view of the judicial review, unless the legal basis permits alternative decisions or designates the limits of the decision.⁵⁶

In light of the above, Hungarian law does not acknowledge the GVH’s discretion in relation to any kind of factual assessment, including any complex economic evaluation as well. The courts have the power to carry out a full legality review of the evidence, and have the freedom to establish the relevant facts of the case. This was further confirmed by the Hungarian Constitutional Court’s resolution no. 30/2014 (IX. 30.) AB, emphasising that even the authority’s circumstantial economic evidence may be reassessed by the court:

In the course of evidentiary assessment, the authority may also provide circumstantial evidence and use data, calculations, economic models, etc., even if these latter documents

⁵⁴ See the Opinion in Hungarian: „Mérlegelési jogkörben hozott közigazgatási határozatnak minősül az a határozat, amelyben a hatóság döntését olyan jogszabályra alapozza, mely kizárólag a döntés kereteit jelöli ki. Mérlegelési jogkörben hozott határozat az is, ahol a döntési lehetőségeket meghatározó jogszabályi rendelkezés a döntés meghozatalának feltételeit és szempontjait nem jelöli meg.”

⁵⁵ See the Opinion in Hungarian: „A jogszabályi rendelkezések sok esetben magához a mérlegelési tevékenységhez fűznek kötelezően figyelembe venni rendelt szempontokat. Ezek tekinthetők a klasszikus mérlegelési szempontoknak, illet tartalmaz például a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról szóló 1996. évi LVII. törvény 78. § (3) bekezdése, amikor többek között a jogsértő piaci helyzetének vagy magatartásának értékelését írja elő.”

⁵⁶ See the Opinion in Hungarian: „A bírói gyakorlatban többször volt látható olyan döntés, amely a hatósági eljárásban felvett bizonyítást és az annak alapján történő értékelést is mérlegelésnek tekintette és a határozat felülvizsgálatát ilyen megközelítés alapján végezte el. Kétségtől eltekintve a bizonyítás értékelése a hatóság részéről egyfajta mérlegelés, azonban ez a típusú „mérlegelés” a bírósági felülvizsgálat szempontjából nem jelent mérlegelési jogkört, ha a jogszabály az adott ügyben döntési lehetőségeket vagy kereteket nem tartalmaz.”

– similarly to expert opinions – sometimes contain uncertain elements or contain a certain degree of probabilistic proof according to the current standing of science. However, the facts established by the GVH cannot be based on mere speculations or assumptions but on incontrovertible evidence. [...] Based on this, the task of the reviewing court is to decide whether the authority complied with its obligation to clarify the facts [...], and whether the individual facts disputed by the persons subject to the proceedings were duly substantiated by the GVH. To that end, it is possible to take evidence in the court phase as well. At the same time, the determination of the probative value of the evidence is left to the internal conviction of the judge [...]⁵⁷

Although currently there are no examples in the Hungarian case law that are about the adjudication of complex calculations or economic models, a few examples among recent judgments dealt with the scope of judicial review and in one example, even the compliance of the standard of review with human rights.

In a case⁵⁸ that involved a foreign currency loan cartel among banks, the Curia was called to adjudicate whether the first instance and second instance courts correctly assessed the facts and evidence established by the GVH. The Curia affirmed the findings of the Opinion that there was a difference between the judicial assessment of the facts under Section 206(1) of the Ket. [today Section 78(2) Kp.] and the judicial assessment of the authority's discretionary decision under Section 339/B Ket. [today Section 85(5) Kp.], with the former category being a subject to reassessment under a review of legality.⁵⁹

Regarding the scope of the review, the Curia also examined the obligations originating from the 'full jurisdiction' as required by the ECtHR. It found that the GVH's procedure does not provide all the relevant guarantees to the undertakings that would be sufficient for a contradictory procedure of a tribunal, and thus the requirements of Article 6(1) ECHR should be complied with in the course of judicial review.⁶⁰ However, according to the Curia, full jurisdiction does not require that the court should decide the case in the authority's place, because it must respect the authority's powers and discretion.⁶¹ Therefore, even during the reassessment of the evidence, it cannot disregard the reasoning in the authority's decision. The court can only accept an alternative interpretation of the evidence if it is presented by the claimants and if it is more reasonable than that of the authority.⁶²

⁵⁷ See resolution no. 30/2014. (IX. 30.) AB, [71].

⁵⁸ Judgment no. EBH2017.K.20. of the Curia.

⁵⁹ Ibid. [69].

⁶⁰ Ibid. [88].

⁶¹ Ibid. [91].

⁶² Ibid. [92].

Despite the fact that reassessment in competition law is possible under Hungarian law, so far there have been only a handful of cases that mentioned it, let alone applied a reassessment of the evidence. In the foreign currency loan cartel case mentioned above, the Curia upheld the GVH's decision regarding the existence of a cartel, but annulled the fine and ordered a repeated procedure due to errors of market definition and the incorrect calculation of the relevant turnover by the GVH.⁶³ In the judgment no. EBH 2017, K.16. relating to vertical agreements in the book retail sector, the Curia refused to adjudicate whether the interpretation of the facts as presented by the claimants was more reasonable than that of the GVH, but it still conflated discretionary assessment with the assessment of the facts.⁶⁴

Other than cartel cases, an abuse of dominance case is notable because there the first instance court held that the GVH selectively assessed the evidence, omitting pieces of statements and other documents without any reason, and established the infringement on that selective assessment. Upon appeal, the Curia upheld the first instance judgment, agreeing with these findings.⁶⁵

IV. CONCLUSIONS

As a conclusion, some aspects of comparison can be pointed out between the two competition law regimes, along the lines of the margin of discretion enjoyed by competition authorities and human rights concerns.

One striking difference is that EU courts apply marginal review to complex economic assessments, while Hungarian courts do not distinguish them from other evaluations made by administrative authorities, and the GVH does not enjoy a margin of appreciation regarding these. Under Hungarian law, economic evidence falls into the category of the facts, which can be subject to reassessment.

However, both judicatures apply a certain kind of deference towards the respective competition authorities as a sign of the separation of powers. Neither regime's judicial review can amount to a *de novo* review, as they cannot substitute their own assessment for that of the authority, and they cannot carry out the competition investigation themselves. Naturally, the authority's decision serves as a 'starting and reference point' for both EU and Hungarian courts, as they must examine its content, including its evidence and reasoning.

Moreover, the intensity of the competition authority's assessment of the facts (or economic facts) can be a subject of debate or ambivalence under both regimes.

⁶³ Ibid. [109]–[122], [196].

⁶⁴ Judgment no. EBH 2017, K.16. of the Curia, [19].

⁶⁵ Judgment no. Kf.IV.38.050/2018/8. of the Curia, [40].

It appears that EU or Hungarian courts do not necessarily refrain from a deeper review, but only rarely decide to intervene in the authority's discretion, upon the occurrence of an error regarding the reasonability of the decision. The matter of intensity is ever more important from a human rights perspective. Neither the Commission nor the GVH can be considered as an impartial, independent tribunal, and in such circumstances, both Hungarian and EU judicial review are highly dependent on the guarantees of 'full jurisdiction' or 'comprehensive review'.